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**AN AGE-OLD DILEMMA:  
MANDATED ADMINISTRATION OF PSYCHOTROPIC  
MEDICATION FOR WARDS**

*Alyson J. Berman-Lonardo*<sup>\*</sup>

**I. INTRODUCTION**

American law allows certain individuals—guardians—to exercise dominion over others—wards or incapacitated persons (“IPs”)—in some circumstances.<sup>1</sup> This kind of control is permissible and often necessary because the IP is unable to perform certain tasks. The guardian’s decision-making may fulfill many needs of the IP, such as well-reasoned decisions involving investments, day-to-day activities, and medical choices.

Depending on the state statutory and common law, a guardian may be given the right to make medical decisions for the IP.<sup>2</sup> This right may include the ability to consent to psychotropic medications for the IP, even when the IP pronounces her will not to take them.<sup>3</sup>

This ability of a guardian to consent to the administration of psychotropic medications for her ward has been a source of contro-

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<sup>1</sup> See, e.g., N.Y. MENTAL HYG. LAW § 81.01 (McKinney 2004); WIS. STAT. ANN. § 54.25(1) (West 2009).

<sup>2</sup> See, e.g., N.Y. MENTAL HYG. LAW § 81.22(a)(8) (McKinney 2004).

<sup>3</sup> *Rivers v. Katz*, 495 N.E.2d 337, 344-45 (N.Y. 1986).

versy in New York.<sup>4</sup> It seems obvious that New York's legislature intended that guardians have the ability to consent, as this right is expressly given in the Mental Hygiene Law.<sup>5</sup> Nevertheless, the issue has arisen in New York State courts. Further complicating the issue, various jurisdictions have ruled differently on whether a guardian has the right to so consent.<sup>6</sup> Within the Second Department alone, there are two contradictory Supreme Court decisions.<sup>7</sup>

The legislature has made it clear through its enactment of Mental Hygiene Law sections 81.22(a)(8) and 81.01 that it intended a guardian's potential powers to include the power to consent to administration of psychotropic medication.<sup>8</sup> The New York Court of Appeals should give credence to the legislative statute, and hold that in certain circumstances, guardians can be given the right to consent to psychotropic medication for their IPs. This right of a guardian should not be unlimited, but it must be among the rights that a court can bestow, in order to best protect the IP.

This Comment addresses whether a guardian should have authority to mandate psychotropic medication for her IP. Part II discusses the constitutional considerations of the issue. Part III discusses psychotropic medications in general. Part IV addresses how various courts have considered the issue, focusing on New York State, where the Court of Appeals has not yet ruled on the issue. Part V discusses other states' statutes. Part VI suggests that when this issue reaches the New York Court of Appeals, the court should hold that lower courts in New York are allowed to grant a guardian the authority to mandate psychotropic medication for the ward, but only af-

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<sup>4</sup> Compare *In re Farbstein*, 619 N.Y.S.2d 239, 240-41 (Sup. Ct. N.Y. County 1994) (acknowledging the guardian's authority to consent to psychotropic medication for a ward, but refusing to grant that guardian the authority to consent to hospital admission of the ward to determine which drug is appropriate), with *In re Gordon*, 619 N.Y.S.2d 235, 236-37 (Sup. Ct. Rockland County 1994) (holding that "[t]he right to refuse antipsychotic medication is a fundamentally protected liberty" that extends to voluntary patients in mental hygiene facilities, and the legislative history of Article 81 should not be interpreted to grant a guardian the authority to impose upon these rights).

<sup>5</sup> See N.Y. MENTAL HYG. LAW § 81.22(a)(8).

<sup>6</sup> See, e.g., *In re N.Y. Presbyterian Hosp.*, 693 N.Y.S.2d 405, 414 (Sup. Ct. Westchester County 1999) (holding that guardian was not permitted to consent to waiver of *Rivers* hearing over IP's objections); *In re Conticchio*, 696 N.Y.S.2d 769, 770 (Sup. Ct. Nassau County 1999) (holding that guardian had authority to consent to administration of medication despite IP's objections).

<sup>7</sup> See *N.Y. Presbyterian Hosp.*, 693 N.Y.S.2d 405; *Conticchio*, 696 N.Y.S.2d 769.

<sup>8</sup> N.Y. MENTAL HYG. LAW §§ 81.01, 81.22 (a)(8).

ter considering a variety of factors in making such a determination.

## II. CONSTITUTIONAL CONSIDERATIONS

Various constitutional considerations are implicated when determining whether a guardian should have the authority to consent to psychotropic medication on behalf of an IP. Fundamental issues including due process, liberty, and autonomy rights must be weighed against the best interest of the IP.

Administering psychotropic medication over a person's will violates that individual's constitutionally protected liberty and privacy interests in controlling one's own body. One may argue that a person who has been adjudicated incapacitated has not given up her constitutional rights to autonomy and liberty. If this is true, then how can a court grant a guardian the authority to mandate the ward to take medication which, by its nature, will alter the ward's mind, and therefore, the very being of the person?

In *O'Connor v. Donaldson*,<sup>9</sup> the Supreme Court determined that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."<sup>10</sup> While the issue in the *O'Connor* case was whether and under what circumstances an individual may be involuntarily civilly committed to an institution, the Court's considerations of constitutional issues are relevant here. Just as involuntarily civilly committing an individual to an institution impinges on the individual's constitutional liberty interest,<sup>11</sup> so too does involuntarily medicating an individual with psychotropic drugs. Should the courts never grant a guardian the authority to mandate psychotropic medication for an IP in an effort to provide the IP with the same constitutional rights to liberty and bodily autonomy?<sup>12</sup> Clearly, a strong state interest in protecting society must outweigh an individual's right to determine what medications to take or avoid when that individual is dangerous to herself or others.

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<sup>9</sup> 422 U.S. 563 (1975).

<sup>10</sup> *Id.* at 576.

<sup>11</sup> *Id.* at 573.

<sup>12</sup> See *Rivers*, 495 N.E.2d at 341 ("[T]he due process clause of the New York State Constitution [article I, section 6] affords involuntarily committed mental patients a fundamental right to refuse antipsychotic medication.").

When considering the reasons for psychotropic medication, the state's strong legitimate interest in controlling the negative effects of mental illness on society must be considered. "Where [a] patient presents a danger to himself or other members of society or engages in dangerous or potentially destructive conduct," the State may be warranted to administer psychotropic medication over the patient's objection.<sup>13</sup> There are a variety of policy considerations supporting states that grant a guardian the authority to consent to psychotropic medication for a ward. One concern is protecting both the incapacitated person and others. A good example of this concern is Kendra's Law. Kendra's Law is a New York statute named after a "woman who was pushed in front of a subway car by a mentally ill person who was not in treatment."<sup>14</sup> Kendra's Law provides that an outpatient who suffers from a mental illness can be ordered to receive outpatient treatment under certain circumstances.<sup>15</sup> Other states followed New York's lead and enacted their own versions of Kendra's Law.<sup>16</sup> The public policy reason to medicate the mentally ill, in order to protect themselves and others, is real and significant.

While individuals have the right, under the United States Constitution, not to be deprived of their liberty rights without due process of law,<sup>17</sup> those rights are not always absolute. Of course it would be unconstitutional to deprive a citizen of her liberties without adequate treatment.<sup>18</sup> It is questionable, however, whether it would unconstitutionally deprive an individual of such rights when society's needs and safety concerns suggest that public policy considerations clearly outweigh individual rights. When an un-medicated individual is dangerous to herself or to society, it is difficult to justify protecting

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<sup>13</sup> *Id.* at 343.

<sup>14</sup> N.Y. MENTAL HYG. LAW § 9.60 (McKinney 2005); Stephen Allen, *Mental Health Treatment and the Criminal Justice System*, 4 J. HEALTH & BIOMEDICAL L. 153, 177 (2008).

<sup>15</sup> N.Y. MENTAL HYG. LAW § 9.60(c)(4) (stating that some such circumstances include that the individual has a "lack of compliance with treatment for mental illness that has . . . resulted in . . . serious violent behavior" towards the individual or towards another, or threats of or attempts at "serious physical harm" to the individual or another); N.Y. MENTAL HYG. LAW § 9.60(c)(6) (stating that the individual, "in view of his or her treatment history and current behavior," requires assistant outpatient treatment in order to "prevent a relapse or deterioration which would be likely to result in serious harm to the person or others").

<sup>16</sup> See Allen, *supra* note 14 at 177 (discussing California's statute known as "Laura's Law," which was named after a woman who was killed by a schizophrenic patient who went on a random shooting, as well as Michigan's "Kevin's Law").

<sup>17</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

<sup>18</sup> *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (D. Ala. 1971).

that individual's liberty rights to remain free of medication. In such a case, the individual's procedural due process rights have not been violated because she would have been given notice of the petition for a guardianship as well as an opportunity to be heard.

Finally, courts must consider how a ward may be provided due process of law if a guardian is granted the authority to mandate psychotropic medication for the ward. In *Rivers v. Katz*,<sup>19</sup> the New York State Court of Appeals held that "due process requires that a court balance the individual's liberty interest against the State's asserted compelling need on the facts of each case to determine whether such medication may be forcibly administered" to an institutionalized patient.<sup>20</sup> The court further required that a patient be given the opportunity to request a *Rivers* hearing, during which the state has the burden to prove, by clear and convincing evidence, that the individual lacks capacity to make a "reasoned decision with respect to proposed treatment before the drugs may be administered pursuant to the State's *parens patriae* power."<sup>21</sup> What steps would constitute due process of law if courts were to grant a guardian with the authority to authorize psychotropic medication for a ward? To make these determinations, it is useful to understand exactly what psychotropic medication is and how it affects those who take it. It is respectfully submitted that a properly appointed guardian, appointed through the processes set out in Article 81 with the procedural protections therein, provides sufficient due process protections for the incapacitated individual.

Imposing a guardian upon an individual is only done with the utmost care, as the imposition of a guardian "intrudes on or removes fundamental liberty interests [such as the right to privacy] protected by the Constitution of the United States."<sup>22</sup> A guardianship may also impose the stigma of a person who lacks the ability to make independent decisions.<sup>23</sup> Due to the constitutional and stigmatic issues that arise when appointing a guardian to an individual, the burden of proof is on the party claiming that a person is incompetent and in

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<sup>19</sup> 495 N.E.2d 337 (N.Y. 1986).

<sup>20</sup> *Id.* at 344.

<sup>21</sup> *Id.* at 343-44.

<sup>22</sup> LAWRENCE A. FROLIK & ALISON McCHRISTAL BARNES, *ELDER LAW: CASES AND MATERIALS* 443 (4th ed. 2007).

<sup>23</sup> *Id.*

need of a guardian.<sup>24</sup> Most states require clear and convincing evidence of the incapacitation.<sup>25</sup>

Courts utilize a variety of methods to determine that a person is incapacitated. Medical assessments, psychological assessments, and functional assessments, along with an evaluation of whether the individual can make a rational decision may be employed.<sup>26</sup> The fact that a person makes decisions that are not commonplace or acceptable to society is an insufficient basis for a determination of incapacity.<sup>27</sup> Rather, courts consider an individual's ability to understand relevant information, appreciate the nature of a situation and its likely consequences, to manipulate information rationally, and communicate a choice.<sup>28</sup> The protections afforded an IP in Article 81, include placing the burden on the party claiming that a person is incompetent,<sup>29</sup> requiring clear and convincing evidence of the incapacitation,<sup>30</sup> and considering the individual's ability to make a rational decision.<sup>31</sup> This is all determined after notice to the IP and a hearing in a New York Supreme Court.<sup>32</sup> Such actions provide sufficient protection to the IP, such that additional due process protections are unnecessary.

### III. EFFECTS OF PSYCHOTROPIC MEDICATION

Psychotropic medications are drugs that "affect the mind, behavior, intellectual functions, perception, moods, and emotions."<sup>33</sup> They have been found by the medical and psychiatric communities to be an effective method to control mental disorders.<sup>34</sup> Psychotropic medications have allowed the mentally ill to live in society, while contributing to the de-hospitalization of those with mental disorders.

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<sup>24</sup> *Id.* at 455.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 468.

<sup>27</sup> FROLIK & BARNES, *supra* note 22, at 468.

<sup>28</sup> Jessica Wilen Berg et al., *Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 RUTGERS L. REV. 345, 351 (1996).

<sup>29</sup> N.Y. MENTAL HYG. LAW § 81.12(a) (McKinney 1992).

<sup>30</sup> *Id.*

<sup>31</sup> N.Y. MENTAL HYG. LAW § 81.02(c) (McKinney 1992).

<sup>32</sup> N.Y. MENTAL HYG. LAW § 81.11(a) (McKinney 2004).

<sup>33</sup> *Steele v. Hamilton Cty. Cmty. Mental Health Bd.*, 736 N.E.2d 10, 15 n.3 (Ohio 2000); see also Merriam-Webster Online Dictionary, <http://www.merriamwebster.com/dictionary/psychotropic> (last visited Nov. 12, 2008) (defining psychotropic as "acting on the mind").

<sup>34</sup> BRUCE J. WINICK, *THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT* 63 (1997).

The use of psychotropic medications has had a significant effect on mental health care since coming into widespread use in 1955.<sup>35</sup> In the ten years prior to 1955, almost half of all hospital beds in the United States were occupied by psychiatric patients.<sup>36</sup> During the ten years following 1955, the population of people in public mental hospitals decreased by more than 10,000.<sup>37</sup> Currently, the hospital is typically a short-term facility that deals with patients in crisis, to diagnose and stabilize them on medication, and discharge patients into society while still being controlled by such medication.<sup>38</sup> While medicated, many mental patients are more receptive to other types of therapy, and are able to function in the community or in less restrictive facilities.<sup>39</sup> By allowing a guardian to consent to psychotropic medication for an IP, that guardian may effectively aid that IP in becoming a functional member of society. In fact, it may be that while the IP is on psychotropic drugs, the IP is able to make reasoned decisions so the IP is no longer incapacitated at all.

Psychotropic medications do, however, have a variety of side effects. Thus, when weighing whether a guardian should have the authority to mandate the administration of psychotropic medications to her IP, the side effects that might result from their use must be considered.

The side effects of these medications, however, should not deter courts from granting guardians the authority to mandate psychotropic medications for IPs. While some side effects can be significant,<sup>40</sup> the results of the inability of guardians to consent to psychotropic medications for IPs can be worse. While an unmedicated patient may require lifelong hospitalization, with medication, she can remain integrated in society, and even contribute to society. While side effects of some psychotropic medications may be unfortunate, these side effects are often minimal in comparison to the benefits received from the use of such medications. Further, there are many new varieties of psychotropic medications which put the pa-

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<sup>35</sup> *Id.* at 68.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> WINICK, *supra* note 34, at 69.

<sup>40</sup> *Id.* at 72.



tient at a decreased risk of side effects.<sup>41</sup> Therefore, while side effects of psychotropic medications should be considered by a guardian in making the decision about whether to consent to psychotropic medications for an IP, they should not deter the courts from granting the guardian the power to make that decision.<sup>42</sup>

#### IV. NEW YORK STATE LAW

##### A. Article 81

Article 81 of the Mental Hygiene Law governs guardianships of incapacitated persons in New York State.<sup>43</sup> When determining which powers to grant a guardian in New York, judges only grant those powers that are required, providing the least restrictive form of intervention.<sup>44</sup> Article 81 provides that a guardian has the power to “consent to or refuse generally accepted routine or major medical or dental treatment.”<sup>45</sup> The statute further defines “major medical or dental treatment” to include “the administration of psychotropic medication or electroconvulsive therapy.”<sup>46</sup> Based on a textual statutory interpretation, one must conclude that guardians *do* have the authority to consent to psychotropic medication for IPs. New York State courts, however, do not always grant the authority to a guardian to

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<sup>41</sup> *Id.* at 76 (discussing the newest and most common variety of antidepressant medications; selective serotonin reuptake inhibitors (“SSRIs”)). SSRIs have far fewer side effects than the previously common antidepressant medications, monoamine oxidase inhibitors (“MAOIs”) and tricyclic antidepressants. *Id.*

<sup>42</sup> *Id.* For more information on the side effects of psychotropic medications, see MARTIN BLINDER, *PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW* 68-70 (3d ed. 1992); Tatyana Gurvich & Janet A. Cunningham, *Appropriate Use of Psychotropic Drugs in Nursing Homes*, *The American Academy of Family Physicians*, [http://www.aafp.org/aafp/AFP\\_printer/20000301/1437.html](http://www.aafp.org/aafp/AFP_printer/20000301/1437.html); John Kamin et al., *Emergency Psychiatry: Extrapyramidal Side Effects in the Psychiatric Emergency Service*, <http://psychservices.psychiatryonline.org/cgi/content/full/51/3/287>.

<sup>43</sup> N.Y. MENTAL HYG. LAW § 81.01.

<sup>44</sup> N.Y. MENTAL HYG. LAW § 81.03(d) (McKinney 2004) (describing “least restrictive form of intervention” to mean that the powers granted to the guardian with respect to the incapacitated person are “consistent with affording that person the greatest amount of independence and self-determination in light of that person’s understanding and appreciation of the nature and consequences of his or her functional limitations”).

<sup>45</sup> *Id.* § 81.22(a)(8).

<sup>46</sup> *Id.* § 81.03(i).

have psychiatric medications administered to their IPs.<sup>47</sup>

### B. New York Court of Appeals

The New York State Court of Appeals has not expressly ruled on the issue of whether New York courts can grant a guardian with the authority to consent to psychotropic medication for her IP. However, the court has spoken to the issue of “whether and under what circumstances the State may forcibly administer antipsychotic drugs to a mentally ill patient who has been involuntarily confined to a State facility” in *Rivers v. Katz*.<sup>48</sup>

In *Rivers*, the petitioners were involuntarily committed pursuant to Mental Hygiene Law section 9.27, and refused antipsychotic drugs.<sup>49</sup> The petitioners’ objections to being medicated with antipsychotic drugs were overruled, and they were involuntarily medicated.<sup>50</sup> The Court of Appeals held that when “the State’s police power is not implicated” and the patient does not consent to taking antipsychotic drugs, a court must determine whether the patient has capacity to make a reasoned decision about the proposed treatment before the drugs may be administered.<sup>51</sup> The determination is made at a hearing after the parties have exhausted all of their available administrative review procedures.<sup>52</sup> The patient should be offered legal representation, and the State would have the burden of proving, by clear and convincing evidence, whether the patient has the ability to make a treatment decision.<sup>53</sup> If the court determines that the patient is capable of making “his own treatment decisions, the State shall be precluded from administering antipsychotic drugs.”<sup>54</sup> If the court deter-

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<sup>47</sup> Compare *Farbstein*, 619 N.Y.S.2d at 241 (acknowledging the guardian’s authority to consent to psychotropic medication for a ward, but refusing to grant the guardian the authority to consent to hospital admission of the ward to determine which drug is appropriate), with *Gordon*, 619 N.Y.S.2d at 236-37 (holding that “[t]he right to refuse antipsychotic medication is a fundamentally protected liberty” that extends to voluntary patients in mental hygiene facilities, and the legislative history of Article 81 should not be interpreted to grant a guardian the authority to impose upon these rights).

<sup>48</sup> *Rivers*, 495 N.E.2d at 339.

<sup>49</sup> *Id.* at 339-40.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 343-44.

<sup>52</sup> *Id.* at 344.

<sup>53</sup> *Rivers*, 495 N.E.2d at 344.

<sup>54</sup> *Id.*

mines that the patient does not have the capacity to determine his treatment, then the court will determine “whether the proposed treatment is narrowly tailored to give substantive effect to the patient’s liberty interest,” considering all relevant circumstances (including the “patient’s best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment, and any less intrusive alternative treatments.”).<sup>55</sup> Finally, the court laid out eight factors that have been used to evaluate a patient’s ability to consent to or refuse treatment;

- (1) the person’s knowledge that he has a choice to make;
- (2) the patient’s ability to understand the available options, their advantages, and [their] disadvantages;
- (3) the patient’s cognitive capacity to consider the relevant factors;
- (4) the absence of any interfering pathologic perception or belief, such as a delusion concerning the decision;
- (5) the absence of any interfering emotional state, such as severe manic depression, euphoria or emotional disability;
- (6) the absence of any interfering pathologic motivational pressure;
- (7) the absence of any interfering pathologic relationship, such as the conviction of helpless dependency on another person;
- (8) an awareness of how others view the decision, the general social attitude toward the choices and an understanding of his reason for deviating from that attitude if he does.<sup>56</sup>

While the *Rivers* court held that there must be a judicial determination of whether or not a patient has the capacity to determine her own psychiatric treatment,<sup>57</sup> and that a patient who has the capacity has the right to reject psychotropic medication,<sup>58</sup> the court did not specify whether a person who is already the subject of a guardianship has also been adjudicated as incapacitated for the purpose of consenting to or refusing psychotropic medication. Therefore, the methods followed by the lower state courts have varied in making such deter-

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 343-44.

<sup>58</sup> *Rivers*, 495 N.E.2d at 344.

minations.

When this issue comes to the Court of Appeals, the court should find that a court's determination that a guardianship is necessary for the IP provides sufficient protection to the IP, such that the court, in the guardianship proceeding, should be able to grant the guardian the right to consent to psychotropic medication for the IP. A *Rivers* hearing would be futile at this point, as it would simply do exactly what the court during the guardianship hearing has already done; namely, determine whether the AIP has the capacity to make a reasoned decision about psychotropic medications. Therefore, a guardianship hearing provides sufficient protection to an AIP such that a separate *Rivers* hearing is unnecessary.

### C. First Department: *In re Farbstein*

In deciding *In re Farbstein*<sup>59</sup> the New York County Supreme Court considered the situation of a guardian appointed for the personal needs of Mrs. Farbstein, who suffered degenerative dementia.<sup>60</sup> The guardian was directed to arrange for twenty-four hour care for Mrs. Farbstein in her apartment, but Mrs. Farbstein refused the home care providers' help.<sup>61</sup> Mrs. Farbstein often forgot who the homecare providers were and ordered them out of her apartment.<sup>62</sup> She even bit one provider.<sup>63</sup> Her guardian consulted with the psychiatrist who had seen Mrs. Farbstein earlier.<sup>64</sup> The psychiatrist suggested that the guardian bring Mrs. Farbstein into the medical center to be evaluated for psychotropic medication.<sup>65</sup> When Mrs. Farbstein refused to be taken to the medical center for evaluation, the guardian attempted to secure help from the police.<sup>66</sup> The police told her that they could not bring Mrs. Farbstein in against her will. Since the guardian was told to get twenty-four hour home care for Mrs. Farbstein, but was unable to do so, the guardian sought judicial assistance.<sup>67</sup>

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<sup>59</sup> 619 N.Y.S.2d 239 (Sup. Ct. N.Y. County 1994).

<sup>60</sup> *Id.* at 240.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Farbstein*, 619 N.Y.S.2d at 240.

<sup>65</sup> *Id.* at 240.

<sup>66</sup> *Id.* at 240-41.

<sup>67</sup> *Id.*

The New York County Supreme Court held that a guardian *does* have the authority to consent to administration of psychotropic medication for a ward; however, a guardian does not have the authority to consent to hospital admission of the ward to determine which drugs are appropriate.<sup>68</sup>

The supreme court's granting of authority to a guardian to consent to administration of psychotropic medication for a ward makes perfect sense. If the ward's decision to refuse medication is solely a result of the ward's condition, then it naturally follows that the ward's refusal of medication should not be considered in determining the ward's best interest. In a guardianship, the guardian is to exercise her judgment of what is in the ward's best interest, after first attempting to act consistent with the ward's wishes and desires, if possible. Consent to psychotropic medication should be no different. If a ward cannot, by reason of the mental incapacity, make a reasoned decision about whether or not to consent to psychotropic medications, then it naturally follows that her guardian should be able to make that reasoned decision for her.

#### D. Second Department

Disagreements exist between the supreme courts under the jurisdiction of the Second Department.<sup>69</sup> *In re Presbyterian Hospital*<sup>70</sup> (a case decided in Westchester County) found that there was no authority of a guardian to consent to psychotropic medications for a ward.<sup>71</sup> However, in deciding *In re Conticchio*<sup>72</sup> the Nassau County Supreme Court found that such authority did exist.<sup>73</sup>

##### 1. *In re Presbyterian Hospital*

In deciding *In re Presbyterian Hospital*, the Westchester County Supreme Court considered "whether an individual for whom a guardian has been appointed nevertheless retains the right to seek a

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<sup>68</sup> *Id.* at 241-42. (emphasis added).

<sup>69</sup> Compare *N.Y. Presbyterian Hosp.*, 693 N.Y.S.2d 405, with *Conticchio*, 696 N.Y.S.2d 769.

<sup>70</sup> *N.Y. Presbyterian Hosp.*, 693 N.Y.S.2d 405.

<sup>71</sup> *Id.* at 411-12.

<sup>72</sup> *Conticchio*, 696 N.Y.S.2d at 769.

<sup>73</sup> *Id.* at 770.

hearing to challenge an effort to medicate her over her objection.”<sup>74</sup> The court held that an individual who had been determined to be incapacitated through an Article 81 guardianship proceeding retains her right to a *Rivers* hearing to challenge an effort to medicate her over her objection, and that the guardian does not have the power to waive this right.<sup>75</sup>

The court interpreted *Rivers v. Katz* to mean that an individual’s right to refuse psychotropic medication is protected by the state constitutional right to privacy.<sup>76</sup> The court evaluated the legislative intent of Article 81, concluding that the intent was to provide the least restrictive form of intervention possible, and to permit people to “exercise the independence and self-determination of which they are capable.”<sup>77</sup> The court held that while courts may grant specific powers to a guardian that are consistent with the functional limitations of the ward, a hearing for the appointment of a guardian for some personal matters does not suffice for a *Rivers* hearing to determine if the ward is capable of making her own determination about psychotropic drugs.<sup>78</sup>

*In re Presbyterian Hospital* was consistent with *In re Gordon*,<sup>79</sup> which was decided five years earlier in Rockland County.<sup>80</sup> *In re Gordon* held that “[n]othing in the legislative history or text of Mental Hygiene Law Article 81 implies that the court has the authority to grant the powers requested by the petitioner, in denial of the person’s fundamentally protected liberties.”<sup>81</sup> In so holding, the court agreed that the right to refuse psychiatric medication is protected by the Due Process Clause of the New York Constitution.<sup>82</sup>

It is a reasonable impulse to provide additional protections for an individual to whom mind-altering medications will be given, given the significant possible side effects. When a guardianship hearing

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<sup>74</sup> *N.Y. Presbyterian Hosp.*, 693 N.Y.S.2d at 407.

<sup>75</sup> *Id.* at 407, 414. See also *Gordon*, 619 N.Y.S.2d at 237 (holding that the court does not have the authority to grant a guardian the power to compel a person to obtain psychiatric treatment or take psychotropic medication against her will, and that the proper remedy is instead an Article 9 proceeding).

<sup>76</sup> *N.Y. Presbyterian Hosp.*, 693 N.Y.S.2d at 409.

<sup>77</sup> *Id.* at 410.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 412.

<sup>80</sup> *Gordon*, 619 N.Y.S.2d at 235.

<sup>81</sup> *Id.* at 237.

<sup>82</sup> *Id.* at 236.

has already been held, however, and the individual has already been found incapacitated, it is unreasonable and unnecessary to hold an additional hearing, which wastes precious judicial manpower on a hearing, the subject of which has already been adjudicated at a guardianship hearing. After all, once the IP has been appointed a guardian, the IP has already been adjudicated incapacitated. It makes sense to save the time and resources of the court. In its decision to appoint a guardian, the court should also consider whether the IP is capable of making a reasoned decision to consent to or refuse psychotropic medications; if not, then the court should grant the guardian with the authority to consent to psychotropic medications for the IP at the time of the guardianship hearing.

## 2. *In re Conticchio*

Despite both being heard in supreme courts under the jurisdiction of the Second Department, *Conticchio* and *New York Presbyterian* are inconsistent holdings.<sup>83</sup>

In *Conticchio*, Mr. Conticchio, a man who suffered from schizophrenia and dementia due to a head injury, had been involuntarily committed and under the guardianship of his mother in Florida.<sup>84</sup> When Mr. Conticchio and his mother moved to Nassau County, New York, his mother petitioned the court to appoint her as Mr. Conticchio's guardian in New York.<sup>85</sup> The court appointed Mr. Conticchio's mother as his guardian and granted her with "the power to consent to or refuse accepted routine or major medical treatment," including the power to consent to antipsychotic medication.<sup>86</sup> The court specifically disagreed with the holding of *In re New York Presbyterian*,<sup>87</sup> asserting that that court disregarded the fact that a guardian is judicially authorized to give consent to medication<sup>88</sup> and that the Westchester County Supreme Court disregarded the legislative

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<sup>83</sup> Compare *N.Y. Presbyterian Hosp.*, 693 N.Y.S.2d at 409, with *Conticchio*, 696 N.Y.S.2d 769.

<sup>84</sup> *Conticchio*, 696 N.Y.S.2d at 770.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (explaining that this court wrote its decision to "clarify the basis for the determination at bar and to record our disagreement with said Westchester decision").

<sup>88</sup> *Id.* at 771.

intent of Article 81.<sup>89</sup>

The *Conticchio* court held that “the consent of a properly appointed and empowered guardian is generally sufficient to permit the administration of medication to a nonconsenting incapacitated person without the need for additional court proceedings or review,”<sup>90</sup> and that this consent is sufficient until the guardian’s powers are modified pursuant to Article 81, if ever.<sup>91</sup> The court reasoned that the guardian knows the incapacitated person best, and is thus in the best position to make a determination regarding his treatment with psychotropic medication.<sup>92</sup> Further, the court reached this decision by evaluating relevant rules of other states<sup>93</sup> as well as the legislative intent of Article 81, which the court determined, by the statutory definition of medical treatment decisions, to include the administration of psychotropic medication or electroconvulsive therapy.<sup>94</sup> The court further reasoned that requiring a judicial determination, as a *Rivers* hearing requires, would delay or interrupt the medication of the incapacitated person, and that such delays and interruptions should be avoided both for the public interest and in the interest of the incapacitated person who would be affected thereby.<sup>95</sup> Further, the court recognized that this would be the least restrictive form of intervention.<sup>96</sup> If a guardian is unable to consent to psychotropic medications for her IP, then the IP will unnecessarily suffer while a *Rivers* hearing is “prepared and filed, and a hearing scheduled and held.”<sup>97</sup>

This court was correct. Requiring an additional hearing when

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<sup>89</sup> *Conticchio*, 696 N.Y.S.2d at 775-76.

<sup>90</sup> *Id.* at 770.

<sup>91</sup> *Id.* at 775-76.

<sup>92</sup> *Id.* at 775.

<sup>93</sup> *Id.* at 775 n.2.

<sup>94</sup> *Conticchio*, 696 N.Y.S.2d at 773 (highlighting the statutory language of N.Y. MENTAL HYG. LAW § 81:03(i), which defines “major medical or dental treatment” to include treatments which involve “the administration of psychotropic medication or electroconvulsive therapy”). The *Conticchio* court determined that since N.Y. MENTAL HYG. LAW § 81:22(a)(8) allows a guardian to “consent to or refuse generally accepted routine or major medical or dental treatment,” and N.Y. MENTAL HYG. LAW § 81:03(i) includes “the administration of psychotropic medication or electroconvulsive therapy” within the definition of “major medical or dental treatment,” the drafters of Article 81 intended that a guardian have the authority to consent to the administration of psychotropic medication or electroconvulsive therapy. *Id.*

<sup>95</sup> *Conticchio*, 696 N.Y.S.2d at 774.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*



an individual has already been determined to be incapacitated is unnecessary and a waste of resources. If the individual has already been determined to be incapacitated for the purpose of making major medical decisions, then a further hearing to determine whether the individual can make medication decisions would be unnecessarily duplicative; after all, this determination could have been made as a part of the guardianship hearing (and likely was), and does not need to be reconsidered. Further, the court is correct in that requiring an additional *Rivers* hearing when a guardianship hearing has already made the necessary determination, may interrupt the medication, causing additional effects that are neither necessary nor beneficial for the success of the IP. The Court of Appeals should clarify that while a *Rivers* hearing may be necessary for an individual who has not already been adjudicated incapacitated, it should not be necessary after a guardianship proceeding, as the guardianship court should have already made this determination.

### E. Third Department: *In re McConnell*

*In re McConnell*<sup>98</sup> does not involve a guardianship, but the court's reasoning is relevant to the discussion of consenting to psychotropic medication. The respondent, a fifty-six year old man with bipolar disorder, was a patient at a psychiatric center.<sup>99</sup> At first, he was a voluntary patient.<sup>100</sup> However, the hospital applied for involuntary retention after he requested to be released in 1987.<sup>101</sup> Thereafter, the hospital sought an order authorizing it to treat Mr. McConnell with neuroleptic medications over his objections.<sup>102</sup> Mr. McConnell testified that although he had experienced adverse effects from neuroleptics in the past, his main reason for refusing medication was that at the time, he was not ill.<sup>103</sup>

The trial court found, by clear and convincing evidence, that Mr. McConnell lacked “ ‘th[e] capacity to determine the course of his own treatment,’ and that the proposed treatment . . . [was] narrowly

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<sup>98</sup> 538 N.Y.S.2d 101 (App. Div. 3d Dep't 1989).

<sup>99</sup> *Id.* at 102.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *In re McConnell*, 538 N.Y.S.2d at 102. (App. Div. 3d Dep't 1989), *appeal dismissed*, 74 N.Y.2d 759 (1989).

tailored to protect his liberty interest,” and the Appellate Division affirmed.<sup>104</sup> In so deciding, the court relied on the “State’s *parens patriae* interest in providing for citizens who cannot care for themselves.”<sup>105</sup> The Appellate Division deferred to the supreme court’s finding that, as a matter of fact, Mr. McConnell’s “mental state is such that he is incapable of making a reasoned or principled decision regarding his own treatment.”<sup>106</sup> Further, uncontroverted expert testimony showed that he failed to perceive his own debilitating mental illness.<sup>107</sup> Thus, the Appellate Division considered the relevant circumstances, Mr. McConnell’s “best interest, the potential benefits and hazards of the intended treatment, and the lack of less intrusive alternatives,” and determined that because he could not make a rational decision regarding treatment with psychotropic medication, the court permitted medication over Mr. McConnell’s will.<sup>108</sup>

This decision is clearly within the bounds of the *Rivers* holding. The Appellate Division considered whether Mr. McConnell was capable of making his own decisions regarding treatment.<sup>109</sup> It considered the fact that he refused treatment because he thought that he was not ill.<sup>110</sup> Finally, the court found by clear and convincing evidence that Mr. McConnell was unable to make the decision about whether to consent to psychotropic medications.<sup>111</sup> While this hearing was not called a “*Rivers* hearing,” it accomplished the same result; it made a determination, by clear and convincing evidence, that Mr. McConnell was unable to make a rational treatment decision for himself, and the court therefore granted another with the right to make this decision. While this was not a guardianship case, it follows the reasoning that if an individual is unable to make a reasoned medical decision for herself (including a decision to consent to or refuse to consent to psychotropic medications), then a court should be able to grant that ability to consent to another.

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<sup>104</sup> *Id.* at 102.

<sup>105</sup> *Id.* See also *Rivers*, 495 N.E.2d at 343-44.

<sup>106</sup> *McConnell*, 538 N.Y.S.2d at 103.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *McConnell*, 538 N.Y.S.2d at 102-03.

## V. OTHER STATES: COMPARING JURISDICTIONS

Different states have adopted various methods of determining whether a guardian should have the power to consent to psychotropic medications for a ward.<sup>112</sup> Arizona, at one extreme, allows guardians to consent to psychotropic medication for a ward,<sup>113</sup> while Massachusetts, at the opposite end of the spectrum, never allows a guardian to so consent.<sup>114</sup>

### A. Arizona

Arizona's state laws allow guardians to consent to psychotropic medications for a ward.<sup>115</sup> The statute states that "a guardian of an incapacitated person may consent to psychiatric and psychological care and treatment, including the administration of psychotropic medications,"<sup>116</sup> when there is "clear and convincing evidence that the ward is incapacitated as a result of a mental disorder . . . and is currently in need of inpatient mental health care and treatment."<sup>117</sup>

Arizona's state legislature has it right. This statute does not simply allow any guardian to consent to psychotropic medications for just any incapacitated person. Rather, it requires clear and convincing evidence (the applicable standard in New York) that the incapacity results, in some way, from the mental disorder.<sup>118</sup> While the New York courts should consider more factors than this,<sup>119</sup> Arizona is on the right track in allowing guardians to be given the power to consent to psychotropic medications for a ward.

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<sup>112</sup> *Comparing* ARIZ. REV. STAT. ANN. § 14.5312 (A)(3) (2003) ("A guardian may give . . . consents or approvals . . . to receive medical or . . . professional care . . .") with MASS. GEN. LAWS ANN. ch. 201 § 6A(c) (West 2002) (repealed 2009) ("No guardian . . . shall have the authority to consent to treatment with antipsychotic medication, provided that the court shall authorize such treatment . . .").

<sup>113</sup> See ARIZ. REV. STAT. ANN. § 14.5312.

<sup>114</sup> See MASS. GEN. LAWS ANN. ch. 201 § 6A(c).

<sup>115</sup> ARIZ. REV. STAT. ANN. §§ 14.5312, 14.5312.01

<sup>116</sup> *Id.* § 14.5312.01(A).

<sup>117</sup> *Id.* § 14.5312.01(B).

<sup>118</sup> *Rivers*, 495 N.E.2d at 344.

<sup>119</sup> See *infra* Part VI.

## B. Illinois

Illinois's statute allows "[a]ny person 18 years of age or older, including any guardian," to "petition the circuit court for an order authorizing the administration of psychotropic medication and electroconvulsive therapy to a recipient of services."<sup>120</sup> Within seven days of the filing of such a petition, the court shall hold a hearing.<sup>121</sup> The court will allow psychotropic medication and electroconvulsive therapy to be administered "only if it has been determined by clear and convincing evidence" that all the factors required by the statute are present.<sup>122</sup> Nonetheless, a guardian can only be "authorized to consent to the administration of psychotropic medication or electroconvulsive therapy to an objecting recipient" under the standards and procedures set forth above.<sup>123</sup>

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<sup>120</sup> 405 ILL. COMPILED STAT. ANN. § 5/2-107.1(a)(1) (West 2007).

<sup>121</sup> *Id.* § 5/2-107.1(a)(2) (noting that there are certain extensions that the petitioner is entitled to, not to exceed twenty-one days).

<sup>122</sup> *Id.* § 5/2-107.1 (a)(4). This statute sets forth the following seven factors that must be proven by clear and convincing evidence in order for the court to approve the administration of psychotropic medication or electroconvulsive therapy:

(A) That the recipient has a serious mental illness or developmental disability.

(B) That because of said mental illness or developmental disability, the recipient currently exhibits any one of the following: (i) deterioration of his or her ability to function, as compared to the recipient's ability to function prior to the current onset of symptoms of the mental illness or disability for which treatment is presently sought, (ii) suffering, or (iii) threatening behavior.

(C) That the illness or disability had existed for a period marked by the continuing presence of the symptoms set forth in item (B) of this subdivision (4) or the repeated episodic occurrence of these symptoms.

(D) That the benefits of the treatment outweigh the harm.

(E) That the recipient lacks the capacity to make a reasoned decision about the treatment.

(F) That other less restrictive services have been explored and found inappropriate.

(G) If the petition seeks authorization for testing and other procedures, that such testing and procedures are essential for the safe and effective administration of the treatment.

*Id.* § 5/2-107.1 (a)(4)(A)-(G).

<sup>123</sup> *Id.* § 5/2-107.1(b).

### C. Wisconsin

Wisconsin's statute concerning a guardian's authority to consent to psychotropic medication for a ward is similar in some respects to Illinois's law.<sup>124</sup> Wisconsin allows a guardian to consent to the administration of psychotropic medication to a ward only under a court order after the guardian petitions the court for the authority.<sup>125</sup> Such a petition must include a statement that each of the following allegations are true: (1) a doctor prescribed the psychotropic medication for the individual;<sup>126</sup> (2) "[t]he individual is not competent to refuse psychotropic medication[;]"<sup>127</sup> (3) the "individual has refused to take the psychotropic medication voluntarily" or it is infeasible to administer the psychotropic medication to the individual voluntarily due to such not being in the best interest of the individual;<sup>128</sup> (4) "[t]he individual's condition for which psychotropic medication has been prescribed is likely to be improved by administration of psychotropic medication and the individual is likely to respond positively to the psychotropic medication[;]"<sup>129</sup> and (5) that "the individual will incur a substantial probability of physical harm, impairment, injury, or debilitation or will present a substantial probability of physical harm to others," evidenced by a history of at least two episodes that "indicate a pattern of overt activity, attempts, threats to act, or omissions that resulted from the individual's failure to participate in treatment . . . that resulted in a finding of probable cause for commitment . . . , a settlement agreement . . . , or commitment ordered[,]" if the psychotropic medication is not administered involuntarily.<sup>130</sup>

The court in Wisconsin "may issue an order authorizing an individual's guardian to consent to involuntary administration of psychotropic medication . . . , if the court or jury finds by clear and convincing evidence that" the requirements aforementioned have been met and that "psychotropic medication is necessary" for treating the condition for which it is sought.<sup>131</sup>

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<sup>124</sup> Compare WIS. STAT. ANN. §§ 54.25, 55.14, with ILL. COMP. STAT. ANN. § 5/2-107.1.

<sup>125</sup> WIS. STAT. ANN. § 54.25 (2)(d)(2)(ac).

<sup>126</sup> *Id.* § 55.14(3)(a).

<sup>127</sup> *Id.* § 55.14(3)(b).

<sup>128</sup> *Id.* § 55.14(3)(c).

<sup>129</sup> *Id.* § 55.14(3)(d).

<sup>130</sup> WIS. STAT. ANN. § 55.14(3)(e)(1).

<sup>131</sup> *Id.* § 55.14(8).

The Wisconsin statute is very well-reasoned. It makes sense that a properly appointed guardian should have the authority to consent to psychotropic medications for an IP. However, by requiring the court to determine, by clear and convincing evidence, that the medication is necessary, the statute substitutes the court for the guardian, in that the court is making the decision about whether to consent instead of the guardian. Rather, the court should give a guardian the authority to consent to such administration if the court finds by clear and convincing evidence that the IP cannot make her own reasoned decision. Then, the guardian should be able to decide, based on the enumerated factors, whether the use of psychotropic medications would be in the best interest of the IP.

#### D. Massachusetts's Former Statute

Massachusetts was an extreme example of a state that did not allow a guardian any authority to consent to psychotropic medications for a ward.<sup>132</sup> In fact, its former statute never allowed a guardian to consent to antipsychotic medication for a ward.<sup>133</sup> Noteworthy is the fact that this statute only mentioned the specific "antipsychotic" medication, but not psychotropic medications in general.<sup>134</sup> As such, a court may have authorized the guardian to monitor the administration of the antipsychotic medication to ensure that the treatment plan is followed.<sup>135</sup>

This statute was far too limiting on a guardian's powers. An IP, unable to make a reasoned decision regarding whether to consent to psychotropic medications, should not be able to decide not to so consent when this decision is undoubtedly made because of the nature of the IP's illness. Rather, a guardian, who is entrusted with the welfare of the IP and able to make important decisions for the IP, should be given the power.

## VI. A PROPOSED SOLUTION

When the Court of Appeals is given the opportunity to decide

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<sup>132</sup> MASS. GEN. LAWS ANN. ch. 201 § 6A (repealed 2009).

<sup>133</sup> *Id.* § 6A(c) (repealed 2009).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* § 6A(d) (repealed 2009).

this issue, it is respectfully submitted that the court further the legislative purpose of the Mental Hygiene Law and hold that a judge should have the power to grant a guardian the power to consent to psychotropic medications for an IP. Such a guardian should be required to consider a number of factors in making the determination to consent to psychotropic medication for a ward, including: (1) the ward's desires to take or avoid psychotropic medication or electroconvulsive therapy in general, along with the ward's desires to take or avoid the specific psychotropic medication or electroconvulsive therapy recommended; (2) the ward's state of mind at the time that the ward makes such desires known; (3) the religious and/or spiritual beliefs that the ward holds at the time the determination is made; (4) the likely risk of harm to the ward if psychotropic medication is not given (including side effects, personality changes, and likely quality of life once such medication is in full effect), compared with that risk if psychotropic medication is given; (5) the likely risk of harm to others (including both those close to the ward and society in general) if the ward is given psychotropic medication, compared to that risk if the ward is not given psychotropic medication; (6) the likelihood of significant improvement if psychotropic medication is given; (7) whether giving the psychotropic medication is the least restrictive treatment alternative; and (8) a weighing of the overall cost and overall benefit of the specific psychotropic medication to the specific ward.

The legislature enacted Article 81 in order to "promote the public welfare by establishing a guardianship system which is appropriate" to care for the "needs of an incapacitated person," tailoring the assistance provided to the IP, based on the "individual needs of that person," taking into account the "personal wishes, preferences, and desires of the person[.]"<sup>136</sup> While it is important to grant an IP with the "greatest amount of independence and self-determination and participation in all the decisions affecting such person's life[.]"<sup>137</sup> it is also important to acknowledge the legitimate state interest of ensuring the health (both mental and physical) and welfare of all citizens.<sup>138</sup> "Where [a] patient presents a danger to himself or other members of society or engages in dangerous or potentially destruc-

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<sup>136</sup> N.Y. MENTAL HYG. LAW § 81.01.

<sup>137</sup> *Id.*

<sup>138</sup> Allen, *supra* note 14, at 177 (discussing the preventive outpatient treatment movement that began in New York with "Kendra's Law," and California with "Laura's Law").

tive conduct,” the State may be warranted to administer psychotropic medication over the patient’s objection.<sup>139</sup> While it is important not to take away more of a ward’s civil rights than is necessary,<sup>140</sup> it is more important to “promote the public welfare” by ensuring that those whose situations require psychotropic medication to ensure their own safety and the safety of others, get such medications.<sup>141</sup>

This approach is similar to that of the Arizona statute in that a guardian, who has a fiduciary duty to the IP, determines what method of treatment is best for the IP.<sup>142</sup> This proposal for New York, however, provides additional protections for the IP in order to protect the IP’s right to liberty and due process; it requires the guardian to consider a number of factors consistent with the goal of the least restrictive intervention, before deciding to consent.<sup>143</sup>

The former Massachusetts rule, which never allowed a guardian the authority to consent to antipsychotic medication for ward,<sup>144</sup> should not be followed. Massachusetts allowed a court, rather than a guardian, to consent to psychotropic medications for a ward.<sup>145</sup> Such an approach is flawed; the guardian is most knowledgeable about the ward’s situation, including the ward’s beliefs, interests, and needs, as well as the ward’s likelihood to harm herself or others. The former Massachusetts statute recognized a ward’s inability to make a reasoned decision, and thus the need for someone other than the ward to make the determination to consent to psychotropic medications. Limiting this authority to the court alone, however, was ill-advised. While the court would be a proper venue to consider those situations where the ward wants to call into question the guardian’s determination for the ward’s need for psychotropic medication, it is not an appropriate venue to consider whether psychotropic medication is necessary in the first place.

It is important that a guardian consider the possible effects of the psychotropic medication or electroconvulsive therapy to be administered. Therefore, it is submitted that the rule in New York should

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<sup>139</sup> *Rivers*, 495 N.E.2d at 343.

<sup>140</sup> N.Y. MENTAL HYG. LAW § 81.01.

<sup>141</sup> *See id.*

<sup>142</sup> ARIZ. REV. STAT. ANN. § 14-5312.01(A)-(B) (2009).

<sup>143</sup> *See generally* ARIZ. REV. STAT. ANN. § 14-5312; ARIZ. REV. STAT. ANN. § 14-5312.01.

<sup>144</sup> MASS. GEN. LAWS ANN. ch. 201 § 6A (repealed 2009).

<sup>145</sup> *Id.*



be amended as follows:

(a) A guardian can be given the power to consent to psychotropic medication over the incapacitated person's objection. When such consent is requested, the guardian must not consent to psychotropic medication for an incapacitated person unless and until the guardian considers the following factors:

(1) the incapacitated person's wishes and desires to take or avoid psychotropic medication or electroconvulsive therapy *in general*, along with the incapacitated person's wishes and desires to take or avoid the *specific* psychotropic medication or OCT recommended,

(2) the incapacitated person's *state of mind* at the time that the incapacitated person makes such wishes and desires known,

(3) the *religious and/or spiritual beliefs* that the incapacitated person holds at the time of the determination,

(4) the likely *risk of harm to the incapacitated person him/herself if psychotropic medication is not given*, compared with that risk if the psychotropic medication is given (including side effects, personality changes, and quality of life once such medication is in full effect),

(5) the likely *risk of harm to others* (including both those close to the incapacitated person and society in general) *if the incapacitated person is given psychotropic medication*, compared to that risk *if the incapacitated person is not given psychotropic medication*,

(6) the *likelihood of significant improvement* if psychotropic medication is given, compared to the likelihood of significant improvement if psychotropic medication is not given,

(7) whether giving the psychotropic medication is a *least restrictive treatment alternative*, and

(8) a weighing of the *overall cost and overall benefit* of the specific psychotropic medication to the specific incapacitated person.

(b) If an incapacitated person whose consent has been given for administration of psychotropic medication by his/her guardian wishes to have a court evaluate the consent, and the incapacitated person makes this desire known to the guardian, the guardian has the duty to alert the court of this issue, within 3 business days, by motion for a hearing on the issue. Until the hearing, the guardian may continue to consent to psychotropic medication only if the risks of continuing the specific psychotropic medication for the incapacitated person are substantially outweighed by the probable benefits of continuing the specific psychotropic medication by clear and convincing evidence, as determined by the guardian.

(c) At the hearing, the court shall hear the concerns of the incapacitated person and the guardian, as well as any relevant and/or interested witnesses. The court may override the guardian's consent only upon a determination that the guardian's evaluation of the above factors, in conjunction with the guardian's ultimate determination to consent to the specific psychotropic medication, was arbitrary and capricious.<sup>146</sup>

## VII. CONCLUSION

Since *Rivers* held that the state has the ability to forcibly administer psychotropic medications to individuals in certain conditions after a hearing,<sup>147</sup> courts have struggled to determine whether guardians have the ability to consent to psychotropic medications for their wards.<sup>148</sup> The various New York departments have decided this inconsistently, and lower courts located within in the second depart-

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<sup>146</sup> See *In re Pell v. Bd. of Educ.*, 313 N.E.2d 321 (N.Y. 1974) ("Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.").

<sup>147</sup> See *Rivers*, 495 N.E.2d 377.

<sup>148</sup> *Farbstein*, 619 N.Y.S.2d 239, 240 (holding that a guardian has the authority to consent to administration of psychotropic medication for a ward); *Gordon*, 619 N.Y.S.2d 235, 236 (holding that the right to refuse psychiatric medication is protected by the Due Process Clause of the New York Constitution); ILL. COMPILED STAT. § 5/2-107.1(a)(1) (allowing guardians to so consent after petitioning the court).

ment have divergent opinions.<sup>149</sup>

A *Rivers* hearing may be necessary when an individual's capacity has not yet been adjudicated. However, when an individual has already been adjudicated as incapacitated through a guardianship proceeding, this adjudication should include a determination of whether the guardian should have the power to consent to psychotropic medications for the ward. If the court determines, through the guardianship proceeding, that the guardian has this power, then this adjudication is sufficient to provide this power—just as the current statute provides. To require an additional *Rivers* hearing after a court of law has already made a determination of incapacity would be a senseless waste of judicial resources; the court, in the guardianship hearing, could have made the determination of incapacity to make a reasoned decision with respect to consenting to psychotropic medications at the guardianship hearing. It is not necessary to hold an additional hearing to that end.

Therefore, when the issue arises, the New York Court of Appeals should hold that when a court is faced with a guardianship proceeding for personal needs, a court should make a determination, as a regular part of the guardianship hearing, as to whether to give the guardian the power to consent to psychotropic medications for the IP.

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<sup>149</sup> See, e.g., *N.Y. Presbyterian Hosp.*, 693 N.Y.S.2d 405; *Conticchio*, 696 N.Y.S.2d 769.