

**LEGAL ASPECTS OF ADULT PROTECTIVE SERVICES
2005 UPDATE**

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LEGAL ASPECTS OF ADULT PROTECTIVE SERVICES 2005 UPDATE

Tele-training March 14, 2005

AGENDA

INTRODUCTION

2 min

Moderator: Warren Otto
SUNY Distance Learning Project

LECTURE I

30 min

Debra Sacks, Esq.
Sadin Law Institute
Brookdale Center on Aging

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- Abuse
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AGENCY ISSUES

10 min

Kathy Crowe, Adult Specialist II
OCFS

QUESTION AND ANSWER

10 min

Debra Sacks and Kathy Crowe

10 min

BREAK

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40 min

Debra Sacks

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Article 81 2004 Amendments

QUESTION AND ANSWER

10 min

Debra Sacks and Kathy Crowe,

CLOSING REMARKS

5 min

Warren Otto

Legislative Developments

National Legislation (passed)

Justice for All Act

H.R. 5107, the Justice for All Act of 2004

The act incorporates several bills dealing with crime victims' rights and DNA testing. The law authorizes funding through 2009 for the support of "state, tribal and local prosecutors offices, law enforcement agencies, courts, jails and correctional institutions, and qualified public and private entities, to develop, establish, and maintain programs for the enforcement of crime victim's rights as provided in law."

Representative Payee Regulations Revised

Social Security Administration, 20 CFR Parts 404, 408 and 416

Federal Register/Vol. 69, No. 194/ Thursday, October 7, 2004/ Rules and Regulations Effective Nov. 8, 2004

This regulation codifies SSA's representative payee policy based on statutory changes made from 1990 – 1999 along with one provision enacted in 2004. The new regulations explain the procedures in determining the need for a representative payee, in selecting a payee, responsibilities of a representative payee, and restitution of misused benefits.

State Legislation (passed)

Civil Practice Laws and Rules is amended by adding a new rule 2103-A

Chapter 111 of the Laws of 2004, (A 10103)

This Rule allows a litigant in a civil proceeding to keep his or her residential or business addresses and telephone numbers confidential from any party when there would be an unreasonable risk to such litigants health and safety.

Definition of "residence" amended in Family Court Family Offense Proceedings

Chapter 391 of the Laws of 2004, (A 0551)

This bill would amend the Family Court Act, Section 818, to clarify that for purposes of fixing venue in order of protection cases,

"residence" shall include a dwelling unit or facility which provides shelter to homeless persons or families on an emergency or temporary basis. This provision allows the victim the ability to petition for orders in any county where they reside at the time the petition is filed.

Greater Opportunity for the Disabled to Live in Their Communities

Chapter 615 of the Laws of 2004, (S 7073)

The Nursing Facility Transition and Diversion Law authorizes the commissioner of health to apply for a nursing facility transition and diversion medicaid waiver in order to test the feasibility of providing home and community based services to individuals who otherwise would be cared for in a nursing facility; provides for reimbursement for several home and community based services not presently included in the medical assistance program; sets forth eligibility requirements for such waiver program; allows the commissioner of health to contract with not-for-profit agencies around the state, regional resource development specialists, who are responsible for approving service plans and providing technical assistance and oversight.

Expanded Long-Term Care Opportunities

Chapter 519 of the Laws of 2004, (A -10834)

Effective 1/1/05

The law enhances long-term care opportunities for seniors with moderate incomes by creating new, fee-for-service Continuing Care Retirement communities (CCRCs). The CCRCs are apartments or cottage-like settings with access to long term care services, including nursing home beds. The legislation allows for the establishment of up to 8 fee-for-service CCRCs in NYS as a statewide demonstration project.

Assisted Living Reform Act

Chapter 2 of the Laws of 2004, (S 7748)

This legislation amends the Public Health Law by creating a new Article 46-B entitled Assisted Living that will give seniors greater consumer protections and more long term care options. The law provides: a definition of assisted living; uniform admission and discharge policies; strong consumer protections; state oversight; standard contract disclosures; and a comprehensive "Resident's Bill of Rights".

Criminal History Record Check of Certain Non-licensed Nursing Home and Home Care Staff

The new regulations amend sections 763.13, 766.11 and addition of Section 400.23 to Title 10 NYCRR; and amendment of section 505.14 of Title 18 NYCRR.

Effective 4/1/05

This regulation was written to protect nursing home residents and home care clients by requiring non-licensed nursing home and home care staff who are employed or used to provide direct care or supervision to residents/clients to undergo criminal history checks.

Access to Medical Records

Chapter 634 of the Laws of 2004, (S- 4964)

This Act amended the Public Health Law Section 18 in relation to access to medical records. It clarifies that a “qualified person”:

- is a guardian under Art 81 and SCPA Art 17; or
- a distributee of any deceased subject having no personal representative; or
- a lawyer with a power of attorney from the qualified person or the subjects estate;
- will be deemed a “personal representative” for purposes of HIPAA.

Release of medical records is subject to other confidentiality statutes

OCA HIPAA Compliant Form

“OCA Official Form No.: 960”

www.nycourts.gov/forms

Article 81 Amended

Chapter 438 of the Laws of 2004, (S 6830 – A)

Effective 12/14/04

This law makes technical amendments to clarify certain provisions of Article 81 of the Mental Hygiene Law.

Miscellaneous Provisions

NY Attorney General Web Site for Drug Price Comparisons

<http://www.nyagr.org>

This new web site will allow consumers to compare prescription drug prices throughout New York State. Regional prices of the 25 most commonly prescribed drugs are posted.

Animal Hoarding

Protective Services for Adults of Wisconsin and the Humane Society of the United States collaborated on a Manual to address the issue of animal hoarding by seniors and its connection to animal abuse.

The Manual, "Creating Safer Communities for Older Adults and Companion Animals", costs \$5 and can be ordered at www.hsus.org/ace/21127.

NYC Hoarding Task Force

A multidisciplinary Hoarding Task Force was formed in NYC in 2003 to try to understand the behavior and develop practical tools and resources for addressing the problem. NYC's Web site http://www.cornellaging.org/gem/hoarding_index.html offers a number of links where visitors can read and learn more about the New York Hoarding Task Force and strategies for helping those who hoard.

The Health Care Decisions Act for Persons with Mental Retardation (Review)

Chapter 500 of the Laws of 2002

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.

Cases of Interest

Abuse

Marszal v. Anderson, 9 A.D.3d 711; 780 N.Y.S.2d 432; 2004

Absent a specific provision in the power of attorney document authorizing gifts, an attorney-in-fact, in exercising his fiduciary responsibilities to the principal, may not make a gift to himself or to a third party of the money or property which is the subject of the agency relationship; such a gift carries with it a presumption of impropriety and self-dealing, a presumption which can be overcome only with the clearest showing of intent on the part of the principal to make the gift. In this case Decedent's son, as her attorney-in-fact, did not have authority to transfer her property to himself prior to her death since the power of attorney did not contain a provision authorizing gifts. Neither the Son's testimony that his mother authorized the transfers nor statements made by his wife that the mother wanted to make him her sole heir actually indicated that the mother ever expressed an intent to make a lifetime gift of her assets to him.

People v. Noel Hasslinger, 4A.D.3d 564; 771N.Y.S.2d 589; 2004

Defendant charged with stealing over one million dollars from an elderly woman suffering from dementia and Alzheimer's disease. Defendant and John May, aware of the victim's diminished mental capacity and hefty financial portfolio, masterminded a plan which began with charging her exorbitant fees for unnecessary home repairs and evolved to fraudulently obtaining a power of attorney thus giving them free reign over all her financial affairs. The County court in Schenectady convicted defendant of the crimes of conspiracy, grand larceny, securities fraud and money laundering and sentenced to 5-15 years in prison and ordered to pay restitution in the amount of \$930,000. On appeal defendant's conviction of securities fraud in violation of the General Business Law Section 352-c (6) was reversed.

Michael G. Connelly v. Maureen T. Connelly, 4 Misc. 3d 1019A; 2004 N.Y. Misc. LEXIS 1319

The father deeded his home to his caregiver daughter and on the same date executed a will. The will also left the home to his daughter and divided the rest of the estate equally between his son and daughter. The son challenged the will alleging constructive fraud, duress and undue influence by the daughter in obtaining title to the house. In reading the many documents submitted by the plaintiff son the court concluded there was not a "scintilla of evidence of undue influence to sustain plaintiff's claim". This case presents a good analysis of the elements of undue influence and issues of family conflict in the context of care-giving.

Assisted Outpatient Treatment 9.60 MHL

In re Sullivan, 4 Misc. 3d 705; 781 N.Y.S.2d 563; 2004 N.Y. Misc. LEXIS 1397

Director of hospital's department of psychiatry failed to produce clear and convincing evidence that patient diagnosed with chronic paranoid schizophrenia and cannabis abuse would not participate in a recommended treatment in the absence of a court order, as required for court-ordered assisted outpatient treatment pursuant to Kendra's Law; record showed that the patient had willingly and voluntarily participated for nearly three months in the very treatment program that was proposed to be ordered.

Guardianship

Article 81 MHL

Matter of Joyce Z., NYLJ June 15, 2004 (Supreme Court, Nassau Cty.) (Asarch, J.)

The IP was surviving in a psychotic state in a home that was barely habitable. The Court finds it is not financially feasible to maintain her home and that it would be the least restrictive alternative to expand powers of the Special Guardian to full guardianship powers and to allow the guardian to place the IP into adult foster care, sell the IP's home to pay off outstanding liens and place the funds into an Supplemental Needs Trust (SNT). This was an extremely complex case with PSA involved. The decision is an excellent example of the court, with involved professionals, seeking a balance of personal liberty and safety.

In the Matter of the Application of G.W.C., __Misc.2d__ ; __NYS2d__ ; 2004N.Y. Misc. LEXIS 968 (Sup. Ct. Tompkins Cty.)(Peckham, J.)

Where the evidence showed that the father of a mildly retarded woman was not a nurturing parent, was not the primary caregiver during his daughter's lifetime, had no real understanding of her limitations as a mentally retarded adult the Court appointed the AIP's siblings as co-guardians despite the fact that they had secured a Power of Attorney from her which they used to withdraw a large sum of money from an account her father maintained for her and put the money into an account in their own names. The Court found, based on the facts found at the hearing, the court evaluator's recommendation, and the AIP's nomination of her siblings, that these inappropriate acts were motivated by a concern for the AIP and were an effort by the siblings to help the AIP gain access to her own funds then under her father's unreasonable control.

**In re New York Foundation For Senior Citizens, Guardian Services, Inc.,
Petitioner-Respondent, as the Guardian of the Personal Needs and Property
Management of Ronald Schoon, an Incapacitated Person, Respondent-Appellant,
2005 N.Y. App. Div. LEXIS 1, (Supreme Court of New York, Appellate Division,
First Department)**

NY Foundation for Senior Citizens was guardian for the IP with power to represent him in an eviction proceeding alleging that the police had found drugs, weapons and live ammunition in his apartment. The IP threatened to kill the agency caseworker with a gun whereby the Court had him committed under MHL Section 9.43. After the IP's release he again threatened the caseworker's life and the Guardian made a motion to be discharged. The court acknowledged in this situation it was perhaps impossible for any guardian to safely render services. The Court then limited the Guardian's responsibilities as to avoid personal contact with the IP. MHLS appealed arguing that the Court must hold a hearing in order to restore powers to the IP and that the guardian's safety is not grounds for modifying its responsibilities. The Appellate Division rejected this argument stating, "The guardian's safety is a ground for modifying its responsibilities. No hearing was necessary given a record sufficient to show that respondent's resistance to the guardianship was such as to make the provision of services impossible"

**In the Matter of the Application of United Health Services Hospitals, Inc. for the
Appointment of a Guardian for AG, 785 N.Y.S.2d 313; 2004 N.Y. Misc. LEXIS 2241**

In this guardianship proceeding the AIP did not answer the petition, take any steps to place his condition affirmatively in issue; call any witnesses or waive any of his civil rights or privileges. The petitioner was a hospital and the proposed guardian the county Commissioner of Social Services. Mental Hygiene Legal Services was appointed by the Court as counsel for the AIP. Petitioner argued that in an eight month period the AIP had been hospitalized over 25 times and had signed himself out against medical advice 16 times. Petitioner called the AIP as a witness. AIP's attorney invoked the right to remain silent. The question of whether the Fifth Amendment right to remain silent applies to an Article 81 hearing is a case of first impression. The Court analyzed case law regarding the constitutional right to remain silent in light of mental illness and the NY rules of evidence in particular, the privilege under CPLR Section 4501 against self incrimination. The court concluded since the Fifth Amendment applies in criminal prosecutions and juvenile proceedings the same has to be true in where liberty is at risk due to mental illness or incapacity. Since the AIP did not waive his right to not testify, due process requires that the AIP has the right to remain silent and refuse to testify against himself in this Art 81 proceeding. The evidence given by petitioner was not clear and convincing of lack of capacity. The petition was dismissed and the temporary guardianship granted to the commissioner of Social Services was revoked.

Power of Attorney/Health Care Proxy/Guardianship

Matter of Julia C.; NYLJ, March 15, 2004, p.20 (County Ct., Nassau Cty) (Asarch, J.)

Court denies motion for summary judgment made by health care agent/attorney-in-fact daughter of the AIP seeking dismissal of an Article 81 petition brought by the son. The daughter argued that the AIP, while competent, executed the advance directives in order to obviate the need for a guardian. The Court denied the motion as there were issues of fact to be determined: (1) the validity of the signature on the HCP (2) neither the HCP or POA authorized the agent to choose the place of abode (3) son and daughter could not agree on the place of abode and (4) the extent of the AIP's actual limitations was not known.

In the matter of Isadora R., 5 AD3d 494; 773 NYS2d 96 (2nd Dept., 2004)

Lower court appoints guardian for an AIP who had a previously designated health care proxy and power of attorney. The nonparty HCP, attorney-in-fact appealed. Appellate Division reversed finding that the AIP had "effectuated a plan for the management of her affairs and possessed sufficient resources to protect her well being". There was no evidence that the long-time friend HCP, POA mishandled the AIP's property or harmed her health or wellbeing by any actions taken by appellant sufficient to justify revoking the power of attorney or health care proxy in favor of a court-appointed guardian.

Matter of Mougianis v. North Shore-Long Island Jewish Health Systems, Inc., NYLJ, May 19, 2004, p. 19, (Sup. Ct., Nassau Cty.) (LaMarca, J.)

An Agent pursuant to a validly executed Health Care Proxy under Public Health Law Section 2982 (3) is deemed a "qualified person" for the purpose of requesting medical information necessary to make a decision about the principal's health and providing such records to the Health Care Agent does not violate HIPAA. Query: Does this mean that people seeking access to medical records of others can now do so by being designated as a health care proxy rather than becoming an Art 81 guardian to meet the "qualified person" requirement of PHL section 18 (1)(g)?

Health Care Decisions Act for Persons with Mental Retardation SCPA Section 1750-b

In the Matter of the Application for the Appointment of a Guardian for Baby Boy W., 3 Misc. 3d 656; 773 N.Y.S.2d 255; N.Y. Misc. LEXIS 132

Maternal grandmother appointed as temporary guardian under SCPA section 1750-b with power to make health care decisions, including withholding or withdrawing life sustaining treatments for mentally retarded Baby Boy W. The Court in issuing its decision did a comprehensive analysis of the constitutionality and due process protections of the Health Care Decision Making Act for Persons With Mental Retardation

(HCDA) and held that that amendments to Article 17-A meet the requirements of the Federal and State Constitutions for equal protection and due process for all mentally retarded persons. The Court further determined that the requirements of 1750-b for withdrawal of life sustaining treatment were met.

In the Matter of the Guardianship of Chantel R. Pursuant to SCPA Art 17-A, 2004 NY Slip Op 24533; 2004 N.Y. Misc. LEXIS 2839

The mother of a 26 year old mentally retarded woman petitions for guardianship with authority to withhold or withdraw life-sustaining treatment. Mental Hygiene Legal Services (MHLS) challenges the constitutionality of SCPA Section 1750-b. In alleging that Section 1750-b is deficient MHLS makes four arguments: (1) the statute improperly fails to require a determination that a mentally retarded person is unable to make health care decisions for herself before conferring authority upon a guardian to make end-of-life decisions on her behalf; (2) the test applied to determine a mentally retarded person's capacity to make health care decisions violate equal protection principles; (3) the statute improperly fails to mandate a standard or procedure to be followed in the event the mentally retarded person objects to the appointment of a guardian authorized to make health care decisions; and (4) the statutory test for terminating life support for a mentally retarded person is impermissibly vague. 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 also noted that the constitutionality of SCPA Section 1750-b was previously upheld in Matter of Baby Boy W. The guardianship was granted in its entirety.

Summary of Article 81 amendments

Guardianship & Fiduciary Services, Office of court Administration

Mental Hygiene Law Article 81 has been amended by Chapter 438 of the Laws of 2004 (effective 12/13/04). The amendment enacts several substantive changes and makes many technical corrections.

- Definition of life sustaining treatment in a new subdivision (j) of section 81.03
- Commencement of a proceeding by the filing of the petition, with the 28 day period for hearing to begin with the signing of the order to show cause, section 81.07 (a), (b)(1)
- Specific prohibition in section 81.07 (b)(3) against any court requirement for the attachment of medical information to the order to show cause as supporting papers
- Changes in the notice and service provisions of section 81.07
- Court evaluator appointments are mandated to be made from the OCA list, 81.09 (b)(1)
- Clarification of section 81.10 (a) to ensure an AIP's right to choose and engage counsel, but also to require appointed counsel to remain of record until the court determines that the engagement of counsel was free and independent
- The only temporary relief under section 81.23 that will require the appointment of counsel is that of temporary guardian, 81.10 (c)(5)
- MHLS may be appointed court evaluator or counsel for AIPs in the community, 81.09 (b)(1); 81.10 (e)
- AIP is the only party who may demand a jury trial on the issue of incapacity, 81.11 (f)
- Courts only have 7 days to render decisions after hearings, 81.13, and a judgment must be entered and served within 10 days of signature, 81.16 (e)
- More detail has been included in the powers of property management guardians, 81.21

- Major medical/dental treatment consent expressly limited by the exception for life sustaining treatment in 81.29 (e), 81.22 (a) (8)
- The purpose of a TRO or preliminary injunction is extended to include the health and safety of the AIP, 81.23 (b) (1), (2)
- Changes in bonding requirements and provision for depositing assets into court and including trustees for bonding, 81.25
- Reference to SCPA 2309 deleted from the compensation provisions of 81.28 (a)
- Courts power to vacate POA and HCP extended to permit the exercise of that power for breach of fiduciary power in addition to invalid execution, 81.29 (d)
- Upon application for modification of powers, a court may dispense with the need for a hearing for good cause, 81.36 (c)

[*1] Michael G. Connelly, Plaintiff, v. Maureen T. Conneely, Defendant

10537/03

SUPREME COURT OF NEW YORK, KINGS COUNTY

2004 NY Slip Op 50961U; 4 Misc. 3d 1019A; 2004 N.Y. Misc. LEXIS 1319

August 2, 2004, Decided

NOTICE:

[**1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

DISPOSITION: Defendant's motion for summary judgment dismissing complaint granted; plaintiff's cross motion denied.

HEADNOTES: Gifts--Inter Vivos Gift.

JUDGES: David B. Vaughan, J.

OPINIONBY: David B. Vaughan

OPINION:

David B. Vaughan, J.

Upon the foregoing papers in this action by plaintiff Michael G. Connelly (plaintiff) against defendant Maureen T. Conneely (defendant) for, inter alia, a declaratory judgment that a deed to certain real property is null and void or that he is entitled to 50% of the proceeds received by defendant from the sale of such property, defendant moves for summary judgment dismissing plaintiff's complaint as against her. Plaintiff cross-moves for summary judgment in his favor, or, in the alternative, for an order disqualifying the law firm of Connors & Sullivan, P.C. and Michael Connors, Esq. from any further representation of defendant, pursuant to DR 5-102 (A) (4), on the ground that they will be material witnesses against defendant [**2] at trial.

The decedent, Coleman Connelly, was born on June 4, 1918 in Ireland, and married Kathleen Donohue (Kathleen Connelly) in 1960. They had two children, defendant, their daughter, who was born in 1962, and plaintiff, their son, who was born in 1965. They lived together in a house, located at 730 54th Street, in Brooklyn, New York. In May 1978, Coleman Connelly executed a will, leaving his property to his wife, and, if she did not survive him, he [*2] directed that all of his property be divided equally between his two children. On April 4, 1989, Kathleen Connelly passed away. In 1988 or 1989, defendant moved out of the house, when she became engaged or was married to her husband, Michael Conneely. In 1994, plaintiff moved out of the house, when he became engaged or was married to his wife, Lauren Marie Marusic.

In March 1995, at her father's request, defendant, her husband, and their first child moved

back into the house. Coleman Connelly allegedly asked defendant to move back into the house because he was alone. At that time, Coleman Connelly was 76 years old, and had diabetes and high blood pressure, for which he took regular medications, and he wore a hearing aid. Under their [**3] arrangement, Coleman Connelly did not charge defendant rent, and, in turn, defendant agreed that she would help care for him if and when his aging process required. Defendant and her husband had a second child, born on September 4, 1997. During this time period, plaintiff and his wife lived in their own home. They first lived in an apartment in Bay Ridge, and plaintiff would come to visit his father at the house about once every two weeks, and, later, when he and his wife and children moved to a house in Rockland County, he would come to visit his father about once a month. Defendant and plaintiff talked on the telephone on a daily basis.

In 1999, Coleman Connelly decided to make a new will, and defendant, at his request, made an appointment for him with the law firm of Connors & Sullivan, P.C., and accompanied him to their law office on May 15, 1999. Although defendant inquired of Michael Connors, Esq. as to whether the will could give her one year after her father's death to get out of the house before the house would have to be sold and the money divided between her and her brother, Coleman Connelly discussed his testamentary intentions separately with Michael Connors, Esq., and [**4] informed him that he, instead, wanted the subject real property to be given to defendant. On May 22, 1999, Coleman Connelly executed a deed transferring title to the real property to defendant, subject to a life estate of Coleman Connelly. On the same date, Coleman Connelly also executed a will. The will also devises the real property to defendant, and it divides the rest of Coleman Connelly's estate between plaintiff and defendant. It is undisputed that the will was duly executed by Coleman Connelly, and properly witnessed by three subscribing witnesses.

After the deed and will were executed, defendant continued to reside with Coleman Connelly. As her father aged and his health began to deteriorate, she assumed growing responsibilities in taking him to doctors, driving him places, helping him fill his prescriptions, and handling certain of his financial transactions. On June 5, 2000, Coleman Connelly fell out of bed, urinated on the bed and on himself, and exhibited noticeable swelling of his ankles. Defendant alleges that her father told her he did not wish her to call a doctor, but that she later called his regular physician, Dr. Edward T. Fitzpatrick, but that he did not call [**5] her back. On June 9, 2000, however, when Coleman Connelly's condition did not improve and continued to worsen, defendant called her brother, who was in the Hamptons, for help, and he told her that she should take him to the hospital. Defendant brought her father to the emergency room at Maimonides Hospital and he was admitted. Coleman Connelly suffered cardiac arrest at the hospital on June 10, 2000, and, later, had to be transferred to a rehabilitation center for a month's stay through late July. He then returned home to live with defendant, and, due to his deteriorated physical condition, home health aides attended him 24-hours-a-day.

Thereafter, Coleman Connelly became abusive to the home health aides, and defendant, reluctantly, considered placing her father in a nursing home. At that time, in late February or [**3] early March 2001, plaintiff first learned about the May 22, 1999 will, when, after plaintiff's wife expressed concern over losing the house to Medicaid once Coleman Connelly went into a nursing home, defendant informed plaintiff that the house was protected from Medicaid by his new will. On May 22, 2001, after a stay at a nursing home, Coleman Connelly died. Upon defendant's [**6] petition to probate the will of Coleman Connelly, plaintiff filed objections to the probate. By deed dated August 14, 2002, defendant sold the subject real property to Xing Yim and Chuen Yim for \$ 338,000. At that time, plaintiff first learned of the earlier May 22, 1999 deed.

Consequently, in April 2003, plaintiff brought this action, seeking a declaratory judgment that the May 22, 1999 deed is null and void, or, if the real property has already been sold (as is alleged), a declaratory judgment that he is entitled to 50% of the proceeds received by defendant from such sale and an injunction requiring defendant to deliver such proceeds to him, or a declaratory judgment that 100% of such sale proceeds must be deposited with the Surrogate's Court, Kings County, for the benefit of the estate of Coleman Connelly, including plaintiff, pro rata among the equal beneficiaries. The complaint alleges that defendant had a

confidential and fiduciary relationship with Coleman Connelly, and that the execution of the May 22, 1999 deed was procured by undue influence, duress, and constructive fraud. A related matter concerning the probate proceeding of Coleman Connelly's will currently remains pending [**7] in the Surrogate's Court, Kings County. Defendant has moved for summary judgment, asserting that plaintiff has failed to produce any evidence demonstrating that she practiced constructive fraud, duress, or undue influence upon Coleman Connelly. Plaintiff has cross-moved for summary judgment, claiming that defendant has not met her burden of proof to show that the May 22, 1999 deed was not the product of fraud, duress, and/or undue influence, and for an order disqualifying the law firm and attorney representing defendant.

In addressing the motion and cross motion, the court notes that it has long been held that in order to establish undue influence:

"It must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted constrained the [donor] to do that which was against his [or her] free will and desire, but which he [or she] was unable to refuse or too weak to resist. It must not be the prompting of affection; the desire of gratifying the wishes of another; the ties of attachment from consanguinity, or the memory of kind acts and friendly offices, [**8] but a coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear . . . lawful influences which arise from the claims of kindred and family or other intimate personal relations are proper subjects for consideration in the disposition of [property], and if allowed to influence a [donor], cannot be regarded as illegitimate or as furnishing [**4] cause for legal condemnation" (*Matter of Walther*, 6 N.Y.2d 49, 53-54, 159 N.E.2d 665, 188 N.Y.S.2d 168 [1959], quoting *Children's Aid Soc. v Loveridge*, 70 NY 387, 394-395 [1877]).

The burden of proving undue influence generally rests with the party asserting its existence (*Matter of Connelly*, 193 A.D.2d 602, 602, 597 N.Y.S.2d 427 [1993]). However, it has been held in the Court of Appeals case of *Gordon v Bialystoker Center & Bikur Cholim, Inc.* (45 N.Y.2d 692, 698-699, 385 N.E.2d 285, 412 N.Y.S.2d 593 [1978]) that under the doctrine of constructive fraud, where a confidential or fiduciary relationship exists between the decedent-donor and the defendant-donee so that they do not act from positions of [**9] equality, only slight evidence is required to shift to the defendant-donee the burden of proving by clear and satisfactory evidence that the transfer of the claimed gift was freely and voluntarily made and that it did not acquire the decedent's property by fraud, undue influence, or coercion.

The case of (*Matter of Gordon*, 45 N.Y.2d at 698-700), though, involved an elderly decedent who suffered from mental and physical infirmities and weakness and who was under the defendant nursing home's complete control and care for her very livelihood and existence and where the nursing home recipient of the bequest was not a natural object of the decedent's bounty. Thus, cases following (*Matter of Gordon*, 45 N.Y.2d at 698-699) have applied the doctrine of constructive fraud and the inference of undue influence where the circumstances showed that such scrutiny was mandated due to the unequal footing of the donor and donee, particularly where the donor would not be naturally disposed to make such a gift, such as where the donee was "a nice man" the donor met at the bank (*Sepulveda v Aviles*, 308 A.D.2d 1, 3, 762 N.Y.S.2d 358 [2003]), a friend upon whom the decedent [**10] was dependent for all of the essentials of daily living (*Matter of Mazak*, 288 A.D.2d 682, 684, 732 N.Y.S.2d 707 [2001]), the donor's home health aide (*JML Investors Corp. v Hilton*, 231 A.D.2d 493, 494, 647 N.Y.S.2d 244 [1996]), the donor's attorney (*Keating v Weinberger*, 160 A.D.2d 674, 160 A.D.2d 675, 675, 553 N.Y.S.2d 452 [1990]), or the draftsman of the will and the donee's accountant and financial advisor (*Matter of Collins*, 124 A.D.2d 48, 55, 510 N.Y.S.2d 940 [1987]).

On the other hand, the inference of undue influence, requiring an explanation of a gift, does not generally arise from the confidential relationship between close family members, such as a

father and daughter since "[the] sense of family duty is inexplicably intertwined in this relationship which, under the circumstances, counterbalances any contrary legal presumption" (*Matter of Swain*, 125 A.D.2d 574, 575, 509 N.Y.S.2d 643 [1986], quoting *Matter of Walther*, 6 N.Y.2d at 56; see also 39 NY Jur 2d, Decedents' Estates § 532). Thus, close family ties may negate the presumption of undue influence that would otherwise arise from a confidential or fiduciary relationship [*11] (see *Matter of Walther*, 6 N.Y.2d at 56; *Matter of Swain*, 125 A.D.2d at 575). Where a familial relationship exists, it may only be viewed as a confidential or fiduciary relationship sufficient to shift the burden of establishing that the transaction was not the product of undue influence if coupled with other factors, such as where the donor is in a physical or mental condition such that he or she is completely dependent upon the defendant-donee for the management of his or her affairs and/or is unaware of the legal consequences of the transaction (see *Peters v Nicotera*, 248 A.D.2d 969, 970, 669 N.Y.S.2d 1000 [1998]; *Matter of Connelly*, 193 A.D.2d at 603; *Loiacono v Loiacono*, 187 A.D.2d 414, 414, 589 N.Y.S.2d 560 [1992]; *Hennessey v Ecker*, 170 A.D.2d 650, 651-652, 567 N.Y.S.2d 74 [1991]; *Matter of Kurtz*, 144 A.D.2d 468, 469, 533 N.Y.S.2d 985 [1988]). [*5]

Plaintiff argues that the inference of undue influence based upon the holding of (*Matter of Gordon*, 45 N.Y.2d at 698-699) should be applied in this case based upon the confidential and fiduciary relationship between Coleman Connelly and defendant. Such argument is [*12] rejected. Here, there was a close familial relationship between Coleman Connelly and defendant, with whom he resided (see *Matter of Walther*, 6 N.Y.2d at 56; *Matter of Posner*, 160 A.D.2d 943, 944, 554 N.Y.S.2d 666 [1990]; *Matter of Swain*, 125 A.D.2d at 575).

Plaintiff's contention that Coleman Connelly's advanced age and ill health made defendant her father's home health aide upon whom he was completely dependent and that, as a caretaker child, this inference of undue influence must be applied, is without merit. Any care rendered by defendant to Coleman Connelly was not done as a physician or home health aide, but as a daughter (see *Matter of Camac*, 300 A.D.2d 11, 12, 751 N.Y.S.2d 435 [2002]). Moreover, there was not such a dependence upon defendant by Coleman Connelly at the time he executed the May 22, 1999 deed such that they dealt on an unequal footing. Coleman Connelly was not unable to care for himself when he signed the deed conveying his home to defendant.

Contrary to plaintiff's arguments, Coleman Connelly was not under the complete control of defendant. Plaintiff himself testified at his deposition that he never saw Coleman Connelly afraid [*13] of anyone nor did he ever see him being intimidated. Indeed, Coleman Connelly remained at plaintiff's home for three weeks in August 1999, three months following the deed's execution. In addition, defendant did not draft the deed or dictate its contents. Rather, the circumstances surrounding its execution indicate that it was the product of the free and unfettered act of Coleman Connelly (*Matter of Walther*, 6 N.Y.2d at 54).

Despite plaintiff's efforts to portray his father as depressed, sickly, and totally dominated by defendant, there is abundant evidence that he was independent-minded, was not under any restraint or compulsion, and was well aware of what he was doing when he executed the May 22, 1999 deed, and that he made a conscious and independent choice to leave the property to his daughter to the exclusion of his son (see *Matter of Mahnken*, 92 A.D.2d 949, 949, 460 N.Y.S.2d 671 [1983]). Michael Connors, Esq. testified at his deposition that Coleman Connelly expressed his estate planning desires to him and stated that he wanted to leave the house to his daughter, and that he did not want his son to get half the house and then force a sale. He stated that Coleman [*14] Connelly was not under any restraint, and that at the time of the execution of the deed, he was of sound mind. Sean Grogan, Esq. also testified that he witnessed both Coleman Connelly and defendant execute the deed, that Michael Connors, Esq. explained to Coleman Connelly that his son would have no interest in the property, and that, in his opinion, Coleman Connelly was of sound mind. Patrick Connelly, a friend of Coleman Connelly for over 25 years, and who visited him approximately 10 to 12 times per year until his death in May 2001, has also submitted his sworn affidavit, stating that Coleman Connelly was always of sound mind, memory, and understanding until he became ill in June 2000, and was not a timid man, and was never afraid to express his opinions or to communicate his wishes.

While it is true that Coleman Connelly was aged when he executed the deed, there is no proof that his mental faculties were impaired at that time (*Matter of Palmentiere*, 171 A.D.2d 871, 872, 567 N.Y.S.2d 797 [1991]). Although Coleman Connelly may have lost weight prior to the execution of the May 22, 1999 deed and suffered from certain physical ailments, including diabetes, high blood pressure, and [**15] the wearing of a hearing aid, there is no evidence that this weight loss or these [**6] physical ailments impaired his mental capacity or in any way effected his ability to freely and voluntarily execute the deed (see *Matter of Minasian*, 149 A.D.2d 511, 511, 540 N.Y.S.2d 722 [1989]).

Plaintiff only offers the affidavit of his purported expert neurologist, Aric Hausknecht, M.D., who opines that Coleman Connelly had chronic underlying dementia, which was exacerbated by an acute hypoxic schematic event that occurred on or about June 9, 2000. He also opines that in May 1999, Coleman Connelly was suffering from chronic illness, including poorly controlled diabetes, hypertension, coronary artery disease, cerebrovascular disease, cachexia, and depression, and that these conditions resulted in cerebral dysfunction with concomitant cognitive impairment.

Dr. Hausknecht, however, never knew Coleman Connelly, and never examined or treated him. Dr. Hausknecht's opinion is based only upon an examination of medical and hospital records and the deposition testimony. The medical and hospital records and deposition testimony do not support Dr. Hausknecht's opinion. As noted above, there is no evidence [**16] that any of Coleman Connelly's medical conditions which existed on May 22, 1999, at the time Coleman Connelly executed the deed, had any effect whatsoever on his cognitive abilities, or that any dementia, which was first exhibited following cardiac arrest on June 10, 2000, existed on May 22, 1999.

Dr. Hausknecht's opinion is purely speculative, and contradicted by the deposition testimony of Dr. Edward T. Fitzpatrick, Coleman Connelly's primary care physician from 1993 until the time of Coleman Connelly's death. Significantly, while testifying regarding his progress notes from February 4, 1999 and from an examination of June 2, 1999, Dr. Fitzpatrick found that Coleman Connelly was alert. There was no reference or indication of any mental infirmities in the testimony of Dr. Fitzpatrick until notations from July 26, 2000, 13 months after the execution of the deed. Dr. Fitzpatrick testified that he examined Coleman Connelly six times during the calendar year 1999; that during the time he treated him, he did not have cerebral dysfunction; and that during those six visits, Coleman Connelly responded to all of his questions appropriately, understood the results of the examinations and/or [**17] treatments, and that he was confident that Coleman Connelly knew what he was doing. He further stated that there was never a time during calendar year 1999 when he felt that Coleman Connelly was not competent enough to understand everything he spoke to him about, including his treatment, and had no reason to believe that Coleman Connelly would not have been able to execute legal documents in May 1999. In addition, Gary S. Gettenberg, M.D., Coleman Connelly's gastroenterologist, who examined Coleman Connelly on July 15, 1999, less than two months after the execution of the May 22, 1999 deed, reported, in his consultation report, Coleman Connelly's mental status as alert and made no mention therein of any confusion or mental incapacity. Thus, Dr. Hausknecht's opinion, which is based purely on speculation and is contradicted by the medical evidence and deposition testimony, is entitled to no weight (see *Matter of Chiurazzi*, 296 A.D.2d 406, 407, 744 N.Y.S.2d 507 [2002]; *Matter of Tracy*, 221 A.D.2d 643, 644, 634 N.Y.S.2d 198 [1995]; *Matter of Swain*, 125 A.D.2d at 576).

Plaintiff also argues that Coleman Connelly was mentally impaired at the time he executed the May 22, 1999 deed [**18] because of "his deluded notion" that plaintiff was going to force defendant to sell the house after he died. Such a notion, however, does not show any cognitive impairment. Rather, it was a rational and legitimate concern and reasonable for Coleman [**7] Connelly to assume that plaintiff would not continue to permit defendant to live in the house and not seek any financial benefit from it which could be realized from its sale. Coleman Connelly's decision to gift the house to defendant as a result of her expression of concern that she might be forced to move from her home could only be characterized as the

desire of gratifying defendant's wishes, due to the promptings of affection and their close familial relationship (see *Matter of Walther*, 6 N.Y.2d at 53-54; *Matter of Posner*, 160 A.D.2d at 944). Thus, the evidence is unrefuted that on the day Coleman Connelly executed the deed, he was of sound mind and fully aware of the nature and consequences of his actions in disposing of his property (see *Matter of Minasian*, 149 A.D.2d at 511).

Plaintiff also asserts that defendant had the opportunity and motive to exercise undue influence. "A mere [*19] showing of opportunity and even of motive to exercise undue influence [,however,] is insufficient to present a triable issue of fact, without additional evidence that such influence was actually exercised" (*Matter of Phillip*, 173 A.D.2d 543, 543, 570 N.Y.S.2d 1008 [1991]; see also *Matter of Walther*, 6 N.Y.2d at 55; *Matter of Gross*, 242 A.D.2d 333, 334, 662 N.Y.S.2d 62 [1997]; *Matter of Posner*, 160 A.D.2d at 944).

Plaintiff further argues that he has put forth sufficient circumstantial evidence to raise a triable issue of fact as to undue influence by defendant. "Of course, undue influence may . . . be proved by circumstantial evidence . . . but this evidence must be of a substantial nature" (*Matter of Walther*, 6 N.Y.2d at 54; see also *Matter of Branovacki*, 278 A.D.2d 791, 792, 723 N.Y.S.2d 575 [2000]).

Plaintiff argues that the fact that he was out of the country when the May 22, 1999 deed and will were executed and that the execution of the deed and will were kept secret from him until after Coleman Connelly was either incapacitated or dead constitutes circumstantial evidence of undue influence. Such argument is unavailing. [*20] Defendant was under no duty to disclose her father's actions. Furthermore, there is no showing that the decision of both Coleman Connelly and defendant to not disclose this information to plaintiff was due to any fraudulent cover-up, as opposed to a mere attempt to prevent family acrimony and to avoid an unpleasant reaction by plaintiff to Coleman Connelly's choice. The case of (*Matter of Collins*, 124 A.D.2d at 54), relied upon by plaintiff, is inapposite since there, the accountant, financial advisor, and draftsman of the will, who was the recipient of the bequest, kept the will a secret from the conservator of the testator and actually sent the conservator a copy of another will, knowing that, at the time, it was already revoked by the new will he had drafted. Such unusual circumstances are not present here.

Plaintiff also relies upon the pre-existing May 1978 will of Coleman Connelly, which had a different distribution scheme, as evidence of undue influence. Such will, which was executed prior to Coleman Connelly's wife's death and his daughter's moving into the house, however, does not vitiate the validity of the May 22, 1999 deed (*Matter of Minervini*), 297 A.D.2d 423, 424, 745 N.Y.S.2d 625 [*21] [2002]).

Plaintiff further argues that the fact that defendant brought Coleman Connelly to the law office of Connors & Sullivan, P.C. to execute the May 22, 1999 will and deed, under the supervision of an attorney he had never met before, which she paid for from a joint account with him that she controlled, shows undue influence. Such argument is rejected. The fact that the law firm of Connors & Sullivan, P.C. and Michael Connors, Esq. were strangers solicited by an appointment made by defendant, and that defendant accompanied Coleman Connelly to the law [*8] office does not support a finding of undue influence in view of the procedures followed in drafting and executing the deed (see *Matter of Walther*, 6 N.Y.2d at 55). Furthermore, the unrefuted deposition testimony shows that it was Coleman Connelly who selected the law firm.

In addition, Coleman Connelly's failure to reveal the extent of defendant's assets to Michael Connors, Esq., the attorney drafting the May 22, 1999 will and deed, does not constitute evidence of undue influence. Such additional knowledge was not required for Michael Connors, Esq. to carry out Coleman Connelly's requested testamentary plan. The [*22] evidence discloses that Coleman Connelly fully expressed his intentions to Michael Connors, Esq. with respect to the real property at issue. Contrary to plaintiff's assertions, the fact that defendant had other assets, and would not have been left destitute if a sale of the house were forced, does not render Coleman Connelly's wishes to gift to her the home where she lived the product of a cognitively impaired mind or undue influence .

Plaintiff also argues that defendant systematically made withdrawals from Coleman Connelly's bank account from January 1998 forward, and that this constitutes evidence of undue influence. Defendant, however, at her deposition adequately explained the purpose of these withdrawals. Specifically, defendant's unrefuted deposition testimony shows that defendant had withdrawn the monies, at her father's request, to provide him with cash for his personal use, or was used by her to purchase medicine or necessary items for her father.

Plaintiff further asserts that there were prior similar acts of undue influence. In support of this assertion, plaintiff points to an August 1994 filing of a lawsuit in Ireland for damages to Coleman Connelly's real property there. [**23] Such lawsuit, which appears to have been instigated by defendant at Coleman Connelly's request, is irrelevant to and does not support a finding of undue influence herein. Similarly, the fact that Coleman Connelly executed a will in Ireland on August 24, 1994 with respect to that real property for purposes of commencing that lawsuit does not constitute evidence that undue influence was exercised at that time or with respect to the deed at issue.

Plaintiff next argues that defendant failed to seek prompt medical attention on June 5, 2000 for Coleman Connelly, when he showed signs of congestive heart failure, i.e., swelling of the ankles, and removed money from his checking account during the time period when she should have taken him to the hospital. Plaintiff claims that this was **elder abuse**, and that this also shows undue influence. Plaintiff's charges of **elder abuse** are completely unfounded. Defendant's decision to respect and abide by her father's wishes to not immediately go to a hospital or her failure to appreciate the full extent of his medical condition until June 9, 2000, when she took him to the hospital's emergency room, does not amount to **elder abuse**. Additionally, there [**24] is no showing that the funds withdrawn by defendant were not done with Coleman Connelly's express consent.

Thus, despite the voluminous submissions and the lengthy nature of plaintiff's papers, which the court has carefully perused, plaintiff has not presented a scintilla of evidence of undue influence sufficient to sustain his claim. Plaintiff's contention that the May 22, 1999 deed resulted from undue influence, duress, or fraud is supported by only speculative allegations and not by evidence demonstrating triable issues (*Matter of Minervini*, 297 A.D.2d at 424; *Matter of Bustanoby*, 262 A.D.2d 407, 408, 691 N.Y.S.2d 179 [1999]).

"An inference of undue influence cannot be reasonably drawn from circumstances when [*9] they are not inconsistent with a contrary intent" (*Matter of Branovacki*, 278 A.D.2d at 793, quoting *Matter of Ruef*, 180 A.D. 203, 204, 167 N.Y.S. 498 [1917], *affd* 223 N.Y. 582, 119 N.E. 1075 [1918]; see also *Matter of Walther*, 6 N.Y.2d at 56; *Matter of Swain*, 125 A.D.2d at 575). Here, the circumstantial evidence presented is entirely consistent with an influence that Coleman Connelly's May 22, 1999 deed [**25] conveying the subject real property to his daughter and excluding his son from such conveyance was the product of his affection and gratitude to her for her devoted daily companionship, care, and assistance to him at that time and for assuming these burdens and responsibilities for his care in the future as his health declined, and his desire to permit her to remain in the home where she lived, and not be pressured into its sale by his son, who lived independently from them and was not subjected to these daily burdens.

While plaintiff is undoubtedly disappointed by his father's choice not to give him or his children a share in the house where he did not reside, and to, instead, reward his daughter for assuming primary responsibility for assisting him in his daily needs, this does not provide a basis to bring a lawsuit unfairly charging defendant with undue influence. Therefore, since there is no real issue as to the mental capacity of Coleman Connelly at the time he executed the subject deed and no supportable inference of fraud, duress, or undue influence, defendant is entitled to summary judgment dismissing plaintiff's complaint as against her (see CPLR 3212 [b] [**26] ; *Matter of Walther*, 6 N.Y.2d at 56; *Mandell v Finkel*, 298 A.D.2d 365, 366, 751 N.Y.S.2d 235 [2002]; *Matter of Minervini*, 297 A.D.2d at 424; *Matter of Philip*, 173 A.D.2d 543, 543, 570 N.Y.S.2d 1008 [1991]; *Matter of Swain*, 125 A.D.2d at 576).

Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint as against her is granted. In view of this disposition, plaintiff's cross motion, insofar as it seeks an order disqualifying the law firm of Connors & Sullivan, P.C. and Michael Connors, Esq. from any further representation of defendant, pursuant to DR 5-102 (A) (4), on the ground that they will be material witnesses against defendant at trial, is rendered moot. Plaintiff's cross motion, insofar as it seeks summary judgment in his favor, is denied.

This constitutes the decision, order, and judgment of the court.

Today's Teleconference

- Legislative Developments
- Miscellaneous Provisions
- Adult Abuse Updates
- Assisted Outpatient Treatment
- Guardianship Case Law
- Article 81 2004 Amendments

Federal Legislation

- Justice for All Act of 2004, (H.R.5107)
- Representative Payee Regulations Revised, (20 CFR Parts 404, 408 and 416)

State Legislation

- Olmsted Compliance
- Nursing Facility Transition and Diversion Law
- Continuing Care Retirement Communities
- Assisted Living Reform Act

State Legislation

Nursing Facility Transition and Diversion Law

- 18 years of age
- Eligible for and in receipt of Medicaid
- Currently reside in NH or in need of skilled care
- Capable of residing in the community with waived MA services

State Legislation

Continuing Care Retirement Communities (CCRCs)

- Allows 8 fee for service CCRCs in NYS
- Offer Independent Housing
- Access to Adult Care Facility
- Access to Nursing Homes
- DOH Oversight

State Legislation

Assisted Living Reform Act
PHL Article 46-B

- Assisted Living Definition
- Licensure
- Enhanced Assisted Living Definition
- Enhanced Licensure
- Licensure Fees

State Legislation

- Residency Admission Policy
- Resident Bill of Rights
- Residency Agreement & Disclosures

State Legislation

Criminal History Record Check

**NY Attorney General Web Site
for Drug Price Comparisons**

www.nyagr.org

Animal Hoarding

**“Creating Safer Communities for
Older Adults and Companion Animals”**

www.hsus.org/ace/21127

**NYC Hoarding Task Force
Web Site**

**[www.cornellaging.org/gem/
hoarding_index.html](http://www.cornellaging.org/gem/hoarding_index.html)**

**Matter of Mougianis v. North Shore-
Long Island Jewish Health Systems**

**Public Health Law Section 2982 (3)
-Health Care Proxy**

- **Right to receive medical information**
- **Medical and clinical records**
- **To make informed health decisions**

Access to Medical Records

Ch. 634 of the Laws of 2004,(S-4964)

Clarifies that a “qualified person”

(PHL Section 18 (1)(g):

- is a guardian under Art 81 and SCPA Art 17; or
- A distributee of any deceased subject having no personal representative; or

Access to Medical Records

- A lawyer with a power of attorney from the qualified person or the subjects estate;

- Will be deemed a “personal representative” for purposes of HIPAA.

**OCA HIPAA Compliant Form
“OCA Official Form No.: 960”**

www.nycourts.gov/forms

**Accessing PSA Resources
On-line**

- <http://sdssnet5/>
- Select OCFS on map of NY
- Choose Protective Services for Adults from the list of Programs and Services
- From PSA Home list, Choose Training Opportunities
- On-Line Presentation Center, select Adult Services, Retrieve Presentations

Available Presentations

- Caseworker Health & Safety and Client Capacity Assessments
- Borderline Personality Disorder
- Dementia and Alzheimer's Disease
- Late Life Depression
- Investigating Physical Abuse
- Is there a Doctor in the House?

Additional Titles

- Legal Aspects of PSA
- The Role of Law Enforcement in Response to Elder Abuse
- Established Protocols of Cultural Traditions

To view PSA Documents

From PSA Home:
Select Key Admin Directive

Available Documents On-Line

- Administrative Directives (ADM's)
– PSA, FTHA
- Local Commissioner's Memorandums (LCM's)
- Informational letters (INF's)
- MOU's
- PSA and FTHA forms

Training Courses On-Line

From PSA Home, select:

- Legal Aspects of PSA
- New Worker Orientation Manual

Links to other Resources

From PSA Home, select:

- PSA Internet Site:
- www.ocfs.state.ny.us/main/psa

What's Available On-Line

- Scope, Definitions, Problem, Abusers, Victims
- PSA FAQ's
- Risk Factors, How You can Help
- Brochures:
 - Protecting Adults from Abuse and Neglect
 - Financial Exploitation of Elderly & Impaired Adults

Links to Other Resources

New York State:

- Office for the Aging
- Department of Health
- Crime Victims Board
- Office of Mental Health
- Office of Mental Retardation and Developmental Disabilities

More Web Links

- National Center on Elder Abuse
- National Center for Victims of Crime
- National Committee for Prevention of Elder Abuse
- U.S. Administration on Aging Elder Abuse Resource Page
- American Association of Retired Persons

Accessing ASAP System

<http://ocfsasap/>

ASAP Requirements

- All new referrals must now be entered into the ASAP system
- Cases open for assessment and ongoing services must also be entered

Entering Current Caseload

- Cases must be entered by the time the next recertification or eligibility determination is due
- Enter the original intake, the assessment form and the last recertification
- Make sure to enter the correct dates

Progress Notes

- Record as soon as possible, but must be within 30 days of the event
- Progress notes become frozen 15 days after date of entry
- Before the notes freeze, only original author can edit the note

Upcoming training

**ASAP Review for Supervisors:
April 26 or 27, on Learn-Linc**

May 25th Q + A Teleconference

General Info on Adult Services Automation Project

From PSA Home list:

**-Select Adult Services Automation
Project (ASAP)**

ASAP Website

- **Overview of Project**
- **Timeline**
- **Business Requirements**
- **Release notes**
- **System Access**

ASAP Contact Info

Sandra.Carrk@dfa.state.ny.us

518 486-3236

Life-sustaining Decisions

- Incapacity to make such decisions must be re-certified.
- The attending physician must certify:
 - person terminal, permanently unconscious, life-sustaining treatment irreversible and indefinite
 - life-sustaining treatment extraordinary burden

Article 81 Amendments

Section 81.03

- Definition of life-sustaining treatment in new subdivision (j)

Article 81 Amendments
Section 81.07(a),(b)(1)

- Proceeding begins by filing the petition
- 28 day time period for hearing begins with the signing of the order to show cause

Article 81 Amendments
Section 81.07(b)(3)

- Privacy for medical and financial information

Article 81 Amendments
Section 81.07

- Changes in the notice and service provisions

Article 81 Amendments
Section 81.09(b)(1)

- Court evaluator appointments mandated to be from OCA list

Article 81 Amendments
Section 81.10(a)

- Clarification of AIP's right to choose counsel

Article 81 Amendments
Section 81.10(c)

- Appointed counsel for AIP only required with temporary guardian

Article 81 Amendments
Section 81.09(b)(1); 81.10(e)

- **MHLS may be appointed court evaluator or counsel for AIPs in the community**

Article 81 Amendments
Section 81.11(f)

- **AIP is the only party who may demand a jury trial on the issue of incapacity**

Article 81 Amendments
Section 81.13

- **Courts only have 7 days to render decisions after hearing**

Article 81 Amendments
Section 81.16(e)

- A judgement must be entered and served within 10 days of signature

Article 81 Amendments
Section 81.21

- More detail included in the powers of property management guardians

Article 81 Amendments
Section 81.29(e), 81.22(a)9(8)

- Major medical/dental treatment consent limited by the exception for life-sustaining treatment

Article 81 Amendments
Section 81.23(b)(1),(2)

- **Temporary Restraining Order or preliminary injunction includes the health and safety of AIP**

Article 81 Amendments
Section 81.25

- **Changes in bonding requirements**

Article 81 Amendments
Section 81.28(a)

- **Change in compensation provisions**

Article 81 Amendments

Section 81.29(d)

- Courts power to vacate POA and HCP extended to permit the exercise of that power for breach of fiduciary power in addition to invalid execution

Article 81 Amendments

Section 81.36(c)

- Upon application for modification of powers, a court may dispense with the need for a hearing for good cause

**Article 81 2004
Amendments Commentary**

www.courts.state.ny.us/ip/gfs

Resource Information:

www.elderabusecenter.org

**Clearinghouse on Abuse and
Neglect of the Elderly (CANE)-
<http://db.rdms.udel.edu:8080/CANE>**

For More Information:

Debbie Sacks

**E-mail:
rdsacks@aol.com**

Kathy Crowe

**E-mail:
kathleen.crowe@dfa.state.ny.us**

Evaluation And Handouts

Intranet

<http://sdssnet5/ohrd>

Internet

<http://www.dfa.state.ny.us>
