A Look at Modern Day Guardianships

By Deidre M. Baker

In New York, individuals are considered legal adults upon reaching the age of 18 and are presumed to have the capacity and right to handle their own affairs. This right, allowing a person to make his or her own decisions, is one that has been long recognized by New York case law.[1] While advance directives such as powers of attorney and health care proxies are important estate and disability planning tools, they do not always resolve the problems that arise when an adult becomes incapacitated. In addition, if no planning is done in advance of incapacity, seeking the appointment of a guardian under Article 81 of the Mental Hygiene Law (MHL) may be the only option available to help an incapacitated person.

History

Guardianships and surrogate decision-making are not new concepts. While these legal arrangements are currently in the forefront due to the movie, "I Care a Lot," and Britney Spears's ongoing conservatorship litigation, their origins date back to Roman law.[2] Guardianships, referred to as conservatorships in some states, are a legal proceeding where a third party seeks authority from a court in order to make some or all decisions on behalf of another adult who is suffering from some functional or cognitive impairments.

In New York, prior to 1993, a party seeking to make decisions on behalf of an allegedly incapacitated adult would rely on Article 78 of the Mental Hygiene Law.[3] Article 78 required a finding of complete incompetence before the court would appoint a "committee" on behalf of the "committed."[4] The requirement of complete incompetence resulted in a stigma for the committed person as the finding resulted in complete deprivation of his or her civil rights. Over time, courts became reluctant to appoint committees due to the overreaching power the committees often had.

In response to the restraining nature of Article 78, the New York State Legislature enacted its conservator statute, Article 77.[5] Article 77 did not require a finding of incompetence, but was limited to property and financial matters only. Most critically, however, was the fact that an individual did not suffer a complete deprivation of civil rights by virtue of the appointment of a conservator under Article 77, as was the case with the appointment of a committee under Article 78.

Practitioners and individuals still argued that neither statute adequately addressed the concerns or needs of a family in need of surrogate decision-making authority for a loved one, leaving a tangible gap in the relief offered by both statutes.[6] While Article 77, the conservator statute, often left the conservator with insufficient authority to properly handle the affairs of the conservatee, Article 78, and its obligatory judicial finding of incompetence, often granted more authority to the committee than was necessary.[7]

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Eventually attempts were made by the New York State Legislature to fill in the gaps. During this time, the trial courts in New York routinely stretched Article 77 beyond its intended use in order to address the needs of an individual.[8] This changed, however, in 1991 when the New York State Court of Appeals decided *Matter of Grinker (Rose)*.[9] There, the Court of Appeals ruled that an attempt to utilize Article 77 in order to place an Alleged Incapacitated Person (AIP) in a skilled nursing facility went well beyond the scope of the statute.[10] The case highlighted the gaping holes left by Articles 77 and 78 as courts were often faced with the difficult choice of granting too little authority under Article 77 or far more than necessary authority under Article 78.

Article 81

Article 81 of the Mental Hygiene Law became law in New York State in 1992 and went into effect April 1, 1993. The statute repealed Articles 77 and 78 of the Mental Hygiene Law and replaced them with one guardianship statute. Article 81 is the statute routinely used by practitioners seeking guardianship for an AIP.

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Mental Hygiene Law § 81.02 requires a two-pronged determination: (1) that a guardian is "necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person" and (2) "that the person agrees to the appointment, or that the person is incapacitated."[11] A finding of incapacity requires clear and convincing evidence be presented to the court demonstrating that the person is likely to suffer harm,[12] and that the likelihood the AIP will suffer harm is because he or she is unable to provide for personal needs or unable to manage property and financial affairs and he or she cannot adequately understand and appreciate the nature and consequences of such inability.[13]

Narrowly Tailored

While commencing a guardianship proceeding may be unavoidable, it should be noted that guardianships in most states, including New York, are viewed as a means of last resort. When a guardianship is being sought, the practitioner must remember that these proceedings are essentially requesting that the court remove the independence of another person and, as such, should be pursued truly when there are no other options.[14]

When enacting Article 81, the Legislature recognized that no uniform solution to the problem of incapacity in an adult existed. Instead, the guardianship system needed to promote the greatest amount of independence and self-determination possible by specifically tailoring the relief to the specific needs of the incapacitated person.[15] The guiding principle of Article 81 demands that, even if the individual alleged to be incapacitated is determined to in fact be incapacitated, the appointment of a guardian is still only appropriate if there are no other available resources or alternatives to meet the individual's needs.[16]

New York courts have routinely dismissed petitions where sufficient resources exist to adequately meet the personal and property management needs of the AIP, even when the individual is undoubtedly incapacitated.[17] In fact, the plain language of Article 81 states that the petition initiating the action must indicate that "the available resources, if any, have been considered by the petitioner and the petitioner's opinion as to their sufficiency and reliability."[18] Prior to seeking judicial intervention on behalf of an individual, the petitioner must first be able to articulate that there is a need for the appointment of a guardian.

Although properly drafted advance directives such as powers of attorney and health care proxies are perhaps the most direct way to obviate the need for a guardianship, they are not the only solutions. When assessing whether the appointment of a guardian is necessary, the court will investigate all resources available to the alleged incapacitated person, including visiting nurses and establishment of representative payee relationships.[19]

If the court determines that the appointment of a guardian is necessary, the guardian should be granted only those powers that are necessary to provide for the person's needs in a manner consistent with the principle of employing the least restrictive alternative, while affording the person the greatest amount of self-determination and independence.[20]

Civil Rights Implications

At the core of individual personhood is the ability to shape and define our lives by the choices we make.[21] All adults are presumed to have capacity to make their own decisions and manage their own affairs until there has been a judicial finding of incapacity. States reserve unto themselves the power to protect the wellbeing of its citizens who are unable to care for themselves.[22] This authority is derived from the states' *parens patriae* power whereby the state is regarded as the legal protector of its vulnerable citizens.[23]

While statutes such as Article 81 seek to provide the court with flexibility when determining the appropriate authority to grant a guardian, the fact remains that for every decision-making power entrusted to a guardian, one is taken away from the ward or incapacitated person. This reality has been described as "the most punitive civil penalty that can be levied against an American citizen."[24] In essence, the appointment of a guardian is the state terminating an individual's personhood under the law.[25]

The Constitution of the United States affords citizens due process rights under its Fifth and Fourteenth Amendments.[26] The Fifth Amendment specifically provides that the government shall not deprive anyone of life, liberty, or property without due process of the law. Guardianship proceedings impact both the liberty and property interest of the AIP.[27] Courts have ruled that liberty includes not only freedom from bodily restraint, but also the right to marry, have children, and other privileges commonly enjoyed by individuals.[28]

Courts have found that an individual is not in need of a guardian simply by virtue of suffering from medical or psychiatric conditions.[29] Essentially, individuals who may have some physical or cognitive impairment are entitled to all of the same rights and protections absent some demonstration that there is a need for a guardian.[30]

Possible Reforms

In light of the tremendous impact a guardianship proceeding can have on the civil rights of an individual, there has been a push for reform. Over the years, as the legal community struggles with the complexities of guardianships in light of the available legislation, it has looked to the Uniform Law Commission (ULC) in order to provide model statutes that could better address the needs of incapacitated people. In 2012, the National Guardianship Network (NGN) held its Third National Guardianship

Summit. The summit resulted in the recommendation that the ULC revise the Uniform Guardianship and Protective Proceedings Act of 1997.[31]

The drafting committee of the ULC spent the next few years putting together helpful state law provisions and reworking the existing legislation. The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act was adopted by the ULC in 2017 and is now ready to be enacted in the states.[32] Key provisions to the act include a new model petition that would provide presiding justices with additional information. The act also provides for supported decision-making as an alternative to guardianships.[33]

Since 2017, only Maine and Washington have adopted the act. The reason the act has not been more widely adopted could be due to financial considerations. In fact, several states, including New Mexico and Iowa, have opted to adopt only those parts of the law that do not require additional spending.[34] The act directs annual accounts, which need to be reviewed by court staff. The reviewing of accountings and other tasks directed by the act will require manpower that some states may not have readily available.[35]

More and more states, including New York, have begun implementing pilot programs surrounding supported decision-making (SDM). SDM is gaining traction as a means to avoid the inherent deprivation of rights that comes as the result of the appointment of a guardian. In 2015, Supported Decision-Making New York (SDMNY) was awarded a grant from the New York State Developmental Disabilities Planning Council (DDPC) for the purposes of creating and distributing educational materials related to supported decision-making throughout New York State.[36]

One of the strategies employed by SDMNY is that SDM is a process rather than a one-time transaction.[37] SDM can be informal or formal depending on the goals of the individual. The process sometimes results in a Supported Decision-Making Agreement (SDMA). The Agreement reflects the terms of the arrangement between the decision-maker and his or her supporters. It also reflects the ways in which the supporter will provide assistance to the decision-maker.[38]

The underlying principle of SDM is that it is a normal human function to consult with other people and sources when making a decision.[39] Additional backing for SDM can be in the 2006 United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), an international human rights treaty.[40] Article 12 of the UNCRPD makes it clear that individuals with disabilities have the same legal capacity as other people.[41] This right to legal capacity includes not only the right to make decisions, but the right to have the law recognize those choices as valid.[42]

Additionally, the American Bar Association through its Commission on Law and Aging, Commission on Disability Rights, Section on Civil Rights and Social Justice,

and Section on Real Property, Trust and Estate Law, produced the PRACTICAL Tool.[43] The PRACTICAL Tool aims to identify and implement decision-making options for persons with disabilities that are less restrictive than a guardianship. The Tool is intended to serve as a checklist for the client interview to ensure attorneys and advocates are aware of possible available alternatives to guardianships.[44]

Conclusion

Guardianships are an ever-changing area of the law, and like most law, it continues to evolve. In many cases, the appointment of a guardian cannot be avoided for a variety of reasons including lack of planning and lack of available alternative resources. As lawmakers continue to recognize the imperfections of existing guardianship laws and the restrictions they impose on an AIP's rights, it is hopeful that other less restrictive means of an assisting an AIP, such as SDM, will continue to evolve.

Endnotes

1. *See Schloendorff v. Society of New York Hospital*, 211 N.Y. 125 (1914).
2. *See* Kristen Booth Glen, *Changing Paradigms, Mental Capacity, Legal Capacity, Guardianships and Beyond*, 44 Colum. Hum. Rts. L. Rev. 93 (2012).
3. N.Y. Mental Hygiene Law § 77 (McKinney 1988) (repealed effective April 1, 1993); N.Y. Mental Hygiene Law § 78 (McKinney 1988) (repealed effective April 1, 1993).
4. *See* N.Y. Mental Hygiene Law § 78 (McKinney 1988).
5. Von Stange, Nora and von Stange, Gary (1993), *Guardianship Reform in New York: the Evolution of Article 81*, Hofstra Law Review: Vol. 21: Iss. 3, Article 5.
6. *Id*.
7. *Id*.
8. *Id*.
9. 77 N.Y.2d 703 (1991).
10. *Id.*
11. N.Y. CLS Men. Hyg. § 81.02(a)(1),(2).
12. Bailly, Rose Mary and Sacks, Debra (2005), *Guide to Adult Guardianship: Article 81 of the New York State Mental Hygiene Law*, at 7.
13. *Id.*
14. *See N.Y. Practice Guide: Probate & Estate Admin* § 17.20 and § 17.16.
15. N.Y. CLS Men. Hyg. § 81.01.
16. Bailly, Rose Mary and Sacks, Debra (2005), *Guide to Adult Guardianship: Article 81 of the New York State Mental Hygiene Law*, at 4.
17. *In re Samuel S. (Helene S.)*, 96 A.D.3d 954, 947 N.Y.S.2d 144, 2012 N.Y. App. Div. LEXIS 4954, 2012 NY Slip Op. 5010, 2012 WL 2330270.
18. N.Y. CLS Men. Hyg. § 81.08 (a)(14).
19. *Id.* at § 81.03(3)
20. *See* generally, *Guide to Adult Guardianship: Article 81 of the New York State Mental Hygiene Law*.
21. *See* generally Kristin Booth Glen, *Supported Decision-Making and the Human Right of Legal Capacity*, 3 INCLUSION 2 (2015).
22. Greene, Susan (2020) *Through the Guardianship Looking Glass: A Personal Perspective on Conflicting Commitments*, 28 Elder L.J. 1.
23. *Id.*
24. H.R. Doc. No. 100-641, at 4 (1987). Subcomm. on Health and Long-term Care of the House Select Comm. on Aging 100th Cong—Abuses in Guardianships of the Elderly and Infirm: A National Disgrace. Prepared statement of Chairman Claude Pepper.
25. Monthie, Jennifer (2017), *The Myth of Liberty and Justice for All Guardianship in New York State*, 80 Alb. L. Rev. 947.
26. USCS Const. Amend. 5; *see* U.S. Const. amend. XIV, § 1.
27. *See* Monthie, Jennifer (2017) *The Myth of Liberty and Justice for All Guardianship in New York State*.
28. *Id.* at 961.
29. *Id.* at 966.
30. *Id.*
31. *Symposium: Third National Guardianship Summit: Standards of Excellence*, Utah Law Review, Vol. 2012, No. 3 (2012);
32. *See* https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c.
33. *Id.*
34. Bayless, Cara (2021), *'More Art' Than Science: Incapacity Findings Prone to Abuse*, at 6.
35. *Id.*
36. Pell, Elizabeth (2019), Supported Decision-Making New York: Evaluation Report of an Intentional Pilot at 4.
37. *See* https://sdmny.hunter.cuny.edu/about-sdmny/about-sdm/sdm-in-general/.
38. *See* https://sdmny.hunter.cuny.edu/for-attorneys/.
39. *Id.* at 8.
40. Booth Glen, Kristin (November 29, 2017), *Piloting Personhood: Reflections From the First Year of a Supported-Decision-Making Project*, Cardozo Law Review, Vol. 39 at 497.
41. G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006) at 12.
42. *Id.* generally.
43. *See* https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/.
44. *Id.*