

17 A Presentation



BRANDOW **LAW**

Plan smart. Plan ahead.

BY
REGINA BRANDOW

ABLE TO MAKE DECISIONS FOR SELF AT AGE 18?

- Able to make medical decisions?
- Financial, including banking?
- Guardianship vs. Advanced Directives –
 - Review of your child's functionality?
 - Be objective- any evaluations to assist you?
 - Court oversight for property under 17a/annual accounting
 - Advanced directives can be changed
- Art 81 Guardianship proceeding in Supreme Court/different process, tailored, mental health issues

S.C.P.A. ARTICLE 17– A STATUTE

- Review of Statute in general (See SCPA § 1750-1761 handout)
- Noteworthy issues to keep in mind:
 - The Surrogate acts as a Gate Keeper
 - Consider the Best Interests of Person with Disability
 - A person who is intellectually disabled is one “who is permanently or indefinitely incapable of managing oneself and/or one’s own affairs because of an intellectual disability” (see SCPA § 1750; *Matter of D.D.*, 50 Misc3d 666, 667-68 [Sur Ct, Kings County 2015]).
 - A person having an impaired ability to understand and appreciate the consequences of decisions on their own behalf, which results in such persons being incapable of managing their affairs and that such condition is permanent in nature.(see SCPA §1750-a)
 - Note: SCPA § 1750 – b Healthcare decisions for intellectually disabled “may” include end of life decision making.

OVERALL PROCESS – POST PETITION

1. Courts may appoint a Guardian ad Litem (“GAL”), if in a facility Mental Hygiene Legal Service (MHLS) and or hearing needed (background and or dispute). See SCPA § 1754.
2. If GAL, receive written Notification of GAL
3. Role of GAL
 1. Review file, background checks, etc.,
 2. Describe overall process; “shall personally interview person” See SCPA §1754(4).
 3. GAL written Report
 4. GAL fees\$. If Person vs. Property
 1. If Property - GAL’s fees should be paid from Respondent’s estate. SCPA §405

HEARING PROCESS

- GAL report Contents of:
 - Jurisdiction (See SCPA §1753)
 - Review of the record
 - Personal interviews with Person (home visits); calls with physicians and or other independent individuals
- If hearing, preparation of
 - Review of GAL report critical
 - Person with a disability shall be present unless medically incapable and likely to result in physical harm to such person. See SCPA §1754 (1) & (4)
 - Issues determines your witnesses, i.e. parent with a past; no parental consent or disability is at question (experts)
- Surrogate's role and rules of evidence

HEARING CONSIDERATIONS UNDER SCPA §1754

- Jury trial shall be deemed waived by failure to make a demand thereof (See SCPA §1754(1))
- Burden on the petitioner
- Evidence to support Petitioner
 - Initial GAL report, along with GAL testifying
 - Other written reports
 - Testimony
 - Records sealed – no need for application as with Art. 81
- If court is satisfied that **best interests** of the person with disability will be promoted by appointment then so decreed. (See SCPA §1754(5))
- Actual Case Scenario – Petition denied

CASE TRENDS & PREVAILING IDEAS

- Overall findings – functionality. See *Matter of D.D.*, 50 Misc3d 666, 667-68 [Sur Ct, Kings County 2015] where the court adopted a test of understanding the functional capacity of an individual with a disability not unlike that set forth in Article 81 of the Mental Hygiene Law.
- Relatively recent case law suggests that guardianship under Article 17-A is an “all or nothing” remedy that does (not) permit the Surrogate’s Court to tailor a guardianship to tend to the respondent’s functional capabilities and limitations.
- **However, most Surrogate’s Court adhere to the rule that an Article 17-A guardianship cannot be tailored** (see *Matter of Sean O.*, NYLJ, Oct. 7, 2016, at 26, col. 6 [Sur Ct, Suffolk County]).

MISCELLANEOUS ISSUES

- **Divorce.** Both parents can be guardian; Surrogate Courts decisions - Various cases – fact specific.
- **Standby Guardian.** SCPA §1757 – *Upon death, renunciation, or adjudication of incompetency of guardian, court may confirm the appointed Standby and alternate. Before confirming the court may conduct a hearing subject to SCPA § 1754.*
- **Jurisdiction.** SCPA §1758 *After the appointment of guardian shall have and retain general jurisdiction over person with disability ..*
- **Duration.** SCPA §1759 *Continue during the life of such person; person or anyone may discharge guardian , limited for property, modified and or dissolved, likewise with marriage. Court shall conduct a hearing pursuant to SCPA § 1754.*
- **Corporate.** SCPA §1760 *No corporate except non-profit corporation organized and having powers to act as guardian. For example NYSARC, See Matter of RK, 11 Misc.3d 741; 809 NYS 2d (Surr. Ct. Westchester Cty. 2006).*

OTHER ISSUES TO BE AWARE OF

- Staleness of documents during GAL report and hearing, i.e. physician must have seen within one year.
- Compensation of Guardian– nothing in the statute (See Matter of Jonathon EE., 86 AD3d 696, 927 NYS 2d 171 (3rd Dept. 2011))
- Compensation of GAL – of person and or of property
- Temporary – if emergency arises

GUARDIANSHIP GRANTED

- Person – no annual reporting which differs from Art. 81.
- Property – annual accounting
 - A guardian of the property appointed under Article 17-A must render an annual accounting detailing the transactions undertaken by the guardian during a particular year.
 - A Guardian ad Litem is appointed to review the annual accounting.
 - The Guardian ad Litem's role is to ensure that all of the funds that should be in a guardianship account actually are there; to confirm that only authorized expenses have been incurred; and to incur that only authorized withdrawals have occurred.
- Interstate Guardianship
 - In 2014, New York enacted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (see Mental Hygiene Law § 83.01).
 - Among other things, this act allows for the transfer of certain guardianships, including Article 17-A guardianships, to and from other states (see *id.*, §§ 83.31 and 83.32).



www.BrandowLaw.com

For Video Workshop on Guardianship

631.675.2540