UTILIZING SCPA ARTICLE 17A AND MHL ARTICLE 81

GUARDIANSHIPS FOR DISABLED CHILDREN

by

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Utilizing SCPA Article 17A and MHL Article 81 Guardianships for Disabled Children

By Sara Meyers, Esq.

"SCPA 17-A is 'a simple guardianship devise, based upon principles of in loco parentis' by which a court can appoint a guardian for an individual based on a diagnosis of mental retardation, developmental disabilities, or traumatic head injury. In contrast, MHL 81 'the most modern form of guardianship . . .' is a more complex statute. Under MHL 81, the court appoints a guardian with authority tailored to the needs and functional limitations of the incapacitated person, rather than basing its decision on the individual's particular diagnosis." (Should we be Talking? Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York, Rose Mary Bailey and Charis B. Nick-Torok, 75 Alb.L.Rev.807, 808.)

SCPA 17-A Background

The need for and appointment of a Guardian under SCPA 17-A is diagnosis driven. A person must be diagnosed as being mentally retarded or developmentally disabled, while MHL Article 81 requires a finding of functional incapacity due to diminished capacity. N.Y. Mental Hyg. Law §81.01 (McKinney 2014).

SCPA 17-A was enacted in 1969 as a means for parents of adult children diagnosed with Mental Retardation (SCPA 17-A defines a Mentally Retarded person as someone who is "incapable to manage him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature and likely to continue indefinitely." SCPA 1750) to seek Guardianship in an inexpensive manner. SCPA 17-A is based on the principle of "in loco parentis." Bailey, at 808. It was seen as a way for parents to continue as the legal care-givers and decision-makers of their mentally retarded children once the child reached the age of legal maturity, 18 years old. Bailey, at 818. In 1989, SCPA 17-A was amended and expanded to include Developmental Disability and Traumatic Brain Injury. See Generally, SCPA 1750. The term Developmental Disability also encompasses autism and autism spectrum disorders, and neurological impairments. SCPA 1750.

Procedure for filing a SCPA 17-A Proceeding

The diagnosis of mental retardation or developmental disability must be certified by a licensed physician and a licensed psychologist; or by two physicians. SCPA 1750 and SCPA 1750-a. The doctors and/or psychologist must complete an Affidavit (a standard SCPA form is used in all counties: SCPA 17-A forms can found on HotDocs or on line, at http://www.nycourts.gov/forms/surrogates/guardianship.shtml).

The Affidavits are then reviewed by the Surrogate's Court in the county in which the individual needing a guardian resides. Upon the Court's approval of the Affidavits, the Article 17-A petition is filed with the Court. (A $20 filing fee is charged by the Surrogate's Court.)

The Petition for Guardianship may be filed by a parent, and interested person, the individual him or herself, or a not-for-profit or corporate entity. (SCPA 1751) The Petition must set forth who is the Petitioner and her relationship to the disabled individual; the identity of the disabled individual and his or her diagnosis.

The standard for appointment, for a person needing a SCPA 17-A Guardian is "best interest of the individual." (SCPA 1750) The SCPA does not establish a burden of proof or standard of proof required for said appointment, rather, as the person has been diagnosed with mental retardation or developmental disability, she requires the appointment of a Guardian to manage his or her personal/medical and/or financial affairs.

Upon the filing of the SCPA 17-A Petition, the Court appoints a Guardian ad Litem, who can serve without a fee, to investigate the allegations set forth in the petition, met with the disabled individual and report its findings to the Court. (SCPA 1754) Unless requested, the Court will waive a hearing, subject to the GAL's Report. The Court will then issue a Decree appointing the Guardian(s). The Guardianship is not tailored to the individual, and does not tailor the Guardian's powers specific to her ward. The Guardianship is also of indefinite duration. (SCPA 1759).

Once appointed Guardian, the SCPA does not set forth criteria about standards that should govern the Guardian's conduct. Nor does SCPA 17-A require the guardian to attend a guardianship training nor file an annual report with the Court (unless she is the Guardian of the Property); though, SCPA 17-A, as discussed above, is seen as a continuation of the parent's legal authority over her child.

Application for Approval of an SNT

The Surrogate's Court will not entertain an application for the approval of a Supplemental Needs Trust for the disabled individual until after a 17A Guardian has been appointed.

Attached to your materials is a sample SCPA Petition for the approval of an SNT, along with a sample SNT approved by the Westchester County Attorney's office,

The Application for the approval of an SNT should be served upon the local social services district and their counsel (for example HRA and OLA in NYC; Westchester DSS and the Westchester County Attorney). It is imperative that the local social services district approve the SNT before same is funded.

While SCPA 17-A has been called a "simple approach to guardianship," MHL Art. 81 has "emerged as a nuanced one." Bailey, at 816.

MHL Article 81 Background

MHL Article 81 was enacted in 1992. (N.Y. Mental Hygiene Law §81) Article 81 takes a broader approach to guardianships, and allows for greater flexibility relevant to the guardianship.

MHL 81 is not "diagnosis" driven, and a determination for the need for a guardian is not made based on a person's medical condition and/or diagnosis. Article 81 provides for a functional assessment of the actual abilities of the alleged incapacitated person ("AIP") for both property and personal management. (MHL §81.15)

Procedures for filing MHL Article 81 Proceeding

An Article 81 petition can be brought by a family member or other interested party, such as the nursing home where the AIP resides. (MHL §81.06.) The Petition must set forth the AIP's functional limitations and demonstrate why the appointment of a guardian is necessary, The proceeding is commenced by filing (a $305 filing fee) an Order to Show Cause and Petition in the Supreme Court in the county where the AIP resides, though if the AIP is in a nursing home, the petition is brought in the county where the nursing home is located. (MHL §81.05)

Upon the Court's signing the Order to Show Cause and setting a date for the Hearing, the Court may appoint an attorney (MHL §81.10) to represent the AIP and/or a Court Evaluator, to investigate the allegations set forth in the Petition and prepare a report (MHL §81.09) for the Court regarding same.

At the Guardianship Hearing, which is usually held within twenty-eight days (MHL §81.07) from the Court's signing of the Order to Show Cause, the Petitioner must prove by clear and convincing evidence that the AIP has functional limitations necessitating the need for a guardian. (MHL §81.12) If said burden is met by the Petitioner, the Court will grant the Petition and appoint a Guardian for the AIP.

The Guardianship Judgment must specifically define the authority of the Guardian,(MHL §§81.21 and 22) and said Judgment can be tailored to the specific needs of the AIP. For example, if the AIP has a health care proxy, the Court may not necessarily appoint a guardian of the person. If the AIP has a Power of Attorney (POA), but said POA limits or does not permit gifting, the Court may authorize the gifting of the AIP's assets for Medicaid or estate planning purposes. (See generally MHL §81.21, Powers of the Guardian, property management). Also, the Judgment must set forth the duration of the Guardianship.

Once appointed Guardian, the Guardian is required to take a Guardianship class. (See generally MHL §81.20, Duties of the Guardian) The Guardian is also required to file an Initial Report (MHL §81.30) within ninety days of appointment, setting forth what she has done on behalf of her ward since appointed. Each calendar year, she is also required to file an Annual Report (MHL §81.31) with the Court.

MHL Article 81 can allow for the Incapacitated Person (IP) to retain some autonomy even with the appointment of a guardian. The statute provides for flexibility and independence. In planning for a disabled child, the key is flexibility and MHL Article 81 can allow for more flexibility and a more tailored guardianship meeting the exact needs of the individual. However, some individuals are constrained by the type of proceeding that can be brought based on the disabled individual's diagnosis and functional capacity.

Application for Approval of an SNT

An Application for the approval of an SNT for the AIP can be made with the filing of the Guardianship Petition. In the request for the powers of the Guardian, a request for the approval of an SNT can be made, as follows.

First, in the paragraph entitled "Plan for Property Management," it should be stated

> "To create and fund a Self Settled/First Party Supplemental Needs Trust for the benefit of JAKE, with MOM and DAD as Co-Trustees, to be funded with the BANK ACCOUNT. (A copy of the proposed JAKE Supplemental Needs Trust is attached hereto and made a part hereof as Exhibit X.)"

In the section entitled "Specific Property Management Powers Sought" in power OTHER:

> "To create and fund a Supplemental Needs Trust for the benefit of JAKE, with MOM and DAD as Co-Trustees, to be funded with the BANK ACCOUNT."

The Guardianship Petition (with the SNT) should be served

upon the local social services district and their counsel (for example HRA and OLA in NYC; Westchester DSS and the Westchester County Attorney). It is imperative that the local social services district approve the SNT before same is funded.

SUMMARY

SCPA Article 17A

1.Standard for the Appointment of a Guardian
Incapable of managing himself/herself or his/her affairs by reason of:
Mental Retardation
Developmentally Disabled -- cerebral palsy, epilpsey, neurological impairment, autism, traumatic head injury
Appointment is in the best interest of respondent(SCPA 1750)

2. Proving Incapacity
Certification by 2 physicians or Certification by 1 physician and 1 psychologist (SCPA 1750 & SCPA 1750-a)

3. Appointment of Counsel
Does not provide for the appointment of counsel for AIP
Limited requirements for appointment of Guardian ad litem or appointment of MHLS (SCPA 1754)

4. Guardian's Powers
Plenary powers over financial and/or personal care of disabled person
Does not provide for "tailoring" the guardian's power to the needs of the individual
Guardian precluded from exercising substituted judgment on behalf of ward

5. Training of Guardians
Does not provide for training of the Guardian
Appointment of guardian is continuation of parent's legal authority over their child

6. Reporting Requirements of Guardian
Reporting for guardian of property only
Some courts require reporting for guardian of the person

7. Health Care Decision Making
14 NYCRR Section 633.11
PHL Section 2504 (per SCPA 1750-b)
Hospital setting – need guardian

8. Considerations – functioning level of person with disability
Low functioning, severely disabled and cannot meaningfully participate in decision making

9. Supplemental Needs Trust
Need Court approval of SNT
possible Bond
Second application to the Court once Guardian appointed

10. Costs
Less expensive
Standardized forms
$20 filing fee
Most are application of person not property
GAL can serve without a fee

11. Role & Authority of Guardian
Health care decision making
No training for guardian
Guidance for annual reporting for guardian of property
Some courts require reporting of guardian of person
Duration of guardianship – indefinite (SCPA 1759)

MHL Article 81

1. Standard for the Appointment of a Guardian
Finding that AIP is unable to provide for personal needs and/or property management, and cannot understand and appreciate the nature and consequences of such inability
OR
AIP consents to appt of guardian (MHL 81.02)

2. Proving Incapacity
Functional assessment of actual abilities of the person to perform activities of daily living (MHL 81.15)
Clear and convincing evidence (MHL 81.12)

3. Appointment of Counsel
Provides for the appointment of counsel (MHL 81.10)
Payment of counsel – from IP funds or 18b panel
Provides for appointment of court evaluator(MHL 81.09)

4. Guardian's Powers
Must specifically define the authority of the guardian
Exercise substituted judgment on behalf of ward
Orders specifically list guardian's authority (MHL 81.15)

Powers of Guardian of the Property (MHL 81.21)

Powers of Guardian of the Property – Health care decision making (MHL 81.22)

5. Duration of guardianship
varies on the needs of the IP (MHL 81.15)

6. Training of Guardians
Training for court evaluators, court examiners and guardians (MHL 81.39, 81.40 and 81.41)

7. Reporting Requirements of Guardian
Accountability – annual reports for both person and property
Initial Report (MHL 81.30)
Annual Report (MHL81.31)

8. Supplemental Needs Trust
Need Court approval of SNT
possible Bond
Application for approval of SNT with initial guardianship petition

9. Cost
Use of IP's funds to pay petitioner's counsel, court evaluator, court examiner, and guardian (MHL 81.09, 81.10, 81.27-28 and 81.32(f))
More expensive
Forms vary from county to county
Filing fee - $305

10. Considerations
Procedural and substantive rights of the individual are more fully provided
High functioning and capable of making some decisions
Provides flexibility and independence
More flexibility in management of property of infant and SNT

Good overview Article 17A vs. MHL 81 cases:

Matter of Chaim A.K., 26 Misc. 3d 837; 855 NYS 2d 582 (Surr. Ct., NY Cty., 2009) – Surrogate Glenn
The Court denied an application by parents for 17A guardianship of their son without prejudice to file an Article 81 guardian, finding that the AIP, although mildly mentally retarded, also has along history of psychological problems that may change over time and that he was in need of the more tailored and more carefully monitored supervision of an Article 81 Guardian.

Matter of John J.H., 27 Misc.3d 705; 896 NYS2d 662 (Surr. Ct., NY

Cty., 2010) – Surrogate Glenn

Parents of a 22 year old autistic man with artistic talent filed a SCPA 17-A petition to become his guardians with the specific power to sell his artwork and to make charitable gifts on his behalf from the proceeds. The court indicated that it was constrained by the language of 17A, to order a plenary guardianship over the property and that it could neither tailor the guardianship to the AIP's particular needs nor issue gift giving powers to the proposed guardians. The court explained that there was a presumption against applying "substituted judgement" in a 17A where the assumption is that the ward never had capacity to formulate a judgment of his own. In the end, the petitioners withdrew their 17A petition and re-filed under Article 81.

Matter of Yvette A., 27 Misc.3d 945; 898 NYS2d 420 (Surr. Ct., NY Cty., 2010) – Surrogate Webber

A father who had not had any contact with his severely mentally retarded Willowbrook class daughter for over 16 years sought to be appointed as her 17A guardian. MHLS, NYLPI, NYCLU and the GAL opposed his appointment and NYLPI and NYCLU requested that the matter be referred to Supreme Court for an Article 81 proceeding. The father was unclear about his daughter's condition and prognosis and had no plan in mind for her continued care. The objectants raised concerns about his motives and commitment to his daughter in light of his past history and were concerned about his suggestion that he would want to remove her from the only group home she had been in for the past 33 years and possibly sue them in relation to their past care of his daughter.. The Surrogate declined to transfer the case to Supreme Court reasoning that Article 81 and SCPA are not alternatives for one another and stating: "although Article 17- A does not specifically provide for the tailoring of a guardian's powers or for the reporting requirements similar to Article 81, the court's authority to impose terms and restrictions that best meet the need of the ward is implicit in the provisions of §1758 of the SCPA." The Court concluded that it had the authority, both at the inception of a 17A decree and upon modification of an original decree, to tailor the order to meet the needs of the ward. The court thus decreed that the father could be appointed, but included very detailed reporting requirement similar to those in Article 81 and further decreed that the independent agency overseeing the Willbrook cases should continue its oversight of the ward.

Matter of Schulze, 23 Misc. 3d 215, 869 NYS 2d 896 (Surr. Ct., NY Cty. 2008)(Surr. Roth)

The Court held that there is no express provision Art. 17A empowering a 17A guardian to make gifts, as contrasted with such

an express grant of power to MHL Art. 81 guardians under MHL 81.21. The court held that despite the absence of such express language, Art. 17A guardians do have such power and do not need to petition a court to be converted to Art. 81 guardians to make such gifts. The court noted that intra-family tax savings ad maximization of gifts to charities are among the objectives that have ben recognized as supporting guardians' exercise of such authority to make such gifts.

In the Matter of Application of Geoffrey M. and Jordana M., as Parents and Guardians for the Personal Needs and Property Management of Sigal M.
42 Misc. 3d 379; 975 N.Y.S.2d 634
November 12, 2013 (County Court of New York, Nassau County)

The application by Geoffrey and Jordana M., the Article 81 co-guardians of the personal needs and property of their daughter, Sigal for an order: (1) permitting the guardians to reimburse to themselves, in their capacity as parents, the sum of $33,348.64 from the guardianship account for all of the costs associated with a bat mitzvah party for Sigal, and (2) authorizing the expenditure of approximately $65,000.00 from the guardianship account to cover the vacation cost for the entire family and an aide.

The Court denied the written application by the guardians for reimbursement from the guardianship account for the costs associated with the bat mitzvah party for Sigal.

The oral application by the guardians for the release of funds from the guardianship account for a vacation to Israel for Sigal, her entire family and an aide, was granted to the extent that the court allowed the guardians to withdraw, for the calendar year 2013, the amount of the costs of the handicap suite required for Sigal; the airline tickets for Sigal, her aide and her mother; and the wheelchair accessible van, all extraordinary expenditures predicated by Sigal's physical condition and personal needs; for a total cost of $27,723.61. (The Court's order of December 18, 2006 (Asarch, J.) permitted the disbursement of up to $20,000.00 a year for a family vacation). The court declined to permit the additional withdrawal from Sigal's guardianship account to pay for the cost of the vacation for Sigal's siblings and father, as well as her parents' hotel room. The court admonished the family that Sigal's funds are not for family use.

The Court directed that the co-guardians must in the future seek prior approval from the Court before incurring any extraordinary expense on behalf of Sigal M.

SURROGATE'S COURT: WESTCHESTER COUNTY

_____

In the Matter of the Application for the Approval of a Supplemental Needs Trust by C

File No.

Petitioner,

PETITION

For: D

_____

TO THE SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

The Petition of C , domiciled and residing at , New York, respectfully shows:

1) Petitioner is the SCPA Article 17A Guardian of the Person and Property of D, her son, pursuant to the Surrogate's Court Decree appointing Guardian and Standby Guardian for a Mentally Retarded Person, dated 2014, with Letters of Guardianship (Person & Property) 17A issued on 2014. A copy of said Decree, Decision and Letters of Guardianship 17A are attached hereto and made part hereof as Exhibit "A."

2) D who suffers from Mental Retardation and whose date of birth is , resides with his mother, C the Court Appointed Guardian of the Person and Property, at , New York.

3) D is a recipient of Medicaid and Social Security Survivor benefits in the monthly amount of $1,577.00. His mother and Court Appointed Guardian, C , is the representative payee for said Social Security Survivor benefits.

4) On , 2012, SR., the father of D, died. D has inherited death benefits in the total amount of $ from the New York State (NYS) Employees Retirement System (Group Term Life) in which his father participated and for which D is the named beneficiary. In my capacity as the Court Appointed Guardian for D, I received two checks, in the amount of $ and $, representing full payment for said death benefits. Copies of said checks are attached hereto and made a part hereof as Exhibit "B".

5)Due to D's Mental Retardation, he cannot make any significant financial or personal decisions and is unable to manage his financial affairs.

6) I have been advised by my attorneys that the above referenced death benefits in the total amount of $ would cause D to be ineligible for Medicaid, as said funds exceed the Medicaid limit of $14,850 for the year 2015, unless said benefits were deposited into a Supplemental Needs Trust for the benefit of D.

7) I am seeking Court permission to approve and authorize the creation and funding of the D Supplemental Needs Trust (SNT)

for the deposit of the $ in life insurance death benefits in order to protect D'S Medicaid benefits and to utilize said monies for his sole benefit, with the date of the trust deemed to be the date said SNT was approved by the Westchester County of Law on behalf of the Westchester County Department of Social Service, being 2014. A copy of the proposed D Supplemental Needs Trust (SNT), which contains Medicaid payback provisions, is attached hereto and made a part hereof as Exhibit "C".

8) The SNT was approved by the Westchester County Law Department pursuant to a letter dated 2014 from , Esq., Assistant County Attorney, on behalf of the Westchester County Department of Social Services, a copy of which letter is attached hereto and made a part hereof as Exhibit "D".

9) Attached hereto and made a part hereof as Exhibit "E" is an original Waiver of Citation and Consent, signed by Esq., on 2014, as the Legal Representative for the Department of Social Services, Westchester County.

10) The names and addresses of the persons interested in this proceeding who are required to be cited upon application or concerning whom this Court is required to have information are:

Westchester County DSS
112 East Post Road, 5th Floor
White Plains, NY 10601-4201

Mental Hygiene Legal Service
200 White Plains Road, 2nd Floor
Tarrytown, New York 10591
Attn: Daniel Pelligrin, Esq.

11) There are no other persons than those mentioned interested in the application or proceeding.

12) I believe that this Petition complies with SCPA §402 as follows:

a) I am qualified to protect the rights of D as his Court appointed Article 17A Guardian;

b) I am not connected in business with any party to the proceeding or the attorney for any party;

c) I am not entitled to share in the estate in which D is interested; and

d) I do not have any interest adverse to or in conflict with that of my ward, D

Therefore, I respectfully request that the Court authorize me to appear on behalf of my ward, D , as his Court Appointed SCPA Article 17A Guardian.

13) No previous application has ever been made to this Court or any other court of competent jurisdiction for the relief sought herein.

WHEREFORE, petitioner requests that
A decree be granted to:

(a) approve and authorize the creation and funding of the D Supplemental Needs Trust (SNT) for the sole benefit of D , with the date of the trust deemed to be the date said SNT was approved by the Westchester County of Law on behalf of the Westchester County Department of Social Service, being 2014;

(b) approve and authorize the transfer of the $ in death benefits issued to D, as the named beneficiary of his late father for the NYS Employees' Retirement System Group Life Term Policy, and be deposited to said D Supplemental Needs Trust;

(c) appoint C the Trustee of the D Supplemental Needs Trust; and

that Mental Hygiene Legal Service may be cited to show cause why a decree should not be made accordingly as he has not provided a "Waiver and Consent" to the D Supplemental Needs Trust.

DATED: _____, 2014

_____
C

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

C , being duly sworn, deposes and says:

That she is the Petitioner and that the contents of said Petition are true to her own knowledge, except as to matters alleged upon information and belief, and that as to those matters, she believes the same to be true.

_____
C

Sworn to before me this
___ day of _____, 2014

_____
Notary Public

D SUPPLEMENTAL NEEDS TRUST

The D SUPPLEMENTAL NEEDS TRUST is created by C , residing at , New York , as Grantor (hereinafter referred to as "Grantor" or "Grantors"), and C , residing at New York , as Trustee (hereinafter referred to as "Trustee" or "Trustees"). Reference in this Trust to the "Trustee" or "Trustees" shall be deemed a reference to whomever is serving as Trustee, whether original, alternate, or successor.

The sole beneficiary of this Trust Estate shall be D , (hereinafter referred to as the "Beneficiary") a person with a chronic and persistent disability.

This is an irrevocable trust for the benefit of D, residing at New York , a person suffering from a chronic and persistent disability during said beneficiary's lifetime. The effective date of this Trust shall be the _____ day of _____, 2014.

W I T N E S S E T H:

WHEREAS, Grantor is the mother and the Court appointed Surrogate's Court, Westchester County Article 17A Guardian, of D; and

WHEREAS, Beneficiary suffers from Severe Mental Retardation, and exhibits mental disabilities, which has resulted in a persistent and chronic disability by reason thereof; and

WHEREAS, Beneficiary whose date of birth is , is approximately 28 years of age; and

WHEREAS, Grantor desires to establish a supplemental needs trust for a substantial portion of the Beneficiary's assets, which trust shall qualify as an exempt trust pursuant to 42 USC §1396p [d][4][A], as codified by NYS Soc. Serv. Law §366[2][b][2][iii][A] and 18 NYCRR §360-4.5[b][5][i][a]; and

WHEREAS, Grantor anticipates that the Beneficiary will continue to have extensive needs as well as other services not provided by private insurance; and

WHEREAS, Grantor anticipates that the creation, funding, assignment of income to this trust, and use of this trust shall not create any period of ineligibility for Medical Assistance, under 42 USC §1396p[c][2][B][iv], as codified in NYS Soc. Serv. Law §366 [5][d][3][ii][D] and 18 NYCRR §360-4.4[c][2][iii][c][iv].

NOW, THEREFORE, in consideration of the promises and of the covenants herein contained, the Grantor has herewith delivered (or acknowledge the delivery thereof) and do hereby grant, convey, assign and set over to the Trustee, the property and/or interests in income described in Schedule "A" annexed hereto (sometimes herein referred to as the "trust fund") IN TRUST, NEVERTHELESS, for the benefit of the Beneficiary on the following terms and conditions:

FIRST: The Trustee shall hold, invest and reinvest the said trust fund, including any other cash, securities or other property, real, personal or mixed, at any time forming a part of this trust, shall collect and receive the income thereof, and shall apply and distribute such income and principal as hereinafter provided, subject to the provisions and restrictions of the Order and Judgment appointing said Trustee as S.C.P.A. Article 17A Guardian and approval by the Surrogate's Court.

A. The Trust fund shall be held, IN TRUST, for the sole benefit of the Beneficiary and shall be held, managed, invested and reinvested by the Trustee, who shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall, at any time and from time to time, pay to (except as hereinafter provided) or apply for the benefit of the Beneficiary, so much (even to the extent of the whole) of the net income and/or principal of this Trust as the Trustees shall deem advisable, in their sole and absolute discretion, subject to the limitations set forth below. The Trustee shall add to the principal of such Trust not less than annually the balance of net income not so paid or applied.

B. This Trust is intended to conform with 42 U.S.C. §1396p [d][4][A], NY EPTL §7-1.12 and NYS Soc. Serv. Law §366 which presently govern trusts referred to as "Supplemental Needs Trusts." The Grantor intends that the assets constituting the Trust fund be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city, or other governmental entity for which the Beneficiary may otherwise be or become eligible or which the Beneficiary may be receiving or may receive at some point in time. Consistent with that intent, it is the Grantor's desire that, before expending any amounts from the net income and/or principal of this Trust, the Trustee considers the availability of all benefits from government or private assistance programs for which the Beneficiary may be or may become eligible and that, where appropriate and to the extent possible, the Trustee endeavors to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the Beneficiary.

C. None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city, or other governmental entity for which the Beneficiary may otherwise be or become eligible or which the Beneficiary may be receiving or receive at some point in time. Without limiting the foregoing, none of the income or principal of this Trust shall be paid directly to the Beneficiary.

D. Notwithstanding the provisions of paragraphs B. and C. above, the Trustee may make distributions to meet the

Beneficiary's needs for food, clothing, shelter or health care even if such distributions may result in an impairment or diminution of the Beneficiary's receipt or eligibility for government benefits or assistance but only if the Trustee determines (i) that the Beneficiary's basic needs will be better met if such distribution is made, and (ii) that it is in the Beneficiary's best interests to suffer the consequent effect, if any, on the Beneficiary's eligibility for or receipt of government benefits or assistance. Notwithstanding the foregoing, if the mere existence of the Trustee's authority to make distributions pursuant to this subparagraph shall result in the Beneficiary's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this subparagraph shall be null and void and the Trustee's authority to make such distributions shall cease and shall be limited as provided in paragraphs B. and C. above, without exception.

E. The Beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

F. To the extent permitted by law, no interest of any beneficiary in the income or principal of any trust shall be subject to pledge, assignment, sale, or transfer in any manner, nor shall any beneficiary have the power in any manner to anticipate, charge, or encumber his or her interest, nor shall the interest of any beneficiary be liable while in possession of the Trustee for debts, contracts, liabilities, engagements, or torts of the Beneficiary; provided however, that this exemption shall not apply in any respect to payments made on behalf of the Beneficiary for medical assistance provided by the New York State Department of Health, Westchester County Department of Social Services, and/or any other appropriate Medicaid entity within New York State or any other state(s). Trust principal shall not be subject to any court directed invasion pursuant to the provisions of the New York Estates, Powers and Trusts Law Sec. 7-1.6, or any other statute of New York or any other state of the United States of America except for purposes of Medicaid reimbursement.

G. Upon early termination of the Trust, the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or other appropriate Medicaid entity within New York State, or any other state(s) shall receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the Beneficiary during his lifetime, as consistent with Federal and State law. If such Beneficiary received Medicaid in more than one state, then the amount distributed to each state shall be based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on behalf of the

Beneficiary. After Medicaid reimbursement, the Trustee shall distribute any income and principal that then remain in the Trust to the Beneficiary. No entity other than the Trust Beneficiary may benefit from the early termination of the Trust.

H. Unless sooner terminated by application to the Westchester County Surrogate's Court and upon thirty (30) days written notice served upon the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 and a Court Order approving said termination is issued, the Trust shall terminate upon the death of the Beneficiary, except that the Trust shall continue to pay reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, payment of any state or federal taxes due from the trust because of the death of D, or other required actions associated with the termination and wrapping up of the trust and collect additional or remaining funds due to the trust, and the Trustee shall distribute any principal and accumulated interest that then remains in accordance with subparagraph (C) of this paragraph.

(A) The Trustee(s) shall serve written notice within 30 days upon the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or the appropriate social services district, of the Beneficiary's death;

(B) Within thirty (30) days of the Beneficiary's death, the Trustee(s) shall serve the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or the appropriate social services district by certified mail, return receipt requested and by regular mail to the Surrogate's Court of Westchester County, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601, a certified copy of the Beneficiary's death certificate exhibiting a "raised seal";

(C) On written consent of the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, the Trustee(s) may withhold a sum in reserve to cover any estate, trust or income taxes which are or may be due upon or by reason of the Beneficiary's death. The decision as to the amount to be held in reserve shall be binding on the remaindermen;

(D) The Trustee shall promptly obtain a certified Statement of Benefits from the New York Department of Health, the Westchester County Department of Social Services,

and/or any other appropriate Medicaid entity within New York State, or any other state(s), of Medicaid payments, if any, made on behalf of the beneficiary during his lifetime. Upon receipt of such Statement of Benefits, the Trustee shall pay the State(s), or designated Social Services district(s), the lesser of (i) the total Medical Assistance provided to the beneficiary during his lifetime, as consistent with Federal and State law; or (ii) the entire balance of the Trust estate. If the beneficiary received Medicaid in more than one State, then the amount distributed to each State shall be based on each State's proportionate share of the total amount of Medicaid benefits paid by all States on behalf of the beneficiary;

(E) All remaining principal and accumulated income shall be paid to the estate of the Beneficiary and distributed in accordance with the laws of the State of New York;

(F) No Trustee shall be discharged and released from office and bond except upon the filing of a final accounting, on notice to the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, in the form and manner required by the Surrogate's Court of Westchester County and by obtaining judicial approval therefor.

SECOND: The Trustee shall have the following powers and discretions, in addition to any conferred by law:

(A) All powers conveyed to the Trustee by law, including those set forth in EPTL §11-1.1. A Trustee who has executed and filed a bond shall have the authority to invest the Trust fund in accordance with EPTL §11-2.2 and §11-2.3. In the event that the Trustee wishes to exercise powers beyond the express and implied powers of EPTL Article 11, the Trustee shall seek and must obtain Court Order.

(B) Only upon Court Order and upon thirty (30) days prior written notice to the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or any other entity providing medical assistance in the State of New York or in any other state, shall the Trustee purchase and/or sell real estate, a condominium, or cooperative apartment or retain any such property coming into their possession for the purpose of providing a residence for the Beneficiary. Any housing purchased shall be an asset of the Trust and the instrument conveying any such house, or real

estate shall identify the Trust as the owner of the housing, and the respective percentages of ownership of the Trust and any other party contributing to the purchase of the housing, if any; and to pay a percentage of operating costs based upon the number of residents in the housing or percentage of ownership of the housing. Upon termination of the Trust, the Trust is to be reimbursed for the Trust's share of ownership of the real property and the Trust is to be reimbursed with the proceeds of the sale.

(C) To employ agents, depositaries, accountants, investment advisors, and attorneys, and to compensate them for their services, subject only to prior Court Order approving all professional services based upon an Affirmation of Legal Services submitted to the court for review and upon thirty (30) days written notice served upon the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601; to employ health care providers, including Social Workers, for the care and support of the Beneficiary, and to compensate them for their services, but only to the extent that such services are not paid for by government programs.

(D) The Trustee may invest in and hold property which is used as the principal residence, furniture, automobile and other items meeting the "special needs" of the Beneficiary despite the fact that such property is non-productive of income. Other non-productive property may also be held by the Trustees, and they shall have the discretion to sell such property if they deem it to be in the Beneficiary's best interest, and add proceeds to the Trust. The Trustee shall serve the Westchester County Department of Social Services written notice at least thirty (30) days prior to the purchase, sale, exchange and or disposal of any real property. Said purchase, sale, exchange and or disposal of any real property shall be subject to the Order of the Westchester County Surrogate's Court and the approval of the Westchester County Department of Social Services.

Court Order is required prior to the purchase of a car with prior notice serviced on the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601. If applicable to meet the needs of the Beneficiary and upon Court Order, the Trustee is authorized to purchase or lease a vehicle suitable for

the transportation of the Beneficiary, on thirty (30) days notice served upon Westchester County. If a vehicle is purchased in the name of the Trustee, the purchase should be conditioned on reimbursing this Trust in the event said vehicle is sold or traded in for another vehicle. In addition, upon the death of the beneficiary and/or termination of this Trust the vehicle is to be sold and this Trust is to be reimbursed with the proceeds of the sale.

(E) The Trustee shall have the power to allocate items to income or principal. The Trustee shall determine whether capital gains will be included in trust accounting income, provided that allocations are consistent from year to year. The Trustees are authorized to deem distributions of principal to be made first from realized capital gains.

(F) To purchase annuities or life insurance policies with Trust principal or income on the condition that the applicable instrument names the Trust as the annuitant of the annuities and names the Trust as the beneficiary of any such annuity and life insurance policy. Any annuity purchased shall provide that the Trust shall be the sole beneficiary thereof and the annuity must commute at the termination of the Trust and be paid to the Trustee, in his/her fiduciary capacity of this Trust.

THIRD: A. In the event that the Beneficiary receives Medical Assistance, the Trustee shall:

(i) At the time of the filing of a Medicaid application, notify the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 or any other entity providing medical assistance in the State of New York or any other state, of this Trust;

(ii) On thirty (30) days written notice, notify the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 of the death of the Beneficiary and provide a certified copy with a raised seal of the Beneficiary's death certificate, and the termination of the within Trust;

(iii) On thirty (30) days written notice, serve the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, with notice in advance of any transactions tending to substantially deplete the principal of the Trust in the case of a Trust valued at more than $100,000; for the purposes of this clause, the Trustee must notify the Department of Social Services of Westchester County, c/o Department of Law,

148 Martine Avenue, Sixth Floor, White Plains, New York 10601 of proposed disbursements from this Trust in excess of the following percentage of Trust principal and accumulated income: five percent (5%) for trusts over $100,000 up to $500,000; ten percent (10%) for trusts valued over $500,000 up to $1,000,000; and fifteen percent (15%) for trusts over $1,000,000. A Court order is required in advance of any transactions tending to substantially deplete the principal of the Trust on notice to the Westchester County Department of Social Services or any other entity providing medical assistance in the State of New York or in any other state.

(iv) On thirty (30) days written notice, serve the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 in advance of any transactions involving transfers from the Trust principal for less than fair market value;

(v) Provide the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 or any other entity providing medical assistance in the State of New York or in any other state with proof of bonding in the amount of the fair market value of all liquid assets held in this Trust and comply with all applicable laws. A Trustee who has executed and filed a bond shall be authorized to invest in accordance with EPTL §§11-2.2 and 11-2.3.

Furthermore, the Trustee(s) shall obtain said bond from a bonding company that is authorized and licensed to do business within the State of New York. Proof of such bonding shall be filed with the Westchester County Department of Social Services and the Clerk of the County of Westchester at the time that the Trust is funded or signed, whichever is later, and upon each annual renewal with proof of payment of the bond premium demonstrating that such bond is in full force and effect.

(vi) The Trustee shall annually account to the Surrogate's Court for all Trust activity in the same manner as a 17A Guardian of the Property. Original accountings must be filed with the Surrogate's Court, County of Westchester, Guardianship Department, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601, and a copy of the accounting must be served on the Westchester County Department of Social Services c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, any other appropriate local social services district or any other entity providing medical assistance in the State of New York or in any other state with the accountings thirty (30) days prior to filing said accountings with the Court. Each annual accounting shall be judicially approved by the Surrogate's Court of Westchester County.

No fees or commissions shall be paid without prior Court

approval. Failure to timely file accountings may result in removal of a Trustee by the Court and/or surcharge on Trustee commissions.

B. The Trustee shall administer this Trust pursuant thereto and consistent with the Guardianship Decree.

FOURTH: A. The Trustee, acting from time to time, is authorized at any time to designate one or more persons or a bank or trust company or a not for profit entity to act in the order named as successor Trustee to fill any vacancy that may occur if no person named herein or previously designated pursuant to this paragraph as a successor Trustee shall be available to act, and only upon prior application to the Court and thirty (30) days written notice served upon the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 or any other entity providing medical assistance in the State of New York or in any other state.

B. Designations of successors or additional Trustee may be made upon the occurrence of a vacancy or prior thereto and shall be embodied in a written, signed and acknowledged instrument delivered to the successor, successors, or additional Trustee so designated. Any such designation may be revoked at any time prior to its delivery to the person designated. If the designating Trustee or Trustees shall die prior to the delivery of such instrument to the person designated, the executors or administrators of the deceased designating Trustee or Trustees may deliver such instrument.

C. A successor or additional Trustee shall qualify by giving notice of acceptance of the Trust. Such notice shall be embodied in a written, signed and acknowledged instrument delivered to any then acting Trustee, or if none, to (1) the Grantors, if living, and (2) the Beneficiary (or if the Beneficiary is disabled, notice shall also be given to his parent, guardian (if a guardian be appointed) or to the person with whom he resides), and (3) the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 or any other entity providing medical assistance in the State of New York or in any other state.

As a Guardian has been appointed for the Beneficiary pursuant to Article 17A of the SCPA the State of New York, or similar statute of another jurisdiction, no resignation and designation of a successor Trustee shall be effective unless approved by the court having jurisdiction thereof.

D. Except as provided in subsection “C.”, above, the resignation of a Trustee is subject to Court approval, and upon filing a final account with the court on notice to the Department of Social Services of Westchester County, c/o

Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 or any other entity providing medical assistance in the State of New York or in any other state. If a Trustee should die or become disabled or incompetent and unable to perform his or her responsibilities as fiduciary, then such Trustee's estate representative or guardian undertakes that responsibility.

Notwithstanding the foregoing, as a Guardian has been appointed pursuant to Article 17A of the S.C.P.A., no Trustee shall be discharged from office and bond, except upon the filing of a final accounting in the manner required by the Surrogate's Court, Westchester County, and obtaining judicial approval of same.

The appointment of a Successor Trustee shall be upon application to the court on notice to the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601.

FIFTH: A. The Trustee, whether individual or a corporation, hereunder shall be paid as compensation for their services the commissions provided by law under S.C.P.A. section 2309, unless payment of such commissions shall be waived.

B. The Trustees are subject to the provisions of the Prudent Investor Act and any amendments thereto.

C. The terms "Trustee" and "Trustees" shall include survivors, successors, or persons appointed as additional Trustees.

D. The masculine gender shall include the feminine, and vice versa. The singular shall include the plural, and vice versa.

SIXTH: A. The preambles set forth above are incorporated by reference, as though more fully set forth at length herein.

B. Neither the Grantor nor any other person shall have the right to make additions to the Trust hereunder by Will or otherwise by transferring to the Trustees additional real or personal property without the consent of the Trustees.

SEVENTH: A. The Trust hereby created shall be irrevocable and may not be altered, amended, revoked, assigned or terminated by the Grantors either in whole or in part. No amendments to this SNT shall increase the class of beneficiaries. Notwithstanding the foregoing,

(i) The Trustee may revise this agreement, subject to the prior written consent of the Westchester County Department of Social Services and Court Order, at the time of the Beneficiary's application for Medical Assistance or at such other time as necessary, in order to insure that the within Trust is not an available resource and that the transfers to this Trust do

not create any period of ineligibility for the care of the Beneficiary. The Westchester County Department of Social Services or any other entity providing medical assistance in the State of New York or in any other state shall be served with thirty (30) days written notice of any application made to the Court for any matter relating to the Trust. Such notice shall be made at least thirty days before the return date of any such action, to the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601.

(ii) Upon an Order of a court of competent jurisdiction and on thirty days written notice served upon the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, the Trustee may amend this instrument at any time, and from time to time, to the extent necessary to establish or maintain the Beneficiary's eligibility for Medical Assistance as articulated in this instrument.

The Trustee shall not have the authority to amend this Trust so as to limit or extinguish the right of New York Department of Health, the Westchester County Department of Social Services, and/or any other appropriate Medicaid entity within New York State, or any other state(s).

Anything in this instrument to the contrary notwithstanding, the Trustee shall not have the authority to amend this Trust so as to limit or extinguish the right of the State of New York, or other jurisdiction, to receive an amount equal to the total Medical Assistance paid on behalf of the Beneficiary during his lifetime under the State's plan, pursuant to Title XIX of the Social Security Act (to the extent of Trust funds remaining upon termination, as provided above).

B. In the event that it is determined that any provision of this Trust shall in any way violate applicable law, such determination shall not impair the government's right to its claim, if any, to the Trust funds remaining following the demise of the Beneficiary or termination of the Trust.

EIGHTH: A. C , residing at, New York , shall serve as the original Trustee.

B. In the event of the death of C or if for any reason whatsoever she ceases to serve as Trustee hereunder, A , residing at New York, shall serve as Trustee hereunder without the approval of any Court.

NINTH: This Agreement and the Trust hereby created shall be construed and regulated by the laws of the State of New York. The Surrogate's Court of the State of New York, Westchester County shall have continuing jurisdiction over the performance of the duties of the Trustee, the interpretation, administration and operation of this Trust, and the appointment

of a Successor Trustee and all other related matters. The appointment of a Successor Trustee not named in this Trust shall be upon application to the Court and upon thirty (30) days written notice served upon the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601.

The Trustee may transfer the situs of the Trust to another jurisdiction upon the consent of the Court retaining jurisdiction and the Court obtaining jurisdiction of the Trust, in the event such action is taken, to elect to have the Trust construed and regulated by the applicable laws of such jurisdiction. The Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or any other appropriate local social services district or any other entity providing medical assistance in the State of New York or in any other state, shall be served with notice of any proposed situs transfer and/or change in choice of law. Notwithstanding any provision to the contrary, in the event that the jurisdiction of the Trust is removed from New York State and Westchester County or any other entity in New York State provides Medicaid services to the Beneficiary, this Trust shall be construed in accordance with the laws of the State of New York.

Any change of jurisdiction shall only occur after notice to each Interested Party, and served upon the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or any other appropriate local social services district or any other entity providing medical assistance in the State of New York or in any other state, shall be served with notice of any proposed situs transfer and/or change in choice of law. Notwithstanding any provision to the contrary, in the event that the jurisdiction of the Trust is removed from New York State and Westchester County or any other entity in New York State provides Medicaid services to the Beneficiary, this Trust shall be construed in accordance with the laws of the State of New York.

This Trust shall be binding upon the estate, executors, administrators and assigns of the grantor any individual Trustee and upon any successor Trustee.

This Trust agreement may be executed in separate counterparts which, together, shall be deemed to be one agreement.

IN WITNESS WHEREOF, the undersigned has executed this agreement as of the day and year first above written.

_____
C
Grantor and Trustee

STATE OF NEW YORK)
)ss.:
COUNTY OF WESTCHESTER)

On the _____ day of _____ , 2014, before me, the undersigned, a Notary Public in and for said state, personally appeared C, known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

Matter of Chaim A.K.
2009 NY Slip Op 29384 [26 Misc 3d 837]
September 21, 2009
Glen, J.
Sur Ct, New York County
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
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[*1]

In the Matter of the Appointment of a Guardian for Chaim A.K.

Surrogate's Court, New York County, August 21, 2009

APPEARANCES OF COUNSEL

Petitioners pro se.

{**26 Misc 3d at 837} OPINION OF THE COURT

Kristin Booth Glen, S.

{**26 Misc 3d at 838}This case presents an important question for courts, and potentially for the legislature:[FN1] to what extent do the shortcomings of article 17-A of the Surrogate's Court Procedure Act [*2]require that it be narrowly construed where mental illness, as well as mental retardation or developmental disability, may be the reason a guardian is required.

The Instant Application

Petitioners here are the parents of Chaim A.K., born March 19, 1988. Because Chaim has reached his majority, his parents have lost legal authority to make decisions, especially medical decisions for him, unless they obtain some form of court authorized guardianship. This is particularly troubling because Chaim has required relatively frequent

hospitalizations and, as he himself admits, cannot bring himself to authorize treatment even if it is in his best interests.[FN2]

In support of their petition, Chaim's parents submitted information from four separate sources. Two are M.D.s who filled out form affidavits to which other documentation is attached;{**26 Misc 3d at 839} one is the report of a psychologist who did an evaluation in 2007; the last is a batch of information relating to Chaim's educational setting in the New York City public school system. Read together, they describe a young man who functioned adequately in regular school classes through fifth grade; he was subsequently placed in special education, where he remains to this day.

The report from his annual individualized education program assessment conference states:"Significant academic and emotional difficulties warrant a more restrictive setting to address his needs and provide functional academic and vocational training."

Assessments and testing[FN3] done to determine his eligibility for educational benefits and services from the State Office of Mental Retardation and Developmental Disabilities (OMRDD) consistently show that Chaim scores "low" in communication, daily living and socialization skills, and Stanford-Binet scores of 72 on nonverbal IQ (borderline range) and 51 on verbal IQ (mild to moderate mental retardation range) result in an overall full scale IQ of 59, just below the first percentile, thus resulting in a finding of cognitive functioning within the mild mental retardation range. His scores on the Weschler Abbreviated Scale of Intelligence give him a "Borderline" on verbal, "Low Average" on performance, and "Borderline" on full-4.[FN4]

When, however, one looks behind the raw numbers, including the more fully fleshed out [*3]reports, especially of Dr. Sheenie Ambardas, his treating psychiatrist,[FN5] a somewhat different picture emerges. Chaim has a long history of psychological and emotional problems which have contributed to his educational{**26 Misc 3d at 840} difficulties.[FN6] He has been diagnosed with impulsivity, hyperactivity, attention deficit disorder, audio and visual hallucinations, self-mutilating behavior, suicidal gestures and attempts, depression, anxiety, and psychosis. Dr. Ambardas's final report shows a diagnosis as follows:

"Axis I: Depressive disorder N.O.S. - 311

"Psychotic disorder N.O.S. - 298.9

"R/O: R/O MDD w/Psychotic Features

"R/O Schizophrenia, R/o Aspergers

"Axis II: Borderline Intellectual Functioning

"Axis III: Seizure D/O; Asthma; Nose Bleeds."

Her early assessment notes "multiple self-injurious behavior" and "suicidal gestures and attempts." Another evaluator noted:

> " 'Emotional state appeared tenuously stable with some indications of overt psychopathology' (Chaim Wakslak, Ph.D. 10/31/07) and [b]ased on background information and behavior observations, it is the opinion of the examiner that Chaim gives evidence . . . consistent with his previous diagnosis of Asperger's disorder" (Young Adult Institute evaluation, Apr. 30, 2009).

The Board of Education Individualized Education Program forms describe Chaim's "disability" as "Emotional Disturbance."

The court's own observation of, and conversation with Chaim suggested intelligence, reasoning and communication skills significantly greater than those of other wards in SCPA article [*4]17-A proceedings carrying diagnoses of mild mental retardation and/or developmental disabilities. At the same time it also indicated (in conjunction with his parents' testimony and the history contained in documents submitted with the petition) serious issues of mental illness.{**26 Misc 3d at 841}

Statutory Framework

New York currently provides two distinct statutory schemes under which a personal or property guardian may be appointed for, and exercise power over, a disabled adult:[FN7] article 17-A of the Surrogate's Court Procedure Act and article 81 of the Mental Hygiene Law. Chaim's parents have chosen to pursue an article 17-A guardianship for several reasons. It is thought to be faster than article 81; petitioners are often pro se, and the

combination of simplified forms, service requirements, and assistance by the clerks in Surrogate's Courts mean that a lawyer is not necessary, an important factor for petitioners like those here for whom such an expense is daunting, if not prohibitive. In New York City, at least, most proposed wards have carried diagnoses of mental retardation or developmental disability since early childhood, and they and their families have ongoing relationships with one of the two main organizations, AHRC (Association for the Help for Retarded Children) and YAI (Young Adult Institute), that provide services to the mentally retarded and developmentally disabled communities. Those organizations recommend that parents seek article 17-A guardianship as their children "age out"[FN8] and often provide information and actual assistance in obtaining guardianship.[FN9]{**26 Misc 3d at 842}

SCPA article 17-A as originally enacted in 1969 applied to persons with "mental [*5] retardation."[FN10] It was revised in 1989[FN11] to add to its coverage persons who are "developmentally disabled."[FN12] Mental Hygiene Law article 81, enacted decades [*6] later in 1992, applies to persons whose functional incapacities make the subject of the proceeding—denominated an "alleged incapacitated person" or "AIP"—unable to manage her person or property such that she is both placed in danger and incapable of{**26 Misc 3d at 843} understanding the consequences of her incapacity (*see* Mental Hygiene Law § 81.02 [b] [1], [2]).

As is apparent on the face of the two statutes, article 17-A is almost purely diagnosis driven, while article 81 requires a more refined determination linking functional incapacity, appreciation of danger, and danger itself.[FN13] This is not the only way in which they differ. The distinctions reflect, at least in part, a decades-long increasing sophistication about mental disabilities as well as an expanding constitutional framework through which the rights of mentally ill persons are protected.

Article 17-A was originally passed, with apparently little discussion, primarily to provide a means for parents of mentally retarded children to continue exercising decision-making power after those children reached age 21.[FN14] The belief at that time was that mental retardation was a permanent and permanently disabling condition with no realistic likelihood of change or improvement over time.[FN15] Hence, the same powers that parents held over minors were seen as appropriately continued for the rest of the mentally retarded

person's life. The extension of article 17-A to the developmentally disabled in 1989 seems to have evoked a similar lack of comment or study, and apparently included the same assumptions.[FN16]

By contrast, article 81, which replaces New York's prior "conservator" and "committee" statutes,[FN17] was the result of several years of study, comment, and public hearings undertaken by the New York State Law Revision Commission, in{**26 Misc 3d at 844} response to a national movement to review [*7]and rewrite adult guardianship statutes.[FN18] Article 81, directed primarily at adults who have lost or diminished capacity, begins with the assumption that all adults are fully capacitated, and requires proof of specific incapacity before a guardian can be appointed to remedy the particular proven incapacity. Article 81 anticipates closely tailored guardianships, granting the guardian, whether of the person or property, no more power than is absolutely necessary under the circumstances of the case,[FN19] and aims to preserve the AIP's autonomy to the greatest degree possible.[FN20]

Unlike article 81, article 17-A provides no gradations and no described or circumscribed powers. Given a finding of either mental retardation or developmental disability, inability to care for one's self (making no distinctions between what the subject of the proceeding can and cannot do) and the amorphous "best interests standard," a guardian is appointed with seemingly unlimited power,[FN21] much like the old conservator and committee. There is no statutory guidance as to the extent of this{**26 Misc 3d at 845} power,[FN22] and surprisingly little case law explication.[FN23] Because of the wide [*8]range of functional capacity found among persons with diagnoses of mental retardation[FN24] and developmental disability,[FN25] the powers granted to provide protection to an article 17-A ward may also need to vary, at least to meet the constitutionally mandated standard of least restrictive means.[FN26]{**26 Misc 3d at 846} [*9]

There are other significant differences between the two statutory schemes, especially procedural:

º A hearing must be held for the appointment of an article 81 guardian, with the right to cross-examination and the right to counsel (Mental Hygiene Law § 81.11 [a], [b]). No

hearing is required under article 17-A where the petition is made by or on consent of both parents or the survivor (SCPA 1754 [1]).[FN27]

º Even when an article 17-A hearing is held, the presence of the allegedly mentally retarded or developmentally disabled person may be dispensed with in circumstances where the court finds the individual's attendance would not be in his or her "best interest" (SCPA 1754 [3]); presence of the subject is presumptively required in article 81 (*see* Mental Hygiene Law § 81.11 [c], [e]; *Matter of Loconti*, 11 AD3d 937 [4th Dept 2004]).

º Article 81 requires the appointment of an independent court evaluator to investigate and make recommendations to the court (Mental Hygiene Law § 81.09); the appointment of a guardian ad litem to perform a similar function is merely discretionary in article 17-A proceedings (SCPA 1754 [1]).

º Almost all article 17-A proceedings are determined by reference to a form "Medical Certification[s] for Appointment of Guardian (SCPA Article 17-A)" which frequently contains conclusory assertions rather than useful information; they are subject neither to cross-examination nor even to the ordinary{**26 Misc 3d at 847} tests of credibility utilized by a factfinder with a live witness.

º Article 81 requires proof by clear and convincing evidence (Mental Hygiene Law § 81.12 [a]), while article 17-A is silent as to the burden.[FN28]

Without assessing the constitutionality of these procedural differences, it should be noted that article 81 affords the AIP substantially more procedural protection and, as well, affords the court greater opportunity to make a nuanced determination of the proposed ward's functional [*10]capacities and the possible trajectory of her condition.[FN29] As discussed below, this procedural lacuna is one reason for denying the instant petition.

Finally, the two statutes differ dramatically in the reporting requirements following the appointment of a guardian of the person.[FN30] Article 81 guardians are mandated to file detailed reports[FN31] 90 days after appointment and thereafter on a yearly basis, while article 17-A guardians have no duty to and, as a matter of practice, never file *any* report

once their appointment has been made.[FN32] The appointing court thus has absolutely no way of knowing whether a guardianship is still necessary or, of equal importance, whether it continues to serve the ward's best interests.

Early and simplistic assumptions about the permanency and unalterability of mental retardation and developmental disability, on the one hand, and the "natural" obligation and desire of{**26 Misc 3d at 848} parents to pursue their disabled children's best interests may have provided justification for this lack of judicial oversight in 1966, but those assumptions are highly questionable in light of today's longer life expectancies[FN33] and advances in medical knowledge.[FN34] Where the appropriate [*11]treatment, with or without medication, is likely to change frequently, and over time, the absence of any continuing judicial oversight raises another red flag about the suitability of article 17-A. Where it appears that the subject's inability to"manage him or herself and/or his or her affairs" is not necessarily attributable to mental retardation or developmental disability, an appointment under article 17-A may not be in the "best interest" of the subject, as the facts in the instant proceeding demonstrate.

Diagnosis of Mental Illness and the "Best Interest" Test

In the vast majority of these cases, there is no question that the proposed ward's disability is the result of mental retardation or developmental disability and that, accordingly, she comes within the purview of article 17-A. Chaim's case is, however, quite different.

While it would be inappropriate for a non-medically-trained court to substitute its own "diagnosis" for that of physicians{**26 Misc 3d at 849} and psychologists, the first question presented in an article 17-A proceeding is whether it appears to the satisfaction of the Surrogate's Court that a person is mentally retarded or developmentally disabled, and that the person is incapable of managing herself and/or her affairs *by reason of* that disability (SCPA 1750). Only after such findings are made is the court authorized to appoint a guardian of the person and/or property of such person, and then only if such appointment is in the best interests of the mentally retarded or developmentally disabled person.[FN35]

Here, although two medical doctors checked boxes on forms that state their "conclusion[s] that the respondent is developmentally disabled" and that "the condition of the respondent is permanent in nature or likely to [continue] indefinitely," the mass of additional information provided, including Dr. Ambardas's detailed records, show a young man with serious psychiatric and emotional problems, including an Axis I diagnosis of Depressive Disorder NOS. It is at least as likely, if not more likely, that Chaim's unquestioned difficulties and "impaired [*12]ability to understand and appreciate the consequences of decisions" are due to mental illness rather than developmental disability or mental retardation.

This failure of proof prohibits the appointment of an article 17-A guardian. At the same time, it suggests that an article 81 guardian is more appropriate, given the differences in the statutory schemes. As the reports in evidence demonstrate, without underestimating the difficulties, Chaim's condition is susceptible to medication and he has the potential, if so far unrealized, for a relatively productive and independent life.[FN36] More significantly, this case illustrates the need for caution in article 17-A proceedings, and the constitutional necessity of strictly confining the provisions of that article to those specific disabilities which it encompasses.

While Chaim may require a guardian, especially, as he himself acknowledges, to make medical decisions, he does not need, nor{**26 Misc 3d at 850} would it be appropriate to appoint a guardian with total, unfettered power over his life, the only choice available under article 17-A. Further, changes in his circumstances, whether as a result of different or improved medications or otherwise, may require altered powers in the guardian or perhaps even, someday, no guardian at all. The periodic reporting provisions and underlying autonomy-enhancing spirit of article 81 keep these possibilities open to the appointing court, while article 17-A, with its assumption of permanence and unchangeability, does not.

For all these reasons, the petition to appoint an article 17-A guardian of the person for Chaim A.K. is denied without prejudice to commencing an article 81 guardianship proceeding in the appropriate court.[FN37]

Footnotes

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Footnote 1: In 1990 the legislature directed a study to reevaluate SCPA article 17-A including possible procedural changes, in light of changes in "care, treatment and understanding of [mentally retarded and/or developmentally disabled] individuals" as well as new legal theories and case law relating to the rights of such persons. (L 1990, ch 516, § 1.) The legislature noted

"since 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 are rights and activities which society has increasingly come to recognize should be exercised by such persons to the fullest extent possible. While guardians appointed pursuant to article 17-A of the surrogate's court procedure act must have the authority to make decisions to ensure the ward's best interest, such decision-making authority by the guardian should not infringe on the right of the ward to make decisions when he or she is capable. The legislature also notes that there exists a national consensus that guardianship, for all persons, should be subject to review." (*Id.*)

Proposed amendments were to be submitted to the legislature by the close of 1991. During that period the Law Revision Commission studied adult guardianship and recommended passage of Mental Hygiene Law article 81, discussed below. No action, however, was taken as to SCPA article 17-A, and the reassessment and changes anticipated almost two decades ago have yet to occur.

Footnote 2: At his hearing Chaim was candid about his unwillingness or inability to deal with doctors or medical issues, and expressed his preference that his parents do so in his stead. Unfortunately, there is no provision in SCPA article 17-A that permits a guardianship limited to medical decision making.

Footnote 3: The assessment measures employed include the Weschler Abbreviated Scale of Intelligence, the Woodcock-Johnson Tests of Achievement, Third Edition, the Vineland Adaptive Behavior Scales, Second Edition, and the Stanford-Binet Intelligence Scales, Fifth Edition.

Footnote 4: These privately done evaluations are slightly suspect as their purpose is to obtain benefits for which Chaim would not be eligible in the absence of some finding of retardation.

Footnote 5: From 2007 into early 2008, Chaim received regular care, including frequent visits for changes in medication, from Dr. Ambardas at St. Vincent's Hospital. Records submitted contain detailed reports of Chaim's examinations, medications, diagnosis, and prognosis. Unfortunately, however, his (or his parents') medical insurance changed so he is no longer able to avail himself of what appears to have been that excellent treatment.

Footnote 6: In one assessment, his treating psychiatrist ranks Chaim's intelligence as "Average-Below Average" while another assessment notes that, while being tested, "Chaim seemed insecure about his responses to items and often changed his mind. He repeatedly changed correct responses to incorrect responses and insisted that the latter were correct. This behavior was consistent through testing and had a negative impact on Chaim's overall performance." Another report notes: "Testing behavior was characterized by an extremely excruciating process of attempting to engage Chaim in some reasonable repertoire" and concludes: "It is very clear that Chaim is inhibited by what appears to be behaviors consistent with ADHD, a mood disorder, dysthymia, anxiety disorder and oppositional defiance. These conditions result in a curious clinical picture."

Footnote 7: As a technical matter, both schemes are also available for minors, but since the law presumes a minor's parents to be her "natural guardian" until she reaches her majority, they are seldom necessary and only rarely utilized. (*But see Matter of Baby Boy W.*, 3 Misc 3d 656, 658 [Sur Ct, Broome County 2004] [article 17-A guardian appointed to make end-of-life decisions for severely mentally retarded month-old infant with "terminal and irreversible" condition].)

Footnote 8: Persons under 21 who have been diagnosed with mental retardation or developmental disability are entitled to educational benefits and services provided by the appropriate education authorities. Upon attaining their majority their entitlements are derived from the State Office of Mental Retardation and Developmental Disabilities and the benefits available to them are substantial. (*See* Mental Hygiene Law § 13.01; *see also* Office of Mental Retardation and Developmental Disabilities Services,

http://www.omr.state.ny.us/ws/servlets/WsNavigationServlet [last updated Aug. 20, 2008].) Services available to adults with other kinds of mental disabilities, including mental illness, are significantly harder to come by than those provided by the OMRDD safety net. Thus, the progress from special education to article 17-A guardianship and OMRDD benefits is usually a temporal continuum unavailable to others with different disabilities.

Footnote 9: A staff attorney from AHRC occasionally represents petitioners, and AHRC also has an arrangement with a pro bono initiative at a major New York City law firm.

Footnote 10: Mental retardation is defined in Mental Hygiene Law § 1.03 (21) as "subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior." The American Association of Mental Retardation (AAMR), arguably the leading professional organization in the field of mental retardation, offered the following definition of mental retardation in 2002 in its tenth edition of the AAMR Reference Manual on Definition and Terminology (Luckasson, Borthwick-Duffy, Buntinx, Coulter, Craig, Reeve, et al., Mental Retardation: Definition, Classification, and Systems of Supports, at 23 [2002]): "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18."

This definition has been widely adopted. It forms the basis for the definition included in the Individuals with Disabilities Education Act of 1990. (*See* Jack Hourcade, *Mental Retardation: Update 2002. ERIC Digest*, available at http://www.ericdigests.org/2003-4/mental-retardation.html [accessed Apr. 7, 2009].)

For purposes of article 17-A, a mentally retarded person is defined as a person who has been certified as being incapable of managing himself or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature or "likely to continue indefinitely." (SCPA 1750 [1].)

Footnote 11: *See* Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA 1750-a, at 109.

Footnote 12: A developmentally disabled person is defined in article 17-A as 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 himself or herself and/or his or her affairs by reason of such disability. This condition must be permanent in nature or likely to continue indefinitely. The disability must be attributable to: (1) cerebral palsy, epilepsy, neurological impairment, autism or a traumatic head injury, or (2) any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons; or (3) dyslexia resulting from a disability described in (1) and (2) above or from mental retardation. (SCPA 1750, 1750-a.)

An estimated nine million children and adolescents are affected by developmental or behavioral disorders, including cerebral palsy, autism, and various forms of mental retardation whether genetic (such as Down syndrome and fragile X syndrome) or due to some intrauterine or perinatal insult to the brain. (W. Maxwell Cowan, M.D. and Eric R. Kandel, M.D., *Prospects for Neurology and Psychiatry*, 285 J Am Med Assn 594 [2001].)

Footnote 13: The statute quite deliberately rejected a diagnosis driven approach, requiring instead a fact specific determination of an individual's functional incapacities. (*See* Mental Hygiene Law § 81.02 [c], [d] [1].)

Footnote 14: *See Matter of Cruz*, 2001 NY Slip Op 40083(U), *4 (2001); *see also* Lawrence R. Faulkner and Lisa Klee Friedman, *Distinguishing Article 81 and Article 17-A Proceedings*, in 1 Abrams, Guardianship Practice in New York State, at 160 (1997).

Footnote 15: *See* 4 Warren's Heaton, Surrogate's Court Practice § 49.02 (2) (a), at 49-6; § 49.03 (1) (b), at 49-8 (7th ed).

Footnote 16: The medical certifications required for an article 17-A petition require the doctor or other appropriate health care professional to state that the "condition [of mental retardation or developmental disability] is permanent in nature or likely to continue indefinitely." (SCPA 1750 [1]; 1750-a [1].)

Footnote 17: Repealed Mental Hygiene Law article 77 governed conservators of conservatees and repealed article 78 concerned committees of incompetents. Those statutes were characterized by the same "all or nothing" finding, primarily diagnosis driven, as article 17-A, and also implicitly assumed irreversibility. (*See* 4 Warren's Heaton, Surrogate's Court Practice § 50.01 [2], at 50-7 [7th ed].)

Footnote 18: The movement began with exposes of abuses by the Associated Press in 1987 (*see* Hon. Steve M. King, *Guardianship Monitoring: A Demographic Imperative*, available at http://www.ncpj.org/guardianship%20monitoring.htm [accessed Apr. 17, 2009]) and was largely spearheaded by the ABA Commission on Legal Problems of the Elderly (now the Commission on Law and Aging) which developed guidelines for adult guardianship at a widely attended and highly regarded conference, The National Guardianship Symposium, held at Wingspread Conference Center in 1988. Since that eponymous "Wingspread Conference," 18 states including New York have substantially or entirely revised their adult guardianship statutes, incorporating some or all of the Wingspread recommendations, and all states made at least minor or moderate revisions. (*See* Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, available at http://www.abanet.org/aging/publications/docs/wardofstatefinal.pdf [Apr. 2005].)

Footnote 19: Mental Hygiene Law § 81.01.

Footnote 20: Rose Mary Bailly, Practice Commentaries, McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.01, at 7 ("[The Legislature] recognized that even when guardianship must be invoked, the authority granted to the guardian should be tailored to the individual's specific needs rather than a 'one size fits all' power, and the authority of the guardian should be limited by those needs").

Footnote 21: Unlike an article 81 proceeding, where the court is obligated to make specific findings on the record and detail the specific powers granted to the guardian (Mental Hygiene Law § 81.15), the court in an article 17-A proceeding simply makes a decree appointing a guardian of the person and/or property. (SCPA 1754 [5].)

Footnote 22: The provisions of SCPA 1756, which permit appointment of a limited property guardian for an employed person, and which permit that person to retain his wages and to bind himself by contract or to an amount "not exceeding one month's wages . . . or three hundred dollars, whichever is greater," suggest that in other cases persons with article 17-A guardians have no right to contract.

Footnote 23: Courts have, however, imposed limitations where constitutionally protected rights are at stake. A court of the Second Department denied an article 17-A guardian the power to authorize sterilization of his ward because "[n]o statute in New York authorizes this extraordinary procedure, and in the absence of legislative guidelines, determination of such a fundamental right may not be left to the courts on a case-by-case basis" (*Matter of D.D.*, 90 Misc 2d 236, 236 [1977]). And, in *Matter of B.* (190 Misc 2d 581, 585 [Tompkins County Ct 2002]) there is dicta that "[t]he equal protection provisions of the Federal and State Constitutions would require that mentally retarded persons in a similar situation be treated the same whether they have a guardian appointed under article 17-A or article 81."

Footnote 24: Mental retardation is determined by IQ scores, themselves subject to challenge, as illness, motor or sensory impairments, language barriers or cultural differences may hamper a child's test performance (The Merck Manual of Diagnosis and Therapy, Mental Retardation [18th ed 2006] [available at http://www.merck.com/mmpe/sec19/ch299/ch299e.html]). Utilizing the Stanford-Binet scoring instrument, mental retardation begins at an IQ of 70 or less, but DSM-IV notes that due to a generally estimated five-point margin of error in standardized intelligence testing, a person with a measured IQ as high as 75 could be deemed to have met the diagnostic criteria for mental retardation if the requisite functional shortcomings are also noted. (*See* John Parry and F. Phillips Gilliam, Handbook on Mental Disability Law, at 51 [American Bar Association 2002].) The American Association of Mental Retardation emphasizes the importance of moving beyond a primary focus on IQ to a more comprehensive assessment and consideration of deficits in adaptive behavior, without which a diagnosis of mental retardation cannot properly be made. (*Id.*)

Mental retardation can be mild, moderate or severe, with persons in one end incapable of speech or ordinary reasoning, and at the other end, capable of working and

living by themselves. (*See* The Merck Manual, Mental Retardation, *supra*.) As noted above at footnote 22, the statute recognizes this variation in part by a provision permitting mentally retarded individuals who work to retain a portion of their wages.

Footnote 25: Developmental disability is even more of a *mot-valise* diagnosis, encompassing such disparate conditions as cerebral palsy and autism, with accompanying variations in levels of physical and mental capacities.

Footnote 26: Due process requires that the least restrictive means be utilized when the state, invoking its parens patriae powers, infringes on an individual's liberty or property interests for that person's protection. (*See e.g.* Antony B. Klapper, *Finding a Right in State Constitutions for Community Treatment of the Mentally Ill*, 142 U Pa L Rev 739, 759 [1993].)

This standard is specifically incorporated in Mental Hygiene Law § 81.01:

"The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable."

Footnote 27: In certain instances, as where involuntary transfer from the community to a nursing home is sought, counsel is constitutionally required, and where the AIP cannot afford counsel, the city is obligated to provide representation. (*See Matter of St. Luke's-Roosevelt Hosp. Ctr. [Marie H.]*, 226 AD2d 106 [1st Dept 1996], *affd* 89 NY2d 889 [1996].)

Footnote 28: The only case law found suggests that the usual civil burden of preponderance of the evidence applies. (*See Matter of Jaime S.*, 9 Misc 3d 460 [Fam Ct, Monroe County 2005].)

Footnote 29: Rose Mary Bailly, Practice Commentaries, McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.01, at 10.

Footnote 30: Both require annual reports by guardians of the property (Mental Hygiene Law § 81.31; SCPA 1719 [incorporated into article 17-A by SCPA 1761]), though the former is subject to review by statutorily denominated court examiners (Mental Hygiene Law § 81.32), while the requirements for, and subsequent examination of, article 17-A reports of property guardians vary from court to court.

Footnote 31: The 90-day report is intended to inform the court as to whether the guardian has put into place the plan which she proposed prior to appointment, and whether fewer or greater powers are then warranted. The yearly report includes the requirement of a report from medical professionals, as well as information about medications, rehabilitative services and living situation. (Mental Hygiene Law § 81.30; Law Rev Commn Comments, reprinted in McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.30, at 344.)

Footnote 32: *See Matter of Stevens*, 17 Misc 3d 1121(A), 2007 NY Slip Op 52097(U) (2007) (SCPA article 17-A provides no continuing oversight of guardians of the person once they have been appointed).

Footnote 33: For example, because children with Down syndrome seldom lived past their twenties when article 17-A was enacted (*see* American Geriatrics Society, The AGS Foundation for Health In Aging, Aging in the Know, *Mental Retardation*, available at http://www.healthinaging.org/aginginthe know/chapters_ch_trial.asp?ch=37 [last updated May 31, 2005]), it was reasonable to assume that their parents would outlive them, and continue to provide guardianship for their wards' lifetime. Today with life expectancy for that population greatly enhanced (*see* Diane Lynn Griffiths and Donald G. Unger, *Views About Planning for the Future among Parents and Siblings of Adults with Mental Retardation*, 43 Fam Rel 221 [1994] [increase in the life span of persons with mental retardation]; *see also* National Association of Parents with Children in Special Education, *Mental Retardation*, available at http://www.napcse.org/exceptionalchildren/mentalretardation.php [accessed Apr. 14, 2009] [older adults with developmental disabilities are living longer than ever before]), it is not uncommon to see article 17-A petitions for mentally retarded persons in their late forties or fifties, where parents are elderly or deceased, and petitioners are siblings, more distant relatives, or even persons not related by blood.

Footnote 34: For example, advances in treatment of autism, included in the broad category "developmental disability," may result in substantial and potentially legally significant increases in functional capacity (*see* Susan Kabot, Wendy Masi, Marilyn Segal, *Advances in the Diagnosis and Treatment of Autism Spectrum Disorders*, 34 Prof Psychol: Res & Prac 26 [2003]; *see also* Sarah Spence and Daniel Geschwind, *Autism Screening and Neurodevelopmental Assessment*, in Autism Spectrum Disorders, at 39 [Eric Hollander ed 2003] [showing increasing evidence that early intervention can improve outcomes]).

Footnote 35: *See* SCPA 1750, 1750-a.

Footnote 36: The Board of Education's Individualized Education Program assessment of long-term adult outcomes proposes the following goals:

> "Chaim will integrate into the community with min. support
>
> "Chaim will attend vocational training program
>
> "Chaim will require support for independent living
>
> "Chaim will be gainfully employed with support."

Footnote 37: Unfortunately, Surrogate's Court lacks jurisdiction to entertain article 81 proceedings for guardian of the person in any circumstances, and guardian of the property only in narrowly circumscribed circumstances, such as when the incapacitated person is the beneficiary of an estate, or is entitled to proceeds from a wrongful death action or the proceeds of a settlement of a cause of action brought on behalf of an infant for personal injuries. (Mental Hygiene Law § 81.04 [b].) Were there concurrent jurisdiction as, for example, between Family Court and Surrogate's Court in adoptions, the instant proceeding could have been converted after technical service and notice additions were made.

Matter of John J.H.
2010 NY Slip Op 20084 [27 Misc 3d 705]
March 8, 2010
Glen, J.
Sur Ct, New York County
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[*1]

In the Matter of the Guardianship of John J.H.

Surrogate's Court, New York County, March 8, 2010

APPEARANCES OF COUNSEL

Simpson Thacher & Bartlett LLP (*Pamela L. Rollins* of counsel), for petitioners.

{**27 Misc 3d at 706} OPINION OF THE COURT

Kristin Booth Glen, S.

This is another in a series of cases that demonstrates the limitations of our current statutory scheme for guardianship of persons with mental retardation and/or developmental disabilities, and that militates for reform of this outdated and unduly restrictive law.

John is 22 years old, with a diagnosis of moderate to severe mental retardation incident to autism. He lives with his parents and siblings, and has been educated at home since the age of 12. With the love and support of his family, and with expert guidance from specialists at Johns Hopkins, John not only has mastered communication and social skills far beyond what might have been expected, but also shows considerable artistic talent. Indeed, his work is of sufficient quality that it has been and—his parents

hope—will continue to be sold, generating a small income which they wish to donate to charity.

Because the H. family has considerable means, and because John is the beneficiary of certain trusts, as well as Uniform Gifts to Minors Act (UGMA) accounts, the monies received from the sale of his art are not necessary for his support. John's parents believe that the charitable contributions make him feel good about himself, so that, in addition to benefitting others, those contributions actually benefit John. As part of their guardianship application,[FN1] they seek the power to sell John's work and make such contributions on his behalf from the proceeds.

Laudable as this request is, and inspiring as are John's artistic accomplishments leading to such request, the court lacks power to grant anything other than a plenary property guardianship [*2]which does not include blanket gift-making powers.[FN2] As noted previously, SCPA article 17-A is a blunt instrument which allows{**27 Misc 3d at 707} for none of the "tailoring" that characterizes our adult guardianship statute (Mental Hygiene Law art 81; *see Matter of Chaim A.K.*, 26 Misc 3d 837 [Sur Ct, NY County 2009]).

That statute, for example, specifically provides, where appropriate, that a guardian of the property may make gifts from the funds of the incapacitated person, subject to review by the appointing court (Mental Hygiene Law § 81.21 [a] [1]; [b] [1]-[6]). Where the power to make gifts is sought in an article 81 guardianship proceeding, the petitioner or guardian is required to supply certain information concerning the allegedly incapacitated person's (AIP) resources and the reasons for, and circumstances surrounding, the proposed gifts. The court must consider, inter alia, "whether the incapacitated person has sufficient capacity to make the proposed [gifts] himself or herself, and, if so, whether he or she has consented to the proposed [gifts]" (Mental Hygiene Law § 81.21 [d] [1]) and may grant the application on a finding that, in the absence of capacity and consent, "a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances" and the incapacitated person has not previously manifested a contrary intention (Mental Hygiene Law § 81.21 [e] [2], [3]). The court's grant of the specified gifting power relieves the guardian of the obligation to

commence any other special proceeding for authority to make the gifts requested (Mental Hygiene Law § 81.21 [f]).

While recognizing that two prior judges in this court have assumed the power of article 17-A guardians to make gifts, those decisions (both of which involve the same ward) are distinguishable, and, as well, rest on questionable authority. In *Matter of Schulze* (23 Misc 3d 215 [Sur Ct, NY County 2008] [*Schulze II*]), the court posed the question as "whether article 81 of the Mental Hygiene Law preempts article 17-A with respect to the authority of guardians to make gifts on behalf of their ward" (*id.* at 216).[FN3] The court answered that question in the negative.

Petitioners in *Schulze II* sought to place virtually all of a guardianship fund in excess of $50 million in a revocable trust that would be governed by article 17-A until the ward's death (which petitioners had alleged was imminent) such that "the availability of the ward's funds for her benefit would remain{**27 Misc 3d at 708} unchanged during the balance of her lifetime" (*id.*).[FN4] In granting the petition the court relied on *Matter of Schulze* (NYLJ, Sept. 3, 1996, at 30, col 1 [*Schulze I*]) and the cases cited therein.

In *Schulze I*, the Surrogate was presented with a petition requesting

> "permission to make gifts totaling $5,000,000 from [Ms. Schulze's funds, held pursuant to article 17-A] to trusts for the benefit of her brother's issue and to pay the gift taxes thereon. Petitioners also [sought] the [*3]authority to make yearly annual exclusion ($10,000) gifts to each of the ward's niece and five nephews without further court approval" (*id.*).

Relying on eight trial court decisions authorizing guardians to "make gifts on behalf of their wards"[FN5] and a thorough review of the ward's financial situation and existing and potential needs, the court limited its allowance of immediate relief to $250,000 (from $5 million). The court also noted that "requests to dispense with court-approval each year are not routinely granted" (*id.*,[FN6] citing *Matter of Daly*, 142 Misc 2d 85 [Sur Ct, Nassau County 1988]).[FN7]

With the exception of *Daly*, all cases cited in *Schulze I* (and thus relied upon in *Schulze II*) involved committees and conservators under the old Mental Hygiene Law,

preceding{**27 Misc 3d at 709} enactment of article 81.[FN8] Those cases in turn were based on the notion of "substituted judgment," that is, what the currently incapacitated person would have done before (or in absence of) his incapacity.[FN9] This demonstrates a critical distinction between guardians for previously capacitated persons and those appointed under article 17-A,[FN10] where the assumption is that the ward has never had capacity.[FN11] [*4]

This distinction—and the gift-giving power which flows from it—has its roots in the common law of England, which distinguished between "idiots" (those born without capacity) and "lunatics" (those whose capacity was impaired later in life and who might someday regain it) (*see* 1 F. Pollock and F. Maitland, The History of English Law Before the Time of Edward I, at 481 [2d ed 1911]).[FN12] The substituted judgment doctrine was developed as a legal fiction by which the King, through Chancery,[FN13] could obtain funds from the property of a lunatic, and{**27 Misc 3d at 710} arose from the germinal decision in *Ex parte Whitbread in the Matter of Hinde, a Lunatic* (35 Eng Rep 878 [Ch Ct 1816]). The holding in *Whitbread*, and the power it conferred on courts to permit gifts from a lunatic's estate, was adopted in New York in 1844 in *In re Willoughby* (11 Paige Ch 257, 260-261 [1844]). The Chancellor cited Shelford's treatise and *Whitbread* in upholding the power of an equity court to make allowances to relatives out of a lunatic's surplus funds, even when those relatives had no claim on the estate, based on the fiction that the court was acting "for the lunatic, and in reference to his estate, as it supposes the lunatic himself would have acted if he had been of sound mind" (*id.* at 259).

Willoughby was followed in *In re Heeney* (2 Barb Ch 326 [1847])[FN14] which is the key case cited in the ALR annotation relied upon in *Schulze I*. The common-law gloss placed on our committee and conservator statutes, and extended by the legislature into article 81, provides no authority for gift giving in the (historically) very different situation of persons who have suffered from significant intellectual disabilities ("idiots") from early childhood on, and there is no similar common-law history with regard to such persons, now covered by article 17-A. [*5]

The instant case, involving a request for ongoing, blanket power to sell John's artwork and to make charitable gifts from the proceeds, is thus distinguishable from the

majority of cases in which gifting authority was sought on behalf of previously capacitated persons,[FN15] and from those few in which article 17-A guardians were permitted to make specific, time-limited transfers.

{**27 Misc 3d at 711}Of at least equal significance, however, this court disagrees that a judge may read into a statute provisions it believes would permit the court to "do justice."[FN16] Appealing as this concept may be, it is inconsistent with general principles of statutory construction (*see* McKinney's Cons Laws of NY, Book 1, Statutes §§ 73, 74), [FN17] as well as the constitutional separation of powers.

In 1990 the legislature recognized that article 17-A was due for reconsideration, precisely because of changes in the "care, treatment and understanding of [mentally retarded or developmentally disabled] individuals," as well as new legal theories and case law relating to the rights of such persons (L 1990, ch 516, § 1), but no action was taken. This court is advised that a coalition of stakeholders, including public interest groups, bar associations, advocates for persons with disabilities, civil liberties organizations and representatives of relevant governmental authorities, have begun work on a proposal to modernize article 17-A, and that the SCPA Legislative Advisory Committee is likewise reexamining the existing law. Just as the limitations—and questionable constitutionality—of the old conservator and committee statutes drove enactment of article 81, so the inability of courts operating under article 17-A to do justice for persons with disabilities in need of some level of guardianship will, hopefully, result in a more progressive, nuanced and protective system of guardianship for this most vulnerable population.

For these reasons, and upon a determination that the relief requested is not available in [*6]this proceeding, John's parents have withdrawn their petition in favor of commencing one under article 81, where tailored guardianship, both of property and the person, appropriate to John's capacities and circumstances, can be obtained (*see* Mental Hygiene Law § 81.01 ["(I)t is the purpose of this act to . . . establish( ) a guardianship system{**27 Misc 3d at 712} which is appropriate 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"]).

Footnotes

Footnote 1: John's parents seek guardianship of the person, end of life decision-making power pursuant to SCPA 1750-b, the power to place UGMA funds into a supplemental needs trust, and certain other powers relating to existing trusts for John's benefit.

Footnote 2: The legislature has provided for one form of limited property guardianship, which permits a ward to retain her earnings and to enter into contracts in an amount "not exceeding one month's wages . . . or three hundred dollars, whichever is greater, or as otherwise authorized by the court." (SCPA 1756.) Such limited guardianship is, however, available only if the proposed ward "is wholly or substantially self-supporting by means of his or her wages or earnings from employment." (SCPA 1756.) That exception is clearly not available here.

Footnote 3: Whether article 81 was or was not intended to preempt any portion of article 17-A is irrelevant to the ultimate issue: whether article 17-A encompasses the power to grant the relief requested.

Footnote 4: According to the court,

> "The proposed trust device . . . would allow [petitioners, the ward's brothers and sole distributees,] to channel their presumptive shares from her intestate estate to their charitable organizations in greater amounts than would be the case if such shares went first to them and then, net of estate tax, to such organizations" (*id*. at 216).

Footnote 5: No appellate authority has been found that permits an article 17-A guardian to make gifts.

Footnote 6: Instead she approved the annual gift-giving authority requested for five years, and only subject to a number of conditions intended to safeguard the ward's financial well-being.

Footnote 7: *Daly* is the only other case in which an article 17-A guardian has been assumed to have gift-giving powers. In the face of a request for authorization to make annual tax-free transfers to family members, the court limited its order to authorization for a single year, without prejudice to renewal "in future years" (*Daly* at 89).

Footnote 8: The *Schulze I* court also cited an ALR annotation by B.C. Ricketts, entitled *Power to Make Charitable Gifts from Estate of Incompetent* (99 ALR2d 946 [emphasis added]).

Footnote 9: Significantly, a number of those cases, where gifting was sought to minimize potential estate taxes, saw denial of petitions based on consideration of the ward's previously executed will and/or estate plan as inconsistent with the proposed gift. (*E.g. Matter of Turner v Turner*, 61 Misc 2d 153 [Sup Ct, Westchester County 1969].)

Footnote 10: The court in *Daly* (142 Misc 2d at 88) noted this distinction, but disregarded it, writing that to distinguish between previously capacitated adults and article 17-A wards "would offer [the latter] less opportunity in the law than persons who have come to know a disability later in life. . . . Rather, the court in pursuit of its equitable powers is called upon to do justice." It is worth noting that the Supreme Court has held that there is reasonable basis for distinguishing between persons with mental illness, and those with mental retardation and/or developmental disability. (*Heller v Doe*, 509 US 312 [1993].)

Footnote 11: One of the many criticisms of article 17-A is its inability to distinguish functional capacity along the continuum of ability that characterizes persons with mental retardation and developmental disability. (*See Matter of Chaim A.K., supra*.)

Footnote 12: The earliest legal writing distinguishing between "idiocy" and "lunacy" was the Statute de Prerogativa Regis dating from the late thirteenth century, giving the King control over an idiot's land, with the only limitation that he would not commit waste or destruction. At the idiot's death, the estate was rendered to his heirs. The King was afforded much less control over the property of a lunatic, lacking both custody over the lunatic's land, and any ability to take any profit for his own use. (Louise Harmon, *Falling Off the Vine*: *Legal Fictions and the Doctrine of Substituted Judgment*, 100 Yale LJ 1, 16-17 [1990].)

Footnote 13: According to the most influential treatise on the subject, Shelford's A Practical Treatise on the Law Concerning Lunatics, Idiots, and Persons of Unsound Mind (1833), the King delegated his parens patriae power over infants and idiots to the Chancellor who exercised that power as a matter of equity. As to lunatics, however, the Chancellor's power was only one of "administration." (Harmon, *Falling Off the Vine*: *Legal Fictions and the Doctrine of Substituted Judgment*, 100 Yale LJ 1, 17-18 [1990].)

Footnote 14: The earlier substituted judgment cases involved "gifting" funds for the maintenance of relatives of the "lunatic," and the petitioner in *Heeney* also made a request for such relief. In addition, however, he requested power to make various charitable contributions. Interestingly, the Chancellor wrote, "I cannot authorize the committee to be the almoner of the general charities of the lunatic," though he authorized modest sums to

be placed at the disposal of Mr. Heeney "for small donations, for temporary relief from want and suffering . . . in such a way as Mr. Heeney may deem fit" (*Heeney* at 329).

Footnote 15: This discussion is not intended to assume that John lacks capacity to make decisions or express his views about the relief requested. Because there was no hearing, the court was not able to determine the level or nature of John's capacities and incapacities. Nor, other than a unitary determination, would article 17-A support such a nuanced approach.

Footnote 16: An exception occurs when such "reading in" is necessary to preserve the statute's constitutionality (*e.g. People v Bailey*, 21 NY2d 588 [1968] [reading a hearing requirement into the statute providing indeterminate sentences for sex offenders]; *Matter of Rachelle L. v Bruce M.*, 89 AD2d 765 [3d Dept 1982] [substituting gender-neutral language in Family Ct Act § 532 to avoid constitutional infirmity]), not at issue here.

Footnote 17: Section 73 reads: "The courts in construing a statute should avoid judicial legislation; they do not sit in review of the discretion of the Legislature or determine the expediency, wisdom or propriety of its action on matters within its powers."

Section 74 reads, in pertinent part: "[T]he failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended."

Matter of Joyce G.S.
2010 NY Slip Op 20518 [30 Misc 3d 765]
December 22, 2010
Holzman, J.
Sur Ct, Bronx County
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[*1]

In the Matter of the Guardianship of Joyce G.S.

Surrogate's Court, Bronx County, December 22, 2010

APPEARANCES OF COUNSEL

McLaughlin & Stern, LLP (*Barbara Sloan* of counsel), for Werner Janssen, Jr., and others, petitioners. *Evan K. Kornrich*, guardian ad litem.

{**30 Misc 3d at 766} OPINION OF THE COURT

Lee L. Holzman, J.

In this application by the SCPA article 17-A guardians of Joyce's property, transferred from the Surrogate's Court, New York County, to this court, the threshold issue is whether this court has authority under the equitable doctrine of substituted judgment to approve the "tax saving" transactions proposed by the petitioners on Joyce's behalf.

Earlier this year, in *Matter of John J.H.* (27 Misc 3d 705 [2010]), Surrogate Glen held that under the common law, a court is precluded from exercising substituted judgment on behalf of article 17-A wards who never had the capacity to handle their own affairs{**30 Misc 3d at 767}. Consequently, that court concluded that the only avenue available for obtaining judicial approval of a gift on behalf of an article 17-A ward is for

the petitioners to be appointed guardians under article 81 of the Mental Hygiene Law and then seek gift-giving authority pursuant to section 81.21 of the Mental Hygiene Law. Notwithstanding the scholarly dissertation on the genesis of the doctrine of substituted judgment in England (*see Matter of John J.H.*, 27 Misc 3d at 709-710), for the reasons hereinafter stated, this court holds that, under the law as it presently exists, it has the power to invoke the equitable doctrine of substituted judgment to approve gifts or tax saving transactions on behalf of article 17-A wards.

In previous applications, three different judges of the Surrogate's Court, New York County, utilized the doctrine of substituted judgment to approve gifts on Joyce's behalf (*see* 23 Misc 3d 215 [2008, Roth, S.]; NYLJ, Sept. 3, 1996, at 30, col 1 [Preminger, S.] [also noting that in 1990, Surrogate Lambert approved gifts on Joyce's behalf]). Although several factors are often relevant in determining whether to approve a gift on behalf of persons who lack the capacity to handle their own affairs (*see* Mental Hygiene Law § 81.21 [d] [enumerating five factors together with "such other factors as the court deems relevant"]), such applications are granted "where the wards would not be adversely affected under the circumstances and where the wards themselves would likely make such gifts if they had the capacity to do so" (23 Misc 3d at 217).

Matter of John J.H. (27 Misc 3d at 705) questions the prior judicial approval of gift-giving applications on Joyce's behalf as well as other authority approving gifts on behalf of article 17-A wards based on the following analysis: (1) it is presumed that the mentally retarded and [*2]developmentally disabled persons who have guardians appointed pursuant to article 17-A never had the capacity to handle their own affairs; (2) the doctrine of substituted judgment is rooted in the English common law and applicable only to "lunatics," i.e., those who once were capable of handling their own affairs, but is inapplicable to "idiots," those who never had the capacity to handle their own affairs; and (3) section 81.21 of the Mental Hygiene Law enlarged the common law to make the doctrine of substituted judgment applicable to any article 81 ward, regardless of whether the ward was classified under the common law as a "lunatic" or an "idiot." This analysis led Surrogate Glen to conclude that as article 81 contains a provision expressly authorizing gift giving by fiduciaries for their wards, and article 17-A does not, a court lacks the authority and jurisdiction under either a statute or the common law to allow gift giving on behalf of article 17-A wards.

While there once was a certain philosophical logic in concluding that courts had no basis to employ substituted judgment for one who never possessed any judgment, the equitable doctrine of substituted judgment is a legal fiction, and in the modern era, it makes no practical sense to limit its application based upon an arcane philosophical distinction between the inherent capacities of a "lunatic" and an "idiot." For the following reasons, this court rejects the notion that it lacks the authority to invoke the doctrine of substituted judgment on behalf of an article 17-A ward: (1) for decades prior to the enactment of article 81 of the Mental Hygiene Law, which was effective on April 1, 1993, New York common law had evolved and courts no longer focused on any threshold distinction between a "lunatic" and an "idiot" before utilizing the doctrine of substituted judgment; (2) instead of abrogating or enlarging New York common law with respect to the doctrine of substituted judgment, section{**30 Misc 3d at 768} 81.21 of the Mental Hygiene Law codified the common law as it existed at the time of its enactment; and, (3) assuming, arguendo, which this court is not willing to do, that section 81.21 did, to some extent, abrogate or enlarge New York common law, this court would nevertheless still have the authority to consider the same factors enumerated in section 81.21 (d) in determining whether to approve a gift-giving application on behalf of an article 17-A ward.

In *Matter of Fairbairn* (56 AD2d 259, 264 [1977]), the court noted the expansion of the common-law doctrine with the following observation:

> "When the doctrine of 'substitution of judgment' originated, there were no gift or inheritance taxes, and so the courts were not asked to consider the tax advantages to an incompetent's estate of a distribution in her lifetime to the presumptive distributees. With the advent of such taxes they were often treated as a factor in decisions made by the courts as to whether a distribution should be made and the manner thereof" (citations omitted).

The breadth of the common-law doctrine was expressed by the Court of Appeals in *Matter of Hills* (264 NY 349, 353-354 [1934]) in the following language:

> "A court of equity, through its general jurisdiction over fiduciaries and its function of guardianship of incompetents, may, in proper case, direct the committee to act in behalf of the incompetent in accordance with what the court finds would, in all probability, have been the choice of the incompetent if he had been of sound mind" (citations omitted).

In determining whether the substituted judgment doctrine should be utilized by fiduciaries appointed pursuant to the predecessor statutes to article 81, the New York courts did not focus upon [*3]whether the ward would be classified as an "idiot" under centuries old English common law as a threshold issue before holding that the court had the jurisdiction and authority to utilize the substituted judgment doctrine (*see Matter of Fairbairn*, 56 AD2d at 259; *Matter of Garbow*, 155 Misc 2d 1001 [1992]; *Matter of Florence*, 140 Misc 2d 393 [1988]; *Matter of Turner v Turner*, 61 Misc 2d 153 [1969]; *Matter of Myles*, 57 Misc 2d 101 [1968]; *Matter of Carson*, 39 Misc 2d 544 [1962]). Moreover, *Matter of John J.H.* (27 Misc 3d at 705) is the only case in which a court concluded that it lacked jurisdiction to invoke the doctrine of substituted judgment on behalf of an{**30 Misc 3d at 769} article 17-A ward (*see Matter of Schulze*, 23 Misc 3d at 215; *Matter of Jackson*, NYLJ, Feb. 6, 1997, at 34, col 3; *Matter of Schulze*, NYLJ, Sept. 3, 1996, at 30, col 1; *Matter of Daly*, 142 Misc 2d 85 [1988]; *Matter of Hymes*, 102 Misc 2d 821 [1979]). In fact, in *Matter of Schulze* (23 Misc 3d at 215), the court expressly rejected the argument that it could not invoke the doctrine of substituted judgment for an article 17-A ward because article 17-A, unlike article 81, contains no express statutory authorization for gift giving. Similarly, in *Matter of Daly* (142 Misc 2d at 85), the court concluded that the doctrine of substituted judgment was equally available to wards under article 17-A and wards under either the then-existing articles 77 or 78 of the Mental Hygiene Law. This court concurs that there is no evidence of any legislative intent to remove this court's jurisdiction or power to act on behalf of an article 17-A ward with regard to an issue merely because article 17-A lacks specific provisions with regard to that particular issue while article 81 or one of its predecessors had or has such provisions.

It is germane that in enacting the Surrogate's Court Procedure Act, the Legislature exercised its "power under § 12(e) of article VI of the Constitution and shall in all instances be deemed to include and confer upon the (surrogate's) court full equity jurisdiction as to any action, proceeding or other matter over which jurisdiction is or may be conferred" (*see* SCPA 201 [2]), and that the proceedings enumerated in the SCPA are not exclusive (*see* SCPA 202). Furthermore, after the appointment of an article 17-A guardian, the Surrogate's Court may "entertain and adjudicate such steps and proceedings . . . as may be deemed necessary or proper for the welfare of such mentally retarded or developmentally disabled person" (*see* SCPA 1758). Accordingly, there appears to be no reason why the Surrogate's Court cannot utilize the common law or the

criteria set forth in the Mental Hygiene Law (§ 81.21 [d]) to approve a gift on behalf of an article 17-A ward. To hold otherwise requires an article 17-A guardian to incur the expenses and time involved in an article 81 proceeding to be appointed a guardian for the second time. The existing law does not mandate such a result. To the contrary, where it is found to be in the best interests of an article 17-A ward, the courts can employ other provisions of article 81, notwithstanding that the SCPA does not contain a similar, specific provision (*see Matter of Mark C.H.*, 28 Misc 3d 765 [2010, Glen, S.] [the same judge who decided *Matter of John J.H.*, 27 Misc 3d at 705]; and *Matter of Yvette A.*, 27 Misc 3d 945 [2010, Webber, S.]).{**30 Misc 3d at 770}

The issue remains whether the transactions proposed by Joyce's four article 17-A guardians, her two brothers, who are her presumptive distributees, an attorney and a financial advisor, should be approved under the doctrine of substituted judgment. The petitioners seek court approval of the following transactions: (1) transferring, without consideration, $200,000 from a revocable trust created for the benefit of Joyce during her lifetime by order of the Surrogate's Court, New York County, in 2008 (the revocable trust) to an irrevocable grantor trust (the grantor trust) for the benefit of Joyce's two brothers and their children; and, (2) then transferring assets having a value of approximately $20 million from the revocable trust to the grantor trust in exchange for the [*4]grantor trust providing an annual payment to Joyce equal to approximately 5.8% of the value of the transferred assets. The two brothers personally guarantee the annuity payments.

The stated twofold purpose of the application is: (1) permitting the transfer of assets between the revocable and the grantor trusts without incurring any present income tax liability; and (2) reducing estate taxes that are projected to be paid by Joyce's estate. Although the branch of the proposal providing for a 5.8% annuity payment to Joyce is an excellent rate of return in today's market, the proposal must be deemed, at least in part, a gift from Joyce to her family both because $200,000 would be transferred from her trust to their trust without consideration and because the stated purpose is to lower the taxes paid by Joyce's estate to benefit her brothers and their children.

Joyce, who is 59 years old, was born with Down syndrome and has been an SCPA article 17-A ward since 1971. According to the petitioners, she enjoyed a good relationship and visits with her brothers and their children prior to experiencing severe health problems at the end of 2008. The petitioners note that Joyce's life expectancy is

shorter than that of a person who does not suffer from Down syndrome. In support, they annex an affidavit by Joyce's current doctor, as well as articles which conclude that although individuals with Down syndrome now live longer than ever before, their life expectancy remains shorter than those who do not suffer from the condition.

Joyce comes from a family of considerable means, and the petitioners aver that her individual assets exceed $48 million. Joyce currently resides at an institution in Pennsylvania where she receives continuous nursing care. Between 2004 and 2008, Joyce's income allegedly exceeded her expenses by approximately{**30 Misc 3d at 771} $400,000 to $500,000 annually. Moreover, and although she suffered a major medical setback in December 2008 which increased her annual medical expenses by close to $200,000, her income over the next 10 years is expected to exceed the cost of her care by anywhere between $260,000 to $800,000 if the court denies the application, and significantly more if the court approves the application. Relying on conversations with administrators at the institution concerning projected cost increases over the next 10 years and the purported rate of return for the proposed annuity, the petitioners assert that it is highly unlikely that Joyce's income ever would be insufficient to meet her needs.

The guardian ad litem appointed for Joyce reports that he is of the opinion that Joyce, if competent, would make the transactions proposed herein in light of the close and loving relationship that she had with her presumptive distributees, her brothers, and their issue, and it is highly unlikely that Joyce will ever have a need for any of the assets that are to be transferred. Specifically, he notes the following: (1) there is the potential for a considerable tax advantage enuring to the ultimate benefit of his ward's siblings and their issue; and (2) there is "no risk or prejudice to (his) ward" as Joyce still retains approximately $28 million in assets and she will receive approximately $1.3 million annually from the annuity which is guaranteed by her two brothers who collectively have assets of approximately $84.5 million. The guardian ad litem has reviewed and is satisfied with the documents to be executed to carry out the proposal.

Notwithstanding that Joyce previously has made substantial gifts to members of her family and the result of the present proposal is that she will transfer in excess of 40% of the value of her total assets, the court concurs with the conclusion of the guardian ad litem. Specifically, Joyce retains more than sufficient assets to take care of all of her projected needs even in the event that her present medical condition improves and she

lives well beyond her life expectancy. Moreover, [*5]because Joyce's brothers are her presumptive distributees and, when her health was better, she enjoyed a close relationship with them and their children, there is every reason to believe that if she were competent, she would want the members of her family to receive the largest amount possible from her estate, provided that she retains more than sufficient assets to meet her own needs.

Accordingly, to the extent applicable to the facts of this application, the court considered the same factors enumerated in{**30 Misc 3d at 772} section 81.21 (d) of the Mental Hygiene Law and grants the application under the equitable common-law doctrine of substituted judgment.

Matter of Yvette A.
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Webber, J.
Sur Ct, New York County
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[*1]

In the Matter of the Guardianship of Yvette A.

Surrogate's Court, New York County, March 25, 2010

APPEARANCES OF COUNSEL

Frankfurt Kurnit Klein & Selz, New York City (*Patrick Boyle* and *Lisa A. Herbert* of counsel), for petitioner. *Aubrey Lees*, New York City, guardian ad litem. *Mental Hygiene Legal Service*, New York City (*James W. Drake* of counsel). *New York Civil Liberties Union*, New York City (*Lisa J. Laplace* of counsel), and *New York Lawyers for Public Interest*, New York City (*Roberta Mueller* of counsel), for Yvette A., as a plaintiff in a related class action. [*2]

{**27 Misc 3d at 946} OPINION OF THE COURT

Troy K. Webber, S.

In this contested proceeding, petitioner Angel A. seeks appointment as guardian of the person and property of his daughter, Yvette A., an alleged mentally retarded person under section 1750 of the Surrogate's Court Procedure Act. Petitioner also seeks the appointment of Rita A., his wife and Yvette's stepmother, as standby guardian and of Natalie A., Yvette's half-sister, as first alternate standby guardian. The petition is opposed by all of the other parties, including Mental Hygiene Legal Service (MHLS), New York Civil Liberties Union (NYCLU), and New York Lawyers for Public Interest (NYLPI),[FN1]

as well as by the guardian ad litem (GAL) for Yvette. The NYCLU and NYLPI have also requested that the matter be referred to the Supreme Court (New York County) for a guardianship proceeding under article 81 of the Mental Hygiene Law rather than under article 17 of the SCPA.

The following facts are undisputed. Yvette was born on October 6, 1966 and was diagnosed with mental retardation by the time she was 2½ years old. Yvette's mother died in 1969 and Angel A. took care of her at home for about 1½ years. Then, in 1971, Angel A. placed Yvette at the Willowbrook State School. She remained there until March 30, 1977, when, as a result of a class action litigation on behalf of the residents of Willowbrook,[FN2] she was transferred to the Episcopal Social Services group home. She has remained there since that date.{**27 Misc 3d at 947}

Yvette is blind, has a history of seizures and anxiety, and exhibits aggressive and self-injurious behavior. She requires assistance with daily living, including feeding and hygiene. While she can make simple choices such as choosing certain food and drink, she is unable to attend to her finances, make complex decisions, medical or otherwise, or maintain her medical appointments. Yvette cannot self-medicate, is not travel-trained and, in part as a result of her blindness, requires one-on-one supervision at all times. Yvette can communicate by simple sounds such as asking for soda and requesting hugs when she meets someone. She currently [*3]attends a day program at the Esperanza Center twice a week. Petitioner, together with the CAB,[FN3] has been Yvette's corepresentative since 2006.[FN4]

The petition is supported by certifications from two medical doctors, both of whom have concluded that Yvette is severely and permanently mentally retarded[FN5] and that she does not have the capacity to make health care decisions, as defined by subdivision (3) of section 2980 of the Public Health Law.[FN6] Both doctors have also concluded that Yvette's presence at a hearing should be dispensed with in view of her inability to understand the proceedings and the possibility that her attendance might cause her harm.

Hearing Testimony

A hearing was held before me on February 25, 2010.[FN7] Petitioner testified that he seeks guardianship of his daughter because he loves her and wants to be involved in her care. He further testified that he regretted having not been in her life for a substantial period of time. According to petitioner this absence{**27 Misc 3d at 948} was due to his inability to cope with Yvette's condition at the same time as he was dealing with the mental and emotional stresses of having two children who are disabled.[FN8] Petitioner acknowledged that he had minimal to no contact with Yvette for a period of approximately 16 years, from 1990 to 2005.[FN9] In essence, petitioner severed all ties [*4] to Yvette during this period.[FN10] He also stated that he had believed it was in Yvette's best interests that he leave Yvette's care to the home, as well as to the other entities having an interest in her welfare as a result of her being a member of the Willowbrook class, which he had regarded as better equipped than he to meet her needs.[FN11] However, according to petitioner, he is now very concerned for his daughter's health and safety in view of certain incidents that have come to light and recent medical developments. As a result, he is considering moving Yvette to another facility and is seeking permission to investigate and possibly initiate a lawsuit against the appropriate parties on Yvette's behalf.

Petitioner conceded that he has not developed a plan for Yvette's continued care and treatment. Further, he was unclear as to her exact medical condition and prognosis.

Objectants have raised concerns as to petitioner's motives and commitment to Yvette, largely in light of (1) his past long period of noninvolvement with Yvette, (2) the uncertainty as to the level of the involvement that he will maintain in the future, and (3) objectants' fear of harm to Yvette if petitioner fails to be involved in her care and again becomes unreachable to give authorizations necessary to her well-being. The GAL for her part has questioned petitioner's account of his level of current involvement in Yvette's care. Objectants have also raised{**27 Misc 3d at 949} concerns regarding petitioner's plans to move Yvette from the facility in which she currently resides.[FN12] MHLS and the GAL argue that, in view of the nature of Yvette's physical and mental disabilities, moving her from the only home and people she has known for more than 33 years would be an extreme hardship for her and is unnecessary absent an indication that they pose some current danger to her. MHLS and the GAL also oppose the appointment of the proposed

standby[FN13] and first alternate standby guardians, who are not actively involved in Yvette's life.[FN14] As stated above, the NYCLU and NYLPI have requested that this petition be [*5]denied and the matter referred for a Mental Hygiene Law article 81 guardianship proceeding in the Supreme Court. In support of such request, they argue that, under all of the circumstances, a guardianship tailored to Yvette's special needs under article 81 would afford her more protection than would an SCPA article 17-A guardianship. Their position is based upon certain assumptions that warrant the following examination.

Discussion

Article 17-A, enacted some 40 years ago, provides for the appointment of a guardian for a mentally retarded or a developmentally disabled person.[FN15] Article 81 was enacted in 1992 to provide for the appointment of guardians for "persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs . . . [and which] permits them to exercise the independence and self-determination of which they are capable" (Mental Hygiene Law § 81.01). However, as the preamble to article 81 makes clear, it was designed as a more flexible and less intrusive {**27 Misc 3d at 950} replacement for the century-old system of committee[FN16] and more recent system of conservatorship.[FN17] Article 81 does not purport to repeal article 17-A.[FN18] Moreover, the legislative history of article 81 does not suggest that it was further intended as an alternative to,[FN19] or amendment of,[FN20] SCPA article 17 or 17-A.

Although, article 17-A does not specifically provide for the tailoring of a guardian's powers or for reporting requirements similar to article 81, the court's authority to impose terms and restrictions that best meet the needs of the ward is implicit in the provisions of section 1758 of the SCPA, under which

> "the court shall have and retain general jurisdiction over the mentally retarded . . . person for whom such guardian shall have been appointed, to take of its own motion [*6]or to entertain and adjudicate such steps and proceedings relating to such guardian, . . . as may be deemed necessary or proper for the welfare of such mentally retarded . . . person."

Moreover, under SCPA 1755[FN21] the court has the power and authority to modify an existing order appointing a guardian of the person or property of an article 17-A ward to adapt the{**27 Misc 3d at 951} terms of the guardianship to new circumstances.[FN22] The statute does not suggest that the extent and substance of such "modification" are in some respects more limited than the needs of the ward herself. Indeed, the legislative history of article 17-A militates against reading the statute as thus limited.[FN23] By logical extension, a 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.

Based on the undisputed facts, the documents submitted, and the testimony, the court finds that Yvette is a mentally retarded person whose condition is permanent, thus meeting the requirements of SCPA 1750 (1). The court also finds that it is in Yvette's best interests to have her father appointed as guardian of the person under SCPA article 17-A. [FN24] However, mindful of petitioner's history as well as the grounds for concern as to his continued involvement in Yvette's care, the court concludes that such guardianship should not be without restriction. Accordingly, petitioner is directed to file duly acknowledged initial and annual reports as guardian of the person with the Guardianship Department of this court. The initial report is due within six months of the date letters are issued. In each report, petitioner must identify his current address and telephone number(s). He must also include Yvette's current residence, list the dates and times of his visits to her since the date of his appointment (a minimum of six times) or the last report (a minimum of 12 times per calendar year), as is applicable, report on Yvette's current medical condition (identifying the medical or other reports on which such report [*7]is based) and any changes in her care since the date of his appointment or the last report, as is applicable. In the same report, he shall identify Yvette's daily activities, including her frequency of attendance and participation at the day program, list the governmental or other financial{**27 Misc 3d at 952} benefits that are received by or for her, and identify any proposed plan that he has to change Yvette's living arrangements, daily activities or care and the reason(s) for such proposed change(s).

The annual report shall be due on or before the 1st of March following the close of the calendar year immediately preceding.

The CAB will continue its role in overseeing Yvette's care and as her representative as provided and defined in the Willowbrook permanent injunction referenced above.[FN25] Petitioner is prohibited from taking any steps to remove the CAB as a representative for Yvette. Petitioner is also restrained from moving Yvette or changing her day program without further order of this court.

Accordingly, letters of guardianship of Yvette's person shall issue to petitioner, subject to the above requirements and restrictions, upon his qualifying according to law.

The court also finds that sufficient proof has been presented for the appointment of a guardian of the property to protect Yvette's rights and interests. Accordingly, restricted letters of guardianship of the property of Yvette are granted to petitioner. Petitioner is restrained from compromising any cause of action and from collecting any proceeds thereof and from taking possession or control of any of Yvette's property until further order of this court. Details of any pending litigation or of any information uncovered which might lead to possible litigation on Yvette's behalf must be included in petitioner's initial or subsequent annual reports, as is applicable.

Based on Rita A. and Natalie A.'s noninvolvement in Yvette's life, petitioner's requests for their appointment as standby guardian and first alternate guardian, respectively, are denied without prejudice.

Footnotes

Footnote 1: The NYCLU and NYLPI are co-counsel for Yvette in her capacity as a plaintiff in the Willowbrook class action. (*See* n 2 below.)

Footnote 2: In 1972 a class action litigation was commenced in the United States District Court for the Eastern District of New York charging that the State of New York violated the constitutional rights of the residents of the Willowbrook State School. That action, now captioned *New York State Assn. for Retarded Children v Paterson* (72 Civ 356, 357) (JRB) (Willowbrook class), is currently pending before the Honorable Raymond J. Dearie. A permanent injunction, dated March 11, 1993, was issued which granted class members enhanced rights, including representation of members by the Consumer Advisory Board (CAB) to protect members' interests.

Footnote 3: The CAB is an independent agency established pursuant to the provisions of sections S and W of appendix A to the final judgment entered on May 5, 1975 in the

Willowbrook class action. A copy of the order establishing the CAB is reported at *New York State Assn. for Retarded Children, Inc. v Carey* (393 F Supp 715 [ED NY 1975]). The mandate of the CAB is to act in loco parentis and to provide necessary advocacy for Willowbrook class members above the treatment and services provided to members by the New York State Office of Mental Retardation and Development Disabilities (OMRDD) for as long as any such class member shall live (*see* Willowbrook permanent injunction appendix ¶ 7).

Footnote 4: The CAB had been Yvette's sole representative from 1994 to 2006.

Footnote 5: The Metro North I.C.F. psychological summary by the clinical coordinator submitted by NYCLU and NYLPI in their opposition papers also states that Yvette is mentally retarded, but that based on recent tests Yvette's condition is of profound mental retardation as opposed to severe.

Footnote 6: SCPA 1750.

Footnote 7: Pursuant to SCPA 1754 (3), based on the medical certifications, it was determined that Yvette's presence at the hearing be dispensed with.

Footnote 8: Petitioner and his ex-wife, Rita A. have a son, Yvette's half-brother, who has cerebral palsy and who underwent surgery in 1989 and was suffering from complications of that surgery in 1989/1990.

Footnote 9: Petitioner testified that he sporadically visited and was kept apprised of Yvette's care by relatives who also sporadically visited Yvette from 1989 to the mid-1990s.

Footnote 10: Since 2006 petitioner testified that he has become actively involved in Yvette's care and visits with her for one-half hour or more, on a weekly or biweekly basis.

Footnote 11: The record reflects that petitioner could not be reached in 2001 when his consent was required for a necessary medical procedure for Yvette. Petitioner testified that he had no knowledge of any attempts to contact him or obtain his consent. It is unclear why the home (or any other entity or person involved in Yvette's care) did not use other options available under the OMRDD regulations or Public Health Law, including applying to this court to obtain the necessary consent.

Footnote 12: Petitioner testified that he has not explored options for alternative living arrangements and has no current plans to move her, but hopes ultimately to move her to a more private and secure home preferably outside of New York City.

Footnote 13: Specifically, objectants questioned whether Rita A. would be able to devote

time to Yvette's care because she is the primary caretaker of her adult disabled son.

Footnote 14: Petitioner testified that Rita A. resumed visiting Yvette on a regular basis in January of this year, but that Natalie A. has not visited Yvette on a regular basis since they were both children, circa late 1980s or early 1990s.

Footnote 15: As originally enacted in 1969, article 17-A applied only to a person with mental retardation. The statute was repealed and replaced by the current statute in 1989 to address the needs of developmentally disabled persons.

Footnote 16: Repealed Mental Hygiene Law article 78 derived from chapter 17, title 6 of the Code of Civil Procedure originally revised from Laws of 1874 (ch 446, tit 2, § 1), amended by Laws of 1894 (ch 504) and Laws of 1895 (ch 946).

Footnote 17: Repealed Mental Hygiene Law article 77 was enacted by Laws of 1972 (ch 251).

Footnote 18: In the 1990 amendment to article 17-A the Legislature directed a study to reevaluate the statute and OMRDD formed a working group to study and suggest revisions to article 17-A to reflect guardianship reforms similar to article 81, but no legislation resulted (*see* Bailly, Practice Commentaries, McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.01, at 10).

Footnote 19: *See Matter of Lavecchia*, 170 Misc 2d 211, 213 (Sup Ct, Rockland County, Nov. 6, 1996) (article 81 was not intended as an alternative to SCPA articles 17 and 17-A appointment of a guardian for a minor or a mentally retarded or developmentally disabled person, respectively]).

Footnote 20: *See Matter of Schulze*, 23 Misc 3d 215 (Sur Ct, NY County 2008).

Footnote 21: SCPA 1755 provides that

"any person on behalf of any mentally retarded . . . person for whom a guardian has been appointed, may apply to the court having jurisdiction over the guardianship order requesting modification of such order in order to protect the mentally retarded . . . person's financial situation and/or his or her personal interests . . . The court shall so modify the guardianship order . . . if the interests of justice will be best served including, but not limited to, facts showing the necessity for protecting the personal and/or financial interests of the mentally retarded . . . person."

Footnote 22: As noted in the text, under SCPA 1758 the court retains general jurisdiction

over the mentally retarded person for whom it appointed a guardian. The power to modify the guardianship order under SCPA 1755 is an exercise of such general jurisdiction.

Footnote 23: See the legislative history of the repealed 1969 version of the statute. (Governor's Approval Mem, 1969 NY Legis Ann, at 586 ["The bill will also enable a protective plan to be tailored to the individual needs of a retarded person by providing a broad flexibility in the types of guardianships that can be utilized"].) The 1989 enactment specifically provides for modifications, i.e., tailoring of powers (SCPA 1755, *supra* n 21).

Footnote 24: SCPA 1754 (5).

Footnote 25: *Supra* n 3.