



Opening Argument



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Guardianships: Toward A Better System

It is vitally important to maintain the public's trust and confidence in guardianships and other court appointed fiduciaries.

Last March a Queens County Grand Jury that investigated guardianship thefts urged major reforms of existing law and court rules to better protect assets of incapacitated individuals and called for sweeping changes in the Mental Hygiene Law and Court rules.

In December the Appellate Division, Second Department called for changes regarding the oversight of court examiners and guardians.

This month a commission, appointed by Chief Judge Judith Kaye, and chaired by Sheila L. Birnbaum of Skadden Arps, proposed reforms regulating the professional conduct of fiduciaries who oversee guardianships, attorneys who monitor the guardians, and attorneys who oversee estates of persons who die without wills.

I commend the excellent work of both the commission and the court. The changes each recommended parallel our Grand Jury's recommendations for reform. We share the same goal: improve the system so it is better and more effective.

Attorney Imprisoned

Our Grand Jury cited the case of a Queens attorney, now behind bars, who was appointed by the court as a guardian to oversee the estates of 14 incapacitated individuals. He was convicted in 2003 of stealing over \$2 million from their estates. The attorney cooperated in the investigation and was automatically disbarred upon his conviction. He is serving a sentence of up to nine years in prison.

The Birnbaum Commission recommended several key changes in two areas 1) guardianships and 2) estates. In the guardianship field, the Birnbaum Commission recommended broad structural changes, called for improved monitoring of Court Examiners and proposed changes to add oversight when a ward of a guardian dies. In the estates field, the proposed changes would limit legal fees charged by the Counsel to the Public Administrator in each county which are taken out of the estates of the deceased. Another would make the Surrogate in each county accountable for the conduct of the Public Administrator and the Counsel. A third would bar a Surrogate from appointing relatives, political associates, court employees and their relatives and law partners as Counsel for the Public Administrator.

The Appellate Division recommended strict compliance with Court orders and set up a new form that has implemented many of our Grand Jury's recommendations. The form provides for stricter controls involving death notices, safety box opening, notification of change of guardian's domicile, final accountings, notification of newly discovered assets and no access to funds without a commission by the Clerk of the Court. It also recommended that a new position of Court Examiner Specialist be set up along with a new policy to require annual evaluations of Court Examiners.

Interim Step

Our Grand Jury recommended setting up a new Statewide office of Chief Court Examiner as an interim step until such time as the Legislature amends Article 81 of the Mental Hygiene Law to provide that court examiners be full-time employees of the Unified Court System. The panel urged the Chief Judge to establish the new office as an arm of the Court to supervise each county's court examiners, review their examination procedures and seek removal or other penalties for any failure to conform to the requirements of the Mental Hygiene Law or the applicable Rules of Court.

Additional recommendations made by both the Appellate Division and the Birnbaum Commission, which in many respects mirror our Grand Jury report, include:

-The Rules of Court should be amended to require that guardians and court examiners be periodically re-certified based on past performance and the satisfactory completion of additional training, as determined by the Office of Chief Court Examiner.

-Court Examiners should be full-time employees of the Unified Court System rather than attorneys or others appointed by the Appellate Division. Additionally, until such time as that recommendation can be implemented, the Chief Judge should establish a statewide Office of Chief Court Examiner to supervise each county's court examiners, review their examination procedures and seek removal or other penalties for failure to conform to the law or Court rules.

-There should be stricter enforcement of existing accounting provisions of the law; notification requirements to ensure effective communication among guardians, examiners, financial institutions and the courts; prohibition of conflicts of interest; uniform procedures for examination of guardian reports and accountings and stronger remedies for failures to meet proper accounting and examination procedures.