

**ARTICLE 81 GUARDIANSHIP PROCEEDINGS:
Overview and Background; Pre-Hearing Procedural Issues**
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PLEASE NOTE:

All program materials and exhibits can be found at
www.tcnylaw.com
under:

**“Article 81 Guardianship Proceedings:
Overview and Backgrounds; Pre-Hearing Procedural Issues”**

Specimens of Notice of Article 81 Guardianship Proceedings,
Order to Show Cause and Petition will be set in
downloadable MS Word format.

ARTICLE 81 GUARDIANSHIP

OVERVIEW AND BACKGROUND

§ 81.01 Prior law; Legislative Findings and Purpose

Before we delve into the statutory analysis of Article 81, we should first go over a few details about legal background that gave rise to the enactment of Article 81 in 1993. Only then will the reasons for New York's creation of such a vast and unwieldy law become clear to us - - the end users of the law - - on behalf of our clients and as offices of the Court in Article 81 proceedings.

Before Article 81, the only legal remedy that could be used to deal with the affairs of an incompetent person was Article 78 of the Mental Hygiene Law. This required a finding of *complete* incompetence. As such, it cast a stigma upon the committed person as it amounted to a complete deprivation of his or her civil rights. Courts became reluctant to appoint committees.

The conservator statute passed in 1972 in the form of Article 77 of the Mental Hygiene Law. It was designed to provide a "less restrictive alternative to the committee procedure." But this was a solution for an incapacitated person's property and financial issues only.

A gap arose between the relief provided under Articles 77 and 78. What could be done to help a person who was not completely incompetent but who still needed assistance for both financial and personal needs? There were legislative attempts at filling the gap, but in 1991, the New York Court of Appeals, in the Matter of Grinker (Rose), 77 N.Y.2d 703 (1991) ruled that an attempt by the New York Department of Social Services to use Article 77 to commit an Alleged Incapacitated Person ("AIP") to a nursing home went beyond the "central property and incidental personal borders" of Mental Hygiene Law Section 77.19. Effectively, the Court of Appeals ended attempts to stretch the conservatorship provisions of Article 77 beyond its property management limits.

Unlike some of our US Supreme Court Constitutional decisions, there were no emanations and penumbras allowed.

Soon thereafter, the New York State Law Revision Commission began drafting a statute with a standard for appointment of a guardian focusing on the needs of the individual, and permitting the appointment of a guardian who can make decisions regarding either the person or the property of the person, or both, if appropriate. New Article 81 was enacted in 1992 and became effective in 1993, Former Articles 77 and 78 were repealed.

Article 81's standard for appointment of a guardian focused on the decisional capacity and functional limitations of the AIP - - the person for whom the appointment was sought. Rather than making determination that person's condition (i.e., some underlying mental and physical disability, the proving of which would constitute the basis for a finding that a guardian was needed - - like a binary "on/off" or "black/white" determination) that would force a person into a conservatorship (Article 77) or committeeship (Article 78), new Article 81 had as its central concept the appointment of a guardian whose powers are *tailored specifically to the particular needs* of a person with respect to personal care, property management or both.

NYS Office of Children and Family Services recites:

“the legislature declares that the purpose of this act is to promote 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 their individual needs of that person, which takes in account the personal wishes, preferences and desires 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.”²

§ 81.02 Power to appoint a guardian of the person and/or property; standard for appointment

Under Section 81.02(a)(1)-(2) “the Court has power to appoint a Guardian if it determines:

- “1. that the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; and
2. that the person agrees to the appointment, or that the person is incapacitated as defined in subdivision (b) of this section. “

NOTE: The standard of “clear and convincing evidence” is an intermediate one between the usual civil “preponderance of the evidence standard” and the criminal laws “beyond a reasonable doubt” standard. The appointment of a guardian necessarily involves the restriction of a person’s liberty and rights which requires this higher standard of proof. It has been found, however, by the Courts that the standard of “beyond a reasonable doubt” is not so required.

Turning to the definition of ‘incapacitated’ under Section 81.02 (b), the Court must find that the person “is unable to provide for personal needs and/or property management; and; the person cannot adequately understand or appreciate the nature or consequences of such inability. Section 81.02 (b)(1)-(2).

²NYS Office of Children & Family Services. Brookdale Center for Healthy Aging & Longevity of Hunter College / CUNY “Mental Hygiene Law. Title E. General Provisions. Article 81. Proceedings for Appointment of a Guardian for Personal Needs or Property Management. NY CLS Men Hyg §81.01. (2007)

The standard of Section 81.02 (b) sheds the former labels of “substantial impairment” or “incompetency” under former Articles 77 and 78 and their requirement that the incapacitated person suffer from some underlying illness or condition. Instead, Section 81.02 (c) requires the Court to give:

- “1. management of the activities of daily living, as defined in subdivision (h) of section 81.03 of this article;
2. understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
3. preferences, wishes, and values with regard to managing the activities of daily living; and
4. the nature and extent of the person's property and financial affairs and his or her ability to manage them.”

NOTE: In sum, Article 81 has put the Court into the position where it is forced to make an extensive evaluation of a person’s ability to function before the Court may exercise its power to appoint a guardian. All this makes admirable constitutional sense. It respects the dignity of the individual, particularly insofar as the statute is designated to interfere with the AIP’s life, through the appointment of a guardian, as little as possible. At the same time, my experience with Article 81 is that it necessarily involves a huge use of judicial and legal resources on an expedited basis. Though commentators have noted that the legislators designed the appointment of a Court evaluator to ease the burden on the Court as a way to ease the burden on the Courts, the Court evaluator system itself has evolved (at least in my opinion) into something of an unfunded mandate imposed on members of the Bar. One could ask whether forcing the Courts to perform so many evaluations leading to a customized appointment of a Guardian under Article 81 really needs to be done

judicially or whether there could be some administrative way to accomplish the same goals and still satisfy constitutional requirements of due process.

A guardian will be appointed if the court determines the AIP is unable to care for himself or herself.

The assessment will also consider the AIP's physical illness, mental disability (including substance abuse) and any medical treatments which will effect the AIP's cognitive behavior.

The AIP can also agree to have a guardian appointed on his or her behalf.

§ 81.03 Definitions (including "Least Restrictive Form of Intervention")

A review of the definition of terms under Article 81 Guardianship:

“(a) “guardian” means a person who is eighteen years of age or older, a corporation, or a public agency, including a local department of social services, appointed in accordance with terms of this article by the supreme court, the surrogate's court, or the county court to act on behalf of an incapacitated person in providing for personal needs and/or for property management.

(b) “functional level” means the ability to provide for personal needs and/or the ability with respect to property management.

(c) “functional limitations” means behavior or conditions of a person which impair the ability to provide for personal needs and/or property management.

(d) “least restrictive form of intervention” means that the powers granted by the court to the guardian with respect to the incapacitated person represent only those powers which are necessary to provide for that person's personal needs and/or property management and which are consistent with affording that person he greatest amount of independence and self-determination in light of that person's

understanding and appreciation of the nature and consequences of his or her functional limitations.

(e) “available resources” means resources such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, powers of attorney, health care proxies, trusts, representative and protective payees, and residential care facilities.

(f) “personal needs” means needs such as, but not limited to, food, clothing, shelter, health care, and safety.

(g) “property management” means taking actions to obtain, administer, protect, and dispose of real and personal property, intangible property, business property, benefits, and income and to deal with financial affairs.

(h) “activities of daily living” means activities such as, but not limited to, mobility, eating, toileting, dressing, grooming, housekeeping, cooking, shopping, money management, banking, driving or using public transportation, and other activities related to personal needs and to property management.

(i) “major medical or dental treatment” means a medical, surgical or diagnostic intervention or procedure where a general anesthetic is used or which involves any significant risk or any significant invasion of bodily integrity requiring an incision or producing substantial pain, discomfort, debilitation, or having a significant recovery period, or which involves the administration of psychotropic medication or electroconvulsive therapy; it does not include any routine diagnosis or treatment such as the administration of medications other than chemotherapy for non-psychiatric conditions or nutrition or the extraction of bodily fluids for analysis; dental care performed with a local anesthetic; and any procedures which are provided under emergency circumstances, pursuant to section two thousand five hundred four of the public health law.

(j) “life sustaining treatment” means medical treatment which is sustaining life functions and without which, according to reasonable

medical judgment, the patient will die within a relatively short time period.

(k) “facility” means a facility, hospital, or school, or an alcoholism facility in this state as such terms are defined in section 1.03 of this chapter, a substance abuse program as such term is defined in article nineteen of this chapter, an adult care facility as such term is defined in section two of the social services law, or a residential health care facility or a general hospital as such terms are defined in section two thousand eight hundred one of the public health law.

(l) “mental hygiene facility” means a facility, hospital, or school, or an alcoholism facility in this state as such terms are defined in section 1.03 of this chapter.”

- **Least Restrictive Form of Intervention**

The provisions of Section 81.03(d) “least restrictive form of intervention” go to the heart of the statute. The Court will only give to the Guardian those powers which the AIP truly needs, based on the Court’s assessment, through a functional needs test, of what powers are to be granted. This contrasts with prior law (Articles 77 and 78) which prescribed powers to conservators or committees. All powers not granted by the Court to the AIP are retained by the AIP.

Importantly, lawyers should realize that the “least restrictive form of intervention” may in fact mean no Article 81 relief is needed at all. If, for example, the AIP has previously executed a broad statutory power of attorney for financial management purposes (meaning, for example, not one just limited to banking or real estate matters), coupled with a statutory gifts rider and has also executed a health care proxy/living will with HIPAA authorization, there may be no need to have an Article 81 guardianship proceeding because the “least restrictive form of intervention” is *no intervention*.

It follows that whenever possible, you, as attorney, should if possible get your own clients to sign the broadest form power of attorney with statutory gifts rider naming agents, successor agents and if necessary alternate successor agents, and similarly, a health care proxy/living wills, HIPAA authorization, also naming an agent, back-up agent and if necessary alternate successor agent. (Query as to whether a lawyer's failure to counsel clients to execute these instruments and to store multiple copies of them) could leave the lawyer open to criticism given the expense and trouble caused by an Article 81 proceeding that your client's execution of these relative simple instruments could have avoided.

PRE-HEARING PROCEDURAL ISSUES

§ 81.04 Jurisdiction and § 81.05 Venue

The Article 81 Guardianship petition should be filed in the Supreme Court (or County Court).

Relief is sought:

1. for a resident of the state;
2. for a nonresident of the state present in the state;

What if the AIP resides in a facility outside New York? Then jurisdiction is based on the domicile of the AIP. New York State borders Connecticut (in our part of the county, this often involves AIPs residing in facilities in Sharon or Canaan, Connecticut), Massachusetts, New Jersey and Pennsylvania. A person domiciled in New York can be placed in a health care facility in any one of these surrounding states. The Article 81 Guardianship proceeding will be brought in the

county in which the AIP is a domiciliary resident. (You may have to bring the proceedings in the state in which the facility is located.)

The proceeding may be brought in:

- the county where the person resides.
- the county where the AIP is physically located.
- in the Surrogate’s Court where an estate proceeding, in which the AIP, has an interest.
- if the AIP resides in a in-care medical facility, in the state and county where the facility is located0

§ 81.06 Who may commence a proceeding

Seven persons can initiate an Article 81 Guardianship proceeding:

- “1. the person alleged to be incapacitated;
2. a presumptive distributee of the person alleged to be incapacitated, as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act;
3. an executor or administrator of an estate when the alleged incapacitated person is or may be the beneficiary of that estate;
4. a trustee of a trust when the alleged incapacitated person is or may be the grantor or a beneficiary of that trust;
5. the person with whom the person alleged to be incapacitated resides;
6. a person otherwise concerned with the welfare of the person alleged to be incapacitated. For purposes of this section a person otherwise concerned with the welfare of the person alleged to be incapacitated may include a corporation, or a public agency, including the department of social services in the county where the person alleged to be incapacitated resides regardless of whether the person alleged to be incapacitated is a recipient of public assistance;

7. the chief executive officer, or the designee of the chief executive officer, of a facility in which the person alleged to be incapacitated is a patient or resident.”

§ 81.07 Notice

Once it is determined who will initiate the Article 81 Guardianship, the next step is to determine what is to be served, who will be served and the method of service.

Service of the following documents are necessary:

- Notice of Article 81 Guardianship Proceedings
- Order to Show Cause
- Petition for Guardianship

The following individuals are to be served ALL documents filed in this proceeding:

- The AIP
- The AIP’s attorney
- The Court Evaluator

All other interested parties in this proceeding are *limited* in the documents they are to receive.

They will receive a copy of the Notice of Article 81 Proceedings. They will not receive a copy of the Order to Show Cause or Petition for Guardianship as it may contain personal and confidential information. Remember, the AIP’s right to confidentiality needs to be protected. The AIP’s dignity needs to remain intact.

- **Notice of Article 81 Guardianship Proceedings**

The notice must contain basic information regarding the AIP, the petitioner and the time and place where the court proceedings will be held:

“1. The name and address of the alleged incapacitated person to whom the guardianship proceeding relates;

2. The name and address of the petitioner;

3. The names of all persons to be given notice of the proceeding;

4. The time when and the place where the order to show cause shall be heard;

5. The object of the proceeding and the relief sought in the petition;

6. The name, address and telephone number of the petitioner's attorney.”

- **Order to Show Cause**

An Order to Show Cause is to accompany the Notice of Article 81 Guardianship Proceedings. The Order should contain:

“1. date, time, and place of the hearing of the petition;

2. a clear and easily readable statement of the rights of the person alleged to be incapacitated that are set forth in section 81.11 of this article;

3. the name, address, and telephone number of the person appointed as court evaluator pursuant to section 81.09 of this article;

4. the name, address, and telephone number of the attorney if one has been appointed for the person alleged to be incapacitated pursuant to section 81.10 of this article; and

5. a list of the powers which the guardian would have the authority to exercise on behalf of the person alleged to be incapacitated if the relief sought in the petition is granted.”

The type face for the Order to Show Cause is to be a size twelve font or larger.

Also, the Order to Show Cause is to be doubled spaced. The Exhibits contain examples of these, and the website permits downloading of the materials in MS Word (.docx) format.

The court will affix the name of the Clerk of the Court, appointed Court Evaluator, return date of the proceeding, the date of the Preliminary Court office (to appoint a temporary guardian) on the Order to Show Cause.

Unless there is just cause, the hearing date is within 28 days from the signing of the Order to Show Cause. Of course this date has to be adjourned if there are problems with the timeliness of service of the relevant papers. The Court has to get jurisdiction over the person of the AIP.

Once issued, the Notice of Article 81 Guardianship Proceeding and Order to Show Cause are to be served on the AIP, attorneys and the Court Evaluator, the following individuals are entitled to Notice under Section 81.07(g):

- the AIP's spouse, if any
- the AIP's adult children, if any
- the AIP's parents, if living
- the AIP's siblings, if any
- any persons with whom the AIP resides
- the AIP's power of attorney agent or health care proxy agent;
- if the AIP is receiving public assistance or protective services, the local Department of Community and Family Service;
- the Chief Executor Officer of the healthcare facility where the AIP resides; and
- the Mental Hygiene Legal Services of the judicial department if the AIP resides in a mental hygiene facility.

If the AIP does not have a spouse, adult children, parents or siblings, notice is to be given to the nearest next of kin who are known to the petitioner. Furthermore:

“(iii) any person or persons designated by the alleged incapacitated person with authority pursuant to sections 5-1501, 5-1505, and 5-1506 of the general obligations law, or sections two thousand nine hundred five and two thousand nine hundred eighty-one of the public health law, if known to the petitioner; and

(iv) if known to the petitioner, any person, whether or not a relative of the person alleged to be incapacitated, or organization that has demonstrated a genuine interest in promoting the best interests of the person alleged to be incapacitated such as by having a personal relationship with the person, regularly visiting the person, or regularly communicating with the person; and

(v) if it is known to the petitioner that the person alleged to be incapacitated receives public assistance or protective services under article nine-B of the social services law, the local department of social services; and

(vi) if the person alleged to be incapacitated resides in a facility, the chief executive officer in charge of the facility; and

(vii) if the person alleged to be incapacitated resides in a mental hygiene facility, the mental hygiene legal service of the judicial department in which the residence is located; and

(viii) such other persons as the court may direct based on the recommendation of the court evaluator in accordance with subparagraph (xvii) of paragraph five of subdivision (c) of section 81.09 of this article.”

A sample Notice of Article 81 Guardianship Proceedings and Order to Show Cause is attached as Exhibit “A.”

§ 81.08 Petition

The petition for guardianship should be as detailed as possible. (See sample Petition for Guardianship attached as Exhibit B.) The petitioner must be specific in the relief and powers requested. The statute provides the verified petition contain:

- “1. the name, age, address, and telephone number of the person alleged to be incapacitated;
2. the name, address, and telephone number of the person or persons with whom the person alleged to be incapacitated resides, if any, and the name, address and telephone number of any persons that the petitioner intends to serve with the order to show cause and the nature of their relationship to the alleged incapacitated person;
3. a description of the alleged incapacitated person's functional level including that person's ability to manage the activities of daily living, behavior, and understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
4. if powers are sought with respect to the personal needs of the alleged incapacitated person, specific factual allegations as to the personal actions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for personal needs;
5. if powers are sought with respect to property management for the alleged incapacitated person, specific factual allegations as to the financial transactions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for property management; if powers are sought to transfer a part of the alleged incapacitated person's property or assets to or for the benefit of another person, including the petitioner

or guardian, the petition shall include the information required by subdivision (b) of section 81.21 of this article;

6. the particular powers being sought and their relationship to the functional level and needs of the person alleged to be incapacitated;

7. the duration of the powers being sought;

8. the approximate value and description of the financial resources of the person alleged to be incapacitated and whether, to the best of the petitioner's knowledge, the person is a recipient of public assistance;

9. the nature and amount of any claim, debt, or obligations of the person alleged to be incapacitated, to the best of the petitioner's knowledge;

10. the names, addresses, and telephone numbers of presumptive distributees of the person alleged to be incapacitated as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act unless they are unknown and cannot be reasonably ascertained;

11. the name, address, and telephone number of the petitioner;

12. the name, address, and telephone number of the person or persons, if any, proposed as guardian and standby guardian, the relationship of the proposed guardian or standby guardian to the person alleged to be incapacitated, and the reasons why the proposed guardian or standby guardian is suitable to exercise the powers necessary to assist the person alleged to be incapacitated;

13. any relief sought pursuant to section 81.23 of this article;

14. the available resources, if any, that have been considered by the petitioner and the petitioner's opinion as to their sufficiency and reliability;

15. any other information which in the petitioner's opinion will assist the court evaluator in completing the investigation and report in accordance with section 81.09 of this article.”

Supporting documentation, such as medical records, are not required to be included as supporting documents unless the AIP has called attention to his or her his medical condition or has waived his or his rights to have this information included in court record. Despite this, I note that medical information is creeping into court papers and leaking out, which is the topic of some controversy for guardianship and patient privacy advocates.

As previously stated, the petitioner must be specific in the relief and powers requested. This includes, but is not limited to: a description of the AIP’s functionality, the powers sought, the duration of the power being sought and available resources of the AIP.

- ***Service of the Notice of Article 81 Guardianship Proceedings, Order to Show Cause and Petition for Guardianship on the AIP***

Service on the AIP is via personal service not less than 14 days prior to the hearing date of the Order to Show Cause. If the AIP refuses to accept service or evades service, the Court can direct service of the Notice, Order to Show Cause and Petition using an alternative means.

- ***Service of the Notice of Article 81 Guardianship Proceedings, Order to Show Cause and Petition for Guardianship on the AIP’s attorney and the Court Evaluator***

Service on the AIP’s attorney and Court Evaluator can be made via personal delivery, overnight mail or fax within three business days following the appointment of the court evaluator and the attorney appointed for the AIP.

- **Service of the Notice of Proceedings and Order to Show Cause on other interested parties**

Notice of the proceeding and the Order to Show Cause will be mailed within 14 days to the AIP's spouse, the AIP's adult children, the AIP's parents, the AIP's siblings and any persons with whom the AIP resides.

Notice of the proceedings will be mailed to the other parties within a time period as designated by the court.

- **Affidavit of Service**

The Court Evaluator will need copies of the Affidavit of Service of the Notice and Order to Show Cause. The Affidavit of Service is needed to prove jurisdiction and will be referenced in the Court Evaluator's Report.

<u>§ 81.23 Provisional remedies</u>
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- **Temporary Guardian**

If the AIP presents an imminent harm to himself or herself, or the AIP's health, well being are in danger or there is fear of misappropriation of the AIP's finances or property are on danger, the petitioner can request to be appointed temporary guardian by indicating so on the Order to Show Cause and the Petition for Guardianship.

The Court will conduct a hearing and may require a bond.

Additionally, under New York Mental Hygiene Law Section 81.10(c)5, if a Temporary Guardian is requested, the Court shall appoint an attorney for the AIP, if the AIP does not already have one.

§ 81.24 Notice of Pendency

If the AIP owns property that needs to be protected, the petitioner should file a Notice of Pendency. The Notice of Pendency should be filed prior to the judgment or when the Commission to Guardians is filed.

LIST OF EXHIBITS

- Exhibit A A sample Notice of Article 81 Guardianship Proceedings and Order to Show Cause
- Exhibit B A sample Petition for Guardianship

ARTICLE 81 GUARDIANSHIP PROCEEDINGS:
Overview and Background; Pre-Hearing Procedural Issues

EXHIBIT A

**NOTICE OF ARTICLE 81 PROCEEDING
&
ORDER TO SHOW CAUSE**

PRESENT: **HON. JAMES D. PAGONES,**
A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF **DUTCHESS**

-----X
IN THE MATTER OF THE APPLICATION FOR
THE APPOINTMENT OF A GUARDIAN BY:

**NOTICE OF ARTICLE 81
PROCEEDING**

GEORGE THOMPSON

Index # _____

Petitioner,

FILING FEES

FOR: **HARDY THOMPSON**

R# _____ DATE _____

A PERSON ALLEGED TO BE INCAPACITATED
-----X

NOTICE OF ARTICLE 81 PROCEEDING

1. ALLEGED INCAPACITATED PERSON'S NAME AND ADDRESS:

**Hardy Thompson
1969 Howard Road
Poughkeepsie, New York 12601**

2. PETITIONER'S NAME AND ADDRESS:

**George Thompson
66 Butch Drive
Wappingers Falls, NY 12590**

3. NAMES OF ALL PERSONS TO BE GIVEN NOTICE OF PROCEEDING:
(include all possible legatees)

**George Thompson
66 Butch Drive
Wappingers Falls, NY 12590**

**Pauline Martin
48 Pleasant Circle
Washington, DC 20020**

4. PETITIONER'S ATTORNEY NAME, ADDRESS AND PHONE NUMBER:

Vincent L. Teahan, Esq.
Attorneys for the Petitioner, George Thompson
Teahan & Constantino LLP
41 Front Street, P.O. Box 1181
Millbrook, NY 12545
(845) 677-2101
(845) 677-1054 - FAX

PERSONAL APPEARANCE REQUIRED

PRESENT: **HON. JAMES D. PAGONES,**
A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF **DUTCHESS**

-----X
IN THE MATTER OF THE APPLICATION FOR
THE APPOINTMENT OF A GUARDIAN BY:

GEORGE THOMPSON

ORDER TO SHOW CAUSE

Petitioner,

Index # _____

FOR: **HARDY THOMPSON**

A PERSON ALLEGED TO BE INCAPACITATED
-----X

IMPORTANT

AN APPLICATION HAS BEEN FILED IN COURT BY GEORGE THOMPSON WHO BELIEVES YOU MAY BE UNABLE TO TAKE CARE OF YOUR PERSONAL NEEDS OR FINANCIAL AFFAIRS. GEORGE THOMPSON 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 GEORGE THOMPSON BELIEVES YOU MAY BE UNABLE TO TAKE CARE OF YOUR PERSONAL NEEDS OR 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 ARE:

**MICHAEL THOMPSON
CHIEF CLERK
DUTCHESS COUNTY SUPREME COURT
10 MARKET STREET, 3RD FLOOR
POUGHKEEPSIE, NY 12601
845-431-1710**

THE COURT HAS APPOINTED 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, OR PSYCHIATRIC 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

City, State, Zip

Telephone Number

The court evaluator is directed to submit his/her report of court evaluator to the guardianship part at least 48 hours prior to the time of the hearing.

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 THAT LAWYER UNLESS YOU DO NOT HAVE THE MONEY TO DO SO.

1. A HEARING ON THIS APPLICATION SHALL BE HELD AT THE SUPREME COURT, DUTCHESS COUNTY, 10 MARKET STREET, POUGHKEEPSIE, NEW YORK ON THE ____ DAY OF _____, 2017 AT _____ A.M./P.M.

2. AT THAT HEARING AND THIS PROCEEDINGS YOU HAVE THE FOLLOWING RIGHTS:
 - A. YOU HAVE THE RIGHT TO PRESENT EVIDENCE.
 - B. YOU HAVE THE RIGHT TO CALL WITNESSES, INCLUDING EXPERT WITNESSES.
 - C. YOU HAVE THE RIGHT TO CROSS EXAMINE WITNESSES, INCLUDING ANY WITNESSES CALLED BY THE COURT.
 - D. YOU HAVE THE RIGHT TO BE REPRESENTED BY A LAWYER OF YOUR OWN CHOICE. 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 REQUESTED TO PAY THAT LAWYER UNLESS YOU DO NOT HAVE THE MONEY TO DO SO.

3. IF A GUARDIAN IS APPOINTED FOR YOU, HE OR SHE MAY BE GIVEN THE AUTHORITY TO EXERCISE THE FOLLOWING POWER ON YOUR BEHALF:
- A. DETERMINING WHO SHALL PROVIDE PERSONAL CARE OR ASSISTANCE TO YOU.
 - B. MAKING DECISIONS REGARDING THE SOCIAL ENVIRONMENT AND OTHER SOCIAL ASPECTS OF YOUR LIFE.
 - C. DETERMINING WHETHER YOU SHOULD TRAVEL.
 - D. BE AUTHORIZED ACCESS TO OR RELEASE OF YOUR CONFIDENTIAL RECORDS.
 - E. APPLYING FOR GOVERNMENT AND PRIVATE BENEFITS ON YOUR BEHALF.
 - F. CONSENTING TO OR REFUSING GENERALLY ACCEPTED ROUTINE OR MAJOR MEDICAL OR DENTAL TREATMENT.
 - G. FACILITATE YOUR PLACEMENT IN AN APPROPRIATE LONG TERM CARE FACILITY.
 - H. CHOOSING THE PLACE OF YOUR ABODE.
 - I. ANY OTHER POWER WHICH THE COURT IN ITS DISCRETION SHALL DEEM APPROPRIATE TO MEET YOUR PERSONAL NEEDS.
 - J. TO COLLECT ASSETS AND INCOME AND TO INVEST AND REINVEST THE SAME AS A PRUDENT PERSON OF DISCRETION AND INTELLIGENCE IN SUCH MATTERS SEEKING REASONABLE INCOME AND TO APPLY SO MUCH OF THE INCOME AND

PRINCIPAL AS NECESSARY FOR YOUR COMFORT, SUPPORT, MAINTENANCE AND WELL-BEING.

K. COLLECTING ALL YOUR INCOME, INCLUDING BUT NOT LIMITED TO SOCIAL SECURITY, DIVIDENDS, INTEREST AND PENSION.

L. PAYING ALL BILLS NECESSARY TO MAINTAIN YOU IN A LONG TERM CARE FACILITY.

M. PROVIDING FOR YOUR MAINTENANCE AND SUPPORT.

N. DETERMINING WHO SHALL PROVIDE PERSONAL CARE FOR YOU AND HAVING THE ABILITY TO PAY FOR SAID SERVICES.

O. ANY OTHER POWER WHICH THE COURT IN ITS DISCRETION SHALL DEEM APPROPRIATE TO MEET YOUR PROPERTY MANAGEMENT NEEDS.

4. THIS ORDER TO SHOW CAUSE, A COPY OF THE PETITION AND ANY SUPPORTING PAPERS UPON WHICH IT IS BASED SHALL BE SERVED UPON HARDY THOMPSON, THE PERSON ALLEGED TO BE INCAPACITATED, BY PERSONALLY DELIVERING THEM TO HIM ON OR BEFORE _____, 2017. IF THE PERSON ALLEGED TO BE INCAPACITATED IS NOT SERVED AT HIS/HER RESIDENCE, A COPY OF THIS ORDER TO SHOW CAUSE, THE PETITION AND ANY SUPPORTING PAPERS SHALL BE LEFT AT HIS/HER RESIDENCE.

5. THIS ORDER TO SHOW CAUSE, A COPY OF THE PETITION AND ANY SUPPORTING PAPERS SHALL BE SERVED BY OVERNIGHT MAIL OR PERSONALLY DELIVERED TO THE OFFICE OF THE COURT EVALUATOR ON OR BEFORE _____, 2017.
6. THIS ORDER TO SHOW CAUSE, AND NOTICE OF THE PROCEEDING SHALL BE SERVED BY FIRST-CLASS MAIL UPON THE NEXT OF KIN OR DISTRIBUTEES AND UPON THE CHIEF EXECUTOR OFFICER OF THE FACILITY WHERE THE AIP RESIDES, IF ANY, AT LEAST FOURTEEN (14) DAYS PRIOR TO THE RETURN DATE OF THIS ORDER TO SHOW CAUSE.

IT IS FURTHER ORDERED AND DIRECTED THAT THE PETITIONER MAKE A DILIGENT EFFORT TO CONTACT FAMILY MEMBERS, OR OTHER PERSONS WHO HAVE A RELATIONSHIP WITH THE ALLEGED INCAPACITATED PERSON AND WHO WOULD BE WILLING TO SERVE AS GUARDIAN.

IT IS FURTHER ORDER AND DIRECTED THAT THE PETITIONER BRING OR CAUSE TO HAVE THE ALLEGED INCAPACITATED PERSON PRESENT IN COURT ON THE RETURN DATE HEREOF. ANY REQUEST FOR A WAIVER OF ANY PROVISIONS OF THIS MUST BE MADE DIRECTLY TO THE COURT. PROOF OF SERVICE MUST BE SUBMITTED TO THE COURT ON OR BEFORE THE RETURN DATE.

Dated: Poughkeepsie, New York
_____, 2017

HON. JAMES D. PAGONES, A.J.S.C.

ARTICLE 81 GUARDIANSHIP PROCEEDINGS:
Overview and Background; Pre-Hearing Procedural Issues

EXHIBIT B

Petition for Guardianship

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF **DUTCHESS**

-----X
IN THE MATTER OF THE APPLICATION FOR THE
APPOINTMENT OF A GUARDIAN BY:

GEORGE THOMPSON

**PETITION FOR
GUARDIANSHIP**

Petitioner,

FOR: **HARDY THOMPSON**

Index # _____

A PERSON ALLEGED TO BE INCAPACITATED
-----X

The petition of **GEORGE THOMPSON** by his attorneys, Teahan & Constantino LLP,
respectfully alleges:

1. The name and address of the Alleged Incapacitated Person is:

**Hardy Thompson
1969 Howard Road
Poughkeepsie, NY 12601**

2. Mr. Thompson (“AIP”) resides alone in his domicile resident. The names, addresses
and telephone numbers of the persons that the petitioner intends to serve with the Order to Show
Cause and the nature of their relationship to the AIP are:

<u>Name and Relationship</u>	<u>Address</u>	<u>Telephone Number</u>
George Thompson Son	66 Butch Drive Wappingers Falls, NY 12590	(845) 298-1012
Pauline Martin Daughter	48 Pleasant Circle Washington, DC 20020	(202) 678-0213

ALLEGED INCAPACITATED PERSON’S FUNCTIONAL LEVEL

3. Upon information and belief:

a. HARDY THOMPSON (“AIP”) was transported via ambulance and admitted to Vassar Brothers Medical Center on February 7, 2017.

b. The AIP was transferred to Sharon Hospital in Sharon, Connecticut and placed in its Senior Behavioral Health Care Unit for psychiatric testing and evaluation.

c. The AIP is alleged to be incapacitated in that he is unable to provide for his personal needs and property management. Also, he does understand the nature and consequences of his said inability.

d. The AIP requires helps with some daily living requirements, including but not limited to bathing, dressing, eating, cooking, shopping, housekeeping and bill payment. Accordingly, the Petitioner believes the AIP is unable to care for his personal needs and property management.

4. Despite having a number of individuals to provide support, the AIP will go days without eating properly, neglecting his personal hygiene, health matters (i.e., he forgets to take his medications) and basic house cleaning. The AIP will not call his children or other friends for assistance to tend to his medical appointments, refilling his medical prescriptions, shopping for food, cleaning supplies and hygiene products. Instead, the AIP will go for days without the necessary items. When reminded of the things he has neglected, the AIP becomes enraged and insists that he can take care of himself. The AIP does not understand the nature and consequences of his said inability to provide for his personal needs.

5. Despite having sufficient financial resources, the AIP, has on more than one occasion, forgotten to pay certain utility bills and his tax bills. The Petitioner, when visiting the AIP at his residence, the Petitioner found a termination notice from the utility company affixed to the AIP's front door. The Petitioner periodically checks with the Tax Collector to confirm receipt of payment of the AIP's property and school tax payments. The AIP does not possess the physical ability to maintain the inside or outside of his home (i.e., he is beginning to hoard items in his home; and he fails to clear the walk-way to prevent injury to himself or others who may visit him) nor does he make the necessary arrangements to hire someone to provide this service for him. The AIP does not understand the nature and consequences of his said inability to care and manage his property.

**POWERS SOUGHT WITH RESPECT TO
PERSONAL NEEDS AND PROPERTY MANAGEMENT**

6. The Petitioner seeks powers with respect to the:
- a. Personal needs of the AIP and their relationship to the functional level and needs of the AIP are as follows:
 - (1) Determine who shall provide personal care or assistance.
 - (2) Make decisions regarding the social environment and other social aspects of the life of the incapacitated person.
 - (3) Authorize access to or release of confidential information or records.
 - (4) Apply for government and private benefits.
 - (5) Consent to or refuse generally accepted routine or major medical or dental treatment as those terms are defined in § 81.03 of the Mental Hygiene Law, including the right to refuse medical interventions such as intravenous and/or other tube-feeding and hydration

mechanical respiration, antibiotic treatment, surgery, or cardiopulmonary resuscitation, and to otherwise exercise all of the powers of a Health Care Agent under Article 29-C of the Public Health Law, and in addition, to act as a surrogate for the purpose of consenting to an Order Not to Resuscitate under the provisions of Article 29-B of the Public Health Law;

(6) Choose the place of abode of the alleged to be incapacitated person.

b. Property management needs of the AIP and their relationship to the functional level and needs of the AIP are as follows:

(1) Inventory and take possession of the financial assets of the AIP, including, but not limited to, cash withdrawn from his residence, cash currently located at his residence, original stock certificates, certificates of deposit, bank account books, retirement accounts, and policies of insurance, and to sell and/or manage such assets and to invest in and purchase appropriate investments.

(2) Creation of a checking account into which all income of the AIP can be direct deposited, including, but not limited to, social security checks, pension payments, dividends, governmental benefits, etc.

(3) Engage in banking transactions for the AIP.

(4) Engage in insurance transactions, including, but not limited to, life, health auto, accident and all other insurance.

(5) Estate transactions; including renouncing or disclaiming any interest or interests that AIP may have in any estate, whether through right of election, inheritance, gift, devise or otherwise.

(6) Claims and litigation of which AIP is or may be party.

(7) Making gifts up to and in excess of the amount of the AIP's gift tax annual exclusion, including transferring of title of his assets and title of his real property to one or more revocable or irrevocable Trusts in order to minimize exposure to gift estate, or other taxes.

(8) Creating, funding or amending revocable or irrevocable intervivos trusts, including so-called Medicaid Trusts.

(9) Chattel and goods transactions.

(10) Bond, share, and commodity transactions.

(11) Access to safe deposit boxes/vaults/safes.

(12) Power to sign tax returns and deal with all federal, state and local taxing authorities on all claims, litigation, settlements and other matters.

(13) Power to deal with all pension, retirement incentive, I.R.A./Keogh/SEP and similar type plans, programs and annuities.

(14) Power to deal with Medicare and Medicaid claims, litigation and settlement.

(15) Power to enter into buy and sell transactions.

(16) Power to forgive and collect debts.

(17) Power to claim, negotiate, obtain, and settle claims and actions for government entitlements and benefits of all kinds with all government administrations an agencies.

(18) Power to make statutory claims and elections.

(19) Power to pay salaries of employees and to employ and pay household help and health aides for the alleged incapacitated person.

(20) Power to provide the alleged incapacitated person with personal health care services from others.

(21) Power to implement and make tax savings decisions; including without limitation estate and gift tax savings.

(22) Power to retain attorneys, accountants, investment counsel and similar professionals concerning the alleged incapacitated person's property and affairs and to pay them.

(23) All other matters.

7. Petitioner requests that the duration of the powers with respect to personal needs and property management to continue for the remainder of the AIP's life.

ALLEGED INCAPACITATED PERSON'S RESOURCES AND OBLIGATIONS

8. Upon information and belief, a summary of the property and income of the AIP is detailed in the attached Schedule A. The resources listed on Schedule A will be utilized for the AIP's medical and custodial care, to the extent that the same are not eligible to be covered by insurance or any government or private benefits for which the AIP may be eligible.

To the best of the Petitioner's knowledge, the AIP is not a recipient of public assistance.

9. Upon information and belief, the AIP has no outstanding claims, debts or obligations.

DISTRIBUTEES, PROPOSED GUARDIAN AND STANDBY GUARDIAN

10. The names, addresses, and telephone numbers of the presumptive distributees of HARDY THOMPSON, the person alleged to be incapacitated, as that term is defined in SCPA 103(42), unless they are unknown or cannot be reasonably ascertained, are as follows:

<u>Name and Relationship</u>	<u>Address</u>	<u>Telephone Number</u>
George Thompson Son	66 Butch Drive Wappingers Falls, NY 12590	(845) 298-1012
Pauline Martin Daughter	48 Pleasant Circle Washington, DC 20020	(202) 678-0213

11. The name, address and telephone number of the Petitioner is:

<u>Name and Relationship</u>	<u>Address</u>	<u>Telephone Number</u>
George Thompson Son	66 Butch Drive Wappingers Falls, NY 12590	(845) 298-1012

12. In accordance with Section 81.06(a)(2) of the New York Mental Hygiene Law, the Petitioner is a presumptive distributee of the person alleged to be incapacitated. The Petitioner, the AIP's son, has been acting as caretaker in some capacity to HARDY THOMPSON (and his wife, prior to her death in 2013) since 2010.

There is no proposed standby guardian at this time.

TEMPORARY GUARDIAN

13. The Petitioner is not seeking relief pursuant to Section 81.23 (or Temporary Guardian).

OTHER INFORMATION

14. *Estate Planning Documents.* The Petitioner was able to locate copies of the AIP's estate planning documents: Last Will and Testament, Living Will and Health Care Proxy, Statutory Gifts Rider and Power of Attorney dated April 11, 1996. The nominated executor of the Will was his wife, MAGGIE THOMPSON. The Attorney-in-Fact and the agent was MAGGIE THOMPSON. MAGGIE THOMPSON, the AIP's wife, predeceased him on July 14, 2013.

Upon information and belief, the AIP did not revise his estate planning after the death of his wife in 2013.

15. Personal Information. The AIP is 90 years of age and is currently a patient at Sharon Health Care Center located 27 Hospital Hill Road, Sharon, Connecticut 06069. The AIP was predeceased by his wife on July 14, 2013. The AIP did not remarry. Other than the two distributees named in paragraph 10, the AIP has no other children either marital, non-marital or adopted.

The AIP was admitted to Vassar Brothers Medical Center on February 7, 2017. On February 13, 2017, the AIP was transferred to Sharon Hospital in Sharon, Connecticut and placed in its Senior Behavioral Health Center Unit for psychiatric testing and evaluation. As of this date, the AIP remains in this facility.

WHEREFORE, your Petitioner requests that the Court:

- A. To appoint the Petitioner, GEORGE THOMPSON, as the Guardian of HARDY THOMPSON, an alleged incapacitated person.
- B. Such other relief as the Court deems just and proper.

Dated: March 30, 2017
Millbrook, New York

GEORGE THOMPSON

VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF DUTCHESS) ss:

GEORGE THOMPSON, being duly sworn deposes and says: that the deponent has read the foregoing petition and knows the contents thereof; that the said is true to deponent's own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters deponent believes it to be true.

GEORGE THOMPSON

Sworn to before me this
_____ day of March, 2017

Notary Public
Commission Expires: _____
Affix Seal or Stamp:

Pursuant to 22 NYCRR 130-1.1., the undersigned, an attorney admitted to practice in the Courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: March _____, 2017

Vincent L. Teahan, Esq.
Teahan & Constantino LLP
41 Front Street, Suite A
P.O. Box 1181
Millbrook, New York 12545
(845) 677-2101
(845) 677-1054 - FAX

SCHEDULE A

Estimated Property and Income Summary

Real Property:

1969 Howard Road Poughkeepsie, NY 12601	<u>\$275,000.00</u>
Total Estimated Real Property:	\$275,000.00

Financial Accounts:

HVFCU Checking Account	\$75,000.00
HVFCU Savings Account	\$30,000.00
Merrill Lynch Investment Account	<u>\$300,000.00</u>
Total Estimated Financial Accounts:	\$405,000.00

Monthly Income:

IBM Pension	\$2,548.00
Social Security	<u>\$1,250.00</u>
Total Estimated Monthly Income:	\$3,798.00