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REPORT ON LEGISLATION BY THE MENTAL HEALTH LAW COMMITTEE

A.8171-A **M. of A. Lavine**

AN ACT to amend the surrogate's procedure act and the judiciary law in relation to guardianship and health care decisions of persons with developmental disabilities

THIS BILL IS APPROVED WITH MODIFICATIONS

The Surrogate's Court Procedure Act, Article 17-A ("SCPA 17-A"), was enacted in by the New York State Legislature in 1969, authorizing a Surrogate to appoint a guardian over the person and/or property of a person with mental retardation.[1] Although SCPA 17-A has since been amended to include persons with developmental disabilities and major end-of-life decision-making powers for guardians, it has largely remained unchanged. There have long been calls to update the statute to reflect social and cultural changes as well as comport with constitutional requirements.[2] On September 26, 2016, a federal lawsuit was commenced in the Southern District of New York, seeking to enjoin the state from appointing guardianships pursuant to SCPA 17-A alleging that it violates the Fifth and Fourteenth Amendments of the US Constitution the American with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973.[3]

The New York City Bar Association ("City Bar") was founded in 1870 and is a private, non-profit organization of more than 23,000 attorneys, judges and law professors. With over 23,000 members, the City Bar has long supported the vigorous and fair enforcement of civil rights law. In January 2016, the City Bar's Mental Health Law Committee in conjunction with the Disability Law Committee issued a report, *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual Disabilities* which addressed how, if at all, the state should provide substituted decision-making for this vulnerable population.[4] The Mental Health Law Committee respectfully urges the Legislature to consider the following modifications to A.8171 (the "Bill")

[1] S.C.P.A. Ch. 59-a, Art. 17-A.

[2] *See* e.g., The Mental Health Law Committee and The Disability Law Committee of The New York City Bar Association, *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 18 C.U.N.Y. L. Rev. 287 (2015); Rose Marie Bailly and Charis B. Nick-Torok, *Should We Be Talking?—Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 Alb. L. Rev. 807 (2012); *Matter of Chaim A.K.*, 26 Misc. 3d 837 (Surr. Court., New York Co. 2009).

[3] Disability Rights New York v. New York State, 1:16-cv-073363-AKH.

[4] 18 CUNY L. Rev. 287 (2015); also available at http://www2.nycbar.org/pdf/report/uploads/20072850-ReportreviewingSurrogatesCourtProcedureActMENHEA1.15.16.pdf (January 2016).

in order to ensure that the rights of persons with developmental disabilities are properly protected.[5]

1. The Standard for Appointment Should Require a Finding of Likeliness to Suffer Harm, Inability to Provide for Personal and/or Property Needs, *AND* Lack of Understanding or Appreciating the Consequences of Such Functional Limitations

As A.8171 § 1 is currently written, a finding of only one of following elements is needed: a likeliness to suffer harm, or an inability to provide for personal and/or property management needs, or an inability to adequately understand or appreciate the nature and consequences of such inability.[6] Instead, as in Mental Hygiene Law ("MHL") Article 81, a finding of all three elements should be required in order to appoint a guardian.[7] In addition, the standard in § 1 of the Bill should match what is found in § 8 (7).[8] Further the findings in § 8 (7) should precede the Court's determination to appoint a guardian in §8 (6).

2. A Least Restrictive Alternative Mandate is Required Under Both Federal and State Law

Currently § 6 of the Bill only requires petitioner to consider less restrictive alternatives, but it does not require a showing that the less restrictive alternatives are insufficient. As per § 8, the court only considers the less restrictive alternatives after finding the need for the appointment of a guardian. When the state interferes with an individual's liberty, due process requires that only the least restrictive means available are employed to achieve the state's objective of protecting the individual and community.[9] This right has been embraced by New York courts[10] and is encompassed in MHL Art. 81.[11] Thus, a finding that there are no less restrictive alternatives available must be made before the appointment of a guardian.

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[5] The Legislature is also considering another approach to amending SCPA 17-a, A.5840/S.5842. The Committee takes no position on that bill at this time.

[6] As a matter of logic, it is difficult to understand how the second and third elements could be disjunctive requirements.

[7] *See* MHL § 81.02. While SCPA 17-A governs guardianship for people with intellectual disabilities only, MHL 81 governs guardianships for all people, including people with intellectual disabilities

[8] § 8 (7) of the Bill designates six findings that the Court must make in order to appoint a guardian: (a) the respondent's functional limitations which impair the respondent's ability to provide for personal and/or property management needs; (b) the respondent's lack of understanding and appreciation of the nature and consequences of his or her functional limitations; (c) the likelihood that the respondent will suffer harm because of the respondent's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations; (d) the necessity of the appointment of a guardian to prevent such harm; (e) the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the findings of this subdivision; and (f) the duration of the appointment.

[9] *O'Connor v. Donaldson*, 422 U.S. 563 (1975); ADA, 42 U.S.C. § 12101-12213.

[10] *See e.g. Kesselbrenner v. Anonymous*, 33 N.Y.2d 161 (1973); *Manhattan Psychiatric Center v. Anonymous*, 285 A.D.2d 189 (1st Dept. 2001).

[11] MHL §§ 81.01, 81.02 (a)(2), 81.03, 81.15, 81.21, 81.22.

3. Presence of the Person Subject to the Guardianship at the Hearing Should Be Required Unless There Are Extraordinary Circumstances

Section 8 of the Bill requires that the respondent be present at the first hearing, unless the respondent's presence is excused by the court because it is "medically contraindicated" according to the court's determination. "Medically contraindicated" is defined as likely to cause harm to the respondent, or where the respondent is unable to participate in the hearing, or where no meaningful participation will result from the respondent's attendance. This provision should be more clearly defined by adding language to more closely mirror MHL Art. 81, which has a presumption that the person subject to a guardianship be present at the hearing, "so as to permit the court to obtain its own impression of the person's capacity."[12] Further, the presumption that a person be present for the hearing also ensures that the person is making an informed decision as to whether to consent or object to the guardianship.

4. A Meaningful Way to Terminate the Guardianship and Restore the Rights to the Person Should Be Added to the Statute

Section 10 of the Bill does not provide a practical and simplified way for a person subject to a guardianship to seek termination of the guardianship and restoration of rights. § 10 does not acknowledge that there is a shifting continuum of functional ability and that persons with developmental disabilities have the capability to grow and acquire more skills as they age. Instead, the statute should require that the person subject to the guardianship be told not only what the guardianship entails, but also how to terminate or modify the guardianship and how to access counsel. Further, as part of the annual reporting requirement that is part of § 17, the guardian should include a current functional assessment of the person and steps that the guardian has taken to maximize the growth and independence of the person subject to the guardianship.

CONCLUSION

The treatment of persons with developmental disabilities is a vitally important issue and we urge the Legislature to consider these proposed changes to A.8171.

Mental Health Law Committee
Naomi Weinstein, Chair

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[12] MHL § 81.11(c). (hearing must be conducted in the presence of the person alleged to be incapacitated unless the person is not present in the state or all the information before the court clearly establishes that the person is completely unable to participate in the hearing or no meaningful participation will result in the person's presence at the hearing). This presumption of presence often necessitates that hearings be held where the person currently resides, whether it is at an apartment, hospital, or nursing home.