
SCPA ARTICLE 17-A

and related matters

**COLLECTED CASES
(Current as of July 22, 2016)**

**Mental Hygiene Legal Service
Second Judicial Department**

Michael D. Neville, Director

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CASE SUMMARIES

I. CONSTITUTIONALITY

Matter of Damaris L., 38 Misc. 3d 570; 956 N.Y.S.2d 848 (NY Cty., 2012)(Glen, J.)

Although admittedly lacking in jurisdiction as a result of the ward having moved permanently out of State, Surrogate Glen, *in dicta*, stated that in order to withstand a due process challenge and possibly also an equal protection challenge, 17-A must be read to include the requirement found in Article 81 that guardianship must be the least restrictive alternative to achieving the State's goal of protecting a person with intellectual disabilities from harm connected to those disabilities and that the court must consider the availability of "other resources" including a support network of family, friends, and professionals before imposing the drastic judicial intervention of guardianship. Surrogate Glen also noted the violation of the principles of Article 12 of the International Convention on the Rights of Persons with Disabilities which endorse supported as opposed to substituted decision making.

Matter of JP Morgan Chase Bank N.A. (Marie H.), 2005-1307, SURROGATE'S COURT OF NEW YORK, NEW YORK COUNTY, 38 Misc. 3d 363; 2012 N.Y. Misc. LEXIS 5843; 2012 NY Slip Op 22387, December 31, 2012

Relying on the Due Process clause of the 14th amendment of the US Constitution and the Supremacy Clause in conjunction with the UN General Assembly's adoption of the Convention and Optional Protocol on the Rights of Person's with Disabilities, the Surrogate of NY County held that *SCPA 17-A does not meet constitutional standards due to the lack of a periodic reporting requirement for guardians of the person*. The Surrogate's rationale was that without such reporting the court cannot ascertain whether the deprivation of liberty resulting from guardianship is still justified by the ward's disabilities or whether the ward has progressed to a level where he can live and function on his own as a result of the services and educational opportunities provided during the preceding period of the guardianship. The court also cannot know whether the guardians is still fulfilling his fiduciary role to the ward and cannot keep effectively monitor the ward who is then the court's responsibility. The Surrogate further reasoned that requiring such reporting would not add a huge administrative burden since SCPA Art 17 and SCPA Art 17-A already require and there is already a process in place for submission of and review of annual financial accountings. This reporting in guardianships of the person is already required under MHL Article 81. Accordingly, the Surrogate of NY County held that in NY County, going forward, SCPA would be read to require yearly reporting and review and that effective as of the date of this decision all new personal 17A guardianships in NY County will be subject to a reporting requirement that guardians answer a yearly questionnaire generated by the court, unless the appointing order requires additional information which shall be supplied in accordance with that order.

Matter of Chantel R., 34 A.D.3d 99; 821 N.Y.S.2d 194 (1st Dept. 2006)

It does not violate the Equal Protection clause of either the State or Federal Constitutions to conclude

that a mentally retarded respondent's expression of a desire to continue life-sustaining treatment is categorically distinguishable from the same desire expressed by a mentally competent individual. Only the latter has the capacity to appreciate the consequences of the decision and thus the ability to make the choice pursuant to an uninformed or irrational alternative. Equal Protection prohibits the government only from treating persons differently from others similarly situated. The difference in treatment of discrete groups need only be rationally relate to a legitimate government interest in order to pass constitutional muster. Mentally retarded individuals are not similarly situated to once competent people. Citing, Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-448, 105 S. Ct. 3249, 87 L.Ed. 2d 313 (1985) and Heller v. Doe, 509 U.S. 312, 320-321, 113 S. Ct. 2637, 125 L.Ed. 2d 257 (1993).

Matter of Derek, 12 Misc.3d 1132; 821 N.Y.S.2d 387 (Surr. Ct. Broome Cty. 2006) (Surr. Peckham)

The Equal Protection and Due Process Clauses of the Federal and NY State Constitutions dictate that the physician-patient privilege apply in a contested SCPA Article 17-A proceeding to prohibit the introduction of certifications completed by treating physicians. There is no rational reason why the respondent in a contested MHL Article 81 guardianship proceeding should be allowed to assert the physician-patient privilege while the respondent in a contested SCPA Article 17-A guardianship proceeding cannot. Similarly, there is no rational reason why a respondent who is alleged in a guardianship proceeding to be developmentally disabled should have any different right to assert the privilege from a respondent who is alleged to be mentally retarded. In all three cases, mentally retarded, developmentally disabled, or incapacitated person, the ultimate finding to be made by the Court is that the respondent is unable to manage his or her personal or property affairs because of a lack of capacity. MHL § 81.02(b)(1); SCPA § 1750(1); SCPA § 1750-a(1).

Matter of Baby Boy W., 3 Misc.3d 656; 773 N.Y.S.2d 255 (Surr Ct., Broome Cty 2004) (Surr. Peckham)

SCPA [1740] 1750-b meets both the due process and equal protection requirements of the Fourteenth Amendment of the Federal Constitution and similar provisions in Article I of the New York State Constitution for all mentally retarded persons whose guardians are appointed after the effective date of the Health Care Decisions Act.

In the Matter of the Guardianship of B., 190 Misc.2d 581; 738 N.Y.S.2d 528 (County Ct., Tompkins Cty. 2002)(Peckham, J.)

In the dicta of an Article 81 case brought in County Court by a guardian for permission to authorization sterilization of her mentally retarded ward, the court stated: "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 article 17-A or article 81. There is no rational basis for saying the ability of a guardian for a mentally retarded person to consent to medical treatment of the ward should differ if the guardian is appointed under article 81 rather than article 17-A."

II. BURDEN AND STANDARD OF PROOF

A. Generally

Matter of Akiva (Moshe), NYLJ, 6/11/13, P. 31 (Surr. Ct. Kings Cty., 2013) (Surr. Lopez Torres)

The Surrogate denied the petition for 17A guardianships over the petitioner's two adult sons, stating that the petitioner failed to profer evidence regarding the elder son's purported diagnosis with Asperger's syndrome and/or obsessive compulsive disorder, or the younger son's purported diagnosis with autism. The Surrogate further held that the establishment of a plenary guardianship, which she characterized as a "wholesale surrender" of personal autonomy and property, was neither necessary nor in the sons' best interests, noting, *inter alia*, that the sons lived unsupervised in the family home for extended periods of time, and credited their testimony regarding their daily activities, their independence of self-care, their use of public transportation, and their ability to seek and obtain necessary medical care.

Matter of Rupper, Unpublished Decision, Surr Ct., Kings County, Surr. Lopez-Torres, File # 2011-783, Dec. 9, 2011

Surrogate denied this petition for a 17A guardianship on the theory that the decision was not about whether the petitioners, loving relatives who included medical professionals, could make a better decision than the proposed ward could make about his medical needs but rather whether the proposed ward has the ability to make his own reasoned medical decision.

Matter of F. Lee Woods, IV, (unpublished) filed 5/16/06, Surr. Ct., Rockland Cty., Index # 2005/771 (Surr. Berliner)

Petition for guardianship dismissed. Petitioner failed to make out a *prima facie* case for guardianship of a 25 year old with a traumatic brain injury where the certificates were stale, respondent established that he was still recovering, and in the interim, had effectuated a plan to meet his needs by issuing a Durable Power of Attorney to his mother.

Matter of Nolan, NYLJ, 10/2/03, p.29, col. 3 (Surr. Ct. Suffolk Cty. 2003)(Surr.Czygier)

The court is authorized to appoint a guardian of the person, if petitioners establish that such appointment is in the best interest of the mentally retarded person, and that the person proposed as the guardian is capable of promoting the best interest of the ward. In considering best interests, the court must consider the emotional, physical, and intellectual needs of the person, and the limitations imposed on the person as a result of his/her disability.

**Matter of Maselli, NYLJ, 3/29/00, pg. 32, col. 4 (Surr. Ct. Nassau Cty. 2000)
(Surr. Radigan)**

“Guardianship proceedings are subject to the same rules with respect to the weight and sufficiency of the evidence as are other litigated matters. Where a material allegation is challenged, the contesting parties will be required to present their proof in order to assist the court in making this determination. The petitioner has the burden of proving to the court’s satisfaction not only that the appointment is necessary to protect the interests of the disabled person, but that the petitioner is a suitable person of appropriate character, standing and ability, whose interests are not adverse to those of the disabled person.”

Matter of Ivans, NYLJ, 3/19/97, p. 31, col. 4 (Surr. Ct., Suff. Cty. 1997)(Surr. Prudenti)

Petition for guardianship was dismissed where the petitioner failed to make out a *prima facie* case for guardianship of an 18 year old with a traumatic brain injury. The certificates of the two physicians established that she was still recovering and was not suffering from a permanent condition, and the Guardian ad Litem recommended to the court that his ward was fully competent to make her own decisions and did not require a guardian. In addition, neither the statute nor case law authorized the court to direct respondent to submit to additional examinations to assist petitioners to make out their case against her.

B. Best interests strategies in the context of divorced parents

Matter of Burns, 42 Misc. 3d 1209(A); 984 N.Y.S.2d 630 (Surr. Ct., Oneida Cty, 2013)(Surr. Gigliotti)

Where the proposed autistic ward lived her entire life with her mother subsequent to her parents’ divorce, and her biological father moved 4 hours away, remaining involved by way of visitation only, and he lacked detailed knowledge of her specific needs, behaviors, medical providers and plan of care, the Surrogate found it was in the proposed ward’s best interest to give guardianship to the mother, and first standby guardianship to the step father who lived with the proposed ward and was more involved with her care. The Surrogate did hold however that at the time the stepfather would be called upon to step up, he would need to qualify and the biological father would at that time have the opportunity to reapply and demonstrate that he has gained the necessary familiarity with his daughter’s needs.

Matter of Timothy R.R., 42 Misc. 3d 775; 977 N.Y.S.2d 877 (Surr. Ct. Essex Cty., 2013)

Where a developmentally disabled man’s maternal aunt applied for standby guardianship over her deceased sister’s son, as she alleged her sister had requested of her, and the young man’s father, who was divorced from his mother, cross-petitioned to be appointed, and both the father and the aunt had the mental stability, character, and ability to function adequately as guardian, and the proposed ward had a loving relationship with his father, the court held that the status of the aunt is that of a

“stranger” rather than a member of the "family circle" since the ward's father is alive and seeks to be appointed guardian.

Matter of Kevin Z., 105 A.D.3d 1269; 966 N.Y.S.2d 226 (3rd Dept., 2013)

The father of a mildly mentally retarded autistic young man has physical custody and the mother had only visitation rights under a Family Court custody order issued when their son was a minor. Upon their son's turning 18, the mother petitioned and the father cross-petitioned for 17-A guardianship. The Surrogate appointed the father and continued visitation to the mother finding that appointing the father was in the proposed ward's best interest because: the son had been living with his father for the past 10 years and continuing this arrangement provided stability; the mother had not shown sufficient change in circumstances in that she frequently failed to visit; was minimally engaged with her son's teachers and care givers; had no firsthand knowledge of his living arrangements; had difficulty coping with her son's behaviors; he often returned from visits to her disheveled and agitated; she threatened to have her son arrested or committed, the father was working toward placing his son in a day program where as the mother's only plan was to try to place him in a residential program nearer to her home; and the mother was unable to accept the findings and concerns of others about her son.

Matter of the Guardianship of Jon Z.K. Z., 24 Misc.3d 1240A; 899 N.Y.S.2d 60 (Surr. Ct., Broome Cty., 2009) (Surr. Peckham)

Parents who had an acrimonious divorce and continuing relationship of hostility toward one another were co-guardians of their son, now a 21 year old autistic young man. Both parents filed various motions seeking control over the decisions concerning their son.. Both the special guardian and the MHLS attorney for the young man recommended that an independent guardian be appointed because the parents relationship was not in the best interests of the young man. The court determined that the parents' deep seated animosity for one another prevented them from cooperating, that they could not cooperate sufficiently to serve as either co- guardians or sole guardians. The court also held that the parents' siblings could not be appointed because the other parent would perceive that individual as too closely aligned with the other parent. Therefore, the court appointed the Special Guardian and her law partner, both on the Part 36 list, as the Guardians.

Matter of Stevens, 2007 NY Misc. Lexis 7877; 238 NYLJ 81 (Surr. Ct. NY Cty., 2007) (Surr.Glen)

The mother and 66 year old stepfather of a 32 year old profoundly retarded woman applied to become co- guardians with end -of- life decision making powers. The biological father, who lived in California, opposed the stepfather's appointment. There was no dispute that the proposed ward has been living with and cared for by her mother and stepfather and their adequacy as the primary caretakers was not challenged. The biological father's reason for opposing the guardianship was his concern that he would be cut out of his daughter's life and, also that the mother and step father, as Jehovah's witnesses, would not make necessary medical decisions regarding blood transfusions if that event was to occur. The mother testified that she knew that her opposition to blood transfusion

could be overridden by a court upon an application by medical professionals if the event were to occur and also that her religious beliefs would not interfere with her making end-of-life decisions. The Surrogate appointed the mother as guardian and the stepfather as standby guardian instead of co-guardian reasoning: (1) while the court may consider religious beliefs in determining the best interests of the ward, religion alone may not be the only factor; (2) the ward will benefit from continuity of care if she remains in the home she has always known; and (3) if the mother should be unable to serve, the stepfather who is in the home would be the best person to serve as standby guardian for the first 60 days before returning to court for confirmation, as which time the biological father and his wife, a registered nurse with experience treating people with developmental disabilities, who was 10 years younger than the step father had the right to come forward to seek guardianship.

Matter of Vazquez, NYLJ, 3/31/00, p. 30, col. 5 (Surr. Ct. Bronx Cty. 2000)(Surr. Holzman)

A father and stepmother sought guardianship of the father's mentally retarded son. The biological mother opposed the application unless she, and not the stepmother, was appointed co-guardian. Both parents entered into a stipulation and a decree was issued by the court which was subject to the terms of this stipulation. The court issued temporary letters (valid for six months) solely to the father and visitation to the mother. The stipulation also provided, that unless the biological mother advised the court in writing within six months of the entry of the decree herein that the father was frustrating her efforts at visitation, permanent letters would automatically issue to the father.

Matter of Hayley M., NYLJ, 6/1/99, p. 32, col. 3 (Surr. Nassau Cty., 1999)(Surr. Radigan)

Upon the petition and cross-petition of the acrimoniously divorced parents of a 20 year old mentally retarded woman, the Court, after hearing, granted co-guardianship to her parents, each to have specific areas of authority in their daughter's life. Visitation and custody was ordered as an extension of the arrangements in place in the divorce settlement during the daughter's minority. The Court also warned the mother that it would change custody to the father if she failed in the future to comply with the Court's Order. Specifically, the Court had concluded that the mother had programmed the daughter to make a false sexual allegation against the father so that she could defeat his efforts to challenge her custody.

Matter of Garrett YY, 258 A.D.2d 702; 684 N.Y.S.2d 700 (3rd Dept., 1999)

Following the acrimonious divorce of the ward's parents, upon application of the Guardian Ad Litem for the son in the divorce proceeding, the Surrogate, after hearing, found that the parents could no longer cooperate with one another, modified an order granting co-guardianship of their mentally retarded 22 year old son, and awarded sole guardianship to the father, upon a finding that he would be the better guardian.

Matter of Colette G., 221 A.D.2d 440; 633 N.Y.S.2d 807 (2nd Dept., 1995)

The Court appointed a temporary, independent guardian, where the animosity between the divorced parents was not in their daughter's best interests and they could not serve either together or alone.

C. Comparison to Article 81

Should We Be Talking? Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York, Rose Mary Bailey and Charis B. Nick-Torok, 75 Alb. L. Rev. 807. Excellent discussion of the differences and similarities between the two forms of guardianship and the arguments for and against merging them or importing aspects of Article 81 into 17-A.

In a series of decisions, all related to the same individual, various Surrogate's grapple with the issue whether a 17-A guardian may engage in gift giving in furtherance of Medicaid/tax planning with different conclusions. See, **Matter of Schulze**, NYJL, 9/3/96 pg. 1, col. 1 (Surr. Ct. NY Cty. 1996)(Surr. Preminger)(Court allows 17-A guardians to make gifts for estate tax planning purposes under same test that applies to Art 81 guardians. In this case, it allowed the gift giving since it would not leave the ward with an estate so depleted that she could not cover the cost of her own care and further her immediate family, which was wealthy in its own right pledged to provide for her care should there be a change in circumstances; **Matter of Schulze**, 23 Misc. 3d 215, 869 NYS 2d 896 (Surr. Ct., NY Cty. 2008)(Surr. Roth) (There is no express provision in SCPA Art. 17-A empowering a 17-A guardian to make gifts as contrasted with such an express grant of power to MHL Art. 81 guardians under MHL 81.21. The court holds that despite the absence of such express language, Art. 17-A guardians do have such power and do not need to petition a court to be converted to Art. 81 guardians to make such gifts. The court noted that intra-family tax savings and maximization of gifts to charities are among the objectives that have been recognized as supporting guardians' exercise of such authority to make such gifts.); **Matter of Joyce G. S.**, 30 Misc. 3d 765; 913 NYS 2d 910 (Surr. Ct., Bronx Cty., 2010) (Surr. Holzman); (Surrogate Holzman expressly rejected Surrogate Glen's holding in Matter of John J.H.. In doing so, Surrogate Holzman held that "under the law as it presently exists, it has the power to invoke the equitable doctrine of substituted judgment to approve gifts or tax saving transactions on behalf of article 17-A wards. The court explained that in enacting the SCPA, the Legislature afforded the Surrogate's Court full equity jurisdiction as to any action, proceeding or other matter over which jurisdiction is or may be conferred" (see SCPA 201[2]), and provided that the proceedings enumerated in the SCPA are not exclusive (see SCPA 202). The Legislature further provided that after the appointment of a 17-A guardian, the Surrogate's court "may entertain and adjudicate such steps and proceedings...as may be deemed necessary or proper for the welfare of such mentally retarded or developmentally disabled person" (see SCPA 1758). Accordingly, Surrogate Holzman concluded that there appears to be no reason why the Surrogate's Court cannot utilize the common law or the criteria set forth in MHL § 81.21 (d) to approve a gift on behalf of an article 17-A ward.

Matter of Barbara Kobloth, Sup Ct, Westchester Cty, Unpublished Decision and Order, Index # 10236/10 (July 7, 2010) (Di Bella, J.) and Matter of Phillip Morris, Sup Ct, Westchester Cty, Unpublished Decision and Order, Index # 10236/10 (July 7, 2010) (Di Bella, J.)

These are companion cases each involving an individual described as profoundly mentally retarded and unable to read or write or manage any property. Each case was brought by the Consumer Advisory Board by Order to Show Cause (“OSC”) seeking appointment of an Article 81 guardian and for the establishment of a Supplemental Needs Trust (“SNT”). In each case the court declined to sign the OSC stating: “ ... the Legislature has enacted a statutory scheme, Surrogate Court Procedure Act [“SCPA”] 1750 *et seq.*, specifically designed to meet the needs of the mentally retarded and developmentally disabled. An application for the appointment of a guardian of the property and establishment of an [SNT} is more properly commenced in Surrogate’s Court under Article 1750 of the [SCPA]”

Matter of John J.H., 27 Misc. 3d 705; 896 N.Y.S.2d 662(Surrogates Court, NY Cty., 2010) (Surr. Glen)

Parents of a 22 year old autistic man with artistic talent petitioned under SCPA 17-A to become his guardians with, inter alia, the specific power to sell his artwork and to make charitable gifts on his behalf from the proceeds. The court, while acknowledging that the parents’ objective was laudable, indicated that it was constrained by both the language of 17-A and its common law roots, to order a plenary guardianship over the property and that it could neither tailor the guardianship to the proposed ward’s particular needs nor issue gift giving powers to the proposed guardians. The court explained that there was a presumption against applying “substituted judgement” in a 17-A guardianship where the assumption is that the ward never had capacity to formulate a judgment of his own. The Surrogate calls for reform of 17-A to a more nuanced and protective system of guardianship for persons with developmental disabilities. In the end, the petitioners withdrew their 17-A petition and re-filed under Article 81. **But see, Matter of Joyce G. S., 30Misc. 3d 765; 913 N.Y.S. 2d 910 (Surr. Ct., Bronx Cty., 2010) (Surr. Holzman)**

Matter of Chaim A.K., 26 Misc.3d 837; 885 N.Y.S.2d 582 (Surr. Ct., NY Cty., 2009) (Surr. Glenn)

Court denied an application by parents for 17-A guardianship of their son without prejudice to file an application for an Art 81 guardian in Supreme Court, finding that the proposed ward, although mildly mentally retarded, also has along history of psychological problems that may change over time and that he was in need of the more tailored and more carefully monitored supervision of an Art 81 Guardian. This opinion is especially well written and thoughtful and discusses the difference between the two types of guardianship and when each is most appropriate.

D. Comparison to CPLR Art. 12 Infant Compromise

Article, Compromise of Infant's Cases, Thomas A. Moore and Matthew Gaier, 2/2/2010, NYLJ (col. 1)

Informative article comparing the relative advantages of using Art 81, Art SCPA 17-A and CPLR Art. 12 Infant Compromise addressing the degree of flexibility in investing and control over the funds.

E. Supported Decision Making

Matter of D.D., 50 Misc3d 666 (Surr Ct , Kings Cty 2016)(Lopez-Torres, Surr.)

Guardianship over 29 year old man with intellectual deficits but strong functional and social skills who had a supportive family and a willingness to seek their advice was denied. Thorough legal and factual discussion.

Matter of Damaris L., 38 Misc. 3d 570; 956 N.Y.S.2d 848 (Surr. Ct., NY Cty., 2012)(Glen, J.)

Although admittedly lacking in jurisdiction as a result of the ward having moved permanently out of State, Surrogate Glen, *in dicta*, stated that in order to withstand a due process challenge and possibly also an equal protection challenge, 17-A must be read to include the requirement found in Article 81 that guardianship must be the least restrictive alternative to achieving the State's goal of protecting a person with intellectual disabilities from harm connected to those disabilities and that the court must consider the availability of "other resources" including a support network of family, friends, and professionals before imposing the drastic judicial intervention of guardianship. Surrogate Glen also noted the violation of the principles of Article 12 of the International Convention on the Rights of Persons with Disabilities which endorse supported as opposed to substituted decision making.

Matter of Vance B., (unpublished), Decision and Order, File No. 2012-4010 , Surr. C T. , Kings Cty. , (Lopez-Torres, Surr.) (Feb. 11, 2014)

Petition for 17-A guardianship by proposed ward's sister was denied after a full evidentiary hearing. Surrogate found that proposed ward presented as "high functioning" and that evidence established that he was able, inter alia, to appropriately respond to questions posed to him, manage his daily needs with the limited assistance of others, understand his own medical needs, communicate with his doctors during his appointments, take daily medication without supervision, travel by subway to certain locations of his choosing and demonstrated indications of being further travel trained, adapt to social boundaries placed on him, consent to medication and finances, advocate for himself using complex verbalization to make his needs known, stay focused, take care of own hygiene and grooming, engage in appropriate conversation, and has no auditory, visual or ambulatory deficits that might limit his functioning, The Surrogate concluded that the proposed ward could "engage in

supported decision making, a less restrictive alternative to a guardian's substituted decision-making.

III. PROCEDURAL ISSUES

A. Whether Hearing required

i. Hearing required

Matter of Kevin Z., 105 A.D.3d 1269; 966 N.Y.S.2d 226 (3rd Dept., 2013)

In a 17-A proceeding the Surrogate may not give res judicata effect to a prior Family Court custody and visitation order issued when the respondent was a minor.

Matter of Lemner, 179 A.D.2d 926; 578 N.Y.S.2d 696 (3rd Dept., 1992)

Petitioner sought modification of an order of Surrogate's Court granting joint guardianship with her ex-husband over their profoundly mentally retarded daughter. She sought to be appointed sole guardian, and for the court to appoint her ex-husband only as alternate standby guardian, on the grounds that a long history of animosity and a failure to cooperate and communicate rendered co-guardianship inappropriate and not in the best interest of the ward. Noting that there was nothing new or additional in the petition for modification which would cause it to change its prior order, Surrogate's Court denied the petition without a hearing. Petitioner appealed. The Appellate Division held that the Surrogate's Court erred in denying the application for modification without a hearing. Stating the "SCPA §1759 (2) unambiguously requires the court to conduct a hearing upon a petition for review pursuant to SCPA §1754. ... Under SCPA §1754, that hearing may be dispensed with ... only with the approval of the subject's parents unless the court finds that the parents have abandoned the subject of the petition in which event their consent is unnecessary ...".

Matter of Rosner, 144 A.D.2d 148; 534 N.Y.S.2d 476 (3rd Dept., 1988)

Where there had been an application for guardianship of a mentally retarded adult by non-parents who lacked the parents' consent for appointment, pursuant to SCPA §1750(2)(b), a hearing should have been held and "a guardian ad litem should have been appointed to protect the mentally retarded adult's interest," unless the parents had abandoned the proposed ward. In this case, a hearing should have been conducted to determine respondents' qualifications for co-guardianship and to allow petitioners to substantiate their allegations of abandonment.

a. Presence of Proposed Ward in Court

Matter of Julio C., 11/26/2008 NYLJ, Vol 240, p. 36, col. 1 (Surr Ct., Bronx Cty)(Surr. Holzman)

The court dispensed with the proposed ward's appearance where medical certifications stated that his disabilities were so severe that his appearance might cause him physical hardship and he was incapable of understanding the proceeding.

Matter of Emmanuel R., 2007 NY Misc. Lexis 8137; 238 NYLJ 97(Surr. Ct., Bronx Cty.)(Holzman, Surr.)

The court dispensed with the proposed ward's appearance where he suffered from severe physical infirmities which would make it difficult for him to travel to the court and he would not understand the proceeding.

ii. Hearing not required

Matter of R.K., 11 Misc.3d 741; 809 N.Y.S.2d 442 (Surr. Ct., Westchester Cty. 2006) (Scarpino, J.)

Over the objection of MHLS, Surrogate's Court, without holding a "full judicial hearing on the merits of the application," modified a corporate guardian's (NYSARC's) powers to include the power to withdraw or withhold life sustaining treatment on the basis of two physician/psychologist certifications. Although MHLS argued that the law required a much more informed judicial determination as to whether the guardians should have such broad powers, the court held that these certifications were sufficient to satisfy the statute at this stage but that more evidence might well be required at the time the guardian in fact exercised its power, at which time MHLS could demand a full hearing. The court indicated that more evidence might well be required at the time that the guardian in fact exercises its authority to withhold or withdraw life sustaining treatment, and at that time, MHLS could demand a full hearing.

Matter of Colette G., 221 A.D.2d 440; 633 N.Y.S.2d 807 (2nd Dept. 1995)

The court held that SCPA 1750-a does not require a specific finding of fact that the proposed ward is mentally disabled; the Court may authorize guardianship on the basis of the certifications submitted by the clinicians.

B. Motions to Dismiss based on Certifications

i. Failure to state a claim

Matter of Vanessa R., 59 A.D.3d 726; 873 N.Y.S. 2d 491 (2nd Dept., 2009), *lv dismissed*, 12 NY3d 872 (2009)

The Appellate Division held that Surrogate's Court had not abused its discretion in dismissing a petition for guardianship on the grounds that the petitioner had failed to file the requisite certifications that the proposed ward was unable to manage her money and make decisions including medical decisions.

Matter of F. Lee Woods, (unpublished) filed 5/16/06, Surr. Ct., Rockland Cty., Index # 2005/771 (Surr. Berliner)

Petition for guardianship was dismissed where petitioner failed to make out a *prima facie* case for guardianship of an 25 year old with a traumatic brain injury, because the certificates were stale, respondent established that he was still recovering, and in the interim, had effectuated a plan to meet his needs by issuing a durable Power of Attorney to his mother.

Matter of Ivans, NYLJ 3/19/97, pg. 31, col. 4 (Surr. Ct., Suff. Cty., 1997)(Surr. Prudenti)

Petition for guardianship was dismissed where the petitioner failed to make out a *prima facie* case for guardianship of an 18 year old with a traumatic brain injury. The certificates of two physicians established that she was still recovering and was not suffering from a permanent condition, and the Guardian ad Litem recommended to the court that his ward was fully competent to make her own decisions and did not require a guardian. In addition, neither the statute nor case law authorized the court to direct respondent to submit to additional examinations to assist petitioner to make out their case against her.

ii. Staleness

Matter of F. Lee Woods, (unpublished) filed 5/16/06, Surr. Ct., Rockland Cty., Index # 2005/771 (Surr. Berliner)

Petition for guardianship denied where petitioner failed to make out a *prima facie* case for guardianship of an 25 year old with a traumatic brain injury, where the certificates were stale, respondent established that he was still recovering and in the interim had effectuated a plan to meet his needs by issuing a Durable Power of Attorney to his mother.

iii. Violation of confidentiality laws

Matter of BM, 19 Misc3d 393; 2015 NY Slip Op 25377; 2015 N.Y. Misc. LEXIS 4089 (Cty. Ct., Rensselaer Cty., 2015) (Morgan, J.)

A proposed ward objected to a petition by his mother seeking SCPA 17-A guardianship over him. He moved to dismiss the application alleging that the vague and unauthorized medical certifications submitted in support of the application failed to state a claim and that, in any event, they could not be considered as they were in violation of HIPAA; the physician-patient privilege set forth in CPLR 4504, and the psychologist -patient privilege set forth in CPLR 4507. Citing In re Derek and Matter of Tara XX the court held that the rules of privacy that apply in MHL Article 81 guardianship proceedings must equally apply in SCPA 17-A guardianship proceedings and struck the certifications but declined to find that the petition must be dismissed for failure to state a cause of action holding further that the certifications were not necessary components of the pleadings and that there were otherwise sufficient allegations in the petition to create a question of facts as to whether respondent was mentally retarded or developmentally disabled and in need of a guardian.

Matter of Derek, 12 Misc.3d 1132; 821 N.Y.S.2d 387 (Surr. Ct., Broome Cty., 2006)(Surr. Peckham)

Submission of the certifications of treating physicians in a contested SCPA 17-A proceeding violates the physician-patient evidentiary privilege (CPLR §4504), HIPAA (45 CFR§160.103, CFR § 164.508, and CFR § 164.512(e)), and the confidentiality provisions of MHL § 33.13(c).

C. Jurisdiction and Venue issues

i. Personal jurisdiction

a. Over ward

Matter of Cuartero, NYLJ, 1/29/03, pg. 21, col. 5 (Surr. Ct., Westchester Cty. 2003) (Surr. Scarpino)

Court lacked jurisdiction over the proposed ward under SCPA 1702 and 1761 because he had been removed from the state by his father prior to his 18th birthday, the custody order did not survive his 18th birthday, he had not been adjudicated incapacitated prior to his 18th birthday, he was no longer domiciled in NY, had not recently visited NY, had no property in NY, and had not consented to submitting to jurisdiction in NY.

Matter of Olear, 187 Misc.2d 706; 724 N.Y.S.2d 283 (Surr. Ct., Nass. Cty. 2001) (Surr. Riordan)

The Surrogate Court had jurisdiction over 17-A proceeding under SCPA 1702 because proposed

ward was found to have been domiciled in NY even though his mother, who had joint custody with the father in NY, had removed him without consent of the father to Arizona after the divorce, and because the proposed ward did not have the capacity to change his domicile in NY to Arizona.

b. Over others

Matter of Cuartero, NYLJ, 1/29/03, pg. 21, col. 5 (Surr. Ct., Westchester Cty. 2003) (Surr. Scarpino)

Court lacked jurisdiction because out-of-state necessary parties required by SCPA §1753 (1), including the proposed ward, his father and his siblings, were not served.

Matter of Olear, 187 Misc.2d 706;724 N.Y.S.2d 283 (Surr. Ct., Nass. Cty. 2001)(Surr. Riordan)

The Surrogate's Court had jurisdiction over a SCPA Article17-A proceeding under SCPA §1702, because it had personal jurisdiction over the mentally retarded adult proposed ward. The Court was not required to have personal jurisdiction over his mother, who sought to frustrate the father obtaining guardianship.

ii. Subject-matter of Surrogate in 17-A proceeding

Matter of Zink, 122 Misc.2d 797; 471 N.Y.S.2d 802 (Surr. Ct., Bronx Cty., 1984)(Gelfand, J.)

SCPA Article 17-A guardian of the person petitioned for expansion of her powers to include property powers and the power to compromise a personal injury case which was pending in Supreme Court on behalf of her ward. The Surrogate granted expansion of the powers but cited CPLR §1207 and denied the application for the compromise, without prejudice, to bringing the compromise in the court where the personal injury action was pending. The court held that although CPLR§1207 does not specifically address mentally retarded individuals, its intent was to protect all persons who cannot manage their own affairs by requiring approval of a settlement of a personal injury action in the court where the action is pending. The court also reasoned that SCPA §1755 states that to the extent that the context permits, proceedings relative to "infants" under Chapter 17 apply with the same force and effect to mentally retarded individuals under 17-A .

Matter of D.D., 64 A.D.2d 898; 408 N.Y.S.2d 104 (2nd Dept, 1978)

Surrogates Court lacked subject matter jurisdiction to entertain a petition by the mother and natural guardian of a mentally retarded woman for authorization to have her sterilized, because no provision

of the SCPA conferred such jurisdiction upon that Court. The Surrogate's Court is a court of limited jurisdiction, and its subject-matter jurisdiction is conferred solely by NY Const. Art VI, Sec. 12 and by statute.

Matter of Olear, 187 Misc.2d 706; 724 N.Y.S.2d 283 (Surr. Ct., Nass. Cty., 2001)(Surr. Riordan)

The Surrogate Court had jurisdiction over 17-A proceeding under SCPA 1702 because proposed ward was found to have been domiciled in NY even though his mother, who had joint custody with the father in NY, had removed him without consent of the father to Arizona after the divorce, and because the proposed ward did not have the capacity to change his domicile from NY to Arizona.

iii. Venue

Matter of Beasley, 234 A.D.2d 32; 650 N.Y.S.2d 170 (1st Dept., 1996)

Although the proposed ward has been institutionalized in a facility located in Otsego County for more than 20 years, the Appellate Division held that (1) the Surrogate's Court, New York County, had properly rejected the challenge to its jurisdiction in an Article 17 - A proceeding on the ground that there was no showing that the proposed ward had ever the capacity to express an intention to change her domicile from New York County where she was born and where her parents, have continuously resided; and (2) the Surrogate's Court had properly refused to transfer venue upon the grounds that the movant had failed to demonstrate that the convenience of material witnesses or the ends of justice would be served by the transfer since the court had already expended a great deal of time and effort on the matter, the Law Guardian, who was serving *pro bono*, worked in New York County had not been impeded in her tasks by the location of the facility in which her ward was institutionalized, and the Court could accept responses to written interrogatories from witnesses who are unable to appear in New York County.

Matter of Darius Ignatius M., 202 A.D.2d 1; 615 N.Y.S.2d 367 (1st Dept. 1994); lv. to app. denied, 85 NY2d 830; cert denied, 514 US 1130

There was a clear showing that the conveniences of material witnesses would be promoted by a change in venue, where the proposed ward was a resident of a developmental center in Schenectady and a proceeding for retention under MHL Article 15 was already pending in that county.

iv. Scope of authority of Surrogate's Court under SCPA 17-A

Matter of Kevin Z., 105 A.D.3d 1269; 966 N.Y.S.2d226 (3rd Dept., 2013)

Surrogate's Court has jurisdiction to: (1) issue a visitation order in a 17-A proceeding and (2) appoint a monitor or impose reporting requirements upon a 17-A guardian.

Matter of the Guardianship of Leo R., 26 Misc.3d 423; 889 N.Y.S.2d 834 (Surr. Ct., Broome Cty., 2009) (Surr. Peckham)

A SCPA 17-A guardian sought a court order in the nature of mandamus, directing Broome Developmental Center (BDC) to perform certain acts that BDC identified as “treatment related,” including giving the guardian unfettered access to her ward anywhere in the facility, providing one-on-one monitoring for her ward, allowing her ward to stay in bed as long as he wishes, and removing a certain other client from his unit. The Surrogate concluded that the continuing jurisdiction of the Surrogate over mentally retarded and developmentally disabled persons under SCPA §1758 is similar to Family Court’s powers under F.C.A. §255 and Supreme Court’s powers under MHL Art 9 and that similarly, it lacks authority to interfere in the discretionary acts of administrative agencies, including interfering in treatment plans developed by the administrative agency charged with the care and treatment of mentally ill, mentally retarded or developmentally disabled persons. The Surrogate concluded that the proper method for review of objections to a treatment plan is the administrative review provided under 14 NYCRR § 633.12 followed, where appropriate, by an Article 78 proceeding.

v. Uniform Guardianship and Protective Jurisdiction Act

Matter of Louise D., 47 Misc.3d 716; 3 N.Y.S.3d 918 (Surr. Ct. Nassau Cty., 2015)(Surr. McCarty III)

A New York 17A guardian moved, with her ward, to Florida and wanted to transfer the supervision of the guardianship to the Florida courts. She applied for and was granted guardianship in Florida and then applied in NY to either terminate or transfer the guardianship under the Uniform Guardianship and Protective Jurisdiction Act. The NY Court found that all the statutory requirements had been met, there were no objections to the transfer, that adequate arrangements existed in Florida for the ward, and that no party was seeking a hearing. The court approved the request without *sua sponte* setting it for a hearing.

D. Physician - Patient privilege

Matter of BM, 19 Misc3d 393; 2015 NY Slip Op 25377; 2015 N.Y. Misc. LEXIS 4089 (Cty. Ct., Rensselaer Cty., 2015) (Morgan, J.)

A proposed ward objected to a petition by his mother seeking SCPA 17-A guardianship over him. He moved to dismiss the application alleging that the vague and unauthorized medical certifications submitted in support of the application failed to state a claim and that, in any event, they could not be considered as they were in violation of HIPAA; the physician-patient privilege set forth in CPLR 4504, and the psychologist -patient privilege set forth in CPLR 4507. Citing In re Derek and Matter of Tara XX the court held that the rules of privacy that apply in MHL Article 81 guardianship proceedings must equally apply in SCPA 17-A guardianship proceedings and struck the certifications

but declined to find that the petition must be dismissed for failure to state a cause of action holding further that the certifications were not necessary components of the pleadings and that there were otherwise sufficient allegations in the petition to create a question of facts as to whether respondent was mentally retarded or developmentally disabled and in need of a guardian.

Matter of Tian, 2007 N.Y. Misc. LEXIS 7594; 238 N.Y.L.J. 73 (Surr Ct., NY Cty., 2007) (Surr. Glen)

Mother petitioned for the guardianship of the person and property of her daughter, who was then a resident at a medical facility. The Surrogate authorized the facility, its staff and employees, to prepare, sign and release to petitioner for filing with the Court, such certifications of physicians and/or psychologists as are required by SCPA 1750, as well as any other documents prescribed by statute or the Chief Administrative Judge of the Courts in support of the petition for appointment of a guardian under, provided, however, that any confidential HIV-related information as defined in PHL § 2780(7) could not be disclosed.

Matter of Derek, 12 Misc.3d 1132; 821 N.Y.S.2d 387 (Surr. Ct., Broome Cty., 2006)(Surr. Peckham)

Submission of the certifications of treating physicians in a contested SCPA Article 17-A proceeding violates the physician-patient evidentiary privilege of CPLR § 4504, HIPAA(45 CFR §160.103) CFR § 164.508 and CFR §164.512(e), the confidentiality provisions of MHL §33.13(c).

E. Compelled submission to psychological/psychiatric examinations

Matter of Ivans, NYLJ, 3/19/97, p. 31, col. 4 (Surr. Ct., Suff. Cty.)(Surr. Prudenti)

Where petitioner failed to make out a *prima facie* case and moved to compel the proposed ward to submit to psychiatric examinations, neither the statute nor case law authorized the court to direct respondent to submit to such examinations to assist petitioners to prove their case against her.

F. Compensation of Guardian ad Litem

Matter of Beilby, 176 A.D.2d 402; 574 N.Y.S.2d 109 (3rd Dept., 1991)

Appellate Division reversed a decision of the Surrogate made pursuant to CPLR §1204 which directed the Commissioner of Social Services to pay the fee of the guardian ad litem in an Article 17-A proceeding. SCPA §405(1) expressly provides that a guardian ad litem's fee should be paid from the mentally retarded person's assets. Given such a specific provision, the inconsistent provision of CPLR §1204 does not apply.

G. Applicability of CPLR provisions to 17-A proceedings

Matter of Beilby, 176 A.D.2d 402; 574 N.Y.S.2d 109 (3rd Dept., 1991)

SCPA § 405(1) expressly provides that the fee of a guardian ad litem should be paid from the mentally retarded person's assets. Given such a specific provision, the inconsistent provisions of CPLR § 1204 does not apply.

Matter of Derek, 12 Misc.3d 1132; 821 N.Y.S.2d 387 (Surr. Ct. Broome Cty., 2006) (Surr. Peckham)

The physician-patient privilege in CPLR § 4504 applies in contested Article 17-A guardianship proceedings just as it does in contested Article 81 proceedings.

Matter of Beasley, 234 A.D.2d 32; 650 N.Y.S.2d 170 (1st Dept., 1996)

Although the proposed ward has been institutionalized in a facility located in Otsego County for more than 20 years, the Appellate Division held that (1) the Surrogate's Court, New York County had, properly rejected the challenge to its jurisdiction in an Article 17 - A proceeding on the ground that there was no showing that the proposed ward had ever the capacity to express an intention to change her domicile from New York County where she was born and where her parents, have continuously resided; and (2) the Surrogate Court's had properly refused to transfer venue upon the grounds that the movant had failed to demonstrate that the convenience of material witnesses or the ends of justice would be served by the transfer since the court had already expended a great deal of time and effort on the matter, the Law Guardian, who was serving *pro bono*, worked in New York County had not been impeded in her tasks by the location of the facility in which her ward was institutionalized, and the Court could accept responses to written interrogatories from witnesses who are unable to appear in New York County.

Matter of Darius Ignatius M., 202 A.D.2d 1; 615 N.Y.S.2d 367 (1st Dept. 1994); lv to app. denied, 85 N.Y.2d 830; cert denied, 514 US 1130

There was a clear showing that the conveniences of material witnesses would be promoted by a change in venue, where the son was a resident of a developmental center in Schenectady and a proceeding for retention under MHL Article 15 was already pending in that county.

Matter of Zink, 122 Misc.2d 797; 471 N.Y.S.2d 802 (Surr. Ct., Bronx Cty. 1984)(Gelfand, J.)

SCPA Article 17-A guardian of the person petitioned for expansion of her powers to include property powers and the power to compromise a personal injury case which was pending in Supreme Court on behalf of her ward. The Surrogate Court granted expansion of the powers, but, citing CPLR § 1207, denied the application for the compromise without prejudice to bringing the compromise in the court where the personal injury action was pending. The court held that although CPLR § 1207

does not specifically address mentally retarded individuals, its intent was to protect all persons who cannot manage their own affairs by requiring court approval of a settlement of a personal injury action in the court where the action is pending before concluding a compromise of such a disabled person's rights. The court also reasoned that SCPA §1755 states that to the extent that the context permits, proceedings relative to "infants" under SCPA Article 17 apply with the same force and effect to mentally retarded individuals under SCPA Article 17-A.

H. Applicability of Art 81 standards to 17-A

In a series of decisions, all related to the same individual, various Surrogate's grapple with the issue whether a 17-A guardian may engage in gift giving in furtherance of Medicaid/tax planning with different conclusions. See, **Matter of Schulze**, NYJL, 9/3/96 pg. 1, col. 1 (Surr. Ct. NY Cty. 1996)(Surr. Preminger)(Court allows 17-A guardians to make gifts for estate tax planning purposes under same test that applies to Art 81 guardians. In this case, it allowed the gift giving since it would not leave the ward with an estate so depleted that she could not cover the cost of her own care and further her immediate family, which was wealthy in its own right pledged to provide for her care should there be a change in circumstances; **Matter of Schulze**, 23 Misc. 3d 215, 869 NYS 2d 896 (Surr. Ct., NY Cty. 2008)(Surr. Roth) (There is no express provision in SCPA Art. 17-A empowering a 17-A guardian to make gifts as contrasted with such an express grant of power to MHL Art. 81 guardians under MHL 81.21. The court holds that despite the absence of such express language, Art. 17-A guardians do have such power and do not need to petition a court to be converted to Art. 81 guardians to make such gifts. The court noted that intra-family tax savings and maximization of gifts to charities are among the objectives that have been recognized as supporting guardians' exercise of such authority to make such gifts.); **Matter of Joyce G. S.**, 30 Misc. 3d 765; 913 NYS 2d 910 (Surr. Ct., Bronx Cty., 2010) (Surr. Holzman); (Surrogate Holzman expressly rejected Surrogate Glen's holding in **Matter of John J.H.** In doing so, Surrogate Holzman held that "under the law as it presently exists, it has the power to invoke the equitable doctrine of substituted judgment to approve gifts or tax saving transactions on behalf of article 17-A wards. The court explained that in enacting the SCPA, the Legislature afforded the Surrogate's Court full equity jurisdiction as to any action, proceeding or other matter over which jurisdiction is or may be conferred" (see SCPA 201[2]), and provided that the proceedings enumerated in the SCPA are not exclusive (see SCPA 202). The Legislature further provided that after the appointment of a 17-A guardian, the Surrogate's court "may entertain and adjudicate such steps and proceedings...as may be deemed necessary or proper for the welfare of such mentally retarded or developmentally disabled person" (see SCPA 1758). Accordingly, Surrogate Holzman concluded that there appears to be no reason why the Surrogate's Court cannot utilize the common law or the criteria set forth in MHL § 81.21 (d) to approve a gift on behalf of an article 17-A ward.

Matter of BM, 19 Misc3d 393; 2015 NY Slip Op 25377; 2015 N.Y. Misc. LEXIS 4089 (Cty. Ct., Rensselaer Cty., 2015) (Morgan, J.)

A proposed ward objected to a petition by his mother seeking SCPA 17-A guardianship over him. He moved to dismiss the application alleging that the vague and unauthorized medical certifications

submitted in support of the application failed to state a claim and that, in any event, they could not be considered as they were in violation of HIPAA; the physician-patient privilege set forth in CPLR 4504, and the psychologist -patient privilege set forth in CPLR 4507. Citing In re Derek and Matter of Tara XX the court held that the rules of privacy that apply in MHL Article 81 guardianship proceedings must equally apply in SCPA 17-A guardianship proceedings and struck the certifications but declined to find that the petition must be dismissed for failure to state a cause of action holding further that the certifications were not necessary components of the pleadings and that there were otherwise sufficient allegations in the petition to create a question of facts as to whether respondent was mentally retarded or developmentally disabled and in need of a guardian.

Matter of Yvette A., 27 Misc.3d 945; 898 N.Y.S.2d 420 (Surr. Ct. NY Cty., 2010)(Surr. Webber)

A father who had not had any contact with his severely mentally retarded Willowbrook class daughter for over 16 years sought to be appointed as her 17-A guardian. MHLS, NYLPI, NYCLU and the guardian ad litem opposed his appointment and NYLPI and NYCLU requested that the matter be referred to Supreme Court for an Article 81 proceeding. The father was unclear about her condition and prognosis and had no plan in mind for her continued care. The objectants raised concerns about his motives and commitment to his daughter in light of his past history and were concerned about his suggestion that he would want to remove her from the only group home she had been in for the past 33 years and possibly sue them in relation to their past care of his daughter.. The Surrogate declined to transfer the case to Supreme Court reasoning that Art 81 and SCPA are not alternatives for one another and stating: “ although Article 17- A does not specifically provide for the tailoring of a guardian’s powers or for the reporting requirements similar to Article 81, the court’s authority to impose terms and restrictions that best meet the need of the ward is implicit in the provisions of §1758 of the SCPA,” (emphasis added). The Court therefore concluded that it did have the authority, both at the inception of a 17-A decree and upon modification of an original decree, to tailor the order to meet the needs of the ward. The court thus decreed that the father could be appointed but included very detailed reporting requirement similar to those in Article 81 and further decreed that the CAB should continue its oversight of the ward.

Matter of F. Lee Woods, (unpublished) filed 5/16/06, Surr. Ct., Rockland Cty., Index # 2005/771 (Surr. Berliner)

Petition for guardianship denied where, *inter alia*, the court adopts argument applicable under MHL Article 81 that respondent had effectuated a plan for his own care, thereby obviating the need for guardianship when he issued a durable power of attorney to his mother.

Matter of Derek, 12 Misc.3d 1132; 821 N.Y.S.2d 387 (Surr. Ct. Broome Cty., 2006) (Surr. Peckham)

The physician patient privilege applies in contested SCPA Article 17-A guardianship proceedings just as it does in contested MHL Article 81 proceedings.

In the Matter of the Guardianship of B., 190 Misc.2d 581; 738 N.Y.S.2d 528 (County Ct., Tompkins Cty. 2002) (Peckham, J.)

In the dicta of a MHL Article 81 case brought by a guardian for permission to authorize sterilization of her mentally retarded daughter/ward, the court, stated: "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 article 17-A or article 81. There is no rational basis for saying the ability of a guardian for a mentally retarded person to consent to medical treatment of the ward should differ if the guardian is appointed under article 81 rather than article 17-A."

I. Applicability of Art 17 provision to 17-A

Matter of Boni P.G., 2006 N.Y. Misc. LEXIS 4699; 236 N.Y.L.J. 96 (Surr. Ct., Bronx Cty. 2006)(Surr. Holzman)

The Surrogate stated that the best interests of the respondent is always the paramount consideration in a guardianship proceeding, whether the application is to appoint a guardian for an infant, a mentally retarded person, or a developmentally disabled person (compare SCPA §1707 (1)[1] with SCPA §1754 (5)[5]). The Surrogate held that since SCPA Article 17-A incorporates all of the SCPA Article 17 provisions that are relevant, and, also, as a matter of common sense, the presumption favoring the parent in infant guardianship proceedings is also applicable to SCPA Article 17-A guardianship proceedings where the respondent is an adult.

J. Jury Trials

Matter of Margaret YY., 101 AD3d 1453; 956 N.Y.S.2d 341 (3rd Dept., 2012)

Relying upon SCPA 1754 (1) which states: "[u]pon a petition for the appointment of a guardian of a mentally retarded or developmentally disabled person [18] years of age or older, the court shall conduct a hearing at which such person shall have the right to jury trial," the Appellate Division held that the right to a jury trial belongs solely to the proposed ward and not to any other party and thus competing successor co-guardians lacked standing to demand a jury trial to determine which of them would be the most appropriate successor/stand-by guardians when the originally appointed guardians were no longer available to serve.

IV. PROCEEDINGS SUBSEQUENT TO APPOINTMENT

A. Modification/Termination

Matter of Sekou Manie, 4/14/ 2010 NYLJ 34 (col. 5) (Surr. Ct. NY Cty.)(Surr. Webber)

Decree granting co-guardianship to the ward's parents was modified upon petition by the ward's mother's (co-guardian) for sole guardianship so that she could authorize necessary medical procedures. The mother was issued temporary letters pending the return of the motion because she could not readily effect service on her co-guardian, the ward's father. The Surrogate ultimately granted the mother sole guardianship because the father had failed to file his oath and designation from the start, he had not maintained regular contact with the ward, and he defaulted on the return date of the motion.

Matter of Jonathan B., NYLJ, March 16, 2009, p. 30, col 1(Surr. Ct. Bronx Cty. (Surr. Holtzman)

Where *pro se* petitioner applied for and was granted guardianship of the person only, and later realized that she also needed guardianship of the property so that she could deposit the proceeds of a settlement into a guardianship account, upon her application to amend the decree, the court, expressing that it was in the ward's best interest, amended the decree to include issuance of letters of guardianship of the property.

Matter of Guglielmo, 2006 N.Y. Misc. LEXIS 4804; 236 N.Y.L.J. 92 (Surr. Ct., Suff. Cty. 2006)(Surr. Czycier)

Individual who, 15 years earlier, had been found to be developmentally disabled as a consequence of a head trauma, petitioned to have the guardianship terminated alleging that his condition had improved sufficiently and that he had regained his independence and no longer required a guardian. Based upon the certifications of one neurologist and one neuropsychologist attesting to the improvement, and the testimony of the petitioner and his wife that he lived independently and has had no contact with the guardian for over 3 years, the Surrogate found that he was no longer in need of a guardian and dissolved the guardianship and revoked the letters of guardianship.

Matter of R.K., 11 Misc.3d 741; 809 N.Y.S.2d 442 (Surr. Ct., Westchester Cty. 2006) (Scarpino, J.)

Over the objection of MHLS, Surrogate's Court, without holding a "full judicial hearing on the merits of the application," modified a corporate guardian's (NYSARC's) powers to include the power to withdraw or withhold life-sustaining treatment on the basis of two physician/psychologist certifications. Although MHLS argued that the law required a much more informed judicial determination as to whether the guardians should have such broad powers, the court held that these certifications were sufficient to satisfy the statute at this stage but that more evidence might well be required at the time the guardian in fact exercised its power, at which time MHLS could demand a

full hearing.

Matter of Garrett YY, 258 A.D.2d 702; 684 N.Y.S.2d 700 (3rd Dept., 1999)

After the acrimonious divorce of the ward's parents, the Court, after a hearing, modified an order, which originally granted parents co- guardianship of their mentally retarded 22 year old, to an order granting sole guardianship to the father, upon a finding that the parents could no longer cooperate with one another, and that the father would be a better guardian. The court cited to the mother's alcoholism, her verbally abusive behavior, her tendency to treat her son as if he were a toddler rather than an adult, and her tendency to show inappropriate affection toward her son as opposed to the father's age appropriate relationship with his son and his efforts toward promoting his son's independence.

Matter of Lemner, 179 A.D.2d 926; 578 N.Y.S.2d 696 (3rd Dept., 1992)

Petitioner sought modification of an order of Surrogate's Court granting joint guardianship with her ex-husband over their profoundly mentally retarded daughter. She sought to be appointed sole guardian, and for the court to appoint her ex-husband only as alternate standby guardian, on the grounds that a long history of animosity and a failure to cooperate and communicate rendered co-guardianship inappropriate and not in the best interest of the ward. Noting that there was nothing new or additional in the petition for modification which would cause it to change its prior order, Surrogate's Court denied the petition without a hearing. Petitioner appealed and the Supreme Court, Appellate Division reversed, holding that the "Surrogate's Court erred in denying the application for modification without a hearing. SCPA §1759 (2) unambiguously requires the court to conduct a hearing upon a petition for review pursuant to SCPA §1754. ... Under SCPA §1754, that hearing may be dispensed with ... only with the approval of the subject's parents unless the court finds that the parents have abandoned the subject of the petition in which event their consent is unnecessary ... ”.

B. Revocation of Letters/Breach of Fiduciary Duty

Matter of Fausto Miguel O. III, 8/10/09 NYLJ, 26 (col. 4) Surr. Ct., NY Cty (Webber, J.)

Although acknowledging that there is a presumption in favor of appointing a parent as the guardian under 17A, the court holds that this presumption can be rebutted "by a showing that the parent does not possess the requisite qualifications required of a fiduciary by reason of want of understanding, or that the parent is not capable of providing a safe, nurturing and stable environment, even where that parent shows genuine love for the child". In this case, the court removed the mother as guardian for her 31 year old mentally retarded son where there was evidence of volatile, erratic and sexually inappropriate behavior by the mother toward her son and where the mother refused to allow the GAL to evaluate the home and also refused in open court to divulge where she would be taking her son to live upon removing him from a group home in which he was thriving. The court found that her inability to recognize the court's role in overseeing the guardianship and thus its need to know the wards whereabouts gave rise to grave concerns for the well being of the ward.

Matter of Rosado (Salazar), 2007 NY Misc. Lexis 8423; 238 NYLJ 106 (Surr Ct., NY Cty.) (Surr. Glen)

Letters of 17-A guardianship were revoked where the guardian (the ward's mother) had applied for 17-A guardianship while an Article 81 was pending in Supreme Court without notifying the Surrogate Court of the relief being requested in Supreme Court. Neither Court granted property powers to the mother and subsequently, the mother refused to acknowledge the authority of the guardian of the property and "boycotted" her by, among other things, refusing to accept funds from the court appointed guardian of the property to buy her daughter a much needed wheelchair and other objects for her comfort and well being. Acknowledging that the mother loved her daughter and has cared for her for 27 years, the Surrogate, nevertheless revoked her letters of limited guardianship of the person finding that the best interests of the ward were not being served while the mother held such authority.

Matter of Diaz, NYLJ, 4/14/04, pg. 24, col. 2 (Surr. Ct., NY Cty. 2004)(Surr. Preminger)

Letters of guardianship were revoked where the guardian had failed for 2 years to file annual accounts, her whereabouts were unknown, and she had failed to manage the ward's property. The court, unable to locate the standby guardian and having no information about the whereabouts of the ward or any other family member to serve in the guardian's place, issued temporary letters to the Public Administrator of New York County.

Matter of Dawne Brown, NYLJ, 5/6/98, pg. 35, col. 1 (Surr. Ct., Westchester Cty. 1998) (Surr. Emanuelli)

OMRDD petitioned for revocation of letters where the current guardians had a pattern of refusing to submit the ward for periodic evaluations or enrolling her in workshop programs in direct violation of conditions set forth in an earlier order of the Court and against her best interests. Commissioner of Social Services was appointed to serve as guardian of the person and representative payee of her Social Security funds pursuant to Soc. Service Law Sec. 473(1) and 18 NYCRR Part 457 because no one else was available to serve.

C. Appeals

i. Mootness

Matter of M.B., 6 N.Y.3d 437; 846 N.E.2d 794 (2006)

The appeal of a Surrogate's decision granting a guardian the authority to make end of life decision was held an exception to the mootness doctrine because the issue presented was substantial, likely to recur, and involved a situation capable of evading review.

Matter of Elizabeth M., 30 A.D.3d 780; 817 N.Y.S.2d 181 (3rd Dept., 2006)

The appeal of a Surrogate's decision granting a guardian the authority to make end of life decision was held an exception to the mootness doctrine because the issue presented was substantial, likely to recur, and involved a situation capable of evading review.

Matter of Claudia EE, 35 A.D.3d 112; 822 N.Y.S.2d 810 (3rd Dept., 2006)

On appeal from an order of the Surrogate's Court granting an application pursuant to SCPA 1750-b for an order directing withdrawal of life sustaining treatment, the Appellate Division found that, despite the wards death, the appeal would be heard as an exception to the mootness doctrine because the issues raised were substantial, likely to recur and were of the type that might typically evade review.

V. GUARDIANS

A. Appointment of

1. Temporary

Matter of Alberto Olivero, 11/24/09 NYLJ 33 (col. 3)(Surr. Ct. NY Cty.)(Surr. Webber)

Surrogate appointed temporary guardian of the property for the sole purpose of establishing an SNT for the benefit of the ward. No explanation or discussion is offered.

Matter of Samuel Erman, May 14, 2007, N.Y.L.J. 21 (Col. 1)(Surr. Ct., King Cty.) (Surr. Seddio)

NYSARC petitioned for appointment of a Temporary Guardian to marshal assets and establish a Supplemental Needs Trust. The Surrogate stated "... there is no provision at law providing for a temporary guardian of the property." N.B.: This case was decided in the context of other issues, one of which was that there was no need to establish an SNT since the funds that would have been placed into the trust were Holocaust War Reparation Compensation which were exempt assets that would not have rendered the ward ineligible for public benefits. (The later issues is dealt with in the Art 81 book).

Matter of N.T.J., NYLJ, 6/27/06, pg. 33, col. 1 (Surr. Ct., Bronx Cty. 2006)(Surr. Holzman)

Respondent was incarcerated in Pennsylvania and was due to be released, if there was a guardian appointed for him in the jurisdiction. After an evidentiary hearing, the Court granted temporary letters for four months, so that it would have an opportunity to be informed as to how the temporary guardianship was proceeding.

Matter of Diaz, NYLJ, 4/14/04, p. 24, col. 2 (Surr. Ct., NY Cty. 2004)(Surr. Preminger)

Letters of guardianship were revoked where the guardian had failed for 2 years to file annual accounts, her whereabouts were unknown, and she had failed to manage the ward's property. The court, unable to locate the standby guardian and having no information about the whereabouts of the ward or any other family member to serve in the guardian's place, issued temporary letters to the Public Administrator of New York County.

Matter of Baby Boy W., 3 Misc.3d 656; 773 N.Y.S.2d 255 (Surr. Ct., Broome Cty. 2004) (Surr. Peckham)

After a hearing, the court issued a decision and order from the bench, appointing the grandmother of an infant in a persistent vegetative state as temporary guardian with powers to withhold or withdraw life- sustaining treatments.

Matter of Vazquez, NYLJ, 3/31/00, p. 30, col. 5 (Surr. Ct., Bronx Cty. 2000)(Surr. Holzman)

The father and stepmother sought guardianship of the father's mentally retarded son. The biological mother opposed the application unless she, and not the stepmother, was appointed co-guardian. After the guardian ad litem ... had filed his report and after a conference with the court, the parties entered into a stipulation on the record in open court and a decree was issued by the court which was subject to the terms of the stipulation. The court issued temporary solely to the father and visitation to the mother. The stipulation also provided, that unless the biological mother advised the court in writing, within six months of the entry of the decree, that the father was frustrating her efforts at visitation, permanent letters would automatically issue to the father.

Matter of Colette G., 221 A.D.2d 440; 633 N.Y.S.2d 807 (2nd Dept. 1995)

The Court appointed an independent temporary guardian, because the animosity between the divorced parents rendered co-guardianship against their daughter's best interests.

2. Standby

Matter of Peiderman, 124 Misc.2d 541; 476 N.Y.S.2d 754 (Surr. Ct., Nass. Cty. 1984)(Surr. Radigan)

SCPA 1753 (1) appears by its terms to authorize the designation of standby guardians only upon consent of parents or guardians. Where the proposed ward was without parents and until the granting of the application before the court also without a guardian, a literal reading of the statute would require the court to withhold the designation of a standby guardian until the appointment of a guardian who may then in his or her fiduciary capacity consent, consistent with the literal provisions of SCPA 1753. Since no mechanism is provided in the statute for such situations, and following a literal interpretation would result in multiple applications and subject all concerned to

the additional costs and inconvenience attendant thereto, and since the nominated guardian was a party to the proceeding and had by the petition sought the designation of the standby and alternate standby guardian, the court was satisfied that the consent of the proposed guardian was sufficient without need of further proceedings or formal qualification.

3. Who can be appointed

i. Suitability of guardian

Matter of Maselli, NYLJ, March 29, 2000, at 28, col, (4)(Surr. Ct., Nass. Cty) (Radigan, Surr.)

Petition for guardianship denied where co-petitioners, the proposed ward's sister and nephew were found to have been unsuitable to serve, because, inter alia, they had been threatening and obstructive with staff caring for the proposed ward and had been unable to account for how the proposed ward's Social Security checks had been spent after the checks had been routed to them. The court further found that guardianship was unnecessary since the infra structure of the state system would be able to meet the proposed ward's needs.

Matter of Timothy R.R., 42 Misc. 3d 775; 977 N.Y.S.2d 877 (Surr. Ct. Essex Cty., 2013)

Where a developmentally disabled man's maternal aunt applied for standby guardianship over her deceased sister's son, as she alleged her sister had requested of her, and the young man's father, who was divorced from his mother, cross-petitioned to be appointed, and both the father and the aunt had the mental stability, character, and ability to function adequately as guardian, and the proposed ward had a loving relationship with his father, the court held that the status of the aunt is that of a "stranger" rather than a member of the "family circle" since the ward's father is alive and seeks to be appointed guardian.

Matter of Steven S.S., Jr., 3/18/2011 NYLJ 28. (col. 1), Surr. Ct., Bronx Cty. (Surr. Holzman)

Where respondent's mother's suitability to serve as guardian of the person was challenged by OPWDD on the grounds that she would seek to regain physical custody of him which would not be in either his best interests or the interest of others, the Surrogate did appoint the mother as guardian of the person but expressly limited the authority in her letters by prohibiting her from removing her son "without obtaining the consent of Sunmount, DDSO, or OPWDD or an order from a court of competent jurisdiction."

Matter of Boni P.G., 2006 N.Y. Misc. LEXIS 4699; 236 N.Y.L.J. 96 (Surr. Ct., Bronx Cty. 2006)(Surr. Holzman)

Court found mother unsuitable to serve as guardian because, although she loved her son and wanted to do what she believed was in his best interest, her distrust of the group home personnel, the

respondent's doctors and his teachers prevented her from making an informed decision with respect to his medical, educational and day-to-day needs and she often rejected their sound advice as to his needs on the theory that "mother knows best." There was a sister who the court found suitable to serve.

Matter of Nolan, NYLJ, 10/2/03, p.29, col. 3 (Surr. Ct., Suffolk Cty. 2003)(Surr. Czygier)

A refusal to accept the advice of the professionals who worked with the proposed ward, a strained relationship between the proposed guardians and the staff that worked with the proposed ward, and the proposed guardian's failure to make long term plans for the ward were all factors in the court finding the proposed guardian unsuitable.

Matter of Maselli, NYLJ, 3/29/00, p. 32, col. 4 (Surr. Ct., Nassau Cty. 2000)(Surr. Radigan)

The petitioner has the burden of proving to the court's satisfaction not only that the appointment is necessary to protect the interests of the disabled person, but that the petitioner is a suitable person of appropriate character, standing and ability, whose interests are not adverse to those of the disabled person. The court found that both the sister and nephew of a mentally retarded individual were unsuitable to serve as guardians where, among other things, they had been uncooperative with and had threatened his caregivers, had taken him home on a visit and failed to return him, and had transferred his social security checks to their own names without explanation.

Matter of Garrett YY, 258 A.D.2d 702;684 N.Y.S.2d 700 (3rd Dept. 1999)

After the acrimonious divorce of the ward's parents, the Court, after a hearing, modified an order granting co-guardianship of their mentally retarded 22 year old son upon a finding that the parents could no longer cooperate with one another. It awarded sole guardianship to the father, finding that he would be the better guardian. The court cited to the mother's alcoholism, her verbal abuse, her tendency to treat her son as if he were a toddler rather than an adult, and her tendency to show inappropriate affection toward her son, as opposed to the father's age appropriate relationship with his son and his efforts toward promoting his son's independence.

Matter of Dawne Brown, NYLJ, 5/6/98, p. 35, col. 1 (Surr. Ct., Westchester Cty. 1998) (Surr. Emanuelli)

OMRDD petitioned for revocation of letters where current guardians had a pattern of refusing to submit the ward for periodic evaluations or enrolling her in workshop programs in direct violation of conditions set forth in an earlier order of the Court and against her best interests. Commissioner of Social Services was appointed to serve as guardian of the person and representative payee of her Social Security funds pursuant to Soc. Service Law Sec. 473(1) and 18 NYCRR Part 457 because no one else was available to serve.

Matter of Darius Ignatius M, 202 A.D.2d 1, 615 N.Y.S.2d 367 (1st Dept. 1994), lv to app. denied 85 N.Y.2d 830; cert denied, 514 US 1130

The court found a father unsuitable to serve as his son's guardian where the evidence showed poor judgment by the father, including his role in delaying necessary dental surgery and his refusal to cooperate with agencies that provided services for his son.

ii. Public / non-profit agencies

Matter of R.K., 11 Misc.3d 741; 809 N.Y.S.2d 442 (Surr. Ct., Westchester Cty. 2006) (Scarpino, J.)

NYSARC, a corporate guardian, was granted the power to make end of life decisions for its ward.

Matter of Diaz, NYLJ 4/14/04, p. 24, col. 2 (Surr. Ct., NY Cty. 2004)(Surr. Preminger)

Letters of guardianship were revoked where the guardian had failed to file annual accounts, her whereabouts were unknown, and she had failed to manage the ward's property. The court, unable to locate the Standby Guardian, and having no information about the whereabouts of the ward or any other family member to serve in the guardian's place, issued temporary letters to the Public Administrator of New York County.

Matter of Dawne Brown, NYLJ, 5/6/98, p. 35, col. 1 (Surr. Ct., Westchester Cty. 1998) (Surr. Emanuelli)

Commissioner of Social Services was appointed to serve as guardian of the person, pursuant to SCPA §1760 and assigned to serve as representative payee of the ward's Social Security funds, pursuant to 18 NYCRR Part 457, where no one else was available to serve.

B. Compensation

Matter of Jonathan EE., 86 AD3d 696, 927 N.Y.S. 2d 171 (3rd Dept. 2011)

Compensation to guardians appointed pursuant to Article 17-A was denied. The Appellate Division looked to the statutory language providing for compensation to both guardians ad litem and Article 81 guardians and concluded, "...we must assume that the Legislature's failure to provide for the compensation of guardians appointed under SCPA Article 17-A was not a mere oversight but, rather, represented a reasoned and intentional decision." Note that the guardian seeking compensation was not a parent, but a third party.

C. Powers of

1. Guardian of the person

a. Medical decision making

i. Withdrawing /withholding life sustaining treatment

A. Granting of the power

i. Substantive standard for granting

Matter of Khalil D., 2007 N.Y. Misc. LEXIS 8835; 238 N.Y.L.J. 117 (Surr. Ct., Bronx Cty.)(Surr. Holtzman)

Power to withhold or withdraw life sustaining treatment was not granted where the proposed ward appeared to have “some understanding of the nature of this proceeding and the effect of granting to someone else the power to withhold or withdraw life sustaining treatment” and the proposed guardians agreed not to seek the power.

Matter of Miriam T., 2008 N.Y. Misc LEXIS 947; 239 N.Y.L.J. 28 (Surr Ct., Bronx Cty)(Surr Holzman)

Despite the reservations of MHLS, 1st Dept., with respect to authorizing the guardian to make decisions concerning life sustaining treatment, the Surrogate held that an examination of respondent at the hearing satisfied the court that the respondent lacks any meaningful understanding of such issues. Moreover, the Surrogate held that to the limited extent that proposed ward grasped the nature of the entire application, she expressed complete confidence in the petitioner’s ability to make decisions of every nature on her behalf.

Matter of R.K., 11 Misc.3d 741; 809 N.Y.S.2d 442 (Surr. Ct., Westchester Cty. 2006) (Scarpino,J.)

Application by guardian for end-of-life decision making powers was granted where certifications allege that the ward is not capable of understanding and appreciating the nature and consequence of health care decisions, including the benefits and risks of and alternatives to any proposed health care and of reaching an informed decision in order to promote his own well being.

Matter of Chantel R., 34 A.D.3d 99; 821 N.Y.S.2d 194 (1st Dept. 2006)

The Appellate Division upheld as Constitutional the Surrogate’s determination that the proposed ward’s lacked capacity to make end-of-life decisions because her answers to questions concerning end-of-life decisions failed to reflect a true appreciation of the consequences of such decisions or

even an awareness of the context in which such a determination might be required Respondent had asserted that she had been denied equal protection because a person of average functional ability is not required to show that a decision to pursue life-sustaining measures "is based on any abstract understanding of life, death or modern medicine." Court declined, as premature, to address whether the "extraordinary burden" standard in the statute is unconstitutionally vague.

ii. Individuals over whom the power can be granted

Matter of Gianelli v. DH, 15 Misc.3d 565; 834 N.Y.S.2d 623 (Sup. Ct., Nassau Cty., 2007)(Murphy, J.)

Although not a petition under SCPA 1750-b, the court looked to SCPA 1750- b and found that there was no "extraordinary burden" justifying termination of life support for a 14 year old boy who was not able to make his own medical decisions and had an eventually fatal but not yet terminal illness. The boy was still alert and responsive, seemingly pain free and still able to derive some pleasures from life. His parents (natural guardians) wanted the feeding tube and ventilator removed and palliative care given during the dying process.

Matter of Christopher M., 2006 N.Y. Misc. LEXIS 5319; 236 N.Y.L.J. 66 (Surr. Ct, NY Cty.)(Surr. Holzman)

A mildly mentally retarded man testified at a SCPA Article 17-A hearing and he appeared to have some understanding of the nature of the proceeding. He indicated that while he was amenable to the appointment of petitioner as his guardian to make medical and property decisions, he would not want life sustaining medical treatment withdrawn or withheld. Petitioner indicated that she would not take such action with respect to the respondent. In light of this testimony, the Court granted the guardianship, without granting the Guardian the authority to make end of life decisions.

Matter of AB, 196 Misc.2d 940; 768 N.Y.S.2d 256 (Sup Ct ., NY Cty. 2003) (Ling-Cohan, J.)

Court applied policy and logic of 1750-b by analogy to allow mother/natural guardian of infant in vegetative state to terminate life support because the child, like a mentally retarded individual, never had the capacity to express her prior intent, the child's circumstances met the test of SCPA 1750-B and allowing her to terminate life support was consistent with Pub. Health Law Sec. 2504(2) which allows a parent to compel a child to undergo medical treatment even over the child's objection.

Matter of Darnell H, 6 Misc.3d 1036(A); 800 N.Y.S.2d 344 (Surr. Ct., Bronx Cty. 2005) (Holzman, J)

Court denied petition by 1750-a guardian of developmentally disabled but not mentally retarded individual for the power under 1750-b to withdraw life sustaining treatment. Overruled by statutory

amendment providing that some developmentally disabled individuals may be subject to end of life decision making powers. See, L.2005, Ch. 744.

iii. Procedural issues

a. Modification

Matter of R.K., 11 Misc.3d 741; 809 N.Y.S.2d 442 (Surr. Ct., Westchester Cty., 2006) (Scarpino, J.)

Over the objection of MHLS and without holding a hearing, the Surrogate's Court, on the basis of two certifications, modified a corporate guardian's (NYSARC) powers to include the power to withdraw or withhold life sustaining treatment. Although MHLS argued that the law required a much more informed judicial determination as to whether the guardians should have such broad powers, the court held that the certifications were sufficient to satisfy the statute at this stage, but that more evidence might well be required at the time that the guardian in fact exercises its power, at which time MHLS could demand a full hearing.

Matter of Garrett YY, 258 A.D.2d 702; 684 N.Y.S.2d 700 (3rd Dept. 1999)

After the acrimonious divorce of the ward's parents, the Court, after a hearing and upon finding that the co-guardians could no longer cooperate with one another, and that the father would make a better guardian, modified an order awarding sole guardianship to the father.

b. Retroactivity

Matter of M.B., 6 N.Y.3d 437; 846 N.E.2d 794 (2006)

Interpreting the language and legislative intent of The New York Health Care Decisions Act for Mentally Retarded Persons (HCDA), the Court of Appeals held that the HCDA is retroactive to guardians appointed prior to its effective date. The Legislature intended to authorize such guardians to make health care decisions for their mentally retarded wards in accordance with the HCDA's strict decision-making structure without having to obtain, through a separate judicial proceeding, an amended guardianship order that specifically recognizes the guardian's authority as encompassing the power to end life-sustaining treatment.

Matter of Baby Boy W., 3 Misc.3d 656; 773 N.Y.S.2d 255 (Surr Ct., Broome Cty. 2004) (Surr. Peckham)

The Court expressly declined to address the retroactivity issue, since the facts of this case did not implicate it.

B. Exercise of the power

i. Extraordinary burden

In the Matter of Joseph P., 106 AD3d1548; 966 N.Y.S. 2d 622 (4th Dept. 2013)

When a profoundly mentally retarded adult, who resided in an OPWDD licenced facility, was admitted to respondent hospital for treatment of a fever and dehydration, evaluation revealed that he could no longer tolerate food or liquid by mouth, that intravenous feeding was inadequate to meet his nutritional needs, and that, unless he received nutrition and hydration through a feeding tube, he would die within a short period of time. Upon receiving notice of the parents' decision to withhold the feeding tube and the hospital's intention to implement that decision, OPWDD objected and commenced the instant proceeding. The appellate court reversed the trial court's decision to allow the withholding of such life saving measures holding that the hospital had failed to meet the requirements of § 1750-b(1), (4)(b)(iii)(B) by showing that the insertion of a feeding tube would impose an extraordinary burden on the patient. The Court found insufficient to establish extraordinary burden the combined situation including assertions they: (a) this individual would encounter difficulty when he is moved to a new facility; (b) will need restraints to prevent him from removing the feeding tube; (c) will continue to be at risk of aspiration; (d) may suffer potential complications arising from the feeding tube; (e) may experience painful and unpleasant measures such as deep suctioning and restraints, (f) could be at risk for peritonitis and (g) would continue to suffer from progression of his spinal curvature, which will ultimately obstruct his breathing and cause his death. OPWDD's witnesses, a registered nurse and physician who had been providing care to the individual for the past 15 years testified that he is alert, awake, and communicative, and that he enjoys social interaction and activities. The physician concluded that there was no medical justification for the guardians' decision to withhold life-sustaining care, that his patient was an excellent candidate for insertion of a feeding tube, and that, if the procedure is performed, he has "an excellent prognosis with many years of life." Moreover, based in part upon their experience with this patient, they also testified that the potentially deleterious consequences of the use of a feeding tube could be mitigated or eliminated.

Matter of Gianelli v. DH, 15 Misc.3d 565; 834 N.Y.S.2d 623 (Sup. Ct., Nassau Cty. 2007)(Murphy, J.)

Although not a petition under SCPA 1750-b, the court looked to SCPA 1750-b and found that there was "no extraordinary burden" justifying termination of life support for a 14 year old boy who was not able to make his own medical decisions and had an eventually fatal but not yet terminal illness. The boy was still alert and responsive, seemingly pain free and still able to derive some pleasures from life. His parents (natural guardians) wanted the feeding tube and ventilator removed and palliative care given during the dying process.

Matter of Chantel R., 34 A.D.3d 99; 821 N.Y.S.2d 194 (1st Dept. 2006)

The Appellate Division declined, on the grounds of ripeness, to address whether the “extraordinary burden” standard is unconstitutionally vague in that it “...unavoidably calls for a subjective determination of a mentally retarded ward's quality of life,” is sufficiently broad and ill-defined as to invest unfettered discretion in a person making a decision to terminate or withhold life-sustaining measures; is “too subjective to yield results that have any predictability or reviewability to protect against error and abuse,” and defies review by requiring an appellate court to assess “the physician's subjective determination of what constitutes an extraordinary burden.”

Matter of Elizabeth M., 30 A.D.3d 780; 817 N.Y.S.2d 181 (3rd Dept. 2006)

The Court found “extraordinary burden,” justifying the withholding of dialysis where the ward, who had irreversible kidney failure, would not medically be a candidate for a kidney transplant. The burden identified was that she would likely react to the stress of dialysis with exacerbation of her pattern of self mutilation, would likely get an infection that would likely spread to her brain as a result of the proximity of the dialysis catheter to the already existing shunt, and she would be subject to excessive clotting due to her small stature.

Matter of Baby Boy W., 3 Misc.3d 656; 773 N.Y.S.2d 255 (Surr. Ct. Broome Cty. 2004) (Surr. Peckham)

The Court found “extraordinary burden” where two neonatologists testified that the prognosis of a severely mentally retarded month old infant, was “dismal,” that his “condition was terminal and irreversible,” and that the interventions, including ventilator, tube feeding, and suctioning which were necessary to keep him alive, were painful.

ii. Role of MHLS

Matter of Elizabeth M., 30 A.D.3d 780; 817 N.Y.S.2d 181 (3rd Dept. 2006)

The procedures of SCPA 1750-b that invite MHLS’s involvement are triggered when the physicians determine that a procedure has become medically necessary and the guardian’s decision that it should be withheld is entered into the patient’s medical chart, even if the physicians and the guardian have long contemplated that life saving procedures would be withheld when the time came that they were medically necessary to sustain life.

Matter of Claudia EE, 35 A.D.3d 112; 822 N.Y.S.2d 810 (3rd Dept 2006)

The Health Care Decisions Act provided MHLS with a right to notice of a guardian's decision and standing to *object* to that decision, but SCPA §1750-b(4)(e)(ii) (5) did not provide that MHLS had to *consent* to the withdrawal or withholding of life-sustaining treatment or require the guardian to obtain MHLS’s consent before the guardian's decision could be implemented. The statute provides that it is the guardian – not MHLS – who has the right to consent or refuse to consent to healthcare

(SCPA 1760-b [1], cross-reference Public Health Law §2980 [6]). An objection can be made at any time and any interpretation of the HCDA providing that an objection can be made only during the 48-hour notice period or that a party is precluded from objecting if it had previously expressed support for the guardian's decision, would render the phrase "at any time" superfluous and, therefore, must be rejected.

ii. Power to consent to sterilization

In the Matter of the Guardianship of B., 190 Misc.2d 581;738 N.Y.S.2d 528 (County Ct., Tompkins Cty. 2002)(Peckham, J.)

In dicta in an Article 81 case brought in County Court by a guardian for authorization to have her mentally retarded daughter/ward sterilized, the court citing *City of Cleburne v Cleburne Living Ctr.*, 473 US 432) stated : "... [T] the Legislature has granted to Article 81 guardians powers it possibly may not have granted to Article 17-A guardians. Even so, it is doubtful whether the same conclusion would be reached regarding article 17-A guardians today. 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 article 17-A or article 81. The Supreme Court held there must be a rational basis for any distinctions in the law affecting the mentally retarded. There is no rational basis for saying the ability of a guardian for a mentally retarded person to consent to medical treatment of the ward should differ if the guardian is appointed under article 81 rather than article 17-A."

Matter of D.D., 64 A.D.2d 898; 408 N.Y.S.2d 104 (2nd Dept. 1978)

Surrogate Court lacked jurisdiction to entertain a petition by the mother/natural guardian of a mentally retarded woman for authorization to have her sterilized, because no provision of the SCPA conferred such jurisdiction upon that Court. Surrogate's Court is a court of limited jurisdiction and its subject-matter jurisdiction is conferred solely by NY Const. Art VI, Sec. 12 and by statute.

b. Power to Consent to Adoption of Ward's children

Matter of Adoption of Michael and Samantha S., 159 Misc.2d 894; 607 N.Y.S.2d 214, (Family Ct., Westchester Cty. 1993)(Bellantoni,J.)

Family Court permitted a SCPA Article17-A guardian of the person to consent to the adoption of the ward's children, where the ward was in a permanent vegetative state as a result of a head injury caused by the children's father's attempt to murder her. The Court looked to both the Domestic Relations Law Section 111(2)(d) and its other related sections, and SCPA Article 17-A, to find support to finalize the adoption.

2. Guardian of the property

a. Purchase of home with funds of infant ward

In each of the cases below the court granted the petition quoting the following rule governing the use of a ward's funds to purchase a family home. Cases are fact specific and are listed below:

“ ... use of a child's funds to purchase a house in which the parents will live is ‘presumptively improper’; however, it can be approved in extraordinary circumstances where, (1) there is clear proof that the infant's parents cannot afford the purchase price; (2) the purchase price represents ‘fair market value’; (3) title is vested in the infant at least to the proportionate degree of his or her investment in the house; (4) the house has features beneficial to the infant and accommodates any physical limitations; (5) necessary measures are taken, where needed, to safeguard the infant's investment against possible waste by the parents; (6) the parents offer a quid pro quo for use of the infant's funds; and (7) the funds remaining after the outlay are sufficient to meet the future needs of the infant.

Matter of A. C., 16 Misc. 3d 1119A; 847 N.Y.S. 2d 895 (Sup. Ct., Bronx Cty. 2007)(Hunter, J.)

Matter of De Las Nueces, NYLJ, 7/3/06, p.38 (col. 4) (Surr. Ct., NY Cty. 2006) (Surr. Berliner)

Matter of Wood, 2006 N.Y. Misc. LEXIS 6541; 236 NYLJ 5 (Surr. Ct., NY Cty. 2006) (Surr. Glen)

Matter of Ferraiola, NYLJ, 1/26/05, p. 36, col. 6 (Surr. Ct.,Westchester Cty.)(Surr. Scarpino)

Matter of Forcella, NYLJ, 1/14/04, p. 32, col. 3 (Surr. Ct., Suff. Cty. 2004) (Surr. Czygier)

Matter of Alfonso, NYLJ, 6/26/03, p. 28, col. 6 (Surr. Ct.,Westchester Cty.)(Surr. Scarpino)

Matter of Tzortzidis, NYLJ, 8/30/00, p. 27. col. 4 (Surr. Ct.,Westchester Cty.)(Surr. Emanuelli)

Matter of Fraietta, NYLJ, 7/12/00, p. 31, col. 5 (Surr. Ct., Westchester Cty. 2000) (Surr. Emanuelli)

Matter of Mercer, NYLJ , 9/10/98, p. 26, col. 1 (Surr. Ct., Westchester Cty. 1998) (Emanuelli, J.)

Matter of Fischer, 2006 N.Y. Misc. LEXIS 6432; 236 N.Y.L.J. 19 (Surr. Ct., Suffolk Cty)(Surrogate Czycier); *further proceedings* at 2007 N.Y. Misc. LEXIS 8013; 238 N.Y. L.J 88

A 17-A guardian who was the ward's sister requested permission to obtain a mortgage on the ward's home to make repairs and then to reside in the home with her family and become the ward's live-in caretakers, alleging that this was the wish of her then deceased mother. Citing its discretion under SCPA §§1713(1) and 1761 to authorize the withdrawal of a ward's funds where the purpose of the withdrawal is to provide for necessities required by the ward, the Surrogate permitted same and allowed the guardian to use the ward's funds for specific expenses to rehabilitate the home. The court excluded certain expenses or pro rata amounts of such expenses to the extent that the benefit also inured to the guardian.

b. Expenditure of infant ward's funds to pay for services that are the responsibility of a parent

Kube v. Petrovick, NYLJ, 8/23/94, p. 25, col. 1 (Sup. Ct., Suff. Cty. 1994)(Doyle, J.)

Court denies application by parents, 17-A guardians, to invade their son's funds to hire the father as his primary caretaker after analyzing all the relevant factors and concluding that the son's settlement already provided an annual income to the father and invading the corpus in accordance with the petition would reduce the son's funds by 75% and would not be in his best interests. The court indicated that under the circumstances it would not shift the father's parental duty of support to the son.

c. SNT / pooled trusts and related issues *

* Case law has been digested in "Article 81 Collected Cases"

<http://www.courts.state.ny.us/ip/gfs/CollectedCases.pdf>

Matter of Hector S., 11/18/09 NYLJ, 33 (col. 3) (Surr. Ct. Bronx Cty. 2009) (Surr. Holzman)

Upon learning of funds in a Willowbrook class consumer's guardianship account, OMRDD sought, pursuant to the Willowbrook decree, a declaration of incorrectly paid Medicaid, to have half of those funds used to repay the debt to Medicaid and to have the other half placed into an SNT-like arrangements for the consumer's benefit. The court approved the application.

Matter of Emmanuel R., 2007 NY Misc. Lexis 8137; 238 NYLJ 97 (Surr. Ct., Bronx Cty.)(Holzman, Surr.)

Where there was a guardian of the person only appointed because the wards fund would be placed in a pooled trust, the court authorized the guardian of the property to enter into a sponsor agreement with AHRC Trust for the purpose of establishing the trust account for the wards benefit but decreed that the guardians of the person would have no further authority with respect to any funds to be deposited or withdrawn therefrom.

d. Medicaid/Tax planning /gifting wards funds*

* Case law has been digested in "Article 81 Collected Cases"

<http://www.courts.state.ny.us/ip/gfs/CollectedCases.pdf>

In a series of decisions, all related to the same individual, various Surrogate's grapple with the issue whether a 17-A guardian may engage in gift giving in furtherance of Medicaid/tax planning with different conclusions. See, **Matter of Schulze**, NYJL, 9/3/96 pg. 1, col. 1 (Surr. Ct. NY Cty. 1996)(Surr. Preminger)(Court allows 17-A guardians to make gifts for estate tax planning purposes under same test that applies to Art 81 guardians. In this case, it allowed the gift giving since it would not leave the ward with an estate so depleted that she could not cover the cost of her own care and further her immediate family, which was wealthy in its own right pledged to provide for her care should there be a change in circumstances; **Matter of Schulze**, 23 Misc. 3d 215, 869 NYS 2d 896 (Surr. Ct., NY Cty. 2008)(Surr. Roth) (There is no express provision in SCPA Art. 17-A empowering a 17-A guardian to make gifts as contrasted with such an express grant of power to MHL Art. 81 guardians under MHL 81.21. The court holds that despite the absence of such express language, Art. 17-A guardians do have such power and do not need to petition a court to be converted to Art. 81 guardians to make such gifts. The court noted that intra-family tax savings and maximization of gifts to charities are among the objectives that have been recognized as supporting guardians' exercise of such authority to make such gifts.); **Matter of Joyce G. S.**, 30 Misc. 3d 765; 913 NYS 2d 910 (Surr. Ct., Bronx Cty., 2010) (Surr. Holzman); (Surrogate Holzman expressly rejected Surrogate Glen's holding in **Matter of John J.H.** In doing so, Surrogate Holzman held that "under the law as it presently exists, it has the power to invoke the equitable doctrine of substituted judgment to approve gifts or tax saving transactions on behalf of article 17-A wards. The court explained that in enacting the SCPA, the Legislature afforded the Surrogate's Court full equity jurisdiction as to any action, proceeding or other matter over which jurisdiction is or may be conferred" (see SCPA 201[2]), and provided that the proceedings enumerated in the SCPA are not exclusive (see SCPA 202). The Legislature further provided that after the appointment of a 17-A guardian, the Surrogate's court "may entertain and adjudicate such steps and proceedings...as may be deemed necessary or proper for the welfare of such mentally retarded or developmentally disabled person" (see SCPA 1758). Accordingly, Surrogate Holzman concluded that there appears to be no reason why the Surrogate's Court cannot utilize the common law or the criteria set forth in MHL § 81.21 (d) to approve a gift on behalf of an article 17-A ward.

e. Guardian serving as administrator of estate in lieu of ward

Matter of Resnick, 76 Misc2d 541; 351 NYS2d 269 (Surr. Ct., Kings Cty. 1973)(Surr. Sobel)

17-A guardian may be appointed under SCPA Sec. 1001(2) as the administrator of an estate, where the ward is the sole distributee.

f. Direct Deposit of Benefit Checks

Matter of Nix, 177 Misc.2d 894; 676 N.Y.S.2d 915 (Surr. Ct., NY Cty., 1998) (Surr. Preminger)

The Surrogate exercised the discretion provided to the Court under SCPA §1708 (which grants authority to waive the requirement of a bond), and found that it is in the ward's best interest to have his benefit checks directly deposited into a fully insured account, thereby reducing unnecessary delays in depositing the checks as well as reducing the risk that the checks will be converted or misappropriated. The Surrogate also found that directly depositing these checks would not impair the court's oversight function, since the guardian will still have to make proper application to expend funds on the ward's behalf.

C. Compensation of Guardians

Matter of Jon Z., 29 Misc.3d 923; 907 N.Y.S. 2d 595 (Surr. Ct. Broom Cty., 2010) (Peckham, J.)

Citing two cases issued pursuant to MHL Article 81, the Surrogate's Court held that the SCPA 17-A guardians of the person may be paid from funds held in the ward's Supplemental Needs Trust where there were virtually no funds available outside of the Trust.

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