

CHANGING OF THE GUARDIANS: A CRITICISM AND ANALYSIS OF THE NEW YORK GUARDIANSHIP STATUTE’S IMPACT ON ELDER ABUSE VICTIMS

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I. INTRODUCTION — MORE ELDERLY, MORE ABUSE

Growing old is a complex business. The elderly are often vulnerable, and vulnerable populations, by definition, require the assistance of the law and the regulatory state. This population is poised to swell dramatically in the coming decades. By 2030, 71.5 million Americans will be over the age of 65. The aging of the Baby Boomer generation, coupled with increased life expectancies, generally means that the number of “old old” will rise most dramatically by 2030, when 9.6 million Americans will be 85 or older.¹ As this demographic grows, so will the complicated needs and problems associated with it.

One of these problems is the incidence of elder abuse. As the number of older Americans grows, studies confirm that occurrences of elder abuse grow as well. According to a study conducted for the National Center on Elder Abuse, there was a 19.7 percent increase in incidents of elder abuse nationwide between 2000 and 2004.²

The term “elder abuse” is used to refer to several types of mistreatment of an older adult, generally perpetrated by someone with a special relationship to that adult. These include physical abuse, sexual abuse, psychological or emotional abuse, neglect, and financial abuse. One out of every 10 people ages 60 and older who live at home suffers abuse, neglect, or exploitation.³

Old age inevitably brings increased vulnerability. There is physical frailty, which, when an individual is no longer able to work and must pay for rising medical costs, is often accompanied by financial precariousness.

1 Erica F. Wood, *State Level Adult Guardianship Data: An Exploratory Survey* 11 (ABA Commn. on L. & Aging Aug. 2006).

2 *Id.*

3 Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University, & New York City Department for the Aging. (May 2011), *Under the Radar: New York State Elder Abuse Prevalence Study*. Self-reported prevalence and documented case surveys. <http://www.lifespan-roch.org/documents/UndertheRadar051211.pdf>.

The elderly often face a diminished support system, as friends die, move away, or are consumed by their own age-related problems. These developments are often frightening, and older people who experience them are often at increased risk for anxiety and depression, which compounds their vulnerability. Old age can be accompanied by decreased cognitive capacity, which further inhibits a person's ability to manage the difficult changes they face.

Elder abusers take advantage of the vulnerabilities of many older adults. In some cases, elder abuse is long-standing abuse that has been quietly perpetrated since long before the victim was elderly, but the increased vulnerability that comes with the victim's age heightens the severity and potential consequences of the abuse. In other cases, these vulnerabilities create openings for new predators to enter. In either case, elder abuse is rooted in the frailties common to many older adults.

Elder abuse is a deeply entrenched phenomenon, because it perpetuates and exacerbates the very frailties that allowed it to begin. Abuse or neglect can accelerate physical and cognitive decline. An abuser can drain a victim's finances, diminishing his or her housing, medical, and caretaker options.

Abusers also often isolate their victims, weakening an already depleted support system. A victim's feelings of guilt, shame, and self-blame can accelerate psychological decline and decrease the likelihood that the victim will come forward and report abuse.⁴

As this problem has become increasingly visible and prevalent, national as well as New York State government and nongovernmental organizations have issued calls for new models incorporating increased social services, oversight, and interorganizational collaboration to combat elder abuse and care for its victims.

In 2004, the Weinberg Center for Elder Abuse Prevention was established as the first facility in the United States to provide direct services to victims of elder abuse via a shelter model.

The Weinberg Center was conceived as a single entity that would, through its construction, holistically address all of the complex and wide-ranging subissues that every elder abuse case presents. Located on the campus of the Hebrew Home at Riverdale, a long-term geriatric care facility with 24-hour security, each client has access to the Hebrew Home's full staff of qualified medical and psychiatric professionals. The Weinberg Center staff comprises an interdisciplinary team that collaborates to create a comprehensive plan for each client, including both medical and psychological care as well as the full range of legal remedies and public benefits. The Weinberg Center team immediately begins working with the client to create a discharge plan by evaluating safe options where the client can thrive and receive the best care in the least restrictive environment.⁵

Some of the many areas in which an elder abuse victim might need legal support and counsel include:

- accessing Medicare and other public welfare funds
- filing for an order of protection against an abuser

4 Sen. Spec. Comm. on Aging, S. Hrg. 107-190, 107th Congress, First Session (Sept. 10, 2001) (testimony of Denis M. Lormel, Chief, Fin. Crimes Sec., Fed. Bureau of Investigation).

5 Deirdre M.W. Lok and Joy Solomon, *The Story of a Shelter: Intervention and Prevention of Elder Abuse*, 20 NYSBA Elder Law Attorney 3, 33-36 (Summer 2010).

- initiating divorce or annulment proceedings
- pursuing guardianship proceedings
- defending against eviction actions in housing court
- reorganizing financial assets

In the nine years since its inception, the Weinberg Center has seen a diverse cohort of clients and employed a variety of legal tools. This article focuses on New York State guardianship, or Article 81 proceedings, which involve a petition requesting a legal determination that an individual lacks capacity and that a legal guardian be appointed to make decisions on behalf of the incapacitated person (IP).⁶ This is an appropriate area of focus for two reasons. First, individuals and organizations working with a case of acute elder abuse will at least consider this form of legal recourse in nearly all cases. Second, this area has been the focus of a good deal of criticism by national and New York-based elder advocacy and watchdog organizations, which claim that the current system is often ineffective, insufficiently conscious of civil rights, and open to abuse.⁷

This article is presented in three parts. Section II provides a brief overview of New York State guardianship proceedings. Section III consists of two case studies, based on an amalgam of several Weinberg Center clients for whom guardianship and capacity were significant issues, and showcases how the shelter model is able to highlight gaps and loopholes in the current guardianship system that might go unnoticed in other contexts. Section IV reviews and critiques the shelter model as well as several alternative models and approaches that have arisen as a result of the flaws highlighted by the case studies. The goal is to construct a microcosm of the difficulties created by the present structure, lay out how the Weinberg Center framework brings these issues into focus, and briefly consider how several models, including that of an elder abuse shelter, attempt to ameliorate these problems.

II. OVERVIEW OF NEW YORK STATE PROCESS FOR ORDERING AND MONITORING GUARDIANS

The governing statute for seeking an adult guardianship in New York State was not created specifically for elder abuse victims, or even specifically for elderly individuals, but rather was drafted based upon the legislature's finding that "the needs of persons with incapacities are as diverse and complex as they are unique to the individual."⁸ The stated purpose of the statute is to create a uniform procedure to address the full range of scenarios involving an adult in need of guardianship, while affording him or her "the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life."⁹ Subsequent sections of this article examine whether this purpose is, in fact, achieved. First, we examine the structure set out by the statute to achieve this overarching goal.

6 N.Y. Mental Hygiene Law § 81 (McKinney 1993).

7 Vera Inst. of Just., *Guardianship Practice: A Six-Year Perspective*, Guardianship Project Issue Brief (Dec. 2011); Wood, *supra* n. 1; U.S. Govt. Accountability Off., *Collaboration Needed to Protect Incapacitated Elderly People*, GAO-04-655 (July 13, 2004).

8 N.Y. Mental Hygiene Law § 81.01.

9 *Id.*

A. The Guardianship Petition and the Definition of Legal Capacity

The list of entities that may file an Article 81 petition is fairly extensive and includes the allegedly incapacitated person (AIP), anyone the AIP lives with, anyone who may inherit from the AIP, and any “person otherwise concerned with the welfare of the person alleged to be incapacitated.”¹⁰

The court must make three findings in order to conclude that an AIP lacks capacity:

1. The court must find that the AIP has some sort of functional impairment and some inability to provide for his or her own personal needs or property management.
2. The court must find that the AIP cannot adequately understand and appreciate the nature and consequences of that inability.
3. The court must find that the AIP is likely to suffer harm as a result of the first two factors.

Only when the court affirms all three findings is a person determined to lack legal capacity and have a guardian assigned to him or her.¹¹

B. Deconstructing the Definition of Capacity

This definition differs sharply from previous iterations of the law, which focused on diagnostic labels and required the presence of an underlying “illness, infirmity, mental weakness, alcohol abuse, addiction to drugs or other cause.”¹² By contrast, the modern standard is meant to be essentially functional and focuses on an individual’s actual abilities in the context of everyday life.¹³

When detailing the contours of this new capacity definition, the New York State Law Revision Commission specified that the evaluation of an AIP must consist of an assessment of several specific areas of daily personal and financial management.¹⁴ Borrowing from the medical literature, the Commission divided this functional evaluation into categories that relate to how an individual’s basic needs are met:

- a) income adequacy and spending patterns (i.e., physical ability to write checks and manage currency and whether pension checks and disability payments arrive on time);
- b) adequacy of food, clothing, and shelter (ability to buy and prepare food; ability to eat and choice of diet; ability to dress and undress; adequacy of laundry facilities; upkeep of shelter; warmth and ventilation; cleanliness of environment; safety of home);
- c) physical functioning (ability to walk, climb stairs, reach, and get in and out of chair and tub);

10 *Id.* at § 81.06.

11 *Id.*

12 *Id.* at §§ 77–78 (repealed 1992). For a more detailed description of the distinctions between Articles 77 and 78 and Article 81, see *Matter of Francis E. Maher*, 207 A.D.2d 133, 621 N.Y.S.2d 617 (1994).

13 T. Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* 273 (2nd ed., Kluwer Academic/Plenum Publishers 2003).

14 Created by Chapter 597 of the Laws of 1934, the Law Revision Commission is a New York State agency consisting of the chairpersons of the Committees on the Judiciary and Codes of the Senate and Assembly, as well as five members appointed by the governor for a term of five years. Its purpose is to examine the common law and statutes of New York State for defects and anachronisms, to receive and consider proposed changes to laws from a variety of sources, and to periodically recommend modifications. See N.Y. St. L. Rev. Commn., <http://www.lawrevision.state.ny.us> (accessed Apr. 29, 2013).

- d) sensory functioning (ability to see, hear, feel, react in ways that do not endanger health or safety);
- e) access to helpful resources such as friends, relatives, physicians, emergency facilities, transportation;
- f) satisfaction with present circumstances, desire for change, and specific assistance the person wishes;
- g) emotional factors (loneliness and anxiety); and
- h) mental status (orientation to reality, memory functioning, reasoning ability).¹⁵

These categories remain the standard by which the court determines whether a functional impairment is present.¹⁶

Ideally, a guardianship petition should specifically state what powers should be given to a guardian for a particular AIP.¹⁷ The requirement to craft a petition around the specific nature of the individual's incapacity illustrates that the goal of the law is to produce an individually crafted guardianship order, granting the guardian only the powers that correspond with the impairments of the AIP.

C. Who Is the Court Evaluator?

Upon receipt of a petition for guardianship, the first thing a court does is appoint a court evaluator. This individual can be a member of one of a number of professions, including attorney, social worker, psychologist, nurse, or accountant, provided the individual has knowledge pertinent to the situation, the person's particular problems, and potential solutions.¹⁸ The Law Revision Commission Comments indicate that the court should select an evaluator based on each case's "unique challenges and needs that cannot always be met by the same type of professional."¹⁹

The court evaluator is required to undergo the same training that all court-appointed guardians must complete.²⁰

D. The Court Evaluator's Report

The role of the court evaluator is to conduct an investigation on behalf of the court by meeting and interviewing the AIP and, if the AIP lives in a facility, speaking with someone there who is familiar with the AIP's situation and condition. The evaluator must then present a written report to the court.

The central issue this report must address is "how the AIP is functioning with respect to the activities of daily living and what is the prognosis and reversibility of any physical

15 B.S. Nolan, *Functional Evaluation of the Elderly in Guardianship Proceedings*, 12 J.L. Med. & Ethics 210 (1984).

16 *Article 81 Training for Guardians, Court Evaluators, Attorney for the Alleged Incapacitated Person Participant Manual* (Sadin Inst. on L. & Pub. Policy, Brookdale Ctr. for Healthy Aging of Hunter College, Dec. 2011) (unpublished handout created for New York State Guardianship Certification).

17 N.Y. Mental Hygiene Law § 81.08.

18 *Id.* at § 81.09.

19 L. Rev. Commn. Comments, reprinted in the notes to N.Y. Mental Hygiene Law § 81.09 (McKinney Supp. 1993).

20 *Article 81 Training, supra* n. 16.

or mental disabilities, alcoholism or substance abuse.”²¹ The evaluator is required to base this conclusion on his or her own assessment of the AIP, along with his or her review of assessments by third parties, such as medical and psychiatric professionals.

The statute’s lengthy set of instructions regarding the report’s contents reflects the fact that it is meant to contain the results of a “meaningful independent exploration of all aspects of the life of the allegedly incapacitated person.”²²

The court evaluator is paid by the AIP’s estate when a guardianship is granted. When a guardianship is not granted, either the AIP, the petitioner, or both pay the evaluator, as the court deems just.²³

E. Counsel for the AIP

One of the issues a court evaluator’s report must address is whether the AIP would like to retain counsel or have counsel appointed. An AIP is not automatically entitled to counsel, but counsel will be appointed under specific circumstances, such as if the AIP requests it or wishes to contest the petition.²⁴

A court evaluator is not required in cases in which counsel is appointed to the AIP.²⁵ This further indicates that the general role of the court evaluator is to give the fact finder insight into the AIP’s viewpoint, a role that is assumed by the AIP’s counsel. The AIP is required to pay his or her counsel reasonable compensation unless the court determines that the AIP is indigent. If the petition is dismissed, the court may order the petitioner to compensate the AIP’s counsel.²⁶

F. Appointing a Guardian

After the court evaluator’s report has been submitted and counsel has been appointed to the AIP, if appropriate, the court holds a hearing at which the AIP must be present unless it has been clearly established that no meaningful participation would result from the AIP’s presence.²⁷

If the court finds that the petitioner has met its burden, the court issues an order appointing a guardian. The order must include the functional limitations of the AIP (now simply the IP) that necessitate a guardian as well as the specific powers granted to the guardian, which should constitute the least restrictive form of intervention.²⁸

Ideally, a person in the community, such as a family member or friend who knows the IP and his or her values and wishes — or the actual petitioner — is designated as a proposed guardian in the original petition. However, often no such person can be found, in which case the court appoints an agency guardian, usually a private entity that is “reasonably compensated” based on a fee-for-service model.²⁹

21 N.Y. Mental Hygiene Law § 81.09(c)(5)(vii).

22 L. Rev. Commn. Comments, *supra* n. 19.

23 N.Y. Mental Hygiene Law § 81.09(f).

24 *Id.* at § 81.10(c).

25 L. Rev. Commn. Comments, *supra* n. 19.

26 N.Y. Mental Hygiene Law § 81.10(f).

27 *Id.* at § 81.11, 81.12.

28 *Id.* at § 81.15.

29 *Id.* at § 81.28. The court will often include in its guardianship order a “zero NAMI” provision. NAMI, or

G. The Guardian's Reporting Requirements

Within 90 days of being appointed, a guardian must submit proof of having completed the required educational program as well as an initial report detailing the steps the guardian has taken to fulfill his or her responsibilities. These documents must be filed with the court, with copies sent to the IP's attorney as well as to the facility in which the IP resides.

If the guardian's responsibilities include property management, the report must include a full inventory of the IP's property and resources and the guardian's plan for the management of such resources. If the guardian's responsibilities include personal needs management, the guardian must include an account of his or her visit with the IP and his or her plans to provide for those personal needs as well as specific information about the health and social services to be provided for the IP.³⁰

The guardian is required to file subsequent annual reports detailing the state of the IP as it relates to the guardian's powers.³¹ A judge or specially assigned referee examines these reports within thirty days of their submission.³²

H. Other Guardianship Duties

Section 81.20 sets out additional, more amorphous duties of an IP's guardian. A guardian must only exercise the powers that have been expressly delegated to him or her and must act with care, diligence, trust, loyalty, and fidelity. In addition to the reports described above, the guardian must visit the IP not less than four times a year. If the guardian has been granted property management powers, he or she has additional obligations related to protecting those resources and allowing the IP the greatest degree of independence possible in protecting their use.³³ These obligations continue until the individual's level of capacity changes³⁴ or until the IP's death.³⁵

III. PITFALLS AND WEAKNESSES IN THE NEW YORK STATE GUARDIANSHIP SYSTEM AS REVEALED BY WEINBERG CENTER CLIENTS

Having reviewed the standard for determining legal incapacity and the judicial process by which a guardian is appointed, we begin a discussion of some of the primary

net available monthly income, refers to the amount of money that an individual must contribute toward his or her own medical bills before Medicaid becomes available to reimburse the provider, essentially an individualized copay determination. This order allows the incapacitated person's income that is used to compensate the guardian to be exempted from this calculation. In *Matter of Deanna W.*, 76 A.D.3d 1096, 908 N.Y.S.2d 692 (2nd Dept. 2011), the court found that the trial court had abused its discretion in including a zero NAMI provision in a guardianship order. This decision has thrown the issue of compensating guardians of indigent individuals into question. For a further discussion of the ramifications of this decision, see Nancy Levitin & Moriah Adamo, *Covering Guardianship Costs in a Post-"Deanna W" World*, N.Y.L.J. (Jan. 6, 2011), http://www.abramslaw.com/publication_and_media_view.aspx?ref=1103 (accessed July 29, 2014).

30 N.Y. Mental Hygiene Law § 81.30.

31 *Id.* at § 81.31.

32 *Id.* at § 81.32.

33 *Id.* at § 81.20(6).

34 *Id.* at § 81.36.

35 *Id.* at § 81.44.

pitfalls and weaknesses of both the legal and administrative structure of Article 81 guardianships. We do this by reviewing two Weinberg Center client case studies. In one case, the Weinberg Center successfully petitioned the court for a legal guardian. In the other, guardianship was considered but ultimately rejected as an inappropriate legal tool. Both case studies illustrate how the values and structure inherent in the multidisciplinary shelter model help illuminate weaknesses in the guardianship system and their effects on the client's quality of life and civil rights.

The case studies focus on how these systemic weaknesses can particularly disadvantage victims of elder abuse who are the subjects of guardianship proceedings. Though each arena mentioned in this section could be the subject of its own independent article, the goal here is to use the Weinberg Center's unique lens to bring the current system's major flaws into focus, to discuss how those flaws are rooted in gaps in the law, and to highlight how the particular confluence of vulnerabilities unique to elder abuse makes its victims particularly susceptible to these flaws.

A. Lack of Data

It is important to note that the Weinberg Center's case studies are especially important because all analysis of this area of law is limited by a troubling lack of state-level guardianship data. This is true across the country, and New York is no exception. As the U.S. Government Accountability Office (GAO) observed in its 2004 report, "Without better statistical data concerning the size of the incapacitated population or how effectively it is being served, it will be difficult to determine precisely what kinds of efforts may be appropriate to better protect incapacitated elderly people from exploitation, abuse and neglect."³⁶

In response to this report, the American Bar Association (ABA), together with the National Center on Elder Abuse, conducted a short survey on state reporting practices in guardianship cases. While New York indicated an interest in collecting data on this type of case, it did not report adult guardianship cases as a "distinct case type" to the state court administrator's office, let alone compile any data about distinct case subtypes such as those involving elder abuse.³⁷ (Specific implications of this lack of data are discussed later in this article.) This absence of hard data means that analyses of the New York system rely more on implication and inference as well as the observations of experienced professionals. Although a large-scale collection of empirical data is ultimately necessary for comprehensive evaluation of the guardianship system, the current dearth of data makes a close dissection of Weinberg Center clients' experiences particularly valuable.

*B. Case Study I: Hilda's Story*³⁸

Our first case study illustrates some of the difficulties in determining whether an individual is the proper subject of an Article 81 petition. Hilda's story reveals how these difficulties, which are attributable to the structure of the proceedings, the precise nature

36 U.S. Govt. Accountability Off., *supra* n. 7.

37 Wood, *supra* n. 1, at 18–27.

38 Names, as well as other major identifiers such as location and gender, have been altered to protect confidentiality.

of the legal standard for incapacity, and the practical realities of court administration can converge in cases of elder abuse and maximize the difficulty of accurately evaluating a victim's capacity. We will also see how the elder abuse shelter model has been purposefully structured to address some of these complexities.

Hilda was an active and independent woman, maintaining her own home well into her eighties. After she suffered a stroke, however, she could no longer live alone.

Her son Sam had a home large enough to accommodate her. Her daughter, Diana, had a very small apartment.

Sam agreed to allow his mother to move in, on the condition that Hilda sign her car over to him, give him her power of attorney, and put her assets in a joint bank account with him. Physically impaired and with no other housing options, Hilda agreed to move in with Sam.

This new living situation began to deteriorate almost immediately. Sam berated Hilda constantly, degrading her by asking if she was wearing her diapers and if she had gone to the bathroom in her pants. He would inspect the bathroom after she used it and would threaten to throw her out if she did not keep herself and the house clean. Soon, Sam decided that Hilda was no longer permitted to shower at his house. He began dropping Hilda off to shower at her daughter Diana's small apartment across town. He often left Hilda, who was then 86 years old, alone outside of the apartment at night in the middle of the winter.

Finally, with Diana's support, Hilda decided that she preferred to move to the Hebrew Home at Riverdale rather than remain with Sam. Upon hearing this, Sam shook Hilda hard, dragged her through the house, and threw her outside on a freezing January night. At some point, Hilda managed to call Diana, who came to get her.

Hilda's family doctor referred her to the Weinberg Center.³⁹ The doctor evaluated Hilda immediately after she left Sam's home and sent a Patient Review Instrument (PRI),⁴⁰ with a report on Hilda's condition, to the Weinberg Center.

The information in the PRI assists the Weinberg Center team in determining whether a potential client meets the Center's criteria for admission. No single criterion is dispositive; some of the factors considered include current medical status, whether abuse is ongoing, whether there are family members who could provide a suitable housing option, and the victim's capacity to consent to admission. If necessary, the Weinberg Center investigates further to ensure that the team is fully informed. Once these factors have been assessed, the team decides whether the Weinberg Center is the appropriate option for a particular individual.

39 The Weinberg Center receives referral calls via a hotline number. To ensure that the Weinberg Center receives confirmed and reliable information, the hotline accepts calls from professionals only. Referrals often come from hospitals, adult protective services, visiting nurse services, and local police.

40 A Patient Review Instrument (PRI) is an assessment instrument used by a medical professional to determine the level of care and the type of living facility needed for an older adult. Typical areas of evaluation include an individual's current medical condition; physical and mental capabilities; impairments such as the inability to eat, walk, and use the bathroom independently; and behavioral traits such as aggressiveness and disruptiveness. A PRI is typically valid for 30 days. The New York State Department of Health requires that a PRI be completed prior to an individual's admission to a long-term care or rehabilitation facility. See Natl. Resource Ctr. on LGBT Aging, *Caregiving Glossary* (Apr. 2011), <http://www.lgbtagingcenter.org/resources/resource.cfm?r=11#P> (accessed Nov. 12, 2012).

In this case, Hilda was approved for admission. Her PRI indicated limited mobility, the need for extensive assistance in eating and using the bathroom, and a diagnosis of significant dementia,⁴¹ characteristics that seemed to indicate she lacked legal capacity. Based on this information, she was placed in the unit that provided care for the lowest functioning individuals and provided the most advanced memory care at the Hebrew Home at Riverdale. The Weinberg Center staff initially assumed that Hilda would require a guardian.

Just a few weeks later, Hilda's level of functioning was dramatically different. As the multidisciplinary team continued to meet regularly to discuss Hilda's progress, it became apparent that, even though Hilda suffered from severe depression, anxiety, and guilt due to the abuse she had suffered, she was, in fact, perfectly lucid, with no confusion or dementia. The Weinberg Center team changed her placement within the Hebrew Home accordingly, and she began to see a psychologist weekly to process her feelings about the abuse.

Today, Hilda is one of the most independent residents of the Hebrew Home. She uses a cane to walk on her own and is a regular volunteer in the garden. She feeds herself and only needs minimal help showering and using the bathroom. There are still times when it seems difficult for her to articulate reasoned and consistent decisions, especially regarding issues directly related to her abusive son. However, the independent psychiatrist who evaluated her several months after her arrival at the shelter found that she has the capacity to make legal decisions on her own behalf. She continues to engage in therapy to manage and work through emotions surrounding her abuse and its aftermath.

C. Hilda: Capacity As a Sliding Scale

Hilda's story reveals a significant weakness in New York's current guardianship system, which begins with the initial decision to file a petition for guardianship. As previously discussed, a determination that an individual is incapacitated requires that a court find, based on clear and convincing evidence, that an AIP has:

- a) a functional impairment
- b) an inability to understand the nature or consequences of that impairment and therefore
- c) is likely to suffer harm.⁴²

In the case of victims of elder abuse such as Hilda, harm has, by definition, already occurred. It is easy to conduct this capacity evaluation backward and determine that, because the elder abuse victim suffered harm and was either unable or unwilling to take action to stop the harm, the victim must lack capacity. The primary difficulty is in discerning the difference between an elder abuse victim and an elder abuse victim who lacks legal capacity.

41 Dementia describes a group of symptoms affecting intellectual and social abilities severely enough to interfere with an individual's daily functioning. Memory loss generally occurs in dementia, but memory loss alone does not necessarily indicate dementia. Dementia indicates problems with at least two brain functions, such as memory and judgment or language. Some causes of dementia are treatable and even reversible. See Mayo Clinic, Diseases and Conditions: Dementia (Apr. 16, 2013), <http://www.mayoclinic.com/health/dementia/DS01131> (accessed Nov. 12, 2012).

42 N.Y. Mental Hygiene Law at § 81.02.

Part of the difficulty involved in parsing this distinction is the fact that current medical and legal consensus indicate that capacity is not static, but rather exists on a gradient. An individual may have some moments in which he or she possesses total capacity and others in which he or she utterly lacks it. As Hilda's story illustrates, people's capacity at any given moment is based on a complex confluence of factors that might include where they are, what types of physical and mental stresses they are experiencing, who they are interacting with, and the goal of that interaction. In this sense, therefore, the entire concept of legal capacity as an objective standard is a "legal fiction."⁴³

This new conception of legal capacity has been integrated into the ABA's Rules of Professional Conduct, as adopted by the New York State Bar. Rule 1.14(a) states, "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client."⁴⁴

The implication here is that conceivably a person may have less than perfect legal capacity but will still be able to direct the course of his or her legal representation as though he or she did, in fact, have the ability to do so. As the New York Bar Association states in its Comments on Rule 1.14, "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."⁴⁵

The ABA and American Psychological Association's joint publication, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, has a chapter, "Techniques Lawyers Can Use to Enhance Client Capacity," which advises such tactics as gaining client trust and confidence and accommodating for sensory impairments such as vision or hearing loss.⁴⁶ The ABA even advises accommodating a certain level of cognitive impairment via the technique of "gradual counseling," which requires an attorney to "repeatedly refer to the client's goals and values in assessing each alternative and in discussing the pros and cons of an alternative."⁴⁷

This process "may assist many clients in thinking through and clearly enunciating a decision. In other cases, the lawyer will be able to summarize the options and the client's values in a way that will help the client confirm them and choose a course of action."⁴⁸ Beyond the underlying assumption that capacity is far from static, the notion here is that even in cases in which legal decision-making capacity is diminished, an individual's ar-

43 Charles P. Sabatino, *Determining the Legal Capacity of Elders: Myths and Realities*, Am. Psychol. Assn. (Aug. 15, 2008).

44 N.Y. Comp. Codes, R. & Regs. tit. 22, § 1200 (2009).

45 ABA Ctr. for Prof. Resp., *Comment on Rule 1.14: Client-Lawyer Relationship: Rule 1.14 Client with Diminished Capacity – Comment [1]*, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/comment_on_rule_1_14.html (accessed Apr. 13, 2014).

46 ABA Commn. on L. & Aging & Am. Psychol. Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005).

47 Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. Contemp. L. 61, 92 (1988).

48 *Id.* at 95.

tification of his or her own values and wishes are crucial to any legal decisions made by, with, or for him or her.

D. Task-Specific Capacity

Hilda's capacity to make decisions for herself remains directly correlated to the degree to which those decisions involve her abuser. The idea that legal capacity is not absolute is supported by the task-specific concept of capacity that has been embraced by the legal community and the New York Rules of Professional Conduct. According to the Comments on Rule 1.14, a person's capacity should be evaluated by examining the following factors as they relate to any given individual decision:

- (i) the client's ability to articulate reasoning leading to a decision
- (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision
- (iii) the consistency of a decision with the known long-term commitments and values of the client.⁴⁹

The idea is that the three-part evaluation of capacity can be applied to any substantive decision and that the individual might lack capacity as it relates to some decisions yet possess it for others, depending on the nature of the decision and the other factors at play when the individual is making the decision.

E. Statutory Language Versus Administrative Reality

The law theoretically acknowledges this contextual approach to legal capacity. The Law Revision Commission, as well as New York case law, incorporates this attitude by repeatedly exhorting that guardianship be used exclusively as a "last resort."⁵⁰ The statute explicitly states that its purpose is to provide "the least restrictive form of intervention."⁵¹ The procedural structure, which requires proof of specific types of functional impairments affirmed by an independent, specially selected court evaluator, was created to allow courts to issue individualized guardianship orders granting guardians limited powers to correspond with an incapacitated individual's specific needs.⁵²

Complexities inherent in situations of elder abuse, coupled with the gap between a theoretical statute and the realities of its administration, mean that these principles are often stymied. As Hilda's rapid deterioration while living with Sam reveals, elder abuse can often exacerbate and accelerate cognitive and emotional decline. Given the fragile nature of capacity, it may be difficult, even for trained professionals, to ascertain how much of this decline might prove reversible once a victim receives trauma treatment in a safe environment.

Important and time-sensitive decisions are often the impetus for filing a guardianship petition. In Hilda's case, immediate decisions had to be made regarding her housing

49 ABA Ctr. for Prof. Resp., *supra* n. 45, at *Comment [6]* (scroll down from top of page).

50 L. Rev. Commn. Comments, reprinted in the notes to N.Y. Mental Hygiene Law § 81.02 (McKinney Supp. 1993); *In re Joseph V.*, 307 A.D.2d 469, 470 (3 Dept. 2003); *Matter of Albert S.*, 286 A.D.2d 684 (2d Dept. 2001).

51 N.Y. Mental Hygiene Law § 81.01.

52 *Id.* at § 81.15(a)(4).

and finances. The parties may not have the luxury of waiting for the cognitive dust to settle. The fact that these decisions often relate to the AIP's abuse and abuser may also mean that these decisions revolve around the AIP's feelings of anguish, guilt, and shame — feelings that may present as a lack of decision-making capacity. These factors make it even more likely that, for victims of elder abuse, guardianship petitions may be filed inappropriately.

Hilda's story illustrates the problems inherent in identifying which individuals are appropriate subjects of Article 81 proceedings. These difficulties stem from both the statutory formulation, as well as the administrative limitations of the proceedings themselves, and are exacerbated by the realities common to many victims of elder abuse. In the next case study, we examine a prototypical scenario in which an elder abuse victim is undoubtedly in need of a guardian but faces the possibility of further victimization within the proceedings themselves. Once again, the shelter model framework serves as an effective tool to pinpoint where systemic weaknesses lie and how they can impact elder abuse victims.

*F. Case Study II: Jim's Story*⁵³

With Jim's story, we focus on some of the enhanced risks faced by elder abuse victims once a guardian has been appointed to them. The specifics of the guardianship statute itself and the way in which it is administered coalesce to create significant gaps in oversight and opportunities for negligence, if not outright abuse. As we will see in Jim's case, the social isolation and financial turmoil that generally characterize elder abuse victims put them at increased risk, which the shelter model tries to offset.

After a series of car accidents in his twenties, Jim was diagnosed with a brain injury and moved back home with his mother, Betty. The injury impaired Jim's memory and cognitive functioning and caused seizures and a pronounced limp. A wealthy widow, Betty lived with Jim and managed all of his financial and personal needs. Upon Betty's death, Jim was left alone in the Manhattan apartment they had shared.

Shortly after Betty's death, Molly introduced herself to Jim on the street near his apartment as he was leaving his bank. Jim and Molly quickly became romantically involved and were married at the courthouse. Several months later, Jim's doctor was alarmed at his condition when Jim arrived for his checkup. Jim had lost 40 pounds in three months and was dirty and malnourished.

When the doctor questioned Jim about his eating habits, Jim said that his wife brought him food twice a week and that he ate saltines between her visits. Alarmed, the doctor alerted New York City Adult Protective Services (APS).⁵⁴

When visiting Jim's apartment, APS found the home dirty and the kitchen full of rotting food. Jim was incapable of articulating how he had lost weight or how the apart-

53 Names, as well as other major identifiers such as location and gender, have been altered to protect confidentiality.

54 Adult Protective Services (APS) is a division of New York City's Department of Social Services. It is a state-mandated case management program that arranges for services and support for physically and/or mentally impaired adults who are at risk of harm. See N.Y.C. Hum. Res. Administration, Dept. of Soc. Servs., *Adult Protective Services*, <http://www.nyc.gov/html/hra/html/services/adult.shtml> (accessed Apr. 13, 2014).

ment's condition had deteriorated. Over several subsequent APS visits, Jim indicated that he loved his wife and that she was planning a trip for them to go to Disneyland. However, he also said she never stayed in the apartment with him and expressed negative feelings toward her.

APS soon became aware that Jim was more than \$15,000 dollars in arrears on his rent and was facing eviction. Furthermore, Jim had given Molly his power of attorney, and she had spent thousands of dollars of his money on personal items such as a television and video games.

An APS psychologist was sent to evaluate Jim and determined that Jim lacked capacity because he did not understand his brain injury, the cause of his weight loss, the reasons for his dirty apartment, the state of his finances, or the eviction proceedings against him. The psychologist concluded that Jim was likely to suffer harm as a result of his inability to understand these functional incapacities.

APS referred Jim to the Weinberg Center, and he was admitted into the shelter. Almost immediately, the Weinberg Center team decided to petition the court to appoint a guardian. The court evaluator's written report confirmed the APS psychologist's original assessment.

Jim told the evaluator that he wanted a guardian but also said that a guardian might make it easier for him and his wife to move to Vermont. Recognizing the substantial assets at stake, coupled with Jim's complicated and conflicted feelings toward his abuser, the court appointed Jim his own counsel. While waiting for Jim's hearing date, the Weinberg Center continued to investigate the extent of the assets that had been taken from Jim. They tried to locate other friends or relatives who might serve as resources and support for Jim.

Initially, unable to locate any suitable resource, the court appointed a community guardianship agency⁵⁵ as guardian for Jim at a hearing where Jim was present. The relationship between the Weinberg Center team and the agency quickly grew strained. The court had initially ordered the agency to hire an independent investigator to learn more about the extent of Jim's abuse and possible charges that might be filed. The agency never did so. The agency was also paying, out of Jim's estate, for storage spaces that allegedly contained the belongings removed from his apartment. The Weinberg Center team requested that the agency sort through the storage spaces and make decisions, with as much consultation with Jim as possible, about their contents. The agency was not responsive to these requests and continued to spend money on the storage spaces for months before finally sorting through and ultimately disposing of the contents of the storage spaces.

The Weinberg Center continued its own independent investigation and found Debra, a first cousin of Jim's, who had been close to Jim up until Betty's death. Jim's relationship with Molly, and its resulting isolation, had driven Debra away. Debra was eager to reconnect with Jim and agreed to serve as Jim's guardian. After Jim was consulted and agreed, the petition was amended accordingly.

55 A community guardianship agency is a not-for-profit organization the court may appoint to serve as a personal needs or property management guardian for multiple individuals. Such organizations are generally appointed in cases in which the incapacitated person (IP) will remain in the community as opposed to moving to a long-term residential facility. Such organizations are paid from the IP's assets. N.Y. Sos. Law § 473-d(1) (McKinney Supp. 1993).

At the close of a second hearing at which Jim was again present, a judge assigned Debra the role of guardian. Debra was happy to visit Jim several times a year and sign off on his treatment plan. The Weinberg Center team would monitor Jim's care plan, keep Debra informed about any changes, and continue to execute its court-approved legal strategy.

This strategy included entering into a housing court settlement regarding the eviction proceedings against Jim, filing for an annulment of Jim's marriage, creating a supplemental needs trust for Jim's remaining assets,⁵⁶ obtaining a restraining order against Molly, nullifying various documents Molly had signed on Jim's behalf, and liaising with the District Attorney's office regarding possible criminal charges to be filed against Molly. After Debra was appointed guardian, Jim's court-appointed counsel filed a motion to be added to the court's decree as a co-guardian. The court granted the Weinberg Center's cross motion opposing this request as unnecessary, and Jim's counsel was ultimately relieved of his duties.

Jim ultimately became a long-term resident of the Hebrew Home, where he continues to thrive and is physically healthy with many friends. Jim and Molly's marriage was annulled, and Molly ultimately received a prison sentence after the District Attorney discovered other similar schemes she had masterminded. The Weinberg Center's staff attorney was a witness at Molly's trial. Jim is under regular treatment by a therapist and now clearly and unequivocally articulates anger toward his abuser, a desire to continue living at the Hebrew Home, and other preferences regarding his own treatment. Debra continues to visit Jim regularly and participates with the Weinberg Center team in discussing changes to Jim's care plan.

G. Jim: Boilerplate Guardianship Orders

Jim's Article 81 story reveals several gaps between the statutory ideal and the administrative reality of court-ordered guardianships in New York State. First and foremost, the overburdened court system has, in almost all cases, dispensed with the time-intensive process of crafting individual guardianship orders in favor of granting wide-ranging powers to guardians using boilerplate language. Debra, like every guardian appointed for a Weinberg Center client, was given generic powers that were not substantially tailored to his or her individual circumstances.

Beyond undermining the legislature's stated findings and purpose in enacting Article 81,⁵⁷ this practice bodes particularly ill for victims of elder abuse, such as Jim and Hilda, who may have specific gaps in their capacity based on trauma due to long-standing abuse coupled with the upheaval that can accompany judicial intervention. The mental health professional, AIP's appointed counsel, court evaluator, and judge all meet and evaluate the AIP at a time when he or she does not necessarily demonstrate his or her actual cognitive abilities.

56 Authorized by N.Y. Ests., Powers & Trusts Law § 7-1.12 (McKinney 1994), a supplemental needs trust allows a trust to be established for the benefit of a person with a severe, chronic, or persistent disability that gives rise to the long-term need for specialized services. The principal or income of the assets placed in trust is not counted as an available resource when the beneficiary's eligibility for government benefits such as Medicaid is calculated.

57 N.Y. Mental Hygiene Law § 81.01.

Jim's decompensated state must also be considered, along with the crucial and time-pressured decisions that he faced, such as finding new housing and moving quickly to cut off Molly's access to his funds. The pressures on an overburdened court system to free up space on its dockets by issuing extensive boilerplate guardianship orders that last indefinitely further compound these factors. Taken together, this means that an elder abuse victim such as Jim is in serious danger of being stripped of his civil rights when he may, in fact, still be able to exercise them to some degree.⁵⁸

H. Lack of Judicial Oversight

Once legal privileges have been taken from an elder abuse victim via the appointment of a guardian to exercise those privileges on his or her behalf, the law creates mechanisms by which they may be partially or wholly reinstated if the individual's capacity improves. Once a guardian is appointed, he or she is required to file an initial report with the office of court administration, which should include any necessary changes to the guardianship powers ordered by the court.⁵⁹ The guardian is also required to file subsequent annual reports, which must include any "facts indicating the need to terminate the appointment of the guardian, or for any alteration in the powers of the guardian and what specific authority is requested or what specific authority of the guardian will be affected."⁶⁰

The statute requires that each of these reports be examined within 30 days of their submission.⁶¹ A judge or a specially appointed referee can conduct this examination. If a report is not submitted, or is incomplete, an examiner can demand that the report be filed or completed and may reduce or deny compensation to the guardian if the guardian does not comply.⁶² Theoretically, an elder abuse victim who regains some capacity, or is actually found to have more capacity than was originally thought, is continuously monitored so that the guardianship order may be adjusted accordingly.

Jim's story also illustrates how the reality of the overburdened and underfinanced system fails to operate as required by statute. While Debra is a positive presence in Jim's life, she lives out of state and often does not visit the requisite four times per year. She has no mental health or legal training beyond the seven-hour course required for a guardianship, and she takes little proactive interest in Jim's treatment plan or current decision-making capabilities. When she is delinquent in filing reports, there are no consequences for Debra and no follow-up by the court.

This anecdotal evidence of insufficient oversight is borne out by New York State's own statistics. In 2004, the GAO surveyed twelve judicial districts in New York about their guardianship practices. Of the twelve, only six indicated that there was any requirement that they document approval of guardianship reports. Only four districts indicated that they used a computer to track when these reports are due and when they are filed.⁶³

Lack of oversight is a systemic problem that reaches far beyond the New York City

58 Interview with Jean Callahan, Dir., Hunter College Brookdale Ctr. for Healthy Aging (Jan. 24, 2012).

59 N.Y. Mental Hygiene Law § 81.30(4)(d).

60 *Id.* at § 81.31(b)(10).

61 *Id.* at § 81.30(a)(2).

62 *Id.* at § 81.30(c), (d).

63 U.S. Govt. Accountability Off., *supra* n. 7, at 71.

Guardianship Assistance Network (GAN) mandate. According to Jean Callahan, Director of Hunter College's Brookdale Center for Healthy Aging, it is impossible to determine how many active guardianships there are in New York State, because cases are often left open even after the IP has died.⁶⁴ This lack of monitoring indicates that the statutory reporting and examination requirements can be ignored with impunity.

This state of affairs in New York is reflective of the state of guardianship cases nationwide. The only data that state court administrative offices receive about guardianship cases is the total number of filings and dispositions made. This partial data blackout makes any sort of meaningful oversight impossible and means that once a guardian is granted powers without any substantive or temporal strictures, they are unlikely to be altered.⁶⁵ It seems that the capacity standard has become precisely the sort of absolute and permanent pronouncement that the legislature sought to avoid.

I. Incentives Created by a Fee-for-Service Model

Lack of oversight in the context of a fee-for-service model is an invitation to abuse. A fee-for-service model means that a fee is taken from the IP's estate and paid to private individuals or entities as payment for their services. This model is present in nearly every step of the guardianship process. Once a guardian is appointed, an IP is required to pay the court-appointed evaluator,⁶⁶ his or her own court-appointed counsel,⁶⁷ and potentially even the petitioner's counsel if the court finds it "appropriate."⁶⁸

If the court appoints an examiner who is not a member of the court's staff to examine the guardian's annual reports, that person will be paid out of the incapacitated individual's estate if his or her estate exceeds \$5,000.⁶⁹ The court has the authority to establish "reasonable compensation for the guardian for as long as the guardian continues to perform his duties."⁷⁰ This compensation is to be paid out of the funds in the IP's estate.⁷¹ Courts generally include the fee structure in the initial guardianship order, usually either a flat monthly fee or an hourly fee, in which the guardian is required to bill for each action taken on the IP's behalf.⁷²

The opportunities for abuse in such a system are manifold. If an IP does have substantial assets, as in Jim's case, a private guardian is effectively incentivized to continue the guardianship for as long as possible and not to investigate too thoroughly whether an IP may in fact have the capacity to do all or some of the things the guardian is being paid to do. This was the way Debra behaved throughout the course of Jim's guardianship. If, on the other hand, an IP is effectively indigent, as Hilda was when she came to the Weinberg Center, there is a profound dearth of guardianship options, and courts often require that a guardian who has been assigned several cases with larger asset pools to take on some

64 Interview with Jean Callahan, *supra* n. 58.

65 Wood, *supra* n. 1, at 34.

66 N.Y. Mental Hygiene Law § 81.09(f).

67 *Id.* at § 81.10(f).

68 *Id.* at § 81.16(f).

69 *Id.* at § 81.32(f).

70 *Id.* at § 81.28.

71 N.Y. Surrogs. Ct. Proc. Act § 2307(3) (McKinney 1994).

72 *Guardianship Practice: A Six-Year Perspective*, *supra* n. 7.

cases pro bono.⁷³ In this scenario, the guardian has little incentive to invest in the time-intensive process of ascertaining whether there has been any change in capacity or what might help improve capacity.

Elder abuse victims are particularly susceptible to these systemic flaws. The common element in abuse cases is isolation of the victim from his or her support system. Therefore, by the time an abuse case reaches a stage in which a guardian is being sought, there is:

- a) less likely to be a trusted friend or family member to assume the position of guardian; and
- b) less likely to be other people who maintain regular significant contact with the incapacitated person once a guardian has been appointed and who might step in if he or she recognizes a need for improvement.

In Jim's case, it took the Weinberg Center several months to locate Debra, who had distanced herself from the family as a result of Jim's abuse. Although Jim and his mother once had many friends in the community, Jim was extremely isolated by the time his abuse reached its peak, and it was his doctor who spent sufficient time with him to recognize that he was being victimized.

J. Guardianship Abuse

In addition to this more subtle form of systemic inertia, which is the product of inaction and perverse incentives, there is the more obvious danger of out and out abuse, neglect, or fraud perpetuated against an incapacitated person by his or her guardian. Jim's brief stint with a community guardianship agency as his guardian provides a brief window into the consequences of this phenomenon and indicates the prevalence of such protracted mistreatment. Indeed, the GAO reported that while a lack of guardianship data makes it difficult to determine how widespread this type of abuse is nationwide, there were hundreds of incidences of abuse throughout the country between 1990 and 2010. Common themes in the cases the GAO identified were states' failure to properly screen guardians initially, failure to monitor them effectively, and failure to share information among state agencies, which prevented timely recognition by authorities of the abuse.⁷⁴

The GAO report provides detailed descriptions of particularly egregious instances of abuse, such as a court-appointed attorney guardian who misappropriated hundreds of thousands of dollars from the estate of an incapacitated former judge. Over the course of six years, the estate went from containing several million dollars in assets to almost nothing, while accruing a million dollars in taxes, interest, and penalties.⁷⁵

As discussed previously, the guardianship process in New York is cloaked in a layer

73 *Report of the Commission on Fiduciary Appointments* 25, N.Y. St. Unified Ct. Sys. (Feb. 2005).

74 U.S. Govt. Accountability Off., *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, GAO-10-1046 (Sept. 30, 2010).

75 *Id.* at 13. Other instances of abuse by New York State court-appointed guardians that have been highlighted by U.S. Government Accountability Office (GAO) reports include an attorney guardian who brought a cake and flowers to a nursing home resident on her birthday and billed her \$850 an hour, his usual rate for legal services, and a guardian who charged an incapacitated person \$300 to deposit the incapacitated person's \$50 Social Security check in person, rather than using direct deposit. *See* U.S. Govt. Accountability Off., *supra* n. 7, at 8.

of bureaucracy and lack of systemic data gathering. Walking through these two case studies, an amalgam of several clients' experiences, helped us parse out issues inherent in the guardianship system that can thwart the stated purpose of Article 81. These case studies illustrate patterns that have become clear to Weinberg Center staff via their emergence in multiple unique iterations over the nine years the shelter has ushered clients through guardianship proceedings. The shelter model, in which a professional team guides and observes clients throughout the entire guardianship process, provides a unique window into the overarching gaps in that process and demonstrates how victims of elder abuse are likely to fall into those gaps.

While the case studies in this article reflect the Weinberg Center model specifically, the shelter model has been replicated throughout the country, with each organization's unique structure reflecting its particular perspective and state guardianship statute. For example, one elder abuse shelter in Delaware, operated by APS, is an independent living unit within a large facility that is reserved for victims of elder abuse. This infrastructure, coupled with APS mandatory reporting requirements, ensures that there is no abuse of the clients the shelter accepts. Another shelter, operated by Lifespan Rochester's Elder Abuse Prevention Program, is a consortium of six long-term care facilities that accept shelter clients on rotation, allowing the shelter to broaden its client capacity. The Center for Elder Abuse Prevention at the Jewish Home in Fairfield, Conn., has operated a successful shelter without attorneys on staff, providing the oversight to ensure that clients are free from abuse.⁷⁶ Despite each shelter's design distinctions, the basic model of providing safe haven via a dedicated staff helps insulate shelter clients from flaws in guardianship structures nationwide.

IV. CLOSING THE GAPS: THE SHELTER MODEL AND BEYOND

We have briefly reviewed the guardianship system as orchestrated in New York State and have used the experiences of Weinberg Center clients to reveal and analyze the problems inherent within that system. Professionals who have encountered New York State's guardianship proceedings in a variety of different contexts are just beginning to share knowledge and insight and come together to put forth best practices.⁷⁷ In November 2011, a daylong conference titled "Guardianship in New York: Developing an Agenda for Change" was held at Cardozo Law School. Participants, including court personnel, academics, and practitioners, formed working groups that put forth recommendations on topics such as streamlining of the guardianship process, monitoring of guardians, problems of poor people within the guardianship system, and alternatives to guardianship.

This conference was part of a growing national dialogue around guardianship. In October 2011, the National Guardianship Network convened the Third National Guard-

76 Information based on presentations at the first Shelter Partners: Regional. National. Global. (SPRING) Alliance Symposium, May 2, 2013. The SPRING Alliance was founded, in response to the proliferation of the shelter model, to create a network of elder abuse shelters sharing expertise, technical assistance, and standards of excellence.

77 The New York State version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act went into effect Apr. 21, 2014. It creates a uniform process to recognize out-of-state guardianships as well as transfer New York State guardianship orders to other jurisdictions.

ianship Summit: Standards of Excellence. The conference focused on post-appointment guardian performance and decision making and included a multidisciplinary group of delegates representing medical, legal, mental health, and government organizations.⁷⁸ The group produced a series of recommendations intended to form the basis of nationally recognized standards for guardians. These standards cover issues such as treatment of the incapacitated person, appropriate fees, reporting requirements, and obligations of the appointing court, among others.⁷⁹

We will now discuss ways in which several different entities, the Weinberg Center, the Vera Institute of Justice's Guardianship Project, the GAO, and New York City's Office of Court Administration (OCA) have attempted to address some or all of these national problems within their own operational purview. None of these programs or approaches promises wholesale relief for all elder abuse victims, and none is put forward here as an exclusive solution. Rather, the aim is to survey different approaches to the issues revealed by the case studies and analysis above and understand the strengths and limitations of the way in which these approaches address issues that the professional community is only beginning to fully understand.

A. Enhanced Screening and Resources for Guardians

Many of the problems that arise once a guardian is appointed seem to be rooted in the appointee's failure to meet the expectations of a guardian outlined in § 81.20. The juncture at which expectations and reality diverge seems hard to pinpoint. One point of potential failure, and therefore potential intervention, was revealed by an undercover investigation conducted by the GAO of the New York State courts' screening process. Using two false identities, one representing a person with extremely poor credit and more than \$30,000 of debt and one using the Social Security number of a deceased person, the investigators were successfully certified as guardians in New York State. None of the fictitious professional and educational information they presented was questioned. The GAO was further informed that criminal background checks are not conducted on prospective guardians but that the courts rely entirely on self-disclosure.⁸⁰

This phenomenon exists throughout the country, and Sen. Amy Klobuchar (D-Minn.) sponsored the Guardianship Accountability and Senior Protection Act, which died in the Senate Judiciary Committee on July 12, 2012. The bill would have provided funding for states to gather data that would allow them to assess the "role, responsibility and effectiveness of state courts" in administering their guardianship programs.⁸¹ It also would have allocated funding for a pilot program in five states to be coordinated by the U.S. Attorney General that would implement enhanced background checks for prospective guardians. The U.S. Attorney General's office would then have received funding to evaluate the program and determine best practices in this area.⁸²

This type of bill is a logical method of government intervention, because it focuses

78 Sally Hurme and Erica Wood, Introduction, 2012 Utah L. Rev. 3 1157 (2012).

79 *Third National Guardianship Summit Standards and Recommendations*, Utah L. Rev. 1191 (2012).

80 U.S. Govt. Accountability Off., *supra* n. 74, at 24–27.

81 Sen. 1744, 112th Cong. § 423 (Oct. 20, 2011).

82 *Id.* at § 202.

on a point in the guardianship process in which the courts are most heavily involved (i.e., the actual appointment and certification of the guardian). This approach also targets the most overtly criminal behavior by weeding out blatantly inappropriate potential guardians. As the case studies above reveal, elder abuse victims are likely to fall prey to such individuals. The victims are often isolated and are less likely to have family or friends who might investigate a suspicious guardian. Moreover, a court that does not mandate background checks is less likely to scrutinize a guardian willing to take on a difficult and complicated case with an indigent incapacitated person. However, even if this type of legislation is implemented, it may not be successful in helping elder abuse victims avoid more subtle forms of guardian neglect or carelessness revealed by Weinberg Center case studies.

New York City's GAN, formed in 2005, works to address some of those service gaps that result from the combination of minimal training for lay guardians and minimal oversight from courts. Funded by the OCA since 2006, GAN provides support to lay guardians, supplementing their court-mandated training and helping them comply with court requirements. GAN assists guardians in finding resources and public benefits that may help his or her IP as well as assists in crafting a plan that will maximize the IP's independence.⁸³ In some sense, GAN is the corollary to increased guardian screenings, because its effectiveness depends entirely on the presence of an active guardian who is willing to invest time in educating himself or herself. OCA's support for this project signifies the growing recognition of the gulf between the minimal legal requirements for guardianship certification and the extensive set of skills and tools necessary to be a truly effective guardian.

B. Institutional Guardianships

Another potential solution to the lack of investigation, training, and monitoring of guardians in New York State is an institutional guardianship model, in which a not-for-profit organization becomes the guardian for incapacitated individuals, who can then benefit from the resources and expertise of that entire organization and all of its employees.

The Vera Institute of Justice's Guardianship Project, which began in 2005, maintains a multidisciplinary team divided into three branches: financial, legal, and case management. Each of these employees undergoes extensive background checks. In this way, incapacitated persons have different people with a variety of abilities working to make decisions on their behalf. This could alleviate some of the problems experienced by Weinberg Center clients, which are inherent because guardians often lack professional training and expertise.

The institutional structure also removes some of the perverse economic incentives, ensuring that the goals of the project's employees are in line with the stated goal of the Article 81 statute: maintaining the incapacitated individual in the least restrictive environment.⁸⁴ We have seen in our case studies that the status quo, where vigilance and capacity maximization are disincentivized, is particularly deleterious to elder abuse victims. In

83 NYCourts.gov, *Guardian Assistance Network*, <http://www.nycourts.gov/ip/gan/> (accessed July 29, 2014).

84 *Guardianship Practice: A Six-Year Perspective*, *supra* n. 7.

particular, agency guardians operating with a profit motive can stand in the way of optimizing an incapacitated person's well-being. However, a not-for-profit structure is not, in and of itself, a solution to these problems. As the Weinberg Center saw in Jim's case, his community guardianship agency, also a non-profit organization, failed to take action on simple property management issues on his behalf, seemed willing to spend his money carelessly and without justification, and blatantly disregarded elements of the court's orders. This lack of due diligence, at best, and outright neglect, at worst, provoked no consequences or follow-up from the court. For an institutional guardian to overcome the profit motive, its operational structure, internal oversight, and organizational culture must be carefully and consciously structured to guard against the incursion of this temptation. Only if such an institutional guardian is formed and operated successfully will there be fewer incapacitated persons at the mercy of agencies that see them as simply more court-mandated pro bono cases to be handled with the minimum effort possible.

The institutional guardianship model, as operated by institutions such as the Vera Institute of Justice, also promises potential long-term savings in at least two ways. This model will work to maintain more incapacitated people in the community, thus driving down the costs of institutionalized care that, particularly in the case of elder abuse victims, are often borne by the state. Moreover, the more careful and consistent monitoring it promises may result in fewer incapacitated people receiving an intensive degree of care as well as a decrease in the overall number of guardianships in the state. This is particularly promising for victims of elder abuse, who, as we have seen, may recover some of their decision-making capacity once they are no longer in a state of crisis and are receiving treatment. Thus far, however, the requisite economic outlay and constant fundraising necessary to operate an institutional guardianship organization has prevented the model from becoming widespread. Additionally, this model only addresses weaknesses in state infrastructure that arise once a guardian has been appointed. It does not approach the question of how guardianship decisions are made initially or how guardianship petition proceedings are conducted, which we have seen can often be problematic for elder abuse victims.

C. Limitations of the Shelter Model

To avoid the potential for missteps at many junctures in the guardianship process, the shelter model is structured to anticipate and correct many of these issues on behalf of the clients it serves. It is important, however, to acknowledge the limitations of the shelter model in effecting systemic change within the guardianship process. The shelter model operates within an extremely limited scope. It is, by definition, a short-term emergency solution for abuse victims whose situation has reached a crisis level. While shelters can effectively assist clients in navigating the guardianship process and its aftermath, this work only extends until a client's discharge. This sharply limits the impact the model can have on weaknesses within the guardianship system.

In addition, there are only a handful of elder abuse shelters currently operational throughout the country. Those shelters generally accept cases that meet their individualized criteria, which are dictated by each organization's mandate, facilities, and funding, among other things. The number of elder abuse victims served by any particular elder abuse shelter compared with the total number of abuse victims in that shelter's catchment

area is relatively low nationwide. This is another facet of the barrier to shelters serving as a force for systemic change in areas such as guardianship. Therefore, while a shelter client's experience with guardianship proceedings is helpful in illustrating systemic problems, a shelter's scope of services is not broad enough to solve those problems in a holistic way.

Recognizing the profound limitations of the shelter model regarding effecting change beyond the limited population it serves, the Weinberg Center has prioritized outreach and advocacy projects that promote education about the tremendous potential for abuse to remain unidentified and even perpetuated within the guardianship arena. For example, the Weinberg Center has partnered with the Vera Institute of Justice's Guardianship Project to identify and address cases of elder abuse within a guardianship context through the creation of a guide for legal practitioners.

We will address the lessons gleaned from our case studies within the context of the shelter model's structural limitations. The case studies exemplify the realities of legal capacity as a delicate sliding scale, which the guardianship system does not fully take into account. In so many Weinberg Center cases, physical and psychological deterioration presented as cognitive incapacity. After months of physical, verbal, financial, and emotional abuse, these individuals become trauma victims and present as such. In Hilda's case, even a medical professional who knew her well was not able to accurately assess the level of capacity she was actually able to reach. This is not due to an oversight by the doctor but to the reality that Hilda may have been functioning at a very low level in the days immediately following her removal from Sam's home. Immediate provisions for Hilda's care were necessary, however, and in those initial days, an environment suited for low-functioning individuals fit her needs.

Had Hilda not been receiving treatment via the shelter model, the urgent need to make critical decisions on her behalf might have required immediately filing for guardianship based on the family doctor's PRI. This is especially true given the fact that, had she not been placed in a facility with a variety of settings and trained professionals, and had she not been monitored by a dedicated team that was intimately familiar with her situation, she may not have received such targeted care and her condition may not have improved as quickly. There are other safeguards to prevent the inappropriate appointment of a guardian (e.g., court-appointed evaluator, court-appointed counsel, hearing at which the presence of the incapacitated person is strongly preferred). However, once there is initial documentation indicating a lack of capacity, it becomes an increasingly uphill battle to reverse the process, especially if urgent decisions need to be made on the incapacitated person's behalf.

Hilda might very well have been appointed a guardian, or at least, a court might have spent valuable time and resources determining whether she should have one. Had she been appointed a guardian, the broad-ranging and effectively permanent powers granted to a guardian with no real incentive to thoughtfully re-evaluate Hilda's condition may have proved difficult to undo. However, with some of the urgency removed, Hilda was, for the first time in years, in a safe environment geared toward regaining her capacity. This waiting period allowed the Weinberg Center staff to distinguish her true medical condition from the immediate fallout of a crisis.

In Jim's case, those months of calm, safety, and regular therapy allowed the Weinberg Center team to help him maximize his capacity so that he could participate in decisions made on his behalf to the fullest extent possible, even if the boilerplate language in his guardianship order did not require that. Clients in the shelter model are able to retain the legal privileges they can, in fact, still exercise. In this way, the shelter model begins to correct problems in the guardianship process before that process has formally begun.

D. Shelter Model Provides Time and Resources for Crucial Investigation

Once a court determines that a guardian is necessary, another common disadvantage for elder abuse victims is that isolation creates a vacuum in their support network. As we saw in Jim's case, he actually had a family member who wanted to serve as his guardian but had been driven away by Jim's abuser. If APS had proceeded with the guardianship on its own, it may have asked that an agency or guardian with no connection to Jim be appointed his guardian.

Appointing a paid guardian for an individual with substantial assets is, as we have discussed previously, a scenario that can easily be abused in various ways. In the shelter model, however, one dedicated team oversees all aspects of a case and therefore can use the wait time inherent in all judicial proceedings to investigate the case from various angles and locate an important resource for the incapacitated person who otherwise might not have been found. In cases such as Jim's, the slow movement of the overburdened justice system, which is part of the same problem that causes a lack of oversight and training for guardians, can actually be used to an incapacitated person's advantage. When the team working on the guardianship is the same team that will oversee the incapacitated person's daily care once a guardian is appointed, its members are motivated to locate resources that will be easiest to work with and most suitable for the incapacitated individual.

E. The Shelter Model Helps Streamline the Guardianship Process

Beyond avoidance of the overt abuse suffered by some incapacitated persons at the hands of court-appointed guardians, the shelter model is also structured to reveal more subversive forms of abuse perpetrated by guardians and other professionals. In Jim's case, for reasons that seemed unsubstantiated, his court-appointed counsel petitioned to become his co-guardian, a request the court ultimately denied. As discussed above, the role of an AIP's court-appointed counsel in Article 81 proceedings is to advocate for the AIP within the context of the guardianship proceeding. Once a legal guardian is appointed, he or she effectively assumes the role of advocate for the IP, thus obviating the need for the IP to retain his or her own counsel. In Jim's case, however, his attorney continued to make court appearances and raise frivolous issues once Debra had been appointed guardian, actions that only served to further compound the case's complexity. The large berth of discretion granted to the AIP's counsel by Article 81, which provides no structure for determining when his or her role is no longer needed, enabled this state of affairs. Had Jim's counsel been provided more direction by the statute, this wrinkle in the proceedings might not have developed.

The fact that a single team was coordinating all aspects of Jim's care made it obvious that the lawyer's services were no longer needed. However, if the organization

of Jim's care had been more disjointed, especially with the agency guardian originally appointed, which was only sporadically monitoring Jim's care, the lawyer might have become another party drawing a check from Jim's estate indefinitely. Even if there are no overtly evil actors, the economic incentives inherent in the guardianship proceeding make it extremely difficult to preserve the incapacitated person's assets. With the Weinberg Center acting as an information hub, and not being poised to receive a payout itself, that task becomes substantially easier.

V. CONCLUSION

Major flaws and weaknesses are inherent in the New York State guardianship system as currently administrated. Furthermore, elder abuse victims are particularly vulnerable to those flaws, and the stated goals of the guardianship process are particularly likely to be thwarted as applied to this population. The elder abuse shelter model's characteristics are especially conducive to illuminating flaws in every step of the guardianship process from before a guardianship petition is filed until after a guardianship order has been issued.

Several initiatives have been designed to address various pitfalls and problems in the New York State guardianship process. While these issues are complex and multi-faceted, and no one direction represents an all-encompassing solution, the combined institutional knowledge of these initiatives has made it increasingly possible to thoroughly diagnose these problems.