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Matter of Grace J.

[*1] Matter of Grace J. 2022 NY Slip Op 22321 Decided on October 14, 2022 Surrogate's Court, Kings County Edmead, S. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on October 14, 2022
Surrogate's Court, Kings County

Matter of Proceeding for the Appointment of a Guardian for
Grace J.,
Pursuant to SCPA Article 17-A.

File No. 1990-5329/A

Attorney for Respondent Grace J.: Rebecca S. Kittrell, Esq., Mental Hygiene Legal Service
Carol R. Edmead, S.

Before the court is a guardianship proceeding pursuant to Article 17-A of the Surrogate's Court Procedure Act (Article 17-A) to confirm Angela J. (Petitioner) as guardian of the

person of Grace J. (Respondent). Petitioner is Respondent's sister, who was appointed standby guardian in a prior guardianship proceeding in 1991 (File No. 1990-5329). This decision follows a hearing held on May 18, 2022. Present at the hearing were Petitioner, Respondent, and Rebecca Kittrell, Esq. (Kittrell), Principal Attorney at the Mental Hygiene Legal Service (MHLS).

Prior to the hearing, Kittrell filed responsive objections to the petition on the ground that an Article 17-A guardianship is not the least restrictive means available to support Respondent with decision making.[FN1] Kittrell further objects on the ground that Petitioner may be seeking guardianship in order to move Respondent to another group home, closer to Petitioner's home, against Respondent's wishes and best interests.

The Initial Guardianship Proceeding in 1991

Respondent is a 64-year-old resident of a group home for adults with intellectual disabilities in Brooklyn. In the initial guardianship proceeding, Respondent's parents were appointed her guardians and Petitioner her standby guardian, by decision issued without a hearing by this court dated October 29, 1991. Respondent's appearance was waived by the court. The decision referred to "certificates" from a psychologist and a psychiatrist, but no testimony or other evidence. The decision did not specify what the certificates stated and simply concluded "[t]he court is satisfied on the record before it that the subject of this proceeding is a retarded person within the meaning of SCPA 1750."

The certificate from the psychologist is a one-page, pre-printed form with blanks for [*2]name, gender, date of birth, dates of testing, and I.Q. score filled in. The certificate's boilerplate language states that Respondent "was seen for the purpose of evaluating her eligibility for guardianship." The form further states that Respondent was interviewed and tested, and found to have an I.Q. of 31, which was "in the range of severe mental retardation." The form also states that Respondent "is incapable of managing her affairs independently by reason of her mental retardation" and "[f]urthermore, this mentally retarded person is not capable of understanding court proceeding [sic] by reason of the degree of her retardation, and I recommend that her presence be dispensed with by the court." The form is signed and notarized by the psychologist. The psychiatrist's certificate is the same form used by the psychologist, with the only difference being that Respondent's I.Q. is noted to be 27.

A guardian ad litem (GAL) was appointed for Respondent and the GAL submitted a report consisting of five paragraphs. The first three paragraphs discuss procedural matters, such as reviewing the file for conflicts of interests and completion of jurisdiction. The fourth

paragraph states that the GAL read the aforementioned forms, and the fifth paragraph states, "I believe, without reservation, that the Petition should be granted in all respects." There is no mention of the GAL having met with Respondent nor having made any independent inquiry other than reading the two forms.

The Instant Guardianship Proceeding

In the instant proceeding, Petitioner seeks letters of guardianship following her appointment as standby guardian, ostensibly due to the deaths of Respondent's guardians/parents in 2002 and 2009. Prior to the hearing in this proceeding, Kittrell filed an affirmation in response to the petition on behalf of Respondent. Kittrell states that she met with Respondent virtually on April 27, 2022 and explained that Petitioner filed a petition for guardianship of Respondent. Kittrell states that Respondent seemed to understand that Petitioner was seeking to make decisions on Respondent's behalf.

Kittrell further states that the group home staff evaluated Respondent and determined that Respondent was capable of choosing where she wished to reside and she "plainly stated" that she wished to stay at her current group home. When Kittrell asked Respondent where she wished to live, Respondent reiterated that she wished to stay at her current home "with her friends." Kittrell states that the care team was concerned that Petitioner was seeking guardianship "in an attempt to move [Respondent] from Brooklyn to Staten Island, not because it is in [Respondent's] best interest, or because it is what [Respondent] wants, but rather because it would be easier" for Petitioner to visit Respondent.

Kittrell further asserts that "[b]ased on what was shared with me by [Respondent's] residential team about her abilities, as well as the rights conveyed by the Family Health Care Decisions Act, which did not exist at the time the original petition was filed, I do not believe [an Article 17-A] guardianship is the least restrictive available means to support [Respondent] with decision making."

Petitioner submits an Affirmation of Examining Physician from Barrington Burt-Miller, D.O. dated July 20, 2021. Dr. Burt-Miller opines that based upon his evaluations, Respondent has "moderate intellectual disabilities" and that she is incapable of understanding the nature and consequences of health care decisions. Also submitted is an Affidavit of Examining Physician from Richard Cohen, Ph.D., a licensed psychologist, dated July 20, 2021. Dr. Cohen states that he reviewed the results of evaluations conducted by Atara Siegel, M.A. and opines that Respondent is within the moderate range of intellectual disability and incapable of managing her [*3]affairs by reason of her intellectual disability.

The report of the psychological evaluation conducted by Siegel under the supervision of Marina Ross, Psy.D., details, inter alia, the results of various testing performed during the evaluation, as well as Respondent's developmental and education history. The summary of the evaluation states that Respondent's overall intellectual functioning was in the "extremely low range" as measured by the Wechsler Adult Intelligence Scales. The summary further states that Respondent demonstrates functioning within the "low range" in the areas of communication, daily living skills, and socialization. Taken together, Respondent's cognitive and adaptive functioning scores meet the criteria for a "moderate intellectual disability."

Article 17-A Guardianship Hearing

At the hearing, Respondent appeared perfectly groomed, in good physical health, and looking much more youthful than her age. Respondent was able to raise her right hand and affirm that her testimony would be the truth. Respondent was very soft-spoken, but seemed to understand all of the questions and answered them, repeating herself when asked. Respondent was able to express herself, albeit in short sentences only, smiled on occasion, exchanged pleasantries, and generally exhibited a very amiable and calm disposition.

When asked where she lived, Respondent stated the street address of the group home where she resides. When asked her age, Respondent stated, "19." When asked if she knew why she was at the hearing, Respondent stated, "I thought for an interview." When asked if she understood what it meant to have a guardian appointed, Respondent stated, "They help. The guardian looks after you."

Respondent testified that at the group home, she helps clean up and wash the dishes. She is able to independently perform hygiene such as brushing her teeth, combing her hair, and getting dressed. Respondent named a few friends with whom she resides at the group home. Respondent described socializing with her friends at the home and "laughing before dinner" together, as well as going outside together for lunch.

Respondent further testified that she sees doctors at the group home. When asked whether she had ever been asked to make a medical decision and whether she was able to make the decision, Respondent replied, "yes." Respondent testified that she takes medications with the assistance of staff at the group home. Respondent also testified that she is treated well at the home and that "they like me." Respondent named all of her siblings and testified that she visits her family at Petitioner's home for the holidays.

Petitioner testified that she is seeking letters of guardianship so long after her parents' deaths because Respondent obtained new health insurance coverage. Petitioner explained that when she met with the insurance agents, they discussed the possibility of moving Respondent to a new group home. Petitioner also described an incident in 2019, when Respondent was at Petitioner's home and had to be taken to the emergency room. When they arrived, the hospital staff questioned whether Petitioner was Respondent's guardian. The answer being "no," Petitioner had to "beg" the staff to provide care, which they did because it was an emergency. When asked how Petitioner has managed since 2009 without letters of guardianship, Petitioner responded, "I was her advocate, so I was signing everything. Everything that needed to be signed, I signed. But, of course, it's not until I was at the... emergency room I realized that that's not good enough."

Discussion

Article 17-A of the Surrogate's Court Procedure Act provides for guardianship over a [*4]person who is permanently or indefinitely "incapable of managing oneself and/or one's own affairs by reason of an intellectual disability." SCPA 1750(1). Here, this court already ruled that Respondent is a person in need of a guardianship. However, the caselaw and approach to Article 17-A guardianships have vastly evolved since the Respondent's initial guardianship proceeding in 1991. As discussed supra, this court granted the initial guardianship petition without a hearing and based upon boilerplate evidence that deemed Respondent unable to testify at a hearing, to be "severely mentally retarded," and incapable of making any decisions for herself. Indeed, the court-appointed GAL did not even meet with the Respondent before rendering a report that parroted the forms filled out by the psychiatrist and psychologist. Unfortunately, this court's decision was likewise pro forma and lacking any substantive analysis that addressed the Respondent as an individual with rights and liberties to be protected.

Since that 1991 decision, international, national, and state-wide movements to affirm the rights of people with disabilities followed. See e.g. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611, U.N. Doc. A/RES/61/611, art. 12 (Dec. 6, 2006) (a United Nations convention recognizing the "movement from viewing persons with disabilities as 'objects' of charity, medical treatment and social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society"); Americans with Disability Act of 1990 (ADA), 42 USCS § 12101 [Amendment Notes 2008] ("physical and mental disabilities in no way diminish a

person's right to fully participate in all aspects of society, [but people with disabilities] are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers"); *Olmstead v. L.C.*, 527 U.S. 581 (1999) (interpreting the ADA, the United States Supreme Court held that a state's services for people with disabilities must be administered in the most community-integrated setting possible).

Most recently in July 2022, the State of New York passed the Supported Decision-Making Agreement Act (SDMAA), which provides, in part, as follows:

(a) The legislature finds that a person's right to make their own decisions is critical to their autonomy and self-determination. People with intellectual, developmental, cognitive and psychosocial disabilities are often denied that right because of stigma and outdated beliefs about their capability. This right is denied, despite the reality that very few people make decisions entirely on their own. Everyone uses supports, as do people with disabilities; who may just need more or different kinds of supports.(b) The legislature further finds that the, now well recognized, practice of supported decision-making is a way in which many people with disabilities can make their own decisions with the support they need from trusted persons in their lives, and that supported decision-making can be a less restrictive alternative to guardianship. Recognizing that supported decision-making can take a variety of forms, the legislature finds that a more formal process, resulting in a supported decision-making agreement between the person with a disability (the decision-maker) and their supporter or supporters, can provide the basis for requiring third parties, who might otherwise question a person's legal capacity because of their disability, to recognize their decisions on the same basis as others. When this more formal process is followed, people with disabilities can make choices confident that they will be respected by others and knowing they will be solely responsible for their own decisions. (NY MHL 82.01.)

The SDMAA provides for a person with a disability and a trusted supporter to enter into an agreement to allow the supporter to assist in decision making, while allowing the person with a disability to retain their autonomy. Under the SDMAA, a "decision or request made or communicated by a person with a disability with the assistance of a supporter in accordance with the provisions of a supported decision-making agreement must... be recognized as the decision or request of the decision-maker and may be enforced by the decision-maker in law or equity on the same basis as all others." (NY MHL 82.11.)

Turning to the instant petition, an Article 17-A guardianship is plenary, resulting in a "total deprivation of the individual's liberties." *Matter of Michael J.N.*, 58 Misc 3d 1204 (A) (Sur Ct, Erie County 2017). Unlike guardianships under Article 81 of the Mental Hygiene Law,

Article 17-A does not allow for the exercise of discretion to limit or tailor the scope of guardianship to meet an individual's specific needs. *Matter of Chaim A.K.*, 26 Misc 3d 837 (Sur Ct, NY County 2009). An Article 17-A guardianship being "the most restrictive type of guardianship available under New York law," it can only be granted "in the absence of less restrictive alternatives." *Matter of Robert C.B.*, 207 AD3d 464, 465 (2d Dept 2022) (quoting *Matter of Eli T.*, 62 Misc 3d 638, 640 [Sur Ct, Kings County 2018]). Further, "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." *Id.* (emphasis in original) (quoting *Matter of Dameris L.*, 38 Misc 3d 570 [Sur Ct, NY County 2012]).

Here, Respondent resides in a group home that by all accounts, competently assists Respondent with activities of daily living and medical needs. Respondent also has caring and capable siblings, including Petitioner, who can support her decision making without the need for a guardianship. Under these circumstances, an Article 17-A guardianship is neither necessary nor appropriate. See e.g., *Matter of Michael J. N.*, 58 Misc 3d 1204[A], 2017 NY Slip Op 51925[U], *6 (Sur Ct, Erie County 2017) (respondent who resides in a group home that monitors his health and well-being and provides other support is not a person in need of an Article 17-A guardian). Indeed, the Respondent has managed without a guardianship in place since 2009 when her mother/guardian died.

There is no doubt that Petitioner deeply cares for Respondent and seeks guardianship because she believes that a guardianship is the best way that she can support Respondent. However, Petitioner may accomplish her goal of assisting Respondent in times of medical crises under the Family Health Care Decisions Act, which authorizes a patient's family member or close friend to make health care decisions for the patient in cases where the patient lacks decisional capacity. NY PHL Article 29-CC (effective June 1, 2010). Petitioner may also consult with the Supported Decision Making New York, an organization that assists family members to implement supported decision making arrangements for healthcare and other needs. (See <https://sdmny.org/>.)

As for the prospect of moving Respondent to a new group home, Respondent may make such a decision in consultation with the staff at her current home, MHLS, and family members, with the sole objective being whether a move is in Respondent's best interests. An Article 17-A guardianship is not required for such purpose and in any event, a guardian cannot make such a decision unilaterally.

Upon the record presented, the credible evidence demonstrates that Respondent is an adult with an intellectual disability, but who has demonstrated the capacity to retain her rights to

[*5]autonomy with the strong support of her siblings and staff at her group home. The record establishes that an Article 17-A guardianship is not the least restrictive means to support Respondent with decision making. Matter of Robert C.B. at 465. Allowing Respondent to retain her rights and liberties, while providing her with any necessary assistance in a supported decision making framework, is ultimately in Respondent's best interests. It is also the only decision that conforms with the settled law. Id.

Conclusion

Accordingly, the guardianship previously granted by this court on October 29, 1991 is hereby terminated, nunc pro tunc, as of November 14, 2009, the date of the Respondent's mother/guardian's death. The petition to confirm Petitioner as standby guardian is hereby denied and dismissed.

This constitutes the decision of the court.

Dated: October 14, 2022

CAROL R. EDMEAD

Acting Surrogate Footnotes

Footnote 1:New York courts have recognized that substantive due process requires ruling out all less restrictive alternatives to Article 17-A guardianships. See Matter of Robert C.B., 207 AD3d 464, 465 (2d Dept 2022).