

## TRUSTS & ESTATES LAW

## Expert Analysis

# Accessing Safe Deposit Boxes Owned By Allegedly Incapacitated Persons

**A**s many estate practitioners know, the Surrogate's Court Procedure Act provides a streamlined procedure for a nominated executor, distributee or person otherwise interested in a decedent's estate to obtain an ex parte order to open a safe deposit box to search for a will, insurance policy, or cemetery deed. SCPA §2003. This procedure is most commonly used when the decedent's surviving family members have reason to believe a will or other estate planning documents are in the safe deposit box, and they are seeking to gain access to the box to commence a probate proceeding or otherwise deal with the decedent's affairs.

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The application to the Surrogate's Court for such an order is fairly simple, and merely requires that the petitioner file a petition setting forth certain information about the decedent, the bank that has possession or control of the safe deposit box, and that such safe deposit box may contain a will, deed to a burial plot, or life insurance policy in the name of a decedent. SCPA §2003(1).

Consider a different scenario, where your loved one has suffered a serious injury or illness affecting their mental capacity to make health care and financial decisions. You know that your relative has a safe deposit

box, but you do not know what is inside. Could there be a power of attorney, health care proxy or living will (collectively referred to as "advance directives") inside, authorizing an agent to make decisions for your relative while they are unable to do so?

Unfortunately, there is no similar streamlined procedure for a family member to access a safe deposit box when the owner of the box is still living, but is suffering from alleged incapacity. It appears that in such a situation, the family or other interested parties must resort to commencing a proceeding for the appointment of a guardian of the personal needs or property management of the alleged incapacitated person (AIP) pursuant to Mental Hygiene Law Article 81, which can be a very costly and time consuming procedure.

Even if a petition is filed pursuant to Article 81 for a very

narrowly tailored and specific purpose—to wit, the appointment of a temporary guardian with the limited power to open the safe deposit box to determine if there are advanced directives inside—the current statute will require the appointment of at least a court evaluator, and likely an attorney for the AIP, resulting in increased cost and expense to the AIP, as well as emotional cost to the AIP and family members.

Of course, the appointment of a court evaluator and attorney for the AIP are important and necessary safeguards to ensure that the appointment of a guardian is necessary, and that the powers granted to the guardian constitute the least restrictive form of intervention. The proposed procedure to allow for access to a safe deposit box owned by an AIP, for the limited purpose of ascertaining whether the box contains a power of attorney, health care proxy or living will, would preserve these important safeguards.

Indeed, if an AIP has executed a power of attorney or health care proxy, the use of those advance directives is, by definition, a less restrictive form of intervention than the appointment of a guardian pursuant to Article 81.

Concerns about privacy with respect to other property or documents that may be in the safe deposit box can be dealt with in the court's order allowing access to the box. For example, the Surrogate's Court Order to Examine Safe Deposit Box provides that the petitioner must examine the box in the presence of an officer of the bank, and that only certain documents may be removed from the box (for example, a will must be delivered personally or by registered mail to the Surrogate's Court, and a life insurance policy

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must be delivered to the named beneficiary) (Nassau County Surrogate's Court's form of the Order to Examine Safe Deposit Box is available at <https://www.nycourts.gov/LegacyPDFS/FORMS/surrogates/pdfs/OrderforSafeDeposit.pdf>). All other property must be maintained in the box and can only be accessed by the duly appointed fiduciary of the estate.

If the safe deposit box order for the AIP is properly and narrowly

tailored, it could be that the appointment of a court evaluator or counsel for the AIP are not necessary. The decision to appoint those individuals may be reserved, in the event no advance directives are located in the box and a full guardianship proceeding is required.

Like the Surrogate's Court procedure, the proposed procedure to access an AIP's safe deposit box could similarly provide that if a power of attorney or health care proxy is found, it must be delivered to the agent named therein, and that the box opening must be supervised by a bank official. This would ensure that any advance directives are delivered to the appropriate parties, and that the AIP's intentions are carried out, using the least restrictive means available.