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## New York Mental Hygiene Law Article 81 Proceedings: A Proposal to Better Protect the Best Interests of an Alleged Incapacitated Person

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**NEW YORK MENTAL HYGIENE LAW ARTICLE 81  
PROCEEDINGS: A PROPOSAL TO BETTER PROTECT THE  
BEST INTERESTS OF AN ALLEGED INCAPACITATED  
PERSON**

*Casey Marsh\**

**ABSTRACT**

Guardianship proceedings under New York Mental Hygiene Law Article 81 are intended to protect the personal needs and property management of an alleged incapacitated person. A guardian appointed for a person is responsible for making decisions in line with the best interests and wishes of his or her ward. While guardians serve a very important purpose, the current procedures of guardianship proceedings allow too much room for family members to bring a proceeding without the alleged incapacitated person's best interests in mind.

Often, people bring guardianship proceedings to fish for information on family members or to circumvent a future Surrogate's Court proceeding. These reasons are not in accordance with the purpose of guardianship proceedings. New York Mental Hygiene Law Article 81, as it stands, allows too much room for people to bring guardianship proceedings for reasons outside the intent and purpose of the proceeding. Recognizing the sensitive nature of these proceedings, the legislature should amend the statute to protect alleged incapacitated persons from proceedings brought without their best interests in mind.

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## I. INTRODUCTION

Imagine a situation where your mother is losing her capacity. She does not have any advance directives in place and must rely on you for help. You know you have her best interests in mind, and she trusts you to help her. She has significant trouble making medical and financial decisions on her own. You want to do everything you can to help, but doctors will not speak to you without your mother's consent, and banks will not give you any financial information. How will you ensure that your mother is in good hands? How will you make sure her bills are paid? In a perfect world, this is the ideal scenario for a guardianship proceeding.

A guardianship proceeding under New York Mental Hygiene Law Article 81 authorizes the court to appoint a third party to make decisions on behalf of a person who is deemed legally incapacitated.<sup>1</sup> The guardianship system allows for a “desirable and beneficial” path for the appointment of a guardian to take care of the personal needs and property management in an individualized fashion.<sup>2</sup> The guardianship system under Mental Hygiene Law Article 81 is designed to take into account the incapacitated person's “personal wishes, preferences, and desires” to preserve the highest level of independence for that person.<sup>3</sup> A guardian can be any person eighteen years or older, a corporation, or a public agency that is appointed to act on behalf of an incapacitated person to handle his or her personal needs and property management.<sup>4</sup>

Guardians are granted extensive powers over their ward. Some of these powers include the power to make gifts, enter into contracts, create revocable or irrevocable trusts for the real and personal property of an incapacitated person's estate, exercise options on behalf of the incapacitated person to purchase securities or other property, authorize access to or release of confidential records, apply for government and private benefits, marshal assets, pay funeral expenses, pay necessary bills, lease the primary residence for up to three years, and retain an accountant.<sup>5</sup> Because these powers are extensive, courts seek to grant

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<sup>1</sup> N.Y. MENTAL HYG. LAW § 81.01 (Consol. 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* § 81.03.

<sup>5</sup> *Id.* § 81.21(a). This is a non-exhaustive list of powers.

powers having “the least restrictive form of intervention.”<sup>6</sup> It is critical for the court to account for the incapacitated individual’s personal wishes, preferences, and desires.<sup>7</sup>

Keeping in mind the scope of the powers granted to guardians, consider a family member whose main objective is not to help his alleged incapacitated mother, but instead is more concerned with gaining information about her health or finances and controlling his mother’s medical and financial decisions for his own personal gain. Regardless of his motive, he can bring an Article 81 Guardianship Proceeding, at minimum, to gain information about his mother’s current medical state and financial situation. The guardianship proceeding described here is for a wholly different purpose than the one described earlier, where you are bringing the proceeding to protect your mother’s best interests. Here, the proceeding is brought for selfish purposes. Either way, both proceedings can be heard under New York Mental Hygiene Law Article 81, and in both proceedings, the alleged incapacitated person can lose her autonomy to her new guardian.

This Note discusses whether the current procedure to bring an Article 81 Proceeding under New York Mental Hygiene Law Article 81, as it stands, allows too much room for family members to access an alleged incapacitated person’s confidential information and gain control over an alleged incapacitated person (“AIP”). Further, this Note discusses the current statute and how the judicial implementation of the statute can grant guardians overly broad authority to make decisions impacting the incapacitated person’s rights. The standards for determining whether a person should be declared incapacitated and the standard for who can bring a proceeding should be more rigorous to protect the AIP and take into account proceedings commenced by people whose motivation is to seek information rather than to benefit the AIP. Often, Article 81 Proceedings permit families to go on a fishing expedition to gain access to an AIP’s confidential information. In cases like these, family members seek to gain control over the AIP to circumvent a later Surrogate’s Court Proceeding and ensure their inheritance is guaranteed. Article 81 Proceedings can be exploitative and sensitive proceedings. They delve into the most personal aspects of an AIP’s life. Often, the AIP is elderly and vulnerable. These vulnerable elderly people should not be forced into having their personal

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

information aired in a courtroom through a lengthy court proceeding. There is an obvious need for guardianship proceedings to protect those who are truly incapacitated. However, the procedure must be altered to protect an AIP from unnecessary and potentially abusive proceedings brought for the wrong reasons.

Section II of this Note discusses guardianships generally, reviewing the need for a guardian, the impact of advance directives on guardianship proceedings, and the powers granted to a guardian. Section III walks through each step of a guardianship proceeding. Section IV argues that the procedure of a guardianship proceeding gives family members too much room to bring frivolous claims to gain information about their elderly relatives. Section V discusses the magnitude of the rights stripped away from an incapacitated person when a guardian is appointed. This Note demonstrates how sensitive guardianship proceedings can be and why proceedings should only be brought when necessary. The nature of the proceeding coupled with the immense powers granted to a guardian should make those who consider bringing a guardianship proceeding view this as a last option, not an avenue for a fishing expedition. Section VI discusses a proposal to change Article 81 proceedings to better ensure the AIP's interests remain at the forefront of the proceeding and prevent an AIP from being subject to frivolous claims.

## II. GUARDIANSHIPS GENERALLY

### A. The Need for a Guardian

When determining whether guardianship is the right avenue for an AIP, New York courts follow Mental Hygiene Law § 81.02(a)<sup>8</sup> (the "MHL"), which states:

[t]he court may appoint a guardian for a person if the court determines: 1. That the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; and 2. that the person agrees to the appointment, or that the person is incapacitated as defined in subdivision (b) of this section. In deciding whether the

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<sup>8</sup> *Id.* § 81.02(a).

appointment is necessary, the court shall consider the report of the court evaluator, as required in paragraph five of subdivision (c) of section 81.09 of this article, and the sufficiency and reliability of available resources, as defined in subdivision (e) of section 81.03 of this article, to provide for personal needs or property management without the appointment of a guardian. Any guardian appointed under this article shall be granted only those powers which are necessary to provide for personal needs and/or property management of the incapacitated person in such a manner as appropriate to the individual and which shall constitute the least restrictive form of intervention, as defined in subdivision (d) of section 81.03 of this article.<sup>9</sup>

Because of the extensive powers granted to a guardian, courts do not take the appointment of a guardian lightly. MHL § 81.02(b) outlines the burden of proof that a guardian must meet; specifically, the statute states that the court determines incapacity based on a standard of clear and convincing evidence.<sup>10</sup> This evidence must consist of “a determination that a person is likely to suffer harm because: 1) the person is unable to provide for personal needs and/or property management; and 2) the person cannot adequately understand and appreciate the nature and consequences of such inability.”<sup>11</sup>

## **B. Advanced Directives**

A guardianship proceeding typically occurs when an AIP can no longer take care of his or her personal needs and/or property management and does not have adequate advance directives in place to account for the necessary decision-making once the individual loses capacity.<sup>12</sup> Advance directives, such as a healthcare proxy or power of attorney, can help circumvent the guardianship proceeding.<sup>13</sup> A healthcare proxy document names an individual to make healthcare

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* § 81.02(b).

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

<sup>12</sup> Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 *FORDHAM URB. L.J.* 495, 521 (2016).

<sup>13</sup> *Id.* at 503.

decisions in anticipation of a time when a person may no longer have capacity to make healthcare decisions independently.<sup>14</sup> Similarly, a power of attorney form is a document that appoints an agent to act on behalf of an individual in case that individual loses capacity and is unable to make financial decisions.<sup>15</sup> With advance directives in place, it is unlikely that a guardian is necessary.<sup>16</sup> This is because there are already individuals appointed, according to the incapacitated person's wishes, while he or she had capacity, that can assist in the incapacitated person's personal needs and property management.<sup>17</sup> However, the advance directives may be insufficient to meet the individual's needs because of a breach of the fiduciary's duty, or the AIP may need more assistance than the documents originally set out, making guardianship an option to protect the incapacitated person from further abuse.<sup>18</sup>

### C. Guardianships Generally

Guardianship proceedings typically arise when someone with close knowledge of an AIP sees that the AIP is unable to make necessary decisions independently or that the AIP's decisions are harmful to his or her wellbeing.<sup>19</sup> A person who must consent to medical treatment but is not of sound mind may need someone to step in to make those decisions.<sup>20</sup> This situation could be avoided if the AIP has a power of attorney or healthcare proxy in place.<sup>21</sup> Many people could be forced into a guardianship because they require a "legally cognizable actor" to make medical decisions or engage in financial or real estate transactions.<sup>22</sup> In addition, a person with close knowledge of the AIP may see a need for a guardian based on the recognition that the AIP's decisions may cause physical or financial harm.<sup>23</sup>

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<sup>14</sup> Keri L. Vanderwarker, *Beware or Be Blindsided: Avoiding Est. Plan. Pitfalls*, 77 ALB. L. REV. 271, 271 (2014). Healthcare proxy documents can be used whether the lack of capacity is temporary or permanent.

<sup>15</sup> *Id.* A power of attorney document can also be used when the principal cannot be present to participate in the transaction.

<sup>16</sup> Diller, *supra* note 12, at 503.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 502.

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

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 503.

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

Most guardians are awarded plenary power.<sup>24</sup> In this instance, the guardianship takes away rights from the incapacitated person “on a wholesale basis rather than individually tailoring the guardianship” to the needs of the specific person.<sup>25</sup> Guardianship under Article 81 allows a petitioner to request personal needs powers, property management powers, or both, depending on the needs of the AIP.<sup>26</sup> The ability to request either personal needs or property management powers should encourage a petitioner to tailor the powers requested to the AIP’s specific needs.<sup>27</sup> However, most guardianship petitions request a review of the AIP’s capacity for decision-making for both personal needs and property management and do not make any distinction between the two.<sup>28</sup>

Most guardianship orders end up removing all rights from the AIP, even when this removal is unnecessary.<sup>29</sup> Generally, guardianships seek to preserve the utmost autonomy for the incapacitated person by allowing the petitioner to request powers specific to the AIP.<sup>30</sup> However, the statute allows the stripping of the incapacitated person’s powers as a whole rather than reviewing the needs of each person and granting powers on a case-by-case basis.<sup>31</sup> This approach does not provide any room to maximize the incapacitated person’s individual independence and autonomy.<sup>32</sup>

Many see guardianship as a tool to prevent the abuse of an incapacitated person.<sup>33</sup> Assuming the appointed guardian acts with the incapacitated person’s best interest in mind, guardianship can be extremely useful to protect the incapacitated person.<sup>34</sup> However, even working at its best, a guardianship deprives an incapacitated person of basic human rights and the ability to make his or her own decisions.<sup>35</sup>

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<sup>24</sup> Eleanor Crosby Lanier, *Understanding the Gap Between Law and Practice: Barriers and Alternatives to Tailoring Adult Guardianship Orders*, 36 BUFF. PUB. INT. L.J. 155, 156 (2019).

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

<sup>26</sup> *Id.* at 159.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 157.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Diller, *supra* note 12, at 536.

<sup>34</sup> *Id.* at 504.

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



As mentioned earlier, a guardian may be granted property management powers and personal needs powers depending on the needs of each person.<sup>36</sup> The property management powers include the right to make gifts and the right to exercise or release powers held by the incapacitated person as trustee, personal representative, guardian for minor, guardian, or donee of a power of appointment.<sup>37</sup> The powers allow the guardian to place the estate property in an irrevocable or revocable trust.<sup>38</sup> Other examples of property management include allowing a guardian to exercise options to purchase securities or other property, exercise rights to elect options, change beneficiaries under insurance and annuity policies, surrender the policies for cash value, and authorize access to or release of confidential records.<sup>39</sup> A guardian's personal needs powers include determining who provides personal care or assistance for the incapacitated person, whether the incapacitated person should travel, and whether the incapacitated person should possess a license to drive.<sup>40</sup> Personal needs powers further include decision-making about an incapacitated person's social environment and other social aspects of the incapacitated person's life, as well as authorizing access to or release of confidential records.<sup>41</sup>

Courts have particular safeguards in place to protect an incapacitated person when a guardian seeks authority to exercise a power that involves the transfer of a part of the incapacitated person's assets for the benefit of another person.<sup>42</sup> This includes decisions by guardians who want to transfer assets to benefit themselves.<sup>43</sup> When making these transfer decisions, courts look to a few factors.<sup>44</sup> These factors include whether this type of transfer has been requested before, the amount and nature of the financial obligations this transfer will involve, and the impact of the transfer on the incapacitated person's ability to financially care for himself.<sup>45</sup> Courts also examine the value of the incapacitated person's property that is the subject of the application, why the transfer is necessary, and whether the incapacitated

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<sup>36</sup> N.Y. MENTAL HYG. LAW § 81.02 (Consol. 2014).

<sup>37</sup> *Id.* § 81.21(a) (Consol. 2014).

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

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* § 81.22(b).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

person has sufficient capacity to make this decision.<sup>46</sup> Further, courts look to whether the incapacitated person has a valid will, and, if so, the names of the beneficiaries, and a description of significant gifts or patterns of gifts made by the incapacitated person.<sup>47</sup>

### III. THE ARTICLE 81 GUARDIANSHIP PROCEEDING

An Article 81 Guardianship is the legal proceeding under New York State Mental Hygiene Law that transfers power from an incapacitated person to an appointed guardian to ensure the incapacitated person's health and safety.<sup>48</sup> In New York State, these proceedings begin in the Supreme Court where determinations of incapacity are based upon a standard of clear and convincing evidence.<sup>49</sup> Article 81 Guardianship proceedings are then broken down into steps to determine the status of the AIP's capacity and whether a guardian should be appointed based on that determination.

#### A. Who May Commence a Proceeding

Mental Hygiene Law section 81.06 outlines who may commence an Article 81 Guardianship Proceeding.<sup>50</sup> The statute is broad regarding who is allowed to bring a guardianship proceeding.<sup>51</sup> Among those who may commence an Article 81 Guardianship Proceeding are the AIP, a presumptive distributee of the AIP, an executor or administrator of an estate when the AIP is or may be the beneficiary of that estate, someone who resides with the AIP, a person who is concerned with the welfare of the AIP, and the chief executive officer, or the designee of the chief executive officer, of a facility where the AIP is a patient or resident.<sup>52</sup> Also included as people who may commence a proceeding are family members and those close to the AIP, as well as those who may not have close knowledge of the AIP.<sup>53</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Neighborhood Legal Servs. Inc., [https://nls.org/wp-content/uploads/2019/02/Article\\_81\\_Guardianship-1.pdf](https://nls.org/wp-content/uploads/2019/02/Article_81_Guardianship-1.pdf) (last visited Jan. 29, 2023).

<sup>49</sup> *Id.*

<sup>50</sup> N.Y. MENTAL HYG. LAW § 81.06 (Consol. 2014).

<sup>51</sup> *Id.*

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

<sup>53</sup> *Id.*

This list leaves room for almost anyone to bring an Article 81 proceeding, even if the person does not have extensive personal knowledge of the AIP. Article 81 proceedings are very invasive because they dive into personal aspects of the AIP's life to determine the AIP's capacity. An individual should only be subjected to an Article 81 proceeding as a last resort. Section 81.06 is too vague in who it allows to commence a proceeding. A person permitted to commence a proceeding under section 81.06 could easily be motivated by other interests, such as access to the AIP's confidential medical and financial information or control over an AIP's assets, rather than acting in the best interests of the AIP. While the proceeding is in place to determine an AIP's capacity and need for a guardian, and the court may ultimately determine that the AIP has capacity and therefore is not in need of a guardian, the AIP should not be subjected to the proceeding in the first place. The statute should be more narrowly tailored to only allow those who have significant knowledge of the AIP's lack of capacity to commence a proceeding. Those who do not have that knowledge should not be permitted to investigate why a person may or may not be incapacitated in the courtroom. This change could be seen through a requirement for the petitioner to show probable cause in order to commence a guardianship proceeding. Instead, the vagueness of the statutory language allows almost anyone who can prove some connection to the AIP to commence a proceeding. This leaves room for those with selfish motives to carry out a fishing expedition, putting the AIP through a lengthy and invasive proceeding. Only those with concrete knowledge and concern for the AIP's wellbeing should be able to commence a proceeding. With a requirement to show probable cause, the petitioner would only be able to commence a proceeding on a showing that there is a reasonable basis to believe the AIP lacks capacity.

### **B. Order to Show Cause and Notice**

Mental Hygiene Law section 81.07 states that a proceeding under Article 81 "shall be commenced upon the filing of the petition."<sup>54</sup> The petition is coupled with an order to show cause.<sup>55</sup> The order to show cause explains why the court needs to appoint a guardian for the incapacitated person, informs the incapacitated person of his or her

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<sup>54</sup> *Id.* § 81.07(a).

<sup>55</sup> *Id.* § 81.07(b).

rights, and contains important information about the trial.<sup>56</sup> The order to show cause is served together with a copy of the petition and any supporting papers.<sup>57</sup> These documents should be served upon the AIP, the court evaluator, and counsel for the AIP.<sup>58</sup>

The notice of the proceeding provides information on the hearing to all interested parties. This information includes the names and addresses of the AIP and petitioner, the names of interested parties who receive notice of the proceeding, the time and place the order to show cause shall be heard, the object of the proceeding and the relief sought in the petition, and the information for the petitioner's attorney.<sup>59</sup>

### C. The Petition

Mental Hygiene Law section 81.08 states the requirements for the petition in an Article 81 Guardianship Proceeding.<sup>60</sup> The petition should specify the reasons why the AIP needs a guardian.<sup>61</sup> The petition either nominates someone specific to be the guardian or asks the court to appoint an independent guardian for the AIP.<sup>62</sup> The petition must be verified under oath and include information about the AIP and his or her circumstances.<sup>63</sup> The petition must describe the AIP's functional level by outlining the AIP's ability to manage daily activities, behavior, and the AIP's understanding and appreciation of the nature and consequences of any inability to manage daily activities.<sup>64</sup>

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<sup>56</sup> *Id.*; (“The order to show cause shall . . . inform the person alleged to be incapacitated of his or her rights, and shall include the following information: 1. date, time, and place of the hearing of the petition; 2. a clear and easily readable statement of the rights of the person alleged to be incapacitated that are set forth in section 81.11 of this article; 3. the name, address, and telephone number of the person appointed as court evaluator pursuant to section 81.09 of this article; 4. the name, address, and telephone number of the attorney if one has been appointed for the person alleged to be incapacitated pursuant to section 81.10 of this article; and 5. a list of the powers which the guardian would have the authority to exercise on behalf of the person alleged to be incapacitated if the relief sought in the petition is granted.”). *Id.* § 81.07(c).

<sup>57</sup> *Id.* § 81.07(b)(3).

<sup>58</sup> *Id.*; *see also id.* § 81.07(e)(1).

<sup>59</sup> *Id.* § 81.07(f).

<sup>60</sup> *Id.* § 81.08.

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

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

<sup>63</sup> *Id.* § 81.08(a).

<sup>64</sup> *Id.*

There is an important distinction between the personal needs and property management powers that must be laid out in the petition.<sup>65</sup> These powers are granted separately, so the petitioner must describe the needs for each of these powers.<sup>66</sup> With regard to personal needs powers, the petition must outline specific factual allegations as to the personal actions involving the AIP that may cause him or her to suffer harm.<sup>67</sup> With regard to property management powers, the petition must offer specific factual allegations as to financial transactions or other actual occurrences involving the AIP that demonstrate that he or she is likely to suffer harm.<sup>68</sup> Further, the petition should outline the powers being sought and their relationship to the functional level and needs of the AIP.<sup>69</sup> The petitioner should specify the duration of these powers, whether temporary or indefinite.<sup>70</sup> The petitioner must describe the value and description of the AIP's financial resources and whether the person is a recipient of public assistance.<sup>71</sup> The petition should state the nature and amount of any claim, debt, or obligations of the AIP.<sup>72</sup> Further, the petitioner must illustrate why the proposed guardian or standby guardian is capable of exercising the necessary powers to assist the AIP.<sup>73</sup> The petition must outline any relief sought.<sup>74</sup> It must also describe the available resources, if any, the petitioner has considered and the petitioner's sufficiency and reliability.<sup>75</sup> Lastly, the petition must include any other information that the petitioner believes may aid the court evaluator in an investigation and report.<sup>76</sup>

It is evident that the court places extensive weight on the petition as it is used as a primary document in the determination of the AIP's capacity and need for a guardian. The information the court requires in the petition sheds light on the AIP's situation and provides insight that can be used in the court evaluator report for the court to

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

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* § 81.08(a)(4).

<sup>68</sup> *Id.* § 81.08(a)(5).

<sup>69</sup> *Id.* § 81.08(a)(6).

<sup>70</sup> *Id.* § 81.08(a)(7).

<sup>71</sup> *Id.* § 81.08(a)(8).

<sup>72</sup> *Id.* § 81.08(a)(9).

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

<sup>74</sup> *Id.* § 81.08(a)(13).

<sup>75</sup> *Id.* § 81.08(a)(14).

<sup>76</sup> *Id.* § 81.08(a)(15).

later review.<sup>77</sup> The information set forth in the petition also assists the judge in making a final determination. This information is highly personal to the AIP, often including confidential medical and financial material. While this information is necessary for a court to reach its decision, it is still personal to the AIP and information that many people would like to remain private. Therefore, it is critical that petitions be brought with merit instead of fishing for this information in court.

Many individuals do not want to go through a court hearing that exploits personal information. This reality strengthens the argument that a guardianship proceeding should not be commenced until the exhaustion of all other avenues. Even if the judge ultimately determines the AIP is not in need of a guardian, the proceeding alone forces the AIP to share personal information to prove capacity. The petition alone requires a great amount of personal information to support a determination of capacity. The court should require the petitioners to exhaust any less invasive means of protection before allowing the commencement of a proceeding. The statute should be amended to require that the petition contain a section that describes the other avenues the petitioner has taken to protect the AIP, why those avenues did not work, and why guardianship is the least restrictive means of protecting the AIP. This could prevent petitioners from bringing a petition with a frivolous claim.

#### D. Court Evaluator

In an Article 81 Guardianship Proceeding, the court appoints a “court evaluator” to serve as the eyes and ears of the court.<sup>78</sup> The court evaluator is responsible for meeting, interviewing, and consulting with the AIP.<sup>79</sup> The court evaluator submits a report to the court with findings and recommendations as to whether the AIP needs a guardian.<sup>80</sup>

The court evaluator is appointed at the time the order to show cause is issued.<sup>81</sup> The court can appoint many different types of people as a court evaluator.<sup>82</sup> Some individuals who can be appointed court evaluator are an attorney working for Mental Hygiene Legal Services,

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<sup>77</sup> See *infra* Section III(d).

<sup>78</sup> N.Y. MENTAL HYG. LAW § 81.09 (Consol. 2014).

<sup>79</sup> *Id.* § 81.09(c)(1).

<sup>80</sup> *Id.* § 81.09.

<sup>81</sup> *Id.* § 81.09(a).

<sup>82</sup> *Id.* § 81.09(b)(1).

an attorney working in the field of Elder Law, a physician, psychologist, accountant, social worker, or nurse.<sup>83</sup> The person appointed must have knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the type of limitation the AIP may have.<sup>84</sup>

The court evaluator must determine whether the AIP understands English or another language and explain to the AIP the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the rights the AIP is entitled to—including the right to counsel.<sup>85</sup> The court evaluator determines whether the AIP wishes to appoint his or her choice of counsel or have the court appoint counsel.<sup>86</sup> The court evaluator interviews the petitioner, or if the petitioner is a facility or government agency, a person within the facility or agency who is familiar with the AIP's condition, affairs, and situation.<sup>87</sup> After completing all of these steps, the court evaluator investigates and writes a report with recommendations to the court.<sup>88</sup> The written report and recommendations must include the court evaluator's personal observations of the AIP and his or her condition, affairs, and situation.<sup>89</sup> In the report, the court evaluator must answer a series of questions provided by the court that aim to inform the court of the AIP's condition.<sup>90</sup> The court evaluator must interview or consult with professionals who have specialized knowledge in the area of the AIP's disabilities and retain an independent medical expert when appropriate.<sup>91</sup> The court evaluator must attend all court proceedings and conferences.<sup>92</sup>

The court evaluator may apply for permission from the court to inspect records of medical, psychological and/or psychiatric examinations of the AIP.<sup>93</sup> The court evaluator has the authority to take all steps necessary to preserve the AIP's property pending the hearing in

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<sup>83</sup> *Id.* § 81.09(b)(1).

<sup>84</sup> *Id.*

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

<sup>86</sup> *Id.* § 81.09(c)(3).

<sup>87</sup> *Id.* § 81.09(c)(4).

<sup>88</sup> *Id.* § 81.09(c)(5).

<sup>89</sup> *Id.*

<sup>90</sup> *See id.* § 81.09(c)(5) (questions provided by the court to be answered in the court evaluator's written report and recommendations).

<sup>91</sup> *Id.* § 81.09(c).

<sup>92</sup> *Id.* § 81.09(c)(9).

<sup>93</sup> *Id.* § 81.09(d).

the event the property is in danger of waste, misappropriation, or loss.<sup>94</sup> Lastly, when a judgment grants or denies a petition, or the AIP dies before a determination is made, the court may award the court evaluator reasonable compensation.<sup>95</sup>

The court evaluator plays a crucial role in Article 81 Guardianship Proceedings by serving as the unbiased eyes and ears of the court. The court evaluator investigates the situation and advocates for the least invasive option for the AIP. By conducting research, without the pressure from either party, the court evaluator may make a determination that ensures the AIP's safety and wellbeing. The court evaluator should be someone that the AIP can trust to give insight into the situation. The court evaluator will take the AIP's wishes into consideration when writing a report and recommendation to the court. The written report and recommendation sheds light on each party's intentions and wishes to the court. The court evaluator's unbiased opinion should point the court towards pursuing the least invasive option, and the courts give great weight to the court evaluator's recommendations in their decision. The court evaluator can assist in mitigating the problems associated with the commencement of a guardianship proceeding as a fishing expedition. As a neutral party, the court evaluator can hear both sides of the story separately without disclosing information to the other side. The court evaluator can be utilized before the AIP even sets foot into the courtroom to determine whether the claims offered in the petition have merit and whether the case moves forward to a hearing. This could prevent petitioners from bringing frivolous claims and forcing the AIP to attend a lengthy court proceeding airing all his or her personal information in a courtroom. If the court evaluator speaks with each side and then to the judge, the judge may have an opportunity to converse with the parties to encourage withdrawal if the claim seems to lack merit.

### **E. Counsel**

Mental Hygiene Law section 81.10 outlines the requirements regarding the AIP's counsel.<sup>96</sup> The statute states that the AIP has a right to engage legal counsel of his or her choice.<sup>97</sup> Any attorney

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<sup>94</sup> *Id.* § 81.09(e).

<sup>95</sup> *Id.* § 81.09(f).

<sup>96</sup> *Id.* § 81.10.

<sup>97</sup> *Id.* § 81.10(a).



appointed to the AIP should continue his or her work until the court has determined that the AIP has retained independent counsel.<sup>98</sup> If the AIP is not represented by counsel at the time the order to show cause is issued, the court evaluator should assist the court in determining whether counsel should be appointed.<sup>99</sup> The court shall appoint counsel in a few circumstances unless it is satisfied that the AIP is represented by his or her own choice of counsel.<sup>100</sup> Some circumstances where the court appoints counsel to the AIP include if the AIP requests counsel and if the AIP wishes to contest the petition.<sup>101</sup> The court can also appoint counsel if the AIP does not consent to the authority requested in the petition.<sup>102</sup> An example is if the AIP does not consent to moving from where he or she currently resides to a nursing home or other residential facility.<sup>103</sup> Another example is if the petition alleges that the AIP needs major medical or dental treatment to which the AIP does not consent.<sup>104</sup> Lastly, the court can appoint counsel for the AIP if the petition requests the appointment of a temporary guardian, if the court determines that a possible conflict may exist between the court evaluator's role and the AIP's advocacy needs, or if at any time the court determines that appointing counsel would be helpful to resolve the matter.<sup>105</sup> Further, if the AIP refuses the assistance of counsel, the court may appoint counsel if the court is not satisfied that the AIP is capable of making an informed decision on the matter.<sup>106</sup> The court can appoint an attorney from Mental Hygiene Legal Services in the judicial department where the AIP resides.<sup>107</sup> The court determines reasonable compensation for the appointed counsel.<sup>108</sup> The AIP is liable for this compensation unless the court is satisfied that the AIP is indigent.<sup>109</sup> If the court appoints counsel, the court may dispense with

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* § 81.10(b).

<sup>100</sup> *Id.* § 81.10(c).

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

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

<sup>103</sup> *Id.*

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

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* § 81.10(d).

<sup>107</sup> *Id.* § 81.10(e).

<sup>108</sup> *Id.* § 81.10(f).

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

the appointment of a court evaluator or may vacate or suspend the appointment of a previously appointed court evaluator.<sup>110</sup>

Under Mental Hygiene Law section 81.10, any AIP is entitled to have the right to choose counsel; however, if the AIP decides to retain counsel, the court must determine that the AIP selected counsel freely and independently.<sup>111</sup> With this step, the court ensures that the AIP has competency to retain counsel. The courts should recognize that a person is not deemed incapacitated until the end of the hearing. If an AIP would like to appoint counsel, there should be no question as to the ability to do so. The courts should not question the AIP's ability to retain counsel when there has not yet been a determination of capacity. The court deciding whether the AIP can appoint his or her own counsel is, in a way, predetermining the capacity of the AIP. An AIP who lacks the capacity to retain counsel likely lacks the capacity to make many other decisions. Ultimately, the AIP does have the right to retain his or her own counsel and the courts should not assume incapacity if the AIP has chosen to exercise that right.

#### F. The Hearing

Mental Hygiene Law section 81.11 outlines the process of a guardianship hearing.<sup>112</sup> The statute states that a guardian can only be appointed after a hearing.<sup>113</sup> In any proceeding brought under Mental Hygiene Law Article 81, the parties involved can present evidence, call witnesses, and direct and cross-examine witnesses.<sup>114</sup> The statute further states that the AIP must be present at the hearing unless certain circumstances are met.<sup>115</sup> If the AIP cannot be physically present in the courthouse, the hearing can take place where the person resides.<sup>116</sup> The exceptions to this rule include if the AIP is not physically present in the state or if the court has enough information to clearly establish that the AIP is “completely unable to participate in the hearing” or “no meaningful participation will result from the person's presence at the hearing.”<sup>117</sup> The statute ensures the AIP is made aware of the factual

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<sup>110</sup> *Id.* § 81.10(g).

<sup>111</sup> *Id.* § 81.10(a).

<sup>112</sup> *Id.* § 81.11.

<sup>113</sup> *Id.* § 81.11(a).

<sup>114</sup> *Id.* § 81.11(b).

<sup>115</sup> *Id.* § 81.11(c).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* §§ 81.11(c)(1), 81.11(c)(2).

basis for the appointment of a guardian in the order of appointment.<sup>118</sup> If the AIP is present at the hearing, the statute requires the court to make the AIP aware of the purpose and consequences of the proceeding, the right to be represented by counsel, and that the court will appoint an attorney if the AIP wishes to be represented.<sup>119</sup> The court is still able to appoint counsel for the AIP if it finds that the AIP is not capable of making an informed decision regarding counsel.<sup>120</sup> Lastly, if the AIP raises issues of fact for the need to appoint a guardian and demands a jury trial on those issues, the court will order a trial by jury.<sup>121</sup> An AIP who does not demand a trial by jury is deemed to waive the right to trial by jury.<sup>122</sup>

As evident from the hearing process outlined in the statute, a hearing under Mental Hygiene Law Article 81 for the appointment of a guardian is very exploitative. The fact-finding nature of the hearing exposes many personal details about the AIP that he or she might otherwise want to keep private. The hearing is to decide whether the AIP has capacity, and it can be very difficult for the AIP to sit through a hearing and listen to all the reasons he or she lacks capacity. While the fact-finding nature of a guardianship proceeding is necessary to determine capacity, a petition should be brought laying out all of the facts. The AIP should not have to then release information to prove capacity because the petition lacked concrete evidence to find that the AIP is likely to suffer harm due to his or her decisions. The proceeding should be limited to the facts alleged in the petition, and the AIP should not have to then produce more information to defend capacity. It can be uncomfortable, saddening, and embarrassing for an AIP to have all aspects of daily life exposed in the courtroom. This is yet another reason that guardianship proceedings should only be brought when absolutely necessary. Alternatively, the court evaluator can assess all information in private to preserve the confidentiality of the information necessary to prove the lack of capacity to avoid the AIP's attending a lengthy proceeding reviewing each aspect of his or her personal life. If the court evaluator was responsible for gathering all necessary facts privately, and the information the court evaluator found was not

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<sup>118</sup> *Id.* § 81.11(d).

<sup>119</sup> *Id.* § 81.11(e).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* § 81.11(f).

<sup>122</sup> *Id.*

available to the other parties, this may prevent petitioners from bringing a guardianship proceeding solely as a fishing expedition.

#### IV. ARTICLE 81 PROCEEDINGS BROUGHT WITH FRIVOLOUS CLAIMS AND IMPROPER MOTIVES

There is a clear and important purpose for guardianship proceedings under New York Mental Hygiene Law Article 81. These proceedings protect the wellbeing of those who are unable to care for their personal needs or property.<sup>123</sup> However, the current procedure of Article 81 proceedings allows room for petitioners to bring frivolous claims to gain access to the AIP's confidential information. Typically, the AIP is a vulnerable, elderly person. These people should not be subject to a lengthy proceeding if the proceeding is unnecessary, and in turn, the Article 81 proceeding procedure should not permit the court to hear meritless claims. The Article 81 proceeding requires the court's review of confidential information sensitive to the AIP. The AIP should be the focus of the proceeding and ensuring the AIP's safety and wellbeing should be the only goal of the proceeding. Needless to say, many petitioners see an Article 81 proceeding as an opportunity to gain control over elderly relatives or to uncover confidential information for their own personal gain. The procedure of an Article 81 proceeding should be revised to ensure that meritless claims are not brought to court.

In *Matter of Judith T.*,<sup>124</sup> the petitioners brought a claim for improper purposes. Here, the court held that the petitioners did not establish with clear and convincing evidence that the AIP was incapacitated.<sup>125</sup> In this case, the court denied a daughter's petition for guardianship over her mother.<sup>126</sup> The AIP suffered a stroke and the petitioner argued that her mother exhibited paranoid, unrealistic, and delusional behavior due to her stroke.<sup>127</sup> The petitioner and her sisters all testified that they loved their mother and provided her with effort and care since her stroke.<sup>128</sup> The petitioner and her sisters admitted

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<sup>123</sup> Susan Greene, *Through the Looking Glass: A Personal Perspective on Conflicting Commitments*, 28 ELDER L.J. 1, 1 (2020).

<sup>124</sup> 58 Misc. 3d 747 (Nassau Cnty. Sup. Ct. 2017).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 750.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

that their mother was incapacitated at the time of her stroke, but waited eight years to bring a proceeding.<sup>129</sup> While the AIP may have been incapacitated at the time of her stroke, she was not at the time the proceeding was commenced, which was around the time the family was made aware their mother retained an attorney to commence a divorce proceeding to divorce their father.<sup>130</sup> The petitioner argued that the motive for commencing this guardianship proceeding was out of concern that her mother could not care for herself without assistance from an aide and that she was unable to manage her finances.<sup>131</sup> The court in this case noted that during the trial, some of the testimony was more appropriate for a matrimonial action and not a guardianship proceeding.<sup>132</sup>

The court evaluator in this case was steadfast in concluding that the AIP was not an incapacitated person.<sup>133</sup> The petitioner called the court evaluator as a witness, and he directly refuted the petitioner's claims.<sup>134</sup> The court stated that the petitioner must prove with clear and convincing evidence that the respondent is unable to provide for her personal needs or property management, and that the respondent lacks an understanding of the nature and consequences of her present physical limitations.<sup>135</sup> The court found that the petitioner did not meet this burden and, to the contrary, the evidence demonstrated that the AIP "is a highly intelligent and educated person who understands her physical limitations."<sup>136</sup> The court further acknowledged that even though the AIP had physical limitations, she did not want to be held back by her disabilities or "the fears and wishes of her daughters or husband she is seeking to divorce."<sup>137</sup>

This case is an example of a guardianship proceeding that was brought for reasons other than the AIP's wellbeing. While the petitioners may very well have cared about their mother and wanted to ensure her safety, it is likely that they also wanted to control the outcome of the divorce proceeding. They did not bring the guardianship

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 749.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

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

<sup>135</sup> *Id.* at 752.

<sup>136</sup> *Id.* at 752-53.

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

proceeding until eight years after their mother suffered her stroke.<sup>138</sup> It is possible that their mother did lack capacity at the time she suffered her stroke and that her daughters were very helpful in her recovery. However, that lack of capacity was not present at the time they commenced the hearing.<sup>139</sup> In the opinion, the judge noted that the case was “hotly contested” and lasted over a span of four months.<sup>140</sup> Four months is a long period of time for an AIP to be dragged through a stressful court proceeding. In its decision, the court stated that the AIP did not lack capacity and was in fact intelligent and able to understand the nature of her disability.<sup>141</sup> The judge even suggested that just because the daughters were fearful of their mother’s decisions did not mean their mother is incapacitated.<sup>142</sup> Mental Hygiene Law Article 81 should prevent the ability to bring this type of claim in court. The current Article 81 procedure allows for the commencement of these meritless proceedings and forces AIPs to go through months of court hearings to prove their capacity and retain their rights. Claims like this ignore the purpose of an Article 81 proceeding and should be dismissed.

An example of a claim where the petitioner cannot meet the clear and convincing evidence standard is when petitioners bring an Article 81 Guardianship Proceeding against an AIP who already has working power of attorney and healthcare proxy documents in place.<sup>143</sup> The law looks to the agent named in power of attorney and healthcare proxy documents to make decisions for the AIP so long as the agent and documents are still effective to protect the AIP.<sup>144</sup> In some cases, when a petitioner is unhappy with the person the AIP chose to act as an agent under a power of attorney or healthcare proxy, the petitioner brings an Article 81 Guardianship Proceeding and claims the current advance planning documents are not sufficient to care for the AIP. However, many times these claims are meritless, and the petitioner just seeks to control the AIP.

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<sup>138</sup> *Id.* at 750.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 748.

<sup>141</sup> *Id.* at 752-53.

<sup>142</sup> *Id.*

<sup>143</sup> Diller, *supra* note 12, at 503.

<sup>144</sup> *Id.*

In *Matter of Schwarz*,<sup>145</sup> working advance directives were in place at the time the petition was filed. In this case, the court held that the petitioner failed to establish that the appointment of a guardian for the AIP was the least restrictive means of intervention.<sup>146</sup> Here, the AIP was a fifty-seven-year-old rabbi and the petition was commenced by Samuel Schwarz, the AIP, and co-petitioner, Simon Schwarz, Samuel's brother, who acted as attorney for the AIP and himself.<sup>147</sup> The court recognized that the AIP did express a preference for the petitioner to become his guardian, but due to his lack of capacity, the AIP could not have been aware of the magnitude of support necessary to maintain his daily living and current level of care.<sup>148</sup> The AIP was bedridden due to multiple sclerosis that was exacerbated by diabetes and leukemia.<sup>149</sup> The petition alleged that the AIP was being wrongfully and unlawfully isolated and coerced by Helene Schwarz, the AIP's sister, and her husband, Jack Kartaginer, that the AIP's assets were unlawfully dissipated by Helene and Jack, and that the AIP's healthcare proxy and power of attorney procured by Helene were obtained under duress.<sup>150</sup> Helene then filed a cross-petition that ordered the dismissal of the petition because there was no need for a guardian as there were advance directives in place.<sup>151</sup> The court noted that in deciding whether a guardian should be appointed, the court is required by statute to consider "the sufficiency and reliability of all available resources to provide for the personal needs or property management without the appointment of a guardian."<sup>152</sup> The court further stated that "'available resources' include care providers as well as 'powers of attorney, health care proxies, and trusts.'"<sup>153</sup> The court observed that if incapacity was established, a guardian was only to be appointed as a least restrictive form of intervention.<sup>154</sup> The court evaluator in this case acknowledged that if the court found the advance directives sufficient that there may

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<sup>145</sup> 33 Misc. 3d 1203(A) (Kings Cnty. Sup. Ct. 2011).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*; N.Y. MENTAL HYG. LAW § 81.02(a).

<sup>153</sup> *Matter of Schwarz*, 33 Misc. 3d 1203(A) (2011); N.Y. MENTAL HYG. LAW § 81.03(e).

<sup>154</sup> *Matter of Schwarz*, 33 Misc. 3d 1203(A) (2011).

be no need to appoint a guardian.<sup>155</sup> To help the court assess the situation, the court utilized the resources of a court-appointed psychiatrist as well as personal interviews with the AIP.<sup>156</sup>

In this case, the court held that a guardianship over the AIP would not be the least restrictive means of intervention due to the existing advance directives.<sup>157</sup> The court noted that the evidence clearly showed that the AIP was incapacitated and unable to provide for his personal needs and property management.<sup>158</sup> The degenerative effects of multiple sclerosis made the AIP totally dependent on others for the activities of daily living.<sup>159</sup> The court emphasized that the longstanding practice is that “even if incapacity is established, a guardian is to be appointed only as a last resort and in a manner which is the least restrictive form of intervention.”<sup>160</sup> If an AIP has effectuated plans to manage his or her affairs and has sufficient resources to protect his or her well-being, there is no need to appoint a guardian.<sup>161</sup> The court found that the AIP’s existing advance directives provided him with high-quality medical care and allowed for the management of the AIP’s daily activities of living, personal needs, finances, and property management in a way that would constitute the least restrictive form of intervention.<sup>162</sup> The court also found that the claims that Helene misappropriated the AIP’s income or engaged in financial mismanagement of the AIP’s assets as power of attorney were meritless.<sup>163</sup> Lastly, the court determined that claims that the AIP was isolated were also unfounded and without legal or factual basis.<sup>164</sup> The court stated:

[d]issatisfied with the AIP’s existing advance directives, petitioner attempted to revoke the February 10, 2004 power of attorney that had been personally executed by the AIP, under false pretenses. It appears that the purpose of this proceeding was to settle scores and address unresolved issues among siblings rather than

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*



advance the best interests of the AIP. As a result of the foregoing, the court finds that the instant proceeding was commenced in bad faith.<sup>165</sup>

This case demonstrates how a guardianship proceeding can be brought because a family member is dissatisfied with the choices the AIP made while executing his advance directives, a purely selfish motive. The AIP in *Matter of Schwarz* suffered from numerous medical issues and should not have been subjected to a guardianship hearing. While the AIP was co-petitioner in this case, it was evident that the AIP lacked capacity. This may have prevented the AIP from understanding what he was doing by commencing this proceeding. Although the AIP was a co-petitioner, the judge acknowledged that this proceeding was brought because of family issues and that a prima facie case was not established. The court discussed at length the merits of the proceeding and a guardianship proceeding was not the appropriate avenue to rectify unresolved family issues.<sup>166</sup> The court ultimately respected the AIP's advance directives and did not revoke them, yet the Article 81 procedure itself allowed this claim to be brought despite working advance directives. The AIP was subjected to not only the hearing but also interviews with the court evaluator and a psychiatrist. The current procedure should be amended to ensure the court does not hear cases brought in bad faith like the case at hand. The court should rely on the court evaluator to ensure there is a valid claim before allowing any further investigation into the case. These types of cases should be stopped before they even begin.

The *Matter of S.K.*<sup>167</sup> is another example of a proceeding brought for the guardianship of an individual who already had advance directives in place.<sup>168</sup> In this matter, the AIP was eighty-four years old and living in a nursing home in The Bronx, New York.<sup>169</sup> The nursing home commenced this Article 81 proceeding because it stopped receiving the AIP's monthly Social Security income.<sup>170</sup> The AIP was Medicaid eligible and his wife applied for Medicaid on his behalf.<sup>171</sup> The AIP executed a durable power of attorney which named his wife

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> 13 Misc. 3d 1045 (Bronx Cnty. Sup. Ct. 2006).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1046.

<sup>170</sup> *Id.* at 1047.

<sup>171</sup> *Id.*

as his attorney-in-fact.<sup>172</sup> While the petitioner alleged that the AIP was incapacitated at the time he executed the power of attorney, there was no evidence to suggest this was true.<sup>173</sup> The AIP's wife received his Social Security income and was not turning it over to the nursing home because the AIP had a health insurance policy which was supposed to cover the AIP's care at the nursing home.<sup>174</sup> The AIP's nursing home bill exceeded \$35,000 at this time.<sup>175</sup>

The court in this case found that even though the AIP had functional limitations, his advance directives provided for his personal needs and property management.<sup>176</sup> The court stated that, "[t]he purpose for which this guardianship proceeding was brought, to wit, for the nursing home to be paid for its care of the person, was not the Legislature's intended purpose when article 81 of the Mental Hygiene Law was enacted in 1993."<sup>177</sup> The court stated that the AIP executed a power of attorney naming his wife as his attorney-in-fact and that it would be an abuse of the court's discretion to revoke a power of attorney unless the attorney-in-fact engaged in conduct that would justify that revocation.<sup>178</sup> In this case, there was no evidence presented that proved the AIP's wife was abusing her power as attorney-in-fact.<sup>179</sup> The cross-petition asserted that the AIP's wife did not turn over his monthly Social Security income because the AIP had a medical insurance policy that covered his nursing home care.<sup>180</sup> This is not evidence that his wife abused her power as attorney-in-fact.<sup>181</sup> Further, there was no evidence presented to demonstrate that the AIP lacked capacity when he executed his power of attorney.<sup>182</sup> The court found that the AIP effectuated a plan for the management of his affairs which eliminated the need to appoint a guardian.<sup>183</sup>

The court stated, "to the extent that the nursing home is seeking to be paid for the care it has rendered to the person, the petitioner must

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1048.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

seek a different avenue of redress for that relief as a guardianship application is inappropriate.”<sup>184</sup> The court further stated that whether an AIP is receiving skilled care or the cost of that skilled care is covered by a health insurance policy is not the proper subject of a guardianship proceeding.<sup>185</sup> The application for the appointment of a guardian for the person and property was denied in this matter and the petition was dismissed.<sup>186</sup>

Here, the nursing home filed the guardianship petition as a way to be paid, not because of concern for the personal needs or property management of the AIP. The AIP had working advance directives in place to account for a time when he lacked capacity.<sup>187</sup> The court in this case respected the AIP’s advance directives and did not appoint a guardian because it recognized that a guardian was unnecessary.<sup>188</sup> As the court stated, the forum for the nursing home to ensure it is paid is not a guardianship proceeding.<sup>189</sup> Courts can avoid hearing meritless claims by amending the Article 81 procedure to ensure there is a valid claim before the court hearing. If a petition alleges that there are advance directives in place, the court evaluator should investigate to see if the advance directives are working. If they are, there is arguably no need for a guardianship proceeding. The AIP and his family should not have had to go through a guardianship proceeding simply because the nursing home was worried about payment. Claims like these waste the AIP’s time and the court’s time and, in turn, should not be heard.

## V. “CIVIL DEATH” AND GUARDIANSHIP

One of the most significant powers granted to a guardian is the right to make decisions on behalf of the incapacitated person.<sup>190</sup> While the intention behind the transfer of the decision-making power to the guardian is to protect the incapacitated person, the incapacitated person loses the ability to make his or her own decisions regarding place of abode, medical decisions, financial choices, and his or her real and

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<sup>184</sup> *Id.* at 1049.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 1046.

<sup>188</sup> *Id.* at 1049.

<sup>189</sup> *Id.*

<sup>190</sup> Diller, *supra* note 12, at 501.

personal property.<sup>191</sup> This divestment of decision-making power “reduces the individual to the legal status of a child.”<sup>192</sup> The guardian does have a duty to the incapacitated person to “exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person.”<sup>193</sup> Still, the incapacitated person loses many basic civil rights that adults typically enjoy.<sup>194</sup> The divestment of basic civil rights due to guardianship is described as “civil death.”<sup>195</sup>

The comparison of the incapacitated person’s remaining rights to those of a child’s should be alarming. The same way a child would not be able to choose their place of abode, travel, marry, or make financial decisions is the way an AIP is treated as an adult. Those types of decisions are made for a child because it is presumed that the child does not have enough life experience to make those types of decisions, or the child is living under the restrictions of his parent’s finances. The AIP is not in this situation. Even though the incapacitated individuals are deemed unable to make decisions for themselves, their autonomy should not be reduced to that extent if it can be prevented. The court should consider ways to preserve the incapacitated person’s rights, including some of his or her decision-making powers, if possible. Total or excessive divestment can be prevented by ensuring that petitioners tailor the powers they request in the petition to the AIP’s needs, and further, that the judge presiding over each guardianship case ensures that the powers granted are not overbroad.

A guardian should be granted specific powers to assist the AIP in making decisions that the AIP is incapable of making on his or her own. Courts are correct to grant all personal needs and property management powers to AIPs who do lack the ability to make *all* personal needs and property management decisions. However, many times the AIP does not lack the ability to make all decisions and may be able to retain some rights to make decisions on his or her own. The courts should preserve as many powers as possible in the AIP that do not impact the AIP’s health or safety. For example, if the AIP has had no issue managing his mortgage payments, but has had significant trouble managing his stock account, the court should only grant the guardian

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<sup>191</sup> Lanier, *supra* note 24, at 159.

<sup>192</sup> *Id.* at 158 (asserting that there is a deprivation of basic rights adults enjoy).

<sup>193</sup> N.Y. MENTAL HYG. LAW § 81.20(a)(3) (Consol. 2014).

<sup>194</sup> Diller, *supra* note 12, at 502.

<sup>195</sup> *Id.* (arguing that the loss of basic civil rights is a significant deprivation of individual rights).

the ability to manage the AIP's stock account, not pay his mortgage. If later on the incapacitated person is unable to pay his mortgage, the guardian could request additional powers from the court. Using this process would ensure the guardian is only granted powers necessary at the time of appointment. If the goal of the guardianship is to provide the least restrictive means of help to the AIP, the total divestment of the decision-making power is not appropriate in cases where the incapacitated person retains some decision-making ability. A possible solution is granting the guardian the power to *aid* the decision-making process of the incapacitated person to protect the AIP and ensure his or her decisions are safe. The guardian can veto a decision the AIP makes that may put him in harm's way, but allow the AIP to continue making choices that will not have a negative impact on the AIP's health or finances. This approach would still allow the guardian to protect the best interests of his or her ward but would also allow the incapacitated person to have more decision-making autonomy.

The statute's separation of personal needs and property management powers allows the court to grant decision-making powers to a guardian in either one or both categories.<sup>196</sup> With this being said, "most guardianship petitions request a review of decision-making capacities under both broad categories, and most guardianship orders remove all rights, even where this removal might not be necessary."<sup>197</sup> The concept of limited guardianship can maximize the incapacitated person's autonomy where a guardianship is the only means to protect an incapacitated person.<sup>198</sup> Limited guardianship allows the judge to tailor the powers granted to the guardian and avoid granting overbroad powers.<sup>199</sup> Limited guardianship is almost always an available option, yet judges rarely utilize it.<sup>200</sup> There is a continued judicial preference for plenary power because judges often believe that appointing plenary powers to the guardian is the best way to meet the needs of the

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<sup>196</sup> Lanier, *supra* note 24, at 159.

<sup>197</sup> *Id.* (citing Fred Bayles, *Guardians of the Elderly: An Ailing System Part I: Declared Legally Dead' by a Troubled System*, ASSOCIATED PRESS (Sept. 19, 1987), <https://apnews.com/article/1198f64bb05d9c1ec690035983c02f9f>). See also Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 219 (2007).

<sup>198</sup> Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 740 (2002).

<sup>199</sup> *Id.* at 741.

<sup>200</sup> *Id.*

incapacitated person and conform to pressures of the judicial system.<sup>201</sup> The needs of the AIP are paramount in a guardianship proceeding, but unfortunately, they do not end up being the only judicial concern.<sup>202</sup> For example, plenary guardianship is efficient when compared to the time it would take the court to tailor the powers granted to a guardian to each individual AIP.<sup>203</sup> By appointing plenary powers, both judges and litigants save time.<sup>204</sup> This more efficient process is also less costly for litigants.<sup>205</sup> Certainly, it is easier for the courts to treat each case similarly and grant plenary guardianship in each case for convenience; however, this is a grave disservice to all AIPs. It is evident that even with systems in place to protect as many rights as possible for the AIP, courts do not always ensure this protection.

## VI. A PROPOSAL FOR A MORE EQUITABLE PROCEDURE

The legislature should change an Article 81 proceeding to ensure the AIP's interests remain at the forefront of the proceeding and prevent petitioners from bringing matters with frivolous claims. First, the courts should better utilize the court evaluator to ensure that guardianship proceedings are not brought as a fishing expedition. The court evaluator can investigate the merits of the claim before an AIP even sets foot into a courtroom. This will ensure that the goal of the proceeding is to protect the best interests of the AIP. Under this system, a court evaluator who discovers that the petition is frivolous, lacks probable cause, or lacks clear and convincing evidence could express this before the AIP is dragged through a court hearing. The court evaluator, through investigation or a more detailed petition, would help decide whether the case should move forward to a hearing.

Second, it should be a requirement that all petitions include all information relevant to making a determination of capacity. The petitioner should not be digging up facts through the hearing to support this determination. The court should not hear cases that do not have a

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<sup>201</sup> *Id.* (citing Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. TOL. L. REV. 189, 203 (1994) (asserting that it is uncomplicated for courts to grant a plenary guardianship as it accounts for any issues that may arise in the future)).

<sup>202</sup> Frolik, *supra* note 198, at 741.

<sup>203</sup> *Id.* at 743.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

sufficient factual basis to raise concern about capacity. The AIP should not have to release information to prove capacity simply because the petitioner did not have enough information in his or her petition to support a determination of incapacity. In addition, if the AIP has advance directives in place, the petition should set forth reasons why those advance directives are insufficient to protect the AIP. If there are working advance directives in place, the court should not conduct a hearing.

The statute should be changed to require probable cause to commence a guardianship proceeding. If the statute had a probable cause requirement, the petitioner could only commence a proceeding upon a showing of a reasonable basis to believe the AIP lacks capacity. Petitioners should be more mindful that the powers they request in the petition are not overbroad. The court tends to lean towards granting a plenary guardianship, which often grants guardians more powers than necessary to care for the AIP. Petitioners must be more specific in requesting powers tailored to the needs of the AIP instead of requesting any and all possible powers. Further, if a petitioner does request all powers, the court should be careful to only grant all powers when necessary. Any time it is possible, the powers should be tailored to the specific needs of the AIP. With these changes to the procedure, courts can preserve the purpose of the proceeding, and therefore, AIPs will not be exposed to an extensive and exploitative proceeding unless absolutely necessary.

## VII. CONCLUSION

Guardianship proceedings brought under New York Mental Hygiene Law Article 81 are very useful when commenced to protect the personal needs and property management of an incapacitated person.<sup>206</sup> Guardianship, when utilized in a good faith manner, is an effective way of ensuring the safety and wellbeing of an incapacitated person. However, guardianship proceedings can be very sensitive for an AIP and expose some of the AIP's most confidential information. Guardianship proceedings should only be brought as a last resort to take care of an AIP. These proceedings should not be brought with frivolous claims for motives other than the best interests of the AIP. The AIP's care should be the paramount issue of the proceeding, but

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<sup>206</sup> Greene, *supra* note 123, at 1.

often, petitioners utilize guardianship proceedings to fish for information on relatives or as a means to exercise control over an elderly person. The current statute, New York Mental Hygiene Law Article 81, subjects a vulnerable population to lengthy court proceedings and airs their personal information in a public setting. The statute should be amended to ensure that the protection and care for the AIP remains paramount to the proceeding and that meritless claims are not heard in court. There should be no room to bring frivolous claims or family fishing expeditions, especially when such a vulnerable population is at risk. Further, guardians are too often granted overbroad powers that leave the AIP with little to no control over his or her own life. When the outcome of this proceeding strips an individual of fundamental rights, the courts should be doing everything in their power to ensure this is only happening for good faith reasons and in the most necessary circumstances. The courts should, where possible, tailor the powers granted to a guardian to suit the needs of each individual AIP. This would guarantee that the AIP's wishes and best interests are preserved. Making it more difficult to bring a frivolous claim or fishing expedition, paying closer attention to the powers requested in the petition, and granting only the powers necessary to protect the AIP would be vital changes. These changes will protect future AIPs from unnecessary proceedings and prevent them from being stripped of rights they deserve to retain.