Restoring Rights in 17A Guardianships: Myths and Strategies

By Jennifer J. Monthie

Introduction

Guardianship under Article 17A of the Surrogate's Court Procedure Act ("Article 17A") is almost always permanent[1]—a court transfers the decision making rights of a person to another and those rights are rarely regained over the lifetime of the person. What happens to a person who is placed under a guardianship and does not need a guardian? Most guardianship statutes, including Article 17A, allow for the modification or termination of the guardianship, but there is limited data on how frequently guardianships are actually terminated. Data on the number of cases where Article 17A guardianships have been terminated and the individual's rights were restored is not currently being collected. Reported decisions of restoration of rights under Article 17A are rare.[2] Those seeking restoration under Article 17A can even face initial opposition to the petition to terminate the guardianship. In two separate Surrogate's Courts, a person seeking to terminate a guardianship was initially turned away by the court's clerk. They were told that they could not seek a termination of the guardianship because their disabilities were adjudicated as permanent.

This article aims to address the myth that restoration of rights is not possible under Article 17A by following the restoration stories of three people, Michael, Junior and Kelly, who sought the termination of their Article 17A guardianships. Junior was placed under guardianship at the age of 25 because of a diagnosis of intellectual disability. He began exploring restoration after he was told that he could not consent to his photograph being used when he was made employee of the month. Kelly was also placed under guardianship because of her diagnosis of intellectual disability. A disagreement about medical care prompted her to seek legal advice about removing her guardian. Michael lived his entire life with his parents who sought guardianship because of his intellectual disability. It was only as his parents health declined and they were unable to serve as his guardian that Michael started to consider whether he needed or wanted a guardian.

Michael, Junior and Kelly struggled to regain their independence and in the process have helped define a practice of restoration under Article 17A. Their cases highlight the impact of limited procedural protections within Article 17A[3] and the lack of a defined process for restoring the rights of someone under guardianships.

History of Article 17A[4]

Before exploring restoration it is important to understand the history of Article 17A. In 1969, spurred by parents and parent organizations seeking to protect the interests of people with intellectual disabilities,[5] a bill was enacted which authorized a Surrogate's Court judge to appoint a guardian over the person, property or person and property of a person with intellectual disability. Article 17A has remained nearly identical today. Article 17A is a plenary guardianship statute that does not direct the tailoring of the powers of the guardian to the specific needs of the person under guardianship. Article 17A does not require any specific factual allegations about the person's ability to understand the nature and consequences of his or her ability to provide for personal needs or property management. Instead, Article 17A requires that the petition be filed with the court on forms prescribed by the Unified Court System of the State of New York.[6] The petitioner is required to submit certifications of two physicians or one licensed psychologist and one physician with the petition. The physician or psychologist must opine whether the person is incapable of managing himself or herself and/or his or her affairs by reason of an intellectual or developmental disability and whether such condition is permanent in nature or likely to continue indefinitely.

In 1990, the Office of Mental Retardation and Developmental Disabilities[7] was directed by the New York State Legislature to study and re-evaluate Article 17A. The legislature sought this study because of "momentous changes [which have occurred] in the care, treatment, and understanding of" individuals with disabilities.[8] The final study

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was to be submitted to the legislature by December 1, 1991, but the study was not made public and ultimately no amendments to Article 17A were made.

Nearly two decades later, a renewed examination of Article 17A began after a Surrogate's Court decision criticized the statute for its procedural shortcomings.[9] This decision was followed by several others and a body of reported decisions on Article 17A have emerged.[10]

Then in 2013, the New York State's Olmstead Cabinet[11] took a position on Article 17A. The Olmstead Cabinet called for Article 17A to be "modernized in light of the Olmstead mandate…with respect to appointment, hearings, functional capacity, and consideration of choice and preference in decision making."[12] In response to this plan, the Office for People With Developmental Disabilities proposed a departmental bill to the legislature that sought to redress the discrimination criticized in the Olmstead report.[13] The Bill was not enacted.[14] Other bills have been introduced to amend Article 17A but each has not passed by both branches of the state's legislature.[15]

On September 21, 2016, Disability Rights New York[16] (DRNY) filed a suit in the United States District Court for the Southern District of New York seeking to enjoin the State of New York[17] from appointing guardianships pursuant to Article 17A, because the statute violates the Fifth and Fourteenth Amendments of the United States Constitution, the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act of 1973 (Section 504).[18] On August 16, 2017, the Southern District of New York dismissed the action on the sole ground that abstention is warranted pursuant to *Younger v. Harris*.[19] The court concluded that "[t]he New York State courts are an adequate venue for plaintiff to ventilate its constitutional concerns, and plaintiff's challenge will receive the full benefit of appellate review, and if needed, review in the Supreme Court of the United States…Accordingly, plaintiff's challenge is not prejudiced by my decision today."[20] On September 11, 2017, DRNY appealed and the appeal is pending before the U.S. Court of Appeals for the Second Circuit.[21]

Restoring Rights an Evolving Process

As Article 17A is being examined by the legislature and challenged in federal court, people who have been placed under guardianship have started to return to Surrogate's Courts to demand restoration of their rights. These restoration cases are challenging because of the way Article 17A is structured. Under Article 17A, a guardianship continues over the entire life of the person; there is no limit on duration or subsequent review of the need for continued guardianship.[22] Modification or termination of an Article 17A guardianship requires the person under guardianship or another person on behalf of the person under guardianship to petition the court to modify, dissolve, or amend the guardianship order.[23] As one Surrogate's Court judge described it, "[a]lthough article 17-A provides for a proceeding by which a guardianship may be terminated (SCPA 1759), commencing such a proceeding is unquestionably daunting, and may be impossible for someone who is immobile or illiterate. Of equal concern, there is no proceeding by which changes in the ward's condition or situation can be addressed."[24]

The lack of an easy to understand and accessible process for terminating or modifying an Article 17A guardianship impacts those under guardianship. Kelly's mother obtained an Article 17A guardianship over her when she was 27 years old. Now, in her 40s she lives in her own apartment where she cooks, cleans and shops for herself. Despite her daily independence, and limited interaction with her guardian, Kelly remained under a guardianship for 15 years.

Access to legal advice and representation is often an insurmountable barrier for a person seeking to terminate a guardianship. Article 17A makes no provision for the appointment of an attorney to represent the individual. Instead, Article 17A states that a court, "may in its discretion appoint a guardian ad litem, or the mental hygiene legal service[25] if such person is a resident of a mental hygiene facility… 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."[26] This provision does not provide for an attorney-client relationship.[27] One Surrogate's Court has held that in light of the severe deprivation of liberty that results from a 17A guardianship, and the inability of the respondent to afford counsel, assignment of counsel was constitutionally mandated when a petition for guardianship is made.[28] This right has not been extended to all Surrogate's Courts across the state or to those seeking a modification or termination of a guardianship under Article 17A.

People under Article 17A guardianship and those who support them are often unsuccessful in securing representation on their own. Clients report contacting several legal advocacy organizations and being denied legal representation because restoration under guardianship was not within the organization's practice area. This is not surprising as the legal practice of restoring the rights of people under Article 17A guardianship is limited. An attorney engaging in this type of representation is given very little guidance from the statute. The process can differ depending on the Surrogate's Court. For one client, even after finally securing legal representation, clerks at the Surrogate's Court refused to accept the petition to terminate the guardianship claiming that because the person was placed under guardianship the person lacked the le-

gal standing to petition the court. In another Surrogate's Court, a clerk told the attorney that since two physicians signed certifications which swore that the disability was severe and permanent, there is no grounds for seeking a termination.

Another barrier to restoration of rights is the lack of understanding about what guardianship means to the person placed under guardianship. Article 17A does not require that the person with intellectual or developmental disabilities be notified of his or her rights to contest the appointment of a guardianship, or to be fully informed of the nature and implications of the proceeding. Many Article 17A guardianships are obtained by parents and family members when the person reaches the age of majority. Those placed under guardianship are sometimes asked if they want their parents to continue to make decisions for them. During a restoration process some clients report that they did not fully understand the impact of guardianship. Clients often report not knowing what a guardianship is and how it impacts their lives. They confuse their desire for their parents to continue to support them with a need to consent to termination of all decision making rights. Others report not understanding the difference between having support in making decisions and having another person make those decisions for them.

During representation in a restoration proceeding, an attorney is, often for the first time, explaining what guardianship means to their client. During the restoration process a person often is considering how decisions are made for the first time, what supports they want or need to help them make decisions, and how restoration may impact the relationships they have and the choices they make. These concerns and questions need to be addressed by the attorney throughout the representation.

In 2014, when DRNY was asked by Michael to assist him, he had just been removed by Adult Protective Services (APS) from his home where he lived with his parents. His parents had been placed in a nursing home and an APS investigation had uncovered deplorable living conditions, a lack of food and working bathing facilities. The home was eventually condemned. Michael had to, for the first time, consider his decision-making process. He learned about what guardianship is and how it impacts his life. Michael developed relationships with the people who supported him and began making decisions about his living arrangements, daily activities and future goals. Over the two year course of the legal proceeding, Michael established his own decision-making process, and he developed a desire to be in control of his life choices. As a result of Michael efforts, those who worked with him regularly, including his service providers and psychologist, supported his quest for independence and autonomy.

The attorney providing representation in Article 17A restoration cases also faces the additional challenge of building a case without access to a developed record from the original guardianship proceeding. Article 17A permits the court "in its discretion to dispense with a hearing for the appointment of a guardian" where the application has been made by (a) both parents or the survivor; or (b) one parent and the consent of the other parent; or (c) any interested party and the consent of each parent.[29] Since parents often serve as guardians, Article 17A guardianships are often appointed without conducting a hearing. The statute does not require the court to make any findings of fact with regard to the nature or extent to the powers requested by the petitioner, the functional abilities or limitations of the person being subjected to the guardianship, or why it is necessary for a guardianship to be appointed. The lack of a hearing and finding of facts impacts representation in restoration cases. There is little information about why a guardianship was sought, or the functional ability of the person to make decisions at the time of the appointment of the guardianships.

Junior was placed under guardianship at the age of 25. Because his family members petitioned for guardianship, Junior's hearing was waived and there was no findings of fact by the court. The only record Junior's attorney had was the decree and letters of guardianship. Therefore, a full record needed to be developed to petition for restoration. This meant gathering records about Junior, obtaining evaluations or assessments from providers and treating professionals, and preparing Junior to provide testimony in court.

Since Article 17A is silent as to which party has the burden when petitioning for modification or dissolution of the guardianship, the burden is placed on the person petitioning the court. That means the person with a disability must prove that it is in her best interest to remove the guardianship. One Surrogate's Court described the "best interest" standard as amorphous, a standard which is "rarely articulated but frequently assumed."[30] Without a record to show why the guardianship was imposed and what the guardianship does to benefit the person, the attorney cannot rely upon a change in circumstances. Instead, the attorney is forced to prove that it is not in the client's best interest to remain under a guardianship.

While Junior's diagnosis had not changed over the course of the guardianship, he had secured competitive employment and was no longer receiving Social Security benefits or Medicaid benefits. His full-time employment afforded him a living wage with health benefits. Even though these life changes could demonstrate that

a guardianship is not necessary, Junior still needed to demonstrate why the guardianship was not in his best interest. Junior's attorney obtained new functional and psychological assessments to support the removal of the guardianship. Junior's attorney relied upon the lack of contact with the guardian, who lived out of state, and the inability to participate in activities at work to show that the guardianship was not in Junior's best interest. An attorney seeking to terminate an Article 17A guardianship should be prepared to present evidence, which far surpasses the evidence used to impose the original guardianship.

Article 17A also contains no requirement that guardians report annually as to the personal status of the person under guardianship.[31] Many people go their entire lives without anyone reviewing the continued necessity for the guardianship order.[32] The lack of a continued review impacts people who are placed under guardianship seeking restoration of rights.

Kelly sought out legal advice after she could not resolve a three-year dispute with her guardian over her medical care. Kelly's doctor recommended a change in her medication. For over three years Kelly tried to convince her guardian to talk with her doctor about a change in medication but her guardian refused. Kelly did not have a forum for reviewing the guardianship and her guardian was not required to provide a report to the court. As this dispute over medication continued, Kelly's relationship with the guardian became more and more tenuous. When a petition to terminate the guardianship was filed, Kelly and her guardian had not spoken for over nine months.

Kelly's experience is not unique. Most people under Article 17A guardianships do not know that there is legal recourse for challenging a decision of a guardian. Article 17A does not require the guardian to educate the person about their option to restore their decision making rights. Guardians even report not knowing that restoration of rights is possible under Article 17A. This is not surprising as the New York State Unified Court System publishes a detailed checklist and forms for obtaining an Article 17A guardianship but does not provide any resources about the process for removing the guardianship.[33] These barriers to legal knowledge and assistance, coupled with the lack of on-going court review, mean that most guardianships stay in place for a person's entire life even where the person does not want the guardian making decisions. Those few that do locate an attorney often lived under a guardianship for years because they were not aware that they could make their own decisions or of the option to remove the guardianship.

In Michael, Kelly and Junior's cases questions about the necessity of the original appointment of the guardianship arose during the representation. Article 17A only requires a certification of disability and then applies a best interest standard. It does not specifically require a showing of harm, an inability to manage personal needs or property, or an inability to understand and appreciate the nature and consequences of such an inability. It also does not require a showing of unmet needs before a guardianship is imposed. All these factors are required before New York's other guardianship statute (Mental Hygiene Law Article 81) is imposed.[34] The lack of consideration of these factors impacts representation in cases to restore the rights of a client under Article 17A guardianship. The standard of review is limited to whether the continuation of a guardianship is in the best interest of the person, instead of whether there is an unmet need that necessitates a guardian's involvement. For Junior, his guardian was living outside the state, had not been in contact with him for several years, and did not oppose the removal of the guardianship. If his attorney had been able to show that there was no unmet need it would have taken far less resources than preparing the case for a best interest standard. Instead, because of the confines of Article 17A, the burden rests on the person under guardianship to show that she has arranged her life to the satisfaction of a court and is capable of making reasoned decisions.

Conclusion

Michael, Junior and Kelly each were successful in having their rights restores.

Kelly was fortunate to have the support of the Guardian Ad Litem who came to court and supported the removal of the guardian. The guardian ultimately agreed to withdraw any opposition and the court terminated the guardianship with a determination that it was not in Kelly's best interest.

Michael had a long two-year legal process to remove his guardians. At trial, the Surrogate's Court found that although Michael has a disability that falls within the jurisdiction of Article 17A, it was not in his best interests to have a guardianship in place. The Surrogate's Court also found that an Article 17A guardianship was not the least restrictive means available because the guardianship was not appropriately tailored to fit his needs. The court concluded that Michael is capable of making reasoned decisions regarding his medical care and treatment and of performing daily living tasks without the need for a guardian.

Junior's guardianship was initially put in place in order to fund a trust with an annuity stemming from a personal injury settlement. The guardian never funded the trust and the annuity remained unclaimed for the du-

ration of the guardianship. For a portion of the guardianship his guardian was out of state and out of contact with Junior. Ultimately, after presenting updated psychological assessments and with Junior's testimony, the court removed the guardianship.

The journey towards restoration was not an easy one. Some have to confront their guardians and others expose themselves to a contentious legal process. In the end, these cases and the struggles these three clients faced should shape the way that we think about Article 17A guardianship. Removal of a guardian is a difficult and emotional process. If our goal is really improving self-determination for all, then as Article 17A is being explored in our legislature and by our courts, the restoration process cannot be an afterthought.

Endnotes

1. SCPA 1759.
2. *See, e.g.*, *Matter of Guglielmo*, 2006 N.Y. Misc. LEXIS 4804; 236 N.Y.L.J. 92 (Sur. Ct., Suffolk Co. 2006); *In re Michael J. N.*, 58 Misc. 3d 1204(A) (N.Y. Sur. 2017).
3. For a "deeper dive" into Article 17A you can reference Karen Andreasian et al., *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 18 CUNY L. Rev. 287(2015); Jennifer J. Monthie, *The Myth of Liberty and Justice for All: Guardianship in New York State* 80 Alb. L. Rev. 947 (2017).
4. This section provides a brief overview of the history of Article 17A and draws from the research of this author's prior publication *The Myth of Liberty and Justice for All: Guardianship in New York State,* 80 Alb. L. Rev. 947 (2017).
5. The statute was originally titled *Guardianship of Mentally Retarded Persons*. The now outdated term "mental retardation" was replaced in 2016 for the preferred term "intellectual disabilities."
6. SCPA 1752. *See* https://www.nycourts.gov/forms/surrogates/guardianship.shtml.
7. The state agency has since been renamed the Office for People with Developmental Disabilities. MHL § 5.01 (Amended L. 2010, c.168 § 2, eff. July 2010.).
8. McKinney's Cons Laws of N.Y., Book 58A, SCPA 1750, Historical and Statutory Notes, L. 1990, c. 516 § 1.
9. *In re Chaim A.K.,* 26 Misc.3d 837, 885 N.Y.S.2d 582 (Sur. Ct., New York Co. 2009).
10. *See, e.g.*, *In re Mark C.H.*, 906 N.Y.S.2d 419 (Sur. Ct. 2010); *In re Dameris L.*, 956 N.Y.S.2d 848 (Sur. Ct. 2012); *In re* D.D., 19 N.Y.S.3d 867 (Sur. Ct. 2015); *Estate of Meir*, N.Y.L.J. Sept. 30, 2016 (Sur. Ct. 2016) *In re Zhuo*, 42 N.Y.S.3d 53 (Sur. Ct. 2016); *In re Sean O.*, N.Y.L.J., Oct. 7, 2016 (Sur. Ct. 2016); *In re Leon*, 2016 N.Y. Misc. LEXIS 3493 (Sur. Ct. 2016); *In re Michelle M.*, 2016 N.Y. Misc. LEXIS 2719 (Sur. Ct. 2016); *In re Hytham M.G.*, 2016 N.Y. Misc. LEXIS 2722 (Sur. Ct. 2016); *In re Zachary W.*, N.Y.L.J., Apr. 28, 2017 (Sur. Ct. 2017).
11. In November 2012, New York's Governor ordered the creation of the Olmstead Development and Implementation Cabinet ("Olmstead Cabinet"), charged with developing a plan consistent with New York's obligations under *Olmstead v. L.C. by Zimring,* 527 U.S. 581 (1999). Under Olmstead, a state has an affirmative duty to ensure that the state's services, programs, and activities for people with disabilities are administered in the most integrated setting appropriate to the person's needs.
12. N.Y.S Olmstead Cabinet, Report and Recommendations of the Olmstead Cabinet: A Comprehensive Plan for Serving New Yorkers with Disabilities in the Most Integrated Setting 28 (2013).
13. Senate Bill 4983, https://www.nysenate.gov/legislation/bills/2015/S4983.
14. In 2016, New York Assembly member Levine introduced A5840 to amend Article 17-A.
15. *See* New York State Assembly Bill A5840 and A8171. New York Senate Bill S5842.
16. DRNY is the designated federal Protection and Advocacy System (P & A) for individuals with disabilities in New York State and, as such, is authorized by Congress to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of individuals with disabilities. See 42 U.S.C. § 15043(a)(2)(A)(ii); N.Y. Exec. Law § 558(b).
17. The suit also names the New York State Unified Court System, Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks.
18. *Disability Rights New York v. New York State, et al.*, 1:16 –cv-07363.
19. *Disability Rights New York v. New York State, et al.*, No. 16 CIV. 7363 (AKH), 2017 WL 6388949 (S.D.N.Y. Aug. 16, 2017).
20. *Id*. at 3.
21. *Disability Rights New York v. New York State, et al* ,2017 WL 6388949 (S.D.N.Y. Aug. 16, 2017), appeal docketed, No. 17-2812 (2nd Cir. Sept. 11, 2017).
22. SCPA 1759(1) "Such guardianship shall not terminate at the age of majority or ...but shall continue during the life of such person, or until terminated by the court."
23. SCPA 1759(2).
24. *In re Mark C.H.*, 28 Misc. 3d 765, 777-78 (Sur. 2010).
25. The Mental Hygiene Legal Service (MHLS) is a New York State agency operating under the auspices of the Presiding Justice of the Appellate Division in each of the state's four judicial departments, pursuant to 22 N.Y.C.R.R. Parts 622, 694, 823, 1023. MHLS is responsible for representing, advocating and litigating on behalf of individuals receiving services for a mental disability who reside or receive services in mental hygiene facilities. See MHL §47.01.
26. SCPA 1754(1).
27. *In re Zhuo,* 2016 NY Slip Op 26309 (Sur. Ct., Kings Co. 2016).
28. *Id.*; *In re Leon*, 2016 N.Y.Misc. LEXIS 3493 (Sur. Ct., Kings Co.).
29.
30. *In re D.D.*, 50 Misc. 3d 666 (Sur. Ct., Kings Co. 2015) citing *In re Udwin,* NYLJ, June 11, 2013 at 31 (Sur. Ct., Kings Co.).
31. The yearly reporting requirements within Article 17A only apply to guardians of the property. *See* SCPA 1761.
32. Surrogates' Court New York County held that 17A is unconstitutional in the absence of periodic reporting and review and read a requirement of same into the law. *In re Mark C.H.*, 906 N.Y.S.2d 419, 434, 435 (Sur. Ct. 2010).
33. *See* https://www.nycourts.gov/courthelp/diy/guardianship17A.shtml.
34. MHL § 81.02(b)(1)-(2); §§ 81.02(a)(1) and (2); 81.03(d).