

TRUSTS AND ESTATES LAW

Expert Analysis

Article 17-A Proceedings Remain an Important Tool

A recent case has voiced some concerns over the Surrogate's Court Procedure Act, Article 17-A proceedings, but these specialized proceedings remain an important tool to ensure long-term guardianship of a person with a static and unchanging condition. *Matter of Chaim A.K.*, NYLJ, Aug. 26, 2009, p. 41, col. 1 (Sur. Ct. New York Co.), highlighted that the court must narrowly construe SCPA Article 17-A proceedings and only allow these guardianships to be created where an individual qualifies under the statute. The Surrogate must be the ultimate gatekeeper in assuring that the very specific and defined circumstances of this proceeding are at issue, and dismissing proceedings where the criteria are not met or are better handled in a tailored Article 81 proceeding or other less restrictive method.

However, within this rubric, there is a need for Article 17-A, and the reasons for its enactment remain true today. Maintaining Article 17-A is strongly supported by parents and support groups of those who are mentally retarded and/or suffer from learning and developmental disabilities.

Article 17-A Proceedings

The Legislature enacted Surrogate's Court Procedure Act Article 17-A in 1969 authorizing a Surrogate to appoint a guardian over the person and the property of a mentally retarded individual, if such appointment served his or her best interests.¹ Before its enactment, the only option for the relatives of mentally retarded individuals was the complex and costly committee and conservatorship proceedings. At the time, vari-

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ous organizations and advocates for the mentally retarded voiced a need for an abbreviated proceeding without committees for individuals with mental retardation, and Article 17-A was that outcome.

The Article 17-A proceeding is most often used to ensure long-term guardianship of a person who will never be able to care for himself due to an unchanging condition.

Article 17-A was envisioned during the Bennett Commission, created in 1961, which weighed the desirability of a tight, logical rule to govern every possible estate as against a simple, reasonable rule for the convenience of the vast majority. It was then Surrogate John D. Bennett's theory that laws should not be made to cover the 1 percent of cases where there may be a problem, thus causing the other 99 percent of the cases to bear unnecessary time and expense. It was his theory that there was always a way to deal with the small fragment of cases that needed special attention and the overall statute dealing with trusts and estates, both from the standpoint of substantive law and procedure, should address the majority of cases and, accordingly, he sought to simplify the practice and procedure.²

The initial statute dealing with those suffering disabilities was repealed in 1989 and replaced by the current Article 17-A. The Legislature later saw the need to provide for the appointment of a guardian for a person who, though not mentally retarded, was simply incapable of managing his affairs, thus allowing the appointment of a guardian for a developmentally disabled person as defined in SCPA 1750-a.

Specifically, the statute is an abbreviated proceeding with standardized forms and requirements, often without the need of legal representation, although it does require the certification by two professionals, one of which is familiar with the condition in question.

The Article 17-A proceeding is most often used to ensure long-term guardianship of a person who will never be able to care for himself due to an unchanging condition.³ It allows the parents to serve as immediate legal guardians while they are able, and to provide for successors for when they are no longer able.⁴

Article 81 Proceedings

In 1990, the Legislature directed a study to re-evaluate conservatorship proceedings and those under Article 17-A "in light of changes in care, treatment and understanding of these individuals as well as new legal theories regarding the rights of such individuals."⁵ In examining the then current system, the Legislature noted that the needs of persons with incapacities were diverse and complex, and the system of conservatorship and committee did not provide the necessary flexibility to meet these needs.⁶

Conservatorship compromised a person's rights only with respect to property and was insufficient alone; however, a committee's judicial finding of incompetence, along with the accompanying stigma and loss of civil rights was often excessive and unnecessary.⁷ The Legislature also noted that some people require some

form of assistance in meeting their personal and property management needs, but do not require the drastic remedies that were afforded at that time.⁸

The purpose of Mental Hygiene Law Article 81 was thus to establish a guardianship system that could be tailored to the individual needs of the person and at the same time afforded them the greatest amount of independence, self-determination and participation in all the decisions affecting such person's life. Most significantly, a guardianship proceeding under Article 81 focuses on the functional ability of the person. It emphasizes how the person carries out daily activities in his everyday life, rather than focusing on the underlying cause of the behavior.

Significantly, although Article 17-A was examined during this same time frame, no amendments to Article 17-A were proposed, suggesting that the current relationship between Article 81 and Article 17-A was consistent with the intent of the Legislature.⁹ Various support groups of Article 17-A pressed the Legislature for its retention at that time.

Need for 17-A Proceedings

Article 17-A proceedings are appropriately utilized to ensure long-term guardianship of a person who will never be able to care for himself due to a static and unchanging condition. These individuals normally need this guardianship device primarily to secure for relatives the legal right to make decisions for a mentally retarded child or adult or one suffering learning and developmental disabilities.

However, as illustrated in the *Matter of Chaim A.K.*, the court must serve as the gatekeeper in only allowing a 17-A guardianship where the individual is mentally retarded and developmentally disabled as defined by statute. If the individual does not meet that criteria, an alternative route often must be taken.

In *Matter of Chaim A.K.*, the individual had been diagnosed with numerous psychological problems. Chaim A.K., 21, admitted at a hearing that he could not deal with medical issues and preferred that his parents take charge of his treatment. Acting pro se, Chaim's parents opted to pursue a 17-A guardianship because of the simplified forms and also because they would not require the services of a lawyer, rather than the more complicated Article 81 proceeding. Ultimately, the court concluded that Chaim's condition, which is susceptible to medication, was likely due to mental illness and psychological problems rather than developmental disabilities or mental retar-

ation. Thus, Chaim's condition was found to be more suited to the tailored Article 81 guardianship with periodic reporting provisions rather than 17-A with its assumption of permanence and unchangeability. The petition to appoint a 17-A guardian was denied without prejudice to commence an Article 81 guardianship proceeding in the appropriate court.

While the outcome was appropriate, the court's suggestion that the Legislature should again closely scrutinize Article 17-A is debated. There are certainly circumstances where the Article 17-A simplified proceeding is appropriate where the individual meets the requirements. Rather than repeal a beneficial statute because some individuals may attempt to use it inappropriately, the court should simply be stalwart as gatekeeper. If the individual does not fit the criteria, an Article 81 proceeding or other tailored remedy can be utilized. However, wholesale legislation should not be driven by a problem of the few.

Using Article 81 Sparingly

Article 81 is and should be a last resort because it deprives a person of so much power and control over his or her life. It is a statute meant to be individually tailored to an individual's needs rather than a "one size fits all" power, and the authority of the guardian should be limited by those needs.

When stipulations are entered into to permit stopped work to proceed, all conditions necessary to resume work should be spelled out, including the owner's payment of all professional fees incurred by the board.

There is relief available outside of Article 81 proceedings. Powers of attorney can be utilized as a legitimate vehicle to avoid an Article 81 guardianship, as well as limited guardians under SCPA 1756, and modified orders under SCPA 1755. Further, in conjunction with the guidelines of EPTL 7-1.12, revocable and special needs trusts can be created. Each of these statutes can be utilized to tailor relief needed for individuals without the deprivation and costs of an Article 81 proceeding. Consideration should be given by the Legislature and perhaps practitioners in creating a separate power of attorney to reach the same goals as Article 81, similar to the form created for the health care proxy.

Regardless, these special circumstances and

specialized cases are the exceptions to a proceeding that otherwise works quite well. In enacting SCPA Article 17-A, it was the intent of the Bennett Commission and those who later undertook the task to create a simple process in order to alleviate parents of undue concern, cost and delay. This legislative intent still exists today, and it is the view of many that Article 17-A proceedings should remain and continue as an integral and important proceeding for these families.

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1. N.Y. SCPA §1750.
2. For a longer discussion of Surrogate Bennett and the Bennett Commission, see C. Raymond Radigan, "John D. Bennett Legacy: Tight, Logical Rules, Simpler Procedures," NYLJ, March 31, 2005 p. 3, col. 1. Mr. Bennett is a former attorney at the author's firm.
3. McKinney's Practice Commentaries, Margaret Valentine Turano, N.Y. SCPA Article 17-A, 1996 Main Volume.
4. Id.
5. As explained in *Matter of Maryanne Cruz*, NYLJ, July 30, 2001, p. 24, col. 2 (Sur. Ct. New York Co.); see also (L. 1990, ch. 516, 1).
6. N.Y. Mental Hygiene Law §81.01.
7. Id.
8. Id.
9. *Matter of Maryanne Cruz*, NYLJ, July 30, 2001 p. 24, col. 2 (Sur. Ct. New York Co.)