

# **Promoting Health, Protecting Rights: A Guide For Using the § 81.16(b) “One-Shot” Provision of MHL Article 81**

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## Acknowledgements

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**Kristin Booth Glen** is University Professor and Dean Emerita, CUNY School of Law, and Project Director, Supported Decision-Making New York. She has had extensive experience with guardianship, both for adults who have lost capacity (MHL Art. 81) and persons with intellectual and developmental disabilities (SCPA 17-A), having served as Surrogate, New York County from 2005-2012 and, previously, Justice of the NYS Supreme Court, and the Appellate Term, from 1986 to 1995. She has written important decisions in both areas, and was involved in the drafting and passage of Arti. 81, with subsequent responsibility for training judges, guardians and GALs on its use.

**Hunter College's Brookdale Center for Healthy Aging** is CUNY's aging research and policy center, located at Hunter College. Since 1974, the Brookdale Center has been working to improve the lives of older adults through research, professional development, and advancements in policy and practice. We work to ensure that aging is framed not as a disease, but as another stage in the life course. Visit us at <http://brookdale.org>.

## Introduction

We live in a highly contractual world where the ability to sign a document that it is legally binding or to give “informed” consent is essential to obtaining goods and services we may each wish for or need. In the healthcare setting, faced with concerns about the legal capacity of older people with dementia, cognitive decline, Alzheimer’s, etc., or those with developmental or psychosocial disabilities, family and friends may confront a cruel choice: satisfy the demand of a third party provider to ensure unquestionable legal authority by obtaining guardianship that strips a person of their civil rights, or see the vulnerable person forego the procedures and/or care they require.

This Guide is intended to offer an alternative for advocates, describing how and why problems to consent arise, explaining why Mental Hygiene Law § 81.16(b) may provide a solution, and discussing the procedural issues that are raised by its use. The Guide also includes several hypotheticals intended to help practitioners think about when § 81.16(b) may be appropriate and, separately, sample pleadings that might be employed in the situations posed by the hypotheticals.

The Guide and the project supported by the Mother Cabrini Foundation was prompted by a small study conducted by the New York Legal Assistance Group (NYLAG), which has lawyers in 36 hospital and clinic settings throughout New York City. Reviewing requests for assistance in securing guardianship over vulnerable persons received by NYLAG’s lawyers over a six-month period, out of 121 requests, *the § 81.16(b) remedy could have been a viable solution in almost a quarter of all cases.*

<b>Article 17(a) Matters</b>	<b>77</b>
<b>Article 81.16(b) would not be an appropriate alternative</b>	<b>57</b>
Change in Guardian	1
Financial Management	4
General*	52
Recommended**	8
Behavioral Control***	2
Immigration	1
Long Term Care Planning	1
Medical Decision	3
<b>Article 81.16(b) could be an appropriate alternative</b>	<b>9</b>
Financial Management	4
General	2
Immigration	2
Long Term Care Planning	2
Medical Decision	1

<b>Article 81 Matters</b>	<b>44</b>
<b>Article 81.16(b) would not be an appropriate alternative</b>	<b>19</b>
Behavioral Control	1
Financial Management	6
Long Term care planning	3
Financial Management	4
General	8
Lawsuit****	1
Housing	4
Property Management	1
<b>Article 81.16(b) could be an appropriate alternative</b>	<b>19</b>
Document replacement	1
Financial Management	3
Green Card Renewal	2
Housing	2
Immigration	5
Long term care planning	7
Medical Decision	2
<b>Grand Total</b>	<b>121</b>
<b>Total of Guardianship requests where § 81.16(b) might be appropriate</b>	<b>28</b>

\* General – A broad array of services and assistance needed for remainder of lifetime.

\*\* Recommended – Someone recommended guardianship to the prospective petitioner, but the petitioner did not specify a reason why they need it.

\*\*\* Behavioral Control – The prospective petitioner wants to control lifestyle choices and medication compliance for a person with a mental illness

\*\*\*\* Lawsuit – The AIP is a party to a lawsuit or potential lawsuit.

## **I. Problem: Lack (or perceived lack) of Capacity and the Draconian “solution” of Guardianship**

New York State law presents a patchwork of solutions to assist vulnerable people in various settings—home, hospitals, and institutions—who may lack, or who are seen/presumed to lack, the capacity to consent to health care-related decisions.<sup>1</sup> These decisions may range from decisions regarding ordinary and routine care to decisions regarding significant major medical

<sup>1</sup> Described as a “bewildering labyrinth of possibilities,” they include the Family Health Care Decisions Act (FHCDA), Public Health Law Art. 29-CC, the Health Care Decisions Act for Persons with Mental Retardation (HCA-MR) S.C.P.A. Section 1750-b, Mental Hygiene Law Art. 80, (Surrogate Decision-Making Committees and Panels) and other provisions for surrogate decision-making for persons receiving or eligible for services from the NYS Office for People with Developmental Disabilities (OPWDD) in 14 N.Y. Comp. Codes R. & Regs Section 633.11. Too lengthy and complex to be explored here, the Brookdale Center for Healthy Aging and the Elder and Disability Justice Clinic

needs. Although the legislature has provided for surrogate decision-making in many situations where a person is deemed to lack capacity, there are still significant lacunae. These are caused by both limitations of coverage in relevant statutes, and because of the ability of gatekeepers to engage in discretionary capacity determinations.

In the first instance, for example, the Family Health Care Decisions Act (FHCDA), provides for healthcare decisions to be made from a ranked list of surrogates<sup>2</sup> if the healthcare provider finds a vulnerable person incapable of giving consent. However, the FHCDA only applies to patients in hospitals, nursing homes and hospice care.<sup>3</sup> Other medical facilities are not covered by the FHCDA, including providers of dental care or home care. Even if the vulnerable person is residing in a covered facility, it may be overly time-consuming to find, or obtain cooperation from, anyone on the ranked list of surrogates.

In the second instance, although the legislature has provided for a Health Care Proxy, an advance directive that providers are required to accept if the person no longer has capacity, the person must have had legal capacity at the time the Proxy was executed.<sup>4</sup> Providers may—reasonably or otherwise—refuse to accept the Proxy on the ground that the person lacked capacity at the time it was executed.<sup>5</sup> Health care providers have been known to refuse to honor proxies in cases where clients, regardless of age, have intellectual or developmental disabilities, but providers’ refusals may also result in denial of treatment for older people who have only recently begun to experience cognitive declines, dementia, etc.

Fearing liability when a person’s capacity is in doubt, and unable or unwilling to rely on existing legislative solutions, providers may insist that the vulnerable person’s loved ones seek guardianship to make medical or financial decisions for them.<sup>6</sup> Guardianship, which in New York is imposed under both MHL Article 81 (for adults who have lost capacity), and SCPA Article 17-A (for persons with intellectual and developmental disabilities and traumatic brain injuries), has been described as “civil death.” Studies show that removing a person’s self-determination, autonomy, and agency often has a negative, sometimes severe impact on their health and wellbeing.<sup>7</sup>

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at CUNY Law School are working on a digital Application that will guide attorneys and health care providers through the legislative, regulatory, and case law “labyrinth.”

<sup>2</sup> The list begins with the person’s court-appointed guardian, if any, the person’s spouse, and proceeds to parents, children, siblings, and a close adult friend familiar with the person’s personal, religious and moral views regarding healthcare. Public Health Law § 2994

<sup>3</sup> Public Health Law § 2994-b(1)

<sup>4</sup> Public Health Law § 2981(1)

<sup>5</sup> While there is a presumption of competency, the Appellate Division has held that “where there is medical evidence of mental illness or a mental defect, the burden shifts to the opposing party to prove by clear and convincing evidence that the person executing the document possessed the requisite mental capacity.” *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)).

<sup>6</sup> For a compelling account of how this can happen, see <https://vimeo.com/583407022/e595733254>.

<sup>7</sup> See National Council on Disability, *Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination* (2018), [https://ncd.gov/sites/default/files/NCD\\_Guardianship\\_Report\\_Accessible.pdf](https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf)

In the majority of cases, despite a preference for “tailored guardianship” in Article 81, courts impose plenary guardianship that strips a vulnerable person of all legal and civil rights. Article 17-A is even more draconian, with plenary guardianship as the *only* possibility.

## **II. “One-Shot,” or the MHL § 81.16(b) Solution**

Happily, in many cases there is an alternative to guardianship. An underutilized provision of New York’s adult guardianship law, **MHL § 81.16(b)**, permits a judge to “authorize a [necessary] **transaction or transactions**” that can solve a single problem or a series of interrelated problems that stem from a health concern.

Informally known as a “*one-shot*” provision, § 81.16(b) can meet a health care provider’s need for informed consent to a medical procedure, or for authorization for a hospital discharge without the requirement of first establishing guardianship. Using § 81.16(b) thus avoids the imposition of guardianship, permits a person to retain their rights, personhood, and dignity, while offering a solution to the vulnerable person’s immediate health concerns and, importantly, takes into consideration that individual’s specific, related challenges.

*Note: this solution is offered for health circumstances that fail to meet the medical emergency exception, under which patients are presumed to have consented to medically appropriate, life-saving care to treat the emergent concern at hand. Similarly, it is not offered for end-of life decisions, which are covered by an extensive list of statutory requirements.*

In addition to decisions that are directly related to a person’s health and medical treatment, a “one-shot” solution can also encompass related issues that impact a person’s health, such as preserving that person’s home from foreclosure, securing an inheritance that makes it possible to pay for necessities, protecting their immigration rights, etc.

## **III. Who can be assisted with § 81.16(b)**

§ 81.16(b) can be used to support the needs of people who have questionable capacity: older adults with cognitive decline, dementia, or Alzheimer’s, among other conditions, as well as vulnerable people with intellectual and developmental disabilities, and people with psychosocial disabilities, all of whom face decision-making obstacles and bias in health care settings, including private offices, clinics, and hospitals.

It is important to note that “lack of capacity” may present in a variety of ways—along a continuum—in the health care setting. At one end are people who are unconscious, or in a

coma, who are obviously “incapacitated” and unable to make a decision. At the other side of the continuum are persons who are clearly expressing their choices, but whose capacity is doubted because of a diagnosis, stigma or prejudice, or a practitioner’s fear of liability. In requesting § 81.16(b) relief, to the extent possible, the person’s wishes should guide the process. In some instances, § 81.16(b) may also present an opportunity for necessary court intervention and relief without the necessity for a finding of incapacity.

#### **IV. How does it work, and when is it appropriate?**

§ 81.16(b) provides several different “Protective arrangements and single transactions,” all of which avoid the imposition of guardianship in order to meet a defined problem. These permit the court to:

1. “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.”

Here, for example, the court could authorize a medical treatment not covered by the FHCDCA because it was outside a hospital, nursing home or hospice facility. Or it could authorize a transfer from a hospital setting to a rehabilitation facility where the patient is perceived as unable to give consent.

Arguably, the “ratify” language could be utilized to have a court approve/”ratify” a person’s health care proxy such that it could be used repeatedly, if necessary, with the legal assurance of its validity that a provider might require.

2. “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 incapacitated person.”

This remedy is most commonly used to protect assets of a vulnerable person, often by creating a Supplemental Needs Trust (SNT) for an inheritance, or through settlement of a tort case to preserve Medicaid eligibility and the creation of an additional source of funds to supplement the care that Medicaid provides.

3. “appoint a special guardian to assist in the accomplishment of any protective arrangement or other transaction authorized under § 81.16(b)].”

Where, for example, it is necessary to establish Medicaid eligibility, including obtaining access to financial records of the vulnerable person, a “special guardian” may be appointed to take all necessary steps to get the person onto Medicaid. The “special guardian” serves only until discharged by the court, presumably after achieving the hoped-for result through authorized transactions, and is not subject to the eligibility or reporting requirements of guardians

appointed under § 81.16(c).

Another situation in which a number of steps need to be taken<sup>8</sup> that can impact eligibility for healthcare involves naturalization for vulnerable persons who are deemed unable to take the requisite oath to support the U.S. Constitution because of incapacity.

## **V. Procedural Issues**

As Article 81 currently exists, the § 81.16(b) “one-shot” provision exists only as a “dispositional alternative” to a petition for guardianship (along with granting or denying the petition). This means that, even if only limited relief is required or requested, the procedural requirements for an Article 81 petition must be followed (see MHL § 81.08). And, under the language of § 81.16, “one-shot” relief is, with one exception, only available if the court has found the vulnerable person “incapacitated.”

There is a however, at least one “short cut” that may make the petitioning process less cumbersome and allow court consideration and determination to occur considerably faster than an ordinary petition for guardianship, as discussed in (C) below. In addition, the Supervising Judges of Supreme Court, Civil Term, may provide for “fast tracking” of § 81.16(b) petitions. Note that whether or not “short cuts” are available depends on the particular facts of the case and the county in which it is brought.

### **A. Who can petition?**

§ 81.08 sets out the range of persons and entities that may “commence a proceeding.” For the purposes of § 81.16(b), three are especially important. First is the vulnerable person her/himself, MHL § 81.08(a)(1).

This would be especially appropriate in a situation where a person with a developmental disability wants a particular treatment, but the healthcare provider, perhaps relying on a diagnosis the person carries or their own biases, refuses to accept the person’s consent. This fairly common situation presents a dilemma for loved ones and attorneys.

On one hand, having the person as the petitioner, requesting the court’s intervention to obtain the treatment s/he wants, is both an accurate framing of the legal problem, and also an affirmation of the person’s agency. On the other hand, because of the apparent limitation on § 81.16(b) relief, the requirement that the person has been found “incapacitated,” the recitation of facts in the pleading would counter this, unless both artfully worded—and

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<sup>8</sup> In addition to actually signing the oath for the vulnerable person, there are requirements for notifying I.N.S. proving incapacity, etc. See New Americans who require an “Oath Waiver: Based on a Medical Disability” during naturalization need to have a “designated representative,” according to U.S. Citizenship and Immigration (USCIS) policy: <https://www.uscis.gov/policy-manual/volume-12-part-j-chapter-3> (Section C. Waiver of Oath).



acceptable to the court. (E.g. *“Petitioner has been deemed incapacitated by X Provider and concedes that determination solely for purpose of this petition for MHL § 81.16(b) relief”*).

To avoid this problem, or where the person is unclear about the decision but does not oppose it, the more obvious choice of petitioner is a family member who would qualify either under § 81.06(a)(6): “a person...concerned with the welfare of the person alleged to be incapacitated,” or under § 81.06(a)(5): “the person with whom the person who is alleged to be incapacitated resides”. Again, however, facts amounting to incapacity would need to be pleaded.

There are two other potentially relevant entities that might serve as petitioners, depending on the situation: where the vulnerable person is a patient in a hospital or another facility that has an interest in a transfer, or in a financial transaction for payment, the hospital/facility (technically “the chief executive officer or [their] designee”) can be an authorized petitioner under § 81.06(a)(7).

Mental Hygiene Legal Services (MHLS) is also authorized to petition, and often does so in uncontested matters involving authorization to create a Supplemental Needs Trust (SNT) or to recover funds due the vulnerable person.

## **B. The Pleadings**

Although the relief sought is not appointment of a guardian, the pleadings must nevertheless conform to the requirements of § 81.08. If MHLS has consented to appointment as counsel for the “allegedly incompetent person” or AIP, this should be included in order to move more expeditiously, as described below.

## **C. Representation by Counsel**

Ordinarily, Article 81 proceedings are considerably slowed by the requirement that “[a]t the time of the issuance of the order to show cause, the court shall appoint a court evaluator,” MHL § 81.08(a). In the best of circumstances, determining who could appropriately serve in that capacity takes time, but the problem is exacerbated where the AIP and/or petitioner cannot afford the cost of an evaluation. There is also the possibility of considerable delay because of the time required for the appointed Court Evaluator to be served with the papers and to perform their duties.

Several subsections of MHL 81.10, “Counsel,” provide for a far speedier alternative. First, the court may appoint counsel, “if at any time it determines that appointment of counsel would be helpful to the resolution of the matter,” MHL § 81.10(c)(7). The court is also empowered to appoint MHLS as counsel, MHL § 81.10(e), and, if it appoints counsel, it “may dispense with the appointment of a court evaluator,” MHL § 81.10(g).

Assuming an agreement by MHLS in the relevant Department to serve as counsel in these cases (as has been the practice in the Third Department), there is no reason why the order to show cause cannot include their appointment, dispense with appointment of a Court Evaluator, and proceed immediately to a hearing.

#### **D. A Relatively Untried, but Creative Possible Approach: Consent by the AIP**

There is a possibility for a litigator to simultaneously accelerate the process of court approval and preserve the dignity of the allegedly incapacitated person (AIP). It should be noted that this approach has not yet been tried (at least to our knowledge), and is therefore without any reported precedent.

Article 81 provides for the appointment of a guardian in two different circumstances: the usual one, where the petitioner seeks guardianship over an unwilling, indifferent or non-communicative AIP, and a less frequently utilized situation in which the AIP “consents to the appointment,” MHL § 81.02(a)(2).

Where the purpose of the petition is court approval of a “transaction or transactions” that the AIP wants, but which third parties are unwilling to provide because of fear of liability, there would be two benefits to the “consent” route. First, the “one-shot” relief could be granted without a finding of incapacity, sparing the AIP that loss of agency, dignity, and respect, and engaging them as a subject/actor in the process.<sup>9</sup> Since the usual finding of “incapacity” would not be required, a brief hearing, which could be held remotely, could be scheduled quickly to establish both necessary requirements.

For a “consent” disposition, the court must make two separate findings: first, the “necessity” of the relief requested,<sup>10</sup> and then the “capacity” of the AIP to give consent. *Matter of Buffalino (James D.)*, 39 Misc. 3d 634 (S. Ct. Suffolk Co. 2013). The capacity determination here is significantly less than that of a full guardianship proceeding, and also presumably less than whatever “test” was utilized by the third party whose refusal to accept consent initiated the search for a legal remedy. The first court to consider the appropriate test wrote that it needed only consider:

...the individual’s 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. The inquiry by the

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<sup>9</sup> A person with a developmental, cognitive or psychosocial disability may not agree to a proceeding in which they will be judicially determined to be incapacitated for many reasons, including possible long-term consequences. There are many areas in which a person’s legal capacity, frequently understood as “mental capacity” may be questioned, see Kristin Booth Glen, *Not Just Guardianship: Uncovering the Invisible Taxonomy of Laws, Regulations and Decisions that Limit or Deny the Right of Legal Capacity for Persons with Intellectual and Developmental Disabilities*, 13 Albany Gov’t. L. Rev. 25 (2019-2020) and a “finding” of incapacity in an § 81.16(b) proceeding could be used against them even after the proceeding has ended.

<sup>10</sup> In the case of an § 81.16(b) application the “necessity” standard should be easy to meet: there will generally be no question that the person needs the treatment, or needs to go to a rehabilitation facility, or needs to qualify for Medicaid in order to receive services, etc. See: *Matter of Buffalino*, supra, accord, *Matter of Anonymous 1 (Anonymous 3)* 68 Misc. 3d 1226(A), 130 N.Y.S. 3d 606 (S. Ct. N.Y. Co. 2020).

court to determine whether an individual has capacity to consent is not the equivalent of the in-depth examination which occurs in a full hearing to determine incapacity wherein the person's ability to understand and appreciate the nature and consequences of their functional limitations is explored and determined.

Unfortunately, the consent guardianship provision is subject to what one court has called the "possible inartful drafting of Article 81," *Matter of Banks (Richard A.)*, 64 Misc. 3d 191 (S. Ct. N.Y. Co. 2019), so it is not clear whether, or how, it might apply to an § 81.16(b) disposition. Read literally, this alternative to involuntary imposition of guardianship would seem to include only the situation where an AIP consents "to the appointment of a guardian," and thus, arguably, not to consent to "court approval of a transaction or transactions." In situations where, under § 81.16(b), a special guardian would be appropriate to carry out the "transaction or transactions," a court might find—and we think should—that consent to a *special* guardian would be sufficient to meet the requirement of § 81.02(a).<sup>11</sup>

The more serious problem is the language of § 81.16(b), "If the person alleged to be incapacitated *is found to be incapacitated* the court may [order a protective arrangement or approve a transaction or transactions]" (emphasis added). Read literally, this would seem to require a finding of incapacity, which is inconsistent with "consent" in the statute.<sup>12</sup> This seems an irrational and unintended result: why should an AIP be able to consent to the more stringent imposition of a guardian, and not be able to consent to what is intended to be a less intrusive remedy, that provided by the "one-shot" disposition? There are, however, two possible ways around a literal reading of the statute.

- i. First, there is an equal protection argument that has been successfully used by MHLS in the Third Department. That is, with regard to the "right" to have a less restrictive alternative to the appointment of a guardian, equal protection would be violated (whether employing the strict scrutiny required when protected rights are at issue, or even a rational relationship test) when the remedy was available only to someone *found incapacitated* by the court ("the incapacitated person"), as opposed to a person merely *alleged* to be so ("the alleged incapacitated person, or AIP"). Unfortunately there are currently no decisions that either adopt or explain the applicability of this claim.
- ii. Alternatively, a good argument could be made that the term "may" ought to be read to mean that, if the person is *not* found to be incapacitated, the court also "may" grant the 81.16(b) disposition. Given the willingness of at least some courts to read

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<sup>11</sup> There is, however, no reported authority for this proposition and reading of the statutory language.

<sup>12</sup> However, given the differing definitions of capacity for "consent" under Section § 81.02(a) and for its lack, Section § 81.02(b) as set out in *Buffalino*, *supra*, perhaps the alleged incapacity relied upon by a third party could be conceded for purposes of the petition, while the AIP might still meet the standard of capacity necessary to consent.

reasonable interpretations into the consent provision of the statute in order to fulfill its purpose, see, e.g. *Matter of Buffalino (James D.)*, 39 Misc. 3d 634 (S. Ct. Suffolk Co. 2013), a court might hold that a petition requesting “one-shot” relief where the AIP consents to that relief should qualify for the different treatment of a consent guardianship.

One court has found an AIP not incapacitated, but nonetheless appointed a special guardian “to monitor and oversee [the AIP’s] financial activities and medical needs and appointments.” The court construed the requirements for protective arrangements relying on the statute’s “guiding principle” of utilizing the “least restrictive form of intervention,” and of tailoring the system “to affor[d] the person the greatest amount of independence and participation in all the decisions affecting such person’s life.”<sup>13</sup>

- iii. Inartfulness in drafting the statute provides a different possibility for using a “consent proceeding” to achieve “one-shot” relief under some circumstances. § 81.16(b) begins by authorizing “one-shot” relief “necessary to achieve any security, service or care arrangement meeting the foreseeable needs “of a person “found to be incapacitated.” This language seems clearly to apply to *personal*, as opposed to *financial* needs, in the same way that the statute distinguishes between guardians of the person, MHL § 81.22, and guardians of the property MHL § 81.21. It continues, however, using the connector “or,” to permit “authorization” “direct[ion]”, or “ratif[ication]” relating to the AIPs property or 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*.” That is, if the relief requested involves money, such as creating an SNT, or qualifying for Medicaid, and not personal needs, it can apparently be granted without a finding of incapacity.

## VI. Lessons for Practice

As the above discussion of the interplay between procedural requirements, statutory lack of clarity, and the varying factual contexts in which § 81.16(b) may be appropriate and/or desirable suggests, the practitioner should begin by asking (and seeking the answers to) a number of questions. These will, in turn suggest the precise relief requested, how the pleadings in the particular case should be structured, and what they should contain.

### A. What Relief Should be Requested

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<sup>13</sup> *Matter of John D*, 885 N.Y.S.2d 194 (S. Ct. Cortland Co. 2009) citing MHL § 81.01 and Abrams, Guardianship Practice in New York State, Ch. 1, Sec. III[E][3], at 24 [1997] (“The court has a very broad selection of alternatives in addressing the case before it. It may...fashion a protective arrangement without appointing a guardian.”)

1. What is the presenting problem? Can it be solved with court approval of one or more clearly ascertainable “transactions”? For an example of this situation, see Hypothetical 1 (Walter X.) below. Here the request would be only that, authorization of the named single transaction. Or,
2. Does the presenting problem require someone to take some number of relatively clearly defined steps over a fairly short time period? See Hypothetical 5 (Irma I.) below. Here the request would be for the appointment of a special guardian. Or,
3. Does the presenting problem require ongoing attention over a considerable period of time (or for the foreseeable future)? See Hypothetical 3 (Xavier G.) below. If so, § 81.16(b) will *not* be an appropriate remedy.

#### **B. What Factual Allegations Should the Pleadings Contain**

4. Is the person unable to make a decision or consent to relief after considerable efforts have been made and appropriate accommodations employed? <sup>14</sup> See Hypothetical 5 (Irma I.) below. Here the pleading should demonstrate need and incapacity, and also that, once the requested relief is granted, the person’s personal and property needs will be cared for so that an Article 81 Guardianship is not required. Or,
5. Does the person understand what a finding of incapacity means, or if they do, do they care that it may be required? If not, the petition is relatively unproblematic, see Hypothetical 1 (Walter X.) below. Alternatively, might the person be willing to concede incapacity solely for the purpose of the petition (as in where a third party refuses to accept consent, which “causes” the person to be legally incapacitated)? Or,
6. Is the person for whom the remedy is sought able to participate in the decision, and, if so, willing to consent to the result sought? See Hypothetical 2 (Winona Z.) below. If so, the pleadings should demonstrate the person’s ability to participate in, or make the decision (which may, however, have been disregarded by the healthcare provider or other relevant third party), as well as the need for the relief. Or,
7. Is the person unwilling to concede incapacity or the necessity of being found incapacitated by a court? See Hypothetical 4 (Wesley W.) below. Here the pleadings should describe the need for the relief *and* provide a factual basis for the person’s ability to consent, as well as why the court’s order should be based on consent rather than a finding of incapacity.

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<sup>14</sup> Making this inquiry, and insisting upon accommodations, should be part of the attorney’s professional and ethical obligations.

8. Does the remedy requested include the appointment of a special guardian, and, if so, whom? Is it someone the person has chosen, or consents to? see Hypothetical 4 below. If so, the pleadings should describe the relationship between the person and the proposed special guardian, their ability to perform the task(s) required, and the person's consent and ability to give same.<sup>15</sup> Note also the relevance of MHL § 81.17 that permits a person alleged to be incapacitated "to nominate a guardian" "[i]n the petition, or in a written instrument duly executed and filed in the proceeding before the appointment of a guardian"<sup>16</sup>. While there is no reference to "special guardian" it is reasonable to believe that an MHL § 81.17 nomination should apply equally to a proceeding under MHL § 81.16(b), and the petition should contain the nomination with reference to the statute.

**C. Will MHLS accept representation of the alleged incapacitated person?**

9. As noted, the appointment of a Court Evaluator is to be avoided if possible, both because of the additional time it requires, and the cost to the petitioner. If the court appoints counsel, it may waive the necessity of a Court Evaluator so that the hearing can be held almost immediately. Where the alleged incapacitated person is in an institutional setting, MHLS may be obligated to represent them, but MHLS Directors in several Departments have expressed willingness to undertake what is essentially *pro forma* representation in a variety of § 81.16(b) cases, so the practitioner should be aware of the policy and/or make appropriate inquiry.

**VII. Applying § 81.16(b): How, if at all, could it work in a variety of hypothetical situations?**

**Hypothetical 1: Walter X.**

Walter X. is an adult with Down syndrome who has difficulty communicating verbally and processing complex information. He is able to perform his own personal care and basic activities of daily living. He feeds himself, dresses himself and attends a day program for adults with Down syndrome. His personal and financial needs are all being adequately met by his sister and through the variety of services he receives.

When the pandemic began, Walter moved in temporarily from the Residential Facility where he lived to the home of his adult sister, Pauline S., who informally helps him with things he is unable to do on his own. Beginning in February of this year, Walter had severe pain in his mouth and an appointment was made for him to see Dr. Tooth, a dentist, who described the treatment necessary to deal with Walter's dental problems. To treat his patients, however, Dr.

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<sup>15</sup> See *Matter of J.S.*, 24 Misc. 3d 1209(A), 2009 N. Y. Misc. LEXIS 1687 (S. Ct. Nassau Co. 2009)

<sup>16</sup> For an example of guardianship on consent and "nomination," see *In re Kathleen FF.* 6 A.D.3d 1035 (3rd Dept. 2004)

Tooth requires them to be fully vaccinated against COVID-19. Pauline took Walter to her own physician, Dr. Shot, who refused to administer the single dose Johnson & Johnson vaccine or any subsequent “booster shots”, stating that, due to his disability, Walter is unable to adequately consent to the procedure. Dr. Shot tells Pauline that she must go to court, commence a guardianship proceeding, and become Walter’s legal guardian in order to have the legal authority to consent to the vaccine and any subsequent “booster shots” on Walter’s behalf.

### **Hypothetical 2: Winona Z.**

Winona is 75 years old. She has fallen and broken her hip. Surgery was required to repair the hip. Prior to her fall, Winona lived alone, managed her own affairs and drove herself wherever she wanted to go. Now that her surgery is complete, it is time for her to move to a rehabilitation center to convalesce and to receive physical therapy, all with the goal of getting Winona back to her own home.

However, the surgery has been hard on Winona and she appears weak. Additionally, needed pain medications have caused her to be intermittently unclear in her responses and to appear, at times, to be confused. Winona’s adult daughter, Petra Z., is helping her mother through this crisis. The hospital’s discharge planning staff has informed Petra that the hospital’s physician believes Winona may lack capacity to consent to being transferred to a rehabilitation center and to a prescribed care regimen. The hospital’s attorney has advised Petra that Winona’s signature will not be accepted as legal consent to the transfer, nor can Petra provide consent on her mother’s behalf. It is likely that Medicare will not continue to authorize in-patient hospital care. Petra is advised that someone must go immediately to court and become Winona’s legal guardian. Petra is reluctant because Winona has always been fiercely independent, and because she has been told that Winona’s confusion will probably go away once she is off all of her prescribed pain medications and has recovered.

### **Hypothetical 3: Xavier G.**

Xavier G. is a 58-year old man who lives alone in his own apartment. He is HIV positive, having been first diagnosed with AIDS in 1987. He has no biological family members in his life. Until recently he cared for himself, did his own shopping and prepared his own meals. Several years ago, his father died and left money for him in a trust. ScroogeBank is his Trustee, holding more than \$300,000 in trust for Wesley.

Xavier G. gets his medical care at a local community clinic. He is referred by his clinic social worker to a Legal Services lawyer for assistance with problems related to his trust. The social worker reports that due to his long illness, Xavier is manifesting signs of premature dementia, a known problem with long-term survivors of AIDS. He gets confused when things require focused attention and follow-up action on his part. Xavier’s account with the clinic is in arrears and his access to his doctor is in jeopardy. Usual payments are not being received from his trust. Additionally, the social worker has discovered that Xavier’s landlord is suing him in a proceeding for Non-payment of Rent, the electricity in Xavier’s apartment has been shut off, his cell phone has been disconnected, and he is not taking his essential medications because he

cannot afford his co-pays. Finally, Xavier is obtaining his only food from local food banks and meal programs.

The lawyer goes to Xavier's apartment where he finds him disheveled, in dirty clothing, with garbage and decaying food scattered around. While interviewing Xavier, the lawyer learns that his premature dementia makes it impossible for him to complete the detailed six-page financial report required twice yearly by ScroogeBank. The lawyer calls the ScroogeBank trustee who is exasperated with Xavier. Despite a cash-rich trust account, no payments have been issued on his behalf for four months. The ScroogeBank trustee explains that no further payments will be made on Xavier's behalf without the updated semi-annual report being submitted so that the trustee can justify any payment made. Further, no more details will be discussed with the lawyer, because ScroogeBank doubts that Xavier has the capacity to engage an attorney.

#### **Hypothetical 4: Wesley W.**

Wesley W. is a 58-year old man who lives alone in his own apartment. He is HIV positive, having been first diagnosed with AIDS in 1987. He has no immediate family members in his life, but he has a close friend and neighbor, Norman F., who he has known for many years. Wesley W. has long cared for himself, done his own shopping, and prepared his own meals. He needs no assistance with his daily personal care. Several years ago, his father died and left money for him in a Trust. ScroogeBank is his Trustee, holding more than \$300,000 in trust for Wesley.

Wesley gets his medical care at a local community clinic. He is referred by his clinic social worker to a Legal Services attorney for assistance with problems related to his trust. Last year Wesley had hip replacement surgery and, after release from the hospital, he had a long and painful rehabilitation process during which he fell behind on many of his financial responsibilities, including filling out the detailed, six-page report that he is required to file bi-annually with ScroogeBank.

Because of his failure to file the report, no payments have been issued on Wesley's behalf for four months. With this decrease in income, Wesley has been unable to pay for many necessities in his life. His account with the clinic is in arrears and his access to his doctor is in jeopardy. Additionally, the social worker has discovered that Wesley's landlord is suing him in a proceeding for Non-payment of Rent, his cell phone has been disconnected, and he is not taking his essential medications because he cannot afford his co-pays. The social worker refers Wesley to a lawyer she knows at DoGood Legal Services.

While interviewing Wesley, the lawyer learns that the cascading problems arising from the loss of Trust payments has left Wesley depressed and distraught at the prospect of his eviction, his inability to get the medications he needs, etc. Wesley admits that because he has made such a mess of things he is completely paralyzed and can't manage his finances now, although he believes that if the crisis was over, he could return to the way he lived before.

The lawyer is prepared to represent Wesley in the eviction proceeding, and to seek a stay until Wesley's past-due payments from the Trust can be recovered. He calls the ScroogeBank



trustee who explains that no further payments will be made on Wesley's behalf without the updated report being submitted in order to justify those payments. Further, the Trustee will not discuss any further details will be discussed with the lawyer because he believes that Wesley may not have capacity to engage an attorney. He suggests that Wesley needs someone to be appointed as his guardian to manage his property.

At their next meeting Wesley brings his dear friend Norman who has offered to help in any way necessary. When the lawyer raises the possibility of guardianship, both Wesley and Norman are horrified, especially at the prospect that Wesley, a long-time activist and a leading figure in the LGBT community, would be declared incompetent.

### **Hypothetical 5: Irma I.**

Irma is an 87-year-old woman who lives with her adult daughter Christina C. and her son-in-law Robert C., both of whom both have full-time jobs. Irma has a fixed income consisting of \$800/month from Social Security, and a pension from her employment as a bookkeeper with ABC Co. of \$600/month that meets most of her expenses, with Christina and Robert supplying the rest. She has been diagnosed with progressive dementia, although she can still get around and do many things for herself. Christina and Robert have been assisting her, but Irma's needs are increasing. She can no longer shop for herself because she gets lost going to the local supermarket, and Christina has been called to take her home several times when she has been found wandering. She recently burned a pot badly when she forgot to turn the stove off, causing Christina to worry even more about leaving her alone while she and Robert are at work.

One day while Christina and Robert are out, Irma slips in the shower and falls. A neighbor hears her moaning in pain and calls 911. When the EMTs arrive, she is unable to answer basic biographical questions and is scared and combative. The EMTs are able to get enough information from the apartment to contact Christina. She and Robert meet Irma at the hospital.

In the emergency room Irma is diagnosed with a broken ankle. Thereafter she has surgery, is put on pain medication, and admitted to a rehab unit until she is stable and can be discharged safely. Christina tells the social worker that Irma's memory has been declining but this is the worst state she's seen Irma in, and also of her fears about leaving Irma alone. Together, Christina and the social worker conclude that in order to return home safely, Irma will need a home attendant while Christina and Robert are at work. To be home care-eligible, Irma will need to qualify for, and enroll in, Medicaid. Christina learns, however, that Irma's current income is too high for Medicaid eligibility.

The social worker previously had another patient in a similar situation who was able to use something called a pooled trust to enroll in Medicaid despite having too much income. She refers the family to the attorney who set up the pooled trust. The attorney confirms that it would be possible to assign the income from Irma's pension to a pooled trust such as one run by NYSARC, but because it is Irma's pension, she would need to consent and sign all the necessary forms, which she is unable to do.

### **VIII. Lessons from the Hypotheticals**

The hypotheticals demonstrate most of the possible variations in the kind of relief that can be requested using MHL § 81.16(b): approval of a single personal needs transaction (Walter X.); appointment of a Special Guardian to meet financial (property) needs; (Irma I. and Wesley W.) appointment of a Special Guardian to meet personal and financial (property) needs: (Winona Z.).

They also demonstrate the issues that can arise if the person for whom the relief is sought (always denominated in the pleadings as the “alleged incapacitated person”) wants, and is willing to consent to the relief, but doesn’t want a finding of incapacity. Here, because of the language of the statute, there may be a difference where the relief is purely for (or can be characterized as) financial (property) needs (Wesley W.); or both personal and financial (property) needs (Winona Z.). In the former hypothetical, the possibility of proceeding on consent, and thus avoiding a determination of incapacity, is less problematic, though not certain, see Section IV(D) iii) above. In the latter, one or both of the legal arguments discussed in Section IV (D)(i and ii) may be necessary to persuade the court to proceed to a consent determination.

### **IX. Some sample pleadings<sup>17</sup>: OSCs, Affidavits, but no Petitions: a plea for statutory reform**

Any application for § 81.16(b) relief will require an Order to Show Cause (OSC), a Petition, and supporting affidavits and/or affirmations, sometimes with additional exhibits (such as medical records, etc.)

The OSC is the first document that indicates what relief is requested, both in the caption (which, of course, appears on all other papers) and in the text that constitutes the Court’s Order. To demonstrate what this might look like for each of the hypotheticals in which MHL § 81.16(b) relief might be sought (Hypotheticals 1, 2, 4, and 5), draft OSCs are attached. MHL § 81.07 service provisions apply; in the hypotheticals and draft OSCs here, there are no family members other than the petitioner, but this should not mislead the practitioner who should carefully consider all the circumstances in determining who must be served (see OSCs for Hypos 1 and 2, referencing relevant governmental agencies)

Especially because a court might not be familiar with § 81.16(b) relief, it is important not only that the supporting affidavits/affirmations lay out all the facts necessary to support the Petition, but also that they tell the story of why this “less restrictive alternative” is appropriate and beneficial for the alleged incapacitated person. And, because the court must make a different “capacity” finding where the relief is granted on consent, the supporting affidavit/affirmations should make clear that the alleged incapacitated person has such capacity. To demonstrate

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<sup>17</sup> Please note that the inclusion of these drafts, sample pleading are not intended as legal advice and should not be deemed as such.

these issues and how they might be supported factually, draft affidavits/affirmations are included after each of the OSCs.

MHL Article 81 is unlike the Uniform Guardianship, Conservatorship and Other Protective Proceedings Act (UGCOPPA) that provides models for substitute decision-making for vulnerable persons, and sets out a separate procedure where the requested relief is a “protective proceeding” that does not result in guardianship. Instead, in order to obtain § 81.16(b) relief, the petitioner is required to follow all the same procedural requirements as if they were seeking a full, plenary guardianship. The requirements for an Article 81 petition are set out in MHL § 81.08, and the practitioner is advised to carefully follow them even though they may appear irrelevant to the purpose of the petition.

Because so much of that required information is specific to the parties involved, draft petitions are not included here. Nor, to the extent that specific financial information is required, even in the case where the relief requested is approval of a single personal needs transaction, as in Hypothetical 1, do the draft affidavits contain financial information unless it is directly related to the problem that the petition seeks to solve. Even then, as in Hypothetical 4, MHL § 81.08 may require still more financial information.

You will note that medical affidavits are included in some of the pleadings for the purpose of showing that the doctor does not believe a plenary guardianship is appropriate. The general rule, however, is that physician affidavits are not necessary to state a prima facie case for relief under Art. 81, and are generally discouraged in practice.

If we want to encourage the use of less restrictive alternatives to guardianship, the law should, as the UGCOPPA does, provide a separate and more expeditious procedure. Statutory reform should be sought. But for now, at least, practitioners who wish to take advantage of the faster, less expensive, rights-protecting and dignity-preserving “disposition” of MHL § 81.08(b), there is no alternative to a carefully drafted petition, filled with all the same information required from everyone, whether they seek plenary guardianship or some less draconian relief.

## **DRAFT PLEADINGS WITH HYPOTHETICALS**

***Please note: Hypotheticals are repeated here for ease of relating the facts they contain to the sample pleading that follow each.***

### **Hypothetical 1: Walter X.**

Walter X. is an adult with Down syndrome who has difficulty communicating verbally and processing complex information. He is able to perform his own personal care and basic

activities of daily living. He feeds himself, dresses himself and attends a day program for adults with Down syndrome. His personal and financial needs are all being adequately met by his sister and through the variety of services he receives.

When the COVID-19 pandemic began, Walter moved temporarily from the Residential Facility where he lived to the home of his adult sister, Pauline S., who informally helps him with things he is unable to do on his own. Beginning in February of this year, Walter had severe pain in his mouth and an appointment was made for him to see Dr. Tooth, a dentist, who described the treatment plan for addressing Walter's dental problems and who has no problem in accepting Walter's consent to the treatment. To treat his patients, however, Dr. Tooth requires them to be fully vaccinated against COVID-19. Pauline took Walter to her own physician, Dr. Shot, who refused to administer the single dose Johnson & Johnson vaccine, stating that, due to his disability, Walter is unable to adequately consent to the procedure. Dr. Shot tells Pauline that she must go to court, commence a guardianship proceeding, and become Walter's legal guardian in order to have the legal authority to consent to the vaccine on Walter's behalf.

Q. How would you advise Pauline S.?

**Hypothetical 1: Walter X. Pleadings, A - D**

**1A. Walter X. Order to Show Cause:**

At a \_\_\_\_\_ Part \_\_\_\_\_ of the  
Supreme Court of the State of New  
York, held in and for the County of  
\_\_\_\_\_, at the  
Courthouse, located at New York  
City and State of New York on the  
\_\_\_\_\_ day of \_\_\_\_\_, 202\_.

PRESENT:

**ORDER TO SHOW  
CAUSE**

Index No. \_\_\_\_\_

HON. \_\_\_\_\_,

JUSTICE

X-----X

**In the Matter of the Application of PAULINE S.,**

**Petitioner,**

**For an Order pursuant to MHL § 81.16(b)  
authorizing administration of a single dose  
Johnson & Johnson COVID-19 Vaccine and  
any subsequent “booster shot” authorized  
By the CDC  
to WALTER X.,**

**Respondent**

X-----X

**IMPORTANT**

**AN APPLICATION HAS BEEN FILED IN COURT BY PAULINE S. WHO BELIEVES YOU MAY BE  
UNABLE TO TAKE CARE OF YOUR PERSONAL NEEDS TO THE EXTENT THAT YOU ARE UNABLE**

**TO CONSENT TO ADMINISTRATION OF A COVID-19 VACCINE NECESSARY TO ENABLE CERTAIN DENTAL TREATMENT THAT YOU NEED.**

**PAULINE S. IS ASKING THAT THE COURT APPROVE A SINGLE TRANSACTION ENABLING YOU TO HAVE A SINGLE DOSE JOHNSON& JOHNSON COVID-19 VACCINE AND ANY SUBSEQUENT “BOOSTER SHOT” AUTHORIZED BY THE CDC ADMINISTERED TO YOU BY DR. SHOT.**

**WITH THIS PAPER IS A COPY OF THE APPLICATION TO THE COURT SHOWING WHY PAULINE S. BELIEVES YOU MAY BE UNABLE TO TAKE CARE OF YOUR PERSONAL NEEDS WITH REGARD TO GIVING CONSENT FOR ADMINISTRATION OF A COVID-19 VACCINE. BEFORE THE COURT AUTHORIZES ADMINISTRATION OF THE COVID-19 VACCINE TO YOU, OR 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 THE COURT TO AUTHORIZE THE VACINATION OR TO HAVE 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, ADDRESS AND TELEPHONE NUMBER OF THE CLERK OF THE COURT ARE:**

**THE COURT HAS APPOINTED MENTAL HYGIENE LEGAL SERVICES (MHLS) AS COUNSEL TO REPRESENT YOU ON THEIR THE COURT MAY GIVE MHLS PERMISSION TO INSPECT YOUR MEDICAL, PSYCHOLOGICAL OR PSYCHIATRIC RECORDS. YOU HAVE THE RIGHT TO TELL THE JUDGE IF YOU DO NOT WANT MHLS TO BE GIVEN THAT PERMISSION.**

**YOUR COURT APPOINTED COUNSEL’S NAME, ADDRESS, AND TELEPHONE NUMBER ARE:**

**YOU ARE ENTITLED TO HAVE A LAWYER OF YOUR CHOICE IF YOU DO NOT WANT MHLS TO REPRESENT YOU WILL BE REQUIRED TO PAY THAT LAWYER UNLESS YOU DO NOT HAVE ANY MONEY TO DO SO.**

On reading and filing the annexed petition of PAULINE S. duly verified the \_\_\_\_ day of \_\_\_\_\_, 202\_, and the affirmation of DOCTOR TOOTH, M.D., dated \_\_\_\_\_, 202\_, and the affidavit of INVOLVED SOCIAL WORKER, from which it appears that WALTER X., the alleged incapacitated person herein, currently residing at the home of his sister, PAULINE S., [Address], is unable to provide for his own personal needs to the extent of being unable to consent to administration of the single dose Johnson & Johnson vaccine, and any subsequent doses that may be advised and authorized by the C.D.C.

It is hereby ORDERED that, on their consent, MENTAL HYGIENE LEGAL SERVICES (MHLS), telephone number (\_\_\_\_) \_\_\_\_\_, [Address], upon filling a notice of appearance be and hereby is appointed attorney for the above-named alleged incapacitated person to appear for and represent the alleged incapacitated person in this proceeding.

It is further ORDERED that WALTER X., an alleged incapacitated person and MHLS, his appointed counsel, show cause at Part \_\_\_\_, Room \_\_\_\_ of this Court, to be held at the Courthouse located at [Address], on the \_\_\_\_ day of \_\_\_\_\_, 202\_, at 9:30 in the forenoon of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered to:

1. Authorize the administration of the single dose Johnson & Johnson COVID-19 vaccine and any subsequent “booster shot” advised and authorized by the CDC to WALTER X. by Dr. Shot, and
2. Grant such other, further or different relief as may be just and proper; and it is further

SUFFICIENT CAUSE APPEARING THEREFORE,

Let THREE (3) day service by personal delivery of a copy of this Order to Show Cause and Petition upon the alleged incapacitated person, WALTER X., and by personal delivery to the offices of Mental Hygiene Legal Services on or before the \_\_\_\_ day of \_\_\_\_\_, be deemed good and sufficient service.

It is further ORDERED that Residential Facility <sup>18</sup>and the Department of Social Services receive notice of this proceeding pursuant to MHL § 81.07(g).<sup>19</sup>

ENTER:

\_\_\_\_\_, J.S.C.

#### **STATEMENT OF ALLEGED INCAPACITATED PERSON'S RIGHTS**

In a proceeding brought pursuant to this article any party to the proceeding 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 counsel of his or her choice.

The hearing must be conducted in the presence of the person alleged to be incapacitated, either at the courthouse or where the person alleged to be incapacitated resides, so as to permit the court to obtain its own impression of the person's capacity. If the person alleged to be incapacitated physically cannot come or be brought to the courthouse, the hearing must be conducted where the person alleged to be incapacitated resides unless:

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<sup>18</sup> Walter was a resident of a facility before relocating to his sister's home during the pandemic, and since there is no proof that he was actually discharged, including the director of the facility is probably warranted.

<sup>19</sup> Because there is an affidavit from an APS social worker, there must be an open APS file, so DSS must be given notice.



1. the person is not present in the state; or
2. all the information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing, or (ii) no meaningful participation will result from the person's presence at the hearing.

If the hearing is conducted without the presence of the person alleged to be incapacitated and the court appoints a guardian, the order of appointment shall set forth the factual basis for conducting the hearing without the presence of the person for whom the appointment is made.

If the hearing is conducted in the presence of the person alleged to be incapacitated and the person is not represented by counsel, the court shall explain to that person, on the record, the purpose and possible consequences of the proceeding, the right to be represented by counsel, and the fact that the court will appoint an attorney to be represented by the counsel, and shall inquire of the person whether he or she wishes to have an attorney appointed. If the person refuses the assistance of counsel, the court may nevertheless appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

If on or before the return date designated in the order to show cause the alleged incapacitated person or counsel for the alleged incapacitated person raises issues of fact regarding the need for an appointment under this article and demands a jury trial of such issues, the court shall order a trial by jury thereof. Failure to make such a demand shall be deemed a waiver of the right to trial by jury.

SUFFICIENT CAUSE APPEARING THEREFORE,

Let ONE (1) day service by personal delivery of a copy of this Order to Show Cause and petition upon the alleged incapacitated person, WALTER X., be deemed good and sufficient and let service of a copy of this Order to Show Cause and petition by PERSONAL delivery to the Court Appointed Attorney, MENTAL HYGIENE LEGAL SERVICES, and RESIDENTIAL FACILITY on or before the \_\_\_\_ day of 202\_, be deemed good and sufficient.

ENTER:

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**1B. Walter X. Pauline S. (Sister's) Affidavit:**

SUPREME COURT  
STATE OF NEW YORK COUNTY OF \_\_\_\_\_  
In the Matter of PAULINE S.,

Petitioner,

**AFFIDAVIT**

For an Order pursuant to MHL § 81.16(b)  
Authorizing administration of a single dose  
Johnson & Johnson COVID-19 Vaccine  
to WALTER X.,

Index No. \_\_\_\_\_

Respondent,

an Alleged Incapacitated Person. \_\_\_\_\_

STATE OF NEW YORK)  
COUNTY OF MONROE) SS:

PAULINE S., being duly sworn, deposes and states:

1. I am the younger sister of WALTER X, an adult with Down syndrome. My brother and I were raised together by our parents who instilled in me the idea that I would one day need to have an essential role in caring for my older brother, when they were no longer living. We grew up in a loving family, and the idea of caring for my brother as an adult, while abstract, did not feel like a burden. My brother is not very communicative with people apart from those he already knows and feels comfortable with, but I always find that I can

understand him.

2. WALTER X., my brother, is an alleged incapacitated person who is 55 years of age. He currently resides with me in my home at [Address] due to the COVID-19 pandemic. I am in communication with HEAD PERSON at RESIDENTIAL FACILITY where WALTER X. was living prior to March 2020.
3. WALTER X. receives approximately \$300.00 per month from a Special Needs Trust established by our mother, now deceased; he receives \$432.00 per month in Supplemental Security Income from the Social Security Administration, which was previously directed to RESIDENTIAL FACILITY for his upkeep. I understand that in New York State the COVID-19 vaccine is administered at no cost, and Dr. Shot has assured me this is the case, so there will be no adverse financial consequences for WALTER X. if the court authorizes a vaccination for him.
4. WALTER X. began telling me that his “mouth hurt” in March of 2021 during my visits to him in RESIDENTIAL PROGRAM. Along with HEAD PERSON at RESIDENTIAL FACILITY, we arranged to have WALTER X. seen by DR. TOOTH. DR. TOOTH’s diagnosis and treatment plan is contained in his affidavit. DR. TOOTH has no problem in accepting my brother’s consent to the treatment he proposes. However, it is Dr. Tooth’s policy not to treat patients unless they are fully vaccinated against COVID-19. At this point, WALTER X. was not eating properly because he couldn’t chew his food and he was still complaining of pain.
5. In search of a COVID-19 vaccination for my brother, I took WALTER X. to see my personal physician, DR. SHOT. My physician, DR. SHOT, explained that he has a stock of the single dose Johnson & Johnson COVID-19 vaccine and that he is authorized to administer it, but

cannot do so without “informed consent”. Although he assured me that there is minimal if any risk for my brother connected to the vaccine, he expressed his concern regarding WALTER X., noting that he has Down syndrome and asserting that WALTER X. is not competent to give informed consent for a COVID-19 vaccination. DR. SHOT told me that he would not give WALTER X. a COVID-19 vaccination, nor did he know of any other healthcare provider who would do so unless I sought and received legal guardianship over WALTER X. to be legally empowered to give such consent on WALTER X.’s behalf. Obtaining guardianship would pose a significant delay to my brother’s treatment and health. Further, guardianship is unnecessary because all of his personal and financial needs are already being cared for.

6. Because there is a two (2) week waiting period after vaccination for full immunity, the single dose Johnson & Johnson COVID-19 vaccine is the best choice for my brother: he will be able to get his necessary dental treatment sooner than if he were to get either of the available two-dose vaccines that require a period of time to pass between shots. I also understand that WALTER X. will also be eligible for a “booster shot” at some designated time after he receives the Johnson& Johnson vaccine, and that getting that shot will be necessary for his longer term health and wellbeing.
7. My brother watches television and is aware both of the COVID-19 pandemic and the existence and availability of COVID-19 vaccines. He has told me on several occasions that he wants to get a vaccine so that he “won’t get sick and die.” While he may not be able to give “informed consent,” I do not believe that he has any objection to getting the single

dose Johnson & Johnson vaccine, or a “booster shot” authorized by the CDC at an appropriate time thereafter.

8. I have been informed, and believe, that court authorization of administration of the single dose Johnson & Johnson vaccine and a subsequent “booster shot” is the least restrictive means necessary to meet my brother’s personal needs.

9. My brother has not created a health care proxy or a power of attorney.

10. It is my request that the Court:

a) Authorize administration of the single dose Johnson & Johnson COVID-19 vaccination and a “booster shot” authorized by the CDC at an appropriate time thereafter to my brother, WALTER X.,

so that he can, within two (2) weeks of such vaccination, receive timely treatment for dental pain from DR. TOOTH, and be subsequently protected against diminution of immunity by administration of a “booster shot” authorized by the CDC.

\_\_\_\_\_

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_

**1C. Walter X. Physician's Affirmation:**

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF MONROE

X-----X

In the Matter of the Application of  
PAULINE S.,

Petitioner,

**AFFIRMATION OF  
PHYSICIAN**

For an Order pursuant to MHL § 81.16(b)  
Authorizing administration of a single dose  
Johnson & Johnson COVID-19 Vaccine  
to WALTER X.,

Index No. \_\_\_\_\_

Respondent,

An Alleged Incapacitated Person.

X-----X

DOCTOR TOOTH, DDS, a dentist licensed to practice in the State of New York, affirms that the following is true under penalties of perjury:

1. I am affiliated with LOVELY Hospital/Agency as (title) Doctor of Dental Surgery. I also maintain a private office at Near Everything Street.

2. My medical specialty is adult dentistry.

3. I saw and evaluated WALTER X. on [Date/s], at my private office, address above.

4. I found the age, mental condition, and diagnosis of the Alleged Incapacitated Person to be:

(Age and date of birth) 55, July 4, 1965

(Medical Condition) Odontalgia (toothache) of the lower jaw, indicated by unwillingness to use both sides of the jaw when eating; possibly related to LR 18 abscess or other infection.

(Diagnosis) X-ray and confirmation of Odontalgia; standard treatment to follow: removal of infected material, cavity treatment, or surgery for removal of damaged tooth with follow-up care recommended, including possible dental reconstruction by crown, only if medically necessary.

5. WALTER X. is my dental patient. He is a person with Down syndrome who has difficulty communicating verbally and in processing any complex medical information. While continuing to practice dentistry during the current COVID-19 pandemic, I require all of my patients to have been fully vaccinated against COVID-19.

6. While in my presence, PAULINE S. has conveyed to WALTER X. the risks and potential harm of a neglected oral infection. I believe that WALTER X. understands that the proposed dental treatment will immediately relieve him of Odontalgia and help him return to enjoying the full range of eating habits and assimilation of nutritious food provided to him by PAULINE S. and at AGENCY, where he receives some meals. I am also clear that WALTER X. wishes to please his sister, as well as AGENCY staff who he likes and respects, by undergoing appropriate dental care and generally participating in caring for his own health. I have no concern about accepting WALTER X.'s consent to the dental treatment I have prescribed.

7. WALTER X.'s mental and emotional statuses include: his willingness to participate in his own health care and well-being, as well as his innate desire to be compliant and friendly.

8. I have discussed the need for WALTER X. to be fully vaccinated against COVID-19 before I can render the necessary dental treatment with PAULINE S. and WALTER X. and I believe Pauline S. understands both the need for the vaccination and the very minimal risks that accompany it, and that WALTER X. also understands that the vaccination is a good thing for him.

9. I recommend the following plan for WALTER X.'s dental care: two weeks following a single dose Johnson & Johnson COVID-19 vaccination, WALTER X. should be scheduled for the earliest possible dental appointment at my office so that dental treatment can proceed.

10. I understand that Pauline S. has petitioned the court to authorize administration of the Johnson & Johnson single dose vaccine to WALTER X., as well as any subsequent "booster shot" authorized by the CDC, and that the court would want to see WALTER X. before granting

the relief requested. In light of the need for swift resolution of the issues presented I recommend that it is in WALTER X.'s best interest that permission for the remote appearance of WALTER X. be granted in lieu of personal appearance in Court.

Dated: County of \_\_\_\_\_, New York, \_\_\_\_\_, 202\_\_\_\_

(Signature)

DDS

DOCTOR TOOTH



**1D. Walter X. Social Worker's Affidavit:**

SUPREME COURT  
STATE OF NEW YORK      COUNTY OF MONROE

In the Matter of the Application of Pauline S.,

Petitioner,

**AFFIDAVIT**

For an Order pursuant to MHL § 81.16(b)  
Authorizing administration of a single dose  
Johnson & Johnson COVID-19 Vaccine  
to WALTER X.,

Index No. \_\_\_\_\_

Respondent,

An Alleged Incapacitated Person

STATE OF NEW YORK)  
COUNTY OF NEW YORK)      SS:

SOCIAL WORKER, being duly sworn, deposes and states:

1. I am a Caseworker for the Adult Protective Services Unit of the NEW YORK County Department of Social Services (\_CDSS). I am an assigned Adult Protective Services (APS) caseworker for Upper Manhattan.
2. WALTER X. is an alleged incapacitated person who is 55 years of age. WALTER X. currently resides at [Address], at the home of his sister, PAULINE S., having moved there from the RESIDENTIAL FACILITY in March 2020, at the start of the COVID-19 Pandemic.
3. WALTER X. is an adult with Down syndrome who has difficulty communicating verbally. He also has difficulty processing complex information.
4. WALTER X. receives approximately \$300.00 per month from a Special Needs Trust established by his mother; he receives \$432.00 per month in Supplemental Security Income

from the Social Security Administration, which was previously directed to RESIDENTIAL FACILITY for his upkeep. Because the COVID-19 vaccine is free to everyone in New York State, there will be no financial consequences to WALTER X. if the relief requested is granted.

5. Petitioner knows of no health care proxy or power of attorney executed by the alleged incapacitated person.
6. Adult Protective Services received an anonymous referral on [Date]. The concerns in the referral were that WALTER X. is a person with Down syndrome and is unable to make his own medical decisions, but that he is also in need of dental treatment that is being withheld due to his inability to consent to administration of a COVID-19 vaccine.
7. PAULINE S.'s personal physician, DR. SHOT, has expressed concern about WALTER X., noting that he has Down syndrome and asserting that WALTER X. is not competent to give informed consent to being vaccinated for COVID-19. DR. SHOT has asserted that he will not administer the Johnson & Johnson vaccine, or any subsequent "booster shot" that may be authorized by the CDC to WALTER X. in the absence of PAULINE S. attaining legal guardianship over WALTER X.
8. I have observed WALTER X. in the home of his sister PAULINE S. where he has been residing since the start of the COVID-19 Pandemic. While WALTER X. may be unable to make medical decisions for himself, he is comfortable communicating with his sister who has served as his interpreter and advocate since childhood.

I believe that her efforts to obtain appropriate dental treatment and to secure authorization for administration of the Johnson & Johnson single dose vaccine and any

subsequent “booster shot” authorized by the CDC are necessary to care for his personal needs and health, and in his best interest.

9. I have been in contact with FRIENDLY Health Care Coordinator RESIDENTIAL FACILITY, who has known WALTER X. since she first came to work for RESIDENTIAL FACILITY in 2000.

WALTER X. has been in residence at RESIDENTIAL FACILITY since 1987, following the death of his mother.

10. FRIENDLY Health Care Coordinator is confident, as am I, that PAULINE S. is acting in

WALTER X.’s best interest in attempting to obtain necessary dental treatment for him and to have WALTER X. vaccinated with the Johnson & Johnson single dose vaccine, and any

subsequent “booster shot” authorized by the CDC, given the minimal risks associated with the vaccine. Not only will administration of the vaccine allow WALTER X. to obtain

necessary dental treatment, it will also protect him from the possibility of serious disease

and/or death from the COVID-19 virus, as recommended by the CDC. It is also my view that

because all of WALTER X.’s other personal needs are being met, court authorization of this

necessary medical transaction is the least restrictive alternative necessary to protect

WALTER X. and meet his health needs.

11. Due to my observations, and the information that I have received from other sources, it is

my request that the Court authorize a Single Transaction authorizing administration of the

one-dose Johnson & Johnson vaccine and any subsequent “booster shot” authorized by the

CDC to WALTER X. by Dr. Shot.

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_

## **Hypothetical 2: Winona Z.**

Hospital administration informs the adult daughter of an elderly person whose capacity is in question that they cannot release her parent post-surgery to rehabilitation facilities without her assuming guardianship of her parent.

Winona is 75 years old. She has fallen and broken her hip. Surgery was required to repair the hip. Prior to her fall, Winona lived alone, managed her own affairs and drove herself wherever she wanted to go. Now that her surgery is complete, it is time for her to move to a rehabilitation center to convalesce and to receive physical therapy, all with the goal of getting Winona back to her own home.

However, the surgery has been hard on Winona and she appears weak. Additionally, needed pain medications have caused her to be intermittently unclear in her responses and to appear, at times, to be confused. Winona's adult daughter, Petra Z., is helping her mother through this crisis. The hospital's discharge planning staff has informed Petra that the hospital's physician believes Winona may lack capacity to consent to being transferred to a rehabilitation center and to a prescribed care regimen. The hospital's attorney has advised Petra that Winona's signature will not be accepted as legal consent to the transfer, nor can Petra provide consent on her mother's behalf. It is likely that Medicare will not continue to authorize in-patient hospital care. Petra is advised that someone must go immediately to court and become Winona's legal guardian. Petra is reluctant because Winona has always been fiercely independent, and because she has been told that Winona's confusion will probably go away once she is off all of her prescribed pain medications and has recovered.

**Hypothetical 2: Winona Z. Pleadings, A – D**

**2A. Winona Z. Order to Show Cause:**

At a \_\_\_\_\_ Part \_\_\_\_\_ of the  
Supreme Court of the State of New  
York, held in and for the County of  
\_\_\_\_\_, at the  
Courthouse, located at New York  
City and State of New York on the  
\_\_\_\_\_ day of \_\_\_\_\_, 202\_\_.

PRESENT:

**ORDER TO SHOW  
CAUSE**

Index No. \_\_\_\_\_

HON. \_\_\_\_\_,

JUSTICE

X-----X

**In the Matter of the Application of PETRA Z.,**

**Petitioner,**

**For the Approval of a Single Transaction**

**Pursuant to MHL § 81.16(b)**

**or, in the alternative,**

**For the Appointment of PETRA Z. as Special Guardian.**

**Pursuant to MHL § 81.16(b)**

**on the Consent, Pursuant to MHL § 81.(c)(1) of**

**WINONA Z.,**

**Respondent,**

**An alleged incapacitated person**

X-----X

**IMPORTANT**

**AN APPLICATION HAS BEEN FILED IN COURT BY PETRA Z. WHO ALLEGES THAT YOU CONSENT TO HAVING THE COURT APPROVE YOUR TRANSFER TO EXCELLENT REHABILITATION FACILITY OR, IN THE ALTERNATIVE TO HER BEING APPOINTED AS SPECIAL GUARDIAN FOR THE SOLE PURPOSE OF CONSENTING TO YOUR TRANSFER.**

**WITH THIS PAPER IS A COPY OF THE APPLICATION TO THE COURT SHOWING WHY PETRA Z. AND YOU WANT THE COURT TO AUTHORIZE A TRANSFER TO EXCELLENT REHABILITATION FACILITY OR TO APPOINT HER AS YOUR SPECIAL GUARDIAN FOR THAT PURPOSE. BEFORE THE COURT DETERMINES WHETHER TO APPROVE THE TRANSFER OR APPOINT PETRA Z. AS SPECIAL GUARDIAN, AND WHETHER YOU ARE ABLE TO CONSENT TO SUCH RELIEF, THE COURT HOLDS A HEARING AT WHICH YOU ARE ENTITLED TO BE PRESENT AND TO TELL THE JUDGE IF YOU DO NOT WANT THE TRANSFER APPROVED OR PETRA Z. APPOINTED AS YOUR SPECIAL GUARDIAN. 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, ADDRESS AND TELEPHONE NUMBER OF THE CLERK OF THE COURT ARE:**

**[Clerk's Name, Address, Phone Number]**

**MENTAL HYGIENE LEGAL SERVICES HAS CONSENTED TO REPRESENT YOU IN THIS PROCEEDING AND THE COURT IS APPOINTING THEM TO DO SO. THE COURT MAY GIVE MENTAL HYGIENE LEGAL SERVICES PERMISSION TO INSPECT YOUR MEDICAL, PSYCHOLOGICAL OR PSYCHIATRIC RECORDS. BECAUSE THE COURT HAS APPOINTED COUNSEL FOR YOU IT HAS WAIVED THE APPOINTMENT OF A COURT EVALUATOR. YOU HAVE THE RIGHT TO TELL THE JUDGE IF YOU DO NOT WANT MENTAL HYGIENE LEGAL SERVICES APPOINTED AS YOUR COUNSEL OR THAT YOU DO NOT WANT THEM COUNSEL TO BE GIVEN PERMISSION TO**

**ACCESS YOUR RECORDS.**

**APPOINTED COUNSEL'S NAME, ADDRESS, AND TELEPHONE NUMBER ARE:**

**[Appointed Counsel's Name, Address, Phone Number]**

**IF YOU DO NOT WANT MENTAL HYGIENE LEGAL SERVICES TO REPRESENT YOU YOU ARE ENTITLED TO HAVE A LAWYER OF YOUR CHOICE BUT YOU WILL HAVE TO PAY THAT LAWYER UNLESS YOU ARE UNABLE TO DO SO.**

**IF THE COURT APPOINTS MENTAL HYGIENE LEGAL SERVICES TO REPRESENT YOU, YOU WILL NOT BE REQUIRED TO PAY THEM.**

On reading and filing the annexed petition of PETRA Z. duly verified the \_\_\_\_ day of \_\_\_\_\_, 202\_, and the affirmation of DOCTOR DOCTOR, M.D., dated \_\_\_\_\_, 202\_, and the affirmation of SOCIAL WORKER., dated \_\_\_\_\_, 202\_, from which it appears that WINONA Z., the alleged incapacitated person herein, presently resides at LOVELY HOSPITAL and requires the approval of a single transaction or, in the alternative, the appointment of PETRA Z. as Special Guardian, because the approval is necessary to provide for her personal needs, and that WINONA Z. consents to such relief,

It is hereby

ORDERED that MENTAL HYGIENE LEGAL SERVICES, telephone number (\_\_\_\_) \_\_\_\_\_, on its consent, upon filling a notice of appearance be and hereby is appointed attorney for the above-named alleged incapacitated person to appear for and represent the alleged incapacitated person in this proceeding, and it is further

ORDERED that because of the appointment of MENTAL HYGIENE LEGAL SERVICES as legal counsel, the appointment of a COURT EVALUATOR is dispensed with, in accordance with MHL § 81.10(g), and it is further

ORDERED that WINONA Z., the alleged incapacitated person, Mental Hygiene Legal Services, the attorney for the alleged incapacitated person, show cause at Part \_\_\_\_\_, Room \_\_\_\_\_ of this Court, to be held at the Courthouse located at \_\_\_\_\_, on the \_\_\_\_ day of \_\_\_\_\_, 202\_, at 9:30 in the forenoon of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered that:

1. Authorizes the transfer of WINONA Z. from LOVELY HOSPITAL to EXCELLENT REHABILITATION FACILITY on consent; or, in the alternative,
2. Appoints PETRA Z. as Special Guardian for the sole purpose of consenting to and arranging for the transfer of WINONA Z. to EXCELLENT REHABILITATION FACILITY, on consent, and
3. Grants such other, further or different relief as may be just and proper.

SUFFICIENT CAUSE APPEARING THEREFORE,

Let THREE (3) day service by personal delivery of a copy of this Order to Show Cause and Petition upon the alleged incapacitated person, WINONA Z., and by personal delivery to the offices of MENTAL HYGIENE LEGAL SERVICES, LOVELY HOSPITAL, and upon Adult Protective Service ADULT PROTECTIVE SERVICES<sup>20</sup> on or before the \_\_\_\_ day of \_\_\_\_\_, be deemed good and sufficient service.

ENTER:

\_\_\_\_\_, J.S.C.

**STATEMENT OF ALLEGED INCAPACITATED PERSON'S RIGHTS**

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<sup>20</sup> Because there is a caseworker assigned, APS should be served.



In a proceeding brought pursuant to this article any party to the proceeding 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 counsel of his or her choice.

The hearing must be conducted in the presence of the person alleged to be incapacitated, either at the courthouse or where the person alleged to be incapacitated resides, so as to permit the court to obtain its own impression of the person's capacity. If the person alleged to be incapacitated physically cannot come or be brought to the courthouse, the hearing must be conducted where the person alleged to be incapacitated resides unless:

1. the person is not present in the state; or
2. all the information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing, or (ii) no meaningful participation will result from the person's presence at the hearing.

If the hearing is conducted without the presence of the person alleged to be incapacitated and the court appoints a guardian, the order of appointment shall set forth the factual basis for conducting the hearing without the presence of the person for whom the appointment is made.

If the hearing is conducted in the presence of the person alleged to be incapacitated and the person is not represented by counsel, the court shall explain to that person, on the record, the purpose and possible consequences of the proceeding, the right to be represented by counsel, and the fact that the court will appoint an attorney to be represented by the counsel, and shall inquire of the person whether he or she wishes to have an attorney appointed. If the person refuses the assistance of counsel, the court may nevertheless appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

If on or before the return date designated in the order to show cause the alleged incapacitated person or counsel for the alleged incapacitated person raises issues of fact regarding the need

for an appointment under this article and demands a jury trial of such issues, the court shall order a trial by jury thereof. Failure to make such a demand shall be deemed a waiver of the right to trial by jury.

SUFFICIENT CAUSE APPEARING THEREFORE,

Let ONE (1) day service by personal delivery of a copy of this Order to Show Cause and petition upon the alleged incapacitated person, WINONA Z., be deemed good and sufficient and let service of a copy of this Order to Show Cause and petition by PERSONAL delivery to the Court Appointed Attorney, MENTAL HYGIENE LEGAL SERVICES, to LOVELY HOSPITAL and ADULT PROTECTIVE SERVICES on or before the \_\_\_\_\_ day of 202\_\_\_\_, be deemed good and sufficient.

ENTER:

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**2B. Winona Z. Petra Z. (Daughter's) Affidavit:**

SUPREME COURT  
STATE OF NEW YORK      COUNTY OF  
In the Matter of the Application of PETRA Z.

Petitioner,

**AFFIDAVIT**

For the Approval of a Single Transaction  
Pursuant to MHL § 81.16(b)  
or, in the alternative,  
For the Appointment of PETRA Z. as Special Guardian  
Pursuant to MHL § 81.16(b)  
on the Consent, Pursuant to MHL § 81.(c)(1) of

WINONA Z.,

INDEX No.

Respondent,

An alleged incapacitated person

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STATE OF NEW YORK)  
COUNTY OF ULSTER) SS:

PETRA Z., Petitioner, being duly sworn, deposes and states:

1. I am the adult daughter of WINONA Z., Respondent. I reside at NOT FAR FROM MOM STREET, WONDERFUL TOWN, NEW YORK.
2. My mother, WINONA Z. is 75 years of age. Until her fall, WINONA Z. resided alone in her home of many years at FABULOUS STREET, WONDERFUL TOWN, NEW YORK.
3. My mother, WINONA Z. has always been very independent. In recent years, she has

become more accepting of my help. Our relationship is such that I stop in to see her several times a week and assist her with errands, shopping, and household chores.

4. WINONA Z. is currently at LOVELY HOSPITAL, having been admitted there with a broken hip from the emergency room on April 6, 2021 after a fall that same day. She has been accepting of my assistance through her recent health crisis. I have visited her every day that she has been hospitalized, and have been able to see my mother at various times of the day and night, and observe how she responds before, during and after receiving pain medication.
5. I know of no health care proxy or power of attorney executed by my mother, WINONA Z.
6. While hospitalized, WINONA Z. seemed confused following her emergency hip replacement surgery on April 6, 2021 at LOVELY HOSPITAL. Medical staff have explained that they see this type of confusion frequently in patients of my mother's age, especially immediately after taking prescribed pain medication. I myself have witnessed my mother's on-again, off-again clarity of mind that coincides with receiving pain medication. As the medication wears off, my mother becomes clear-headed and amiable.
7. I understand that due to her intermittent confusion the Hospital Administrator is concerned that my mother, WINONA Z., is unable to make timely decisions for herself regarding her transfer to a qualified rehabilitation facility.
8. While my mother, WINONA Z., appears to be occasionally confused about where she is, sometimes, unable to remember that she just underwent surgery, she is more frequently lucid; my mother has told me repeatedly that she is ready to be transferred to rehabilitation, especially if her doctor, DOCTOR DOCTOR, believes that she is ready to be

transferred.

9. Prior to her emergency hospitalization in early April 2021 with a broken hip, my mother, WINONA Z., was living on her own, enjoying an active and independent life. My mother saw her friends regularly and went to social events, including local protests against environmental degradation, among other issues.
10. Ms. SUPERVISING DOCTOR performed a capacity evaluation for WINONA Z. on April 19, 2021. A copy of that evaluation is attached. It was Ms. SUPERVISING DOCTOR's opinion that, while WINONA Z. has exhibited intermittent confusion, this may only be the temporary result and side effect of her currently prescribed pain medication.
11. My mother, WINONA Z., is a strong-willed woman; she is fiercely independent, does not want to be declared incapacitated, and fears the potential consequences of a finding of incapacity. Instead, she is willing to consent to the Court approving her transfer to the Rehabilitation Facility pursuant to MHL § 81.02(a), or, if the Court finds it appropriate, to my appointment as Special Guardian for the sole purpose of consenting to, and arranging her transfer, pursuant to MHL § 81.16(c)(1).
12. Granting the relief requested will be the least restrictive alternative available to meet WINONA Z.'s personal needs.
13. I understand that the medical staff – including DOCTOR DOCTOR, my mother's attending physician, and Ms. SUPERVISING DOCTOR, and the LOVELY HOSPITAL nursing staff – believe that my mother is very likely to make good if not full recovery of her mobility while at EXCELLENT REHABILITATION FACILITY.
14. At EXCELLENT REHABILITATION FACILITY I will be welcome to visit my mother, WINONA Z.,

and her mental state will be monitored daily for improvement with the goal of enabling her to return safely to her home for further physical therapy.

15. Other than enabling the transfer to EXCELLENT REHABILITATION FACILITY, all my mother's personal and financial needs are being adequately met.

16. Accordingly, based on my personal knowledge to my observations, and the information that I have received from other sources, it is my request that the Court

- a) Authorize the immediate transfer of WINONA Z. from LOVELY HOSPITAL to EXCELLENT REHABILITATION FACILITY, or, in the alternative,
- b) Appoint me as Special Guardian for the sole purpose of consenting to and arranging the transfer; and
- c) That the relief be granted on my mother's consent rather than unnecessarily and inappropriately determining her to be incapacitated.

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_

PETRA Z.

**2C. Winona Z. Physician's Affirmation:**

SUPREME COURT

STATE OF NEW YORK      COUNTY OF \_\_\_\_\_

In the Matter of the Application of PETRA Z.

Petitioner,

**AFFIRMATION  
OF PHYSICIAN**

For the Approval of a Single Transaction

Pursuant to MHL § 81.16(b)

or, in the alternative,

For the Appointment of PETRA Z. as Special Guardian.

Pursuant to MHL § 81.16(b)

on the Consent, Pursuant to MHL § 81.(c)(1) of

WINONA Z.,

INDEX No.

Respondent,

An alleged incapacitated person

\_\_\_\_\_

DOCTOR DOCTOR, M.D., a physician licensed to practice in the State of New York, affirms that the following is true under penalties of perjury:

1. I am affiliated with LOVELY HOSPITAL as SENIOR SURGEON.

2. My medical specialty is HIP SURGERY.

3. I saw and evaluated WINONA Z. on (date(s)) \_\_\_\_\_ [202\_], at LOVELY HOSPITAL.

4. I found the age, medical condition, diagnosis, and mental condition of the Alleged Incapacitated Person to be:

Age, DOB: 75-years old, born in 1946<sup>21</sup>

Medical Condition: POST BROKEN HIP SURGERY

Diagnosis: SURGERY SUCCESSFUL; REHABILITATION NEEDED

5. At present, due to the trauma of surgery, recovery, and medication I find WINONA Z. to be incapacitated in the following ways, typical of post-surgery patients of her age and younger: WINONA Z. is suffering from physical weakness and lack of stamina, and is in need of both rest and physical therapy at a qualified facility to regain her mobility and resilience. Further, WINONA Z. appears to be intermittently bewildered and unsure of her surroundings, especially on taking prescribed pain medication at regular intervals to ease recovery. At times, but inconsistently, WINONA Z. appears to be disoriented and forgetful that she has just had surgery. At present, WINONA Z. does not have the ability to make decisions regarding her transfer to a qualified rehabilitation facility and seems temporarily incapacitated by the combination of the natural post-surgery healing process and the medications she has been prescribed to return her to more robust health.

6. WINONA Z. appears to want to be transferred to a rehabilitation facility to enable her recovery from surgery, notwithstanding her intermittent confusion. Although I question her capacity to give legally binding informed consent to the transfer, I believe she has the capacity to consent to a court order for that transfer.

7. I have discussed the needs and likely rehabilitation schedule of WINONA Z. with PETRA Z., her daughter, as well as with LOVELY HOSPITAL social work staff, who state that the following assistance is necessary:

REHABILITATION FOR REPAIRED HIP IN A CERTIFIED REHABILITATION SETTING;

8. I recommend that WINONA Z. be transferred from LOVELY HOSPITAL to EXCELLENT REHABILITATION FACILITY preparatory to returning home after the necessary completion of rehabilitation, with in-home PHYSICAL THERAPY to follow.

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<sup>21</sup> Under OCA's uniform privacy rules; exact birthdates should not be used in pleadings; the year of birth will suffice. Uniform Rules for N.Y. State Trial Courts, 202. (e)(1)(ii).



9. LOVELY HOSPITAL has the capacity to permit WINONA Z. to appear remotely for the Court hearing; I recommend that in light of her weakened physical condition and the need for swift resolution of the issues presented that permission for the remote appearance of WINONA Z. be granted in lieu of personal appearance in Court.

Dated: County of \_\_\_\_\_, New York, \_\_\_\_\_, 202\_\_\_\_

DOCTOR DOCTOR  
(Signature) M.D.  
(Print name underneath)  
LOVELY HOSPITAL

**2D. Winona Z. Social Worker's Affidavit:**

SUPREME COURT  
STATE OF NEW YORK COUNTY OF \_\_\_\_\_  
In the Matter of the Application of PETRA Z.

Petitioner,

**AFFIDAVIT**

For the Approval of a Single Transaction  
Pursuant to MHL § 81.16(b)  
or, in the alternative,  
For the Appointment of PETRA Z. as Special Guardian.  
Pursuant to MHL § 81.16(b)  
on the Consent, Pursuant to MHL § 81.(c)(1) of

WINONA Z.,

INDEX No.

Respondent,

An alleged incapacitated person  
\_\_\_\_\_

STATE OF NEW YORK)  
COUNTY OF ULSTER) SS:

DEDICATED CASEWORKER, being duly sworn, deposes and states:

1. I am a Caseworker for the Adult Protective Services Unit of the \_\_\_\_\_ County Department of Social Services (\_\_\_\_\_ CDSS). I am the assigned Adult Protective Services (APS) caseworker on call for LOVELY HOSPITAL.
2. WINONA Z. is an alleged incapacitated person who is 75 years of age. She is currently at LOVELY HOSPITAL, having been admitted there from the Emergency Department on April 6, 2021. Ms. Z's home address is FABULOUS STREET, WONDERFUL TOWN, NEW YORK.
3. Ms. Z. is a retired college teacher, a widow, with one daughter, PETRA Z., who resides at NOT FAR FROM MOM STREET, WONDERFUL TOWN, NEW YORK.
4. Petitioner knows of no health care proxy or power of attorney executed by the alleged incapacitated person.
5. Adult Protective Services received a referral regarding Ms. Z., an in-patient at LOVELY HOSPITAL on April 8, 2021. The concerns in the referral were that Ms. Z., is exhibiting intermittent confusion following her emergency hip replacement surgery on April 6, 2021 at LOVELY HOSPITAL especially after taking prescribed pain medication, and due to her intermittent confusion, may be unable to make timely decisions for herself regarding her transfer to a qualified rehabilitation facility.
6. I observed Ms. Z. in her shared room at LOVELY HOSPITAL where she has been recovering post hip-replacement surgery. As is typical of patients who receive this surgery at any age, she is still experiencing pain from the recent operation and has routine mobility difficulties. Ms. Z. needs assistance getting out of bed, getting to the toilet, getting into and out of the shower, and when walking, needs assistance to ensure that she is steady on her feet. In my

observation, Ms. Z. appears to be occasionally confused about where she is, and sometimes does not remember that she just underwent surgery. Despite having been introduced to me on several occasions and previously remembering my name, depending on when I visit her, Ms. Z. sometimes does not remember who I am. It is my observation that these periods of confusion coincide with the effects of her prescribed pain medication that is provided to her by nursing staff.

7. Ms. Z.'s primary care physician, DOCTOR DOCTOR has also expressed concern about her confusion. Her doctor has expressed concern about Ms. Z.'s ability to communicate her needs clearly and understand what is happening to her.
8. Prior to her emergency hospitalization in early April 2021 with a broken hip, according to her daughter, PETRA Z., Ms. Z. was living on her own, enjoying an active and independent life as a retired but engaged 75-year old. Ms. Z. was able to perform and enjoy all major activities of daily living, including bathing and shopping for herself; cooking meals at home, and taking part in a robust social life that included volunteering, taking part in social justice protests, and seeing her friends regularly. Before her mother's injury, PETRA Z. spoke on the phone with her mother several times each week, and stopped by her mother's house socially or as the result of having run an errand for her mother several times a month.
9. PETRA Z. was with her mother on the night that she broke her hip and brought her in to the hospital. PETRA Z. has assured me that she will visit her mother in the rehabilitation facility and, upon completion of rehabilitation and return to her home, will assist her in any way necessary to meet her personal needs.
10. Ms. SUPERVISING DOCTOR performed a capacity evaluation for Ms. Z. on April 19, 2021. A

copy of that evaluation is attached. It was Ms. SUPERVISING DOCTOR's opinion that while Ms. Z. has exhibited intermittent confusion, this may only be the temporary result and side effect of her currently prescribed pain medication. In Ms. SUPERVISING DOCTOR's opinion, as the amount of medication that Ms. Z. takes on a daily basis is reduced per doctor's orders while Ms. Z. is convalescing at EXCELLENT REHABILITATION FACILITY, Ms. Z.'s former mental acuity is likely to return and she is expected to be restored to her full capacity, understanding, and focus, and to be able to provide for her own personal needs with the assistance that she has always received from her daughter, PETRA Z. Ms. Z is, by all accounts, and by my observation, a fiercely independent woman who does not want to be declared incapacitated, although she is willing to consent to the Court approving her transfer to the Rehabilitation Facility pursuant to MHL § 81.02(a). Based on my observations and my conversations with her doctors.

11. I believe she has the capacity to give that consent.
12. Ms. Z. came to the Emergency Department at LOVELY HOSPITAL in a medical crisis, and was admitted with a broken hip for surgery. While clearly in pain at that time, Ms. Z. was coherent throughout her admission and was able to answer direct questions promptly and clearly. Prior to the precipitating event that brought her to the ED, according to her daughter, PETRA Z.'s account, Ms. Z. was focused and aware of her surroundings. It is the belief of DOCTOR DOCTOR, Ms. Z.'s attending physician, and Ms. SUPERVISING DOCTOR, as well as LOVELY HOSPITAL nursing staff, that Ms. Z. is very likely to make good if not full recovery of her mobility while at EXCELLENT REHABILITATION FACILITY, allowing her to return home where she will continue to receive PHYSICAL THERAPY for strength and

endurance. At this point, LOVELY HOSPITAL believes that Ms. Z.'s pharmacologically-induced intermittent confusion will abate while she is under 24-hour supervision at EXCELLENT REHABILITATION FACILITY. Ms. Z. will be physically and emotionally cared for, observed, and put through daily exercises while at EXCELLENT REHABILITATION FACILITY. At EXCELLENT REHABILITATION FACILITY her daughter, PETRA Z. will be welcome to visit her and her mental state will be monitored daily for improvement with the goal of enabling Ms. Z. to return safely to her home for further physical therapy.

13. Based on my observations, and the information that I have received from other sources, I unqualifiedly support the application of PETRA Z. in requesting court authorization of the immediate transfer of WINONA Z. from LOVELY HOSPITAL to EXCELLENT REHABILITATION FACILITY, on her consent; or, in the alternative, that PETRA Z. be appointed Special Guardian for the purpose of consenting to, and arranging the transfer of WINONA Z to EXCELLENT REHABILITATION FACILITY, also on the consent of WINONA Z., rather than unnecessarily and inappropriately determining Ms. Z. to be incapacitated.

---

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_

DEDICATED CASEWORKER

### **Hypothetical 3: Xavier G.**

*No pleadings are included for this hypothetical as it is not appropriate for 81.16(\$) relief*

### **Hypothetical 4: Wesley W.**

Wesley W. is a 58-year old man who lives alone in his own apartment. He is HIV positive, having been first diagnosed with AIDS in 1987. He has no immediate family members in his life, but he has a close friend and neighbor, Norman F., who he has known for many years. Wesley W. has long cared for himself, done his own shopping, and prepared his own meals. He needs no assistance with his daily personal care. Several years ago, his father died and left money for him in a Trust. ScroogeBank is his Trustee, holding more than \$300,000 in trust for Wesley.

Wesley gets his medical care at a local community clinic. He is referred by his clinic social worker to a Legal Services attorney for assistance with problems related to his trust. Last year Wesley had hip replacement surgery and, after release from the hospital, he had a long and painful rehabilitation process during which he fell behind on many of his financial responsibilities, including filling out the detailed, six-page report that he is required to file bi-annually with Scroogebank.

Because of his failure to file the report, no payments have been issued on Wesley's behalf for four months. With this decrease in income, Wesley has been unable to pay for many necessities in his life. His account with the clinic is in arrears and his access to his doctor is in jeopardy. Additionally, the social worker has discovered that Wesley's landlord is suing him in a proceeding for Non-payment of Rent, his cell phone has been disconnected, and he is not taking his essential medications because he cannot afford his co-pays. The social worker refers Wesley to a lawyer she knows at DoGood Legal Services.

While interviewing Wesley, the lawyer learns that the cascading problems arising from the loss of Trust payments has left Wesley depressed and distraught at the prospect of his eviction, his inability to get the medications he needs, etc. Wesley admits that because he has made such a mess of things he is completely paralyzed and can't manage his finances now, although he believes that if the crisis was over, he could return to the way he lived before.

The lawyer is prepared to represent Wesley in the eviction proceeding, and to seek a stay until Wesley's past-due payments from the Trust can be recovered. He calls the ScroogeBank trustee who explains that no further payments will be made on Wesley's behalf without the updated report being submitted in order to justify those payments. Further, the Trustee will not discuss any further details will be discussed with the lawyer because he believes that Wesley may not have capacity to engage an attorney. He suggests that Wesley needs someone to be appointed as his guardian to manage his property.

At their next meeting Wesley brings his dear friend Norman who has offered to help in any way necessary. When the lawyer raises the possibility of guardianship, both Wesley and Norman are horrified, especially at the prospect that Wesley, a long-time activist and a leading figure in the LGBT community, would be declared incompetent

## Hypothetical 4: Wesley W. Pleadings, A - D

### 4A. Wesley W. Order to Show Cause:

At a \_\_\_\_\_ Part \_\_\_\_\_ of the  
Supreme Court of the State of New  
York, held in and for the County of  
New York, at the Courthouse  
located at \_\_\_\_\_ New York City  
and State of New York on the  
\_\_\_\_\_ day of \_\_\_\_\_, 202\_\_.

PRESENT:

**ORDER TO SHOW  
CAUSE**

Index No. \_\_\_\_\_

HON. \_\_\_\_\_,

JUSTICE

X-----X

**In the Matter of the Application of COMMUNITY HOSPITAL, Petitioner,  
On Behalf of Affiliated GRASSROOTS CLINIC,**

**PETITIONER,**

**For the Appointment of a Special Guardian for Property Matters  
Pursuant to MHL § 81.16(b) On the Consent of  
WESLEY W.,**

**RESPONDENT,**

**An Alleged Incapacitated Person**

X-----X

**IMPORTANT**



**AN APPLICATION HAS BEEN FILED IN COURT BY COMMUNITY HOSPITAL AFFILIATED WITH GRASSROOTS CLINIC THAT BELIEVES YOU MAY BE UNABLE TO TAKE CARE OF YOUR FINANCIAL AFFAIRS. COMMUNITY HOSPITAL IS ASKING THAT NORMAN F. BE APPOINTED AS SPECIAL GUARDIAN TO MAKE CERTAIN FINANCIAL DECISIONS FOR YOU. COMMUNITY HOSPITAL STATES THAT YOU HAVE CONSENTED TO THE RELIEF THAT HAS BEEN REQUESTED.**

**WITH THIS PAPER IS A COPY OF THE APPLICATION TO THE COURT SHOWING WHY COMMUNITY HOSPITAL BELIEVES YOU MAY BE UNABLE TO TAKE CARE OF CERTAIN OF YOUR FINANCIAL AFFAIRS AND THAT YOU CONSENT TO THE APPOINTMENT OF A SPECIAL GUARDIAN TO DO SO. 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, TO TELL THE JUDGE IF YOU DO NOT WANT ANYONE APPOINTED OR IF YOU DO OR DO NOT CONSENT TO THE APPOINTMENT. 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, ADDRESS AND TELEPHONE NUMBER OF THE CLERK OF THE COURT ARE:**

**[Clerk's Name, Address, Phone Number]**

**THE COURT HAS APPOINTED A COURT EVALUTOR 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:**

[Court Evaluator's Name, Address, Phone 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 THAT LAWYER UNLESS YOU DO NOT HAVE ANY MONEY TO DO SO.**

On reading and filing the annexed petition of COMMUNITY HOSPITAL duly verified the \_\_\_\_\_ day of \_\_\_\_\_, 202\_, and the affirmation of DOGOOD LEGAL SERVICES LAWYER, Esq., dated \_\_\_\_\_, 202\_, the affidavit of NORMAN F., and the affidavit of WESLEY W., dated \_\_\_\_\_, 202\_, from which it appears that WESLEY W., the alleged incapacitated person herein, resides at [Address of Wesley W.], and is unable to manage certain of his property and financial affairs. It is ORDERED that WESLEY W., the alleged incapacitated person, and NORMAN F. show cause at Part \_\_\_\_\_, Room \_\_\_\_\_ of this Court, to be held at the Courthouse located at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 202\_, at 9:30 in the forenoon of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered:

1. Appointing NORMAN F. as SPECIAL GUARDIAN for certain property management and financial matters of the alleged incapacitated person, WESLEY W., upon the consent of WESLEY W., and granting the SPECIAL GUARDIAN the following powers: to communicate with TRUSTEE SCROOGE BANK on WESLEY W.'S behalf; to assist WESLEY W. and DOGOOD LEGAL SERVICES LAWYER with completing the required biannual documentation and with signing said documentation on WESLEY W.'s behalf; to assist DOGOOD LEGAL SERVICES LAWYER in defending WESLEY W. in the non-payment proceeding brought by his landlord, and currently pending against him; and to manage WESLEY W.'s current SSI payments to obtain necessary medications and restore his cell phone service until he receives the monies due him from the SCROOGE BANK TRUST; and
2. Granting such other, further or different relief as may be just and proper; and it is further

ORDERED that [Name of Court Evaluator], telephone number (\_\_\_\_) \_\_\_\_\_, upon filling his/her consent and affidavit of responsibility be and hereby is appointed Court Evaluator for the above-named alleged incapacitated person to appear for and protect his interests in this proceeding, upon duly qualifying and consenting according to law, complying with Part 36 of the rules of the Chief Judge and filing the certificate required by §36.1(d) and the notice of appointment required by §36.3 of the Rules of the Chief Judge; and it is further

SUFFICIENT CAUSE APPEARING THEREFORE,

Let FOURTEEN (14) day service by personal delivery of a copy of this Order to Show Cause and Petition upon the alleged incapacitated person, WESLEY W., and petition by delivery to the office of [Name of Court Evaluator] on or before the \_\_\_\_\_ day of \_\_\_\_\_, be deemed good and sufficient service.

ENTER:

\_\_\_\_\_, J.S.C.

### **STATEMENT OF ALLEGED INCAPACITATED PERSON'S RIGHTS**

In a proceeding brought pursuant to this article any party to the proceeding 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 counsel of his or her choice.

The hearing must be conducted in the presence of the person alleged to be incapacitated, either at the courthouse or where the person alleged to be incapacitated resides, so as to permit the court to obtain its own impression of the person's capacity. If the person

alleged to be incapacitated physically cannot come or be brought to the courthouse, the hearing must be conducted where the person alleged to be incapacitated resides unless:

1. the person is not present in the state; or
2. all the information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing, or (ii) no meaningful participation will result from the person's presence at the hearing.

If the hearing is conducted without the presence of the person alleged to be incapacitated and the court appoints a guardian, the order of appointment shall set forth the factual basis for conducting the hearing without the presence of the person for whom the appointment is made.

If the hearing is conducted in the presence of the person alleged to be incapacitated and the person is not represented by counsel, the court shall explain to that person, on the record, the purpose and possible consequences of the proceeding, the right to be represented by counsel, and the fact that the court will appoint an attorney to be represented by the counsel, and shall inquire of the person whether he or she wishes to have an attorney appointed. If the person refuses the assistance of counsel, the court may nevertheless appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

If on or before the return date designated in the order to show cause the alleged incapacitated person or counsel for the alleged incapacitated person raises issues of fact regarding the need for an appointment under this article and demands a jury trial of such issues, the court shall order a trial by jury thereof. Failure to make such a demand shall be deemed a waiver of the right to trial by jury.

SUFFICIENT CAUSE APPEARING THEREFORE,

Let three (3) days service by personal delivery of a copy of this Order to Show Cause and petition upon the alleged incapacitated person, WESLEY W., be deemed good and sufficient, and let service of a copy of this Order to Show Cause and petition by delivery to the office of

the Court Evaluator, and personal delivery to NORMAN F., on or before the \_\_\_\_\_ day of \_\_\_\_\_, be deemed good and sufficient.

ENTER:

\_\_\_\_\_

#### **4B. Wesley W. Norman F. (Friend's) Affidavit:**

SUPREME COURT

STATE OF NEW YORK      COUNTY OF \_\_\_\_\_

In the Matter of the Application of COMMUNITY HOSPITAL,

On Behalf of Affiliated GRASSROOTS CLINIC

Petitioner,

**AFFIDAVIT**

For the Appointment of a Special Guardian for Property Matters

Pursuant to MHL § 81.16(b) On the Consent of

WESLEY W.,

Index No:

an Alleged Incapacitated Person.

STATE OF NEW YORK)

COUNTY OF NEW YORK)      SS:

Norman F., being duly sworn, deposes and states:

1. I am a Norman F., a longtime friend and neighbor of WESLEY W. I have known WESLEY W. since 1995 when I first moved into the building at [Address] where he has lived since 1990. I am a teacher in the New York City Public Schools and have been continuously so employed since 1989.
2. WESLEY W. is a living legend in the New York City activist LGBT Community. He was among the founders of the Lower East Side Harm Reduction Center, an AIDS prevention service organization primary devoted to the needs of users of intravenous drugs.
3. WESLEY W. has no children, but he is an established father-figure to a younger generation of LGBT service providers and activists who work and volunteer at a number of local organizations, including the GRASSROOTS CLINIC and at the Alliance for Positive Change, a

local AIDS service organization.

4. WESLEY W. is retired from his employment of 30+ years as an Outreach Worker at the Lower East Side Harm Reduction Center. He receives a minimal monthly SSI payment, and is the beneficiary of a Trust at SCROOGE BANK with a substantial balance, following the death of his father in 2016.
5. In my experience, while WESLEY W. has become more physically frail in recent years and is grateful for assistance from his friends, his chosen family, he is keenly independent and committed to living in the handicapped-accessible apartment that he formerly shared with his lover of over 20 years, Peter, who died in 2015.
6. I have frequently observed WESLEY W. in his home as a guest and as a helpful friend. With some weekly assistance from a volunteer roster of cleaners, he maintains his home beautifully, regularly prepares his own simple meals, and in general meets and/or has the necessary assistance to meet all of his personal needs.
7. I have learned from WESLEY W. that he is extremely worried about his financial state, that seems to have steamrolled out of control following his hip surgery and hospitalization last year. I understand that, for lack of funds to pay his co-pays he has recently gone without medication which is dangerous for a person living with AIDS, that he is facing an eviction proceeding for non-payment brought against him by our landlord, and has been unable to complete the financial disclosure report that he must complete every two years to fulfill the requirements of the SCROOGE BANK TRUST, a legacy from his father. It is the funds from this trust that he has previously used for the expenditures that he is currently unable to pay. Similarly, WESLEY W.'s cell phone has been turned off because of nonpayment.

8. I have also spoken with the attorney from DOGOOD LEGAL SERVICES who is prepared to deal with the eviction proceeding by obtaining a stay until funds are available from the SCROOGE BANK TRUST to pay all the arrears. He has informed me that SCROOGE BANK will not deal with him directly and insists that a Guardian must be appointed for WESLEY W. to deal with the necessary financial forms that will permit the release of the funds otherwise due to WESLEY W.
9. I believe that there are a number of steps that are necessary to extricate WESLEY W. from his current predicament and to meet his financial (and financially related housing) needs. These include filling out the necessary forms for SCROOGE BANK and securing the TRUST payments due to WESLEY W.; making arrangements with GRASSROOTS CLINIC to continue to treat him until the funds are available and, if necessary, signing a promissory note secured by those forthcoming funds; utilizing SSI funds on hand to make co-payments for necessary medications and to restore cell-phone service; and cooperating with DOGOOD LEGAL SERVICES in their defense of non-payment proceeding.
10. Based on my long friendship with and knowledge of WESLEY W., I believe that his inability to meet his financial needs, as described above, is temporary, resulting from a series of cascading responsibilities he was unable to meet after his hip surgery, from which he is now completely recovered. I believe that once the immediate crisis is resolved and his finances are back on an even keel, he will be able to meet all of his financial needs as he did previously, with any informal assistance his friends, including me, are happy to provide.
11. WESLEY W. is a proud and independent person who has survived many difficulties.
12. WESLEY W. is a long-time activist in the fight for LGBT rights, and for civil rights generally.



13. When he heard that SCROOGE BANK was insisting that he have a guardian appointed to make all his decisions for him that would essentially take away his rights, he was horrified. While he sees that he has let his situation get out of control because of his hip surgery and hospitalization, he does not consider himself incompetent and does not want to be branded as such by a Court. He understands that if the relief requested here is granted on his consent, there will be no finding of incompetence/incapacity. That is what he greatly desires.
14. WESLEY W. is fully aware of the crisis he is in and his current inability to meet his financial needs, and is willing—if not massively relieved—to have a Special Guardian appointed for a limited time, and the limited purpose of resolving these issues. I am honored that he is also willing to consent to—and has asked me to serve as—his Special Guardian.
15. I believe that WESLEY W. has the capacity to consent to this relief.
16. It is my respectful request that the Court appoint me, NORMAN F., as the Special Guardian for the property matters for WESLEY W. described herein, on his consent, without the necessity of finding him incapacitated.
- \_\_\_\_\_

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_

#### **4C. Wesley W. Lawyer's Affidavit:**

SUPREME COURT

STATE OF NEW YORK COUNTY OF \_\_\_\_\_

In the Matter of the Application of COMMUNITY HOSPITAL,

On Behalf of Affiliated GRASSROOTS CLINIC

Petitioner,

**AFFIDAVIT**

For the Appointment of a Special Guardian for Property  
Matters Pursuant to MHL § 81.16(b) On the Consent  
Of WESLEY W.,

Respondent,

Index No:

an Alleged Incapacitated Person. \_\_\_\_\_

STATE OF NEW YORK)

COUNTY OF NEW YORK) SS:

DEDICATED ATTORNEY, being duly sworn, deposes and states:

1. I am a staff attorney for DOGOOD LEGAL SERVICES in New York City. I work closely with COMMUNITY HOSPITAL, and frequently with GRASSROOTS CLINIC, their Lower East Side, Manhattan, affiliate. GRASSROOTS CLINIC SOCIAL WORKER put me in touch with WESLEY W. following an urgent intake meeting on [Date].
2. WESLEY W. is an alleged incapacitated person who is 58 years of age.  
WESLEY W.'s home address is \_\_\_\_\_.
3. WESLEY W. has no children or close family. His partner of two decades, Peter, passed away in 2015. He has a close advocate and friend in his neighbor NORMAN F.
4. WESLEY W. is a longtime HIV/AIDS survivor, and is being assisted by SOCIAL WORKER, at GRASSROOTS CLINIC, affiliated with COMMUNITY HOSPITAL.

5. WESLEY W. has a SCROOGE BANK Trust established in his name by his deceased father in the amount of \$300,000; he also receives SSI in the amount of \_\_\_\_\_. By his own description, WESLEY W. lives frugally, and until this time, within his budget.
6. The significant issues facing WESLEY W. stem from his inability to access his assets held in Trust at SCROOGE BANK. Because he has been unable to fulfill his obligation to file bi-annual (every two years) reports to SCROOGE BANK on his own, he has been denied access to his monies that have previously been used to pay his
  - a) monthly rent to LANDLORD; b) co-pays on his prescribed medications, and c) co-pays on his regular visits to GRASSROOTS CLINIC, where he now has an outstanding balance of \$\_\_\_\_\_.
7. SCROOGE BANK Trustees have communicated by U.S. Mail with WESLEY W. that no payments will be forthcoming until he files the obligatory bi-annual report. WESLEY W. reports that in a phone conversation with SCROOGE BANK manager [Name], the manager inferred that WESLEY W. was not fit to oversee his own finances.
8. LANDLORD has commenced a Non-payment of Rent proceeding against WESLEY W. in Landlord-Tenant Court, [Address].
9. I met with WESLEY W. in my office on [Date]; WESLEY W. was accompanied by his friend, NORMAN F., and spoke candidly in front of him, relying on NORMAN F.'s support and memory of recent events. The close friendship between the two men was palpable. WESLEY W. is no longer taking his medications as prescribed as he doesn't have enough money from SSI to cover all the expenses he formerly paid with his monthly SCROOGE BANK Trust allowance; he is consumed by worry about becoming homeless, and he admits to

being disoriented: he cannot concentrate on complex financial matters, such as reviewing the Trust documentation and completing it. He asserts that this is a task that he has previously been able to do, but that a combination of recent circumstances has overwhelmed him, leading to the current situation. He believes that once the current crisis is resolved he will be able to deal with his financial issues with informal support from his friend NORMAN F.

In our meeting, NORMAN F. reassured WESLEY W. that he would be available to assist him with regard to the current filing and, if necessary, in the future.

10. In my opinion, WESLEY W. is aware of his circumstances, limitations, and need for immediate assistance in sorting out his various financial problems, including the threatened eviction for non-payment, and he can consent to specific help in the financial problems he is urgently facing.
11. I recommend that WESLEY W.'s immediate concerns can be promptly ameliorated through a team approach involving legal advocacy and the appointment of a Special Guardian, following MHL § 81.16(b), Single Transaction.
12. As the attorney for WESLEY W., I will advocate for a stay in Landlord-Tenant Court regarding the issue of his Non-payment of Rent, and negotiate with GRASSROOTS CLINIC to continue seeing WESLEY W. as a client of longstanding.
13. With the assistance of a Special Guardian, WESLEY W. will be able to complete the SCROOGE BANK Trust paperwork, and have the majority money for his living expenses restored to his control. With the support of a Special Guardian, when his SCROOGE BANK

Trust funds are once again accessible, WESLEY W. will be able to pay off his arrears in rent, clinic fees, and restock his prescribed medications.

14. In the meantime, an appointed Special Guardian can assist WESLEY W. to make a budget for his immediate expenses, such as his medications, using monies received from SSI.
15. The appointment of a Special Guardian will also assist DOGOOD LEGAL SERVICES in obtaining a stay of the eviction proceeding, and will bridge communication for his continued treatment at GRASSROOTS CLINIC.
16. Due to my observations of WESLEY W. and my interactions with NORMAN F., and the information that I have received from other sources, including GRASSROOTS CLINIC SOCIAL WORKER, it is my recommendation that the Court appoint NORMAN F. as Special Guardian for the financial and property management decisions of WESLEY W. pursuant to MHL § 81.16(b) and on the Consent Of WESLEY W.

\_\_\_\_\_

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_

#### **4D. Wesley W.'s Affidavit:**

SUPREME COURT

STATE OF NEW YORK      COUNTY OF NEW YORK \_\_\_\_\_

In the Matter of the Application of COMMUNITY HOSPITAL,  
On Behalf of Affiliated GRASSROOTS CLINIC,

Petitioner,

**AFFIDAVIT**

For the Appointment of a Special Guardian for Property  
Matters Pursuant to MHL § 81.16(b) On the Consent  
Of WESLEY W.,

Respondent,

Index No:

an Alleged Incapacitated Person. \_\_\_\_\_

STATE OF NEW YORK)

COUNTY OF NEW YORK) SS:

WESLEY W., being duly sworn, deposes and states:

1. My name is WESLEY W. I am 58-years old and reside at [Address], my home of 20 years.
2. I am aware that my financial circumstances are dire at present. I understand that I am facing an eviction proceeding brought by LANDLORD for non-payment of rent; that I have unpaid bills with GRASSROOTS CLINIC; that I have not been able to buy the medications I need to be in good health, or to maintain my cellphone service.
3. I am aware that my dire financial situation stems from the fact that I did not complete the paperwork for SCROOGE BANK that was due 6 months ago.

This was mostly because I was hospitalized for hip surgery and then had a long and very painful rehabilitation, although I am now physically recovered. I am very upset that I have

made a mess of things. I am most worried about losing my apartment, but I am also upset because I haven't been able to buy my prescription medication and my phone has been cut off. I am too worried and upset to be able to manage the current crisis in my financial affairs.

4. I believe that I can return to managing my property and financial needs, as I have always done, once this immediate crisis is resolved. Assistance will allow me to remain in my beautiful apartment, in the heart of the community that means so much to me.
5. Although I know I need help from the Court, I do not want to have all my rights taken away, or to be placed under guardianship, or to be found to be incompetent. I did not survive the AIDS crisis in the late 1980s to allow myself to lose my rights and my dignity because of the mistakes I made after my surgery. That is not right and it is not necessary.
6. I understand that there is a "less restrictive alternative" to guardianship that will afford me the assistance I need through the appointment of a Special Guardian for a limited time and with the limited purpose of doing what is necessary to get me out of my current crisis. That is the relief I would like from this honorable Court.
7. NORMAN F. is my dear friend and neighbor. We have lived in the same building since he moved in in 1995. I trust and rely on NORMAN F. for his good sense, and because he has my best interests at heart. I have asked him if he would be willing to be appointed as my Special Guardian and he has said yes.
8. I also understand that if I consent to this proceeding and the relief that is requested, there will be no need or requirement for the Court to find me incompetent or incapacitated if it finds that I have the capacity to consent. I have that capacity, and I do consent.

9. I hereby nominate NORMAN F. as my Special Guardian pursuant to MHL § 81.17 to assist me with the immediate financial needs that have put me in such a difficult situation, giving him legal authority to act on my behalf with LANDLORD, DO GOOD LEGAL SERVICES STAFF ATTORNEY, GRASSROOTS CLINIC, and SCROOGE BANK and allow his access to my SSI payments to purchase my medications and re-connect my phone until I receive the monies that I am due from SCROOGE BANK.
10. It is my sincere hope that the Court will see its way to appointing NORMAN F. as my Special Guardian for these immediate financial needs so that I will be able to get back to my old life as an independent person who can and will care for his own needs. Thank you for your consideration.
- \_\_\_\_\_

Sworn to before me this \_\_\_\_\_ day of 202\_.



## Hypothetical 5: Irma I.

Irma I. is an 87-year-old woman who lives with her adult daughter Christina C. and her son-in-law Robert C., both of whom both have full-time jobs. Irma has a fixed income consisting of \$800/month from Social Security, and a pension from her employment as a bookkeeper with ABC Co. of \$600/month that meets most of her expenses, with Christina and Robert supplying the rest. She has been diagnosed with progressive dementia, although she can still get around and do many things for herself. Christina and Robert have been assisting her, but Irma's needs are increasing. She can no longer shop for herself because she gets lost going to the local supermarket, and Christina has been called to take her home several times when she has been found wandering. She recently burned a pot badly when she forgot to turn the stove off, causing Christina to worry even more about leaving her alone while she and Robert are at work.

One day while Christina and Robert are out, Irma slips in the shower and falls. A neighbor hears her moaning in pain and calls 911. When the EMTs arrive, she is unable to answer basic biographical questions and is scared and combative. The EMTs are able to get enough information from the apartment to contact Christina. She and Robert meet Irma at the hospital.

In the emergency room Irma is diagnosed with a broken ankle. Thereafter she has surgery, is put on pain medication, and admitted to a rehab unit until she is stable and can be discharged safely. Christina tells the social worker that Irma's memory has been declining but this is the worst state she's seen Irma in, and also of her fears about leaving Irma alone. Together, Christina and the social worker conclude that in order to return home safely, Irma will need a home attendant while Christina and Robert are at work. To be home care-eligible, Irma will need to qualify for, and enroll in, Medicaid. Christina learns, however, that Irma's current income is too high for Medicaid eligibility.

The social worker previously had another patient in a similar situation who was able to use something called a pooled trust to enroll in Medicaid despite having too much income. She refers the family to the attorney who set up the pooled trust. The attorney confirms that it would be possible to assign the income from Irma's pension to a pooled trust such as one run by NYSARC, but because it is Irma's pension, she would need to consent and sign all the necessary forms, which she is unable to do.

## Hypothetical 5: Irma I. Pleadings, A - D

### **5A. Irma I. Order to Show Cause:**

At a \_\_\_\_\_ Part \_\_\_\_\_ of the  
Supreme Court of the State of New  
York, held in and for the County of  
\_\_\_\_\_, at the  
Courthouse, located at New York  
City and State of New York on the  
\_\_\_\_\_ day of \_\_\_\_\_, 202\_.

PRESENT:

**ORDER TO SHOW  
CAUSE**

Index No. \_\_\_\_\_

HON. \_\_\_\_\_,

JUSTICE

X-----

**In the Matter of the Application of CHRISTINA C.,**

**Petitioner,**

**For the Appointment of a Special Guardian pursuant to MHL § 81.16(b) of  
IRMA I.**

**Respondent,**

**An Alleged Incapacitated Person**

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### **IMPORTANT**

**AN APPLICATION HAS BEEN FILED IN COURT BY CHRISTINA C. WHO BELIEVES, YOU  
MAY BE UNABLE TO TAKE CARE OF YOUR PERSONAL NEEDS OR FINANCIAL AFFAIRS.**

**CHRISTINA C. IS ASKING THAT SHE BE APPOINTED AS A SPECIAL GUARDIAN TO ENROLL YOU IN MEDICAID BY PLACING SOME OF YOUR ASSETS IN A POOLED TRUST, AND OBTAINING HOME CARE FOR YOU SO THAT YOU CAN RETURN HOME. WITH THIS PAPER IS A COPY OF THE APPLICATION TO THE COURT SHOWING WHY CHRISTINA 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, ADDRESS AND TELEPHONE NUMBER OF THE CLERK OF THE COURT ARE:**

**THE COURT IS NOT APPOINTING A COURT EVALUATOR. INSTEAD, THE COURT IS APPOINTING MENTAL HYGIENE LEGAL SERVICES (MHLS) AS YOUR COUNSEL TO EXPLAIN THIS PROCEEDING TO YOU AND TO INVESTIGATE THE CLAIMS MADE IN THE APPLICATION. THE COURT MAY GIVE MHLS PERMISSION TO INSPECT YOUR MEDICAL, PSYCHOLOGICAL OR PSYCHIATRIC RECORDS. YOU HAVE THE RIGHT TO TELL THE JUDGE IF YOU DO NOT WANT MHLS TO BE GIVEN THAT PERMISSION. THE NAME, ADDRESS, AND TELEPHONE NUMBER OF MHLS ARE:**

**IF YOU DO NOT WANT MHLS AS YOUR LAWYER, YOU ARE ENTITLED TO HAVE A LAWYER OF YOUR CHOICE REPRESENT YOU. YOU WILL BE REQUIRED TO PAY THAT LAWYER UNLESS YOU DO NOT HAVE ANY MONEY TO DO SO.**

On reading and filing the annexed petition of CHRISTINA C. duly verified the \_\_\_\_ day of \_\_\_\_\_, 202\_, and the affirmation of DOCTOR DOCTOR, M.D., dated

\_\_\_\_\_, 202\_, and the affidavit of SOCIAL WORKER, Social Worker,  
\_\_\_\_\_, dated \_\_\_\_\_, 202\_.

It is ORDERED that IRMA I., the alleged incapacitated person and the attorney for the alleged incapacitated person, hereinafter named, show cause at Part \_\_\_\_\_, Room \_\_\_\_\_ of this Court, to be held at the Courthouse located at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 202\_, at 9:30 in the forenoon of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered:

1. Appointing a Special Guardian pursuant to MHL § 81.16(b) for the limited personal needs and property management of the alleged incapacitated person who shall have the power to: take the necessary steps to qualify IRMA I. for Medicaid, including assigning the payments from Irma I.'s pension from ABC Co. assets and depositing same in a pooled trust with NYSARC, enrolling IRMA I. in Medicaid, and arranging for any necessary medical care and for home care services so that she can return to reside with CHRISTINA C. and her husband at their home.

2. Granting such other, further or different relief as may be just and proper; and it is further

ORDERED that MHLS at \_\_\_\_\_, telephone number (\_\_\_\_) \_\_\_\_\_, upon filing its notice of appearance be and hereby is appointed attorney for the above-named alleged incapacitated person to appear for and represent the alleged incapacitated person in this proceeding, and it is further

ORDERED that because MHLS has been appointed counsel for Respondent IRMA I., the necessity for appointment of a Court Evaluator is waived; and

SUFFICIENT CAUSE APPEARING THEREFORE,  
Let THREE (3) day service by personal delivery of a copy of this Order to Show Cause and Petition upon the Alleged Incapacitated Person, IRMA I., and by personal delivery to the offices of Mental Hygiene Legal Services on or before the \_\_\_\_\_ day of \_\_\_\_\_, be deemed good and sufficient service.

ENTER:

## **STATEMENT OF ALLEGED INCAPACITATED PERSON'S RIGHTS**

In a proceeding brought pursuant to this article any party to the proceeding 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 counsel of his or her choice.

The hearing must be conducted in the presence of the person alleged to be incapacitated, either at the courthouse or where the person alleged to be incapacitated resides, so as to permit the court to obtain its own impression of the person's capacity. If the person alleged to be incapacitated physically cannot come or be brought to the courthouse, the hearing must be conducted where the person alleged to be incapacitated resides unless:

1. the person is not present in the state; or
2. all the information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing, or (ii) no meaningful participation will result from the person's presence at the hearing.

If the hearing is conducted without the presence of the person alleged to be incapacitated and the court appoints a guardian, the order of appointment shall set forth the factual basis for conducting the hearing without the presence of the person for whom the appointment is made.

If the hearing is conducted in the presence of the person alleged to be incapacitated and the person is not represented by counsel, the court shall explain to that person, on the record, the purpose and possible consequences of the proceeding, the right to be represented by counsel, and the fact that the court will appoint an attorney to be represented by the counsel, and shall inquire of the person whether he or she wishes to have an attorney appointed. If the person refuses the assistance of counsel, the court may nevertheless appoint counsel if the

court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

If on or before the return date designated in the order to show cause the alleged incapacitated person or counsel for the alleged incapacitated person raises issues of fact regarding the need for an appointment under this article and demands a jury trial of such issues, the court shall order a trial by jury thereof. Failure to make such a demand shall be deemed a waiver of the right to trial by jury.

SUFFICIENT CAUSE APPEARING THEREFORE,

Let three (3) days service by personal delivery of a copy of this Order to Show Cause and petition upon the Alleged Incapacitated Person, be deemed good and sufficient and let service of a copy of this Order to Show Cause and petition by regular mail or delivery to the office MHLS, on or before the \_\_\_\_\_ day of \_\_\_\_\_, be deemed good and sufficient.

ENTER:

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## **5B. Irma I. Christina C. (Daughter's) Affidavit:**

SUPREME COURT

STATE OF NEW YORK      COUNTY OF \_\_\_\_\_

In the Matter of the Application of CHRISTINA C.,

Petitioner,

### **AFFIDAVIT**

For the Appointment of a Special Guardian pursuant  
To MHL § 81.16(b) of IRMA I.,

Respondent,

Index No:

An Alleged Incapacitated Person.

STATE OF NEW YORK)

COUNTY OF MONROE)      SS:

CHRISTINA C., being duly sworn, deposes and states:

1. I am the daughter of IRMA I., who is 87-years old. I have no living brothers or sisters. My mother is currently convalescing and receiving rehabilitation at LOCAL HOSPITAL, having been admitted there from the Emergency Department on [Date] with a broken ankle.
  2. My husband, ROBERT C. and I share our home with IRMA I. at [Address]. IRMA I. has lived with us since 2002, after the death of my father, IMRE I.
  3. During her working life, for 32 years, IRMA I. was a bookkeeper at ABC CO.
- My mother has a pension from her job of \$600 per month, and she receives approximately \$800. each month from Social Security. My mother and I have a joint bank account with a current balance of about \$300.00. My husband, ROBERT C. and I pay for all expenses related to my mother's health and well-being in excess of what she is able to contribute.

4. To my knowledge, IRMA I. has never created a health care proxy or power of attorney.
5. In 2016, my husband and I were initially worried when IRMA I. began showing signs of occasional forgetfulness, asking questions as if she had never asked them. Because this behavior was infrequent, on the advice of her primary physician, we tried to observe her for any changes, but kept to our regular work-and-home life routines.
6. IRMA I. has increasingly been having trouble at home. A pot in which she was cooking oatmeal burned because she forgot it on the stove; and more recently she became disoriented while shopping at GREENGROCERS and I had to leave work to collect her and bring her home. She also attempts to leave the house with no clear destination but so far, because I have been working at home remotely during the pandemic, I have been able to stop her and bring her back inside.
7. Last month IRMA I. apparently slipped while taking a shower when ROBERT C. and I were both briefly out of the house at our jobs. Our neighbor heard her calling out and called the fire department for help. Our neighbor has a key to our house and let in the FDNY EMTs. IRMA C. was found on the floor of the bathroom. While the EMTs were bringing my mother to the LOCAL HOSPITAL, the neighbor called me at work to let me know what happened and where IRMA C. was being taken.
8. My mother's primary care physician, [Name] has said that she has progressive dementia, and that things will likely get worse. I am worried about my mother and do not want her to be at home alone for long periods of time. Neither my husband nor I want to put my mother in a home, and we would like to continue to care for her in our home, but with the return to the office now that we are out of lockdown, I am concerned about the cost of a



home attendant which we cannot possibly afford on the basis of our salaries.

9. We have avoided applying for Medicaid for my mother because we had been managing, but the need for a home attendant has now makes that a necessity.

My mother is not able to fill out any of the forms to apply to Medicaid or to access necessary bank and financial records, so I need court authorization to do that for her.

10. I understand from the social worker at LOCAL HOSPITAL that my mother's income is too high to qualify for Medicaid, but that it would be possible to reduce her income by assigning her pension benefits to a pooled trust such as that operated by NYSARC. Income from the pooled trust could be allocated to supplement my mother's health and personal needs as necessary. I would need court authority to assign IRMA I.'s pension to any pooled trust.

11. I want to, and with court authority will, investigate enrolling my mother in a pooled trust with NYSARC Trust Services so that my mother can qualify for Medicare and home help. I would then make all necessary arrangements to secure the necessary home services.

12. Once the necessary steps are taken and my mother qualifies for Medicaid, and home attendant services have been applied for and approved, I will separately apply to be my Mother's Social Security Representative Payee, and there will be no further need for me to have any authority from the court. I do not wish to be my mother's guardian, and I know that she would not want that. My husband and I will continue to care for all of her personal and financial needs as we have done for many years.

13. Accordingly, for this purpose, I ask the Court to appoint me as Special Guardian for my mother, IRMA I.'s, personal needs and financial decisions, which I understand constitutes a

less restrictive alternative to guardianship, for the following personal and financial objectives:

- a) Medicaid Qualification. IRMA I. receives \$800 from Social Security monthly and receives \$600/monthly pension from ABC. Co. On information and belief this income is in excess of the limitations imposed by Medicaid. In collaboration with NYSARC Trust Services, I will assign IRMA I.'s pension benefits to the pooled trust operated by NYSARC and I will obtain the necessary financial records and furnish the necessary information to qualify IRMA I. for Medicaid.
- b) Medicaid Home Attendant. Once IRMA I. qualifies for Medicaid, I will apply on her behalf for home attendant services during the day while my husband, ROBERT C., and I are working. Upon approval I will arrange for such services with a reputable and licensed agency recommended to me by the social worker at LOCAL HOSPITAL.
- c) Once all of this is done I will report fully to the court on all of my actions and ask to be discharged as Special Guardian.

\_\_\_\_\_

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_

**5C. Irma I. Physician's Affidavit:**

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF \_\_\_\_\_

X-----X

**In the Matter of the Application  
Of Christina C., Petitioner,**

**For the Appointment of a Special Guardian  
Pursuant to MHL § 81.16(b)  
Of Irma I., Respondent**

**AFFIRMATION OF**

**PHYSICIAN**

Index No. \_\_\_\_\_

X-----X

I, DOCTOR DOCTOR, M.D., a physician licensed to practice in the State of New York, affirm that the following is true under penalties of perjury:

1. I am affiliated with LOCAL HOSPITAL, [Address] as an Emergency Department physician. I also maintain an office at [Address].
2. My medical specialty is in Emergency Medicine, focusing on urgent and acute care.
3. I saw and evaluated IRMA I. on [Date], at LOCAL HOSPITAL, (address above).
4. I found the age, mental condition, and diagnosis of IRMA I to be as follows:
  - a) 87 years of age; birthdate: February 14,1934; b) Ankle Fracture (right leg); possible medicine-induced delirium; significant deterioration of mental faculties; c) Stabilized broken tibia; cognitive impairment with a diagnosis of progressive dementia.
5. IRMA I. cannot currently manage her own activities of daily living; she is immobilized by her ankle fracture and general frailty, the need for rest so that her fracture may heal, and she is disoriented. IRMA I. is unable to communicate or attend to her own financial needs; while she has been stabilized in the hospital, she is not entirely aware of the nature and consequences of her functional limitations. By these markers, I understand IRMA I. to be

incapacitated at present, and given the report of her Daughter Christina C. and her prior diagnosis of progressive dementia, I believe that she is unlikely to improve significantly.

7. Currently, IRMA I. takes the following medications: naproxen (OTC pain medication); lisinopril (for high blood pressure); a potassium supplement; and an OTC laxative.

8. IRMA I. recognizes and responds positively to her daughter, CHRISTINA C., and to the husband of CHRISTINA C., ROBERT C. IRMA I. lives with and relies on them both for their care; in turn, they assist and spell each other. CHRISTINA C. reports that her mother's inability to care for herself and manage her own affairs has been declining for some time. I do not recommend IRMA I. for guardianship as she has an established, functioning support system in her family members at home.

9. While with rest and care, IRMA I.'s ankle will heal, her mental prognosis is unlikely to resolve with time. I have discussed IRMA I.'s needs with her daughter and son-in-law, CHRISTINA C. and ROBERT C., as well as with MS. V. STEADY, LCSW, LOCAL HOSPITAL social worker who states that the following assistance is necessary:

- a) IRMA I. has an excellent support system in her daughter and son-in-law in their home [Address];
- b) However, as they both work full-time, CHRISTINA C. and ROBERT C. need the relief of home care assistance for IRMA I.;
- c) To receive home care, IRMA I. must undergo a financial review to ascertain that she can qualify for Medicaid;
- d) Once IRMA I. has qualified for Medicaid, she can be properly cared for at home with the help of her family, CHRISTINA C. and ROBERT C.

10. IRMA I. is presently recovering from an ankle fracture. While it is not impossible for her to appear in Court, it would be detrimental for her to be required to appear physically, and it is likely that her appearance in Court would be further disorienting for her. I recommend that the Court avail itself of any remote appearance mechanisms and protocols that have been put in place for the COVID-19 pandemic so that IRMA I. can continue to convalesce in the home of her daughter and son-in-law without undue disturbance, and that will yet allow the Court to observe IRMA I., even virtually, for itself.

Dated: County of \_\_\_\_\_, New York, \_\_\_\_\_, 200\_\_

\_\_\_\_\_  
(Signature) M.D.

DOCTOR DOCTOR

## **5D. Irma I. Social Worker's Affidavit:**

SUPREME COURT

STATE OF NEW YORK      COUNTY OF \_\_\_\_\_

In the Matter of the Application of Christina C.,

Petitioner,

### **AFFIDAVIT**

For the Appointment of a Special Guardian pursuant  
To MHL § 81.16(b) of Irma I.,

Respondent,

Index No:

an Alleged Incapacitated Person. \_\_\_\_\_

STATE OF NEW YORK)

COUNTY OF    SS:

Ms. VERY STEADY, LCSW, being duly sworn, deposes and states:

1. I am a LICENSED CLINICAL SOCIAL WORKER employed at LOCAL HOSPITAL, and was the assigned case worker on duty in the Emergency Department when IRMA I. was first admitted with a broken ankle.
2. IRMA I. is an alleged incapacitated person who is 87-years of age. She is currently convalescing and receiving treatment in a rehabilitation ward at LOCAL HOSPITAL, having been admitted there from a medical ward after surgery following her admittance to the Emergency Department on [Date].
3. IRMA I.'s home address is [Address].
4. IRMA I. is a widow, with one daughter, CHRISTINA C. IRMA I. has lived at the home of

CHRISTINA C. and her husband, ROBERT C. since 2002.

5. IRMA I. is a former bookkeeper. She receives approximately \$800 per month in SSI, and has a pension of \$600 per month from the ABC Co., the firm where she worked for 32 years. She has a joint bank account with her daughter, CHRISTINA C., with a balance of about \$300.00.
6. Petitioner, CHRISTINA C., knows of no health care proxy or power of attorney executed by IRMA I. Petitioner is the only immediate family of IRMA I. and has been caring for her with increasing vigilance since 2016 when a significant deterioration in her mental condition was first noted, according to discussions with both CHRISTINA C. and ROBERT C.
7. I was enlisted in this case on the advice of DOCTOR DOCTOR, an attending Emergency Department physician at LOCAL HOSPITAL who treated IRMA I. when she was first brought in by EMTs with a broken ankle, having slipped while bathing. Her accident was reported by a neighbor; her daughter and son-in-law were both at their respective places of employment.
8. According to CHRISTINA C., her mother has been having increasing difficulty in managing her activities of daily living, including bathing, cooking, and shopping, in which she used to take much social enjoyment as it got her out of the house and among her neighbors and local shop owners.
9. I observed IRMA I. while she was in the Emergency Department while waiting for the arrival of CHRISTINA C., and during her stay on a rehab ward at LOCAL HOSPITAL, when she was admitted after surgery and once her ankle was stabilized. At the time of her admittance, IRMA I. was disoriented and had difficulty communicating. While in the Emergency

Department, IRMA I. was occasionally resistant to the ministrations of ED staff, unwilling to comply with treatment, and unable to answer questions. IRMA I. was placated by the arrival of her daughter, CHRISTINA C. and willing to take comfort from her, which greatly aided staff and DOCTOR DOCTOR in treating her ankle. CHRISTINA C. reported that her mother's mental condition has deteriorated in recent months. IRMA I. did not remember me from visit to visit when I came to see her in her LOCAL HOSPITAL room twice per day, but she recognizes and lights up when her daughter, CHRISTINA C., or her son-in-law, ROBERT C., enters the room.

10. IRMA I.'s primary care physician, [Name] was reached by phone [Number] and expressed concern about her, noting that, in the doctor's opinion, IRMA I. suffers from progressive dementia. While her doctor expressed concern about IRMA I., she praised the attentiveness of CHRISTINA C., and her husband, acknowledging that it is difficult for working couples to care for older adults with high needs.
11. Most recently, as reported by CHRISTINA C., before slipping in the shower, IRMA I. became disoriented while shopping at the neighborhood grocery store, where she has shopped for almost two decades. The owner of the store called CHRISTINA C. at work to let her know that IRMA I. was sitting in her office, crying and confused. CHRISTINA and ROBERT C. had intended to discuss their options for help but were not able to have that conversation before IRMA I. had her accident at home while they were both working.
12. As a routine part of my duties, I conducted a capacity evaluation for IRMA I., performed on [Date.] A copy of that evaluation is attached. It is my opinion that IRMA I. no longer has the capacity to make decisions about her personal needs or her financial management.



13. While IRMA I. is not yet ready for a medical discharge, she cannot return home without daily care not only because she is an invalid at present and cannot walk, but also because she is at risk for falling because of her ongoing lack of awareness of her condition. In addition, her general confusion, propensity to wander and the potential for serious domestic accidents mean that she should not be left alone and needs home attendant services during the time that CHRISTINA and ROBERT C. are at work. The appropriate answer is Medicaid, if IRMA I. can qualify.
14. While IRMA I. does not have capacity to make her own personal or financial decisions, or care for her own person and financial needs, I believe that a full Guardianship is not necessary for IRMA I. Her family members, CHRISTINA C. and ROBERT C. are established and trusted in their roles as caregivers, as they have been caring for their mother and mother-in-law, respectively, for almost two decades. Once IRMA I. qualifies for Medicaid and home attendant services are arranged for, all of her personal and financial needs will be met, as they have been in the past, by her daughter and son-in law.
15. Due to my own observations and information that I have received from other sources, it is my request that, as the least restrictive intervention available, the Court appoint CHRISTINA C. as the Special Guardian for IRMA I. for her personal needs and financial decisions for the following personal and financial objectives:
- a. Medicaid Qualification. IRMA I. receives \$800.00 from SSI monthly and receives a pension of \$600/monthly from ABC. Co. This income is in excess of the limitations imposed by Medicaid. CHRISTINA C. will need to assist in an examination of IRMA I.'s finances with NYSARC Trust Services, and to have the authority to assign IRMA

I.'s pension to the NYSARC Pooled Trust, in order to reduce her income to a level that makes her Medicaid eligible. On information and belief, NYSARC will be able to use income from the pension funds to supplement IRMA I.'s needs.

b. Medicaid Home Attendant. Once IRMA I. qualifies for Medicaid CHRISTINA C. will need to apply to Medicaid for home health attendant services during the day while she and ROBERT C. are working.

c. Plan to Return Home Safely. With her Medicaid qualification established, as the representative of LOCAL HOSPITAL, I will create a discharge plan for the home return of IRMA I., with the scheduling of home visits to establish safe transfer of custody, and with ongoing support for the duration of the transfer period.

16. I also support DOCTOR DOCTOR'S recommendation that, given her frailty and confusion, IRMA I. not be required to travel a considerable distance to the courthouse, which could be frightening and disorienting to her, but that the court permit any hearing to be held with her attendance remotely by Zoom or similar platform which is available in LOCAL HOSPITAL.

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Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_