

# Trusts and Estates Law Section Journal



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# Beware of Abusing Article 81 Guardianships

By Imaan Moughal and Penny Kassel

## Guardianship for an Incapacitated Adult

An alleged incapacitated person, colloquially known as an AIP, is one who needs help caring for his or her personal and/or financial needs. Article 81 of New York's Mental Hygiene Law authorizes a person to be appointed Guardian by the Court on behalf of an AIP.<sup>1</sup> A guardian, often a relative, can be anyone concerned with the welfare of AIP and found suitable by the court to exercise the powers necessary to assist that person.<sup>2</sup>

The legislative purpose of the Article 81 is to promote public welfare by tailoring each guardianship to the individual needs of the AIP, taking into account his or her personal wishes, and when possible, giving the AIP "the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life."<sup>3</sup>

Procedurally, once a guardianship petition is filed, the court appoints a Court Evaluator and conducts a hearing to determine whether a guardian should be appointed. The court evaluator is usually an attorney, physician, social worker, or representative of Mental Hygiene Legal Services who acts as the eyes and ears of the court, making an independent evaluation in determining whether the AIP is incapacitated and in need of the appointment of a guardian. At times, the court evaluator will recommend who should or who should not be appointed guardian. Ultimately the court will either deny the petition for some reason, or will declare the AIP to be an Incapacitated Person (now known as IP) in need of a guardian to provide for the personal and/or financial needs of the IP based on factors set forth in Article 81. If an AIP is able to consent to the appointment of a guardian, the court will denominate the AIP a person in need of a guardian (a "PING"). The court may designate a Guardian of the Person, giving the guardian authority to make personal decisions on behalf of the incapacitated person and/or a Guardian of the Property, which authorizes the guardian to manage the finances of the incapacitated person.

## Abuse of Article 81

It is important to remember that the purpose of Article 81 is that the least restrictive form of intervention possible should be used. The abuse or improper use of

an Article 81 guardianship can result in ramifications for bringing forth a frivolous petition.

The decision in *In re Bette Frankel*,<sup>4</sup> is illustrative. There, the Petitioner, who was the great-niece of the AIP, sought to become the guardian of the AIP, despite the existence of advanced directives, a power of attorney (POA) and health care proxy (HCP), in favor of the Respondent.

Both appointive documents were duly executed by the AIP at a time when she had mental capacity, and under the supervision of an independent attorney.<sup>5</sup>

The petitioner acknowledged that she was aware of the existence of the AIP's advanced directives and made no showing that they were obtained fraudulently, by undue duress or influence, or that they had been misused or abused.<sup>6</sup> Her sole objection was that she disagreed with the respondent's decisions as they related to the AIP's affairs.

Specifically, the petitioner sought to become the guardian because she, as a nurse practitioner, felt that she was better able to decide the AIP's plan of care than the respondent, who also happened to be the AIP's brother. She disagreed with the fact that that he had placed her in a skilled nursing facility. The petitioner felt that the AIP should return to her home.

While the mere existence of an advance directive does not automatically require dismissal of the petition

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for the appointment of a guardian as an alternative resource, the court must find the guardianship necessary to provide for the needs of the person. Section 81.29(d) of the MHL authorizes the court to modify, amend, or revoke an advance directive if the court finds the directive was obtained under certain factors that include, but are not limited to (i) executed at a time when the person lacked capacity, (ii) if the agent breached his fiduciary duty, or (iii) if the agent is not available, willing or able to fulfill their fiduciary duty.<sup>7</sup> In the *Frankel* case, the petitioner was unable to prove that the resources available to the AIP were invalid, improperly obtained or misused, or that the AIP's brother breached his fiduciary duty.<sup>8</sup>

In a similar case, *S.I. v. R.S.*,<sup>9</sup> the court found that there was no need for a guardian where the AIP had a valid health care proxy, and the petitioning parties failed to establish any ground upon which that AIP should be removed as an agent; nor had they established that the agent was acting in bad faith.

Stark differences exist between advance directives and guardianships. An advance directive, specifically a power of attorney, gives the principal the authority to determine whom he or she appoints as agent, and the level of authority that person has. In a guardianship, on the other hand, the court chooses the identity of the guardian and determines the extent of that guardian's powers. A guardianship proceeding is much more involved and exhaustive than an advance directive, requiring court and attorney involvement. Guardianships are also much more costly and time-consuming. As statute and case law make clear, guardianships should only be used as a last resort when less restrictive alternatives have been exhausted.

In determining a guardianship proceeding where advance directives are in place, a court must consider not only the availability of an agent's resources, but also his or her reliability. If an advance directive is being abused by an agent, the court has the authority to terminate it.<sup>10</sup>

Hence, in *Matter of Mitchell*,<sup>11</sup> the Appellate Division reversed a decision appointing a guardian for failure to consider sufficiency and reliability of available resources. The Court opined that the power of attorney and health care proxy should have been investigated before determining that a guardian was necessary.

In the *Frankel* matter, the court denied the guardianship petition, holding that the necessity of a guardian had not been demonstrated by clear and convincing evidence.<sup>12</sup> The court noted lesser restrictive alternatives, specifically the advance directives naming the AIP's brother as her HCP, were in place.<sup>13</sup> Petitioner did not challenge the sufficiency and reliability of the HCP, and testified only as to her belief that she was the more appropriate person to make the AIP's health care

decisions.<sup>14</sup> The court explained that the petitioner's difference of opinion with the agent as to the AIP's best interests, and her desire to substitute her judgment for that of the appointed agent, is not a sufficient reason to vacate advance directives. Moreover, no evidence was presented that the agent had breached his fiduciary duty or that the advance directives were otherwise invalid.<sup>15</sup>

Of significance is that court also found that the proceeding did not confer any benefit on the AIP and, therefore, that her funds should not be used to pay its costs. Thus, the petitioner was directed to pay the fees of the court evaluator, counsel to the AIP, and legal fees of the cross-petitioner.<sup>16</sup> Indeed, it is established that courts may direct petitioners to pay such fees when there is no showing that the AIP benefited in any way from the guardianship proceeding.<sup>17</sup> This is designed, *inter alia*, to discourage frivolous guardianship petitions.

## Conclusion

In sum, the appointment of a guardian is a drastic remedy that involves an invasion of the AIP's freedom and a judicial deprivation of their constitutional rights. Before petitioning for such relief, careful and serious consideration should be given to all the relevant facts.

## Endnotes

1. N.Y. Mental Hygiene Law (MHL) § 81.02(a).
2. N.Y. MHL § 81.19(a)(1).
3. N.Y. MHL § 81.01.
4. Index No. 100259-18 (Sup. Ct., Kings Co. 2019) (Ruchelsman, J.).
5. *Id.*
6. *Id.*
7. N.Y. MHL § 81.29(d).
8. *Id.*
9. *S.I. v. R.S.*, 24 Misc. 3d 567, 877 N.Y.S. 2d 860 (Sup. Ct., Nassau Co. 2009).
10. N.Y. MHL § 81.29(d).
11. *In re Mitchell*, 124 A.D. 3d 1402, 1 N.Y.S. 3d 701 (4th Dep't 2015).
12. Index No. 100259-18 (Sup. Ct., Kings Co. 2019) (Ruchelsman, J.).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *In re Rocco*, 161 Misc. 2d 760, 615 N.Y.S. 2d 260 (Sup. Ct., Suffolk Co. 1994).