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Expert Analysis

Nominating a Guardian Ad Litem Pursuant to SCPA Article 4

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While it is widely known in the legal community that a guardian may be nominated pursuant to Article 81 of the Mental Hygiene Law (MHL), it may not be common knowledge that Surrogate's Court Procedure Act (SCPA) Article 4 provides for a nomination process as well for a guardian ad litem (GAL). This article focuses on the nomination process of a guardian ad litem in the Surrogate's Court. While both statutes allow for the incapacitated or incompetent person to have a say in the nomination of the individual's guardian, the procedure to nominate a GAL through SCPA Article 4 is comparable to that of an Article 81 guardian. However, in Surrogate's practice most practitioners leave it to the court to make the appointment.

Purpose of Article 81 And Article 4

The purpose of Article 81 guardianships is for the betterment of the allegedly incapacitated person's (AIP) life. Such a task is achieved by balancing the areas of the AIP's life that require assistance while still maintaining the individual's independence as much as possible. MHL 81.01. An AIP's participation in the nomination process for its guardian aligns with this goal because the AIP is afforded control by statute and through the court itself. To maintain such a difficult balance, Article 81 demands strict procedural requirements, such as a hearing to adjudicate whether the AIP is indeed incapacitated and a determination by court order as to the specific powers over the persons and/or the AIP's property, depending on the AIP's daily needs. See MHL 81.06, 81.07. The AIP's civil rights are protected.

Conversely, in Surrogate's practice a GAL's authority is more reserved, limited in scope and civil rights are generally an issue. For one, GALs do not represent persons judicially found to be incapacitated. Rather they are appointed in cases where representation is required for an infant, incompetent, conservatee or person under disability. See SCPA 401, 403. The role of a GAL is further limited to handle only certain legal matters on behalf of the person they are representing. See *In re Estate of Bernice B.*, 176 Misc. 2d 149 (Sur. Ct., N.Y. Cnty. 1998). Nevertheless, the role of a GAL to provide assistance in litigation for a person under disability is crucial and courts are cognizant of that fact as well. As a policy matter, "courts [do] not 'shut their eyes to the special need of protection of a litigant actually incompetent but not yet judicially declared as such.'" *Shad v. Shad*, 167 A.D.2d 532, 533 (2d Dep't 1990) (quoting *Sengstack v. Sengstack*, 4 N.Y.2d 502, 509 (1958)). Still, GAL powers must be narrower than those of an Article 81 guardian because the individual has not been afforded the same procedural

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protections of an Article 81 proceeding. See *1234 Broadway v. Feng Chai Lin*, 25 Misc. 3d 476, 487 (Civ. Ct., N.Y. Cnty. 2009).

GAL Nomination

Although the requirements in nominating and assigning a GAL are less stringent than those of an Article 81 guardian, that is not to say that there are no precautions in place. For one, GALs are restricted to attorneys admitted to practice in New York state as they represent someone's interest during litigation. SCPA 404(1). A lay person is not licensed to defend these interests or competent to understand the proceedings. Moreover, GALs may be provided with training by the court and, in some cases, training may be mandated before serving as a GAL.

Article 81 permits an AIP to nominate his or her guardian by petition or a written instrument that is duly executed, acknowledged, and filed in Surrogate's Court in the proceeding before the appointment of a guardian. Like Article 81, a GAL may be nominated by the individual in need of the guardian under SCPA Article 4. However, a SCPA Article 4 GAL nomination is restricted to when the GAL is an attorney representing an infant 14 years or older. In those instances, the infant "may petition the court … for the appointment of a named attorney as his guardian ad litem." SCPA 403(1). The nominee must submit an affidavit explaining his or her qualifications and how he or she came to the point of being asked to represent the infant. SCPA 403(1)(a)(i), (ii). The legal guardian must also submit an affidavit providing his or her consent, that he or she has no adverse interest to the interest of the infant or that, despite that adverse interest, he or she has not influenced the infant's decision regarding the nomination, and any additional information. SCPA 403(b)(i)-(iii). It should be noted that the parent or guardian of the infant of 14 years or older may also nominate a GAL through the same process.

Courts generally take the infant's choice of a GAL into high regard. For example, in *In re Polinsky's Estate*, the lower court's denial of an infant's motion to vacate a nomination by his mother and to appoint the infant's choice was held to be an improper use of discretion. *In re Polinsky's Estate*, 11 A.D.2d 738 (2d Dep't 1960). Even so, courts do not blindly accept the nomination from the infant, parent, or guardian. It is well-settled law that the special guardian appointed to protect the infant is "held to a duty of strict and undivided loyalty to the infant's interests." *In re Wechsler's Estate*, 152 Misc. 564, 566 (Sur. Ct., N.Y. Cnty. 1934). However, oftentimes the nominee comes from the recommendation of a parent, and could be an attorney who works with the parent's attorney or in the same office, which could create a conflict of interest.

When dealing with cases involving the appointment of a GAL, it is essential to remember that an infant 14 years or older, or possibly its parent or legal guardian, may nominate a GAL through SCPA Article 4.

For instance, in *In re Reifler's Will*, the court did not appoint the infant's uncle as the infant's GAL despite being appropriately qualified. *In re Reifler's Will*, 22 Misc. 2d 242 (1960). The court concluded it would not be possible for the uncle to give complete loyalty to the infant's legal issues. Id. A GAL nomination may also be denied when the nominee is too close to the transaction in question. See *In re Diaz*, Nos. 2013-2913/B, 2013-2913/C, 2013 WL 5890687 at *1 (N.Y.Sur. Nov. 1, 2013).

Furthermore, Part 36 of the Rules of the Chief Judge, Appointments by the Court, delineates the responsibilities and procedures of a judge when making certain appointments, including that of a GAL. 22 NYCRR 36.0. The objective of Part 36 is to appoint "trained and competent persons" while avoiding appointments based on "factors unrelated to the merit of the appointments or the value of the work performed." Id. This section was created with the intention to appoint individuals "without favoritism, nepotism, politics or other factors related to the qualifications of the appointee or the requirements of the case." Id. As such, the rules lay out the procedure for the Chief Judge to implement such as an application, training, the establishment of a list of appointees, registration of active applicants every two years, and the removal of an appointment. Part 36 also outlines who may be appointed and the procedure for the appointee regarding the filing of a notice of appointment, a certification of compliance, and the approval of compensation. Id. at 36.4.

Conclusion

When dealing with cases involving the appointment of a GAL, it is essential to remember that an infant 14 years or older, or possibly its parent or legal guardian, may nominate a GAL through SCPA Article 4. The nomination process is not so different from the nomination process for an Article 81 guardian, which many already use in their legal practice. In both cases, the choice does not need to be left solely with the court. Ultimately, SCPA Article 4 provides an often unknown option when selecting the appropriate GAL and practitioners should keep this in mind if doing so would benefit an infant in handling his or her legal affairs.