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Cover Page Footnote

30-1

IN RE ALLERS: A DISPLAY OF PROGRESS, NOT PERFECTION, IN THE GUARDIANSHIP SYSTEM

Melanie Rosen[*]

I. INTRODUCTION

Article 81 of New York's Mental Hygiene Law was created with the intention of promoting the welfare of an incapacitated person by establishing a system for the appointment of a guardian.[1] The law applies to proceedings for appointing a guardian for personal or property management needs.[2] The significance of this provision has been amplified in recent years.[3] Several demographic trends have enabled researchers to predict an increased number of guardianship appointments in the coming years.[4] In 2003, 35.9 million people in the United States were of ages sixty-five and older.[5] By 2030, with the Baby Boomers coming of age, that number is expected to double.[6] Additionally, the number of people aged eighty-five and older is expected to grow from 4.7 to 9.6 million by 2030.[7] Alzheimer's disease and dementia cases have also become far more prevalent, doubling since 1980.[8] As a consequence, reliance by Allegedly Incapacitated Persons ("AIPs") and their families, counsel, and the courts upon Article 81 and its body of law will become even more frequent in the near fu-

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[1] N.Y. MENTAL HYG. LAW § 81.01 (McKinney 2013).

[2] *Id.*

[3] Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STETSON L. REV. 143, 149 (2007) (referring to guardianship as an important tool in today's society nationwide).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Karp & Wood, *supra* note 3, at 149-50.

ture.[9]

The Fifth Amendment of the United States Constitution,[10] which has been inconsistently applied to Guardianship Proceedings, is replicated in the New York State Constitution.[11] The purpose of the Fifth Amendment is to safeguard several individual civil liberties and, more specifically, to protect against self-incrimination.[12] Although this privilege originally extended only to criminal proceedings, its interpretation has evolved[13] and was recently applied in a civil Guardianship Proceeding.[14]

In *In re Allers*,[15] the Supreme Court of Dutchess County determined that a temporary guardian needed to be appointed for the AIP, G.P.[16] On July 19, 2012, the court found that G.P. required assistance with his property management needs, but found that appointment of a personal needs guardian was unwarranted.[17] G.P. attended the hearing with his court-appointed attorney, where the opposing counsel representing the Department of Social Services ("DSS") attempted to call G.P. to the stand to testify as a witness to the proceeding.[18] G.P.'s attorney objected, and the court sustained the objection.[19] On July 26, 2012, the New York Supreme Court of Dutchess County, declining to follow a pair of appellate court decisions, held that the Fifth Amendment privilege against self-incrimination did, in fact, protect AIPs from being compelled to testify at their Guardianship Proceedings.[20]

AIPs in civil Guardianship Proceedings are just as vulnerable as others who are protected by the right against self-incrimination,

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[9] Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL. REV. 241 (1998).

[10] U.S. CONST. amend. V.

[11] Michael Prisco, Note, *Supreme Court of New York Appellate Division, Fourth Department In Re Heckl*, 25 TOURO L. REV. 1327, 1340 (2009).

[12] *Id.*; *see* U.S. CONST. amend. V; *see also* N.Y. CONST. art. I, § 6.

[13] *See In re* Gault, 387 U.S. 1, 49 (1967) (upholding a juvenile's right against self-incrimination in a non-criminal proceeding).

[14] *See In re* Allers, 948 N.Y.S.2d 902, 906 (Sup. Ct. Dutchess Cty. 2012) (holding that an AIP can invoke his Fifth Amendment right against self-incrimination).

[15] *Allers*, 948 N.Y.S.2d 902.

[16] *Id.* at 903. Throughout the article, as is common in guardianship proceedings, aliases given to the parties by the court will be utilized. Frequently, these aliases consist of the parties' names reduced to an acronym.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Allers*, 948 N.Y.S.2d at 906.

such as criminal defendants, because they can demonstrate a deprivation of liberty.[21] Not only is an AIP vulnerable to coercion because of his or her particular mental or physical incapacity, but there is a greater risk that he or she might lose certain individual freedoms.[22] This Comment will explore the recent decision of *Allers* as it relates to the Fifth Amendment and Guardianship Proceedings, and how Article 81 of the New York State Mental Hygiene Law is a well-needed step forward in the protection of AIPs and their constitutionally protected right against self-incrimination.

II. THE FIFTH AMENDMENT AND AIPS

The Fifth Amendment to the Constitution was ratified in 1791,[23] and was replicated in the New York Constitution.[24] At first, the Fifth Amendment only applied to actions by the federal government, but the ratification of the Fourteenth Amendment extended these individual protections to the States.[25] The Fifth Amendment was enacted to safeguard the people from majoritarian impulses, and it provides five distinct liberties: (1) the right to be indicted by an impartial Grand Jury before being tried for a federal criminal offense, (2) the right to be free from multiple prosecutions or punishments for a single criminal offense, (3) the right to remain silent when prosecuted for a criminal offense, (4) the right to have personal liberties protected by the Due Process Clause of the Fourteenth Amendment, and (5) the right to receive just compensation when the government takes private property for public use.[26]

Designed to promote the public's well-being, the Fifth Amendment right against self-incrimination protects individuals from making inculpatory statements.[27] This right was developed in reaction to certain historical practices, which compelled criminal defend-

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[21] *In re* United Health Servs. Hosps., Inc., 785 N.Y.S.2d 313, 317 (Sup. Ct. Broome Cty. 2004).

[22] *Id.*

[23] *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (discussing "the textual and historical evidence regarding the original meanings of the Fifth and Fourteenth Amendment[s]").

[24] Prisco, *supra* note 11, at 1340.

[25] *United Health* Servs. Hosps., *Inc.*, 785 N.Y.S.2d at 313-14; *see Gault*, 387 U.S. at 49.

[26] N.Y. CONST. art. I, § 6.

[27] 7 CARMODY-WAIT 2d § 42:141.

ants to "admit guilt from their own lips."[28] The right against self-incrimination is broadly interpreted to assure that an individual is not compelled to provide evidence that may be used against him or her.[29] The components of the constitutional privilege against self-incrimination are: "(1) the right of a witness not to incriminate himself; (2) the right of a defendant in a criminal trial not to take the witness stand at all; and (3) the right of such a defendant not to have his failure to take the stand commented upon."[30]

The right against compelled self-incrimination is ordinarily not a self-executing device; it must be claimed. As such, citizens seeking its protection must assert their Fifth Amendment right in a timely fashion.[31] Of the very few exceptions to this generally self-executing device, one is the *Miranda* right to remain silent.[32] Another limited exception applies when "an individual is subjected to a practice that denies him a free choice to admit, to deny, or to refuse to answer, then . . . an individual does not need to invoke the privilege against self-incrimination in order to have his admissions suppressed in an ensuing criminal prosecution."[33] In determining whether a person's Fifth Amendment right against self-incrimination has been violated, the Court considers the significance of the testimony and weighs it against the prejudice to the party.[34]

Originally, the right against self-incrimination did not attach in all instances.[35] The text of the Fifth Amendment limited the right

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[28] Michigan v. Tucker, 417 U.S. 433, 440 (1974); *see* Andresen v. Maryland, 427 U.S. 463, 470 (1976) (stating "the development of this protection was in part a response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber, 'which placed a premium on compelling subjects of the investigation to admit guilt from their own lips.' ").

[29] Maness v. Meyers, 419 U.S. 449, 461 (1975).

[30] United States ex rel. Miller v. Follette, 278 F. Supp. 1003, 1007 (E.D.N.Y. 1968), *aff'd*, 397 F.2d 363 (2d Cir. 1968).

[31] United States v. D.F., 857 F. Supp. 1311, 1323 (E.D. Wis. 1994); *see* Roberts v. United States, 445 U.S. 552, 559 (1980); *see also* Garner v. United States, 424 U.S. 648, 655 (1976) (stating that once an individual "discloses the information sought, any incriminations. . .are viewed as not compelled," and the privilege is no longer available).

[32] *Roberts*, 445 U.S. at 560.

[33] United States v. Saechao, 418 F.3d 1073, 1077 (9th Cir. 2005) (holding that "the probationer's answers to incriminating questions posed by his probation officer are deemed compelled and are inadmissible in ensuing criminal proceedings") (internal quotation marks and citations omitted); *Id.* at 1081.

[34] United States v. Humphrey, 696 F.2d 72, 75 (8th Cir. 1982); *see* United States v. Gould, 536 F.2d 216, 222 (8th Cir. 1976).

[35] Ryan v. C. I. R., 568 F.2d 531, 541-42 (7th Cir. 1977); *see Gault*, 387 U.S. at 49 (stating that juvenile proceedings are technically "civil" and do not fall within the original, ex-

against self-incrimination to criminal proceedings.[36] There has been great controversy amongst judges regarding how the Fifth Amendment should be interpreted, and the Supreme Court has attempted, on several occasions and in various situations, to determine exactly what falls within the protections of the Fifth Amendment.[37] However, today, in the State of New York, the constitutional privilege against self-incrimination has been applied in non-criminal proceedings regarding juveniles,[38] as well as in family court proceedings.[39] Interestingly, only recently have the courts in New York protected an AIP's right against self-incrimination in Guardianship Proceedings.[40]

III. *IN RE ALLERS*

On July 13, 2012, the court gathered to determine whether G.P. was going to be appointed a temporary guardian for his personal care and property management needs.[41] G.P. did not consent to the appointment of a guardian.[42] The Commissioner of Social Services of Dutchess County ("DSS") called G.P. to the stand to testify as a witness, but G.P.'s attorney objected, and ultimately, the court sustained the objection.[43] On July 19, 2012, although the application for a personal care guardian was denied, a temporary guardian for G.P.'s property needs was appointed.[44]

On July 26, 2012, a hearing was held to determine whether G.P.'s temporary guardian should be made into a permanent guardian.[45] Prior to the hearing, DSS submitted a letter stating that G.P. should have previously been required to testify and requested that he

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plicit meaning proscribed by the Fifth Amendment).

[36] *Ryan*, 568 F.2d at 541-42.

[37] *See Gault*, 387 U.S. at 49 (stating that "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked . . . . [F]or example, [it can] be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory").

[38] *In re* White, 334 N.Y.S.2d 476, 480 (Fam. Ct. Nassau Cty. 1972).

[39] *In re* Ashley, 683 N.Y.S.2d 304, 305 (App. Div. 3d Dep't 1998); *see* Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 94 (1964) (stating "[t]he privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory").

[40] *See Allers*, 948 N.Y.S.2d 902.

[41] *Id.* at 903.

[42] *Id.* at 904.

[43] *Id.* at 903.

[44] *Id.*

[45] *Allers*, 948 N.Y.S.2d at 903.

be ordered to do so.[46] DSS cited two Fourth Department, Appellate Division decisions, both of which held that an AIP could be compelled to testify at his or her own guardianship hearing.[47] The Department of Social Services argued that, because no Second Department decisions address the issue, the court should rely on those Fourth Department decisions.[48]

The judge discussed the many protections that Article 81 provides, including the rights to proper notice, legal representation, the right to demand a jury trial, and the right to be present at, and participate in, any and all hearings.[49] However, the judge also noted that Article 81 was "noticeably silent" on the issue of whether an AIP must testify at his or her own Guardianship Proceeding.[50]

The court in *Allers* treated the letter as a motion in limine and denied the request.[51] The court held it did not agree with the Fourth Department's interpretation of the statute.[52] Instead, on July 26, 2012, the New York Supreme Court of Dutchess County held that the Fifth Amendment privilege against self-incrimination did, in fact, protect an AIP from being compelled to testify at his or her own Guardianship Proceeding.[53] The judge held that the Fourth Department decisions were wrong and unreliable for the present use because they relied on a now-outdated statute, Article 77.[54] The judge noted that the new and improved Article 81 standard is much more difficult to satisfy because decisions must be based upon clear and convincing evidence, rather than merely best interests.[55] The court went on to explain that the legislature intended to "heighten right[s] previously absent" when it implemented Article 81.[56] The Judge determined that the decision in *In re United Health Services Hospitals, Inc.*[57] was a more appropriate application of the rule, and that the AIP should not

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[46] *Id.*

[47] *Id.* at 904 (citing *In re* Heckl, 840 N.Y.S.2d 516 (4th Dep't 2007)).

[48] *Id.*

[49] *Id.*

[50] *Allers*, 948 N.Y.S.2d at 904.

[51] *Id.* at 903.

[52] *Id.* at 906

[53] *Id.*

[54] *Id*. at 905 (stating that Mental Hygiene Law Article 77 was in effect at the time of the previous decisions).

[55] *Allers*, 948 N.Y.S.2d at 905.

[56] *Id.*

[57] 785 N.Y.S.2d 313 (Sup. Ct. Broome Cty. 2004).

be compelled to testify at her hearing.[58]

Aside from the court's most recent decision regarding the Fifth Amendment right against self-incrimination and Guardianship Proceedings, the court in *Allers* explained that Article 81 continues to be described as a statute "at war with itself," "containing language suggesting that some decisions should be made in the best interest of the AIP," and creating "contradictory notions of an adversarial model and a paternalistic model."[59] Some suggest that Guardianship Proceedings should be treated like traditional litigation, basing decisions upon the technicalities of the law in order for a party to prevail. [60] Others, on the contrary, believe Article 81 should be used as a guideline, which must meet the "best interest[s]" of the AIP, while placing little emphasis on the rules of evidence.[61]

IV. ARTICLE 81

A. History

On April 1, 1993, Article 81 became effective and the former guardianship statutes, Articles 77 and 78, were repealed.[62] A study by New York's Law Revision Commission had revealed that Articles 77 and 78 were failing to provide adequate protection to incapacitated persons.[63] While Article 77 catered to the monetary and property needs of the incapacitated person, it did not address any personal needs.[64] Article 78, on the other hand, authorized the appointment of a committee that would address these personal needs, but only if the court found that the AIP was totally incompetent.[65]

Since "[a] finding of incompetence was a drastic measure,

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[58] *Allers*, 948 N.Y.S.2d at 905.

[59] *Id.* at 904 (quoting Daniel G. Fish, *Does the Fifth Amendment Apply in Guardianship Proceedings*?, N.Y. L.J., Feb. 25, 2011).

[60] Daniel G. Fish, *Does the Fifth Amendment Apply in Guardianship Proceedings*?, N.Y.L.J., Feb. 25, 2011.

[61] *Id.*

[62] Rosann Torres, *Article 81 of the Mental Hygiene Law: Designed to Protect the Elderly, But Prejudicing Children's Rights*, 7 J.L. & POL'Y 303, 309 (1998).

[63] *Id.* at 310.

[64] *Id.* at 309.

[65] *Id.* at 310; *see* EDWIN KASSOFF, ELDERLAW AND GUARDIANSHIP IN NEW YORK § 11:4 (1996) (describing the inadequacies of Articles 77 and 78 stating "Article 78 went beyond financial matters, authorizing the appointment of a committee that could exercise control over the personal life of a person judged to be incompetent").

which could deprive individuals of their civil rights," the court was reluctant to employ Article 78.[66] Consequently, the courts' decisions often favored the use of Article 77, resulting in inadequate protection for the personal welfare of incapacitated persons.[67] In an attempt to correct this inadequacy, the legislature enacted Article 81, which addressed simultaneously both the personal and property-related needs of AIPs.[68] Article 81, the new and improved standard, did away with "the labels of incompetency and substantial impairment in Articles 77 and 78 and their requirement of some underlying illness or condition."[69] Using a least restrictive means standard, Article 81 outlines the powers of guardians as fiduciaries to maintain the property and person of incapacitated persons.[70]

B. Appointment of a Guardian

Appointment of a guardian under Article 81 is based on clear and convincing evidence rather than the previous "best interests" standard.[71] This is an improved attempt at affording AIPs heightened rights, which were previously absent.[72] Article 81 entitles the AIP to "proper notice, legal representation, the right to demand a jury trial, the right to be present at any hearing, present evidence and otherwise participate."[73] Article 81 was enacted with the legislative purpose of addressing the "needs of persons with incapacities [which] are as diverse and complex as they are unique to the individual."[74] Although an appointed guardian is given authority to satisfy the needs of the incapacitated person, this power can only be exercised in cases where the court sees it absolutely necessary for the specific individual.[75] By narrowing the power of the guardian's authority, the AIP is able to maintain the "greatest amount of independence and self-determination and participation in all the decisions" made.[76]

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[66] Torres, *supra* note 62, at 310 (quoting KASSOFF, *supra* note 65).
[67] *Id.* at 310-11.
[68] *Id.* at 313.
[69] N.Y. MENTAL HYG. LAW § 81.02 cmt. 2.
[70] *Id.* at § 81.02(a)(2).
[71] *Allers*, 948 N.Y.S.2d at 905.
[72] *Id.*
[73] *Id.* at 904.
[74] N.Y. MENTAL HYG. LAW § 81.01.
[75] *Id.* at § 81.03(d).
[76] *Id.* at § 81.01.

To appoint a guardian, the court must consider less restrictive alternatives, such as employing visiting nurses, homemakers, home health aides, adult day care services, trusts, and representative and protective payees.[77] In determining whether the appointment of a guardian is appropriate for the personal and property needs and safety of an AIP, a two-pronged test is applied.[78] First, the court must determine that an appointment is necessary to provide for the AIP's needs.[79] Second, if the AIP does not agree to the appointment of a guardian, the court must find that he or she is incapacitated.[80] This includes reviewing available information such as the court evaluator's report.[81]

Since Article 81 is flexible in order to conform to the needs of each individual, it closes the loophole for those who need some assistance, but for whom a full-time guardian is not necessary.[82] In these instances, the appointment of a temporary guardian is an option.[83] Temporary guardians are also appointed in emergency situations involving suspected victimization or manipulation.[84] In those situations, the temporary guardian has the power to put a hold on the AIP's personal bank account and other assets until the court can fully review the matter.[85]

C. Court Evaluator

In collecting evidence, court evaluators are appointed to investigate the Article 81 petition and seek to insure that the AIP's best interests are considered.[86] The court can appoint a court evaluator

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[77] *Id.* at § 81.03(d)-(e); *see also* Leslie Salzman, *Guardianship for Persons with Mental Illness-A Legal and Appropriate Alternative?*, 4 ST. LOUIS U.J. HEALTH L. & POL'Y 279 (2011) (discussing acceptable alternatives to guardianship).

[78] N.Y. MENTAL HYG. LAW § 81.02.

[79] *Id.* at § 81.02(a)(1).

[80] *Id.* at § 81.02(a)(2).

[81] *Id.*

[82] *Id.* at § 81.23(a)(1).

[83] N.Y. MENTAL HYG. LAW § 81.23(a)(1).

[84] *Id.* at § 81.23; *see In re* Rochester Gen. Hosp., 601 N.Y.S.2d 375, 377 (1993) (stating that a temporary guardian was appointed in order to complete the Medicaid application because the AIP's son had failed to do so in a timely manner).

[85] N.Y. MENTAL HYG. LAW § 81.23; *see In re* Ella C., 943 N.Y.S.2d 791 (Kings Cty. Sup. Ct. 2011) (stating that the court appointed "[a] temporary guardian of Ms C., restrained all of Ms C.'s children from interfering with her property rights, vacated any powers of attorney she had given, and restrained financial institutions from releasing Ms C.'s assets").

[86] N.Y. MENTAL HYG. LAW § 81.09(c)(4).

once an order to show cause is issued.[87] The duties of the court evaluator are extensive, and are imperative in making sure that the AIP's rights are protected.[88] A court evaluator must meet with and interview the AIP and explain, in whatever manner necessary, "the nature and possible consequences of the proceeding, the general powers and duties of a guardian, [and] available resources."[89]

The court evaluator must determine whether the AIP wants or needs legal counsel.[90] The court evaluator must then compose a written report and recommendation to the court.[91] The report must be based on the court evaluator's personal observations, and include responses to the seventeen questions listed in New York Mental Hygiene Law, Article 81.[92] It is the court evaluator's duty to attend all

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[87] *Id.* at § 81.09(a).

[88] *Id.* at § 81.09(c).

[89] *Id.* at § 81.09(c)(1), (2).

[90] *Id.* at § 81.09(c)(2).

[91] N.Y. MENTAL HYG. LAW § 81.09(c)(5).

[92] See *Id.* at § 81.09(c)(5) listing the following questions for assessment:

> (i) does the person . . . agree to the appointment;
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> (ii) does the person wish legal counsel of his or her own choice;
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> (iii) can the person . . . come to the courthouse for the hearing;
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> (iv) . . . is the person completely unable to participate in the hearing;
>
> (v) if the person cannot come to the courthouse, would any meaningful participation result from the person's presence at the hearing;
>
> (vi) are available resources sufficient and reliable to provide for personal needs or property management without the appointment of a guardian;
>
> (vii) how is the person . . . functioning;
>
> (viii) what is the person's understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
>
> (ix) what is the approximate value and nature of the financial resources of the person;
>
> (x) what are the person's preferences, wishes, and values with regard to managing the activities of daily living;
>
> (xi) has the person alleged to be incapacitated made any appointment or delegation;
>
> (xii) what would be the least restrictive form of intervention;
>
> (xiii) what assistance is necessary for those who are financially dependent upon the person;
>
> (xiv) is the choice of proposed guardian appropriate;
>
> (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; and

court proceedings and conferences to adequately protect the AIP.[93]

A court evaluator may be any person drawn from a pre-approved list by the Office of Court Administration, including:

> the mental hygiene legal service in the judicial department where the person resides, a not-for-profit corporation, an attorney-at-law, physician, psychologist, accountant, social worker, or nurse, with knowledge of property management, personal care skills, problems associated with disabilities, and the private and public resources available for the type of limitation the person is alleged to have.[94]

D. Counsel

If an AIP has not acquired private counsel, the court must appoint Mental Hygiene Legal Services (MHLS) in the judicial department where the AIP resides.[95] MHLS is a New York State agency that advocates, and is responsible for, the rights of people who are admitted to all mental health, developmental disability, and drug-treatment facilities.[96] If MHLS is appointed as counsel, and the agency is already serving as court evaluator, MHLS will be relieved from its appointment as court evaluator.[97]

E. Incapacity as the Standard

To appoint a guardian without the AIP's consent, the court must find that the AIP is incapacitated.[98] The standard for incapacity focuses on the decision-making capabilities and functional limitations of the AIP.[99] According to N.Y. Mental Hygiene Law § 81.12, the petitioner bears the burden and must demonstrate the quantum of

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

[93] *Id.* at § 81.09(c)(9).

[94] *Id.* at § 81.09(b)(1).

[95] *Id.* at § 81.09(b)(2).

[96] N.Y. MENTAL HYG. LAW § 47.01(a); *see, e.g.*, *In re* Alexis H., 572 N.Y.S.2d 194,195 (App. Div. 4th Dep't 1991) (stating that MHLS provided legal assistance to patients and residents of schools for mentally retarded and family care homes).

[97] N.Y. MENTAL HYG. LAW § 81.09(b)(2).

[98] *Id.* at § 81.02(2)(A).

[99] *Id.* at § 81.02(c).

proof required for a finding of incapacity. The petitioner must prove incapacity by clear and convincing evidence.[100] The petitioner must also provide evidence that the AIP is likely to suffer some sort of harm if the court does not intervene.[101] These harms may be related to a person's inability to provide for his or her own personal needs, or the management of his or her property.[102] The court also looks at whether the AIP is likely to suffer harm because he or she is unable to comprehend the nature of his or her particular inability.[103] To determine incapacity, and the functional level and limitations of the person, the court also assesses the AIP's management of daily living activities.[104] Any and all physical and mental illnesses or prognoses are considered, as well as substance dependence and any medications that may affect the person's behavior, cognition, or judgment.[105]

Typically, guardians, court evaluators, and the various professionals who provide services to AIPs are chosen from a list that is preapproved by the court.[106] However, there are circumstances in which the court will not refer to the list.[107] Such circumstances exist when, among other instances, the proposed guardian is a relative of the AIP or is a nonprofit entity.[108] Once a guardian is found to be necessary, the AIP must either agree to the appointment, or the court must find the person to be incapacitated.[109] A hearing is required in either instance so that the court is able to assess the voluntariness of the AIP's consent and make findings regarding the powers to be granted to the guardian.[110]

F. Substituted Judgment

Article 81 was enacted to provide narrowly tailored assistance to persons unable to adequately care for themselves and their proper-

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[100] *Id.* at § 81.12(a).
[101] *Id.* at § 81.02(b).
[102] N.Y. MENTAL HYG. LAW § 81.02(b)(1).
[103] *Id.* at § 81.02(b)(2).
[104] *Id.* at § 81.02(c)(1).
[105] *Id.* at § 81.02(c)(4).
[106] *Id.* at § 81.09(b)(1).
[107] N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1(b) (2013).
[108] *See Id.* (listing banks and trust companies as other exceptions).
[109] N.Y. MENTAL HYG. LAW § 81.02(a)(2).
[110] *Id.* at § 81.11(c).

ty.[111] Often these limitations extend to an AIP's inability to make reasoned judgments, warranting "the authorization and exercise of treatment powers by a guardian."[112] It is a legal standard of decision-making on behalf of AIPs, in which the guardian must take into account the personal "wishes and desires of an incapacitated person," while also using his better judgment for the health and well-being of the AIP. [113] For example, an AIP suffering from schizophrenic delusions may believe he is cured and no longer needs treatment, or that he is being medicated as part of some conspiracy.[114] In such an instance, where the AIP's best interests are not compatible with his wishes, substituted judgment would be used.[115] The common law doctrine of substituted judgment is recognized by the courts in New York,[116] and "is an integral part of Article 81."[117]

A court can only allow the use of the doctrine of substituted judgment "if satisfied by clear and convincing evidence," that it is necessary.[118] Evidence must prove:

> that [t]he incapacitated person lacks the requisite mental capacity to perform the act or acts for which approval has been sought[;] . . . [that] . . . a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances; [and that] [t]he incapacitated person has not manifested an intention inconsistent with the performance of the act or acts for which approval has been sought . . . or, if such intention was manifested, the particular person would be likely to have changed such intention under the circumstances existing at the time of the filing of the petition.[119]

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[111] *In re* Conticchio, 696 N.Y.S.2d 769, 770-71 (Sup. Ct. Nassau Cty. 1999); *see also* N.Y. MENTAL HYG. LAW § 81.02(b)(1).

[112] *Conticchio*, 696 N.Y.S.2d at 771.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *In re* Shah, 733 N.E.2d 1093, 1099-1100 (N.Y. 2000); *see also In re* Florence, 530 N.Y.S.2d 981, 982 (Sur. Ct. 1988).

[117] *Conticchio*, 696 N.Y.S.2d at 771.

[118] Eugene E. Peckham, *Last Resort Estate Planning Finds Acceptance in Statutes and Cases Relying on Substituted Judgment*, 74 N.Y. ST. B.J. 33, 34 (2002).

[119] *Id.* (quoting N.Y. MENTAL HYG. LAW § 81.21(e) (McKinney 2011)).

The substituted judgment provision of Article 81 ensures that the rights of AIPs are justly protected by "provid[ing] a method [of] last resort."[120]

V. PREVIOUS HOLDINGS

In *Allers*, the court held that the authority cited by DSS was inapposite because it was based on standards articulated before the enactment of Article 81.[121] The Fourth Department decision, *In re Heckl*,[122] relied on *In re Lyon*, a Second Department case.[123] In *Lyon*, the court applied the standard articulated in Articles 77 and 78 of the Mental Hygiene Law.[124] Because the enactment of Article 81 heightened the required standard of proof, the court in *Allers* held it was not bound by stare decisis, and disagreed with *Lyon*.[125]

A. *In re Lyon*

In May of 1976, the Supreme Court of New York Appellate Division, Second Department, reviewed the judgment of the Supreme Court of Westchester County, which appointed a third party as the guardian of AIP Lillian Lyon.[126] The Appellant, the son of Mrs. Lyon, argued that he should have been appointed conservator.[127] The "Appellant [was] the remainderman of [Mrs. Lyon's] trust[,] which provide[d] income for the support of his mother" if other allocated funds were not sufficient.[128] Contrary to the findings of the court, the Appellant claimed that his mother's care was "'squandering' in view of her condition."[129]

Mrs. Lyon, an 84-year-old quadriplegic, resided in a nursing home, entirely dependent on others to care for her personal and property needs.[130] Both Mrs. Lyon's in-house caretaker and chauffeur

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120 Peckham, *supra* note 118, at 38.

121 *Allers*, 948 N.Y.S.2d at 906.

122 840 N.Y.S.2d 516 (4d Dep't 2007).

123 *Allers*, 948 N.Y.S.2d at 906.; *In re* Lyon, 382 N.Y.S.2d 833 (2d Dep't 1976).

124 *Lyon*, 382 N.Y.S.2d. at 835.

125 *Allers*, 948 N.Y.S.2d at 906.

126 *Lyon*, 382 N.Y.S.2d at 833 (explaining that at the time of the hearing the guardian was called the conservator and the AIP was called the conservatee).

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

provided testimony explaining that prior to her deteriorated mental condition, Mrs. Lyon had expressed indifference about her son.[131] A nurse at the residence also testified that the Appellant never sent his mother cards or did anything for her, and visited only twice in the year prior to the hearing.[132] Applying Article 77, which was the statute then in force, and in view of the evidence provided, the court found no reason to disturb the arrangements; therefore, the petitioner, a friend of the AIP, remained the best choice as Mrs. Lyon's conservator.[133]

B. *In re Heckl*

In *Heckl*, Rosanna E. Heckl and her siblings sought to have their mother, Aida C., declared incapacitated in order to have a guardian appointed to watch over her property.[134] The New York Supreme Court of Erie County appointed a court evaluator and ordered the evaluator to meet with the AIP in hopes of assisting and protecting her interests.[135] The AIP then acquired counsel and moved to vacate the order.[136] The AIP argued that being forced to discuss her personal business with a court evaluator violated her Fifth Amendment right against self-incrimination because her responses could be introduced as evidence against her in her Guardianship Proceeding.[137] Therefore, her "liberty interest [was] at stake."[138] The AIP argued that MHL § 81.10(g) allows an AIP to remove her court evaluator when the court appoints counsel. Hence, this same rule should apply when the AIP hires her own counsel.[139]

The court denied the AIP's motion and ordered the court evaluator to meet with the AIP immediately, whereby the AIP continued to refuse to speak with the court evaluator.[140] The court gave

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[131] *Lyons*, 382 N.Y.S.2d at 834.
[132] *Id.*
[133] *Id*. at 835.
[134] *Aida, C*., 886 N.Y.S.2d at 296.
[135] *Heckl*, 840 N.Y.S.2d at 518-19.
[136] *Id.* at 518.
[137] *Id.*
[138] *Id.*
[139] *Id*. at 519; *see* N.Y. MENTAL HYG. LAW § 81.10(g) (McKinney 2004) (stating that "the court may dispense with the appointment of a court evaluator or may vacate or suspend the appointment of a previously appointed court evaluator").
[140] *Heckl*, 840 N.Y.S.2d at 522.

the AIP one last chance to comply with the instructions before being held in contempt.[141] The AIP then appealed to the Appellate Division, Fourth Department.[142] This court held that "the appointment of a court evaluator did not violate the AIP's constitutional rights."[143] However, the court did "reverse[] the order of [] contempt" against the AIP.[144] The appellate court agreed that the AIP's liberty interest was at stake,[145] but concluded instead that the constitutional protections "against self-incrimination do[] not attach in all instances," such as administrative or civil proceedings.[146] Because the AIP was not subject to any type of criminal proceeding, the constitutional protection against self-incrimination did not apply.[147]

C. *In re Gault*

The court in *Heckl* referred to *In re Gault*,[148] a United States Supreme Court decision, "which [discussed the degree] to which the U.S. Constitution protects the right against self-incrimination."[149] In *Gault*, a minor was taken into police custody because he and another boy had allegedly made lewd phone calls to a neighbor.[150] Accompanied by his mother and older brother, the minor met with the judge in his chambers to discuss the accusations.[151] Neither he nor his accompanying family members were informed that the minor did not have to make any statements.[152] At the hearing, the judge provided testimony concerning the minor's undocumented statements from the meeting.[153]

The judge determined that the minor was a delinquent and committed him to a specialized school until he reached the age of majority.[154] The minor's counsel filed a writ of habeas corpus, arguing

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141 *Id.*
142 Prisco, *supra* note 11, at 1327.
143 *Id.* at 1330.
144 *Id.* at 1330-31.
145 *Heckl*, 840 N.Y.S.2d at 520.
146 *Id.* at 520 (citing Allen v. Illinois, 478 U.S. 364, 372 (1986)).
147 *Heckl*, 840 N.Y.S.2d at 520.
148 *Gault*, 387 U.S. 1 (1967).
149 Prisco, *supra* note 11, at 1331.
150 *Gault*, 387 U.S. at 4.
151 *Id.* at 5.
152 *Id.* at 10.
153 *Id.* at 7.
154 *Id.* (stating that the age of majority is twenty-one).

that he was not afforded the constitutional protections against self-incrimination that he otherwise deserved.[155] The State argued that the Fifth Amendment provided those protections only in instances related to criminal matters and that juvenile proceedings were civil.[156] "[The] Arizona Supreme Court affirmed the dismissal, and the United States Supreme Court granted certiorari."[157]

The United States Supreme Court held that the Fifth Amendment could not be limited to a specific class of individuals or merely to criminal proceedings.[158] Instead, one must look to the "nature of the statement of admission and the exposure which it invites."[159] The Court held that even when a proceeding is non-criminal, the privilege against self-incrimination might still be invoked.[160] Here, the Fifth Amendment protection against self-incrimination was interpreted and applied broadly.[161]

D. *Allen v. Illinois*

Allen v. Illinois significantly limited the scope and application of the Fifth Amendment.[162] The defendant in *Allen* was prosecuted by the State of Illinois for "committing [] crimes of unlawful restraint and deviate sexual assault."[163] The State attempted to have the defendant "declared a sexually dangerous person" and committed to a psychiatric institution.[164] As part of this process, the defendant had to undergo a number of psychiatric examinations.[165] Later, the defendant objected to the introduction of statements he made to the psychiatrists, claiming that his Fifth Amendment right against self-incrimination was violated.[166] The trial judge advised the State to

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155 *Gault*, 387 U.S. at 42.

156 *Id.* at 46.

157 Prisco, *supra* note 11, at 1333.

158 *Gault*, 387 U.S. at 49.

159 *Id.*

160 *Id.*

161 *Id.* at 59.

162 *Allen*, 478 U.S. at 375.

163 *Id.* at 365; *see* People v. Allen, 463 N.E.2d 135, 136 (Ill. 1984) (stating that the defendant was charged with unlawful restraint and deviate sexual assault "pursuant to Sections 11-3 and 10-3 of the Illinois Criminal Code. (Ill. Rev. Stat. 1981, Ch. 38, Pars. 11-3 and 10-3)").

164 *Allen*, 478 U.S. at 365.

165 *Id.* at 366.

166 *Id.*

limit its testimony to include only the opinions of the examining psychiatrists.[167]

The court found the defendant "to be a sexually dangerous person" and committed him to a mental health facility.[168] The Appellate Court of Illinois for the Third District reversed, finding that the defendant's constitutional rights, outlined in the Fifth Amendment, were not protected.[169] The Supreme Court of Illinois reversed, finding that the defendant's right against self-incrimination did not apply in a civil proceeding concerning psychiatric treatment.[170] The United States Supreme Court affirmed, stating that the proceedings "were not 'criminal' within the meaning of the Fifth Amendment to the United States Constitution."[171] The Court stated that the precedent set in *Gault*, declaring that the protections of the Fifth Amendment are invoked whenever one's liberty interests are at stake, is "plainly not good law," and that the Fifth Amendment was not applicable.[172]

VI. THE HOLDING IN *ALLERS*

The court in *Allers*, held that *United Health Services Hospitals* was the most applicable and appropriate case on point.[173] In *United Health Services*, the AIP was called to the stand to testify about his condition at his own Guardianship Proceeding.[174] The AIP's counsel objected on the grounds that the AIP's liberty interests were at stake, claiming he could not be forced to testify according to the United States and New York Constitutions.[175] The New York Supreme Court of Broome County had to determine whether an AIP could be compelled to answer questions where the answers could directly affect the AIP's liberty interest.[176]

The court felt that the deprivation of liberty faced by the minor in *Gault* was comparable to the liberties at stake in *United Health*

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[167] *Id.*

[168] *Id.* at 366.

[169] *Allen*, 478 U.S. at 367 (relying on Estelle v. Smith, 451 U.S. 454 (1981)).

[170] *Id.* at 367 (relying on Mathews v. Eldrige, 424 U.S. 319 (1976)).

[171] *Id.* at 375.

[172] *Id.* at 372.

[173] *Allers*, 948 N.Y.S.2d at 905 (citing United Health Servs. Hosps. Inc., 785 N.Y.S.2d 313).

[174] *United Health Servs. Hosps. Inc.*, 785 N.Y.S.2d at 313.

[175] *Id.* at 316-17.

[176] *Id.* at 313.

Services Hospital, Inc. in that both were subject to potential civil commitment against their will, and the livelihood of the minors in were dependent upon decisions made by others.[177] The court in *United Health Services* addressed the holding in *Gault*, which stated that "there is a threat of self-incrimination whenever there is a 'deprivation of liberty'; [sic] and there is such a deprivation whatever the name of the institution, if a person is held against his will."[178] Based on this reasoning and because of the loss of liberty at stake, the court found that the AIP could not be forced to testify at a Guardianship Proceeding because doing so would be a denial of his or her constitutional protections against self-incrimination.[179]

VII. WHAT HAS BEEN DONE, WHAT WE SHOULD DO, AND WHAT IT ALL MEANS FOR THE FUTURE

Guardianship is going to become even more important in our society in the coming years.[180] It is a powerful legal instrument that can bring about positive or negative effects upon a vulnerable population with impairments, "affording needed protections, yet drastically reducing fundamental rights."[181] Demographic trends show that there will be an "increased need for surrogate decision-making," and therefore, a greater calling for the guardianship system as a whole.[182] This need will continue to climb as the population ages.[183] Moreover, advances in medical technology have enabled human beings to live longer and potentially outlive caregivers, necessitating more frequent guardianship appointment.[184] Additionally, the issues associated with the guardianship system impact all parts of society.[185] Individuals of all social strata[186] and ages with mental retardation, developmental disabilities, and mental illnesses comprise growing populations who utilize the guardianship system.[187] For these reasons, the guardian-

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177 *Id.* at 316-17.
178 *Id.* at 314.
179 *United Health Servs. Hosps. Inc.*, 785 N.Y.S.2d at 317.
180 Karp & Wood, *supra* note 3, at 149.
181 *Id.* at 146.
182 *Id.* at 149-50.
183 *Id.* at 149.
184 *Id.* at 149-50.
185 Laura Lane, *Justice for the Weakest*, N.Y. L.J., Sept. 26, 2006.
186 *Id.*
187 Karp & Wood, *supra* note 3, at 150.

ship system will be used more frequently, and therefore, must be monitored closely to protect this vulnerable and ever-growing population.[188]

AIPs and individuals involved in guardianship appointments can be described as the " 'unbefriended' population, that is, those who have no family or friends available and qualified to serve as guardian."[189] Guardians make a variety of critical care decisions, often with little knowledge of an AIP's personal life or values, "sometimes with high [workloads] and insufficient staffing."[190] Elder abuse inflicted by such caretakers has been the cause of harm accounting for injury, exploitation, and mistreatment of between one and two million Americans ages sixty-five and older.[191] Oftentimes the friendship a person forms "can initially appear innocent," such as where the AIP signs his house over to his guardian because he is grateful to have someone caring for him, acting like a friend.[192] However, these situations often result in the financial abuse of AIPs.[193]

It is not far-fetched to expect the Fifth Amendment right against self-incrimination extends further than to merely protect criminal defendants[194] because an AIP who has legally been categorized as incompetent is far more vulnerable and susceptible to being taken advantage of than a criminal defendant.[195] This population is at an even greater risk than criminal defendants, who have been provided this protection, as Guardianship Proceedings may determine who will be making medical and personal care decisions, such as, where an AIP will reside, including the power to place the AIP in a nursing home or residential care facility, and how their assets will be handled.[196] The current guardianship system continues to be "complex, fractured, insensitive, and uncaring to the needs of a very vulnerable

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[188] *Id.* at 184 (stating that "monitoring is at the very core of the court's . . . responsibility.").

[189] *Id.* at 150.

[190] *Id.* at 151.

[191] *Id.* at 150.

[192] Lane, *supra* note 185.

[193] *Id.*

[194] *See Allen*, 478 U.S. at 375 (holding that a criminal defendant is entitled to the right against self-incrimination).

[195] Karp & Wood, *supra* note 3, at 184 (referring to AIPs as society's "most vulnerable" members).

[196] *See* N.Y. MENTAL HYG. LAW § 81.22(a)(1-9) (McKinney 2010).

population."[197]

A. What Has Been Done Thus Far?

In the past, "the impetus for [] change" in the guardianship system came more from the press than from legal professionals.[198] Prior to the formation of Article 81, the Associated Press put together "an exposé of adult guardianship that caused a[n] [uproar nationwide], [] prompt[ing] Congressional hearings."[199] In response, an interdisciplinary conference took place where "national experts in law, psychiatry and psychology, advocates, court administrators, and judges" gathered.[200] The conference generated the eponymous " 'Wingspread Recommendations', which were subsequently adopted by the ABA House of Delegates."[201] In addition, a growing number of not-for-profit and for-profit agencies, as well as public guardianship programs, developed to serve this at-risk, "unbefriended" population.[202] Because of these and other efforts in the 1980's, there was a burst of guardianship reform.[203]

New York's Mental Hygiene Law, Article 81 exemplifies "the current paradigm in guardianship," acknowledging the challenges set forth by earlier activists.[204] In the past, many New York courts have used a narrow interpretation of the Fifth Amendment as applied to AIPs, focusing less on the rights at stake and more on the cause of action or type of proceeding at hand.[205] More recently, though, as seen in *Allers*, the privilege has been applied more broadly to non-criminal proceedings.[206]

"Article 81 ushered in a new era in the treatment of mental

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[197] Lane, *supra* note 185.

[198] Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 108 (2012).

[199] *Id.* at 109.

[200] *Id.*

[201] *Id.*

[202] Karp & Wood, *supra* note 3, at 150.

[203] Glen, *supra* note 198, at 109; *see* A. Frank Johns, *Ten Years After: Where is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L.J. 33, 78-79 (1999) (stating that "twenty-eight states introduced as many as 100 guardianship bills, passing as many as twenty-three in eighteen states.").

[204] Glen, *supra* note 198, at 111.

[205] *Heckl*, 886 N.Y.S.2d at 298.

[206] *Allers*, 948 N.Y.S.2d at 906.

illness," providing for the least restrictive form of intervention.[207] The new, stricter Article 81 protects an AIP's Fifth Amendment right to a greater extent than ever before.[208] Therefore, reliance on cases decided prior to the enactment of Article 81 is incorrect, and the holding in *Allers* should be utilized instead. This process is what has caused AIPs to question the application of the Fifth Amendment, as the new standard has dealt with this issue inconsistently. Article 81 should act as an example of what guardianship statutes nationwide should strive to mimic because it represents a profound step away from a model of traditional litigation. Decisions prior to Article 81 show the arc of progress leading up to and following its implementation, but should not be relied on as precedent because the standard has changed.

B. What Should We Do?

As proven by the effects of the Human Rights Movement of the 1980's, the people need to expect and demand incremental change toward protection for AIPs in a more consistent manner. In essence, involvement of the press is crucial. Aside from the efforts put forth thus far and the decision in *Allers*, lower courts in New York continue to act inconsistently regarding the application of the Fifth Amendment to Guardianship Proceedings.[209] Still unclear is whether the Fifth Amendment right against self-incrimination applies to Guardianship Proceedings in whole, or only in particular circumstances. Although the Fifth Amendment right against self-incrimination was applied to an AIP taking the stand as a witness in *Allers*, this privilege was not applied to statements made by an AIP to a court evaluator in *Heckl*.[210]

In order to keep guardianship law moving, the Fifth Amendment must be consistently and permanently added as a safeguard to all aspects of the guardianship system. *Heckl* needs to be reversed because it highlights a major inconsistency that still exists and exemplifies how Article 81 was not an all-encompassing fix. Even in an instance such as *Heckl*, where the improved Article 81 was applied,

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[207] Peckman, *supra* note 118, at 34.
[208] *Id.*
[209] Prisco, *supra* note 11, at 1340.
[210] *Id.* at 1343.

the AIP was not protected by the right against self-incrimination.[211] The AIP's worries were rational and she did not want to speak to a court evaluator because she knew everything she said could be used against her at a hearing as though she had taken the stand. Thus, the AIP was faced with a predicament, having to choose between testifying or facing contempt of the court.[212] The Fifth Amendment should be applied, not only to protect an AIP against self-incrimination, but also to conversations between the AIP and the appointed court evaluator, especially when the AIP is able to provide their own counsel.

Unfortunately, judges are forced to rely on historical precedent that argues that the Fifth Amendment privilege against self-incrimination should not be applied in a civil proceeding.[213] However, the scope of the Fifth Amendment has broadened, and such an application is no longer warranted. *Gault* demonstrates that the United States Supreme Court is in agreement that the scope of the Fifth Amendment has broadened and that it should not only be applied to specific populations.[214] Judges need to adhere consistently to this broadened interpretation, applying the right against self-incrimination to all aspects of Guardianship Proceedings.

The decision in *United Health Services* has left an imprint on the New York court system because it was the first of its kind drawing on the conclusions made in *Gault*.[215] This court also supported the notion that the Fifth Amendment right against self-incrimination should not be narrowly applied. One can only hope that these decisions will act as an example for future issues related to the Fifth Amendment and Guardianship Law in general.

C. Proposed Model

The holdings in *Allers* and *United Health Services* do not do a great deal to "quell the concerns of AIPs."[216] Although the implementation of Article 81 was a huge stride forward, there is still room to strengthen its protections. Article 81 continues to be "described as

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[211] *Id.*
[212] *Id.* at 1330.
[213] Johns, *supra* note 203, at 66.
[214] Prisco, *supra* note 11, at 1337.
[215] *Id.*
[216] *Id.* at 1343.

a statute at war with itself."[217] While some decisions suggest that Guardianship Proceedings should be treated as "traditional litigation" based upon the technicalities of the law, others treat Article 81 merely as a guideline to meet the "best interest[s]" of the AIP.[218] There is still, however, a middle ground between these two extremes. In fact, a more holistic approach may be the answer.[219] AIPs deserve the heightened standard of scrutiny introduced by Article 81, as well as greater sensitivity in general. The system must look beyond the legal paperwork and see the person.

Guardianship Proceedings deserve to be subjected to the heightened standard of scrutiny introduced by Article 81, not only because the individual's liberty interest is at stake, but also because decisions rely heavily on the discretion of a single judge[220] determining mental capacity on a case-by-case basis.[221] Historically, judges appointed to Guardianship Proceedings have often "lack[ed] the requisite expertise," having little or no training in mental health law or psychiatry.[222] It is not recommended that this discretion be taken away from judges, but rather, that judges appointed to handle Guardianship Proceedings have an actual interest in the sensitive matters at hand. Guardianship judges deal with particularly personal matters, and have the ability to change an individual's liberties. A judge with a greater interest will likely treat these proceedings with greater sensitivity and attention.

A society can be judged by the way it "treats its weakest and most vulnerable members."[223] For this reason, Guardianship Proceedings should not be treated as traditional litigation. There should not be a strict adherence to the rules of evidence because the best interests of the AIP should be a priority. In fact, this is the goal those who advocated for the implementation of Article 81 sought to achieve.[224] A special problem-solving courtroom with a less intimi-

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[217] *Allers*, 948 N.Y.S.2d at 904 (quoting Fish, *supra* note 59).

[218] Fish, *supra* note 59.

[219] Lane, *supra* note 184.

[220] Meta S. David, *Legal Guardianship of Individuals Incapacitated by Mental Illness: Where Do We Draw the Line?*, 45 SUFFOLK U. L. REV. 465, 482 (2012).

[221] *Id.* at 469.

[222] William Brooks, *The Tail Still Wags the Dog: The Pervasive and Inappropriate Influence By the Psychiatric Profession on the Civil Commitment Process*, 86 N.D. L. REV. 259, 285-86 (2010).

[223] Lane, *supra* note 185.

[224] Fish, *supra* note 59.

dating environment may be more conducive to this result. AIPs, who often enter Guardianship Proceedings frightened and disoriented, should never feel like they have done wrong; a guardianship courtroom should feel very little like a courtroom. Greater efforts must be made to assure that AIPs are not frightened by the system or the courtroom. In this regard, round-table discussions, rather than traditional court hearings, may provide a more conducive environment.

Integrating all pending cases involving an incapacitated person before a single judge may actually prove to be beneficial for the mental well-being of an AIP who would no longer have to go from courtroom to courtroom.[225] Traditional guardianship caseloads are six cases a day, five days a week.[226] To provide greater sensitivity to this population, caseloads should be lessened. By lessening each judge's caseload and appointing judiciary duties to judges who have an interest in the issues associated with guardianship, judges will not only be able to spend more time on individual matters, they will also have a better chance of knowing the family and the circumstances, "and can effectively work with the different parties to get things resolved" in the best interests of the AIP.[227]

VIII. CONCLUSION

The courts need to consistently apply the Fifth Amendment to Guardianship Proceedings using a more holistic approach, while striving for a happy medium between a strict application of the traditional rules of evidence and the guidelines provided by Article 81. Although the law pertaining to Guardianship Proceedings has come a long way toward protecting not only the property, but also the personal interests of AIPs, the current system continues to be one "in which decisions are unpredictable and [] inconsistent."[228]

The right against self-incrimination was created to maintain the integrity of the courts by preventing the use of coerced statements created by abhorrent methods such as force or psychological domination.[229] These intentions, paired with the vulnerability of the popula-

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[225] Lane, *supra* note 185.

[226] *Id.*

[227] *Id.*

[228] David, *supra* note 220, at 482.

[229] Brown v. Illinois, 422 U.S. 520, 601 (1975); United States v. Massey, 437 F. Supp. 843, 856 (M.D. Fla. 1977).

tion utilizing the guardianship system, make AIPs most in need of Fifth Amendment protections. Yet, historically, this right has been applied far too narrowly. Until recently, the protection against self-incrimination excluded AIPs in Guardianship Proceedings, and even today, this issue continues to be addressed inconsistently. It would be surprising and totally illogical if the privilege against self-incrimination were available to hardened criminals, but not to AIPs.

In *Allers,* the court was not willing to apply stare decisis from previous cases, which repealed former Articles 77 and 78, showing that the enactment of Article 81 was an acknowledgement of the dire need to heighten the protection of AIPs' rights and to administer a gentler approach instead.[230] *Allers* displays a legislative distinction of the improved standard. This heightened sensitivity applies not only to constitutional rights, but also to the approach of the courts. Aside from this most recent decision favoring the protection of AIPs, Guardianship Proceedings in New York and nationwide still fail to incorporate the kindness and sensitivity needed for this population. Demographic trends underscore the dire need for the application of the Fifth Amendment in Guardianship Proceedings when constitutional rights and financial resources are transferred to guardians, leaving AIPs with diminished capacity at the mercy of the guardians.

[230] *Allers*, 948 N.Y.S.2d at 906; Rosann Torres, *Article 81 of the Mental Hygiene Law: Designed to Protect the Elderly, But Prejudicing Children's Rights*, 7 J.L. & POL'Y 303, 11 (1998).