

# Elder Abuse in Guardianship Cases: A Legal Resource Guide

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THIRD EDITION



The Harry and Jeanette  
**Weinberg Center for Elder Justice**  
AT THE HEBREW HOME AT RIVERDALE



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This Guide is the result of persistent, diligent efforts by many committed professionals. Many of the authors and editors started this work on the first edition over 10 years ago and their contributions remain the foundation for the guide.

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**Project Guardianship** was founded in 2005 as a project of the Vera Institute of Justice (Vera). In partnership with the New York State Office of Court Administration, Vera launched Project Guardianship to fill a gap in guardianship and older adult services for New Yorkers.

Today, Project Guardianship is an independent nonprofit agency providing person-centered, court-appointed guardianship for a largely low-income population of aging adults and people with disabilities and mental illness who lack family or other support. Since its founding, Project Guardianship has demonstrated that a program centered on human dignity can enable people with limited resources and support to live more independently, while also saving public dollars.

Project Guardianship uses a multidisciplinary team model to serve some of the court's most complex cases. Teams of lawyers, case managers, finance managers, and benefits specialists provide those who need guardians with a high-quality continuum of care, regardless of their ability to pay. Project Guardianship specializes in maintaining clients' residency in their communities and aiding clients' return to their own homes after prolonged nursing home or hospital stays.

Additionally, Project Guardianship casts a spotlight on shortcomings in the guardianship and older adult services safety net. Through research and policy advocacy, Project Guardianship seeks to promote models that address critical needs for individuals, save public dollars, and allow key governmental institutions to operate more effectively. Project Guardianship educates decision makers at the local, state, and federal levels about current gaps in care, the growing population in need of services, and practical approaches for addressing those needs.

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# Introduction to Elder Abuse in Guardianship Cases

Elder abuse is more prevalent than most people assume. In fact, the Centers for Disease Control and Prevention (CDC) estimate that 10 percent of people over 60 experience abuse.<sup>1</sup> Globally, an estimated one in six older adults experience abuse each year.<sup>2</sup> Economic abuse is particularly prevalent, with 4.1% of all older adults in New York reporting a major financial exploitation event.<sup>3</sup> The estimated value of assets taken from older adults by financial abuse increases dramatically with each successive study conducted and has most currently been calculated at \$36.48 billion annually nationwide.<sup>4</sup> Even these stark numbers fail to adequately capture the true scope of elder abuse. According to Under the Radar: New York State Elder Abuse Prevalence Study, for every elder abuse incident documented by government agencies, nearly 23 others remain hidden.<sup>5</sup> This statistic indicates that the vast majority of elder abuse victims are not being reached or served by the infrastructure and resources currently in place to protect them.

The risk of incapacity increases as a person ages.<sup>6</sup> Physical frailty, complex medical needs, changing cognition, isolation, and emotional and environmental changes become increasingly likely as people age. Furthermore, diminished capacity is associated with lack of judgment, impaired reasoning, and memory loss, heightening the risk of abuse. Older adults with diminished capacity who have not appointed a surrogate decision maker may need a guardian to meet their personal and property management needs. Facts indicating elder abuse are often either the impetus for initiating a guardianship or emerge over the course of the guardianship process.

As leaders in the fields of elder justice, elder abuse prevention, and guardianship, the Weinberg Center and Project Guardianship have partnered to create this guide for legal practitioners involved in guardianship proceedings.

Our shared goal is to provide tools and strategies by which legal professionals can better identify, respond to, and remedy incidences of elder abuse that arise within the context of a guardianship. The often insidious and covert nature of elder abuse and exploitation demands that guardians and other advocates remain alert and diligent in their investigation and ongoing monitoring of clients' financial circumstances and relationships. If abuse is suspected or discovered, the guardian must take steps to protect their client's physical safety, safeguard their assets, and restrain and remove exploitive forces and persons from the client's life.

## INDICATIONS THAT A PERSON MAY—OR MAY NOT—NEED A GUARDIAN

Guardianship pursuant to Article 81 of the New York Mental Hygiene Law mandates the least restrictive form of intervention to meet the personal and property management needs of persons alleged to lack capacity in order to ensure the greatest degree of independence and self-determination.<sup>7</sup> Guardianship can be sought when an interested or concerned party believes that a person, because of their physical and/or functional limitations, is unable to manage their life independently, and as a result, may be at risk of harm. While guardianship may be appropriate in such circumstances, the appointment of a guardian inherently means a reduction in autonomy and agency, and it is possible that less intrusive options can address the risks faced and services needed by the individual.<sup>8</sup> If resources exist, such as a power of attorney or health care proxy, the personal needs and property management of the individual may already

be adequately provided for, making a guardianship an unnecessary and excessive intrusion upon the individual's liberty interests.<sup>9</sup> With this in mind, guardianship should be pursued as a last resort, where there are insufficient available resources or adequate alternatives to protect the individual.<sup>10</sup>

A court may appoint a guardian if it determines that a guardian is necessary to provide for the individual's personal needs, including food, clothing, shelter, health care, safety, or to manage their property and financial affairs.<sup>11</sup> The person must either agree to the appointment or the petitioner must prove, by clear and convincing evidence, and through specific factual allegations, that the individual is incapacitated.<sup>12</sup> The petitioner has the burden to show that the alleged incapacitated person (AIP) is likely to suffer harm because he or she is unable to provide for their own personal needs and/or property management, and that they cannot adequately understand and appreciate the nature and consequences of such inability.<sup>13</sup>

A finding of incapacity involves an analysis of the functional abilities and limitations of the individual. A court must assess the AIP's ability to manage their activities of daily living (ADLs)<sup>14</sup> and whether there is an appreciation of the consequences of any inability to manage those activities.<sup>15</sup> The assessment also considers the individual's personal, property, and financial demands, the resources available to assist the person with those demands, and whether the person suffers from any physical illness or mental disability.<sup>16</sup>

A guardianship is appropriate for personal needs in order to assist a person who is no longer able to care for their own well-being. Such incapacities may stem from medical conditions causing severe loss of cognitive abilities, such as dementia, Alzheimer's, or Huntington's disease, or other restraints, both physical and mental. Indications of cognitive decline may include an individual's inability to administer their own medications<sup>17</sup> or ambulate,<sup>18</sup> the consumption of spoiled or incompletely cooked food,<sup>19</sup> or a demonstration of carelessness resulting in dangerous situations, such as kitchen fires.<sup>20</sup>

These same medical conditions and resulting decline of physical and cognitive abilities may also impact a person's ability to effectively manage their property and financial affairs. Indications that a guardianship may be appropriate for financial management include a person's inability to pay their bills, mounting debt,<sup>21</sup> or irrational expenditures.<sup>22</sup> Often, unchecked financial abuse, in the form of people stealing or inappropriately commingling the individual's funds, can be a sign that a guardianship is necessary.<sup>23</sup> In addition, a guardianship may be necessary when the individual is unable to maintain a livable home, especially when such circumstances endanger the person's ability to continue living in their current residence and create a risk of homelessness.<sup>24</sup>

Courts have found that an individual's difficulty taking care of their personal needs or property management alone may not warrant a guardianship. For example, a person's living arrangements, precarious housing situation, meager financial means, hygiene habits, or peculiar, bizarre, eccentric or erratic behavior alone does not warrant a guardian.<sup>25</sup> The AIP must be unable to adequately understand and appreciate the nature and consequences of their inability to provide for their personal and/or property management needs.

Under the statute, if the AIP can recognize the nature and consequences of their disability, the appointment of a guardian is only appropriate if an individual agrees to it.<sup>26</sup>

If a guardianship is necessary, the individual's affairs must be managed in accordance with the individual's wishes, preferences and desires,<sup>27</sup> to the greatest extent possible under the circumstances. In accordance with the underlying policy and intent of Article 81, guardianship should provide the least restrictive form of intervention possible.<sup>28</sup> With this in mind, courts should attempt to limit guardian's authority to whatever is necessary to meet the needs of the AIP.<sup>29</sup> For example, courts may limit the scope of the guardian's powers, the duration of the guardianship, or appoint a guardian for a specific purpose or single transaction.<sup>30</sup>



# ELDER ABUSE AND EXPLOITATION IN THE CONTEXT OF GUARDIANSHIP

## Elder Abuse and Exploitation by a Third-Party Abuser

Even where a guardianship proceeding has commenced and a guardian is appointed, acts of exploitation and abuse may remain undiscovered or persist. In some cases, the exploiter may disappear until the court proceedings conclude, while in others, they may rush to financial institutions to withdraw funds before a guardian is commissioned<sup>31</sup> and banks are notified. In other circumstances, the courts and parties to the proceeding, including petitioners and the court evaluators appointed to investigate an older adult's circumstances prior to the guardian's appointment, may not uncover evidence of existing abuse. New facts concerning suspicious transactions or relationships may arise during the course of the guardianship. For example, a newly executed will may be discovered by the guardian, or, in the process of marshaling assets, the guardian may notice large or frequent cash withdrawals on banking records of an IP who is homebound, or otherwise incapable of making the transaction.

Elder abuse may not always be apparent upon the commencement of a guardianship because it can take various forms that are not easily visible. The most obvious form of elder abuse is physical abuse, which can range from mishandling by a caregiver, causing bruises on the older adult's arms, back, or legs, to more serious physical injuries caused by criminal acts, including broken bones, restraint or burn marks.

Complaints by clients or caregivers, or observations of injuries during home visits, hospitalizations, and in long-term care settings demand the guardian's immediate attention. Indications such as pressure ulcers, poor hygiene, inappropriate living conditions, lack of adequate nutrition and medicine may be signs of deeper abuse or neglect. Although such injuries

and symptoms are not in themselves conclusive evidence of abuse or neglect, they should be immediately and thoroughly investigated, and the proper authorities should be notified.

Financial exploitation, sexual abuse, and psychological abuse may be less obvious, and may be hidden or explained away by the victim to protect family members or may be unrecognized or forgotten by a cognitively impaired individual. Because these forms of abuse may be less apparent, particularly where they leave no physical trace, it is important that a guardian be aware of the ways these issues might manifest and investigate any areas of concern.

## Elder Abuse and Exploitation by the Court-Appointed Guardian

The appointment of a guardian is not a panacea for all abuse, neglect, or exploitation. In some circumstances, the guardianship itself has become an instrument for perpetrating such abuse. Beginning in 2004, in the wake of several sensational news accounts of guardianship abuse that captured the public's attention, the Government Accountability Office issued a series of reports citing serious deficiencies in government monitoring and oversight of court-appointed guardians.<sup>32</sup> The most recent report, issued in 2016, found continued lack of comprehensive, nationwide data collection regarding court-appointed guardians.<sup>33</sup> The report also cites some important local, state, and federal initiatives that mark a move toward greater transparency and oversight, including Health and Human Services, Administration on Aging's National Adult Maltreatment Reporting System (NAMRS).<sup>34</sup> NAMRS allows standardized data submissions by state Adult Protective Services (APS) agencies.<sup>35</sup>

NAMRS reports have cited incidents in New York, including a case where an attorney-guardian billed a client \$850 in legal fees to deliver birthday cake and flowers to a client at a nursing home and another where a guardian stole more than \$4 million from 23 clients.

In 2013, the New York State Unified Court System established a model statewide Working Interdisciplinary Network of Guardianship

Stakeholders (WINGS). The purpose of the WINGS initiative is to bring together delegates from various disciplines to serve as a sustainable collaborative mechanism for strategic planning and action to improve New York's adult guardianship system.<sup>36</sup> Additional state WINGS groups have been established across the country with the aim of ensuring more uniform guardian accountability and fiduciary standards.<sup>37</sup>

WINGS' primary strategy for targeting guardianship abuse is improvement of monitoring practices, such as the "establishment of databases and auditing systems, use of investigators, imposition of sanctions, and structured protocols for review of egregious cases to identify ways to prevent similar outcomes."<sup>38</sup> Unfortunately, this effort has been underfunded and has lacked the support needed to effectuate significant change. Consequently, WINGS groups are struggling to achieve long-term systematic reform.<sup>39</sup> A major problem for WINGS groups is the lack of reliable government data regarding the prevalence of elder abuse. Reports of abusive guardians still appear in the news, however, associated with agencies such as nonprofit guardianship companies and hospital systems.<sup>40</sup> In 2020, the American Bar Association (ABA) Commission on Law and Aging published a briefing paper that reflected the difficulty WINGS is having identifying and combating elder abuse.<sup>41</sup>

Despite the obstacles, progress has been made. Substantial short-term improvements have been accomplished by WINGS in refining the guardianship process, promoting less restrictive options to guardianship, and addressing guardianship abuse. WINGS facilitated more training for judges and court staff and began gathering data regarding current practices to assess need.<sup>42</sup> WINGS' promotion of less restrictive alternatives to decision making and identification of gaps in services aim to reduce unnecessary and overbroad guardianships.<sup>43</sup>

In 2018, Project Guardianship published a report on the state of guardianship and the availability and sufficiency of guardianship services in New York entitled *Incapacitated, Indigent, and Alone: Meeting Guardianship and Decisions Support Needs in New York*.<sup>44</sup> The report identifies a number of systemic issues that contribute to abuse during the pendency of the guardianship hearing and after the appointment of a guardian, including a lack of standardized forms that would specifically prompt for allegations of abuse by petitioners, deficiencies and delays in reporting by guardians, and lack of oversight by courts. The report considers the dynamics of elder abuse within guardianships and includes recommendations to address these areas of concern.

## Elder Abuse

According to the CDC, "elder abuse is an intentional act, or failure to act, by a caregiver or another person in a relationship involving an expectation of trust that causes or creates a risk of harm to an older adult."<sup>45</sup>

Elder abuse includes physical abuse, emotional or psychological abuse, sexual abuse, financial exploitation, and neglect.<sup>46</sup>

## TYPES OF ABUSE

Elder abuse is perpetrated and manifests in a number of different forms. All forms of abuse are exertions of power and control over the target of abuse. In the context of a guardianship proceeding, all involved

parties must be aware of the unique ways that people causing harm can exert power and control over an older adult with limited capacity.<sup>47</sup>

It is important that guardians and other guardianship stakeholders understand the indicators of various types of abuse to improve early identification and intervention and mitigate harm to the person under guardianship.

**Physical Abuse** is the nonaccidental use of force that results in bodily injury, pain or impairment. Examples include being slapped, burned, cut, bruised or improperly restrained.<sup>48</sup> In addition to bodily harm, physical abuse engenders great fear in the target of abuse. Indications of physical abuse may include

unexplained physical injuries, broken bones, pressure marks, and abrasions.

**Psychological/Emotional Abuse** is the willful infliction of mental or emotional anguish by threat, humiliation, intimidation or other abusive conduct, including but not limited to, frightening or intimidating an older adult.<sup>49</sup> Examples include name-calling, “the silent treatment,” insults, threats, isolation, treating the older adult like a child, and controlling behavior. Indications of emotional/psychological abuse may be the individual’s unexplained withdrawal from normal activities, a change in alertness, self-destructive behavior, unusual depression/crying, and social and physical isolation.<sup>50</sup>

**Sexual Abuse** is nonconsensual sexual contact of any kind, including but not limited to forcing sexual contact or forcing sex with a third party.<sup>51</sup> Examples include nonconsensual touching, fondling or kissing, rape, taking sexually explicit photographs, and causing exposure to explicit sexual content.<sup>52</sup> Indications of sexual abuse may be bruises around the breasts or genital area and torn or bloody clothing or undergarments.

**Economic Abuse/Financial Exploitation** is the improper use of funds, property, or resources by another individual. Examples include fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers, and denial of access to assets.<sup>53</sup> Indications of economic abuse/financial exploitation include confusion about finances and transactions, activity deviating from usual banking patterns, requests for additional ATM cards or first time use of ATM card, opening a joint account, changing a power of attorney, changing an account beneficiary, making investments counter to self-interest, sudden property transfers or changes to a will, new authorized signers on signature cards, mail redirected to a new address, checks written out of numerical order, increased occurrence of bounced checks/overdraft fees or low balances, and large withdrawals from previously inactive accounts.

**Neglect**<sup>54</sup> is the failure by a caregiver or other person in a relationship of trust to protect an elder from harm or the failure to meet needs for essential medical care, nutrition, hydration, hygiene, clothing, basic ADLs or shelter, which results in a serious risk of compromised health and/or safety, relative to

age, health status, and cultural norms.<sup>55</sup> In New York, there is no affirmative duty to provide care to an older adult who needs assistance by virtue of familial or other intimate relationship with that older adult. Deciding not to participate in an older adult’s care is not, by definition, abusive. Essential to the definition of neglect as a type of abuse is the pre-existence of a caregiving relationship. In the context of that relationship, failure to provide care or prevention of an older adult from accessing care may be considered abuse. Indications of neglect include malnutrition, dehydration, pressure marks, inappropriate use of medication, and lack of access to assistive devices.

## IMPACT OF TRAUMA

For older adults who have experienced abuse, the impact of this trauma can be far reaching. Trauma is “an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional, or spiritual well-being.”<sup>56</sup> Trauma can stem from interpersonal events such as abuse, singular occurrences such as accidents, or more sweeping cultural or historical experiences such as war, natural disasters, or racial injustice. Research suggests that early life trauma is associated with the experiencing of subsequent trauma later in life. For many older adults, elder abuse may be the most recent in a series of traumas accumulated over a lifetime. In an older adult, current trauma stemming from elder abuse may trigger responses to past trauma, with ranging impact.

Trauma can have a variety of physical, cognitive and psychological effects, which may continue to manifest throughout an individual’s life decades after a trauma has been experienced. Common effects of trauma include: headaches; changes in sleep patterns; increases in use of alcohol or drugs; feelings of fear, depression, or anxiety; nightmares or flashbacks; feelings of detachment; and difficulties with attention and memory.<sup>57</sup>

It is important that professionals working with older adults throughout the guardianship process have a general understanding of trauma and how it can manifest because of the pervasiveness of trauma, and its wide ranging and long-lasting impact.

# Elder Abuse and Guardianship

Guardianship proceedings present judges, counsel, guardians, and other stakeholders a unique insight into the lives of those before the court. They provide an opportunity to recognize and remedy abusive situations at any stage of the proceeding. This section explores the unique means of identifying and responding to elder abuse at the pre-petition, the pre-adjudication, and the post-appointment stages of an Article 81 guardianship proceeding.

## PRE-PETITION

Because guardianship is a remedy of last resort, it should be sought only when all other less restrictive measures have been exhausted. Specifically, in cases of elder abuse, it is critical to determine whether there are appointed decision makers (for example, through a power of attorney or health care proxy document) or default decision makers (for example, through the Family Health Care Decisions Act) who can adequately assist without court intervention and the diminishment of rights inherent in the appointment of a guardian.

It is important to remember that the mere existence of an appointed decision maker is not sufficient to protect a person experiencing harm or to avoid guardianship. Powers of attorney (POAs) or healthcare proxies can be leveraged by a person causing harm as a tactic of power and control. When determining whether surrogate decision makers exist, efforts must be made to determine whether the documents were appropriately executed and whether the surrogate has breached their fiduciary duty to the principal.<sup>58</sup>

Even where an appointed decision maker is ready and willing to assist, these potential sources of social support may be unable to effectively exercise their authority, having been denied access to the AIP or denied important information by the abuser. In these cases, professionals should prioritize reengagement with those supportive individuals who may have been excluded by an abuser in the past to determine

whether they can assist the person experiencing harm or make decisions on their behalf.

## Assessment of Capacity

Capacity is a person’s ability to understand the nature and effects of their actions and decisions. There is a difference between clinical and legal capacity. A clinical understanding of capacity allows for a nuanced understanding of the gradation between capacity, diminished capacity, and a lack of capacity. Under Article 81, legal capacity is binary and task specific; an individual can have the requisite legal capacity in one instance but not in another. A person’s legal capacity depends on their understanding and ability to perform a specific task in a specific instance.<sup>59</sup>

Many factors affect capacity including the typical impacts of aging,<sup>60</sup> stroke, disability, trauma history, mental health status, and dementia. Importantly, some circumstances contributing to diminished capacity—including dehydration and certain medical conditions—are temporary and reversible. Other circumstances affecting capacity—including dementia, Parkinson’s disease, and coma—are more permanent, and in some cases, progressive.

Protracted medical neglect and trauma, which are hallmarks of abuse, can have profound effects on an older adult’s mental state. Confusion, short term memory impairment, and trauma responses can be mistaken for cognitive impairment. It is critical to allow time and a safe, therapeutic environment for an individual to medically stabilize prior to a final determination of incapacity.

Under Article 81, a legal finding of incapacity requires a showing, by clear and convincing evidence, that the AIP is likely to suffer harm because they are unable to provide for their own personal needs and/or property management and that they cannot adequately understand and appreciate the nature and consequences of such inability.<sup>61</sup>



## Supported Decision Making

Supported decision making (SDM) describes a process for decision making in which a person maintains decisional autonomy by selecting a trusted person or persons to support them in their decision-making process.<sup>62</sup> This support can include helping access information, deliberate options, and discuss potential outcomes. The SDM model focuses on the identification of specific functional concerns (for example, financial exploitation, care coordination, or a housing issue) and available social or community supports (for example, a family member, friend, or community social service agency) that can enhance a person's ability to plan and make decisions to address those concerns.<sup>63</sup>

This process can be formalized through a document or contract. An increasing number of state legislatures and courts have recognized SDM as an alternative to guardianship.<sup>64</sup> In 2022, New York State enacted Article 82 of the Mental Hygiene Law, which enshrines supported decision-making agreements as a recognized tool for assisting persons with an intellectual, developmental, cognitive, and/or psychosocial disability in making autonomous decisions about their lives.<sup>65</sup> Pursuant to Article 81's directive that a guardianship should seek the least restrictive intervention possible, SDM should be considered before seeking guardianship.<sup>66</sup> The ABA's PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making is a tool to assist legal professionals in identifying and implementing SDM options.<sup>67</sup>

## PRE-ADJUDICATION

Even when a guardianship is the only practicable option for safeguarding the well-being of an AIP, the Article 81 directive for the "least restrictive form of intervention" requires that the court delegate "only those powers which are necessary to provide for that person's personal needs and/or property management" while "affording that person the greatest amount of independence and self-determination in light of that person's understanding and appreciation of the nature and consequences of his or her functional limitations."<sup>68</sup>

## Petitioning for Guardianship

An Article 81 guardianship is commenced by the filing of a petition and the signing of an order to show cause (OSC) by the presiding judge.<sup>69</sup> This petition can be filed by the AIP themselves, a presumptive distributee of the AIP, an executor of or beneficiary of the AIP's estate, a trustee of a trust that the AIP is a grantor or beneficiary of, a person that resides with the AIP, a person "otherwise concerned with the welfare" of the AIP (including a corporation or a public agency like APS), or the chief executive officer of a facility in which the AIP is a patient or resident.<sup>70</sup> Because the petitioner has the burden to show that the AIP is in need of a guardian,<sup>71</sup> it is vital that the petition contains specific factual allegations about why the AIP is in need of a guardian. When the AIP is experiencing abuse, the facts of the abuse can be an important component of these allegations.

An OSC is an alternative way of initiating a motion, which the applicant submits ex parte to the court. If the judge decides to grant the OSC, it is signed and returned to the applicant, who must then serve it on all other appropriate parties in the manner and timing directed by the court. In Article 81 cases, petitioners file a proposed OSC with their petition. If the judge grants the OSC, it is signed and returned to the applicant, who must then serve it on all other appropriate parties.<sup>72</sup>

Some petitioners may seek to become guardian to expand their power and control over the AIP, for example to gain access to financial accounts. There are cases where the petitioner in the guardianship case is also the respondent in a collateral litigation, such as a family offense proceeding or matrimonial action, where they have been accused of abusive behavior. Because there is no current mechanism to affirmatively screen for such litigation, it is important for the court and any appointees, in particular the court evaluator and counsel to the AIP, to make inquiries into the existence of any collateral proceedings and consider the motivations of the petitioner in bringing the guardianship proceeding.

## Elder Abuse and Confidentiality

Confidentiality concerns can arise in a number of contexts during the guardianship process, including issues of attorney-client privilege and the release of sensitive medical information. In cases where there is alleged elder abuse, the disclosure of information can create additional risk factors for the AIP.

If there is concern about the person causing harm having access to confidential information contained in the petition, the petitioner may request that the petition or other court records be sealed.<sup>73</sup> While the statute does not require service of the petition on all parties, the petition may be accessible to parties during the course of the proceeding. When the AIP may be at risk of further harm, a request may be made of the court for an in-camera inspection of information that is relevant for the court to know, but that should be kept out of public reach.

There may be times when an attorney who previously represented, or is currently representing a client, is in the best position to recognize signs of abuse and is unable to address it within the scope of their representation. The attorney may have confidentiality concerns when considering whether to take action to protect their client, for example by reaching out to service providers or commencing a guardianship proceeding. Generally, "a lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."<sup>74</sup> Any scenario in which emergency medical attention is appropriate likely falls under this exception. In addition, there may be situations where issues of capacity alone create a level of danger to the client that may permit breaching confidentiality.

When an attorney reasonably believes that a client has diminished capacity, is at risk of "substantial physical, financial or other harm," and is unable to act in their own interests, the attorney may take "reasonably necessary protective action" including consulting with third parties and seeking a guardian ad litem or a guardian of person or property.<sup>75</sup> The New York rules of professional responsibility explicitly state that an attorney who behaves in this way is not

violating attorney client confidentiality as long as the disclosures are "reasonably necessary to protect the client's interests."<sup>76</sup> An attorney should refrain from sharing confidential information regarding a client with diminished capacity to third parties until the attorney has determined it is unlikely that the third party will act adversely to the client's interests.<sup>77 78</sup>

Petitioners, respondents, and court personnel should be mindful of other privileges that must be respected, regardless of allegations of incapacity. In particular, the testimony of treating doctors and psychiatrists, as well as the inclusion of medical information or documentation in the guardianship petition or any other court papers could potentially violate the Health Insurance Portability and Accountability Act (HIPAA) or physician-patient privilege.<sup>79</sup> It is important that the court's assessment of capacity under Article 81 is a functional assessment and not a medical one. While sometimes relevant, medical information and diagnoses are not required in an Article 81 proceeding and should not be the centerpiece of a case for guardianship. Where medical evidence is subject to HIPAA or physician-patient privilege is relevant, a petitioner or court evaluator may request a court order to view medical records, speak with medical personnel, or hire an independent medical expert to evaluate the AIP. When medical information is integrated into a court evaluator's neutral report, the proceeding is more likely to remain focused on determining the AIP's functional capacity. Courts will generally classify APS psychiatrists as "examining" rather than "treating" physicians, whose observations, records, and testimony are therefore not privileged, although it has been argued that some level of privilege should still apply, at least insofar as the APS psychiatrist has engaged in diagnosis or any kind of therapeutic relationship with the AIP.<sup>80</sup>

## Civil Remedies to Address Elder Abuse

While petitioners may sometimes have a clear understanding of the full scope of circumstances faced by an AIP at the time a case is commenced, it is often true that the specific details of the finances, personal property management, or conditions in the home that lead a person to need a guardian



are unclear to the petitioner at the time of filing. Previously unknown third parties, family members, property, assets, and bills will often surface during the course of the guardianship proceeding, or even after the guardian has been appointed. It may prove necessary for a petitioner, third party, or duly appointed temporary guardian to seek additional relief from the guardianship court to prevent, stop, and/or redress incidents of elder abuse during or after a guardianship proceeding.

## Utilizing the Order to Show Cause

Generally, it will be necessary for a party to move the court for relief if the authority needed to address abuse has not been vested in a temporary guardian or other appointed decision maker. For litigants, the use of an OSC has two main advantages over the filing and service of a notice of motion: (1) The court's direction of the method of service makes it a more flexible tool that can accelerate the timing of a hearing and provide alternative ways of sending the papers to other parties entitled to notice, which can be critical where emergency relief is sought, and (2) the OSC, upon signing by the judge, affords the possibility to seek interim relief to mitigate any harm that might occur before a hearing can be held on the application.

When seeking to address elder abuse, an OSC can be utilized to request the following relief:

### Temporary Guardian

Although Article 81 sets forth a prompt timeline for resolution of guardianship cases,<sup>81</sup> these cases often exceed the 28-day statutory timeframe, sometimes taking years to resolve. This long process can be particularly detrimental in guardianship cases involving elder abuse, where emergency action is frequently required to address or prevent harm. The court must balance the need for immediate intervention against potential infringement on the rights of the AIP. In some jurisdictions, particularly those with less access to court evaluators, temporary guardians serve an important role in the case investigation process.

The appointment of a temporary guardian may be required to address immediate safety risks. For example, a temporary guardian may be necessary to access medical records, arrange for medical

treatment, or temporarily place the AIP in a safer housing situation. In cases involving financial exploitation, appointment of a temporary guardian may be necessary to safeguard assets and ensure that financial resources are used for the benefit of the AIP.

### Procedure

Courts have authority to appoint a temporary guardian for an AIP under New York Mental Hygiene Law Section 81.23(a)(1). This request can be made in the petitioner's initial OSC or at any time before the appointment of a guardian. The court may also, *sua sponte*, determine that a temporary guardian should be appointed during the pendency of the proceeding.<sup>82</sup> When the AIP's safety is at immediate risk, the court may appoint a temporary guardian for an AIP without first holding a hearing.<sup>83</sup> Notice of appointment of a temporary guardian shall be given to the AIP, and any person having custody or control over the AIP's person or property, as the court may prescribe.

### Grounds

Pursuant to New York Mental Hygiene Law Section 81.23(a)(1) the court can appoint a temporary guardian upon showing of danger "in the reasonably foreseeable future to the health and well-being of the [AIP,] of waste, misappropriation, or loss of [the AIP's] property." In evaluating this danger, the court will consider the immediacy of the risk and other factors like instances of physical or psychological abuse, previous reports of domestic disturbances, and issues surrounding financial health when making a determination.<sup>84</sup>

### Consequences

Once appointed, a temporary guardian functions as a guardian for the AIP. The temporary guardian shall have powers specifically enumerated by the court. The term of appointment cannot extend beyond the appointment of a permanent guardian or dismissal of the case. Prior to the expiration of the term of the temporary appointment, the temporary guardian must report to the court all actions taken pursuant to the order of appointment.

### Injunctive Relief/Temporary Restraining Order

#### Procedure

New York Mental Hygiene Law Section 81.23(b) provides a mechanism to request injunctive relief

and/or a temporary restraining order (TRO) to maintain the status quo during the pendency of the guardianship proceeding and prevent further abusive actions. This relief can be used to prevent contact with the AIP, restrain certain actions, stop financial transactions, secure the AIP's residence, and may also be utilized to halt proceedings in other courts pending the outcome of the guardianship. The Uniform Civil Rules for the Supreme Court & The County Court generally prohibit a party from seeking a TRO *ex parte*, i.e., without notice to the affected parties to the proceedings. Pursuant to 22 NYCRR 202.8-e, the person applying for a TRO must give advance notice of the time, date, and place where the application will be made and supply the opposing parties with the papers enough in advance to allow them to appear and contest the application.

A petitioner, guardian, or other party to a guardianship proceeding who is seeking to bring an application for a TRO to prevent or stop abuse or exploitation may rightly be concerned about the potential consequences of giving advance notice to an alleged perpetrator of abuse. The rules permit a party applying for a TRO to do so without giving such advance notice, provided they show that "there will be significant prejudice to the party seeking the restraining order by giving of notice."

### Grounds

Injunctive relief and/or a TRO is proper when the court believes that without it, the health, safety, or welfare of the IP or AIP would be endangered and/or the property of the IP or AIP would be dissipated to that person's detriment.

### Consequences

If granted, the request for injunctive relief and TRO is granted, the party against whom it is directed is legally prevented from undertaking the proscribed action. If the party persists in their behavior or takes a prohibited action, they may be subject to both criminal<sup>85</sup> and civil penalties.

While an injunction or TRO may operate in a similar fashion to an order of protection, insofar as they may restrict a third party from taking certain actions against the protected person, their enforcement mechanisms may not be as simple as those of an order of protection. In an attempt to streamline

enforcement of a TRO granted during Article 81 proceedings, a New York Supreme Court judge recommended a freestanding form for TROs that closely mirrors the format of a criminal court order of protection.<sup>86</sup> This facilitates ease of use by police officers who would be called upon if and when the order is violated.

### Subpoena Power

Subpoenas can be an important tool for fact finding in an Article 81 case. Gathering relevant documents and interviewing people involved in the AIP's life is particularly vital to understanding elder abuse cases. In cases with an appointed court evaluator, the court evaluator will be a vital component of the investigation. Article 81 does not confer specific subpoena power upon the court evaluator, but the court evaluator may request that the court order the disclosure of records that may be needed to prepare their report, including, for example, bank and medical records.<sup>87</sup>

### Procedure

Under New York Mental Hygiene Law Section 81.23(b)(3)(ii), the court is able to confer subpoena power upon the attorney for the petitioner. This allows the attorney to subpoena documents (bank records, medical records, credit reports, and property transfers) and people who are relevant to the guardianship proceeding and/or any investigation of abuse. For example, the petitioner might subpoena a lawyer who represented a party during a transaction that was part of a pattern of abuse. The lawyer can be required to testify regarding the circumstances surrounding the transaction.<sup>88</sup> It is important to think creatively when utilizing a subpoena to substantiate abuse, because many witnesses may be able to contribute relevant observations and information.

### Grounds

The subpoena is issued for the sake of investigating claims of potential abuses of the AIP.

### Consequences

The court will have access to records of all of the fiduciary agents and associated involvements of the AIP. Witnesses who are subpoenaed can shed light on the circumstances surrounding financial transactions, property transfers, and prior legal actions. For instance, where a power of attorney was executed

by an AIP and used to financially drain their account, the attorney who facilitated the documents execution may be subpoenaed and questioned as to its validity.

## Vacatur of Power of Attorney

### Procedure

If a court has appointed or is going to appoint a guardian, the court can modify, amend, or revoke a previously executed appointment or power “if the court finds that the previously executed appointment [or] power ... was made while the person was incapacitated or if the court determines that there has been a breach of fiduciary duty by the previously appointed agent.” The appointment of a guardian per se does not vacate a POA executed prior to the guardianship. The court must expressly order revocation.

### Grounds

A POA can be vacated when the agent<sup>89</sup> violates their fiduciary duty to the principal.<sup>90</sup> The agent must adhere to instructions from the principal, act in the best interests of the principal, and avoid any conflicts of interest.<sup>91</sup> The agent must keep the principal's property separate and distinct from the agent's property and must maintain receipts for all transactions.<sup>92</sup> The agent may be subject to liability for conduct or omissions that violate the agent's fiduciary duty.<sup>93</sup>

A POA can also be invalidated when the principal lacked the requisite capacity at the time the document was executed. A person has capacity to execute a power of attorney if they have the “ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.”<sup>94</sup> A person lacks the capacity to execute a POA only if “the person's mind was so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction.”<sup>95</sup> A person trying to vacate a POA based on incapacity must show that “because of the affliction, the individual was incompetent at the time of the challenged transaction.”<sup>96</sup> A POA will be void if the principal lacked capacity to understand the nature and consequences of the transaction at the time the

power of attorney was executed.<sup>97</sup> Present incapacity of the principal does not necessarily void a previously executed POA; a POA is considered “durable unless it expressly provides that it terminates by the incapacity of the principal.”<sup>98</sup> The term “durable” means that the POA will remain valid even if the principal<sup>99</sup> becomes incapacitated.<sup>100</sup>

In other cases, a POA presented by the person causing harm may be a fraudulent or forged document. In these cases, the document will be void due to fraud or forgery and the perpetrator could be criminally liable.<sup>101</sup>

### Consequences

If a power of attorney is revoked or the agent is removed, said agent no longer has the ability to act on behalf of the principal. If the principal is unable to act on their own behalf to exercise the authority that was granted in the POA, it may be necessary to expand the powers of the guardian or assist in the creation of alternative forms of assistance, including the possible execution of a new POA.

An agent who has violated their fiduciary duties or been involved in perpetrating fraud on the principal may be subject to criminal and civil liability. A guardian may be called upon to take action in referring possible criminal activity to a district attorney's office or bringing an action for the return of misappropriated assets.

A bank or financial institution may be liable for funds disbursed in reliance on a power of attorney that is void on its face, meaning that the document fails to comply with the definitions and rules of construction contained in New York General Obligations Sections 5-1501, 5-10502A-N. The institution may also be liable for relying on a POA after it has received actual notice that the POA has been revoked or of events that terminate a POA by operation of law. Actual notice means written notice and reasonable opportunity to act on such notice.<sup>102</sup>

## Vacatur of a Health Care Proxy

### Procedure

If a court has appointed or is going to appoint a guardian, the court can modify, amend, or revoke a previously executed appointment or power “if the court finds that the previously executed appointment

[or] power ... was made while the person was incapacitated or if the court determines that there has been a breach of fiduciary duty by the previously appointed agent.”<sup>103</sup> The appointment of a guardian per se does not vacate a HCP executed prior to the guardianship. The court must expressly order revocation.

### Grounds

A person lacks the capacity to appoint a health care proxy only if “the person's mind was so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction.” Actions or inactions of the health care proxy that rise “to the level of incompetence or bad faith” are sufficient grounds to vacate a health care proxy.<sup>104</sup>

It is important to note the date and circumstances under which someone executes a health care proxy. For example, a health care proxy executed on the principal's sickbed, with a large inheritance set to benefit the proxy upon the principal's death, might invite a different level of scrutiny and examination by the court.

These circumstances must be considered in determining whether there is bad faith or whether the health care proxy has been executed when the principal was of sound mind.

### Consequences

If a health care proxy is revoked or an appointed proxy is removed, the guardian must consider whether the authority to make medical decisions now rests in their hands. If a guardian has medical decision-making authority pursuant to their appointing order, or subsequent order of the court, and there is no longer a duly appointed health care proxy, the guardian may be the primary medical decision maker upon the revocation or removal of the proxy. If no such authority was granted, the guardian may need to consider whether an application to the guardianship court to expand the powers is necessary, or whether other, less restrictive means are available to provide for adequate medical decision making on behalf of the person under guardianship.<sup>105</sup>

## Housing Court Matters

The underlying factual circumstances driving a guardianship petition may include a pending housing court matter. For example, when an AIP is no longer able to manage their finances, they may stop paying their rent or fail to recertify for housing subsidies, leading to an eviction for nonpayment. In cases of elder abuse, the AIP may face eviction due to nonpayment after significant financial exploitation, a lease violation, or a nuisance complaint attributable to the behavior or presence of the person causing harm.

In addition to the threat of eviction, the effects of elder abuse may manifest as ongoing interference with the older adult's use of the home. In cases of elder abuse, a housing court proceeding may need to be initiated in order to have the person causing harm removed from the AIP or IP's home.

At the pre-adjudication stage, the petitioner should attempt to determine if there is a pending eviction proceeding and, if an eviction proceeding is discovered, request a stay of the landlord/tenant matters during the pendency of a guardianship proceeding. If a proceeding has already been commenced in housing court, the petitioner or temporary guardian may need to coordinate with a guardian-ad-litem, counsel, or housing court part to ensure that there is awareness of the pending guardianship proceeding and take appropriate action to safeguard the rights of the AIP, including seeking vacatur of any stipulations signed.<sup>106</sup>

The petitioner, court evaluator, and, if appointed, temporary guardian will also need to immediately assess the security of the AIP's home to determine if there are any remedies that need to be sought in housing court to safeguard the AIP.

For more discussion on when a temporary guardian is appointed, see Part III.C. Civil Remedies.<sup>107</sup>

## Integrated Part in New York County

Housing issues in New York County may take place in Part I, The Integrated Part, which is a subset of the New York County Civil Court. Cases are transferred into Part I when a tenant living in New York County is the subject of both a civil, housing court case, and a



supreme court, Article 81 guardianship case.<sup>108</sup> These cases are combined and adjudicated by an acting supreme court justice, which enables a more efficient adjudication of often deeply intertwined legal issues.

## Consolidation of Actions

An AIP may be involved in other ongoing court proceedings during a guardianship. It can be helpful, particularly in cases where elder abuse is suspected, for these cases to be consolidated and heard by the same court. Consolidating actions can avoid unnecessary duplication of work and better ensure that the judge has access to the information, testimony and evidence germane to all legal actions arising from a common set of facts. For example, when there is a question of capacity related to the transfer of title to real property, a housing court proceeding may be consolidated with a guardianship proceeding to resolve both issues more efficiently and holistically. Actions pending in other courts may be consolidated into an action before the supreme court, such as a guardianship action, by filing a motion to consolidate with the guardianship court.<sup>109</sup>

## POST-ADJUDICATION: THE ROLE OF THE GUARDIAN

Upon appointment and qualification as guardian, a guardian's actions will be directed and guided by a combination of the duties imposed on them and the powers entrusted to them. The nature of a guardian's duties and powers will differ depending on the specific functional limitations and needs of the person for whom they have been appointed. It is incumbent on the guardian to understand and act within the parameters of their appointment.

Section 81.20 of the Mental Hygiene Law lays out the general duties of a guardian, which reflect the values of loyalty and trust at the core of the relationship between the guardian, court, and the person under guardianship. The duties of all appointed guardians include exercising only the powers granted to them

by the court,<sup>110</sup> using those powers in a way that maximizes the independence and autonomy of the IP to the fullest extent possible,<sup>111</sup> exercising "the utmost care and diligence when acting on behalf of the IP,"<sup>112</sup> exhibiting "the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person,"<sup>113</sup> filing reports with the court,<sup>114</sup> and visiting the IP at least four times per year.<sup>115</sup>

When a guardian has been granted property management powers, there are additional duties including to "preserve, protect, and account for such property and financial resources faithfully,"<sup>116</sup> determine the existence and location of any last will and testament,<sup>117</sup> use the financial resources of the IP to support them and any dependents,<sup>118</sup> and turn over any assets under the control of the guardian at the end of the guardianship.<sup>119</sup> The court may also impose duties specific to the individual guardianship at the time of appointment, or at any point during the duration of the guardianship.

If, at the conclusion of the guardianship hearing, the court determines that the appointment of a guardian is necessary to provide for the personal needs and/or property management of the AIP, the judge will make a finding as to the powers "which constitute the least restrictive form of intervention" to provide for [the IP's] specific needs.<sup>120</sup> Mental Hygiene Law Sections 81.21 and 81.22 list some of the standard powers conferrable upon property management and personal needs guardians, respectively, but the court also has the power grant whatever powers are necessary to meet the needs of the IP. While the initial powers granted to the guardian, as articulated in the appointing order, should represent the least restrictive intervention, the functional limitations that dictate the assistance needed by the IP may change over time, necessitating an adjustment of the guardian's powers.

The powers granted to the guardian must be used to meet the basic needs of the IP and can include personal needs powers (such as arranging for and consenting to medical treatment, providing for their social needs, and ensuring their nutritional and care needs are being met) and property needs powers (such as collecting income and making financial

decisions, creating or maintaining trusts, and applying for government benefit programs). The guardian must also be prepared to exercise their powers to protect an IP from abuse and exploitation, and to take appropriate steps to assist them when abuse is perpetrated, either before or during the guardianship.

If the need to adjust the powers of the guardian arises, an application can be made to the court for such an amendment by the guardian, IP, or any person who is entitled to commence a proceeding under Article 81.<sup>121</sup> Generally, the party requesting to modify the powers of the guardian must prove that modification is necessary to meet the needs of the IP. However, if the request is for the termination of the guardianship and restoration of all rights to the IP, that burden of proving the necessity of guardianship shifts to any party objecting to that request.<sup>122</sup>

Interested parties and the courts can also take legal action when a guardian fails in their duty, or worse, uses the powers entrusted to them by the court to exploit or abuse the IP. Possible remedies include the removal of the guardian, reduction of professional fees claimed by or awarded to the guardian, or the ordered return or restoration of assets misappropriated by the guardian.

## Medical–Legal Concerns

### The Family Health Care Decisions Act

#### Background

Enacted in 2010, the Family Health Care Decisions Act (FHCDA) establishes the authority of certain individuals to make medical treatment decisions for persons who are in a hospital or residential health care facility, lack capacity to make such decisions for themselves, and have not previously appointed a health care agent.<sup>123</sup>

#### Authority

Pursuant to the FHCDA, an Article 81 court-appointed guardian granted medical decision-making authority has the highest priority in medical decision making.<sup>124</sup>

#### Scope

A surrogate under the FHCDA is empowered to make all health care decisions the individual would make, including, under certain conditions, withholding

or withdrawing life sustaining treatment.<sup>125</sup> When making any decisions, a surrogate must be guided by the patient's wishes, including moral and religious beliefs. If those wishes cannot, with "reasonable diligence" be ascertained, then the surrogate must act in the patient's best interests.<sup>126</sup> When determining best interests of the patient, the surrogate must consider "the dignity and uniqueness of every person; the possibility and extent of preserving the patient's life; the preservation, improvement or restoration of the patient's health or functioning; the relief of the patient's suffering; and any medical condition and such other concerns and values as a reasonable person in the patient's circumstances would wish to consider."<sup>127</sup>

## End-of-Life Considerations

Court-appointed guardians are frequently called upon to act as surrogate health care decision makers, including in end-of-life care decisions. Under the FHCDA, guardians engaged in end-of-life care planning must act in accordance with the IP's wishes, or, if those wishes cannot be ascertained, the IP's best interests.<sup>128</sup>

For older adults who have experienced abuse and have a court-appointed community guardian, that guardian may be the only person in their lives empowered and available to make end-of-life care choices. Guardians sometimes refuse to make end-of-life decisions due to lack of clarity about their authority to facilitate such decisions, lack of understanding about the impact of medical interventions, or both.

This refusal to engage in end-of-life care decision making can lead to tragic outcomes, especially when there is an abuser who otherwise qualifies as surrogate decision maker of lower priority than the guardian. When the person causing harm is a close family member, the guardian's refusal to act may empower the abuser to act as the surrogate, positioning them to cause further harm to the IP. When there is no other surrogate available, the guardian's refusal to act means that the IP will receive all life-sustaining interventions by default—even if these often-painful medical interventions are unwanted.

## Medical Orders of Life Sustaining Treatment (MOLST) Forms

A MOLST form is a written memorialization of a patient's values and wishes regarding life sustaining medical treatment.<sup>129</sup> These forms are completed by a health care professional at the instruction of the patient. They detail the patient's wishes regarding cardiopulmonary resuscitation, intubation, hospitalization, and artificial nutrition, among other life prolonging treatments.<sup>130</sup> If the patient lacks capacity to complete the form on their own, then a surrogate decision maker, determined by a health care proxy or the FCHDA, is empowered to fill out the form in accordance with the wishes and best interests of the patient.<sup>131</sup>

Though MOLST forms generally operate in furtherance of the promotion of a patient's autonomy and right to make major medical decisions for themselves, it is possible for them to be misused in a way that can make them an instrument of abuse. While it might be assumed a surrogate decision maker or professional guardian is more likely to withhold life prolonging treatments with the intent of hastening an incapacitated person's death, in fact overtreatment at end of life is far more common and can constitute abuse where it is contrary to the known wishes and values of the older adult, or where the surrogate decision maker substitutes their own judgment in lieu of making diligent efforts to ascertain those wishes and values.<sup>132</sup>

## Peter Falk's Law

The 2016 amendment to Article 81 known as Peter Falk's Law was enacted in order to prevent guardians from exercising their powers to exclude family and friends from contact with the IP, and to ensure that family and friends receive notice about important life events, such as the person's death. Specifically, the law requires the Article 81 guardian's order of appointment to include identification of "persons entitled to receive notice of the [IP's] death, the intended disposition of the remains ... , funeral arrangements and final resting place" and allows the inclusion of identification of "persons entitled to notice of the [IP's] transfer to a medical facility" and "persons entitled to visit the [IP]."<sup>133</sup> If there are not provisions in the order and judgement that specify access to information about the IP, either because the

guardianship order predated the enactment of Peter Falk's Law or because the court declined to delineate parties entitled to such access, the affected parties should notify the court and seek amendment of the order to name the parties entitled to access and information. If the guardian is causing harm to the IP in violation of Peter Falk's Law, such as isolating the IP, the affected parties should notify the court and seek relief under Peter Falk's Law.

While the purpose of Peter Falk's Law is to prevent the perpetration of abuse by a guardian who would use their powers to isolate the IP from their family and friends, there may be competing concerns that the operation of the law might facilitate abuse by a party entitled to notice under the statute. For example, where an older adult has experienced abuse perpetrated by a family member, the required notice of hospitalization can pose a safety concern by alerting said abusive family member of the IP's location. Generally, courts will not seek to facilitate access to an IP by an abuser, but the directives allowing visitation and sharing of information to the abusive party may have been put in place before the abuse was known to the court. If there are concerns that the requirements of Peter Falk's Law in a particular case place the IP at risk, the guardian should notify the court and seek amendment of any order provisions that could create a risk of abuse.

## Civil Remedies to Address Elder Abuse

The circumstances and indications of past or ongoing elder abuse may not always become apparent over the course of a guardianship proceeding or may arise for the first time after the proceeding has concluded. An appointed guardian must be prepared to take action to identify signs of elder abuse, prevent continued harmful behaviors, and mitigate harm caused by such abuse. In some cases, the guardian may already have the authority needed to take appropriate action. For example, taking control of the income and assets of an IP can effectively limit financial exploitation. However, there may be circumstances in which a guardian should seek additional relief from the court.

## Applications to the Guardianship Court

Even after a finding of incapacity and appointment of an Article 81 guardian, the guardian may seek legal relief through the guardianship part by OSC, notice of motion, or, in some courts, more informally through a case conference with the relevant parties.

### Access to Money, Turnover Proceedings Procedure

A guardian who has been granted property powers and authority over the income and assets of the IP should move swiftly to take control of those financial resources. The full scope of an IP's finances may not always be apparent at the outset of the guardianship, and the newly appointed guardian should be thorough in their effort to identify assets that need to be controlled. Talking with the IP, searching the home for financial documents, reviewing statements for receipt of income, requesting information from the Social Security Administration and Internal Revenue Service, and contacting local banks can all be effective investigative tools. If the IP is entitled to any public benefits, including the Supplemental Nutrition Assistance Program, Social Security Disability Insurance, public housing, and housing subsidies, the guardian should ensure that the IP is enrolled and actually receives these benefits. Even where there has been no specific allegation or sign of financial exploitation, a newly appointed guardian should review past financial statements to ensure there is not unexplained or suspicious transactional activity that might be evidence of financial exploitation. Furthermore, a guardian should request and review credit reports to ensure there is no fraud or identity theft that may have occurred under the IP's name.<sup>134</sup>

When the IP is living in the community, it may be a challenge for a guardian to manage the IP's household finances while maintaining the flexibility needed for the IP to pay for small, daily household expenses like laundry and food purchases. The guardian must consider a number of factors, including the risk of the IP handling and carrying cash, the level of autonomy that should be afforded, the extent to which oversight can be maintained through alternative means, and the extent to which the cash needs of the household can be reduced through guardian-initiated transactions.

When a guardian gains information which suggests that assets which legally belong to the IP are being held by a third party who refuses to cede control, Section 81.43 of the Mental Hygiene Law provides for a procedure to seek turnover of the assets to the guardian. There may also be circumstances where a guardian who has not been granted authority over the finances of an IP learns of past or ongoing financial exploitation. If such a situation occurs, the guardian should be prepared to bring this to the court, and if appropriate, make an application for the expansion of powers, and for any other relief that can safeguard the IP's assets until relief is granted.

### Temporary Restraining Order

When a guardian becomes aware of ongoing or imminent abusive activities that are causing or are likely to cause harm, the guardian can seek a TRO directly through the guardianship part.<sup>135</sup>

## Family Court Order of Protection

In the majority of elder abuse cases, a family member is the person causing harm. Two-thirds of the abusers are adult children or spouses.<sup>136</sup> Family members who abuse drugs or alcohol, who have a mental/emotional illness, and/or who feel burdened by their caregiving responsibilities cause harm at higher rates than those who do not.<sup>137</sup> Family court orders of protection can be a vital tool to document or help prevent abuse.

### Procedure

A family court order of protection is initiated by the filing of a petition, after which the petitioning party will go before a judge. If the grounds are met, the judge will sign a temporary order of protection and direct service of the temporary order of protection and a summons upon the abusive party. The temporary order of protection will remain in place until the return date of the summons, at which point the judge will make a determination as to whether a final order of protection is warranted.

In a case where the person experiencing abuse lacks capacity, a "duly authorized agency, association, society or institution" may originate an order of protection proceeding on the IP's behalf.<sup>138</sup> While such orders are generally initiated in family court, in New York, the New York Supreme Court is the state's trial-level court of general jurisdiction, which is authorized to hear all matters including family court orders of protection.<sup>139</sup>



## Grounds

In order to petition in family court, two jurisdictional criteria must be satisfied. The petitioner must be related by blood or marriage to the respondent, have a child in common with the respondent, or be in an “intimate relationship” with the respondent. A judge can find an intimate relationship between the parties even if the parties have never lived together and do not have a sexual relationship.<sup>140</sup> In determining whether the parties have an “intimate relationship,” the court will look to factors like “the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship.”<sup>141</sup>

Second, the petitioner must allege that the respondent has committed one of a specific list of “family offenses.” For applicable offenses, see Part VI.<sup>142</sup>

## Consequences

The protections offered by a civil order of protection vary based on the nature of the case<sup>143</sup>. They can include orders for the respondent to stay away from the petitioner’s home or any other place the petitioner frequents and to refrain from all telephonic or electronic communication as well as all third-party contact. The order will generally last for two years, but the petitioner can request protection for up to five years if one or more “aggravating circumstances” are present. Aggravating circumstances include: physical injury, use of a dangerous instrument, a history of previous violations of other orders of protection, prior convictions for crimes against the petitioner, exposure of family or household member to physical injury, prior incidents that illustrate the respondent is an immediate and ongoing danger to the petitioner or another family or household member.<sup>144</sup>

The order can also require the respondent to vacate a home shared with the person experiencing abuse, even if the respondent’s name is on the lease or deed.<sup>145</sup> If the guardian will be assisting the victim in leaving the victim’s current residence in order to move to a secure location, the judge issuing the order of protection can order the landlord to terminate the victim’s lease without penalty. The landlord and co-tenants must be given 10-days’ notice that the victim plans to apply for this relief.<sup>146</sup>

A judge may also place a respondent on probation. The petitioner, an older parent to an adult child or a

partner, might not want an order of protection,<sup>147</sup> but rather for the respondent to comply with standard or additional terms of probation that mandate substance abuse treatment, anger management treatment, mental health treatment, or other conditions of probation. Probation can be ordered by itself, or in addition to an order of protection.

Restitution up to \$10,000 may also be ordered. Property damage and medical costs can be recovered by the older adult victim through a request for restitution at the dispositional phase of the family offense proceeding. Evidence need not be competent, and the court can consider any relevant and material evidence, including hearsay, where the hearing established that the expenditures were a result of the respondent’s actions in the family related offense.

The violation of a family court order of protection is a crime and is subject to police enforcement. Because the police must ultimately respond to violations of an order of protection, it is recommended that the court issue the order of protection as a standalone order, as opposed to incorporating it into the order appointing the guardian. It is sometimes difficult for a guardian to be aware that an order of protection has been violated—for example, when an order requires a party to stay away from the IP, but the IP’s functional limitations impede their ability to report illegal contact. A guardian should take care to understand the precise parameters of a new or pre-existing order of protection and take appropriate measures to ensure it is enforced if violated.

## Housing Court

### Eviction of the Incapacitated Person

Many older adults experiencing harm face eviction from their residence as a consequence of the abuse. For example, an older adult may face eviction for nonpayment of rent due to financial exploitation or abuse that prevents them from writing and mailing a check or for nuisance or violation of the terms of the lease when an abuser moves into the older adult’s apartment and engages in inappropriate behavior.<sup>148</sup> In these instances, it may be the responsibility of the guardian to help protect or advocate for the rights of the person under their care and help mitigate and address any ongoing issues that might put them at risk of eviction.

If a party wishes to initiate an eviction proceeding or foreclosure action against an IP, it is necessary for them to first move the guardianship court for permission to bring an action. While this relief is usually granted by the court, and can be sought retroactively, failure to do so creates a jurisdictional defect that can result in dismissal of the eviction or foreclosure matter. Often, rent arrears can be reduced or waived through legal argument and negotiation. If the tenant lives in a rent-stabilized apartment it may even be possible to proceed with a buyout of the home, but attorneys should be cautioned to consult a benefits specialist for eligibility consequences. If a marshal’s notice has already been issued, the guardian should immediately inform the marshal of the tenant’s incapacity, especially where the warrant was obtained without the guardianship court’s knowledge of or consent to the commencement of the action.

### Eviction of Third Party in the Incapacitated Person’s Home

Sometimes an abuser may be physically residing in the home of the IP, making it difficult to stop and prevent the abusive behavior. An eviction action can be initiated against a third party if the home’s deed, lease, or rental agreement is in the IP’s name. If the third party has resided in the home for more than 30 days, notice must be given to them that permission to reside in the home has been revoked prior to commencement of the action.<sup>149</sup>

### Illegal Lockout

If the IP has occupied an apartment for at least 30 days, with or without a lease, they may not be evicted or otherwise prevented from accessing their apartment without a court order awarding a judgment of possession and warrant of eviction. If they have been forcibly or unlawfully locked out, the police department must be called for assistance. If the police are unable to assist, an illegal lockout proceeding in housing court should be initiated on behalf of the IP to restore possession.<sup>150</sup>

### Landlord’s Unlawful Eviction of Incapacitated Person

If a landlord has wrongfully evicted an incapacitated tenant from a rent stabilized apartment, that tenant may be entitled to the difference of rent for a new apartment. Such relief

is appropriate if it can be shown that “such damages as are the natural consequence of the landlord’s trespass or wrongful act.”<sup>151</sup>

### Displaced Possessions

If the tenant was “ejected, or put out of real property in a forcible or unlawful manner,” she may collect treble damages for all her discarded possessions.<sup>152</sup>

## Real Property

For many people subject to a guardianship proceeding, an ownership interest in real property is their most significant and valuable asset and is therefore a potential target for abuse and exploitation. Fortunately, there are actions that petitioners and guardians can take to help mitigate the risk of exploitation related to real property ownership and, in some circumstances, to redress exploitative acts that occurred before the guardianship.

Property and assets of the IP often need to be marshaled and recovered. This may be complicated further if the IP was the subject of financial abuse. An IP is vulnerable to any one of the following common financial scams: reverse mortgages, investment fraud, foreclosure rescue scam, POA abuse, identity theft or contractor fraud, and home improvement scams. Specific action can be taken to stop the sale of an IP’s home, distribution of an IP’s assets, or reliance on a fraudulent deed.

### Preventing Fraudulent Conveyance of Title

Fraudulent conveyance of title to a third party can cause permanent harm to an IP. Where a petitioner or other party to a pending guardianship proceeding has a concern that an AIP is at risk of being defrauded to title of a piece of real property in New York, CPLR 6501 allows for the filing of a notice of pendency (sometimes referred to by its common law name, *lis pendens*) with the county clerk in the county in which the real property is located. A notice of pendency is effective for three years from filing (and can be renewed upon application to the court) and provides constructive notice that there is a pending court action which will affect the ownership of the property, effectively limiting the ability of an AIP to convey clean title to a third party.

In New York City, information regarding the ownership of real property, including copies of recorded deeds, can be found on the Automated City Register Information System, while other New York county clerk's offices generally maintain similar online databases where deed information can be found. One of the first actions a guardian should take upon appointment is to review the relevant public records and confirm the current recorded ownership of real property in which the IP is believed to have an interest. If an ownership interest is identified, one of the duties of a guardian granted property management powers is to file a Statement Identifying Real Property with the recording officer in the county in which the real property is located. Like a notice of pendency, a Statement Identifying Real Property serves to put potential purchasers on notice that owner of the property is unable to convey clean title, in this instance because the owner lacks the requisite capacity and has a guardian vested with that authority. Unlike a notice of pendency, a Statement Identifying Real Property is not time limited and does not need to be renewed, as long as the guardianship is active.

### **Redressing Fraudulent Conveyance of Title**

It is sometimes the case that the fraudulent conveyance of title to real property is itself the predicate for bringing a guardianship petition, while in other cases, such conveyance is unknown to the petitioner or court and is subsequently uncovered by the guardian after their appointment. In either scenario, a guardian is required to take action to restore title to the IP and prevent further transfer of the property. Ultimately, the ability to undo any prior conveyance will rest on a number of factors, including the circumstances and timing of the transfer of title, the capacity of the IP at the time of transfer, and the nature of the mutual understanding of the parties to that transaction. It may be necessary to seek the advice of counsel with experience in real property litigation to determine whether a cause of action is available to void or find void the conveyance and where such action should be filed. If litigation to void a fraudulent conveyance of real property is anticipated, a guardian should consider filing a notice of pendency, as discussed above, with the

county clerk, to maintain the status quo and put any future good-faith purchasers on notice that there is a question as to whether the third party holding nominal title is able to convey ownership of the property.

### **Theft of Economic Benefits of Property Ownership**

Exploitation can also occur where the economic benefits of property ownership are exploited to the detriment of the IP. For example, a third party may have used fraud or abused their authority under a power of attorney or guardianship to mortgage the property and drain its equity, or installed tenants or other occupants in the property, or diverted payment of rent from existing leases. When a mortgage has been improperly taken against the property, action must be taken to prevent default and the loss of title through a foreclosure action. Given the complicated nature of foreclosure prevention and defense, it may be advisable to seek the advice of counsel as to what remedies are available to the IP. If income or equity from the property that should belong to the IP has been taken by a third party, it may also be necessary to bring an action pursuant to Mental Hygiene Law Section 81.43 for an accounting and turnover of the misappropriated assets, and steps should be taken to ensure that future income is directed to the guardian.

### **Interference with Enjoyment of Property**

Finally, sometimes the exploitation and abuse connected with real property ownership does not involve theft of income, equity, or title but instead causes interference with the ability of the IP to enjoy the use of their home and maintain it as a safe and habitable abode that adequately meets their care needs. For example, an IP may have been in a skilled nursing facility during the pendency of the guardianship and their community home harbors unauthorized occupants who are preventing a discharge plan from being enacted, or a family member or tenant may be creating nuisance conditions in the home that interfere with care or endanger the welfare of the IP and/or their caregivers. The guardian may be able to use remedies, including ejectment, eviction, TROs, and orders of protection to address these types of interference and create a safe, stable home environment for the IP.

### **Real Property Situated Outside of New York**

Where an IP has an interest in real property physically located outside of the state of New York, it is necessary for a guardian to understand the applicable laws of that jurisdiction to perform the functions described above. Because a guardian's appointment is made pursuant to New York law, it may be necessary to bring a proceeding in the state in which the property is located to have the New York guardianship recognized, or to separately grant authority in that jurisdiction to act as guardian. This can become further complicated if an ownership interest is held in foreign property, as there is no international reciprocity or recognition of the guardian's authority granted under New York law. In such a situation, it would be advisable to seek the assistance of counsel licensed to practice in that jurisdiction and assess what remedies are available to protect the out-of-state or foreign property.

### **Wills**

#### **Inability of Court to Invalidate a Will**

One of the duties of a guardian granted property powers is to "determine whether the incapacitated person has executed a will, determine the location of any will, and the appropriate persons to be notified in the event of the death of the incapacitated person and, in the event of the death of the incapacitated person, notify those persons."<sup>153</sup> However, guardians should be aware that even when there is suspicion that the will, or codicil to a will, is the product of fraud or undue influence, the court is unable to invalidate or revoke a will or a codicil of an IP during the lifetime of such a person.<sup>154</sup> Upon the IP's death, a will or codicil can be challenged in probate. It is also important to note that a finding of incapacity under Article 81 of the Mental Hygiene Law does not automatically mean that an IP lacks the requisite testamentary capacity to execute a last will and testament. Even so, a guardian should be diligent in considering the circumstances surrounding the execution of a will, post-adjudication. Even though the will or codicil may not be challenged while the IP is alive, its contents may be part of a larger pattern of abuse that needs to be addressed.

## **When the Fiduciary is the Abuser**

This section will discuss methods for removing abusive guardians and fiduciaries. People under guardianship may come into the court system with existing trusts, POAs, or health care proxies. Importantly, these documents do not become invalid just because the principal is deemed incapacitated after their execution. However, in some situations, these documents may be invalidated because they were not executed in the best interests of the principal, or are flawed for other reasons, such as being executed under duress or after the principal has been determined lack capacity. When a document has not been executed in the principal's best interests, or when it can be established that the beneficiary of such a power is using it to further his or her own personal interests, it may be possible for the court to revoke that power.

### **Removal of Abusive Guardians**

Guardians, entrusted with the care and protection of vulnerable individuals unable to independently care for themselves, must always adhere to the highest standards of fiduciary integrity. The duties of a guardian include exercising the "utmost care and diligence when acting on behalf of an incapacitated person" and exhibiting the "utmost degree of trust, loyalty and fidelity in relation to the incapacitated person."<sup>155</sup> Indeed, a guardian must also "preserve, protect, and account for such property and financial resources faithfully."<sup>156</sup>

A court can remove a guardian "when the guardian fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just."<sup>157</sup> To do so, a petitioner must file a motion for removal.<sup>158</sup> The motion can be filed by the person examining the initial and annual reports under New York Mental Hygiene Law Section 81.32 or by any person authorized to commence a proceeding under the Mental Hygiene Law.<sup>159</sup>

#### **Standards for Removing a Guardian**

The overall concern when considering whether to remove a guardian "remains the best interest of the incapacitated person."<sup>160</sup> A guardian is "charged with the highest possible fiduciary responsibility toward



his ward and will be judged under the strictest standards.<sup>161</sup> Indeed, a trial court has “considerable discretion in determining whether a guardian should be replaced.”<sup>162</sup>

### Process for Removing a Guardian

Any person authorized to commence a guardianship proceeding (including the IP)<sup>163</sup> or examining the initial or annual reports may seek to remove a guardian by moving the court for that relief.<sup>164</sup> The motion can seek solely to remove and replace the existing guardian, without contesting the individual's capacity or need for a guardian.<sup>165</sup> Some evidentiary proof of the allegations of misconduct by the guardian must be asserted.<sup>166</sup> Allegations painted in broad conclusory terms will not meet the standard for removal,<sup>167</sup> and evidence must be credible and support the allegations of misconduct.<sup>168</sup>

### Additional Remedies to Guardian Financial Misconduct

Where a guardian has committed misconduct that is financial in nature there are additional remedies which can be sought in the guardianship court to remediate the harm suffered by the IP. It is the duty of a guardian to use the funds under their control for the sole benefit of the IP, and where they fail to do so the court may take several possible actions, including ordering an accounting from the guardian, requiring turnover of misappropriated assets, or denying or reducing a guardian's compensation. One preventive tool that courts can use to protect an IP from financial exploitation or waste perpetrated by the guardian is the required filing of a surety bond.<sup>169</sup> Where the court has required the guardian to obtain a surety bond, and the guardian is unable or unwilling to return any misappropriated or misused funds to the estate of the IP, the surety will pay funds, up to the face value of the bond, to the IP and bring an action against the guardian to recover their losses.

### Other Options to Address Guardian Misconduct

There are ways to advise the court about a guardian's misconduct without immediately filing a motion. A concerned party, including a friend, family member, or court evaluator, can call the chambers of the judge who oversees the guardianship and inquire about how to submit a complaint, or can attempt to

schedule a meeting with the judge to address the problem.<sup>170</sup> The concerned party can also contact the court examiner appointed at the time the guardianship was established. The court examiner may be willing to make a home visit and report any concerns regarding the guardian to the judge.

If a concerned party believes that a guardian or other court appointee is not adequately fulfilling their responsibilities, they can contact the acting managing Inspector General for Fiduciary Appointments of the New York Unified Court System (Inspector General's Office). This office receives complaints about unsatisfactory performance by guardians and others that have been appointed in certain fiduciary capacities under Part 36 of the Rules of the Chief Judge<sup>171</sup> (including, but not limited to, guardians ad litem, receivers, referees, and law guardians). The Inspector General's Office also investigates allegations of abuse by trustees of supplemental needs trusts who are appointed by the court. If an investigation is warranted, the Inspector General's Office will investigate, and, if there is abuse, will recommend to the chief administrative judge that the guardian be barred from any future appointment.<sup>172</sup>

### Power of Attorney Vacatur

A guardian appointed with limited authority due to the existence of a power of attorney, which the court deems to be a less restrictive alternative, should seek to have a good working relationship with the appointed agent(s). Meeting the interconnected personal and property needs of an IP often requires communication, cooperation, and collaboration between the agent under a power of attorney and the guardian. A guardian, however, must be prepared to take action if the agent is unable or unwilling to perform their duties.<sup>173</sup>

### Health Care Proxy Vacatur

While the existence of a health care proxy, or execution thereof after the commencement of the guardianship can obviate the need to appoint a guardian with medical decision-making authority, its utility as a less restrictive alternative to guardianship only extends as far as the ability and willingness of the health care agent to act in accordance with the

appointing document. Where an IP's agent under a health care proxy is unable to carry out their duties, or when a health care proxy of questionable provenance is put forth after the appointment of the guardian, the guardian can take action to vacate the health care proxy.<sup>174</sup>

### Voiding a Trust or Removal of Abusive Trustee

Trusts are a common legal vehicle used in tax, estate, and Medicaid planning, and a person with a guardian may be the settlor and or beneficiary of such a trust. Impropriety in the creation of the trust or mismanagement of trust funds by the trustee may be forms of abuse that need to be redressed in the course of an Article 81 guardianship proceeding.

#### Voiding a Trust

The conditions surrounding the drafting of the trust should be examined for fraud, duress, forgery, absence of capacity of principal or other situations that would void the trust. This is dependent on the language of the trust.

#### Standing To Remove a Trustee

Under the New York Estates, Powers and Trusts Law, a New York Supreme Court judge can, “on application of any person interested in a trust estate,” suspend or remove a trustee “who has violated or threatens to violate his trust ... or who for any reason is a person unsuitable to execute a trust.”<sup>175</sup> A trustee may be unsuitable when there is friction between a trustee and beneficiary, which “interferes with the proper administration of the trust ... or if the trustee's continuing to act as such would be detrimental to the interests of the beneficiary.”<sup>176</sup>

#### Standards and Allegations of Trustee Misconduct

A trustee owes the trust beneficiaries an undivided duty of loyalty and must act with good faith in administering the trust.<sup>177</sup> The standard of conduct to which a trustee is held is “a standard of good faith and honesty.”<sup>178</sup> While the removal of a trustee may be sought, it “is a drastic action not to be undertaken absent a clear necessity ... and an individual seeking removal bears the burden of demonstrating that the

trustee has violated or threatens to violate his or her trust or is otherwise unsuitable to execute the trust.”<sup>179</sup>

Allegations of misconduct for the removal of a trustee must be “substantiated by evidentiary proof.”<sup>180</sup> For example, when a trustee has engaged in self-dealing with trust assets, has a criminal indictment, or has flouted court orders, the trustee can be removed.<sup>181</sup>

A trustee can be removed if he has made unauthorized investments “or otherwise improvidently managed or injured the property committed to his charge or by reason of other misconduct in the execution of his office or dishonesty, drunkenness, improvidence or want of understanding.”<sup>182</sup>

### Process for Removing a Trustee

To remove a trustee, a “co-fiduciary, creditor, person interested, [or] any person on behalf of an infant ... may present to the court having jurisdiction a petition praying for a decree suspending, modifying or revoking those letters and that the fiduciary may be cited to show cause why a decree should not be made accordingly.”<sup>183</sup>

A lifetime trustee can be removed by petition, and the trustee “must be cited to show cause” why the court would not have cause to remove the trustee.<sup>184</sup> Aside from going to court, if a trustee was appointed by the court under Part 36 for a supplemental needs trust, a concerned party could contact the office of the acting managing Inspector General for Fiduciary Appointments of the New York Unified Court System, which investigates claims of trustee abuse.

If a trustee is removed, the judge can appoint a successor trustee and, if there is no acting trustee, can order that the trust be executed by a receiver or other officer.<sup>185</sup> A receiver may be appointed by the court when there is danger that the property will be removed, lost, injured, or destroyed.<sup>186</sup> A court appointing a receiver can “authorize him to take and hold real and personal property ... Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited.”<sup>187</sup> The original trust should remain intact if possible. Otherwise, it may be viewed as a self-settled trust and will be subject to attachment by creditors whether the debts were incurred before or after the creation of the trust.<sup>188</sup>

# Special Resources and Best Practices in Cases of Elder Abuse

In New York, a coordinated community response to elder abuse has yielded some creative, cross-disciplinary resources for intervention in cases of elder abuse.

## Enhanced Multidisciplinary Teams

Enhanced multidisciplinary teams (E-MDTs) bring together a diverse group of professionals to discuss and coordinate responses to complex cases of elder abuse and neglect. Each E-MDT is comprised of representatives from APS, law enforcement, district attorney's offices, local offices for the aging, attorneys, elder abuse prevention providers, medical professionals, and other professionals working with older adults experiencing abuse. In each meeting, E-MDT members discuss new and existing cases, strategize about intervention strategies, share information, and coordinate safety and resource planning.

The New York City Elder Abuse Center (NYCEAC) oversees E-MDT development in all five boroughs of New York City. In 2018, New York Governor Andrew Cuomo announced funding to support the creation and rollout of E-MDTs in every county in the state—the first statewide initiative of its kind.<sup>189</sup> Lifespan oversees E-MDTs operating in upstate New York counties.<sup>190</sup>

## Elder Justice Resource Guide

The Elder Justice Resource Guide was developed by the Office for Justice Initiatives' Division of Policy and Planning and the Weinberg Center. The guide is a user-friendly tool designed to assist judges, court personnel, and other legal professionals in addressing the range of issues older adults,

particularly older adults experiencing abuse, face when accessing the court system. Substantive content includes practical information about how to identify elder abuse and neglect, memory and other changes related to the aging process, relevant criminal and civil laws, and related benefits and entitlements for the special needs of older adults. The guide contains a comprehensive Elder Abuse Resource Directory of national, state, and local resources and services available in each of New York's thirteen judicial districts. To access the guide, visit <https://www.elderjustice.nycourts.gov/>.

## Weill Cornell/NYP Vulnerable Elder Protection Team

The Vulnerable Elder Protection Team (VEPT) is an emergency department-based multidisciplinary care team designed to address elder abuse, neglect, and exploitation. The mission of VEPT is to “improve care and ensure safety for victims of elder abuse, neglect, and exploitation through a hospital-based, multidisciplinary team approach.” In collaboration with such organizations as APS and NYCEAC, VEPT seeks to “increase identification, appropriate intervention, and reporting of elder mistreatment while also decreasing the burden on emergency department and hospital providers in managing these complex and challenging cases.”<sup>191</sup>

## Elder Justice Shelter Programs

The Harry and Jeanette Weinberg Center for Elder Justice is a first of its kind elder abuse shelter program housed in the Hebrew Home at Riverdale. The

Weinberg Center multidisciplinary team provides safe shelter for older adults who have experienced abuse in the community and are unable to access traditional homeless or domestic violence shelters due to skilled nursing needs. Through a multidisciplinary

team consisting of attorneys, social workers, public health professionals, and medical professionals, the Weinberg Center seeks to champion justice and dignity for older adults. For more information, visit <https://theweinbergcenter.org>.

# Elder Abuse and Criminal Remedies

Where elder abuse is perpetrated through criminal acts, prosecution may be pursued through the criminal justice system. The arrest, detention, conviction, and incarceration of an abusive individual can be an effective tool to stop harmful behavior toward the older adult. It is also important to ensure that remedies are sought that can more directly assist the older adult who has experienced abuse and redress the harm done to them.

Innocent victims of crime, certain relatives, dependents, legal guardians and eligible good Samaritans can apply to the New York State Office of Victim Services for compensation for out-of-pocket expenses not covered by insurance or other resources. For more information, call: 1-800-247-8035 or visit [www.ovs.ny.gov](http://www.ovs.ny.gov). Additionally, if an abuser is found or pleads guilty, at sentencing, the court may order restitution to be paid to a victim by the perpetrator of a criminal offense for the losses or injuries incurred as a result of the criminal offense. For more information, contact the local district attorney's office.

## Guardianship and Criminal Prosecution

Cases involving elder abuse are often complicated by the credibility of the complaining witness, the availability and evidence provided by the person reporting the crime, the response by law enforcement, and the natural time constraints that exist when a victim is aging. At times, elder abuse is recognized long after the time, place and occurrence

of the crime. In other instances, evidence of elder abuse arises during court proceedings, including guardianship proceedings. Witness testimony that is given under oath can be used as sworn statements, admissions, or used in cross-examination during a subsequent criminal proceeding. Communication between the different court systems, prosecutors, and advocates is imperative to utilize all of the evidence that may be gathered in various proceedings involving the elder abuse. Protocol for communication among advocates, the district attorney's office, law enforcement, and the courts is not dictated by Article 81 and differs depending on jurisdiction. In all instances, the court has the authority to direct either the attorney for the AIP or the appointed guardian to communicate with the appropriate authorities when a potential crime is uncovered.

Testimony from guardianship proceedings may also be used in subsequent or ongoing family court proceedings. Such evidence and testimony can also be used and may be of particular value if the complaining witness has died or cognitively deteriorated. Transcripts, court files and documents that are identified can be subpoenaed for use.

Bearing in mind the potential implications of testimony in the guardianship proceeding, it may be critical for the attorney to raise objections to irrelevant testimony. When the abuser is in the courtroom, a closed courtroom should be requested. Violations of TROs, outside or even inside the courtroom may be grounds for a criminal contempt charge and law enforcement and the court staff, who may be witnesses, should be notified immediately.



It is important to be mindful that the AIP's statements may also be used against them in cross-examination, or to substantiate a cross-complaint in criminal or family court. Moreover, a judicial finding of incapacity may also harm the victim's credibility.

See Part VI for a list of crimes to consider in cases of elder abuse.<sup>192</sup>

## Victims of Crime with Diminished Capacity

A victim who lacks capacity may not be able to participate in the trial process, and this will significantly influence the district attorney's decision whether to move forward with a case. However, it is possible to successfully prosecute a crime where the victim is incapacitated. Depending on the particular nature of the incapacity, the victim may still be able to testify and give an effective first-person account of the abuse.<sup>193</sup> If the victim's cognitive impairment is such that testifying would not be practicable, it is especially important to gather as much nontestimonial evidence as possible.

### Tips for Creative Investigation and Prosecution in Elder Abuse Cases:

- Take photos of any evidence that might fade or dissipate (e.g., bruises or other wounds, property destroyed or vandalized by the abuser, the condition of the home etc.).
- Medical staff are often in the best position to chronicle, document, and report evidence of abuse.
- Objects of any sort may be considered a weapon.
- Statements by the abuser can constitute admissions.
- Neighbors, doormen, and supers may have the best information about the circumstances of abuse.
- Do not hesitate to encourage hospital personnel to use a sexual offense evidence collection kit (rape kit) to gather evidence. Evidence of this sort dissipates quickly, so hospital staff should be alerted immediately that a rape kit is required.

- Banks and financial institutions have their own internal reporting requirements. Internal Suspicious Activity Reports may be attached to the account or client. These reports may produce evidence of a larger crime or series of crimes, making the case easier to prosecute.
- District attorney's offices also have their own investigative units with subpoena power to freeze accounts and obtain documents that show illegal transactions.

In cases of financial exploitation, a victim who lacks capacity at the time the transactions or execution of documents took place is generally not able to give permission or authority for a third party to gain any kind of financial control; therefore, medical opinions regarding the victim's capacity before or at the time of the financial transaction may be necessary. Sufficient transaction and other financial records may make a criminal case possible even if a victim is unable to testify due to incapacity.

## Criminal Court Orders of Protection

When an alleged abuser is arrested for a crime and brought before a judge for arraignment, the judge may issue an order of protection as a condition of the release or bail of the defendant.

A "stay away" order of protection, requires that the accused have absolutely no contact with the alleged victim. Physical proximity is prohibited, as well as all telephonic and electronic communications, and attempts to communicate with the victim using third parties. If the defendant had been residing with the victim, he may be required to vacate the residence for as long as the order is in effect.

A court can also issue a "limited" order of protection, which prohibits "assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, disorderly conduct, criminal mischief, intimidation, threats, or any other criminal offense," as well as any other conditions that the court may add.

## Violations of an Order of Protection

### Generally

A significant advantage of an order of protection is its affordance of an opportunity for a third party who witnesses a violation of the order to report the crime. This tactic is extraordinarily effective for abuse victims who may be too afraid to report the violation, or for a victim who may be unable to report a violation because of diminished capacity. If a defendant violates an order of protection, the court may revoke his bail, and/or conditional discharge or probation.

### Crimes to Consider

Criminal contempt and, if there is a prior conviction for contempt, a felony charge for the second contempt.<sup>194</sup>

### Sentences

A sentence or plea agreement can require that the defendant participate in drug, alcohol or mental health treatment as well as anger management classes. Restitution to the victim can also be mandated. The guardian can assist in making the incapacitated victim's wishes known to the district attorney if appropriate.

## Enforcing Orders of Protection—Tracking Abusers

In many elder abuse cases where an abuser has been arrested, knowing the custody status of the abuser is critical to preserving the victim's safety and enforcing an order of protection. The Victim Information and Notification Everyday Program includes a phone number that victims, families, advocates or service providers can call to get information on the current custody status of specific offenders arrested in New York. Callers can also set automatic alerts that will notify them when there are any status changes. At least three of the following pieces of information about the offender are required: first name, last name, date of birth, date of arrest. The number to call is: (888) VINE-4-NY (846-3469).

## Effect of Bail Reform

In April 2019, New York passed new bail reform laws that aimed to address disparities created by the state's bail system by eliminating cash bail for almost all persons charged with misdemeanors and nonviolent felony offenses.<sup>195</sup> The purpose of this reform was to prevent the incarceration of defendants based on solely on the inability to afford bail. Some advocates criticized the reform as a threat to public safety and victims of crime.<sup>196</sup> The law was amended in early 2020 to expand the range of crimes for which the court could impose monetary bail and included a variety of nonmonetary conditions for release, including mandatory treatment and counseling.<sup>197</sup> These new cash bail eligible crimes include, among others, strangulation in the second degree when committed against a family member (New York Penal Law Section 121.12), unlawful imprisonment against a family member (New York Penal Law Section 125.10), and any crime resulting in death.<sup>198</sup>

Criminal contempt is also a charge eligible for monetary bail under the new law.<sup>199</sup> If there has been an alleged violation of an order of protection where the protected party is in a domestic relationship with the protected person, the court can set cash bail.<sup>200</sup> A domestic relationship is not limited to romantic relationships and can include familial relationships or other close affiliates.<sup>201</sup> In any of those cases, the court may issue a criminal order of protection as a condition of the defendant's bail.<sup>202</sup> The court has discretion to decide whether to renew the order on each court date. If the case is dismissed, the order is immediately dismissed as well. If the trial results in a conviction, the order of protection can become final and can last, in the case of a felony conviction, for up to eight years from the date of conviction or the end of the prison term.<sup>203</sup>

# Elder Abuse and Criminal Remedies

## PHYSICAL ABUSE

Crime—Citations Are to NY Penal Law (unless otherwise noted)	Category	Heightened or Additional Charge due to Prior Conviction for Charged Offense	Statute of Limitations (clock begins to run at commission of offense)	Hate Crime Specified Offense*	Bail Eligible?	Family Court Jurisdiction**
Disorderly Conduct §240.20	Violation		1 year	No	No	Yes
Harassment 2° §240.26	Violation		1 year	No	No	Yes
Harassment 1° §240.25	Class B Misdemeanor	Aggravated Family Offense	2 years	Yes	No	Yes
Aggravated Harassment 2° §240.30	Class A Misdemeanor	Aggravated Harassment 1° Or Aggravated Family Offense	2 years	Yes	No	Yes
Aggravated Harassment 1° §240.31	Class E Felony		5 years	No	Yes, if against a member of same household	No
Aggravated Family Offense §240.75***	Class E Felony		5 years	No	No	No
Criminal Possession of a Weapon 4° §265.01	Class A Misdemeanor		2 years	No	No	No
Unlawful Imprisonment 2° §135.05	Class A Misdemeanor	Aggravated Family Offense	2 years	Yes	Yes, if against a family member	No
Unlawful Imprisonment 1° §135.10	Class E Felony	Aggravated Family Offense	5 years	Yes	Yes, if against a family member or household	No
Attempted Assault 2° §110.00/120.05	Class E Felony		5 years	Yes	No	Yes
Attempted Assault 3° §110.00/120.00	Class B Misdemeanor		2 years	Yes	No	Yes
Assault 1° §120.10	Class B Felony	Aggravated Family Offense	5 years	Yes	Yes	No
Assault 2° §120.05	Class D Felony—includes intentionally causing injury if victim is at least 65 and defendant is more than 10 years younger than victim.	Aggravated Family Offense	5 years	Yes	Yes	Yes

Assault 3° §120.00	Class A Misdemeanor	Aggravated Family Offense	2 years	Yes	Yes, if charged as a hate crime	Yes
Burglary 3° §140.20	Class D Felony	Aggravated Family Offense	5 years	No	No	No
Burglary 2° §140.25	Class C Felony	Aggravated Family Offense	5 years	No	Yes, if the defendant is charged with entering the living area of the dwelling	No
Burglary 1° §140.30	Class B Felony	Aggravated Family Offense	5 years	No	Yes	No
Criminal Possession of a Weapon 4° §265.01	Class A Misdemeanor	Criminal Possession of a Weapon 3 (if previously convicted of ANY crime)	2 years	No	No	No
Criminal Possession of a Firearm §265.01-b	Class E Felony		5 years	No	No	No
Criminal Possession of a Weapon 3° §265.02	Class D Felony		5 years	No	Yes	No
Criminal Possession of a Weapon 2° §265.03	Class C Felony		5 years	No	Yes	No
Criminal Possession of a Weapon 1° §265.04	Class B Felony		5 years	No	Yes	No
Endangering the Welfare of an Incompetent or Physically Disabled Person 2° §260.24	Class A Misdemeanor		2 years	No	No	No
Endangering the Welfare of an Incompetent or Physically Disabled Person 1° §260.25	Class E Felony		5 years	No	No	No
Endangering the Welfare of a Vulnerable Elderly Person 2° §260.32	Class E Felony		5 years	No	No	No
Endangering the Welfare of a Vulnerable Elderly Person 1° §260.34	Class D Felony		5 years	No	No	No
Kidnapping 2° §135.20	Class B Felony		5 years	Yes	Yes	No
Kidnapping 1° §135.25	Class A-1 Felony		None	Yes	Yes	No
Murder 2° §125.25	Class A-1 Felony	Aggravated Family Offense	None	Yes	Yes	No
Manslaughter 1° §125.20	Class B Felony	Aggravated Family Offense	5 years	Yes	Yes	No
Manslaughter 2° §125.15	Class C Felony	Aggravated Family Offense	5 years	Yes	No	No
Robbery 3° §160.05	Class D Felony		5 years	Yes	No	No
Robbery 2° §160.10	Class C Felony		5 years	Yes	No	No

Robbery 1° §160.15	Class B Felony		5 years	Yes	Yes	No
Stalking 2° §120.55	Class E Felony	Aggravated Family Offense	5 years	Yes	No	Yes
Stalking 1° §120.60	Class D Felony	Aggravated Family Offense	5 years	Yes	Yes	Yes
Criminal Obstruction of Breathing or Blood Circulation §121.11	Class A Misdemeanor	Aggravated Family Offense	2 years	No	Yes, if against a family member or household	Yes
Strangulation 2° §121.12	Class D Felony	Aggravated Family Offense	5 years	Yes	Yes, if against a family member or household	Yes
Strangulation 1° §121.13	Class C Felony	Aggravated Family Offense	5 years	Yes	Yes	Yes
Reckless Endangerment 2° §120.20	Class A Misdemeanor	Aggravated Family Offense	2 years	Yes	No	Yes
Reckless Endangerment 1° §120.25	Class D Felony	Aggravated Family Offense	5 years	Yes	No	Yes
Menacing 3° §120.15	Class B Misdemeanor	Menacing 2° or Aggravated Family Offense	2 years	Yes	No	Yes
Menacing 2° §120.14	Class A Misdemeanor	Menacing 1° or Aggravated Family Offense	2 years	Yes	No	Yes

**Note:**

**“Vulnerable elderly person”** means a person 60 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. New York Penal Code § 260.31(3). These charges apply when the accused is caregiver to the victim.

**“Caregiver”** is defined as a person who (i) assumes responsibility for the care of a vulnerable elderly person pursuant to a court order or (ii) receives monetary or other valuable consideration for providing care for a vulnerable elderly person. New York Penal Code § 260.31(1).

**“Incompetent or physically disabled person”** means an individual who is unable to care for himself or herself because of physical disability, mental disease, or defect. New York Penal Code § 260.31(4).

## PSYCHOLOGICAL/EMOTIONAL ABUSE

Crime—Citations Are to NY Penal Law (unless otherwise noted)	Category	Heightened or Additional Charge due to Prior Conviction for Charged Offense	Statute of Limitations (clock begins to run at commission of offense)	Hate Crime Specified Offense*	Bail Eligible?	Family Court Jurisdiction**
Menacing 1° §120.13	Class E Felony	Aggravated Family Offense	5 Years	No	No	No
Stalking 4° §120.45	Class B Misdemeanor	Stalking 3° or Stalking 2° or Aggravated Family Offense	2 years	Yes	No	Yes
Stalking 3° §120.50	Class A Misdemeanor	Aggravated Family Offense	2 years	Yes	No	Yes
Stalking 2° §120.55	Class E Felony	Aggravated Family Offense	5 years	Yes	No	Yes
Stalking 1° §120.60	Class D Felony	Aggravated Family Offense	5 years	Yes	Yes	Yes
Coercion 3° §135.60	Class A Misdemeanor	Aggravated Family Offense	2 years	Yes	No	Yes
Coercion 2° §135.61	Class E Felony	Aggravated Family Offense	2 years	No	No	Yes
Coercion 1° §135.65	Class D Felony	Aggravated Family Offense	5 years	No	No	No
Criminal Mischief 4° §145.00	Class A Misdemeanor	Aggravated Family Offense	2 years	Yes	No	Yes
Criminal Mischief 3° §145.05	Class E Felony	Aggravated Family Offense	5 years	Yes	No	Yes
Criminal Mischief 2° §145.10	Class D Felony	Aggravated Family Offense	5 years	Yes	No	Yes
Criminal Mischief 1° §145.12	Class B Felony	Aggravated Family Offense	5 years	Yes	No	Yes
Harassment 2° §240.26	Violation		1 year	No	No	Yes
Harassment 1° §240.25	Class B Misdemeanor	Aggravated Family Offense	2 years	Yes	No	Yes
Aggravated Harassment 2° §240.30	Class A Misdemeanor	Aggravated Harassment 1° Or Aggravated Family Offense	2 years	Yes	No	Yes
Aggravated Harassment 1° §240.31	Class E Felony		5 years	No	No	No
Aggravated Family Offense §240.75***	Class E Felony		5 years	No	No	No
Trespass §140.05	Violation		1 year	No	No	No
Criminal Trespass 3° §140.10	Class B Misdemeanor		2 years	Yes	No	No
Criminal Trespass 2° §140.15	Class A Misdemeanor		2 years	Yes	No	No
Criminal Trespass 1° §140.17	Class D Felony		5 years	Yes	No	No

Endangering the Welfare of an Incompetent or Physically Disabled Person 2° §260.24	Class A Misdemeanor		2 years	No	No	No
Endangering the Welfare of an Incompetent or Physically Disabled Person 1° §260.25	Class E Felony		5 years	No	No	No
Unlawful Dissemination or Publication of an Intimate Image §245.15	Class A Misdemeanor		2 years	No	No	Yes
Overdriving, Torturing and Injuring Animals; Agriculture and Markets Law §353	Class A Misdemeanor		2 years	No	No	No
Aggravated Cruelty to Animals; Agriculture and Markets Law §353-a	Felony—definite sentence not to exceed 2 years		5 years	No	No	No
Appropriate Shelter for Dogs Left Outdoors §353-b	Violation		1 year	No	No	No
Confinement of Companion Animals in Vehicles §353-d	Violation		1 year	No	No	No

## SEXUAL ABUSE

Crime—Citations Are to NY Penal Law (unless otherwise noted)	Category	Heightened or Additional Charge due to Prior Conviction for Charged Offense	Sex Offender Registration Required upon Conviction	Statute of Limitations (clock begins to run at commission of offense)	Hate Crime Specified Offense*	Bail Eligible?	Family Court Jurisdiction**
Sexual Misconduct §130.20	Class A Misdemeanor	Aggravated Family Offense	Yes	2 years	No	Yes	Yes
Forcible Touching §130.52	Class A Misdemeanor	Aggravated Family Offense	Yes if defendant has prior conviction for sex offense	2 years	No	Yes	Yes
Sexual Abuse 3° §130.55	Class B Misdemeanor	Aggravated Family Offense	Yes if defendant has prior conviction for sex offense	2 years	No	Yes	Yes
Sexual Abuse 2° §130.60(1)	Class A Misdemeanor	Aggravated Family Offense	Yes	2 years	No	Yes	Yes
Sexual Abuse 1° §130.65	Class D Felony	Aggravated Family Offense	Yes	5 years	Yes	Yes	No
Aggravated Sexual Abuse 4° §130.65a	Class E Felony	None	Yes	5 years	No	Yes	No
Aggravated Sexual Abuse 3° §130.66	Class D Felony	Aggravated Family Offense	Yes	5 years	No	Yes	No
Aggravated Sexual Abuse 2° §130.67	Class C Felony	Aggravated Family Offense	Yes	5 years	Yes	Yes	No
Aggravated Sexual Abuse 1° §130.70	Class B Felony	Aggravated Family Offense	Yes	None	Yes	Yes	No
Rape 3° §130.25	Class E Felony	None	Yes	5 years	No	Yes	No
Rape 2° §130.30	Class D Felony	Aggravated Family Offense	Yes	5 years	No	Yes	No
Rape 1° §130.35	Class B Felony	Aggravated Family Offense	Yes	None	Yes	Yes	No
Criminal Sexual Act 3° §130.40	Class E Felony	Aggravated Family Offense	Yes	5 years	No	Yes	No
Criminal Sexual Act 2° §130.45	Class D Felony	Aggravated Family Offense	Yes	5 years	No	Yes	No
Criminal Sexual Act 1° §130.50	Class B Felony	Aggravated Family Offense	Yes	None	Yes	Yes	No
Persistent Sexual Abuse §130.53	Class E Felony	Aggravated Family Offense	None	5 years	No	Yes	No
Aggravated Family Offense §240.75***	Class E Felony			5 years	No	No	No
Endangering the Welfare of a Vulnerable Elderly Person 2° §260.32	Class E Felony	None	None	5 years	No	No	No
Endangering the Welfare of a Vulnerable Elderly Person 1° §260.34	Class D Felony	None	None	5 years	No	No	No



## NEGLECT

Crime—Citations Are to NY Penal Law (unless otherwise noted)	Category	Heightened or Additional Charge due to Prior Conviction for Charged Offense	Statute of Limitations (clock begins to run at commission of offense)	Hate Crime Specified Offense*	Bail Eligible?	Family Court Jurisdiction**
Endangering the Welfare of an Incompetent or Physically Disabled Person 2° §260.24	Class A Misdemeanor		2 years	No	No	No
Endangering the Welfare of an Incompetent or Physically Disabled Person 1° §260.25	Class E Felony		5 years	No	No	No
Endangering the Welfare of a Vulnerable Elderly Person 2° §260.32	Class E Felony		5 years	No	No	No
Endangering the Welfare of a Vulnerable Elderly Person 1° §260.34	Class D Felony		5 years	No	No	No
Reckless Endangerment 2° §120.20	Class A Misdemeanor	Aggravated Family Offense	2 years	Yes	No	Yes
Reckless Endangerment 1° §120.25	Class D Felony	Aggravated Family Offense	5 years	Yes	No	Yes
Manslaughter 2° §125.15	Class C Felony	Aggravated Family Offense	5 years	Yes	No	No
Unlawful Imprisonment 2° §135.05	Class A Misdemeanor	Aggravated Family Offense	2 years	Yes	No	No
Unlawful Imprisonment 1° §135.10	Class E Felony	Aggravated Family Offense	5 years	Yes	Yes, if against a family member or household	No
Aggravated Family Offense §240.75***	Class E Felony		5 years	No	No	No

## FINANCIAL ABUSE

Crime—Citations Are to NY Penal Law (unless otherwise noted)	Category	Heightened or Additional Charge due to Prior Conviction for Charged Offense	Statute of Limitations (clock begins to run at commission of offense)	Hate Crime Specified Offense*	Bail Eligible?	Family Court Jurisdiction**
Forgery 3° §170.05	Class A Misdemeanor		2 years	No	No	No
Forgery 2° §170.10	Class D Felony		5 years	No	No	No
Forgery 1° §170.15	Class C Felony		5 years	No	No	No
Criminal Possession of a Forged Instrument 3° §170.20	Class A Misdemeanor		2 years	No	No	No
Criminal Possession of a Forged Instrument 2° §170.25, 170.27	Class D Felony		5 years	No	No	No
Criminal Possession of a Forged Instrument 1° §170.30	Class C Felony		5 years	No	No	No
Petit Larceny §155.25	Class A Misdemeanor		2 years or within 1 year of discovery if there is alleged violation of fiduciary duty	Yes	No	No
Grand Larceny 4° §155.30	Class E Felony		5 years or within 1 year of discovery if there is alleged violation of fiduciary duty	Yes	No	Yes
Grand Larceny 3° §155.35	Class D Felony		5 years or within 1 year of discovery if there is alleged violation of fiduciary duty	Yes	No	Yes
Grand Larceny 2° §155.40	Class C Felony		5 years or within 1 year of discovery if there is alleged violation of fiduciary duty	Yes	No	No
Grand Larceny 1° §155.42	Class B Felony		5 years or within 1 year of discovery if there is alleged violation of fiduciary duty	Yes	Yes	No
Unlawful Collection Practices §190.50	Class B Misdemeanor		2 years	No	No	No
Making a False Statement of Credit Terms §190.55	Class A Misdemeanor		2 years	No	No	No
Identity Theft 3° §190.78	Class A Misdemeanor	Identity Theft 2 (if previously convicted of one of specified related offenses)	2 years	Yes	No	Yes
Identity Theft 2° §190.79	Class E Felony	Identity Theft 1 (if previously convicted of one of specified related offenses)	5 years	Yes	No	Yes

Identity Theft 1° §190.80	Class D Felony		5 years	No	No	Yes
Unlawful Possession of Personal Identification Information 3° §190.81	Class A Misdemeanor		2 Years	No	No	No
Unlawful Possession of Personal Identification Information 2° §190.82	Class E Felony	Unlawful Possession of Personal Identification Information 1 (if previously convicted of one of specified related offenses)	2 years	No	No	No
Unlawful Possession of Personal Identification Information 1° §190.83	Class D Felony		5 years	No	No	No
Scheme to Defraud 2° §190.60	Class A Misdemeanor		2 years	No	No	No
Scheme to Defraud 1° §190.65	Class E Felony		5 years	No	No	No
Robbery 3° §160.05	Class D Felony		5 years	Yes	No	No
Robbery 2° §160.10	Class C Felony		5 years	Yes	No	No
Robbery 1° §160.15	Class B Felony		5 years	Yes	Yes	No
Coercion 2° §135.60	Class A Misdemeanor	Aggravated Family Offense	2 years	Yes	No	Yes
Coercion 1° §135.65	Class D Felony	Aggravated Family Offense	5 years	Yes	No	No

## CRIMES RELATING TO JUDICIAL PROCEEDINGS AND COURT ORDERS

Crime	Category	Heightened or Additional Charge due to Prior Conviction for Charged Offense	Statute of Limitations (clock begins to run at commission of offense)	Hate Crime Specified Offense*	Bail Eligible?	Family Court Jurisdiction**
Criminal Contempt 2° §215.50	Class A Misdemeanor	Criminal Contempt 1° OR Aggravated Family Offense	2 years	No	Yes—if underlying order of protection is for a family member	No
Criminal Contempt 1° §215.51	Class E Felony	Aggravated Criminal Contempt OR Aggravated Family Offense	5 years	No	Yes—if underlying order of protection is for a family member	No
Aggravated Criminal Contempt §215.52	Class D Felony	Aggravated Family Offense	5 years	No	Yes—if underlying order of protection is for a family member	No
Aggravated Family Offense §240.75***	Class E Felony		5 years	No	No	No
Tampering with a Witness 4° §215.10	Class A Misdemeanor		2 years	No	No	No
Tampering with a Witness 3° §215.11	Class E Felony		5 years	No	Yes	No
Tampering with a Witness 2° §215.12	Class D Felony		5 years	No	Yes	No
Tampering with a Witness 1° §215.13	Class B Felony		5 years	No	Yes	No
Intimidating a Victim or Witness 3° §215.15	Class E Felony		5 years	No	Yes	No
Intimidating a Victim or Witness 2° §215.16	Class D Felony		5 years	No	No	No
Intimidating a Victim or Witness 1° §215.17	Class B Felony		5 years	No	No	No

\* A person commits a hate crime when he commits a specified offense and either (a) selects his victim based on one of the enumerated characteristics, which include age, or (b) commits the act based in whole or substantial part because of a belief or perception about one of the enumerated characteristics of the victim, which include age. New York Penal Law Section 485.05. When an individual is convicted of a hate crime, they are subject to harsher sentencing guidelines. New York Penal Law Section 485.10.

\*\* The victim and the alleged abuser must have one of the following relationships in order for the crimes indicated to be considered a family offense: related by blood or marriage, formerly married, have a child in common, currently or formerly in an “intimate relationship.” New York Family Court Act Section 812. If one of these relationships exists, the victim may file a petition in family court for a civil order of protection. New York Family Court Section 842.

\*\*\* Aggravated Family Offense (New York Penal Law Section 240.75): A person commits an aggravated family offense when he commits a specified offense as defined in subdivision two of this section (as indicated in the above chart as a “Heightened or Additional Charge due to Prior Conviction for Charged Offense) and he has been convicted of one or more specified offenses within the immediately preceding five years. An aggravated family offense is the commitment, attempt or conspiracy to commit any of the specified offenses where the defendant and the person against whom the offense was committed were members of the same family or household as defined in 530.11 of the Criminal Procedure Law. The person against whom the current specified offense is committed may be different from the person against whom the previous specified offense was committed, and such persons do not need to be members of the same family or household.

New York Criminal Procedure Law Section 530.11: The victim and the alleged abuser must have one of the following relationships in order to be considered members of the same family or household: person related by blood or marriage, person legally married to one another, persons formerly married to one another regardless of whether they still reside in the same household, persons who have a child in common, regardless of whether such persons have been married or have lived together at any time, and persons who are not related by blood or marriage and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

## Endnotes

- 1 *Violence Prevention: Preventing Elder Abuse*, Ctrs. Disease Control & Prevention (June 2, 2021), <https://www.cdc.gov/violenceprevention/elderabuse/fastfact.html>.
- 2 *Elder Abuse*, WHO (2021), <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.
- 3 Lifespan of Greater Rochester, Inc., Weill Cornell Med. Ctr. of Cornell Univ. & N.Y. City Dep't for the Aging, *Under the Radar: New York State Elder Abuse Prevalence Study*, 3 (May 2011), <http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf>.
- 4 True Link, *The True Link Report on Elder Financial Abuse 2015* (Jan. 2015), <http://documents.truelinkfinancial.com/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf>.
- 5 Lifespan of Greater Rochester, Inc., Weill Cornell Med. Ctr. of Cornell Univ. & N.Y. City Dep't for the Aging, *Under the Radar: New York State Elder Abuse Prevalence Study*, 3 (May 2011), <http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf>.
- 6 ABA Commission on Law and Aging and APA Working Group, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists*, (2008), <https://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>.
- 7 N.Y. Mental Hyg. Law § 81.01 (McKinney 2021).
- 8 The American Bar Association, *Practical Tool for Lawyers: Steps in Supporting Decision-Making*, 1 (2016), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/PRACTICALGuide.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/PRACTICALGuide.pdf).
- 9 Although the petitioner met his burden to show by clear and convincing evidence that Kufeld was incapacitated, the court did not grant the guardianship petition because there was evidence that advance directives were in place, which addressed all of Kufeld's personal and property management needs. *In re Kufeld*, 23 Misc. 3d 1131A (Sup. Ct. Bronx County 2009).
- 10 N.Y. Mental Hyg. Law § 81.03(e) (McKinney 2021), states that the statute defines “available resources” as resources such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, powers of attorney, health care proxies, trusts, representative and protective payees, and residential care facilities.
- 11 N.Y. Mental Hyg. Law § 81.02 (McKinney 2021).
- 12 The court dismissed a petition to appoint an Article 81 guardian because it failed to contain any specific factual allegations of any incapacity that would warrant the appointment of a guardian. *In re Meisels*, 10 Misc. 3d 659 (Sup. Ct. Kings County 2005).
- 13 N.Y. Mental Hyg. Law § 81.02(b) (McKinney 2021).
- 14 N.Y. Mental Hyg. Law § 81.03(h) (McKinney 2021). The statute defines “activities of daily living” as activities such as, but not limited to, mobility, eating, toileting, dressing, grooming, housekeeping, cooking, shopping, money management, banking, driving or using public transportation, and other activities related to personal needs and to property management.
- 15 N.Y. Mental Hyg. Law § 81.02(c) (McKinney 2021).
- 16 *Id.*
- 17 *In re Mary J.*, 290 A.D.2d 847 (3d Dep't 2002).
- 18 *Id.*
- 19 *Matter of Karen P.*, 254 A.D.2d 530, 531 (3d Dep't 1998).
- 20 *Id.*
- 21 *Application of Hammons*, 164 Misc. 2d 609 (Sup. Ct. Queens County 1995).
- 22 *In re Ada*, 25 Misc. 3d 940 (Sup. Ct. Cortland County 2009).
- 23 *Matter of Kustka*, 163 Misc. 2d 694 (Sup. Ct. Queens County 1994).
- 24 *Application of Hammons*, 164 Misc. 2d 609 (Sup. Ct. Queens County 1995). *But see In re Seidner*, N.Y.L.J., Oct. 8, 1997, 28, col. 4 (Sup. Ct. Nassau Cty).
- 25 The appellate court reversed a jury decision finding someone incapacitated solely on evidence that an eviction proceeding were commenced against him after he was substantially delinquent in his rent payments and failed to maintain his apartment in proper condition. *In re David C.*, 294 A.D.2d 433, 434 (2d Dep't 2002). *See, e.g., In re Peterson*, N.Y.L.J., Jan. 15, 1997, 26, col. 4 (Sup. Ct. New York County); *In re Seidner*, N.Y.L.J., Oct. 8, 1997, 28, col. 4 (Sup. Ct. Nassau County) (holding that a precarious housing situation and meager financial means do not, without more, constitute proof of incapacity such that a guardian is warranted); *In re Tait*, N.Y.L.J., May 31, 1994, at 28 (Sup. Ct. N.Y. County) (holding that even though the AIP dressed oddly and collected garbage, she did not necessarily need a guardian, noting that a guardian would then have to be appointed for every mentally ill adult living a marginal existence in New York City).
- 26 The Third Department found that a guardian was not necessary in a case where the AIP suffered a stroke, which left him partially paralyzed and aphasic but occasionally able to speak a few words. The court found that even with these limitations, there was no evidence that he was unable to provide for the management of his property, or that he was incapable of adequately understanding and appreciating the nature and consequences of his disabilities. *In re Maher*, 207 A.D.2d 133 (3d Dep't 1994). *But see In re Lula XX*, 224 A.D.2d 742 (3d Dep't 1996) (finding that the purely physical disability was sufficient evidence for the court to appoint a guardian).
- 27 N.Y. Mental Hyg. Law § 81.01 (McKinney 2021).

28 *Id.*

29 The court appointed a special guardian, pursuant to Mental Hyg. Law § 81.16(b), for the limited purpose of arranging for visiting nurse or other home health care services and arranging regular medical examinations by the AIP's current physician. *In re Janczak*, 167 Misc. 2d 766, 773 (Sup. Ct. Ontario County 1995).

30 N.Y. Mental Hyg. Law §§ 81.01(b)(6), (c)(8) (McKinney 2021).

31 A guardian's commission is the document issued by the court that states "1. the title of the proceeding and the name, address, and telephone number of the IP; and 2. the name, address, and telephone number of the guardian and the specific powers of such guardian; and 3. the date when the appointment of the guardian was ordered by the court; and 4. the date on which the appointment terminates if one has been ordered by the court." The commission serves as the official credentials that allow an individual or institution to act in their capacity as guardian. N.Y. Mental Hyg. Law § 81.27 (McKinney 2021).

32 U.S. Gov't Accountability Off., GAO-04-655, *Guardianship: Collaboration Needed to Protect Incapacitated Elderly People* (July 2004); U.S. Gov't Accountability Off., GAO-10-1046, *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* (Sept. 2010); U.S. Gov't Accountability Off., GAO-11-678, *Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement* (July 2011).

33 U.S. Gov't Accountability Off., GAO-17-33, *Elder Abuse: The Extent of Abuse by Guardians is Unknown, but Some Measures Exist to Help Protect Older Adults* (Nov. 2017), <https://www.gao.gov/assets/690/681088.pdf>.

34 *Id.*

35 U.S. Admin. for Cmty. Living & U.S. Dep't of Health and Hum. Servs., *Adult Maltreatment Report* (2019), <https://acl.gov/sites/default/files/programs/2020-10/2019%20NAMRS%20Report.pdf>.

36 WINGS: *Working Interdisciplinary Networks of Guardianship Stakeholders*, National Guardianship Network, [https://www.naela.org/NGN\\_PUBLIC/WINGS/NGN\\_PUBLIC/Wings.aspx?hkey=7779904f-99fa-4184-aeb0-253e11bef518](https://www.naela.org/NGN_PUBLIC/WINGS/NGN_PUBLIC/Wings.aspx?hkey=7779904f-99fa-4184-aeb0-253e11bef518).

37 State WINGS Groups in Action, [https://www.naela.org/NGN\\_PUBLIC/NGN\\_PUBLIC/Wings\\_States.aspx](https://www.naela.org/NGN_PUBLIC/NGN_PUBLIC/Wings_States.aspx).

38 *Id.*, 11.

39 *Id.*, 6.

40 *Id.*, 8-9.

41 ABA's Briefing Paper, *Advancing Guardianship Reform and Promoting Less Restrictive Options*, [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2020-wings-briefing-paper.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-wings-briefing-paper.pdf)

42 *Id.*, 14.

43 *Id.*, 15.

44 *Incapacitated, Indigent, and Alone: Meeting Guardianship and Decisions Support Needs in New York* (November 2018), [https://projectguardianship.org/sites/default/files/inline-files/445INC\\_1.PDF](https://projectguardianship.org/sites/default/files/inline-files/445INC_1.PDF).

45 *Preventing Elder Abuse*, CDC (May 2021), <https://www.cdc.gov/violenceprevention/pdf/elder/preventingElderAbuseFactsheet.pdf>.

46 *Id.*

47 *Power and Control Wheel for People with Dementia*, Harry & Jeanette Weinberg Ctr. for Elder Justice at the Hebrew Home at Riverdale (2021), [https://theweinbergcenter.org/wp-content/uploads/2022/02/Power-and-Control-Wheel-FINAL\\_Weinberg-Center.pdf](https://theweinbergcenter.org/wp-content/uploads/2022/02/Power-and-Control-Wheel-FINAL_Weinberg-Center.pdf).

48 18 NYCRR § 457.1(b)(1).

49 18 NYCRR § 457.1(b)(3).

50 Isolation occurs when (a) family members or caregivers restrict an older adult's contact with others or (b) an older adult is not given the opportunity to speak with others without the family member or caregiver present.

51 18 NYCRR § 457.1(b)(2).

52 Steven A. Schurkman, *Elder Law Q & A: Answers to Questions About Estate and Financial Planning, Health Care Planning and Elder Abuse 55* (2000).

53 18 NYCRR § 457.1(b)(7).

54 Self-neglect is defined by New York regulation as the inability, due to physical and/or mental impairments, to perform tasks essential to caring for oneself, including but not limited to: providing essential food, clothing, shelter and medical care; obtaining goods and services necessary to maintain physical health, mental health, emotional well-being and general safety; or managing financial affairs. Self-neglect is not considered a form of elder abuse, but rather a related phenomenon which may occur alongside or be triggered by elder abuse. Some tools and strategies for addressing elder abuse may still be relevant in self-neglect cases. 18 NYCRR § 457.1 (b)(6); JE Hall, DL Karch, and AE Crosby, *Elder Abuse Surveillance: Uniform Definitions and Recommended Core Data Elements For Use In Elder Abuse Surveillance*, Version 1.0. Atlanta (GA): National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 2016 at 37.

55 *Id.*

56 Substance Abuse and Mental Health Servs.' Admin., *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach*, Dept' Health and Hum. Servs., HHS no. (SMA) 14-4884 (2014), [https://ncsacw.samhsa.gov/userfiles/files/SAMHSA\\_Trauma.pdf](https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf).

57 Substance Abuse and Mental Health Servs.' Admin., *A Treatment Improvement Protocol: Trauma-Informed Care in Behavioral Health Services*, Dept' Health and Hum. Servs., HHS no. (SMA) 13-4801, 62-63 (2014), <https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4816.pdf>.

58 See discussion *infra* Part III.C.iii. When the Fiduciary is the Abuser.

59 ABA Commission on Law and Aging and APA Working Group, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists*, (2008), <https://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>.

60 The typical effects of aging in the brain are varied and multidirectional: mental processing generally slows; the ability to store new vocabulary increases; multitasking becomes more difficult; the ability to store new concepts increases; prospective memory declines; temporal memory typically holds; processing highly emotionally arousing experiences becomes more difficult; and focus on the positive aspects of life increases. Risa Breckman, LCSW, Malya Levin, Esq., Leslie Mantrone, LMSW, & Joy Solomon, Esq., *The Things They Carry: Advancing Trauma Informed Responses to Elder Abuse*, NYCEAC & The Harry and Jeannette Weinberg Center for Elder Justice at the Hebrew Home at Riverdale (Jan. 2020), <https://theweinbergcenter.org/wp-content/uploads/2020/01/TheThingsTheyCarry-JAN2020.pdf>.

61 N.Y. Mental Hyg. Law § 81.02 (McKinney 2021).

62 The ABA Comm'n on Law and Aging, *Supporting Decision Making Across the Age Spectrum*, ABA (March 2020), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2020-supporting-decision-making-final-report.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-supporting-decision-making-final-report.pdf).

63 ABA, *PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making* (May 8, 2016), [https://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice/practical\\_tool/](https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/).

64 See *Matter of Dameris L.*, 38 Misc. 3d 570 (Sur. Ct., New York 2012); See, e.g., n 69, *supra*.

65 N.Y. Mental Hyg. Law § 82.01 (McKinney 2022).

66 N.Y. Mental Hyg. Law § 81.01 (McKinney 2021).

67 ABA, *PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making* (May 8, 2016), [https://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice/practical\\_tool/](https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/).

68 N.Y. Mental Hyg. Law § 81.03(d) (McKinney 2021).

69 *Id.*

70 N.Y. Mental Hyg. Law § 81.06 (McKinney 2021).

71 N.Y. Mental Hyg. Law § 81.02(b) (McKinney 2021).

72 CPLR §2214 (d).

73 N.Y. Mental Hyg. Law § 81.14(b)

74 22 NYCRR Part 1200 § 1.6(b)(1).

75 *Id.* at § 1.14(b).

76 *Id.* at § 1.14(c).

77 *Id.* at § 1.14 cmt. 8.

78 For resources for attorneys considering the ethical consequences of seeking guardianship for a client, see <https://www.nycbar.org/member-and-career-services/ethics/hotline>.

79 N.Y. C.P.L.R. § 4045(a) (McKinney 2021).

80 See Joseph A. Rosenberg, *Routine Violations of Medical Privacy in Article 81 Guardianship Cases: So What or Now What?*, 85 N.Y. State Bar Ass'n J., 34, no. 1 (Jan. 2013), for an in-depth discussion about medical privacy issues in the guardianship process.

81 See N.Y. Mental Hyg. Law § 81.13, .07 (McKinney 2021).

82 § 8:40. Provisional remedies—Temporary guardian, N.Y. Elder Law Practice § 8:40 (2021 ed.).

83 *Ginsberg v. Larralde*, 59 A.D.3d 249 (1st Dep't 2009).

84 *In re Jaar-Marzouka*, 51 Misc. 3d 1226(A) (N.Y. Sup. Ct. 2016). See also *Ginsberg v. Larralde*, 59 A.D.3d 249 (1st Dep't 2009) (trial court did not err in appointing a temporary guardian to an AIP who suffered a stroke because (1) the AIP was severely compromised and unable to communicate, (2) the AIP was unable to manage her property due to complications from her stroke, and (3) the court limited the temporary guardian's authority to preserving the AIP's estate and paying bills); *Matter of Saphier*, 167 Misc. 2d 130, 637 N.Y.S.2d 630 (Sup. Ct. 1995) (court granted a temporary guardian to discharge a 90-year-old woman from the hospital to fulfill her wish of dying at home and because there was cause for concern of the theft of a valuable piece of property given the AIP's absence from her home).

85 N.Y. Penal Law § 215.51 (McKinney 2021).

86 *In re Jaar-Marzouka*, 51 Misc. 3d 1226(A) (N.Y. Sup. Ct. 2016).

87 N.Y. Mental Hyg. Law § 81.09(d) (McKinney 2021).

88 However, be aware that the attorney-client privilege may be a defense for the attorney to raise and use to shield his or her client.

89 An agent is "a person granted authority to act as attorney-in-fact for the principal under a power of attorney." N.Y. Gen. Oblig. Law § 5-1501 (McKinney 2021).

90 The agent "must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principals of morality, fidelity, loyalty and fair dealing." N.Y. Gen. Oblig. Law § 5-1505(2) (McKinney 2021). See *In re Walter K.H.*, 31 Misc. 3d 1233(A), 4 (N.Y. Sup. Ct., Erie County 2011), where the court revoked a POA upon finding that agent had engaged in self-dealing by driving principal's car, using principal's credit cards, and storing principal's belongings in expensive storage facility.

91 2A N.Y. Jur.2d Agency § 72 (2013).

92 N.Y. Gen. Oblig. Law § 5-1505 (McKinney 2021).

93 N.Y. Gen. Oblig. Law § 5-1505(2)(b) (McKinney 2021).



94 N.Y. Gen. Oblig. Law § 5-1505(2)(c) (McKinney 2021)

95 N.Y. Gen. Oblig. § 5-1501 (McKinney 2021); The Fourth Department upheld a POA even though principal had mild dementia at time of document's execution. *In re Mildred M.J.*, 844 N.Y.S.2d 539, 541 (4th Dep't 2007).

96 *In re Mildred M.J.*, 844 N.Y.S.2d 539, 541 (4th Dep't 2007).

97 N.Y. Gen. Oblig. Law § 5-1501(2)(c); § 5-1510(2)(b) (McKinney 2021).

98 N.Y. Gen. Oblig. Law § 5-1501A (McKinney 2021).

99 The principal is an individual "acting for himself . . . who executes a power of attorney." N.Y. Gen. Oblig. Law § 5-1501 (McKinney 2021).

100 *Id.*

101 See *infra* Part VI. Elder Abuse Crimes Chart.

102 N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2021); see *Gornicki v. M & T Bank*, 162 Misc. 2d 471 (Sup. Ct. Niagara County 1994), noting that a reasonable opportunity to act is a question of fact dependent on the circumstances of the individual case, including the bank's procedures and the bank's technology.

103 N.Y. Mental Hyg. Law § 81.29 (McKinney 2021).

104 *In re Walter K.H.*, 31 Misc. 3d 1233(A), 5 (Sup. Ct. Erie County 2011), holding that a health care proxy would not be removed without evidence that agent was unable or unwilling to act. See also *S.I. v. R.S.*, 24 Misc. 3d 567 (Sup. Ct. Nassau County 2009), where the husband wrote in the health care proxy "I wish to live" but stated to his wife that he did not want to be like others in the hospital who were essentially lifeless.

105 For example, the ability of the person under guardianship to make their own health care decisions, their possession of the requisite capacity to execute a new health care proxy or other advance directive, or the availability of other surrogates under the Family Health Care Decisions Act may all be alternatives to expansion of the powers of the guardian.

106 Also, note that the marshal is required to make a referral to APS whenever the individual facing eviction is elderly and must postpone the eviction for two weeks to await their findings. The marshal must also notify APS at least 24 hours before proceeding with such an eviction. City of New York Department of Investigations, *Handbook of Regulations*, ch. IV, § 6-7 (eff. April 23, 2014).

107 See *infra* Part III.C. Civil Remedies.

108 Shlomo Hagler, *Innovative Part Integrates Guardianship and Housing Matters*, NY Times (June 22, 2011).

109 N.Y. C.P.L.R. § 602 (McKinney 2021).

110 N.Y. Mental Hyg. Law § 81.20(a)(1) (McKinney 2021).

111 *Id.* at (a)(6)(i) and (a)(7).

112 *Id.* at (a)(2).

113 *Id.* at (a)(3).

114 *Id.* at (a)(4).

115 *Id.* at (a)(5).

116 *Id.* at (a)(6)(ii).

117 *Id.* at (a)(6)(iii).

118 *Id.* at (a)(6)(iv).

119 *Id.* at (a)(6)(v).

120 N.Y. Mental Hyg. Law § 81.15(a)(4) and (b)(5) (McKinney 2004).

121 N.Y. Mental Hyg. Law § 81.36(b) (McKinney 2021).

122 *Id.* at (d).

123 N.Y. Pub. Health Law § 2994 (McKinney 2021).

124 *Id.* at (d)(1).

125 *Id.* at (d)(5).

126 *Id.* at (d)(4).

127 N.Y. Pub. Health Law § 2994-D(4) (McKinney 2021).

128 N.Y. Pub. Health Law § 2994-D(4)-(5) (McKinney 2021).

129 *Form DOH-5003: Medical Orders for Life-Sustaining Treatment (MOLST)*, NY Dept of Health (rev 2018), <https://www.health.ny.gov/forms/doh-5003.pdf>.

130 *Id.*

131 N.Y. Pub. Health Law § 2994-D(5) (McKinney 2021); see also *Medical Orders for Life-Sustaining Treatment (MOLST)*, NY Dept of Health (rev Apr. 2020), [https://www.health.ny.gov/professionals/patients/patient\\_rights/molst/](https://www.health.ny.gov/professionals/patients/patient_rights/molst/).

132 Pamela B. Teaster and James O'Brien, *The Elder Mistreatment of Overtreatment at End of Life*, Public Policy & Aging Report, 2014, 24, 92-96, doi: 10.1093/ppar/pro025.

133 *Id.*

134 Everyone is entitled to one free credit report a year from each key credit-reporting agency. Access annual credit report at <https://www.annualcreditreport.com/index.action>.

135 See *supra* Part III.B. Pre-Adjudication.

136 National Center on Elder Abuse, et al. *The National Elder Abuse Incidence Study: Final Report*. Admin. for Children and Family Services & The Admin. on Aging (Sept. 1998), [https://acl.gov/sites/default/files/programs/2016-09/ABuseReport\\_Full.pdf](https://acl.gov/sites/default/files/programs/2016-09/ABuseReport_Full.pdf).

137 Lawrence Schiamberg, & Daphna Gans, "An Ecological Framework for Contextual Risk Factors in Elder Abuse by Adult Children," 11 *Journal of Elder Abuse & Neglect* 1, 79-103 (1999).

138 N.Y. Fam. Ct. Act § 822(b) (McKinney 2021).

139 N.Y. Const. art. VI, § 7; N.Y. Fam. Ct. Act § 114 (McKinney 2021).

140 N.Y. Fam. Ct. Act § 812(1) (McKinney 2021).

141 *Kristina L. v. Elizabeth M.*, 156 A.D.3d 1162 (NY Sup Ct 2017) (court determined an intimate relationship existed where defendant lived in plaintiff's apartment, watched plaintiff's young child, and the parties were each familiar with personal details of each other's lives).

142 See *infra* Part VI. Elder Abuse Crimes Chart.

143 For a list of remedies, see [http://ww2.nycourts.gov/COURTS/nyc/family/faqs\\_domesticviolence.shtml#op3](http://ww2.nycourts.gov/COURTS/nyc/family/faqs_domesticviolence.shtml#op3).

144 *Id.* at § 827(v)(ii); § 842.

145 N.Y. Fam. Ct. Act §§ 842, 842(a) (McKinney 2021).

146 N.Y. Real Prop. Law §§ 227-c(1), (2)(a) (McKinney 2021).

147 See *ex* Judy Smith, *Difficult: Mothering Challenging Adult Children through Conflict and Change* (2022).

148 See *supra* Part III.B. Pre Adjudication.

149 N.Y. C.P.L.R. § 713(3) (McKinney 2021).

150 *Illegal Lock-outs*, New York City Housing Court, <http://nycourts.gov/courts/nyc/housing/lockouts.shtml>.

151 *Fisher v. Queens Park Realty Corp.*, 41 A.D.2d 547, 549 (2d Dep't 1973).

152 N.Y. Real. Prop. Acts. Law § 853 (McKinney 2021). See also *Clinkscale v. Sampson*, 48 A.D.3d 730 (2d Dep't 2008).

153 N.Y. Mental Hyg. Law § 81.20(a)(6)(iii) (McKinney 2021).

154 *Id.*; see, e.g., *Application of Rochester Gen. Hosp.*, 158 Misc. 2d 522, 530 (Sup. Ct. Monroe County 1993).

155 N.Y. Mental Hyg. Law §§ 81.20(a)(2), (3) (McKinney 2021).

156 *Id.* at (a)(6)(ii)

157 N.Y. Mental Hyg. Law § 81.35 (McKinney 2021).

158 67 N.Y. Jur.2d Infants § 489 (2013).

159 N.Y. Mental Hyg. Law § 81.35 (McKinney 2021).

160 *In re Francis M.*, 58 A.D.3d 937, 938 (3d Dep't 2009).

161 *In re Jones*, 31 Misc. 3d 1205A (Sup. Ct. Kings County 2011).

162 *In re Joshua*, 62 A.D.3d 795, 797 (2d Dep't 2009), where guardian/trustee was removed after improperly taking money from a supplemental needs trust to pay herself as compensation for guardianship duties.

163 *In re Francis M.*, 58 A.D.3d 937, 938 (3d Dep't 2009), where the guardian was removed when IP requested a new guardian because the current guardian was demeaning and condescending.

164 N.Y. Mental Hyg. Law § 81.35 (McKinney 2021).

165 *Matter of Arnold O.*, 226 A.D.2d 866, 867 (3d Dep't 1996).

166 Elder Law and Guardianship in NY § 15:47 (2012); 67 N.Y. Jur.2d Infants 489 (2013); see also *In re Jones*, 31 Misc. 3d 1205A (Sup. Ct. Kings County 2011), where petitioner sought removal of the guardian on the grounds that the guardian did not assist the IP, who was born without arms, in obtaining accessible wheelchair and housing accommodation.

167 *In re Beverly YY*, 79 A.D.3d 1442 (3d Dep't 2010), holding that evidence of an IP's fall, without more, was not enough to prove neglect and warrant removal; *Matter of Arnold O.*, 226 A.D.2d 866 (3d Dep't 1996), holding that conclusory allegations alone fail to establish guardianship misconduct.

168 *In re Dunsmoor*, 24 A.D.3d 1218 (4th Dep't 2005), where disagreements over choice of residential facility and treatment for the IP were not sufficient grounds for removing a guardian.

169 N.Y. Mental Hyg. Law § 81.25(a) (McKinney 2021).

170 Guidance provided by the Guardian Assistance Network (GAN). GAN assists family guardians who have been appointed in Kings County under Mental Hyg. Law Article 81. GAN was founded by the Vera Institute of Justice, initially as a program component of The Guardianship Project, and has since been absorbed into government as a service of the Office of Court Administration. See *Guardian Assistance Network*, <http://www.nycourts.gov/ip/gan/>.

171 Under Part 36, judges appoint guardians, guardians ad litem, supplemental needs trustees, etc. on a fair and impartial basis. Judges choose the guardians from a list of appointees who have applied and been found eligible to perform these duties. Part 36. Appointment by the Court, [http://www.nycourts.gov/ip/gfs/Part36RulesFINAL\\_1.pdf](http://www.nycourts.gov/ip/gfs/Part36RulesFINAL_1.pdf).

172 It is important to note that the Inspector General's Office handles only matters related to Part 36 guardians and agency guardians who are appointed by judges—not guardians who are family members or friends (if there is a problem with a family member/friend guardian, the concerned party must take the issue to court). Further, the office does not handle power of attorney or health care proxy issues.

173 See *supra* Part III.B.iii. Civil Remedies to Address Elder Abuse.

174 See *supra* Part III.B.iii. Civil Remedies to Address Elder Abuse.

175 N.Y. Est. Powers & Trusts Law § 7-2.6 (McKinney 2021).

176 *In re Bitter*, 11 Misc. 3d 1032, 1034 (N.Y. Surr. Ct. Nassau County 2006) (decedent's daughter-in-law's letters of trusteeship revoked after son started divorce proceedings).

177 *In re Trust made by Giles*, 902 N.Y.S.2d 717, 720 (3d Dep't 2010), holding the testamentary trustee did not make unauthorized distributions from trust by giving beneficiaries large cash distributions.

178 *Hoopes v. Bruno*, 128 A.D.2d 991, 991 (3d Dep't 1987).

179 *In re Trust made by Giles*, at 720 (3d Dep't 2010).

180 *Matter of Rose BB*, 243 A.D.2d 999, 999 (3d Dep't 1997), where trustee was not removed when evidence did not support allegations of misconduct.

181 *Gouiran v. Gouiran*, 263 A.D.2d 393, 393 (1st Dep't 1999).

182 N.Y. Surr. Ct. Proc. Act Law § 711(2) (McKinney 2021).

183 N.Y. Surr. Ct. Proc. Act Law § 711 (McKinney 2021).

184 N.Y. Surr. Ct. Proc. Act Law § 711(11) (McKinney 2021).

185 N.Y. Est. Powers & Trusts Law § 7-2.6 (McKinney 2021).

186 N.Y. C.P.L.R. § 6401 (McKinney 2021).

187 *Id.* at (b).

188 N.Y. Est. Powers & Trusts Law § 7-3.1 (McKinney 2021).

189 Funding to Support 23 Existing Teams, Create New Teams to Serve Every County by 2020, NYS Off. of Victim Servs. (July 31, 2018), <https://ovs.ny.gov/news/governor-cuomo-announces-8-4-million-combat-elder-abuse-financial-exploitation>.

190 *Enhanced Multidisciplinary Teams*, Lifespan, <https://www.lifespan-roch.org/enhanced-multidisciplinary-teams> (last accessed Sept. 29, 2020).

191 Weill Cornell Medicine (n.d.), Vulnerable Elder Protection Team (VEPT), Emergency Medicine, <https://emed.weill.cornell.edu/divisions/vulnerable-elder-protection-team-vept>.

192 See *infra* Part VI. Elder Abuse Crimes Chart.

193 Current New York State Criminal Procedure Law allows for a prospective witness who suffers from demonstrable physical illness or impairment to be conditionally examined under oath. This testimony is then admissible as evidence in a subsequent trial. N.Y. Crim. Proc. Law § 660.20(2)(b) (McKinney 2021). A recent report of the New York State White Collar Crime Task Force recommends that this law be amended to allow for conditional examination of all potential witnesses aged 75 and older, regardless of impairment. The Dist. Att'ys Ass'n of the State of New York, *Report of the New York State White Collar Crime Task Force*, 65-66 (2013). A bill based upon this recommendation is currently pending in the NYS Assembly. 2014 NY Assembly Bill A8779.

194 See *infra* Part VI. Elder Abuse Crimes Chart.

195 Center for Court Innovation, *Bail Reform and Domestic Violence: Implications of New York's New Pretrial Statute* (August 2019), 1, [https://www.courtinnovation.org/sites/default/files/media/document/2019/nys\\_bail\\_domestic\\_violence2.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2019/nys_bail_domestic_violence2.pdf).

196 Brennan Center for Justice, *New York's Latest Bail Law Changes Explained* (April 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>.

197 Center for Court Innovation, *Bail Reform Revisited, The Impact of New York's Amended Bail Law on Pretrial Detention* (May 2020), 1, [https://www.courtinnovation.org/sites/default/files/media/document/2020/Bail\\_Reform\\_Revisited\\_050720.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2020/Bail_Reform_Revisited_050720.pdf).

198 *Id.*, 2-4.

199 Center for Court Innovation, *Bail Reform and Domestic Violence: Implications of New York's New Pretrial Statute* (August 2019), pg. 1, [https://www.courtinnovation.org/sites/default/files/media/document/2019/nys\\_bail\\_domestic\\_violence2.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2019/nys_bail_domestic_violence2.pdf).

200 *Id.*

201 N.Y. Crim Proc. Law §§ 530.11(1)(a)-(e) (McKinney 2021).

202 N.Y. Crim Proc. Law § 530.12-530.13 (McKinney 2021).

203 *Id.* at §§ 530.12(4), 530.13(4).

