

# **BERWITZ & DiTATA LLP**

Attorneys and Counselors at Law

310 Old Country Road Suite 101  
Garden City, New York 11530  
Telephone (516) 747-3200 • Facsimile (516) 747-3727

Lawrence N. Berwitz

Maureen R. DiTata

## **Guardianship- Different Strokes for Different Folks Article 81 Guardianship**

In our last issue of “A Step Ahead,” we provided information regarding Article 17 and 17-A guardianships. In this issue, we will address the “other” New York guardianship proceeding, the Article 81 guardianship.

First, it is important to remember that estate planning is not just about what happens after you die. A good estate plan will also protect you if there comes a time in your life when you become incapacitated. Some people incorrectly assume that a spouse or “next of kin” has legal authority to manage our affairs if we become incapacitated. This is not true. Without proper planning, if you become ill or incapacitated, an Article 81 guardianship proceeding is in your future.

Article 81 of New York’s Mental Hygiene Law authorizes a Court to appoint a representative to make personal and property management decisions for an individual who is ill or incapacitated. The proceeding is generally commenced through the filing of a Petition by the person seeking to be appointed as the guardian. The Petition must be supported by evidence that the individual is no longer capable of managing his or her personal and/or financial affairs. The Court will then conduct a hearing at which evidence will be produced and witnesses questioned so that it can determine whether a guardian is needed and, if so, who that guardian should be. The Court will also determine what level of personal care and property management powers should be granted to the guardian.

Article 81 guardianships can be costly, time-consuming and intrusive on affairs that most of us would prefer to keep private. Imagine parading your loved one before a Court to prove that he or she can no longer make appropriate personal and financial decisions. Imagine having to testify about your loved one’s bathing, grooming and bathroom habits, or having to admit that your loved one no longer knows how to write a check or pay a bill. Imagine that, apart from these indignities, Court fees, attorneys fees, fees for the service of process and the fees of a Court Evaluator, someone whom the Court appoints to investigate the matter before the hearing, must all be paid. Now consider that the process takes weeks and even months for the Petition to be prepared, served, filed, considered by the Court and investigated by the Court Evaluator, and more time passes before the matter appears on the Court’s calendar

for the hearing, after which additional time is required to prepare, serve and file the papers which will ultimately constitute the authority of the guardian to act! Add to this that there is no guarantee that the person who wishes to be appointed will prevail. Finally, once appointed, a guardian must account to the Court on an annual basis, apprise the Court of the incapacitated person's affairs, explain expenditures made on behalf of the incapacitated person and obtain Court approval before performing certain tasks or taking certain steps on behalf of the incapacitated person. It is no wonder that people in the know wish to avoid guardianship.

### **How can I avoid an Article 81 Guardianship?**

Proper planning in advance and the implementation of "Advance Directives" can eliminate the need for a guardianship proceeding. A Power of Attorney (POA) permits you, the "principal," to name another, the "agent," to make financial and property management decisions for you. A Health Care Proxy (HCP) appoints an agent to make health and medical decisions for you if you are unable to communicate your wishes. A Living Will (LW) contains information for your agent as to your end-of-life wishes. Having these documents in your estate plan will allow you to avoid Court involvement and ensure that your health and financial matters remain private. By utilizing these effective tools, we can maintain control for as long as possible and then ensure that our wishes will be carried out by those we trust.