

**LEGAL ASPECTS
OF PSA
*2009 UPDATE***

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**LEGAL ASPECTS
OF PSA
2009 UPDATE
Teleconference March 18, 2009**

Agenda

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SUNY Distance Learning
Project;
Alan Lawitz, Director, Bureau
of Adult Services

LECTURE I.....Debra Sacks, Esq.
Sadin Institute on Law,
Brookdale Center for Healthy
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Rose Mary Bailly. Esq.,
Executive Director, NYS Law
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LEGISLATIVE DEVELOPMENTS

2008-2009

Federal Legislation

The following information can be found on www.elderjustice.org

- **S. 1070 (The Elder Justice Act):** In 2008, the Senate version of the Elder Justice Act, authored by Sen. Lincoln(AR) and Sen. Hatch (UT), gained 14 new co-sponsors for a total of 33 co-sponsors, including then President-elect Barack Obama. On September 10th, 2008, the Finance Committee marked up and passed the Elder Justice Act for the 3rd time in history. On September 19th, 2008 the bill was placed on the Senate legislative calendar for consideration by the full Senate, but was never brought to the floor. As a result, the legislation must be introduced again in the 111th Congress which convened on January 3, 2009.
- **H.R. 1783 (The Elder Justice Act):** The House version of the Elder Justice Act, authored by Rep. Emanuel (IL) and Rep. King(NY), gained 36 new co-sponsors in 2008, for a total of 122 co-sponsors. On April 17th, 2008, the subcommittee of Crime, Terrorism, and Homeland Security of the House Judiciary Committee held a hearing on the Elder Justice Act. Author Rep. Rahm Emanuel and Elder Justice Coalition National Coordinator Bob Blancato testified on behalf of the bill. On May 14th, 2008 the full House Judiciary Committee passed the bill, but no action was taken by the three other committees (Education and Labor, Energy and Commerce, and Ways and Means) that had jurisdiction over the bill.
- **S. 1577 (The Patient Safety and Abuse Prevention Act of 2007):** Introduced by Senator Kohl in 2007, S. 1577 gained two new co-sponsors in 2008 for a total of 16 co-sponsors, one of them being then President-Elect Barack Obama. On September 10th, 2008, the bill was passed by the Senate Finance Committee and on September 22nd placed on the legislative calendar for consideration by the full Senate, but was never brought to the Senate floor.
- **H.R. 5352 (Elder Abuse Victims Act of 2008):** The newest Elder Justice legislation was introduced on February 12th, 2008 by Rep. Sestak (PA). On April 17th, the subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee held a hearing on the bill during which Rep. Sestak and Bob Blancato both testified on behalf of the bill. On May 14th, 2008 the full House Judiciary Committee passed the bill and on September 23rd the full House of Representatives passed the Act by a vote of 387-28. Further action on the bill was halted in the Senate.

Representative Payee Regulations Revised

66520 Federal Register / Vol. 73, No. 218 / Monday, November 10, 2008 / Rules and Regulations

Amends subpart U of part 404 and subpart F of part 416 of chapter III of title 20 of the Code of Federal Regulations as set forth below.

With these final rules, the Social Security Administration is eliminating the requirement that they conduct a face-to-face interview before selecting an individual or organization to be a representative payee **if they have already conducted a face-to-face interview with that payee and the payee is qualified and currently acting as a payee.** However, they retain discretionary authority to require a subsequent face-to-face interview of any payee applicant.

NY State Legislation – Chapter Laws of 2008

Abuse/Domestic Violence

Chapter 326 (A11707) Effective Immediately

The law amends section 812 of the family court act and sections 530.11 and 530.12 of the criminal procedure law in relation to orders of protection and the definition of "members of the same family or household";

This law amends and expands this definition to the following:

“Members of the same family or household” means persons related by consanguinity or affinity, legally married to one another, formerly married to one another whether or not living together, persons who have a child in common regardless of whether such persons have been married or lived together, unrelated persons who continually or at regular intervals reside in the same household or have done so in the past, and persons who are or have been in a dating or intimate relationship whether or not they have ever lived together.

Chapter 290 (A08781) Effective 7/21/08

Authorizes a three-year extension of the judicial hearing officer pilot program in the family courts of the seventh and eighth judicial districts for ordering a reference to determine an application for an order of protection or temporary order of protection in certain cases.

Chapter 406 (A08634) Effective Immediately

To allow victims of domestic violence to place or temporarily lift a "freeze" on their credit report free of charge and to prohibit credit reporting agencies from sharing with any third party the basis for the request of or placement of a freeze.

Chapter 532 (S04541) Effective 12/4/08

Authorizes that orders of protection in child support, paternity, persons in need of supervision, custody and matrimonial proceedings may prohibit the unjustified killing or injuring of the companion animal of the person protected by such order or of any minor child residing with such protected person.

Chapter 584 (A10228) Effective Immediately

Aliens who are victims of domestic violence are now eligible for residential services.

Chapter 68 (A9818 / S6979) Effective: 6/ 29/ 08

The bill, known as “Granny’s Law”, amends NY Penal Law §120.05 to increase from a misdemeanor to a class D violent felony the crime of assault on a person sixty-five years of age or older when the perpetrator is more than ten years younger than the victim.

Chapter 291 (A09813) Effective 9/ 21/ 08

To more effectively prosecute those who commit fraud against “vulnerable elderly persons” section 190.65 of the Penal Law is amended by increasing the severity of the crime to a felony for engaging in a scheme to defraud more than one vulnerable elderly person as defined in subdivision three of section 260.30 of the Penal Law.

"Vulnerable elderly person" means a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care (260.30 Penal Law).

Chapter 510 (A09673) Effective 12/4/08

Section 240.30 of the Penal Law is amended to establish a person is guilty of aggravated harassment in the second degree when, with the intent to harass, annoy, threaten or alarm another person he or she transmits or delivers a written communication, which includes a recording, in a manner likely to cause annoyance or alarm.

Chapter 601 (S02061) Effective 11/1/08

The law establishes for the purposes of the crime of criminal mischief and related offenses that "property of another" shall include property jointly or co-owned by another person.

Chapter 184 (A09905) Effective 7/7/08

The law amends section 214-c of the Executive Law directing the superintendent of state police to work with state office for the aging and the office of children and family services develop policies and educational materials relating to abuse of adults for use by the members of the division of state police.

Int. No. 737-A, NYC Council, Effective 1/23/09

A Local Law to amend the administrative code of the city of New York, in relation to elder abuse prevention.

Section 1. Section 21-201 of the administrative code of the city of New York is amended by adding a new subdivision e to read as follows:

e. "Elder abuse" shall mean any knowing, intentional, or negligent act by a caregiver or any other person holding a trusting relationship with a vulnerable older adult, which causes harm or a serious risk of harm to that older adult including physical, emotional, sexual, or financial harm, or neglect, abandonment or confinement.

Chapter 2 of title 21 of the administrative code is amended by adding a new section 21-203. This section requires the NYC Department for the Aging to develop training programs and disseminate information about the issue of elder abuse. The law requires the Commissioner to develop a program to train senior service providers in the detection and reporting of elder abuse and the counseling of abuse victims.

Health Care

Chapter 197 (A10764) Effective 7/7/08

This bill makes permanent and extends statewide a current demonstration program in place for Monroe and Onondaga counties permitting an alternative "do-not-resuscitate" DNR form to be used in non-hospital settings and to use one or more forms for issuing an order not to intubate, regardless of the setting. Any such alternative forms intended for use for persons with mental retardation or developmental disabilities or persons with mental illness who are incapable of making their own health care decisions or who have a guardian of the person appointed pursuant to article eighty-one of the mental hygiene law or article seventeen-A of the surrogates court procedure act must also be approved by the commissioner of mental retardation and developmental disabilities or the commissioner of mental health, as appropriate.

Chapter 203 (A10934) Effective 7/7/08

Expands the duties of the interagency geriatric mental health planning council to include chemical dependence and veteran's issues.

Chapter 594 (A11468) Effective 9/25/09

Enacts the "New York certified aide registry and employment search act"; provides for the department of health to develop and maintain a home care services worker registry of home care services workers; provides what information is to be collected and by whom and how the information may be accessed.

Chapter 515 (A10622) Effective 3/ 4/09

The patients rights notification required to be given by hospitals must now include a notice that patients cannot be discriminated against because of age.

Miscellaneous

Chapter 82 (S06965) Effective 5/21/08

The services under a naturally occurring retirement community supportive services program are now available to certain persons who reside in contiguous areas.

Chapter 167 (A06198) Effective 7/7/08

The director of the state office for the aging is now a member of the state consumer protection board.

Chapter 182 (A09715) Effective 7/7/08

The law establishes animal response teams for use in emergencies and disasters affecting animals in New York State.

Chapter 644 (S 4996-B) Effective 9/1/09

An act to amend the general obligations law, in relation to powers of attorney, providing definitions and general requirements for valid powers of attorney, providing for the duties of the agent, requiring the agent to sign the power of attorney form, providing procedures for the revocation of the power of attorney, and providing for civil proceedings with respect to powers of attorney, and to repeal sections 5-1501, 5-1502M, 5-1505 and 5-1506 of such law relating to powers of attorney.

Chapter 575 (A8527A / S6203B) Effective 1/109

The law, "The Exempt Income Protection Act", amends the Civil Practice Laws and Rules (CPLR) establishing a procedure for claiming exemption of certain income from levy of execution by judgment debtors. This legislation resolves the current problem of seizing exempt funds and provides balanced protection for both judgment debtors and judgment creditors.

To access the entire law on Enforcement of Money Judgments go to:

<http://public.leginfo.state.ny.us/menuf.cgi>

Under the SEARCH heading at the bottom click on Laws of New York. Click on CVP Civil Practice Laws and Rules in the Consolidated Laws. See Article 52, Enforcement of Money Judgments. In particular read Section 5205, 5222 and following.

For Consumer Fact Sheets on Dealing with Debt go to MFY Legal Services web site

<http://www.mfy.org/english.shtml>

Chapter 575 (A8527A / S6203B)

Debtor/Creditor Law

Summary of Specific Provisions:

Section 1 Amends the Civil Practice Laws and Rules (CPLR) Section 5205 list of exemptions from money judgments. The list would now include the first \$2,500 in a bank account when the account contains exempt funds which have been directly or electronically deposited within the last 45 days.

Section 2 Amends CPLR 5222 (b), (d), and (e) which govern the restraining notice form used for the enforcement of money judgments. It will amend the form to make clear that certain funds are exempt.

Section 3 Amends CPLR 5222 by adding new subdivisions (h), (i), and (j).

New subdivision (h) would make clear that the first \$2,500 in a bank account cannot be restrained when the account contains exempt funds which have been directly or electronically deposited within the last 45 days.

New subdivision (i) would make clear that an amount equal to two-hundred and forty times the minimum wage and cannot be restrained except such part that a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependants.

New subdivision (j) would make clear that a banking institution cannot assess a fee if it is served with a restraining notice and the bank account cannot be lawfully restrained or it is restrained it is in violation of the CPLR.

Section 4 Adds a new CPLR 5222-a creating a procedure in regards to exempt funds.

New subdivision (b)(3) requires the banking institution to serve the judgment debtor within two days of receipt of the restraining notice with the copies of the exemption notice and exemption claim forms provided to the banking institution by person seeking restraint or levy.

New subdivision (c)(1) requires the judgment debtor who is claiming an exemption to complete the exemption claim forms and return them to the banking institution and judgment creditor within 20 days.

New subdivision (c)(3) requires a banking institution to release funds to a judgment debtor eight days after being served with a completed exemption form unless the judgment creditor has interposed an objection.

New subdivision (c)(5) provides that the banking institution may subject the funds to restraint or execution after 25 days if the judgment debtor does not respond to the service of the exemption notice and exemption claim forms.

New subdivision (g) permits a judgment debtor to counterclaim against a judgment creditor who disputes a judgment debtor's claim of exempt funds in bad faith or who has actual knowledge that the funds are exempt.

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<http://www.mfy.org/english.shtml>

Cases of Interest

Mental Illness/Assisted Outpatient treatment Orders

Mental Disability Law Clinic v. Hogan, United States District Court for the Eastern District of New York, 2008 U.S. Dist. LEXIS 70684

The Plaintiff Clinic was asking for certification for a Class Action. The clinic is attempting to make AOT orders available to mentally ill persons who meet all the eligibility criteria except 9.60 (c) (4).

The Mental Disability Law Clinic stated a claim under the Americans With Disabilities Act (ADA) that individuals who, at the time of an evaluation for inpatient commitment, would and could have benefited from Assisted Outpatient Treatment but for the requirements of § 9.60(c)(4) which requires that the patient has a history of noncompliance with treatment that has caused either two hospitalizations in the past 36 months OR one or more acts of violence in the last 48 months. The court found that, due to the illness of one of the clinic's constituents and the allegation that she continued to refuse to take her medication, the likely harm of another hospitalization and the fact that this harm could have been avoided if she were subject to "assisted" outpatient mental health treatment (AOT) met the requirements for standing to sue the defendants under an Equal Protection claim. The clinic's mentally ill constituents were certified as a class as well as the defendant state and local government class.

In the Matter of Thomas G., respondent; Pilgrim Psychiatric Center, 2008 NY Slip Op 4087; 50 A.D.3d 1139; 857 N.Y.S.2d 631; 2008 N.Y. App. Div.

Petitioner psychiatric center appealed an order by the Suffolk County Supreme Court (New York) that denied its Mental Hygiene Law section 9.33 petition to retain respondent patient for involuntary psychiatric care, and directed the release of the patient in conjunction with assisted outpatient treatment. The appellate court found that, contrary to the trial court's determination, the patient was a person "in need of involuntary care and treatment" under Mental Hygiene Law section 9.01. The psychiatric center demonstrated, by clear and convincing evidence, that the patient's mental illness, Axis I schizoaffective disorder, bipolar type, and poly-substance abuse, caused him to pose a substantial threat to others. The trial court was presented with evidence of the patient's extensive history of psychiatric admissions and hospitalizations caused by his noncompliance with medication and resulting threats of violence toward others. The center elicited testimony from an expert in psychiatry who testified that the patient denied he suffered from a mental illness and refused to accept the recommended dosage of antipsychotic medication, which would treat his illness. The patient's paranoid delusions and grandiose thinking prevented him from having any insight into his mental illness or

making any informed judgments regarding his treatment. Accordingly, the center's Mental Hygiene Law § 9.33 petition for retention should have been granted.

Access Orders

In the Matter of Albany County Department of Social Services, Respondent, v Josephine Rossi, Appellant, 2008 NY Slip Op 582; 47 A.D.3d 1165; 850 N.Y.S.2d 701; 2008 N.Y. App. Div. LEXIS 541

Petitioner commenced this proceeding seeking an order for access to respondent's residence to conduct an assessment as to whether she was a person in need of protective services for adults. Ultimately, the parties entered into a stipulation which provided that respondent would bring the outside of her home into compliance with certain sanitary code standards. Respondent agreed to permit petitioner to enter the outside of the residence and to take photos. Almost two months after the stipulation's execution, respondent moved to set it aside alleging, among other things, that she was manipulated, defrauded and misled. Supreme Court denied the motion, prompting this appeal by respondent. Since stipulations are favored by the courts and are not to be lightly set aside moreover there was no evidence of any fraud, collusion or misrepresentation on petitioner's part the Supreme Court properly denied her vacatur request.

Matter of Eugenia M., 20 Misc3d 1110A; 2008 N.Y. Misc. LEXIS 3787; 2008 NY Slip Op 51301U

Several months after APS had filed for a guardianship proceeding they requested an Access Order to reevaluate the AIP. The court declined to grant the Order on the grounds that APS already had an opportunity to evaluate the respondent. Since the respondent left her apartment regularly APS could attempt to evaluate her at those times. Moreover, APS could not use the Access Order to gain evidence of incapacity to be used in the Article 81 proceeding. An Access Order is only to be used to determine eligibility for the Protective Services program.

Article 81 Guardianship

Post Death Procedure

Chapter 175 of the Laws of 2008

Effective January 7, 2009

Summary of Specific Provisions

Section One: Amends subdivision (a) of Section 81.34 of the Mental Hygiene Law to mandate that:

1. The guardian notify the personal representative of the estate along with other listed parties (in section 81.16) showing that , to the extent the guardian is responsible for the property, all taxes have been paid or that no taxes are due and that the guardian has fully reported all property actions and noticed the required parties of same
2. Upon the death of the IP the guardian is authorized
 - to pay the funeral expenses of the IP,
 - in the absence of a duly appointed personal representative of the estate, to pay the estimated estate and income tax charges and other charges of emergent nature
 - pay bills only if the Guardian had bill paying power while the IP was alive
81.21 (a) (19)

Section Two: Adds a new Section 81.44 to the Mental Hygiene Law to specify the post death procedure to be done by the guardian to transition the guardianship to an estate. Included in these provisions is:

1. Within twenty days of the death of the IP the guardian must prepare a *Statement of Death* (last residence of the IP, date and place of death, names and addresses of all persons entitled to Notice, including the estate representative)
 - serve copy of Statement of Death upon the court examiner, appointed estate representative or representative named in the will and the Public Administrator in the county where the guardian was appointed

- file the original Statement of Death together with proof of service with the court that appointed the guardian

2. Within one hundred and fifty days of the death of the IP

- A Statement of Assets and Notice of Claim must be served upon the personal representative of the decedent's estate or, if no personal representative, upon the Public Administrator

Statement of Assets - a description of the nature and approximate value of the guardianship property at the time of the incapacitated persons death and

Notice of Claim - the approximate amount of any claims or liens against the guardianship property

- Shall deliver all guardianship property to the appointed personal representative of the IP's estate or the Public Administrator
- The guardian may retain, pending the settlement of the guardian's Final Report, guardianship property equal in value to the claim for administrative costs, liens and debts
- A final report must be filed with the court.

Revoking a Will or Codicil of an IP
Chapter 176 of the Laws of 2008
Effective July 7, 2008

Summary of Specific Provision

Amends subdivision (d) of Section 81.29 of the Mental Hygiene Law to provide that the court in an Article 81 proceeding **shall not** invalidate or revoke a will or codicil of an incapacitated person during the lifetime of such person.

2007-2008 Regular Sessions
IN A S S E M B L Y
June 7, 2007
Chapter 175

AN ACT to amend the mental hygiene law, in relation to proceedings upon the death of an incapacitated person.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision (a) of section 81.34 of the mental hygiene law, as added by chapter 698 of the laws of 1992, is amended to read as follows:

(a) The guardian or the personal representative of the guardian may present to the court a petition showing the names and addresses of all persons entitled to receive notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article and THE PERSONAL REPRESENTATIVE OF THE ESTATE showing that, to the extent the guardian is responsible for the property of the incapacitated person, all taxes have been paid or that no taxes are due and that the petitioner has fully reported and has made full disclosure in writing of all the guardians actions affecting the property of the incapacitated person to all persons interested and seeking a decree releasing and discharging the petitioner. UPON THE DEATH OF THE INCAPACITATED PERSON, THE GUARDIAN IS AUTHORIZED TO PAY THE FUNERAL EXPENSES OF THE INCAPACITATED PERSON AND, IN THE ABSENCE OF A DULY APPOINTED PERSONAL REPRESENTATIVE OF THE ESTATE, PAY ESTIMATED ESTATE AND INCOME TAX CHARGES, AS WELL AS OTHER CHARGES OF EMERGENT NATURE.

The mental hygiene law is amended by adding a new section 81.44 to read as follows:

81.44 PROCEEDINGS UPON THE DEATH OF AN INCAPACITATED PERSON.

(A) WHEN USED IN THIS SECTION:

1. "STATEMENT OF DEATH" MEANS A STATEMENT, IN WRITING AND ACKNOWLEDGED, CONTAINING THE CAPTION AND INDEX NUMBER OF THE GUARDIANSHIP PROCEEDING, AND THE NAME AND ADDRESS OF THE LAST RESIDENCE OF THE DECEASED INCAPACITATED PERSON, THE DATE AND PLACE OF DEATH, AND THE NAMES AND LAST KNOWN ADDRESSES OF ALL PERSONS ENTITLED TO NOTICE OF FURTHER GUARDIANSHIP PROCEEDINGS PURSUANT TO PARAGRAPH THREE OF SUBDIVISION (C) OF SECTION 81.16 OF THIS ARTICLE INCLUDING THE

NOMINATED AND/OR APPOINTED PERSONAL REPRESENTATIVE, IF ANY, OF THE DECEASED INCAPACITATED PERSON'S ESTATE

2. "PERSONAL REPRESENTATIVE" MEANS A FIDUCIARY AS DEFINED BY SUBDIVISION TWENTY-ONE OF SECTION 103 OF THE SURROGATE'S COURT PROCEDURE ACT TO WHOM LETTERS HAVE BEEN ISSUED AND WHO IS AUTHORIZED TO MARSHAL THE ASSETS OF THE DECEDENT'S ESTATE.

3. "PUBLIC ADMINISTRATOR" MEANS A PUBLIC ADMINISTRATOR WITHIN OR WITHOUT THE CITY OF NEW YORK, AS ESTABLISHED BY ARTICLES ELEVEN AND TWELVE OF THE SURROGATE'S COURT PROCEDURE ACT, OR THE CHIEF FISCAL OFFICER OF A COUNTY ELIGIBLE TO BE APPOINTED AN ADMINISTRATOR, PURSUANT TO SECTION TWELVE HUNDRED NINETEEN OF THE SURROGATE'S COURT PROCEDURE ACT. THE ROLE OF THE PUBLIC ADMINISTRATOR UNDER THIS SECTION IS THAT OF A STAKE HOLDER OR ESCROWEE ONLY, AND THE PUBLIC ADMINISTRATOR SHALL NOT, BY VIRTUE OF THIS SECTION, HAVE A SUBSTANTIVE ROLE IN ADMINISTERING THE ESTATE.

4. "STATEMENT OF ASSETS AND NOTICE OF CLAIM" MEANS A WRITTEN STATEMENT UNDER OATH CONTAINING THE CAPTION AND INDEX NUMBER OF THE GUARDIANSHIP PROCEEDING, THE NAME AND ADDRESS OF THE INCAPACITATED PERSON AT THE TIME OF DEATH, A DESCRIPTION OF THE NATURE AND APPROXIMATE VALUE OF GUARDIANSHIP PROPERTY AT THE TIME OF THE INCAPACITATED PERSON'S DEATH; WITH THE APPROXIMATE AMOUNT OF ANY CLAIMS, DEBTS OR LIENS AGAINST THE GUARDIANSHIP PROPERTY, INCLUDING BUT NOT LIMITED TO MEDICAID LIENS, TAX LIENS AND ADMINISTRATIVE COSTS, WITH AN ITEMIZATION AND APPROXIMATE AMOUNT OF SUCH COSTS AND CLAIMS OR LIENS.

(B) UNLESS OTHERWISE DIRECTED BY THE COURT, ALL PAPERS REQUIRED TO BE SERVED BY THIS SECTION SHALL BE SERVED BY REGULAR MAIL AND BY CERTIFIED MAIL RETURN RECEIPT REQUESTED.

(C) WITHIN TWENTY DAYS OF THE DEATH OF AN INCAPACITATED PERSON, THE GUARDIAN SHALL:

1. SERVE A COPY OF THE STATEMENT OF DEATH UPON THE COURT EXAMINER, THE DULY APPOINTED PERSONAL REPRESENTATIVE OF THE DECEDENT'S ESTATE, OR, IF NO PERSON REPRESENTATIVE HAS BEEN APPOINTED, THEN UPON THE PERSONAL REPRESENTATIVE NAMED IN THE DECEDENT'S WILL OR ANY TRUST INSTRUMENT, IF KNOWN, AND UPON THE PUBLIC ADMINISTRATOR OR THE CHIEF FISCAL OFFICER OF THE COUNTY IN WHICH THE GUARDIAN WAS APPOINTED, AND

2. FILE THE ORIGINAL STATEMENT OF DEATH TOGETHER WITH PROOF OF SERVICE UPON THE PERSONAL REPRESENTATIVE AND/OR PUBLIC ADMINISTRATOR OR CHIEF FISCAL OFFICER, AS THE CASE MAY BE, WITH THE COURT WHICH ISSUED LETTERS OF GUARDIANSHIP.

(D) WITHIN ONE HUNDRED FIFTY DAYS OF THE DEATH OF THE INCAPACITATED PERSON, THE GUARDIAN SHALL SERVE UPON THE PERSONAL REPRESENTATIVE OF THE DECEDENT'S ESTATE OR WHERE THERE IS NO PERSONAL REPRESENTATIVE, UPON THE PUBLIC ADMINISTRATOR OR CHIEF FISCAL OFFICER, A STATEMENT OF ASSETS AND NOTICE OF CLAIM, AND, EXCEPT FOR PROPERTY RETAINED TO SECURE ANY KNOWN CLAIM, LIEN OR ADMINISTRATIVE COSTS OF THE GUARDIANSHIP PURSUANT TO SUBDIVISION (E) OF THIS SECTION, SHALL DELIVER ALL GUARDIANSHIP PROPERTY TO:

1. THE DULY APPOINTED PERSONAL REPRESENTATIVE OF THE DECEASED INCAPACITATED PERSON'S ESTATE, OR
2. THE PUBLIC ADMINISTRATOR OR CHIEF FISCAL OFFICER GIVEN NOTICE OF THE FILING OF THE STATEMENT OF DEATH, WHERE THERE IS NO PERSONAL REPRESENTATIVE.
3. ANY DISPUTE AS TO THE SIZE OF THE PROPERTY RETAINED SHALL BE DETERMINED BY THE SURROGATE COURT HAVING JURISDICTION OF THE ESTATE.

(E) UNLESS OTHERWISE ORDERED BY THE COURT UPON MOTION BY THE GUARDIAN ON NOTICE TO THE PERSON OR ENTITY TO WHOM GUARDIANSHIP PROPERTY IS DELIVERABLE, AND THE COURT EXAMINER, THE GUARDIAN MAY RETAIN, PENDING THE SETTLEMENT OF THE GUARDIAN'S FINAL ACCOUNT, GUARDIANSHIP PROPERTY EQUAL IN VALUE TO THE CLAIM FOR ADMINISTRATIVE COSTS, LIENS AND DEBTS.

(F) WITHIN ONE HUNDRED FIFTY DAYS OF THE INCAPACITATED PERSON'S DEATH, THE GUARDIAN SHALL FILE HIS OR HER FINAL REPORT WITH THE CLERK OF THE COURT OF THE COUNTY IN WHICH ANNUAL REPORTS ARE FILED, AND THEREUPON PROCEED TO JUDICIALLY SETTLE THE FINAL REPORT UPON SUCH NOTICE AS REQUIRED BY SUBDIVISION (C) OF SECTION 81.33 OF THIS ARTICLE, INCLUDING NOTICE TO THE PERSON OR ENTITY TO WHOM THE GUARDIANSHIP PROPERTY WAS DELIVERED. THERE SHALL BE NO EXTENSION OF THE TIME TO FILE A FINAL REPORT EXCEPT BY ORDER OF THE COURT.

(G) UPON FAILURE OF THE GUARDIAN TO COMPLY WITH SUBDIVISIONS (D) OR (F) OF THIS SECTION, ANY PERSON ENTITLED TO NOTICE OF THIS PROCEEDING MAY FILE A PETITION TO COMPEL THE GUARDIAN TO ACCOUNT, TO SUSPEND AND/OR REMOVE THE GUARDIAN, AND TO TAKE AND STATE THE GUARDIAN'S ACCOUNT.

Guardianship Cases of Interest 2008-2009

Power of the Guardian

Matter of M.R. v H.R., ___ Misc3d ___; 2008 N.Y. MISC. LEXIS 4347 (Sup. Ct. Bronx Cty., 2008)

Where MHLS counsel for the AIP alleged in a pre-trial motion that the AIP had never issued the power-of-attorney instrument by which his daughter, the purported attorney-in-fact had sold his home and used the proceeds in part for her own personal needs, the court revoked the power-of-attorney pending trial of the matter.

The children of the AIP had been appointed temporary guardians for the primary reason of placing the AIP in a nursing home over his objection and did so place him prior to trial. They further intended to transfer him to another facility. MHLS sought discharge of those temporary co-guardians prior to trial and the Court Evaluator asserted that she had reviewed the AIP's medical records in the nursing home and saw no evidence of incapacity or need for placement in the nursing home. The court discharged the temporary co-guardians stating that it was *ultimately for the jury to decide whether the AIP required a guardian with power over the person to place him in a nursing home*. The court further ordered that the temporary co-guardians turn over to the AIP all of his bankbooks, documents, wallet and other personal effects.

Matter of Gloria N., 2008 NY Slip Op 7185; 2008 N.Y. App. Div. LEXIS 7030 (1st Dept. 2008)

Placement in a nursing home is not the least restrictive alternative form of intervention. Where the IP was not given notice or an opportunity to be heard on the issue, the court's order granting the guardian that power deprived respondent of her right to due process and the order granting such power was reversed.

Choice of Guardian

Matter of Audrey D., 48 AD3d 3d 806; 2008 N.Y. App Div. LEXIS 1742 (2nd Dept. 2008)

A nominated guardian must be appointed unless the court determines for good cause shown that such appointment is not appropriate. The court found that although the AIP, facing eviction, nominated her father to be her guardian, that he was not a suitable choice because he had no plan for finding, and did not know how to acquire, adequate housing for AIP given her limited financial resources. Thus the court properly appointed a community guardian program as it was better suited to find appropriate housing.

Change of Venue

Matter of Lillian A

1. The court which signed the guardianship Order had jurisdiction over the IP even though she was now out of- state because, although the guardian had the power to transfer her abode, he did not have the power to and did not change her domicile.
2. If a judicial proceeding is begun with jurisdiction over the person it is within the power of the State to bind that party by subsequent orders in the same cause.

Matter of Davis/Matter of Fister

1. Change of venue to another county can only be made by order *upon motion*; and that there is no basis in either MHL 81.05(a) or CPLR 510 for a court to *sua sponte* change venue.
2. A motion to modify an order shall be made to the judge who signed the order or judgment.

Matter of Lillian A., 20 Misc3d 215; 860 NYS 2d 382(Sup. Ct., Delaware Cty., 2008)

An Article 81 guardian was appointed by a New York court after a bedside hearing, while the AIP was a patient in a hospital in New York. The Order provided, among other things, that the guardian had the power to change the IP's place of abode and also that the guardianship was for a limited duration and subject to being extended upon further motion at a later date. The guardian then changed the place of the IP's abode to an out-of-state nursing home. When the Order was expiring, the guardian moved in the New York court to extend his powers. The New York Court held that (1) it did have jurisdiction over the IP even though she was now out of- state because, although the guardian had the power to transfer her abode, he did not have the power to and did not change her domicile and (2) if a judicial proceeding is begun with jurisdiction over the person it is within the power of the State to bind that party by subsequent orders in the same cause. Having established that jurisdiction existed, the court then held that because the IP was then "not present in the state" under MHL 81.11 (c)(1) the IP's presence at the hearing could be waived.

Matter of Davis, 6/4/08, NYLJ 32 (col. 3) (Sup. Ct., Queens Cty.)

Where the AIP resided in a facility in Queens County and petitioner filed an Article 81 petition in Supreme Court, Kings County, the court in Kings County *sua sponte* transferred the case to Queens citing MHL 81.05 (a) as authority. The Queens court held that MHL 81.05(a) provides that the proceeding must be brought where the AIP resides or is physically present but does not contain any provision for a change of venue if a matter is filed in an improper county. It also found that MHL 81.07 provides only for a change of venue in relation to convenience of the parties or witnesses, or condition of the AIP. The court held that CPLR 510 controlled and that such section provided that venue may be changed only upon motion of a party and that it was thus an abuse of discretion

for the Kings County court to have changed venue *sua sponte* on the basis of it having been filed in the wrong county. Since the matter had already been delayed nearly 2 months, the court in Queens considered the petition, signed the Order to Show Cause but made the petition returnable in Kings where it has been originally commenced.

Matter of Fister, 19 Misc3d 1145A; 2008 N.Y. Misc. LEXIS 3344 (Sup. Ct., Queens Cty. 2008)

A guardian was appointed in NY county for a period of three years. The guardian later asked the court to modify the original order to the extent of changing the term from a period of three years to an indefinite period. Another judge, to whom the order to show cause was presented, declined to sign the order, instead, issuing an order, *sua sponte*, directing that venue of the action be changed to Queens where the IP was then residing. The court in Queens County declined to accept the transferred case on the grounds that the transfer was in violation of law, holding that an action may be tried in the venue designated even though improper if there is no motion for change of venue, that the place of trial of an action shall be in the county designated by the plaintiff unless changed to another county by order *upon motion*; and that there is no basis in either MHL 81.05(a) or CPLR 510 for a court to *sua sponte* change venue. The court further held that there is absolutely no authority to change the county where an action has been brought, post judgment...and that a motion to modify an order shall be made to the judge who signed the order or judgment. The court concluded: "[i]t is utterly implausible to expect that a case should be transferred from county to county every time a ward is moved. To do so would sabotage the continuity by the court and court examiners to properly and efficiently administer a guardianship case throughout many years." See also, companion case, *Matter of Davis*, NYLJ 6/4/08, p.32, col.3. (Thomas, J.)

Abuse

Matter of Sally A. M., 19 Misc3d 1124A; 2008 NY Slip OP 50843U (Sup.Ct., Rensselear Cty, 2008)

Upon allegations that an AIP's sister who was her power of attorney was misusing the AIP's funds for her own benefit, the Court appointed a Temporary Guardian to marshal and protect the assets and directed a compulsory accounting by the attorney-in-fact. The court determined that it had jurisdiction to compel the accounting because: (1) a fiduciary relationship existed; (2) There were funds entrusted to the fiduciary; (3) there was no other remedy; and (4) there had been a demand for and refusal of an accounting. The court held that the sister breached her fiduciary duty as trustee and attorney-in-fact. The court ordered the sister and her husband to refund the money to the AIP.

In the Matter of the Application of H.R. for the Appointment of a Guardian for I.I.R 2008 NY Slip Op 52404U; 21 Misc. 3d 1136A; 2008

The petition sought an appointment of a Guardian for I.I.R. and to declare the marriage to S.L.C. null and void. I.I.R. was 90 years of age, hard of hearing with numerous physical ailments, depression and dementia. In 2008 I.I.R. and S.L.C., who was 53, were married and S.L.C. was then given power of attorney by I.I.R.. They never lived together as husband and wife. S.L.C. maintained her residence in Brooklyn, New York.

In an Article 81 proceeding, annulment of a marriage is an available remedy where the evidence establishes that the party was incapable of understanding the nature, effect and consequences of the marriage. The testimony of S.L.C. was found to be not credible. The record did not establish that S.L.C., a 53 year old woman and I.I.R., a 90 year old man, shared a romantic relationship or cohabitated together as husband and wife. There was no wedding ring and no change in residency for S.L.C.. The record did establish that S.L.C. purchased numerous items for herself and her family which were paid for by I.I.R., including but not limited to airline tickets to the Philippines, a car lease for her son, membership to Bally's Gym, and camera equipment in the amount of \$ 2,400. The testimony of Mr. I.I.R. revealed that he had no recollection of approving of these purchases. In fact, Mr. I.I.R. was unable to recall that he had appeared in court on prior occasions and whether he knew the extent of his assets. As such, the marriage to S.L.C. was declared null and void. The power of attorney was revoked and the son of I.I.R was appointed guardian.

Guardianship for Mentally Retarded and Developmentally Disabled Persons

(Article 17-A of the Surrogates Court Procedure Act)

Chapter 262 (A10833) Effective Jan 7, 2009

This bill amends Section 1750-b of the Surrogates Court Procedure Act to allow Surrogate Decision Making Committees (SDMCS) to make a decision regarding life-sustaining treatment. An SDMC would be authorized to make a decision to withhold or withdraw life-sustaining treatment only if no guardian or involved family member is available. The bill also authorizes dispute mediation systems or a hospice ethics committee, if such entity exists, to attempt non-binding resolution of a dispute emanating from an objection to a decision. If such mediation entity is not available or cannot resolve such dispute, the objection would proceed to judicial review as provided for in Section 1750-b.

Chapter 198 (A10811) Effective January 1, 2009

This bill would allow persons otherwise eligible for the Surrogate Decision-Making Committee (SDMC) Program, notwithstanding their discharge from a facility and program provided, funded or approved by an office of the Department of Mental Hygiene, to use the SDMC without having previously been the subject of an SDMC determination. The bill would also authorize the Commission on Quality of Care and Advocacy to Persons with Disabilities to contract with non-profit organizations, as well as the community dispute resolution centers currently authorized by Article 21-A of the Judiciary Law, for local administration of the SDMC hearings.

Chapter 210 (A11054-A)

The bill permits a demonstration of the use of a simplified advance health care directive form, for persons in receipt of mental retardation and developmental disabilities services.

Effective date: Upon the date of the approval of the form by the Commissioners of Health and Mental Retardation and Developmental Disabilities and shall terminate two years thereafter.

Chapter 327 (S08679-A) Effective immediately.

The Commissioner of Mental Retardation and Developmental Disabilities shall convene and chair a workgroup to examine existing work hours for employees whose primary responsibility is the daily care and supervision of and interaction with residents or participants in a facility or program operated or licensed by the office of mental retardation and developmental disabilities, the office of mental health and the office of alcoholism and substance abuse services. The workgroup shall issue a report with recommendations to the governor.

**Guide to
Amendments to the Power of Attorney Law
Chapter 644 of the Laws of 2008**

The power of attorney is a written instrument whereby an individual appoints another person to act on his or her behalf in financial matters. The person making the appointment is known as the “Principal” and the person receiving the appointment is known as the “Agent.” Their relationship is governed by the common law of agency and by the statutory provisions of New York’s general obligations law.

The changes made by Chapter 644 to the general obligations law clarify many gaps and ambiguities in the statute and reflect a major shift over the past decade in the use of powers of attorney to include complicated estate and financial planning in addition to the traditional routine financial matters.

Chapter 644 also addresses longstanding problems such as third parties’s reluctance to accept powers of attorney and the use of powers of attorney to exploit vulnerable adults.

The major provisions as they relate to the Power of Attorney, Principals, Agents, Third Parties, and Special Proceedings are outlined below.

Power of Attorney

A. Standard statutory form for routine financial management

Execution Requirements – notarized signatures of Principal and Agent (signatures do not have to be notarized at the same time; however, the date on which an Agent's signature is acknowledged is the effective date of the power of attorney as to that Agent

B. Separate rider for major gifts and other transfers

Execution Requirements – notarized signature of Principal, and signatures of two witnesses

C. Alternative – non-statutory form with notarized signatures of Principal and Agent; if the document authorizes major gifts and other transfers, signatures of two witnesses

Principal

A. Appoint a monitor to request, receive, and compel Agent to provide, copy of power of attorney and records, and compel third parties to disclose power of attorney and such records

B. Revoke a power of attorney

- (1) under the terms of the power of attorney
- (2) deliver a written, signed and dated revocation of the power of attorney to
 - (a) the Agent who must stop acting notwithstanding the actual or perceived incapacity of Principal unless Principal is subject to a guardianship under article eighty-one of the mental hygiene law; and
 - (b) any third party that the Principal has reason to believe has received, retained or acted upon, the power of attorney
- (3) If the power of attorney has been recorded, the revocation must be recorded; notwithstanding the recording of a revocation, a third party must have actual notice of the revocation for the revocation to be effective
- (4) Unless the Principal expressly provides otherwise, the execution of a power of attorney revokes any and all prior powers of attorney executed by the Principal

C. Notice to the Principal

Agent

- A. Statutory description of responsibilities of Agent and standard of care
 - (1) To act according to any instructions from Principal or, absent instructions, the best interest of Principal
 - (2) To keep Principal's property separate
 - (3) To keep a record of all receipts, disbursements, and transactions entered into by the Agent on behalf of Principal, and
 - (a) provide, upon 15 days notice, the record and a copy of the power of attorney
 - (i) monitor
 - (ii) a co-Agent or successor Agent
 - (iii) a government entity, or official investigating a report that Principal may be in need of protective or other services, or investigating a report of abuse or neglect
 - (iv) a court evaluator, a guardian ad litem, a guardian or conservator, the personal representative of the deceased Principal's estate
 - (b) be subject to special proceeding to compel disclosure
- B. Resignation
 - (1) Written notice to Principal and Agent's co-Agent, successor Agent or the monitor, if one has been named, or Principal's guardian
 - (2) If none of the above, and Principal is incapacitated or Agent has notice of any facts indicating Principal's incapacity, written notice to a

- government entity having authority to protect the welfare of Principal, or may petition the court to approve the resignation
- (3) Principal may provide for alternative means

C. Compensation

- (1) Salary – none unless the power of attorney so provides
- (2) Reimbursement for expenses – for reasonable expenses actually incurred in connection with the performance of Agent's responsibilities.

D. Agent's signature

- (1) Where the hand-written signature, written disclosure of the agency relationship
- (2) In all transactions on behalf of Principal, Agent attests that:
 - (a) Agent has actual authority to engage in the transaction
 - (b) Agent does not have notice that the power of attorney has been terminated or revoked
 - (c) For a nondurable power of attorney, Agent does not have notice of Principal's incapacity, or notice of any facts indicating the Principal's incapacity

E. Co-Agents

- (1) Principal may designate two or more persons to act as co-Agents who must act jointly unless power of attorney otherwise provides
- (2) If prompt action is required and to avoid irreparable injury to the Principal's interest when a co-Agent is unavailable because of absence, illness or other temporary incapacity, the other co-Agent or co-Agents may act for the Principal

Third Parties

A. Acceptance

- (1) Agent's signature in a transaction made on behalf of the Principal constitutes an attestation to the validity of the power of attorney and his or her authority
- (2) No actual notice of revocation

B. Reasonable Refusal

- (1) Agent's refusal to provide an original or certified copy of power of attorney
- (2) Third party's good faith referral of Principal and Agent to APS
- (3) Actual knowledge of a report made to APS
- (4) Actual knowledge of, or reasonable belief in, Principal's death
- (5) Actual knowledge of, or reasonable belief in, Principal's incapacity where the power of attorney is nondurable

- (6) Actual knowledge or a reasonable belief that Principal was incapacitated at the time the power of attorney was executed
- (7) Actual knowledge or a reasonable belief that power of attorney was procured through fraud, duress or undue influence
- (8) Actual notice of termination or revocation of the power of attorney
- (9) Refusal by a title insurance company to underwrite title insurance for a transfer of real property made pursuant to a major gifts rider or non-statutory power of attorney absent express instructions or purposes of the Principal

C. Unreasonable Refusal

- (1) Power of attorney is not on third party's form
- (2) Lapse of time since the execution of the power of attorney
- (3) Lapse of time between the date of acknowledgment of the signature of Principal and the date of acknowledgment of the signature of any Agent

D. Consequences of Refusal to Honor a Power of Attorney

- (1) An unreasonable refusal is unlawful and may subject the third party to a special proceeding and a court order compelling acceptance

Special Proceedings

- A. Compel the Agent to make records available
- B. Determine whether a power of attorney is valid
- C. Determine whether a Principal had capacity to execute a power of attorney
- D. Determine whether the power of attorney was wrongfully procured
- E. Remove an Agent
- F. Determine compensation of Agent
- G. Compel acceptance of a power of attorney

Changes for Powers of Attorney in New York

By Rose Mary Bailly and Barbara S. Hancock

On January 27, 2009, Governor David Paterson signed Chapter 644 of the Laws of 2008, amending the General Obligations Law to provide significant reforms to the use of powers of attorney in New York. Chapter 644 was the result of eight years of study by the New York State Law Revision Commission and was the subject of much debate and comment by several Sections of the New York State Bar Association.

The power of attorney is an effective tool for attorneys and the public at large for estate and financial planning and for avoiding the expense of guardianship. The power of attorney is also a simple document to create. It can be obtained from any number of Web sites on the Internet or in a stationery store, and its execution merely requires the principal's signature and its acknowledgment before a notary public. But this simplicity belies the extraordinary power that the instrument can convey, and its popularity has also led to its use for transactions far more complex than were originally contemplated by the law, particularly in the areas of gift giving and property transfers.

The instrument's power is also demonstrated by the potential authority the agent can hold. This can include power to transfer assets that pass by will as well as those that usually pass outside a will, such as joint bank accounts, life insurance proceeds and retirement benefits.

The principal can delegate these sweeping powers to the agent without fully recognizing their scope (particularly if the principal executes the document without the benefit of legal counsel). The agent can act immediately,

The revised Power of Attorney Law has an original effective date of March 1, 2009. However, the effective date was delayed until September 1, 2009, after the extension was passed by the Senate (S.1728) on February 24 and by the Assembly (A.4392) on February 10. The bill was signed into law by the Governor on February 27, 2009, as Chapter 4 of the Laws of 2009.

The New York State Bar Association supported this extension in order to provide practitioners with sufficient time to prepare for these significant changes.

For more information please visit our Web site, www.nysba.org.

This article is based on the New York State Law Revision Commission's *2008 Recommendation on Proposed Revisions to the General Obligations Law – Powers of Attorney*. The Commission's 2008 Recommendation, Chapter 644 and other material related to Chapter 644 can be found at the Commission's Web site: <http://www.lawrevision.state.ny.us>.

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unless the instrument is a springing power of attorney, *i.e.*, one that becomes effective upon the occurrence of a specified event such as the principal's incapacity. In all cases, the agent can act without notifying the principal. Under a durable power of attorney or springing durable power of attorney, which continues in effect after the principal's incapacity, the agent acts without oversight when an incapacitated principal is no longer able to control or review the agent's actions – a situation which under common law would have terminated the power of attorney.

Despite the broad authority associated with this important, popular and powerful tool for financial management, the N.Y. General Obligations Law (GOL), which governs powers of attorney, has been silent as to a number of matters. These omissions include descriptions of the agent's fiduciary obligations and accountability, the manner in which the agent should sign documents where a handwritten signature is required, the limits of the agent's authority to make gifts to third parties and to himself or herself, the manner in which the principal

The statutory short form is not valid until it is signed by both the principal and agent, whose signatures are duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.² The date on which an agent's signature is acknowledged is the effective date of the power of attorney as to that agent; if two or more agents are designated to act together, the power of attorney takes effect when all the agents so designated have signed the power of attorney and their signatures have been acknowledged.³

A power of attorney executed prior to the effective date of Chapter 644 will be continue to be valid, provided that the power of attorney was valid in accordance with the laws in effect at the time of its execution.⁴

Major Gifts and Other Property Transfers

Chapter 644 requires that a grant of authority to make major gifts and other asset transfers must be set out in a major gifts rider to a statutory power of attorney, which contains the signature of the principal duly notarized and which is witnessed by two persons who are not named in

The execution requirements alert the principal to the gravity of granting the agent this type of authority.

can revoke the document, the circumstances under which a third party may reasonably refuse to accept a power of attorney, and the effect on powers of attorney of the 2003 Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule regarding medical records. The statute's provisions have been ambiguous in other areas such as gift-giving authority and authority to make other property transfers.

Based on its study, the Commission concluded that while a power of attorney should remain an instrument flexible enough to allow an agent to carry out the principal's reasonable intentions, the combined effect of its potency and easy creation, the General Obligations Law's silence about several significant matters, and ambiguities about the authority to transfer assets can frustrate the proper use of the power of attorney, particularly when a principal is incapacitated and can no longer take steps to ensure its proper use. Chapter 644 addresses these statutory gaps and clarifies the ambiguities to assist parties creating powers of attorney and third parties asked to accept them.

General Provisions

Chapter 644 creates a new statutory short form power of attorney. On or after the chapter's effective date, to qualify as a statutory short form power of attorney, an instrument must meet the requirements of GOL § 5-1513.¹

the instrument as permissible recipients of gifts or other transfers, in the same manner as a will.⁵ In the alternative, the principal may grant such authority to the agent in a nonstatutory power of attorney executed in the same manner as a major gifts rider.⁶ The creation of a major gifts rider or its alternative nonstatutory power of attorney allows the principal to make an informed decision as to whether the agent may make gifts or other transfers of the principal's property to third parties as well as to the agent. The execution requirements alert the principal to the gravity of granting the agent this type of authority. An agent acting pursuant to authority granted in a major gifts rider or a nonstatutory power of attorney must act in accordance with the instructions of the principal or, in the absence of such instructions, in the principal's best interests.⁷ All statutory provisions relating to major gifts and property transfers have been located in a new GOL § 5-1514, rather than spread throughout the statute.

Powers of attorney often serve two very different purposes: management of the principal's everyday financial affairs and reorganization or distribution of the principal's assets in connection with financial and estate planning. The General Obligations Law has allowed the use of the statutory short form power of attorney for both purposes.

The former statutory language and statutory form made it difficult for a principal to make an informed deci-

sion about what, if any, authority he or she wants to give the agent with respect to making gifts and transferring property interests in connection with financial and estate planning.

First, the gifting and transfer provisions were scattered among other arguably more routine provisions. The statutory gifting authority was listed 13th (M) of 16 powers, and authority over insurance transactions and retirement benefit transactions, which can include changing beneficiaries, were listed sixth (F) and 12th (L) respectively; all of these could easily be overlooked. Unlike the gifting power, the insurance and retirement benefit powers listed on the form gave no hint that their construction sections allow the agent to change beneficiary designations. In giving the agent authority over insurance policies and retirement benefits, the principal might have been thinking of more routine matters, such as the need for more insurance or a different type of insurance and might have been unaware that he or she had given the agent authority that could alter the estate plan or reduce his or her property.

Second, the statutory short form did not indicate that the agent may be able to engage in self-gifting or designate himself or herself as the beneficiary of the principal's insurance policies and retirement benefits.

The potential for confusion was compounded by a third factor, namely, the ambiguity of the law regarding these types of transactions. The statutory construction sections for the authority to open joint bank accounts, and to change beneficiaries of insurance policies and retirement plans, did not require on their face that in order to exercise such authority the agent also be granted authority to make gifts or vice versa. So it might appear from a reading of the statute, that the agent could open a joint bank account and make changes in beneficiary designations without having separate gifting authority. However, cases interpreting the statute appeared to hold that if the principal intends to authorize the agent to open joint bank accounts with the principal and change the beneficiaries of the principal's insurance policies and retirement benefits, the principal must grant gifting authority in addition to authority over joint bank accounts, and insurance and retirement benefits.

Finally, the statute permitted modifications to the statutory short form to authorize significant transfers; but, like the powers listed explicitly on the form, they could be buried amid masses of legal text and could fail to attract the principal's attention to the significance of these modifications.

HIPAA Privacy Rule

Chapter 644 adds the term "health care billing and payment matters" to the term "records, reports and statements" as those terms are explained in construction § 5-1502K,⁸ so that an agent can examine, question, and

pay medical bills in the event the principal intends to grant the agent power with respect to records, reports and statements, without fear that the HIPAA Privacy Rule would prevent the agent's access to the records. This provision is applicable to all powers of attorney executed before, on or after the effective date of Chapter 644.⁹ It does not change the law forbidding the agent from making health care decisions.¹⁰

The General Obligations Law has been silent as to the relationship between the power of attorney, an agent's authority to access medical records under New York law, and the Privacy Rule, a federal regulation regarding individual medical information promulgated in April 2003 pursuant to HIPAA. The ambiguity about an agent's authority to access medical records under New York law arose out of several factors. Neither subdivision K on the statutory short form (power to access records), nor § 5-1502K, which construed the term "records," contained an express reference to medical records. Moreover, § 18 of the Public Health Law, which identifies qualified persons who are entitled to access to a patient's health records, does not include all agents acting pursuant to a power of attorney.¹¹ As a result, health care providers have refused to make records available to an agent seeking clarification of a medical bill, without the express language in the power of attorney document authorizing such release.

The ambiguity thus created is exacerbated by the HIPAA Privacy Rule, which creates national standards limiting access to an individual's medical and billing records to the individual and the individual's "personal representative." Under the Privacy Rule, health information relating to billings and payments may be available to an agent if the agent can be characterized as the principal's "personal representative" as defined in the Privacy Rule. Under the regulations, the "personal representative" for an adult or emancipated minor is defined as "a person [who] has authority to act on behalf of a individual who is an adult or an emancipated minor in making decisions related to health care."¹²

The General Obligations Law has limited the authority of the agent to financial matters, and expressly prohibits the agent from making health care decisions for the principal. The Public Health Law defines a health care decision as "any decision to consent or refuse to consent to health care."¹³ "Health care," in turn, is defined as "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition."¹⁴

The principal may grant health care decision making authority to a third party only by executing a health care proxy pursuant to § 2981 of the Public Health Law. The health care proxy law makes clear that financial liability for health care decisions remains the obligation of the principal.¹⁵ As a practical matter, payment issues are left to the principal or the principal's agent. The Privacy Rule regarding access to records does not take into account a

One of the goals of the original creation of a statutory short form was to encourage financial institutions to accept such documents.

statutory structure such as New York's, which permits the division of the responsibilities for health care decisions and bill paying between two representatives, the health care agent and the agent.

Agent

Chapter 644 includes a statutory explanation of the agent's fiduciary duties, codifying the common law recognition of an agent as a fiduciary.¹⁶ A notice to the agent is added to the statutory short form explaining the agent's role, the agent's fiduciary obligations and the legal limitations on the agent's authority.¹⁷ If the agent intends to accept the appointment, the agent must sign the power of attorney as an acknowledgment of the agent's fiduciary obligations.¹⁸

Chapter 644 also requires that, in transactions on behalf of the principal, the agent's legal relationship to the principal must be disclosed where a handwritten signature is required.¹⁹ In all transactions (including electronic transactions) where the agent purports to act on the principal's behalf, the agent's actions constitute an attestation that the agent is acting under a valid power of attorney and within the scope of the authority conveyed by the instrument.²⁰ Chapter 644 allows for the principal to provide in the power of attorney that the agent receive reasonable compensation if the principal so desires.²¹ Without this designation, the agent is not entitled to compensation.²²

Both the durable and springing durable power of attorney permit the agent to continue to act after the principal has become incapacitated. The intent behind this change to the common law was laudable – to allow an agent to act for the principal precisely at a time when the principal needs assistance, to permit the principal to plan for possible incapacity, and to eliminate the need for expensive alternatives such as a trust or guardianship. However, the principal's incapacity leaves the principal unable to monitor the agent's actions and to revoke the power if he or she is not satisfied with the agent's conduct. Thus an agent could take actions on behalf of the principal for months or years, without any supervision and not always to the benefit of the principal. Recognizing that the potential for financial exploitation was inherent in the delegation of authority to an agent, public hearings in the early 1990s led to a two-pronged recommendation for reform – educating the principal and holding the agent accountable. Changes to the law regarding the principal's education were adopted but

the statute was not revised to reflect the agent's accountability until now.

Principal

Chapter 644 adds a section to the statute that explains how the power of attorney can be revoked.²³ It expands the "Caution" to the principal so that the principal will be better informed about the serious nature of the document.²⁴ Chapter 644 also permits the principal to appoint someone to monitor the agent's actions on behalf of the principal,²⁵ and gives the monitor the authority to request that the agent provide the monitor with a copy of the power of attorney and a copy of the documents that record the transactions the agent has carried out for the principal.²⁶ Such accountability is consistent with the common law requirement that where one assumes to act for another he or she should willingly account for such stewardship.

Third Parties

Chapter 644 provides that third parties have the ability to refuse to accept powers of attorney based on reasonable cause.²⁷ The basis for a reasonable refusal includes, but is not limited to, the agent's refusal to provide an original or certified copy of the power of attorney and questions about the validity of the power of attorney based on the third party's good faith referral of the principal and the agent to the local adult protective services unit, the third party's actual knowledge of a report to the local adult protective services unit by another person, actual knowledge of the principal's death, or actual knowledge of the principal's incapacity when he or she executed the document, or when acceptance of a nondurable power of attorney is sought on the principal's behalf.²⁸ When a third party unreasonably refuses to accept a power of attorney, the statute authorizes the agent to seek a court order compelling acceptance of the power of attorney.²⁹ Chapter 644 expands the definition of "financial institution" to include securities brokers, securities dealers, securities firms, and insurance companies³⁰ and provides that a financial institution must accept a validly executed power of attorney without requiring that the power of attorney be on the institution's own form.³¹ The third party does not incur any liability in acting on a power of attorney unless the third party has actual notice that the power is revoked or otherwise terminated.³² A financial institution is deemed to have actual notice of revocation after the financial institution receives written notice at the office where the account is located and has had a reasonable opportunity to take action.³³

One of the goals of the original creation of a statutory short form was to encourage financial institutions to accept such documents. The anticipated results did not follow. Many institutions instead required that the principal execute a document prepared by the institution. The

enactment of the durable power of attorney actually exacerbated the situation. If the financial institution would not accept a statutory short form durable power of attorney and the principal had already lost capacity, serious difficulties could ensue because the principal could not legally execute another document. In 1986, the General Obligations Law was amended to make it unlawful for a financial institution to refuse to accept a statutory short form. Notwithstanding this statutory provision, financial institutions apparently continue to refuse to accept statutory short form powers of attorney and continue to demand that the institution's own form be completed.

Other Major Provisions

Chapter 644 increases the amount of the gifting provision to that of the annual exclusion amount under the Internal Revenue Code.³⁴ It adds a provision allowing gifting to a "529" account, up to the annual gift tax exclusion amount.³⁵ These "529" accounts, authorized in the Internal Revenue Code at § 529, are popular tax-advantaged savings accounts for education expenses. Chapter 644 amends the provisions regarding gift splitting to allow the principal to authorize the agent to make gifts from the principal's assets to a defined list of relatives, up to twice the amount of the annual gift tax exclusions, with the consent of the principal's spouse.³⁶

Other Provisions

An attorney who has been instructed by the principal not to disclose the document to the agent at the time of the agent's appointment may do so without concern that it is already a legally effective document because the instrument does not become effective until the agent signs.³⁷ An attorney can certify a copy of a power of attorney instead of having to record it to get certified copies from the county clerk, which result protects client's privacy and limits costly trips to the county clerk's office.³⁸ In addition, the default statutory provisions regarding annual exclusion gifting will always be up to date with federal law.³⁹

Financial institutions may demand an affidavit that the power of attorney is in full force and effect when they are asked to accept it.⁴⁰

Investigative agencies and law enforcement officials can request a copy of the power of attorney and the records of the agent⁴¹ and bring a special proceeding to compel disclosure in the event of the agent's failure to comply.⁴²

Additionally, the basis for termination and revocation of a power of attorney and resignation of an agent are described,⁴³ as are the relationships among co-agents and the initial and successor agents.⁴⁴

Conclusion

With these changes, New York's law has been updated and refined to reflect the complexities that surround the

use of powers of attorney in financial and estate planning matters.⁴⁵ ■

1. 2008 N.Y. Laws ch. 644, § 2, 5-1501B; § 19, 5-1513. All statutory references for amendments to the General Obligations Law are to the sections in Chapter 644.
2. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1).
3. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(3).
4. 2008 N.Y. Laws ch. 644, § 21.
5. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(2)(a), § 19, 5-1514.
6. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(2)(b), § 19, 5-1514.
7. 2008 N.Y. Laws ch. 644, § 19, 5-1514(5).
8. 2008 N.Y. Laws ch. 644, § 12.
9. 2008 N.Y. Laws ch. 644, § 21.
10. 2008 N.Y. Laws ch. 644, § 12, 5-1502K(1).
11. See N.Y. Public Health Law § 18(1)(g) (PHL) (refers only to attorneys who hold a power of attorney from an otherwise qualified person or the patient's estate specifically "authorizing the holder to execute a written request for patient information." An otherwise qualified person is the patient, article 81 guardian, parent of an infant, guardian of an infant, or distributee of deceased patient's estate if no executor or administrator has been appointed).
12. 45 C.F.R. § 164.502(g)(2).
13. PHL § 2980(6).
14. PHL § 2980(4).
15. See PHL § 2987.
16. 2008 N.Y. Laws ch. 644, § 19, 5-1505.
17. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(d)(2); § 19, 5-1513(n).
18. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(c); § 19, 5-1513(o).
19. 2008 N.Y. Laws ch. 644, § 19, 5-1507(1).
20. 2008 N.Y. Laws ch. 644, § 19, 5-1507(2).
21. 2008 N.Y. Laws ch. 644, § 19, 5-1506(1).
22. *Id.*
23. 2008 N.Y. Laws ch. 644, § 19, 5-1511.
24. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(d)(1); § 19, 5-1513(a).
25. 2008 N.Y. Laws ch. 644, § 19, 5-1509.
26. *Id.*
27. 2008 N.Y. Laws ch. 644, § 18, 5-1504.
28. *Id.*
29. 2008 N.Y. Laws ch. 644, § 19, 5-1510(2)(i).
30. 2008 N.Y. Laws ch. 644, § 2, 5-1501(5).
31. 2008 N.Y. Laws ch. 644, § 18, 5-1504(1)(b)(1).
32. 2008 N.Y. Laws ch. 644, § 18, 5-1504(3).
33. *Id.*
34. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(1).
35. *Id.*
36. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(2).
37. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(3)(a).
38. 2008 N.Y. Laws ch. 644, § 18, 5-1504(1)(a)(1).
39. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(1).
40. 2008 N.Y. Laws ch. 644, § 18, 5-1504(5).
41. 2008 N.Y. Laws ch. 644, § 19, 5-1505(2)(a)(3).
42. 2008 N.Y. Laws ch. 644, § 19, 5-1510(1).
43. 2008 N.Y. Laws ch. 644, § 19, 5-1511.
44. 2008 N.Y. Laws ch. 644, § 19, 5-1508.
45. In so doing, New York's law has come in line with the laws of many other jurisdictions and the recent amendments to the Uniform Power of Attorney Act, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm.

Chapter 326 – Orders of Protection

“Members of the same family or household” means persons related by consanguinity or affinity, legally married to one another, formerly married to one another whether or not living together, persons who have a child in common regardless of whether such persons have been married or lived together, **unrelated persons who continually or at regular intervals reside in the same household or have done so in the past, and persons who are or have been in a dating or intimate relationship whether or not they have ever lived together.**

Amendments to the Penal Law – Enhanced Penalties

- Chapter 68 - Penal Law Section 120.05
 - “Granny’s Law” - increases from a misdemeanor to a class D violent felony the crime of assault on a person sixty-five years of age or older when the perpetrator is more than ten years younger than the victim.

Amendments to the Penal Law – Enhanced Penalties

- Chapter 291- Penal Law Section 190.65
 - Increases the severity of the crime to a felony for engaging in a scheme to defraud more than one vulnerable elderly person.

**Amendments to the Penal Law –
Enhanced Penalties**

- Chapter 291- Penal Law Section 190.65
 - "Vulnerable elderly person" means a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care.

Chapter 575 - Debtor/Creditor Law

- Amends the Civil Practice Laws and Rules (CPLR) establishing a procedure for claiming exemption of certain income from levy of execution by judgment debtors.

Chapter 575 - Debtor/Creditor Law

- *Section 1:*
 - Expands the list of exemptions from money judgments to include the first \$2,500 in a bank account when the account contains exempt funds which have been directly or electronically deposited within the last 45 days.

Chapter 575 - Debtor/Creditor Law

- *Section 2:*
 - It will amend the restraining notice form to make clear that certain funds are exempt.

Chapter 575 - Debtor/Creditor Law

- *Section 3: Adds 3 new subdivisions*
 - (h) the first \$2,500 in a bank account cannot be restrained when the account contains exempt funds which have been directly or electronically deposited within the last 45 days.

Chapter 575 - Debtor/Creditor Law

- *Section 3: Adds 3 new subdivisions*
 - (j) a banking institution cannot assess a fee if it is served with a restraining notice and the bank account cannot be lawfully restrained or it is restrained in violation of the CPLR.

Chapter 575 - Debtor/Creditor Law

- *Section 4:* Adds a new CPLR Section 5222-a creating a procedure in regards to exempt funds.
 - (b)(3) requires the banking institution to serve the judgment debtor within **two days** of receipt of the restraining notice with the copies of the exemption notice and exemption claim forms provided to the banking institution by person seeking restraint or levy.

Chapter 575 - Debtor/Creditor Law

- *Section 4:* Adds a new CPLR Section 5222-a creating a procedure in regards to exempt funds.
 - (c)(1) requires the judgment debtor who is claiming an exemption to complete the exemption claim forms and return them to the banking institution and judgment creditor within 20 days.

Chapter 575 - Debtor/Creditor Law

- *Section 4:* Adds a new CPLR Section 5222-a creating a procedure in regards to exempt funds.
 - (c)(3) requires a banking institution to release funds to a judgment debtor eight days after being served with a completed exemption form unless the judgment creditor has interposed an objection

Chapter 575 - Debtor/Creditor Law

- *Section 4:* Adds a new CPLR Section 5222-a creating a procedure in regards to exempt funds.
 - (c)(5) provides that the banking institution may subject the funds to restraint or execution after 25 days if the judgment debtor does not respond to the service of the exemption notice and exemption claim forms.

For Consumer Fact Sheets
on Dealing with Debt,
go to MFY Legal Services web site:

<http://www.mfy.org/english.shtml>

**Challenge to Assisted Outpatient
Treatment Law (AOT) MHL Section 9.60**

- Mental Disability Law Clinic v. Hogan
 - Attempt to make AOT orders available to mentally ill persons who meet all the eligibility criteria **except** 9.60 (c) (4).
 - MHL § 9.60(c) (4) requires that the patient has a history of noncompliance with treatment that has caused either two hospitalizations in the past 36 months OR one or more acts of violence in the last 48 months

Article 81 Amendment

**Chapter 175
of the Laws of 2008**

Post Death Powers of Guardian
(81.34, 81.36)

- Payment of funeral expenses of IP
- Pay estimated estate and income tax (only if an estate personal representative has not been appointed)
- Pay bills only if guardian had bill paying power when the IP was alive (81.21)
- Pay other charges of emergent nature
- Defend/maintain litigation until estate representative is appointed (81.21)

Post Death Procedure
(81.44)

Within 20 Days of the Death of the IP
Guardian Must :

- Prepare Statement of Death
 1. Serve copy of Statement of Death upon court examiner, estate representative and Public Administrator
 2. File original Statement of Death with proof of service with the court

Within 150 days of the death of the IP
Guardian Must

- Serve "Statement of Assets and Notice of Claim" upon estate representative or the Public Administrator
- Deliver guardianship property to estate representative or the Public Administrator
- Guardian may retain (pending settlement of the Final Report) guardianship property equal in value to the claim for administrative costs, liens and debts
- File the final Report with the court

Article 81 Cases

- Change of Venue
 - Matter of Lillian A
 - Matter of Davis
 - Matter of Fister

Matter of Lillian A

1. The court which signed the guardianship Order had jurisdiction over the IP even though she was now out of- state because, although the guardian had the power to transfer her abode, he did not have the power to and did not change her domicile.
2. If a judicial proceeding is begun with jurisdiction over the person it is within the power of the State to bind that party by subsequent orders in the same cause.

Matter of Davis/Matter of Fister

1. Change of venue to another county can only be made by order upon motion; and that there is no basis in either MHL 81.05(a) or CPLR 510 for a court to sua sponte change venue.
2. A motion to modify an order shall be made to the judge who signed the order or judgment.
