



The Harry and Jeanette Weinberg Center
for Elder Abuse Prevention

at the Hebrew Home at Riverdale

Elder Abuse in Guardianship Cases

A LEGAL RESOURCE GUIDE

SECOND EDITION

**This guide was created through a partnership between
The Harry and Jeanette Weinberg Center for Elder Abuse Prevention
at the Hebrew Home at Riverdale and The Guardianship Project,
a Demonstration Project of Vera Institute of Justice.**

Hebrew Home at Riverdale



RiverSpring Health™

The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale

The Weinberg Center is the nation's first elder abuse shelter, and uses a holistic service method that provides elder abuse victims with a safe and secure environment, a full continuum of medical, psychological, therapeutic and social services and a uniquely tailored legal action plan created and executed by the Weinberg Center's attorneys. These services include both serving as petitioners in guardianship cases as well as advocating for elder abuse victims throughout the guardianship process. As a virtual shelter located within the Hebrew Home at Riverdale's long-term care facility, the multi-disciplinary Weinberg Center staff team works with Hebrew Home professionals to determine optimal placement, security and services for the client based on each individual's specific needs. This opportunity to receive comprehensive coordinated care creates a unique opportunity for victims to recover dignity, access justice and create healing in their own lives. Professional referrals can be made via our 24-hour hotline at 1-800-56-SENIOR.

The Weinberg Center is also committed to spearheading community outreach efforts and developing and delivering training to a variety of legal and non-legal audiences about elder abuse prevalence, warning signs and response and referral strategies. Our staff has conducted educational series on elder abuse for a broad gamut of professional and community groups including lawyers, judges and other court personnel, hospital and healthcare employees, law enforcement workers, financial institution employees, legislators and even doormen. These cohorts are all positioned to identify and intervene in instances of suspected elder abuse, and to help refer clients to the Weinberg Center where appropriate.

For more information or professional training on elder abuse or this guide, visit weinberg-center.org or contact:

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The Guardianship Project, a Demonstration Project of Vera Institute of Justice

Vera Institute of Justice, Inc. (Vera) is an independent, not-for-profit organization that combines expertise in research, demonstration projects, and technical assistance to help improve the systems people rely upon for justice and safety. Established in 1961 and recognized as a pioneer in justice policy reform, Vera identifies disparities in social justice, both in communities and legal systems, and specializes in designing demonstration projects with government partners to test innovative solutions. Each model is launched only after careful, empirical study, always with the goal of achieving measurable objectives to improve the quality and accessibility of justice for ordinary citizens.

In 2005, Vera established The Guardianship Project in collaboration with the New York State Office of Court Administration to test a new model of agency guardianship for older adults and people with disabilities who have been adjudicated by a court as incapacitated and have no family or friend to care for them. With no public guardianship system in New York State, judges typically appoint private attorneys to serve this population. However, because guardians are compensated under the state's compensation framework from client funds, few private attorneys take cases involving clients with high needs and low assets, especially those involving the time-intensive task of coordinating a discharge back to the community from a hospital or nursing home. As a result, many indigent incapacitated elderly are neglected, and ultimately spend their remaining years either languishing in costly institutions without medically needing to be there, or living at home without services, in isolation, poverty, and poor health. The Guardianship Project—which offers comprehensive legal, casework, property, and financial management services regardless of clients' resources—was designed to fill this critical and increasing gap in the state's ability to provide trustworthy guardianship care and advocacy for all New Yorkers who need it. For more information, please contact The Guardianship Project's Director, Jacqueline A. Baillargeon at jbaillargeon@nycourts.gov.

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1. Why This Guide

Elder abuse is rampant and growing in New York State. According to *Under the Radar: New York State Elder Abuse Prevalence Study*, 14% of all older adults in New York State have experienced some form of elder abuse upon reaching their 60th birthday. Economic abuse is particularly prevalent, with 4.1% of all older adults in New York State reporting a major financial exploitation event¹ and a national annual financial loss to victims estimated at \$2.9 billion.² Furthermore, for every elder abuse incident documented by government agencies, there are nearly 24 that go unreported.³ This statistic indicates that the vast majority of elder abuse victims are not being reached or serviced by the infrastructure and resources that are currently in place to protect them.

While there is no direct link between aging and incapacity, factors such as physical frailty, complex medical needs, decreased cognitive ability, isolation, and emotional and environmental changes become increasingly common as people age. This means that older adults are generally at increased risk of diminished capacity and more likely to need a guardian to protect them. Furthermore, as capacity decreases, the risk of abuse increases with symptoms such as lack of judgment, impaired reasoning and memory loss, and therefore, elder abuse can often emerge over the course of the guardianship process.

As leaders in the fields of elder abuse prevention and guardianship, respectively, The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale, (hereinafter “the Weinberg Center”), and the Vera Institute of Justice’s Guardianship Project (hereinafter “Vera”) have partnered to create this manual for legal practitioners involved in guardianship proceedings. Our shared goal is to provide tools and strategies by which legal professionals can better identify, respond to, and remedy incidences of elder abuse that arise within the context of a guardianship. The often insidious and covert nature of elder abuse and exploitation demands that guardians and other advocates remain ever alert and diligent in their investigation and ongoing monitoring of clients’ financial circumstances and relationships, and if abuse is suspected or discovered, that they take immediate steps to protect their clients’ physical safety, safeguard their assets, and restrain and remove exploitive forces and persons from the client’s life.

A. INDICATIONS THAT A PERSON MAY—OR MAY NOT—NEED A GUARDIAN

Guardianship pursuant to Article 81 of the New York Mental Hygiene Law mandates the least restrictive form of intervention to meet the personal and property management needs of persons under guardianship while, at the same time, ensuring the greatest degree of independence and self-determination.⁴ Guardianships are often sought when an interested or concerned party believes that a person, because of his or her mental health, physical, and functional limitations, is unable to manage independently, and as a result, may be at risk of harm. While guardianship may be appropriate in such circumstances, it is possible that other, less intrusive options can address the risks facing and services needed by the individual.⁵ With this in mind, guardianship should be pursued as a last resort, where there are no available resources or adequate alternatives available to protect the individual.⁶ If

resources exist, such as a power of attorney or health care proxy, the personal needs and property management of the individual may already be adequately provided for, making a guardianship unnecessary and an excessive intrusion upon the individual's liberty interests.⁷

A court may appoint a guardian if it determines that a guardian is necessary to provide for the individual's personal needs, including food, clothing, shelter, health care, or safety, or to manage his or her property and financial affairs.⁸ The person must either agree to the appointment or the petitioner must prove, by clear and convincing evidence and through specific factual allegations, that the individual is incapacitated.⁹ The petitioner has the burden to show that the allegedly incapacitated person, (hereinafter "AIP") is likely to suffer harm because he or she is unable to provide for their own personal needs and/or property management and that he or she she cannot adequately understand and appreciate the nature and consequences of such inability.¹⁰

A finding of incapacity is a functional analysis, in which both the functional abilities and limitations of the individual are to be examined. A court must assess the AIP's ability to manage their activities of daily living¹¹ and whether there is an appreciation of the consequences of any inability to manage those activities.¹² The assessment also considers the individual's personal, property and financial demands and whether the person suffers from any physical illness or mental disability.¹³

A guardianship is appropriate for personal needs in order to protect a person who is no longer able to care for her own well-being. Such disabilities may stem from severe loss of cognitive abilities, such as dementia, Alzheimer's or Huntington's disease, or other restraints, both physical and mental. Indications may include an individual who is unable to administer her own medications,¹⁴ unable to ambulate,¹⁵ eating spoiled or incompletely cooked food,¹⁶ or who has been prone to carelessness that resulted in dangerous situations, such as kitchen fires.¹⁷ Indications that a guardianship may be appropriate for financial management include a person's inability to pay her bills, resulting in mounting debt¹⁸ or irrational expenditures.¹⁹ Often unchecked financial abuse, in the form of people stealing or commingling the individual's funds, can itself be a sign that a guardianship is necessary.²⁰ In addition, a guardianship may be necessary where the individual is unable to maintain a livable home, especially when such circumstances endanger the person's ability to continue living in her current residence and may cause her to become homeless.²¹

Courts have found that an individual having difficulty taking care of her personal needs or property management alone may not warrant a guardianship. For example, a person's living arrangements, precarious housing situation, meager financial means, hygiene habits or peculiar, bizarre, eccentric or erratic behavior alone does not warrant a guardian unless the statutory standard of incapacity is met.²² This is because not only must the person be unable to provide for her personal needs and/or property management but must also not be able to adequately understand and appreciate the nature and consequences of such inability. Therefore, if the individual can recognize the nature and consequences of her disability, a guardianship may not be appropriate—unless the individual agrees to a guardianship.²³

If a guardianship is necessary, it must be managed in accordance with the individual's wishes, preferences and desires,²⁴ to the greatest extent safe and possible under the attending circumstances. In accordance with the underlying policy and intent of the Article 81 statute, guardianship should provide the least restrictive form of intervention possible.²⁵ With this in mind, a guardian should be granted only the powers necessary to accomplish what is needed.²⁶ A guardianship can also be created for a limited duration of time and for a specific purpose.²⁷

B. ELDER ABUSE AND EXPLOITATION IN THE CONTEXT OF GUARDIANSHIP

Even where a guardianship proceeding has commenced and a guardian is appointed, acts of exploitation and abuse may persist. In some cases, the exploiter may ‘go underground’ until the court proceedings conclude and in others, he or she may rush to financial institutions before a guardian is commissioned²⁸ and banks notified, in order to withdraw the incapacitated person’s (hereinafter “IP”) funds. In other circumstances, court evaluators appointed to investigate an AIP’s²⁹ circumstances prior to the guardian’s appointment may not uncover evidence of existing abuse. Moreover, new facts concerning suspicious transactions or relationships may arise during the course of the guardianship. For example, a newly executed will may be discovered by the guardian in the IP’s apartment, or in the process of marshaling assets, the guardian may notice large or frequent cash withdrawals on banking records where the IP is homebound, mentally incapable of making the transaction or institutionalized.

Elder abuse can take various forms and may not always be immediately visible. The most obvious form of elder abuse is physical abuse, which, as noted, can range from mishandling by a caregiver, causing bruises on the IP’s arms, back, or legs, to more serious criminal acts such as physical injuries including: broken bones, restraint or burn marks. Complaints by clients or caregivers, or observations of injuries during home visits, hospitalizations, and in long-term care settings demand the guardian’s immediate attention. Indications of physical neglect, such as bedsores, poor hygiene, filthy living conditions, lack of adequate nutrition and medicine may be telling of deeper abuse or neglect problems. Although such injuries and symptoms are not in themselves conclusive evidence of abuse or neglect, they should be immediately and thoroughly investigated, with the proper authorities notified. Other forms of abuse and exploitation can be less obvious, and may be hidden or explained away by the victim to protect family members, or may be unrecognized or forgotten by the cognitively impaired individual.

Whereas indigent clients under guardianship may be systemically neglected, those with assets are often exploited. In 2004, in the wake of several sensational news accounts of abuse in guardianship that captured the public’s attention, the Government Accountability Office (GAO) issued a scathing report citing serious deficiencies in government monitoring and oversight of court-appointed guardians.³⁰ The report highlighted several egregious cases of financial exploitation of clients by guardians entrusted with their care, including one New York case where an attorney-guardian billed a client \$850 in legal fees to deliver birthday cake and flowers to the client at the nursing home. In 2010, the GAO issued a second critical report, detailing continuing pervasive incidences of client abuse and exploitation perpetrated by guardians across multiple states—citing yet another New York case where a guardian stole more than \$4 million from 23 clients—and in 2011, the GAO published yet another report on guardianship documenting continuing government monitoring failures.³¹ Since then, the New York State Unified Court System was one of four court systems selected by the National Guardianship Network, to receive grant funding and establish a model state-wide Working Interdisciplinary Network of Guardianship Stakeholders (WINGS). The purpose of the WINGS initiative is to bring together delegates from various disciplines to serve as a sustainable collaborative mechanism for strategic planning and action to improve New York State’s adult guardianship system.³²

C. ELDER ABUSE AND PRIVILEGE

If the suspected victim of elder abuse is a client or potential client, an attorney may have confidentiality concerns. Generally, “a lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.”³³ Any scenario in which emergency medical attention is appropriate likely falls under this exception; even if the victim’s legal capacity is not in question.

When an attorney reasonably believes that a client is suffering from diminished capacity, is at risk of “substantial physical, financial or other harm,” and is unable to act in his own interests, the attorney may take “reasonably necessary protective action” including consulting with third parties and seeking a guardian ad litem or a guardian of person or property.³⁴ The New York Rules explicitly state that an attorney who behaves in this way is not violating attorney client confidentiality as long as the disclosures are “reasonably necessary to protect the client’s interests.”³⁵ An attorney should refrain from sharing confidential information with third parties, however, even regarding a client who has diminished capacity, if it is likely that the third party will act adversely to the client’s interests.³⁶

Petitioners, respondents and court personnel should also be mindful of other privileges that must be respected regardless of allegations of incapacity. In particular, the testimony of treating doctors and psychiatrists, as well as the inclusion of medical information or documentation in the guardianship petition or any other court papers could potentially raise the issue of HIPAA violations or physician-patient privilege.³⁷ It is important to bear in mind that the court’s assessment of capacity under Article 81 is a functional assessment and not a medical one. Medical information and diagnoses are not required in an Article 81 proceeding and should not be the centerpiece of a case for guardianship. Where medical evidence subject to HIPAA or physician-patient privilege is relevant, a petitioner or court evaluator may request a court order to view medical records, speak with medical personnel or hire an independent medical expert to evaluate the AIP. When medical information is integrated into a court evaluator’s neutral report, the proceeding is more likely to remain focused on determining the AIP’s functional capacity and the least restrictive alternatives available to that individual. Courts will generally classify APS psychiatrists as “examining” rather than “treating” physicians, whose observations, records and testimony are therefore not privileged, though it has been argued that some level of privilege should still apply, at least insofar as the APS psychiatrist has engaged in diagnosis or any kind of therapeutic relationship with the AIP.³⁸

2. Types of Abuse and the Criminal Remedy

Elder abuse may be criminal and pursued through law enforcement to seek justice in criminal court. Innocent victims of crime, certain relatives, dependents, legal guardians and eligible good samaritans can apply to the New York State Office of Victim Services (OVS) for compensation for out-of-pocket expenses not covered by insurance or other resources. For more information, call: 1-800-247-8035 or visit www.ovs.ny.gov. Additionally, if an abuser is found or pleads guilty, at sentencing, the Court may order restitution to be paid to a victim by the perpetrator of a criminal offense for the losses or injuries incurred as a result of the criminal offense. For more information, contact the local District Attorney's Office.

Cases involving elder abuse are often complicated by the credibility of the complaining witness, the availability and evidence provided by the person reporting the crime, the response by law enforcement, and the natural time constraints that exist when a victim is aging. At times, elder abuse is recognized long after the time, place and occurrence of the crime. In other instances, evidence of elder abuse arises during court proceedings, including guardianship proceedings. Witness testimony that is given under oath can be used as sworn statements, admissions, or used in cross-examination during a subsequent criminal proceeding. Communication between the different court systems, prosecutors, and advocates is imperative to utilize all of the evidence that may be gathered in various proceedings involving the elder abuse. Protocol for communication between advocates, the district attorney's office, law enforcement and the courts is not dictated by Article 81 and differs depending on jurisdiction. In all instances, the court has the authority to direct either the attorney for the AIP or the appointed guardian to communicate with the appropriate authorities when a potential crime is uncovered.

Testimony from guardianship proceedings may also be used in subsequent or ongoing family court proceedings, such evidence and testimony can also be used, and may be of particular value if the complaining witness has died, or further cognitively deteriorated. Transcripts, court files and documents that are identified can be subpoenaed for use. Bearing in mind the potential implications of testimony in the guardianship proceeding, it may be critical for the attorney to raise objections to irrelevant testimony. When the abuser is in the courtroom, request a closed courtroom. Violations of temporary restraining orders, outside or even inside the courtroom may be grounds for a criminal contempt charge and law enforcement and the court staff, who may be witnesses, should be notified immediately.

It is important to be mindful that the AIP's statements may also be used against them in cross-examination, or to substantiate a cross-complaint in criminal or family court. Moreover, a judicial finding of incapacity may also harm the victim's credibility.

A. PHYSICAL ABUSE AND EMOTIONAL ABUSE

Physical Abuse is the non-accidental use of force that results in bodily injury, pain or impairment. Examples can include being slapped, burned, cut, bruised or improperly restrained.³⁹ In addition to bodily harm, this form of abuse engenders great fear in the abuse victim. Indications of physical abuse may include unexplained physical injuries, broken bones, pressure marks or abrasions.

Emotional/Psychological Abuse is the willful infliction of mental or emotional anguish by threat, humiliation, intimidation or other abusive conduct, including but not limited to, frightening or intimidating an adult.⁴⁰ Examples include name-calling, “the silent treatment,” insults, threats, isolating the individual or treating him/her like a child, and controlling behavior. Symptoms of ongoing emotional/psychological abuse may be the individual’s unexplained withdrawal from normal activities, a change in alertness, self-destructive behavior, unusual depression/crying, and social and physical isolation.⁴¹

Crimes to Consider: Assault and Harassment. See Chime Chart p. 30-31.

Assault as a Hate Crime A person commits a hate crime when he commits a specific offense and either (a) selects his victim on one of the enumerated characteristics, which include age or (b) commits the act based in whole or substantial part because of a belief or perception about one of the enumerated characteristics of the victim, which include age.⁴² When an individual is convicted of a hate crime, they are subject to harsher sentencing guidelines.⁴³

Assault in the Second Degree where the perpetrator causes physical injury to a person 65 years or older and the perpetrator is more than 10 years younger than the victim.⁴⁴

***Endangering the Welfare of an Incompetent or Physically Disabled Person** “Incompetent or physically disabled person” means an individual who is unable to care for himself or herself because of a physical disability, mental disease or defect.⁴⁵

***Endangering the Welfare of a Vulnerable Elderly Person** “vulnerable elderly person” means a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care.⁴⁶

**These charges apply when the accused is the caregiver to the victim.*

Caregiver a person who (1) assumes responsibility for the care of a vulnerable elderly person pursuant to a court order or (2) receives monetary or other valuable consideration for providing care for a vulnerable elderly person.⁴⁷

A victim who lacks capacity may not be able to participate in the trial process and this will significantly influence the District Attorney’s decision whether to move forward with a case. However, it is possible to successfully prosecute a crime where the victim is incapacitated. Depending on the particular nature of the incapacity, the victim may still be able to testify and give an effective first person account of the abuse.⁴⁸ If the victim’s cognitive impairment is such that testifying would not be practicable, it is especially important to gather as much non-testimonial evidence as possible.

TIPS

- Take photos of any evidence that might fade or dissipate: bruises or other wounds, destroyed or vandalized property by the abuser, or the condition of the home.
- Medical staff are often in the best position to chronicle, document and report evidence of abuse.
- Objects of any sort may be considered a weapon.
- Statements by the abuser can constitute admissions.
- Neighbors, doormen and supers may have the best information about the circumstances of abuse.

B. SEXUAL ABUSE

Sexual Abuse is non-consensual sexual contact of any kind, including but not limited to forcing sexual contact or forcing sex with a third party.⁴⁹ Examples include inappropriate touching, fondling or kissing, rape, taking sexually explicit photographs or causing exposure to explicit sexual content.⁵⁰ Indications of sexual abuse may be bruises around the breasts or genital area and torn or bloody clothing or undergarments.

Crimes to Consider: Forcible Touching and Rape. See Crime Chart p. 33

A victim who lacks capacity often needs assistance with activities such as bathing and using the bathroom, and are particularly vulnerable to sexual abuse. However, someone who has diminished capacity may still be able to consent to sexual activity. If it is unclear whether there was consent an in-depth investigation may be required. These conversations should be conducted with the goal of analyzing the incapacitated person's ability to express choices, appreciate the meaning of sexual activity and communicate the personal value they place on sexual activity.

TIPS

- Do not hesitate to encourage hospital personnel to use a sexual offense evidence collection kit ("rape kit") to gather evidence. Evidence of this sort dissipates quickly, so hospital staff should be alerted immediately that a rape kit is required.

C. FINANCIAL ABUSE

Economic Abuse/Financial Exploitation is the improper use of funds, property, or resources by another individual. Examples include fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets.⁵¹ Indications of economic abuse/financial exploitation may be: confusion about finances and transactions, activity deviating from usual banking patterns, requests for additional ATM cards or first time use of ATM card, opening a joint account, changing a power of attorney, changing an account beneficiary, or opening inappropriate investments, sudden property transfers or changes to will, new authorized signers on signature cards, mail redirected to a new address, checks written out of numerical order, flurry of bounced checks/overdraft fees or low balances, and large withdrawals from previously inactive accounts.

Crimes to Consider: Forgery and Larceny. See Crime Chart p. 35-36.

A victim who lacks capacity at the time the transactions or execution of documents took place is generally not able to give permission or authority for a 3rd party to gain any kind of financial control; therefore, medical opinions that show the victim's capacity before or at the time of the financial transaction may be necessary. Sufficient transaction and other financial records may make a criminal case possible even if a victim is unable to testify due to incapacity. (See Tips, page 11 infra.)

TIPS

- Banks and financial institutions have their own internal reporting requirements.* Internal Suspicious Activity Reports (SARs) may be attached to the account or client. These reports may produce evidence of a larger crime or series of crimes, making the case easier to prosecute.
- District attorney's offices also have their own investigative units with subpoena power to freeze accounts and obtain documents that show the illegal transactions.

**New York State does not mandate any action by bank professionals who suspect that a customer is being financially exploited. Legislation is currently pending that would authorize bank personnel to refuse to complete a transaction based on a reasonable belief of exploitation, and would then require them to report the case to the appropriate social services agency. The bill also permits these professionals to share relevant records with law enforcement and social services officials, and provides liability protection for financial institutions who take such action in good faith.⁵²*

D. NEGLECT

Neglect is recognized in both active and passive forms, each of which is harmful and dangerous to an individual relying upon the caregiver for assistance. **Active neglect** is a willful failure by the caregiver to fulfill the care-taking functions and responsibilities assumed by the caregiver. Examples include abandonment, willful deprivation of food, water, heat, clean clothing and bedding, eyeglasses or dentures, or health related services.⁵³ **Passive neglect** is a non-willful failure of a caregiver to fulfill care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment or denial of food or health related services because of inadequate caregiver knowledge, infirmity, or disputing the value of prescribed services.⁵⁴

Self neglect is the inability, due to physical and/or mental impairments to perform tasks essential to caring for oneself, including but not limited to: providing essential food, clothing, shelter and medical care, obtaining goods and services necessary to maintain physical health, mental health, emotional well-being and general safety; or managing financial affairs⁵⁵. Indications of neglect may be: bedsores, unattended medical needs, poor hygiene, unkempt/dirty appearance, malnourishment or dehydration and unusual weight loss.

Crimes to Consider: Endangering the Welfare of an Incompetent or Physically Disabled Person, Endangering the Welfare of a Vulnerable Elderly Person, and Reckless Endangerment. See Crime Chart p. 34.

TIPS

- Unless the perpetrator is a paid or court-ordered caregiver, it may be hard to charge a crime on the basis of neglect.
- However, where there is a substantial risk of serious physical injury, there may be enough evidence for the crime of Reckless Endangerment.

E. CRIMINAL COURT ORDERS OF PROTECTION

Generally

If an arrest is made, either the accused will be released without bail, or bail will be set and the accused will either pay the bail amount and be released pending conviction or will remain in jail. In any of those cases, the court may issue a criminal Order of Protection as a condition of the defendant's bail. If the case is dismissed, the Order is immediately dismissed as well.⁵⁶ If the trial results in a conviction, the Order of Protection can become final and can last, in the case of a felony conviction, for up to 8 years from the date of conviction or the end of the prison term.⁵⁷

A "full" Order of Protection, requires that the accused have absolutely no contact with the alleged victim. This includes physical proximity as well as all telephonic and electronic communications. The defendant is also prohibited from trying to communicate with the victim using third parties. If the defendant had been residing with the victim, he may be required to vacate the residence for as long as the Order is in effect.

A court can also issue a **“limited” Order of Protection**, which prohibits “assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, disorderly conduct, criminal mischief, intimidation, threats, or any other criminal offense,” as well as any other conditions that the court may add.

A criminal Order of Protection is “temporary” for the duration of the trial, and generally extends from one court date to the next. The court has the discretion to decide whether to renew the Order on each court date.

F. VIOLATIONS OF AN ORDER OF PROTECTION

Generally

Aside from the specific conditions of the Order of Protection, a significant advantage of this type of remedy is the ability for a third-party to witness a violation of the Order of Protection and report the crime of contempt of court. This tool is extraordinarily effective for abuse victims who may be too afraid to personally report the violation, or for a victim who may be unable to report a violation because of diminished capacity. If a defendant violates an Order of Protection, the court may revoke his bail, conditional discharge or probation.

Crimes to Consider: Criminal Contempt and if there is a prior conviction for contempt, the second contempt can be charged as a felony. See Crime Chart p. 37.

Sentences

A sentence or plea agreement can require that the defendant participate in drug, alcohol or mental health treatment as well as anger management classes. Restitution to the victim can also be mandated. The guardian can assist in making the incapacitated victim’s wishes known to the district attorney if appropriate.

Enforcing Orders of Protection – Tracking Abusers

In many elder abuse cases where an abuser has been arrested, knowing the custody status of the abuser is critical to preserving the victim’s safety and enforcing an Order of Protection. The VINE Program (Victim Information and Notification Everyday) is a phone number that victims, families, advocates or service providers can call to get information on the current custody status of a specific offender who has been arrested in New York State. Callers can also set automatic alerts that will notify them when there are any status changes. You will need at least three of the following pieces of information about the offender: first name, last name, date of birth, date of arrest. The number to call is: (888) VINE-4-NY (846-3469).

3. Civil Remedies for the Petitioner or Court-Appointed Guardian

A. UTILIZING THE ORDER TO SHOW CAUSE

An Order to Show Cause (“OSC”) is an alternative way of initiating a motion, by which the applicant submits an ex parte proposed order to show cause to the court. If the judge decides to grant the OSC, it is signed and returned to the applicant, who must then serve it on all other appropriate parties.⁵⁸ Confidential information that the petitioner does not want all parties to know should not be contained in the OSC, and should not even be stated in the petition. While the statute does not require service of the petition on all parties, the petition is accessible to parties once an index number is assigned to the OSC. Ask the court for an in-camera inspection of information that is relevant for the court to know, but that should otherwise be kept out of the public’s or abuser’s reach.

Often the financial conditions, personal property management, or condition in the home that lead a person to need a guardian are unclear at the time of the initial appointment. Unknown people and family, property, assets and bills will often surface during the course of the guardianship proceeding, or even after the guardian has been appointed. Request credit reports to ensure there is no fraud or identity theft that may have occurred under the incapacitated person’s name.⁵⁹ At times, when new information comes to light, it is necessary for the guardian to act upon it immediately, and an Order to Show Cause may be the best method to seek immediate relief. An Order to Show Cause can be utilized in the following ways:

1. Subpoena Power

Procedure

Under N.Y. Mental Hyg. Law §81.23(b)(3)(ii) the court is able to confer subpoena power upon the attorney for the petitioner. This allows the attorney to subpoena documents (bank records, medical records, credit reports and property transfers) and people who may be relevant to investigate any wrongdoing. For example, the petitioner might subpoena a lawyer who represented a party during a transaction that was part of a pattern of abuse. The lawyer can be required to testify regarding the circumstances surrounding the transaction. However, be aware that the attorney-client privilege may be a defense for the attorney to raise and use to shield his or her client. It is important to think creatively when utilizing a subpoena to substantiate abuse, because many witnesses may be able to contribute relevant observations and information.

Grounds

The subpoena is issued for the sake of investigating any claims about potential abuses of the incapacitated person.

Consequences

The court will have access to records of all of the fiduciary agents and associated involvements of the incapacitated person. Witnesses who are subpoenaed can shed light on the circumstances surrounding financial transactions, property transfers and even prior legal actions. For instance, where a power of attorney was executed by an incapacitated person, and used to financially drain their account, the attorney who facilitated the documents execution, may be subpoenaed and questioned as to its validity.

2. Access to Money

Procedure

The guardian can ask the court through an OSC cause to access funds immediately necessary for the alleged incapacitated or incapacitated person's needs.

3. Temporary Restraining Order

Procedure

A Temporary Restraining Order ("TRO") can be used to remove a person from the home, prevent contact or to stop financial transactions, including banking transactions and property transactions/sales. A TRO may also be utilized to halt proceedings in other courts pending the outcome of the guardianship.

Grounds

A TRO is a proper action when the court believes that without such restraining order, the property of the incapacitated person or person alleged to be incapacitated would be dissipated to that person's detriment or that the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated would be endangered.

Consequences

The court may order the removal of a person, or the freezing of a transaction, proceeding or transfer of assets.

4. Consolidation

An AIP may be involved in other ongoing court proceedings at the same time that a guardianship is in progress. It can be very helpful, particularly in cases where elder abuse is suspected, for these cases to be consolidated and heard by the same court that will have access to the information, testimony and evidence that accompany a guardianship proceeding. Actions pending in other courts may be consolidated into an action before Supreme Court, such as a guardianship action, by filing a motion to consolidate with the guardianship court.⁶⁰

B. HOUSING COURT

Eviction proceedings are commonly tied to individuals who are in need of a guardian. Often, an incapacitated person has fallen behind on rent because they are no longer able to manage their finances or recertify for housing subsidies. The landlord, in some instances, might have improperly taken steps to remove the incapacitated tenant, and the tenant needs to defend the pending proceeding, needs re-entry into the home, or to retrieve property from inside the home. An incapacitated person might also need to initiate a housing court proceeding in order to have someone removed from the incapacitated person's home. If a proceeding has already started in housing court, the guardian may need to coordinate with a guardian-ad-litem or housing court part to seek vacatur of any stipulations signed by the incapacitated person.

1. Eviction of the Alleged Incapacitated Person

The Petitioner, Court Evaluator or Guardian will need to immediately assess the security of the incapacitated person's home. Whether they are facing foreclosure or eviction for nonpayment or other cause, including nuisance, the role of the guardian will be to stop any other proceedings from moving forward and assess the next viable step for the incapacitated person. Often rent arrears can be reduced or waived through legal argument and negotiation. If the tenant lives in a rent-stabilized apartment it may even be possible to proceed with a buyout of the home, but attorneys should be cautioned to consult a

benefits specialist for eligibility consequences. If a marshal's notice has already been issued, the guardian should immediately inform the marshal of the tenant's incapacity. The marshal is required to make a referral to Adult Protective Services whenever the individual facing eviction is elderly and must postpone the eviction for two weeks to await their findings. The marshal must also notify APS at least 24 hours before proceeding with such an eviction.⁶¹ In an instance where the landlord has written notification that the incapacitated person is in a hospital, or a nursing home, the notice requirement mandates that the landlord execute service of process on the incapacitated person at the hospital or long-term care facility.⁶²

2. Illegal Lockout

If the incapacitated person has occupied an apartment for at least 30 days, with or without a lease, he or she may not be evicted without a court order awarding a judgment of possession and warrant of eviction. If they have been forcibly or unlawfully locked out, first call the police department for assistance. If the police are unable to help, start a proceeding in Housing Court to be "restored to possession," called an "illegal lockout."⁶³

3. Eviction of 3rd Party in the Incapacitated Person's Home

An eviction action can be initiated against a 3rd party if the home's deed, lease or rental agreement is in the incapacitated person's name. If the 3rd party has resided in the home for more than 30 days, notice must be given to them that permission to reside in the home has been revoked prior to commencement of the action.⁶⁴ (See below, Family Court)

4. Landlord's Unlawful Eviction of Incapacitated Person

If a landlord has wrongfully evicted an incapacitated tenant from a rent stabilized apartment, that tenant may be entitled to the difference of rent for a new apartment. Such relief is appropriate if it can be shown that "such damages as are the natural consequence of the landlord's trespass or wrongful act".⁶⁵

5. Displaced Possessions

If the tenant was "ejected, or put out of real property in a forcible or unlawful manner" she may collect treble damages for all her discarded possessions.⁶⁶

**Housing issues in New York County may take place in Part I, the Integrated Part, a subset of the New York County Civil Court. Cases are transferred into Part I when a tenant living in New York County is the subject of both a Civil Court, Housing Part case and a Supreme Court, Article 81 Guardianship case. Cases are combined and adjudicated by an Acting Supreme Court Justice.*

C. FAMILY COURT

Among reported elder abuse cases, a family member was the reported abuser in 90% of the cases. Two-thirds of the abusers were adult children or spouses.⁶⁷ Family members who abuse drugs or alcohol, who have a mental/emotional illness, and who feel burdened by their caregiving responsibilities, abuse at higher rates than those who do not.⁶⁸ These statistics demonstrate that there is too often a need for an elder abuse victim to receive a Family Court Order of Protection in order to document abuse or help prevent abuse by a family member or intimate partner.

1. Family Court Orders of Protection

In order to petition in Family Court, two jurisdictional criteria must be satisfied. The petitioner must be related by blood or marriage to the respondent, have a child in common with the respondent, or be in an "intimate relationship" with the respondent. A judge can

find an intimate relationship between the parties even if the parties have never lived together and do not have a sexual relationship.⁶⁹ The petitioner must allege that the respondent has committed one of a specific list of “family offenses.” (See Crime Chart for list of applicable offenses). In a case where an abuse victim lacks capacity, a “duly authorized agency, association, society or institution” may originate an Order of Protection proceeding on the incapacitated person’s behalf.⁷⁰

The protections offered by a civil Order of Protection will vary based on the nature of the case. They can include Orders for the respondent to stay away from the petitioner’s home or any other place the petitioner frequents and to refrain from all telephonic or electronic communication as well as all third party contact. The judge will hold a hearing to determine whether to grant a final Order of Protection. The Order will generally last for 2 years, but the petitioner can request protection up to 5 years if one or more “aggravating circumstances” are present. Aggravating circumstances include: physical injury, use of a dangerous instrument, a history of previous violations of other Orders of Protection, prior convictions for crimes against the petitioner, exposure of family or household member to physical injury, prior incidents that illustrate the respondent is an immediate and ongoing danger to the petitioner or another family or household member.⁷¹

The Order can also require the respondent to vacate a home shared with the victim, even if the respondent’s name is on the lease or deed.⁷² If the guardian will be assisting the victim in leaving the victim’s current residence in order to move to a secure location, the judge issuing the OOP can order the landlord to terminate the victim’s lease without penalty. The landlord and co-tenants must be given 10 days notice that the victim plans to apply for this relief.⁷³

A judge may also place a respondent on probation. The petitioner, an older parent to an adult child or partner, might not want an Order of Protection, but rather for the respondent to comply with standard or additional terms of probation that mandate substance abuse treatment program, anger management program, mental health compliance, or other condition of probation. Probation can be ordered by itself, or in addition to an Order of Protection.

Restitution up to \$10,000 may also be ordered. Often property damage and medical costs can be recovered by the older adult victim, through a request for restitution at the dispositional phase of the family offense proceeding. Evidence need not be competent and the court can consider any relevant and material evidence, including hearsay, where the hearing established that the expenditures were a result of the respondent’s actions in the family related offense.

2. The Older Adults Access to Justice Project

At times, an older adult and incapacitated person may be mobility-challenged or bed-bound. In those instances, most New York City area Family Courts have adopted a protocol which allows elder abuse victims and their representatives to either schedule specific appointments with the court or, if the victim is homebound, to arrange for hearings and appearances to be conducted remotely.⁷⁴

D. CIVIL COURT

Property and assets of the incapacitated person often need to be marshaled and recovered. This may be complicated further if the incapacitated person was the subject of financial abuse. An incapacitated person is vulnerable to any one of the following common financial scams: reverse mortgages, investment fraud, foreclosure rescue scam, power of attorney (POA) abuse, theft by caregivers/sweetheart scams, lottery/sweepstakes scams, telephone scam, computer/internet scams, identity theft or contractor fraud and home improvement scams. Specific action can be taken to stop the sale of an incapacitated person's home, distribution of assets, or reliance on a fraudulent deed.

1. Notice of Pendency

A Notice of Pendency should also be filed on a home that may be sold without authority.⁷⁵

2. Lien

A lien can be placed on a house to make sure, assuming there is any equity left, that collection can be made for any stolen money.

3. Trespass

The perpetrator can be sued for trespass if he doesn't leave the property.⁷⁶

4. Inability of Court to Invalidate a Will

The court is unable to invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person.⁷⁷

5. Fraudulent Deed

In an Order to Show Cause to Turnover Property, the guardian may ask that a fraudulently executed deed be deemed null and void, and the property returned to the incapacitated person.

E. FAMILY HEALTHCARE DECISIONS ACT

Background

Enacted in 2010, the Family Health Care Decisions Act ("FHCDA") establishes the authority of certain individuals to make medical treatment decisions for individuals who: are in a hospital or residential health care facility, lack capacity to make such decisions for themselves and have not previously appointed a health care agent.⁷⁸

Authority

Pursuant to the FHCDA, an Article 81 court-appointed guardian has the highest priority in medical decision-making, ranked above a spouse and an adult child.⁷⁹

Scope

A surrogate under the FHCDA is empowered to make all health care decisions the individual would make, including, under certain conditions, withholding or withdrawing life sustaining treatment.⁷³ When making any decisions, a surrogate must be guided by the patient's wishes, or, if those wishes cannot be known, by the patient's best interests.⁷⁴

4. Where the Fiduciary is the Abuser

This section will discuss methods for removing abusive guardians and fiduciaries. People under guardianship may come into the court system with existing trusts, powers of attorney, or health care proxies. Importantly, these documents *do not* become invalid just because the principal is deemed incapacitated at a later date. In some situations, these documents may not have been executed in the best interests of the principal, or they may be flawed for other reasons, such as where they were executed under duress, on the principal's sickbed, or after the principal has been determined to be incapacitated. When a document has not been executed in the principal's best interests, or when it can be established that the beneficiary of such a power is using it to further his or her own personal interests, it may be possible for the court to revoke that power.

A. REMOVAL OF ABUSIVE GUARDIANS

Guardians, entrusted with the care and protection of vulnerable individuals unable to independently care for themselves, must always adhere to the highest standards of fiduciary integrity. The duties of a guardian include exercising the "utmost care and diligence when acting on behalf of an incapacitated person" and exhibiting the "utmost degree of trust, loyalty and fidelity in relation to the incapacitated person."⁸² Indeed, a guardian must also "preserve, protect, and account for such property and financial resources faithfully."⁸³

A court can remove a guardian "when the guardian fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just."⁸⁴ To do so, a petitioner must file a motion for removal.⁸⁵ The motion can be filed by the person examining the initial and annual reports under N.Y. Mental Hyg. § 81.32 or by any person entitled to notice under the Mental Hygiene Law.⁸⁶ These individuals include the person designated by the Court to examine the initial and annual reports, the petitioner in a guardianship proceeding, the incapacitated person's (IP's) spouse, parents, children, or siblings, or anyone who has "demonstrated a genuine interest in promoting the best interests" of the IP.⁸⁷ The IP may also bring the motion.⁸⁸ Lastly, anyone who is entitled to bring a guardianship proceeding may bring the motion, including a trustee of a trust for which the IP is a beneficiary and someone with whom the IP resides.⁸⁹

1. Standards for Removing a Guardian

The overall concern when considering whether to remove a guardian "remains the best interest of the incapacitated person."⁹⁰ A guardian is "charged with the highest possible fiduciary responsibility toward his ward and will be judged under the strictest standards."⁹¹ Indeed, a trial court has "considerable discretion in determining whether a guardian should be replaced."⁹²

2. Process for Removing a Guardian

By Order to Show Cause, a petitioner can file a motion to remove a guardian.⁹³ The petition can seek solely to remove and replace the existing guardian, without contesting the individual's capacity or need for a guardian.⁹⁴ Some evidentiary proof of the allegations of misconduct by the guardian must be asserted.⁹⁵ Allegations painted in broad conclusory terms will not meet the standard for removal.⁹⁶ Evidence must be credible and support the allegations of misconduct.⁹⁷

A guardian may be removed, however, when the incapacitated person indicates that he has been mistreated and wants a new guardian, subject to evidentiary proof.⁹⁸ Evidence to remove a guardian was sufficient when witnesses testified at a hearing to the stress and tension between the incapacitated person and her guardian (her mother), as well as to abuse of illegal substances and possible improper use of the incapacitated person's funds.⁹⁹

3. Other Options to Address Guardian Misconduct

There are other ways to advise the court about a guardian's misconduct without immediately filing a motion. A concerned party, including a friend, family member, or court evaluator, can call the chambers of the judge who oversees the guardianship and inquire about how to submit a complaint, or can attempt to schedule a meeting with the judge to address the problem.¹⁰⁰ The concerned party can also contact the court evaluator appointed at the time the guardianship was established, who may be willing to make a home visit and report to the judge any concerns regarding the guardian.

If the guardian was appointed under Part 36,¹⁰¹ the concerned party can contact the Acting Managing Inspector General for Fiduciary Appointments of the New York Unified Court System ("Inspector General's Office or "Office"). This Office receives complaints about unsatisfactory performance of guardians and others that have been appointed in certain fiduciary capacities (including, but not limited to, guardians ad litem, receivers, referees, and law guardians). The Inspector General's Office also investigates allegations of abuse by trustees of Supplemental Needs Trusts who are appointed by the court. If an investigation is warranted, the Inspector General's Office will investigate, and, if there is abuse, will recommend to the Chief Administrative Judge that the guardian be removed from all future appointments.¹⁰²

B. VOIDING A TRUST OR REMOVAL OF ABUSIVE TRUSTEE

1. Voiding a Trust

The conditions surrounding the drafting of the trust should be examined for fraud, duress, forgery, absence of capacity of principal or other situations that would void the trust. This is dependent on the language of the trust.

2. Why and by Whom a Trustee can be Removed

A trustee owes the trust beneficiaries an undivided duty of loyalty, and must act with good faith in administering the trust.¹⁰³ The standard of conduct to which a trustee is held is "a standard of good faith and honesty."¹⁰⁴ Lastly, removal of a trustee "is a drastic action not to be undertaken absent a clear necessity...and an individual seeking removal bears the burden of demonstrating that the trustee has violated or threatens to violate his or her trust or is otherwise unsuitable to execute the trust."¹⁰⁵

Under the New York Estates, Powers, and Trusts Law, a New York Supreme Court judge can, "on application of any person interested in a trust estate," suspend or remove a trustee "who has violated or threatens to violate his trust...or who for any reason is a person unsuitable to execute a trust."¹⁰⁶ A trustee may be unsuitable when there is friction between a trustee and beneficiary, which "interferes with the proper administration of the trust...or if the trustee's continuing to act as such would be detrimental to the interests of the beneficiary."¹⁰⁷ If a trustee is removed, the judge can appoint a successor trustee and, if there is no acting trustee, can order that the trust be executed by a receiver or other officer.¹⁰⁸ A receiver may be appointed by the court when there is danger that the property will be removed, lost, injured, or destroyed.¹⁰⁹ A court appointing a receiver can "authorize him to take and hold real and personal property...Upon motion of the receiver or a party, powers granted to a

temporary receiver may be extended or limited.”¹¹⁰ The original trust should remain intact if possible otherwise it may be viewed as a self settled trust and will be subject to attachment by creditors whether the debts were incurred before or after the creation of the trust.¹¹¹

3. Standards and Allegations of Trustee Misconduct

Allegations of misconduct for the removal of a trustee must be “substantiated by evidentiary proof.”¹¹² For example, when a trustee has engaged in self-dealing with trust assets, has a criminal indictment, or has flouted court orders, the trustee can be removed.¹¹³

A trustee can be removed if he has made unauthorized investments “or otherwise improvidently managed or injured the property committed to his charge or by reason of other misconduct in the execution of his office or dishonesty, drunkenness, improvidence or want of understanding.”¹¹⁴

4. Process for Removing a Trustee

To remove a trustee, a “co-fiduciary, creditor, person interested, [or] any person on behalf of an infant...may present to the court having jurisdiction a petition praying for a decree suspending, modifying or revoking those letters and that the fiduciary may be cited to show cause why a decree should not be made accordingly.”¹¹⁵

A lifetime trustee can be removed by petition, and the trustee “must be cited to show cause” why the court would not have cause to remove the trustee.¹¹⁶ Aside from going to court, if a trustee was appointed by the court under Part 36 for a supplemental needs trust, a concerned party could contact the office of the Acting Managing Inspector General for Fiduciary Appointments of the New York Unified Court System, which investigates claims of trustee abuse.

C. POWER OF ATTORNEY — REMOVAL OF ABUSIVE AGENT

1. Presumption and Capacity

A power of attorney (POA) is considered “durable unless it expressly provides that it terminates by the incapacity of the principal.”¹¹⁷ The term “durable” means that the POA will remain valid even if the principal¹¹⁸ becomes incapacitated.¹¹⁹ A person has capacity to make a power of attorney if they have the “ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.”¹²⁰

A person will be considered incapacitated and unable to execute a POA only if “the person’s mind was so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction.”¹²¹ Indeed, a person trying to vacate a POA based on incapacity must show that “because of the affliction, the individual was incompetent at the time of the challenged transaction.”¹²² A POA will be found void if the principal lacked capacity to understand the nature and consequences of the transaction at the time the power of attorney was executed.¹²³

2. Why and by Whom a POA can be Revoked

A POA can be revoked by a court order under either N.Y. Gen. Oblig. §5-1510 or N.Y. Mental Hyg. §81.29.¹²⁴ If a court has appointed a guardian, it can modify, amend, or revoke a previously executed appointment or power “if the court finds that the previously executed appointment [or] power...was made while the person was incapacitated or

if the court determines that there has been a breach of fiduciary duty by the previously appointed agent.”¹²⁵ The appointment of a guardian *per se* does not vacate a POA executed prior to the guardianship.

An agent acting under a POA¹²⁶ has a fiduciary relationship with the principal.¹²⁷ The agent must adhere to instructions from the principal and, when there are no instructions, must act in the best interests of the principal and avoid any conflicts of interest.¹²⁸ The agent must keep the principal’s property separate and distinct from the agent’s property and must maintain receipts for all transactions.¹²⁹ The agent may be subject to liability for conduct or omissions that violate the agent’s fiduciary duty.¹³⁰ In 2010, the New York State Power of Attorney laws were substantially revised, in large part as a response to the deluge of elder abuse being perpetrated by fiduciaries. The new POA law provides a mechanism for the guardian to commence a special proceeding requiring an agent to provide an accounting of all transactions and disbursements made on behalf of the principal. Further modifications to the law that balance ease of execution and risk for abuse continue to be debated.¹³¹

3. Process and Standards for Vacating a POA

To remove a POA outside the guardianship context, a special proceeding can be commenced “upon the grounds that the agent has violated, or is unfit, unable, or unwilling to perform, the fiduciary duties under the power of attorney.”¹³² A POA can also be vacated by a guardianship judge through an Order and Judgment.¹³³ Additionally, a motion can be brought by Order to Show Cause in the guardianship part.

Since the agent owes a fiduciary duty to the principal, the agent “must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing.”¹³⁴

4. Consequences for Acting on an Invalid POA

A Bank or financial institution may be liable for funds disbursed in reliance on a Power of Attorney that is void on its face, meaning that the document fails to comply with the definitions and rules of construction contained in N.Y. Gen. Oblig. §5-1501, 5-10502A-O. The institution may also be liable for relying on a POA after it has received actual notice that the POA has been revoked or of events that terminate a POA by operation of law. Actual notice means written notice and reasonable opportunity to act on such notice.¹³⁵

D. HEALTH CARE PROXY VACATUR

1. Presumption and Capacity

A person will be considered incompetent to make a health care proxy only if “the person’s mind was so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction.”¹³⁶ Vacatur of a health care proxy, as with vacatur of a POA, requires a showing that “because of the affliction, the individual was incompetent at the time of the challenged transaction.”¹³⁷

It is important to note the date and circumstances under which the health care proxy was executed. For example, if the proxy is executed on the principal’s sickbed when the principal has an inheritance that would become available upon her death, the validity of the health care proxy may need to be examined. On the other hand, if the proxy is executed when the principal is in good health and has a loving relationship with the friend or family member named in the document, this might not raise any red flags. These circumstances must be considered in determining whether there is bad faith or whether the proxy has been executed when the principal was of sound mind.

2. Standards for Removing a Health Care Proxy

To vacate a health care proxy, the actions or inactions of the health care proxy must rise “to the level of incompetence or bad faith.”¹³⁸ In another example, when evidence was ascertained through witnesses that a man wanted to live to the fullest, his wife was not removed as a health care proxy even when she wanted to remove artificial ventilation.¹³⁹

3. Process and by Whom a Health Care Proxy can be Revoked

A health care provider, family member, close friend, conservator, or commissioner of health or mental health can “commence [a] special proceeding ...with respect to any dispute arising under [the Public Health Law].”¹⁴⁰ This special proceeding can be used to determine the validity of a health care proxy, and can be brought in an Order to Show Cause in the guardianship part.¹⁴¹ It can be used to “have [the] agent removed on grounds that agent (a) is not reasonably available, willing and competent to fulfill his or her obligations under this article or (b) is acting in bad faith”; or to “override the agent’s decision about health care treatment on the grounds that (a) the decision was made in bad faith.”¹⁴² A guardian may not revoke a health care proxy without a Court Order to that effect.¹⁴³

5. Case Examples with Suggested Legal Interventions

As this guide has illustrated, every elder abuse case is unique and complex and creating an effective strategy to properly address these issues in a guardianship context can be daunting. Below are some actual case studies and a step-by-step illustration of how the contents of this guide can be used to systematically address these multifaceted instances of abuse.

A. MS. W

Ms. W is 92 years old. She was never married and has no children or close relatives. She outlived most of her friends and trusted her long time home health aide by her granting her financial authority through a Power of Attorney. She has suffered from multiple sclerosis and now also has dementia and chronic gastrointestinal problems. A former casting director at a prestigious advertising company, for the past half a century she lived in a modest, rent-stabilized apartment in Manhattan. Immediately before the guardianship proceeding was commenced Ms. W's aide dropped Ms. W off at a local hospital's emergency room. Using her power of attorney, the aide drained Ms. W's entire life savings (\$471k) and since then is believed to have left the country. Once commissioned, the guardian intended to assess Ms. W's apartment to prepare Ms. W for a move home. Unfortunately Ms. W had no keys at the rehabilitation facility and the registered landlord refused to return the guardian's calls. Upon obtaining a court order to hire and pay a locksmith and enter the apartment, the guardian went to Ms. W's home and learned that the apartment was re-rented and that the landlord had discarded all of Ms. W's belongings.

Ms. W: Legal Strategy

1. Gain Entry to Apartment and Recover Property

Since Ms. W was unlawfully locked out of her apartment without a court order you should first call the police department for assistance. If the police are unable to help, you may start a proceeding in the Housing Court to be "restored to possession," called an "illegal lockout." (See Housing Court Section 2 p. 17).

If Housing Court is unable to restore Ms. W to her original apartment because of the new tenant, the landlord should be sued to pay for the difference of rent for a new apartment, and the rent she has been paying for her original rent stabilized apartment. (See Housing Court Section 4 p. 17).

Since Ms. W was "ejected, or put out of real property in a forcible or unlawful manner" she may collect treble damages for all her discarded possessions. (See Housing Court Section 5 p. 17).

2. Revoke the Power of Attorney

Although N.Y. Mental Hyg. Law §81.22(b)(2) proscribes a guardian from revoking a Power of Attorney, the court can be asked to revoke the Power of Attorney by Order to Show Cause. A court may modify, amend, or revoke such power under N.Y. Mental Hyg. Law §81.29(d). An investigation should be conducted into the validity of the Power of Attorney, which should include an assessment as to whether the document was executed when Ms. W was under duress, or whether circumstances of fraud, forgery, absence of capacity were present. Additionally, the court should consider whether there was a breach of fiduciary duty by the home health aide, and an accounting for the financial expenditures can be mandated. (See Power of Attorney–Removal of Abusive Agent p.23)

3. Recover the Funds

The aide acting under a Power of Attorney had a fiduciary relationship with Ms. W. and may be liable for the breach of her fiduciary duty. N.Y. General Obligations Law §5-1505(2)(b). Under N.Y. Mental Hyg. Law §81.23(b)(3)(ii) the court is able to grant subpoena power upon the attorney for the petitioner, allowing the attorney to subpoena the aide, if she is located. (See Power of Attorney–Removal of Abusive Agent p.22, See Utilizing the Order to Show Cause p.15).

Funds may be recovered from the bank if the Power of Attorney was void on its face. (See Power of Attorney–Removal of Abusive Agent p.23)

B. MS. P

Ms. P, a 96-year-old woman diagnosed with dementia was living in Florida until a woman claiming to be her granddaughter moved her to New York without informing relatives of her whereabouts. Ms. P was found living in a basement apartment that was small, cluttered and hot; a place totally unsuitable for her current needs. Ms. P was being held against her will, and verbally, physically, mentally and financially abused by the “granddaughter”. Ms. P’s bank accounts, retirement accounts, social security savings, and other retirement funds were completely depleted, including the equity from Ms. P’s condominium in Florida. A condominium was purchased in New Jersey with the title jointly held in the name of the woman and Ms. P. After appointment, the guardian also learned that additional credit cards were taken out in Ms. P’s name, and the \$10K that was Ms. P thought was being used for a pre-paid burial account, was instead used to purchase a now-repossessed Land Rover. Additionally, the woman was collecting rental income from Florida condominium.

Ms. P: Legal Strategy

1. Fraudulent use of Credit Cards

The credit cards should be cancelled and the fraud should be reported to the credit card company. Depending on the exact timeframe of events, Ms. P may only be liable up to \$50 of the fraudulent charges on her credit card. 15 U.S.C.A. §1643. (See Utilizing the Order to Show Cause p.15).

2. Recovery of Rental Proceeds

If there is any authority for the “granddaughter” to collect the rent such authority should be revoked immediately. If the “granddaughter” has no apparent authority to collect the rents then any amount that was unlawfully paid to her can be collected from the renters. In addition, whether the “granddaughter” had authority or not she should be sued to return the rent. (See Power of Attorney–Removal of Abusive Agent p.23).

3. Recovering Stolen Assets from the New Jersey home

A lien must immediately be placed on the New Jersey house. This would ensure that equity for the eventual sale of the house could be used to reimburse Ms. P. In addition a Temporary Restraining Order should be sought to stop the sale of the New Jersey house until it is decided exactly how much money the “granddaughter” owes Ms. P. A Notice of Pendency should also be filed on the New Jersey house. N.Y. C.P.L.R. Article 65. (See Temporary Restraining Order p. 16, See Civil Court p.18).

4. Recovery of Equity in Florida condominium

An investigation must be conducted to determine how exactly the equity was drained from the condominium. Findings should include what procedure was used (mortgages etc.), whether Ms. P was present, whether Ms. P delegated authority to her “granddaughter”, and whether Ms. P had capacity at that time. If authority was given through the Power of Attorney with Ms. P as principal and the “granddaughter” as agent then it should be determined whether the Power of Attorney was flawed on its face. If the Power of Attorney was flawed on its face, the title company, who insured the transaction, should be sued to reimburse for the loss in equity. (See Subpoena Power p.15, See Power of Attorney–Removal of Abusive Agent p.22, See Removal of Abusive Holders of Powers of Attorney Section 1, p.28).

5. Recovery of Assets in Bank

The bank can be sued to recover the money it disbursed to the “granddaughter” if she had no apparent authority to authorize such a transaction. The account should also be closed and a new guardianship account created. (See Power of Attorney–Removal of Abusive Agent p.22).

C. MS. A

Ms. A, age 73, is a widow with four living children. She lives in a subsidized one-bedroom apartment in New York City and is required to annually comply with recertification reporting on the household’s composition and income. She is the only reported household member. Two years before the guardianship proceeding, Ms. A. was the respondent in a landlord-tenant proceeding based on charges of non-desirability due to the alleged sale and possession of drugs by three of her sons, from Ms. A’s apartment. Ms. A entered a stipulation agreeing to ban all three sons from stepping foot on the Housing Authority’s property. While Ms. A was temporarily receiving rehabilitation in a facility, one of her sons moved back into her home. A personal needs guardian who had medical decision-making power was appointed. Ms. A informed the guardian that when it came time, she wished to “die with dignity at home.” While receiving rehabilitation, Ms. A became extremely ill, suffering from kidney failure, and was no longer responsive. Doctors recommended hospice for Ms. A. Ms. A’s son vehemently objected, claiming that she was a religious woman who had always wanted all interventions possible to continue living. The guardian considered all its options, including whether to consent to hospice care at home. The potential home care vendor stated that to provide in-home services, the aide would need a place to sleep and could not share a room with another person.

Ms. A: Legal Strategy

1. Removal of the Son from the Apartment

The son can be ordered to leave the property. If he does not comply immediately, the court should be petitioned for a temporary restraining order to keep the son out of the apartment and therefore assure Ms. A’s continued retention of the apartment. (See Temporary Restraining Order p.16).

Additionally, the son can be sued for trespass if he doesn’t leave the property. (See Trespass p.19).

2. Hospice Decision

Since this is a decision regarding hospice care, and Ms. A did not have a health care proxy, The New York's Family Health Care Decisions Act would be in effect. (N.Y. Pub. Health Law §2994-b(1)). Pursuant to the Act an Article 81 court-appointed guardian would have higher priority in medical decision making than an adult child. (N.Y. Pub. Health Law §2994-d(1)(a)). The easiest option would be to set up a living quarter for the live-in home health aide in the living room. If setting up living quarters is not an option you can request New York City Housing Authority (NYCHA) to transfer apartments to accommodate medical equipment or hospital bed. (Transfer Priority T3). <http://www.nyc.gov/html/nycha/downloads/pdf/TSAPlan.pdf> (See Family HealthCare Decisions Act p.19).

D. MS. G

Ms. G, age 72, was admitted to the hospital for a routine procedure. Instead of operating on her leg, the surgeon mistakenly operated on her vertebra. Ms. G suffered permanent loss of the use of her legs and significant cognitive impairment. Ms. G became dependent on others for most of her personal needs, including: bathing, feeding, toileting, shopping, cooking, and transferring. It became evident that her apartment, without modifications, was unsuitable for her current needs. The doorways were too narrow for her to maneuver her wheelchair, the upstairs was inaccessible, and the bathroom did not contain a shower she could use. Tom, her long-time partner and agent under a previously executed Power of Attorney, managed the \$2 million medical malpractice settlement she received from the botched surgery. He put the money into a Supplemental Needs Trust for Ms. G's benefit of which he was both trustee and the successor beneficiary. Yet Tom has refused to give Ms. G a personal allowance, modify the apartment to make it more comfortable for her, or even purchase a new wheelchair for her. In fact, Tom's conduct has become more and more controlling. He prevented access to her mailbox and put the phone out of her reach. When she tried to move from her bed, Tom gave her a sedative to make her more passive. She became bed-bound and prone to bed sores. Eventually Adult Protective Services was made aware of her neglect and petitioned the court for a guardian to be appointed to her.

Ms. G: Possible Legal Strategies

1. Order of Protection

The Family Court should be petitioned for an "Order of Protection" pursuant to Family Court Act §842 to keep Tom away, and home health aides and nurses should be hired to assist Ms. G. Alternatively, a Restraining Order can be requested from the court residing over the guardianship procedure. (See Family Court p. 17, See Temporary Restraining Order p.16).

2. Choice of Abode

In the spirit of N.Y. Mental Hyg. Law §81 the guardian should give Ms. G her independence by asking her whether she would rather move into a new more suitable apartment for her condition or should her money be used to renovate her current apartment to be wheelchair accessible.

3. Access to Assets

The guardian can ask the court through an Order to Show cause to access Ms. G's funds to purchase her a new bed or wheelchair. (See Access to Money p.16).

4. Validity of the Supplemental Needs Trust

The conditions surrounding the drafting of the trust should be examined for fraud, duress, forgery, absence of capacity of principle or other situations that would void the trust.

This of course is dependent on the language of the trust. The court should be petitioned to remove Tom as trustee pursuant to N.Y. Est. Powers & Trusts §7-2.6(a)(2). This is because his "continuing to act as such would be detrimental to the interests of the beneficiary." *In re Bitter*, 11 Misc. 3d 1032, 1034 (N.Y. Surr. Ct. Nassau County 2006). The original trust should remain intact if possible otherwise it may be viewed as a self settled trust and will be subject to attachment by creditors whether the debts were incurred before or after the creation of the trust.. N.Y. Est. Powers & Trusts Law §7-3.1. (See Voiding a Trust or Removal of Abusive Trustee p.21).

5. Health Care Proxy Vacatur

N.Y. Mental Hyg. Law §81.22(b)(2) proscribes a guardian from revoking a health care proxy. Therefore, instead, the guardian, a family member or close friend can petition the court to remove Tom as health care proxy by showing that he has been acting in bad faith. N.Y. Pub. Health §2992 (2)(b). See *In re Walter K.H.*, 31 Misc. 3d 1233(A), 5 (N.Y. Sup. Ct. Erie County 2011). (See Health Care Proxy Vacatur p.23).

5. Crime Chart

PHYSICAL ABUSE

| Crime – citations are to NY Penal Law unless otherwise noted | Category | Heightened or Additional Charge due to Prior Conviction for Charged Offense | Statute of Limitations (clock begins to run at commission of offense) | Hate Crime Specified Offense* | Family Court Jurisdiction |
|--|---|---|---|-------------------------------|---------------------------|
| Disorderly Conduct §240.20 | Violation | | 1 year | | Yes |
| Harassment 2° §240.25 | Violation | | 1 year | | Yes |
| Harassment 1° §240.25 | Class B Misdemeanor | Aggravated Family Offense | 2 years | Yes | Yes |
| Aggravated Harassment 2° §240.30 | Class A Misdemeanor | Aggravated Harassment 1° | 2 years | Yes | Yes |
| Aggravated Harassment 1° §240.31 | Class E Felony | | 5 years | | |
| Aggravated Family Offense §240.75*** | Class E Felony | | 5 years | | |
| Criminal Possession of a Weapon 4° §265.01 | Class A Misdemeanor | | 2 years | | |
| Unlawful Imprisonment 2° §135.05 | Class A Misdemeanor | Aggravated Family Offense | 2 years | Yes | |
| Unlawful Imprisonment 1° §135.10 | Class E Felony | Aggravated Family Offense | 5 years | Yes | |
| Assault 1° §120.10 | Class B Felony | Aggravated Family Offense | 5 years | Yes | |
| Assault 2° §120.05 | Class D Felony – includes intentionally causing injury if victim is at least 65 and defendant is more than 10 years younger than victim. | Aggravated Family Offense | 5 years | Yes | Yes |
| Assault 3° §120.00 | Class A Misdemeanor | Aggravated Family Offense | 2 years | Yes | Yes |
| Burglary 3° §140.20 | Class D Felony | Aggravated Family Offense | 5 years | | |
| Burglary 2° §140.25 | Class C Felony | Aggravated Family Offense | 5 years | | |
| Burglary 1° §140.30 | Class B Felony | Aggravated Family Offense | 5 years | | |
| Criminal Possession of a Weapon 4° §265.01 | Class A Misdemeanor | Criminal Possession of a Weapon 3 (if previously convicted of ANY crime) | 2 years | | |
| Criminal Possession of a Firearm §265.01-b | Class E Felony | | 5 years | | |
| Criminal Possession of a Weapon 3° §265.02 | Class D Felony | | 5 years | | |
| Criminal Possession of a Weapon 2° §265.03 | Class C Felony | | 5 years | | |
| Criminal Possession of a Weapon 1° §265.04 | Class B Felony | | 5 years | | |

| Crime – citations are to NY Penal Law unless otherwise noted | Category | Heightened or Additional Charge due to Prior Conviction for Charged Offense | Statute of Limitations (clock begins to run at commission of offense) | Hate Crime Specified Offense* | Family Court Jurisdiction ** |
|--|---------------------|---|---|-------------------------------|------------------------------|
| Endangering the Welfare of an Incompetent or Physically Disabled Person 2° §260.24 | Class A Misdemeanor | | 2 years | | |
| Endangering the Welfare of an Incompetent or Physically Disabled Person 1° §260.25 | Class E Felony | | 5 years | | |
| Endangering the Welfare of a Vulnerable Elderly Person 2° §260.32 | Class E Felony | | 5 years | | |
| Endangering the Welfare of a Vulnerable Elderly Person 1° §260.34 | Class D Felony | | 5 years | | |
| Kidnapping 2° §135.20 | Class B Felony | | 5 years | Yes | |
| Kidnapping 1° §135.25 | Class A-1 Felony | | None | Yes | |
| Murder 2° §125.25 | Class A-1 Felony | Aggravated Family Offense | None | Yes | |
| Manslaughter 1° §125.20 | Class B Felony | Aggravated Family Offense | 5 years | Yes | |
| Manslaughter 2° §125.15 | Class C Felony | Aggravated Family Offense | 5 years | Yes | |
| Robbery 3° §160.05 | Class D Felony | | 5 years | Yes | |
| Robbery 2° §160.10 | Class C Felony | | 5 years | Yes | |
| Robbery 1° §160.15 | Class B Felony | | 5 years | Yes | |
| Stalking 2° §120.55 | Class E Felony | Aggravated Family Offense | 5 years | Yes | Yes |
| Stalking 1° §120.60 | Class D Felony | Aggravated Family Offense | 5 years | Yes | Yes |
| Criminal Obstruction of Breathing or Blood Circulation §121.11 | Class A Misdemeanor | Aggravated Family Offense | 2 years | | Yes |
| Strangulation 2° §121.12 | Class D Felony | Aggravated Family Offense | 5 years | Yes | Yes |
| Strangulation 1° §121.13 | Class C Felony | Aggravated Family Offense | 5 years | Yes | Yes |
| Reckless Endangerment 2° §120.20 | Class A Misdemeanor | Aggravated Family Offense | 2 years | Yes | Yes |
| Reckless Endangerment 1° §120.25 | Class D Felony | Aggravated Family Offense | 5 years | Yes | Yes |
| Menacing 3° §120.15 | Class B Misdemeanor | Menacing 2° OR Aggravated Family Offense | 2 years | Yes | Yes |
| Menacing 2° §120.14 | Class A Misdemeanor | Menacing 1° OR Aggravated Family Offense | 2 years | Yes | Yes |

NOTE

“Vulnerable elderly person” means a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care. New York Penal Code §260.31(3). These charges apply when the accused is caregiver to the victim.

“Caregiver” is defined as a person who (i) assumes responsibility for the care of a vulnerable elderly person pursuant to a court order or (ii) receives monetary or other valuable consideration for providing care for a vulnerable elderly person. Id. at §260.31(1).

“Incompetent or physically disabled person” means an individual who is unable to care for himself or herself because of physical disability, mental disease or defect. New York Penal Code §260.31(4).

EMOTIONAL/PSYCHOLOGICAL ABUSE

| Crime – citations are to NY Penal Law unless otherwise noted | Category | Heightened or Additional Charge due to Prior Conviction for Charged Offense | Statute of Limitations (clock begins to run at commission of offense) | Hate Crime Specified Offense* | Family Court Jurisdiction |
|--|--|---|---|-------------------------------|---------------------------|
| Menacing 1° §120.13 | Class E Felony | Aggravated Family Offense | 5 Years | | |
| Stalking 4° §120.45 | Class B Misdemeanor | Stalking 3° OR Stalking 2° OR Aggravated Family Offense | 2 years | Yes | Yes |
| Stalking 3° §120.50 | Class A Misdemeanor | Aggravated Family Offense | 2 years | Yes | Yes |
| Stalking 2° §120.55 | Class E Felony | Aggravated Family Offense | 5 years | Yes | Yes |
| Stalking 1° §120.60 | Class D Felony | Aggravated Family Offense | 5 years | Yes | Yes |
| Coercion 2° §135.60 | Class A Misdemeanor | Aggravated Family Offense | 2 years | Yes | Yes |
| Coercion 1° §135.65 | Class D Felony | Aggravated Family Offense | 5 years | Yes | |
| Criminal Mischief 4° §145.00 | Class A Misdemeanor | Aggravated Family Offense | 2 years | | |
| Criminal Mischief 3° §145.05 | Class E Felony | Aggravated Family Offense | 5 years | Yes | Yes |
| Criminal Mischief 2° §145.10 | Class D Felony | Aggravated Family Offense | 5 years | Yes | Yes |
| Criminal Mischief 1° §145.12 | Class B Felony | Aggravated Family Offense | 5 years | Yes | Yes |
| Harassment 2° §240.26 | Violation | | 1 year | | Yes |
| Harassment 1° §240.25 | Class B Misdemeanor | Aggravated Family Offense | 2 years | Yes | Yes |
| Aggravated Harassment 2° §240.30 | Class A Misdemeanor | Aggravated Harassment 1° | 2 years | Yes | Yes |
| Aggravated Harassment 1° §240.31 | Class E Felony | | 5 years | | |
| Aggravated Family Offense §240.75*** | Class E Felony | | 5 years | | |
| Trespass §140.05 | Violation | | 1 year | | |
| Criminal Trespass 3° §140.10 | Class B Misdemeanor | | 2 years | Yes | |
| Criminal Trespass 2° §140.15 | Class A Misdemeanor | | 2 years | Yes | |
| Criminal Trespass 1° §140.17 | Class D Felony | | 5 years | Yes | |
| Endangering the Welfare of an Incompetent or Physically Disabled Person 2° §260.24 | Class A Misdemeanor | | 2 years | | |
| Endangering the Welfare of an Incompetent or Physically Disabled Person 1° §260.25 | Class E Felony | | 5 years | | |
| Overdriving, torturing and Injuring Animals; Agriculture and Markets Law §353 | Class A Misdemeanor | | 2 years | | |
| Aggravated Cruelty to Animals; Agriculture and Markets Law §353-a | Felony – definite sentence not to exceed 2 years | | 5 years | | |
| Appropriate Shelter for Dogs Left Outdoors §353-b | Violation | | 1 year | | |
| Confinement of Companion Animals in Vehicles §353-d | Violation | | 1 year | | |

SEXUAL ABUSE

| Crime – citations are to NY Penal Law unless otherwise noted | Category | Heightened or Additional Charge due to Prior Conviction for Charged Offense | Sex Offender Registration Required upon Conviction | Statute of Limitations (clock begins to run at commission of offense) | Hate Crime Specified Offense* | Family Court Jurisdiction |
|--|---------------------|---|---|---|-------------------------------|---------------------------|
| Sexual Misconduct §130.20 | Class A Misdemeanor | Aggravated Family Offense | Yes | 2 years | | Yes |
| Forcible Touching §130.52 | Class A Misdemeanor | Aggravated Family Offense | Yes if defendant has prior conviction for sex offense | 2 years | | Yes |
| Sexual Abuse 3° §130.55 | Class B Misdemeanor | Aggravated Family Offense | Yes if defendant has prior conviction for sex offense | 2 years | | Yes |
| Sexual Abuse 2° §130.60 | Class A Misdemeanor | Aggravated Family Offense | Yes | 2 years | | Yes |
| Sexual Abuse 1° §130.65 | Class D Felony | Aggravated Family Offense | Yes | 5 year | Yes | |
| Aggravated Sexual Abuse 4° §130.65a | Class E Felony | None | Yes | 5 years | | |
| Aggravated Sexual Abuse 3° §130.66 | Class D Felony | Aggravated Family Offense | Yes | 5 years | | |
| Aggravated Sexual Abuse 2° §130.67 | Class C Felony | Aggravated Family Offense | Yes | 5 years | Yes | |
| Aggravated Sexual Abuse 1° §130.70 | Class B Felony | Aggravated Family Offense | Yes | None | Yes | |
| Rape 3° §130.25 | Class E Felony | None | Yes | 5 years | | |
| Rape 2° §130.30 | Class D Felony | Aggravated Family Offense | Yes | 5 years | | |
| Rape 1° §130.35 | Class B Felony | Aggravated Family Offense | Yes | None | Yes | |
| Criminal Sexual Act 3° §130.40 | Class E Felony | Aggravated Family Offense | Yes | 5 years | | |
| Criminal Sexual Act 2° §130.45 | Class D Felony | Aggravated Family Offense | Yes | 5 years | | |
| Criminal Sexual Act 1° §130.50 | Class B Felony | Aggravated Family Offense | Yes | None | Yes | |
| Persistent Sexual Abuse §130.53 | Class E Felony | Aggravated Family Offense | None | 5 years | | |
| Aggravated Family Offense §240.75*** | Class E Felony | | | 5 years | | |
| Endangering the Welfare of a Vulnerable Elderly Person 2° §260. 32 | Class E Felony | None | None | 5 years | | |
| Endangering the Welfare of a Vulnerable Elderly Person 1° §260. 34 | Class D Felony | None | None | 5 years | | |

NEGLECT

| Crime – citations are to NY Penal Law unless otherwise noted | Category | Heightened or Additional Charge due to Prior Conviction for Charged Offense | Statute of Limitations (clock begins to run at commission of offense) | Hate Crime Specified Offense* | Family Court Jurisdiction** |
|--|---------------------|---|---|-------------------------------|-----------------------------|
| Endangering the Welfare of an Incompetent or Physically Disabled Person 2° §260.24 | Class A Misdemeanor | | 2 years | | |
| Endangering the Welfare of an Incompetent or Physically Disabled Person 1° §260.25 | Class E Felony | | 5 years | | |
| Endangering the Welfare of a Vulnerable Elderly Person 2° §260.32 | Class E Felony | | 5 years | | |
| Endangering the Welfare of a Vulnerable Elderly Person 1° §260.34 | Class D Felony | | 5 years | | |
| Reckless Endangerment 2° §120.20 | Class A Misdemeanor | Aggravated Family Offense | 2 years | Yes | Yes |
| Reckless Endangerment 1° §120.25 | Class D Felony | Aggravated Family Offense | 5 years | Yes | Yes |
| Manslaughter 2° §125.15 | Class C Felony | Aggravated Family Offense | 5 years | Yes | |
| Unlawful Imprisonment 2° §135.05 | Class A Misdemeanor | Aggravated Family Offense | 2 years | Yes | |
| Unlawful Imprisonment 1° §135.10 | Class E Felony | Aggravated Family Offense | 5 years | Yes | |
| Aggravated Family Offense §240.75*** | Class E Felony | | 5 years | | |

FINANCIAL ABUSE

| Crime – citations are to NY Penal Law unless otherwise noted | Category | Heightened or Additional Charge due to Prior Conviction for Charged Offense | Statute of Limitations (clock begins to run at commission of offense) | Hate Crime Specified Offense* | Family Court Jurisdiction** |
|---|---------------------|---|---|-------------------------------|-----------------------------|
| Forgery 3° §170.05 | Class A Misdemeanor | | 2 years | | |
| Forgery 2° §170.10 | Class D Felony | | 5 years | | |
| Forgery 1° §170.15 | Class C Felony | | 5 years | | |
| Criminal Possession of a Forged Instrument 3° §170.20 | Class A Misdemeanor | | 2 years | | |
| Criminal Possession of a Forged Instrument 2° §170.25, 170.27 | Class D Felony | | 5 years | | |
| Criminal Possession of a Forged Instrument 1° §170.30 | | Class C Felony | | 5 years | |
| Petit Larceny §155.25 | Class A Misdemeanor | | 2 years or within 1 year of discovery if there is alleged violation of fiduciary duty | Yes | |
| Grand Larceny 4° §155.30 | Class E Felony | | 5 years or within 1 year of discovery if there is alleged violation of fiduciary duty | Yes | Yes |
| Grand Larceny 3° §155.35 | Class D Felony | | 5 years or within 1 year of discovery if there is alleged violation of fiduciary duty | Yes | Yes |
| Grand Larceny 2° §155.40 | Class C Felony | | 5 years or within 1 year of discovery if there is alleged violation of fiduciary duty | Yes | |
| Grand Larceny 1° §155.42 | Class B Felony | | 5 years or within 1 year of discovery if there is alleged violation of fiduciary duty | Yes | |
| Unlawful Collection Practices §190.50 | Class B Misdemeanor | | 2 years | | |
| Making a False Statement of Credit Terms §190.55 | Class A Misdemeanor | | 2 years | | |
| Identity Theft 3° §190.78 | Class A Misdemeanor | Identity Theft 2 (if previously convicted of one of specified related offenses) | 2 years | Yes | |
| Identity Theft 2° §190.79 | Class E Felony | Identity Theft 1 (if previously convicted of one of specified related offenses) | 5 years | Yes | |
| Identity Theft 1° §190.80 | Class D Felony | | 5 years | | Yes |
| Unlawful Possession of Personal Identification Information 3° §190.81 | Class A Misdemeanor | | 2 years | | |
| Unlawful Possession of Personal Identification Information 2° §190.82 | Class E Felony | Unlawful Possession of Personal Identification Information 1 (if previously convicted of one of specified related offenses) | 2 years | | |

continued

FINANCIAL ABUSE continued

| Crime – citations are to NY Penal Law unless otherwise noted | Category | Heightened or Additional Charge due to Prior Conviction for Charged Offense | Statute of Limitations (clock begins to run at commission of offense) | Hate Crime Specified Offense* | Family Court Jurisdiction** |
|---|---------------------|---|---|-------------------------------|-----------------------------|
| Unlawful Possession of Personal Identification Information 1° §190.83 | Class D Felony | | 5 years | | |
| Scheme to Defraud 2° §190.60 | Class A Misdemeanor | | 2 years | | |
| Scheme to Defraud 1° §190.65 | Class E Felony | | 5 years | | |
| Robbery 3° §160.05 | Class D Felony | | 5 years | Yes | |
| Robbery 2° §160.10 | Class C Felony | | 5 years | Yes | |
| Robbery 1° §160.15 | Class B Felony | | 5 years | Yes | |
| Coercion 2° §135.60 | Class A Misdemeanor | Aggravated Family Offense | 2 years | Yes | Yes |
| Coercion 1° §135.65 | Class D Felony | Aggravated Family Offense | 5 years | Yes | |

CRIMES RELATING TO JUDICIAL PROCEEDINGS AND COURT ORDERS

| Crime – citations are to NY Penal Law unless otherwise noted | Category | Heightened or Additional Charge due to Prior Conviction for Charged Offense | Statute of Limitations (clock begins to run at commission of offense) | Hate Crime Specified Offense* | Family Court Jurisdiction** |
|--|---------------------|---|---|-------------------------------|-----------------------------|
| Criminal Contempt 2° §215.50 | Class A Misdemeanor | Criminal Contempt 1° OR Aggravated Family Offense | 2 years | | |
| Criminal Contempt 1° §215.51 | Class E Felony | Aggravated Criminal Contempt OR Aggravated Family Offense | 5 years | | |
| Aggravated Criminal Contempt §215.52 | Class D Felony | Aggravated Family Offense | 5 years | | |
| Aggravated Family Offense §240.75*** | Class E Felony | | 5 years | | |
| Tampering with a Witness 4° §215.10 | Class A Misdemeanor | | 2 years | | |
| Tampering with a Witness 3° §215.11 | Class E Felony | | 5 years | | |
| Tampering with a Witness 2° §215.12 | Class D Felony | | 5 years | | |
| Tampering with a Witness 1° §215.13 | Class B Felony | | 5 years | | |
| Intimidating a Victim or Witness 3° §215.15 | Class E Felony | | 5 years | | |
| Intimidating a Victim or Witness 2° §215.16 | Class D Felony | | 5 years | | |
| Intimidating a Victim or Witness 1° §215.17 | Class B Felony | | 5 years | | |

* A person commits a hate crime when he commits a specified offense and either (a) selects his victim based on one of the enumerated characteristics, which include age or (b) commits the act based in whole or substantial part because of a belief or perception about one of the enumerated characteristics of the victim, which include age. N.Y. Penal Law §485.05. When an individual is convicted of a hate crime, they are subject to harsher sentencing guidelines. *Id.* at §485.10.

** The victim and the alleged abuser must have one of the following relationships in order for the crimes indicated to be considered a family offense: related by blood or marriage, formerly married, have a child in common, currently or formerly in an “intimate relationship.” NY Family Court Act §812. If one of these relationships exists, the victim may file a petition in Family Court for a civil order of protection. NY Family Court §842.

*** Aggravated Family Offense (N.Y. Penal Law §240.75): A person commits an aggravated family offense when he commits a specified offense as defined in subdivision two of this section (as indicated in the above chart as a “Heightened or Additional Charge due to Prior Conviction for Charged Offense”) and he has been convicted of one or more specified offenses within the immediately preceding five years. An aggravated family offense is the commitment, attempt or conspiracy to commit any of the specified offenses where the defendant and the person against whom the offense was committed were members of the same family or household as defined in 530.11 of the Criminal Procedure Law. The person against whom the current specified offense is committed may be different from the person against whom the previous specified offense was committed and such persons do not need to be members of the same family or household.

N.Y. Criminal Procedure Law §530.11: The victim and the alleged abuser must have one of the following relationships in order to be considered members of the same family or household: person related by blood or marriage, person legally married to one another, persons formerly married to one another regardless of whether they still reside in the same household, persons who have a child in common, regardless of whether such persons have been married or have lived together at any time, and persons who are not related by blood or marriage and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

FOOTNOTES

- ¹ Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University, New York City Department for the Aging, *Under the Radar: New York State Elder Abuse Prevalence Study*, May (2011) at <http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf>, pg. 3.
- ² Metlife Mature Market Institute, *The Metlife Study of Elder Financial Abuse*, June (2011) at <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf>, pg. 2.
- ³ Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University, New York City Department for the Aging, *supra* note 1, at 2.
- ⁴ N.Y. Mental Hyg. Law §81.01 (McKinney 2013).
- ⁵ See American Bar Association's *Practical Tool for Lawyers Steps in Supporting Decision Making* at http://www.americanbar.org/groups/law_aging/resources/guardianship_practice/practical_tool.html.
- ⁶ The statute defines "available resources" as resources such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, powers of attorney, health care proxies, trusts, representative and protective payees, and residential care facilities. N.Y. Mental Hyg. Law. §81.03(e) (McKinney 2013).
- ⁷ *In re Kufeld*, 23 Misc. 3d 1131A, (Sup. Ct. Bronx County 2005)(Although the petitioner met his burden to show by clear and convincing evidence that Kufeld was incapacitated the court did not grant the guardianship petition because evidence was shown that there were advance directives in place which addressed all of his personal and property management needs.)
- ⁸ N.Y. Mental Hyg. Law §81.02 (McKinney 2013).
- ⁹ *In re Teitelbaum*, 10 Misc. 3d 659 (Sup. Ct. Kings County 2005)(the court dismissed a petition for an Article 81 Guardian because it failed to contain any specific factual allegations of an incapacity that would warrant the appointment of a guardian).
- ¹⁰ N.Y. Mental Hyg. Law §81.02(b) (McKinney 2013).
- ¹¹ The statute defines "activities of daily living" as activities such as, but not limited to, mobility, eating, toileting, dressing, grooming, housekeeping, cooking, shopping, money management, banking, driving or using public transportation, and other activities related to personal needs and to property management. N.Y. Mental Hyg. Law §81.03(h) (McKinney 2013).
- ¹² N.Y. Mental Hyg. Law §81.02(c) (McKinney 2013).
- ¹³ *Id.*
- ¹⁴ *In re Mary J.*, 290 A.D.2d 847 (3d Dep't 2002).
- ¹⁵ *Id.*
- ¹⁶ *Matter of Karen P.*, 254 A.D.2d 530, 531, 678 N.Y.S.2d 802, 803 (3d Dep't 1998).
- ¹⁷ *Id.*
- ¹⁸ *Application of Hammons*, 164 Misc. 2d 609 (Sup. Ct. Queens County 1995).
- ¹⁹ *In re Ada*, 25 Misc. 3d 940 (Sup. Ct. Cortland County 2009).
- ²⁰ *Matter of Kustka*, 163 Misc. 2d 694 (Queens County Sup. Ct. 1994).
- ²¹ *Application of Hammons*, 164 Misc. 2d 609 (Sup. Ct. Queens County 1995). *But see In re Seidner, Id.*
- ²² *In re David C.*, 294 A.D.2d 433, 434 (2d Dep't 2002)(The appellate court reversed a jury decision finding someone incapacitated solely on evidence that an eviction proceeding was commenced against him after he was substantially delinquent in his rent payments and failed to maintain his apartment in proper condition.); *In re Tait*, N.Y.L.J., May 31, 1994, at 28 (Sup. Ct. N.Y. County 1994) (The court held that even though the AIP dressed oddly and collected garbage, she did not necessarily need a guardian, noting that a guardian would then have to be appointed for every mentally ill adult living a marginal existence in New York City.); *In re Seidner*, N.Y.L.J., Oct. 8, 1997, at 28, col 4 (Sup. Ct. Nassau County 1997)(The court held that a precarious housing situation and meager financial means do not, without more, constitute proof of incapacity such that a guardian is warranted.); *In re Peterson*, N.Y.L.J., Jan. 15, 1997, at 26, col 4 (Sup. Ct. New York County 1997).
- ²³ *In re Maher*, 207 A.D.2d 133 (3d Dep't 1994)(The court found that a guardian was not necessary in a case where the alleged incapacitated person suffered a stroke which left him partially paralyzed and aphasic, although occasionally able to speak a few words. The court found that even with these limitations there was no evidence that he was unable to provide for the management of his property, or that he was incapable of adequately understanding and appreciating the nature and consequences of his disabilities.) *But see In re Lula XX*, 224 A.D.2d 742 (3d Dep't 1996)(where the court appointed a guardian where the disability was purely physical).
- ²⁴ N.Y. Mental Hyg. Law §81.01 (McKinney 2013).
- ²⁵ *Id.*
- ²⁶ *In re Janczak*, 167 Misc. 2d 766, 773 (Sup. Ct. Ontario County 1995)(The court appointed a special guardian, pursuant to N.Y. Mental Hyg. Law §81.16(b) (McKinney 2013) for the limited purpose of providing adult protective services in the form of arranging for visiting nurse or other home health care services and arranging regular medical examinations by the AIP's current physician.)
- ²⁷ N.Y. Mental Hyg. Law §81.15(b)(6), (c)(8) (McKinney 2013).
- ²⁸ A guardian's commission is the document issued by the court that states "1. the title of the proceeding and the name, address, and telephone number of the incapacitated person; and 2. the name, address, and telephone number of the guardian and the specific powers of such guardian; and 3. the date when the appointment of the guardian was ordered by the court; and 4. the date on which the appointment terminates if one has been ordered by the court." N.Y. Mental Hyg. Law §81.27. The commission serves as the official credentials that allow an individual or institution to act in their capacity as guardian.
- ²⁹ An alleged incapacitated person is an individual who is the subject of a guardianship proceeding. In order for that person to be adjudicated incapacitated a court must find, based on clear and convincing evidence, that a person is likely to suffer harm because: 1. The person is unable to provide for personal needs and/or property management; and 2. The person cannot adequately understand and appreciate the nature and consequences of such an inability." *Id.* §81.02(b).
- ³⁰ U.S. Government Accountability Office. *Collaboration Needed to Protect Incapacitated Elderly People*, GAO-04-655, July 13, 2004.
- ³¹ U.S. Government Accountability Office. *Incapacitated Adults: Oversight of Federal Fiduciaries and Court Appointed Guardians Needs Improvement*, GAO-11-678, July 2011; U.S. Government Accountability Office. *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, GAO-10-1046, September 2010.
- ³² National Guardianship Network, http://nationalguardianshipnetwork.org/wings_states.htm.
- ³³ 22 NYCRR Part 1200 §1.6(b)(1)(2012).
- ³⁴ *Id.* at §1.14(b).
- ³⁵ *Id.* at §1.14(c).
- ³⁶ *Id.* at §1.14 cmt. 8.
- ³⁷ NY CPLR §4504(a).
- ³⁸ For an in-depth discussion about medical privacy issues in the guardianship process, see Joseph A. Rosenberg, *Routine Violations of Medical Privacy in Article 81 Guardianship Cases: So What or Now What?*, New York State Bar Association Journal, Vol. 85, No. 1, January 2013.
- ³⁹ N.Y. SOS. Law §457(b)(1).

- 40 N.Y. SOS. Law §457(b)(3).
- 41 Isolation occurs when (a) family members or caregivers restrict an older adult's contact with others or (b) an older adult is not given the opportunity to speak with others without the family member or caregiver present.
- 42 N.Y. Penal Law §485.05.
- 43 N.Y. Penal Law §485.10.
- 44 N.Y. Penal Law §120.05(12).
- 45 N.Y. Penal Law §260.31(4).
- 46 N.Y. Penal Law §260.31(3).
- 47 N.Y. Penal Law §260.31(1).
- 48 Current New York State Criminal Procedure Law allows for a prospective witness who suffers from demonstrable physical illness or impairment to be conditionally examined under oath. This testimony is then admissible as evidence in a subsequent trial. CPL §660.20(2)(b). A recent report of the New York State White Collar Crime Task Force recommends that this law be amended to allow for conditional examination of all potential witnesses aged 75 and older, regardless of impairment. The District Attorneys Association of the State of New York, Report of the New York State White Collar Crime Task Force 65-66 (2013). A bill based upon this recommendation is currently pending in the NYS Assembly. 2014 NY Assembly A8779.
- 49 N.Y. SOS. Law §457(b)(2).
- 50 Schurkman, Steven A., *Elder Law Q & A: Answers to Questions About Estate and Financial Planning, Health Care Planning and Elder Abuse*, pg. 55 (2000).
- 51 N.Y. SOS. Law §457(b)(7).
- 52 2013 NY Senate-Assembly S6221, A7892A.
- 53 N.Y. SOS. Law §457(b)(4).
- 54 *Id.* at (b)(5).
- 55 *Id.* at (b)(6).
- 56 N.Y. CPL. Law §530.12, 530.13.
- 57 *Id.* at §530.12(4), 530.13(4).
- 58 For other procedural distinctions between OSCs and standard motion practice, see CPLR §2214 (d).
- 59 There are three major credit reporting companies from which to request reports:
 Equifax: www.equifax.com; 1-800-525-6285 Transunion: www.transunion.com; 1-800-680-7289
 Experian: www.experian.com; 1-888-397-3742
- 60 N.Y. CPL. Law §602.
- 61 City of New York Department of Investigations Handbook of Regulations, Chapter IV §6-7, Effective April 23, 2014.
- 62 N.Y. REAL PROP. §735(1)(a); *Parras v. Ricciardi*, 710 N.Y.S.2d 792 (Civ. Ct. 2000).
- 63 (<http://nycourts.gov/courts/nyc/housing/lockouts.shtml>)
- 64 N.Y. CPL. Law §713(3).
- 65 *Fisher v. Queens Park Realty Corp.*, 41 A.D.2d 547, 549, 339 N.Y.S.2d 642, 645 (2d Dep't 1973).
- 66 NY RPAPL § 853. See also *Clinkscale v. Sampson*, 48 A.D.3d 730, 853 N.Y.S.2d 572 (2d Dep't 2008).
- 67 National Center on Elder Abuse, Westat, Inc. (1998). The national elder abuse incidence study: Final report. Washington D.C.: Authors.
- 68 Schiamberg, L. & Gans, D. (1999). An ecological framework for contextual risk factors in elder abuse by adult children. *Journal of Elder Abuse & Neglect*, 11(1), 79-103.
- 69 NY Fam Ct Act §812(1).
- 70 NY Fam Ct Act §822(b).
- 71 *Id.* at §827(v)(ii), §842.
- 72 NY Fam Ct Act §842, 842(a).
- 73 NY Real Prop §227-c(1) & (2)(a).
- 74 Deirdre Lok, "New Protocol Brings Access to Justice for Older Adults in New York City," *New York Law Journal*, July 6, 2012.
- 75 N.Y. C.P.L.R. Article 65.
- 76 104 N.Y. Jur. 2d Trespass § 10.
- 77 *Id.* (see *Application of Rochester Gen. Hosp.*, 158 Misc. 2d 522, 530, 601 N.Y.S.2d 375, 381 (Sup. Ct. Monroe County 1993)).
- 78 NY Public Health Law §2994.
- 79 *Id.* at (d)(1).
- 80 *Id.* at (d)(5).
- 81 *Id.* at (d)(4).
- 82 N.Y. Mental Hyg. §81.20 (a)(2), (3) (McKinney 2013).
- 83 N.Y. Mental Hyg. §81.20 (a)(6)(ii) (McKinney 2013).
- 84 N.Y. Mental Hyg. §81.35 (McKinney 2013).
- 85 67 N.Y. Jur.2d Infants 489 (2013).
- 86 N.Y. Mental Hyg. §81.35 (McKinney 2013).
- 87 N.Y. Mental Hyg. §81.07(g) (McKinney 2013).
- 88 *Id.*
- 89 N.Y. Mental Hyg. §81.06 (McKinney 2013).
- 90 *In re Francis M.*, 58 A.D.3d 937, 938 (3d Dep't 2009).
- 91 *In re Jones*, 929 N.Y.S 2d (N.Y. Sup. Ct. Kings County 2011).
- 92 *In re Joshua*, 62 A.D.3d 795, 797 (2d Dep't 2009) (guardian/trustee removed after improperly taking money from a supplemental needs trust to pay herself in compensation for guardianship duties).
- 93 67 N.Y. Jur.2d Infants 489 (2013); see also *In re Jones*, 929 N.Y.S 2d 200 (N.Y. Sup. Ct. Kings County 2011) (removal sought by petitioner because guardian did not assist the incapacitated person, who was born without arms, in obtaining accessible wheelchair and housing accommodation).
- 94 *Matter of Arnold O.*, 226 A.D.2d 866, 867 (3d Dep't 1996).

- ⁹⁵ Elder Law and Guardianship in N.Y. §15:47 (2012).
- ⁹⁶ *In re Beverly YY*, 79 A.D.3d 1442 (3d Dep't 2010) (evidence that the incapacitated person fell, without more, not enough to prove neglect and warrant removal); *Matter of Arnold O.*, 226 A.D.2d 866 (3d Dep't 1996) (conclusory allegations alone fail to establish guardianship misconduct).
- ⁹⁷ *In re Dunsmoor*, 24 A.D.3d 1218 (4th Dep't 2005) (disagreements over choice of residential facility and treatment for the incapacitated person not sufficient grounds for removing guardian).
- ⁹⁸ *In re Francis M.*, 58 A.D.3d 937, 938 (3d Dep't 2009) (guardian removed where IP wanted a new guardian because the current guardian was demeaning and condescending).
- ⁹⁹ *In re Guardianship of Candace C.*, 910 N.Y.S.2d 761 (N.Y. Sup. Ct. Dutchess County 2010).
- ¹⁰⁰ Guidance provided by the Guardian Assistance Network (GAN). GAN assists family guardians who have been appointed in Kings County under Mental Hygiene Law Article 81. GAN was founded by the Vera Institute of Justice initially as a program component of The Guardianship Project, and has since spun-off into government as a service of the Office of Court Administration. See *Guardian Assistance Network*, <http://www.nycourts.gov/ip/gan/>.
- ¹⁰¹ Under Part 36, judges appoint guardians, guardians ad litem, supplemental needs trustees, etc. on a fair and impartial basis. Judges choose the guardians from a list of appointees who have applied and been found eligible to perform these duties. *Part 36. Appointment by the Court*, http://www.nycourts.gov/ip/gfs/Part36RulesFINAL_1.pdf
- ¹⁰² It is important to note that the Inspector General's office handles only matters related to Part 36 guardians who are appointed by judges—not guardians who are family members, friends, or others appointed outside of Part 36 (if there is a problem with a family member/friend guardian, the concerned party must take the issue to court). Further, the office does not handle power of attorney or health care proxy issues.
- ¹⁰³ *In re Trust made by Giles*, 902 N.Y.S.2d 717, 720 (3d Dep't 2010) (testamentary trustee did not make unauthorized distributions from trust by giving beneficiaries large cash distributions).
- ¹⁰⁴ *Hoopes v. Bruno*, 513 N.Y.S.2d 301, 302 (3d Dep't 1987).
- ¹⁰⁵ *In re Trust made by Giles*, at 720 (3d Dep't 2010).
- ¹⁰⁶ N.Y. Est. Powers & Trusts § 7-2.6 (McKinney 2013).
- ¹⁰⁷ *In re Bitter*, 11 Misc. 3d 1032, 1034 (N.Y. Surr. Ct. Nassau County 2006) (decedent's daughter-in-law's letters of trusteeship revoked after son started divorce proceedings).
- ¹⁰⁸ N.Y. Est. Powers & Trusts §7-2.6 (McKinney 2013).
- ¹⁰⁹ N.Y. C.P.L.R. §6401(a) (McKinney 2013).
- ¹¹⁰ N.Y. C.P.L.R. §6401(b) (McKinney 2013).
- ¹¹¹ N.Y. Est. Powers & Trusts Law §7-3.1.
- ¹¹² *Matter of Rose BB*, 663 N.Y.S.2d 415, 417 (3d Dep't 1997) (trustee not removed when evidence did not support allegations of misconduct).
- ¹¹³ *Gouiran v. Gouiran*, 693 N.Y.S.2d 127, 128 (1st Dep't 1999).
- ¹¹⁴ N. Y. Surr. Ct. Proc. Act §711(2) (McKinney 2013).
- ¹¹⁵ N. Y. Surr. Ct. Proc. Act §711 (McKinney 2013).
- ¹¹⁶ N. Y. Surr. Ct. Proc. Act §711(11) (McKinney 2013).
- ¹¹⁷ N.Y. Gen. Oblig. §5-1501A (McKinney 2013).
- ¹¹⁸ The principal is an individual "acting for himself...who executes a power of attorney." N.Y. Gen. Oblig. §5-1501 (McKinney 2013).
- ¹¹⁹ *Id.*
- ¹²⁰ N.Y. Gen. Oblig. §5-1501 (McKinney 2013).
- ¹²¹ *In re Mildred M.J.*, 844 N.Y.S.2d 539, 541 (4th Dep't 2007) (POA upheld even though principal had mild dementia at time of document's execution).
- ¹²² *Id.*
- ¹²³ N.Y. Gen. Oblig. §5-1501(2)(c); §5-1510(2)(b)(McKinney 2013).
- ¹²⁴ N.Y. Gen. Oblig. §5-1511(1)(h) (McKinney 2013).
- ¹²⁵ N.Y. Mental Hyg. §81.29(d) (McKinney 2013).
- ¹²⁶ An agent is "a person granted authority to act as attorney-in-fact for the principal under a power of attorney." N.Y. Gen. Oblig. §5-1501 (McKinney 2013).
- ¹²⁷ N.Y. Gen. Oblig. §5-1505(2) (McKinney 2013).
- ¹²⁸ 2A N.Y. Jur.2d Agency §72 (2013).
- ¹²⁹ N.Y. Gen. Oblig. §5-1505 (McKinney 2013).
- ¹³⁰ N.Y. Gen. Oblig. §5-1505(2)(b) (McKinney 2013).
- ¹³¹ N.Y. Gen. Oblig. §5-1510(2)(e) (McKinney 2013).
- ¹³² N.Y. Gen. Oblig. §5-1510(2)(f) (McKinney 2013).
- ¹³³ N.Y. Gen. Oblig. §5-1511(1)(h) (McKinney 2013).
- ¹³⁴ *In re Walter K.H.*, 31 Misc. 3d 1233(A), 4 (N.Y. Sup. Ct. Erie County 2011) (POA revoked upon finding that agent had engaged in self-dealing by driving principal's car, using principal's credit cards, and storing principal's belongings in expensive storage facility).
- ¹³⁵ N.Y. Gen. Oblig. §5-1504 (McKinney 2013); See *Gornicki v. M & T Bank*, 162 Misc. 2d 471, 617 N.Y.S.2d 448 (1994) (noting that a reasonable opportunity to act is a question of fact dependent on the circumstances of the individual case, including the bank's procedures and the bank's technology).
- ¹³⁶ *In re Mildred M.J.*, 844 N.Y.S.2d 539, 541 (4th Dep't 2007) (health care proxy upheld even though principal had mild dementia).
- ¹³⁷ *Id.*
- ¹³⁸ *In re Walter K.H.*, 31 Misc. 3d 1233(A), 5 (N.Y. Sup. Ct. Erie County 2011) (health care proxy would not be removed without evidence that agent was unable or unwilling to act).
- ¹³⁹ *S.I. v. R.S.*, 24 Misc. 3d 567 (N.Y. Sup. Ct. Nassau County 2009) (husband wrote on health care proxy "I wish to live" but stated to wife that he didn't want to be like others in the hospital who were essentially lifeless).
- ¹⁴⁰ N.Y. Pub. Health §2992 (McKinney 2013).
- ¹⁴¹ N.Y. N.Y. Mental Hyg. Law §81.29(d).
- ¹⁴² N.Y. Pub. Health §2992 (McKinney 2013).
- ¹⁴³ N.Y. N.Y. Mental Hyg. Law §81.22(b)(2).



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