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Guardians Ad Litem in Housing Court

Gerald Lebovits



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Guardians Ad Litem in Housing Court

*By Gerald Lebovits, Matthias W. Li, and Shani R. Friedman**

I. Introduction

Each year, thousands of adults suffering from physical, mental, or other incapacities are found incapable of adequately defending or prosecuting their rights in proceedings before New York City Civil Court, Housing Part, commonly called Housing Court. Many of these adults are elderly.¹ Many suffer from physical debilitation, mental illness, and substance addiction.² Many are victims of physical, mental, and financial abuse. Many are unable to receive benefits to which they are entitled. Many have no one who will help them. Many cannot even come to court.

As dictated by Civil Practice Law and Rules (CPLR) Article 12, Housing Court must appoint a guardian ad litem (GAL) to advocate for and assist the incapacitated person, who is then known as a ward.³ The standard under CPLR 1201 is that Housing Court must appoint a GAL for "an adult incapable of adequately prosecuting or defending his rights." All involved must aid the incapacitated using the least restrictive means to intervene in their lives. Governmental agencies like Adult Protective Services (APS),⁴ a division of the New York State Department of Social Services (DSS), and the court itself affect the ability of GALs to advocate for their wards.

Consequences, including involuntary relocation and the eviction of those who deserve protective services, come not only from the merits of Housing Court litigation but also from incapacitated litigants' lack of legal representation;⁵ the lack of affordable housing in New York City; tenants, landlords, charities, and government personnel scrambling over scarce resources; the poverty suffered by most Housing Court litigants with diminished capacity; and the hectic pace of Housing Court proceedings. Those who serve as GALs perform an invaluable service defending societal values and maintaining the integrity of the Housing Court and summary eviction proceedings by protecting those most in need. But simply appointing a GAL does not resolve all the problems for the incapacitated, the adverse

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parties, or the court itself. Frustrations and delays beset too many cases involving GALs.⁶

This article discusses the role GALs play in Housing Court and the law affecting GALs, wards, and potential wards.

II. The GAL's Duties

Until 1962, when CPLR 1201 was enacted, GALs were called "special guardians" when they served in special proceedings like summary nonpayment and holdover proceedings. Whether in a special proceeding or a plenary action, a GAL is "an officer of the court with powers and duties strictly limited by law and he may act only in accordance with the instructions of the court and within the law under which appointed."⁷ Translated from Latin, ad litem means "for the suit."⁸

Housing Court may appoint a guardian on its own initiative,⁹ even when a potential ward opposes the motion. The CPLR contains no requirement that a prospective ward agree with the appointment, and case law permits the appointment. In the 1998 case of *Anonymous v. Anonymous*, for example, the Appellate Division, First Department, affirmed Supreme Court's appointment of guardian ad litem despite the defendant's objection.¹⁰ It is difficult in practical terms to appoint a GAL without the ward's consent and cooperation, and it makes the GAL's work challenging if the ward does not consent. The GAL will nevertheless help the court by presenting an objective assessment after an investigation. Due process will be satisfied by the GAL's and the court's always considering the ward's best interests; by allowing the ward to speak and be heard, at least to an adequate extent, on whether to appoint a GAL and on any other relevant issue that might arise during the proceeding; and by permitting the ward to hire an attorney.

In appointing a GAL, the court may set out the GAL's duties in a court order. Doing so can help assure that the GALs will do what they are required to do in each specific case, assuage the opposing

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party that the proceeding will move relatively expeditiously, and assure the public that appointing the GAL is appropriate.

The GAL's primary obligation "is to act in his or her ward's interest."¹¹ Although the scope of the GAL's duties is narrow, the GAL takes on a variety of roles, acting simultaneously as an advocate, social worker, and liaison between the ward, APS, social-service agencies, the marshal, the ward's family, opposing counsel, and the court. The GAL is often called upon to establish a relationship with the ward to understand the ward's concerns and wishes.

The GAL might also engage in settlement negotiations, become familiar with what benefits the ward may receive, and assure that the ward receives required services from appropriate agencies. The GAL may not control the ward's finances, but the GAL intervenes with social-services agencies, the Social Security Administration, the New York City Housing Authority, SCRIE, Section 8, and APS, among others. The GAL might hire an attorney for the ward, perhaps by seeking the aid of The Legal Aid Society, Legal Services for New York, MFY Legal Services, Northern Manhattan Improvement Corp. Legal Services, or a law-school clinic like Cardozo Bet Tzedek Legal Services. The GAL might also proceed to trial, with or without an attorney representing the ward.

A GAL's role is limited to the action or proceeding before the court. The role of a Mental Hygiene Law (MHL) Article 81 guardian, often called a "community guardian," is far broader. An Article 81 guardian can be appointed after a Supreme Court proceeding as a guardian of the ward's property, person, or both, and not merely for a piece of litigation. GALs are also different from law guardians who represent children in Supreme Court matrimonial actions, from Family Court law guardians, and from Family Court and Surrogate's Court guardians.¹²

MHL Article 81 guardians have more expansive powers, such as the ability to relocate a ward, than Housing Court GALs. For an MHL Article 81 guardian to be appointed, the ward must be found incapacitated or agree that appointing a MHL Article 81 guardian is necessary.¹³ In MHL Article 81 proceedings, proof of the ward's incapacitation must be based on clear and convincing evidence that "the person is unable to provide for personal needs and/or property management; and the person cannot adequately understand and appreciate the nature and consequences of such inability."¹⁴ Because MHL Article 81 guardians have greater powers over their wards than Housing Court GALs do, the law establishes the higher standard of competency to appoint an Article 81 guardian, as opposed to the lower standard of incapacity to defend or prosecute rights in order to appoint a Housing Court GAL.

The incompetency standard for a Housing Court GAL appointment is less than and different from the incompetency standard for an MHL Article 81 guardian. Were the law otherwise, GALs would be appointed only after Supreme Court declared an individual incompetent.

MHL Article 81 sets out a method for the courts to determine a litigant's competency, and "until that is done the courts should not have to decide case by case whether a particular party is of sufficient mentality to be a suitor or defendant."¹⁵

Once appointed, a Housing Court GAL is assigned to a specific proceeding. In a nonpayment proceeding, a ward routinely has rental arrears, often sizeable by the time a GAL is appointed, and might also not be paying ongoing use and occupancy. A ward who meets APS guidelines and becomes an APS client is entitled to receive services. These services include APS's applying on the ward's behalf for a grant to cover arrears and for voluntary or involuntary financial management, a program by which APS will oversee paying the rent and housing bills with the ward's funds to assure that the rent will be paid and not squandered or allowed to sit unused. If the ward is not an APS client, these applications may be made to another social-service agency like Self Help or the Jewish Association for Services for the Aged (JASA).

Holdover proceedings are often initiated because of alleged nuisances, sometimes caused by outstanding psychological or physiological conditions like obsessive-compulsive disorder, dementia, or Alzheimer's. Common nuisances include having unmanageable pets or hoarding, called a Collyer's

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condition after the Collyer brothers, who hoarded in a New York townhouse in the 1950s. These nuisances might create a fire hazard, odors, or a rodent or garbage infestation. In cases of a tenant-ward's unmanageable-pet problem, inappropriate behavior, or hoarding, the GAL, working with APS and the landlord, will coordinate with the necessary agencies or third parties, such as Animal Control, a psychiatrist, JASA, or a company to which APS contracts out for a cleaning to resolve the nuisance. Although the court has the power in a pending proceeding to grant access to a landlord to effect repairs, the Housing Court GAL does not, however, have the authority to allow cleaners into the apartment without the ward's consent and may not force the ward to comply. Only an Article 81 guardian may force compliance.

Under a March 2007 Civil Court Advisory Notice¹⁶ and a March 2007 binding directive¹⁷ from the New York City Civil Court's Administrative Judge, issued in response to a 2007 decision of the Appellate Term, First Department, in *BML Realty Group v. Samuels*,¹⁸ GALs must fill out a GAL Case Summary form,¹⁹ which they must retain in their files for three years. The Case Summary form documents the GAL's contacts with the ward, the GAL's advocacy efforts, and the steps the GAL took to follow through with the plan set forth in any stipulation of settlement. The court may require the GAL to submit the Case Summary form or may question the GAL on the record. If the court requires the GAL to submit the Case Summary form, the judge may direct on the GAL appointment order that the GAL submit it. The Case Summary form is not intended to be placed in the court file unless the file is sealed. The GAL might be asked to give the Administrative Judge a copy of the summary.

III. Conflicts Arising from the GAL's Role

As an officer of the court, the GAL is required to investigate fully and fairly and to keep the court informed about the information obtained during the investigation of the ward.²⁰ GALs who advocate for litigants with diminished capacities often face moral and ethical dilemmas arising from that investigation and from the tension between advocating for their wards and being officers of the court. Can the GAL both report objectively to the court and still always advocate in the ward's best interests? May the GAL's judgment be substituted for the ward's?

If the GAL and the ward disagree on how to handle the case, should the GAL go forward if doing so means contradicting the ward's wishes? If a ward is in a nursing home, hospital, or rehabilitative institute and is unlikely to resume tenancy at the location in dispute, should a GAL be allowed to enter into a stipulation of settlement on the ward's behalf in which the ward surrenders the apartment if the ward opposes that settlement? If a landlord offers significant incentives for the tenant to surrender possession, may a GAL sign a stipulation to relocate the ward if the ward refuses to leave? If a ward wants a trial in a nonpayment case but has no valid defense and the GAL can get a stipulation of settlement offering the ward needed time to pay the arrears, may the GAL act contrary to the ward's intentions and risk an eviction post-trial for failure to pay a possessory judgment in five days?

No apparent or uniform answer exists for these questions. Addressing these questions was a New York County Lawyers' Association (NYCLA) Task Force on Housing Court Resources Subcommittee, which held a conference in October 2004 and issued a report on Housing Court GALs.²¹ NYCLA's Board of Directors approved the Task Force's final report, called the *Report on Resources in the Housing Court*, on February 5, 2007.²² The final report incorporates all the Subcommittee's recommendations.²³

NYCLA's final report, tracking its Subcommittee Report, advises that "[i]f there is no agreement between the GAL and the respondent (and counsel for the respondent, if any), the Housing Court Judge is to evaluate the respondent to determine whether the respondent has sufficient capacity to decide how the case should be resolved."²⁴ If the ward has sufficient capacity, NYCLA would urge the court to refer the case for trial or another proceeding. If not, NYCLA would urge the court and the GAL to refer the case to APS for an Article 81 proceeding. Only Article 81 guardians have the power to

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compel wards to accept settlements.

Other authorities and practitioners agree with NYCLA's position. According to those who hold this view, GALs are not vested with the authority to settle cases. CPLR 1207, they argue, "grants authority to the representatives of an infant or a person judicially declared incompetent to settle claims, but does not include guardians ad litem among the representatives with settlement authority."²⁵ They contend that a fair reading of CPLR 1207 is that "the legislature did not authorize guardians ad litem to settle claims on behalf of the individuals they represent, unless the ward has been declared incompetent."²⁶ For support, they cite *In re Estate of Bernice B.*, in which the New York County Surrogate's Court found in 1998 "that a GAL cannot bind her adult ward to a settlement of which the ward disapproves unless the ward's incapacity to participate in the litigation (or in its settlement) has been established under the special procedural safeguards afforded by the [MHL]."²⁷ They also cite *Tudorov v. Collazo*, in which the Appellate Division, Second Department, wrote, as to CPLR 1207, that if a ward objects to a GAL's attempt to settle a case, "a guardian ad litem is not authorized to apply for approval of a proposed settlement of a party's claim"²⁸ They additionally note that the concept of a GAL's "stepping into the ward's shoes" appears in "training manuals" only and has no case-law support.²⁹

Others have a different opinion. They might agree that the GAL may not settle a proceeding without court approval. But, they argue, the court may approve a GAL's proposed settlement of any proceeding, including ones that surrender possession, and the ward's desires are relevant but not determinative. For proponents of this view, the relationship between a GAL and a ward is different from that of attorney-client, in which the attorney must follow the client's wishes but in which a GAL might be obliged out of necessity to act contrary to the ward's desires and to support a settlement position adverse to what the ward wants.

Some courts have allowed GALs to act contrary to their wards' wishes. The Appellate Division, Third Department, in *In re Feliciano v. Nielson*, for example, quoting from dictum from the Court of Appeals in *In re Aho*, held that "a guardian ad litem is not to be viewed as an 'unbiased protagonist of the wishes of an incompetent' and may even act contrary to the wishes of its ward."³⁰

Many judges agree with *Feliciano*. One, in a law-journal article, has written that "[t]he GAL steps into the shoes of the ward"³¹ Another, in a training outline, has explained that "[a]lthough the ward's desires are relevant, they are not determinative. Thus, a guardian ad litem may have to act contrary to the ward's desires and maintain a position adverse to the ward."³² A third, Justice Fern A. Fisher, the New York City Civil Court Administrative Judge, whose office oversees the GAL program, submitted a Comment in opposition to the NYCLA Subcommittee Report, arguing that a GAL must act in the ward's interests but may act in opposition to the ward's preferences.³³ The Comment notes the difference in the statutory procedure to settle claims by infants, judicially declared incompetents, and conservatees and the role of the judge and GAL in settling claims against respondent-tenants not judicially declared incompetent but who nevertheless are incapable of adequately defending their rights.³⁴ The Comment looks to the CPLR's legislative intent and argues that "the legislature considered and rejected CPLR 1207 and 1208's application to actions where the GAL is appointed to defend the interests of a party," including respondent-tenants in Housing Court.³⁵ Justice Fisher argues that if the ward and the GAL disagree, and the judge does not find that an Article 81 proceeding is warranted, the case should not be sent out for a trial that can lead to an eviction.

Justice Fisher opines, therefore, that the judge should determine whether to so-order a settlement or recommendation if the ward disagrees with the settlement the GAL recommends.³⁶ In making that determination, the court and the GAL should consider the least restrictive alternatives when intruding into the ward's autonomy.

Practical concerns underlie the belief that a GAL, supervised by the court and acting with the court's permission, should be allowed to urge a court to disregard a ward's irrational wishes. Just

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because the court or a GAL wants to refer the matter for an Article 81 guardian does not mean that APS will accept the case or that Supreme Court will appoint an Article 81. GALs and Housing Court judges are not the wards' attorneys and do not prepare the papers for Supreme Court. The ward might be evicted if an Article 81 guardian is not appointed. Not accepting a fair stipulation that a GAL negotiates might also result in possible injustices because Article 81 proceedings are lengthy, drawn-out affairs. Even if the Housing Court matter is stayed pending an Article 81 proceeding, possible injustices might include denying landlords legitimate use and occupancy (which APS will not pay if it seeks an Article 81 guardian) and forcing the ward's neighbors to tolerate the ward's allegedly intolerable behavior.

After NYCLA issued its Subcommittee Report and Justice Fisher issued her Comment, the Subcommittee issued a Minority Report but adhered to its majority views.³⁷ NYCLA's final report, approved, as mentioned above, in February 2007, considered and rejected Justice Fisher's Comment.

The reality is that GALs, to some valid extent, make decisions that affect their wards. In striving to "protect and assist a party, [GALs] do substitute their judgment and decisions for the decision making that the party otherwise would exercise in a proceeding and curtail the party's autonomy and freedom in that respect."³⁸ This curtailment of the ward's autonomy ranges from invasions into the ward's financial independence in the form of APS involuntary financial management, to the GAL's coordinating a heavy-duty cleaning, to emergency hospitalization or institutionalization of the ward, to the GAL's recommending an MHL Article 81 guardianship proceeding. In an Article 81 guardianship proceeding, the Article 81 guardian is even more involved in the ward's life than a Housing Court GAL may ever be.

When a disagreement between the GAL and the ward's attorney arises over how to handle the ward's case, should the GAL, as an officer of the court, report this to the court, and whose position should prevail? One author has opined "that [the lawyer] can seek judicial removal of the present guardian [ad litem] and appointment of a new guardian ad litem . . . [and] then the attorney can seek judicial resolution of the disagreement with the guardian [ad litem], or can withdraw from the case."³⁹ According to a Civil Court advisory opinion, "a GAL should allow the attorney to handle all the legal paperwork related to the case unless the attorney takes action contrary to the ward's welfare."⁴⁰ If there is a conflict, or when the GAL believes that the attorney is not doing the work, the GAL should notify the judge, and the matter should be discussed and resolved on the record.⁴¹ Disagreements between the GAL and the ward's attorney might develop because they have different practical and ethical obligations toward the ward and might differ about what is in the ward's best interests.

Attorneys also experience conflicts. As the New Jersey Supreme Court in *In re M.R.* explained, "[g]enerally, the attorney should advocate any decision made" by the incapacitated person, and "[o]n perceiving a conflict between that person's preferences and best interests, the attorney may inform the court of the possible need for a guardian *ad litem*."⁴² But if the client opposes a GAL, the attorney may move for a GAL only if the client is incapacitated and "if there is no practical alternative, through the use of a power of attorney or otherwise, to protect the client's best interests . . ."⁴³ If that happens, the attorney may not be a witness at a contested hearing.⁴⁴

A question exists whether a GAL may perform purely legal work on the ward's behalf, such as drafting a memorandum of law. Some GALs who are attorneys will perform legal work out of kindness to their wards and generosity to the court. Although it is often difficult to find an attorney for the ward, the better practice is for GALs not to perform legal work and, instead, to do their best to retain an attorney. As three experts explain:

Even when the guardian ad litem is a lawyer, he or she cannot take on the dual role of acting as both guardian ad litem and legal counsel. Guardians ad litem and counsel for defendants perform different roles. The guardian ad litem is an officer of the court whose role is to protect the interests of the ward and

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report to the court. The attorney, while an officer of the court as well, must be a zealous advocate for the client in an adversarial process. The two roles are distinct, as are the obligations.⁴⁵

It is difficult for an attorney-GAL to see a defect in the pleadings and not point it out to the court. Courts often tolerate GALs who do legal work. It would be unseemly for a court, having heard a GAL argue a meritorious legal issue for a ward, to disregard the argument, not because of its merits, but because the GAL perhaps should not have been the one to make it. The line between an attorney-GAL and an attorney is sometimes blurred.

Another issue arising out of the GAL's role is whether private legal malpractice insurance will protect GALs. GALs need not be lawyers.⁴⁶ GALs should be indemnified by legal malpractice insurance, some argue, because GALs are involved in legal proceedings and do at least quasi-legal, if not fully legal, work to protect their wards. The NYCLA Task Force on Housing Court Resources Subcommittee Report notes, however, that "[t]here is a diversity of opinion among private attorneys with regard to whether private legal malpractice insurance will cover work performed as a *pro bono* GAL in Housing Court."⁴⁷

The New York State Attorney General has issued an opinion stating that court-certified volunteer GALs are entitled to state indemnification under the Public Officers Law § 17(1)(a) because they are state-sponsored volunteers.⁴⁸ Under Public Officers Law § 17(1)(a), GALs are entitled to state indemnification only if they are deemed an "employee" and not independent contractors. If the court determines that GALs, paid or unpaid, are independent contractors, then GALs would not be entitled to state indemnification. Under a New York State Attorney General Advisory Opinion dated October 24, 2006, paid GALs will not be indemnified under the Public Officers Law because they are not volunteers.⁴⁹ Unless the Attorney General issues a different opinion or the Legislature amends the law, some compensated GALs, who are at risk of being sued by incapacitated, paranoid wards, might be disinclined to serve. Other GALs will serve but will be victimized by frivolous litigation. Several groups, including the New York State Bar Association's Real Property Law Section's Landlord and Tenant Proceedings Committee, have therefore proposed legislation to compel the state to indemnify Civil Court GALs.⁵⁰

GALs have some protection, however, from law suits by their wards. The Civil Court in *Lau v. Berman* has held that a ward may not sue a GAL absent the ward's first obtaining court approval and that the ward's failure to do so must result in dismissing the action: "Once a court appoints a guardian to represent an incapacitated person, litigation against the guardian as representative of the incapacitated person may not proceed without permission of the court which appointed the guardian."⁵¹ The court found that a suit against a GAL for breach of duty, conspiracy, and defamation for acting against the ward's interests must be treated differently from other actions because "[a] guardian ad litem may be obliged to act contrary to the wishes of the incompetent and adopt a position that is adverse to the position of the ward."⁵²

IV. Who May Be Appointed to Serve as a GAL?

Because issues involving incapacitated litigants are critical to the court, the litigants, and the public, the New York City Civil Court has a GAL program in place. The court trains and certifies GALs, serves as a liaison to other agencies and stakeholders, and in general administers the GAL program.

To become a certified Civil Court GAL, the appointee must undergo a court-approved day-long training program. The training, overseen by the Civil Court Administrative Judge's office, is currently

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offered twice each year in two live training sessions, usually in January and June. Video replays of the trainings can be viewed in between the scheduled live sessions.⁵³ Attorneys admitted to the bar for at least two years can receive a total of six free Continuing Legal Education (CLE) credits for completing the training.⁵⁴

Applications to serve as a Housing Court GAL are available online.⁵⁵

Court certification is not necessary for trained pro bono professionals associated with social-service agencies⁵⁶ or for students affiliated with a law school's elder-law clinic.⁵⁷

Courts must take the proposed GAL's financial ability into account under CPLR 1202(c) when determining whether the GAL can provide for the ward's best interests.⁵⁸ Before a court may make an appointment, the proposed GAL must sign an affidavit "stating facts showing his ability to answer for any damage sustained by his negligence or misconduct."⁵⁹ These facts include the GAL's assets, income, and liabilities.⁶⁰ CPLR 1202(c) is not always used in summary proceedings, in which Housing Court GALs have vastly fewer powers than Supreme Court Article 81 guardians and in which Housing Court monitors its GALs more closely than other courts do. GAL appointment orders in Housing Court sometimes provide that the GAL will serve without bond. Some appointment orders even provide that GALs need not comply with CPLR 1202(c) affidavit requirement.⁶¹ The fear is that compelling GALs to submit these affidavits is an onerous demand that might decrease the available pool of GALs who could assist Housing Court litigants. A Civil Court directive provides, however, that "Judges must insure that [a CPLR 1202(c)] affidavit is filed."⁶²

Housing Court GALs need not file a notice of appointment under § 36.2(c) of the Rules of the Chief Judge, but judges, judicial hearing officers, and their spouses, children, and parents are disqualified from services as a GAL.⁶³

It is widely agreed that private law firms should be encouraged to serve as GALs, given the level of legal training and expertise that attorneys possess. Private attorneys serving as GALs increase the efficiency of the GAL appointment and training process.⁶⁴ But a GAL need not be an attorney.⁶⁵ Nor must a GAL be a doctor when the ward is mentally impaired.⁶⁶

V. How GALs are Appointed

A GAL may be appointed upon APS motion under CPLR 1202(a), or the court may appoint a GAL on motion or "at any stage of the action upon its own initiative."

CPLR 1201 lists three categories of persons who must appear by a GAL: (1) certain infants; (2) certain adjudicated incompetents or conservatees; and (3) individuals "incapable of adequately prosecuting or defending [their] rights." This paper addresses the third category.

As to potential wards who might be incapable of adequately defending their rights, the court should hold a hearing to ascertain the need to appoint a GAL for them even when they have competent counsel or when they and their attorneys object to appointing a GAL.⁶⁷ The court in *Fran Pearl Equities Corp. v. Murphy* found that a hearing is required to determine whether to appoint a GAL.⁶⁸ According to *Silver & Junger v. Miklos*,⁶⁹ the court may appoint a GAL without a hearing if it relies on APS's psychiatric documents and the petitioner's letter to APS supporting the need for a GAL. A hearing is not required if the proposed ward and opposing party agree, on consent, that a GAL is needed or would be helpful to resolve the proceeding. No hearing is required when GAL appointment can be based on the court record and documentation that raise no issues of fact.

If the court before which the proceeding is pending does not appoint a GAL, an application for

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A GAL may also be made under CPLR 1202(a)(1) on motion by "an infant party if he is more than fourteen years of age." CPLR 1201 additionally provides that unless the court appoints a GAL, an infant shall appear by a parent having legal custody or, if there is no parent, by another person or agency having legal custody. The phrase "having legal custody" refers to judicially determined custody. Allowing a parent or legal guardian to appear without appointing a GAL eliminates an unnecessary application to the court. Appointing a GAL is required if "the right to custody exists neither by parenthood or by decree."⁷⁰

CPLR 1202(a)(2) provides that a motion to appoint a GAL may be brought by a "relative, friend or a guardian, committee of the property or conservator." A government agency like APS or DSS has standing to move for a GAL, given its duties under Social Services Law § 473 and 18 NYCRR 457. APS has standing as a friend of the court to move to appoint a GAL without moving to intervene in the proceeding.⁷¹

Under CPLR 1012(a)(1), a court must permit a person to intervene as a party when a state statute confers the right to do so.⁷² A protective-service agency must have a network of professional consultants and service providers and may be involved with health, mental health, aging, and legal and law-enforcement agencies.⁷³ The Social Services Law does not give a protective-services agency the right to intervene to seek a GAL for a party.⁷⁴ In a special proceeding in the Housing Court, therefore, APS intervention is permitted only by leave of the court.⁷⁵

CPLR 1202(a)(3) provides that a motion to appoint a GAL may be brought by "any other party to the action if a motion has not been made under paragraph one or two within ten days after completion of service."⁷⁶ The "other party" may be the opposing one or the opposing party's counsel. Courts interpret CPLR 1202(a)(3) to require a party who knows, or believes, that the opposing party suffers from a mental condition to bring that condition to the court's attention.⁷⁷ This is especially true of the opposing side's attorney, who is an officer of the court. The opposing side has a duty to inform the court of an adversary's incapacity, especially when evidence in a prior proceeding between the two parties suggested that a guardian was required. In *Jackson Gardens LLC v. Osorio*, the court found that "[t]he fact that a guardian was found to be needed in a prior case, between the same parties, six months prior, clearly placed a duty on the petitioner to inform the court, and makes his failure to do same inexcusable."⁷⁸

Even when a litigant has insufficient proof to move for a GAL, the litigant still has an obligation to bring the potential ward's mental disability to the court's attention.⁷⁹ Securing a judgment and evicting a tenant the landlord knew was mentally incapacitated and in a nursing home can subject the landlord to claims for wrongful eviction and property damage.⁸⁰ Not only does moral obligation require informing the court of a litigant's possible incapacity, but a legal one does as well.

Sometimes a landlord will have a duty to inform the court that the tenant might need a GAL if for no reason other than that the nuisance allegations that form the grounds for the holdover suggest a pattern of bizarre acts that might warrant a GAL. On the other hand, sometimes counsel will be only too glad to raise the matter of appointing a GAL so as to frazzle a nervous, unrepresented litigant or cause a court to question the litigant's rationality and good faith.

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A court-approved GAL is appointed when a Housing Court judge submits a Guardian ad Litem Request Form to the borough's Housing Court Supervising Judge or GAL coordinator, who maintains a list of court-approved GALs. The Housing judge may request a GAL who has particular experience or specialization. The Supervising Judge or GAL coordinator gives the appointing judge two or three names from the list, and the appointing judge's court attorney contacts the first of the two or three to assess availability and interest. The potential GAL may accept only if the court makes the initial contact; no other party to the case may arrange for the appointment. The court attorney informs the potential GAL of the basic facts of the case, including whether the ward is an APS client. If the potential GALs decline appointment, the Supervising Judge or GAL coordinator provides new names.

Once a person agrees to serve as a GAL, the appointing judge or court attorney prepares an order of appointment, which, when completed and signed by the appointing judge, is submitted to the Supervising Judge. The court attorney then mails the order and the papers in the court file to the GAL.

A judge may also directly appoint a potential ward's relative, friend, therapist, or social worker to serve as the GAL, although the judge should be on guard for the potential of a conflict of interests. A judge who makes a direct appointment need not submit anything to the Supervising Judge or GAL coordinator, and the Supervising Judge or GAL coordinator will not give the appointing judge a list of potential GALs. According to a Civil Court advisory notice, those non-court-certified individuals, "as a condition of the appointment, must participate in training specified by the Administrative Judge."⁸¹

CPLR 1202(c) provides that no GAL appointment is valid unless the GAL files written consent of the appointment with the court. A court may not appoint a GAL who is unwilling to serve.

VI. Housing Court's Authority to Appoint a GAL

The Civil Court, including its Housing Part, has the authority to appoint a GAL in a summary proceeding⁸² and need not refer a GAL motion to a Supreme Court judge. Under CPLR 1202(a), "[t]he court in which an action is triable may appoint a guardian ad litem at any stage in the action."⁸³ Even if an adjudication of incompetency has not been made, the court must appoint a GAL if court intervention is required to protect the best interests of a litigant incapable of adequately asserting claims and rights.⁸⁴

One Civil Court judge in three decisions published more than 15 years ago wrote that Housing Court does not have the jurisdiction to appoint GALs.⁸⁵ All other courts have disagreed. These courts, from the Appellate Term down,⁸⁶ have explained that Civil and Housing Court judges "ha[ve] the duty to protect a litigant who is incapable of protecting his or her interests"⁸⁷ and "the inherent power to appoint a guardian ad litem."⁸⁸

VII. When Can a GAL be Appointed?

Housing Court must appoint a GAL for litigants in a pending proceeding if the court finds, based on a preponderance of the evidence, that the litigants are incapable of adequately prosecuting or defending their rights.⁸⁹ A determination of incompetency, unlike in an Article 81 proceeding, is not required.⁹⁰ The Court of Appeals in the seminal *Sengstack v. Sengstack* found that although a GAL appointment should not be used to evade a formal declaration of incompetency, the court still has a duty to protect a litigant who might be incompetent but not formally declared incompetent.⁹¹

Under CPLR 1202, a GAL may be appointed at any stage of the action or proceeding. The Appellate Division, First Department, in *In re Beyer* confirmed in 1964 that CPLR 1202(a) allows

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courts to appoint GALs at any stage and "to a complex of situations, some of which may antedate the technical institution of the proceeding."⁹² The court may, therefore, appoint a GAL before the action or proceeding begins. That might occur when a landlord's attorney serves a petition and notice of petition and alerts the court to appoint a GAL rather than allow a tenant to be evicted for failing to answer the petition in a nonpayment proceeding or for being absent at an inquest in a holdover proceeding.

In actions or proceedings involving incompetents, the court should wait for the application of the persons entitled to move for the appointment of a GAL before the court appoints the GAL. If that procedure might endanger the incompetent's interests, then the appointment can be made at the inception of the action or proceeding - for example, in an order to show cause before the petition and notice of petition are served.⁹³ The court may also appoint a GAL after the parties have agreed on a settlement,⁹⁴ or after a judgment is entered,⁹⁵ or at the appeals stage.⁹⁶

An action or proceeding against litigants incapable of adequately protecting their interests may not proceed without notice to the court of the litigant's incapacities and a court inquiry.⁹⁷ Following the proposition set out in *Vinokur v. Balzaretti* that "[t]he public policy of this State, and of this court, is one of rigorous protection of the rights of the mentally infirm,"⁹⁸ a hearing should be conducted whenever a question of fact arises about whether a GAL is required.⁹⁹ Questions of fact might concern a potential ward's alleged delusional behavior, poor judgment, and subclinical manifestations.¹⁰⁰ The court in *Weingarten v. State* held that when a party eligible under CPLR 1202(a) applies for a GAL for an individual who resides in a mental institution, a rebuttable presumption arises that the individual is incapacitated.¹⁰¹

CPLR 1201 dictates that a litigant's mental impairment less than incompetency may support appointing a GAL.¹⁰² A GAL must be appointed if a potential ward does not understand the nature of the legal proceeding or the possible consequences of the court's judgment.¹⁰³

The proposed ward's physical impairments may also warrant appointing a GAL if the proposed ward is pro se and unable to appear in court to defend or assert a claim.¹⁰⁴ A GAL will also be appointed when the litigant is unable to appear in court because of incarceration.¹⁰⁵ In *Leibowitz v. Hunter*,¹⁰⁶ the court granted a motion to appoint a GAL to aid a plaintiff in a coma due to injuries sustained in a car accident. Some courts will have declined to appoint a GAL if the potential ward's physical incapacity was not linked to a mental incapacity.¹⁰⁷

The court will take a host of factors into account to determine whether a litigant requires a GAL. A litigant's decreased mental ability or physical agility caused by advanced age,¹⁰⁸ disease,¹⁰⁹ or drug or alcohol abuse¹¹⁰ is relevant. Patients in psychiatric institutions presumptively require a GAL's assistance.¹¹¹ Courts will consider affidavits from neighbors, physicians, and others capable of attesting to the litigant's mental and physical capabilities.¹¹²

Not only are tenants eligible to receive a GAL, but landlords are as well. A GAL may also be appointed in any Housing Court proceeding, not just an eviction proceeding. Although GALs are seen most commonly in nonpayment and holdover proceedings, they serve in illegal lock-out and HP (repair) proceedings.¹¹³

The GAL's role ends when the case is dismissed, discontinued, settled, or otherwise resolved. A new GAL is required for every new proceeding,¹¹⁴ although the judge who believes that the GAL performed satisfactorily and developed a positive relationship with the ward may appoint the same GAL for the new proceeding.

VIII. Vacatur of Judgments

Most courts if pressed will vacate a final judgment of possession and warrant of eviction if it

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^z (*Guardians Ad Litem, continued from page 11*)

finds that an individual required a GAL during the action or proceeding but did not have one, regardless whether an attorney represented the tenant at the trial.¹¹⁵ In *124 MacDougal St. Assocs. v. Hurd*, the court vacated a default judgment against a tenant who needed a GAL and an Article 81 guardian.¹¹⁶ Courts have vacated foreclosure, divorce, and money judgments, more than a year after the default, for mentally incapacitated defendants.¹¹⁷

If the court, once notified that a tenant is incapacitated, fails to make the appointment or give careful consideration to the need for a GAL, it is "improvident and requires the reversal of the judgment."¹¹⁸ Most courts will similarly vacate a judgment and restore a party to possession if they find that the party was unable adequately to defend rights in the proceeding.¹¹⁹ Of import is a March 2007 Civil Court Advisory Notice stating that "if it appears that a respondent is incapable of adequately defending against a proceeding, the court should appoint a guardian ad litem and any default judgment entered prior to the appointment in most instances should be vacated. Failure to vacate the default judgment maybe [sic] reversible error."¹²⁰

When APS moves for a GAL, it will often tell the court on the landlord's application that the motion to vacate the judgment may be held in abeyance. Many GALs never move to vacate the judgment. They will use the judgment's nonvacatur as a bargaining tool, if the ward will not otherwise be prejudiced, to get more time to satisfy the judgment. Often landlords consent to giving wards time to satisfy the judgment if the judgment is not vacated. Landlords also consent to GALs in close cases on the condition that the court not immediately vacate the judgment.

An out-of-court stipulation signed by tenants incapable of adequately defending their rights will be vacated if the tenant required a GAL.¹²¹ If a tenant is "unable to address a particular topic without going off on a tangent"¹²² and otherwise is unable to defend legal rights, the default judgment should be vacated and a GAL appointed.

In *Roe Corp. v. Doe*,¹²³ the court vacated a judgment of possession after finding that the petitioner-landlord, who knew about the respondent-tenant's incapacities, had a legal obligation to inform the court that the tenant was incapacitated. In *V.K.*, the court went even further, holding that "a petitioner, in any proceeding, [must] be extremely diligent' in determining whether a party may be under a disability requiring a guardian ad litem."¹²⁴ If a party fails to notify the court of an adversary's disability before obtaining a default judgment, it is a fraud on the court and a basis to vacate the judgment.¹²⁵

IX. When GALs Are Not Required

Some courts will not vacate a judgment despite the ward's incapacitation. These courts will deny a motion to appoint a GAL even after a default and eviction, and even when the landlord knew about the tenant's infirmities.¹²⁶ In *Kalimian v. Driscoll*, the court found that the fact that counsel represented the tenant played no role in determining whether the tenant was prejudiced by the absence of a GAL,¹²⁷ but the court in *Hertwig-Brilliant v. Michetti* found that failure to appoint a GAL was harmless because competent counsel represented the litigant, who was also helped by family.¹²⁸ Some courts will not appoint a GAL when the respondent waits two years in the proceeding until the eve of the trial to move for a GAL.¹²⁹ The court in *321 W. 16th St. Assocs. v. Wiesner*, for example, refused to appoint a GAL late in the proceeding.¹³⁰

A court will deny a motion to appoint a GAL and vacate a judgment if the potential ward does not prove an incapacity to prosecute or defend rights.¹³¹ Thus, a motion will be denied if the letter of the

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psychologist who examined the tenant does "not state that [the] tenant was incapable of defending her rights or that appointment of a guardian was needed."¹³²

When a motion to appoint a GAL is made, the court must balance the litigant's interests with those of third parties, such as other tenants in the building, to assess whether to appoint a GAL. At first, litigants might appear unable to defend their rights adequately. After further assessment, the court might determine that the potential ward does not need a GAL.¹³³

Some courts have declined to appoint a GAL on the ground that appointing one will not help a recalcitrant litigant. *Stratton Coop., Inc. v. Fener*¹³⁴ was a nuisance proceeding in which the tenant repeatedly refused access to her home or to cure the hazardous accumulations. In that case, the Appellate Division, First Department, affirmed the final judgment and the decision finding that appointing a guardian (an Article 81 guardian in this instance) would not have resolved the issue of access and that the rights of the other tenants needed to be acknowledged. The court balanced the tenant's needs with the rights of the other tenants in the building whose health and safety were at risk.

Similarly, in *Pinehurst Constr. Corp. v. Schlesinger*,¹³⁵ a nuisance holdover proceeding, although the Appellate Term dissent argued that the final judgment after trial should be reversed because it appeared that the tenant was an "elderly, chronically sick, and apparently disturbed tenant,"¹³⁶ the majority found no basis to conclude that appointing an Article 81 guardian, "even if warranted, would remedy the long-standing, acute problems posed by tenant's aggressive, antisocial behavior."¹³⁷

Having a history of mental impairment is insufficient by itself to require either the appointment or continued service of a GAL. The incapacity could have disappeared by the time the new action or proceeding began.¹³⁸

X. Removing a GAL

A court's disagreement with a guardian's choices is insufficient to warrant replacing the guardian. In *Sutherland v. New York*,¹³⁹ the plaintiff's mother accepted a lump-sum monetary offer from the city to settle her and her child's claims, despite the trial court's view that the child's best interests required that payment be made over a period of years. The trial court entered an order removing the mother as guardian and replacing her with a GAL. The Appellate Division, First Department, reversed, finding that the disagreement was insufficient to warrant removing the natural parent as GAL.¹⁴⁰

Likewise, the court in *Stahl v. Rhee* found that a plaintiff's mother's refusal to accept a settlement on her son's behalf was insufficient to replace the mother, acting as legal guardian, with a GAL.¹⁴¹ The plaintiff became severely mentally retarded from his exposure to antibacterial skin cleanser prescribed for him shortly after his birth. According to the Appellate Division, Second Department, Supreme Court improperly discharged the plaintiff's mother as the plaintiff's guardian and inappropriately replaced her with a court-appointed GAL when the plaintiff's mother refused to accept a proposed settlement "under any circumstances" because it would not cover her son's expenses.¹⁴² The Appellate Division held that the mother's decision was not unreasonable, arbitrary, or capricious, especially absent proof of a conflict of interest between the mother and the infant plaintiff. The Second Department therefore reversed Supreme Court's decision removing the child's mother as his legal guardian.¹⁴³

Courts have the power to remove a GAL on their own motion if a GAL, in the GAL's capacity as an officer of the court and as the person charged with protecting the ward's rights, engages in conduct that prejudices or harms the ward.¹⁴⁴ The court in *De Forte v. Liggett & Myers Tobacco Co.* found that "[t]he rights of an infant cannot and should not be lost through the obdurate, unreasonable and uninformed conduct and opinion of the guardian ad litem."¹⁴⁵ A judge who determines that the GAL is acting against the ward's best interests should remove the GAL. If the Civil Court removes the GAL from its list of certified GALs, each Housing judge overseeing a particular case decides whether

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to remove the GAL while the proceeding is pending. A court may further vacate a warrant of eviction and restore a tenant to possession, even after the marshal executes the warrant of eviction, if the GAL's ineffective assistance caused the eviction.¹⁴⁶

A court should be wary about defaulting a ward whose GAL did not appear. Under CPLR 1203, no default may be entered until 20 days after a GAL is appointed.¹⁴⁷ Even after that time passes, the court should not begin to consider a default judgment against the ward until the court inquires diligently into what caused the default. If the GAL is responsible for the default, the court should consider relieving the GAL, appointing a new GAL, and informing the Administrative Judge.

Sometimes a GAL behaves egregiously, although not necessarily toward the ward. In *Hitchcock Plaza, Inc. v. Clark*, a GAL spat on an associate of the opposing side's law firm.¹⁴⁸ The law firm moved for sanctions against the GAL. The court denied the motion because the GAL was not a party or an attorney, sustained the spitting charge, and referred the GAL to the Administrative Judge.¹⁴⁹

When the judge or the Civil Court's GAL program believes that a GAL is performing inadequately, they must do their best to investigate the matter promptly. A complaint against a GAL triggers due-process rights. Under § 36.3(e) of the Rules of the Chief Judge, "The Chief Administrator [of the Courts] may remove any [GAL] from any list for unsatisfactory performance or any conduct incompatible with appointment from that list, or if disqualified from appointment pursuant to this Part. A [GAL] may not be removed except upon receipt of a written statement of reasons for the removal and an opportunity to provide an explanation and to submit facts in opposition to the removal." The Chief Administrator's duties to consider removing a Civil Court GAL are delegated to the Civil Court's Administrative Judge.

XI. Proper Advocacy

The courts must determine whether a GAL has represented the ward's best interests. Courts have the continuing responsibility to supervise the GAL's work.¹⁵⁰ In a New York City Civil Court Advisory Notice dated March 2007, the court advised that judges must assess the adequacy of the GAL's advocacy for the ward before it may so-order a stipulation that a GAL wishes to enter into.¹⁵¹ The judge must assess whether the GAL has met with the ward and attempted to have a home visit, whether the GAL has determined what the ward desires as an outcome of the case, and whether the GAL has investigated and weighed all the factors in the case and recommends a settlement in the ward's best interests. The GAL must also develop a plan to assist the ward in obtaining repairs, money, or other assistance to comply with the proposed stipulation and follow through with the plan to assist the ward. The GAL must inform the court whether the ward agrees with the proposed settlement. Finally, the GAL must try to locate a missing ward and take all possible steps to get the ward to come to court.

In making these assessments, the court must allocute on the record any significant stipulation, such as one that settles a proceeding. The court should not simply sign the stipulation as if were a two-attorney stipulation, even if the GAL is an attorney.¹⁵²

The court's supervisory role limits a GAL's advocacy. Once again, as three experts explain:

If a settlement does not compromise a ward's property rights (*e.g.*, if there is no provision that a default will result in the issuance or execution of a warrant of eviction, or that a property right will be surrendered), then the court may determine that a settlement is appropriate without further action to protect the ward, and the court — not the guardian ad litem — may approve the settlement. On the other hand, if the ward's property rights are implicated (*e.g.*, if the settlement provides for a warrant or surrender), the court must make an initial determination whether it can approve the settlement.¹⁵³

The GAL's duties and the court's obligations are fact-specific. The more the ward gives up in of terms a settlement, the more the GAL must investigate, advocate, and explain. And the more the court must assure the integrity of the proceedings and protect the

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ward's rights by inquiring, examining, and allocuting on the record.

XII. Service Issues

Before any action or proceeding may go forward, the ward or potential ward must receive the petition and notice of petition underlying the proceeding as well as any motion to appoint a GAL. The RPAPL and the CPLR require service so that the ward or the ward's guardian, committee, or conservator will get notice of any pending action or proceeding.

a. Service of Petition and Notice of Petition

Under RPAPL 735, the petition and notice of petition must be personally delivered on the respondent, delivered and left with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, or served by conspicuously placed service. Properly serving the petition, notice of petition, and any predicate notice is especially important when the landlord knows that the tenant resides in a hospital, nursing home, or other institution. The landlord's failure to mail additional copies of the petition and notice of petition to this additional, alternative address will result in a dismissal of the proceeding.¹⁵⁴

In the nonpayment summary proceeding *Parras v. Ricciardi*,¹⁵⁵ the court vacated the default judgment awarded to a petitioner-landlord who failed to mail additional copies of the petition and notice of petition to the nursing home where the tenant-respondent was residing. The court found that "when the landlord knows the tenant is living in a nursing home, the tenant must be served with the petition and notice of petition at the nursing home in order for the court to have jurisdiction over the summary proceeding."¹⁵⁶ The court also found that RPAPL 735(1)(a) forbids a default against tenants not served at their other residential address even if the petitioner does not learn about the other residence until the person preparing the affidavit of nonmilitary service discovers the tenants' whereabouts in connection with preparing the affidavit of investigation.¹⁵⁷

In RPAPL 735(1)(a), "residence" "means the particular locality where the tenant is actually living at the time the summary proceeding is commenced."¹⁵⁸ This residence might be a location different from the premises of which the landlord seeks possession. Even proper service at the nursing home would not have been satisfactory in *Parras*, though, because the landlord knew that the respondent was mentally incompetent and did not inform the court of that fact before it obtained a default judgment.¹⁵⁹

b. Service Upon the Ward of a Motion to Appoint a GAL

CPLR 1202(b) requires that a notice of motion to appoint a GAL "be served upon the guardian of [the ward's] property, upon [the ward's] committee or upon [the ward's] conservator" or, if none exists, then "upon the person with whom [the ward] resides." CPLR 1202(b) also requires personal service on the potential ward if that person is over the age of 14 and has not yet been judicially declared as an incompetent. The court must deny a motion not served on the potential ward.¹⁶⁰ Unless there is a judicial declaration of incompetence or court determination of the litigant's mental condition, the potential ward must be given an opportunity to be heard.¹⁶¹ The court in *Beach Haven Apts. Assocs. LLC v. Riggs* held, in this regard, that "it is critical that the proposed ward be properly served so that he is aware of the motion and the basis upon which APS seeks the imposition of a guardian ad litem and so that he can appear in court and argue for or against the motion."¹⁶²

XIII. Compensation for GALs

CPLR 1204 sets forth the compensation that GALs may receive for their services. In proceedings in which the ward is an APS client, APS, through the New York City Human Resources Administration (HRA), will provide compensation of \$600.00 for the entire action or proceeding, whether

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or not the GAL is an attorney or has special skills. The GAL order should include a note that HRA will pay the GAL \$600.00 in exchange for the GAL's services. An exception to the normal APS compensation policy could entail the court's asking HRA to approve a higher fee when the GAL provides more services than usually required. A court that believes that the ward is or will be an APS client may appoint the GAL immediately with the understanding that a determination whether APS will compensate the GAL will be made later.

Upon either the GAL's or the GAL's attorney's filing an affidavit that shows the services rendered, the court may, in the case of a ward who is not an APS client, enter an order granting the GAL reasonable compensation. The compensation may "be paid in whole or part by any other party or from" the ward's recovery or other property.¹⁶³ If the GAL seeks more than \$500 in compensation in a non-APS case, then the GAL or the GAL's attorney "must file with the fiduciary clerk, on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the [GAL or the attorney retained by the GAL] has filed the notice of appointment and certification of compliance."¹⁶⁴ No compensation may be awarded unless the GAL "has filed the notice of appointment and certification of compliance form."¹⁶⁵

Details about compensation for Civil Court GALs are available on the court's Web site.¹⁶⁶

Compensation "shall not exceed the fair value of services rendered."¹⁶⁷ What qualifies as reasonable compensation varies from case to case. So long as a GAL can support the request for compensation with an application "supported by [an] itemized documentation showing the work performed and his hourly rate"¹⁶⁸ and that the "fees are fair and reasonable,"¹⁶⁹ the court will award the requested compensation. The GAL was able to meet this standard in *C.F.B. v. T.B.* and was awarded nearly \$8000.¹⁷⁰ In a different case, *Bolsinger v. Bolsinger*, the Appellate Division found that "[i]n fixing the fee, the dollar value for nonlegal work performed by an attorney who is appointed a guardian ad litem pursuant to CPLR 1202 should not be enhanced just because an attorney does it."¹⁷¹ Rather, other factors must be considered to determine the appropriate compensation. In *Bolsinger*, the court stated that these factors include fixing the compensation "with due regard to the responsibility, time and attention required in the performance of [the GAL's] duties,' the result obtained, and the funds available to the person who must bear the cost of the guardian ad litem's services."¹⁷²

A court that deems a GAL's compensation excessive will reduce the amount. In *In re First National City Bank (In re Springett's Trust)*, the court found that the GAL "rendered extensive services for a period of almost five years"¹⁷³ and that "his services were of considerable assistance to the court."¹⁷⁴ But the court relied on the other factors to reduce the amount awarded from the requested \$8000 to \$4000.¹⁷⁵

Courts will take the paying wards' net worth into account to determine the reasonableness of the GAL's compensation. In *In re Becan*, a 1966 case, the court determined the tenant's net worth to be small because his estate totaled less than \$2500.¹⁷⁶ The court noted additionally that the appointed GAL expended a minimum amount of effort. The court reduced the original \$250 award to the GAL to \$100. The court found that because the GAL was a guardian of the court who was appearing in an accounting of the estate of an incompetent veteran, the GAL was "bound to conscientiously perform [his] respective duties, with the understanding that [he] may be asked to accept most moderate compensation for [his] services."¹⁷⁷

CPLR 1204 permits GALs to be compensated from the proceeds of the ward's award and allows payment to be made by "any other party," including the party whom the GAL does not represent. In *Perales v. Cuttita*,¹⁷⁸ the Appellate Division, Third Department, held that the Special Term had acted within its discretion when it required the Commissioner of Social Services to pay the attorney for services rendered as a GAL for residents of adult-care facilities. CPLR 1204 restricts the GAL's compensation to be paid from a non-party. In *In re Baby Boy O.*, the GAL went uncompensated because the mother did not receive a recovery from which the GAL could be paid.¹⁷⁹ Because

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the Commissioner of Social Services was not a party to the proceeding, moreover, the Commissioner could not be directed to pay the GAL. A party can be ordered to pay the GAL if that party's actions led to appointing the GAL. In *In re Ault*, the court found that CPLR 1204 directs that "a party may be charged with payment of the compensation of a guardian ad litem only where the actions of such party generated unnecessary, unfounded or purely self-serving litigation that resulted in the appointment of a guardian."¹⁸⁰

XIV. The Role of Adult Protective Services

APS is a governmental agency created under New York's Social Services Law § 473 for New York City's five boroughs.¹⁸¹ To be eligible for APS services, individuals must be at least 18 years old, not reside permanently in a hospital, nursing home, or rehabilitation facility, and as a result of mental or physical impairments be unable to meet the following three criteria. The first of these criteria is that prospective clients be unable to "meet their essential needs for food, shelter, clothing, or medical care"¹⁸² or protect themselves from "physical, sexual, or emotional abuse, active, passive or self-neglect or financial exploitation."¹⁸³ The second criterion is that the individuals be "in need of protection from actual or threatened harm due to physical, sexual or emotional abuse, active, passive or self-neglect or financial exploitation, or by hazardous conditions caused by the action or inaction of either themselves or other individuals."¹⁸⁴ The third criterion is that the individuals have "no one available who is willing and able to assist."¹⁸⁵ APS does not consider the individuals' income in determining whether to aid them.

Title 18 NYCRR 457 sets forth the criteria to determine whether someone needs APS services. Individuals and organizations may refer individuals to APS, either by telephone or the internet. APS then responds to the referral by conducting an assessment. APS will assist clients to get grants for rent arrears, medical and psychiatric care, services like Meals on Wheels and home care, public assistance, and other programs to enable clients to remain at home. APS's mission is to provide services while using the least restrictive measures possible. APS occasionally needs to use more restrictive measures, such as putting the client on financial management, referring the case to its Office of Legal Affairs to appoint a GAL, and, if necessary, referring the case for an Article 81 guardian who can enforce an order to conduct a heavy-duty cleaning or to arrange to relocate a ward to a more affordable apartment or a setting with a suitable level of care.

From time to time APS will accept as a client someone whom the courts, landlords' attorneys, and tenant advocates might agree does not need a GAL. Courts, landlords' attorneys, and tenant

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advocates are also surprised occasionally to learn that APS will not accept someone they agree should have a GAL. One explanation for the incongruence is that the APS acceptance criteria as outlined above differ from the CPLR 1201 standard for appointing a GAL: that the person be an adult incapable of adequately prosecuting claims and defending rights.

APS assessments are designed to satisfy APS acceptance criteria and not CPLR 1201, even though APS will submit its assessment reports to Housing Court pursuant to a motion to secure a GAL under CPLR 1201 and to vacate a judgment if one exists. Judges and practitioners are occasionally stymied by APS reports that do not directly cover the factors helpful in deciding whether a potential ward has or had the physical or mental wherewithal to litigate. These factors, typically absent from APS assessments, include whether the potential ward understands the court process and the contours of the specific litigation.

When an APS assessment concludes that a potential ward is severely mentally retarded, one can assume that the potential ward is or was unable to prosecute claims and assert defenses. The ward is therefore entitled to a GAL and to vacate the judgment under CPLR 1201. Less clear is when the assessment finds the potential ward depressed. A valid assessment of clinical depression under DSM IV means that the potential ward was incapable of prosecuting and asserting claims and defenses. But mere non-clinical depression is different. Just because someone is depressed, a natural state for someone facing eviction, does not mean that the person is or was unable to prosecute claims and assert defenses, even if it might mean that the depressed person is entitled to APS services.

Similarly unhelpful is psychiatric terminology in reports that Housing judges often see using the words "rule out," as in, "rule out bipolar disorder." "Rule out" means that the psychiatrist does not rule something out — that the psychiatrist cannot say that the potential ward is not bipolar. This is different from ruling something in — that is, saying that the ward is bipolar. A "rule out" formulation is relevant, if at all, on the possibility that something cannot be or was not excluded. The formulation is inadmissible if offered as proof of a conclusion. Only if based on a reasonable degree of certainty or similar belief expressing a probability supported by a rational basis is expert medical opinion testimony admissible as a conclusion.¹⁸⁶

If APS does not accept a client during the proceeding, the Housing judge who wants to appoint a GAL must find and appoint a volunteer. The typical ward cannot afford to pay for a GAL, and volunteers are hard to find.¹⁸⁷ But the Civil Court's GAL program makes prospective GALs aware that they are expected to accept at least three pro bono cases a year.

Sometimes, despite the court's requests, APS will reject a client during the proceeding and, instead, seek a GAL and judgment vacatur only after the case has concluded with a final judgment, when the tenant is on the verge of an eviction. This problem also arises when the landlord or its counsel does not inform the court that a GAL might be needed or when the presiding judge or court staff abdicate their responsibility to inquire or do not possess the sensitivity to appreciate the need for a GAL.

When any of these things happen, or do not happen, cures that might have affected a proceeding at its early stage occur at the end of the proceeding and require the results to be undone and redone. That should not be the goal. The goal, as well-explained by three thoughtful commentators, is to "obviate the need for litigation at the back-end of the proceeding. Weaving a tighter safety net for tenants with diminished capacity in order to identify them earlier in the proceedings would result in: (1) greater integrity to the judicial process; and (2) judicial resources more rightfully expended at the onset of the litigation as opposed to the end, when the court is required to vacate a default or warrant
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and begin the proceedings again."¹⁸⁸

If APS determines that a potential ward is ineligible for its services, Housing Court may not compel APS to reverse its decision. As the Appellate Term, First Department, has written, "The landlord-tenant court [is] not authorized to direct a reinvestigation or reconsideration of tenant's case."¹⁸⁹ To obtain a review under 18 N.Y.C.R.R. 404.1(f), the potential ward must contact the Fair Hearing Section at the New York State Office of Temporary and Disability Assistance (OTADA). The potential ward can either fill out the online fair-hearing request form at <http://www.otda.state.ny.us/oah/default.asp> or mail or fax the fair-hearing request form, also available on the OTADA Web site, to P.O. Box 1930, Albany, New York 12201. During the hearing, the potential ward presents reasons why APS should have accepted the case. A review of the fair-hearing determination is made by a CPLR Article 78 proceeding in Supreme Court.

APS's tool *APS Search*¹⁹⁰ allows authorized individuals to look up APS clients by name and address. There has been a change in the APS Search Protocol in Housing Court. *APS Search* is now limited to cases that Housing Court refers to APS. This new limitation reflects confidentiality concerns over the names of APS clients not subjects of specific search inquiries. Previously, names of all APS clients close to the search terms would appear when searching by name or address. APS is required to keep these names and addresses confidential because they are not the subjects of the specific inquiry.

APS Eviction Units operate under an agreement with the New York City Department of Investigation Marshal's Bureau. They visit and assess clients and potential clients threatened with imminent eviction. Shortly before or at the moment of eviction, marshals will alert APS to investigate if the court directs them to do so, perhaps on an order directing a landlord to direct the marshal to notify APS before an eviction, or if anyone else, including a tenant, makes a legitimate request.¹⁹¹ APS develops service plans for clients eligible for APS services. APS will petition, by order to show cause, the court to appoint a GAL to assist clients with eviction proceedings in Housing Court in cases referred by a marshal.

In 2006, APS referred 1751 clients for GALs.¹⁹² APS also petitions Supreme Court to appoint under Article 81 of the Mental Hygiene Law. In 2006, APS referred 768 clients for Article 81 guardians.¹⁹³

If APS seeks an Article 81 guardian, its representatives, or the GAL after speaking to APS representatives, will seek a Housing Court stay of the execution of the warrant. Much litigation arises at this point because, from the landlord's perspective, APS will not pay rent in the interim and because APS, a busy agency that does not quickly seek Article 81 guardians, will perform triage, handling its most pressing, eviction-ready cases first and the rest later. Landlords will suggest that judges deny applications to stay the warrant to force APS's Office of Legal Affairs to seek an Article 81 guardian faster, but that puts the judge in an untenable position, given the possibility that a disabled tenant might be evicted because the court wanted to push APS into action. And more delays ensue once an Article 81 guardian is sought.

If the person is eligible for APS assistance based on a preliminary determination, APS will evaluate the potential ward to determine whether a GAL is required. APS will make this determination by using such methods as a home visit and through a psychiatric evaluation by one of its staff medical personnel. If APS determines that a GAL is required, APS will request that a GAL be appointed. Determining whether APS will accept a case takes four to six weeks. Referrals in Housing Court are often made by the judges, who contact the borough APS representative, who acts as a liaison and friend of the court. This process often takes another two to four weeks for a GAL to appear in court on

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the ward's behalf after the court signs the order appointing the GAL.

Although APS decisions affect Housing Court's ability to address a ward's needs, Housing judges lack the authority to compel APS to act or not act: "[A]n administrative determination regarding social services benefits is not reviewable in the Housing Court."¹⁹⁴ Consequently, the process in some cases will frustrate judges, GALs, and landlords, when APS does not initially accept a case when the court makes a referral and does so only much later, after a final judgment has been rendered.

In *Vega v. Eggleston*, a 2002 action in Supreme Court, New York County, the New York Legal Assistance Group represented a class of plaintiffs against the commissioner of HRA and others, who were represented by the New York City Corporation Counsel and the New York State Attorney General.¹⁹⁵ The court signed a so-ordered a consent stipulation in 2003 in which APS promised to improve its assessment and intake process in a wide variety of matters, including eviction prevention and housing relocation. As relevant to Housing Court GALs, the consent order's goal is two-fold. First to assure that "APS will address, promptly and appropriately, the eviction prevention and housing relocation service needs of clients who appear to be APS eligible while they are being assessed for APS services when delaying such services until after initial Assessment would be harmful to the client."¹⁹⁶ Second, to assure that APS, during the referral and assessment process, will "take all reasonable steps appropriate under the circumstances to prevent the eviction of, or to attempt to relocate, the client on or before the eviction date."¹⁹⁷

XV. Conclusion

New York's adult population, especially the growing senior-citizen segment, will continue to require advocacy in Housing Court due to mental and physical impairments. The pool of qualified GALs must keep pace. What is best for the ward, landlords, GALs, the GAL program, and the court are expedient, fair resolutions. All involved in the process must strive to enable GALs to serve the ward, the court, and society and to minimize the disruptions and intrusions into the lives of incapacitated individuals with tenancies in jeopardy.

(Endnotes)

¹ See N.Y.C. Dep't of Aging, *Quick Facts on the Elderly in New York City*, available at <http://home2.nyc.gov/html/dfta/downloads/pdf/quickfacts.pdf> (last visited Aug. 11, 2007) (reporting that according to 2005 Census, approximately 943,000 New Yorker City dwellers are over 65; approximately 2.4 million individuals are over 65 in New York State).

² See N.Y.C. Dep't of Health & Mental Hygiene, Div. of Mental Hygiene, *Prevalence and Cost Estimates of Psychiatric and Substance Use Disorders and Mental Retardation and Developmental Disabilities in N.Y.C. 9*, available at <http://www.nyc.gov/html/doh/downloads/pdf/mh/mh-2003prevalence.pdf> (last visited Aug. 11, 2007) (noting that about 366,000 individuals in New York City have psychiatric and substance-abuse disorders).

³ For two excellent pieces on GAL law and practice, see Jeanette Zelhof, Andrew Goldberg & Hina Shamsi, *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 Cardozo Pub. L. Pol'y & Ethics J. 733 (2006); Judith J. Gische, *Guardian ad Litem Appointments in Civil Proceedings for Adults Incapable of Adequately Prosecuting or Defending Their Rights*, 19 Westchester B.J. 289 (1992).

⁴ Adult Protective Services is formerly known as Protective Services for Adults (PSA).

⁵ See generally Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 Cardozo Pub. L. Pol'y & Ethics J. 659 (2006) (discussing problems facing pro se litigants in Housing Court).

⁶ One Housing Court judge has written that "[o]ur sense of concern and frustration is heightened at times by the perceived inaction, delay and bureaucratic impenetrability of government agencies and programs (Adult Protective Services [APS])

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... [and] the perceived delay in related matters in other courts (e.g., Supreme Court Article 81 proceedings) . . .” Marc Finkelstein, *Guardians Ad Litem in Housing Court* 4 (unpublished outline revised for N.Y. St. B. Ass’n Cttee. on Landlord and Tenant Proceedings, Sept. 14, 2006) (alteration adding “APS” in original).

⁷ *De Forte v. Liggett & Myers Tobacco Co.*, 42 Misc. 2d 721, 723, 248 N.Y.S.2d 764, 766 (Sup. Ct. Kings Co. 1964) (citing *Honadle v. Stafford*, 265 N.Y. 354, 356, 193 N.E. 172, 173 (1934); *Lee v. Gucker*, 16 Misc. 2d 346, 347, 186 N.Y.S.2d 700, 702 (Sup. Ct. N.Y. Co. 1959)).

⁸ Black’s Law Dictionary 46 (8th ed. 2004).

⁹ See *City of N.Y. v. Tillis*, N.Y.L.J., Feb. 9, 2000, p. 29, col. 4 (Hous. Part Civ. Ct. N.Y. Co. 2000) (noting Housing Court’s bringing application for GAL on its own motion).

¹⁰ See 256 A.D.2d 90, 91, 681 N.Y.S.2d 494, 494 (1st Dep’t 1998) (mem.).

¹¹ *Pettas v. Pettas*, 88 Misc. 2d 955, 957, 389 N.Y.S.2d 537, 539 (Sup. Ct. Nassau Co. 1976).

¹² In the Family Court of the State of New York in the City of New York, law guardians are private practitioners or lawyers from The Legal Aid Society, Lawyers for Children, the Society for the Prevention of Cruelty to Children, or the Children’s Law Center whom the judge assigns to represent a child in Family Court under the Family Court Act. N.Y.C. Bar Ass’n, *Introductory Guide to the New York City Family Court* 4 (2006) (Gerald Lebovits, principal author), available at http://www.abcnyc.org/pdf/famguide_ms.pdf (last visited Aug. 11, 2007). For the differences between guardians in Family Court and Surrogate’s Court, see *id.* at 38 (“The Family Court has similar jurisdiction and authority as the Surrogate Court about the guardianship of the person of a minor, a child 17 years or younger. Normally, guardianship petitions of the person of a minor are filed in the Family Court. The Surrogate’s Court has the power over the property of a minor and may appoint a guardian of the person, the property, or both the person and the property.”). For an excellent piece on legal guardians and children, see Cross-Borough Collaboration, *The Basics: Becoming a Legal Guardian in New York State* (2002), available at <http://www.brooklynbar.org/vlp/booklets/81441CBCBasicGuardiansrcb.pdf> (last visited Aug. 11, 2007).

¹³ See Mental Hygiene Law § 81.02(a)(2).

¹⁴ *Id.* § 81.02(b).

¹⁵ *Sengstack v. Sengstack*, 4 N.Y.2d 502, 509, 176 N.Y.S.2d 337, 342, 151 N.E.2d 887, 890 (1958).

¹⁶ N.Y.C. Civ. Ct., Advisory Notice, *Settlements in GAL Cases* (eff. Mar. 8, 2007), available at <http://nycourts.gov/courts/nyc/housing/directives/AN/gal.pdf> (last visited Aug. 11, 2007).

¹⁷ N.Y.C. Civ. Ct., Directives and Procedures, *GAL Case Summary* (eff. Mar. 7, 2007), available at <http://nycourts.gov/courts/nyc/housing/directives/DRP/drp178.pdf> (last visited Aug. 11, 2007).

¹⁸ 15 Misc. 3d 30, 31, 833 N.Y.S.2d 348, 349 (App. Term 1st Dep’t 2007) (per curiam) (vacating judgment because GAL, despite not having met or visited tenant, entered into stipulation for judgment of possession to landlord, despite parties’ knowledge that APS intended to file for Article 81 guardianship).

¹⁹ CIV-LT-57, *GAL Case Summary* (eff. Feb. 2, 2007), available at <http://nycourts.gov/courts/nyc/housing/pdfs/gal%20pdfs/casesummary.pdf> (last visited Aug. 11, 2007).

²⁰ *Riley v. Erie Lackawanna R.R. Co.*, 119 Misc. 2d 619, 621, 463 N.Y.S.2d 986, 987 (Sup. Ct. Chautauqua Co. 1983).

²¹ N.Y. County L. Ass’n (NYCLA), *Task Force on Housing Court Resources Subcommittee Report*, available at http://www.nycla.org/siteFiles/Publications/Publications468_0.pdf (last visited Aug. 11, 2007) [hereinafter “NYCLA Subcommittee Rpt.”]. The recommendations of the groups that participated at the NYCLA conference appear at 3 Cardozo Pub. L. Policy & Ethics J. 591 (2006).

²² N.Y. County L. Ass’n (NYCLA), *Report on Resources in the Housing Court*, available at http://nycla.org/siteFiles/News/News59_1.pdf (last visited Aug. 11, 2007) [hereinafter “NYCLA Final Rpt.”].

²³ *Id.* at 8-14 & 19-21.

²⁴ *Id.* at 12; accord NYCLA Subcommittee Rpt., *supra* note 21, at 10.

²⁵ Zelhof et al. *supra* note 3, at 745.

²⁶ *Id.* This proposition has case-law support: “Although a guardian ad litem appointed for an incapacitated adult party may prosecute or defend the claims and rights of such a party, the guardian ad litem is the only CPLR 1201 representative who is not expressly authorized by statute to apply for court approval of a proposed compromise of the claims of such incapacitated party pursuant to CPLR 1207.” *DeSantis ex rel Qualtiere v. Bruen*, 165 Misc. 2d 291, 295, 627 N.Y.S.2d 534, 537 (Sup. Ct. Suffolk Co. 1995).

²⁷ 176 Misc. 2d 550, 553, 672 N.Y.S.2d 994, 997 (Sur. Ct. N.Y. Co. 1998) (cited in Zelhof et al., *supra* note 3, at 763 n.112).

²⁸ 215 A.D.2d 750, 750, 627 N.Y.S.2d 419, 419 (2d Dep’t 1995) (mem.) (cited in Paris R. Baldacci, *Addressing the Challenge of Persons with diminished Capacity in Housing Court: Index of Materials* 212, 213 (unpublished outline for N.Y.C. Bar Ass’n CLE, Dec. 7, 2005).

²⁹ Zelhof et al. *supra* note 3, at 762 (“MFY [legal services] attorneys have heard references during court appearances, and

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²(*Guardians Ad Litem*, continued from page 21)

have seen references in training materials for guardians ad litem, to the concept of 'stepping into the shoes' of wards. An electronic search of reported cases in New York State does not provide guidance as to the content of this phrase.").

³⁰ *In re Feliciano v. Nielson*, 290 A.D.2d 834, 835, 736 N.Y.S.2d 510, 512 (3d Dep't 2002) (quoting *In re Aho*, 39 N.Y.2d 241, 247, 383 N.Y.S.2d 285, 288, 347 N.E.2d 647, 651 (1976)).

³¹ Gische, *supra* note 3, at 290.

³² Finkelstein, *supra* note 6, at 21.

³³ See Fern A. Fisher, *Comment to the NYCLA Task Force on Housing Court Resources Subcommittee Report on Standardized Procedures in Cases Where GALs are Appointed for Respondents with Diminished Capacity* 6 (2006).

³⁴ *Id.* at 1-2.

³⁵ *Id.* at 2.

³⁶ *Id.* at 6.

³⁷ See NYCLA Subcommittee Rpt., *supra* note 21, at Addendum.

³⁸ *N.Y. Life Ins. Co. v. V.K.*, 184 Misc. 2d 727, 732, 711 N.Y.S.2d 90, 95 (Hous. Part Civ. Ct. N.Y. Co. 1999).

³⁹ Neil H. Mickenberg, *The Silent Clients: Legal Aid and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 Stan. L. Rev. 625, 634 (1979) (footnotes omitted).

⁴⁰ N.Y.C. Civ. Ct., Advisory Notice, *GAL Cases Where There is Also an Attorney of Record* (eff. Apr. 18, 2007).

⁴¹ *Id.*

⁴² *In re M.R.*, 135 N.J. 155, 177-78, 638 A.2d 1274, 1285 (1994).

⁴³ N.Y. St. B. Ass'n, Cttee. on Prof. Ethics, Op. 746 (July 18, 2001); accord ABA Formal Ethics Op. 96-404, *Client Under a Disability* (Aug. 2, 1996).

⁴⁴ *Id.*

⁴⁵ Zelhof et al., *supra* note 3, at 771.

⁴⁶ *Bolsinger v. Bolsinger*, 144 A.D.2d 320, 321, 533 N.Y.S.2d 934, 934 (2d Dep't 1988) (mem.).

⁴⁷ NYCLA Final Rpt., *supra* note 22, at 13.

⁴⁸ Op. Att'y Gen. No. 2006-F3, available at <http://www.oag.state.ny.us/lawyers/opinions/2006/formal/2006-F3.pdf> (last visited Aug. 11, 2007).

⁴⁹ Op. Att'y Gen. No. 2006-F5, available at <http://www.oag.state.ny.us/lawyers/opinions/2006/formal/2006-F5.pdf> (last visited Aug. 11, 2007).

⁵⁰ The legislation, proposed by retired Housing Judge Bruce Gould and cowritten by Dov Treiman, Esq., both Committee members, would provide as follows: "Subdivision (j) of section 110 of the New York City Civil Court Act is added to read as follows: (j) In actions and proceedings before the Housing Part, guardians ad litem appointed by the court pursuant to Article 12 of the civil practice law and rules shall be deemed state employees solely for the purposes of the Public Officers Law Section 17, titled, "Defense and indemnification of state officers and employees."

⁵¹ *Lau v. Berman*, Index No. 18375CVN2004, at 4 (Civ. Ct., N.Y. Co.) (Kern, J.) (unpub. op.) (quoting *Aho*, 39 N.Y.2d at 247, 383 N.Y.S.2d at 288, 347 N.E.2d at 651) (explaining that a "guardian ad litem may [not] be regarded as an unbiased protagonist of the wishes of an incompetent").

⁵² *Id.* (citing *Smith v. Keteltas*, 27 App. Div. 279, 50 N.Y.S. 471 (1st Dep't 1898)).

⁵³ N.Y.C. Civ. Ct., Housing Part, *Prospective Guardians Ad Litem*, available at <http://www.nycourts.gov/courts/nyc/housing/GALprospective.shtml> (last visited Aug. 11, 2007).

⁵⁴ *Id.*

⁵⁵ See https://www.nycourts.gov/courts/nyc/housing/pdfs/GAL_application.pdf (last visited Aug. 11, 2007).

⁵⁶ 22 N.Y.C.R.R. Part 36.1(b)(3) (Rules of the Chief Judge).

⁵⁷ *Soybel v. Gruber*, 132 Misc. 2d 343, 347 504 N.Y.S.2d 354, 357 (Hous. Part Civ. Ct. N.Y. Co. 1986). In *Soybel*, at issue was the then-extant Brooklyn Law School's Senior Citizen Law Office.

⁵⁸ See *Backerman v. Coccola*, 189 A.D. 235, 237, 178 N.Y.S. 423, 424 (1st Dep't 1919).

⁵⁹ CPLR 1202(c).

⁶⁰ *Weingarten v. State*, 94 Misc. 2d 788, 791, 405 N.Y.S.2d 605, 607 (Ct. Cl. 1978).

⁶¹ Finkelstein, *supra* note 6, at 20 ("Guardian ad litem orders do often provide that the guardian ad litem is to serve without bond . . .") & 21 ("[I]t might be argued that the specific affidavit requirement of 1202(c) is not necessary for GAL's in Housing Court.").

⁶² N.Y.C. Civ. Ct., *Housing Part Guardian ad Litem*, LSM 153 (revised) (eff. Sept. 30, 2005), at 2, available at <http://www.nycourts.gov/courts/nyc/civil/directives/LSM/lsm153.pdf> (last visited Aug. 11, 2007).

⁶³ *Id.* at 1.

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(*Guardians Ad Litem*, continued from page 22)

⁶⁴ *NYCLA Final Rpt.*, *supra* note 22, at 9. For the benefits of serving as a Housing Court GAL, see William J. Dean, Pro Bono Digest, *Service as a Guardian ad Litem*, N.Y.L.J., July 3, 2006, p. 3, col. 1 (quoting private practitioners who serve as volunteer GALs, including this: "My greatest accomplishment as a lawyer will always be my work on behalf of a mentally disabled indigent client, for whom I served as a guardian ad litem.") (quoting Lisa E. Cleary, Esq.).

⁶⁵ *Bolsinger*, 144 A.D.2d at 321, 533 N.Y.S.2d at 934.

⁶⁶ *Barnes v. MRG Partners*, N.Y.L.J., Nov. 29, 2000, p. 29, col. 3 (Hous. Part Civ. Ct. N.Y. Co.).

⁶⁷ See *Kalimian v. Driscoll*, N.Y.L.J., Mar. 6, 1991, p. 22, col. 3 (Civ. Ct. N.Y. Co.) (vacating jury verdict despite presence of counsel because tenant was "unable to effectively cooperate with [counsel] at trial, post-trial and on appeal and does not fully understand the legal and practical consequences of subject summary proceedings"), *aff'd*, N.Y.L.J., July 20, 1992, p. 23, col. 4 (App. Term 1st Dep't) (per curiam).

⁶⁸ N.Y.L.J., Jun. 16, 1989, p. 25, col. 5 (App. Term 1st Dep't) (per curiam).

⁶⁹ N.Y.L.J., Aug. 24, 1994, p. 23, col. 4 (Hous. Part Civ. Ct. Bronx Co.).

⁷⁰ *Villafane v. Banner*, 87 Misc. 2d 1037, 1038-39, 387 N.Y.S.2d 183, 184 (Sup. Ct. N.Y. Co. 1976).

⁷¹ *N.Y. Life Ins.*, 184 Misc. 2d at 731, 711 N.Y.S.2d at 93.

⁷² CPLR 1012(a)(1).

⁷³ Soc. Serv. L. § 473(2)(a).

⁷⁴ *N.Y. Life Ins.*, 184 Misc. 2d at 729, 711 N.Y.S.2d at 93.

⁷⁵ See CPLR 401; *N.Y. Life Ins.*, 184 Misc. 2d at 731, 711 N.Y.S.2d at 94.

⁷⁶ CPLR 1202(a)(3).

⁷⁷ See, e.g., *Sarfaty v. Sarfaty*, 83 A.D.2d 748, 749, 443 N.Y.S.2d 506, 507 (4th Dep't 1981) (mem.) ("[P]laintiff had the burden to bring the condition of defendant's mental state to the court's attention so that it could make suitable inquiry and determine whether a guardian should have been appointed for her to protect her interests and before a default judgment could be entered against her."); *Barone v. Cox*, 51 A.D.2d 115, 118, 379 N.Y.S.2d 881, 884 (4th Dep't 1976); *Parras v. Ricciardi*, 185 Misc. 2d 209, 214, 710 N.Y.S.2d 792, 796-97 (Hous. Part Civ. Ct. Kings Co. 2000) ("When a creditor becomes aware that his alleged debtor is or apparently is incapable of protecting his own legal interests it is incumbent upon him to advise the court thereof so . . . the court may thereafter in its discretion appoint a guardian ad litem to protect the defendant's interests.").

⁷⁸ N.Y.L.J., July 11, 2001, p. 25, col. 6 (Hous. Part Civ. Ct. Queens Co.).

⁷⁹ *State of N.Y. v. Getelman*, N.Y.L.J., Sept. 7, 1993, p. 25, col. 6 (Sup. Ct. Albany Co.).

⁸⁰ See *Benenson v. Dimonda*, N.Y.L.J., Jan. 16, 2002, p. 22, col. 1 (Civ. Ct. Kings Co.); *Parras*, 185 Misc. 2d at 213-14, 710 N.Y.S.2d at 796.

⁸¹ N.Y.C. Civ. Ct., LSM 153 (revised) (eff. Sept. 30, 2005), at 2, available at http://www.nycourts.gov/courts/nyc/civil/directives/LSM/lsm_153.pdf (revised) (last visited Aug. 11, 2007).

⁸² See, e.g., *N.Y.C. Hous. Auth. v. Hart*, N.Y.L.J., May 16, 1990, p. 29, col. 3 (Civ. Ct. N.Y. Co.).

⁸³ CPLR 1202(a); accord *Finkelstein*, *supra* note 6, at 8 (noting that Housing Court judges have authority to appoint GALs).

⁸⁴ *Stane v. Dery*, 86 Misc. 2d 416, 417, 382 N.Y.S.2d 607, 608 (Sup. Ct. N.Y. Co. 1976); *Soybel*, 132 Misc. 2d at 343, 504 N.Y.S.2d at 354.

⁸⁵ See *1199 Hous. Corp. v. Jackson*, N.Y.L.J., Mar. 20, 1991, p. 22, col. 6 (Hous. Part Civ. Ct. N.Y. Co.) ("[T]here is no basis for a guardian ad litem to be appointed by this court . . ."); *Silgo 22nd St. Assocs. v. Hennies*, N.Y.L.J., Apr. 24, 1991, p. 22, col. 6 (Hous. Part Civ. Ct. N.Y. Co. 1991) (same); *Zuckerman v. Burgess*, N.Y.L.J., Mar. 13, 1991, p. 22, col. 3 (Hous. Part Civ. Ct. N.Y. Co. 1991) (same).

⁸⁶ *BML Realty Group*, 15 Misc. 3d at 31, 833 N.Y.S.2d at 349; *83 E. Assocs. v. Mager*, N.Y.L.J., Nov. 10, 1992, p. 21, col. 1 (App. Term 1st Dep't) (per curiam) (finding, given documentation submitted supporting tenant's mental condition, that "it was an abuse of discretion for [Housing Court] to have denied, without a hearing, the motion to ascertain whether tenant was capable of . . . adequately defending her interests in the litigation").

⁸⁷ *Soybel*, 132 Misc. 2d at 347, 504 N.Y.S.2d at 357.

⁸⁸ *466 Assocs. v. Murray*, 151 Misc. 2d 472, 476, 573 N.Y.S.2d 360, 363 (Civ. Ct. N.Y. Co. 1991).

⁸⁹ *N.Y. Life Ins.*, 184 Misc. 2d at 728-729, 711 N.Y.S.2d at 92 ("The standard of proof to establish the grounds for a guardian ad litem is a preponderance of the evidence.").

⁹⁰ *In re Lugo*, 8 A.D.2d 877, 877, 187 N.Y.S.2d 59, 61 (3d Dep't 1959) (mem.), *aff'd*, 7 N.Y.2d 939, 197 N.Y.S.2d 740 (1960); *Anonymous v. Anonymous*, 3 A.D.2d 590, 594, 162 N.Y.S.2d 984, 988 (2d Dep't 1957); *Stane*, 86 Misc. 2d at 417, 382 N.Y.S.2d at 608.

⁹¹ See 4 N.Y.2d at 509, 176 N.Y.S.2d at 342.

⁹² 21 A.D.2d 152, 154, 249 N.Y.S.2d 320, 322 (1st Dep't 1964).

⁹³ See *id.* at 155, 249 N.Y.S.2d at 324.

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- ⁹⁴ See *Riley v. Erie L. R.R. Co.*, 119 Misc. 2d 619, 619, 463 N.Y.S.2d 986, 986 (Sup. Ct. Chautauqua Co. 1983).
- ⁹⁵ See, e.g., *Parras*, 185 Misc. 2d at 215, 710 N.Y.S.2d at 797.
- ⁹⁶ See *In re Application of King*, 284 A.D. 748, 749, 135 N.Y.S.2d 495, 496 (2d Dep't 1954).
- ⁹⁷ See *id.* at 214, 710 N.Y.S.2d at 796.
- ⁹⁸ 62 A.D.2d 990, 990, 403 N.Y.S.2d 316, 316 (2d Dep't 1978) (mem.).
- ⁹⁹ See *Shad v. Shad*, 167 A.D.2d 532, 533, 562 N.Y.S.2d 202, 203 (2d Dep't 1990).
- ¹⁰⁰ *Grasso v. Matarazzo*, N.Y.L.J., Apr. 8, 1998, p. 32, col. 3 (Hous. Part Civ. Ct. Kings Co.); *Kings 28 Assocs. v. Raff*, 167 Misc. 2d 351, 353, 636 N.Y.S.2d 257, 258 (Hous. Part Civ. Ct. Kings Co. 1995).
- ¹⁰¹ 94 Misc. 2d at 790, 405 N.Y.S.2d at 607.
- ¹⁰² *Jonas Equities v. Brunelle*, N.Y.L.J., Feb. 6, 1991, p. 25, col. 2 (Hous. Part Civ. Ct. Queens Co.), *rev'd on other grounds*, N.Y.L.J., Jun. 29, 1992, p. 32, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).
- ¹⁰³ 1021-27 Ave. St. John HDfC v. Hernandez, N.Y.L.J., May 6, 1992, p. 23, col. 3 (Hous. Part Civ. Ct. Bronx Co.).
- ¹⁰⁴ *Finkelstein*, *supra* note 6, at 10.
- ¹⁰⁵ *Wenzel v. Wenzel*, 122 Misc. 2d 1001, 1003, 472 N.Y.S.2d 830, 834 (Sup. Ct. Suffolk Co. 1984).
- ¹⁰⁶ 45 Misc. 2d 580, 581, 257 N.Y.S.2d 434, 435 (Sup. Ct. N.Y. Co. 1965).
- ¹⁰⁷ See, e.g., *So. Indust., Inc. v. Esray Fabrics, Inc.* 81 A.D.2d 647, 647, 438 N.Y.S.2d 341, 342 (2d Dep't 1981) (mem.).
- ¹⁰⁸ *Bird v. Citibank, N.A.*, 102 A.D.2d 718, 719, 477 N.Y.S.2d 1, 3 (1st Dep't 1984) (mem.); *Vinokur*, 62 A.D.2d at 990, 403 N.Y.S.2d at 316.
- ¹⁰⁹ *In re Christopher*, 177 Misc. 2d 352, 354, 675 N.Y.S.2d 807, 807 (Sup. Ct. Queens Co. 1998).
- ¹¹⁰ *Anonymous v. Anonymous*, 256 A.D.2d 90, 91, 681 N.Y.S.2d 494, 494 (1st Dep't 1998) (mem.) (appointing GAL due to defendant's "chronic irrational and agitated state attributable to alcohol and substance abuse and defendant's consequent and manifest inability to assist his attorneys in his defense").
- ¹¹¹ *Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607 ("[W]hen an application is made for appointment of a guardian ad litem to represent a person who resides in a mental institution, whether on a voluntary basis or pursuant to court commitment, such residence creates a presumption that the person involved is unable to adequately prosecute or defend his rights.").
- ¹¹² See, e.g., *466 Assocs.*, 151 Misc. 2d at 474, 573 N.Y.S.2d at 361.
- ¹¹³ See *Acosta v. Beka Realty LLC*, N.Y.L.J., Oct. 3, 2005, p. 17, col. 1 (Hous. Part Civ. Ct. Kings Co.) (appointing GAL in HP proceeding).
- ¹¹⁴ *Kirso Prop. Co. v. Brief, Comm'r of Soc. Servs. of City of N.Y.*, N.Y.L.J., Jun. 29, 1998, p. 30, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).
- ¹¹⁵ See, e.g., *Kalimian*, N.Y.L.J., July 20, 1992, p. 23, col. 4 (App. Term 1st Dep't) (per curiam) ("The fact that tenant was represented by counsel in the trial proceedings is of little, if any, relevance in determining whether she was prejudiced by the absence of a guardian ad litem.").
- ¹¹⁶ N.Y.L.J. Feb. 2, 2000, p. 28, col. 4 (Civ. Ct. N.Y. Co.).
- ¹¹⁷ See *Parras*, 185 Misc. 2d at 215, 710 N.Y.S.2d at 797.
- ¹¹⁸ See, e.g., *Rakiecki v. Ferenc*, 21 A.D.2d 741, 741, 250 N.Y.S.2d 102, 103 (4th Dep't 1964) (mem.).
- ¹¹⁹ *N.Y.C. Hous. Auth. v. Beverly B.*, N.Y.L.J., Apr. 13, 2005, p. 20, col. 1 (Hous. Part Civ. Ct. Kings Co.).
- ¹²⁰ N.Y.C. Civ. Ct., Adv. Notice, *Default Judgments in GAL Cases* (eff. Mar. 8, 2007), available at <http://nycourts.gov/courts/nyc/housing/directives/AN/default.pdf> (last visited Aug. 11, 2007) (citing, among others, *Oneida Nat'l Bank & Trust Co. Cent. N.Y. v. Unczur*, 37 A.D.2d 480, 326 N.Y.S.2d 458 (4th Dep't 1971)).
- ¹²¹ E.g., *Grasso*, N.Y.L.J., Apr. 8, 1998, p. 32, col. 3.
- ¹²² *Deepdale Gardens Third Corp. v. Knox*, N.Y.L.J., Oct. 1, 1996, p. 26, col. 1 (Sup. Ct. Queens Co.).
- ¹²³ N.Y.L.J., Jan. 15, 2003, p. 21, col. 5 (Dist. Ct. Nassau Co.) [incorrectly labeled "Richmond County District Court" in N.Y.L.J.].
- ¹²⁴ *N.Y. Life Ins.*, 184 Misc. 2d at 737, 711 N.Y.S.2d at 97 (quoting *In re Estate of Bacon*, 169 Misc. 2d 858, 864, 645 N.Y.S.2d 1016, 1020 (Sur. Ct. Westchester Co. 1996)).
- ¹²⁵ See, e.g., *Hotel Pres. v. Byrne*, N.Y.L.J., Mar. 12, 1999, p. 26, col. 1 (App. Term 1st Dep't) (per curiam) (vacating default judgment because petitioner knew or had reason to know that respondent was incapable of protecting her interests when judgment was entered); *Jackson Gardens*, N.Y.L.J., July 11, 2001, p. 25, col. 6 (vacating default judgment because petitioner knew that respondent-tenant had GAL in prior proceeding); *Surrey Hotel Assocs., L.L.C. v. Sabin*, N.Y.L.J., June 29, 2000, p. 28, col. 4 (Hous. Part Civ. Ct. N.Y. Co.) (vacating judgment because petitioner had accepted rent from APS and complained about tenant's behavior); *Glick v. Quintana*, N.Y.L.J., Nov. 30, 1992, p. 27, col. 4 (Civ. Ct. N.Y. Co.) (vacating default judgment because petitioner knew that respondent had a GAL in two prior proceedings).
- ¹²⁶ See, e.g., *Greene v. Resch*, 114 Misc. 2d 780, 783, 452 N.Y.S.2d 314, 316 (Hous. Part Civ. Ct. Kings Co.) (denying vacatur of judgment even though opposing party knew about tenant's mental incapacity.).

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- ¹²⁷ N.Y.L.J., July 20, 1992, p. 23, col. 4 (App. Term 1st Dep't) (per curiam).
- ¹²⁸ N.Y.L.J., Nov. 9, 1993, p. 26, col. 1 (Sup. Ct. N.Y. Co.).
- ¹²⁹ See, e.g., 355 W. 85th St. Corp. v. Tremblay, N.Y.L.J., Apr. 3, 2002, p. 18, col. 5 (Hous. Part Civ. Ct. N.Y. Co.).
- ¹³⁰ See N.Y.L.J., Nov. 19, 1998, p. 32, col. 4 (App. Term 1st Dep't) (per curiam).
- ¹³¹ See *Urban Pathways, Inc. v. Lublin*, 227 A.D.2d 186, 186, 642 N.Y.S.2d 26, 26 (1st Dep't 1996) (mem.).
- ¹³² *Wilson Han Assocs., Inc. v. Arthur*, N.Y.L.J., July 6, 1999, p. 29, col. 4 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1999) (mem.).
- ¹³³ See *So. Indus.*, 81 A.D.2d at 647, 438 N.Y.S.2d at 341 (finding that physical impairment alone did not render tenant unable to defend his interests adequately).
- ¹³⁴ 211 A.D.2d 559, 559, 621 N.Y.S.2d 77, 78 (1st Dep't 1995) (mem.).
- ¹³⁵ 12 Misc. 3d 26, 816 N.Y.S.2d 815 (App. Term 1st Dep't 2006) (per curiam).
- ¹³⁶ *Id.*, at 29, 816 N.Y.S.2d at 817 (Gangel-Jacob, J., dissenting).
- ¹³⁷ *Id.*, at 27, 816 N.Y.S.2d at 816.
- ¹³⁸ See *Arcieri v. Arcieri*, 49 Misc. 2d 223, 224, 266 N.Y.S.2d 1020, 1021 (Sup. Ct. Kings Co. 1966) (finding that prior institutionalization did not evidence existing incompetency).
- ¹³⁹ 107 A.D.2d 568, 568, 483 N.Y.S.2d 307, 308 (1st Dep't 1985) (mem.).
- ¹⁴⁰ See *id.*, at 569, 483 N.Y.S.2d at 308.
- ¹⁴¹ 220 A.D.2d 39, 44-45, 643 N.Y.S.2d 148, 152 (2d Dep't 1996).
- ¹⁴² *Id.* at 43, 643 N.Y.S.2d at 151.
- ¹⁴³ See *id.* at 46, 643 N.Y.S.2d at 153.
- ¹⁴⁴ *N.Y.C. Hous. Auth. v. Maldonado*, N.Y.L.J., Apr. 13, 2005, p. 19, col. 3 (Hous. Part Civ. Ct. Bronx Co.).
- ¹⁴⁵ 42 Misc. 2d 721, 723, 248 N.Y.S.2d 764, 766 (Sup. Ct. Kings Co. 1964).
- ¹⁴⁶ See *Pomeroy Co. v. Thompson*, N.Y.L.J., Sept. 18, 2002, p. 20, col. 6 (Hous. Part Civ. Ct. N.Y. Co.) (finding that GAL, APS, and N.Y.C. Department of Investigation failed to protect ward's tenancy because no one submitted application for grant for arrears before eviction), *aff'd*, 5 Misc. 3d 51, 784 N.Y.S.2d 278 (App. Term 1st Dep't 2004) (per curiam).
- ¹⁴⁷ CPLR 1203 provides that "[n]o judgment by default may be entered against an infant or a person judicially declared to be incompetent unless his representative appeared in the action or twenty days have expired since appointment of a guardian ad litem for him."
- ¹⁴⁸ 1 Misc. 3d 906(A), 781 N.Y.S.2d 624, 2003 N.Y. Slip. Op. 51524(U), at *1, 2003 WL 23109709, at *3, 2003 N.Y. Misc. LEXIS 1635 (Hous. Part Civ. Ct. N.Y. Co., Dec. 19, 2003) (Gerald Lebovits, J.).
- ¹⁴⁹ The GAL in the proceeding was eventually removed from the Civil Court's GAL program.
- ¹⁵⁰ *BML Realty Group*, 15 Misc. 3d at 31, 833 N.Y.S.2d at 349 (quoting *N.Y.C. Hous. Auth. v. Jackson*, 13 Misc. 3d 141(A), 2006 N.Y. Slip Op. 522655(U), 2006 WL 3437858, at *2 (App. Term 2d Dep't 2d & 11th Jud. Dists. Nov. 17, 2006) (mem.)).
- ¹⁵¹ N.Y.C. Civ. Ct. Advisory Notice, *Settlements in GAL Cases* (Mar. 8, 2007) available at <http://nycourts.gov/courts/nyc/housing/directives/AN/gal.pdf> (last visited Aug. 11, 2007).
- ¹⁵² *Id.*
- ¹⁵³ *Zelhof et al. supra* note 3, at 765.
- ¹⁵⁴ *Parras*, 185 Misc. 2d at 212-13, 710 N.Y.S.2d at 795.
- ¹⁵⁵ *Id.* at 212, 710 N.Y.S.2d at 795.
- ¹⁵⁶ *Id.*, 710 N.Y.S.2d at 795.
- ¹⁵⁷ *Id.*, 710 N.Y.S.2d at 795.
- ¹⁵⁸ *Id.*, 710 N.Y.S.2d at 795.
- ¹⁵⁹ *Id.*, 710 N.Y.S.2d at 796.
- ¹⁶⁰ *Andrews v. Mensch*, 100 Misc. 2d 79, 81, 418 N.Y.S.2d 527, 528 (Dist. Ct. Suffolk Co. 1979) ("Nevertheless, CPLR 1202 requires that notice be given to the person who would be represented and since no such notice has been given in this instance, the court is inclined to deny the motion with leave to renew upon proper papers."); *Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607.
- ¹⁶¹ *Bocina v. Schlau*, 125 Misc. 2d 682, 683, 480 N.Y.S.2d 93, 94 (Sup. Ct. Suffolk Co. 1984) (citing *Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607)).
- ¹⁶² N.Y.L.J., Jul. 29, 2005, p. 20, col. 1 (Hous. Part Civ. Ct. Kings Co.).
- ¹⁶³ CPLR 1204.
- ¹⁶⁴ 22 N.Y.C.R.R. 36.4(b)(1).
- ¹⁶⁵ *Id.* 36.4(b)(2).
- ¹⁶⁶ See <http://www.courts.state.ny.us/courts/nyc/housing/GALexisting.shtml#forms> (last visited Aug. 11, 2007).
- ¹⁶⁷ 22 N.Y.C.R.R. 36.4(b)(4).

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¹⁶⁸ *C.F.B. v. T.B.*, 9 Misc. 3d 1105(A), 806 N.Y.S.2d 443, 2005 N.Y. Slip Op. 51412(U), at *5, 2005 WL 2185481, at *4, 2005 N.Y. Misc. LEXIS 1902, at *12 (Sup. Ct. Erie Co. May 24, 2005).

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ *Bolsinger*, 144 A.D.2d at 321, 533 N.Y.S.2d at 934.

¹⁷² *Id.*, 533 N.Y.S.2d at 935 (quoting *In re Becan*, 26 A.D.2d 44, 48, 270 N.Y.S.2d 923, 930 (1st Dep't 1966), and *In re Lydia E. Hall Hosp. (Cinque)*, 117 Misc. 2d 1024, 1025, 459 N.Y.S.2d 682, 683 (Sup. Ct. Nassau Co. 1982)).

¹⁷³ 35 A.D.2d 927, 927, 316 N.Y.S.2d 575, 576 (1st Dep't 1970) (per curiam)

¹⁷⁴ *Id.*, 316 N.Y.S.2d at 576.

¹⁷⁵ *Id.*, 316 N.Y.S.2d at 576.

¹⁷⁶ 26 A.D.2d at 48, 270 N.Y.S.2d at 930.

¹⁷⁷ *Id.*, 270 N.Y.S.2d at 930.

¹⁷⁸ 127 A.D.2d 960, 961, 512 N.Y.S.2d 565, 566 (3d Dep't 1987).

¹⁷⁹ 298 A.D.2d 677, 679, 748 N.Y.S.2d 811, 813 (3d Dep't 2002).

¹⁸⁰ 164 Misc. 2d 272, 274, 624 N.Y.S.2d 351, 353 (Sur. Ct. N.Y. Co. 1995).

¹⁸¹ For an explanation at APS's Web site of what the agency does, see http://www.nyc.gov/html/hra/downloads/pdf/adult_protective_services.pdf (last visited Aug. 11, 2007).

¹⁸² APS Memorandum W2-244, Rev. Jan. 2005 [hereinafter "APS Memorandum"].

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See, e.g., Matott v. Ward*, 48 N.Y.2d 455, 423 N.Y.S.2d 645, 399 N.E.2d 532 (1979).

¹⁸⁷ The New York City Bar Association used to be a source of volunteer GALs. The City Bar's GAL program no longer exists, even though program details still appear on the City Bar's Web site. *See* <http://www.abcny.org/CityBarFund/CommunityOutreachLawProgram.htm> (last visited Aug. 11, 2007).

¹⁸⁸ *Zelhof et al.*, *supra* note 3, at 749.

¹⁸⁹ *Marypat Realty Corp. v. Hernandez*, N.Y.L.J., Dec. 31, 2002, p. 18, col. 1, 2002 N.Y. Slip Op. 50504(U), at *1, 2002 WL 31940717, at *1 (App. Term 1st Dep't) (per curiam).

¹⁹⁰ *See* APS Search page, available at <https://a069-webapps3.nyc.gov/APSearch/login.aspx> (last visited Aug. 11, 2007). APS Search requires a username and password.

¹⁹¹ Marshals must make a "reasonable effort" before executing a warrant to determine whether a resident of a household is at risk. N.Y.C. Dep't of Investigation, *N.Y.C. Marshals Handbook of Regulations*, Ch. 4, § 6.6 (eff. Oct. 24, 1997), available at <http://www.nyc.gov/html/doi/html/marshals/mar4.html#6s6> (last visited Aug. 11, 2007).

¹⁹² APS Memorandum, *supra* note 176.

¹⁹³ *Id.*

¹⁹⁴ *Marypat Realty*, N.Y.L.J., Dec. 31, 2002, p. 18, col. 1, 2002 N.Y. Slip Op. 50504(U), at *1, 2002 WL 31940717, at *1 (citing *Jonas Equities*, N.Y.L.J., June 29, 1992, at 32, col. 6).

¹⁹⁵ *See* index number 401210/02.

¹⁹⁶ *Id.* at 10, at ¶ 11.

¹⁹⁷ *Id.* at 10, at ¶ 12.



Dead Tenants Society

By Michael E. Plank, Esq.¹

I. EXECUTIVE SUMMARY

Question: Is there a statutory right in the estate, where a residential tenant dies during the pendency of a landlord-tenant summary proceeding?

Brief answer: Yes, there is a statutorily defined right in the estate to a brief stay and a follow-on procedure where there is a lease, but not for an oral month-to-month tenancy. Furthermore, the right is a limited procedural one that does not give the estate the right to assume the lease without the landlord's consent, or to tie up the leased premises until a final order of probate is granted by the Surrogate's (Continued on page 27)