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Sean O.

Surrogate's Court of New York, Suffolk County

September 30, 2016, Decided; October 24, 2016, Published

2015-3462

Reporter
2016 NYLJ LEXIS 3647 *

Sean O.

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(Matter of Sean O., 2015-3462, NYLJ, Oct. 24, 2016 at 27)

Core Terms

guardian, guardian ad litem, guardianship, best interest, appointment, decisions, developmental disability, disability, plenary, medical decision, healthcare, step-mother, diagnosis, tailored, friends

Judges: **[*1]** Surrogate John Czygier, Jr.

Opinion

Cite as: Matter of Sean O., 2015-3462, NYLJ 1202770425408, at *1 (Surr., SUF, Decided September 30, 2016)

Surrogate's Court, Suffolk County

2015-3462

For Plaintiff: Attorney for Petitioner: Regina Brandow, P.C., Stony Brook, NY. Robert M. Harper, Esq., Guardian ad Litem, Uniondale, NY.

CASENAME

In the Matter of the Guardianship of Sean O., Pursuant to SCPA Article 17-A

2015-3462

Decided: September 30, 2016

ATTORNEYS

Attorney for Petitioner: Regina Brandow, P.C., Stony Brook, NY.

Robert M. Harper, Esq., Guardian ad Litem, Uniondale, NY.

DECISION

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Before the court is a petition seeking the appointment of co-guardians, a standby guardian, a first alternate standby guardian, and a second alternate standby guardian of the person of an adult alleged to have a developmental disability. Respondent, a twenty-seven (27) year old man, Sean O., is presented as suffering from a developmental disability. Petitioners are Sean's father and step-mother.

Jurisdiction has been obtained over all persons listed in the petition as necessary parties, including the subject of this proceeding. No one has filed objections to the relief requested by petitioners. In light of the affirmations of the examining

physician, **[*2]** Jonathan Boxer, M.D., and the examining licensed psychologist, Geroge A. Blednick, PhD., which were insufficient to establish, in and of themselves, that the disability warranted the appointment of a plenary guardian, a guardian ad litem was appointed to represent the interests of respondent.

Background

According to the interim report of the guardian ad litem, Sean graduated from high school with the assistance, it is claimed, of extensive accommodations. The guardian ad litem reported that Sean attends to hygiene, does his own laundry, cooks his meals, lives with a roommate, and drives locally without accompaniment. Indeed, it appears that Sean drives on his own to Delaware to visit petitioners. Sean also socializes with mainstream pupils and works part time for Stop & Shop. In his extensive and thoughtful report, the guardian ad litem notes that Sean does not perform all tasks perfectly, and often misunderstands information relayed to him without seeking clarification, especially with regard to his health care. Tellingly, the court is advised that there is no need for a

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property guardian, as current arrangements undertaken by the petitioners appear to be sufficient.

Pursuant to the **[*3]** medical affirmations submitted, Sean's diagnosis is autism; he has difficulty on a social level with interpersonal relationships, and it is alleged that he needs a guardian to make health care decisions on his behalf. The guardian ad litem notes that this diagnosis brings Sean within the definition of a developmentally disabled person under *SCPA 1750-A*, but recommends something less than full plenary powers, i.e. a more "tailored" guardianship. The guardian ad litem cites the court's jurisdiction to entertain and adjudicate "steps and proceedings" relating to a guardian (SCPA 1758), the court's ability to modify a guardianship order (SCPA 1755), as well as various occasions where other Surrogate's Courts have allowed tailored guardianships (see Yvette A., 27 Misc.3d 950; Matter of Kevin Z., 105AD3d 1269; *Matter of Schulze, 23 Misc3d 215*).

Upon consideration of the interim report of the guardian ad litem, a hearing was held pursuant to SCPA 1754 before the court.

Hearing

At the hearing, testimony was heard from Sean's father and step-mother, co-petitioners, as well as from Sean's treating psychologist and Sean himself. Sean's father testified that he first noticed that Sean had developmental problems when Sean was about three years old. Throughout all of Sean's schooling he has **[*4]** required specialized assistance for learning disabilities, was in a self contained classroom with other special education students, and had a one-on-one aide who worked with him.

Sean lives apart from the proposed co-guardians (who currently live in Delaware) in a home owned by his father. Sean shares the home with a roommate, who is also under a disability, and another woman who is described as the caretaker of the two. The roommates share expenses. Although petitioners no longer live in the state, they maintain regular contact with Sean and his father comes to New York to visit every few weeks. Sean has been approved for services from the Office of People With Developmental Disabilities ("OPWDD") and through that organization will get a job coach. Sean works at Stop & Shop, but has expressed a desire for employment that is somewhat more challenging, such as Home Depot or Costco. Sean has friends with whom he socializes, some at the same level of disability, some at a higher level. Sean's father testified that

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Sean has the support of OPWDD, family, friends, and mental health professionals.

Sean's father testified that Sean has a history of

poor decision making and doesn't retain information **[*5]** told to him by his doctors and employers. As a result it is his father's fear that Sean might make bad decisions. As an example, he testified that Sean was diagnosed in February of this year with cancer, however, when told the diagnosis, Sean misunderstood that he had ventricular cancer when in fact it was testicular cancer. Sean's father stated that his motivation in bringing the instant petition is to know that Sean will be cared for, that there is a plan in place, and a successor guardian. Sean's father stated that he is most concerned that he has the ability to make health care decisions, although did not believe that Sean can manage his finances on his own money. Sean's bank account is tied to his father's so that Sean's father can review it periodically. Further he testified that Sean does have a health care proxy.

The second witness was the proposed co-guardian, Sean's step-mother. Sean's step-mother testified that she has known Sean for five years and describes Sean as personable, well liked, a kind hearted person, who gets along well with people, with an occasional disagreement. When she first moved in with Sean and Sean's father, she would make sure Sean ate, and reminded **[*6]** Sean of his daily hygiene requirements. She testified that Sean goes to the gym and loves photography. She speaks to Sean three times a week, and speaks often with the house mate's parents.

Sean's step-mother testified that they are seeking guardianship to keep Sean safe and to ensure that he makes the right decisions. She testified that Sean cannot retain or process information, is too shy to ask someone to repeat what they have said, and will agree with someone without knowing what was really said. She stated that she and her husband want to move Sean to Delaware in a year, but that they did not do it right away as Sean does not like change and wanted to stay close to friends. In addition OPWDD had recommended that Sean live a self-directed life in New York. She described Sean's support system in New York as consisting of a counselor, nurse practitioner, psychologist and job coach.

The next testimony came from Sean's treating psychologist, Dr. Blednick. Dr. Blednick testified that he has treated Sean since February of 2013, sees Sean about three times a month, and

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sometimes meets with Sean's parents. Dr. Blednick described Sean's condition as a developmental disability, permanent **[*7]** in nature. In Dr. Blednick's opinion, Sean needs a structured setting with support system around him, what he described as a "scaffolding." Dr. Blednick considered the current guardianship petition as part of this "scaffolding." Dr. Blednick described Sean's intellectual ability as borderline, with poor working memory and also described Sean as impulsive. In Dr. Blednick's opinion, Sean's needs are best served when he has someone else to advise him with medical decisions, as he is unable to understand the risks and benefits of medical decisions. Dr. Beldnick testified that he believes that Sean's parents would consider Sean's best interests when making decisions related to Sean, but he stated that the guardianship should be nuanced to focus on medical decision making. Tellingly, his testimony seemed to reveal that he was under the impression that this proceeding would be limited to this function.

Finally, court heard testimony from Sean himself. Sean testified that he lives on his own, and is visited by friends and his parents. Sean testified that he believed his parents look out for his best interests, and that it would be hard to make decisions without his parents because sometimes **[*8]** he needs their help. Sean testified that he takes care of his activities of daily living, can cook, takes turns cleaning his house, takes his medication, has a drivers license, and used to have his own car. Sean stated that he works, that his paycheck is automatically deposited into his bank, and that he then uses a debit card to pay for things. Sean shops for his own needs. Sean testified that he has a girlfriend, and one day would like to get

married, have a stable job and live a good life. Sean testified that he likes photography, fishing and being outside. Sean's understanding of what a guardian does is that it is someone who will help him out. Sean testified that if he ever disagreed with his parents over a major life decision, they would have to come to a compromise, if not, there would be a problem. In fact, based on his testimony, his apparent acquiescence in this proceeding was made unaware of the extent of the power and control a plenary guardian would have.

The guardian ad litem has filed his final report. In his final report, the guardian ad litem does not recommend that the court grant a plenary Article 17-A guardianship, as it would not be the least restrictive means to **[*9]** protect Sean's interests. The guardian ad litem, however, does recommend that the court, if it is so inclined, tailor the 17-A guardianship to permit the guardians to make decisions concerning Sean's medical and dental affairs.

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Discussion

Petitioner bears the burden of proving, to the satisfaction of the court, that respondent is in need of a guardian, in that respondent falls within the diagnostic categories defined in SCPA 1750 and *SCPA 1750-a*, and that such appointment is in the best interests of respondent (SCPA 1750; *SCPA 1750-a*; Matter of Maselli, NYLJ, March 29, 2000 at 28, col. 4). The determination of what is in respondent's best interests is within the Surrogate's discretion (SCPA 1751, *SCPA 1750-a*).

By contrast, with the appointment of a guardian under MHL Article 81, the court looks at respondent's ability to function, specifically, that respondent will likely suffer harm, that respondent is unable to provide for personal needs and/or property management, and that respondent is unable to understand and appreciate the nature and consequences of such inability (see *MHL 81.02(s)(b)(1)-(2)*). In further contrast to the plenary nature of the Article 17-A guardian, Article 81 was enacted in 1992 to provide persons with disabilities with a less restrictive option to meet each **[*10]** individual's needs (see Albany Law Review Article "Should We Be Talking?" *75 Alb.L.Rev. 807, 2011-2012* for a comprehensive review of the statute's legislative intent).

Clearly, as someone with a diagnosis of autism, Sean falls within the ambit of the statutory definition of someone with a developmental disability for whom a guardian can be appointed. Having established this, the court must then look at the best interests of respondent. In making this decision, the court cannot ignore 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 (see *O'Connor v. Donaldson, 422 U.S. 563*; *Kesselbrenner v. Anonymous, 33 NY2d 161*; *Manhattan Psychiatric Center v. Anonymous, 285 AD2d 189*). Indeed, whether a diagnosis of autism with its increasingly extended spectrum[1] should even be part of the statutory predicate for consideration of a person's eligibility for a 17-A guardianship is outside this court's purview.

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The record before the court establishes that Sean is a young man who has cognitive limitations but who is also functioning on his own in society as a capable adult who engages in supportive decision making with his family and support professionals. Moreover, Sean is aware of his limitations and **[*11]** recognizes his need to turn to others for guidance on certain matters. In fact, he had executed a health care proxy authorizing his parents to make medical decisions for him. Sean lives on his own, has a driver's license, is employed, and has an active social life. Further, it is clear that Sean is

[1] Estimates that 1 out of every 88 children is autistic are increasingly quoted, see "Seeing the Spectrum" an article in The New Yorker magazine dated January 25, 2016 in its book review of the same name.

supported by family, friends, and professionals who all have his best interests at heart. Petitioners' concern for Sean's safety, well being, and health care were testified to as their motivation for filing the instant petition. These are valid concerns, but the only question for the court is whether or not Sean needs an Article 17-A guardian. Based upon the record before the court as described above, he does not. The guardian ad litem proposes a limited type of appointment, i.e. one only authorizing petitioners to act as guardians vis-a-vis medical decisions. Again, the question is whether this is necessary. It is not: Sean has given petitioners his health care proxy.

In reviewing precedent, the court acknowledges that there is no unanimity in the Surrogates' Courts. There are courts that have appointed Article 17-A guardians with tailored powers and subsequently imposed the type of detailed **[*12]** reporting requirements similar to those found in Article 81 (see *Matter of Yvette, 27 Misc3d 945*; *Matter of Mark, C. H., 28 Misc3d 765*; *Matter of Joyce G. S., 30 Misc3d 765*; cited in New York Law Journal Article "Article 17-A Guardianship Statute: Still Alive and Well" C. Raymond Radigan and Peter K. Kelly, 3/14/2016 NYLJ). Yet other courts have interpreted Article 17-A to be "a blunt instrument allowing for none of the tailoring available under Article 81" (*Matter of John J. H., 27 Misc3d 705, 706*; citing *Matter of Chaim A. K., 26 Misc3d 837*). Indeed, the most recent decision on this topic issued by my esteemed colleague, Hon. Margarita Lopez Torres, eloquently describes the courts' concerns with the evolving use of 17-A guardianships when less restrictive means are available for the protection of those with a developmental disability (see Matter of Meir, 9/30/2016 NYLJ p.36).

If the court's ultimate charge when considering a 17-A guardian for a respondent is to decide whether or not it is in respondent's best interest to appoint a 17-A guardian, it is manifest to this court that trying to accomplish within the

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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.

Thus, based upon the documentary proof, the oral testimony presented at the hearings, **[*13]** the reports of the guardian ad litem, as well as the appearance and demeanor of Sean, petitioner has not demonstrated, to the satisfaction of the court, that a plenary guardianship pursuant to SCPA 17-A is necessary and in Sean's best interests.

Accordingly, the application is denied and the proceeding is dismissed.

The foregoing constitutes the decision and order of this court.

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