LEGAL ASPECTS OF ADULT PROTECTIVE SERVICES
2006 UPDATE

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LEGAL ASPECTS OF ADULT PROTECTIVE SERVICES 2006 UPDATE

Tele-training March 13, 2006

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Legislative Developments

Federal Legislation

2005 White House Conference on Aging
Top Ten Resolutions (www.whcoa.gov)

- Reauthorize the Older Americans Act within the first six months following the 2005 White House Conference on Aging
- Develop a coordinated, comprehensive long-term care strategy by supporting public and private sector initiatives that address financing, choice, quality, service delivery, and the paid and unpaid workforce
- Ensure that older Americans have transportation options to retain their mobility and independence
- Strengthen and improve the Medicaid program for seniors
- Strengthen and improve the Medicare program
- Support geriatric education and training for all healthcare professionals, para-professionals, health profession students and direct care workers
- Promote innovative models of non-institutional long-term care
- Improve recognition, assessment and treatment of mental illness and depression among older Americans
- Attain adequate numbers of healthcare personnel in all professions who are skilled, culturally competent and specialized in Geriatrics
- Improve state and local based integrated delivery systems to meet the 21st century needs of seniors

Elder Justice Act (S. 2010) (www.elderjusticecoalition.com)
Introduced by Sen. Hatch the Bill is aimed at increasing the detection, prevention, and prosecution of elder abuse. The Bill is similar to (S. 333) introduced during the previous Congress but has several new provisions including:

- Training , technical assistance, research, and demonstrations aimed at improving Ombudsman effectiveness in addressing abuse and neglect in nursing homes and assisted living facilities;
- Training for nursing aides on dementia care and job-related stress reduction;
- Nurse Aide Registry study.

State Legislation – Chapter Laws of 2005

Miscellaneous

Chapter 188 of the Laws of 2005 (A1092A)

Effective October 10, 2005
The law authorizes municipalities to exempt people with disabilities living in rent controlled. Rent subsidized or Mitchell-Lama houses from rent increases.

Chapter 435 of the Laws of 2005 (A2947)

Effective August 9, 2005
This law gives the Commission on Quality of Care and Advocacy for Persons with Disabilities oversight authority for programs funded by either the Office of Mental Retardation and Developmental Disabilities (OMRDD) or the Office of Mental Health (OMH).

Abuse

Chapter 186 of the Laws of 2005 (S 5092)

Effective September 1, 2005
The act amends the executive law, the criminal procedure law and the correction law, in relation to the rights of crime victims to be aware of a defendant's incarceration status.

Chapter 246 of the Laws of 2005 (S 936B)

Effective November 19, 2005
The law provides that information pertaining to a covered person under an insurance policy may be withheld from the policy holder when there is an order of protection.

Chapter 563 of the Laws of 2005 (S 4135A)

Effective August 23, 2005
This law amends the Judiciary law relating to orders of reference in relation to orders of protection. The act permits the use of Referees to issue orders of protection at night in family court for another three years.

Health Care

Chapter 715 of the Laws of 2005 (S 2751A)

Effective April 11, 2006
This bill allows Surrogate Decision Making Committees (SDMC), established pursuant to Article 80 of the Mental Hygiene Law, to continue making medical decisions for individuals for whom it has jurisdiction in the event the individual's residential setting is changed.

Chapter 734 of the Laws of 2005 (S 5785)

Effective October 11, 2005
The law allows the Department of Health to authorize the use of one or more alternative forms for issuing a non-hospital order not to resuscitate as part of one or more demonstration programs in Monroe or Onondaga counties.

Chapter 744 of the Laws of 2005 (S 5323)

Effective October 18, 2005
This bill corrects an omission in Chapter 500 of the Laws of 2002 - The Health Care Decision Making Act for Persons with Mental Retardation. The law extends health care decision making authority pursuant to Section 1750-a to guardians of the developmentally disabled who are also mentally retarded or are otherwise proven incapable of making his/her own health care decisions.

Chapter 536 of the Laws of 2005 (S 4877B)

The law requires the Office of Mental Retardation and Developmental Disabilities (OMRDD) and Office of Children and Family Services (OCFS) (Protective Services for Adults) to enter into a Memorandum of Understanding (MOU) to define their respective roles for intervening on behalf of an adult with mental retardation or other developmental disability who is being abused or neglected in a non-certified setting. Further, it would require OMRDD and OCFS to report annually to the Legislature on the success of the MOU and provide comprehensive information related to the efforts of the two agencies to safeguard individuals in non-certified settings. The legislation also gives the Commission on Quality of Care and Advocacy for Persons with Disabilities an oversight role in this issue.

Mental Health

Chapter568 of the Laws of 2005 (S 4742B) Geriatric Mental Health Act

Effective August 23, 2005
The purpose of this bill is to lay the groundwork for the state to be able to provide high quality services to meet the current mental health needs of older New Yorkers and prepare for the coming elder boom. The Mental Hygiene Law is amended to add a new Section 7.41 Geriatric service demonstration program. The office will provide grants to providers of mental health care to the elderly.

Chapter 571 of the Laws of 2005 (A 4775)

Effective August 23, 2005
This bill amends two sections of the Mental Hygiene Law that relate to clinical records and confidentiality and patient as well as patient representative access to such records by extending the provisions of these sections to non-licensed mental hygiene programs operated by or in contract with a local government unit.

Chapter 192 of the Laws of 2005 (A 02972)

Effective July 12, 2005
Amends Section 9.45 of the Mental Hygiene Law. Authorizes the legal guardian, or intensive or supportive case manager of a person to report to the director of community services that such person has a mental illness for which immediate treatment in a hospital is appropriate and that it is likely such illness will cause serious harm to such person or others, which shall be the basis for the removal of such person to a hospital for a comprehensive psychiatric evaluation.

Chapter 137 of the Laws of 2005 (A 08991)

Effective June 30, 2005
This bill makes a technical clarification regarding the eligibility criteria for assisted outpatient treatment.

Chapter 158 of the Laws of 2005 (S 5876) Assisted Outpatient Treatment Program

Effective June 30, 2005
The purpose of this bill is to extend and enhance the state's Assisted Outpatient Treatment (AOT) program, commonly known as "Kendra's Law," and to provide for more extensive investigation of the implementation and effectiveness of the program. The bill extends the expiration date of Kendra's Law to June 30, 2010.

Following are a summary of the major amendments to Mental Hygiene Law Section 9.60:

- Requires appropriate and timely investigations of persons who may need an AOT Order;
- Clarifies the responsibilities of the Director of Community Services (DCS);
- Adds psychologists and licensed social workers to the list of persons who may petition the court for an AOT order;
- Authorizes OMH to make available to counties with a population under 75,000 an OMH physician to make the affirmation required for the petition;
- Clarifies that the subject of an AOT petition may be represented by privately financed counsel;

- Requires notification of all service providers who are included in a written treatment plan;

- Provides that in instances where the petitioner is not the director, the written treatment plan, and the testimony of the physician who developed the plan, would be required on a date set by the court, not on the date of the hearing;

- Requires the appropriate director to provide a copy of the court order to relevant parties, including the patient, nearest relative, up to three persons designated by the patient, the mental hygiene legal service or anyone acting on the patient's behalf, the original petitioner, identified service providers, the current healthcare agent, the appropriate program coordinator, and the DCS, if he/she is not the petitioner;

- Clarifies that petitions for extensions must be filed within 30 days prior to the expiration of the current order; and, that if such petition is filed in a timely manner, the current order would remain in effect until the court's disposition of the petition for an extension;

- Permits a director, family member or person living with the patient, if such person filed the original petition, to file a petition for an AOT extension;

- Requires the director to provide notice of a petition for a material change to an AOT plan to all parties required to receive notice of the original petition, and authorizes the court to approve the material change without a hearing, if the patient informs the court that he/she agrees to the change;

- Authorizes the DCS to direct the removal of a patient, who is present in his/her county, to an appropriate hospital based upon the determination of the appropriate DCS;

- Requires OMH to develop a mental health training program for judges and court personnel; and

- Numerous data collection, program evaluation and reporting provisions.

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Case Law Developments

Article 9 Mental Hygiene Law

<u>In the Matter of Ricardo H</u>., 17 A.D.3d 464; 793 N.Y.S.2d 140; 2005
This was a proceeding pursuant to Mental Hygiene Law § 9.33 to retain a patient in a hospital for involuntary psychiatric care. The patient suffered from schizoaffective disorder, poly-substance dependence (alcohol and cocaine/crack), and anti-social personality disorder with repeated hospitalizations, a history of noncompliance with medications, and three suicide attempts. His long-standing drug abuse problem coupled with his mental health problems, had led to frequent arrests.
Over several years, a pattern developed whereby the patient would be hospitalized until he stabilized then discharged to an assisted outpatient treatment program, only to find himself, several months later, at the emergency room in poor physical health, either in a drug-intoxicated state and/or experiencing hallucinations.
These facts established by clear and convincing evidence that the patient was mentally ill, in need of further care and treatment, and posed a threat to himself and/or others. Accordingly, the petition for retention should have been granted.

Article 81 Guardianship

<u>Columbia Memorial Hospital v. Barley</u>, 16 A.D.3d 748, 790 N.Y.S. 576 (3rd Dept. 2005)
Plaintiff hospital sues IP and her guardian DSS to recover payment for medical services rendered. Plaintiff alleges in a motion for summary judgment that IP's home was transferred to her brother without fair consideration and alleges that the guardian was in breach of their fiduciary duty to the IP for failing to prevent the fraudulent transfer. Court finds that plaintiff's claim against the guardian for breach of fiduciary duty should have been dismissed because the plaintiff did not plead the guardian had a fiduciary duty to plaintiff. The court states that plaintiff can however raise the issue in the article 81 court in the context of whether DSS breached its' duty to the IP.

<u>In the Matter of the Estate of Catherine Stiehler, Deceased</u>. 9 Misc. 3d 1114A; 2005 N.Y. Misc. LEXIS 2113 (Sup. Ct., Richmond Cty.)
In this contested administration proceeding, the decedent, Catherine Stiehler, died from a gunshot wound to the head on December 8, 2003. Arrested and charged with the crime was decedent's husband, John Stiehler, who was to be arraigned on December 31, 2003,but who died on January 4, 2004 at Bellevue Hospital.
In the discovery phase of this proceeding various subpoenas and demands were served seeking records relating to the decedent and her husband including a subpoena served on New York City Adult Protective Services. Corporation Counsel of the City of New

York, filed an attorney's affirmation to quash the subpoena contending that the records sought are confidential and not subject to disclosure pursuant to Social Services Law § 473-e. At the Court's request, the information sought to be discovered was delivered to the Court for an in camera review. After reviewing the material submitted, the Court found the information contained therein to be already known by all parties involved. Accordingly, there was no reason to violate the confidentiality of the Adult Protective Services materials and direct compliance with the subpoena served upon them, thus the motion for a Protective Order was granted.

In re Rose P. (Anonymous), 15 App Div 3d 665, 790 NYS2d 689.
Judgment ordering the sale of an incapacitated person's property was reversed and the petition was denied where the trial court should have held a bedside hearing under N.Y. Mental Hygiene Law § 81.11(c). The court evaluator was unable to make a recommendation on the propriety of sale and move in that he was unable to speak to the incapacitated person for a sufficient length of time. The court evaluator was of the opinion that the incapacitated person could meaningfully participate in such a hearing.

Matter of Ethan Hylton, NYLJ, January 6, 2005, p. 26 (Surr. Ct.) (Holzman, Sur.)
At the request of the Public Administrator, who was appointed the **Article 81** guardian of the owner of certain realty in the Supreme Court, the realty was offered for sale at a public auction conducted before this court. After spirited bidding, the highest bid was in the sum of $478,500. The acceptance of the bid is subject to the approval of the Supreme Court where the Article 81 guardianship proceeding is pending.

In the Matter of Patricia Biehl, 9 Misc. 3d 1116A; 2005 N.Y. Misc. LEXIS 2203 (Supreme Court, Queens County)
Mark Palomino commenced an action by Order to Show Cause for the appointment of a guardian of his aunt, Patricia Biehl, an Alleged Incapacitated Person. The Petition alleged that Mrs. Biehl, 90 years old, had become the subject of gross exploitation by one Brian Loftman, a health care attendant, and his mother including but not limited to the transfer of her home and more than $ 250,000.00 in cash. Mr. Loftman had received a Power of Attorney from the AIP under which the house was transferred to him. He argued Mrs. Biehl had transferred the property to him because she “wanted it that way”.
The Court found undue influence imposed upon Mrs. Biehl by the attendant and his mother that rose to the level of “moral coercion” which destroyed her free will. An attorney was appointed as guardian of the person and property and special guardian directed to insure the appropriate transfer of the deed of the property back into the name of Patricia Biehl and ensure that Mrs. Biehl is appropriately cared for. The Special Guardian was also to determine whether any other monies had been misappropriated by either Brian Loftman or his mother. The court also revoked the Power of Attorney.

<u>Matter of Marie H</u>., __AD2d__: 2006 N.Y. App. Div. LEXIS 676 (2nd, Dept. 2006)
For the purposes of the physician-patient privilege, a psychiatrist who examines an individual as part of a mobile crisis team to determine his/her need for involuntary psychiatric treatment and who did not prescribe or otherwise participate in her treatment and who was unaware of the nature of her treatment is NOT a treating psychiatrist whose testimony can be barred under CPLR 4504(a).

<u>Matter of J.G</u>., N.Y.L.J. August 19, 2005; Pg. 21 (Sup. Ct., Bronx Cty.) (Hunter, J)
Petitioner Attorney sought appointment of a guardian for his client, an **a**lleged incapacitated person (AIP). The court appointed an evaluator, who stated that while the AIP consented to the guardianship**,** his reason was to have someone help with his housing and monetary problems.

The court found no indicia that the AIP understood that an incapacitation finding would deprive him of a great deal of power and control over his life, and noted no evidence was found that the AIP was incapacitated or in need of a guardian. The court found conflicts with petitioner also representing the AIP in a personal injury case, and questioned whether petitioner brought this action merely to protect himself from professional responsibility violations as he continued with the personal injury action. The court directed petitioner to contact Adult Protective Services to try to obtain assistance to prevent the AIP's homelessness, due to his impending eviction.

Housing Matters

<u>In re Stephen B. (Eggelston),</u> 17 A.D.3d 584, 793 N.Y.S.2d 149 (2nd Dept. 2005)
APS had petitioned to become guardian and during that proceeding filed to stay an eviction proceeding until 120 days from the qualification of the guardian. The landlord intervened and moved to have DSS pay the rent during the period of the stay and the trial court granted landlord's application. The Appellate Division reversed ruling that there must be a legal obligation on the part of the municipality, either statutory or contractual, before public funds may be paid to individuals and that in this instance no statutory or contractual provision was identified requiring DSS to pay the use and occupancy required by the Supreme Court.

<u>New York City Housing Authority v. Maldonado</u>, NYLJ, April 13, 2005, p. 19 (Civil Ct., Bronx Cty.) (Madhavan, J.)
In this summary holdover proceeding, petitioner seeks possession of the premises on the ground that respondents Lucy Maldonado and her son, Ramon Rivera, are licensees of Jose Rivera, the deceased tenant of record. On June 30, 2004, respondent Maldonado's guardian ad litem stipulated that his ward would vacate the premises by December 31, 2004. Respondent Maldonado now moves this court, pro se, for an order extending her time to vacate the premises. Respondent's motion was granted.
The Court discharged the guardian ad litem finding his gross failure to protect his ward to

be shocking and unconscionable. The remaining branches of respondent's pro se order to show cause were adjourned to permit a new and adequate guardian ad litem to be appointed for respondent.

Health Care

Borenstein v. Simonson, 8 Misc.3d 481; 797 NYS2d 818 (Sup. Ct., Queens Cty.)
The issue presented in this case was whether a health care agent with authority to make health care decisions, pursuant to a duly executed proxy, could prevent the immediate surgical insertion of a percutaneous gastric feeding tube?
The Health Care Proxy executed while the AIP was competent did not provide instructions to the agent for dealing with artificial nutrition and hydration as required by PHL 2981(4) and 2982. The AIP was on an NG tube when her physician sought authorization to insert a PEG. The Health Care Agent refused to authorize the PEG and the AIP's sister petitioned for a special guardian to make the nutrition/hydration decisions. Petitioner also sought to void the HCP on the grounds that the agent was not acting in the AIP's best interest or alternately to declare that the agent was without power to make decisions about nutrition/hydration and to enjoin the Health Care Agent from interfering with health care decisions about nutrition/hydration. The court declared that the agent was without power to make nutrition/hydration decisions as there was no affirmative indication in the Proxy document giving the agent the power to make these kinds of decisions. However, the court found no basis for voiding the HCP. In making its decision the court discussed Jewish law on the subject of withdrawing or withholding life sustaining treatment.

Matter of Mougiannis, NYLJ, December 1, 2005, p. 22, (AD2, Brooklyn)
An Appeals court in Brooklyn ruled in favor of broad access to medical records for health care agents who are not appointed as guardians through the Surrogate's courts.
The first-impression ruling from the Appellate Division, Second Department, addresses a conflict in two laws governing the rights of persons responsible for the health care of individuals who cannot make such decisions alone.
While the court held that access to records under Public Health Law §18 is limited to parents or appointed guardians, it found that health care agents who execute agreements under Article 29-C of the Public Health Law--in this case, a daughter of a sick mother--have broad access to records under PHL §2982(3).

Matter of Topa, NYLJ, November 7, 2005, p. 19 (Sup. Ct., Queens Cty.) (Thomas, J.)
Petitioner daughter commenced a guardianship proceeding pursuant to Article 81 for the appointment of a guardian for her father, an allegedly incapacitated person. Petitioner alleged the nursing home, where her father was temporarily placed for rehabilitation, insisted she commence the petition if she ever wished to have her father discharged or to see any of his medical records. The nursing home administrator refused to honor the

alleged incapacitated person's health care proxy given to the petitioner, daughter and refused to allow the father to leave the facility and return home.
The petitioner argued her father was not incapacitated, contending he was competent to care for his physical and financial needs. The court noted a geriatric care manager, and a court-appointed temporary guardian, both found the alleged incapacitated person to have a high level of capacity and function, and fully lucid, and the court agreed, finding he did not require a guardian. It stated the nursing home's "reprehensible" and inexcusable actions violated petitioner's fundamental rights, and offended the conscience of the court. Thus, the court imposed attorney's fees on the nursing home for this proceeding.

In the Matter of Murray F.and Marilyn F., incapacitated persons;
SUPREME COURT OF NEW YORK, KINGS COUNTY
2005 NY Slip Op 50562U; 7 Misc. 3d 1011A; 2005 N.Y. Misc. LEXIS 752
April 11, 2005, Decided

PRIOR HISTORY: The guardian, Self Help Community Services was represented by Kenneth Churin, Esq. and the Incapacitated Persons were represented by Georgann Caporal, Esq. of Mental Hygiene Legal Services.
DISPOSITION: For all of the reasons stated above, the application to remove Self Help Community Services as guardian in this case is denied.
HEADNOTES: [**1011A] Guardian and Ward--Removal of Guardian.
JUDGES: Anthony J. Cutrona, J.
OPINIONBY: Anthony J. Cutrona
OPINION:
Anthony J. Cutrona, J.

The incapacitated persons**,** by their attorney, Georgeann Caporal Esq. of Mental Hygiene Legal Services, move for an order removing the Guardian of the Person and Property of the incapacitated persons**.** Counsel basis her argument, inter alia, on the fact that a relative, Joseph Bono, Mr. and Mrs. F's brother in law, has stepped forward and is willing to be appointed guardian.

This is truly one of the most demanding cases that the Court has encountered in the Guardianship Part. It is a case study of the frustrations encountered in many of these situations, where, despite the best efforts [***2] of many different people, no solace can be found for the IPs or any of the other parties.

Background

Mr. and Mrs. F., who were married in 1975, first presented to the court on May 21, 2001 by way of a petition by City of New York's Human Resources Administration to have a guardian appointed for them. The City had gotten involved in this case by way of Protective Services for Adults, which stepped in when Mr. and Mrs. F. were the subject of eviction proceedings in Housing Court, because they owed over $ 5000.00 in rent notwithstanding the fact that Murray F. earned over $ 50,000.00 per year, sorting second class mail at his job at the Post Office, where he has worked for over 30 years.

According to medical evaluations submitted by the petitioner, Mr. F. was diagnosed with personality disorder, characterized by isolation, avoidance and paranoid behavior, obsessive-compulsive features, and a history of impulse control problems. There is also an indication that he is mentally retarded. Mrs. F. was diagnosed with probable mental retardation, not otherwise specified.

Evidence was presented to this court that Murray F. suffers from Collier Brothers

Syndrome. In other words he [***3] is a hoarder. Their apartment at 7201 Bay Parkway, Brooklyn, was stacked floor to ceiling with magazines, newspapers, garbage, old mail (from the Post Office) etc. There was severe insect infestation. Moreover, there were two dogs in the apartment who were allowed to defecate and urinate in the house. In sum, the apartment was an unsanitary, unhealthy, disgusting mess. This description of the apartment was confirmed by several photographs taken by the court evaluator.

On February 14, 2002, this court signed orders and judgments appointing Self Help Community Services (hereinafter referred to as "Self Help") as guardian of the persons and [*2] property of Murray and Marilyn F. At that time, there was no one else who came forward to serve as guardian. Accordingly, the community guardian was appointed.

Problems ensued almost immediately. The guardian attempted to set up essential heavy duty cleanings of the apartment on several occasions but were thwarted by Mr. and Mrs. F. who refused access to their apartment. In an attempt to gain Mr. and Mrs. F. cooperation, the Court, by order dated January 17, 2003, appointed Michael Neville, Esq. of Mental Hygiene Legal Services (hereinafter referred [***4] to as "MHLS") to represent Mr. and Mrs. F. interests in the matter. It was arranged with Mr. Neville that he would go through the contents of the apartment with Mr. and Mrs. F., so as to ensure that nothing was being thrown out that was important and/or of value to them. It was also essential that the dogs be removed from the apartment as it was apparent that the couple could not adequately care for their needs and their presence was causing a health hazard. (Through this whole period, the landlord also had a holdover proceeding pending, because of the condition of the apartment and disruptive behavior by Murray F., such as walking naked in the common hallways. The court continued the stay of these proceedings on several occasions.)

These efforts on the part of the guardian, the court and Mr. Neville while achieving some results (a heavy duty cleaning was arranged and paid for by Self Help and performed by the New York City Department of Human Resources on December 12, 2002 resulting in the removal of approximately 250 bags of trash and other materials from the living room alone) barely scratched the surface of the problem. Any attempts to schedule additional cleanings were met with [***5] extreme agitation on the part of Mr. F., and distress by Mrs. F. Finally, on March 13th, 2003, this court was forced to grant Self Help's application for an access order for the apartment, to conduct inspections, repairs, cleaning and to remove any pets, if necessary without the permission of Mr. and Mrs. F. The Court also gave the guardian permission to obtain the assistance of the New York City Police Department, if necessary, to gain access to the apartment. In her affirmation in support of the application for an access order, dated December 26, 2002, Masha Friedman, ACSW, RG., Assistant Director of the Community Guardian Program for Self Help stated the following:
In an attempt to address and cure the condition of Mr. and Mrs. F's apartment I arranged for a consultation on compulsive hoarding with Dr. Randy Frost (FROST) of Smith College, an expert in the treatment of compulsive hoarding syndrome. FROST and I personally visited Mr. and Mrs. F.'s premises in early July 2002 in an effort to engage them in a constructive discussion about their squalid and verminous environment. This

attempt to address Mr. and Mrs. F.'s compulsive hoarding syndrome was a complete failure. [***6] Murray completely rejected the notion that his apartment was a dangerous fire and health hazard because of possessions and trash piled from floor-to-ceiling throughout the whole apartment. During the visit I observed mice all over the apartment as they skittered over the heaps of old newspapers and other assorted trash-there were mounds of mouse feces everywhere and every square inch of the apartment was infested with cockroaches...Both continue to believe that their apartment did not need, and does not need additional, heavy duty cleaning despite its obvious squalor. To make matters worse, Murray also manifests symptoms of Antisocial [*3] Personality Disorder, which renders him chronically irritable and inappropriately aggressive. In Murray, symptoms of Antisocial Personality Disorder are revealed by his repeated verbal assaults and threats of harm directed at me and all of Self help staff that have come in contact with him...

Living with Mr. and Mrs. F., amidst the clutter and squalor, are two dogs that are matted, covered with feces and appear to be in ill health. I believe that the dogs never go outside because they urinate and defecate on the hallway floor that was covered [***7] with plastic bags that were taped to the floor...Marilyn, in denial that the apartment required cleaning, was walking on the dog feces with her bare feet while asserting that there was "nothing wrong" in cohabitating with, and maintaining dogs in this manner. Animal Rescue made two attempts to remove the dogs, but Marilyn refused to open the door.

Finally, due to the extraordinary efforts of everyone involved, Self Help was able to arrange for and have carried out heavy duty cleanings which greatly improved the condition of the apartment. Self Help rented storage units on Mr. and Mrs. F.'s behalf and moved much of the salvageable material that Mr. and Mrs. F. wanted to keep there. Unfortunately, Mr. F. began almost immediately to move items back into his apartment. This material, which had been infested with insects was brought back into the dwelling causing another serious cockroach problem.

During this whole process, continuing to the present, Mr. F. has continually harassed everyone involved with the case. He has deluged chambers, courtroom staff and clerks in the Guardianship Office with countless phone calls, letters and faxes. It would be no exaggeration to state that these [***8] communications number in the hundreds. He has often phoned chambers several times a day, and while he has never crossed the line by making threats against court personnel, he has often been loud and profane, both to my Law Clerk and Confidential Secretary. There have been days when it has been impossible to conduct any other business in chambers because of Mr. F's constant phone calls. While the heavy duty cleanings were taking place, the purpose of Mr. F's communications were to complain about the personal possessions that were being removed from his apartment. The Guardian has reported to the court that it's employees are also being harassed by Mr. F. and they have been subject to threats and physical abuse. As will be discussed later, Mr. F. has also expressed his dissatisfaction with other elements of the guardianship. At around the same time, Mr. Neville, a supervisor with MHLS, reassigned the case to a staff attorney.

Self Help also encountered tremendous difficulty in trying to gain control over Mr. and Mrs. F.'s money. As previously mentioned, Mr. F. is employed by the United States Postal Service. It has never been established how Mr. F. was able to obtain this job or maintain [***9] his employment, given his mental state. The court is aware however, that Mr. F. has a brother who works with him in the Post Office. (This brother has had no involvement with this case). On several occasions, Self Help attempted to having Mr. F's paycheck forwarded directly to the agency, but each time, Mr. F. was able to reverse the process and have his check delivered to [*4] himself, personally. Apparently, the problem was that the postal service had no procedure in place to deal with this type of situation, that of an incapacitated person with this type of full time position, which is admittedly, very unusual. During the time that Mr. F. remained in control of these funds, he did not pay the rent or stay current on many other bills. Mr. and Mrs. F. had been living beyond their means. They had eight "high risk" credit cards with monthly charges and substantial interest rates. They had six telephone accounts a contract for bottled water and a subscription to DirectTV. They ordered a Craftmatic adjustable bed for over $ 4000.00. As a result, Self Help was forced to effectively lend him the money by paying his obligations out of agency funds. To date, Self help has lent Mr. and Mrs. F. [***10] approximately $ 12,000 in this manner.

Notwithstanding all of these obstacles, Self Help has managed to stabilize Mr. and Mrs. F.'s living and financial situation. The apartment is now in relatively good shape. The landlord, who had been aggressively pursuing Mr. and Mrs. F.'s eviction and who had been appearing every time an issue relating to the Guardianship had come before the court, has been silent for quite some time. The guardian has facilitated Mr. and Mrs. F. finding doctors who take their insurance plan. Mr. and Mrs. F. are now on a budget and are living within their means. In addition to paying all of their bills, the guardian had been giving Mr. F. $ 350.00 per week for daily living expenses. When Mr. F. complained that he didn't have any money to take vacations, Self Help decided to reduce this amount to $ 250.00 and to place the other $ 100.00 in a vacation fund. The guardian also agreed to give Mr. and Mrs. F. extra money when Mr. F. works overtime, which he often does.

The institution of this budget has again caused Mr. F. to obsessively phone and fax the court, it's clerks and personal staff. There have also been reports of Mr. F. becoming both physically and verbally [***11] threatening to Self Help staff. In sum, the situation has become intolerable.

Is the court of the opinion that Self Help is perfect? No. The court, for example, is disappointed that the guardian has not pursued, more aggressively, services based upon their diagnosis' of mental retardation. (There has been testimony however, that Mr. F. has adamantly refused such services) Given the most difficult circumstances under which they have had to perform, the court feels that the guardian has more than adequately fulfilled its responsibilities.

Joseph Bono

Joseph Bono is married to Marilyn F's sister, and knows the couple for approximately 30 years. He has offered to assume the duties of Mr. and Mrs. F's guardian.

Mr. Bono has worked for Consolidated Edison for 45 years. He currently works in its computer training and applications department. Mr. Bono testified at the hearing on this application, that prior to the past year, he has visited Mr. and Mrs. F. 1 or 2 times in the last 25 years. He testified that he did not come forward immediately to serve as guardian because his wife, Marilyn F's sister, was undergoing cancer treatments, which understandably, took up most of his [***12] time and focus. He further testified that his wife has been in remission for 2 1/2 years, which enables him to spend the necessary time to take care of Mr. and Mrs. F.'s needs. His wife however, has no communication with Mr. and Mrs. F and is not involved in their lives.

Since early, 2003, Mr. Bono, at the court's urging and assent, has been working as an intermediary between Mr. and Mrs. F. and Self Help and assisting in any way possible. Mr. Bono stated that he receives 3-4 voice messages from Mr. F., almost every day. He typically [*5] waits until evening to pick up these messages and then calls him back.

When Mr. F. testified in favor of this application, it was clear that he did not appreciate the necessity that he and his wife be put on a strict budget. It was obvious, in fact, that the major impetus for Mr. F. wanting to replace Self Help with Mr. Bono was his feeling that Mr. Bono would give him more money.

The Court is cognizant of the case law that states that a "stranger will not be appointed as guardian of an incapacitated person "unless it is impossible to find within the family circle, or their nominees one who is qualified to serve." ***Matter of Naquan S.***, 2 A.D.3d 531, 767 N.Y.S.2d 906 (2d Dept. 2003) [***13] 7 It has also been held however that "the established preference for a relative may be overridden by a showing that the proposed guardian-relative has rendered inadequate care to the IP, has interests adverse to the IP or otherwise is unsuitable to exercise the powers necessary to assist the IP" ***Matter of Gustafson***, 308 A.D.2d 305, 764 N.Y.S.2d 46 (1st Dept, 2003).

While Mr. Bono's concern is greatly appreciated, it is this court's determination that given Mr. F's demanding, aggressive and belligerent behavior, coupled with the couple's substantial need for intensive supervision and services, it would be impossible for Mr. Bono, by himself, to adequately perform the guardian's duties. Furthermore, given Mr. Bono's 25 year indifference to Mr. and Mrs. F.'s plight, it is difficult to believe that he will now be willing and able to withstand this most difficult of tasks, which requires constant, even daily attention.

An example of the court's concern is contained in a status letter, dated December 26, 2002, from Masha Friedman of Self Help, to the court (written at the court's request). Mr. Bono, at the time was still caring for his wife, but was trying to provide limited assistance [***14] to the guardian. The letter states the following:
Prior to the previously mentioned heavy-duty cleaning, Mr. Bono telephoned me to report that the condition of Mr. and Mrs. F's apartment had improved because Murray F.

reportedly had removed ten (10) contractor's bags full of trash; he asserted that the apartment was sufficiently improved to cure the nuisance situation. Based upon Mr. Bono's assertions I was about to cancel the heavy-duty cleaning, but decided to first inspect the premises. My inspection was shocking; the premises were in appalling condition, in fact, it was far worse then when I had first seen it. In my estimation the clutter had increased by at least fifty percent (50%); it became obvious to me that Mr. Bono's attempts at intervening in the matter, while perhaps well intentioned, were not based upon any first hand knowledge nor on any insight into the problem presented by the task of preserving Mr. and Mrs. F's tenancy and the prevention of their becoming homeless.

The court was also distressed by another aspect of Mr. Bono's testimony with respect to this application. He stated that if he were made guardian, his plan would be to put Mr. F's money in [***15] a bank account and let him draw what he needs himself, using the remainder to pay outstanding bills. This "plan" showed a total lack of understanding as to Mr. F's mind set and psychological condition. Mr. F. has repeatedly shown that he is totally incapable of managing money. Any money put into a bank account would surely be removed by Mr. F. immediately, causing the couple serious financial difficulties.

These passages point up the overwhelming nature of being Mr. and Mrs. F.'s guardian and [*6] the danger of submitting to Mr. F's will when he harasses and bothers. It is this court's determination that Mr. Bono, through no fault of his own, will not be able to properly carry out the functions of guardian for Mr. and Mrs. F.

Finally, as previously mentioned, this court appointed Mental Hygiene Legal Services in January, 2003 to assist in getting Mr. and Mrs. F. to cooperate with the necessary heavy duty cleanings. Due to the constant problems associated with this guardianship, the court decided to maintain MHLS' representation of Mr. and Mrs. F. to act as a buffer between Mr. and Mrs. F., Self Help and the court. As a result, Mr. and Mrs. F. have had free legal counsel for approximately [***16] 1 1/2 years, a benefit provided to no other Incapacitated Person in a Guardianship case before the court.

It is now an appropriate time to end this relationship. The constant tension between Self Help and Mr. and Mrs. F.'s counsel has hindered the guardian in properly and professionally carrying out it's function. The court praises Mental Hygiene Legal Services' efforts in this most difficult of cases and appreciates the "no win" situation that it was placed in, by being put in a situation of trying to execute Mr. F.'s wishes. It is now time to let Self Help do its job. It is therefore the court's order that Mental Hygiene Legal Services is discharged as counsel for Mr. and Mrs. F. for all purposes, except for conclusion of litigation of this application.

Accordingly, for all of the reasons stated above, the application to remove Self Help Community Services as guardian in this case is denied.

Guardianship 17-A Surrogates Court Procedure Act

Article 1750-b SCPA Health Care Decision Making Act

Matter of Darnell Anthony H., NYLJ, March 18, 2005 p.26 (Surr. Ct., Bronx Cty.) (Holzman, Surr.)

This proceeding seeking the appointment of a guardian of the person of a developmentally disabled person pursuant to Article 17-A of the Surrogate's Court Procedure Act presents the following issues of concern under the Health Care Decisions Act For Persons With Mental Retardation 1) Does an SCPA 1750-a guardian of a developmentally disabled person have the authority to make any of the health care decisions enumerated in SCPA 1750-b? 2) Are there any circumstances under which an SCPA 1750-a guardian of a developmentally disabled person should be granted the authority to make decisions to withhold or withdraw life-sustaining treatment ? The Mental Hygiene Legal Services requested that the guardianship papers specifically state that the guardian was not empowered to make life-sustaining decisions.

The Surrogate found that there was "implied authority" in the statute to empower the guardian to make health care decisions for the developmentally disabled ward, based on the statute's requirement of certification that the ward was "incapable of managing himself or herself and/or his or her affairs" by reason of his condition. The Surrogate refrained from determining whether there is, under existing law, room to grant a guardian the right to make decisions regarding life-sustaining treatment, but requested that the Legislature consider this issue.

In the Matter of M.B. (Anonymous), 21 A.D.3d 28; 797 N.Y.S.2d 510; 2005 LEXIS 6543

This was an appeal by the Mental Hygiene Legal Service, in a proceeding pursuant to SCPA article 17-A to determine that the guardian of M.B. did not have the authority to withhold or withdraw life-sustaining treatment pursuant to SCPA 1750 and 1750-b, effective March 16, 2003, on the ground that those provisions are not to be applied retroactively to guardians appointed prior to the effective date.

The court held that SCPA 1750-b shall not apply to guardians appointed prior to its effective date, without a judicial determination specifically granting such guardians powers pursuant to SCPA 1750-b in accordance with the statutory safeguards set forth in SCPA 1750(2) to determine if the ward was capable of making health care decisions. The order was reversed.

New York Law Journal
May 25, 2005 Wednesday

HEADLINE: Wills, Estates and Surrogate's Practice;
Surrogate's Court Procedure §1750-b: Guardians' Unique Authority
BYLINE: Peter C. Valente and Eve Rachel Markewich

The tragic case of Terri Schiavo, the young woman in Florida who was in a coma for 15 years, brought home to all of us the benefits of executing a health care proxy and/or living will.

For days, last month, Terri Schiavo's future was front-page news, as her husband and family engaged in battle over whether or not her feeding tube should be removed. While the case was notable because it went up and down both the state and federal court systems, in the end, the Florida judge made a ruling based on his finding of Ms. Schiavo's intent regarding health care choices. Since Ms. Schiavo had not executed a document asserting her wishes, the courts were left to find her intent based on less direct evidence.

Article 17-A

Living wills and health care proxies, executed by fully competent persons help alleviate the Schiavo case issues. But what about the individual who is not competent to execute such a document? What about a person who is mentally retarded, and lacking the requisite competence to make the life and death decision as to whether treatment should be withheld or withdrawn? Article 17-A of the Surrogate's Court Procedure Act (SCPA), the statute governing appointment of a guardian for a mentally retarded person, addresses the issues of health care decisions for mentally retarded individuals and the authority of guardians to make health care decisions on their behalf, including decisions to withdraw life-sustaining treatment.

When Article 17-A was enacted initially, it was silent as to the authority of a guardian to make health care decisions for her ward. Effective March 17, 2003, the Legislature amended 17-A to provide clear standards for health care decision-making for mentally retarded persons with 17-A guardians. The statute specifically empowers the Surrogate to authorize the guardian of a mentally retarded person to make "any and all health care decisions" for a ward that a person with capacity might make, and the authorization "may include decisions to withhold or withdraw life-sustaining treatment." SCPA Â§1750-b[1].

The power to make decisions regarding life-sustaining treatment is unique to the Article 17-A guardian for a mentally retarded person, and is not available to a guardian under Article 81 of the Mental Hygiene Law, or to a guardian of a developmentally disabled person, under Article 17-A.1 The official Revision Note to the amended statute includes

the following:

JUSTIFICATION:

Currently, under New York State law, persons must be mentally competent to order withdrawal or withholding of life-sustaining treatment in the event they become terminally ill and believe continued treatment would be excessively burdensome. If they are not mentally competent, having lapsed into a coma for example, they cannot have life-sustaining treatment withdrawn or withheld unless they previously (when they were mentally competent) left a living will or appointed a health care proxy to make such decision for them. However, many persons with mental retardation never have the mental competency to draft a living will or appoint a health care proxy. They can never, nor can anyone acting on their behalf, order withdrawal or withholding of life-sustaining treatment, except when declared brain dead. Consequently, they may linger, through unnecessary medical intervention, in a state of irrevocable anguish. Persons with mental retardation are, as a class, uniquely disqualified from health care rights essential to the humane and dignified treatment to which every other citizen is entitled. This legislation provides a carefully controlled legal and medical process for withholding or withdrawing life sustaining treatment while safeguarding the rights, liberties and best interests of persons with mental retardation.

Procedure and Rights

In keeping with that "justification," the statute is detailed in its procedure and carefully guards the rights of the disabled person. The procedure begins with a determination that the individual is mentally retarded, and, as a result, unable to make her own health care decisions (SCPA Â§1750). A hearing is required, and the mentally retarded individual may request a hearing by a jury, but the Court has discretion to dispense with a hearing upon the consent of the parents of the mentally retarded person. SCPA Â§1754(1).

In order for the Surrogate to appoint a guardian for a mentally retarded person, that individual must be

...certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with mental retardation...as being incapable to manage him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature or likely to continue indefinitely. (SCPA Â§1750[1])

Moreover, in each instance, the medical certification

...*shall* include a specific determination by such physician and psychologist, or by such physicians, as to whether the mentally retarded person has the capacity to make health care decisions...for himself or herself. (SCPA Â§1750[2]). Emphasis supplied

Pursuant to the above provisions, the authority of the guardian to make health care decisions is determined by the court at the outset. In the event the guardian seeks to exercise that power, the statute is specific as to the standard employed by the guardian. To start, all health care decisions must be "solely and exclusively [based] on the best interests of the mentally retarded person and, when reasonably known or ascertainable with reasonable diligence, on the mentally retarded person's wishes, including moral and religious beliefs." (SCPA Â§1750-b (2).)

Five Factors in a Decision

Moreover, the guardian is required to include consideration of five factors:

i. The dignity and uniqueness of every person;

ii. The preservation, improvement or restoration of the mentally retarded person's health;

iii. The relief of the mentally retarded person's suffering by means of palliative care and pain management;

iv. The unique nature of artificially provided nutrition or hydration, and the effect it may have on the mentally retarded person; and

v. The entire medical condition of the person. (SCPA Â§1750-b[2]).

Decisions relating to life-sustaining treatment are treated separately under the statute, and the guardian is affirmatively obligated to "advocate for the full and efficacious provision of health care, including life-sustaining treatment." SCPA Â§1750-b (4). In addition, despite the fact that the initial appointment of a guardian requires medical certification of the ward's incapacity to act regarding health care decisions, the guardian is not empowered to act with reference to life-sustaining treatment until the attending physician "confirm[s] to a reasonable degree of medical certainty that the mentally retarded person lacks capacity to make health care decisions," and that determination must be made in consultation with another physician or licensed psychologist. SCPA Â§1750-b(4)(a). Moreover, either the attending physician, or the consulting psychologist or physician, must have specified mental health training or certification.

In order for the guardian to be empowered to direct the withdrawal or withholding of life-sustaining treatment, the attending physician, with the concurrence of another physician, must determine, and note on the patient's chart, that both of the following conditions have been satisfied:

i. The mentally retarded person has a terminal condition, is permanently unconscious, or has a medical condition (other than mental retardation) which requires life-sustaining treatment and is irreversible and will continue indefinitely; and

ii. The life-sustaining treatment would impose "an extraordinary burden" in light of the

person's medical condition, other than mental retardation, and the expected outcome of the life-sustaining treatment, notwithstanding the person's mental retardation. SCPA Â§1750-b(4)(b).

In the case of a decision to withdraw nutrition or hydration, there must be a further finding by the attending physician, in consultation with another physician, that: (a) there is no reasonable hope of maintaining life; or (b) the artificially provided nutrition or hydration poses an extraordinary burden. SCPA Â§1750-b(4) and (b)(iii).

Withholding Treatments

The statute requires the guardian directing the withholding or withdrawal of life-sustaining treatment to do so either in writing, or orally, in front of two witnesses. Then at least 48 hours prior to removal of life-sustaining treatment, the attending physician is required to notify certain individuals of the decision, to allow for objections. If there is an objection, to a decision made regarding life-sustaining treatment, then that decision "shall be suspended, pending judicial review," unless the suspension, itself, is likely to result in the death of the ward. SCPA §1750-b (5).

There is no requirement of notice to the mentally retarded person's family, although there is a requirement of notifying the director of any facility in which the patient is residing, or from which the patient was transferred, and there is an obligation to notify the Mental Hygiene Legal Service or the Commissioner of Mental Retardation and Developmental Disabilities. SCPA §1750-b (4). Despite the lack of required notice to family, once a guardian makes a decision to withdraw or withhold life-sustaining treatment, parents and adult siblings do have standing to object, if they have maintained "substantial and continuous" contact with the incapacitated person, and any objection will suspend the withdrawal of life-sustaining treatment until judicial review. SCPA §1750-b(5)(ii).

'Guardianship of Chantel R'

Although amended Article 17-A has been in effect for two years, there have not been many published cases on the issue. In the last few months, however, both Surrogates Eve M. Preminger and Lee L. Holzman have written on the matter. In *Matter of the Guardianship of Chantel R*,6 Misc3d 693 (2004) Surrogate Preminger was faced with a law suit brought by Mental Hygiene Legal Service (MHLS) objecting to a mother's petition for appointment as guardian for her daughter, Chantel, because the guardianship included authority to withhold or withdraw life-sustaining treatment under SCPA §1750-b.

MHLS asserted that the amended statute: 1) fails to require a determination that a mentally retarded person is unable to make health care decisions for herself before granting the authority to a guardian to make decisions regarding withdrawal of life-sustaining treatment; 2) violates equal protection principles for persons for whom a guardian was appointed prior to the amendment of the statute, in that there is no requirement that a finding be made that the mentally retarded person is incapable of

making "end of life" decisions; 3) fails to mandate a standard to be followed in the event the mentally retarded person objects to the appointment of the guardian; and 4) is impermissibly vague with regard to the statutory test for discontinuing life support.

Surrogate Preminger held an extensive hearing, in which three experts testified about their interviews with Chantel and their opinions of her capacities. The experts concurred that Chantel had "no ability to think abstractly or imagine a future situation in which she is gravely ill or unconscious" and that she "functions intellectually at or about the level of a seven-year-old child." 6 Misc3d at 694.

In a comprehensive decision, Surrogate Preminger upheld the statute and appointed the mother to be guardian for Chantel. The Surrogate noted that under the revised SCPA Â§1750-b, the Surrogate is required to make a specific decision as to the capacity of the mentally retarded individual to make decisions regarding life-sustaining treatment; therefore, the Surrogate found no merit in MHLS' first objection to the statute.

The court held that the statute does not violate equal protection principles because "a mentally retarded person is treated no differently than a competent person":

The statute does not impose a different standard in requiring that a mentally retarded person be capable of understanding the medical choices available to her and the potential consequences of the decisions made....

Where, as here, the answers given by the mentally retarded person show that she does not have a true appreciation of the consequences of any given health care decision or even the context in which such a decision might arise, it is obvious that those answers lack any true meaning. It would be a disservice to Chantel under those circumstances to give her utterances effect and thereby deny her the assistance of a guardian who is able to act in her best interests. 6 Misc3d at 698.

Surrogate Preminger also specifically held that Chantel R. was provided due process by her entitlement to a hearing, including a right to a jury, at the time of the appointment of the guardian, at which time the issue of capacity to make decisions on life-sustaining treatment is made.

Finally, Surrogate Preminger also concluded that the standard for the termination of life support, if an objection is lodged, is not impermissibly vague, given the specific standards the guardian is required to apply before making decisions regarding life-sustaining measures, as discussed earlier in this article. The court held that the "extraordinary burden" standard set forth in SCPA Â§1750-b(4)(b)(ii) was sufficiently specific, in that it directed the guardian only to assess the physical condition of the ward and the likelihood of recovery, 6 Misc3d at 702, as well as the other specific factors set forth in the statute. The court dismissed MHLS' assertion that the statute provided the guardian "unlimited discretion." 6 Misc3d at 703.

Developmental Disabilities

The *Chantel* case dealt with the appointment of a guardian for a mentally retarded person, for which SCPA Â§1750-b is expressly applicable. In contrast, the statute omits from its coverage guardians of persons with developmental disabilities. At least one Surrogate has questioned whether this blanket omission is proper.

In March of this year, Surrogate Holzman was faced with a petition from MHLS requesting that his appointment of a guardian for a developmentally disabled individual specifically state that the guardian is not empowered to make decisions regarding life-sustaining treatment. The *Matter of the Guardianship of Darnell Anthony H*, 6 Misc3d 1036A.

In an unpublished opinion, Surrogate Holzman acknowledged both the statutory differentiation and the factual differentiation between a person who is mentally retarded and a person who is developmentally disabled, and declined to cloak the guardian of the developmentally disabled individual with the SCPA Â§1750-b authority.

In *Darnell Anthony* Surrogate Holzman found that there was "implied authority" in the statute to empower the guardian to make health care decisions for the developmentally disabled ward, based on the statute's requirement of certification that the ward was "incapable of managing himself or herself and/or his or her affairs" by reason of his condition. The Surrogate refrained from determining whether there is, under existing law, room to grant a guardian the right to make decisions regarding life-sustaining treatment, but requested that the Legislature weigh in specifically:

[T]he Legislature was able to craft legal and medical safeguards to protect the rights of the mentally retarded while granting authority to their guardians to make life-sustaining treatment decisions so that they would not have to linger in an irrevocable state of anguish as the result of "unnecessary" medical interventions. The same reasons compel that at least an attempt be made to enact similar legislation for the benefit of those developmentally disabled who never had, or will have, the capacity to articulate an opinion on the issue.

Presumably in response to Surrogate Holzman's suggestion, legislation has since been introduced to address the omission of developmentally disabled persons from SCPA Â§1750-b. See Assembly Bill No. 8274, referred to the Judiciary Committee on May 10, 2005, which grants guardians of developmentally disabled persons the same decision-making authority granted to guardians of mentally retarded persons.

Conclusion

The issues present in Article 17-A guardianships comprise a very small part of the Surrogate's Court's docket and, indeed, judicial review of the decisions regarding life-sustaining treatment are more likely to be heard in Supreme Court, than in Surrogate's Court. Nevertheless, the Surrogate's Court practitioner should be aware of the broad powers that can be granted to the 17-A guardian at the inception of her appointment, and

the necessity of significant medical analysis that must be undertaken at that juncture.

1 There is currently pending proposed legislation which adds a new section to the Public Health Law entitled "Family Health Care Decisions Act." The proposed act "establishes a decision-making process whereby a surrogate is selected and empowered to make health care decisions for patients who lack capacity to make their own health care decisions" and who have not otherwise executed a health care proxy or provided clear and convincing evidence of their treatment wishes. See Senate Bill No. 4296. The bill was submitted to the Committee on Health on April 13, 2005. In addition, Assembly Bill No. 8274, referred to the Judiciary Committee on May 10, 2005, addresses the omission of developmentally disabled persons from SCPA Â§1750-b.

Peter C. Valente is a member of Blank Rome and chairman of its Private Client Practice Group. Eve Rachel Markewich is a member of Blank Rome's litigation department and Private Client Practice Group and appears regularly in the Surrogates' Courts.

LOAD-DATE: May 31, 2005

Power Point Content

2006 PSA Legal Aspects Update
Teletraining

1.
2005 White House Conference on Aging (www.whcoa.gov)

Top Ten Resolutions

- Reauthorize the Older Americans Act
- Develop a coordinated, comprehensive long-term care strategy
- Ensure that older Americans have transportation options
- Strengthen and improve the Medicaid program
- Strengthen and improve the Medicare program
- Support geriatric education and training
- Promote innovative models of non-institutional long-term care
- Improve recognition, assessment and treatment of mental illness and depression among older Americans
- Attain adequate numbers of healthcare personnel who are skilled, culturally competent and specialized in Geriatrics
- Improve state and local based integrated delivery systems to meet the 21st century needs of seniors

2.

Elder Justice Act (S. 2010) (www.elderjusticecoalition.com)
New provisions:

- Training , technical assistance, research, and demonstrations aimed at improving Ombudsman effectiveness in addressing abuse and neglect in nursing homes and assisted living facilities;
- Training for nursing aides on dementia care and job-related stress reduction;
- Nurse Aide Registry study

Health Care

3.
Chapter 744 of the Laws of 2005 (S 5323)

Amends The "Health Care Decision Making Act for Persons with Mental Retardation".

The law extends health care decision making authority pursuant to Section 1750-a to guardians of the developmentally disabled who are also:

- mentally retarded or
- otherwise proven incapable of making his/her own health care decisions.

4.
Chapter 568 of the Laws of 2005 (S 4742B) Geriatric Mental Health Act

Goal: Meet the current and future mental health needs of older New Yorkers

Grants to Fund:

- Community integration
- Improved quality of treatment
- Integration of services
- Workforce enhancement
- Family support
- Finance
- Specialized populations
- Information clearinghouse
- Staff training

5.
Chapter 536 of the Laws of 2005 (S 4877B)

OMRDD and OCFS/PSA must:

- Enter into a MOU to define respective roles for intervening on behalf of an adult with mental retardation or other developmental disabilities who is being abused or neglected in a non-certified facility;

- Requires OMRDD and OCFS to report annually to the Legislature on the success of the MOU;

- Annually provide comprehensive information related to the efforts of the two agencies to safeguard individuals in non-certified settings; and

- Gives the Commission on Quality of Care and Advocacy for Persons with Disabilities an oversight role in this issue.

6.
Chapter 158 of the Laws of 2005 (S 5876) Assisted Outpatient Treatment Program

Major Amendments:

- Requires appropriate and timely investigations of persons who may need an AOT Order;

- Clarifies the responsibilities of the Director of Community Services;

- Adds psychologists and licensed social workers to the list of persons who may petition the court for an AOT order;

- Authorizes OMH to make available to counties with a population under 75,000 an OMH physician to make the affirmation required for the petition;

- Clarifies that the subject of an AOT petition may be represented by privately financed counsel;

- Requires notification of all service providers who are included in a written treatment plan;

- Provides that in instances where the petitioner is not the director, the written treatment plan, and the testimony of the physician who developed the plan, would be required on a date set by the court, not on the date of the hearing;

- Requires the appropriate director to provide a copy of the court order to relevant parties, including the patient, nearest relative, up to three persons designated by the patient, the mental hygiene legal service or anyone acting on the patient's behalf, the original petitioner, identified service providers, the current healthcare agent, the appropriate program coordinator, and the DCS, if he/she is not the petitioner;

- Clarifies that petitions for extensions must be filed within 30 days prior to the expiration of the current order; and, that if such petition is filed in a timely manner, the current order would remain in effect until the court's disposition of the petition for an extension;

- Permits a director, family member or person living with the patient, if such person filed the original petition, to file a petition for an AOT extension;

- Requires the director to provide notice of a petition for a material change to an AOT plan to all parties required to receive notice of the original petition, and authorizes the court to approve the material change without a hearing, if the patient informs the court that he/she agrees to the change;

- Authorizes the DCS to direct the removal of a patient, who is present in his/her county, to an appropriate hospital based upon the determination of the appropriate DCS;

- Require OMH to develop a mental health training program for judges and court personnel; and

- Numerous data collection, program evaluation and reporting provisions.

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7.

Health Care Law

<u>Borenstein v. Simonson</u>

<u>Matter of Mougiannis</u>

<u>Matter of Topa</u>

8.
Issues Raised Under the Health Care Proxy Law
(Article 29-C of the Public Health Law)

- What are the powers of the Agent?
- What about nutrition/hydration?
- Agents access to medical records
- Agent acting in the best interest of the patient

9.
Borenstein v. Simonson

- Nutrition/hydration powers
- Best interest of the patient

PHL Section 2982 (2)
"….if the principal's wishes regarding the administration of artificial nutrition and hydration are not reasonably known and cannot with reasonable diligence be ascertained, the agent shall not have the authority to make decisions regarding these measures."

10.
Matter of Mougiannis

- Access to medical records
- HIPAA

Public Health Law Section 2982 (3)

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

11.
Matter of Topa

- Access to medical records
- Right to discharge the patient

12.

The Health Care Decisions Act for Persons with Mental Retardation
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.

13.
Matter of Darnell Anthony H.

1) Does an SCPA 1750-a guardian of a developmentally disabled person have the authority to make any of the health care decisions enumerated in SCPA 1750-b?

2) Are there any circumstances under which an SCPA 1750-a guardian of a developmentally disabled person should be granted the authority to make decisions to withhold or withdraw life-sustaining treatment?

14.
In the Matter of M.B. (Anonymous)

Should SCPA 1750-b apply to guardians appointed prior to its effective date?

15.
The Powers should NOT apply retroactively

"…without a judicial determination specifically granting such guardians powers pursuant to SCPA 1750-b in accordance with the statutory safeguards set forth in SCPA 1750(2) to determine if the ward was capable of making health care decisions."

The **I**nternational **N**etwork for the **P**revention of **E**lder **A**buse, reminds you that

5 Million Vulnerable Elders are counting on you for

Protection from Abuse and Neglect

VOTE: Resolution 19:

Create a National Strategy for Promoting Elder Justice Through the Prevention and Prosecution of Elder Abuse

Your vote will help establish the first national strategy to address abuse and mistreatment. The strategy includes:

Enacting the Elder Justice Act, S 2010, enhance States Protective Services for Adults, empower Local law enforcement prosecution of financial exploitation, develop uniform national definitions to aid in the identification and eradication of abuse, neglect and mistreatment. Recommended by the 1995 WHCOA.

Supported Strongly by:

International Network for the Prevention of Elder Abuse (INPEA)
(600+ members, representing the rights of millions of elders around the globe)

The Elder Justice Coalition (EJC) (400+ members)

The National Committee for the Prevention of Elder Abuse (NCPEA (200+ Members)

The National Adult Protective Services Association (NAPSA) (400 Members representing thousands of APS)

National Association of Area Agencies on Aging. (n4a)
(See "The Fab Fifteen)

The New York State WHCoA Delegation (44% of votes)

Show your support for World Elder Abuse Awareness Day: June 15, 2005, wear an elder abuse wristband

WWW.INPEA.NET

Rank	Resolution	Description	Total Votes
1	17	Reauthorize the Older Americans Act Within the First Six Months Following The 2005 White House Conference on Aging	1061
2	30	Develop a Coordinated, Comprehensive Long-Term Care Strategy by Supporting Public and Private Sector Initiatives that Address Financing, Choice, Quality, Service Delivery, and the Paid and Unpaid Workforce	1015
3	22	Ensure That Older Americans Have Transportation Options to Retain Their Mobility and Independence	1002
4	50	Strengthen and Improve the Medicaid Program for Seniors	969
5	51	Strengthen and Improve the Medicare Program	962
6	41	Support Geriatric Education and Training for All Healthcare Professionals, Paraprofessionals, Health Profession Students, and Direct Care Workers	937
7	42	Promote Innovative Models of Non-Institutional Long-Term Care	934
8	36	Improve Recognition, Assessment, and Treatment of Mental Illness and Depression among Older Americans	929
9	40	Attain Adequate Numbers of Healthcare Personnel in All Professions Who are Skilled, Culturally Competent, and Specialized in Geriatrics	920
10	71	Improve State and Local Based Integrated Delivery Systems to Meet 21st Century Needs of Seniors	883
11	4	Establish Principles to Strengthen Social Security	876
12	12	Promote Incentives for Older Workers to Continue Working and Improve Employment Training and Retraining Programs to Better Serve Older Workers	869
13	67	Develop a National Strategy for Supporting Informal Caregivers of Seniors to Enable Adequate Quality and Supply of Services	861
14	11	Remove Barriers to the Retention and Hiring of Older Workers, Including Age Discrimination	856
15	19	Create a National Strategy for Promoting Elder Justice Through the Prevention and Prosecution of Elder Abuse	851
16	24	Enhance the Affordability of Housing for Older Americans	836
17	69	Implement a Strategy and Plan for Accountability to Sustain the Momentum, Public Visibility, and Oversight of the Implementation of 2005 WHCOA Resolutions	831
18	5	Foster Innovations in Financing Long-Term Care Services to Increase Options Available to Consumers	830
19	61	Promote the Integration of Health and Aging Services to Improve Access and Quality of Care for Older Americans	814
20	18	Encourage Community Designs to Promote Livable Communities that Enable Aging in Place	798
21	34	Improve the Health and Quality of Life of Older Americans through Disease Management and Chronic Care Coordination	775
22	33	Promote the Importance of Nutrition in Health Promotion and Disease Prevention and Management	771
23	53	Improve Access to Care for Older Adults Living in Rural Areas	738
24	1	Provide Financial and Other Economic Incentives and Policy Changes to Encourage and Facilitate Increased Retirement Savings	718
25	56	Develop a National Strategy for Promoting New and Meaningful Volunteer Activities and Civic Engagements for Current and Future Seniors	699

26	25	Encourage the Development of a Coordinated Federal, State, and Local Emergency Response Plan For Seniors in the Event of Public Health Emergencies or Disasters	692
27	23	Enhance the Availability of Housing for Older Americans	677
28	59	Reauthorize the National and Community Service Act to Expand Opportunities for Volunteer and Civic Engagement Activities	674
29	46	Promote Innovative Evidence-Based and Practice-Based Medical and Aging Research	658
30	9	Modernize the Supplemental Security Income (SSI) Program	638
31	26	Support Older Adult Caregivers Raising Their Relatives' Children	635
32	48	Ensure Appropriate Recognition and Care for Veterans across All Healthcare Settings	624
33	15	Encourage Redesign of Senior Centers for Broad Appeal and Community Participation	605
34	44	Reduce Healthcare Disparities among Minorities by Developing Strategies to Prevent Disease, Promote Health, and Deliver Appropriate Care and Wellness	594
35	52	Educate Americans on End of Life Issues	591
36	62	Develop Incentives to Encourage the Expansion of Appropriate Use of Health Information Technology	569
37	37	Prevent Disease and Promote Healthier Lifestyles through Educating Providers and Consumers on Consumer Healthcare	557
38	28	Promote Economic Development Policies that Respond to the Unique Needs of Rural Seniors	553
39	31	Apply Evidence Based Research to the Delivery of Health and Social Services Where Appropriate	530
40	39	Improve Health Decision Making through Promotion of Health Education, Health Literacy, and Cultural Competency	526
41	10	Strengthen the Social Security Disability Insurance Program	525
42	32	Evaluate Payment and Coordination Policies in the Geriatric Healthcare Continuum to Ensure Continuity of Care	524
43	47	Encourage Appropriate Sharing of Healthcare Information across Multiple Management Systems	511
44	43	Ensure Appropriate Care for Seniors with Disabilities	499
45	7	Strengthen Law Enforcement Efforts at the Federal, State, and Local Level to Investigate and Prosecute Cases of Elder Financial Crime	497
46	72	Review Alignment of Government Programs That Deliver Services to Older Americans	475
47	21	Support Older Drivers to Retain Mobility and Independence through Strategies to Continue Safe Driving	473
48	14	Expand Opportunities for Developing Innovative Housing Designs for Seniors' Needs	472
49	55	Improve Patient Advocacy to Assist Patients in and across All Care Settings	469
50	29	Promote Enrollment of Seniors into the Medicare Prescription Drug Program	463
51	73	Assist Limited English Proficient Elders to Ensure that They are Well Informed about Programs and Services and Can Be Served throughout the Aging and Health Network	454
52	35	Enhance Provider and Consumer Education About Alcohol and Substance Abuse and Appropriate Treatment	449
53	54	Optimize Medication Management Programs	440

54	3	Change Policies Regarding Defined Contribution Pension Plans to Increase Retirement Savings	435
55	20	Encourage More Effective Oversight and Accountability at the State and Local Level of Court Appointed Guardians and Conservators	433
56	8	Promote Financial Literacy Throughout the Lifespan	433
57	45	Promote Informed Healthcare Consumers and Consumer Choice	411
58	27	Expand Integrated Aging and Disability Resource Centers Nationwide	410
59	38	Increase Awareness of the Benefits of an Active Mind on Resultant Quality of Life	401
60	6	Coordinate Prevention of Financial Crimes Against Seniors	397
61	13	Promote Assistive Technology in the Workplace to Help Older Workers Remain in the Workforce	391
62	65	Promote an Accessible Nation by Expanding the Availability and Utilization of Assistive and Universally Designed Technologies through Private-Public Incentives	391
63	63	Assure That Technology Policies Stimulate Innovation and Investment to Support Current and Future Seniors	390
64	57	Promote Lifelong Learning and E-Literacy for Older Adults	385
65	16	Encourage the Advancement of Intergenerational Strategies	385
66	70	Promote a National Strategy for Responding to the Higher Prevalence of Disabilities in an Aging Population	383
67	68	Identify Best Practices Derived from the Experiences of Other Industrial Countries Facing an Aging Population	355
68	2	Improve Disclosure and Education Regarding Participants' Pension Plans for Enabling Effective Retirement Savings	355
69	66	Promote Broad Policy Readiness and Engagement for the Demographic Future	273
70	60	Develop Programs and Services Promoting Use of Public Libraries among the Older Adult and Baby Boomer Population	249
71	64	Promote Marketplace Innovations to Address the Changing Tastes and Preferences of Aging Baby Boomers	244
72	49	Increase Awareness of Prevention and Treatment Strategies to Maintain Sensory Capacities As One Ages	238
73	58	Increase Awareness of the Positive Physical and Psychological Impact that Arts Participation Can Have on Older Americans	224

INTERNATIONAL NETWORK for the PREVENTION of ELDER ABUSE

WORLD ELDER ABUSE AWARENESS DAY

June 15, 2006

"My World... Your World... Our World – Free of Elder Abuse"

Partners:

IAG
International Association of Gerontology

WHO
World Health Organization

IFA
The International Federation on Ageing

HelpAge International

PAHO
Pan American Health Organization

UN NGO
Committee on Ageing

ILC-Argentina
International Longevity Ctr.

AARP
Global Aging

Canadian Network for the Prevention of Elder Abuse

OSS
Ontario Seniors' Secretariat
Ontario, Canada

NCEA
National Center on Elder Abuse, Wash DC, USA

ACTION on ELDER ABUSE – UK

Age Concern, England

The International Network for the Prevention of Elder Abuse and its partners invite you to participate in the first World Elder Abuse Awareness Day on June 15, 2006. We hope that the day will be a collaboration of great minds, hearts and people from around the world, all dedicated to the continued efforts of preventing elder abuse both in their own communities and globally. A Proclamation will be issued that reflects global concern for elder abuse: the need for people to recognize and understand what it is and how it can be prevented. Governments, communities, professional and business organizations are asked to explore and promote elder abuse awareness through events such as cultural, educational, art and social activities, as well as networking with other entities to plan intervention. Our partners have already been very supportive: Dr. Renato Maia Guimaraes, President of the IAG has provided the extensive resources of his organization and has himself been a critical link to developing countries. Official UN recognition of world awareness day would lend great importance and Dr. Alex Kalache, (WHO) is assisting us to navigate this process. However the really important players are you – all the activists, advocates, volunteers, seniors, experts and other stakeholders who really want a forum – a dialogue – to generate an international policy on elder abuse. This Day of Awareness is a step in that direction.

Here is the plan: Countries will select a Coordinator (organization or Individual) who will be responsible for overseeing the activities and ensuring that the needs of their constituency are met. The Coordinator will establish a Work Team who will determine how best to address issues such as, publicity, marketing, communication and events (etc.) The Steering Committee will be available to assist the coordinators, to act as a resource, provide information and to maintain overall organization. A Tool Kit will offer specific ideas and guidelines for various activities (www.INPEA.net). Please choose a Coordinator now and register that person with INPEA Secretary General Susan Somers. Coordinators and work team members will be posted on the website along with a Calendar of Events.

The time is short. Elder abuse is a crime against humanity. The international community has the opportunity to move beyond the rhetoric – to "walk the talk". The World Elder Abuse Awareness Day June 15, 2006 may just be the magical moment we have been waiting for.

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Susan Somers, Secretary-General sbsomers5@aol.com

WHCOA 2006
Implementation Strategy Session: Policy Committee Report

Res. 19: Create a National Strategy for Promoting Elder Justice Through the Prevention and Prosecution of Elder Abuse

- **Enact and fully fund comprehensive elder justice legislation (The Elder Justice Act) to address elder abuse**

- **Build capacity of Adult Protective Services programs nationwide with specific funds & focus on elder financial abuse exploitation.**

- **Create an Elder Abuse Awareness postage stamp (similar to breast cancer stamp)**

Today's Teleconference

- Federal Legislation
- State Legislation
- Assisted Outpatient Treatment
- OCFS Issues
- Guardianship Case Law

White House Conference on Aging, 2005

- Reauthorize the Older Americans Act
- Develop a coordinated, comprehensive long-term care strategy
- Ensure that older Americans have transportation options
- Strengthen and improve the Medicaid program

White House Conference on Aging, 2005

- Strengthen and improve the Medicare program
- Support geriatric education and training
- Promote innovative models of non-institutional long-term care
- Improve recognition, assessment and treatment of mental illness and depression among older Americans

White House Conference on Aging, 2005

- Attain adequate numbers of healthcare personnel who are skilled, culturally competent and specialized in Geriatrics
- Improve state and local based integrated delivery systems to meet the 21st century needs of seniors

White House Conference on Aging, 2005

www.whcoa.gov

Elder Justice Act (S. 2010) New Provisions

- Training, technical assistance, research, and demonstrations to improve effectiveness in addressing abuse and neglect in nursing homes and assisted living facilities;
- Training for nursing aides on dementia care and job-related stress reduction;
- Nurse Aide Registry study

Chapter 744 of the Laws of 2005 (S 5323)

- Amends The "Health Care Decision Making Act for Persons with Mental Retardation".
- The law extends health care decision making authority pursuant to Section 1750-a to guardians of the developmentally disabled who are also:

  -mentally retarded or

  -otherwise proven incapable of making his/her own health care decisions.

Chapter 568 of the Laws of 2005 (S 4742B) Geriatric Mental Health Act

- Goal: Meet the current and future mental health needs of older New Yorkers
- Grants to Fund:

  -Community integration

  -Improved quality of treatment

  -Integration of service

  -Workforce enhancement

  -Family support

Chapter 568 of the Laws of 2005 (S 4742B) Geriatric Mental Health Act

- Grants to Fund:

  -Finance

  -Specialized populations

  -Information clearinghouse

  -Staff training

Chapter 158 of the Laws of 2005 (S5876)

Assisted Outpatient Treatment Program

Major Amendments:

- Requires appropriate and timely investigations of persons who may need an AOT Order;
- Clarifies the responsibilities of the Director of Community Services;
- Adds psychologists and licensed social workers to the list of persons who may petition the court for an AOT order;

Chapter 158 of the Laws of 2005 (S5876)

Assisted Outpatient Treatment Program

Major Amendments:

- Authorizes OMH to make available to counties with a population under 75,000 an OMH physician to make the affirmation required for the petition;
- Clarifies that the subject of an AOT petition may be represented by privately financed counsel;

Chapter 158 of the Laws of 2005 (S5876)

Assisted Outpatient Treatment Program

Major Amendments:

- Requires notification of all service providers who are included in a written treatment plan;
- When the petitioner is not the director, the written treatment plan, and the testimony of the physician who developed the plan, would be required on a date set by the court, not on the date of the hearing;

Chapter 158 of the Laws of 2005 (S5876)

Assisted Outpatient Treatment Program

Major Amendments:

- Requires appropriate director to provide a copy of the court order to relevant parties: patient, nearest relative, up to three persons designated by patient, mental hygiene legal service or anyone acting on patient's behalf, original petitioner, identified service providers, current healthcare agent, appropriate program coordinator, and DCS, if he/she is not the petitioner;

Chapter 158 of the Laws of 2005 (S5876)

Assisted Outpatient Treatment Program

Major Amendments:

- Clarifies petitions for extensions must be filed within 30 days prior to expiration of current order; and, if petition is filed in a timely manner, current order would remain in effect until the court's disposition of the petition for an extension;

Chapter 158 of the Laws of 2005 (S5876)

Assisted Outpatient Treatment Program

Major Amendments:

- Permits a director, family member or person living with the patient, if such person filed the original petition, to file a petition for an AOT extension;

Chapter 158 of the Laws of 2005 (S5876)

Assisted Outpatient Treatment Program

Major Amendments:

- Requires the director to provide notice of a petition for a material change to an AOT plan to all parties required to receive notice of the original petition, and authorizes the court to approve the material change without a hearing, if the patient informs the court that he/she agrees to the change;

Chapter 158 of the Laws of 2005 (S5876)

Assisted Outpatient Treatment Program

Major Amendments:

- Authorizes DCS to direct removal of a patient, who is present in his/her county, to an appropriate hospital based upon the determination of DCS;
- Require OMH to develop a mental health training program for judges and court personnel; and
- Numerous data collection, program evaluation and reporting provisions.

Chapter 536 of the Laws of 2005 (S4877B)

OMRDD and OCFS/PSA must:

- Enter into a MOU to define respective roles for intervening on behalf of an adult with mental retardation or other developmental disabilities who is being abused or neglected in a non-certified facility;
- Requires OMRDD and OCFS to report annually to the Legislature on the success of the MOU;

Chapter 536 of the Laws of 2005 (S4877B)

OMRDD and OCFS/PSA must:

- **Annually provide comprehensive information related to the efforts of the two agencies to safeguard individuals in non-certified settings; and**
- **Gives the Commission on Quality of Care and Advocacy for Persons with Disabilities an oversight role in this issue.**

Health Care Law

Borenstein v. Simonson

Matter of Mougiannis

Matter of Topa

Issues Raised Under the Health Care Proxy Law (Article 29-C of the Public Health Law)

- **What are the powers of the Agent?**
- **What about nutrition/hydration?**
- **Agents access to medical records**
- **Agent acting in the best interest of the patient**

Health Care Law Borenstein v. Simonson

- **Nutrition/hydration powers**
- **Best interest of the patient**

Health Care Law Borenstein v. Simonson

PHL Section 2982(2)

"…if the principal's wishes regarding the administration of artificial nutrition and hydration are not reasonably known and cannot with reasonable diligence be ascertained, the agent shall not have the authority to make decisions regarding the measures."

Matter of Mougiannis

- **Access to medical records**
- **HIPAA**

Matter of Mougiannis

Public Health Law Section 2982 (3)

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

Matter of Topa

- Access to medical records
- Right to discharge the patient

The Health Care Decisions Act for Persons with Mental Retardation
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

The Health Care Decisions Act for Persons with Mental Retardation
Chapter 500 of the Laws of 2002

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

The Health Care Decisions Act for Persons with Mental Retardation
Chapter 500 of the Laws of 2002

To withhold or withdraw life-sustaining treatment physician must:

- re-certify person's incapacity to make such decisions
- certify person is terminal, permanently unconscious, or has an irreversible condition which will continue indefinitely
- certify treatment as extraordinary burden in light of the medical condition and expected outcome

The Health Care Decisions Act for Persons with Mental Retardation
Chapter 500 of the Laws of 2002

Life-sustaining Decisions

If decision is to withdraw or withhold artificially provided nutrition or hydration must prove there is no reasonable hope of maintaining life or it poses an extraordinary burden.

Matter of Darnell Anthony H.

1) Does an SCPA 1750-a guardian of a developmentally disabled person have the authority to make any of the health care decisions enumerated in SCPA 1750-b?
2) Are there any circumstances under which an SCPA 1750-a guardian of a developmentally disabled person should be granted the authority to make decisions to withhold or withdraw life-sustaining treatment?

In the Matter of M.B. (Anonymous)

Should SCPA 1750-b apply to guardians appointed prior to its effective date?

In the Matter of M.B. (Anonymous)

The Powers should NOT apply retroactively

"…without a judicial determination specifically granting such guardians powers pursuant to SCPA 1750-b in accordance with the statutory safeguards set forth in SCPA 1750(2) to determine if the ward was capable of making health care decisions."

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