ADULT GUARDIANSHIP IN NEW YORK

Article 17-A of the Surrogates Court Act

and

Article 81 of the Mental Hygiene Law

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Guardianship in New York State

Guardianship refers to a proceeding in which a Court declares a person to be incapacitated and appoints a Guardian to make personal needs and financial decisions for him or her. The Court which appoints the Guardian authorizes the Guardian to make a broad range of decisions for the incapacitated person, including but not limited to, medical decisions, where the incapacitated person should reside, who will provide care to the incapacitated person, and where and how the disabled person's assets should be invested. The Court may appoint a single Guardian to make these decisions, or it may divide this function among one or more Co-Guardians.

New York State law provides two vehicles through which a Court may appoint a guardian for a disabled individual. Important differences exist between these two types of guardianship.

Guardianship pursuant to Article 17-A of the Surrogate's Court Procedure Act, is available only to persons who qualify on the basis of mental retardation or developmental disability. The statute requires that the developmental disability must be attributable to cerebral palsy, epilepsy, neurological impairment, autism or traumatic brain injury or another condition which is found to be "closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons." Dyslexia may be found to be a developmental disability if it is sufficiently severe to be equivalent to mental retardation or any of the other listed developmental disabilities. Except for traumatic brain injuries, the disability must have begun before age 22.

In a 17-A proceeding, a Petition is filed in the Surrogate's Court of the county in which the incapacitated person resides. The law contains a list of individuals who may be the Petitioner, in order of priority, which is usually the parents first, then any interested person over 18 years old or a nonprofit corporation. The Petition must be supported by two affidavits. One of the affidavits must be prepared by a physician. The other must be prepared by a licensed psychologist or a physician who has professional knowledge in the care and treatment of persons with mental retardation. The court supplies standard forms for these affidavits, which must be carefully completed by the treating doctor or psychologist within six months of an examination.

The other procedure for appointment of a guardian is pursuant to Article 81 of the Mental Hygiene Law. Unlike the 17-A guardianship, this proceeding takes place in the Supreme Court in the county of the incapacitated person's residence. These proceedings also differ from 17-A proceedings in that the person can be of any age or any type of disability; the subject of the proceeding is not required to have a medical diagnosis of mental retardation or a developmental disability. There is no requirement that medical affidavits be submitted with the guardianship petition. In fact, due to concerns for protection of the privacy of medical records, inclusion of medical records in the initial guardianship petition is frowned upon. The Petitioner may be anyone, including the disabled person himself or herself. The Court must determine the 'functional limitations' of the incapacitated person and tailor the powers and duties of the Guardian to the "least restrictive" means of intervention.

An Article 81 Petitioner must show with clear and convincing evidence the incapacitated person's inability to provide for his or her personal needs and/or property management. Petitioner must list the powers he or she is seeking, which must be "tailored specifically to the particular needs" of the person with respect to personal care, property management, or both.

In a 17-A guardianship, the Petitioner must decide which powers are requested – i.e., guardian of the property, guardian of the person or guardian of the person and property. If guardianship is granted, the guardian will have all of the powers of a personal needs or property guardian, as detailed in the statute. Since 2003, the Guardian of a person who is determined to be mentally retarded may obtain permission to make end of life health care decisions, including the ability to withhold or withdraw life sustaining treatment. In December of 2007, the ability to make end of life health care decisions was extended to guardians of individuals with developmental disabilities.

In an Article 17-A proceeding, the disabled person must appear in court for the hearing unless 'medically incapable of being present to the extent that attendance is likely to result in physical harm'. However, many courts interpret this requirement very liberally and often waive the requirement of physical appearance at the hearing upon a certification by a physician of the likelihood of harm. The Court may appoint a guardian ad litem, a neutral attorney, or Mental Hygiene Legal Services to interview the disabled individual and make a recommendation to the court regarding the need for a guardian and the appropriateness of the petitioning parties to serve as guardians. The Court may

disperse with the necessity of a hearing based upon that recommendation. As a practical matter, most Article 17-A guardianship hearings require only a limited Court appearance. If a guardian of property is appointed, the assets of the disabled person must be held by the Guardian, jointly with the clerk of the Court unless the Guardian obtains a bond and files annual reports with the Court. As ownership of assets will disqualify the individual from receiving means-tested government benefits such as SSI or Medicaid, the Guardian can petition the court for permission to place the assets into a self-settled Supplemental Needs Trust.

The procedure for appointment of an Article 81 guardian is more complex. The incapacitated person is required to be present at the hearing unless the information before the court clearly establishes that the individual is "completely unable to participate in the hearing or that no meaningful participation will result from the person's presence at the hearing." If this is not established and the individual is unable or unwilling to travel to the court, the hearing must be conducted where the incapacitated person resides 'so the court can obtain its own impression of the person's capacity.' Upon the filing of the Petition, the Court is required to appoint a court evaluator who has many responsibilities, including explaining the proceeding to the alleged incapacitated person, investigating the allegations contained in the Petition and issuing a report to the Court. The incapacitated person is entitled to retain counsel of his or her own choosing and the court evaluator is authorized to make recommendations to the court as to whether counsel should be appointed, if the incapacitated person does not have an attorney. Counsel must be appointed if the alleged incapacitated person requests counsel, wishes to contest the Petition, a temporary guardian is requested, the Petition requests major medical treatment or permission to remove the alleged incapacitated person to a skilled nursing facility or another residential facility. If counsel is appointed, the court may dispense with the appointment of a court evaluator.

The appointment of an Article 81 guardian is based upon clear and convincing evidence of the disabled person's functional limitations. The guardian is only given powers that are the least restrictive form of intervention. Although a Guardian of the person may be given the authority to make major medical decisions, the Guardian will not have the authority to administer psychotropic medication without the consent of the incapacitated person. Moreover, an Article 81 guardian may not place the incapacitated person in a nursing home, residential care facility or a psychiatric hospital without a court order. While the Court is likely to appoint the Petitioner as Guardian, there are

no guarantees, especially if his or her appointment is opposed by the disabled person or other family members. There is no provision for the guardian to hold property jointly with the clerk of the court, but the Guardian must obtain a bond and file annual reports with the Court. In addition, the Guardian is generally required to attend a training course which has been certified by the Office of Court Administration.

BIOGRAPHY OF FRANCES M. PANTALEO

Frances M. Pantaleo is a partner at Bleakley Platt & Schmidt LLP, concentrating in the areas of Elder Law, Trust and Estates , Medicaid Planning, Guardianship, Special Needs Planning and legal issues affecting individuals with disabilities and their families. She is a member of the National Academy of Elder Law Attorneys and a Past Chair of the Elder Law and Special Needs Section of the New York State Bar Association and a member of its Special Needs Planning Committee. She has previously served as Chair of the Elder Law Committee of the Westchester County Bar Association and Chair of the Health and Elder Law Section of the Westchester Chapter of the Women's Bar Association.

Ms. Pantaleo has been recognized as a "Super Lawyer" in the area of Elder Law and has been named one of the top twenty-five attorneys in Westchester County . She has received an AV rating (the highest available) from Martindale-Hubbell.