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Guardianship Through the Ages: Guardianship Reform and Decision-Making Supports



Panel Presenters

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Guardianship Reform: From Surrogate Decision Maker to Supported Decision-Making

Lawrence Faulkner, Esq.

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Emerging consensus

- ▶ Do not look for what a person with a disability cannot do and do it for them.
- ▶ Look for what we need to do to make it possible for that person to do those things for themselves

How We Got Here!

- ▶ Brief Legal History of surrogate-decision making in NYS

- ▶ - Prior to 1969 Committee of the Incompetent

- Judicial finding of incompetent, loss of civil rights and control of person and property

- 1969 Guardian of Persons with Mental Retardation (SCPA 17-A Guardians)

- Amendments include: IDD, ID and 1750-b Medical Decision Making

- At the time institutional placement or maintenance at home.

- 1972 Conservatorship: Preference for conservatorships, No declaration of incompetence needed

- 1969 -1993: Guardianship of Persons with DD, Committee of the Incompetent, Conservatorship

- 1993 - MHL Article 81 Guardianship, Committee of the Incompetent and Conservatorship repealed.

Current Tools for Surrogate-Decision Making

▶ So Now:

- ▶ two guardianship statutes
- ▶ HealthCare Proxy statute (PHL 29-c) (1990)
- ▶ Healthcare Decisions act for persons with I/DD, SCPA Section 1750-b (2003)
- ▶ Family HealthCare Decision Act (PHL 29-cc and ccc) (2010)
- ▶ Power of Attorney (GOB 5-150B)
- ▶ Surrogate Decision-Making Committees MHL Article 80
- ▶ OPWDD Regulations 14 NYCRR 633.11
- ▶ Anything missing?

“Issues” with SCPA 17-A

▶ SCPA Art. 17A

- ▶ Child for life, Art 17 is Guardian of Minors
- ▶ Limited right to counsel
- ▶ Limited right to a hearing and jury and only over 18.
- ▶ No requirement to consider other less restrictive alternatives
- ▶ Based on medical condition, not functional abilities or limitations
- ▶ No reporting on the continuing condition of the individual or what the Guardian of the Person has or is doing. Only Guardian of the Property provides “reports.”
- ▶ Best Interest test, rather than what the protection from harm and inability to recognize danger
- ▶ Reflect, how does this help the individual become able to make their own decisions?

Guardianship: A Tool for Independent Living

- ▶ Report from the Commissioner of the New York State Office for Mental Retardation and Developmental Disabilities as required by Chapter 516 of the Laws of 1990.
- ▶ Draft prepared for the Commissioner, 1995 never released.
- ▶ Some probable conclusions:
 - ▶ Inclusion of due process rights such as counsel and a hearing
 - ▶ Provisional for additional information for the court
 - ▶ Need for a limited or tailored guardianship
 - ▶ Decision based upon a functional analysis of the individual's abilities
 - ▶ Need for training of guardians.

Some other considerations

- ▶ Olmstead v L. C. (U.S. Supreme Court, 1999)
 - ▶ Held that states are required to provide community-based services for individuals with disabilities (use of least restrictive setting) as long as appropriate, the individual does not oppose the service and it can be reasonably accommodated.
 - ▶ NY Olmstead Report Issued October 2013
 - ▶ Identified guardianship as needing reform:
 - ▶ “The Olmstead Cabinet also recommends reform to law governing guardianship over people with developmental disabilities. Community integration includes the ability of people with disabilities to make their own choices to the maximum extent possible. Guardianship removes the legal decision-making authority of an individual with a disability and should, consistent with Olmstead, only be imposed if necessary and in the least restrictive manner.”

Other Considerations, Olmstead, continued

- ▶ “Under Article 17A, the basis for appointing a guardian is diagnosis driven and not based upon the functional capacity of the person with disability. A hearing is not required, but if a hearing is held, Article 17A does not require the presence of the person for whom guardianship is sought. Additionally, Article 17A does not limit guardianship rights to the individual’s specific incapacities, which is inconsistent with the least-restrictive philosophy of Olmstead. Once guardianship is granted, Article 17A instructs the guardian to make decisions based upon the “best interests” of the person with a disability and does not require the guardian to examine the choice and preference of the person with a disability.”

Other Considerations, continued:

- ▶ United Nations Convention on the Rights of Persons with Disabilities (CRPD), Article 12 (2006):
 - ▶ 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
 - ▶ 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
 - ▶ 3. States Parties shall take appropriate measures to provide access by persons with disabilities with the support they may require in exercising their legal capacity.
 - ▶ 181 states and European Union have signed, not the US, President Obama made US a signatory but Senate has not agreed to have US join the Convention.

Supported Decision-Making

- ▶ Emerging consensus:
 - ▶ Do not look for what a person with a disability cannot do and do it for them.
 - ▶ Look for what we need to do to make it possible for that person to do those things for themselves
- ▶ Is this a challenge to all guardianship laws, even those which identify what a person cannot do and appoint a surrogate to only do those things?
- ▶ Matter of Robert C.B., May 15, 2020, Surrogate's Court, Dutchess County
 - ▶ Role for supported decision making
- ▶ Matter of Capurso (2019, Surrogate's Court, Westchester)
 - ▶ Role for reporting changes and growth of the individual
 - ▶ Informal and formal supports, available alternatives to plenary guardianship

SDM What is It

- ▶ “Supported decision-making means a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions including decisions related to where the adult wants to live, and where the adult wants to work, without impeding the self-determination of the adult.” Texas statute
- ▶ What do we all do when making many decisions like buying a car, accepting a job offer, or picking a color of paint for the living room?
- ▶ SDM intended to protect, honor and empower the right of adults to make their own decisions and is intended to provide the supports needed to assist the individual with I/DD in making those decisions for themselves. In this way it is a shift away from stripping a person of their rights with the appointment of a surrogate decision maker and is a natural continuation of the shift away from the “child for life ”expectation.

SDM How

- ▶ Several states have enacted SDM is legislation including Alaska, Delaware, District of Columbia, Indiana, Nevada, North Dakota, Rhode Island, Texas, Wisconsin.
- ▶ In 2015 the New York State Developmental Disabilities Planning Council (DDPC) awarded a grant to a consortium of Hunter College/CUNY, The New York Alliance for Inclusion and Innovation and The Arc Westchester to undertake a pilot program in NY including diversion of individuals from guardianship, restoration of rights of persons under guardianship, develop a model project to encourage and institute SDM and provide education on SDM.

SDM How

- ▶ Parties to the development of SDM:
 - ▶ The Decision Maker (DM): the individual seeking a more formalized expression of the use of supported decision making.
 - ▶ The Supporter(s): those persons whom the DM wants to help them make a decision(s).
 - ▶ Facilitator: an individual who
 - ▶ assists the DM in understanding SDM,
 - ▶ Assists the DM in identifying the area(s) of decision making they may want help with
 - ▶ Assists the DM in identifying those persons they want to be their “Supporters”
 - ▶ Works with those individuals the DM has identified as Supporters to understand their roll in assisting the DM to make decisions, NOT making decisions for the DM
 - ▶ Brings the DM and the Supporters together to understand the process on their respective roles in SDM

SDM How

- ▶ -Informal model: this process continues with the DM making decisions with advice, information and resources from the Supporter(s) . The Facilitator may continue to work with both the DM and the Supporter(s) to facilitate the process and hopefully insure the Supporter(s) do not start making decisions for the DM
- ▶ Formal Model: Once the DM has identified the areas of activity with which they want assistance with reaching a decision and the Supporter(s) has agreed, the parties sign a Supported Decision Making Agreement (SDMA) formalizing the arrangement. That Agreement is revocable at will by the DM

SDM: Some Issues

- ▶ Formal SDMA or Not:
 - ▶ The actual document will assist getting doctors, bankers, lawyers, and other third parties to accept the decision of the DM without fear of law suits, etc.
 - ▶ Legislative and/or judicial recognition of the SDMA's may make it harder for individuals with I/DD who do not have a SDMA to get their decisions recognized by those third parties.
- ▶ SDM is not similar to a POA or HC Proxy. It does not delegate decision making authority to another party
- ▶ Direct Care Workers and other staff of Programs within which the DM participates or receives services: In many cases the persons most trusted and familiar to the DM are such staff. The choice of such individuals as Supporters raises questions of conflict of interest, job descriptions and expectations, etc. These need to be carefully considered.

SDM How

- ▶ Issues continued:
 - ▶ Over time, if not continued to be monitored by a Facilitator, there may a tendency for the Supporter to take on the role of making decisions for the DM or “encouraging” particular decisions in ways which may be difficult for the DM to resist. Such language as “...don't you really want to....,” or “...don't you trust my advice...?” may go beyond advice and information in impact.
 - ▶ How is facilitation maintained? Staff of agencies, volunteers, etc.

SDM

► Thank You.

Guardianship Through the Ages, Guardianship Reform and Decision-Making Supports

The Arc New York 2020 Guardianship Symposium

Kathryn E. Jerian, Esq. – The Arc New York

Deputy Executive Director & General Counsel



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17-A Legislative Action To Date & The Arc New York's Relationship to 17-A



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17-A Workgroup

- As a result of Olmstead Report, Governor's Olmstead counsel 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 others
- Meetings held from Nov. 2013 - Feb. 2015 to draft legislative proposal

Legislative History

- 2015 - S. 4983 (came from “Olmstead 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 New York gets a bill introduced seeking changes (S. 5842) – stalled in legislative process
- June 2017 – More “onerous” version of The Arc bill introduced – also stalled
- 2019/20 Legislative Session – Nothing.....(also more on this in a bit)

DRNY Challenge to Constitutionality of 17-A (dismissed 2/2019)

What is Disability Rights New York (DRNY)?

- Non-profit seated in NY but federally funded under the DD Act
- Role is to advocate for individuals with I/DD
- Can file suit on variety of issues – *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.
- <https://www.drny.org/page/litigation-12.html>

What did 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

What was the basis of DRNYs 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

Status of DRNY Suit

- Aug. 2017 – Defendants motion to dismiss the case was granted based on abstention
- Feb. 2019 – Appeal dismissed; lower court dismissal affirmed (<https://casetext.com/case/york-v-new-york-1>)
- Link to oral argument here:
<http://www.ca2.uscourts.gov/decisions/isysquery/a3fe6238-d548-4b77-8983-5c87a656f941/1/doc/17-2812.mp3>

Bottom Line

- No further action since February 2019 dismissal
- Informal comments from State Legislators indicate that they expect reform will be a long process...see next section!

Current Reform Efforts – Dual Track

OCA/Surrogate Judges' Work

- Some saw judges as the “missing voice” in prior reform efforts
- Cost to system/strain on staffing for new bills?
- How does it actually work now?
- Does it need reform?
- So...judges undertook to start at square one and craft their own bill
- Like LRC, nothing was introduced during 2019 or 2020 sessions

OCA/Surrogate Judges' Work: Main Points

- Clear and convincing evidence, imposed in least restrictive manner based on functional abilities that the individual is incapable of managing his/her affairs will be the standard
- MHLS to be appointed counsel as general default
- GAL may also be appointed, or respondent can proceed *pro se* if court allows it
- Tailoring is expected if warranted (in scope and duration)
- Includes new decision-making standard (best interests a last resort)

Updating Guardianship Law – Article 17A of the Surrogate’s Court Procedure Act

Rose Mary Bailly, Esq., Albany Law School

Law Revision Commission

- ▶ Article 4-A of the Legislative Law
- ▶ Purpose
 - ▶ To examine state statutes and current judicial decisions and recommend needed reforms
 - ▶ To recommend changes to bring the law of this state, civil and criminal, into harmony with modern conditions.

Commission Proposal

- ▶ **Study/process**
 - ▶ Examining history and current policies at federal and state level
 - ▶ Considering prior legislation
 - ▶ Meeting with various stakeholder and interested individuals and organizations

Commission Proposal

- ▶ Retain SCPA Article 17A
- ▶ Recognize updated statutory procedures and substantive law
 - Due process
 - Clear and convincing evidence standard of proof
 - Tailored authority of the guardian
 - Guidance for decision-making
 - Periodic review
- ▶ David L. Bazelon & Elizabeth M. Boggs, THE PRESIDENT'S PANEL ON MENTAL RETARDATION, Foreword to REPORT OF THE TASK FORCE ON LAW (1963); ABA COMMISSION ON THE MENTALLY DISABLED, GUARDIANSHIP & CONSERVATORSHIP 1-2 (1979); Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 89 Stat. 486 (1975).

Commission Proposal

- ▶ Similarities between Commission's proposal and the proposal of the Surrogate's Court OCA Advisory Committee
 - ▶ Coverage
 - ▶ Abilities
 - ▶ Process
 - ▶ Guardian's authority

Coverage

- ▶ Individuals with
 - ▶ Intellectual disabilities,
 - ▶ Developmental disabilities
 - ▶ Traumatic brain injury prior to age 22
 - ▶ Medical certifications are not necessary

Abilities

- ▶ Alternatives to guardianship identified in the statute
- ▶ Guardianship petition must allege the inadequacy of such alternatives
- ▶ Functional abilities form basis for an appointment, with the least restrictive form of guardianship
- ▶ Need for a guardian established by clear and convincing evidence

Process

- ▶ Appointment of counsel; Mental Hygiene Legal Service, counsel of choice
- ▶ Discretionary appointment of a guardian ad litem
- ▶ Required hearing; person alleged to need the guardian must attend unless the court excuses them

Guardian's Authority

- ▶ Tailored
- ▶ Decisions governed by individual's wishes and desires (if known)
- ▶ Decisions governed by individual's best interests

Commission Proposal

- ▶ Differences between Commission's proposal and the proposal of the Surrogate's Court OCA Advisory Committee
 - ▶ Duration of appointment
 - ▶ Discharge/modification of appointment
 - ▶ Periodic review

Duration of guardianship

- ▶ **Commission**

- ▶ Guardianship duration established in the order of appointment

- ▶ **OCA**

- ▶ guardianship continues until the court takes steps to modify or revoke it.

Discharge/modification of appointment

- ▶ **Commission**

- ▶ burden of proof on the person objecting to discharge or seeking increased powers for the guardian

- ▶ **OCA**

- ▶ burden of proof not clear

Periodic review of guardianship

- ▶ **Commission**

- ▶ review every 3 years by Mental Hygiene Services;
purpose to determine if less restrictive alternatives
are available and reliable

- ▶ **OCA**

- ▶ **Silent**

Commission proposal

- ▶ Overall three year study of implementation of amendments

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Mental Hygiene Legal Service

SCPA 17-A Guardianships

- The court may in its discretion dispense with a hearing for the appointment of a guardian, and may in its discretion appoint a guardian ad litem, or the mental hygiene legal service if such person is a resident of a mental hygiene facility as defined in subdivision (a) of section 47.01 of the mental hygiene law, to recommend whether the appointment of a guardian as proposed in the application is in the best interest of the person who is intellectually disabled or person who is developmentally disabled,

§ 1754. Hearing and trial, NY SURR CT PRO § 1754

17-A Counsel or Guardian Ad Litem

- If the respondent resides in an article 47 facility the Service receives notice of the petition and appears as counsel. Typical practice is to file a Notice of Appearance.
- If respondent does not reside in an OPWDD certified setting court appointment necessary for MHLS appearance. Typical appointment is as *guardian ad litem*.
- Role of MHLS -to recommend whether the appointment of a guardian as proposed in the application is in the best interest of the person who is intellectually disabled or person who is developmentally disabled ...

Role of MHLS – Appellate Division Regulations

- In those guardianship proceedings pursuant to article 81 of the Mental Hygiene Law or article 17-A of the Surrogate's Court Procedure Act in which the service participates as counsel, court evaluator, guardian *ad litem* or party:
 - (1) Upon receipt of notice of application in such proceedings, the director shall:
 - (i) examine the papers and ascertain that the notices required to be given to parties and patients and, as far as known to the director, to other persons entitled thereto, have been duly served and that there has been due compliance with the prescribed statutory procedure;
 - (ii) examine the records relating to the affairs or medical or psychiatric condition of the party or patient;

Section 823.2 (b). Duties of the director, 22 NY ADC 823.2

Role of MHLS – Appellate Division Regulations

- iii) interview every such party or patient, advise him or her of the nature of the proceeding and of his or her legal rights including the right to legal representation and the right to a court hearing, determine whether he or she has any objections to the proceeding or to the proposed guardian or whether he or she has any other objections;
- (iv) interview any psychiatrist, examining physician or psychologist, or such other psychiatrist or physician who has knowledge of the party or patient's mental and physical condition;
- (v) obtain all available information as to the extent and nature of the party or patient's assets;
- (vi) obtain all available information concerning the party or patient's family, background and any other fact that may be necessary or desirable.

Section 823.2. Duties of the director, 22 NY ADC 823.2

Role of MHLS –Appellate Division Regulations

- (i) The director shall notify the court of any request for hearing.
- (ii) In the director's discretion, and in the interest of the party or patient, the director may demand a hearing.

22 NY ADC 823.2 (b)(2)

17 A practices – MHLS investigation

- Upon being served with a 17-A petition, MHLS staff will contact the petitioner, typically parents or other family members, and schedule a home visit if the respondent resides with the petitioner.
- If the respondent resides in an OPWDD operated or certified residence, MHLS will visit the respondent at the residence or day program;
- Consistent with our enabling regulations, described above, MHLS staff will interview clinicians familiar with the respondent's circumstances and gather pertinent records that inform our investigation.

17-A practices – MHLS investigation

- MHLS will also typically inquire to determine if:
- (1) the respondent is a student with a disability and thus has an Individualized Educational Plan (IEP). We will request a copy of the IEP from parent-petitioners;
- (2) in all cases, if the respondent is receiving HCBS waiver services and thus has a care manager, MHLS will speak to the care manager and request copy of Life Plan;
- (3) MHLS will also search its internal records to determine if the agency had any prior contacts or communications with the respondent or relevant to respondent's circumstances.

17-A practices – MHLS investigation

- If the respondent informs MHLS that she objects to the appointment of a guardian. MHLS will demand a hearing on the respondent's behalf.
- If the respondent informs MHLS that he does not object to the appointment of a guardian or if the respondent is unable to inform MHLS of his position, MHLS will typically generate a report in the form of an attorney "Affirmation." The report will include a procedural summary of the case and a detailed narrative concerning the respondent and whether there is any objection to the appointment of a guardian.
- In some cases, specific requests may be made to tailor the guardianship to the respondent's individual needs.

THANK
YOU

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