INFORMATIONAL LETTER

TRANSMITTAL: 93 INF-32

DIVISION: Services and Community Development

TO: Commissioners of Social Services

DATE: August 18, 1993

SUBJECT: Article 81 of the Mental Hygiene Law: Responses to Inquiries at Regional Meetings and Notice of Technical Amendments

SUGGESTED DISTRIBUTION:
Directors of Services
Adult Services Staff
Agency Attorneys
Staff Development Coordinators

CONTACT PERSON: Your district's Adult Services Representative at 1-800-342-3715 as follows:

Thomas Burton	ext. 432-2987
Kathleen Crowe	ext. 432-2996
Michael Monahan	ext. 432-2864
Janet Morrissey	ext. 432-2997
Irvin Abelman	(212) 383-1755

ATTACHMENTS: Technical Amendments to Article 81 of the Mental Hygiene Law (Not Available on Line)

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
83 ADM-15 88 ADM-23 91 INF-40 92 INF-40		457	Article 9-B Articles 77, 78 & 81 of Mental Hygiene Law		

DSS-329EL (Rev. 9/89)

In March of 1993, the Department conducted six regional technical assistance sessions on Article 81 of the Mental Hygiene Law (MHL): Proceedings for Appointment of a Guardian for Personal Needs or Property Management. The purpose of this release is to provide clarification regarding certain questions raised during these sessions and to inform local social services districts of technical amendments to Article 81 MHL.

I. Following are answers to questions that were raised during the six regional technical assistance sessions:

1. Where to file the Petition

Question: For districts outside of New York City, may the petition be filed in the Supreme Court?

Response: Yes. The petition shall be filed with the Supreme Court in New York City and the Supreme or County Courts outside the City. The petition may also be filed in Surrogates Court when the alleged incapacitated person (AIP) has an interest in an estate proceeding.

2. Order to Show Cause/Petition

Question: What is the difference between an Order to Show Cause and a Petition?

Response: An Order to Show Cause is the initial document which states the intention to apply for the appointment of a Guardian. It contains the required notice to the AIP, written in large type, including: the date, time and place of the hearing; the rights of the AIP; identification of the court evaluator and attorney; the list of proposed powers for the guardian; and a warning of the significance of the proceeding.

The Petition is the actual application to the court for an appointment of a guardian. It contains the information required by Section 81.08 MHL, which includes: client identifying information ; an explanation of the functional level of the AIP; the reasons for the guardianship; the available alternative resources that have been explored; the particular powers sought and their relationship to the functional level of the AIP; the suitability of the proposed guardian; and any provisional relief which is being sought, such as a temporary guardian.

3. Confidentiality

Question: Must the petition and supporting papers be included with the copy of the order to show cause which must be served to all persons who must receive notice.? How can confidentiality be preserved?

Response: Section 81.07(a)3 MHL requires that the order to show cause, together with a copy of the petition and any supporting papers shall be served upon all those required to receive notice. The list of persons required to receive notice, as described in Section 81.07(d), is quite broad, including: relatives; persons with whom the AIP resides; persons or organizations demonstrating a genuine interest in promoting the best interests of the AIP; the AIP's attorney and any designated persons; the court evaluator; the local department of social services (dss) if the person receives public assistance or Protective Services for Adults (PSA); facility directors if the person resides in any facility and the mental hygiene legal service of the judicial department in which the residence is located.

If districts have concerns about releasing confidential medical or psychiatric evaluations to certain persons they should document their reasons and request that the court provide direction as to whether those documents can be withheld in specific circumstances. This matter also will be brought to the attention of the Law Revision Commission which is evaluating Article 81 MHL.

4. Court Evaluator

a) Question: Can the court evaluator take any immediate steps to protect the money or property of the AIP prior to the appointment of a guardian?

Response: Yes. As indicated in Section 81.09(e) MHL, if the court evaluator believes that the AIP's property is in danger of waste, misappropriation or loss, he or she may establish an escrow or savings account to protect cash found or take other appropriate protective measures while the investigation and proceedings for the establishment of a guardian are being conducted. The court evaluator must subsequently report the actions taken to the court.

b) Question: Who is responsible for training of the court evaluators?

Response: As indicated in Section 81.09(b) MHL, court evaluators are chosen from a list maintained by the Office of Court Administration (OCA). Section 81.40 MHL requires that each person appointed by the court to be an evaluator must complete a training program approved by the chief administrator of the court system. At the present time OCA is reviewing and approving training programs submitted by various private and public entities. Persons who wish to be court evaluators should obtain information on approved courses from OCA. Section 81.40(c)MHL allows the court to waive some or all of the court evaluator education requirements. Until approved courses are widely available, judges will likely invoke this section of the law and choose a court evaluator based on the person's integrity and experience.

c) Question : Can the department of social services be the court evaluator and petitioner at the same time?

Response: No. The court evaluator is intended to act as an independent investigator who, after gathering information about the allegedly incapacitated person, prepares a written report and recommendations to assist the court in reaching a determination.

d) Question: In an Article 81 proceeding initiated by a petitioner other than a social services district, can the social services district be appointed as Court Evaluator?

Response: There is no apparent authority for a court to require social services district PSA staff to act as a court evaluator in such cases. PSA staff resources are properly allocated by the social services district, rather than by the court. In addition, courts would have no lawful authority to require PSA staff to act outside the lawful scope of their duties by requiring investigations in cases where it does not appear that the allegedly incapacitated person is in need of PSA. Courts should be encouraged to choose evaluators from the community. As indicated in 81.09(b) MHL, the court can choose from a wide variety of disciplines including but not limited to attorneys, physicians, psychologists, accountants, social workers or nurses.

e) Question: Who pays the court evaluator?

Response: Section 81.09(f) MHL indicates that the court may award a reasonable allowance to the court evaluator. If the petition is granted, the costs are paid by the estate of the AIP. If the petition is denied or dismissed the costs are payable by the petitioner or the AIP or both in proportions determined by the court. If the AIP dies before a determination is made, the costs are paid by the petitioner or the estate of the decedent. The law does not address how payments are to be made if the AIP is indigent. For PSA clients, the costs of the court proceedings, including the court evaluator, are considered legitimate PSA expenses, chargeable to Title XX and the Services Overclaim. We intend to advise the Law Revision Commission of the need to explore other funding sources for Article 81 proceedings brought on behalf of indigent persons.

f) Question: Must a court evaluator be bonded?

Response: No, there is no requirement that a court evaluator be bonded. Presumably a court could in its discretion impose a requirement for the filing of a bond by a court evaluator in a given case, particularly where there are significant assets and the court may be concerned about the authority of the court evaluator to take immediate steps to safeguard the property of an allegedly incapacitated person.

5. Provisional Remedies

a) Question: When do you request a temporary guardian?

Response: As indicated in 81.23 MHL, a temporary guardian can be requested at the beginning of the proceedings when you file the petition, or at any point prior to the appointment of the guardian. A temporary guardian would be appropriate if the district can show danger in the reasonably foreseeable future to the health and well being of the AIP or danger of waste, misappropriation or loss of the property of the AIP. The temporary guardian can be granted the same powers and duties available to a full guardian as listed in Section 81.21 MHL (property management) and Section 81.22 MHL (personal needs). The order of appointment must list the specific powers and duties and the time limit of the appointment.

b) Question: Can a temporary guardian be appointed without a hearing?

Response: Although the statute does not expressly state that there must be a hearing prior to the appointment of a temporary guardian, it appears that case law would mandate some form of prior notice and hearing, even if informal, in most cases. The law does not favor "ex parte" orders especially those which affect important rights of individuals. (See e.g. Matter of Fosmire, 75 N.Y. 2d. 218, 224; Rivers v. Katz, 67 N.Y. 2d. 485). This view is consistent with that of the Law Revision Commission. The courts recognize that there may be cases in which an individual's condition is so grave that there is no opportunity for prior notice and hearing. In such cases, an effort should be made to communicate with the client or responsible relatives if only to give prompt notice that an order has been issued appointing a temporary guardian.

c) Question: What is the difference between a temporary restraining order and a preliminary injunction, both of which are available as provisional rememdies in an Article 81 proceeding?

Response: While both are types of injunction intended to prevent threatened actions that may injure the allegedly incapacitated person, a temporary restraining order is generally issued pending a hearing for a preliminary injunction, without notice to the other party, where it appears that immediate and irreparable injury, loss or damage will result unless the other party is restrained before the hearing can be held. A preliminary injunction, on the other hand, may be granted only upon notice to the party to be enjoined.

6. Changes to Powers of the Guardian

Question: If the court grants certain powers to the guardian to meet a particular need, and a short time later a new emergency arises necessitating another intervention, is it necessary to go back to court?

Response: Yes. The intent of the law is that the guardian's powers are limited to the least restrictive intervention which can meet the needs of the incapacitated person. However,it is recommended that districts base their original request for powers on a thorough assessment of the incapacitated person's limitations and try to anticipate the need for additional intervention that may arise in the near future. In spite of this, situations may arise which were not anticipated and the district will have to return to court to request additional powers. A court evaluator and, if appropriate, counsel for the incapacitated person would again be appointed to investigate the situation, unless the court waives their participation.

7. Conflicts with the Guardian's Powers

a) Question: What can the district do if they are appointed as guardian and then discover that a person with a valid Power of Attorney is exploiting the client?

Response: As stated in 81.22(b) MHL, a guardian may not revoke any previously given power of attorney (POA). Pursuant to 81.29 (d) MHL, a court may revoke a POA only if the court finds that the document was executed while the person was incapacitated and therefore is not valid. In situations where the district discovers that the POA was valid when granted, but there is now evidence of exploitation there are several options to pursue. The district can seek injunctive relief from the court by requesting a temporary restraining order; they can refer the case to the district attorney's office for possible criminal charges; or they could bring a civil action under common law grounds, alleging breach of fiduciary responsibility, requesting an accounting of finances and the removal of the POA. We plan to request the Law Revision Commission to draft a technical amendment to Article 81 which would allow the removal of previously existing POA's when it can be shown that there is evidence of waste, loss or misappropriation of the ward's funds or where the person appointed under the POA is otherwise failing to act in the ward's best interest.

b) Question: How are guardianship powers enforced? What should the district do if a client for whom they have been named guardian refuses to accept the interventions ordered by the court.?

Response: If a client is resisting services that have been court ordered the district should bring this matter to the attention of the court and ask for direction. The court has broad discretionary powers in enforcing its orders.

8. Availability of Others to Serve as Guardian

Question: May the district state that it is unavailable or unwilling to act as guardian for persons who are in protected residential settings such as nursing homes or adult care facilities?

Response: Section 81.19 MHL states that providers of health care, day care, educational or residential services to the incapacitated person are not eligible to serve unless the court finds that no other person or corporation is available or willing to act as guardian. Thus, they are not completely precluded from serving. As indicated in 90 ADM-40,"PSA:Client Characteristics", adult residents of long term residential care facilities are generally not eligible for PSA. Long term residential care facilities are responsible for meeting the essential needs of their residents and for providing a safe environment. Districts may choose to serve as guardians for persons who do not meet the PSA client characteristics, but they are not mandated to do so. If the district is unwilling to serve as the guardian for a resident of a residential care facility, the court may select the residential care provider if no one else is available.

II. The technical amendments to Article 81 MHL, which became effective April 1, 1993, clarified certain areas of the law and are discussed below:

1. The statute now requires that the petitioner give notice of the guardianship proceedings to the local department of social services if it is known to the petitioner that the allegedly incapacitated person (AIP) receives protective services for adults. This will ensure that districts can appropriately advocate for and plan for the needs of PSA clients who may need guardianship services. [Section 81.07(d)1.(viii)]

2. The requirement that the order to show cause and copy of the petition be personally delivered to the AIP has been modified to allow delivery by other means, such as mail delivery, when the petitioner can demonstrate to the court's satisfaction that the AIP has refused service. Also, the statute clarifies that if the AIP is not served at home, a copy of the order to show cause and petition shall be left at the residence of the AIP with a person of suitable age and discretion. [Section 81.07(d)2.(i)]

3. In the section of the law concerning the scope of the court evaluator's report and recommendations to the court, the statute clarifies that if the proposed guardian is an authorized community guardian program, the local department of social services may provide the court with information on the proposed plan to identify and meet the needs of the AIP. This would eliminate a duplicative report on this question by the court evaluator. [Section 81.09(c)5.(xiv)]

4. A section is amended to state that if the AIP dies before the determination is made in a proceeding, the court may award reasonable compensation to any attorney appointed, payable by the petitioner, or the estate of the decedent or by both in proportions as the court may deem just. [Section 81.10(f)]

5. The section of the law concerning compensation for attorneys is amended to specifically add the attorney general and the attorney for a local department of social services as attorneys for whom the court may award reasonable compensation when the petition is granted, or where the court otherwise deems appropriate. [Section 81.16(f)]

6. The law is amended to clarify that the mental hygiene legal service may not serve as a guardian. [Section 81.19(f)]

7. The powers of a guardian for property management are expanded to include the power to authorize access to, or release of confidential records and to apply for government and private benefits. This corrects an oversight in the law which originally gave these powers only to guardians who had been granted power over personal needs. [Section 81.21(a)11.and 12.]

8. In the section of the law concerning the powers of the guardian with respect to personal needs, the statute is amended to indicate that a guardian appointed under Article 81 cannot consent to the voluntary formal or informal admission of an AIP to an alcoholism facility. This clarifies that admission to an alcoholism facility remains governed by Article 21 of the Mental Hygiene Law. [Section 81.22(b)1.]

9. A new section is added to the law that establishes proceedings to discover property withheld. If, after a guardian has been appointed, the guardian receives information that the incapacitated person has money or property which should be under the control of the guardian to be used for the benefit of the incapacitated person, the guardian may commence a proceeding in court to discover these resources. The petition shall request that the person holding the property be ordered to attend an inquiry and be examined accordingly and to deliver the property of the incapacitiated person if it is within his or her control. [Section 81.44(a)and(b)]

10. Any conservators or committees appointed prior to April 1, 1993 will be governed by the reporting requirements contained in Article 81, as of May 1, 1994. Until then the existing reporting requirements continue. [Chapter 698 of the Laws of 1992, Section 4.(a)]

11. The amended statute clarifies that for all proceedings commenced under Articles 77 or 78 MHL prior to April 1, 1993 for which a determination has not yet been reached, the court shall make findings as required by Section 81.15 MHL and use the dispositional alternatives contained in Section 81.16 MHL. This means that for pending cases districts would be able to request the use of protective arrangements, single transactions or a special guardian if appropriate. Also, unless the court deems it impracticable, pending cases will be governed by all of the other provisions of Article 81. [Chapter 698 of the Laws of 1992, Section 4.(b)]

Frank Puig
Deputy Commissioner
Services and Community Development