



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item #19(a)

REQUESTED ACTION: Approval of an affirmative legislative proposal from the Trusts and Estates Law Section to amend the Mental Hygiene Law.

Attached is a report from the Trusts and Estates Law Section to amend Mental Hygiene Law §81.21(c). The amendment would eliminate an erroneous reference to Mental Hygiene Law §81.07(d). By eliminating the erroneous reference, the risk of confusion as to the persons required to be given notice of a petition for relief will be reduced.

The report will be presented by Robert M. Harper, co-chair of the Section's Committee on Legislation and Governmental Relations.

**NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES LAW SECTION**

Proposed Legislation

It is hereby recommended that Mental Hygiene Law § 81.21(c) be amended to read as follows:

(c) Notice of a petition seeking relief under this section shall be served upon:

(i) the persons entitled to notice in accordance with paragraph one of subdivision (e) of section 81.07 of this article;

(ii) if known to the petitioner or guardian, the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act unless the court dispenses with such notice; and

(iii) if known to the petitioner or guardian, any person designated in the most recent will or similar instrument of the incapacitated person as beneficiary whose rights or interests would be adversely affected by the relief requested in the petition unless the court dispenses with such notice.

The foregoing shall be effective upon enactment.

Memorandum in Support

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 § 81.21(a).¹ In enacting MHL § 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

¹ *Matter of Franchina*, 21 Misc.3d 1123(A), at *4 (Sup. Ct., Nassau County 2008).

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.”²

MHL § 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.³ The failure to satisfy the notice requirements set forth in MHL § 81.21(c) can have serious practical implications, including subjecting the court-authorized transfers to subsequent determinations that they are invalid.⁴

Although MHL § 81.21(c) specifically references MHL § 81.07(d)(1), it appears that the cross-reference to MHL § 81.07(d)(1) is erroneous. In its current form, MHL § 81.07(d) contains the legend for Orders to Show Cause commencing MHL Article 81 guardianship proceedings.⁵ Instead, it is MHL § 81.07(e)(1) that enumerates the individuals who are entitled to service of process of Orders to Show Cause in Article 81 proceedings.⁶ They include: (a) the alleged incapacitated person; (b) the attorney for the alleged incapacitated person; and (c) the court evaluator.⁷

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

² *See id.*

³ M.H.L. § 81.21(c).

⁴ *Matter of Burns*, 267 A.D.2d 755, 757 (3d Dep't 1999).

⁵ Mental Hygiene Law § 81.07(d).

⁶ Mental Hygiene Law § 81.07(e).

⁷ *See id.*

81.21(c) to reference MHL § 81.07(e)(1), rather than MHL § 81.07(d)(1), these objectives can be accomplished.

For the foregoing reasons, it is respectfully recommended that MHL § 81.21(c) be amended as set forth in this memorandum.

Resolutions

Trusts and Estates Law Section, New York State Bar Association

Opinions expressed are those of the Section preparing these resolutions and do not represent those of the New York State Bar Association unless and until they have been adopted by its Executive Committee.

TO: Executive Committee, New York State Bar Association

FROM: Executive Committee, Trusts and Estates Law Section

DATED: October 10, 2013

RE: Reports for January, 2014 Meeting

RESOLVED, that the NYSBA Trusts and Estates Law Section supports the following amendment:

(c) Notice of a petition seeking relief under this section shall be served upon:

(i) the persons entitled to notice in accordance with paragraph one of subdivision (e) of section 81.07 of this article;

(ii) if known to the petitioner or guardian, the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act unless the court dispenses with such notice; and

(iii) if known to the petitioner or guardian, any person designated in the most recent will or similar instrument of the incapacitated person as beneficiary whose rights or interests would be adversely

affected by the relief requested in the petition unless the court dispenses with such notice.

RESOLVED, that the NYSBA Trusts and Estates Law Section is in favor of the above amendment for the reasons set forth in the accompanying Memorandum in Support, without further comment.

Resolution Prepared By: Robert M. Harper, Jennifer F. Hillman, and Ian W. MacLean

Approved By: Vote of the Executive Committee of the NYSBA Trusts and Estates Law Section

Section Chair: Carl Baker