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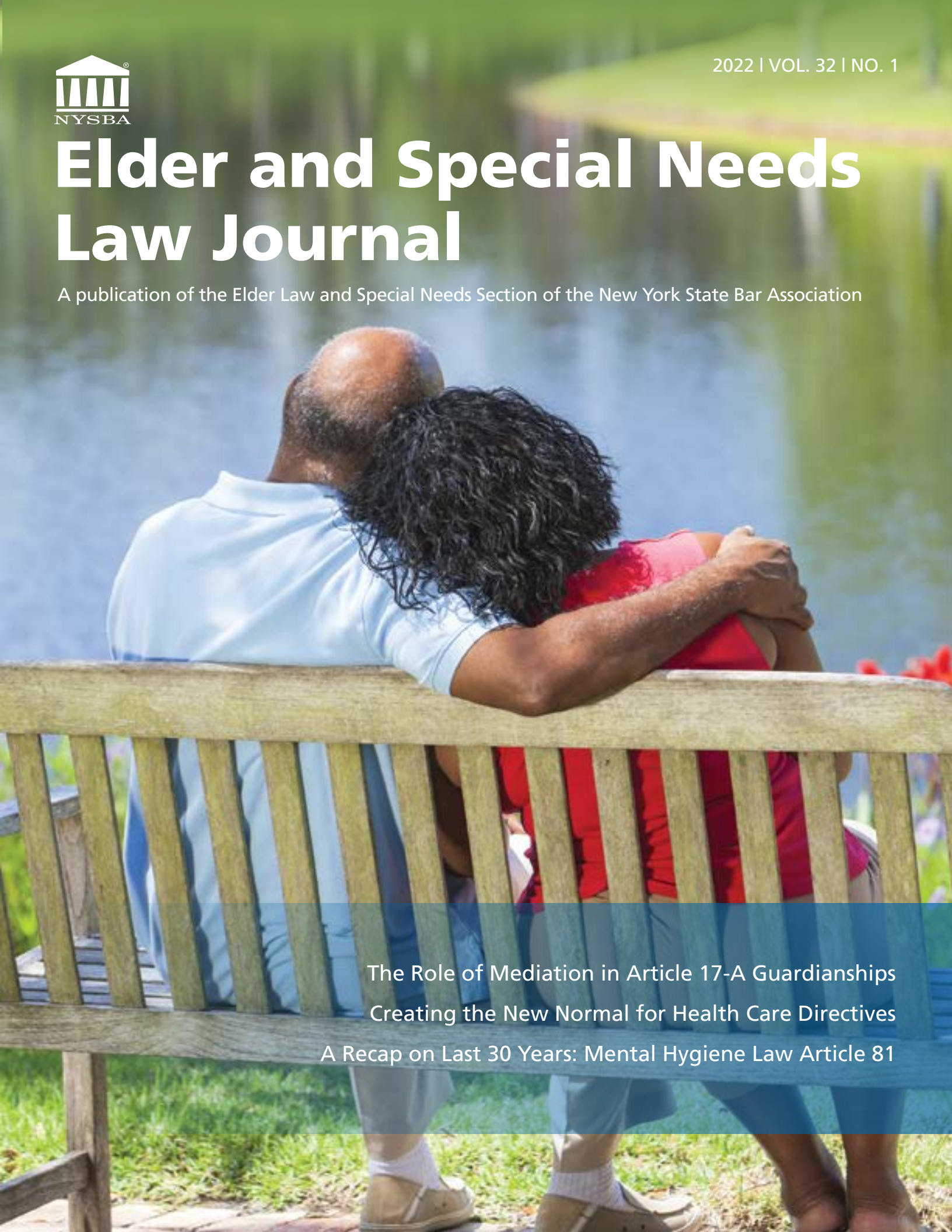

The Role of Mediation in Article 17-A Guardianships

Creating the New Normal for Health Care Directives

A Recap on Last 30 Years: Mental Hygiene Law Article 81

# A Recap on Last 30 Years: Mental Hygiene Law Article 81

## Q&A with Arthur M. Diamond and Danielle M. Visvader

This article is presented as a "free wheeling" conversation between Arthur M. Diamond, former New York State Supreme Court justice and supervising guardianship judge in Nassau County (retired), and Danielle M. Visvad-er of Abrams Fensterman, LLP, former co-chair of the NCBA Elder Law Committee, on the practical pluses and minus-es of Article 81 of the Mental Hygiene Law. We thought a as the statute nears its 30th anniversary, it would be a good time to discuss what works well, and maybe not so well, along with discussing a few potential changes to the law.

**Arthur M. Diamond:** I think we can both agree that after almost 30 years Article 81 has largely succeeded in addressing the needs of an extremely vulnerable population while giving significant due process protections to the subject of the proceeding—something many other state statutes have failed to do. But I think we have seen that in the day-to-day workings, the law is not perfect and could use some tweaks.

Let me start with one of the things the law does NOT do and that is to name who, exactly, is a "party" to the proceeding. We know that the petitioner, the person initiating the guardianship, clearly qualifies. After that, not so clear. There has been commentary that the subject of the pro-ceeding, the Alleged Incapacitated Person (AIP), is not a party, but rather simply that: the subject. If someone files opposition via a cross-petition, that person clearly would be a party. But what about those who are required to be given notice (See MHL 81.07) (i.e., next of kin who ap-pear at the hearing without counsel and ask to be heard on various issues, most commonly capacity and/or who should be the guardian?) Their desire to participate at the hearing can create all kinds of logistical problems for the court. The statute (MHL 81.11) states clearly that "any party to the proceeding shall have the right to . . . ." But for those who don't fit that definition they have not offi-cially "appeared" in the proceedings, they have not given the attorneys in the case notice via written submissions as to what evidence or witnesses they may have, but on the other hand they may have valuable information to present and often have a strong emotional attachment to the AIP. Should the statute address this?

**Danielle Visvader:** I agree. Article 81 fails to define the word "party" anywhere in the statute. As you said, it is obvious that the petitioner, who commences the proceed-ing, is a party and, therefore, is entitled to call witnesses and present evidence under MHL 81.11. The same is true for a cross-petitioner. I also find it difficult to think of an AIP as simply, "the subject" of the proceeding, because in a contested proceeding, the AIP is certainly entitled to call witnesses and present evidence. The relief sought in an Article 81 proceeding directly affects the AIP's liberty interests and decision-making ability, and an AIP should be afforded all of the rights that any other litigant [party] in a contested proceeding is entitled to. Perhaps an argument can be made that in proceedings where an AIP cannot meaningfully participate and does not have counsel, then the AIP is the "subject" and not a "party." The statute should differentiate between the two sets of circumstances. With respect to "interested parties," which are mainly next of kin or friends/associates of the AIP, I think we agree that they are not parties to the proceeding. Nevertheless, courts routinely allow these individuals to address the court and provide information. This should be prohibited in contested matters and for the most part, it is. In uncontested matters, it is usually not an issue and their contributions assist the court in getting a clearer picture of the AIP's circumstances. The statute does a very good job in outlining the interested parties and who is entitled to notice but there should be some additional guidance on the role of those individuals at the hearing.

**AMD:** The role of the court evaluator, probably the most unique aspect of Article 81, deserves some discussion. Let's start with the report: who should get it and when? The statute is silent on this. I sat on the Guardianship Advisory Committee headed by the wonderful Hon. Tom Aliotta and we tried for years to get some unanimity amongst judges in the Second Department about these issues and were never successful. In my chambers we authorized it to be released to counsel for the petitioner, counsel for the AIP, and counsel for the cross-petitioner, if any, upon it being filed with the court. Counsel could discuss it with their clients but not provide a copy. Lay people did not see it or hear unless and until it went into evidence at the hearing. What's your experience been with this and what if any problems does it create?

**DV:** Exactly. The rules regarding the release of the court evaluator report varies greatly amongst the judges. My experience with the court evaluator report is that not only does it vary from judge to judge, but it sometimes varies from case to case before the same judge. In almost all uncontested proceedings, courts will allow the release of the report. This is not true in contested proceedings. As a practitioner, it is incredibly difficult to prepare for the hearing without having access to the court evaluator report in advance, particularly when the report is lengthy. The court

evaluator will be called to testify at the hearing and seek to have the report entered into evidence. If the report has not been distributed in advance, counsel will need time to review the report mid-hearing in order to make proper objections to its admissibility and to subsequently cross-examine the court evaluator. I do not believe it jeopardizes the AIP by making the report available. The petitioner still needs to meet its burden of proof of clear and convincing evidence by producing its own witnesses. The court evaluator remains the court's witness. The transparency simply assists all counsel in preparation; results in a smoother hearing process, and could encourage resolution of the matter. It should be noted, however, that in the overwhelming majority of cases, even where the actual release of the report is not permitted, the court evaluator provides some insight into his or her ultimate recommendations to the court.

**AMD:** Another topic that I think merits some attention is what is the proper role of the evaluator after the report is filed. I know some parts utilize the evaluator as almost a mediator at times which I personally don't approve of. It's only happened a few times in my career but a "runaway" evaluator is not unheard of and that can really create all sorts of problems, especially when one side feels that there is real bias against them. Should their involvement be limited to their statutory duties? And lastly on this subject I'll raise something that I will probably be a distinct minority on but what would you think about a rule that prevented the evaluator from engaging in *ex parte* conversations with lawyers who are in the case after their report has been filed? Considering that the evaluators get their "gravitas" from being a so-called "arm of the court," something strikes me as improper about them having these discussions with one side. The court does not do that, so why should they? Are they being lobbied? Prepped for trial? What is the nature of these contacts?

**DV:** I believe that MHL 81.09 gives a thorough description of the duties of the court evaluator and provides an outline of very specific questions that should be addressed in the report. Where the statute falls short is in certain areas, such as 81.09(c)(5)(ii) where the evaluator needs to determine whether the AIP needs counsel. There have been far too many cases where the court evaluator recommends that counsel be appointed at the return date of the Order to Show Cause. This is an issue because the court must adjourn the hearing to allow time to appoint counsel. In addition, how did the court evaluator complete his or her report if the AIP wanted counsel? Did he or she continue to question the AIP on various issues without counsel being present? The statute should provide some direction, specifically if the AIP requests counsel, that the interview should stop. The court evaluator should immediately contact the court to have counsel appointed and the interview should continue in the presence of the AIP's counsel. Now, with regard to limiting the role of the court evaluator to the statutory duties, I would say that is advisable. While it is true that in some cases I have relied on the court evaluator to mediate issues, it never feels quite right. The court evaluator should be limited to doing an investigation and rendering a report with recommendations. If the parties need assistance mediating issues, the court should refer the matter to the Mediation Program. With regard to counsel speaking with the court evaluator after the report has been submitted, I am not sure that I would equate those conversations to *ex parte* communications with the court but I can see where there is a cause for concern. In practice, I think communication with the court evaluator after submission of his or her report is rare. In my cases, once the court evaluator report has been submitted, I do not have much conversation with the court evaluator. However, conversations between the court evaluator and counsel occur regularly throughout the course of a contested proceeding up to the submission of the court evaluator report. I do not believe those conversations should be considered lobbying or prepping for trial. In fact, until the completion of the report, I believe it is prudent for all counsel to speak with the court evaluator and advocate their client's position. I expect that there is regular communication from all sides.


**AMD:** I'm going to finish with my singular pet peeve with the law and that is the role/use of temporary guardians by many judges. (MHL. 81.23). The law is very clear:

> the court may, upon a showing of *danger* in the reasonably foreseeable future to the health and well-being of the Alleged Incapacitated Person, or danger of waste, misappropriation or loss of the property appoint a Temporary Guardian for a period *not to extend* beyond the date of the issuance of the Commission to the Guardian. Note that this can be done at virtually any point in the proceeding, including *ex-parte* at the bringing of the petition. (emphasis added).

The problem is that over the years, I have seen far too many examples of courts using temporaries as a stop-gap measure when they are undecided as to what to do with the case and not to avoid immediate potential harm to the

AIP. The need to make the AIP's next rent payment is not a reason to appoint a temporary. I could give you many other examples. We must be aware that there are no reporting requirements for the temporary guardian until the commission to the guardian is granted. If a temp is left in place for years—and I have seen many examples of this—the court has really abandoned the AIP. I suggest that we need mandatory periodic reporting requirements by temporaries and vastly reduce their use to the true emergencies they are supposed to address.

**DV:** I completely agree that the statute, in its current form, only allows for the appointment of a temporary guardian in very limited circumstances. However, this section of the statute that should be looked at for revision. As a practitioner, the appointment of a temporary guardian can resolve a number of outstanding issues in the most complex cases. A temporary guardian is sometimes used in settlement negotiations between a petitioner and counsel for the AIP, where an AIP is adamantly opposed to a guardian but willing to consent to a temporary guardian for a shortened period of time. Feuding children may be apprehensive about the permanent appointment of a stranger to make decisions but willing to have a temporary guardian in the short term. There are many examples as to why a temporary guardian is needed in complex cases even where there is no imminent danger or risk to the AIP. In addition, the appointment of a temporary guardian can also resolve simple cases with limited issues. In a straightforward proceeding where financial resources are limited and the AIP resides in a skilled nursing facility, perhaps a temporary guardian can be appointed to marshal the minimal funds, pay outstanding bills, submit a Medicaid application, and seek discharge. In order to address some of the concerns raised about temporary guardians, courts should schedule status conference dates (most already do) for the temporary guardian to report back to the court as to his or her progress. The statute should provide periodic reporting requirements for temporary guardians but they should not be as strict and formal as the reporting requirements for permanent guardians. I would suggest that periodic reports by temporary guardians be sent in the form of a letter to the court with a copy to all counsel.

This brings me to one of my own pet peeves with the law—accounting and reporting requirements for guardians. All guardians must report to the court annually as to the personal needs and property management of their wards (MHL 81.31) and the reports are to be examined by the court examiner within 30 days of filing (MHL 81.32). This rarely, if ever, happens. Guardians are routinely late in filing their reports and in some counties, it takes *years* for the annual reports to be examined. The same is true with respect to final accounts. It can also take *years* for a guardian's final account to be examined and for that guardian to be discharged, even where everything is in order and there are no objections. As a Part 36 guardian, this is untenable as you are essentially stuck on the case for years after the death of your ward simply awaiting the reconciliation of paperwork and the report of a court examiner. A solution to these problems starts with the statute itself. First, the reporting requirements in the statute imply that all cases are the same and that is very far from the truth. I suggest that in cases with minimal assets (perhaps under $30,000), basic accountings should be required on a biennial basis and should be reviewed by the court, and not a court examiner. In cases where the ward is a Medicaid recipient and the financial resources fall below the Medicaid resource level, accountings should be required even less often. In cases where there are no assets, an annual accounting by the guardian of the property should be waived. Guardians and court examiners alike are overwhelmed with paperwork, which leads to a serious backlog and late filings. An amendment to the statutory requirements would eliminate at least a portion of the backlog and this would ultimately assist in another crucial area—the shortage of guardians. Perhaps if the reporting requirements were less burdensome, more individuals would make themselves available for Part 36 appointments.

**Arthur M. Diamond** served as a Supreme Court justice in Nassau County from January, 2004 until his retirement in March of 2020. He was the supervising judge of guardianship matters at the time of his retirement. For many years he served on the statewide Guardianship Advisory Committee as well as being a member of the Second Department Guardianship Roundtable. Judge Diamond lectures extensively on matters of evidence and trial practice and he writes regularly for the Nassau Lawyer, the newspaper of the Nassau County Bar Association.

**Danielle M. Visvader** is a partner at Abrams Fensterman, LLP and she has been with the firm for over 16 years. Visvader practices Elder Law and specifically concentrates her practice on guardianship proceedings under Article 81 of the Mental Hygiene Law for both individuals and institutional clients, including nursing homes and hospitals. She is also eligible for court appointments in various counties throughout the downstate area as court evaluator, Counsel for Alleged Incapacitated Persons and Counsel to the Guardian. Visvader is a member of the board of directors of the Nassau County Bar Association and the Nassau County Women's Bar Association. She is also a co-chair of the Elder Law Committee of WBASNY and the former co-chair of the Elder Law Committee of the Nassau County Bar Association. When she is not practicing law, she enjoys spending time with her family. She is married to Joe Pradas and they have three children—Zachary (age 8), Olivia (age 6), and Jake (age 4).