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THE END OF *PARENS PATRIAE* IN NEW YORK: GUARDIANSHIP UNDER THE NEW MENTAL HYGIENE LAW ARTICLE 81

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[1]

> The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.[2]

I. INTRODUCTION

Guardianship is commonly defined in the following manner:

> [a] legal arrangement under which one person (a guardian) has the legal right and duty to care for another (the ward) and his or her property. A guardianship is established because of the ward's inability to legally act on his or her own behalf [e.g., because of minority . . . or mental or physical incapacity].[3]

The root of guardianship is benevolence.[4] The definition of guardianship reflects an intent "to assist and protect persons of limited capacity."[5] However, an examination of the history of guardianship laws reveals that the price of that benevolent intent has often been borne by the wards, paid for with their freedom and liberty. An examination of

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1. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

2. JOHN STUART MILL, ON LIBERTY 15 (Everyman's Library, Alfred A. Knopf 1992) (1859).

3. BLACK'S LAW DICTIONARY 707 (6th ed. 1990) (alteration in original).

4. Penelope A. Hommel et al., *Trends in Guardianship Reform: Implications for the Medical and Legal Professions*, 18 L. MED. & HEALTH CARE 213, 213 (1990) [hereinafter *Trends in Guardianship Reform*].

"Benevolence" is defined as "[t]he doing of a kind or helpful action towards another, under no obligation except an ethical one." BLACK'S LAW DICTIONARY 159 (6th ed. 1990).

5. *Trends in Guardianship Reform, supra* note 4, at 213.

the history of guardianship statutes in New York State reveals how difficult it can be for a state's legislature and courts to provide the protections necessary for a ward's welfare without unnecessarily endangering her freedom as a result of the zeal to protect. Indeed, it was not until 1992, with the passage of Article 81 of the Mental Hygiene Law,[6] that the word "guardian" was used with respect to the protection of incompetent adults in the statutes of New York State.[7]

This Comment will examine how the changes in New York guardianship law work to cure prior defects, and at what costs. Part II will discuss the traditional values and processes of guardianship. Part III will compare the new guardianship laws of New York State to those they replaced and discuss the cases that made change necessary and those which interpret the new law. The conclusion will explicate how the new law might affect those who must resort to it.

II. BACKGROUND

A. Parens Patriae

The historical foundations for guardianship have been traced to Rome at the time of Cicero, to legal proceedings for the protection of the property of incompetents.[8] Guardianship first appears in English law with the passage of the statute *De Praerogativa Regis*,[9] which recognized guardianship as a duty of the sovereign to protect and care for the person and property of the mentally incompetent.[10] The term *parens patriae* means "parent of the country" and stemmed from the emerging English concept of the king as father of his subjects.[11]

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6. 1992 N.Y. Laws ch. 698.

7. Under New York law prior to the passage of Article 81, a "conservator" was appointed to care for only the property of an incompetent person, 66 N.Y. JUR. 2D *Infants and Other Persons Under Legal Disability* § 331 (1987) (discussing now repealed Mental Hygiene Law Article 78), and a "committee" was appointed to care for the person and property of the incompetent. *Id.* (discussing now repealed Mental Hygiene Law Article 77). The term "guardian" was used only in matters pertaining to minors (infants). *Id.* § 114.

8. Peter M. Horstman, *Protective Services For The Elderly: The Limits Of Parens Patriae*, 40 MO. L. REV. 215, 218 (1975) (citing AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 1 (rev. ed. 1971) [hereinafter AMERICAN BAR FOUNDATION STUDY]). The *Horstman* article is widely cited, and is especially useful for acquiring an understanding of the relationship between guardianship proceedings, criminal law, and due process.

9. 17 Edw. 2, c. 9 (1324), *cited in* Horstman, *supra* note 8, at 218.

10. Horstman, *supra* note 8, at 218.

11. *Id.*

The legal process that developed for determining an individual's mental status was a writ *de idiota inquirendo*,[12] which was tried to a jury.[13] If the jury found the subject of the proceeding incompetent, the Chancellor would commit the subject to the care of some friend, who would be compensated for rendering that care.[14] "The incompetent's heir was generally made manager of the estate, although according to Blackstone, 'to prevent sinister practices' he was not given custody of the incompetent. For the custody of the estate, the heir was responsible to the court of chancery, to the recovered lunatic, or to his administrator."[15] The fiduciary obligations of an heir gradually developed into a set of customs, rules, and standards for the proper management of a lunatic's property,[16] and were carried over into the United States after the American Revolution.[17] Exercising a "modified form of *parens patriae*,"[18] the states, applying common law or acting under their own constitutional or statutory provisions, would exercise jurisdiction "over the persons and property of the mentally incompetent to assure that those unable to care for themselves were protected from harm."[19]

The *parens patriae* power is distinct from the police power of the state.[20] It is through the police power that a state intervenes "to restrict the liberty of individuals who endanger the health and safety of

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12. *Id.* at 218-19. Literally, "inquiring concerning an idiot." Sporza v. German Sav. Bank, 84 N.E. 406, 412 (N.Y. 1908). This expression, as archaic as it sounds, continued to be used in New York into this century, as seen in *Sporza*. More commonly seen, however, was the expression *de lunatico inquirendo*, which was last used by the Court of Appeals of New York in *In re* Coates, 173 N.E.2d 797, 804, (N.Y. 1961); by the Appellate Division in *In re* Long, 26 N.Y.S.2d 271, 275 (N.Y. App. Div. 1941), *rev'd*, 40 N.E.2d 247 (N.Y. 1942), and by the Supreme Court for New York County in *In re* Schermerhorn, 98 N.Y.S.2d 361, 363 (N.Y. Sup. Ct. 1950) *rev'd*, 98 N.Y.S.2d 367 (N.Y. App. Div.), *aff'd*, 98 N.E.2d 475 (N.Y. 1951). For a discussion on the different treatment historically between idiots and lunatics, *see* Horstman, *supra* note 8, at 218-19.

13. Horstman, *supra* note 8, at 219.

14. *Id.*

15. *Id.* (quoting AMERICAN BAR FOUNDATION STUDY, *supra* note 8, 13, at 3-4).

16. *Id.*

17. Horstman, *supra* note 8, at 219; John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569, 570-73 (1972).

18. Horstman, *supra* note 8, 13, at 219.

19. *Id.* (citing AMERICAN BAR FOUNDATION STUDY, *supra* note 8, at 250). By 1890, the Supreme Court had suggested that the *parens patriae* power is rooted in the very nature of the state in modern society. Mormon Church v. United States, 136 U.S. 1, 57-58 (1890). The Court described that power as "inherent in the supreme power of every State . . . and often necessary to be exercised in the interest of humanity . . . ." *Id.* at 57; Comment, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1208 (1974).

20. *Trends in Guardianship Reform*, *supra* note 4, at 213.

the community at large."[21] However, the well-being of the individual "is the sole justification for the exercise of the state's authority as *parens patriae*."[22]

The most common and obvious exercise of police power is in the area of criminal law, wherein the state uses its power "in ways that are manifestly detrimental to the individual."[23] Because the exercise of police power has the potential to cost the individual his or her liberty, property, or both, "very strict procedural safeguards and a formal adversarial proceeding always accompany any exercise of the police power in order to protect individual rights and liberties from arbitrary infringement."[24] Yet, in spite of the potentially manifest restrictions on the individual rights and liberties of a ward,[25] the states have traditionally exercised their *parens patriae* powers in an atmosphere of informality. Relaxed procedures were said to be justified because the proceedings were nonadversarial; the sole preoccupation of the court was to serve the individual's best interest.[26] However, as many commentators have pointed out,[27] guardianship, especially if plenary, can result in a deprivation of personal rights and civil liberties which can be devastating.[28] Indeed, until relatively recently, the constitutional requirement

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21. *Id.*

22. *Id.* (quoting Horstman, *supra* note 8, at 221).

23. *Trends in Guardianship Reform*, *supra* note 4, at 213.

24. *Id.*

25. George J. Alexander, *Premature Probate: A Different Perspective on Guardianship for the Elderly*, 31 STAN. L. REV. 1003, 1003-04 (1979). Professor Alexander suggests that the following situations, *inter alia*, create the potential for abuse of a ward's liberties: the guardian making health treatment decisions contrary to the ward's wishes, including protective hospitalization, involuntary commitment, and unwelcome therapies including electroconvulsive therapy; denying the ward the benefit of his or her possessions or savings; channelling funds away from individuals the ward would like to benefit and toward persons the guardian deems more suitable; and restricting the expenses paid
to or on behalf of the ward for the purpose of maintaining or enlarging the size of the estate that will pass upon the ward's death. Professor Alexander's article is recommended for its discussion of the Living Will as both a preferable substitute for guardianship, as well as its use by individuals to control their medical treatment in the event of incompetence.

26. Horstman, *supra* note 8, at 221.

27. *See generally* Horstman, *supra* note 8; Alexander, *supra* note 25; Lawrence A. Frolik, *Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599 (1981); *Guardianship: An Agenda For Reform; Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, 13 MENTAL & PHYSICAL DISABILITY L. REP. 271, 282-88 (1989); Louis A. Mezzullo & Michael C. Roach, *The Uniform Custodial Trust Act: An Alternative to Adult Guardianship*, 24 U. L. REV. 65 (1989).

28. Horstman, *supra* note 8, at 231. A detailed, not to mention scathing, analysis of what a ward stands to lose appears on pages 231-35 in the section titled "Guardianship Proceedings:

that no person shall be deprived of "life, liberty or property without due process of law"[29] was not applied in the guardianship context even though there is "nothing in either the Fifth[30] or Fourteenth[31] Amendments which limits the applicability of the due process clause to criminal matters."[32] Fortunately, some states have begun to recognize that while guardianship can be appropriate and beneficial for some, it can be highly detrimental to others.[33]

B. The Trend from Lunatic to Incompetent to Incapacitated Person

The legislative trends reflect a shift in philosophy from the paternalistic benevolence of *parens patriae* to a recognition that individuals who may need protection due to their limitations may also need protection from the unnecessary loss of liberty that is frequently a consequence under the older laws.[34] The newer laws incorporate as a purpose the promotion of autonomy, and achieve this by changing the definition of incapacity and expressing a preference for limited guardianships.[35]

A typical "traditional" law would define incompetence by the status or condition of the subject. An older Michigan law, for example, deemed incompetent "all persons who are insane, imbecile, idiotic, or who by reason of old age or disease are mentally incompetent to have the care, custody and management of their estate."[36]

The Uniform Probate Code, adopted widely, represents an early reform effort.[37] A typical version reads:

> "[I]ncapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate

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What is at Stake?"

29. U.S. CONST. amend. XIV § 1.

30. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

31. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV § 1.

32. Horstman, *supra* note 8, at 236.

33. *Trends in Guardianship Reform*, *supra* note 4, at 214.

34. *Id.* at 215.

35. *Id.*

36. MICH. COMP. LAWS § 703.1(4), *cited in Trends in Guardianship Reform*, *supra* note 4, at 215. This language was in use until 1978. *Id.*

37. *Trends in Guardianship Reform*, *supra* note 4, at 215.

> responsible decisions concerning his person or management of his affairs.[38]

A statute thus worded is an improvement because of the requirement that the impairment must rise to a level that renders the subject bereft of the ability to understand or communicate "responsible decisions." Nevertheless, the use of words like "mental illness," "advanced age," and "responsible" may still invite evaluations of the person's capacity based on his or her status or condition and encourage value judgments on whether his or her actions were "responsible," "reasonable," or "proper."[39] Commentators have found such definitions unsatisfactory "because labels or diagnoses of physical or mental disability may provide no meaningful indication of the person's ability to function autonomously."[40] One writer regards such language as "vague" and "normative," the use of which invites arbitrary findings of incapacity.[41] Another warns that the use of such standards "increases the risk that an individual might lose 'control over decisions governing his/her own life . . . for mere idiosyncratic behavior.'"[42]

The newer generation of statutes either eliminates the reliance on labels and establishes objective standards for evaluating the subject's ability to manage personal financial matters,[43] or expressly states that

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38. *Id.* (citing N.M. STAT. ANN. § 45-5-101.F (Michie 1978)).

39. *Trends in Guardianship Reform*, *supra* note 4, at 215.

40. *Id.*

41. Bobbe S. Nolan, *Functional Evaluation of the Elderly in Guardianship Proceedings*, 12 L. MED. & HEALTH CARE 210 (1984). The author, a certified geriatric nurse practitioner, was a law student when she wrote this article. The notes to the new Article 81 of the Mental Hygiene Law of New York cite to it, and many of the concepts promoted therein appear to have been adopted by the New York legislature. Especially interesting is the use of the "functional evaluation," discussed at 210-12, which achieves statutory realization in N.Y. MENTAL HYG. LAW § 81.02(c), which requires the court to consider the "functional level and functional limitations of the person," and in § 81.09 (Appointment of Court Evaluator). *See infra* notes 127-48 and accompanying text.

42. *Trends in Guardianship Reform*, *supra* note 4, at 215 (citing Thomas L. Hafemeister & Bruce D. Sales, *Interdisciplinary Evaluations for Guardianships and Conservatorships*, 8 L. & HUMAN BEHAVIOR 335, 338 (1984)).

43. The District of Columbia, for example, provides that "'[i]ncapacitated individual' means an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator." D.C. CODE ANN. § 21-2011(11), enacted in 1987. This definitional section also provides that "'[m]anage financial resources' means those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income," and that "'[m]eet essential requirements for physical health or safety' means those actions necessary to provide

"[a]ge, eccentricity, poverty, or medical diagnosis alone is not sufficient to justify a finding of incapacity."[44] For example, comparing a statute devoid of language that invites a court to consider labels or status[45] to an earlier reform statute that uses words like "mental illness," "advanced age," and "responsibility,"[46] shows the shift from reliance on a mere diagnosis to a mandate for evidence of actual incapacity.[47]

The other common feature of the newer reform statutes is their preference for limited guardianship, wherein "even if a person is found to be incapacitated, guardianship is to be used only to the extent necessary."[48] Under a statute embodying this preference, a guardian will be granted "only those powers and only for that period of time necessary to provide for the demonstrated needs of the ward."[49] Typically, a court will be required to "make specific findings regarding the ward's disabilities and to issue specific orders regarding the extent of, and limits on, the guardian's powers."[50] Moreover, the typical statute will provide that "[a]n incapacitated person for whom a guardian has been appointed retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by court order."[51]

In addition to the change in the definition of incapacity and the preference for limited guardianship, the newer statutes have provided for reforms both in methods of assessing capacity and in strengthening procedural safeguards.[52] As we shall see, New York has incorporated all these trends in its new Mental Hygiene Law Article 81.

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health care, food, shelter, clothing, personal hygiene, and other care without which serious physical injury or illness is more likely than not to occur." D.C. CODE ANN. § 21-2011(15)-(16).

44. N.D. CENT. CODE § 30.1-28-04.2.a (1989).

45. *See* D.C. CODE ANN. § 21-2011(11), *supra* note 43.

46. *See, e.g.,* N.M. STAT. ANN. 45-5-101.F, *supra* note 38.

47. *Trends in Guardianship Reform*, *supra* note 4, at 216.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* (citing specifically to N.M. STAT. ANN. § 45-5-301.1, and generally to FLA. STAT. ANN. § 744.331(5) and N.D. CENT. CODE § 30.1-28-04.5).

52. *See Trends in Guardianship Reform*, *supra* note 4, at 216-21.

III. COMPARISON OF OLD AND NEW LAWS IN NEW YORK

A. *Articles 77 and 78*

Prior to the passage of Article 81 (and repeal of Articles 77 and 78) of the Mental Hygiene Law, the only legal remedy available for dealing with the needs of an allegedly incompetent person was found in Article 78.[53] Article 78 provided for the appointment of a committee upon a finding of complete incompetence.[54] However, such a finding imposed a stigma on the respondent, and was accompanied by a loss of civil rights.[55] In practice, therefore, the courts became reluctant to invoke Article 78.[56] The result was that, absent the requisite finding of complete incompetence, concerned parties who sought assistance for an individual who required no more than property management found no remedy in the courts.[57]

The New York legislature responded in 1972 by passing a conservatorship statute, Article 77,[58] which provided for "a less restrictive alternative to the committee procedure."[59] The legislature designed Article 77 to provide a solution for property and financial issues only, restricting the conservator's authority to the "control, charge and management of the estate, real and personal, of the conservatee."[60] Thus, where the allegedly incompetent person required nothing more than assistance with financial or property matters, Article 77 provided the remedy of conservatorship. At the other end of the spectrum, if a court found the respondent completely incompetent, Article 78 provided

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53. 1972 N.Y. Laws ch. 251, replacing sections 100-13 of the Mental Hygiene Law.

54. N.Y. MENTAL HYG. LAW § 78.01 (Consol. 1989) (repealed 1993). "A committee is a fiduciary who has powers over a person who is incompetent to manage himself or his affairs by reason of age, alcohol abuse, mental illness, or other cause, or is a patient in a state mental facility who is unable to conduct his personal and business affairs." 66 N.Y. JUR. 2D *Infants and Other Persons Under Legal Disability* § 331 (1987).

55. G. Oliver Koppell & Kenneth J. Munnelly, *The New Guardian Statute: Article 81 of the Mental Hygiene Law*, 65 N.Y. ST. B.J. 16 (1993) (citing RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE 1992 LEGISLATURE 2 [hereinafter L.R.C. RECOMMENDATION]).

Assemblyman Koppell, chairman of the Assembly Judiciary Committee, was the main sponsor of the bill. Mr. Munnelly was the Counsel to the Assembly Judiciary Committee, and helped draft the legislation.

56. Koppell & Munnelly, *supra* note 55, at 16.

57. *Id.*

58. 1972 N.Y. Laws ch. 251.

59. Koppell & Munnelly, *supra* note 55, at 16.

60. *Id.* (quoting N.Y. MENTAL HYG. LAW § 77.19 (Consol. 1987) (repealed 1993)).

the remedy of a committeeship. However, neither Article 77 nor 78 provided a remedy for situations in which the respondent was not completely incompetent but was in need of limited assistance, perhaps of a nature that combined both financial and personal needs.

Two 1974 amendments appeared, at first, to provide a narrow bridge over that gap. The first amendment created a "statutory preference in both Articles 77 and 78 for the appointment of a conservator."[61] The second amendment "allowed the conservator to assume a limited role in protecting the personal well-being of the conservatee."[62] The extension of the conservator's authority was limited by the standard for the appointment of a conservator as set forth in section 77.01(1): "substantial impairment of his ability to care for his property or . . . [inability] to provide for himself or others dependent upon him for support."[63] However, the need to bridge the gap was sufficiently compelling to cause many courts to grant "conservators authority over the person of the conservatee."[64] This was a completely understandable solution to the problem discussed earlier: that when an individual who was not completely incompetent was in need of something more than assistance with financial or property matters alone, neither Article 77 nor 78 provided for a well-tailored remedy.

Nevertheless, the New York Court of Appeals put an end to judicial bridge-building on April 30, 1991, when it decided *In re Grinker (Rose)*.[65] In *Grinker (Rose)*, the petitioner, who was Commissioner of Social Services for New York City and desirous of placing the respondent (Seena Rose) in a nursing home, argued that "[A]rticle 77 authorize[d] courts to grant conservators the power to commit their wards to nursing homes where conservatees' 'well-being' so require[d]."[66] The petitioner relied on section 77.19,[67] which provided that a conservator appointed under Article 77 "shall have all of the powers and duties granted to or imposed upon a committee *of the property*" appointed under Article 78,[68] and argued that section 77.19 authorized courts "to empower conservators to involuntarily commit their wards to

61. Koppell & Munnelly, *supra* note 55, at 16 (citing 1974 N.Y. Laws ch. 297).
62. Koppell & Munnelly, *supra* note 55, at 16 (citing 1974 N.Y. Laws ch. 623).
63. N.Y. MENTAL HYG. LAW § 77.01(1) (Consol. 1989) (repealed 1993).
64. Koppell & Munnelly, *supra* note 55, at 16 (citing *In re* Detzel, 521 N.Y.S.2d 6 (N.Y. App. Div. 1987) and *In re* Evelyn P., 522 N.Y.S.2d 617 (N.Y. App. Div. 1987)).
65. 573 N.E.2d 536 (N.Y. 1991).
66. *Id.* at 539.
67. N.Y. MENTAL HYG. LAW § 77.19 (Consol. 1989) (repealed 1993).
68. *In re Grinker (Rose)*, 573 N.E. 2d at 539 (quoting N.Y. MENTAL HYG. LAW § 77.19).

nursing homes."[69] The lower courts agreed with the petitioner, finding support for his position in the following language from section 77.19: "the court order appointing a conservator shall set forth . . . [a] plan for the preservation, maintenance, and care of the conservatee's income, assets and *personal well-being*, including the provision of *necessary personal and social protective services* to the conservatee."[70]

The Court of Appeals rejected the petitioner's argument, finding that the legislative history of the 1974 amendment to Article 77 did not support "the Commissioner's expansive reach."[71] The legislature's intent, per the court, "was to ensure that 'older person[s] without close relatives or friends [are able to] function[ ] in the community,' while 'protecting their independence and right to manage their own property and personal affairs to the greatest possible extent.'"[72] The Governor, adding little in the way of gloss, stated upon signing the bill that "it would 'enable[ ] the conservator to assume a *limited role* in protecting the personal well being of the conservatee.'"[73] The court, however, was not convinced of even that expansive a reading, holding that

> [a]ssuming, without deciding, that Mental Hygiene Law § 77.19 authorizes a grant of limited power over a conservatee's person incidentally related to the primary power over property . . ., we conclude that it clearly does not authorize the potent personal transformation of involuntary commitment of a conservatee to a nursing home. The availability of such a significant involuntary displacement of personal liberty should be confined to a Mental Hygiene Law Article 78 incompetency proceeding, with its full panoply of procedural due process safeguards.[74]

The court concluded that the lower courts had erred "in extending the beneficial reach of Mental Hygiene Law § 77.19 beyond its central property and incidental personal borders."[75]

This decision "highlighted the vacuum that exist[ed] in New York law regarding persons who may require some assistance but who do not require the drastic remedy of either a conservator, with its consequent affront to the integrity and independence of the individual, or a

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69. *Id.* at 539.

70. *Id.* (quoting N.Y. MENTAL HYG. LAW § 77.19) (emphasis in original).

71. *Id.* at 539.

72. *Id.* (alterations in original) (quoting MEM. OF SENATOR GIUFFREDA, 1974 N.Y. LEGIS. ANN., at 176, 178).

73. *Id.* at 539 (alterations in original) (quoting GOVERNOR'S APPROVAL MESSAGES 53-59, *reprinted in* 1974 N.Y. LEGIS. ANN., at 397, 399).

74. *Id.* at 539 (citations omitted).

75. *Id.* at 540.

committee with its finding of incompetence."[76] Stripped of the judicially created remedies developed after 1974, New York courts were once again faced with having to choose between "a remedy which governs property and finances or a remedy which judges a person completely incompetent."[77] After *Grinker (Rose)*, there would be no further use of Article 77 for anything beyond the meeting of incidental personal needs.[78]

B. The Repeal of Articles 77 and 78 and the Passage of Article 81

1. Purpose of Article 81

In response to *Grinker (Rose)*, the New York State Law Revision Commission (LRC) proposed the "creation of a single statute, with a standard for appointment which focuses on the needs of the individual and permits the appointment of a guardian who can make decisions regarding either the person or the property of the person, or both if appropriate."[79] The LRC's proposal was adopted by the legislature in 1992, and became effective in 1993. The situations that led up to the LRC proposal were incorporated into the legislation itself:

> The current system of conservatorship and committee does not provide the necessary flexibility to meet [the] needs [of persons with incapacities]. Conservatorship which traditionally compromises a person's rights only with respect to property frequently is insufficient to provide necessary relief. On the other hand, a committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a deprivation that is often excessive and unnecessary. Moreover, certain persons require some form of assistance in meeting their personal and property management needs but do not require either of these drastic remedies. The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the *least restrictive form of intervention* which assists them in meeting their needs but, at the same time, permits

76. Koppell & Munnelly, *supra* note 55, at 16-17 (quoting L.R.C. RECOMMENDATION, *supra* note 55, at 20).

77. Koppell & Munnelly, *supra* note 55, at 17.

78. *Id.*

79. *Id.* (quoting L.R.C. RECOMMENDATION, *supra* note 55, at 4).

> them to exercise the independence and self-determination of which they are capable.[80]

The legislature set forth the purpose of Article 81 in the very same opening section:

> The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.[81]

Among the hallmarks of the new Article 81 are most of the measures adopted by the newer reform statutes in other states,[82] including a standard for appointment that focuses on "the decisional capacity and functional limitations of the person for whom the appointment is sought rather than on some underlying mental or physical condition of the person."[83]

2. Provisions

a. Power to Appoint a Guardian

"The cornerstone of Article 81 is the concept of appointing a guardian whose powers are tailored specifically to the particular needs of a person with respect to personal care, property management or both."[84] The court has the power to appoint a guardian if it determines:

> (1) that the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; *and*

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80. N.Y. MENTAL HYG. LAW § 81.01 (second through fifth sentences) (Consol. Supp. 1993) (Legislative findings and purpose) (emphasis added).

81. *Id.* (sixth sentence).

82. *See supra* notes 34-52 and accompanying text.

83. Koppell & Munnelly, *supra* note 55, at 17 (citing L.R.C. RECOMMENDATION, *supra* note 55, at 4).

84. L.R.C. RECOMMENDATION, *supra* note 55, at 4.

(2) that the person agrees to the appointment, or that the person is incapacitated as defined in subdivision (b) of this section.[85]

b. Standard for Appointment of a Guardian

When the person does not agree to the appointment, the court, using a two-prong test, must find that the person is incapacitated.[86]

The determination of incapacity shall be based on clear and convincing evidence and shall consist of a determination that a person is likely to suffer harm because:
(1) the person is unable to provide for personal needs and/or property management; and;
(2) the person cannot adequately understand and appreciate the nature and consequences of such inability.[87]

This standard eliminates use of the labels of incompetency and substantial impairment in Articles 77 and 78 and the requirement found therein that there be some underlying illness or condition.[88]

This section requires the court to give "primary consideration to the functional level and functional limitations of the person."[89] In so doing, the court must:

(c) . . . include an assessment of that person's: (1) management of the activities of daily living . . .; (2) understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living; (3) preferences, wishes, and values with regard to managing the activities of daily living; and (4) the nature and extent of the person's property and financial affairs and his or her ability to manage them.

It shall also include an assessment of (i) the extent of the demands placed on the person by that person's personal needs and by the nature and extent of that person's property and financial affairs; (ii) any physical illness and the prognosis of such illness; (iii) any mental disability . . . alcoholism or substance dependence . . . and the prognosis of such disability, alcoholism or substance dependence; and (iv) any medications with which

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85. N.Y. MENTAL HYG. LAW § 81.02(a)(1)-(2) (Consol. Supp. 1993) (emphasis added).
86. *Id.* § 81.02(a)(2).
87. *Id.* § 81.02(b)(1)-(2).
88. Koppell & Munnelly, *supra* note 55, at 17 (citing L.R.C. RECOMMENDATION, *supra* note 55, at 3).
89. N.Y. MENTAL HYG. LAW § 81.02(c) (Consol. Supp. 1993). The terms "functional level" and "functional limitations" are defined in §§ 81.03(b) and (c) respectively. *See infra* notes 105-11 and accompanying text.

> the person is being treated and their effect on the person's behavior, cognition and judgment.
>
> (d)In addition, the court shall consider all other relevant facts and circumstances regarding the person's (1) functional level; and (2) understanding and appreciation of the nature and consequences of his or her functional limitations.[90]

As should be evident from the foregoing, New York courts are now statutorily charged with making an extensive functional evaluation of a person before they may exercise their power to appoint a guardian.[91] This is consistent with prior New York Court of Appeals holdings. In *Rivers v. Katz*,[92] a case in which patients in a mental hospital refused to be treated with antipsychotic drugs, the court held that "there must be a judicial determination of whether the patient has the capacity to make a reasoned decision . . . before the drugs may be administered pursuant to the State's *parens patriae* power."[93] The court stated specifically that a determination of incapacity to make a decision for oneself is "uniquely a judicial, not a medical function,"[94] and is only to be made at a hearing at which the patient is afforded representation by counsel, and where the State "would bear the burden of demonstrating by clear and convincing evidence the patient's incapacity . . . ."[95]

Whether a functional evaluation as extensive as Article 81 requires is best conducted by a court of law is a valid question. However, as will be seen below, the legislature anticipated this criticism by requiring the appointment of a court evaluator[96] to assist the court in meeting its heavy obligation.

c. Least Restrictive Form of Intervention, Functional Level, and Functional Limitations

Section 81.03 provides definitions for several terms appearing in Article 81, among the most important of which are "least restrictive form of intervention," "functional level," and "functional limitations."

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90. *Id.* § 81.02(c)-(d). "Activities of daily living" is defined § 81.03(h).
91. Koppell & Munnelly, *supra* note 55, at 18.
92. 495 N.E.2d 337 (N.Y. 1986), *reh'g denied*, 498 N.E.2d. 438 (N.Y. 1986).
93. *Id.* at 344.
94. *Id.* at 343 (citing Rogers v. Commissioner of Dept. of Mental Health, 458 N.E.2d 308 (Mass. 1983)); *In re* Roe, 421 N.E.2d 40 (Mass. 1981).
95. *Rivers*, 495 N.E.2d at 344. *Accord In re Grinker (Rose)*, 573 N.E.2d at 539-40.
96. *See infra* notes 127-34 and accompanying text.

When appointing a guardian, the court is to be guided by the concept of "least restrictive form of intervention."[97] The term

> means that the powers granted by the court to the guardian with respect to the incapacitated person represent *only those powers which are necessary* to provide for that person's personal needs and/or property management and which are consistent with affording that person the greatest amount of independence and self-determination in light of that person's understanding and appreciation of the nature and consequences of his or her functional limitations.[98]

"The concept of 'least restrictive form of intervention' is an expression of the doctrine of 'least restrictive alternative.'"[99] The Supreme Court established that doctrine in *Shelton v. Tucker*,[100] and requires that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[101] The doctrine was first applied in a civil commitment setting in *Lake v. Cameron*,[102] wherein the United States Court of Appeals for the District of Columbia held that "[d]eprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection,"[103] and that any "alternative course of treatment or care should be fashioned as the interests of the person and of the public require *in the particular case*."[104]

The term "functional level," which is one of the two primary considerations the court shall use in reaching its determination under section 81.02(c),[105] is defined as "the ability to provide for personal needs and/or the ability with respect to property management."[106] According to the LRC, the term is intended to be "a neutral term which encourages those participating in the guardianship proceeding to

97. Koppell & Munnelly, *supra* note 55, at 18.
98. N.Y. MENTAL HYG. LAW § 81.03(d) (Consol. Supp. 1993) (emphasis added).
99. L.R.C. RECOMMENDATION, *supra* note 55, at 7.
100. 364 U.S. 479 (1960).
101. *Id.* at 488.
102. 364 F.2d 657 (D.C. Cir. 1966), *cert. denied*, 382 U.S. 863 (1965).
103. *Id.* at 660.
104. *Id.* (emphasis added).
105. *See supra* notes 89-96 and accompanying text.
106. N.Y. MENTAL HYG. LAW § 81.03(b) (Consol. Supp. 1993).

consider the abilities of the person and not just to focus on the person's limitations."[107]

The other mandatory consideration is "functional limitations," which are defined as "behavior or conditions of a person which impair the ability to provide for personal needs and/or property management."[108] The LRC explains that this definition focuses the court on the behavior or circumstances of the allegedly incapacitated person that impair his or her "ability to provide for personal needs or financial or property management."[109]

Throughout the statute, the stress is on "functional levels" and "limitations" rather than diseases, underlying medical conditions, diagnoses, and labels.[110] The definitions support that intention.[111] Hence, it should no longer be possible for a petitioner to obtain court-ordered protection for an allegedly incapacitated person by the mere offer of medical evidence of dementia or Alzheimer's Disease.

d. Procedural Requirements and Safeguards

Section 81.07 sets forth the notice requirement of Article 81. It provides the manner of service, and the time in which it must be accomplished (within fourteen days prior to the return date of the application).[112] "Notice to the allegedly incapacitated person must be written in 12-point type and in plain language, so as to inform the person of his or her rights and the powers sought for the guardian in a

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107. LAW REVISION COMMISSION COMMENTARY, *reprinted in* the notes to N.Y. MENTAL HYG. LAW § 81.03 (Consol. Supp. 1993) [hereinafter L.R.C. COMM. with a reference to the notes under which section the commentary appears].

108. N.Y. MENTAL HYG. LAW § 81.03(c) (Consol. Supp. 1993).

109. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.03 (Consol. Supp. 1993).

110. *Id.*

111. The other terms defined in § 81.03 are "guardian" (which may be a person 18 years or older, a corporation, public agency, or a county court), "available resources" (which include such things as visiting nurses, home health aides, and adult day care, as well as powers of attorney and trusts), "personal needs" (such as food, clothing, shelter, health care, and safety), "property management" (which means "taking actions to obtain, administer, protect, and dispose of real and personal property, intangible property, business property, benefits, and income and to deal with financial affairs"), "activities of daily living" (which include mobility, eating, dressing, housekeeping, cooking,
shopping, money management, and other activities related to personal needs and to property management), and "major medical or dental treatment" (which means, generally, anything involving anesthesia, risk, invasion, pain, discomfort, debilitation, significant recovery period, or psychotropic medication or electroconvulsive therapy; but does not include anything regarded as "routine"). N.Y. MENTAL HYG. LAW § 81.03(a), (e)-(i) (Consol. Supp. 1993).

112. Koppell & Munnelly, *supra* note 55, at 18.

manner that can be reasonably understood."[113] Furthermore, the same papers must be served, by mail or in person, on the spouse of the allegedly incapacitated person, parents of the person (if living), any adult children, any adult siblings, and persons with whom the allegedly incapacitated person resides.[114] If none of the aforementioned people receives notice, then it must be served on "at least one and not more than three of the living relatives of the person alleged to be incapacitated in the nearest degree of kinship who are known to the petitioner or whose existence and address can be ascertained . . . with reasonably diligent efforts[.]"[115] Other persons entitled to service include:

- those designated by the allegedly incapacitated person pursuant to a valid durable power of attorney or living will,[116]
- any person or organization with a demonstrable genuine interest in promoting the best interests of the person,[117]

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113. *Id.* Section 81.07(c) provides that the order to show cause must carry the following legend (in 12-point type or larger, bold face, and double spaced):

IMPORTANT

An application has been filed in court by _____ who believes you may be unable to take care of your personal needs or financial affairs. _____ is asking that someone be appointed to make decisions for you. With this paper is a copy of the application to the court showing why _____ believes you may be unable to take care of your personal needs or financial affairs. Before the court makes the appointment of someone to make decisions for you the court holds a hearing at which you are entitled to be present and to tell the judge if you do not want anyone appointed. This paper tells you when the court hearing will take place. If you do not appear in court, your rights may be seriously affected.

You have the right to demand a trial by jury. You must tell the court if you wish to have a trial by jury. If you do not tell the court, the hearing will be conducted without a jury. The name and address, and telephone number of the clerk of the court are: _____

The court has appointed a court evaluator to explain this proceeding to you and to investigate the claims made in the application. The court may give the court evaluator permission to inspect your medical, psychological, or psychiatric records. You have the right to tell the judge if you do not want the court evaluator to be given that permission. The court evaluator's name, address, and telephone number are: _____

You are entitled to have a lawyer of your choice represent you. If you want the court to appoint a lawyer to help you and represent you, the court will appoint a lawyer for you. You will be required to pay that lawyer unless you do not have the money to do so.

N.Y. MENTAL HYG. LAW § 81.07(c) (Consol. Supp. 1993).

114. N.Y. MENTAL HYG. LAW § 81.07(d)(ii) (Consol. Supp. 1993).

115. *Id.* § 81.07(d)(iii).

116. *Id.* § 81.07(d)(iv).

117. *Id.* § 81.07(d)(v).

- the attorney for the person alleged to be incapacitated,[118]
- the court evaluator,[119]
- the local department of social services if it is known to the petitioner that the respondent receives public assistance or protective services,[120]
- the director of any facility operating under terms defined elsewhere in which the allegedly incapacitated person resides,[121] and
- "such other persons as the court may direct based on the recommendation of the court evaluator . . . ."[122]

That section 81.07 sets forth ten categories of persons who are to be notified of the petition (including the person alleged to be incapacitated) is ample indication of the seriousness with which the legislature views the threat to the liberty of the respondent. The LRC states that section 81.07 "broadens the group of persons upon whom service shall be required in order to involve persons who may be able to shed some light on the situation but who under former Articles 77 and 78 would not be entitled to service."[123] That someone might have no legal relation to the respondent is no longer relevant under Article 81.

Section 81.08 sets forth the requirements for the petition, which must be verified under oath.[124] There are fifteen additional requirements, which fall into six general categories of information:

> (1) an explanation of the functional level of the person alleged to be incapacitated; (2) the reasons for the guardianship; (3) the available alternative resources that have been explored; (4) the particular powers sought and their relationship to the functional level of the person; (5) the proposed guardian and the reasons why the proposed guardian is suitable; (6) any conflicts of interest between the petitioner and the person alleged to be incapacitated and any proposed guardian.[125]

Taking sections 81.07 and 81.08 together, one can appreciate the level of concern the legislature had for the rights of the respondent. On one hand, there is the large number of persons entitled to be notified

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118. *Id.* § 81.07(d)(vi).
119. *Id.* § 81.07(d)(vii).
120. *Id.* § 81.07(d)(viii).
121. *Id.* § 81.07(d)(ix).
122. *Id.* § 81.07(d)(x).
123. L.R.C. COMM., *supra* note 107, *in* the notes following N.Y. MENTAL HYG. LAW § 81.07 (Consol. Supp. 1993).
124. N.Y. MENTAL HYG. LAW § 81.08(a) (Consol. Supp. 1993).
125. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.08 (Consol. Supp. 1993).

under section 81.07, encompassing virtually anyone who might be in a position to provide the court with assistance in performing its functional evaluation.

On the other hand, there is the extensive and detailed information that section 81.08 requires to be set forth in the petition. Not only must the petitioner state his or her reasons for seeking the appointment of a guardian, the petitioner must explain the functional level of the respondent and the other alternatives that have been explored. This is in keeping with the "least restrictive form of intervention" requirement and puts the court on notice as to what has and has not been attempted with respect to the respondent. Moreover, the petitioner is required to state what powers he or she seeks for the guardian and how those powers relate to the functional level of the respondent. Under this requirement, a petitioner seeking a broad mandate for the guardian will be required to allege all facts pertaining to the functional level of the respondent that would justify such broad authority.

The statute also requires the petitioner to identify the proposed guardian and to explain why that particular person is suitable. This implies that, just as a diagnosis of dementia or old age will no longer be sufficient grounds for a finding of incompetency, merely being the respondent's close relative or business partner will not necessarily satisfy a court as to one's suitability for the role of guardian. This concern may be seen in the requirement that the petition reveal any conflicts of interest between the petitioner and the respondent, and between the respondent and any proposed guardian.[126]

e. Court Evaluator and Counsel

Article 81 does not provide for a guardian ad litem. This is because, according to the LRC, it was not always clear whether the guardians ad litem appointed under prior laws "were acting as advocates for the person who was the subject of the proceeding, or as neutral 'eyes and ears' of the court."[127] When a guardian ad litem reasonably believes that the subject person is in need of protection, but that person resists, then the guardian cannot both advocate for that person's wishes and be

126. "Conflict of interest" is not defined in Article 81, and an examination of situations that might give rise to a conflict in the Article 81 context is beyond the scope of this Comment. However, it does not seem unrealistic to this writer that a court would be cautious when the petitioner or proposed guardian is a potential beneficiary under the respondent's will, or is a partner or co-venturer in a business or investment.

127. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.10 (Consol. Supp. 1993).

honest with the court. The ethical waters are muddied further when the guardian ad litem is paid by a party whose interests are not being served undividedly. The new law alleviates this internal conflict by distinguishing between the two roles of the former guardian ad litem and creating two separate positions: the counsel, whose client is the person alleged to be incapacitated, and the court evaluator, whose responsibility is to be the court's neutral observer and reporter, and creating separate rules to govern each.[128]

Section 81.09 requires that the court appoint a court evaluator to "act as an independent investigator to gather information to aid the Court in reaching a determination about the person's capacity, the availability and reliability of alternative resources, and assigning the proper powers to the guardian."[129] The court evaluator's duties, specified in the statute, are "designed to provide guidance and direction to the court evaluator in fulfilling his or her role in the proceeding."[130] That role is to "provide the court with [the evaluator's] 'personal observations as to the person alleged to be incapacitated and his or her condition, affairs and situation.'"[131]

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128. *Id.*

129. Koppell & Munnelly, *supra* note 55, at 18.

130. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.09 (Consol. Supp. 1993).

131. *Id.;* N.Y. MENTAL HYG. LAW § 81.09(c)(5) (Consol. Supp. 1993). Subsection (c)(5) also requires the court evaluator to provide information obtained in response to specified questions:

> (i) does the person alleged to be incapacitated agree to the appointment of the proposed guardian and to the powers proposed for the guardian;
>
> (ii) does the person wish legal counsel to be appointed or is the appointment of counsel in accordance with section 81.10 of this article otherwise appropriate;
>
> (iii) can the person alleged to be incapacitated come to the courthouse for the hearing;
>
> (iv) if the person alleged to be incapacitated cannot come to the courthouse, is the person completely unable to participate in the hearing;
>
> (v) if the person alleged to be incapacitated cannot come to the courthouse, would any meaningful participation result from the person's presence at the hearing;
>
> (vi) are available resources sufficient and reliable to provide for personal needs or property management without the appointment of a guardian;
>
> (vii) how is the person alleged to be incapacitated functioning with respect to the activities of daily living and what is the prognosis and reversibility of any physical and mental disabilities, alcoholism or substance dependence? The response to this question shall be based on the evaluator's own assessment of the person alleged to be incapacitated to the extent possible, and where necessary, on the examination of assessments by third parties, including records of medical, psychological and/or psychiatric examinations obtained pursuant to subdivision (d) of this section. As part of this review, the court evaluator shall consider the

The court may choose as an evaluator:
any person drawn from a list maintained by the office of court administration with knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the type of limitations the person is alleged to have, including, but not limited to, an attorney-at-law, physician, psychologist, accountant, social worker, or nurse . . . .[132]

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diagnostic and assessment procedures used to determine the prognosis and reversibility of any disability and the necessity, efficacy, and dose of each prescribed medication;

(viii) what is the person's understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;

(ix) what is the approximate value and nature of the financial resources of the person alleged to be incapacitated;

(x) what are the person's preferences, wishes, and values with regard to managing the activities of daily living;

(xi) has the person alleged to be incapacitated made any appointment or delegation [under a durable power of attorney] or
a living will;

(xii) what would be the least restrictive form of intervention consistent with the person's functional level and the powers proposed for the guardian;

(xiii) what assistance is necessary for those who are financially dependent upon the person alleged to be incapacitated;

(xiv) is the choice of proposed guardian appropriate, including a guardian nominated by the allegedly incapacitated person . . .; and what steps has the proposed guardian taken or does the proposed guardian intend to take to identify and meet the current and emerging needs of the person alleged to be incapacitated unless that information has been provided to the court by the local department of social services when the proposed guardian is a community guardian program . . .;

(xv) what potential conflicts of interest, if any, exist between or among family members and/or other interested parties regarding the proposed guardian or the proposed relief;

(xvi) what potential conflicts of interest, if any, exist involving the person alleged to be incapacitated, the petitioner, and the proposed guardian; and

(xvii) are there any additional persons who should be given notice and an opportunity to be heard.

N.Y. MENTAL HYG. LAW § 81.09(c)(5) (Consol. Supp. 1993).

132. N.Y. MENTAL HYG. LAW § 81.09(b)(1) (Consol. Supp. 1993). Article 81 also provides that court evaluators satisfy an education requirement:

(a) Each incapacitated person is entitled to a court evaluator whom the court finds to be sufficiently capable of performing the duties of a court evaluator necessary to ensure that all the relevant information regarding a petition for the appointment of a guardian comes before the court and to assist the court in reaching a decision regarding the appointment of a guardian.

(b) Each person appointed by the court to be an evaluator must complete a training program approved by the chief administrator which covers: (1) the legal duties and responsibilities of the court evaluator; (2) the rights of the incapacitated person with emphasis on the due process rights to aid the court evaluator in

Under prior law, an appointed guardian ad litem was likely to be an attorney, who would act as both an advocate for the respondent and an evaluator for the court.[133] However, those roles "blurred and contributed to the confusion and delay in the proceeding."[134] By distinguishing between the roles, Article 81 permits the court to choose an evaluator whose sphere of expertise is closely aligned with the functional limitations likely to be considered in the proceedings.

Nevertheless, Article 81 still contemplates that the proceedings may be adversarial,[135] and provides that "[a]ny person for whom relief . . .

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determining his or her recommendation regarding the appointment of counsel and the conduct of the hearing; (3) the available resources to aid the incapacitated person; (4) an orientation to medical terminology, particularly that related to the diagnostic and assessment procedures used to characterize the extent and reversibility of any impairment; (5) entitlements; (6) psychological and social concerns relating to the disabled and frail older adults.

(c) The court may, in its discretion, waive some or all of the requirements of this section or impose additional requirements. In doing so, the court shall consider the experience and education of the court evaluator with respect to the training requirements of this section.

N.Y. MENTAL HYG. LAW § 81.40 (Consol. Supp. 1993). There appears to be no concern that many court evaluators will not have had legal training other than that provided for in § 81.40. The Law Revision Commission comments:

> Court evaluators play a significant role in the guardianship proceeding. In order to provide the court with a useful evaluation of the person who is alleged to be incapacitated the court evaluator should have thorough knowledge of both the evaluator's responsibilities and medical and mental health terminology, particularly relating to diagnostic and assessments procedures, the side effects of medications, the myths and the process of aging, and community services and programs. Waiver of the training requirement should only occur if the person appointed court evaluator has education and experience in the training areas required under this section.

L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.40 (Consol. Supp. 1993).

133. Koppell & Munnelly, *supra* note 55, at 18-19. *See also supra* notes 127-28 and accompanying text.

134. Koppell & Munnelly, *supra* note 55, at 19.

135. Indeed, the entire process is simplified greatly if the person alleged to be incapacitated "agrees to the appointment." N.Y. MENTAL HYG. LAW § 81.02(a)(2) (Consol. Supp. 1993). Even so, a court will not appoint a guardian unless it determines "that the appointment is necessary to provide for the personal needs of that person . . . ." *Id.* § 81.02(a)(1).

The adversarial nature of the process is further acknowledged in § 81.12 (burden and quantum of proof), which provides that "[t]he court may, for good cause shown, waive the rules of evidence." *Id.* § 81.12(b) (first sentence). However, the good cause exception "does not apply to the admission of the court evaluator's report and any supporting affidavits thereto." L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.12 (Consol. Supp. 1993). A prerequisite to admission is that the evaluator be subject to cross-examination, and "that if the court determines that information contained in the report is . . . not sufficiently reliable, the court shall require that the person who provided the

is sought shall have the right to be represented by legal counsel of the person's choice."[136] Although the appointment of a court evaluator is mandatory under Article 81,[137] the appointment of counsel is not.[138] However, the court must appoint counsel in any of the following seven circumstances:

> (1) the person alleged to be incapacitated requests counsel;
>
> (2) the person alleged to be incapacitated wishes to contest the petition;
>
> (3) the person alleged to be incapacitated does not consent to the authority requested in the petition to move the person alleged to be incapacitated from where that person presently resides to a nursing home or other residential facility . . . or other similar facility;
>
> (4) if the petition alleges that the person is in need of major medical or dental treatment and the person alleged to be incapacitated does not consent;
>
> (5) the petition requests temporary powers pursuant to section 81.23 of this article [provisional remedies, *e.g.*, appointment of a temporary guardian];
>
> (6) the court determines that a possible conflict may exist between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated;
>
> (7) if at any time the court determines that appointment of counsel would be helpful to the resolution of the matter.[139]

Even if the person alleged to be incapacitated refuses assistance of counsel, the court may appoint counsel "if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel."[140]

The role of counsel "is to represent the person alleged to be incapacitated and ensure that the point of view of the person alleged to be incapacitated is presented to the court."[141] The LRC contemplates that the counsel will fulfill the traditional role of the advocate, expecting that

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information testify and be subject to cross examination." § 81.12(b) (second sentence).

136. N.Y. MENTAL HYG. LAW § 81.10(a) (Consol. Supp. 1993).

137. *Id.* § 81.09(a).

138. Koppell & Munnelly, *supra* note 55, at 19.

139. N.Y. MENTAL HYG. LAW § 81.10(c) (Consol. Supp. 1993).

140. *Id.* § 81.10(d).

141. L.R.C. COMM., *supra* at 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.10 (Consol. Supp. 1993).

> [a]t a minimum that representation should include conducting personal interviews with the person; explaining to the person his or her rights and counseling the person regarding the nature and consequences of the proceeding; securing and presenting evidence and testimony; providing vigorous cross-examination; and offering arguments to protect the rights of the allegedly incapacitated person.[142]

Article 81 provides that both the court evaluator and the appointed counsel shall be compensated and permits fee-shifting.[143] When the petition is successful, compensation is charged to the respondent.[144] If the petition fails, the court may require compensation to be paid by the "petitioner or by the person alleged to be incapacitated, or both in such proportions as the court may deem just."[145] As should be apparent, a respondent of modest means may suffer financially from all the protection Article 81 provides. In contemplation of that problem, the statute provides that "[i]f the court appoints counsel under [section 81.10], the court may dispense with the appointment of a court evaluator or may vacate or suspend the appointment of a previously appointed court evaluator."[146] Although this is not a perfect solution, it is the only appropriate outcome: by recognizing that "counsel's advocacy role

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142. *Id.*

143. "When judgment grants a petition, the court may award a reasonable allowance to a court evaluator . . . payable by the estate of the allegedly incapacitated person." N.Y. MENTAL HYG. LAW § 81.09(f) (Consol. Supp. 1993).

"The court shall determine the reasonable compensation for . . . any attorney appointed pursuant to this section. The person alleged to be incapacitated shall be liable for such compensation unless the court is satisfied that the person is indigent." *Id.* § 81.10(f).

144. *Id.* §§ 81.09(f) and 81.10(f). In one case when the court "granted the petition to appoint a guardian, it ordered payment of a fee to the New York City Commissioner of Social Services, citing [Mental Hygiene Law] § 81.16(f) which authorizes payment of a fee to either the Attorney General or the attorney for a local department of social services." Bonnie Cohen, *Mental Hygiene Law § 81 After One Year*, N.Y.L.J., Apr. 13, 1994, at 1.

145. N.Y. MENTAL HYG. LAW § 81.09(f) (Consol. Supp. 1993). In a case in which the petition was denied, the court refused to allow payment to the court evaluator out of the funds of the respondent, and ordered the petitioner to pay the evaluator. *In re* Presbyterian Hospital (Early), N.Y.L.J., July 2, 1993, at 22 (N.Y. Sup. Ct. 1993). In another case, the court ordered the Nassau County Department of Social Services to pay both the court evaluator and the Mental Hygiene Legal Service, who was appointed counsel. *In re* Gelezewski, N.Y.L.J., Nov. 17, 1993, at 30 (N.Y. Sup. Ct. 1993).

There is one case reported in which, after denying the petition, the court ordered that the court evaluator be paid out of the respondent's assets, but denied payment of the petitioner's attorney out of the respondent's assets. *In re* Chachkers (Weissberg), N.Y.L.J., Jan. 25, 1994, at 21 (N.Y. Sup. Ct. 1994). There is no provision in Article 81 for compensating the petitioner's attorney.

146. N.Y. MENTAL HYG. LAW § 81.10(g) (Consol. Supp. 1993).

will provide protection for the allegedly incapacitated person, and that some estates may be financially overburdened by the expenses of both the court evaluator and counsel,"[147] the legislature has chosen protection of the respondent's interests over the court's need for a neutral evaluating party.[148]

f. Hearing

Section 81.11 requires that a "determination that the appointment of a guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing."[149] Moreover, "[t]he hearing must be conducted in the presence of the person alleged to be incapacitated, either at the courthouse or where the person alleged to be incapacitated resides . . . ."[150] This is a significant requirement and serves a threefold purpose: first, it permits judges to make "first hand observations and draw first hand impressions of the allegedly incapacitated person[;]"[151] second, it "permits [the person alleged to be incapacitated] to be part of the decisionmaking process, thereby recognizing, respecting and preserving the person's dignity[;]"[152] and third, it contemplates that "the person's presence may allow the person to accept the appointment of a guardian more easily than someone who has been excluded from the process even by the best of intentions."[153]

There are only two circumstances under which the respondent will not be required to attend: first, when the respondent is not present in the state; or second, when "all the information before the court clearly establishes that (i) the person . . . is completely unable to participate in the hearing or (ii) no meaningful participation will result from the

147. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.10 (Consol. Supp. 1993).

148. It was the safer course constitutionally as well. *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (which calls for full and formal pre-termination hearing when a liberty or property interest is at stake) *and* Matthews v. Eldridge, 424 U.S. 319 (1976) (which calls for a balancing of three factors: the private interest to be affected by official action; the risk of an erroneous deprivation of that interest at the hand of official action, and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, taking into account the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail).

149. N.Y. MENTAL HYG. LAW § 81.11(a) (Consol. Supp. 1993).

150. *Id.* § 81.11(c).

151. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.11 (Consol. Supp. 1993).

152. *Id.*

153. *Id.*

person's presence at the hearing."[154] These exceptions are designed to permit the hearing to proceed without the person alleged to be incapacitated "only if the judge is convinced that the person is completely unable to participate in the hearing or no useful purpose would be served by the person's presence . . . ."[155]

The presence requirement addresses a concern as to the reliability of written observations.[156] Although the statute requires appointment of a neutral court evaluator, as an additional measure of protection for the respondent's liberty and property rights (especially if the judge has waived the court evaluator requirement under section 81.10(g)), the statute requires the judge to make his or her own evaluation.[157] According to the LRC, "disparities often exist between what is written on paper and what is deduced from observing the person first hand [because] [i]nformation on paper tends to underrate capacity."[158]

This requirement appears to have been inspired by the decision in *Grinker (Rose)*,[159] wherein the physician testified that the respondent was a "schizophrenic who is 'incapable of managing any kind of activities requiring long range planning . . .'"[160] and the guardian ad litem recommended that a conservator be appointed because she seemed "incapable of . . . do[ing] anything to generate any income. . . ."[161] However, the respondent's own testimony convinced the court to deny the petition because it showed "her reflective competence, awareness and weighing of her precarious financial situation."[162]

Finally, the person's presence "allows the court to draw a carefully crafted and nuanced order which takes into account the person's dignity, autonomy, and abilities because the judge has had the opportunity to learn more about the person as an individual rather than a case description in a report."[163]

Both the burdens on and the powers in the hands of the judge are impressive: She must order a neutral evaluation of and representation

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154. N.Y. MENTAL HYG. LAW § 81.11(c) (Consol. Supp. 1993).
155. Koppell & Munnelly, *supra* note 55, at 19.
156. *Id.*
157. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.11 (Consol. Supp. 1993).
158. *Id.* (citation omitted).
159. 573 N.E.2d 536 (1991).
160. *Id.* at 537.
161. *Id.* at 537-38.
162. *Id.* at 540.
163. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.11 (Consol. Supp. 1993).

for the respondent (subject to the financial hardship exception) and have the respondent present at the hearing even if it means traveling to the respondent's residence; and yet she may completely override the recommendations of the evaluator on the basis of impressions she makes within the relatively short time span of the hearing itself. While it is true that most respondents who in an earlier time would have had their liberty somewhat casually restricted would enjoy tremendous protection under Article 81, we must realize that if fate lends its hand and bestows upon the respondent a "lucid moment" at just the right time, a petition otherwise rightfully brought might be denied.

The prospect of a judge ignoring the evidence that results from the considerable amount of resources necessary to comply with the requirements of Article 81, merely from exposure to the respondent in the unnatural environment of a hearing, is alarming. It is not unreasonable to speculate that the specter of a judicial finding based more on impressions than evidence might increase the cost of what already appears to be a fairly expensive process.[164] The desire to minimize the risk of such an outcome might result in more lengthy hearings due to the submission of more evidence than would otherwise have been necessary, more investigative time spent by the court evaluators (which might require hiring more of them to cope with demand), and more appeals, as well as the possibility of pressure on the respondent to perform in certain ways at the hearing.

g. Burden and Quantum of Proof

As under prior Article 77, a "determination that a person is incapacitated must be based on clear and convincing evidence."[165] The petitioner carries the burden of proof.[166] Additionally, the rules of evidence apply (although the court may waive them for good cause shown).[167] The court evaluator's report may be admitted even though the report "contains hearsay statements and observations of other

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164. *See In re* Lepkowski, 623 N.Y.S.2d 995 (N.Y. Sup. Ct. 1995) (where attorney fees of over $11,000 were deemed excessive, petitioner was responsible for difference between reasonable amount charged to ward's estate and total bill); *see also In re* Spingarn, 626 N.Y.S.2d 650 (N.Y. Sup. Ct. 1995) (ward's estate held responsible for only $32,500 of petitioner's attorney fees where attorneys had billed a total of 230 hours "on a relatively simple matter" at hourly rates from $220 to $415 per hour).

165. Koppell & Munnelly, *supra* note 55, at 19; N.Y. MENTAL HYG. LAW § 81.12(a) (Consol. Supp. 1993).

166. N.Y. MENTAL HYG. LAW § 81.12(a), second sentence.

167. *Id.* § 81.12(b).

professionals"[168] if the court evaluator testifies, is subject to cross-examination, and the court determines that the report is reliable.

h. Findings

Article 81 requires that if the court appoints a guardian, it must make certain findings on the record.[169] What findings will be required will "depend on whether the appointment is voluntary, for personal needs, or for property management."[170] There are four findings common to all appointments: (1) the person's functional limitations which impair the person's ability to provide for personal needs, property management, or both; (2) the necessity of the appointment to prevent harm; (3) the specific powers of the guardian which constitute the least restrictive form of intervention; and (4) duration of the appointment.[171] The findings necessary for nonvoluntary appointments are that "the person lacks an understanding and appreciation of the nature and consequences of his or her functional limitations and is likely to suffer harm" arising from those functional limitations and the inability to understand their consequences.[172]

i. Powers of the Guardian

The powers of the guardian with respect to property management are governed by section 81.21,[173] while those with respect to personal needs are governed by section 81.22.[174] Each section provides a non-exclusive list of powers which may be granted to the guardian.[175]

The section governing property management embodies the doctrine of "substitut[ion] of judgment,"[176] which requires the guardian to act in the manner the incapacitated person would have "if he or she had the capacity to act."[177] The source of the doctrine in New York is *In re*

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168. Koppell & Munnelly, *supra* note 55, at 20; N.Y. MENTAL HYG. LAW § 81.12(b) (Consol. Supp. 1993).

169. N.Y. MENTAL HYG. LAW § 81.15(a)-(c) (Consol. Supp. 1993).

170. Koppell & Munnelly, *supra* note 55, at 20.

171. *Id.*

172. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.15 (Consol. Supp. 1993).

173. Koppell & Munnelly, *supra* note 55, at 20.

174. *Id.*

175. *Id.*

176. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.21 (Consol. Supp. 1993).

177. *Id.*

Florence.[178] Section 81.21 also recognizes that "prior competent choices of the person will be given effect."[179]

The section governing personal needs provides a list of personal care powers that includes deciding whether he or she should travel and where he or she should live.[180] The most important personal care power, however, is the ability to "consent to or refuse generally accepted routine or major medical . . . treatment."[181] The section instructs that these decisions are to be made "in accordance with the patient's wishes, including the patient's religious and moral beliefs, or if the patient's wishes are not known and cannot be ascertained with reasonable diligence, in accordance with *the person's best interests* . . . ."[182] The source of the "best interests" doctrine in New York is *Rivers v. Katz*.[183] As embodied in section 81.22, a consideration of the ward's best interest includes his or her dignity and uniqueness; the possibility and extent of preserving his or her life; preserving, improving, or restoring health or functioning; relief of suffering; adverse side effects associated with treatment; and availability of less intrusive alternative treatments.[184] Finally, section 81.22 specifically prohibits a guardian from revoking any advance directives (*e.g.*, durable powers of attorney, Do Not Resuscitate Orders, and Living Wills).[185]

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178. 530 N.Y.S.2d 981 (N.Y. Sur. Ct. 1988).

179. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.21 (Consol. Supp. 1993).

180. N.Y. MENTAL HYG. LAW § 81.22(a) (Consol. Supp. 1993).

181. *Id.* § 81.22(a)(8).

182. *Id.* (emphasis added).

183. 495 N.E.2d 337, 344 (N.Y. 1986).

184. N.Y. MENTAL HYG. LAW § 81.22(a)(8) (Consol. Supp. 1993).

185. *Id.* § 81.22(b)(2). As is the case with court evaluators (*see supra* note 132), guardians are subject to an education requirement. The law provides:

> (a) Each incapacitated person is entitled to a guardian whom the court finds to be sufficiently capable of performing the duties and exercising the powers of a guardian necessary to protect the incapacitated person.
>
> (b) Each person appointed by the court to be a guardian must complete a training program approved by the chief administrator which covers: (1) the legal duties and responsibilities of the guardian; (2) the rights of the incapacitated person; (3) the available resources to aid the incapacitated person; (4) an orientation to medical terminology, particularly that related to the diagnostic and assessment procedures used to characterize the extent and reversibility of any impairment; (5) the preparation of annual reports, including financial accounting for the property and financial resources of the incapacitated person.
>
> (c) The court may, in its discretion, waive some or all of the requirements of this section or impose additional requirements. In doing so, the court shall consider the experience and education of the guardian with respect to the training requirements of this section, the duties and powers assigned to the guardian, and the

j. Effect on the Incapacitated Person of Appointment of a Guardian

In keeping with the goal of providing the least restrictive form of intervention, section 81.29 contains three significant provisions: first, "[a]n incapacitated person for whom a guardian has been appointed retains all powers and rights except those powers and rights which the guardian is granted[;]"[186] second, "appointment of a guardian shall not be conclusive evidence that the person lacks capacity for any other purpose, including the capacity to dispose of property by will[;]"[187] and third, "title to all property of the incapacitated person shall be in such person and not in the guardian."[188] Furthermore, "[t]he property shall be subject to the possession of the guardian and to the control of the court for the purposes of administration, sale or other disposition *only to the extent directed by the court order appointing the guardian.*"[189]

As to the right to withdraw life-sustaining treatment, Article 81 does not change New York law, nor does it represent an impediment to such change.[190] As of this writing, the right to decline treatment has not been extended to third parties when the patient is unable to do so "unless a health care proxy or Do Not Resuscitate Order is in place or there is otherwise clear and convincing evidence of the patient's wishes regarding such treatment expressed while the patient was competent."[191]

3. Case Law Interpretation of Article 81

a. In re Rochester Gen. Hosp.

As of this writing, there have been few cases arising under Article 81 that have reached the appellate level, but there have been several at the trial level. One of the more interesting ones is *In re Rochester Gen. Hosp. (Levin)*.[192]

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needs of the incapacitated person.

N.Y. MENTAL HYG. LAW § 81.39 (Consol. Supp. 1993).

186. N.Y. MENTAL HYG. LAW § 81.29(a) (Consol. Supp. 1993).

187. *Id.* § 81.29(b).

188. *Id.* § 81.29(c).

189. *Id.* (emphasis added).

190. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.29 (Consol. Supp. 1993).

191. *Id.* (citation omitted).

192. 601 N.Y.S.2d 375 (N.Y. Sup. Ct. 1993).

In *Rochester*, the person alleged to be incapacitated, Mr. Levin, had been a patient at the petitioner hospital for one year. He was originally admitted for medical problems experienced while a resident at a nursing home. The hospital began Article 81 proceedings because the patient's son (to whom the father had previously granted a health care proxy and appointment as power of attorney) had refused to cooperate with the hospital in obtaining Medicaid reimbursement to cover the more than $75,000 in hospital expenses.[193]

The court issued an order to show cause in conformity with the requirements of section 81.07 (which sets forth the bold face large print requirement) in that it advised Mr. Levin, inter alia, "that a court evaluator had been appointed to explain the proceeding and investigate the claims made in the application."[194] However, the court never did appoint a court evaluator, but *did* appoint the Mental Hygiene Legal Service as his counsel, pursuant to section 81.10.[195] The court, recognizing its error, kept the petition alive by noting that it has discretion, under section 81.10(g), not to appoint a court evaluator in cases where counsel is appointed.[196]

The court supported its decision to appoint counsel instead of a court evaluator by reasoning that when a respondent wishes to contest the petition, refuses to consent to a request for transfer to a nursing home, or when the order to show cause includes the provisional remedy of an appointment of a temporary guardian pursuant to section 81.23(a), then the court *must* appoint counsel, pursuant to section 81.10(c)(2).[197] Because this court already had appointed a temporary guardian, the court held that appointment of counsel was mandatory.[198] However, the court found another ground, albeit unnecessary, for mandatory appointment of counsel: as Mr. Levin was found (later in the opinion) to be incapacitated to the extent that he could not consent to transfer to a nursing home, it follows that he "could not consent to the appointment of a guardian and should be considered as in the same position as

193. *Id.* at 377. The hospital may file a petition under N.Y. MENTAL HYG. LAW § 81.06(a)(6) as "a person otherwise concerned with the welfare of the person alleged to be incapacitated." *Id.*

194. *Id.*

195. *Id.* In addition, the court appointed a temporary guardian, pursuant to § 81.23, (which provides for provisional remedies) "in order to complete the Medicaid application process, which was due to expire prior to the return date of the application." *Id.*

196. *Id.*

197. *Id.* at 377-78.

198. *Id.* at 378.

an [allegedly incapacitated person] who wishes to contest the petition."[199]

This bit of judicial sleight-of-hand has not been challenged because *Rochester* has not been appealed. Therefore, it is law in New York that if a court finds a respondent incapacitated in accordance with the requirements of Article 81, then that later finding may be used to support the earlier exercise of discretion by that same court to appoint counsel instead of a court evaluator. From the point of view of the respondent, this provides greater protection of his or her interests (assuming that the appointed counsel assumes the role of advocate and not that of evaluator). Nevertheless, it is inevitable that this portion of the opinion will be criticized for using a finding to support a prefinding decision.

As discussed earlier, the purpose of dividing the internally conflicting roles of the former guardian ad litem between the court evaluator and the counsel was to eliminate the conflict inherent in the role.[200] The exception that permits a court to dispense with appointment of a court evaluator when counsel has been appointed arises when the appointment of both threatens the financial condition of the respondent.[201] There is no mention in the statutes that the counsel is to accede to both roles in such a circumstance. However, the court in *Rochester* held that "there is no reason why counsel could not perform most of these same services,"[202] thereby returning New York to the pre-Article 81 days of guardians ad litem and their inherent conflicts of interest. This court appears to have misunderstood the purpose of section 81.10(g), which is to provide relief to an estate "financially overburdened by the expenses of both the court evaluator and counsel."[203] A holding that would have been more in keeping with the intention of section 81.10(g) would have been to rely on the adversarial process and its requirement that the petitioner meet his or her burden of proof by clear and convincing evidence of incapacity, and that such proof be subject to vigorous cross-examination. It appears to this writer that the *Rochester* court was wrong when it saw "no reason why counsel could not perform" both roles.[204]

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199. *Id.*
200. *See supra* notes 127-48 and accompanying text.
201. *Id.*
202. *Rochester*, 601 N.Y.S.2d at 378.
203. L.R.C. COMM., *supra* note 107, *in* notes following N.Y. MENTAL HYG. LAW § 81.10 (Consol. Supp. 1993).
204. *Rochester*, 601 N.Y.S.2d at 378.

The *Rochester* court ultimately found that Mr. Levin was an incapacitated person as defined by section 81.02(1) and (2).[205] In keeping with the requirement that the respondent be at the hearing, the court commenced the hearing at the hospital due to Mr. Levin's physical inability to be brought to the courthouse.[206] Based upon its own observations at that hearing, as well as the testimony of the psychiatrist who examined Mr. Levin, it was "apparent that [he] was completely unable to participate in the hearing and that no meaningful participation would result from his continued presence."[207] The remainder of the proceeding was held at the courthouse.[208] However, Article 81 requires that the court "give primary consideration to the functional level and functional limitations of the person."[209] The term "functional level" is defined to include "the ability to provide for personal needs and/or the ability with respect to property management,"[210] and "functional limitations" takes into account the "behavior or conditions of a person which impair the ability to provide for personal needs and/or property management."[211] As discussed earlier, there is nothing in the language of Article 81 that uses terms of diagnosis or status,[212] yet this court relied on the psychiatrist's testimony, which disclosed that "Mr. Levin suffers from a severe, progressive dementia, which may be ascribed to senile brain disease, arteriosclerotic deterioration and/or Alzheimer's disease."[213] Although it appears from the opinion that the psychiatrist's diagnosis was accurate, that is entirely beside the point. What Article 81 requires is that the court hear testimony as to the respondent's functional level and limitations. The facts of this case indicate that Mr. Levin's functional level was extremely low and his functional limitations were profound.[214] This court failed to understand that among the purposes of Article 81 is the promotion of a system of guardianship that meets a person's needs based on his or her

205. *Id.* at 379.
206. *Id.* at 378.
207. *Id.*
208. *Id.*
209. N.Y. MENTAL HYG. LAW § 81.02(c) (Consol. Supp. 1993).
210. *Id.* § 81.03(b).
211. *Id.* § 81.03(c).
212. *See supra* notes 84-111 and accompanying text.
213. *Rochester*, 601 N.Y.S.2d at 379.
214. *Id.* at 378-79.

functional level and limitations, personal wishes, preferences, and desires, rather than diagnoses or labels.[215]

Regardless of the flaws in how the court reached its decision, it was correct to grant the petition. Another issue facing this court, however, was whether the power of attorney and health care proxy Mr. Levin had previously executed, naming his son as attorney and proxy, should "obviate the necessity for the appointment of a guardian."[216] It was clear from the facts that the son was at best "vague and uncertain" as to his father's needs,[217] and at worst guilty of misappropriating the funds of his father's business, which he was running.[218] Yet among the factors the court must consider is whether there has been a previous execution of a power of attorney, a health care proxy, or a living will.[219] Furthermore, although the court may in its discretion grant broad powers to the guardian, "a guardian is expressly prevented from revoking any such appointment or delegation."[220] With these facts and laws before it, the court set about removing the obstacle of the son.

The court began by finding that the power of attorney granted to the son was provided for in the General Obligations Laws of New York,[221] which provide that "this power of attorney shall not be affected by the subsequent disability or incompetence of the principal."[222] Next, the court found that section 5-1601(2) of the General Obligations Law provides that in the event a committee or conservator is thereafter appointed for the principal, the attorney-in-fact named under section 5-1601(1) is to account to the committee or conservator. The court also found that Article 81, as amended, provides that section 5-1601(2)

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215. Oddly, the court seems to agree. In its discussion of the powers of the guardian, the court stated that by enacting Article 81:

> The legislature eliminated the 'diagnostic labels,' required under former Articles 77 and 78, and defined incapacity in terms of a person's functional limitations or inability to provide for personal needs and/or property management. . . .
>
> Based upon the rationale behind enactment of Article 81, the terms 'disability' or 'incompetence' may no longer have relevance in terms of appointment of a guardian . . . .

Id. at 380.

216. *Id.* at 379.

217. *Id.* The son could not remember how many times he had seen his father during a year of hospitalization, nor could he remember when he had last visited. *Id.*

218. *Id.*

219. *Id.*; N.Y. MENTAL HYG. LAW § 81.19(d) (Consol. Supp. 1993).

220. *Rochester*, 601 N.Y.S.2d at 380 (citing N.Y. MENTAL HYG. LAW § 81.22(b)(2) (Consol. Supp. 1993)).

221. *Id.*

222. *Id.* (citing N.Y. GEN. OBLIG. LAW § 5-1601(1) (Consol. 1989)).

applies to guardians appointed under Article 81,[223] and that General Obligations Law section 5-1601(2) grants a committee or conservator (or in the case under Article 81 as amended, guardian) the "same power as a principal 'to revoke, suspend or terminate all or any part of such power of attorney,' and this, of course, is in direct conflict with the provisions of Mental Hygiene Law section 81.22(b)(2)."[224] At this point, the court correctly questioned "the continued viability of certain aspects of General Obligations Law, Section 5-1601, and in particular, the authority of a guardian to revoke a power of attorney."[225] Furthermore, the court correctly recognized that no guardian could revoke the power of attorney "previously granted to Mr. Levin's son," and that it would constitute "an anomaly if a guardian were precluded from making responsible decisions for the preservation of a person's property because the same decision making authority had been previously granted, under a power of attorney, and the grantee thereof is unwilling or unable to fulfill his or her duties."[226] As it was the opinion of the court that Mr. Levin's son was both unwilling and unable to fulfill his duties, it exercised its considerable discretion in fashioning a remedy.

The court's first step was to appoint the previously temporary guardian as permanent guardian for the property of Mr. Levin.[227] Although it recognized that the guardian "would be unable to revoke the previously executed power of attorney," the court held that "there should be nothing to prevent a court of competent jurisdiction to exercise its inherent powers to set aside such power of attorney under appropriate circumstances" and, as its second step, directed "that the appointment of [the] son, under the power of attorney and its delegation of authority to him be revoked."[228] The court's third step was to direct the newly appointed guardian to assume those property management powers granted in the previously executed power of attorney, to resolve the Medicare situation at the hospital, and to "commence a proceeding to discover property of Mr. Levin which may have been withheld by his son or others, including, but not limited to the proceeds from the sale of real property."[229] The court recognized that although

223. *Id.* (citing 1992 N.Y. Laws ch. 698, § 4, effective Apr. 1, 1993, as amended).

224. *Id.* at 380. As discussed earlier, § 81.22(b)(2) prohibits a guardian from revoking any such directives. *See supra* notes 190-91, 220 and accompanying text.

225. *Id.*

226. *Id.* at 380-81.

227. *Id.* at 381.

228. *Id.*

229. *Id.*

it had the power to revoke the previously executed power of attorney with respect to property management, it could not achieve the same result with respect to the health care proxy due to the prohibition against revoking a health care proxy under section 81.22(b)(2).[230] However, the court invoked Public Health Law section 2992(2), which provides that an agent named in a health care proxy can be removed "on the ground that the agent . . . is not reasonably available, willing and competent to fulfill his or her obligations under this article."[231] The court noted that section 2992(2) provides that a conservator or committee (or in the case under Article 81 as amended, guardian) may petition for removal. Therefore, as the last step in removing the son, the court authorized the newly appointed guardian to commence a special proceeding under section 2992(2) to remove Mr. Levin's son as the agent under the health care proxy.[232]

b. Other Cases Under Article 81

In the relatively short time Article 81 has been in force, there have been other trial level cases both granting and denying petitions for guardianship.[233] The most interesting ones, however, are those that have denied the petition.

In *In re Lambrigger*,[234] the respondent was an eighty-five year old woman who was paralyzed from a stroke. Although the respondent was unable to move or communicate verbally, the court would not "make assumptions regarding her mental acuity" nor would it "compound her physical tragedy with the additional indignity of unnecessarily circumventing her right to self-determination . . . ."[235] After ascertaining that she understood her situation, as well as some relatively sophisticated aspects of her late husband's estate, the court denied the petition. However, the court did recognize that although the respondent was capable of making decisions, she would need assistance in carrying them out, and appointed her daughter, the petitioner, as a "special guardian to assist [the respondent] in the preparation and execution of any forms, documents or other papers as may be necessary for her to implement any property management decisions she may make . . . ."[236]

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230. *Id.*
231. *Id.* (citing N.Y. PUB. HEALTH LAW § 2992(2) (Consol. 1989)).
232. *Id.* at 381.
233. *See* Cohen, *supra* note 144.
234. N.Y.L.J., May 31, 1994 at 25 (N.Y. Sup. Ct. 1994).
235. *Id.*
236. *Id.*

In *In re Heumann*,[237] the respondent was an eighty-two year old man who had been living in a nursing home for four years. The petitioner was his son, who had been living in Israel for eighteen years, and who now wanted to bring his father to live near him in a "first class facility."[238] The hearing was conducted at the nursing home so that the father could be present. The son alleged that his father was too impaired from Alzheimer's Disease to care for himself or his property, and further alleged that he wanted to take care of his father because he considered it "his religious and moral obligation" to do so.[239] He offered a letter from his rabbi in Israel so stating.[240]

Although the physician who examined the father testified that he was unable to make rational decisions about his care, the court concluded otherwise. At the hearing, the father testified accurately as to his whereabouts for the past four years, and stated that he preferred to remain where he was rather than go to Israel because he did not think he would be able to "get around" there.[241]

The courts in both cases made it clear that were it not for the requirement in Article 81 that the respondent be present at the hearing, the outcomes might have been different. However, the outcome in *Heumann* is somewhat less compelling than in *Lambrigger*. In *Lambrigger*, the result was well-tailored. The respondent received only that assistance necessary at the time, and the daughter-petitioner was given a modicum of control over her mother's welfare. In *Heumann*, however, the court may have given short shrift to the petitioner's interests by allowing what may have been the father's "lucid moment" to get in the way of the son's desire to care for and be with his father in his final years.

This raises a serious concern about the extent to which the judge should be allowed to base his or her decision on the in-court observation. While there may have been sound countervailing reasons why the petitioner's father in *Heumann* should not have been moved to Israel (a psychiatrist employed by the nursing home in which Mr. Heumann resided submitted an affidavit advising that moving him would be detrimental to his health), there was substantial evidence to the contrary as well. The judge in *Heumann*, however, appeared to be more

237. N.Y.L.J., Nov. 17, 1993 at 25 (N.Y. Sup. Ct. 1993).
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*

impressed by the fact that the respondent was able to remember the names of the nursing homes he had been in recently than by any of the other evidence offered as to his serious limitations.

IV. THE EFFECT OF ARTICLE 81 ON THOSE WHO RESORT TO IT

Article 81 provides tremendous protection to the personal and property interests of a respondent who does not consent to appointment of a guardian. The procedural protections are ample: notice must be served on a potentially large number of persons who may be in a position to shed light on the respondent; notice must be served on the respondent in large print and in plain language; a court evaluator must be appointed (subject to a financial hardship exception) to explain the seriousness of the proceeding; the petition must be verified and specific as to why the petitioner believes guardianship is indicated; the hearing is required to be held in the presence of the respondent; the burden is on the petitioner to prove the incapacity alleged by clear and convincing evidence; and petitioner may bear the cost of the court evaluator and respondent's court-appointed counsel if he or she fails to meet that burden.[242]

The substantive protections are substantial as well. The court may appoint a guardian only upon a finding of incapacity that is based upon consideration of factors pertaining to functional level and limitations, and the ability of the respondent to understand the consequences of those limitations. The court may not rely on diagnoses, labels, or status. If the court does appoint a guardian, it must grant to him or her only those powers necessary to meet the specific needs identified by the court.[243]

From the point of view of the petitioner, however, the climb is steep. Benevolence and good intentions will not suffice, nor will the word of the family doctor or neurologist. Unless the petitioner can afford good legal counsel, not only might the petition fail, but the petitioner may be charged for the cost of the court evaluator and court-appointed counsel.[244] On one hand, this policy is likely to discourage the filing of petitions prematurely, as well as some inspired by venal motives. On the other hand, a good faith petitioner might take an unnecessarily conservative approach and wait as long as possible, perhaps too long,

242. *See supra* notes 112-72 and accompanying text.
243. *See supra* notes 79-111, 173-91 and accompanying text.
244. *See supra* notes 143-48 and accompanying text.

before filing. Under Article 81, a potential petitioner must weigh numerous financial, medical, and legal factors in coming to her decision, and that is likely to be an expensive proposition.

The petitioner does not necessarily assume all the risk. If the petitioner waits until something serious happens (like a physical injury or the respondent setting a fire in the home) as a way of lowering the risk of an adverse outcome in court, then it is the respondent who bears some of the costs of the heightened protections available under Article 81, a risk not necessarily knowingly and voluntarily assumed. This situation puts the petitioner and his or her attorney in a position of some ethical ambiguity.

The petitioner must also take into account the possibility of the judge finding the evidence insufficient to grant the petition when weighed against the performance of a respondent having a moment of lucidity in court.[245] Again, the respondent, who but for his or her moment of lucidity would be afforded necessary protection, bears the risk to his or her well-being should the petitioner delay bringing the petition until evidence of the respondent's incapacity is sufficient to overwhelm a judge's inclination to deny the petition. Practitioners should be watching the opinions to see which judges appear more likely to be moved by in-court performance, and when the petitioner has little choice of court, advise the petitioners accordingly. That the judge's findings must be specific and on the record[246] limits her from acting capriciously, but because the burden is on the petitioner and the presumption is one of capacity, this requirement is more likely than not to tip the scale in favor of denying the petition. Hence, the petitioner is left with little choice but to proceed upon thoughtful deliberation, weighing the cost of preparing and bringing a petition that might be denied against the cost to the respondent of delay.

From the point of view of the court, Article 81 places demands on judicial resources that modern courts may be ill-prepared to provide. The procedural requirements are precise, the factors to be considered are numerous, and the hearing may need to be held away from the courthouse. The process is designed to produce substantial amounts of evidence, all of which must be taken into account if the court decides to appoint a guardian, for the powers delegated must be precisely defined.[247] Furthermore, proceedings under Article 81 take preference

245. *See supra* notes 149-63 and accompanying text.
246. N.Y. MENTAL HYG. LAW § 81.15 (Consol. Supp. 1993).
247. *See supra* notes 85-185 and accompanying text.

over all other causes in New York courts.[248] Practitioners will need to take into consideration the effects this burden will have on their cases. Of special concern is the role of the court evaluators, who are dependent on the courts for their employment. Should a heavily burdened court begin to give court evaluator assignments to those persons who save the court the most time, perhaps by doing the minimal amount of investigation necessary to satisfy the demands of the statute, with the result that certain evaluators are more respondent-friendly than others, practitioners will have to do the additional preparation necessary to bring a case that outweighs the evaluator report.

From the practitioner's point of view, the intentions of Article 81 may have been somewhat undermined, as our earlier discussion of *Rochester* suggests.[249] Counsel for the respondent, in a case in which the court dispenses with the court evaluator, now has reason to be unsure of his or her role, although the author recommends that appointed counsel assume the role of advocate. Furthermore, the attorney drafting advance directives for a competent client must now be aware of how deftly the court in *Rochester* disposed of an attorney-in-fact/health care agent it disliked.[250]

V. RECOMMENDATIONS AND CONCLUSIONS

Because meeting the requirements of Article 81 is likely to be difficult, a petitioner may not succeed in having a guardian appointed for someone who may truly be in need of a guardian if the petitioner fails to convince the court of that need by the required quantum of proof.[251] Furthermore, the process is expensive. But these are

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248. N.Y. MENTAL HYG. LAW § 81.13 (Consol. Supp. 1993). The full text of the section is as follows:

> Unless the court, for good cause shown, orders otherwise, a proceeding under this article is entitled to a preference over all other causes in the court. Unless the court, for good cause shown, orders otherwise, the hearing or trial shall be conducted within the time set forth in subdivision (a) of section 81.07 of this article. A decision shall be rendered within forty-five days of the date of the signing of the order to show cause, unless for good cause shown, the court extends the time period for rendering the decision. In the event the period is extended, the court shall set forth the factual basis for the extension. The commission shall be issued to the guardian within fifteen days after the decision is rendered.

Id.

249. *See supra* notes 192-232 and accompanying text.

250. *See supra* notes 216-32 and accompanying text.

251. Mezzullo & Roach, *supra* note 27, at 68.

concerns that should be addressed well before the need for an appointed guardian ever arises.

Because an appointed guardian is subject to the supervision of the court, it is the court that establishes the scope of the guardian's role, and the guardian is subject to the court's direction and supervision.[252] Conversely, a trustee takes her powers from a trust document, which embodies the instructions a competent person wishes carried out on her behalf in the event of a later incapacity.[253] Therefore, one of the better strategies for dealing with Article 81 is to avoid its invocation.

Although it is beyond the scope of this Comment to suggest every alternative to guardianship, it does appear that parties resort to it when the incapacitated person does not have in place advance directives, executed while competent, that provide instructions, wishes, and intentions with respect to property, personal needs, and health care. As the possibility is realistic that a "testator might become physically or mentally incapacitated months or even years before death,"[254] some mechanism for carrying out the wishes and preferences of the person would obviate the need for a guardianship.[255] A recent appellate decision in New York, *In re Maher*, supports this conclusion, holding that "where the allegedly incapacitated person has effectuated a plan for the management of his affairs," such a plan obviates the need for a guardian.[256] The plan in *Maher* was not sophisticated: the respondent had granted a power of attorney to his lawyer and added his wife as a signatory on his bank accounts. The court deemed this sufficient evidence of the respondent's appreciation for his own handicaps with respect to his assets insofar as he effectuated a plan for their management.[257]

While *Maher* might lead some to conclude that a relatively simple plan will obviate the need to pursue an Article 81 proceeding, practitioners should keep in mind the lesson of *Rochester*,[258] wherein the court, motivated by its dislike for the respondent's unlikable son, assiduously undid the respondent's appointments of both power of attorney and health care proxy. Backup appointments would appear to be advisable under the circumstances.

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252. *Id.*; N.Y. MENTAL HYG. LAW §§ 81.20 - .39 (Consol. Supp. 1993).
253. Mezzullo & Roach, *supra* note 27, at 68.
254. *Id.* at 69.
255. *Id.*
256. *In re* Maher, 621 N.Y.S.2d 617, 622 (N.Y. App. Div. 1994).
257. *Id.*
258. *See supra* notes 216-32 and accompanying text.

The commissioners on Uniform State Laws have provided a mechanism, the Uniform Custodial Trust Act (UCTA), whereby individuals can provide for management of assets in the future in the event of incapacity.[259] The UCTA permits a person to designate a future custodial trustee to receive property upon the occurrence of some future event.[260] Under the UCTA, a custodial trust affords the declarant (who becomes the beneficiary) and his or her dependents protection against possible future incapacity of the beneficiary without the necessity of a guardianship.[261] Furthermore, under the UTCA, the incapacity of the beneficiary does not terminate any of the following: the custodial trust, the designation of a successor trustee, any power of authority of the trustee, or the immunities of third persons relying on actions of the trustee.[262]

A custodial trust created pursuant to the UCTA is inexpensive to create, is flexible to administer, and does not require a court proceeding either at creation or during operation.[263] It would appear, therefore, that the UCTA, by providing for an inexpensive estate planning tool that anticipates incapacity, has the potential to reduce the inevitable burden Article 81 places on New York courts. The New York State legislature should consider its adoption.

VI. SUMMARY

After hundreds of years of benevolent treatment, incapacitated residents of New York are less likely than ever to have their rights and liberties abridged without due process of law. However, those who do not plan for incapacity must rely on the highly expensive and adversarial

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259. UNIF. CUSTODIAL TRUST ACT, 7A U.L.A. 8, prefatory note at 8-9. (Cum. Supp. 1995). An extensive discussion of the UCTA may be found in Mezzullo & Roach, *supra* note 27, at 74-82.

As of this writing, the UCTA has not been adopted in New York, but has been adopted in 11 states. *See* ALASKA STAT. § 13.60.010 - .990 (1995); ARK. CODE ANN. § 28-72-401 to -422 (Michie 1991); HAW. REV. STAT. § 554B-1 to -22 (1989); IDAHO CODE §§ 68-1301 to -1322 (1989); MASS. GEN. L. ch. 203B, § 1-19 (1994); MINN. STAT. §§ 529.01 - .19 (1990); MO. REV. STAT. §§ 404.400 - .650 (1986); N.M. STAT. ANN. § 45-7-501 to -522 (Michie 1992); R.I. GEN. LAWS § 18-13-1 to -22 (1988); VA. CODE ANN. § 55-34.1 to -34.19 (Michie 1990); *and* WIS. STAT. §§ 880.81 - .905 (1991-92). UNIF. CUSTODIAL TRUST ACT, 7A U.L.A. 8, (Cum. Supp. 1995).

260. UNIF. CUSTODIAL TRUST ACT § 3(a).

261. *Id.*, prefatory note at 9. *See also* Mezzullo & Roach, *supra* note 27, at 74-82.

262. UNIF. CUSTODIAL TRUST ACT § 10(f), 7A U.L.A. 12 (Cum. Supp. 1995); Mezzullo & Roach, *supra* note 27, at 77.

263. Mezzullo & Roach, *supra* note 27, at 85.

process of an Article 81 guardianship proceeding. The risks run both ways: Petitioners who bring their cases with an insufficiency of evidence, prematurely, or both, run the risk of bearing the respondent's costs of the proceedings; and respondents who are truly in need of protection but who have failed to plan for it may have to wait until their well-being is truly compromised before enough evidence is available to persuade the trier by the required quantum of proof.

Therefore, estate planning attorneys, in addition to engaging in their traditional concern over the minimization of taxes and the securing of "sensible treatment" of their clients' beneficiaries,[264] should advise their clients of the risks associated with reliance on the guardianship laws, and the benefits of advance planning for incapacity.

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264. *Id.* at 69.