

04/30/04

By Elizabeth Stull  
Brooklyn Daily Eagle

## **Proposed Legislation To Clarify Article 81**

REMSEN STREET - They gave the bad news, first. Earlier this month, two seasoned elder law attorneys reviewed some proposed changes to relevant state and federal statutes at a legal seminar co-sponsored by the Brooklyn Bar Association and the Volunteer Lawyers Project.

First, Howard Krooks, of Littman Krooks, LLP, explained why the New York State Bar Association has taken the unusual step of hiring a lobbyist to block changes to Medicaid. Then he and Bernard Krooks, also of Littman Krooks, LLP, described potentially helpful amendments to Article 81 of the Mental Hygiene Law and measures that would strengthen powers of attorney.

### **Proposed Amendments To Article 81**

Article 81 allows the appointment of a guardian for someone who needs help making personal and financial decisions. It only applies when the person does not have a power of attorney or a health care proxy. In order to appoint a guardian, a judge must sign an order to show cause and hold a hearing on the matter.

Currently, under -81.13, the court is required to render a decision within 45 days of signing an order to show cause, unless the period is extended for good cause shown.

Bernard Krooks believes the 45-day deadline is much too fast, because often the hearing has not yet been held within the 45-day period. Under the proposed amendments, the court is required to render a decision within seven days after the hearing - "It's much more practical," Krooks commented.

Another amendment would prevent unnecessary disclosure of an Alleged Incapacitated Person (AIP)'s health and financial information.

Currently, the AIP's personal information is sent to a broad list of people along with petitions in the proceeding, Krooks said. Under the proposed amendment, only the AIP, his or her lawyer, and the court evaluator would receive the Petition and supporting affidavits. Everyone else would receive only the names and addresses of the parties and attorneys.

Because the current statute does not indicate whether or not the Physician's Affidavit must be included in the Petition, there has been much confusion and inconsistency in decisions about submitting the Affidavit, which contains confidential medical information, Krooks said.

The proposed amendment would specify that "the court shall not require that supporting papers contain medical information."

Amended -81.10 would clarify that an AIP may retain his or her own counsel, notwithstanding the court-appointed counsel.

Amended -81.29 expands the court's power to revoke a Power of Attorney where there has been a breach of fiduciary duty. Under the current law, the court may only revoke a power of attorney made while the person was incapacitated; under the amendment, the court could revoke even if it was executed before the person became incapacitated.

### **Proposed POA Legislation**

"You can't let your clients leave your office without a durable power of attorney," Krooks recommended. "That doesn't mean it's a panacea, but it's clearly preferable to a guardianship."

A power of attorney is a signed agreement that authorizes another person to make financial decisions and transactions if you become incapacitated. A person acting under authority of a power of attorney is called the attorney-in-fact.

Proposed legislation would add two sections to the banking law to strengthen powers of attorney. Section 9-u would require all "banking institutions" authorized to do business in New York State to honor a statutory short form power of attorney. The section does not mention brokerage firms.

Section 9-v would provide that if the principal becomes disabled or incompetent, the power of attorney remains effective. This intent must be expressly specified in writing and executed by the principal.

### **General Obligations Law: POA**

The New York State Law Revision Commission has recommended amendments to the General Obligations Law that define a prudent person standard for powers of attorney, and lay out fiduciary duties of the attorney-in-fact.

The power of attorney can involve as much work as an executor's position, but whereas the executor or -trix receives a statutory percentage of the estate, Krooks noted that current laws are silent about the POA's compensation.

The Commission's proposal requires that a reasonable compensation for the POA, agreed-upon in writing, must be honored. The attorney-in-fact would also be entitled to reimbursement for "reasonable expenses actually incurred."

Among other proposed changes, a third party would not be allowed to reject a power of attorney simply because it is not on the third party's own form; this would not constitute reasonable cause. The Commission further recommends that the statutory short form authority allow the attorney-in-fact to act as the individual's personal representative to pay medical bills, for services approved by the individual or an appointed health care agent.

As a "personal representative," an attorney-in-fact could access personal medical information without violating the Health Insurance Portability and Accountability Act (HIPAA)'s Privacy Rule.

### **Long-Term Care and Security Act of 2003**

A federal act still in committee would make long-term care (LTC) insurance premiums an above-the-line tax deduction and provide tax credit for caregivers.

Some people have questioned the viability of long-term care insurance when Medicaid is an alternative, Krooks said; but he observed, "Most people would rather not go on Medicaid."

### **Estates, Powers And Trusts Law**

Effective September 30, 2003, the EPTL was amended to permit a trustee to exercise the power to make distributions to him/herself as beneficiary under certain circumstances. The trust must provide for this power by express reference to section 10-10.1 of the EPTL.

Krooks recommended that putting money in trust for children or heirs is better than leaving money, because the trust avoids taxes and probate - but be aware of the succession, he warned. Trustees, even family members, can not receive trust money themselves unless it is provided in the trust document.

### **Recent Changes to Rule 36**

Bernard Krooks also reviewed recent changes to Part 36 of the Chief Judge, which governs court appointments in New York State. The changes went into effect on June 1, 2003, and were "intended to ensure that appointees are selected on the basis of merit, without favoritism, nepotism, politics or other factors unrelated to the qualifications of the appointee or the requirements of the case."

Under the new Part 36, no person or entity can receive more than one appointment per year for which the anticipated compensation exceeds \$15,000. If a person or entity receives more than \$50,000 in compensation by the courts during any year, he or she will not be eligible for appointments compensated by any court during the next year.

These limitations do not apply, however, if the appointment is necessary to maintain continuity of representation or service.

**- Brooklyn Daily Eagle 2004**