

TRACK 2
Using the CPLR:
Advanced Practice in Article 81 Guardianship

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**USING THE CPLR:
ADVANCED PRACTICE IN ARTICLE 81 GUARDIANSHIP**

*Presentation to the Elder Law and Special Needs Section of the New York State Bar Association
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PURPOSE OF ARTICLE 81

In enacting Article 81 of New York State’s Mental Hygiene Law, the legislature declared:

The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desire of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person’s life.

N.Y. Mental Hygiene L. § 81.01. In accordance with this purpose, Article 81 is the least restrictive means of guardianship, and “[a]ny guardian appointed under this article shall be granted only those powers which are necessary to provide for personal needs and/or property management of the incapacitated person in such a manner as appropriate to the individual and which shall constitute the least restrictive form of intervention . . .” N.Y. Mental Hygiene Law § 81.02(a)(2).

APPOINTING A GUARDIAN

The Court must determine: (1) “the appointment is necessary to provide for the personal needs of the[e] person”; and (2) the person either (a) agrees to the appointment, or (b) is incapacitated. See N.Y. Mental Hygiene L. § 81.02(a).

Incapacity depends on a showing, by clear and convincing evidence, that a “person is likely to suffer harm because: (1) the person is unable to provide for personal needs and/or property management; and (2) the person cannot adequately understand and appreciate the nature and consequences of such inability.” See N.Y. Mental Hygiene L. § 81.02(b). This showing consists of a number of components, including a required court evaluator report, the resources available to the allegedly incapacitated person, and the functional level and limitations of a person. See N.Y. Metal Hygiene L § 81.02(c)-(d).

JURISDICTION & VENUE

JURISDICTION

Pursuant to N.Y. Mental Hygiene L. § 81.04:

If after a hearing or trial in accordance with the provisions of this article it is determined that relief under this article is necessary, the supreme court, and the county courts outside the city of New York, shall have the power to provide the relief set forth in this article:

1. for a resident of the state;
2. for a nonresident of the state present in the state;
3. for a nonresident of the state pursuant to section 81.18¹ of this article.

Notwithstanding the provisions of subdivision (a) of this section, when it appears in any proceeding in the surrogate's court that a person interested in an estate is entitled to money or property as a beneficiary of the estate, or entitled to the proceeds of any action as provided in section 5-4.1 of the estates, powers and trusts law, or to the proceeds of a settlement of a cause of action brought on behalf of an infant for personal injuries, and that the interested person is a resident of, is physically present, or has any property in, the county in which the proceeding is pending and is allegedly incapacitated with respect to property management under the provisions of this article, and the surrogate's court is satisfied after a hearing or trial in accordance with the provisions of this article that the interested person is incapacitated with respect to property management, the surrogate's court shall have the power to order relief for that person with respect to property management in accordance with the provisions of this article.

See *In re Verna HH.*, 756 N.Y.2d 300 (App. Div. 2003) (trial court erred in dismissing underlying petition based on Petitioner's lack of property in the state, as mere physical presence is all that is required).

See *In re Vaneria*, 712 N.Y.2d 221 (App. Div. 2000) (petition dismissed because the alleged incapacitated person resided in MA and was not physically present nor did they own property within the state).

See *In re Mary S.*, 651 N.Y.2d 81 (App. Div. 1996) (judgment affirmed because although the AIP resided in Maryland, she had personal connections and property in the state).

VENUE

An Article 81 proceeding shall be brought "in the supreme court within the judicial district, or in the county court of the county in which the person alleged to be incapacitated resides, or is

¹ "Where the person alleged to be incapacitated is not present in the state and a guardian, by whatever name designated, has been duly appointed pursuant to the laws of any other country where the person alleged to be incapacitated resides to assist such person in property management, the court in its discretion, may make an order appointing the foreign guardian under this article with powers with respect to property management within this state on the foreign guardian's giving such security as the court deems proper." N.Y. Mental Hygiene L. § 81.18.

physically present, or in the surrogate’s court having jurisdiction pursuant to subdivision (b) of section 81.04 of this article.” See N.Y. Mental Hygiene L. § 81.05(a). If the person alleged to be incapacitated lives, or is cared for, in a facility, then the location of the facility is considered the proper venue. See id. If the person alleged to be incapacitated cannot be located or does not live in the state, then the location of his/her property is considered the proper venue. See id.

Generally, a proceeding to modify a prior order shall be brought in the court where the prior order was issued, unless the incapacitated person lives, or is cared for, in a facility – under those circumstances, the proceeding should be brought where the facility is located. See N.Y. Mental Hygiene L. § 81.05(b).

For either type of proceeding, if the facility’s location is inconvenient, an interested party may move to change the venue. See N.Y. Mental Hygiene L. § 81.05.

See *In re Davis*, 866 N.Y.S.2d 91 (Sup. Ct. Queens Cty. 2008) (venue improper because alleged incapacitated person lived in Queens County in the Veteran’s Home).

See *In re S.A.W.*, 841 N.Y.S.2d 823 (Sup. Ct. Rockland Cty. 2007) (change of venue improper because the petitioner failed to sustain burden of establishing convenience of material witnesses nor that the ends of justice would be promoted by a change of venue).

WHO COMMENCES THE PROCEEDING?

Article 81 proceedings may be brought by seven (7) categories of individuals:

1. The person alleged to be incapacitated (the “AIP”). See *In re Kufeld*, 889 N.Y.S.2d 882 (Sup. Ct. Bronx Cty. 2009) (AIP commenced the proceeding via self-petition to have a guardian appointed to manage his personal needs and property).

2. The presumptive distributee of the AIP, *i.e.*, any person entitled to take or share in the property of a decedent under the statutes governing descent and distribution.

3. The executor or administrator of an estate of which the AIP is or may be a beneficiary. See *In re Curran*, 781 N.Y.S.2d 334 (App. Div. 2004) (both the preliminary executor of the estate and the sole beneficiary of the estate were proper parties to petition).

4. The trustee of a trust for which the AIP is or may be the grantor or beneficiary.

5. The individual with whom the AIP resides.

6. A person (including a corporation, public agency, social services, etc.) “otherwise concerned with the welfare” of the AIP. See *In re Azzi*, 36 N.Y.S.3d 336 (App. Div. 2016) (petitioner’s adult siblings are persons otherwise concerned with the welfare of the AIP).

7. The CEO of a facility where the AIP is a patient or resident. See *In re C.K.*, 839 N.Y.S.2d 432 (Sup. Ct. Nassau Cty. 2007) (hospital where the AIP is admitted is an entity that can initiate the proceedings).

COMMENCING THE PROCEEDING

“A proceeding under [Article 81] shall be commenced upon the filing of a petition.” See N.Y. Mental Hygiene L. § 81.07(a).

ORDER TO SHOW CAUSE

*How Should the Order to Show Cause Look and
What Information Should it Contain?*

The Order to Show Cause must be written in: (1) large type; (2) plain language; and (3) in a language other than English if necessary to adequately inform the alleged incapacitated person (the “Person”) of her/his rights. See N.Y. Mental Hygiene L. § 81.07(c).

The Order to Show Cause must include: (1) the date, time, and hearing of the Petition; (2) a clear, easily readable statement of the Person;² (3) the name, address, and phone number of the court evaluator;³ (4) the name, address, and phone number of an appointed attorney, if any; (5) a list of the powers the guardian would have if the Petition were granted; and (6) a legend in size 12 or larger, bold, double-spaced type.⁴ See N.Y. Mental Hygiene L. § 81.07(c)-(d).

*What Does the Court Do Upon Receipt of the Order
to Show Cause?*

1. Set the date on which the Order to Show Cause will be heard – no more than twenty-eight (28) days from date of signing Order (more or less for good cause shown);
2. List the name, address, and phone number of the Court Evaluator in the Order;
3. Require the Order to be served, with a copy of the Petition and supporting papers, on: (a) Alleged Incapacitated Person; (b) Court Evaluator; and (2) Counsel for Alleged Incapacitated Person; and
4. Require Notice of the Proceeding and a Copy of the Order to Show Cause to individuals identified in N.Y. Mental Hygiene L. § 81.07(g)(1).

See N.Y. Mental Hygiene L. § 81.07(b).

A sample Order to Show Cause satisfying these requirements is attached hereto as Exhibit A .

VERIFIED PETITION

The Petition must be verified under oath. See N.Y. Mental Hygiene L. § 81.08(a).

² See N.Y. Mental Hygiene L. § 81.11.

³ See N.Y. Mental Hygiene L. § 81.09.

⁴ See N.Y. Mental Hygiene L. § 81.07(d).

Verification is a written statement under oath that asserts the truth of allegations in a pleading.⁵

The Verified Petition must include⁶, at least, the following:

1. Name, address, and phone number of:
 - a. AIP;
 - b. Anyone with whom AIP resides, and of anyone on whom service of the Order to Show Cause will be made;
 - c. Presumptive distributees of AIP;
 - d. Petitioner; and
 - e. Any proposed Guardian or Standby Guardian.
2. Description of AIP's functional level;
3. Powers sought with respect to AIP's personal needs – specific, particularized, duration;
4. Powers sought with respect to AIP's property management needs – specific, particularized, duration;
5. Approximate value and description of financial resources of AIP;
6. Nature and amount of claims, debts, etc. of AIP;
7. Relief sought pursuant to N.Y. Mental Hygiene L. § 81.23; and
8. Available resources considered by Petition and opinion as to sufficiency and reliability.

See *In re Schneider*, 852 N.Y.S.2d 769 (App. Div. 2008) (petition dismissed for lack of specific factual allegations of personal actions or financial transactions demonstrating capacity).

See *In re Buffalino*, 960 N.Y.S.2d 627 (Sup. Ct. Suffolk Cty. 2013) (petition dismissed because it did not allege the unavailability of other alternatives or resources).

A sample Verified Petition satisfying these requirements is attached hereto as Exhibit B .

⁵ See N.Y. C.P.L.R. § 3020 (2018).

⁶ See N.Y. Mental Hygiene L. § 81.08(a).

SERVICE V. NOTICE

*The Order to Show Cause (etc.) must be served on
AIP, AIP's attorney, and the Court Evaluator.*⁷

Service Methods for AIP⁸:

1. Personal Delivery to the AIP, not less than 14 days prior to the hearing date of the Order to Show Cause; or
2. Alternate method of service if the petitioner demonstrated to the court's satisfaction that the AIP has refused to accept service

Service Methods for AIP's attorney and Court Evaluator⁹:

1. By facsimile; or
2. Personal delivery; or
3. Overnight delivery service within three business days following the appointment of the Court Evaluator and the appearance of the AIP's attorney

In re Hammons 645 N.Y.S.2d 392 (established the principles for determining what constitutes refusal of service; same as CPLR 308 some type of affirmative act which evidences a deliberate attempt to resist service)

*Notice of the Proceeding (etc.) must be mailed to
the following, no less than fourteen (14) days prior
to the Hearing Date*¹⁰:

- ❖ Spouse of AIP;
- ❖ Parents of AIP;
- ❖ Adult Children of AIP;
- ❖ Adult Siblings of AIP; and
- ❖ Anyone with whom AIP Resides; or
- ❖ If none of the above, then "at least one and not more than three of the living relatives of [AIP] in the nearest degree of kinship who are known to Petitioner or whose existence and address can be ascertained by Petitioner with reasonably diligent efforts."

⁷ See N.Y. Mental Hygiene L. § 81.07(d).

⁸ See N.Y. Mental Hygiene L. § 81.07(e).

⁹ *Id.*

¹⁰ See N.Y. Mental Hygiene L. § 81.07(g).

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- ❖ In addition to the above, others enumerated in N.Y. Mental Hygiene L. § 81.07(g)(1)(iii)-(viii) – very fact specific.

See *In re Gabr*, 961 N.Y.S.2d 736 (Sup. Ct. Kings Cty. 2013) (petition dismissed for failure to provide notice to the spouse of the AIP as spouse and as a person with whom the AIP resided).

NOTICE OF APPEARANCE

A sample Notice of Appearance is attached hereto as **Exhibit C**.

THE PROCEEDING

DISCLOSURE DEVICES

After commencement of an action, there are seven ways to obtain information under the CPLR:

- ❖ Depositions upon oral questions;
 - ❖ Depositions without the state upon written questions;
 - ❖ Interrogatories;
 - ❖ Demands for addresses;
 - ❖ Discovery and inspection of documents or property;
 - ❖ Physical and mental examinations; and
 - ❖ Requests for Admission.
- See N.Y. C.P.L.R. § 3102(a).

If a party's disclosure device causes "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice," then the party receiving the disclosure request may move for a protective order. See N.Y. C.P.L.R. § 3103(a).

Subpoena Duces Tecum

A subpoena duces tecum may be served on any person once an action has been commenced. See N.Y. C.P.L.R. § 3120(1). The subpoena may request the ability to inspect, copy, test, or photograph designated document and things. See N.Y. C.P.L.R. § 3120(1)(i).

The subpoena duces tecum must specify:

1. The time (not less than twenty (20) days after service thereof), place, and manner of making the inspection, etc.;
2. The items to be inspected, etc.; and
3. A description of the items, with reasonable particularity.

See N.Y. C.P.L.R. § 3120(2).

The subpoena duces tecum must be served on all parties. See N.Y. C.P.L.R. § 3120(3). Service is the same for the subpoena as it is for a summons. See N.Y. C.P.L.R. § 2303(a).

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Within five (5) days of compliance therewith, the requesting party must notify all parties that there has been a production and provide an opportunity for them to inspect, etc. See N.Y. C.P.L.R. § 3120(3).

If a party wishes to issue a subpoena duces tecum to a public entity, such as a department of the state, then a **motion** must be made, on notice to the department, to a judge. See N.Y. C.P.L.R. §§ 2307; 3120(4).

A sample subpoena duces tecum and order to a department of the state is attached hereto as
Exhibit D.

Failure to comply with a judicial subpoena is punishable as a contempt of court. See N.Y. C.P.L.R. § 2308(a). If a party fails to comply with any other subpoena, then the issuing party must move in the supreme court to compel compliance and obtain relief. See N.Y. C.P.L.R. § 2308(b)(1).

SEALING ORDERS

Governing Rule: 22 N.Y.C.R.R. § 216

Part 216 of the Uniform Rules for the New York State Trial Courts permits Courts to seal court records in civil actions in the trial courts for good cause shown:

Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

For purposes of this rule, “court records” shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

See 22 N.Y.C.R.R. § 216.1.

How to Obtain a Sealing Order

Before engaging in motion practice, a party desiring a Sealing Order should meet and confer with opposing counsel. Often, these Orders may be stipulated to by the Parties, requiring only a “So Ordered” by the Judge.

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If a stipulation cannot be reached, then a party desiring a Sealing Order should make a motion comprised of: (1) a notice of motion; (2) an affidavit explaining why there is good cause for a sealing order; (3) a memorandum of law explaining why there is good cause of a sealing order; and (4) a proposed sealing order.

See *In re A.J.*, 781 N.Y.S.2d 623 (Sup. Ct. Kings Cty. 2004) (good cause to seal file in guardianship proceeding found where AIPs and potential witnesses were afraid to speak to court evaluator for fear of retribution from the AIPs abusive son).

See *In re Astor*, 824 N.Y.S.2d 755 (Sup. Ct. N.Y. Cty. 2006) (file sealed only with respect to medical, mental health and nursing records pertaining to AIP and all of the court examiner's reports).

A sample Sealing and Confidentiality Order is attached hereto as Exhibit E .

KEY RULES OF EVIDENCE

In an Article 81 proceeding, any party has the right to: (1) present evidence; (2) call witnesses, including expert witnesses; (3) cross-examine witnesses; and (4) be represented by counsel of his or her choice. See N.Y. Mental Hygiene L. § 81.11. “The court may, for good cause shown, waive the rules of evidence.” See N.Y. Mental Hygiene L. § 81.12(b).

See *In re Mary WW.*, 4 N.Y.S.3d 381 (App. Div. 2015) (good cause for relaxing rules of evidence and considering hearsay where AIP suffered from severe dementia and could not attend the modification hearing).

See *In re Marie H.*, 811 N.Y.S.2d 708 (App. Div. 2006) (§ 81.12(b) only applies in uncontested proceedings).

If a court does not waive the rules of evidence, a few specific provisions arise frequently in the context of Article 81 proceedings: (1) hearsay; (2) the Dead Man Statute; and (3) privilege (discussed infra).

Hearsay

An out of court statement being offered for the truth of the matter asserted. See *People v. John*, 52 N.E.3d 1114 (N.Y. 2016).

N.Y. C.P.L.R. § 4518. Business Records Exception: Any writing or record, whether in the form of an entry in a book, a memorandum or record of any act, transaction or occurrence, shall be admissible in evidence in proof of that act if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it.

N.Y. C.P.L.R. § 4520. Certificate or Affidavit of Public Officer. A certificate or affidavit to a fact ascertained or an act performed, made and filed or deposited in a public office of the state by a public officer, as required or authorized by a special provision of law, in the course of his official duty, is prima facie evidence of the facts stated therein.

Dead Man's Statute

N.Y. C.P.L.R. § 4519. Personal transaction or communication between witness and decedent or mentally ill person. A person deriving his title or interest from, through or under a deceased person or mentally ill person, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or mentally ill person shall not be examined as a witness in his own behalf or interest, except where the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication.

PRIVILEGE

Physician Privilege	Psychologist Privilege	Social Worker Privilege
N.Y. C.P.L.R. § 4504	N.Y. C.P.L.R. § 4507	N.Y. C.P.L.R. § 4508
“Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which [s]he acquired in attending a patient in a professional capacity, and which was necessary to enable [her] to act in that capacity.”	“The confidential relations and communications between a psychologist registered under the provisions of [N.Y. Educ. L. § 153] are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall be construed to require any such privileged communications to be disclosed.”	“A person licensed as a licensed master social worker or a licensed clinical social worker under the provisions of [N.Y. Educ. L. § 154] shall not be required to disclose a communication made by a client, or his or her advice given thereon, in the course of his or her professional employment . . .”
<u>See</u> In re BM, 19 N.Y.S.3d 393 (N.Y. Cty. Ct. 2015) (the physician-patient privilege applies to Article 81).	<u>See</u> People v. Rivera, 33 N.E.3d 465 (N.Y. 2015) (under Article 81 a Court Evaluator may apply for permission to inspect medical and psychiatric records of the AIP)	<u>See</u> In re Allers, 961 N.Y.S.2d 356 (Sup. Ct. Dutchess Cty. 2012) (by affirmatively placing his mental condition in issue by opposing the petition for the appointment of a guardian, the AIP has waived privilege under §4508)

The court evaluator may apply to the court for permission to inspect these typically privileged records. See N.Y. Mental Hygiene L. § 81.09(d).

EXHIBIT A

SAMPLE ORDER TO SHOW CAUSE

At an IAS part of the Supreme Court of
the State of New York held in and for
the County of Onondaga at the
Onondaga Supreme and County Court,
on the ___ day of _____, 2020

PRESENT: HON.
Justice, Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of
JANE A. DOE,

Petitioner,

v.

For an Order of Appointment of a Guardian for the Person and
Property of
JOHN B. DOE,

An Alleged Incapacitated
Person Pursuant to Article 81
of the Mental Hygiene Law.

**ORDER TO SHOW
CAUSE AND REQUEST
FOR TEMPORARY
RELIEF**

Index No.

RJI No.

IMPORTANT

An application has been filed in Court by JANE A. DOE, who believes you may be unable to take care of your personal needs or financial affairs. JANE A. DOE is asking that someone be appointed to make decisions for you. With this paper is a copy of the application to the Court showing why JANE A. DOE believes you may be unable to take care of your personal needs and financial affairs. Before the Court makes the appointment of someone to make decisions for you, the Court holds a hearing at which you are entitled to be present and to tell the Judge if you

do not want anyone appointed. This paper tells you when the Court hearing will take place. If you do not appear in Court, your rights may be seriously affected.

You have the right to demand a trial by jury. You must tell the Court if you wish to have a trial by jury. If you do not tell the Court, the hearing will be conducted without a jury. The name and address, and telephone number of the clerk of the Court is:

Patricia J. Noll

Onondaga County & City of Syracuse Criminal Courthouse

505 S. State Street Rm. 110, Syracuse, NY 13202

Phone: 315-671-1030

The court will appoint a Court Evaluator to explain this proceeding to you and to investigate the claims made in the application. The Court may give the Court Evaluator permission to inspect your medical, psychological, psychiatric, or financial records. You have the right to tell the Judge if you do not want the Court Evaluator to be given that permission. The Court Evaluator's name, address and telephone number are:

(Name)

(Address)

(Telephone number)

You are entitled to have a lawyer of your choice represent you. If you want the Court to appoint a lawyer to help you and represent you, the Court will appoint a lawyer for you. You will be required to pay the lawyer unless you do not have the money to do so.

NOTICE TO ALLEGED INCAPACITATED PERSON

Pursuant to Article 81 of the Mental Hygiene Law, a hearing will be held on the return date of this Order to Show Cause. At this hearing, you shall have the right to:

1. Present evidence;
2. Call witnesses, including expert witnesses;
3. Cross-examine witnesses, including witnesses called by the Court;
4. Be represented by a lawyer of your choice;
5. Have the hearing conducted in your presence, either at the Courthouse or your residence (if you cannot physically come or be brought to the Courthouse); and
6. Have this case tried by a jury, unless you fail to demand it.

On reading and filing of the annexed Petition of JANE A. DOE, duly verified on the ____ day of January, 2020, from which it appears that JOHN B. DOE, an alleged incapacitated person, residing at 123 Main Street, Rochester, New York, #####, located in the County of Monronondaga, State of New York, is a person likely to suffer harm because he is unable to provide for his personal needs and property management and that he cannot adequately understand and appreciate the nature and consequences of such incapacity,

ORDERED that, JOHN B. DOE, the Alleged Incapacitated Person (“AIP”), **SHOW CAUSE** before a Justice of this Court to be held at Onondaga County & City of Syracuse Criminal Courthouse, 505 S. State Street, Syracuse, NY 13202 at an IAS Part ___ Room ___ on the ___ day of January, 2020, or as soon thereafter as counsel can be heard, why an Order should not be entered:

APPOINTING JANE A. DOE, an appropriate person, Guardian for the Personal Needs and Property Management of JOHN B. DOE, an AIP, upon the Guardian qualifying in accordance with the statutes of the State of New York in such cases made and provided;

AUTHORIZING JANE A. DOE to exercise the following powers on behalf of AIP if the relief sought in the Petition is granted:

A. Authority to take possession and control of all property of AIP, both real and personal, including but not limited to those properties listed in the annexed petition;

B. Authority to apply AIP’s assets and income as necessary for the comfort, support, maintenance and well-being of the alleged incapacitated person;

C. Authority to make reasonable expenditures therefrom for the purpose of providing AIP with necessities or preserving the property of AIP;

D. Authority to provide for the extraordinary expenses in respect to the proper care and maintenance of AIP, and to pay the providers of the same, including physicians, hospital nurses, aides, nursing homes, if any;

E. Authority to pay all just debts of AIP and to protect and account for AIP’s property and financial resources, including but not limited to retroactive payment of any debt to Medicaid;

F. Authority to invest surplus funds in investments eligible by law for the investment of trust funds, to dispose of investments so made and to reinvest the proceeds as so authorized;

G. Authority to maintain, in her own name and official title, any civil judicial proceeding which AIP might have maintained were he competent;

H. Authority to retain counsel provided that any fees paid to such counsel shall be subject to the approval of the Court;

I. Authority pursuant to Section 81.36(e) of the Mental Hygiene Law upon the death of AIP to pay for the reasonable funeral expenses of AIP;

J. Authority upon the death of AIP to pay the bills of AIP, incurred prior to the death of AIP, provided that the guardian would otherwise have had the authority to pay such bills;

K. Such authority as may be granted by any statute of the United States of America or the State of New York to a guardian of the property, conservator, or committee of the property unless any such statute specifically requires the permission of the Court before the exercise of the power granted;

L. Authority to exercise such other powers necessary and sufficient to manage the property and financial affairs of AIP;

M. Authority to pay for the care and maintenance of AIP in accordance with the plan outlined in the petition;

N. Authority to provide for proper living arrangements for AIP and to choose the place of his residence;

O. Authority to determine who will provide personal care or assistance to AIP;

P. Authority to determine who will provide medical care and treatment to AIP;

Q. Authority to access and release all of AIP's confidential medical records in order to provide for his proper medical treatment and power to access and release all of AIP's confidential financial records in order to provide for his continued care and to make any necessary application for governmental and private assistance and to participate in any governmental administrative hearings or other related activities;

R. Authority to consent to or refuse generally accepted routine medical or dental treatment, including administration of medications, if any, consistent with the findings herein and Section 81.15 of the Mental Hygiene Law;

S. Authority to consent to or refuse life sustaining measures including surgery, antibiotics, cardiac resuscitation, respiratory support and artificially administered feeding and fluids, in accordance with AIP's religious and moral beliefs, as known to petitioner;

T. Authority to make decisions regarding AIP's environment and other social aspects of his life;

U. Authority to apply for all government and private benefits including Medicaid, and participate in all related activities including but not limited to governmental administrative agency hearings on behalf of AIP;

V. Authority to determine whether AIP has a will, determine the location of any will and the appropriate persons to be notified in the event of the death of the alleged incapacitated person and in the event of the death of the alleged incapacitated person, to notify those persons

W. Authority to determine whether AIP should travel; and

X. Authority to act with respect to all retirement accounts and retirement assets of AIP, including but not limited to:

i. The authority to apply for all retirement benefits;

- ii. The authority to conduct all retirement benefit transactions
- iii. The authority to apply for all service retirement for AIP;
- iv. The authority to withdraw from or enroll in any retirement plan;
- v. The authority to choose any retirement option and/or death benefit option offered; and

- vi. The authority to file any and all financial institution related paperwork with regard to AIP's retirement plan or death benefit; and

GRANTING Petitioner such other and further relief as this Court may deem just and proper; and it is further

ORDERED that, pending the hearing and determination of the application to appoint a Guardian, JANE A. DOE is appointed Temporary Guardian with the authority to:

- A. Access all bank and financial accounts; and make withdrawals, deposits, and use the account(s) to pay necessary bills of JOHN B. DOE at the Temporary Guardian's discretion. If the financial institution, whether or not specifically named herein, fails or refuses to comply with the direction of the Temporary Guardian, a representative of the financial institution shall appear in Court on the return date to explain its refusal to comply with this Court Order; and

- B. Act with respect to all retirement accounts and retirement assets of JOHN B. DOE, including but not limited to:

- i. Applying for all retirement benefits;
- ii. Conducting all retirement benefit transactions;
- iii. Applying for all service retirement for JOHN B. DOE;
- iv. Withdrawing from or enroll in any retirement plan;
- v. Choosing any retirement option and/or death benefit option offered;

vi. Filing any and all financial institution related paperwork with regard to JOHN B. DOE's retirement plan or death benefit; and

C. Make all medical decisions for JOHN B. DOE.

SUFFICIENT CAUSE APPEARING THEREFORE, it is

ORDERED, that _____ of _____ be and is hereby appointed Court Evaluator herein to investigate the allegations made in the petition, to explain this proceeding to the alleged incapacitated person or to his family or representatives, and to report to the Court, the functional abilities and functional limitations of the alleged incapacitated person in this proceeding, and it is further

ORDERED, that _____ of _____ be and hereby is appointed counsel to represent JOHN B. DOE, in this proceeding, and it is further

ORDERED, that service by personal delivery of a copy of this Order and of the papers upon which it is based upon JOHN B. DOE at least 14 days prior to the return date be deemed good and sufficient service; and it is further

ORDERED, that a copy of this Order to Show Cause and the petition shall be left with a person of suitable age and discretion at the residence of the person alleged to be incapacitated, if he is not served there; and it is further

ORDERED, that service of a copy of this Order and of the papers upon which it is based upon the Court Evaluator and Counsel herein by personal delivery to their offices or by overnight delivery service or by facsimile, within 3 business days of the date of this order or on or before the ____ day of _____, 2020, be deemed good and sufficient; and it is further

ORDERED, that pursuant to Mental Hygiene Law § 81.07 a conformed copy of the Order to Show Cause and a Notice of the Proceeding shall be served by regular mail, not less

than fourteen (14) days prior to the hearing date in the Order to Show Cause to the following:
Jack C. Doe, 123 Oak Street, Albuffalo, New York, #####; Jessica D. Doe, 123 Maple Lane,
Watertutica, New York #####; and City Center Hospital; and it is further

ORDERED, that the Court award fees to be paid from JOHN B. DOE's income/assets as
administrative costs and expenses of the Guardianship Proceeding to Petitioner's Counsel for
legal services rendered and costs/expenses incurred; and it is further

ORDERED, that any Guardian appointed herein shall be ordered to repay/reimburse the
Medicaid program for funds expended to the extent that the income and resources of JOHN B.
DOE exceed the Medicaid eligibility level at the time such assistance was granted; and it is
further

ORDERED, that to the extent JOHN B. DOE is placed or is continued on Medicaid,
ordering all costs and expenses in connection with this proceeding including legal fees, and
nursing home care costs be deemed as administrative costs and expenses of the Guardianship
Proceeding and paid from net available monthly income (NAMI) and/or excess available
resources, as a spend down under Medicaid chronic care budgeting standards; and it is further

ORDERED, that the Court Evaluator be given access to the medical records of AIP,
from City Center Hospital, and be allowed to discuss AIP's medical the medical, psychological
and/or psychiatric records and condition with the medical and social worker and staff at City
Center Hospital and furthermore allow the Court Evaluator access to the financial records that
may be maintained by City Center Hospital and be allowed to discuss with Sutton Park Center's
financial department issues surrounding AIP's financial records and governmental benefits; and
further permission to inspect, review and copy any financial, banking, government, retirement,
legal and other records of AIP, which are in the care and custody of City Center Hospital,

including, but not limited to, his Last Will and Testament, Powers of Attorney/Health Care Proxy, if any contained in AIP's file on the ground that said records and information are likely to assist the Court Evaluator in his or her report to the Court; and it is further

ORDERED, that any appointee herein shall comply with Section 36.3 of the Rules of the Chief Judge by filing OCA Form 830.1 with the Office of the Court Administration and OCA form 830.3 with the appointing Justice. Any subsequent affidavit or affirmation of service submitted to this Court must contain a statement indicating such compliance and be accompanied by a properly completed OCA Form 830.

Dated: January __, 2020

Hon. _____
Justice, Supreme Court

ENTER

EXHIBIT B

SAMPLE VERIFIED PETITION

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of
JANE A. DOE,

Petitioner,

v.

For an Order of Appointment of a Guardian for the Person and
Property of
JOHN B. DOE,

An Alleged Incapacitated
Person Pursuant to Article 81
of the Mental Hygiene Law.

VERIFIED PETITION

Index No.

RJI No.

Petitioner, JANE A. DOE, by and through Counsel, being duly sworn, states as follows:

1. JANE A. DOE, (“Petitioner”) brings this Petition seeking immediate appointment as the Temporary Guardian of JOHN B. DOE’s property and subsequent appointment as Guardian of JOHN B. DOE’s person and for purposes of property management. Throughout this Petition, JOHN B. DOE will be referred to as the Alleged Incapacitated Person (“AIP”). Petitioner requests that she is authorized to act pursuant to her appointment.

2. Petitioner is AIP’s wife. Petitioner resides at 123 Main Street, Rochester, New York, #####, located in the County of Onondaga, State of New York. Petitioner’s telephone number is (____) ____-____.

3. Petitioner has standing to bring this Petition pursuant to New York’s Mental Hygiene Law (“MHL”) § 81.06(a)(2) and (6) as a presumptive distributee of AIP and as a person otherwise concerned with the welfare of the person alleged to be incapacitated.

4. Upon information and belief, no previous application for the relief herein requested has been made to this or any other Court.

ALLEGED INCAPACITATED PERSON

5. AIP is _____ (___) years of age. He was born on _____.

6. AIP's permanent address is 123 Main Street, Rochester, New York, #####, located in the County of Monrotondaga, State of New York.

7. AIP's home telephone number is (____) ____-____.

8. I am AIP's spouse. We have ___ children.

9. AIP's presumptive distributees are Petitioner, and his children, _____.

10. AIP is under no obligation of support with respect to any third party.

11. AIP sustained a heart attack, which has left him severely cognitively impaired (in a coma) and unable to advocate for himself or manage his financial affairs.

BACKGROUND

12. Petitioner is AIP's spouse.

13. On _____, 2019, AIP suffered a massive heart attack leaving him cognitively impaired.

14. AIP's parents are deceased.

15. AIP has an adult son, Jack C. Doe, 123 Oak Street, Albuffalo, New York, #####.

16. AIP has an adult sister, Jessica D. Doe, 123 Maple Lane, Watertutica, New York #####.

17. Petitioner is the only person who visits AIP on a daily basis.

18. Due to the sudden onset of AIP's current condition, he has an immediate need for assistance with his financial affairs requiring a temporary guardian of his property.

AVAILABLE RESOURCES

19. AIP does not have a power of attorney or health care proxy.

20. To Petitioner's knowledge and belief, AIP's estimated financial resources and monthly income are as follows, as of January 2017:

Assets	Ownership	Approximate Value as of January 2020
Checking Account	AIP	
Personal effects	AIP	
Monthly Income	Recipient	Amount
	AIP	
	AIP	

NEED FOR GUARDIAN OF THE PROPERTY OF JOHN B. DOE

21. AIP is likely to suffer harm because he cannot manage his most basic finances; he cannot adequately understand and appreciate the nature and consequences of his inability to handle his property management needs.

22. AIP's assets, as set forth in this Petition, could be subject to waste if not adequately protected or looked after.

23. Due to AIP's comatose state and current condition, his functional level with regard to his financial affairs is non-existent.

24. AIP is unable to tend to his most basic property management needs, much less understand immediate medical costs or other financial and investment affairs.

25. It is unknown how long AIP will remain unconscious. Indications from treating medical professionals have inferred that it could be permanent. Even if AIP were to become

conscious, it is unclear what capacity he would have immediately and if he would be able to adequately recover at all.

26. Without an appointment of a guardian of the property, AIP will not be able to meet his basic financial obligations. Furthermore, the immediacy of the situation and the nature of his circumstances put his health and welfare in danger if a temporary guardian cannot be appointed.

27. Petitioner understands the nature of her husband's condition and is the logical choice for guardian.

28. Petitioner also requests the immediate appointment of herself as Temporary Guardian pursuant to MHL § 81.23(a)(1) to serve until the scheduled hearing by the Court may be completed.

29. Petitioner is aware of the forms of public assistance (SSD and Medicaid), which AIP currently receives and easily manage her husband's finances.

30. Petitioner is unaware of any other health-related or financial factors or concerns beyond what have been set forth herein.

31. AIP, in his current condition, has no understanding or appreciation of his inability to manage his daily property management tasks. If appointed Guardian, Petitioner intends to marshal and consolidate AIP's various assets, manage and invest AIP's assets appropriately, pay all of AIP's bills in a timely fashion, and file tax returns on AIP's behalf, until such time as the Court may hold a hearing on the proposed guardianship, if Temporary Guardian, or until AIP recovers from his condition and is capable of understanding and maintaining his daily property management tasks on his own.

PROPERTY-NEEDS POWERS SOUGHT

32. The guardianship powers sought are those as set forth in section 81.21 of the Mental Hygiene Law, and as set forth in the Order to Show Cause, to include the following.

- a. Authorize access to or release of confidential records;
- b. Marshal all income and assets, and necessary incidental powers to effectuate such power including but not limited to the power to redirect and open any and all mail directed to the incapacitated person;
- c. Transact any banking business including establishing checking accounts, savings accounts, retirement accounts, certificates of deposit, collecting, negotiating, depositing, withdrawing, endorsing checks, drafts, or any negotiable instrument and any incidental powers related thereto, and further including the establishment of a Guardianship Account;
- d. Create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of the incapacitated person;
- e. Endorse, collect, negotiate, deposit and withdraw Social Security, disability, pension or annuity benefit checks;
- f. Represent the rights of AIP and file legal actions for negligence, medical malpractice and personal injury giving rise to AIP's current physical and mental health conditions;
- g. Pay such bills as may be reasonably necessary for the proper care and maintenance of AIP, and to pay the providers of the same, including physicians, hospital nurses, aides, nursing homes, if any;
- h. Pay bills after the death of the incapacitated person provided the authority existed to pay such bills prior to death until a temporary administrator or executor is appointed;

- i. Purchase, sell, hypothecate, assign and pledge stocks, bonds, mutual funds, stock rights, stock dividends, coupons and all securities;
- j. Retain attorneys, accountants, investment counselors, brokers, and similar professionals concerning the incapacitated person's personal and real property, and to pay the necessary disbursements and fees for such individuals;
- k. Prepare, complete, and sign all tax returns, and pay the tax due as shown by said returns; appear on behalf of the incapacitated person before Federal, State and local taxing authorities; prosecute, defend and settle all tax claims, litigation, assessments and levies relating to any taxing authority or any type of tax;
- l. File, prosecute, compromise and settle all personal and property insurance claims and all incidental powers related thereto necessary to effectuate this power, including without limitation to surrender insurance policies for cash value;
- m. Exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;
- n. Renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with paragraph (c) of section 2-1.11 of the estates, powers and trusts law;
- o. Apply for government or private benefits;
- p. Engage in Estate and Medicaid planning on behalf of the incapacitated person; and
- q. Any other power that the Court in its discretion shall deem appropriate to meet the incapacitated person's property needs.

INTERESTED PARTIES

33. The interested parties herein are:

<u>Name and Address</u>	<u>Telephone Number</u>	<u>Relationship to AIP</u>
Jack C. Doe, 123 Oak Street, Albuffalo, New York, #####	(____) ____ - ____	AIP's Son
Jessica D. Doe, 123 Maple Lane, Watertutica, New York #####	(____) ____ - ____	AIP's Adult Sibling.

DURATION OF POWERS BEING SOUGHT

34. Based on AIP's current condition, it is requested that the powers granted by the Court to the Temporary Guardian continue until a hearing is conducted for appointment of a guardian of the property for AIP.

35. Should the Court find after the hearing that a guardianship of the property is warranted, it is requested that the powers granted by the Court to the Guardian be for an indefinite period.

36. Petitioner requests that she be authorized to use the powers granted to them by the Court separately and independently so as to ensure efficient and immediate protection and use of AIP's property for his benefit.

WHEREFORE, Petitioner respectfully requests that the Court:

A. Issue an Order to immediately appoint JANE A. DOE, Temporary Guardian of the Property for JOHN B. DOE and vest her with the powers requests herein;

B. Sign the annexed Order to Show Cause;

C. Appoint some proper person to serve as Court Evaluator, pursuant to N.Y. Mental Hygiene L. § 81.09;

D. Declare that JOHN B. DOE is incapacitated as that term is defined by N.Y. Mental Hygiene L. § 81.02(b);

- E. Appoint Petitioner as Guardian and vest her with the powers requests herein; and
- F. Grant such other and further relief as the Court deems just and proper.

Dated: January __, 2020

LAW FIRM, PLLC

By: _____

Attorney, Esq.

Address 1

Address 2

Syracuse, New York 13202-1355

Telephone: (315) 555-1234

Fax: (315) 555-1234

Email: attorney@lfpllc.com

VERIFICATION

STATE OF _____)

)

ss.:

COUNTY OF _____)

JANE A. DOE being duly sworn, deposes and says that deponent is the mother and presumptive distributee of the alleged incapacitated person, a Petitioner in the within action; that deponent has read the foregoing Verified Petition and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: personal relationship with the alleged incapacitated person, the alleged incapacitated person's documents and records.

JANE A. DOE

Sworn to before me this
__ day of _____, 2020.

Notary Public

EXHIBIT C

SAMPLE NOTICE OF APPEARANCE

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of
JANE A. DOE,

Petitioner,

v.

For an Order of Appointment of a Guardian for the Person and
Property of
JOHN B. DOE,

An Alleged Incapacitated
Person Pursuant to Article 81
of the Mental Hygiene Law.

**NOTICE OF
APPEARANCE**

Index No.

RJI No.

PLEASE TAKE NOTICE that Attorney, Esq., of Law Firm, PLLC, hereby appears as
attorney for Petitioner Jane A. Doe in the above-captioned matter.

Dated: January __, 2020

LAW FIRM, PLLC

By: _____

Attorney, Esq.

Address 1

Address 2

Syracuse, New York 13202-1355

Telephone: (315) 555-1234

Fax: (315) 555-1234

Email: attorney@lfpllc.com

EXHIBIT D

SAMPLE SUBPOENA DUCES TECUM FOR TESTIMONY

SAMPLE ORDER FOR SUBPOENA DUCES TECUM

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of
JANE A. DOE,

Petitioner,

v.

For an Order of Appointment of a Guardian for the Person and
Property of
JOHN B. DOE,

An Alleged Incapacitated
Person Pursuant to Article 81
of the Mental Hygiene Law.

JUDICIAL SUBPOENA

Index No.

RJI No.

TO: Jake B. Doe, Commissioner
Onodonroe County Department of Human Services
111 Rochecuse Rd.
Syrochester, New York 14633

YOU ARE HEREBY COMMANDED to appear at the New York State Supreme Court,
County of ONODONROE, at the Onodonroe County Courthouse, 123 Hall of Justice, Syrochester,
New York, ten (10) days from the date this subpoena is served, or at any recessed or adjourned
date, and to bring with you copies of the documents identified in the attached schedule of
documents in your possession, custody or control.

Your failure to comply may be punishable as a contempt of this Court.

Hon. Judge _____

Dated:

SCHEDULE OF DOCUMENTS

1. Public assistance records, limited to applications for housing assistance, correspondence, leases, landlord statements, payment vouchers or invoices, child care requests, tenant billing authorization forms, schedules and other similar documents reflecting the addresses where each of the following individuals resided or leased property, or received child care or other babysitting services during the time period 1994 through 2004, and the time period when each person resided and/or was cared for at each address:
 - a. Jeffery Z. Doe, date of birth 1/30/50
 - b. Jaqueline Y. Doe, date of birth 2/3/04

2. Records reflecting the schedule of payments made to all building owners, landlords, and/or child care service providers in connection with the residency or tenancy and/or receipt of child care services of/by any of the following individuals during the time period 1994 through 2004:
 - a. Jeffery Z. Doe, date of birth 1/30/50
 - b. Jaqueline Y. Doe, date of birth 2/3/04

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of
JANE A. DOE,

Petitioner,

v.

For an Order of Appointment of a Guardian for the Person and
Property of
JOHN B. DOE,

An Alleged Incapacitated
Person Pursuant to Article 81
of the Mental Hygiene Law.

ORDER

Index No.

RJI No.

Defendant John Doe, having submitted a request for the attached Judicial Subpoena Duces Tecum directed to the ONODONROE County Commissioner of Human Services for records material and necessary to the defense of this action, and there is no objection to the form of the attached Subpoena, and the ONODONROE County Attorney's Office on behalf of the ONODONROE County Department of Human Services having raised no objection to the form of the attached Subpoena Duces Tecum, it is hereby

ORDERED, that the attached Judicial Subpoena Duces Tecum shall issue from this Court and may be served upon Jane A. Doe, ONODONROE County Commissioner of

Human Services, 111 Rohecuse Rd., Syrochester, New York 14633 forthwith; and it is further

ORDERED, that all attorneys of record in the above matter are permitted to check out the Department of Human Services records from the ONODONROE County Supreme Court Clerk's Office for copying for all counsel; and it is further

ORDERED, that said records must be returned to the ONODONROE County Supreme Court Clerk's Office within one (1) business day of checkout by any attorney of record.

Dated: January __, 2020

Hon. _____
Justice, Supreme Court

ENTER

EXHIBIT E

SAMPLE SEALING AND CONFIDENTIALITY ORDER

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of
JANE A. DOE,

Petitioner,

v.

For an Order of Appointment of a Guardian for the Person and
Property of
JOHN B. DOE,

An Alleged Incapacitated
Person Pursuant to Article 81
of the Mental Hygiene Law.

**SEALING AND
CONFIDENTIALITY
ORDER**

Index No.

RJI No.

THIS MATTER, having come before the Court upon the application of Legal Firm, PLLC, attorneys for Petitioner Jane A. Doe (the “Petitioner”), for a Confidentiality Agreement and Protective/Sealing Order (the “Order”), sealing the court records in this proceeding and requiring the parties to keep confidential all information exchanged during the courts of this proceeding, and the Court having found there is good cause shown for the issuance of this Order under 22 N.Y.C.R.R. § 216.1, it is hereby:

ORDERED as follows:

1. The parties to the above-captioned action (the “Parties”) will not disclose the financial, medical, psychological, or psychiatric information filed along with or related to this proceeding (the “Confidential Information”), to any third parties, including, but not limited to, any member of the press or media, any internet web site, and any other third party not specified in paragraphs 5(a) through 5(d) below.

2. This Protective/Sealing Order shall also apply to the Confidential Information and/or other similar types of personnel information.

3. Either party may designate information, documents, and items produced in discovery as Confidential Information, which shall be so marked in advance of their production or disclosure. If the opposing party objects to the designation of a document as Confidential Information, it may, if good faith negotiations prove unsuccessful, apply to this Court for a ruling that the document shall not be so treated, giving notice to the other party. Until this Court enters an Order changing the designation, the document shall be treated as Confidential Information in accordance with this Protective/Sealing Order.

4. Any document to be filed with the Court that contains Confidential Information, including, but not limited to, the complaint in this action, shall be filed under seal in an envelope on which a statement substantially in the following form shall be written: “CONFIDENTIAL -- This envelope contains documents and/or information that are subject to a Protective/Sealing Order entered by the Court.” All such material so filed shall be maintained by the Court Clerk separate from the public records in this action and shall not be released.

5. All Confidential Information produced during the course of discovery, and all subsequent discovery, testimony, and other litigation referring to such Confidential Information, shall be maintained in confidence by the parties to be used solely for the purpose of this action. The parties shall not disclose Confidential Information to any third party other than the following:

a. counsel of record for the parties and regular employees of such counsel assisting in the conduct of this action;

b. experts or consultants retained or employed by the parties or their counsel, as long as they have signed a copy of the Certification annexed to this Protective/Sealing Order;

c. witnesses or other persons from whom testimony is taken or may be taken in this action, as well as any stenographer who has been hired to produce a transcript of any deposition taken in this action, as long as they have signed a copy of the Certification annexed to this Protective/Sealing Order; and

d. the Court, jury, or other court personnel in this action.

6. Nothing in this Protective/Sealing Order, nor any action taken in compliance with it, shall operate as an admission by any party that any particular document or information is or is not confidential. Further, nothing in this Protective/Sealing Order shall affect the admissibility or non-admissibility of documents or other evidence at trial. Any document designated as Confidential Information may be offered into evidence unless the opposing party obtains a separate protective order from the Court, and may be admitted into evidence unless the opposing party states a valid evidentiary objection.

7. Within 30 days after the conclusion of this action (including any appeals), all Confidential Information and all copies thereof shall be returned to counsel for the party that produced the Confidential Information.

Dated: January __, 2020

Hon. _____
Justice, Supreme Court

ENTER

EXHIBIT F


FRANCES L. PANTALEO, BLEAKLEY PLATT & SCHMIDT, LLP, "LESSONS FROM ASTOR, CLARK,
AND REDSTONE: THE INCAPACITATED CLIENT- IS GUARDIANSHIP THE ANSWER?" NYSBA TRUSTS
AND ESTATES SECTION ANNUAL MEETING (JANUARY 2017)

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Bond

Using the CPLR:
Advanced Practice in
Article 81 Guardianship


Joseph A. Greenman, Esq.
Richard L. Weber, Esq.



Commitment • Service • Value • Our Bond

Purpose of Article 81

The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes into account the personal wishes, preferences and desire of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.



Appointment is necessary to provide for the personal needs of a person.


The person agrees to the appointment; or

The person is **incapacitated**.

Clear and convincing evidence that the person is likely to suffer harm because:

The person is unable to provide for personal needs and/or property management; and

The person cannot adequately understand and appreciate the nature and consequences of such inability.



Jurisdiction & Venue

- Supreme Court, county courts outside NYC
 - Resident of NYS;
 - Non-resident present in NYS;
 - Nonresident, pursuant to 81.18.
- Surrogate's Court has the power to order relief for specifically enumerated individuals with respect to property management in accordance with Article 81.
 - Supreme or County Court
 - Surrogate's Court – limited 81.04(b)
 - Where alleged incapacitated resides or is physically present
 - If resides/cared for in facility, then location of facility
 - If not present in state, then where property is situated
 - Modify order
 - Court originally granted
 - If facility, then location of facility

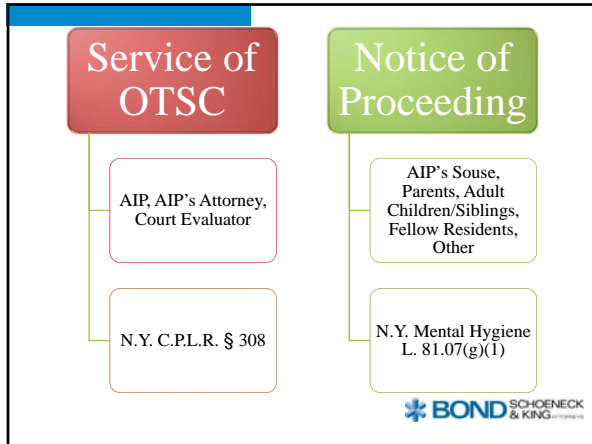




Order to Show Cause

- Order to Show Cause Format
 - Large Type
 - Plain Language
 - English (or Other)
- Order to Show Cause Must Include
 - Date, Time, and Hearing of petition
 - Clear, Readable Statement
 - Name, Address, Phone: Court Evaluator; Attorney
 - List of Potential Guardian Powers
 - Legend
- Next Steps
 - Court Signs OTSC
 - Name, Address, Phone: Court Evaluator
 - Serve OTSC on AIP, Court Evaluator, Counsel for AIP
 - Notice of the Proceeding to Certain Individuals





Verified Petition

- Name, Address, Phone
 - AIP; Fellow residents; Presumptive distributees; Petitioner; Proposed Guardian/Stand-by
- Description of AIP's functional level
- Powers sought with respect to AIP's personal, property management needs
- Approximate value/description of AIP's financial resources (and debts, claims, etc.)
- Relief sought
- Available resources

BOND SCHOENECK & KING

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of
JANE A. DOE,
Petitioner,
v.
JOHN B. DOE,
An Alleged Incapacitated Person Pursuant to Article 81 of the Mental Hygiene Law.

NOTICE OF APPEARANCE

Index No. _____
EJINo. _____

PLEASE TAKE NOTICE that Attorney, Esq., of Law Firm, PLLC, hereby appears as attorney for Petitioner Jane A. Doe in the above-captioned matter.

Dated: January __, 2020

LAW FIRM, PLLC

By: _____
Attorney, Esq.
Address 1 _____
Address 2 _____
Syracuse, New York 13202-1355
Telephone (315) 555-1234
Fax: (315) 555-1234
Email: attorney@lfp8c.com

Notice must be mailed to the following, no less than 14 days prior to the hearing date:
- Spouse of AIP
- Parents of AIP
- Adult siblings of AIP
- Anyone with whom AIP resides
* If none of the above then "at least one and not more than three of the living relatives of [AIP] in the nearest degree of kinship who are known to Petitioner or whose existence and address can be ascertained by Petitioner with reasonably diligent efforts."

BOND SCHOENECK & KING

Disclosure Devices

Depositions upon oral questions
Depositions without the state upon written questions
Interrogatories
Demands for addresses
Discovery and inspection of documents and property
Physical and mental examinations
Requests for Admission

Subpoena Duces Tecum

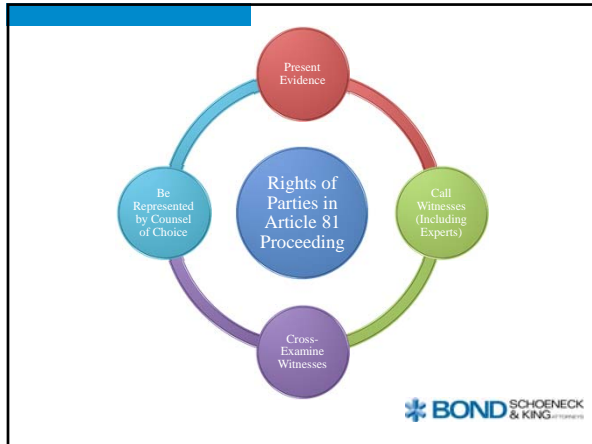
- Can be served on ANY person; must be served on all parties
- Must contain:
 - Time (not less than 20 days after service), place, and manner of making the inspection
 - Items to be inspected, with description
- After compliance, 5 days to notify other parties and provide access
- Failure to Comply
 - Contempt, Motion to Compel

- Specific rules for public entities
 - Must submit proposed order and judicial subpoena to court for the Judge's signature
 - Must file the signed order and judicial subpoena with the county clerk
 - Contents of the judicial subpoena are the same

See N.Y. C.P.L.R. 2307; 3120(4).

Sealing Orders

- 22 N.Y.C.R.R. 216.1.
- Stipulated → So Ordered
- Motion
 - Notice of Motion
 - Affidavit explaining Good Cause
 - Memo of Law, if Necessary
 - Proposed Sealing Order



HEARSAY: An Out of Court Statement Offered for the Truth of the Matter Asserted

CPLR 4518 • Business Records

CPLR 4520 • Public Officers

CPLR 4519 • Dead Man

BOND SCHOENECK & KING

PRIVILEGE: A Court Evaluator May Be Able to Circumvent

CPLR 4504 • Physicians

CPLR 4507 • Psychologists

CPLR 4508 • Social Workers

BOND SCHOENECK & KING
