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ARTICLE 81 OF THE MENTAL HYGIENE LAW: DESIGNED TO PROTECT THE ELDERLY, BUT PREJUDICING CHILDREN'S RIGHTS

Rosann Torres**

Guardianship¹ is a trust of the most sacred character. From the Guardian the law exacts absolute fidelity and will be satisfied with nothing less.²

INTRODUCTION

Article 81 of New York's Mental Hygiene Law³ was enacted as a result of heated debate concerning the abusive powers

* N.Y. MENTAL HYG. LAW § 81 (McKinney 1997).

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¹ "Guardianship" is the "office, duty or authority, given by a [c]ourt [o]rder to [a] [g]uardian [and] may be referred to as the total property and assets coming under the authority of the [g]uardian." Leona Beane, *Glossary for Guardians: Key Words, Terms, Phrases and Concepts*, in GUARDIANSHIP LAW: ARTICLE 81 - 1997 TRAINING TO OBTAIN CERTIFICATION, 1997, 247, 257 (PLI Litig. & Admin. Practice Course Handbook Series No. D-258, 1997).

² *In re Bond*, 297 N.Y.S. 493, 497 (App. Div. 1937).

³ N.Y. MENTAL HYG. LAW § 81 (establishing the procedure for the appointment of a guardian for the personal needs or property management of a judicially declared incapacitated person). Article 81 states that a guardian of the person is appointed by the court to provide for the personal needs of the incapacitated person. *Id.* § 81.22. The powers of a guardian of the person include many provisions that are rendered absurd when the statute is applied to children. For example, the guardian of the person is empowered to determine whether the incapacitated person should possess a license to drive. *Id.* § 81.22(4). Also, a guardian of the property is appointed by the court with authority to manage the property and financial affairs of the incapacitated person. *Id.* § 81.21.

exercised by court-appointed conservators⁴ and committees⁵ over the person and property of their elderly wards⁶ under Articles 77 and 78 of the Mental Hygiene Law.⁷ Under these repealed guardianship statutes, an elderly person's due process rights were frequently violated by a judiciary which often took over three months to appoint a conservator or committee to manage his or her affairs.⁸ Additionally, in Article 77 and 78 hearings, the guardian

⁴ See N.Y. MENTAL HYG. LAW § 77 (McKinney 1988) (repealed 1993) (defining a conservator as a person appointed by the court to manage the money and property of an incapacitated person); see also *In re Cantor*, 363 N.Y.S.2d 79, 79 (Sur. Ct. 1975) (granting petitioner, who had been appointed as a conservator under Article 77, letters of administration of the estate of the conservatee's brother). The *Cantor* court outlined the powers of the Article 77 conservator:

Article 77 of the Mental Hygiene Law enacted in 1972 has many beneficent purposes. The most important is to provide property management for those persons who fall short of qualifying for committeeships [under Article 78] because they may not be said to be legally insane, but who are unable to manage their own affairs because of other debilitating factors. Another is to overcome the reluctance of relatives or other interested persons to apply for the appointment of a committee upon a judicial finding of incompetence. The appointment of a conservator to manage a person's property carries with it no stigma. In most cases, as here, it is purposed to establish a fiduciary to care for the property of a person who by reason of advancing age cannot perform this function himself.

Id. at 80.

⁵ See N.Y. MENTAL HYG. LAW § 78 (McKinney 1988) (repealed 1993). Article 78 established the procedure for the appointment of a committee, who is defined as a guardian for an incapacitated person who has been civilly committed. *Id.* See also Rose Mary Bailly, *Introduction to Article 81 of the Mental Hygiene Law: Guardianship for Personal Care and/or Property Management*, in ARTICLE 81 OF THE MENTAL HYGIENE LAW 3, 4 (New York State Bar Ass'n ed., 1993) (defining a committee under Article 78).

⁶ A "ward" is a person, especially a child or an incompetent individual, placed by the court under the care and supervision of a guardian or conservator. BLACK'S LAW DICTIONARY 1583 (6th ed. 1990).

⁷ See N.Y. MENTAL HYG. LAW § 77 (outlining the procedures for the appointment of a conservator to safeguard the property of an incapacitated person); N.Y. MENTAL HYG. LAW § 78 (detailing the procedures for the appointment of a committee to protect the welfare of an incapacitated person).

⁸ See Julia C. Spring & Nancy Neveloff Dubler, *Conservatorship in New York State: Does it Serve the Needs of the Elderly?*, THE RECORD, Apr. 1990,

ad litem⁹ often waived the presence of alleged incapacitated adults even though they were often capable of making their own decisions. Advocates of elder law reform¹⁰ vigorously argued that Articles 77 and 78 must be repealed to remedy the abuses being suffered by elderly persons under these guardianship statutes.¹¹

at 288. This article details the American Bar Association's Committee on Legal Problems of the Aging's analysis of data from 92 conservator and committee cases in the Bronx, Brooklyn and Manhattan. *Id.* The report highlights four primary deficiencies of the old guardianship system. *Id.* at 300. First, the process was very slow. *Id.* Second, in 90 of the 92 cases the guardian ad litem waived the presence of the alleged incapacitated person at the hearing. *Id.* Third, in appointing conservators, judges did not use specific directives to limit the conservator's powers. *Id.* Finally, post-appointment monitoring of conservators and committees considered only the income and disbursements of the incapacitated adult. *Id.* The personal welfare of the ward was not monitored. *Id.*

⁹ A guardian ad litem is a "[p]erson appointed by the court in a proceeding that is in litigation, to protect the interests in the litigation of an infant, incompetent, or missing or absent person, or anyone else who is under a disability, who is a party to, or interested in the litigation." Beane, *supra* note 1, at 256.

¹⁰ See Bailly, *supra* note 5, at 4 (describing how advocates of elder law reform such as the Brookdale Center on Aging, the largest multidisciplinary gerontology center in New York City, as well as members of the Bar, the judiciary, and practitioners contributed to the repeal of Articles 77 and 78 through legislative debate).

¹¹ See Bailly, *supra* note 5, at 3 (describing the series of debates that catalyzed the repeal of Articles 77 and 78); see also *In re Appointment of a Conservator of the Property of Virginia Fisher*, 552 N.Y.S.2d 807 (Sup. Ct. 1989). The *Fisher* case involved a proceeding to appoint a conservator for Virginia Fisher, an incapacitated 83 year-old woman. *Id.* at 808. Ms. Fisher suffered from uterine cancer and was admitted to Lenox Hill Hospital for surgery and radiation treatment. *Id.* While recovering from surgery, a petition was brought by the Department of Social Work (the "Department") at Lenox Hill to appoint a conservator to manage Ms. Fisher's property and funds. *Id.* at 809. The Department also requested that the court issue an order requiring Ms. Fisher to accept the services of a home attendant or social worker. *Id.* The court denied the Department's request on the grounds that the appointment of a conservator to preserve the property of persons unable to manage their affairs does not authorize that conservator to make health care and placement decisions that infringe upon the conservatee's personal liberty. *Id.* at 810. As a result, the court held that until Ms. Fisher is adjudicated as incompetent to manage her affairs under Article 78, she must be permitted to make her own healthcare decisions.

Catalyzed by these advocates for the elderly, and after four years of legislative debate, Article 81 was enacted in 1992.¹² The focus of Article 81 was to protect the elderly by establishing the procedures for the appointment of a guardian¹³ dedicated to the diverse and complex needs of incapacitated adults.¹⁴ The significance of this statute has been magnified by New York's growing elderly population and its need for an effective guardianship system.¹⁵

Since its enactment, Article 81 has functioned successfully as a guardianship statute for the elderly.¹⁶ However, some courts have begun to apply Article 81 to guardianship proceedings for minors.¹⁷ Because Article 81 is an "Adult Guardianship Statute"¹⁸

Id. at 815.

¹² See Bailly, *supra* note 5, at 3 (describing the focus of Article 81's enactment).

¹³ A guardian is defined as "[a] person (18 years of age or older) or a corporation or public agency appointed by the [c]ourt who is lawfully invested with the power and charged with the duty of taking care of the person and/or managing the property and affairs of another person who is determined by the [c]ourt to be incapacitated." See Beane, *supra* note 1, at 256.

¹⁴ See N.Y. MENTAL HYG. LAW § 81.01 (McKinney 1997).

¹⁵ See generally Rose Mary Bailly & Robert L. Geltzer, *Mental Hygiene Law - Article 81: A Judicial Deskbook in GUARDIANSHIP LAW: ARTICLE 81 - 1997 TRAINING TO OBTAIN CERTIFICATION, 1997*, 35 (PLI Litig. & Admin. Practice Course Handbook Series No. D-258, 1997) (noting that the repeal of Articles 77 and 78 was necessary in order to establish a guardianship system under Article 81 to accommodate the needs of New York's elderly population which "has been increasingly sustained by extraordinary medical technologies").

¹⁶ *Id.*

¹⁷ *In re Addo*, N.Y.L.J., Sept. 30, 1997, at 26 (Sup. Ct. 1997) (holding that an Article 81 proceeding is an appropriate means to appoint a guardian for a mentally retarded child); *In re Lavecchia*, 650 N.Y.S.2d 955, 955 (Sup. Ct. 1996) (converting an Article 81 proceeding to an Article 17 guardianship proceeding for a physically disabled thirteen year-old); *In re Marmol*, 640 N.Y.S.2d 969, 969 (Sup. Ct. 1996) (holding that an Article 81 proceeding is an appropriate vehicle for safeguarding the assets of seven year-old Adonis Pineda); *In re Le*, 637 N.Y.S.2d 614, 615 (Sup. Ct. 1995) (determining that an Article 81 proceeding to appoint a guardian for a ten year-old functioning at least one grade level below normal is appropriate).

¹⁸ See *Marmol*, 640 N.Y.S.2d at 972. Although the *Marmol* decision was commenced for an infant, the court noted that Article 81 is an "Adult

designed for a self-supporting elderly person,¹⁹ commencing

Guardianship Statute” which contemplates a self-supporting adult. *Id.*

¹⁹ *Id.* at 972. Under Article 81, “self-supporting adults” have the monetary and property means to provide for their care, but a guardian is necessary to manage these funds. *See* N.Y. MENTAL HYG. LAW § 81.02 (outlining the powers to appoint a guardian of the person and property of a self-supporting adult). The guardian of the property of an incapacitated person must locate, safeguard, transfer and bring together all of the assets of the incapacitated person upon being commissioned (by the Clerk of the Court) as guardian of the property. *See* Beane, *supra* note 1, at 251. The guardian must then open separate guardianship bank and brokerage accounts, located in New York State only, under the ward’s social security number. *See* Margaret Ann Bomba, *Legal Duties and Responsibilities of a Guardian*, in *GUARDIANSHIP LAW: ARTICLE 81 - 1997 TRAINING TO OBTAIN CERTIFICATION*, 1997, 350 (PLI Litig. & Admin. Practice Course Handbook Series No. D-258, 1997). The guardian then must obtain, save and pay all bills necessary for the care and maintenance of the ward. *Id.* at 351. This system contemplates a self-supporting adult because the funds for the maintenance of the ward derive from the ward’s social security benefits, pension benefits, interest income or principal. *Id.* The court monitors the guardian’s transactions by having the guardian file an Annual Report by May 31 each year. *See* N.Y. MENTAL HYG. LAW § 81.31. The Annual Report contains a true and full account of all of the guardian’s receipts and disbursements for the calendar year. *See* Bomba, *supra*, at 423-25. The Annual Report contains the following schedules:

- 1) Schedule A sets forth the principal account with which the guardian is charged pursuant to last year’s Annual Report as well as any additional principal which came into the guardian’s hands for the calendar year.
- 2) Schedule A-1 is a statement of all income which came into the guardian’s possession for the calendar year.
- 3) Schedule A-2 is a statement of all capital gains which occurred for the calendar year.
- 4) Schedule B is a statement of all disbursements made during the calendar year, including administrative expenses and expenses for the care and maintenance of the IP [incapacitated person] for the calendar year.
- 5) Schedule B-1 is a statement of all capital losses.
- 6) Schedule C is a statement of all assets remaining on hand as of December 31 of the calendar year for which the accounting is prepared.
- 7) Schedule D is a statement of claims against the estate which are limited to unpaid administration expenses.
- 8) Schedule E is a statement of all changes to the principal account.

guardianship actions for minors under Article 81 has raised questions about the statute's ability to protect children personally and financially.²⁰

This Note argues that by applying Article 81 to guardianship proceedings for children, some New York courts have misinterpreted both the meaning and intent of the statute.²¹ An examination of cases in which Article 81 was applied to children illustrates that while the judiciary may desire to protect children, the ultimate decision of whether minors are covered under Article 81 must remain with the New York State Legislature.²² Part I of this Note examines the history of Article 81, and reveals that the statute was born out of the need to protect elderly persons from being committed to nursing homes by conservators who only had authority over their finances. Part II analyzes the plain meaning of the language of Article 81, while Part III examines the legislative intent behind the enactment of Article 81. Lastly, Part IV discusses the four reported cases involving Article 81 proceedings for minors, giving particular emphasis to *In re Addo*.²³ This Note concludes that in light of the problems with applying Article 81 to minors, the statute should be amended to include infants, or in the alternative, the entire guardianship process should be reformed to address the specific needs of minors through the implementation of mediation.

See Bomba, supra, at 423-24. The Annual Report is reviewed by the court, as well as a court evaluator. *See Bomba, supra*, at 423-24. A court evaluator is a "person appointed by the [c]ourt whose role in the Guardianship proceeding is to investigate" the accuracy and veracity of the Annual Report. *See Beane, supra* note 1, at 252.

²⁰ *See* N.Y. MENTAL HYG. LAW § 81.02 (McKinney 1997) (describing the concerns raised in the legal community regarding whether Article 81 should be employed for an infant when well-developed case law and rules exist under C.P.L.R. 12).

²¹ *See* discussion *infra* Part II.

²² *See infra* Part V.

²³ *In re Addo*, N.Y.L.J., Sept. 30, 1997, at 26 (Sup. Ct. 1997).

I. THE HISTORY OF ARTICLE 81

Article 81 was enacted in July 1992 and became effective on April 1, 1993.²⁴ Article 81 repealed the former guardianship statutes, Articles 77²⁵ and 78,²⁶ by creating a procedure for the appointment of a guardian whose powers are tailored to the “personal wishes, preferences, and desires”²⁷ of an elderly incapacitated person.²⁸

Article 81 repealed Articles 77 and 78, after a study by New York’s Law Revision Commission²⁹ (“Commission”) determined that Articles 77 and 78 did not provide elderly incapacitated persons with adequate protection.³⁰ In addition, the Commission

²⁴ See N.Y. MENTAL HYG. LAW § 81.01 (outlining the legislative history of Article 81).

²⁵ See N.Y. MENTAL HYG. LAW § 77 (McKinney 1988). Article 77 outlined the procedures for the appointment of a guardian of the property of an incapacitated person. *Id.* Under Article 81, a guardian of the property is described as one who is appointed by the court with authority to manage the property and financial affairs of the incapacitated person. See N.Y. MENTAL HYG. LAW § 81.21.

²⁶ See N.Y. MENTAL HYG. LAW § 78 (McKinney 1988). Article 78 outlined the procedures for the appointment of a committee of an elderly incapacitated person. *Id.* Under Article 81, a committee is now defined as a “guardian of the person” who is appointed by the court to provide for the personal needs of the incapacitated person. N.Y. MENTAL HYG. LAW § 81.22 (McKinney 1997).

²⁷ *Id.* § 81.01.

²⁸ See *id.* § 81 (establishing a guardianship system to meld, when appropriate, into one person, to wit, the guardian, all powers formerly divided between the conservator under Article 77 and the committee under Article 78). See also Julie M. Solinski, *Guardianship Proceedings in New York: Proposals for Article 81 to Address Both the Lack of Funding and Resource Problems*, 17 PACE L. REV. 445, 447-49 (1997) (stating that Article 81 replaced Articles 77 and 78 because of the inflexibility of the dual structure of the conservatorship and committee system in addressing the needs of persons with incapacities).

²⁹ Established in 1934, the New York State Law Revision Commission is the oldest agency in the common-law system devoted to law reform through legislation. Bailly, *supra* note 5, at 19.

³⁰ The Law Revision Commission determined that:

[T]here is a consensus among the members of the Judiciary, the Bar, and representatives of state, local and private agencies who work with

found that Article 77 was inadequate because it primarily regulated the conservator's control over the money and property of an elderly incapacitated person.³¹ The personal needs of an elderly incapacitated person were not addressed under this article.³²

Alternatively, Article 78 authorized the appointment of a committee that could exercise total personal control over an elderly incapacitated person, provided a court found the person totally incompetent.³³ However, "[a] finding of incompetence was a drastic measure, which could deprive individuals of their civil rights."³⁴ Consequently, courts were reluctant to employ Article 78 to appoint a committee for an elderly incapacitated person.³⁵ Instead, courts favored Article 77 because it provided a less drastic

disabled *older adults* that the most helpful method of relieving this problem would be the creation of a single statute with a standard for appointment which focuses on the needs of the individual and permits the appointment of a guardian who can make decisions regarding either the person or the property of the person, or both if appropriate.

Article 81 of the Mental Hygiene Law: Hearings on S.4498C Before the Committee on Mental Hygiene (1992) (memorandum of the Law Revision Commission) (emphasis added); see also EDWIN KASOFF ET AL., *ELDERLAW AND GUARDIANSHIP IN NEW YORK* § 11:2, at 463 (1st ed. 1996) (describing the inadequacies of Articles 77 and 78); Bailly, *supra* note 5, at 3-4.

The Law Revision Commission's initial concern in its proceedings to repeal Article 77 was that its standard of substantial impairment, which related only to incapacitated persons' ability to manage their property, was improperly being used to allow a conservator power over the incapacitated persons. Bailly, *supra* note 5, at 3-4. Moreover, the Law Revision Commission also recommended proposals for the reform of Article 78, which had fallen into disuse because it required the court to find that the alleged incapacitated person was completely incompetent. Bailly, *supra* note 5, at 4. The courts were reluctant to make such a finding because it frequently translated into "an accompanying stigma and a loss of civil rights." Bailly, *supra* note 5, at 4.

³¹ See KASOFF, *supra* note 30, § 11:3, at 463.

³² See KASOFF, *supra* note 30, § 11:3, at 463.

³³ See KASOFF, *supra* note 30, § 11:4, at 463.

³⁴ See KASOFF, *supra* note 30, § 11:4, at 463.

³⁵ See KASOFF, *supra* note 30, § 11:4, at 463. "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." KASOFF, *supra* note 30, § 11:4, at 463.

measure.³⁶ However, as noted, Article 77 was ill-equipped to deal with the personal welfare of the elderly.³⁷

In order to remedy the inadequacies of Articles 77 and 78, New York courts began giving conservators greater authority over their conservatee's personal welfare under Article 77.³⁸ *In re Cook*³⁹ and *In re Huffard*⁴⁰ are noteworthy examples of courts' expansions of conservators' Article 77 powers into the realm of the committee.

The *Cook* decision involved an Article 77 proceeding in which an almost ninety year-old woman, Alice Schildmacher, contracted to sell land to LeFinis Homes for \$75,000.⁴¹ Schildmacher's attorney, John Cook, drafted the contract,⁴² and approximately five months later was appointed conservator of the property of Schildmacher. Shortly before the closing date, a title search revealed that Schildmacher did not have clear title to the premises.⁴³ Nearly two years after the discovery of the title defect, the conservator commenced a proceeding to clear title.⁴⁴ The court found for the conservator and declined to approve the contract of sale on the ground that the conservatee lacked the mental capacity to execute a contract.⁴⁵ The court held that Schildmacher lacked capacity despite never being declared incompetent under Article 78.⁴⁶ Although the court recognized that Schildmacher was never

³⁶ See KASOFF, *supra* note 30, § 11:4, at 463. "For many individuals, a committee was an excessive and unnecessary remedy. Because Article 78 frequently presented 'all-or-nothing' choices, the courts were reluctant to use it. Instead, attempts were made to expand the limits of Article 77." KASOFF, *supra* note 30, § 11:4, at 463.

³⁷ See KASOFF, *supra* note 30, § 11:4, at 463.

³⁸ See, e.g., *In re Cook*, 520 N.Y.S.2d 400, 401 (App. Div. 1987) (expanding conservator's powers by allowing an Article 77 conservator to nullify a contract made by a competent conservatee); *In re Huffard*, 381 N.Y.S.2d 195, 197 (Sup. Ct. 1976) (stating that the court may expand a conservator's powers).

³⁹ 520 N.Y.S.2d at 400-01.

⁴⁰ 381 N.Y.S.2d at 197.

⁴¹ *Cook*, 520 N.Y.S.2d at 400-01.

⁴² *Id.* at 401.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 402.

⁴⁶ *Id.*

adjudicated incompetent, it held that the manner in which her attorney/conservator discharged his duties was not in the best interests of his ward.⁴⁷ The *Cook* decision thereby opened the door for conservators to expand their powers based on a "best interest of the ward" standard.

The second case of note is *In re Huffard*.⁴⁸ In *Huffard*, the court declined to appoint a bank as conservator of the property of an elderly person.⁴⁹ However, the court stated that it was within its powers to appoint an institution as conservator of an elderly incapacitated person.⁵⁰ The court substantiated its reasoning by finding that "[t]he powers and duties of the conservators are set forth in the amended law [N.Y. Mental Hygiene Law § 77.19(3)], which casts an additional duty on the court. However, the court may add . . . any of the aforesaid powers during the term of the conservatorship."⁵¹

The practices typified in *Cook* and *Huffard* were eventually overruled by the New York Court of Appeals' ruling in *In re Grinker*.⁵² The *Grinker* court held that Article 77 did not empower a conservator to commit an elderly incapacitated person to a nursing home.⁵³ The court stated that "[t]he availability of such a

⁴⁷ *Id.*

⁴⁸ 381 N.Y.S.2d 195 (Sup. Ct. 1976).

⁴⁹ *Id.* at 197.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 573 N.E.2d 536 (N.Y. 1991). The *Grinker* case was the impetus for the repealing of Articles 77 and 78. See KASOFF, *supra* note 30, § 11:5, at 463-64. *Grinker* highlighted the fact that Articles 77 and 78 did not afford sufficient due process protection to allegedly incapacitated adults. See KASOFF, *supra* note 30, § 11:5, at 463-64. The *Grinker* court resolved a long-standing split of opinions among judges and practitioners by ruling that a conservator or guardian of the property under Article 77 could not authorize a nursing home placement. See KASOFF, *supra* note 30, § 11:5, at 463-64. Specifically, the court held that Article 77 did not give a conservator the power to commit the conservatee to a nursing home. *Grinker*, 573 N.E.2d at 540. Therefore, the birth of Article 81 resulted from an issue specifically tailored to an elderly person: who has the authority to place an elderly person in a nursing home? See Bailly, *supra* note 5, at 10-11 (describing how the New York Court of Appeals' ruling in *Grinker* catalyzed the repeal of Articles 77 and 78).

⁵³ *Grinker*, 573 N.E.2d at 537.

significant involuntary displacement of personal liberty should be confined to a Mental Hygiene Law [A]rticle 78 incompetency proceeding, with its full panoply of procedural due process safeguards.”⁵⁴ In short, New York State’s highest court limited the broad application of Article 77 by ruling that conservators do not have the authority to make decisions regarding the person of the conservatee.⁵⁵ The *Grinker* decision drew a bright line between the powers of a conservator and a committee.⁵⁶ The Court of Appeals, however, left open the question of how courts should provide for elderly persons requiring more than the limited services of mere conservators, but less than the complete control of committees.⁵⁷ The Legislature answered this question by enacting Article 81, which established the procedure for the appointment of a guardian whose powers are tailored to both the personal and property management needs of elderly incapacitated persons.⁵⁸

⁵⁴ *Id.* at 539.

⁵⁵ *Id.* (explaining that the intent of the legislature in enacting Article 77 was to limit the scope of a conservator’s power only to the conservatee’s property, not the conservatee’s person).

⁵⁶ KASOFF, *supra* note 30, § 11:5, at 463-64 (stating that the *Grinker* decision clarified the distinction between a conservator and a committee).

⁵⁷ KASOFF, *supra* note 30, § 11:5, at 463-64.

⁵⁸ See N.Y. MENTAL HYG. LAW § 81.02 (McKinney 1997). Under section 81.02(a), “[t]he court may appoint a guardian for the 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.” *Id.* Section 81.02 does not expressly state that only elderly persons are covered under the statute. However, the legislature never intended Article 81 to apply to children. See *infra* Part III (discussing the legislative intent underlying the passage of Article 81); see also *In re Marmol*, 640 N.Y.S.2d 969, 972 (Sup. Ct. 1996) (noting in dictum that while no express language in Article 81 states that a guardianship proceeding cannot commence for a minor, the statute was intended to apply to adult incapacitated persons only). In *Marmol*, the mother of Adonis, a child who had been incapacitated by an automobile accident, filed a petition for appointment of guardian of person and property of her child under Article 81. The court appointed the attorney, Rebecca Rawson, guardian of the property of Adonis Pineda and Allison Marmol as guardian of his person. See *infra* Part IV.B, discussing *Marmol*.

II. THE PLAIN MEANING OF ARTICLE 81

The express language of Article 81 makes clear that it does not apply to infants.⁵⁹ First, the language of Article 81 demonstrates that the statute is designed solely for the protection of judicially declared incapacitated adults.⁶⁰ Article 81 outlines the powers of guardians, as fiduciaries, to maintain the property and person of incapacitated adults.⁶¹ Because the powers are designed to deal with specific problems confronting the elderly, the statute would be rendered absurd if applied to minors.⁶² For example, sections of Article 81, such as the "adult care facility"⁶³ and the "multipurpose senior citizen center[]"⁶⁴ provisions, are concepts which are inapplicable to children.⁶⁵ The language of Article 81 also delineates the powers of guardians to "provide support for persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide for that support."⁶⁶ In addition, the text of Article 81 outlines the procedure for guardians to "exercise rights to elect options and change

⁵⁹ See *infra* notes 62-66 and accompanying text (discussing the fact that numerous sections within the text of Article 81 detail circumstances, such as how a guardian should modify an incapacitated person's will, which if applied to minors would render portions of the text of Article 81 absurd).

⁶⁰ See *infra* notes 62-66 and accompanying text.

⁶¹ See N.Y. MENTAL HYG. LAW § 81.02 (outlining the powers of a guardian).

⁶² Sections of Article 81 would be rendered absurd if applied to children because they outline guidelines which a guardian must follow when an incapacitated person is married, has a deceased spouse, is a tenant in the entirety or is an alcoholic. See *generally* N.Y. MENTAL HYG. LAW § 81.

⁶³ An adult care facility is a family type home for adults, or a shelter or residence for adults. It provides temporary or long-term residential care and services to adults who do not require continual medical or nursing care, but are unable to live independently because of physical or other limitations associated with age. See Beane, *supra* note 1, at 248; see also N.Y. MENTAL HYG. LAW § 81.03(e) (defining adult care homes and facilities); N.Y. SOC. SERV. LAW § 2 (McKinney 1997) (defining "adult care facility").

⁶⁴ See N.Y. MENTAL HYG. LAW § 81.03(e).

⁶⁵ *Id.*

⁶⁶ N.Y. MENTAL HYG. LAW § 81.21(a)(2) (McKinney 1997).

beneficiaries under insurance and annuity policies and to surrender the policies for their cash value.”⁶⁷ Finally, Article 81 also states that guardians have the power to “exercise any rights to an elective share in the estate of the incapacitated person’s deceased spouse.”⁶⁸ The plain meaning of these provisions, when read in the context of the entire statute, prove that the Legislature intended Article 81 to apply only to elderly incapacitated persons.

Second, the actual words of Article 81 reveal that the Legislature intended the statute to apply only to the elderly. The canons of statutory interpretation hold that to interpret a statute correctly, primary analysis may begin and end with its precise language.⁶⁹ Therefore, it is not necessary to look beyond the words to ascertain the legislature’s intent.⁷⁰ For example, in addressing due process

⁶⁷ N.Y. MENTAL HYG. LAW § 81.21(a)(8).

⁶⁸ N.Y. MENTAL HYG. LAW § 81.21(a)(9).

⁶⁹ See N.Y. STATUTES § 230-40 (McKinney 1997). The New York Courts that have applied Article 81 for minors utilize the canon of statutory construction which states that “[w]ords of ordinary import used in a statute are to be given their usual and commonly understood meaning.” *Id.* § 232. In this manner the courts hold that the terms “person” and “individual” within the text of Article 81 should be given a general or plain meaning in order to allow the statute to encompass children. N.Y. MENTAL HYG. LAW § 81.01. For example, the “Legislative Findings and Purposes” section of Article 81 states that guardianship proceedings should be commenced pursuant to “the needs of *persons* with incapacities.” *Id.* (emphasis added). The statute never expressly states that children are excluded from the definition of person. *Id.* The only time that the statute makes reference to age is when it defines the term “guardian.” *Id.* § 81.03(a). The statute states that “‘guardian’ means a person who is eighteen years of age or older.” *Id.* The statute’s definition of guardian, however, suggests that a person is also one who is eighteen or older, i.e. not a minor. *Id.* Nonetheless, even if the court were to employ the canon of statutory interpretation holding that plain language must be given effect, it would violate the opposing canon which states that general meaning does not apply “[w]hen the use of certain words in a statute is inconsistent . . . or makes the clause meaningless or absurd.” N.Y. STATUTES § 231. Because the powers granted to guardians of the person and property do not apply to children, inclusion of such a group under Article 81 would render these powers absurd.

⁷⁰ The canons of statutory interpretation in New York state that: “[i]n the construction of statutes . . . [T]he words used should be given the meaning intended by the lawmakers, and words will not be expanded so as to enlarge their meaning to something the Legislature could easily have expressed but did not.”

issues in its "Legislative Findings and Purposes" section, Article 81's text clearly states: "[i]mperfect as the guardianship system may be in this regard, at least there is a mechanism for questioning decisions regarding an impaired *older adult*."⁷¹ Consequently, New York Courts must not expand Article 81 to include infants because under New York's rules for statutory interpretation, the courts must not do that which the Legislature could have easily done: include infants under the umbrella of Article 81.

III. LEGISLATIVE INTENT

The "Legislative Findings and Purposes"⁷² section of Article 81 also indicates that the statute was enacted to address the "[n]eeds of persons with incapacities [which] are as diverse and complex as they are unique to the individual."⁷³ To effectuate this goal, Article 81 establishes the procedure for the appointment of a guardian whose powers are narrowly tailored to meet the needs of elderly incapacitated adults.⁷⁴ In order to create a narrowly tailored guardianship, the statute expressly provides that an elderly incapacitated person should be granted "the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life."⁷⁵ In its debates, the

N.Y. STATUTES § 230.

⁷¹ N.Y. MENTAL HYG. LAW § 81.01 (emphasis added).

⁷² N.Y. MENTAL HYG. LAW § 81.01 (McKinney 1997).

⁷³ *Id.* See also Bailly, *supra* note 5, at 3 (outlining the findings of the Commission with respect to the needs of the elderly).

⁷⁴ See N.Y. MENTAL HYG. LAW § 81.02(a)(2) (McKinney 1997) (stating that "[a]ny guardian appointed under this article shall be granted only those powers which are necessary . . . in such a manner as appropriate to the individual and which shall constitute the least restrictive form of intervention"). See, e.g., *In re Early*, N.Y.L.J., July 2, 1993, at 22 (Sup. Ct. 1993) (dismissing hospital's petition for appointment of a guardian for an eighty year-old blind woman because she had a plan for the management of her own affairs that was narrowly tailored to her needs). The *Early* court declined to appoint a guardian to manage Ms. Early's funds because she had made suitable arrangements with a trustworthy neighbor to accommodate her financial needs. *Id.*

⁷⁵ N.Y. MENTAL HYG. LAW § 81.01. See also *Early*, N.Y.L.J., July 2, 1993, at 22 (determining that an elderly person can make decisions about the plan of care he or she desires).

Commission studied reports from specialists in geriatric medicine to determine how Article 81 might provide older adults with greater freedom and self determination.⁷⁶ Because the Legislature never intended infant guardianship proceedings to be commenced under Article 81, the needs of children were not addressed in these legislative debates and studies.⁷⁷ Consequently, Article 81 is ill-equipped to deal with infant guardianship issues and an Article 81 guardianship proceeding should never be commenced for an infant.

Moreover, the *Governor's Bill Jacket*⁷⁸ contains transcripts of both New York State Senate and Assembly debates, committee reports and correspondence that affirmatively state that the Legislature never intended Article 81 to apply to minors.⁷⁹ For

⁷⁶ See Law Revision Commission Comments to N.Y. MENTAL HYG. LAW § 81.02 (McKinney 1997). The Commission's comments indicate that during the legislative debates over the amendment of Article 81, specialists in geriatric medicine conducted functional evaluations of elderly persons' basic needs and recommended how new legislation should be designed to meet these needs. The evaluations provided information about elderly persons' physical ability, sensory functioning and spending patterns in order for the court to craft a narrowly tailored Article 81 guardianship order. *Id.*

⁷⁷ *Id.* (making no comment about including minors).

⁷⁸ See *Governor's Bill Jacket* to 1992 N.Y. Laws 698. The *Governor's Bill Jacket* is the primary collection of legislative history in New York State. See Robert M. Zinman, *Under the Spreading Bankruptcy: Subordinations and the Codes*, 2 AM. BANKR. INST. L. REV. 293, 315 n.122 (1994) (describing the purposes of the *Bill Jacket* in New York State legislative history). It is comprised of letters and reports received by the Governor or the Governor's counsel interpreting a bill that has passed. *Id.* The letters, reports, and memoranda recommend that the Governor either pass the legislation, veto the legislation, or make no comment on the legislation. *Id.* The *Bill Jacket* is available to the public at the New York State Library in Albany and from the New York State Legislative Service, Inc. located at 299 Broadway, New York, New York 10007. *Id.*

⁷⁹ See *Governor's Bill Jacket* to 1992 N.Y. Laws 698. The *Bill Jacket* contains memoranda written to Elizabeth D. Moore, Counsel to Governor, in reference to "an act amending the Mental Hygiene Law, relating to the appointment of guardians for personal needs and property management for persons who are likely to suffer harm because they cannot provide for their own food or shelter." See *id.* The *Bill Jacket* also contains the Report of the Law Revision Commission, Assembly debates and Senate debates. The Law Revision Commission's members dedicated to the enactment of Article 81 were Carolyn

example, the Acting Executive Director of the Council on Children and Families abstained from commenting on the implications of Article 81 in a letter of reply to the Counsel to the Governor⁸⁰ because Article 81 was not presented as a statute involving the rights and regulation of minors.⁸¹

Additionally, on March 17, 1992, Julia C. Spring, Esq. of The Association of the Bar of the City of New York presented testimony for the Joint Public Hearings regarding proceedings for

Gentile, Christopher J. Mega, Dale M. Volker and Joseph R. Lentol. The sponsors of this legislation in the Senate were Nicholas Spano, Chair, Senate Mental Hygiene, and in the Assembly, G. Oliver Koppell, Chair, Assembly Judiciary, and Elizabeth Connelly, former chair, Assembly Mental Health. *Id.* See also *infra* notes 80-81 and accompanying text (highlighting the fact that correspondences to the Governor's Law Revision Commission from agencies such as the Council on Children and Families indicate that the Legislature never intended Article 81 to apply to children).

⁸⁰ Letter from Frederick B. Meservey, Acting Executive Director of New York's Council on Children and Families, to Elizabeth D. Moore, Counsel to the Governor, State of N.Y. (July 21, 1992), Governor's *Bill Jacket* to 1992 N.Y. Laws 698. Mr. Meservey wrote:

The Council assumes that the new Article [81] relates primarily to incapacitated adults since it does not repeal or amend Surrogate's Court Procedure Act Article 17 (Guardians and Custodians [for infants] or 17-A (Guardians of Mentally Retarded and Developmentally Disabled Persons) or the Family Court Act or Social Services Law provisions relating to guardianship and custody, or care and custody, of children. . . . Based on that assumption, the Council on Children and Families makes no recommendation with respect to the bill, since it does not directly affect areas of interest in which the council is currently involved.

Id. Additionally, Mr. Meservey concluded his correspondence by stating that "the Bill has no impact on families." *Id.*

⁸¹ *Id.* This correspondence by the Council on Children and Families is very troublesome because it brings to the forefront the misunderstanding regarding Article 81. The Council never expected Article 81 to apply to children. *Id.* Consequently, the Council read the proposed law and interpreted it to have no impact on families. *Id.* The Council is a safeguard for the protection of children and families and would have proposed Guardianship Training for Children and educational requirements for infant incapacitated persons had it anticipated that Article 81 would apply to children. *Id.* See also *infra* Part V, discussing recommendations the Legislature must follow should the New York Courts continue their trend in judicial activism by applying Article 81 for minors.

the appointment of a guardian under Article 81.⁸² Ms. Spring stated: "The Association of the Bar of the City of New York strongly supports the passage of proposed Article 81 to the Mental Hygiene Law as an act to meet the needs, while preserving the liberties, of *adults* who are judicially determined to be incapacitated."⁸³ The express language of the testimony of the Bar states that "adults" are to be protected.⁸⁴ Again, no language in the testimony extends to children.⁸⁵ In further support of the proposition that Article 81 does not apply to minors, Spring stated, "[p]roposed Article 81 is designed to key order to need. It thus generates the least restrictive intervention possible to compensate for the incapacitated adult's deficiencies."⁸⁶

Finally, Legislative Document (1991) No. 65 by the State of New York, Report of the Law Revision Commission for 1991, stated: "The focus of the Commission's study has been to define the decisionmaking [sic] needs of disabled older adults, to examine the current statutory procedures and local practices in light of such needs, and to recommend proposals for change where appropriate."⁸⁷ In order to accomplish this goal, the Commission circulated questionnaires to public and private agencies involved in addressing the needs of disabled older adults.⁸⁸ Again, the focus of the questionnaire was on the needs of elderly persons. The questionnaire made no mention of children.⁸⁹ Therefore, because the Legislature and the legislative debates never expressed an intent to

⁸² *Article 81 of the Mental Hygiene Law: Joint Public Hearings by the Committee on Legal Problems of the Aging Legal Problems of the Mentally Ill and Medicine and Law of the Association of the Bar of the City of New York, Governor's Bill Jacket to 1992 N.Y. Law 698.*

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* The study disregarded data collected from wards less than fifty years of age. The study concluded that one statute—an Adult Guardian statute—must replace Articles 77 and 78 because there was no oversight of obligations regarding the personal welfare of incapacitated older adults. *Id.*

⁸⁹ *Id.*

apply Article 81 to minors, the statute should not be used in a guardianship proceeding for a minor.

In contrast to Article 81, Article 17 of New York Surrogate's Court Procedure Act⁹⁰ ("Article 17") and Article 12 of the New York Civil Practice Law and Rules⁹¹ ("C.P.L.R. 12") were expressly designed to protect children. The intent of Article 17 and C.P.L.R. 12 derives from the Surrogate's Courts' wide discretion in protecting infants under its best interests of the child standard.⁹² As a result, both Article 17 and C.P.L.R. 12 outline strict criteria that proposed guardians must meet in order to be granted guardianship powers.⁹³ For example, proposed Article 17 guardians must affirmatively state in their petition "the reasons why [they] would be a suitable guardian."⁹⁴ The Article 17 petition must also disclose whether the proposed guardian has been the subject of a child abuse report.⁹⁵ In addition, the petition must include an accounting of the child's assets and income.⁹⁶ C.P.L.R. 12 contains similar criteria for the selection of a guardian. Under this statute, "[i]n the selection of a guardian the court will be guided by the moral character and future ability of the [proposed guardian] to advance and promote the interests of the infant."⁹⁷ Therefore, guardianship proceedings for minors should only be commenced under Article 17 or C.P.L.R. 12.

⁹⁰ N.Y. Surr. Ct. Proc. Act § 17 (McKinney 1997).

⁹¹ N.Y. C.P.L.R. 12 (McKinney 1997).

⁹² N.Y. Surr. Ct. Proc. Act § 1707 (McKinney 1997) (stating that "[i]f the court be satisfied that the interests of the infant will be promoted by the appointment of a guardian of his person or of his property, or both, it must make a decree accordingly"); *see also* KASOFF, *supra* note 30, § 10:9, at 439.

⁹³ N.Y. Surr. Ct. Proc. Act § 1704 (outlining contents of an Article 17 petition).

⁹⁴ *Id.* § 1704(7).

⁹⁵ *Id.* § 1704(6).

⁹⁶ N.Y. Surr. Ct. Proc. Act § 1704(4) (stating that a petition for the appointment of a guardian for an infant must include "[t]he estimated value of the real and personal property and of the annual income therefrom to which the infant is entitled").

⁹⁷ N.Y. C.P.L.R. § 1210 note (McKinney 1997) (Legislative Studies and Reports).

Nothing in the legislative history, nor in the background of its enactment, indicates that Article 81 was intended as a guardianship statute for infants. Because the Legislature never intended Article 81 to apply to minors, an overwhelming majority of cases reported under Article 81 involve the elderly.⁹⁸ Nonetheless, in some circumstances, guardianship proceedings for minors have been brought under Article 81.

IV. CASE LAW

An analysis of recent decisions applying Article 81 highlights the dangers inherent in commencing guardianship proceedings for infants.⁹⁹ *In re Le*,¹⁰⁰ *In re Marmol*,¹⁰¹ *In re Lavecchia*,¹⁰² and *In re Addo*¹⁰³ are examples of such cases. The *Le* decision was the first to use Article 81 in an infant guardianship proceeding.¹⁰⁴ The *Le* opinion held that the application of Article 81 to an infant was appropriate because the statute's underlying purpose was to create a guardianship tailored to the needs of an incapacitated person.¹⁰⁵ The second case to employ Article 81 for an infant

⁹⁸ See, e.g., *In re Marmol*, 640 N.Y.S.2d 969, 972 (Sup. Ct. 1996) (discussing the fact that Article 81 is overwhelmingly a guardianship law for the elderly).

⁹⁹ The third case, *In re Lavecchia*, was initially commenced as an Article 81 guardianship proceeding, but was later converted to a proceeding under S.C.P.A. 17. 650 N.Y.S.2d 955, 957 (Sup. Ct. 1996).

¹⁰⁰ 637 N.Y.S.2d 614 (Sup. Ct. 1995).

¹⁰¹ 640 N.Y.S.2d 969 (Sup. Ct. 1996).

¹⁰² 650 N.Y.S.2d 955 (Sup. Ct. 1996).

¹⁰³ *In re Addo*, N.Y.L.J., Sept. 30, 1997, at 26 (Sup. Ct. 1997).

¹⁰⁴ *Le*, 637 N.Y.S.2d at 614. The *Le* case involved a guardianship proceeding brought under Article 81 for a ten year-old boy who suffered severe injuries after falling four stories from his apartment window. *Id.* Although the child was seriously injured, he was only one year below his normal grade level as a result of the accident. *Id.* at 614-15. This important fact shows that the child had a fair opportunity to become a competent adult. *Id.* Consequently, the court should never have commenced a proceeding under Article 81.

¹⁰⁵ *Id.* at 617 (arguing that the application of Article 81 to infants is appropriate because the needs of minors are more unique than those of adults); see also N.Y. MENTAL HYG. LAW § 81.01 (McKinney 1997) (mandating that the "needs of persons with incapacities are as diverse and complex as they are unique

was *In re Marmol*, which advocated the broadest interpretation of Article 81 in proceedings for the appointment of a guardian of the person and property of an infant.¹⁰⁶ The third case of significance, *In re Lavecchia*,¹⁰⁷ involved a proceeding originally brought under Article 81 to appoint a guardian for a thirteen year-old, but later was converted to a proceeding under Article 17.¹⁰⁸ The *Lavecchia* court recognized the inappropriateness of applying Article 81, a statute designed to meet the needs of the elderly, to minors. In the final case dealing with minors, *In re Addo*,¹⁰⁹ the court recognized the rarity of applying Article 81 to infant proceedings, yet did not employ other available statutory remedies.¹¹⁰ Collectively, these four cases highlight the difficulty of

to the individual”).

¹⁰⁶ See *Marmol*, 640 N.Y.S.2d at 972 (stating that “[a] guardian may be appointed for anyone, of whatever age, who is functionally disabled to make a decision affecting his or her life”); see also Cerisse Anderson, *Use of Guardian Law for Child is Allowed; Support by Parents is Still Required*, N.Y.L.J., Feb. 23, 1996, at 1 (noting that *Marmol* is the first major case applying Article 81 to an infant).

¹⁰⁷ 650 N.Y.S.2d 955 (Sup. Ct. 1996) (involving a thirteen year-old quadriplegic for whom a guardianship proceeding under Article 81 was commenced). The proceeding was brought despite the fact that the infant was “alert, knowledgeable, articulate and [understood] the nature of [the] proceeding.” *Id.* at 956. In this case, the court converted the Article 81 proceeding into a proceeding under S.C.P.A. Article 17. *Id.* at 957. The court ruled that an Article 17 proceeding was the appropriate remedy because it provided specific and well-established procedural mechanisms to protect infants, the mentally retarded and persons who were developmentally disabled. *Id.* Kasoff, *supra* note 30, § 10:1, at 437 (“The focus of Article 17 is protection for persons under eighteen.”)

¹⁰⁸ See discussion *infra* Part IV.C and accompanying text.

¹⁰⁹ *Addo*, N.Y.L.J., Sept. 30, 1997 at 26 (Sup. Ct. 1997) (holding that an Article 81 proceeding is an appropriate means to appoint a guardian for a mentally retarded child).

¹¹⁰ *Id.* The *Addo* court noted that while “nothing in [Article 81] precludes its use for the young, the statute is silent with respect to the parental obligations and responsibilities of the parents to support the incapacitated child.” *Id.* (citing *Marmol*, 640 N.Y.S.2d at 969). Although the *Addo* court recognized this deficiency in Article 81, it failed to apply the remedy available under C.P.L.R. 12, which governs the application of withdrawals of infant funds. *Id.* The *Addo* court would only state that the case warranted review under N.Y. C.P.L.R. Article 12. *Id.*

safeguarding an infant's funds under a statute crafted for a self-supporting elderly person.

A. An Analysis of In re Le

The *Le* court was the first to commence an Article 81 proceeding for a minor. The case involved a guardianship proceeding for a ten year-old boy named Daniel Le.¹¹¹ Daniel suffered severe injuries after falling from a fourth floor window of his Queens apartment.¹¹² Despite the seriousness of Daniel's injuries, by the time of the guardianship proceeding, he was no longer under the regular care of doctors.¹¹³ In fact, Daniel "made a remarkable recovery" and was only functioning one year below his normal grade level.¹¹⁴

The *Le* court approved a guardianship proceeding to appoint Kate Le and Stanley Young as co-guardians of the property of Daniel Le.¹¹⁵ The court's reasoning for employing Article 81, where no precedent existed for such application, was absent from the opinion. In addition, the traditional reasoning that the "Adult Guardian Statute" should be employed when the infant will never attain competency upon reaching majority was absent from the *Le*

¹¹¹ *In re Le*, 637 N.Y.S.2d 614 (Sup. Ct. 1995).

¹¹² *Id.* Daniel was placed in foster care shortly after his birth. *Id.* After foster care failed, he was placed with his grandmother in her Queens apartment where six months later he fell four stories from their apartment window. *Id.*

¹¹³ *Id.* As a result of injuries he sustained from the fall, Daniel underwent brain surgery on April 20, 1989 and an operation to repair a perforated ear drum on July 2, 1991. *Id.* The guardianship proceeding was commenced on or about December 11, 1995. *Id.*

¹¹⁴ *Id.*

¹¹⁵ Co-guardians are two (or more) persons appointed by the court to act together as guardians for the incapacitated person. Beane, *supra* note 1, at 251. The guardians must act together in all aspects of the guardianship. Beane, *supra* note 1, at 251. For example, all checks must be signed by each guardian. Beane, *supra* note 1, at 251. Nhan Thi Thanh (Kate) Le is Daniel's adopted sister and Stanley Young was Daniel's attorney. *In re Le*, 637 N.Y.S.2d at 615. Daniel's father, Vincent Le, also commenced an action against Michael Pistilli and the Pistilli Realty Company, the owners and landlords of the Queens apartment where Daniel fell. *Id.* at 614. Prior to the trial a settlement was reached awarding Daniel \$5,326,347 over his lifetime. *Id.* at 616.

reasoning. In fact, the *Le* court could not employ this reasoning because medical testimony described Daniel as a "fun-loving active youngster who participates in all types of activities."¹¹⁶ It is therefore unclear why Article 81 was employed to appoint a guardian for Daniel.

The *Le* court attempted to rectify this ambiguity by reasoning that the intent of Article 81 was to "create a guardianship system that is tailored to meet the specific needs of the individual by taking into account the personal wishes, preferences and desires of the alleged incapacitated person."¹¹⁷ Upon this rationale, the *Le* court attempted to expand the language of Article 81 to encompass all individuals, including infants. The court stated that "[a]s a result of Daniel's youth and inexperience, he [was] unable to prepare his own meals, attend to his own purchases, provide for his education, and use public transportation for himself."¹¹⁸ In light of the fact that most ten year-old children are unable to perform the aforementioned tasks, it is not clear why the court appointed a guardian for a youngster only functioning at one grade below normal.¹¹⁹ The *Le* court's decision raised numerous questions regarding the appropriateness of employing Article 81 to infants. The court's reasoning apparently hinged on the statute's language that the "needs of persons with incapacities are as diverse and complex as they are unique to the individual."¹²⁰ Therefore, the *Le* court suggests that the protection of Daniel's settlement was a priority, and thus, Article 81 should be employed. This reasoning is flawed because it does not explain the court's logic in employing Article 81, a statute written specifically for elderly adults, not for children.

B. An Analysis of In re Marmol

The *Marmol* ruling is the most prominent case advocating Article 81 in an infant guardianship proceeding.¹²¹ This landmark

¹¹⁶ *Id.* at 615.

¹¹⁷ *Id.* (quoting N.Y. MENTAL HYG. LAW § 81.01 (McKinney 1997)).

¹¹⁸ *Id.* at 617.

¹¹⁹ *Id.* at 614.

¹²⁰ N.Y. MENTAL HYG. LAW § 81.01.

¹²¹ *In re Marmol*, 640 N.Y.S.2d 969, 972 (Sup. Ct. 1996).

decision in New York Guardianship Law involved a petition pursuant to Article 81 for the appointment of a guardian of the person and property of Adonis Pineda, an infant.¹²² Adonis required a guardian to safeguard the approximately \$5,400,000 settlement he received from the City of New York after being struck by a police car.¹²³ At the time of the accident Adonis was just two months shy of his first birthday.¹²⁴ The accident left Adonis "mentally retarded, probably for life."¹²⁵

Because Adonis was rendered profoundly brain-damaged, the court employed Article 81 to appoint Allison Marmol as guardian for her son.¹²⁶ Although the funds Adonis received from his settlement were originally awarded pursuant to C.P.L.R. 12,¹²⁷ the court reasoned that an Article 81 proceeding with Adonis' mother as guardian was more appropriate.¹²⁸

The *Marmol* decision was based primarily on the fact that Adonis could never reach competency upon attaining majority.¹²⁹ However, the court's decision to employ Article 81 was inappropriate because an infant's funds are sufficiently safeguarded under C.P.L.R. 12 past majority.¹³⁰ Nevertheless, the court employed Article 81, an adult guardianship law whose provisions contemplate

¹²² *Id.* at 970.

¹²³ *Id.* at 971.

¹²⁴ *Id.*

¹²⁵ *Id.* The guardian in the *Marmol* case, Rebecca H. Rawson, Esq., wrote an article in the *New York Law Journal* in which she disputed the court's characterization of Adonis as mentally retarded. See Rebecca H. Rawson, *Pay for Guardians*, N.Y.L.J., June 16, 1997, at 2. Ms. Rawson stated, "If you were to meet [Adonis], you would know immediately that, whatever he may now score on a standardized test, he is brain-damaged, not mentally retarded." *Id.*

¹²⁶ *Marmol*, 640 N.Y.S.2d at 971.

¹²⁷ N.Y. C.P.L.R. 12 (McKinney 1997). C.P.L.R. 12 sets forth the rules applicable to all judicial proceedings in which persons under a disability are parties. *Id.* Specifically, C.P.L.R. 12 establishes the procedures by which infants, incompetents, conservatees and other persons with legal disabilities may prosecute and defend their rights in actions brought by and against them. See, e.g., *DeSantis v. Bruen*, 627 N.Y.S.2d 534, 537 (Sup. Ct. 1995) (describing a proceeding for a child under C.P.L.R. 12).

¹²⁸ *Marmol*, 640 N.Y.S.2d at 971.

¹²⁹ *Id.*

¹³⁰ See generally *infra* notes 148-151.

the incapacitated person to be self-supporting.¹³¹ This action creates the danger that Adonis must be self-supporting.¹³²

Since *Marmol*, New York Guardianship practice has been wrought with questions over whether an Article 81 proceeding is appropriate for a child.¹³³ The core question that the *Marmol* decision raised was whether the distinction between the law as set forth in C.P.L.R. 12 and Article 81 affects the responsibility of Adonis' parents to provide for his support. This is a pivotal question because the law under Article 81 is clear in stating that incapacitated persons must provide for their own care. This implies that Adonis must deplete the funds he received from his settlement to provide for his care. However, under C.P.L.R. 12, Adonis' funds would be held by the court until majority is reached and his parents would then have the duty to support their incapacitated son. It is unclear which standard applies under Article 81 guardianships for infants. However, it is inappropriate for the courts to commence a proceeding for a child under Article 81 and then act as a quasi-legislature by amending Article 81 to allow it to conform to C.P.L.R. 12.

The facts of *Marmol* indicate that an Article 81 guardianship for a child is not appropriate. Accordingly, the court should never have transferred the guardianship for Adonis from C.P.L.R. 12 to Article 81. Although the *Marmol* court failed to employ C.P.L.R. 12, it did acknowledge that it was defying decades of precedent standing for the proposition that an infant's funds are securely held under C.P.L.R. 12.¹³⁴ The court stated that "[C.P.L.R.] 12 is generally used to hold the proceeds of an infant's personal injury settlement until he reaches his majority."¹³⁵ Although the court recognized that C.P.L.R. 12 may be used, it determined that Article

¹³¹ *Marmol*, 640 N.Y.S.2d at 972.

¹³² *Id.*

¹³³ See N.Y. MENTAL HYG. LAW § 81.02 (McKinney 1997) (discussing the questions that the *Marmol* and *Le* cases raised regarding whether Article 81 could be used for an infant, and whether "given statutory and court restrictions on withdrawal from an infant's funds, an Article 81 guardian could use the monies received as a result of the settlement to provide for the child's support").

¹³⁴ *Marmol*, 640 N.Y.S.2d at 972.

¹³⁵ *Id.*

81 was a more efficient remedy because the infant in this case would never become a competent adult.¹³⁶ The Court stated, "to insure maximum protection," the incapacitated infant's funds would be held under Article 81.¹³⁷ In fact, Article 81 enables guardians to utilize the incapacitated persons' funds with greater discretion than a remedy under C.P.L.R. 12. In general, this is detrimental to infants because they have a longer life span than the elderly persons whom Article 81 was meant to reach. The court should have kept Adonis' funds secure under C.P.L.R. 12 to conserve them for his later life.

In support of the proposition that Article 81 is a more appropriate remedy when the infant will never attain competence, the court cited *In re Ramos*.¹³⁸ *Ramos*, a 1981 case decided prior to the enactment of Article 81,¹³⁹ involved the appointment of co-conservators of a "hopelessly and irreversibly retarded and otherwise multiply handicapped" infant, Samuel Ramos.¹⁴⁰ Samuel received a \$1,600,000 medical malpractice settlement for physical and medical injuries he sustained.¹⁴¹ The issue facing the *Ramos* court was whether the court should appoint a conservator for Samuel or proceed with the "usual guardianship procedure."¹⁴² It is noteworthy that the court does not identify the so-called "usual guardianship procedure"¹⁴³ for an infant. Instead, the *Ramos* court justified employing Article 77 by stating that "[t]he usual guardianship procedure would be contraindicated since,

¹³⁶ *Id.*; see also *In re Lavecchia*, 650 N.Y.S.2d 955, 956 (Sup. Ct. 1996). This proposition is demolished by the *Lavecchia* court's holding that it is inappropriate to appoint a guardian under Article 81 for an alert and knowledgeable infant.

¹³⁷ *Marmol*, 640 N.Y.S.2d at 972. The court refer to language employed in *In re Ramos*, 445 N.Y.S.2d 891, 892 (Sup. Ct. 1981) (stating that Article 78.12 of the Mental Hygiene Law must be used because the infant, upon reaching his legal maturity, will not be able to care for himself or his property).

¹³⁸ 445 N.Y.S.2d 891 (Sup. Ct. 1981).

¹³⁹ *Id.* at 892. The *Ramos* opinion was decided under N.Y. MENTAL HYGIENE LAW § 77, which was repealed by Article 81.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

concededly, plaintiff upon reaching his legal majority will not be able to care for himself or his property, thus conservatorship would . . . provide the proper vigilance to insure maximum protection of the rights and interests of the plaintiff."¹⁴⁴ The *Marmol* court's adamant defense of *Ramos* as mandatory precedent is troublesome for two reasons. First, *Ramos* was decided under Article 77,¹⁴⁵ which, due to its inadequacy, was repealed by Article 81.¹⁴⁶ Article 77 was repealed because it inadequately provided for the individual needs of an incapacitated person. Because of this inadequacy, the *Ramos* solution does not afford infants heightened security and protection, and is improper. This shortcoming of Article 77 was recognized by the *Marmol* court in its acknowledgment that the guardianship was not narrowly tailored to Adonis Pineda's needs.

Second, the *Marmol* court's reliance on *Ramos* is faulty because nothing in C.P.L.R. 12 precludes its use for a child, such as Adonis, who is permanently incapacitated. Because C.P.L.R. 12 was an available remedy for Adonis, the court's implication that the only means to secure Adonis's funds was through Article 81 guardianship was false. The *Ramos* decision should not have been used as controlling precedent in the face of contrary law under C.P.L.R. 12.

Instead, the *Marmol* court should have employed C.P.L.R. 12 to protect Adonis' funds based on the rationale of *Mills v. Durst*.¹⁴⁷ In *Mills*, the New York Supreme Court ruled that a supplemental needs trust¹⁴⁸ ("SNT") could be created for a

¹⁴⁴ *Id.*

¹⁴⁵ N.Y. MENTAL HYG. LAW § 77 (McKinney 1988) (repealed 1993) (outlining the procedure for the appointment of a conservator).

¹⁴⁶ N.Y. MENTAL HYG. LAW § 81 (McKinney 1997); *see generally supra* Part I (discussing the history of Article 81).

¹⁴⁷ 594 N.Y.S.2d 537 (Sup. Ct. 1993).

¹⁴⁸ A supplemental needs trust ("SNT") is a trust:

generally established with the resources of third parties, such as parents of disabled children or children of aging parents. Because they are established with third party resources, the Medicaid transfer of assets rules do not apply if the aged or disabled person applies for Medicaid benefits. There is now legislation permitting the establishment of a [SNT] using the person's own funds, if certain requirements are met,

permanently incapacitated infant under C.P.L.R. 1206(c).¹⁴⁹ The SNT would restrict the guardian's control over the infant's funds even past the age of majority.¹⁵⁰ The *Mills* court argued that the SNT did not differ in any significant degree from those requirements specifically set forth in the statute.¹⁵¹ Therefore, both the holding in *Mills* and the plain meaning of C.P.L.R. 1206 refute the *Marmol* rationale that the only remedies available to protect the infant's funds beyond majority are those pursuant to Article 81. By this reasoning, the *Marmol* court should have proceeded under C.P.L.R. 12.

The appointment of a guardian for a minor also defies the legislative intent of Article 81. Ironically, the *Marmol* court fully recognized this fact in its reasoning by stating, "the purpose of Article 81 . . . was to create a guardianship law to meet the needs of elderly persons afflicted with the various, too-bountiful ills that flesh is heir to."¹⁵² Despite this affirmation of Article 81 as a guardianship law for the elderly, the *Marmol* court held that because Adonis Pineda would never attain competence, "[t]he instant petition presents [the] rare instance of the relatively new statute being applied to a minor."¹⁵³

which usually provide that at the person's death, Medicaid must be paid back the amount of benefits expended by the Medicaid program.

Beane, *supra* note 1, at 269; *see also* N.Y. EST. POWERS & TRUSTS LAW § 7-1.12 (McKinney 1997) (outlining the procedures for establishing a SNT for persons with severe and chronic or persistent disabilities).

¹⁴⁹ *Mills*, 594 N.Y.S.2d at 543.

¹⁵⁰ C.P.L.R. 12 outlines the procedure a guardian must follow in order to withdraw funds held in trust for the incapacitated infant. In addition, the court, under C.P.L.R. 1206(c) can approve a settlement that includes a trust which continues payment into that trust past the age of majority. N.Y. C.P.L.R. 1206 (McKinney 1997); *see also* *Mills*, 594 N.Y.S.2d at 540.

¹⁵¹ *See* N.Y. C.P.L.R. 1206.

¹⁵² *In re Marmol*, 640 N.Y.S.2d 969, 972 (Sup. Ct. 1996).

¹⁵³ *Id.*

The *Marmol* decision is also improper because Articles 17¹⁵⁴ and 17-A,¹⁵⁵ as well as C.P.L.R. 12, provide for well-established guardianship proceedings for infant incapacitated persons. The *Marmol* court could have commenced this proceeding under Articles 17 and 17-A of the S.C.P.A. because the Legislature specifically enacted the statute to provide substantive and procedural mechanisms for the protection of infants,¹⁵⁶ persons who are mentally retarded¹⁵⁷ and persons who are "developmentally disabled."¹⁵⁸ Because Articles 17 and 17-A establish with specificity the procedural and substantive methods of a guardianship proceeding specifically tailored to the needs of a minor,¹⁵⁹

¹⁵⁴ N.Y. SURR. CT. PROC. ACT § 17 (McKinney 1997) (outlining the procedures for the appointment of a guardian of the person and property of an infant).

¹⁵⁵ N.Y. SURR. CT. PROC. ACT § 17-A (McKinney 1997) (outlining the procedures for the appointment of a guardian of the person and property of a mentally retarded infant).

¹⁵⁶ See N.Y. SURR. CT. PROC. ACT § 1701 (McKinney 1997) (stating that "[t]he court has power over the property of an infant and is authorized and empowered to appoint a guardian . . . of an infant whether or not the parent or parents of the infant are living").

¹⁵⁷ See N.Y. SURR. CT. PROC. ACT § 1759 (McKinney 1997) (stating that "such guardianship [of a mentally retarded and developmentally disabled person] shall not terminate at the age of majority or marriage of such mentally retarded or developmentally disabled person."). Section 1759 is a key section in refuting the four courts' argument that an Article 81 proceeding is necessary when an infant incapacitated person is profoundly retarded and will never achieve competence, because it counters the *Ramos* rationale that an Article 81 proceeding is the sole means to protect an infant's funds past majority.

¹⁵⁸ *Id.*

¹⁵⁹ N.Y. SURR. CT. PROC. ACT § 1750-a (McKinney 1997) (outlining the appointment procedure); N.Y. SURR. CT. PROC. ACT § 1751 (McKinney 1997) (describing the petition for appointment of a guardian in procedural terms); N.Y. SURR. CT. PROC. ACT § 1752 (McKinney 1997) (describing the petition for appointment of a guardian in substantive terms including, but not limited to, the content of the petition); N.Y. SURR. CT. PROC. ACT § 1754 (McKinney 1997) (addressing how the court should proceed in the event that parents abandon their incapacitated children). These sections of S.C.P.A. Article 17-A clearly show that the Legislature drafted and amended the statute to accommodate every situation that could arise in an infant guardianship. *Cf.* N.Y. MENTAL HYG. LAW § 81 (mandating that the court should use the least restrictive form of intervention to

it is entirely unnecessary and a blatant misinterpretation of New York State's Guardianship Law, to commence an infant guardianship proceeding under Article 81.

Because Article 81 is not tailored to the needs of a child, commencing an Article 81 guardianship for an infant does the infant a disservice by creating greater opportunity for neglect and abuse of the system.¹⁶⁰ Conversely, Articles 17 and 17-A are well-reasoned provisions enacted for the protection of minors, and therefore guardianship proceedings are more appropriately commenced under these articles because they are narrowly tailored to the needs of an incapacitated infant. The *Marmol* court erred in applying Article 81 to minors rather than the statutes drafted specifically for that purpose. The fact that the *Marmol* court relied on the reasoning that "nothing in [Article 81] precludes its use for

accommodate the needs of an incapacitated person). The Article 81 mandate does not address everyday situations such as the one cited in section 1754 of the S.C.P.A., where an incapacitated infant is abandoned by his or her parent. This is the crux of the problem with employing Article 81. Because Article 81 does not establish guidelines for an infant's guardianship proceeding, the guardian for the incapacitated child has greater flexibility. This flexibility is troublesome in cases such as *Marmol* where the guardian attempts to obtain court approval to withdraw funds that an incapacitated infant has received in a medical malpractice settlement. In *Marmol*, the court allowed the proceeding to be held under Article 81 under the shaky rationale that Article 81 would serve the infant incapacitated child who would unfortunately never regain capacity. 640 N.Y.S.2d 969, 972 (Sup. Ct. 1996). This is a mere pretext. Section 1759 of the S.C.P.A. provides for cases where the infant never would regain consciousness. See N.Y. SURR. CT. PROC. ACT § 1759. The real reason that courts bring proceedings under Article 81 is flexibility and freedom from the specific rules of S.C.P.A. Articles 17 and 17-A, and C.P.L.R. 12 which address step-by-step procedures for the appointment of a guardian of an incapacitated infant.

¹⁶⁰ Justice Kasoff, a Queens County Supreme Court Justice responsible for hearing cases brought under Article 81, has commented on this overlap. KASOFF, *supra* note 30, § 10:81, at 459. Justice Kasoff writes: "[a]lthough the two articles [S.C.P.A. and Article 81] do not track one another in scope, the 'overriding criteria' of Article 81—its mandate to have the court invoke only the 'least restrictive form of intervention on the individual's life'—has been found equally applicable to Article 17-A." KASOFF, *supra* note 30, § 10:81, at 459. Justice Kasoff's commentary illustrates that Article 17-A is more inclusive than Article 81.

the young”¹⁶¹ does nothing to rebut this argument and reveals its logically flawed reasoning. Because the *Marmol* court misconstrued the legislative intent and the plain meaning of Article 81 and failed to recognize the availability of other well-established remedies, Adonis Pineda was not provided adequate security over his settlement.

C. An Analysis of In re Lavecchia

The third case of significance, *In re Lavecchia*,¹⁶² involved an Article 81 proceeding to appoint a guardian for a thirteen year-old rendered quadriplegic¹⁶³ as the result of injuries sustained in an automobile accident.¹⁶⁴ The proceeding was initiated pursuant to Article 81 despite the fact that the infant was “alert, knowledgeable, articulate and [understood] the nature of [the] proceeding.”¹⁶⁵ In contrast to *Le*, the *Lavecchia* court correctly converted the Article 81 proceeding into an Article 17 claim because the infant was capable of competence upon attaining majority.¹⁶⁶ Moreover, the court held that “the purpose of Article 81 . . . was to address the decision-making needs of disabled older adults It was not intended as an alternative to existing statutes . . . under Articles 17 and 17-A.”¹⁶⁷

The *Lavecchia* opinion recognized that appointment of a guardian for the incapacitated infant was necessary because the infant was likely to suffer harm since she was unable to provide for her personal needs and property management.¹⁶⁸ The court found that “in the case of an infant who is physically disabled, an Article 17 guardianship proceeding is the more appropriate proceeding to appoint a guardian than an Article 81 Mental Hygiene Law

¹⁶¹ *Marmol*, 640 N.Y.S.2d at 972.

¹⁶² 650 N.Y.S.2d 955 (Sup. Ct. 1996).

¹⁶³ *Id.* at 956.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 957.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 956.

guardianship proceeding.”¹⁶⁹ The *Lavecchia* court refused to apply Article 81 because existing statutes developed to safeguard infants were available.¹⁷⁰ The precedent set by the *Lavecchia* court recognized that Article 81 was not intended as an alternative to existing statutes governing infants. Instead, it established that an Article 81 proceeding in the case of an infant was inappropriate.¹⁷¹

*D. An Analysis of In re Addo*¹⁷²

In re Addo is the most recent reported case involving the commencement of a proceeding under Article 81. In *Addo*, the court considered whether to appoint parents as co-guardians for their seven year-old brain-damaged son, Mark Irving Addo, who had won a medical malpractice settlement.¹⁷³ Mark suffered brain damage and resulting cerebral atrophy, seizure disorder and mental retardation at or about the time of his birth.¹⁷⁴ Because Mark’s injuries were permanent and his prognosis was disability for life, the court employed a similar rationale as that used in *Marmol* to circumvent the use of C.P.L.R. 12.¹⁷⁵ The *Addo* court reasoned that “since Mark is not expected to reach competency upon attaining majority, the settlement funds will be held under Article 81 to insure maximum protection.”¹⁷⁶ Therefore, ignoring the precedent set in *Lavecchia*,¹⁷⁷ the *Addo* court ruled that a

¹⁶⁹ *Id.* at 957.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *In re Addo*, N.Y.L.J., Sept, 30, 1997, at 26 (Sup. Ct. 1997).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (stating that the petitioner [parent of the incapacitated child] could have chosen relief under C.P.L.R. 12). The *Addo* court dismissed the fact that the appropriate proceeding exists under C.P.L.R. 12 by reiterating the *Ramos* opinion that “only in the rare case where an infant is not expected to reach competence upon attaining his majority are these funds held under Article 81 to insure maximum protection.” *Id.* (citing *In re Ramos*, 445 N.Y.S.2d 891, 892 (Sup. Ct. 1981)).

¹⁷⁶ *Addo*, N.Y.L.J., Sep. 30, 1997, at 26.

¹⁷⁷ *In re Lavecchia*, 650 N.Y.S.2d 955, 957 (Sup. Ct. 1996) (holding that a

proceeding for the appointment of a guardian of the property of an infant was appropriate under Article 81.¹⁷⁸

The *Addo* court's decision to hold the infant's funds under Article 81 was improper for three reasons. First, because Article 81 was designed for an elderly person with a relatively short life-span, the guardian under Article 81 has greater access to the incapacitated person's funds. This reflects the court's view that invasion of the elderly person's assets was a reality of advanced age. Additionally, once the principal estate is depleted, the elderly person becomes eligible for Medicare.¹⁷⁹ Conversely, a court employing C.P.L.R. 12 on behalf of an infant, views invasion of the infant's principal as a circumstance to be avoided.¹⁸⁰ By this reasoning, C.P.L.R.

proceeding commenced under Article 81 for an incapacitated infant should be converted to a proceeding under S.C.P.A. 17 or 17-A).

¹⁷⁸ *Addo*, N.Y.L.J., Sept. 30, 1997, at 26.

¹⁷⁹ Subchapter XVIII of the Social Security Act provides a health insurance plan for people 65 and older. 42 U.S.C. § 1395 (1998). See also Lenise Dolan, *The Lawyer, the GCM, the Forest and the Trees: Long Term Care Issues*, in GUARDIANSHIP LAW: ARTICLE 81 1997 TRAINING TO OBTAIN CERTIFICATION 1997, 143, 156 (PLI Litig. & Admin. Practice Course Handbook Series No. D-258, 1997). Medicare is a federal program administered by the U.S. Department of Health and Human Services; enrollment is managed by the Social Security Administration. *Id.* at 156.

¹⁸⁰ See *Federal Deposit Ins. Corp. v. Tremaine*, 37 F. Supp. 177, 180 (S.D.N.Y. 1940) (ruling that a petition for withdrawal of an infant's funds should contain (1) a full explanation of the reason for the withdrawal; (2) several sworn statements by qualified persons of the estimated costs of the proposed expenditures and the necessity of the work to be done; (3) the infant's age; (4) the amounts and date withdrawn the infant and parent; (5) the amount on hand and earned income; (6) a recital of previous withdrawals and the reasons therefor; (7) a recital of the financial circumstances of the infant's family; (8) a statement that the expenditure cannot be afforded by the infant's family; (9) the nature of the infant's injury and present state of health; and (10) any other facts material to the application); *Hilgarth v. Costello*, 506 N.Y.S.2d 267, 269 (Sup. Ct. 1986) (denying petition to permit withdrawal of funds deposited in savings bank pursuant to infant's compromise order for purpose of transferring funds to tax deferred insurance annuity that would earn higher rate of interest, because tax deferred annuities are not among devices enumerated in C.P.L.R. 1206 that may be used for investment of such proceeds so as to guard against risk of depletion). See also *In re Stackpole*, 168 N.Y.S.2d 495, 499 (Sup. Ct. 1957) (denying parent's application to withdraw funds to pay tuition for a religious high school

12 preserves the infants' principal sums until they attain majority, and if necessary, beyond majority.¹⁸¹ Moreover, under C.P.L.R. 12, adequate protection of the infant's interests is secured because the infant's funds can only be withdrawn upon order of the court.¹⁸² For example, by employing Article 81 instead of C.P.L.R. 12, the court awarded the mother of Mark Addo a \$25,000 salary as compensation as his care giver.¹⁸³ The guardian-mother would never have received such compensation under C.P.L.R. 1206(c), which has strict guidelines regarding the management of an infant's funds.¹⁸⁴ In contrast, Article 81 does

from proceeds of infant's cause of action for personal injuries, notwithstanding father's financial inability to meet payment).

¹⁸¹ See cases cited *supra* note 180.

¹⁸² N.Y. C.P.L.R. 1206(c) (McKinney 1997).

¹⁸³ Mrs. Addo originally petitioned the court for a salary of \$45,000 to provide care giver services to her son. *Addo*, N.Y.L.J., Sept. 30, 1997, at 26. Cf. *Donato v. Gonzalo*, 546 N.Y.S.2d 278, 280 (Sup. Ct. 1989) (denying application for withdrawal of funds from infant's bank accounts established pursuant to court order with proceeds of settlement of medical malpractice action, in order to reimburse infant's father for purchase of computer equipment and software for infant, because such items were not related to injuries suffered by infant). *Donato* provides an instructive contrast to the *Addo* ruling. By the reasoning presented in a case brought under C.P.L.R. 12, such as *Donato*, the mother-guardian in *Addo* would never have been allowed to receive a \$25,000 yearly salary as compensation for the care of her child, who was in school for the majority of the day. Similar to the computer equipment in *Donato*, compensation to the mother in *Addo* for ordinary care for her child is not related to the injuries suffered by the infant.

¹⁸⁴ C.P.L.R. 1206(c) states:

[T]he court may order that money constituting any part of the property be deposited in one or more specified insured banks or trust companies or savings banks or insured state or federal credit unions or be invested in one or more specified accounts in insured savings and loan associations, or it may order that a structured settlement agreement be executed, which shall include any settlement whose terms contain provisions for the payment of funds on an installment basis, provided that with respect to future installment payments, the court may order that each party liable for such payments shall fund such payments, in an amount necessary to assure the future payments, in the form of an annuity contract executed by a qualified insurer and approved by the superintendent of insurance pursuant to articles fifty-A and fifty-B of

not provide explicit guidelines for the management of an incapacitated person's funds.¹⁸⁵

this chapter. The court may elect that the money be deposited in a high interest yield account such as an insured "savings certificate" or an insured "money market" account. The court may further elect to invest the money in one or more insured or guaranteed United States treasury or municipal bills, notes or bonds. This money is subject to withdrawal only upon order of the court, except that no court order shall be required to pay over to the infant who has attained the age of eighteen years all moneys so held unless the depository is in receipt of an order from a court of competent jurisdiction directing it to withhold such payment beyond the infant's eighteenth birthday. Notwithstanding the preceding sentence, the ability of an infant who has attained the age of eighteen years to accelerate the receipt of future installment payments pursuant to a structured settlement agreement shall be governed by the terms of such agreement.

N.Y. C.P.L.R. 1206(c).

¹⁸⁵ Section 81.21(a) of the Mental Hygiene Law states that:

[T]hose powers which may be granted [to a guardian] include, but are not limited to, the power to: 1. make gifts; 2. provide support for persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide for that support; 3. convey or release contingent and expectant interests in property, including marital rights and any right of survivorship incidental to joint tenancy or tenancy by the entirety; 4. exercise or release powers held by the incapacitated person as trustee, personal representative, guardian for minor, guardian, or donee of a power of appointment; 5. enter into contracts; 6. create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of the incapacitated person; 7. exercise options of the incapacitated person to purchase securities or other property; 8. exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value; 9. exercise any right to an elective share in the estate of the incapacitated person's deceased spouse; renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with paragraph (c) of section 2-1.11 of the estates, powers and trusts law; 11. authorize access to or release of confidential records; and 12. apply for government or private benefits.

N.Y. MENTAL HYG. LAW § 81.21(a) (McKinney 1997). A comparison of C.P.L.R. 12 and Article 81 indicates that C.P.L.R. 12 is a statute outlining a guardian's restrictions, whereas Article 81 outlines the affirmative powers that

Second, an Article 81 proceeding to appoint a guardian for a child is improper because the infant's parents are responsible for the care and expenses of their child.¹⁸⁶ In a C.P.L.R. 12 proceeding, the court is mindful that there exists a legal duty of a parent to support a child until that child attains majority.¹⁸⁷ Accordingly, the court in a C.P.L.R. 12 proceeding is protective of the infant's funds.¹⁸⁸ By contrast, under Article 81, there is no safeguard for a child's funds because it is the guardian, not the court, that has control over the incapacitated person's funds.¹⁸⁹ Under Article 81 there is no need for a court order for every disbursement, as there is with C.P.L.R. 12, because the guardian has control of the checkbook and can make disbursements independent of a court order.¹⁹⁰ In fact, the guardian is even paid a commission on these disbursements.¹⁹¹

Third, the *Addo* decision is contrary to public policy because it mandates that Mark Addo pay his mother a salary, simply for being his mother, from funds awarded to him as compensation for his

a guardian has with respect to the incapacitated person's funds. *See id.*; N.Y. C.P.L.R. 12.

¹⁸⁶ *See, e.g., Gaffney v. Constantine*, 87 N.Y.S.2d 131, 132 (Sup. Ct. 1949) (stating that it is the legal duty of parents to provide for their minor children).

¹⁸⁷ N.Y. C.P.L.R. 1206; *see also Gaffney*, 87 N.Y.S.2d at 132.

¹⁸⁸ *See generally Joseph S. Mattina, Guardianship Funds in Erie County: A Proposal for Investment Flexibility with Security*, 69 N.Y. St. B.J. 50 (1997). The Honorable Joseph S. Mattina, Surrogate of Erie County, N.Y. is responsible for appointing the parent or other responsible adult to be the guardian of the property of an infant. *Id.* Judge Mattina states that in employing C.P.L.R. 12, "[t]he court's first priority in determining the type of investments that may be purchased for guardianship accounts has been the safety of the principal." *Id.*

¹⁸⁹ *See generally Bailly, supra* note 5, at 3-5. Article 81 guardians marshal and collect all known accounts of the incapacitated person and deposit them into interest bearing guardianship accounts. The guardian has control over the incapacitated person's funds and makes disbursements on behalf of the incapacitated person. Bailly, *supra* note 5, at 5-6.

¹⁹⁰ *See supra* note 19 and accompanying text (discussing the fact that the guardian of the property has control over the incapacitated person's bank account and can make disbursements from the guardianship account).

¹⁹¹ N.Y. SURR. CT. PROC. ACT § 2309 (McKinney 1997) (providing the calculation for the payment of commissions to the guardian from the Guardianship account).

injuries.¹⁹² The *Addo* court's \$25,000 per year award defies an avalanche of precedent standing for the principle that it is the duty of a father and mother to feed and clothe their children.¹⁹³ Infants cannot be required to even buy themselves clothing from the money awarded to them for injuries sustained.¹⁹⁴ "[T]he law is clear that the fund must be preserved for the infant's benefit when he attains majority. Exceptions are proper when the income and assets of the parents are not sufficient to provide for [the infant's] needs."¹⁹⁵ The court, in employing the term "needs," refers to "surgical, medical, or dental expenses."¹⁹⁶ Therefore, exceptions are only proper for expenditures which are a direct result of the accident; in short, expenses which would not have occurred "but for" the accident. By this reasoning, the court's granting Mrs. Addo a salary for her services as mother was improper. "While Mrs. Addo aids Mark with his toiletry and dressing in the morning, thereafter from 8:30 [a.m.] to 3:30 [p.m.], while Mark is at school she has no contact with Mark."¹⁹⁷ The record affirmatively showed that Mrs. Addo spent the same amount of time caring for Mark as she did for her healthy children. The *Addo* court defied a hundred years of case law by ignoring the fact that "although the guardian, as a fiduciary, is responsible for the care and management of the ward, the court must make the ultimate decision as to what is in the best interest of the child."¹⁹⁸ In the *Addo* case, the ward's parents had the resources to support their child; therefore, the court should not have awarded Mrs. Addo a salary for services she was legally bound to perform. In this regard, the court in *Gaffney v. Constantine* noted that:

[The] court is the guardian of [an infant's funds] and when the child reaches twenty-one, he has a right to expect to receive the money awarded to him for his injury with

¹⁹² *In re Addo*, N.Y.L.J., Sept. 30, 1997, at 26 (Sup. Ct. 1997).

¹⁹³ See *supra* note 183 and accompanying text (discussing the duty of parents to safeguard their children financially).

¹⁹⁴ See *Gaffney v. Constantine*, 87 N.Y.S.2d 131, 132 (Sup. Ct. 1949).

¹⁹⁵ *In re Curry*, 491 N.Y.S.2d 217, 219 (Sur. Ct. 1985).

¹⁹⁶ *Id.*

¹⁹⁷ *Addo*, N.Y.L.J. Sept. 30, 1997, at 26.

¹⁹⁸ *Id.*

interest and not a bundle of court orders showing that his funds were spent for ordinary necessities of life which others [parent-guardians] were obligated by law to furnish to him. [Parents] must feed and clothe [their] children.¹⁹⁹

Therefore, because it is the duty of the parents to provide support for their children, and it is against public policy to pay the mother of an infant a salary for caring for her own child, courts should not commence Article 81 guardianship proceedings for minors under the statute as currently enacted.

V. RECOMMENDATIONS

Should New York courts continue their trend of judicial activism by employing Article 81 for infants, as seems likely, the Legislature must amend Article 81 to explicitly exclude or include children within the meaning of "persons." For such an amendment to be effective, it must include provisions addressing the unique needs of children, such as education, day care and the psychological needs of developing children.

Several aspects of Article 81 should also be specifically amended to safeguard the rights of minors. First, the Legislature should amend Article 81 to mandate that guardianship training²⁰⁰

¹⁹⁹ *Gaffney*, 87 N.Y.S.2d at 132 (denying petition of an unemployed father to withdraw funds from son's personal injury settlement); *see also* *Demarco v. Seaman*, 283 N.Y.S. 697, 698 (Sup. Ct. 1937) (holding that parents may not withdraw money from awards held for their children to compensate them for their pain and suffering).

²⁰⁰ *See* N.Y. MENTAL HYG. LAW § 81.39 (McKinney 1997) (outlining guardian education requirements). "Each person appointed by the court to be a guardian must complete a training program approved by the chief administrator." *Id.* § 81.39(b). The importance of this provision is that in the guardianship training session, the guardian is trained with respect to his or her legal duties and responsibilities as well as all the available resources for the health and well-being of the incapacitated person. These resources only include directories of centers on aging. This must be amended to reflect the fact that a guardian in the training class may be charged with the care of a minor. But again, the fact that guardianship training classes do not address the needs of the infant points to the fact that the Legislature never intended the statute to extend to minors. This brings to the forefront the issue that a guardian of an infant incapacitated person

focus on issues dealing with minors. Currently, guardianship training covers the legal duties of a guardian,²⁰¹ the rights of an incapacitated person,²⁰² the available resources to assist an incapacitated person,²⁰³ an orientation to medical terminology²⁰⁴ and the preparation of annual reports.²⁰⁵ Existing guardianship training sessions also provide the guardian with information about Medicare, nursing homes,²⁰⁶ protective services for adults,²⁰⁷ Social Security and other resources that are of special concern to the elderly.²⁰⁸ However, children have different developmental needs from the elderly in such areas as education, day care, and psychological care. It is counterproductive to have a guardian of the person and property of an infant incapacitated person undergo training geared towards the needs of the elderly. If the court insists on applying Article 81 to children, then dual guardianship training programs must be created to address the drastically different needs

is not properly trained under Article 81 training classes. This may have a negative impact on the child if the available resources to aid the infant are unknown.

²⁰¹ *Id.* § 81.39(b)(1).

²⁰² *Id.* § 81.39(b)(2).

²⁰³ *Id.* § 81.39(b)(3). For example, guardianship training sessions distribute information to guardians on how they may obtain information from the New York City Department for the Aging regarding benefits available for people sixty and over. *See Dolan, supra* note 179, at 169.

²⁰⁴ N.Y. MENTAL HYG. LAW § 81.39(b)(4) (McKinney 1997).

²⁰⁵ *Id.* § 81.39(b)(5).

²⁰⁶ Nursing homes are residential health care facilities offering twenty-four hour services including skilled nursing, complete assistance with activities of daily living as well as other skilled therapies, predominantly for older adults. *See Dolan, supra* note 179, at 156.

²⁰⁷ Protective services for adults are "services provided to people under Title XX who have no one responsibly able to assist them, and who, because of either physical or mental impairment are unable to meet their essential needs." *See Dolan, supra* note 179, at 156.

²⁰⁸ *See Dolan, supra* note 179, at 146. Guardianship training classes stress the fact that the best plan for an elderly incapacitated person is one which "consults the preferences of the elders and their adult children; harmonizes them as much as possible, and brings all the local practical resources (of Medicare, Medicaid, insurance, voluntary organizations, and the private sector) into play." *Dolan, supra* note 179, at 146. Again, mention of the needs of incapacitated children is absent throughout the guardianship training literature.

of children and the elderly. In addition, an infant incapacitated person has the benefit of a longer life span in which technology and medical improvements may one day eliminate the infant's need for a guardian. This reality can best be addressed in a specialized infant guardianship program.

Second, Article 81 should be amended to create a hybrid statute combining its mandate of a guardianship structure focusing on the incapacitated person's need for autonomy with C.P.L.R. 12's insistence on protecting the principal of an infant's funds. Under such a hybrid statute, New York courts would have the versatility of Article 81's requirement that the guardian provide the ward with a narrowly tailored guardianship, coupled with the stipulation that all the infants' funds may only be withdrawn by court order.

Third, should the courts continue to allow infant guardianship proceedings to be commenced pursuant to Article 81, then the Legislature should adopt mediation as an alternative to the inherently adversarial nature²⁰⁹ of an Article 81 hearing.²¹⁰ In determining whether mediation would be appropriate in the guardianship context, the Legislature should refer to the successes mediation has had in the field of child custody. Child custody hearings are analogous to Article 81 proceedings in that neither result in final judgments of right or wrong. Rather, the goal of both Article 81 and child custody proceedings is to arrive at a compromise that maintains a continuing relationship between the parties. Mediation is a viable tool in an Article 81 proceeding because it eliminates the animosity fostered by litigation and empowers parties to resolve disputes in a cooperative manner.²¹¹ Moreover, the adversarial nature of Article 81 proceedings have been found to have "devastating psychological, social and economic effects on the

²⁰⁹ In order for a petitioner to prevail in a guardianship proceeding, there must be clear and convincing evidence that "the person is unable to provide for personal needs and/or property management; and the person cannot adequately understand and appreciate the nature and consequences of such inability." N.Y. MENTAL HYG. LAW § 81.02(b)(1)-(2) (McKinney 1997).

²¹⁰ See Julie Michaels Keegan, *Court-Referral Guardianship Mediation: A Practical Alternative to Article 81 Proceedings*, ELDER LAW ATT'Y, Fall, 1997, at 53, 55 (1997) (outlining the benefits of mediation in the guardianship context).

²¹¹ *Id.* at 55.

parties [families], while creating significant cost to the courts.”²¹² Mediation would be most successful at remedying the economic implications of applying Article 81 to an infant guardianship proceeding.

The potential that mediation has for change in the infant guardianship context is immense. A case study which illuminates the necessity of mediation is found in the *Marmol* situation. By a 1997 memorandum decision, the court granted a motion by the guardian of the property of Adonis Pineda, Rebecca Rawson, to withdraw from Adonis’ funds \$57,531.50 for guardian services rendered from August 1, 1996 through January 31, 1997. This was not the first fee application granted to Ms. Rawson by the court. Since the date of her appointment as guardian through August 1, 1996, Ms. Rawson received \$80,346.50. The mother of the infant, Allison Marmol, objected to this fee arrangement. The decision stated: “Ms. Marmol voices her fear that Adonis’ assets are being seriously eroded by the fee demands of the guardian of the property.”²¹³ Adonis’ mother further contended that “if the fee structure and Ms. Rawson’s present application remain unmodified . . . the cost of Ms. Rawson’s services will represent the largest single yearly depletion of Adonis’ assets, far surpassing the cost of his education, therapies and other services.”²¹⁴ In fact, the memorandum decision highlights the fact that Mrs. Marmol, upon learning that every telephone communication made to Ms. Rawson was billed to the estate, resolved to stop calling Rawson.²¹⁵

The breakdown in communication illustrated by the *Marmol* decision is exactly the scenario that mediation would resolve. In the mediation process billing procedures would be anticipated and explained. By contrast, the *Marmol* court did not anticipate the harm its misuse of Article 81 would have on Adonis’ future.

²¹² *Id.* at 53.

²¹³ Motion by the Guardian of the Property of Adonis Pineda and Cross-motion by the Guardian of the Person at 12, *In re Marmol*, 640 N.Y.S.2d 969 (Sup. Ct. 1996) (No. 500113/95).

²¹⁴ *Id.*

²¹⁵ *Id.*

The court stated:

It was not anticipated by this court at the time of the Order setting the rate of compensation for the guardian that the need for her services would be as extensive as they are and would generate billings of such magnitude. Adonis receives \$98,218.75 semi-annually, for a yearly income of \$196,437.50. The total value of the settlement in his personal injury action is approximately \$5 million. He currently has in his account \$700,000. This is the same amount that was in his account in February 1996. Thus, his entire annual income has been consumed by expenses, over half of which constitute guardianship fees. If the cost of the guardianship of the property consumes half or more of Adonis' annual income, it could be tenably argued that the very purpose of such guardianship has been defeated; that the child's annual funds would be doubled at one stroke with the elimination of the very services intended to protect his income.²¹⁶

Under the process of mediation the basic misunderstandings between the parties in a guardianship proceeding, such as attorney's billing procedures for telephone calls, would never arise because there would be an open line of communication between all parties. In addition, mediation in the infant guardianship context would create a more comfortable environment whereby the parties could more effectively outline the needs of the child.²¹⁷ Moreover, mediation is a less costly alternative to litigation.²¹⁸ Consequently, the infant would be left with a larger settlement upon attaining majority.²¹⁹

The use of mediation in the infant guardianship context offers an alternative to litigation that would focus on the needs of the child in a more affordable and timely manner.²²⁰ Therefore, should the court's trend of judicial activism continue, the process

²¹⁶ *Id.* at 12-13.

²¹⁷ Keegan, *supra* note 210, at 55.

²¹⁸ Keegan, *supra* note 210, at 56.

²¹⁹ Keegan, *supra* note 210, at 56.

²²⁰ Keegan, *supra* note 210, at 56.

of mediation must be employed to further safeguard the rights of the minor.²²¹

CONCLUSION

The plain meaning and legislative intent of Article 81 affirmatively establishes that the statute was designed as a procedure for the appointment of a guardian to meet the personal and/or property management needs of elderly incapacitated persons. The history of Article 81 provides concrete evidence that the Legislature never intended infant guardianship proceedings to be commenced under the statute. Furthermore, the needs of children were never addressed in legislative debates and studies. As a result, Article 81 is ill-equipped to deal with infant guardianship issues and care.

It is therefore evident that New York courts must reject the precedent of *Marmol* and accept *Lavecchia* as the proper disposition of child guardianship proceedings. The *Lavecchia* court, recognizing the inappropriateness of using Article 81 for infants, converted the matter into a proceeding under S.C.P.A. Article 17. Furthermore, New York courts must dispense with blindly employing *Ramos* for the proposition that Article 81 is the only alternative when an infant will never reach competency upon attaining majority.

Courts must also carefully review C.P.L.R. 12 as a viable alternative for holding permanently incapacitated infant's funds. Comparatively, Article 81 affords only weak protection of these funds. As a result, the *Addo* court allowed an incapacitated infant's mother to collect a \$25,000 annual salary merely for being the child's mother. This incongruous result ignores the fact that the funds of this child are compensation for pain and suffering as well as for his maintenance upon attaining majority. The child alone is entitled to all of the money from his settlement and C.P.L.R. 12 protects that principle.

The *Addo* case and the recent motions and cross-motions filed in *Marmol* are indicative of the changes necessary in infant guardianship law. New York State Court of Appeals' Chief Judge

²²¹ Keegan, *supra* note 210, at 55.

Kaye recently established a Project Task Force to explore the use of mediation and ADR in the New York Court System in order to provide litigants with more choices. Although guardianship proceedings in general, and infant guardianship proceedings in particular, were not the focus of the Project Task Force study, they must be brought under this mediation umbrella. The same advocates in the elderlaw community who fought for the repeal of Articles 77 and 78 must investigate the abuses suffered by children under Article 81 on a case by case basis with a focus on their physical, economic and emotional well-being, instead of an analysis of lifeless court opinions.

Persons who serve as guardians of incapacitated children stand in a position of trust and confidence. As fiduciaries they have a duty that must not be compromised. Article 81 proceedings commenced for minors not only undermine the legitimacy of the guardian, but strip incapacitated infants of the funds earmarked for their survival.

