Surrogate's Court Procedure Act Article 17-A and Its Ever-Changing Landscape

By Robert M. Harper

Article 17-A ("Article 17-A") of the Surrogate's Court Procedure Act ("SCPA") has garnered a great deal of attention in the past year. Indeed, as evidenced by the many recently published decisions interpreting Article 17-A, the Surrogate's Courts have been called upon to address novel issues involving the statute, including the extent to which a plenary guardianship of a person who is intellectually or developmentally disabled is warranted; whether a Surrogate's Court has the authority to tailor an Article 17-A guardianship; and whether a person who is intellectually or developmentally disabled has a right to assigned counsel in a proceeding commenced to appoint an Article 17-A guardian for that person. While these issues, among others, are anything but settled (and are almost certain to spark legislative action in the near future), this article seeks to provide practitioners with an update on the many recent developments involving Article 17-A.

The Historical Background

Article 17-A provides for the appointment of guardians for persons who are intellectually or developmentally disabled. As initially enacted in 1969, Article 17-A governed guardianship of persons who were mentally retarded.[1] In 1989, the Legislature amended Article 17-A in order to make it applicable to persons who were developmentally disabled.[2] The Legislature has since amended Article 17-A to omit references contained therein to mental retardation and to substitute them for intellectual disability.[3]

In first enacting Article 17-A several decades ago, the Legislature sought "to provide a means for parents of mentally retarded children to continue exercising decision making power after those children reached age twenty-one."[4] The underlying rationale was that mental retardation was a permanent condition, which had "no realistic likelihood of change or improvement over time", such that the powers that the parents had over minor children who were mentally retarded should last for the duration of the mentally retarded children's lifetimes.[5] The Legislature apparently made the same assumptions in extending Article 17-A to persons who were developmentally disabled.[6]

Of course, societal attitudes toward persons with intellectual and developmental disabilities have changed in the decades since the Legislature first enacted Article 17-A.[7] Now more than ever before, emphasis is placed upon maximizing the lives of those persons by way of supported decision making, rather than the substituted decision making that oftentimes arises from an Article 17-A guardianship.[8]

The Current Statutory Framework

A plenary guardianship under Article 17-A "wholly removes" the legal right of a person who is intellectually or developmentally disabled "to make decisions over one's own affairs and vests in the guardian virtually complete power over such individual."[9] When a plenary guardianship is granted under Article 17-A, the guardian has what courts have described as "virtually total power over [the] ward's life"; and is empowered to made decisions concerning the ward's medical care, place of abode, social associations, travels, employment, and living arrangements.[10] Consequently, the Surrogate's Courts have recognized that a plenary Article 17-A guardianship results in an "immense loss of individual liberty" for a person who is intellectually or developmentally disabled within the meaning of Article 17-A.[11]

Under Article 17-A, a person who is intellectually disabled is one "who is permanently or indefinitely incapable of managing oneself and/or one's own affairs because of an intellectual disability."[12] The respondent's condition "must be certified by a licensed physician and a licensed psychologist or by two licensed physicians, one of whom has familiarity with or knowledge of the care and treatment of persons with intellectual disabilities."[13]

A person who is developmentally disabled is one who has a permanently "impaired ability to understand and appreciate the nature and consequences of decisions which result in such person being incapable of managing himself or herself and/or his or her affairs by reason of developmental disability," whose disability: "(a) is attributable to cerebral palsy, epilepsy, neurological impairment, autism or traumatic head injury"; (b) "is attributable to any other condition of a person found to be closely related to intellectual disability because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of persons with intellectual disabilities"; or (c) "is attributable to [certain diagnoses of] dyslexia"; and (d) originates before such person attains age twenty-two."[14] The term person with a developmental disability also includes a person who has been certified as

> (i) having an intellectual disability, or
> (ii) having a developmental disability, as defined in [Mental Hygiene Law § 1.03], which (A) includes intellectual

> disability, or (B) results in a similar impairment of general intellectual functioning or adaptive behavior so that such person is incapable of managing himself or herself, and/or his or her affairs by reason of such developmental disability.[15]

While not opining as to what the answer should be, at least one Surrogate's Court has raised the question of "whether a diagnosis of autism . . . should even be part of the statutory predicate for consideration of a person's eligibility for a 17-A guardianship."[16] It appears that this is because the autism spectrum is "increasingly extended" and may not lend itself to the "one size fits all" guardianship that typically arises under Article 17-A.[17]

Article 17-A does not obligate a Surrogate's Court to "make a specific finding of fact that the person requiring guardianship is mentally disabled."[18] On the contrary, where the evidence presented includes certifications from a licensed psychologist and a licensed physician (or two licensed physicians, one of whom has familiarity with or knowledge of the care and treatment of persons with intellectual and developmental disabilities), and the respondent's best interest will be served by the appointment of a guardian, the Surrogate's Court has the authority to appoint a guardian under Article 17-A.[19] Critically, a showing that the respondent is a person who is intellectually or developmentally disabled is not, in and of itself, sufficient to justify an Article 17-A guardianship.[20]

The Best Interest of a Respondent

A party petitioning for Article 17-A guardianship must establish that the imposition of a guardianship would be in the best interest of the person with an intellectual or developmental disability.[21] The term "best interest" is not specifically defined in Article 17-A.[22] As a result, at least one Surrogate has described it as "amorphous," and noted that the "criteria necessary to support a finding that appointment of a guardian is appropriate in a particular case are rarely articulated but frequently assumed."[23]

In the absence of statutory guidance as to what the term "best interest" involves, the Surrogate's Courts have considered the functional capabilities and limitations of the respondents who are alleged to be in need of Article 17-A guardians.[24] The courts also have concluded that Article 17-A guardianship is only warranted when a respondent's functional limitations render it necessary.[25] They have reasoned that doing so properly accounts for the "emerging awareness that there is a wide range of functional capacity found among persons with diagnoses of intellectual disability and developmental disability."[26]

What is more, in determining whether a respondent's best interest will be served by the appointment of an Article 17-A guardian, a court must consider "the due process requirement that any resulting deprivation of [the] respondent's liberty must employ the 'least restrictive means' available to achieve the objective of protecting the individual and the community."[27] To determine whether lesser restrictive alternatives to an Article 17-A guardianship are available, a court must inquire into the resources that are accessible to help the respondent.[28] The resources may include "a support network of family, friends, and supportive services."[29] As guardianship under Article 17-A oftentimes is viewed as an option of last resort, Surrogate's Courts have concluded that tailored guardianships under Article 81 of the Mental Hygiene Law ("Article 81") and the use of advance directives may be lesser restrictive means, which preclude the imposition of Article 17-A guardianships on respondents in appropriate circumstances.[30]

Thus, in *Matter of Sean O.*, Suffolk County Surrogate John M. Czygier, Jr. denied the petitioners' application to be appointed as Article 17-A guardians for their twenty-seven year-old son.[31] Surrogate Czygier reasoned that, although the respondent had cognitive limitations, he functioned "as a capable adult who engages in supportive decision making with his family and support professionals"; "is aware of his limitations and recognizes his need to turn to others for guidance on certain matters; and "had executed a health care proxy authorizing his parents to make medical decisions for him."[32] Those factors established to the court that it was not necessary to appoint Article 17-A guardians for the respondent.[33]

When advising clients whether to pursue guardianship under Article 17-A, practitioners should be careful to ensure that their clients will be able to establish that the requested guardianship is in the best interest of the respondent; that it is necessary; and that the guardianship is the least restrictive option that is available. If the clients fail to make those showings in seeking guardianship under Article 17-A, their petitions may be denied, even when uncontested.

To Tailor or Not to Tailor an Article 17-A Guardianship

Relatively recent case law suggests that guardianship under Article 17-A is an "all or nothing" remedy that does not permit the Surrogate's Court to tailor a guardianship to tend to the respondent's functional capabilities and limitations. Indeed, one Surrogate has gone so far as to describe Article 17-A as "a blunt instrument allowing for none of the tailoring available under Article 81", which specifically requires that a guardianship be tailored to address the actual needs of a respondent.

However, the conclusion that Article 17-A does not permit tailoring is not necessarily universally held.[34] Some Surrogate's Courts have appointed Article 17-A guardians "with tailored powers and subsequently imposed the type of detailed reporting requirements similar to those found in Article 81."[35] In stark contrast to the Surrogate that described Article 17-A as a "blunt instrument" that does not permit tailoring, another Surrogate found that a Surrogate's Court "that has the power to modify a guardianship order once it has been issued to meet the needs of the ward surely also has the power to tailor the order to meet such needs at the outset."[36]

Given that the Surrogates have reached differing conclusions as to whether an Article 17-A guardianship can be tailored to address the functional capabilities and limitations of respondents in guardianship proceedings before them, it may be necessary for the Legislature to amend Article 17-A to resolve this issue once and for all. Absent such legislative action, the issue of whether an Article 17-A guardianship may be tailored may vary from county to county, depending on how the local Surrogate's Court interprets the statute.

The Right to Assigned Counsel

Recent decisions from Surrogate's Courts in Chautauqua County and Kings County recognize that Article 17-A respondents who lack financial resources to retain counsel may have a constitutionally mandated right to assigned counsel.[37] The Surrogates have relied upon SCPA 407, which permits a Surrogate's Court to assign counsel for an indigent party when the court "determines that such assignment of counsel is mandated by the constitution of this state or of the United States."[38] In relying upon SCPA 407, the Surrogate's Courts have found that the right of an indigent individual to make his or her own medical decisions is protected by the due process clauses of the federal and state constitutions.[39] Thus, where an Article 17-A guardianship proceeding implicates the respondent's right to make medical decisions for himself or herself, a respondent who lacks the resources to afford counsel may have a constitutionally guaranteed right to assigned counsel.[40]

Kings County Surrogate Margarita Lopez Torres also has explained that the appointment of a guardian ad litem for the respondent does not obviate the need to assign counsel for the respondent.[41] The reason is that the role of the guardian ad litem is different from that of assigned counsel.[42] The role of the guardian ad litem—which Surrogate Lopez Torres has described as that of a "neutral evaluator"—involves conducting an investigation; rendering a report; and making recommendations concerning the respondent's needs to the Surrogate's Court.[43] In contrast, the role of assigned counsel is "to actually represent and advocate for the respondent" in safeguarding the respondent's "rights, explain[ing] the consequences, and counsel[ing] the respondent about available alternatives to the proceeding."[44] Presumably, the available alternatives include guardianship under Article 81 and the use of advance directives.

Chautauqua County Surrogate Stephen Cass's recent decision in *Matter of L.S.* is illustrative.[45] There, the petitioner petitioned to be appointed as an Article 17-A guardian for the respondent, seeking a directive authorizing the petitioner "to make all medical and dental decisions for [the respondent] and to render consent to all medical procedures that are necessary for the wellbeing of" the respondent.[46] Noting that the right to make medical decisions for one's self is a constitutionally mandated due process right, and that the respondent was indigent, Surrogate Cass found that the respondent had a right to assigned counsel, pursuant to SCPA 407.[47] Surrogate Cass explained that, according to the criteria propounded by the New York State Office of Indigent Legal Services, a person is presumed to be eligible for assigned counsel if the person's "net income is at or below 250 percent of the federal poverty level guidelines."[48] The presumption may be rebutted by "compelling evidence that the applicant has the financial resources to pay for a qualified attorney"; and the "resources of a third party shall not be considered [in the absence of the third party's consent] to pay for counsel."[49] Based upon the sworn allegations in the petition that the respondent had no property or income, the Surrogate appointed the Chautauqua County Public Defender to represent the respondent.[50]

Although Surrogate Lopez Torres reached a similar result in *Matter of Leon*, the Surrogate applied different reasoning in concluding that the respondent in an Article 17-A proceeding—who lacked the resources to pay for an attorney—had a right to assigned counsel.[51] Indeed, Surrogate Lopez Torres found that Article 17-A implicated the respondent's constitutionally protected due process rights to privacy, "to refuse unwanted medical treatment," and "to make personal decisions regarding marriage, procreation, contraception, family relationship, child rearing, and education."[52] As such, the Surrogate applied a three-pronged test to determine whether a respondent in an Article 17-A proceeding—whose physical liberty was not at stake—had a right to assigned counsel.[53] The three factors for consideration were: (a) "the private interest that will be affected"; (b) "the risk of an erroneous deprivation of such interest through the procedures used"; and (c) "the government's interests."[54] Applying those factors, Surrogate Lopez Torres held that fundamental liberty interests were at stake; the absence of counsel, among other things, subjected the proceeding to the possibility for an erroneous determination; and the government's financial interest in avoiding the obligation to pay for assigned counsel did not outweigh the respondent's interest in receiving such counsel.[55] As a result, the Surrogate appointed counsel for the respondent from the Kings County 18-B panel.[56]

The foregoing cases demonstrate that a respondent in an Article 17-A proceeding who lacks the financial means with which to retain counsel may have a constitutionally protected right to assigned counsel. What remains to be seen is whether—and to what extent—other Surrogate's Courts follow suit in assigning counsel for indigent respondents in Article 17-A proceedings.

The Right to a Hearing

Under SCPA 1754, the Surrogate's Court must hold a hearing in an Article 17-A proceeding, except when the petitioners are the respondent's parents; or the application is made by someone other than the respondent's parents, but with the consent of the respondent's parents.[57] The court has discretion to appoint a guardian ad litem for the respondent; the respondent has a right to a jury trial; and the court possesses discretion to dispense with the respondent's presence at a hearing where the physicians' certifications establish to the court's satisfaction that the respondent is "medically incapable of being present to the extent that attendance is likely to result in physical harm to" the respondent.[58] Practically speaking, the vast majority of Article 17-A guardianships are granted without a hearing, either before a court or a jury (which almost never occurs).[59]

To justify the appointment of a guardian, Article 17-A requires that the Surrogate's Court be satisfied that the "best interest" of the person who is intellectually or developmentally disabled "will be promoted by the appointment of a guardian."[60] Commentators have explained that the applicable standard of proof "is presumptively preponderance of the evidence."[61] In this respect, among many others, Article 17-A contrasts with Article 81, which specifically requires that the petitioner establish that a guardianship is necessary by clear and convincing evidence.[62]

Recent case law suggests that Surrogate's Courts are more carefully scrutinizing Article 17-A guardianship applications than they did in the past. Petitioners seeking guardianship under Article 17-A should be well prepared to make the evidentiary showing required by Article 17-A at a hearing, as the failure to do so is more likely now than ever before to result in the dismissal of their petitions.[63]

Complications Concerning Article 17-A

Closely related to the legal issues discussed above are concerns that recently have arisen relative to the constitutionality of Article 17-A and the manner in which it provides for persons who are intellectually or developmentally disabled to be treated. These concerns have resulted in federal litigation concerning Article 17-A, as well as the so-called Olmstead Cabinet, which has called for reforms to be made to Article 17-A. The underlying concerns are briefly discussed below.

In September 2016, a not-for-profit corporation called Disability Rights New York ("DRNY") commenced a federal lawsuit, alleging that Article 17-A is unconstitutional and impermissibly discriminates against people who have intellectual and developmental disabilities.[64] The complaint filed in the DRNY action seeks a judgment declaring that Article 17-A violates the United States Constitution and certain federal statutes, as well as injunctive relief concerning the granting, modification, and termination of Article 17-A guardianships.[65] It will be interesting to see whether DRNY's lawsuit—which appears to seek to transform Article 17-A's approach to guardianship into that which typically is granted under Article 81—sparks legislative action to amend Article 17-A. After all, guardianship under Article 17-A oftentimes is more streamlined, more user-friendly, and less expensive than an Article 81 guardianship.

Previously, Governor Cuomo created the Olmstead Cabinet to address concerns that arose as a result of the United States Supreme Court's 1999 decision in *Olmstead v. L.C.*[66] The *Olmstead* decision addressed how persons who had mental disabilities should be treated under the Americans with Disabilities Act of 1990.[67] Based upon the *Olmstead* decision, the Olmstead Cabinet's report recommends that Article 17-A be updated to permit guardianships granted thereunder to be tailored to meet each respondent's functional limitations. The Olmstead Cabinet further recommends that Article 17-A be amended to "mirror the more recent Article 81 with respect to appointment, hearings, functional capacity, and consideration of choice and preference in decision making." Although the Governor's office published it in October 2013, the Olmstead Cabinet's report has yet to bring about legislative action with respect to Article 17-A.

It remains to be seen what impact, if any, the DRNY lawsuit and recommendations of the Olmstead Cabinet will have in bringing about changes to Article 17-A. However, one fact that appears to be undeniable is that Article 17-A will change in the not-too-distant future, and the concerns that gave rise to the DRNY action and the Olmstead Cabinet certainly will be part of the conversation leading up to any statutory amendments that result.

Conclusion

While the text of Article 17-A has not changed much in the past few decades, the manners in which Surrogate's Courts are interpreting—and applying—Article 17-A appears to be evolving. In advising clients whether to commence Article 17-A guardianship proceedings, practitioners should be mindful of how the Surrogate's Courts are applying the statute. The failure to consider the many recent developments involving Article 17-A may well result in the denial of applica-

tions made thereunder, which is a result that both practitioners and their clients would like to avoid.

Endnotes

1. *Matter of Chaim A.K.*, 26 Misc. 3d 837, 842, 885 N.Y.2d 582 (Sur. Ct., N.Y. Co. 2009).
2. *See id.*
3. Mem. in Support of A.2125-a, *available at:* http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A02125&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y (last viewed on October 10, 2016).
4. *Chaim A.K.*, 26 Misc. 3d at 842.
5. *See id.*
6. *See id.*
7. *Matter of D.D.*, 50 Misc. 3d 666, 669, 19 N.Y.S.2d 867 (Sur. Ct., Kings Co. 2015).
8. *See id.*
9. *See D.D.*, 50 Misc. 3d at 668 (citation omitted).
10. *Matter of Mark C.H.*, 28 Misc. 3d 765, 776, 906 N.Y.S.2d 419 (Sur. Ct., N.Y. Co. 2010).
11. *See id.*
12. *See D.D.*, 50 Misc. 3d at 667-68.
13. *See id.*
14. SCPA 1750-a(1).
15. SCPA 1750-a(2).
16. *See Matter of Sean O.*, N.Y.L.J., Oct. 7, 2016, at 26, col. 6 (Sur. Ct., Suffolk Co.).
17. *See id.*
18. *Matter of Colette G.*, 221 A.D.2d 440, 440-41, 633 N.Y.S.2d 807 (2d Dep't 1995).
19. *See id.*
20. *See Sean O.*, *supra* note 16.
21. *Matter of Hytham M.G.*, 52 Misc. 3d 1211(A), at *3 (Sur. Ct., Kings Co. 2016); *Matter of Amber M.*, N.Y.L.J., Oct. 7, 2016, at 39 (Sur. Ct., N.Y. Co.).
22. SCPA 1750 and 1750-a.
23. *See Hytham*, 52 Misc. 3d 1211(A), at *3.
24. *Matter of Sean O.*, N.Y.L.J., Oct. 7, 2016, at 26, col. 6 (Sur. Ct., Suffolk Co,); *Matter of D.D.*, 50 Misc. 3d 666, 669, 19 N.Y.S.2d 867 (Sur. Ct., Kings Co. 2015).
25. *See Sean O.*, *supra* note 16.
26. *See D.D.*, 50 Misc. 3d at 669.
27. *See Sean O.*, *supra* note 16..
28. *See D.D.*, 50 Misc. 3d at 669-70.
29. *See id.*
30. *Matter of Antonio C.*, 52 Misc. 3d 1212(A), at *3 (Sur. Ct., Kings Co. 2016); *D.D.*, 50 Misc. 3d at 675.
31. *See Sean O.*, *supra* note 16.
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*; *Matter of Yvette A.*, 27 Misc. 3d 945, 949-51, 898 N.Y.S.2d 420 (Sur. Ct., N.Y. Co. 2010); *Matter of Joyce G.S.*, 30 Misc. 3d 765, 769, 913 N.Y.S.2d 910 (Sur. Ct., Bronx Co. 2010); *see also Matter of Anonymous G.*, N.Y.L.J., Mar. 21, 1994, at 25, col. 4 (Sur. Ct., Nassau Co.) ("There could, of course, be an intermediate area where she may need a guardian for limited purposes only. In those cases where the court finds that full guardianship of the property is not required, limited guardianship of the property is authorized pursuant to SPCA 1756. Utilizing the court's inherent powers pursuant to SCPA 202, the court should be able to grant limited guardianship of the person as well.").
36. *Yvette A.*, 27 Misc. 3d at 949-51.
37. *Matter of L.S.*, N.Y.L.J., July 26, 2016, at 32 (Sur. Ct., Chautauqua Co.); *Matter of Zhuo*, N.Y.L.J., Oct. 7, 2016, at 43 (Sur. Ct., Kings Co.).
38. *See id.*
39. *See id.*
40. *See id.*
41. *Matter of Leon*, 2016 WL 5724234, at *5 (Sur. Ct., Kings Co. Oct. 3, 2016).
42. *See id.*
43. *See id.*
44. *See id.*
45. *Matter of L.S.*, N.Y.L.J., July 26, 2016, at 32 (Sur. Ct., Chautauqua Co.).
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*
51. *Matter of Leon*, 2016 WL 5724234, at *1-5 (Sur. Ct., Kings Co. Oct. 3, 2016).
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.*
56. *See id.*
57. SCPA 1754.
58. *See id.*
59. N.Y. City Bar. Ass'n Report of the Mental Health Comm. & Disability Law Comm., *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 17 C.U.N.Y. L. Rev. 287, 304 (2015).
60. *Matter of Mueller*, 25 Misc. 3d 165, 166, 887 N.Y.S.2d 768 (Sur. Ct., Dutchess Co. 2009).
61. *See* N.Y. City Bar Ass'n Report, *supra* note 59.
62. *See id.*
63. *Matter of Sean O.*, N.Y.L.J., Oct. 7, 2016, at 26, col. 6 (Sur. Ct., Suffolk Co.).
64. Complaint, *Disability Rights N.Y. v. N.Y. St.*, 16-CV-07363 (S.D.N.Y.).
65. *See id.*
66. N.Y. St. Report & Recommendation of the Olmstead Cabinet: A Comprehensive Plan for Serving New Yorkers in the Most Integrated Setting, at 27-28 (Oct. 2013), *available at*: http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/olmstead-cabinet-report101013.pdf (last viewed on October 10, 2016).
67. *Olmstead v. L.C.*, 527 U.S. 581 (1999).

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