SHOULD WE BE TALKING?—BEGINNING A DIALOGUE ON GUARDIANSHIP FOR THE DEVELOPMENTALLY DISABLED IN NEW YORK

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I. INTRODUCTION

New York has two major forms of guardianship for an incapacitated person¹: Article 81 of the Mental Hygiene Law, titled “Proceedings for Appointment of a Guardian for Personal Needs or Property Management”² (“MHL 81”) and Article 17-A of the Surrogate’s Court Procedure Act, titled “Guardians of Mentally

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The authors gratefully acknowledge the editorial assistance of Barbara Hancock, Esq.

¹ New York also has a guardianship statute for veterans, Article 79 of the Mental Hygiene Law, titled “Proceedings Relative to Incompetent Veterans and Infant Wards of the United States Veterans’ Administration,” a relatively simple appointment when an incapacitated veteran or an infant is entitled to receive benefits from the Veterans’ Administration and the agency has determined that the appointment of a guardian is necessary to facilitate the receipt of those benefits. See N.Y. MENTAL HYG. LAW §§ 79.01–79.43 (McKinney 2012). The provisions of that statute are beyond the scope of this discussion.

² MENTAL HYG. §§ 81.01–81.44.
Retarded and Developmentally Disabled Persons”3 (“SCPA 17-A”). These two statutes, which had their beginnings in different eras—SCPA 17-A in 19694 and MHL 81 in 19925—reflect different motivations and purposes in the approach to guardianships.

The authors acknowledge that the term “intellectual disability” has replaced the term “mental retardation” and its derivatives in the federal government and most states, including New York with its renamed Office of People with Developmental Disabilities (OPWDD). However, SCPA 17-A has not been amended to reflect this change. Because this article relies heavily on the language of the statute and its legislative history, it will use the term “mental retardation.” Perhaps changing the terminology of the statute could be the beginning of the consideration of other changes discussed here.

SCPA 17-A is “a simple guardianship device, based upon principles of in loco parentis”6 by which a court can appoint a guardian for an individual based on a diagnosis of mental retardation,7 developmental disabilities,8 or traumatic head injury.9 In contrast, MHL 81, “the most modern form of guardianship created under New York State law,”10 is a more complex statute. Under MHL 81, the court appoints a guardian with authority tailored to the needs and functional limitations of the incapacitated individual, rather than basing its decision on the individual’s particular diagnosis.11

A practitioner considering the appointment of a guardian for an

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5 Id.
6 Rose Mary Bailly, Practice Commentaries, C81.28, in N.Y. Mental Hyg. Law § 81.28 (McKinney 2011) (quoting In re Cruz, No. 500001/01, 2001 WL 940206, at *4 (Sup. Ct. N.Y. County July 16, 2001)).
7 SCPA 1750.
8 SCPA 1750-a(1)(a)–(c).
9 SCPA 1750-a(1)(a).
10 Cruz, 2001 WL 940206, at *10.
11 N.Y. Mental Hyg. Law § 81.01 (McKinney 2012) (“The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable. The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person’s life.”).
individual with mental retardation or a developmental disability is confronted with a choice between statutes with two distinct views of guardianship. The difficulties in making this choice have become apparent in recent cases comparing the statutes’ relative merits. These cases highlight significant differences between the statutes and illustrate the ambiguities about the scope and jurisdiction inherent in co-existing statutes.\textsuperscript{12}

While the response to these differences and ambiguities might be to “modernize” SCPA 17-A or fashion one statute out of the two, at least two barriers currently exist to such solutions. The first one, and perhaps the more difficult to overcome, is that many advocates are opposed to abandoning separate treatment for individuals with mental retardation and developmental disabilities, particularly for those individuals whose disabilities are profound.\textsuperscript{13} Their position is bolstered by the legal principle that treating individuals with developmental disabilities differently from others in the community is constitutionally permissible in certain circumstances.\textsuperscript{14} The


\textsuperscript{13} See Radigan & Hillman, supra note 12. In 1990, the New York State Legislature and Governor directed the Commissioner of the Office of Mental Retardation and Developmental Disabilities (now known as the Office for People with Developmental Disabilities) to undertake a study of SCPA 17-A in light of national guardianship reform efforts, and the “momentous changes [that] have occurred in the care, treatment and understanding of these individuals [with developmental disabilities].” 1990 N.Y. Laws 3208. Nothing came of that study. See id.

second barrier, which also cannot be discounted, is the relative ease and modest cost of commencing an SCPA 17-A guardianship proceeding. Notwithstanding those barriers, several recent developments suggest the possibility of opening a dialogue about whether changes to SCPA 17-A could benefit individuals with developmental disabilities while preserving much of the statute’s original intent.

The first development is a series of amendments to SCPA 17-A beginning in 2002 that for almost eight years left a wide disparity between SCPA 17-A guardians and MHL 81 guardians regarding end-of-life decision-making. The 2002 SCPA 17-A amendment clarified the authority of a guardian of an individual diagnosed with mental retardation to make health care decisions, including end-of-life decisions, based on the best interest of the individual. While the statute’s previous silence on health care decisions may have been consistent with the notion of a guardian acting “in loco parentis,” the 2002 amendment recognized that a medical provider needs certainty regarding the authority of either a parental guardian or an unrelated guardian. The amendment also marked a major shift in New York’s law regarding end-of-life decisions because it overturned New York’s common law rule that a guardian

for mentally retarded adults), § 524.5-303 (West 2011) (judicial guardianship appointments), § 524.5-502 (West 2011) (compensation and expenses for guardians), § 626.557 (West 2011) (incarcerated or vulnerable adults who require a guardian).

See, e.g., In re Forcella, 188 Misc. 2d 135, 139 n.1, 726 N.Y.S.2d 243, 246 n.1 (Sup. Ct. Suffolk County 2001) (observing that SCPA 17-A guardians may be less expensive than Article 81 guardians); JulieAnn Calareso & Brian R. Grimsley, Article 17-A Practice Across New York State: A Survey of Surrogate’s Court Practices in Surrogate’s Court Procedure Act Article 17-A Cases, N.Y.S.B.A. ELDER LAW, Winter 2011, at 4–5 (noting that costs for filing an SCPA 17-A guardianship range from $20.00 to $38.00 and that most counties accept uniform state court official forms).

Heath Care Decisions for Persons with Mental Retardation, 2002 N.Y. Laws 3375, 3376 (codified as amended at SCPA 1750-b(1)).

See SCPA 1750-b(2)(a).

See Turano, Supplementary Practice Commentaries, supra note 4, C1750:1. Not everyone was clear as to the guardian’s authority. See Rose Mary Bailly, Practice Commentaries, C81.29, in N.Y. MENTAL HYG. LAW § 81.29(e) (McKinney 1996).

The assumption that parents could legally make decisions after their children reached the age of majority was tenuous. The issue was addressed in practice through regulations of the New York State Office of Mental Retardation and Developmental Disabilities (“OMRDD”) which allowed and continues to allow parents and other interested individuals to make health care decisions. See N.Y. COMP. CODES R. & REGS. tit. 14, § 633.99(b), (bo) (2011). Additionally, courts often include health care powers in the orders of appointment of SCPA 17-A guardians. See Lisa K. Friedman, Lawrence R. Faulkner & Rose Mary Bailly, Legislative Delegation of Authority: Powers of Attorney, Medical Care Decision Making, Guardianship and Alternatives, in REPRESENTING PEOPLE WITH DISABILITIES 12-1, 12-49 (Patricia W. Johnson et al. eds., 3d ed. 2007) (discussing the procedure for obtaining health care decision making authority).
could not make end-of-life decisions for an individual who never had the capacity to express his or her wishes.\textsuperscript{20}

There was a “\textit{certain irony}” in the 2002 SCPA 17-A amendment as it defined the terms “withhold[ing] or withdraw[ing] life sustaining treatment,” with reference to section 81.29(e) of the MHL.\textsuperscript{21} At that time, however, MHL 81 “neither prohibit[ed] or authorize[d]” end-of-life decisions based on the best interest of the incapacitated individual.\textsuperscript{22} Instead, an MHL 81 guardian was required to satisfy the common law rule in New York applicable to individuals who had capacity at one time, namely, that a surrogate demonstrate clear and convincing evidence of the incapacitated individual’s prior competent wishes.\textsuperscript{23}

Subsequent amendments to SCPA 17-A in 2003, 2005, and 2007 provided an even more expansive view of end-of-life decision-making under the statute.\textsuperscript{24} It was not until 2010, as part of the enactment of New York’s Family Health Care Decisions Act,\textsuperscript{25} that MHL 81 was amended to authorize the guardian to make end-of-life decisions based on the best interests of the incapacitated individual.\textsuperscript{26} While the breadth of the changes to SCPA 17-A regarding end-of-life decision-making based on an individual’s best interest is laudatory, the eight year lag between legislation authorizing an SCPA 17-A guardian to make such decisions and legislation authorizing an MHL 81 guardian to do so highlights the pitfalls of a two statute regime and the challenges for practitioners in choosing a guardianship proceeding for the developmentally disabled individual.

The second development is the questions raised by some recent decisions highlighting the differences between the two guardianship statutes and some resulting ambiguities about the scope and


\textsuperscript{21} Bailly, \textit{Practice Commentaries}, supra note 18.

\textsuperscript{22} \textit{Id}.


\textsuperscript{24} \textit{See discussion infra Part III.A.}


\textsuperscript{26} 2010 N.Y. Sess. Laws 23–24 (McKinney). Indeed, prior to the amendment, the guardian’s authority to make end-of-life treatment decisions was governed by common law requiring clear and convincing evidence of prior competent wishes of the incapacitated individual in order to withhold or withdraw life sustaining treatment. \textit{O’Connor}, 72 N.Y.2d at 534 n.5, 531 N.E.2d at 615 n.5, 534 N.Y.S.2d at 894 n.5; \textit{see also In re} Storar, 52 N.Y.2d 369, 379, 420 N.E.2d 64, 72, 438 N.Y.S.2d 266, 274 (1981) (citing Addington v. Texas, 441 U.S. 418, 424 (1978)).
The third development is a report of the diversity of practices and customs in the application of SCPA 17-A from county to county and even within individual counties.27

This article is offered as framework for beginning a dialogue among practitioners and academics about this statute regime by highlighting the underlying goals of national guardianship reform efforts, the history of SCPA 17-A, and some emerging issues posed by recent interpretations of SCPA 17-A.

II. TRENDS IN GUARDIANSHIP

For a long time, the law viewed an individual’s “incompetence in simple black and white terms.”28 Individuals with developmental disabilities were subjected to plenary guardianships29 along with a concomitant “deprivation of rights.”30 By the 1960s, this presumption was being tested at the national level.31 In 1962, the President’s Commission on Mental Retardation urged that solutions to legal problems faced by individuals with mental retardation address, among other things, the appropriateness of tailored guardianships given continuously changing social conditions.32 In 1969, the International League of Societies for the Mentally Handicapped likewise urged tailored guardianships for individuals with partial impairments.33 By 1976, appreciation was growing for careful and constructive law reform in a broad spectrum of areas including personal and civil rights of individuals with mental

27 See Calareso & Grimsley, supra note 15.
28 ABA COMMISSION ON THE MENTALLY DISABLED, GUARDIANSHIP & CONSERVATORSHIP 1–2 (1979) [hereinafter Guardianship & Conservatorship] (citing THE INTERNATIONAL LEAGUE OF SOCIETIES FOR THE MENTALLY HANDICAPPED, SYMPOSIUM ON GUARDIANSHIP OF THE MENTALLY RETARDED 11 (1969)); see also discussion infra Part III.A.
30 Guardianship & Conservatorship, supra note 28, at 1–2 (citing THE INTERNATIONAL LEAGUE OF SOCIETIES FOR THE MENTALLY HANDICAPPED, supra note 28, at 11).
32 THE PRESIDENT’S PANEL ON MENTAL RETARDATION, supra note 31 (“The President’s Panel on Mental Retardation was appointed by President Kennedy on October 17, 1961, with the mandate to prepare a ‘National Plan to Combat Mental Retardation.’” (citing Foreword)).
33 Guardianship & Conservatorship, supra note 28, at 2.
2011/2012] Guardianship for the Developmentally Disabled 813

...retardation and developmental disabilities. The 1976 Report of the President’s Committee on Mental Retardation, stated that:

Statutes and court procedures bearing on competency should be clarified and revised (a) to recognize gradations of competence, (b) to recognize that areas of competency may be quite varied and therefore should be separable in law, (c) to assure full and explicit due process safeguards on any and all areas of competency, and that the scope of any judgment of incompetence is made fully explicit, and (d) to ensure that restrictions of competency be limited to a specific period of time or subject to periodic review.

Following the 1975 passage of the Developmentally Disabled Assistance and Bill of Rights Act, the American Bar Association ("ABA") undertook a broad study of major areas of law affecting developmentally disabled children and adults. This study, known as the Developmental Disabilities State Legislative Project, included guardianship. The goal was to encourage "well conceived" legislation that drew on "the best thinking, most advanced concepts, and outstanding work products from other states." After a review of state guardianship statutes, the Project concluded that the standards for appointing guardians for individuals with disabilities were frequently "broad and vague" and, most importantly, "failed to recognize that individuals with disabilities are often capable of doing many things for themselves." The Project proposed a Model Guardianship and Conservatorship Act, the purpose of which was to establish:

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54 Id. at 1–2.
55 Id. at 2 (quoting THE PRESIDENT’S COMMITTEE ON MENTAL RETARDATION, REPORT TO THE PRESIDENT—MENTAL RETARDATION: CENTURY OF DECISION 65–66 (1976)).
57 Guardianship & Conservatorship, supra note 28, at iii. Other topics included advocacy, special education, personal and civil rights, zoning, standards for habilitation and care, architectural barriers, and criminal justice issues. Id. at iv.
58 Id. at iii.
59 Id. at 1.
60 Id.
61 The Project proposed:

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a system which permits partially disabled and disabled persons and minors to participate as fully as possible in all decisions which affect them, which assists such persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources, and developing or regaining their abilities to the maximum extent possible, and which accomplishes these objectives through the use of the least restrictive alternatives.\footnote{Id. § 11 (intervention proceedings for partially disabled and disabled persons).
\footnote{Id. § 10.}
\footnote{Id. §§ 17–18.}}

To that end, the model statute provides a detailed list of provisions to cover all aspects of guardianship from procedure to substantive effect to accountability. The statute’s highlights include the following: (1) providing a list of disposition alternatives ranging from least to most restrictive, including court ordered assistance without the appointment of a guardian, a limited personal guardian, a limited conservator for financial affairs, a personal guardian, and a conservator for all financial affairs;\footnote{Id. § 10 (―‗Disabled persons‘ means adults whose ability to receive and evaluate information effectively and/or to communicate decisions is impaired to such an extent that they lack the capacity to manage their financial resources and/or to meet essential requirements for their physical health or safety even with court-ordered assistance or the appointment of a limited personal guardian or limited conservator.‖).} (2) defining disabled and partially disabled adults without reference to a particular diagnosis;\footnote{Id. § 3(2) (―‗Disabled persons‘ means adults whose ability to receive and evaluate information effectively and/or to communicate decisions is impaired to such an extent that they lack the capacity to manage their financial resources and/or to meet essential requirements for their physical health or safety even with court-ordered assistance or the appointment of a limited personal guardian or limited conservator.‖).} (3) using a neutral multi-disciplinary team’s mandatory evaluation of the appropriateness of the relief sought;\footnote{Id. § 15.} (4) providing a hearing at which the court is required to explicitly consider “the relationship between the skills needed to protect a respondent’s health and financial assets and the respondent’s abilities and disabilities;”\footnote{Id. §§ 17(6)(a)(i), 18(7)(a)(i).} (5) listing the powers and duties of the various possible surrogates,\footnote{Id. § 31.} including annual reporting requirements;\footnote{Id. §§ 17–18.} (6) requiring periodic reviews;\footnote{Id. § 15.} (7) listing the rights and privileges of the individual with the disability;\footnote{Id. § 10.} and (8) explaining the effect of the appointment of a surrogate on the

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\item limited conservators and conservators and their duties and powers; and to specify the rights of individuals subject to intervention proceedings and dispositional orders.
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individual with the disability.\textsuperscript{51}

As reform efforts on behalf of individuals with developmental disabilities moved forward, advocates for older vulnerable adults joined the calls for reform.\textsuperscript{52} In 1987, the Associated Press (“AP”) issued a report, \textit{Guardianship of the Elderly: An Ailing System},\textsuperscript{53} which revealed that guardianship appointments across the nation often violated due process guarantees and failed to address the needs of vulnerable adults.\textsuperscript{54} The ABA once again assumed leadership of a national reform effort to address the flaws identified by the AP.\textsuperscript{55} The recommendations, very similar to reforms advocated for developmentally disabled individuals, included: the use of the least restrictive alternative in addressing the needs of the incapacitated person; tailored guardianship orders; and guardian accountability.\textsuperscript{56}

Neither the provisions of the Model Guardianship Act nor the ABA recommendations regarding vulnerable adults found their way into SCPA 17-A.\textsuperscript{57} In 1992, however, MHL 81 was enacted with many of the various recommendations advocated for older adults.\textsuperscript{58}

\begin{thebibliography}{99}
\bibitem{51} See \textit{id. § 15.}
\bibitem{52} See Fred Bayles & Scott McCartney, \textit{Guardians of the Elderly: An Ailing System Part VI: Gloomy Outlook, but Some Alternatives to Guardianship}, ASSOCIATED PRESS, Sept. 25, 1987 (citing critics of guardianship and proponents of alternatives to guardianship).
\bibitem{53} See Fred Bayles & Scott McCartney, \textit{Part II: Many Elderly Never Get Their Day In Court}, ASSOCIATED PRESS, Sept. 21, 1987 (describing the lack of due process in guardianship proceedings); see also Fred Bayles & Scott McCartney, \textit{Guardians of the Elderly: An Ailing System Part IV: Public Guardians Struggle to Keep Pace}, ASSOCIATED PRESS, Sept. 23, 1987 (discussing the failings of guardianship programs).
\bibitem{55} See \textit{generally Report No. 1 of the COMM’N ON LEGAL PROBLEMS OF THE ELDERLY, COMM’N ON THE MENTALLY DISABLED & SECTION ON INDIVIDUAL RIGHTS AND RESPONSIBILITIES, ABA, ANNUAL REPORT 772 (1989)} (discussing pertinent findings of the AP report and subsequent actions of the ABA).
\bibitem{57} See discussion supra Part I; see also \textit{In re Mark C.H.}, 28 Misc. 3d 765, 769, 906 N.Y.S.2d 419, 422 (Sur. Ct. N.Y. County 2010) (noting that no changes were made to SCPA 17-A as a result of the Law Revision Commission’s review of the state’s conservator and guardianship laws).
\bibitem{58} See, e.g., \textit{N.Y. MENTAL HYG. LAW § 81.10} (McKinney 2012) (Counsel); \textit{id. § 81.02(b)} (stating the burden of proof of clear and convincing evidence for incapacity determinations); \textit{id. § 81.16(c)(2)} (“If the person alleged to be incapacitated is found to be incapacitated and the court determines that the appointment of a guardian is necessary, the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the incapacitated person.”).
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as well as many identified by the disabilities' advocates.\(^59\) SCPA 17-A thus remained a simple approach to guardianship while MHL 81 emerged as a nuanced one.

Not surprisingly, the different treatment of guardianship under the two statutes has led to ambiguity about their co-existence. While the significance of this ambiguity in the overall appointments of SCPA 17-A guardians is difficult to measure because of inadequate data regarding adult guardianships,\(^60\) issues emerging from some recently reported decisions indicate practitioners can face significant challenges.

If any dialogue emerges regarding the relationship between SCPA 17-A and MHL 81, part of that process should be the collection of meaningful data necessary to understand and appreciate current practices and the potential effect of change.\(^61\)

person in providing for personal needs and/or property management.\(^59\); id. § 81.30 (Initial Report); id. § 81.31 (Annual Report); id. § 81.32 (Examination of Initial and Annual Reports).

\(^60\) Id. § 81.02(c) ("In reaching its determination, the court shall give primary consideration to the functional level and functional limitations of the person. . . . It shall also include an assessment of (i) the extent of the demands placed on the person by that person's personal needs and by the nature and extent of that person's property and financial affairs; (ii) any physical illness and the prognosis of such illness; (iii) any mental disability, as that term is defined in section 1.03 of this chapter, alcoholism or substance dependence as those terms are defined in section 19.03 of this chapter, and the prognosis of such disability, alcoholism or substance dependence; and (iv) any medications with which the person is being treated and their effect on the person's behavior, cognition and judgment."); id. § 81.16(c)(2) ("If the person alleged to be incapacitated is found to be incapacitated and the court determines that the appointment of a guardian is necessary, the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the incapacitated person in providing for personal needs and/or property management."); id. § 81.20 (Duties of the Guardian); id. § 81.21 (Powers of Guardian: Property Management); id. § 81.22 (Powers of Guardian: Personal Needs); id. § 81.29 (Effect of the Appointment on the Incapacitated Person); id. § 81.30 (Initial Report); id. § 81.31 (Annual Report); id. § 81.32 (Examination of Initial and Annual Reports).

\(^61\) New York is just beginning to track adult guardianship appointments. In 2005, a statewide guardianship database was introduced in two test locations—Brooklyn and Staten Island. ERICA F. WOOD, STATE-LEVEL ADULT GUARDIANSHIP DATA: AN EXPLORATORY SURVEY 32 (2006), http://www.ncea.aao.gov/ncearoot/main_site/pdf/publication/GuardianshipData.pdf. This database will be expanded incrementally throughout the state over the next few years, and will centralize, in electronic form, guardianship records that previously were available only in hard copy or local databases. The database will include elements on name and contact information for incapacitated person (including data of birth); whether guardian of person, property or both; name of court examiner; history of case; as well as status of reports and accounts. When complete, the database "will not only accurately describe the extent of the pending guardianship caseload in New York, but provide individual judges with a tool to monitor compliance with statutory reporting requirements."

\(^61\) Recent reports of the U.S. Government Accountability Office ("GAO") highlight concerns over a lack of oversight and the dearth of data available for efficacy assessments of
III. THE HISTORY AND PROCEDURE OF ARTICLE 17-A OF THE SURROGATE’S COURT PROCEDURE ACT

A. History

Like much of the country, for a long time New York viewed an individual’s competence as a “black and white.” During the 1960s, New York’s only procedure for appointing a surrogate decision maker for a person without capacity was Article 78 of the Mental Hygiene Law. Article 78 provided for the appointment of a committee of the person or property, or both, based on a judicial determination that the person was “incompetent”—a term the statute did not define. Although the statute described the duties of a committee of the property as managing the financial affairs of the incompetent person, it was silent regarding the committee’s powers over the personal affairs of the incompetent person. Guidance for the powers of the committee of the person could be gleaned from case law, which held that a committee was “charged with the responsibility of taking care of the physical needs of the incompetent, protecting his person, furnishing him with such medical and other care . . . as [was] required, and looking after his health and general welfare.” With the appointment of a committee, the individual determined to be incompetent lost his or her civil rights. At a later date, a conservatorship statute was

guardianship practice. In 2004, the GAO released a report that concluded that a lack of data available for review makes judging the success of guardianship reforms difficult. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE 22 (2004). In 2010, the GAO released another report documenting that the lack of available data thwarted efforts to determine the accuracy of hundreds of allegations of physical and financial abuse and neglect by guardians across the states. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS 5–6 (2010).

See generally N.Y. MENTAL HYG. LAW §§ 78.01–78.31 (McKinney 2012) (repealed 1992) (providing for the appointment and duties of a committee of incompetent or patient).

The word “committee” was a term of art and generally involved the appointment of a single individual. Id. § 78.01.

Rose Mary Bailly, Purpose and Overview of Article 81, in 1 GUARDIANSHIP PRACTICE IN NEW YORK STATE 4, 4 (Robert Abrams ed., 2004).

Id.

Id. at 4 (quoting In re Webber, 187 Misc. 674, 677, 64 N.Y.S.2d 281, 285 (Sur. Ct. Kings County (1946)).

Id.
added as Article 77 of the Mental Hygiene Law for persons whose disabilities did not render them incompetent.\textsuperscript{69} Only the committee statute is relevant to the discussion of the history of SCPA 17-A.\textsuperscript{70} Both the committee and conservatorship statutes were repealed with the enactment of MHL 81.\textsuperscript{71}

SCPA 17-A was enacted in 1969,\textsuperscript{72} as a means for parents of adult children with a diagnosis of mental retardation to avoid the costly burden of these “committee” procedures.\textsuperscript{73} The new statute was envisioned as an opportunity for parents to continue as the legal caregivers of their mentally retarded child once the child reached the age of majority,\textsuperscript{74} and through the appointment of successor guardians to ensure care for the children upon the parents’ deaths.\textsuperscript{75}

The statute’s emphasis on the parents’ continued role is evident from several of its features. SCPA 17-A is placed in New York’s Consolidated Laws immediately following the statute governing guardianship of minors: namely, Article 17 of the Surrogate’s Court Procedure Act.\textsuperscript{76} The provisions of SCPA 17 are applicable to SCPA 17-A guardians “with the same force and effect as if an ‘infant,’” as referred to in SCPA 17, were “mentally retarded” and a “guardian” referred to in SCPA 17, were a “guardian of the mentally retarded

\textsuperscript{69} See id. at 5; see also N.Y. MENTAL HYG. LAW § 77.01–77.41 (McKinney 2011) (repealed 1992) (providing for conservators in the mental hygiene law).

\textsuperscript{70} See Bailly, supra note 65, at 4–5.

\textsuperscript{71} See N.Y. MENTAL HYG. LAW § 81 (McKinney 2011) (explaining in historical notes that Article 81 took the place of Articles 77 and 78); see also Cerrato, supra note 62, at 29 (discussing how, prior to the enactment of Article 81, a conservator was appointed through an Article 78 proceeding).

\textsuperscript{72} See 1969 N.Y. Laws 3046.

\textsuperscript{73} 1969 N.Y. LEGIS. ANN. 325 (“A statutory provision which will provide for lifetime guardianship of a retarded individual to eliminate the cost and complications caused by a separate proceeding in a separate court at age 21, eliminate the possibility of many retarded individuals being without necessary guidance after age 21, and to distinguish between guardianship for the retarded and committeehip for the mentally ill.”). See 1969 N.Y. LEGIS. ANN. 326, for a discussion of the purpose of proposed legislation for aid to the disabled. As a historical note, a 1968 proposal recommending a separate statute in the Surrogate’s Court Procedure Act was vetoed by the governor because it failed to define the term “mental retardation” and did not provide for a jury trial, “a major protection for an individual under the ordinary incompetency proceeding . . . which assures an opportunity for public scrutiny of claims that an individual is incompetent and must be deprived of his right to manage himself and his property.” 1968 N.Y. LEGIS. ANN. 577. The memo also noted that a guardianship provision for an individual with mental retardation might be more appropriately included in the mental hygiene law. Id.

\textsuperscript{74} 1969 N.Y. LEGIS. ANN. 325.

\textsuperscript{75} Id. at 326. The legislation permitted the not-for-profit corporations to act as guardians for the person where no parent survived or there were no family members available to act. Id.

\textsuperscript{76} See generally N.Y. SURR. CT. PROC. ACT. 1701–1761 (McKinney 2012) (organizing the Surrogate’s Procedure Act such that Article 17-A follows Article 17).
2011/2012] Guardianship for the Developmentally Disabled 819

person.” SCPA 17-A is silent about the guardian’s authority over personal matters. It is also silent about authority over property, but that subject is addressed in SCPA 17, where parents are appointed as guardians to manage money that a child inherited or received as part of a judicial settlement.

In enacting SCPA 17-A, the legislature was mindful of the desire of parents to “provide for [a] lifetime guardianship” because “[t]he present law does not take into account the unique status of a retardate in that the fact and degree of retardation and the need for guidance and assistance are determinable at a very early age and remain so for life.”

The legislature was also mindful that the only alternative to the committee statute for many parents was to use their last will and testament to designate a family member to assume the caretaker role at the parents’ deaths. This alternative was viewed as flawed for several reasons. Many parents fail to make wills. A delay between the parent’s death and the probate of a will was inevitable. The designation in a will was no guarantee that the proposed guardian would be approved by the court or, indeed, accept the guardianship, given the responsibilities and the costs associated with assuming the office.

In 1989, a new SCPA 17-A replaced the 1969 statute. It continued guardianship for individuals with mental retardation and

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77 SCPA 1761. The Governor’s suggestion that the statute would be more appropriately included in the Mental Hygiene Law was unavailing. 1968 N.Y. LEGIS. ANN. 577 (quoting the Governor’s Veto Memorandum of an earlier version of the statute in 1968 which stated “that the problem addressed by this bill [the extension of the parent’s authority passed the age of majority] may well be better treated as a part of that revision [of the mental hygiene law] rather than a piecemeal amendment at this time.”).

78 See generally SCPA 1750–1761 (failing to address whether the guardian appointed by the court is vested with authority over personal matters, but granting the guardian authority over healthcare decisions and wages or earnings in appropriate circumstances).

79 See generally SCPA 1701, 1723 (vesting with the court authority to appoint a guardian over an infant’s property); see also SCPA 2220 (providing that certain money and property received in connection with an inheritance or settlement must be paid directly to the guardian).

80 1969 N.Y. LEGIS. ANN. 25, 325.


82 Id. at 24, 326.

83 Id. at 24–25, 326.

84 See id. at 25, 326. These provisions noted that the guardian designation will give parents assurance that the person they have chosen to appoint is prepared to accept responsibilities associated with guardianship and that guardianship fees will be, at a minimum, substantially reduced. Id.

85 1989 N.Y. Laws 3093.
expanded the statute’s coverage to include individuals with a developmental disability or a traumatic brain injury. The new statute also made some changes to the process of appointment.

As noted earlier, the statute underwent several amendments beginning in 2002 to address an SCPA 17-A guardian’s authority regarding health care decisions. The 2002 amendment clarified the authority of a guardian for an individual with mental retardation to make health care decisions, including end-of-life decisions, as defined in MHL 81. In 2003, SCPA 17-A was amended to allow corporate guardians to make end-of-life health care decisions for individuals with mental retardation. In 2005, the provisions regarding health care decisions, including end-of-life decisions, were expanded to include individuals with developmental disabilities. In 2007, the statute was again amended to authorize end-of-life decision-making by family members for a person who has been diagnosed as having mental retardation or a developmental disability and has no guardian. In 2008, the statute was further amended to allow a surrogate decision-making panel under Article 80 of the Mental Hygiene Law to make end-of-life decisions for an individual who met the criteria of SCPA 17-A.

With the enactment of these amendments through 2008, SCPA 17-A’s treatment of end of life decisions stood in stark contrast to their treatment under MHL 81, which, as noted earlier, neither authorized nor prohibited a guardian or anyone else to make end-of-life decisions.

2010 amendments further refined SCPA 17-A by adding the Willowbrook Consumer Advisory Board as an authorized guardian for Willowbrook class members, and by substituting a new definition of life sustaining treatment for the reference to MHL 81’s

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88 See discussion supra Part I (discussing the clarifications made to the statute for the scope of a guardian’s authority and whether the guardian can make end-of-life decisions on behalf of the individual).
89 SCPA 1750-b.
90 2003 N.Y. Laws 2872 (codified as amended at SCPA 1750-b(1)).
91 2005 N.Y. Laws 3585 (codified as amended at SCPA 1750-a(2)).
92 2007 N.Y. Laws 2793 (codified as amended at SCPA 1750-b(1(a)).
93 Article 80 authorizes the use of surrogate decision-making panels for major medical and dental treatment for individuals who reside or formerly resided in facilities operated or regulated by the NYS Department of Mental Hygiene and who do not have an individual willing and able to act as a surrogate decision-maker. Background, COMM’N ON QUALITY OF CARE AND ADVOCACY FOR PERSONS WITH DISABILITIES, http://cqc.ny.gov/advocacy/surrogate-decision-making/background (last visited Jan. 30, 2012).
94 2008 N.Y. Laws 3293 (codified as amended at SCPA 1750-b(1(a)).
definitions for withdrawing and withholding life sustaining treatment decisions.\textsuperscript{95}

\textbf{B. Procedure}

Although a SCPA 17-A guardian can be appointed for an individual of any age who sustains a traumatic brain injury,\textsuperscript{96} the primary focus of the statute is individuals who are mentally retarded\textsuperscript{97} or have a developmental disability and whose condition originated prior to age 22.\textsuperscript{98}

A mentally retarded individual is defined under the statute as a person deemed “incapable to manage him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature or likely to continue indefinitely.”\textsuperscript{99} A developmentally disabled person is defined as a person “having an impaired ability to understand and appreciate the nature and consequences of decisions which result in such person being incapable of managing himself or herself and/or his or her affairs by reason of developmental disability.”\textsuperscript{100}

The statute further provides that the developmental disability must be caused by:

- cerebral palsy, epilepsy, neurological impairment, autism or traumatic head injury; . . . [or] any other condition of a person 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; or . . . dyslexia resulting from a disability . . . or from mental retardation . . . [that] originate[d] before such person attains age twenty-two . . . \textsuperscript{101}

The diagnosis of mental retardation or developmental disability must be certified by one licensed physician and one licensed

\textsuperscript{95} 2010 N.Y. Sess. Laws 40 (codified as amended at SCPA 1750-b(1)(a)).
\textsuperscript{96} SCPA 1750-a(1)(a).
\textsuperscript{97} SCPA 1750.
\textsuperscript{98} SCPA 1750-a(1).
\textsuperscript{99} SCPA 1750. The American Association on Mental Retardation defines mental retardation as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” James W. Ellis, \textit{Decisions by and for People with Mental Retardation: Balancing Considerations of Autonomy and Protection}, 37 \textit{VILL. L. REV.} 1779, 1780 (1992) (quoting \textit{AM. ASS’N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION} 1 (Herbert J. Grossman ed., 1983)).
\textsuperscript{100} SCPA 1750-a(1).
\textsuperscript{101} SCPA 1750-a(1)(a)–(d).
psychologist, or by two licensed physicians. The procedure for the appointment of an SCPA 17-A guardian is relatively simple. Permissible petitioners include a parent, any interested person eighteen years of age or older, or the mentally retarded or developmentally disabled individual who is eighteen years of age or older. A corporation with “the corporate power to act as guardian of mentally retarded or developmentally disabled persons” may also petition for the appointment of a guardian. Rules and court preferences may vary the requirements for commencing the proceeding.

After the petition is served on the required parties, the statute mandates that a hearing be held unless waived by the court. The hearing will likely be waived when both parents are the petitioners, one parent is the petitioner with the consent of the other parent, or a third party is the petitioner with the parents’ consent. If the court waives the hearing, it has the discretion to appoint a guardian ad litem or the Mental Hygiene Legal Service to recommend to

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102 SCPA 1750-a(1)–(2).
103 SCPA 1751.
104 SCPA 1760.
105 See Calareso & Grimsley, supra note 15, at 5. For example, not all courts require that medical affidavits, whether of their own design or those provided through Hot Docs, be notarized. Id. (internal citations omitted).
106 See SCPA 1753. Process is issued, if their residences are known, to:
(a) the parent or parents, adult children, if the petitioner is other than a parent, adult siblings, if the petitioner is other than a parent, and if the mentally retarded or developmentally disabled person is married, to the spouse . . . .] (b) the person having care and custody of the mentally retarded or developmentally disabled person, or with whom such person resides if other than the parents or spouse; and (c) the mentally retarded or developmentally disabled person if fourteen years of age . . . .

SCPA 1753(1)(a)–(c). Notice of the petition, as distinguished from process, must be served by certified mail on:
(a) the adult siblings . . . and adult children if the petitioner is a parent; (b) the mental hygiene legal service . . . if the mentally retarded or developmentally disabled person resides in such a facility; (c) in all cases, to the director in charge of a facility licensed or operated by an agency of the state of New York, if the mentally retarded or developmentally disabled person resides in such facility; (d) one other person if designated in writing by the mentally retarded or developmentally disabled person; and (e) such other persons as the court may deem proper.

SCPA 1753(2)(a)–(e).
107 SCPA 1754(1).
108 SCPA 1754(1)(a)–(c).
109 SCPA 1754(1), 403(2) (stating provisions for appointment of a guardian ad litem by the court).
110 SCPA 1754(1); N.Y. MENTAL HYG. LAW §§ 47.01, 47.03 (McKinney 2012). These provisions indicate that Mental Hygiene Legal Service represents individuals receiving care or alleged to be in need of care at inpatient and community-based facilities for the mentally disabled in judicial and administrative proceedings concerning admission, retention, care, and treatment. Id.
the court whether the appointment of a guardian is in the individual's best interest.111

If the hearing is held, the statute requires the presence of the individual for whom the guardian is sought.112 The court may dispense with the individual's presence if a physician certifies that the individual is "medically incapable of being present" because he or she will suffer physical harm, or if the court otherwise concludes that requiring the individual's presence would not be in his or her best interest.113 If the court excuses the individual from attending the hearing, the court may appoint a guardian ad litem or the Mental Hygiene Legal Service to interview the individual and submit a report to the court.114 The statute does not provide any direction about the conduct of the hearing.

The standard for appointing a guardian under SCPA 17-A is whether it is in the best interest of the individual.115 The statute neither establishes the burden nor the standard of proof required to establish that a guardian is in the best interest of the individual.116

Two forms of guardianship are available: a plenary guardian of the property and person,117 or a limited guardian for property other than wages and earnings.118 In practice, the appointment of a guardian of the property is driven by the extent of assets belonging to the incapacitated person.119 The court may also appoint "a standby guardian of the person or property or both" who is authorized to act when the guardian initially appointed is no longer willing or able to act, and "an alternate and/or successive alternates to [the] standby guardian," to act in the event of the death or incapacity of the standby guardian or his or her renunciation of the appointment.120

A not-for-profit corporation organized by its charter to be a guardian can be appointed as the guardian for the personal

111 SCPA 1754(1), (5).
112 SCPA 1754(3).
113 Id.
114 SCPA 1754(4).
115 SCPA 1750.
117 SCPA 1750.
118 SCPA 1756.
119 While on its face, such determinations may raise concerns for those individuals who may acquire assets at a later date, as the survey makes clear the data collected is an aggregation of decisions, not an assessment of individual cases. See Calareso & Grimsley, supra note 15, at 4. Without a thorough review of the circumstances of each determination, any conclusions drawn are circumstantial, or at least unsubstantiated.
120 SCPA 1757(1).
The statute prohibits any corporations, including a not-for-profit corporation, from acting as a guardian for property management.\textsuperscript{122} Upon their appointment as guardians, “parents can legally continue their authority [over their disabled child] beyond age 18.”\textsuperscript{123} The SCPA 17-A guardianship remains in effect permanently, “or until terminated by the court.”\textsuperscript{124}

When it was enacted in the 1960s, the guardian’s authority was understood to be that of a parent, making a description of that authority in the statute unnecessary.\textsuperscript{125} Although the amendments regarding end-of-life treatment provide direction to the guardian,\textsuperscript{126} the scope of the guardian’s authority regarding other decisions remains unclear;\textsuperscript{127} the exact scope of an SCPA 17-A’s authority is not described in the statute, perhaps because when it was enacted in the 1960s, the statute’s intent was to perpetuate a parent’s authority. When it was enacted in the 1960s clearly the intent was to perpetuate a parent’s authority.\textsuperscript{128}

The statute provides no criteria about the standards that should govern the guardian’s conduct. This omission may present difficulties for any guardian, but, assuming that a parent will be guided by natural parental concern, it becomes particularly difficult for a corporate guardian or a successor/alternate guardian who has not served as the individual’s parents. The peace of mind that parents find with the naming of successor and alternate guardians, knowing that there will always be someone to look after their son or daughter for the rest of that person’s natural life, may be a hollow promise if the statute’s expression of continued advocacy is somewhat vague.\textsuperscript{129} The lack of standards can also present difficulties in determining whether a guardian’s decisions are appropriate and in the best interest of the individual.

Given the intent behind the statute’s creation, it cannot be

\textsuperscript{121} SCPA 1760.
\textsuperscript{122} Id.
\textsuperscript{124} SCPA 1759(1).
\textsuperscript{125} SCPA 1750-b(1)–(2).
\textsuperscript{126} SCPA 1759(1).
\textsuperscript{127} SCPA 1750-b(1)–(2).
\textsuperscript{129} See generally SCPA 1750-a. (failing to detail a mechanism for ensuring continued care).
2011/2012] Guardianship for the Developmentally Disabled

doubted that many parents have derived comfort from the appointment of a guardian and, that likewise many individuals with mental retardation and developmental disabilities have been protected by the appointment of a guardian. Nevertheless, it is worth considering whether, in light of trends in the treatment of guardianship proceedings over the past fifty years, SCPA 17-A could provide a more nuanced approach where appropriate—one which strikes a balance between enhancing the ability of individuals to make decisions affecting their own lives and protecting individuals “from the consequences of potentially unwise, ill-informed or incompetently made decisions.”

It is also worth considering whether the statutory clarification of questions raised in some recent decisions regarding SCPA 17-A will benefit both practitioners and their clients.

IV. STATUTORY QUESTIONS

A. Is SCPA 17-A Constitutional?

Several cases have addressed the issue of whether SCPA 17-A is unconstitutional on due process, equal protection, and vagueness grounds. The cases have involved challenges to different elements of SCPA 17-A: its treatment of incapacity to make end-of-life decisions, the guardian’s duty to account regarding the personal care of the individual, and the applicability of the patient-physician privilege. The resolution in each of these cases reflects the difficulty of assessing under what circumstances a court might conclude that the statute is unconstitutional.

On the issue of differentiating between the capacity to make end-of-life decisions by an individual with mental retardation or a developmental disability and by a previously competent individual, In re Chantel R., the only appellate decision to date on the issue of constitutionality, held it was constitutionally permissible for statutes to treat the issue of capacity differently.

\[130\] Ellis, supra note 99, at 1779.
\[132\] In re Chantel Nicole R., 34 A.D.3d at 100, 821 N.Y.S.2d at 195.
\[133\] In re Mark C.H., 28 Misc. 3d at 786–87, 906 N.Y.S.2d at 434.
\[134\] In re Derek, 12 Misc. 3d at 1133, 821 N.Y.S.2d at 388–89.
\[135\] In re Chantel Nicole R., 34 A.D.3d at 103, 821 N.Y.S.2d at 197.
Chantel R., a twenty-six year old woman who was, as the court described her, “moderately retarded,” challenged the determination that she lacked capacity to make end-of-life decisions, as a violation of her rights to due process and equal protection; she further claimed that SCPA 17-A was unconstitutionally vague. Chantel R. asserted that she had capacity to object to granting her guardian authority to make end-of-life decisions “because she understands the meaning of the words with which” she voiced her objection. The medical personnel who testified at the guardianship hearing—as well as both the trial and appellate courts—disagreed. They viewed the question of her capacity as whether she understood the decision in the abstract, not whether she used appropriate words. The trial court concluded that she failed to appreciate “the consequences of such [end-of-life] decisions or even an awareness of the context in which such a determination might be required.” The trial court dismissed the equal protection and vagueness challenges, and “declined to decide if the discretion afforded by statute to dispense with a hearing (SCPA 1754) might violate due process because respondent was afforded a hearing.”

On appeal, Chantel R. asserted that she was denied equal protection because the treatment afforded individuals such as herself was different from the treatment by once-competent individuals who are not required to show that their decisions regarding life-sustaining treatment are “based on any abstract understanding of life, death or modern medicine,” and that no rational basis existed for such different treatment. The First Department rejected the equal protection argument on the grounds that individuals with mental retardation are not situated similarly to once-competent individuals, and that a rational basis exists for different treatment regarding a determination of their capacity to

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136 Id. at 100, 821 N.Y.S.2d at 195.
137 Id.
138 Id.
139 Id. at 101, 821 N.Y.S.2d at 196.
140 Id. at 101–02, 821 N.Y.S.2d at 196.
141 See id.
142 Id. at 102, 821 N.Y.S.2d at 197. Additionally, the court noted that she could not travel by herself nor could she conduct basic financial transactions. Id. at 101, 821 N.Y.S.2d at 195.
143 Id. at 103, 821 N.Y.S.2d at 197.
144 Id.
145 Id. at 104, 821 N.Y.S.2d at 198 (quotation marks omitted).
146 Id.
understand medical treatment decisions.\textsuperscript{147}

On the issue of the lack of an SCPA 17-A guardian’s duty to account, one trial court has held that the absence of any reporting requirement regarding the personal care of the ward would render the statute unconstitutional on the grounds that it violated due process, but that the court would read into the statute a reporting and review requirement to preserve its constitutionality.\textsuperscript{148}

The court in \textit{In re Mark C.H.} provided an extensive analysis of the constitutional mandate that an individual who is deprived of his liberty (as is the case upon the appointment of a SCPA 17-A guardian) is entitled to due process, including the procedural requirement that a guardian report on the personal care the individual is receiving.\textsuperscript{149} The court concluded that a guardian should be appointed for Mark C.H. and that his guardian should report to the court on a yearly basis in the same manner as is required under MHL section 81.31.\textsuperscript{150}

On the issue of the statute’s violation of due process and equal protection because of a failure to apply the patient-physician privilege to SCPA 17-A guardian proceedings, one trial court has held that no rational basis exists for allowing different treatment as to the applicability of patient-physician privilege.\textsuperscript{151} In \textit{In re Derek}, the court concluded that the application of the patient-physician privilege must apply equally to guardianships under SCPA 17-A as it does to guardianships under MHL 81;\textsuperscript{152} to allow otherwise would also run afoul of the protection of due process.\textsuperscript{153} As the court noted,
“[i]t would certainly be arbitrary to say that the respondent against whom a proceeding for the appointment of a guardian is brought can assert the physician-patient privilege in one type of proceeding, but not the other. That would be unequal operation of the law violative of due process.”

The courts in In re Derek and In re Mark C. H., were willing to read requirements into the statute to eliminate the challenge and preserve the constitutionality of the statute. It is not clear whether other courts would be willing to do so with respect to other aspects of the statute and, as the cases regarding gift-giving authority described below demonstrate, there is likely to be disagreement on whether they are allowed to do so—leaving practitioners to proceed at their peril.

B. Can the Court Grant Gifting Authority to SCPA 17-A Guardians?

As noted earlier, SCPA 17-A is silent about the extent of a guardian’s authority, including regarding whether a guardian can make gifts from the ward’s property, whereas MHL 81 spells out this authority in detail. Consequently, a disagreement exists among the courts as to whether gifting authority can be granted to an SCPA 17-A guardian despite the statutory silence, and by extension, whether the substituted judgment standard articulated in common law and in MHL 81 provides an available rationale for evaluating the validity of the gift under SPCA 17-A.
In *In re Schulze*158 ("Schulze I") and *In re Joyce G.S.*159 ("Schulze II"), the SCPA 17-A guardians of the property for a mentally retarded woman requested gift-giving authority for various transactions related to their ward’s multi-million guardianship fund.160 At the time of *Schulze I*, Joyce Schulze, the fifty-seven-year-old sister of the guardians, suffered from Down’s Syndrome, and was presumed near death.161 Prior to her decline, Joyce enjoyed a loving and involved relationship with her brothers162 who had served as her guardians for decades.163 Due to the sizeable estate and concerns over the imminence of Joyce’s death, the brothers (her sole distributees) requested permission to transfer funds from Joyce’s guardianship account into a revocable trust for Joyce’s lifetime benefit, with the remainder being donated to various charities upon her passing.164 Two years later, the brothers again petitioned for gifting authority in order to perform a number of transactions designed to reduce the tax burden on the estate, and to maximize the benefit for Joyce during her lifetime as well as the charitable contributions after her death.165

The Surrogate in *Schulze I* considered the issue of whether the lack of express statutory language in SCPA 17-A for gift-giving, coupled with the enumerated gift-giving authorities provided in MHL 81, precluded the court from granting the request.166 Nevertheless, the court granted the petition, reasoning that an SCPA 17-A guardian could be granted gift-giving authority under common law, provided the wards’ interests were not adversely affected, “and where the wards themselves would likely make such gifts if they had the capacity to do so.”167 With respect to the concern that MHL 81 preempted gifting authority under SCPA 17-A, the court explained that neither the preamble to MHL 81 nor the statute’s legislative history demonstrated any express or implied

158 *In re Schulze I*, 23 Misc. 3d at 215, 869 N.Y.S.2d at 896.
159 *In re Schulze II*, 30 Misc. 3d at 771, 913 N.Y.S.2d at 914–15.
160 At the time of the petition filed in *In re Schulze I*, Joyce’s assets totaled over $50 million. *In re Schulze I*, 23 Misc. 3d at 216, 869 N.Y.S.2d at 896. Her assets had decreased to $48 million two years later due to her increased medical and residential needs. *In re Schulze II*, 30 Misc. 3d at 770, 913 N.Y.S.2d at 914.
161 *In re Schulze I*, 23 Misc. 3d at 216, 869 N.Y.S.2d at 896.
162 *In re Schulze II*, 30 Misc. 3d at 770, 913 N.Y.S.2d at 914.
163 *In re Schulze I*, 23 Misc. 3d at 216, 869 N.Y.S.2d at 896.
165 *In re Schulze II*, 30 Misc. 3d at 770, 913 N.Y.S.2d 913–14.
166 *In re Schulze I*, 23 Misc. 3d at 216–17, 869 N.Y.S.2d at 897–98.
intention that MHL 81 would repeal or impinge on SCPA 17-A.  

168 Rather, according to the court, MHL 81’s preamble made clear that the statute was replacing the existing conservatorship and committee statutes described earlier, which were subsequently repealed.  

169 Equally significant for the court was the fact that repealing the statutes did not disrupt the existing guardianships.  

170 This combination of express language and overt action regarding the conservator and committee statutes, coupled with the lack of either express language or overt action with respect to SCPA 17-A, proved for the court that SCPA 17-A was unaffected by the enactment of MHL 81.  

171 Given Joyce’s failing health, the court remarked on the absurdity of the result if it found otherwise, as the time required to seek appointment of an MHL 81 guardian would render the brothers’ efforts moot.  

Before the decision in Schulze II, another surrogate offered a different view on an SCPA 17-A guardian’s gifting authority. In re John J.H. involved the parents’ application for an SCPA 17-A guardian for their twenty-two-year-old son diagnosed with severe autism.  

173 John J.H. was able to make substantial strides in mastering the limitations of his disease with his family’s support and intense work with experts at the Johns Hopkins Hospital.  

174 He was financially independent because of the family’s considerable wealth and trust funds available to him.  

175 The parents sought guardianship over his person, power over end-of-life health care decisions, and authority regarding a supplemental needs trust.  

176 His considerable artistic talent led his parents also to seek authority to sell his artwork and donate the proceeds to charities.  

177 Describing Article 17-A as “a blunt instrument which allows for none of the ‘tailoring’ that characterizes our adult guardianship statute [MHL 81],” the court concluded that the plenary power of

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168 In re Schulze I, 23 Misc. 3d at 216–18, 869 N.Y.S.2d at 897.  
169 Id. at 217, 869 N.Y.S.2d at 897.  
170 Id.  
171 See id.  
172 Id. at 217–18, 869 N.Y.S.2d at 897.  
174 Id.  
175 Id.  
176 Id. at 706 n.1, 896 N.Y.S.2d at 663 n.1.  
177 Id. at 706, 896 N.Y.S.2d at 663.  
178 Id. at 706–07, 896 N.Y.S.2d at 663 (citing N.Y. MENTAL HYG. LAW § 81 (McKinney 2010); In re Chaim A.K., 26 Misc. 3d 837, 885 N.Y.S.2d 582 (Sur. Ct. N.Y. County 2009)).
an SCPA 17-A guardian does not include gift giving.\textsuperscript{179} The court distinguished its conclusion from the decision in \textit{Schulze I}\textsuperscript{180} and criticized the use of substituted judgment to approve these gifts under SCPA 17-A as ill-conceived because most individuals for whom an SCPA 17-A guardian is sought are assumed to never have had capacity.\textsuperscript{181} The court recognized in a footnote that another earlier decision ignored the distinction and employed substituted judgment under its equitable powers because to do otherwise “would offer [the latter] less opportunity in the law than persons who have come to know a disability later in life.”\textsuperscript{182}

Finally, the court in \textit{John J.H.} was critical of reading language or concepts into a statute in order to do justice based on the express limitations placed on the judiciary to “avoid judicial legislation.”\textsuperscript{183} After an extensive review of the development of the common law regarding the application of substituted judgment to make gifts on behalf of individuals who previously had capacity, the court pointed out that there has been no similar development of the law for individuals under an SCPA 17-A guardianship.\textsuperscript{184} Moreover, because no hearing had been held, the court did not have before it a determination as to John’s capacity to make certain types of decisions. In the end, the parents withdrew their petition in favor of proceeding under MHL 81.\textsuperscript{185}

The court concluded that SCPA 17-A was unduly restrictive and expressed the desire that reform of the statute be undertaken in light of developments in the “‘care, treatment and understanding of [mentally retarded or developmentally disabled] individuals,’ as well as new legal theories and case law relating to the rights of such persons” which have been recognized for more than twenty years.\textsuperscript{186}

\textit{Schulze II}, decided two years after \textit{Schulze I} by a different surrogate, and after \textit{John J.H.}, continued the line of thinking expressed in \textit{Schulze I}, both with respect to the brothers’ desire to transfer funds for the purpose of tax planning and maximization of

\begin{footnotes}
\item[180] \textit{Id.} at 708–09, 896 N.Y.S.2d at 664–65.
\item[181] \textit{Id.} at 709–10, 896 N.Y.S.2d at 665–66 (explaining how the distinction used by these courts is a legal fiction established in England to access the funds of previously capacitated persons).
\item[182] \textit{Id.} at 709 n.10, 896 N.Y.S.2d at 665 n.10 (alteration in original) (quoting \textit{In re Daly}, 142 Misc. 2d 85, 88, 536 N.Y.S.2d 393, 395 (Sur. Ct. Nassau County 1988)).
\item[183] \textit{In re John J.H.}, 27 Misc. 3d at 711 n.17, 896 N.Y.S.2d at 666 n.17 (quoting N.Y. STAT. LAW § 73 (McKinney 2010)).
\item[184] \textit{In re John J.H.}, 27 Misc. 3d at 710, 896 N.Y.S.2d at 666.
\item[185] \textit{Id.} at 711, 896 N.Y.S.2d at 667.
\end{footnotes}
their sister Joyce’s assets, as well as the court’s reliance on the substituted judgment standard.\textsuperscript{187} A distinguishing factor is that in \textit{Schulze II} the brothers’ plan required permission for an inter-vivos transfer of a relatively nominal portion of Joyce’s funds into an irrevocable trust for the benefit of the brothers and their families.\textsuperscript{188} Significant to this proposed transaction was that, by design, the gift to the brothers allowed them a means of increasing Joyce’s income annually by over five percent, an amount that far exceeded the gifted portion.\textsuperscript{189}

Granting the petition, the court took the opportunity to embellish on the reasoning expressed in the prior \textit{Schulze} decision and offered rebuttal to direct attacks by the court in \textit{John J.H.} that the \textit{Schulze I} opinion breached the scope of judicial authority by usurping the legislature’s intention of prohibiting gift-giving powers under Article 17-A.\textsuperscript{190} On the issue of substituted judgment, the court offered several arguments refuting the \textit{John J.H.} court’s contention that the substituted judgment standard was only available for individuals protected under MHL 81 guardianship provisions.\textsuperscript{191} Primary among them was its categorical dismissal of the \textit{John J.H.} court’s reliance on outdated English common law terminology and standards, such as categorizing persons who never had decision making capacity as “idiots” and the subsequent claim that only those described as “lunatics” (those having had capacity and lost it) were afforded the substituted judgment standard under common law.\textsuperscript{192} Noting the decades’ old changes in New York jurisprudence allowing substituted judgment for mentally retarded and developmentally disabled individuals that predated MHL 81,\textsuperscript{193} as well as pointing out the codification of the unabridged common law standards in section 81.21,\textsuperscript{194} the court found the argument of the court in \textit{John J.H.} flawed in scope and content.\textsuperscript{195}

Equally unfounded to the court in \textit{Schulze II} was the contention that the lack of express language in SCPA 17-A regarding gift-giving authority, conflated with the express provisions for such


\textsuperscript{188} Id. at 770, 913 N.Y.S.2d at 913–14.

\textsuperscript{189} Id. at 770, 913 N.Y.S.2d at 914.

\textsuperscript{190} Id. at 766–67, 913 N.Y.S.2d at 911–12.

\textsuperscript{191} Id. at 767–68, 913 N.Y.S.2d at 912.

\textsuperscript{192} Id. at 767, 913 N.Y.S.2d at 912.

\textsuperscript{193} Id.

\textsuperscript{194} Id. at 767–68, 913 N.Y.S.2d at 912.

\textsuperscript{195} Id. at 767, 913 N.Y.S.2d at 911–12.
authority in the more recent MHL 81, implied the legislature’s intent that the powers were only available under MHL 81.\textsuperscript{196} The court maintained:

\begin{quote}
[T]here is no evidence of any legislative intent to remove this court’s jurisdiction or power to act on behalf of an [SCPA] 17-A ward with regard to an issue merely because article 17-A lacks specific provisions with regard to that particular issue while MHL 81 or one of its predecessors had or has such provisions.\textsuperscript{197}
\end{quote}

Going further, the surrogate referenced section 1758 directly, noting that the express language granted the court the authority to “‘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.’”\textsuperscript{198} Consequently, the court found it reasonable to consider any of the applicable factors enumerated under MHL 81.21(d) or common law in making its determination.\textsuperscript{199} Extending the point, the court reasoned that prohibiting a court from applying the factors, without some alternative mechanism for obtaining the authority, potentially forced a guardian under SCPA 17-A to have to undergo the expense and burden of commencing another guardianship proceeding under MHL 81, simply to acquire the gifting authority.\textsuperscript{200}

Applying the reasoning to the brothers’ request, the court in Schulze II concurred with the guardian ad litem appointed to protect Joyce’s interests in the petition, finding that Joyce’s considerable wealth in excess of her foreseeable needs conferred no risk to her interests, thus satisfying the first condition for substituted judgment.\textsuperscript{201} Acknowledging the longstanding loving relationship Joyce enjoyed with her family, the court similarly found it likely that were Joyce competent, she would want to confer the gift, provided her interests were not affected, thereby fulfilling the second condition.\textsuperscript{202}

The court’s observation that among the cases allowing the substituted judgment standard for those who never had decision making capacity, the John J.H. court was the only one to deny its

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\textsuperscript{196} Id. at 769, 913 N.Y.S.2d at 913.
\textsuperscript{197} Id.
\textsuperscript{198} Id. (quoting N.Y. SURR. CT. PROC. ACT § 1758 (McKinney 2010) (alteration in original)).
\textsuperscript{199} Id. at 769, 913 N.Y.S.2d at 913.
\textsuperscript{200} Id.
\textsuperscript{201} Id. at 771, 913 N.Y.S.2d at 914–15.
\textsuperscript{202} Id. at 771, 913 N.Y.S.2d at 914.
\end{flushright}
application 203 may foretell deeper concerns. Given the important use of gifting of an individual’s assets, the potential confusion of practitioners and their clients warrants clarification of the issues.

C. Whether SCPA 17-A Is the Exclusive Remedy for Creating a Guardianship for an Individual with Disabilities?

Notwithstanding that SCPA 17-A covers minors with long-term disabilities 204 some courts have appointed MHL 81 guardians for these individuals 205. In addition, MHL sections 1.03(6), 1.03(11), 81.06(7), and 81.03(k) collectively permit directors of schools and developmental centers for the care and treatment of developmentally disabled persons to apply for the appointment of an MHL 81 guardian for a person in such a facility 206. As with many of the other issues arising out of the co-existence of the two statutes, however, neither the cases nor these statutory provisions have foreclosed disagreement.

In In re Lavecchia, the issue was whether MHL 81 could be used to appoint a guardian for a quadriplegic minor 207. The court had converted the MHL 81 proceeding into an application for a guardian of a minor under SCPA 17, finding it to be a more appropriate form of relief because the child was “alert, knowledgeable, articulate and understands the nature of this proceeding” as well as because of the reasons a guardian was sought 208. In dicta the court opined, without citing any authority, that MHL 81 was not intended as an alternative to SCPA 17 and 17-A 209.

In re Forcella involved an application for the appointment of an MHL 81 guardian for a six-year-old minor 210. In discussing the overlapping reach of SCPA 17-A and MHL 81 with respect to infants, the court suggested that the more flexible substantive standards of MHL 81 do not by themselves support the appointment of an MHL 81 guardian rather than an SCPA 17-A guardian for a

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203 Id. at 768–69, 913 N.Y.S.2d at 913.
204 See N.Y. SURR. CT. PROC. ACT § 1750 (McKinney 2012).
205 See, e.g., In re Nhan Thi Thanh Le, 168 Misc. 2d 384, 390, 637 N.Y.S.2d 614, 617 (Sup. Ct. Queens County 1995) (appointing coguardians for property management of incapacitated individual).
206 See N.Y MENTAL HYG. LAW §§ 1.03(6), 1.03(11), 81.03(k), 81.06(7) (McKinney 2012).
208 Id. at 212–13, 650 N.Y.S.2d at 956–57.
209 Id. at 213, 650 N.Y.S.2d at 957.
It has also been suggested that an SCPA 17-A guardianship is the exclusive remedy for traumatic brain injury because individuals with traumatic brain injury (“TBI”) had no remedy prior to the amendment of SCPA 17-A in 1989. That view, however, is not supported by case law. Prior to the 1989 amendment to SCPA 17-A and the enactment of MHL 81, an Article 78 committee or an Article 77 conservator could be appointed for such individuals. In re Moretti\(^{215}\) cuts against any argument that TBI cases had no remedy prior to the amendment of SCPA 17-A and/or that the enactment of SCPA 1750-a established the sole and exclusive remedy for such cases.\(^{216}\) In Moretti, a 1987 case, the court appointed a conservator for an eighteen-year-old with TBI.\(^{217}\) SCPA 1750-a(1)(a) covering TBI took effect on January 1, 1990.\(^{218}\) Three years later the conservator appointment in Moretti was converted to an MHL 81 guardianship (i.e., not an SCPA 17-A guardianship) on a motion by the conservator for an order establishing a supplemental needs trust.\(^{219}\) Notwithstanding the place in history of TBI cases, practitioners will understandably be confused about what choice to make regarding guardianship for a minor with a life-time disability.

D. Can a Court Tailor An SCPA 17-A Guardianship?

Two recent cases come to different conclusions on whether a guardianship tailored to the need of the incapacitated individual can be ordered under SCPA 17-A.\(^{220}\) In In re Guardianship of Yvette...
A., the father sought guardianship for his daughter Yvette, a blind, forty-four-year-old, mentally retarded woman.\textsuperscript{221} Rather than having the petition removed to Supreme Court for the purpose of commencing an MHL 81 guardianship, the court granted a restricted and conditional guardianship to the petitioner, relying on section 1758, which grants the court general jurisdiction to make whatever provisions it finds are “necessary or proper”\textsuperscript{222} to ensure the welfare of the mentally retarded person for whom the guardian was appointed,\textsuperscript{223} and section 1755, which contains “the power and authority to modify an existing order appointing a guardian of the person or property . . . to adapt the terms of the guardianship to new circumstances.”\textsuperscript{224}

The court also relied on the legislative history of the repealed 1969 version of SCPA 17-A, which stated that “[t]he bill will also enable a protective plan to be tailored to the individual needs of a retarded person by providing a broad flexibility in the types of guardianships that can be utilized”\textsuperscript{225} and the enacted 1989 version, which explicitly permits modifications.\textsuperscript{226} The court rejected arguments that Yvette’s unique needs required the tailoring and extensive guidance provisions provided by MHL 81, and concluded that “the legislative history of [A]rticle 81 does not suggest that it was further intended as an alternative to, or amendment of, SCPA [A]rticle 17 or 17-A.”\textsuperscript{227}

The court addressed concerns about the father’s awareness or

\textsuperscript{221} In re Yvette A., 27 Misc. 3d at 946–47, 898 N.Y.S.2d at 421.
\textsuperscript{222} See SCPA 1758.
\textsuperscript{223} In re Yvette A., 27 Misc. 3d at 950, 898 N.Y.S.2d at 424.
\textsuperscript{224} Id. at 950–51, 898 N.Y.S.2d at 424 (citing SCPA 1755).
\textsuperscript{225} See Governor’s Memoranda from Governor Nelson Rockefeller, Governor of the State of N.Y., reprinted in 1969 N.Y. LEGIS. ANN. 585, 586 (1969).
\textsuperscript{226} See SCPA 1755. This version, enacted in 1989 to include the needs of developmentally disabled persons allows for tailoring powers to meet the needs of such persons. Additionally, “[t]he court shall so modify the guardianship order . . . if the interests of justice will be best served including, but not limited to, facts showing the necessity for protecting the personal and/or financial interests of the mentally retarded . . . person.” Id.
\textsuperscript{227} In re Yvette A., 27 Misc. 3d at 950, 898 N.Y.S.2d at 424 (citing In re Lavecchia, 170 Misc. 2d 211, 650 N.Y.S.2d 955 (Sup. Ct. Rockland County 1996); In re Schulze I, 23 Misc. 3d 215, 869 N.Y.S.2d 896 (Sup. Ct. N.Y. County 2008)). Article 81 of the MHL was not intended as an alternative to an Article 17 and 17-A appointment of a guardian for a minor or a mentally retarded or developmentally disabled person, respectively. See In re Schulze I, 23 Misc. 3d at 217, 869 N.Y.S.2d at 897; see also In re Yvette A., 27 Misc. 3d at 950 n.18, 898 N.Y.S.2d at 424 n.18 (noting that a working group was convened by the Legislature in 1990 to review Article 17-A with respect to reforms drafted for Article 81 of the MHL, but no legislation resulted); Rose M. Bailly, \textit{Practice Commentaries}, C81.01, in N.Y. MENTAL HYG. LAW § 81.01 (McKinney 2011).
understanding of Yvette’s medical condition, and his sixteen-year absence from Yvette’s life, by imposing detailed initial and annual reporting requirements which required documented evidence of petitioner’s ongoing involvement in Yvette’s life and daily care.  

The court also imposed restrictions on the guardian’s authority to move Yvette without prior court approval, and prohibited the guardian from discharging the Willowbrook Consumer Advisory Board (“CAB”) as Yvette’s advocate, a relationship established in a prior proceeding.  

The court also imposed additional enumerated restrictions on the guardian’s authority over property.  

Unlike the court deciding In re Yvette, which found wide discretion and authority to tailor guardianships to individual needs under SCPA 17-A, the court in In re Chaim A.K. concluded that it lacked the statutory authority to grant a guardian anything less than complete and virtually indelible rights over the individual.

The court refused to grant the parents’ petition for an SCPA 17-A guardianship, finding that a mildly mentally retarded young adult, dually diagnosed with mental illness and developmental disabilities, required limited but not complete supervision and guidance.

Expressing concern that over time, the young man’s complex condition might improve allowing him to regain some or all authority over his own life, the court held that guardianship required the statutory flexibility provided in an MHL 81 proceeding, but unavailable under SCPA 17-A.

To demonstrate its conviction that SCPA 17-A provides no option for tailoring a guardianship to meet Chaim’s needs, the court evaluated the appropriateness of appointing a guardian.

The court found SCPA 17-A’s reliance on a diagnosis of mental retardation or a developmental disability suggested the

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228 In re Yvette A., 27 Misc. 3d at 948, 951, 898 N.Y.S.2d at 422, 425.
229 See id. at 947 n.3, 952, 898 N.Y.S.2d at 422 n.3, 425 (“The CAB is an independent agency established pursuant to the provisions of sections S and W of Appendix A to the final judgment entered on May 5, 1975 in the Willowbrook class action.  A copy of the order establishing the CAB is reported at New York State Assn. for Retarded Children, Inc. v. Carey (393 F. Supp. 715 [E.D.N.Y. 1975]).  The mandate of the CAB is to act in loco parentis and to provide necessary advocacy for Willowbrook class members above the treatment and services provided to members by the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD) for as long as any such class member shall live.”) (citing N.Y. Ass’n for Retarded Children v. Cuomo, No. 72 Civ. 356, 357 at 9 (E.D.N.Y. Mar. 11, 1993)).
232 Id. at 849–50, 885 N.Y.S.2d at 591.
233 Id. at 842, 885 N.Y.S.2d at 591.
234 Id. at 849–50, 885 N.Y.S.2d at 590.
“appointment under article 17-A may not be in the ‘best interest’ of the subject”\textsuperscript{235} because when his limitations were complicated by his mental illness and “not necessarily attributable to mental retardation or developmental disability.”\textsuperscript{236} The court questioned the extent to which “the shortcomings of [SCPA 17-A] require that it be narrowly construed where mental illness, as well as mental retardation or developmental disability, may be the reason a guardian is required.”\textsuperscript{237} While Chaim’s mental retardation, complicated by his mental illness and his own admission that he wanted his parents to make medical decisions for him,\textsuperscript{238} rendered him in need of a guardian, the court chose a narrow interpretation of the statute, providing for “no gradations and no described or circumscribed powers [and required the appointment of a guardian] . . . with seemingly unlimited power.”\textsuperscript{239} Noting that MHL 81 “anticipates closely tailored guardianships, granting the guardian . . . no more power than is absolutely necessary under the circumstances . . . and aims to preserve the AIP’s autonomy to the greatest degree possible,”\textsuperscript{240} the court found no authority under SCPA 17-A to grant his parents a limited guardianship over Chaim.\textsuperscript{241}

Having established that SCPA 17-A provisions prevented appointing Chaim’s parents as guardians for healthcare decision making only, the court felt equally constrained by what it considered the “amorphous ‘best interests standard’”\textsuperscript{242} and the lack of procedural protections available for monitoring and modifying the guardianship over time.\textsuperscript{243} Comparing the extensive reporting requirements and guidelines available under MHL 81 to the lack of similar provisions under SCPA 17, the court noted that “[A]rticle 17-A guardians have no duty to and, as a matter of practice, never file any report once their appointment has been made.”\textsuperscript{244}

The court was concerned that Chaim’s best interests would be
thwarted as his condition improved over the course of his lifetime, as “the absence of any continuing judicial oversight raises another red flag about the suitability of [A]rticle 17-A.”

The court denied the parents’ petition without prejudice so that an MHL section 81 proceeding could commence.

Again, these cases may leave practitioners and clients confused about how to proceed in the best interest of the incapacitated individual.

E. Can a Court Compensate SCPA 17-A Guardians?

The Third Department recently held that an SCPA 17-A guardian is not entitled to compensation because the statute is silent on the subject, and the authority to award fees based on MHL section 81 cannot be imputed to SCPA 17-A. The parents of Jon Z., a young man with a diagnosis of autism, were appointed his co-guardians under SCPA 17-A. The parents’ co-guardianship was subsequently terminated and two neutral co-guardians were appointed because of “the the antipathy, even hatred, of the parents for each other.”

The new guardians subsequently sought compensation for their services, to be paid by the parents or the son’s supplemental needs trust. The Surrogate’s Court awarded compensation payable from the trust, holding that the parents were not liable for the guardians’ fees. The trustee appealed, as did the co-guardians on the part of decision about the parents’ liability.

The Third Department held that SCPA 17-A provided no statutory authority upon which to base an award. Relying on general rule of statutory construction that “when enacting a statute

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245 Id. at 848, 885 N.Y.S.2d at 590.
246 Id. at 850, 885 N.Y.S.2d at 591.
249 Id. at 1240(A), 899 N.Y.S.2d at 60, 2009 WL 2601373, at *3.
251 Id. at 925–26, 907 N.Y.S.2d at 597.
252 Id. at 924, 907 N.Y.S.2d at 596.
254 Id. at 698, 927 N.Y.S.2d at 173. Consequently, the court did not need to reach the other issues raised on appeal, namely, the reasonableness of the award and the appropriate source of payment. Id.
the Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject,”255 and the fact that other New York guardianship statutes allow compensation, the court determined that SCPA 17-A’s silence was “a reasoned and intentional decision.”256 The court also concluded that the Surrogate Court’s reliance on MHL 81 was inappropriate.257

The lack of authority to compensate guardians is troubling, particularly when the statute envisions that guardianship will be overseen by corporate guardians and individuals other than a parent who, it could be assumed, are acting out of love and affection for their child rather than in return for a fee.258

V. CONCLUSION

Because SCPA 17-A and MHL 81 had their beginnings at different times, 1969 and 1992 respectively, and with different motivations and approaches to guardianship, they are now tripping over one another. Courts are debating the constitutionality of SCPA 17-A in light of different treatment of individuals under the respective statutes and whether the provisions and requirements of MHL section 81 which are absent in SCPA 17-A can be imputed into the older statute. Given the challenges posed by these questions for courts, practitioners and advocates, shouldn’t we be talking about how best to address these concerns?

256 In re Jonathan EE., 86 A.D.3d at 698, 927 N.Y.S.2d at 173.
257 Id. at 698, 927 N.Y.S.2d at 173.
258 See, e.g., Mantella v. Mantella, 268 A.D.2d 852, 853, 701 N.Y.S.2d 715, 716 (App. Div. 3d Dep’t 2000) (noting the presumption, when parties are related, that services are rendered out of love without expectation of remuneration); Leonard Nursing Home, Inc. v. Kay, No. 45-1-2002-1242, 2003 WL 1571579, at *2 (Sup. Ct. Saratoga County Mar. 13, 2003) (holding the money transfers by the decedent’s daughter-attorney in fact fraudulent because it was without fair consideration).