

## Memorandum of Qualified Support

### COMMITTEE ON DISABILITY RIGHTS

Disability #1

June 9, 2017

A. 8171

By: M. of A. Lavine

Assembly Committee: Codes

Effective Date: 180<sup>th</sup> day after it

shall have become a law

**AN ACT** to amend the surrogate's court procedure act and the judiciary law, in relation to replacing the term intellectually disabled with developmentally disabled; and guardianship and health care decisions of persons with developmental disabilities; and to repeal section 1750-a of the surrogate's court procedure act relating thereto.

**LAW & SECTION REFERRED TO:** Surrogate's Court Procedure Act Article 17-A

#### Introduction

Article 17-A of the Surrogate's Court Procedure Act ("SCPA"), which authorizes the appointment of a guardian for individuals with intellectual and other developmental disabilities, may be declared unconstitutional and must be reformed. Thus, the Committee on Disability Rights writes with qualified support of A. 8171 (Bill), introduced on June 1, 2017.<sup>1</sup>

#### Background

In New York State, guardianship of individuals with intellectual disabilities and other developmental disabilities may be sought either pursuant to Article 17-A of the SCPA or Mental Hygiene Law ("MHL") Article 81. A guardianship proceeding under Article 81 may be commenced in Supreme or County Court and tailors any deprivation of rights to an individual's functional limitations rather than a diagnosis. Article 81 explicitly requires the court to impose the least restrictive form of intervention, taking into account community supports, resources and existing advanced directives that may render guardianship unnecessary (MHL §§ 81.02[a][2]; 81.03[e]). The venue of 17-A proceedings is Surrogate's Court. In contrast to Article 81, the basis for appointing a 17-A guardian is determined by whether the person has a qualifying diagnosis of an

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<sup>1</sup> Two other bills are pending to amend Article 17-A (see A.5840 [Lavine]; S.5842 [Hannon]). The Committee concludes that the bills do not address sufficiently the constitutional deficiencies of Article 17-A and thus cannot recommend passage without a strong statement that future chapter amendments are required.

intellectual or other developmental disability.<sup>2</sup> On its face, Article 17-A provides only for the appointment of a plenary guardianship of the person, property, or person and property, and does not expressly authorize or require the Surrogate to dispose of the proceeding in a manner least restrictive of the individual’s rights. Indeed, Article 17-A does not even require the court to find that the appointment of a guardian is necessary (*cf.*, MHL § 81.02[a][1]). The plenary nature of Article 17-A has been compared to a “blunt instrument” (*Matter of Chiam A.K.*, 26 Misc 3d 837 [Surrogate's Court, New York County 2009]). Given the many substantive and procedural variations between Article 17-A and Article 81, commentators have long called for reform or “modernization” of Article 17-A (*see, Bailly & Nick Torak, Should we be talking? - Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 Albany Law Review 807 [2012]). A federal lawsuit was commenced on September 26, 2016, in the United States District Court for the Southern District of New York against the State seeking to enjoin the courts from appointing guardians pursuant to Article 17-A.<sup>3</sup> The lawsuit alleges, among other things, that Article 17-A violates the due process clauses and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the Americans with Disabilities Act.

### Analysis

The Committee on Disability Rights offers qualified support for A. 8171 because should the Bill become law, it would quiet the constitutional cloud over Article 17-A. The Bill addresses and cures present deficiencies related to notice, the right to counsel and eliminates guardianship based upon diagnosis alone. In addition, the clear and convincing evidence standard is codified, as well as a decision-making standard for guardians that takes into account the preferences of the person with a developmental disability, if known. Finally, the Bill, if enacted, would require annual reporting by guardians of the person. The bill, however, should be amended to address the following concerns:

- 1). **§ 6** of the Bill requires the petitioner to plead whether alternatives to guardianship have been considered, including but not limited to, "the execution of a health care proxy, power of attorney, representative payee, service coordination, and/or other social support services, other available supported or shared decision-making, and surrogate decision-making committee, and reasons for the declination of such alternatives." The Committee endorses the pleading

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<sup>2</sup> In 2016, article 17 was amended to omit all references to guardianship for mentally retarded persons and the term “mental retardation.” Substituted is the phrase “guardians of persons who are intellectually disabled and developmentally disabled.” (L.2016, c. 198, § 9, eff. July 21, 2016). As now codified, section 1750 is guardianship of persons who are intellectually disabled and section 1750-a is guardianship of persons who are developmentally disabled. A. 8171 uses the term “developmental disability” exclusively. An intellectual disability is a developmental disability by definition. (*see* MHL § 1.03[22]).

<sup>3</sup> *Disability Rights New York v. New York State*, 1:16-cv-0733 (AKH).

requirements but notes an omission in the Bill text because the court is not required to find that lesser restrictive alternatives are not suitable to meet the needs of the respondent before appointing a guardian.

2). § 8 of the Bill amends current SCPA 1754 and encompasses among other things, the findings of fact required to be made by the court before a guardian is appointed. The Bill text of new 1754 (6) & (7) tracks Article 81 (*see* MHL§ 81.15 [b]), but reversing the order of these provisions would be preferable. The findings of fact listed at paragraph 7 should precede the court's legal conclusion (now found at paragraph 6) that the appointment of a guardian is necessary.

3). § 9 of the bill addresses "Modification Order." The section should be retitled to "Modification and Termination Order." Further, the legislation should expressly recognize that persons who are developmentally disabled have the potential to grow and acquire more skills as they age, dispelling the archaic notion that people with developmental disabilities are perpetual children. Therefore, the Committee recommends that a 17-A guardian should be obligated annually to report under the proposed section 1762 any growth in the person's functional capacity and steps taken by the guardian to maximize growth of the person's functional abilities and decision making abilities with assistance. If growth is reported then the guardian, must apply to the court to modify or terminate the guardian's powers as the individual acquires capacity to function in previously enumerated domains within ten days of such annual report (*cf.* MHL§ 81.31[e]).

4) There should be a definitional section added to clarify terms. (*cf.* MHL§ 81.03). Terms that might be defined and adopted from Article 81 include "available resources" and "least restrictive intervention." Special consideration should be given to adding a definition of "Supported Decision Making." The Developmental Disabilities Planning Council (DDPC) in New York State is funding a five year project to promote Supported Decision Making as an alternative to guardianship for people with developmental disabilities (*See*, <https://ddpc.ny.gov/supported-decision-making-0>). The Committee recommends including an appropriate definition of "**Supported decision-making.**"

5) With the addition of a definitional section, the Committee would also recommend that proposed section 1750 be amended and that "available resources" be substituted for "unmet needs," a term that is not defined.

6) The Committee recommends that there be an express provision added to the legislation providing for retention of rights (*cf.* MHL 81.29[a]). A 17-A respondent should retain "all powers and rights except those powers and rights which the guardian is granted."

7) Finally, for purposes of drafting, the Committee observes that SCPA Article 17-A proceedings are typically disposed by "Decrees" rather than "Orders and Judgments."

### **Conclusion**

This Bill would amend Article 17-A of the SCPA in an effort to address the due process concerns that have been raised by several New York State Surrogate Court Judges in their written decisions in certain 17-A Guardianship matters as well as by Disability Rights New York.

With litigation pending in the Southern District of New York, brought by Disability Rights New York, seeking to have SCPA Article 17-A declared unconstitutional, there is grave concern that the decision of that court could dramatically impact 48 years of guardianships established pursuant to this statute.

Amending the statute at this time is a better solution than the possibility of having the entire statute declared unconstitutional, thereby calling into question the authority of guardians acting in good faith pursuant to that statute for the last half century.

The Committee on Disabilities Rights offers **qualified support** for this legislation in order to address the issues raised in the pending federal litigation. Subsequent to the enactment of this legislation, we hope that further issues, if any, would be addressed with subsequent legislation.