

Humanistic and social concerns that gave rise to article 81 of new york mental hy...

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Introduction

Many practitioners see Article 81 of Mental Hygiene Law as a huge step forward in the statutory regulation of the guardianship of incapacitated persons. The Article provides for more flexible and less restrictive approach in the determination of the legal status of those incapacitated persons who are in need of guardians` protection. The principle of individual approach underlies the article. The principle implies that in every particular case the powers of a guardian must be tailored to the needs of the incapacitated person. The guardian will assist the ward only in those matters where the assistance is needed (activities of daily living, property management, etc.). If, however, the ward shows the ability to manage particular aspects of his/her life, the court shall not grant the guardian the powers over this part of ward`s life. It seems that the legislator, in drafting of this statute, was motivated by a desire to protect the personal freedom of the incapacitated. By incorporation of this principle into the statute, the legislator attempts to limit the influence and power of a guardian over the ward and, therefore, minimize the possibility of guardian abusing his powers and acting against the interests of the ward.

In the following essay, I would like to demonstrate how exactly the following statute protects the rights of the incapacitated, as well as to point the common issues that arise during the implementation of the Article.

General provisions of the law

The main purpose of the article 81 is set out in the section 81-01 – Legislative findings and purpose. The legislator recognizes that the main

purpose of the law is to establish new guardianship system that will be tailored to the individual needs of the incapacitated person. In the motivation of this purpose the legislator recognizes the diversity and complexity of individual needs of persons with incapacities and, therefore, seeks to provide more flexible approach to the problem of guardianship. At the same time, it is noted that the previous legislature provided for more restrictive approach, the one that did not consider the need of incapacitated persons for independence of which they might be capable. Thus, the ultimate purpose of the law is to create more flexible guardianship system that takes into account personal needs, wishes, and desires of incapacitated person (IP), and the one that allows for more independence and self-determination, with regard to the mental and physical state of the person with incapacity.

The court may appoint a guardian when it finds that such appointment is necessary for the personal needs and for property and financial management of person`s affairs. A person is deemed incapacitated only if there is convincing evidence that this person may suffer harm from the inability to provide for personal needs or inability to manage property or financial affairs or if there evidence that the person does not understand real consequences of his/her inability. In other cases, the person must give consent for the appointment of a guardian. The court must give consideration to the functional level and limitations of the person, particularly focusing on person`s ability to manage activities of daily life, preferences and wishes of the person regarding these activities, person`s financial affairs and the ability to manage those affairs. The court must assess all factors that are relevant to the determination of person`s need for a guardian and must use

this measure only as a last resort – the court must impose guardianship only if there are no other means to protect the person. The appointed guardian shall be granted only with those powers that are needed for effective protection of person`s needs. The powers of a guardian must not restrict person`s independence and the possibility of self determination with due regard to functional limitations and the nature of incapacity.

Court evaluator plays a crucial role in the procedure of guardian appointment. The duties of the court evaluator include interviewing and consulting with alleged incapacitated person (AIP), as well as with the petitioner, consulting with professionals who have specialized knowledge about the alleged incapacity, making reports and recommendations to the court. Essentially, the court evaluator acts as an independent and impartial investigator whose main function is gathering information that is necessary for court`s determination of person`s degree of capacity. The court evaluator also provides the court with the information pertaining to the availability of alternative resources, the candidature of the guardian, and the determination of specific powers of the guardian.

Article 81 provides for the right of AIP for counsel. If the person does not have a counsel, the court has the obligation to appoint one in certain situations, including cases when the AIP requests counsel, contests the petition, or if the court finds that there might be possibility of conflict between the functions of court evaluator and the interests of AIP, etc. The counsel represents the interests of the AIP and makes sure that the person`s position is duly defended during court proceedings. The representation of the

AIP by the counsel usually includes the possibility to present and cross-examine witnesses, presenting evidence and arguments.

Abuse of powers by the guardian.

The relationships between the guardian and the ward are fiduciary i. e. based on the principle of trust. Ward places his trust on the guardian, and the guardian must act accordingly. Unfortunately, not all guardians act honestly. Some of them may abuse their powers and commit illegal acts with the intention to defraud the person under wardship. In most instances, it is the elder citizens who become victimized by the individuals with whom they have fiduciary relations.

The guardians may abuse personal relationships and deceive the IP or exert undue influence on his/her decision. Undue influence implies the instances when guardians misuse their powers and exploit the trust and loyalty of the IP in order to exert influence on the decision-making or gain control over person`s assets or property. (Uekert, Keilitz ,& Saunders, 2012, p. 4)

Depending on specific powers of a guardian, the latter has the authority over particular aspects of ward`s personal affairs, personal property or finances.

Guardian of the estate is the person who exercises specific powers in regard to the personal property of the ward. The guardian, or other legal representative who acts in this competence, has the power to deal with transactions, transfer assets or enter into contracts on behalf of his ward. All of these powers are specified in the court`s order authorizing the guardian to act as the fiduciary, and depending on the particular case, the guardian may act either independently or should receive a consent of the ward. In any

case, the fundamental principle is that the guardian must act in the best interests of the ward. The fiduciary's main obligation is to carry out his responsibilities diligently and with the utmost care to the needs and wishes of the IP.

Other instances of guardian's abuse may include negligent behavior in regard to the matters of personal care. It means that the guardian does not carry out his responsibilities properly, as provided by the requirements of the law and guardian's personal duties as prescribed by the court's order. While some cases of negligence may not cause significant harm to the ward, others may result in serious harm and can be qualified as criminal negligence. Other violations of guardian-ward relations may include physical and sexual abuse.

The main problem with these types of crimes is that they often go unnoticed due to the presumption of guardian's honesty and conscientiousness. The nature of the relations between the IP and his/her guardian is based on the subordinacy. In this regard, these relations have many similarities with parent-child relations. Both children and the incapacitated persons rely on the support of parents and guardians respectively. This support is essential to the well-being of the "subordinates". Often, the incapacitated person, as much as the child, does not have the ability to protect herself due to the physical and mental condition or status. The legislature in these matters places trust on those who are responsible for providing this support. For this reason, it is hard to prevent and detect child abuse, as well as the abuse of incapacitated.

The statutory mechanism of prevention of abuse.

Article 81 Mental Hygiene Law plays an essential role in the protection of those incapacitated persons who are forced to use the assistance of guardians. The act is based on a set of principles that ensure that the possibility of guardian abusing his powers will be minimized.

Principle of least restrictive form of intervention lies at the foundation of the Article. This principle means that the guardian must have only those powers needed to provide necessary assistance to the IP, the powers that compensate for the person's limitations. The IP must be given the greatest possible amount of independence with due regard to his/her functional limitations. This principle ensures that the guardians "control" over IP will not be complete, it will be limited to a particular aspect of person's life where there is an actual need of guardian's assistance. For example, if the IP due to physical incapacity cannot move, but preserves the ability to manage his/her financial affairs, the guardian's duties will be limited to assistance in daily activities such as housekeeping, cooking etc.

Principle of alternative resources. This principle states that the appointment of the guardian must be used as a method of last resort. The court must assess the possibility of other, non-judicial means of assisting IP such as visiting nurses, adult day care, etc. (Sacks, Bailly, 2005) The main idea of the principle is that the court must assess alternative (non-restrictive) means of assisting the incapacitated person that might be used instead of guardianship. This principle arises from previously mentioned concept of least restrictive form of intervention and encourages the court to provide the IP with assistance that would be less restrictive in regard to his/her

independence.

The duties and the candidature of the guardian is a subject of particular concern in the article. Prior to the appointment of the guardian, the court must consider the needs of the IP, relationship between the IP and proposed guardian, experience of the guardian. Section 81. 19 of the Article sets forth the provision that non-profit organizations, public service officials, representatives of the community guardian services, etc. may be appointed as guardians of IP. The main principle of the article is that guardian must have appropriate experience with regard to the needs of the IP. Another essential requirement is that the guardian must not have a solely financial interest in the ward.

The article also establishes general duties of the guardian, including the obligation to exercise care and diligence when acting on behalf of the ward, exhibit loyalty and fidelity in relation to the ward etc. (Sacks, Bailly, 2005).

The peculiarity of this section of the article is that it does not set forth a comprehensive list of guardian`s duties. The court by its order prescribes specific duties of the guardian, and those duties may vary from case to case, depending on the functional limitations of the ward, as well as on any other physical and mental conditions. The guardian must keep the records of all transactions entered into on the behalf of the ward. The filing of the annual report is another important duty of the guardian. The purpose of the report is to provide the court with all information relevant to the status of IP.

Again, the wording of the article follows from the previously mentioned principles of the principle of least restrictive form of intervention and the principal of individual approach.

The court evaluator and the counsel for the AIP.

The Article implies that the court evaluator and the counsel for the AIP play major parts in the guardianship appointment proceedings. At the same time, practitioners argue that in many cases the appointment of both counsel and court evaluator is redundant, inter alia, due to the necessity to compensate their services which may turn out exhaustive to the financial state of AIP.

Another problem arises from the requirement of mandatory appointment of counsel for AIP. Sometimes contesting of appointment of guardian may not be in the interests of the AIP. In cases when the AIP does not understand the consequences and nature of the proceeding, contesting of the appointment of guardian may in fact be detrimental to the AIP. (Solinski, 1997, p. 455)

Conclusion

As we can see, Article 81 of the law establishes new principles that regulate guardian appointment proceedings. The legislator took into consideration the necessity to protect personal freedom and independence of the ward. This idea forms the principle of least restrictive form of intervention – the concept that underlies the basic provisions of the statute. Another purpose of the following article is to create such mechanism that would minimize the possibility of guardian abusing his authority. This purpose is achieved by provisions that limit the powers of guardian to a particular set of duties. The court establishes the list of these duties with due regard to the functional level of particular alleged incapacitated person. The court also assesses the personality of the guardian, as well as his/her ability to carry out responsibilities diligently and with utmost care to the needs of the ward.

Despite the progressive nature of the Article, such issues as the burden of compensation for the services of the court evaluator and the counsel, as well the rule that establishes mandatory appointment of counsel for the AIP need further clarification regarding the practical aspects.

References.

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