

MHL Article 81 - Guardianship - A Brief Overview

by Ignatius L. Muscarella, Esq. - Guardianship Referee, Nassau County

I. FROM COMMENCEMENT TO APPOINTMENT

Guardianship cases begin with the filing of an Order to Show Cause [OSC] and Verified Petition (MHL 81.07 and 81.08).

The OSC must include the appointment of a Court Evaluator chosen from the fiduciary list (MHL 81.09 and 22 NYCRR 36.1 and 36.2). The Court Evaluator is to interview all interested parties and report back to the Court with recommendations. Issues to be addressed are statutorily listed and include whether an attorney should be appointed for the AIP (allegedly incapacitated person), whether the AIP can meaningfully participate in the hearing, the assets, desires and functionality of the AIP, the suitability of the proposed Guardian (MHL 81.09[c]).

A hearing is to be held within 4 weeks of the date of the OSC (MHL 81.07[b][1]), unless extended for good cause (MHL 81.13).

Although rare, the OSC may provide for immediate appointment of a Temporary Guardian (MHL 81.23[a]). More often, the OSC will provide for appointment of counsel for the AIP, and if the AIP does not already have counsel the Court must subsequently appoint counsel upon the request of the AIP or if the AIP wishes to contest the proceeding (MHL 81.10[c]).

If after hearing there is no finding of incapacitation, the proceeding is dismissed (MHL 81.16[a]).

If after hearing the Court finds the AIP is an Incapacitated Person (IP), or if there is consent by the AIP for the appointment of a Guardian and the Court finds that the AIP is in need (PING - Person In Need of a Guardian), the Court shall issue an Order and Judgment (MHL 81.16[c, d and e]) appointing one or more persons to serve as one or more of the following types of Guardian. (MHL 81.15):

- a Special Guardian may be appointed to handle a specific task (MHL 81.16[b]).

- a Guardian for Personal Needs may be appointed (MHL 81.15[b]).

- a Guardian for Property Management may be appointed (MHL 81.15[c]).

In all instances (Temporary, Special, Personal Needs and Property Management), a Commission is required to be issued before commencement of duties by the Guardian (MHL 81.27). The Commission is to be issued within 15 days of the appointment (MHL 81.13) although this is generally a practical impossibility, especially where a bond is first required to be posted or a training course to be attended (MHL 81.25[a] and 81.39). In Nassau where a Temporary Guardian is appointed, the OSC often provides that the OSC shall serve as the Commission. If a bond is directed for a Temporary Guardian, it is to be filed within 10 days of that Commission (MHL 81.25[b]).

II. FILING REQUIREMENTS AFTER APPOINTMENT

Temporary and Special Guardians

Temporary Guardians are not required to file Initial or Annual Reports. Rather, Temporary Guardians shall report to the Court “prior to the expiration of the term of appointment” (MHL 81.23[a][1]). The term of appointment for a Temporary Guardian may not extend beyond the date of issuance of the Commission to another type of Guardian (MHL 81.23[a][1]).

Special Guardians are also not required to file Initial or Annual Reports (at least in Nassau). Rather, Special Guardians “shall report to the Court on all matters done pursuant to the order of appointment and shall serve until discharged ...” (MHL 81.16[b]).

Since there are neither Initial or Annual Reports being filed by Temporary and Special Guardians, their appointment does not trigger the need to appoint a Court Examiner (see MHL 81.32[a]).

Personal Needs and Property Management Guardians

INITIAL REPORT - Within 90 days of issuance of a Commission to a Personal Needs and/or Property Management Guardian, the Guardian is required to file an Initial Report with the Court and to serve a copy upon the Court Examiner (among others) (MHL 81.30).

The Court Examiner (appointed pursuant to MHL 81.32[b]) is required to examine the Initial Report within 30 days of such filing (MHL 81.32[a][1]). If the Court Examiner believes the Initial Report is incomplete, the Court Examiner is to obtain from the Guardian a revised report and/or missing documentary evidence (MHL 81.32[d][1]) with Court assistance if necessary (MHL 81.32[d][2]).

Since the Court Examiner’s first review of the Guardian’s Initial Report may necessitate some back and forth between the Court Examiner and the Guardian to produce a finalized Initial Report satisfactory to a thorough Court Examiner, the 30 day period for review by the Court Examiner generally applies to the first review.

The Court Examiner’s finalized review of the Guardian’s Initial Report (Court Examiner’s Initial Report) is filed with the Court (MHL 81.32[e]), but the content of this Initial Report is not generally reviewed and is not judicially confirmed (at least in Nassau). There is no statutory time period governing when the Court Examiner is to file the Court Examiner’s Initial Report.

ANNUAL REPORT - By May of each year all Personal Needs and/or Property Management Guardians are required to file an Annual Report with the Court covering the preceding calendar year and to serve a copy upon the Court Examiner (among others) (MHL 81.31[a, c, and d]). The filing deadline may only be changed "upon motion or order of the court" (MHL 81.31[a]). (Exception for filing the first year in Nassau: If the Guardian's Commission is dated October 1 or later, Nassau does not generally require an Annual Report to be filed that first year but expects this period to be essentially covered by the Guardian's Initial Report and then included as part of the next year's Annual).

The Court Examiner (appointed pursuant to MHL 81.32[b]) is required to examine the Annual Report within 30 days of such filing (MHL 81.32[a][2]). If the Court Examiner believes the Annual Report is incomplete, the Court Examiner is to obtain from the Guardian a revised report and/or missing documentary evidence (MHL 81.32[d][1] with Court assistance if necessary (MHL 81.32[d][2])).

Since the Court Examiner's first review of the Guardian's Annual Report often necessitates some back and forth between the Court Examiner and the Guardian to produce a finalized Annual Report satisfactory to a thorough Court Examiner, the 30 day period for review by the Court Examiner generally applies to the first review.

The Court Examiner's finalized examination of the Guardian's Annual Report (Court Examiner's Report) is filed with the Court (MHL 81.32[e]) and is reviewed and judicially confirmed each year with one notable exception. If the assets of the IP's estate are less than \$50,000, the Court Examiner's Report is filed every other year and covers a 2 year period - this biannual report is then judicially reviewed and confirmed. There is no statutory time period governing when the Court Examiner is to file the Court Examiner's Annual (or Biannual) Report.

DEATH OF IP - Upon the death of an IP, the Guardian is required to file with the Court and serve upon the Court Examiner (among others) a Statement of Death within 20 days (MHL 81.44[c] effective 1/3/09).

Within 150 days of the IP's death the Guardian is required to file a final report (Final Accounting) with the Court and to move for judicial settlement on notice (MHL 81.44[f]). Within the same 150 days the Guardian is to turn over to the representative of the deceased IP's estate or the Public Administrator all assets of the IP, holding back only those assets necessary for administrative costs, liens and debts (MHL 81.44[d] and [e]).

In Nassau, once an IP has died all involvement of the Court Examiner essentially ceases and the proposed Final Accounting and motion (MHL 81.33) or petition (MHL 81.34) is submitted directly to the Court for review and judicial confirmation .

SUCCESSOR GUARDIAN OR TERMINATION OF ROLE OF GUARDIAN - Upon the need to appoint a successor Guardian (e.g., due to the death or removal of the Guardian) or upon termination of a Guardianship role (e.g., depletion of assets eliminates need for any Property Management Guardian), a Final Accounting is also required (MHL 81.33[b]). In Nassau, the Court Examiner is usually appointed Referee to report on the Final Accounting before review and judicial confirmation.

NOTE: In all instances involving submission of papers to the Court for review and judicial confirmation, the papers are first vetted by our Guardianship Part where the need for significant changes, corrections and/or supplementation is often discovered.

III. FIDUCIARY APPOINTMENTS

Guardians, Court Evaluators, and various professionals who provide services to Guardians (e.g., attorneys, accountants) must be chosen from a court approved list of such individuals unless

- (1) the proposed Guardian is a relative of the IP, or is proposed by a party to the proceeding, or is a nonprofit entity (22 NYCRR 36.1[b][2][i] and [ii];
- (2) the proposed Court Evaluator is a nonprofit entity (22 NYCRR 36.1[b][2][iii];
- (3) the proposed professional to assist the Guardian is recommended to the Court by the Guardian (22 NYCRR 36.2[a]). (Note: Certain additional but less common exceptions exist).

Off list appointments may only be made upon a finding of “good cause ... set forth in writing and... filed with the fiduciary clerk” with a copy sent to the Chief Administrator (22 NYCRR 36.2[b][2]).

Numerous and varied filing requirements exist for both the Court and the appointees at the time of appointment and at the time of compensation (see 22NYCRR 26.1 et seq. and 36.4).