Legal (and Other) Issues in Article 81 Guardianship

2024 NYPWA Summer Conference

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Introduction

Mental Hygiene Law Article 81 (MHL Art. 81) is one of the two adult guardianship statutes in New York State law. A local social services district's adult protective service

court, the surrogate's court, or the county court to act on behalf of an incapacitated person in providing for personal needs and/or for property management.

MHL Art. 81 also gives specific authority to an LDSS to commence an MHL Art. 81 proceeding:

> Mental Hygiene Law §81.06 Who May Commence a Proceeding
>
> (a)(6)- a person otherwise concerned with the welfare of the person alleged to be incapacitated . For purposes of this section a person otherwise concerned with the welfare of the person alleged to be incapacitated may include a corporation, or a public agency, including the department of social services in the county where the person alleged to be incapacitated resides regardless of whether the person alleged to be incapacitated is a recipient of public assistance.

We have a number of questions and issues that relate to the appointment of the LDSS as guardian.

Issue: Conflict of interest between the DSS interest as payor of public assistance versus a fiduciary duty to the incapacitated person as their guardian.

In Matter of Bessie C. (Commissioner of Cayuga County Dept. of Social Servs.), 225

Notwithstanding the Bessie C.

Supreme Court abused its discretion in making its determination, so there may be other cases where the county in which the IP is placed is named as opposed to the county responsible for public assistance. There are also other situations where the subject of a guardianship is not placed in a nursing home, instead perhaps is a public assistance recipient in County A, but goes into a hospital in County B and becomes the subject of a guardianship petition in County B. In other cases, the adult is not currently receiving public assistance, but the live in County A, and wind up in a hospital in County B and require a guardian, but there is no individual able and willing to serve responsibly, so an LDSS is required to serve.

sure that the facility attorney puts in adequate proof that the guardianship is proven and necessary. We have had a bigger problem with facility attorneys delaying the hearing or not submitting orders timely in what I believe is an effort to extend provisional Medicaid coverage, so our Court has taken over drafting the orders and we get them done quickly.

90 ADM-40, which is still an active OCFS directive, indicates that NY State Health Department regulations (10 NYCRR 405.9(f)) require hospital staff to develop discharge plans for all patients in need of post-hospital care and to assist patients in obtaining any services that they will need in the community. The following conditions must be met before a patient may be discharged:

- the patient must be determined by a physician to be medically ready for discharge;
- the hospital must ensure that the patient has a discharge plan that meets the patient's post-hospital needs;
- the hospital must ensure that all necessary post-hospital services are in place or reasonably available to the patient; and
- the patient will be discharged to a safe environment.

However, 10 NYCRR 405.9(f) has been amended a few times since 1990, including the section on hospital discharges, which is now found in section (h). The discharge section now reads:

> (h) Discharge. (1) The hospital shall ensure that each patient has a discharge plan which meets the patient's post-hospital care needs. No patient who requires continuing health care services in accordance with such patient discharge plan may be discharged until such services are secured or determined by the hospital to be reasonably available to the patient.
>
> (2) The hospital shall have a discharge planning coordinator responsible for the coordination of the hospital discharge planning program. The discharge planning coordinator shall be an individual with appropriate training and experience as determined by the hospital to coordinate the hospital discharge planning program.
>
> (3) The hospital shall ensure:
>
> (i) that discharge planning staff have available current information regarding home care programs, institutional health care providers, and other support services within the hospital's primary service area, including their range of services, admission and discharge policies and payment criteria;
>
> (ii) the utilization of written criteria as part of a screening system for the early identification of those patients who may require post-hospital care planning and services. Such criteria shall reflect the hospital's experience with patients requiring post-hospital care and shall be reviewed and updated annually;
>
> (iii) that upon the admission of each patient, information is obtained as required to assist in identifying those patients who may require post-hospital care planning;

(iv) that each patient is screened as soon as possible following admission in accordance with the written criteria described in subparagraph (ii) of this paragraph and that this screening is coordinated with the utilization review process;

(v) that each patient identified through the screening system as potentially in need of post-hospital care is assessed by those health professionals whose services are appropriate to the needs of the patient to determine the patient's post-hospital care needs. Such assessment shall include an evaluation of the extent to which the patient or patient's personal support system can provide or arrange to provide for identified care needs while the patient continues to reside in his/her personal residence ;

(vi) that for each patient determined to need assistance with post-hospital care, the health professionals whose services are medically necessary, together with the patient and the patient's family/representative shall develop an individualized comprehensive discharge plan consistent with medical discharge orders and identified patient needs ;

(vii) that each patient determined to need assistance with post-hospital care and the patient's family/representative receive verbal and written information regarding the range of services in the patient's community which have the

home health assessment, completed by the hospital for purposes of post-hospital care;

(xi) that relevant discharge planning information is available for the utilization review committee; and

(xii) the development and implementation of written criteria for use in the hospital emergency service indicating the circumstances in which discharge planning services shall be provided for a person who is in need of post emergency care

x

(4) The discharge plan shall be developed by the clinical staff member, who, in the development of such plan, shall consider the patient's self-reported confidence in maintaining their health and recovery and following an individualized safety plan. The clinical staff member shall also consider an assessment of the patient's home and family environment, vocational/educational/employment status, and the patient's relationships with significant others. The purpose of the discharge plan shall be to establish the level of clinical and social resources available to the individual post-treatment and the need for the services for significant others. The plan shall include, but not be limited to, the following:

(i) identification of any other treatment, rehabilitation, self-help and vocational, educational and employment services the patient will need after discharge;

(ii) identification of the type of residence, if any, that the patient will need after discharge;

(iii) identification of specific providers of these needed services;

(iv) specific referrals and initial appointments for these needed services;

(v) the patient, and their family/significant other(s) shall be offered naloxone education and training and a naloxone kit or prescription; and

(vi) an appointment with a community based provider to continue access to medication for addiction treatment.

Part 2 of the question submitted about hospital discharges has to do specifically with proposed discharges from Office of Mental Health facilities:

> We are fielding requests from OMH housing providers suggesting we need to file guardianship petitions on folks they find difficult to serve. We even received a guardianship appointment for a person in a state psychiatric placement recently. I am very concerned that there is a push by OMH providers to suggest local DSS's should become guardian of folks for whom OMH has no effective supportive housing. They are suggesting that some folks with incredibly difficult and dangerous behaviors are lacking competency due to the severity of their MH

The statute pertaining to the discharge of persons of in-patient at facilities licensed by the Office of Mental Health, MHL §29.15, does include that the LDSS must cooperate with the discharge planning from those facilities, although the discharge planning

consent to the voluntary formal or informal admission of the incapacitated person to a mental hygiene facility under article nine or fifteen of this chapter or to a chemical dependence facility under article twenty-two of this chapter;[5] or

consent in perpetuity to the administration of psychotropic medication to the incapacitated person, over their objection and without any further judicial review or approval[6]

Another objection would be the appointment of an LDSS when there is a suitable person in the AIP's family circle who is qualified to serve. As a general proposition, the court will not appoint strangers as either a guardian of the person or the property unless it is impossible to find someone within the family circle who is qualified to serve. Matter of Gustafson, 308 AD2d 305, (1st Dept. 2003). The problem with this objection is that there does not seem to be any reported cases where the court has appointed an individual over an LDSS. For example, in the Matter of United Health Servs. Hosps., Inc. (J.W.), case mentioned earlier, the court found that the mother, who was the only individual suggested as an alternative guardian to DSS, was not an appropriate person to serve as guardian.

If the LDSS is nominated, and is aware of individuals who might be appropriate to serve, they should consider contacting the individuals to see if they would be interested in serving. This leads us to the next issue.

Issue: Failure of the non-DSS petitioner to notice relatives or others as required by MHL

Discharge planning generally requires the hospital or other facility to include family members and others in discharge planning. Similarly, in an Article 81 guardianship, the petitioner is obliged by MHL 81.07 requires that notice of the guardianship proceeding be provided to:

(g) Notice of the proceeding.

1. Persons entitled to notice of the proceeding shall include:

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

[5] See MHL §81.22(b)(1)

[6] ^ D © G[(ZZ} vv U36 AD3d 106 (2nd Dept., 2006)

adult siblings of the person alleged to be incapacitated, if any; the person or persons with whom person alleged to be incapacitated resides; and

(ii) in the event no person listed in subparagraph (i) of this paragraph is given notice, then notice shall be given to at least one and not more than three of the living relatives of the person alleged to be incapacitated in the nearest degree of

There is limited caselaw on the effects of a failure to give proper notice, however there are two cases that stand for the position that the failure to give notice to the above parties prohibits the matter to proceed to a hearing:

In In re John T., 42 AD3d 459 (2d Dept.2007) the 2nd Department found that where the petitioner had failed to provide notice to the nursing home where the AIP was confined, that the court could not impose the petitioner's attorney's fees[7] against the nursing home ("Holliswood"):

> In the absence of notice to Holliswood, the Supreme Court improperly proceeded with the hearing and improvidently awarded attorneys' fees and disbursements as against it. Holliswood should have been informed that the guardianship hearing would serve as a factual predicate for the award of attorneys' fees and disbursements against it, particularly since the petitioner had only requested in her papers that her attorneys be paid a reasonable fee from Mr. T.'s assets. The Supreme Court should have advised Holliswood that it was considering the imposition of fees and costs and/or sanctions, and afforded it a full opportunity to be heard in order to explain why it had refused to release Mr. T. from its facility for

We have had an explosion of guardianships over the last 2 years. I try to go to all of the cases we are noticed on because when I do not show up on we typically get appointed. In Onondaga County, the Surrogate as acting Supreme handles all the guardianships. The Court does a good job of not appointing us if there is anyone else that can possibly serve, so I do not ever file a motion requesting not to be appointed.

> appropriate, are considered unavailable to the A/R prospectively and for a retroactive period of three months."

Onondaga County Surrogate's Court has taken over drafting the Art. 81 orders and they are done quickly.

And additional, related question is whether there are alternative to full guardianship in the above situation or when there is some property to be disposed of by the guardian.

> The guardian was appointed to handle all of the property issues, which are now resolved, or where the primary purpose was to file a Medicaid application, and that has been accomplished, and now there is nothing left for the guardian to do.

One thing that the LDSS could consider is asking the court to appoint them as a special guardian under MHL §81.16 for the purpose of handling the above issues, once they are resolved to the court's satisfaction, the special guardian is relieved.

Uncooperative Incapacitated Persons

Issue: How can the LDSS serve uncooperative clients, and service providers who refuse to cooperate with the LDSS when the LDSS is appointed as guardian?

The following questions illustrate a number of difficulties that a guardian might encounter.

> We have been progressively receiving more and more guardianship assignments for individuals who have been declared "incapacitated" but continue to reside in the community. We have found these clients to be incredibly difficult. Often they refuse to speak with us, refuse to allow us in their homes, and refuse to attend appointments and assessments we set up for them. Law enforcement does not provide assistance, even when shown the Order of Guardianship and/or Commission of guardian. Medical professionals will frequently provide information directly to the client, instead of Department staff. Further, many of these medical professionals aren't even aware of our involvement because the IP does not disclose this.
>
> Is there a mechanism by which we can ensure the IP is engaging with us and receiving necessary services?
>
> How much liability do we face in these cases where we cannot enter the IP's home or force them to attend medical treatment?

There are no easy answers to these questions. Unfortunately, some courts are of the view that when an LDSS is appointed as guardian, that they function as some sort of

“guardian angel” able to swoop down and pluck the incapacitated person out of harm’s way. It is even more difficult if the incapacitated person’s issues are mental health related, since MHL Article 81 is really not meant to serve as an alternative to mental health treatment.

The first suggestion would be to ensure that the LDSS is receiving notice and participating in the guardianship hearings. If these guardianships are being utilized by petitioners looking to dump their problems on the LDSS then that should be objected to.

If there are mental health aspects to the AIP’s, the earlier mentioned restrictions should be raised to the court, that no guardian may be granted to power to:

> consent to the voluntary formal or informal admission of the incapacitated person to a mental hygiene facility under article nine or fifteen of this chapter or to a chemical dependence facility under article twenty-two of this chapter;[8] or
>
> consent in perpetuity to the administration of psychotropic medication to the

1. What powers does the guardian have?
2. Do the powers give the guardian everything they need to discover and gather the property assets of the IP?
3. What property does the IP have, including any income streams?
4. What liabilities does the IP have?
5. What is the living situation of the IP? Is that subject to change?
6. Is the IP financially supporting anyone?
7. What assets does the LDSS have in the way of supports to the property management guardian may wish to utilize?
    - x Accounting
    - x Real estate (if there is real property to be sold)
    - x Personal property sales (if property needs to be sold to support the IP, or if the IP is going to be placed out of the home and must downsize, etc.)

Note that if the guardian needs to retain such services as a realtor or accountant, that the LDSS is not required to utilize the Part 36 list, but must be mindful of its own

Issue- Court Examiner Charges- payment sources

$750,001-$1,000,000	$900
Over $1,000,000	$1,000

(3) The fee shall be calculated on the net value of the estate at the close of the calendar year for which the annual report has been filed. Upon a showing of extraordinary circumstances, a fee in excess of the fee fixed by the schedule may be awarded.

(4) An application for a fee for an estate with a value of $5,000 or less shall be made by standard voucher and shall be approved by the Presiding Justice or the designee of the Presiding Justice.

(5) An application for a fee for an estate with a value of more than $5,000 shall be set forth in the report of the court examiner and shall be approved by order of the Presiding Justice for payment by the estate. The court examiner shall serve a copy of the order approving payment on the guardian, committee or conservator, and shall file a copy of the order with the clerk of the court that appointed the guardian.

(6) A guardian, committee or conservator may apply to the Presiding Justice for review and reconsideration of any fee on the ground of excessiveness. Such application shall be in writing and shall be made within 20 days of service by the court examiner of the order directing payment of the fee from the estate.

We received the following question, from a county in the 4th Department.

Generally, in order to file a final report, the guardian must zero out the accounts of the IP such that there are no funds left. Then the Court Examiner reviews the final report. The Court Examiner charges a fee for this but of course the County no longer has any funds of the IP to pay the Court Examiner's final bill. Most Court Examiner seek to have their final bill paid by the state but several have invoiced us and then motioned to hold us in contempt when we could not pay.

How should we be handling this and how are other counties doing it? Should we be holding funds in escrow when we close out the IP's account to pay the Court Examiner down the road?

Mental Hygiene Law § 81.32 (Examination of initial and annual reports) sets forth the sources of payment for the court examiners.

> (f) Expenses of examination. The expenses of the examination shall be payable out of the estate of the incapacitated person examined if the estate amounts to five thousand dollars or more, or, if the estate amounts to less than this sum, by the county treasurer of the county or, within the city of New York by the comptroller of the city of New York, out of any court funds in his or her hands.

When deciding whether or not to set money aside from the incapacitated person's estate to pay the court examiner, you have to be mindful of what other debts the estate has. Under Matter of Shannon, 25 NY3d 345 (2015), upon the death of the incapacitate person, unless otherwise ordered by the court upon motion by the guardian on notice to the person or entity to whom guardianship property is deliverable, and the court examiner, the guardian may retain, pending the settlement of the guardian's final account, guardianship property equal in value to the claim for administrative costs, liens and debts. The phrase "administrative costs, liens and debts" has been interpreted by Shannon to mean those costs, liens and debts related to the administration of the guardianship. These include court examiner fees, guardian fees, attorney fees, and any filing fees for final report.

When paying expenses at the outset of the guardianship, you should also be mindful of Matter of Hart (D.S.), 79 Misc3d 1101 (Supreme Court, Chemung County, 2023) In that case the DSS guardian filed for the discharge of the guardianship after the death of the IP. In reviewing the final accounting, the Court decided to surcharge the guardian for

APPENDIX

The actual letter, in pdf form, can be found here:

• Agency refusal to allow an individual receiving services to return to his certified residence or day program because the Agency feels it can no longer provide appropriate care to that individual.

Regardless of the purported reason, a provider's refusal to allow an individual to return to his or her residence or other service program is considered a discharge. Therefore, providers must adhere to the procedures outlined in 14 NYCRR 633.12 and the corresponding OPWDD Community Placement Procedures. This process requires that the individual or the representative of the individual be given the opportunity to object to the discharge and, ultimately, be afforded the opportunity to have a hearing scheduled by OPWDD. Please remember that, if the individual or their advocate objects to the proposed discharge or other proposed change to a service, placement and/or services should remain in place pending conclusion of the 633.12 process.

A provider's attempt to inappropriately discharge an individual is a violation of 14 NYCRR 633.12, as well as Article 16 of the NYS Mental Hygiene Law. In accordance with the OPWDD Accountability Initiative, OPWDD will impose appropriate fines for any such violations and may take additional adverse certification actions as needed. Questions regarding the objection and hearing processes can be directed to the appropriate Regional Office.

cc: Deputy Commissioners
Associate Deputy Commissioners
Provider Associations

*OPWDD Community Placement Procedures are available online at: https://opwdd.ny.gov/system/files/documents/2020/01/community_placement_procedures-green-book.pdf