



VOLS Guide to Article 81 Guardianships

This guide is for informational purposes only and does not constitute legal advice. The VOLS Elderly Project provides advice and council on Article 81 Guardianship matters but does not provide court representation.

What is an Article 81 Guardianship?

[Article 81](#) of the New York Mental Hygiene law governs guardianships in New York and defines what rights and responsibilities they entail. Guardianships under Art. 81 exist to empower individuals, oftentimes family members, to take care of those who are no longer able to take care of themselves. A common example of an Art. 81 guardianship would be an adult child being appointed as guardian to their parent who is no longer able to care for themselves. Separately, there are Article 17 guardianships for minors and Article 17-A guardianships for intellectually or developmentally disabled individuals older than 18 years of age who are incapable of managing their own affairs.

Guardianships help fill in the gap where an individual lacks the legal capacity required to execute a healthcare proxy or power of attorney, but still needs another person to be able to make medical or financial decisions and to engage in financial or legal transactions for them. Legal capacity is the concept underlying the entire idea of guardianship, and to explain this concept simply, if someone becomes unable to express their thoughts or wishes then a court may deem them legally incapacitated and therefore unable to form contracts or sign important legal documents.

When is an Article 81 Guardianship needed?

Your average individual has legal capacity to execute a healthcare proxy which ensures that someone has the legal authority to act on their behalf with respect to medical decisions if they are unable to do so. Likewise, those that have legal capacity to execute a power of attorney can ensure that someone they trust has the legal authority to handle their financial affairs. If you or your loved one has legal capacity then they should execute both a healthcare proxy and a power of attorney, but if you are reading this document then you are likely in a situation where someone lacks capacity and executing these documents is no longer possible. In the situation where a person lacks legal capacity to sign a healthcare proxy and power of attorney, a guardian can be appointed who can manage their finances and ensure that they are receiving the medical care they require.

An important thing to note is that Art. 81 guardianships are not purely limited to people who are both mentally and physically impaired to the point of incapacity. For

example, if a person is still capable of managing their health care decisions then a guardian may be appointed as solely a guardian for property management, who has no control over important medical decisions. Also of note, a guardian for personal needs will supersede both a previously appointed health care proxy and the default rules for healthcare decision making under the Family Health Care Decisions Act. The default rules under Family Health Care Decisions Act provide us with a list of individuals who have priority when it comes to making decisions, starting with a person's spouse, then their adult children, their parents, their siblings, and finally their close friends. While these default rules may work in some situations you're always better off executing a healthcare proxy so there's a plan in place if the need arises.

Guardians are generally meant to take care of their ward in the manner least restrictive to their ward, and they are meant to do so in a manner which takes the wants and needs of their ward into account. The general idea is that the guardianship is supposed to allow for maximum freedom for the ward while still allowing for their needs to be met. However, under special conditions, like an emergency, a judge may expand those powers so that the ward may be appropriately cared for.

Individuals involved in the process

- **The Incapacitated Person (IP)** also known as **the Ward** - the individual being placed in a guardianship. May also be referred to as the **Alleged Incapacitated Person (AIP)** when incapacity has not been established yet.
- **The Guardian** - The guardian is the individual appointed by the court to take care of the personal needs and/or the property and finances of the ward. Their specific responsibilities will be decided by the court and they may be specific or very broad depending on what the court decides is best for the ward.
- **The Clerk of Courts/the Guardianship Office** - The clerks and the county specific guardianship offices can help answer your questions regarding court procedure rules and filing issues. They can also help you access all of the documents associated with your case.
- **The Court Evaluator** - A court evaluator will be appointed by the court to perform an initial investigation and interview of the AIP in order to assess their circumstances, prevent harm to them or their property, and make recommendations for the court based on the AIP's needs and capabilities. Those findings will play a major role in helping the judge make a decision during the initial hearing.
- **The Court Examiner** - The court examiner's role is to review the guardian's reports regarding the health of the IP and to check your accountings of the IP's assets and finances. The guardian should be provided with the contact information of the court examiner.

Who can file a petition for a guardianship?

Under Article 81 almost any individual or group may file a petition to begin a guardianship proceeding, even if they don't intend to be the AIP's guardian. This means that the AIP, their care facility, or anyone else concerned with their welfare are all

allowed to start the guardianship process. Additionally, while the process may seem complicated, you do not need to be a lawyer or have hired one in order to file for a guardianship, anyone is allowed to do it.

Who is qualified to be a guardian?

Under Article 81, the AIP may nominate an individual to be their guardian if they are capable. Further, there are quite a few broad categories of people who are qualified to be guardians. A guardian may be any individual over the age of 18, or any parent under the age of 18. The qualifications to be a guardian are intentionally very broad so that individuals like spouses, adult children, relatives, neighbors, and care organizations can take the steps needed to care for the incapacitated person. That said, the court will investigate a proposed Guardian and the judge has the last say as to the guardian's fitness for the role.

Process and Application

To get the process started you need to file a Petition for Guardianship with the appropriate court. You can consult the section below to help you find the appropriate court to file in. There are specific requirements for what must be in a petition under the law so it's a good idea to work off of a court form so that you provide all of the required information. As guidance for what the Petition should say, it's useful to know that New York's Mental Hygiene Law 81.02(a) states that the court may appoint a guardian for the person if it determines that doing so is necessary to provide for the needs of that person, including food, clothing, shelter, health care, or safety, and/or to manage the property and financial affairs of that person, and that the person is either incapacitated or agrees to the appointment. "Incapacitated" means that a person is likely to suffer harm because the person is unable to provide for personal needs and/or property management, and the person cannot adequately understand and appreciate the nature and consequences of such inability (Mental Health Law 81.02 (b)). Filing will require payment of a fee, but if you are unable to pay the fee then you can have it waived so you no longer have to pay it. To do so, you need to submit a motion for what is known as "Poor Persons Relief" under Civil Practice Law and Rules 1101 - you can obtain this form from the court and file it with your Petition.

In addition to the Petition and any other forms that the court requires, you will also need to: (1) put other relevant parties on notice of the proceeding such as family members of the AIP; (2) complete an Order to Show Cause, which requests the AIP show why a guardian shouldn't be appointed, and a Request for Judicial Intervention, which requests that a judge be assigned to your case; (3) and, at the end of the process, obtain an Order Appointing Guardian, which appoints someone as the guardian and grants them the powers attached to that role.

After the appropriate paperwork has been filed in order to start the process, a Court Evaluator will be appointed to interview the AIP and gain a better understanding of their condition and capabilities. The Court Evaluator will produce a report on their findings which will be relied upon by the judge during the initial hearing where they decide whether or not to appoint a guardian. Generally, if the guardianship is

uncontested, then this hearing will be very straightforward, but if there are any complications then it can be more substantial. If the AIP fights the appointment of a guardian then you may want to hire an attorney if possible since the hearing may become a full trial with a jury which is difficult to navigate on your own.

Where do you file?

Petitions for Article 81 Guardianships are filed with the NY Supreme Court of the judicial district, or in the county court of the county in which the AIP resides or is physically present. If you can't determine where the AIP resides, then the county in which all or most of their property is present is appropriate. Further, if there were any prior orders, such as the appointment of a temporary guardian, then that court should handle any additional proceedings regarding the guardianship of the AIP. As of February 2021, The New York Courts website provides the following chart regarding the court locations and how to contact them:

County Clerks & Guardianship Offices in Metropolitan Area Courts	
Brooklyn	<p><i>Kings County Supreme Court</i> 360 Adams Street, Brooklyn, NY 11201</p> <p><i>County Clerk's Office</i> (347) 404-9818, Room: 122B To file the Oath and Designation, the bond, get your Guardianship Commission, have copies certified, and file your reports</p> <p><i>Guardianship Office</i>, (347) 296-1757, Room 285 To have your bond reviewed and approved, to obtain copies of forms and for general information</p>
Bronx	<p><i>Bronx County Supreme Court</i> 851 Grand Concourse, Bronx, NY 10451</p> <p><i>Guardianship Department</i> (718) 618-1330, Room 6M-11 To get forms, ask questions and file reports</p> <p><i>County Clerk's Office</i>, Room 118 For bond approval and filing, to file your Oath and Designation and to get your Guardianship Commission and have it certified</p>

<p>Manhattan</p>	<p><i>New York County Supreme Court</i> 60 Centre Street, New York, NY 10007</p> <p><i>Guardianship and Fiduciary Support Office</i> (646) 386-3328, Rm. 158 To get copies of forms, file reports, and general information</p> <p><i>County Clerk’s Office</i> (646) 386-5936, Room 141B To file the Oath and Designation and the bond, get your Guardianship Commission, and obtain certified copies of it.</p>
<p>Staten Island</p>	<p><i>Richmond County Supreme Court</i> Guardianship Department, 25 Hyatt Street Staten Island, NY 10301</p> <p><i>Guardianship Office</i> (718) 675-8586, 4th floor To get forms, ask questions, get your Guardianship Commission, and obtain certified copies of the Commission</p> <p><i>County Clerk’s Office</i> (718) 390-5389 130 Stuyvesant Place, Room 101, Staten Island Use this office to file Oath and Designation and all reports</p>
<p>Queens</p>	<p><i>Queens County Supreme Court</i> 88-11 Sutphin Boulevard, Jamaica, NY 11435</p> <p><i>Guardianship Office</i>, (718) 298-1040, Room 100 To pick up forms, file the Oath and Designation and the bond, get your Guardianship Commission and certified copies of the Commission, file reports and ask questions</p>

What does a guardian need to do?

The actual responsibilities and powers of the guardian are decided on a case-by-case basis. Guardians have general duties to their ward under the law. This includes the duty to:

1. Exercise care, diligence, trust, loyalty, and fidelity when acting on behalf of the incapacitated person with regards to the personal and/or financial needs.
2. File an initial and annual reports for the alleged incapacitated person’s finances and personal needs.
3. Visit the incapacitated person not less than four times a year.
4. Preserve, protect, and account for the alleged incapacitated person’s property and financial resources.

5. Make sure the incapacitated person receives proper medical care/treatment according to their respective needs.

Guardians will also need to complete a guardianship training program which has been approved by the chief administrator. An example is the one provided by the Guardian Assistance Network, which you can find [here](#).

This is legal information and does not constitute legal advice, nor is it an offer of representation. This guide was prepared by VOLS' Veterans Initiative in April 2021. If you have questions about the information in this guide please contact us at 347-521-5704 or pkempner@volsprobono.org.