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Expert Analysis

Considerations When the Proposed Article 17-A Guardian May Not Be Suitable

By **C. Raymond Radigan**

And **Jennifer F. Hillman**

Much of the current focus on Article 17-A involves the constitutional rights of the alleged incapacitated person (AIP). This article highlights a different concern: when the AIP is clearly in need of a guardian and fits the parameters set forth in Article 17-A, but the proposed guardian may not be suitable or appropriate to act as guardian for a multitude of reasons. For example, the parents of an adult AIP may be divorced, but both want to be named as co-guardians and the rights of each co-guardian must be detailed. Or, the proposed guardian may make appropriate decisions regarding medical care for the AIP, but there are concerns about what the proposed guardian deems to be a safe and appropriate living environment.

C. RAYMOND RADIGAN *is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek.* JENNIFER F. HILLMAN *is a partner at the firm.*

While there are some courts that believe an Article 17-A guardianship can be granted with additional restrictions, other courts have ruled that Article 81 is a more appropriate vehicle for tailoring a guardianship. However, under either statute the problem remains that there may be a need for additional monitoring or restrictions upon the guardian in order to protect the AIP. We submit that there are practical ways to tailor an Article 17-A guardianship in these circumstances.

Tailoring a Guardianship

The most notable case for tailoring an Article 17-A guardianship was in *Guardianship of Yvette A.*, 27 Misc.3d 945 (Surr Ct New York Co 2010) wherein the father of Yvette, the AIP, petitioned for guardianship. Yvette was clearly a person in need of a guardian, however the petitioner had admittedly been absent from his daughter's life for approximately 16 years, admittedly did not have a plan for her continued care and treatment, and was unclear of her exact diagnosis.

There are practical ways to tailor an Article 17-A guardianship.

The New York County Surrogate's Court found that it was in Yvette's best interests to have her father appointed as guardian of the person under Article 17-A, rather than Article 81. However, because of the petitioner's history of non-involvement, the court placed restrictions on the guardianship including requiring petitioner to file extensive

annual reports with the guardianship department of the court that included (i) the petitioner's current address and telephone number; (ii) Yvette's current address; (iii) the dates and times of petitioner's visits with Yvette (a minimum of six times in a six-month period and twelve times in a twelve-month period); (iv) a report on Yvette's current medical condition (with references to the reports reviewed); (v) any changes in Yvette's condition; (vi) a list of Yvette's daily activities and the frequency of her attendance; (vii) any proposed plan that petitioner had to change Yvette's living arrangements, daily activities or care, and the reasons for the change.

This decision is directly contrary to more recent cases which have strongly espoused that Article 17-A guardianships cannot be tailored. See e.g., *In re Guardian for Michelle M.*, 52 Misc3d 1211(A), *2 (Surr Ct Kings Co 2016); *In re Guardian for Antonio C.*, 52 Misc3d 1212(A) (Surr Ct Kings Co 2016); *Matter of Sean O.*, NYLJ Oct. 24, 2016 (Suffolk County Surrogate's Court). However, in each of the above cases, the courts were most concerned with granting a plenary guardianship when it appeared that was not the least restrictive form of intervention, or in the best interest of the AIP. The fitness of the petitioner to serve as a guardian was not questioned.

Fitness of Proposed Guardian

When the fitness of the proposed guardian is questioned, the same issues will be present in an Article 81 or an Article 17-A guardianship. If the need for a guardian is not questioned because the AIP fits within the diagnosis parameters of Article 17-A, it is unnecessary to submit the AIP, the family and the court to a more rigorous and expensive Article 81.

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However, the restrictions set forth in *Matter of Yvette* placed significant oversight with the court, and the annual reports may be overly burdensome to the Surrogate's Court staff if this becomes a common practice.

We submit that in these situations the court could appoint the proposed guardian as the Article 17-A guardian, while imposing restrictions and conditions upon the guardian. For example, the guardianship could be conditioned upon petitioner consenting to the AIP remaining in an adult residential facility and requiring petitioner to apply to the Surrogate's Court before the AIP could be removed from any adult residential facility. If the AIP is in a private home, petitioner could be mandated to (i) maintain a relationship with an OPWDD [Office for People With Developmental Disabilities] certified agency; and (ii) place the AIP in a day program with attendance requirements.

Each of these conditions would provide protections and oversight for the AIP. These conditions could be memorialized in a separate stipulation signed by the petitioner and so ordered by the court. Thus, any non-compliance with the stipulation could be adjudicated as a violation of a court order. This is sometimes done when an AIP's parents divorced while the AIP was a minor. Now that the AIP has reached majority, they are still in need of a guardian. The prior terms in a support and custody agreement between the divorced parents about medical decisions and care for the AIP could now be incorporated into a stipulation that survives into the AIP's adulthood.

These practical solutions provide extra protections for an AIP, while also fostering the spirit of Article 17-A.

Disability Rights Lawsuit

In a prior column,[1] the recently filed petition by Disability Rights New York (DRNY) against the New York State Unified Court System was discussed at length. In the petition filed in the Southern District of New York, DRNY sought a declaratory judgment that Article 17-A violates the U.S. Constitution, the Americans With Disabilities Act and the Rehabilitation Act of 1973. Primarily, the petition alleged that Article 17-A violates the Fifth and 14th Amendments' Due Process and Equal Protection clauses.

In June 2017, defendants filed a motion for judgment on the pleadings, arguing that the SDNY must abstain from exercising jurisdiction over a case where the circumstances interfere, among other things, with "civil proceedings involving certain orders…uniquely in furtherance of the state courts' ability to perform their judicial functions" as set forth in *Sprint v. Jacobs*, 134 S. Ct. 584, 591 (2013).

In a recent decision dated Aug. 16, 2017,[2] Judge Alvin K. Hellerstein found that Article 17-A guardianships are judicial proceedings presided over by state-court judges, and thus the petition directly implicates the way that New York courts manage their own guardianship proceedings under Article 17-A. In particular, plaintiff sought to permanently enjoin defendants from adjudicating incapacity and appointing guardians pursuant to SCPA Article 17-A, and also sought an order requiring defendants to notify all people who are currently subject to Article 17-A guardianship orders of their right to request modification or termination of the guardianship order.

Hellerstein found that this injunction would "control or prevent the occurrence of specific events that might take place in the course of future state [Article 17-A proceedings]…by imposing standards on state court proceedings that would require for [their] enforcement the continuous supervision by the federal court over the conduct of those proceedings." (internal citations omitted).

For those reasons, the court abstained and dismissed the petition. However, the court also noted that plaintiffs were not precluded from challenging the constitutionality of Article 17-A in state court. Stay tuned.

Conclusion

As demonstrated by decisions of the surrogates throughout the state (many of which are officially cited or published in the *New York Law Journal*), numerous petitions under Article 17-A are routinely granted. It is a relatively small number of proceedings where the court finds it necessary to either reject or modify the relief sought. For those cases, a just resolution must be found taking into consideration the staff limitations available to the surrogate's in handling the more difficult—although limited—number of cases where there are additional concerns.

1. Hon. C. Raymond Radigan and John G. Farinacci, SCPA Article 17-A Guardianship Statute Revisited, New York Law Journal March 16, 2017.

2. *Disability Rights N.Y. v. State of N.Y.*, No. 1:16-cv-07363 AKH (S.D.N.Y. Aug. 16, 2017).