

**LEGAL ASPECTS OF ADULT
PROTECTIVE SERVICES**

2007 UPDATE

AGENDA

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Article 81

Article 17-A SCPA

LEGAL ASPECTS OF ADULT PROTECTIVE SERVICES

2007 UPDATE

Tele-training March 19, 2007

AGENDA

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**Moderator: Trish Geary
SUNY Distance Learning Project**

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Commissioner, Adult Services,
NYSOCFS, Bureau of Adult
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Legislative Developments

Federal Legislation

H.R. 3248: Lifespan Respite Care Act of 2006

This Bill amends the Public Health Service Act to establish a program to assist family caregivers in accessing affordable and high-quality respite care, and for other purposes. The Lifespan Respite Care Act provides \$289 million over five years for states to provide services to families such as:

- **develop lifespan respite care at the state and local level;**
- **provide respite care services for family caregivers caring for children or adults;**
- **train and recruit respite care workers and volunteers;**
- **provide information to caregivers about available respite or support services;**
and
- **assist caregivers in gaining access to such services.**

H.R. 6197: Older Americans Act Amendments of 2006

To amend the Older American Act of 1965 to authorize appropriations for fiscal years 2007 through 2011. The Act authorizes numerous grants to the states on a broad spectrum of issues such as:

- **to prepare communities for the aging of the population,**
- **support the use of health monitoring and technology,**
- **improve transportation for seniors,**
- **conduct activities of national significance to support caregivers,**
- **build public awareness of cognitive impairments, and**
- **grants for elder justice programs and collection of data regarding elder abuse, neglect, and exploitation.**

State Legislation – Chapter Laws of 2006

Abuse

Chapter 173 of the Laws of 2006 (A3691)

The purpose of this Bill is to ensure that crime victims are made aware of their rights and available assistance programs.

Chapter 215 of the Laws of 2006 (A9907A)

Amends sections of the criminal procedure law with respect to the duration of final orders of protection, providing for duration of up to eight years. This legislation will give increased protection to those who are at risk of being harmed by persons convicted in criminal court.

Chapter 253 of the Laws of 2006 (S7691A)

This Bill provides that pets may be included in orders of protection in certain circumstances. The bill will include in the order of protection that a defendant refrain from intentionally injuring or killing, without justification a companion animal owned, possessed, leased, kept or held by the petitioner or a minor child residing in the household.

Chapter 356 of the Laws of 2006 (A10130A)

This Bill amends the mental hygiene law and the education law, in relation to reports concerning the abuse and mistreatment of mentally retarded and developmentally disabled adults. The bill spells out clearly that reports regarding persons having previously received services from OMRDD shall be made to that agency and others shall be reported to Adult Protective Services. The bill requires the commissioners from those respective agencies to develop a memorandum of understanding (MOU) to be entered into by each county Developmental Disabilities Services Organization (DDSO) and Department of Social Services outlining the responsibility of each and how this shall be implemented

Chapter 673 of the Laws of 2006 (S6825A)

This law authorizes providers of services to the mentally ill, mentally retarded and developmentally disabled people to conduct nationwide criminal history checks of employees by forwarding an individual's fingerprints to the FBI.

Health Care

Chapter 534 of the Laws of 2006 (S8029)

Requires that patients discharged from an Office of Mental Health facility be referred only to an adult home or residence that is consistent with the patient's needs and that is not under a DOH enforcement action.

Chapter 633 of the Laws of 2006 (A11720B)

The purpose of this Bill is to improve access to home based medical care for the elderly living in the community as part of the "Home Based Primary Care for the Elderly Demonstration Project". The program will allow up to three nursing homes that also provide a variety of community based care to provide home based physician, nurse practitioner and physician assistant services to elderly patients.

Chapter 325 of the Laws of 2006 (S6365A)

This bill would permit alternative "do-not-resuscitate" DNR forms to specifically include "do-not-intubate" orders and would exclude people with mental illness from using the alternative DNR forms.

Chapter 76 of the Laws of 2006 (S5917A)

This bill amends a new section of the Public Health Law, 4201, which establishes an orderly process for the disposition of a decedent's remains. This law allows an individual, before s/he dies, to designate a person to carry out their wishes regarding the disposition of his/her remains following death. It also creates a rank order list of people who can carry out those wishes absent a written instrument executed by the decedent.

The following persons in descending priority shall have the right to control the disposition of the remains of a decedent:

- the person designated in a written instrument**
- the decedent's surviving spouse;**
- the decedent's surviving domestic partner;**
- any of the decedent's surviving children eighteen years of age or older**
- either of the decedent's surviving parents;**
- any of the decedent's surviving siblings eighteen years of age or older;**
- a legal guardian ; or**

- a duly appointed fiduciary of the estate of the decedent.

NOTE: the Form for “Appointment of an Agent to Control Disposition of Remains” Can be accessed at the Department of Health website www.health.state.ny.us .

Chapter 748 of the Laws of 2006 (S8482)

Timothy’s Law creates a mental health benefit structure comprised of two mandates for large employers and a subsidized mandate paired with a “subscriber option” for the same coverage for groups with 50 or fewer employees.

All employers that offer health insurance and not exempt under federal law (self-insured plans) or state law (Healthy New York, Child Health Plus, Family Health Plus) will, for the first time, be required to provide broad based mental health coverage including at least 20 outpatient days and 30 inpatient days, with co-payments and deductibles comparable to those used for physical ailments (financial parity). This provision provides unlimited coverage of medically necessary care for children and adults with the following diagnoses: *schizophrenia/psychotic disorders, major depression, bipolar disorder, delusional disorders, panic disorder, obsessive compulsive disorders, anorexia, and bulimia*. Exclusions may be no more restrictive than the parity-based coverage for state employees, the Empire Plan. Exclusion of chronic mental illnesses would thereby be prohibited.

Miscellaneous

Chapter 677 of the Laws of 2006 (S6913A)

The law requires disaster preparedness plans in New York to take into account the needs of individuals with domesticated pets and service animals following a disaster or emergency.

Case Law Developments

Decisions Jan. 2006 – Dec. 2006

ABUSE

In re Hazel P.R., Petitioner-Respondent, v Paul J.P., Respondent-Appellant.,
2006 NY Slip Op 8193; 2006 N.Y. App. Div. LEXIS 13452

In view of the testimony of both parties at the fact-finding hearing, the Appellate Court affirmed the lower court's decision that respondent's treatment of petitioner, his mother, who is particularly vulnerable because of her mental illness, and his extended pattern of menacing, harassment, attempted assault and disorderly conduct toward her, constitute aggravating circumstances (Family Ct Act § 827[a][vii], § 842;

In the Matter of GARY STEINHILPER, on Behalf of BEATRICE STEINHILPER,
Respondent, v LINDA DECKER, Appellant, 2006 NY Slip Op 9968; 2006 N.Y. App.
Div. LEXIS 15728

A series of financial transactions perpetrated by fraud and manipulation do not constitute harassment or any other of the listed family offense crimes in Article 8 of the Family Court Act therefore the Family Court lacked subject matter jurisdiction to hear the petition thus it was dismissed.

In the Matter of the Estate of George J. Ferrara, Deceased. Salvation Army,
Appellant, Dominick Ferrara, et al., Respondents. 7 N.Y.3d 244; 852 N.E.2d 138;
819 N.Y.S.2d 215; 2006 N.Y. LEXIS 1759

Article 5, title 15 of the General Obligations Law prescribes what a statutory short form power of attorney must contain, specifies the powers that the form may

authorize and defines their scope. In this appeal, the Court of Appeals held that an agent acting under color of a statutory short form power of attorney that contains additional language augmenting the gift-giving authority must make gifts pursuant to these enhanced powers in the principal's best interest.

Matter of Astor, 13 Misc. 3d 862; 2006 N.Y. Misc. LEXIS 2451

This was a hotly contested guardianship proceeding concerning the health, care and finances of society icon Brooke Astor. On July 20, 2006, Philip Marshall filed a petition seeking to remove his father (and Mrs. Astor's son), Anthony Marshall, as primary care giver of Mrs. Astor, and to void the powers of attorney over her finances and health care proxy he held. Petitioner sought to name a long-time friend of Mrs. Astor, Annette de la Renta, as guardian of her person, and JPMorgan as guardian of her property. The petition contained serious and disturbing allegations of a pattern of neglect and mistreatment of Mrs. Astor over the last several years. The petition alleged that Anthony Marshall had not provided for his elderly mother and, instead, had allowed her to live in less than adequate living conditions in her Manhattan apartment and had cut back on necessary medication and doctor's visits, while enriching himself from her assets.

The court signed the order to show cause on July 21, 2006, appointing Annette de la Renta as temporary guardian of the person and JPMorgan Bank, and Daniel Fish, an elder law attorney, as temporary guardians of the property. The order authorized JPMorgan to pay for Mrs. Astor's interim medical care, housing, relocation to her home in Briarcliff Manor other personal needs, as well as to marshal her income and assets and sign and file income tax returns and other tax documents. Mrs. Astor's assets exceed over \$ 120 million.

The case centered on whether the powers of attorney and health care proxy that Anthony Marshall had received from his mother should be declared void by the court because he allegedly breached his fiduciary responsibilities to his mother. Thus, it was necessary for the parties to show what actions Anthony Marshall had engaged in over the last several years and Brooke Astor's capacity to make decisions at the time her son engaged in those actions. The legal issues were numerous, complex and novel. A large number of witnesses were contacted and interviewed, witnesses such as Mrs. Astor's family members, physicians, nurses, caretakers, current and former staff, friends, former attorneys and financial advisors.

The Mental Hygiene Law requires that guardianship hearings be held expeditiously and take precedence over all other matters before the court. Due to the complexity of this matter and a motion by several news organizations to unseal the record, the court extended the hearing date well past the 28-day period contemplated by MHL § 81.07(b) (1), and ultimately set a hearing date of October 19, 2006. Thus, the parties were required to prepare for trial on a relatively expedited basis. According

to Harvey Corn, Esq., co-counsel for Anthony Marshall, more than eighty thousand pages of documents were produced in discovery. These included many thousands of pages of financial records, estate documents and tax returns and over a thousand pages of mostly handwritten nursing and medical records.

At the hearing a Settlement Agreement was reached whereby the temporary guardians were named permanent guardians. In addition, over \$ 11 million in assets - consisting of cash, jewelry and art - was returned to Mrs. Astor by Anthony Marshall and his wife, Charlene Marshall. Collateral totaling over \$10 million has been pledged by the Marshalls to cover any future claims brought on behalf of Mrs. Astor's estate. In addition, Anthony and Charlene Marshall, along with two of Mrs. Astor's former attorneys agreed to renounce any right to be appointed a fiduciary under Mrs. Astor's last will and testament, codicils or other testamentary documents.

The settlement did not involve any admission of wrongdoing by any party; it specifically provided that it could not be construed and did not represent any finding against Anthony Marshall and that it would not be admissible in any later proceeding for any purpose. It was a settlement joined in by all for the benefit of Mrs. Astor and her estate.

At the end of the proceeding there were numerous fee applications submitted to the court, encompassing the services of 56 lawyers, 65 legal assistants, six accountants, five bankers, six doctors, a law school professor, and two public relations' firms. The total amount of the fees and expenses the court was asked to approve for a three-month period of time was a staggering \$ 3,044,055.71.

In the Matter Williams, 2006 NY Slip Op 51521U; 12 Misc. 3d 1191A; 2006 N.Y. Misc. LEXIS 2109

This was a case of financial exploitation and manipulation of a 90 year old woman by her niece and grand nephew. After being placed in a nursing home by these relatives they took over her home and spent over \$200,000 of the AIP's assets under a Power of Attorney the grand nephew had obtained. The grand nephew petitioned to become the guardian of Ms. Williams alleging she was totally incapacitated. The nursing home arranged for a psychiatric evaluation of Ms. Williams whereby a consulting psychiatrist among other things, found that Ms. Williams was not demented and had the capacity to make decisions for herself. Orders of Protection were issued to protect against the grand nephew and niece. Ms. Williams hired an attorney and revoked the Power of Attorney.

There was ample evidence at the hearing from persons involved in Ms. William's life to show she had an informal support system in place to care for herself at home

until her relatives gradually took over her life. Ms. Williams clearly testified that she did not wish to have her grand nephew as her guardian. Indeed, she informed the court that she no longer wished to have any contact with him whatsoever.

The court found

“Although her judgment has been questionable in some of her past dealings and her recent history is rife with incidents where her good and trusting nature had been abused, the court is not making a finding of mental incapacity but rather that due to the ravages of age and physical incapacity she must rely upon the good will and aid of others to perform the functions of everyday life and thus has become extremely vulnerable to abuse and predatory behavior. Thus far, living in this unprotected environment has enabled opportunistic persons to access her financial resources and obtain thousands of dollars; it has allowed her relatives to leave her in a nursing home against her will. Her physical and financial freedom has been jeopardized. Ms. Williams is unquestionably at continued risk of harm without having a guardian of her person and property in place. These circumstances provide clear and convincing evidence that appointment of a guardian is needed to protect Ms. Williams as contemplated by the legislature in enacting Article 81 of the Mental Hygiene Law.”

The court appointed the VERA Guardianship Project (in Brooklyn) as guardian. The VERA Project assisted Ms. Williams to move back into her home with homecare in place.

A secondary issue in this case was the conduct of the attorney. The petitioner’s attorney should have disqualified himself from representing the petitioner grand nephew due to a conflict of interest. The attorney had previously represented the AIP when he prepared a Will and Power of Attorney giving petitioner-grand nephew control over her finances. Additionally, although having established an attorney-client, confidential relationship with the AIP and even having met with her and having been notified by her that she believed her nephew was stealing from her, the attorney undertook to represent the petitioner in a proceeding adverse to the AIP to declare her incompetent and nullify her revocation of the Power of Attorney that he prepared.

Matter of Margaret S., 2006 N.Y. Misc. LEXIS 2833; 236 N.Y.L.J. 9

Petitioner alleges that the AIP's transfer of title to the "family homestead" was the result of undue influence on the part of her brother, Peter, and the lack of capacity on the part of the AIP.

In this case the Court found that the close family ties between Peter, Ann and Margaret S. resulting from the AIP's dependency upon her son and daughter-in-law due to her declining health and mental condition, were alone insufficient to establish that the AIP was the subject of undue influence by either of them. Moreover, the trial transcript contained evidence that Margaret.S.'s expressed desire to give her

house to Peter was not the result of undue influence or control but rather was the natural product of her gratitude to her son for the care she has received and expects to receive from him in the future.

Regarding the question of legal capacity at the time of the transfer of title, it is well established that persons suffering from a disease such as Alzheimer's are not presumed to be wholly incompetent but rather, it must be established that, because of the affliction, the person was incompetent at the time of the transaction.

The court gave great weight to the testimony of the treating physician of Margaret S. as persuasive of the capacity of the AIP to comprehend and understand that she was transferring ownership of her home to Peter to the exclusion of her other children. The transfer was conducted in the presence of Dr. S. following a physical examination and mental evaluation of the AIP. The doctor's opinion of the AIP's lucidity when executing the deed was considered significant in view of the longstanding doctor-patient relationship between herself and the AIP, as well as her extensive experience in the field of geriatrics.

Health Care

In the Matter of the Appointment of a Guardian for A.C, 12 Misc. 3d 1190A; 2006 N.Y. Misc. LEXIS 2091

Absent any evidence at the hearing that would justify invalidating the health care proxy that is currently in place, the court found that the person had effectuated a plan for her medical and personal needs that would obviate the appointment of a guardian over her person. Moreover, the person has the ability to execute a power of attorney, if she so chooses, and select an attorney-in-fact, to assist her with her financial needs.

Therefore the application for appointment of a guardian was denied.

Matter of Susan Jane G., (2006, App Div, 2d Dept) 823 NYS2d 102.

Daughters were properly appointed as guardians of their mother's person and property and a power of attorney the mother had executed in favor of her husband was properly revoked as the daughters showed that the mother was an incapacitated person and that the power of attorney was executed while the mother was incapacitated; the daughters also showed that the husband was no longer reasonably available, willing, and competent to fulfill his obligations under N.Y. Pub. Health Law Art. 29-C, thereby warranting revocation of a health care proxy.

**In the Matter of the Application for the Appointment of a Guardian for S.K.,
2006 NY Slip Op 26384; 2006 N.Y. Misc. LEXIS 2609**

The nursing home was seeking to be paid for the care it has rendered by petitioning for the appointment of a guardian of the patient. Additionally the nursing home wanted the guardian to settle the questions of whether or not the person is receiving skilled care and whether the costs of skilled nursing care are covered by the person's health insurance policy. A cross-petition was filed by the person's wife seeking to dismiss the petition as she holds a power of attorney naming her the person's attorney-in-fact.

The court found that even though the person had functional limitations, he has advanced directives in place to provide for his personal needs and property management. The purpose for which this guardianship proceeding was brought, for the nursing home to be paid for its care of the person, was not the legislature's intended purpose when Article 81 was enacted. Moreover, the Director of Social Services at the nursing home testified that Mrs. K. makes medical decisions for the person. There was no evidence set forth at the hearing to prove that Mrs. K. is in any way abusing her power as attorney-in-fact or to demonstrate that the person lacked capacity when he executed the power of attorney. The court found that the person had effectuated a plan for the management of his affairs thus obviating the need for the appointment of a guardian. The petitioner must seek a different avenue of redress for relief as a guardianship application is inappropriate.

Physician/Patient Privilege

**In the Matter Of The Application of Kang Yun Yu, Director of In-Patient
Psychiatry at Interfaith Medical Center, Petitioner, For the Appointment of a
Guardian For Q.E.J.,2006 NY Slip Op 26459; 2006 N.Y. Misc. LEXIS 3378**

The issue presented in this case is whether an exception should be created to the physician/patient privilege when the medical institution in which the AIP resides seeks to present medical records and the testimony of a treating physician to have a guardian appointed in order to secure an appropriate placement of the AIP upon her discharge.

The Appellate Courts that have considered admissibility have consistently upheld the privilege. While there may be some valid argument to creating an exception to the physician/patient privilege in guardianship matters, it has not yet been created by the legislature, nor has the Court of Appeals interpreted MHL § 81.12 (b) to be an exception to this privilege. Until such time as there is a change in the law or the Court of Appeals rules otherwise, the privilege applies in all contested guardianship cases. Accordingly, where a treating medical/healthcare facility seeks to admit into evidence a treating physician's testimony and medical records regarding an AIP,

such records and testimony, even for the salutary purpose of securing an appropriate placement for the AIP, remain privileged and will not be admitted unless the AIP waives the privilege or affirmatively places his/her medical condition in issue.

In the Matter of Bess Z., 27 A.D.3d 568; 813 N.Y.S.2d 140; 2006, LEXIS 2858

Even though the Supreme Court properly appointed the appellant's children as co-guardians of her personal needs and property management the Court should not have admitted the testimony of her treating physician. The admission of that testimony violated the appellant's doctor-patient privilege, nevertheless it does not warrant a new hearing since the remainder of the testimony, including the testimony of the appellant's children, established the appellant's inability to care for her medical, personal, or financial needs; further, Mental Hygiene Law article 81 does not require medical testimony in a guardianship proceeding.

Procedure

In the Matter of STUART G. and PAUL G., Petitioners, for the Appointment of Co-Guardians of Harold G., an Alleged Incapacitated Person., 12 Misc. 3d 232; 820 N.Y.S.2d 426; 2006 N.Y. Misc. LEXIS 483

The AIP's ex-wife, who held POA and HCP, and the AIP's son were served with Notice of Petition and thereafter requested from petitioner's counsel a copy of the petition and supporting papers. They alleged that there was information or allegations therein that affected their property rights and that they were therefore entitled to full and specific notice, an opportunity to be heard and an opportunity to confront their accusers in court. AIP's counsel refused to turn it over, both to protect his rights in the Article 81 proceedings as well as his rights in the long resolved matrimonial proceeding that the wife sought to reopen. While pointing out that Article 81 has specific notice provisions under the Mental Hygiene Law section 81.07(g)(2), as amended, the court allowed disclosure of the information as it appeared it would not cause "undue humiliation and embarrassment" to the Alleged Incapacitated Person and it was clear that the ex-wife and son already had all the information in the petition, having been the petitioners in a prior Article 81 proceeding that had been discontinued because the AIP was living out of state.

In ordering the relief, the Court had done so based on the facts of this case and noted that this is an exception to the law as it presently exists, and all requests must be evaluated by the Court on a case-by-case basis.

Guardian Powers

In the Matter of Rhodanna C. B. (Anonymous), 823 N.Y.S.2d 497; 2006 N.Y. App. Div. LEXIS 13055

The Appellate Division held that the Supreme Court's appointment of guardians pursuant to Mental Hygiene Law article 81 with the authority to consent in perpetuity to the administration of psychotropic medication to their ward, over her objection and without any further judicial review or approval, is inconsistent with the due process requirements of *Rivers v Katz*. The lower court's judgment was reversed

Matter of Mary XX., (2006, App Div, 3d Dept) 822 NYS2d 659

Guardian was entitled to an accounting from a trustee that held all of the ward's property in trust and provided income to the ward for the ward's care and support because the guardian had an obligation to assure that the ward's living and support needs were being met. Although the guardian had not been appointed as a guardian over the ward's property, she was nevertheless entitled to the accounting.

In the Matter of the Application for the Appointment of a Guardian for E.H., 13 Misc. 3d 1233A; 2006 N.Y. Misc. LEXIS 3194

In the Matter of the Application for the Appointment of a Guardian for E.H., A Person Alleged To Be Incapacitated.

92170/06

SUPREME COURT OF NEW YORK, BRONX COUNTY

2006 NY Slip Op 52101U; 13 Misc. 3d 1233A; 2006 N.Y. Misc. LEXIS 3194

November 6, 2006, Decided

HEADNOTES: [1233A] Guardian and Ward--Appointment of Guardian. Civil Practice Law and Rules--§ 4508 (Evidence; social worker).**

JUDGES: Alexander W. Hunter, J.

OPINION BY: Alexander W. Hunter

OPINION:

Alexander W. Hunter, J.

A petition has been filed for the appointment of a guardian of the person and property of *E.H.*, an alleged incapacitated person (hereinafter known as "the person"). The Court, having been satisfied that the person was served with the order to show cause and petition by personal delivery at least fourteen days prior to the return date, and that all other necessary interested persons required to be served under Mental Hygiene Law section 81.07 were timely served with the order to show cause and petition, appointed a court evaluator from Mental Hygiene Legal

Service (hereinafter "MHLS").

However, this court was informed by MHLS that it had represented the person in proceedings in connection with her hospitalization at St. Barnabas Hospital and it would be a conflict for MHLS to serve as court evaluator. Accordingly, this court issued an order dated October 4, 2006, vacating [***2] the appointment of MHLS as court evaluator and appointing MHLS as counsel for the person. Beverly Dorman, Esq. represented the person.

The hearing was held on *October 26, 2006*. The hearing was conducted in the absence of the person. She refused to come to court for the hearing even though arrangements were made by the hospital to bring her to court. She did not want to discuss the proceedings at the hospital and left the room even though her attorney was present. Accordingly, her appearance was waived. Michael Swanwick, Assistant Director of Social Work at St. Barnabas Hospital, Cathy Lloyd, the person's case manager from Adult Protective Services (hereinafter "APS") and Rosemary Davis, an employee of the New York City Housing Authority (hereinafter "NYCHA"), testified at the hearing.

At the commencement of the hearing, the person's attorney objected to the testimony of Michael Swanwick on the ground that he is a social work supervisor at St. Barnabas Hospital and there is a social worker/client privilege under C.P.L.R. § 4508. She asserted that any information received by Mr. Swanwick as supervisor, was obtained from the person's treating social worker, [***3] and the information would "in effect" be privileged. However, as counsel for the petitioner articulated, Mr. Swanwick is not involved in a treating relationship with the person. Therefore, there is no social worker/client privilege that would attach to his testimony or his observations of the person.

Moreover, petitioner asserted that Mr. Swanwick would provide testimony as a member [*2] of the Discharge/Length of Stay Committee at St. Barnabas Hospital. Said committee discusses those particular patients whose length of stay in the hospital is elongated and formulates a safe and appropriate discharge for said patients. Petitioner's counsel cited to the Public Health Law's mandate to ensure that each patient has a discharge plan which meets the patient's "post-hospital care needs." n1 The issue of why the person in the matter herein cannot be discharged safely is the purpose of this guardianship proceeding. The person has functional limitations which prevent her from having the ability to effectuate a plan of discharge that will preserve her health and well-being upon her discharge from the hospital.

----- Footnotes -----

n1 10 NYCRR 405.9(f)

----- End Footnotes----- [***4]

The petitioner also argued that a hospital is one of the parties that can commence an Article 81 proceeding for the appointment of a guardian. If the argument by counsel for the person is taken to its logical extreme, hospitals would be prevented from commencing guardianship proceedings if they were precluded from offering this kind of non privileged evidence at a hearing. This was not the intention of the legislature in enacting Article 81. The petitioner contends that Article 81 seeks to achieve a balance between the alleged incapacitated person's rights and the state's interest in protecting the health and welfare of its citizens and, as such, the court has the discretion to decide when to sustain evidentiary objections and when not to.

In particular, petitioner's counsel points out that the hospital did not request the appearance of the treating physician or the treating social worker which would clearly violate the privilege. Instead, petitioner called as a witness the social work supervisor who is familiar with the person in his role supervising "problem cases" in the hospital. The supervising social workers' role in this matter is that of a discharge planning social worker [***5] which is different from a social worker in a community setting who has a treating relationship with a patient and assists the person in social and psycho-social issues.

This court recognizes that even though this is a guardianship proceeding wherein the person's medical and mental condition are at issue, the social worker/patient privilege has not been waived. n2 However, this court permitted Mr. Swanwick to testify as to his observations of the person in his role as a member of the Discharge/Length of Stay committee as it relates to the person.

----- Footnotes -----

n2 See, *Matter of Rosa B.*, 1 A.D.3d 355, 767 N.Y.S.2d 33 (2nd Dept. 2003)

----- End Footnotes-----

FINDINGS OF FACT

It is determined that the following findings of fact were established by clear and convincing proof upon the documentary evidence submitted and the testimony adduced:

1. The person is seventy-four (74) years of age and she presently resides at St. Barnabas Hospital located at Third Avenue and East 183rd Street in Bronx County.
2. The person is a long-term resident [***6] of the hospital. She came to the attention of Mr. Swanwick when the person's social worker had concerns about the person's discharge from the hospital. The person is deaf and she has behavioral problems which cause her to become non-compliant with her medication. She has mental and medical conditions, such as high blood pressure, which require that she

take daily medication. Although she has been compliant with [*3] taking her medication at the hospital, the hospital was required to request court intervention at least twice in the past in order to get the person to comply. She has stated that she has no intention of taking her medication upon her discharge from the hospital.

The person can perform most of her activities of daily living but she needs prompting in order to do so, such as bathing daily. She often refuses to eat and her meals are brought to her room as opposed to the dining hall at the hospital. The person is belligerent and angry and has been assaultive with the staff at the hospital. The person wants to return to her apartment in the community. However, the person refuses any assistance including devices to aide her with her hearing impairment. The hospital has [***7] made efforts to provide care for her if she returns to her apartment in the community, such as Assisted Outpatient Treatment, intensive care management, and APS, but all have declined to work with the person because she is not compliant with her medications and because there is a lack of support in the community. She was placed on financial management through APS after she faced eviction for failure to pay her rent. As a result, the person is in need of someone to provide for her personal needs and financial management. The guardianship is required for an indefinite duration.

3. The person's income and assets consist of social security benefits in the amount of approximately \$ 600 per month.

4. Mr. Swanwick stated that he believes a nursing home would be the best environment for the person because it is a more restrictive environment where the person can be supervised regularly and medical staff is present to address her needs and make sure she takes her medication. The person has stated that she does not require assistance but if she returns to her home without assistance, she will be a danger to herself and to others. The person was initially brought to St. Barnabas Hospital by [***8] emergency medical technicians after her apartment flooded and she refused to allow emergency personnel to enter the apartment.

5. The person's APS caseworker stated that the person was referred to APS in late 2004 or early 2005 because she was facing eviction from her apartment for failing to pay her rent. She was placed on financial management so that her rent could be timely paid. The caseworker was only able to meet with the person one time and was only able to speak to her in the doorway because the person refused to let the caseworker enter her apartment. The caseworker stated that there was a psychiatric evaluation in the APS file wherein the psychiatrist who evaluated the person indicated that the person had scissors and a knife in her pocket and she leapt at the psychiatrist when she went to the apartment to perform her evaluation.

6. Ms. Davis, the NYCHA employee assigned to work in the building where the person resided, a senior citizen building, was the only person able to keep track of the person. She stated that the person told her she would hear a lady screaming at night and that there was a man "hitting the children." However, upon hearing this,

Ms. Davis stated that [***9] she grew concerned because the person is hearing impaired. Ms. Davis further stated that as a result of the person's hearing impairment, NYCHA installed a doorbell in the person's apartment wherein a bulb would light up if someone was ringing her doorbell. However, the person disconnected the doorbell.

Ms. Davis would see the person leave her apartment approximately once a month to go shopping for groceries but she stopped seeing her approximately three years ago. She went to the person's door and heard nothing. She became concerned and entered her apartment with social [*4] services personnel. Ms. Davis found the person crouched in a corner with a head of lettuce in her hand that she had peeled down to the core. She was severely dehydrated and disheveled.

When the flood occurred in the person's apartment, it caused flooding to several apartments below that of the person's. The police were called, as were firefighters and other emergency personnel. The person refused to permit anyone to enter the apartment. Police officers cut the chain on the person's door and forced their way into the apartment. Upon entering, Ms. Davis heard the person screaming that she did not want help [***10] and she ran toward the window/terrace area.

Ms. Davis stated that she is concerned for the person and agrees that the person requires a guardian because she isolated herself while she was in her apartment and when emergency personnel were in the person's apartment, she observed that there was no food whatsoever in the refrigerator. The person had no electricity in her apartment and it is unknown how long she was living in that condition.

7. Through cross-examination of the witnesses, the person's counsel established the person's position that she did not want to have a guardian appointed and she wanted to return to her apartment in the community.

CONCLUSIONS OF LAW

1. After examination of the documents submitted and the testimony adduced at the hearing, the petition for the appointment of a guardian for the person and property is hereby granted. *Integral Guardianship Services*, a not-for-profit social services agency located at 36 West 44th Street, New York, New York 10036, is hereby appointed guardian of the person and property.

2. The guardian is granted those powers listed under Mental Hygiene Law § 81.22, which are necessary and [***11] sufficient to provide for the personal needs of the person. These include the power:

a) to determine who should provide personal care or assistance;

b) to make decisions regarding the social environment and other social aspects of the life of the person;

c) to choose the place of abode for the person, including, but not limited to nursing home or community residence;

d) to apply for government and private benefits on behalf of the person;

e) to authorize access to or release of confidential records;

f) to consent to or refuse generally accepted routine or major medical or dental treatment subject to the provisions of subdivision (e) of section 81.29 of this article dealing with life sustaining treatment; the guardian shall make treatment decisions consistent with the findings herein pursuant to Mental Hygiene Law § 81.15 and in accordance with the person's wishes, including the person's religious and moral beliefs, or if the person's wishes are not known, and cannot be ascertained with reasonable diligence, in accordance with the person's best interests, including a consideration of the dignity and uniqueness of every person, the possibility and extent [*12] of preserving the person's life, the preservation, improvement or restoration of the person's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a [*5] reasonable person in the person's circumstances would wish to consider;**

g) determine whether the person should travel;

h) defend or maintain any civil judicial proceeding.

3. The guardian of the property is granted those powers listed under Mental Hygiene Law § 81.21 which are necessary and sufficient to provide for the management of the person's assets. These powers include the following:

a) the guardian shall be allowed to make reasonable expenditures from the person's assets, for the purpose of providing support of the person in the event the annual income is insufficient to meet the person's needs;

b) to marshall and invest the person's assets in investments eligible by law for investment of trust funds and to dispose of investments so made and reinvest the proceeds as so authorized;

c) to pay any existing debts or claims which have been proven [*13] to the satisfaction of the guardian as being properly due and owing;**

d) to preserve, protect and account for such property faithfully; to retain or employ attorneys, accountants or other professionals to assist in the performance of the duties of the guardian. However, payment of fees to such persons shall only be paid with prior approval of the Court;

e) the guardian of the property may not alienate, mortgage, lease or otherwise dispose of real property without the specific direction of the Court obtained upon proceedings taken for that purpose as prescribed in Article 17 of the Real Property Actions and Proceedings Law, provided however, that without instituting such proceedings, the guardian of the property may, without the authorization of the Court, lease any real property for a term not exceeding five years;

f) pay funeral expenses.

4. These powers constitute the least restrictive form of intervention consistent with the person's functional limitations.

5. The bond that is normally required pursuant to Mental Hygiene Law § 81.25 is hereby waived. Moreover, the educational requirements pursuant to Mental Hygiene Law § 81.39 [***14] are also waived.

6. Integral Guardianship Services, as guardian, shall be compensated in the amount of \$ 450.00 per month, which sum shall be deducted from the person's income and shall be deemed excluded from available income for the purpose of the Medicaid calculation of net available monthly income, because such expenditure for the administrative costs of this proceeding is necessary to insure the medical and physical well-being of the person.

7. Integral Guardianship Services shall have the power to retain an attorney solely necessary for legal work, or an accountant to assist in the preparation of the initial report, annual accountings, and final report or to assist in the preparation of federal and state income tax returns, subject to court approval of fees.

8. Integral Guardianship Services, as guardian of the property shall pay to its attorney(s) from the assets and/or income of the person, the sum of \$ 300.00 as and for legal fees pertaining to the creation of the guardianship, including the preparation and filing the oath and designation, preparing and obtaining the guardianship commission, reviewing the file and rendering initial advice.

9. The guardian shall file an [***15] interim report and annual report, in accordance with Mental [*6] Hygiene Law §§ 81.30 and 81.31, with the Guardianship Department of Bronx County, 851 Grand Concourse, Bronx, New York. Failure to file said reports may result in the removal of the guardian.

10. Petitioner is directed to settle an order and judgment, with a copy of this decision, in accordance with Mental Hygiene Law § 81.16 (c) and the guardian is directed to file its designation in accordance with Mental Hygiene Law § 81.26. Said order and judgment should be filed in a timely fashion due to the exigency of these proceedings.

This constitutes the decision and order of this court. Date: November 6, 2006

**In the Matter of the Estate of George J. Ferrara, Deceased. Salvation Army,
Appellant, Dominick Ferrara, et al., Respondents.
No. 92**

COURT OF APPEALS OF NEW YORK

**7 N.Y.3d 244; 852 N.E.2d 138; 819 N.Y.S.2d 215; 2006 N.Y. LEXIS 1759; 2006 NY
Slip Op 5156
June 29, 2006, Decided**

**PRIOR HISTORY: Matter of Ferrara, 22 A.D.3d 578, 802 N.Y.S.2d 471, 2005 N.Y.
App. Div. LEXIS 10875 (N.Y. App. Div. 2d Dep't, 2005)**

**DISPOSITION: Order reversed, without costs, and matter remitted to Surrogate's
Court, Rockland County, for further proceedings in accordance with the opinion
herein.**

COUNSEL: Edwin David Robertson, for appellant.

Annette G. Hasapidis, for respondents.

Mariya S. Treisman, for the Attorney General.

JUDGES: Opinion by Judge Read. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo and R.S. Smith concur.

OPINION BY: READ

OPINION:

[139] [***216] [*247] READ, J.:**

Article 5, title 15 of the General Obligations Law prescribes what a statutory short form power of attorney must contain, specifies the powers that the form may authorize and defines their scope. On this appeal, we hold that an agent acting under color of a statutory short form power of attorney that contains additional language augmenting the gift-giving authority must make gifts pursuant to these enhanced powers in the principal's best interest.

I.

On June 10, 1999, decedent George J. Ferrara, a retired stockbroker who was residing in Florida at the time, executed a will "mak[ing] no provision . . . for any family member . . . or for any individual person" because it was his "intention to leave [his] entire residuary estate to charity." Accordingly, in the same instrument he bequeathed his estate to a sole beneficiary, The Salvation Army, "to be held, in perpetuity, in a separate endowment fund to be named the 'GEORGE J. FERRARA MEMORIAL FUND' with the annual net income therefrom to be used by the Salvation Army to further its charitable purposes in the greater Daytona Beach, Florida area." On August 16, 1999, decedent executed a codicil naming the Florida attorney who had drafted his will and codicil as his executor, and otherwise "ratif[ied], confirm[ed] and republish[ed] [his] said Will of June 10, 1999." Decedent was single, and had no children. His closest relatives were his brother, John, and a sister, and their respective children.

According to John Ferrara's son, Dominick Ferrara, after decedent was hospitalized in Florida in December 1999, he and his father "were called to assist." Dominick Ferrara traveled to Florida to visit decedent, who

[*248] "told [him] he wanted to move to New York to be near his family and asked [him] to obtain Powers of Attorney for his signature so that [he] could attend to [decedent's] affairs. At [decedent's] direction [Dominick Ferrara] went to a local

stationery store and obtained several Powers of Attorney which [he] filled out in [his] own words and gave to [decedent] for his review and signature. [Decedent] reviewed them and signed all of them before a Notary Public."

These Florida powers of attorney apparently authorized Dominick and John Ferrara to write checks on decedent's bank accounts and liquidate certificates of deposit; to sell and/or buy stocks and securities; and to sell decedent's Florida residence and its contents and his automobile. According to Dominick Ferrara, decedent took him to his bank in Florida, where he handed over a blue bag kept in a safe deposit box. The blue bag contained stock certificates for shares of IBM stock as well as certificates of deposit.

On January 15, 2000, Dominick Ferrara accompanied decedent on a flight from Florida to New York. He brought along the blue bag and a box containing decedent's [***217] [**140] 1998 federal income tax returns and other personal papers or records and memorabilia; he testified that there was no will among these papers, which he apparently culled after decedent's death, and that decedent never mentioned any will to him. Immediately upon arriving in New York, decedent was admitted to an assisted living facility. He was thin, malnourished and weak, and was suffering from an array of serious chronic maladies.

On January 25, 2000, ten days later, decedent signed, and initialed where required, multiple originals of a "Durable General Power of Attorney: New York Statutory Short Form," thereby appointing John and Dominick Ferrara as his attorneys-in-fact, and allowing either of them to act separately

"IN [HIS] NAME, PLACE AND STEAD in any way which [he] [him]self could do, if [he] were personally present, with respect to the following matters [listed in lettered subdivisions A through O] as each of them is defined in Title 15 of Article 5 of the New York General Obligations Law to the extent that [he was] permitted by law to act through an agent."

Subdivisions (A) through (O) of the pre-printed form listed various [*249] kinds of transactions; in particular, subdivision (M) specified "making gifts to my spouse, children and more remote descendants, and parents, not to exceed in the aggregate \$ 10,000 to each of such persons in any year." Decedent authorized his attorneys-in-fact to carry out all of the matters listed in subdivisions (A) through (O). Critically, decedent also initialed a typewritten addition to the form, which stated that "this Power of Attorney shall enable the Attorneys in Fact to make gifts without limitation in amount to John Ferrara and/or Dominick Ferrara."

Dominick Ferrara insists that this provision authorizing him to make unlimited gifts to himself was added "in furtherance of [decedent's] wishes," because decedent repeatedly told him in December 1999 and January 2000 that he "wanted [Dominick Ferrara] to have all of [decedent's] assets to do with as [he] pleased."

When asked if he and decedent had discussed making gifts to other family members - including his father, John, the other attorney-in-fact - Dominick Ferrara replied that they had not, again because "my Uncle George gave me his money to do as I wished." Dominick Ferrara acknowledges that decedent made no memorandum or note to this effect, and only once expressed these donative intentions in the presence of anyone else - Dominick's wife, Elizabeth. Dominick Ferrara sought out an attorney in New York City "to discuss [his] Uncle's wishes," and this attorney provided him with the power of attorney that decedent ultimately executed.

The power of attorney was notarized by an attorney with whom Dominick and Elizabeth Ferrara were acquainted. This attorney testified that she attended the signing at the Ferraras' behest, and was acting as a notary only, not as an attorney for either the Ferraras or decedent. Specifically, she rendered no legal advice to decedent, who read the form in her presence before signing it. The attorney and Dominick Ferrara generally agree that it was Dominick who explained the form's provisions to decedent; she does not recall the word "gift" having been mentioned.

Decedent's condition deteriorated. He was admitted to the hospital on January 29, 2000, and never left. Decedent died on February 12, 2000, less than a month after moving to New York, and approximately three weeks after executing the power of attorney. During those three weeks, Dominick Ferrara transferred about [**141] [***218] \$ 820,000 of decedent's assets to himself, including the IBM stock and about \$ 300,000 in cash from the certificates of [*250] deposit, multiple bank accounts and the sale of the Florida property. After decedent's death, he filed a 1999 federal income tax return for decedent, and collected a refund in the amount of roughly \$ 9,500. Dominick Ferrara testified that he does not recall what happened to any of the \$ 300,000 in cash, but that he still owns the IBM stock.

The Salvation Army found out about decedent's will after a doctor in Florida, learning of decedent's death, contacted decedent's Florida attorney, the executor of his estate under the will, to inquire about an unpaid bill. Claiming that Dominick Ferrara had stonewalled every effort to obtain relevant information, The Salvation Army subsequently commenced a proceeding under section 2103 of the Surrogate's Court Procedure Act against Dominick Ferrara and others, seeking discovery and turnover of decedent's assets n1. The Ferrara respondents moved to dismiss the turnover proceeding on the ground that, prior to decedent's death, Dominick Ferrara had properly transferred substantially all of decedent's assets to himself pursuant to the power of attorney. The Surrogate denied the motion, set a discovery deadline, and scheduled a hearing to determine the power of attorney's validity.

----- Footnotes -----

n1 The Florida lawyer renounced his appointment as executor, and consented to issuance of letters of administration c.t.a. to The Salvation Army.

----- End Footnotes -----

The Surrogate dismissed the petition on March 31, 2004. He first determined that

decedent was competent to execute the power of attorney, and that it was properly signed, initialed and notarized in conformity with article 5, title 15 of the General Obligations Law. The Surrogate noted that there was at one time "a presumption of impropriety due to the appearance of impropriety and self dealing" when an attorney-in-fact made self-gifts (3 Misc. 3d 944, 945-946, 775 N.Y.S.2d 470 [Sur Ct Rockland County 2004] [citation omitted]). He opined, however, that amendments to article 5, title 15 of the General Obligations Law, enacted in 1996 and effective January 1, 1997, had eliminated this presumption. Thus, "when a post-January 1, 1997 power of attorney specifically and expressly authorizes gifting by the agent to himself, the presumption of impropriety no longer applies and the burden of proving the validity of the gift is no longer on the agent" (*id.* at 946 [references omitted]). As a result, "the burden of proving the invalidity of the gift is on [The Salvation Army]," and here, The Salvation Army "failed to demonstrate that the transfers pursuant to the power of attorney [were] invalid" [*251] (*id.*). The Surrogate further observed that title 5, article 15 directs an attorney-in-fact authorized to make annual gifts of \$ 10,000 or less to specified beneficiaries to do so only for purposes reasonably deemed to be in the principal's "best interest." The court invited the Legislature to amend the law "to provide for the same [best interest] limitation when there is express language in the power of attorney for gifts to an agent in excess of \$ 10,000 per year" (*id.* at 947).

The Appellate Division affirmed, seemingly concluding that while the presumption of impropriety still exists, Dominick Ferrara had overcome it solely by virtue of the power of attorney; and that "competent evidence was adduced at the hearing to support [the Ferrara] respondents' contention that the decedent specifically authorized the distribution of his funds to . . . Dominick Ferrara" (22 A.D.3d 578, 802 N.Y.S.2d 471 [2d Dept 2005]). We granted [**142] [***219] The Salvation Army permission to appeal, and now reverse.

II.

Section 5-1501 of the General Obligations Law sets out the forms creating a durable and nondurable statutory short form power of attorney (sections 5-1501[1] and 5-1501[1-a] respectively) n2. By these forms, the principal appoints an attorney-in-fact to act "in [his] name, place and stead" with respect to any or all of 15 categories of matters listed in lettered subdivisions A through O "as each of them is defined in Title 15 of Article 5 of the New York General Obligations Law"; specifically, the 15 categories in paragraphs A through O are interpreted in corresponding sections 5-1502A through 5-1502O of the General Obligations Law (*id.*). n3

----- Footnotes -----

n2 A durable power of attorney survives the principal's incapacity and disability, while a nondurable power of attorney terminates if the principal becomes incapacitated or disabled.

n3 The 15 categories are real estate transactions (section 5-1502A); chattels and goods transactions (section 5-1502B); bond, share and commodity transactions (section 5-1502C); banking transactions (section 5-1502D); business operating transactions (section 5-1502E); insurance transactions (section 5-1502F); estate transactions (section 5-1502G); claims and litigation (section 5-1502H); personal relationships and affairs (section 5-1502I); benefits from military service (section 5-1502J); records, reports and statements (section 5-1502K); retirement benefit transactions (section 5-1502L); gifts to specified beneficiaries not to exceed \$ 10,000 to each per year (section 5-1502M); tax matters (section 5-1502N); and all other matters (section 5-1502O). Paragraph P on the form authorizes the attorney-in-fact to delegate any or all of the matters selected to anyone whom he chooses. Paragraph Q, which reads "each of the above matters identified by the following letters," allows the principal to list the letters of all the matters authorized and then to initial in one place on the document, as decedent did here, rather than separately initial each selected lettered subdivision.

----- End Footnotes-----

[*252] As relevant to this case, in 1996 the Legislature amended section 5-1501(1) to add lettered subdivision M, authorizing the attorney-in-fact to "make gifts to [the principal's] spouse, children and more remote descendants, and parents, not to exceed in the aggregate \$ 10,000 to each of such persons in any year" (*see* L 1996, ch 499). Section 5-1502M construes this gift-giving authority

"to mean that the principal authorizes the agent . . . to make gifts . . . either outright or to a trust for the sole benefit of one or more of [the specified] persons . . ., *only for purposes which the agent reasonably deems to be in the best interest of the principal*, specifically including minimization of income, estate, inheritance, generation-skipping transfer or gift taxes"

(General Obligations Law § 5-1502M[1] [emphasis added]). Such gifts may not exceed \$ 10,000 "unless the statutory short form power of attorney contains additional language pursuant to section 5-1503 of the general obligations law authorizing gifts in excess of said amount or gifts to other beneficiaries" (*id.*). Section 5-1503(2), in turn, permits "additional language" that "supplements one or more of the powers enumerated in one or more of the constructional sections [5-1502A through 5-1502O] in [Title 15] with respect to a subdivision [A through O] of the statutory short form power of attorney . . . affirmatively chosen by the principal, by specifically listing additional powers of the agent."

Thus, section 5-1502M unambiguously imposes a duty on the attorney-in-fact to exercise gift-giving authority in the best interest of the principal. Nothing in section 5-1502M indicates that the best [***220] [**143] interest requirement is waived when additional language increases the gift amount or expands the potential beneficiaries pursuant to section 5-1503. The Ferrara respondents argue - and the

Surrogate seemed to agree - that because section 5-1503(2) does not also contain a best interest requirement, an attorney-in-fact has no obligation to act in the principal's best interest unless the additional language explicitly so directs. But section 5-1503(2) states that the "additional language" may "supplement[] one or more of the powers enumerated in one or more of *the constructional sections*" (emphasis added). By referring to the constructional sections, [*253] section 5-1503(2) incorporates their limitations into any additional language supplementing a defined power, including the gift-giving authority interpreted by section 5-1502M. This is consistent with section 5-1503(3), which permits "additional language" to be added to the statutory short form power of attorney in order to make "some additional provision which is *not inconsistent with* the other provisions of the statutory short form power of attorney" (emphasis added). The Legislature intended section 5-1503 to function as a means to customize the statutory short form power of attorney, not as an escape-hatch from the statute's protections.

Legislative purpose and history also support this reading of these provisions. The Legislature enacted the 1996 amendments to "clarify and simplify" existing law while protecting principals from abuse (NYS Ass Mem in Support of Legislation, Bill No. A10754; *see also* Bill Jacket, L 1996, ch 499). The amendments added powers "to deal with tax matters, and retirement benefit transactions, and to make gifts to named relatives, not to exceed \$ 10,000 per year" (NYS Ass Mem in Support of Legislation, Bill No. A10754). By making these powers explicit and defining their scope, the amendments sought to "make it clearer when these powers are granted, and allow the principal to focus specifically on these issues" (*id.*). At the same time, to prevent abuse and overreaching, the amendments "add[ed] language to the interpretive sections of the law to make clear the scope of the new powers relating to tax and retirement planning and gifting" (*id.*).

Section 5-1502M, the constructional section governing gift-giving, explains at subdivision (1) that authority to make gifts in the best interest of the principal includes "minimization of income, estate, inheritance, generation-skipping transfer or gift taxes." As this language shows, the purpose of the gift-giving authority is to allow an attorney-in-fact to carry out the principal's intentions to use gifts as part of a financial or estate plan, which will often involve taking advantage of certain tax provisions. In fact, the amount the attorney-in-fact is permitted to gift under subdivision M of the form - \$ 10,000 per qualified beneficiary per year - tracks the federal annual gift-tax exclusion in effect in 1996. In short, the Legislature sought to empower individuals to appoint an attorney-in-fact to make annual gifts consistent with financial, estate or tax planning techniques and objectives - not to create gift-giving authority generally, and certainly not to supplant a will.

[*254] As further evidence of this intent, subdivision M of the form includes only the closest of potential familial beneficiaries. While the attorney-in-fact may make gifts to himself if he qualifies as a beneficiary, the statute focuses on the close family members, not on the attorney-in-fact. Thus, the attorney-in-fact is not excluded, but the statute includes the best interest requirement to serve the statute's purpose and

to prevent abuse.

Finally, the best interest requirement is consistent with the fiduciary duties [***221] [*144] that courts have historically imposed on attorneys-in-fact. "A power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal" (*Mantella v Mantella*, 268 A.D.2d 852, 701 N.Y.S.2d 715 [3d Dept 2000] [internal quotation marks and citation omitted]). Because "the relationship of an attorney-in-fact to his principal is that of agent and principal, . . . the attorney-in-fact 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" (*Semmler v Naples*, 166 A.D.2d 751, 752, 563 N.Y.S.2d 116 [3d Dept 1990] [internal quotation marks and citations omitted]).

In short, whether the gift-giving power in a statutory short form power of attorney is limited to the authority spelled out in lettered subdivision M in section 5-1501(1), or augmented by additional language in conformity with section 5-1503, the best interest requirement remains. Thus, Dominick Ferrara was only authorized to make gifts to himself insofar as these gifts were in decedent's best interest, interpreted by section 5-1502M as gifts to carry out the principal's financial, estate or tax plans. Here, Dominick Ferrara clearly did not make gifts to himself for such purposes. Rather, he consistently testified that he made the self-gifts "in furtherance of [decedent's] wishes" to give him "all of [his] assets to do with as [Dominick] pleased." n4 The term "best interest" does not include such unqualified generosity to the holder of a power of attorney, especially where the gift virtually impoverishes a donor whose estate plan, shown by a recent will, contradicts any desire to benefit the recipient of the [*255] gift. Accordingly, the order of the Appellate Division should be reversed, without costs, and the matter remitted to Surrogate's Court for further proceedings in accordance with this Opinion.

----- Footnotes -----

n4 Because Dominick Ferrara did not satisfy his fiduciary duty under General Obligations Law §§ 5-1501 and 5-1503 to make gifts in decedent's best interest, we need not and do not reach the additional issue raised by The Salvation Army and Attorney General, appearing in his capacity as statutory intervenor; namely, whether the burden of proof shifted to Dominick Ferrara to establish by clear evidence that his self-dealing (both in executing the power of attorney and making the gifts to himself) was free from fraud, deception or undue influence.

----- End Footnotes-----

Order reversed, without costs, and matter remitted to Surrogate's Court, Rockland County, for further proceedings in accordance with the opinion herein. Opinion by Judge Read. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo and R.S. Smith concur.
Decided June 29, 2006

**Guardianship of the Mentally Retarded and
Developmentally Disabled
Surrogates Court Procedure Act, Article 17-A**

Cases

In the Matter of Derek, 2 Misc. 3d 1132; 821 N.Y.S.2d 387; 2006 N.Y. Misc. LEXIS 1598

The application of the physician-patient privilege (CPLR Section 4504) to Article 17-A proceedings is the issue in this case and is a matter of first impression in New York. The use of two treating physician affirmations that referred to the hospital records of Derek were questioned. The Court found since Case law under Article 81 has uniformly held that the privilege applies in contested guardianship proceedings there is no rational reason why it should not also apply in Art 17-A guardianship. In addition, the rules regarding confidentiality of patient information under HIPAA and MHL Section 33.13 (c) also apply requiring consent by either the patient or a court order for disclosure. There was neither consent by Derek nor a court order in this case thus the affirmations of the two physicians were stricken from the record. The Court did however suggest that since the ultimate finding to be made by the Court is that the respondent is unable to manage his or her person or property and affairs because of a lack of capacity petitioners should be given an opportunity to have Derek examined by two other non-treating physicians in order to provide the certifications required by SCPA § 1750-a.

In the Matter of the Guardianship of Boni P.G, 13 Misc. 3d 1235A; 2006, LEXIS 3278

The mother and sister of a 22 year old mentally retarded man petitioned and cross petitioned to be appointed his guardian. The presumption is that it is in the best interests of a child that their parents prevail in a contest with a non-parent in a guardianship proceeding. This presumption may be overcome only where the non-parent establishes extraordinary circumstances. Staff at the group home testified that there were numerous medical and behavioral problems with the son and that the mother was non-cooperative and hostile toward the staff refusing to address any of the issues. The mother also had problems with mental illness and past allegations of child abuse. The sister's approach to the care of her brother, on the other hand, was the exact opposite of her mother's. Instead of distrusting every suggestion made by those charged with the respondent's daily care or refusing to meet with the respondent's doctors and teachers, the sister was willing to listen to everyone and to make an informed choice in an effort to alleviate and remedy some of his health and behavior issues. Thus, extraordinary circumstances did exist which warranted a finding that the respondent's sister, and not his mother, should be appointed guardian of his person.

Health Care Decisions Act SCPA Section 1750(b)

Cases - End of Life Decisions

Matter of M.B., No. 47, Court of Appeals of New York, 6 N.Y.3d 437; 846 N.E.2d 794; 813 N.Y.S.2d 349; 2006

Court of Appeals reversed the Appellate Division ruling reinstating the ruling of the Surrogate's Court that the legislative history supports the finding that the legislature intended the Health Care Decision Making Act to authorize guardians appointed prior to the effective date of 3/16/2003 to make end of life decisions without seeking a new guardianship Order.

Matter of R.K. (2006, Sup) 809 NYS2d 442.

Judicial determination envisioned in the New York Health Care Decisions Act for Persons with Mental Retardation, was sufficient to empower an elderly retarded person's long-time guardian to address end-of-life issues where it was based on testimony by the person's physician and psychologist regarding the person's inability to deal with such issues independently; a full contested hearing, of the sort Mental Hygiene Legal Service had advocated, could still appropriately be held in the event the guardian actually tried to exercise the rights it was being granted, to make end-of-life decisions

Proceeding for the Appointment of a Guardian for CK Pursuant to SCPA Article 17-A, 2006 NY Slip Op 50756U; 11Misc. 3d 1087A

Petitioner sought to be appointed a 17-A guardian for her sister, CK who was 50 with Down's Syndrome with severe mental retardation, progressive dementia and advanced Alzheimer's. The petitioner asked as guardian to be given the power to make health care decisions, including life-sustaining decisions under 1750-b. The parents and Mental Hygiene Legal Services (MHLS) consented to the guardianship petition. At the time CK was in a hospital intensive care unit attached to a respirator. A conference was held with all interested parties and medical experts. The physicians concurred that the performance of a tracheotomy and insertion of a feeding tube were medically futile and would impose an undue burden on CK.

The guardianship was granted and the guardian immediately served notice on MHLS of her intent to withdraw life-sustaining treatment. MHLS did not object. Ck was then removed from the respirator and admitted into the hospice unit. CK had a temporary rally whereby MHLS withdrew their consent and unilaterally wrote a letter to the hospital informing them they must "afford CK efficacious and life-sustaining treatment". The hospital thinking this was a court order discharged CK from hospice and sent her back to the ER for readmission with all the mandated medical tests and procedures. The court, upon notification of the "letter" called together all the parties. The court stated, "MHLS' actions in this matter are egregious. Having consented to the guardian's decision, MHLS, without benefit of notice of intent to withdraw consent, and without the courtesy of consultation with the duly appointed 17-A guardian, the court or the care providers, summarily substituted its medical judgment for that of the guardian."

The court pointed out the lack of proper procedure that MHLS had used and further charged the agency of taking the position of Goliath against David without any basis in fact and stressed these cases should be about the clients, not their attorney, MHLS and its desired power.

In the Matter of CLAUDIA EE (CK)., AD3d_;2006, 822 N.Y.S.2d 810; LEXIS 12512

Appeal by MHLS from an order of the Surrogate's Court of Albany County which granted petitioner's application, in a proceeding pursuant to SCPA article 17-A, for an order withdrawing life-sustaining treatment for CK. MHLS challenged the scope of the guardian's authority.

In the Matter of CK, MHLS asserted that it consented only to the removal of Claudia's ventilator and, once she survived withdrawal from the ventilator, it could revoke its consent. Further, MHLS asserted that the guardian was required to obtain the consent of MHLS for each and every particular type of life-sustaining treatment to be withheld or withdrawn such that once Claudia survived removal of the ventilator, the full procedure set forth in SCPA 1750-b (4) had to be repeated and additional consents from MHLS obtained before any further action to implement the guardian's decision could be taken.

The Appellate Division, however, stated that the statute provides it is the guardian not MHLS who has the right "to consent or refuse to consent to health care" thus the

Surrogate's Court correctly rejected MHLS's argument. If MHLS disagrees with the guardian's decision, it remains free to object at any time and provide notice of that objection to the parties as specified in SCPA section 1750-b(5) of the statute or commence a special proceeding challenging that decision as intended by SCPA section 1750-b(6). Finally, there is no indication in the statute that MHLS is entitled to notice of each particular medical procedure employed in implementing the guardian's decision. The Surrogate Court's decision was affirmed.

In the Matter of the Guardianship of ES, a Mentally Retarded Person, 819 N.Y.S.2d 847; 2006

The guardians conformed with the statutory requirements of Section 1750-b(6) authorizing individuals to commence a special proceeding when deciding to refuse or withdraw treatment. After extensive medical testimony for both sides the experts agreed with the parents that dialysis would be nothing more than a cruel prolongation of the inevitable. The court affirmed the guardian's decision and further found that life-sustaining treatment would impose an extraordinary burden on ES in light of her medical condition. The court struck down any express or implied objections from MHLS. In addition the court stated that MHLS had disregarded and overstepped the statutory procedures involved and the agencies

actions appeared to be motivated by making public policy rather than acting in the best interests of ES.

In the Matter of ELIZABETH M. (ES), 30 A.D.3d 780; 817 N.Y.S.2d 181; 2006, LEXIS 7945

Trial court properly upheld guardian's decision to withhold dialysis from their daughter, who was profoundly mentally retarded and suffered from spina bifida, as the daughter's renal failure was irreversible, and the treatment would have imposed an extraordinary burden on the daughter.

In re Guardianship of Chantel Nicole R., etc., AD1st 2006;821 N.Y.S.2d 194; LEXIS 10922

This appeal arises out of the 2004 appointment, pursuant to SCPA 1750, of petitioner Pamela R. as guardian of the person of her daughter, respondent Chantel R., a 26-year-old mentally retarded person. Mental Hygiene Legal Service, on Chantel's behalf, objects to the appointment to the extent that the guardianship extends to decisions concerning life-sustaining treatment and challenges the constitutionality of the statute under equal protection, due process and vagueness grounds.

The Court made an extensive review of NY case law on surrogate decision making along with the statutory requirements for determining incapacity to make health care decisions and for guardians to make end-of-life decisions for mentally retarded persons finding the statute sufficient. The Court held that any disparity in treatment of a mentally retarded person is justified by legitimate state interests, that respondent has been accorded due process and is not aggrieved on such grounds and that the asserted vagueness of any statutory provision with respect to the withholding or withdrawal of medical treatment was not before the Court. Therefore, the guardianship ruling was affirmed in all respects.

The Health Care Decisions Act for Persons With Mental Retardation

SCPA Section 1750(b)

Key Provisions

- **Expanded legal standard**
- **Details decision making process**
- **Right to access medical records**
- **Life-sustaining decisions**
- **Disputes/objections to health care decisions**
- **Provider compliance**
- **Immunity**

Decision Making Process must consider

- **Person's dignity and uniqueness**
- **The preservation, improvement or restoration of health**
- **The relief of suffering**
- **The unique nature and effect of artificially provided nutrition and hydration**
- **The entire medical condition**

Life-sustaining Decisions

In order for a decision to withhold or withdraw life-sustaining treatment the mentally retarded person's incapacity to make such decisions must be re-certified. The attending physician must also certify:

- **that the person is terminal, is permanently unconscious, or has a condition requiring life-sustaining treatment which is irreversible and which will continue indefinitely, and**
- **that the life-sustaining treatment would be an extraordinary burden, in light of the person's medical condition and the expected outcome, notwithstanding the person's mental retardation.**

If the decision is to withdraw or withhold artificially provided nutrition or hydration it must be proven that either there is no reasonable hope of maintaining life, or that it poses an extraordinary burden.

4. Life-sustaining treatment. The guardian shall have the affirmative obligation to advocate for the full and efficacious provision of health care, including life-sustaining treatment as defined in subdivision (e) of section 81.29 of the mental hygiene law. In the event that a guardian makes a decision to withdraw or withhold life-sustaining treatment from a mentally retarded person:

(a) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, must confirm to a reasonable degree of medical certainty that the mentally retarded person lacks capacity to make health care decisions. The determination thereof shall be included in the mentally retarded person's medical record, and shall contain such attending physician's opinion regarding the cause and nature of the mentally retarded person's incapacity as well as its extent and probable duration. The attending physician who makes the confirmation shall consult with another physician, or a licensed psychologist, to further confirm the mentally retarded person's lack of capacity. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, must (i) be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law, or (ii) have been employed for a minimum of two years to render care and service in a facility or program operated, licensed or authorized by the office of mental retardation and developmental disabilities, or (iii) have been approved by the commissioner of mental retardation and developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating mental retardation. A record of such consultation shall be included in the mentally retarded person's medical record.

(b) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, with the concurrence of another physician with whom such attending physician shall consult, must determine to a reasonable degree of medical certainty and note on the mentally retarded person's chart that:

(i) the mentally retarded person has a medical condition as follows:

A. a terminal condition, as defined in subdivision twenty-three of section twenty-nine hundred sixty-one of the public health law; or

B. permanent unconsciousness; or

C. a medical condition other than such person's mental retardation which requires life-sustaining treatment, is irreversible and which will continue indefinitely; and

(ii) the life-sustaining treatment would impose an extraordinary burden on such person, in light of:

A. such person's medical condition, other than such person's mental retardation; and

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's mental retardation; and

(iii) in the case of a decision to withdraw or withhold artificially provided nutrition or hydration:

A. there is no reasonable hope of maintaining life; or

B. the artificially provided nutrition or hydration poses an extraordinary burden.

(c) The guardian shall express a decision to withhold or withdraw life-sustaining treatment either:

(i) in writing, dated and signed in the presence of one witness eighteen years of age or older who shall sign the decision, and presented to the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(ii) orally, to two persons eighteen years of age or older, at least one of whom is the mentally retarded person's attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law.

(d) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, who is provided with the decision of a guardian shall include the decision in the mentally retarded person's medical chart, and shall either:

(i) promptly issue an order to withhold or withdraw life-sustaining treatment from the mentally retarded person, and inform the staff responsible for such person's care, if any, of the order; or

(ii) promptly object to such decision, in accordance with subdivision five of this section.

(e) At least forty-eight hours prior to the implementation of a decision to withdraw life-sustaining treatment, or at the earliest possible time prior to the implementation of a decision to withhold life-sustaining treatment, the attending physician shall notify:

(i) the mentally retarded person, except if the attending physician determines, in writing and in consultation with another physician or a licensed psychologist, that, to a reasonable degree of medical certainty, the person would suffer immediate and severe injury from such notification. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, shall:

A. be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law, or

B. have been employed for a minimum of two years to render care and service in a facility operated, licensed or authorized by the office of mental retardation and developmental disabilities, or

C. have been approved by the commissioner of mental retardation and developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed

psychologist possess specialized training or three years experience in treating mental retardation. A record of such consultation shall be included in the mentally retarded person's medical record;

(ii) if the person is in or was transferred from a residential facility operated, licensed or authorized by the office of mental retardation and developmental disabilities, the chief executive officer of the agency or organization operating such facility and the mental hygiene legal service; and

(iii) if the person is not in and was not transferred from such a facility or program, the commissioner of mental retardation and developmental disabilities, or his or her designee.