

# Preserving Rights, Ensuring Health Care: Using the One- Shot Provision of MHL 81.16(b)



**HUNTER** | Brookdale Center  
for Healthy Aging

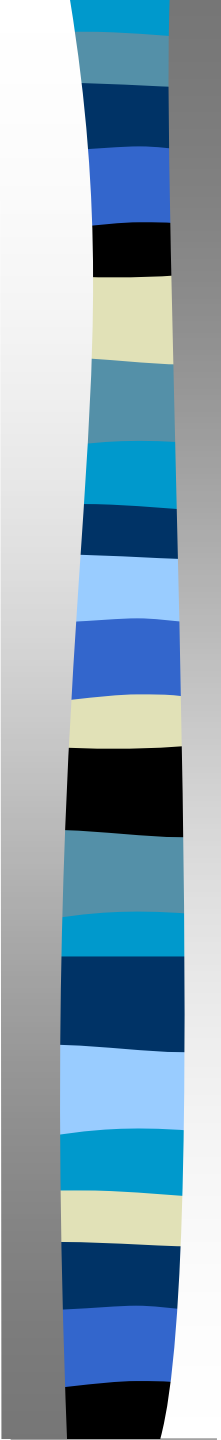
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# What's the problem?

- Many services/transactions in our society require consent
- In many circumstances, third parties question a person's legal capacity to give consent (or enter into the transaction)
- The default solution is to require someone to get guardianship



# Denials of Medical Care Unless Guardianship is Obtained Really Happen

- [Maureen's story](#)



# Guardianship

- The legal status by which a person's rights (over their person, their property, or both) are removed, and power to make decisions for them given to another—the Guardian
- In NY, 2 separate statutes, MHL Art 81 for adults who have “lost capacity”, and SCPA 1750, for persons with I/DD who have never had capacity



# Differing approaches; similar results

- Reforms in the late 80's, early 90's led to numerous procedural protections in Art. 81, and an overarching focus on “least restrictive alternative” and “tailored” guardianships
- Since at least 1990 it has been clear that SCPA 17-A is woefully out of date and almost surely unconstitutional



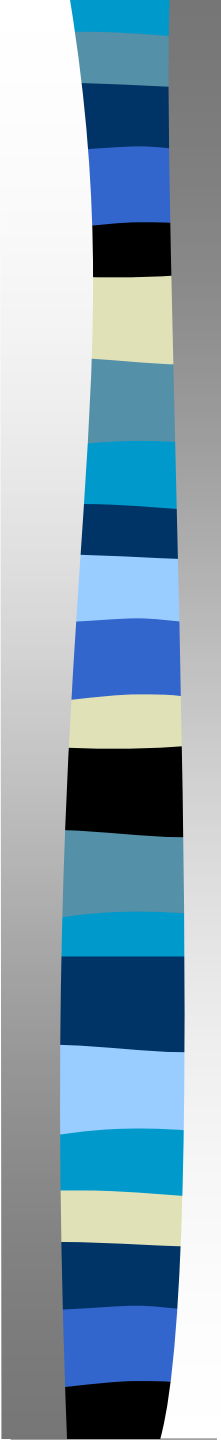
# But in reality

- The vast majority of Art 81 guardianships are plenary; very, very few restoration proceedings
- Statutorily, all Art 17-A guardianships are plenary, although Surrogates are now engaging in “work-arounds”; supported decision-making (SDM) increasingly a ground for restoration



# So what's wrong here?

- There is a constitutional and statutory (in Art. 81) imperative to utilize the least restrictive alternative available to meet the person's needs
- There is a huge body of evidence on the negative consequences of unwanted guardianship on older people with cognitive decline and of guardianship more generally on people with I/DD
- Unwanted guardianship violates the human right to legal capacity, premised in equality, non-discrimination and dignity



# MHL 81.16(b) to the rescue

- Derived from the UGCPPA (now UGCOPPA) “other protective proceedings” provisions
- Intended as a limited intervention short of (less restrictive than) guardianship in which the person never loses their legal and civil rights





# What's the objective?

- To avoid unnecessary guardianship that robs a person of their legal rights
- To ensure that they receive the treatment/services, or can enter into the transaction that is necessary for health and/or wellbeing
- To avoid unnecessarily burdening the legal system



## But...(a caveat)

- Your primary responsibility as a lawyer is to uphold rights, not to make life easier for the courts (*The “they’ll eventually end up coming back anyway, so why not just do a full guardianship now” conundrum*)



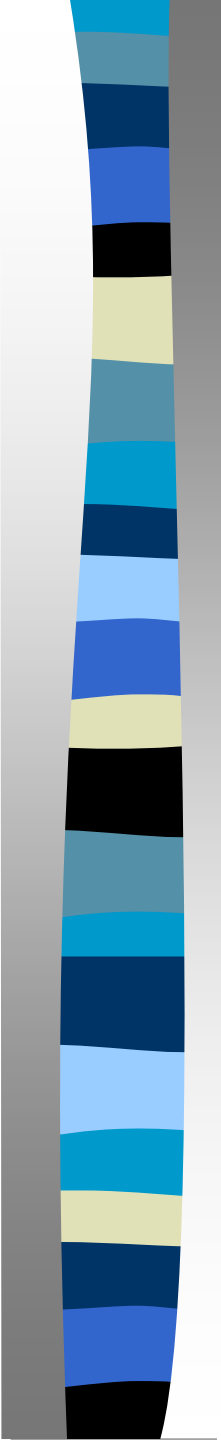
# Why MHL 81.16(b)?

- Statutory (MHL 81.01) and constitutional requirement of “least restrictive means” (or alternative)
- History of “other protective proceedings” provisions from which MHL 81.16(b) was derived
- Can be a “less restrictive alternative” to appointing a guardian when all that’s needed is a “single transaction or transactions”



# Under 81.16(b) the Court can:

- “*authorize, direct or ratify any transaction or series of transactions* necessary to achieve any security, service or care arrangement meeting the foreseeable needs of the incapacitated person”
- “*authorize, direct or ratify any contract, trust, or other transaction* relating to the incapacitated person’s affairs”
- “*appoint a special guardian* to assist in the accomplishment of any protective arrangement or other transaction authorized [by this section]”



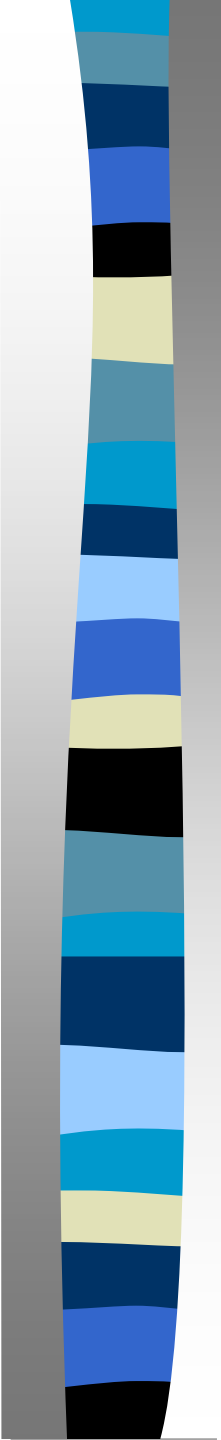
# Some health and health-related situations in which MHL 81.16(b) can be useful

- Consent to medical or dental treatment when the FHCDA does not apply
- Qualifying for Medicaid
- Hospital discharge plan (as to a rehab facility)
- Securing an inheritance
- Creating an SNT
- Creating an ABLE account
- Naturalization
- Mortgage foreclosure



# Procedural Issues

- The “one-shot” provision is a *disposition*, not a *remedy*
- Requires the same formality and procedural protections as guardianship
- Requires a hearing and finding of incapacity or, arguably, capacity to consent
- Statute is “inartfully drawn” in apparently limiting consent to approval of a transaction or transactions, or appointment of a special guardian, to financial matters



# When is the “one shot” appropriate?

- Where consent to a single or several related transactions will solve the problem (“authorization or ratification”)
  1. Consent to Covid-19 vaccine (Walter X.)
  2. Transfer to rehab facility (Winona Z.)
- Where several steps or transactions are necessary to solve the problem, and someone needs to do them (appointment of a special guardian)
  3. Qualifying someone for Medicaid (Irma L.)
  4. Dealing with an eviction proceeding, securing funds, etc. (Wesley W.)



# When is the “One Shot” Inappropriate?

- When there are multiple issues that will have to be dealt with over a substantial period of time, or indefinitely (Xavier G.)
- When a tailored guardianship is clearly the least restrictive alternative
- But...not just to avoid the possibility that court intervention may be needed again sometime in the future





# What must the Court find (Petitioner allege and prove)?

- The person alleged to be incapacitated *is* incapacitated
- The transaction or transactions to be approved are “necessary as a means of providing for the personal needs and/or property management of the person”



# Red flags around the incapacity requirement

- Some clients/AIPs may not be concerned about a finding of incapacity
- For others, maintaining a sense of control over their lives (especially older persons with progressive cognitive decline) and dignity militates against such finding
- Possible subsequent and unintended consequences from a finding of incapacity



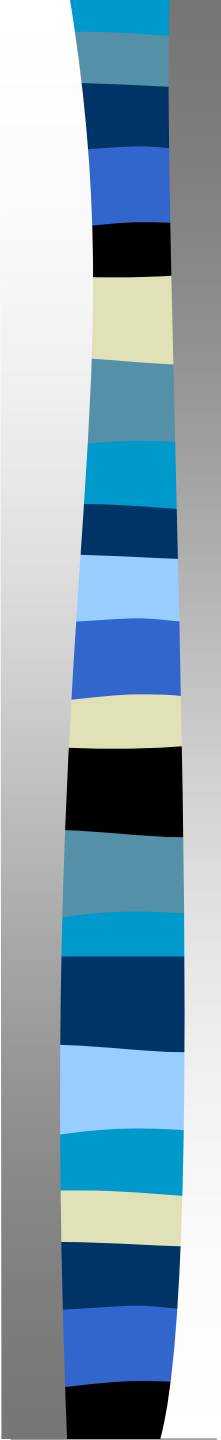
# What about consent (MHL 81.02 [a])?

- Avoids finding of incapacity
- Requires a finding that the AIP has the capacity to consent (the “ability to meaningfully interact and converse with the court, his or her understanding of the nature of the proceeding, and his or her comprehension of the personal and property management powers being relinquished” *Matter of Buffalino [James D.]*)



# MHL 81.02

- **81.02. Power to appoint a guardian of the person and/or property; standard for appointment**
- **(a)** The court may appoint a guardian for a person if the court 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. (emphases added)



# Can there be an 81.16(b) disposition on consent?

- Language of the statute seems to preclude, *but*
- Can be parsed to distinguish between personal needs transactions and those involving “any contract, trust or other transaction relating to the incapacitated person’s property and financial affairs” through emphasis on the connector “or” (only works where money is involved)
- Or, construing MHL 81.02(a)(2) and 81.16(c) to require overarching purpose of “least restrictive alternative” *Matter of John D.*, 885 N.Y.S.2d194 (S. Ct. Cortland Co.1997)
- Or, as in the Third Department, an equal protection argument (no reported decisions)



# “Parsing” the “inartfully drawn statute”

- 81.16(b)
- **(b)** Protective arrangements and single transactions. If the person alleged to be incapacitated is found to be incapacitated, the court without appointing a guardian, may authorize, direct, or ratify any transaction or series of transactions necessary to achieve any security, service, or care arrangement meeting the foreseeable needs of the incapacitated person, **or** *may authorize, direct, or ratify any contract, trust, or other transaction relating to the incapacitated person’s property and financial affairs* if the court determines that the transaction is necessary as a means of providing for personal needs and/or property management for the alleged incapacitated person. (emphases added)



# Construing Appointment on Consent

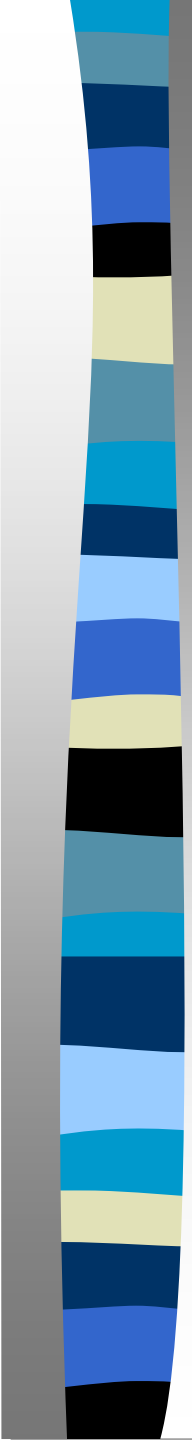
- **§ 81.15. Findings**

- **(a)** Where the court determines that the person agrees to the appointment and that the appointment is necessary, the court shall make the following findings on the record:

- **1.** the person's agreement to the appointment;...
- **4.** the specific powers of the guardian which constitute the *least restrictive form of intervention* consistent with the person's functional limitations (emphasis added)

- **81.16 (c) Appointment of a Guardian**

- **1.** If the person alleged to be incapacitated is found to have agreed to the appointment of a guardian and the court determines that the appointment of a guardian is necessary, the order of the court shall be designed to accomplish the *least restrictive form of intervention* by appointing a guardian with powers limited to those which the court has found necessary to assist the person in providing for personal needs and/or property management. (emphasis added)



Given the procedural requirements of Art. 81, how can the “one shot” be made more efficient?

- Avoid the appointment of a Court Evaluator through MHLS agreement to serve as counsel for the person
- Get individual courts to agree to “fast track” MHL 81.16(b) applications





# Beside benefits to the client/AIP

- Court benefits from “fast tracking” with speedier dispositions (balancing longer time frames for petitions seeking guardianship)
- Court system benefits from avoiding appointment of a Court Examiner and monitoring required by MHL 81.32
- Availability of the one-shot remedy (even of they never need it) incentivizes parents of people with I/DD to utilize supported decision-making rather than seeking guardianship.



# Think out of the box

- Be creative !
- A possible solution to the healthcare proxy dilemma for people with I/DD (the general presumption that all adults have capacity is reversed if the person carries a diagnosis; see *In re John T. (Hanson)*, 989 N.Y.S.2d 903, 904 (N.Y. App. Div. 2014) (quoting, *In re Rose S. (Anonymous)*, 741 N.Y.S.2d 84, 85 (N.Y. App. Div. 2002)).
- This really happens!  
See <https://vimeo.com/583407022/e595733254> (Maureen's story)
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# Remember

- Protecting constitutional and legal rights is one of a lawyer's highest callings and most important responsibilities
- And you'll feel really good about doing it!