Legal (and Other) Issues in Article 81 Guardianship

2024 NYPWA Summer Conference July 16, 2024

Article 81 Guardianship Case Summaries 2018-2024

(As of 6-21-2024)

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AIP Support of Spouse and Others

Matter of R.T. (D.C.), 64 Misc3d 612 (Supreme Court, Broome County, 2019)

In this case, the spouse of the AIP petitioned to be his guardian of person and property with a cross petition being filed by the AIP's children. Subsequently the IP was placed in an adult care facility. The case came back to court, with the wife amending her petition to grant her the authority to utilize the AIP's income for her own support. Eventually she withdrew her petition to be named guardian of property, and consented to the appointment of the cross petitioners as property co-guardians.

The parties negotiated a possible resolution with respect to property issues which would provide for some monthly support of petitioner from AIP's income. A hearing date was scheduled, with interim settlement conferences to attempt resolution of this matter per the tentative agreement. With a substantial insurance reimbursement payment to AIP anticipated after December 1, 2018, the court directed that no withdrawals be made from AIP's account after that date, so that the proper allocation of that refund payment could be made.

On December 26, 2018, cross petitioners filed an amended cross petition seeking a monetary judgment against petitioner, alleging theft of the AIP's income. The parties agreed to a settlement of most of the open issues, which left open only certain property claims asserted by cross petitioners against the wife.

The children alleged that AIP lacked capacity to manage his own affairs as of January 1, 2017, after which they requested the court apply the provisions of Mental Hygiene Law § 81.29 (d). That section allows the court to "modify, amend, or revoke any previously executed . . . contract, conveyance, or disposition . . . made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed [transaction] . . . was made while the person was incapacitated."

On this point the Court found that the explicit language of this provision allows the court to reverse transactions made by the incapacitated person but is silent as to reversing transactions made by a spouse or joint bank account holder. Therefore, it found that the provisions of Mental Hygiene Law § 81.29 (d) were not directly applicable for providing the relief requested by the cross petitioners.

Secondly, the Cross petitioners asked the court to find the joint tenancy in regard to joint account was terminated in 2017 when the wife began taking all of the money from the joint account. Cross petitioners argue that once the wife took control of AIP's joint account, her withdrawal of all the funds in that account terminated the joint tenancy and rendered petitioner subject to a claim for recovery of one half of the amount in the account. However, court held that in any claim for a recovery of excess withdrawals, the withdrawing tenant may avoid surcharge by proving, by clear and convincing evidence, that the withdrawals were for the other tenant's benefit or with his consent. The testimony at the hearing established that all of AIP's needs were being met while he

was under the care of wife, and that continues where he now resides. Atypically, he is also the owner of a long-term care policy, the terms of which not only provide for his current care, but also ensure his ultimate qualification for Medicaid, if necessary, without impacting his assets.

Although it was not clear from the record before the court how wife/petitioner and the AIP handled the mechanics of bill paying and expense management, it was clear that their total income was used for individual and collective needs and desires, including their home, clothing, travel and entertainment. As petitioner testified, she and AIP did not plan for accumulation but spent all their income. She stated that AIP “likes things nice and was very generous.” The children were aware of their father’s financial planning.

The court found that consent of the joint tenant need not be express but can be implied. Factors to determine implied consent include the nature, duration and closeness of the relationship between the joint tenants; the presence or absence of a habit of freely commingling their funds; testamentary dispositions for the excess withdrawer; prior generosity toward the excess withdrawer; the pattern, purpose and amounts of the withdrawals; the age and physical condition of the joint tenant when the excess withdrawals were made; the source of the funds in the joint account; and the tenant's knowledge of the withdrawals.

In this case, the AIP was clearly generous to wife/petitioner and himself when he had capacity, and actively participated in their pattern of freely spending. The parties elected to own the marital residence as tenants in common, with reciprocal life uses, rather than as joint tenants. AIP made no provision for petitioner in his will, though he did make her the beneficiary of one of his retirement accounts.

The Court then looked at the issue of whether a spouse has a duty to use marital funds solely for the financial support of an incapacitated spouse prior to the commencement of an article 81 proceeding?

The court found that the AIP's continued intellectual deterioration ultimately rendered the lifestyle and spending habits of AIP and petitioner impossible to maintain. As AIP continued to suffer the impacts of dementia, petitioner knew or should have known that she had a duty, as a spouse, to not spend AIP's income in a manner inconsistent with his established pattern of support for her, him, and them.

Reviewing these factors, the court found that certain transactions by petitioner, starting as of January 1, 2017, and continuing through 2018, were in breach of her duty to act consistently with their previous expenditure pattern; AIP by then lacked the capacity to affirmatively consent to her use of his income; and some expenditures were not made with AIP's implied consent. Based upon that finding, the court ordered that certain transactions be reversed.

Annual Reports

Matter of Richman (Soifer), 69 Misc3d 1213(A), (Supreme Court, Queens County, 2020)

The court found that the asset balance of the trust formed under the Will of the IP's deceased father, f/b/o the IP should be included under "Other Assets" on the annual accounting.

The court also found that there was no conflict existing, even though the guardian was also the trustee of the trust and its sole remainderman

What I find interesting here is that the court was okay with this guardian not visiting the IP, instead permitting that to be done by a 3rd party, and also letting the failure to file the annual reports slide. While the court was concerned that there should be an accounting of the trust to a third party I wonder how long he's going to permit the property management guardian/trustee and trust remainderman to spend zero of the trust funds for the benefit of the IP.

Appropriate LDSS to Serve as Guardian

Matter of Kimberly DD., 220 AD3d 1091 (3rd Dept., 2023)

While holding that Supreme Court did not abuse its discretion in appointing Washington County as guardian, in view of Saratoga County's status under SSL §62 as respondent's residence for purposes of medical assistance and public assistance or care, the 3rd Dept. found that Saratoga County's Commissioner should serve as respondent's guardian. Under SSL §62(5)(d), when a person who was admitted to a nursing home located in a district other than the district in which she was then residing is or becomes in need of medical assistance, the social services district *from which* she was admitted shall be responsible for providing such medical assistance. Saratoga County was the IP's residence district under SSL §62 and was and continuing to provide medical assistance to her. The 3rd Dept. further held that the statute also charges the residence district with providing "public assistance or care" and in that regard, under Social Services Law § 473, a resident social services district must also provide "protective services" to an individual in need, including services arranging, when necessary, for guardianship either directly or through referral to another appropriate agency.

Attorney Fees

Matter of Ruth S. (Stein), 181 AD3d 943 (2nd Dept., 2020)

The Second Department affirmed the Supreme Court order that imposed sanctions on two of the parties for frivolous conduct, and also awarded the guardian additional compensation and additional fees for extraordinary services and awarded additional counsel fees to the guardian's attorney. Although the additional compensation to the guardian and its attorney was to be paid out of the IP's funds, the IP's estate was granted a judgment against the two parties for the full amount of the compensation.

Matter of W.L., 66 Misc3d 392 (Supreme Court, Tompkins County, 2020)

An Article 81 petition was filed April 10, 2020. On April 14, 2020, the Court issued an Order to Show Cause. The matter came before the Court on May 15, 2020, via Skype for Business. The Court held a conference with Petitioner, the attorneys of record, and the Court Evaluator. The parties, including the AIP, consented to the issuance of a Temporary Order in lieu of going forward with a hearing on the matter.

At the conclusion of the May 15 appearance the Court invited the Court Evaluator, counsel for the AIP, Petitioner, and Petitioner's counsel to submit affirmations of services for their work in connection with this matter.

Petitioner is the AIP's long-time and trusted counsel. He has represented the AIP for more than twenty years, and when the AIP perceived the need to update his estate and financial planning, he selected Petitioner to serve the dual fiduciary roles of agent under a POA and co-trustee of the revocable trust. Those documents were prepared by Petitioner at the AIP's request. Petitioner also has an additional fiduciary responsibility to the AIP as his attorney.

In his fee affirmation, Petitioner set forth his services rendered in connection with the AIP's matters commencing mid-March 2020, at the time the Article 81 proceeding was initiated and filed. He requested the Court allow the payment of some $55,000 in fees, the stated value of Petitioner's services at his standard rate of $350 per hour. The AIP's Court- appointed attorney filed a response to Petitioner's fee request, on behalf of the AIP arguing that Petitioner should not be compensated at his regular attorney hourly billing rate for services rendered as agent under the POA. He also argued that to the extent Petitioner chose to retain his own counsel in the Article 81 proceeding, he cannot be compensated for that time, which is not usually compensable for a non-attorney petitioner in an Article 81 matter, and should alternatively be viewed as duplicative of the attorney who represented the Petitioner's services.

The Court noted that courts typically award attorneys compensation for services as guardian at a lower rate than for services as a lawyer, deeming a component of those services administrative rather than legal. This judge noted that he has commonly compensated for attorney guardian services at half the rate of legal services, and that services rendered by an attorney as agent under a POA should arguably be discounted on the same basis.

The Court went on to say that General Obligations Law §5-1506 provides that an agent acting under a POA may be compensated if the POA so provides, but does not provide a structure, or any baseline, for that compensation. The AIP's POA allows for "reasonable compensation" but is silent on the rate. Where the document is silent it falls to the court to determine reasonable compensation for an agent's services.

Eventually, the Court determined that reasonable compensation for Petitioner as agent under the AIP's POA was seventy-five percent (75%) of his standard hourly rate.

With respect to Petitioner's request for compensation for the time spent in connection with the Article 81 proceeding, the Court found that the typical petitioner in an Article 81 proceeding is not compensated for petitioner-related tasks that are not truly legal in nature. One factor in the Court's review of the fee request was the sheer size of the requested fee in proportion to Dr. L.'s liquid resources. The current combined fee request for Petitioner and his counsel for the Article 81 proceeding was $33,000, quite substantial for a matter which has not yet had any hearing. The Court said that it was not second-guessing Petitioner's or his counsel's handling of their case but reviewing whether all the efforts expended are appropriately chargeable to AIP's, the Court allowed a fee of $24,750 to Petitioner and his counsel, to be allocated between them in whatever manner they or their firm deems appropriate.

Matter of Ralph C. (Cavigliano), 175 AD3d 1077 (4th Dept., 2019)

The 4th Department reversed the Supreme Court's decision which had denied the request from the guardian that assets of the incapacitated person be used to pay the guardian's attorney fees incurred in discharging the guardianship after the incapacitated person's death.

Matter of C.O. (G.P.), 65 Misc3d 1220(A), (Supreme Court, Broome County, May 22, 2019)

The petitioner and cross- petitioner in a contested Article 81 proceeding, both of whom requested to be appointed as their mother's guardian for both personal needs and property management, requested that their attorneys' fees be paid out of their mother's assets. Neither were appointed, rather other persons were as guardian of personal needs and property management.

The Court noted that the same parties now requesting fees were all previously before the Court in 2015 on an earlier Article 81 petition filed in Chenango County, New York, by one the children seeking the appointment of a guardian for the mother That petition was dismissed, and the Court rendered a decision regarding then requested legal fees.

The statute provides for the determination by the court of the fair and reasonable fee of counsel for a petitioner in a successful proceeding. The court also has discretionary

authority to award fees where a petition is not granted. MHL §81.16(f); Retainer agreements between petitioners and their respective counsel control the parties to those agreements, but do not bind the court in its determination of the fair and reasonable fees to be paid from the assets of an incapacitated person. The Court retains the responsibility to set the reasonable and appropriate portion of legal fees payable from the IP's resources.

This was a clearly contentious matter. In some ways, it was a continuation of the discord that exists between the cross-petitioner and his siblings. C. O. was the named petitioner, but Ms. Richmond's affirmations reflect that the remaining siblings - other than cross-petitioner and T. P., who did not appear at all in this proceeding - explicitly or implicitly supported petitioner's application and her position.

The court found that while in 2015, the IP appeared to have capacity and that it was appropriate to decline to award any of cross-petitioner's legal fees from her resources, that in the current proceeding, she exhibited clear impairments that impact her ability to adequately and effectively address both her personal and property needs.

The Court found that based upon such factors as the IP's limited resources and its finding that some legal fees could have been avoided had the children cooperated with each other, that it would permit $12,000 of her assets be used to pay the petitioner's attorney fees, and $2500 used to pay the cross-petitioner's attorney fees.

Matter of McEwen (Welte), 63 Misc3d 1228(A), (Supreme Court, Monroe County, 2019)

This case discusses the requests for attorney's fees made by the various parties to an Art. 81 case. The Court made a fairly thorough of the requests, particularly those of the petitioner's attorney who was from a different county than that of this case.

The parties made six court appearances (including a 4 ½ hour hearing) and participated in two phone conferences. Counsel for the petitioner requested for fee in the amount of $49,568.16. this amount represented approximately 1/6 of the AIP's assets. An objection was filed by Mental Hygiene Legal Services on behalf of the AIP.

The Court noted that in deciding the reasonable compensation to be awarded as attorney's fees in a guardianship proceeding that it must provide a "clear and concise explanation with reference to 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 responsibility involved."

The Court found that considering the lack of complexity of the issues and the ease with which the desired result was obtained, the total hours spent by counsel for the Petitioner, approximately 181 hours, seemed grossly excessive. The Court also found that an unreasonable amount of time was billed for ”non-issues,“ i.e., matters on which there should have been no argument and no expenditure of time. For example, the petitioner demanded that the AIP serve a Response or Answer to the Petition, which although not unprecedented, is not the general practice in an Article 81 proceeding. Counsel then argued that the AIP was in ”default,“ however, the failure to serve an Answer in an Article 81 proceeding does not result in a default; no court would allow a ”default“ by the AIP for her failure to serve a pleading, if the result is to work against the AIP's health and welfare without a hearing. Further, the petitioner made extensive ”Omnibus“ Article 31 discovery demands, which demanded ”voluminous and confidential discovery responses from the AIP, which were unnecessary. The Petitioner was in possession of sufficient information (indeed, the court evaluator had already performed the work of itemizing the assets and provided the report to the parties) to be able to prevail at the hearing without the production of the documents requested in the ”Omnibus Demand.“ The temporary guardian too provided information regarding the AIP's finances, in fact, the temporary guardian agency supervisor was the petitioner's main witness. The petitioner was able to testify regarding the circumstances of her mother's living conditions, health and hygiene, and cognitive abilities. The demand for the AIP's medical records was ill-informed: it is well-settled that an AIP's medical records are confidential, and that the AIP does not put her medical condition at issue (thus waiving her confidentiality) by being named as the subject of an Article 81 application for a guardian. The Court hereby reduced the fee to the amount of $27,694.00 plus expenses in the amount of $1,381.25., to be paid by the guardian out of the funds owned by the AIP.

The Court also reduced the court evaluator’s fee from the requested $23,380 to $15,000.

In the Matter of Christopher A. (Anonymous). Kagan & Gertel, etc., nonparty-appellant; Paul G. Mederos, nonparty-respondent, 180 AD3d 1036 (2nd Dept., 2020)

This another attorney fee case, but with a twist. The sequence of events were that on July 22, 2014, a young man (hereinafter the IP) was in a motorcycle accident which left him with a traumatic brain injury. On August 20, 2014, the IP's mother, who eventually was appointed guardian, executed a retainer agreement for a law firm to prosecute an action to recover damages for personal injuries sustained by the IP. The retainer provided that the appellant was entitled to retain one-third of any sum recovered in the personal injury action. In October 2014, the mother commenced the Article 81 proceeding, and on February 4, 2015, the Supreme Court, appointed the guardian, and

appointed an attorney as counsel to the IP to review any settlement negotiated in the personal injury action.

Thereafter, the guardian commenced an action to recover damages for personal injuries on behalf of the IP, which resulted in a settlement in the sum of $1,000,000. In October 2015, the guardian moved in the Article 81 proceeding, for court approval of the settlement and for court approval of an attorney's fee to the retained law firm in the sum of $335,133.33. The Court denied the part of the motion which was to approve an attorney's fee in the sum of $335,133.33. The court determined that the guardian did not have authority to execute the retainer on the IP's behalf because she had not yet been appointed guardian at the time of execution, and thus, the appellant was not entitled to one-third of the settlement pursuant to the retainer. The Court did direct the law firm to submit an affirmation of legal services to aid in determining an appropriate attorney's fee, and eventually did approve the settlement and authorized the guardian to pay the law firm a fee award of $88,256.65.

The Second Department affirmed the Supreme Court's decision, finding that the guardian lacked authority to execute the retainer. Although a guardian may be granted the authority to retain counsel, here, the mother executed the retainer on August 20, 2014, prior to her commencement of this proceeding in October 2014, and her appointment as guardian on February 4, 2015. The Second Department also found that there was no indication in the record that the guardian possessed actual or apparent authority to execute the retainer on the IP's behalf.

The Second Department also upheld the court's analysis of the attorney fee request and adequately explained its award of the attorney's fee that it made.

Matter of James H., 168 AD3d 1201 (3rd Dept., 2019)

In this case the 3rd Department reversed a contempt finding made by the Art. 81 court against the trustee of a supplemental needs trust of the incapacitated person. The court had awarded fees to the court evaluator and directed that they be paid from one of several trusts that the IP was a beneficiary. However, the trust was unfunded, and was still, along with several other trusts, subject to a probate proceeding. The trustee had requested the trial court's advice, and was apparently trying to not violate the terms of the trust.

Matter of Hutchinson, 206 AD3d 472 (1st Dept., 2022)

The 1st Department found that Supreme Court providently exercised its discretion in charging approximately 60% of the legal fees for this guardianship to the son of the AIP, concluding that throughout the litigation, he had acted in a vexatious and self-interested manner that did not further his mother's interests.

In concluding that appellant was responsible for the bulk of the fees, Supreme Court properly struck a balance between fees incurred through appellant's actions and those of his former counsel, on the one hand, and fees that would have been incurred even without their actions, on the other.

Supreme Court also acted well within its discretion in denying the son's request for reimbursement of his own legal fees, given the court's finding that the work performed by he and his counsel conferred no benefit upon the AIP and, in fact, caused her to suffer harm.

Matter of Lillian G., 208 AD3d 871 (2nd Dept., 2022)

The original order appointed the son as co-guardian, and the property management guardian was directed to reimburse the son for legal fees, based upon certain conditions. The son brought a frivolous contempt motion against the property management guardian, who cross-petitioned to remove the son as co-guardian, which was granted.

Supreme Court ordered the son to pay the legal fees of this litigation, but on appeal, the 2nd Department found that that the attorney affirmations submitted in support of the requests for attorneys' fees contain entries that were vague and which had to be shown to be relevant only to the matter for which the Supreme Court awarded costs and attorneys' fees against the son, so it remitted the case back to Supreme Court to have that done.

Matter of Lillian G., 208 AD3d 875 (2nd Dept., 2022)

The Supreme Court had directed the property guardian to reimburse the son for legal fees from the guardianship estate, and later conditioned the reimbursement on the son providing a full accounting and on his submission of proof that he had returned all funds to Lillian's accounts and removed his name from those accounts. Lillian then died. The son moved to discharge the property management guardian due to Lillian's death, to enforce the reimbursement of the legal fees, and to vacate the order regarding his accounting, return of funds, and removal of his name from the accounts. Supreme Court denied that motion, and the 2nd Department affirmed.

Capacity Prior to Appointment of Guardian

Inwood Tower, Inc. v. V.F., 75 Misc3d 1211(A) (Supreme Court, New York County, 2022)

This guardianship arose out of a housing court matter that had started in 2015. Counsel for V.F. in the housing matter, filed an Article 81 Guardianship proceeding in 2021.

Following her appointment, the guardian challenged a stipulation that V.F. had agreed to regarding the housing court matter.

The court vacated the stipulation, finding that a full examination of V.F.'s capacity and whether he required the appointment of a guardian ad litem given his noted mental health condition did not occur at the time the stipulation was entered into, thus requiring vacatur of the stipulation in accordance with public policy.

Change of Abode of IP

Matter of Emilia R. O., 221 AD3d 712 (2nd Dept., 2023)

The 2nd Dept. reversed the order which denied one co-guardian's (Monica) motion for leave to change Emilia R. O.'s place of abode and, in effect, granted that branch of the other co-guardian's cross-motion which was to return Emilia R. O. to her residence in Nanuet.

In 2017, the Supreme Court appointed Monica and her sister Janet as co-guardians of the person and property of their mother, Emilia R. O., with the power to choose the place of abode. At that time, the IP had lived in her apartment in Nanuet for several years. In April 2021, Monica with the knowledge and consent of Janet, brought the IP to stay with her in her home in New Paltz. It was understood by both guardians that the IP would live there until certain issues with the IP's caregiver arrangement were resolved and renovations to her apartment were completed. In August 2022, Monica moved for leave to change the IP's abode to New Paltz.

In reversing Supreme Court, the 2nd Dept. held that Monica O. demonstrated that a change in abode would be in the IP's best interests. The evidence showed that Monica O. had been the IP's primary caretaker since April 2021, had provided a comfortable and accommodating living environment for the IP, and had capably managed the IP's day-to-day care and needs. More importantly, the medical evidence demonstrated the importance of stability when an individual suffers from dementia. Similarly, the evidence showed that moving the IP back to Nanuet could lead to confusion, the deterioration of her condition, and the worsening of her depression.

Choice of Attorney

Matter of Julean W. (Pamela W.), 78 Misc3d 1237(A) (Supreme Court, Nassau County, 2023)

The AIP was involved in a motor vehicle accident. The AIP's daughters retained a personal injury attorney who took certain steps with regard to the potential personal injury action. A guardianship petition was filed and subsequently granted, although the Court did not address the issue of representation in the personal action.

The Court then held a hearing and found that the personal injury attorney had met with the IP, outside the presence of her counsel and found that she had “completely recovered. The Court was concerned about these and other actions, and that the attorney might wind up testifying in a personal injury action, so it appointed a different attorney to represent the IP for the personal injury accident.

Choice of Guardian

Matter of C.O. (G.P), 69 Misc3d 1219(A), (Supreme Court, Broome County, 2020)

After a hearing, the Court appointed a son of the IP as a successor property management guardian. The IP had expressed that she did not wish to have any guardian appointed, but she has also consistently indicated she would prefer SP to act as her guardian if one must be appointed. This amounted to an informal nomination of SP to act as her property guardian, and the Court found that it must thus appoint him unless there is a showing that such appointment would be inappropriate. The fact that SP does not get along and has had conflict with at least three of his siblings, to varying degrees, did not alter the court’s position.

The Court may appoint any individual over eighteen years of age found to be suitable to exercise the powers necessary to assist the incapacitated person, including but not limited to a spouse, adult child, parent, or sibling. HL §81.19(a). The Court must appoint an individual nominated by the alleged incapacitated person to act as guardian unless the Court "determines the nominee is unfit" or the alleged incapacitated person no longer wishes the nominee to be appointed. MHL §81.19(b). In the absence of a formal nomination in writing, the Court "*shall* appoint a person nominated by the person alleged to be incapacitated orally or by conduct during the hearing or trial unless the court determines for good cause that such appointment is not appropriate." HL §81.19(c) (emphasis added).

In appointing a guardian for an incapacitated person, the primary concern is the best interests of the incapacitated person. *See Matter of Von Bulow, 63* NY2d 221, 224 (1984); *Matter of Rudick,* 278 AD2d 328, 329 (2000). The appointment of a family member is preferable. *See, e.g., Matter of Ardelia R*., 28 AD3d 485, 487 (2006); *Matter of Joseph V*., 307 AD2d 469, 471 (2003). "[S]trangers will not be appointed [guardian] of the person or property of the incompetent, unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve." *Ardelia, supra*; *Matter of Chase*, 264 AD2d 330, 331 (1st Dept 1999), quoting *Matter of Dietz*, 247 A.D. 366, 367 (1st Dept 2006); Matter of Camoia (Giaimo), 2015 NY Misc. LEXIS 2934, *41-42 (Sup Ct, Kings County 2015).

Matter of Gordon, 189 AD3d 408 (1st Dept., 2020)

While there was no disagreement about the lack of capacity, the issue remained of whether the guardianship was necessary, and also of if a guardian was to be appointed, who that should be. In any event, because the judge did not permit the petitioner to present proof about why he would be an appropriate guardian, the case was remanded for that purpose, with a temporary guardian appointed.

Matter of Gomes (R.M.), 76 Misc3d 1215(A) (Supreme Court, Suffolk County, 2022)

The husband's admission of abuse of the IP and his concomitant criminal conviction resulting in the issuance of an Order of Protection in favor of the IP, reflected that he was unsuitable to serve as guardian, notwithstanding that the IP nominated him

While victims of domestic violence do not lose the right to nominate a guardian of their choice and to have that choice seriously considered by the Court, the threshold duty of the Court is to appoint a fiduciary that will ensure the safety of the IP and meet the personal and property management needs of the IP.

Matter of Tanya M. (Josette M.), 77 Misc3d 1227(A) (Supreme Court, Nassau County, 2023)

The court found that the IP's two daughters/sisters both wanted to be guardian and both merited the appointment. However, they cannot work together as there is dissension between them. Rather than appoint from the Part 36 list, the court appointed one as property management guardian, and a third party as co-guardian of person. The appointed child was required to petition within the next year for continued appointment.

Matter of Corinne S., 82 Misc3d 679 (Supreme Court, Nassau County, 2023)

The court appointed a guardian from the Part 36 list where it found that the IP did not want either the IP's daughter or wife appointed, and the court also found, based upon the evidence at the hearing that neither the daughter or wife would be appropriate guardians.

Matter Laura Ann Sachs, 226 AD3d 604 (1st Dept., 2024)

The order of Supreme Court, New York County, which denied the cross-petition to appoint petitioner Allegra Soler Guardian if petitioners Laura Ann Sachs and Allan Preston Sachs-Ambia were removed, was modified. The rationale cited by the court for removal of the Guardians was flawed. The court suggested that a provision in the Trust documents eliminating respondent's power to remove petitioners as Trustees of the

Trust if she was found to be incapacitated motivated them to initiate the guardianship proceeding. However, after presentation of medical and other evidence, the court determined that respondent was an Incapacitated Person (IP) and appointed them co-Guardians. Thus, the initiation of the guardianship proceeding was found to be justified based on respondent's condition, and the court did not consider the Trust provision a disqualification to their appointment as co-Guardians.

The court next cited the Guardians' irrational fear that a friend of respondent and others would induce her to change her will and make them beneficiaries of her estate. However, evidence was presented by respondent's longtime Trusts and Estates attorney that she lacked testamentary capacity. Thus, the fear was unwarranted. In any event, nothing in the record suggests that those fears had a detrimental effect on respondent. Restricting her social activities during the Covid-19 pandemic seems prudent.

The court also cited as a ground for removal respondent's expressed desire that her grandchildren, the co-Guardians, not have the power to restrict her activities. However, there is an established preference that a relative be appointed guardian unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve (*see Matter of Gustafson,* 308 AD2d 305, 308 [1st Dept 2003]). This preference may be overridden by a showing that the proposed guardian has rendered inadequate care to the IP, has interests adverse to the IP, or is otherwise unsuitable to exercise the powers necessary to assist the IP. No such showing was made here. The numerous deficiencies cited by respondent in her motion papers appear to be minor, were adequately explained by the co-Guardians, and the problems that were identified were promptly addressed by them. Respondent's dissatisfaction and the stress that it induced resulted from the constraints of a guardianship, not the Guardians. The court did not cite any conduct on the part of the Guardians that was not in the best interests of respondent or inconsistent with their fiduciary responsibilities.

Matter of United Health Servs. Hosps., Inc. (J.W.), 82 Misc3d 1218(A) (Supreme Court, Broome County, 2024)

The Court appointed Tioga County DSS as guardian over the IP’s mother.

The Court found that the IP did not have effective resources in place to address his personal or property needs. He had executed a health care proxy and power of attorney appointing his mother as agent, though in Court he was unable to explain what they were and did not recall completing them. While the Court had some concern about the IP's ability to have executed those documents in the first place, petitioner had not sought their revocation.

The greater concern pertained to the ability of the mother to act as an effective resource for the IP The Court found that the mother was not an effective resource to address the

IP's needs as presented in the hearing. Her testimony was not credible, and she did not seem to accept the extent of the IP's limitations and the needs created by those limitations. She admitted to lying to the police regarding an incident between her and the IP. She did not get the IP medical attention leading up to his stroke. Her home did not appear to be suitable for both her and the IP to reside in, and an order of protection remained in place preluding the IP residing in the mother's home. The Court found that she was also not an effective resource for the IP as an agent under the health care proxy or power of attorney, with respect to effectuating his discharge from the hospital.

Commingled Funds

Matter of Williams (E.S.), 79 Misc3d 1227(A) (Supreme Court, Broome County, 2023)

The Court allocated commingled funds between a mother and daughter, both of whom had Art. 81 guardians, so that a pooled trust could be set up for the daughter and a guardianship account for the mother.

The Court also reviewed requested attorney fees.

Consolidation with Foreclosure Case

Matter of Robinson, 2020 NY Slip Op 32779(U) August 25, 2020 Supreme Court, Kings County Judge: Leon Ruchelsman

A tax lien foreclosure action was commenced against the AIP, shortly thereafter, the Art. 81 petition was filed. The court consolidated the foreclosure action with the guardianship action. The parties moved seeking to, essentially, oppose that determination on the grounds the guardianship matter and the foreclosure matter were two distinct lawsuits with no issues of law or fact in common.

The Court held that the consolidation was based on the fact the foreclosure matter and the guardianship matter both involve the same core issue, namely the mental capacity of Rose Robinson. The court found that the case of In Re Joseph J., 106 AD3d 1004, 965 NYS2d 588 [2d Dept., 2013] which held that consolidation of a guardianship proceeding and a foreclosure proceeding is not proper since the issues are too disparate, did not create an absolute rule barring the consolidation of guardianship and foreclosure matters. Rather, the question of consolidation must be considered on a case- by- case basis.

Matter of Adler (Garyfalia K.) Misc3d 2024 NY Slip Op 24099 (Supreme Court, Nassau County, 2024)

The found that it could not appoint the AIP's son, even though he was designated as her health care and the court found that truly cared for his mother.

Petitioner submitted evidence to substantiate its argument that Nickolas K.'s irrational behavior and overzealous patient advocacy for his mother, based upon what he believed was the proper way to medically treat his mother, together with the purported stalking and harassment of hospital personnel, has resulted in a criminal proceeding pending against him.

If he was convicted, not only would it impact his physical ability to serve as guardian, but it would bar him from serving as his mother's guardian. The Part 36 fiduciary rules of the Chief Judge specifically state that "no person convicted of a felony, *or for five years following the date of sentencing after conviction of a misdemeanor* (unless otherwise waived by the Chief Administrator upon application), shall be appointed unless that person receives a certificate of relief from disabilities."

Although the son is presumed innocent until proven guilty, he made numerous admissions at trial which could negatively impact the criminal case pending against him, and the court found that it cannot appoint an individual or a family member who is facing serious criminal charges and subject to orders of protection which would prevent the guardian from entering petitioner's facility if the AIP is brought there again in the future.

The court was also concerned that there was proof adduced at trial demonstrating the son's lack of cooperation with the court evaluator, and his inability to be reasonable and cooperate with hospital personnel during the care, treatment and potential discharge of his mother from the hospital. Despite repeated instructions not to speak out of turn, the son's vituperative behavior was on full display during the trial with his numerous outbursts interrupting witnesses, the attorneys and the Court. Throughout the proceeding the son declared that he is only interested in bringing his mother home, whether or not that is practicable or prudent, and did not want her discharged to a skilled nursing facility under any circumstances since he believed that he could take of her better care of her at his home.

Discharge of Guardianship

Matter of Erik LL., 226 AD3d 1176 (3rd Dept., 2024)

The order of Supreme Court, Schenectady County, which denied the mother's motion to terminate respondent's guardianship was affirmed.

The IP, a 29-year-old individual with special needs, has been residing in a group home licensed by the OPWDD since 2012. After the mother allegedly announced her intent to remove respondent from the group home and into her residence, petitioner filed an Art. 81 proceeding seeking to appoint a guardian for respondent. Following a virtual hearing, Supreme Court issued an order in March 2022 appointing respondent's father as his

guardian with the authority to choose his residence. Since the appointment, the father has kept respondent in the group home. A few days after the guardianship appointment, the mother moved for an order placing respondent in her care, alleging that he had been subjected to abuse at the group home and had expressed his desire to live with her. By order entered July 27, 2022, Supreme Court denied the mother's application, finding that she had not set forth sufficient legal or factual grounds for a modification or reversal of the March 2022 order.

While recognizing that the mother is sincere in her beliefs and appears genuinely concerned for her son's welfare, the 3rd Dept. found that her application did not make the requisite legal showing. The 3rd Dept. several procedural issues with the mother's challenge, but chose to interpret the mother's application as seeking relief pursuant to provisions of the Mental Hygiene Law.

While MHL §81.36 authorizes a court to discharge a guardian or modify the guardian's powers where "the incapacitated person has become able to exercise some or all of the powers necessary to provide for personal needs" or "for some other reasons . . . the guardian is no longer necessary . . . or the powers of the guardian should be modified based upon changes in the circumstances of the incapacitated person, the 3rd Dept. noted that the mother's moving affidavit was signed just four days after the appointment order was issued. No change in circumstances was identified in that four-day window. Instead, the affidavit asserted that respondent requested to be released from the home "over a year ago," and no time frame was provided for the other factual statements made in the application. Under these circumstances, the mother's application failed to set forth a sufficient legal or factual basis to modify or terminate the March 2022 guardianship order.

Discontinuance of Proceeding

Matter of Lane (Michelle R.), 78 Misd3d 268 (Supreme Court, Nassau County, 2022)

During the hearing the petitioner moved to discontinue the proceeding, with the agreement of the AIP, pursuant to CPLR §3217. The court had already taken extensive testimony from the petitioner, the temporary guardian, the geriatric care manager and the court evaluator.

The court found that neither CPLR §3217 nor MHL Art. 81 addresses voluntary discontinuance in an Art. 81 case. After reviewing the law, and due to its concern about the best interests of the AIP, the court denied the motion to discontinue. Eventually the court appointed separate guardians for person and property, for a period of one year.

Matter of Nicole L. (Eleanor D.), 78 Misc3d 389 (Supreme Court, Nassau County, 2023)

The court permitted a voluntary discontinuance during the hearing but before the court evaluator report came into evidence.

The court ordered petitioner to pay 50% of the AIP legal fees.

The court also made a referral to the attorney grievance committee regarding the petitioner's attorney's dissemination introduction of the Court Evaluator Report in a Family Court proceeding. The court found that the court evaluator's report is meant to remain confidential, and not to be utilized for any other purpose than the Article 81 case.

Discovery

Matter of Muser, 206 AD2d 563 (1st Dept., 2022)

The 1st Department held that Supreme Court providently exercised its discretion in denying the motion to compel and declining to sign the subpoenas emailed to chambers. The discovery sought was related to the fee applications of private attorneys and other court appointees in this guardianship proceeding, which is a matter that falls within the court's discretion. The court properly determined that the documents requested were not necessary in determining a fee award, were not tailored to obtaining any relevant information, and that the requested information would have unduly delayed the proceeding.

Evidence

Matter of Corinne S. (Steven S.), 79 Misc3d 777 (Supreme Court, Nassau County, 2023)

The rules of evidence apply in a contested Article 81 hearing

CPLR §4519, which prohibits a party or a person interested in the event, from being examined as a witness in their own behalf against a transaction or communication between the witness and the deceased person or person with a mental illness, except where the testimony of the person with a mental illness or deceased person is given in evidence, concerning the same transaction or communication, does not apply unless the AIP is shown to be suffering from a mental illness.

Matter Laura Ann Sachs, 226 AD3d 604 (1st Dept., 2024)

The 1st Department also affirmed Supreme Court's grant of the motion of respondent for a protective order regarding audio recordings and transcripts of certain conversations in her home.

The court properly declined to admit into evidence audio recordings and transcripts of those recordings that contained conversations between respondent and others in her apartment because petitioner admitted that he edited the recordings and saved only the portions he deemed relevant.

Family Health Care Decisions Act

Kings County Hosp. v M.R., 79 Misc3d 1217(A) (Supreme Court, Kings County, 2023)

Hospital filed an application to treat M.R. over her objection under the Family Healthcare Decisions Act, Public Health Law (PHL) § 29-cc.

M.R.'s daughter was identified as a suitable surrogate, however, she testified that she did not feel comfortable acting as her mother's surrogate and refused the appointment.

The court permitted the hospital to treat M.R. as requested. Section 2994-g of the PHL governs treatment over objection for patients like M.R. who do not have a surrogate. The statute delineates the steps the hospital must take to provide routine or major medical treatment to a patient without a surrogate. PHL § 2994-g.

Financial Exploitation

Matter of T.K. (K.K.), 81 Misc3d 1231(A) (Supreme Court, Suffolk County, 2024)

This lengthy decision detailed the evidence presented and the relevant considerations that the Court made in appointing a property management guardian for an IP who was being financially exploited.

Frivolous Litigation

Matter of Diontae B. P., 215 AD3d 681 (2nd Dept., 2023)

The 2nd Dept. affirmed the order which awarded attorney's fees to the guardian against the petitioners and their attorney.

The frivolous conduct included, among other things, moving to have the guardian of the property removed while the branch of guardian's motion which was to resign as guardian of the property was pending before the court, and failing to withdraw that motion once the court had determined that the contentions raised in connection with the

petitioners' motion, which were the same contentions raised in connection with the guardianship accountings, were without merit.

Matter of Farley (Doe), Misc3d 2024 NY Slip Op 24117 (Surrogate Court, Monroe County, 2024

The court made an award of Actual and reasonable and necessary costs, as well as attorney fees, and financial sanctions in the amount of $10,000.00 petitioner, payable by the attorney for the cross-petitioner, in connection with the motion to quash an improperly used subpoena

Costs, attorney fees, and sanctions were also awarded to petitioner against the cross-petitioner in connection with the motion to remove petitioner as Temporary Guardian and additional relief based on his conduct in prolonging the resolution of the Art. 81 proceeding and harassing the cross-petitioner.

Guardian Accounting

Matter of Shauntray T. (Margaret T.), 176 AD3d 719 (2nd Dept., 2019) Mark

The mother of the incapacitated person, who is also the guardian of the personal needs of the IP, filed objections to the final account of the successor guardian of the property of the IP. Supreme Court, without conducting a hearing, in effect, denied those objections, and judicially settled the final account. The mother appealed.

The 2nd Department affirmed the Supreme Court decision, holding that:

- A party who objects to a guardian's final account has the initial burden of coming forward with evidence to establish that the amounts set forth are inaccurate or incomplete

- If the objections raise disputed issues of fact concerning the necessity of disbursements, reasonableness of fees, or management of assets, a hearing should be held

- If the objectant meets his or her initial burden, the accounting party must prove by a preponderance of the evidence that the accounting is accurate and complete

Here, to the extent that the objectant raised disputed issues as to the propriety of certain disbursements made from guardianship funds for the IP's expenses, the Court agreed with the Court Examiner, who reviewed the final account and extensive supporting documentation, the largely conclusory and unsubstantiated objections, and the responses thereto, and concluded that the challenged disbursements were proper, and that under the circumstances presented, the Supreme Court was not required to hold a hearing.

Matter of William O., 222 AD3d 756 (2nd Dept., 2023)

The 2nd Dept. affirmed the court's confirmation of a referee's report with respect to cross-claims between the guardian and a health care provider.

The guardian was renting out one of the IP's rooms, but at some point, the health care provider took over rent collection as compensation for her services. The court appointed a referee to report on the final accountings of the guardian and the health care provider. The referee found that the provider violated her fiduciary duty to the IP as his geriatric care manager because she had no authority to collect rent.

The Court providently exercised its discretion in directing the care manager to reimburse the IP's estate for the rent which she collected without authorization and denied her claim for the IP's alleged unpaid expenses.

Matter of Giuliana M., 220 AD3d 864 (2nd Dept., 2023)

The executor of the IP's estate objected to the final account of the guardian. The 2nd Dept. held that there were disputed issues of fact as to the accuracy and completeness of the guardian's final account, and whether the guardian failed to adequately investigate the alleged misappropriation of the decedent's assets and should be denied fees and/or surcharged for breaching his fiduciary duties. Under such circumstances, the Supreme Court erred in denying the executor's objections to the guardian's final account without conducting a hearing.

Matter of Hart (D.S.), 79 Misc3d 1101 (Supreme Court, Chemung County, 2023)

The 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 failing to pay the court evaluator's and IP's counsel fees. The Court found that the IP had sufficient funds at the time of the guardianship appointment and that the fees should have been paid as a priority over other expenses of the IP.

Matter of J.C., Misc3d 2024 NY Slip Op 50744(U) (Supreme Court, Kings County, 2024)

The Court denied a petition to surcharge the property guardian for:

- Maintaining guardianship funds for payment of guardianship expenses
- Using guardianship funds to pay for private health insurance for the IP as opposed to having an SNT created and attempting to qualify the IP for Medicaid

- For failing to marshal certain stock shares where it was shown that the guardian made the attempt to marshal that asset, and that the guardian was unable to get any cooperation from the company in that attempt, and further had notified the Florida guardian of their attempt

Guardian Compensation

Matter of Vincent (Isler), 187 AD3d 764 (2nd Dept., 2020)

Here, contrary to the appellant's contention, the Supreme Court providently exercised its discretion in awarding her compensation in the total sum of $6,930. Although the appellant contended that she should have received a greater compensation award due to her status and experience as an attorney, she was not appointed to serve as an attorney or otherwise authorized to function in that capacity (*see generally Matter of Helen S.*, 169 AD3d 1048, 1050; *Matter of Reitano v Department of Social Servs.*, 90 AD3d 934, 934). To the contrary, the court specifically appointed another individual to serve "as counsel" to the appellant in connection with her role as the temporary property management guardian (*cf. Matter of Christopher A.*, 180 AD3d 1036). Contrary to the appellant's further contention, the court providently exercised its discretion in refusing to compensate her for services that it concluded were the responsibility of other individuals participating in the proceeding, outside the scope of her appointment, or otherwise discharged in an unsatisfactory manner (*see* Mental Hygiene Law § 81.23[a][1]; *cf. Matter of Joshua H. [Grace N.]*, 80 AD3d at 699; *Matter of Lillian A.*, 56 AD3d at 768; *see generally Matter of Goldstein v Zabel*, 146 AD3d at 630-631). The record supports the court's determination that an award in the total sum of only $6,930 constituted "reasonable compensation" in this case (Mental Hygiene Law § 81.23[a][1]) and, under the circumstances, we decline to disturb it. Accordingly, we affirm the order dated June 11, 2019, insofar as appealed from.

Matter of Francina, 77 Misc3d 1228(A), Nassau County, 2023)

After a 7-day hearing, the court approved the final accounting and granted the compensation request. The court found that the guardian had:

- settled owed and accruing state and federal income tax deficiencies over one million dollars;
- managed over ten properties;
- monthly care expenses for the incapacitated person of $25,000.00, despite a lack of liquid assets

All the while dealing with a dysfunctional family.

Matter of Alexander B.P. (Hafner), 165 AD3d 801 (2nd Dept., 2018)

Although MHL §81.28(a) requires the Court to establish a plan for the compensation of the guardian, it does not specify the source of payment.

The sealing of the records was appropriate, even though a written finding of good cause was not made, as there was good cause in light of the AIP's privacy interests and the nature of the incapacity involved.

Guardian Liability

Moulton–Barrett v. Ascension Health–IS, Inc., 222 AD3d 1064 (3rd Dept., 2023)

The order of Supreme Court, Broome County, which granted a motion by defendants Care Manage for All, LLC and Kim Evanoski to dismiss the complaint against them was affirmed.

Care Manage For All, LLC (hereinafter CMFA), a geriatric care manager, was appointed as guardian of her person. The court further granted CMFA authority to consent to or refuse medical treatment on behalf of decedent in accordance with her best interests, after consideration of her wishes and moral and religious beliefs.

Decedent died on June 30, 2021 and CMFA filed a petition to be discharged from acting as decedent's guardian. Plaintiff (son of IP) objected to CMFA's discharge and objected to certain expenses related to the cost of decedent's care. Specifically, plaintiff asserted that he was not informed of, and disagreed with, decedent's placement into hospice care, contending the care was against decedent's wishes. Supreme Court determined the objections were without merit, and denied the objections, granted CMFA payment for its services rendered as guardian and discharged it. Plaintiff did not appeal from that order.

Plaintiff, as executor of decedent's estate, then sued in relation to the medical treatment that the AIP received prior to her death. Included in the suit was a wrongful death and survival action against CMFA and its owner, defendant Kim Evanoski, alleging negligence, professional negligence and breach of fiduciary duties; negligent hiring, retention, supervision and/or training against CMFA; and pecuniary loss and loss of society against all defendants due to alleged reckless and incompetent at-home hospice care resulting in decedent's death. CMFA and Evanoski moved to dismiss the complaint, asserting that the claims in the instant action are barred by collateral estoppel as the issues were considered and decided by Supreme Court's order, wherein CMFA was discharged as decedent's guardian. Supreme Court found that, as a result of the discharge order, plaintiff was collaterally estopped from commencing this action against CMFA and Evanoski, and dismissed the complaint against them.

The 3rd Dept, found that the record reflected that the issues in the current lawsuit were previously litigated in the discharge proceeding, specifically as to whether CMFA had the authority to act, and then acted in a manner consistent with that authority.

As to any claim for professional malpractice, the discharge order granted CMFA's request for guardian fees after considering plaintiff's objections. The adverse determination in an action to recover fees for the rendering of professional services precluded the commencement of a malpractice action with regard to the same services. As to the claim for negligent hiring/retention/supervision, the complaint did not contain any allegations that related to any employee or independent contractor of CMFA, except for Evanoski.

Hearing

Matter of Judith T. (Rosalie D.T.), 58 Misc3d 747 (County Court, Nassau County, 2017)

Court made a “directed verdict” dismissing the petition, finding that the Petitioner did not establish a prima facie case by clear and convincing evidence. While the AIP did have physical limitations, she understood those.

Matter of Fritz G., 164 AD3d 503, (2nd Dept., 2018)

Appointment of personal needs guardian was reversed where the Appellate Division found that the hearing evidence consisted only of the petitioner’s testimony about the AIP’s mental illness and the testimony of the court evaluator, who had only one brief telephone conversation with the AIP. It was also found that the court had failed to consider any less restrictive options as an alternative to guardianship.

Matter of Elizabeth TT. (Suzanne YY.—Elizabeth ZZ.), 177 AD3d 20 (3rd Dept., 2019)

This case involved the appeal of a dismissal of an Article 81 petition without a hearing and the denial of a petitioner’s request that the AIP be ordered to undergo a neuropsychological evaluation.

The Third Department found that a hearing is required, even though the Court did make findings in the context of deciding the motion to dismiss the petitions.

With regard to the parameters of the hearing, the Third Department agreed with Supreme Court's determination that respondent cannot be forced to undergo a neuropsychological evaluation and/or be compelled to testify against her own interests.

Although the Mental Hygiene Law permits a court evaluator to retain “an independent medical expert where the court finds it is appropriate” (Mental Hygiene Law § 81.09 [c] [7]), as well as to “apply to the court for permission to inspect records of medical, psychological and/or psychiatric examinations of the [AIP]” (Mental Hygiene Law § 81.09 [d]), contrary to petitioner's assertion, there is no corresponding statutory requirement for an AIP to abide by a court evaluator's recommendation that he or she undergo a neuropsychological evaluation to assess his or her present cognitive condition.

Matter of Rachel Z. (Jack Z.—Anna B.), 181 AD3d 80 (2nd Dept., 2020)

The Second Department found that the record reflected that, on the first day of the hearing, the court heard testimony from the Rachel, the AIP, engaged in colloquy with her and was able to observe her in the courtroom, and only at the conclusion of the hearing that day excused her from attending subsequent hearing dates. The record demonstrated that the court was able to obtain its own impression of capacity, and concluded that she would not be able to meaningfully participate in the hearing. Moreover, no party, including Rachel's appointed attorney, objected to the determination to dispense with Rachel's presence. Accordingly, contrary to the appellant's contention, the court's failure to comply with the requirement that it set forth in the order and judgment its factual basis for conducting the remainder of the hearing in Rachel's absence did not require reversal. The Second Department also noted that this issue had not been preserved for appellate review.

The Second Department also agreed with the Supreme Court's determination that the appointment of a guardian of Rachel's person and property was necessary Contrary to the appellant's contention, the power of attorney and health care proxy held by the appellant were not sufficient and reliable available resources to protect Rachel's interests, in light of the evidence indicating that Rachel was incapacitated at the time she executed them, and the evidence that the appellant was not acting in Rachel's best interests.

Matter of Linda H.A. (Belluci), 174 AD3d 704, (2nd Dept., 2019) Morgan

The 2nd Department affirmed the finding that Linda H.A. was an incapacitated person and that a guardian was needed to provide for her personal needs and property management.

The evidence at the hearing consisted of the testimony of four persons: (1) Linda H.A., (2) Linda H.A.'s sister, (3) a social worker assigned to oversee Linda H.A.'s care, and (4) the court-appointed evaluator, who had interviewed Linda H.A., the social worker, and Linda H.A.'s three siblings, among others (cf. Matter of Fritz G., 164 AD3d 503, 504 [2018]). The record reveals that Linda H.A. had expressed delusional beliefs, had been

evicted from her apartment because of her abusive and disruptive behavior toward other tenants, and had since been living in a train station or in the boiler room of a building, among other places. She was unable to articulate a plan for obtaining housing upon her discharge from the hospital. The record also revealed that Linda H.A. had a history of failing to comply with medical treatment and refusing assistance with housing.

Least Restrictive Alternative

Matter of the Application of Jillian B., (Benny D.), 68 Misc3d 1219 (Supreme Court, Chemung County, 2020)

The Court found that a guardian was necessary for the personal needs of the AIP. While the AIP's needs were appropriately addressed through his residency at Woodbrook, the AIP could leave any time he wished. This reality supported the conclusion that AIP would pose a safety risk to himself and others if he were to leave Woodbrook and have to attend to his personal needs on his own.

The Court also found AIP's property management needs require the appointment of a guardian. Petitioner testified AIP required her assistance managing his finances, including selling his home and truck and arranging for rent payment to Woodbrook on AIP's behalf. Janet R. also testified to helping AIP with his finances and balancing his checkbook for him, due to his inability to do it himself. While the AIP acknowledged his reliance on Petitioner's assistance with his finances, including the current payments to Woodbrook, he consistently threatened to revoke her authority.

The Court found that the executed a Power of Attorney and Health Care Proxy but expressed that he wished to revoke both to preclude Petitioner from making decisions on his behalf.

Matter of Armanno (K.K.), 69 Misc3d 1212(A), (Supreme Court, Delaware County, 2020)

DSS petitioned for both personal needs and property management. The court dismissed the petition, finding that a personal needs guardian was not required, as the AIP was a long- term nursing home resident. The court also found that a property management guardian was not required, as DSS had approved the last two Medicaid re-certifications, although the AIP did not have capacity to make property management decisions, and the court revoked a POA.

Legal Obligations of IP

M. of Mozelle W., 167 AD3d 636, (2nd Dept., 2018)

Supreme Court properly denied the motion of a landlord requesting that the local district be liable for the rent arrears of the APS client that APS had filed the Art. 81 petition for and obtained a restraining order against the landlord from evicting the client. Neither of these actions created a legal obligation on the part of the local district to assume any debts of the AIP.

Marriage

Matter of John M., 79 Misc3d 1230(A) (Sup Ct., New York County, 2023)

The Petitioner proved by clear and convincing evidence that John M. was unable to enter into a marriage with Helen E. and was indeed incapacitated when he married Helen M. The Court noted that if an Art. 81 guardian has been appointed and the IP is found to have been incapable of understanding the nature, effect, and consequences of the marriage, annulment of the marriage is an available remedy for the guardian.

The Court also found that a marriage revoked under Mental Hygiene Law § 81.29(d), unlike a marriage annulled under the Domestic Relations Law is *void ab initio*. As such, Helen E. was not entitled to a spousal share of John M.'s estate and could claim no legal interest as a spouse.

Medical Decisions

Matter of Pescatore, 57 Misc3d 569 (Supreme Court, Kings County, 2017)

The Court permitted the guardian to consent to life sustaining treatment over the objection of the Incapacitated Person. In doing so, the Court looked at what is required by the Family Health Care Decisions Act, and found that the treatment (dialysis) was not inhumane or extraordinarily burdensome.

MHL Article 83

Matter of J.D.S., 70 Misc3d 556 (Surrogate's Court, New York County, 2020)

Note- this is a 17-a case, but the principles are the same

The Surrogate conducted a hearing, which considered the factors found in section 83.23(c) of the MHL which requires that the court:

"shall consider all relevant factors, including: 1. any expressed preference of the respondent; 2. whether abuse, neglect or exploitation of the respondent has occurred or is likely to occur, and which state could best protect the respondent from the abuse, neglect or exploitation; 3. the length of time the respondent was physically present in or was a legal resident of this or another state; 4. the distance of the respondent from the

court in each state; 5. the financial circumstances of the respondent's estate; 6. the nature and location of the evidence; 7. the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence; 8. the familiarity of the court of each state with the facts and issues in the proceeding; and 9. if an appointment were made, the court's ability to monitor the conduct of the guardian or conservator."

After a hearing, and after having contact with the North Carolina court, the Surrogate found that upon consideration of "all relevant factors," that the proceeding for the guardianship of J.D.S. should be heard in North Carolina and, accordingly, declined to exercise jurisdiction. The guardian ad litem appointed to represent J.D.S.'s interests reached the same conclusion. The proceeding in this court was stayed until proof was provided that the guardianship proceedings in North Carolina have been determined

Order of Protection

Matter of Kristine F., 206 AD3d 729 (2nd Dept., 2022)

The 2nd Department found that the evidence supported a finding that the proposed successor was not an appropriate person for appointment as the substitute successor guardian of the person of and remitted the matter to the Supreme Court, Richmond County, for the appointment of a suitable successor guardian.

The 2nd Department also found that MHL article 81 does not include the authority for the court to grant an order of protection against the IP, so it reversed the Supreme Court order which had imposed the order of protection.

Payment of Attorney and Court Evaluator Fees

Matter of Marie P. L. A., 215 AD3d 671 (2nd Dept., 2023)

The 2nd Dept. reversed the order which directed the petitioner to pay the court evaluator and IP attorney's fees after the petition was granted. The MHL provides for such an order for fees when the petition is dismissed.

Payments for Services of Providers

Matter of Jon Z., 178 AD3d 1417 (4th Dept., 2019)

In this case, a pro se petitioner, who is the son of the incapacitated person, appealed from three orders of Supreme Court. In appeal No. 1, the court granted that part of respondent's motion seeking payment for her services as the guardian of petitioner's incapacitated mother. In appeal No. 2, the court granted that part of respondent's motion seeking payment to a nursing home for services rendered to the mother. In

appeal No. 3, the court denied petitioner's motion to vacate a prior order of the court, which had denied petitioner's prior motion for, among other relief, removal of respondent as guardian.

The Fourth Department noted that its review on the appeals was limited to the record on appeal as settled by the court, and that the Petitioner's self-titled "Complete Record" was not properly before them.

In denying the appeals, the Fourth Department noted that with respect to appeal Nos. 1 and 2, the petitioner did not specifically challenge the amount requested by respondent for her fees or the amount due to the nursing home. Instead, petitioner contended that neither respondent nor the nursing home should receive the requested amounts because respondent engaged in fraud and was wasting the mother's assets. However, the petitioner offered no evidence of fraud aside from his conclusory statements, which were insufficient to establish either fraud or the unreasonableness of the requested amounts Further, the record contained undisputed invoices from the nursing home regarding the services provided to the mother during the relevant time frame. The Fourth Department therefore concluded that the court properly granted that part of respondent's motion seeking payment for those services. Likewise, the court properly granted that part of respondent's motion seeking an award of her fees, which were supported by itemized records.

With respect to appeal No. 3, the Fourth Department rejected petitioner's contention that the court's prior order should be vacated on the ground that it was procured by fraudulent means inasmuch as petitioner's broad, unsubstantiated allegations did not entitle him to such relief.

The Fourth Department also held that petitioner's remaining contentions regarding the sale of certain real property were not properly before them on these appeals.

Peter Falk's Law

Matter of S.B. (E.K.), 60 Misc3d 735 (Supreme Court, Chemung County, 2018)

The Court would not grant an Article 81 guardianship based upon a petition that requested that the AIP be required to visit with the Petitioner. The Court found that Peter Falk's Law (MHL §81.16) does not create a right of independent visitation relief.

The Court also found that it could not order the AIP to undergo a cognitive evaluation at the request of the Petitioner.

Matter of Hultay v. Mei Wu S., 140 AD3d 502, (1st Dept., 2016)

A guardian who has the authority to limit the IP's social environment may restrict others from contacting the IP, and enforce that right via a restraining order. The record

reflected that the IP had expressed that he did not want contact with his ex-wife, and that he was vulnerable to manipulation.

Matter of F.W.S. (BJS), 71 Misc3d 429 (Supreme Court, Chemung County, 2021)

The court applied "Peter Falk's Law" in finding that the guardian could not prohibit Diane A from visiting with the IP, but also found that the guardian could choose to not hire Diane A as the IP's personal care-giver in the absence of proof that his decision would harm the IP.

Post-Death Procedure

Matter of Lillian G., 208 AD3d 877 (2nd Dept., 2022)

The 2nd Department, following the reasoning in *Matter of Shannon*, modified the order of Supreme Court to delete the provision that the property management guardian pay a $255,000 claim sought by the IP's son, inasmuch as the claim was unrelated to the administration of the guardianship.

Once the IP had died, the guardian lacked the authority to make payment to the son from the guardianship, rather, his recourse was to seek payment from Lillian's estate.

Powers of Guardian

Matter of Elizabeth T., 214 AD3d 815 (2nd Dept., 2023)

The 2nd Department affirmed the Supreme Court's decision which concluded that the guardian lacked authority to enter into the resident agreement with a retirement community and to execute the promissory note without prior court approval, and for the retirement community to return the unused portion of the payment to the estate of the no deceased incapacitated person.

Matter of Elizabeth T., 214 AD3d 815 (2nd Dept., 2023)

The 2nd Department affirmed the Supreme Court's decision which concluded that the guardian lacked authority to enter into the resident agreement with a retirement community and to execute the promissory note without prior court approval, and for the retirement community to return the unused portion of the payment to the estate of the no deceased incapacitated person.

Matter of R.C., Misc3d 2024 NY Slip Op 50745(U) (Supreme Court, Kings County, 2024)

The IP had created a trust over real property for which she was the beneficiary and trustee. Subsequently, a guardian was appointed for her. The Property Guardian moved to revoke the Trust and mortgage the Trust Estate because the IP's monthly income failed to cover the costs of her care and support, which at the time of the motion, were about $28,500 in Court Ordered fees and rental arrears.

The Court found that since the power to revoke the trust fell within the ambit of powers retained by the IP as Grantor and Trustee of the Trust, her property guardian, by extension, had the power to exercise that right on the IP's behalf, so granted the motion to revoke the trust.

Recovery of Property

Matter of Anonymous 1, 226 AD3d 402 (1st Dept., 2024)

The order, Supreme Court, New York County, which denied the motion of nonparty appellant ALP, Inc. to compel arbitration, was affirmed.

In this guardianship proceeding, the appointed guardian of the person in need of a guardian (PING) filed a petition seeking to discover and recover artwork and other intellectual property created and allegedly owned by the PING from the possession of nonparty ALP, a corporation under the control of the PING's daughter. It was the guardian's position that the PING, who personally created the subject property, is, and has always been, the owner of such property. In response to the petition, ALP moved to compel arbitration of the PING's claim based on the arbitration clause in an "Agency Agreement" between the PING and ALP, which was executed in February 2000 (the 2000 agreement) and was produced to the guardian in this proceeding in 2017.

The 1st Dept. affirmed the denial of the motion to compel arbitration on the ground that the claim asserted by the guardian on behalf of the PING did not fall within the scope of the arbitration clause in the 2000 agreement. The 2000 agreement provided for a consignment relationship between the PING and ALP, with the PING as consignor of his artwork and ALP as the consignee. While the 2000 agreement assumes the PING's ownership of the consigned artwork, the 2000 agreement is not the basis of the PING's claim of ownership. Moreover, the petition filed on behalf of the PING does not assert any claim for breach of the 2000 agreement. Accordingly, the claim that the guardian asserts on behalf of the PING does not arise from the 2000 agreement and, therefore, that claim does not fall within the scope of the 2000 agreement's arbitration clause, which applies only to "disputes *arising out of this Agreement* " (emphasis added).

Removal of IP to Mental Hygiene Facility

Matter of Kahan (C.C.), 80 Misc3d 1228(A) (Supreme Court, Westchester County, 2023)

The Court dismissed a petition brought by an Art. 81 guardian of person and property which requested a warrant pursuant to Mental Hygiene Law § 9.43 directing that the IP brought before the Court for a hearing to determine whether they should be removed to a hospital specified in Mental Hygiene Law § 9.39(a). The petition alleged that the IP's apartment was uninhabitable and was being condemned, and that despite the condition of the apartment, the respondent refused to leave, thus placing herself at risk of harm.

Removal of Guardian

Matter of Irene A., 214 AD3d 790 (2nd Dept., 2023)

The court examiner filed a petition to remove the guardian and to hold her personally liable for the costs of the removal proceeding. Subsequently, the IP's son, filed a petition to remove the guardian and to hold her personally liable for the costs of the removal proceeding, and to appoint him as successor guardian. The guardian then moved to resign as guardian.

The Supreme Court held a hearing on the issue of whether Vaughan should be permitted to resign or should instead be removed for cause, and determined that she should be removed for cause, and granted those branches of the petitions which were to hold the guardian personally liable for the costs of the removal proceeding. The 2nd Department found that the guardian should only have been liable for the attorneys fees directly related to her removal, and directed a further hearing on that issue.

Matter of Roberts, 205 AD3d 562 (1st Dept., 2022)

The 1st Department reversed the order of Supreme Court which had removed the property guardian and remanded the case for a hearing.

The court examiner had requested removal of the property guardian, a relative of the AIP, and to have him replaced with non-relative.

The 1st Department found that the court had not considered the response of the guardian, and simply accepted the request of the court examiner, without making any findings of fact or conclusions of law to justify the removal of guardian.

Matter of Ellen H. (Cassandra H.) 82 Misc3d 1207(A) (Supreme Court, Broome County, 2024)

The court found malfeasance on the part of the guardian in handling the IP's supplemental need trust.

The petition filed by MHLS alleged that during the period of 2016 through June 2023, the accounts held for the received a total of $574,965.49 in settlement payments from the annuity. During this entire period Cassandra resided in a Medicaid paid group home with supporting services.

The Court Evaluator's report established that the accounts held for Cassandra's benefit held a total of about $58,200 at that time, leaving $516,765.49 unaccounted for. Specific noted expenditures from the accounts held for Cassandra, includie payments on multiple automobile loans, none used primarily or substantially for Cassandra's benefit; several large payments on personal loans of the guardians, payments on a substantial RV loan at a time it was and could not have been used for Cassandra's benefit; transfers and expenditures made in Arizona and California while the trustees/guardians were in those states and Cassandra was in New York; unexplained cash withdrawals; expenses for a hot tub at Ellen's home during the Covid-19 pandemic, while Cassandra was unable to leave her group home; repaving of the driveway at Ellen's home in that same time period; car repairs; and miscellaneous shopping expenditures.

The problematic payments raised in the Court Evaluator's report, were an issue previously made clear to Cassandra's property guardians and trustees, Ellen and Scott H., nearly twenty years ago. In 2006, three years after Cassandra's SCPA Article 17-A guardianship was converted by the Supreme Court to the current MHLS Article 81 guardianship, improper expenditures from Cassandra's funds and reporting deficiencies were brought to the attention of Ellen and Scott H., with the involvement of their counsel. The guardians/trustees acknowledged their errors and committed to not repeating them, and yet the exact same malfeasance reoccurred. The nominal responses by Ellen H. during the course of the current inquiry have included her expression of lack of knowledge and understanding about her fiduciary duty to her daughter. The Court found this beyond lacking credibility, and very relevant to the determination made here. It compels a finding of malfeasance, not misfeasance.

Removal of Trustee

Matter of Serena W., 218 AD3d 597 (2nd Dept., 2023)

The successor guardian moved to remove and to hold the SNT trustee in contempt for failure to provide an accounting of the SNT and to pay guardianship fees. Although the trial found contempt, the 2nd Dept. did reverse, as it found that the guardian was not

prejudiced by the failure to provide the accounting, and there as no date in the order to pay the guardianship fees.

The decision to remove the SNT trustee was affirmed as the 2nd Department agreed that the trustee often requested excessive proof of expenses and failed to timely pay requests even when proper proof was submitted.

Revocation of Health Care Proxy

Matter of Vicki M. A., 218 AD3d 769 (2nd Dept., 2023)

The 2nd Dept. affirmed the order which revoked the petitioner's designation as health care proxy and appointed the petitioner and cross-petitioner as co-guardians of the person of Vicki M. A.

The petitioner had requested to be appointed as the guardian of the property of her mother, Vicki M. A. The petitioner did not request to be appointed the guardian of the person, as she had been designated Vicki M. A.'s health care proxy in August 2017. The petitioner's sister cross-petitioned to be appointed as co-guardian of the property and, if the health care proxy was revoked, as co-guardian with the petitioner of the person.

The Supreme Court found that while the health care proxy was sufficient to satisfy the requirements of Public Health Law § 2981(5)(a), the record showed that there had been a breach of fiduciary duty by the petitioner. Thus, the health care proxy held by the petitioner was not a sufficient and reliable available resource to protect Vicki M. A.'s interests, in light of the evidence indicating that the petitioner was not acting in Vicki M. A.'s best interests.

Sale of Real Property

Matter of C.O. (G.P.), 65 Misc3d 1230(A) (Supreme Court, Broome County, 2019)

The facts of this case were that on September 13, 2019, the Property Guardian filed two petitions seeking Court authorization to sell two parcels of unimproved real property owned by AIP. Opposition to the two petitions was filed by counsel for the IP, and separately by two of the IP’s children.

The property guardian had listed the properties through a real estate broker and had entered into contracts to sell the properties. The contracts were signed by the Property Guardian on behalf of AIP but did not state he is her guardian. The contracts also did

not contain language that made the sales contingent on Supreme Court authorization, though the guardian's power is so limited.

Both petitions alleged that there were real property taxes totaling about $10,000 owed for all the properties owned by the IP and her Trust, and that there were other debts totaling about another $30,000. The petitions contain information about a monthly budget for AIP, indicating that she receives $3,641.04 in monthly Social Security and VA benefits, and she has $3,349.14 per month in expenses. The petitions indicate that there “remains $1,336.84” in the guardianship bank account as of September 10, 2019. Each alleges it is “in the best interests of AIP's finances to liquidate this parcel of vacant land and apply the net proceeds to the outstanding debt,” and the “best use of the assets is for them to be sold and the funds conservatively invested so they remain available for AIPs' future needs.”

In opposition to the petitions, the IP stated that she does not want any of her real property sold, as it has significant meaning to her, and she ultimately wishes to bequeath it to her children, if possible. Her attorney submitted that nothing in the Court's Order Appointing Guardian requires the immediate sale of real property. The attorney also affirmed that he called the Chenango County real estate tax authorities and discovered that the last day to pay the real estate taxes on all four parcels of real property owned by IP before they go into foreclosure is March 31, 2021. He also pointed out that the Court's previous order required the Property Guardian to provide IP's family members the first opportunity to purchase any real property, if it were to be sold, and that the Guardian did not offer to sell the properties to family members before listing them with the real estate broker. He also argued the Property Guardian had not investigated the ways in which the parcels of land could produce income.

One of the children opposed the sale of one of the properties, indicating that she wished to purchase that property. She provided emails between herself and the Property Guardian, which indicate that she began to express a desire to purchase the property on August 16, 2019. Subsequent emails showed that the Property Guardian told her he received a cash offer on the property for $23,000, to which she responded that she thought she would buy it for $23,000, The Property Guardian responded that he would prepare a contract to that effect, but later the Property Guardian wrote to her indicating the other party offered more money and he was going to accept the offer. The daughter also produced an email to the Property Guardian by which she made suggestions regarding how the properties could become self-sustaining and income-producing.

The daughter, who was also Guardian of the Person, raised an issue regarding her hiring of a personal companion for AIP, explaining that the companion was hired in June 2019 and was never paid by the Property Guardian, so she quit.

A son of the IP submitted that the contract for one of the properties was not signed by the Property Guardian until after the offer expired, making it invalid, and also pointed out that the Property Guardian did not include language that conditions the ultimate sale of

the property on Supreme Court approval, putting IP at risk of a breach of contract action. He also alleged that the properties may have been undervalued by the listing agent, as her opinion letters are unsupported by written information on comparable sales or other evidence to show how she established fair market values. Last, he argued that based upon the monthly budget provided by the Property Guardian in both petitions, the sale of the properties was not necessary to provide for the current maintenance and support of AIP because her immediate expenses are all being met by her monthly income. In addition, he claimed that there were other assets of the IP that the petitions failed to disclose.

The hearing on these petitions was conducted on October 15, 2019.

The Court cited Mental Hygiene Law 81.20(a)(6)(i) in denying the petitions, finding that the proposed sale of the properties did not constitute the least restrictive form of intervention to provide for IP's maintenance and support at this time. The Court found that that the IP's monthly income covers her monthly expenses, and that the real issue for the Property Management guardian was how to adequately address IP's longer-term debts. The Court found that since the real property was not in imminent danger of foreclosure and that some other assets had been uncovered that the Property Guardian should explore alternatives to the sale of the real property.

It also came to light during this case, that one of the objecting children was the representative payee for the IP's VA benefits and received them, rather than the Property Management Guardian. The Court warned that if this child exercised his right in the future to challenge the actions of the Property Guardian that he would likely have to account for his use of the IP's benefits.

Sealing of Record-Confidentiality

Matter of Caminite (Amelia G.), 57 Misc2d 720 (Supreme Court, Nassau County, 2017)

The Court refused to seal the record of the Art. 81 proceeding pursuant to MHL §81.14 saying that the public interest in access outweighed the private interests of the parties. The AIP had real estate holdings in the 10's of millions of dollars and the allegations in the petition were that she had been subject to financial exploitation.

Matter of Alexander B.P. (Hafner), 165 AD3d 801 (2nd Dept., 2018)

Although MHL §81.28(a) requires the Court to establish a plan for the compensation of the guardian, it does not specify the source of payment.

The sealing of the records was appropriate, even though a written finding of good cause was not made, as there was good cause in light of the AIP's privacy interests and the nature of the incapacity involved.

Matter of R.H., 77 Misc3d 1223(A) (Supreme Court, New York County, 2022)

Supreme Court denied the application of a respondent in a pending Family Offense proceeding to obtain a transcript of the testimony of a psychiatrist who provided expert testimony in an Article 81 case on behalf of HRA APS.

The court cited the confidentiality of APS under SSL §473-e, and that even though the son was not seeking a copy of written records that the transcript of the doctor's testimony from the Article 81 proceeding related to her evaluation of the AIP on behalf of APS, was covered by SSL §473-e.

Additionally, the son failed to set forth a sufficient basis as to why the transcript was relevant or necessary to the Family Offense proceeding, in as much as there are other ways for the Family Court to become familiar with Ms. H.'s mental health conditions.

Service of OSC

Matter of Tompkins County Dept. of Social Servs. (John K.), 70 Misc3d 1207(A) (Supreme Court, Tompkins County, 2020)

When the Petitioner was able to prove to the court that it could not effectuate personal service, the court permitted service by mail.

In this case, the AIP was a patient at a hospital in Sayre, Pennsylvania. The hospital was not allowing any individuals to enter the hospital unless it was medically necessary, due to the Covid-19 pandemic, so a process server or Department of Social Services case worker had not been allowed to enter the hospital to serve the papers on the AIP Hospital staff, on the direction of the hospital's counsel, had also refused to assist Petitioner in delivering the papers to the AIP personally.

Standing to Participate in Hearing

Matter of Adler (Garyfalia K.) Misc3d 2024 NY Slip Op 24099 (Supreme Court, Nassau County, 2024)

The court reviewed issues related to those noticed of the guardianship proceeding to participate in the Article 81 hearing, noting that neither Article 81 of the Mental Hygiene Law, nor Article 4 of the CPLR, which governs special proceedings such as guardianship proceedings, specify a roadmap for a concerned individual as to how that person can contest an Article 81 guardianship petition. Noticed individuals could of

course retain an attorney, or represent themselves in the proceeding, yet contrary to popular belief, there is no formal mechanism suggested or directed in either statute. Instead, individuals entitled to participate in the special proceeding will usually file what are unofficially labeled "cross petitions," although technically there is no such procedural device specified or permitted in Article 81 or Article 4.

Temporary Guardian

Matter of SB (EK), 69 Misc.3d 1208(A), (Supreme Court, Chemung County, 2020)

The special guardian was concerned about possible physical abuse, and based upon its report to the court the court appointed the special guardian as temporary guardian had the case return to court. The court took some testimony and then continued the case pending a hearing on the AIP's capacity.

Matter of Newman, 77 Misc3d 1229(A) (Supreme Court, Nassau County, 2023)

The temporary guardian requested that the court appoint a temporary receiver to protect the interest of the IP in real property.

This court noted that the appointment of a temporary receiver is not only an extraordinary provisional remedy, but also that it could not find a reported decision for the appointment of a temporary receiver in a guardianship proceeding.

In this case, both the temporary guardian and the court evaluator made a clear evidentiary showing that the immediate appointment of a temporary receiver was warranted to protect the substantial monetary and real property assets of the IP from his business partner, which appeared to have been misappropriated and mismanaged by the partner. The court also found that clear and convincing evidence had been submitted to the Court that there was a likelihood that the IP was the victim of elder abuse in the form of financial exploitation by the partner, who had also cross-petitioned to become guardian.

Temporary Restraining Order

Matter of Alexander C., 221 AD3d 894 (2nd Dept., 2023)

The temporary guardian requested and was granted a TRO to prevent the AIP's co-op from foreclosing on or selling Alexander C.'s shares of stock in the co-op. In addition, the court, in its own, also directed the apartment to be expeditiously listed for sale, and

enjoined the co-op from unreasonably withholding its approval of a prospective buyer or collecting more than the costs for maintenance and assessment of fees due at closing.

The 2nd Dept. reversed the sale order, holding that this relief was not requested by temporary guardian in either its petition or order to show cause, and its submissions otherwise failed to demonstrate that this relief was warranted.

Termination of Guardianship

Matter of Raphael R., 168 AD3d 947 (2nd Dept., 2019)

2nd Dept., reversed the Supreme Court determination that the IP remained incapacitated. An Art. 81 guardian had been appointed to manage the man's structured settlement when he turned 18. 2nd Dept., found that the record at the termination proceeding did not contain clear and convincing evidence that the IP remained incapacitated.

Matter of Banks (Richard A.), 64 Misc3d 191(Supreme Court, New York County, 2019)

The central issue in this case is the legal standard for terminating a guardianship that was entered on consent of the alleged incapacitated person pursuant to Mental Hygiene Law § 81.02. The AIP sought to withdraw his consent and opposes the continuation of the guardianship.

The court found that a guardianship predicated on consent cannot be continued when the person subsequently withdraws that consent. The court did conduct a hearing with regard to the motion to to terminate the guardianship. The court evaluator testified and was subject to cross-examination, and his report was received into evidence. He recommended that some assistance from a guardian was needed although the AIP did not show any signs of dementia or an inability to communicate.

The court found that even if it had the authority to continue the guardianship solely upon a finding of necessity, that it would decline to do so as the guardian had failed to establish by clear and convincing evidence that the guardianship should not be terminated. While there was no dispute that the AIP is an alcoholic, the mere use or even abuse of drugs or alcohol by itself does not generally constitute a functional limitation by clear and convincing evidence under article 81. Similarly, proof of mental illness alone does not establish incapacity. The record established that the AIP was now differently situated than he was at the time the guardian was initially appointed, and that his physical condition has greatly improved. In 2017, he was debilitated due to a spinal

injury, confined to a wheelchair, and unable to care for his daily needs without assistance. Currently, he is no longer in that condition and is now able to ambulate freely and perform activities of daily living on his own.

Matter of Angeliki K. (Fanny K.), 183 AD3d 733 (2nd Dept., 2020)

In this case, a property management guardian returned to court to request the authority to change the IP's place of abode from New York to an assisted living and rehabilitation facility that the IP had been admitted to in Athens, Greece, with the IP continuing to maintain her permanent residence in New York. The court, without a hearing, denied the motion and, sua sponte, terminated the guardianship due to a lack of a continuing nexus between the guardianship and New York.

The Second Department reversed the decision, holding that Supreme Court should not have, sua sponte, terminated the guardianship, without a hearing, as a guardianship may be terminated only on application of a guardian, the incapacitated person, or any other person entitled to commence a proceeding under Mental Hygiene Law article 81 with a hearing on notice. In any event, the evidence submitted by the guardian in support of her motion demonstrated that the IP still required a guardian to manage her property located in Greece. Furthermore, the evidence submitted by the guardian in support of her motion demonstrated that changing the IP's place of abode was in her best interests.

Matter of C. O. (G. P.), 69 Misc3d 1208(A), (Supreme Court, Broome County, 2020)

After a hearing the Court found that the guardian discharged his duties satisfactorily during his tenure as property guardian of G. P. The benefit of hindsight has shown that perhaps not every decision made by the guardian was the best possible course, but guardians are afforded wide latitude to make decisions on behalf of their wards, and the Court is not going to second-guess those decisions made by the guardian in what has been an exceedingly difficult case plagued by complex finances and interpersonal family dynamics. The guardian started with AIP's finances in a deficit position and testified credibly that he took actions to try to pay her liabilities, specifically trying to sell her properties to generate funds.

Turning to the specific factors to be utilized to set compensation, the Court found the time spent by the guardian and his staff necessary and appropriate. The circumstances of AIP's debts, assets, and income make formulating a clear financial plan difficult and lend themselves to a property guardian exercising his discretion to explore different approaches. The guardian had substantial experience in all aspects of Article 81 proceedings and has evidenced to the Court the skill required to manage the financial and personal challenges as a property guardian. As stated above, the plan and approach developed by the guardian were reasonable under the circumstances of this

case, and he attempted to balance AIP's substantial debt with her expressed desire to preserve her real estate. The plan was ultimately not approved by the Court, but AIP's situation was not made meaningfully worse during the guardian's tenure.

Turnover Proceeding

Matter of Smith ("GF"), 69 Misc3d 1203(A) Supreme Court, Warren County, 2020)

A case where a guardian is appointed, and once he begins to attempt to marshal the IP's assets and apply for Medicaid, he uncovers financial exploitation via a power of attorney utilized by the nephew. They then try to recover financial assets via a MHL 81.43 turnover proceeding. The nursing homes have an obvious interest in how this case turns out, since due to the cash and real estate transfers made by the IP (although actually made by the nephew/POA for his own benefit) there is a Medicaid eligibility issue. A further complication is that the IP has now died, so there may be an issue about whether the guardian can continue with the turnover proceeding, and if he can't, whether the estate administrator will be willing and able to pick up the ball on that.

Venue

Matter of Weiss (Agam S.), 77 Misc3d 1226(A) (Supreme Court, Nassau County, 2023)

The court found that is was in the best interest of the IP to transferred the guardianship from Nassau County to Kings County Supreme Court.

The IP had been originally placed in Nassau County, but had since transferred to a placement in Kings County, which was less than seven miles from Kings County Supreme Court, and there was with no foreseeable intention of the IP moving to a different placement.