

# The ARC New York Guardianship Training Symposium

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## Objectives For Training

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- Introduction to guardianship laws in New York
- Identifying less restrictive alternatives
- Legislative Initiatives

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## Mental Hygiene Legal Service

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- Agency of the Appellate Divisions of State Supreme Court.
- Operates pursuant to an enabling law codified at Mental Hygiene Law sections 47.01 & 47.03.
- There are four appellate divisions so there are four MHLS departments.
- Website with MHLS contacts in every county [Mental Hygiene Legal Service \(nycourts.gov\)](http://MentalHygieneLegalService(nycourts.gov)).

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## Why consider guardianship? 7

- ▶ Health care decision-making;
- ▶ Transition from school to adult services;
- ▶ Prosecute or defend litigation;
- ▶ Access to confidential records;
- ▶ Apply for services from OPWDD;
- ▶ Create trusts of property

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## Challenging assumptions 8

- ▶ Less restrictive alternatives exist; See website of Richmond County Surrogate- <http://ww2.nycourts.gov/guardianship-disabled-person-31631>
- ▶ People can often make their own decisions or decisions with the support of others;
- ▶ Parents do not have to secure guardianship to obtain access to records;
- ▶ OPWDD regulations recognize actively involved family members as legally authorized surrogates for most purposes

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### Two Guardianship Statutes in New York State

A guardian for a developmentally disabled person may be appointed under either article 81 of the Mental Hygiene Law  
or  
Surrogate's Court Procedure Act article 17-A

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Mental Hygiene Law article 81 10

- ▶ *General Guardianship Statute in NYS;*
- ▶ Does not depend upon a person's diagnosis, but rather functional limitations;
- ▶ Commence the case in Supreme or County Court;
- ▶ Surrogate's Court can exercise jurisdiction if beneficiary of estate is alleged to be incapacitated

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Guardian as defined by article 81 11

- ▶ A person who is eighteen years of age or older, a corporation, or a public agency, including a local department of social services;
- ▶ A person who is appointed in accordance with the terms of this article by the Supreme Court, the Surrogate's Court, or the County Court; and
- ▶ A person who acts on behalf of an incapacitated person in providing for personal needs and/or property management.

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Surrogate's Court Procedure Act article 17-A 12

- ▶ Discrete guardianship statute for people with developmental disabilities or traumatic brain injury;
- ▶ Proceeding is commenced in Surrogate's Court;
- ▶ Petitioners rely on forms promulgated by the Office of Court Administration
- ▶ <http://ww2.nycourts.gov/forms/surrogates/guardianship.shtml>

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## COMPARISON OF PROCESS FOR APPOINTMENT

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graph TD; A[Filing of petition] --- B[Who can file – and does the petitioner need an attorney]; B --- C[Role of MHLS]; C --- D[Court Evaluator]; D --- E[Hearing and legal standard]
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## Who can petition – article 81

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- ▶ 1. the person alleged to be incapacitated;
- ▶ 2. a presumptive distributee of the person alleged to be incapacitated
- ▶ 3. an executor or administrator of an estate when the alleged incapacitated person is or may be the beneficiary of that estate;
- ▶ 4. a trustee of a trust when the alleged incapacitated person is or may be the grantor or a beneficiary of that trust;
- ▶ 5. the person with whom the person alleged to be incapacitated resides;
- ▶ 6. a person otherwise concerned with the welfare of the person alleged to be incapacitated. For purposes of this section a person otherwise concerned with the welfare of the person alleged to be incapacitated may include a corporation, or a public agency
- ▶ 7. the chief executive officer, or the designee of the chief executive officer, of a facility in which the person alleged to be incapacitated is a patient or resident.

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## Who can petition – article 17-A

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- ▶ A petition for the appointment of a guardian of the person or property, or both, of a person who is intellectually disabled or a person who is developmentally disabled may be made by a parent, any interested person eighteen years of age or older on behalf of the person who is intellectually disabled or a person who is developmentally disabled including a corporation authorized to serve as a guardian as provided for by this article, or by the person who is intellectually disabled or a person who is developmentally disabled when such person is eighteen years of age or older
- ▶ 17-A petitions are often commenced by a parent without the assistance of an attorney

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## Role of MHLS

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- ▶ MHLS can be appointed as counsel or court evaluator in an article 81 proceeding;
- ▶ In an article 81 proceeding the person has a right to counsel that is not recognized in the article 17-A statute;
- ▶ MHLS is served with the 17-A petition when the respondent resides in an OPWDD certified residential setting. MHLS appears as counsel in these cases;
- ▶ MHLS may also appear in a 17-A proceeding as *guardian ad litem* if appointed by the court;
- ▶ MHLS in some cases might also commence an article 81 guardianship proceeding

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## STANDARD FOR APPOINTMENT

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### MHL Art. 81

- ▶ The appointment must be **necessary** to provide personal needs and to manage the property and financial affairs of the person
- ▶ The person must agree to the appointment of a guardian **OR** the person must be found to lack capacity

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## Standard for Appointment

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- ▶ A person lacks capacity when he or she is likely to suffer harm because:
  - ▶ He or she is unable to provide for personal needs and property management, **and**
  - ▶ He or she cannot adequately understand and appreciate the nature and consequences of such inability

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Article 81  
Standard for  
Appointment

- ▶ Determining Incapacity: court shall give primary consideration to the functional level and personal limitations of the person

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Contrast 17-A Standard for  
Appointment

- ▶ When it appears to the satisfaction of the court that a person has an intellectual disability or is developmentally disabled, the Surrogate's Court is authorized to appoint a guardian of the person or property or both if such appointment is in the best interest of the person.

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Form of Judgment or Decree

MHL Art. 81

- ▶ A guardian's appointment by Supreme or County Court is memorialized by either an:
  - ▶ Order,
  - ▶ Judgment, or
  - ▶ Order and Judgment

The Clerk of Court should also issue a commission (MHL § 81.26)

SCPA 1750-A

A guardian's appointment by Surrogate's Court is memorialized by:

- Letters of guardianship or a decree.

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## POWERS OF THE GUARDIAN

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### MHL Article 81:

Powers are specifically set forth based upon individual capabilities and needs;

Tailored to the needs of the individual

### SCPA Article 17-A:

Powers are typically plenary in nature and specified;

*However, court should expressly determine whether the guardian has authority to make health care decisions*

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## MODIFICATION OF GUARDIAN'S AUTHORITY

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### MHL Article 81:

If alleged incapacitated person's circumstances change, guardian must go back to court and seek to expand or eliminate powers

### SCPA Article 17-A:

Modification is permitted and court retains jurisdiction, but there is no mandate to seek modification.

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## TERMINATION OF GUARDIAN'S AUTHORITY

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- ▶ Article 81 The court appointing the guardian shall discharge or modify the powers of the guardian where appropriate.
- ▶ Discharge appropriate where the person adjudicated incapacitated and in need of the appointment of a guardian becomes able to exercise some or all of the powers necessary to provide for personal needs or property management.
- ▶ NY MENT HYG § 81.36

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**TERMINATION OF GUARDIAN'S AUTHORITY** 25

- ▶ 17-A
- ▶ A person eighteen years or older for whom such a guardian has been previously appointed or anyone, including the guardian, may petition the court to have the guardian discharged and a successor appointed.
- ▶ Duration of guardianship, NY SURR CT PRO § 1759

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**TERMINATION OF GUARDIAN'S AUTHORITY** 26

- ▶ Case example – 17-A
- ▶ To satisfy the due process rights of the person with a disability, the court determined that it must consider the person's "functional capacity, less restrictive alternatives, and opportunities for supported decision-making ...."
- ▶ The 23-year-old ward in *Robert C.B.* held two food-industry jobs, where he performed well without accommodations. He got himself to work, to his doctors, and to his dentist, without assistance. He had a high-school Regents diploma and an above-average IQ.
- ▶ ***Court removed guardian of person, maintained guardianship of property, case on appeal***

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**Limits of Guardian's Authority** 27

- ▶ *Guardians cannot unilaterally determine treatment planning in facilities*
- ▶ *Matter of Leo R*
- ▶ SCPA article 17-A guardian of her brother, Leo, requested that Broome Developmental Center be enjoined as follows: (1) to give guardian unfettered access to her brother anywhere in the BDC facility, (2) to maintain one-on-one monitoring for Leo, (3) to not awaken Leo and force him to get out of bed until he is ready, and (4) to remove another resident from the unit where Leo resided.

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## Limits of Guardian's Authority

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- ▶ Courts do not have authority to interfere in the discretionary acts of administrative agencies, which includes interference in treatment plans developed by the administrative agency charged with the care and treatment of developmentally disabled persons.
- ▶ The system for review of objections to a treatment plan is under 14 NYCRR 633.12 and includes informal objection followed by written objection, a hearing, and appeal to the Commissioner

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## SCPA Article 17-A

- ▶ SCPA article 17-A endures and enjoys significant support particularly among parents because when compared to MHL article 81 its procedures are:  
 "Simpler and more straightforward and many 17-A petitioners are able to proceed without the assistance of an attorney resulting in significant cost savings."  
*See, Practice Commentaries, SCPA article 17-A by Margaret Valentine Turano*

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## SCPA Article 17-A

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- ▶ An extensive body of case law has developed since 1992 which observes that article 81 of the MHL affords respondents in guardianship proceedings significantly more procedural and substantive due process protections than does article 17-A of the SCPA
- ▶ Federal lawsuit was commenced to challenge article 17-A (*DRNY v. State of NY*)
- ▶ **See article in materials – Guardianship: A Civil Rights Perspective**

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## Alternatives to Guardianship

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1. Health care proxy;
2. Simplified Advance Directives
3. Supported decision making
4. Legally authorized surrogates in OPWDD system;
5. Power of attorney; representative payments, special needs trusts, ABLE accounts (for property)
6. Surrogate decision making (article 80 of the Mental Hygiene Law)

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## Health Care Agents

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- ▶ Defined:
- ▶ Public Health Law § 2980:
- ▶ "Health care proxy" means a document delegating the authority to make health care decisions, executed in accordance with the requirements of this article (Article 29-C of the PHL).

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## Health Care Agents

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- ▶ "Health care agent" or "agent" means an adult to whom authority to make health care decisions is delegated under a health care proxy.
- ▶ "Health care decision" means any decision to consent or refuse to consent to health care.

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## Health Care Agents

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- ▶ Execution: Public Health Law § 2981
- ▶ A competent adult ("principal") may appoint a health care agent.
- ▶ Every adult shall be presumed competent to appoint a health care agent *unless* such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a guardian of the person has been appointed for the adult pursuant to article 81 of the MHL or Article seventeen-A of the Surrogate's Court Procedure Act

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## WITNESSING OF HCP

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- ▶ **General Rule:**
- ▶ Two adult witnesses required when a health care proxy is executed. The witnesses shall state that the principal appeared to execute the proxy willingly and free from duress. The person appointed as agent shall not act as witness to execution of the health care proxy.

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## Health Care Agents

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- ▶ **Special witnessing requirements**
- ▶ At least one witness shall be an individual who is not affiliated with the facility and at least one witness shall be a physician or clinical psychologist who either is employed by a developmental disabilities services office or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by OPWDD or has been approved by the Commissioner in accordance with regulations that shall require that a physician or clinical psychologist possess specialized training or three years experience in treating developmental disabilities (see 14 NYCRR 633.20).

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## Supported Decision Making 43

*Compare Mental Capacity and Legal Capacity*

Commonly formulated mental capacity is the ability of a person on his/her own:

- ▶ Understand information needed to make the decision;
- ▶ Retain the information;
- ▶ Appreciate the consequences;
- ▶ Communicate the decision in ways others understand

Legal capacity = the capacity and power to create, modify or extinguish legal relationships

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## Supported Decision Making 44

Proponents of Supported Decision Making argue that as a society we need other ways to recognize and support the right to legal capacity, not mental capacity



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## A new formula for legal capacity 45

individual will and preferences

+ unique decision-making abilities

+ supports

+ accommodation

+ equal legal recognition

= Capability to make decisions



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**SDM - a new approach** 46

From	To
A 'presumption of capacity'	A presumption to act independently
Capacity assessment	Assessing need for supports and 'alternative course of action'
Guardianship	Exploration of alternatives
Finding of incapacity	Finding of need for support
Substitute decision making	Supported decision making and power to appoint
Best interest test	Best interpretation of will and preference

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**Supported Decision Making New York** 47

- ▶ The Developmental Disabilities Planning Council funded a 5-year grant to pilot Supported Decision Making in New York
- ▶ <https://sdmny.hunter.cuny.edu/>

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**SDM-NY** SDMNY – Supported Decision-Making New York 48

- ▶ We believe that every person has the right to make his or her own decisions, regardless of disability, and to have those decisions legally recognized. This belief is reflected in the United Nations Convention on the Rights of Persons with Disabilities that posits legal capacity as a "human right"
- ▶ We understand that no one makes decisions entirely in a vacuum, that we all engage in some kind of supported decision-making, and that people with intellectual disabilities may simply need more, or different kinds of supports in order to make their decisions.

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## SDM

- Process culminates in a Supported Decision- Making Agreement that is recognized by third parties;
- Legislation has been passed to codify supported decision making in NYS  
A. 8586/S.7107  
New Article 82 of Mental Hygiene Law

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## Surrogate Decision-Making Alternatives

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- ▶ For people receiving services from OPWDD there are regulations that promulgate surrogate lists for health care decision making
- ▶ 14 NYCRR 633.10 (life sustaining treatment)
- ▶ 14 NYCRR 633.11 (major medical treatment)
- ▶ Family member surrogates recognized when they are actively involved.
- ▶ *Actively involved means: significant and ongoing involvement in a person's life so as to have sufficient knowledge of the person's needs.*

Section 633.99. Glossary, 14 NY ADC 633.99

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## Surrogate Access to Information

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- ▶ *Family member surrogates can also obtain access to clinical records without being a legal guardian*
- ▶ "...upon the written request of a parent of an adult patient or client, spouse, adult child, or adult sibling of a patient or client, a facility shall provide an opportunity, within ten days, for such parent, spouse, adult child or adult sibling to inspect any clinical record maintained or possessed by such facility concerning the care and treatment of such patient or client for which the parent, spouse, adult child or adult sibling is authorized pursuant to law, rule or regulation to provide consent and has consented or is being requested to provide such consent ...

§ 33.16 Access to clinical records, NY MENT HYG § 33.16

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## Surrogate Can Choose CCO

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- ▶ *Choosing a Care Coordination Organization –surrogates recognized*
- ▶ If a person lacks the ability to choose a CCO and does not have a guardian lawfully empowered to enroll him or her in a CCO, then any of the following parties, in the order stated, may take any of the actions enumerated in subdivision (a) of this subpart:
  - ▶ (1) an actively involved spouse;
  - ▶ (2) an actively involved parent;
  - ▶ (3) an actively involved adult child;
  - ▶ (4) an actively involved adult sibling;
  - ▶ (5) an actively involved adult family member;
  - ▶ (6) the Consumer Advisory Board for the Willowbrook Class members, but only for members of the Willowbrook Class.
- ▶ Section 635-11.8.

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## ACCESS TO SCHOOL RECORDS FOR TRANSITION PLANNING

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- ▶ *Access to school records for students aging out to adult services – NYSED guidance still states that once student turns 18, parents must be legal guardian to have access to school records.*
- ▶ <http://www.p12.nysed.gov/specialed/publications/policy/parentguide.htm>
- ▶ *This is incorrect.*
- ▶ Federal Education Rights and Privacy Act (FERPA), 20 U.S.C. 1232g
- ▶ Parents of "dependent children" retain rights -- school records may still be disclosed to them under FERPA.
- ▶ FERPA cross-references the IRS Code for the definition of dependent children and the definition includes children under the age of 24 who still reside with their parent (the taxpayer) and attend school or adult children who are permanently and totally disabled.

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## Closing Thoughts

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- ▶ Guardianship has civil rights implications
- ▶ See article in materials, *Guardianship a Civil Rights Perspective*
- ▶ Special considerations for voting.
- ▶ OPWDD website - <https://opwdd.ny.gov/access-supports/frequently-asked-questions-about-voting>
- ▶ "Q. Can my guardian keep me from voting? A. If you have questions regarding how guardianship affects your right to vote contact your care manager for assistance..."

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## Closing Thoughts-challenging assumptions

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- ▶ A guardian in NYS cannot prevent a person from voting nor should a guardian cast the ballot for the person with a disability
- ▶ Article – *Make Every Vote Count: Reform New York’s Election Law to Protect the Franchise for People with Disabilities* (Shea, Ishee, Albany Law School, Government Law Review, June 2021)
- ▶ Article written to challenge assumptions about ability of people to vote when under guardianship

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- ▶ Guardianship, when properly exercised, can be an important support and service for people who are developmentally disabled. It can provide both advocacy and access to services for such persons. Guardianship is one among several avenues for surrogate decision-making, however, Guardianship should be pursued only when it is thought to be the least restrictive form of intervention necessary to meet the needs of the individual.

## Closing Thoughts

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