

Memorandum urging **APPROVAL**

NYSBA Memorandum #15 GOV

September 16, 2015

S. 4179

A. 490

By: Sen. Ortt

By: M of A Ryan

Senate Committee: Mental Health

Assembly Committee: Judiciary

Effective Date: Immediately

THE NEW YORK STATE BAR ASSOCIATION STRONGLY URGES APPROVAL OF THIS LEGISLATION

The authority of a guardian appointed under Article 81 of the New York Mental Hygiene Law ("MHL") to transfer an incapacitated person's assets to another is derived from MHL section 81.21(a). In enacting MHL section 81.21, "the Legislature gave statutory recognition to the common-law doctrine of substituted judgment by expressly authorizing the transfer of a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act." (*Matter of Mildred A.*, 21 Misc.3d 1123(A), at *4 (Sup. Ct., Nassau County 2008).

MHL section 81.21(c) provides that, when an Article 81 guardian seeks to transfer an incapacitated person's assets under that section, "the persons entitled to notice in accordance with paragraph one of subdivision (d) of section 81.07 of the (Mental Hygiene Law)", among others, shall receive notice of the application. The failure to satisfy the notice requirements set forth in MHL section 81.21(c) can have serious practical implications, including subjecting the court-authorized transfers to subsequent determinations that they are invalid. See, *Matter of Burns*, 267 A.D.2d 755, 757 (3d Dept. 1999).

Although MHL section 81.21(c) specifically references MHL section 81.07(d)(1), it appears that the cross-reference to MHL section 81.07(d)(1) is erroneous. In its current form, MHL section 81.07(d) contains the legend for Orders to Show Cause commencing MHL Article 81 guardianship proceedings. Instead, it is MHL section 81.07(e)(1) that enumerates the individuals who are entitled to service of process of Orders to Show Cause in Article 81 proceedings. They include: (a) the alleged incapacitated person; (b) the attorney for the alleged incapacitated person; and (c) the court evaluator.

Based upon the foregoing, MHL section 81.21(c) should be amended to help ensure that all individuals whom the Legislature intended to receive notice of applications made under section 81.21 receive such notice; and to reduce the possibility for confusion among practitioners and litigants seeking to satisfy MHL section 81.21(c)'s notice requirements.

These objectives can be accomplished by amending MHL section 81.21(c) to reference MHL section 81.07(e)(1), rather than MHL section 81.07(d)(1).

Based on the foregoing, the Association **STRONGLY URGES APPROVAL** of this legislation, which was developed by its Trusts and Estates Law Section.