



Guardianship Reform: Where are we now and how did we get here?

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Roadmap of Presentation

- I – History of 17-A & Reform Efforts
- II - DRNY Lawsuit
- III – Law Revision Commission
- IV – Current Trends/Cases of Interest
- V – Questions/Comments



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Part I: History of 17-A Reform in a Nutshell



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Article 17-A of the Surrogate's Court Procedure Act

1969 – law originally enacted (mainly at behest of The Arc New York and its families) & applied only to persons with "mental retardation"

1989 – Original 17-A repealed and replaced with current version, applicable to those with developmental disabilities and the "mentally retarded"

1992 – Article 81 enacted – some overlap with Article 17-A but more complicated and costly



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Olmstead v. L.C. (U.S. Supreme Court, 1999)

- Held that States are required to provide community-based services for individual with disabilities (i.e., use of the least restrictive setting) as long as appropriate, the individual does not oppose the community based service, and it can be reasonably accommodated by the State
- Not until 2012...NY creates "Olmstead Plan Development and Implementation Cabinet" to advise Governor on compliance with Olmstead decision and to suggest changes in law to comply



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NY Olmstead Report

- Issued October 2013
- Identified 17-A guardianship as one of two areas requiring legal reform
- Stated that Olmstead requires that guardianship only be imposed if necessary and in the least-restrictive manner possible
- Pointed out basis for 17-A is diagnosis driven (as opposed to functional capacity), hearings are not always required, and lack of decision-making standard for routine decisions that includes the point of view of the individual under guardianship



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17-A Workgroup

- As a result of Olmstead Report, Roger Bearden (then Governor's Olmstead counsel and now General Counsel to OPWDD) formed a workgroup to discuss changes to 17-A
- Workgroup included a range of individuals: practitioners, a family member, DRNY, The Arc New York counsel, NYCLU counsel, PADD counsel, private attorneys, MHLS, and Chapter counsel
- Meetings held from Nov. 2013 - Feb. 2015 to draft proposal



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Legislative History

- 2015 - S. 4983 (came from "Bearden workgroup")
 - Bill now "dead"
- Sept. 2016 – DRNY files suit alleging 17-A unconstitutional (unhappy with lack of progress in legislature)(more on this in a bit...)
- May 2017 – The Arc NY gets a bill introduced seeking changes (S. 5842) – stalled in legislative process
- June 2017 – More "onerous" version of The Arc bill introduced – also stalled
- 2019 Legislative Session -- ?? Anticipated proposal from New York Law Revision Commission and possibly others....



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Part II: DRNY Challenge to Constitutionality of 17-A



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What is Disability Rights New York (DRNY)?

- Non-profit seated in NY but federally funded under the DD Act
- Supposed to advocate for individuals with I/DD
- Known to file lawsuits – see suit re: NYS failure to discharge adults from out-of-state residential schools, suit against landlords for not allowing service animals on premises, etc.



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What is the basis of DRNY's lawsuit?

- Equal Protection Problems - federal constitution provides that no state can deny any person "equal protection of the law"
- DRNY claims because NYS has two different laws for guardianship Article 81 (for any disabilities) and Article 17-A (only for I/DD), that people with I/DD aren't equally protected by the law BECAUSE provisions are different
- Due Process Violation Problems – federal constitution again prohibits government from taking away life, liberty, or property w/o due process
- They claim granting guardianship removes "liberty" and that the process in 17-A doesn't meet constitutional safeguards



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What does the DRNY suit seek?

- Sept. 2016 – DRNY files suit in federal court alleging 17-A is unconstitutional & seeks:
 - Declaration that 17-A is unconstitutional
 - Injunction requiring notice to every individual who has a 17-A guardian telling them they have a right to terminate or modify their guardianship
 - If anyone takes up the offer in the notice, courts must hold a hearing using “clear and convincing evidence” and applying the substantive and procedural rights in Article 81
 - Disallow state courts from issuing any other 17-A decrees until the law is revised



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Status of DRNY Suit

- Aug. 2017 – Defendants motion to dismiss the case was granted (based on technical legal grounds – not “on the merits”)
- 2018 – DRNY appealed the dismissal; oral arguments were held on 8/16/18 – decision forthcoming
- Link to oral argument here:
<http://www.ca2.uscourts.gov/decisions/isysquery/a3fe6238-d548-4b77-8983-5c87a656f941/1/doc/17-2812.mp3>



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Bottom Line

- Even if DRNY dismissal is upheld, DRNY has option of filing similar suit in state court; if dismissal is overturned, case still needs to proceed on the merits in federal court
- Will be a while before we know how this will impact our legislative process and what pressure this will apply
- Informal comments from State Legislators indicate that they expect reform will be a long process



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Part III: Reform Efforts Under NYS Law Revision Commission

- Main concept is seeking to obtain consensus.
- Interviewing parents, MHLS, DRNY, attorneys from around the state and other professionals who work with individuals with disabilities as well as professionals from other states that have a two track system.
- Hope to obtain some form of consensus and have a legislative proposal that has been approved by major stakeholders for introduction in the 2019 legislative session.



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Part IV: Current Trends/ Cases of Interest

- Sloane v. M.G. (NY County Supreme Court → 1st Dep't)
- MG – 80 y/o man lived in CR for 25 years prior to hosp. admission
- Suffered heart attack, anoxic brain injury resulting in permanent vegetative state/dependent on ventilator
- Family member/guardian tried to remove life sustaining treatment under 1750-b and MHLS objected claiming: (1) 1750-b shouldn't be used because MG previously had capacity, and (2) using 1750-b violates equal protection
- Court held that equal protection isn't violated because people with ID/DD are differently situated since many of them never had capacity – unlike people who would normally use the Family Health Care Decisions Act
- M.G. died prior to the court's decision



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Part IV: Current Trends/ Cases of Interest

- In re: Anna E. (App. Div., 2nd Dept.)
- Parents of 51 y/o woman applied for 17-A g'ship – trial court denied the petition and parents appealed
- Anna has cerebral palsy, 24-hour supervision, can't feed herself – developmental age of ~ 4 mos.
- Appeals court held that Anna met the standard for 17-A guardianship and there was no reason the trial court should have denied the petition
- Court remanded and ordered trial court to issue decree naming the parents Anna's 17-A guardian
- Trial Court made decision that 17-A was not appropriate because Article 81 was an available option and was less restrictive, ignoring the fact that 17-A is on the books.



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Part IV: Current Trends/ Cases of Interest

- A host of other cases preceding *Anna F.* where Surrogates denied a 17-A Application due to it not being appropriate or the least restrictive alternative and directing family to seek out an alternative.
- In at least one case, *Matter of Cronin*, Court sought to determine how a Trust was being utilized in the context of the life of an individual with a disability in the context of a 17-A proceeding.
- Continuing Communication and Education is required.



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Questions? Comments?



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