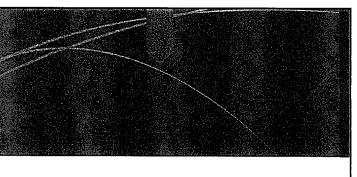
RESPONSIBI] PREPARATION ETHICS GUARDIAN; REPORTS LITIES, S 日 日 H O H

June Presented 13, 2025 Уď M Steller, Esq.

Article 81 Guardianship

Rights of the Incapacitated Person (post hearing) Medical and Treatment Issues Current Legal Issues

Melissa Ann D. Dizon, Esq.



RIGHTS OF THE INCAPACITATED PERSON (POST-HEARING)

CURRENT LEGAL ISSUES

*
MEDICAL & TREATMENT ISSUES



RIGHTS OF THE INCAPACITATED PERSON (POST-HEARING)

- MHL §81.15 Findings of the court required
- Necessity, PLUS
- ■Agreement, OR
- Incapacity, harm, lack of understanding and appreciation
- Functional limitations, necessity, specific powers, duration
- Type and amount of property and financial resources
- Additional findings required under MHL §81.21 when a petition seeks a guardian for property management



RIGHTS OF THE INCAPACITATED PERSON (POST-HEARING)

- Effect of the Appointment of a Guardian on the IP
- Due process rights
- MHL §81.29 All powers not granted to Guardian are retained by the IP.
- See Matter of Samuel, 82 Misc. 3d 616 (Sup. Ct., Nassau Co. 2024) ("[i]t is an incorrect reading of the law to assert that 'as a result' of the appointment of an article 81 guardian, the decedent lacked testamentary capacity.").

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RIGHTS OF THE INCAPACITATED PERSON (POST-HEARING)

- MHL §81.16 Dispositional Alternatives
- Dismissal
- Protective Arrangements
- Single Transactions
- Special Guardian
- Appointment of Guardian; Least Restrictive Form of Intervention



CURRENT LEGAL ISSUES

- MHL §81.22(b)(2) Guardian may not revoke Durable POAs, Health Care Proxies, DNRs, Living Wills
- Guardian may revoke limited POAs that are excluded from GOL §5-1501. See Bronstein v. Clements, 169, A.D.3d 1202 (3d Dep't 2019).
- End-of-Life Issues
- See Matter of Doe, 53 Misc. 3d 829 (Sup. Ct., Kings Co. 2016) (comprehensive discussion of New York common law and the FHCDA as it pertains to the withdrawal of life-sustaining treatment).
- SCPA 1750 and 1750-b Decisions for persons who are intellectually disabled.
- Medical Testimony & Confidentiality Issues
- Applications to seal records
- Use of the Court Evaluator Report





CURRENT LEGAL ISSUES (CON'T)

- Issues specific to IPs living with mental illness
- MHL §81.22(b)(1) Guardian may not consent to the voluntary or informal admission of the IP to a mental hygiene facility.
- Proceedings Under Article 9 Involuntary Hospitalizations & AOT
- Matter of Kahan, 2023 NYLJ LEXIS 2885 (Sup. Ct., Westchester Co. 2023) of Article 81). (questions whether MHL §9.43 petition brought by guardian runs afoul
- preempt the appointment of a money manager under MHL §9.60). Matter of William C., 64 A.D.3d 277 (2d Dep't 2009) (Article 81 does not
- Psychotropic Medications Rivers v. Katz, 67 N.Y.S.2d 485 (1986)
- Matter of Rhodanna C.B., 36 A.D.3d 196 (2d Dep't 1996) ("[d]ue electroconvulsive therapy is proposed over the patient's objection."). court each time the administration of psychotropic medication or process requires that the question of capacity be evaluated by a



MEDICAL & TREATMENT ISSUES

- Medical terminology
- Functional limitations and least restrictive form of intervention
- Diagnostic and assessment procedures
- Dementia, mental illness, developmental disabilities, alcoholism and substance abuse
- Extend and reversibility of impairment
- Medications and adverse reactions
- Psychological and emotional problems associated with aging process; mental or physical disability
- Stresses of care-giving
- Psychological and social concerns of the elderly or disabled

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THIS INDEX NUMBER IS <u>SEALED</u>, UNLESS AND UNTIL FURTHER ORDER OF THE COURT. HOWEVER, APPOINTED GUARDIAN(S) AND THE COURT EXAMINER DUE TO PRIVACY ISSUES IN THIS MATTER, THIS ENTIRE COURT FILE UNDER ARE PERMITTED ACCESS TO SAID FILE.

(01/2021)

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF DUTCHESS	
In the Matter of	CONCLUSIONS OF LAW AND JUDGMENT
	NDEX #
(Name of Person in Need of Guardian).	
{ } = choice must be made of <u>either</u> selection.	
[] = choice may be made of either, both, any, all selections.	
Mark choice with X.	
HAYES, M.G., A.J.S.C.	
In a guardianship proceeding, pursuant to article 81 of the Mental Hygiene Law, the Court, having	of the Mental Hygiene Law,
Need of Guardian (PING)) was a [] resident of this State, [] present in the State,	no ixalis of r sison in
I not present in the State,I nonresident of this State, present in the State,and whose date of birth is :	
and having been satisfied that (Name of PING) was served with the order to show cause and petition by personal delivery at least 14 days prior to the return date, and that all other persons required to be served under Mental Hygiene Law section 81.07 were	with the order to show r to the return date, and that e Law section 81.07 were
timely served with the order to show cause and petition, and having appointed alan [] Court Evaluator: (Specify name.)	having appointed a/an
Attorney for (Name of PING): (Specify name.), and having scheduled a return date for this proceeding, at which time:	hich time:
A (Name of P/NG) appeared personally and consented to the petition and	rented to the petition and

the appointment of a guardian.

] (Name of PING) appeared personally and consented to the petition and

- who waived his/her appearance and entered a consent to the petition and the appointment of a guardian.] (Name of PING) did not appear personally, but appeared by counsel,
- (If A. (Name of PING) appeared personally and a trial was conducted is chosen, check 1(a) and skip to 2 of the Findings of Fact.)
- (Proceed to] (Name of PING) did not appear personally and a trial was conducted. 1. of the Findings of Fact.)

FINDINGS OF FACT

- 1. a. [] Does not apply.
- because This proceeding was not tried in the presence of (Name of PING)
- i. [] (Name of PING) was not present in the State.
- or no meaningful participation would result from his/her presence at the trial, because could not communicate any meaningfully relevant information, etc.). (Specify, e.g., the PING was in a coma, had such cognitive impairments that he/she could not understand the proceeding, was so disoriented that he/she] (Name of PING) was completely unable to participate in the trial

established by clear and convincing proof upon the documentary evidence submitted and the testimony adduced. IT IS DETERMINED that the finding of fact contained in paragraph 1 (b) was

- because he/she needs a person other than himself/herself to provide for It has been established that (Name of PING) is in need of a guardian,
- clothing, shelter, health care or safety).] personal needs, including (Specify relevant items, e.g., food,
- assets). items, e.g., collection of income, payment of bills, protection and investment of I financial and property management, including (Specify relevant
- 3. It has been established
- a. [] that no other available resources exist.
- Organization), but are found to be insufficient or unreliable, because (Specify, e.g., Power of Attorney, Health Care Proxy, Volunteer Service from Community I that other available resources appear to exist, viz., (Specify, e.g., a

the Power of Attorney or Health Care Proxy were invalidly given, the Attorney in not sufficiently skilled). Fact or Health Care Agent have violated their fiduciary duties, the volunteers are

- powers such needs would not be met. necessary to provide for the needs of (Name of PING) and without the grant of these 4. It has been established that the powers granted in the within judgment are
- 5. It has been established that the:
- the guardianship of person is required for
- [] an indefinite duration.
- [] a period of (Specify time).
- b. the guardianship of property is required for
- [] an indefinite duration.
- [] a period of (Specify time)

G are established IT IS DETERMINED that the findings of fact contained in paragraphs 2, 3, 4, and

- I upon the consent of (Name of PING).
- the testimony adduced. I by a preponderance of proof upon the documentary evidence submitted and
- mental, cognitive impairments, impairments to judgment, insight, memory, etc.) limitations: (Specify, from the record, functional limitations, both physical and It has been established that (Name of PING) has the following functional

established IT IS DETERMINED that the findings of fact contained in paragraph 6 are

- [] upon the consent of (Name of PING).
- and the testimony adduced.] by clear and convincing proof upon the documentary evidence submitted

If upon consent, check 7(a) and skip to 8 of the Findings of Fact.

- 7. a. [] Does not apply.
- b. [] It is established
- nature and consequences of these functional limitations; that (Name of PING) lacks understanding and a appreciation of the
- functional limitations and inability to understand adequately and appreciate the nature and consequences of such limitations, because: (Specify, from the record, e.g., PING that it is likely that (Name of PING) will suffer harm because of these

self-administration of medication, and to understand and appreciate its necessity; same; likewise the inability to provide for medical care and treatment, including activities of daily living and does not understand or appreciate the necessity of will suffer physical harm because of the inability to provide for any or all of the estate planning, filing of tax returns and payment of taxes; etc.); income, the payment of bills, protection and investment of assets. Medicaid and likewise financial and property management, viz., collection and deposit of

and the testimony adduced. established by clear and convincing proof upon the documentary evidence submitted IT IS DETERMINED that the findings of fact contained in paragraph 7 (b) are

- suited to exercise the powers necessary to assist (Name of PING), because (Specify. appointment as a guardian under Mental Hygiene Law section 81.19 and is / are best experience, best choice among others proposed, no one proposed and the Court but expert in this field.). had to choose from the Fiduciary List or a non-profit organization not on the list from record, e.g., relationship with PING, nomination by PING, education and 8. It is established that (Name[s] of Guardian[s]) is / are eligible for
- assets is (Specify, from record, dollar amount of cash, stocks, bonds, mutuals, (Specify, from record, Do not include real estate.), and monthly income is in the approximate amount of It has been established that the approximate value of (Name of PING)'s liquid dollar amount.)

the testimony adduced. established by a preponderance of proof upon the documentary evidence submitted and IT IS DETERMINED that the findings of fact contained in paragraphs 8 and 9 are

CONCLUSIONS OF LAW

- <u>0</u> The Court has jurisdiction in this proceeding as to subject matter and person
- <u>그</u> (Name of PING) is a person in need of the appointment of a guardian.
- 12. (Name of PING) is
- . [] consenting to the appointment of a Guardian
- . [] an incapacitated person.
- intervention consistent with (Name of PING)'s functional limitations The powers granted in the within judgment are the least restrictive means of

JUDGMENT

ORDERED AND ADJUDGED that within 30 days of the signing of the Judgment, the Guardian shall file the Designation of the Clerk to receive Process and obtain the Commission from the County Clerk. The Guardian shall serve a copy of the Commission signed by the County Clerk upon this court and the Court Examiner within 5 days of its issuance and that the Commission issued in accordance herewith shall constitute the Guardian's / Co-Guardian's sole warrant to act;	ORDERED AND ADJUDGED that upon filing the designation [] and bond, by the Guardian / Co-Guardians of the Person and/or Property, the County Clerk shall execute and issue a commission, in the form attached hereto.;	[] not be required to file a bond. [] file a bond for the duration of the Guardianship in the amount of \$(Specify the amount directed by the Court at the trial or leave blank for the Court to complete. The amount of the bond may be adjusted by the Court throughout the term of the Guardianship);	ORDERED AND ADJUDGED that the Guardian/Co-Guardians of the Property shall	ORDERED AND ADJUDGED that the Guardian/Co-Guardians of the Person and/or Property shall file with the County Clerk a designation of the Clerk for service of process, in the form attached hereto;	THE GUARDIAN(S) ARE TO NOTIFY THE COURT & COURT EXAMINER WITHIN 30 DAYS OF ANY CHANGE OF ADDRESS.	I Jointly The Guardian(s) were [Inominated by petitioner or ward; [Ifamily members; [Independent Guardian(s) appointed by the Court.	I Co-Guardian of the Property: (Name, address, phone number). [] Co-Guardian of the Person: (Name, address, phone number). The co-Guardians are authorized to act I I individually	[] Guardian of the Person: (Name, address, phone number must be	is confirmed; ORDERED AND ADJUDGED that the report of the Referee dated ORDERED AND ADJUDGED that the following is / are appointed: [] Guardian of the Property: (Name, address, phone number must be
of the Process and	l/or Property, ched hereto.;	t of trial or leave ljusted by the	f the Property	the Person (for service of	ER WITHIN 30	nembers; or	<u>ber).</u> er).	nust be	lated : : must be

[] the Power of Attorney, executed on (<i>Date</i>), appointing (<i>Name</i>) as Attorney-in-Fact. [] the Health Care Proxy, executed on (<i>Date</i>), appointing (<i>Name</i>) as Health Care Agent.	[] the Power of Attorney, executed on (<i>Date</i>), appointing (<i>Name</i>) as [] the Health Care Proxy, executed on (<i>Date</i>), appointing (<i>Name</i>) as Otherwise, It	ORDERED AND ADJUDGED that the following is revoked: I any and all previously executed Powers of Attorney and————————————————————————————————————
] the Power of Attorney, executed on (<i>Date</i>), appointing (<i>Name</i>) as /] the Health Care Proxy, executed on (<i>Date</i>), appointing (<i>Name</i>) as] the Power of Attorney, executed on <i>[Date]</i> , appointing <i>[Name]</i> as] the Health Care Proxy, executed on <i>(Date)</i> , appointing <i>(Name)</i> as <i>ise, it</i>] any and al
[] the Health Care Proxy, executed on (Date), appointing (Name) as	[] the Health Care Proxy, executed on (<i>Date</i>), appointing (<i>Name</i>) as rwise, it] the Power
	erwise, it] the Health

section 81.20; in accordance with the general duties imposed upon guardians by Mental Hygiene Law ORDERED AND ADJUDGED that the Guardian/Co-Guardians shall act faithfully

have the following powers with regard to the property of [Name of PING]: ORDERED AND ADJUDGED that the Guardian/Co-Guardians of Property shall

- government entitlement checks; invest funds with the same authority as a trustee dispose, as appropriate. All guardianship accounts shall be solely for the benefit of pursuant to New York EPTL section 11-2.2; inventory personal belongings, and store or canceled checks to the Guardian and endorse, collect, negotiate and deposit al bank that shall provide either banking statements, canceled checks, or copies of other similar accounts as 'GUARDIANSHIP' accounts titled as follows: "Guardianship the incapacitated person and no 'joint' accounts shall be allowed negotiable instruments drawn to the order of (Name of Ping), including, but not limited to [Guardian's name]" Account for [name of incapacitated person] by Guardian of the Property, 11. Marshal his/her income and assets and establish bank, brokerage and ', utilizing the incapacitated person's Social Security number, = a
- Court Order, representative and there shall be a certification of the contents by the Guardian and bank representative. Open the safety deposit box, if any, in the presence of a bank The contents of the safety deposit box cannot be removed without prior
- and care <u>၂</u> Pay such bills as may be reasonably necessary for his/her maintenance

- exceed the lesser of 5% of all liquid assets in the guardianship estate or \$10,000 exceed \$500, AND the total of all gifts to all individuals in the same year does not gifts to an individual, if the total of all gifts to that individual in the same year does not Law section 81.21.(b), except that no prior court approval shall be required for any gift or 14. Make gifts, subject to prior court approval, pursuant to Mental Hygiene
- dependent and amount of support.) address of dependent, relationship to PING, whether legally obligated to support Provide support for persons dependent upon him/her (Specify name and
- the property; however, a prior court order is required to mortgage real property (other submission of a copy of the fully executed contract and a written appraisal of the value of price is in excess of \$10,000 or 10% of the guardianship estate, whichever is less, provided that no prior court approval shall be required when the contract price is including construction contracts, shall require prior court approval, if the contract contracts for the sale or purchase of assets [e.g., real estate, cars, boats, etc.], provided that prior to the closing of title the Court approves the terms of sale, upon less than \$500);] 6. Enter into contracts (including contracts for the sale of real property
- [x] 7. Establish from resources only and not from income:
- [x] an irrevocable prepaid funeral trust and submit proof of such trust to the Court Examiner with the Initial Report.] a luxury account in the amount permitted by statute.
- all proposed transfers, pursuant to Mental Hygiene Law section 81.21(b); Engage in Medicaid and estate planning, subject to prior court approval of
-] 9. Apply for government and private benefits;
- such proceedings. All such legal actions are subject to prior court approval. The including administrative proceedings, and to settle and compromise all matters related to the incapacitated person without a prior written court order. Guardian(s) are NOT Guardian is put on notice that NO attorneys fees are to be paid from the assets of includes the authority to hire counsel, to prosecute and to defend civil proceedings, the Guardianship; that would require them to be personally responsible for legal fees for services to incapacitated person nor is the Guardian required to sign any retainer agreements required to be personally responsible for legal fees for the benefit of the J 10. Legal capacity to sue on behalf of the incapacitated person which
- claims, litigation, settlements and other matters related thereto; all tax obligations and appear before federal, state and local taxing authorities on all 111. Sign and file income tax returns and all other tax documents for any and

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the Guardian determines that such professional assistance is necessary, subject to court approval of fees upon a **detailed** affidavit of services submitted to the court. **Legal fees** may NOT be paid by the Guardian prior to court approval (see page 8, paragraph Retain an attorney solely for necessary legal work, or an accountant, if

- as other charges of an emergent nature, if there is no duly appointed personal insufficient to pay for same; and pay estimated estate and income tax charges, as well representative of the estate; guardianship estate at death, to the extent that a prepaid funeral trust, if any, is 14. Pay the funeral expenses of out of any funds remaining in the
- same would have otherwise existed; 15. Pay such bills after death if incurred prior thereto and if authority to pay
- turn over of guardianship property; with all of the terms of Mental Hygiene Law §81.44, including the specific directions as to [] 16. Upon the death of the incapacitated person, the Guardian shall comply
- 17. Lease a primary residence for up to 3 years.
- or donee of a power of appointment. personal representative, including Executor, beneficiary, guardian for a minor, guardian, 18. Exercise or release powers held by the incapacitated person as trustee,
- in the Guardian's name for the incapacitated person for the delivery of all mail, if regard to the incapacitated person's mail, including the establishment of a post office box authority to direct, forward or stop the delivery of mail and to take all lawful actions with necessary. 19. Collect and open all of the incapacitated person's mail; to have full
- [] 20. Pursuant to Mental Hygiene Law §81.20 (6)(vi), if the incapacitated person owns real property, the Guardian of the Property, within 30 days of Judgment, is to file Guardian of the Property's and Surety's (if any) name, address and telephone number Judgment finding that the person now has a Guardian of the Property; and listing the owned by the incapacitated person and also stating the date of the Guardianship the Court Examiner), identifying, including the tax map numbers, the real property notarized statement with the County Clerk where the property is located (send a copy to and have recorded and indexed under the name of the incapacitated person, a on this statement.

ORDERED AND ADJUDGED that the guardianship of the property shall be for

[] an indefinite duration

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shall have the following powers with regard to the personal needs of (Name of PING): ORDERED AND ADJUDGED that the Guardian/Co-Guardians of the Person

- 1 1. Determine who shall provide personal care or assistance for him/her
- his/her life; <u>ب</u> ج Make decisions regarding social environment and other social aspects of
-] 3. Determine whether he/she should travel;
- 4 Determine whether he/she should possess a license to drive;
- incapacitated person regarding condition, treatment and care. authority to discuss and consult with all medical/dental/mental health providers for the Insurance Portability and Accountability Act (HIPAA); and which shall include the all medical/dental/mental health providers' records governed by the Federal Health <u>ن</u> Authorize access to or release of confidential records, including any and
-] 6. Make decisions regarding education;
- [] 7. Apply for government and private benefits.
-] 8. Choose the place of abode
- his / her consent or further order of the court. facility or residential care facility, as defined by Public Health Law section 2801, without I provided that (Name of PING) shall not be placed in a skilled nursing
- provided that no consent shall be given to the voluntary formal or informal admission of including the authority to effectuate all necessary documentation for such placement; facility or residential care facility, as defined by Public Health Law section 2801 and (Name of PING) to a mental hygiene facility under article 9 or 15 of the Mental Hygiene Law or to an alcoholism facility under article 21 of the Mental Hygiene Law. I including placement or continued placement in a skilled nursing
- without the consent of (Name of PING) or further order of this court or a court of given to the administration of psychotropic medication or electroconvulsive therapy findings of Mental Hygiene Law section 81.15 and in accordance with the standards in dental treatment, provided that treatment decisions are made consistent with the competent jurisdiction. Mental Hygiene Law section 81.22 (a)(8), and provided further that no consent shall be 19. Consent to or refuse generally accepted routine or major medical or

[] 10. Execute a Do Not Resuscitate Order in accordance with the provisions of Article 29-B of the Public Health Law.

] 11. (Other)

ORDERED AND ADJUDGED that the guardianship of the person shall be for

- [] an indefinite duration.
-] a period of (Specify time)

shall be compensated pursuant to ORDERED AND ADJUDGED that the Guardian / Co-Guardians of the Property

- [] Surrogate's Court Procedure Act section 2307, or
- [] Surrogate's Court Procedure Act section 2309, or
- order.] a plan to be submitted to the court within 30 days and approved by court
- order. pursuant to a plan to be submitted to the Court within 30 days and approved by court] that the Guardian / Co-Guardian of the Person shall be compensated
- [] the Guardian is waiving commissions

shall examine all accountings, including Initial Report, Annual Accounting and Final by Mental Hygiene Law sections 81.30, 81.31, 81.33 and 81.44. The Court Examiner with the County Clerk's Office and a copy to the Court Examiner appointed as required accountings [Initial Report within 90 days of receiving commission, Annual Accounting within 30 days of receipt. The Guardians are put on notice that upon any Accountings every year before May 15 and Final Report within 150 days of death] ORDERED AND ADJUDGED that the Guardian/Co-Guardians shall file all

shall not take any annual commissions / compensation for any year until that injury awards and the failure to properly file reports and accountings, the Guardian may the Court; and it is further year's annual account is filed, reviewed by the Court Examiner, and approved by surcharged and or commissions due the Guardian being reduced. The Guardian be ordered to appear before the court which may result in the Guardian being removed, the failure to immediately notify the Court Examiner of any settlements or personal breach of fiduciary duty, including the failure to include all assets in the accountings

the Court Evaluator, if any the chief executive officer of a facility if the incapacitated person resides in a facility and Hygiene Legal Service if the incapacitated person resides in a mental hygiene facility following: the incapacitated person, the counsel for the incapacitated person, the Mental County Clerk's office, the Guardian shall send a copy of the Initial Report to the ORDERED AND ADJUDGED that in addition to filing the Initial Report with the

from the incapacitated person's assets unless otherwise stated) which is deemed amounts: reasonable for the services provided is approved for the following in the following ORDERED AND ADJUDGED that compensation (to be paid by the Guardian

 1		Hygiene	_	_
] Expert Witnesses (Specify): \$] Petitioner's Attorney: \$	Hygiene Legal Service shall be made payable to "NYS Unified Court System")] Court-Appointed Attorney: \$(checks to Me	Court Evaluator: \$

[] (Other): \$
[] Compensation shall be approved in a separate order, upon submission of
affidavits of services.
ORDERED AND ADJUDGED that Guardian/Co-Guardians
[]shall
[] shall not
be required to complete a training program, as required by Mental Hygiene Law section
81.39, within a reasonable period after issuance of the commission.
ORDERED AND ADJUDGED that the following is appointed Court Examiner.
ORDERED AND ADJUDGED that the Final Accounting in this matter is hereby referred to the
Court Examiner to hear and report to the Court pursuant to Mental Hygiene Law 81.33.
ORDERED AND ADJUDGED that the following shall be served with notice of all
further proceedings in this matter:
[] (Name of PING.)
[] Guardian/Co-Guardians.
[] Mental Hygiene Legal Service.
[] Court Examiner.
[] Bonding Company.
[] Veterans Administration.

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decedent, funeral arrangements and final resting place when that information is known or can be reasonably ascertained by the guardian: notice of the incapacitated person's death, the intended disposition of the remains of the ORDERED AND ADJUDGED that the following individual(s) shall be served with

		ORDERED AND ADJUDGE		
		ORDERED AND ADJUDGED that the following individual(s) shall be served with notice of the incapacitated person's transfer to a medical facility:		
		l(s) shall be served with		

visit the incapacitated person, if they so choose. However, the identification of such ORDERED AND ADJUDGED that the following individual(s) shall be entitled to

person(s) in the order shall in no way limit the persons entitled to visit the incapacitated	capacitated
person:	

procedures for the examination and settlement of said reports and accountings geographical jurisdiction of this court without a prior written court order The person in need of guardianship may not be permanently removed from the Dr. Martin Luther King Jr. Boulevard, 14th Floor, White Plains, NY 10601) shall govern all matter and that the Rules of the 9th Judicial District's Guardianship Accounting Part (111 ORDERED AND ADJUDGED that the court shall maintain jurisdiction over this

unless said individual is represented by his / her own separate counsel the person whom the Court has appointed as Guardian in filing the Guardian's designation with the County Clerk and obtaining the commission from the County Clerk, signing of the Judgment and that Petitioner's counsel shall be responsible for assisting Clerk to Receive Process and obtain the bond and Commission within 30 days of the ORDERED AND ADJUDGED that the Guardian shall file the Designation of the

Law and Judgment" shall be personally served upon and read to (Name of PING) by the ORDERED AND ADJUDGED that a copy of the "Findings of Fact, Conclusions of

Mental Hygiene Law section 81.16 (e). Court Evaluator, by counsel for (Name of PING) or by the Guardian in accordance with

Part. Failure to comply may result in sanctions affidavit of service that such service was timely done shall be filed with the Guardianship entitled to notice of further proceedings within 20 days of the date of the Judgment. An the Order To Show Cause and Petition) shall be served upon all counsel, and all persons Examiner only. A copy of the Findings of Fact, Conclusions of Law and Judgment (NOT petitioner's counsel, by regular mail, upon the Guardian /Co-Guardians and the Court Law and Judgment and Order To Show Cause and Petition shall be served by ORDERED AND ADJUDGED that a copy of the Findings of Fact, Conclusions of

statement indicating such compliance and be accompanied by a properly completed of the Rules of the Chief Judge by filing the proper forms with this Court when applicable Approval of Compensation Any subsequent affidavit or affirmation of service submitted to this Court must contain a ORDERED AND ADJUDGED that any appointee herein shall comply with Part 36

within 20 days of the death, file an original death certificate with this Court and a copy of and/or mental condition. Additionally, the Guardian is to immediately notify this Court, the residence and of any significant change in the incapacitated person's assets, physical the death certificate with the Court Examiner, duly appointed personal representative of Surrogate's Court and the Court Examiner of the death of the incapacitated person and Examiner, in writing within 30 days, of a change in the incapacitated person's place of ORDERED AND ADJUDGED that the Guardian is to report to the Court

document, and the Public Administrator. the estate or, if none, with the personal representative named in the will or a trust

its issuance. copy of the Commission with the Court Examiner and the Court within 5 days of the official Commission issued by the County Clerk. The Guardian shall file a including marshaling of assets and collecting income, until the Guardian receives ORDERED AND ADJUDGED that the Guardian is not authorized to act,

Dated: Poughkeepsie, New York

ENTER:

HON. MICHAEL G. HAYES, A.J.S.C.

The Petitioner's Name, Address and Telephone Number are: (Specify)

The Attorney for the Petitioner's Name, Address and Telephone Number are: (Specify)

SUPREME: COURT OF THE STATE OF NEW YORK COUNTY OF	
In the Matter of the Appointment of a Guardian of the Person and Property of	Index No.
An Alleged Incapacitated Person	OATH AND DESIGNATION OF CLERK
I,, duly appointed Guardian of the Person and Property of the above named, do hereby promise that I will faithfully, honestly and impartially discharge the trust committed to me as such Guardian. I will obey all lawful directions of the Court, and I will render an Initial Report and Annual Report of a just and true account of all monies and other property received by me.	duly appointed Guardian of the Person and Property of the above do hereby promise that I will faithfully, honestly and committed to me as such Guardian. I will obey all lawful directions in Initial Report and Annual Report of a just and true account of all ived by me.
York, appointed Guardian of the Person and Property of the above named hereby designate the Clerk of the Supreme Court, and his successor in office, as a person on whom service of any process issuing from said Court in this proceeding, or in any other proceeding, upon me as Guardian of the Person and Property of, may be made in like manner and	oty of, state of Newbove named, store in office, as a person on whom g, or in any other proceeding, upon, may be made in like manner and
Dated:, New York	Name of Capardian
Acknowledgment	
STATE OF	
On the day of in the year, before me, the undersigned, personally appeared personally known to me or proved to me on the basis of satisfactory evidence to be the individual of the personal of the person	before me, the undersigned, personally sonally known to me or proved to me on the
within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.	e(s) is (are) subscribed to the cuted the same in his/her/their nent, the individual(s), or the e instrument.

(signature and office of individual taking acknowledgment)

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF DUTCHESS

IN THE MATTER OF THE APPLICATION FOR THE APPOINTMENT OF A GUARDIAN BY

Petitioner,	Index No.
FOR:	COMMISSION TO ACT
[A PERSON IN NEED OF A GUARDIAN or AN INCAPACITATED PERSON].	
ASSIGNED JUDGE: HONORABLE MICHAEL G. HAYES ACTING SUPREME COURT JUSTICE	ICE
BRADFORD H. KENDALL, COUNTY CLERK of DUTCHESS COUNTY, NEW YORK nereby issues a COMMISSION TO ACT as GUARDIAN of the PERSON and PROPERTY for:	COUNTY, NEW YORK ERSON and PROPERTY for:
[INSERT NAME OF PING/IP]	
AS FOLLOWS:	
The name, address, and telephone number of the Guardian is:	
The specific powers of above said Guardian are enumerated as follows:	ows:
The Guardian of the Person and Property has the following powers with regard to the personal needs and property management of [INSERT NAME OF PING/IP] ϕ	wers with regard to the <i>OF PING/IP</i>]
1. [LIST ALL POWERS FROM COURT ORDER] 2.	
The above said Judgment was filed in this office on Also, an Oath an Oath and Interpretation for said Guardian was filed in this office on So far as the records in my office show [INSERT NAME OF GUARDIAN] is the Guardian of the Person and Property of [INSERT NAME OF PING/IP]. This appointment is indefinite.	. Also, an Oath and So far as the the Guardian of the Person ant is indefinite.
Dated: Poughkeepsie, NY BRADFORD	BRADFORD H. KENDALL
	DUTCHESS COUNTY CLERK

STATEMENT IDENTIFYING REAL PROPERTY Pursuant to Mental Hygiene Law § 81.20 (a)(6)(vi)

Record and Index under:

day of in the year 20, personally known to me or proved to me on the babscribed to the within instrument and acknowledged to me on the instrument, the individual, or the person upon behalf or	Name of Guardian OR Co-Guardian of Property State of New York) County of ss:	Check if: [] city [] town [] village) Signed	Section Block Lot Name of Municipality	Tax Map Designation/Municipality:	REAL PROPERTY	Surety: Bond Number	Supreme County Index Number	Date of Decision/Verdict Date of Judgment	Adjudication of Incapacity:	[] (check box if there is/are Co-Guardian(s) of Property and list below)	Address	Guardian of Property:	Address	Incapacitated Person:
before me, the undersigned, personally appeared sis of satisfactory evidence to be the individual whose that she executed the same in her capacity, that by her which the individual acted, executed the instrument.	erty	town [] village)				Bond Number		nent		y and list below)				

Notary



Matter of Samuel

Surrogate's Court of New York, Kings County
January 11, 2024, Decided
File No. 2016-2501/A&B

Reporter

82 Misc. 3d 616 *; 206 N.Y.S.3d 888 **; 2024 N.Y. Misc. LEXIS 283 ***; 2024 NY Slip Op 24014 ****; 2024 WL 238160

[****1] In the Matter of Phylliscita Ismay Samuel, Deceased.

Subsequent History: As corrected through Wednesday, April 17, 2024

Counsel: [***1] Law Office of Lorin O. Lewis, P.C., Brooklyn (Lorin O. Lewis of counsel), for Leopold Osborne.

Johnnie Woluewich, Bronx, for Morgan Samuel.

Judges: Bernard J. Graham, S.

Opinion by: Bernard J. Graham

Opinion

[**889] [*618] OPINION OF THE COURT

Bernard J. Graham, S.

In this contested probate proceeding, Leopold J. Osborne (Osborne) filed a petition to deny probate of a written instrument dated October 30, 2014, purported to be the last will and testament of the decedent. A separate petition was filed by Morgan Samuel (Samuel) seeking probate [**890] of the October 30, 2014 instrument, and objections to this petition were filed by Osborne. Mr. Osborne now moves for summary judgment and to deny probate of the propounded 2014 instrument. For the reasons set forth below, the motion for summary judgment is denied.

Procedural History

Phylliscita Ismay Samuel (decedent or Phylliscita) died on April 23, 2016. On June [****2] 23, 2016, a propounded instrument dated October 30, 2014 (the 2014 instrument), was filed with the court, along with her death certificate and an affidavit of domicile. On October 26, 2016, a petition for the denial of the petition for probate and to grant letters of administration, with supporting documents, was [***2] filed by Osborne, by his attorney. Thereafter, on January 18, 2017, a notice of appearance was filed by counsel to Samuel, along with a petition seeking probate of the 2014 instrument and letters testamentary issued to Samuel.

reply and another conference was scheduled for October 11, 2023, at 3:00 p.m. On October 11, 2023, at the court and Samuel's attorney a copy of his reply, the conference. At 2:20 p.m., Osborne's attorney emailed Osborne's attorney no less than four times. At 10:10 inappropriate and prejudicial." Samuel's counsel sent another email at 9:36 a.m. attaching [***3] verification extension, for no justifiable reason, would be highly at 9:28 a.m. that he objected to an extension of time for uploaded and he indicated that he would "file Osborne's attorney was given a final opportunity to file a was held on September 12, 2023, at which time scheduled for May 18, 2021. Another court conference Samuel's attorney. Thereafter, a court conference was summary judgment. An affirmation in opposition to The instant motion was filed on March 4, 2020, in which Osborne seeks dismissal of the cross-petition and attorney affirmation in response extension of time would be discussed at the 3:00 a.m., the court responded that the request for an the filing of a reply, asserting that "an 11th hour response within 7 days." Samuel's attorney responded inquire whether the opposition to his motion could be Osborne's motion, dated March 22, 2020, was filed by [*619] that the opposition papers had been sent to 9:16 a.m., Osborne's attorney emailed the court to ᅙ opposition

summary judgment, which he also uploaded to NYSCEF (New York State Courts Electronic Filing System). The conference was conducted as scheduled, and Samuel's attorney requested an opportunity to review the reply and respond as needed. This request was granted. On October 18, 2023, Samuel's attorney emailed the court and Osborne's attorney with a copy of an affirmation in furtherance of the parties' October 11, 2023 court conference, which raised the concern that the October 11, 2023 reply papers contained fake case law resulting from artificial intelligence hallucinations.

Factual Background

The decedent executed a purported prior will on May 11, 2012 (the 2012 instrument). In 2014, Phylliscita was the subject of a *Mental Hygiene Law article 81* guardianship proceeding in Kings County, bearing index number 100184/2014. By order and judgment appointing guardian of the person and/or property (O&J) [***4] dated September 8, 2014, Phylliscita was adjudicated incapacitated and the court (by the Honorable Michael L. Pesce) appointed Samuel as her guardian of the person and property. Thereafter, on October 30, 2014, the decedent executed the purported 2014 will which is the subject of this proceeding.

In addition to summary judgment, Osborne seeks dismissal of Samuel's petition [**891] and denial of the propounded 2014 instrument, alleging that the decedent lacked capacity at the time of execution, and that the instrument was procured as a result of fraud, duress and undue influence by Samuel and others.

[****3] Discussion

Allegations of Use of Artificial Intelligence

At the outset, the court is compelled to address the allegation that Osborne's attorney submitted reply papers which contain fictional and/or erroneous citations as a result of his reliance on a website which contained information created by generative artificial intelligence (AI). While this issue is one of first impression for this court, other courts have addressed similarly problematic filings.

[*620] Even without definitive proof that AI was used to prepare the reply, or an admission by Osborne's counsel, or in fact any acknowledgment by him of the [***5] allegations raised by Samuel's attorney

whatsoever, it is evident that five of the six cases cited in his reply are either erroneous or nonexistent.

seconds, shows that the cases and citations contained produced by AI without proper examination and scrutiny. In his haste to submit a response, Osborne's attorney have realized this as well. effort needed to cross-check this information, he would nonexistent. Had counsel taken the minimal time and within the response are incorrect or fake Lexis search of the cases cited, which takes mere Chief Administrator of the State of New York." A simple defined in Subsection c of 130-1.1 of the Rules of the paper or the contentions herein are not frivolous as under the circumstances, that the presentation of the information and belief, formed after inquiry reasonable under penalty of perjury "to the best of his knowledge, citations that he was presenting to the court were legitimate and factual, and he certified and affirmed took no rather the attorney's failure to review the sources and of itself that causes such offense and concern, but legal documents, it is not necessarily the use of Al in Although the court is dubious about using AI to prepare steps to ensure that the information and

and to the reputation of a party attributed with falsely invoked as authors of the bogus opinions judicial precedents. There is potential harm to the fake opinions. The opposing party wastes time and "Many harms flow from the submission [***6] of legal profession and the American judicial system." fictional conduct. It promotes cynicism about the reputation of judges and courts whose names are may be deprived of arguments based on authentic is taken from other important endeavors. The client money in exposing the deception. The Court's time 22, 2023, 22-cv-1461 (PKC)].) v Avianca, In: 3, *2, 2023 WL . Inc., 4114965, *1 JSD NY, June 2023 U.S.

The court has determined that the penalty for committing this fraud upon the court should include striking the pleading from the record and the scheduling of an appearance before the court to address whether of the imposition of economic sanctions is warranted. These consequences are similar to the penalties imposed by an Ohio court upon violation of the artificial intelligence provision established in its standing order [*621] governing civil cases, which prohibits the use of Al in the preparation of any filing submitted to the court. (See Whaley v Experian Info. Solutions, Inc., 2023 U.S. Dist. LEXIS 205468, 2023 WL 7926455 [SD Ohio, Nov. 16, 2023, Case No. 3:22-cv-356].)

[**892] The New York Codes, Rules and Regulations (NYCRR) at 22 NYCRR 130-1.1 (c) states that

"conduct is frivolous [***7] if:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law:

"(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

"(3) it asserts material factual statements that are false.

"Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall [****4] consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

factual bases of the contents of his reply, as over three regarding the case law and court holdings that are false. since his reply asserts material factual statements search engines such as Lexis or Westlaw. erroneous by simply checking the citations on legal the court conference held on September 12, an additional and final opportunity to file the reply during [1] The court finds that counsel's conduct was frivolous apparent to counsel that his research was completely Lastly, as previously noted, it should have been Furthermore, Osborne's attorney was explicitly provided motion and Samuel's years had elapsed since the filing of [***8] his own He had ample time available to investigate the legal and opposition in March 2020. 2023.

Pursuant to 22 NYCRR 130-1.1 (a),

"The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses [*622] reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part,

which shall be payable as provided in <u>section 130-1.3</u> of this Subpart."

Therefore, the court would be well within its discretion to sanction Osborne's counsel for such conduct, and the appropriateness of sanctions will be addressed at a date to be set by [***9] the court.

Motion for Summary Judgment

Summary Judgment Standard of Review

opposing papers. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d proponent's submissions, the facts must be carefully viewed in the light most favorable to the nonmoving party. (Ortiz v Varsity Holdings, LLC, 18 NY3d 335, 339, denial of the motion, regardless of the sufficiency of the material issues of fact. (<u>Alvarez v Prospect Hosp., 68</u> NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 tendering evidence to demonstrate the absence of any showing of entitlement to judgment as a matter of law by a summary judgment motion must make a prima facie granted only where there is an absence of any material Summary judgment is a drastic remedy that may be 960 N.E.2d 948, 937 N.Y.S.2d 157 [2011].) 316 [1985].) [**893] In reviewing the sufficiency of the N.E.2d 240, 942 N.Y.S.2d 13 [2012].) The proponent of issues of fact requiring a trial. (See CPLR 3212 [b]; [1986].) Failure to make this initial showing requires a Vega v Restani Constr. Corp., 18 NY3d 499, 503,

Once a prima facie showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof sufficient to establish the existence of material issues of fact requiring a trial of the action. (<u>Chance v Felder</u>, 33 AD3d 645, 823 N.Y.S.2d 172 [2d Dept 2006]; <u>Zuckerman v City of New York</u>, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980].) In order to defeat a motion for summary judgment, the respondent must "lay bare [their] proof" and demonstrate that there is a genuine triable issue of fact, by allegations that are specific and detailed and substantiated by admissible evidence in the record. (<u>Towner v Towner</u>, 225 AD2d 614, 615, 639 N.Y.S.2d 133 [2d Dept 1996].) Mere conclusory [****10] assertions will not suffice. (<u>Matter of O'Hara</u>, 85 AD2d 669, 671, 445 N.Y.S.2d 201 [2d Dept 1981]; [*****5] McGahee v Kennedy, 48 NY2d 832, 400 N.E.2d 285, 424 N.Y.S.2d 343 [1979].)

While the court has authority to grant a summary

granting such relief may [*623] be rare in a probate ₫

judgment motion proceeding" (see Matter of Pascal, 127 N.E.2d 835 [1955]). denying probate, 309 NY 108, "occasion 113,

Testamentary Capacity

issue of [testamentary] capacity is one for the jury." (Matter of Kumstar, 66 NY2d 691, 692, 487 N.E.2d 271, conflicting inferences from undisputed evidence, the there is conflicting evidence or the possibility of drawing where there are material issues of fact" (Matter of Pollock, 64 NY2d 1156, 1158, 480 N.E.2d 346, 490 proceedings, that remedy is inappropriate in any case summary judgment may be available in probate fact exists. (Bank of N.Y. Mellon v Gordon, 171 AD3a but to determine whether any triable issue of material function of the court on a motion for summary judgment natural objects of her bounty (Matter of Sabatelli, 161 AD3d 872, 874, 76 N.Y.S.3d 207 [2d Dept 2018]). The will, the nature and extent of her property, and the understood the nature and consequences of making the proving testamentary capacity, i.e., that the testator is not to resolve issues of fact nor to assess credibility, The proponent of a will bears the initial burden of 496 N.Y.S.2d 414 [1985].) N.Y.S.2d 732 [1985] [citation omitted]). Further, "[w]hen 97 N.Y.S.3d 286 [2d Dept 2019].) "While

an assessment of the person's activities of daily living primary consideration shall be given to the functional adequately understand and appreciate the nature and consequences of such inability. Further, Mental Hygiene person is unable to provide for personal needs and/or property management, and the person cannot finding that a person is likely to suffer harm because the that a determination of incapacity be based upon a execute a will. Mental Hygiene Law § 81.02 (b) requires different from the testamentary capacity needed to the [***11] context of an article 81 proceeding is much was appointed a guardian. However, capacity in because she had been found to be incapacitated and lacked capacity at the time of execution of her will is guardianship proceeding. (Matter of Bess Z., 27 AD3d grooming, cooking, or banking, pursuant to level and functional limitations of the person, including [2] The crux of Osborne's argument that Phylliscita Activities of daily living include tasks such as dressing Law § 81.02 (c) provides that in making a determination, 568, 813 N.Y.S.2d 140 [2d Dept 2006].) Mental Hygiene Law § 81.03 (h). The Mental Hygiene not require medical testimony

well established that the requirements of Mental Hygiene Law article 81. It is The standard for testamentary capacity is different from

of Coddington, 281 App Div 143, 146, 118 N.Y.S.2d bounty and the relation of one to the other." (Matter his property and the natural objects [***12] sufficient clarity so that without prompting he is able will, a person must only 'be able to think with NY 22, 120 N.E. 83 [1918].) 525 [3d Dept 1952], citing Matter of Heaton, 224 transacted; to hold in mind the extent and nature of to understand and carry out the business to be

81 guardian, the decedent lacked testamentary capacity of fact arising in an action to determine the validity of a with respect to due execution of the 2014 instrument. assert that "as a result" of the appointment of an article in any other case." It is an incorrect reading of the law to will are no different in this respect from questions of fact testator's history of convulsions, noting that "[q]uestions issue of capacity as a matter of law, despite the 862 [3d Dept 1917]), the Court declined to decide the In Matter of Strong (179 App Div 539, 547, 166 N.Y.S.

grounds that the decedent lacked capacity at the time of capacity. Thus, the motion for summary judgment on the judgment as a matter of law, and that triable issues of established a prima facie showing of entitlement to execution must be denied. material fact exist in this instance as to testamentary Accordingly, the court finds that Osborne has not

[****6] Undue Influence and Fraud

undue opportunity, and the actual exercise of influence. (Estate demonstrate of Malone, 46 AD3d 975, Where undue influence is alleged, three elements of 2007].) To prove undue influence, the objectant must influence must 846 N.Y.S.2d 782 [3d Dept be established: motive,

quoting Children's Aid Socy. of City of N.Y. v or too weak to resist." (Matter of Walther, 6 NY2d will and desire, but which he was unable to refuse the testator to do that which was against his free importunity which could not be resisted, constrained action and destroyed free agency, or which, by coercion, [***13] "that the influence exercised amounted to a moral 49, 53, 159 N.E.2d 665, which restrained 188 N.Y.S.2d 168 [1959], independent

Loveridge, 70 NY 387, 394 [1877].)

As for fraud, "[a]n objectant seeking to establish that a will is the product of fraud must demonstrate by clear and convincing evidence that the proponent of the will knowingly made false statements to the testator to induce the testator to make a will disposing of his or her property in a manner contrary to that [*625] which the testator would have effected." (Matter of Rottkamp, 95 AD3d 1338, 1339-1340, 945 N.Y.S.2d 394 [2d Dept 2012].)

since no one, not even a court appointed guardian, can appointed guardian," as Osborne seems to suggest, previously drafted will" within the "specific guidelines for outside the scope of his appointment, Osborne attempts to retroactively impose a burden upon the guardian execute a will, and alleging that the guardian acted authority from the Supreme Court to allow Phylliscita to Supreme Court does not grant the power to draft a new argues that the power granted by the Kings County assumed to "unduly influence" their ward. Osborne also automatically deemed to be in an adversarial role or guardian appointed by the Supreme Court is drafting a new will. drafter obtain "input" from a medical professional when person. There is also no requirement that an attorney execute a last will and testament on behalf of another have provided for "the change, revision or removal of a which does not exist under the law. Nor would the O&J faulting the executing [***14] a will or revoking a prior will. By to the guardian, it did not prohibit Phylliscita from will. However, while the O&J conveyed certain authority the decedent," the court notes that an article 81 position of undue influence over the decision making of appointed guardian, [Morgan Samuel] maintained a [3] Although Osborne contends that "as the newly activities, guardian [**895] for not requesting responsibilities, and duties 으 not

Osborne also suggests that undue influence "is abundantly clear" since the 2014 instrument named Samuel as executor and beneficiary, and by that time he was also acting as her court appointed guardian. However, even "hounding" a testator to make a will (see e.g. <u>Matter of Neuman, 14 AD3d 567, 568, 789 N.Y.S.2d 182 [2d Dept 2005]</u>), or "exercis[ing] control over [a testator's] activities," does not necessarily rise to the level of undue influence (see e.g. <u>Matter of Klitgaard, 83 AD2d 651, 651, 442 N.Y.S.2d 590 [3d Dept 1981]</u>).

The Appellate [***15] Court in Matter of Burke (82 AD2d

260, 441 N.Y.S.2d 542 [2d Dept 1981]] reversed a decree and remitted to the Surrogate's Court for a new trial, in a case where a decedent executed a subsequent will while hospitalized which made a bequest to the operator of the nursing home where the decedent had been a patient and received care for some time. The <u>Burke</u> Court cited <u>Walther</u>, noting that undue influence

"must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment [*626] arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity . . . and which could not be resisted, so that the motive was tantamount to force or fear." (Matter of Burke, 82 AD2d at 269.)

These criteria are questions of fact which make summary judgment inappropriate under the circumstances.

The <u>Burke</u> Court also cited <u>Matter of Elmore (42 AD2d 240, 346 N.Y.S.2d 182 [3d Dept 1973])</u>, which

"held, with respect to the connection between a testamentary beneficiary and the attorney preparing the will, as [****7] follows: 'Where a will has been prepared by an attorney associated with a beneficiary, an explanation is called for (see <u>Matter of Lamerdin, 250 App. Div. 133, 135, 293 N.Y.S. 967</u>), and it is a question of fact for the jury as to whether the proffered explanation is adequate."" (<u>Matter of Burke, 82 AD2d at 274.</u>)

Osborne has argued that since Mary Katherine Brown, Esq. was [***16] the attorney who drafted Phylliscita's 2014 instrument and was also Samuel's attorney in the guardianship proceeding, she could not have believed decedent to be of sound mind or knowledgeable of the extent of her bounty or relations. The court agrees with the <u>Burke</u> Court that this too is an issue of fact for consideration by a jury.

The court therefore finds that Osborne has failed to establish a prima facie showing of entitlement to judgment as a matter of law, and that triable issues of material fact exist as to the question of undue influence.

Conclusion

All other arguments have been considered and found to be moot or without merit. For the foregoing reasons, the

Page 6 of 6 82 Misc. 3d 616, *626; 206 N.Y.S.3d 888, **895; 2024 N.Y. Misc. LEXIS 283, ***16; 2024 NY Slip Op 24014, ****7

and this matter shall proceed to trial. Based on the foregoing, it is hereby ordered that the attorney affirmation in response to opposition to summary judgment, dated October 11, 2023, is hereby stricken from the record; and it is further ordered that counsel for citations. appears [***17] to be AI generated research and related to the improper submission that relies on what Leopold Osborne shall appear before the court on January 30, 2024, at 10:00 a.m., for further proceedings cross-petition and deny probate is denied in its entirety, motion for summary judgment to dismiss the [**896]

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As of: May 31, 2023 3:48 PM Z Cited

Matter of Kristine F.

Supreme Court of New York, Appellate Division, Second Department June 8, 2022, Decided

2021-05069 (Index No. 8255/04)

206 A.D.3d 729 *; 167 N.Y.S.3d 810 **; 2022 N.Y. App. Div. LEXIS 3658 ***; 2022 NY Slip Op 03723 ****; 2022 WL 2057823

[****1] In the Matter of Kristine F. (Anonymous),

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d OFFICIAL REPORTS THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE

incapacitated person, and for the issuance of an order of protection against Kristine F. in favor of nonparty successor guardian of the person of Kristine F., an appoint Gina-Marie LoBraico-Reitano as the substitute from, without a hearing, granted those branches of the motion of Thomas F. and Lorraine F. which were to Richmond County (Thomas P. Aliotta, J.), dated September 10, 2020. The order, insofar as appealed Hygiene Law article 81 [***1], Kristine F. appeals from stated portions of an order of the Supreme Court, David L. Cassato. Prior History: In a proceeding pursuant to Mental

Riselvato, and Jennifer Degroot of counsel), for NY (Michael D. Neville, Dennis B. Feld, Timothy M. Counsel: Mental Hygiene Legal Service, Garden City,

Gina-Marie LoBraico-Reitano, Staten Island, NY, for respondents Thomas F. and Lorraine F.

DILLON, J.P., ROMAN, MALTESE and DOWLING, JJ., JOSEPH J. MALTESE, DEBORAH A. DOWLING, JJ. Judges: MARK C. DILLON, J.P., SHERI S. ROMAN,

Opinion

[*729] [**810] DECISION & ORDER

successor guardian of the person of Kristine F. denied, and the matter is remitted to the Supreme for the issuance of an order of protection against appealed from, on the law and in the exercise of Court, Richmond County, for the appointment of a Kristine F. in favor of nonparty David L. Cassato are the person of Kristine F., an incapacitated person, and Reitano as the substitute [***2] successor guardian of Lorraine F. which were to appoint Gina-Marie LoBraicobranches of the motion [**811] of Thomas F. and discretion, without costs or disbursements, and those ORDERED that the order is reversed insofar as

discretion in granting that branch of the motion of selecting a guardian for an incapacitated person, the primary concern is the best interests of the guardian of the person of Kristine F. person of Kristine F. (see id. § 81.19[3][b]). Accordingly appointment as the substitute successor guardian of the 81.19[d][8]), the evidence supports incapacitated between the person proposed as guardian and the the relevant factors, including "any conflicts of interest E.H.—Penny F.H.], 131 AD3d 1058, 1059, 16 N.Y.S.3d 474, quoting Matter of Audrey D., 48 AD3d 806, 807, 853 N.Y.S.2d 143). Here, upon consideration of all of incapacitated person" (Matter of Beatrice R.H. [Dean Marie LoBraico-Reitano as the substitute successor Thomas F. and Lorraine F. which was to appoint Gina-The Supreme Court improvidently exercised its LoBraico-Reitano is not an person" (Mental Hygiene appropriate "'In [*730] finding

206 A.D.3d 729, *730; 167 N.Y.S.3d 810, **811; 2022 N.Y. App. Div. LEXIS 3658, ***2; 2022 NY Slip Op 03723,
*****1

we remit the matter to the Supreme Court, Richmond County, for the appointment of a suitable successor guardian of the person of Kristine [***3] F. (see id. § 81.19).

The Supreme Court further erred in granting that branch of the motion of Thomas F. and Lorraine F. which was for the issuance of an order of protection against Kristine F. in favor of nonparty David L. Cassato. Contrary to the contention of Thomas F. and Lorraine F., Mental Hygiene Law § 81.22(a)(2) does not provide the Supreme Court with the power to issue an order of [*2]protection against the incapacitated person (see generally Matter of Kevin M., 136 AD3d 826, 826, 26 N.Y.S.3d 84).

Kristine F.'s remaining contention is not properly before this Court.

DILLON, J.P., ROMAN, MALTESE and DOWLING, JJ., concur.

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Neutral
As of: May 31, 2023 4:08 PM Z

Matter of S.B. (e.K.)

Supreme Court of New York, Chemung County

March 24, 2021, Decided

2017-1474

Reporter

2021 N.Y. Misc. LEXIS 3752 *; 2021 NY Slip Op 50618(U) **; 72 Misc. 3d 1205(A); 147 N.Y.S.3d 871; 2021 WL 2763954 PROCEDURAL HISTORY

[**1] In the Matter of the Application of S.B., Petitioner, Pursuant to Article 81 of the Mental Hygiene Law for the Appointment of a Guardian of the Person and Property of E.K., an Alleged Incapacitated Person. In the Matter of the Petition of S.B., Petitioner, against E.I., Power of Attorney, Respondent.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Counsel: [*1] For S. B.: Douglas Mahr, Esq., Gina Glover, Esq., Scolaro Feter Gritzanti & McGough, P.C., Syracuse, NY.

For E. K.: Greg S. Catarella, Esq., Law Office of Greg S. Catarella, Binghamton, NY.

For E. I.: Denice Hamm, Esq., Hamm & Roe, LLP, Elmira, NY.

For Care Manage for All, LLC: Mariette Geldenhuys Esq., Ithaca, NY.

Judges: Hon. David H. Guy, Acting Supreme Court

Opinion by: David H. Guy

Opinion

David H. Guy, J.

child, was put on notice of the proceedings, [*2] and retained Denice Hamm, Esq. as counsel to represent appeared, and gave his report as required by law requested relief should not be granted. Mental Hygiene should not be appointed for her, and why the other show cause why a guardian of her person and property cause was signed May 4, 2017, directing that E. K. ("AIP"), as well as visitation with E. K. . An order to show her mother, E. K., an Alleged Incapacitated Person appointment of a guardian of the person and property of Mental Hygiene Law, on April 25, 2017, seeking the her in this matter. K. and duly appeared as same. E. I., E. K. 's only other Robert L. Halpin, Esq. was appointed as Counsel to E counsel, was Legal Service (3rd Dept.), Richard Wenig, Esq., A petition was filed by S. B., pursuant to Article 81 of the appointed as Court Evaluator, duly 으

Following multiple court appearances and agreed-upon temporary orders, a second petition was filed by S. B. on January 26, 2018, under MHL Article 81, again seeking the appointment of a guardian of E. K. By decision and order of this Court dated June 15, 2018, this Court dismissed both petitions. Matter of S.B. (E.K.), 60 Misc 3d 735, 79 N.Y.S.3d 874 (Sup Ct. Chemung County 2018). By opinion and order dated September 19, 2019, the Appellate Division reversed the 2018 decision and remanded these matters to this Court for further proceedings. Matter of S.B. (E.K.), 66 Misc 3d 452, 117 N.Y.S.3d 814 (3d Dept 2019).

On November 1, 2018, S. B. filed a related power of attorney accounting action against E. I., as agent under power of attorney for E. K., in Chemung Supreme Court (Index No. 2018-2295).

By scheduling order dated October 9, 2019, the Court

set discovery deadlines and scheduled the hearing in these matters to commence on December 17, 2019. Based on the motion practice of the parties, which revealed that Mr. Halpin would likely be called to testify as a fact witness in the hearing, the Court issued a decision and order dated November 27, 2019, relieving Mr. Halpin as counsel for the reasons stated in that decision, and appointing Greg S. Catarella, Esq. as successor counsel [*3] to represent E. K. in this proceeding. The Court also issued orders dated January 22, 2020 and February 20, 2020, deciding various discovery and in limine motions filed by the parties.

The hearing was convened on March 4, 2020, at which time Greg S. Catarella, Esq. appeared; the presence of E. K. was dispensed with by the Court for good cause shown; Mental [**2] Hygiene Legal Service (3rd Dept.), Kristin Snyder, Esq., of counsel, appeared as court evaluator and gave her report as required by law; S. B. appeared with her counsel, Douglas Mahr, Esq. and Gina Glover, Esq.; and E. I. appeared with her counsel, Denice Hamm, Esq. The Court accepted the court evaluator's reports into evidence and made the finding that E. K. is unable to coordinate her own visitation with her daughter, S. B., despite the clearly expressed desire of E. K. to engage in such visitation. Based on this finding, the Court appointed Care Manage For All, LLC as the special guardian of E. K. (sometimes referred to herein as the "Special Guardian"), with the following authority:

- a) Facilitate visitation between E. K. and S. B., with visits to take place at least once per month, with the authority including but not limited [*4] to coordinating with E. K., E. I., and S. B. regarding the scheduling of dates and times for visitation; determining the amount of time per visit; picking up E. K. and transporting her to and from visits; and cancelling or rescheduling visitation if E. K. cannot physically or does not want to attend. The Guardian shall have unrestricted access to E. K.
- b) Setting up and coordinating the use of telephone calls and/or an electronic means of video communication between E. K. and S. B., such as, for example, Skype or Facetime.

While the Special Guardian was appointed based on the Court's finding that E. K. lacks capacity with regard to visitation and required the assistance of a guardian to facilitate such visitation, specific terms of the frequency and modes of visitation were agreed upon on the record, in open court, by E. I., S. B., and all counsel.

The Court's confirming written order and findings, dated

March 13, 2020, revoked any health care proxies executed by E. K. prior to March 4, 2020 and directed the Special Guardian to submit informal bimonthly reports to the Court and all counsel about the status of visitation between E. K. and S. B., and any other related issues that arise [*5] in relation to that visitation.

report requested, among other things, an allegations of neglect and isolation of E. K. by E. I. That temporarily reside outside E. I.'s home. providing E. I. respite as a caregiver by allowing E. K. to The July 14, 2020 report contained additional E. I. 's home, without interference from the E. I. and R. I. Guardian unrestricted access to meet with E. K. inside access order on July 13, 2020, granting the Special Hygiene Law Section 81.23(b)(1). The Court issued an as a request for temporary relief pursuant to Mental well-being and safety, and the Court treated the report that raised concerns for the Court regarding E. K. 's 2020. The July 14, 2020 report contained information July 12, 2020, July 14, 2020, July 16, 2020, and July 20, the Special Guardian dated June 21, 2020, July 7, 2020, The Court received and reviewed interim reports from

On July 17, 2020, S. B. filed a new petition (Index No. 2020-5382) alleging E. K. needs a guardian of the person and property and reiterating the Special Guardian's request for immediate temporary relief in the form of E. K.'s placement outside E. I.'s home. The petition also requested the Court remove E. I. from all bank accounts held jointly with [*6] E. K. and hold S. I. and R. I. in contempt for interfering with court-ordered visitation between E. K. and S. B.

The Court found good cause for an expedited hearing and issued an order to show cause on July 17, 2020. E. I. filed a petition on July 22, 2020, denying the allegations made in the Special Guardian's reports and requesting that the Court either dismiss S. B.'s petition or appoint E. I. as E. K.'s guardian.

choose the place of abode of E. K. and schedule and granting the Special Guardian the additional authority to Skype for Business on July 24, 2020. Testimony was iш Special Guardian was also given the authority to access take E. K. to an appointment with a geriatrician. The Court issued a temporary order dated July 24, 2020. and parties. At the conclusion of the day's hearing, the Guardian. E. K. also briefly appeared before the Court pursuant to received from Kim The hearing on E. K.'s immediate welfare convened via K.'s medical records and information from her Mental Hygiene Law Section 81.23(a), Evanoski, CEO of the Special

providers and to refill her prescriptions. Upon the issuance of the July 24, 2020 order, the Special Guardian placed E. K. in the home of S. B., where she has resided to-date, with the [*7] Special Guardian authorized and directed to facilitate visitation and/or phone contact between E. K. and E. I.

On July 27, 2020, the Court issued an order restraining E. I., and anyone acting under her auspices, supervision, or control from withdrawing any funds from the joint checking account held by E. I. and E. K. at Chemung Canal Trust Company. The account had never been redirected to E. K.'s Trust, as directed by the Court's March, 2020 Order. This account remains frozen.

The Court held the hearing on the 2020 cross-petitions via Microsoft Teams on August 10, 2020; August 11, 2020; August 20, 2020; September 2, 2020; September 3, 2020; September 9, 2020; and September 16, 2020. S. B. rested her case-in-chief on September 16, 2020, at which point Mr. Catarella, on behalf of E. K., moved for summary judgment to dismiss the petitions. This request was denied on the record, based on the Court finding the petitioner made a prima facie case that E. K. suffers from limitations that impact her ability to provide for her personal needs and may not have effective resources in place to address the limitations. E. I. presented her case-in-chief on September 17, 2020; September 30, 2020; October [*8] 7, 2020; October 8, 2020; October 21, 2020; November 12, 2020; and December 1, 2020.

Over the course of the hearing, the Court issued both verbal guidance and periodic letter decisions reminding the parties of the remaining issues within the Court's focus, for which the Court would render a decision on at the conclusion of the hearing. On December 1, 2020 the Court reserved its decision on the two petitions and related outstanding issues and provided all parties the opportunity to submit post-hearing submissions. Submissions were received from E. K., S. B. and E. I. The Decision on the petitions and all outstanding issues follows.

THE HEARING

The following is a summary of testimony provided by selected witnesses who testified at the hearing. While the Court heard and considered all admitted testimony and documentary evidence, what follows are the relevant and persuasive facts that form the basis for the Court's ultimate findings and decision in this matter.

limitations. E. K. demonstrated an awareness that her daughters do not get along. E. l. reported that her feelings toward S. B. stem from childhood grievances 50-year old grudge that continues to the present day. finances. Mr. Wenig described the sisters' dynamic as a and their father favoring S. B., particularly regarding S. I. and E. I.; watched her move around; and generally or four times; interviewed her alone and jointly with the court evaluator, Mr. Wenig met with E. K. at least three evaluator's reports and testimony. In his capacity as Dept.), testified in his capacity as the previous Court Evaluator in this matter. Mr. Wenig has more than 30 [*9] years of experience at Mental Hygiene Legal assessed Services, and the Court gives great weight to his court Binghamton office of Mental Hygiene Legal Service (3rd Richard Wenig, Esq., now-retired supervisor of the her cognitive functioning and

Mr. Wenig testified about his June 2017 report, received in evidence as Court Exhibit 7. He [**3] expressed a general concern about the E. I. and family control of E. K.'s access to other individuals, particularly the S. B. and family, and opined that in his experience, this raises red flags regarding the well-being of the person alleged to need a guardian. He had no concern about E. K. residing with S. B.

As of at least 2017, E. K. was completely relying on the E. I. and R. I. to handle her financial affairs, [*10] including writing checks. According to Mr. Wenig, E. K.'s cognitive limitations subtly worsened after his initial involvement in 2017, with her having less ability to remember details or coherently participate in conversation over time.

S. B. testified that she works as a nurse anesthetist, owns a horse business, and has been married to M. B. for 43 years. She provided background history on E. K. and her marriage to S. B. and E. K.'s father, who traditionally handled the family's finances. After her husband died in 2007, E. K. executed estate planning documents, including a will, a power of attorney, and a living will, all of which were received in evidence. E. K. named S. B. as her attorney-in-fact and health care proxy by documents dated March 20, 2007.

E. K. sold her home in Moosic, Pennsylvania in July 2007 and thereafter alternately resided in the homes of each of her daughters for approximately six months at a time. S. B. built an addition on her home to be utilized as an apartment for E. K. E. K. enjoyed living in S. B.'s home, spending her time cleaning, ironing, sweeping, and playing with the animals. While E. K. split her time

between their homes, she was able to speak on the [*11] phone with each daughter during the periods when she resided in the other's home.

E. K. was unable to drive herself, so M. B. would transport her to and from E. I.'s home. E. I. forbade S. B. from entering her property. S. B. was afraid of E. I.

In 2015, S. B. observed E. K. suffering cognitive decline, including confusion, memory issues, and wandering, and took her for a medical evaluation.

About December 23, 2015, E. K. went to E. I. 's home, with the stated intention to return before New Year's. E. K. extended that visit and ultimately communicated she did not want to leave E. I. and R. I. She resided exclusively in E. I.'s home from then on. After that, S. B. could only get E. K. on the phone sporadically; after April 2016, E. K. no longer had her own cell phone.

E. K. executed a new power of attorney in July 2016, naming E. I. as her agent. In S. B.'s opinion, due to E. K.'s cognitive decline, she was not capable of understanding the import of executing a planning document after 2015.

In July 2016, S. B. received a card from E. K., entered into evidence, expressing that she would like to come stay at S. B.'s home for a weekend. The visit was never coordinated. That same month, S. B. [*12] was notified that she was removed from E. K.'s bank account at Sponja Credit Union, with E. I. replacing her on the account.

After not seeing her mother for more than a year, or reach her on the phone since April 2016, S. B. and her husband drove to E. I. 's home in January 2017. When they arrived, E. I. came outside, screaming in S. B.'s face for her to leave the property. M. B. spoke to E. I. separately, and after a few minutes, E. I. allowed them into her home to visit with E. K. for approximately 45 minutes. E. K. was happy to see them and wondered why they had not visited.

These events, and her fear that E. K. was being isolated and possibly mentally abused, prompted S. B. to file her original guardianship petition in April 2017.

S. B. testified about copies of checks from E. K.'s account at Chemung Canal Trust Company ("CCTC"), which were entered into evidence. S. B. pointed out several checks from the CCTC account made out to R. I. with "legal fees" written in the memo line. S. B. testified that these checks [**4] indicate E. I. and her

husband were taking advantage of E. K.'s diminished capacity to access her CCTC account.

After the first court appearance on the guardianship petition [*13] in 2017, S. B. had three visits with E. K. in the summer of 2017. S. B. made recordings at each of the visits, which were entered into evidence. During one of the conversations, S. B. interrogated E. K. about a letter she received from E. K., which S. B. believed E. K. was directed to write. The letter, apparently in E. K.'s handwriting, stated, among other things, that S. B. was harassing E. K., and E. K. did not wish to see S. B. ever again. In the recording, E. K. is heard denying writing the letter and stating that if the letter were in her handwriting, she would have had to be under duress to have written it. E. K. states she is not making her own decisions, that she is doing what other people tell her to do.

While living exclusively since December 2015 with E. I., E. K. suffered a fractured right wrist, a sprained ankle, broken hips on both sides, and surgery for a bowel obstruction in January 2020. S. B. was not notified about the wrist or ankle injuries, and she did not hear about one of the hip injuries until it came up in a deposition related to these matters.

S. B. believes the Special Guardian has done a good job to date, and S. B. would continue to coordinate visitation [*14] or phone contact between E. K. and E. I. E. K. has resided with S. B. since July 24, 2020, and when S. B. leaves the home to go to work, she pays two aides to stay with E. K. S. B. and the Special Guardian believe E. K. has improved since being placed in her home. She now has shoes that fit her feet and walks more easily. E. K. has gained six pounds; walks with S. B. daily; sleeps regularly; and engages in activities, crafts, and appropriate physical therapy exercises.

Kim Evanoski, principal of the Special Guardian, provided information about the contact between E. K. and E. I. since E. K. has resided with S. B. At the end of August, a visit took place at an ice cream shop, at which Ms. Evanoski described E. K. as noticeably nervous and hyper-alert in E. I.'s presence.

Ms. Evanoski testified about her clinical work regarding elder abuse and spoke to her concerns about her personally witnessing E. I. pushing E. K. into her wheelchair and being aware of E. I. pushing E. K. onto a toilet. Ms. Evanoski did express satisfaction with the results of E. K.'s doctor's appointment, which was directed by the Court's July 24, 2020 order.

Erik O'Brien, employee of the Special Guardian, testified [*15] about recordings he made of visits and attempted visits between Ms. Evanoski and E. K. and about his written statements incorporated into the Special Guardian's reports, admitted during the July 24, 2020 emergency hearing. He reiterated his statements that E. I. improperly put E. K. in her wheelchair by failing to secure her feet. He also confirmed his statements that during attempted visits by Ms. Evanoski, E. K. seemed afraid to leave S. I.'s and R. I.'s property to see S. B.; stated she needed permission from E. I. to leave the property; and said nothing good would happen if she left the property without E. I.'s permission.

very angry, aggressively pointing her finger, and saying she was trained to provide care for E. K. Ms. B. of, and lack of respect for the privacy of E. K.E. I. got uncomfortable with this interaction and E. I.'s treatment back [**5] onto a commode upon her return from the car ride home. When Ms. B. stated that she was I. deal with E. K. [*16] in a rough manner, including E. I. grabbing E. K.'s walker as E. K. was attempting to enter interaction with E. K. on July 18, 2020, when she accompanied Ms. Evanoski, Mr. O'Brien, and E. K. for a abuse" of E. K. by E. I. categorized the behavior she witnessed as "deliberate pants and underpants, take her diaper off, and push her the house. Ms. B. also witnessed E. I. pull down E. K.'s home for the day. At the end of the day, when E. K. was returned home to S. I.'s residence, Ms. B. witnessed E. E. K. consistently expressed fear about leaving E. I.'s and back, a trip of many hours. According to Ms. Boldt, visit between E. K. and S. B. Misty Boldt accompanied the group from Montour Falls to Syracuse for the visit a clinical trauma professional, testified as to her interaction with E. K. on July 18, 2020, when she Misty Boldt, a licensed social worker who is certified as

Dr. Sara Solomon, E. K.'s primary health care provider, testified that she always believed that E. K. was safe in E. I. 's care, and that E. I. provided appropriate care for E. K. Redacted versions of E. K.'s medical records were entered into evidence during Dr. Solomon's testimony. These documents included an email from E. I. directly to Dr. Solomon's office assistant, dated June 2, 2020, in which E. I. stated the following:

Hi Dr. Solomon, . . I needed to touch base with you quickly. The woman who was assigned to be mom's

- Dr. Solomon did not respond to this email and, despite being questioned about it, testified that E. I. did not ask her directly to prevent E. K.'s visits with S. B.
- Dr. Solomon acknowledged that in recent years E. K. had become an unreliable reporter of her own information. Dr. Solomon obtained most of her information about E. K. from E. I. and accepted without question what E. I. reported to her. Dr. Solomon saw no reason why E. K. should not be allowed to visit with S. B. Despite having noted in her records that E. K. could be the "adult victim of psychological bullying", [*18] Dr. Solomon never made a referral or reported the matter to Adult Protective Services. Dr. Solomon supports E. K. living in an environment where she has an appropriate diet and experiences the least amount of stress possible.
- E. I. testified that she is 70 years old and has been married to R. I. for 41 years. She has no reservations about being able to provide care for E. K. According to E. I., E. K. can follow a normal conversation if you repeat and explain things slowly. E. K. expresses a desire to understand when someone is speaking to her.
- E. I. testified that after the court appearance in 2017, she coordinated the installation of a phone for E. K.'s use but that E. K. would pull the phone out of the wall or take it off the hook. E. I. does not care if E. K. has a phone while she resides in her home. E. I. also does not care if E. K. ever interacts or communicates with S. B. but denied ever doing anything to actively stop or interfere with their communication. If E. I. were appointed E. K.'s person guardian, she would not allow S. B. to enter her property to visit with E. K. She confirmed she is unable to put aside her personal animosity of S. B. for E. K.'s sake.

guardian as we explained to you already is way overstepping here [sic] roll [*17] [sic] in all this. I am not allowing her into the house period.... We need you to do something for her and help us give mom the peace to get better and leave her alone finally. We need you to write a letter to [my attorney] Denice [Hamm] stating moms health needs to be the priority here and not ridiculous visits mom is so worried about will again be forced on her and she thinks she has to go along with to keep the peace because no one in charge will listen to her and stand up for her. You are her Dr. and she needs you to help her get through all this and you know from 3 years now what she has said and her feelings....

¹ The medical records received in evidence were redacted to remove confidential medical information and did not constitute a waiver of E. K. 's doctor-patient privilege. *In re Rosa B.-S., 1 AD3d 355, 356, 767 N.Y.S.2d 33 (2d Dept 2003).*

E. I. denied influencing [*19] E. K. in her decision making or how she spends her money. E. I. [**6] could not remember how much of E. K.'s money she used to pay her legal fees to Ms. Hamm. She stated that E. K. wanted to pay the fees and made the suggestion at the outset of this proceeding in 2017. According to E. I., E. K. directed E. I. and R. I. to fill out the legal fee checks and E. K. signed them.

When E. K. resided in her home, E. I. coordinated her diet and the provision of her medical care. She got E. K. appropriate responsive medical care whenever E. K. fell and suffered an injury. Following E. K.'s release from the hospital after her first hip injury, E. I. coordinated with the Chemung County Health Department for nurses and physical therapists to provide services to E. K. in E. I. and R. I.'s home. E. K. suffered a second hip fracture in October 2019 due to what E. I. referred to as E. K.'s impatience while getting into a car without using her walker. E. I. testified that the hospital and county workers did not have any concern about how E. K. injured herself on either occasion.

E. I. denied remembering whether she asked Dr. Solomon to write a letter to stop visits between E. K. and S. B. She also denied telling [*20] E. K. that S. B. wants to place her in a nursing home, a possibility which E. I. acknowledged petrifies E. K.

In January 2020, E. K. underwent a surgery for an intestinal issue, resulting in her current use of a colostomy bag. E. I. testified she had no issue with S. B. visiting E. K. in the hospital, where she was admitted for approximately a week. E. I. denied providing the hospital with information about the guardianship proceeding or instructing that S. B. should not be allowed to visit with E. K.

E. I. stated her version of the day on which E. K. was taken by Ms. Evanoski, Mr. O'Brien, and Ms. Boldt for a visit with S. B. E. I. acknowledged putting E. K. on the commode in the view of Ms. Boldt but denied that anything about the interaction was abusive or inappropriate.

E. I. claimed that the court's order was vague on coordination of visits by the Special Guardian and she did not understand E. K. was supposed to leave her property to have visitation with S. B. In response to questions about an audio recording of E. I. stating that E. K. was not to leave her property, E. I. stated that they did not know where E. K. was being taken and she was never told about a scheduled visit, which [*21] is why she prevented the visit from taking place.

In support of her case, E. I. called numerous witnesses who uniformly testified to the strong relationship between R. I. and E. I., and E. I.'s devotion to providing care for E. K. Almost every witness E. I. called denied knowing anything about all of the dynamic between E. I. and S. B.; E. I. having a temper or ever having a bad reaction to anything; or this three-plus year-long litigation.

Chemung County caseworkers testified that E. I. was always cooperative with their instructions on how to care for E. K.; she consistently worked well with them; followed their general recommendations; purchased necessary items for E. K. 's care; and provided appropriate medical care for E. K. The caseworkers did not note any concerns about E. I. or the environment in her home, though none of the workers performed any kind of psychological assessment of E. K. during their time working with her. They are mandated reporters and never made a report about E. K. or her home to Adult Protective Services.

Helen Peregrim, a Chemung County nurse care manager who oversaw E. K.'s case and provided direct care, testified that she wanted E. K. to stay placed in [*22] E. I.'s home and found the court proceeding frustrating. Ms. Peregrim advised E. I. to not let E. K. leave the property without a court order, due to her concern for E. K.'s safety, though she was unable to articulate the safety concern with any specificity. She understood this court proceeding as S. B. wanting to gain "custody" of E. K. Her personal opinion is that E. I. is an excellent caregiver and E. K. should be allowed to continue to reside in the Ingersoll home.

Monica Rice is a nursing assistant E. I. hired as a private care home health aide following E. K.'s January 2020 surgery. Ms. Rice understood that E. I. was hiring her at the time because E. I. and R. I. were becoming overwhelmed with caring for E. K. in addition to running their household, caring for their livestock and animals, and handling the finances and taxes for their animal-related non-profit organization. Ms. Rice is a mandated reporter and never made such a report or observed anything inappropriate in E. I. and R. I.'s home. She described E. K. as liking her despite her consistently encouraging E. K. to walk more on her own.

Ms. Rice was very complimentary of the care provided by E. I. and R. I. but also testified [*23] about caregiver fatigue and the toll it takes when an individual must provide constant care for an elderly or ailing family member. Ms. Rice would encourage E. I. and R. I. to

leave the house and enjoy time to themselves. According to Ms. Rice, it was apparent to her that E. I. and R. I. were "mentally struggling." Ms. Rice also confirmed E. K. communicating she wanted S. B. to be able to visit her in the E. I. and R. I.'s home.

Peter Smith, a neighbor of E. I. and R. I., testified that he transported E. K. for court-ordered visits with S. B. on three occasions. Mr. Smith did not know why he was asked to drive E. K., and he described the visits as enjoyable for E. K. and otherwise uneventful. He said that on one occasion, S. B. was asking E. K. about visiting for Christmas in a "somewhat pushy" manner.

Testimony was also given by M. B., husband of S. B.; D. I., daughter of R. I.; and four friends of E. I.'s family; D. O., registered nurse who provided care for E. K.; and D. G., friend of the E. I. and physical therapist for Chemung County. E. I. and R. I., and S. B. and M. B. all testified to identify certain checks written from E. K.'s accounts; copies of [*24] those checks were entered into evidence. While not summarized here, that testimony and documentary evidence were considered by and supports the findings, analysis and determinations made by the Court.

FINDINGS OF FACT

The Court makes the following findings of fact regarding the request for the appointment of a guardian of the person of E. K., based on the clear and convincing evidence received at the hearing.

E. K. is a 92-year old woman whose husband died in 2007, prompting her to sell their home in Pennsylvania and spend half of each year residing in the homes of her two children, S. B. and E. I.E. I. has a long-standing hatred of S. B. and has consistently refused to allow S. B. onto her property, so when E. K. would switch residences, S. B.'s husband would drive her to and from E. I.'s home. In December 2015, E. K. decided to indefinitely reside in the home of E. I., where she lived until the Court authorized the Special Guardian's placement of E. K. in the home of S. B. in July 2020. E. K. now lives in S. B.'s home and appears to be content and thriving in that environment.

E. K. appears to have reasonably intact cognitive functioning, with some memory loss. The Court has, on its [*25] own, observed a decline in E. K.'s cognitive abilities from when it met with E. K. and her counsel incamera at the outset of this proceeding in 2017 until the Court spoke with E. K. briefly via Skype for Business

during the hearing date in July 2020.² E. K. receives assistance [**7] attending to her hygiene, taking medication, getting dressed and eating meals, among other activities of daily living. E. K. has suffered several health issues in the last few years, including fractures in both hips and a surgery in January 2020, resulting in her current use of a colostomy bag. While E. K. resided in E. I.'s home, they provided E. K. with appropriate medical care and arranged for physical rehabilitation following her injuries and illness.

On March 20, 2007, E. K. executed a health care proxy appointing S. B. as her health care agent. During a hospitalization, E. K. executed a new health care proxy dated August 30, 2019, naming E. I. as her health care agent. Both were revoked by the Court's March 13, 2020 order.

Since this proceeding commenced in 2017, E. K. has consistently expressed that she wants to continue residing in E. I.'s home and that she wants to have a relationship, communication, [*26] and visitation with S. B. *Matter of S.B., supra at 745*.

has openly and actively isolated E. K. from S. B., E. I. did provide E. K. with a social life consisting of friends case, that she will not coordinate E. K. obtaining, keeping, or using a phone or any other technology for S. in late 2015, E. K. had drawn ultimately no contact with S. and neighbors, solely of E. I.'s choosing. B. or anyone else to communicate with E. K. While E. I. stated directly to the Court, throughout the course of this visitation. E. I. still refuses to allow S. B. onto her property. E. I. has consistently demonstrated, and began, E. I. still refused to coordinate communication or visitation between E. K. and S. B. After this proceeding refused to effectively coordinate any communication or initiation of this guardianship petition in 2017, E. I. communication, or in person. From that time until the Once E. K. began residing full-time in the home of E. I. E. K. had dramatically reduced and . Б by phone, video

E. I. consistently refused to provide E. K.'s medical information directly to S. B. On one occasion E. I. notified her counsel regarding E. K.'s hospitalization; otherwise, S. B. has not received information or updates from E. I. when E. K. has been [*27] hospitalized or injured, even after the initiation of this proceeding in 2017.

²The Court noted this decline in its 2018 Decision, indicating E. K. 's "ability to communicate her basis for making her decisions continues to erode..." <u>Matter of S.B., supra at 746</u>.

In Court on March 4, 2020, E. I., both personally and through her counsel, agreed to the terms of an Order effectuating a response to the Court's finding that E. K. has the limitation of being unable to coordinate communication or visitation with S. B. Since then, E. I. has acted in a very uncooperative manner toward the Special Guardian and its employees, which were tasked by the Court with facilitating communication and visits between E. K. and S. B. The Court notes that while the implementation of the Special Guardian's responsibilities coincided with the beginning of the Covid-19 pandemic, E. I. continued to refuse contact or visitation, even with the Special Guardian's employees following all appropriate safety protocols.

E. I. has engaged in a pattern of behavior to manipulate E. K.'s medical providers, seemingly in an attempt to achieve E. I.'s own objectives. E. I. emailed Dr. Solomon's office on June 2, 2020, asking Dr. Solomon to take action to stop the court-ordered visitation. The redacted medical records received in evidence demonstrate that E. I. was providing Dr. Solomon with misleading information, [*28] presumably to bolster her case in this litigation. Petitioner's Exhibit 17 contains medical records created by Dr. Solomon with the following references:

From September 16, 2019 office visit: "Geriatric Patient with her daughter who is now the health care proxy—recent hospitalization at ARNOT — much difficult reaching sister who has been fighting for control of proxy for years from west coast — new arrangement better for medical status and treatments for the patient"

From November 13, 2018 office visit: "Social — still seems that her other daughter may be [**8] demanding custody for money . . . What does patient need to sign saying worried that daughter other daughter [sic] will take her away"

From May 23, 2018 office visit: "[The] patient's daughter was concerned that her Mother was crying-much stress due to custody of patient-another daughter wants to [sic] Mother but patient does not want to move"

From July 17, 2017 office visit: "Legal case in process to force patient to leave her home with her daughter E. I."

Dr. Solomon was provided this information by E. I., to keep E. K.'s physician on E. I.'s "side" in this litigation.

When questioned about this, E. I. denied providing any information [*29] about the litigation to the hospital during E. K. stay there for surgery in January 2020.

However, the hospital's record, admitted in evidence, states: "Family strife younger sister is suing mother for guardianship article 81 and should not be alone with patient . . . All history is from [S. l. and family] and medical record." This constitutes further interference by E. l. in the contact and relationship between E. K. and S. B.

This documentary evidence, coupled with E. I.'s own testimony flatly denying interference with E. K.'s visitation or communication, leads the Court to generally question E. I.'s credibility.

The Court found similar issues of credibility regarding many of E. I.'s witnesses, who uniformly provided testimony denying knowledge about E. I.'s bad relationship with S. B., or E. I. ever demonstrating a temper or bad reaction. The Court's own observation is that E. I. appears to be very vocal and expressive about her feelings in general and about her feelings for her sister specifically. Many of E. I.'s witnesses, including Scott Sturdivant, Debra O'Brian, Daniel Goodman, Vicki Petras and Michelle Craven, gave remarkably similar testimony and even used identical verbiage [*30] to describe the level of care provided by E. I., E. I.'s good nature, and the relationship between E. I. and her family.

The Court makes the following findings of fact regarding the request for the appointment of a guardian of the property of E. K., based on the clear and convincing evidence received at the hearing: E. K. executed the E. K. Irrevocable Trust on September 1, 2016. Robert L. Halpin, Esq. is the trustee. E. K. executed a power of attorney, naming S. B. as her agent, on March 20, 2007. E. K. revoked that power of attorney and executed a new one, with the assistance of Mr. Halpin, on July 6, 2016, naming E. I. as her agent. The 2016 power of attorney contained a statutory gift rider.

E. I. has been assisting E. K. administer a CCTC checking account, held jointly with

E. I. This account receives a survivor's pension from E. K.'s late husband and her Social Security income. This is E. K.'s only asset that exists outside the trust. The Court froze this bank account in its March 13, 2020 order and again enjoined E. I. from accessing it when E. K. was placed in S. B.'s residence, by order dated July 27, 2020.

From the CCTC account, E. K. paid to Denice Hamm or R. I. a total amount [*31] of \$35,965.80, for legal fees owed by E. I. to Ms. Hamm for her representation of E.

I. in this matter. R. I. wrote out the majority of these checks, with E. K. signing them. The memo lines on these checks state "legal fees" or "legal expenses;" some reference Ms. Hamm or her firm directly. There are 11 of [**9] these checks, dated between October 2018 and October 2019.

LEGAL STANDARD

688 (3d Dept 2009); Matter of May Far C., 61 AD3d 680, 680, 877 N.Y.S.2d 367 (2d Dept 2009); Matter of Matter of Kurt T., 64 AD3d 819, 821-822, 881 N.Y.S.2d restrictive alternative standard. MHL §81.01; see also guardian's should be appointed as guardian, and the scope of the available $\underline{\mathit{MHL}}$ §§81.02(a)(2), 81.03(a). Finally, if there are limitations that are not adequately addressed by obviating the need for the appointment for a guardian. others, or statute, that adequately address those needs, must then consider whether the AIP has sufficient resources in place, either through efforts of the AIP, affairs. MHL §81.02. If such limitations exist, the Court care and safety, or to manage her property and financial personal needs, including food, clothing, shelter, health limitations which render her unable to provide for her analysis. First, the Court must examine whether AIP has In considering this Article 81 petition for the appointment of a guardian, the Court must undertake a three-part Misc 3d 452, 117 N.Y.S.3d 814 (3d Dept 2019). S.B. (E.K.), 60 Misc 3d 735, 79 N.Y.S.3d 874 (Sup Ct, Chemung County 2018), rev'd on other grounds, 66 resources, the Court must consider who powers, consistent with the [*32] least

and extent of the person's property and finances, in the regarding management of these affairs; and the nature banking; her understanding and appreciation of the nature and consequences of any inability to manage these activities; her preferences, wishes, and values management, manage the activities of daily living related to property including an assessment of the person's ability to person's "functional level and functional limitations," the Court must give primary consideration to the inability." MHL §81.02(b). In reaching its determination, appreciate the nature and consequences of such and that the AIP does not "adequately understand and for her personal needs and/or property management, is likely to suffer harm because she is unable to provide additional two-part finding. The Court must find the AIP on clear and convincing evidence and requires an of the AIP's incapacity, the determination must be based When the Court appoints a guardian based on a finding such as money management and

context of her ability to manage them. <u>MHL</u> §§ 81.02(c); <u>81.03(h)</u>; see also <u>Matter of Maher</u>, <u>207 AD2d 133</u>, <u>621</u> <u>N.Y.S.2d 617 (2d Dept 1994)</u>. The Court must also assess, in pertinent part, "the extent of the demands [*33] placed on the person . . . by the nature and extent of that person's property and financial affairs;" any mental disability and the prognosis of the disability; "any medications with which the person is being treated and their effect on the person's behavior, cognition and judgment;" and "other relevant facts and circumstances." <u>MHL</u> §§ 81.02 (c)(4); (d).

needs one. Matter of Daniel TT, N.Y.S.2d 827 (3d Dept. 2007). requiring the Court to determine if the AIP actually Whether to appoint a guardian is a matter of discretion actions for a given situation." Pflueger, supra, at 299 acts as long as it falls within the range of reasonable possible. Williams, supra; Cheryl B. K., supra; In re Pflueger, 181 Misc 2d 294, 693 N.Y.S.2d 419 (Sur Ct. must be careful not to unduly substitute its judgment, or that of others, for E. K. 's judgment. *Id.*; <u>Matter of</u> references to respecting the AIP's wishes to the extent Suffolk County 2003). Article 81 cases are replete with is able to. MHL <u>§81.01;</u> In re Matter of Cheryl B. K., 45 Misc. 3d 1227[A], 5 N.Y.S.3d 327, 2012 NY Slip Op to make the decisions affecting her life, to the extent she personal wishes, preferences and desires, allowing her New York County 1999). The Court should "approve any Williams, 194 Misc 2d 793, 755 N.Y.S.2d 818 (Sup Ct, 52513[U] (Sup Ct, Broome County 2012). The Court Article 81 mandates that the Court consider E. K. 's 39 AD3d 94,

CONCLUSIONS OF LAW

Guardian Appointment

The Court finds by clear and convincing evidence that E. K. has limitations that render her unable to provide for her personal needs, based on her short-term memory issues and inability to [**10] attend [*34] to her own meals, hygiene, medication administration, doctor's appointments, and general safety. MHL §81.02. This incorporates and expands upon the finding made by the Court on March 4, 2020, memorialized in the March 13, 2020 order, that E. K. lacked the ability to independently address her desired visitation with S. B.. In the Matter of E. K., Sup Ct, Chemung County, March 13, 2020, Guy, J., index No. 2017-1474.

The Court also finds that E. K. does not have sufficient

resources in place to address these needs. The Court accepts that the S. I. and R. I. have a loving marital relationship and many friends with whom they and E. K. socialized. But E. I. 's relationship with her sister impacts in the most negative way E. I. 's ability to serve as a fully effective resource for her mother. While E. I. provided effectively for many of E. K. 's personal needs, she has outright refused, since at least 2016, to address E. K. 's desire to have contact and a relationship with S. B. E. I. has held E. K. in a state of isolation, openly executing a plan to keep E. K. out of contact with her sister by making E. K. unavailable to S. B. either by phone, video, or in person. It required multiple interventions [*35] by the Court and the Special Guardian to ensure S. B. had any access to her mother.

she agreed to in March 2020. due to the unwillingness of E. I. to cooperate with a plan communication or visitation between E. K. and S. B., also relying on the reports of the Special Guardian regarding the impossibility of effectuating and were suffering from caregiver fatigue. The Court is responsibilities, including their provision of care to E. K., I. and R. I. were both mentally struggling with their many had no criticism of the care provided to E. K. by E. I., E. her case-in-chief. Ms. Rice clearly stated that while she testimony of Monica Rice, called by E. I. in support of and recommendations of the court evaluator, to which the Court gives great weight. The Court also credits the address this limitation, are consistent with the reports B. in particular, and her lack of effective resources to effectively manage visitation and communication with S. provide for The Court's conclusions regarding E. K. 's inability to her personal needs, her inability effectuating

E. K. 's need and desire to have a relationship with her daughter Suzanne was completely frustrated when she resided with E. I. . E. K. is unable [*36] to independently provide for this need. If E. K. continues to reside in the home of S. B., who is willing and able to facilitate communication and visitation between E. K. and E. I., then E. K. 's personal need to have a relationship with both her daughters can be met.

Based on the totality of the clear and convincing evidence received at trial, the Court finds that the living arrangement put in place by E. K., residing in E. I. 's home, was not an effective "resource" to address her living situation and her desire to have a relationship with both of her daughters.

The Court finds E. K. is incapacitated based on the clear and convincing evidence and is likely to suffer harm

because of her inability to provide for her personal needs, including for her activities of daily living and her visitation and communication with those outside of E. I. 's sphere of influence. The Court finds E. K. does not adequately understand and appreciate the nature and consequences of that inability. <u>MHL §81.02(b)</u>.

In so concluding, the Court has fully considered E. K. 's personal wishes, preferences, and desires. <u>MHL §81.01</u>; *Cheryl B. K., supra.* While she has consistently expressed a desire to reside in the home of E. I., she has also consistently expressed [*37] a desire to visit and speak with S. B., which E. I. has frustrated and prevented at every possible juncture. E. I. has used her access to her mother as a weapon against her sister, putting her personal animus for her sister above the needs, desires, and wishes of E. K. It is not reasonable for E. K. 's desire to reside with E. I. — in an environment where E. I. isolates E. K. as a response to E. I. 's own relationship with her sister — to override E. [**11] K. 's desire to have a relationship, contact, and in-person visitation with S. B.

In accordance with this conclusion, the Court will appoint Care Manage For All, LLC as Guardian of the Person of E. K. . The Court makes this appointment, rather than either of E. K.'s daughters, due to the long-standing history of discord between them, making them both unsuitable to serve as guardian under these circumstances. MHL § 81.19(a)(1); see, e.g., Matter of Ardelia R., 28 AD3d 485, 487, 812 N.Y.S.2d 140 (2d Dept 2006); Matter of Camoia (Giaimo), 48 Misc. 3d 1221(A), 22 N.Y.S.3d 137, 2015 NY Misc. LEXIS 2934, *41-42 (Sup Ct. Kings County 2015). The continued appointment of Care Manage For All, LLC as an independent, neutral third-party will serve E. K. 's best interests in being able to have her communication and visitation coordinated without the negative impact of her daughters' toxic relationship.

In accordance with this conclusion, the Court grants Care [*38] Manage For All, LLC the following personal needs powers:

Determine who shall provide the personal care, health care and assistance for the personal needs and health of Elizabeth J. Kotula. To enter into contracts for the same and direct payment to such persons, firms or corporations.

Make decisions regarding social environment and other social aspects of the life of Elizabeth J. Kotula, including but not limited to the authority and responsibility to coordinate E. K. 's visitation and communication with E. I..

Choose the place of abode of Elizabeth J. Kotula, consistent with the Findings pursuant to <u>Section</u> <u>81.15</u> of the Mental Hygiene Law, provided that long-term placement of Elizabeth J. Kotula in a nursing home or other residential facility as those terms are defined in the Public Health Law '2801 will require further Court authorization.

While the power to decide the place of abode rests within the discretion of Care Manage For All, LLC as Person Guardian, the Court's expectation is that E. K. will continue to reside in the home of S. B., as long as that is safe and practicable. E. K. 's other longstanding and often stated desire is not to be placed in a "nursing home." The Court will issue a separate [*39] order confirming this appointment and the powers granted.

is the most straightforward result for E. K.'s medical granting S. B. [**12] medical decision-making authority convoluted nature of this case and the various medical directives executed by E. K., issuance of a new order guardian under article 81 of the Mental Hygiene Law." meant to be a replacement for a court appointed "Family Health Care Decisions Act was clearly never decisions. Public Health Law § 2994-d [1]. However, the extent she is deemed medically unable to make her own B. to make medical decisions on E. K. 's behalf, to the the Guardian's access to medical records and providers. by E. $K.,^3$ granting S. B. the authority to make medical decisions on behalf of E. K., and confirming E. I. 's and revocation of all health care proxies previously executed The Court will also issue a separate order confirming its N.Y.S.2d 687 (Sup Ct, Nassau County 2012). Given the The Family Health Care Decisions Act might enable S. Matter of Restaino (AG), 37 Misc 3d 586, 590-591, 950

The Court also finds by clear and convincing evidence that E. K. has limitations that render her unable to provide for her property needs, based on her short-term memory issues and demonstrated inability to independently manage and control the asset she has outside of the trust [*40] she created. MHL §81.15(c). The Court declines to appoint a property guardian for E. K. . The trust E. K. created, with an independent trustee, has proven to be an effective resource for her property

needs and can be utilized to meet her needs going forward. <u>Matter of S.B., supra at 747</u> (finding the trust to be an "effective resource" for E. K.). E. K. 's one outside account and the income flowing into it will be directed to the trust, so it can fully manage her property needs. Mr. Halpin, in his discretion as trustee, can make payments to or on behalf of E. K. as he deems appropriate in the exercise of his fiduciary duty, and as directed for the care of E. K. by her person guardian.

The Court directs that the income to the CCTC joint account be redirected to the E. K. Irrevocable Trust. The Court will issue a separate order authorizing trustee Robert Halpin, Esq. to redirect this income into the trust, close the account once the income has been redirected, and deposit the proceeds of the account into the trust. With that redirection and closure, all of E. K.'s assets will be under the management of her trustee, obviating the need for the appointment of a property guardian. This result is the least restrictive alternative [*41] for E. K. in terms of management of her property.

The appointment of Care Manage For All, LLC, with its limited powers, and no property guardian appointment, constitutes the least restrictive form of intervention to address E. K. 's limitations. <u>MHL § 81.16(c)(2)</u>.

I. Legal fees paid from E. K. 's funds

It is uncontroverted that the E. I. and R. I. wrote checks from E. K. 's CCTC account for legal fees owed to Denice Hamm for representation of them in this proceeding, in the total amount of \$35,965.80. All other claims raised in the power of attorney accounting proceeding were withdrawn by S. B.. The Court hereby orders that E. I. repay that full amount to the E. K. Irrevocable Trust, based on a variety of factors.

E. I. testified that E. K. wanted to pay her legal fees associated with this matter, and she has advanced the legal argument that she had authority to direct these gifts as the agent under E. K. 's 2016 power of attorney. Gift-giving authority conferred to an agent under a power of attorney must be exercised in the "best interest of the principal, consistent with financial, estate or tax planning techniques and objectives." Matter of Ferrara. 7 NY3d 244, 253, 852 N.E.2d 138, 819 N.Y.S.2d 215 (2006). An attorney-in-fact is prohibited from making gifts to herself that [*42] are not in the principal's best interest and are contrary to the principal's estate plan. Matter of Garrasi, 33 Misc 3d 1224(A), 943 N.Y.S.2d 791, 2011 NY Slip Op 52096(U) (Sur Ct, Schenectady

³The Court revoked all health care proxies in its order dated March 13, 2020 and issued a separate order to that effect, also on March 13, 2020. The March 13, 2020 Order is superseded by this Decision; the new order revoking all health care proxies will similarly supersede the March 13, 2020 order revoking E. K. 's health care proxies.

County 2011), aff'd 104 AD3d 990, 961 N.Y.S.2d 594 (3d Dept 2013).

The Court finds E. I. 's testimony that E. K. wanted to pay her legal fees associated with this matter self-serving, and without any independent verification that this was what E. K. wanted. E. K. did not take any action to ratify these transfers, which were essentially gifts. There was no evidence presented that the transfer of these funds to pay for E. I. 's legal fees was in E. K. 's best interest or provided her any benefit at all. Such transfers were also contrary to E. K. 's estate plan, by which E. K. leaves her estate equally to her two daughters.

Based on the testimony, documentary evidence, and the Court's own observations throughout the pendency of this proceeding, the Court concludes that E. K. lacked the capacity to ratify these transfers or direct them in the first place. E. K. was unable to independently manage her finances [**13] before October 2018, the date of the first check made out by R. I. and signed by E. K.E. K. implicitly acknowledged her own inability to manage her finances through the creation of her trust in 2016.

The Court also has the authority to decide whether [*43] a petitioner's legal fees will be paid from an alleged incapacitated person's resources. MHL § 81.16[f]. In this case, the Court determines that E. I. 's fees should not be paid from E. K. 's resources. E. K. 's consistent desire, expressed for years, was to be able to see both her daughters and for them to stop fighting. E. I. using her mother's money to fund her pursuit of this litigation - to subvert or preclude E. K. 's contact and communication with S. B. - was in complete derogation of her mother's express wishes.

The Court hereby directs that E. I. pay the amount of \$35,965.80 to the E. K. Irrevocable Trust within thirty (30) days of the signing of this Decision. Mr. Halpin is directed to provide confirmation to the Court once the trust has received these funds, and he is further authorized and directed to enter judgment on behalf of the trust against E. I. in said amount if the payment is not made as directed in this Decision.

II. Allocation of fees for Care Manage For All, LLC and its counsel

By decision and order dated July 16, 2020, the Court awarded \$1,550 to Care Manage For All, LLC in its capacity as Special Guardian and found that a portion of that fee would be assessed against E. I. [*44] for her

interference in the court-ordered visitation between E. K. and S. B.. *In the Matter of E. K.*, Sup Ct, Chemung County, July 16, 2020, Guy, J., index No. 2017-1474. The Court confirms that finding based on the evidence presented at the hearing in this matter.

The Court directs that \$1,050 of the \$1,550 owed to Care Manage For All, LLC be paid by E. I. . The remaining \$500 will be paid to Care Manage For All, LLC from the E. K. Irrevocable Trust.⁴

In the course of the hearing, E. I. 's counsel served a subpoena on Care Manage For All, LLC, prompting Ms. Evanoski to hire Mariette Geldenhuys, Esq. as her counsel, to aid her in responding to the subpoena in the form of a motion to quash. The motion to quash was granted on the record on November 5, 2021. In the affidavit in support of the motion to quash, Ms. Evanoski requested the Court direct payment of her legal fees to Ms. Geldenhuys in connection with this matter.

confirms that finding now. In the Matter of E. K., Sup Ct, was frivolous within the meaning of Part 130 and of subpoenas in this matter in the middle of the hearing Court already made the finding that Ms. Hamm's pursuit prolong the resolution of the litigation, or to harass or No. 2017-1474. Chemung County, November 24, 2020, Guy, J., index maliciously injure another." 22 NYCRR 130-1.1(c). The as conduct that is "undertaken primarily to delay or that party's frivolous conduct, which is defined, in part, legal fees and costs against another party resulting from that [*45] the Court may exercise its discretion to award 2013). Part 130 of the Rules of the Chief Judge provides 3d 513, 529, 963 N.Y.S.2d 819 (Sup Ct, Queens County provisions, statutes, or court rules to the contrary. exceptions each side typically pays its own counsel fees, with The so-called "American rule" dictates that in litigation, Centreville, LLC v. for recovery pursuant to Lin Assoc. Architects, PC, 39 Misc contractual

The Court has received and reviewed the affirmation of services and time record submitted by Ms. Geldenhuys for her legal fees and disbursements in connection with her work in this matter. The Court directs that E. I. pay \$6,317.50 for the legal fees and disbursements incurred by Care Manage For All, LLC in connection with

⁴ If the portion of this bill allocated against E. I. has already been paid from the E. K. Irrevocable Trust, E. I. will reimburse the trust in the sum of \$1,050 within 30 days of the date of this Decision, or said amount will be added to the judgement authorized above.

defending the subpoenas served by Ms. Hamm in the midst of the hearing in this matter, said payment to be made within 30 days of the date of this Decision.

III. Request for contempt finding

S. B. has requested that E. I. be held in contempt for her interference with visitation between [*46] E. K. and S. B.. The Court has once declined to award sanctions against E. I. in this matter. *In the Matter of E. K.*, Sup Ct, Chemung County, November 24, 2020, Guy, J., index No. 2017-1474.

While the Court has made findings of fact that support the conclusion that E. I. actively and openly interfered with the court-ordered visitation, it is within the Court's discretion to award sanctions, and the Court declines to exercise that discretion at this time.

This Decision constitutes the Order of the Court.

In furtherance of this Decision, it is hereby

ORDERED, that the petition filed by S. B. on July 17, 2020 is GRANTED regarding its request for the appointment of a guardian of the person and DENIED regarding its request for the appointment of a guardian of the property; and it is further

ORDERED, that E. I. shall pay back the amount of \$35,965.80 to the E. K. Irrevocable Trust within thirty (30) days of the signing of this Decision, with Mr. Halpin to provide confirmation to the Court once he has received these funds; and it is further

ORDERED, that E. I. shall pay \$1,050 to Care Manage For All, LLC or to the E. K. Irrevocable Trust, if the Trust already paid this amount to Care Manage For [*47] All, LLC, within thirty (30) days of the signing of this Decision; and it is further

ORDERED, that Robert Halpin, Esq. shall pay \$500 from the E. K. Irrevocable Trust to Care Manage For All, LLC within thirty (30) days of the signing of this Decision; and it is further

ORDERED, that E. I. shall pay \$6,317.50 to Mariette Geldenhuys, Esq., for legal fees and disbursements incurred by Care Manage For All, LLC in connection with its response to subpoenas issued in this matter, within thirty (30) days of the signing of this Decision; and it is further

ORDERED, that the request of S. B. to find E. I. in

contempt of Court and award sanctions is DENIED.

Date: March 24, 2021

Hon. David H. Guy

Acting Supreme Court Justice

End of Document



Current through 2025 released Chapters 1-413

Article 29-C Health Care Agents and Proxies (§§ 2980 — New York Consolidated Laws Service Public Health Law (Arts. I — 50) V

§ 2981. Appointment of health care agent; health care proxy.

- Authority to appoint agent; presumption of competence.
- (a) A competent adult may appoint a health care agent in accordance with the terms of this article
- pursuant to article eighty-one of the mental hygiene law or article seventeen-A of the surrogate's court appoint a health care agent, or unless a guardian of the person has been appointed for the adult agent unless such person has been adjudged incompetent or otherwise adjudged not competent to (b) For the purposes of this section, every adult shall be presumed competent to appoint a health care procedure act.
- sign the proxy. The witnesses shall state that the principal appeared to execute the proxy willingly and free so, at the adult's direction and in the adult's presence, and in the presence of two adult witnesses who shall the proxy. Another person may sign and date the health care proxy for the adult if the adult is unable to do health care proxy, signed and dated by the adult in the presence of two adult witnesses who shall also sign from duress. The person appointed as agent shall not act as witness to execution of the health care proxy. Health care proxy; execution; witnesses. (a) A competent adult may appoint a health care agent by a
- at least one witness shall be a qualified psychiatrist or psychiatric nurse practitioner. hygiene facility is also a hospital as defined in subdivision ten of section 1.03 of the mental hygiene law health, at least one witness shall be an individual who is not affiliated with the facility and, if the mental (b) For persons who reside in a mental hygiene facility operated or licensed by the office of mental
- approved by the commissioner. Such regulations shall require that a physician, nurse practitioner, facility and at least one witness shall be a physician, nurse practitioner, physician assistant or clinical with developmental disabilities, at least one witness shall be an individual who is not affiliated with the (c) For persons who reside in a mental hygiene facility operated or licensed by the office for people physician assistant, or clinical psychologist possess specialized training or three years experience in has been approved by the commissioner of developmental disabilities in accordance with regulations and service in a facility operated or licensed by the office for people with developmental disabilities, or 13.17 of the mental hygiene law or who has been employed for a minimum of two years to render care psychologist who either is employed by a developmental disabilities services office named in section treating developmental disabilities.
- section may be done using audio-video technology, for either or both witnesses, provided that the following conditions are met (as used in this subdivision, "remote witness" means a witness acting using audio-visual 2-a. Alternate procedure for witnessing of health care proxies. Witnessing a health care proxy under this
- (a) The principal, if not personally known to a remote witness, shall display valid photographic identification to the remote witness during the audio-video conference;

- (b) The audio-video conference shall allow for direct interaction between the principal and any remote
- during the audio-video conference; and via facsimile or electronic means, within twenty-four hours of the proxy being signed by the principal Any remote witness shall receive a legible copy of the health care proxy, which shall be transmitted
- (d) The remote witness shall sign the transmitted copy of the proxy, and transmit it back to the
- employee of a hospital may not be appointed as a health care agent by any person who, at the time of the appointment, is a patient or resident of, or has applied for admission to, such hospital. Restrictions on who may be and limitations on a health care agent. (a) An operator, administrator or
- (b) The restriction in paragraph (a) of this subdivision shall not apply to:
- (i) an operator, administrator or employee of a hospital who is related to the principal by blood, marriage or adoption; or
- mental hygiene facility or a psychiatric unit of a general hospital may serve as agent for a principal (ii) a physician, physician assistant, or nurse practitioner, subject to the limitation set forth in paragraph (c) of this subdivision, except that no physician or nurse practitioner affiliated with a blood, marriage or adoption. residing in or being treated by such facility or unit unless the physician is related to the principal by
- assistant, or nurse practitioner shall not act as the patient's attending practitioner after the authority under the health care proxy commences, unless the physician, physician assistant, or nurse practitioner declines the appointment as agent at or before such time. If a physician, physician assistant, or nurse practitioner is appointed agent, the physician, physician
- appointment, he or she is presently appointed health care agent for ten principals. the issue of, or married to, such person, shall be appointed as a health care agent if, at the time of (d) No person who is not the spouse, child, parent, brother, sister or grandparent of the principal, or is
- pursuant to subdivision one of section two thousand nine hundred eighty-three of this article, that the 4. Commencement of agent's authority. The agent's authority shall commence upon a determination, made principal lacks capacity to make health care decisions.
- Contents and form of health care proxy.
- (a) The health care proxy shall:
- (i) identify the principal and agent; and
- the principal's behalf. (ii) indicate that the principal intends the agent to have authority to make health care decisions on
- decisions, and limitations upon the agent's authority. (b) The health care proxy may include the principal's wishes or instructions about health care
- until revoked. If, prior to the expiration of a proxy, the authority of the agent has commenced, the proxy certain condition. If no such date or condition is set forth in the proxy, the proxy shall remain in effect (c) The health care proxy may provide that it expires upon a specified date or upon the occurrence of a shall not expire while the principal lacks capacity.

0

A health care proxy may, but need not, be in the following form:

Health Care Proxy

health care agent to make any and all health care decisions for me, except to the extent I state I (name of principal) hereby appoint (name, home address and telephone number of agent) as my

This health care proxy shall take effect in the event I become unable to make my own health care

and hydration. If you choose to state instructions, wishes, or limits, please do so below: artificial nutrition and hydration, your agent will not have authority to decide about artificial nutrition instructions or wishes, and limit your agent's authority. Unless your agent knows your wishes about NOTE: Although not necessary, and neither encouraged nor discouraged, you may wish to state

I direct my agent to make health care decisions in accordance with my wishes and instructions as stated above or as otherwise known to him or her. I also direct my agent to abide by any limitations on his or her authority as stated above or as otherwise known to him or her.

health care agent. agent, I hereby appoint (name, home address and telephone number of alternate agent) as my In the event the person I appoint above is unable, unwilling or unavailable to act as my health care

occurrence of the condition I have stated below: I understand that, unless I revoke it, this proxy will remain in effect indefinitely or until the date or

indefinitely): (Please complete the following if you do NOT want this health care proxy to be in effect

This proxy shall expire: (Specify date or condition)

Signature:

Address:

Date:

me and appears to be of sound mind and acting willingly and free from duress. He or she signed my presence. I am not the person appointed as agent by this document. (or asked another to sign for him or her) this document in my presence and that person signed in I declare that the person who signed or asked another to sign this document is personally known to

Witness:

Address:

Witness:

Addrace

- (e) The health care proxy shall not be executed on a form or other writing that also includes the delegation of the authority to make health care decisions executed prior to the enactment of this article execution of a power of attorney, provided, however, that nothing in this paragraph shall invalidate a
- instructions shall not be construed to imply a wish not to donate. designate another person to do so, under article forty-three of this chapter. Failure to state wishes or donation and may limit the health care agent's authority to consent to organ or tissue donation or A health care proxy may include the principal's wishes or instructions regarding organ and tissue
- Alternate agent.
- (a) A competent adult may designate an alternate agent in the health care proxy to serve in place of
- assistant, or nurse practitioner (A) that the person appointed as agent is not reasonably available, (i) the attending practitioner has determined in a writing signed by the physician, physician willing and competent to serve as agent, and (B) that such person is not expected to become

circumstances; reasonably available, willing and competent to make a timely decision given the patient's medical

- (ii) the agent is disqualified from acting on the principal's behalf pursuant to subdivision three of this section or subdivision two of section two thousand nine hundred ninety-two of this article, or
- (iii) under conditions set forth in the proxy.
- (b) If, after an alternate agent's authority commences, the person appointed as agent becomes available, willing and competent to serve as agent:
- and (i) the authority of the alternate agent shall cease and the authority of the agent shall commence;
- principal's medical record. (ii) the attending practitioner shall record the change in agent and the reasons therefor in the

History

November 17, 2023; <u>L 2024. ch 619. § 1</u>, effective March 21, 2025. Add, <u>L 1990, ch 752, § 2</u>, eff Jan 18, 1991; amd, <u>L 1994, ch 23, § 4</u>, eff March 28, 1994; <u>L 2000, ch 540, § 1</u>, eff Oct 4, 2000; <u>L 2009, ch 348, § 3</u>, eff Oct 25, 2009; <u>L 2012, ch 56, § 6</u> (Part J), eff March 30, 2012; <u>L 2018, ch 342, § 2</u>, effective February 3, 2019; <u>L 2019, ch 708, § 18</u>, effective June 17, 2020; <u>L 2023, ch 636, § 1</u>, effective

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NY CLS Pub Health § 2994-b

Current through 2025 released Chapters 1-413

Article 29-CC Family Health Care Decisions Act (§§ 2994-a — 2994-u) New York Consolidated Laws Service Public Health Law (Arts. I — 50)

٧

laws and regulations. 2994-b. Applicability; priority of certain other surrogate decision-making

- 1. This article shall apply to health care decisions regarding health care provided in a hospital, and to decisions regarding hospice care without regard to where the decision is made or where the care is provided, for a patient who lacks decision-making capacity, except as limited by this section.
- decision-making capacity in a hospital as defined by section 1.03 of the mental hygiene law. 1-a. This article shall also apply to decisions regarding orders not to resuscitate for a patient who lacks
- shall be governed by such article, and shall have priority over decisions by any other person except the attending practitioner shall make reasonable efforts to determine whether the patient has a health care agent appointed pursuant to article twenty-nine-C of this chapter. If so, health care decisions for the patient patient or as otherwise provided in the health care proxy. Prior to seeking or relying upon a health care decision by a surrogate for a patient under this article, the
- that the patient has been temporarily transferred from a mental hygiene facility operated or licensed by the office of mental health or the office for people with developmental disabilities, then such physician, nurse the attending practitioner has reason to believe that the patient has a history of receiving services for an (c) of this subdivision is applicable: practitioner or physician assistant shall make reasonable efforts to determine whether paragraph (a), (b) or has an intellectual or developmental disability; or the practitioner in a general hospital has reason to believe intellectual or developmental disability; it reasonably appears to the attending practitioner that the patient Prior to seeking or relying upon a health care decision by a surrogate for a patient under this article, if
- court procedure act, health care decisions for the patient shall be governed by section seventeen (a) If the patient has a guardian appointed by a court pursuant to article seventeen-A of the surrogate's hundred fifty-b of the surrogate's court procedure act and not by this article.
- sustaining treatment for the patient shall be governed by section seventeen hundred fifty-b of the subdivision one of section seventeen hundred fifty-b of such act, decisions to withdraw or withhold lifesurrogate's court procedure act but falls within the class of persons described in paragraph (a) of (b) If a patient does not have a guardian appointed by a court pursuant to article seventeen-A of the surrogate's court procedure act and not by this article.
- regulations of the office of mental health or the office for people with developmental disabilities, then subdivision, but consent for the decision may be provided pursuant to the mental hygiene law or the decision shall be governed by such statute or regulations and not by this article. **(c)** If a health care decision for a patient cannot be made under paragraphs (a) or (b) of this
- pursuant to subdivision two or three of this section, then the health care decision shall be made pursuant to 4. If, after reasonable efforts, it is determined that a health care decision for the patient cannot be made this article

History

Add, <u>L 2010, ch 8, § 2</u>, eff June 1, 2010; amd, <u>L 2011, ch 167, § 2</u>, eff Sept 18, 2011; <u>L 2017, ch 430, § 17</u>, effective May 28, 2018; <u>L 2019, ch 708, § 22</u>, effective June 17, 2020; <u>L 2022, ch 479, § 30</u>, effective July 26, 2022; <u>L 2023, ch 742, § 2</u>, effective March 21, 2024; <u>L 2024, ch 40, § 1</u>, effective March 21, 2024.

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NY CLS Pub Health § 2994-d

Current through 2025 released Chapters 1-413

Article 29-CC Family Health Care Decisions Act (§§ 2994-a — 2994-u) New York Consolidated Laws Service Public Health Law (Arts. I — 50)

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§ 2994-d. Health care decisions for adult patients by surrogates

- person on the list to be surrogate, provided no one in a class higher in priority than the person designated for an adult patient who lacks decision-making capacity. However, such person may designate any other objects: persons in prior classes are not reasonably available, willing, and competent to act, shall be the surrogate 1. Identifying the surrogate. One person from the following list from the class highest in priority when
- (a) A guardian authorized to decide about health care pursuant to article eighty-one of the mental hygiene law;
- (b) The spouse, if not legally separated from the patient, or the domestic partner;
- (c) A son or daughter eighteen years of age or older;
- (d) A parent;
- (e) A brother or sister eighteen years of age or older
- (f) A close friend.
- of the patient whose friendship with the patient preceded the patient's admission to the facility. If a individual is related to the patient by blood, marriage, domestic partnership, or adoption, or is a close friend physician assistant who has privileges at the hospital or a health care provider under contract with the mental hygiene facility from which the patient was transferred, or a physician, nurse practitioner or physician assistant shall not act as the patient's attending practitioner after his or her authority as surrogate physician, nurse practitioner or physician assistant serves as surrogate, the physician, nurse practitioner or hospital may not serve as the surrogate for any adult who is a patient of such hospital, unless such Restrictions on who may be a surrogate. An operator, administrator, or employee of a hospital or a
- Authority and duties of surrogate. (a) Scope of surrogate's authority.
- any and all health care decisions on the adult patient's behalf that the patient could make. (i) Subject to the standards and limitations of this article, the surrogate shall have the authority to make
- attending practitioner relies on the patient's prior decision, the physician, nurse practitioner or physician orally during hospitalization in the presence of two witnesses eighteen years of age or older, at least writing or, with respect to a decision to withdraw or withhold life-sustaining treatment expressed either adult patient has already made a decision about the proposed health care, expressed orally or in (ii) Nothing in this article shall obligate health care providers to seek the consent of a surrogate if an designated for the patient, the attending practitioner shall make reasonable efforts to notify the one of whom is a health or social services practitioner affiliated with the hospital, or in writing. If an surrogate prior to implementing the decision; provided that in the case of a decision to withdraw or assistant shall record the prior decision in the patient's medical record. If a surrogate has already been

withhold life-sustaining treatment, the attending practitioner shall make diligent efforts to notify the surrogate and, if unable to notify the surrogate, shall document the efforts that were made to do so

- patient lacks decision-making capacity and upon identification of a surrogate pursuant to subdivision determination, made pursuant to section twenty-nine hundred ninety-four-c of this article, that the adult decision-making capacity, the authority of the surrogate shall cease. one of this section. In the event an attending practitioner determines that the patient has regained (b) Commencement of surrogate's authority. The surrogate's authority shall commence upon a
- diagnosis, prognosis, the nature and consequences of proposed health care, and the benefits and risks information necessary to make an informed decision, including information about the patient's about the patient's health care. Health care providers shall provide and the surrogate shall seek of and alternatives to proposed health care. the right to receive medical information and medical records necessary to make informed decisions (c) Right and duty to be informed. Notwithstanding any law to the contrary, the surrogate shall have
- Decision-making standards.
- (a) The surrogate shall make health care decisions:
- in accordance with the patient's wishes, including the patient's religious and moral beliefs; or
- such other concerns and values as a reasonable person in the patient's circumstances would wish patient's health or functioning; the relief of the patient's suffering; and any medical condition and and extent of preserving the patient's life; the preservation, improvement or restoration of the interests shall include: consideration of the dignity and uniqueness of every person; the possibility ascertained, in accordance with the patient's best interests. An assessment of the patient's best (ii) if the patient's wishes are not reasonably known and cannot with reasonable diligence be to consider.
- centered; health care decisions shall be made on an individualized basis for each patient, and shall be (b) In all cases, the surrogate's assessment of the patient's wishes and best interests shall be patientconsistent with the values of the patient, including the patient's religious and moral beliefs, to the extent reasonably possible.
- sustaining treatment) shall be authorized only if the following conditions are satisfied, as applicable: subdivision four of this section, decisions by surrogates to withhold or withdraw life-sustaining treatment (including decisions to accept a hospice plan of care that provides for the withdrawal or withholding of life-Decisions to withhold or withdraw life-sustaining treatment. In addition to the standards set forth in
- a
- months, whether or not treatment is provided; or (B) the patient is permanently unconscious; o standards, (A) the patient has an illness or injury which can be expected to cause death within six assistant, that, to a reasonable degree of medical certainty and in accord with accepted medical determines, with the independent concurrence of another physician, nurse practitioner or physician (i) Treatment would be an extraordinary burden to the patient and an attending practitioner
- reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the (ii) The provision of treatment would involve such pain, suffering or other burden that it would patient has an irreversible or incurable condition, as determined by an attending practitioner with reasonable degree of medical certainty and in accord with accepted medical standards. the independent concurrence of another physician, nurse practitioner or physician assistant to a
- committee, including at least one physician, nurse practitioner or physician assistant who is not directly treatment under subparagraph (ii) of paragraph (a) of this subdivision only if the ethics review responsible for the patient's care, or a court of competent jurisdiction, reviews the decision and In a residential health care facility, a surrogate shall have the authority to refuse life-sustaining

NY CLS Pub Health § 2994-d

decision to withhold cardiopulmonary resuscitation. determines that it meets the standards set forth in this article. This requirement shall not apply to a

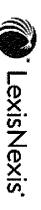
- determines that it meets the standards set forth in this subdivision and subdivision four of this section. committee, including at least one physician, nurse practitioner or physician assistant who is not directly subparagraph (ii) of paragraph (a) of this subdivision, to withdraw or withhold nutrition and hydration provided by means of medical treatment, the decision shall not be implemented until the ethics review (c) In a general hospital, if the attending practitioner objects to a surrogate's decision, under responsible for the patient's care, or a court of competent jurisdiction, reviews the decision and
- under this article and is not subject to this article. (d) Providing nutrition and hydration orally, without reliance on medical treatment, is not health care
- sustaining treatment either orally to an attending practitioner or in writing. (e) Expression of decisions. The surrogate shall express a decision to withdraw or withhold life

History

effective May 28, 2018; <u>L 2019, ch 708, § 24,</u> effective June 17, 2020. Add, <u>L 2010, ch 8, § 2,</u> eff June 1, 2010; amd, <u>L 2011, ch 167, § 4,</u> eff Sept 18, 2011; <u>L 2017, ch 430, § 19,</u>

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Bronstein v Clements

Supreme Court of New York, Appellate Division, Third Department February 28, 2019, Decided; February 28, 2019, Entered

526669

169 A.D.3d 1302 *; 95 N.Y.S.3d 414 **; 2019 N.Y. App. Div. LEXIS 1447 ***; 2019 NY Slip Op 01470 ****; 2019 WL 960164

v Mahlon T. Clements, Appellant. and Property of Seymour B. Bronstein Sr., Respondent [****1] Anita L. Bronstein, as Guardian of the Person

Counsel: [***1] The Clements Firm, Glens Falls (Thomas G. Clements of counsel), for appellant.

counsel), for respondent. Barclay Damon LLP, Syracuse (Michael J. Balestra of

Judges: Before: Garry, P.J., Egan Jr., Aarons, Rumsey and Pritzker, JJ. Garry, P.J., Egan Jr., Rumsey and Pritzker, JJ., concur.

Opinion by: Aarons

Opinion

summary judgment. Lawrence County, which granted plaintiff's motion for Supreme Court (Farley, J.), entered July 17, 2017 in St. [*1302] [**415] Aarons, J. Appeal from an order of the

defendant as Bronstein's agent and granted him two attorney was a limited power of attorney appointing unrestricted authority to plaintiff. The other power of two powers of attorney. One power of attorney granted defendant in New York. Due to Bronstein's declining with each other. In 2013, Bronstein took a bus to visit acquaintances who also had some real estate matters "[t]o engage in real property transactions [***2] in New powers—"[t]o create a trust for [Bronstein's] benefit" and Defendant thereafter assisted Bronstein in preparing his briefcase, causing defendant to have to pick him up. mental health, Bronstein missed his bus stop and lost Defendant and Seymour B. Bronstein Sr., a physician resided ⋾ Pennsylvania, are personal

York State" on Bronstein's behalf. Defendant used a

Bronstein executed them in New York. Pennsylvania form for both powers of attorney, and

revocation of the limited power of attorney given to defendant by Bronstein. Following joinder of issue, commenced this action seeking, among other things, a defendant's power of attorney. Plaintiff thereafter of the Pennsylvania order in [**416] the St. Lawrence had been revoked. Plaintiff subsequently commenced a estate transactions on Bronstein's behalf. In January defendant's limited power of attorney. Notwithstanding appeals. We affirm. other things, granted plaintiff's motion. Defendant power of attorney was revoked. Supreme Court, among plaintiff moved for, among other things, summary [***3] County Clerk's office, as well as a revocation of Bronstein's guardian. Plaintiff then filed a certified copy Pennsylvania proceeding [*1303] appointing plaintiff as Bronstein. In May 2016, an order was issued in this proceeding in Pennsylvania for plenary guardianship of from dementia and that defendant's power of attorney the foregoing, defendant continued to engage in real Bronstein's behalf, sent based upon the general power of attorney to act on judgment seeking a declaration that defendant's limited 2016, plaintiff advised defendant that Bronstein suffered After Bronstein's health continued to decline, plaintiff, a purported revocation of

under New York law, a guardian may not "revoke any appointment ... made by the incapacitated persor (see 20 Pa Code § 5604 [c] [former (1)]). Meanwhile, by Bronstein once she was appointed as his guardian plaintiff could revoke any prior powers of attorney made Pennsylvania statute in effect at the conflict between the laws of the jurisdictions involved" of law issue is to determine whether there is an actual "The first step in any case presenting a potential choice NE2d 936, 597 NYS2d 904 [1993]). Under the (Allstate Ins. Co. v. Stolarz, 81 NY2d 219, relevant time,

pursuant to [General Obligations Law §§ 5-1501, 5-1601 and 5-1602]" (Mental Hygiene Law § 81.22 [b] [2]). As such, whether a conflict between New York and Pennsylvania law exists turns on whether the limited power of attorney given to defendant was made, as relevant here, pursuant to General Obligations Law § 5-1501. If so, then a conflict exists; if not, there is no conflict.

revoking it (see Mental Hygiene Law § 81.22 [b] [2]). not fall within the ambit of General Obligations Law § 5such, because the limited [***5] power of attorney does mortgage loan, lease or management agreement. As take action in connection with a listing of real property, two powers were given to defendant so that he could purposes. The record also does not indicate that these that are solely reserved for business or commercial transactions on his behalf in New York-are not powers trust for Bronstein's benefit or to engage in real estate defendant in the limited power of attorney-creating a there. Furthermore, the two powers [*1304] given to St. Lawrence County and that he would spend time Bronstein owned a house in the Town of Oswegatchie in business. Indeed, defendant averred in his affidavit that buying and selling real property was Bronstein's primary commercial purposes. Nor does the record reflect that indicate that it was created primarily for business or We disagree. Such document, on its face, does not made pursuant to General Obligations Law § 5-1501. two categories, it does not constitute an appointment attorney issued to defendant falls into either of these plaintiff maintains that because the limited power of management agreement," among others. To that end, with a listing of real property, mortgage loan, lease or real estate broker [***4] to take action in connection commercial purpose" and "a power given to a licensed power of attorney given primarily for a business or from General Obligations Law § 5-1501, respectively, "a New York law exists. is not excluded from General Obligations Law § 5-1501, Accordingly, a conflict between Pennsylvania law and Obligations Law § 5-1501. More to the point, because it 1501C (1) or (9), it is not excluded from General Obligations Law § 5-1501C (1) and (9), which excludes General Obligations Law § 5-1501 generally governs York law prohibits plaintiff from unilaterally 으 attorney. Plaintiff relies 9 General

Although plaintiff, once she registered the Pennsylvania order appointing her as Bronstein's guardian, could "exercise in [New York] all powers authorized in the order of appointment," she could only do so to the extent such powers were not

granted dispute at issue and, therefore, Supreme Court correctly that Pennsylvania has the greater concern with the was required to act for the benefit of Bronstein, we find arguments have been examined and are unavailing foregoing and [****2] taking into account that defendant the powers granted to defendant were "explained more fully [***6] in Pa. C.S. Chapter 56." In view of the power of attorney as a "Pennsylvania Durable Power of powers of attorney, defendant referred to the limited that a Pennsylvania form was used to create both resident of Pennsylvania, defendant does not dispute [1991]). The record discloses that Bronstein was a morality, fidelity, loyalty and fair dealing" (Semmler v Naples, 166 AD2d 751, 752, 563 NYS2d 116 [1990] must act in accordance with the highest principles of good faith and undivided loyalty toward [Bronstein], and occurrence or the parties, has the greatest concern with which, because of its relationship or contact with the Attorney" and the limited power of attorney noted that dismissed 77 NY2d 936, 572 NE2d 48, 569 NYS2d 607 [internal quotation marks and citation omitted], appeals Defendant, as Bronstein's agent, "must act in the utmost 741 [2010], quoting <u>Babcock v Jackson, 12 NY2d 473, 481, 191 NE2d 279, 240 NYS2d 743 [1963]).</u> the specific issue raised in the litigation' " (Matter of the applicable law should be that of 'the jurisdiction [**417] "Under established conflict of laws principles 14 NY3d 100, plaintiff's motion. 109, 923 NE2d 1129, 896 NYS2a Defendant's

[*1305] Garry, P.J., Egan Jr., Rumsey and Pritzker, JJ., concur. Ordered that the order is affirmed, with costs.

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[&]quot;prohibited under the laws of [New York]" (Mental Hygiene Law § 83.39 [a]). In view of our determination that Mental Hygiene Law § 81.22 [b] (2) prohibits plaintiff from revoking any prior pówers of attorney given by Bronstein, plaintiff's reliance on Mental Hygiene Law § 83.39 (a) is unavailing.



Matter of Hutchinson

Index No. 500234/15, Appeal No. 15320,15321, Case No. 2021-04065, 2021-03188 Supreme Court of New York, Appellate Division, First Department February 15, 2022, Decided; February 15, 2022, Entered

Reporter

202 A.D.3d 534 *; 164 N.Y.S.3d 70 **; 2022 N.Y. App. Div. LEXIS 954 ***; 2022 NY Slip Op 00968 ****; 2022 WL 451965

[****1] In the Matter of Ann Meritt Hutchinson, An Alleged Incapacitated Person.

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FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT
TO REVISION BEFORE PUBLICATION IN THE
OFFICIAL REPORTS.

Prior History: [***1] Orders, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered August 2, 2021, and on or about August 24, 2021, which, to the extent appealed from as limited by the briefs, and after a hearing, granted the motion of Ann Merritt Hutchinson to amend the power of her personal needs guardian, Michael Mascetti, Esq., by removing his power to make health care decisions and reinstating a health care proxy dated November 18, 2015, and otherwise confirming all remaining powers set forth in the order by which Mascetti was appointed, and denied the motion of appellant John E. Hutchinson, IV to dismiss the petition to amend the guardianship, to disqualify court-appointed counsel, Susan Brown, Esq., and to remove Mascetti as personal needs guardian, unanimously affirmed, without costs.

Counsel: John E. Hutchinson IV, appellant, Pro se

McCarthy Fingar LLP, White Plains (Michael S. Kutzin of counsel), for Ann Merritt Hutchinson, respondent.

Judges: Before: Kern, J.P., Oing, Singh, Moulton, González, JJ.

Opinion

[**71] [*534] Supreme Court correctly granted the application to amend the guardianship to allow AMH to appoint her daughter as her health care agent, since AMH's decision to do so was consistent with the 2015 health care [***2] proxy, and, on this record, AMH had the requisite capacity to appoint a health care agent in 2015. Indeed, AMH was never adjudicated incompetent. In opposing the restoration of powers to AMH appellant failed to meet his burden to show by clear and convincing evidence that the guardianship should not be amended (see Mental Hygiene Law § 81.36[d]).

Further, AMH's presence at the hearing was not required. The reduction of the guardian's powers did not implicate AMH's right to due process, and there was ample evidence that involving her in the court proceedings would only distress her and put her health at risk (see <u>Mental Hygiene Law § 81.36[c]</u>).

[*535] The record supports the conclusion that the guardians of the person and the property acted within their authority in restricting appellant's access to AMH and to her personal information.

Appellant failed to submit admissible evidence in support of his motion to remove Brown as counsel. Likewise, his allegations against Mascetti are broad and conclusory or at best concern minor deficiencies in Mascetti's performance, which do not warrant removing Mascetti as personal needs guardian (see Mental Hygiene Law § 81.35; Matter of Solomon R. [Michael R.], 123 AD3d 934, 935, 999 N.Y.S.2d 435 [2d Dept 2014], appeal dismissed 25 NY3d 959 [2015]).

We have considered appellant's remaining contentions and find them unavailing.

THIS CONSTITUTES [***3] THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: February 15, 2022

End of Document



Matter of Doe

Supreme Court of New York, Kings County
August 19, 2016, Decided

100012/06

Reporter

53 Misc. 3d 829 *; 37 N.Y.S.3d 401 **; 2016 N.Y. Misc. LEXIS 3174 ***; 2016 NY Slip Op 26278 ****

[****1] In the Matter of Jane Doe, an Incapacitated Person.

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.
THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE PRINTED OFFICIAL REPORTS.

Counsel: Mark Hus, Esq., for petitioners

Anthony Gentile, Esq., Ira Salzman, Esq., and Lisa C. Boranian, Esq., for respondents.

Judges: [***1] HON. KATHY J. KING, J.S.C.

Opinion by: KATHY J. KING

Opinion

{**53 Misc 3d at 832} OPINION OF THE COURT

Kathy J. King, J.

[*832] [**403] In this guardianship proceeding, petitioner, Yakov B., moves by order to show cause for an order enjoining Fern Finkel, Esq., as the special guardian for Jane Doe, ¹ an incapacitated person (IP),

Article 29-CC of the Public Health Law, commonly known as the Family Health Care [****2] Decisions Act (FHCDA), for the IP and directing that the special guardian rehabilitate the IP. In support of the order to show cause, the father of the IP, Yakov, submits an affidavit in support. On the return date of the order to show cause, Anna B., Yakov's wife and mother of the IP, and Bella R., the IP's first cousin, joined in the application on the record. The movants appeared pro se on the return date. The special guardian, co-guardians, John D. and Julia S., the IP's husband and daughter, respectively, and Mental Hygiene Legal Service (MHLS) as attorney for Jane Doe, submit opposition to the requested relief.

Background and Procedural History

Medical Center prematurely at seven months. Due to on xxxx xx, 1997. The couple married in 1999. Although cardiac childbirth, on November 23, 2003, Jane Doe went into complications third child, Elizabeth, who was delivered at Beth Israel 2003, Jane Doe, then 37 years old, gave birth to her she worked briefly as a [**404] home attendant, Jane moved in with him in 1996. Their son, Michael, was born her first husband. Thereafter, she met John D. and States with her daughter, Julia, in 1993, after divorcing the former Soviet Union. She immigrated to the United Jane Doe was born on xxxx xx, 1966 in Belarus, part of Doe was primarily a "stay at home mom." On xxxx xx, arrest during associated an with unsuccessful intubation her pregnancy

¹By order of this court dated February 13, 2013, the court ruled that the named party in this proceeding and her spouse be referred to as "Jane Doe" and "John D.," respectively. Based on the sensitive [***2] nature of the issues raised herein, the court will refer to all other interested parties and witnesses, except for medical providers, by first name only.

²Life-sustaining treatment is defined as "any medical treatment or procedure without which the patient will die within a relatively short time, as determined by an attending physician to a reasonable degree of medical certainty." (*PHL §2994-a [19]*)

unit of Rutland Park Nursing Home. her life, and currently receives total care in the ventilator institutional care in a health care facility for the rest of Based on Jane Doe's medical condition, she will require classified as being in a persistent vegetative state.4 percutaneous receives artificial hydration and nutrition through a attaches ventilator dependent requiring an endotracheal tube that contraction of her four extremities due to irreversible muscular and tendon damage). Presently, she is result, she suffered anoxic brain damage and spastic encephalopathy (loss of oxygen to the brain). As a quadriparesis from the respirator through the trachea, 3 gastrostomy (feeding tube),3 and is respiratory (the{**53 Misc failure, [***3] 3d at 833} [*833] and anoxic

At the time of this incident, Julia was 15 years old, Michael was six years old, and [****3] both resided with Jane Doe and John D. Other than Jane Doe's immediate family, her blood relatives include her parents, Yakov and Anna, and a brother Igor B. who is a licensed practical nurse at Resort Nursing Home's respiratory unit. Jane Doe was previously a patient at Resort Nursing Home's ventilator unit, where Igor was involved in her care. Bella is a close relative of Jane Doe and her family, having joined in the instant [***5] application, and appearing in court with Yakov and Anna regarding prior proceedings initiated by Igor.

In 2006, Jane Doe received a settlement of about \$7.1

any further proceedings. Anna, and Julia as interested parties to receive notice of The order and judgment also named Yakov, [**405] Esq., was appointed property management guardian personal needs guardian and Jacqueline Kadanoff, judgment dated July 11, 2006. John D. was appointed meaning of MHL §81.02, and issued an order and that Jane Doe is an incapacitated person within the parties, including Yakov and Anna, the court determined Doe. After a full hearing and upon notice to all interested guardianship proceeding under Article 81 of the Mental John D. commenced(**53 Misc 3d at 834) [*834] conjunction with the settlement of the lawsuit, in 2006, million from the settlement award for loss of services. In against Beth Israel. Her husband, John D., received \$1 Hygiene Law for the appointment of a guardian for Jane million as a result of a medical malpractice lawsuit

proceeding, and represents Jane Doe in the instant physician to perform an independent medical examination of Jane Doe⁵ and appointed MHLS as number of years that passed since her initial evaluation Doe. Boranian, Esq., appeared for MHLS in the and to reevaluate Jane Doe due to the considerable Evaluator to investigate the allegations raised by Igor, application, appointed Frieda Rosengarten as Court moved by emergency order to show cause to have John measures to remove Jane Doe from life support, Igor proceeding before the court. counsel to in 2006. By separate order, the court appointed a D. removed as the personal needs guardian of Jane In 2012, after learning that John D. was about to initiate The court, [***6] protect Jane in conjunction with Doe's interests. Lisa ဂ

In opposition to Igor's order to show cause, John D. moved by motion dated August 17, 2012 for an order determining, inter alia, that he, as Jane Doe's personal needs guardian, is her surrogate pursuant to <u>PHL §2994-0 [1]</u>, and therefore has the authority to take appropriate steps to withdraw her from life-sustaining treatment. The respective applications of the parties served as a catalyst to extensive litigation wherein Igor was represented by Tzvi Saperstein [***7] of the law firm of Salem, Shor & Saperstein, LLP, and David C. Gibbs III of the Gibbs Law Firm, P.A., located in Seminole, Florida (appearing pro hac vice), who is

³Since Jane Doe is unable to swallow, a percutaneous endoscopic gastrostomy, commonly referred to as a "PEG" or feeding tube, has been inserted through her abdominal wall and into her stomach. A PEG allows nutrition, fluids and/or medications to be put directly into the stomach, bypassing the mouth and esophagus.

⁴Renowned neurologist Dr. Fred Plum created the term "persistent vegetative state" and is the author of several treatises and numerous articles explaining it [***4] as follows:

[&]quot;Personality, memory, purposive action, social interaction, sentience, thought, and even emotional states are gone. Only vegetative functions and reflexes persist. If food is supplied, the digestive system functions and uncontrolled evacuation occurs; the kidneys produce urine; the heart, lungs, and blood vessels continue to move air and blood; and nutrients are distributed in the body." (See also Quinlan, 70 N.J. at 24-25, 355 A.2d 647 [1976] [Dr. Plum's similar explanation of the vegetative state]; President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment at 174-175 [1983].)

⁵ Dr. Jerome Posner was appointed to conduct an independent neurological medical exam of Jane Doe and prepared a report dated February 27, 2013 containing his findings in the 2012 action brought by Igor.

particularly known for representing the parents in the well-publicized case of Terri Schiavo (Schiavo ex rel. Schindler v Schiavo, 403 F3d 1223 [11th Cir. Mar. 23, 2005]]. John D. and Julia have been represented by Ira Salzman of Goldfarb, Abrandt, Salzman & Kutzin, LLP, throughout the pendency of this litigation, including the instant order to show cause. [**53 Misc 3d at 835]

sustaining treatment pursuant to PHL §§2994-d [4] and health care decisions, including the withdrawal of lifeas the surrogate of Jane [***8] Doe with regard to all would serve as the special guardian of Jane Doe. In her capacity as special guardian, Ms. Finkel was designated personal needs co-guardians and Fern Finkel, Esq., parties stipulated that John D. and Julia would serve as \underline{d} [1] was also withdrawn with prejudice. In addition, the that he is Jane Doe's surrogate pursuant to PHL §2994and John D.'s motion requesting an order determining guardian of Jane Doe was withdrawn with prejudice, application to remove John D. as the personal needs stipulation of settlement, the parties agreed that Igor's on the record on April 17, [****4] 2013. Pursuant to the lgor, and MHLS entered into a stipulation of settlement included several appearances and hearings, John D., [*835] After more than a year of litigation, which

The parties further stipulated that any decision regarding the withdrawal of life-sustaining treatment pursuant to PHL §§2994-d [4] and [5] would be made by Ms. Finkel only after consultation with John D., Julia, Yakov and Anna. In the event Ms. Finkel recommended the withdrawal of life-sustaining treatment pursuant to PHL §§2994-d [4] and [5], this determination would be final and binding upon the parties to the stipulation of settlement. The terms of the stipulation of settlement were memorialized in an order dated September 6, 2013 (final order).

Pursuant to the final order, the special guardian submitted a report to the family [**406] and court (the report) dated November 15, 2013, wherein she determined that Jane Doe is in a persistent vegetative state without hope of recovery and that it is not in her best interests to remain on life support. Thereafter, on December 6, 2013, the special guardian served a seven-day written notice on all interested parties of her "intention to discontinue life support."

The Instant Order to Show Cause

On December 13, 2013, Yakov, Anna, and Bella moved

Mark Hus, Esq. An additional adjournment was granted 3d at 836} [*836] required to determine the special guardian's compliance with PHL §§2994-d [4] and (5). taken for [Jane Doe]'s rehabilitation." treatment, and for an order requesting that "steps be by the parties. for submission of opposition to the order to show cause counsel. The movants were, thereafter, represented by The order to show cause was adjourned from January 8 to January 14, 2014 to permit the movants to retain granting the stay directed that a hearing was (** 53 Misc special guardian's decision to withdraw life-sustaining restraining order to prevent the implementation of the order show cause [***9] for a The court in temporary

The special guardian, represented by Anthony Gentile of Godosky & Gentile, P.C., in opposition, argues that the order to show cause is a delay tactic. Specifically, the movants did not previously object to her designation as special guardian or her authority to act as surrogate for Jane Doe regarding the withdrawal of life-sustaining treatment pursuant to PHL §§2994-d [4] and [5]. In reaching her conclusion to withdraw life-sustaining treatment from Jane Doe pursuant to PHL §§2994-d [4] and [5]. Ms. Finkel contends that she complied with this court's order vesting her with the authority to act as [***10] surrogate, by conducting a thorough investigation of Jane Doe's condition, which included visiting Jane Doe on multiple occasions and interviewing medical providers and family members.

other misconduct of an adverse party; and (4) make no discovered evidence in the possession of Yakov and Anna; (3) make no claim of fraud, misrepresentation or final order; (2) make no claim that there is any newly argue that the movants, in effect, seek to vacate a prior discretion that was granted to her by the court. They modification or vacatur of a prior judgment or order." allegations for not participating in the proceeding resulting in the that the movants (1) fail to provide an excusable default vacate a prior court order pursuant to Civil Practice Law order of the court, and that no legal basis exists to limited to alternative, request that the scope of the hearing be order to show cause before the court, and Rules ("CPLR") §5015. Specifically, they contend Co-guardians John D. and Julia also seek denial of the whether Ms. Finkel [****5] abused of lack of jurisdiction or of "reversal, or in the

In seeking denial of the order to show cause, the coguardians also argue that neither the stipulation of [***11] settlement, nor the final order, require the special guardian to pursue rehabilitation. The co-

guardians also point to Igor's representation that he discussed the terms of the stipulation of settlement, which the final order is based on, with family members. {**53 Misc 3d at 837}

[*837] Finally, as a basis for their argument that the sole issue to be determined by the court is whether or not the special guardian abused her discretion, the coguardians rely on a December 13, 2013 ruling made on the record, wherein the court determined that the issue before it is [**407] "whether Ms. Finkel complied with the stipulation."

stipulation of settlement. Igor's testimony on the record where he indicated that based on their familial relationship. MHLS points to there is privity [***12] between the movants and Igor terms is res judicata. While Yakov, Anna, and Bella were not parties to the settlement, MHLS argues that final order. As such, the stipulation of settlement by its issues were negotiated, settled, and memorialized in the raises precisely the same issues that were raised by argues that the order to show cause before the court vacate the final order, but they are collaterally estopped cause, contends that the movants, in effect, seek to MHLS, in joining the opposition to the order to show lgor in his 2012 order to show cause, and that these from challenging Ms. consulted with family members regarding the Finkel's determination. MHLS

cause to remove the guardian. failed to offer any justification for their failure to present contends that under CPLR §2221(e), the movants have misapplied a controlling principle of law. MHLS also overlooked or misapprehended the relevant facts, or reargue, where a party can establish that the court because only parties to a prior proceeding may move to and (e). MHLS contends that under CPLR §2221(d), the "motion to renew or reargue" under CPLR §§2221(d) cause is warranted, in the event that it is construed as a consistent with the terms set forth in the final order. Finally, MHLS argues that denial of the order to show order to show cause consists solely of testimony from Ms. Finkel establishing that her decision was made evidence presented to the court at a hearing on the "new" facts at the time Igor made his prior order to show the order co-guardians, ਰ show cause should be MHLS requests that any denied

[1] As a threshold matter, the court rejects the assertions of both the co-guardians and MHLS that the movants [***13] are barred from contesting the special guardian's decision to withdraw life-sustaining treatment

from Jane Doe pursuant to PHL §82994-d [4] and [5]. The [****6] FHCDA specifically [*838] {**53 Misc 3d at 838} provides that "[a]ny person connected with the case ... [who has objections to the incapacity determination, the choice of surrogate, or the surrogate decisions] may commence a special proceeding... with respect to any matter arising under this article." (PHL §2994-r [1]) Accordingly, this statutory provision vests the movants, by virtue of their family relationship, with the authority to seek the requested relief, notwithstanding notice of the prior proceeding. For the same reasons, MHLS's argument that the movants are required to seek intervention under CPLR §401 is without merit.

proceeding.'?" (*D'Arata v New York Cent. Mut. Ins. Co.,* 76 NY2d 659, 667-668, 564 N.E.2d 634, 563 N.Y.S.2d placed in issue and actually determined in the prior have been properly raised by the pleadings or otherwise quoting <u>Ross v Medical Liab. Mut. Ins. Co., 75 NY2o</u> 825, 826, 551 N.E.2d 1237, 552 N.Y.S.2d 559 [1990]) Dev., addressed and specifically decided.'?" (Crystal particular opportunity to contest the prior issue (Kaufman v Eli Lilly the [**408] present action, and (2) the party to be doctrine of collateral estoppel are that (1) the identical litigated' so as to satisfy the identity requirement, it 'must "Generally, for 'a question to have been actually "Preclusive effect, however, will only be given where the & Co., 65 NY2d 449, 482 N.E.2d 63, 492 N.Y.S.2d 584 precluded from relitigating the issue had a full and fair issue was decided in the prior action and is decisive in elements [***14] that must be satisfied to invoke the not the tribunals or causes of action are the same." decided against that party or those in privity, whether or from relitigating in a subsequent action or proceeding an "The doctrine of collateral estoppel . . . precludes a party preclude the movants from seeking the requested relief. The court further finds that collateral estoppel does not Regents of State of NY, 72 NY2d 261, 268, 527 N.E.2a 716, 717-718, 949 N.Y.S.2d 398 [2d Dept 2012] 76 NY2d 659, 564 N.E.2d 634, 563 N.Y.S.2d 24 [1990]). [1985]; see also D'Arata v New York Cent. Mut. Ins. N.E.2d 487, 478 N.Y.S.2d 823 [1984]) (Ryan v New York Tel. Co., 62 NY2d 494, issue clearly raised in a prior action or proceeding and 1222, 532 N.Y.S.2d 85 [1988]) LLC v Devon Architects of NY, P.C., 97 AD3d issue was quoting Matter of Halyalkar v Board 'actually litigated, The two squarely Co.,

⁶ "Person connected with the case' means . . . any person on the surrogate list" (*PHL§2994-a* [19]).

appointed guardian complied with PHL §§2994-d [4] and before this court. application raises a new issue which was not previously CPLR §5015, is without merit because the instant effect, seeking a vacatur of the final order pursuant to rationale, [***15] the argument that the movants are, in applications address the issue of whether a court 839] [*839] contrary to the contentions raised{**53 Misc 3d at were not parties to the stipulation of settlement and as personal needs guardian. Yakov, Anna, and Bella order to show cause, which sought to remove John D. identical issue that was previously raised in Igor's 2012 Here, the current issue before the court is not the is the case here. in opposition, neither of the previous Based on the same

Finally, the court rejects the contention that the movants seek reargument and renewal of the final order pursuant to <u>CPLR §2221(d)</u> and <u>(e)</u>, since the movants do not seek to present "new" facts that the court should have considered before issuance of the final order, nor do the movants contend that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law.

Based on the foregoing, the court finds that the movants have standing to object to the special guardian's decision to withdraw life-sustaining treatment from Jane Doe, and now considers the merits of the relief requested by the movants, Yakov, Anna, and Bella.

Hearing,

In support of the order to show cause, Anna testified on behalf of the moving parties.⁸ Yevgeniya B., Semen G. and Raisa F. were also produced by the movants to testify. In opposition, the court heard testimony from the special guardian and Dr. Rajat Mukherji. Additionally, the special guardian submitted into evidence the following: the report dated November [**409] 15, 2013,

Dr. Jerome Posner's⁹ report dated February 27, 2013, an affirmation dated December 23, 2013 and Dr. Joseph C. Yellin's December 20, 2013 affidavit.¹⁰

{**53 [*840] Misc 3d at 840}Summary of Testimony

Anna, Mother of Jane Doe

Jane Doe's mother, Anna, testified with the assistance of a Russian interpreter. On direct examination, she acknowledged that her daughter [***17] was a patient in nursing homes located in both Brooklyn and Queens. She emphasized that she and her husband, Yakov, would visit her daughter at the respective nursing homes during the day and evening, at a minimum of one visit per week.

On cross-examination, when asked whether she recalled the name of the respective nursing homes in Brooklyn or Queens, Anna retorted to counsel that she didn't need to remember the names of the facilities because she knew their locations.

The court also conducted a brief inquiry of Anna as to whether she was aware of Igor's previous application and the stipulation of settlement resolving the matter, which resulted in the appointment of a special guardian. Anna acknowledged that she knew about the agreement, however, she stated that Igor merely told her about the agreement, and did not discuss the agreement with her.

[****7] Yevgeniya, Sister-in-Law of Jane Doe

On direct examination, Yevgeniya stated that she is the sister-in-law of Jane Doe. Yevgeniya testified that Jane Doe had expressed her wishes regarding end-of-life decision-making on more than one occasion. Yevgeniya recounted a conversation that she had with Jane Doe upon her admission to Victory Memorial [***18] Hospital for gallbladder surgery. She stated that this conversation took place "around 1999, plus, minus a year or two." According to Yevgeniya, she explained to her sister-in-law the meaning of a do not resuscitate (DNR) form, which had been given to her upon

⁷At the commencement of the hearing, the parties consented to the special guardian producing evidence in support of her position prior to the presentation of evidence to be submitted in support of the order to show cause by the moving parties. While the court permitted the special guardian to proceed prior to the movants on the order [***16] to show cause, the movants still have the burden of proof on the issue of the special guardian's compliance with the Public Health Law.

⁸Based on the representation of counsel, Yakov did not appear for the proceeding due to a health condition.

⁹The special guardian consulted with Dr. Posner, the court appointed neurologist in the 2012 proceeding.

¹⁰ At the request of Dr. Mukherji, Dr. Yellin performed neurological consultations of Jane Doe at Ditmas Park. The special guardian also consulted Dr. Yellin.

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admission to the hospital. In refusing to sign the DNR, Jane Doe indicated to Yevgeniya that she wanted her life to be saved under any circumstances. Yevgeniya further testified that Jane Doe expressed the same wishes on multiple hospital admissions afterwards, including her last visit to (Beth Israel) hospital where she was accompanied by her husband, John D.

Yevgeniya stated that "I just decided that . . . I'm just not gonna go because I only have one day off. I'm not going would stop her. As a result of the bedside meeting, discontinue Jane Doe from life support) and that nothing the special guardian indicated that she had already made up her mind (regarding her intention to Bella had a bedside meeting with Ms. Finkel in which meeting with the special guardian, Yakov, Anna, and further testified that on the day before the requested and sent Ms. Finkel an email to that effect. Yevgeniya However, Yevgeniya decided not to go to the meeting, meet with emphasizing the importance of granting the requested meeting, Yevgeniya testified that Ms. Finkel agreed to from doing this stated that there is nothing in the world that will stop her Finkel was impolite during the conversation [**410] and meeting since she had previously scheduled a meeting with Yakov and Anna. Yevgeniya also testified that Ms. conclusions. Ms. Finkel, however, refused the requested Ms. Finkel in December and requested a meeting to Yevgeniya, Ms. Finkel did not return the phone calls. meeting with Igor, Yakov and Anna. of-life wishes after the special guardian's October 2013 called Ms. Finkel twice to tell her about Jane Doe's end-841}that were asked."11 However, she stated that she were "tons" of objections to questions and "[she] was only answering the questions [*841] {**53 Misc 3d at Doe's wishes in prior court proceedings since there to go because it's going to be all over." Yevgeniya further testified that she finally spoke with Yevgeniya stated that she had not testified about Jane how her a few days before December 17th. Ms. Finkel [***19] on December 17, arrived at 2013.¹² After According to her

On cross-examination, after repeated attempts to elicit whether Igor knew about Jane Doe's prior conversations wherein she expressed her wishes, Yevgeniya testified that she revealed the conversations to Igor in

connection with the instant application only. According to Yevgeniya, she did not have "discussions in detail with [Igor] because that's what [sic] I was instructed not to." At the same time, Yevgeniya testified that Igor told her that his previous [****8] application before the court had been settled, and, in fact, she indicated that she read the settlement.

Upon further cross-examination, Yevgeniya maintained that the special guardian did not discuss her intentions with anyone. At the same time, however, she conceded that she was{**53 Misc 3d at 842} [*842] not at the family meeting with the special guardian. Further, Yevgeniya acknowledged that the two-page email to the special guardian cancelling the requested December meeting, and rebuking Ms. Finkel, Mr. Salzman, and Jane Doe's malpractice attorneys, omitted any reference whatsoever [***21] of Jane Doe's end-of-life wishes.

Raisa, Yevgeniya's Mother

needs to continue living and if something of this sort were to happen to her, that is what she would want. stated that due to the [***22] surgeon who administered anesthesia that resulted in due to an allergic reaction to anesthesia, she was she had been experiencing due to inflammation, but that adjacent to Jane Doe, and they frequently strolled of October 2003," when she resided in the building expressed her wishes regarding medical treatment. The she had two conversations with Jane Doe in which she Raisa, Jane Doe indicated that a person always [**411] she would find herself in a vegetative state. According to about having another surgical procedure, for fear that testified that she shared with Jane Doe her ambivalence anesthesia she suffers from panic attacks. Raisa further speak, however, in fact, she could hear everything. She under the impression that she could not hear, see, or indicated that while she was unconscious everyone was recounted to Jane Doe her past experience with a Doe recommended unable to get treatment for the pain. In response, Jane together in the park. Raisa told Jane Doe of the pain first conversation took place "possibly [in] the beginning Doe is her son-in-law's (Igor) sister. Raisa testified that translations were not accurate. She testified that Jane discontinued using the interpreter after stating that the interpreter for a On direct examination, Raisa testified through a Russian being unconscious portion മ for five days. surgeon, of her testimony, adverse however,

Raisa further testified that the second conversation took

¹¹ Yevgeniya had previously testified at the hearing resulting from Igor's emergency [***20] application to have John D. removed as personal needs guardian in 2012.

¹² Referring to the date set forth in the seven-day notice for the withdrawal of life-sustaining treatment.

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place during the same period of time, but that "[she] didn't know specifics." She testified that she recalled this conversation very well because she could not have surgery because of her allergic reaction to anesthesia and was in severe pain and crying. She stated to Jane Doe that she did not want to live, and Jane Doe responded that if she was similarly situated she would want to live. Raisa asserts that after her daughter, Yevgeniya, retained a new attorney to stop the termination of Jane Doe's life support, she disclosed to her daughter the prior conversations she had with Jane Doe.{**53 Misc 3d at 843}

Jane Doe's wishes prior to December 2013 or January testified that no one talked to her [****9] or asked about John D. as guardian, and nothing else. Finally, Raisa was told that the prior proceeding dealt with removing however that was "a long time ago," and, in any event, knew that her son-in-law, Igor, had attempted to stop beginning of January 2014. She also conceded that she was approximately the end of December 2013 or spoke about the need to remember this conversation time, [***23] 2003, when Jane Doe was pregnant. At the same the conversations with Jane Doe took place in October [*843] On cross-examination, Raisa stated that one of Ö from terminating life support previously, she indicated that the first time anyone

Semen, Yakov's Nephew

stay alive. According to Semen, Jane Doe stated that if day Jane Doe, Maria, and Bella were in the kitchen apartment building did not have an [***24] elevator, and close by, and that he would assist Jane Doe in bringing Alexander up and down the stairs because the that he would visit Maria's home often since he lived wheelchair bound husband, Alexander. He indicated around 1994, when Jane Doe, together with Julia, lived with Jane Doe about her wishes in the event that she for the sake of her children and relatives. something were to happen to her she would want to live talking about how ill Alexander is, and how he wanted to Maria lived on the second floor. Semen testified that one became ill. He recounted a conversation that took place Yakov is his uncle. He further testified that he spoke interpreter. On direct examination, Semen testified that Semen testified with the assistance of a Russian home of Maria, another cousin, and her

On cross-examination, Semen acknowledged that the 1994 conversation with Jane Doe wherein she

expressed her end-of-life wishes was the sole conversation that they had on the subject. He conceded that he and Jane Doe had no further conversations about her end-of-life wishes between 1994 and 2003.

While Semen stated that he became aware of the instant proceeding more than a month prior to the hearing, he could not remember who told him about it.

At the conclusion of his testimony, Semen's request to address the court was granted and he stated his opinion that in this circumstance, a mother and father are the only two people that have the right to turn off life support. [**53 Misc 3d at 844]

[*844] <u>Dr. Rajat Mukherji, Jane Doe's Treating</u> <u>Physician</u>

The special guardian produced Dr. Rajat Mukherji, Jane Doe's treating physician. He testified that he is a board-certified internist and a fellow [***25] in pulmonary and critical care medicine. Presently, he is chief of pulmonology in the Department of Medicine at Kingsbrook Jewish Medical Center, where he treats patients in the ventilator and intensive [**412] care unit. He also treats patients in the ventilator unit at Ditmas Park Nursing and Rehabilitation Center and Rutland Park Nursing Home, both of which are affiliated with Kingsbrook.

bradycardia multiple diagnoses (loss of oxygen), which resulted in cessation of blood flow to the brain. He indicated that she is treated for frequently. however, if [***26] needed, he will visit her more month, where he Generally, he has two formal visits with Jane Doe every tract, [****10] hypertension, distention of megacolon, condition can be attributable to anoxic encephalopathy Rutland Park. He indicated that Jane Doe's medical special 2012, and as her treating physician, he worked with the her admission to the Ditmas Park's ventilator unit in He testified that Jane Doe has been his patient since guardian to have Jane Doe transferred to മ (slow heartbeat), the gastrointestinal prepares abdomen including cardiomyopathy with and seizure lengthy chart notes, and metabolic condition gastrointestinal acidosis, disorder.

Dr. Mukherji testified that his overall role is to keep Jane Doe alive and stated that her treatment regimen includes a daily alkaloid to prevent the buildup of acids in the body; and that to prevent her from filling up with feces, laxatives are regularly given to her to keep the

function or cognitive ability. (**53 Misc 3d at 845) have reflexes, they are not evidence of hemispheric sensations of any kind. He explained that while she may totally unaware of what is happening outside and of comprehend that her eyes are open. Cognitively, she is actually have sleep/wake cycles, she is unable to indicated that while Jane Doe can open her eyes and abdomen due to the sluggishness of her bowels. He inward. and fingers are clenched, and her feet are deviated cleaned every shift and put back in again. Her hands receive oxygen from a ventilator, while at the same time electrolyte abnormalities, are treated as they occur. periodic permitting suctioning of the tube which has to be Jane Doe also has a tracheotomy enabling her to going. She experiences chronic muscle spasms, bronchial Other diagnoses, such as seizures, distention of her spasms, and

[*845] Dr. Mukherji agreed with [***27] the findings contained in Dr. Posner's affirmation and medical report which found that Jane Doe has no orientation to noise, no response to threats, and no spontaneous movement of the extremities. He also agreed with Dr. Posner's findings, based on the magnetic resonance imaging (MRI), that Jane Doe has suffered a major loss of brain tissue consistent with the long-term effect of anoxic encephalopathy. Citing Dr. Posner's finding that there is no basal ganglia on the MRI, Dr. Mukherji testified that this finding suggests deep-seated damage to the brain, since the basal ganglia are structures above the brain stem which are essential to brain stem function.

Dr. Mukherji opined, with a reasonable degree of medical certainty, that Jane Doe is permanently unconscious and in a persistent vegetative state.

respiratory system damage due to the effects of anoxic brain stem function, there is brain stem, spinal cord, and explained [**413] that even though Jane Doe may have community regarding whether or not a patient in this examination that there is a dispute in the medical noted that the major reason for prescribing Tylenol is for fever, if it occurs, and acknowledged on redirect Jane Doe may be in pain. At the same time, he also the right to administer [***28] Tylenol if they feel that grimacing. He indicated that the treating nurses have that Dr. Yellin's notes states that she did show some grimacing (as an indication of pain), he acknowledged While he has never personally observed Jane Doe pain, thus, it is difficult to measure her being in pain. Doe does not have the cognitive ability to recognize On cross-examination, Dr. Mukherji testified that Jane should receive pain medication.

encephalopathy. While she can exhibit sensory reflexes in response to stimuli, she is unaware that any form of stimulation is taking place.

Although Jane Doe was previously weaned off the ventilator, Dr. Mukherji testified that, at the present time she is unable to be weaned off the ventilator, in any measure, due to the weakening of her diaphragm and disuse atrophy. According to Dr. Mukherji, Jane Doe's decreased functionality demonstrates that her overall medical condition has deteriorated. In response to the court's inquiry as to the life expectancy of Jane Doe given her medical condition, [*****11] Dr. Mukherji responded that such a patient can generally survive about 7 to 10 years, and added that [***29] "it's surprising that she has survived this long." [**53 Misc 3d at 846]

[*846] Fern Finkel, Esq., Special Guardian 13

D., Julia, Yakov, Anna, and Igor, and telephone interviews with Jacqueline Kadanoff, Esq., and Drs. Doe had been a patient for six years prior to her transfer current and prior Court Examiner. Court Evaluator, Freida Rosengarten, and with the Salzman, Dory Salem and Tzvi Saperstein, Yellin. She also spoke with attorneys Lisa Boranian, Ira to Ditmas documents filed in this proceeding. She also conducted reviewed Jane Doe's medical records, as well as the prognosis, functional ability, relationships, which included an assessment of Jane Doe's diagnosis, cause. She testified that in August 2013, the court Rajat [***30] Mukherji, Jerome Posner, and Joseph Additionally, Ms. Finkel conducted interviews with John member of a patient who shared a room with Jane Doe. respiratory interviewed nurses, aides, nutritionists, social workers, interviews of staff at Resort Nursing Home, where Jane history. In this regard, Ms. the final order, she undertook a thorough investigation pursuant to the final order. As part of her duties under appointed her to be the special guardian for Jane Doe Ms. Finkel testified in opposition to the order to show Park in late 2012. At Ditmas Park, she therapists, receptionists Finkel stated that she and a family and

Ms. Finkel responded affirmatively when asked if she had made the necessary investigative inquiries to invoke surrogate decision-making under <u>PHL §§2994-d</u> [4] and (5). Ms. Finkel stated that her first inquiries were

¹³ Ms. Finkel's testimony also includes reference to the report dated November 15, 2013.

made of the five people who knew Jane Doe prior to the incident—her husband, daughter, parents and brother. Of these five family members, John D. was the only person who affirmatively responded that Jane Doe had a conversation with a friend regarding her end-of-life wishes. However, the friend's name was not provided by John D., or his attorney. Ms. Finkel concluded that there was insufficient proof of what Jane Doe's wishes would be regarding health care decision-making. Ms. Finkel also inquired about Jane Doe's religious and moral beliefs pursuant to PHL_\$2994-d_[4][a][i]. After speaking with Jane Doe's family, Ms. Finkel determined that Jane Doe was born into the Jewish faith but was not religious and not someone who would be bound by strict tenets of orthodoxy.

Since Jane Doe's wishes [***31] could not be ascertained, Ms. Finkel testified that the next line of her investigative inquiry was to [**53 Misc 3d at 847] [*847] determine Jane Doe's best interests pursuant to PHL §2994-d [4](a)(ii), in which she conducted interviews with Ditmas Park medical and nursing personnel, together with family members. Further, she personally visited Jane Doe and [**414] reviewed Jane Doe's medical chart and consulted with Jane Doe's treating physician, and consulted with Drs. Posner and Yellin to obtain independent medical opinions.

recovery, or of restoration to function at any level. life-sustaining treatment because she is permanently is not in Jane Doe's best interests to continue receiving consistent with the report, that she met the criteria for a surrogate decision under <u>PHL §2994-d [5](a)(i)</u> since it Drs. Mukherji, Posner, and Yellin. Ms. Finkel testified, that Jane [***32] Doe is in a persistent vegetative state Additionally, Ms. Finkel testified that she determined person would not want to be in Jane Doe's condition. condition would want and found that a reasonable interests to what a reasonable person in Jane Doe's respond to stimuli. She analogized Jane Doe's best not make eye contact, manner, does not follow commands or directions, does conscious movements, is unable to communicate in any Ms. Finkel [****12] found that Jane Doe makes no unresponsive when asked to blink her eyes or squeeze touching her face and hand. Jane Doe was similarly no response after calling Jane Doe by name, and During her bedside visits with Jane Doe, she received Finkel's hand. Based on these initial observations, permanently unconscious after consulting with with no and does not meaningfully reasonable expectation

Ms. Finkel also found that further medical treatment

Jane with accepted medical standards. reasonable degree of medical certainty in accordance has no expectation of meaningful recovery to a 3d at 848} [*848] Doe is permanently unconscious and Posner, and Yellin, who concurred that Jane (** 53 Misc Ms. Finkel also cited the opinions of Drs. Mukherji, treatment [***33] would be burdensome to Jane Doe, result of suctioning. In finding that further medical two hours as a result of being on the respirator, or, as a movement, and noted that Jane Doe is moved every perspiring to stop. Further, Ms. Finkel also testified that procedure for her face to stop flushing particular, that it would take considerable time after this evidenced by distention of the abdomen. She noted, in hyperventilates and perspires after her daily enema, copious detail how Jane Doe recoils, spasms, contracts, would be an extraordinary burden to Jane Doe under which is given to treat her gastrointestinal symptoms, PHL §2994-d/5](a)(ii). The special guardian described in Doe grimaces and recoils with any type and the ♀

The results of Ms. Finkel's investigation are contained in the report dated November 15, 2013, in which she indicated her intent to withdraw life-sustaining treatment from Jane Doe pursuant to PHL §§2994-d [4] and <a href="[5]. Thereafter, Ms. Finkel testified that she proceeded to make the arrangements to implement her decision which included service of the seven-day notice on all interested parties and informing Ditmas Park. Ms. Finkel also testified that she contacted attorneys Ira Salzman and Tzvi Saperstein, as attorneys for Yakov, Anna, and Igor regarding the decision.

intention to withdraw life-sustaining treatment from Jane date. No objections to the transfer were raised by either to [***34] carry out her decision. Ms. Finkel called Mr. Jane Rosengarten, Court Examiner Shoshana Myerson, and David Gibbs, Ira Salzman, Jacqueline Kadanoff, and Park to Rutland Park, and on December 6, 2013, Ms. 4, [**415] 2013, Jane Doe was transferred from Ditmas the transfer and Mr. Saperstein to advise of the transfer Salzman to obtain the consent of the co-guardians for consulting Dr. Mukherji, the special guardian learned Ditmas Park would not honor her decision to withdraw Upon advising Ditmas Park of her decision under PHL Lisa Boranian, Doe on Yakov and Anna, attorneys Tzvi Saperstein, Finkel stated that she served a seven-day notice of her attorney on behalf of their clients. On December Thereafter, Jane Doe was transferred to Rutland Park that Rutland Park would not object to her decision. §§2994-d [4] and (5), Ms. Finkel was informed that Doe's life-sustaining treatment. However, after as well as, Court Evaluator Frieda

the administrator of Rutland Park.

made up her mind and was not going to change it. meeting was canceled because Ms. Finkel had already the family meeting, but, Yevgeniya did not show up. Instead, Yevgeniya left a message stating that the Finkel arranged to meet with Yevgeniya the day after meeting did not change her findings. However, Ms. responsiveness. Ms. Finkel testified that the family believed that Jane Doe, at times, exhibits signs of room, where it lasted about three hours. Contrary to Ms. became heated and had to be moved into a meeting with Yakov, Anna, Finkel testified [***35] that she had a bedside meeting request for a bedside visit, along with Yevgeniya's request for a meeting. On December 11, 2013, Ms. due to the gravity of her decision, she granted Bella's information presented to her as of November 15, 2013, decision as surrogate was made based on all the and for the first time, she was contacted by Igor's wife, Finkel testified that she was [****13] contacted by Bella, Yevgeniya. While Ms. Finkel acknowledged that her A few days after the seven-day notice was served, Ms [*849] {**53 Misc 3d at 849}Finkel's findings, the family and Bella. The meeting quickly

On cross-examination, Ms. Finkel stated that there was no ethics committee review of her decision, nor did Jane Doe have a health care proxy.

Discussion

Issue Presented

In the case at bar, the court must determine whether the special guardian's decision to withdraw life-sustaining treatment from Jane Doe complies with the FHCDA, and whether said decision constitutes an abuse of discretion.

Since the enactment of the FHCDA, the majority of cases interpreting the statute involve infants and developmentally disabled patients, who have never had decision-making capacity (In re Goldstein, 99 AD3d 1233, 951 N.Y.S.2d 443 [4th Dep't 2012]; [****36] In re Northern Manhattan Nursing Home, 32 Misc. 3d 754, 928 NYS2d 810 [Sup. Ct., New York County, 2011]; In re Erie County Medical Center Corp. ex. Rel. Norsen, 33 Misc. 3d 1208[A], 939 NYS2d 740, 2011 NY Slip Op 51820[U] [Sup. Ct., Erie County, 2011]; Matter of Restaino (AG), 37 Misc 3d 586, 950 N.Y.S.2d 687 [Sup. Ct. Nassau County, 2012]). In In re Zornow, 31 Misc. 3d

clarified 34 Misc. 3d 1208[A], 943 NYS2d 795, 2011 NY Slip Op 52455[U] [Sup. Ct., Monroe County, 2011], a case with similar facts to the case at bar, the court found that under the FHCDA, the ward was obligated to receive artificially administered food and water¹⁴ based on the ward's religious and moral beliefs coupled with the fact that there was no showing of permanent unconsciousness, life expectancy of less than six months, and irreversible condition. In the within matter, unlike Zornow, the special guardian contends that Jane Doe's religious and moral beliefs cannot be ascertained, despite claims to the contrary by family{**53 Misc 3d at 850} [*850] members. Thus, this is a case of [**416] first impression as the court must review the special guardian's decision under PHL §2994-d [4] and (5).

New York Law and the Withdrawal of Life-Sustaining Treatment

should be done with his own body (Schloendorff v adhered to the principle that every human being of adult Under the common law, "[n]o right [was] held [to be] more sacred . . . than the right of every individual to the years and sound mind has a right to determine what common-law right, and the courts have consistently unquestionable authority of law." (*Union Pacific Ry Co. V* Botsford, 141 U.S. 250, 251, 11 S. Ct. 1000, 35 L. Ed. of Storar, Grace Plaza of Great Neck, Inc. v Elbaum 82 NY2d 10, 623 N.E.2d 513, 603 N.Y.S.2d 386, supra; to consent to or decline life-sustaining treatment (Matter a patient having decision-making capacity, has the right Dept 1987). Thus, it is well settled law in this state that of Great Neck, Inc. v Elbaum, 82 NY2d 10, 623 N.E.2d 551 N.E.2d 77, 551 N.Y.S.2d 876 [1990]; Grace Plaza L. Ed. 2d 153 [1981]; Fosmire v Nicoleau, 75 NY2d 218, Society of NY Hosp., 211 NY 125, 105 N.E. 92 [1914]; restraint or interference of others, unless by clear and possession and control of his own person, free from all County Med. Ctr., 129 AD2d 1, 516 N.Y.S.2d 677 [2d 266 [1981], cert denied 454 U.S. 858, 102 S. Ct. 309, 70 In re Storar, 52 NY2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 734 [1891]) New York [***37] law is based on this 603 N.Y.S.2d 386 [1993]; Delio v Westchester

¹⁴ Pursuant to <u>PHL</u> §2994-0 (5)(d) providing nutrition and hydration orally, without reliance on medical treatment, is not health care under this statute and is not subject to this article. However, under the statute artificially administered food and water by surgical procedure can be considered life-sustaining treatment.

<u>Delio v Westchester County Med. Ctr., supra</u>). This right has been recognized by the legislature (<u>PHL §§2504</u>, <u>2805-d</u>; <u>CPLR §44401-a</u>).

of life supports under the circumstances like those patient's "firm and settled commitment to the termination clear and convincing evidence means proof of the the seminal case of [*851] Matter of established by clear and convincing evidence. The patient, who lacked capacity since birth could not be which would end his life, since the preferences of the retarded man to discontinue blood [***38] transfusions Court denied the request of the mother of a mentally expressed a desire to forgo such measures. By contrast, in *Matter of Storar*, a companion case, the convincing evidence that the patient, when competent, request of a patient's guardian to discontinue the upon a showing of clear and convincing evidence of the County Med. Ctr. ex. rel. O'Connor, 72 NY2d 517, 531 Court further expounded on this evidentiary standard in patient's respirator since it was established by clear and circumstances (Matter of Storar). In Matter of Eichner patient's wishes to refuse treatment under specific sustaining treatment can be withdrawn or withheld only N.E.2d 607, 534 N.Y.S.2d 886 [1988], by holding that Ct. 309, 70 L. Ed. 2d 153 [1981], the Court approved the For patients lacking decision-making capacity, however, (52 NY2d 363 [1981], cert denied 454 U.S. 858, 102 S. Court of Appeals has consistently ruled that life-Westchester

amendments gave surrogates decision-making [***39] individuals lacking capacity, and are commonly referred both provide a third party with decision-making ability for the passage of New York's do not resuscitate law¹⁵ and health care proxy law,¹⁶ respectively, [**417] which Task Force recommendations served as the basis for Force on Life and Law (Task Force) in 1985. The initial medical technology, convened the New York State Task moral and legal considerations arising from decisions to need to develop public policy regarding the ethical, Shortly after the Court of Appeals issued its ruling in Eichner and Storar, Governor Cuomo, recognizing the and/or prolong life due to advancements in advance ᅙ withhold directives. 익 withdraw Subsequent legislative life-sustaining

treatments under these statutes. 17

became a reality.²¹ debate and compromise the passage of the FHCDA submitted to the legislature, and after 17 years proposals [***40] on surrogate decision-making were sustaining{**53 Misc 3d at 852} [*852] treatment."20 others close to [a] only the legislature can authorize family members and others close to [a] patient to decide about lifeestablished by the New York [State] Court of Appeals, Force found that based on the "legal precedents advanced directives]."19 At the same time, the Task choices posed by decisions for these patients [without the do-not-resuscitate and health care proxy laws, New addressed this issue in its 1992 report, When Others treatment under specific circumstances. The Task Force remained unchanged—clear and convincing evidence of York State took major strides to address the hard The Task Force acknowledged that "[w]ith passage of Must Choose: Deciding for Patients Without Capacity. 18 the patient's wishes to refuse the same or similar capacity to forgo life-sustaining treatment, the law without advance directives and lacking decision-making Notwithstanding these legislative initiatives, for patients this backdrop, the

Family Health Care Decisions Act

The FHCDA was signed into law on March 16, 2010.²²

¹⁷ <u>Pub. Health Law, Article 29-B</u>, as amended L.1991, c 370 §4 to 8, L.2010, C. 8, §§10 to 12, eff June 1, 2010; <u>Pub. Health Law, Article 29-C</u>, as amended L1991, c. 370, §18, L.2004, C. 230, §27, eff July 27, 2004.

¹⁸ New York State Task Force on Life and the Law, When Others Must Choose: Deciding for Patients Without Capacity (Mar. 1992).

¹⁹ Id. at ix (Executive Summary)

²⁰ Id. at p. 74.

²¹ In 1993 the Task Force's proposals were sent to the legislature. Despite strong support among a diverse group of organizations, opposition to the FHCDA by special interest groups impeded its passage. Over the course of 17 years the bill was introduced in the Senate, only to be stymied in committee. In 2009, Senator Thomas Duane (D-Manhattan) became Chair of the Senate Health Committee and introduced a compromise bill that resulted in the passage of the FHCDA.

¹⁵ NY Pub. Health Law §§ 2960-2978.

¹⁶ NY Pub. Health Law §§ 2980-2994

²²L 2010, ch 8, § 2, adding Public Health Law art 29-CC

determination by a [****14] physician (PHL §2994-c). Public Health PHL §2994 [1] sets forth, in order of surrogate for the purpose of surrogate decision-making: priority, a list of persons who can be designated as upon the appointment of an article 81 guardian²⁴ for incapacity can be made pursuant to [**418] court order, treatment.²³ authorize the withholding or withdrawal of life-sustaining limits the circumstances in which a surrogate may to the substituted judgment/best interests standard; and health care decisions; requires the surrogate to adhere who have not otherwise appointed an agent to make health care decisions for patients who lack capacity and provides for the selection of a surrogate decisionmaker nursing homes (L 2010, ch 8, § 1). The statute sets forth and without advanced directives in hospitals and applicable for patients lacking decision-making capacity New York law" and establish a decision-making process from a priority list; empowers such surrogates to make The intent of the statute is to "fill[] a gap that remains in requirements for determining [***41] incapacity; care decisions or Under the statute, a determination of pursuant to മ medical

- 1. A court appointed guardian;
- A spouse or domestic partner (as defined in the FHCDA); {**53 Misc 3d at 853}
- 3. A son or daughter (18 years of age or older);
- 4. A parent;
- 5. A brother or sister (18 years of age or older); and
- A close friend.

[*853] If a person with higher priority on the list declines to act, then the next person on the list, in order of priority, has the right to act. In order for a surrogate to make a decision regarding life-sustaining treatment the statutory mandate is twofold and requires that the criteria in both PHL-8822994-d/4/] and (5) be met.

<u>PHL §2994-d [4]</u> provides that health care decisions be made:

"(a) (i) in accordance with the patient's wishes,

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including the patient's religious and moral beliefs; or

would wish to consider. reasonable person in the patient's circumstances condition and such other concerns and values as a patient's patient's health or functioning; the relief of the preservation, improvement or restoration of the and uniqueness of every person; the possibility and interests shall include: consideration of the dignity interests. An assessment of the patient's best ascertained, in accordance with the patient's best extent "(ii) if the patient's wishes are not reasonably known cannot of preserving the suffering; and any with reasonable patient's medical [***42] diligence

"(b) In all cases, the surrogate's assessment of the patient's wishes and best interests shall be patient-centered; health care decisions shall be made on an individualized basis for each patient, and shall be consistent with the values of the patient, including the patient's religious and moral beliefs, to the extent reasonably possible." (Emphasis added.)

PHL §2994-d [5] further provides that

"[i]n addition to the standards set forth in subdivision four of this section, decisions by surrogates to withhold or withdraw life-sustaining treatment . . . shall be authorized only if the following conditions are satisfied, as applicable:

"(a) (i) Treatment would be an extraordinary burden to the patient and an attending physician determines, with the independent concurrence of{***53 Misc 3d at 854} [*854] another physician, that, to a reasonable degree of medical certainty and in accord with accepted medical standards, (A) the patient has an illness or injury which can be expected to cause death within six months, whether or not treatment is provided; *or* (B) the patient is permanently unconscious; *or*

"(ii) The provision [***43] of treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the patient has an irreversible or incurable condition, as determined by an attending physician with the independent concurrence of another physician to a reasonable [**419] degree of medical certainty and in accord with accepted medical standards." (Emphasis added.)

In the case at bar, it is undisputed that the FHCDA applies to Jane Doe. The court by order and judgment

²³ For a comprehensive discussion of the FHCDA, see Robert N. Swidler, *New York's Family Health Care Decision Act*, NY St Bar Assn J 18 (June 2010).

²⁴ Article 81 of the Mental Hygiene Law was also amended, in 2010, to direct that health care decisions by a personal needs guardian be made in accordance with the standards set forth in the FHCDA (Mental Hygiene Law § 81.22 [a] [8] [i], as amended by L 2010, ch 8, § 25 [eff June 1, 2010]).

53 Misc. 3d 829, *854; 37 N.Y.S.3d 401, **419; 2016 N.Y. Misc. LEXIS 3174, ***43; 2016 NY Slip Op 26278, ****14

a nursing home as a result of her incapacity and has no making capacity. 25 Additionally, Jane Doe is a patient in Mukherji, and the concurring report of Dr. Yellin, further advance directives. establishes that Jane Doe presently lacks decisiontestimony evidence produced at the hearing, which includes the incapacitated dated July 11, 2006 adjudged Jane Doe to be an of Jane Doe's attending physician, Dr. person. The uncontroverted medical

permissible (see PHL §§2994-d [4](b) statutory purpose of Ms. Finkel, as special guardian, is consistent with the act as Jane Doe's surrogate pursuant to PHL §2994-d delegated his statutory rights to the special guardian to terms of the stipulation of settlement with Igor, John D. guardian and spouse of Jane Doe. However, under the two highest positions on the priority list, personal needs [2] In the [***44] context of PHL §2994-d and MHL to act as Jane Doe's surrogate, since he stands in the The court finds that John D.'s delegation of rights to Article 81, John D. is vested with the statutory authority the FHCDA, and is thus,

as to whether to withdraw life-sustaining treatment. Jane [***45] Doe's religious beliefs were not instructive these findings, Ms. Finkel properly determined that This finding was not disputed by the movants. Based on temple, observe the Sabbath or keep a kosher home. but that she is non-observant, since she did not attend investigation revealed that Jane Doe is Jewish by birth, this regard, Ms. Finkel first considered Jane Doe's reasonably ascertained. The record indicates that, in whether first determine, the FHCDA, {**53 Misc 3d at 855} [*855] the court must withdraw life-sustaining treatment from Jane Doe under [3](b) In reviewing the special guardian's decision to and moral beliefs. The results of her Jane pursuant to <u>PHL</u> Doe's end-of-life end-of-life wishes can be §2994-d [4](a)(i),

Additionally, while the special guardian did not delineate finds that it is not probative regarding this inquiry. testimony of Anna, Jane [****15] inferred. In Doe's values from which her end-of-life wishes could be Further, the special guardian sought to ascertain Jane specific this regard, results of her interview with Frieda the court considers Doe's mother, and the

> properly determined that the information obtained from Jane Doe's end-of-life wishes. the Court Evaluator's report was insufficient to infer Based on the evidence before the court, Ms. Finkel differences with members of her nuclear family unit. indicates that Jane Doe proceeding), a review of the Court Evaluator's report, 26 Rosengarten (the Court Evaluator valued family, the despite

contact information. Ms. Finkel was not provided with the friend's name or friend about her wishes. Upon further inquiry, however, individual to provide relevant information, by informing response to Ms. Finkel's inquiries, John D. was the only attorneys regarding Jane Doe's end-of life wishes. In the movants, the family, and [***46] their respective Ms. Finkel testified credibly that she made inquiries of expressed her end-of-life wishes prior to her incapacity. interested parties to determine if Jane Doe specifically her of a [**420] conversation Jane Doe had with a Next, the special guardian conducted interviews with all

conversations with Jane Doe, the first "possibly [in] the beginning of October 2003," and the second deliberation and level of persistent commitment that the with their indefiniteness and sporadic nature, lack the under which these conversations took place coupled family member. Taken as a whole, the circumstances be precipitated by the plight of a wheelchair bound around 1994, again on a park bench, and appeared to Semen's claimed conversation with Jane Doe took place bench and appeared to be a knee-jerk reaction to conversations with Jane Doe took place on a park of time, but that "[she] didn't know specifics." Raisa's conversation took place [***47] during the same period in a hospital setting, and took place "around 1999, plus, vague recollection of when these conversations took any circumstances. The witnesses, however, have a continue to live and wanted her life to be saved under Raisa's adversity to doctors and medicine. Similarly, minus a year or two." Raisa stated that she had two place. The conversation with Yevgeniya was purportedly 3d at 856} [*856] is that, if sick, Jane Doe wanted to substance of their respective conversations, {**53 Misc coincides with the service of the seven-day notice. The conversations with Jane Doe regarding her end-of-life made in response to Jane Doe's refusal to sign a DNR conversations, While Yevgeniya, Semen, and Raisa each testified as to the court questions the veracity the disclosure of which curiously of these

reach an informed decision." and risks of and alternatives to proposed health care, and to consequences of proposed health care, including the benefits PHL §2994-a [5] defines decision-making capacity as "the bility to understand and appreciate the nature and

dated February 13, 2016. ²⁶ The court takes judicial notice of the Court Evaluator's report

Court relied on in *Eichner, supra*, to authorize the discontinuance of the respirator for a patient in a vegetative state. Accordingly, the court finds that these conversations are insufficient to establish that Jane Doe articulated her end-of-life wishes to Yevgeniya, Semen, or Raisa.

The court also rejects the claims of the movants who contend that the special guardian failed to consider Jane Doe's end-of-life wishes. The credible evidence establishes that due to the gravity of her responsibility, the special guardian made her continued availability known to the attorneys, family members, and medical personnel [***48] throughout her investigation. To this end, even after the special guardian issued the report dated November 15, 2013, she agreed to a bedside meeting at Rutland Park, with Yakov, Anna and Bella. Moreover, both Semen and Raisa fail to explain why these conversations with Jane Doe were not brought to the attention of [****16] Jane Doe's family members, any attorney for the family members, or the special guardian.

to participate in interviews that Ms. Finkel had with the surrogate decision-making for Jane Doe and chose not consented to the appointment of a special guardian for was also personally aware that her husband, Igor, canceling the meeting. The court notes that Yevgeniya the{**53 Misc 3d at [*857] 857} email sent to Ms. Finkel opportunity to have a meeting with Ms. Finkel to discuss Jane Doe's wishes, and failed to mention any family, which included her husband, Igor. information about Jane Doe's end-of-life wishes in incredible. of Jane Doe's life support to be disingenuous and Finkel "had made up her mind" regarding the withdrawal Additionally, the court finds Yevgeniya's claims that Ms. Yevgeniya summarily rejected the

Based on the credible evidence adduced at the hearing, together with the results of the special [***49] guardian's investigation, the court finds that the special guardian correctly determined that Jane Doe's end-of-life wishes could not be reasonably ascertained pursuant to PHL §2994-d [4](a)(i).

[**421] The court must now review, pursuant to <u>PHL §2994-d [4](a)(ii)</u>, whether Ms. Finkel's decision to withdraw life-sustaining treatment is in Jane Doe's best interests. <u>PHL §2994-d [4](a)(ii)</u> provides that

"[a]n assessment of the patient's best interests shall include: consideration of the dignity and uniqueness of every person; the possibility and extent of preserving the patient's life; the preservation,

improvement or restoration of the patient's health or functioning; the relief of the patient's suffering; and any medical condition and such other concerns and values as a reasonable person in the patient's circumstances would wish to consider."

application of the best interests standard surrogate decision-making set forth in the FHCDA. recommendations contained therein served as {**53 patient.30 The Task Force report is instructive on the who have a responsibility to further the well-being of the surrogate must consult with health care professionals understood to reflect a societal consensus, or a "reasonable person," choosing as most people would Misc 3d at 858 [*858] a basis for the criteria for the decisionmaker;29 and to make this assessment the possible from the perspective of the patient, not that of best interests should be determined as far [***50] as and burdens of available treatment options; 28 a patient's report, under the best interests standard, the surrogate choose for themselves.²⁷ According to the Task Force's is required to objectively assess the relative benefits The application of the best interests standard, is often

incompatible with any degree of consciousness. Similarly, Dr. Yellin, upon examination, diagnosed Jane vegetative state. He opined to a reasonable degree of Doe with anoxic encephalopathy resulting in a persistent MRI which shows extensive tissue destruction that is evidence of even minimal cognitive function; and (3) the been in a persistent [***51] vegetative state for several Doe's [****17] medical history established that she has recovery. Dr. Posner based his conclusion on: (1) Jane in a persistent vegetative state without possibility of an MRI performed in July of the same year, Jane Doe is together with Dr. Mukherji, a board-certified internist and special guardian consulted Dr. Jerome B. Posner and In the case of Jane Doe, the record establishes that the years; (2) his examination of Jane Doe in 2012, and his review of reasonable degree of medical certainty, that based on Jane Doe's treating physician. Dr. Posner opined to a Dr. Yellin, both of whom are board-certified neurologists an examination of Jane Doe found no

²⁷ New York State Task Force on Life and the Law, When Others Must Choose: Deciding for Patients Without Capacity 35 (Mar. 1992).

²⁸ ld.

²⁹ *ld.* at p. 55

³⁰ *Id.* at p. 109

medical certainty that Jane Doe is permanently unconscious and her diagnosis is permanent and irreversible. The opinions of both these consulting physicians are consistent with Dr. Mukherji who also opined to a reasonable degree of medical certainty, that Jane Doe's condition is permanent and that there is no treatment modality that would improve her physical or mental condition.

sign of consciousness or will improve with rehabilitation. objective medical evidence that Jane Doe exhibits any the contrary, the movants have failed to provide any does not make eye contact. Despite their contentions to manner, does not follow commands or directions, and caretakers; she is unable to communicate in any do not move except in spasm or to recoil, or if moved by state; does not make conscious movements, her limbs exists in a vegetative and permanently unconscious exhibits no conscious action or participation in life; stimuli and has been ventilator dependent [**422] and recoiling from pain; she is unresponsive to meaningful which manifests in physical spasm, hyperventilation or to any meaningful stimuli, other than discomfort stimuli understanding, comprehension, awareness or reaction determined Based on the uncontroverted medical evidence and persistent [***52] of her investigation, the that Jane vegetative state since 2003; Doe lacks participation, special guardian

In discussing the application of the best interests standard to surrogate decision-making, in its publication, *Ethics and*{**53 Misc 3d at [*859] 859} *Clinical Practice Guided by the Family Health Care Decisions Act*, ³¹ the New York City Health and Hospitals Corporation Bioethics Council (HHC Bioethics Council) explains that "[m]edical care often imposes pain and suffering in exchange for a promised benefit, amelioration of prior pain or chance of enhanced quality of life. But these benefits may not be available to balance the burdens of treatment." Sadly, in the case of Jane Doe, the special guardian's findings establish that there are no physical or mental benefits [***53] associated with medical intervention by continuing life-sustaining treatment for

Jane Doe. Prolongation of life for Jane Doe could only mean that she is hooked up to a mechanical ventilator and monitors; receives artificial nutrition and hydration through a feeding tube; is subject to physical intrusion on a daily basis to ensure the functioning of her vital organs, and is wholly dependent on others for the most intimate of bodily functions. As Ms. Finkel recounted in her testimony,

"I cannot imagine any reasonable person having spent one time with her, let alone the seven visits that I made, anybody ever wanting to be in that condition without an expectation or really any expectation of a meaningful recovery. Her [Jane Doe's] life is lying in [****18] a bed with tubes and suctioning, beeps and buzzes going off because her functions are constantly being thrown out of whack."

In its discussion of implementing the FHCDA, HHC Bioethics Council emphasizes that "[i]t is especially important in considering the notion of 'best interest[s]' that the medical team be both honest and clear, as it is supportive and comforting." Significantly, the court notes that, Dr. Mukherji, as a health care provider under the statute, had the option of refusing to honor the special guardian's decision (see PHL §2994-n (2)(b)). Instead, upon Ditmas Park's refusal to honor the special guardian's decision, Dr. Mukherji facilitated Jane Doe's transfer from Ditmas Park to Rutland Park, where he had privileges. It can be inferred, therefore, that {**53 Misc 3d at 860} [*860] Dr. Mukherji did not oppose the special guardian's decision to have Jane Doe's life-sustaining treatment withdrawn.

[4] Based on a review of the record, the court finds that Ms. Finkel's decision to withdraw life-sustaining treatment from Jane Doe satisfies the best interests standard set forth in <u>PHL §2994-d [4](a)(ii)</u>.

The court now considers whether the special guardian's decision to withdraw [**423] life-sustaining treatment from Jane Doe complies with Public Health PHL §2994-d [5], which has two tests. Life-sustaining treatment can be withdrawn [***55] or withheld if either test is met. PHL §2994-d [5](a)(i) requires a finding that treatment would be an extraordinary burden to the patient and concurring medical opinions that the patient is permanently unconscious. Ms. Finkel's determination that Jane Doe's continued treatment on the respirator would be excessively burdensome is supported by the

³¹ New York City Health and Hospitals Corporation Bioethics Council is comprised of all the chairpersons of ethics committees at each of the hospitals and long-term care facilities of the New York City Health and Hospitals Corporation.

³² Matthew Varughese et al., Ethics and Clinical Practice [***54] Guided by the Family Health Care Decisions Act, 16 NY St Bar Assn Health L J 79 (2011).

53 Misc. 3d 829, *860; 37 N.Y.S.3d 401, **423; 2016 N.Y. Misc. LEXIS 3174, ***55; 2016 NY Slip Op 26278, . ****18

evidence. This is a subjective determination to be made by the surrogate.³⁴ By specifying the part of the determination that the physicians have to make, the statute implicitly leaves it up to the surrogate to make the other part of the determination. Additionally, consistent with the statute, concurring medical opinions by Dr. Mukherji, Jane Doe's treating physician, and Dr. Yellin, establish to a reasonable degree of medical certainty that Jane Doe is permanently unconscious.

circumstances to continue treatment. inhumane or extraordinarily burdensome under the or [****19] current treatment involves such pain, certainty that (** 53 Misc 3d at 861) [*861] Jane Doe's and Yellin did not opine to any degree of medical state is able to feel pain (id.). Additionally, Drs. Mukherji establish whether a patient in a persistent vegetative the evidence relied upon by the special guardian did not extraordinarily burdensome under the circumstances," would involve such pain, suffering or other burden that it evidence to establish that "[t]he provision of treatment standards. another physician to a reasonable degree of medical attending physician with the independent concurrence of irreversible or incurable condition, as determined by an deemed inhumane or extraordinarily burdensome under suffering or other burden that it would reasonably be that the provision of treatment would involve such pain, Public Health PHL §2994-d [5](a)(ii) requires a finding circumstances reasonably and in other burden that it would be reasonably While the special guardian and [***56] accord with ф deemed the accepted medical patient has inhumane submitted suffering 으 an

sustaining [***57] treatment from Jane Doe. special $\underline{\$2994-d}$ [5](a)(i) but does not comply with the criteria set forth in \underline{PHL} $\underline{\$2994-d}$ [5](a)(ii). 35 However, the sustaining treatment from Jane Doe complies with PHL [5] Based on a review of the record, the court finds that special guardian's guardian's alone compliance with sufficient decision to ರ withdraw withdraw PHL §2994-d ≣felife-

Conclusion

variety of safeguards. 36 or withholding of life-sustaining treatment, subject to a surrogates to make decisions regarding the withdrawal paradigm. In fact, [**424] the majority of jurisdictions surrogate consent statutes have become the new representative assemblies" (id. at 269). Accordingly, in the decades since the initial Task Force report, timing of death (see <u>Cruzan v. Dir., Mo. Dept. of Health,</u> 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 technology which effect the prolongation of life and the the issues raised by the have adopted a variation of such statutes permitting Supreme Court that "[b]road policy questions bearing on acknowledged the view expressed by the United States State courts throughout the nation have grappled with and death are more In response, state legislatures 2841, advancement properly addressed 으 medical

{**53 [*862] Misc 3d at 862}The FHCDA, New York's

³⁴ New York State Bar Association, Frequently Asked Questions About the Family Health Care Decisions Act, http://www.nysba.org/CustomTemplates/content.aspx?id=264 62 (last revised Jan. 9, 2011).

³⁵An ethics committee review is not required because the special guardian's decision to withdraw life-sustaining treatment does not comply with <u>PHL §2994-d [5](a)(ii)</u>.

Washington, Wash. Rev. Code Ann. §7.70.010 to .160; Wes Dakota, South Carolina, S.C. Code Ann. §44-66-10 to -80; South Carolina, N.C. Gen. Stat. §90-320 to -328; North Dakota, N.D. Cent. Code §23-12-01 to -19; Ohio, Ohio Rev. Code Ann. New Mexico, N.M. Stat. Ann. 1978 §§24-7A-1 to -18; North Montana, Mont. Code Ann. §§50-9-101 to -111; Nevada, to -626; Michigan, Mich. Comp. Laws Ann. §§333.5651 to Rev. Stat. §§311.621 to .644; Louisiana, La. Rev. Stat. Ann. §40:1299.58.1 to .10; Maine, Me. Rev. Stat. Ann tit. 18-A, §5to -16; Idaho, Idaho Code §§ 39-4501 to -4515; Illinois, Florida [***58] , Fla. Stat Ann. §§765.101 to .113; Georgia, Ga. Delaware, Del Code Ann, 16 Del. Code §§2501 to 2518; Connecticut, Conn. Gen. Stat. Ann. §§19a-570 to -580g; 3201 to -3231; Arkansas, Ark. Code Ann. §§20-6-101 to Stat. §§13.52.010 to .395; Arizona, Ariz. Rev. Stat. Ann. §§36-36 Alabama, Ala. Code 1975 §§22-8A-1 to -14; Alaska, Alaska §75-2a-101 to -125; Virginia, Va. Code §54.1-2981 to -2993; Safety] Code Ann. §166.031 to .053; Utah, Utah Code Ann Tenn. Code Ann §68-11-1801 to 1815; Texas, Tex. [Health & Pennsylvania, Pa. Consolidated Stat. tit. 20, §§5451 to 5461; §2133.01 to .16; Oregon, Or. Rev. Stat. §§449.535 to .690; NEW HAMPSHIRE, RSA 137-J; .5661; Mississippi, Miss. Code Ann. §§41-41-201 to -303; 801 to -817; Maryland, Md. ILCS §§ 40/1 to 40/65; Indiana, Ind. Code Ann. §§16-36-1-1 Code Ann. §§31-9-1 to -Z; Hawaii, Hawaii Rev. Stat. §§327E-1 District of Colorado, Colo. Rev. Stat. Ann. §§15-18-101 to 15-18.7-110; 14; Iowa, Iowa Code Ann. §§144A.1 to .12; Kentucky, Ky. Columbia, DC VA. Code Ann. §16-30-1 to -25; Wyoming, Codified Laws §34-12C-1 Health-Gen. Code Ann., §§5-601 Code Rev. Stat. §127.505 to .660; §§21-2201 -8; Tennessee Nev.

FHCDA, patient adequate safeguards. practices of medicine, and at the same time affords the the best interests of the patient to coexist with the best therein, is sufficient to protect against error and permits finds that the legal and medical framework of the best interests is an additional consideration. The court end-of-life wishes prior to losing capacity, the patient's has no advance directives and did not communicate his and beliefs. In circumstances where the patient [***59] assessment of the patient including his wishes, values, allows a surrogate to make decisions based on a holistic been replaced with a legal and medical framework that decisional case law which protects against error has "presumption of life" inference relied on in New York's and convincing evidentiary standard resulting from the best interests; and allows persons connected to the case to challenge a decision.³⁷ Specifically, the clear on the patient's wishes if known or else the patient's treatment; obligates the surrogate to base his decision certain nonclinical findings about the burdens of the specific clinical findings; requires the surrogate to make physician and an independent physician to safeguards and is one of the more comprehensive statutes in existence surrogate consent statute, together with the safeguards provided for as it requires the affords patients significant attending make

which the court has not taken lightly. The tragic events under the statute. proceeding to challenge the special guardian's decision Bella retained counsel and commenced the instant Yevgeniya, with the acquiescence of Yakov, Anna and the instant proceeding. On the other hand, Igor's wife, to PHL §§2994-d [4] and (5). However, neither Igor special guardian for surrogate decision-making pursuant created a familial divide. On the one hand, John D., of 2003 resulting in Jane Doe's medical condition have decision has been requested by the movants, a task [**425] Judicial [*863] $\{**53$ Misc 3d at 863 $\}$ nor his attorney appeared in and Igor consented to the appointment of a review of the special guardian's

contemplate being permanently [***60] unconscious for consciousness in the future. Thus, disability is total and suffered extensive tissue destruction of the brain which Doe is to be kept metabolically alive since she has evidence, the sole benefit of medical treatment for Jane a period of nine years and counting. Based on the Most 37 year olds like Jane Doe are unlikely incompatible ≨<u>i</u> any degree of recovering ᅙ

> of a failing organism."39 and not simply extend individual organ function in light of the patient, it must advance the health and well being, "[i]n order for an intervention to be in the best interest[s] imperative' [because it exists it must be employed]"38 should not be [****20] governed by the 'technological consistent with the spirit of the statute expressed by the functioning is no return to an even minimal level of social or human Bioethics Council: "[t]he practice of medicine possible. The court's conclusion is

no reasonable expectation of life. devoid of thought, emotion and sensation, and thus, has Jane Doe wherein she concluded that Jane Doe is consultations with Dr. Posner and numerous visits with Jane Doe, who does not oppose the special guardian's decision. The court is also guided by Ms. Boranian, counsel for Ms. Boranian's position is based

shall be "patient centered." Accordingly, in reviewing the Misc [*864] PHL§2994-d [5](e). In the face of resistance and hostility exhibited by some family members, Ms. with the statutory criteria set forth in PHL §§2994-d [4] the court is satisfied that the special guardian complied record in this tremendously sensitive and difficult matter, the FHCDA, which is that surrogate decision-making and provided notice of her decision pursuant to {**53 physicians in support of her findings under the statute two physicians as statutorily required, considered the concurring clinical opinions of not only deliberation of the results thereof. Specifically, she and (5). Finkel remained committed to enforce the clear intent of immediate family, extended family, and their attorneys, Further, she discussed her decision with Jane Doe's after conducting a full investigation and upon careful sustaining treatment from Jane Doe was made only area of elder law, Ms. Finkel's decision to withdraw lifefaith. As a long-standing practitioner and lecturer in the responsibilities as set forth in the final order in good special contend otherwise, the court finds that Ms. Finkel, as [6] It is important to note [***61] that while the movants guardian for Jane Doe, fulfilled but three

special guardian's decision to withdraw life-sustaining Based on the foregoing, [***62] the court finds that the treatment from Jane Doe complied with PHL

³⁸ New York City Health and Hospital Corporation Bioethics Council, Ethics and Clinical Practice Guided by the Family Health Care Decisions Act, supra.

Decision Act, supra ³⁷ Robert N. Swindler, New York's Family Health Care

[4] [**426] (5) [5](a)(i), and therefore, did not constitute an abuse of discretion.

Accordingly, it is hereby, ordered, that the instant order to show cause is denied in its entirety.

KATHY J. KING

End of Document



NY CLS Men Hyg § 9.60

Current through 2025 released Chapters 1-413

New York Consolidated Laws Service

Title B Mental Health Act (Arts. 7 — 11)

with a Mental Illness (§§ 9.01 — 9.64)

Mental Hygiene Law (Titles A — E)
Article 9 Hospitalization of Persons

S 9.60 Assisted outpatient treatment. [Expires and repealed June 30,

- <u>a</u> Definitions. For purposes of this section, the following definitions shall apply:
- services plan developed pursuant to article forty-one of this chapter, prescribed to treat the person's alcohol or substance abuse; supervision of living arrangements; and any other services within a local prevent a relapse or deterioration that may reasonably be predicted to result in suicide or the need for mental illness and to assist the person in living and functioning in the community, or to attempt to counseling and periodic tests for the presence of alcohol or illegal drugs for persons with a history of activities; educational and vocational training or activities; alcohol or substance abuse treatment and compliance with prescribed medications; individual or group therapy; day or partial day programming or assertive community treatment team services to provide care coordination, and may also include any of the following categories of services: medication; periodic blood tests or urinalysis to determine ordered by the court pursuant to this section. Such treatment shall include case management services (1) "assisted outpatient treatment" shall mean categories of outpatient services which have been
- of a hospital licensed or operated by the office of mental health which operates, directs and supervises (2) "director" shall mean the director of community services of a local governmental unit, or the director an assisted outpatient treatment program.
- than the county where the assisted outpatient treatment order was originally issued. community services of the county where the assisted outpatient resides, even if it is a different county (3) "director of community services" and "local governmental unit" shall have the same meanings as provided in article forty-one of this chapter. The "appropriate director" shall mean the director of
- of such individuals, and to ensure compliance with court orders. evaluate the condition or needs of assisted outpatients, to take appropriate steps to address the needs (4) "assisted outpatient treatment program" shall mean a system to arrange for and coordinate the provision of assisted outpatient treatment, to monitor treatment compliance by assisted outpatients, to
- (5) "assisted outpatient" shall mean the person under a court order to receive assisted outpatient treatment.
- (6) "subject of the petition" or "subject" shall mean the person who is alleged in a petition, filed pursuant to the provisions of this section, to meet the criteria for assisted outpatient treatment
- (7) "correctional facility" and "local correctional facility" shall have the same meanings as provided in section two of the correction law.
- (8) "health care proxy" and "health care agent" shall have the same meanings as provided in article twenty-nine-C of the public health law.

- pursuant to subdivision (f) of section 7.17 of this chapter, who is responsible for the oversight and monitoring of assisted outpatient treatment programs. (9) "program coordinator" shall mean an individual appointed by the commissioner of mental health.
- of this subdivision through the operation of joint assisted outpatient treatment programs. Nothing in this approval by the commissioner. Directors of community services shall be permitted to satisfy the provisions office of mental health may operate, direct and supervise an assisted outpatient treatment program, upon supervise an assisted outpatient treatment program. The director of a hospital licensed or operated by the local governmental units and hospitals in providing and coordinating assisted outpatient treatment. subdivision shall be interpreted to preclude the combination or coordination of efforts between and among (b) Programs. The director of community services of each local governmental unit shall operate, direct and
- person: (c) Criteria. A person may be ordered to receive assisted outpatient treatment if the court finds that such
- (1) is eighteen years of age or older; and
- (2) is suffering from a mental illness; and
- (3) is unlikely to survive safely in the community without supervision, based on a clinical determination;
- (4) has a history of lack of compliance with treatment for mental illness that has
- within the last six months, during which the person was or is hospitalized or incarcerated; or correctional facility or a local correctional facility, not including any current period, or period ending petition, at least twice within the last thirty-six months been a significant factor in necessitating hospitalization in a hospital, or receipt of services in a forensic or other mental health unit of a (i) except as otherwise provided in subparagraph (iii) of this paragraph, prior to the filing of the
- or attempts at, serious physical harm to self or others within the last forty-eight months, not (ii) except as otherwise provided in subparagraph (iii) of this paragraph, prior to the filing of the including any current period, or period ending within the last six months, in which the person was or petition, resulted in one or more acts of serious violent behavior toward self or others or threats of, is hospitalized or incarcerated; or
- mental illness that substantially interferes with or limits the person's ability to comply with expiration of the order; (a) the person has experienced a substantial increase in symptoms of order for assisted outpatient treatment that has expired within the last six months, and since the (iii) notwithstanding subparagraphs (i) and (ii) of this paragraph, resulted in the issuance of a court treatment, has undergone emergency observation, care, and treatment or has been admitted for inpatient care or has been incarcerated; recommended treatment; or (b) the person, due to a lack of compliance with recommended
- that would enable him or her to live safely in the community; and is, as a result of his or her mental illness, unlikely to voluntarily participate in outpatient treatment
- the person or others as defined in section 9.01 of this article; and treatment in order to prevent a relapse or deterioration which would be likely to result in serious harm to in view of his or her treatment history and current behavior, is in need of assisted outpatient
- or mandated treatment shall not preclude a finding that the person is likely to benefit from assisted outpatient treatment. (7) is likely to benefit from assisted outpatient treatment. Previous non-compliance with court oversight
- subject to a petition pursuant to this chapter and consistent with article twenty-nine-C of the public health (d) Health care proxy. Nothing in this section shall preclude a person with a health care proxy from being
- (e) Petition to the court.

- present. Such petition may be initiated only by the following persons: county court in the county in which the subject of the petition is present or reasonably believed to be (1) A petition for an order authorizing assisted outpatient treatment may be filed in the supreme or
- (i) any person eighteen years of age or older with whom the subject of the petition resides; or
- years of age or older of the subject of the petition; or (ii) the parent, spouse, domestic partner, sibling eighteen years of age or older, or child eighteen
- (iii) the director of a hospital in which the subject of the petition is hospitalized; or
- services to the subject of the petition or in whose institution the subject of the petition resides; or (iv) the director of any public or charitable organization, agency or home providing mental health
- petition for a mental illness; or (v) a qualified psychiatrist who is either supervising the treatment of or treating the subject of the
- treating the subject of the petition for a mental illness; or social worker, licensed pursuant to article one hundred fifty-four of the education law, who is (vi) a psychologist, licensed pursuant to article one hundred fifty-three of the education law, or a
- defined in the social services law, of the city or county in which the subject of the petition is present (vii) the director of community services, or his or her designee, or the social services official, as or reasonably believed to be present; or
- (viii) a parole officer or probation officer assigned to supervise the subject of the petition
- (2) The petition shall state:
- (i) each of the criteria for assisted outpatient treatment as set forth in subdivision (c) of this section;
- provided that the hearing on the petition need not be limited to the stated facts; and (ii) facts which support the petitioner's belief that the subject of the petition meets each criterion,
- (iii) that the subject of the petition is present, or is reasonably believed to be present, within the county where such petition is filed.
- (3) The petition shall be accompanied by an affirmation or affidavit of a physician, who shall not be the petitioner, stating either that:
- (i) such physician has personally examined the subject of the petition no more than ten days prior petition, and is willing and able to testify at the hearing on the petition; or to the submission of the petition, recommends assisted outpatient treatment for the subject of the
- willing and able to examine the subject of the petition and testify at the hearing on the petition. subject of the petition meets the criteria for assisted outpatient treatment, and such physician is subject of the petition to submit to an examination, such physician has reason to suspect that the (ii) no more than ten days prior to the filing of the petition, such physician or his or her designee has made appropriate attempts but has not been successful in eliciting the cooperation of the
- (4) In counties with a population of less than eighty thousand, the affirmation or affidavit required by making such affirmation or affidavit consistent with the provisions of such paragraph. office is authorized to make available, at no cost to the county, a qualified physician for the purpose of paragraph three of this subdivision may be made by a physician who is an employee of the office. The
- (f) Service. The petitioner shall cause written notice of the petition to be given to the subject of the petition mental hygiene legal service, the health care agent if any such agent is known to the petitioner, the and a copy thereof to be given personally or by mail to the persons listed in section 9.29 of this article, the appropriate program coordinator, and the appropriate director of community services, if such director is not

- hygiene legal service, or privately financed counsel, at all stages of a proceeding commenced under this (g) Right to counsel. The subject of the petition shall have the right to be represented by the mental
- (n) Hearing.
- appear at the hearing, and appropriate attempts to elicit the attendance of the subject have failed, the adjourned, the court shall hear testimony and, if it be deemed advisable and the subject of the petition factual basis for conducting the hearing without the presence of the subject of the petition. court may conduct the hearing in the subject's absence. In such case, the court shall set forth the is available, examine the subject of the petition in or out of court. If the subject of the petition does not be advised of such date. Upon such date, or upon such other date to which the proceeding may be affirmation or affidavit accompanied the petition, and such other persons as the court may determine to person receiving notice pursuant to subdivision (f) of this section, the petitioner, the physician whose assisted outpatient treatment expeditiously. The court shall cause the subject of the petition, any other court shall consider the need for further examination by a physician or the potential need to provide holidays. Adjournments shall be permitted only for good cause shown. In granting adjournments, the than three days from the date such petition is received by the court, excluding Saturdays, Sundays and (1) Upon receipt of the petition, the court shall fix the date for a hearing. Such date shall be no later
- each of the criteria for assisted outpatient treatment. the facts and clinical determinations which support the allegation that the subject of the petition meets the physician to testify by video conference upon a finding of good cause. Such physician shall state subject of the petition consents to the physician testifying by video conference; or (ii) the court orders has been: (i) shown that diligent efforts have been made to attend such hearing in person and the (2) The court shall not order assisted outpatient treatment unless an examining physician, who hearing. Provided however, a physician shall only be authorized to testify by video conference when it more than ten days before the filing of the petition, testifies in person or by videoconference at the recommends assisted outpatient treatment and has personally examined the subject of the petition no
- whose affirmation or affidavit accompanied the petition as to whether the subject meets the criteria for examination is performed by another physician, the examining physician may consult with the physician physician is privileged by such hospital or otherwise authorized by such hospital to do so. If such affidavit accompanied the petition pursuant to paragraph three of subdivision (e) of this section, if such examination of the subject of the petition may be performed by the physician whose affirmation or Retention of the subject of the petition under such order shall not exceed twenty-four hours. The subject of the petition into custody and transport him or her to a hospital for examination by a physician are members of an authorized police department or force, or of a sheriff's department to take the true, the court may order peace officers, acting pursuant to their special duties, or police officers who does not consent and the court finds reasonable cause to believe that the allegations in the petition are subject to consent to an examination by a physician appointed by the court. If the subject of the petition (3) If the subject of the petition has refused to be examined by a physician, the court may request the assisted outpatient treatment.
- describe the types or classes of medication which should be authorized, shall describe the beneficial outpatient treatment, and (iv) the rationale for the recommended assisted outpatient treatment. If the (4) A physician who testifies pursuant to paragraph two of this subdivision shall state: (i) the facts which support the allegation that the subject meets each of the criteria for assisted outpatient treatment, (ii) that the treatment is the least restrictive alternative, (iii) the recommended assisted medication should be self-administered or administered by authorized personnel. and detrimental physical and mental effects of such medication, and shall recommend whether such recommended assisted outpatient treatment includes medication, such physician's testimony shall
- his or her behalf, and to cross-examine adverse witnesses. (5) The subject of the petition shall be afforded an opportunity to present evidence, to call witnesses on
- (i) Written treatment plan.

- court no later than the date set by the court pursuant to paragraph three of subdivision (j) of this on the petition. If a person other than a director is the petitioner, such plan shall be provided to the petitioner, the written treatment plan shall be provided to the court no later than the date of the hearing deterioration which would be likely to result in serious harm to the person or others. If a director is the is clinically related to the mental illness; and (ii) that such testing is necessary to prevent a relapse or sufficient facts for the court to find (i) that such person has a history of alcohol or substance abuse that or illegal substances provided the physician's clinical basis for recommending such plan provides counseling and treatment, such plan may include a provision requiring relevant testing for either alcohol maximum benefit for the subject. If the written treatment plan includes alcohol or substance abuse authorized personnel, and shall specify type and dosage range of medication most likely to provide medication, it shall state whether such medication should be self-administered or administered by such physician recommends that the subject of the petition receive. All service providers shall be include all categories of services, as set forth in paragraph one of subdivision (a) of this section, which community treatment team services to provide care coordination. The written treatment plan also shall written treatment plan. The written treatment plan shall include case management services or assertive appropriate director, in consultation with such director, develops and provides to the court a proposed notified regarding their inclusion in the written treatment plan. If the written treatment plan includes (1) The court shall not order assisted outpatient treatment unless a physician appointed by the
- consider any directions included in such proxy in developing the written treatment plan. the subject. If the subject of the petition has executed a health care proxy, the appointed physician shall the treating physician, if any; and upon the request of the subject of the petition, an individual significant with an opportunity to actively participate in the development of such plan: the subject of the petition; to the subject including any relative, close friend or individual otherwise concerned with the welfare of (2) The physician appointed to develop the written treatment plan shall provide the following persons
- set by the court pursuant to paragraph three of subdivision (j) of this section. the petition. If a person other than a director is the petitioner, such testimony shall be given on the date plan. If a director is the petitioner, testimony pursuant to this paragraph shall be given at the hearing on which establish that such treatment is the least restrictive alternative, and, if the recommended assisted director testifies to explain the written proposed treatment plan. Such physician shall state the professional. If the subject of the petition has executed a health care proxy, such physician shall state medication recommended, the beneficial and detrimental physical and mental effects of such outpatient treatment plan includes medication, such physician shall state the types or classes of categories of assisted outpatient treatment recommended, the rationale for each such category, facts (3) The court shall not order assisted outpatient treatment unless a physician appearing on behalf of a the consideration given to any directions included in such proxy in developing the written treatment medication, and whether such medication should be self-administered or administered by an authorized

(j) Disposition.

- the subject of the petition meets the criteria for assisted outpatient treatment, the court shall dismiss the (1) If after hearing all relevant evidence, the court does not find by clear and convincing evidence that
- paragraph one of subdivision (a) of this section, which the assisted outpatient is to receive, but shall not treatment for an initial period not to exceed one year. In fashioning the order, the court shall specifically and the testimony provided to the court pursuant to subdivision (i) of this section. include any such category that has not been recommended in both the proposed written treatment plan treatment plan, which shall include all categories of assisted outpatient treatment, as set forth in treatment appropriate and feasible for the subject. The order shall state an assisted outpatient make findings by clear and convincing evidence that the proposed treatment is the least restrictive and feasible less restrictive alternative, the court may order the subject to receive assisted outpatient subject of the petition meets the criteria for assisted outpatient treatment, and there is no appropriate (2) If after hearing all relevant evidence, the court finds by clear and convincing evidence that the

- testimony, the court may order assisted outpatient treatment as provided in paragraph two of this outpatient treatment, and the court has yet to be provided with a written proposed treatment plan and Sundays and holidays, immediately following the date of such order. Upon receiving such plan and provide the court with such plan and testimony no later than the third day, excluding Saturdays, testimony pursuant to subdivision (i) of this section, the court shall order the appropriate director to by clear and convincing evidence that the subject of the petition meets the criteria for assisted (3) If after hearing all relevant evidence presented by a petitioner who is not a director, the court finds
- the duration of such assisted outpatient treatment. may specify the type and dosage range of such psychotropic drugs and such order shall be effective for such drugs by authorized personnel as part of an assisted outpatient treatment program. Such order (4) A court may order the patient to self-administer psychotropic drugs or accept the administration of
- instances, the order shall require the appropriate director, as that term is defined in this section, to throughout the period of the order. provide or arrange for all categories of assisted outpatient treatment for the assisted outpatient outpatient treatment for the assisted outpatient throughout the period of the order. In all other the court order shall direct the hospital director to provide or arrange for all categories of assisted (5) If the petitioner is the director of a hospital that operates an assisted outpatient treatment program,
- service providers, and all others entitled to notice under subdivision (f) of this section. (6) The director shall cause a copy of any court order issued pursuant to this section to be served legal service or anyone acting on the assisted outpatient's behalf, the original petitioner, identified personally, or by mail, facsimile or electronic means, upon the assisted outpatient, the mental hygiene
- (k) Petition for additional periods of treatment.
- assisted outpatient treatment is warranted and whether such a petition was or will be filed pursuant to paragraph two of this subdivision. Upon determining whether such criteria continue to be submit to an examination, within thirty days prior to the expiration of an order of assisted outpatient appropriate attempts to, but has not been successful in eliciting, the cooperation of the subject to whether the assisted outpatient continues to meet the criteria for assisted outpatient treatment. If, as met, such director shall notify the program coordinator in writing as to whether a petition for continued treatment, such director may petition the court to order continued assisted outpatient treatment documented in the petition, the director determines that such criteria continue to be met or has made (1) Prior to the expiration of an order pursuant to this section, the appropriate director shall review
- authorized to terminate such blood tests or urinalysis without further action by the court. the written treatment plan or another physician designated by the director, and such physician shall be of alcohol or illegal drugs shall be subject to review after six months by the physician who developed section shall be applicable. Any court order requiring periodic blood tests or urinalysis for the presence section shall not be applicable. The notice provisions set forth in paragraph six of subdivision (j) of this this section; provided that the time restrictions included in paragraph four of subdivision (c) of this pursuant to this subdivision shall be in accordance with the provisions of the foregoing subdivisions of the court's disposition of such petition does not occur prior to the expiration date of the current order, status pursuant to the applicable subparagraph, may petition the court to order continued assisted paragraph one of subdivision (e) of this section, and the current petitioner retains his or her original director or the current petitioner, if the current petition was filed pursuant to subparagraph (i) or (ii) of (2) Within thirty days prior to the expiration of an order of assisted outpatient treatment, the appropriate the current order shall remain in effect until such disposition. The procedures for obtaining any order outpatient treatment for a period not to exceed one year from the expiration date of the current order. If
- (I) Petition for an order to stay, vacate or modify.
- outpatient treatment, the assisted outpatient, the mental hygiene legal service, or anyone acting on the (1) In addition to any other right or remedy available by law with respect to the order for assisted

assisted outpatient's behalf may petition the court on notice to the director, the original petitioner, and all others entitled to notice under subdivision (f) of this section to stay, vacate or modify the order.

- consent from the terms of a current order relating to the administration of psychotropic drugs. or from a current assisted outpatient treatment plan, or any deviation without the assisted outpatient's the purposes of this paragraph, a material change is an addition or deletion of a category of services to without a hearing. Non-material changes may be instituted by the director without court approval. For the court that he or she agrees to the proposed material change, the court may approve such change holidays, the court shall hold a hearing on the petition; provided that if the assisted outpatient informs section. Not later than five days after receiving such petition, excluding Saturdays, Sundays and court. Such petition shall be filed on notice to all parties entitled to notice under subdivision (f) of this change in the assisted outpatient treatment plan, unless such change is authorized by the order of the (2) The appropriate director shall petition the court for approval before instituting a proposed material
- (m) Appeals. Review of an order issued pursuant to this section shall be had in like manner as specified in section 9.35 of this article.
- article relating to the involuntary admission and retention of a person. If at any time during the seventy-two such hospital beyond the initial seventy-two hour period shall be in accordance with the provisions of this and treatment in a hospital pursuant to the provisions of this article. Any continued involuntary retention in permit a physician to determine whether such person has a mental illness and is in need of involuntary care an assisted outpatient who is present in his or her county to an appropriate hospital, in accordance with the such persons. Any director of community services, or designee, shall be authorized to direct the removal of program, or to any other hospital authorized by the appropriate director of community services to receive into custody and transport any such person to the hospital operating the assisted outpatient treatment an approved mobile crisis outreach team as defined in section 9.58 of this article shall be authorized to take ambulance service, as defined by subdivision two of section three thousand one of the public health law, or director, the director's designee, or any physician designated pursuant to section 9.37 of this article, an outpatient into custody and transport him or her to the hospital operating the assisted outpatient treatment involuntary civil commitment or a finding of contempt of court. released. Failure to comply with an order of assisted outpatient treatment shall not be grounds for article, and does not agree to stay in the hospital as a voluntary or informal patient, he or she must be hour period the person is determined not to meet the involuntary admission and retention provisions of this for observation, care and treatment and further examination in the hospital for up to seventy-two hours to directing the removal of such assisted outpatient pursuant to this subdivision. Such person may be retained provisions of this subdivision, based upon a determination of the appropriate director of community services law enforcement officials shall carry out such directive. Upon the request of such physician, the appropriate program or to any hospital authorized by the director of community services to receive such persons. Such are members of an authorized police department or force or of a sheriff's department to take the assisted 9.37 of this article, may direct peace officers, acting pursuant to their special duties, or police officers who physician, the appropriate director, the director's designee, or any physician designated pursuant to section whether he or she has a mental illness for which hospitalization is necessary. Upon the request of such or failure when determining whether the assisted outpatient is in need of an examination to determine urinalysis, or alcohol or drug test as required by the court order, such physician may consider such refusal refuses to take medications as required by the court order, or he or she refuses to take, or fails a blood test, necessary pursuant to section 9.27, 9.39 or 9.40 of this article. Furthermore, if such assisted outpatient hospital for an examination to determine if such person has a mental illness for which hospitalization is services, the director's designee, or any physician designated by the director of community services to section 9.39 or 9.40 of this article, such physician may request the appropriate director of community to a hospital pursuant to section 9.27 of this article or immediate observation, care and treatment pursuant pursuant to section 9.37 of this article, to direct the removal of such assisted outpatient to an appropriate were made to solicit compliance, and (iii) such assisted outpatient may be in need of involuntary admission the assisted outpatient, has failed or refused to comply with the assisted outpatient treatment, (ii) efforts (n) Failure to comply with assisted outpatient treatment. Where in the clinical judgment of a physician, (i)

- court that a person is in need of assisted outpatient treatment shall not be construed as or deemed to be a (o) Effect of determination that a person is in need of assisted outpatient treatment. The determination by a determination that such person is incapacitated pursuant to article eighty-one of this chapter.
- hundred seventy-five or article two hundred ten of the penal law. petition or hearing under this section shall be subject to criminal prosecution pursuant to article one (p) False petition. A person making a false statement or providing false information or false testimony in a
- receive, admit, or retain patients who otherwise meet the provisions of this article regarding receipt, (q) Exception. Nothing in this section shall be construed to affect the ability of the director of a hospital to retention or admission.
- (r) Education and training.
- educational and training materials on the use of this section, which shall be made available to local (1) The office of mental health, in consultation with the office of court administration, shall prepare governmental units, providers of services, judges, court personnel, law enforcement officials and the
- the use of this section and generally address issues relating to mental illness and mental health training program for supreme and county court judges and court personnel. Such training shall focus on (2) The office, in consultation with the office of court administration, shall establish a mental health
- services pursuant to this subdivision shall be public records, and the records shall not be released by the discharge their duties pursuant to section 9.47 of this article, and where such provider of inpatient that is deemed necessary by such director or designee who is required to coordinate and monitor the care services operated or licensed by the office of mental health to provide contemporaneous information, director to any person or agency, except as already authorized by law. of section 33.13 of this chapter and such disclosure is in accordance with all other applicable state and of any individual who was subject to an active assisted outpatient treatment order to appropriately person receiving assisted outpatient treatment pursuant to an active assisted outpatient treatment order, including but not limited to relevant clinical records, documents, and other information concerning the federal confidentiality laws. None of the records or information obtained by the director of community psychiatric services is required to disclose such information pursuant to paragraph twelve of subdivision (c) A director of community services or his or her designee may require a provider of inpatient psychiatric

History

Add, <u>L 1999, ch 408, § 6</u>, eff Aug 9, 1999; amd, <u>L 2005, ch 158, § 4</u>, eff June 30, 2005; <u>L 2010, ch 111, § 1</u> (Part E), eff July 1, 2010; <u>L 2013, ch 1, § 23</u>, eff March 16, 2013; <u>L 2015, ch 382, § 1</u>, effective October 26, 2015; <u>L 2022</u> <u>ch 56, § 2</u> (Part UU, Subpart H), effective April 9, 2022; <u>L 2025, ch 57, § 9</u> (Part EE), effective August 7, 2025

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<u>Kahan v.</u> For the Involuntary Hospitalization Pursuant to Section 9.43 of the Mental Hygiene Law of C. C.

Supreme Court of New York, Westchester County

October 18, 2023, Decided; October 25, 2023, Published

69393/2023

Reporter

2023 NYLJ LEXIS 2885 *

Kahan v. For the Involuntary Hospitalization Pursuant to Section 9.43 of the Mental Hygiene Law of C. C., An Alleged Mentally III Person

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(Kahan v. For the Involuntary Hospitalization Pursuant to Section 9.43 of the Mental Hygiene Law of C. C., An Alleged Mentally III Person, NYLJ, Oct. 25, 2023 at p.17, col.1)

Judges: [*1] Judge: Justice Damaris E. Torrent

Opinion

suffered from a mental illness for which treatment was whether Respondent should be removed to a hospital for evaluation. Petitioner alleged that Respondent property of Respondent sought a warrant pursuant to Mental Hygiene Law § 9.43 directing that Respondent Petitioner had made the required showing, the Article 9 harm to herself as defined in Mental Hygiene Law § appropriate and which was likely to result in serious was uncertain in light of the relationship between the be evaluated for admission to a mental hygiene facility, residence against her will and to cause Respondent to authorize Petitioner to remove Respondent from her serious harm. The court further determined that, even if its claim that Respondent's illness was likely to result in Respondent was unable to meet her needs in support of determined that Petitioner failed to show that 9.39(a). The court declined to issue a warrant. The court be brought before the court for a hearing to determine court-appointed guardian authority to issue a warrant, and thus to of the person and

parties, and such relief may have required a hearing in the Article 81 Court.

Full Case Digest Text

For the Involuntary Hospitalization Pursuant to Section 9.43 of the Mental Hygiene Law of C.C.

dismissed. the requested warrant, and the petition is denied and the reasons set forth herein, the Court declines to issue ruled that no warrant shall be issued at this time and informed counsel that a written Order would follow. For on behalf of the respondent. After argument, this Court Legal Service, by Katherine B. Davies, Esq., appeared appeared by Marc Mendlowitz, Esq. Mental Hygiene argument was heard on October 17, 2023. Petitioner to leave, thus placing herself at risk of harm. Oral the condition of the apartment, the respondent refuses uninhabitable and is being condemned, and that despite petitioner is the guardian of the property and person of to a hospital specified in Mental Hygiene Law §9.39(a). respondent be brought before this Court for a hearing to to Mental Hygiene Law §9.43 directing October 17, 2023, petitioner seeks a warrant pursuant The petition alleges, in sum and substance, that the determine whether the respondent should be removed DECISION [*2] AND ORDER By Petition respondent, that respondent's apartment

Mental Hygiene Law §9.43(a) provides that a Court shall issue a warrant directing that the subject of the petition be brought before it when the Court is informed by verified statement "that a person is apparently mentally [*3] ill and is conducting... herself in a manner... which is likely to result in serious harm to... herself." A petitioner may make the required showing by demonstrating that the respondent is unable to meet her needs for food, clothing and shelter (see <u>Matter of</u>

Boggs v. New York City Health & Hosps. Corp., 132 AD2d 340 [1st Dept 1987]).

clothing and shelter, as would be required for issuance clothing and shelter. The petition appears to convey of a section 9.43 warrant. respondent is unable to meet her needs for food only that the petitioner would prefer that respondent that respondent is unable to meet her needs for food, program, which includes group therapy, and was not agree to a different living arrangement, and not that the did petitioner articulate any basis for the Court to find respondent is not compliant with her treatment plan. Nor able to articulate any basis for the Court to find that respondent is a participant in an outpatient treatment condemned at this time. Petitioner further reported that conceded that respondent's apartment has not been substandard. At oral argument, counsel for petitioner conditions make the required showing, as it is alleged only that the The Court finds that petitioner in this matter failed to respondent's apartment

evaluated for admission to a mental hygiene facility" been held that a Court lacks the authority to grant a this Court has the authority to issue a warrant, as it has court. Finally, even if the petition made the showing with a hearing on notice before the article 81 court" against her wishes, the [respondent] must be provided at least temporarily, against her will. Pursuant to Menta purpose of removing the respondent from her residence, pursuant to Article 81 of the Mental Hygiene Law, as it is (Matter of Eggleston v. Gloria N., 55 AD3d 309, 309 [1st required by section 9.43(a), it is questionable whether section 9.43 warrant and subsequent removal order, retain respondent at a hospital after the issuance of a remove the respondent "from her home and community brought by the respondent's guardian for the apparent instant application runs afoul of the respondent's rights remove this matter from the purview of the article 81 intervening acts of physicians, in determining whether to not persuaded Aged, 127 AD3d 526, 528 [1st Dept 2015]). The Court is (Matter of Drayton v. Jewish Assn. for Servs. Furthermore, [*4] Dept 2008]). "the Law §81.36(c), when a guardian seeks to power to by petitioner's the Court is concerned that the cause respondent argument that the

To the extent to which the above cases may be read to conflict with the authority set forth in section 9.43(a), such a perceived conflict need not be resolved on this application, [*5] in light of petitioner's failure to make the required showing pursuant to section 9.43(a) that

respondent is unable to meet her needs for food, clothing and shelter. The Court thus declines to issue a warrant.

Accordingly, it is hereby

ORDERED that the petition is denied and dismissed

The foregoing constitutes the Decision and Order of the Court.

Dated: October 18, 2023

New York Law Tournal

End of Document



Matter of William C.

Supreme Court of New York, Appellate Division, Second Department
May 26, 2009, Decided

2007-10432

Reporter

64 A.D.3d 277 *; 880 N.Y.S.2d 317 **; 2009 N.Y. App. Div. LEXIS 4068 ***; 2009 NY Slip Op 4232 ****

[****1] In the Matter of William C., Appellant. Dean R. Weinstock, Executive Director of Pilgrim Psychiatric Center, Respondent. (Index No. 19929-07)

Prior History: Appeal from an order and judgment (one paper) of the Supreme Court, Suffolk County (James F.X. Doyle), dated July 25, 2007. The order and judgment, insofar as appealed from, authorized the appointment of a money manager as a component of assisted outpatient treatment.

Counsel: [***1] *Mental Hygiene Legal Service*, Mineola (*Sidney Hirschfeld*, *Scott M. Wells* and *Dennis B. Feld* of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York City (Michael S. Belohlavek, Monica Wagner and Richard Jackson of counsel), for respondent.

Judges: WILLIAM F. MASTRO, J.P., ANITA R. FLORIO, RUTH C. BALKIN, RANDALL T. ENG, JJ. MASTRO, J.P., FLORIO, BALKIN and ENG, JJ., concur.

Opinion by: RUTH C. BALKIN

Opinion

[*279] [**319] Balkin, J.

Enacted in 1999, <u>Mental Hygiene Law § 9.60</u>, commonly known as Kendra's Law, ¹ provides a

¹Kendra's Law was introduced in response to public outcry following two similar incidents in the New York City subway

been declared incapacitated. Based on the language financial affairs of a mentally ill person, who has not whether Mental Hygiene Law § 9.60 authorizes have statute so authorizes. and history of Kendra's Law, we conclude that the appointment of a money manager to assist with the apparent first impression decompensation to receive mental health services, or from mental illnesses. It requires those persons who outpatient treatment programs for persons suffering [***2] else face involuntary commitment. The issue of framework for the judicial authorization of involuntary a history of medication noncompliance at the appellate level is and

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The following facts essentially [***3] are undisputed. By order to show cause and petition dated July 20, 2007, the petitioner, Dean R. Weinstock, as Executive Director of Pilgrim Psychiatric Center [****2] (hereinafter the Hospital), a hospital licensed and operated by the New York State Office of Mental Health, commenced the instant proceeding in the Supreme Court, Suffolk County, seeking authorization for the imposition of an

system in 1999, when two men, diagnosed with schizophrenia, pushed two persons, one of whom was Kendra Webdale, into the path of oncoming subway trains (see An Explanation of Kendra's

Kendra's http://www.omh.state.ny.us/omhweb/Kendra web/Ksummary.htm; Matter of K.L., 1 NY3d 362, 366, 806 NE2d 480, 774 NYS2d 472 [2004]; Matter of Manhattan Psychiatric Ctr., 285 AD2d 189, 191, 728 NYS2d 37 [1st Dept 2001]; Blood, Governor Pushes Kendra's Law, Seeks New Curbs on Violent Patients, Daily News, May 19, 1999, at http://www.nydailynews.com/archives/news/1999/05/19/1999-05-19 gov pushes kendra s law see.htm).

Both assailants had been recently discharged from psychiatric facilities, were noncompliant with psychiatric treatment, and lacked permanent housing (id.).

involuntary assisted outpatient treatment (hereinafter AOT) program pursuant to <u>Mental Hygiene Law § 9.60</u> for William C. The accompanying petition alleged that William C., a 43 year old suffering from mental illness, was unlikely to survive safely in the community without supervision, had a history of lack of compliance with treatment for mental illness, and had been [*280] hospitalized at least twice within the preceding 36 months, before transfer to the Hospital.

in him losing his apartment, [and] becoming homeless." asserted that William C.'s noncompliance had "resulted mental illness dating back to the 1980s. Dr. Chatterjee psychiatric history of at least 20 hospitalizations for defined by Mental Hygiene Law § 1.03(20)-spanning a Soumitra Chatterjee, a psychiatrist who had medically evaluated William C. on July 12, 2007, as well as a participate voluntarily with the treatment recommended medications. Dr. Chatterjee affirmed that William C. worksheet, outlining his treatment prepared treatment plan worksheet pursuant to Mental for him, explaining that He further opined that William C. was unlikely to bipolar type--a severe and chronic mental illness as The petition was supported by the affirmation of Dr. [***4] had been diagnosed with schizoaffective disorder, Law § 9.60 and a [**320] medication and prescribed

apartment is infested with ticks and there is feces extremely poor insight into physical assault of family members. He has becomes increasingly angry and violent, leading to are invading his home and stealing from him. He coming out of the faucets. He believes that people experiences "[w]hen non-compliant with medication, [William C.] hospitalizations." noncompliant with treatment, leading to multiple suspicious rapid decompensation, and paranoid that his his illness and is becomes

and care coordination by the Case Management Evaluation Referral and Assessment Unit of the Suffolk socialization groups, psychiatric supervised community residence, best interests, which included him living at a 24-hour Chatterjee recommended a treatment plan to serve his appointment of the Federation of Organizations ² After consultation with William C. and his sister, Dr. Additionally, Community the treatment plan Mental Hygiene aftercare treatment, [***5] participation in recommended Services. the

bills and other bills, thereby resulting in his failure to that William C. was unable or unwilling to pay his doctor that money management services were required, given would greatly benefit him and prevent a relapse, and least restrictive alternative available for William C. Chatterjee believed that the treatment plan was the receive medication participate [***6] in the recommended AOT plan, which maintained that William C. was unlikely to voluntarily mood stabilizers, anti-Parkinson's drugs and beta blockers), and his need for an AOT order. Dr. Chatterjee medication his psychiatric and noncompliance history, his extensive testified as to his evaluation and diagnosis of William C., a hearing on the petition, in which Dr. [*281] On July 25, 2007, the Supreme Court conducted requirements and qualify for Medicaid. (including antipsychotics

According to a report by Lillian Graziano, LMSW, Intensive Case Manager, William C. "was always very responsible about paying the bills that, 'he saw' as important to pay," but if he believed that it was something that he was not supposed to pay, including rent, "he absolutely would not pay it." In fact, Ms. Graziano confirmed that the patient refused to pay the 20% Medicaid spend-down required by doctors' and clinics' bills for services rendered, so that he no longer received Medicaid but only Medicare.

Following the hearing, by order and judgment dated July 25, 2007, the Supreme Court, inter alia, determined that William C. met the criteria for an AOT order as set forth in *Mental Hygiene Law § 9.60*, [**321] and directed that he receive the AOT for a period of six months, including the [***7] money management services. The Supreme Court found that the evidence clearly indicated the need for such service, and that unless William C. participated in the AOT program, his welfare and ability to survive in the community would be jeopardized. This appeal ensued, limited to the propriety of the provision regarding money [****3] management.

William C. requested a rehearing and review of the proceedings pursuant to <u>Mental Hygiene Law § 9.60</u> (m), which provides for a de novo rehearing and review of the AOT order and judgment by another Supreme

provide money management services on behalf of William C.

² Under contract with the County of Suffolk, the Federation of the Organizations is a not-for-profit, "community-based social \underline{K} 2

welfare agency" operating several programs, including "representative payee services to individuals recovering from mental illnesses in Suffolk County who are unable to manage their own income" (http://www.fedoforg.org; see Matter of Kanarskee, 196 Misc 2d 469, 474, 765 NYS2d 433 [2003]).

manager was improper. alia, a determination that the appointment of a money Supreme Court denied William C.'s application for, inter (see Cohen v Anne C., 301 AD2d 446, 448, 753 NYS2d Court Justice pursuant to Mental Hygiene Law § 9.35 500 [2003]). By order dated October 30, 2007, the

[*282] <u>II.</u>

mootness doctrine. 3 to William C. In opposition, William C. argues that the issues presented fit within the exception to the judgment appealed from and its unique nature peculiar be dismissed on the ground of mootness, given, inter alia, the expiration in January 2008 of the order and Preliminarily, the Hospital contends that the appeal must

nonreviewable (see Matter of M.B., 6 NY3d 437, 447, relatively brief existence, would be rendered otherwise important and recurring issues which, by virtue of their doctrine exists permitting courts to preserve for review of the judgment" (Matter of Hearst Corp. v Clyne, 50 the interest of the parties is an immediate consequence directly affected by the determination of the appeal and considered moot unless the rights of the parties will be live, have become moot by passage of time or change court from considering questions "which, although once 846 NE2d 794, 813 NYS2d 349 [2006]; Matter of Chenier v Richard W., 82 NY2d 830, 832, 626 NE2d see Saratoga County Chamber of Commerce v Pataki, 654 [2003], cert denied 540 US 1017, 124 S Ct 570, 157 100 NY2d 801, 810-811, 798 NE2d 1047, 766 NYS2d The doctrine of mootness would ordinarily preclude a 928, 606 NYS2d 143 [1993]; Matter of Manhattan Psychiatric Ctr., 285 AD2d 189, 191, 728 NYS2d 37 Ed 2d 430 [2003]). An exception to the mootness circumstances. 714, 409 NE2d 876, 431 NYS2d 400 [1980]; = general an appeal will be

money manager as a component of an AOT, squarely appealed from by its own terms renders this appeal moot, we find that the issue of whether <u>Mental Hygiene</u> [1] Although the expiration of the order and judgment fits within the mootness exception (see Matter of K.L., 302 AD2d 388, 389, 755 NYS2d 93, affd 1 NY3d 362 Law § 9.60 [***9] authorizes the appointment of a

<u>|</u> arguments. assist patients starting point in

³By decision and order on motion dated [***8] July 9, 2008 referred the issue of dismissal of the appeal to this panel. branch of the motion which was to expand the record and (2008 NY Slip Op 77239[U] [2008]), this Court denied that

> suffering from [***10] mental illinesses. I or moothess argument, reasons, we reject the Hospital's moothess argument, and turn to the merits of the appeal. importance (see <u>Matter of Chenier v Richard W., 82</u> NY2d at 832; <u>Matter of Westchester Rockland</u> implicates significant and novel questions of statewide repetition vis-à-vis mentally ill persons and mental 423 NYS2d 630 [1979]), involving the rights of patients Newspapers v Leggett, 48 NY2d 430, 399 NE2d 518, Anne C., 301 AD2d at 448). Just as important, it 705 NE2d 1191, 683 NYS2d 150 [1998]; Matter of (see <u>Mental Hygiene Law § 9.60 [j] [2];</u> [*283] <u>Mental</u> Hygiene Legal Servs. v Ford. 92 NY2d 500, 505-506, review due to the short six-month term of the AOT plans manager]). The issue will typically evade appellate Ct, Suffolk County 2003] [**322] [authorizing money 880 NYS2d 874, already faced the issue, reaching different results (see health facilities and, in fact, at least two trial courts have NYS2d 37 [2001]). This issue has a likelihood of Hearst Corp. v Clyne, 50 NY2d at 714-715; cf. Cohen v County Ct 2008] [disallowing money manager]; <u>Matter of Kanarskee, 196 Misc 2d 469, 476, 765 NYS2d 433 [Sup</u> Matter of MacGilvary v Thomas I., 22 Misc. 3d 1121[A]. Manhattan Psychiatric Ctr., 285 AD2d 189, from [***10] mental illnesses. 774 NYS2d 472 [2004]; Matter 2008 NY Slip Op 52655[U] [Suffolk 191,

permit such service. We agree with the Hospital's would assist patients' self-sufficiency in the community, counters that it is precisely because a money manager of their lives," including their finances. The Hospital community, not "the micro-management of every aspect authorizing money management services within the AOT plan, as Mental Hygiene Law § 9.60 only that Mental Hygiene Law § 9.60 should be interpreted to contemplates outpatient medical services necessary to [2] William C. posits that the Supreme Court erred in in living and functioning in

here, they must be analyzed in context and in a manner effect to the plain meaning thereof" (Majewski v interpretation must always be the language itself, giving that 'harmonize[s] the related provisions terms of related statutes are involved, as is the case 696 NE2d 978, 673 NYS2d 966 [1998]; see Matter of Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583, AD3d 588, 589, 795 NYS2d 594 [2005]]. "When the lansen Ct. Homeowners Assn. v City of New York, 17 any case [and]

renders them compatible' " (Matter of M.B., 6 NY3d at 447, [***11] citing Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington, 97 NY2d 86, 91, 761 NE2d 565, 735 NYS2d 873 [2001]).

within a local or unified services plan developed pursuant to article forty-one of this [***12] chapter, training or activities; alcohol or substance abuse treatment and counseling and periodic tests for the outpatient services which have been ordered by the court pursuant to this section. Such treatment shall in suicide or the need for hospitalization." community, or to attempt to prevent a relapse or living arrangements; and [**323] any other services presence of alcohol or illegal drugs for persons with a day programming activities; educational and vocational medications; individual or group therapy; day or partial or urinalysis to determine compliance with prescribed categories of services: medication; periodic blood tests coordination, and may also include any of the following community treatment team services to provide care include case management services or assertive [*284] 366; Matter of Weinstock, 288 AD2d 480, 733 NYS2d 243 [2001]), Mental Hygiene Law § 9.60 (a) (1) 4 deterioration that may reasonably be predicted to result assist the person in living and functioning in the prescribed to treat the person's mental illness and to history of alcohol or substance abuse; supervision of defines an AOT plan, in relevant part, as follows: " muster (see Having previously been found to pass constitutional 'assisted outpatient treatment' shall mean categories of [****4] <u>Matter of K.L.</u> 1 NY3d

Prior to judicial authorization of an AOT for an adult, Mental Hygiene Law § 9.60 (c) enumerates several requirements to be established, including that the patient "is suffering from a mental illness," "is unlikely to survive safely in the community without supervision," has a treatment noncompliance history necessitating hospitalization or resulting in "serious violent behavior" or threats toward self or others, is presently "unlikely to voluntarily participate in outpatient treatment," and is in "need of assisted outpatient treatment in order to prevent a relapse or deterioration which would be likely to result in serious harm to the [patient] or others" (Mental Hygiene Law § 9.60 [c] [1-7]; see Matter of Manhattan Psychiatric Ctr., 285 AD2d at 193). This criteria must be established by "clear and convincing

evidence" (Mental Hygiene Law § 9.60 [j] [3]; see Matter of K.L., 1 NY3d at 371; Matter of Weinstock, 288 AD2d at 481). As the New York [***13] State Legislature intended, this procedure recognizes that

reprinted in McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 9.60, Historical and hospital emergency rooms." (L 1999, ch 408, § 2, among mental health providers improved dissemination of information between and the community; the expansion of the use coordination of care for mentally ill persons living in establishment [*285] of assisted outpatient treatment as a mode of treatment; improved patients decompensate. Effective mechanisms for their own care, and often reject the outpatient Statutory Notes, at 240.) conditional release in psychiatric hospitals; and the accomplishing [care and treatment] include: the by helplessly and watch their loved ones and Family members and caregivers often must stand treatment offered to them on a voluntary basis. illness, have great difficulty taking responsibility for "[s]ome mentally ill persons, because of their and general 으

Supreme and hospitalization history (see Mental Hygiene Law § 9.60 [c]). Indeed, William C. does not challenge the need of an AOT order because of his noncompliance burden of establishing that William C. was a person in that was a "feasible less restrictive alternative" (Menta money management services component, and whether assistance to return to the community at large (see Supreme Court's underlying finding that he cannot be order. It [***14] is undisputed that the Hospital met its management services as a component of the AOT Hygiene Law § 9.60 [j] [2]). His only contentions concern the propriety of the AOT's Matter of Manhattan Psychiatric Ctr., 285 AD2d at 196). left to his own devices and requires outpatient Applying these principles to the matter at bar, the Court providently ordered money

Although Mental Hygiene Law § 9.60 does not specifically refer to money management services, it permits the provision of "assisted outpatient treatment" including "any other services within a local or unified services plan ... prescribed to treat the person's mental illness and to assist the person in living and functioning in the community" (Mental Hygiene Law § 9.60 [al [1]). It cannot be seriously disputed [**324] that money management is a service which would assist a mentally ill person in "living and functioning" as a productive member of the community. [***15] Particularly with

⁴ In 2005, Kendra's Law was amended and extended for five years until June 30, 2010 (L 2005, ch 158, § 9).

respect to William C., there was [****5] clear and convincing documentary and testimonial evidence of his failure to properly manage his money by continuously refusing to pay for certain medical services, thereby jeopardizing his eligibility for Medicaid and thus access to his medications.

we find that Mental Hygiene Law § 9.60 permits the inclusion of money management [***16] services consequently becoming a danger to himself or others prevent a relapse of William C. and to prevent his services, more than merely appropriate, are essential to that money management services are appropriate. Such scenario, viewed in light of proof elicited at the hearing either Medicare or Medicaid, it would appear virtually Unless his medications are to be provided through part of William C.'s AOT order. Manhattan Psychiatric Ctr., 285 AD2d at 196). As such, (see Matter of Weinstock, 288 AD2d at 481; Matter of housing payments, more than justifies the conclusion that William C. would likely fall behind on his rent and Misc 2d 446, 450, [*286] 732 NYS2d 549 [2001]). This indicated by the but also that he would rapidly decompensate, certain not only that William C. would fail to medicate, Weinstock, 288 AD2d at 481; Matter of Barry H., 189 expert testimony (see Matter as as

supervision and treatment, but who without such assistance, will relapse and require long periods of hospitalization" (L 1999, ch 408, § 2, reprinted in McKinney's Cons Laws of NY, Book 34A, *Mental* principle, and the proper judicial function is to discern function "well and safely in the community with and apply the will of the [legislators]" (Matter of ATM statute. "[L]egislative intent is the great and controlling manager can be found in the legislative goals of the AD2d at 196). Hygiene Law §9.60, Historical and Statutory Notes, at 240; see Matter of Manhattan Psychiatric Ctr., 285 Legislature found that certain mentally ill persons would NYS2d 335 [2009]]. In enacting Kendra's Law, the NYS2d 191 [1989]; East Acupuncture, P.C. v Allstate Ins. Co., 61 AD3d 202, 2009 NY Slip Op 01191, 873 298, 779 NYS2d 808 [2004]; see Matter of Sutka v One v Landaverde, 2 NY3d 472, 476-477, 812 NE2d Further support for the appointment of a money 73 NY2d 395, 403, 538 NE2d 1012, 541

Consonant with this legislative intent, by providing a money manager for William C., the AOT would go a long way in ensuring his continuous treatment and his housing stability, two of the main correlators in the prevention of violent acts by mentally [***17] ill persons,

as found by the Legislature (see L 1999, ch 408, § 2; Matter of Manhattan Psychiatric Ctr., 285 AD2d at 196; Matter of Barry H., 189 Misc. 2d 446, 452, 732 NYS2d 549 [2001]. It would additionally advance the strong "state's interest in immediately removing from the streets noncompliant patients previously found to be, as a result of their noncompliance, at risk of a relapse or deterioration likely to result in serious harm to themselves or others" (Matter of K.L., 1 NY3d at 373).

community living skills and prevent the unnecessary hospitalization of the seriously impaired, chronically mentally ill population." Mental Hygiene Law § 41.21 (f) administrative activities designed to comprehensive goals of $\underline{\textit{Mental Hygiene Law article 41}},$ which is designed: "to enable and encourage local expand existing community programs for the mentally continuity [*287] of care; to [**325] improve and to governments to develop in the community preventive, municipality Mental Hygiene Law § 41.03 (15) authorizes ill." (Mental Hygiene Law § 41.01) In meeting this goal, rehabilitative, Further, as stated in Mental Hygiene Law § 9.60 (a), [***18] further provides for unified services, including: management to provide and treatment services "programs services ≓ enhance the and within

- "(1) In patient services.
- "(2) Out-patient services....
- "(6) Preventive services.
- "(7) Diagnostic and referral services...
- "(13) Such other services as may be approved by the commissioner."

and including uninterrupted care" (Mental Hygiene Law § 41.01) and other benefits, mentally ill patients in ensuring for them a "continuity of rehabilitative, and treatment services" (id.). conditions and prevent relapse (Mental Hygiene Law § medications, broad scope of article 41 because they would assist Money management services would easily fall within the 41.01). Money management services, thus, fit rationally reasonably essential components to treat mental within psychiatric "community services and preventive

In sum, as noted by the court in <u>Matter of Kanarskee</u> (196 <u>Misc 2d at 476)</u> and it is equally true here, both <u>Mental Hygiene Law § 9.60</u> and <u>Mental Hygiene Law article 41</u> permit the [****6] appointment of a money manager, subject to an independent review by the Social Security Administration as to the designation of an appropriate "representative payee" to manage the patient's Social Security benefits (see 42 USC § 1383 [a] § 405 [i]; <u>Matter of Macgilvray</u>, 196 <u>Misc 2d at 476-</u>

64 A.D.3d 277, *287; 880 N.Y.S.2d 317, **325; 2009 N.Y. App. Div. LEXIS 4068, ***18; 2009 NY Slip Op 4232, *****6

<u>477</u>).

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taking full responsibility for the care of her brother. that she was a viable alternative or even desirous of sister, there was nothing in the record demonstrating William C. Other than the fact that William C. had a represented the "less restrictive alternative" available to appointment of the Federation of Organizations unsupported by the record. The record reveals that the William [*288] patient's diagnosis (Mental Hygiene Law § 9.60 [j] [2]), alternative" treatments that might be appropriate for the required to explore possible "feasible less restrictive of Organizations. Although the Supreme have constituted a less restrictive alternative when compared to the court's appointment of the Federation appointment of his sister as the money manager would [3] William [***19] C. alternatively contends that the C.'s contention in this respect Court is

circumstances, given with the Hospital. rendered incapacitated by his mental illness. We agree exclusive remedy for money management services or Hospital disputes the notion that article 81 is the the appointment of a money manager for him. The would have been the only appropriate mechanism for proceeding pursuant to Mental Hygiene Law article 81 [4] Finally, William C. asserts that a guardianship would be [***20] that he has not been applicable ₽ William C.'s

Article 81 of the Mental Hygiene Law deals with guardianship proceedings involving the personal needs and/or property management of persons judicially declared incapacitated (see Mental Hygiene Law § 81.02 requires a court to make a two-pronged determination: first that the appointment is "necessary to provide for the [**326] personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person"; and second, "that the person agrees to the appointment, or that the person is incapacitated" (Mental Hygiene Law § 81.02 [a], [b]; see Matter of Daniel TT., 39 AD3d 94, 97, 830 NYS2d 827 [2007]; Matter of Maher, 207 AD2d 133, 139-140, 621 NYS2d 617 [1994]).

Although William C. is correct that <u>Mental Hygiene Law</u> <u>article 81</u> provides a procedure to declare a person incompetent and appoint a guardian to manage the person's affairs (see <u>Mental Hygiene Law § 81.02 [a]</u>),

his reliance on that statute is misplaced. Aside from the fact that no one is seeking to declare William C. incapacitated, article 81 contemplates the divestiture of control [****21] over the incapacitated person's personal needs or/and financial affairs (see Matter of Joseph S., 25 AD3d 804, 805, 808 NYS2d 426 [2006]), which is contrary to a money manager, who would work in tandem with the patient.

article 81 does not preempt the appointment of a money under article 81. Contrary to William C.'s arguments manager pursuant to Mental Hygiene Law § 9.60. be a determination that such [patient] is incapacitated" an AOT order "shall not be construed as or deemed to specifically [*289] provides that the implementation of Indeed, incapacity prior to the approval of an AOT order (id.). statutory scheme does not require a finding Moreover, the Court of Appeals in Matter of K.L. (1 Hygiene Law § 9.60 predicated upon the fact that the NY3d at 372) specifically rejected a challenge to Mental Mental Hygiene Law 0 으

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In accordance with the foregoing, we hold that <u>Mental Hygiene Law § 9.60</u> authorizes the appointment of a money manager for a mentally ill person in connection with an AOT order. Accordingly, the order and judgment is affirmed insofar as appealed from.

Mastro, J.P., Florio, and Eng, JJ., concur.

Ordered [***22] that the order and judgment is affirmed insofar as appealed from, without costs or disbursements.

[****7] Motion by the respondent, inter alia, to dismiss an appeal from an order and judgment (one paper) of the Supreme Court, Suffolk County, dated July 25, 2007, on the ground that it has been rendered academic. By decision and order on motion of this Court dated July 9, 2008, the branch of the motion which was to dismiss the appeal was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof. Upon the papers filed in support of the motion, the papers filed in opposition thereto, and the argument of the appeal, it is Ordered that the branch of the motion which was to dismiss the appeal as academic is denied in light of our determination in *Matter of William C*. (decided herewith). Mastro, J.P., Florio, Balkin and Eng, JJ., concur.

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36 A.D.3d 106, 823 N.Y.S.2d 497, 2006 N.Y. Slip Op. 07870

**1 In the Matter of Rhodanna C.B.,
Appellant. Pamela B. et al., Respondents

Supreme Court, Appellate Division Second Department, New York 2004-08263, 2114/04 October 31, 2006

CITE TITLE AS: Matter of Rhodanna C.B. (Pamela B.)

SUMMARY

Appeal from a judgment of the Supreme Court, Westchester County (Peter P. Rosato, J.), entered July 6, 2004. The judgment, insofar as appealed from as limited by appellant's brief, granted the petition in a guardianship proceeding pursuant to Mental Hygiene Law article 81 authorizing respondent guardians to consent to the administration of psychotropic medication or electroconvulsive therapy without appellant's consent or a further order of the court.

HEADNOTE

Incapacitated and Mentally Disabled Persons Involuntary Administration of Drug Due Process Requirements

the question of capacity be evaluated by a court each electroconvulsive therapy is proposed over the patient's time the administration of psychotropic medication or mother's due process rights. Due process requires that further judicial review or approval, was violative of the possible regaining of capacity, without the need for any objection at any point in the future, regardless of her of psychotropic medication to their mother over her Law § 81.22 (a) (8) to consent to the administration duration with the authority pursuant to Mental Hygiene undergone psychiatric hospitalization, for an unlimited incapacitated person living at home who had previously Petitioners' appointment as guardians of the personal objection. Allowing a single determination of lack of of their middle-aged mother, an alleged

capacity in a guardianship proceeding to forever deprive the patient of an automatic judicial reassessment of the patient's capacity in the event that extraordinary medical therapies are proposed against the patient's will in the distant future would improperly cede the authority to weigh the medical evidence and treatment issue to a guardian who is likely to lack the same degree of medical and psychiatric knowledge possessed by a court which regularly conducts hearings into such treatment questions.

RESEARCH REFERENCES

Am Jur 2d, Guardian and Ward §§ 100, 101

Carmody-Wait 2d, Proceedings for Appointment of Guardian for Personal Needs and Property Management § 109:126.

ि McKinney's, Mental Hygiene Law § 81.22 (a) (8)

NY Jur 2d, Infants and Other Persons Under Legal Disability §§ 443, 444.

*107 ANNOTATION REFERENCE

See ALR Index under Due Process; Guardian and Ward; Incompetent and Insane Persons.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: guardian /3 personal /2 needs /p psychotropic /p due /2 process

APPEARANCES OF COUNSEL

Mental Hygiene Legal Service, Mincola (Sidney Hirschfeld, Felicia B. Rosen and Dennis B. Feld of counsel), for appellant.

OPINION OF THE COURT

Mastro, J.

We hold today that the Supreme Court's appointment of guardians pursuant to Mental Hygiene Law article 81 with the authority to consent in perpetuity to the administration of psychotropic medication to their ward, over her objection and without any further judicial review or approval, is inconsistent with the due process

requirements of Rivers v Katz (67 NY2d 485 [1986]). Accordingly, we reverse the judgment insofar as appealed from.

discussed in the Rivers v Katz (supra) decision. judgment runs afoul of the due process considerations the proposed medical treatment. This **2 aspect of the of Rhodanna's capacity or the propriety and necessity of durational limitation on that authority or judicial review therapy to Rhodanna over her objection, without any administration of psychotropic drugs or electroconvulsive effectively authorized the guardians to consent to the perceived lack of mental capacity, but which also petition to appoint the guardians based on Rhodanna's Court rendered a judgment which not only granted the testimony or expert evidence was adduced, the Supreme home. Following a brief hearing at which no medical psychiatric hospitalization and who currently lives at incapacitated person who previously has undergone personal needs of their middle-aged mother, an alleged of Rhodanna C.B. to be appointed the guardians of the This proceeding involves a petition by the two children

In Rivers v Katz (supra), the Court of Appeals considered the circumstances under which a mentally ill patient who has been involuntarily confined to a state facility can be administered psychotropic drugs over his or her objection. The Court began *108 its analysis by making reference to the fundamental principles of patient autonomy underlying such a determination:

"In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his [or her] medical treatment in order to insure that the greatest possible protection is accorded his [or her] autonomy and freedom from unwanted interference with the furtherance of his [or her] own desires. This right extends equally to mentally ill persons who are not to be treated as persons of lesser status or dignity because of their illness" (EN Rivers v Katz, supra at 493 [citations omitted]).

Noting the potentially devastating side effects of psychotropic drugs, the Court reasoned that before a patient could be forcibly medicated with such drugs pursuant to the State's parens patriae power, "there must be a judicial determination of whether the patient has the capacity to make a reasoned decision with respect to

proposed treatment" (* Rivers v Katz, supru at 497; see e.g. Matter of William S., 31 AD3d 567 [2006]; Matter of Michael L., 26 AD3d 381 [2006]; Matter of Joseph O., 245 AD2d 856 [1997]). In the event that the patient's lack of capacity to determine the course of his or her own treatment is demonstrated by clear and convincing evidence, then

"the court must determine whether the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments" (the least of the least of

Again, the burden is on the party advocating the therapy "to establish by clear and convincing evidence that the proposed treatment meets these criteria" (id. at 498).

In the present case, Rhodanna is not an institutionalized patient, although it has been determined that she suffers from mental illness. Moreover, no attempt has yet been made to medicate her with psychotropic drugs against her will. Nevertheless, pursuant to suffers Mental Hygiene Law § 81.22 (a) (8), the Supreme Court has authorized the guardians to consent to such *109 a course of treatment over Rhodanna's objection and without further court approval, if they, in their sole discretion, deem it to be appropriate at some point, no matter how far in the future.

To be sure, as our dissenting colleague notes, the statute empowers the court to authorize a guardian to "consent to or refuse generally accepted routine or major medical... treatment" (Mental Hygiene Law § 81.22 [a] [8]), which by definition includes "the administration of psychotropic medication or electroconvulsive therapy" (Mental Hygiene Law § 81.03 [i]). Moreover, as evidenced by its acknowledgment of the Rivers v Katz (supra) decision in enacting whental Hygiene Law § 81.22, the Legislature was aware of, and presumably was convinced that the statute comported with, its holding (see Law Rev Commn Comments, reprinted in McKinney's Cons Laws of NY, Book 34A, following Mental Hygiene Law § 81.22, at 274). However, since such an approach does not provide for an automatic judicial reassessment of the

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mental capacity of an incapacitated person who objects to treatment at the time the treatment is proposed, and does not require that any judicial assessment of the necessity and propriety of the proposed treatment ever be conducted, the grant of this authority fails to comport with the multiple-step inquiry designed to safeguard the rights of the incapacitated person as set forth in Rivers v Katz (supra).

a Mental Hygiene Law article 81 proceeding comports the procedural protections required under Rivers (supra) ["the article 81 procedures . . . provide an individual with Katz (supra) (see Katter of New York Presbyt. Hosp., with the due process requirements set forth in Rivers v (b). Therefore, the initial determination as to capacity in the record pursuant to Mental Hygiene Law § 81.15 to incapacity, the court must make specific findings on Law § 81.11). Finally, in rendering a determination as and the court must hold a hearing (see Mental Hygiene the right to counsel (see Mental Hygiene Law § 81.10), [c] [5]). Moreover, the alleged incapacitated person has appoint a guardian (see Re Mental Hygiene Law § 81.09 report and recommendation regarding the petition to Law § 81.09 [d]), and to provide the court with a written and psychiatric records (see 13 *110 Mental Hygiene permission to inspect the person's medical, psychological, Hygiene Law § 81.09 [c] [7]), to apply to the court for where the court deems it appropriate (see Es Mental pursuant to Mental Hygiene Law § 81.09, who has the Westchester Div. [J.H.L.], 181 Misc 2d 142, 147 [1999] person's alleged incapacity (see Ramental Hygiene Law duty to interview or consult professionals regarding the be preceded by the appointment of a court evaluator and consequences of such inability. This finding must cannot adequately understand and appreciate the nature to provide for his or her own personal needs and clear and convincing evidence that the person is unable 81.02 (b), a finding of incapacity must be based on of the person when it follows the procedures set forth pursuant to Mental Hygiene Law article 81, it conducts a the personal needs of an alleged incapacitated person in the article. Indeed, under Mental Hygiene Law § constitutionally adequate inquiry into the mental capacity that when a court is asked to appoint a guardian of we agree with the Supreme **3 Court and the dissent As to the first prong of the Rivers v Katz (supra) analysis, 81.09 [c] [6]), to retain an appropriate medical expert

in the case of a person who objects to a proposed treatment plan"]).

appointment, would deprive her of the due process rights and requisite judicial review mandated by Rivers v Katz"]). alleged incapacitated person) pursuant to a guardianship administration of (electroconvulsive therapy) to (the the power, with unlimited duration, to consent to the person) is found to be incapacitated pursuant to Mental ें supra at 149-150; see ि Matter of Shari K., 177 Misc 2d status of a person found to be incapable of deciding a Hygiene Law § 81.02 (b), to grant (the proposed guardian) 25, 27 [1998] ["(a)ssuming that (the alleged incapacitated of New York Presbyt. Hosp., Westchester Div. [J.H.L.], medical treatment issue for himself [or herself]" (Matter is recognition of the potential for change in the mental constitute a determination binding in futuro" and "there reasoned decision as to the proposed treatment does not finding that a mentally ill person is unable to make a objecting patient, apparently acknowledging that "the seeks to administer such a course of treatment to an to capacity be made each time that a medical provider v Katz (supra) mandates that a new determination as without further judicial intervention. Conversely, Rivers future, regardless of her possible regaining of capacity, therapy over Rhodanna's objection at any point in the administration of psychotropic drugs or electroconvulsive indefinite duration, and are authorized to consent to the guardians of Rhodanna have been appointed for an following the appointment of a guardian. Indeed, the decisions at any point in the future, even many years reassessment of Rhodanna's capacity to make treatment the judgment appealed from expressly requires a judicial However, neither Mental Hygiene Law article 81 nor

*111 Hence, the foregoing decisions recognize that a person's mental capacity can change over the course of time, and due process requires that the question of capacity be evaluated each time the administration of psychotropic medication or electroconvulsive therapy is proposed over the patient's objection. This is especially true in the case of a person such as Rhodanna, who is relatively young and may have guardians for another 30 years or more, during which time her degree of mental capacity may change quickly and dramatically, perhaps as a result of sound medical decisions made by those very guardians. To hold, as the Supreme Court did, that the single determination of lack of capacity made in this Mental Hygiene Law article 81 guardianship proceeding

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may forever after deprive Rhodanna of an automatic judicial reassessment of her capacity **4 in the event that such extraordinary medical therapies are proposed against her will in the distant future, affords her far less due process protection than an involuntarily-committed patient who has no guardian at all.

remove the guardian or limit his powers, the issue of mental capacity in the face of the proposed treatment of such an affirmative objection and an application to powers by the guardian in this regard. In the absence on the incapacitated person, or someone acting on her proposed, Mental Hygiene Law § 81.36 places the onus the court for permission to act each time the therapy is treatment or electroconvulsive therapy must apply to (supra), in which the entity advocating psychotropic drug own mental capacity before treatment, thereby satisfying or her welfare may make such an application, a ward can always obtain *112 a reassessment of his or her an incapacitated person or anyone concerned with his exercise." The burden of proof upon an application to Rivers v Katz (supra). However, unlike in Rivers v Katz Matter of Conticchio (supra), the court reasoned that since to such relief" (Mental Hygiene Law § 81.36 [d]). In the incapacitated person "shall be on the person objecting terminate the guardianship or restore certain powers to personal needs . . . which the guardian is authorized to some or all of the powers necessary to provide for "the incapacitated person has become able to exercise modify his or her powers if it is demonstrated that may apply to the court to discharge a guardian or under this article" (Mental Hygiene Law § 81.36 [b]) 81.36 (a) (1) provides that a guardian, the incapacitated to consent to the narrow categories of extraordinary person, "or any person entitled to commence a proceeding they are proposed. Moreover, Mental Hygiene Law § medical intervention under discussion here at the time assessment of the person's current or prospective ability statutes, or in the judgment appealed from, mandating an the management of her property, there is nothing in those regarding the condition of the incapacitated person and provide for the filing of periodic reports with the court While Mental Hygiene Law §§ 81.30 and F 81.31 an incapacitated person who objects to such treatment. and 81.36 (a) (1) and the reasoning is in Matter of Conticchio (182 Misc 2d 205 [1999]) offer little solace to In this regard, Mental Hygiene Law §§ 81.30, 🏝 81.31 to formally object to the continued exercise of

> with psychotropic drugs or electroconvulsive therapy ability to make her own decisions regarding treatment the timely judicial review of the incapacitated person's procedures outlined in Rivers v Katz (supra) for ensuring to provide a constitutionally satisfactory substitute for the substantial shortcomings, we are compelled to conclude that the mechanism in Mental Hygiene Law § 81.36 fails laboring under the effects of drug therapy. Given these ill, is not represented by counsel, and may already be of and exercise this right, especially where she is mentally unrealistic to expect the incapacitated person to be aware will seek to limit or terminate his own powers, and it is prove illusory, since it is unlikely that the guardian himself issue of capacity provided by this statute would frequently limited opportunity for ongoing judicial oversight on the is never revisited by the court. Furthermore, even the

§ 81.22 (a) (8) authorizes the appointing court to empower to an incapacitated person over her *113 objection, albeit psychotropic drug treatment or electroconvulsive therapy the judgment before us. Rather, F. Mental Hygiene Law judicial inquiry in Mental Hygiene Law article 81 or in supra at 497-498). There is simply no analogue to this the guardian to consent to the administration of, inter alia, intrusive alternative treatment regimens (Rivers v Katz, and adverse side effects associated with it, and any less account the patient's best interests, the potential benefits recognize the liberty interest of the patient, taking into whether the proposed treatment is narrowly tailored to against her expressed wishes, the court must ascertain can be compelled to undergo psychotropic drug treatment v Katz (supra) requires that before an incapacitated patient noted earlier, once a lack of capacity is determined, Rivers Law article 81 and from the judgment in this case. As (supra) analysis is glaringly absent from Mental Hygiene The second inquiry required under the Rivers v Katz

"a consideration of the dignity and uniqueness of every person, the possibility **5 and extent of preserving the person's life, the preservation, improvement or restoration of the person's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a reasonable person in the incapacitated person's circumstances would wish to consider" (**Mental Hygiene Law § 81.22 [a] [8]).

While these factors are similar to those set forth in *Rivers*v Katz (supra), Mental Hygiene Law § 81.22 (a) (8)

permits the guardian to consent to such therapy without

efficacy, or necessity of the treatment.

the court ever conducting any inquiry into the nature,

Matter of Shari K., 177 Misc 2d 25, 27 [1998], supra ["to appointment, would deprive (the patient) of the due therapy) to (the patient) pursuant to a guardianship to consent to the administration of (electroconvulsive grant (the guardian) the power, with unlimited duration, was narrowly tailored to protect patient's liberty interest]; intrusive alternatives established that proposed treatment intended psychotropic drug treatment, and lack of less psychiatric evidence adduced at judicial hearing regarding 881 [1989] [clear and convincing medical *114 and her liberty interest]; Matter of McConnell, 147 AD2d to stabilize patient was narrowly tailored to preserve determination that closely-monitored program designed treatment and potential side effects supported court's [1992] [hearing evidence regarding goal of proposed ill patient]; Matter of Mary Ann D., 179 AD2d 724 over the objection of involuntarily committed mentally antipsychotic medication is appropriate to administer psychiatric evaluation to determine whether prescribed narrowly tailored to protect the patient's liberty interest; that it can determine whether the proposed treatment is who can provide the court with a second opinion so the appointment of an independent psychiatric expert Gregory F., 292 AD2d 606 [2002] [matter remitted for upon an incapacitated person (see e.g. Matter of and to what extent such treatment should be forced sides of the treatment issue before determining whether a thorough inquiry and weigh the evidence on both necessity and value of requiring that a court conduct numerous other decisions which have recognized the an approach is contrary to the express holding in and decide the treatment issue to her guardians. Such it cedes the authority to weigh the medical evidence over her objection at some point in the future. Rather, or electroconvulsive therapy is proposed for Rhodanna involvement in the event that psychotropic drug treatment Likewise, the judgment in this case requires no judicial patient's best interests, potential benefits and hazards of AD2d 724 [1994] [court should have ordered independent 🎏 Matter of Kings Park Psychiatric Ctr. [Gerald L.], 204 Rivers v Katz (supra), as well as to the reasoning of

by Rivers v Katz (supra)ⁿ]; ^{§ 58} Matter of Gordon, 162 Misc 2d 697 [1994] [proposed guardian's request for authority to compel alleged incapacitated person to receive psychotropic medication against her will in the future was denied; the proper remedy is to seek permission pursuant to Rivers v Katz (supra)]).

and expense in dealing with the incapacitated person on experts to aid it in evaluating the incapacitated person's may be presented on both sides **6 of the issue, witnesses intentioned a guardian may be, the pressures, difficulties, made by a guardian. Indeed, regardless of how wellconcerns which could influence the treatment decision decision maker, unfettered by the personal interests and AD2d 485 [1999]). Similarly, the court acts as an impartial AD3d 425 [2006]; Matter of Mausner v William E., 264 Matter of Paris M. v Creedmoor Psychiatric Ctr., be demonstrated by clear and convincing evidence (see treatment, and the propriety of *115 the treatment must true condition and the overall efficacy of the proposed the court may appoint independent and disinterested may be subjected to the crucible of cross-examination, represented by counsel, medical evidence and other proof of an adversarial proceeding in which the parties are treatment, the issues are fully explored in the context a court is the arbiter of the propriety of the proposed stamp" the treatment recommendation. Conversely, when danger exists that the guardian will merely "rubber impact of the proposed treatment. Therefore, a genuine appreciate his ward's condition and the true necessity and will even possess the level of sophistication necessary to do so, nor is it realistic to assume that every guardian physician, there is no requirement in article 81 that he of a course of psychotropic drug therapy by a treating second opinion when confronted with a recommendation treatment questions. Hence, while a guardian may seek a by a court which regularly conducts hearings into such degree of medical and psychiatric knowledge possessed judicial proceeding. A guardian is likely to lack that decisions be made by the court in the context of a the requirement in Rivers v Katz (supra) that those However, there are compelling reasons for adhering to the requisite factors and make such treatment decisions. a guardian has been appointed for an incapacitated in Matter of Conticchio (supra) in finding that when (supra), our dissenting colleague relies upon the decision Notwithstanding the plain language in Rivers v Katz person, the guardian rather than the court may apply

a regular basis over the course of time may lead him or her to consent to a treatment plan on behalf of his or her unwilling ward in an unrealistic attempt to cure the person, or in an effort to control erratic or embarrassing conduct by medicating the person to maintain the ward in a docile state. This is particularly true when, as in this case, the guardianship is unlimited in duration and may last for decades, during which time the guardian's own circumstances and priorities may change considerably. There is a real possibility that in such cases, no matter how altruistic the motives of a guardian may be at the time of his appointment, the liberty interest of the incapacitated person may give way to the convenience of the guardian in the ensuing years. Therefore, a guardian is not an adequate substitute for a court in making such decisions.

In reaching our conclusion, we are not unmindful of the presumption of constitutionality which attaches to legislation, as well as of the heavy burden shouldered by those who challenge a statute on the ground that it fails

to pass constitutional muster (see ***LaValle v Hayden, 98 NY2d 155, 161 [2002]). Likewise, we acknowledge the principle that legislation must be interpreted in such a manner as to render it constitutional whenever possible (see National Assn. of Ind. Insurers v State of New York, 89 NY2d 950, 952 [1997]). Indeed, it is precisely that principle which compels us to construe Mental Hygiene Law article 81 as including a Rivers v Katz (supra) hearing requirement in those limited circumstances where a ward objects to the proposed administration of psychotropic drugs or electroconvulsive therapy.

Accordingly, the protection of the liberty interest and autonomy of an incapacitated person, the cornerstone of the decision in *Rivers v Katz (supra)* and of Mental Hygiene Law article 81 itself, is achieved only when a guardian's consent to a proposed course of psychotropic drug treatment or electroconvulsive therapy over his ward's objection is subjected to the multiple due process safeguards afforded by an adversarial *116 proceeding before an impartial judicial decision-maker who considers both the current mental capacity of the person and the propriety of the proposed treatment. Since the judgment at issue fails to provide these fundamental protections, it should be reversed insofar as appealed from.

In view of the foregoing, we have no occasion to reach the merits of the appellant's additional substantive contentions.

Accordingly, the judgment is reversed insofar as appealed from, on the law, and a provision is added thereto directing the petitioners not to authorize the administration of psychotropic medication or electroconvulsive therapy to Rhodanna C.B. without her consent or a further order of the court following a hearing.

Luciano, J. (dissenting). I do not agree with my colleagues in the majority that the judgment in this Mental Hygiene Law article 81 proceeding violates the due process concerns addressed in Fill Rivers v Kalz (67 NY2d 485 [1986]), insofar as it does not provide that the appointed guardians for the incapacitated person's personal needs are not authorized to consent to the administration of psychotropic medication over the incapacitated person's objection.

of capacity to make such decision, and least restrictive incapacitated person, when the statutory criteria of lack alternative are satisfied. to the administration of psychotropic medication to an a court authorizing a personal needs guardian to consent of the incapacitated person as paramount factors. As such, the constitutional rights recognized and safeguarded by person's, always with the best interests and liberty interests to substitute his or her judgment for the incapacitated of making particular decisions, a guardian is allowed where those limitations render the individual incapable capable of in light of his or her functional limitations, and much autonomy and self-determination as he or she is incapacitated person should be permitted to retain as pervading Mental Hygiene Law article 81 is that the individual under the circumstances. The overriding theme restrictive form of intervention necessary for the particular by the court and exercised by the guardian are the least himself or herself, and requires that the powers granted a judicial determination that the alleged incapacitated major medical decisions to be appointed, there must be person lacks the capacity to make such determinations for a personal needs guardian with the authority to make Mental Hygiene Law article 81 requires that in order for Rivers v Katz (67 NY2d 485 [1986]) are not offended by

*117 As articulated in Rivers v Katz (supra), the fountainhead for the right of a mentally incapacitated person to accept or reject medical treatment protocols, including the administration of psychotropic drugs, is the

Due Process Clause of the New York State Constitution. Rivers v Katz (supra) was decided before the enactment of Mental Hygiene Law article 81, and it is incluctable that, in the absence of a duly-appointed guardian, the requirement that a Rivers v Katz hearing be conducted before the administration of any psychotropic medication over an individual's objection is alive and well.

In enacting Mental Hygiene Law article 81, the New York State Legislature made expansive inquiry into the protection of due process rights of a putative mentally incapacitated person, and the Law Revision Commission Comments to article 81 are punctuated by references to Rivers v Katz (supra; see Law Rev Commn Comments, reprinted in McKinney's Cons Laws of NY, Book 34A, following Mental Hygiene Law §§ 81.02, §§ 81.03). Moreover, the legislation is presumptively constitutional.

Mental Hygiene Law § 81.22 (a) (8) authorizes a court to grant a guardian the power to "consent to or refuse generally accepted routine or major medical or dental treatment" on the incapacitated person's behalf.

Mental Hygiene Law § 81.03 (i) defines "major medical or dental treatment" as including treatment "which involves the administration of psychotropic medication or electroconvulsive therapy." It is thus clear that the New York State Legislature intended, in enacting

Hygiene Law § 81.22 (a) (8) and [18] § 81.03 (i), to authorize the court to empower an appointed guardian to consent to the administration of psychotropic medication to an incapacitated person, without the necessity of a Rivers v Katz hearing.

Rivers v Katz (supra) held that before mind-altering drugs can be administered to an individual over his or her objection, there must be a judicial determination that

can be administered to an individual over his or her objection, there must be a judicial determination that the individual lacks the capacity to decide for himself or herself whether to consent to such treatment. If the individual has the capacity to make a reasoned decision, then the medication cannot be administered over his or her objection. If a court determines that the patient lacks such capacity, then

"the court must **7 determine whether the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest . . . taking into consideration all relevant circumstances, *118

including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments" (id. at 486-487).

In a Mental Hygiene Law article 81 proceeding, before granting a petition for the appointment of a guardian of the personal needs of an alleged incapacitated person who does not consent to the guardian's appointment, the court must find by clear and convincing evidence that the alleged incapacitated person is unable to provide for his or her personal needs and lacks understanding and appreciation of such inability (see Mental Hygiene Law § 81.02 [b] [1], [2]).

The court is required to make specific findings concerning the incapacitated person's functional limitations which impair his or her ability to provide for personal needs, and the person's lack of understanding of the nature and consequences of those limitations (see Mental Hygiene Law § 81.15 [b] [1], [2]). The statutory standard for appointment of a guardian in a Mental Hygiene Law article 81 proceeding satisfies the Rivers v Katz (supra) requirement of a judicial determination of whether the person has the capacity to make a reasoned decision regarding treatment.

delineated functional limitations and lack of appreciation of intervention," in light of the individual's specifically such powers "which constitute the least restrictive form court appointing a guardian is only permitted to grant substantive effect to the patient's liberty interest . . . taking that "the proposed treatment is narrowly tailored to give administered over objection, there must be a showing decisions on behalf of an incapacitated person, moreover, has been given the authority to make major medical of the nature and consequences of such limitations (see at 486-487). Under Mental Hygiene Law article 81, the the treatment and any less intrusive alternative[s]" (id the treatment, the adverse side effects associated with the patient's best interests, the benefits to be gained from treatment decision, then before the treatment can be by the court to lack capacity to make a reasoned whether the proposed treatment is narrowly tailored to Rivers v Katz (supra) as pertinent to the determination of is required to consider the same factors as set forth in Mental Hygiene Law § 81.15 [b] [5]). A guardian who into consideration all relevant circumstances, including If, after a Rivers v Katz hearing, an individual is found

give substantive effect to the individual's liberty interest, in making a decision as *119 to whether to consent to or refuse medical treatment (see ** Mental Hygiene Law § 81.22 [a] [8]).

The focus throughout Mental Hygiene Law article 81 on limiting a guardian's authority to what is "necessary to assist the person in providing for personal needs," in order to "accomplish the least restrictive form of intervention" (Mental Hygiene Law § 81.16 [c] [1]), satisfies the *Rivers v Katz* (supra) "narrowly tailored" criteria.

proposed treatment could be dispensed. **8 a Rivers v Katz hearing would be required before the the court should not grant such authority, in which case to an incapacitated person, and when there is a doubt assess the propriety of granting a guardian the power to consent to the administration of psychotropic medication proceedings, the appointing court is in the best position to guardian may prove to be a concern in other guardianship the well-being of their mother. Insofar as the motives of a have altruistic intentions arising out of their concern for incapacitated person's personal needs, her two children, of the record satisfies me that the coguardians of the with psychotropic medication, in this case a review by inappropriate factors to support forced treatment judicial forum. While the majority posits that a guardian, whether or not a family member, may be motivated to the individual's liberty interest, be decided in a consideration all relevant considerations, the proposed treatment is narrowly tailored to give substantive effect require that the determination of whether, taking into is a uniquely judicial function, it does not purport to be satisfied in a judicial proceeding. While Rivers v requires that the narrow tailoring requirement can only I disagree with the majority's contention that due process Katz (supra) states that a determination of incapacity

I do not agree with the majority that permitting a court to grant a guardian the authority to consent to the administration of psychotropic medication or electroconvulsive therapy violates due process because there is no ongoing review of the individual's mental capacity to make a reasoned medical treatment decision. That argument was the basis for the holding in Matter of New York Presbyt. Hosp., Westchester Div. (J.H.L.) (181 Misc 2d 142, 147 [1999]) which,

although recognizing that article 81 "provide[s] an individual with the procedural protections required under *Rivers*," nevertheless held that a guardian could not be authorized to consent to the administration of psychotropic medication over the objection of an incapacitated person, without first conducting a *Rivers v Katz* hearing. However, as *120 stated by the late Court of Claims Judge Frank [5] S. Rosetti in *Matter of Conticchio* (182 Misc 2d 205, 211 [1999]):

process requirements of Rivers (supra)." hearing and hence concededly compliant with the due are essentially the same as in an original article 81 439). Thus the procedural safeguards in such a review Comments, op. cit., Mental Hygiene Law § 81.36, at Mental Hygiene Law § 81.36 [d]; Law Rev Commn powers are still necessary with respect thereto (see, making reasoned treatment decisions and the guardian's that the incapacitated person is still incapable of the guardian to show by clear and convincing evidence [b], [c]; § 81.06 [a] [6]), and the burden of proof is on for treatment powers (see, Mental Hygiene Law § 81.36 her welfare can request a hearing on the continued need incapacitated person or anyone concerned with his or Mental Hygiene Law § 81.36. Under said provision the "Such a view does not sufficiently value the article provision for modification of powers, to wit,

The majority opines that the continued oversight contemplated by Mental Hygiene Law § 81.36 will often prove illusory. However, an incapacitated person who has regained the capacity to make his or her own reasoned medical treatment decisions will presumably also be capable of seeking legal representation for the purpose of exercising the right to seek modification or termination of the guardian's powers.

Based on all the foregoing, I believe that the judgment should be affirmed insofar as appealed from.

Ritter, J.P., and Skelos, J., concur with Mastro, J.; Luciano, J., dissents and votes to affirm the judgment insofar as appealed from in a separate opinion.

Ordered that the judgment is reversed insofar as appealed from, on the law, without costs or disbursements, and a provision is added thereto directing the petitioners not to authorize the administration of psychotropic medication or electroconvulsive therapy to Rhodanna C.B. without

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her consent or a further order of the court following a hearing.

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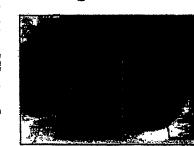
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Routine Violations of Medical Privacy in Article 81 Guardianship Cases: So What or Now What?

By Joseph A. Rosenberg

Introduction

Each day in courtrooms throughout New York State, and indeed the United States, judges are asked to decide whether to appoint a guardian for an alleged incapacitated person ("AIP") with the power to make decisions about property management and personal needs. In New York, the standard for appointing a



guardian under Article 81 of the Mental Hygiene Law requires clear and convincing evidence of two main elements: that a guardianship is necessary to provide for a person's personal needs and property management, and the person either consents to the appointment or is found to be incapacitated. Medical evidence is not necessary to prove that a person is incapacitated and needs a guardian. Atthough medical information can be an important piece of the guardianship "puzzle," it may be prejudicial and obscure the primary inquiry under Article 81: what are the functional capacities of the person alleged to need a guardian, and does the person have functional limitations that she does not fully understand or appreciate, and as a result place her at risk of harm?*

Anecdotal evidence suggests that many, if not most, guardianships are resolved in a generally decent manner, with genuine care and concern for the person who is alleged to be incapacitated and in need of a guardian. However, the "loose use" of medical information creates the risk that medical privacy rights are routinely violated. This is not only a cause for concern in that unauthorized disclosure of private health related information is unlawful and damaging to a person, but it also may shift the predominant frame of a guardianship from a functional assessment to a medical diagnosis. Excessive reliance on medical evidence can result in a court order that appoints a guardian without a full exploration of less restrictive alternatives that may be available and sufficient. Consider the following scenarios:

 Adult Protective Services ("APS") filed a petition to appoint a guardian for a single woman in her mid-80s based on an investigation conducted by an APS psychiatrist. The petition alleged that the woman could not make decisions about her property or personal needs, including health care deci-

chiatrist allegedly obtained the woman's consent to meet. The discussion leading to the patient's "consent" was brief and the psychiatrist did not advise her that the information he was gathering might be used in a guardianship petition and at a hearing. Although the APS psychiatrist testified that the person was incapacitated and needed a guardian, the petition was dismissed because the court found that the person had the capacity to execute advance directives and had an adequate informal support system. The testimony of the psychiatrist was permitted and the psychiatric affidavit remained part of the public record.

- appropriate home care and case management charge back to his home in the community with and required that the guardian facilitate a dissent to the appointment of a guardian, but only support of the petition. The hospital also alleged alleged psychiatric issues and substance abuse in pointed for a man in his 60s who was brought to A hospital filed a petition for a guardian to be apwith limited powers for a limited period of time, court found the person had the capacity to conplace him permanently in a nursing home. The power to sell his residence in the community and to his home and asked for a guardian with the that the person could not be safely discharged hospital included medical information relating to ented while shopping at a local supermarket. The the hospital by his family when he became disori-
- A nursing home filed a petition to have a guardian appointed for a woman in her 80s who had been living at home in an apartment. After a mild stroke required the woman's hospitalization, and rehabilitation in a nursing home, the petitioner alleged that the woman needed a guardian due to her dementia and psychiatric issues. The petition asked that the guardian be granted the power to relinquish the AIP's apartment and keep her in the nursing home. The court appointed a guardian with the power to release the person's apartment and place her permanently in the nursing home.
- A parent filed a petition to be appointed guardian for his 21-year-old daughter, whose struggles with psychiatric issues required her to reside in a residential school. The school provided medical information that was used to support the peti-

tion, and the daughter's psychiatrist submitted an affidavit that was attached to the petition. The petition requested a guardianship with full powers and for an unlimited duration. Although the daughter's functional capacity was relatively high and she may have been able to function independently over time, the court appointed the parent as guardian with broad powers for an unlimited duration.

These cases represent a microcosm of cases decided pursuant to Article 81 of the New York Mental Hygiene Law. This statute, which was enacted in 1983, has been justifiably lauded as a pioneering piece of legislation because it moved the focus of the need for a guardian from a medical model to a functional model and looks at the capacity of the person to make decisions and perform activities of daily living.⁶

need a guardian, and 2) all of the cases could have been resolved without filing a petition for guardianship age. Despite their variety, the cases described above all major decisions for a child reaching the 21 years of nursing home; sale of a residence in the community and ianship proceeding are also illustrative: protection violated the medical privacy of the person alleged to included as part of the petition and used in ways that ance that a parent would have legal authority to make permanent placement in a nursing home, and assurand mental disease. The reasons for bringing a guardand the young adult, suffering from a lack of maturity release her apartment and place her in a nursing home, the elderly woman whose guardian was authorized to history of financial problems and substance abuse being forced out of his residence and into a nursing home; support system in place; the older person who had a group, including the elderly woman, who becomes the subject of an APS investigation, who has an adequate people alleged to need a guardian represent a diverse a government agency, hospital, nursing home, or a famvelopmental disabilities." The case vignettes described affect cognition (e.g., Alzheimer's disease and other dementia-related conditions), mental illness, and/or dedue to mental health issues, age-related diseases that and demographic patterns point to substantial increases and the United States is rapidly becoming more diverse, have two commonalities: 1) medical information was son alleged to need a guardian to file a petition. Those person or entity concerned with the welfare of the perily member—and the statute also authorizes any other above reflect this diversity. The petitioners can include in the number of people who may need a guardian The adult guardianship population in New York possible financial exploitation, discharge to a

In recent years, a great deal of attention has been paid to the "back end" of guardianships. This phase of a guardianship relates primarily to the duties of a guardian, the duration of the guardianship, the filing of

initial, armual and final reports which are reviewed by court examiners and approved by the guardianship part or court. In addition, this judicial oversight is crucial to assure that the powers being exercised remain appropriate and necessary, and that the person is residing in the least restrictive setting that is reasonable under the circumstances.⁹

However, relatively less attention has been paid to issues at the "front end" of guardianships, which is the point at which unnecessary guardianships can be avoided. ¹⁰ These issues include the standard for appointing a guardian, pleading requirements, possible alternatives to a guardianship, the nature and quality of notice to the AIP and interested parties, circumstances under which an attorney must be appointed, the scope of the court evaluator's role, and the use of medical information to support a petition to appoint a guardian, whether in the form of medical affidavits, records, or testimony.

Article 81 is a functional statute that includes important components of due process. The standard for the appointment of a guardian is clear and convincing evidence. The pleadings must include a plain English notice to the AIP. The court must hold a hearing at which the AIP must be present, unless the court dispenses with this requirement. The court must appoint a court evaluator or an attorney for the AIP. The rules of evidence apply in contested hearings, courts are required to consider alternatives to a guardianship before appointing a guardian, the statute requires particular findings of fact, and provides for a variety of arangements that include limited guardianships both in scope and duration.¹¹

many years. But the failure to adequately safeguard and during the pre-hearing investigation stage when the parties prepare their evidence, and while the neutral a functional and least restrictive means framework will ship that is unnecessary rights of the AIP person, but also result in a guardianmation might not only violate the dignity and privacy protect private medical and health care related infortion that remains in court files and digital records for see, know, or care about the private medical informamay be relatively benign and in reality few people may throughout the "back end" of the guardianship in the guardian's initial and annual reports. These violations continue at the hearing, and (if a guardian is appointed) court evaluator assesses the allegations and prepares recommendations to the court. These violations may ianship case, including the "front end" in pleadings, may occur throughout the various phases of a guardbe subordinated a medical diagnosis. These violations is that the statutory mandate to view the case through person's medical privacy will be violated, and the other medical information create a dual risk. One risk is that a Yet, even under Article 81, routine disclosures of

resources of the guardianship system. 14 in unnecessary guardianships that further strain the as case management and discharge planning, resulting instead of exploring meaningful support services, such agencies (i.e., APS) may file a guardianship proceeding (i.e., hospitals and nursing homes) and government sessment and potential alternatives to a guardianship to a secondary consideration. Thus, health care facilities enable a petitioner (and court) to relegate a functional to the person alleged to need a guardian in that it may century in numerous reports and studies. 12 Medical information and diagnosis may potentially be detrimental has been repudiated over the course of the last quarter vestiges of the medical model of guardianship, which loose use of medical information may help perpetuate tion to violating a person's medical privacy rights, the tion be disclosed and admitted into evidence during the violations of a person's medical privacy rights and unare whether there are sufficient safeguards to prevent various phases of an Article 81 guardianship. In addider what circumstances, if any, should medical informasibly a jury, make a decision. Rather, the real questions admissible, then it may very well help a judge, and poscase. Indeed, if it is relevant, probative, material, and medical evidence should ever be part of a guardianship The question I explore in this article is not whether

In addition, and perhaps more importantly, to have a guardian appointed to make decisions is to experience a "civil death." It deprives a person of the fundamental rights that define our personhood. It deprives a person of the right to forge an individual path in the world, however flawed and imperfect, as part of a larger community. It is those precious and fundamental rights that are essential to nurture human growth and development.

A. The Tension Between Functional and Medical Evidence to Prove the Need for a Guardian and Incapacity

Guardianships involve the deprivation of a person's fundamental liberty rights that are protected by the Due Process Clause of the Rourteenth Amendment to the U.S. Constitution. If The United Nations Convention and Optional Protocol on the Rights of Persons With Disabilities ("UN Convention") also includes far reaching provisions and a framework for protecting fundamental human rights for people with disabilities. If A guardianship should only be used as a last resort when less restrictive alternatives have been exhausted. If a court decides that a guardian is necessary, the U.S. Constitution and Article 81 require that the guardian only be granted the minimum powers that are necessary. Article 81 provides for an array of due process protections, including:

Detailed notice and pleading requirements

- A functional framework that does not require medical information;
- The appointment of a neutral court evaluator or attorney for the person in every case;
- Consideration of less restrictive alternatives to a guardianatup;
- A mandatory hearing;
- The right to invoke the Fifth Amendment protection against self-incrimination;¹⁷
- Clear and convincing evidence of the need for a guardian and the person's consent or incapacity;
- Required findings of fact; and
- Tailored guardianships that are monitored after 90 days and annually.

The concept of the least restrictive alternative is central to the rights of people who are subjected to guardianship proceedings and is codified in the opening legislative findings and purpose section of Article 81:

all the decisions affecting such person's self-determination and participation in greatest amount of independence and son, and which affords the person the takes in account the personal wishes, individual needs of that person, which preferences and desires of the percapable...in a manner tailored to the self-determination of which they are them to exercise the independence and needs but, at the same time, permits which assists them in meeting their the least restrictive form of inbervention incapacities to make available to them able for and beneficial to persons with The legislature finds that it is desir

The stakes of a guardianship proceeding are extremely high. The outcome of a guardianship directly affects the AIP's right to make decisions about fundamental aspects of life such as where to live, ¹⁹ health care and medical treatment, ²⁰ social environment, ²¹ and management of finances and property. ²² The right to live independently, with appropriate support, is an essential component for a person to be fully recognized under the law. In Article 81 cases, the question often arises whether a person should continue living at home in the community, return to a community residence from a hospital or nursing facility, or continue to reside in a health care facility or other instinuional setting, Article 81 mandates that a person under a guardianship

be given the opportunity to remain living in, or return to, the community provided it is reasonable.²³

The right of people with disabilities to live independently in the community was recognized by the U.S. Supreme Court in Olinstead n. L.C. by Zimring. In Olinstead, the U.S. Supreme Court held that under the Americans with Disabilities Act (ADA), individuals with disabilities had a right to "the benefits of community living" if the placement was appropriate, it was not opposed by the "affected" individual, and the placement could be reasonably accommodated without a fundamental altering of the program providing the services. The court held that under the ADA, the segregation of individuals with disabilities within institutions constitutes discrimination, and the ADA's "integration regulation" requires reasonable accommodations in a community based setting. 26

The right to independent living under Article 19 ("Independent Living and Being Included in the Community") is also a key provision of the UN Convention. The UN Convention focuses on a person's legal capacity and rejects substitute decision-making and guardianship in favor of a support model of decision-making. There is a symbiotic relationship under the UN Convention between the Article 19 mandate for independent living and Article 12, which provides that persons with disabilities shall have equal recognition before the law and be entitled to the support necessary to "exercise their legal capacity." 21

The standard for appointing a guardian has evolved along with societal notions of incapacity, the understanding that disability is as much a social construct as a personal challenge, our knowledge that the capacity to make decisions is local and not global, and the value we place on autonomy over protection. The concept of disability has, and continues to be, defined under a variety of rubrics, not all of which are mutually exclusive. Medical, legal, and functional needs are all accepted "prisms" through which a person's capabilities can be assessed. The "support of legal capacity" model under Article 12 of the UN Convention situates all people along a continuum of support.²⁹

The medical evidence dilemma reflects the tension between autonomy and protection that is at the core of guardianship cases and also illuminates the larger, evolving movement away from a medical model to a functional framework, which may ultimately culminate in the support model envisioned by Article 12 of the UN Convention. A requirement that medical evidence must be offered to establish incapacity or disability may violate a person's civil rights and result in an erroneous determination that does not reflect the functional ability and capacity of the person in contrast, appointing a guardian merely based on factual evidence that is anecdotal, may risk ignoring or minimizing medical

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conditions that are causing the person's limitations and that might be temporary or responsive to treatment. 30

When the evidence presented to prove the need for a guardian involves both a person's psychiatric condition and history, two main problems arise. First, admlssion of this evidence "[p]oses a significant risk of unfair prejudice to the plaintiff in light of the persistent and evasive stigmatizing effects of psychiatric diagnoses." Second, "[f]act finders are likely to misuse psychiatric evidence, particularly when offered through expert witnesses, because they have few tools to independently evaluate such evidence and thus may overvalue the significance of psychiatric diagnoses for the resolution of factual questions." 32

The functional capacity framework of Article 81 looks primarily at the person's capacity to manage activities of daily living, including decisions about finances and health care. The standard for appointing a guardian under Article 81 has two essential components. The guardianship must be necessary and, the person must either consent or found to be "incapacitated." A court must not appoint a guardian if there are adequate alternatives that are less restrictive and adequately meet the person's needs, which would make the guardianship unnecessary. The term incapacitated under the statute means the person has: a) limitations that interfere with activities and decisions of daily living; b) the person does not understand the nature and consequences of her limitations; and is c) therefore at risk of harm.

Although Article 81 has many of the positive attributes of the functional approach, the inappropriate use of medical evidence creates the risk of violating the medical privacy rights of the person alleged to need a guardian. The consequences of these violations may depend in large part on the context of the case and the circumstances of the person. Greater awareness of medical privacy would help Article 81 fully realize its stated intent to base guardianship on a person's functional capacity and reinforce respect for the complete legal recognition of each person's rights, dignity, and legal capacity.

B. Protections Against Disclosure of Medical Information that Affect the Guardianship Population

Privacy is of great value in our society, and medical privacy in particular enjoys multi-layered levels of protection under various laws that govorn disclosure by health care entities and individual providers. The include the right to medical privacy, protection against disclosures by entities under the federal Health Insurance Portability and Accountability Act (FIIPAA) and the New York Mental Hygiene Law, as well as evidentiary privileges such as the physician-patient privilege.³⁰

Medical Privacy Rights under the U.S. Constitution and State Constitution Apply to Individuals Alleged to Need a Guardian

The U.S. Supreme Court has recognized a right of informational privacy under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. There are two broad categories recognized within the right to privacy: the right to autonomy, which protects personal choices from unwarranted interference from the government, and the right to maintain the confidentiality of private information. The Whalen v. Roe, the court held that although there was a constitutional right of privacy, a computerized record of prescriptions for controlled substances maintained by the State of New York did not violate those rights, as it contained adequate protection against disclosure and did not affect an individual's decision to obtain a prescription.

Maison criticized the majority for imposing an unduly restrictive standard, particularly in the procedural posture of deciding a motion to dismiss the complaint. website, and the New York Times ran an article about her situation. The court held that her privacy rights were its investigation, the BOE posted her condition on its would bring "opprobrium," such as disgrace, discrimination, and intolerance. 43 Maison involved a music have a serious medical condition that, if disclosed, Constitution requires a case-by-case analysis, in Matson v. Bd. of Educ. of the City Sch. Dist. of N.Y., 4 the Second Although courts agree that determining if a person's medical privacy rights have been violated under the personal matters" applies to the medical information of a person with HIV^{39} a prisoner with HIV who is a and discrimination, and that any adverse consequences the teacher suffered were due to her abuse of the sick dition that if disclosed would result in societal stigma involve a psychiatric disorder, was not the kind of connot violated in that fibromyalgia was not fatal, did not potential abuse of its sick leave policy. In the course of the City of New York Board of Education ("BOE") for teacher with fibromyalgia who was investigated by Circuit hold that the standard requires that the person transsexual, ⁴⁰ and a person with sickle-cell anemia. ⁴¹ this constitutional right "[i]n avoiding disclosure of leave policy, not her medical condition. The dissent in Federal courts in the Second Circuit have held that

Assuming a particular medical condition is sufficiently serious and subject to societal discrimination, the question of whether disclosure is reasonable requires analysis of the government's interest in public health and whether action was taken to minimize the disclosure of private information.

Although not specifically mentioned in the N.Y. Constitution, New York courts have held that the scope of the right to privacy protected under the N.Y. Constitution is broader than the U.S. Constitution. The N.Y. Court of Appeals has not specifically ruled on the questional to the privacy process of the privacy protection.

tion of disclosure of medical records, although it has upheld the requirement under New York City law that the name and address of a person obtaining an abortion be included on the pregnancy termination document filed with the Department of Health, as it furthered a governmental interest in maternal health and made it easier for government officials to retrieve a person's health records.⁴⁶

medical information supporting a finding of incapacity a person to discrimination and intolerance. A person's trigger the required level of disgrace, discrimination mental capacity to make decisions, disclosure could that particular medical conditions relate to a person's and that a guardianship was necessary. To the extent appear to be satisfied if a case involved the disclosure of guaronan court decides the person is incapacitated and appoints a or disappear merely because a government agency or health care facility files a petition for guardianship, or a reasonable expectation of privacy should not diminish serious, potentially fatal, and if revealed could subject from discrimination under the ADA. Each of these are these potentially disabling conditions is protected a history of substance abuse, a person suffering from such as Alzheimer's disease, Parkinson's disease, or tion and includes information related to a condition a medical affidavit accompanies a guardianship petiand intolerance required by Matson. Por example, if the requirement that a condition be "serious" Applying these standards to guardianship cases, would

HIPAA and the New York Mental Hygiene Law Limit the Circumstances Under Which Covered Entitles May Disclose Protected Health Care Information in Guardianship Proceedings

The release of medical records is subject to the requirements of the Health Insurance Portability and Accountability Act (HIPAA). ** HIPAA preempts state law unless the state law provides greater privacy protection to health-related information than HIPAA. For example, prior to HIPAA, a person who brought a medical malpractice action was deemed to have placed his or lar medical condition at issue, and therefore impliedly consented to the disclosure of medical information to the defendant's attorney. However, HIPAA's provisions require separate authorization by the plaintiff before a defendant's attorney is permitted to obtain protected health related information. Otherwise, the information is not admissible.

A patient or her authorized representative (for example, a person named in a HIPAA release, a court appointed guardian with the power to access health care information, or an agent under a health care proxy) must consent prior to the disclosure of medical records by a covered entity under HIPAA. Exceptions to these requirements include a disclosure required by law, which include but are not limited to requests made in

the course of a judicial proceeding. The disclosure may be in response to a subpoena, court order, or other process related to the proceeding.

court order or subpoena. 51 Miguel M. applied retroactively and ruled that the medi disclosed without the patient's consent and without a cal records at issue were not admissible since they were with virtually identical facts, a lower court held that that a crime has been committed. In a subsequent case in which courts have admitted medical records to prove distinguished the AOT context from a criminal context the court held that the records were not admissible, and ception under HIPAA and the Privacy Rule. Moreover, AOT program did not fall within the public health exor administrative process. The court also held that the treatment, or pursuant to a court order or other judicial and there was no juddial process in the form of a court order or subpoena. 51 In Miguel M., the records prolease of medical records to a state agency in an Assisted Outpatient Treatment (AOT) proceeding pursuant to N.Y. Mental Hygiene Law § 9.60 (a.k.a Kendra's Law) violated HIPAA, as the disclosure was not authorized exceptions recognized under HIPAA: for purposes of vided to the AOT administrator did not meet any of the by the person who was the subject of the proceeding The N.Y. Court of Appeals has held that a hospital's re medical records or information, and potentially a fine the HIPAA procedures will result in the exclusion of the to its general rule of non-disclosure, the failure to follow Although HIPAA includes a number of exceptions

Under Article 81, health care facilities that initiate guardianship proceedings routinely disclose medical information without the consent of the patient or an authorized representative. This disclosure of medical information may be at the very beginning stage of a guardianship proceeding, with the filing of the petition. The disclosure often continues throughout all stages of the guardianship. All the while, sensitive health care information is disclosed freely, without the AIP's consent or a court order.

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Evidentiary Privileges Protect Disclosure and Admission of Medical Evidence in Guardianship Proceedings

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Evidentiary privileges govern the relationship between a health care professional (and other disciplines such as social workers) and a patient/client/consumer. The physician-patient privilege did not exist at common law and New York was the first jurisdiction to enact a physician-patient statutory privilege in 1828. Although subject to some criticism, this privilege is firmly embedded in the public policy of New York. The privilege safeguards disclosures by individual providers and entities under the theory that "privilege in the courtroom will encourage disclosure in the sickroom." The physician-patient privilege protects information obtained by a physician who attends to a person in her

professional capacity, whether the information is communicated to the physician or based on the physician's observations. A physician-patient relationship is created when "professional services are rendered and accepted by the patient pursuant to an express or implied contract." The privilege applies regardless of whether the information is in the form of testimony or record. The privilege is construed broadly, although there are exceptions for review of records by a court evaluator in an Article 81 case, sexaminations related to employment (unless the physician affirmatively treats or recommends treatment), secases involving guardianship or custody of abused or destitute children, reports made in concerning suspected abuse and neglect of children, where the physical and mental condition of a decedent is at issue, and for certain public health purposes. 60

The privilege is not waived merely because a person has to defend against an action that places her medical or psychiatric condition at issue, even if the plaintiff or petitioner claims that the person's medical condition is "in controversy" and subject to discovery. It is applies directly to Article 81 guardianships, where a person who is alleged to need a guardian is not making a claim, or putting her medical condition at issue (at least initially), but is defending allegations made in the petition by a government agency, health care facility, person, or other entity.

ALL SALES

Typically, a person who is alleged to need a guardian may interact with a variety of physicians and other health care professionals who initiate contact with the person in a therapeutic context and may be subject to an evidentiary privilege. This sort of involuntary physician-patient relationship can pose special challenges in a guardianship, as they may not fit neatly within the traditional conception of a treating physician.

C. The Use and Abuse of Medical Information in Guardianship Proceedings: A Double-Edged Sword Along a Fine Line

The disclosure of medical information in a guardianship case creates a risk that the person's medical privacy rights will be violated and health-related information will be admitted into evidence that may not be causally connected to the person's functional capacity and might distort the need for a guardian based on a medical diagnosis. Conversely, the use of medical diagnosis. Conversely, the use of medical evidence and testimony in guardianships may be necessary to assure that any possible determination of incapacity is not the result of side effects from medication, depression, or other conditions that if properly treated will resolve the problems causing the person's incapacity.62

Under Article 81, a guardian can only be appointed if it is necessary and the person consents or is found to be incapacitated. The element of necessity requires a finding that the person is at risk of harm if a guardian is

that may lead to harmful consequences.66 If a court of a knowing or informed choice about the decisions questionable wisdom or even self-destructive nature of inability to pay rent or provide for one's needs, nor the interfere with decisions about property and personal needs may put the person at risk of harm. 6 Notably, a incapacitated. Incapacity is defined as a person's lack of make an informed decision about the nature and conrequires that the person either have the capacity to element of either consent or a finding of incapacity not appointed. If alternatives to a guardian are available is found to be incapacitated. adequate alternatives exist or the person is not at risk of harm, the petition must be dismissed, even if the person finds that a guardianship is not necessary, for example if finding of incapacity cannot be based, for instance, on awareness and understanding of how limitations that sequences of having a guardian appointed or be found and sufficient, the guardianship may not be necessary, and the petition must be dismissed.⁶⁴ The secondary "bad" decisions. Rather, it must be based on the absence

Article 81 requires that certain information be included in the petition, including a "description of the AIP's functional level, including the AIP's ability to manage the activities of daily living, behavior, and understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living." Witnesses may be family members or friends, professionals that have come into contact with the person or health care personnel who may base their assessment on a medical diagnosis. Although this evidence can and should be primarily factual and anecdotal, medical information and diagnoses continue to have a significant, if not primary, role in Article 81 cases. However, medical evidence is not required, either as part of the petition or at the hearing."

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The use of medical evidence depends in large part on the context, the reasons for its use, and the role of the person requesting access to those records. In an uncontested proceeding, courts may have the discretion to relax evidentiary rules, although that may still be problematic in that the privacy rights of a person may be violated. In a contested guardianship hearing, the full panoply of objections and evidentiary requirements apply, and courts will deny motions to admit medical records and testimony into evidence. In a contested apply, and courts will order the hearing be closed to the public and the case record scaled. To

 Using Protected Medical information in Support of the Petition May Violate HIPAA, the Physician-Patient Privilege, and Distort the Focus on Functional Capacity and the Least Restrictive Alternative

There is risk that the privacy rights of the AIP may be violated when the order to show cause and petition

are filed. The petitioner may be a hospital or nursing home, and the petition may contain the AIP's medical information obtained from the facility's medical records or records of treating physicians at the facility. Although Article 81 explicitly states that medical information is not required to be included in the petition, the order to show cause must inform the person that the court evaluator may request a court order to inspect medical or psychiatric records and that the AIP has the right to object to this request. In this very common scenario, a court may strike a medical affidavit attached to the petition because it violates a person's medical privacy rights under HIPAA, the physician-patient privilege, or other applicable privacy laws.

When the petitioner is a hospital, nursing home, or other covered entity, the practice of including medical information as part of the petition violates HIPAA. In Matter of Derek, in a case decided under Article 17-A of the Surrogate's Court Procedure Act but directly applicable to Article 81, a court removed medical affidavits that were attached to the petition, which is required by the statute. The court held that the affidavits violated HIPAA, but denied the motion to dismiss as there was sufficient non-privileged information to state a cause of action.

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If medical information from a treating physician is included as part of the potition, it may also violate the physician-patient privilege. Even when the purpose of the petition is to secure an appropriate placement for a patient in a facility, medical records and the testimony of treating physicians are not admissible. In the illustrative case of Ihra X, a contested advensarial proceeding in which the privilege had been asserted, a daughter alleged in the Article 81 petition that her mother had various psychiatric conditions that made her incapacitated. The daughter attached affidavits from a physician who treated the mother during a prior hospitalization, and reports of "medical personnel" who "attended" to the mother prior to that hospitalization. The court evaluator requested access to the AIP's medical records, and permission to retain an independent physician to consult. The respondent AIP asked the medical records, and also opposed the request of the court evaluator.

The court began its analysis by referring to the strong public policy in New York which supports the physician-patient privilege. The court noted that its purpose was "[t]o encourage its citizenry to seek medical treatment for any physical or mental condition without fear of the public ridicule or disgrace that might result from a disclosure of any such condition."

The court stated that, although the privilege was not absolute, there were very limited exceptions, including the use of medical records by a court evaluator in guardian-

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ship matters to assist in the investigation of the case as well as potential disclosure under some circumstances

The court in Thra X denied a motion by the court evaluator to discover medical records because the court held that it would reduce the level of due process protection for the AIP to one below other civil litigants. The court ordered that medical information attached to the petition be removed and sealed. The holding in Thra X affirmed the vitality of the physician-patient privilege and the duty of the court to honor the privilege.

A peditioner who seeks disclosure of medical records by subpoens subsequent to filing the petition implicates a variety of protections against disclosure of medical information. In granting a motion to quash the subpoens served on a local agency of NYSARC Inc., the court noted that this was a case of first impression. As the New York State Office of People with Developmental Disabilities certified the local agency, the records were protected under N.Y. Mental Hygiene Law § 33.13. As a covered entity, the local ARC agency was subject to the requirements of HIPAA, which requires that medical records be held confidential without the consent of the patient or a court order. The court also held that the records were protected under the physician-patient privilege. Notably, the court emphasized that medical evidence is not required in an Article 81 proceeding, and there was ample non-privileged information to prove the need for a guardian.⁷⁸

Using medical information in the petition potentially violates laws protecting medical privacy. The practice may also have the effect of allowing the petitioner to minimize or ignore the statutory requirement to provide information about the person's functional capacity and fully explore whether alternatives to a guardianship are available. This has the effect of framing the guardianship in terms of medical diagnosis, and enables the petitioner to avoid taking responsibility for meaningful discharge planning or case management that meets the needs of the person without the appointment of a guardian. Even if a guardianship is necessary, medical information substitutes for a description of the person's capacity to perform activities of daily living and make decisions. Instead of guardianship being a last resort, it becomes a means for providing case management and discharge planning, often to the detriment of the person.

 Disclosure of Medical Records to the Neutral Court Appointed Investigator: A Sound Practice That Balances the Need for Relevant Information and Privacy Concerns

Under Article 81, the court evaluator plays a pivotal role in the proceeding and has broad-ranging powers, including the duty to protect the property and interests of the person alleged to need a guardian. ⁸⁰ As the neutal "eyes and ears" of the court, the court evaluator is

in a unique position to shape how the case unfolds. It critical that the court evaluator attempt to limit unnecessary disclosures of medical information, fully explor the availability of less restrictive alternatives, promote the use of evidence related to functional capacity, and it is necessary to appoint a guardian, recommend that the court only grant those powers that are necessary and appropriate.

Article 81 strikes a balance between the court eval ator's possible need to review medical records, and th importance of protecting the medical privacy rights of the person alleged to need a guardian. A court evaluator may request a court order to review medical records, and if the court issues an order, it is only for. the limited purpose of assisting the court evaluator in her investigation. The court may order the disclosur of these records to the court evaluator, notwithstandir the physician-patient privilege, the psychologist-patie privilege, or the social worker-client privilege provisions of the CPLR. B However, the authority of the court may be limited by federal and state laws that impose different standards for the disclosure of particular kin of records including, but not limited to, records of patients in alcoholism and substance abuse facilities, HI related information, and records of patients in mental hygiene facilities.

Article 81 draws an important distinction between the use of medical records to assist the court evaluator and their admissibility as evidence in court. This framework recognizes that while medical records mighe helpful in a court evaluator's assessment, they are not always essential and should not be disclosed unnecessarily or automatically be deemed admissible. To court evaluator should initially only disclose relevant records to the court in-camera. Unless the court direct otherwise, the court evaluator should only discuss medical specific diagnoses and medications in a separate addendum to the court evaluator report.

a breach of the AIP's physician-patient privilege. It dent medical expert may be necessary in order to avo the court evaluator needs that information, an indepo there is insufficient medical information available an where it is necessary and appropriate. 8 An indepento the court to retain an independent medical expert larly admissible. 87 The court evaluator can also apply information obtained by the court evaluator are simiexamination, that does not mean medical records and into evidence if the court evaluator is subject to cross or extend to admission as evidence at the hearing. pre-hearing discovery, as with Article 31 of the CPLR of the petitioner, or attorney for the person alleged to need a guardian. ⁸⁵ This disclosure may be limited to further disclosure of those records upon the request to the court evaluator, the court may also direct such Although the court evaluator's report may be admit If the court orders that medical records be disclos

dent medical expert may help determine if the AIP is incapacitated. A court may deny a request by the court evaluator for an order that grants access to medical records on the basis that it would deny the person alleged to need a guardian constitutionally protected due process rights.⁸⁹

a public record is part of the proceeding and remains in the court file as uncontested proceeding, if private medical information cerns about medical privacy are equally present in an evidence and testimony would not be required. Conmakes a finding of incapacity unnecessary and medical point based on a finding of necessity and consent. This to the appointment of a guardian, a court may aprelaxing the rules of evidence may create a potential problem for a person who needs, and does not object to, a guardian. If the person has the capacity to consent of the person alleged to be incapacitated. However, statutes that provide enhanced protection of the rights versarial" approach embodied in modern guardianship "best interests" approach to guardianship and the "adof evidence. This discretion, as noted by the court in Tima X, reflects the balance between the more traditional ceedings and for good cause shown, to relax the rules The court is also authorized, in uncontested pro-

Testimony by Physicians and Other Health Care Professionals to Support the Appointment of a Guardian

The physician-patient privilege and other similar evidentiary privileges apply in contested Article 81 cases. So Under Article 81, medical testimony is not required in all cases and may not be admissible unless the person waives the physician-patient privilege or she places her medical condition at issue in the hearing. If A person placed her mental condition at issue when she included a doctor's report in her motion to dismiss the Article 81 petition, notwithstanding her assertion that the sole purpose of the report was to rebut the allegations of her examining physician Patient privilege by failing to object to the physician-patient privilege by failing to object to the testimony of a physician relies on her notes and not the person's medical records.

If the privilege has not been waived, the testimony of a treating physician should be excluded. He Functional evidence alone can be sufficient to establish to meet the statutory standard for appointing a guardian. Even if the testimony of the treating physician is not admissible, the court may appoint a guardian based on the testimony of the person's children that she could not manage her medical, personal, and financial needs. He manage her medical, personal, and financial needs.

The traditional confines of the physician-patient privilege may not adequately protect disclosures of private medical information when the person alleged to need a guardian has interacted with physicians and

trist's role and found that it was closer to that of a police officer making an arrest than a treating physician. The decision in *Marie H.* was supported by statutes that created a relatively well-defined role for the psychiatrist institution to which the person was taken. treatment by other psychiatrists and providers at the cue component of a structured response that included well-being of the person, and served as part of the resthat the psychiatrist was acting to protect the safety and acting within the scope of emergency circumstances with specific protocols and remedies. The court noted analyzed the nature and responsibilities of the psychiadue to a psychiatric condition. The court in Marie H trist was acting pursuant to a statutory "Comprehensive Psychiatric Emergency Program." This program care and treatment and posed a danger to her or others commit a person who was found to need immediate authorized participating psychiatrists to involuntarily moved to strike the testimony of the psychiatrist on the basis of the physician-patient privilege. Whe psychiawas part of a mobile emergency response team, the AIP other grounds. In a case involving a psychiatrist who material, relevant, and probative and not excludable or subject to the privilege and is admissible provided it is roles. The testimony of a non-treating physician is not other health care professionals who serve in a variety of

4. The Special Case of the APS Psychlatrist as investigator and Witness: A Treating Physician Subject to Evidentiary Privilege or a "Guardianship Specialist" Fulfilling the Agency's Protective Function?

Federal law requires states to provide Adult Protective Services ("APS"). The protective services agency is generally responsible for providing information, referrals, and assurance that services are available to individuals who are unable to manage their property or personal care. The agency works to provide for vulner-able individual's personal needs and protect them from dangerous circumstances arising from neglect or abuse, particularly for those who have no one able or willing to provide needed assistance. Adult protective services have a legal duty to provide necessary care and services to eligible adults.

APS must provide an array of support services designed to assist vulnerable adults who are at risk of harm to remain in the community and avoid institutionalization. Additionally, APS is required to prevent or resolve cases of neglect, expioltation or abuse by enhancing the person's capacity to function independently. APS may investigate allegations or provide services to a vulnerable person, ¹⁰⁰ and decide that it is necessary to file a guardianship petition. When a psychiatrist employed by APS is part of the investigation, roles may be blurred. Information gathered from the AIP in an arguably therapeutic context may later be used as evidence in a guardianship proceeding. The

methods by which APS obtains this information, and its use in guardianship cases, raises issues related to medical privacy and the scope and application of the physician-patient privilege.

There are two significant practices involving APS that raise serious concerns as to violations of the liberty interests and medical privacy rights of vulnerable elders. The first scenario occurs when APS is unable to gain access to a person, perhaps because the person does not want to cooperate for fear of being placed in an institution or having a guardian appointed. Under these circumstances, APS may utilize an exparte process that culminates in an order granting access to the vulnerable elder's residence. The limited purpose of this visit is ostensibly to assure that the person is not in danger.

It is improper for APS to use evidence obtained as part of this ex parte process in a guardianship case. Matter of Eugenia M. 101 involved a 95-year-old woman whose landlord contacted APS and reported inter alia that her cooperative apartment was in need of repairs. A psychiatrist for APS met with Ms. M in March 2007. In early 2008, the City of New York Department of Social Services, the parent agency of APS, initiated an Article 81 guardianship proceeding and a hearing was scheduled for February 8, 2008. Ms. M thought the hearing was scheduled for February 6, in part because the return date was "faint" on the order to show cause, and traveled to the courtroom alone by public transportation, despite the winter cold.

After several months, during which the hearing was adjourned, the petitioner requested that the matter be further adjourned as Ms. M refused to allow the APS caseworker into her home. The petitioner suggested that an additional adjournment would allow APS to obtain an "Order to Gain Access" to Ms. M's apartment, which in turn would allow the APS psychiatrist to evaluate Ms. M. The court denied the request by APS because the Order to Gain Access is only intended to be used to assess a person's need for protective services—which APS had already done—and is also only appropriate if there is no other opportunity to observe and evaluate the person. In this instance, Ms. M left her apartment on a daily basis to shop, which would afford APS a sufficient opportunity to interact with her.

Ms. M's court-appointed attorney argued that APS was using the adjournment and possible Order to Gain Access as a pretext to gather additional evidence to support its guardianship petition since the rune-month delay had rendered APS's evidence stale. The court held that it was improper for APS to use the Order to Gain Access for this purpose and denied the motion for an adjournment. The petitioner then commenced its case with one witness, the APS psychiatrist, who testified based on the single meeting with Ms. M. The psychia-

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rist testified that Ms. M's apartment needed some repairs, some of which had not been done because Ms. M reported that she had previously been overcharged for the repairs. The psychiatrist further testified that Ms. M had food in the refrigerator, her grooming was "passable," told him that she paid her own bills, did her own banking, shopping, cooking, and had health insurance. The court dismissed the petition, finding that the evidence established that Ms. M's only functional limitation was an unsteady gait, and that the itreat of a future eviction did not support the appointment of a guardian. The court saw the APS conduct for what it was: an abuse of a practice that is designed to be used in rare cincumstances and only for the person's protection.

raises medical privacy and evidentiary privilege concerns is the use of APS psychiatrists to obtain information that is used in a guardianship petition. In these actually fairly complex and casts doubt as to whether it ment and personal care, the nature of the consent is sent to a meeting with the APS psychiatrist but not have the capacity to make decisions about property manageit is possible that a person may have the capacity to conneeded a guardian with broad powers, including those very person who provided "informed consent" actually is truly informed, knowing, and voluntary related to medical and health care decisions. Although comes the basis of the psychiatrist's testimony that the cally, the information obtained during that process beconsented to be interviewed by the psychiatrist. Ironipetition routinely recites that the person voluntarily comes the primary witness for the petitioner. The APS the person's need for guardianship, and ultimately be psychiatrist becomes the primary investigator, assesses scenarios, the APS caseworker is usually familiar with the AIP, having worked on his or her case. Next the APS Outside the ex parte context, a similar practice that

As a threshold matter, it is doubtful that the psychiatrist provides sufficient information to the AIP for the AIP to form the predicate for an informed decision. The psychiatrist is employed by APS, and APS is charged with protecting those in need, including diagnosing and improving their circumstances. The psychiatrist will not only perform assessment and evaluation for those purposes, but the information obtained may also be the basis for bringing a guardianship proceeding, in part for precisely those decisions relating to the informed consent that the APS psychiatrist is trying to obtain. Bven if the APS psychiatrist does provide that information, a truly informed consent would require that the person understands the role of the psychiatrist within APS, the mandate of APS, and the nature and scope of guardianship proceeding, in

The extent to which the APS practice of using a psychiatrist as a "guardianship specialist" violates medica privacy depends, at least in part, on a number of fac-

privacy, does the person have a reasonable expectation of privacy when meeting with an APS psychiatrist in an arguably therapeutic context? Can the APS psychiatrist be characterized as a "treating physician" subject to the physician-patient evidentiary privilege, or alternatively does the psychiatrist owe a duty of confidentiality to the person?

Generally, the existence of a privilege favors the "exclusion of the evidence." "If The decision as to what values to recognize through the law of privileges is a difficult one." Conventional wisdom holds that due to the narrow scope of the physician-patient privilege, the APS psychiatrist is an "examining" physician to whom the privilege does not apply. However, a closer examination of the APS mandate suggests that the role of the APS psychiatrist may be within the scope of the evidentiary privilege that attaches to treating physicians. Consider the following characterization of the APS role:

The Commissioner is likewise charged with arranging for medical and psychiatric services to evaluate and whenever possible to safeguard and improve the circumstances of adults with serious impairments (See Social Services Law § 473(1)(b)) (emphasis added). 105

The psychiatrist "visiting" Ms. Mon behalf of APS was charged with carrying out the APS mandate to evaluate, safeguard, and improve Ms. M's circumstances. A treating physician is defined as one who provides diagnosis or medical treatment pursuant to an explicit or implicit agreement. ¹⁰⁶ Although the APS psychiatrist is not providing services under a standing order from a physician, pursuant to the agency's statutory mendate, the psychiatrist is both diagnosing and attempting to remediate the person's medical condition. Although APS is required to conduct an investigation when a report is made of a vulnerable person at risk, in the guardianship context, the psychiatrist often, if not always, seeks to obtain consent to meet with the person.

It is therefore arguable that the APS psychiatrist should knoor the person's expectations of privacy and also be subject to the physician-patient privilege, at least to the extent that the psychiatrist is involved in diagnosis and any kind of therapeutic relationship. Unlike a personal injury case, in the context of a guardianship proceeding, the person alleged to be incapacitated is not placing her own medical condition at issue. The case is prought "against" the person, and the petitioning party in New York has the burden of proving that the guardianship is necessary and the person either consents or is incapacitated as defined by the statute. A distinction between the APS psychiatrist's interaction with a potential AIP and a more conventional relationship between a

psychotherapist and patient is that, typically, a conventional patient consults the psychotherapist for diagnosis and treatment, whereas APS initiates contact with an AIP pursuant to a statutory mandate. 107

The privilege that attaches to communications between a patient and her physician or psychiatrist is subject to a number of exceptions, including when it occurs for reasons other than treatment. 108 The intended protective function of APS may require that a petition for guardianship be filed if the person is having difficulty providing for her needs, although guardianship should only be a last resort after sufficient efforts have been made to provide necessary services to the person. The purpose of the guardianship would ostensibly be to prevent harm to the vulnerable person and assure that she receives and maintains sufficient services. Assuming that alternatives to a guardianship have been fully explored to no avail, these arguments would support the view that the APS psychiatrist is not subject to the physician-patient privilege.

Yet there remains something quite troubling about this relationship and the medical professional's use of information obtained during the course of the APS investigation. Under Article 81, medical evidence is not necessary and non-privileged evidence that is relevant and material to a person's functional capacity and the standard for appointing a guardian is sufficient and favored by the statute. The rationale for using a psychiatrist to obtain information for APS is therefore weaker, and at least requires that diagnostic and other medical information obtained by the psychiatrist be excluded. A better alternative would be to rely on testimony from the APS caseworker regarding the AIP's functional capacity.

D. Recommendations to Prevent, Manage, and Resolve Violations of Medical Privacy Article 81 Guardianships

Although Article 81 is a "functional capacity" statute, it falls short of the emerging support model envisioned by Article 12 of the UN Convention that recognizes a person's full legal capacity regardless of disability. The support model would replace the guardianship incapacity framework with a "co" or "facilitated" structure for supportive decision-making. Article 81 includes many provisions that respect a person's autonomy and protects due process, privacy, and liberty interests that are at stake for individuals who are alleged to need a guardian. However, the permissive use of medical information perpetuates the medical model of guardianship, and creates the risk that medical privacy rights are routinely violated. Consequently, it may also impede a full exploration of functional capacity and alternatives to guardianship.

The following recommendations are intended to improve Article 81 through a combination of proposed

amendments and suggested "best practices." The ultimate goal of these recommendations is to move Article Material towards a completely functional framework that utilizes a support model that will ultimately replace the notion of incapacity and guardianship with the model of "partnered" or "facilitated" decision-making required under Article 12 of the U.N. Convention.

- tion, attorneys for petitioners should conduct a tion, attorneys for petitioners should conduct a complete investigation in order to fully assess the person's functional capacity, and determine whether alternatives to a guardianship are availshould thoroughly assess the need for a guardianship are availian and determine to the greatest extent possible is an and determine to the greatest extent possible if the person has the capacity to make decisions. This assessment should focus on the statutory standard, explore potential alternatives to a guardianship, highlight the person's functional abilities rather than medical diagnosis, and use the statutory powers as a checklist. 109
- 2. When drafting the petition, the attorney for the petitioner should include as much of the statutorily required information as possible. Under § 81.08(a), the petition is supposed to include specific information, including the following most relevant to these recommendations:
- Describe the person's functional capacity based on her ability to manage activities of daily living.
- Include specific information about events, actions, or occurrences that create a risk of harm, and indicate that the person does not appreciate or understand the limitations that interfere with her ability to provide for her personal needs or property nurangement. 110
- Explicitly connect the person's needs and functional capacities to the powers sought.
- Identify and describe resources that may be available as alternatives to the guardianship.¹¹² If none exist, describe specific actions taken by the petitioner that would constitute due diligence in exploring these potential alternatives.
- Include any other information that would help the court evaluator. 113 This existing statutory requirement implicitly requires that the petitioner view the petition from the perspective of the court evaluator, at least with respect to making sure that a guardianship is necessary and there are not sufficiently reliable alternatives that are available.

Do not include medical information without a court order. Medical information is not required to be included with the petition. The statute's emphasis on functional capacity and medical privacy protections suggest, and may require, that medical information not be included with the petition.

Suggested "best practices" for judges:

- Do not sign the Order to Show Cause if the petition does not include the required elements described above.
- Prior to accepting a petition that includes protected or privileged medical information, require the petitioner's attorney to submit an affirmation explaining the need for medical information, why evidence of functional capacity is not available or sufficient, and formally request a court order to include medical information with the petition.
- As part of an order granting the request to
 use medical information (whether made by
 the petitioner or the court avaluator), require
 the protected or privileged information to be
 in a separate document, perhaps as a "medical information rider" to the petition, or an
 addendum to the court evaluator report, so
 addendum to the court evaluator report, so
 from the publicly available case documents.
- Exclude medical information and evidence from the hearing, unless there is insufficient evidence related to the person's functional capacity, or the medical information is necessary and appropriate in order to make the sary and appropriate in order to make the required findings and decisions, assure that required findings and decisions, assure that the person's medical diagnosis and medicathe person's medical diagnosis and therapeutic, or tion regimen is accurate and therapeutic, or for any other reason that would be helpful to for any other reason that would be helpful to sharply focus the hearing on the person's sharply focus the hearing on the person's functional capacity, potential alternatives to a guardianship, and the least restrictive alternative.
- Disseminate rules for court evaluators regarding the use of medical information. These rules would emphasize that the assessment a functional one and not a medical diagnost. The rules would also require a court order for the court evaluator to obtain medical information and disclose it to other parties, information, the court evaluator would only be permitted to include medical diagnoses, medications, treatment, and other protected information in a separate addendum to the court evaluator report, unless otherwise

ordered by the court or the court record is sealed.

- 4. A party seeking to introduce medical evidence that may infringe on a person's medical privacy rights should be required to make a proffer of necessity. The court may either rule on the proffer as part of pre-hearing written motion or hear oral argument on the issue prior to the hearing or on the hearing date.
- Require APS to focus more on functional capacity in its guardianship assessment and petition process, rather than basing its assessment, petition, and testimony too much on medical diagnosis.
- treatment of the person. can diagnose and opine as to appropriate capacity, rather than as a professional who should only be permitted to testify in that cal, or social work professional), the person specialist" rather than a medical, psychologifor a guardian (i.e., acting as a "guardianship evidentiary privilege is assessing the need the professional who may be subject to an consequences of the APS employee's role. If able and may not understand the nature and from an unsuspecting person who is vulnerto achieve the statutory goals of APS, rather proceeding. The goal would be to encourage used "against" the person in a guardianship ing and not gather information that may be nature and consequences of the consent, the and the person does not fully understand the purpose is assessing the need for a guardian, to assess the person's capacity to determine whether a guardianship is warranted). If the cally states the purpose of the meeting (i.e., is it a therapeutic relationship that gives rise to an evidentiary privilege or is the purpose psychologists, and social workers employed Clarify the role of physicians, psychiatrists, than gather evidence for a guardianship case these professionals to work with the person to obtain informed consent, which specifiguardianship by the Department of Social leges. Prior to a decision to file a petition for capacity as an APS service provider, subject when they are acting in their professional by APS who provide services to a person, and APS professional must terminate the meetthese professionals should follow a protocol them to their profession's evidentiary priviervices or other "parent" agency of APS,
- When an APS investigation involves an APSemployed psychiatrist or other professional who may potentially infringe on the person's medical privacy or be subject to evidentiary

- resort, APS should have a caseworker, not a If a guardianship petition is filed as a last psychiatrist, tostify about the AIP's functional that may avoid the need for a guardianship. would be to have APS fully explore services mation at the hearing. in hur capacity as a medical professional, that sion should be allowed. If the psychiatrist or tion to the professional, no further discuspotential consequences of providing informathe person has the capacity to understand the son. If the professional does not believe that meaningful informed consent from the peras a medical expert or about medical inforperson should be precluded from testifying "guardianship specialist" for APS rather than health care professional is truly acting as a privileges, the professional must obtain A better alternative
- Amend the last clause of § 81.07(b)(3), by replacing "the court shall not require that supporting
 papers contain medical information" with "the
 petition, and any supporting papers, shall not
 include medical information without a court
 order."
- 7. Amend Article 81 terminology generally to more precisely reflect a focus on a person's legal capacity, rather than her incapacity or deficiency. It's Throughout the statute, replace the term "alleged incapacitated person" with "person alleged to need a guardian" and replace the term "incapacitated person" with "person with a guardian."

Conclusion

Article 81 should continue moving toward becoming a fully functional capacity statute that emphasizes functional capacity, requires that alternatives to a guardianship be fully explored prior to appointing a guardian, and raises the threshold for including medical information with the petition and at the hearing. If a court determines that medical evidence is necessary, there should be uniform procedures to ensure that a person's medical privacy rights are protected. Ultimately, both the medical and functional models of guardianship based on a person's incapacity should be replaced by a support model that recognizes the full legal capacity of the person, and identifies areas in which assistance is needed without a finding of incapacity.

Endnotes

Under Article 81 of the N.Y. Mental Hygiere Law, the person is initially referred to as an "Alloged Incapacitated Person" (AIP) and if a guardian is appointed, an "incapacitated Person" (IP).

If the person consents to the guardianship, the court order will

generally refer to the person as a "person in need of a guardian" (PING).

- N.Y MENTAL HYG. LAW § 81.02(a)(2).
- in in dementia, hypertension, and coronary artery disease, could not cook, wandered from home, did not know her income, where she banked, and despite substantial savings, was behind on her woman did not understand or appreciate the consequences of her limitations where AFS found her at her knone without number water, food, electricity, or heat, she was disgussed with Se, e.g., in 11 Ardelia R., 28 A.D.3d 485, 812 N.Y.S.2d 140 (2d Dep't 2006) (testimony established that frail 82-year-old
- provide for personal needs and/or the ability with respect to property management." N.Y. Mewru. Hrc., Law § 81.03(b). The statute states that "[fjunctional level means the ability to
- Ś The facts have been altered in these composite cases to protect privacy, although all of the facts and documents in these and virtually all Article 81 cases are matters of public record, available for enybody to see, unless the case file is sealed under N.Y. Mearat. Hye. Law § 81.14.
- brain injuries, and other enumerated conditions. N.Y. SCPA 1750-A. Article 17-A was initially enacted in 1969 primarily for parents of children with developmental disabilities who were reaching the age of majority, and has not been amended in any algolificant way. Article 17-A lacks most, if not all, of the due process protections of Article 81, as well as its flexibility, powers, and nuances. Courts have borrowed from the framework of Article 81 to fashion remedies that would pass constitutional muster or that are otherwise permitted under Article 81. See, e.8. In 18 Mark C.H., 28 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Mark C.H., 28 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765, 906 N. V.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765, 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N.Y. In 18 Misc. 34 765 906 N.Y.S.24 419 (Sur. Ct. N Crity. 2010) (In a case involving guardianship for person whose medical diagnosis was belied by his functional capabilities, court discussed history of Article 17-A within constitutional and international human rights framework, and imposed monthoring requirements to assure that the person's needs were being met by a guardian and by a substantial trust established for his benefit); In 12 Yvette A., 27 Misc. 54 945, 888 N.Y.S.24 429 (Sm. Ct. N.Y. Crity. 2010) (court held that under Article 17-A terms and restrictions in best interests of person can be imposed on guardian and imposed initial and annual reporting requirements on guardian of the person). Although the focus of this article is on Article 81, my analysis applies with equal force Although Article 81 can be used to appoint a guardian for any person who is found to need a guardian, regardless of his or her particular functional capacity or medical condition. Article 17-A of the N.Y. Surrogate's Court Procedure Art is an alternative guardianship strinte that follows a medical model and is limited. to Article 17-A
- .4 National Survey of Court Practices, 37 Straton L. Rev. 143, 150 (2007) (noting that guardianship population will grow and be more diversified, and that approximately 7-8 million individuals have intellectual disabilities, affecting 10% of families). Naomi Karp & Urica F. Wood, Guardianship Monitoring: A
- œ See, e.g., Naomi Karp & Erica Wood, Guarding the Guardians: Promising Practices for Court Monitoring (AARP 2007); Pamela B. Teaster et al., Wards of the State: A National Study of Public Guardianship (ABA Comm. L. & Aging 2005), available at http://www.abanet.org/aging/publications/docs/wardoistatsfinal.pdf; Sally Balch Hurme & Erica Wood, Guardian Accumtability Then and Now: Tracing Tenets for An Active Court Role, 31 STETICN L. Ray. 867 (2002).
- 'n member or "lay" guardian, it is likely that an attencey will be required to assist with reporting, or the court examiner will have to provide assistance or at least review corrected reports. If the guardian is a "professional" appointed from the Part 36 are reviewed by a count exeminer and approved by a judge. N.Y. Marin, Hrc. LAW §§ 81.30, 81.31. If the guardian is a family A guardian appointed under Article 81 must complete and file an initial 90-day report and subsequent armud reports, which

- fiduciary list of appointees, that person may not be available for snother case that may involve greater need. Finally, when a guardian is appointed, payment for the petitioner's attorney, the court evaluator, the attorney for the person under the guardiarship (if any), and the court examiner must be made
- Ħ Mentally Disabled & Legal Problems of the Elderly, Am. Mentally Disabled & Legal Problems of the Elderly, Am. Bar Ass'n, Guardisrip: An Agenda for Agtom, 13 Mental. & Phrescal Disabled & Legal Problems of the Elderly, Am. Bar Ass'n, Guardisrip: An Agenda for Agtom, 13 Mental. & Phrescal Disablence of Wingspread Conference): Frank Johns & Charles P. Sabatino, Introduction: Wingspan—The Second National Guardisribly Conference, 31 Striston L. Rav. 573 (2002): Wingspan—The Second National Guardisribly Conference, Recommendations, 31 Striston L. Rav. 575 (2002): Marshall B. Kapp, Reforming Guardisriblines, 31 Striston L. Rev. 1047 (2002) (nothing the presence of widespread disagreement among Wingspan participants, mostly revolving urpured the tension between adversarial and therapeutic approaches). The National Guardisribip Summit: Standards of Excellence" at the University of Utah S.J. Quinney College of Law in Salt Lake the University of Utah S.J. Quinney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney College of Law in Salt Lake the University of Utah S.J. Outoney There have been three major guardiarship "summits" in the United States, each resulting in findings and recommendations. <u>(C107</u> a multi-disciplinary group of experts and produced comprehensive recommendations. See Comm'ns on the The 1988 and 2001 Wingspan Conferences gathered together appointment guardian performance and decision-making.*
 See http://www.guardianshipsummit.org (last visited April 9.
- Ħ In the functional model represents an improvement over the traditional status based medical model, which relied primarily on medical diagnosis as the basis for appointing a guardian. Although it has many positive aspects, to the extent that a functional model of guardianship requires a finding of incapacity, prometes the role of courts, and focuses on limitations and deficits, it falls short of the nondiscriminatory applications of the support model of the United Nations (Convention and Optional Protocol on the Rights of Persons wit Disabilities, 46 ILM 443 (2007), available at http://www.un.org. disabilities.fomvention/convention/inlishtml flast visited Apr. 9, 2012) (hereafter "UN Convention"). The UN Convention vas algued by President Barack Obams on July 24, 2009, 74 Fed. Reg. 37923 (July 29, 2009), but has not yet been ratified by the U.S. Scratte. Nevertheless, the UN Convention and other international treaties and documents are relevant when other international treaties and documents are relevant when analyzing potential human rights violations that may ariso in guardianship cases. For a fuller discussion of the international framework within the context of an SCIA Article 17-A case, see In re Mark C.H., 28 Misc. 3d 765, 783-88, 996 N.Y.S.2d 419, 432-36 (Sur. Ct. N.Y. Cmy. 2010).
- 1 See, e.g., A.R.A. Comm'n on Law and Aging, Guerilanship Law & Practice, available at http://www.americanbecong/groups/ law_aging/resources/guardianship_law_practice.html (last visited Apr. 9, 2012).
- ಭ Alternatives to guardianships include various supports such a home health askes, visiting nurses, adult day care, and senior centers and advance directives such as a power of athorney for property decisions, a health care proxy or living will for health care decisions, N.Y. Mannau Hyc. Law § 81.03(e).
- # guardianship can be expensive and utilized source judicial resources, Grandianships also provide a source of compensati for court appointed guardians and court examiners, and fees are generally paid from the assets of the person for whom a guardian has been appointed. Compensation and appointments Guardianship courts play an important and largely construction in a sturing that vulnerable individuals brought before them, and their constitutional rights, are protected. Occasional the protective function of the court comes at the expense of the portson's rights of self-determination and autonomy. A

that described the impact of the new appointment regime under Part 36, Development of a New Fiduciary Appointment System, was issued on February 9, 2004 by the Office of Court Administration, Guardlan and Fiduciary Services. The text of the rules and reports are available at http://www.nymurts.gov/ip/gfs (last visited Apr. 10, 2012). (the Inspector General's Report on Fiduciary Appointments in New York and the Report of the Commission on Fiduciary, referred to as the "Bimbourn Commission"). Another report enacted in response to two reports Issued by the Office of Court Administration in 2001 that verified the need for reform rit. 22 pt. 36, which became effective on June 1, 2003 and were

- ij 5. Sec. 4.2. In 17 Grinker, 77 N.Y.2d 713, 573 N.H.2d 536, 570
 N.Y.S.2d 448 (1991) (holding that predecessor statutes to Article 81, lacked protection for fundamental liberity interests protected under the U.S. Constitution); In 17 Father, 147 Misc.2d 329, 552
 N.Y.S.2d 807 (Sup. Cl. N.Y. Cnly. 1989) (describing constitutional infirmities of conservator and committee statutes that preceded Article 81); In 12 Doe, 181 Misc. 2d 787, 696 N.Y.S.2d 394 (Sup. Cl. Nassau Cnly. 1999).
- Ë convention/conventionfull shim! (last visited Apr. 9, 2012).
 Among the key provisions in the UN Convention are Article 12. "Equal recognition before the law." Article 19, "Living independently and being included in the community," and 46 ILM 443 (2007), available at http://www.un.org/disabilities/ Article 22, "Respect for privacy."
- Ŗ *in re* A.G., 6 Misc. 3d 447, 785 N. Y.S.2d 313 (Sup. Ct. Broome Carty: 2006).
- 뜢 N.Y. Mintal Hyc. Law § 81.01.
- 19 See N.Y. Mendal Hyg. Law § 81.22(a)(9).
- Ŗ See N.Y. MENTAL HYG. LAW § 81.72(a)(8). See also N.Y. PUB. HEMIR LAW ARTHUE CC (authorizing guardian to make health care decisions as sourogate with power to make decisions to refuse or withdraw life-sustaining treatment)-
- 12 N.Y. MENTAL HYG. LAW §81.22(a)(2).
- Ø See N.Y. MENTAL HYG. LAW § 81.21 (authorizing a wide array of property management powers, including the power to make transfers, giffs, and establish trusts). See also Helen Hayes Hosp. v. DeBucno (In re Shah), 95 N.Y.2d 148, 711 N.X.5.2d 824 (2000) (Article 81 guardian has power to engage in Medicaid planning, including transfers of assets to henself).
- ß N.Y. MINTAL Hrc. Lan § 81.22(a)(9)
- 2 Ed. 2d 540 (1999) Olmstead v. L. C. by Zimring, 527 U.S. 581, 119 S. Ct. 2176, 144 L
- ķ (1999). Obstand, 527 U.S. 581, 599, 119 S. Ct. 2176, 144 L Ed. 2d 540
- × 28 CFR §35.130(d) (1998).
- Ŋ 2012). The U.S. Department of Justice is actively socking to enforce the requirements of Olassiand. See http://www.ada.gov/olassiand/index.htm (last visited Apr. 2, 2012). See also Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc., 2012 U.S. App. LEXIS 6984 (2d Cir. 2012) (holding that plaintiff beloed standing to bring action under the "integration mandate" of the ADA to challenge failure of New York State officials to place residents of solult homes who had sectious mental illnesses in the community). UN Convention, available at http://www.un.org/disabilities/convention/conventionfull.shtml (bot visited April 9,
- UN Convention.
- 8 8 Capacity as a legal matter and the support structure is designed, as is Article 12 of the UN Convention, the person retains capacity as a legal matter and the support structure is designed, as is Article 81, to promote decisions by the person. Any "facilitated" decision would be based on the person's preferences, wishes, and values. Article 81 comes close to Article 12 in its functional approach, mendate to explore alternatives to a guardianably, and requirement that the guardian make decisions based on a subjective understanding of the person's

- wishes are not known or ascertainable. wishes, and only utilize a best interests approach if the person's
- ខ when depression is an underlying cause). The assessment of incapacity by judges, lawyers, and health care professionals may be unreliable due to pretext and "sanism." See Michael L. Perlin, "Hall-Whoded Prejudice Lapped Forth". Smism, Pretextuality, and Wing and Hom Mamial Disability Law Developed as it Did. 10]. See, e.g., Robert F. Roca, Determining Decisional Capacity: A Medical Perspective, 62 Forestaw L. Rev. 1177 (1994) (explaining the critical rule a psychiatrist can play in identifying the existence of a medical condition that may be causing cognitive impairment and recognizing when interventions such as adjusting medication may alleviate problems, for example CONTEMP. LEGAL ISSUES 3 (1999).
- 띘 Deixine M. Smith, The Disordered and Discredited Plaintiff: Psychlatric Evidence in Civil Litigation, 31 CAMOOD L. Rev. 749, 753 (2010).
- ×
- 썷 33. N.Y. MENTAL HYG. LAW § 81.02(a)(1), (2).
- 34, N.Y. Meural, Hw.: Law § 81.02(a)(2). See, e.g., In re May Far C., 61 A.D.3d 680, 877 N. Y.S.2d 367 (2d Dep't 2009) (appointment of guardian reversed where person made sufficient arrangements for meeting her needs, including executing a power of attorney)
- 띯 article These "privacy tents" include intruston upon another's seclusion and public disclosure of private facts. A physician or other health care professional in a confidential relationship may incur test liability through an unauthorized disclosure of confidential information. Liability under bort law for invasion of privacy is another potential protection, but beyond the scope of this
- × 5. See, e.g., Whalen v. Roe, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977) (computer record of prescriptions for controlled substances); Nixon v. Admin, of Gen. Serv., 433 U.S. 425, 457, 97 S. Ct. 277, 53 L. Ed. 2d 867 (1977) (presidential papers). The U.S. Supreme Court has also found a broader right to privacy in a variety of other contexts. See, e.g., Lawrence v. Tocas, 539 U.S. 558, 123 S. Ct. 2477, 156 L. Ed. 2d 588 (2003) (right to consensual serval context between people of the same sex); Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973) (right to choose abortion); Griswold v. Connecticut, 381 U.S. 479, 80 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (right to obtain contraception).
- ধ O'Connor v. Pierson, 426 K3d 187 (2d Cir 2005) (holding that Board of Education did not have legitimate interest in demanding private medical records from teacher with a scrious lithces in matter involving sick leave, oxplaining that when a "legislative burden" infringes on privacy rights, the court will apply intermediate scrutiny and only pormit it when the government has a substantial interest that outwelghs the privacy interest).
- 629 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).
- 8 Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994).
- \$ Powell v. Schriver, 175 F.3d 107, 110 (2d Cir. 1999).
- Fleming v. State Univ. of N.Y., 502 R Supp. 2d 324 (E.D.N.Y.
- ţŝ 631 F.3d 57 (2d Cir. 2011).
- ŝ standard for finding a right of medical privacy had only required a "serious medical condition." See O'Connor v. Flerson. Maton, 691 F.3d 57, 66 (2d Ctr. 2011). Prior to Maton, the Supre note 37
- * Maison, 631 F.3d at 72-73.
- ķ See e.g., Rivers v. Katz, 67 N.Y.2d 485, 504 N.Y.5.2d 74, 495 N.E.2d 337 (1986); 1-12 New Appleman New York Insurance aw 5 12.06.
- ķ Schulman v. New York City Hoalth and Hosps. Corp., 38 N.Y2d 234, 579 N.YS.2d 702, 342 N.E.2d 501 (1975).

- 57. Civil Rights Privacy Brief, Summary of the HIPAA Privacy Rule, are liable at workthes, gov/ocr/privacy summary, poli). Note that are liable at workthes, gov/ocr/privacy summary, poli). Note that are federal statutes govern matters related to medical privacy, other federal statutes govern matters related to medical privacy, including the Privacy Act, 5 U.S.C. § 5252 (federal agencies); including the Privacy Act, 5 U.S.C. § 5252 (federal agencies); see PAA v. Cooper, 2012 U.S.C. 1200 (amages) under the act is limited to definition of "actual damages" under the act is limited to pecuniary damages), and the Americans with Disabilities Act, pecuniary damages), and the Americans with Disabilities Act, pecuniary damages), and the Americans with Disabilities Act, pecuniary damages). 42 U.S.C. § 1320d; 45 C.E.R. §§ 160-164 (the entire privary rule is available at http://www.hbs.gov/ocr/hbpan). Under HIPAA, the release of medical records and information is authorized, inter alia, pursuant to a court order or to a personal representative who is defined as a person with the legal representative who is defined as a person with the legal suthority to make health care decisions. For a summary of HIPAA, see U.S. Dep't of Health & Human Services Office of
- ģ See, e.g., In re Mougiannis, 25 A.D.3d 230, 806 N.Y.S.2d 629 (2d Dep't 2006) (court held that court appointed guardian was a qualified person under HIPAA, but that health care agent was only authorized to obtain records related to duties as agent).
- Ş 45 C.F.R. 164.508, 164.512 (e).
- æ In it Miguel M., 17 N.Y3d 37, 926 N.Y.S.2d 371 (2011).

 Protections similar to HIPAA that apply to facilities operated by the Office of Mental Health and the Office of People with Developmental Disabilities can be found at N.Y. Mistr. Hyg. Law
- ä § 33.13. In rt Dolan (Lies O.), 33 Misc. 3d 870, 930 N.Y.S.2d 425 (Sup. Ct. Nassau Caty. 2011).
- ង See, e.g., N.Y. C.F.I..R. 4504 (physician, nurie); 4507 (psychologist); 4508 (social worker).
- ģ Dillonbock v. Hess, 73 N. Y.2d 278, 539 N. Y.S.2d 707 (1988)
- criminal prosecution against person involving prescription drugs, court discussed purposes and exceptions to physician-patient privilege and held that it occluded information from patient who provided the prescriptions to the defendant). People v. Sinski, 88 N. Y.2d 487; 646 N. Y.S.2d 651 (1996) (In
- 쎯 (citing Alexander, Practice Commentaries, McKinney's Cans Laws of NY, Book 7B, CPLR C4504:1, at 628 (1997)). People v. Sinski, 88 N.Y.2d 487, 491, 646 N.Y.S.2d 651 (1996)
- 548 (2d Dep't 1993). Heller v. Peckskill Cmty. Hosp., 198 A.D.2d 265, 603 N.Y.S.2d
- Dillenbeck v. Hess, 73 N.Y.2d 278, 284, 539 N.Y.S.2d 707, 711
- N.Y. MENTAL HYC. Law § 81.09(d).
- Heller v. Poekskill Community Hosp., 198 A.D.2d 265, 603 N.Y.S.7d 548 (2d Dep't 1993).
- 8 See People v. Sinski, 88 N.Y.2d 487, 669 N.E.2d 809, 646 N.Y.S.2d 651 (1996).
- Dillenbeck v. Hess, 73 N. Y.2d 278, 280-281, 539 N.Y.S.2d 707, 709 (1989) (plaintiff in personal injury case sought medical records of defondant from hospitalization on day of our socident to desarmine blood alcohol level, but court held protected by physician-patient privilege).
- S See Roca, supra note 30, at 1177.
- N.Y. MENTAL Fire. LAW § 81.02(a).
- 2 2 Se., e.g., in re May Far C., 61 A.D.3d 680, 877 N.Y.S.2d 367 (2d Dep't 2009) (reversing appointment of guardien where AIP made adequate arrangements for her affairs, including examing a power of attorney white airc had sufficient capacity); in re Neilie G., 38 A.D.3d 547, 831 N.Y.S.2d 473 (2d Dep't in revealing a power of attorney when are needed authority in revealing a power of attorney white airc and sufficient capacity); in re Neilie G., 38 A.D.3d 547, 831 N.Y.S.2d 473 (2d Dep't in revealing a power of attorney when are needed at the revealing a power of attorney when a power of attorn 2007) (reversing appointment of independent guardan where daughter was agent under springing power of attorney, which daughter was agent under springing power of attorney, which was available resource rendering appointment of a guardian was available resource rendering appointment of a guardian unnecessary, and allegation that daughter had orgaged in unnecessary, and allegation that daughter had property was questionable transaction involving Alle's real property was questionable transaction from the benefit and transaction unfounded where daughter did not benefit and transaction

- did not adversely affect AIP's inherests); in re Mildred MJ, 43 A.D.3d 1391, 844 N.Y.5.2d 539 (4th Dep't 2007) (petition 43 A.D.3d 1391, 844 N.Y.5.2d 539 (4th Dep't 2007) (petition dismissed where AIP had the capacity to execute advance discrives and family relaboratiop did not create presumption fundue influence nor a confidential relaboratiop so as to stort and the proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in re Isadora R., 5 A.D.3d 494, 773 N.Y.S.2c burden of proof; in results of the r attorney was properly carrying out plan for care of person? management of properly); In 12 Albert S., 216 A.D.2d 664, 72 management of properly); In 12 Albert S., 216 A.D.2d 664, 72 management of properly); In 12 Albert S., 216 A.D.2d 664, 72 management of 128 (2d Dep't 2001) (court refused to appoint guan N.Y.S.2d 128 (2d Dep't 2001)); Court refused to appoint guan N.Y.S.2d 128 (2d Dep't 2001); and court lacked authority to with provisions of living will, and court lacked authority to with provisions of living will, and court lacked authority to treatment that was not contained in advance directives). impose additional requirement for turnihution of life-susta
- Ģ N.Y. MENTAL HYG. LAW § 81.02(b).
- 6. See, e.g., in re David C., 294 A.D.2d 433, 742 N.Y.S.2d 336 (2) to fi a guardian after an eviction proceeding initiated based of a guardian after an eviction proceeding initiated based of a guardian after an eviction proceeding initiated based of fallure to pay rent and maintain the agartment properly, or fallure to pay rent and ministen was incapacitated and in reversed jusy finding that person was incapacitated and in reversed jusy finding that person of incapacity. "It is do not, without more, constitute proof of incapacity." It is do not, without more, constitute proof of incapacity. "It is do not, without more, constitute proof of incapacity." It is do not, without more, constitute proof of incapacity (eve Tait, N.Y.L.J., May 31, 1994, at 23 (Sup. Ct. N.Y. Cnty.) (eve Tait, N.Y.L.J., July 2, 1993, et 22 (Su Presbyterian Hosp. (Early), N.Y.L.J., July 2, 1993, et 22 (Su Presbyterian Hosp. (Early), N.Y.L.J., July 2, 1993, et 22 (Su Presbyterian Hosp. (Early), N.Y.L.J., July 2, 1993, et 22 (Su Presbyterian Hosp. (Early), N.Y.L.J., July 2, 1993, et 22 (Su Presbyterian Hosp.) (guardian not appointed for elderly woman w N.Y. Cnty.) (guardian not appointed for elderly woman to sumusing home or did not allow home care attendants to at muscling home or did not allow home care attendants to at the potential for harm if she refused placemor į
- 53. N.Y. MENTAL HYG. LAW § 81.08(a)(3).
- ģ See, e.g., N.Y. MENTAL Hvc. LAW S 81.07(b)(3); In no Bess Z. N.Y. Slip Op 1809, 2006 N.Y. App. Div. LEXIS 2888 (2d Da N.Y. Slip Op 1809, 2006 N.Y. App. Div. LEXIS 2888 (2d Da N.Y. Slip Op 1809), 14 Misc. 3d 448, 824 N.Y. S.2d 882 (Sup. 2006); In no Chij., 14 Misc. 3d 448, 824 N.Y. S.2d 882 (Sup. Chiy. 2006); In no Higgins (Ingland), N.Y.L.J., Oct. Kings Cniy. 2006); In no Higgins (Ingland), N.Y.L.J., N.Y.L.J., N.Y.L.J., N.Y.L.J., N.Y.L.J., N.Y.L.J.,
- \$ Ser, e.g., in re Q.E.J., 14 MSsc. 3d 448, 824 N.Y.S.2d 882 (5)
- 넑 N.Y. MERTAL HYG. Law § 81.14(b), (c); Ser In re Astor, 13 h 1203A, 824 N.Y.S.2d 755 (Sup. Ct. N.Y. Crity, 2006) (cour medical, psychological, and nursing records, as well as: evaluator's reports, and documents that contained conf Kings Cnty. 2006). information such as social security and financial account numbers; court proceedings concerning any confidents information would be closed to the public and press); h I Misc. 3d 910A, 781 N.YS.2d 623 (Sup. Ct. Kings Caty (on motion of court evaluator, court closed countroom a sealed the record where husband and wife who were a to be incapacitated feated their son who had physically financially abused them).
- N.Y. MENTAL Hrg. LAW § 81.07(c).
- ĸ Ķ See In re Jamus B., 25 Misc. 3d 467, 881 N.Y.S.2d 837 (Su Delaware Cuty. 2009) (agency certified by state agency provide services for people with developmental disabi 12 Misc. 3d 1132, 821 N.Y.S.2d 987 (Sur. Ct. Broome Cn
- × Ħ of treating physician attached to pelition would have physician-patient privilege, except that respondent pl See, e.g., in re Goldfarb, 160 Misc. 2d 1036, 1049, 612 N. 788, 793 (Sup. Ct. Suffolk Cary, 1994) (court held that?
- In re Q.E.J., 14 Misc. 3d 448, 824 N.Y.S.2d 882 (Sup. Ct medical candition at issue)
- In re Than X. N. Y.L.J., Sept. 18, 1996, at 27 (Sup. Ct. Sui
- 3

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- 78. In re James B., 25 Misc. 3d 467, 881 N.Y.S.2d 837 (Sup. Ct. Delawam Cnty. 2009).
- 79. N.Y. Minrau Hyc. Law § 81.08(a)(3): In re Mary J., 250 A.D.2d 847, 736 N.Y.S.2d 542 (3d Dep't 2002) (allegations in petition were sufficient where they described the alleged incapacitated person's physical problems, memory impairment, need for assistance in performing activities of daily living, and lack of understanding of the nature and consequences of her inability and limitations).
- BO. N.Y. MENDAI, HYC. LAW § 81.09.
- cause that the court evaluator may be granted permission to inspect medical records and of the right to object by telling the judge that the court evaluator should not be given permission. N.Y. Menru. Hyg., Law § 81.07(c). This right to object may only be meaningful if the AIP has retained an attorney, or has the right to be appointed an attorney under N.Y. Menru. Hyg. Law § 81.10.
- 82. See, e.g., in re Kufeld, 51 A.D.3d 483, 859 N.Y.5.2d 119 (1st Dep't 2008) (affirming court's decision to grant court evaluator's request for order to access medical records as they would assist in investigation, especially in light of allegations by All's nephew of duress and courcing against the AIP and AIP's allogations of incapacity in salf-pedition).
- B. N.Y. Mental Hyg. Law § 81.09(d).
- 84. 14.
- 85. 1d.
- In re Goldfarb, 160 Misc. 2d 1036, 1041–42, 612 N.Y.S.2d 788, 792 (Sup. Ct. Suffolk Cody. 1994).
- N.Y. Mental, Hyo. Law § 81.12(b); Gold/arb, 160 Misc. 2d at 1043, 612 N.Y.S.2d at 793.
- B. N.Y. MENTAL HYC. LAW § 81.09(c)(7).
- 89, In 11 Thra X, N.Y.L.J., Sept. 18, 1996, at 27 (Sup. Ct. Suffolk Coty.).
- 90. N.Y. Mental Hyg. Law § 81.09(d); Coldforb, 160 Misc. 2d 1036, 612 N.Y.S.2d 788.
- 91. In re Rosa B.-S., 1 A.D.3d 355, 767 N.Y.S.2d 33 (2d Dep't 2003); In re Bess Z, 27 A.D.3d 568, 813 N.Y.S.2d 140 (2d Dep't 2006) (court excluded testimony of treating physician, but held that testimony established by clear and convincing evidence that the person was likely to suffer harm because she could not care for her medical, personal, and financial needs and did not understand the nature of her limitations).
- 92. Goldferb, 160 Misc. 2d 1036, 612 N.Y.S.2d 788.
- In re Mahes, 207 A.D.2d 133, 143, 621 N.Y.S.2d 617, 623 (2d Dep³t 1994).
- 94. See, e.g., Bess 2., 27 A.D.3d at 568, 813 N.Y.S.2d at 140 (testimony of AIP's treating physician violated physician-patient privilege, but other evidence sufficiently clear and convincing to appoint guardian); In re Seidner, N.Y.L.J., Oct. 8, 1997, at 25, col. 3 (Sup. Ct. Nassau Cnty.) (excluding medical evidence to which AIP objected based on physician-patient privilege and dismissing petition for lack of evidence).
- 95. Rose B.-S., 1 A.D.3d at 955, 767 N.Y.S.2d at 33.
- 96. In re Marke H., 25 A.D.3d 704, 811 N.Y.S.2d 708 (2d Dep't 2006).
- 97. 42 U.S.C. 55 1397-1397F.
- N.Y. Soc. Serv. Law § 473(1); N.Y. Cone. Copes R. & Ress. Tit. 18 pt. 457; see also http://www.ocfs.state.ny.us/math/psa/; 97 artial.
- See, e.g., Dan R. v. Bane, 199 A.D.2d 322, 606 N.Y.S.2d 1000 (2d Dept 1993) (local commissioner of Department of Social Services required as part of protective services to serve as representative payer for pursons receiving SSI who are unable to manage their own finances).
- 100. Adult protective services are available to all adults who meet the following nun-financial eligibility criteria: unable to provide

- necessary food, clothing, or medical care, access public and private benefits, or protect harself from physical or mental injury, neglect, malitentment, or financial exploitation. The person must be at risk and need protection from actual or potential harm. No other person or agency must be able or willing to provide the needed assistance. N.Y. Soc. Serv. LAW § 473(1); 18 NYCRR § 457.1(c)(1), (2), (3); 90 ADM-40.
- In re Eugenla M., 20 Misc. 3d 1110A, 867 N.Y.S.2d 373 (Sup. Ct. Kings City, 2008).
- 102. One court has called the practice of trying to assess on a case by case basis the validity of a waiver in this context a practice "fraught with peril and failbility." In re Goldfarb, 160 Misc. 2d 1036, 1040, 612 N.X5 2d 788, 791 (Sup. Ct. Suffolk Cnty. 1994).
- 103. Fredland et al., Evidence Law and Practice, p. 792 (3d ed. 2007).
- 104. Id. at 793.
- 105. Bilgenia M., 20 Misc. 3d at 1110A, 867 N.Y.S.2d at 373.
- Heller v. Peckskill Cmty. Hosp., 198 A.D.2d 265, 669 N.Y.S.2d 548 (2d Dep*t 1993).
- 107. See, e.g., Jaffee v. Redmand, 518 U.S. 1, 116 S. Ct. 1923, 135

 L. Ed. 2d 397 (1996) (upholding claim of psychotherapistpatient privilege where police officer sought services from a
 clinical social worker aubsequent to shooting in which he was
 involved). The client or patient of a social worker may invoke an
 evidentiary privilege under N.Y. C.P.L.R. 4508.
- 108. Ser 1-12 Bender's New York Evidence § 12.04.
- 109. N.Y. Mevrat. Hyc. Law §§ 81.02; § 81.02(a) (standard for appointing a guardian); § 81.03(e) (available resources that are alternatives to a guardianship); § 81.21 (property management) and § 81.22 (personal needs).
- 110. N.Y. MENTAL HYC. LAW § 81.04(a)(4), (5).
- 111. N.Y. MENTAL HYC. LAW § 81.04(a)(6).
- 112. N.Y. MENTAL HYC. LAW § 81.04(a)(14).
- 113. N.Y. MEYIAI. HYL: LAW § 81.04(a)(9).
- is. Article 81 made great strides by using "incapacity" and "incapacitated person" instead of the labels "incompetenty" and "incompetent" that was used in the predocessor Article 78 "Committee" statute. However, in the cristing two decades, societal awareness of the importance of language has increased, and it is time to update the statute and use language that does not reflect negatively on the person or suggest that the person's legal capacity is not entitled to full recognition under the law, for example, New York has replaced the term "mental retardation" with "developmental disability" or "intollectual disability" in state agencies, statutes, and regulations.

Joseph A. Rosenberg is a Professor of Law at the City University of New York School of Law. He is a supervising attorney in the law school's Elder Law Clinic, His law review articles have explored a variety of topics, including adult guardianships and the vulnerable elderly, using online instruction to teach lawyering skills, supplemental needs trusts for people with disabilities, and professional responsibility issues in elder law practice. He is currently focused on working to protect the rights of indigent adults in adult guardianship proceedings, developing strategies to increase access to legal services for elders whose primary language is not English, expanding experiential learning across the law school curriculum, and developing online instruction and collaboration through his service on the CUNY Committee on Academic

Chaos in the Courts: A Procedural Solution to Rein in Contested Article 81 Cases

By Elizabeth A. Adinolfi

Contested Article 81 Guardianship cases are becoming both more frequent and more litigious, straining the resources of the court system, petitioners, and the Alleged Incapacitated Person (AIP)/Incapacitated Person (IP)'s estate. There is no other type of litigation where a person, who has done nothing that creates any legal liability, can be brought to court against their will, have their most personal and private information shared with multiple individuals, who often have no legal right to such information, be forced to litigate for months on end, and face the risk of having to pay for nearly all of the expenses of the proceeding. Petitioners, who often have nothing to gain by initiating an Article 81 proceeding, but do so to help a vulnerable friend or family member, can find themselves facing exorbitant legal bills, as well as the ongoing demands on their time as proceedings drag on for months and years.

the proceeding. Courts refer to these participants in a variety of ways, including "interested parties," "interested persons," or entities like landlords, nursing homes, or creditors. often include paramours, siblings, and children, and at time proceeding unless called by a party as a witness. These parties not parties and should not be permitted to participate in the "quasi-parties," but no matter what they are called, they are non-party has a legally protected interest in the outcome of sel, and are permitted to participate regardless of whether the but appear on the day of the hearing, with or without coundisruptive are the non-parties who do not file Cross-Petitions sometimes from persons aligned with the AIP, sometimes from more frequently finding themselves faced with Cross-Petitions, and the court evaluator. Counsel for petitioners and AIPs are than those anticipated by the statute: the petitioner, the AIP, large number of Article 81 cases that involve participants other those with interests counter to the AIP. What can be even more A driving factor behind this increased litigiousness is the

Practitioners faced with these individuals who interject themselves into Article 81 proceedings will find little instruction in Article 81 as to how they should respond. While Article 81 provides explicit procedures for initiating a proceeding, once the petition is filed, Article 81 proceedings can feel like the Wild West. I posit that one of the primary reasons for Article 81 cases frequently turning into multi-party, contested litigations is the tendency of the courts and practitioners to treat Article 81 as a stand-alone statute disembodied from the practices and procedures set forth in the New York State Civil Practice Law and Rules (CPLR). This article will focus on those provisions of the CPLR that provide practitioners and the courts with the greatest ability to maintain tight control

over who is allowed to participate in the proceeding, being Article 4, which provides the general rules governing special proceedings, and Article 10, which sets forth the procedures nonparties must follow if they wish to intervene in a proceeding.

Article 4: Special Proceedings

Article 4 of the CPLR governs special proceedings, including Article 81 Guardianships. Special proceedings are created or authorized by statute to provide, in theory, a "quick and inexpensive way to implement a right." Special proceedings are intended to be resolved in a procedure more akin to motion practice than full-blown litigation. Article 4 accomplishes this, in part, by significantly curtailing matters such as joinder of parties and discovery by requiring leave of court.³

For Article 81 practitioners, the most important provision is CPLR 401, which provides that the only parties to a special proceeding are the petitioner and any adverse party the respondent. More importantly, "[a]fter a proceeding is commenced, no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court." It is at this point where many Article 81 proceedings begin to go off the rails, as practitioners, and sometimes the courts, ignore CPLR 401. This is due in large part to courts and practitioners misinterpreting the notice provision of MHL § 81.07(g) as giving the persons entitled to notice the equivalent of party status and the right to be heard and participate.

MHL § 81.07(g) does not confer party or "quasi-party" status on persons entitled to notice. The court in *Matter of Allen* provided a cogent analysis of the statute demonstrating that persons entitled to notice are not parties to Article 81 proceedings:

MHL § 81.07 was amended effective December 13, 2004 by Laws 2004 ch.438. The amendment removed the persons entitled to notice of guardianship proceeding (generally relatives, friends and persons holding a power of attorney or health care proxy from the AIP) from former subsection (d) and placed them in subsection (g). Former subsection (d) was entitled "Service," and provided in subparagraph (2)(iii) that the relatives, etc. "shall be personally served or served by mail." This created some confusion as to whether the persons listed in former subsection (d) were parties to the proceeding entitled to participate in the hearing for the appointment of a guardian.

New subsection (g) is entitled "Persons entitled to notice of the proceeding" and provides in subparagraph (2) that "Notice of the proceeding... shall be mailed to..." the relatives, etc. This is clearly not the type of personal service of process that is required to make a person a party defendant or respondent in the proceeding.⁵ The amendment of MHL § 81.07 effectively corrects statutorily any prior implication that the relatives, etc. entitled to notice of the proceeding are parties entitled to participate in the hearing, request adjournments, etc. Thus the persons listed in amended MHL § 81.07 (g), ..., are not parties to the proceeding.⁶

As noted by the Law Revision Commission in its report recommending the 2004 amendments to Article 81, Section 81.07 was amended due to "concerns regarding unnecessarily disclosing intimate information regarding a person's health and financial status to people who would not otherwise have access to such information and causing undue humiliation and embarrassment to the alleged incapacitated person." Withholding the petition, and the information contained therein, further supports the *Allen* court's conclusion that persons entitled to notice are not parties. CPLR 403(b) requires that "the petition and affidavits specified in the [order to show cause], shall be served on any adverse party." But persons entitled to notice are not served with the petition and affidavits as required by CPLR 403(b), so they are not an "adverse party" under Article 4. If they are not adverse parties, they cannot satisfy CPLR 401's requirement for being respondents.

Furthermore, the requirement that a person be provided with notice of the proceeding does not "provide a statutory entitlement to intervene in the proceeding, or to be considered an entity [or person] that will be affected by the outcome." The notice provision of 81.07 is not intended to confer party status, rather it is to provide the individuals entitled to notice with "an opportunity to make an informed decision regarding [their] desired level of involvement therewith." Counsel for petitioners should be careful when drafting the Notice of Proceeding not to refer to the person receiving notice as an "interested party" or otherwise suggest that the receipt of notice grants said individual the right to participate in the proceeding. A person entitled to notice, or any other person who becomes aware of a guardianship proceeding and wishes to participate, must still follow the procedures for intervention set forth in the CPLR.

The Problem of Standing

Another reason Article 81 proceedings can devolve into expensive, high conflict, multi-party litigations is the unrestricted nature of standing under Article 81. Due to the lack of

the usually required personal interest, standing in the ordinary sense is not required to serve as a petitioner in a guardianship case. "Interest, or the claim of interest, is the statutory test as to the right to be a party to legal proceedings almost without exception. Unless a party has some personal interest in the result he can have no standing in court. But anyone, even a stranger, can petition for a commission to inquire as to the sanity of any other person within the jurisdiction of the court. While this is now provided by statute it was also the rule at common law." ¹⁰

"From the moment of its institution, 'the primary object of the proceeding is not to benefit any particular individual, but to see whether the fact of mental incapacity exists, so that the public, through the courts, can take control.' 11 "The petitioner can derive no direct benefit from it. The advantage to him, if any, is only such as would result if any other person had first acted in the matter." 12

The expansive nature of standing under Article 81 invites chaos, as courts cannot look to the traditional standing doctrine when faced with multiple non-parties seeking to file cross-petitions or otherwise participate as quasi-parties/interested parties. Yet, the mere fact that everyone has standing to bring an Article 81 proceeding does not mean that once a petition is filed non-parties should, or must, be allowed to participate. There is no intervention as a matter of right in special proceedings under CPLR 401, and nothing in Article 81 confers such a right. Accordingly, Article 10 of the CPLR gives courts the power to exclude a person entitled to notice, or any other person with an interest in whether an AIP is placed under guardianship, from participating as a party in an Article 81 proceeding.

Article 10: Parties Generally

Article 10 governs the joinder of parties, as well as who may intervene in a proceeding as a matter of right, or with leave of the court. CPLR 401, however, is more restrictive than Article 10, and prohibits intervention except by leave of the court. If a non-party wishes to obtain party status to be heard and participate in an Article 81 proceeding, they must follow the procedures set out in CPLR 1013 and 1014. It is the failure of practitioners to follow these procedures, and courts failing to require compliance, that leads to the growing number of out-of-control Article 81 proceedings.

CPLR 1013 provides: Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or act. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party. CPLR 1014 provides: A mo-

Continued on page 14

tion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought.

Under Article 10, a non-party who merely files a cross-petition, which has unfortunately become common practice, does not gain party status and should not be permitted to participate in the proceeding. Likewise, a non-party who makes a motion to intervene without including a proposed cross-petition cannot be granted party status.¹³ It is error for the court to even consider a motion to intervene that does not include a proposed pleading.¹⁴

Courts in Article 81 proceedings are faced with making decisions of profound importance and consequence. Given the gravity of these decisions, it is understandable that courts want to have as much information, and as many perspectives as possible. Yet, permitting the intervention of additional parties is not only unnecessary, it is often counter-productive and may interfere with the court's ability to render a decision in a timely manner or otherwise reach a resolution in the case.

Guardianship cases with multiple parties can often distract the court from the purpose of the proceeding: for the court to determine whether the AIP suffers from functional limitations that place the AIP at risk of harm, and if so, whether the appointment of a guardian is the least restrictive means of protecting the AIP from harm. ¹⁵ Article 81 proceedings are not the place to work out sibling rivalries, conduct vendettas against stepparents, or for friends and neighbors with an inflated sense of importance and knowledge about the AIP to interject themselves.

When intervenors are permitted without the court closely scrutinizing their reasons for wanting to become a party, counsel for the AIP may find their ability to advocate for the AIP's wishes compromised and their litigation strategy disrupted by an intervenor who claims to know what the AIP wants but is acting in their own self-interests. Even intervenors acting in good faith who believes they know what the AIP wants, or what is in the AIP's best interests, may not know the AIP as well as they think.

Intervenors are undermining cases where the petitioner and the AIP may be able to reach a settlement and avoid the need for a contested proceeding. An AIP may be amenable to consenting to a guardianship to avoid the need for an adversarial hearing and the risk of being declared an Incapacitated Person. Likewise, a petitioner may be willing to accept a settlement involving a more limited guardianship and/or having another individual serve as guardian to avoid the damage to their relationship with the AIP that an adversarial hearing can cause. If the court finds the AIP has sufficient capacity to give consent, and the terms of the settlement provide sufficient protection for the AIP, the proceeding can be resolved without an adver-

sarial hearing. cross-petitioners, or quasi-parties, can thwart a settlement in service of their own interests, forcing the AIP to be put through an expensive and distressing adversarial hearing.

Even in cases where settlement is unlikely, every additional participant makes scheduling and completing the hearing in a timely manner more difficult. It can be a challenge to set the hearing date when taking into account the availability of the court, petitioner and petitioner's counsel, the AIP and the AIP's counsel, and the court evaluator. Now imagine a case where the AIP has three or four children, all of whom have retained counsel and expect to participate in the hearing. The court must try to set a hearing date while accommodating the schedules of a dozen or more individuals. If a hearing needs to be continued beyond the initial date, which becomes more likely as the number of participants increases, it can take months, even more than a year, to complete a process the Legislature intended to take a matter of weeks.

Courts should be hesitant to permit third parties to intervene both to avoid delay in reaching a resolution but also because of the financial burden this places on the AIP and the petitioner. A cross-petitioner is entitled to put on his or her own case, which can result in additional days of hearing. Quasi-parties may not be entitled to put on their own case, but they can add hours or days through conducting their own cross-examination of witnesses. If a cross-petitioner or quasi-party engages in motion practice that again drives up the costs to the AIP.

large legal fees. compensated, and petitioners personally bearing unexpectedly leading to court appointees going uncompensated or under-AIP's resources. 16 Few AIPs can bear such a financial burden, award counsel fees to a successful petitioner, payable from the the counsel fees for the AIP. And the court has the discretion to petition is dismissed, the court can order the petitioner to pay paid by the IP unless the court finds they are indigent. If the AIP, and if the petition is granted, the compensation shall be reasonable compensation for court appointed counsel for the ate. MHL § 81.10(f) provides that the court shall determine between petitioner and the AIP as the court deems appropripay the court evaluator's compensation or allocate the amount or dismissed, the court may order the petitioner or the AIP to the AIP's assets if a petition is granted, or if a petition is denied may award the court evaluator reasonable compensation from impact on the AIP. MHL § 81.09(h) provides that the court ers and quasi-parties to intervene can have devastating financial The permissiveness with which courts allow cross-petition-

These financial ramifications are yet another reason for courts to require any interested person who wants to participate to comply with CPLR 1013 and become a formal cross-petitioner. In the first instance, courts can prevent these financial costs by keeping additional participants out of these proceedings. If a potential cross-petitioner cannot present the court

with a proper motion to intervene, the court need not sign the Order to Show Cause, sparing peritioner and the AIP the expense of preparing responsive papers. But in cases where a court, after a proper CPLR 1013 motion is made, finds that the intervenor is an appropriate cross-petitioner, the cross-petitioner is now subject to the provisions of 81.09 and 81.10 and can be made to bear some of the financial burden resulting from their involvement if the court denies their cross-petition.

How a Non-Party Can Participate

If the court denies a proposed cross-petitioner's motion to intervene, or if an interested person fails to make a motion in the first instance, that does not foreclose their involvement in the proceeding. All persons entitled to notice must be sent a Notice of Proceeding which lists the contact information for petitioner's counsel, counsel for the AIP, if counsel is appointed, and the court evaluator. Counsel for petitioners may want to add language to the Notice of Proceeding stating that a person entitled to notice is not a party, and in order to intervene in the proceeding they must comply with CPLR 1013 and 1014.

An interested person's first step, before incurring the expense of making a motion to intervene as a cross-petitioner, should be to contact counsel for the petitioner, if they believe the AIP requires a guardian, or counsel for the AIP if they do not think the AIP needs a guardian or that the AIP would accept them as a guardian over petitioner or a court appointee. Their participation as a witness for either party is far more likely to assist the court than their participation as a cross-petitioner or quasi-party without imposing extraordinary expense on the AIP.

guardian, the court held that the nursing home's participation financially if the IP was permanently placed in the facility. permanent placement. The court also found that the nursing inadequately represented by either party." To the extent the seeking to intervene in order to protect "any interest that is advocate in favor of permanent placement. The court denied which the IP was residing brought a motion to intervene to care facility, to which the IP objected. The nursing home in plication to have him permanently placed in a skilled nursing was unnecessary and denied the motion to intervene. Because the nursing home was seeking the same relief as the home was in conflict with the IP because it stood to benefit act in the IP's best interests, which it was doing by seeking the being, the court held that it is the guardian's responsibility to nursing home asserted it was acting to protect the IP's wellthe motion, finding inter alia, that the nursing home was not intervention is unnecessary. The IP's guardian brought an ap-In the Matter of J.J. is illustrative of circumstances where

If an interested person's position does not align with either the petitioner or the AIP, they should speak to the court Evaluator. It may be that their intervention as a cross-petitioner would be appropriate under those circumstances, and the court

Evaluator would be in the best position to recognize whether there are interests at stake that are not adequately represented by either the petitioner or the AIP.

Conclusion

For Article 81 to work, practitioners and the courts must conduct the proceedings as the Legislature intended: as summary proceedings with two parties, absent compelling circumstances warranting the intervention of a third party. While it is understandable that the court wants as much information as possible before imposing guardianship on an AIP, it has become counterproductive and harmful to allow unfettered intervention of third parties.



Elizabeth A. Adinolf is a partner with Phillips Nizer LLP where she concentrates her practice on guardianship and matrimonial law. She is a member of the Executive Committee of the Elder Law amd Special Needs Section of the New York State Bar Association, and a former co-chair of the section's Guardianship Committee.

Endnotes

- 1. MHL § 81.07 §(1).
- 2. Siegel, NY Prac. § 547
- CPLR 401, 408.
- 4. CPLR 401.
- 5. CPLR 304, 306, 306-b and 308.
- 6. See also CPLR 401.
- 7. New York Bill Jacket, 2004 A.B. 8838, Ch. 438.
- In the Matter of J.J., 2011 NY Slip Op. 51329(U) [32 Misc 3d 1215(A)].
- 9. In the Matter of Grace R., 12 A.D.3d 764, 766 (3d Dep't 2004).
- Hughes, 71 Sickels at 73-74, 22 N.E. 446; see also In re Kaltman, 38 N.Y.S.2d at 623 ("Such an application may be presented by any person.")
- In re Kaltman, 38 N.Y.S.2d 622 (1942) (quoting Matter of Frank's Estate, 283 N.Y. 106, 110, 27 N.E.2d 801, 802; Hughes v. Jones, 71 Siekels 67, 116 N.Y. 67, 22 N.E. 446 (1889).
- 12. Hughes, 71 Sickels at 77, 22 N.E. 446.
- Lamberti v. Metropolitan Transportation Authority, 170 AD2d 224 (1st Dept 1991); accord Zehnder v. State, 266 AD2d 224, 224-25 (2d Dept 1999) (Supreme Court properly denied the motion to intervene in absence of proposed pleading); Colonial Sand and Stone Co., Inc. v. Flacke, 75 AD2d 894, 895 (2d Dept 1980) (court lacks power to grant a motion to intervene that fails to attach a proposed pleading).
- 14. Rozewicz v. Ciminelli, 116 AD2d 990 (4th Dept 1986)
- 15. MHL § 81.01.
- 16. MHL § 81.16(f).



Matter of Alexander B.P. (Hafner)

Supreme Court of New York, Appellate Division, Second Department

October 10, 2018, Decided

2016-11267

eporter

165 A.D.3d 801 *; 86 N.Y.S.3d 103 **; 2018 N.Y. App. Div. LEXIS 6678 ***; 2018 NY Slip Op 06744 ****; 2018 WL 4905416 as so modified, the [***2] order and judgmen

[****1] In the Matter of Alexander B.P., Respondent. Long Island Jewish Valley Stream Hospital, Appellant. Bruce Robert Hafner, Nonparty Respondent. (Index No. 31965/16)

Counsel: [***1] La Salle, La Salle & Dwyer, P.C., Sea Cliff, NY (Lori A. La Salle of counsel), for petitionerappellant.

Bruce Robert Hafner, Lynbrook, NY, nonparty-respondent pro se.

Judges: WILLIAM F. MASTRO, J.P., SANDRA L. SGROI, JOSEPH J. MALTESE, VALERIE BRATHWAITE NELSON, JJ., MASTRO, J.P., SGROI, MALTESE and BRATHWAITE NELSON, JJ., concur.

Opinion

[*801] [**104] In a proceeding pursuant to <u>Mental</u> <u>Hygiene Law article 81</u>, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Nassau County (Daniel R. Palmieri, J.), dated September 4, 2016. The order and judgment, insofar as appealed from, directed the petitioner to compensate the guardian in the sum of \$500 per month and to pay the fee of \$250 to the court evaluator, and sealed the record of the proceedings.

Ordered that order and judgment is modified, on the facts and in the exercise of discretion, by deleting the provision thereof directing the petitioner to compensate the guardian in the sum of \$500 per month, and substituting therefor a provision directing that the total sum of \$3,000 shall be paid from the funds of Alexander B.P. to Bruce Robert Hafner, Esq., the guardian, for his services rendered on behalf of Alexander B.P. to date;

as so modified, the [***2] order and judgment is affirmed insofar as appealed from, without costs or disbursements; and it is further,

Ordered that the matter is remitted to the Supreme Court, Nassau County, for the entry of an order relieving Bruce Robert Hafner, Esq., as guardian, and substituting in his stead a suitable not-for-profit guardian for Alexander B.P.

proceedings. The petitioner appeals. to the court evaluator, and sealed the record of the court directed the petitioner to compensate the guardian Alexander B.P.'s person and property. Additionally, the the petition and appointed an independent guardian, order and judgment dated September 4, 2016, granted The petitioner, Long Island Jewish Valley Stream Hospital, by Catherine Hottendorf, in her capacity as its in the sum of \$500 per month and to pay the fee of \$250 management. After a hearing, the Supreme Court, in an provide Alexander B.P., was in need of a guardian in order to Hygiene Law article 81 alleging that then Executive Director, filed a petition pursuant to Mental Robert [**105] for his personal Hafner, Esq., needs and ರ property

Pursuant to Mental Hygiene Law § 81.28 (a), the court shall establish a plan for the reasonable compensation of a guardian. The only requirement is that [***3] the court "must take into account the specific authority of the guardian or guardians to provide for the personal needs and/or [****2] property management [*802] for the incapacitated person, and the services provided to the incapacitated person by such guardian" (see Matter of Goldstein v Zabel, 146 AD3d 624, 629, 45 NYS3d 432 [2017]). Thus, the Legislature did not specifically provide that the guardian's compensation must come from any particular source.

The Legislature provided that the court may direct the petitioner to compensate a court evaluator and/or legal

compensated from the funds of Alexander B.P. 673 NYS2d 122 [1998]). Rather, the guardian must be discretion (see generally Matter of Lyles, 250 AD2d 488, guardian constituted an Court's directive that the petitioner compensate the proceeding was commenced in bad faith, the Supreme successful and there was no evidence that the [***4] compensate a guardian, given that the petitioner was explicitly prohibit a court from directing a petitioner to although Mental Hygiene Law § 81.28 (a) does not proceeding" (Matter of Lyles, 250 AD2d 488, 489, 673 NYS2d 122 [1998]). In contrast, the issue of the source of compensation for a guardian only arises when a very well have to bear the financial burden of the petition, or one motivated by avarice, that they might was clearly cautioning those who would bring a frivolous petition is granted and thus is not frivolous. Therefore, AD3d 1166, 70 NYS3d 639 [2018]). "[T]he Legislature made in the proceeding (see Mental Hygiene Law §§ incapacitated person dies before a determination is counsel in a guardianship proceeding only when the 81.09 [f]; 81.10 [f]; Matter of Buttiglieri [Ferrel J.B.], 158 denied or dismissed, improvident exercise or the alleged

However, we agree with the Supreme Court's determination directing the petitioner to pay the court evaluator's fee. "By stipulation, the parties may shape the facts to be determined at trial and thus circumscribe the relevant issues for the court to the exclusion of disputed matters that otherwise would be available to the parties" (Deitsch Textiles v New York Prop. Ins. Underwriting Assn. 62 NY2d 999, 1002, 468 NE2d 669, 479 NYS2d 487 [1984]; see Dental Health Assoc. v Zangeneh, 80 AD3d 724, 724, 915 NYS2d 311 [2011]). Here, the petitioner entered into a stipulation providing that it would pay the court evaluator's fee.

Finally, we agree with the Supreme Court's determination granting the guardian's application to seal the record pursuant to Mental Hygiene Law § 81.14 (b) (see Matter of Linda E. [Justin B.], 55 Misc 3d 700, 49 NYS3d 272 [Sup Ct. Tompkins County 2017]). Although the court should have entered the order upon a "written finding of good cause [to seal the record], which shall specify the grounds thereof" (Mental Hygiene Law § 81.14 [b]), there was good cause to seal the record in light of Alexander B. P.'s privacy interests and the nature of the incapacity involved.

[*803] Accordingly, the guardian should be paid the total sum of \$3,000 [***5] from the funds of Alexander B. P. for his services rendered on behalf of Alexander B. P. to date. We remit the matter to the Supreme Court,

Nassau County, for the entry of an order relieving Bruce Robert Hafner as guardian [**106] and substituting a suitable not-for-profit guardian for Alexander B. P. Mastro, J.P., Sgroi, Maltese and Brathwaite Nelson, JJ., concur.

End of Document



Matter of Linda E. (Justin B.)

Supreme Court of New York, Tompkins County February 16, 2017, Decided 2017-0038

Reporter

55 Misc. 3d 700 *; 49 N.Y.S.3d 272 **; 2017 N.Y. Misc. LEXIS 559 ***; 2017 NY Slip Op 27042 ****; 2017 WL 674086

Tompkins County Court ordered a <u>CPL a</u>

[****1] In the Matter of Linda E., Petitioner, for the Appointment of a Guardian of the Person and Property of Justin B., a Person Alleged to be Incapacitated.

Subsequent History: As Corrected July 13, 2017.

Counsel: Harris & Panels (Michael Harris [***1] of counsel) for petitioner.

Mental Hygiene Legal Service (Richard J. Wenig of counsel) for Justin B.

Matthew Van Houten, District Attorney, for People of the State of New York.

Judges: Hon. David H. Guy.

Opinion by: David H. Guy

Opinion

[*701] [**273] David H. Guy, J.

On January 20, 2017, Linda E. filed a petition under article 81 of the Mental Hygiene Law requesting the appointment of a guardian of the person and property of her son, Justin B. By order to show cause dated January 24, 2017, the court appointed Mental Hygiene Legal Service for the Third Department (MHLS) as counsel for Mr. B. The matter was scheduled for a hearing in the Tompkins County courthouse on February 15, 2017.

Mr. B. is under felony indictment for murder in the second degree and menacing a police officer. The

evaluation of Mr. B. when he tried to plead guilty at his arraignment. Mr. B. was examined and found unfit to proceed. The County Court ordered Mr. B.'s commitment per *CPL 730.50* for further evaluation, and he has been transferred to Mid-Hudson Psychiatric Center

On February 6, 2017, Matthew Van Houten, Tompkins County District Attorney, communicated his intention of having himself, or other personnel from [***2] his office, attend the hearing on this article 81 proceeding. Counsel for the petitioner and for Mr. B. were advised of Mr. Van Houten's request. On February 8, 2017, Mental Hygiene Legal Service for the Third Department, Richard J. Wenig, Esq., of counsel, filed a motion requesting this matter be sealed pursuant to Mental Hygiene Law § 81.14 (b), and that members of the public, including Mr. Van Houten and members of his District Attorney staff, be excluded from the proceeding.

The court executed an order to show cause on the sealing/exclusion motion on February [****2] 8, 2017, directing responsive [*702] papers be submitted by February 10, 2017, with any replies to the responding papers submitted to the court by February 14, 2017. Mr. Van Houten submitted an affirmation in opposition to the motion on February 10, 2017. Mr. B.'s counsel in the criminal proceeding, James A. Baker, Esq., filed an affirmation in support of the motion on February 14, 2017. Mr. Wenig submitted a responsive affidavit on February 14, 2017. The motion was orally argued in advance of the scheduled hearing. This written decision confirms the decision made on the record on February 15, 2017.

Mental Hygiene <u>Law article</u> 81 proceedings are presumptively open to the public and may only [***3] be sealed by the court upon a written finding for good cause. In making this [**274] determination, the court

must consider "the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated" (Mental Hygiene Law § 81.14 [b], [c]. For the reasons set forth below, the court finds Mr. B. has established good cause. The record of this proceeding shall be sealed and the public, including members of the staff of the Tompkins County District Attorney, will be excluded from the proceeding.

The allegations in the article 81 petition support the court's execution of the order to show cause, setting this matter down for a hearing. In order for the court to fully and fairly adjudicate this article 81 proceeding, both petitioner and Mr. B. need to be able to speak fully and freely and present relevant evidence without fear of adverse impact on Mr. B.'s pending criminal proceedings. Mr. Van Houten concedes in paragraph 10 of his affirmation that the criminal matter against Mr. B. is merely suspended, not dismissed.

public, particularly members of the prosecutor's office evidence in this proceeding due to the presence of the in its responsibility to appropriately adjudicate the article pending criminal case. This court cannot be restrained to obtain information for use against Mr. B. in his Houten's stated purpose in attending this proceeding is also extends to this article 81 proceeding. Mr. Van 313 (Broome County Supreme Court, 2004). Clearly, implicated (Matter A. Since Mr. B.'s liberty interests are at stake in the article proceeding by the potential chilling impact on B.'s right [***4] against criminal self-incrimination proceeding, his G., 6 Misc 3d 447, 785 N.Y.S.2a Fifth Amendment rights are

waiver of his medical privacy right with respect to the already been found not guilty by reason of mental clinical, records were held to be protected where he had the alleged incapacitated person's medical, including public or other legal proceedings. In Matter of John Z., waive his privacy right with respect to this proceeding. may affirmatively choose to, or even inadvertently, 720 [3rd Dept 2015]; Matter of Rosa B.-S. [William M.B.], 1 AD3d 355, 767 NYS2d 33 [2d Dept 2003]]. He medical, including mental health, evidence (42 USC § Mr. B. can exercise his medical privacy right to exclude proceeding, which is not lost by his arrest, or by the CPL Mr. B. also has a medical privacy right in this article 81 That is an evidentiary issue in this proceeding. It is not a State Off. of Mental Health], 128 AD3d 1249, 9 NYS3d Law § 33.13; Matter of John Z. [Commissioner of N.Y. 730.50 [*703] suspension of his criminal proceedings. et seg; Public Health Law § 18; Mental Hygiene

defect. That [***5] protection is even more compelling in this case, where Mr. B.'s criminal proceedings are still pending.

Mr. Van Houten argues that a judicial determination of Mr. B.'s "incapacity" in this article 81 proceeding would be relevant in the pending criminal matter. The definition of incapacity under article 81 is not the same as incapacity with respect to criminal proceedings. Under article 81, "incapacity" means having limitations which impair one's ability to address personal and/or financial affairs (Mental Hygiene Law § 81.02 [b] [1]; Matter of Rosa B.-S.) Incapacity under article 81 is specifically not diagnosis based, which is why the medical privilege applies in these [****3] proceedings. Thus, it is difficult to see how a judicial determination of incapacity in an article 81 proceeding would be relevant to a determination of incapacity in criminal proceedings.

If sealed by this court the record in this guardianship proceeding will not be available to mental health professionals in connection with any criminal psychiatric evaluation of Mr. B. Again, given the different [**275] standards applicable in the different proceedings, it is also unlikely it would be useful or relevant to capacity evaluations in a criminal proceeding.

Balancing the above factors [***6] in consideration of the orderly and sound administration of justice, the court exercises its discretion to exclude the public from these proceedings, and seal the records, as requested by Mr. B.

End of Document



Matter of Caminite (Amelia G.)

County Court of New York, Nassau County September 5, 2017, Decided

32049-1-2016

57 Misc. 3d 720 *; 62 N.Y.S.3d 724 **; 2017 N.Y. Misc. LEXIS 3307 ***; 2017 NY Slip Op 27286 ****

G., an Alleged Incapacitated Person Personal Needs and Property Management of Amelia Petitioners, for the Appointment of Co-Guardians of the [****1] In the Matter of Denise B. Caminite et al.,

Subsequent History: [***1] As Corrected September

Counsel: Avallone & Bellistri, Lake Success (Rocco G. Avallone of counsel), for Denise B. Caminite, petitioner.

Stephen W. Schlissel, Garden City, petitioner pro se.

petitioner. (Richard G. Corde of counsel), for Patrick Nogoda, Boeggeman, George & Corde, P.C., White Plains

Michael Chetkof, Garden City, for Amelia G

A. Smith of counsel), court evaluator Law Office of David A. Smith, PLLC, Garden City (David

counsel), for Jeffrey Silver, nonparty. Wolf, LLP, Lake Success (Carolyn Reinach Wolf of Abrams, Fensterman, Fensterman, Eisman, Ferrara &

Silverson, Pareres & Lombardi, LLP, New York City nonparty. (Joseph T. Pareres of counsel), for Caminite Trust,

Helwig, Henderson, LaMagna, Gray & Spinola [***3],

Cohen, nonparty. White Plains (Michael LaMagna of counsel), for Donald

Judge. Judges: Hon. Gary F. Knobel, Acting County Court

Opinion by: Gary F. Knobel

Opinion

[**725] [*721] Gary F. Knobel, J.

Ħe representation of Amelia G. by court-appointed counsel petitioner Denise B. Caminite for an order sealing the capacity after the entry of the order and judgment. For appointed counsel for Amelia G. should continue in that Michael Chetkof, Esq., is granted. record in this guardianship proceeding is denied, and this case should be sealed, and whether the courtalleged incapacitated person, are whether the record in guardian for the person and property of Amelia G., an court in this special proceeding pursuant to Article 81 of The stipulated remaining issues to be determined by the reasons stated below, the application by cross-Mental Hygiene Law for the appointment of a application φ മ്പ order continuing

from either a disease, illness, condition or injury which significantly impairs her or his ability to care for their their physician-patient privilege (see <u>Matter of Rosa B.-S. [William M.B.], 1 AD3d 355, 767 NYS2d 33 [2003]</u>), psychiatric condition [***4] into issue [*722] nor waived alleged to be incapacitated has not put their medical or wrongdoing or fault. Instead, even though the person or he is alleged to be "incapacitated," is not accused of most other forms of litigation since the respondent, the Guardianship proceedings are unique and different from the petitioner claims that the respondent is suffering individual haled into court against their will because she

needs, and thus it is necessary to appoint a guardian with extensive powers to prevent harm to that individual. Consequently, since the respondent can lose her or his civil liberties guaranteed by the United States and New York State Constitutions, <u>Article 81</u> of the Mental Hygiene Law was designed to be an adversarial process, not a collaborative or mediative one, in an effort to protect the respondent's liberty interests. The statute presumes that the individual is not incapacitated until proved so by the highest standard of proof, clear and convincing evidence. Article 81 therefore gives a person the opportunity to fight against and object to the deprivation of their freedom and right to make their own [**726] decisions and conduct their life the way they see fit.

public having access to their medical, psychiatric and said—if they were not cognitively impairedcare or advocate for them? What would they have many of whom do not have family members or friends to themselves from identity theft or financial exploitation, lives or express their needs and wishes. Who will speak which severely impair their ability to manage their [***5] have significant functional limitations, usually neurological, due to dementia or Alzheimer's disease, financial information? on behalf of these vulnerable individuals of our society The tragic reality is that the majority of respondents ♂ care for themselves and -about the protect

Cons Laws of NY, Book 14, Domestic Relations Law § 4; Scheinkman, Practice Commentaries, McKinney's parties, their attorneys are prohibited from disclosure to anyone other than the the same manner that documents in matrimonial cases case files are sealed and shielded from public view in practitioners assume that all county clerk guardianship open to the public to observe, within the past year in Newsday, Long Island's daily newspaper. Although guardianship proceedings are publicity generated by stories which have appeared have occurred with greater frequency as a result of the appointees to seal the record in their particular case Requests to this court by litigants, attorneys and court-C235:1 at 522-524 [***6] [2010 ed]). This is possibly oarties, their attorneys and court personnel (*see* many article 81

Whenever the sealing of a court record is sought pursuant to statute or court rule, competing constitutional rights are pitted against each other: the public's right to information and access to court proceedings, versus the individual's right to privacy.

A recent survey conducted by the American Bar Association Commission on Law and Aging indicates that as of December 31, 2016, nine states seal significant portions of records in guardianship cases (e.g., the petition, professional evaluation reports) and that 13 states (e.g., New Jersey, Connecticut, Ohio, Kentucky, Oklahoma, New Hampshire) mandate that guardianship hearings be confidential, the documents contained therein be sealed, and public access to those records granted only upon good cause [***7] shown (ABA Commission on Law and Aging, www.americanbar.org/aging).²

New York, along with the majority of states, mandates the inverse: public access to documents in guardianship proceedings is presumptively permitted, unless a litigant sufficiently demonstrates to the court "good cause" why the record should be sealed in accordance with Mental Hygiene Law § 81.14. The statute was enacted in [**727] 1993, three years prior to the enactment by Congress in 1996 of the Federal Health Insurance Portability and Accountability Act, hereinafter HIPAA (42) USC § 1320d et seq.), which prohibited, inter alia, the disclosure of a patient's medical information unless it was authorized by the patient or by a court order (Matter of Miguel M. [Barron].. 17 NY3d 37, 43, 950 NE2d 107, 926 NYS2d 371 [2011]). Mental Hygiene Law § 81.14 mandates, in pertinent part with respect to the sealing issue at bar, that

"(a) A record of the proceedings shall be made in all cases.

due in part to the fact that <u>Mental Hygiene Law § 81.07</u> (f) limits the service of the petition to only the alleged incapacitated person, his or her attorney, and the court evaluator, and that interested parties are only entitled to be served with a copy of the order to show cause.

¹ See e.g. Will Van Sant, Signed, Sealed and Secret: Guardianship Cases Often Sealed, Preventing Public Scrutiny, Newsday, Oct. 3, 2016, § A at 2, col 1; Will Van Sant, NY County Clerks Told to Flag Orders That Could Hide Cases, Newsday, Mar. 14, 2017, § A at 5, col 1.

²The <u>Uniform Guardianship and Protective Proceedings Act</u>, adopted by 43 states, including New York, technically requires only reports and professional evaluations to be sealed, but may be revealed to the respondent, the petitioner and their attorneys, and pursuant to court order, those showing good cause (Uniform Guardianship and Protective Proceedings Act §§ 307 [1]-[4]; 407 [1]-[4]).

the civil practice law and rules . . clerk shall remain subject to protective orders under obtained through disclosure and not filed with the connection and records of any nature filed with the clerk in heard. Court records shall include all documents prescribe appropriate notice and opportunity to be necessary [****2] or desirable, the court proceedings, and the privacy of the person alleged the grounds thereof. In determining whether good written finding of good cause, which shall specify sealing the court records in a proceeding under this interest of the public, the orderly and sound cause has been shown, the court shall consider the administration [*724] "(b) The court shall not enter an order be incapacitated. Where it appears [***8] either in whole or in part, except upon a with of justice, the proceeding. the nature Documents of the may

"(d) At the time of the commencement of the hearing, the court shall inform the allegedly incapacitated person of his or her right to request for good cause that the court records be sealed and that a person, persons, or the general public be excluded from the hearing." (Mental Hygiene Law § 81.14 [a], [b], [d] [emphasis added].)

the interests of the public as well as of the parties" (22 NYCRR 216.1 [a]), while section 81.14 (b) mandates justice, the nature of the proceedings, and the privacy of determining [*725] whether "good cause" has been three additional factors that the court must consider in finding of good cause, the differences between them are upon agreements between the parties (see Mancheski v Gabelli Group Capital Partners, 39 AD3d 499, 501, 835 concerns that judges were sealing court records based section 81.14 was enacted into law, in response to Judge [***9] in 1991, two years earlier than when cases that was promulgated by the Chief Administrative administrative court rule pertaining to non-article 81 individuals selected to be interviewed therein. Mental been any public discourse on whether court records in established: "the orderly and sound administration of that the court rule requires the trial judge to "consider permit the sealing of the record only upon a written Newsday articles bringing the issue to the forefront and the views expressed therein by the reporter and the guardianship cases should be sealed, other than the history or legislative discussion pertaining to Mental There does not appear to be any published legislative Hygiene Law § 81.14, nor does there appear to have NYS2d 595 [2007]]. Although both statute and rule Law § 81.14 (b) tracks the statewide

the person alleged to be incapacitated" (*Mental Hygiene Law § 81.14 [b]*).

search of the truth" (Matter of A.J., 1 Misc 3d 910[A], relationship with their son . . . [and] to promote candor in this court) held in sealing that record that incapacitated] allowed the [elderly married persons alleged to be of the proceedings and the closure of the courtroom . . . are personal and sensitive in nature "The sealing proceedings under Article 81 of the Mental Hygiene Law Matter of A.J. (1 Misc 3d 910[A], 781 NYS2d 623, 2004 to the Appellate Division, Second Department, stated in For example, Justice Leventhal, before he was elevated guardianship cases have [***10] sealed court records. factor has served as the predominant reason judges in file in whole or in part in a particular case pursuant to guardianship proceedings which evaluate whether good cause" has been demonstrated to seal the court guardianship proceeding. There are only consider and apply the criteria set forth in section 81.14 There NY Slip Op 50016[U] Mental Hygiene Law § 81.14 (b). [**728] The privacy published trial court decisions arising from New York to seal the record or exclude the public from observing a 787, 794, 696 NYS2d 384 [1999]), Justice Rossetti (of 781 NYS2d 623, 2004 NY Slip Op 50016[U], *2-3 [Sup Ct, Kings County 2004]). In Matter of Doe (181 Misc 2d are no appellate cases in New York which ರ speak freely concerning their [2004]) that "[g]uardianship

"disclosure of confidential medical and treatment information would be potentially embarrassing and damaging to respondent, particularly with respect to his relationship with his parents and further treatment of his problems (including his alcohol and substance abuse [cf., 42 CFR ch.l. subch A. part 2])....[, and that] there was no indicated public or other interest in disclosure of these essentially personal proceedings outweighing such potential injury" (Matter of Doe, 181 Misc 2d 787, 794, 696 NYS2d 384 [Sup Ct. Nassau County 1999] [citations omitted])...

Similarly, Justice Guy in <u>Matter of Linda E. (Justin B.).</u> 55 <u>Misc 3d 700, 49 NYS3d 272 [2017]</u> excluded members of the public and the Tompkins County District Attorney's Office from the courtroom and sealed the record to protect the alleged incapacitated person's [***11] medical privacy rights and liberty interests in view of pending criminal proceedings against [****3] him (<u>Matter of Linda E. [*726] [Justin B.]. 55 Misc 3d 700,702-703, 49 NYS3d 272 [Sup Ct. Tompkins County 2017]</u>; see also <u>Matter of Astor, 13</u>

Misc 3d 1203[A], 824 NYS2d 755, 2006 NY Slip Op 51677[U] [Sup Ct, New York County 2006]).

governmental [**729] control helps "to ensure the actual government" (Id. at 575, 580). This right of access to the communication on matters relating to the functioning of share a common core purpose of assuring freedom of right to attend criminal trials, since these constitution implicitly granted [***12] to the public the and Fourteenth amendments to the United States that the freedoms and guarantees imbedded in the First the backdrop of this long history, the Court concluded process and its results" (id. support derived from public acceptance of both the [since] the means used to achieve justice must have the trials had significant community therapeutic value . . . criminal trial, Chief Justice Burger observed that "public presumptive access" (Richmond Newspapers, held in open court, to which the public [shall] have free (Mancheski v Gabelli Group Capital Partners at 501). Burger, Ch. J.], quoting E. Jenks, The Book of English 555, 566-567, 100 S Ct 2814, 65 L Ed 2d 973 [1980, jurisprudence, centuries before the ratification of the explained that this public policy has its roots in English 341, 342, 705 NYS2d 339 [2000]). In the watershed and its proceedings (see Mancheski v Gabelli Group federal courts for the public to have access to the courts preference by our state legislature and courts and Sealing court records for compelling reasons and in the United States Supreme Court case of 2814, 65 L Ed 2d 973 [1980]), Chief Justice Burger Newspapers, Capital Partners; Anonymous v Anonymous, 263 AD2d fair administration of justice is an exception to the strong perceived fairness 73-74 States Constitution, "that all judicial trials are and openness of the trial," [6th ed s Supreme Court case of <u>Richmond</u> Inc. v Virginia (448 US 555, 100 S Ct ಠ receive 1967]). 으 at 567, 570-571). Against the Inc. v Virginia, 448 US 5 information judicial explaining especially the "freedoms system" under "the

policy strongly favoring the public's access [*727] record in this proceeding. In view of the existing public petitioners all maintain that there is no basis to seal the appointed counsel, the temporary guardian and the incapacitated person, petitioner, Denise B. Caminite, who is not related to the Other than the proposed co-guardian and cross-Fortunately, she is well cared for 24 hours per day. the wishes of the alleged incapacitated person because typical situation: the court cannot accurately ascertain The proceeding at bar presents an unfortunate but court files, suffers and after applying the criteria set forth in from a severe cognitive impairment. the court evaluator, court-

> from unscrupulous behavior. interests of the incapacitated person to be protected burying secrets, hiding the truth and thwarting the best diminishes the possibilities for injustice, incompetence, cast upon the judicial process by public observation scrutiny of guardianship proceedings. "[T]he bright light tens of millions of dollars, and are precisely the Indeed, sealing the record here would have the effect of perjury, and fraud" (Mancheski v Gabelli Group Capital examples set forth in arguments that favor public incapacitated person whose real estate holding is worth control over and overreaching, Svengali-like manipulation pertain to possible wrongdoing, financial exploitation merely allegations and never the subject of a hearing, good cause to warrant the sealing of the record here Mental Hygiene Law § 81.14 (b), this court concludes Westinghouse Elec. Partners at 501, quoting Republic of Philippines v The serious allegations [***13] in the petition, though that Ms. Caminite has failed to sufficiently demonstrate vulnerable Corp., 949 F2d 653, 660 [1991]). very wealthy elderly

established to seal the record here. guardianship proceedings, good cause has not been sister states which presumptively seal court records in compelling interest of the movant (see Mancheski v Gabelli Group Capital Partners at 502). Moreover, in ease of international identity theft, and the number of HIPAA on guardianship proceedings, the unfortunate not the interests or privacy rights of of, the alleged incapacitated [***14] are paramount, and proceeding, the privacy rights of, and the best interests considering whether to seal the record in a guardianship demonstrate that public access to the court documents Although the legislature should reevaluate Mental Hygiene Law § 81.14 in view of the broad impact of filed in this proceeding would likely result in harm to interests of the parties as Ms. Caminite has failed to The public interest here clearly outweighs the private [****4] (see Matter of Linda E. [Justin B.] at 702-703). other litigants

The court further finds that it is in the best interests of the incapacitated person for the court to continue to monitor the management of her complicated large real property asset, as well as her personal needs. Consequently the court sets this case down for a status conference on November 9, 2017, at 10:00 a.m., and reappoints Michael Chetkof, Esq., to continue in his representation of the incapacitated person.



Matter of Nunziata (Nancy K.)

Supreme Court of New York, Nassau County April 15, 2021, Decided 850023-1-2021

Reporter

72 Misc. 3d 469 *; 148 N.Y.S.3d 841 **; 2021 N.Y. Misc. LEXIS 2260 ***; 2021 NY Slip Op 21129 ****; 2021 WL 1824733

McENANEY, CROSS-PETITIONER. Incapacitated Person, RESPONDENT, WILLIAM Nunziata., Commissioner of the Nassau County Appointment of a Guardian for Nancy K., An Alleged Department of Social Services, PETITIONER, For the [****1] In the Matter of the Application of Nancy

RELEASE OF THE FINAL PUBLISHED VERSION. DOCUMENT IS SUBJECT TO CHANGE PRINTED OFFICIAL REPORTS. Notice: THE TO REVISION BEFORE PUBLICATION IN THE THIS OPINION IS UNCORRECTED AND SUBJECT LEXIS **PAGINATION** 유 PENDING SIHT

Prior History: Matter of Nunziata (nancy K.), 2021 N.Y. Apr. 15, 2021) LEXIS 2209, 2021 WL 1804404 (N.Y. Sup. Ct.,

County Department of Social Services. Uniondale, NY. Commissioner of the Nassau County Department of Social Services, David Zachary Carl, Esq., Nassau Counsel: [***1] For Petitioner: Nancy Nunziata,

LLC, Garden City, NY. Strassler Rosenthal, Esq., Firm Name: Rosenthal Law For Nancy K., Alleged Incapacitated Person: Elisa

City, NY; Temporary Guardian, Lloyd Jeffrey Weinstein, Esq., Firm Name: THE WEINSTEIN GROUP, P.C., Name: EDWARD F. CUNNINGHAM, ESQ., Garden Evaluator, Edward Francis Cunningham, Esq., Firm HABERMANN & HEITNER LLP, Jericho, NY; Court Heitner, Esq. Firm Name: SELTZER SUSSMAN For Nancy K., Alleged Incapacitated Person: Brian R

Name: NOVICK & ASSOCIATES, P.C., Huntington, NY. For the Cross-Petitioner: Donald Novick, Esq., Firm

For the Cross-Petitioner: Kimberly Arlen Schechter,

Esq., Novick & Associates, P.C., Huntington, NY

Huntington, NY. Firm Name: NOVICK & ASSOCIATES, P.C., For the Cross-Petitioner: Albert Vincent Messina, Esq.,

Judges: HON. GARY F. KNOBEL, J.S.C

Opinion by: GARY F. KNOBEL

Opinion

[**844] [*470] Gary F. Knobel, J

confidentiality mandates of Social Services Law § 473permitted to an interested party in a guardianship proceeding within the [**845] context of the proceeding, for an order directing the disclosure to him commencement of the hearing proceeding within an issue of first impression on the extent of discovery pertaining to the alleged incapacitated person, presents of the adult protective motion by the services [***2] ("APS") file cross-petitioner, in this special

and the cross-petitioner, William McEnaney. entered into on November 6, 2020, between the AIP abuse in the guise of financial exploitation and emotional abuse. The main focus of the petition is to set the Nassau County Department of Social Services pursuant to <u>Article 81 of the Mental Hygiene Law</u>, seeks executed on October 8, 2019, and to void the marriage [*471] fifty-plus page petition is replete with allegations of elder a judgment appointing an independent guardian for the alleged incapacitated person, Nancy K. ("AIP"). The personal needs and property This proceeding, commenced by the Commissioner of aside and void the advanced directives management of the

The cross-petition seeks an order dismissing the petition

determine her medical and personal care. power to handle her property management affairs and guardian of the person and property of the AIP, with the an independent guardian or appoint cross-petitioner as permanent guardian, and that either the court appoint Weinstein, Esq., be removed and not be appointed a appointed the guardian of the person and property of determines that an independent person should be cross-petitioner using the advanced directives put in place in 2019. The and permitting the cross-petitioner to care for the AIP AIP, that [***3] the temporary guardian, Lloyd alternatively seeks, ≕ the court

During an interlude in petitioner's direct case (to date a caseworker and her supervisor have testified), the cross-petitioner's counsel moved for the disclosure of the entire APS file pursuant to a proposed subpoena duces tecum. By order dated March 25, 2021 (Knobel, J.) this court held the motion in abeyance pending an *in camera* review of the APS file by the Court.

documents "bear upon the credibility of individuals to the allege incapacitated person, Nancy K., for the period of January 1, 2015, through February 19, 2021." McEnaney to serve as guardian of the person and admissible evidence concerning the propriety of William cross-petition should be granted, i.e., the existence of this action and to establish whether the relief in the statements against interest from any party or witness in actions of William McEnaney, the existence of any statements concerning the capacity of Nancy K. and the Adult Protective Services, to discover any admissions or a time line of events relevant to the complaint made to who [***4] will give testimony in this matter, to establish relevant and necessary on the ground The cross-petitioner argues that these documents are interviews, and memoranda that concern, refer or relate support of its petition, to wit, "[a]II reports, case notes, disclosure The cross-petitioner contends that he is entitled to the property of the alleged incapacitated person, of petitioner's proof that it may offer in that these

Petitioner and counsel for Nancy K. vehemently oppose any disclosure of the contents of the file to the cross-petitioner, contending, *inter alia*, that the records sought are confidential and not subject to disclosure to the cross-petitioner pursuant to <u>Social Services Law 473-e</u>. Counsel for the AIP argues that this statute permits court-appointed counsel for the AIP and the temporary guardian to review the subject documents, and that the proposed subpoena *duces [****2] tecum* should not be signed by the Court since the subpoena seeks, as in the

Second Department case of *Valdez v. Sharaby, 258 A.D.2d 458, 458, 684 N.Y.S.2d 595 [2d Dept 1999]*, records for the purpose of obtaining information to impeach [***5] the general credibility of witnesses.

[**846] <u>Social Services Law § 473-e</u>, titled "Confidentiality of protective services for adults' records," provides as follows:

- "1. Definitions. When used in this section unless otherwise expressly stated or unless the context or subject matter requires a different interpretation:
- (a) "Subject of a report" means a person who is the subject of a referral or an application for protective services for adults, or who is receiving or has received protective services for adults from a social services district.
- (b) "Authorized representative of a subject of a report" means (i) a person named in writing by a subject to be a subject's representative for purposes of requesting and receiving records under this article; provided, however, that the subject has contract capacity at the time of the writing or had executed a durable power of attorney at a time when the subject had such capacity, naming the authorized representative as attorney-in-fact, and such document has not been revoked in accordance with applicable law; (ii) a person appointed by a court, or otherwise authorized in accordance with law to represent or act in the interests of the subject; or (iii) legal counsel for the subject.
- authorized representative, except to the extent that who is the subject of the report, or the subject's be released with the written permission of the person paragraphs (a) through (g) of this subdivision, shall only district, shall be confidential and, or photographs taken concerning such reports in the reports and information may be made available to: pursuant to subdivision three of this section. there is a basis for non-disclosure of such information persons, possession of the department or a social services limited to, the names of referral sources, written reports as any other information obtained, including but not 2. [***6] Reports made pursuant to this article, as well officers and agencies [*473] except to enumerated
- (a) any person who is the subject of the report or such person's authorized representative;
- (b) a provider of services to a current or former protective services for adults client, where a social services official, or his or her designee determined that

72 Misc. 3d 469, *473; 148 N.Y.S.3d 841, **846; 2021 N.Y. Misc. LEXIS 2260, ***6; 2021 NY Slip Op 21129, ****2

such information is necessary to determine the need for or to provide or to arrange for the provision of such services;

- (c) a court, upon a finding that the information in the record is necessary for the use by a party in a criminal or civil action [***7] or the determination of an issue before the court;
- (d) a grand jury, upon a finding that the information in the record is necessary for the determination of charges before the grand jury;
- otherwise affects a person who is the subject of a investigation or criminal prosecution involves investigation or prosecution; prosecution, such records may be related to the criminal report, and that it is reasonable to believe that due to reasonable cause to believe criminal prosecution of a person, is necessary to conduct a criminal investigation or requests such information stating that such information department or by a county sheriff when such official officer employed by a city, county, town or village police a member of the division of state police, or a police investigator employed in the office of a district attorney, (e) a district attorney, an assistant district attorney or nature of the crime under rson, that there that the crimin investigation criminal Q Q
- (f) a person named as a court-appointed evaluator or guardian in accordance with article eighty-one of the mental hygiene law, or a person named as a guardian [**847] for the mentally retarded in [****3] accordance with article seventeen-A of the surrogate's [***8] court [*474] procedure act; or
- (g) any person considered entitled to such record in accordance with applicable law.
- information will be detrimental to the safety or interests official reasonably finds that the release determine a person's need for such services and the cooperated referral or submitted an application on behalf of a such information would identify a person who made a two of this section, if such official finds that release of otherwise authorized to release pursuant to subdivision withhold, in whole or in part, 3. The commissioner or a social services official may of such person." assessment conducted by a social services district to person for information in their possession which he or she is protective 3 a subsequent investigation services for adults, or who the release of any of such and

(Soc. Serv. Law § 473-e)

The legislative history of the 1995 enactment of <u>Social</u> <u>Services Law 473-e</u> reflects the Legislature's intent to add confidentiality provisions related to adult protective service records and to increase protection of mentally or physically impaired dependent adults from financial, physical and emotional abuse, neglect, and other hazardous situations. Other elected officials urged the Governor to enact the proposed [***9] legislation:

"A new <u>section 473-e of the Social Services Law</u> is added, regarding confidentiality of records of Protective Services for Adults. It establishes that PSA reports on individuals cannot be released without the written permission of the subject of the report or his authorized representative. It also authorizes the Commissioner or a Social Services official to withhold information on a PSA subject if doing so would have a harmful effect.

This legislation represented a necessary comprehensive approach to ending elder abuse. To successfully combat elder abuse, it must be addressed on several levels: education and outreach, increased protections for potential victims residing in long term care facilities, and preservation of confidentiality so that people who witness elder abuse are not deterred from reporting it."

(Bill Jacket, L. 1995, C.395, at 28, Approval Recommended by the Mayor of the City of New York, Rudolph W. Guiliani.)

omitted] and whether undue delay will result from the speedy adjudication, since permitting discovery could Rivera, supra at 1365). request [citation omitted]" (Matter of Suit-Kote Corp. v tailored to obtain the necessary information [citation [citation omitted], whether the request is carefully that the requested information is material and necessary whether the party seeking disclosure has established (2nd Dept. 2015). "Among the factors weighed are E.H.—Penny F.H.). denying disclosure (see, Matter of Beatrice R.H.(Dean E.H.—Penny F.H.). 131 AD3d 1059, 16 N.Y.S.3d 475 Thus the trial court has broad discretion in granting or Connors, NY Prac, § 555 at 1365 [6th [***10] ed.]). N.Y.S.3d 642 [3rd Dept. 2016]; CPLR 408; Siegel & have the effect of delaying the proceeding (see, Matter only by leave of the court in view of the need for a guardianship proceeding at bar, disclosure is available of Suit-Kote Corp. v. Rivera, 137 AD3d 1361, Ħ മ special proceeding, such 1364,

The Court of Appeals in Forman v. Henkin, 30 NY3d

72 Misc. 3d 469, *475; 148 N.Y.S.3d 841, **847; 2021 N.Y. Misc. LEXIS 2260, ***10; 2021 NY Slip Op 21129, ****3

656, 665, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018) reiterated that

"[t]he words, 'material and necessary' [as codified in <u>CPLR 3101(a)</u>] are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing [**848] on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is [****4] one of usefulness and reason' (<u>Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406, 235 NE2d 430, 288 NYS2d 449 [1968]</u>; see also <u>Andon v 302-304 Mott St. Assoc., 94 N.Y.2d 740, 746, 731 NE2d 589, 709 NYS2d 873 [2000]</u>)

(Forman v Henkin, 30 NY3d 656, 661-662, 70 N.Y.S.3d 157, 93 N.E.3d 882 [2018]

The Court then discussed the limits on disclosure:

"The right to disclosure, although broad, is not unlimited. <u>CPLR 3101</u> itself "establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (<u>CPLR 3101[b]</u>); attorney's work product, also absolutely immune (<u>CPLR 3101[c]</u>); and trial preparation materials, [***11] which are subject to disclosure only on a showing of substantial need and undue hardship" (<u>Spectrum Sys. Intl. Corp. v Chemical Bank, 78 N.Y.2d 371, 376, 581 N.E.2d 1055, 575 N.Y.2d 809 [1991]). The burden of establishing a right to protection under these provisions is with the party asserting it—"the protection claimed must be consistent with the purposes underlying the immunity" (<u>id. at 377</u>)."</u>

(Forman v Henkin, supra; see also [*476] Wasserman v. Amica Mut. Ins. Co., __AD3d __,

2021 NY Slip Op 02189 [2ndDept. April 7, 2021]).

ultimately determined representative of the subject of the report" will be in time. However, the issue of whether the crossconcedes that Nancy K. is incapacitated at this moment the report [the alleged incapacitated person]" (Social Services Law § 473-e (2). The cross-petitioner written permission of the person who is the subject of contained in the APS file are "confidential and, except to petitioner should paragraphs (a) through (g) shall be released with the persons, This Court notes that the documents and information officers be found to and at the agencies enumerated conclusion of be the "authorized cross-petitioner this

> already been furnished. be provided to the cross-petitioner, if they have not interaction and investigation of the AIP, and they are to affidavits from APS caseworkers in 2021 regarding their APS file were annexed as part of the petition and were uploaded to NYSEF. The APS file also includes currently in evidence. The photographs contained in the previously exchanged between all parties and are and his counsel. The documents also contain objective testing known as "Mini Mental Examinations" conducted This information is readily available to cross-petitioner property [***12] deeds and bank account information. public searches of Department of Motor Vehicle records, parties or is a public record. For example, the the information contained therein is either known by all After reviewing the APS file, the Court finds that most of documents submitted for in camera review contain APS caseworkers. These examinations were

However, as to the documents that are not known to all parties nor public record, there are a series of notes and reports contained in the APS file which do not mandate disclosure: 1) "Protective Services For Adults Referral to Office of Legal Affairs"; 2) Intake Disposition Reports and 3) Progress Notes.

The Court finds that the report labeled "Protective Services for Adults Referral To Office of Legal Affairs," which was sent to the Legal Unit from Shirley Rembert, CW III and Muriel Jeanty Petiote, SUP II, falls within the protective ambit of <u>Social Services Law § 473-e</u>, CPLR [***13] [****5] <u>3101 (d)</u>, and analogous case precedent.

[**849] The disclosure of this information would identify persons who made a referral, and even after redaction, the release of this information may be detrimental to the safety or interests [*477] of the referral source, all of which is contrary to the intent and purpose of <u>Social Services Law 473-e</u>. Moreover, as materials prepared in anticipation of litigation, these documents are subject to a conditional privilege (<u>CPLR 3101/dl</u>). To demonstrate that this privilege is applicable, it must be shown that the material was prepared exclusively in anticipation of litigation (*Bombard v. Amica Mut. Ins. Co., 11 AD3d 647, 783 N.Y.S.2d 85 [2d Dept.2004]; Agovino v. Taco Bell 5083, 225 AD2d 569, 639 N.Y.S.2d 111 [2d Dept.1996]).*

This Court further finds that this report, and any notes by APS employees (except what is directed to be disclosed below) also fall within the interagency and intra-agency exemption of *Public Officers Law § 87*

(2)(g) since the report and notes contain opinions, ideas or advice exchanged are part of the consultative or deliberative process of government decision making:

deliberative process of the government by ensuring that persons in an [***14] advisory role [will] be able to quotation marks and citations omitted]; see Matter of express their opinions freely to agency decision makers" N.Y.3d 712, 909 N.E.2d 1235, 882 N.Y.S.2d 397 [2009] AD3d 981, 984, 871 N.Y.S.2d 489 [2009], lv. denied 12 Matter of Miller v. New York State Dept. of Transp., 58 477, 488, 796 N.Y.S.2d 302, 829 N.E.2d 266 [2005]; NY2d at 276, 653 N.Y.S.2d 54, 675 N.E.2d 808 [internal or advice exchanged as part of the consultative or (Matter of Gould v. The purpose of such exemption is "to protect the 690, 699, 603 N.Y.S.2d 294, 623 N.E.2d 15 [1993]; deliberative process of government decision making" 131, 132, 490 N.Y.S.2d 488, 480 N.E.2d 74 [1985]). N.Y.2d 267, 277, 653 N.Y.S.2d 54, 675 N.E.2d 808 "The intra-agency exemption applies to "opinions, ideas, Matter of 1996]; see Public Officers Law § 87[2][g]; Matter of v. Nassau County Community Coll., Xerox Corp. v. Times Co. v. City of NY Fire Dept., 4 NY3d New York City Police New York City Police Town of Webster, 65 NY2a Dept., 81 NY2d

(Smith v. New York State Off. of Atty. Gen., 116 AD3a 1209, 1210, 984 N.Y.S.2d 190, 191-92 [3rd Dept. 2014]; compare Mosey v. County of Erie, 148 AD3d 1572, 50 N.Y.S.3d 641 [4th Dept. 2017]).

Accordingly, petitioner's counsel and counsel for the AIP have met their burden in demonstrating that this report is privileged, and thus this report will not be made available to cross-petitioner.

at the AIP's residence. There are other entries in the notes summarize each case worker's visit with the AIP entries. Social Services Law § 473-e(2)(c) permits the the referral source's name and or identity in any of the contact with a referral source. There is no mention of progress notes which refer to a case worker's telephone also be made available to cross-petitioner as these to the cross-petitioner's counsel on or before April 20, the referring persona and or entity, and then furnished including all phone numbers and addresses related to referred the matter to APS [*478] shall be redacted, Disposition Reports," any information which contains the The documents labeled "Progress Notes" shall of the person(s) or agency or entity which ♂ the documents labeled "Intake

release of the records to the "court upon a finding that the information [***15] in the record is necessary for the use by a party in a criminal or civil action or the determination of an issue before the court." The Court finds that the [***850] progress notes contained in the file marked as <u>Section 2</u> for the court's review shall be turned over to cross-petitioner's counsel by April 20, 2021.

The Court notes that this disclosure should not delay this proceeding, which is scheduled to continue today, April 15, 2021, at 2 pm, with hearing testimony on the cross-petition, and continue on April 22, 28, and 30. In the event this proceeding has not concluded by April 30, in view of the personal and professional conflicts the attorneys who are involved in this matter have, this proceeding shall be adjourned on May 24, 2021, and continue daily until completion.

The request by the court-appointed attorney for the AIP for a copy of the APS file produced by petitioner is granted (see <u>Social Service Law § 473-e (2)[a]</u>); the court evaluator and temporary guardian may request the file from petitioner if they choose to do so (see <u>Social Service Law § 473-e (2) [f]</u>).

Accordingly, it is hereby

caseworkers or supervisors, on or before April 2o, 2021, disposition notes" and "progress notes" as set forth and other counsel the documents labeled and it is further the petitioner shall [***16] provide to the cross-petitioner subpoena duces tecum is granted only to the extent that to CPLR 2307 for an order granting the issuance of a ORDERED, that the cross-petitioner's motion pursuant as well as the 2021 affidavits by "intake APS

ORDERED, that petitioner's counsel shall provide a copy of the APS file to the attorneys for the AIP on or before April 20, 2021.

The foregoing constitutes the decision and order of this Court.

Dated:April 15, 2021

HON. GARY F. KNOBEL J.S.C.

End of Document



Matter of Nicole L. (Eleanor D.)

Supreme Court of New York, Nassau County
January 12, 2023, Decided
Index No. 850098/2021

Reporter

78 Misc. 3d 389 *; 2023 N.Y. Misc. LEXIS 132 **; 2023 NY Slip Op 23014 ***

[***1] In the Matter of the Application of Nicole L. FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY OF Eleanor D., AN ALLEGED INCAPACITATED PERSON

Notice: THE PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE PRINTED OFFICIAL REPORTS.

Counsel: [**1] For Petitoner: Steve Zalewski, Huntington Station, NY; Brittany Froning, Zelentiz Shapiro D'Agastino, Forest Hills, NY.

For AIP: Akiva Shapiro, Old Bethpage, NY.

For Evaluator: John Newman, Commack, NY.

Judges: HON. GARY F. KNOBEL, J.S.C

Opinion by: GARY F. KNOBEL

Opinion

[*391] Upon the foregoing papers, the motion by the petitioner to discontinue this Article 81 [***2] guardianship proceeding, and the motions by the respondent for an order *inter alia* imposing sanctions upon the petitioner and her former law firm is granted to the extent indicated below.

The motions at bar has presented the Court with issues of apparent first impression in guardianship cases pertaining to the handling of a court evaluator's report which is not in evidence, and the discontinuance of a guardianship proceeding, pursuant to <u>C.P.L.R.</u> § 3217,

after the hearing has commenced but before the court evaluator has testified.

undue influence by Nicole L. Court (eventually determined by a jury in favor of Eleanor) to set aside the transfer of real property and npon Eleanor's investment account based on the alleged proceeding, and an action by Eleanor D. in Supreme by the petitioner against her mother, this Article 81 point there were two proceedings and one action taking this guardianship proceeding from its inception. At one respondent could be represented by private counsel of This has been a contentious guardianship proceeding commenced by the petitioner Nicole L. against her place simultaneously: one in Family Court commenced her own choosing. Eleanor D. has vigorously opposed counsel, Akiva issue of whether Eleanor D. independently retained her Eleanor D.After a brief hearing by this Court on the Newman, Esq. as the court evaluator and counsel for Shapiro and D'Agostino P.C. The Court appointed John Her counsel at the time was the law firm of Zelentiz, proceeding which allegedly left her incapacitated. [**2] Eleanor's personal and property needs based primarily mother Eleanor D., an alleged incapacitated person, for appointment of Nicole L. events prior to the commencement Shapiro, this court found the guardian for

Numerous filing and supplemental filings have been made regarding the instant matter. The issues before the Court can be summarized as: (1) whether to permit discontinuance of the action; (2) the awarding of fees; and (3) what, if any, sanctions or actions should be taken for the disclosure of the court evaluator's report [**3] to the judge presiding over the Family Court proceeding.

[*392] DISCONTINUANCE

Turning first to the issue of whether this Article 81

evaluator has testified. petitioner's cross examination and before the court proceeding incapacitated person. Here the issue is whether this determination to appoint a guardian for the alleged Court can, or should permit, an Article 81 guardianship court evaluator testified, but before the Court made a motion to discontinue an Article 81 proceeding after the proceeding should be discontinued pursuant to C.P.L.R. <u>3217</u> in Division Second Department's analysis of C.P.L.R. § § 3217 (b), this Court, in Matter of Lane (Michelle R.), 159, 175 NYS3d 299 [2nd Dept 2022] and applied it to a County, Knobel, J.] recently reviewed the Misc 3d Emigrant Bank v. Solimano, 209 AD3d 153, . 2022 NY Slip Op 22401 [Sup. Ct., Nassau to be discontinued in the middle Appellate 으

The quandary is that <u>C.P.L.R. § 3217</u> has not been amended to reflect the enactment of Article 81 thirty years ago, and that there is no provision in the Mental Hygiene Law governing the discontinuance of a guardianship proceeding.

deems proper (id.) "Thus, CPLR 3217, viewed in its discontinuance of the action pursuant to a stipulation of process and the filing of proof of service with the court clerk (see, <u>C.P.L.R.</u> § <u>3217[a][1]</u>). The second stage is discontinuance the farther the litigation progresses" stage of a litigation, while imposing greater requirements upon the party discontinuances by mere unilateral notice at the earliest all parties and upon terms and conditions the court been submitted to the court or jury, the court can order a C.P.L.R. § 3217[b]). The final stage is after the case has terms and conditions the court deems proper (id.; the action during this time period by court order upon However, the Court can also grant a discontinuance of (see, Emigrant Bank v. Solimano, 209 AD3d 153, 159, the filing of a written stipulation executed by all parties determination of the [***3] facts; this period requires and before the case is submitted to a court or jury for the broad time period between the responsive pleading is required, within twenty (20) days after the service of responsive pleading [**4] is served, or if no responsive proceeding. The first time period is prior to the time a permits a discontinuance at three separate stages of the applies to special proceedings as well as actions, and In Emigrant Bank the court stated that C.P.L.R. § 3217 N.Y.S.3d 299, 305-306 [2nd Dept. 2022]) (Emigrant Bank v. 175 NYS3d 299 [2nd Dept 2022]; C.P.L.R. § 3217[a][2]). operates Solimano, 209 AD3d 153, 160, 175 മ see-saw, allowing incrementally seeking ਨੂੰ

> thus guardianship proceeding 'crosse[s] the rubicon from its predeliberative stage of $\underline{C.P.L.R.}$ § 3217(a)(1),' and court and a stipulation of all parties (Emigrant Bank v. of this Court, when the court evaluator issues a report cannot be voluntarily discontinued, [**6] in the opinion was County, Knobel, J.]). discontinuance at that juncture requires both leave of clear explanation of the statute in Emigrant Bank, a be parties to the proceeding), stipulate to that relief. Contrary to $\underline{C.P.L.R.}$ § 3217 as presently cast, and the evaluator (who in the view of this Court are deemed to petitioner, or the alleged incapacitated and the court granted by court order, regardless of whether the guardianship proceeding, other than due to the death of words, an application by the petitioner to discontinue a better served by continuing the action (Id.). In other of actions when the true parties' best interests would be conservatorship/guardianship proceeding as a means of protecting "conservatees," "incompetents" / alleged Soliman, supra at 162)" (Matter of Lane (Michelle R.,) incapacitated individuals 'from the collusive termination Court that the legislative intent of C.P.L.R. § 3217 (a)(2) Korn-Miller, NY Civ Prac P 3217.05). It is clear to this committee has been appointed is a party" (7 Weinsteininfant, conservatee, proceeding before a guardian has been [**5] appointed for the alleged incapacitated person; it does however continuance "CPLR 3217 (a)(2) does not contemplate the dis [*393] explicitly bar discontinuance by stipulation where an alleged 'triggering the ಠ 2022 NY Slip Op 22401 [Sup. Ct., Nassau limit the by incapacitated person, should the petitioner or incompetent for whom a statutory condition right ਰ 으 discontinue guardianship only

Based upon the foregoing principles, this Court permits the discontinuance of this Article 81 guardianship proceeding pursuant to <u>C.P.L.R. § 3217 (b)</u>, even though the court evaluator never testified about his report. The petitioner has not completed her presentation of proof in support of her petition to become her mother's guardian, the court evaluator has no formal opposition to the discontinuance, and both the petitioner and the respondent are in rare agreement to discontinue the proceeding. The Court notes that the Mental Hygiene Law does [*394] not specifically grant to the court evaluator the power to consent to a discontinuance (see, In re Chachkers, 159 Misc 2d 912, 913-914, 606 NYS2d 959 [NY Sup. Ct. 1993]).

PAYMENT OF LEGAL FEES

When a petition to appoint a guardian is denied or dismissed, *Mental Hygiene Law § 81.09(t)* grants When a party moves to discontinue the Article 81 guardianship proceeding, and the discontinuance is stipulated to by the parties, this Court has held that it is supra at 823-824). Dept 2016]; Matter of James A. McG. [Robinson], 68
AD3d 1118, 890 N.Y.S.2d 345 [2009]; Matter of Kurt T., 282-283; see also, Matter of Fairley v. Fairley, 136 such proportions as the court may deem just" (Petty, at by the person alleged to be incapacitated, or both in to the [court] evaluator . . . payable by the petitioner or discretion to the court to award "reasonable allowance 958, 947 N.Y.S.2d 144 [2012]; Matter of Kurt T., 64 AD3d 819, 824, 881 N.Y.S.2d 688 [3rd Dept. 2009]). N.Y.S.3d 271 (Nassau Sup. Ct. 2016), citing <u>Matter of</u> Petty, 256 AD2d 281, 282-4, 682 N.Y.S.2d 183; see, the functional equivalent of [**7] a dismissal (Matter of AD3d 432, 26 N.Y.S.3d 1, 2016 NY Slip Op 00758 [1st [***4] Matter of Samuel S. [Helene S.], 96 AD3d 954, Misc 3d 834, 836, 28 68

When a petition is dismissed the court may direct the petitioner to pay the reasonable compensation for counsel for the Alleged Incapacitated Person (Mental Hygiene Law § 81.10[f]). Furthermore, the court has broad discretion in determining what constitutes reasonable compensation to the Court Evaluator or to counsel for the alleged incapacitated person (see, Matter of Zofia L. [Jolanta s. — Bogdan L.], 136 AD3d 818, 26 N.Y.S.3d 95, 2016 NY Silp Op 00974 [2nd Dept. 2016]; Matter of Annette B., 56 AD3d 551, 866 N.Y.S.2d 881 [2008]; Matter of Theodore T. [Charles T.], 78 AD3d 955, 957, 912 N.Y.S.2d 72 [2010]). When awarding compensation, the court is required to explain and base its decision on the 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 [**8] responsibility involved (*Matter of Alice D.*, at 613-614; see, *Matter of Freeman, 34 NY2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 [1974]*).

In the instant matter, the Petitioner's motives were at the very least questionable when commencing this guardianship [*395] proceeding. While it may not have been frivolous, the contentiousness between mother

and daughter cast a giant shadow over this proceeding; most telling being the jury verdict in favor of the respondent mother, the extensive cross-examination by respondent's counsel of the petitioner, and the extensive motion practice.

receipt of this decision and order. pay the fifty percent awarded within ten (10) days of is hereby awarded \$56,385.00 for 161.1 hours of legal services rendered fifty percent to be paid by the Alleged Incapacitated Person. Petitioner is directed to petitioner [**9] and fifty percent to be Incapacitated Person's affirmation of legal services and at a rate of \$650.00 per hour for this proceeding alone. client has incurred legal fees in the sum of \$104,715.00 supra at 282-284; Matter of Samuel S. [Helen S.], 96 provided, in view of the fact that *inter alia* the court evaluator is one of the leading guardianship practitioners in Nassau County (see, <u>Matter of Petty</u>. \$17,812.50 for 37.75 hours of professional services parties to immediately pay fifty per cent of his fee, which AD3d 954, 958, 947 N.Y.S.2d 144 [2012]; Matter of Kurt Court deems to be the reasonable total sum of As to the court evaluator's fee, the court directs both T., supra at 824). Counsel for Eleanor D. claims that his Court has reviewed Counsel to the paid by the

3. SANCTIONS AND CONFIDENTIALITY OF COURT EVALUATOR REPORT

This is a case of first impression regarding the unilateral decision by a party to disseminate, and even introduce, a Court Evaluator Report is a separate judicial proceeding without permission from the guardianship justice presiding over the guardianship proceeding.

<u>C.P.L.R. § 4504(a)</u> details a variety of information that is deemed confidential and privileged. The Legislature has enacted several narrow exceptions to this rule for various reasons, one of which being <u>Mental Hygiene Law § 81.09</u> details the responsibilities of the Court Evaluator and details what said report will contain. While <u>Mental Hygiene Law § 81.09</u> on its face does not explicitly state the confidentiality of the Court Evaluator Report, it is clear, that this report should not be disseminated without court

¹The confidentiality of this information is paramount in all practice areas except for these narrow legislative exceptions (see, *People v. Sinski*, 88 NY2d 487, 669 N.E.2d 809, 646 N.Y.S.2d 651 [1996]).

approval. The Court Evaluator Report necessitates the compilation of information regarding physical and mental prognosis, substance dependency, financial analysis, and other sensitive information. [*396] The information sought by a Court Evaluator may [**10] be so deeply privileged that even the Court Evaluator would need a court order to access that information (Mental Hygiene Law § 81.09[d]).

Commission Commentary 1993]). available (Mental Hygiene Law § 81.09 [Law Revision indicated that the medical records were routinely made records and the study of the practice under the statutes other laws. It should be noted that neither Article 77 nor should alert the court evaluator to the need to consult disclosed to any parties/counsel in the proceeding" (id.). portion of the Court Evaluator's Report should even be Guardianship Court with discretion to determine if any goes on to state that ". . . Article 81 vests the guardianship-proceedings-handbook-ad2-may-2022.pdf Hygiene Law § 81.09 elaborates that "... section 81.09 https://www.nycourts.gov/ip/gfs/pdfs/best-practices-The Law Revision Commission Commentary for Menta (accessed January 4, 2023]). The Task Force Report Department Guardianship Practices Guardianship Proceedings Second Judicial financial always contains confidential and personal medical and The Second Department's Guardianship Task Force Report states that the Court Evaluator's "... Report addressed the issue of confidentiality of patient information pertaining to Task Force the AIP" Report, (Best

The Court Evaluator 's report [**11] can be analogized to Grand Jury minutes. When the Legislature enacted <u>C.P.L. § 245.20</u> they allowed for automatic dissemination to defense, but it did nothing to abrogate the secrecy of a grand jury proceeding (see, <u>C.P.L. § 245.20[1][b]</u>; <u>C.P.L. § 190.25[4][a]</u>). The intention to allow individuals involved in the pending action access to information that is necessary to continue forward with the proceeding. The Court allows the parties access to the Court Evaluator's Report under the same premise.

access disbursed Evaluator's Person. Clearly, the Legislature intended the Court would be especially a contested proceeding where the Report Report can be freely used in any other legal proceeding, reasonable attorney believe that a Court Evaluator's memorialization. There is no case, court rule, or statute which would let a ਰ when they used against the alleged Incapacitated confidential information and required its Report as granted the confidential and Court Evaluator not freely

> Maher, 1994], leave to appeal denied 86 NY2d 703, N.Y.S.2d 607, 655 N.E.2d 704 [1995]).² testifies and is subject to cross examination (Matter of cannot be admitted into evidence unless the Evaluator exhibit in a Family Court proceeding. This is [***5] especially troubling since Court Evaluator's Report the Court Evaluator's professional violation appears to have occurred when proceeding. Regardless of the intent for disseminating gain advantage [**12] in a contentious Family Court strategic disclosure of personal medical information to disclosure by petitioner's prior counsel. This was appropriate to issue sanctions or refer this matter to the Grievance Committee. This was not an inadvertent [*397] Court 207 AD2d 133, 621 N.Y.S.2d 617 [2nd Dept This Evaluator's Court must determine whether it is Report was submitted as an Report, an ethical

In view of the fact that this is a case of first impression, the Court has determined that the appropriate action to take is to refer this matter to the Grievance Committee.

The foregoing constitutes the decision and order of this Court; all other issues contained within the moving papers that have not been explicitly ruled upon are now moot or denied.

ENTER

DATED: January 12, 2023

HON. GARY F. KNOBEL J.S.C.

End of Document

²It is important to note that these actions were taken by the Petitioner's prior counsel Zelenitz, Shapior & D'Agostino P.C.

INE LIVING GEMS®

Teeps Snow and Positive Approach® to Care Team care providers, allows them to use what they have to be their best. The GEMS advocate that everyone living with brain change when given the opportunity will shine. seeing individuals as precious, unique, and capable encourages a care partnership and is the core of this model. Providing supportive settings for everyone, including Just as gemstones need different settings and care to show their best characteristics, so do people. Rather than focusing on a person's loss when there is brain change, a moment. Modifying environments, situations, interactions, and expectations will create either supportive positive opportunities or result in distress and a sense of failure. The GEMS model recognizes the dynamic nature of the human brain and its abilities. Unlike other cognitive models, it acknowledges that everyone's abilities can change in



- True to self: personal preferences remain basically the same
- Can be flexible in thinking and appreciate multiple perspectives
- Selects from options and can make informed decisions

• Displays many facets: behavior and perspective can shift dramatically

Care is refused or seen as threatening due to differences in perspective and ability

What happens to or around an Amber, may cause strong and surprising reactions

• Focused on sensation: seeks to satisfy desires and thes to avoid what its disliked

• Euters others' space and crosses boundaries attempting to meet own needs

Visual abilities are limited: focus is on pieces or parts not the whole picture

Environment can drive actions and reactions, without safety awareness

beiupeA caution & Moment of Time ~ Caution Required.

· Has periods of intense activity: may be very curious or repetitive with objects or actions

• Big) arrong movements are possible, while skilled abilities are being lost . When moving each y when stopped each get moving nears guidenee and help. o Melkes use of alythan can usually sing, ham, pray, svey, rock, clep, sud dense

- Tends to miss subtle hints, but gets magnified facial expressions and voice rhythms
- Can mimic actions or motions, but will struggle to understand instructions/gestures
- Able to pick up and hold objects, and yet not know what to do with them

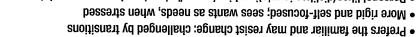


- Stress/pain/fatigue may trigger Diamond state: back to Sapphire with relief
- Able to suppress and filter personal reactions: chooses effective responses
- Processes well and able to successfully transition

• Aging doesn't change ability: processing slows, more effort/time/practice needed

RUBY ~ Deep and Strong in Color ~ Others Stop Seeing What is Possible

Danger exists due to limited abilities combined with automatic actions or reactions



- Reacts to changes in environment; benefits from familiar; functional/forgiving • Personal likes/dislikes in relationships/space/belongings become more intense
- Needs repetition and time to absorb new/different information or routines
- Trusted authority figures can help: reacts better when respect is mutual



Will frequently recognize familiar touches, voices, faces, aromas, and tastes

- Understanding input takes time: go slow and simplify for success Personhood survives, although all other capabilities are minimal
- In care, first get connected by offering comfort then use careful and caring touch
- Changes in the body are profound: weight loss, immobility, systems are failing
- As protective reflexes are lost, breathing, swallowing, and moving will be difficult
- Care partners benefit from learning the art of letting go rather than simply giving up





FMERALD ~ Green and On the Go With a Purpose ~ Vaturally Flawed

- Lives in moments of clarity mixed with periods of loss in logic/reason/perspective Sees self as able and independent with limited awareness of changes in ability.
- Understanding and use of language change: vague words and many repeats
- Awareness of time, place, and situation will not always match current reality • Cues and support help when getting to/from places and doing daily routines
- Strong emotional reactions are triggered by fears, desires, or unmet needs
- Needs to know what comes next: seeks guidance and assistance to fill the day





Is in tawed, title part of being a natural emeral of neod not seed on which my flow, use a positive, to go home. To provide the help and assistance I need you must go with my flow, use a positive, but I will emeaning of but I will emeaning of someone has taken them. My brain will make up information to fill in the blanks which makes you think I am lying. If you try to correct me or argue I may become resentiul or suspicious of you. I am not always rational, but I don't want to be made to feel incompetent. My brain plays tricks on think I am lying. If you try to correct me or argue I may become resentiul or suspicious of you. I am not always rational, but I don't want to be made to feel incompetent. My brain plays tricks on think I am lying. If you try to correct me or argue I may become resentiul or suspicious of you. I am not always rational, but I don't want to be made to feel incompetent. My brain plays tricks on think I am lying. If you try to correct me or argue I may life. When I am struggling I may tell you. I want on always rational, but I don't want to a sasistance I need you must go with my flow, use a positive, and not always rational, and modify my environment."

EMERALD

EMERALD

"While hidden like a pearl in an oyster shell, I will still have moments when I become alert and responsive. I am near the end of my life. Moments of connection create a sense of wholeness and value between us. Use our time together not just to provide care, but to comfort and connect with me. To help me complete life well, it's important to honor my personhood when making medical or care decisions; please don't talk about me as though I am not still here. I respond best to familiar voices and gentle rhythmic movements. I am ruled by reflexes and will startle easily. My breathing or swallowing. My body may no longer desire food and drink as me having difficulty breathing or swallowing. My body may no longer desire food and drink as I prepare to leave this life. I may not be able to stop living without permission from your greatest gift at this time in my life is to let me know that it is ok to go."

"My overall cognition is clear and sharp. When happy and supported, I am capable and shine in my abilities. When distressed, I can be cutting and rigid and may see your help as a threat. I have trouble seeing other points of view and may become less aware of boundaries or more possessive about my relationships, personal space, and belongings. I have many facets so people see me differently depending on the situation. This can cause conflict among my family, friends, or care team as it's hard to tell if I am choosing my behavior or truly have limits in my ability. I can socially engage and have good cover skills. People will vary in their awareness of what is happening to me. I want to keep habits and environments as they have always been of what is happening to me. I want to keep habits and environments as they have always been of what is happening to me. I want to keep habits and environments as they have always been of what is happening to me. I want to see or others. I am often focused on the past, personal values, or finances. I will need help to make changes in my life; it's hard for me. I can be in a Diamond state for reasons other than dementia."

The first peep and or studies with my take the studies are assisted to account of the first peep and or account of the first peep and to know what to do. Danger is part of my life due to losses in visual skills, chewing abilities, and to know what to do. Danger is part of my life due to losses in visual skills, chewing abilities, and to know what to do. Danger is part of my life due to losses in visual skills, chewing abilities, and to know what to do. Danger is part of my life due to losses in visual skills, chewing abilities, and to know what to do. Danger is part of my life due to losses in visual skills, chewing abilities, and to know what to do. Danger is part of my life due to losses in visual skills, chewing abilities, and to know what to do. Danger is part of my life due to losses in visual skills, chewing abilities, and to know what to do. Danger is part of my life due to losses in visual skills, chewing abilities, and to know what to do. Danger is part of my life due to losses in visual skills, chewing abilities, and to know what to do. Danger is part of my life due to losses in visual skills, chewing abilities, and to do. Danger is part of my life due to losses in visual skills, chewing all have

"My brain is healthy a true blue It I am adjing normally or distressed, it may talk to myself because I find words. I can describe what I am thinking so you understand. I may talk to myself because I am giving myself cues and prompts. I can learn new things and change habits, but it takes time and effort. Honoring my choices and preferences, when possible, is important. I need more time to make decisions. Give me the details and let me think about it before you need an answer. I am able to remember plans and information but supports are helpful. I may like specific I am able to remember plans and information but supports are helpful. I may like specific I am able to remember plans and reminder calls. Health changes in vision, hearing, but my solarity as notes, calendars, and reminder calls. Health changes in vision, hehavior, but my cognitive abilities remain the same." (S. SAPPHIRE)

"Like & lostide üreppedin an amber, lemesugirin a momentoring, litney surpriselyon to see how lieke in the world stroud me, litney not strowy you or see your sees who lite as litney so the solution of seed on the section how you lost so the section how you look sound, move, and to so the lilke to do simple tasks over and over the first or frustrate you, it soothes me. I don't recognize danger, you will have to safeguard my environment. I'm intolerant to discomfort because my mouth, hands, feet, and genitalia are highly sensitive due to changes in my nervous system. Therefore, activities like eating, taking medication, mouth care, bathing, dressing, and tolleting may distress me. Please notice my reaction and stop if I am resisting. I can't help myself and one or both of us may get notice my reaction and stop if I am resisting. I can't help myself and one or both of us may get hurt emotionally and/or physically. If this happens, wait a few minutes, connect with me, and try a different approach; possibly substituting one area of focus for another." AMBER different approach; possibly substituting one area of focus for another."

The Living GEMS® From the Person Living with Dementia (PLWD)

MELARTICIE 81

and related matters

COLLECTED CASES

(Current through June 2025)

Mental Hygiene Legal Service

Second Judicial Department

Eben R. Hill, Director

Felicia B. Rosen, Principal Attorney

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