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Constitutional Challenges to Article 17-A Guardianships

By Lisa R. Valente

Constitutional flaws in Article 17-A of the Surrogate's Court Procedure Act ("Article 17-A"), such as substantive and procedural due process deficiencies, including, but not limited to, lack of reporting by a guardian and lack of monitoring by the court, demand that this New York State statute be reformed. Changes in the legal, medical and social landscape surrounding persons with intellectual and developmental disabilities (PWIDD) since the enactment of Article 17-A in 1969 support the need for reevaluation and reform.

The population of PWIDD is rapidly increasing, making their needs and rights an increasingly controversial legal topic. Through medical advances, and social and cultural initiatives designed to increase the independence, autonomy and self-determination of PWIDD, intellectual and developmental disability is no longer a static diagnosis. Article 17-A fails to recognize that PWIDD can live full and independent lives with the support of family, friends and other resources, without the need for a plenary guardianship.

The diagnosis-oriented Article 17-A statute no longer comports with the social, legal and medical advances of today, and, more importantly, violates fundamental constitutional rights of PWIDD. A comparison of Article 17-A's statutory provisions with provisions from New York's other guardianship statute, Mental Hygiene Law Article 81 ("Article 81"), demonstrates how Article 17-A fails to provide substantive and procedural due process rights to which PWIDD are entitled.

History of Article 17-A

In 1969, New York State enacted Surrogate's Court Procedure Act Article 17-A ("Article 17-A") authorizing a Surrogate to appoint a guardian over the person and/or property of a person with mental retardation.[1] A mentally retarded person, now known as an intellectually disabled person, is defined as a person who has been certified as being incapable of managing him or herself and/or his or her affairs by reason of intellectual disability and that such condition is permanent in nature or likely to continue indefinitely.[2] Article 17-A was the result of various organizations, including parents and parent organizations, voicing the need for an abbreviated court proceeding for individuals with mental retardation when they reached the age of 18.[3] At that time, Mental Hygiene Law Article 81 (to be further discussed below) did not exist, and the only mechanisms available for substituted decision-making were Mental Hygiene Law Articles 77 and 78 committee and conservator proceedings. The ideology was that mentally retarded persons are perpetual children[4] and the legal rights that parents have over persons under

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18 years of age should be continued indefinitely for the parents of mentally retarded persons.[5] In 1989, Article 17-A was amended to include other "developmental disabilities."[6] A developmentally disabled person is a person who has been certified as having an impaired ability to understand and appreciate the nature and consequences of decisions to such an extent that he or she is incapable of managing him or herself and/or his or her affairs by reason of such disability, and such condition must be permanent in nature or likely to continue indefinitely, and must be attributable to cerebral palsy, epilepsy, neurological impairment, autism, traumatic brain injury, or any condition found to be closely related to intellectual disability.[7] The condition must have originated before age 22, except for traumatic brain injury, which has no age limit.[8]

Current Issues with Article 17-A

Under Article 17-A, the basis for appointing a guardian relies entirely on whether the person has a qualifying diagnosis of an intellectual or other developmental disability,[9] a diagnosis-driven definition of incapacity. The statute allows the appointment of a guardian upon

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proof establishing to the "satisfaction of the court" that a person is intellectually or developmentally disabled, and that his or her best interests would be promoted by the appointment of a guardian.[10] In most cases, the only proof needed to appoint a guardian is the certifications of two physicians or of a physician and a psychologist showing that the person has an intellectual or developmental disability.[11] In some courts, no hearing in an Article 17-A proceeding is held. The statute does not require the court to find that the appointment of a guardian is necessary, nor does it guarantee PWIDD the right to counsel.[12] In some courts, the Surrogate may make a determination based solely on the papers submitted without meeting the PWIDD.

In addition, Article 17-A guardianship is plenary; the person under guardianship loses the right to make any and all decisions. The appointment of a guardian has no time limit and continues indefinitely.

Furthermore, unless otherwise ordered by the court, there is no requirement that a guardian of the person ever report on the status of PWIDD, and there is no review of the necessity for continuation of the guardianship by the court.

> should be exercised by such persons to the fullest extent possible.[15]

In September 2016, due to Article 17-A's alleged unconstitutional provisions, a lawsuit was brought by Disability Rights New York, a protection and advocacy agency in New York, seeking to enjoin the appointment of guardians under Article 17-A.[16] Even though the case was dismissed on abstention grounds, the complaint alleged that Article 17-A violated the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, the Americans with Disabilities Act, and § 504 of the Rehabilitation Act.[17]

As one court noted, the extreme remedy of guardianship should be the last resort for addressing an individual's needs because "it deprives the [individual] of so much power and control over his or her life."[18]

A comparison of the differences between New York State's Surrogate's Court Procedure Act Article 17-A and Mental Hygiene Law Article 81 guardianship statutes will assist in highlighting the flaws and failings of Article 17-A, and the need for reform.

"Even though Article 81 proceedings are typically more expensive than Article 17-A proceedings, the benefit of Article 81 proceedings is protection of due process rights of the alleged incapacitated person."[23]

In light of recent constitutional challenges to the provisions of Article 17-A and its lack of providing for the least restrictive form of intervention, Surrogate's courts have been scrutinizing petitions for guardianship and dismissing them if guardianship is not the least restrictive form of intervention.[13] Surrogate's courts have begun to acknowledge that there is a wide range of functional capacity found among PWIDD, and that understanding the functional capacity of an individual with disability is necessary in determining the best interest and necessity of guardianship.[14] In fact, the New York State Legislature recognized this when it amended Article 17-A in 1990, noting

> [S]ince this statute was enacted in 1969, momentous changes have occurred in the care, treatment and understanding of these individuals. Deinstitutionalization and community-based care have increased the capacity of persons with mental retardation and developmental disabilities to function independently and make many of their own decisions. These . . . rights and activities which society has increasingly come to recognize

Mental Hygiene Law Article 81

In or around 1991, the New York State Law Revision Commission examined adult guardianship issues and proposed Mental Hygiene Law Article 81 ("Article 81"), which was enacted in 1992 and which became effective in 1993.[19] The stated purpose of Article 81 is to

> satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.[20]

DIFFERENCES BETWEEN ARTICLE 17-A AND ARTICLE 81

Article 17-A has received positive feedback from families because of its relative ease in initiating the proceeding, often without the need of legal counsel.[21] The 17-A procedure is far simpler than an Article 81 proceed-

ing. Article 17-A proceedings are more affordable than Article 81 proceedings since there is no court evaluator appointed by the court, as is the case in Article 81 proceedings.[22] However, protection of individual rights should not be sacrificed for convenience or expense. Even though Article 81 proceedings are typically more expensive than Article 17-A proceedings, the benefit of Article 81 proceedings is protection of due process rights of the alleged incapacitated person.[23]

A. Petition

Article 81 requires its petition to include "a description of the alleged incapacitated person's functional level including that person's ability to manage the activities of daily living, behavior, and understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living."[24] If a proposed guardian is seeking personal needs powers, Article 81 also requires that the petition include specific factual allegations that demonstrate that the alleged incapacitated person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for his or her personal needs.[25] Furthermore, if a proposed guardian is seeking property management powers, Article 81 requires the petition to include specific factual allegations that demonstrate that the alleged incapacitated person will likely suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for property management.[26]

In contrast, Article 17-A does not require that its petition contain any specific factual allegations about the person's ability to understand the nature and consequences of his or her ability to provide for personal or property management needs. Rather, Article 17-A only requires that the petition be prepared and filed on prescribed court forms.[27] Article 17-A simply requires that a licensed physician and/or licensed psychologist certify that the PWIDD is an intellectually or developmentally disabled person.[28] The physician or psychologist is not directed to describe how the existence of an intellectual or developmental disability makes the person incapable of managing himself or herself or his or her affairs. Furthermore, Article 17-A does not require a petitioner to state why the person would likely suffer harm if the court did not appoint a guardian.

B. Court Investigation

Article 81 requires the appointment of an independent court evaluator to investigate and make recommendations to the court.[29] One of the court evaluator's duties is to explain to the alleged incapacitated person, in a manner which the person can reasonably understand, the nature and possible consequences of the proceeding, the general powers and duties of a guardian, and the rights to which the person is entitled, including the right to counsel.[30]

Article 17-A, on the other hand, only provides that the court, *in its discretion,* can appoint a guardian ad litem to perform a similar function.[31] Article 17-A makes no provision to ensure that the PWIDD is fully informed of the nature of the proceeding and its possible consequences.

C. Grounds for Appointment of Guardian

Article 17-A relies entirely on a diagnosis-driven definition of incapacity[32] as opposed to Article 81 which focuses on a functional analysis of the alleged incapacity.[33] Article 81 mandates that a guardianship can only be imposed when it is necessary to provide for the personal needs and/or property management of the alleged incapacitated person and such person either consents to the appointment, or it has been shown that: 1) the person is likely to suffer harm; *and* 2) the person is unable to provide for personal needs and/or property management; *and* 3) the person cannot adequately understand and appreciate the nature and consequences of such inability.[34]

In contrast, Article 17-A only provides that when it shall appear to the satisfaction of the court that a person is an intellectually disabled or developmentally disabled person, the court is authorized to appoint a guardian of the person or property, or both, if the appointment of a guardian or guardians is in the best interest of the intellectually disabled or developmentally disabled person.[35] The Article 17-A statute allows all of a person's decision-making to be permanently removed based on a medical diagnosis and on the subjective decision of a surrogate. Such a standard does not comport with constitutional liberty and substantive due process rights.

D. A Hearing

Article 81 requires that "a determination that the appointment of a guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing."[36] On the other hand, in some courts, there is no hearing in an Article 17-A proceeding. No hearing is required where the petition is made by or on consent of both parents, or the surviving parent.[37] The Surrogate may make a determination based solely on the papers submitted.

In addition, Article 81 provides that the person for whom guardianship is sought must be present at the hearing, even if it means that the judge must travel to where the person resides or some other place outside the courtroom "so as to permit the court to obtain its own impression of the person's capacity."[38] Exceptions are limited. By contrast, Article 17-A allows the presence at a hearing to be dispensed with where, upon medical evidence, presence "is likely to result in physical harm" or the person is "medically incapable" of attendance, or "such other circumstances which the court finds would not be in the best interests of the mentally retarded or developmentally disabled person."[39] As a result, if there

is a hearing, the person for whom guardianship is sought may not be present.

E. Burden of Proof

Article 81 requires proof of clear and convincing evidence of all three criteria—likely harm, inability to provide, and inability to understand and appreciate.[40] Article 17-A does not provide a standard for burden of proof. Article 17-A's language only provides that it must appear to the satisfaction of the court that *the best interests* of such person will be promoted by the appointment of a guardian.[41] In fact, one New York court held that "the decision to appoint a guardian of the person or property, or both, under N.Y. Surr. Ct. Proc. Act § Art. 17-A is based upon a less stringent standard of proof, namely, the best interests of the mentally or developmentally disabled person."[42]

F. Right to Counsel and Right to Cross-Examine

Article 81 provides that the alleged incapacitated person has "the right to choose and engage legal counsel of the person's choice,"[43] and also requires the appointment of counsel in various circumstances, such as when the alleged incapacitated person contests the proceeding.[44] Article 17-A makes no provision for the appointment of an attorney to represent the person for whom guardianship is sought. Rather, Article 17-A states that the court *may, in its discretion,* appoint a guardian *ad litem* or the mental hygiene legal service (if the person resides in a mental hygiene facility), to recommend whether the appointment of a guardian is in the best interest of the PWIDD.[45]

In addition, Article 81 specifically provides a party opposing guardianship with the right to cross examine.[46] Article 17-A has no similar provision.

G. Findings on the Record

Article 81 provides that in order to appoint a guardian of the person and/or property, the court must make specific findings on the record.[47] Even with the consent of the alleged incapacitated person, the court must still find on the record the person's functional limitations, necessity for a guardian to deal with those limitations, the specific powers granted to the guardian, and the duration of the appointment.[48] Additional findings are required when there is no consent. These findings must show, on the record, that the petitioner has met its burden, by clear and convincing evidence; that the alleged incapacitated person lacks understanding and appreciation of the nature and consequences of his or her functional limitations; and the likelihood of harm resulting from the lack of understanding and appreciation. Furthermore, the findings must show the specific powers granted to the guardian, and that the powers are the least restrictive form of intervention necessary.[49] Article 17-A has no provision requiring findings on the record. In fact, there can be no record of findings if there is no hearing in an Article 17-A proceeding, as can be the case.

H. Qualifications of Guardian

Article 81 provides detailed provisions regarding who should be appointed as guardian, including the alleged incapacitated person's preferences and/or nomination.[50] The court must consider the social relationship between the proposed guardian and the alleged incapacitated person, and between the proposed guardian and "other persons concerned with the welfare of the incapacitated person."[51] The court must further consider the care and services being provided to the incapacitated person,[52] the unique requirements and needs of the incapacitated person,[53] and whether there are any conflicts of interest between the incapacitated person and the proposed guardian.[54] Article 17-A has no provisions with regard to what specific considerations are to be taken into account by the court if a guardian is to be appointed.

I. Guardian's Powers – Plenary v. Tailored

One of the most controversial issues with Article 17-A guardianships is that the statute provides that upon the diagnosis and "best interest" finding, the Surrogate's only remedy is to appoint a plenary guardian, thus removing that individual's legal right to make decisions over one's own affairs and vesting in the guardian "virtually complete power over such individual."[55] Specifically, the statute provides that "if the court is satisfied that the best interests of the intellectually disabled person or developmentally disabled person will be promoted by the appointment of a guardian of the person, or the property, or both, *it shall make a decree naming such person or persons as guardians*."[56] Article 17-A does not require the Surrogate to consider "least restrictive alternatives" and it does not provide for a limited or tailored guardianship. This was illustrated in *In re Chaim A.K.*, where the court found that although the person for whom guardianship was sought may have required a guardian to make medical decisions, he did not need, nor was it appropriate, to appoint a guardian "with total, unfettered power over his life, the only choice available under 17-A."[57]

On the other hand, Article 81's provisions show a strong preference against a plenary guardianship, and appear to favor a more closely tailored guardianship designed to meet the specific functional limitations that might result in harm to the incapacitated person. The statute specifically states that if the court has found the person to be incapacitated and that the appointment of guardian is necessary, "the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the incapacitated person in providing for personal needs and/or property management."[58] Furthermore, Article 81 imposes an obligation on the guardian to "afford the incapacitated person the greatest amount of independence

and self-determination with respect to personal needs and/or property management—in light of that person's wishes, preferences and desires…."[59] In fact, Article 81 specifically provides that a person for whom a guardian is appointed "retains all powers and rights except those powers and rights which the guardian is granted."[60] In addition, Article 81 provides for single purpose transactions as an even less restrictive means than appointing a full guardian.[61]

J. Reporting and Review

Article 17-A only requires that the guardian of the property file a yearly report with regard to the person under guardianship's finances.[62] A guardian of the person is not required to file any report or provide any information about the well-being of the person under guardianship, or whether there is any continuing necessity for a guardian. This lack of monitoring is a violation of the PWIDD's constitutional rights. Without periodic review, there is no way for the court to know if the guardianship is still necessary, or if it should be terminated or modified (if allowed), or whether it continues to serve the PWIDD's best interests.[63] In light of today's longer life expectancies and advances in medical knowledge, and where the appropriate treatment is likely to change frequently, "the absence of any continuing judicial oversight raises another red flag about the suitability of Article 17-A."[64] As one court held, in the absence of periodic reporting and review, Article 17-A is unconstitutional, and the Surrogate administratively imposed the requirement of yearly reporting on all guardians of the person in that court.[65]

By contrast, Article 81 provides detailed reporting requirements for guardians of both the person and property, including an initial report, to be filed within 90 days of the issuance of a commission to the guardian,[66] and annual reports thereafter,[67] which are reviewed by court examiners. These reports describe "the social and personal services that are to be provided for the welfare of the incapacitated person"[68] and information concerning the social condition of the incapacitated person, including the social and personal services currently utilized by the incapacitated person, and the social skills and social needs of the incapacitated person.[69] In addition, Article 81 requires court-appointed guardians to visit the person under guardianship a minimum of four times per year.[70]

K. Termination or Modification of Guardianship

Article 81 recognizes that a person's functional capacity or incapacity can change and therefore, specifically provides for modification or termination of a guardian's powers.[71] Under Article 81, there is a broad range of persons who can initiate a proceeding for modification or termination, including "the guardian, the incapacitated person, or any person entitled to commence a proceeding under this article."[72] A hearing is required, and a jury trial is available on demand by the incapacitated person and his or her counsel.[73] Where the relief sought is termination of the guardianship, the party opposing such relief must prove, by clear and convincing evidence, that the grounds for guardianship continue to exist.[74] These provisions illustrate Article 81's principle of least restrictive intervention.

Unlike Article 81, Article 17-A fails to recognize that PWIDD's functional capacities can change and that a guardian may no longer be needed. The statute provides for the presumptive continuation of the guardianship for the entire life of the person, unless terminated by the court.[75] Article 17-A does permit modification "to protect the intellectually disabled or developmentally disabled person's financial situation and/or his or her personal interests."[76] This provision, however, is typically used only to replace one family member guardian with another.[77] Moreover, the statute does not indicate who has the burden of proof or the proof needed in order to terminate the guardianship. Hence, many Surrogate courts place the burden on the moving party. Applications brought by a person under guardianship for termination of guardianship appear to be rare.[78]

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Constitutional Challenges to Article 17-A

The Fifth and Fourteenth Amendments of the U.S. Constitution provide that neither the federal nor state government shall deprive any person "of life, liberty, or property without due process of law." Fundamental liberty interests protected by the U.S. Constitution include "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children … and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[79] In cases involving deprivation of personal liberty, courts are required to impose only the

least restrictive form of intervention consistent with the clinical condition of a given individual.[80]

Unlike Article 81, Article 17-A lacks constitutionally protected procedural guarantees such as a right to a mandatory hearing; a right to be present at the hearing; a right to call witnesses and cross-examine; a right to a higher standard of burden of proof, specifically, the standard of clear and convincing evidence; a right to conclusive findings on the record; a right to routine reporting and review; a right to a proper and justified means for modification and/or termination of guardianship; and most importantly, a right to the least restrictive means of intervention, which should include tailored powers to a guardian, if a guardian is needed.

Substantive due process has been understood to include a requirement that when the state interferes with an individual's liberty on the basis of its police power, it must utilize the least restrictive means available to achieve its goal of protecting the individual and the community.[81] New York has embraced this idea of least restrictive alternatives. For example, in *Kesselbrenner v. Anonymous*, the court stated that "to subject a person to a greater deprivation of his personal liberty than necessary to achieve the purpose for which he is being confined is, it is clear, violative of due process."[82] This was the rationale behind the enactment of Article 81 where the Law Revision Commission described the goal of the statute as "requiring a disposition that is the least restrictive form of intervention."[83]

By contrast, Article 17-A is unnecessarily broad. Article 17-A's imposition of a plenary guardianship of the person and/or property which terminates all decision-making authority, without an assessment of the person's functional abilities and without narrowly tailoring the guardian's powers, serves no compelling government interest. In addition, there is no compelling or legitimate government interest for applying more protections for appointment of a guardian in an Article 81 proceeding than in an Article 17-A proceeding.

Attempts to Reform Article 17-A

In 2013, New York's Olmstead Cabinet issued a report concluding that Article 17-A's diagnosis-driven basis for appointing a guardian, rather than a basis requiring review of the functional capacity of the person with disability, did not comport with the State's responsibility under the American with Disabilities Act, and thus, the Olmstead Cabinet recommended that Article 17-A be amended to include an examination of the functional capacity and consideration of choice and preference in decision making.[84] To date, Article 17-A has not been so amended.

During the 2017 legislative session, several bills were presented to reform Article 17-A, but none of them passed.[85] A common theme in the proposed bills were provisions guaranteeing that a guardian will only be appointed when the respondent shows significant specific intellectual functioning impairments; thus, requiring the court to conduct an inquiry into the person's actual abilities before a guardian is appointed.[86] The proposed measures also require that petitioners affirmatively plead that alternatives to guardianship, such as advance directives, service coordination and other shared/supported decision-making models, were considered, and identified.[87] Furthermore, the proposals call for the right of all respondents to a hearing and representation by counsel, either by the respondent's choosing, or by Mental Hygiene Legal Service, or by other court-appointed counsel.[88]

A. Least Restrictive Means

As the U.S. Supreme Court held in *Jackson v. Indiana*, where personal liberty is being deprived, courts must apply only the least restrictive form of intervention consistent with the clinical condition of a given individual.[89]

As Article 81 provides, alternate, least restrictive legal means should be examined in all guardianship cases before a guardian is deemed necessary. Legal tools, such as powers of attorney, may be utilized to handle financial matters, and advance directives, such as a health care proxy, may be utilized to allow family members to make medical decisions for the PWIDD when he or she is no longer able to do so.[90] Furthermore, services are provided by the Office for People with Developmental Disabilities to support individuals with intellectual disabilities. These alternative resources enable persons with disabilities to maintain as much control over their own life decisions as they are capable to make in the least restrictive setting.[91]

B. Supported Decision-Making

There has been a movement away from the traditional guardianships involving substituted decision-making to more supported decision-making guardianships allowing the a person alleged to be in need of a guardian to retain autonomy and self-determination. In fact, support systems may be so beneficial and helpful to PWIDD that they may eliminate the need for a guardian. Such was the case in *In re Dameris L.* where the court terminated an Article 17-A guardianship on the finding that a support network had developed around the person under guardianship such that she was able, with their support, to make her own decisions, thus, no longer needing a guardian.[92] The *Dameris* court held that:

> [T]o avoid a finding of unconstitutionality, N.Y. Surr. Ct. Proc. Act. § 17-A must be read to require that supported decision making must be explored and exhausted before guardianship can be imposed or, to put it another way, where a person with an intellectual disability has the "other resource" of decision making support, that resource/network constitutes the least restrictive alternative, precluding the imposition of a legal guardian.[93]

Also, as stated by the American Bar Association:

> Supported decision-making constitutes an important new resource or tool to promote and ensure the constitutional requirement of the least restrictive alternative. As a practical matter, supported decision-making builds on the understanding that no one, however abled, makes decisions in a vacuum or without the input of other persons whether the issue is what kind of car to buy, which medical treatment to select, or who to marry, a person inevitably consults friends, family, coworkers, experts, or others before making a decision. Supported decision making recognizes that older persons, persons with cognitive limitations and persons with intellectual disability will also make decisions with the assistance of others although the kinds of assistance necessary may vary or be greater than those used by persons without disabilities.[94]

As one court stated, guardianship "may be granted only if it is the least restrictive alternative to achieve the goal of protecting a person with a mental disability."[95] This was proven in *In re D.D.*, where the court denied the petitioners, the mother and the brother of the person for whom guardianship was sought, guardianship based on the fact that the person for whom guardianship was sought was benefiting from a network of supported decision-making which had "yielded a safe and productive life where he ha[d] thrived and remained free from the need to wholly supplant the legal right to make his own decisions."[96] The *D.D.* court found that guardianship was not the least restrictive means to address the needs of the person for whom guardianship was sought, where the presence of supported, instead of substituted, decision-making was available.[97]

Conclusion

Article 17-A was enacted with the intent to provide protection for PWIDD who were viewed as vulnerable persons in our society. However, as discussed herein, the statute's provisions are outdated and infringe on the constitutional rights of PWIDD. The statute requires extensive reform in order to be constitutionally sound. The time has come for plenary guardianships with unlimited duration to end, and for PWIDD to have equal rights and to participate in our society on an equal basis. Ideally, reform to Article 17-A will result in a reduction of guardianship filings and will promote exploration and use of alternatives to guardianship, with the idea of preserving the constitutional rights of PWIDD.

Endnotes

1. The term "intellectual disability" has replaced the term "mental retardation" in New York (*see* 2010 N.Y. Laws ch. 168; 2011 N.Y. Laws ch. 37).
2. N.Y. Surr. Ct. Proc. Act § 1750.
3. *See* Karen Andreasian, Natalie Chin, Kristin Booth Glen, Beth Haroules, Katherine Hermann, Maria Kuns, Aditi Shah, Naomi Weinstein, *Revisiting S.C.P.A. 17-A: Guardianship for People with Developmental Disabilities*, 18 CUNY L. Rev. 287 (2015).
4. *See generally*, Janice Brockley, *Rearing the Child Who Never Grew: Ideologies of Parenting and Intellectual Disability in American History*, in Mental Retardation in America, 130 (Steve Noll & James Trent, Jr. eds. 2004).
5. *See* Rose Mary Bailly & Charis B. Nick-Torok, *Should We Be Talking? Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 Alb. L. Rev. 807, 817-19 (2012).
6. 1989 N.Y. Sess. Laws 675 § 2 (McKinney).
7. N.Y. Surr. Ct. Proc. Act § 1750-a.
8. *Id*.
9. N.Y. Surr. Ct. Proc. Act §§ 1750, 1750-a.
10. *Id*.
11. *Id*.
12. *See* Bailly & Nick Torak, *supra* note 5, at 807, 821-25.
13. *See In re D.D.*, 50 Misc.3d 666 (Surr. Ct. Kings Cnty. 2015).
14. *Id.*
15. L 1990, ch 516, § 1, reprinted in McKinney's Consol. Laws of N.Y., Book 58A, SCPA 1750, Historical and Statutory Notes at 427 (2011 ed.).
16. *Disability Rights N.Y. v. State of N.Y.*, No. 1:16-cv-07363 AKH (S.D.N.Y. Aug. 16, 2017). Complaint available at http://www.new.drny.rg/docs/art-17a-lawsuit.pdf.
17. Sheila E. Shea and Carol Pressman, *Guardianship: A Civil Rights Perspective*, NYSBA Journal 19, 22 (February 2018).
18. *In re Dameris L.*, 38 Misc3d 570, 577-78 (Surr. Ct. N.Y. Cnty. 2012).
19. Bailly, Practice Commentary, McKinney's Consol. Laws of N.Y., Book 34A Mental Hyg. § 81.01.
20. N.Y. Mental Hyg. Law § 81.01.
21. *See* Karen Andreasian, et al., *supra* note 3.
22. *Id*.
23. *See* Rose Mary Bailly, Practice Commentaries McKinney's Consol. Laws of N.Y. Book 34A, Mental Hyg. Law § 81.01, p. 9, *citing* Strauss, *Before Guardianship, Abuse of Patient Rights Behind Closed Doors*, 41 Emory L. J. 761, 763 (1992).
24. N.Y. Mental Hyg. Law § 81.08(3).
25. N.Y. Mental Hyg. Law § 81.08(4).
26. N.Y. Mental Hyg. Law § 81.08(5).
27. N.Y. Surr. Ct. Proc. Act § 1752.
28. N.Y. Surr. Ct. Proc. Act §§ 1750, 1750-a.
29. N.Y. Mental. Hyg. Law § 81.09.
30. *Id*.
31. N.Y. Surr. Ct. Proc. Act § 1754(1) (emphasis added).
32. "[A] person who is developmentally disabled is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians…" N.Y. Surr. Ct. Proc. Act § 1750-a.
33. "In reading its determination the Court shall give primary consideration to the functional level and functional limitations of the person." N.Y. Mental Hyg. Law § 81.02(c).

34. N.Y. Mental Hyg. Law § 81.02(a)(b)(1)-(2).
35. N.Y. Surr. Ct. Proc. Act §§ 1750, 1750-a.
36. N.Y. Mental Hyg. Law § 81.11(a).
37. N.Y. Surr. Ct. Proc. Act. § 1754(1).
38. N.Y. Mental Hyg. Law § 81.11(2).
39. N.Y. Surr. Ct. Proc. Act § 1754(3).
40. N.Y. Mental Hyg. Law §81.12(a).
41. N.Y. Surr. Ct. Proc. Act § 1754(5) (emphasis added).
42. *In re Jonathan Alan Mueller*, 25 Misc.3d 165, 166 (Surr. Ct., Dutchess Cnty 2009).
43. N.Y. Mental Hyg. Law § 81.10(a).
44. N.Y. Mental Hyg. Law § 81.10(c).
45. Surr. Ct. Proc. Act § 1754(1) (emphasis added).
46. N.Y. Mental Hyg. Law § 81.11(b)(3).
47. N.Y. Mental Hyg. Law § 81.15.
48. N.Y. Mental Hyg. Law §§ 81.15(a)(2-5).
49. N.Y. Mental Hyg. Law §§ 81.15(b)(2-3), (5).
50. N.Y. Mental Hyg. Law § 81.19.
51. N.Y. Mental Hyg. Law § 81.19(d)(2).
52. N.Y. Mental Hyg. Law § 81.19(d)(3).
53. N.Y. Mental Hyg. Law § 81.19(d)(7).
54. N.Y. Mental Hyg. Law § 81.19(d)(8).
55. *In re Mark C.H.*, 28 Misc3d 765, 776 (Surr. Ct. N.Y. Cnty 2010).
56. N.Y. Surr. Ct. Proc. Act § 1754(5) (emphasis added).
57. 26 Misc.3d 837, 847 (Surr. Ct. NY Cnty 2009).
58. N.Y. Mental Hyg. Law § 81.16(c)(2).
59. N.Y. Mental Hyg. Law § 81.20(6)(1), (7).
60. N.Y. Mental Hyg. Law § 81.29(a).
61. N.Y. Mental Hyg. Law § 81.16.
62. N.Y. Surr. Ct. Proc. Act §§ 1761, 1719.
63. *In Re Chaim A.K.*, 26 Misc.3d 837, 847 (Surr. Ct. NY Cnty 2009).
64. *Id*. at 848.
65. *In Re Mark C.H.*, 28 Misc.3d 765 (Surr. Ct. N.Y. Cnty 2010).
66. N.Y. Mental Hyg. Law § 81.30(b).
67. N.Y. Mental Hyg. Law § 81.31.
68. N.Y. Mental Hyg. Law § 81.30(c)(2).
69. N.Y. Mental Hyg. Law § 81.31(b)(6)(iv).
70. N.Y. Mental Hyg. Law § 81.20(a)(5).
71. N.Y. Mental Hyg. Law § 81.36.
72. N.Y. Mental Hyg. Law § 81.36(b).
73. N.Y. Mental Hyg. Law § 81.36(c).
74. N.Y. Mental Hyg. Law § 81.36(d).
75. N.Y. Surr. Ct. Proc. Act § 1759.
76. N.Y. Surr. Ct. Proc. Act § 1755.
77. *See, e.g., In re* Garrett YY, 258 A.D.2d 702 (3d Dept. 1999).
78. *In re* Mark C.H., 28 Misc.3d 765, n.28 (2010).
79. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
80. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).
81. *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).
82. 33 N.Y.2d 161, 165, 350 N.Y.S.2d 889, 305 N.E.2d 903 (1973).
83. Law Revision Commission Comments, 34 A. McKinney's Consol. Laws of N.Y. §81.03.
84. http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/olmstead-cabinet-report101013.pdf.
85. *See* N.Y. Assembly Number 8171(2017), N.Y. Assembly Number 5840 (2017), N.Y. Senate Number 5842 (2017).
86. Sheila E. Shea and Carol Pressman, *Guardianship: A Civil Rights Perspective*, NYSBA Journal 19, 23 (February 2018).
87. *Id*.
88. *Id*.
89. 406 U.S. 715, 738 (1972).
90. *In re D.D.*, 50 Misc.3d 666 (Surr. Ct. Kings Cnty 2015).
91. *Id*.
92. 38 Misc.3d 570 (Surr. Ct. N.Y. Cnty 2012).
93. *Id*.
94. Proposed Resolution and Report, American Bar Association, Commission on Disability Rights, Section of Civil Rights and Social Justice, Section of Real Property, Trust and Estate Law, Commission on Law and Aging, Report to the House of Delegates (2017) www.americanbar.org/content/dam/aba/directories/policy/2017_am_113.docx.
95. *In re Guardian for A.E..*, NYLJ, Aug. 17, 2015 at 22, col 4 (Surr. Ct. Kings Cnty 2015).
96. *In re D.D.*, 50 Misc3d 666 (Surr. Ct. Kings Cnty 2015).
97. *Id*.