

# **CLOSING AN ARTICLE 81 GUARDIANSHIP**

Submitted By:  
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## **Closing an Article 81 Guardianship**

**By: Britt Burner, Esq.**

**Nancy Burner & Associates, P.C.**

*These materials will explain the process that must be followed upon the death of a person for whom a guardian has been appointed pursuant to Article 81 of the Mental Hygiene Law. The materials will also discuss common issues that arise during that process. In addition, the materials will speak to the steps that must be taken upon the death or incapacity of a person that has been designated as the guardian.*

### 1) Death of the Incapacitated Person

#### a) Death Certificate is to be sent to:

- (1) Social Security Administration, if death was not reported by the funeral home
- (2) Veteran's Administration, if applicable
- (3) Pension plan
- (4) Health insurance plans (i.e. Medicare supplement)

#### b) Statement of Death:

##### i) MHL §81.44. Proceedings upon the death of an incapacitated person

##### ii) Must Include:

- (1) Caption and index number of guardianship proceeding
- (2) Name of decedent and last place of residence
- (3) Date and place of death
- (4) Names and addresses of all interested parties as determined by the order and judgment appointing guardian
- (5) Names of personal representatives (i.e. executor, trustee)

iii) Service

(1) Service must be made upon:

- (a) local department of social services
- (b) appointed or nominated personal representative
- (c) the public administrator

(2) By regular mail and certified mail, return receipt requested

(3) Peter Falk's Law (A.3461-C/S.5154-C)

- (a) Amendment to MHL § 81.16(c)
  - (i) Adding paragraphs (4) – (6)
  - (b) Signed by Governor Andrew M. Cuomo on July 21, 2016, effective immediately
    - (i) Order and judgment must list individuals who shall receive notice of death and funeral arrangements, notice of transfer to a medical facility, and persons entitled to visitation

iv) File original with proof of service within 20 days of IP's death

c) Ex Parte Order Permitting Final Account and Petition

- i) Order is returned with a date by which the final account must be filed with the county clerk (usually approximately 60 days)
- ii) This is not a form that the guardian submits; this order is created by the court

d) Notice of Motion for Judicial Settlement of Final Account

- i) MHL § 81.33. Intermediate and Final Account
- ii) The process must be commenced within 150 days of the death of the IP

iii) Service

(1) Service must be made upon:

- (a) Persons entitled to notice under MHL §81.16(c)
- (b) Administrator/Executor of IP's estate
- (c) Administration of facility at which IP resides, if applicable
- (d) Mental Hygiene Legal Services, if IP was residing in a facility

iv) Contents

- (1) Does not require information regarding personal needs of IP
- (2) Value of guardianship assets at death
- (3) Claims, debts or liens against property – approximate value
  - (a) including Medicaid liens, tax liens, administrative costs

v) Sworn to before a notary

vi) Medicaid may submit a claim at this point

vii) Court may ask additional questions

e) Order Settling Final Account

i) Suffolk County – accepts the proposed order with the Notice of Motion and Final Account

- (1) Other counties – notice of settlement with proposed order
  - (a) Submit after motion date in case there are objections

ii) MHL § 81.34. Decree on filing instruments approving accounts

- (1) Limited authority for guardian to pay “time sensitive” expenses including estimated estate and incomes taxes, funeral and burial costs

iii) Matter of Shannon, 25 N.Y.3d 345, 12 N.Y.S.3d 600, 34 N.E.3d 351 (2015)

(1) Facts: Nursing facility and department of social services each had a claim against decedent for medical services provided. There had been an order by the Court presiding over the guardianship to pay the nursing facility but the guardian did not make the payment prior to the death of the IP.

(2) Issue: “whether Mental Hygiene Law § 81.44 permits a guardian to retain property of an incapacitated person after the incapacitated person has died for the purpose of paying a claim against the incapacitated person that arose before such person’s death.”

(3) Holding: a guardian is not permitted to retain property for the purpose of paying a claim that arose before death.

(a) Guardian may only pay administrative expenses, not claims against the estate

iv) In re Glener, 202 A.D.2d 503, 609 N.Y.S.2d 26, 1994 N.Y. App. Div. LEXIS 2384 (N.Y. App. Div. 2d Dep't 1994)

(1) Guardian cannot pay judgment creditors without a court order

(2) Guardian is responsible for IP’s well-being while IP is alive

(3) After death, guardian’s job is to “wind up” the guardianship

v) In re Saphier, 167 Misc. 2d 130, 637 N.Y.S.2d 630, 1995 N.Y. Misc. LEXIS 649 (N.Y. Sup. Ct. 1995)

(1) Valuable violin stolen from IP. Guardian was cooperating with law enforcement to recover the item.

(2) Guardianship may be extended beyond the death of the IP if doing so is necessary to protect the property and estate of the IP.

- (3) Guardian has a duty to “preserve, protect, and account for” the assets of the IP
  - (a) MHL § 81.21. Powers of guardian; property management
- f) Affidavit for Order Discharging Guardian and Surety
  - i) Details distributions made from the guardianship assets and actions taken by guardian
    - (1) Provide canceled checks – this is necessary to formally close the bond
    - (2) Closing bank statement
  - ii) Surrender of assets to personal representative
    - (1) In re Estate of Baron, 180 Misc. 2d 766, 691 N.Y.S.2d 882, 1999 N.Y. Misc. LEXIS 226 (N.Y. Sur. Ct. 1999)
      - (a) Guardian must turn over assets at the time of appointment of the personal representative of the estate
      - (b) Hold back some money from personal representative to pay attorney fees and guardian commissions – details of this are listed in the affidavit
      - (c) Turning over money to public administrator
        - (i) If no personal representative has been appointed within 150 days of death, the funds are to be turned over to the public administrator of the county where IP resided at time of death. MHL § 81.44(d)
- g) Order Discharging Guardian and Surety After Final Account
  - i) Bond Premiums
    - (1) Sureties liability does not stop until order discharging is signed
      - (a) Covers issues that may arise during the review of the final account
    - (2) Premiums are due until discharge of surety unless language is added to the discharge order -

- (a) the surety is discharged retroactive to the date of death of the IP (or until the turnover of assets)

2) Death or Incapacity of the Guardian

a) MHL § 81.37. Resignation or suspension of powers of guardian

- i) Court may allow guardian to resign on notice of motion with submission of final account

b) MHL § 81.38. Vacancy in office

- i) Interim guardian – 90 days or until final account is filed and successor appointed

- (1) Specific powers enumerated in order appointing

- ii) Standby or successor was named in original order

- (1) Can act as guardian immediately

- (2) Must be confirmed by court within 60 days

- (3) Court *may* hold a hearing

- (a) Upon petition of person with standing under MHL § 81.11

c) MHL § 81.33. Report filed is in same form as annual accounting with testimony regarding personal needs

- i) Submitted by personal representative of guardian's estate if guardian is deceased

- (1) Date by which report is due and name of person responsible for submission is by court order

- ii) Service upon same persons as described above

- iii) Court may appoint counsel to IP or a referee to investigate



3) Failure to Comply

- a) MHL 81.44(g) – any person entitled to notice of proceeding has standing to bring a petition to compel guardian to submit final account

4) Additional Resources:

- a) <http://www.nycourts.gov/courts/index.shtml>
  - i) find the appropriate County Court and search for forms specific to that county



**FORMS FOR CLOSING**

**AN ARTICLE 81**

**GUARDIANSHIP**



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_

-----X  
In the Matter of Final Account of  
(GUARDIAN),  
as Guardian of the Person and Property of  
(IP)  
an Incapacitated Person, now deceased.  
-----X

STATEMENT OF DEATH  
Index No.

(GUARDIAN), the Guardian of (IP), informs the necessary parties of the death of the  
incapacitated person, pursuant to MHL § 81.44.

(IP) resided at \_\_\_\_\_ and died on \_\_\_\_\_ at \_\_\_\_\_

The names and addresses of all parties entitled to notice pursuant to MHL § 81.16(c)(3) are  
as follows:

[LIST NAMES AND ADDRESSES HERE]

Dated: \_\_\_\_\_  
(GUARDIAN)

STATE OF NEW YORK     )  
  ) ss.:  
COUNTY OF \_\_\_\_\_ )

On the \_\_\_ day of \_\_\_\_\_, 20\_\_\_, before me personally appeared (GUARDIAN)  
to me known to be the individual described in and who executed the above statement and  
acknowledged to me that she executed the same.

Dated: \_\_\_\_\_  
Notary Public



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_

-----X  
In the Matter of Final Accounting of  
(GUARDIAN),  
As Guardian of the Person and Property of  
(IP),  
An incapacitated person, now deceased  
-----X

Index No.  
  
NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the Order of this Court dated and filed herein the \_\_\_\_\_, the Final Accounting of (GUARDIAN) as Guardian of the property which was filed in the Office of the Clerk of the County of \_\_\_\_\_ on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, the undersigned will move this Court to be held at the Supreme Court, [INSERT COURT ADDRESS], on the \_\_\_\_\_, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order judicially settling, determining and for payment of the outstanding bills and other claims made against the assets of the incapacitated person as more fully set forth in said accounting, and granting such other and further relief as to the Court may seem just and proper.

Yours, etc.

\_\_\_\_\_  
By: ( ATTORNEY FOR GUARDIAN)  
(ATTORNEY ADDRESS)  
(ATTORNEY PHONE NUMBER)





SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_

-----X

In the Matter of the Final Account  
of \_\_\_\_\_,  
Guardian of the Property  
of \_\_\_\_\_

**FINAL ACCOUNT**

Index No. \_\_\_\_\_

An Incapacitated Person.

-----X

I, \_\_\_\_\_, with offices at \_\_\_\_\_, as Guardian  
for the above named person, do hereby make, render, and file the following Final Account.

On the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, I was appointed Guardian of the Property of  
\_\_\_\_\_ by Order of Supreme Court, \_\_\_\_\_ County. My commission to  
act was filed on \_\_\_\_\_ and I have continued to act as such fiduciary since that date.

Pursuant to the Order I filed a bond in the amount of \$\_\_\_\_\_ with the Clerk of \_\_\_\_\_  
County. The bond is still in force and effect with the [INSERT SURETY NAME], with offices in  
the State of New York, as Surety. There has been no change in the Surety thereon, and the Surety is  
in good financial standing as when the bond was given.

The following is a true account of all receipts and all disbursements from \_\_\_\_\_ through  
\_\_\_\_\_.

STATE OF NEW YORK     )  
  ) SS.:  
COUNTY OF \_\_\_\_\_ )

I, \_\_\_\_\_, being duly sworn, say I am the Guardian for Property Management of the above named person. The foregoing account and inventory contains, to the best of my knowledge and belief, a full and true statement of all my receipts and disbursements on account of said person; and of all money and other personal property of said person which have come into my hands or have been received by any other persons or by my order or authority since my appointment, and of the value of all such property, together with a full and true statement and account of the manner in which I have disposed of the same and of all property remaining in my hands at the time of filing this account and inventory; also a full and true description of the amount and nature of each investment made by me since my appointment. I do not know of any error or omission in the account and inventory to the prejudice of said person.

DATED: \_\_\_\_\_

Sworn before me on this  
day of \_\_\_\_\_, 2016

\_\_\_\_\_  
Notary Public

At a Special Term Part VI of the Supreme Court of the State of New York, held in the County of \_\_\_\_\_ at

\_\_\_\_\_,  
New York, on the \_\_\_\_ day of \_\_\_\_\_, 2016

PRESENT:

HON. \_\_\_\_\_

JUSTICE

-----X  
In the matter of the Final Accounting of  
(GUARDIAN)  
As Guardian of the Person and Property  
of (IP)  
an incapacitated person, now deceased.  
-----X

ORDER SETTLING FINAL ACCOUNT  
Index No.

(GUARDIAN), residing at \_\_\_\_\_, as Guardian of the person and property of (IP) an incapacitated person, having presented and filed a petition dated and verified the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ , requesting leave to render and file and have judicially settled h final accounting of proceedings as such Guardian having filed a final accounting of h\_\_ proceedings pursuant to the order of this Court made the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ in the office of the Clerk of the County of \_\_\_\_\_, and notice of these proceedings having been given to:

(LIST PARTIES ENTITLED TO NOTICE)

NOW, upon reading and filing the aforesaid petition and Order of the Court, the final account, dated and verified the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, the affidavit of \_\_\_\_\_, sworn to the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ evidencing service of the foregoing papers, it is

ON motion of \_\_\_\_\_,

ORDERED that the final account of proceedings of \_\_\_\_\_ as Guardian of (IP), an incapacitated person, be and the same hereby is judicially settled, passed and allowed as rendered and filed according to the following summary statement thereof;

SUMMARY STATEMENT

Principal Received on Appointment	\$ _____
Additional Principal Received During Period	\$ _____
Conversion to Principal	\$ _____
Income	\$ _____
Total Receipts	\$ _____
Disbursements	\$ _____
Charge to Guardian	\$ _____
Cash and property on hand	\$ _____

And it is further

ORDERED that the said (GUARDIAN) be and he/she hereby is allowed the sum of \$\_\_\_\_as and for h\_ legal commissions as Guardian of the within named incapacitated person and it is further

(OMIT PRECEDING PARAGRAPH IF GUARDIAN WAIVES COMMISSION)

(Use any of the following ORDERED paragraphs, number 1-11, as applicable)

ORDERED that \_\_\_\_\_, Esq. be and he/she is allowed the sum of \$\_\_\_\_\_ as and for his/her) legal services and disbursements rendered in the within proceeding.

ORDERED that \_\_\_\_\_ , Guardian ad Litem herein be and he/she hereby is allowed the sum \$\_\_\_\_\_ as and for a fee for the services rendered herein.

ORDERED that (GUARDIAN), pay to \_\_\_\_\_, Esq., Referee herein, the sum of \$\_\_\_\_\_ which sum is allowed to h\_ for h\_ services and disbursements and an

additional sum of \$\_\_\_\_\_ to reimburse said Referee for h\_ fee in reviewing the annual accounting for the period ending (date) which accounting had been reviewed by the Referee but for which accounting no order confirming the Report of Referee had been entered previously herein, which sum the (GUARDIAN) shall pay from the funds of the said incapacitated person in h\_ hands as Guardian and it is further

ORDERED that the (GUARDIAN) be and he(she) hereby is directed to pay to the DIRECTOR OF \_\_\_\_\_ STATE HOSPITAL the sum of \$\_\_\_\_\_ to be deposited and used for a burial fund for the within named incapacitated person.

ORDERED that the (GUARDIAN) be and he(she) hereby is directed to pay to the DIRECTOR OF \_\_\_\_\_ STATE HOSPITAL the sum of \$\_\_\_\_\_ to be deposited and used as a luxury fund for the use and benefit of the within named incapacitated person and disbursed at a rate of not more than \$\_\_\_\_\_ per month

ORDERED that in the event that there is money remaining on deposit in the aforesaid luxury fund upon the death of the incapacitated person the DIRECTOR OF \_\_\_\_\_ STATE HOSPITAL be and he(she) hereby is authorized to pay same to the OFFICE OF MENTAL HEALTH OF THE STATE OF NEW YORK on account of any monies due and owing for the care and maintenance of the within named incapacitated person and such payment shall be made through the office of the Attorney General of the State of New York, 120 Broadway, New York, New York 10271.

ORDERED (provide for payment of any other fees or claims allowed)(Separate paragraph for each payment.)

ORDERED that the balance of \$\_\_\_\_\_ remaining in the hands of the (GUARDIAN) plus accrued interest, if any, and less the amounts awarded herein be paid over by the said

(GUARDIAN) to the OFFICE OF MENTAL HEALTH OF THE STATE OF NEW YORK toward liquidation and payment of the amount due for the past care and maintenance of the within named incapacitated person and such payment shall be made through the Office of the Attorney General of the State of New York, 120 Broadway, New York, New York 10271.

ORDERED that the balance remaining in the hands of the Guardian plus accrued interest, if and any, and less the amounts awarded herein be paid over by the said Guardian to the \_\_\_\_\_ COUNTY DEPARTMENT OF SOCIAL SERVICES toward liquidation and payment of the amount due for the past care and maintenance of the within named incapacitated person and such payment shall be made through the office of the \_\_\_\_\_ County Attorney's Office, with offices at \_\_\_\_\_, New York.

ORDERED that the balance remaining in the hands of the (GUARDIAN) consisting of (list cash, securities, property, etc.) plus accrued interest, if any be turned over by the (GUARDIAN) to \_\_\_\_\_ as (Administrator)(Executor) of the Estate of the within named deceased incapacitated person.

ORDERED that the balance remaining in the hands of the (GUARDIAN), consisting of (list cash, securities, property, etc.) plus accrued interest, if any, be turned over and restored to the former incapacitated person .

ORDERED that the balance remaining in the hands of the (GUARDIAN) plus accrued interest, if any to be turned over to the official representative of the Estate of the deceased incapacitated person, or, if no official representative is appointed within \_\_\_\_\_ days, the (GUARDIAN) is directed to turn over the funds to the \_\_\_\_\_

County Public Administrators office, with offices at \_\_\_\_\_, as the administrator of the Estate of (IP) obtain a receipt therefore

ORDERED that upon filing receipts, releases or cancelled checks evidencing compliance with the provisions of this order, as ex parte order SHALL be entered discharging the (GUARDIAN) and cancelling (his)(her) bond.

ENTER IN \_\_\_\_\_ COUNTY

---

J.S.C.





COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_

-----X

In the Matter of the Final Account of  
(GUARDIAN),

Guardian of the Person and Property of  
**(IP),**  
An Incapacitated Person

-----X

Index No.  
AFFIDAVIT FOR ORDER  
DISCHARGING  
GUARDIAN AND SURETY

STATE OF NEW YORK    )  
  ) ss.:  
COUNTY OF \_\_\_\_\_ )

I, (GUARDIAN), residing at \_\_\_\_\_, as Guardian  
of (IP), being duly sworn, deposes and says:

1.     After submission of the final account I paid \_\_\_\_\_ the  
sum of \_\_\_\_\_ for the bond premium. This left a balance in the Guardianship  
account of \$\_\_\_\_\_.

2.     Pursuant to the Order Settling Final Account dated \_\_\_\_\_ I paid the  
following expenses:

- a.     (ATTORNEY FOR GUARDIAN) the sum of \$\_\_\_\_\_ as and for  
          their legal services and disbursements.
- b.     (GUARDIAN) the sum of \$\_\_\_\_\_ as and form my legal  
          commissions as Guardian.

3.     The balance remaining in the Guardianship was paid over to the Estate of  
\_\_\_\_\_.

4.     Attached as Exhibit A is a copy of the closing statement and cancelled  
evidencing payment of the foregoing expenses.

WHEREFORE, your affiant requests that this Court discharge myself as Guardian and \_\_\_\_\_ Company as the Surety retroactive to \_\_\_\_\_ the date of death of \_\_\_\_\_ and for such other and further relief as this Court deems just and proper.

DATED: \_\_\_\_\_

\_\_\_\_\_

Sworn to before me this  
day of \_\_\_\_\_, 2016.

\_\_\_\_\_  
Notary Public

At a Special Term Part VI of the  
Guardianship Part of the Supreme Court of  
the State of New York, held in and for the  
County of \_\_\_\_\_ at  
\_\_\_\_\_, New York  
on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

PRESENT:

HON. \_\_\_\_\_  
Justice

-----X

Index No.

In the matter of the Final Account of  
(GUARDIAN),

Ex-Parte Order Discharging  
Guardian After Final Account

As Guardian of the Person and Property of  
(IP),  
An incapacitated person, now deceased

-----X

(GUARDIAN), as Guardian of the person and property of (IP), having complied with the prior Order of this Court dated the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, judicially settling the final account and having submitted, herewith, a copies of the cancelled checks showing disposition of the assets pursuant to said order;

NOW, on motion of \_\_\_\_\_, it is

ORDERED, that said (GUARDIAN), Guardian of (IP) is hereby discharged from all liability in connection with all matters embraced in the said account an it is further,

ORDERED, that \_\_\_\_\_, the Surety on the Guardian/trustee bond is discharged from all liability in connection with all matters embraced in the said account retroactive to \_\_\_\_\_ the date of death of \_\_\_\_\_.

ENTER IN \_\_\_\_\_ COUNTY

\_\_\_\_\_  
J.S.C.

