Chaos in the Courts: A Procedural Solution to Rein in Contested Article 81 Cases

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Contested Article 81 guardianship cases are becoming both more frequent and more litigious, straining the resources of the court system, petitioners and the alleged incapacitated persons and their estates. There is no other type of litigation where a person who has done nothing that creates any legal liability can be brought to court against their will, have their most personal and private information shared with multiple individuals who often have no legal right to such information, be forced to litigate for months on end and face the risk of having to pay for nearly all of the expenses of the proceeding. Petitioners who often have nothing to gain by initiating an Article 81 proceeding, but do so to help a vulnerable friend or family member, can find themselves facing exorbitant legal bills, as well as the ongoing demands on their time as proceedings drag on for months and years.

A driving factor behind this increased litigiousness is the large number of Article 81 cases that involve participants other than those anticipated by the statute: the petitioner, the alleged incapacitated person, and the court evaluator.[1] Counsel for petitioners and alleged incapacitated persons are more frequently finding themselves faced with cross-petitions, sometimes from persons aligned with the incapacitated persons, sometimes from those with interests counter to them. What can be even more disruptive are the non-parties who do not file cross-petitions but appear on the day of the hearing, with or without counsel, and are permitted to participate regardless of whether the non-party has a legally protected interest in the outcome of the proceeding. Courts refer to these participants in a variety of ways, including “interested parties,” “interested persons” or “quasi-parties,” but no matter what they are called, they are not parties and should not be permitted to participate in the proceeding unless called by a party as a witness. These parties often include paramours, siblings and children and, at times, entities like landlords, nursing homes or creditors.

Practitioners faced with these individuals who interject themselves into Article 81 proceedings will find little instruction in Article 81 as to how they should respond. While Article 81 provides explicit procedures for initiating a proceeding, once the petition is filed, Article 81 proceedings can feel like the Wild West. I posit that one of the primary reasons for Article 81 cases frequently turning into multi-party, contested litigations is the tendency of the courts and practitioners to treat Article 81 as a stand-alone statute disembodied from the practices and procedures set forth in the New York State Civil Practice Law and Rules. This article will focus on those provisions of the CPLR that provide practitioners and the courts with the greatest ability to maintain tight control over who is allowed to participate in the proceeding, being Article 4, which provides the general rules governing special proceedings, and Article 10, which sets forth the procedures non-parties must follow if they wish to intervene in a proceeding.

Article 4: Special Proceedings

Article 4 of the CPLR governs special proceedings, including Article 81 guardianships. Special proceedings are created or authorized by statute to provide, in theory, a "quick and inexpensive way to implement a right."[2] Special proceedings are intended to be resolved in a procedure more akin to motion practice than full-blown litigation. Article 4 accomplishes this, in part, by significantly curtailing matters such as joinder of parties and discovery by requiring leave of court.[3]

For Article 81 practitioners, the most important provision is CPLR 401, which provides that the only parties to a special proceeding are the petitioner and any adverse party the respondent. More importantly, "[a]fter a proceeding is commenced, no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court."[4] It is at this point where many Article 81 proceedings begin to go off the rails, as practitioners, and sometimes the courts, ignore CPLR 401. This is due in large part to courts and practitioners misinterpreting the notice provision of Mental Hygiene Law Section 81.07(g) as giving the persons entitled to notice the equivalent of party status and the right to be heard and participate.

MHL 81.07(g) does not confer party or "quasi-party" status on persons entitled to notice. The court in *Matter of Allen* provided a cogent analysis of the statute demonstrating that persons entitled to notice are not parties to Article 81 proceedings:

"Mental Hygiene Law § 81.07 was amended effective December 13, 2004 by Laws 2004 ch.438. The amendment removed the persons entitled to notice of guardianship proceeding (generally relatives, friends and persons holding a power of attorney or health care proxy from the AIP) from former subsection (d) and placed them in subsection (g). Former subsection (d) was entitled 'Service,' and provided in subparagraph (2)(iii) that the relatives, etc. 'shall be personally served or served by mail.' This created some confusion as to whether the persons listed in former subsection (d) were parties to the proceeding entitled to participate in the hearing for the appointment of a guardian.

"New subsection (g) is entitled 'Persons entitled to notice of the proceeding' and provides in subparagraph (2) that 'Notice of the proceeding . . . shall be mailed to . . .' the relatives, etc. This is clearly not the type of personal service of process that is required to make a person a party defendant or respondent in the proceeding.[5] The amendment of MHL § 81.07 effectively corrects statutorily any prior implication that the relatives, etc. entitled to notice of the proceeding are parties entitled to participate in the hearing, request adjournments, etc. Thus the persons listed in amended MHL § 81.07 (g), . . ., are not parties to the proceeding."[6]

As noted by the Law Revision Commission in its report recommending the 2004 amendments to Article 81, Section 81.07 was amended due to "concerns regarding unnecessarily disclosing intimate information regarding a person's health and financial status to people who would not otherwise have access to such information and causing undue humiliation and embarrassment to the alleged incapacitated person."[7] Withholding the petition, and the information contained therein, further supports the *Allen* court's conclusion that persons entitled to notice are not parties. CPLR 403(b) requires that "the petition and affidavits specified in the [order to show cause], shall be served on any adverse party." But persons entitled to notice are not served with the petition and affidavits as required by CPLR 403(b), so they are not an "adverse party" under Article 4. If they are not adverse parties, they cannot satisfy CPLR 401's requirement for being respondents.

Furthermore, the requirement that a person be provided with notice of the proceeding does not "provide a statutory entitlement to intervene in the proceeding, or to be considered an entity [or person] that will be affected by the outcome."[8] The notice provision of 81.07 is not intended to confer party status; rather it is to provide the individuals entitled to notice with "an opportunity to make an informed decision regarding [their] desired level of involvement therewith."[9] Counsel for petitioners should be careful when drafting the Notice of Proceeding not to refer to the person receiving notice as an "interested party" or otherwise suggest that the receipt of notice grants said individual the right to participate in the proceeding. A person entitled to notice, or any other person who becomes aware of a guardianship proceeding and wishes to participate, must still follow the procedures for intervention set forth in the CPLR.

The Problem of Standing

Another reason Article 81 proceedings can devolve into expensive, high conflict, multi-party litigations is the unrestricted nature of standing under Article 81. Due to the lack of the usually required personal interest, standing in the ordinary sense is not required to serve as a petitioner in a guardianship case:

"Interest, or the claim of interest, is the statutory test as to the right to be a party to legal proceedings almost without exception. Unless a party has some personal interest in the result he can have no standing in court. But anyone, even a stranger, can petition for a commission to inquire as to the sanity of any other person within the jurisdiction of the court. While this is now provided by statute it was also the rule at common law."[10]

"From the moment of its institution, 'the primary object of the proceeding is not to benefit any particular individual, but to see whether the fact of mental incapacity exists, so that the public, through the courts, can take control.'"[11] "The petitioner can derive no direct benefit from it. The advantage to him [sic], if any, is only such as would result if any other person had first acted in the matter."[12]

The expansive nature of standing under Article 81 invites chaos, as courts cannot look to the traditional standing doctrine when faced with multiple non-parties seeking to file cross-petitions or otherwise participate as quasi-parties/interested parties. Yet, the mere fact that everyone has standing to bring an Article 81 proceeding does not mean that once a petition is filed non-parties should, or must, be allowed to participate. There is no intervention as a matter of right in special proceedings under CPLR 401, and nothing in Article 81 confers such a right. Accordingly, Article 10 of the CPLR gives courts the power to exclude a person entitled to notice, or any other person with an interest in whether an incapacitated person is placed under guardianship, from participating as a party in an Article 81 proceeding.

Article 10: Parties Generally

Article 10 governs the joinder of parties, as well as who may intervene in a proceeding as a matter of right or with leave of the court. CPLR 401, however, is more restrictive than Article 10 and prohibits intervention except by leave of the court. If a non-party wishes to obtain party status to be heard and participate in an Article 81 proceeding, they must follow the procedures set out in CPLR 1013 and 1014. It is the failure of practitioners to follow these procedures, and courts failing to require compliance, that leads to the growing number of out-of-control Article 81 proceedings.

CPLR 1013 provides:

"Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or act. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party. CPLR 1014 provides: A motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought."

Under Article 10, a non-party who merely files a cross-petition, which has unfortunately become common practice, does not gain party status and should not be permitted to participate in the proceeding. Likewise, a non-party who makes a motion to intervene without including a proposed cross-petition cannot be granted party status.[13] It is error for the court to even consider a motion to intervene that does not include a proposed pleading.[14]

Courts in Article 81 proceedings are faced with making decisions of profound importance and consequence. Given the gravity of these decisions, it is understandable that courts want to have as much information and as many perspectives as possible. Yet, permitting the intervention of additional parties is not only unnecessary; it is often counter-productive and may interfere with the court's ability to render a decision in a timely manner or otherwise reach a resolution in the case.

Guardianship cases with multiple parties can often distract the court from the purpose of the proceeding: for the court to determine whether the alleged incapacitated person suffers from functional limitations that place him or her at risk of harm and, if so, whether the appointment of a guardian is the least restrictive means of protecting them from harm.[15] Article 81 proceedings are not the place to work out sibling rivalries, conduct vendettas against stepparents or for friends and neighbors with an inflated sense of importance and knowledge about the alleged incapacitated person to interject themselves.

When intervenors are permitted without the court closely scrutinizing their reasons for wanting to become a party, counsel for the incapacitated person may find their ability to advocate for their wishes compromised and their litigation strategy disrupted by intervenors who claim to know what the alleged incapacitated person wants but are acting in their own self-interests. Even an intervenor acting in good faith who believes they know what the client wants, or what is in his or her best interests, may not know the person as well as they think.

Intervenors are undermining cases where the petitioner and the alleged incapacitated person may be able to reach a settlement and avoid the need for a contested proceeding. The person may be amenable to consenting to a guardianship to avoid the need for an adversarial hearing and the risk of being declared an incapacitated person. Likewise, a petitioner may be willing to accept a settlement involving a more limited guardianship and/or having another individual serve as guardian to avoid the damage to their relationship with the alleged incapacitated person that an adversarial hearing can cause. If the court finds he or she has sufficient capacity to give consent, and the terms of the settlement provide sufficient protection for him or her, the proceeding can be resolved without an adversarial hearing. Cross-petitioners, or quasi-parties, can thwart a settlement in service of their own interests, forcing some to be put through an expensive and distressing adversarial hearing.

Even in cases where settlement is unlikely, every additional participant makes scheduling and completing the hearing in a timely manner more difficult. It can be a challenge to set the hearing date when taking into account the availability of the court, petitioner and petitioner's counsel, the alleged incapacitated person and his or her counsel and the court evaluator. Now imagine a case where the incapacitated person has three or four children, all of whom have retained counsel and expect to participate in the hearing. The court must try to set a hearing date while accommodating the schedules of a dozen or more individuals. If a hearing needs to be continued beyond the initial date, which becomes more likely as the number of participants increases, it can take months, even more than a year, to complete a process the Legislature intended to take a matter of weeks.

Courts should be hesitant to permit third parties to intervene both to avoid delay in reaching a resolution but also because of the financial burden this places on the incapacitated person and the petitioner. Cross-petitioners are entitled to put on their own cases, which can result in additional days of hearing. A quasi-party may not be entitled to put on their own cases, but they can add hours or days through conducting their own cross-examination of witnesses. If a cross-petitioner or quasi-party engages in motion practice, that again drives up the costs.

The permissiveness with which courts allow cross-petitioners and quasi-parties to intervene can have devastating financial impact on incapacitated persons. MHL Section 81.09(h) provides that the court may award the court evaluator reasonable compensation from his or her assets if a petition is granted, or if a petition is denied or dismissed, the court may order the petitioner or the incapacitated person to pay the court evaluator's compensation or allocate the amount between him or her and the petitioner as the court deems appropriate. MHL Section 81.10(f) provides that the court shall determine reasonable compensation for court-appointed counsel for the alleged incapacitated persons, and if the petition is granted, the compensation shall be paid by them, unless the court finds them indigent. If the petition is dismissed, the court can order the petitioner to pay the counsel fees for the incapacitated person. And the court has the discretion to award counsel fees to a successful petitioner, payable from the incapacitated person's resources.[16] Few can bear such a financial burden, leading to court appointees going uncompensated or undercompensated and petitioners personally bearing unexpectedly large legal fees.

These financial ramifications are yet another reason for courts to require any interested person who wants to participate to comply with CPLR 1013 and become a formal cross-petitioner. In the first instance, courts can prevent these financial costs by keeping additional participants out of these proceedings. If a potential cross-

petitioner cannot present the court with a proper motion to intervene, the court need not sign the Order to Show Cause, sparing the petitioner and the incapacitated person the expense of preparing responsive papers. But in cases where a court, after a proper CPLR 1013 motion is made, finds that the intervenor is an appropriate cross-petitioner, the cross-petitioners are now subject to the provisions of 81.09 and 81.10 and can be made to bear some of the financial burden resulting from their involvement if the court denies the cross-petition.

How a Non-Party Can Participate

If the court denies a proposed cross-petitioner's motion to intervene, or if an interested person fails to make a motion in the first instance, that does not foreclose their involvement in the proceeding. All persons entitled to notice must be sent a Notice of Proceeding, which lists the contact information for petitioner's counsel, counsel for the alleged incapacitated person, if counsel is appointed, and the court evaluator. Counsel for petitioners may want to add language to the Notice of Proceeding stating that a person entitled to notice is not a party, and in order to intervene in the proceeding they must comply with CPLR 1013 and 1014.

An interested person's first step, before incurring the expense of making a motion to intervene as a cross-petitioner, should be to contact counsel for the petitioner, if they believe the person in question requires a guardian, or counsel, if they do not think a guardian is needed or that the incapacitated person would accept the cross-petitioner as a guardian over the petitioner or a court appointee. Their participation as witnesses for either party is far more likely to assist the court than their participation as a cross-petitioner or quasi-party without imposing extraordinary expense on the incapacitated person.

Matter of J.J. is illustrative of circumstances where intervention is unnecessary. The incapacitated person's guardian brought an application to have him permanently placed in a skilled nursing care facility, to which he objected. The nursing home in which he was residing brought a motion to intervene to advocate in favor of permanent placement. The court denied the motion, finding, inter alia, that the nursing home was not seeking to intervene in order to protect "any interest that is inadequately represented by either party." To the extent the nursing home asserted it was acting to protect the person's well-being, the court held that it is the guardian's responsibility to act in the incapacitated person's best interests, which it was doing by seeking the permanent placement. The court also found that the nursing home was in conflict with the incapacitated person because it stood to benefit financially if he was permanently placed in the facility. Because the nursing home was seeking the same relief as the guardian, the court held that the nursing home's participation was unnecessary and denied the motion to intervene.

If an interested person's position does not align with either the petitioner or the alleged incapacitated person, he or she should speak to the court evaluator. It may be that their intervention as cross-petitioners would be appropriate under those circumstances, and the court evaluator would be in the best position to recognize whether there are interests at stake that are not adequately represented by either the petitioner or the alleged incapacitated person.

Conclusion

For Article 81 to work, practitioners and the courts must conduct the proceedings as the Legislature intended: as summary proceedings with two parties, absent compelling circumstances warranting the intervention of a third party. While it is understandable that the court wants as much information as possible before imposing guardianship, it has become counterproductive and harmful to allow unfettered intervention of third parties.

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[1] MHL § 81.07 §(1).

[2] *Siegel*, NY Prac. § 547.

[3] CPLR 401, 408.

[4] CPLR 401.

[5] CPLR 304, 306, 306-b and 308.

[6] *Matter of Allen*, 10 Misc. 3d 1072(A) (Sup. Ct., Tompkins Co. 2005); *see also* CPLR 401.

[7] New York Bill Jacket, 2004 A.B. 8838, Ch. 438.

[8] *Matter of J.J.*, 32 Misc. 3d 1215(A) (Sup. Ct., N.Y. Co. 2011).

[9] *Matter of Grace R.*, 12 A.D.3d 764, 766 (3d Dep't 2004).

[10] *Hughes v. Jones*, 116 N.Y. 67, 74 (1889); *see also In re Kaltman*, 38 N.Y.S.2d 622, 623 (1942) ("Such an application may be presented by any person").

[11] *In re Kaltman*, 38 N.Y.S.2d 622 (quoting *Matter of Frank's Estate*, 283 N.Y. 106, 110; *Hughes*, 116 N.Y. 67).

[12] *Hughes*, 116 N.Y. at 77.

[13] *Lamberti v. Metropolitan Transportation Authority*, 170 A.D.2d 224 (1st Dep't 1991); *accord Zehnder v. State*, 266 A.D.2d 224, 224–25 (2d Dep't 1999) (Supreme Court properly denied the motion to intervene in absence of proposed pleading); *Colonial Sand and Stone Co., Inc. v. Flacke*, 75 A.D.2d 894, 895 (2d Dep't 1980) (court lacks power to grant a motion to intervene that fails to attach a proposed pleading).

[14] *Rozewicz v. Ciminelli*, 116 A.D.2d 990 (4th Dep't 1986).

[15] MHL § 81.01.

[16] MHL § 81.16(f).