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INFORMATIONAL LETTER

TRANSMITTAL: 92 INF-40

DIVISION: Adult Services

TO: Commissioners of  
 Social Services

DATE: September 28, 1992

SUBJECT: Article 81 of the Mental Hygiene Law: Proceedings for  
 Appointment of a Guardian for Personal Needs or  
 Property Management (Chapter 698 of the Laws of 1992)

SUGGESTED

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

CONTACT PERSON: Any questions concerning this release should be  
 directed to your district's Adult Services  
 Representative at 1-800-342-3715 as follows:

Irvin Abelman ext. 432-2980 or  
 (212) 804-1247  
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ATTACHMENTS: 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.
88 ADM-23		457	Article 9-B		
83 ADM-15			Articles		
91 INF-40			77, 78 & 81 of Mental Hygiene Law		

The purpose of this release is to inform local social services districts of a recent amendment to the Mental Hygiene Law, in relation to the appointment of guardians for personal needs and property management for persons who are likely to suffer harm because they are unable to provide for personal needs including food, shelter, health care, or safety and/or are unable to manage property and financial affairs.

Chapter 698 of the Laws of 1992, effective April 1, 1993, repeals Article 77 and 78 of the Mental Hygiene Law which authorize the appointment of conservators and committees respectively for persons whose ability to care for their property is substantially impaired or who are judged to be incompetent. Chapter 698 replaces these two Articles with Article 81 of the Mental Hygiene Law which authorizes the appointment of a guardian whose authority is appropriate to satisfy the needs, either personal or financial, of an incapacitated person. Article 81 seeks to ensure that any appointment of a guardian is tailored and limited to only those activities for which a person needs assistance, taking into account the personal wishes, preferences and desires of the person. The standard for appointment of this new procedure focuses on the decisional capacity and functional limitations of the person for whom the appointment is sought, rather than on some underlying mental or physical condition of the person. This amendment to the Mental Hygiene Law was enacted at the request of the New York State Law Revision Commission, which had studied Articles 77 and 78 since 1987.

Article 81 attempts to ensure that an allegedly incapacitated person retains the maximum degree of independence possible and that only the least restrictive form of intervention is imposed upon the person. With the assistance of a court-appointed evaluator, a court will examine the functional level and needs of an allegedly incapacitated person and will authorize appointment of a guardian only if necessary. If a guardian is appointed, the guardian will be granted only those powers necessary to provide for the person's needs.

In addition to strong due process protections, Article 81 provides local social services districts with flexibility and creative mechanisms for the provision of necessary services to Protective Services for Adults (PSA) clients. The statute contains a number of limited and provisional remedies which will permit the courts to effectively address short-term and emergency situations in a manner which assures the provision of necessary services in the least intrusive manner while protecting the rights of the allegedly incapacitated person. These mechanisms, which are designed to provide for the personal needs and/or property management of the alleged incapacitated person, include special guardians, protective arrangements, single transactions or series of transactions, and temporary guardians. These provisions are described in greater detail in Section 81.16 of the statute.

A number of the major provisions of Article 81 are highlighted below:

1. The statute lists a number of persons who may file a petition for the appointment of a guardian, including the Department of Social Services in the county where the person alleged to be incapacitated resides (81.06).
2. The petition is usually filed in Supreme Court or County Court, although under certain circumstances the petition may be filed in Surrogate's Court (81.04, 81.05).
3. The court, at the time of issuance of an order to show cause, is required to name a court-appointed evaluator. The evaluator is given a variety of specific duties and is also given authority to protect the property of the person alleged to be incapacitated pending the hearing in the event the property is in danger of waste, misappropriation or loss (81.09).
4. The court evaluator may apply to the court for permission to inspect records of prior medical, psychological and psychiatric examinations of the person alleged to be incapacitated (81.09).
5. Counsel may be appointed for a person alleged to be incapacitated (81.10).
6. A determination that a person is incapacitated under the provisions of Article 81 must be based on clear and convincing evidence (81.12).
7. In an appropriate case, a court may, as an alternative to a long term guardian, authorize a protective arrangement, a transaction, a series of transactions, a contract, a trust or other arrangement to protect the person or property of an alleged incapacitated person. The court may also name a special guardian to assist in the accomplishment of these transactions (81.16).
8. Included in the list of who may serve as guardians are local social services officials and any community guardian programs operating pursuant to Article 9-B of the Social Service Law, provided that a community guardian program is appointed as guardian only where a special proceeding for the appointment of a guardian under this statute has been commenced by a social services official with whom the program was contracted (81.19).
9. If the court determines that a guardian is necessary, the court is required to delineate the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the person's functional limitations and the likelihood of harm. The incapacitated person retains all other powers and rights except those specifically granted to the guardian (81.15, 81.29).

10. A more extensive statement of the powers and duties than exists in current law is set forth in Sections 81.20 (Duties of Guardian), 81.21 (Powers of Guardian; Property Management) and 81.22 (Powers of Guardian; Personal Needs).
11. The statute allows for the appointment of a temporary guardian, upon showing of danger in the reasonably foreseeable future to the health and well being of the alleged incapacitated person, or danger of waste, misappropriation, or loss of the property of the alleged incapacitated person. The court may also issue a temporary restraining order to enjoin the sale, disposition, assignment, transfer or dissipation of property (81.23).
12. The guardian or temporary guardian may be required to file a bond prior to appointment. A community guardian program may file a consolidated bond of up to \$1.5 million dollars (81.25).
13. The statute provides for the court to establish a plan for the reasonable compensation of the guardian (81.28).
14. Detailed reporting requirements are included for court-appointed evaluators and guardians (81.09, 81.30, 81.31, 81.32, 81.33).
15. Article 81 includes provisions for the removal of guardians (81.35), the discharge or modification of the powers of guardians (81.36), resignation or suspension of the powers of guardians (81.37) and vacancy in office (81.38).
16. Guardians are required to complete a training program which includes the legal duties and responsibilities of the guardian, the rights of the incapacitated person, the available resources to aid the incapacitated person, an orientation to medical terminology, and the preparation of annual reports, including financial accounting.
17. Court-appointed evaluators are also required to complete a training program which includes the legal duties and responsibilities of the evaluator, the right of the incapacitated person with emphasis on due process rights, the available resources to aid the incapacitated person, an orientation to medical terminology, entitlements, and psychological and social concerns relating to the disabled and frail older adults.
18. Any conservators or committees appointed under Articles 77 and 78 of the Mental Hygiene Law shall continue in force and effect until modified or abrogated by a judge pursuant to Article 81.

Local social services districts currently are required to petition for the appointment of a conservator or committee and/or serve as conservator or committee in appropriate situations where no one else is willing and able to act on behalf of the client in accordance with Section 473.1(c) and (e) of Social Services Law and Section 457.1(c)(7) of the Department's regulations.

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As of April 1, 1993, they will be required to petition for the appointment of a guardian and/or serve as a guardian, special guardian or temporary guardian when necessary. Therefore, Protective Services for Adults (PSA) and legal staff should familiarize themselves with the provisions of Article 81.

The Department will be revising its training programs to reflect the provisions of Article 81, particularly the Legal Aspects of PSA training initiative which PSA caseworkers and supervisors are required to attend. In addition, the Department's Division of Legal Affairs will be conducting training for local social services district attorneys in conjunction with the New York Public Welfare Association. Additional implementation activities may be forthcoming based upon any needs which are identified by the districts.

A copy of Article 81 is attached to this release.

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William E. Gould  
Acting Deputy Commissioner  
Division of Adult Services