# PROPOSING AN AMENDMENT TO ARTICLE 81 TO ALLOW INVALIDATION OF WILLS AS PART OF, OR SUBSEQUENT TO, A PROCEEDING FOR APPOINTMENT OF A GUARDIAN

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Jane Doe is a seventy-nine-year old woman who lives alone in the same apartment she once shared with her husband who passed away over fifteen years ago. Although she owns her apartment, she has not paid her maintenance bills in three months. A few weeks ago, the co-op office called Jane's only child, Sara, to discuss the matter. Sara quickly placed a check in the mail to cover the back payments and called her mother to say she would be visiting the next afternoon.

The next morning, Sara received a phone call from her mother's bank. The bank officer was suspicious as to why Sara's mother had requested three new passbooks in the past four months and had withdrawn large sums of money.

Sara then proceeded to her mother's apartment in Queens. No one answered the door, so she used her key to let herself in. Sara noticed the place was immaculate. She thought to herself, "If something was really wrong with my mother, the place would not look so clean, she wouldn't be so organized."

On her mother's desk, Sara noticed an unopened lawyer's letter. She wasn't familiar with the name and so she proceeded to open the envelope. What she discovered was a recently executed Power of Attorney and Last Will & Testament. The new Will requested everything be left to Carla, her mother's housekeeper. Sara was shocked.

When Jane returned home, Sara tried to talk with her mother about the urgency of the situation. Jane insisted that Sara was making everything up, that her daughter was unjustly tormenting her and had always been a selfish child. Jane grew even angrier when Sara showed her the paperwork that Jane insisted was part of Sara's little game to somehow make her look

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stupid. Jane reminded her daughter that she had been intelligent enough to be one of the first women to attend City College.

The next day, Sara went to her lawyer to discuss bringing a guardianship proceeding under New York Mental Hygiene Law Article 81 in order to appoint herself as her mother's guardian.[2] The lawyer informed her that under such a proceeding the court would presumably revoke the Power of Attorney in favor of Carla,[3] but that the court most probably would not revoke the Will.[4] This would mean that Sara would have to wait until her mother passed away to challenge the Will's validity.[5]

However, Sara's lawyer also informed her that Jane might still have enough capacity to execute a new Will.[6] If the court felt Jane was lacking testamentary capacity, then the court could use Will substitutes to transfer out her mother's assets in order to avoid most of the property being subject to probate.

## ALZHEIMER'S DISEASE

Jane is one of approximately 4.5 million Americans suffering from Alzheimer's Disease and other forms of dementia.[7] Alzheimer's is a progressive, degenerative disease of the brain, which afflicts "one in ten persons over 65 and nearly half of those over 85."[8] Although Alzheimer's is a fatal disease, a person may live an average of eight years and as many as twenty years after the onset of symptoms. The disease may range in severity from mild forgetfulness to completely losing the ability to speak and understand.[9]

As of 1993, over 19 million Americans reported having a family member with the disease.[10] Most often, it is the family members who must provide the day-to-day care for people with Alzheimer's.[11] As the disease

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[2] *See generally* N.Y. MENTAL HYG. LAW § 81 (McKinney Supp. 1993).

[3] *See generally* § 81.29.

[4] *See* § 81.29(b).

[5] New York uses post-mortem probate. Hence, all Will challenges are filed in Surrogate's Court after the death of the testator.

[6] Note that a guardian cannot be granted authority to execute a Will or codicil. *See* LEONA BEANE, THE ADULT GUARDIAN-MENTAL HYGIENE LAW, ARTICLE 81, 281 PLI/EST. 177, 237 (1999). However, a finding of incapacity for guardianship purposes does not automatically prove incapacity for testamentary purposes.

[7] *See* ALZHEIMER'S ASSOCIATION, *Statistics about Alzheimer's Disease, at* http://www.alz.org/AboutAD/Statistics.htm (last visited Oct. 20, 2002) [hereinafter ALZHEIMER'S ASSOCIATION].

[8] *Id.*

[9] *See id.*; *see also* ALZHEIMER'S DISEASE EDUCATION AND REFERRAL CENTER, *Alzheimer's Disease Fact Sheet, at* http://www.alzheimers.org/pubs/adfact.html (last visited Oct. 20, 2002) [hereinafter ALZHEIMER'S DISEASE EDUCATION AND REFERRAL CENTER].

[10] *See* ALZHEIMER'S ASSOCIATION, *supra* note 7.

[11] *See* ALZHEIMER'S DISEASE EDUCATION AND REFERRAL CENTER, *supra* note 9.

worsens, a caregiver may find the care for the affected loved one creates physical, mental and financial hardships.[12]

One of the many reasons a guardianship proceeding is filed is to allow the caretaker to use the incapacitated person's funds to help them handle their financial affairs.[13] Hence, if Sara is appointed Jane's guardian, Sara will not have to exhaust her own savings in order to care for her mother during her mother's final days. It is quite common for a relative to contest a Will's validity based on a testator's diagnosis of Alzheimer's Disease. [14]However, at present, a caretaker may not contest a Will as part of an Article 81 guardianship proceeding, but instead must wait until the death of the incapacitated person.[15]

## ARTICLE 81 HISTORY & AMENDMENT PROPOSAL

In order for Sara to have Jane declared incapacitated for guardianship purposes, she must prove her mother's incapacity under New York Mental Hygiene Law Article 81, entitled Proceedings for Appointment of a Guardian for Personal Needs or Property Management.[16]

Article 81 was enacted in 1992 as a response to the inadequacy of laws available for incapacitated persons and their caretakers.[17] The preceding laws, Article 77[18] and Article 78,[19] were either restricted to full control over

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[12] *See id.*

[13] A typical guardianship application states that, "[a]n application has been filed in court by _____ who believes you may be unable to take care of your personal needs or financial affairs. _____ is asking that someone be appointed to make decisions for you." MICHAEL S. HABER, GUARDIANSHIPS: ARTICLE 81 OF THE MENTAL HYGIENE LAW, 266 PLI/EST. 423, 439-40 (1998). Other reasons that one files a guardianship proceeding are to "provide support for persons dependant on the incapacitated person," "exercise or release powers held by the incapacitated person," "exercise any right to an elective share in the estate of the incapacitated person's deceased spouse," "enter into contracts," "authorize access or release of confidential records," or "apply for government or private benefits." § 81.21(a).

[14] *See In re* Will of Ethel Holden Brownstone, 735 N.Y.S.2d 78 (N.Y. App. Div. 2001) (holding that evidence was insufficient to prove testator lacked testamentary capacity due to Alzheimer's disease); *In re* Ruth Levenson, 735 N.Y.S.2d 186 (N.Y. App. Div. 2001) (holding that allegations that the testator had Alzheimer's disease at the time of Will execution could not be proved as doctor was not identifiable and alleged statements were inadmissible hearsay); *In re* Estate of Jane B. Buchanan, 665 N.Y.S.2d 980, 983 (N.Y. App. Div. 1997) (stating that "[m]ere proof that testator suffered from old age, physical infirmity and chronic, progressive senile dementia when the [W]ill was executed is not necessarily inconsistent with testamentary capacity").

[15] *See supra* text accompanying note 6.

[16] This Note does not go into the lengthy procedures of Article 81.

[17] *See* § 81.01; *see also* Nora von Strange & Gary von Strange, *Guardianship Reform in New York: The Evolution of Article 81*, 21 HOFSTRA L. REV. 755, 758 (1993); Neil B. Posner, *The End of* Parens Patriae *in New York: Guardianship Under the New Mental Hygiene Law Article 81*, 79 MARQ. L. REV. 603, 614 (1996).

[18] *See* N.Y. MENTAL HYG. LAW § 77 (McKinney 2002) (repealed 1993) (allowing for the appointment of a conservator for property only).

[19] N.Y. MENTAL HYG. LAW § 78 (McKinney 2002) (repealed 1993) (providing for the appointment of a committee upon a finding of complete incompetence).

the incapacitated person or control over their property, both real and personal.

Article 81, which repealed both Articles 77 and 78, sought to correct the apparent restrictions the court faced in appointing a guardian by establishing a guardianship system that customized appointments on an individual need basis.[20] The statute authorizes the court to address personal and/or property management needs by taking into account the physical and mental function of each person, as well as their preferences and desires.[21] While some court appointed guardians might take full control of an incapacitated person's person and property, other guardians might be granted limited functions in order for the incapacitated to exercise some level of independence.[22]

Although Article 81 is a vast improvement from prior law, there are still loopholes in the statute that curb the court's ability to function efficiently and preserve resources. One of these loopholes is the ambivalent position the statute takes when dealing with the Last Will and Testament of an incapacitated individual.[23]

Due to such inconsistencies, many New York Supreme Court judges are reluctant to handle testamentary capacity issues related to Wills executed just prior to a court's finding of incapacity of an individual for Article 81 purposes. This point was noted in the Queens County Supreme Court decision of *In re Ruby Slater*:[24]

> [T]he Court, *sua sponte* takes the extraordinary step of vitiating the Will executed on November 17, 2000. In doing so this Court is conscious that such [action] is usually reserved to the Surrogate and the Court has the authority to exercise its general jurisdiction and make this determination in light of the facts before it at this time.[25]

This note is meant to propose an amendment to Article 81[26] that will mitigate the New York Supreme Court's uneasiness in addressing the matter

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[20] *See* § 81.21; *see also* Posner, *supra* note 17, at 613-14 (pointing out that § 81.01 discusses the fact that certain incapacitated persons require some form of assistance in meeting their personal and property management needs but do not require the drastic remedies that were available prior to the enactment of Article 81).

[21] *See* § 81.21.

[22] *See* § 81.16(c); BEANE, *supra* note 6, at 188.

[23] *See* BEANE, *supra* note 6, at 188.

[24] N.Y.L.J., Feb. 11, 2002, at 28 (N.Y. Sup. Ct. 2002).

[25] *Id.* The New York Supreme Court is endowed with general original jurisdiction in law and equity. N.Y. CONST. art. VI, § 7(a). If the legislature creates new classes of actions and proceedings, the Supreme Court shall have jurisdiction over such classes of actions and proceedings even though the Legislature confers other courts with jurisdiction over these same actions and proceedings. *See* N.Y. CONST. art. VI, § 7(c).

[26] Presumably this would be accomplished by amending Article 81.29 to include the word "Wills."

of Wills by authorizing the court to address the matter as part of a guardianship appointment proceeding, either at the time of filing a proceeding or as a subsequent motion.

Part I of this note addresses specific sections of Article 81 that help explain the paradoxical relationship between the legislation and Wills. Part II compares the common law capacity issues associated with Article 81 with the capacity issues required of testamentary capacity. Part III compares the concept of such an amendment to Article 81 with that of ante-mortem probate.

## I. ARTICLE 81

### A. *Proving Incapacity*

Since the non-payment of rent is in itself not sufficient to prove a person's incapacity,[27] how then can Sara have herself appointed as her mother's guardian? The court may appoint a guardian after determining two factors.[28] First, 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."[29] Second, the court must determine that the person either agrees to the appointment or that the person is deemed incapacitated by the court.[30] As Jane is oblivious to her condition, she is not about to consent to having her "ungrateful" daughter appointed as her guardian.

Hence, under Article 81, Sara must prove by "clear and convincing evidence"[31] that her mother is likely to suffer harm because: (1) she is unable to provide for her personal needs and/or property management and (2) she cannot adequately understand and appreciate the nature and consequences of her inability.[32] Under Article 81, the court is authorized to give "primary consideration to the functional level and functional limitations of the person . . . [as well as] consider all other relevant facts and circumstances regarding the person's functional level,"[33] including "any physical illness and the prognosis of such illness."[34]

Although it is common in most counties to hear physician testimony,

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[27] *See In re* David C., 742 N.Y.S.2d 336 (N.Y. App. Div. 2002) (noting the fact that appellant was substantially delinquent in his rent payments and failed to maintain his apartment in a proper condition did not constitute sufficient evidence to prove incapacity under Article 81).

[28] *See* § 81.02(a); *see also In re* Maher, 621 N.Y.S.2d 617, 618 (N.Y. App. Div. 1994).

[29] § 81.02(a).

[30] *See* § 81.02(b).

[31] *Id.; see also* § 81.12 (placing the burden of proof on the petitioner).

[32] *See* § 81.02(b).

[33] § 81.02(c).

[34] *Id.*

Article 81 does not specifically provide for a physician's testimony in court.[35] The lack of any mandatory medical testimony points to the perception that a diagnosis is not conclusive of incapacity, but is instead evidence to be considered in light of a person's behavioral and functional limitations.[36] Further, a person's functional limitations may sometimes be determined without medical testimony, as witness testimony may be able to determine whether an individual is capable of dressing, shopping, cooking or managing his or her assets.[37]

The best testimony is often that of the allegedly incapacitated person.[38] Although a doctor's testimony is not mandatory, the presence of the allegedly incapacitated person at the hearing is a required so the court can make their own judgments regarding the person's capacity.[39] If the allegedly incapacitated person cannot make it to the courthouse, the hearing may be moved to their location.[40] Unless the evidence clearly establishes that the person is completely unable to participate in the guardianship proceeding, the requirement will not be dispensed with.[41]

In order to further examine the inconsistencies in relation to Wills under Article 81, it can be assumed that a hearing was held to determine Jane's incapacity. It can also be assumed that not only did Jane take the

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[35] *See In re* Kustka, 622 N.Y.S.2d 208, 210 (N.Y. Sup. Ct. 1994) (pointing out that the legislature could have specifically listed physician testimony if they had intended for the court to consider medical testimony); *see also In re* Harriet R., 639 N.Y.S.2d 390 (N.Y. App. Div. 1996) (discussing that a thirty-seven year old morbidly obese woman contended that although respondent provided clear evidence that she was physically limited by her obesity, they failed to prove that she lacked the understanding or appreciation of the nature and consequences of her limitations. She alleged that the court's decision was based largely on psychiatric testimony and that she should have been afforded an opportunity to challenge that testimony with the testimony of a court-appointed independent psychiatrist. After affirming the appointment of a guardian, the court noted that they based their determination upon the statements and testimony of all the witnesses, not merely upon the psychiatric testimony and that there is nothing in Article 81 which mandates medical testimony in a guardianship proceeding); BEANE, *supra* note 6, at 182.

[36] *See* Law Revision Commission Comment, N.Y. MENTAL HYG. LAW § 81.02.

[37] *See Kustka*, 622 N.Y.S.2d at 210.

[38] While this is often the best evidence to prove incapacity or capacity, it may also be the worst evidence, if the allegedly incapacitated person is skilled at covering up his or her condition.

[39] *See* § 81.11(c); *Kustka*, 622 N.Y.S.2d at 211 (discussing that the court-appointed a guardian for the property of Mr. Kustka without a doctor's testimony, after he testified at his appointment hearing regarding his financial affairs. The court observed Mr. Kustka's demeanor and his confusion when questioned about his new wife/former home healthcare aid's questionable withdrawal from his funds). *But see In re* Maher, 621 N.Y.S.2d 617 (N.Y. App. Div. 1994) (demonstrating that the petitioner failed to establish by "clear and convincing" evidence that the respondent was unable to handle his property. The court noted that although the respondent had suffered a stroke that had left him with right-sided hemiplegia and aphasia, his ability to understand what he was told and to make his wishes known was not impaired).

[40] *See* § 81.11(c).

[41] *See* § 81.11(c)(2); *In re* DiCecco, 661 N.Y.S.2d 943, 944 (N.Y. Sup. Ct. 1997) (stating that the court waived the presence of the AIP, since the AIP could not understand or meaningfully participate in the proceedings).

witness stand, but that both a doctor and other witnesses helped clearly establish Jane's need for a guardian over her person and property, and finally, that Sara was appointed her mother's guardian.[42]

### B. *The Powers of the Courts & the Guardian*

Under Article 81.21, the court may authorize a guardian to exercise powers that are "necessary and sufficient to manage the property and financial affairs of the incapacitated person" in order to provide for the person's "maintenance and support."[43] Power might be granted to "transfer a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act."[44] Transfers made may "be in any form that the incapacitated person could have employed if he or she had the requisite capacity, except in the form of a Will or codicil."[45]

Even though a guardian does not have the power to execute a Will for the incapacitated person, Article 81 authorizes the power to transfer assets for gifting purposes,[46] as well as the power to create revocable or irrevocable trusts that are not limited by the incapacitated person's lifetime.[47] The New York Supreme Court has also held that since authority is granted to a guardian to create trusts, the court alone has the authority to allow a guardian to modify an already existing trust.[48]

Although many of the transferring-out mechanisms allowed under Article 81 are used as part of a Medicaid planning device,[49] they may also act

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[42] *See* § 81.19(d). In appointing a Guardian, the court shall consider any appointment or delegation made by the AIP pursuant to a General Power of Attorney, DNR Order, Health Care proxy or Living Will, as well as the social relationship between the incapacitated person and the Guardian, other persons concerned with the welfare of the incapacitated person, and any conflicts of interest between the person proposed as Guardian and the incapacitated person. *Id.*

[43] § 81.21(a).

[44] *Id.*

[45] *Id.*

[46] *See* § 81.21(a)(1); *see also In re* Shah, 694 N.Y.S.2d 82 (N.Y. App. Div. 1999) (showing how Article 81 authorizes an appointed guardian to transfer the incapacitated person's assets to that person's spouse for the essential purpose of allowing the spouse to then refuse to use those assets for the payment of the costs associated with long term care).

[47] *See* § 81.21(a)(6).

[48] *See In re* Elsie "B," 707 N.Y.S.2d 695 (2000) (holding that the guardian's modification of incapacitated person's inter vivos trust to name guardian's two sons as additional co-trustees was properly ratified, where incapacitated person's Alzheimer's disease made it unlikely that she would regain her mental capacity).

[49] *See In re* Daniels, 618 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1994); *see also In re* DiCecco, 661 N.Y.S.2d 943 (N.Y. Sup. Ct. 1997) (allowing Medicaid planning); *Shah*, 694 N.Y.S.2d at 87 (noting that in distributing assets under a Medicaid plan to the incapacitated person's spouse pursuant to Article 81, a court may permit an incapacitated person to do, by way of a guardian, those essential things such a person could do but for his or her incapacity); *In re* Dianne DaRonco, 638 N.Y.S.2d 275 (N.Y. Sup. Ct. 1995) (stating that if approval of transfer of funds was denied, the cost of incapacitated person's nursing home would deplete the estate and render

as estate planning devices that both replace the necessity for a Will or escape probate.[50]

This does not necessarily mean that a Will is to be ignored when gifting out assets. A guardian who is granted the authority to manage an incapacitated person's property must, "determine whether the incapacitated person has executed a Will, determine the location of any Will, and the appropriate persons to be notified in the event of the death of the incapacitated person."[51] Further, when a guardian petitions to execute a transfer of assets, the petitioner must attach, if available, a copy of the incapacitated person's Will as well as a "statement as to how the terms of the Will became known to the petitioner or guardian."[52]

Hence, if Sara seeks to transfer out any of her mother's assets, she must submit to the court a copy of her mother's latest Will leaving everything to Carla.[53] Unless the court dispenses with such a requirement, Sara must also give notice to Carla of any proposed transfer of funds.[54]

In determining whether to approve of a petition to transfer assets, some of the factors the court will consider are: (1) whether the recipients of the proposed transfer "are the natural objects of the bounty of the incapacitated person,"[55] (2) whether the proposed transfer "is consistent with any known testamentary plan or pattern of gift[ing]" previously made,[56] and (3) whether "a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances."[57]

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the wife and son completely destitute).

[50] *See* BEANE, *supra* note 6, at 215. Some examples of Will substitutes are: trusts, life insurance, joint ownership of property, joint bank accounts and totten trust accounts.

[51] § 81.20(a)(6)(iii).

[52] § 81.21(b)(6). The guardian must also submit a list of names, relationships, and addresses of the presumptive distributes, as well as any beneficiaries under the most recent Will of the incapacitated person. *See* § 81.21(b)(8).

[53] *See id.* Presumably, Sara would have already filed a copy of Jane's Will in seeking to obtain power to manage her mother's property. *See* § 81.20(a)(6)(3). The reason for such a requirement is that the guardian is to act in compliance with the incapacitated person's wishes. *See* § 81.21(a).

[54] *See* § 81.21(c)(iii). The lack of such notice may result in the vacation of any approved transfer. *See also In re* Felix, 684 N.Y.S.2d 62, 64 (N.Y. App. Div. 1999) (holding that the guardians' failure to serve co-guardian with request to create Medicaid trust warranted vacature of the order approving the trust). It is important to note that Sara would have also been required to send notice of the initial guardianship proceeding to Carla under § 81.07(d)(iv) which refers to those designated with authority under a power of attorney. *Id.* However, there is no actual requirement that Will beneficiaries be sent notice. *Id.*

[55] § 81.21(d)(4).

[56] *Id.*

[57] § 81.21(e)(2).

In *In re John "XX,"*[58] the New York Supreme Court approved a transfer of $640,000 of the incapacitated person's assets to his adult children.[59] The court reasoned that the guardian's request to transfer funds was the "substituted judgment"[60] of the incapacitated person and therefore the transfer was consistent with John "XX"'s intent to benefit his adult children as manifested in his Will.[61] The court also considered the seventy-year association between John and his guardian/cousin when they allowed her to testify that she "knew that if competent, he would choose to make the transfers so as to be eligible to apply for Medicaid, while preserving a portion of his estate for his daughters."[62]

In *In re Felix*,[63] the New York Supreme Court vacated an order to establish a Medicaid trust after the co-guardians, the wife and stepson of the incapacitated person, failed to give notice to a fellow co-guardian, the incapacitated person's niece.[64] In contrast, in *In re* Burns, the court noted that failure to give notice was not in itself reason to vacate an order.[65] The trust that the co-guardians set up was created to benefit the incapacitated person's wife and the balance of the principle would be distributed to the wife's heirs at law.[66] However, the incapacitated person's Will, which included a requirement of survivorship, provided only that his wife would receive $25,000 and his interest in their house.[67] The court reasoned that since the trust the co-guardians created provided benefits to individuals who would not have benefited under the incapacitated person's Will, the order to vacate was appropriate.[68]

If the court only considered the incapacitated person's Will when approving the gifting out of assets, Sara would surely be in trouble as

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58 *In re* John "XX," 652 N.Y.S.2d 329 (N.Y. App. Div. 1996).

59 *See id.* at 330-31.

60 Law Review Commission Comment, N.Y. MENTAL HYG. LAW § 81.21.

61 *See John* "XX," 652 N.Y.S.2d at 331.

62 *Id.* at 330-31. Medicaid is a joint federal/state program that provides medical assistance to people meeting certain income and resource limits. A state Medicaid plan must provide a period of ineligibility for medical assistance when any institutionalized individual makes such a transfer of funds on or after the look-back date. In John's situation, as an institutionalized individual, the applicable look-back date is thirty-six months prior to his application for medical assistance. Hence, the reason the guardian petitioned to transfer out just enough money to sustain John's medical needs for three years. *Id.* at 331. *See also* N.Y. SOC. SERV. LAW § 366(5)(d)(1)(vi) (McKinney 1992) (stating Medicaid look-back period).

63 *See In re* Felix, 684 N.Y.S.2d 62 (N.Y. App. Div. 1999).

64 *See id.*

65 *In re* Burns, 731 N.Y.S.2d 537 (N.Y. App. Div. 2001) (stating that the fact that the testamentary heir of the incapacitated person did not receive notice of guardian's application to give charitable gifts was not sufficient to reverse the approval of the court). *See infra* text accompanying notes 75-83.

66 *See Felix*, 684 N.Y.S.2d at 64.

67 *See id.*

68 *See id.*

realistically, that would mean the only person Sara could gift money to would be Carla.

However, in *In re Daniels*,[69] the New York Supreme Court approved a transfer of real property to the twenty-year old daughter of an incapacitated person even though the incapacitated person also had a twenty-three year old son. The court explained that although the disposition was inconsistent with the known testamentary plan of the incapacitated person, the transfer to the son would not be legally possible under the rules of Medicaid eligibility.[70] The court further reasoned: (1) that the son resided in his own apartment that was paid for out of the incapacitated person's funds,[71] (2) that the daughter, who was a student, could use her father's support,[72] (3) that if the incapacitated person had been able to make the transfer himself, he would have chosen to do so,[73] and (4) that the incapacitated person was not considering Medicaid eligibility at the time he created his Will.[74]

In *In re Burns*,[75] the New York Supreme Court approved of charitable donations of $40,000[76] out of the assets of an incapacitated person. Essentially, this transfer completely changed the incapacitated person's Will.[77] The Will of the incapacitated person directed her entire estate go to her brother.[78] However, as her brother predeceased her, the whole of her estate passed to her nephew under the prevailing anti-lapse statute.[79] When approving the gifts, the court reasoned that the nephew, though her "sole surviving heir was not the natural object of her bounty."[80] Evidence was introduced, including a transcript from a previous hearing in which the

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69 618 N.Y.S.2d 499 (N.Y. App. Div. 1994).

70 *See id.* at 503. Medicaid planning involves the transferring of assets to permit a person to become Medicaid-eligible for the cost of nursing home care while enabling the incapacitated person to preserve assets for their heirs. *Id.* at 500. Transferring of assets to a child who is under the age of twenty-one is exempted from inclusion in determining a person's eligibility for medical assistance. *See* N.Y. SOC. SERV. LAW § 366(5)(d)(3)(i)(B) (McKinney 1992).

71 *See Daniels*, 618 N.Y.S.2d at 500.

72 *See id.* at 502.

73 *See id.* at 499.

74 *See id.* at 503.

75 *See In re* Burns, 731 N.Y.S.2d 537 (N.Y. App. Div. 2001).

76 *See id.* at 538.

77 *See id.* at 540. Although the incapacitated person died pending the appeal of the case, the Supreme Court mentioned that the matter was properly continued in the Supreme Court, as the Supreme Court and Surrogate's Court had concurrent jurisdiction over a decedent's estate. *Id.* at 539.

78 *See id.* at 538.

79 *See* N.Y. EST. POWERS & TRUSTS § 3-3.3 (McKinney 1992). "Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, *per stirpes*." *Id.* However, it is also important to note that even if the gift to her brother had lapsed, as her nephew was her sole surviving heir under the New York intestacy statute, all would have still gone to him. *Id.*

80 *In re* Burns, 731 N.Y.S.2d 537, 540 (N.Y. App. Div. 2001).

incapacitated person participated, to demonstrate that she was aware that her nephew was her sole surviving heir and that she did not want him to receive the whole of her estate since he had previously stolen some money from her.[81] Further, the court accepted the petitioner's contentions that he had conversations with the incapacitated person regarding the proposed gifts, and that at no time did she attempt to retract them.[82] Analyzing this case leads one to wonder why, if the incapacitated person was deemed to have capacity to allow a transfer and if her intent was that her nephew not be the sole beneficiary under her Will, she did not choose to just revoke her old Will and execute a new one.[83]

Considering Sara's situation, if she were to petition the court to transfer assets out of Jane's estate, it is highly likely that the New York Supreme Court would approve of the transfer. First, under *Burns*, the court could conceivably find that Carla was not the natural object of Jane's bounty. Second, under *John "XX,"* the requested transfer could be viewed as "substituted judgment" of the incapacitated person. Finally, although the transfer would be inconsistent with the last known Will of Jane, the court could review evidence of the Jane's relationships with her daughter and with Carla[84] to prove that if Jane possessed the capacity of a "reasonable individual" she would have preferred her estate be transferred to her daughter.[85]

### C. *Article 81.29: The Power to Revoke*

What about the Power of Attorney in favor of Carla that Jane executed prior to Sara's appointment as Jane's guardian? Does the court have a right to revoke the Power of Attorney now that they have granted Sara the right to manage Jane's property? What if Sara discovered that Jane had made numerous withdrawals from her bank account in the form of checks drawn out to Carla? Can Sara or the court authorize a refund of any money paid out? What other power does the court have to revoke any contracts or

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[81] *See id.* The court relied on evidence regarding the incapacitated person's refusal to transfer to her nephew, for a nominal fee, her interest in the home that she co-owned with her brother. *Id.* The court also stated that "[a]lthough she did not have a full appreciation of the extent of her assets which, at that time, approximated $500,000, she affirmed her intent to make a distribution of money to the charities listed by petitioner." *Id.* at 538.

[82] *See id.* at 540. The court noted that although the prior hearing evidence indicated that the incapacitated person was not in the habit of making charitable donations, she regularly gave to her church and had been committed to other related religious organizations. *Id.*

[83] *See id.* The estate of the incapacitated person at the time of the initial filing of suit was worth approximately $500,000. *Id.* Since the transferred funds were only worth $40,000, her nephew still inherited, assuming creditor's claims did not wipe out the remaining portion of the estate. *Id.*

[84] *See id.* at 538. Presumably, the court could also examine any evidence of undue influence.

[85] *See* § 81.21(e)(2).

conveyances made prior to the hearing on Jane's capacity?

An incapacitated person retains all powers and rights that were not granted to the guardian.[86] In fact, an incapacitated person may even execute a Will on his or her own behalf.[87] According to Article 81.29(b), "the appointment of a guardian shall not be conclusive evidence that the person lacks capacity for any other purpose, including the capacity to dispose of property by Will."[88] Of course, a lawyer who assists an incapacitated person in executing a Will must take all precautionary measures necessary to prove that testamentary capacity is still present.[89]

Conversely, Article 81.29, subsection (d) provides that a court that finds a person incapacitated:

> [M]ay modify, amend, or revoke any previously executed appointment or delegation under section 5-1501, 5-1601, or 5-1602[90] of the general obligations law . . . or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated.[91]

The powers granted under Article 81.29 are essential in that they allow a court to amend wrongs that have been visited on an incapacitated person. For example, a Power of Attorney is often used as a simple alternative to appointing a guardian.[92] However, numerous "horror stories" exist of elderly persons signing over a Power of Attorney to a relative or friend, only to find their assets disappear.[93] Occasionally, some of these situations end up in guardianship proceedings.[94] *In re Jennie Fanelli*[95] sadly illustrates some of the evils that may easily occur.

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86 *See* § 81.29(a).

87 *See* § 81.29(b).

88 *Id.*

89 *See In re* Scher, 524 N.Y.S.2d 494 (N.Y. App. Div. 1988) (holding that any attorney for an elderly person must make sure that the client has the requisite testamentary capacity to make a Will); *see also In re* Ruby Slater, N.Y.L.J., Feb. 11, 2002, at 28 (N.Y. Sup. Ct. 2002) (stating that a lawyer's actions "in drafting and proceeding with the execution of the Will, from an obviously impaired individual, is not only the epitome of improper conduct but borders on criminal").

90 These provisions refer to Powers of Attorney and surrogate decision-makers named in Living Wills or Healthcare Proxies. *See* von Strange & von Strange, *supra* note 17, at 769.

91 § 81.29(d) (citation omitted).

92 *See* Leona Beane, *Beware the Misuse of Power of Attorney*, N.Y.L.J., Aug. 23, 2002, at 4.

93 *See id.*

94 *See id.*

95 *In re* Jennie Fanelli, N.Y.L.J., Feb. 23, 1998, at 28 (N.Y. Sup. Ct. 1998).

In *Jennie Fanelli*, a somewhat healthy ninety-two year old woman gave two great-nieces a joint Power of Attorney.[96] At that time her assets were worth approximately $600,000.[97] However, four years later when her great-nieces dropped her off at a hospital,[98] her estate was worth only $200. The hospital, determining Mrs. Fanelli was not in need of hospitalization, tried to contact the nieces. The nieces had given incorrect information and the hospital was unable to locate them. The hospital petitioned for the appointment of a guardian.[99] By that point, it was useless for the court to revoke the Power of Attorney.[100]

Under a guardianship proceeding, a Power of Attorney may only be revoked by a court.[101] The guardian is not granted any authority to revoke any appointment or delegation made pursuant to a General Power of Appointment, Health Care Proxy or Living Will.[102] This may easily lead to a dilemma if the court chooses not to revoke a Power of Attorney, yet appoints a separate guardian to exercise minimal intervention in a person's property management. Hence, if the court chose not to revoke the Power of Attorney that Jane executed in favor of Carla, Sara's appointment as a guardian would be highly limited.

However, when a guardianship proceeding is brought after a Power of Attorney has been executed prior to incapacity, the court will decide whether the execution of the document restrains the necessity for the appointment of a guardian[103] or whether a guardian should be appointed and the Power of Attorney revoked.[104]

The New York Supreme Court pointed out in *In re Rochester General Hospital* that it "would be an anomaly if a guardian were precluded from making responsible decisions for the preservation of a person's property because the same decision making authority had been previously granted, under a Power of Attorney, and the grantee thereof is unwilling or unable to fulfill his or her duties."[105] Subsequently, the court revoked a Power of

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96 *See id.*

97 *See id.*

98 *See id.* At the time Mrs. Fanelli was brought to the hospital, she was disoriented and had mild swelling in her legs, which was treatable with oral medication. Her great-niece later testified that she thought this was the way to get her aunt into a home. *Id.*

99 *See id.*

100 *In re* Jennie Fanelli, N.Y.L.J., Feb. 23, 1998, at 28 (N.Y. Sup. Ct. 1998). The court notified the Elder Abuse Program of the Manhattan District Attorney's Office of the need for further investigation and assessment of the co-fiduciary who had managed the assets for all fees, including those of the Court Evaluator's fees and petitioner hospital. *Id.*

101 *See* § 81.29(d).

102 *See* § 81.22(b). Notice the restriction is inconsistent with the authority granted under § 81.29(d); *see also* BEANE, *supra* note 6, at 187.

103 *See In re* Rochester General Hospital, 601 N.Y.S.2d 375, 379 (N.Y. Sup. Ct. 1993).

104 *See id.*

105 *Id.* at 381.

Attorney in favor of the incapacitated person's son, after the son refused to cooperate in obtaining Medicaid reimbursement to cover his father's hospital expenses.[106]

In revoking the Power of Attorney, the court noted that it had serious doubts as to the son's ability to make future decisions regarding his father's medical care,[107] that the son had ignored at least ten requests by the hospital to meet with them to discuss completing a Medicaid application, and that he was "either unable or unwilling to exercise the authority granted to him under the Power of Attorney."[108]

Following the decision in *In re Rochester General Hospital*, the court went further in *In re Kern*[109] by stating that any acts done under the authority of a Power of Attorney may be voidable.[110] The court, after revoking the Power of Attorney in favor of the incapacitated person's friend, authorized the appointed guardian to investigate some of the transfers of the more than $300,000 transferred to the attorney-in-fact.[111]

As Article 81.29(d) points out, revocations are not limited to merely a Power of Attorney. In *In re Lebovici*,[112] a case of first impression for the New York Supreme Court, Queens County, the incapacitated person's court-appointed guardian moved to vacate and discharge a mortgage entered into one year prior to being deemed incapacitated. The ground for the discharge included the fact that the woman was incapacitated at the time of the execution of the mortgage.[113]

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106 *See id.* at 377. The son had also assumed control of his father's company and indicated his father's home had been previously sold, but was unable to fully account for the proceeds. *Id.* at 379. The hospital had brought the guardianship proceeding as "a person otherwise concerned with the welfare of the person alleged to be incapacitated." § 81.06(a)(6). The Court concluded that the hospital had established, by clear and convincing evidence, that the incapacitated person was likely to suffer harm because of his inability to provide for his personal needs and property management and could not adequately understand and appreciate the nature and consequences of such an inability. *In re* Rochester General Hospital, 601 N.Y.S.2d 375, 379 (N.Y. Sup. Ct. 1993). *But see In re* Chase, 694 N.Y.S.2d 363 ((N.Y. App. Div. 1999) (stating that the Appellate Division reversed the lower court's revocation of a power of attorney after concluding that, although the incapacitated person's daughter had transferred out most of her father's assets, she was properly taking care of all his needs in accordance with her father's previous wishes).

107 *In re* Rochester General Hospital, 601 N.Y.S.2d 375, 379 (N.Y. Sup Ct. 1993). In fact, the son had rarely visited his father in the hospital. *Id.*

108 *Id.; see also In re* Mascolone, 647 N.Y.S.2d 433 (N.Y. Sup. Ct. 1996) (showing that the incapacitated person's niece was unable or unwilling to sell the incapacitated person's cooperative apartment in order for them to become Medicaid eligible).

109 627 N.Y.S.2d 257 (N.Y. Sup. Ct. 1995).

110 *See id.* at 263.

111 *See id.* at 264.

112 655 N.Y.S.2d 305 (N.Y. Sup. Ct. 1997).

113 *See id.*

The court cited earlier law under the former conservatorship and committee statutes, Article 77 and Article 78,[114] and held that it was "well settled that the contracts of a person of unsound mind who has not been judicially declared incompetent are voidable, rather than void, at the election of the incompetent or his duly authorized representative."[115] The court refused to void the mortgage holding that the evidence of incapacity at the time of the mortgage's execution was insufficient[116] and that where a mortgagee had no notice of incapacity at time of the execution of the mortgage, the mortgagee was a bona fide purchaser for value that could not be disturbed.[117]

In examining a person's capacity to enter into a contract, the *Lebovici* court reaffirmed the general rule that "mental weakness alone is not sufficient to justify setting aside a contract"[118] and that the law "presumes the competence of an individual."[119] The court further stated that the party alleging incapacity must bear the burden of proving that, "at the time of the transaction, the party was so deprived of his mental faculties as to be wholly unable to understand or comprehend the nature of the transaction."[120]

In *Jenkins v. Stephenson*,[121] the New York Supreme Court invalidated a conveyance of real property after determining that the incapacitated person was in fact incapacitated at the time of the transfer of the property and that the transfer was the result of undue influence and fraud.[122]

It also appears from the case law evolving out of Article 81 that the New York Supreme Court's view on a person's capacity may be dependent on the

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114 *See id.* at 307.

115 *Id.*

116 *See id.* at 308. Only eyewitness evidence existed regarding the incapacitated person's condition at the time of the mortgage and the doctor's and psychiatrist's examinations did not take place until nearly a year later. Further, the bank submitted an the affidavit from the title closer and notary public present at the closing of the mortgage stating the incapacitated person was responsive to questions and did not appear to be acting peculiar or unusual. *Id.* at 306.

117 *See In re* Lebovici, 655 N.Y.S.2d 305, 308 (N.Y. Sup. Ct. 1997).

118 *Id.* at 307; *see also* Ortelere v. Teachers' Ret. Bd. of City of N.Y., 303 N.Y.S.2d 362 (N.Y. 1969) (holding that although a schoolteacher had elected to take the maximum lifetime benefit under retirement plan with nothing payable to her beneficiary at her death and had complete cognitive judgment and understanding, her election would be voided and benefits would be payable to her husband under prior election as she suffered from a medically classified psychosis); Smith v. Comas, 570 N.Y.S.2d 135 (N.Y. App. Div. 1991) (stating that appellant's medical expert was unable to state with a reasonable degree of medical certainty that the appellant at the time of the transaction at issue was unable to understand the nature of the transaction and the consequences of his signing of the contract of sale).

119 *Smith*, 570 N.Y.S.2d at 135; *see also* Feiden v. Feiden, 542 N.Y.S.2d 860 (N.Y. App. Div. 1989) (holding that the fact that the grantor was suffering from Alzheimer's disease did not raise a presumption of incompetence. It must be shown that, because of the affliction, the person was incompetent at the time of the transaction).

120 *Lebovici*, 655 N.Y.S.2d at 307; *see also Feiden*, 542 N.Y.S.2d at 860.

121 733 N.Y.S.2d 723 (N.Y. Sup. Ct. 2001).

122 *See id.*

public policy underlying the particular contract. In *In re Johnson,*[123] the court annulled the marriage of an eighty-four year old incapacitated woman, which occurred after the commencement of a proceeding to appoint a guardian, but prior to the appointment of the guardian.[124] The court determined that where the woman was incapacitated and incapable of understanding the nature, effect and consequences of marriage, the court could annul the marriage.[125]

The court further held that since marriage is defined as a "civil contract" under Domestic Relation Law Section 10,[126] it could conclude that a marriage was a contract subject to revocation under Article 81.29(d).[127] The court also found support in New York Domestic Relation Law Section 7,[128] which stated that a marriage was voidable if one of the parties entering into the marriage was incapable of consenting "for want of understanding."[129] In edition, the court considered the "state's public policy interests in the status and obligations of the parties to the marriage, and the familiar relations that arise after formation of a valid marriage."[130]

In *In re Kustka,*[131] a similar case to *Johnson,* the court appointed an independent guardian to manage Mr. Kustka's property[132] after his granddaughter grew concerned that her grandfather's new wife was using his assets to support her family in Czechoslovakia.[133] The grandfather's new wife had served as her grandmother's former live-in home health care attendant.[134] Three months after the grandmother's death, Mr. Kustka and the home health care worker were married.[135] Evidence was admitted to show that subsequent to his wife's death and his new marriage, Mr. Kustka had become forgetful and confused and began to doubt people's devotion to him.[136] Although Mr. Kustka was able to drive, express his thoughts clearly and keep his house clean, he was unaware of the thousands of dollars that

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123 658 N.Y.S.2d 780 (N.Y. Sup. Ct. 1997).

124 *See id.* at 781.

125 *See id.*

126 N.Y. DOM. REL. LAW § 10 (McKinney 1909).

127 *See In re* Johnson, 658 N.Y.S.2d 780, 785 (N.Y. Sup. Ct. 1997).

128 N.Y. DOM. REL. LAW § 7 (McKinney 1978).

129 § 7(1).

130 *Johnson,* 658 N.Y.S.2d at 785.

131 622 N.Y.S.2d 208 (N.Y. Sup. Ct. 1994).

132 *See id.* at 211.

133 *See id.* at 208-09. The court evaluator stated that thousands of dollars had been taken from Mr. Kustka's accounts over the last three or four years. The evaluator established that some of the funds went to his new wife's relatives in Czechoslovakia and added that the new wife had combined her own funds with Mr. Kustka's to such an extent that Mr. Kustka was uncertain as to the extent of his actual finances. *Id.*

134 *See id.* at 208.

135 *See In re* Kustka, 622 N.Y.S.2d 208 (N.Y. Sup. Ct. 1994).

136 *See id.* at 208.

had been taken from his account by his new wife.[137] Evidence was submitted to show that certified bank checks totaling over fifty thousand dollars had been issued to his new wife's daughters and to a Slovakian travel agency that transported individuals to and from Czechoslovakia.[138]

When appointing a guardian for property management[139] the court stated that the appointed guardian should investigate the financial transactions that occurred regarding the funds of the alleged incapacitated person and should report any criminal or civil wrongs to the district attorney.[140] Further, the court suggested that "[T]he guardian, if he be so advised, may commence a plenary action to annul the marriage."[141]

In allowing the annulment of a marriage, the court is effectively changing the incapacitated person's testamentary disposition despite the question of whether they had actually executed a Will. First, if the incapacitated person had executed a Will naming the spouse as a beneficiary, the bequest is automatically revoked by an annulment of the marriage.[142] Second, if the incapacitated person died intestate, the former spouse would be denied his/her elective share, as the marriage would not be granted its legal effect.[143] Of course, it is only under extreme conditions that a court will annul a marriage in an Article 81 guardianship proceeding.[144] It is under these same extreme conditions where the New York Supreme Court should also feel authorized to invalidate a Will.

## II. TESTAMENTARY CAPACITY

As clearly laid out in Article 81, the ability to care for one's self bares a different burden than the capacity to make a Will.[145] In a Will contest, the petitioner must prove that the testator did not possess testamentary capacity

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137 *See id.* at 209.

138 *See id.*

139 The court noted that Mr. Kustka, who testified at the appointment hearing, appeared confused in regard to his finances and his new wife's questionable behavior with his finances. *See id.* at 211.

140 *See In re* Kustka, 622 N.Y.S.2d 208, 212 (N.Y. Sup. Ct. 1994).

141 *Id.*

142 *See* N.Y. EST. POWERS & TRUSTS LAW § 5-1.4(a) (McKinney 1981) If, after executing a Will, the testator's marriage is annulled, the annulment revokes any disposition or appointment of property made by the Will to the former spouse unless the Will expressly provides otherwise. *Id.*

143 *See* N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a)(1) (McKinney 1981) (explaining the disqualification of a surviving spouse's elective share under N.Y. EST. POWERS & TRUSTS LAW 5-1.1). *But see* Bennett v. Thomas, 327 N.Y.S.2d 139 (N.Y. App. Div. 1971) (stating that the post-death annulment of marriage does not affect surviving spouse's right of election against deceased's estate).

144 There is a fundamental right to marry. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967). For a state statute to invalidate a marriage, there must be sufficiently important state interests involved. *See* Zablocki v. Redhail, 434 U.S. 374 (1978).

145 *See* N.Y. MENTAL HYG. LAW § 81.29(b).

by showing: (1) whether the testator understood the nature and consequences of executing a Will; (2) whether the testator knew the nature and extent of the property they were disposing of; and (3) whether the testator knew those who would be considered the natural objects of their bounty.[146] One of the most common challenges to probate is that the testator lacked mental capacity at the time the Will was made.[147] In 1926, the New York Court of Appeals summarized the predicament by stating:

> The law jealously guards the right of a person to dispose of his property by will, whatever his condition of health may be, but there comes a time when the ordinary death-bed will, prepared when the testator is sinking slowly but surely to his end, must be submitted to careful scrutiny to determine whether it indeed meets the tests of testamentary capacity.[148]

Medical records are an important factor in showing that confusion and significant mental impairment are sufficient to create a question of fact concerning testamentary capacity.[149] In *In re Estate of Slade*,[150] the court found that although a 91-year-old woman executed her Will in the presence of her lawyer and psychiatrist, medical records made a year prior to the execution indicated that she was suffering from degenerative dementia.[151] In invalidating Mrs. Slade's Will, the court further found that: (1) the testator believed that her assets amounted to a significantly lower amount than the actual value of her estate, and that (2) according to her stock broker she had been unable to transact any business for three years leading up to the Will execution as she was unsure of what stock she owned.[152]

However, in *In re Estate of Kumstar*,[153] the 85-year-old decedent died approximately one week after executing a new Will that named her two nieces as primary beneficiaries.[154] The decedent's nephew filed objections to probate alleging undue influence[155] and lack of testamentary capacity.[156]

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146 *See In re* Estate of Kumstar, 66 N.Y.2d 691 (N.Y. 1985).

147 *See* John C. Welsh, *Estates and Trusts*, 49 SYRACUSE L. REV. 473, 483 (1999).

148 *In re* Will of Delmar, 243 N.Y. 7, 10-11 (N.Y. 1926).

149 *See* Welsh, *supra* note 146, at 484; *see also In re* Spangenberg, 670 N.Y.S.2d 48 (N.Y. App. Div. 1998) (showing that around the time the decedent executed the Will, decedent's medical records revealed a diagnosis of delirium, with symptoms of confusion, disorientation and significant mental impairment); *In re* Estate of Robinson, 477 N.Y.S.2d 877 (N.Y. App. Div. 1984) (indicating that at time Will was executed the decedent had no palpable pulse).

150 483 N.Y.S.2d 513 (N.Y. App. Div. 1984).

151 *See id.*

152 *See id.*

153 66 N.Y.2d 691, 692 (N.Y. 1985).

154 *See id.*

155 *See id.* Often, lack of capacity and undue influence claims are both asserted in relation to the infirm or elderly testator. To prove undue influence, the petitioner must show that the influence exercised "amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the

The New York Court of Appeals reversed the Surrogate Court's denial of probate after reviewing the evidence submitted at trial by those close to the decedent and the decedent's treating physician.[157] Upon reviewing the evidence, the court found that based on a "reasonable degree of medical certainty," the decedent was competent when she signed the Will.[158]

It is extremely difficult to prove testamentary incapacity when dealing with a testator suffering from Alzheimer's disease, because a person suffering from the disease is not presumed to be wholly incompetent.[159] Instead, it must be demonstrated that, because of affliction, the individual was incompetent at the time of the challenged transaction.[160] Hence, one must determine that the person suffering from Alzheimer's Disease was incapable of having moments of lucidity.[161] Further, evidence cannot be based exclusively on a decedent's medical records.[162] Because it is necessary to meet such a high threshold of proof to succeed in a claim of testamentary incapacity, it is common for Will contestants to also claim undue influence. Undue influence is often not determined by direct proof, but rather shown by circumstantial evidence.[163]

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testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist." *In re* Walther, 159 N.E.2d 665, 668 (N.Y. 1959) (quoting Children's Aid Society v. Loveridge, 70 N.Y. 387, 394 (N.Y. 1877)). *See also In re* Panek, 667 N.Y.S.2d 177, 179 (N.Y. App. Div. 1997) (stating that undue influence may be proven even where testamentary capacity exists); *In re* Spangenberg, 670 N.Y.S.2d 48, 48-49 (N.Y. App. Div. 1998) (holding that the lack of testamentary capacity does not lead to a finding of undue influence).

156 *See Kumstar*, 66 N.Y.2d 691 at 692.

157 *See id.*

158 *Id. But see In re* Estate of Robinson, 477 N.Y.S.2d 877, 879 (N.Y. App. Div. 1984) (indicating that evidence presented at the time the Will was executed showed that the decedent had a fever of 105.4 degrees and was unable to respond to verbal stimuli).

159 *See* Gala v. Magarinos, 665 N.Y.S.2d 95 (N.Y. App. Div. 1997) (holding that the record supported the finding that the parents were of sound mind and appropriate capacity when they executed challenged documents. Although the son asserted that parents suffered from Alzheimer's Disease, attorneys who supervised the execution of various documents, and subscribing witnesses thereto, testified without contradiction that the parents appeared to be capable of comprehending and understanding the nature of transactions at issue).

160 *See id.*

161 *See In re* Estate of Buchanan, 665 N.Y.S.2d 980, 984 (N.Y. App. Div. 1997) (stating that despite the fact that the testator suffered a complete loss of cognitive function as a result of senile dementia four months following execution of Will and finding that testator had testamentary capacity when she executed Will was supported by attorney).

162 *See id.* at 984; s*ee also In re* Estate of Van Patten, 627 N.Y.S.2d 141, 143 (N.Y. App. Div. 1995) (holding that the testimony of a medical practitioner that is based almost exclusively upon medical records is the weakest and most unreliable type of evidence).

163 *See In re* Panek, 667 N.Y.S.2d 177, 179 (N.Y. App. Div. 1997) (holding that evidence supported a finding that the Will was the product of undue influence); Rollwagen v. Rollwagen, 63 N.Y. 504, 519 (N.Y. 1876) (showing that undue influence can be shown by all the facts and circumstances surrounding the testator such as: the nature of the Will, the testator's family relations, the condition of their health and mind, dependency upon and subjection to the control of the person who was supposed to have wielded the influences, the opportunity and disposition of the person to wield it and the acts and declarations of such person); *In re* Rosen, 747 N.Y.S.2d 99 (N.Y. App. Div. 2002) (holding that the Will was the product of undue influence exerted over the decedent by his sister).

Appointment of a guardian under Article 81 raises "'a very serious issue' concerning [the incapacitated person's] capability to make a valid Will,"[164] even though the appointment in itself is not conclusive evidence that the person lacks the capacity to execute a Will.[165] In *In re Will and Testament of Colby*,[166] the appointment of a guardian for the decedent a few months before the decedent executed the first of three codicils to his Will, did not establish that the decedent lacked testamentary capacity at the time he executed the codicils. The court found that incapacity for guardianship purposes was "based upon different factors from those involved in a finding of testamentary capacity."[167] In using *Colby* to analyze Sara's dilemma it would appear that Jane's Will would not fail for lack of testamentary capacity based on the fact that Jane had Alzheimer's Disease. However, the Will may still fail if Sara could prove that Carla had exerted undue influence upon Jane, or that at the time of the execution of the Will, Jane lacked the requisite testamentary capacity. Further, the fact that a court declared Jane incapacitated for Article 81 purposes does not mean that Jane could not execute another Will if she so chose. Still, under Article 81, Sara cannot challenge her mother's capacity and would need to await her mother's death to contest the Will in Surrogate's Court.

## III. COMPARING CAPACITY

Although the requirements to prove incapacity under Article 81 differ from the requirement to prove testamentary capacity, this does not necessarily lead to the conclusion that the issues must be brought in different courts, nor that a person found incapacitated under Article 81 would automatically be found to lack testamentary capacity. To say that such a result would follow is to question the New York Supreme Court's ability to adhere to Article 81.29. This is not the case, as proven by the court's care in adhering to revocations under the statute.

Bringing a guardianship proceeding and contesting probate are expensive endeavors. The fact that similar evidence must be presented in two separate courts is a tremendous waste of the court's time and the incapacitated person's assets. The expenses of bringing a guardianship

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164 *In re* Estate of Baldwin, 745 N.Y.S.2d 265, 266 (N.Y. App. Div. 2002) (awarding counsel fees to the executor who raised testamentary capacity, undue influence and fraud challenges at the time of testator's second Will, since the executor unselfishly and effectively pursued his duty to prevent the frustration of the testator's wishes and to effectuate decedent's intentions as expressed in testator's prior Will, thereby providing invaluable service to the Surrogate Court and substantial benefit to the charitable beneficiaries).

165 *See id.*

166 660 N.Y.S.2d 3 (N.Y. App. Div. 1997).

167 *Id.*

proceeding (if the petition is granted)[168] as well as the expenses of defending a contested Will are paid out from the incapacitated person's estate. Both proceedings will undoubtedly require not only medical and psychological testimony, but also the testimony of the people with whom the incapacitated person resides or has frequent contact. Hence, the fees are doubled when different courts hear the same evidence twice.

In *In re Ruby Slater,*[169] a case similar to Jane's, Ruby Slater was a sixty-seven year old woman suffering from Parkinson's disease, hypertension and Non-Insulin Dependent Diabetes Mellitus.[170] She could not walk, suffered from tremors, her speech was barely coherent, her insight into her health problems was poor, and her judgment was impaired.[171] Nevertheless, a lawyer from New York allowed her to execute a Will and Power of Attorney in favor of her former home health care attendants, even though Mrs. Slater's father was still living.[172]

In view of the evidence presented in the Article 81 proceeding, the court did not doubt that undue influence was involved since: (1) the lawyer was hired by the home health care attendants and not by Mrs. Slater, (2) the Will was witnessed by the lawyer and her husband, and (3) the home healthcare attendants had created a situation in which Mrs. Slater was isolated from her family and friends.[173]

Further, the court found that Mrs. Slater did not have testamentary capacity at the time the Will was executed. In making this finding, the court pointed out that, "while mere proof that the decedent suffered from old age, physical infirmity or . . . senile dementia does not preclude testamentary capacity, the record is devoid of any evidence that she knew the identity and relation of those considered to be the natural objects of her bounty."[174]

The court also found that it was clear that Mrs. Slater was neither lucid nor rational at the time the Will was made and that "given her inability to control her hands or hold something, the Court is convinced beyond any doubt that Ms. Slater did not read the Will prior to its execution."[175] Under such extraordinarily onerous circumstances, the New York Supreme Court revoked the Power of Attorney, as well as the Will of Mrs. Slater. The court noted that it was "conscious that such [action] is usually reserved to the Surrogate and the Court has the authority to exercise its general jurisdiction

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168 *See* N.Y. MENTAL HYG. LAW § 81.09(f).

169 N.Y.L.J., Feb. 11, 2002, at 28 (N.Y. Sup. Ct. 2002).

170 *See id.*

171 *See id.*

172 *See id.*

173 *See id.*

174 *In re* Ruby Slater, N.Y.L.J., Feb. 11, 2002, at 28 (N.Y. Sup. Ct. Feb. 11, 2002).

175 *Id.*

and make this determination in light of the facts before it at this time."[176] The court's holding in *In re Ruby Slater* is significant in that it highlights the importance of allowing Will revocations as part of, or subsequent to, an Article 81 proceeding. This is not to suggest that Will revocations should become a common component of an Article 81 proceeding, only that under situations where the evidence presented is extreme and the appropriate remedies are available, as in Jane's situation, the New York Supreme Court should not question its own authority nor dismiss in deference to the Surrogate Court. Although the matter is the Surrogate Court's specialty, the New York Supreme Court is equally proficient in handling such matters, especially when the evidence necessary to make the relevant finding is essentially indistinguishable.

## IV. ANTE-MORTEM PROBATE AND AMENDING ARTICLE 81

The concept of allowing the invalidation of a Will under Article 81 is akin to ante-mortem or living probate, which seeks to validate a testator's Will during the testator's lifetime.[177] Ante-mortem probate is as old or even older than the Bible.[178] Texts from the Books of Genesis and Ruth discuss the unquestionable right of inheritance given before the death of a decedent.[179] Unfortunately, ante-mortem probate has been highly controversial throughout the history of the United States.[180]

The first ante-mortem probate statute was enacted in Michigan in 1883.[181] The statute allowed the testator to petition the Probate Court to admit and establish his Will as his Last Will and Testament after he proved the Will was executed: (1) without fear, fraud, impartiality or undue influence, (2) with full knowledge of its contents, and (3) with the testator having sound mind and memory and full testamentary capacity at the time of the execution.[182] Once the Will was declared valid, there was no possibility of invalidating it on grounds of insanity or want of testamentary capacity.[183]

Two years later, in *Lloyd v. Wayne Circuit Judge*, the statute was declared unconstitutional.[184] In *Lloyd*, a testator presented his Will for validation under the ante-mortem statute, which excluded his wife and one of his sons

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176 *Id.*

177 *See* Gerry W. Beyer & Aloysius A. Leopold, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 133 (1990).

178 *See id.* at 148-49.

179 *See id.*

180 *See id.* at 133.

181 *See id.* at 152.

182 *See* Tracy Costello-Norris, *Is Ante-Mortem Probate a Viable Solution to the Problems Associated with Post-Mortem Procedures?*, 9 CONN. PROB. L.J. 327, 329 (1995).

183 *See id.*

184 *See* 23 N.W. 28, 28 (1885).

from sharing in his estate. The court found the statute unconstitutional for two reasons. First, "it enabled the testator to avoid the rights of his spouse and children," and second, "the statute failed to provide for finality of judgment" as the testator was allowed to change or revoke the Will at any time without having to go through another procedure.[185]

In the 1930s, a renewed interest in ante-mortem probate led The National Conference of Commissioners on Uniform State Laws to create a committee for drafting a uniform act to validate a Will before the death of the testator.[186] Two methods were proposed in a fashion similar to the Michigan Statute.[187] However, the committee added a further requirement that if a testator desired to revoke his Will, he had to file a written withdrawal.[188] Unfortunately, the drafts did not receive a positive response and eventually the concept of ante-mortem probate withdrew into a period of hibernation.[189]

Although the United States currently utilizes a post-mortem probate procedure, three states—Ohio, Arkansas, and North Dakota – "have enacted ante-mortem probate statutes which allow a testator to validate his Will as to form, testamentary capacity and freedom from undue influence."[190]

The modern statutes are based on a proposal drafted by Professor Howard Fink of Ohio State University.[191] The proposal grants standing to all individuals who would be heirs by intestate succession, as well as to all beneficiaries under the Will. After a Will is executed under this proposal, the testator would bring suit in a court of competent jurisdiction to request that the court, by declaratory judgment, hold the Will valid.[192] To determine the Will's validity, the court considered the signatures, number of witnesses, the degree of existence of undue influence and the testamentary capacity of the testator.[193] All interested parties would be notified of the proceeding. The Will would be filed with the court, if the court determined that the Will was valid.[194] If the testator wished to nullify the Will, the process would have

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185 *Id.* at 28-29. *See* Beyer & Leopold, *supra* note 177, at 153.

186 *See* Beyer & Leopold, *supra* note 177, at 161.

187 *See id.* In the first method, the testator was required to file his Will for safe keeping with the clerk of the court. In the second method, the testator would file the Will in a package under seal with the clerk of the court with a list of witnesses. The spouse and prospective heirs were the named defendants. The court served each of the defendants and then conducted a hearing to determine if the Will should be admitted. If it was admitted, it was conclusively presumed that the testator executed the writing without fear, fraud or undue influence and with full knowledge of its contents and that he was of sound mind and memory. *Id.*

188 *See id.*

189 *See id.*

190 Costello-Norris, *supra* note 182, at 327.

191 *See* Beyer & Leopold, *supra* note 177, at 166.

192 *See id.*

193 *See id.* at 166-67.

194 *See id.*

to be repeated.[195]

Although ante-mortem probate has been rejected in most states, Professors Aloysius A. Leopold and Gerry W. Beyer of St. Mary's University School of Law have stated the potential benefits of the system as follows:

> Ante-mortem probate has the potential of greatly improving the ability of our legal system to effectively transmit an individual's wealth by providing the testator with greater certainty that his distribution desires will be fulfilled. Because the validity of the will would be determined prior to death when all relevant evidence is before the court, will contests would be greatly reduced. In addition, ante-mortem probate would lead to more efficient use of scarce and valuable resources because less court time would be spent dealing with spurious will contests and fewer estate funds would be dissipated defending those contests.[196]

It is important to note that allowing an amendment to Article 81 permitting Will revocations is similar but not identical to ante-mortem probate. The testator brings a proceeding under modern ante-mortem probate. Under Article 81, the proceeding would be at the request of the appointed guardian or at the discretion of the New York Supreme Court. Will revocations would not be considered for Wills enacted years prior to the determination of incapacity but would be viewed on similar grounds as other contract invalidations under Article 81.29. Further, holding a proceeding under Article 81 does not open the doors to family disharmony or the risk of disinheritance in the same way that ante-mortem probate may.[197]

One of the main purposes of post-mortem Will contests "is to ensure that deserving heirs do not lose their portion of the decedent's estate as a result" of undue influence or insufficient capacity which may have affected the decedent at the time he executed his Will.[198] In an Article 81 proceeding, the court determines an incapacitated person's functioning level on an individual and direct basis. Removing the barrier that disallows Will revocations under such a proceeding actually improves the quality of evidence to which the court is allowed access.[199] Typically, the Surrogate's Court will only have transcripts of the Article 81 proceeding to examine, but in a Will contest held subsequent to an Article 81 proceeding, the court will have contact with the incapacitated person, as well as access to relevant witnesses, who might become unavailable at a later time or fail to recollect

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195 *See id.*

196 Beyer & Leopold, *supra* note 177, at 181-82.

197 *See* Costello-Norris, *supra* note 182, at 356.

198 Beyer & Leopold, *supra* note 177, at 134.

199 *See id.* at 183.

important information.[200]

Testing the validity of the instrument after the testator's death is illogical in many Article 81 proceedings. Unlike ante-mortem probate, which may inevitably weigh on a court's time and resources by allowing for the creation of a new type of suit,[201] an Article 81 proceeding is already in the court's hands at the time a Will revocation is requested. As both defending a probate proceeding and bringing a guardianship proceeding are chargeable to the estate of the incapacitated person or decedent, the effect of allowing a combination of the suits will greatly diminish the wasting of estate resources.

## V. CONCLUSION

An amendment to Article 81 to allow Will revocations could either be added as an allowable revocation under Article 81.29 or as a new instructional section to the New York Mental Hygiene Law. If the latter were the case, the legislature could create restrictions in relation to the various time periods or functional limitations a court should consider in determining whether or not to hear a Will contest. Hence, if a person was deemed incapacitated only in relation to their personal needs, and not in relation to their financial needs, the amendment could deny a Will contest. Still, no matter how limited the amendment would be, *In re Ruby Slater* and Jane's case point out that occasionally there can be a serious need to allow for Will revocations as part of, or subsequent to an Article 81 proceeding.

The case for invalidating Jane's Will is easy when compared to some of the other cases discussed in this note. Given the circumstances under which Jane executed her Will, and the court's tendency to prefer natural heirs to outsiders, it would be surprising if the court did not find the Will invalid.[202] However, unless Article 81 is amended to allow such revocations, Sara will have to wait until her mother passes away in order to contest the document. At that point, she will have to present the same evidence twice, once in the Article 81 proceeding and again in a probate proceeding. Jane's estate will bear the heavy burden of defending against both proceedings.

Why should two separate courts hear the same evidence when the New York Supreme Court is fully capable of handling both matters? If judges felt the statute more definitively authorized the conjunction of such proceedings, a heavy burden could be lifted from both the courts and the parties to the actions.

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200 *See* Costello-Norris, *supra* note 182, at 334.

201 *See id.* at 356.

202 *See* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996).