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A NEW RESOURCE FOR REFORMING GUARDIANSHIP LAW FOR PEOPLE WITH I/DD

Our work at SDMNY is based on the human right of legal capacity, the right to make one's own decisions, and to have those decisions legally recognized. Guardianship violates this right by removing a person's ability to make decisions about their lives, and gives that power to another, the guardian.

Because the Constitution says that personal and/or property rights can't be taken away for the purpose of protecting someone if there is a "less restrictive alternative" available, we have spent the last 8 years developing a facilitation process leading to a Supported Decision-Making Agreement (SDMA) that constitutes a "less restrictive alternative" now enshrined in our new SDMA law, Article 82 of the Mental Hygiene Law. We know, however, that while this process works for the vast majority of people with I/DD, there are still those, with severe impairments, for whom we have not yet devised effective supports. Until that happens, there will still be a need, though greatly reduced, for guardianship.

The NY State Capitol, which houses the State legislature

Unfortunately, the guardianship statute for people with I/DD, Surrogates Court Procedure Act Article 17-A (SCPA 17-A), enacted in 1969 and virtually unchanged since, is totally outdated, and in the view of almost everyone, entirely unconstitutional. It permits imposition of a plenary guardian–that is, one who has complete power over the person with I/DD– based on a diagnosis and the determination that it would be in the person's "best interest." It provides virtually no procedural protections, and in most cases, this profound violation of rights can be made based only on formulaic papers; the judge never even sees the person who will now lose all their legal and civil rights, potentially forever. There is no recognition that I/DD exists on a spectrum of severity, or that people with I/DD can learn and grow. It says nothing of the Constitutional requirement of "least restrictive alternative."

In 1990 the legislature recognized that it was time to change the law and directed a report on the "changing conditions" since 1969 to be included, but the report was never made public and the law remains essentially unchanged, almost 35 years later. Earlier this year our partner Disability Rights New York (DRNY) filed a lawsuit challenging the constitutionality of 17-A (Good News 2/16/2024) which has reawakened interest in rewriting the statute. Just last week the New York State Bar Association posted a Report by its Disability Rights Committee that offers a blueprint for progressive, rights-based change. (**Click here to read the full Report**)

Like the "Principles for SDMA Legislation" (**click here to read the "Principles"**) that we developed before OPWDD drafted the bill that became our SDMA law, the Report lays out all the major issues that require reform and what would be required to satisfy due process and equal protection for people at risk of guardianship. Importantly for us, it is explicit about the requirement of least restrictive alternative and names SDM as one such alternative. It would require the party petitioning for guardianship to show that alternatives had been tried or, if not, to explain why. Equally important, it calls for the burden of proof in restoration proceedings to fall on the party who seeks to continue the guardianship, rather than on the person with I/DD who seeks to end it and restore their rights.

The Report is thorough, thoughtful, well written and documented, and compelling in its arguments for significant change. While we look forward to a time when guardianship is no longer necessary for anyone, a major, rights-based reform of 17-A is long overdue. The Report provides an important resource for the work that now needs to be done.

THANKS TO THE NYSBA DISABILITY RIGHTS COMMITTEE FOR THEIR WORK IN MOVING THIS REFORM FORWARD