

# *LKR Alert*

May 1, 2002

**Littman Krooks & Roth P.C.**

**Elder Law and Guardianship**

## **GUARDIANSHIP PRACTICE VARIES FROM COUNTY TO COUNTY**

Despite the fact that there is presently only one guardianship statute (i.e., Article 81 of the Mental Hygiene Law) in New York State, there are a variety of issues which vary in treatment from county to county depending on the local practice. Two issues which may be of particular concern to the skilled nursing facility (or other health care facility) wherein the Alleged Incapacitated Person ("AIP") resides, are discussed below.

1. MEDICAL TESTIMONY. One issue that varies by county is whether medical testimony is required at the hearing to determine capacity. While medical testimony is not required under Article 81, many local counties (see below) require such testimony in one form or another (i.e., in person or by telephone).

Kings and New York:	Yes (in person).
Westchester:	Yes (via telephone).
Bronx and Queens:	No, but there should be a good reason for not providing the medical testimony.
Rockland:	No, except in contested matters.
Nassau and Suffolk:	No (generally).

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2. PHYSICIAN'S AFFIDAVIT. Another issue that varies by county is whether a Physician's Affidavit (which typically evidences the AIP's lack of capacity) must be included with the Order to Show Cause and Petition (i.e., the two documents that are filed with the Court in commencing the guardianship proceeding). While a Physician's Affidavit is not required under Article 81, many local counties (see below) require the Affidavit.

Kings and Rockland: Yes.

New York: Yes. However, this may vary depending on which judge is assigned to hear the case.

Suffolk: No.

Bronx, Nassau, Queens and Westchester: No. However, there should be a good reason for not providing the Physician's Affidavit.

The above issues (i.e., whether medical testimony and/or a Physician's Affidavit is required by a particular county) could have a direct impact (fiscally) on the nursing home which commences the guardianship proceeding (i.e., in cases where the nursing home is the Petitioner), since, under Article 81, the Petitioner can be made to pay the costs of the guardianship proceeding, where the AIP is indigent. Such costs may include the Court approved compensation of the examining physician.

In addition, where a nursing home physician provides medical testimony and/or a Physician's Affidavit (in counties where either or both are required), there is a related issue as to whether the facility/physician is violating the physician-patient privilege by disclosing confidential information related to the AIP. For this reason, some counties (particularly those which do not require either medical testimony or a Physician's Affidavit) may rely on the testimony of family, friends, social workers or others in determining capacity.

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