

<b>New York State Office of Children and Family Services Bureau of Training</b>	
<h1>Satellite Downlink Coordinator Packet and Materials</h1>	
<h2><i>Satellite Broadcast Services</i></h2>	
<b>Teleconference:</b>	<b>Legal Aspects of PSA Workers: 2003 Update</b>
<b>Date:</b>	<b>March 27, 2003</b>
<b>Test Time:</b>	<b>9:00 AM</b>
<b>Program Time:</b>	<b>9:30 AM – 11:30 AM</b>
<b>Broadcast Channel</b>	<b>Digital Channel 1</b>
<p><b>Package Contents:</b></p> <ol style="list-style-type: none"> <li>1. General Instructions:</li> <li>2. Handouts and Powerpoints</li> <li>3. Evaluation Forms</li> <li>4. Call In Question Forms</li> <li>5. Roster</li> </ol>	
<b>Produced By:</b>	<b>SUNY Distance Learning Project Training Strategies Group, SUNY Central Administration</b>

## **General Instructions**

### **Introduction:**

The Bureau of Training maintains a network of teleconference downlink sites at residential facilities and local district offices across New York State. BT offers an array of Tele - training topics designed and produced specifically for state and local district staff. The training office will also retransmit programs produced and offered by national organizations such as: National Institute on Corrections, Office of Juvenile Justice and Delinquency Prevention, and the Welfare Reform Academy. BT welcomes suggestions for new teleconferences topics.

Generally BT broadcasts five or six training programs every month. Most programs are offered in the afternoon from 1:30 - 3:30. . A programming guide is maintained on the agency Intranet site. Program announcements are also sent out to all Staff Development Coordinators, Training Coordinators and Downlink Coordinators by email. Videotape copies of all past BT produced programs can be borrowed from the NYS OCFS Multi Media Center (518-473-8072). Downlink site Coordinators are encouraged to may make their own tapes of programs to show at a later time.

Downlink Coordinators are asked to ensure that staff is informed about upcoming teleconferences; and that the teleconferencing equipment is set up and functional prior to each telecast. Problems with equipment should be reported to Martha Murphy at 518-474-2424. BT maintains a technician to visit downlink sites and correct problems. With timely reporting, most problems will be addressable prior to broadcast.

In general the Training Coordinator is responsible for the successful presentation of the teleconference at their downlink site. This general responsibility is meant to include the notification of staff, provision of handouts, testing of equipment, reporting of evaluation results, and ensuring that the site is reserved, set up and presentable.

### **Set Up:**

Downlink coordinators should expect to receive information packets about one week prior to the teleconference. Please review the material and make copies of the necessary forms and handouts

Several days prior to the satellite broadcast, please test the TV and satellite receiver to ensure that it functions properly. Any problems should be reported to Martha Murphy at 518-474-2424. With enough advance notice OCFS Bureau of Training will be able to provide the site with technical assistance.

### **Trouble Numbers:**

If you experience trouble the day of the teleconference here are some contact numbers

NY Network Studios	518-443-5333
NY Network Uplink and Technical Assistance	518-453-9521
SUNY Distance Learning Project (Marti Murphy)	518-474-2424

### **During The Teleconference:**

During the teleconference, the downlink coordinator's role will depend upon whether or not there are any onsite activities to coordinate and whether there is a call in question segment. In each of these instances, it is expected that the downlink coordinator will facilitate and assist with the needs of the participants

**Evaluations:**

All teleconference evaluations are submitted on line at either the agency Internet site or on the agency Intranet. Specific web sites are listed below. Downlink coordinators have the option of either having participants report on line themselves, or, conducting a paper evaluation for the entire site, summarizing it, and reporting that summary evaluation on line.

To have individuals report their evaluations on line, downlink coordinators can distribute the "Instructions For The On-Line Submission of Teleconference Evaluations By Individuals".

To report a summary for the entire site, downlink coordinators can use the attached forms and submit the summary tabulated evaluation at:  
<http://sdssnet5/ohrd/distancelearning/satellite/evaluation/> (Agency Intranet) or at  
<http://www.dfa.state.ny.us/ohrd/satdefault.htm>. (Agency Internet)

**Rosters:**

Everyone who attends a teleconference should sign in on the attendance roster. Downlink coordinators should either establish a sign in desk or pass around a set of rosters prior to the teleconference. Once the teleconference is finished rosters should be FAXed to the OCFS home Office.

Rosters from local district sites should be faxed to Martha Murphy at 518-472-5165

Rosters from OCFS facilities should be faxed to Karen Tribley-Smith at 518-473-9169

# **Handouts For Legal Aspects of PSA: 2003 Update**

**March 27, 2003 9:30 – 11:30 AM**

**LEGAL ASPECTS OF ADULT PROTECTIVE SERVICES  
2003 UPDATE**

**CONTENTS OF TRAINING PACKET**

**Agenda**

**Adult Abuse**

National legislation  
State legislation

**Tips For Working With People Who Hoard**

**AOT (Kendra's Law) Interim Report**

**Health Law**

New legislation

**Article 81 Fiduciary Appointments**

**Cases of Interest**

Abuse by Power of Attorney  
Article 9 Mental Hygiene Law  
Health Law  
Representative Payeeship  
Article 81

**Health Care Decisions Act for Persons with Mental Retardation**

# LEGAL ASPECTS OF ADULT PROTECTIVE SERVICES

## 2003 UPDATE

Tele-training March 27, 2003

### AGENDA

#### INTRODUCTION

Moderator: Trish Geary  
SUNY Distance Learning Project

#### LECTURE I

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

- Adult Abuse
- Civil Commitment
- Assisted Outpatient Treatment
- Health Law
- Representative Payee-ship

#### AGENCY ISSUES

Kathy Crowe

#### QUESTION AND ANSWER

Debra Sacks and Kathy Crowe

#### BREAK

#### LECTURE II

Debra Sacks

Article 81 Case Law

Guardianship Special Issues

#### QUESTION AND ANSWER

Debra Sacks and Kathy Crowe

#### CLOSING REMARKS

Trish Geary

# LEGAL ASPECTS OF ADULT PROTECTIVE SERVICES 2003 UPDATE

## Adult Abuse

### National Legislation (introduced)

#### Elder Justice Act (S. 333)

Administration  
Committees and advisory bodies  
Resource center and library  
National data collection  
National grants and other funding  
Programs to promote quality in long term care settings  
Office of Adult Protective Services  
Dept. of Justice/Office of Elder Justice

### State Legislation (passed)

#### Judicial Hearing Officers in Family Court

Chapter 219 of the Laws of 2002  
Authorizes the creation of Judicial Hearing Officers in family court in Monroe and Erie County to issue ex parte orders of protection for domestic violence victims.

#### Orders of Protection Entered onto Statewide Registries Expanded

Chapter 462 of the Laws of 2002  
Allows for orders of protection issued against intimate partners to also be included in the statewide family protection and warrant registry.

#### Identity Theft Law

Chapter 619 of the Laws of 2002  
Defines consumers and financial institutions as victims of the crime. It sets out a range of penalties for those who aid, attempt or commit identity theft.

#### Predatory Lending Law (A. 11856)

Predatory lending is an unfair lending practice that often takes advantage of elderly consumers. This new law provides for disclosures and counseling for consumers when applying for these high cost loans.

# **TOP TEN TIPS WORKING WITH PEOPLE WHO HOARD**

Authors

Amanda Leis, MSW, Hartley House, N.Y.C.

Susan Siroto, MSW, Search and Care, N.Y.C.

Rosemary Bakker, MS, Weill Medical College, Cornell University, N.Y.C.

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- Let go of ideal notions of cleanliness. Accept the value of your client's clutter, no matter how much it may look like rubbish. Explore realistic or unrealistic hopes for their clutter and accommodate them if possible.
- Focus on life safety issues, eviction prevention, and essential services such as home care and apartment repairs. You have to meet certain standards, but you don't have to exceed them.
- To accomplish the above, team up with a lawyer/tenant advocate or home care agency to find out exactly what level of cleanliness your client needs to achieve and maintain. Check to see if there is a government funded cleaning service in your client's neighborhood that can help with ongoing maintenance.
- Work at the client's pace, but only if you can. A client's "de-cluttering" pace may be much slower than the eviction process. Your lawyer or home care agency can provide the necessary reality check.
- For non-emergency situations, some volunteer organizations will work for "as long as it takes". Before you begin the throwing out process, start with "re-organizing" their belongings. Large plastic crates and wicker baskets can help separate items into categories.
- Be aware of fall and fire risk. Help your clients create a clear pathway from room to room. Test your client's smoke alarm monthly. Pay attention to red flag warnings and seek immediate help. Newspapers stored on top of or inside a gas stove put both your client and their neighbors at fire risk.
- Think outside the box. Clients have been helped to donate or sell their belongings; one woman even sent her "stuff" to relatives in her home country. Informal supports, such as high school students, can help pack up agreed upon donations.
- If you need a cleanout, discuss beforehand how to safeguard the client's belongings during the cleaning process. Have a written contract. Also discuss what to do with valuables that turn up, such as money and jewelry. Be prepared to find a temporary home for pets while the cleanout is being conducted.
- During the cleanout, have a social worker present that already has a supportive relationship with the client. However, clean-outs can be overwhelming to people with severe hoarding behavior. Have a back-up plan if emergency psychiatric services are needed.
- Hoarding is a serious threat to your client's health. It takes a village to deal with this complex and painful disorder. Don't go it alone: share experiences, seek advice and take care of yourself. You'll be better able to help your clients bring some order to chaos-one day, one client at a time.

## Assisted outpatient Treatment

### Kendra's Law

### OMH Interim Report

(Through 12/3/02)

#### ***Outcomes of Judicial Proceedings***

Number of referrals/investigations	7,938
Petitions filed	2,559
Petitions granted	2,433
Percentage of petitions granted	95%

#### ***Characteristics of AOT Recipients***

On average, persons under AOT are 37 and male (68%). Most are unmarried and are living in independent settings in the community (61% are living in such settings, alone or with parents, spouses, friends or other relatives).

#### ***Diagnoses***

Schizophrenia	70%
Bipolar disorder	13%
Co-occurring mental illness and substance Abuse (with mental illness as primary diagnosis)	60%

#### ***Hospitalization/homelessness/arrest/incarceration***

In the three years prior to Court Order	
Psychiatric hospitalizations	91%
Homelessness	20%
Arrests	29%
Incarcerations	18%

#### ***Services received while under AOT***

	<u>Prior to AOT</u>	<u>Under AOT</u>
Case management	52%	100%
Medication management	63%	94%
Substance abuse services	26%	52%
Housing support services	23%	41%

#### ***Significant events***

	<u>Prior to AOT</u>	<u>Under AOT</u>
Psychiatric hospitalization	87%	20%
Homelessness	21%	3%
Arrests	30%	5%
Incarcerations	21%	3%

([http://www.omh.state.ny.us/omhweb/Kendra\\_web/interimreport](http://www.omh.state.ny.us/omhweb/Kendra_web/interimreport))

## Health Law **New Legislation**

### Healthcare Whistleblower Protection

Chapter 24 of the Laws of 2002

Protection for workers who report when they reasonably believe that a violation has occurred that could potentially harm a patient.

### Most Integrated Setting Coordinating Council

Chapter 551 of the Laws of 2002

The Most Integrated Setting Coordinating Council will develop and oversee the implementation of a comprehensive plan to ensure that people of all ages with disabilities receive the services they need in the most integrated settings possible (implements the 1999 U.S. Supreme Court decision Olmstead v. L.C.).

## Article 81

### **Fiduciary Appointments**

#### In General

A guardian is a fiduciary and as such must act with trust, loyalty, and fidelity and make reasonable decisions that protect personal and pecuniary interests of their ward. Fiduciary appointees such as receivers, guardians and guardians ad litem assist the court and it's litigants in many situations. Guardians are entrusted to manage the affairs of vulnerable adults and therefore, like all fiduciaries, should be chosen with utmost care. Fiduciary appointments and behavior has often been the subject of controversy and close scrutiny. Heightened attention was directed to this area in 2000 and resulted in findings of abuse in the appointment process and violations of the fiduciary rules by appointees.

#### New Rules

In response to these findings new rules governing fiduciary appointments were written that involve changes affecting not only guardians but also the attorneys and court evaluators involved in each Article 81 case. These Rules encompass such things as qualifications for appointment, caps on the number of appointments and amount of compensation that fiduciaries may receive. In late 2002 the existing Part 36 of the Rules of the Chief Judge (22NYCRR) were repealed and a new Part 36 of those Rules entitled "Appointments By The Court" were adopted. These rules are effective June 1, 2003. See the NYS Courts website at [www.court.state.ny.us](http://www.court.state.ny.us) for a copy of the new Rules.

## CASES OF INTEREST

### **ABUSE BY POWER OF ATTORNEY**

In the Matter of the Estate of Joseph H. Naumoff, (3<sup>rd</sup> Dept. 2003)

The Court determined that an Agent under a power of attorney breached her fiduciary duty and engaged in self-dealing when she transferred \$58,000 to herself from the principal's (her father) funds. Daughter/Agent failed to establish the father intended that she have the money. Furthermore, just because the daughter and her family lived with her father the distributions could not be justified as reimbursement for services performed. There was no evidence that the father intended to compensate her for her efforts.

### **ARTICLE 9 MENTAL HYGIENE LAW**

In re Weinstock (Shali K.), 742 N.Y.S.2d 477 (Kings County 2002)

A petition seeking assisted outpatient treatment for a patient who had been brought to a mental health facility following an abusive and threatening outburst on the subway is dismissed where there was no credible proof that either the incident on the subway or an assault on a doctor while hospitalized was causally related to a failure to comply with a prior outpatient treatment plan. In fact, there was no evidence that the patient had been subject to any prior outpatient treatment plan. While the patient offered no excuse for his actions, the burden of proof is on petitioner, and the patient is under no obligation to offer any excuse for his behavior. Thus the court accepted the argument that a violent act in the hospital may satisfy the criterion of M.H.L. 9.60 (c)(4)(ii), but denied the petition because the petitioner failed to establish a nexus between the violent act and respondent's treatment failure.

In the Matter of Kwang L., (2d. Dept. 2003)

Kwang's constitutional challenges to Kendra's Law fail on all grounds. Kwang L. raises three constitutional objections to Mental Hygiene Law Section 9.60(n), which sets forth the procedure for removing from the community to a hospital an assisted outpatient who fails to comply with an AOT order. The assisted outpatient may be retained in the hospital for up to 72 hours for an examination to determine if he/she needs involuntary care and treatment. 1) The contention that Section 9.60(n) violates procedural due process because it does not require a pre-removal hearing fails. The brief 72-hour detention does not constitute a substantial deprivation of liberty whereas the government has a strong interest in avoiding time-consuming judicial hearings. Also any detention beyond the 72 hours is governed by Article 9 statutory provisions for involuntary commitment which contain sufficient procedural due process requirements. 2) 9.60(n) does not violate equal protection clauses of the U.S. and state constitutions. New York case law firmly establishes that insanity defendants may properly be treated differently from persons who are subject to civil commitment. 3) Kwang L. failed to establish that Section 9.60(n) violates the Fourth Amendment to the U.S. constitution and Articles I Section 12 of the NYS Constitution because it does not require a finding of dangerousness. On the contrary the law requires a doctor to make several clinical judgments based on the statutory criteria of noncompliance with treatment that has led to

hospitalization, violent acts or threatening behavior which are sufficient to justify removal and detention of the outpatient.

In re Retention of Judge, 745 N.Y.S.2d 885 (Monroe County 2002)

The court ordered the release of a patient with bipolar disorder who was involuntarily admitted to a psychiatric hospital where the hospital, at a hearing requested by the patient on the need for involuntary inpatient care and treatment, failed to establish by clear and convincing evidence that he was in need of retention, and if released, would pose a danger to himself or others. (NY Mental Hygiene Law Sections 9.27, 9.31 and 9.39)

In the Matter of Gregory F., 292 A.D.2d 606 (2d. Dept. 2002)

In a proceeding for permission to administer electro-convulsive therapy to a patient without his consent the Supreme Court denied Patient's request for a second opinion. The Appellate Division reversed stating the patient's diagnosis of paranoid schizophrenia, autism and mild mental retardation indicated a need for an expert second opinion to give substantive effect to the patient's liberty interest

## **HEALTH LAW**

In the Matter of Wyckoff Heights Medical Center v. Luis Rodriguez, 741 N.Y.S. 2d 400, (Kings County 2002)

A mandatory discharge ordering a patient in a health care facility to leave that facility in accordance with the discharge notice served upon him was granted where inpatient services are no longer necessary and an appropriate discharge plan has been established. The facility has complied with all statutory and administrative guidelines governing the discharge of patients, and the fact that the patient is not satisfied with the facility that has agreed to accept him is immaterial. Inasmuch as the patient has acted violently towards the employees of adult homes who have tried to treat him in the past, he has forfeited any claim to their services, and may not demand that he be treated in a specific health care facility of his choosing. The patient's continued presence in the current facility is an abuse that need not be tolerated.

In the Matter of University Hospital of the State University of New York Upstate Medical University, Petitioner for an Order Determining the Validity of a Health Care Proxy Executed by Yvette Casimiro, N.Y. Misc. 2d. (Onondaga County 2002)

The treating hospital maintained that a Health Care Proxy and Living Will were valid and that the physical condition of the patient satisfied the specific criteria to invoke the patient's expressed wishes that the life sustaining treatment be terminated. Respondents, who were the patient's niece and her husband and agents under the proxy, refused to consent to the withdrawal. Respondents argued that their aunt did not understand the meaning of the Living Will when she signed it and had voiced a desire to revoke it. Furthermore she was a devout Catholic and believed that only God could take a life.

The patient's wishes must be established by clear and convincing evidence. In determining whether the hospital met this burden of proof the court considered the following factors: the validity of the advance directives; the medical and physical condition of the

patient both at the time of execution and at present; any intervening factors that may have occurred between the period of execution and the present; the medical testimony and opinions of patient's prognosis; her expressions of desire and intent; and her expressed religious and moral beliefs. The court concluded that the patient by her words and actions had revoked both her Living Will and Health Care Proxy thus both instruments were stricken in their entirety.

Blouin v. Spitzer, 213 F. Supp. 2d 184 (N.D.N.Y. July 22, 2002)

A New York federal court held that the Attorney General had qualified immunity from a 42 U.S.C. Section 1983 suit claiming that they violated the constitutional rights of a patient with mental retardation when they ordered that life-sustaining nutrition and hydration of the patient be continued while she had gastrointestinal bleeding.

## **REPRESENTATIVE PAYEESHIP**

### **Social Security Act Section 407(a)**

The statute says Social Security and SSI funds shall not be "*subject to execution, levy, attachment, garnishment, or other legal process*" The following cases interpret this section of the statute.

Mason v. Sybinski, (7<sup>th</sup> Cir. Feb. 11, 2002)

The Seventh Circuit found that a state's hospital practice, as representative payees, of applying a portion of institutionalized Social Security recipient's benefits toward the cost of their maintenance without their consent did not violate the anti-attachment provision of the Social Security Act (the Act), 42 U.S.C. Section 407 or procedural due process.

Washington State Dept. of social and Health Services v. Guardianship Estate of Keffeler, 2003 U.S. LEXIS 1735

The U.S. Supreme Court upheld Washington State's practice of using Social Security and SSI funds it receives as representative payee for foster children to reimburse itself for the cost of foster care. The Court rejected the plaintiff's contention that the practice constituted "other legal process" within the meaning of the Social Security Act's anti-assignment provision. As urged by the Social Security Administration, the Court adopted an extremely narrow view of the protection afforded beneficiaries by Section 407(a). The potentially far-reaching decision reversed the Washington Supreme Court and seems to overrule Court of Appeals decisions in several circuits.

Huggins v. Pataki, (E.D.N.Y. July 11, 2002)

A federal district court in New York upheld a state statutory procedure under which a judgment creditor can temporarily freeze a judgment debtor's bank account, even when that account consists entirely of Social Security benefits.

## ARTICLE 81

Matter of Ruby Slater, (Sup. Ct. Queens Co.) NYLJ Feb. 11, 2002

Commissioner of Social Services in NYC petitioned for guardianship for a woman who had allegedly been exploited by two home health aides and an attorney. Because of lack of testamentary capacity at the time of execution and undue influence and extraordinary onerous actions of the aides and attorney the court revoked all fiduciary documents executed by Ms. Slater (powers of attorney, health care proxy and a will). The court granted the petition and appointed NY Foundation for Senior Citizens as guardian.

Matter of Emma Jenkins, 293 A.D.2d 612 (2d. Dept. 2002)

Guardian appointed under Article 81 learned from the District Attorney that the IP had transferred property when she had questionable capacity. The Guardian then brought a proceeding seeking to void the deed. The Supreme Court determined that the IP was incapacitated at the time of the transfer and that the transfer was a result of undue influence and fraud. Whether the transfer could be voided was the issue on appeal. The party that had received the property then sold it to a third party. The Supreme Court determined that the third party was a bona fide purchaser and that the deeds could not be voided. The guardian appealed. The Appellate division determined the third party had failed to timely record the deed and thus it was not valid.

Matter of Rose S., 293 A.D.2d 619 (2d. Dept. 2002)

A guardianship Order was modified by deleting the provision determining that the health care proxy executed by Rose S. prior to the guardianship proceeding was valid. A provision was substituted declaring it invalid. Public Health Law Section 2981 presumes every adult is competent to appoint a health care agent. However, where there is medical evidence of mental defect, the burden shifts to the opposing party to prove by clear and convincing evidence that the person executing the document possessed the requisite capacity. In this case the son was the agent under the proxy and failed to prove her capacity at the time in question. Both Rose's treating physician and the hospital record indicated she was suffering from confusion and disorientation at the time the document was executed.

In the Matter of David C., 294 A.D.2d 433 (2d. Dept. 2002)

The Commissioner of Dept. of Social Services brought an Article 81 proceeding for David C. He was not paying his rent, his apartment was not in "proper condition", and eviction proceedings had begun. The Supreme Court, Queens County appointed a guardian and David C appealed. The Appellate Division reversed. "A precarious housing situation and meager financial means do not, without more, constitute proof of incapacity".

In re Rita Levy, 2003 N.Y. App. Div. LEXIS 1802

In this Article 78 proceeding, a guardian seeks a writ of mandamus compelling a Supreme Court judge to hold a bedside hearing under Section 81.36 to allow the incapacitated person, Ms. Levy, to be involuntarily placed in a nursing home and to vacate the judge's prior order

referring the matter to a Special Referee. The guardian's application to modify her powers under 81.36 required that a hearing be held in a timely manner. This case, in particular, needed to be expedited because of the IP's continued hospitalization and the cost incurred. In addition the judge exceeded his authority by referring the issue to a Referee. Article 81 does not authorize such a reference and there is no case law to uphold it. The writ of mandamus to compel an 81.36 hearing was granted.

In the Matter of Verna HH, 2003 N.Y. App. Div. LEXIS 1271

Petitioner and respondent are the children of Verna HH. Prior to the commencement of the Article 81 proceeding the AIP had lived with respondent in Kentucky for ten years. The petitioner had brought her to New York and initiated the proceeding for guardianship. Respondent moves to dismiss on grounds the court lacks jurisdiction. The Supreme Court granted the motion to dismiss finding that Verna had neither property nor sufficient contacts with New York. The Appellate Division reversed. Section 81.04(a)(2) allows for a guardianship proceeding to be brought for a "nonresident of the state present in the state...nothing beyond mere physical presence in the state is required in order to confer jurisdiction".

## NEW YORK STATE SENATE

**INTRODUCER'S MEMORANDUM IN SUPPORT** submitted in accordance with Senate Rule VI.  
**Sec 1**

**BILL NUMBER:** 54622B

**SPONSOR:** HANNON

**TITLE OF BILL:** An act to amend the surrogate's court procedure act,' in relation to health care decisions made by the guardian of a mentally retarded person

**PURPOSE:** To explicitly provide guardians of mentally retarded persons with the authority to make health care decisions for such persons, including decisions regarding life-sustaining treatment under certain circumstances.

**SUMMARY OF PROVISIONS:** Section 1 identifies this bill as the "Health Care Decisions Act for Persons with Mental Retardation".

Section 2 amends section 1750 of the Surrogate's Court Procedure Act regarding guardians of mentally retarded persons, to require the certification that a mentally retarded person is incapable of taking care of himself or herself, which is required for a guardianship, to include a specific determination as to whether the person has the capacity to make health care decisions for himself or herself. It also provides that the absence of such a determination in the case of guardians appointed prior to this act shall not preclude their making such decisions.

Section 3 adds a new section 1750-b to the Surrogate's Court Procedure Act regarding health care decisions for mentally retarded persons. It is comprised of eight subdivisions, as follows:

Subdivision 1 provides that a guardian with health care decision making authority may make any health care decisions which the mentally retarded person could have made himself or herself if he or she had capacity. This includes decisions regarding life-sustaining treatment under certain defined circumstances, except in the case of corporate guardians. It is important to note that, under this bill, corporate guardians retain their current authority to make any health care decision other than a decision to withdraw or withhold life-sustaining treatment.

Subdivision 2 provides the decision making standard for all health care decisions. Specifically, it provides that all health care decisions must be based on the best interests of the mentally retarded person, which must include a consideration of the person's dignity and uniqueness, the preservation, improvement or restoration of the person's health, the relief of the person's suffering, the unique nature and effect of artificially provided nutrition and hydration, and the person's entire medical condition. It is important to note that a consideration of the person's entire medical condition encompasses the full range of factors affecting that persons health, including, for instance, whether that person is pregnant, and if so, the impact of treatment; decisions on the course and outcome of that pregnancy. Such decisions may not be influenced by any assumption that the mentally retarded person is not entitled to the same care afforded to persons without mental retardation, or by financial considerations of any kind.

Subdivision 3 provides that guardians are entitled to all the medical information necessary to make informed decisions regarding the mentally retarded persons care:

Subdivision 4 provides an additional, narrower standard for health care decisions regarding life-sustaining treatment. It provides that the guardian must advocate for the full and efficacious provision of health care, including life-sustaining treatment. In order for a decision to withhold or withdraw such treatment to be made, first the mentally retarded person's incapacity to make such decisions must be recertified. The attending physician must also certify three things: first, that the person is terminal (likely to die within one year), is permanently unconscious, or has a condition requiring life-sustaining treatment which is irreversible and which will continue indefinitely; second, that the life-sustaining treatment would be an extraordinary burden, in light of the persons medical condition and the expected outcome, notwithstanding the persons mental retardation; third, if the decision is to withdraw or withhold artificially provided nutrition or hydration, that either there is no reasonable hope of maintaining life, or the artificially provided nutrition or hydration poses an extraordinary burden. The decision to withhold or withdraw treatment must be made either orally to two people, or in writing with at least one witness. Notice must be given to interested parties, including the Mental Hygiene Legal Service or the Commissioner of Mental Retardation and Developmental Disabilities.

Subdivision 5 provides that interested parties may object to a health care decision, at which point the decision is suspended pending judicial review, unless such suspension is likely to result in the death of the mentally retarded person.

Subdivision 6 provides that interested parties may commence a judicial proceeding in the event of any dispute under this section.

Subdivision 7 provides that a provider must comply with a guardian's decisions, unless it is contrary to the provider's religious beliefs or moral convictions, in which case the mentally retarded person shall be promptly transferred, provided that the provider must 'comply with the guardians decision prior to transfer if the failure to do so is likely to result in the death of the mentally retarded person.

Subdivision 8 grants guardians and providers immunity for any decisions made reasonably and in good faith.

Section 4 of the bill provides that it shall be effective in 180 days.

**EXISTING-LAW:** Guardians of persons with mental retardation, who are appointed pursuant Article 17-A of the Surrogate's Court Procedure Act, have traditionally had the authority to make health care decisions for their wards. Recent case law has disallowed that authority, particularly in the area of life-sustaining decisions.

**JUSTIFICATION:** This bill clarifies that guardians of persons with mental retardation have the authority to make health care decisions, including decisions regarding life-sustaining treatment under certain circumstances. It recognizes the exceptional lifelong responsibility for continued care that parents and siblings often bear for adult family members with mental retardation. Especially during a health care crisis, the need to effectively advocate to enhance, preserve or protect the health of a family member with mental retardation, or to avoid their needless pain and suffering, is overwhelming. Guardianship pursuant to Article 17-A of the Surrogate's Court Procedure Act is central to exercising that responsibility.

However, lack of clear authority regarding provision of life-sustaining treatment has, on occasion, obstructed the guardian's role or, worse, created catastrophic obstacles to relieving desperate health care emergencies. This bill recognizes the imperative of reassuring Article 17-A guardians that, subject to appropriate oversight, they will have the authority to make critical health care decisions for an individual who cannot make those decisions for himself or herself. At the same time, it includes many protections to ensure the rights of persons with mental retardation are adequately protected.

The inconsistent enforcement of guardians, health care decision making authority is, in large part, attributable to a gap in New York law. Under New York common law, a patient has final authority over his or her own health care. Thus, a patient who is competent to make health care decisions can refuse life-sustaining treatment, and such treatment can only be withheld or withdrawn from an incompetent patient if there is clear and convincing evidence that such withholding or withdrawal would have been the patient's own choice. A good argument can be made that this is a useful rule to preserve the autonomy of patients who at one time were competent.

Courts have, however, extended the rule to patients who were never competent to make health care decisions. Since these patients were never able to formulate an opinion on the issue of life-sustaining treatment, the rule requires such patients to be kept alive regardless of the level of their suffering, which is often caused by the life-sustaining treatment itself. This "clear and convincing evidence" rule has been applied to thwart decisions even by court-appointed guardians, who in almost every other respect "step into the shoes" of their wards, and can make any decisions their wards could have made if competent.

In precluding the withholding or withdrawal of life sustaining treatment from mentally retarded persons, the "clear and convincing evidence" rule clearly discriminates against this particularly vulnerable segment of the population by denying them the same choices afforded to competent or formerly-competent patients. Courts, legal scholars, and patient advocates have all begged for a legislative structure allowing the rule to be circumvented in such, cases, where its application is clearly inappropriate. See, e.g., *In re Storar*, 52 N.Y.2d 363, 382-3 (1981). This bill provides such a structure, and clarifies that guardians of mentally retarded persons have the authority to make the full range of health care decisions for them.

In general, the bill reflects four overarching motives: (1) to clarify that decisions regarding life-sustaining treatment are part of the natural continuum of all health care decisions, (2) to allow decisions to end life-sustaining treatment only where the need is clearest (i.e. where patients are profoundly ill and never had the ability to make such decisions for themselves), (3) to utilize existing legal standards wherever possible, and (4) to maintain judicial oversight of close decisions, with a statutory structure incorporating a workable standard for the court.

Article 17-A guardianship was initiated by parents, for parents. For over half a century, guardianship has allowed parents, family members and other persons devoted to persons with mental retardation the standing to advocate for and authorize appropriate medical care, residential choices and other life care decisions. This bill assures that Article 17-A guardians can perform this function even more effectively while addressing critical gaps in the existing law.

**LEGISLATIVE HISTORY:** 2001: Referred to Judiciary.

**FISCAL IMPLICATIONS:** None.

**LOCAL FISCAL IMPLICATIONS:** None.

**EFFECTIVE DATE:** 180 days. 4

### **Elder Justice Act**

- Administration
- Committees/ Advisory Bodies\
- Resource Center and Library
- National Data Collection
- Grants/ Funding
- Long Term Care
- Office of Adult Protective Services
- Dept. of Justice/ Office of Elder Justice

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### **Elder Justice Center Website**

<http://www.usdoj.gov/elderjustice.com>

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### **Judicial Hearing Officers in Family Court**

- Chapter 219 of the Laws of 2002

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**Orders of Protection  
Entered onto Statewide  
Registries Expanded**

- Chapter 462 of the Laws of 2002

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**Identity Theft Law**

- Chapter 619 of the Laws of 2002

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**Predatory Lending Law**

**(A.11856)**

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**Healthcare Whistleblower  
Protection**

- Chapter 24 of the Laws of 2002

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**Most Integrated Setting  
Coordinating Council**

- Chapter 551 of the Laws of 2002

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**Social Security Act  
Section 407 (a)**

**“Social Security and SSI funds  
shall not be subject to execution,  
levy, attachment, garnishment,  
or other legal process”**

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**Lopez v. Wash. Mut. Bank**  
**302 F.3d 900**  
**2002 US App**  
**(9<sup>th</sup> Cir. Cal.)**

**Allows banks to seize incoming  
direct deposits of Social Security  
and SSI funds to satisfy bank  
fees and overdrafts**

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**Article 81**  
**Fiduciary Appointments**

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**Fiduciaries**

- **Receivers**
- **Trustees**
- **Guardians**
- **Guardians ad litem**

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**New Part 36 of the Rules of  
the Chief Judge**

**“Appointments By The Court”**

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**NYS Courts**

**[www.court.state.ny.us](http://www.court.state.ny.us)**

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**The Health Care Decisions Act  
for Persons with Mental  
Retardation**

**• Chapter 500 of the Laws of 2002**

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## 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

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## 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

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## For More Information:

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Phone: 518-486-3451

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## Instructions For The On-Line Submission of Teleconference Evaluations By Individuals

Teleconference participants can submit their individual teleconference evaluations directly on-line at either the agency Internet site or at the agency Intranet site.

On the agency Intranet site participants should go to the following web address (<http://sdssnet5/ohrd/distancelearning/satellite/evaluation/>) and click on "Submit an On-Line Evaluation". On the agency Internet site the address is: <http://www.dfa.state.ny.us/ohrd/satdefault.htm>. Click on "Evaluations", then "Submit and On-Line Evaluation"

The following information is provided to assist in the completion of the on line evaluation form

- This form provides you the opportunity to enter information by typing into a text box or by using a drop down menu to pick (highlight) a selection. The Tab key of your keyboard will advance you to each next field. Your Shift-Tab key will return you to the previous field. Once the last field is completed you must click on the "Submit" button to process your responses. After clicking on the "Submit" button you will be given a confirmation screen. You can review and edit you choices on this screen. Once you are satisfied with your entries, clicking "Confirm" will send your evaluation to the database. Only one submission for each program from each downlink site is allowed.
- You must complete first name, last name, and phone number for your submission to be accepted
- Use the drop down menus to select a program name and the site from which you are reporting
- Please ensure you include the number of attendees
- For each of the four quality measures, please average the individual responses together and report the average response
- For "Comments" and "Suggested Topics" please summarize the comments and topics provided by your attendees
- Once you have completed you evaluation, the results will be immediately tabulated

**Use These Forms To Tabulate And  
Submit A Site-Wide Evaluation**









Target Population					Job Type										
Code	Description				Code	Description				Code	Description				
1	Employed By NYS OCFS				1	Administrator				8	Supervisor				
2	Employed By NYS OTDA				2	Clerical / Support				9	Volunteer Worker				
3	Employed By NYS Dept of Health				3	Consultant				10	Health Care Worker				
4	Employed By NYS Dept. of Labor				4	Direct Services Worker / Caseworker				11	Teacher / Vocational Specialist				
5					5	Eligibility Worker				12	Professional Specialist				
6	Employed By Local District DSS (County DSS, NYC HRA, or NYC ACS)				6	Foster Parent				13	Recreation Specialist				
7	Employed By a non profit or voluntary agency				7	Investigator				14	Other / Not Listed				
8	Employed by any other local (county or city) agency other than local District DSS														
9	Other / Individual Category														
0	County Youth Bureau														
Functional Area															
Code	Description				Code	Description				Code	Description				
<b>Administration</b>					17	Foster Care									
1	Commissioner's Office				18	Juvenile Justice Foster Care				32	Homeless Housing Assistance				
2	Budget Office				19	Private Residential Child Care									
3	Contract Management				20	Teenage Pregnancy Prevention				<b>Department of Health</b>					
4	Finance Management				21	Commission For The Blind and Visually Handicapped				33	Medicaid				
5	Personnel				22	Indian Affairs				34	Managed Care				
6	Quality Assurance				23	Adult Services				35	Department of Health / Other				
7	Training and Workforce Development				24	Services / Other									
8	Support Services				25	Legal Affairs Counsel's Office				<b>Department of Labor</b>					
<b>Services</b>					<b>Temporary and Disability Assistance</b>					36	Welfare To Work				
9	Large - Over 25 Bed Facility				26	Energy Programs				37	Department of Labor / Not Listed				
10	Small - 25 Beds and Under Facility				27	Food Stamps				38	Other / Not Listed				
11	Program Services				28	Public Assistance									
12	Program Support and Community Services				29	Child Support Enforcement									
13	Adoption				30	Disability Determination									
14	CPS				31	ES / Other									
15	Day Care														
16	Domestic Violence Prevention														
County		County		County		County		County		County		County		County	
Albany	01	Chenango	08	Essex	15	Jefferson	22	Niagara	29	Otsego	36	Schohaire	43	Tompkins	50
Allegany	02	Clinton	09	Franklin	16	Lewis	23	Onieda	30	Putnam	37	Schuyler	44	Ulster	51
Broome	03	Columbia	10	Fulton	17	Livingston	24	Onondaga	31	Rensselaer	38	Seneca	45	Warren	52
Cattaraugus	04	Cortland	11	Genesee	18	Madison	25	Ontario	32	Rockland	39	Steuben	46	Washington	53
Cayuga	05	Delaware	12	Greene	19	Monroe	26	Orange	33	St. Lawrence	40	Suffolk	47	Wayne	54
Chautauqua	06	Dutchess	13	Hamilton	20	Montgomery	27	Orleans	34	Saratoga	41	Sullivan	48	Westchester	55
Chemung	07	Erie	14	Herkimer	21	Nassau	28	Oswego	35	Schenectady	42	Tioga	49	Wyoming	56
														Yates	57
														New York City	65