



# ARTICLE 17-A OF THE SURROGATE'S COURT PROCEDURE ACT *Guide*

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## **ARTICLE 17-A OF THE SURROGATE'S COURT PROCEDURE ACT**

The right to self-determination is a fundamental principle of human rights. The exercise of these rights is intertwined in the decisions we make in managing our daily lives. When functional limitations impair the ability of our loved ones to be self-determining, the law provides us with the ability to make decisions on their behalf.

Individuals certified as having developmental or intellectual disabilities, prior to age 22, which substantially impairs their ability to manage their property or to make personal needs decisions can find relief through an Article 17-A guardianship proceeding commenced in the Surrogate's Court. These individuals are known as the Respondent in the proceeding.

Additionally, individuals whose functional limitations arise from a traumatic brain injury, occurring at any age, can also utilize this form of guardianship proceeding.

### **THE GUARDIANSHIP PROCEEDING**

A 17-A Guardianship proceeding is commenced by the completion and submission of the following:

1. Verified Petition with a Guardian's Oath and Designation;
2. OCFS Request for Information Form (3909);
3. Either: Two (2) Physician's Affirmation (Certifications), or One (1) Physician's Affirmation (Certification) and One (1) Licensed Psychologist's Affidavit; and
4. Birth Certificate of the Respondent (original/certified copy).

A Petition can be filed by a parent or by any interested person who is 18 years of age or older in the Surrogate's Court for appointment as Guardian of the Person, Guardian of the Property, Guardian of the Person and Property or Limited Guardian of the Property.

In appropriate cases the following additional items must be filed:

1. Consent and Oath and Designations of the Standby and/or Alternate Standby Guardian;
2. Waiver, Renunciation and Consent of the parent, spouse, adult siblings and adult children of the Respondent who is not petitioning to be Guardian;
3. Fingerprints of Guardians;

4. Death Certificate of deceased natural parent(s) (Certified copy);
5. Affidavit of Proposed Guardian; and
6. Psycho-Social Evaluations, Psychological Reports, IEPs and Standardized Testing.

The Surrogate reviews the Petition and issues a Citation setting a return date to establish jurisdiction over the Respondent and/or setting a hearing date. The Citation is then personally served upon the Respondent and other parties that have not filed a Consent or Waiver who have an interest in the proceeding as required by statute or as designated by the Court. Generally, only parties that object to the relief requested in the Petition, need to appear at the Citation Return Date.

In certain cases, a Guardian ad Litem (GAL) will be appointed to represent the best interests of the Respondent and investigate the allegations for the need for a guardian. The GAL is the advocate for the respondent, but he/she is not the respondent's attorney. The GAL is appointed to evaluate whether the guardianship is in the best interest of the respondent and offer a report and recommendation to the Court. The GAL will interview all the parties to the proceedings. The GAL will investigate the allegations in the Petition and make a written report to the Court. The report will include recommendations regarding the Respondent and the proceedings. This report will assist the Court in deciding whether to appoint a guardian. The fee for the GAL's services will typically be awarded in the discretion of the Court.

### **STANDARDIZED TESTING**

The following is a list of standardized tests used and accepted by the Surrogate's Court in the evaluation of intellectually disabled individuals:

Cattell Infant Intelligence Scale  
Stanford-Binet Intelligence Scale  
Wechsler Adult Intelligence Scale-Revised  
Wechsler Intelligence Scale for Children  
Bailey Scales of Infant Development  
Vineland Adaptive Behavior Scale  
AAMD Adaptive Behavior Scale  
Maturity Scale  
Leiter International Performance IQ  
Merrill Palmer Scale of Mental Tests  
Perkins-Binet Intelligence Tests

The above list does not include projective instruments (personality assessments), but it is the most likely group of tests to yield data about intellectual status or classification.

### **THE HEARING**

Hearings are generally held in all cases. It is within the discretion of the court based on the papers filed, if a hearing will be held. Most of the time there will be a hearing. The Petitioner, Respondent and Proposed Guardians are required to appear at the hearing. At the hearing, the Petitioner testifies as to the need for guardianship, who they desire to be appointed as Guardian and the powers requested. The GAL, if appointed, testifies as to his/her findings and recommendations. Other witnesses may also be called. The Court typically states its conclusions at the end of the hearing in a Decree and/or Decision.

### **TESTIFYING IN COURT**

1. Be truthful.
2. Do not guess, speculate or assume.
3. Pause after each question to formulate the main points of your answer. Do not answer so quickly that your attorney cannot object, if necessary.
4. Listen carefully to the question being asked. Concentrate and answer only the question being asked.
5. Do not volunteer information. Resist the urge to answer the question not asked.
6. Do not be concerned if you cannot answer a question. Say, "I don't know," or "I don't remember."
7. If you remember only part of the answer, state what you remember and say that you cannot remember the rest.
8. Do not think out loud.
9. Do not try to be funny, sarcastic, or say something that depends on the tone of your voice for its meaning.
10. If you do not understand a question or words in a question, do not hesitate to say so.
11. Try to maintain a confident, calm appearance during, before, and after your testimony.
12. If you are shown documents, take ample time to read each document prior to answering any questions about it. Do not comment about a document you are shown, except to answer the questions asked.
13. If there are any abnormalities evident on the face of the document you are shown,

- do not hesitate to refer to them if they affect your answer to any question. Be prepared to state how the irregularity affects the answer.
14. Counsel may object to questions. When an objection is made do not answer until you are advised to by your attorney or the judge. If the judge sustains the objection, do not answer the question. If the judge overrules the objection, you are to answer the question.
  15. Most importantly do not become flustered. No one expects a witness to be perfect. Just listen to your attorney's advice and do the best you can.

### **POST HEARING**

Once the Surrogate determines that the Respondent needs a Guardian, a Decree and/or Decision and Letters of Guardianship of the Person and/or Property and in applicable cases, Standby Guardianship and Alternate Standby Guardianship are issued by the Court. Letters of Guardianship continue in full force and effect for the duration of the Respondent's life. The actual printed Letters may expire, and the Guardian would just have to obtain recent Letters. The Guardian also has the authority to make all decisions with respect to the medical and dental needs of the Respondent and in cases where the Respondent is intellectually disabled, end-of life decisions for the Respondent. In cases where Letter of Guardianship of the Property are issued, any funds of the Respondent that come into the Property Guardian's hands must be deposited immediately in an interest-bearing account in the bank and branch designated by the Surrogate's Court. The Guardianship account is held jointly with the Chief Clerk of the Surrogate's Courts and the Property Guardian and all checks for deposit must be submitted to the Guardianship Department for endorsement. The Property Guardian is not permitted to act alone. In order for the Property Guardian to withdraw funds from the Guardianship account, a withdrawal application must be filed with the Surrogate's Court.

### **ANNUAL ACCOUNTING**

Guardians of the Property must file an annual accounting with the Surrogate's Court within 30 days of the anniversary of their appointment. The account must document all actions taken in regard to the property of the guardianship, including financial statements from each financial institution and copies of court orders authorizing any withdrawals. Property Guardians must maintain accurate records of all actions taken and should be able to produce documentation supporting their records. The failure to file account can lead to a suspension of the Guardian which they are no longer permitted to act or may even result in the removal of the Guardian and a successor is appointed.

## **ASSET PROTECTION PLANNING**

Special Needs Trusts can be used to protect the assets, such as an inheritance or personal injury settlement, of a loved one with intellectual and/or developmental disabilities when they are already in receipt of government benefits. An application to the Surrogate's Court to establish and fund a Special Needs Trust can be brought after the Guardian of the Property has been appointed in the initial Article 17A proceeding. The petition to establish the Special Needs Trust should be made as soon as possible to protect the government benefits of your loved one.

## **TIMELINE**

The following is an estimated timeline of a typical guardianship case. This is merely a guideline. It is often beyond the control of Petitioner's attorney. The Courts, in large part, control the time frames and it is not unusual for the timeline to be longer than expected. The timeline is affected by when the completion of medical provider's affirmations/affidavits happen and the results of the 3909 background check that must be completed in order to file the Petition. Petitioners should also expect the possibility of amending or supplementing information on a case-by-case basis after the Petition is filed.

From Retention of Counsel to Filing of Petition	4 - 6 weeks
Citation Return Date (Citation)	6 - 8 weeks after filing Petition
Guardianship Hearing	4 - 6 weeks after Citation Return Date
Decree, Decision, Letters of Guardianship	1-2 weeks after Hearing

## **ARTICLE 17-A GLOSSARY**

**Accounting.** The rendering of a true and accurate report of the Guardian's activities to the Court, complete with copies of invoices, cancelled checks, reports and other documentary evidence substantiating the report. The accounting is submitted to the Court and is reviewed by an appointed examiner. Failure to account can result in the removal of a guardian.

**Affidavit of Guardian.** This is a specified affidavit to be sworn to and signed by the proposed Guardian, if the proposed Guardian is not the parent of the subject of the proceeding.

**Bond.** Evidence that the company issuing the bond insures the performance of the guardian's duties. The bond protects the incapacitated person from the misdeeds of the guardian. Generally, the funds in a 17-A proceeding are under the joint control of the Court and the Guardian, and because of this generally the bond is not required.

**Certified copy.** A copy of a document or record signed and certified by the officer who has custody of the original document. For example, the court clerk will certify copies of the guardian's order of appointment.

**Certificate of Letters of Guardianship.** The written authority issued by the court authorizing or directing the 17-A Guardian to carry out the duties and responsibility of his or her appointment.

**Certifying Physician.** A licensed physician who provides a written specific determination as to the whether the subject of the guardianship proceeding has the capacity to make health care decisions and other decisions for him or herself.

**Certifying Psychologist.** A licensed psychologist who provides a written specific determination as to the whether the subject of the guardianship proceeding has the capacity to make health care decisions and other decisions for him or herself.

**Citation.** Taking formal steps to advise interested persons of the guardianship proceeding, the Surrogate's Court issues a Citation advising certain parties of the place and date of the hearing. This Citation must be served on the required parties by the Petitioner or their attorney. The Citation is served personally on some parties, and by mail on other parties.

**Decision.** A determination by the court arrived after it has considered the facts and applicable law.

**Decree.** A document issued by the Court if the Court is satisfied, after the hearing, reflecting the need for the guardian and the identity of the guardians and stand by guardian if applicable.

**Domicile.** A fixed, permanent and principal home to which a person wherever temporarily located, always intends to return.

**Examiner.** A person appointed by the presiding judge of each appellate division in each of the four judicial departments of New York to examine the annual reports submitted by guardians.

**Exhibit.** An item that is offered to the court for its inspection.

**Fingerprints.** Whenever the proposed guardian is not the parent of the subject of the proceeding, the Court will require that the proposed guardian be finger-printed and the fingerprints are submitted to the Court.

**Hearing.** A proceeding of relative formality in which issues are considered and witnesses are heard by a judge; the hearing generally results in a final decision on those issues. The Court now requires the appearance of the person over whom guardianship is sought, unless attending the proceeding would endanger that person.

**Incapacitated Person or Ward.** A person who is not able to adequately protect his or her rights

**Limited Guardian of the Property.** This is a special form of guardianship brought where an adult with mental retardation is able to maintain gainful employment but needs some assistance in managing his or her affairs. This allows the individual to enter into certain limited contracts and to receive, manage, and spend their wages, while the guardian manages all other property.

**Mental Hygiene Legal Service.** Is a legal service organized under article 47 of the mental hygiene law to provide legal assistance to patients or residents of certain facilities within the state.

**Motion.** An oral or written application or request to the court to determine a controversy.

**Notice.** As to a guardianship proceeding, taking formal steps to advise interested persons of the guardianship proceeding.

**OCFS Request for Information Form 3909.** This two-page form that is required in all Guardianship proceedings provides information allowing proper inquiry to be made of the New York State Central Register of Child Abuse and Maltreatment. This form is required whether or not the proposed guardian or any adult over 18 living with the proposed guardian had been the subject of any reports of maltreatment of abuse. All proposed guardians, standby guardians, and members of their households over 18 are subject to this inquiry. This form requires the provision of all addresses for each such individual since the later of turning 18 or 1973 through the current year, as well as all maiden names and alias of any of those parties.

**Order.** An official command by the court requiring, allowing, or forbidding some act to be done.

**Citation.** A form of notice to the respondent and other persons entitled to notice used in guardianship proceedings.



**Petition.** The petition is the document submitted to the Court, explaining what the Petitioner wants and why it is necessary. This document also includes information about the family of the subject of the guardianship; any proposed standby guardians and any additional people residing with the subject of the guardianship.

**Petitioner.** The party commencing the guardianship proceeding.

**Physician's Certification.** The specific written determination that the subject of the guardianship proceeding does not have the capacity to make health care decisions, other decisions or both health care and other decisions. Article 17-A requires the certification to be in a specified form. The law also requires that at least one such certification accompany the petition.

**Psychologists Affidavit.** The specific written determination that the subject of the guardianship proceeding does not have the capacity to make health care decisions, other decisions or both health care and other decisions. Article 17-A requires the certification to be in a specified form. The law requires that two certifications accompany the petition; they may take the form of two physicians' certifications as described above, or one physician's certification and one psychologist's affidavit. At least one of the parties setting forth the functional limitations and their causes must be familiar with mental retardation (or developmental disability if applicable) and must have the qualifications to make the certification of the persons inability to manage by reason of mental retardation (or developmental disability if applicable) and that the condition is permanent and likely to continue indefinitely

**Presumptive distribute.** A person who would be entitled to take a share in the property of the alleged incapacitated person if the alleged incapacitated person were deceased.

**Property.** Anything that is subject of ownership and is real or personal or is the subject of an action (such as the damages in a medical malpractice action)

**Respondent.** The person for whom a guardian is sought. And every other party other than the petitioner

**Rules of Evidence.** Rules that govern the admissibility of evidence at trials and hearings.

**Service of process.** Usually the delivery of the Citation to the person over whom guardianship is sought and other persons entitled notice of the guardianship proceeding.

**Standby guardian.** Is a guardian appointed at the time of the appointment of the guardian to act in the event that the guardian resigns, dies, is removed, discharged, or suspended or becomes incapacitated. The standby guardian is empowered to assume office immediately upon the resignation, death, removal, discharge, suspension, or adjudication of incapacity of the guardian subject only to the confirmation of the court

appointment within sixty days following the assumption of the office. The Court may conduct a hearing before confirming the appointment.

**Subpoena.** A command to appear and give testimony or show certain documents or records at a specified time and place.

**Surrogate's Court.** The Court in New York which has jurisdiction over all actions relating to decedents' the probate of wills, actions relating to estates, and the guardianship of minors and of guardianships brought under Surrogate's Court Procedure Act section 17-A for persons whose functional limitations arise by reason of mental retardation or developmental disability.

**Trust.** An arrangement under which property is administered by one person (the trustee) for the benefit of another person (the beneficiary); the person who establishes the trust is known as the Settlor.

**Trustee.** The person who administers the trust.

**Venue.** The county where the guardianship proceeding is commenced.

**Verified pleading.** A pleading that has been sworn to by the party submitting it to court.

**Waiver.** A specific form which is signed by a party having certain rights relating to the guardianship, by which the waive all or some of those rights. To be effective, the person waiving, must be fully informed of those rights and must have the mental capacity to comprehend both the meaning of those rights and the effect of their waiving them.

NOTE: The above is merely informational and not legal advice. This guide was published in January 2025 and based on New York law. You should contact us for any changes or updates in the law or long term care planning. Future changes in law may render the above information inaccurate. If you have any questions regarding this guide, please do not hesitate to call RUSSO LAW GROUP, P.C. at (516) 683-1717 or contact us at [www.VJRussoLaw.com](http://www.VJRussoLaw.com).

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