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Expert Analysis

Article 17-A Guardianship Statute: Still Alive and Well

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Article 17-A of the Surrogate's Court Procedure Act (SCPA), as currently enacted, permits the surrogate to appoint a guardian of the person or property, or both, for individuals who are mentally retarded[1] and individuals with a developmental disability. In most cases, Article 17-A is used to ensure long-term guardianship of persons who never were and never will be able to care for themselves. It permits their parents, when the disabled persons become adults, to serve as their legal guardians while the parents live and appoint successors when the parents are gone.[2]

When it appears to the satisfaction of the court that a person is an individual with a developmental disability, the court is authorized to appoint a guardian if it is in the "best interest" of such a person. A mentally retarded person or an individual with an intellectual disability is a person incapable of managing their affairs or making decisions on their own behalf. An individual with a developmental disability is a person having an impaired ability to understand and appreciate the consequences of decisions on their own behalf, which results in such persons being incapable of managing their affairs.

Thus Article 17-A is a diagnosis-driven statute. When a surrogate appoints the guardian, it does so based upon the individual's particular diagnosis. Contrast Article 81 of the Mental Hygiene Law in which the court appoints a guardian with authority tailored to the functional limitations of the incapacitated individual.[3] As previously stated by the author:

> Most significantly, a guardianship proceeding under Article 81 focuses on the functional ability of the person. It emphasizes how the person carries out daily activities in his everyday life rather than focusing on the underlying causes of the behavior.[4]

Diagnosed individuals more and more have a wide range of decision-making capacities. Courts have struggled with the flexibility of Article 17-A to deal with the range of capacities of such individuals.

Recent Article 17-A cases have focused upon the range of decision-making capacities of individuals with an intellectual disability and/or a developmental disability. Diagnosed individuals more and more have a wide range of decision-making capacities. Courts have struggled with the flexibility of Article 17-A to deal with the range of capacities of such individuals.

In the recent case of *Matter of D.D.*,[5] Surrogate Margarita Lopez-Torres denied a petition for a SCPA 17-A guardianship as not in the best interest of the respondent.

The respondent was a healthy 29-year-old person diagnosed with Down syndrome with a low to mild intellectual disability. After a hearing, it was apparent that D.D. had a history of consulting with family members before making significant decisions. The principal issue concerned D.D.'s desire to marry. The petitioner, his mother, believed D.D. did not have the capability of making medical decisions and Mrs. D. was adamantly opposed to D.D. marrying. She was particularly opposed to the identified fiancé, also with Down syndrome, the likelihood of a Down syndrome child as a product of the union, and Mrs. D's belief that the couple would not be able to take care of a child.

The court referred to Article 17-A as wholly removing the individual's legal rights to make decisions over one's own affairs. Calling such an appointment an immense loss of liberty, the court held that the burden of proving that the appointment of a guardian is in the best interest of the person with an intellectual disability is on the petitioner. Calling the guardianship an "extreme remedy," the court opined that it should be a last resort to deprive an individual of so much power and control over one's life.

The court adopted a test of understanding the functional capacity of an individual with a disability not unlike that set forth in Article 81 of the Mental Hygiene Law. The court held that SCPA 17-A must be read to require that supported decision-making be explored and exhausted before guardianship can be imposed, stating that "the drastic judicial intervention of guardianship" can only be imposed if it is the least

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restrictive alternative to protecting a person with a mental disability.

Tailoring the Guardianship

When the Legislature re-enacted Article 17-A in 1989, it added provisions to permit the court to tailor guardianship to the needs of the ward.[6] Professor Margaret Turano's commentary to the McKinney's SCPA 1750 sets forth the ability of the surrogate to limit a guardianship to fit the needs of the ward. It enhanced the rights of the disabled person by discretionary appointment of a guardian ad litem, permissible modification of the guardianship order and greater scrutiny of the need for the appointment prior to waiving a hearing. SCPA 1758 makes clear that the court retains jurisdiction over the ward and the guardian. The court can, even on its own accord, take steps to protect the ward. Under SCPA 1755, the court can modify a guardianship order when or if circumstances change.

While *Matter of D.D.* and *Matter of Chaim A.K.*,[7] upon which it relied, have found that there is no authority under Article 17-A to grant a limited guardianship or fashion procedures for modifying or monitoring the guardianship over time, several courts have indeed done so.

In the *Matter of Kevin Z.*,[8] the Appellate Division, Third Department, held that the surrogate continued to have jurisdiction over an adult autistic son after the appointment of his father as guardian of his person and property, empowering the court to impose reporting and/or monitoring requirements if and when it sees fit and to order visitation with the divorced mother of the adult autistic son.

In *Matter of Yvette A.*,[9] the surrogate rejected arguments that the ward's unique needs required the tailoring and guidance provided by Article 81. The court imposed detailed reporting requirements requiring documented evidence of petitioner's involvement in the life of his intellectually disabled and blind daughter, restricted his authority to move her without court order and prohibited him from discharging her prior advocate. The court also imposed additional enumerated restrictions on his authority of the ward's property.

In *Matter of Mark C.H.*,[10] the court required the guardian to report to the court annually the information that MHL §81.31 requires for incapacitated persons.

In *Matter of Joyce G.S.*,[11] the Bronx surrogate held that where it is found to be in the best interest of an Article 17-A ward, the court can employ other provisions of Article 81, notwithstanding that the SCPA does not contain a similar specific provision.

As Surrogate Renee Roth stated in *Matter of Schultz II*,[12] given the purposes underlying Article 81, it could not have been intended to serve as an impediment to protecting Article 17-A wards. Instead, Article 81 would be an impediment if it required an Article 17-A guardian to bring further proceedings under Article 81 in another court to obtain relief allegedly unavailable in the Article 17-A court.

The cases cited are but several examples of the flexibility that Article 17-A courts exercise and show that that statute is a good alternative to the more expensive and time-consuming procedures of Article 81.

Alternative to Drastic Remedy

The authors believe that Article 17-A is not "a drastic remedy" for persons diagnosed with the statutory conditions. It should not be avoided at all costs as a remedy for those so diagnosed. The cases cited are but several examples of the flexibility that Article 17-A courts exercise and show that that statute is a good alternative to the more expensive and time-consuming procedures of Article 81. It may be that guardianship was not warranted in the case of D.D. on the facts alleged. It may also be that a limited guardianship of D.D. could have been fashioned so that his mother made certain critical decisions about marriage and raising a child.

Conclusion

Once again, as to the court's suggestion in *Matter of D.D.* and *Matter Chaim A.K.* that the Legislature should closely scrutinize Article 17-A, there are clearly circumstances where an Article 17-A simplified proceeding is appropriate because the individual meets the diagnostic requirement. Article 17-A remains flexible to be tailored to the individual under such a disability. The answer is not to modify or repeal such a beneficial statute, or otherwise incorporate SCPA 17-A into Article 81 because someone may attempt to use it inappropriately.

Surrogates are still the gatekeepers and can reject petitions which are not susceptible to Article 17-A. More attention should be given to SCPA 1755 whereby the court can limit the guardianship to fit the needs of the ward. Consideration should be given by the Legislature to amend SCPA 1956 to provide appropriate provisions for limited guardianship of the person and not just to property. In addition, an Article 81 or other tailored remedies can be utilized.

In all, wholesale condemnation of salutary legislation should not be the product of the problems of the few.

1. SCPA 1750, SCPA 1750-a. The statute as originally enacted provided for guardianship for a "mentally retarded person" in SCPA 1750. It continues to use that terminology despite criticism and a preference to refer to individuals with intellectual and/or developmental disabilities.

2. McKinney's Practice Commentaries, Margaret Turano, SCPA 1750 (2015). Turano is a professor at St. John's University School of Law.

3. Bailly and Nick Torok, "Should We Be Talking? A Dialogue on Guardianship for the Developmentally Disabled," 75 Albany L. Rev 807 (2012) at fms 6-11.

4. C. Raymond Radigan and Jennifer H. Hillman, "Article 17-A Proceedings Remain an Important Tool," NYLJ Jan. 6, 2010 at 3, col 1.

5. 50 Misc.3d 666, (Surr. Ct., Kings Co. 2015).

6. Supra, footnote 2.

7. 26 Misc.3d 837 (Surr. Ct., New York County 2009).

8. 105 AD3d 1269 (3d Dept. 2013).

9. 27 Misc.3d 945 (Surr. Ct., New York County, 2010).

10. 28 Misc.3d 765 (Surr. Ct., New York County 2010).

11. 30 Misc.3d 765 (Surr. Ct., Bronx County 2010).

12. 23 Misc.3d 215 (Surr. Ct., New York County 2008).