

Advocating for Least Restrictive Alternatives in Plenary Guardianships

By Amy C. O'Hara

Recently our firm represented guardians seeking a modification of their son's guardianship under Article 17-A of the Surrogate's Court Procedure Act (Article 17-A) to revoke guardianship of the property while continuing to maintain guardianship over his person. In what appears to be a case of first impression, the Westchester County Surrogate's Court issued a decision granting the guardians' petition.¹

In 2010, a petition was filed on behalf of Jacob's parents to be appointed as guardians over Jacob's person and property based upon his inability to make decisions on his own regarding his person and property. Jacob has lifelong developmental disabilities that include autism spectrum disorder and cerebral palsy, resulting in cognitive delays.

Over the years, with the support of his guardians, Jacob made significant progress in his ability to manage his property. Through enrollment and cooperation with supportive programs, Jacob became steadily more independent and demonstrated the capacity to manage his property without his guardians' decisions supplanting his own. At the same time, despite his guardians' support for Jacob to live as independently as possible, Jacob still required total assistance by his guardians in attending to his health care decision-making. When faced with medical decisions, he would experience paralyzing anxiety that resulted in his inability to make any decisions at all.

Given Jacob's advancements in financial independence, it was determined the guardians would petition the court to seek a modification to the terms of Jacob's guardianship, namely they wanted to terminate the property guardianship but maintain guardianship of the person.

It is imperative to be aware of the issues surrounding the Article 17-A statute as articulately reviewed by Lisa R. Valente in the Fall 2019 issue of this publication, specifically that it is a plenary guardianship.² The Article 17-A statute is archaic and does not allow for tailoring of an individual's functional limitations, which is vital when supporting the least restrictive alternative for individuals who have higher functioning capabilities but still need substantial support in one or more areas and when certain advance directives are not appropriate.

Article 17-A currently allows a guardian to petition the court to have the guardianship order modified, dissolved or amended.³ The statute further enables courts to modify a guardianship order "if in its judgment . . . the interests of justice will be best served."⁴



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Courts must look at the best interests of the individual in need of a guardianship.⁵ As described by *In re Guardian for Hytham*, the assessment of an individual's best interests should include an in-depth analysis of their functional capacity.⁶ "Understanding the functional capacity of an individual with disability, what an individual can or cannot do, is a necessary inquiry in determining best interest and the necessity of guardianship. This is especially true in light of the emerging awareness that there is a wide range of functional capacity found among persons with diagnoses of intellectual disability and developmental

disability."⁷

The analysis of "functional capacity" is a fact based inquiry that examines the abilities of an individual and their potential for decision-making.⁸ As Surrogate Margarita López Torres stated in *In re Guardian of Michelle M.*, "[t]he perfunctory appointment of a plenary guardian based upon medical certifications or diagnostic tests alone, without careful and meaningful inquiry into the individual's functional capacity, relies upon the incorrect assumption that the mere status of intellectual disability provides sufficient basis to wholly remove an individual's legal right to make decisions for himself."⁹

Surrogate's Courts have also held that the best interests of an individual can change with time. For example, Surrogate Kristin Booth Glenn, presiding over *In re Guardianship of Dameris*, held that when a guardianship was no longer strictly necessary for the individual's decision-making and there was a system of supported decision-making in place, the guardianship should be terminated.¹⁰ The decision noted how Article 17-A should be interpreted. "SCPA article 17-A must be read to include the require-

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ment 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."¹¹

In *In re Jacob A.B.*,¹² the Westchester County Surrogate's Court moved the barometer forward in developing case law to modify plenary guardianships to allow an element of tailoring to the least restrictive alternative. Jacob now has the ability to execute a supportive power of attorney tailored to his needs while at the same time his parents maintain full guardianship authority over his person, thereby eliminating the overwhelming anxiety he encountered when communicating with doctors regarding medical decisions.

It is arguable that there is a way to go to reach where we need to be in order to most effectively serve the individual's needs in the 17-A guardianship process.

Article 17-A provides no mechanism for the courts to routinely review the welfare of an individual under a guardianship.¹³ As practitioners who represent families in all aspects of special needs planning, including Article 17-A guardianships, we are charged with the responsibility of protecting individuals with functional limitations while at the same time providing them with the least restrictive form of intervention. We should be mindful of the families we represent in guardianship proceedings once a guardianship matter is complete. As these individuals with disabilities age and navigate their way into adulthood, it is important that we work toward a goal where there is a mechanism to allow for these individuals to have access to the least restrictive alternative of intervention if their functional capabilities warrant a change to the terms of their guardianship.

Endnotes

1. *In re Jacob A.B.*, N.Y.L.J., Jan 31, 2020, p. ____, col _____. (Surr. Ct. Westchester Co. 2020).
2. Lisa R. Valente, *Constitutional Challenges to Article 17-A Guardianships*, N.Y.St. Elder and Special Needs Law Journal, vol 29, no. 4, at p.11, Fall 2019.
3. N.Y. Surr. Ct. Proc. Act § 1759.
4. N.Y. Surr. Ct. Proc. Act § 1755.
5. N.Y. Surr. Ct. Proc. Act § 1754(5).
6. *In re Guardian for Hytham M.G.*, 52 Misc. 3d 111(A), 41 N.Y.S.3d 719, 2016 N.Y. Slip Op. 5113(U) (Surr. Ct. Kings Co. 2016).
7. *Id.* at 3.
8. *In re Guardian for Michelle M.*, 52 Misc. 3d 1211(A), 41 N.Y.S.3d 719, 2016 N.Y. Slip Op. 5114(U) (Surr. Ct. N.Y. Co. 2016).
9. *Id.* at 3.
10. *In re Dameris L.*, 38 Misc. 3d 570, 576, 956 N.Y.S.2d 848, (Surr. Ct. N.Y. Co. 2012).
11. *Id.* at 579.
12. See *In re Jacob A.B.*, *supra* note 1.
13. If a guardian of the property is appointed, an annual accounting must be submitted.

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