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PROTECTING THE RIGHTS OF LITIGANTS WITH DIMINISHED CAPACITY IN THE NEW YORK CITY
HOUSING COURTS

PROTECTING THE RIGHTS OF LITIGANTS WITH DIMINISHED CAPACITY IN THE NEW YORK CITY HOUSING COURTS

*Jeanette Zelhof, Andrew Goldberg and Hina Shamsi**

INTRODUCTION

According to a 2002 New York City Department of Health and Mental Hygiene Community Health Survey, approximately 381,000 New Yorkers suffer from some form of serious mental illness.¹ The New York City Department of Aging indicates that, according to the 2000 Census, there are over 930,000 persons over age 65 living in New York City.² This number does not include those living in "group quarters," a category that includes nursing homes and other institutions.³ Thus, large numbers of individuals in New York City who are afflicted with mental illness or who are over age 65 are at risk of being sued in proceedings in the Housing Part of the Civil Court of the City of New York (the Housing Court) in the event of nonpayment of rent or allegations of activities that could jeopardize their tenancies.

Individuals with mental illness and individuals suffering from age-related infirmities may experience great difficulty negotiating the Housing Court system. The system has strict procedural requirements, lacks a right to assigned counsel, yet has a mandate to summarily process cases.⁴

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¹ NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE DIVISION OF MENTAL HYGIENE, PREVALENCE AND COST ESTIMATES OF PSYCHIATRIC AND SUBSTANCE USE DISORDERS AND MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES IN NYC 9, *available at* <http://www.nyc.gov/html/doh/downloads/pdf/mh/mh-2003prevalence.pdf> (last visited Apr. 24, 2005).

² NEW YORK CITY DEPARTMENT OF AGING, QUICK FACTS ON THE ELDERLY IN NEW YORK CITY, *available at* <http://www.nyc.gov/html/dfta/pdf/quickfacts.pdf> (last visited Apr. 24, 2005).

³ For the definition of "group quarters" see U.S. CENSUS BUREAU, SELECTED APPENDIXES: 2000: SUMMARY SOCIAL, ECONOMIC AND HOUSING CHARACTERISTICS (2003), at B-13, *available at* <http://www.census.gov/population/cen2000/phc-2-a-B.pdf> (last visited Dec. 16, 2004).

⁴ For the reader's ease and for consistency, we refer to "plaintiff" and "defendant" in this article although in a summary proceeding, such as in the Housing Court, the correct nomencla-

Individuals with diminished capacity, without understanding the legal consequences of their consent, have easily been pressured into signing agreements that give judgments and warrants to landlords. These individuals may also be more susceptible than other litigants to the pressure on Housing Court judges to expeditiously process summary proceedings. They may also be adversely impacted by the Housing Court's hectic environment,⁵ where, often, little time is allowed for inexperienced defendants to fully comprehend the issues despite the enormity of the rights at stake. On the occasion of the 30th Anniversary of the Housing Court, this article examines the statutory and jurisprudential bases for protections currently in place for litigants with diminished mental capacity. This article also suggests improvements, including accommodations pursuant to the Americans with Disabilities Act of 1990 (the ADA)⁶ and a right to counsel, so that the Housing Court can better serve and protect the rights of litigants with diminished capacity.

The article is based on the experiences of attorneys in the Mental Health Law Project and the Adult Home Advocacy Project of MFY Legal Services, Inc. (MFY) in the Housing Courts in the five boroughs of New York City. MFY has provided free civil legal services to low-income New Yorkers since its founding in 1963. Originally a unit of Mobilization for Youth, a social welfare organization on Manhattan's Lower East Side, MFY was incorporated as a separate not-for-profit law firm in 1968. In 1983, the Mental Health Law Project of MFY was created to provide advocacy services and legal representation to persons with psychiatric disabilities throughout New York City. In 1994, the Adult Home Advocacy Project was created to focus on the rights of disabled residents of adult homes (known as "board and care homes" outside New York State) citywide. In these projects, MFY's staff represents persons in, among other matters: housing, Supplemental Security Income/Social Security Disability (SSI/SSD) benefits, public assistance, Medicaid, and civil rights issues. MFY's work enables persons with mental illness to avoid homelessness and hospitalization. In addition, it enables such persons to remain in the community by ensuring the pres-

ture is to refer to "petitioner" and "respondent." We have not, however, changed "petitioner" and "respondent" when used in a quote.

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) (describing challenges faced by pro se litigants, not necessarily with diminished capacity, in Housing Court).

⁶ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

ervation of income streams and affordable housing, including private apartments, public housing and supportive housing. The staff of the Mental Health Law Project and the Adult Home Advocacy Project train, advise and represent thousands of persons with disabilities each year.

Part I of this article describes the evolution of society's understanding of people with mental illness and their capacity to make decisions, as well as the reflection of that evolution in more flexible and enlightened legislation and jurisprudence. This section reviews how New York's legislature and its courts have applied the state's long-standing commitment to rigorous protection of the mentally ill, culminating in the passage of the guardian *ad litem* provisions of the Civil Practice Law and Rules (CPLR) in 1962. Part I also describes the provisions of the ADA that, as recently interpreted by the United States Supreme Court, guarantee equal access to courts for litigants with disabilities.

Part II assesses the implementation and adequacy of the guardian *ad litem* provisions of the CPLR. It describes the obligation of a party to inform the court if the party is aware that another litigant has diminished capacity. This section also describes the court's own obligation to be diligent in determining whether a litigant requires the appointment of a guardian *ad litem* to protect his or her rights in a proceeding. Part II lays out the standards for appointment of a guardian *ad litem*, making it clear that a judicial declaration of incompetence is not necessary; instead, the standard requires that the litigant be "incapable of adequately prosecuting or defending" his or her rights.⁷ The obligations of the guardian *ad litem* and the court after the guardian is appointed are also discussed in this section. Importantly, this article shows that despite the Housing Court practices to the contrary, guardians *ad litem* do not have the authority to settle cases on behalf of a ward; only the court may authorize a settlement after adequate inquiry into its bases and terms. Part II includes recommendations for better implementation and enforcement of the guardian *ad litem* provisions of the CPLR.⁸

Part III of this article sets forth a series of recommendations that would bring the Housing Court system into better compliance with its obligations under the ADA. These recommendations include accom-

⁷ N.Y. C.P.L.R. § 1201 (2004).

⁸ Francis J. Clark, Esq., Director, Guardian Ad Litem Program, Civil Court of the City of New York, projects that in 2004, 1,200 requests for guardians *ad litem* will have been made. Mr. Clark estimated that 85-90% result in the appointment of a guardian *ad litem*. Telephone interview with Francis J. Clarke, Director of Guardian Ad Litem Program, Civil Court of the City of New York (Dec. 20, 2004) (notes on file with authors).

modations that would identify litigants with diminished capacity at the earliest stages of a Housing Court proceeding as well as a variety of other accommodations that would assist such litigants to access the court system in order to adequately defend their rights. Part III concludes with the recommendation that counsel be appointed for the Housing Court litigants with diminished capacity in order to ensure equal access to the court system.

I. BACKGROUND: SOCIETAL DEVELOPMENTS REFLECTED IN STATUTES AND CASE LAW

A. *Societal Developments: Evolution Of Understanding Of Mental Illness*

Society has long grappled with the challenge of providing housing and social services for those with diminished capacity. Until the middle of the twentieth century, people with severe mental disabilities were largely restricted to living in mental institutions apart from the rest of society. With developments in the clinical treatment of mental illness by the middle of the twentieth century, and the advent of medications such as antipsychotic drugs designed to minimize the adverse symptoms of various types of mental illness, individuals with disabilities became more able to live on their own in community settings. With these developments came a more enlightened attitude toward people with mental illness and a public policy that encouraged integration into all aspects of society. Specifically, in New York State, these developments led to a policy of "deinstitutionalization" with the goal of reintegration of these individuals into the community.

One societal effect of these developments is that large numbers of individuals with mental illness (and/or advanced age), by dint of their living in the community in apartments, single room occupancy hotels, or housing where support services are provided, are subject to the jurisdiction of the Housing Court in the event of a breach of their contracts with landlords. When these individuals come before the Housing Court, the court has a responsibility to ensure the protection of their rights and to comply with federal law to accommodate them. This is concededly no easy task: "[c]apacity is the black hole of legal ethics."⁹

⁹ Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1082 (1994).

The capacity of a person with a psychiatric disability is not easily ascertained and can require a complex inquiry. For example, a person diagnosed with schizophrenia who presents himself bizarrely might be capable of "adequately defending" himself in the proceeding. On the other hand, an individual diagnosed with depression who presents himself as composed and acts in a socially appropriate manner may, in fact, be unable to do more than "present himself" in the court. Such a person may be clinically unable to do anything to defend himself, even taking an action as simple as calling the local Social Security Administration office to replace a lost check. To further complicate matters, each of these individuals may be capable only for a certain period of time, or may be capable only for certain purposes. Medication can bring about degrees of wellness, but degrees of incapacity may still exist or sporadically occur, given the episodic nature of the symptoms of mental illness.

Well before 1962, New York's legislature and its courts recognized the obligation to protect the rights of those with diminished capacity. The implementation of the obligation focused on whether individuals were competent or not.¹⁰ In 1962, in response to developing understandings of the complexities of protecting people with varying degrees and symptoms of mental illness, New York's legislature enacted CPLR Article 12. CPLR Article 12 permitted the appointment of a guardian *ad litem* and did away with the stark distinction between the protections afforded to those deemed to be competent and those adjudged to be incompetent.

B. *Judicial and Legislative Developments In New York:
CPLR Article 12 And Its Background*

Both New York courts and the state's legislature have long recognized the need to protect the rights of individuals with diminished mental capacity. As early as 1903, the Court of Appeals stated in *Wurster v. Armfield* that "[i]ncompetent persons become the wards of the court, upon which a duty devolves of protection both as to their persons and property. This duty is not limited to cases only in which a committee has been appointed, but it extends to all cases where the fact of incompetency exists. . . ."¹¹ The Court of Appeals' protective language in the *Wurster* case was used in subsequent early cases to protect the

¹⁰ See N.Y. CIV. PRAC. ACT § 207 (1922); *Wurster v. Armfield*, 175 N.Y. 256, 262 (1903).

¹¹ *Wurster*, 175 N.Y. at 262.

interests of individuals whose competency was at issue.¹² Similarly, § 207 of the Civil Practice Act, a precursor to the current protections of CPLR §§ 1201-1203, provided that:

The supreme court may appoint a guardian ad litem or special guardian for an infant or an incompetent person, at any stage in any action or proceeding, when it appears to the court necessary for the proper protection of the rights and interests of such infant or incompetent person and fix the fees and compensation of such guardian, except when it is otherwise expressly provided by law.¹³

There are few reported cases interpreting or applying Civil Practice Act § 207, except in the context of determining payments to a guardian *ad litem* appointed under the provision. Rather, the early cases focus on other protective legislation, which required that actions disposing of a mentally disabled person's interest in real property could only be taken by application to a court.¹⁴ The required application could be made either by a "committee of the property" of the incompetent person or by "any relative or other person" on behalf of the incompetent person.¹⁵

¹² See, e.g., *Martin v. Teachers' Ret. Bd. of City of N.Y.*, 54 N.Y.S.2d 245 (App. Div. 1945) (holding that the court's duty to protect incompetent persons and their property extended even where no committee had been appointed so that bargains or contracts detrimental to his estate made by the incompetent person before adjudication of incompetence and appointment of committee were voidable); *In re Harkavy's Estate*, 56 N.Y.S.2d 700 (N.Y. Sur. Ct. 1945) (accepting as evidence of incompetence an individual's incarceration in a mental institution and, even where no adjudication of incompetency had been made or committee appointed, permitting the individual's special guardian to file objections on her behalf to trust account adjustments by trust executors).

¹³ N.Y. CIV. PRAC. ACT § 207 (2005). In addition, § 208 of the Civil Practice Act provided that:

In the case of a defendant judicially declared to be incompetent to manage his affairs, in consequence of lunacy, idiocy or habitual drunkenness, and for whom a committee has been appointed, where the court, in its opinion, has reasonable ground to believe that the interest of the committee is adverse to that of the defendant, or that for any reason he is not a fit person to protect the rights of the defendant, the court, with or without application therefore and in the defendant's interest, by order made at any stage of the action, may appoint a special guardian ad litem to conduct the defence for the incompetent defendant, to the exclusion of the committee, and with the same powers, and subject to the same liabilities, as a committee of the property.

N.Y. CIV. PRAC. ACT § 208 (2005).

¹⁴ N.Y. CIV. PRAC. ACT §§ 1388-1394 (1939).

¹⁵ N.Y. CIV. PRAC. ACT § 1389 (1939).

Before the application could be granted, a committee of the property had to be appointed.¹⁶

Significantly, both this early legislation and the case law focused on the mental competence of a litigant as opposed to the individual's ability to adequately defend or prosecute his or her rights in a proceeding, regardless of the extent of mental illness. Additionally, until the late 1950s, courts generally presumed mental competence on the part of an individual until that person was judicially adjudicated an incompetent.¹⁷ A committee or guardian would only be appointed to protect the property rights of the individual upon adjudication of that individual's incompetence.¹⁸ In practice, though, courts applied the protective policy of *Wurtzel* by vacating agreements made by a person with mental illness before adjudication of his or her incompetence.¹⁹

In *Anonymous v. Anonymous*,²⁰ one of the few cases to discuss the standards for appointment of a guardian *ad litem* pursuant to Civil Practice Act § 207, the court provides a possible reason for the scarcity of cases under that section. According to the court, there was "widespread misconception" of the "distinction between the rights and powers of a person for whom a committee has been appointed and those of one who has not been judicially declared to be incompetent."²¹ The court ascribed this confusion to the "inaccurate use of the term 'incompetent' to refer to a person of unsound mind who has not been adjudicated incompetent,"²² and noted that "[a] certification that a person is afflicted with a mental disease requiring care and treatment is not the same thing as an adjudication that he is incompetent to manage himself

¹⁶ N.Y. CIV. PRAC. ACT § 1391 (1939).

¹⁷ See, e.g., *In re Palestine's Estate*, 270 N.Y.S. 844 (N.Y. Sur. Ct. 1934); N.Y. CIV. PRAC. ACT § 236 (2005) ("A party who is of full age may prosecute or defend a civil action in person or by attorney unless he has been judicially declared to be incompetent to manage his affairs.").

¹⁸ See, e.g., *New York City Housing Authority v. Pena*, 123 N.Y.S.2d 62, 66 (N.Y. Mun. Ct. 1953) ("It is well established that the courts have no power to appoint a special guardian on behalf of a person who, although apparently incompetent to handle his affairs, has not been judicially adjudicated an incompetent.").

¹⁹ See, e.g., *Lee v. New York*, 64 N.Y.S.2d 417, 424 (N.Y. Ct. Cl. 1946) ("[I]t has been uniformly determined that a person of unsound mind, but not judicially declared incompetent may sue and be sued in the same manner as any ordinary member of the community, with the proviso noted in *Wurster v. Armfield*" that courts have a duty to protect incompetent persons regardless of whether a committee had been appointed (citation omitted)).

²⁰ *Anonymous v. Anonymous*, 162 N.Y.S.2d 984 (App. Div. 1957).

²¹ *Id.*

²² *Id.* at 986.

or his affairs."²³ The court approved the appointment of a guardian *ad litem* for a defendant who had not been adjudicated incompetent based on "a determination of the fact that the state of the record indicates a necessity for the court to intervene for the party's protection."²⁴

Subsequently, in the seminal 1958 case *Sengstack v. Sengstack*,²⁵ the court of appeals held that a judicial adjudication of incompetence was not necessary prior to the appointment of a guardian *ad litem* because the existence of the judicial adjudication procedure "does not mean that the courts shut their eyes to the special need of protection of a litigant actually incompetent but not yet judicially declared such. There is a duty on the courts to protect such litigants."²⁶ Therefore, the court in *Sengstack* found that the lower court appropriately performed this duty when it appointed a guardian *ad litem* pursuant to §§ 207 and 208 of the Civil Practice Act to investigate and report to the court the steps necessary to protect the interests of a plaintiff with diminished mental capacity.²⁷

In 1962, the state legislature formalized the approach taken by the court in *Sengstack* through enactment of Article 12 of the CPLR, which governs the appointment, role, and compensation of guardians *ad litem* for those with diminished mental capacity.²⁸ CPLR Article 12 consolidated similar provisions that had previously been scattered in various sections of the Civil Practice Act.²⁹ One important difference between

²³ *Id.* at 987.

²⁴ *Id.* at 988.

²⁵ *Sengstack v. Sengstack*, 176 N.Y.S.2d 337 (1958).

²⁶ *Id.* at 342.

²⁷ *Id.* at 342-43.

²⁸ N.Y. C.P.L.R. Art. 12 (1962). CPLR Article 12 also governs guardians *ad litem* for infants and conservatees. This article focuses on the provisions as they relate to persons with diminished mental capacity. Minor clarifying amendments were made to subsections of CPLR Article 12 in 1974, 1981 and 1986. With one exception, these changes did not substantively alter the provisions. The one substantive change was to Article 1201, which, as originally enacted, permitted the appointment of a guardian *ad litem* for an "adult defendant incapable of adequately protecting his rights." N.Y. C.P.L.R. § 1201 (1962) (emphasis added). This led to the question of whether courts had the power to appoint a guardian *ad litem* to prosecute an action. In *Liebowitz v. Hunter*, 257 N.Y.S.2d 434 (N.Y. Sup. Ct. 1965), the court found that it did. This view was adopted by New York's legislature, which amended section 1201 to provide that a guardian *ad litem* may be appointed for "an adult incapable of adequately prosecuting or defending his rights." N.Y. C.P.L.R. § 1201 (1968) (emphasis added). See also *Fales v. State*, 438 N.Y.S.2d 449 (N.Y. Ct. Cl. 1981) (describing development of law leading to 1968 amendment to N.Y. C.P.L.R. § 1201).

²⁹ See *Liebowitz*, 257 N.Y.S.2d at 437 (quoting WEINSTEIN ET AL., 2 NEW YORK CIVIL PRACTICE § 1202.01) ("CPLR 1202(a) consolidates the scattered provisions relating to appoint-

the Civil Practice Act and Article 12 is that the 1962 provisions specifically clarify that a guardian *ad litem* shall be appointed for a person not judicially declared incompetent, but who nevertheless is not capable of adequately prosecuting or defending his or her rights:

§ 1201. Representation of infant, incompetent person or conservatee. Unless the court appoints a guardian *ad litem*, . . . a person judicially declared to be incompetent shall appear by the committee of his property, and a conservatee shall appear by the conservator of his property. A person shall appear by his guardian *ad litem* if he is . . . [a] person judicially declared to be incompetent, or a conservatee as defined in section 77.01 of the mental hygiene law and the court so directs because of a conflict of interest or for other cause, or if he is an adult incapable of adequately prosecuting or defending his rights.³⁰

According to the Advisory Committee Notes to CPLR § 1201:

The last phrase of the last sentence of this section requires that a defendant, other than an infant or judicially declared incompetent, who is incapable of adequately protecting his rights be represented by a guardian *ad litem*. Under former law, such a defendant's interests were protected in essentially the same manner. CPA § 226(1) permitted a court to order that a copy of a summons also be delivered to a designated person and after such an order is made service is not complete until a copy of the summons is so delivered. The designated person is required to examine the case and protect the rights of the defendant until and unless a special guardian is appointed. RCP 44. In reality, the designated person is a special guardian.³¹

CPLR § 1202 sets forth the categories of people who may make a motion for appointment of a guardian *ad litem*, and the notice and consent requirements for such a motion:

§ 1202. Appointment of guardian *ad litem*. (a) By whom motion made. The court in which an action is triable may appoint a guardian

ment of a guardian *ad litem* that appeared in §§ 202, 203, 207 and 208 of the Civil Practice Act and rule 39 of the Rules of Civil Practice. It applies to all guardians *ad litem*.”).

³⁰ N.Y. C.P.L.R. § 1201 (2004).

³¹ N.Y. C.P.L.R. § 1201 advisory committee's notes. The advisory committee notes clarify that a guardian *ad litem* could be appointed even if there is a committee for a person judicially declared incompetent if, for example, the Committee “has an adverse interest” or “‘for other cause,’ such as the fact that the guardian or committee is a nonresident.” *Id.*

ad litem at any stage in the action upon its own initiative or upon the motion of: . . . 2. a relative, friend or a guardian, committee of the property, or conservator; or 3. 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. (b) Notice of motion. Notice of a motion for appointment of a guardian *ad litem* for a person shall be served upon the guardian of his property, upon his committee or upon his conservator, or if he has no such guardian, committee, or conservator, upon the person with whom he resides. Notice shall also be served upon the person who would be represented if he is more than fourteen years of age and has not been judicially declared to be incompetent. (c) Consent. No order appointing a guardian *ad litem* shall be effective until a written consent of the proposed guardian has been submitted to the court together with an affidavit stating facts showing his ability to answer for any damage sustained by his negligence or misconduct.³²

CPLR § 1202 uses only the term guardian *ad litem* and abolished the Civil Procedure Act's prior distinction between a "special guardian" (used for guardians appointed in a special proceeding) and a "guardian *ad litem*" (used for guardians appointed for a specific action).³³ Significantly, § 1202 specifies that a motion for a guardian *ad litem* may be brought at any stage of the proceeding and may be brought at the court's own initiative. In addition, the Advisory Committee Notes emphasize the special duty of a party to the action to bring to the court's attention information that indicates the other party may not be able to defend his or her interests in the proceeding:

Where a party has information indicating that another party is incompetent to protect his interests it should be revealed to the court so that the court can appoint a guardian. Failure to suggest the party's inadequacy to the court would constitute a fraud which could be the basis for a motion to set aside any judgment.³⁴

Unlike prior law, § 1202 also allows a motion to be made by third parties, including a committee, with knowledge of a defendant's possible

³² N.Y. C.P.L.R. § 1202 (2004).

³³ N.Y. C.P.L.R. § 1202 advisory committee's notes ("The use of the term 'special guardian' is abolished. RCP 40 uses the words 'guardian *ad litem*' if the appointment is made in an action and 'special guardian' if made in a special proceeding. The distinction is unnecessary.").

³⁴ N.Y. C.P.L.R. § 1201 advisory committee's notes.

inability to assist in his or her defense.³⁵ Finally, also unlike prior law, notice of a motion to appoint a guardian *ad litem* is required to be given to the person alleged to be incapable of defending his or her rights in the proceeding.³⁶

CPLR § 1203 allows an appointed guardian *ad litem* time to investigate the case and determine the appropriate strategy for proceeding:

§ 1203. Default judgment. No 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. No default judgment may be entered against an adult incapable of adequately protecting his rights for whom a guardian *ad litem* has been appointed unless twenty days have expired since the appointment.³⁷

CPLR § 1204 permits a guardian *ad litem* to be compensated, but requires the compensation to be approved by a court based on an affidavit that permits the court to evaluate the guardian *ad litem*'s services:

§ 1204. Compensation of guardian *ad litem*. A court may allow a guardian *ad litem* a reasonable compensation for his services to be paid in whole or part by any other party or from any recovery had on behalf of the person whom such guardian represents or from such person's other property. No order allowing compensation shall be made

³⁵ N.Y. C.P.L.R. § 1202 advisory committee's notes ("Subparagraph 2 permits a motion to be made by a relative or friend of the defendant for the appointment of a guardian *ad litem* for a defendant who is incapable of adequately protecting his rights but who is not an infant or a person judicially declared incompetent. There is no similar provision in the CPA or RCP. Such a provision will aid in protecting the rights of such a defendant when the friend but not the adverse party has knowledge of the defendant's incapacity. Subparagraph 2 also permits such a motion to be made by a committee of the property of the incompetent; there is no similar provision in the former act or rules. The committee should be allowed to make such a motion for there may be times when his interest is adverse to his ward's interest. He should be permitted—indeed, he is morally obligated—to bring his interest to the court's attention by such a motion.").

³⁶ *Id.* ("Subd (b) is derived from CPA § 204. It has a broader scope than the CPA section, however, since it is not confined to actions involving infants. The subdivision requires that notice of motion be given to a defendant alleged to be incapable of adequately protecting his rights since such a person should be afforded an opportunity to contest the motion.").

³⁷ See also N.Y. C.P.L.R. § 1203 advisory committee's notes ("The last sentence is new. It will give the guardian *ad litem* of a person incapable of adequately protecting his rights an opportunity to prepare the case and decide upon a course of action.").

except on an affidavit of the guardian or his attorney showing the services rendered.³⁸

CPLR § 1205 provides that guardians *ad litem*, and a person for whom a guardian *ad litem* has been appointed, shall not be liable for court costs:

§ 1205. Liability for costs of infant, judicially declared incompetent, or conservatee, or representative. An infant, a person judicially declared to be incompetent, a conservatee, a person for whom a guardian *ad litem* has been appointed, or a representative of any such person, shall not be liable for costs unless the court otherwise orders.³⁹

Finally, CPLR § 1207 provides for the settlement of claims made against a person judicially declared to be incompetent:

§ 1207. Settlement of action or claim by infant, judicially declared incompetent or conservatee, by whom motion made; special proceeding; notice; order of settlement. Upon motion . . . of the committee of the property of a person judicially declared to be incompetent, or of the conservator of the property of a conservatee, the court may order settlement of any action commenced by or on behalf of the infant, incompetent or conservatee. If no action has been commenced, a special proceeding may be commenced upon petition of such a representative for settlement of any claim by the . . . incompetent or conservatee in any court where an action for the amount of the proposed settlement could have been commenced Notice of the motion or petition shall be given as directed by the court. An order on such a motion shall have the effect of a judgment. Such order, or the judgment in a special proceeding, shall be entered without costs and shall approve the fee for the . . . incompetent's or conservatee's attorney, if any.⁴⁰

³⁸ See also N.Y. C.P.L.R. § 1204 advisory committee's notes ("This section is derived from RCP § 43 and also from a part of CPA § 207. Rule 43 required that no order allowing compensation be made except upon an affidavit by the guardian (and in some cases also by the attorney) stating that the case had been examined and all necessary steps have been taken to protect the rights of the ward. The requirement has been preserved. Despite its imperfections, such an affidavit will furnish at least some basis for determining the value of the guardian's services.").

³⁹ See also N.Y. C.P.L.R. § 1205 advisory committee's notes ("Since new CPLR § 1201 permits representation by such a guardian he would be exempted from costs by the rule unless a court otherwise ordered . . . A court will award costs against a representative where he has been guilty of misconduct." (citation omitted)).

⁴⁰ N.Y. C.P.L.R. § 1207 (2004).

As discussed in greater detail below,⁴¹ this section 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. In accordance with its plain language, 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. This restriction on the authority of guardians *ad litem* is relevant to the Housing Court because the vast majority of guardians *ad litem* are appointed for people not adjudicated incompetent.

Interpretation and application by New York courts of the provisions of CPLR Article 12 is discussed further in Section II.

C. Federal Developments: The Americans With Disabilities Act

The passage of the ADA was intended to usher in "a bright new era of equality, independence, and freedom"⁴² for people with physical and mental disabilities. The goal of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"⁴³ including mental disabilities.⁴⁴ For the purposes of the ADA, a person has a disability if he or she has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual."⁴⁵ Title II of the ADA pro-

⁴¹ See discussion *infra* Part II.C.

⁴² President George H. W. Bush, Remarks at the Signing Ceremony for the ADA (July 26, 1990).

⁴³ 42 U.S.C. § 12101(b)(1) (2005).

⁴⁴ 28 CFR § 35.104(4) (2005). Despite the fact that the ADA explicitly prohibits discrimination based on mental disability, lawsuits on behalf of people with such disabilities are relatively rare. Not only has litigation lagged, the assistance manual and other government support for the ADA focus almost exclusively on physical barriers. See, e.g., DEPARTMENT OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL §§ 5.1000, 5.2000, 7.0000, available at <http://www.usdoj.gov/crt/ada/taman2.html> (last visited, Feb. 2, 2005) (using mainly examples of physical disabilities to illustrate ADA requirements). One commentator has noted that "we have little or no understanding of the corollary social adaptations that are necessary to fully integrate people with mental disabilities into our society." SUSAN STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 59 (2001). The challenges of enforcing the ADA on behalf of people with mental disabilities thus requires creative thinking on the part of judges, lawyers, advocates, mental health professionals, and persons with disabilities, an effort that this article is intended to further.

⁴⁵ 42 U.S.C. § 12102(2)(A) (2005). A full discussion of the statutory provisions and case law applicable to the determination of who qualifies as a "disabled" person for the purposes of the ADA is beyond the scope of this article. Briefly, the test for determining whether a person is

hibits discrimination against people with disabilities "in the provision or operation of public services, programs or activities,"⁴⁶ and applies to any "public entity," including courts and state and local governments.⁴⁷

In a 2004 case, the U.S. Supreme Court acknowledged the historical context of the harms that Title II is intended to address: "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, '[a]s of 1979, most States . . . categorically disqualified 'idiots' from voting without regard to individual capacity.'"⁴⁸ Specifically, citing to cases involving discrimination against the mentally ill, the Supreme Court stated that "[t]he historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment."⁴⁹ The Supreme Court pointed out that in the case of public entities, such as courts, Congress recognized that "failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion"⁵⁰ Significantly, "[t]his duty to accommodate is perfectly consistent with the well-established due process principle that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts."⁵¹ The Court concluded that Congress' enactment of Title II as applied to the "fundamental right of access to the courts" was a valid exercise of

disabled under the ADA requires a three-step inquiry: (i) whether the person suffers from a physical or mental impairment; (ii) whether the life activity allegedly impaired is a major one; and (iii) whether the specified impairment substantially limits that major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). While no agency was granted authority to interpret the term disability, the Department of Justice ("DOJ"), which enforces Title II of the ADA, governing access to public programs, issued non-binding regulations that define physical or mental impairment and major life activity. See *Sutton v. United Airlines*, 527 U.S. 471, 479 (1999); *Bartlett v. New York State Board of Law Exam'rs*, 226 F.3d 69, 79 (2d Cir. 1998); 28 C.F.R. § 35.104 (2005); 29 C.F.R. § 1630.2(h)-(i) (2005). Included in the DOJ's definition of "physical or mental impairment" is "[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 28 C.F.R. § 35.104 (1)(i)(B).

⁴⁶ *Tennessee v. Lane*, 124 S.Ct. 1978, 1984 (2004).

⁴⁷ 42 U.S.C. § 12131(1)(A) - (B) (2005).

⁴⁸ *Lane*, 124 S.Ct. at 1989 (citation omitted).

⁴⁹ *Id.* (citing *Jackson v. Indiana*, 406 U.S. 715 (1972) and *Youngberg v. Romeo*, 457 U.S. 307 (1982)).

⁵⁰ *Lane*, 124 S.Ct. at 1993.

⁵¹ *Id.* at 1994.

Congressional power to abrogate states' sovereign immunity under § 5 of the Fourteenth Amendment.⁵²

In keeping with the reasoning of the Supreme Court, persons with mental illness who become litigants in the Housing Court have the right to accommodations that allow them a meaningful opportunity to be heard if they are qualified for Title II protection. Persons with disabilities are qualified for Title II protection if they, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."⁵³ A litigant sued and therefore haled by necessity into the Housing Court meets the essential eligibility requirements for services from the Housing Court.

The Department of Justice has promulgated regulations to implement Title II under the authority of 42 U.S.C. § 12134(a).⁵⁴ The overarching premise of the regulations is that a public entity, such as the Housing Court, must provide reasonable accommodations in order to provide disabled people with the same services and benefits that non-disabled people receive.⁵⁵ Pursuant to the regulations, the Housing Court is prohibited from providing services to disabled people that are "not equal to [those] afforded others," are "not as effective," "limit . . . any right, privilege, advantage or opportunity . . .," or "defeat[] or substantially impair[] [the] accomplishment of the objectives of the public entity's program."⁵⁶ If a litigant requests an accommodation, the burden for refusing the request is high. The Housing Court must show that the requested accommodation would fundamentally alter the nature of the services it provides⁵⁷ and provide a written statement of the reasons for reaching that conclusion.⁵⁸ The regulations also provide for a grievance procedure.⁵⁹

⁵² *Id.*

⁵³ 42 U.S.C. § 12131(2) (2004).

⁵⁴ 42 U.S.C. § 12134(a) (2005).

⁵⁵ 28 C.F.R. § 35.130 (2005).

⁵⁶ *Id.*

⁵⁷ *Id.* § 35.130(b)(7).

⁵⁸ *Id.* § 35.164.

⁵⁹ *Id.* § 35.107(b).

As discussed in Section III, there are a number of accommodations the Housing Court could and should make to its services in order to make them accessible to persons with disabilities.

II. ASSESSMENT OF CPLR ARTICLE 12'S GUARDIAN AD LITEM PROVISIONS AS A MEANS OF PROTECTING THE RIGHTS OF LITIGANTS WITH DIMINISHED CAPACITY

A. *Compliance By Parties With The Obligation To Inform, And By The Courts With The Obligation To Inquire, When A Litigant May Require A Guardian Ad Litem*

State and Housing Courts repeatedly cite *Vinokur v. Balzaretti* for the proposition that the "public policy of this State, and of this court, is one of rigorous protection of the mentally infirm."⁶⁰ This public policy has been applied in New York courts to impose upon both litigants and the courts an affirmative obligation to determine whether a party who may have diminished capacity requires a guardian *ad litem* to prosecute or defend his or her rights in a proceeding. Failure of either litigants or courts to fulfill their obligations may result in a judgment that is void or voidable. Despite this affirmative obligation, in Housing Court proceedings there are numerous reported instances of failures in recognizing or addressing a tenant's disability at the early stage of a proceeding. Instead, it is often not until a default judgment has been obtained or a trial has been conducted that a tenant's disability becomes an issue.⁶¹ The reported cases indicate that courts will often then direct the appointment of a guardian *ad litem* and vacate any judgment obtained before that appointment.

MFY is generally successful in representing clients in proceedings to vacate these judgments, but frequently has little time to do so before a warrant is scheduled to be executed. This situation requires our attorneys to move quickly by order to show cause, undoing judgments that often should not have been entered in the first place. This is an unnecessary and avoidable expenditure of limited legal resources, as well as of judicial resources. The better practice would be to require a landlord, at the outset of the proceeding, to inform the court of whether he or she believes or has reason to believe that the tenant may not be capable of

⁶⁰ *Vinokur v. Balzaretti*, 403 N.Y.S.2d 316, 316 (App. Div. 1978).

⁶¹ Frequently, MFY is not contacted about a case until a final judgment or default is entered, a warrant of eviction is issued by the Housing Court, and a City Marshal is prepared to execute the warrant and evict the tenant.

adequately defending his or her rights, and for the court itself to become more knowledgeable about the manifestations of mental illness. As we suggest more fully below,⁶² implementation of certain procedural mechanisms and accommodations might 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 and begin the proceedings again.

1. A Litigant is Obligated to Disclose to the Court any Information
About Another Party's Inability to Prosecute
or Defend a Proceeding

In *Oneida National Bank and Trust Co. Central N.Y. v. Unczar*,⁶³ one of the first cases to interpret a plaintiff's obligations under CPLR Article 12, the Fourth Department read CPLR §§ 1201 and 1203 together to require "the appointment of a guardian ad litem in every case where the defendant is an adult incapable of adequately protecting his rights, before a default judgment may be entered against him."⁶⁴ According to the court, "[t]his places the burden upon a plaintiff who has notice that a defendant in his action is under a mental disability, to bring that fact to the court's attention and permit the court to determine whether a guardian ad litem should be appointed to protect such defendant's interests."⁶⁵ The plaintiff creditor in *Oneida* was aware that the defendant debtor was hospitalized in an institution for the mentally ill, yet served a summons and complaint on the defendant in the hospital without obtaining prior approval of the court as required by New York's Mental Hygiene Law.⁶⁶ The Fourth Department held that based on the plaintiff's failure to "safeguard the interests of its mentally ill debtor,"⁶⁷ the court below properly exercised its inherent power to open

⁶² See discussion *infra* Part II.A.3-4.

⁶³ *Oneida Nat'l Bank and Trust Co. Cent. N.Y. v. Unczar*, 326 N.Y.S.2d 458 (App. Div. 1971).

⁶⁴ *Id.* at 461.

⁶⁵ *Id.* at 461-62.

⁶⁶ *Id.* at 459-60.

⁶⁷ *Id.* at 462.

its judgment in the interest of justice by vacating both a default judgment and the resulting sale of the defendant's home.⁶⁸

Other appellate decisions have uniformly applied the *Oneida* court's holding that a plaintiff who is aware or has reason to be aware that a defendant is incapable of defending his or her interests at the time when the action was begun and when the default judgment was entered has the burden of disclosing this information to the court.⁶⁹ Moreover, it is not enough for the plaintiff to merely notify the court that a defendant's mental condition is at issue—the plaintiff must be diligent in bringing the matter to the court's attention.⁷⁰ Similarly, in an often-cited and closely-reasoned decision, the Housing Court in *New York Life Insurance Co. v. V.K.*, stated the "need for 'a petitioner, in any proceeding, to be extremely diligent' in determining whether a party may be under a disability requiring a guardian *ad litem* and, if there is any question, giving the court an opportunity for an investigation and report regarding that need."⁷¹ The plaintiff's obligation is triggered once the

⁶⁸ See also *Barone v. Cox*, 379 N.Y.S.2d 881, 883-884 (App. Div. 1976).

⁶⁹ See, e.g., *State v. Kama*, 699 N.Y.S.2d 472, 473 (App. Div. 1999) ("The record reveals that the plaintiff was on notice that the defendant suffered from a mental disability. Accordingly, the burden was on [the plaintiff] to bring that fact to the attention of the court to make a suitable inquiry into whether a guardian ad litem was needed before judgment could be entered. As [the plaintiff] failed to do so, the judgment must be vacated" (citation omitted)); *Sarfaty v. Sarfaty*, 443 N.Y.S.2d 506, 507 (App. Div. 1981) (vacating default judgment where plaintiff husband and his attorney knew that defendant wife had been receiving psychiatric care and failed 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*, 379 N.Y.S.2d at 883-85 (vacating default judgment entered after creditor's failure to make requisite disclosure to court, and stating "[w]hen 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 that the court may . . . in its discretion appoint a guardian ad litem to protect the defendant's interests." (citation omitted)).

⁷⁰ *In re Foreclosure of Tax Liens by Ithaca*, 724 N.Y.S.2d 211, 212-13 (App. Div. 2001) (reversing foreclosure judgment where plaintiff had only notified court that a special guardian had been appointed for defendant in a prior proceeding and failed to disclose additional details regarding defendant's competency, and stating that plaintiff "should have been more diligent in bringing this matter to the court's attention.").

⁷¹ *N.Y. Life Ins. Co. v. V.K.*, 711 N.Y.S.2d 90, 97 (N.Y. Civ. Ct. 1999) (citing *In re Bacon*, 169 Misc. 2d 858, 864 (Sur. Ct. 1996)); see also, *Parras v. Ricciardi*, 710 N.Y.S.2d 792 (N.Y. Civ. Ct. 2000) (denying application for judgment and warrant on default where plaintiff landlord knew defendant tenant was mentally incapacitated and in a nursing home, and noting that plaintiff's attorney had not only a moral obligation to inform the court of the tenant's diminished capacity, but also a legal obligation); *Jackson Gardens L.L.C. v. Osorio*, N.Y.L.J., July 11, 2001, at 25 (N.Y. Civ. Ct. 2001) (vacating default judgment and eviction warrant on finding that guardian *ad litem* had been appointed for defendant tenant in prior proceeding brought by

plaintiff has notice that a defendant is under a mental disability, even if the plaintiff determines that he or she lacks sufficient proof to make a motion for the appointment of a guardian *ad litem*.⁷²

2. The Court Must Be Diligent In Determining Whether a Litigant Requires A Guardian *Ad Litem*

In accordance with New York's policy of protecting the rights of those with diminished capacity, the court itself has the obligation to be diligent in determining whether a litigant requires the appointment of a guardian *ad litem* to protect his or her rights in a proceeding. This obligation applies regardless of whether the litigant is represented by counsel, and attaches upon notice to the court or by the court's own observation that the litigant may not be able to adequately prosecute or defend his or her rights.⁷³ Such notice may come to the court's attention through a variety of means, including the litigant,⁷⁴ counsel for the litigant,⁷⁵ an opposing party,⁷⁶ involvement in the proceeding by Adult

plaintiff landlord and landlord had sought default judgment in instant proceeding without notifying the court of the appointment of a guardian in the prior case); *Surrey Hotel Assocs., L.L.C. v. Sabin*, N.Y.L.J., June 29, 2000, at 28 (N.Y. Civ. Ct. 2000) (vacating default judgment upon finding that plaintiff landlord had notice of defendant tenant's disability because rent payments were made by Protective Services for Adults on behalf of tenant, and where landlord's attorney described tenant's conduct as "strange" and landlord had complained that tenant's conduct altered the quality of life for other building tenants).

⁷² *State v. Getelman*, N.Y.L.J., Sept. 7, 1993, at 26, (Sup. Ct. 1993).

⁷³ *Vinokur v. Balzaretto*, 403 N.Y.S.2d 316, 316 (App. Div. 1978) (holding that the fact that defendant was adequately represented by counsel should have been of "no consequence" to the lower court when it considered and denied the motion for guardian *ad litem*, without a hearing, where moving affidavits made allegations of senility).

⁷⁴ See, e.g., *Shad v. Shad*, 562 N.Y.S.2d 202, 203 - 04 (App. Div. 1990) (overturning lower court's denial of defendant's motion for a guardian *ad litem* and finding of default where defendant "submitted two letters from her psychiatrist" in which "psychiatrist unequivocally concluded that the defendant was unable to defend herself and that the appointment of a guardian and litem was necessary" and holding that "where there is a question of fact as to whether a guardian *ad litem* should be appointed, a hearing must be conducted."); *Kushner v. Mollin*, 535 N.Y.S.2d 41, 42 (App. Div. 1988) (holding that lower court erred "by not conducting a hearing to determine whether the plaintiff required the appointment of a guardian *ad litem*" where court was on notice that plaintiff suffered from Down's syndrome); *Palaganas v. D.R.C. Indus., Inc.*, 407 N.Y.S.2d 170, 171 (App. Div. 1978) (vacating default judgment and ordering hearing on motion for appointment of a guardian *ad litem* where plaintiffs "question[ed] the degree" of defendant's incapacity).

⁷⁵ *State of New York v. Getelman*, N.Y.L.J., Sept. 7, 1993, at 25 (Sup. Ct. 1993) (motion brought by defendant's legal services attorneys); *Soybel v. Gruber*, 518 N.Y.S.2d 920, 921 (N.Y. Civ. Ct. 1987) (same).

⁷⁶ *466 Assocs. v. Murray*, 573 N.Y.S.2d 360, 360 (N.Y. Civ. Ct. 1991) (landlord moving for appointment of guardian *ad litem* to assist tenant).

Protective Services (through the Department of Social Services),⁷⁷ or relatives or friends of the defendant.⁷⁸ The court may also appoint a guardian *ad litem sua sponte*, based on its own observations of a litigant's inability to defend a proceeding adequately.⁷⁹ In each of these instances, "once the issue [of a litigant's competency] was raised, the court 'ha[d] the duty to protect a party incapable of protecting her own interests, particularly when her home is in controversy.'"⁸⁰ It is especially critical that the Housing Court observe its duty to provide "rigorous protection of the rights of the mentally infirm,"⁸¹ through diligent inquiry into whether a guardian *ad litem* is required to be appointed, because in many instances the very grounds underlying a landlord's suit (i.e., the tenant's allegedly strange or potentially dangerous behavior) raise "an issue as to the [tenant's] ability to adequately defend her rights," thus warranting an inquiry as to "whether the appointment of a guardian *ad litem* [is] required."⁸²

⁷⁷ *Perrotty v. Shor*, N.Y.L.J., Apr. 22, 1999, at 28 (N.Y. App. Term 1999) (finding that the lower court erred in denying Department of Social Service's post-trial motion for appointment of guardian *ad litem* in light of "tenant's erratic conduct throughout the proceeding and the psychiatric evaluation report detailing her bipolar disorder and associated impaired judgment" and ordered lower court to make such an appointment). Of note, at least one Housing Court judge has held that the Social Services Law does not confer on the Department of Social Service the right to intervene in an action in order to seek appointment of a guardian *ad litem*, but that the Department of Social Services may still make a motion for appointment as a "friend" pursuant to N.Y. C.P.L.R. § 1202. *N.Y. Life Ins. Co. v. V.K.*, 711 N.Y.S.2d 90, 93-94 (N.Y. Civ. Ct. 1999). We believe the Court's reasoning on this issue is correct. N.Y. C.P.L.R. § 1202's provision for a guardian *ad litem* motion made by a "friend" has been broadly interpreted to include the Department of Social Services. *Id.* However, the Housing Court cases continue to use the language of "intervention" by the Department of Social Services, when they may actually mean that the Department of Social Services has made a motion for appointment of a guardian *ad litem* rather than seeking formal intervention.

⁷⁸ N.Y. C.P.L.R. § 1202(a)(2).

⁷⁹ *Anonymous v. Anonymous*, 681 N.Y.S.2d 494 (App. Div. 1998) (affirming appointment of guardian *ad litem* on lower court's own initiative, based upon that court's observation of the defendant and over the defendant's objection); *see also*, *City of N.Y. v. Tillis*, N.Y. L.J., Feb. 9, 2000, at 29, (N.Y. Civ. Ct. 2000) (having the Housing Court bring an application for guardian *ad litem* on its own motion).

⁸⁰ *In re Foreclosure of Tax Liens by Ithaca*, 724 N.Y.S.2d 211, 213 (App. Div. 2001) (reversing foreclosure judgment) (citing *N.Y. Life Ins. Co.*, 711 N.Y.S.2d at 95; N.Y. C.P.L.R. § 1201 (2005); *Sengstack v. Sengstack*, 176 N.Y.S.2d 337, 342 (1958)).

⁸¹ *Vinokur v. Balzaretti*, 403 N.Y.S.2d 316, 316 (App. Div. 1978).

⁸² *Roe Corp. v. Doe*, N.Y.L.J., Jan. 15, 2003, at 21 (N.Y. Civ. Ct. 2003) (alleging that because tenant maintained a Collyers apartment, a hearing regarding propriety of appointing a guardian *ad litem* for the tenant was necessary); 124 *MacDougal St. Assocs. v. Hurd*, N.Y. L.J., Feb. 2, 2000, at 28, (Civ. Ct. 2000) (acknowledging that it was required to weigh the disturbance of the alleged nuisance to others residing in tenant's building against public policy pro-

These cases make clear that, if the Housing Court judge sees behavior on the part of a litigant that triggers the question of the litigant's mental capacity, the judge must act to determine whether a guardian *ad litem* may need to be appointed. Failure to do so risks reversal of all the proceedings held before the judge, including a trial, even where the tenant was represented by counsel.⁸³

3. Consequences of a Litigant's Failure to Bring a Party's Diminished Capacity to the Court's Attention or of the Court Appropriately to Consider Such Information

"A party's failure to notify the court of an adversary's disability before obtaining a default judgment is a fraud upon the court and a basis for vacating the judgment."⁸⁴ This result is mandated by CPLR § 1203⁸⁵ and further supported by the legislative history to CPLR Article 12, which states that:

[w]here a party has information indicating that another party is incompetent to protect his interests it should be revealed to the court so that the court can appoint a guardian. Failure to suggest the party's

recting rights of the mentally infirm, and found that tenant's mental condition impeded her ability to defend herself against the landlord's allegations); *Perrotty v. Shor*, N.Y.L.J., Apr. 22, 1999, at 28 (N.Y. App. Term 1999) (holding that appointment of guardian *ad litem* in the first instance might have "been effectual in facilitating landlord's access to the apartment premises, the principal basis for eviction set forth in the petition"); *Deepdale Gardens Third Corp. v. Knox*, N.Y.L.J., Oct. 1, 1996, at 25 (Sup. Ct. 1996) (vacating default judgment and approving the appointment of guardian *ad litem* where nuisance upon which landlord based eviction proceeding, the harboring of pigeons and cats and verbal and physical abuse and harassment of other residents, cast doubt upon tenant's competency in the first instance, which doubt was confirmed by post-judgment psychiatric evaluation that diagnosed tenant as "suffering from probably Bipolar Disorder, hypomania, and possible alcohol dependence/abuse.").

⁸³ *Kaliminian v. Driscoll*, N.Y.L.J., July 20, 1992, at 23 (N.Y. App. Term 1992) (reversing trial judgment against tenant and affirming post-trial appointment of guardian based upon the "uncontroverted hearing testimony of the tenant's expert psychiatric witness.").

⁸⁴ *N.Y. Life Ins. Co. v. V.K.*, 711 N.Y.S.2d 90, 98 (N.Y. Civ. Ct. 1999) (citing *In re Bobst*, 651 N.Y.S.2d 26, 26 (App. Div. 1996) and *Sarfaty v. Sarfaty*, 443 N.Y.S.2d 506, 507 (App. Div. 1981)); see also *Jackson Gardens L.L.C. v. Osorio*, N.Y.L.J., July 11, 2001 (N.Y. Civ. Ct. 2001), at 25 (holding that landlord's failure to inform court that guardian *ad litem* had been appointed for tenant in prior action between the same parties before the same court a few months earlier, before landlord sought default judgment in the instant proceeding "is a fraud upon the court, and renders the judgment obtained a nullity.").

⁸⁵ N.Y. C.P.L.R. § 1203 ("No default judgment may be entered against an adult incapable of adequately protecting his rights for whom a guardian *ad litem* has been appointed unless twenty days have expired since the appointment.").

inadequacy to the court would constitute a fraud which could be the basis for a motion to set aside any judgment.⁸⁶

New York courts have held that such a failure by a party renders any relief obtained by the party—regardless of the stage of the proceedings—void or voidable.⁸⁷ In the landlord-tenant context, one court has noted that “entering a judgment and executing a warrant, had one been issued, with knowledge that the tenant was mentally incapacitated and in a nursing home, would only subject the landlord to potential claims for, *inter alia*, possession, wrongful eviction and property damage.”⁸⁸ Despite these clear statements of the law, landlords continue to fail to notify courts at the outset of a proceeding of their knowledge that a tenant may have diminished capacity.⁸⁹ It is incumbent upon judges to

⁸⁶ N.Y. C.P.L.R. § 1201 advisory committee's notes.

⁸⁷ *Oneida Nat'l Bank and Trust Co. Cent. N.Y. v. Unczar*, 326 N.Y.S.2d 458, 461 (App. Div. 1971) (holding that failure of plaintiff to bring to court's attention the defendant's possible mental disability resulted in vacatur of default judgment, even after foreclosure and subsequent sale of property to third party); *Kaliminian v. Driscoll*, N.Y. L.J., July 20, 1992, at 23 (N.Y. App. Term 1992) (vacating jury verdict and directing the appointment of a guardian *ad litem*; fact that defendant tenant was represented by counsel in the trial proceedings was of little relevance since defendant suffered from a mental illness); *State v. Kama*, 267 A.D.2d 225, 226 (N.Y. App. Div. 1999) (vacating default judgment); *Sarfaty*, 443 N.Y.S.2d at 507 (vacating default judgment); *Barone v. Cox*, 379 N.Y.S.2d 881, 883-85 (App. Div. 1976) (vacating default judgment).

⁸⁸ *Parras v. Ricciardi*, 710 N.Y.S.2d 792, 796 (N.Y. Civ. Ct. 2000).

⁸⁹ See, e.g., *Hotel Pres. v. Byrne*, N.Y.L.J., Mar. 12, 1999, at 26 (N.Y. App. Term 1999) (vacating default judgment in nonpayment proceeding where landlord “knew or had reason to know that tenant was a mentally incapacitated person incapable of protecting her interests at the time the judgment was entered” because landlord's building premises were for use “by the elderly and/or disabled”); *Roe Corp. v. Doe*, N.Y.L.J., Jan. 15, 2003, at 23 (N.Y. Civ. Ct. 2003) (vacating default judgment and warrant, even after defendant tenant's eviction where grounds for termination and plaintiff landlord's own observations regarding condition of tenant's apartment raised issue regarding tenant's ability to adequately defend her rights and landlord had failed to bring these facts to the court's attention); *Beneson v. Dimonda*, N.Y.L.J., Jan. 16, 2002, at 22 (N.Y. Civ. Ct. 2002) (vacating default judgment and warrant where plaintiff landlord knew even prior to beginning the proceeding that defendant tenant “was incapable of protecting his interests” but failed to bring this knowledge to court's attention); *Surrey Hotel Assocs., L.L.C. v. Sabin*, N.Y.L.J., June 29, 2000, at 28 (N.Y. Civ. Ct. 2000) (vacating default judgment upon finding that plaintiff landlord was on notice of defendant tenant's disability because rent payments were made by Adult Protective Services and because plaintiff had acknowledged and complained about tenant's behavior); *Glick v. Quintana*, N.Y.L.J. Nov. 30, 1992, at 27 (N.Y. Civ. Ct. 1992) (vacating default judgment and warrant where plaintiff landlord was aware that defendant tenant was incapable of defending her rights because a guardian *ad litem* had been appointed in two prior proceedings involving the same parties).

make clear to plaintiffs that they will not tolerate the withholding of such information.

Once notified, failure by a court to appoint a guardian *ad litem* or to adequately consider the need for a guardian *ad litem* has been held to be "improvident and requires the reversal of the judgment. . . ." ⁹⁰

4. Recommendations

The Housing Court cases illustrate that a tenant's potential disability often comes to the court's attention only at the later stages of litigation, despite the obligation of a landlord to notify the court if he or she believes or has reason to believe that a tenant is of diminished capacity. In many instances, the court is apprised of the potential risk after default judgment and, in some cases, after a stipulation of settlement has been signed or a trial conducted and a warrant of eviction issued. Currently, under rules governing the conduct of a City Marshal when performing an eviction, the Marshal is obligated to make a "reasonable effort" to ascertain prior to executing on a warrant whether a resident of a household is at risk.⁹¹ The Marshal's Handbook of Regulations recommends that the Marshal make an inquiry of the landlord or of the landlord's attorney. It makes little sense to make this inquiry at the end of the proceeding rather than at the beginning. Instead, identifying litigants with diminished capacity at the earliest possible stage of the proceeding will allow the court to offer appropriate accommodations or protections before the case is adjudicated.

We recommend, therefore, that § 208.42 of the Uniform Civil Rules for the New York City Court⁹² be amended to require that when the plaintiff landlord purchases an index number, he or she must inform

⁹⁰ *Rakiecki v. Ferenc*, 250 N.Y.S.2d 102 (App. Div. 1964) (setting aside judgment after trial where court was put on notice during trial that the defendant was institutionalized but failed to appoint a guardian *ad litem*); 83 *East Assoc. v. Mager*, N.Y.L.J. Nov. 10, 1992, at 21 (N.Y. App. Term 1992) (vacating judgment where court had before it statements of two psychiatrists diagnosing defendant tenant with impaired judgment and chronic schizophrenia, and holding that "it was an abuse of discretion for the [housing] court to have denied, without a hearing, the motion to ascertain whether a tenant was capable of appreciating or adequately defending her interests in the litigation.").

⁹¹ DEPARTMENT OF INVESTIGATION: CITY OF NEW YORK. NEW YORK CITY MARSHALS HANDBOOK OF REGULATIONS Ch. 4 § 6.6 (1997). New York City Marshals are regulated by the New York City Department of Investigation ("DOI") and the NEW YORK CITY'S MARSHAL'S HANDBOOK OF REGULATIONS, governing Marshals, available at http://www.nyc.gov/html/doi/html/marshals/marshal_handbook.html (last visited Mar. 9, 2005).

⁹² N.Y. UNIFORM CIV. RULES, N.Y. CIV. CT. ACT § 208.42 (2005).

the court whether he or she believes or has reason to believe that the tenant is a person who may be at risk. This could be accomplished by including a check box on the Notice of Petition that states, for example, "Petitioner believes or has reason to believe that the Respondent may be a person with diminished capacity such that he or she may need assistance in adequately defending his or her rights." This would alert the court to the need for an appropriate inquiry to be conducted, possibly under seal or in closed session to avoid embarrassment and to protect confidential information.

B. *Standards for Appointment of a Guardian Ad Litem*

1. The Standards

Since the enactment of CPLR Article 12 in 1962, it has been well established that a judicial declaration of incompetence or incapacity is not necessary for the appointment of a guardian *ad litem*. Pursuant to CPLR § 1201, courts are explicitly required to appoint a guardian *ad litem* in cases where a litigant's impairment does not rise to the level of incompetence, but where the court finds that the litigant is "incapable of adequately prosecuting or defending his [or her] rights."⁹³ Even a

⁹³ N.Y. C.P.L.R. § 1201 (2005); *see also* Grasso v. Matarazzo, 694 N.Y.S.2d 837, 838 (N.Y. App. Term 1999) (stating that the standard for appointment of guardian *ad litem* is whether tenant's mental condition would "impede his ability to assist in the presentation of and defense of his case" to any degree); Kings 28 Assocs. v. Raff, 636 N.Y.S.2d 257, 259 (N.Y. Civ. Ct. 1995) ("[Section 1201] does not set a standard of incompetency . . . but rather sets forth a lesser standard of an individual who does not appear able to adequately defend or prosecute his/her rights in the individual proceeding [before the court]"); Weingarten v. N.Y., 405 N.Y.S.2d 605, 606-07 (N.Y. Ct. Cl. 1978) (holding that the court need not make a finding that a litigant is incompetent in order to appoint a guardian *ad litem*). Despite the 1962 clarification by the legislature, a few decisions continue to apply a competency analysis to the decision to appoint a guardian *ad litem* by examining whether a litigant is in fact an "unadjudicated incompetent." *See, e.g.,* Bryant v. Riddle, 687 N.Y.S.2d 108, 109 (App. Div. 1999) (noting that "a person of unsound mind but not judicially declared incompetent may sue or be sued in the same manner as any other person." The court affirmed the appointment of a guardian *ad litem* because the plaintiff appeared to be "an unadjudicated incompetent."); Parras v. Ricciardi, 710 N.Y.S.2d 792, 796 (N.Y. Civ. Ct. 2000) (reasoning that the underlying rationale of CPLR § 1201 is that a court owes a duty to protect incompetent persons as its wards, and that this duty extends to all cases where the fact of incompetency exists whether or not there has been a judicial adjudication of incompetence). The issue was further complicated by three 1991 decisions by the same judge, Judge Solomon, in which the court held that it did not have jurisdiction to appoint a guardian *ad litem*, because the appointment required a competency determination that only the Supreme Court, and not the Housing Court, could make. *See* Zuckerman v. Burgess, N.Y.L.J., Mar. 13, 1991, at 22 (N.Y. Civ. Ct. 1991). *See also* 1199 Housing Corp. v. Jackson, N.Y.L.J., Mar. 20, 1991, at 21 (N.Y. Civ. Ct. 1991); Silgo 22nd Street Assoc. v. Hennies, N.Y.L.J., Apr.

temporary illness or other circumstances *suggesting* that a litigant may be incapable of adequately prosecuting or defending his or her rights warrants appointment of a guardian *ad litem*.⁹⁴ In addition, New York Housing Courts have uniformly found that if a defendant resides at an inpatient psychiatric or geriatric facility rather than at the subject premises, at a bare minimum the court should undertake an inquiry into whether a guardian *ad litem* should be appointed. Most courts faced with the issue have held that, in this circumstance, appointment of a guardian is necessary.⁹⁵

24, 1991, at 22 (N.Y. Civ. Ct. 1991). These decisions have subsequently been criticized and distinguished. *See, e.g.*, 466 Assocs. v. Murray, 151 Misc. 2d 472, 475 (N.Y. Civ. Ct. 1991) (distinguishing 1991 Judge Solomon decisions and holding that the Housing Court has the "inherent power" and jurisdiction under CPLR §§ 1201-02 "to appoint a guardian *ad litem* for the limited purpose of appearing for a party during the particular litigation at hand"); *accord*, 124 MacDougal St. Assocs. v. Hurd, N.Y.L.J., Feb. 2, 2000, at 28 (N.Y. Civ. Ct. 2000) (holding that the role of a guardian *ad litem* appointed by the Housing Court "is limited to that specific action or proceeding as opposed to a guardian appointed under MHL Article 81 which would normally involve more expansive powers beyond a Housing court proceeding"); *City of N.Y. v. Tillis*, N.Y.L.J., Feb. 9, 2000, at 29 (N.Y. Civ. Ct. 2000) ("Housing Court Judges are authorized to appoint a Guardian Ad litem in appropriate circumstances in the interest of justice"); *see also* Parras v. Ricciardi, 710 N.Y.S.2d 792, 797 (N.Y. Civ. Ct. 2000) (holding that appointment of a guardian *ad litem* is a "routine occurrence" in Housing Court summary proceedings). While certain litigants in need of a guardian *ad litem* may possess more severely diminished mental capacity and thus an inability to adequately prosecute or defend their rights, the general rule, cited by the overwhelming majority of courts, recognizes that the Article 12 standard does not require a finding of incompetency.

⁹⁴ *See, e.g.*, Kings 28 Assocs. v. Raff, 636 N.Y.S.2d 257, 258 (N.Y. Civ. Ct. 1995) (holding that a guardian *ad litem* should be appointed even though elderly tenant was alleged to be "mentally competent" where the recent death of her husband in addition to other "subclinical" manifestations rendered it difficult for her to take the appropriate actions on her own to preserve her tenancy); Jennie Realty Corp. v. Sandberg, N.Y.L.J., July 21, 1993, at 23 (N.Y. Civ. Ct. 1993) (reasoning that in light of psychiatrist's "uncontroverted albeit non-conclusive testimony," based on limited conversations with defendant tenant that tenant could "function in society" but had "poor insight and judgment," court appointed guardian *ad litem* where court could not "state categorically that the respondent's mental condition did not impede his ability to defend against the landlord's allegations." (citation omitted)); Daejan v. Cohen, No. 90-423, 1991 N.Y. Misc. LEXIS 835, at *1 (N.Y. App. Term 1991) (appointing a guardian *ad litem* where tenant's general "want of understanding" was accompanied by "shouting and screaming profanities at her neighbors and repeatedly opening and slamming shut her apartment door," and appointment might well lead to cure of problems about which landlord complained in the first instance).

⁹⁵ *See, e.g.*, Beneson v. Dimonda, N.Y.L.J., Jan. 16, 2002, at 22 (N.Y. Civ. Ct. 2002) (requiring inquiry into the appointment of guardian *ad litem* where tenant was in a residential psychiatric facility on the date of the eviction and landlord alleged that tenant "engaged in behavior that was dangerous to person and property."); Parras v. Ricciardi, 710 N.Y.S.2d 792, 795 (N.Y. Civ. Ct. 2000) (requiring guardian *ad litem* to be appointed where "affidavit of investigation prepared by the landlord himself" stated that tenant was "about 90 years of age,

CPLR § 1202 clearly contemplates that the issue of the appointment of a guardian *ad litem* for an adult who has not been judicially declared to be incompetent may either be raised by the court "upon its own initiative" or by motion of "a relative, friend . . . or any other party to the action."⁹⁶ Notice of such a motion must be served upon "the person who would be represented" and upon "the person with whom he resides."⁹⁷ Beyond these minimal requirements, CPLR Article 12 is silent as to the type of proceeding, showing, or hearing that is required prior to the appointment of a guardian *ad litem*. The jurisprudence applying Article 12, however, rightly reflects the courts' exercise of flexibility in determining whether to appoint a guardian *ad litem* and the standard of proof required for a showing that such an appointment is necessary. At a minimum, when the issue of the potential need for appointment of a guardian *ad litem* is raised, courts conduct a suitable

mentally incompetent, and resides in a nursing home"); *Kirso Prop. Co. v. Brief*, N.Y.L.J., June 29, 1998, at 30 (N.Y. App. Term 1998) (in holding tenant's default was due to her commitment in an involuntary psychiatric treatment program, the Appellate Term vacated the lower court's grant of default judgment and reversed its denial of motion for appointment of guardian *ad litem*); *466 Assocs. v. Murray*, 573 N.Y.S.2d 360, 361 (N.Y. Civ. Ct. 1991) (requiring hearing on motion for appointment of guardian *ad litem* where tenant was confined to a mental hospital and suffering from chronic paranoid schizophrenia and allegedly kept his apartment in a state of "chaos and filth" presenting a health hazard); *Weingarten v. N.Y.*, 405 N.Y.S.2d 605, 606-07 (N.Y. Ct. Cl. 1978) (holding that where litigant "resides in a mental institution, whether on a voluntary basis or pursuant to court commitment, such residence creates a [rebuttable] presumption that the person involved is unable to adequately prosecute or defend his rights," appointment of a guardian *ad litem* is warranted under N.Y. C.P.L.R. § 1201). We note that in many of these cases, the face of the landlord's pleadings indicates that the tenant is residing in a residential care facility, which should trigger the plaintiff's and the court's duty to inquire whether a guardian *ad litem* is required.

⁹⁶ N.Y. C.P.L.R. § 1202(a) (2005).

⁹⁷ N.Y. C.P.L.R. § 1202(b) (2005); *see also* *Weingarten v. N.Y.*, 405 N.Y.S.2d 605, 606-07 (N.Y. Ct. Cl. 1978) (denying motion for appointment of guardian *ad litem* without prejudice to renew upon proper papers in accordance with N.Y. C.P.L.R. article 12 where plaintiff seeking appointment of himself as guardian *ad litem* for his sister failed to serve the motion on the sister personally: "In the absence of a judicial declaration of incompetence or other Court determination of her mental condition, due process requires that she be given an opportunity to be heard. It may be that she is capable of prosecuting her rights on her own behalf . . . Mental ailments vary and the legal implications with respect thereto vary as well." (citation omitted)); *Parras* 710 N.Y.S.2d at 795 ("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" and holding that default may not be entered against a tenant who is not so served because "[i]n no other way can we avoid accidentally evicting people who are temporarily in a hospital, convalescent home or nursing home, or temporarily living with a relative or friend in order to recuperate from illness.").

inquiry, the content of which is left to each court's discretion.⁹⁸ From the experience of MFY's attorneys, the Housing Court judges are generally sensitive to the need for the appointment of a guardian *ad litem* once the issue is raised and generally make an appropriate determination of the necessary inquiry on a case-by-case basis.

Whether an actual hearing is required often depends on the circumstances. The court is required to hold a hearing if a motion for the appointment of a guardian *ad litem* is opposed, or if there exists a question of fact about the need for an appointment.⁹⁹ On the other hand,

⁹⁸ See, e.g., *In re Foreclosure of Tax Liens by the City of Ithaca*, 724 N.Y.S.2d 211, 213 (App. Div. 2001) (holding that the lower court "ha[d] the duty to protect a party incapable of protecting her own interests, particularly when her home is in controversy," and that at a minimum, the court conduct an "inquiry") (quoting *N.Y. Life Ins. Co. v. V.K.*, 184 Misc. 2d 727, 732 (N.Y. Civ. Ct. 1999)); *Parras*, 710 N.Y.S.2d at 798 (N.Y. Civ. Ct. 2000) (dismissing landlord's application for a judgment and warrant on default seeking elderly tenant's eviction, court observed that upon proper service of renewed petition and notice by landlord to court that it might be necessary to appoint a guardian *ad litem* for the tenant, the court should then conduct a "proper inquiry" into the need for such appointment in order to protect tenant's rights); *State v. Kama*, 699 N.Y.S.2d 472, 473 (App. Div. 1999) (vacating default judgment where lower court conducted no "suitable inquiry" into whether a guardian *ad litem* should have been appointed for defendant).

⁹⁹ See, e.g., *Shad v. Shad*, 562 N.Y.S.2d 202, 204 (App. Div. 1990) (holding that a "question of fact requiring a hearing" was raised where, in conjunction with defendant's motion for the appointment of a guardian *ad litem* to represent her, defendant "submitted two letters from her psychiatrist stating that she has been in psychiatric treatment for 13 years, is under daily medication, and suffers from mental illness that severely impairs her insight and judgment and causes her to act in a self destructive manner."); *Kushner v. Mollin*, 535 N.Y.S.2d 41, 42 (App. Div. 1988) (holding that lower court erred "by not conducting a hearing to determine whether the plaintiff required the appointment of a guardian *ad litem*" where plaintiff suffered from Down's syndrome and had filed a motion to vacate a stipulation of settlement executed by plaintiff's mother); *Palaganas v. D.R.C. Indus., Inc.*, 407 N.Y.S.2d 170, 171 (App. Div. 1978) (hearing on appointment of guardian *ad litem* required where plaintiffs "question[ed] the degree of defendant[s] incapacity" and requested a hearing); *Vinokur v. Balzaretto*, 403 N.Y.S.2d 316, 316 (App. Div. 1978) (holding that the lower court abused its discretion in denying, "without [a] hearing, [the] motion to determine defendant's fitness to adequately defend her rights in "light of the strong allegations of senility presented in the moving affidavits," because, as a matter of public policy, a hearing is required under these circumstances); see also *Roe Corp. v. Doe*, N.Y.L.J., Jan. 15, 2003, at 23, (N.Y. Civ. Ct. 2003) (reasoning that allegations that tenant maintained a Collyers apartment necessitated a hearing regarding propriety of appointing a guardian *ad litem* for the tenant); *Grasso v. Matarazzo*, 694 N.Y.S.2d 837, 838 (App. Div. 1999) (requiring a hearing "on the issue of appointment," where former tenant brought suit seeking the appointment of a guardian *ad litem* and to be restored to possession of his apartment on the ground that his agreement to relinquish the premises was procured under threat by the landlord); *Kaliminian v. Driscoll*, N.Y.L.J., July 20, 1992, at 23, (N.Y. App. Term 1992) (affirming post-trial appointment of guardian *ad litem* based upon the "uncontroverted hearing testimony of the tenant's expert psychiatric witness"); *466 Assocs.*, 573 N.Y.S.2d at 364 (finding that a hearing was required where landlord's motion for appointment of guardian *ad litem* was

when evidence in support of a motion for appointment of a guardian *ad litem* is undisputed, particularly compelling, or based on a court's own observations, courts may decide to appoint a guardian *ad litem* on a motion without a hearing.¹⁰⁰ In either circumstance, there ought to be at least a minimal showing that an individual is not capable of adequately prosecuting or defending his or her rights in order to grant a motion for appointment of a guardian *ad litem*.¹⁰¹

accompanied by affidavits of psychiatrist and of neighbor, tenant was confined to a mental hospital, apparently suffering from chronic paranoid schizophrenia, the parties had a history of contentious litigation, and tenant opposed the appointment through counsel); 83 East Assoc., A Partnership v. Mager, N.Y.L.J. Nov. 10, 1992, at 21 (N.Y. App. Term 1992) ("[I]t was an abuse of discretion for the [housing] court to have denied, without a hearing, the motion to ascertain whether a tenant was capable of appreciating or adequately defending her interests in the litigation." (citation omitted)).

¹⁰⁰ See, e.g., Anonymous v. Anonymous, 681 N.Y.S.2d 494 (App. Div. 1998) (affirming appointment of guardian *ad litem* by lower court, based upon that court's observation of the defendant and over the defendant's objection); N.Y. Life Ins. Co. v. V.K., 711 N.Y.S.2d 90, 96 (N.Y. Civ. Ct. 1999) (finding that where Department of Social Services moved for appointment of a guardian *ad litem* pursuant to N.Y. C.P.L.R. § 1202(a)(2) as "friend" of tenant, the report of a psychiatrist who conducted one interview with tenant sufficed to establish by a preponderance of the evidence that guardian *ad litem* should be appointed without a hearing); Henriquez v. Cook, N.Y.L.J. Feb. 10, 1992, at 26 (N.Y. Sup. Ct. 1999) (appointing guardian *ad litem* for plaintiff tenants without hearing where plaintiffs were former psychiatric inpatients who were placed in housing owned by defendant landlord as part of out-patient placement plans; motion in support of guardian *ad litem* accompanied by affidavits of plaintiffs and their case management coordinator showing that plaintiffs understood the underlying issues in case, but needed a guardian *ad litem* to assist in decisionmaking); King's 28 Assocs., 636 N.Y.S.2d at 260 (appointing, upon order to show cause brought by New York Department of Social Services and without a hearing, guardian *ad litem* for elderly and mentally at-risk tenant based upon in-court observation of tenant by court and its court attorneys, the moving papers, and psychiatric evaluations); Silver & Junder v. Miklos, N.Y.L.J., Aug. 24, 1994, at 23 (N.Y. Civ. Ct. 1994) (appointing guardian *ad litem* without a hearing, based primarily upon a report of a psychiatric examination that concluded that tenant was "in need of psychiatric help," which was bolstered by a letter landlord's agent had written to Protective Services for Adults that stated tenant was "not capable of rationally making decisions" for himself). See also Brewster v. John Hancock Mutual Life Ins. Co., 720 N.Y.S.2d 462, 462 (App. Div. 2001) (ordering, on its own initiative, lower court to appoint a guardian *ad litem* for plaintiff where, during the pendency of defendant's appeal but before it had been perfected or submitted, counsel for plaintiff successfully moved to be relieved on the ground that "it appears that Plaintiff has become incompetent to make decisions regarding her case, or to testify at trial."); Perrotty v. Shor, N.Y.L.J., Apr. 22, 1999, at 28 (N.Y. App. Term 1999) (finding that the Housing Court erred in summarily denying Department of Social Service's post-trial motion for appointment of guardian *ad litem* in light of "tenant's erratic conduct throughout the proceeding and the psychiatric evaluation report detailing her bipolar disorder and associated impaired judgment" and ordered lower court to make such an appointment).

¹⁰¹ The question of the standards of proof and persuasion necessary for a showing that a person is incapable of adequately defending his or her rights is an open one. In New York Life

2. Recommendation

It cannot be over-emphasized that the standard for appointment of a guardian *ad litem* is whether or not the person is an “adult incapable of adequately prosecuting or defending his [or her] rights.”¹⁰² It is not a competency test. MFY attorneys are frequently challenged by judges to make the case that a client was “incompetent” at the time that, for example, he or she failed to appear in court and defaulted, or signed an improvident stipulation. We recommend that judges set aside the language of competence or incompetence and adhere to the language of the statute.¹⁰³ Case law shows that courts have judiciously exercised the flexibility implicit in CPLR Article 12 to determine when a guardian *ad litem* is required. We further recommend that judges continue to exer-

Insurance Co. v. V.K., 711 N.Y.S.2d 90, 96 (N.Y. Civ. Ct. 1999), Judge Billings attempted to formulate a standard, and determined that a “mere preponderance” of the evidence sufficed in a case in which the motion was not opposed by the proposed ward. *See also* JEROME PRINCE, RICHARDSON ON EVIDENCE, § 3-203 (Richard T. Farrell ed., 1995) (clarifying that the preponderance of the evidence is generally the lowest standard for the burden of persuasion in New York civil cases, the others being “beyond a reasonable doubt” (which rarely applies in civil cases), and the intermediate “clear and convincing evidence” standard). Courts have generally required that a minimal showing of inability to adequately defend rights is required in support of a guardian *ad litem* motion. *See, e.g.*, Wilson Han Assoc., Inc. v. Arthur, N.Y. L.J., July 6, 1999, at 29 (N.Y. App. Term 1999) (affirming the Housing Court’s denial of post-judgment motion for appointment of a guardian *ad litem* where letter of psychologist who evaluated tenant “did not state that tenant was incapable of defending her rights or that appointment of a guardian was needed”); Urban Pathways, Inc. v. Lublin, 642 N.Y.S.2d 26, 26 (App. Div. 1996) (holding that the lower court properly refused to consider appointing a guardian *ad litem* for defendant where defendant “failed to present evidence tending to show that she was incapable of either prosecuting or defending her rights, or that plaintiff actively concealed any possible mental disability with which she might have been afflicted”); *In re the Estate of Venezia*, N.Y.L.J., Apr. 2, 2004, at 37 (Surr. Ct. Kings Cty. 2004) (denying plaintiff’s motion for guardian *ad litem* for defendant based on allegations that defendant lacked mental capacity and had engaged in unnecessary litigation; court found that although defendant “may be cantankerous and litigious, he certainly does not appear to be incompetent or unable to adequately protect his rights. He has retained counsel, has substantially cooperated with her and has participated in the litigation before this court.”).

¹⁰² N.Y. C.P.L.R. § 1201 (2005).

¹⁰³ Competency was the standard under the former conservator and committee statutes. *See, e.g.*, N.Y. CIVIL PRACTICE ACT § 207 (2005). *See also* N.Y. MENTAL HYG. LAW art. 77 – 78 (repealed 1992). Article 81 of the Mental Hygiene Law, which replaced the conservator and committee statutes, no longer uses a competency standard; nor is a determination of incompetency required for appointment of a guardian *ad litem* under the language of the guardian *ad litem* statute. *See also* N.Y. MENTAL HYG. LAW art. 81 (2005); N.Y. C.P.L.R. § 1201 (2005).

cise this flexibility and that they apply the low "mere preponderance"¹⁰⁴ threshold for an evidentiary showing if the motion is contested.

C. *The Obligations Of The Guardian Ad litem And The Court After Appointment Of The Guardian Ad Litem*

New York jurisprudence has long been clear that the powers of a guardian *ad litem* are limited by law and the instructions of the court by which he or she is appointed.¹⁰⁵ Guardians *ad litem* are officers of the court and should be guided by the court in their actions.¹⁰⁶ MFY attorneys have heard references during court appearances, and 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. The only case found that mentions the phrase is *Jennie Realty Corp. v. Sandberg*, where movant argued the guardian *ad litem* would "stand in the shoes of the respondent."¹⁰⁷ It is likely that the concept has evolved as a shorthand reference for the set of obligations and tasks that a guardian *ad litem* undertakes in exercising his or her duties with respect to the ward, as overseen by the court. The few reported cases that allude to the duties of a guardian *ad litem* indicate that courts may require guardians *ad litem* to investigate the underlying causes of action, the bases for defenses that may be asserted by the ward, and the ward's capacity to protect his or her own rights in the litigation.¹⁰⁸ In the experience of MFY attorneys, guardians *ad litem* have

¹⁰⁴ See *supra* note 101, for a discussion of the standards of proof and persuasion courts have applied to determine whether a person is incapable of adequately defending his or her rights.

¹⁰⁵ *Honadle v. Statford*, 193 N.E. 172, 173 (N.Y. 1934) ("A guardian *ad litem* is an officer of the court, and his powers and duties are strictly limited by law"); *Lee v. Gucker*, 186 N.Y.S.2d 700, 702 (N.Y. Sup. Ct. 1959) ("The court has power to remove or revoke the authority of a guardian *ad litem* at its discretion and it is its duty to do so where it is necessary and in order to protect the interests" of the ward (in this case an infant).).

¹⁰⁶ *Honadle*, 193 N.E. at 173 (holding that a guardian *ad litem* "can only act in accordance with the instructions of the court and within the law under which appointed.").

¹⁰⁷ N.Y.L.J., July 21, 1993, at 23 (Bx. Civ. Ct. 1993).

¹⁰⁸ See, e.g., *Silver & Junder v. Miklos*, N.Y.L.J., Aug. 24, 1994, at 23 (N.Y. Civ. Ct. 1994) (directing guardian *ad litem*, upon appointment, to investigate facts and circumstances underlying claim of plaintiff landlord against defendant tenant, tenant's defense, tenant's capacity to contest landlord's claim and represent herself in the proceeding, and directing guardian *ad litem* to report to the court and the parties in writing); *466 Assoc.*, 573 N.Y.S.2d 360, 364 (N.Y. Civ. Ct. 1991) (finding that in holdover case based on allegations of nuisance, "[w]hile it may not be the function of a guardian *ad litem* to oversee a tenant's affairs long-term and to assist in making financial decisions, etc., as a conservator or committee would be empowered to do in a proper

assisted wards in, inter alia: applying for welfare assistance; applying for assistance with rent arrears either through the public assistance office or through advocacy with charities; applying for SSI or SSD benefits; making arrangements for financial management assistance or heavy-duty house cleaning services by Adult Protective Services; making appointments with mental health professionals; re-certifying for housing subsidies; and challenging lapsed housing subsidies.

The court has a continuing obligation to oversee the actions of a guardian *ad litem*.¹⁰⁹ However, it is not clear from the sparse case law what the parameters of the court's oversight are. Although a number of courts require guardians *ad litem*, once appointed, to make interim or final reports or recommendations to the court, there is little authority whether those reports or recommendations are required to be in writing. Nor is it clear whether, upon receipt of a report or recommendations, the judge must make findings of fact and conclusions of law before accepting or rejecting the views of the guardian *ad litem*.¹¹⁰

With respect to the guardian *ad litem*'s relationship to the ward, wards may disagree with a guardian *ad litem*'s recommendations, even to the extent of obtaining separate counsel and being heard separately by

case, that does not diminish the necessity of such a guardian *ad litem* in assisting the court, where the situation requires it, to ascertain whether such tenant adequately understands the circumstances surrounding the pending litigation and the consequences that may flow from it.”).

¹⁰⁹ *Pomeroy Co. v. Thompson*, N.Y.L.J., Sept. 18, 2002, at 20 (N.Y. Civ. Ct. 2002); *aff'd*, 5 Misc.3d 51 (N.Y. App. Term 2004) (holding that “the utter failure of the [guardian *ad litem*] as well as various City agencies to advocate for and protect the interests of the respondent in this [nonpayment] proceeding” led to issuance of warrant of eviction. The court vacated the warrant and *sua sponte* discharged guardian *ad litem*, noting that it “has a continuing obligation to ensure that respondent’s rights are adequately protected and, in furtherance of that obligation, removed the [guardian *ad litem*] and appointed a new [guardian *ad litem*].”).

¹¹⁰ *Feliciano v. Nielsen*, 736 N.Y.S.2d 510 (App. Div. 2002), is one of the few cases to address this issue. In this case, the Third Department rejected the defendant’s argument, made by her counsel in a child custody case, that her guardian *ad litem* did not have the authority to resolve the dispute by stipulation and that the court was required to conduct a full fact-finding hearing, unless it satisfied itself after conversations with the “incompetent” defendant that she accepted the agreement. *Id.* at 512. The Third Department stated that a hearing was not required where the guardian *ad litem* “articulated” to the court his belief that the settlement was in his client’s best interest, even though she disagreed with it. *Id.*

the court.¹¹¹ Courts are divided, however, over whether the guardian *ad litem* must accede to the ward's personal preferences.¹¹²

On the other hand, it is wrong for the Housing Court to permit guardians *ad litem* either (1) to "accept" a settlement on a ward's behalf, or (2) to "enter into stipulations of settlement" that compromise a ward's property rights (e.g., stipulations that a warrant of eviction may be issued or executed upon a defendant ward's default, or settlements agreeing to the surrender of a ward's apartment), because the guardian *ad litem*'s authority is limited to recommending a resolution to the court, which the court is obligated to confirm, modify, or reject, as the court determines is appropriate. Under CPLR § 1207, the governing authority to settle cases, the only representatives authorized to settle cases are: a committee for individuals judicially declared to be incompetent, a conservator of the property of a conservatee, or a guardian appointed pursuant to Mental Hygiene Law Article 81.¹¹³ The legislature specifically excluded guardians *ad litem* from the representatives authorized to settle cases.¹¹⁴

D. Recommendation

Based on statutes and case law, we recommend that the Housing Court monitor more closely any settlement proposals made by guardians *ad litem* to ensure that they do not act outside the scope of their authority. Explanations by guardians *ad litem* of the actions they have taken to

¹¹¹ *In re the Estate of Venezia*, N.Y.L.J., Apr. 2, 2004, at 37 (Surr. Ct. Kings Cty. 2004) (denying plaintiff's motion for guardian *ad litem* on the grounds that the guardian would prevent defendant from engaging in allegedly vexatious litigation because "[e]ven if the court were to appoint a guardian *ad litem* for [defendant], he would still be able to retain his own counsel and engage in litigation.").

¹¹² *Compare Matter of Aho*, 347 N.E.2d 647, 651 (N.Y. 1976) (stating in dicta that a guardian *ad litem* may take the wishes of a ward into account in determining the best interests of the ward, but it is the determination of the guardian *ad litem* that will prevail); *Feliciano*, 736 N.Y.S.2d at 510 (upholding lower court's approval of a settlement recommended by guardian *ad litem* but opposed by ward); *New York Life Ins. Co. v. V.K.*, 711 N.Y.S.2d at 95 (stating in dicta that guardian *ad litem*, after assessing a ward's best interests, may act to advance those interests, even if they are contrary to the ward's wishes, and maintain a position adverse to the ward), *with In re Estate of Bernice B.*, 672 N.Y.S.2d 994, 997 (Sur. Ct. N.Y. 1998) (interpreting provisions of the Surrogate's Court Procedure Act to hold that "a [guardian *ad litem*] 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 [Mental Hygiene Law].").

¹¹³ N.Y. MENTAL HYG. LAW art. 81 (1993) (replacing New York's committee and conservatorship laws).

¹¹⁴ N.Y. C.P.L.R. § 1207 (2005).

assist their wards in participating in the defense of the proceedings and explanations of why a particular course of action or settlement is recommended should be in writing or at least made on the record in, for example, the form of an allocution.

The court must then determine whether additional protections may be needed for the ward. 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. The court should conduct a full inquiry of the litigant and the guardian *ad litem* concerning the bases for the terms of the settlement and the litigant's understanding of the settlement. Depending on the level of incapacity of the litigant, the court may decide that the case requires a Supreme Court determination of whether an Article 81 guardian should be appointed before a settlement is approved that relinquishes the litigant's property rights. If the litigant has a higher level of capacity, the court may determine that the settlement terms are appropriate and approve the settlement as recommended by the guardian *ad litem*. The responsibility for making what may be a delicate and complex determination, on a case-by-case basis, resides with the court as it exercises its authority to approve settlements.

Further, guardians *ad litem* must be informed at the outset of their appointment about their responsibilities to their wards and to the court, including the court's expectation to receive interim and final reports of the guardian *ad litem*'s recommendations. It should be made clear that guardians *ad litem* may not settle cases—they may only recommend settlements. Where a settlement provides for the relinquishment of a property right, the guardian *ad litem* may further recommend the appointment of an Article 81 guardian to make that decision.

III. RECOMMENDATIONS TO BRING THE HOUSING COURT INTO COMPLIANCE WITH THE ADA AND TO BETTER PROTECT THE RIGHTS OF LITIGANTS WITH DIMINISHED CAPACITY

As recently illustrated in the United States Supreme Court's decision in *Tennessee v. Lane*,¹¹⁵ federal law has evolved in response to changing societal norms with regard to standards of equal access and protection of the rights of people with disabilities. To ensure it complies with this mandate, the Housing Court needs to adopt new procedures, including: (1) methods of identifying people who need accommodations; (2) a clear and simple method for litigants to request accommodations; (3) education of judges and court personnel to assist litigants with requests for accommodations or to offer accommodations as appropriate; (4) a well-defined procedure by which the court will evaluate requests for accommodations, and approve or deny them in a timely fashion; and (5) an appeal and/or grievance procedure for denials. Because little information exists about what accommodations improve access to courts for people with mental disabilities, we make general recommendations based on our experience at MFY that could assist the Housing Court in meeting its obligations. The actual development of appropriate accommodations should involve collaboration among judges, lawyers, mental health professionals, people with mental disabilities, and court personnel.¹¹⁶

¹¹⁵ *Tennessee v. Lane*, 124 S.Ct. 1978 (2004).

¹¹⁶ To illustrate the range of disabilities and how the symptoms are exhibited, we have compiled two composite case examples based upon MFY's extensive experience with clients with diminished capacity:

Example 1: Mr. G suffers from Major Depression. He owes rent and his landlord has started a proceeding in the Housing Court to evict him. On the day of the first court appearance, the symptoms of Mr. G's depression do not manifest themselves in the courtroom. He appears coherent, is well dressed and understands what is transpiring. He tells the court that he will go to the local welfare office to apply for assistance in order to pay his back rent (which he does not have) and he agrees to return in two weeks, the next date designated by the court to appear. Instead, Mr. G puts the papers in his coat pocket, goes home, and spends the rest of the day watching TV and sleeping — just as he spends every day—due to his illness. The fatigue related to his depression paralyzes him, and profound feelings of worthlessness along with recurrent thoughts of death and suicide render him unable to do anything but languish at home. He does not go to the welfare office and he does not return to court on the designated date. It is only when Mr. G sees a marshal's notice of eviction on his door, that he musters the will to go back to court and learns that a final judgment was issued authorizing his eviction when he failed to return to court as instructed.

A. *Recommendation 1: Litigants With Diminished Capacity Should Be Identified Early In The Process*

The Housing Court needs to create a system that includes various approaches to identifying litigants with diminished capacity who may need a guardian *ad litem* to assist in defending a proceeding and/or who may need accommodations from the court during the course of the proceeding. This system would ensure litigants with diminished capacity equal access to court proceedings and a meaningful opportunity to be heard. The following are some suggestions to assist the court in better identifying litigants with diminished capacity.

1. Training for Judges, Clerks, and the Housing Court Staff

While the New York City Housing Court system currently has a training program to instruct clerks on how they can appropriately assist pro se tenants,¹¹⁷ additional training is needed for all court personnel in areas concerning the different forms of mental illness, how these illnesses exhibit themselves, the capabilities of persons with various disabilities, and how these capabilities vary from day to day. This will assist court personnel in the fundamental first step of understanding disabili-

Example 2: Ms. S suffers from Paranoid Schizophrenia. She has not taken her medication for a few months because she lost her Medicaid card. Her landlord has sued her, claiming that she is a nuisance. This is the second nuisance proceeding that the landlord has brought against Ms. S. In the last proceeding, a guardian *ad litem* was appointed. When she goes to court for the first hearing date, she is late, and cannot sit down for long. She goes in and out of the courtroom, shaking her head and talking to herself. After an hour, her case is called. She is now very agitated and refuses to make eye contact with her landlord. The judge asks if she has read the nuisance allegations in the landlord's petition. (The petition alleges that she yells in the hallways of the building, calls the police on her neighbors, and plays loud music at all hours of the night.) She says that the landlord is trying to kill her and that her neighbors are working with the landlord to do so. The judge asks if she admits the allegations or denies them, and she answers that she really needs to get going because she's very busy. The judge tells her to return for trial in two weeks. As a result of the lack of medication for the past few months—a fact she is unlikely to bring to the court's attention—Ms. S is experiencing "confused thoughts" in the clinical sense; she cannot rationally respond to the allegations nor respond to the court. She is likely experiencing thoughts rapidly racing through her mind, none of which are connected each other and thinks that everyone is "out to get her." On the trial date, Ms. S returns to court and sits through the trial, alternating between making obscene comments and yelling at the judge.

¹¹⁷ NEW YORK STATE UNIFIED COURT SYSTEM, FACILITATING ACCESS TRAINING MANUAL, REFERENCE MANUAL, available at http://www.courts.state.ny.us/ip/justiceinitiatives/pdfs/FATP_Vol1.pdf (last visited Apr. 19, 2005).

ties and other causes of diminished capacity, and will likely assist the court in identifying litigants with diminished capacity.

2. Use of Appropriate Computer Technology to Cross-Reference Prior Court Appointment of Guardians *Ad Litem* and the Records of Adult Protective Services About Litigants at Risk.

Housing Court clerks should, upon filing of a new case, routinely check the computer link-up system between the Housing Court and Adult Protective Services.¹¹⁸ This cross-referencing of information will immediately identify litigants who have been known to be at risk in the past and will facilitate intervention early in the proceeding, if still necessary.

3. Disclosure by Landlords and Their Counsel at the Commencement of a Proceeding, or as Soon as They Become Aware of it, of Information They Have About The Possible Diminished Capacity of a Litigant

This may be accomplished by amending the authorized form for the notice commencing the Housing Court proceeding to include a checkbox next to an appropriate statement, such as: "Petitioner believes or has reason to believe that the Respondent may be a person with diminished capacity such that he or she may need assistance in adequately defending his or her rights. Failure to disclose information on diminished capacity may be good cause to reopen a case."

4. Adequate Notice to Litigants of Their Right to Request an Accommodation Under the ADA

Federal regulations require the Housing Court to give adequate notice of how the ADA applies to court proceedings.¹¹⁹ Although the

¹¹⁸ We understand that access to Adult Protective Services' database will shortly be available to the Housing Court.

¹¹⁹ 28 C.F.R. § 35.106 (2004). The Housing Court's current method for requesting an accommodation may be insufficient for people with diminished capacity. Currently, each court has an ADA coordinator, or "liaison," whose duties include facilitating requests for accommodations. The liaison cannot deny a request. If the accommodation requested seems to present an undue burden to the court, the liaison presents it to the Chief Clerk who, along with the Office of Court Administration's Director of Operations, determines if the requested accommodation or an alternative may be granted. See NEW YORK STATE UNIFIED COURT SYSTEM, ADA FRE-

Housing Court has posted notices, they contain only a general statement that the ADA requires the court to provide accommodations. For example, the notice currently in place at the Manhattan Housing Court states that "If you need an accommodation, please ask a court officer to direct you to the Chief Clerk's office for assistance." Someone with a mental disability may not understand that this applies to them. In addition, the posters generally include only icons associated with physical disabilities. The Manhattan Housing Court notice illustrates the point: the notice includes four symbols — a person with a cane, the famous wheelchair symbol, a pair of hands (presumably indicating the availability of sign language) and an ear with a bar over it (presumably indicating the availability of other services for the deaf) — all of which are related to physical disabilities. A more appropriate notice might read, "If you have a physical or mental disability, you may ask the judge or a clerk to assist you during your case. For example, you may need a quiet room to wait in, an afternoon appointment, help filling out paperwork, or a referral to Adult Protective Services." Such notices should be posted prominently on every floor of the court, included on post cards sent by the Housing Court clerk's office, available as handouts in the clerk's office, and made as announcements in the Housing Court courtrooms.

B. *Recommendation 2: Once Litigants With Diminished Capacity Are Identified, A Variety Of Accommodations Should Be Made Available*

The challenge of accommodating litigants with disabilities does not end once a litigant has been identified, or has self-identified, as being of diminished capacity.¹²⁰ The Department of Justice (DOJ) Regulations implementing Title II of the ADA require public entities to furnish appropriate auxiliary aids and services in order to provide people with disabilities equal opportunities and to give primary consideration to the aid or service requested by the person with a disability.¹²¹ There is no one accommodation that meets the needs of all litigants with disa-

QUENTLY ASKED QUESTIONS, available at <http://www.nycourts.gov/accessibility/index.shtml> (last visited Apr. 19, 2005).

¹²⁰ When a litigant self-identifies and requests an accommodation, the criteria for granting or denying a requested accommodation needs to be clear and simple. Because the court's goal is to be more accessible, a letter from a doctor, therapist, social worker, or other treatment provider should be sufficient proof that a person qualifies as disabled under the ADA. There should be the right to appeal to an administrative judge from any denial of a requested accommodation.

¹²¹ 28 C.F.R. § 35.160 (2005).

bilities. There must be a variety of accommodations and flexibility on the part of the court to weave a better safety net for these litigants. Furthermore, the question of what aids and services are helpful for people with mental disabilities is largely unexplored and must also be the subject of discussion among judges, lawyers, mental health professionals, people with disabilities, and court personnel.¹²²

The following is a preliminary list of suggestions intended as a starting point for discussion:

1. Prominent signage throughout the Housing Court informing litigants of their rights to request an accommodation. Presently, the signage in the Housing Court is neither prominently displayed nor explicit that the right to request an accommodation applies to persons with mental disabilities.
2. A quiet waiting room. This accommodation would assist litigants for whom the sometimes chaotic and noisy environment of the Housing Court exacerbates the symptoms of mental illness and the stressors contributing to de-compensation.
3. An afternoon calendar. The elderly and people with disabilities often take medication that has the side effect of making it difficult to wake up or be coherent early in the day. Sometimes, they are unable to come to court for the morning calendar, or come late, and find they have already been defaulted. An afternoon calendar would alleviate some of these problems.
4. Calling the case of a litigant identified as having diminished capacity first. This would be helpful for people for whom the Housing Court environment and long waiting time for cases may cause further agitation and confusion.

¹²² An interesting development in the courts and mental health arena is the proliferation of mental health parts in criminal courts nationwide. Take, for example, the Brooklyn Mental Health Court. A joint project of the New York State Unified Court System, the Center for Court Innovation, and the New York State Office of Mental Health, it addresses both the treatment needs of defendants with mental illness and the public safety concerns of the community, by linking defendants with serious and persistent mental illness (such as schizophrenia and bipolar disorder) to mental health treatment as an alternative to incarceration. See BROOKLYN MENTAL HEALTH COURT, FACT SHEET, *available at* <http://www.courtinnovation.org> (last visited Dec. 7, 2004). Two of this article's authors attended a session of the court on the morning of September 14, 2004, and believe there are useful lessons to be learned from the model that can be applied in the Housing Court. MFY is considering the legal and social implication of such a part and whether such a part could serve as a further accommodation to disabled litigants in the Housing Court.

5. Telephone or video appearances and testimony; in-home hearings. This accommodation would assist individuals who are unable to come to court due to disabilities such as agoraphobia, claustrophobia, or age-related infirmities.
6. Special clerks trained to assist litigants with diminished capacity to formulate accommodations and to assist in accessing social and legal services.
7. On-site support services. The Housing Court should have adequate referrals to legal and social services for disabled litigants, including mental health services. This accommodation would provide access to assistance with applications (e.g., for rent arrears from welfare or for cleaning services from Adult Protective Services in Collyers cases where it is alleged the tenant is hoarding), as well as address any underlying clinical issue that may be the cause of the behavior putting the tenant at risk of being evicted.

C. *Recommendation 3: Provide Counsel For All Housing Court Litigants With Diminished Capacity*

The appointment of a guardian *ad litem* and the provision of the types of accommodations suggested herein, are not, in and of themselves, sufficient protections of the rights of litigants with diminished capacity. Those litigants must also have an attorney to prosecute or defend their cases. 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 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.

Government-funded counsel for litigants with disabilities who cannot afford an attorney should be a right under the ADA. The thirty years since the establishment of the Housing Court have made clear that without counsel, *pro se* litigants are at a significant disadvantage in proceedings that may result in the loss of a home, and the traumatic chain effect on the litigant's family, access to education, employment, and

participation in civil society and political life.¹²³ These disadvantages are heightened for people with diminished capacity.

Although the First Department held that there is no general right to counsel in the Housing Court,¹²⁴ recent scholarship indicates that Title II of the ADA could provide the basis for a right to counsel for disabled litigants.¹²⁵ There is a sound argument to be made that just as a deaf person needs a sign language interpreter to access the justice system, or a wheelchair-bound person needs a ramp to enter the courthouse, a person of diminished capacity needs the assistance of an attorney to interpret the court system and to accommodate entry, in the theoretical sense, to the courthouse.

CONCLUSION

In the Housing Court proceedings where cases move quickly and the laws involved are a byzantine web of overlapping provisions, the rights of litigants with diminished capacity are easily trampled. On this Thirtieth Anniversary of the Housing Court, we call upon the justice community to renew its commitment to the rigorous protection of litigants with diminished capacity. This is a historic moment in the development of disability law in which New York courts could take the lead with better implementation of New York's guardian *ad litem* statute and better provision of accommodations pursuant to the Americans with Disabilities Act, including establishing a right to counsel for person with diminished capacity.

¹²³ 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); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to be Represented by Counsel*, 3 CARDOZO PUB. L., POL'Y & ETHICS J. 699 (2006).

¹²⁴ *Donaldson v. State*, 548 N.Y.S.2d 676 (App. Div. 1989).

¹²⁵ See Lisa Brodoff et al., *Access to Justice: A Call For A Civil Gideon: The ADA: One Avenue to Appointed Counsel Before a Civil Gideon*, 2 SEATTLE J. SOC. JUST. 609 (2004).