Article 81 Enactment and Its Impact on the Aging Women Population

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Recognizing the increased need for long term care solutions with the coming of age of the Baby Boomers, the government is slowly reviving its policies surrounding long term care. Despite the public push towards activism, many of these programs have been stymied by the pitfalls of bureaucracy which has been slow in response. Recent efforts at rejuvenation of guardianship laws have injected the elderly population with a renewed sense of dignity and helped those citizens regain personal autonomy. Because women fill the role of the caregiver more frequently than men and since elderly women typically live longer than their male counterparts they are also more likely to be the subject of a petition to award guardianship. Thus, the recent developments in the guardianship laws are of particular importance to women of all ages.

According to a recent study by the Economics and Statistics Administration, women outnumbered elderly men at every age. For example, in 1994, elderly women, those defined as aged 65 or more, outnumbered elderly men by a ratio of 3 to 2. As the elderly advance in age this ratio increases exponentially resulting in 5 women to every 2 men at age 85, based on 1994 statistics. Poignantly stated, the study reveals that as people age, “most elderly men have a spouse for assistance, especially when health fails, (but) most elderly women do not.” As a result of this more elderly women become the subject of guardianship petitions and require assistance with their daily care, both personal and financial.

2 Id.
3 Id.
4 Id.
Health officials are confronted with the notion that chronic illness plagues each passing generation of elderly women. Limitations on activities due to chronic conditions increase exponentially with age, regardless of gender. Moreover, limitations on adults’ mental capacity such as progressive dementia and Alzheimer’s disease ravage the elderly and leave them vulnerable to fraud, financial mismanagement, anger and confusion. The increase of these conditions present a unique question of how to balance the efficacy needs of the individual and the safety of the person, the public and the caregivers, who are typically female relatives.

New York, like all other states, has enacted certain statutes to address these needs unique to the chronic care generation of elderly. This legislative initiative is evidenced by the evolution of the guardianship statutes. Derived from the state power of parens patriae, the United States Supreme Court recognized the government’s need to care for those unable to care for themselves as early as 1890. New York had previously enacted committee and conservatorship statutes that depended on a legal conclusion of general incompetency. Conservatorships were designed under New York law to appoint a fiduciary responsible to manage, or conserve, his or her ward’s assets while committees were appointed with plenary powers once the ward was deemed incompetent. This process was time consuming, costly, and often degrading to the person on whose behalf the proceeding was allegedly initiated.

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7 Id.
9 N.Y. MENTAL HYG. Law 77, 78 (McKinney’s 2004)
Due to stereotypes surrounding guardianships embedded in common law culture combined with the exposure of widespread abuse of powers, many reformists called for changes in existing guardianship laws.\textsuperscript{11} New York State was no different. Activists recognized that guardianship should be the last resort because it essentially strips the ward of her ability to remain autonomous and independent. Many reformers believed that even after the decision was made to petition the court for a surrogate decision maker, this individual's powers should be limited only to those areas of deficiency that the ward was experiencing.\textsuperscript{12}

As revealed in an examination of the Memorandum of the Law Revision Commission contained in the Governor's bill jacket for the passage of Article 81, the primary goal in reforming this body of law was to "fill the vacuum" that results from the "one size fits all" approach embodied in the old system of committees and conservatorships.\textsuperscript{13} Put another way, the Law Revision Commission feared that the existing statutes were either too narrow or too expansive and a legislative gap ensued. The Commission further was of the belief that Articles 77 and 78 of the Mental Hygiene Law "straight jacketed the judiciary rather than provide it with the needed flexibility and guidance."\textsuperscript{14} Because of this, many judges were attempting to overcome this gap that resulted from the inefficiencies of the statutes and legislate from the bench.\textsuperscript{15} The judges sitting on the trial level and the intermediate appellate level benches were enumerating which powers were granted upon the committee in the final order which

\begin{footnotes}
\item[14] Id.
\item[15] See In re Millman, 522 N.Y.S. 2d 617 (2nd Dep't. 1987)
\end{footnotes}
discretionary authority was not granted under the existing statutes.\textsuperscript{16} Recognizing the lower court's efforts to ameliorate seemingly bad legislation, the New York State Court of Appeals determined that these "well-intentioned efforts of the judiciary (were) inappropriate".\textsuperscript{17} The Court of Appeals continued to demonstrate the difficulty with which loved ones were confronted with if they desired to make even the most limited decisions regarding the "person" of the ward. The Court stated that these individuals were only then afforded the option of an "excessive remedy" that required the showing of "a psychopathology of such magnitude to justify the loss of all decision-making powers."\textsuperscript{18} While appropriate in the most extreme situations many individuals did not require such drastic measures and were emotionally injured by the resulting stigma that followed such a legal determination. In light of the foregoing, and with a more conservative spirit of \textit{parens patriae}, the New York State legislature determined that "the needs of the persons with incapacities are as diverse and complex as they are unique to the individual".\textsuperscript{19} Because the committee and conservator statutes did not effectively address these needs and the changing culture of America that placed increasing emphasis on retaining individual autonomy, the legislative modified the statutes accordingly.

New York changed the way it looked at those in need of surrogate decision makers and underwent a massive revision of its guardianship laws in 1992.\textsuperscript{20} By enacting Article 81 of the Mental Hygiene Law, New York legislators, aided with the overwhelming expertise of the Law Revision Commission, tipped the balance of the scales towards preservation of individual autonomy. The Bill repealed Articles 77 and 78 of the Mental Hygiene Law and replaced them with one solitary Article designed to address collectively the needs of an incapacitated individual. The statutes

\textsuperscript{16} Id.

\textsuperscript{17} \textit{Matter of Grinker (Rose)}, 77 N.Y. 2d 703 (1991).

\textsuperscript{18} Legislative Bill Jacket citing \textit{Memorandum of Eugene Kerr, M.D.}, Office of Psychiatry, New York City Department of Human Resources 1.

\textsuperscript{19} N.Y. MENTAL HYG. Law 81.01 (McKinney 2004).

\textsuperscript{20} Id. At 164.
contained in Article 81 require that "the guardians have only those powers necessary to assist the incapacitated person to compensate for any limitations" and the powers must be "tailored to the individual needs of an incapacitated person which takes into account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life." This notion of tailoring is encompassed in the Due Process centered analysis that the new laws were based on.

Research suggests that the Due Process components of Article 81 result in the substantial appreciation for self-determination that the new statute seeks to retain. More specifically, the statute provides "cautionary" notice requirements to the person alleged to be incapacitated as exemplified in 81.07. This section requires that the Order to Show Cause on which the petition for guardianship is brought contain a notice in bold, large typeface directed to the individual and the seriousness of the underlying proceeding. This notice section explains the nature of the rights that the alleged incapacitated person is afforded under Article 81 in an almost *Miranda*-like fashion. Moreover, that statute requires that the person that is the subject of the proceeding appear in court unless proof of extraordinary circumstances satisfies the Court Evaluator and ultimately the presiding judge. Further, the court will only render the legal conclusion of incapacity as to the particular areas of the individual's deficiency upon clear and convincing evidence.

Another noteworthy change in the new laws is the separate positions of the court appointed attorney for the alleged incapacitated person and the Court Evaluator. The court appointed attorney acts as an advocate for the individual whereas the responsibility of the Evaluator is to be the proverbial eyes and ears

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21 *Id.*
23 *Id.*
24 N.Y. MENTAL HYG. 81.12 (McKinney 2004); See *In re Seidner*, N.Y.L.J., Oct 8, 1991 (Nassau Co.).
of the court. The Evaluator acts as a neutral liaison between the court and the alleged incapacitated person and the surrounding circumstances. However, in order to satisfy Due Process requirements, if a substantial liberty interest is at stake the court will appoint an attorney for the individual. While these two positions are certainly important, absent extenuating circumstances or the specific request of the person alleged to be incapacitated, the court typically will only appoint an Evaluator to preserve the potential ward’s funds. However, it should be noted that this goal may be also accomplished by the court’s waiver of the appointment of a court evaluator under 81.10.

If the presiding judge makes a determination upon clear and convincing evidence that the individual is incapacitated to the extent required to appoint a guardian the judge will tailor her Order to come within the stated purpose of the statute. The Order will appoint a guardian, typically upon the request of the incapacitated person or upon recommendation of family members, and specify the areas in which the guardian has authority to act. This tailored authority is juxtaposed against the plenary powers enjoyed by Article 77 and 78 appointees. The guardian is given highly specific direction with regard to every facet of property and financial management such as entering contracts, making gifts, trusts, or wills, and investing, in addition to aspects of daily life such as education, driving, residence, and travel. Thereafter, the appointed guardian is responsible to the court in terms of educational requirements in addition to initial reports and annual accountings.

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28 Von Strange, citing N.Y. MENTAL HYG. Law 77.19, 78.15 (McKinney 2004).
29 Id.
30 Id.
Although the passage of Article 81 certainly improved the arena of guardianship law, it is not a perfect system. Some ten years after the passage of the statute, continual efforts are being made by the Law Revision Commission and various lobbyists to fine tune the statute. The various measures taken to protect the autonomy of the alleged incapacitated person create numerous opportunities for legal appointments, therefore the area of guardianship law has become increasingly controversial. Despite recent efforts by the Honorable Chief Justice Kaye of the New York State Court of Appeals to reform fiduciary fiefdoms promulgated by the Office of Court Administration Part 36 rules, areas prone to abuse still remain. To the detriment of the reputation of the legal profession, many attorneys continue to view the statutory commissions awarded guardians as supplement to fees. This appears to be an area of concern that the reforms of 1993 did not remedy.

The overall purpose of the legislature, however, has been met with success. The Article 81 reform, which as the statistics show affects women more commonly than men, constitutes a significant step forward towards making sure the needs of our elderly are not ignored or left at the mercy of inflexible laws. Legislative efforts that afford our aging women greater care and protection need to continue so that we can make sure that those who care and nurture us the most are not forgotten.