Guardianship Reform in New York: The Evolution of Article 81

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NOTE

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She received the bill in the mail this morning. It was for $34.99: a reasonable price to pay for the shoes she ordered forty-five days ago. Mary Bogart, age eighty-five, living alone on East 76th Street in Manhattan, promptly wrote a check for this amount. After cooking lunch for herself, she mailed the check to the proper address that same day. She always paid her bills on time.

Mary detested her current apartment; she longed to return to the address of her youth between Second and Third on East 84th, an area she considered her neighborhood. This place was dreadful. She had no friends here. She didn’t even know the name of the old man who lived next door. No one, including the super, called her by name. Yet Mary could remember a different time and place; she remembered East 84th Street. In her active mind, she still saw Rosemary McGovern skipping rope and Mr. Goodman shooing all the kids away from his corner store. And most importantly, even on this morning, Mary still called East 84th, Apartment 5C, her home.

Mary had not lived at “home” for thirty-two years yet she planned to return. Nevertheless, like Rosemary McGovern and Mr. Goodman, her “home” no longer existed. It was now a parking garage. Mary had seen the garage; she just did not recall it.

Mary Bogart’s first husband died soon after the death of their only child, Caroline, in May of 1947. Her little girl had perished jumping from rooftop to rooftop, a popular children’s game in New York in the forties. Her second husband left Mary sometime in the fifties. She thought he had since passed away, but she truly did not care. She had an older sister, Jean, who died from cancer in 1989. Jean’s only child, Howard, and his wife Alice, lived on Long Island and tried to help. Alice helped attend to Mary’s financial affairs but Mary demanded control of her checkbook. After all, Mary reasoned, it was her money. Howard, in addition to visiting Mary every Wednesday, tried to help arrange needed medical care for her. Mary Bogart, a physically powerful woman nine months ago, had cancer and was losing strength quickly. She was beginning to have problems keeping track of her doctor appointments.
There was no one else who cared.
Two years ago, Mary had $200,000 in her bank account. Despite regularly receiving Social Security and Medicare, her account now totaled $68,000. If not for Alice's intervention, Mary would have spent the entire $200,000 within six months. She had not spent her money on exorbitant rent; Howard had found her a nice rent stabilized apartment. Nor had she spent her lifetime savings on unauthorized medical bills; Alice ensured Medicare covered her cancer treatments. No, the problem was Mary.

The check she had written that morning was the third she had written in the amount of $34.99 for the same shoes. Additionally, while she was writing this check, her doctor was in his office wondering where Mary was and if she had again forgotten her scheduled treatment. It was not an isolated incident.

Mary Bogart is not an isolated case. There are now more elderly people, aged sixty-five or older, in the United States than at any other time in history. This segment of the population has increased dramatically over the last four decades. Between 1960 and 1987, the average life expectancy increased from sixty-seven to seventy-two years for men and seventy-three to seventy-eight years for women.

Researchers predict that by the year 2035, seventy-one million Americans, twenty-five percent of the population, will be elderly. However, our population is not merely getting older. As we enter extreme old age, our lives are often impaired by chronic health and mental problems. Degenerative conditions such as heart disease, crippling arthritis, and dementia can cause sensory loss, impaired mobility, and diminished energy as well as emotional problems.

3. Rein, supra note 1, at 1847 (citing Commission of Legal Problems of the Elderly et al., American Bar Ass'n, Guardianship of the Elderly: A Primer for Attorneys 1 (1990)).
6. See Prosper, supra note 2, at 490.
leading to the need for guardianship include "severe developmental disabilities, head injuries, chronic chemical dependency and strokes." 7

As we age and encounter problems that we are personally unable to resolve satisfactorily, 8 it becomes necessary for someone else to make those decisions for us. This concept, guardianship, is neither new nor isolated. It has been traced back to ancient Rome. 9 In England, early law utilized guardianships to protect either the crown's or an heir's interest in an insane person's property. 10 Over time, English courts altered their focus to protect the individual's interest rather than merely the crown's land. 11

In the United States guardianship provisions vary. Socioeconomic forces, including increases in life expectancy as well as changes in family structure and transmission of wealth, have influenced and continue to influence guardianship laws. 12 Over the last decade, many jurisdictions reformed their laws to protect individuals subject to competency proceedings. 13

Prior to April 1, 1993, New York was governed by Articles 77 and 78 of the Mental Hygiene Law. 14 These statutes provided for conservators of property 15 and committees of persons 16 respectively. Article 77, the conservator statute, often afforded insufficient power for the fiduciary to provide appropriate and necessary relief for the conservatee. On the other hand, Article 78, the committee statute,

8. Jan M. Rosen, Your Money; Power of Attorney in Elderly Care, N.Y. TIMES, Aug. 18, 1990, § 1, at 34 (reporting that as medical science prolongs life, an increasing number of people are outliving their mental abilities to make financial and health-care decisions).
11. Id.
12. See generally Rein, supra note 1, at 1848-59.
13. See discussion infra part III.
15. See Miler & Hurme, supra note 7, at 657 (explaining that conservators, also known as guardians of the estate, are responsible for expending the incapacitated person's funds for his or her care or the care of any dependents, and that the estate is not intended to be preserved for heirs or expended for the benefit of others).
16. See id. at 656 (describing the duties of the committee of the person, sometimes referred to as guardian of the person, as "arranging a proper living situation for the ward, providing adequate health care and other services (e.g., habilitation, socialization) that are needed to provide the ward with a satisfactory quality of life").
required a judicial finding of incompetence; the concomitant deprivation of civil rights was frequently excessive and unnecessary. Professor John J. Regan of Hofstra University School of Law, a distinguished scholar of guardianship issues, called Article 78 "an example of guardianship overkill." 17

In response to the inadequacies of these two statutes, New York recently established a comprehensive new statute, Article 81 of the Mental Hygiene Law, effective April 1, 1993. This statute repeals both Articles 77 and 78 and specifically addresses the personal and property management needs of incapacitated persons. Article 81 appoints guardians with limited powers and utilizes a philosophy of "the least restrictive form of intervention." 18

The purpose of this article is threefold: first, to review the evolution of guardianship law in New York that generated the need for Article 81; second, to examine the purposes and provisions of Article 81, comparing the new law to its predecessors in New York, Articles 77 and 78, and to guardianship laws in other states; finally, to discuss issues of concern that persist or arise under Article 81.

I. THE EVOLUTION OF ARTICLE 81

Article 77 was enacted in 1972. Prior to this date, the only available legal remedy addressing the needs of an alleged incompetent 19 was Article 78, which provided for the appointment of a committee. 20 However, Article 78 mandated a judicial finding of incompetence, 21 which was accompanied by the loss of the ward's civil

18. N.Y. MENTAL HYG. LAW § 81 (McKinney Supp. 1993) (effective April 1, 1993). Section 81.01 states in pertinent part: "[t]he 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 them to exercise the independence and self-determination of which they are capable."
20. See John J. Regan, Refusing Life-Sustaining Treatment for Incompetent Patients: New York’s Response to Cruzan, 19 N.Y.U. REV. L. & SOC. CHANGE 341, 344 n.24 (1991-92) (describing a committee of the person as "an individual to whom the custody of a person is given by a court after a hearing at which the person has been determined to be incompetent").
21. Section 78.01 states in pertinent part: "[t]he supreme court, and the county courts
Because this remedy was often excessive, the judiciary was reluctant to invoke the committee statute. Instead, courts preferred to utilize Article 77. Further, in 1974, a legislative enactment established the statutory preference for the appointment of a conservator over the appointment of a committee, thereby encouraging conservatorships rather than committees whenever possible.

In 1972, in response to the restrictive nature of Article 78, the New York Legislature enacted Article 77, the conservatorship statute. This statute was intended to be less restrictive than the committee procedure. It also avoided subjecting those who needed assistance to the stigma of a judicial finding of incompetence and the accompanying loss of fundamental civil rights.

In contrast to Article 78, the appointment of a conservator under Article 77 did not require a finding of incompetence. Rather, the standard in Article 77 was that the individual "has suffered substantial impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for support." Under this statute, the conservator's authority included the "control, charge and management of the estate, real and personal, of the conservatee and . . . the powers and duties granted to or imposed upon a committee of the property of an incompetent." However,
this authority was limited by the court’s approval of 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.”29 Under Article 77, there was no loss of civil rights solely by reason of the appointment of a conservator.30

Three significant statutory differences readily distinguished Article 77 from Article 78. First, a judicial finding of incompetence was only required under the committee statute. Second, the conservatorship statute was limited to property and financial matters as contrasted to the committee statute that contained no such limitation. And third, the committee statute involved the deprivation of the ward’s civil rights; such extensive loss was not incurred in an Article 77 proceeding.31

Due to virtual abandonment of the committee32 procedure by the judiciary, some courts, utilizing Article 77, began to expand the powers of a conservator to include exercising authority over the person. In the case of In re Millman,33 the New York Appellate Division, Second Department, found that “[t]he provision in the order which requires the conservator to provide home care for the conservatee ‘at times needed’ is within the court’s authority under Mental Hygiene Law § 77.1934 to set forth a plan for the provision

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29. Id.
30. Section 77.25(a) states in pertinent part: “[a] conservatee shall not be deprived of any civil right solely by reason of the appointment of a conservator, nor shall such appointment modify or vary any civil right of a conservatee.” See supra text accompanying note 26.
31. LRC RECOMMENDATION, supra note 19, at 7.
32. Id. at 2.
34. § 77.19. The section states under “Powers and duties of conservator:”

[the court order appointing a conservator shall set forth (1) the duration of the conservatorship; (2) the extent of the income and assets of the proposed conservatee which are to be placed under the conservatorship; and (3) the court approved plan for the preservation, maintenance, and care of the conservatee’s
of necessary personal and social protective services to the
conservatee.\textsuperscript{35} Similarly, the Second Department also held in its \textit{In re Wolinsky}\textsuperscript{36} decision that "since a conservator performs essentially the same function as a committee, but with respect to a person who has not been adjudicated to be incompetent, the court operates under the same restriction."\textsuperscript{37} These courts, not wanting to subject incapacitated people to a finding of incompetency under Article 78, looked to certain language in Article 77 regarding the "personal well-being"\textsuperscript{38} of the conservatee as suggesting that conservators had the power to exercise authority over the person.\textsuperscript{39}

A conflicting view was offered by other courts that held Article 77, although a viable remedy for property management needs, was not intended to be expanded to include power over the person. The Appellate Division, First Department, in the case of \textit{In re Detzel}\textsuperscript{40} clearly distinguished the applicability of Article 77 from Article 78 stating:

The power of a conservator to carry out a court-approved plan for the preservation, maintenance, and care of the conservatee’s income, assets and personal well-being, does not authorize involuntary control of the conservatee’s person (Mental Hygiene Law § 77.19). Such an order could only follow a plenary hearing . . . (Mental Hygiene Law § 78.03(e)).\textsuperscript{41}

Similarly, the Supreme Court, New York County, emphatically stated

\begin{quotation}
\textit{Id.} \\
\footnote{35. \textit{Millman}, 522 N.Y.S.2d at 618 (footnote added).} \\
\footnote{36. 476 N.Y.S.2d 15 (App. Div. 1984).} \\
\footnote{37. \textit{Id.} at 16.} \\
\footnote{38. § 77.19(3); see supra note 34.} \\
\footnote{39. LRC \textit{RECOMMENDATION, supra note 19, at 2.} \\
\footnote{40. 521 N.Y.S.2d 6 (App. Div. 1987).} \\
\footnote{41. \textit{Id.} at 7. Section 77.19 sets forth the powers and duties of the conservator. Section 78.03 sets forth the requirements for a proceeding for declaration of incompetency and appointment of committee generally and includes procedural due process safeguards.}
This opinion is written and published . . . to dispel the widely held notion that conservatorship provides a vehicle for the management of a conservatee’s person, by ostensibly authorizing the conservator to make health care and placement decisions that infringe upon the conservatee’s personal liberty under the guise of protecting and promoting the conservatee’s “best interest.”

Prior to the 1991 New York Court of Appeals decision of In re Grinker (Rose), lower New York courts plainly disagreed as to the extent of a conservator’s power over the conservatee. By deciding In re Grinker (Rose), the court of appeals effectively settled this argument and, in doing so, gave substantial impetus to the need for guardianship reform in New York by holding that conservators under Article 77 were not empowered to exercise powers over the person. Such reform resulted in Article 81.

In Grinker (Rose), New York City’s Commissioner of Social Services brought an Article 77 proceeding seeking the appointment of a conservator for Ms. Seena Rose. Ms. Rose, a fifty-nine-year-old artist with limited income, fell behind in her rent and utility payments and chose not to market her artwork to remedy her financial deficiencies. The Supreme Court of New York County, relying essentially on testimony that Ms. Rose suffered from a mental illness, appointed a conservator with authority to manage her assets and to commit her to a nursing home “when medically indicated.” On appeal to the Appellate Division, Ms. Rose argued that Mental Hygiene Law Section 77.19 did not authorize empowering conservators

42. 552 N.Y.S.2d 807 (Sup. Ct. N.Y. County 1989).
43. Id. at 809.
44. 77 N.Y.2d 703 (1991).
45. Id. at 710 (resolving the disagreement among lower courts as to whether a conservator of the property under § 77 can exert power over the person of the conservatee as well. The court held that § 77.19 does not authorize conservators to involuntarily commit their wards to nursing homes and that such power is confined to an § 78 incompetency proceeding with its full panoply of procedural due process safeguards).
46. Id. at 709. The court looks at the conservatorship statute drafters’ report, 1966 REPORT OF NEW YORK LAW REVISION COMMISSION at 263, 271, reprinted in 1966 McKinney’s Session Laws of NY, at 2842, which stressed the “intent that the remedy be limited to the property of a conservatee and have no effect upon the conservatee’s person.”
47. Grinker, 77 N.Y.2d at 705.
48. Id.
49. Id.
to commit their wards to nursing homes.\textsuperscript{50} She also argued that the Commissioner failed to prove that her ability to care for her property was substantially impaired.\textsuperscript{51} Therefore, she asserted, a conservator should not have been appointed.\textsuperscript{52}

The Appellate Division affirmed the lower court and modified the judgment only to the extent of requiring court approval prior to her commitment to a nursing home. The court of appeals reversed and dismissed the petition holding that section 77.19 did not authorize conservators to take the profound action of committing their wards to nursing homes.\textsuperscript{53} The court also found that the Commissioner did not satisfy the procedural and evidentiary requirements of section 77.01(1)\textsuperscript{54} for the appointment of a conservator of Ms. Rose's property.\textsuperscript{55}

The court of appeals in \textit{Grinker (Rose)} found that "[t]he enacted language of article 77 reflects the Legislature's intent to limit the scope of a conservator's power only to the conservatee's property."\textsuperscript{56} The court held that "[t]he 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."\textsuperscript{57}

\textit{Grinker (Rose)} clarified the "all or nothing" choice courts were forced to make between the limited powers under Article 77 and the all encompassing powers of Article 78. "By doing so, however, the case in turn dramatize[d] the very difficulty the courts ha[d] been

\begin{itemize}
\item \textsuperscript{50} \textit{Id.} at 705.
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.} at 706.
\item \textsuperscript{54} § 77.01(1). This section states:
\begin{quote}
[t]he supreme court, and the county courts outside the city of New York, if satisfied by clear and convincing proof of the need therefor, shall have the power to appoint one or more conservators of the property (a) for a resident who has not been judicially declared incompetent and who by reason of illness, infirmity, mental weakness, alcohol abuse, addiction to drugs, or other cause, has suffered substantial impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for support, or (b) for a non resident of the state for whom a conservator of his property, by whatever name designated, has been appointed pursuant to the laws of any other state, territory, or country in which he resides. Such person for whom a conservator is appointed is hereinafter designated as the "conservatee."
\end{quote}
\item \textit{Id.}
\item \textsuperscript{55} \textit{Grinker}, 77 N.Y.2d at 706.
\item \textsuperscript{56} \textit{Id.} at 709.
\item \textsuperscript{57} \textit{Id.} at 710 (citations omitted).
\end{itemize}
trying to overcome, namely choosing between Article 77 which governs only property and Article 78 which judges a person completely incompetent." Articles 77 and 78 failed to provide the judiciary with the flexibility needed to address individual cases. Instead, these two statutes stymied the judiciary, forcing it at times to circumvent the statutes’ inadequacies by extending the powers of conservators under Article 77. Clearly, Grinker (Rose) held these judicial actions inappropriate. Article 77, on one hand, lacked necessary procedural due process safeguards and could no longer be utilized by courts to empower conservators with authority over the conservatee’s person. Article 78, on the other hand, was plainly disfavored by the judiciary as it was excessive in nature, often unnecessary in scope and required the stigma of a judicial finding of incompetence.

After Grinker (Rose) held that Article 77 was not the appropriate statute to rely upon when making health care choices for an incapacitated person, the courts were forced to either utilize the disfavored Article 78 or disallow these types of “actions.” This choice left a defective gap in New York State guardianship law that demanded resolution. The state legislature addressed this gap by enacting Article 81.

II. A COMPARISON OF ARTICLE 81 TO ITS PREDECESSOR STATUTES, ARTICLES 77 AND 78

The final version of Article 81 amends the Mental Hygiene Law, replacing the repealed Articles 77 and 78, and closely follows the proposal of the New York State Law Revision Commission. This organization will continue to play a key role in the development of

58. LRC RECOMMENDATION, supra note 19, at 19.
59. Id. at 2.
60. See supra note 23.
61. NEW YORK STATE LAW REVISION COMM’N, MEMORANDUM RELATING TO ARTICLE 81 OF THE MENTAL HYGIENE LAW (1992) [hereinafter LRC MEMORANDUM].
62. Established in 1934, the New York State Law Revision Commission is the oldest continuous agency in the common-law world devoted to law reform through legislation. The Commission consists of five members appointed by the Governor for five-year terms, one of whom is designated by the Governor as Chair, and the four respective Chairs of the Senate and Assembly Committees on Judiciary and Codes, as ex-officio members. Serving on the Commission during Article 81’s creation as members were Carolyn Gentile, Chairwoman, Kalman Finkel, Albert J. Rosenthal, Robert M. Piter, and Deborah A. Batts. The ex-officio members were Christopher J. Mega (Chair, Senate Judiciary Committee), Dale M. Volker (Chair, Senate Codes Committee), G. Oliver Koppell (Chair, Assembly Judiciary Committee), and Sheldon Silver (Chair, Assembly Codes Committee). Rose Mary Bailly, Law Revision
guardianship law as the statute itself provides that the Law Revision Commission shall evaluate Article 81's effectiveness and report its findings and any recommendations for modification to the governor and state legislature by April 1, 1996.63

A. Purpose

The initial statement of the legislature reflects that its motivation in enacting Article 81 is to create a flexible vehicle to meet the needs of persons requiring personal or property management assistance that will assure imposition of the "least restrictive form of intervention."64 The previous scheme of conservatorship and committee are explicitly rejected for both inadequacy65 and excessiveness.66 Further, the lawmakers' statement sets forth the intent to provide necessary assistance while honoring an individual's independence and self determination capability.67 The legislators state that public policy is best served by a guardianship system that narrowly addresses needs while reflecting "personal wishes, preferences and desires" of persons with incapacities.68

Article 81 clarifies the distinction between matters of property and personal needs that were blurred by cases decided under Articles 77 and 78.69 Enactment of a single statute under which personal and/or property decisionmaking can be assigned to a guardian eliminates the necessity of choosing one or the other proceeding, a choice which in many ways predetermined the fate of person whose care and rights were in question.70 Because the standard for appointment is highly individualized, any and all needs can be addressed by one

63. 1992 N.Y. Laws 698 § 5; see also G. Oliver Koppell & Kenneth J. Munnelly, The New Guardian Statute: Article 81 of the Mental Hygiene Law, N.Y. St. B.J., Feb. 1993, at 16, 20. G. Oliver Koppell is Chair of the Assembly Judiciary Committee and was Article 81's main sponsor; Kenneth J. Munnelly is counsel to the Assembly Judiciary Committee and assisted in the bill's drafting.
64. § 81.01.
65. Id. (noting that conservatorship which involves property management lacks the ability to provide relief where assistance for personal needs is required).
66. Id. (remarking that the "drastic" nature of these remedies is often an overly broad solution for people who require some but not total assistance in managing their affairs).
67. Id.
68. Id.
69. See supra notes 33-43 and accompanying text.
70. See Miller & Hurme, supra note 7, at 657 (noting that "[c]onflict may develop when the guardian of the person and the guardian of the estate are two different individuals, with divergent views on meeting the needs of the ward").
proceeding. The "least restrictive" alternative standard fills a gap in the law of Articles 77 and 78 that left people who needed partial assistance with virtually an "all or nothing" remedy.\(^\text{72}\)

**B. Procedural Concerns**

Article 81 differs distinctly from its predecessors in its attention to due process protection for the person alleged to be incapacitated. Although Articles 77 and 78 empowered the court to divest a person of civil rights, those statutes did not articulate specific standards to guide the court in its determination.\(^\text{73}\) Both sections named conditions that might provide a basis for finding incompetence or substantial impairment including advanced age, mental illness and alcohol abuse.\(^\text{74}\) However, neither article offered direction to the court as to how to understand and appraise a person's need for assistance, and neither required the court to make findings regarding the person's inability to sustain personal needs or manage property.

Article 81 is characterized and strengthened by specificity. In contrast to the previous laws, it explicitly requires that a finding of incapacity be supported by clear and convincing evidence of (1) an inability to fulfill personal needs or manage property; (2) an inadequate understanding of the consequences of such impairment; and (3) a likelihood of harm that may result therefrom.\(^\text{75}\) It further mandates that the court shall consider a person's functional abilities and limitations with attention to specific areas of that person's life; these will reveal the extent to which assistance is appropriate in precisely defined areas.\(^\text{76}\) The functional assessment is comprehensive, and while

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71. See § 81.02(a)(2).
72. See LRC MEMORANDUM, supra note 61, at 2, 4.
73. See §§ 77.01, 78.01. A proceeding under § 78 gives the court jurisdiction over persons who are incompetent to manage either themselves or their affairs while § 77 concerns those whose ability to care for property or provide for self or dependents is substantially impaired.
74. Id.
75. § 81.02(b).
76. See § 81.02(c). This subsection states that in determining incapacity the court must consider:
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;
it includes review of the person's mental and physical condition, those considerations are not weighted.\textsuperscript{77} The statute clearly defines considerations that are pertinent to the court's evaluation of need and remedy. This direction will reduce the possibility of subjective or uninformed determinations while lending certainty and predictability to the law.

When a guardian is appointed under Article 81, whether pursuant to a determination of incapacity or by the ward's agreement, the court will be required to set forth on the record findings it makes relating to the person's limitations to provide for personal needs or manage property. These findings must include the guardian's specific powers reflecting the least restrictive intervention that will adequately address the person's functional limitations and must also define the duration of the appointment.\textsuperscript{78} In respect of the incapacitated person's privacy, the findings are made on the record rather than in the judgment or order.\textsuperscript{79}

Of critical importance to the heightened attention afforded to due process consideration by Article 81 are the provisions governing notice and hearing requirements.\textsuperscript{80} Articles 77 and 78 were silent on the matters of form and content of notice; both were governed by N.Y. Civil Practice Law and Rules Section 403, which provides only that the notice may be in the form of a petition or an order to show cause and that the time and place of the hearing for a special proceeding be included in the notice contents.\textsuperscript{81}

\begin{itemize}
\item[(ii)] any physical illness and the prognosis of such illness; (iii) any mental disability . . . and the prognosis of such disability, alcoholism or substance dependence; and (iv) any medication with which the person is being treated and their effect on the person's behavior, cognition and judgment.
\end{itemize}

\textit{Id.}

\textsuperscript{77} Id. § 81.02(c) (stating that "in reaching its determination, the court shall give primary consideration to the functional level and functional limitations of the person") (emphasis added).

\textsuperscript{78} See § 81.15. Subsection (b) of this provision deals with petitions requesting guardianship to provide for personal needs. It calls for the court to articulate the person's specific impairment, a lack of understanding thereof, the likelihood of harm that may result from the limitations and the necessity to prevent that harm by appointment of a guardian. Subsection (c) of this provision concerns petitions requesting guardianship for the purpose of property management and requires a listing of the type and amount of property and financial resources in question, the specific functional limitation in relation thereto, the likelihood of resulting harm and the necessity of prevention of that harm by appointment of a guardian.

\textsuperscript{79} NEW YORK STATE LAW REVISION COMM'N, COMMENTS RELATING TO ARTICLE 81 OF THE MENTAL HYGIENE LAW 24 (1992) [hereinafter LRC COMMENTS].

\textsuperscript{80} See §§ 81.07, .11.

\textsuperscript{81} N.Y. CIV. PRAc. L. & R. § 403 (McKinney 1988).
The process that is due depends on the nature of the interest at stake.\textsuperscript{82} The notice requirements of Article 81 are appropriately rigorous in light of the precious fundamental rights at risk.\textsuperscript{83} Because notice that is received but not fully comprehended by the alleged incompetent is meaningless and constitutionally infirm,\textsuperscript{84} safeguards in Article 81 assure that the alleged incapacitated understands the nature and gravity of the proceeding. The cautionary explanation appearing first in the notice requirements of Article 81 is a recurrent theme throughout the statute.\textsuperscript{85}

In addition to a plain statement of the rights of the allegedly incapacitated person, notice of a proceeding under this section must set forth the following warning in "twelve point or larger bold face double spaced type:"\textsuperscript{86}

**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 applica-

\textsuperscript{82} See Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

\textsuperscript{83} See supra note 22.

\textsuperscript{84} See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314-15 (1950) (announcing that the type of notice which will accord with the Constitution is determined by the particular circumstances of the proceeding and must be calculated to actually inform).

\textsuperscript{85} See § 81.09(c)(2) (directing the court evaluator to explain to the alleged incapacitated person the nature and consequences of the proceeding and the person's relevant rights); see also § 81.11(e) (requiring the court to explain on the record the purpose and possible consequences of the hearing to any unrepresented alleged incapacitated person who is present at the hearing).

\textsuperscript{86} § 81.07(c).
tion. 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.87

The simple language and cautionary tone of this warning are designed to eliminate the possibility of a person unnecessarily losing the right to self determination because of a lack of understanding or awareness of the proceeding. These provisions are tailored to assure that actual notice is received in comprehensible form by people who may be laboring under some form of impairment due to advanced age, medication, illness or other cause. The form of the order to show cause must be printed in large type, written in whatever language is necessary to effectively communicate the information to the recipient and must include a listing of the powers to be exercised by the guardian if the relief sought by the petitioner is granted.88

The notice subsection of Article 81 also expands the list of people entitled to notice that was set forth in Articles 77 and 78.89 Limited only by “reasonably diligent efforts”90 on the part of the petitioner, the following parties are entitled to notice of a proceeding under Article 81: the allegedly incapacitated person’s extended family;91 any parties known to have been designated by the alleged incapacitated person to act on his or her behalf;92 the person’s attorney

87. Id.
88. § 81.07(b).
89. See § 77.07 (requiring that notice be given to nonpetitioner proposed conservatees, the proposed conservatee’s children and spouse or, if they are unknown, distributees, or if they are unknown, a person with whom the proposed conservatee resides, an officer overseeing the school or hospital and the mental health legal service if the proposed conservatee is a patient in such a facility); see also § 78.03 (naming the same parties listed in § 77.07 as being entitled to notice as well as other persons deemed proper by the court).
90. § 81.07(d)(1)(ii).
91. § 81.07(d)(1)(iii) (listing the person’s spouse, parents, adult children, adult siblings, cohabitant, or in the alternative, at least one but not more that three living relatives where the existence of these people can be ascertained by the petitioner’s reasonably diligent efforts).
92. See § 81.07(d)(1)(iv) (specifying that “any person or persons designated by the alleged incapacitated person with authority pursuant to sections 5-1501, 5-1601, and 5-1602 of
if known; the court evaluator; the local social services department if the person receives public aid; supervisory personnel of a residential care facility or hospital where the person alleged to be incapacitated may reside and the mental hygiene legal service of the jurisdiction where that facility is located. Additionally, any person or organization known to have demonstrated a sincere interest in the person who will be the subject of a proceeding under Article 81 is entitled to notice of the proceeding. The statute provides that such interest may be demonstrated by “having a personal relationship with the person, regularly visiting the person, or regularly communicating with the person.” Clearly, this expansive list is designed to maximize the possibility that all parties interested in the welfare of the person whose capacity is to be scrutinized will have the opportunity to participate in or investigate the progress of the proceeding.

Increased specificity is also required in the contents of a petition to initiate guardianship proceedings under Article 81. While Article 77 called for a petition to set forth the petitioner’s reasons for concern and Article 78 required a listing of facts demonstrating incompetence, these broad and vague directives were unlikely to result in information of sufficient depth to realistically portray the situation alleged to require remedy. The new law requires that the petition describe the functional level of the person who is to be the subject of the proceeding, with attention to that person’s ability to

the general obligations law, or sections two thousand nine hundred five and two thousand nine hundred eighty-one of the public health law, if known to the petitioner”). This provision refers to powers of attorney and surrogate decisionmakers named in living wills or health proxies.

93. § 81.07(d)(1)(vi).
94. § 81.07(d)(1)(vii).
95. § 81.07(d)(1)(viii).

One of the best known hospital operations, combining aspects of the advocacy services and legal aid, is the Mental Hygiene Legal Services . . . in New York. Composed of lawyers and mental health professionals, MHLS acts as an intermediary between hospital personnel and patients and between patients and the courts, informs patients of their rights, and investigates patients’ claims.

Id.

97. § 81.07(d)(1)(ix). This clause refers to schools, alcoholism facilities, residential health care facilities, and substance abuse programs, as defined in § 81 and other New York laws.
98. § 81.07(d)(1)(v).
99. See § 77.03(b).
100. See § 78.03(c).
conduct daily aspects of living and his or her comprehension of any limitations of that ability. Further, a petition must now include “specific factual allegations” pertaining to a demonstration that the person alleged to be incapacitated is likely to suffer harm because of an inadequate understanding of the inability to fulfill personal or property management needs. If a guardian is proposed in the petition, “the reasons why the proposed guardian or standby guardian is suitable to exercise the powers necessary to assist the person alleged to be incapacitated” must be included.

One of the most striking procedural differences between Article 81 and its predecessors is its efforts to assure contact between the court and the person alleged to be incapacitated “so as to permit the court to obtain its own impression of the person’s capacity.” Rather than resting the fate of a person on written reports, the legislature recognizes that a matter so significant as deprivation of rights should include personal observation by the court. “Judges have substantial expertise in evaluating the persons who testify in court not only by their testimony but also by their appearance and demeanor.” While Article 77 required the presence of the proposed conservatee at the hearing, that requirement could be overcome by reason of physical or other inability explained to the court’s satisfaction. Article 78 did not address the proposed incompetent’s attendance at the proceeding.

In contrast, the new law assigns great import to presence by insisting that the allegedly incapacitated person come to the hearing or, in the likely event that physical impediments exist, that the hearing be conducted at the residence of the person. The statute makes this requirement difficult to overcome, greatly increasing the

101. See § 81.08(a)(3).
102. See § 81.08(a)(4) (requiring that petitions seeking control of a person’s personal needs include “specific factual allegations as to the personal actions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for personal needs”); see also § 81.08(a)(5) (requiring similarly that petitions seeking property management powers set forth “specific factual allegations as to the financial transactions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate” the need for intervention to prevent harm).
103. § 81.08(a)(12).
104. § 81.11(c).
105. LRC COMMENTS, supra note 79, at 18.
106. See § 77.07(b).
107. § 81.11(c).
accessibility of the court proceeding to the person it will impact. The hearing may only proceed in the absence of the person alleged to be incapacitated if that person is not present in the state or if the court determines that the person is completely unable to participate or participate meaningfully. An order of appointment made in the absence of the incapacitated person must include an explanation of the factual basis for conducting the hearing without that person.

Article 81 is structured to safeguard the rights of the individual alleged to be incapacitated at each procedural step. The provision addressing hearings requires that the cautionary explanation set forth in the notice be repeated to the allegedly incapacitated person on the record emphasizing the purpose and consequences of the proceeding and the right to counsel. As was the case under the prior enactments, a jury trial will be ordered when demanded where issues of fact exist.

A determination of incapacity must be supported by clear and convincing evidence presented at the hearing by the petitioner. This standard of proof is consistent with the requirement for a finding of substantial impairment necessitating a conservator under Article 77. Perplexingly, although Article 78 put the proposed incompetent person at the most severe risk of loss, it did not define a standard of proof to guide determinations. This type of ambiguity undoubtedly contributed to its disuse.

Where good cause is shown, the court may waive the rules of evidence to admit out of court statements in an Article 81 proceeding. The court evaluator's report is admitted into evidence in cases where the court evaluator testifies and may be cross examined. However, if the court finds any information therein to be unreliable, the person who provided the information will be required to testi-

108. Id.
109. § 81.11(d).
110. § 81.11(e).
111. § 81.11(f).
112. See § 81.02(b). The determination of incapacity is two-pronged involving a finding that harm is likely to result 1) because of person's inability to meet personal or property management needs, and 2) because that person cannot comprehend the nature and consequences of that inability.
113. See infra notes 223-28, 276-82 and accompanying text (discussing the appropriate standard of proof for guardianship proceedings).
114. § 77.01(1).
115. See § 81.12(b).
116. See infra notes 138-41 and accompanying text.
Expeditious timing is a feature of the new legislation designed to cure a system "plagued with unconscionable delays." The legislature states that "[a] proceeding under this article is entitled to preference over all other causes in the court," and sets forth a timetable that results in issuance of the guardianship commission within a maximum of sixty days of the signing of the order to show cause. These provisions respond to the urgency of the matters involved where the previous statutes left the fate of scheduling the hearing or trial to the court system. Under Article 81, the provision that requires notice to be served no less than fourteen days prior to the return date of the order to show cause affords the alleged incapacitated person time to consider and prepare for the proceeding.

Even though the new statute should result in prompt resolutions, the legislature incorporated the provisions of Articles 77 and 78 that related to provisional remedies. Upon a showing of pending danger to the welfare or property of the alleged incapacitated person, a temporary guardian with specific responsibility and authority can be appointed to serve until the case is resolved. Similarly, the court may enjoin or temporarily restrain persons from transferring or

117. § 81.12(b).
118. Rosen, supra note 8, at 34 (quoting John J. Regan, Professor of Law at Hofstra University School of Law and former member of the ABA Commission on the Mentally Disabled).
119. § 81.13.
120. Id. The timeline for a proceeding under Article 81 is as follows: § 81.07(a)(1) states that the court must set a date no more than 28 days from the filing of the petition on which the show cause order is returnable and the hearing is scheduled; § 81.07(d)(2)(i) states that service must occur not less than fourteen days prior to the return date of the order; § 81.13 requires that a decision must be announced within forty-five days of the date of the signing of the order to show cause and the guardianship commission must be issued within fifteen days after the decision. These deadlines can only be extended upon a showing of good cause.
121. Section 77 is silent regarding timing and § 78.03(e) merely directs that the matter proceed to hearing or trial upon the return date of the petition.
122. § 81.07(d)(2)(i).
123. See § 77.08 (providing for a temporary receiver to preserve the proposed conservatee's property pending final disposition and also providing for the granting of temporary restraining orders to prohibit any conduct endangering the welfare of the property or of the proposed conservatee).
124. See § 78.03 (setting forth protections similar to those of § 77.08 relating to a temporary receiver or temporary restraining order to safeguard the property interests of the proposed incompetent).
125. See § 81.23.
126. § 81.23(a)(1).
dissipating property of the alleged incapacitated person or from acting in a manner contrary to that person’s welfare pending final disposition of the matter. 127

The repealed articles were mute in regard to the hearing record and confidentiality of the files. Article 81 mandates that all cases be recorded. 128 However, the allegedly incapacitated person is informed at the outset of the hearing of his or her right to request that the record be sealed and that particular people or the general public be excluded from the hearing. 129 Such a request may be granted, but the court must set forth a written finding of good cause determined by “the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated.” 130

C. The Court Evaluator and Counsel for the Respondent

Proceedings under Article 81 will include more participants than cases brought under Articles 77 or 78. The new law maximizes protection for the alleged incapacitated person’s rights requiring that notice be given to all potentially interested parties, 131 mandating appointment of legal counsel under certain circumstances 132 and creating the position of court evaluator to assist the court in gathering as much information and insight as possible regarding the person alleged to be incapacitated in order to affect a sound decision. 133 The court evaluator must be appointed at the issuance of a show cause order, 134 though the position may be dispensed with or dismissed if an attorney is appointed to represent the person alleged to be incapacitated. 135 The statute directs that any person knowledgeable about personal care, property management, problems relating to disabilities and resources available to persons with limitations of the type allegedly impairing the person in question may serve as court evaluator. 136 This subsection suggests that attorneys, physicians, psy-

127. § 81.23(b)(1)-(5).
128. § 81.14(a).
129. § 81.14(d).
130. § 81.14(b)-(c).
131. See supra notes 89-98 and accompanying text.
132. See infra notes 143-50 and accompanying text.
133. § 81.09.
134. Id.
135. § 81.10(g).
136. § 81.09(b)(1).
chologists, accountants, social workers, nurses, the jurisdiction’s mental hygiene legal service, and others may qualify to carry out the court evaluator’s duties.\textsuperscript{137}

The importance of the court evaluator to the new statutory scheme is evident in the exhaustive list of duties to be fulfilled by the appointed person.\textsuperscript{138} These tasks include explaining the nature and consequence of the proceeding to the person whose capacity is being questioned, appraising the person of pertinent rights, questioning the person as to his or her wishes regarding appointment of legal counsel and evaluating whether appointment of counsel is appropriate, researching the alleged incapacity, retaining expert medical opinion where appropriate, attending all court proceedings and conferences, examining medical, psychological or psychiatric records of the person where necessary,\textsuperscript{139} preserving property of the person from misappropriation or loss pending the hearing, and investigating and making recommendations requested by the court.\textsuperscript{140}

The statute requires that the evaluator report personal observations and recommendations to the court. It also articulates a list of seventeen questions that the evaluator must address relating to the person’s wishes and preferences, abilities and limitations, prognosis of any disability, comprehension, financial resources, family situation, and relationships as well as assessment of the proposed relief.\textsuperscript{141}

\begin{itemize}
\item \textsuperscript{137} § 81.09(b)(1)-(3).
\item \textsuperscript{138} § 81.09(c).
\item \textsuperscript{139} These records are privileged and are only subject to examination upon a finding by the court that they contain information likely to assist the court evaluator in preparation of the report pursuant to § 81.09(d).
\item \textsuperscript{140} § 81.09(c).
\item \textsuperscript{141} Section 81.09(c)(5) directs that the evaluator’s report will include information in response to these questions:
\begin{enumerate}
\item (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 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,
This comprehensive investigation into the universe of the person in question combines with the first hand observation of that person by the court\textsuperscript{142} to insure that a precise and accurate assessment supports whatever determination is made.

Another feature of the new bill designed to address procedural concerns is a provision for appointment of counsel\textsuperscript{143} that was absent in the previous statutes. The guardians \textit{ad litem} of Articles 77 and 78 not only fulfilled duties that included neutral investigative activity for the court, but also some advocacy activity for the proposed conservatee or incompetent. Article 81 clarifies these two types of activities and creates separate positions for them; counsel acts as representative for the allegedly incapacitated person\textsuperscript{144} and a court evaluator objectively assesses the person and the situation for the court.\textsuperscript{145}

Under Article 81, the court must appoint counsel in the following circumstances:\textsuperscript{146} upon request of the person alleged to be incapacitated 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 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 consequence of any inability to manage the activities of daily living; (ix) what is the approximate value and nature of the finances of the person alleged to be incapacitated; (x) what are the person’s preferences, wishes, and values with regard to the activities of daily living; (xi) has the person alleged to be incapacitated made any appointment or delegation pursuant to section 5-1501, 5-1601, or 5-1602 of the general obligations law, section two thousand nine hundred sixty-five or two thousand nine hundred eighty-one of the public health law, or a living will; (xii) what would be the least restrictive form of intervention consistent with the person’s functional level and the power 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 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; (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 opportunity to be heard.

\textit{Id.}

\textsuperscript{142} See supra notes 104-05 and accompanying text.

\textsuperscript{143} § 81.10.

\textsuperscript{144} See \textit{id.}

\textsuperscript{145} See § 81.09.

\textsuperscript{146} § 81.10(c); see also § 81.10(e) (allowing that if the person alleged to be incapacitated...
pacitated, in the event that the person wishes to contest the petition or does not consent to the authority sought,\textsuperscript{147} where there may be conflict between the person's advocacy needs and the role the court evaluator is to fulfill,\textsuperscript{148} or where temporary powers are requested by the petitioner.\textsuperscript{149} The court may appoint counsel even over the objection of the person who is to be the subject of the proceeding if the court determines that the person is incapable of informed decisionmaking regarding legal representation.\textsuperscript{150}

\textit{D. Remedies}

The heart of reform requiring the least intrusive intervention that meets an incapacitated person's needs lies in the subsection of Article 81 dealing with dispositional alternatives. Here the departure from the expansive and ill-defined conservator and committee remedies of the past is manifested in personalized arrangements that go no further than necessary to assist beneficially an incapacitated person. This approach is consistent with Supreme Court announcements that even legitimate and substantial governmental purposes "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."\textsuperscript{151}

As part of the necessity for a guardian, the court reviews determining the court evaluator's report and recommendations regarding available resources "such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, powers of attorney, trusts, representative and protective

\textsuperscript{147} See § 81.10(c)(3). This may include situations where the person does not consent to a proposed change of residence or to proposed medical or dental treatment.
\textsuperscript{148} See supra notes 133-41 and accompanying text.
\textsuperscript{149} See supra notes 123-27 and accompanying text.
\textsuperscript{150} See § 81.10(d).
\textsuperscript{151} Shelton v. Tucker, 364 U.S. 479, 488 (1960) (explaining further that "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose" (footnote omitted)); see also Rivers v. Katz, 67 N.Y.2d 485, 497 (1986) (holding that where medical treatment is proposed for a person found to be without capacity to make treatment decisions, "the court must determine whether the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest").
payees, and residential care facilities" and considers whether these resources sufficiently and reliably provide for the alleged incapacitated person's needs without appointment of a guardian. Whether a guardian is appointed with the ward's agreement or upon a finding of incapacity, "the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the person in providing for personal needs and/or property management." The court also has the option of crafting an arrangement for persons found to be incapacitated but not in need of the ongoing protection of a guardian. Here the court may provide for specific transactions or protective care arrangements with or without the assistance of a special guardian designated to carry out a particular duty.

E. The Guardian

The New York Legislature strives in Article 81 to ensure that the person serving as guardian is qualified and will act in the best interest of the incapacitated person without conflicting personal interests. As in the past, an alleged incapacitated person has the option to nominate a guardian with evidentiary and cautionary conditions. But under Article 81, the person so nominated must be appointed by the court, absent a finding of unfitness, if that is the continuing preference of the incapacitated person. This approach furthers the legislature's goal of preserving in the incapacitated person as much freedom of choice as possible. Should there be no nominee in the petition or other written instrument, the court is directed to

152. § 81.03(c).
153. § 81.09(c)(5)(vi).
154. § 81.16(c)(1)-(2).
155. § 81.16(b). Specifically, the court may:
authorize, direct, or ratify any transaction or series of transactions necessary to achieve any security, service, or care arrangement meeting the foreseeable needs of the incapacitated person, or may authorize, direct, or ratify any contract, trust, or other transaction relating to the incapacitated person's property and financial affairs if the court determines that the transaction is necessary as a means of providing for personal needs and/or property management for the alleged incapacitated person.

Id.
156. See § 77.03; see also § 78.05.
157. See § 81.17 (stating that "[i]n the petition, or in a written instrument duly executed, acknowledged, and filed in the proceeding before the appointment of a guardian the person alleged to be incapacitated may nominate a guardian").
158. § 81.19(b).
appoint as guardian a person that the alleged incapacitated person nominates either orally or by conduct during the hearing, unless it is found that such appointment would be inappropriate. The previous statutes did not have a presumption favoring the nominee of the proposed conservatee or incompetent; instead the court conducted a "best interests" analysis before appointing the nominee of the proposed conservatee or incompetent.

Additional specificity for guardian eligibility evolved with each subsequent enactment. Article 78 allowed the appointment of a community guardian program but was otherwise silent on the question of eligibility. Any community guardianship program, relative or friend of the conservatee could be designated to serve under Article 77; these categories included concerned corporations or agencies authorized to act as conservators. The new Act subordinates the importance of family ties to the qualifications of a person to exercise the guardian powers. Further, it excludes corporations from fulfilling guardianship duties relating to personal needs unless the corporation is not-for-profit and specifically organized to carry out such activities. Others excluded from serving as guardians are parties whose only interest is related to their position as creditor to the alleged incapacitated person or parties who provide care or residential services to the person. These entities are only considered as a last resort because of possible conflict between business interests and the interest of the ward.

As in other provisions of Article 81, the legislature charges the court with specific considerations in determining who shall be appointed guardian. This requirement forces the court to examine the particular individuals involved, any arrangements made previously by the allegedly incapacitated person, such as durable powers of attorney and health care proxies, and the facts relevant to that person's situation. No such directives were included in Articles 77 or 78.

159. § 81.19(c).
160. §§ 77.03(d), 78.05(d).
161. § 78.03(a).
162. § 77.03(e).
163. § 81.19(a)(1).
164. § 81.19(a)(2)-(3).
165. § 81.19(e). The statute does allow parties otherwise excluded from serving as guardians to be appointed where no other person or corporation is willing or able to act in that capacity.
166. § 81.19(d)(1)-(8). This subsection directs the court to consider the following in appointing a guardian:
The distinct differences between Article 81 and its predecessors are illustrated in the provisions relating to the scope of the guardian’s authority. When actions brought under Articles 77 and 78 resulted in the naming of a conservator or committee, the degree of control vested therein was extensive. The repealed statutes indicated that the conservator or committee enjoyed plenary authority, subject only to limitations or directions set forth in the court order.\textsuperscript{167} In contrast, a guardian appointed pursuant to an order under Article 81 may exercise only those powers defined by the court\textsuperscript{168} while affording maximum independence and autonomy to the incapacitated person and deference to that person’s wishes in light of whatever functional limitations may exist.\textsuperscript{169} The guardian, charged with maintaining the status of a fiduciary, must “exercise the utmost care and diligence when acting on behalf of the incapacitated person”\textsuperscript{170} and “exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person.”\textsuperscript{171} The statute requires that the guardian visit the ward at least four times annually, a number which may be increased by the court.\textsuperscript{172} As a precautionary measure the court may, at its discretion, require a guardian to file a bond before assuming his or her duties.\textsuperscript{173}

For every decision or transaction made by the guardian on behalf of the incapacitated person, the guardian is to intervene as minimally as possible and to act as the incapacitated person would have if he or

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(1) any appointment or delegation made by the person alleged to incapacitated in accordance with the provisions of section 5-1501, 5-1601, or 5-1602 of the general obligations law and sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law; (2) the social relationship between the incapacitated and the person, if any, proposed as guardian, and the social relationship between the incapacitated person and other persons concerned with the welfare of the incapacitated person; (3) the care and services being provided to the incapacitated person at the time of the proceeding; (4) the powers which the guardian will exercise; (5) the educational, professional and business experience relevant to the nature of the services sought to be provided; (6) the nature of the financial resources involved; (7) the unique requirements of the incapacitated person; and (8) any conflicts of interest between the person proposed as guardian and the incapacitated person.

\textit{Id.}

167. \textit{See} §§ 77.19, 78.15.
168. § 81.20(a)(1).
169. § 81.20(a)(6)-(7).
170. § 81.20(a)(2).
171. § 81.20(a)(3).
172. § 81.20(a)(5).
173. \textit{See} § 81.25.
she were able to do so.\textsuperscript{174} In the area of treatment decisions, if the wishes of the ward are neither known nor ascertainable, the guardian is directed to use a "best interests" analysis to support decision making.\textsuperscript{175} This approach follows the principle of substituted judgment\textsuperscript{176} that has developed in other areas of New York law.\textsuperscript{177} Clearly, a familiarity and personal relationship with the ward is a condition precedent to effective fulfillment of this role. All guardians are constrained from giving consent to admit the incapacitated person to a mental hygiene facility or from overriding by revocation previously made powers or attorney or living wills.\textsuperscript{178} This provision will prevent a situation wherein a person who has lost the right of asset control may be involuntarily institutionalized based on a guardian's perception of serving the ward's best interest.\textsuperscript{179}

\textbf{F. Training and Monitoring}

Another innovation of Article 81 that will improve the competence of guardianship proceedings and exercise of guardianship authority is the education requirement. All persons involved in an official capacity must complete a training program designed to enhance the ability to perform their duties. The purpose of this requirement is to "increase the awareness of the Bar, the persons appointed as guardians, and other participants in guardianship proceedings of the complexity of guardianship issues."\textsuperscript{180}

Every guardian must be trained to understand applicable legal

\textsuperscript{174} See §§ 81.21, 81.22. The guardian is given highly specific direction with regard to every facet of property and financial management such as entering contracts, making gifts, trusts, or wills, and investing to name a few. Similarly, the act addresses particular aspects of daily life such as education, driving, residence, and travel.

\textsuperscript{175} § 81.22(a)(8). \textit{But see} Rein, \textit{supra} note 1, at 1826 (noting that a recent study suggests that "the decisions made by the court or surrogate under either [a substituted judgment or best interests] approach often are contrary to what the objects of this solicitude would actually want even if competent").

\textsuperscript{176} \textit{See}, e.g., \textit{N.Y. MENTAL HYG. LAW} § 80 (McKinney 1988) (regarding surrogate decisionmaking for a person unable to understand and appreciate the nature and consequences of proposed medical treatment); \textit{see also} \textit{N.Y. PUB. HEALTH LAW} § 2965 (McKinney Supp. 1993) (regarding surrogate decisionmaking for a person unable to understand and appreciate the nature and consequences of a do-not-resuscitate order).

\textsuperscript{177} \textit{See} Koppell & Munnelly, \textit{supra} note 63, at 20 (stating that "[t]his section codified the doctrine of substitution of judgment which has been recognized by courts in New York State"); \textit{see generally}, Regan, \textit{supra} note 20 (discussing surrogate decisionmaking).

\textsuperscript{178} § 81.22(b).

\textsuperscript{179} \textit{See} \textit{In re} Fisher, 552 N.Y.S. 807, 813 (Sup. Ct. N.Y. County 1989).

\textsuperscript{180} \textit{LRC RECOMMENDATION}, \textit{supra} note 19, at 4.
duties and responsibilities, the incapacitated person's rights, resources available to assist the incapacitated person, relevant medical terminology and reporting requirements. Similar training is required for every person appointed by the court as an evaluator, and people serving in this capacity must also acquire general knowledge about "psychological and social concerns relating to the disabled and frail older adults." Examiners appointed by the court to review the guardian's reports are also required to submit to whatever training may be necessary to supplement their education and experience in order to ensure responsible monitoring. Although Article 81 is explicit in its education directives, it fails to set forth a plan for implementing training programs.

Article 81 establishes monitoring procedures to ensure that guardians conform to the purpose and philosophy of Article 81 as they carry out their assigned duties. Under the previous statutes, conservators, charged with financial management, were not accountable for the ward's well-being or health, nor were committees required to report on the social or medical status of their wards. Financial monitoring was similarly inadequate. Under Article 81, the guardian must comply with extensive reporting criteria including an initial report to be filed with the court within ninety days of the issuance of the commission, setting forth the details of the incapacitated person's financial and/or personal affairs and the guardian's management plan. Annual reports to the court must contain information regarding the incapacitated person's physical, mental and social condition, health care received and pending, the appropriateness of the residential setting, accountings of financial matters, a summary of the guardian's activities on behalf of the incapacitated person and facts indicating the need to alter the guardianship. Review and verification of guardianship reports will result in higher costs to the court, but experimental projects in other states using volunteer monitors may yield a viable and affordable alternative.

181. § 81.39.
182. § 81.40.
183. § 81.41.
184. See infra text accompanying note 271.
186. Id.
187. See § 81.30.
188. § 81.31.
189. See Miler & Hurme, supra note 7, at 655 (describing an ABA study and Legal
Consistent with the goal of preserving self-control to whatever extent possible, the guardian is required to submit a copy of the annual report to the incapacitated person as well as to the supervisor of a facility in which that person may reside (and the mental hygiene legal service for the jurisdiction) and to the court for prompt examination. These provisions encourage the incapacitated person to maintain an interest in the management of his or her own affairs, demand a high level of attention from the guardian and increase the number of persons overseeing the progress of the guardian's management. Sanctions for failure to report include denial or reduction of the guardian's compensation and removal from the position.

Article 81 is endowed with flexibility through its provision regarding modification. Should an incapacitated person regain capacity or require more assistance, the court may discharge the guardian or modify the enumerated powers which the guardian is authorized to exercise. Because the presumption of this statute is ability rather than disability, a party opposing restoration of control to the incapacitated person or a party seeking to further limit the power of the incapacitated party has the burden of proof.

III. GUARDIANSHIP LAW IN OTHER STATES

There is an observable nationwide trend towards guardianship reform which seeks to preserve capacity for self-determination by narrowly defining guardian powers, as the New York legislature does, to create the least restrictive intervention that will serve the needs of an incapacitated person arising from functional limitations. A measure of impetus for legislative efforts to amend guardianship systems has been attributed to a 1988 Associated Press report regarding abuse in conservatorship and guardianship law throughout the U.S. While attempts to standardize this area of the law through federal legislation were unsuccessful, a survey conducted by the

Counsel for the Elderly project wherein AARP volunteers are recruited to serve as court visitors, court auditors and records researchers).

190. §§ 81.31(b)(11), 81.32.
191. See §§ 81.32, 81.35.
192. See § 81.36.
193. Id.
194. See LRC RECOMMENDATION, supra note 19, at 36.
195. See Judith McCue, The States Are Acting to Reform Their Guardianship Statutes, TR. & EST., July 1992, at 32, 32, 37; see also Miler & Hurme, supra note 7, at 658.
196. McCue, supra note 195, at 32.
American College of Trust and Estate Counsel reveals "that at least 25 states have added or are contemplating new legislation or amended existing laws since 1987. . . ."197 The issues of due process, limitation of guardian powers and guardian accountability are being targeted for investigation in other states and changes are being enacted.198 Innovations such as the use of volunteer monitors199 and video tape training presentations are also being developed at the local level.200

A. Purpose

New laws in Florida and New Hampshire exemplify the philosophy that supports New York's Article 81. Florida law states that the public welfare is best served by providing assistance that "least interferes with the legal capacity of a person to act in his own behalf"201 through a system that assists as needed while permitting decision making on the part of an incapacitated person to the greatest extent possible.202 Similarly, New Hampshire's statutory scheme allows imposition of "protective orders only to the extent necessitated by the individual's functional limitations"203 and seeks to preserve the civil rights and liberties of the proposed ward by mandating the least restrictive form of intervention consistent with that goal.204

B. Functional Assessment

Reform bills throughout the country generally focus determination of an individual's incapacity on a comprehensive assessment of functional abilities and limitations205 in terms of social, mental, emotional and physical factors. Functional assessment departs from the approach taken in some states that measures disability primarily by categorical definition of physical or mental condition. The latter method may lead to a decision based on the description of a person's condition rather than a decision that considers how the condition

197. Id.
199. See Miler & Hurme, supra note 7, at 655.
200. See McCue, supra note 195, at 35.
201. FLA. STAT. ANN. § 744.1012.
202. See id.
204. Id. § 464-A:9(III)(d).
205. See McCue, supra note 195, at 37.
actually affects the alleged incapacitated person. The Missouri statute is illustrative of wording that may lead a court to focus on a condition "label" used to describe the person rather than the person's behavior: "[a]n 'incapacitated person' is one who is unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he lacks capacity to meet essential requirements."\(^{206}\)

In contrast, those acts that aspire to afford greater protection to alleged incapacitated persons through comprehensive and individualized assessment direct the court to pursue a functional approach for determining incapacity and service delivery needs. Utah law states that incapacity concerns functional limitation not mental condition.\(^{207}\) The Florida statute specifically mandates that a person alleged to be incapacitated undergo a comprehensive examination by three court appointed professionals\(^{208}\) that shall include a physical and mental health evaluation, but also an analysis of the person's functional abilities and limitations.\(^{209}\) New Hampshire defines incapacity as a legal rather than medical disability and, like New York's Article 81, relates the necessity for guardianship to harm arising from that inability to meet personal or property management needs.\(^{210}\) But New York, unlike New Hampshire, requires a finding of mental incapacity, not just functional incapacity.\(^{211}\) Article 81 defers to self-direction and presumes that a person with functional limitations who understands the nature and consequences of those inabilities will seek and direct needed assistance without the appointment of a guardian.\(^{212}\)

\(^{208}\) Fla. Stat. Ann. § 744.331(3) (specifying that the examination will be conducted by a physician, a psychiatrist and two other professionals such as a gerontologist, registered nurse, nurse practitioner, social worker or another doctor, psychiatrist or psychologist).
\(^{209}\) Id.
\(^{211}\) See John J. Regan, Protecting the Elderly: The New Paternalism, 32 Hastings L.J. 1111, 1123-25 (1981) (distinguishing New Hampshire’s purely functional approach from traditional guardianship law that is based on the theory that exercise of parens patriae power is appropriate only where a person is unable to act rationally).
\(^{212}\) See § 81.02(b). Under this clause a person who is physically disabled, but mentally competent to understand and appreciate his or her functional impairments, will not meet the standard of incapacity justifying appointment of a guardian.
C. Hearing and Counsel

The requirement of a hearing prior to guardianship is common. While many states' guardianship legislation articulates an alleged incapacitated person's right to attend the hearing determining his or her rights, other states go farther to assure the respondent's presence. Currently "the alleged incapacitated person's presence is mandatory in a minimum of ten states, he or she has the right to attend in a minimum of twenty-two states, and nine states make an exception when attendance could be harmful to the ward."

In Oklahoma, absence of the person alleged to be incapacitated is permissible for good cause only, and if the person waives the right to be present, the court must set forth findings on the record as to the reasons for the person's absence and alternatives considered. Florida prescribes that the alleged incapacitated person must attend unless that person or the attorney for that person waives the right or good cause for absence is shown. Similarly, New Hampshire mandates the respondent's presence, but the requirement can be overcome if the alleged incapacitated person or counsel for that person informs the court that the person does not express a desire to attend. Like New York, Michigan strongly encourages presence and participation by the alleged incapacitated person by directing that the court shall take all practical steps to ensure attendance including moving the hearing site to accommodate that person's needs.

Counsel for the respondent is defined in most states as a right, but a number of statutes call for appointment of counsel for persons who would be otherwise unrepresented. Michigan's approach is akin to New York's, requiring appointment of counsel in certain situations such as those in which the respondent wishes to

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213. See BRAKEL ET AL., supra note 9, at 416-22.
215. McCue, supra note 195, at 35 (footnotes omitted).
216. OKLA STAT. tit. 30, § 3-106(B) (1991).
220. E.g., Ohio Rev. Code Ann. § 2111.02(c)(7)(d)(i) (Anderson 1992); see McCue, supra note 195, at 35 (noting that at least 35 states give the alleged incapacitated person a right to counsel).
contest the petition or objects to a particular guardian.\textsuperscript{222}

\textbf{D. Proof}

Most jurisdictions prescribing a quantum of proof necessary to support the appointment of a guardian insist, as New York does, on clear and convincing evidence.\textsuperscript{223} The Supreme Court announced, in the context of civil commitment, that the clear and convincing standard of proof is appropriate in civil cases where liberty interests are at stake.\textsuperscript{224} Rejecting the "preponderance of evidence" standard, the Court stated that "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than the possibility of harm to the state."\textsuperscript{225} States generally apply this reasoning to guardianship proceedings, but standards for acceptable proof throughout the states vary. Some statutes are silent on the matter, while others offer vague direction regarding sufficient proof, such as evidence that the decisionmaker finds "satisfactory."\textsuperscript{226}

In contrast, New Hampshire analogizes the deprivation of liberty resulting from appointment of a guardian to the deprivation of liberty that follows criminal conviction by demanding proof beyond a reasonable doubt of incapacity, the necessity of guardianship and the absence of alternative resources.\textsuperscript{227} The Supreme Court has cautioned about the use of the reasonable doubt standard in cases dealing with mental capacity, noting the difficulty of making such a certain determination in such an uncertain area.\textsuperscript{228}

\textbf{E. Limited Guardianship}

Other state legislatures that have overhauled guardianship laws are also moving in the direction of eliminating plenary supervision in

\textsuperscript{222} See \textsc{Mich. Comp. Laws} § 700.4434a(2)-(3).

\textsuperscript{223} E.g., \textsc{Fla. Stat. Ann.} § 744.331(5)(c); \textsc{Mich. Comp. Laws} § 700.444(1).


\textsuperscript{225} Id. at 427.

\textsuperscript{226} See, e.g., \textsc{W. Va. Code} §§ 44-10A-1, 44-10A-2 (1982) (stating that guardian appointment is appropriate "[w]hen it shall appear to the satisfaction of the county commission . . . "); \textsc{Wyo. Stat.} § 3-2-104 (1977) (stating that requirements are satisfied when "the allegations of the petition as to the status of the proposed ward are proved").

\textsuperscript{227} \textsc{N.H. Rev. Stat.} § 464A:9(III).

\textsuperscript{228} Addington, 441 U.S. at 427, 429 (hesitating to apply the "beyond a reasonable doubt" standard to cases where definite conclusions are difficult and where there is no punitive dimension).
favor of limited guardian powers. Specifically defined authority to intervene, narrowly tailored to respond to the incapacitated person's need for assistance, is strongly preferred in states that have studied and revamped this area of law. This approach is sound in its recognition that the extent of limitation varies greatly among incapacitated persons and that intervention should be proportional to need. Research reveals that as people age, the relationship between autonomy and good health strengthens.

Michigan allows courts to assign a guardian "only those powers and only for that period of time as is necessary to provide for the demonstrated need of the legally incapacitated person." Strongly preferring limited guardianship, Utah law permits a grant of full authority only in the absence of any alternative and supported by specific findings as to inadequacy of other remedies. An appointed guardian in Florida may only exercise those rights that the court has found, based on clear and convincing evidence, that the incapacitated person is incapable of exercising. These provisions and those of New York's new Article 81 stand in dramatic contrast to the full and sweeping powers that conservators or committees exercised over the affairs of their wards as a consequence of assignment under acts such as the repealed New York Articles 77 and 78.

F. Monitoring

Problems may arise in the post-hearing phase of guardianship because of changes in the ward's needs or because of the guardian's performance. Monitoring in the form of supervision of the guardian or review of the guardianship order is necessary to address and resolve these problems. Although most states provide for some form of guardianship monitoring by setting forth reporting requirements, the frequency and type vary. Some states call for an initial report and subsequent biannual reporting, while others leave the report-

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229. McCue, supra note 195, at 35.
230. Rein, supra note 1, at 1835.
231. MICH. COMP. LAWS § 700.444(2).
232. UTAH CODE ANN. § 75-5-304(2).
233. FLA. STAT. ANN. § 744.331(6)(e)-(f).
234. Miler & Hurme, supra note 7, at 655.
235. See id. at 654 (reporting that while guardianship monitoring is generally improving, some states routinely review the guardianship but others still take a passive role, and conjecturing that a "hands off" philosophy by some state courts may have its roots in the Uniform Probate Code).
236. E.g., CAL. PROB. CODE § 1850 (West 1991); IND. CODE ANN. § 29-3-9-6(a)(1)
The recently reformed bills emphasize accountability by setting forth specific topics for inclusion in the reports, demanding frequent and regular reports with sanctions for noncompliance, and creating a system of examination. Such requirements should result in positive change to a "haphazardly administered . . . and underscrutinized" guardianship system.

IV. REMAINING CONCERNS

The New York State Law Revision Commission developed Article 81 in response to the need for guardianship reform in New York. The Commission commenced its study of Articles 77 and 78 of the Mental Hygiene Law in 1987. It emerged in 1991 with a new proposal after substantial consultation with authorities in various fields. As part of this process, the Commission conducted extensive legal and empirical research, circulated questionnaires to numerous experts, co-sponsored a conference on the reformation of New York Conservatorship Law with the Brookdale Institute on Law and Rights of Older Adults and met with members of the Judiciary and members of the Bar as well as representatives of various public and private agencies. The Commission also regularly consulted with experts in the area of rights and needs of disabled older adults, particularly the Brookdale Institute.

Clearly, a need to reform Articles 77 and 78 existed. The proposal put forth by the Law Revision Commission was drafted


238. See, e.g., FLA. STAT. ANN. §§ 744.367, 744.3675 (requiring detailed annual reports updating the condition of the incapacitated person and setting forth their needs as well as a plan to meet those needs); see also notes 185-91 and accompanying text.

239. Spring & Dubler, supra note 185, at 320 (quoting the ASSOCIATED PRESS, SPECIAL REPORT—GUARDIANS OF THE ELDERLY: A FAILING SYSTEM 6 (1988)).

240. Hearings, supra note 17, at 6 (testimony of Assemblyman G. Oliver Koppell, Chairman of the Assembly Judiciary Committee).

241. Id. at 8; see also LRC RECOMMENDATION, supra note 19, at 1.

242. Hearings, supra note 17, at 8-9 (testimony of Assemblyman G. Oliver Koppell, Chairman of the Assembly Judiciary Committee).

243. Id.

244. Id. at 6. Assemblyman Koppell stated, "[m]any of us in the Legislature see a great need for both review and overhaul of the current sections of the Mental Hygiene Law." Id.

245. Id. at 7-8 (testimony of Carolyn Gentile, Law Revision Commissioner). In her testimony, Ms. Gentile identified Professor Emeritus Al Rosenthal of Columbia, LRC Execu-
with thoughtful and competent research.\textsuperscript{246} As such, it generally received enthusiastic support by state legislators as well as expert witnesses testifying at the new legislation's May, 1991 public hearing.\textsuperscript{247} However, the philosophy of guardianship is contentious. For example, should it be a benignly paternalistic\textsuperscript{248} approach or an adversarial approach affording higher standards of due process to the subject of the proceeding?\textsuperscript{249} Unavoidably, Article 81 cannot satisfy everyone. The following is a discussion of concerns that remain.

One of the most controversial aspects of guardianship deals with the appointment of counsel for the alleged incapacitated. Some assert that "[c]ounsel as advocate for the respondent [alleged incapacitated] should be appointed in every case, to be supplanted by respondent's private counsel if the respondent prefers."\textsuperscript{250} During the last decade of guardianship reform, most states mandated the appointment of counsel.\textsuperscript{251} For example, Florida established a relatively vigorous adversary structure, as compared to New York's\textsuperscript{252} balanced approach. The New York approach calls for mandatory appointment of counsel only under certain circumstances including when the alleged...
incapacitated requests one or when the court-appointed evaluator believes it necessary to protect the rights of the alleged incapacitated. Despite arguments that appointment of counsel should be mandatory in a guardianship hearings, the Seventh Circuit held that appointment is not required because "the nature of the intrusion on liberty interests resulting from an adjudication of incompetency is far less severe than the intrusion resulting from other types of proceedings in which the presence of counsel has been mandated."

A contrasting view to mandated appointment of counsel is that the expense of appointed counsel is wasteful because beneficence to the alleged incapacitated is the primary motivation for most proceedings. If no opposition to appointment of guardianship exists, mandatory counsel becomes an unwarranted expense which even the alleged incapacitated does not wish. Clearly, mandatory appointment of counsel results in additional costs. This cost operates to further deplete the alleged incapacitated's estate because Article 81 demands the estate incur this fee.

The question remains whether guardianship proceedings are properly served through the adversarial process or by a hearing leading to a determination of "best interests." Arguably, those "best interests" are most effectively revealed through advocacy of counsel.


255. Alison P. Barnes, Elder Law: Beyond Guardianship Reform: A Reevaluation of Autonomy And Beneficence For A System of Principled Decision-making In Long Term Care, 41 EMORY L.J. 633, 715 (1992); see also Hearings, supra note 17, at 48 (testimony of Wallace L. Leinheirdt, Chairman of the New York State Bar Association Trusts and Estates Section Committee on Persons Under Disability) (claiming that in his fifteen years of personal conservatorship work, for the most part, well in excess of 90 percent of the cases are non-adversarial).

256. Hearings, supra note 17, at 158 (testimony of Lawrence Faulkner, Deputy General Counsel, Office of Mental Retardation and Developmental Disabilities).

257. Section 81.10(f) states in pertinent part: "[t]he person alleged to be incapacitated shall be liable for such compensation [for the appointed attorney] unless the court is satisfied that the person is indigent."

258. BRAKEL ET AL., supra note 9, at 27-28 (suggesting that it is incorrect to assume in a civil commitment hearing where the state acts pursuant to its parens patriae power that the proceeding is a real contest between parties with opposite interests).

259. But see Lauren B. Lisi & Anne M. Burns, Mediation in Guardianship Cases: A Promising Alliance, 26 CLEARINGHOUSE REV. 644 (1992) (suggesting that mediation offers a more effective solution "because parties are committed to them, having been part of the process that created them").
Article 81 provides that counsel is mandated under certain circumstances. When counsel is appointed, delay tactics often ensue. These tactics include exercising the right to a jury, hiring experts, postponements and engagement in various motion practices. "This would make the action more legally complex, and would certainly result in a higher proportion of cases being dismissed regardless of the actual needs and capacities of the proposed ward." Therefore, in certain cases, advocacy of counsel, rather than furthering the best interests of the alleged incapacitated, ultimately results in precisely the opposite outcome.

Another area of controversy involves a determination of who may fill the role of court evaluator. Section 81.09 makes it clear that the court evaluator is intended to act as an independent investigator gathering information to aid the court. The statute does not mandate that the evaluator be an attorney. In fact, it specifically lists several disciplines that are qualified to perform the role.

Many other states also permit non-attorneys to fill this role. However, several experts testifying at the May, 1991 public hearing stressed that attorneys are the most effective evaluators. Wallace L. Leinheardt, Chairman of the New York State Bar Association Trusts and Estates Section Committee on Persons Under Disability, and a subcommittee on the Guardianship Law, stated "that the use of

260. § 81.10; see supra note 252.
261. Spring & Dubler, supra note 185, at 322.
262. See id.
263. § 81.09; see supra notes 131-41 and accompanying text.
264. § 81.09(c). This section states in pertinent part:

The duties of the court evaluator shall include the following: . . . (5) investigating and making a written report and recommendations to the court; the report and recommendations shall include the court evaluator's personal observations as to the person alleged to be incapacitated and his or her condition, affairs and situation, as well as information in response to . . . [listed] questions.

Id.; see supra note 141 (listing questions that the court evaluator is to address thereby clearly establishing that the court evaluator is intended to act as an independent investigator to assist the court).

265. Hearings, supra note 17, at 67-68 (testimony of Sally B. Hurme, Assistant Project Director, Commission on the Mentally Disabled, American Bar Association) (testifying that as of the date of the hearing "of the twenty-two states that do have some sort of statutory provision for the appointment of a visitor investigator to make a pre-hearing investigation, . . . overwhelmingly those visitors are not attorneys"); see also id. at 147 (testimony of Debra Sacks, associate staff attorney at the Institute of Law and Rights of Older Adults at the Brookdale Center on Aging of Hunter College) (agreeing that most court investigators in other states are non-legal entities and instead come from various professions with developed expertise in their professions).
non-lawyers [for court evaluators] will most likely increase rather than decrease the cost of the proceeding."\textsuperscript{266} Similarly, Marvin Bernstein, Director of Mental Hygiene Legal Service\textsuperscript{267} for the First Department, expressed that he personally would feel more comfortable if the court evaluator were an attorney.\textsuperscript{268} In direct contrast to this position, Debra Sacks, an associate staff attorney at the Institute on Law and Rights of Older Adults at the Brookdale Center on Aging of Hunter College, remarked that the Institute believes a non-lawyer is better suited to fill the role of the court evaluator because there is a need for "more input in the assessment process from non-legal entities, people that are professionally trained in these areas."\textsuperscript{269}

A question remains as to whether patronage positions established under New York's guardian \textit{ad litem} system will be perpetuated as court evaluators. Arguably, lawyers may not be the best situated to discern service delivery needs for incapacitated people. Further, lawyers might not be as well versed as some other professionals in securing community resources for an incapacitated person. But unless the Office of the Court Administrator reforms its lists to include people from the professions suggested by Article 81,\textsuperscript{270} the role of court evaluator will be limited to lawyers.

Moreover, Article 81's training directives\textsuperscript{271} are open-ended, do

\textsuperscript{266}. \textit{Hearings}, supra note 17, at 45 (testimony of Wallace L. Leinheardt, Chairman of the New York State Bar Association Trusts and Estates Section Committee on Persons Under Disability) (claiming that expenses will include the non-lawyer's fee and the fee for the attorney that will invariably be required). Leinheardt further claims the use of a non-lawyer will result in due process difficulties because the non-lawyer will be unable to evaluate the legal issues presented. \textit{Id.}

\textsuperscript{267}. \textit{Id.} at 171-72 (testimony of Marvin Bernstein, Director of Mental Hygiene Legal Services for the First Department). Mental Hygiene Legal Service has a substantial amount of experience representing people in guardianship hearings. It is a primary provider of legal advocacy services to mentally disabled people in New York facilities.

\textsuperscript{268}. \textit{Id.} at 180.

\textsuperscript{269}. \textit{Id.} at 141 (testimony of Debra Sacks, associate staff attorney at the Institute of Law and Rights of Older Adults at the Brookdale Center on Aging of Hunter College).

\textsuperscript{270}. § 81.09(b). This section states in pertinent part:
the court may appoint as court 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.

\textit{Id.}

\textsuperscript{271}. §§ 81.39, 81.40, 81.41. These sections are respectively entitled "Guardian education requirements," "Court evaluator education requirements," and "Court examiner education requirements."
not specify who will provide this training, what evaluation standards will be utilized to judge participants in these training programs, when waiver of this requirement is appropriate, or how these education requirements will be funded. Clearly, the organization awarded the education contracts by the Office of the Court Administrator will be an important factor in determining who ultimately fills these roles.

Despite Article 81's stated purpose of the "least restrictive alternative," guardianship under this statute involves the loss of civil rights. As such, ensuring due process protections is a critical issue. Although Article 81 contains substantially more protections than its predecessor statutes, due process concerns remain under the new legislation. For example, a "respondent has a right to be present and should be present if at all possible."\(^{272}\) Sections 81.11(c)-(e) require presence of the alleged incapacitated, certainly a step toward protection of due process. However, an exception exists permitting the judge to waive presence if it is clearly established that the alleged incapacitated is completely unable to participate in the hearing or no meaningful participation will result from the person's presence at the hearing.\(^{273}\) Julia C. Spring, representing the Association of the Bar, City of New York, urged that:

> the judge be obligated to seek the allegedly incapacitated person even if this occasionally requires the judge to visit the person in a hospital or a nursing home. The statute should allow waiver only when the individual cannot be located, when the proceeding is ancillary to a guardianship in another state and possibly when the individual is permanently unconscious.\(^{274}\)

Similarly, Justice Kristin Booth Glen of the Supreme Court Civil Term, New York County, emphatically argued "unless the ward's presence is mandated—or it is required that the judge view the ward who cannot be brought to court—everything we know tells us that the ward will almost never be seen."\(^{275}\)

Two subsections of Section 81.12 raise further due process con-

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272. RECOMMENDED JUDICIAL PRACTICES, supra note 249, at 3.
273. § 81.11(c)(2).
274. Hearings, supra note 17, at 191-92 (testimony of Julia C. Spring, representing the Association of the Bar, City of New York). Ms. Spring refers to an examination by Justice Kristin Booth Glen in which Justice Glen stated that she discovered after their hearings that many of the alleged incapacitated were actually more incapacitated than she had expected and that some of her decisions would have been different had she seen the individual.
275. Id. at 274 (testimony of Justice Kristin Booth Glen, Supreme Court Civil Term, New York County).
cerns. First, under Section 81.12(a), the determination that a person is incapacitated is predicated upon a standard of clear and convincing evidence rather than beyond a reasonable doubt.276 The deprivation of an individual’s civil rights is certainly a serious concern. One would imagine criminal defense counsel raising formidable objections if their clients could be found guilty under such a standard. However, the Supreme Court in Addington v. Texas,277 announced that the appropriate burden of proof in civil cases which implicate individual liberty is clear and convincing evidence.278 While allowing that states are free to develop their own standards,279 the Court discouraged use of the reasonable doubt standard for non-criminal cases where the power to restrict liberty “is not exercised in a punitive sense.”280 Determinations of functional capacity, like psychiatric diagnoses, involve “subtleties and nuances”281 that render certainty beyond a reasonable doubt a near impossibility.282 The clear and convincing standard is practical and realistic in the context of guardianship proceedings.

Additionally, under Section 81.12(b) the rules of evidence may be waived by the court for good cause.283 Under this subsection, the court evaluator can submit hearsay allegations, and if the judge feels such statements are reliable, the judge may admit them. Such relaxation of the rules of evidence affords the respondent no opportunity for cross examination. Nonetheless, during the May, 1991 hearing, several expert witnesses testified that the rules of evidence should be relaxed. For example, Justice Edwin Kassoff, the Presiding Justice of the Appellate Term of the Supreme Court, stated: “[t]he court would

276. Section 81.12(a) states: “[a] determination that a person is incapacitated under the provisions of this article must be based on clear and convincing evidence. The burden of proof shall be on the petitioner.”
278. Id. at 424, 432.
279. Id. at 430-31.
280. Id. at 428.
281. Id. at 430.
282. Id. at 432.
283. § 81.12(b). This section states:
The court may, for good cause shown, waive the rules of evidence. The report of the court evaluator may be admitted in evidence if the court evaluator testifies and is subject to cross examination; provided, however, that if the court determines that information contained in the report is, in the particular circumstance of the case, not sufficiently reliable, the court shall require that the person who provided the information testify and be subject to cross examination.
Id.
not be permitted to get an entire picture which is necessary for the protection for the alleged incapacitated if we have strict rules of evidence."  

Likewise, Wallace Leinheardt expressed his view that strictly following the rules of evidence to require in person testimony by all witnesses would be excessively costly.  

In contrast to Kassoff’s and Leinheardt’s similar positions, in Lessard v. Schmidt, a federal district court held that “[w]here standard exclusionary rules forbid the admission of evidence, no sound policy reasons exist for admitting such evidence in an involuntary mental commitment hearing.”  

The Lessard approach would increase costs and pose practical problems associated with requiring the testimony of doctors in all cases. A reasonable alternative would be to allow affidavits in uncontested cases; but where there is a contest, the interests at stake justify a requirement that all witnesses testify in person and be subject to cross examination. 

Finally, due process concerns are exacerbated when appointment of counsel is not mandatory and when the court evaluator is a non-lawyer. The National Conference of the Judiciary on Guardianship Proceedings for the Elderly adopted a recommendation under a heading of “Procedure: Ensuring Due Process Protections” that “[c]ounsel as advocate for the respondent should be appointed in every case, to be supplanted by respondent’s private counsel if the respondent prefers.”  

Wallace Leinheardt stated his belief that “it’s doubtful that the requirements of due process can be satisfied at a reasonable cost if the person occupying the court investigator role is other than an attorney.”  

Protections have been included in Article 81 to discourage  

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284. Hearings, supra note 17, at 19 (testimony of Justice Edwin Kassoff, Presiding Justice of the Appellate Term of the Supreme Court).  
285. Id. at 45 (testimony of Wallace L. Leinheardt, Chairman of the New York State Bar Association Trusts and Estates Section Committee on Persons Under Disability) (stating that “the requirements that the rules of evidence be followed in all cases will, in my judgment, require the testimony of doctors in all cases. There, again, there will be a concomitant increase in the cost of these proceedings”).  
287. Lessard, 349 F. Supp. at 1103.  
288. RECOMMENDED JUDICIAL PRACTICES, supra note 249, at 3.  
289. Id.  
290. Hearings, supra note 17, at 47 (testimony of Wallace L. Leinheardt, Chairman of the New York State Bar Association Trusts and Estates Section Committee on Persons Under Disability).
non-meritorious petitions. While such aims are certainly laudable, it is possible that these provisions will instead intimidate people who might not petition despite legitimate concerns.\textsuperscript{291} Debra Sacks, speaking for the Brookdale Center of Aging at Hunter College, stated:

We don’t believe that the petitioners should be responsible for carrying the cost of court investigators. If such would be the case, we’re fearful that well-meaning family, friends and others concerned with the welfare of an impaired person would not make use of the court system purely for financial considerations.\textsuperscript{292}

Under Article 81, the petitioner may incur costs if the petition is unsuccessful. If the petition is dismissed, the court may, in its discretion, have the petitioner pay such compensation as the court determines for the alleged incapacitated’s representation.\textsuperscript{293} The petitioner may also have to pay the costs of the court evaluator if the petition is dismissed.\textsuperscript{294} Further, guardians are subject to sanctions if they either fail to report or file incomplete reports.\textsuperscript{295} Finally, a guardian may be removed for misconduct. In this case, the guardian must pay costs for failure to comply with an order or for misconduct.\textsuperscript{296}

Article 81 does not authorize guardians to make decisions regarding life-sustaining treatment for their wards. It is currently the law in New York that, in the absence of clear and convincing evidence of

\textsuperscript{291} See Spring & Dubler, \textit{supra} note 185, at 322 (arguing that the "possibility of financial penalty for petitioning would discourage all but institutions from so doing; the concerned neighbor or relative is unlikely to embark on such a course").

\textsuperscript{292} \textit{Hearings, supra} note 17, at 149 (testimony of Debra Sacks, associate staff attorney at the Institute of Law and Rights of Older Adults at the Brookdale Center on Aging of Hunter College); \textit{see generally id.} at 248 (testimony of Ira Salzman, an attorney for adults in Mental Hygiene Law since 1978) (speaking of the procedural complexities involved in section 81 as well as its basic adversarial nature which "is just going to [make the petitioner] take his marbles and go home").

\textsuperscript{293} Section 81.10(f) states in pertinent part: "[I]f the petition is dismissed, the court may in its discretion direct that petitioner pay such compensation [for the mental hygiene legal service or any attorney appointed] for the person alleged to be incapacitated."

\textsuperscript{294} Section 81.09(f) states in pertinent part: "[W]hen a judgment denies or dismisses a petition, the court may award a reasonable allowance to a court evaluator, including the mental hygiene legal service, payable by the petitioner or by the person alleged to be incapacitated, or both in such proportions as the court may deem just."

\textsuperscript{295} § 81.32(c)(2), (d)(2). Regarding failure to report or filing an incomplete report, the sections state in pertinent part: "[A] upon failure to comply with such demand [court examiner’s demand], the court, may upon the recommendation of the court examiner, enter an order requiring compliance with the demand and may deny or reduce the amount of the compensation of the guardian, or remove the guardian pursuant to section 81.35 of this article."

\textsuperscript{296} Section 81.35 states in pertinent part that the court "may compel the guardian to pay personally the costs of the motion [to remove the guardian] if granted."
an incapacitated patient’s wishes regarding life-sustaining treatment, no one may make a decision to reject such treatment.\textsuperscript{297} Therefore, incapacitated people who did not give appropriate advance directives such as health care proxies or living wills may “receive unsought and often, burdensome life-sustaining treatment which offers them no benefit and from which the law provides no escape.”\textsuperscript{298} To address this issue, The New York State Task Force on Life and the Law\textsuperscript{299} recently proposed legislation to create a system to identify and authorize surrogate decision makers for incapacitated people.\textsuperscript{300} Apparently the drafters of Article 81 yielded to the Task Force proposal as the more appropriate medium in which to address such a controversial development in the law. Therefore, resolution of this question is beyond the scope of Article 81.

Financial consequences of Article 81 will not be known until after its effective date of April 1, 1993. However, certain increased costs can be expected and will be absorbed by various parties including the wards, the petitioners\textsuperscript{301} and the state. A “least restrictive alternative” philosophy carries with it an inherent additional cost factor.\textsuperscript{302} Court hearings for modification purposes can be expected, with each subsequent hearing generating further expenses.\textsuperscript{303} Supplemental reporting and the examination of these reports will strain public resources. The estate may be depleted faster because the estate

\textsuperscript{297} In re Westchester County Medical Center ex rel. O’Connor, 531 N.E.2d 607 (N.Y. 1988); In re Storar (In re Eichner) 420 N.E.2d 64 (N.Y.), cert. denied, 454 U.S. 858 (1981).

\textsuperscript{298} Regan, supra note 20, at 341.

\textsuperscript{299} See The New York Task Force on Life and the Law, When Others Must Choose—Deciding for Patients Without Capacity (1992) (setting forth recommendations and a legislative proposal addressing the issues of who may make treatment decisions for incapacitated patients who did not make prior directives and what criteria should govern those decisions). The Task Force on Life and the Law was convened by Governor Mario Cuomo in 1985 to recommend policy on various issues raised by medical advances. Previous Task Force proposals concerning do-not-resuscitate orders in health care proxies were enacted into law. Id. at vii.

\textsuperscript{300} Regan, supra note 20, at 344-52.

\textsuperscript{301} See supra notes 291-94.

\textsuperscript{302} Melvin T. Axilbund, Comm’n on the Mentally Disabled, American Bar Association, Exercising Judgment for the Disabled 14 (1979). The Commission on the Mentally Disabled effectively states, “[t]he basic problem . . . is that there are too few resources, too few real decisions to be made by anyone. No change in the guardianship law will alter that fact. At a time when the volume of real resources is not growing or is perhaps even declining and when competition for services seems to be increasing, achieving guardianship law reform could well be an empty victory. This is true not only because it might delay the essential effort to expand resources, but because the reform proposals themselves have a tendency to enhance guardianship costs and ignore other concerns.”

\textsuperscript{303} See supra notes 192-93 and accompanying text.
will now pay for both the court evaluator and counsel. Travel by judges to see allegedly incapacitated individuals will result in further expenditures and encumbrances on an already over-burdened judiciary. Additional charges will be incurred for court evaluator training, foreign language notice, type size alterations and increased notice requirements. The Mental Hygiene Legal Service will most likely see a greater demand for its services resulting in state budget implications. Clearly, the potential for heightened costs abounds.

However, this fiscal impact may not occur. The frequency with which people resort to the court for guardianship may diminish as the popularity and use of durable powers of attorney, health care proxies and living wills increase.304

V. CONCLUSION

Guardianship reform, like most law, is evolving. Although Article 81 certainly does not resolve all remaining concerns for incapacitated people in New York, it is clearly a significant step forward from its predecessor statutes, Articles 77 and 78. Anticipating future developments, the new statute requires the Law Revision Commission to undertake an evaluation and report concerning the effectiveness of Article 81, together with recommendations regarding its modification, to be submitted to the governor and the legislature by April 1, 1996.305 It is anticipated that the Law Revision Commission’s forthcoming recommendations will continue the ambitious goals thus far recognized by Article 81.

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304. LRC MEMORANDUM, supra note 61, at 5.
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