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## ARTICLE 17-A GUARDIANSHIP IN NEW YORK

### Acknowledgment

The term "intellectual or development disability" (I/DD) has replaced the term "mental retardation" and its derivatives in the Federal and most State statutes and regulations. New York State was slow to change, but in July, 2016 the term "mentally retarded" was replaced with "intellectually disabled" in Article 17-A of the Surrogate's Court Procedure Act (the "SCPA").

### 1. Introduction.

SCPA 17-A is a simple guardianship device, based upon principles of *in loco parentis* by which a court can appoint a guardian for an individual based on a diagnosis of "intellectual disability," "developmental disability" or traumatic head injury.

17-A Guardianships are appointed for persons who are "intellectually disabled" or "developmentally disabled." These classifications include a person who been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons who are developmentally disabled or intellectually disabled.

### 2. Diagnosis Driven.

The proceeding in the Surrogate's Court is driven by the certification of a diagnosis of "intellectual disability" or "developmental disability" by doctors.

- an "intellectually disabled" person is a person who has been certified: (i) as being incapable to manage him or herself and/or his or her affairs by reason of an intellectual disability; and (ii) that such condition is permanent in nature or likely to continue indefinitely.
- a "developmentally disabled" person is a one who has been certified as having an 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

and that such condition: (i) is permanent in nature or likely to continue indefinitely; (ii) is one of several designated in the SCPA; and (iii) which originates before such person attains age twenty-two.

### 3. Who may Petition the Court?

A petition for the appointment of a 17-A Guardian of the person or property, or both, may be made by: (i) a parent; (ii) any interested person eighteen years of age or older; (iii) a corporation authorized to serve as a guardian: or (iv) the person with I/DD when such person is eighteen years of age or older.

### 4. What must Accompany the Petition?

The person petitioning the Court must submit the following documents to the Surrogate's Court to request that a 17-A Guardian be appointed for the person with I/DD:

- ▶ a verified Petition together with the Oath and Designation of the proposed Guardian;
- ▶ a form from the NY Office of Children & Family Services making inquiry to the NY State Central Register of Child Abuse and Maltreatment;
- ▶ two Certifications from doctors that the person with I/DD is "intellectually disabled" or "developmentally disabled" and that the appointment of a Guardian is in his/her "best interest;"
- ▶ a certified Copy of the birth certificate of the person with I/DD;
- ▶ fingerprints of the proposed Guardian(s);
- ▶ a filing Fee (\$20.00 plus \$6.00 ea. for Certificate(s) of Appointment;
- ▶ Consents of the Standby Guardian(s); and

- ▶ the Citations to or Waiver and Consents of parties who are to be served.

## 5. The Hearing.

Unlike the case of a Guardian for an infant, the SCPA requires that a hearing be held for the appointment of an Article 17-A Guardian for person with I/DD. In rare cases, there may be a jury trial.

The Court may, in its discretion, dispense with a hearing for the appointment of a Guardian if the parents either request or consent to the appointment of a 17-A Guardian. In that instance, the Court may, in its discretion, appoint a *guardian ad litem*, or the Mental Hygiene Legal Services (if the person with I/DD is a resident of a mental hygiene facility) to recommend whether the appointment of a Guardian is in the “best interest” of the person with I/DD. The guardian *ad litem* or the Mental Hygiene Legal Service attorney, if appointed, must personally interview the person with I/DD and submit a written report to the Court.

Unless a certifying doctor directs otherwise, the person with I/DD must be present at any hearing.

If the person with I/DD is not present at the hearing, the Court may appoint a guardian *ad litem* if no Mental Hygiene Legal Services attorney is authorized to act on behalf of the person with I/DD.

## 6. Decree Appointing the Article 17-A Guardian(s)

The Surrogate’s Court will issue a Decree appointing an Article 17-A Guardian at the conclusion of the hearing, or if there is no hearing, upon the papers submitted on behalf of the person with I/DD. The Decree will be issued if the Court is satisfied that the “best interests” of the person with I/DD will be promoted by the appointment of a Guardian of the person or property, or both.

## 7. Powers of an Appointed 17-A Guardian

Unlike a Guardianship under Article 81 of the Mental Hygiene Act, SCPA Article 17-A does not provide for gradation of the Guardian’s authorized powers. Neither does Article 17-A describe or circumscribe the powers granted. There is no statutory guidance as to the extent of this power, and surprisingly little discussion in cases decided by the Courts of New York State.

Given a finding of: (i) either “intellectual disability” or “developmental disability;” (ii) the inability to care for one's self (making no distinctions between what the person with I/DD can and cannot do); and (iii) the amorphous “best interest” standard, the 17-A Guardian is appointed by the Court with seemingly unlimited power. An Article 17-A Guardianship is very broad and covers most decisions that are usually made by a parent for a child, such as financial and healthcare decisions.

## 8. Standby Guardian

The Surrogate’s Court can appoint a standby Guardian or an alternate or successor Guardian. The standby or alternate Guardian will automatically succeed to his/her duties and powers in the event of the death, renunciation or incapacity of the Guardian. All that needs to be done in that event is that the standby or alternate Guardian must have the Court confirm the appointment within one hundred eighty (180) days following assumption of his/her duties.

## 9. Duration of Guardianship

An Article 17-A Guardianship is not terminated when the person with I/DD attains age 18 or when he or she subsequently marries. The Guardianship continues during the lifetime of the person with I/DD and until it is terminated by the Court. In other words, the Court retains jurisdiction! After appointing a Guardian, the Court may take such steps relating to the Guardianship as it deems necessary or proper for the welfare of the person with I/DD. The SCPA gives the Court authority: (i) to discharge a Guardian and have a successor appointed; or (ii) to modify, dissolve or otherwise amend the Order establishing the Guardianship.

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