

Article 81 Guardianships

What is an Article 81 Guardianship?

An Article 81 Guardianship is a legal proceeding under NYS Mental Hygiene Law in the Supreme Court for individuals who lack mental capacity to execute advance directives or whose advance directives are not comprehensive. It is a judicial determination based on clear and convincing evidence that an individual is incapacitated. Enacted in 1993, an Article 81 proceeding replaced conservatorships and committees in NYS.

How do I start this proceeding?

This type of proceeding is brought on by filing an Order to Show Cause and Petition in the Supreme Court and paying a fee to obtain an Index number.

Who can bring an Article 81 proceeding?

There are seven (7) categories of persons who may commence an Article 81 proceeding. They are as follows:

- a. The person alleged to be incapacitated (the AIP);
- b. A presumptive distributee of the AIP;
- c. The executor or administrator of an estate in which the AIP is or may be a beneficiary;
- d. A trustee of a trust in which the AIP is or may be the grantor or a beneficiary;
- e. The person with whom the AIP resides;
- f. A person otherwise concerned with the welfare of the AIP;
- g. The chief executive officer or the designee of the chief executive officer of a facility in which the AIP is a resident or a patient.

What happens after the documents are filed with the Court?

The Judge who has been assigned to the case will sign the Order to Show Cause and schedule a court date for everyone named in the documents to appear in court. The court date must be held within 28 days. The Judge will also appoint a Court Evaluator to review the allegations in the Petition and interview all of the parties. The Judge may also appoint someone as a temporary guardian and appoint an attorney for the person who is alleged to be incapacitated.

What is a Court Evaluator?

A Court Evaluator is a neutral person appointed by the Court to make an independent investigation of the allegations contained in the Petition and make a report and recommendation to the Court as to whether a guardian should be appointed for an individual.

What happens under an Article 81 proceeding?

The appointment of a guardian will only be made if the Petitioner can prove to the court that the person they are seeking guardianship over lacks mental capacity.

Does the person who lacks mental capacity have the right to an attorney?

Yes. Any person for whom a guardianship is sought has the right to be represented by legal counsel of his or her own choice.

Is a hearing required?

Yes. A hearing is required before a guardian is appointed. A hearing must be held within 28 days from the date of the signing of the Order to Show Cause by the judge. The burden of proof of the need to have a guardian appointed is on the petitioner.

What authority is given to an Article 81 guardian?

The amount of authority that an Article 81 guardian will receive is dependent on what was asked for in the Petition and what was stated in the court order.

Who can be appointed as the guardian?

Any person 18 years of age or older including but not limited to a spouse, adult child, parent or sibling.

When is an Article 81 guardianship necessary?

This type of guardianship is especially necessary if an individual, who lacks capacity, does not have a Power of Attorney or a Health Care Proxy document.

If an individual does have a Power of Attorney but the agent under the Power of Attorney has taken money from the person for their own use and the person now lacks capacity to sign a new Power of Attorney document, an Article 81 guardianship will be necessary to revoke the Power of Attorney and have someone else appointed to oversee the person's financial affairs.

What are a guardian's duties?

The duties of an Article 81 guardian in general are:

- a. The guardian shall exercise only those powers authorized by the court order;
- b. A guardian must exercise utmost care and diligence when acting for the benefit of the AIP;
- c. A guardian must exhibit the utmost degree of trust, loyalty and fidelity to the AIP;
- d. A guardian must file initial and final reports;
- e. A guardian must visit the AIP at least 4 times a year or more as specified in the court order.

How long does this type of guardianship last?

A guardian appointed under Article 81 remains as such guardian until either:

- a. he or she is removed as guardian for failing to comply with any court order, or for misconduct or for any other cause which may seem just to the court; or
- b. the AIP has become able to do some or all of the functions regarding personal needs and/or property management that the guardian was authorized to do; or

- c. the AIP has died.

What is Guardianship over the Person?

Guardianship over the Person allows a guardian to make all daily decisions concerning the individual such as where the individual will live, who will provide personal care and assistance as well as medical decisions.

What is Guardianship over the Property?

Guardianship over the Property allows the guardian to make decisions about the individual's property. The extent of the guardian's authority will depend on the individual's capacity and the extent of their property.

Is an Article 81 Guardianship the same as an Article 17A Guardianship?

Both types of guardianships are different in their own respect. Generally, Article 81 guardianships are used for the elderly who lack capacity. Under an Article 81 guardianship, the guardian's authority is limited by what is contained in the Order of Appointment. The procedures for obtaining an Article 81 guardianship are found under the NYS Mental Hygiene Law.

An Article 17A guardianship only authorizes a guardian for a person who is mentally retarded or has a developmental disability. The procedures for obtaining an Article 17A guardianship are found under the NYS Surrogate Court Procedure Act. In both guardianships, the guardian has a duty to look out for the best interest of the individual for whom they have been appointed.

Do I need an attorney to bring an Article 81 proceeding?

Yes. There are certain rules that must be followed under the statute such as the form of the documents, service of process, notices, etc. To ensure that the rules are followed, you will need an attorney to properly draft documents for this proceeding.