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THE UNIQUE ROLE OF THE GUARDIAN IN INPATIENT PSYCHIATRIC CARE

***44 T**he Article 81 **guardian** plays a unique role when the incapacitated person (also known as "the ward") is suffering from a mental illness and requires admission to a hospital for inpatient **psychiatric** care. As rates of mental illness continue to climb and more of these individuals who suffer from such an illness find themselves in guardianship court, it is essential that all practitioners understand the nuances of inpatient psychiatric treatment. In fact, this insight into Mental Hygiene Law Article 9 and related issues is relevant for all guardianship practitioners, whether in the role of guardian, court evaluator, counsel to the alleged incapacitated person or otherwise.

What Is a Mental Illness?

There are many conditions that are classified as "mental disorders" (or mental illnesses) according to the Diagnostic and Statistical Manual of Mental Disorders.[1] The manual recognizes diagnoses such as schizophrenia and other psychotic disorders, bipolar disorder, trauma and stress-related disorders, eating disorders, conduct disorders and neurocognitive disorders.[2] Symptoms of these disorders can include, but are not limited to, delusions, hallucinations, agitation, labile mood, aggression, disorganized thought process, paranoia, suicidal or homicidal ideation, isolative behavior, refusal to take prescribed psychiatric or medical medication and/or an inability to care for oneself. Dual diagnoses exist where there is a psychiatric diagnosis and either alcohol or substance use. Many of these conditions and the related symptoms, especially when untreated, significantly impair judgment and decision-making ability.

Does the Incapacitated Person Have a Mental Illness?

The guardian must obtain information and/or records to fully understand the incapacitated person's mental health condition and history, if any. To start, the pleadings in the underlying guardianship proceeding should explain the psychiatric history, prior hospitalizations, prescribed medications and the pattern of symptoms or behaviors that impair the ability to manage personal and/or financial affairs. The guardian should speak with the petitioner as well as any other family, friends and treatment providers. These people can provide valuable insight into the incapacitated person's condition and symptoms, including what "red flags" to look for when he or she may have stopped taking prescribed medication, may be decompensating and/or may require hospitalization.

The court evaluator's report should also have information obtained from family, treatment providers, and other collateral sources that can provide value to the guardian. Further, the court evaluator may have applied to the court for permission to inspect medical, psychological and/or **psychiatric** records that would be useful to the **guardian**.[3] If so, the court can direct disclosure of the court evaluator report to the guardian and can direct further disclosure of the medical records to the guardian, as the court deems appropriate.[4]

If none of these avenues prove fruitful, or perhaps if the current presentation of symptoms and behaviors is a "first break," the guardian may wish to consider an evaluation by a mental health professional. Such authority to obtain an evaluation can be granted by the court in the underlying Order and Judgment Appointing Guardian or can be requested in a subsequent application, where appropriate.

Access to Medical Records

When caring for an incapacitated person with mental illness, the Order and Judgment Appointing Guardian must contain specific and unambiguous language allowing the guardian to access protected health information as well as the authority to disclose and/or release such information. Sample language can be found directly in the statute - ***45** Mental Hygiene Law Section 81.22(a)(5): "authorize access to or release of confidential records."

Access and disclosure of such medical records is protected under federal and state law. The federal law, known as the Health Insurance Portability and Accountability Act (HIPAA), and the New York State law, found in Mental Hygiene Law Sections 33.13 and 33.16, protect patient records and generally preserve doctor-patient confidentiality. The guardian must have authority to override such protections, including authority to access and disclose records over the ward's objection. Such language in the order and judgment prevents a situation where the ward's refusal to consent to the release of information or records disrupts the guardian's ability to perform his or her duties. The guardian must be able to review records and communicate freely with the treatment providers. Such communication is essential, especially when the ward is hospitalized and receiving psychiatric treatment in a facility.

Getting to the Hospital

The **guardian** of a mentally ill incapacitated person must understand the clinical and legal systems available to secure a **psychiatric** evaluation and/or treatment in a hospital setting. The initial evaluation will be completed either in an emergency room or a comprehensive psychiatric emergency program (CPEP) of a hospital.

If the individual is willing to obtain a psychiatric evaluation and/or treatment, the individual can see a psychiatrist or "self-present" to a hospital for an evaluation and admission. Voluntary presentation to a mental health professional or hospital is the least restrictive form of intervention.

If the individual is uncooperative, likely lacking insight into the symptoms and impaired functioning, there are several ways to request an initial assessment in the community that may lead to a formal evaluation in a hospital. First, the guardian, a neighbor, a family member or other concerned person can call 911 and request a "well-check," whereby police and/or emergency medical services can assess the individual's safety in the community and ultimately bring the individual to a hospital for an evaluation. Second, the guardian or other persons can call the local mobile crisis team, a group of behavioral health professionals such as social workers or other advocates, who generally provide an in-person visit within a few hours of receiving a referral.[5] The teams offer a range of services, including, but not limited to, assessment and crisis intervention. If the team determines that a person in crisis requires further psychiatric assessment, they can arrange for the individual to be transported to the hospital for a psychiatric evaluation.

The **guardian** or other concerned person can also apply to the court for a mental hygiene warrant and request that a judge remand the individual to a hospital for a **psychiatric** admission.[6] The guardian can request the secondary appointment of counsel to assist with this legal proceeding.[7] The verified statement or petition filed with the court must allege with specificity that the individual has or may have a mental illness and exhibits behavior that is likely to result in serious harm to self and/or others.[8] Based upon these allegations, the court can issue a civil warrant for the local sheriff to bring the individual to court for a hearing. The individual is appointed counsel through the Mental Hygiene Legal Service.[9] At the hearing, the court determines if the legal standard has been met by clear and convincing evidence, and, if so, the court can issue an order directing the removal of the individual to a hospital for immediate evaluation not to exceed 72 hours.[10]

Regardless of how the individual gets to an emergency room for a psychiatric evaluation, the next step is that the hospital, through its procedures, must ultimately determine whether that individual should be admitted for psychiatric treatment.

The Psychiatric Admission

The principal statute governing the inpatient hospitalization of individuals with mental illness in New York State is the Mental Hygiene Law Article 9. Article 9 sets forth the legal requirements for voluntary, involuntary and emergency admissions to a hospital, as well as the retention of patients pursuant to a court order.[11]

In the emergency room, the role of the guardian is one of advocacy. The guardian, first and foremost, must provide the hospital staff and/or evaluating psychiatrist with collateral information. This is where the previously discussed history, symptomology and access to records are extremely useful. The guardian can provide firsthand information about the individual's behaviors and symptoms in the community, past medications and past hospitalizations, if any. This information can support the clinician's assessment in furtherance of a psychiatric admission to the hospital.

A voluntary admission, where the patient consents, is the least restrictive form of admission for psychiatric treatment. If the individual is willing, a hospital may admit as a voluntary patient "any suitable person in need of care and treatment, who voluntarily makes written application" for admission.[12]

The hospital can pursue an involuntary admission when the individual does not consent, likely due to a lack of insight and understanding of the psychiatric illness and symptoms. Under Mental Hygiene Law Section 9.39, the need for psychiatric care must be certified by a staff physician. An individual may be held for up to 15 days involuntarily if suffering from a mental illness for which immediate observation, care and treatment in hospital is appropriate, and the individual's condition is likely to result in serious harm to self or others.[13] Under Mental Hygiene Law Section 9.27, the need for psychiatric care ***46** must be certified by two physicians. An individual may be held for up to 60 days involuntarily if suffering from a mental illness for which immediate observation, care and treatment in hospital is appropriate, and the individual's condition is likely to result in a substantial threat of physical harm to self or others.[14]

Neither Article 9 nor Article 81 provide the guardian with authority to take an active role in the admission process. Article 81 specifically states that a guardian cannot consent to the voluntary formal or informal admission of the incapacitated person to a mental hygiene facility.[15] The involuntary admissions process is uniquely a clinical determination based upon a diagnosis of mental illness and the likelihood of danger that an individual poses to self or others. As described above, the guardian's role is one of advocacy and support.

Requesting Release From the Hospital

Article 9 affords a voluntarily or involuntarily committed individual the right to request judicial review of the propriety of their stay within the hospital. This means that the incapacitated person, now a patient on the inpatient psychiatry unit, can request to be discharged. If the psychiatric treatment team does not believe that the individual should be discharged, the court holds a hearing where a judge will determine this ultimate issue. The only parties to this proceeding are the hospital and the patient. A guardian does not have party status but, under certain circumstances, may be called as a witness to support further retention in a hospital. A court must be satisfied by clear and convincing evidence that the individual is both mentally ill and poses a substantial risk of serious harm to self and/or others.[16] The guardian should be prepared for a less than optimal discharge plan should a court grant the patient's request for release. The patient could be discharged from the hospital as early as the same day as the hearing, which often means that the hospital staff have not been able to secure outpatient appointments or follow up for treatment in the community.

Discharge Planning

Generally, the goal of inpatient psychiatry treatment teams is short-term stability and not long-term comprehensive recovery. Hospital stays in New York are short and often frequent. Long-term treatment is generally delegated to outpatient care programs. This reality creates a challenge to the guardian who has the obligation of providing care and safety in the community. Thus, the guardian must begin planning for discharge almost immediately upon admission. The clock is ticking as soon as the individual is admitted as there are time constraints written into the Mental Hygiene Law to protect patient

rights. The above-mentioned Article 9 hearings could result in a ward's discharge from a hospital with very little notice. A guardian who has been actively planning for discharge with the treatment team throughout the admission is in a much better position than a guardian caught by surprise.

The guardian must advocate early and often for a comprehensive discharge plan. The discharge plan can include services such as an outpatient psychiatrist, an outpatient therapist, a partial hospital program or a clinic appointment. A psychiatrist must be identified to perform medication checks and write prescriptions.

If the ward meets criteria for participation in the Assisted Outpatient Treatment[17] program, the guardian must advocate for the hospital to apply. Assisted Outpatient Treatment is a valuable discharge tool for mentally ill individuals who refuse services and/or medication in the community and are frequently hospitalized. It can provide case management or an Assertive Community Treatment team to coordinate the individual's care, as well as individual and/or group therapy, medication, alcohol or substance abuse counseling and urinalysis or blood testing for the presence of alcohol or illegal substances.[18] If noncompliant with the Assisted Outpatient Treatment plan, the individual can be brought to a hospital for an evaluation and possible admission.[19]

Applying for Assisted Outpatient Treatment and gaining acceptance into the program is a lengthy process that requires cooperation from the inpatient psychiatric team and approval from the court. Ultimately, the state Supreme Court, after a hearing, determines whether the patient should be required to participate in the program.[20] In addition to advocacy, the **guardian** may also have to authorize access to and disclosure of the ward's prior **psychiatric** records to demonstrate that he or she meets the criteria for the program.[21] The guardian may also testify at the hearing to describe the ward's non-compliance with treatment in the community and symptoms that led to hospitalization.

Discharge planning must also include housing, requiring cooperation between the guardian and the social work staff to either confirm that the ward can return to a previous residence or to ensure that the hospital makes the appropriate referrals to secure new housing. A referral for the shelter system, Section 8 housing or other mental health supportive housing takes time. There is limited bed availability across all types of housing, long waitlists and lengthy interview procedures. The hospital likely needs authorizations to access and release the ward's psychiatric records to apply for such housing. When the guardian starts this process on day one, the chances of a safe, successful discharge plan increase.

In some cases, the guardian may consider action before the appointing guardianship judge as it relates to discharge planning and securing services in the community. For example, the **guardian** may wish to retain and pay for ***47** a geriatric care manager or **psychiatric** case manager to ensure a successful discharge plan and long-term stability. A case manager, often a social worker or other mental health professional trained in behavioral issues, can supplement the role of the guardian to assess the individual's ability and needs, arrange and advocate for services and monitor the individual in the community. A case manager can also find creative solutions to maintain an individual safely in the community or assist with locating housing if the individual's current living situation is no longer appropriate.

Refusing Medications

The role of an Article 81 guardian is extremely limited when it comes to psychotropic medications. In New York, neither a guardian, family member nor a health care agent can authorize the administration of psychotropic medications.

On an inpatient psychiatric unit, the treatment team can follow the appropriate clinical and legal procedures to obtain authorization to treat an involuntary patient over his or her objection. This involves a capacity determination, an internal administrative review process[22] and a hearing before a Supreme Court judge.[23] The patient is entitled to counsel through the Mental Hygiene Legal Service.[24] Often the patient's medical record is entered into evidence. The treating psychiatrist must testify that the individual lacks the capacity to make a reasoned decision regarding the psychiatric treatment, amongst other criteria.[25] This capacity determination must be made notwithstanding a previous court determination of incapacity pursuant to Article 81.

Similar to the Article 9 retention hearings discussed above, the guardian is not a party to these treatment over objection proceedings. The guardian may be called as a witness, perhaps in support of stabilization on the recommended medication before discharge. The guardian can testify to behaviors in the community when the individual may have been functioning

well on a medication regimen versus behaviors exhibited when he or she stopped taking a certain medication. Such firsthand knowledge can influence a judge's decision to authorize treatment.

Conclusion

The Article 81 guardian plays a unique role when managing the care and safety of a mentally ill incapacitated person. Rather than struggling to understand and navigate both the legal and clinical mental health systems amidst a crisis, practitioners should educate themselves and plan proactively so that when the incapacitated person decompensates, the guardian is able to confidently advocate and support for the ward's best interests.

Footnotes

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1 Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).

2 *Id.*

3 New York Mental Hygiene Law (MHL) § 81.09(d).

4 *Id.*

[5] *See* Crisis Services/Mental Health: Mobile Crisis Teams, https://www.nyc.gov/site/doh/health/health-topics/crisis-emergency-services-mobile-crisis-teams.page.

[6] MHL § 9.43.

[7] 22 N.Y.C.R.R. § 36.1(a)(10).

[8] MHL § 9.43(a).

[9] *See* MHL § 47.01.

[10] MHL § 9.43. At any time during the 72-hour period, the patient may, if appropriate, be admitted as a voluntary or involuntary patient.

[11] *See* MHL §§ 9.13, 9.27, 9.31, 9.39 and 9.33.

[12] MHL § 9.13.

[13] MHL § 9.39; *see* MHL § 1.03(20) for the definition of "mental illness."

[14] MHL § 9.27.

[15] MHL § 81.22(b).

16 MHL § 9.31.

17 MHL § 9.60.

18 MHL § 9.60(a).

19 MHL § 9.60(n).

20 MHL § 9.60.

21 MHL § 9.60(c). To be eligible for Assisted Outpatient Treatment program, the individual must be 18 years of age or older, suffer from a mental illness, unlikely to survive safely in the community without supervision and have a history of non-compliance with psychiatric treatment. *Id.*

22 14 N.Y.C.R.R. § 27.8.

23 *See* *Rivers v. Katz,* 67 N.Y.2d 485 (1986).

24 *See* MHL § 47.01.

25 *Rivers,* 67 N.Y.2d 485.

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