THE MYTH OF LIBERTY AND JUSTICE FOR ALL: GUARDIANSHIP IN NEW YORK STATE

*Jennifer J. Monthie**

I. INTRODUCTION

On September 21, 2016, Disability Rights New York ("DRNY"),[1] filed suit in the U.S. District Court for the Southern District of New York, seeking to enjoin the State of New York[2] from appointing guardianships[3] pursuant to Article 17-A of the Surrogate's Court Procedure Act, claiming that the statute violated the Fifth and Fourteenth Amendments of the U.S. Constitution, the Americans with Disabilities Act ("ADA"), and § 504 of the Rehabilitation Act of 1973.[4] The lawsuit asserts that Article 17-A discriminates against individuals with intellectual and developmental disabilities because it "permit[s] the termination of all decision-making rights[,] including . . . where to live, whom to associate with, what medical treatment to seek and receive, whether to marry and have children,

* Jennifer J. Monthie, Esq. is the Legal Director at Disability Rights New York ("DRNY"). DRNY is supported by the U.S. Department of Health & Human Services, Administration on Intellectual and Developmental Disabilities; Center for Mental Health Services, Substance Abuse & Mental Health Services Administration; U.S. Department of Education, Rehabilitation Services Administration; and the Social Security Administration. This article does not represent the views, positions, or policies of, or the endorsements by, any of these federal agencies. The views expressed in this article are the author's personal views and do not reflect any view of the DRNY. The author gratefully acknowledges the editorial assistance of Timothy A. Clune, Esq., and Cliff Zucker, Esq.

[1] Complaint, Disability Rights New York v. New York, No. 1:16-cv-07363-AKH (S.D.N.Y. Sept. 21, 2016). 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. 42 U.S.C. § 15043(a)(2)(A)(i)–(ii) (2012); *see* N.Y. EXEC. LAW § 558(b) (McKinney 2017).

[2] Complaint, *supra* note 1, at relief requested ¶ 3. The suit also names as defendants the New York State Unified Court System, Chief Judge Janet DiFiore, and Chief Administrative Judge Lawrence K. Marks. Complaint, *supra* note 1, ¶¶ 17, 20, 23, 25–27.

[3] Complaint, *supra* note 1, at relief requested ¶ 3. Guardianship is a legal process that terminates a person's right to make and act on some or all decisions and grants that power to another individual. *See* Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 93 (2012).

[4] *See* Complaint, *supra* note 1, at relief requested ¶ 3.

whether to vote, and where to work."[5]

"In New York State, guardianship of individuals with intellectual disabilities and developmental disabilities may be sought pursuant to Article [17-A] or Mental Hygiene Law Article 81."[6] DRNY's lawsuit challenges the discriminatory differences in the substantive standards governing Article 17-A and Article 81. "[U]nder Article [17-A], the basis for appointing a guardian is diagnosis driven, that is, whether a person has an intellectual or developmental disability."[7] "Article [17-A] provides . . . for the appointment of a plenary guardianship of the person, property or person and property[, which] is not individually tailored . . . ."[8] By contrast, Article 81 applies to all persons with functional limitations that allegedly impair their capacity to make decisions.[9] Article 81 does not distinguish between individuals with mental illness, intellectual disabilities, developmental disabilities, or any other disability. Instead, Article 81 requires a court to assess the individual's "'functional limitations which impair the person's ability to provide for personal needs or property management' regardless of the origin of the functional limitation."[10] Under Article 81, any deprivation of rights must be tailored to the functional limitations of the person rather than based on an individual's diagnosed disability.[11] "Article

[5] *Id.* ¶ 2.

[6] *Id.* ¶ 30. Article 17-A was originally enacted in 1969 and applied to persons with "mental retardation." *In re* Chaim A.K., 885 N.Y.S.2d 582, 585 (Sur. Ct. 2009). It was revised in 1989 to add persons who are "developmentally disabled." *Id.* SCPA was again revised in 2016 to replace the term "mental retardation" with "intellectual disability." N.Y. SURR. CT. PROC. ACT LAW § 1750 (McKinney 2017). Article 81, enacted in 1992, applies to all persons whose functional incapacities make them unable to manage themselves or their property such that they are both placed in danger and incapable of understanding the consequences of their incapacity. *See* N.Y. MENTAL HYG. LAW § 81.02(b)(1)–(b)(2) (McKinney 2017).

[7] Complaint, *supra* note 1, ¶ 33; *see In re Chaim A.K.*, 885 N.Y.S.2d at 586 ("As is apparent on the face of the two statutes, Article 17-A is almost purely diagnosis driven, while article 81 requires a more refined determination linking functional incapacity, appreciation of danger, and danger itself."); 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) [hereinafter OLMSTEAD REPORT], http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/olmstead-cabinet-report101013.pdf.

[8] Complaint, *supra* note 1, ¶ 34; *In re* Michelle M., 2016 N.Y. Misc. LEXIS 2719, at *7 (Sur. Ct. July 22, 2016) ("[T]he appointment of a guardian under Article 17-A is an entirely plenary guardianship."). Article 17-A only permits a limited guardianship of the property where the individual with a disability is "self-supporting by means of his or her wages or earnings from employment" for property other than wages and earnings. SURR. CT. PROC. ACT LAW § 1756. "[T]here is no equivalent statutory provision permitting limited guardianship of the person." *In re Michelle M.*, 2016 N.Y. Misc. LEXIS 2719, at *7 n.5.

[9] *See* MENTAL HYG. LAW § 81.02(b)(1)–(b)(2), (c); Complaint, *supra* note 1, ¶ 43.

[10] MENTAL HYG. LAW § 81.15(a)(2); Complaint, *supra* note 1, ¶ 43.

[11] Complaint, *supra* note 1, ¶ 31; *see* MENTAL HYG. LAW §§ 81.01, 81.02(a)(2).

81 explicitly requires the court to impose the least restrictive form of intervention, [when] taking into account the community supports, resources and existing advance directives that render a guardianship unnecessary."[12]

DRNY's lawsuit challenges the lack of due process in Article 17-A, namely, that it allows reliance upon uncontested medical certifications for the imposition of a guardianship without ever having the person present at a hearing and does not provide the individual with a right to be represented by counsel.[13] By contrast, the allegedly incapacitated person in an Article 81 proceeding is entitled to a hearing and representation by an attorney throughout the entire proceeding, as well as a myriad of procedural protections otherwise absent in Article17-A.[14]

Guardianship is a state's termination of an individual's legal status or personhood under the law. Despite the state's best intentions, and as demonstrated below, the appointment of another as decision-maker ("guardian") is a fundamental infringement on an individual's personal liberty and property rights. As our understanding and acceptance of the rights of people with disabilities continues to evolve under the law, guardianship laws have faced greater scrutiny and at minimum must withstand constitutional prescriptions of due process and equal protection.

On August 16, 2017, the Southern District of New York granted defendants' motion for judgment on the pleadings in *Disability Rights New York v. New York,* on the sole ground that abstention is warranted pursuant to *Younger v. Harris*.[15] The court found: "The 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."[16] On September 11, 2016, plaintiff DRNY appealed and the matter is currently pending before the U.S. Court of Appeals for the Second Circuit.

This article examines the claims asserted in *Disability Rights New York v. New York*, comparing the substantive and procedural

[12] Complaint, *supra* note 1, ¶ 32; *see* MENTAL HYG. LAW §§ 81.02(a)(2), 81.03(e).

[13] *See* Complaint, *supra* note 1, ¶¶ 73, 77.

[14] *See* MENTAL HYG. LAW §§ 81.02(a)(2), 81.10(a), 81.11(c).

[15] Younger v. Harris, 401 U.S. 37 (1971); *see* Order Granting Defendants' Motion for Judgment on the Pleadings, Disability Rights New York v. New York, 16 Civ. 7363 (AKH) (Aug. 16, 2017).

[16] Order, *supra* note 15.

aspects of New York's systems for appointing guardianships pursuant to Article 17-A and Article 81. This comparison will focus on the constitutional deficiencies of Article 17-A from both the due process and equal protection perspectives, and examine the discriminatory impact of the appointment of a guardianship through the lens of the ADA and § 504.

II. ORIGINS OF GUARDIANSHIP

Guardianship stems from the power of the state to act to protect the well-being of its citizens when they cannot care for themselves, also known as the "*parens patriae*" power. The *parens patriae* power derives from English law at the time of the settling of the American colonies, when the King had the authority to act as "the general guardian"[17] for all "persons who had lost their intellects and became . . . incompetent to take care of themselves."[18] After the American Revolution, *parens patriae* was held to be "inherent in the supreme power of every state[,] . . . and often necessary to be exercised in the interests of humanity."[19] The premise for guardianship is that members of a society grant power to the state for the protection of their eventual future well-being.[20]

Despite these benevolent intentions—often directed at individuals with disabilities—*parens patriae* power does not shield the state from the constitutional requirements of due process and equal protection under the law.[21] In fact, the U.S. Supreme Court has long recognized that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[22] Whenever "the state . . . act[s] in *parens patriae*, it

[17] Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972). "The nature of the *parens patriae* suit has been . . . expanded in the United States beyond that which existed in England." *Id.* (citing Louisiana v. Texas, 176 U.S. 1, 19 (1900)).

[18] Brief for American Ass'n on Mental Deficiency et al. as Amici Curiae Supporting Respondent at 27, O'Connor v. Donaldson, 422 U.S. 563 (1974) (No. 74-8) (citing *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1208 n.41 (1974)).

[19] Late Corp. of Church of Jesus Christ v. United States, 136 U.S. 1, 57 (1890).

[20] *See* A. Frank Johns, *Guardianship Folly: The Misgovernment of* Parens Patriae *and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 5–6, 7 (1997) (providing a greater discussion of *parens patriae* powers).

[21] *O'Connor*, 422 U.S. at 583 ("[A]n inevitable consequence of exercising the *parens patriae* power is that the ward's personal freedom will be substantially restrained, whether a guardian is appointed to control his property, he is placed in the custody of a private third party, or committed to an institution. Thus, however the power is implemented, due process requires that it not be invoked indiscriminately.").

[22] *In re* Gault, 387 U.S. 1, 18 (1967).

has the inescapable duty to vouchsafe due process."[23] As one New York State Surrogate's Court judge wrote while examining an Article 17-A guardianship petition: "[J]udicial scrutiny of the exercise of the *parens patriae* power has been imprecise and in guardianship and conservatorship proceedings, it has historically been exercised with little or no concern for due process protection[;] . . . [therefore] a more restrictive due process environment is justified in the exercise of the *parens patriae* power."[24]

III. GUARDIANSHIP REFORM

In February 1977, President Carter established the Commission on Mental Health to review the mental health needs of the nation.[25] The Commission, recognizing the unchecked *parens patriae* power of states, reported that improving the guardianship system was a high priority. "Because guardianship can lead to a deprivation of legal rights, it is a highly restrictive method of providing supervision and assistance[;] . . . [i]t is therefore essential that guardianship laws be carefully tailored to avoid any unnecessary restrictions on the rights of individuals."[26] The Commission specifically recommended: increased procedural protections such as written and oral notice; the right to be present at the proceeding; the right to legal representation; and a clear and convincing evidence standard of proof.[27] The Commission also called for "a comprehensive evaluation of functional abilities conducted by trained personnel;" the exercise of the guardian's powers only in the least restrictive manner; and "a system of limited guardianship [where a person's] rights are removed . . . for only those activities in which [the] person" is unable to act competently.[28]

In 1978, building upon the Commission's recommendations, the American Bar Association's ("ABA") Commission on the Mentally Disabled proposed the ABA Model Guardianship Statute, which highlighted limited guardianship and other alternative pathways to addressing the needs of individuals with disabilities without

[23] Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968).

[24] *In re* Mark C.H., 906 N.Y.S.2d 419, 425 n.23 (Sur. Ct. 2010).

[25] Exec. Order No. 11,973, 42 Fed. Reg. 10,677 (Feb. 23, 1977).

[26] PRESIDENT'S COMM'N ON MENTAL HEALTH, REPORT TO THE PRESIDENT FROM THE PRESIDENT'S COMMISSION ON MENTAL HEALTH 43 (1978), https://babel.hathitrust.org/cgi/pt?id=uc1.b4087615;view=1up;seq=59.

[27] *Id.* at 71.

[28] *Id.* at 43, 71.

resorting to guardianship.[29] The Model Guardianship Statute proposed laws to enhance the autonomy and retain the decision-making rights of individuals with disabilities.[30] The Model Guardianship Statute provided procedural due process protections that were either nonexistent or vaguely worded in most guardianship laws.[31] The Model Guardianship Statute also replaced the process of relying on conclusory medical opinions about the person's incapacity with functionally based criteria for assessing the person's need for substitute decision-making.[32] These recommendations, however, did not result in substantial guardianship reform across the United States. Instead, it took another decade, abuse of an aging population, and an Associated Press exposé to prompt states to reform guardianship laws.

In September 1987, the Associated Press published an exposé of a year-long study into the state of guardianship in the United States, with a headline announcing: "Declared 'Legally Dead' by a Troubled System."[33] The Associated Press examined 2,200 probate, guardianship, and conservatorship estate files,[34] and found that forty-eight percent were missing annual financial accountings, and thirteen percent lacked any entries after the appointment of the guardianship.[35] One of the most shocking findings of the report was that forty-nine percent of the people under guardianship were not present at the hearings when the guardianship was appointed, and twenty-five percent of their records failed to indicate whether hearings had even been held.[36] This exposé revealed that "[i]n

[29] *See* Comm'n on the Mentally Disabled, Am. Bar Ass'n, *Legal Issues in State Mental Health Care: Proposals for Change*, 2 MENTAL DISABILITY L. REP. 444, 445–46, 449 (1978).

[30] *See id.* at 451.

[31] *See id.* at 444, 445. The Model Guardianship Statute specifically directed that due process protections such as notice, the right to counsel, mandatory hearings and jury trials, multidisciplinary pre-hearing investigations to evaluate the person's social, economic, mental and physical functioning, and consideration of alternatives to guardianship, be included in guardianship statues. *Id.*; *see also* Johns, s*upra* note 20, at 41–43 (providing a greater discussion of the Commission's Model Guardianship Statute).

[32] Comm'n on the Mentally Disabled, *supra* note 29, at 451–52 (providing an example of what the criteria are for evaluation of a person's incapacity).

[33] Fred Bayles & Scott McCartney, *Guardians of the Elderly: An Ailing System Part I: Declared 'Legally Dead' by a Troubled System*, ASSOCIATED PRESS (Sept. 19, 1987), http://www.apnewsarchive.com/1987/Guardians-of-the-Elderly-An-Ailing-System-Part-I-Declared-Legally%20Dead-by-a-Troubled-System/id-1198f64bb05d9c1ec690035983c02f9f.

[34] *Id.* State statutes use a variety of terms to define guardianship systems, including: guardian of the person, guardian of the estate, probate, or conservatorship. Brenda K. Uekert & Thomas Dibble, *Guardianship of the Elderly Past Performance and Future Promises*, 23 CT. MANAGER 9, 9–10 (2008), http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1570.

[35] Bayles & McCartney, *supra* note 33.

[36] *See id.*

thousands of courts around the nation every week, a few minutes of routine and the stroke of a judge's pen are all that it takes to strip [a person] of basic rights."[37] A legal tool meant to protect people and their property was shown to result in financial or physical mistreatment. One source that was quoted in these articles summarized the failings: "Guardianship is a process that uproots people, literally 'unpersons' them, [and] declares them legally dead . . . . Done badly, it does more hurting than protecting."[38]

In 1988, the ABA's Commission on the Mentally Disabled and the Commission on Legal Problems of the Elderly convened experts[39] and issued a report with thirty-one recommendations for reforming guardianship systems across the United States.[40] At the time, most state guardianship laws failed to include even the most basic due process of notice and the opportunity for a hearing, lacked uniform rules of evidence and civil procedure, failed to appoint counsel, lacked any process for confronting or cross-examining witnesses, and failed to tailor or limit the guardianship to minimize the loss of autonomy.[41] New York State's process for appointing substitute decision-makers also failed to meet these basic due process requirements.

A. New York State's Guardianship System Reform

In 1990, the ABA's Committee on Legal Problems of the Aging analyzed ninety-two conservator and committee cases in the Bronx, Brooklyn, and Manhattan.[42] The report found: long delays in the

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[37] *Id.*

[38] *Id.*

[39] *See* Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867, 867–69 (2002). The Associated Press prompted the ABA's Commission on Legal Problems of the Elderly to host a conference in Wingspread, Wisconsin. *See id.* The recommendations from that conference, entitled: "Guardianship: An Agenda for Reform—Recommendations of the National Guardianship Symposium and Policy of the American Bar Association (ABA 1989)," were subsequently adopted by the ABA House of Delegates. *See id.* at 868–69, 869 n.3.

[40] COMM'N ON THE MENTALLY DISABLED & COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, AM. BAR ASS'N, GUARDIANSHIP: AN AGENDA FOR REFORM: RECOMMENDATIONS OF THE NATIONAL GUARDIANSHIP SYMPOSIUM AND POLICY OF THE AMERICAN BAR ASSOCIATION, at iv (1989).

[41] *See* Johns, *supra* note 20, at 20; *see also* Rose Mary Bailly, *Introduction to Article 81 of the Mental Hygiene Law: Guardianship for Personal Care and/or Property Management*, *in* ARTICLE 81 OF THE MENTAL HYGIENE LAW 3–7 (New York Bar Ass'n ed., 1993) [hereinafter Bailly, *Introduction to Article 81*] (describing a series of debates that catalyzed the repeal of Articles 77 and 78).

[42] *See* Julia C. Spring & Nancy Neveloff Dubler, *Conservatorship in New York State: Does it Serve the Needs of the Elderly?*, 45 RECORD 288, 306 (1990).

legal process; that in eighty-seven of the eighty-nine cases, the person's presence at the hearing was waived; that orders did not limit the conservator's or committee's powers; and that there was no post-appointment monitoring of the personal welfare of the person.[43] Based on this report and the work of other interested stakeholders,[44] the New York State legislature directed the New York State Law Revision Commission[45] to study committee and conservatorship under Articles 77[46] and 78.[47] The Law Revision Commission submitted a report to the legislature, which prompted the legislature to determine that New York's conservatorship and committee laws were not flexible enough to meet the diverse and complex needs of individuals with disabilities that impact capacity.[48] After the Law Revision Commission's study was completed, the legislature found:

> Conservatorship[,] which traditionally compromises a person's rights only with respect to property[,] frequently is insufficient to provide necessary relief. On the other hand, a committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a deprivation that is often excessive and unnecessary. Moreover, certain persons require some form of assistance in meeting their personal and property management needs but do not require either of these drastic

[43] *See id.* at 312, 315, 318–20; Rosann Torres, *Article 81 of the Mental Hygiene Law: Designed to Protect the Elderly, but Prejudicing Children's Rights*, 7 J.L. & POL'Y 303, 310 (1998).

[44] *See* Torres, *supra* note 43, at 309–10; *see also* Bailly, *Introduction to Article 81*, *supra* note 41, at 4, 5 (detailing how advocates contributed to the repeal of Articles 77 and 78 through legislative debate).

[45] *See* Bailly, *Introduction to Article 81, supra* note 41, at 3–4. Created by Chapter 597 of the Laws of 1934, the New York State Law Revision Commission is a state agency consisting of the chairpersons of the Judiciary and Codes Committees of the Senate and Assembly, as well as five members appointed by the Governor for a term of five years. *About the Commission*, N.Y. ST. L. REVISION COMMISSION, https://lawrevision.state.ny.us/ (last visited Jan. 26, 2017). Its purpose is to examine the common law and statutes of New York State for defects and anachronisms, to receive and consider proposed changes to laws from a variety of sources, and to periodically recommend modifications. *See id.*

[46] *See* N.Y. MENTAL HYG. LAW § 77.01 (repealed 1993) (defining a "conservator" as a person appointed by the court to manage the money and property of an incapacitated person).

[47] *See* N.Y. MENTAL HYG. LAW § 78 (repealed 1993). Article 78 permitted the appointment of a committee as a guardian for an incapacitated person who had been civilly committed. *See* Torres, *supra* note 43, at 304 n.5; *see also* Bailly, *Introduction to Article 81*, *supra* note 41, at 4–5 (describing "committee" under Article 78); Rose Mary Bailly, Practice Commentaries, McKinney's Consolidated Laws of New York, 2015 Electronic Update, Mental Hygiene Law § 81.01 [hereinafter Bailly, Practice Commentaries] (referring to Articles 77 and 78 as New York's committee and conservatorship laws).

[48] *See, e.g.*, Bailly, Practice Commentaries, *supra* note 47.

remedies.[49]

In 1992, in response to these failings of the existing system, the legislature enacted Article 81, declaring:

> [I]t is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.[50]

Article 81 was drafted to include all persons with disabilities that impact capacity, and requires the court to focus on the individual's alleged "'functional limitations[,]' [which] means behavior or conditions of a person [that] impair[s] the ability to provide for personal needs and/or property management," regardless of the functional limitation's origin.[51]

In contrast, Article 17-A was developed in the 1960s in response to the advocacy of parents to protect the rights of their family members in institutional settings.[52] The President's Panel on Mental Retardation from the Department of Health, Education and Welfare, issued a report that called for guardians of all institutionalized individuals with intellectual disabilities. It stated:

> We believe that all [individuals with intellectual disabilities] living in institutions . . . should have outside guardians who could check on the ward's treatment, care, and release possibilities. As elsewhere, the guardian would have responsibility for maintaining contact with the ward wherever he lived or received care, and of reviewing his progress with those who have professional responsibility for him. The guardian should remain throughout the spokesman for his ward, the lay interpreter of his needs, the partisan who watches over him and his interests, his alter ego in the assertion of legal rights.[53]

In 1968, spurred by parents and parent organizations seeking to

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[49] MENTAL HYG. LAW § 81.01.

[50] *Id.*

[51] *Id.* § 81.03(c).

[52] THE PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW, *passim* (1963), https://mn.gov/mnddc/parallels2/pdf/60s/63/63-ROT-PPMR.pdf.

[53] *Id.* at 27.

protect the interests of people with intellectual disabilities, a bill was enacted that would have created "procedure for appointing a permanent guardian for persons and property," where a parent could, prior to the age of fourteen, seek a lifetime appointment of guardianship of their child.[54] At the time, guardianship in New York terminated at the age of majority and required a separate proceeding to prove incompetency pursuant to Article 78.[55] The legislature sought "[a] statutory provision . . . to eliminate the cost and complications caused by a separate proceeding in a separate court at age [twenty-one] . . . and to distinguish between guardianship for [individuals with intellectual disabilities] and committeeship for the mentally ill."[56] The justification for the bill asserted that the "need for lifetime guardianship and guidance are determined at an early age [for individuals with intellectual disabilities], remaining more or less constant."[57] The bill was vetoed by the Governor because it created "a substantial problem, perhaps of constitutional dimensions, in that an individual's right to manage his person and his property could be taken away by a proceeding . . . after a finding of [intellectual disability]."[58]

A year later in 1969, the legislature enacted Article 17-A and it was signed into law by the Governor. Article 17-A authorized a Surrogate's Court judge to appoint a guardian over the person, property, or person and property of a person with mental retardation.[59] Article 17-A was placed within Surrogate's Court Procedures Act ("SCPA") Article 17, which governs the appointment of a guardian over a minor child.[60] The practice commentaries for Article 17-A state: "The guardianship of a mentally retarded . . . person is very much like the guardianship of a child."[61] Article 17-A remains nearly identical today, permitting the Surrogate's Court to appoint a guardianship over:

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[54] VETO MEMORANDUM NO. 199, S. B. 1343-A, 191st Reg. Sess. (N.Y. 1968).

[55] *See id.*

[56] Memorandum from the State Ass'n for Retarded Children regarding the Appointment of Guardians, S. 2767, ch. 1143 (1968).

[57] *See* Memorandum from the Joint Legislative Comm. on Mental and Physical Handicap in Support of Program Bill No. 3 (1968).

[58] *See* VETO MEMORANDUM NO. 199, *supra* note 54. The Attorney General advised the Governor that the New York State Constitution requires a jury trial in all proceedings for the appointment of a committee or guardian for a person over the age of twenty-one. *See* Sporza v. Ger. Sav. Bank, 84 N.E. 406, 411 (N.Y. 1908).

[59] *See* N.Y. SURR. CT. PROC. ACT LAW § 1750 (McKinney 2017). In 2016, the term "mental retardation" was replaced with "intellectual disability" in Article 17-A. *See id.*

[60] *See* SURR. CT. PROC. ACT LAW § 1701.

[61] Margaret Valentine Turano, Practice Commentaries, McKinney's Consolidated Laws of New York, 2016 Electronic Update, Surrogate's Court Procedure Act Law § 1761.

> [A] person who is intellectually disabled[,] . . . who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with an intellectual disability, having qualifications to make such certification, as being incapable to manage him or herself and/or his or her affairs by reason of intellectual disability and that such condition is permanent in nature or likely to continue indefinitely.[62]

In 1986, Article 17-A was expanded to include other "developmental disabilities."[63]

Unlike Article 81, Article 17-A is a plenary guardianship statute that does not tailor the powers of the guardian to the specific needs of the person under guardianship.[64] Article 17-A also does not require the court to make any findings of fact with regard to the nature or extent of the powers requested by the petitioner, the allegedly incapacitated person's functional abilities and limitations, alternatives to guardianship, or why it is necessary for a guardian to be appointed.[65] The practice commentary following New York Mental Health Law section 81.01 describes the significant distinctions between Article 81 and Article 17-A:

> Although the enactment of Article 81 has had a profound impact on guardianship law in New York, it has not effected

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[62] SURR. CT. PROC. ACT LAW § 1750.

[63] *See* 1989 N.Y. Sess. Laws 1358, 2245 (McKinney). For the purposes of Article 17-A:

> [A] person who is developmentally disabled is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with developmental disabilities, having qualifications to make such certification, as having an impaired ability to understand and appreciate the nature and consequences of decisions which result in such person being incapable of managing himself or herself and/or his or her affairs by reason of developmental disability and that such condition is permanent in nature or likely to continue indefinitely, and whose disability: (a) is attributable to cerebral palsy, epilepsy, neurological impairment, autism or traumatic head injury; (b) is attributable to any other condition of a person found to be closely related to intellectual disability because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of persons with intellectual disabilities; or (c) is attributable to dyslexia resulting from a disability described in subdivision one or two of this section or from intellectual disability; and (d) originates before such person attains age twenty-two, provided, however, that no such age of origination shall apply for the purposes of this article to a person with traumatic head injury.

SURR. CT. PROC. ACT LAW § 1750-a.

[64] *See* SURR. CT. PROC. ACT LAW § 1750; Karen Andreasian et al., *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 18 CUNY L. REV. 287, 309 (2015).

[65] *See* SURR. CT. PROC. ACT LAW § 1750; Andreasian et al., *supra* note 64, at 303, 309, 310.

> any change in Article 17-A of the Surrogate's Court Procedure Act[,] which governs guardianship for persons with mental retardation or developmental disabilities. Article 17-A is markedly different from Article 81. The proceeding can only be brought in Surrogate's Court . . . the appointment can be made without a hearing or the presence of the person alleged to need a 17-A guardian; and it does not provide the same due process protections, the limited or tailored authority of the guardian, nor the detailed accountability of the guardian as Article 81.[66]

In 1990, the legislature directed the Office of Mental Retardation and Developmental Disabilities ("OMRDD")[67] to study and re-evaluate Article 17-A in light of:

> [M]omentous changes [that] have occurred in the care, treatment and understanding of . . . individuals [with disabilities]. Deinstitutionalization and community-based care have increased the capacity of persons with mental retardation and developmental disabilities to function independently and make many of their own decisions. These are rights and activities which society has increasingly come to recognize should be exercised by such persons to the fullest extent possible.[68]

The legislature recognized that the guardian's authority should not infringe on the rights of individuals with intellectual and developmental disabilities to make decisions and that "there exists a national consensus that guardianship, for all persons, should be subject to review."[69] It was also recognized that under Article 17-A, the "due process assurances were substandard" for individuals with intellectual and developmental disabilities.[70] The legislature directed a study of when critical decision-making, including medical or health-related decisions, should be delegated to a guardian, as well as what the appropriate procedural changes or other revisions to the existing statute were.[71] The final study was to be submitted to the legislature by December 1, 1991, but the study was not made

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[66] *See* Bailly, Practice Commentaries, *supra* note 47.

[67] The state agency has since been renamed the "Office for People with Developmental Disabilities" ("OPWDD"). *See* N.Y. MENTAL HYG. LAW § 5.01 (McKinney 2017).

[68] Historical and Statutory Notes, McKinney's Consolidated Laws of New York, Book 58A, Surrogate's Court Procedure Act Law § 1750, L. 1990, c. 516 § 1.

[69] *Id.*

[70] STATE OF NEW YORK BUDGET REPORT ON BILLS, 1990 Sess., S. 7139-D, § 4.

[71] *See* Historical and Statutory Notes, *supra* note 68, § 2.

public and ultimately no amendments to Article 17-A were made.[72]

Nearly twenty-one years later, 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 the . . . *Olmstead v. L.C.*"[73] decision.[74] On June 22, 1999, the U.S. Supreme Court held in *Olmstead v. L.C.* that unjustified segregation of individuals with disabilities constituted discrimination in violation of Title II of the ADA.[75] The Court held that public entities must provide community-based services to persons with disabilities when (1) such services are appropriate; (2) the affected persons do not oppose community-based treatment; and (3) community-based services can be reasonably accommodated, taking into account the resources available to the public entity and the needs of others who are receiving disability services from the entity.[76] This decision placed an affirmative duty on states 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.

The Olmstead Cabinet examined New York's compliance with Olmstead, and issued a thirty-one-page report with recommendations in October 2013.[77] This report concluded that Article 17-A discriminated against people with intellectual and developmental disabilities under the ADA, because:

> Under Article [17-A], the basis for appointing a guardian is diagnosis driven and is not based upon the functional capacity of the person with disability. A hearing is not required, but if a hearing is held, Article [17-A] does not require the presence of the person for whom the guardianship is sought. Additionally, Article [17-A] does not limit guardianship rights to the individual's specific incapacities, which is inconsistent with the least-restrictive philosophy of Olmstead. Once guardianship is granted, Article [17-A] instructs the guardian to make decisions based upon the "best interests" of the person with a disability and does not require the guardian to examine the choice and

[72] *See id.* § 4.
[73] Olmstead v. L.C. by Zimring, 527 U.S. 581 (1999).
[74] OLMSTEAD REPORT, *supra* note 7, at 8.
[75] *See Olmstead*, 527 U.S. at 597.
[76] *See id.* at 607.
[77] *See* OLMSTEAD REPORT, *supra* note 7.

preference of the person with a disability.[78]

"The Olmstead Cabinet recommend[ed] that Article [17-A] be modernized in light of the Olmstead mandate to mirror the more recent Article 81 with respect to appointment, hearings, functional capacity, and consideration of choice and preference in decision-making."[79] In 2015, the Office for People With Developmental Disabilities proposed a departmental bill to the legislature, which sought to redress the discrimination criticized in the Olmstead report.[80] The bill was not enacted. In 2016, two new bills were introduced: Senate bill 5840[81] and Assembly bill 8171.[82] At the time of the printing of this article, the state has not made revisions to Article 17-A or the Unified Court System's forms used to petition for guardianship.

IV. NEW YORK STATE'S GUARDIANSHIP SYSTEM AND CONSTITUTIONAL RIGHTS

In *Disability Rights New York v. New York*, the plaintiff asserted that "[f]or decades, individuals with intellectual and developmental disabilities have been deprived of their constitutional rights and discriminated against because of their disabilities by New York State's Unified Court System through the appointment of plenary guardians pursuant to Article 17-A."[83] The lawsuit was filed "to defend the rights guaranteed by the United States Constitution."[84] The plaintiff criticized the differing procedures used for appointing guardianships in New York State, and highlighted the deprivations of rights of individuals with intellectual and developmental disabilities.[85]

The Fifth Amendment to the U.S. Constitution provides that the federal government shall not deprive any person "of life, liberty, or property, without due process of law."[86] The Fourteenth Amendment makes this requirement applicable to the states, and together, the Fifth and Fourteenth Amendments forbid the government from infringing on a fundamental liberty interest

[78] *See id.* at 28.
[79] *Id.*
[80] *See* S. B. 4983, 238th Reg. Sess. (N.Y. 2015).
[81] *See* S. B. 5840, 239th Reg. Sess. (N.Y. 2016).
[82] *See* Assemb. B. 8171, 239th Reg. Sess. (N.Y. 2016).
[83] Complaint, *supra* note 1, ¶ 1.
[84] *Id.* ¶ 3.
[85] *See id.* ¶¶ 29–34.
[86] U.S. CONST. amend. V.

where the matter is not narrowly tailored to serve a compelling governmental interest.[87]

A. Property and Liberty Interests as Fundamental Rights

Guardianship impacts both the fundamental liberties and property interests of individuals. An individual may be subject to guardianship indefinitely, interfering with the individual's ability to maintain personal relationships, seek and obtain employment, marry, or vote.[88] The U.S. Supreme Court recognized many years ago that constitutionally protected liberty is:

> [N]ot merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[89]

"In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property."[90] So while the "rights to acquire, enjoy, own and dispose of property" are fundamental rights, so is the right to speak and the right to travel.[91] While the Supreme Court has not specifically defined "liberty," the term is broadly defined and "extends to the full range of conduct which the individual is free to pursue," and must not be restricted without proper governmental objective.[92]

These liberty and property rights are fundamentally at stake in a guardianship proceeding. Guardianship can infringe on a person's fundamental right to privacy to engage in personal conduct;[93] a

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[87] *See* U.S. CONST. amend. XIV, § 1; Reno v. Flores, 507 U.S. 292, 301–02 (1993).

[88] As noted by one Surrogate's Court judge:

> Many decisions that define the essence of an individual, such as where and with whom she lives, whether she can travel, work, marry, engage in certain social activities, whether and how she manages her income and resources, and what medical treatment she undergoes or refuses, are removed from that individual, who will have lost the legal right and ability to govern her own affairs and participate in society without the approval of another. For this reason, Article 17-A guardianship is perhaps the most restrictive type of guardianship available under New York law.

In re Michelle M., 2016 N.Y. Misc. LEXIS 2719, at *7–8 (N.Y. Sur. Ct. 2016).

[89] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[90] Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

[91] Sei Fujii v. State, 242 P.2d 617, 624 (Cal. 1952); *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 432 (1968).

[92] Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

[93] Once a guardian is appointed, "the guardian dictates the ward's residence; the ward's freedom to travel is curtailed; and the ward's legal relationship with other persons is limited." Deere v. Deere, 708 P.2d 1123, 1125–26 (Okla. 1985).

fundamental right to refuse unwanted medical treatment;[94] a fundamental right to make personal decisions regarding "marriage, procreation, contraception, family relationships, child rearing, and education;"[95] and a fundamental right to vote.[96] New York courts have described guardianship as "calculated to deprive a citizen not only of the possession of his property, but also of his personal liberty."[97] Two New York Surrogate's Courts (New York County and Kings County) have consistently invoked the liberty and property interests of individuals subjected to Article 17-A guardianship.[98] The New York County Surrogate's Court found:

> The appointment of a plenary guardian of the person under article 17-A gives that guardian virtually total power over

[94] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."). The right to refuse treatment includes a liberty interest in avoiding the unwanted administration of antipsychotic drugs. *See* Washington v. Harper, 494 U.S. 210, 221–22 (1990). Pursuant to Article 17-A, where a person has been adjudged as being incapable of making health care decisions under SCPA § 1750-b, the court is not required to periodically revisit this decision. *See* N.Y. SURR. CT. PROC. ACT LAW §§ 1750-b, 1758, 1759 (McKinney 2017). As such, the guardian may make health care decisions indefinitely. *See id.*

[95] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)); *see* Hoadley v. Hoadley, 155 N.E. 728, 729 (N.Y. 1927) ("Marriages contracted by persons incapable of contracting . . . [are] thereafter to be void from the time their nullity was declared by a court of competent authority.").

[96] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) (first quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); and then quoting Reynolds v. Sims, 377 U.S. 533, 561–62 (1964)). Under New York State law, "[n]o person who has been adjudged incompetent by order of a court of competent judicial authority shall have the right to register for or vote at any election in this state unless thereafter he shall have been adjudged competent pursuant to law." N.Y. ELEC. LAW § 5-106(6) (McKinney 2017). This provision has been used to exclude individuals with disabilities from voting. *See* 1234 Broadway LLC v. Feng Chai Lin, 883 N.Y.S.2d 864, 869 (N.Y. Civ. Ct. 2009). The court stated: "Only when litigants are so incapacitated that Supreme Court deems them judicially incompetent may the state take away their liberty and place it in the hands of a guardian appointed to handle the litigant's affairs comprehensively—a Mental Hygiene Law article 81 guardian." *Id.* at 869. In so stating, the court equates a plenary guardianship with being declared judicially incompetent. *See id.*; *see also* Michele J. Feinstein & David K Webber, *Voting under Guardianship: Individual Rights Require Individual Review*, 10 NAELA J. 125, 125 (2014) ("[I]ndividuals under guardianship[] often face substantial barriers to voting, or worse, they are denied the right to vote.").

[97] *In re* Burke, 125 A.D. 889, 891 (N.Y. App. Div. 1908); *In re* Ginnel, 43 N.Y.S.2d 232, 235 (N.Y. Sup. Ct. 1943).

[98] *See, e.g.*, Estate of Meir, N.Y.L.J., Sept. 30, 2016, at 36 (Sur. Ct. 2016) (holding that evaluating functional capacity and assessing what is the least restrictive tool available to address that individual's specific area of need, is a necessary inquiry in determining whether to appoint a guardian); *In re* Zhuo, 42 N.Y.S.3d 530, 537 (Sur. Ct. 2016) (holding the statute unconstitutional in the absence of appointed counsel at public expense); *In re* Mark C.H., 906 N.Y.S.2d 419, 434, 435 (Sur. Ct. 2010) (holding the statute unconstitutional in the absence of periodic reporting and review, and reading a requirement of same into the law); *In re* Chaim A.K., 885 N.Y.S.2d 582, 587–88 (Sur. Ct. 2009) (criticizing the procedural shortcomings of the statute as potentially unconstitutional).

> her ward's life . . . including virtually all medical decisions, where the ward shall live, with whom she may associate, when and if she may travel, whether she may work or be enrolled in habilitation programs, etc. This imposition of virtually complete power over the ward clearly and dramatically infringes on a ward's liberty interests.[99]

A recent Kings County Surrogate's Court decision exemplifies the impact that guardianship could have on the liberty interests of individuals with disabilities. *Matter of D.D.* involved a young man who the court described as "aspir[ing] to someday do what many people desire—to marry."[100] The petitioners sought the appointment of an Article 17-A guardianship based in part to prevent D.D. from entering into a marriage.[101] The court recognized that the right to marry is one of our most basic fundamental rights as citizens, and "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]."[102] Consequently, the court held that when the state acted to remove D.D.'s decision-making power, he was deprived of control over those decisions affecting his life, liberty, and property that the Constitution guarantees.[103] Other surrogate's courts have examined the constitutional implications of Article 17-A and the interplay between Article 17 and Article 81.[104] However, New York County and Kings County Surrogate's Courts remain outliers for applying the protections of Article 81 to Article 17-A proceedings.

B. What Process is Due?

Since it cannot go unnoticed that guardianship is a serious

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[99] *See In re Mark C.H.*, 906 N.Y.S.2d at 427 (citing *In re Chaim A.K.*, 885 N.Y.S.2d at 587–88); *In re* D.D., 19 N.Y.S.3d 867, 869–70 (Sur. Ct. 2015).

[100] *In re D.D.*, 19 N.Y.S.3d at 875.

[101] *Id.* at 873.

[102] *Id.* (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).

[103] *See In re D.D.*, 19 N.Y.S.3d at 875, 876 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)); Tennessee v. Lane, 541 U.S. 509, 539 (2004) (citing U.S. CONST. amend. XIV, § 1).

[104] *See, e.g., In re* Zachary W., N.Y.L.J., Apr. 28, 2017 (Sur. Ct. 2017) ("[T]he court, in making its decision, is ever mindful of the due process requirement that any resulting deprivation of respondent's liberty must employ the 'least restrictive means' available to achieve the objective of protecting the individual and the community."); *In re* Sean O., N.Y.L.J., Oct. 7, 2016 (Sur. Ct. 2016) ("[I]t is manifest to this court that trying to accomplish within the confines of 17-A that which is more appropriately authorized in an Article 81 proceeding, would not be fulfilling the court's goal of seeing that respondent's best interests are met."); *In re* James Richard Maselli, 2000 N.Y. Misc. LEXIS 708 (Sur. Ct. 2000) (showing that in order to support this significant loss of individual liberty, the petitioner bears the burden of proving, to the satisfaction of the court, that the appointment of a guardian is necessary and in the best interest of the person with intellectual or developmental disability).

deprivation of one's rights and liberties, the second part of the U.S. Supreme Court's analysis asks what process is due. To answer this question, one must balance the individual interest and the procedure in protecting that interest against the state's countervailing objective.[105]

As established above, the governmental interest in guardianship stems from *parens patriae* power, to protect its citizens from harm. One New York Surrogate's Court recognized that in an Article 17-A proceeding, the governmental interest was "ensuring that when, in the exercise of its *parens patriae* power, it places almost total control over a person with disabilities in the hands of another, that person is, at the very least, no worse off than she would have been had no guardianship been imposed."[106] This clear objective to protect must therefore be balanced against the individual's liberty and property interests and the procedural protections to preserve those interests.

C. Liberty and Property Interests and Procedural Protections

There are three factors to determine whether a taking of liberty or property violates a person's rights to procedural due process.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[107]

The appointment of a guardianship is an official act of the Unified Court System that affects the individual's private interest. There is also a substantial risk of erroneously depriving an individual of these fundamental interests when Surrogate's Courts adopt the procedures set forth in Article 17-A. There is also a high probative value to adopting additional procedural safeguards. As one

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[105] *See* Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961) ("[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.").

[106] *In re* Mark C.H., 906 N.Y.S.2d 419, 430 (Sur. Ct. 2010) (emphasis added).

[107] Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).

Surrogate's Court concluded: "[Article 17-A] guardianships are of unlimited duration and scope, with no provision for independent review or examination. As such, an erroneous determination may have substantial and likely permanent consequences."[108] The governmental interest in expanding the substantive and procedural protections for individuals with intellectual and developmental disabilities can be addressed by looking at the entirety of the Unified Court System. The substantive and procedural processes already exist within Article 81, and some Surrogate's Courts have adopted these processes to preserve the rights of individuals within Article 17-A proceedings as well.[109] Therefore, the fact that the court system already provides these protections weighs against the defense of a fiscal or administrative burden.

D. Necessity of Guardianship

Since the appointment of a guardian results in a deprivation of fundamental rights, there must be compelling governmental interest for the appointment.[110] An Article 81[111] guardianship can be ordered only if there is proof by clear and convincing evidence that: (1) the person is likely to suffer harm; (2) "the person is unable to provide for personal needs and/or property management;" and (3) "the person cannot adequately understand and appreciate the

[108] *In re* Zhuo, 42 N.Y.S.3d 530, 536 (Sur. Ct. 2016).

[109] *See, e.g.*, *In re* Leon, 2016 N.Y. Misc. LEXIS 3493, at *4, *9 (Sur. Ct. 2016) (appointing legal counsel to the person subjected to the guardianship proceeding in light of the severe deprivation of individual liberty to the respondent); *In re* Michelle M., 2016 N.Y. Misc. LEXIS 2719, at *12 (Sur. Ct. 2016) (analyzing what an individual can and cannot do in managing his or her daily affairs and assessing the least restrictive tool available to address the individual's specific area of need); *In re* Hytham M.G., 2016 N.Y. Misc. LEXIS 2722, at *19 (Sur. Ct. 2016) ("Where . . . the less restrictive alternative to guardianship of supported decision-making is available, substituted decision-making through guardianship should not be granted."); *In re* Dameris L., 956 N.Y.S.2d 848, 854 (Sur. Ct. 2012) ("To the extent that New York courts have recognized ['least restrictive alternative'] as a constitutional imperative . . . it must, of necessity, apply to guardianships sought pursuant to article 17-A . . . ."); *In re Mark C.H.*, 906 N.Y.S.2d at 429 (adopting annual reporting requirements to address due process violations); *In re* Guardianship of B., 738 N.Y.S.2d 528, 532 (Tompkins Cty. Ct. 2002) ("The equal protection provisions of the federal and state Constitutions . . . require that mentally retarded persons in a similar situation be treated the same whether they have a guardian appointed under Article 17-A or [A]rticle 81.").

[110] *See* Addington v. Texas, 441 U.S. 418, 425 (1979); Rivers v. Katz, 495 N.E.2d 337, 341–43 (1986); Sherry F. Colb, *Freedom from Incarceration: Why is this Right Different from all Other Rights?,* 69 N.Y.U. L. REV. 781, 785–88 (1994); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term: Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 88 (1997).

[111] A comparison of the processes for appointing guardianship pursuant to Article 81 and Article 17-A should not be read as an endorsement of the Article 81 statute. Instead, a comparison is used only to explore the substantive and procedural aspects of these different systems for appointing guardianships.

nature and consequences of such inability."[112] Even if the alleged incapacitated person is found to lack capacity, Article 81 mandates a showing of unmet needs before a guardian can be appointed.[113]

"The presence of a particular [medical or psychiatric] condition does not necessarily preclude a person from functioning effectively."[114] In fact, the New York Court of Appeals in *Rivers v. Katz* strongly declared: "[If] the law recognizes the right of an individual to make decisions about . . . life out of respect for the dignity and autonomy of the individual, that interest is no less significant when the individual is mentally or physically ill."[115] Article 81 applies this principle to guardianship. By contrast, Article 17-A directs that where "the court is satisfied that the best interests of the person who is intellectually disabled or person who is developmentally disabled will be promoted by the appointment of a guardian of the person or property, or both, it shall make a decree naming such person or persons to serve a such guardians."[116] This violates the *Rivers* holding.

Article 17-A allows the Surrogate's Court to terminate an individual's decision-making authority in every aspect of life and deprive the individual of fundamental liberty interests with a mere determination that it is in the person's best interest to do so.[117] This "best interest" standard has been applied freely by the courts, particularly when the petitioners are parents or loved ones of the individual with disabilities. As the New York County Surrogate's Court recognized:

> Early and simplistic assumptions about the permanency and unalterability of mental retardation and developmental disability, on the one hand, and the 'natural' obligation and desire of parents to pursue their disabled children's best

[112] MENTAL HYG. LAW § 81.02(b)(1)–(2).

[113] *See id.* §§ 81.02(a)(1), 81.03(d).

[114] Glen, *supra* note 3, at 113 n.89; *see also Rivers*, 495 N.E.2d at 342.

[115] *Rivers*, 495 N.E.2d at 341 (quoting *In re* Mental Health of K. K. B., 609 P.2d 747, 752 (Okla. 1980)).

[116] N.Y. SURR. CT. PROC. ACT LAW § 1754(5) (McKinney 2017).

[117] *See In re* D.D., 19 N.Y.S.3d 867, 869–70 (Sur. Ct. 2015) (quoting *In re* Mark C.H., 906 N.Y.S.2d 419, 427 (Sur. Ct. 2010)) ("Under Article 17–A, appointment of a guardian of the person of an intellectually disabled individual wholly removes that individual's legal right to make decisions over one's own affairs and vests in the guardian 'virtually complete power' over such individual."); *see also In re* Chaim A.K., 885 N.Y.S.2d 582, 587 (Sur. Ct. 2009) ("Given a finding of either mental retardation or developmental disability, inability to care for one's self (making no distinctions between what the subject of the proceeding can and cannot do) and the amorphous 'best interests standard,' a guardian is appointed with seemingly unlimited power, much like the old conservator and committee.").

> interests may have provided justification for this lack of judicial oversight in 1966, but those assumptions are highly questionable in light of today's longer life expectancies and advances in medical knowledge.[118]

E. Standard of Proof

Where a fundamental liberty or property interest is at stake, evidentiary protections are required as a matter of due process.[119] The U.S. Supreme Court has recognized that for most "civil cases and administrative proceedings[,] the duty of prevailing by a mere preponderance of the evidence" applies.[120] However, where liberty and property interests are at stake, the Supreme Court has demanded proof by "clear, unequivocal, and convincing evidence."[121] For example, the Supreme Court has required clear and convincing proof before a state may involuntarily commit individuals in state mental hospitals.[122] While the Supreme Court has yet to decide the level of proof needed in guardianship matters, the rationale used in involuntary commitment proceedings is applicable. Civil commitment, like a guardianship, constitutes a significant deprivation of liberty that requires due process protections, it engenders adverse social consequences to the individual, and it has a significant impact on the individual.[123] Similarly, like a guardianship, the state has an interest to protect and use its *parens patriae* power, and the risk of erroneously isolating an individual "based solely on a few isolated instances of unusual conduct" is high.[124]

Other courts have specifically recognized the need for a heavy evidentiary burden of requiring proof by clear and convincing evidence in guardianship proceedings due to the rights and

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[118] *In re Chaim A.K.*, 885 N.Y.S.2d at 589–90.

[119] *See* Addington v. Texas, 441 U.S. 418, 427 (1979). "In cases involving individual rights, whether criminal or civil, '[the] standard of proof [at a minimum] reflects the value society places on individual liberty.'" *Id.* at 425 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)).

[120] *See* Woodby v. Immigration & Naturalization Servs., 385 U.S. 276, 285 (1966).

[121] *See, e.g.*, *id.* at 277 (arguing for the use of the clear, unequivocal, and convincing evidence standard in the deportation context). The Court has used the "clear, unequivocal, and convincing" standard of proof to protect particularly important individual interests in various civil cases. *See, e.g.*, Chaunt v. United States, 364 U.S. 350, 353 (1960); Schneiderman v. United States, 320 U.S. 118, 125 (1943).

[122] *See Addington*, 441 U.S. at 433.

[123] *See id.* at 425–26.

[124] *See id.* at 426, 427.

privileges at stake.[125] In fact, the clear and convincing standard is a growing trend in guardianship proceedings.[126] Article 81 requires clear and convincing evidence of the necessity of guardianship before a guardian will be appointed.[127] By contrast, the decision to appoint a guardian of the person or property, or both, under Article 17-A is based upon the less-stringent best interest standard.[128] The New York and Kings County Surrogate's Courts have described the best interest standard as "amorphous."[129] "[T]he criteria necessary to support a finding that appointment of a guardian is appropriate in a particular case are rarely articulated but frequently assumed."[130] Given the gravity of the liberty and property interests at stake in an Article 17-A guardianship proceeding, the imposition of a heavier evidentiary burden of proof of the need for a guardianship is needed.

F. Notice

The U.S. Supreme Court in *Bell v. Burson*[131] firmly established that "due process requires that when a state seeks to terminate [a protected] interest . . . it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective.'"[132] Notice must be "reasonably calculated, under all the circumstances" to inform the parties of the nature and purpose of the action.[133]

In New York, the Article 81 notice must inform the individual of the right to a hearing, to present evidence, call witnesses, cross examine witnesses, and be represented by counsel of his or her choice.[134] Article 81 requires notice to a person with a disability and the notice must include a clear and easily readable statement of the

[125] *See In re* Fisher, 552 N.Y.S.2d 807, 808, 813 (Sup. Ct. 1989) (citing Santosky v. Kramer, 455 U.S. 745, 769 (1982)).

[126] *See* Mark D. Andrews, Note, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 ELDER L.J. 75, 96–97 (1997).

[127] N.Y. MENTAL HYG. LAW § 81.02(b) (McKinney 2017).

[128] *See* N.Y. SURR. CT. PROC. ACT LAW § 1750-a(1) (McKinney 2017).

[129] *See In re* D.D., 19 N.Y.S.3d 867, 870 (Sur. Ct. 2015) (quoting *In re* Chaim A.K., 885 N.Y.S.2d 582, 587–88 (Sur. Ct. 2009)).

[130] *In re D.D.*, 19 N.Y.S.3d at 870.

[131] Bell v. Burson, 402 U.S. 535 (1971).

[132] *Burson*, 402 U.S. at 542; *see also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("[T]here can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

[133] *Mullane*, 339 U.S. at 314.

[134] *See* N.Y. MENTAL HYG. LAW § 81.11(b)(1)–(4) (McKinney 2017).

rights of the person in twelve-point or larger, bold, double-spaced, typed font, as follows:

IMPORTANT

AN APPLICATION HAS BEEN FILED IN COURT BY _____ WHO BELIEVES YOU MAY BE UNABLE TO TAKE CARE OF YOUR PERSONAL NEEDS OR FINANCIAL AFFAIRS. _____ IS ASKING THAT SOMEONE BE APPOINTED TO MAKE DECISIONS FOR YOU. WITH THIS PAPER IS A COPY OF THE APPLICATION TO THE COURT SHOWING WHY _____ BELIEVES YOU MAY BE UNABLE TO TAKE CARE OF YOUR PERSONAL NEEDS OR FINANCIAL AFFAIRS. BEFORE THE COURT MAKES THE APPOINTMENT OF SOMEONE TO MAKE DECISIONS FOR YOU THE COURT HOLDS A HEARING AT WHICH YOU ARE ENTITLED TO BE PRESENT AND TO TELL THE JUDGE IF YOU DO NOT WANT ANYONE APPOINTED. THIS PAPER TELLS YOU WHEN THE COURT HEARING WILL TAKE PLACE. IF YOU DO NOT APPEAR IN COURT, YOUR RIGHTS MAY BE SERIOUSLY AFFECTED.

YOU HAVE THE RIGHT TO DEMAND A TRIAL BY JURY. YOU MUST TELL THE COURT IF YOU WISH TO HAVE A TRIAL BY JURY. IF YOU DO NOT TELL THE COURT, THE HEARING WILL BE CONDUCTED WITHOUT A JURY. THE NAME AND ADDRESS, AND TELEPHONE NUMBER OF THE CLERK OF THE COURT ARE:

THE COURT HAS APPOINTED A COURT EVALUATOR TO EXPLAIN THIS PROCEEDING TO YOU AND TO INVESTIGATE THE CLAIMS MADE IN THE APPLICATION. THE COURT MAY GIVE THE COURT EVALUATOR PERMISSION TO INSPECT YOUR MEDICAL, PSYCHOLOGICAL, OR PSYCHIATRIC RECORDS. YOU HAVE THE RIGHT TO TELL THE JUDGE IF YOU DO NOT WANT THE COURT EVALUATOR TO BE GIVEN THAT PERMISSION. THE COURT EVALUATOR'S NAME, ADDRESS, AND TELEPHONE NUMBER ARE:

> YOU ARE ENTITLED TO HAVE A LAWYER OF YOUR CHOICE REPRESENT YOU. IF YOU WANT THE COURT TO APPOINT A LAWYER TO HELP YOU AND REPRESENT YOU, THE COURT WILL APPOINT A LAWYER FOR YOU. YOU WILL BE REQUIRED TO PAY THAT LAWYER UNLESS YOU DO NOT HAVE THE MONEY TO DO SO.[135]

The Article 81 court must also appoint a person to explain:

> To the person alleged to be incapacitated, in a manner which the person can reasonably be expected to understand, the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the rights to which the person is entitled, including the right to counsel.[136]

However,

> Article [17-A] does not require that the individual with intellectual or developmental disabilities be notified of his or her rights to contest the appointment of a guardianship, be present at a hearing, or be represented by an attorney. Article [17-A] makes no provision to tailor notice requirements to ensure that the individual . . . is fully informed of the nature and implications of the proceeding.[137]

The Supreme Court has also examined whether notice needs to be tailored to the specific needs of the individual. In *Covey v. Town of Somers,*[138] the Court discussed whether more notice is required when a person is known to have a particular disability.[139] The Court expressly rejected the argument that "the Fourteenth Amendment does not require the state to take measures in giving notice to [a person with a disability] beyond those deemed sufficient in the case of [a person without a disability]."[140] Instead, the Court concluded in a later case that "the state's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the state owes to each individual that process which, in light of the

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[135] *Id.* § 81.07; Complaint, *supra* note 1, ¶ 78.
[136] MENTAL HYG. LAW § 81.09(c)(2).
[137] Complaint, *supra* note 1, ¶¶ 81, 82.
[138] Covey v. Town of Somers, 351 U.S. 141 (1956).
[139] *See id.* at 145.
[140] *Id.* at 146, 147.

values of a free society, can be characterized as due."[141] Furthermore, when a fundamental right is implicated, the notice given must be designed not only to facilitate the preparation of a defense, but also to inform the party of the basis for the potential termination of his or her rights with particularity.[142] The notice afforded under Article 17-A is not tailored and does not meaningfully inform the person of the nature and possible consequences of the proceeding or the right to contest the proceeding.

G. The Petition

The pleading requirements of Article 17-A and Article 81 also differ dramatically. Article 81 requires the petition to include "a description of the alleged incapacitated person's functional level including that person's ability to manage the activities of daily living, behavior, and understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living."[143] Article 81 also requires the petition to include:

> Specific factual allegations as to the personal actions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for personal needs.[144]

Additionally, Article 81 requires the petition to include "the particular powers being sought and their relationship to the functional level and needs of the person alleged to be incapacitated."[145]

In contrast, Article 17-A 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 17-A requires only that the petition be filed with the court on forms prescribed by the Unified Court System.[146] The petitioner is required to submit certifications

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[141] Boddie v. Connecticut, 401 U.S. 371, 380 (1971).

[142] *See In re* Gault, 387 U.S. 1, 33 (1967) (rejecting the stated governmental interest of protecting a child to justify lack of notice in a juvenile proceeding to a minor).

[143] N.Y. MENTAL HYG. LAW § 81.08(a)(3) (McKinney 2017).

[144] *Id.* § 81.08(a)(4).

[145] *Id.* § 81.08(a)(6).

[146] *See* N.Y. SURR. CT. PROC. ACT LAW § 1752 (McKinney 2017).

of two physicians, or one licensed psychologist and one physician, with the petition.[147] The physician or psychologist must determine whether the person is "incapable [of] manag[ing] him[self] 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."[148] The forms prescribed by the Unified Court System permit the physician or psychologist to check boxes regarding these fundamental conclusions. As one Surrogate's Court judge put it:

> Almost all article 17-A proceedings are determined by reference to a form "Medical Certification[s] for Appointment of Guardian (SCPA Article 17-A)" which frequently contains conclusory assertions rather than useful information; they are subject neither to cross-examination nor even to the ordinary tests of credibility utilized by a factfinder with a live witness.[149]

Furthermore, the physician or psychologist is not required to describe in detail how the existence of an intellectual or developmental disability makes the person incapable of managing himself or herself or his or her affairs. Instead, the physician or psychologist must only "[d]escribe, in detail, the nature, degree and origin of the *disability*."[150] Finally, unlike Article 81, Article 17-A does not require the petitioner to state the specific powers requested and the relationship between the powers sought and the individual's functional limitations.[151]

In *Matter of D.D.,* Kings County Surrogate's Court found: "The two physicians' certifications state, in a conclusory manner in a preprinted form, that by reason of his intellectual disability, D.D. is not capable of managing himself and appreciating the nature and consequences of health care decisions, and of reaching an informed decision to promote his own well being."[152] These certifications did not identify why the guardianship was being sought, or include any evidence used by the two physicians in reaching their opinions that

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[147] *See id.* § 1750(1).

[148] *Id.*

[149] *In re* Chaim A.K., 885 N.Y.S.2d 582, 589 (Sur. Ct. 2009).

[150] *See* Administrative Order of the Chief Administrative Judge of the Courts, AO/165/16, Aug. 1, 2016 (emphasis added).

[151] *Compare* N.Y. MENTAL HYG. LAW § 81.08(a)(4)–(6) (McKinney 2017) (requiring the petitioner to state, with specific allegations, the specific powers requested and the nexus between such powers and the individual's incapacitation), *with* SURR. CT. PROC. ACT LAW § 1752 (requiring only generic information of the individual over whom guardianship is sought).

[152] *In re* D.D., 19 N.Y.S.3d 867, 871 (Sur. Ct. 2015).

D.D. was incapable of managing himself. In fact, the preprinted form prescribed by Article 17-A does not provide any notice to an allegedly incapacitated person of the reasons why the guardianship is sought, the extent of the powers sought, the right to contest the proceeding at a hearing, or to be represented by an attorney.[153]

The use of medical certifications in Article 17-A proceedings have also faced greater scrutiny by Surrogate's Court judges because they result in petitioners using protected health information without first seeking the individual's informed consent.[154] In order for medical practitioners to complete the certifications, they must examine the allegedly incapacitated person and perform or review testing that clinically establishes the person's intellectual or developmental disability.[155] Affidavits obtained in violation of the physician-patient privilege have been excluded in contested Article 17-A proceedings.[156] Individuals subjected to a guardianship proceeding have a privacy interest in protecting their health information and preventing the use of their records as evidence against their own legal interests.[157] Under the Privacy Rule, medical providers can disclose information only if they have the patient's authorization or are ordered to do so by the court.[158] Therefore, when the court admits the certification based on protected health information, the person subject to the guardianship proceeding has already been deprived of his or her privacy interest.[159] For all of the above reasons, the elimination of conclusory medical opinions in guardianship petitions has been a key recommendation for guardianship reform since the mid-1970s.[160]

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[153] MENTAL HYG. LAW § 81.07; Complaint, *supra* note 1, ¶ 78.

[154] *See, e.g.*, *In re* BM, 19 N.Y.S.3d 393, 395 (Sur. Ct. 2015) (holding that the physician-patient privilege, as well as the HIPAA privacy rules, apply to Article 17-A guardianship proceedings); *see also In re* Derek, 821 N.Y.S.2d 387, 390 (Sur. Ct. 2006) (striking from the record a physician's affirmations in an Article 17-A proceeding for the physician's failure to uphold the physician-patient privilege).

[155] *See In re BM*, 19 N.Y.S.3d at 394–95 (citing SURR. CT. PROC. ACT. § 1750-a(1)–(2)).

[156] *See In re Derek*, 821 N.Y.S.2d at 390; *see also In re BM*, 19 N.Y.S.3d at 395 (striking two medical certifications due to a physician's failure to uphold the physician-patient privilege and HIPAA privacy rules).

[157] *See In re Derek*, 821 N.Y.S.2d at 389, 390.

[158] *See* 45 C.F.R. §§ 164.508(a)(1), 164.512(f)(1)(i)(A) (2017); *In re Derek*, 821 N.Y.S.2d at 390.

[159] The Article 17-A statutory language requiring the certifications is trumped by the Privacy Rule because HIPAA only permits state law to trump the Privacy Rule when it is more stringent than the Privacy Rule. 45 C.F.R. § 160.203(b).

[160] *See, e.g.*, Comm'n on the Mentally Disabled, Am. Bar Ass'n, *Legal Issues in State Mental Healthcare: Proposals for Change—Guardianship*, 2 MENTAL DISABILITY L. REP. 444, 451–52 (1978) (recommending more encompassing medical evaluations for guardianship

H. Right to Counsel

The risk of erroneously depriving individuals with disabilities of liberty and property interests in a guardianship proceeding is even higher when that person is not represented by an attorney. The U.S. Supreme Court has long recognized in criminal proceedings that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[161] New York State courts have also held that certain deprivations of life and liberty trigger a right to counsel at public expense.[162] Even the Chief Judge of the Unified Court System recognized:

> [I]t is an equally obvious truth in civil proceedings involving fundamental human needs, it is extremely difficult, if not impossible, for a person to be assured a fair outcome without a lawyer's help . . . . No issue is more fundamental to our constitutional mandate of providing equal justice under law than ensuring adequate legal representation, . . . [and t]here is no substitute for full legal representation, especially for the most vulnerable litigants in our society—the elderly, children, struggling families, *people with disabilities* and abuse victims.[163]

Article 81 requires the appointment of an attorney when the alleged incapacitated person: (1) requests counsel; (2) wishes to contest the proceeding; or (3) does not consent to the authority requested in the petition; or when: (1) the petition alleges the person is in need of major medical or dental treatment; (2) is being

proceedings).

[161] Powell v. Alabama, 287 U.S. 45, 68–69 (1932); *accord* Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

[162] *See In re* Ella B., 285 N.E.2d 288, 290 (N.Y. 1972) (holding that parents have a right to counsel when facing a termination of the right to custody of a minor child proceeding); People *ex rel.* Rogers v. Stanley, 217 N.E.2d 636, 636 (N.Y. 1966) (holding that a patient challenging institutional commitment has constitutional right to assigned counsel); *In re* St. Luke's-Roosevelt Hosp. Ctr., 640 N.Y.S.2d 73, 74 (App. Div. 1996) (requiring the City of New York to pay attorneys' fees for counsel appointed to represent an indigent alleged incapacitated individual in an Article 81 guardianship proceeding); *see also* People *ex rel.* Menechino v. Warden, Green Haven State Prison, 267 N.E.2d 238, 242 (N.Y. 1971) (holding that a parolee has the right to counsel in parole revocation hearings); Hotel Martha Washington Mgmt. Co. v. Swinick, 322 N.Y.S.2d 139, 141 (Sup. Ct. 1971) (holding that a tenant has a due process right to counsel in an eviction proceeding); G. v. G., 345 N.Y.S.2d 361, 362, 367 (Fam. Ct. 1973) (holding that a father that is incarcerated for failure to comply with a support order is entitled to assigned counsel in a support proceeding). *Compare* Jacox v. Jacox, 350 N.Y.S.2d 435, 436 (App. Div. 1973) (holding that a party is entitled to assigned counsel in matrimonial litigation), *with In re* Smiley, 330 N.E.2d 53, 55 (N.Y. 1975) (holding that an indigent wife in a divorce action is not entitled to free counsel).

[163] *In re* Leon, 2016 N.Y. Misc. LEXIS 3493, at *8 (Sur. Ct. 2016) (emphasis added).

transferred to a nursing home or other residential facility; or (3) where the court determines that a possible conflict exists between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated.[164] In Article 81 proceedings, where the person is indigent, the state, or its appropriate subdivision, is required to pay for assigned counsel.[165] Article 81 also grants the alleged incapacitated person "the right to choose and engage legal counsel of the person's choice."[166]

Article 17-A makes no provision for the appointment of an attorney to represent the individual. Instead, Article 17-A states that a court:

> *May in its discretion* appoint a guardian *ad litem*, or the mental hygiene legal service 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.[167]

This provision does not provide for an attorney-client relationship, though. In an unreported decision, the Kings County Surrogate's Court highlighted the distinction between appointing counsel and appointing a guardian *ad litem*:

> [T]he role of assigned counsel is different from the function of a guardian *ad litem* (GAL), hence appointment of the latter does not satisfy the need for the former. . . . The GAL primarily serves in a limited capacity as a neutral evaluator who investigates, reports, and makes recommendations to the court based on her own assessment of the needs of the proposed ward. By contrast, the role of assigned counsel is to represent the respondent as her attorney. Counsel serves as a vigorous advocate on the respondent's behalf, safeguarding her rights, explaining the consequences of appointment of a guardian, and counseling her about available alternatives to the proceeding.[168]

Article 81 also requires the appointment of an independent court evaluator to investigate and make recommendations to the court.[169] The court evaluator has a duty to ensure that the alleged

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[164] N.Y. MENTAL HYG. LAW § 81.10(c)(1)–(4), (6) (McKinney 2017).
[165] *See id.* § 81.10(f); *In re St. Luke's-Roosevelt Hosp. Ctr.*, 640 N.Y.S.2d at 74.
[166] MENTAL HYG. LAW § 81.10(a).
[167] N.Y. SURR. CT. PROC. ACT LAW § 1754(1) (McKinney 2017) (emphasis added).
[168] *In re* Zhuo, 53 Misc. 3d 1121, 1129 (N.Y. Sur. Ct. 2016).
[169] *See* MENTAL HYG. LAW § 81.09(a).

incapacitated person understands the petition and the nature and potential consequences of the proceeding.[170] The court evaluator must also educate the person about his or her legal rights and assess whether legal counsel should be appointed.[171] In addition, the court evaluator is required to conduct a thorough investigation to aid the court in reaching a determination about the person's capacity, the availability and reliability of alternative resources, selecting the guardian, and assigning the proper powers to the guardian.[172] The appointment of a court evaluator is mandatory with one exception: the court *may* dispense with the appointment when the court appoints an attorney for the person.[173]

The Law Revision Commission explained why the appointment of counsel is absolute, and the difference between the appointment of a guardian *ad litem* and an attorney:

> In the past it often has not been clear whether the guardians *ad litem* appointed pursuant to Article 77 and 78 were acting as advocates for the person who was the subject of the proceeding or as a neutral "eyes and ears" of the court. In order to alleviate the confusion, Article 81 distinguishes between the two roles of counsel and that of guardian *ad litem*, now known as court evaluator, and creates separate rules to govern each . . . . The role of counsel . . . is to represent the person alleged to be incapacitated and ensure that the point of view of the person alleged to be incapacitated is presented to the court. At minimum that representation should include conducting personal interviews with the person; explaining to the person his or her rights and counseling the person regarding the nature and consequences of the proceeding; securing and presenting evidence and testimony; providing vigorous cross-examination; and offering arguments to protect the rights of the allegedly incapacitated person.[174]

In 2016, the Kings County Surrogate's Court, in *Proceeding for the Appointment of a Guardian for Leon Pursuant to SCPA Article 17A*, tackled the appointment of an attorney in an Article 17-A proceeding. The court recognized that the individual subjected to the guardianship proceeding was at risk of losing "all legal

[170] *See id.* § 81.09(c)(2).
[171] *See id.* § 81.09(c)(3).
[172] *See id.* §§ 81.09(c)(5), 81.10 cmt.
[173] *See id.* § 81.10(g).
[174] Complaint, *supra* note 1, ¶ 109; *see* MENTAL HYG. LAW § 81.10 cmt.

authority and control over decisions regarding himself and his affairs, including medical decisions about his own treatment and placement in residential facilities."[175] The court found that "[i]n light of the severe deprivation of individual liberty . . . that will result from granting the relief of [an Article 17-A] plenary guardianship, and the inability of the respondent to afford counsel, . . . [it is] determine[d] that the assignment of counsel . . . is constitutionally mandated . . . ."[176] Despite this promising holding, there remains no consistent assignment of counsel across the Surrogate's Courts in Article 17-A proceedings.

I. The Hearing

The U.S. Supreme Court has established that "the right to a meaningful opportunity to be heard within the limits of practicality must be protected against denial by particular laws that operate to jeopardize it for particular individuals."[177] Due process does not require every civil deprivation of liberty or property interests to be preceded by a hearing on the merits.[178] Instead, the Constitution requires "an opportunity, which must be granted at a meaningful time and in a meaningful manner,"[179] for a "hearing appropriate to the nature of the case."[180] The nature, formality, and procedural requirements of a hearing may "vary, depending upon the importance of the interests involved . . . [but] a state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."[181]

A jury trial by hearing was mandated in the former conservator system in Mental Health Law Article 78[182] proceedings where "the court's determination must [have been] made on the basis of competent medical evidence, and not on the conclusions of

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[175] *In re* Leon, 2016 N.Y. Misc. LEXIS 3493, at *1 (Sur. Ct. 2016).

[176] *Id.* The court relied upon SCPA section 407, which states: "[A] judge may assign counsel to represent any adult . . . under this act if he determines that such assignment of counsel is *mandated by the constitution of this state or of the United States*." N.Y. SURR. CT. PROC. ACT LAW § 407(1)(b) (McKinney 2017) (emphasis added).

[177] Boddie v. Connecticut, 401 U.S. 371, 379–80 (1971).

[178] *See, e.g.*, Windsor v. McVeigh, 93 U.S. 274, 278–79 (1876) (holding that defendant had not been deprived of an opportunity to appear and be heard on the merits when defendant's property was seized prior to the receipt of notice in order to obtain in rem jurisdiction in an action for libel).

[179] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[180] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[181] *Boddie*, 401 U.S. at 378–79.

[182] *See* N.Y. MENTAL HYG. LAW § 78.03(e) (repealed 1993).

laymen."[183] Even with the parties' agreement the court was not absolved of its obligation to protect the allegedly incompetent person.[184] New York State recognized that, "a procedure for summary declaration of incompetency . . . could engender collusion . . . . Balanced against the potential for abuse, the expenditure of time and money caused here by a rule requiring a hearing in all cases seems minimal."[185] Therefore, Article 78 proceedings required live medical testimony and concluded that even affidavits of the individual's physicians with conclusions on the question of competency "only served to make it 'presumptively appear, to the satisfaction of the court' that [the individual] is incompetent[,] . . . [but i]t cannot be the sole basis for a determination of incompetency."[186]

These standards served as the foundation for the hearing process for Article 81.

> Article 81 requires the court to conduct a hearing before the appointment of a guardianship; the hearing may be waived only if the alleged incapacitated person consents to the appointment of a guardian. Under Article 81, "the hearing must be conducted in the presence of the person alleged to be incapacitated . . . so as to permit the court to obtain its own impression of the person's incapacity. If the person alleged to be incapacitated physically cannot come or be brought to the courthouse, the hearing must be conducted where the person alleged to be incapacitated resides unless . . . all information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing or (ii) no meaningful participation will result from the person's presence at the hearing."
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> . . .
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> The Law Revision Commission stressed the importance of having the person present at the hearing because "seeing the person allowed the court to draw a carefully crafted and nuanced order which takes into account the person's dignity, autonomy and abilities, because the judge has had the opportunity to learn more about the person as an individual

[183] *In re* Von Bulow, 470 N.Y.S.2d 72, 74 (Sup. Ct. 1983).

[184] *See id.* ("'The application is not opposed, but the duty of this court is nonetheless to examine into the matter to ascertain' whether the petition should be granted." (quoting *In re* Laridon, 27 N.Y.S.2d 799, 800 (Sup. Ct. 1941))).

[185] *In re Von Bulow*, 470 N.Y.S.2d at 74.

[186] *Id.* at 74 n.2.

> rather than a case description in a report."
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> . . .
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> [By contrast,] Article [17-A] directs the court to conduct a hearing but also 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.[187]

In addition to dispensing with a hearing, Article 17-A and the forms prescribed by the statute also direct the petitioner to identify "any circumstances which the court should consider in determining whether it is in the best interest[] of the [alleged incapacitated] person not to be present at the hearing."[188] The statutory standard for determining whether a person subjected to an Article 17-A proceeding must be present at the proceeding is delineated as:

> If a hearing is conducted, the person who is intellectually disabled or person who is developmentally disabled shall be present unless it shall appear to the satisfaction of the court on the certification of the certifying physician that the person who is intellectually disabled or person who is developmentally disabled is medically incapable of being present to the extent that attendance is likely to result in physical harm to such person who is intellectually disabled or person who is developmentally disabled, or under such *other circumstances which the court finds would not be in the best interest* of the person who is intellectually disabled or person who is developmentally disabled.[189]

Matter of Mark C.H. clearly demonstrates the necessity for the appearance of the person in court. Mark was adopted at a young age into a family with substantial means.[190] He was later diagnosed with autism and when his mother was diagnosed with terminal cancer, the family was advised to place him in a residential program for individuals with disabilities.[191] The professionals working with Mark recommended that Mark's appearance at the Article 17-A hearing be dispensed with, and "[b]ecause of the[] recommendations

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[187] Complaint, *supra* note 1, ¶¶ 90, 93–95.
[188] N.Y. SURR. CT. PROC. ACT LAW § 1752(7) (McKinney 2017).
[189] *Id.* § 1754(3) (emphasis added).
[190] *See In re* Mark C.H., 906 N.Y.S.2d 419, 419 (Sur. Ct. 2010).
[191] *See id.* at 419–20.

and the substantial distance Mark would [have been] required to travel to court," Mark's presence at the initial hearing was waived.[192] The court then learned that the petitioner had never visited Mark or contacted the staff of the residential program to ascertain Mark's needs.[193] The court ordered that the petitioner visit Mark and it was observed that "though he [was] non-verbal, he appeared to respond appropriately to questions asked by classroom staff, using picture symbols and non-verbal gestures to communicate with others."[194] Under Article 81, Mark would have been given the opportunity to participate in this hearing with appropriate accommodations, such as a hearing conducted where he resided, and based upon the observations, the court may have been able to ascertain meaningful information about Mark relevant to a guardianship petition.[195]

J. Plenary or Limited Powers of the Guardian

The New York State Unified Court Administration's guidance on Article 17-A states: "An Article 17-A Guardianship is very broad and covers most decisions that are usually made by a parent for a child such as financial and healthcare decisions," and having "the responsibility of both the ward's life decision[s] and the ward's property."[196] This guidance also states: "A guardian of the *person* can make life decisions for the ward like health care, education and welfare decisions . . . [while a] guardian of the *property* handles decisions about the ward's money, investments and savings."[197] In fact, a Surrogate's Court has described the power of a 17-A guardian as having "seemingly unlimited power, much like the old conservator and committee. There is no statutory guidance as to the extent of this power, and surprisingly little case law explication."[198]

In cases involving deprivations of personal liberty, courts are required to impose only the least restrictive form of intervention.[199]

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[192] *See id.* at 420.

[193] *See id.*

[194] *See id.* at 420–21.

[195] *See* N.Y. MENTAL HYG. LAW § 81.11(c) (McKinney 2017).

[196] *Guardianship of a Person who is Intellectually Disabled or Developmentally Disabled*, NYCOURTS.GOV, www.nycourts.gov/courthelp/Guardianship/17A.shtml (last visited Jan. 30, 2017); *Guardianship Basics*, NYCOURTS.GOV, www.nycourts.gov/courthelp/Guardianship/basics.shtml (last visited Jan. 30, 2017).

[197] *Guardianship Basics*, *supra* note 196 (emphasis added).

[198] *In re* Chaim A.K., 885 N.Y.S.2d 582, 587 (Sur. Ct. 2009).

[199] *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972); *see also* Kesselbrenner v. Anonymous,

This includes when "the state invoke[s] its *parens patriae* powers, [and] infringes on an individual's liberty or property interests for [the] person's protection."[200] Therefore, "[t]he extreme remedy of guardianship should be the last resort for addressing an individual's needs because 'it deprives the individual of so much power and control over his or her life.'"[201] This standard is specifically incorporated in the findings of Article 81, which state:

> The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention [that] assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable.[202]

Article 81 requires the court to limit or tailor the guardianship to "the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the incapacitated person in providing for personal needs and/or property management."[203] The legislature specifically declared that the purpose of Article 81 was to create a "guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which . . . affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life."[204]

By contrast, under Article 17-A, there is no provision for a lesser

305 N.E.2d 903, 905 (N.Y. 1973) ("To subject a person to a greater deprivation of personal liberty than necessary to achieve the purpose for which he is being confined is, it is clear, violative of due process."); Carter v. Beckwith, 28 N.E. 582, 583 (N.Y. 1891) ("[The] exercise of the jurisdiction of the court to deprive a person of his liberty and property on the ground of lunacy, however necessary, is, nevertheless, the exercise of a supreme power, and should be surrounded by all reasonable safeguards to prevent mistake or fraud.").

[200] *In re Chaim A.K.*, 885 N.Y.S.2d at 588 n.26 (citing Antony B. Klapper, *Finding a Right in State Constitutions for Community Treatment of the Mentally Ill*, 142 U. PA. L. REV. 739, 759 (1993)); *see also In re* Dameris L., 956 N.Y.S.2d 848, 854 (Sur. Ct. 2012) ("To the extent that New York courts have recognized [']least restrictive alternative[] as a constitutional imperative, it must, of necessity, apply to guardianships sought pursuant to [A]rticle 17-A, as well as under the more recent and explicit Mental Hygiene Law [A]rticle 81. Thus, proof that a person with an intellectual disability needs a guardian must exclude the possibility of that person's ability to live safely in the community supported by family, friends and mental health professionals."); *In re* Andrea B., 405 N.Y.S.2d 977, 981 (Fam. Ct. 1978) ("[S]ubstantive due process requires adherence to the principle of the least restrictive alternative.").

[201] *In re* D.D., 19 N.Y.S.3d 867, 870 (Sur. Ct. 2015).

[202] N.Y. MENTAL HYG. LAW § 81.01 (McKinney 2017).

[203] *Id.* § 81.16(c)(2).

[204] *Id.* § 81.01.

restrictive option than the appointment of a plenary guardian of the person. Article 17-A simply provides:

> If . . . the court is satisfied that the best interests of the person who is intellectually disabled or person who is developmentally disabled will be promoted by the appointment of a guardian of the person or property, or both, it shall make a decree naming such person or persons to serve as such guardians.[205]

The state's Olmstead Cabinet found that:

> Article [17-A] does not limit guardianship rights to the individual's specific incapacities, which is inconsistent with the least-restrictive philosophy of Olmstead. Once guardianship is granted, Article [17-A] instructs the guardian to make decisions based upon the "best interests" of the person with a disability and does not require the guardian to examine the choice and preference of the person with a disability.[206]

While Article 17-A does not specifically direct the court to consider the least restrictive form of intervention, the New York County Surrogate's Court has determined:

> In order to withstand constitutional challenge, including, particularly, challenge under our own state Constitution's due process guarantees, SCPA article 17-A must be read to include the requirement that guardianship is the least restrictive alternative to achieve the state's goal of protecting a person with intellectual disabilities from harm connected to those disabilities. Further, the court must consider the availability of "other resources," like those in Mental Hygiene Law § 81.03(e), including a support network of family, friends and professionals before the drastic judicial intervention of guardianship can be imposed.[207]

In fact, "[i]n order to identify 'the least restrictive alternative [to guardianship] . . . ,' an inquiry into the availability of resources to assist the individual, including a support network of family, friends, and supportive services, is required."[208] In one case, the Kings County Surrogate's Court refused to appoint a guardianship over a

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[205] N.Y. SURR. CT. PROC. ACT LAW § 1754(5) (McKinney 2017).

[206] OLMSTEAD REPORT, *supra* note 7, at 28.

[207] *In re* Dameris L., 956 N.Y.S.2d 848, 854–55 (Sur. Ct. 2012).

[208] *In re* D.D., 19 N.Y.S.3d 867, 870 (Sur. Ct. 2015) (quoting *In re Dameris L.*, 956 N.Y.S.2d at 854).

person with intellectual and developmental disabilities on the grounds that it was not the least restrictive intervention.[209] The court determined:

> To the extent needed, alternate, less restrictive legal tools, such as a power of attorney, may be utilized to handle other financial matters, and advance directives, such as a health care proxy, may be utilized to allow family members to make medical decisions for D.D. when he is no longer able to do so. . . . Furthermore, a wide range of services, some of which it appears D.D. already utilizes, are offered . . . to support individuals with intellectual disabilities, such as supportive housing, including supervised semi-independent living options, adaptive skill development, adult educational programs, vocational training, community inclusion and relationship building, and self-advocacy, informed choice and behavioral skills development. These alternative resources enable individuals with disabilities to maintain as much control over their own life decisions as they are capable to make in the least restrictive setting.[210]

K. Reporting and Review

Fundamental to due process is that the state may not impose an indefinite loss of personal liberty without periodic review.[211] The reporting and review processes differ dramatically between Article 17-A and Article 81. Specifically:

> Article 81 imposes rigorous reporting and oversight provisions upon the appointment of a guardian. The court is also required under Article 81 to specifically enumerate the powers regarding both property management and personal needs, with which the guardian will be vested. In contrast, Article [17-A] contains no requirement that guardians report annually as to the personal or property status of the person under guardianship. Reporting requirements such as those contained in [Article 81], allow the court to determine whether a guardian is fulfilling his or her fiduciary responsibility, and to ensure that the individual's autonomy is being preserved to the maximum extent possible. [Article

[209] *See In re D.D.*, 19 N.Y.S.3d at 875–76.

[210] *Id.* at 874–75.

[211] Jackson v. Indiana, 406 U.S. 715, 738 (1972) (confirming that periodic review of competency is required to justify the continued confinement of an individual).

> 81] require[s] the guardian to submit written initial and annual reports describing, "the social and personal services that are to be provided for the welfare of the incapacitated person," and "information concerning the social condition of the incapacitated person, including: the social and personal services currently utilized by the incapacitated person; the social skills of the incapacitated person; and the social needs of the incapacitated person." The reporting requirement of Article 81 also includes information concerning the incapacitated person's medical and residential needs, and requires the guardian to submit in his or her report any and all facts indicating a need to terminate, or modify the terms of the guardianship. Preservation of the alleged incapacitated person's autonomy to the fullest extent possible is one of the avowed purposes of the reporting requirements.[212]

By contrast, "[i]ndividuals with disabilities subject to Article 17-A guardianship orders routinely go their entire lives without anyone reviewing the continued necessity for the guardianship order."[213] The yearly reporting requirements within Article 17-A only apply to guardians of the property.[214] Furthermore, the content of reporting for property guardians is "broadly described, and there are variations in what is required among the various Surrogate's Courts."[215]

In *Matter of Mark C.H.*, the New York County Surrogate's Court concluded that since guardianship placed total control over an individual in the hands of another person, such deprivation could only continue if it was necessary. Only with periodic reporting can the court "ascertain whether the deprivation of liberty resulting from guardianship is still justified by the ward's disabilities, or whether she has progressed to a level where she can live and function on her own."[216] Based upon this decision, the Surrogate's Court in New York County is unique when requiring Article 17-A guardians to complete yearly reporting to the court for review.[217]

The same Surrogate's Court judge also highlighted why reporting and review is important:

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[212] Complaint, *supra* note 1, ¶¶ 128–33 (internal citations omitted).
[213] *Id.* ¶ 161.
[214] *See In re* Mark C.H., 906 N.Y.S.2d 419, 425 n.22 (Sur. Ct. 2010).
[215] *Id.*
[216] *Id.* at 428.
[217] *See id.* at 435 n.52.

> First . . . [t]he court appoints the guardian to carry out [the state's *parens patriae*] duty and the guardian is a fiduciary bound to the highest standards. 'In reality,' observed one judge, 'the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility.' Second, unlike with decedents' estates, the incapacitated person is a living being whose needs may change over time. This argues for a more active court role in oversight. Third, monitoring can be good for the guardian by offering guidance and support in the undertaking of a daunting role. Fourth, monitoring can be good for the court by providing a means of tracking guardianship cases and gauging the effect of court orders. Finally, monitoring can boost the court's image and inspire public confidence.[218]

L. Powers and Selection of Guardian

The 1969 Uniform Probate Code provided that "[a] guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child."[219] Article 17-A retained this "paternalistic standard."[220] An Article 17-A guardian exercises and completely manages the affairs of the person subject to guardianship.[221] By contrast, Article 81 adopted the "substitute judgment" alternative to the best interest standard of Article 17-A.[222] "Substitute[] [j]udgment is the principal of decision-making that substitutes the decision the person would have made when the person had capacity as the guiding force in any surrogate decision the guardian makes."[223]

Moreover, Article 17-A permits any person over the age of

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[218] *Id.* at 424 (citing Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867, 871–72 (2002)).

[219] UNIF. PROBATE CODE § 5-312 (amended 2010).

[220] Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 116 (2012).

[221] *See* N.Y. SURR. CT. PROC. ACT LAW § 1756 (McKinney 2017). The one limited exception is when a "Limited Guardianship of the Property" is appointed for individuals who supports themselves. *See In re Mark C.H.*, 906 N.Y.S.2d at 427 n.26. In this situation, the person under guardianship can keep his or her wages and can enter into contracts for sums that do not exceed the greater of his or her month's pay or $300, or as the court otherwise authorizes. *See* SURR. CT. PROC. ACT LAW § 1756.

[222] *See* N.Y. MENTAL HYG. LAW § 81.21 cmt. (McKinney 2017).

[223] NAT'L GUARDIANSHIP ASS'N, STANDARDS OF PRACTICE 8 (4th ed. 2013), http://www.guardianship.org/documents/Standards_of_Practice.pdf.

eighteen not otherwise subjected to guardianship to be appointed as a guardian.[224] By contrast, Article 81 provides detailed consideration for who should be appointed a guardian, including consideration of the alleged incapacitated person's preferences and nomination.[225] Article 81 specifically requires the court to consider:

> [A]ny appointment or delegation made by the person alleged to be incapacitated . . . ; the social relationship between the incapacitated person and the [proposed guardian] . . . ; the care and services being provided to the incapacitated person at the time of the proceeding; . . . the educational, professional and business experience relevant to the nature of the services sought to be provided; the nature of the financial resources involved; the unique requirements of the incapacitated person; and any conflicts of interests between the person proposed as guardian and the incapacitated person.[226]

In fact, one of the major criticisms of Article 77 and Article 78—which predate Article 81—was the lack of interaction between the individual serving as guardian and the person subjected to the guardianship.[227] Therefore, the authors of Article 81 required that the court-appointed guardian visit the person under guardianship a minimum of four times per year.[228] As the Law Revision Commission stated:

> Decision-making is a fundamental part of the guardian's role. In order to carry out this responsibility in the most careful and diligent manner, the guardian should develop a personal relationship to the ward, in the event one does not exist, so that the guardian can understand the decision's impac[t] from the incapacitated person's perspective and involve the incapacitated person in the decisions to the greatest extent possible.[229]

Article 17-A does not direct the guardian to visit the person under guardianship.

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[224] *See* SURR. CT. PROC. ACT LAW § 1752(5).
[225] *See* MENTAL HYG. LAW § 81.19(d)(1)–(8).
[226] *Id.*
[227] *See* Spring & Neveloff Dubler, *supra* note 42, at 319–20; Torres, *supra* note 43, at 310.
[228] *See* MENTAL HYG. LAW § 81.20(5).
[229] *Id.* § 81.20 cmt.

M. Modification, Termination, and Restoration of Rights

Under Article 17-A, a guardianship continues over the entire life of the person under guardianship, and there is no limit on duration or subsequent review of the need for continued guardianship.[230] Modification or termination of an Article 17-A 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.[231] Even after a petition is made, the court may dispense with the hearing at the request of the parent.[232] Article 17-A is silent as to which party has the burden when petitioning for modification or dissolution of the guardianship, and thus the burden is on the person with a disability to prove that it is in his or her best interest to remove the guardianship. As one Surrogate Court judge described:

> Although 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.[233]

By contrast, Article 81:

> [S]pecifically contemplates removal of the guardian or powers when the guardian or the power is no longer necessary. Article 81 requires a hearing when a petition for modification or termination is initiated, as well as the right to a jury trial upon request. Significantly, under Article 81, the party opposing the termination of guardianship bears the burden of proving by clear and convincing evidence that the grounds for guardianship continue to exist. Under Article 81, where a petition seeks to increase the powers of a guardian, the petitioner also has the burden of proving by clear and convincing evidence that such an increase in power i[s] necessary.[234]

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[230] *See* N.Y. SURR. CT. PROC. ACT LAW § 1759(2) (McKinney 2017). "Such guardianship shall not terminate at the age of majority . . . but shall continue during the life of such person, or until terminated by the court." *Id.* § 1759(1).

[231] *See id.* § 1759(2).

[232] *See id.* § 1754(1)(a)–(c).

[233] *In re* Mark C.H., 906 N.Y.S.2d 419, 429 n.33 (Sur. Ct. 2010) (citing SURR. CT. PROC. ACT LAW § 1759).

[234] Complaint, *supra* note 1, ¶¶ 139–42 (first citing MENTAL HYG. LAW § 81.36(a); then citing *id.* § 81.36(c); and then citing *id.* § 81.36(d)).

When comparing the processes for appointing and removing guardianship under Article 81 with Article 17-A, the likelihood of erroneously depriving an individual with intellectual and developmental disabilities of liberty and property interests is significantly higher. Furthermore, this comparison also shows that there is a high probative value to the additional procedural safeguards within Article 81, which are lacking in Article 17-A. Therefore, a balance between the individual interests and the importance of the procedure in protecting these interests against the state's countervailing objective of protection is clearly weighted toward the individual's interests.

N. Guardianship in New York State and Equal Protection

Under the Fourteenth Amendment of the U.S. Constitution, individuals subjected to Article 17-A guardianship proceedings are also denied the equal protection of the laws.[235] While the end to be achieved by Article 17-A and Article 81 is the same,[236] the means is not, and the inequality of treatment is not justifiable.[237] The Fourteenth Amendment requires that where a person's fundamental rights and liberties[238] are implicated, "classifications which might invade or restrain them must be closely scrutinized and carefully confined."[239] The U.S. Supreme Court requires a strict scrutiny test for state laws affecting fundamental rights, even when the class affected is not a suspect class, stating[240]:

> The guaranty of "equal protection of the laws is a pledge of the protection of equal laws." When the law lays an unequal

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[235] *See In re* Guardianship of B., 738 N.Y.S.2d at 532 ("The equal protection provisions of the federal and state Constitutions would require that mentally retarded persons in a similar situation be treated the same whether they have a guardian appointed under [A]rticle 17-A or [A]rticle 81."); *In re* Derek, 821 N.Y.S.2d 387, 389–90 (Sur. Ct. 2006).

[236] *See* MENTAL HYG. LAW § 81.01; SURR. CT. PROC. ACT LAW § 1750.

[237] *See* SURR. CT. PROC. ACT LAW § 1750.04; *In re Guardianship of B.*, 738 N.Y.S.2d at 532.

[238] The fundamental rights protected by the U.S. Constitution encompass:

> [N]ot merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[239] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

[240] *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 536, 541–42 (1942) (discussing the applicability of strict scrutiny to a state's sterilization law directed at convicted criminals); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (holding that strict scrutiny must be used where state laws impinge on personal rights protected by the Constitution).

> hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.[241]

As demonstrated above, the due process protections afforded to individuals subjected to these guardianship proceedings depends on whether guardianship is being considered pursuant to Article 17-A or Article 81.[242] Specifically, Article 81 directs the court to limit the appointment of a guardianship even if the person is found to be incapacitated, while an Article 17-A proceeding relies exclusively on the best interest standard for appointment of guardianship.[243] There are also stark differences with the level of notice that each of the statutes requires: Article 81 directs that the notice inform the alleged incapacitated person of the nature and potential consequences of the proceeding and the right to a hearing and counsel,[244] whereas Article 17-A is silent as to notice beyond providing a copy of the petition to the individual with a disability.[245] Once the petition proceeds to a hearing, the right to counsel,[246] the right to a mandatory evidentiary hearing,[247] and the standard of proof applied at the hearing all differ dramatically.[248]

Also, when the court appoints a guardianship, the Article 81 process directs that the guardianship be tailored and that the person's right to participate in decision-making not be encumbered to the greatest extent possible.[249] Article 81 specifically directs that guardianship must be administered in the least restrictive manner after consideration of all other alternatives.[250] Article 17-A directs

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[241] *Skinner*, 316 U.S. at 541 (first citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); and then citing Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 350 (1938)).

[242] *See* Bailly, Practice Commentaries, *supra* note 47.

[243] *See* N.Y. MENTAL HYG. LAW § 81.16(c)(2) (McKinney 2017); N.Y. SURR. CT. PROC. ACT LAW § 1754(5) (McKinney 2017).

[244] *See* MENTAL HYG. LAW § 81.09(c)(2).

[245] SURR. CT. PROC. ACT LAW § 1753(1)(c).

[246] Article 81 specifically directs the appointment of an attorney at public expense in an Article 81 proceeding while Article 17-A is silent. *See* MENTAL HYG. LAW § 81.10(c); SURR. CT. PROC. ACT LAW § 1754.

[247] Article 81 mandates an evidentiary hearing be held to allow for the greatest participation of the alleged incapacitated person while 17-A permits the presence of a person to be waived by certain petitioners. *See* MENTAL HYG. LAW § 81.11; SURR. CT. PROC. ACT LAW § 1754.

[248] Article 81 applies the clear and convincing standard for the appointment of guardianship while 17-A applies a lesser evidentiary standard of best interest for the appointment of guardianship. *See* MENTAL HYG. LAW § 81.12(a); SURR. CT. PROC. ACT LAW § 1752(7).

[249] *See* MENTAL HYG. LAW §§ 81.03(d), 81.21(a), 81.22(a).

[250] *See id.* § 81.02(a)(2); *see, e.g.*, *In re* May Far C., 877 N.Y.S.2d 367, 368 (App. Div. 2009)

the appointment of only a plenary guardianship.[251]

Furthermore, Article 17-A uses a lower standard of proof as compared to Article 81. Article 81 expressly requires courts to apply a clear and convincing evidence standard of proof,[252] whereas Article 17-A uses a best interest standard.[253]

Finally, a person placed under an Article 17-A guardianship faces greater difficulty when attempting to terminate or modify the guardianship. Article 17-A places the burden on the person seeking to terminate the guardianship—the person with a disability. On the other hand, Article 81 specifically prescribes a mechanism for termination of the guardianship and places the burden on the party seeking to continue the guardianship.[254]

The line drawn between individuals subjected to Article 17-A and Article 81 is an artificial one, and one that should be (and is) prohibited by the due process clause.[255] In fact, the New York County Surrogate's Court has struggled with these divergent processes and recognizes that subjects of Article 17-A guardianships are similarly situated and therefore should be treated equally to subjects of Article 81 guardianships.[256] In *Matter of Derek*, the New York Surrogate's Court held: "There [was] no rational reason why the respondent in a contested article 81 guardianship proceeding should be [able] to assert [a] . . . privilege while the respondent in a contested article [17-A] guardianship . . . cannot."[257] In the run of cases, this does not happen.

V. IMPACT OF THE ADA AND § 504 ON GUARDIANSHIP LAWS IN NEW YORK STATE

Under the ADA and § 504, a qualified individual with a disability

(reversing the appointment of a guardian where the incapacitated person had made sufficient arrangements for meeting her needs, including executing a power of attorney, prior to becoming incapacitated).

[251] *See In re* Chaim A.K., 885 N.Y.S.2d 582, 587 (Sur. Ct. 2009) ("Unlike [A]rticle 81, [A]rticle 17-A provides no gradations and no described or circumscribed powers. . . . [A] guardian is appointed with seemingly unlimited power.").

[252] MENTAL HYG. LAW § 81.12(a).

[253] SURR. CT. PROC. ACT LAW § 1752(7).

[254] *See supra* notes 230–34 and accompanying text.

[255] *See* Skinner v. Oklahoma, 316 U.S. 535, 542 (1942); *In re* Guardianship of B., 738 N.Y.S.2d 528, 532 (Tompkins Cty. Ct. 2002).

[256] *See In re Guardianship of B.,* 738 N.Y.S.2d at 532 ("The equal protection provisions of the federal and state Constitutions would require that mentally retarded persons in a similar situation be treated the same whether they have a guardian appointed under [A]rticle 17-A or [A]rticle 81.").

[257] *In re* Derek, 821 N.Y.S.2d 387, 389 (Sur. Ct. 2006).

may not be subject to discrimination by reason of his disability by any state entity or program receiving federal support.[258] A disability is defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual."[259] The definition of disability must be construed in favor of broad coverage of individuals under the ADA.[260] A "'qualified individual with a disability' is defined as 'an individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.'"[261] Individuals must have an intellectual disability or developmental disabilities under New York State law to be appointed a guardianship pursuant to Article 17-A.[262] That is, Article 17-A prescribes that individuals with intellectual and developmental disabilities will be placed under guardianships because of their diagnosed disabilities if it is deemed in their best interest. Furthermore, individuals with disabilities who are subjected to an Article 17-A proceeding do not choose the forum (Article 17-A versus Article 81) for the guardianship proceeding, as the forum is selected by the person petitioning for guardianship.[263]

The New York Unified Court System is the judicial arm of the New York State government.[264] The New York State Unified Court System receives federal assistance in the form of grants, which it distributes to programs it administers, and it is therefore a covered public entity under § 504.[265] New York State and the Unified Court System is therefore charged with an affirmative obligation to fulfill the promise of the ADA, which is "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for all individuals with disabilities.[266] Indeed, New York's highest

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[258] *See* 42 U.S.C. § 12132 (2012); 29 U.S.C. § 794(a) (2012).

[259] 42 U.S.C. § 12102(1)(A); *accord* 29 U.S.C. § 705(9)(B).

[260] *See* 42 U.S.C. § 12103(4)(1)(A).

[261] United States v. Georgia, 546 U.S. 151, 153–54 (2006) (quoting 42 U.S.C. § 12131(2)).

[262] *See* N.Y. SURR. CT. PROC. ACT LAW §§ 1750, 1750-a(1) (McKinney 2017).

[263] *See id.* § 1751.

[264] *See Accessibility: About the Americans with Disabilities Act (ADA)*, NYCOURTS.GOV, https://www.nycourts.gov/accessibility/ (last updated Aug. 3, 2017). The New York Unified Court System implements the ADA, and pursuant to § 504, "'program or activity' means all the operations of . . . a department, agency, special purpose district, or other instrumentality of a state." 29 U.S.C. § 794(b)(1)(A), (d).

[265] *See* N.Y. STATE UNIFIED COURT SYS., FISCAL YEAR 2016-2017: BUDGET, at 3 (2015), https://www.nycourts.gov/admin/financialops/BGT16-17/2016-17-UCS-Budget.pdf.

[266] 42 U.S.C. § 12101(a)(7); *see also* OLMSTEAD REPORT, *supra* note 7, at 26 (explaining the role of the New York State Unified Court System in administering services to those with mental health issues).

court has ruled: "[If] the law recognizes the right of an individual to make decisions about life out of respect for the dignity and autonomy of the individual, that interest is no less significant when the individual is [disabled]."[267] The Olmstead Cabinet recognized this obligation as well, and prescribed that changes be made in Article 17-A to align with Article 81.[268]

Failure to afford qualified individuals with disabilities the procedures and protections afforded to other individuals with disabilities through Article 81—including consideration of the least restrictive form of intervention in determining the need for a guardian—has a discriminatory effect.[269] Individuals with intellectual and developmental disabilities must not be subjected to a different guardianship standard that presents greater barriers to their full participation in society or enjoyment of their rights and liberties.[270] In order to avoid a discriminatory outcome, a state must make reasonable modifications. The two Surrogate's Courts in New York County and Kings County have recognized the discriminatory impact of the strict application of Article 17-A, and as a result, have adopted the procedures of Article 81 in modifying Article 17-A.[271] Yet, this practice has not been universally adopted across Surrogate's Courts and the Unified Court System has not taken affirmative steps to reasonably modify its processes for appointing Article 17-A guardianships.[272]

VI. CONCLUSION

Disability Rights New York v. New York State exposed the constitutional failings and the discriminatory impact of Article 17-A. These failings have been known for decades but Article 17-A has not been reformed. Two Surrogate's Courts, New York County and

[267] Rivers v. Katz, 495 N.E.2d 337, 341 (N.Y. 1986) (quoting *In re* Mental Health of K.K.B., 609 P.2d 747, 752 (Okla. 1980)).

[268] *See* OLMSTEAD REPORT, *supra* note 7, at 28.

[269] *See* Andreasian et al., *supra* note 64, at 312.

[270] *See* Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 178, 182–83 (2010) (discussing guardianship and the ADA integration mandate).

[271] *See In re* Antonio C., No. 2015-4490, 2016 N.Y. Misc. LEXIS 2742, at *6–7 (Sur. Ct. July 22, 2016); *In re* Hytham M. G., 2016 N.Y. Misc. LEXIS 2722, at *9 (Sur. Ct. Apr. 14, 2016); *In re* D.D., 19 N.Y.S.3d 867, 870–71 (Sur. Ct. 2015); *In re* Dameris L., 956 N.Y.S.2d 848, 854–55 (Sur. Ct. 2012); Estate of Albert J., N.Y.L.J., Mar. 2, 2017 (Sur. Ct. 2017).

[272] At the time of this article's publication, the Unified Court System had not modified its policies or forms. *See* Bell v. Burson, 402 U.S. 535, 542 (1971); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

Kings County, have been forced to rewrite Article 17-A to pass constitutional muster. While these two Surrogate's Courts have repeatedly exposed these failings and fashioned resolutions by applying the standards from Article 81, other Surrogate's Courts have not followed these practices. The Unified Court System has not modified its policies and forms, and this inadequate law remains in the statute books. Article 17-A is archaic and violates the Constitution, the ADA, and § 504. Globally, nations are looking at guardianship statutes, though created with benevolent intentions, as relics of the past and are forcing lawmakers to re-examine the application of its *parens patriae* power toward people with disabilities.[273] In fact, an examination of these guardianship statutes revealed "that the price of that benevolent intent has often been borne by the [individual with a disability], paid for with their freedom and liberty."[274] While Article 81, crafted in the 1990s, sought to limit the authority of the state to infringe on decision-making, both guardianship systems are still built upon the premise that surrogate decision-making is necessary. This premise is currently being tested both in New York State and internationally.[275] That said, when guardianship is considered, the process must not deny constitutional rights and discriminate against individuals with disabilities. For this reason, Article 17-A must be reformed either by the courts or by the legislature.

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[273] In 2006, the United Nations General Assembly adopted both the Convention and the Optional Protocol on the Rights of Persons with Disabilities. G.A. Res. 61/106, annex I, II (Dec. 13, 2006). The United States became a signatory on July 24, 2009. Proclamation No. 8398, 74 Fed. Reg. 37,923 (July 24, 2009). Article 12 of the Disability Convention requires states to:

> [R]ecognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life [and] . . . shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. States . . . shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

G.A. Res. 61/106, annex I, Art. 12, ¶¶ 2–4; *see also* Robert D. Dinerstein, *Implementing Legal Capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8, 8–9 (2012) (discussing Article 12 and legal capacity).

[274] Neil B. Posner, Comment, *The End of* Parens Patriae *in New York: Guardianship under the New Mental Hygiene Law Article 81*, 79 MARQ. L. REV. 603, 603 (1996).

[275] *See* Andreasian et al., *supra* note 64, at 329.