

DEPARTMENT OF SOCIAL SERVICES

40 NORTH PEARL STREET, ALBANY, NEW YORK 12243-0001

CESAR A. PERALES
Commissioner



INFORMATIONAL LETTER

TRANSMITTAL: 89 INF-059

DIVISION: Adult Services

TO: Commissioners of
Social Services

DATE: November 16, 1989

SUBJECT: Appointment of Guardians of Mentally Retarded and
Developmentally Disabled Persons

SUGGESTED DISTRIBUTION: County and Agency Attorneys
Directors of Social Services
Protective Services for Adults Staff
Staff Development Coordinators

CONTACT PERSON: Any questions concerning this release should be
directed to the appropriate Adult Services
Representative at 1-800-342-3715 as follows:

- Sharon Lane, ext. 432-2985
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ATTACHMENTS: Article 17-A of the Surrogate's Court Procedure Act:
Guardians of Mentally Retarded and Developmentally
Disabled Persons (Chapter 675 of the Laws of 1989) –
[Now available on-line]

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
88 ADM-23 83 ADM-15		Part 457	473 SSL Surrogate's Court Procedure Act		

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 Judith Berek
 Deputy Commissioner
 Division of Adult Services

STATE OF NEW YORK

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1989-1990 Regular Sessions

IN SENATE

March 22, 1989

Introduced by Sen. SPANO -- (at request of the Commission on Quality of Care for the Mentally Disabled) -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the surrogate's court procedure act, in relation to the appointment of guardians for persons who are mentally retarded and developmentally disabled and repealing certain provisions of such act relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

- 1 Section 1. Subdivision 4 of section 1705 of the surrogate's court
- 2 procedure act is REPEALED.
- 3 § 2. Article 17-A of the surrogate's court procedure act is REPEALED
- 4 and a new article 17-A is added to read as follows:
- 5 ARTICLE 17-A
- 6 GUARDIANS OF MENTALLY RETARDED AND
- 7 DEVELOPMENTALLY DISABLED PERSONS
- 8 Section 1750. Guardianship of mentally retarded persons.
- 9 1750-a. Guardianship of developmentally disabled persons.
- 10 1751. Petition for appointment; by whom made.
- 11 1752. Petition for appointment; contents.
- 12 1753. Persons to be served.
- 13 1754. Hearing and trial.
- 14 1755. Modification order.
- 15 1756. Limited guardian of the property.
- 16 1757. Standby guardian.
- 17 1758. Court jurisdiction.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [] is old law to be omitted.

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1 1759. Duration of guardianship.
2 1760. Corporate guardianship.
3 1761. Application of other provisions.
4 § 1750. Guardianship of mentally retarded persons
5 When it shall appear to the satisfaction of the court that a person is
6 a mentally retarded person, the court is authorized to appoint a guar-
7 dian of the person or of the property or of both if such appointment of
8 a guardian or guardians is in the best interest of the mentally retarded
9 person. Such appointment shall be made pursuant to the provisions of
10 this article, provided however that the provisions of section seventeen
11 hundred fifty-a of this article shall not apply to the appointment of a
12 guardian or guardians of a mentally retarded person. For the purposes of
13 this article, a mentally retarded person is a person who has been certi-
14 fied by one licensed physician and one licensed psychologist, or by two
15 licensed physicians at least one of whom is familiar with or has profes-
16 sional knowledge in the care and treatment of persons with mental retar-
17 dation, having qualifications to make such certification, as being inca-
18 pable to manage him or herself and/or his or her affairs by reason of
19 mental retardation and that such condition is permanent in nature or
20 likely to continue indefinitely.
21 § 1750-a. Guardianship of developmentally disabled persons
22 When it shall appear to the satisfaction of the court that a person is
23 a developmentally disabled person, the court is authorized to appoint a
24 guardian of the person or of the property or of both if such appointment
25 of a guardian or guardians is in the best interest of the developmen-
26 tally disabled person. Such appointments should be made pursuant to the
27 provisions of this article, provided however that the provisions of sec-
28 tion seventeen hundred fifty of this article shall not apply to the ap-
29 pointment of a guardian or guardians of a developmentally disabled
30 person. For the purposes of this article, a developmentally disabled
31 person is a person who has been certified by one licensed physician and
32 one licensed psychologist, or by two licensed physicians at least one of
33 whom is familiar with or has professional knowledge in the care and
34 treatment of persons with developmental disabilities, having qualifica-
35 tions to make such certification, as having an impaired ability to un-
36 derstand and appreciate the nature and consequences of decisions which
37 result in such person being incapable of managing himself or herself
38 and/or his or her affairs by reason of developmental disability and that
39 such condition is permanent in nature or likely to continue indefin-
40 itely, and whose disability:
41 1. is attributable to cerebral palsy, epilepsy, neurological impair-
42 ment, autism or traumatic head injury which, notwithstanding any other
43 provisions of this chapter, originates after the age of eighteen;
44 2. is attributable to any other condition of a person found to be
45 closely related to mental retardation, because such condition results
46 in similar impairment of general intellectual functioning or adaptive
47 behavior to that of mentally retarded persons; or
48 3. is attributable to dyslexia resulting from a disability described
49 in subdivision one or two of this section or from mental retardation;
50 and
51 4. originates before such person attains age eighteen.
52 § 1751. Petition for appointment; by whom made
53 A petition for the appointment of a guardian of the person or
54 property, or both, of a mentally retarded or developmentally disabled
55 person may be made by a parent, any interested person eighteen years of

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1 age or older on behalf of the mentally retarded or developmentally disa-
2 bled person including a corporation authorized to serve as a guardian as
3 provided for by this article, or by the mentally retarded or developmen-
4 tally disabled person when such person is eighteen years of age or
5 older.

6 § 1752. Petition for appointment; contents

7 The petition for the appointment of a guardian shall be filed with the
8 court on forms to be prescribed by the state chief administrator of the
9 courts. Such petition for a guardian of a mentally retarded or develop-
10 mentally disabled person shall include, but not be limited to, the fol-
11 lowing information:

12 1. the full name, date of birth and residence of the mentally retarded
13 or developmentally disabled person;

14 2. the name, age, address and relationship or interest of the peti-
15 tioner to the mentally retarded or developmentally disabled person;

16 3. the names of the father, the mother, children, adult siblings if
17 eighteen years of age or older, the spouse and primary care physician if
18 other than a physician having submitted a certification with the peti-
19 tion, if any, of the mentally retarded or developmentally disabled per-
20 son and whether or not they are living, and if living, their addresses
21 and the names and addresses of the nearest distributees of full age who
22 are domiciliaries, if both parents are dead;

23 4. the name and address of the person with whom the mentally retarded
24 or developmentally disabled person resides if other than the parents or
25 spouse;

26 5. the name, age, address, education and other qualifications, and
27 consent of the proposed guardian, standby and alternate guardian, if
28 other than the parent, spouse, adult child if eighteen years of age or
29 older or adult sibling if eighteen years of age or older, and if such
30 parent, spouse or adult child be living, why any of them should not be
31 appointed guardian;

32 6. the estimated value of real and personal property and the annual
33 income therefrom and any other income including governmental entitle-
34 ments to which the mentally retarded or developmentally disabled person
35 is entitled; and

36 7. any circumstances which the court should consider in determining
37 whether it is in the best interests of the mentally retarded or develop-
38 mentally disabled person not be present at the hearing if conducted.

39 § 1753. Persons to be served

40 1. Upon presentation of the petition, process shall issue to:

41 (a) the parent or parents, adult children, if the petitioner is other
42 than a parent, adult siblings, if the petitioner is other than a parent,
43 and if the mentally retarded or developmentally disabled person is mar-
44 ried, to the spouse, if their residences are known;

45 (b) the person having care and custody of the mentally retarded or
46 developmentally disabled person, or with whom such person resides if
47 other than the parents or spouse; and

48 (c) the mentally retarded or developmentally disabled person if four-
49 teen years of age or older for whom an application has been made in such
50 person's behalf.

51 2. Upon presentation of the petition, notice of such petition shall be
52 served by certified mail to:

53 (a) the adult siblings if the petitioner is a parent, and adult chil-
54 dren if the petitioner is a parent;

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- 1 (b) the mental hygiene legal service in the judicial department where
2 the facility, as defined in subdivision (a) of section 47.01 of the men-
3 tal hygiene law, is located if the mentally retarded or developmentally
4 disabled person resides in such a facility;
5 (c) in all cases, to the director in charge of a facility licensed or
6 operated by an agency of the state of New York, if the mentally retarded
7 or developmentally disabled person resides in such facility;
8 (d) one other person if designated in writing by the mentally retarded
9 or developmentally disabled person; and
10 (e) such other persons as the court may deem proper.
11 1. No process or notice shall be necessary to a parent, adult child,
12 adult sibling, or spouse of the mentally retarded or developmentally
13 disabled person who has been declared by a court as being incompetent.
14 In addition, no process or notice shall be necessary to a spouse who is
15 divorced from the mentally retarded or developmentally disabled person,
16 and to a parent, adult child, adult sibling when it shall appear to the
17 satisfaction of the court that such person or persons have abandoned the
18 mentally retarded or developmentally disabled person.
19 § 1754. Hearing and trial
20 1. Upon a petition for the appointment of a guardian of a mentally
21 retarded or developmentally disabled person eighteen years of age or ol-
22 der, the court shall conduct a hearing at which such person shall have
23 the right to jury trial. The right to a jury trial shall be deemed
24 waived by failure to make a demand therefor. The court may in its
25 discretion dispense with a hearing for the appointment of a guardian,
26 and may in its discretion appoint a guardian ad litem, or the mental hy-
27 giene legal service if such person is a resident of a mental hygiene
28 facility as defined in subdivision (a) of section 47.01 of the mental
29 hygiene law, to recommend whether the appointment of a guardian as
30 proposed in the application is in the best interest of the mentally
31 retarded or developmentally disabled person, provided however, that such
32 application has been made by:
33 (a) both parents or the survivor; or
34 (b) one parent and the consent of the other parent; or
35 (c) any interested party and the consent of each parent.
36 2. When it shall appear to the satisfaction of the court that a parent
37 or parents not joining in or consenting to the application have aban-
38 doned the mentally retarded or developmentally disabled person or are
39 not otherwise required to receive notice, the court may dispense with
40 such parent's consent in determining the need to conduct a hearing for a
41 person under the age of eighteen. However, if the consent of both
42 parents or the surviving parent is dispensed with by the court, a hear-
43 ing shall be held on the application.
44 3. If a hearing is conducted, the mentally retarded or developmentally
45 disabled person shall be present unless it shall appear to the satisfac-
46 tion of the court on the certification of the certifying physician that
47 the mentally retarded or developmentally disabled person is medically
48 incapable of being present to the extent that attendance is likely to
49 result in physical harm to such mentally retarded or developmentally
50 disabled person, or under such other circumstances which the court finds
51 would not be in the best interest of the mentally retarded or develop-
52 mentally disabled person.
53 4. If either a hearing is dispensed with pursuant to subdivisions one
54 and two of this section or the mentally retarded or developmentally dis-
55 abled person is not present at the hearing pursuant to subdivision three

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1 of this section, the court may appoint a guardian ad litem if no mental
2 hygiene legal service attorney is authorized to act on behalf of the
3 mentally retarded or developmentally disabled person. The guardian ad
4 litem or mental hygiene legal service attorney, if appointed, shall per-
5 sonally interview the mentally retarded or developmentally disabled per-
6 son and shall submit a written report to the court.

7 5. If, upon conclusion of such hearing or jury trial or if none be
8 held upon the application, the court is satisfied that the best in-
9 terests of the mentally retarded or developmentally disabled person will
10 be promoted by the appointment of a guardian of the person or property,
11 or both, it shall make a decree naming such person or persons to serve
12 as such guardians.

13 § 1755. Modification order

14 Any mentally retarded or developmentally disabled person eighteen
15 years of age or older, or any person on behalf of any mentally retarded
16 or developmentally disabled person for whom a guardian has been ap-
17 pointed, may apply to the court having jurisdiction over the guardian-
18 ship order requesting modification of such order in order to protect the
19 mentally retarded or developmentally disabled person's financial situa-
20 tion and/or his or her personal interests. The court may, upon receipt
21 of any such request to modify the guardianship order, appoint a guardian
22 ad litem. The court shall so modify the guardianship order if in its
23 judgment the interests of the guardian are adverse to those of the men-
24 tally retarded or developmentally disabled person or if the interests of
25 justice will be best served including, but not limited to, facts showing
26 the necessity for protecting the personal and/or financial interests of
27 the mentally retarded or developmentally disabled person.

28 § 1756. Limited guardian of the property

29 When it shall appear to the satisfaction of the court that such men-
30 tally retarded or developmentally disabled person for whom an applica-
31 tion for guardianship is made is eighteen years of age or older and is
32 wholly or substantially self-supporting by means of his or her wages or
33 earnings from employment, the court is authorized and empowered to ap-
34 point a limited guardian of the property of such mentally retarded or
35 developmentally disabled person who shall receive, manage, disburse and
36 account for only such property of said mentally retarded or developmen-
37 tally disabled person as shall be received from other than the wages or
38 earnings of said person.

39 The mentally retarded or developmentally disabled person for whom a
40 limited guardian of the property has been appointed shall have the right
41 to receive and expend any and all wages or other earnings of his or her
42 employment and shall have the power to contract or legally bind himself
43 or herself for such sum of money not exceeding one month's wages or
44 earnings from such employment or three hundred dollars, whichever is
45 greater, or as otherwise authorized by the court.

46 § 1757. Standby guardian

47 1. Upon application, a standby guardian of the person or property or
48 both of a mentally retarded or developmentally disabled person may be
49 appointed by the court. The court may also, upon application, appoint an
50 alternate and/or successive alternates to such standby guardian, to act
51 if such standby guardian shall die, or become incapacitated, or shall
52 renounce. Such appointments by the court shall be made in accordance
53 with the provisions of this article.

54 2. Such standby guardian, or alternate in the event of such such
55 standby guardian's death, incapacity or renunciation, shall without fur-

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1 ther proceedings be empowered to assume the duties of his or her office
2 immediately upon death, renunciation or adjudication of incompetency of
3 the guardian or standby guardian appointed pursuant to this article,
4 subject only to confirmation of his or her appointment by the court
5 within sixty days following assumption of his or her duties of such
6 office. Before confirming the appointment of the standby guardian or al-
7 ternate guardian, the court may conduct a hearing pursuant to section
8 seventeen hundred fifty-four of this article upon petition by anyone on
9 behalf of the mentally retarded or developmentally disabled person or
10 the mentally retarded or developmentally disabled person if such person
11 is eighteen years of age or older, or upon its discretion.

12 § 1758. Court jurisdiction

13 After the appointment of a guardian, standby guardian or alternate
14 guardians, the court shall have and retain general jurisdiction over the
15 mentally retarded or developmentally disabled person for whom such guar-
16 dian shall have been appointed, to take of its own motion or to enter-
17 tain and adjudicate such steps and proceedings relating to such guar-
18 dian, standby, or alternate guardianship as may be deemed necessary or
19 proper for the welfare of such mentally retarded or developmentally dis-
20 abled person.

21 § 1759. Duration of guardianship

22 1. Such guardianship shall not terminate at the age of majority or
23 marriage of such mentally retarded or developmentally disabled person
24 but shall continue during the life of such person, or until terminated
25 by the court.

26 2. A person eighteen years or older for whom such a guardian has been
27 previously appointed or anyone, including the guardian, on behalf of a
28 mentally retarded or developmentally disabled person for whom a guardian
29 has been appointed may petition the court which made such appointment or
30 the court in his or her county of residence to have the guardian dis-
31 charged and a successor appointed, or to have the guardian of the
32 property designated as a limited guardian of the property, or to have
33 the guardianship order modified, dissolved or otherwise amended. Upon
34 such a petition for review, the court shall conduct a hearing pursuant
35 to section seventeen hundred fifty-four of this article.

36 3. Upon marriage of such mentally retarded or developmentally disabled
37 person for whom such a guardian has been appointed, the court shall,
38 upon request of the mentally retarded or developmentally disabled per-
39 son, spouse, or any other person acting on behalf of the mentally
40 retarded or developmentally disabled person, review the need, if any, to
41 modify, dissolve or otherwise amend the guardianship order including,
42 but not limited to, the appointment of the spouse as standby guardian.
43 The court, in its discretion, may conduct such review pursuant to sec-
44 tion seventeen hundred fifty-four of this article.

45 § 1760. Corporate guardianship

46 No corporation may be appointed guardian of the person under the
47 provisions of this article, except that a non-profit corporation organ-
48 ized and existing under the laws of the state of New York and having the
49 corporate power to act as guardian of mentally retarded or developmen-
50 tally disabled persons may be appointed as the guardian of the person
51 only of such mentally retarded or developmentally disabled person.

52 § 1761. Application of other provisions

53 To the extent that the context thereof shall admit, the provisions of
54 article seventeen of this act shall apply to all proceedings under this
55 article with the same force and effect as if an "infant", as therein

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1 referred to, were a "mentally retarded" or "developmentally disabled
2 person" as herein defined, and a "guardian" as therein referred to were
3 a "guardian of the mentally retarded person" or a "guardian of a
4 developmentally disabled person" as herein provided for.

5 § 3. Continuation of guardians of the mentally retarded. All guardians
6 of the mentally retarded appointed pursuant to article 17-A of the
7 surrogate's court procedure act, proposed to be repealed by section two
8 of this act, shall continue to serve as guardians pursuant to the new
9 article 17-A of such act as added by section two of this act provided
10 however, that any orders, determinations or decisions of the appointing
11 or a subsequent court, shall continue in force and effect until duly
12 modified or abrogated by a judge pursuant to the new article 17-A of
13 such act.

14 § 4. This act shall take effect on the first day of January next suc-
15 ceeding the date on which it shall have become a law.

REPEAL NOTE.--Subdivision 4 of section 1705 of the surrogate's court
procedure act, proposed to be repealed by section one of this act, makes
provision for notification of the mental hygiene legal service, the
director of the facility and other persons when the mentally retarded
person is a resident in a mental hygiene facility. This provision would
be replaced by a similar provision in the new article 17-A of the
surrogate's court procedure act, as added by section two of this act, to
consolidate procedures specific to the appointment of a guardian for a
mentally retarded or developmentally disabled person within a single
article. Article 17-A of the surrogate's court procedure act, proposed
to be repealed by section two of this act, makes provisions for the ap-
pointment of guardians of mentally retarded persons. It would be
replaced by a new article 17-A in the surrogate's court procedure act
which would allow other developmentally disabled persons to receive the
services of a court-appointed guardian as well and would more clearly
prescribe the procedures for the appointment of a guardian and the
rights of the mentally retarded or developmentally disabled person.