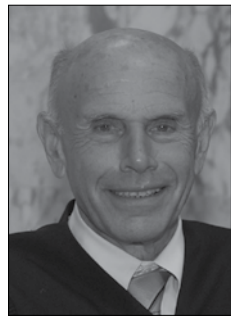


# The Coming Crisis in Appointing Art. 81 Guardians

Article 81 of the Mental Hygiene Law allows courts to appoint guardians for those people who, after a hearing and the presentation of clear and convincing evidence, have been found to be incapacitated and are unable to manage their personal needs and/or property. Under this statute, an incapacitated person is defined as one who cannot appreciate the nature and consequences of their functional limitations such that the person cannot manage their needs and may suffer harm if a guardian is not appointed on their behalf.

Guardianship is a special proceeding that is commenced with the filing a verified petition and the signing of an order to show cause. The petition must allege the basis for the belief that the alleged incapacitated person (the "AIP") is in need of a guardian. When signing the order to show cause, the court immediately appoints a court evaluator who interviews the interested parties as well as the AIP, if the parties are willing. The court evaluator then submits a report to the court that details the evaluator's findings and includes a recommendation as to whether a guardian is needed, as well as who is best suited to act as guardian.

The court has several pools of guard-



Hon Arthur M. Diamond



Moriah Adamo

ians from which to draw. Preferably, a family member or close friend of the AIP will be available, willing and able. If no one known to the AIP is available to be the guardian, the court may either appoint an individual who has qualified as an Office of Court Administration Part 36 eligible appointee, or a not-for-profit agency contracted for by the Nassau County Department of Social Services. However, many AIPs are presented to the court without a family member or friend to serve and, for a host of reasons, the availability of Part 36 appointees and not-for-profit agencies is rapidly diminishing as viable alternatives for the court. Herein lies the problem.

In order to address the coming crisis, we must first identify the populations at risk. AIPs that have available family or friends to serve as guardians typically will be taken care of by that person as guardian. Likewise, for those AIPs with substantial assets, the judiciary generally does not have a problem finding a Part 36 appointee to serve as guardian. Where there is a payment source, there is a willingness to serve. Increasingly, however, the court is presented with AIPs who have modest savings and income. These AIPs are at risk of not having a qualified guardian to protect their interests.

The at-risk population will typically fall within two general categories: (1) community-based AIPs — those living in their home or returning to their home from a hospital or other institution; and (2) institutionalized AIPs — those living in nursing homes. Each population presents its own problems.

Turning first to at-risk community-based AIPs, the courts face a number of challenges. While Nassau County does offer a "public guardian" program run under the auspices of the Department of Social Services' Adult Protective Services Division that contracts out guardianship work to not-for-profit agencies, this program has limitations. First, funding

for this program limits the number of appointments permitted within a year. Further, it is only available for community-based individuals deemed to be Nassau County residents and it will not provide services to individuals found within Nassau County that may have resided elsewhere prior to the onset of incapacity. Compounding these limitations, Nassau County has recently lost a major not-for-profit guardianship program that had been available for appointment outside of the public guardian program with the closing of Family & Children's Associations. Finally, Part 36 appointees are not eager to accept these community-based appointments where there is little potential for payment and the very real time commitment presented by the demands of managing a person's medical and financial needs.

Finding a guardian for a community-based AIP is difficult, but finding one for an institutionalized AIP is an even greater challenge. As we've said, those living in nursing homes or long-term care institutions do not qualify for Nassau County's public guardianship program. Further, institutionalized AIPs are often Medicaid recipients whose income must be remitted to the

See GUARDIANS, Page 13

We've got a  
**Patent**  
— on —  
**Experience**

Over 10,000  
patents granted

Over 17,000  
trademarks  
obtained

Over 50 years  
of experience

- Our expertise extends to all areas of technology
- We represent everyone from individuals to multinational corporations
- We serve clients with distinction in both foreign and domestic intellectual property law
- We help clients identify emerging technologies and ideas

For more information, call us today at  
**516.365.9802**

or fax us at 516.365.9805  
or e-mail us at law@collardroe.com



1077 Northern Blvd., Roslyn, NY 11576  
www.collardroe.com



## FLORIDA ATTORNEY

**LAW OFFICES OF RANDY C. BOTWINICK**

Formerly of Pazer, Epstein & Jaffe, P.C.

### CONCENTRATING IN PERSONAL INJURY



**RANDY C. BOTWINICK**  
30 Years Experience

- Car Accidents • Slip & Falls • Maritime
- Wrongful Death • Defective Products
- Tire & Rollover Cases • Traumatic Brain Injury
- Construction Accidents



Co-Counsel and Participation  
Fees Paid



**JAY HALPERN**  
35 Years Experience

Now associated with Jay Halpern and Associates, we have obtained well over \$100,000,000 in awards for our clients during the last three decades. This combination of attorneys will surely provide the quality representation you seek for your Florida personal injury referrals.

**MIAMI** 150 Alhambra Circle  
Suite 1100, Coral Gables, FL 33134  
P 305 895 5700 F 305 445 1169

**PALM BEACH** 2385 NW Executive Center Drive  
Suite 100, Boca Raton, FL 33431  
P 561 995 5001 F 561 962 2710

Toll Free: **1-877-FLA-ATTY (352-2889)**

From Orlando to Miami... From Tampa to the Keys  
www.personalinjurylawyer.ws

## HON. JOSEPH P. SPINOLA

### MEDIATOR & SPECIAL MASTER



Joseph Spinola is a former Justice of the New York State Supreme Court. Since leaving the bench in 2010, Spinola has become a full time mediator, and one of the most popular and successful mediators in New York. He was voted the #1 Mediator in New York by lawyers in the *New York Law Journal* survey the last five consecutive years (2011-2015), and has developed a reputation for settling difficult cases.

He has extensive experience litigating and presiding over a wide array of civil disputes including labor law, complex personal injury, medical malpractice, products liability, business, employment, commercial, premises liability, insurance coverage, matrimonial, and financial matters.

Spinola has 30 + years experience as a litigator and judge. He also has the unique perspective of trying cases as a defense attorney, plaintiff's attorney, and judge – which gives him the ability to understand all sides and aspects of the cases he mediates.

**Resolute Systems, LLC** 

MEDIATION, ARBITRATION & ADR CONSULTING

Long Island: 1-516-222-0688  
90 Merrick Avenue, Suite 200, East Meadow, NY 11554

Manhattan: 1-212-967-6799  
370 Lexington Avenue, Suite 702, New York, NY 10017

[www.SpinolaMediation.com](http://www.SpinolaMediation.com)



## GUARDIANS ...

Continued From Page 5

nursing home each month as a Net Available Monthly Income ("NAMI") obligation. However, for those with only Social Security income, Medicaid regulations do not allow for payment for a guardian's services from Social Security. Part 36 appointees increasingly turn down these appointments when it is clear that in all likelihood there will not be funds available to pay the guardian a monthly or annual fee.

These constraints on the availability of guardians pose a real problem for the judiciary. There is no available person or entity willing to serve, yet the statute makes it clear that the person, if found incapacitated, *must* have a guardian appointed on their behalf.

With limited government funding available at the present time, this problem will not be solved without community involvement. Judge Diamond, along with Moriah Adamo, Esq. and the NCBA Elder Law Social Services & Health Advocacy Committee have formed a "Guardianship Task Force" dedicated to addressing this impending crisis. The Task Force is addressing these issues in a variety of ways including researching public funding options and providing resources for individuals to equip themselves to serve as guardian. Among the sub-committee's initiatives is a community outreach program that will seek those civic-minded

individuals who are willing to serve as guardian for those at risk.

What will be specifically involved? Generally, a guardian qualified under the Part 36 list must care for the personal needs and finances of incapacitated individuals in accordance with the court's order of appointment. The guardian's role as personal needs guardian would be to see their ward once a month and make sure that they are being cared for appropriately. A financial management guardian has a fiduciary obligation to use their ward's income and assets for the ward's maintenance. A financial management guardian may also need to apply for and maximize their ward's Medicaid benefits. Every year the guardian must file a report describing the guardian's activity through the previous year and the general condition of their ward.

If you are a young lawyer or someone who wants to experience guardianship law first hand, we ask that you consider taking an assignment as guardian and joining the Guardianship Task Force. For more information, please contact Moriah Adamo at [madamo@abramslaw.com](mailto:madamo@abramslaw.com).

**Hon. Arthur M. Diamond is a Supreme Court Justice in Mineola. He welcomes evidence questions & comments and can be reached at [adiamond@nycourts.gov](mailto:adiamond@nycourts.gov). Moriah Adamo, partner with Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf LLP in Lake Success, represents both medical providers and individuals in Article 81 Guardianship proceedings.**