

# Navigating Right to Counsel Under Mental Hygiene Law Article 81.10

By Laura M. Brancato

For elder law practitioners, the initiation of a proceeding pursuant to Article 81 of the Mental Hygiene Law is a familiar process. The penultimate purpose of the proceeding is to both protect the rights of the alleged incapacitated person (AIP) and to protect the AIP's person and property. Experienced guardianship practitioners are acutely aware of the impact guardianship proceedings have on a person who is alleged to be incapacitated. The initiation of the Article 81 process is an intrusion into the life of the person over whom guardianship is sought and is frequently a source of significant stress for the AIP. A guardianship imposed upon an individual can permanently deprive the individual of autonomy over medical and financial decisions. Accordingly, the constitutional protections afforded to the AIP during the pendency of an Article 81 proceeding are of crucial importance. In these types of court proceedings, more than most, counsel plays a vital role in advocating for and protecting a vulnerable client.

Access to counsel is assured by and through § 81.10. The subject matter of this article will focus on the provisions relating to appointment of counsel by the court or independent retention of counsel by the AIP. This article examines the provisions of § 81.10(a) and the court's role in determining whether counsel has been freely and independently selected by the AIP. It will also address other protections afforded the AIP by statute, specifically related to informed waiver of counsel and role of the court in informing the AIP of their constitutionally protected right to have counsel throughout the pendency of the guardianship matter.

Article 81 specifically designates the circumstances under which counsel will be appointed for the AIP and the role of appointed counsel in representing the AIP's interest in the proceeding.<sup>1</sup> This determination is usually made by the presiding judge once the petition to commence the proceeding is entertained and the order to show cause is signed. Whether the court decides to appoint counsel in the initial order to show cause is in the court's sole discretion, with limited exceptions.<sup>2</sup> The appointment of counsel depends upon many factors, such as the allegations in the underlying verified petition, the powers sought by the petitioner, and the existence of a perceived conflict among interested parties to the proceeding. The court *must* appoint counsel for the AIP in limited circumstances, including if the Order to Show Cause seeks the appointment of a temporary guardian,

if the AIP requests counsel or if the AIP wishes to contest the proceeding.<sup>3</sup>

The court must apprise the AIP of his or her right to counsel. Failure to do so has resulted in reversal of lower court decisions. In *In re Wogelt/In re Lichtenstein*, 223 A.D.2d 309; 646 N.Y.S.2d 94 (1st Dep't, 1996); *on remand sub nom, In re Lichtenstein*, 171 Misc. 2d 29; 652 N.Y.S.2d 682 (Sup. Ct., Bronx Co., 1996), the Court refused to appoint counsel for the AIP when the AIP contested appointment of the guardian and opposed a move to a different nursing home. The Supreme Court did not notify the AIP on record of the purpose and possible consequences of the Article 81 proceeding, the AIP's right to be represented by counsel, and that the court would appoint counsel if she so desired. This resulted in the reversal of the appointment of a guardian by the appellate court.

The appellate courts have even emphasized the role of the court evaluator in ensuring that the AIP has been adequately notified of his or her right to proceed with the assistance of counsel. In *In re Edward G.N.*,<sup>4</sup> the Appellate Division, Second Department, reversed the final order and judgement of the Nassau County Supreme Court and found that the Supreme Court erred in failing to appoint



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counsel for the AIP “as there was no evidence that the Court Evaluator explained to the appellant his right to counsel, determined whether the appellant wished to have legal representation or evaluated whether counsel should be appointed in accordance with MHL § 81.10.”<sup>5</sup>

Beyond advising the AIP of his or her right to representation in an Article 81 guardianship proceeding, the court must also ensure that any waiver of the appointment of counsel by an AIP is a knowing and willful waiver. *In re Gulizar, N.O.*,<sup>6</sup> an order and judgement of the Supreme Court appointing a guardian for the AIP was reversed by the Appellate Division, Second Department, on the law, remitting the matter to the Supreme Court, Kings County, for the appointment of counsel to represent the appellant and for a new hearing on the petition. The appellate court’s decision stated in, in pertinent part, “since there was no evidence that the appellant made an informed decision to refuse the assistance of counsel, the Supreme Court should have appointed counsel to represent her” (*In re Gulizar N.O. (Rudy O.)* 2013 N.Y. Slip Op. 07489 Decided on November 13, 2013 Appellate Division, Second Department) (see Mental Hygiene Law § 81.10 [c] [2], [3]; [d]; see also *In re Edward G.N.*, 17 AD3d at 601). In this case, the appellate court found that the absence of the AIP at the hearing was not adequately explained and the testimony presented did not prove that she could not meaningfully participate in the matter. The absence of the AIP, along with the absence of evidence that the AIP knowingly and willfully waived her right to have counsel appointed, warranted a reversal of the lower court decision.

Contrast the *Gulizar* decision with the finding in *In re Camoia*.<sup>7</sup> Here, the Appellate Division upheld the decision of the trial court not to appoint counsel, finding that,

while the Court declined to appoint counsel for Rose, the appointment of counsel is not mandatory in every guardianship case. In the instant case, none of the circumstances warranting mandatory appointment of counsel as set forth in Mental Hygiene Law § 81.10 were present. Namely, the AIP did not request the appointment of counsel; the AIP did not contest the petition; the AIP resided in a nursing home at the time of the petition; the petition did not allege the need for any major medical or dental treatment, the petition did not request the appointment of a temporary guardian; and no conflict existed between the Court Evaluator’s role and the advocacy needs of the AIP.<sup>8</sup>

Oftentimes, the court does not appoint counsel for an AIP, especially where the court finds evidence that the AIP is unable to meaningfully participate in the subject proceeding. Certainly, best practice would dictate that

any party over whom guardianship is sought should be informed by both the court and court evaluator that the statute affords the individual with the provision of counsel should the individual desire to be represented.

Whether the court appoints counsel in either the original order to show cause or after an initial appearance, the alleged incapacitated person maintains the right to retain counsel *of his or her own choosing*<sup>9</sup> specifically pursuant to Article 81.10. In pertinent part, the statute provides:

(a) Any person for whom relief under this article is sought shall have the right to choose and engage legal counsel of the person’s choice. In such event, any attorney appointed pursuant to this section shall continue his or her duties until the court has determined that retained counsel has been chosen freely and independently by the alleged incapacitated person.<sup>9</sup> (emphasis added)

The current language in § 81.10(a) was enacted pursuant to a 2004 amendment, which sought to clarify the prior language of the statute. The current law seeks to ensure an AIP’s right to choose and engage counsel but also to require appointed counsel to remain of record until the court determines that the engagement of counsel was free and independent. The language of the amendment specifically replaced the term “right to be represented by” with the term “right to choose and engage” legal counsel of the person’s choice and added the language requiring the appointed attorney to remain as counsel until such determination was made. Indeed,

(s)ince this appointment occurs before the alleged incapacitated person is served and perhaps even aware of the potential for the guardianship proceeding, the potential exists for multiple counsel, one appointed and one retained. The alleged incapacitated person has the right to engage counsel even if the court has already appointed counsel but the court should satisfy itself that the retained counsel is truly independent before dismissing appointed counsel.<sup>10</sup>

Having established that access to counsel is a critical component of Article 81, the court is left to determine whether the AIP has the capacity to retain counsel of his or her own choosing. The prior and current statute are both silent as to the method the court should use to examine the AIP to determine if such person has the requisite ability to choose and engage counsel. This leaves the inquiry solely in the hands of the presiding judge and allows for discrepancies among courts regarding when or how this inquiry is performed. Specifically, § 81.10(a) does not mandate when the inquiry should occur. It also provides no indication of who, other than the presiding

judge, can make such a request. This leaves open the question of where this inquiry should take place and who should be present during such an examination. The statute does not delineate whether the court must inform the AIP that the AIP has the right to choose his or her own attorney, even if the court has already appointed counsel in the initial order to show cause.

Some practitioners have likened the court's inquiry to a Lincoln hearing, which is a family court proceeding promulgated pursuant to the matter of *Lincoln v. Lincoln*.<sup>11</sup>

In the context of a family court matter, a Lincoln hearing is a confidential inquiry conducted by a judge in a child custody proceeding where testimony of the subject children is taken outside the presence of their parents. Similarly, in a guardianship proceeding, the inquiry related to retained counsel can occur *in camera*, which affords the AIP the opportunity to be examined outside the presence of other interested parties. To best protect the interests of the AIP, it would be prudent for the court's inquiry to be conducted in a manner that would not produce evidence that could be used against the AIP in the subsequent guardianship proceeding.

Does the AIP have an absolute right to a Lincoln type inquiry if she desires to use an attorney of her own choosing? If her chosen attorney files a Notice of Appearance, is she guaranteed a hearing to confirm her ability to retain counsel? What rights does she have if an inquiry is never conducted and chosen counsel is denied the right to participate on behalf of the AIP? Conversely, what happens when retained counsel appears in an action and an interested party challenges the AIP's ability to retain counsel? Who can request a Lincoln type inquiry be conducted? Is it only upon independent action of the court?

Consider the actions of the court in the matter of *Caryl S.S. v. Valerie L.S.*<sup>12</sup> This case concerns an AIP who allegedly retained counsel to represent her during an Article 81 proceeding. After extensive court inquiry, including a visit by the judge and all interested parties to the home of the AIP, the court ultimately denied the participation by the retained attorney. The petitioner was the daughter of the AIP; the petition contained allegations of undue influence on the part of her brother, the cross-petitioner. Taking those allegations of influence into account, the court held that "[w]hile it may not be unusual for an attorney to be contacted or selected by a relative, it is unusual when that relative is a person charged with exerting undue influence, and with using his agency powers improperly for his own gain."<sup>13</sup> The court in *Caryl* took great care to conduct a rather lengthy inquiry into the origins of the representation by retained counsel with a specific focus on how the AIP came into contact with her retained attorney. The court eventually disqualified retained counsel after finding that the AIP evidenced severe memory impairment and confusion when asked about the topic of retaining counsel and the

court found no evidence that counsel had been freely and independently retained.

Unfortunately, there is a deficit of additional guiding caselaw in this area, which makes the issue somewhat more complex. Consider a case our firm recently handled. The estranged children of the AIP commenced an action to be named co-guardians of their father's person and property. The court signed the order to show cause and appointed counsel for the AIP. At the time the initial order was signed, the AIP was unconscious in a local hospital and appointed counsel appeared at the initial date on behalf of the AIP. The matter was continued for a period of time during which the AIP regained consciousness and returned to his home. The AIP thereafter sought out his estate planning attorney (someone he had worked with for years and whom he desired to retain to represent him in the guardianship proceeding). The AIP signed a retainer agreement with chosen counsel and counsel filed his Notice of Appearance with the court prior to the commencement of the hearing.

Retained counsel appeared on the hearing date with the intention of representing the AIP during the guardianship proceeding. The AIP took the position that he desired to have counsel of his own choosing and that he wanted to vehemently defend against his sons and any potential appointment of a guardian. Without conducting any inquiry into the ability of the AIP to retain counsel, the court declined to allow retained counsel to represent the AIP during the hearing. The discussion relating to the desires of the AIP to use retained counsel occurred on the record in open court, in the presence of petitioners and their attorney as well as various other parties.

This example raises a number of interesting questions pertaining specifically to § 81.10(a). Absent a more detailed inquiry into the functioning of the AIP, how can the process ensure the right to chosen counsel in matters such as this case? Was the court obligated to do a further, more extensive investigation into the circumstances of the retention of counsel? Could another interested party request the court perform a more detailed inquiry? On appeal, would an appellate court reverse? On its face, is the refusal to conduct an inquiry reversible error?

Counsel's advocacy role in the Article 81 process undoubtedly provides protection for the allegedly incapacitated person. In guardianship proceedings, the court, all counsel, and the court evaluator should take great care to ensure the AIP's protections under the statute are honored.

## Endnotes

1. MHL § 81.10 (states that the role of counsel is to ensure that the AIP's point of view is presented to the court).
2. See MHL § 81.10 and also *In re Camoia*, 48 Misc. 3d 1221(A); 2015 N.Y. Slip Op. 51179(U)(Sup. Ct., Kings Co. 2015) (King,

J.S.C.) Court declined to appoint counsel for an AIP stating that the AIP's due process rights would not be violated because appointment of counsel is not mandatory in every guardianship and in the instant case none of the statutory circumstances warranting appointment were present.

3. MHL § 81.10(c).
4. 17 A.D.3d 600; 795 N.Y.S.2d 244 (2d Dep't 2005).
5. Mental Hygiene Law § 81.10 (see Mental Hygiene § 81.09[c][2] and [3]; *In re Wogelt*, 223 A.D.2d 309, 314, 646 N.Y.S.2d 94). *In re D.G.*, 4 Misc. 3d 1025A; 798 N.Y.S.2d 343 (Sup Ct, Kings Co., 2004).
6. *In re Gulizar N.O.*, 111 A.D.3d 749; 974 N.Y.S. 2d 801 (2d Dep't 2013). Appellate Division reverses an order and judgment appointing a guardian, on the law, and remits the matter back to the Supreme Court for the appointment of counsel to represent the AIP, and for a new hearing on the petition, noting that there

was no evidence that the AIP made an informed decision to refuse the assistance of counsel.

7. 48 Misc. 3d 1221(A), 22 N.Y.S.3d 137.
8. *Id.* at 11.
9. MHL § 81.10(a)
10. MHL § 81.10, Right to Counsel, McKinney's Consolidated Laws of New York Annotated, Practice Commentary, by Rose Mary Bailly, 2020.
11. *Lincoln v. Lincoln*, 24 N.Y.2d 270, 272, 299 N.Y.S.2d 842, 247 N.E.2d 659 [1969] [brackets omitted].
12. 45 Misc. 3d 1223(a), 5 N.Y.S. 3d 327, 2014 WL 6780656 (Sup. Ct., Bronx Co. 2014).
13. *Id.* at 9.