

Message from the Chair

It has been a busy fall for the members of the Health Law Section. Among the issues/topics and events undertaken by Section members are the following:



1. The presentation of a highly successful Fall Meeting with a reported attendance of 96. Our thanks to Anoush Koroghlian Scott for this successful program.
2. Ongoing planning for what looks like a very exciting program during the Annual Meeting of the Association in January. The program on hot topics in health care law is being organized by a Committee under the guidance of Margaret Davino.
3. The Special Committee, whose organization is being facilitated by Brendan Parent, Chair of the Committee on Ethical Issues in the Provision of Health Care, and newly appointed Editor of the *Health Law Journal*, is continuing its efforts to develop a proposal on needed reforms to guardianship under Article 17-A of the Surrogate's Court Procedure Act. Please see my comments below. The Committee has reached out to a variety of stakeholders, including other Sections of the Bar Association, in this effort. Recently, the Law Revision Commission has also taken an active role.
4. The Section is also facilitating discussions related to clarifying the relationship between the various New York healthcare decision-making statutes, including the Family Health Care Decisions Act and the Health Care Decisions Act for Individuals with Developmental Disabilities, and related statutes concerning health care, such as proxies, DNR orders, etc. Similar to the efforts regarding reform to guardianship, the Section has reached out to other Sections of the Bar Association and stakeholders encouraging participation.
5. The Section's Committee on Medical Research and Biotechnology has drafted correspondence, with supporting material and guidelines, on the sharing of information from research laboratories with clinical laboratories and primary care physicians in cases where research findings indicate possible healthcare anomalies. After a thorough review, communications addressed to the Department of Health in this area have been proposed by the Section to the Executive Committee of the Bar

Association. The effort is being facilitated by Sam Servello, Chair of the Committee.

6. A Special Committee on the Committee Structure of the Section met and is proposing the combining of several existing committees and related changes to the section by-laws. These proposals will be presented to the members of the Section at the Annual Meeting in January.
7. The Executive Committee will also be presenting proposed changes in the Section's by-laws concerning the election of officers.
8. The Nominating Committee met and will be presenting the following slate of nominations for officers at the Annual Meeting of the members in January:
Chair: Robert A. Hussar (elected last year)
Chair-Elect: Hermes Fernandez
Vice-Chair: Karen L.I. Gallinari
Treasurer: Anoush Koroghlian Scott
Secretary: Nathan G. Prystowsky

These are a few of the issues that have been addressed by this Section in the past few weeks. A complete list would be too long for this short column but I hope this encourages members of this Section who are not currently involved in a committee, or committees, to become involved.

I would like to take the remainder of this column to discuss how the current proposals for reform of guardianship under the Surrogate's Court Procedure Act Article 17-A reflect the evolution of thought concerning the rights of individuals with intellectual and developmental disabilities. The efforts to reform the statute currently before the legislature are not an anomaly or "radical" proposals. Rather they reflect the increasing recognition that individuals with intellectual and developmental disabilities are first persons under the law and entitled to enjoy the same rights and privileges of all other citizens. Any limitations of those rights and privileges should be based upon a clear showing of fact that the individual needs assistance in the exercise thereof.

Prior to 1965, New York State had a single statute concerning the appointment of a surrogate to make decisions for a person who was allegedly incompetent to make decisions. Mental Hygiene Law, Article 78, Committee of the Incompetent, was that statute. The appoint-

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ment of a Committee of the Incompetent, which could be, and usually was, a single individual, was based upon a judicial finding of “incompetence” and included appointment of a “Committee” to make all decisions for the person and property of the “incompetent” person. It is important to recollect that at that time individuals with intellectual and developmental disabilities were presumed to be unable to exercise the rights of citizenship. For those individuals residing in state-run “schools,” such as the infamous Willowbrook, the state acted in its role as *parens patriae* to make all decisions on behalf of the individual, including medical. For those individuals who resided in the community there was no provision, short of a declaration of incompetency, to provide for any type of surrogate decision making. The families of individuals with intellectual and developmental disabilities educated and lobbied for a statute that would provide them with the authority to make decisions for such individuals after they reached the age of maturity.

The guardianship statute, Article 17-A of the Surrogate’s Court Procedure Act, effective in 1969, was enacted as an amendment to Article 17 of the Surrogate’s Court Procedure Act, guardianship of minors. The statute’s placement reflected the attitude that individuals with intellectual and developmental disabilities were “children for life” and needed protection similar to that of minors and that parents or guardians of such individuals should be given the same rights as parents over a minor regardless of the age of said individual. Section 1750-B was added later codifying the authority of the guardian to make healthcare decisions for the individual. The statute is based on a medical diagnosis of intellectual or developmental disabilities, not a functional analysis. No declaration of incompetence is necessary, the appointments are generally plenary in nature providing near total authority over the individual and/or the individual’s property, and the statute provides limited due process of law in that there is no requirement for the appointment for counsel, or for the holding of the hearing before a surrogate judge. In addition, while guardians of the property must file an annual report with the court, there is no such requirement for a guardian of the person.

The Committee of the Incompetent was joined by the Conservatorship Statute in 1972. Conservatorship did not require a declaration of incompetence. The court under the conservatorship statute was empowered to appoint conservators for persons who, because of advanced age, illness, mental weakness, drug abuse, alcohol abuse, or other causes, have suffered “substantial impairment” to their ability to care for their property or to provide for either themselves or their dependents. By 1991 the courts had limited coverage of conservatorship to property matters. In 1993 both the Committee of the Incompetent and the Conservatorship Statute were repealed and replaced by Guardianship under Mental Hygiene Law

Article 81. Throughout the 1980s there had been efforts nationwide to provide more due process rights within guardianship statutes and a recognition that each individual had different strengths, weaknesses and needs. Mental Hygiene Law Article 81, Guardianship, reflects that approach. Guardianship under Article 81 is tailored to those specific areas where assistance is needed in decision making and a showing that such “limited” guardianship is the least restrictive type of relief, i.e., other types of relief are not adequate, and that the appointment must be necessary to provide for the personal or property needs of that person. The individual is entitled to an independent evaluation for the court by a court-appointed evaluator, it is not diagnosis based, the individual has the right to counsel and the right to a hearing and there is an annual report required of the guardian, both of property and person.

The differences between Article 81 and Article 17-A and the increasing recognition of the individual needs and rights of persons with intellectual and developmental disabilities have given rise to the current efforts for reform. Proposed reforms include recognition of the individual as an adult with civil rights similar to those of other adults, removal of the medical diagnosis and attached certifications and replacement thereof with the requirement that the petitioner must show specific impairments are present that make necessary the specific relief sought by the appointment of a surrogate decision maker. In most proposals for reform alternatives to guardianship must have been considered and found inappropriate for the circumstances. In addition, in some but not all of the proposed reforms, the guardian of the person, as well as the guardian of the property, is required to make annual reports.

These considerations are part of several bills recently introduced in the legislature. As reported earlier in this column, the Health Law Section has taken the lead in pulling together representatives of a several of Sections of the State Bar Association and other stakeholders in efforts to craft reform to Guardianship under 17-A of the Surrogate’s Court Procedure Act.

Legislation forthcoming from these efforts must also recognize the important role played by families in the lives of individuals with intellectual and developmental disabilities. Any legislation, to be effective, must be crafted so that appropriate guardianship remains accessible to those families. If we keep in mind both the role played by families and the rights of citizenship and due process for individuals with intellectual and developmental disabilities, we can craft guardianship legislation that continues to provide an indispensable tool in the effort to avoid the unnecessary deprivation of citizenship rights and increases the ability of individuals with intellectual and developmental disabilities to live and work successfully in the community.

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