

**ADDRESSING FINANCIAL ABUSE
IN ARTICLE 81
GUARDIANSHIP PROCEEDINGS**

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WHAT IS FINANCIAL ABUSE?

The terms “financial abuse” and “financial exploitation are used interchangeably.

N.Y. Social Services Law §473(6) defines financial exploitation as follows: “Financial exploitation” means improper use of an adult’s funds, property or resources by another individual, including but not limited to, fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers, or denial of access to assets.” N.Y. Soc Serv L. §473(6).

THE REALITY OF FINANCIAL ABUSE

The National Adult Protective Services Association lists some alarming statistics on its website with regard to Elder Financial Exploitation:

- 1 in 9 seniors reported being abused, neglected or exploited in the past 12 months;
- The rate of financial exploitation is extremely high, with 1 in 20 older adults indicating some form of perceived financial mistreatment;
- Elder abuse is vastly under-reported; only 1 in 44 cases of financial abuse is ever reported;
- Abused seniors are 3 times more likely to die and 4 times more likely to go into a nursing home;
- 90% of abusers are family members or trusted others;
- 1 in 10 financial abuse victims will turn to Medicaid as a direct result of their own monies being stolen from them;
- Cognitive impairment and the need for help with activities of daily living (ADL’s) make victims more vulnerable to financial abuse;

National Adult Protective Services Association (www.napsa-now.org)

NEW YORK

A New York State study found that major financial abuse was self-reported at a rate of 41 per 1000 surveyed and was higher than the self-reported rates of all other abuse, including emotional, physical and sexual abuse or neglect.¹

POPULATION IN CRISIS

As if the above statistics are not alarming enough, it is important to note that the aging population is only going to get larger, therefore, the expectation is that there will be more individuals over the age of 65 who are at risk of some form of elder abuse, including financial abuse, which is the most prevalent form of elder abuse according to the above studies.

In the United States, the 2010 Census recorded the greatest number and proportion of people age 65 and older in all of decennial census history: 40.3 million, or 13% of the total population. This “Boomer Generation” effect will continue for decades.²

By 2050, the population aged 65 and over is projected to be 83.7 million, with 18 million people being over the age of 85.³

Financial abuse by itself costs older Americans over \$2.6 Billion Dollars annually.⁴

¹ Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University, & New York City Department for the Aging. (2011). [*Under the Radar: New York State Elder Abuse Prevalence Study*](#) (PDF).

² U.S. Dept. of Commerce, U.S. Census Bureau (2011). [*The Older Population: 2010*](#)(PDF).

³ U.S. Dept. of Commerce, U.S. Census Bureau. (2014). [*An Aging Nation: The Older Population in the United States*](#) (PDF).

⁴ MetLife Mature Market Institute, The National Committee for the Prevention of Elder Abuse, The Center for Gerontology at Virginia Polytechnic Institute and State University. [*Broken Trust: Elders, Family & Finances*](#) (PDF).

ARTICLE 81 AND FINANCIAL EXPLOITATION

In enacting Article 81 of the Mental Hygiene Law, the New York State Legislature declared:

The legislature declares that it is the purpose of this act to promote public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person...”

N.Y. Mental Hygiene L. §81.01.

The Court must determine that there is a need for the appointment of a Guardian and that the Alleged Incapacitated Person either consents to the appointment of a Guardian or is incapacitated. See N.Y. MHL §81.02(a).

For our purposes today, let’s assume that capacity is not an issue. The second prong on this standard is **need**. The Court’s determination as to need will be based on a finding after a hearing where the burden is on the Petitioner to show, by clear and convincing evidence, that there is a need for the appointment of a Guardian.

As practitioners, when evaluating whether there is a need for the appointment of a Guardian, one should always consider the state of the finances of the Alleged Incapacitated Person (“AIP”). Ask yourself the following:

- (1) What are the financial resources of Alleged Incapacitated Person?
- (2) Are we aware of any questionable transactions, whether by bank records, deed transfers, or by notations on a Medicaid notice from DSS?
- (3) When did these questionable transactions occur? When did the AIP lose capacity?
- (4) Are there joint bank accounts?
- (5) Is there a Power of Attorney? If so, who is the agent and when was it executed?
- (6) Are the AIP’s bills being paid? Are bills being paid that are not for the benefit of the AIP? (For example, is the AIP non-communicative yet paying a cell phone bill by auto debit or has the AIP been in a nursing home yet paying for utilities like Verizon, Con Ed, or cable?)
- (7) Does the AIP receive income and if so, where is it going?

PROVISIONAL REMEDIES UNDER SECTION 81.23 OF THE MENTAL HYGIENE LAW

At different stages throughout the course of an Article 81 guardianship proceeding, there are several different remedies that the Court can grant.

Section 81.23 of the Mental Hygiene Law provides for provisional remedies, including the appointment of a Temporary Guardian and/or the issuance of an Injunction and Temporary Restraining Order. See NY MHL §81.23(a) and (b).

TEMPORARY GUARDIAN

Section 81.23 of the Mental Hygiene Law provides for the appointment of a Temporary Guardian:

1. At the commencement of the proceeding or at any subsequent stage of the proceeding prior to the appointment of a guardian, the court may, upon showing of danger in the reasonably foreseeable future to the health and well being of the alleged incapacitated person, or danger of waste, misappropriation, or loss of the property of the alleged incapacitated person, appoint a temporary guardian for a period not to extend beyond the date of the issuance of the commission to a guardian appointed pursuant to this article. The powers and duties of the temporary guardian shall be specifically enumerated in the order of appointment and are limited in the same manner as are the powers of a guardian appointed pursuant to this article.....

N.Y. Mental Hygiene L. §81.23(a).

In summary:

- A Temporary Guardian can be appointed at commencement (in the Order to Show Cause) or at any stage of the proceeding where a Temporary Guardian is necessary;
- There must be a showing of danger in the reasonably foreseeable future to health and well-being, or, which is more relevant for today's program, danger of waste, misappropriation, or loss of the property of the AIP;
- There is a limited duration for the appointment thus the term "temporary";
- Specific powers are to be granted - least restrictive only to address the imminent needs;
- If seeking a Temporary Guardian, you must also seek the appointment of counsel for the AIP (See NY MHL §81.10(c)(5).)

When seeking a Temporary Guardian at the commencement of the proceeding, be sure to include a section in the Petition specifically outlining the powers requested and the need for the Temporary Guardian.

How does a Temporary Guardian address financial abuse?

A Temporary Guardian can be a very effective means to address financial abuse. A Temporary Guardian can be utilized for the following purposes:

- (1) marshal assets and income;
- (2) obtain access to confidential financial records to review;
- (3) address any issues surrounding real property - pending sales, squatters, tenants who are not paying rent, payment of bills that are crucial (i.e. heating & oil bills in winter months to avoid pipes bursting) that may not be addressed by an attorney-in-fact who has breached his/her duty;
- (4) another set of eyes on the AIP and the individuals who are involved in the finances;
- (5) determine care decisions and payment for care where an individual has refused to utilize the AIP's monies for desperately needed care;

A Temporary Guardian is also a good tool because seeking the appointment of a Temporary Guardian does not have the same notice requirements as seeking an Injunction or Temporary Restraining Order. A Temporary Guardian could result in a similar effect, for example, marshaling of funds from any joint accounts, therefore the money is protected.

INJUNCTION AND TEMPORARY RESTRAINING ORDER

Section 81.23 of the Mental Hygiene Law also provides for the issuance of an Injunction and Temporary Restraining Order:

(b) Injunction and temporary restraining order.

1. The court may, at any time prior to or after the appointment of a guardian or at the time of the appointment of a guardian with or without security, enjoin any person, other than the incapacitated person or the person alleged to be incapacitated from selling, assigning, or from disposing of property or confessing judgment which may become a lien on property or receiving or arranging for another person to receive property from the incapacitated person or the person alleged to be incapacitated or doing or suffering to be done any act or omission endangering the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated when an application under this article seeks such an injunction and it satisfactorily appears from the application, affidavits, and other proofs that a person has done, has suffered to be done or omitted to do, or threatens to do or is about to do an act that endangers the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated or has acquired or is about to acquire any property from the incapacitated person or person alleged to be incapacitated during the time of that

person's incapacity or alleged incapacity without adequate consideration. Such order shall be made upon an order to show cause or upon the initiative of the court and may, upon the application for the appointment of a guardian, in the discretion of the court, be continued for ten days after the appointment of a guardian. Notice of any injunction shall be given to any person enjoined, to the incapacitated person or the person alleged to be incapacitated, and to any person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated in such manner as the court may prescribe.

2. A temporary restraining order may be granted with or without security when an application seeks an injunction under paragraph one of this subdivision and where the court is satisfied that in the absence of such restraining order, the property of the incapacitated person or person alleged to be incapacitated would be dissipated to that person's detriment or that the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated would be endangered. Notice of the temporary restraining order shall be given to any person restrained, to the incapacitated person or the person alleged to be incapacitated, and to any person having custody or control over the person or property of the incapacitated person or person alleged to be incapacitated in such manner as the court may prescribe. Such temporary restraining order shall neither be vacated nor modified except upon notice to the petitioner and to each person required to receive notice of the petition pursuant to [paragraph one of subdivision \(g\) of section 81.07](#) of this article.

3. When the court is satisfied that the interest of the incapacitated person or person alleged to be incapacitated would be appropriately served, the court may provide in a temporary restraining order that such temporary restraining order shall have the effect of:

(i) a restraining notice when served in a manner and upon such persons as the court in its discretion shall deem appropriate;

(ii) conferring information subpoena power upon the attorney for the petitioner when the court in its discretion shall deem appropriate.

4. Where such a temporary restraining order provides for a restraining notice a person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated is forbidden to make or suffer any sale, assignment, transfer or interference with any property of the incapacitated person or the person alleged to be incapacitated except pursuant to the order of the court.

5. Where such a temporary restraining order provides the petitioner's attorney with information subpoena power, service of a copy of the order together with an information subpoena shall require any person so subpoenaed to provide petitioner's attorney with any information concerning the financial affairs of the incapacitated person or the person alleged to be incapacitated.

What is the difference between an Injunction and a Temporary Restraining Order?

TRO: A Temporary Restraining Order is a form of immediate and temporary relief that remains in place for a specific duration of time until the Court has an opportunity to render a decision as to the appointment of a Guardian and an application for an Injunction.

Injunction: An Injunction is a more permanent remedy that may be granted at any time prior to or after the appointment of a Guardian or at the time of the appointment of a Guardian.

For example:

John Smith commences an Article 81 proceeding for his mother, Mary Smith. Mary currently resides in her own home, which she owns outright, with her daughter, Jane, who is John's twin sister. Jane moved in to Mary's home after her divorce over twenty years ago. Mary suffers from advanced Alzheimer's disease and prior to becoming ill, she executed a Power of Attorney naming Jane as her attorney-in-fact. Mary has a solid long term care insurance policy, therefore, she does not need to qualify for Medicaid or engage in any Medicaid planning transfers, such as the care taker child transfer. Jane, as attorney-in-fact for Mary, decides that John does not visit enough and does not help her with any of mom's care. As attorney-in-fact, Jane decides that she is going to transfer mom's house to herself and to her other sister, Cathy ("Chatty Cathy"), as tenants in common. Jane does not consult with mom as mom would not be able to understand, and if she did understand, she would be livid. Mom loves all three of her children equally; lights up when John visits on holidays; and executed a prior Will leaving the house to all three children as tenants in common. John learns from Chatty Cathy (no surprise there!) that Jane plans to do this deed transfer. John hires an attorney to commence a guardianship proceeding for mom and he wants to utilize all available provisional remedies. What can he do?

- John would seek an Injunction as permanent relief to stop Jane from executing the deed transfer but also seek a Temporary Restraining Order while waiting for the guardianship hearing to occur, which would address the Injunction that is being sought.

- John would also seek revocation of the POA, which will be addressed later on

USES:

- restrain a POA from being used where you believe there is a breach of fiduciary duty;
- restrain a pension company from issuing further checks if you believe the income is being misappropriated;
- freeze a bank account that is being managed under a POA or that is joint

****22 NYCRR 202.7 - When seeking an Injunction or a Temporary Restraining Order, you must follow the notice provisions under Rule 202.7.**

You must make a good faith effort to give notice to the party to be enjoined or restrained or attach an affidavit for waiver of notice due to significant prejudice to the party seeking the restraining order. Typically, you are looking to make a showing of significant prejudice to prevent an individual from wiping out a bank account, transferring the property, etc. before getting to Court.

_____ You should always plan to argue for the issuance of a TRO in person, even if it is included in the Order to Show Cause at the time of the filing of the papers.

INFORMATION SUBPOENA

Under Section 81.23(5), a Temporary Restraining Order may provide the Petitioner's attorney with Information Subpoena power. This is an incredibly useful tool as it requires any person so subpoenaed to provide Petitioner's attorney with any information concerning the financial affairs of the AIP.

This can be used to compel an attorney-in-fact, for example, to disclose information about the AIP's financial transactions. The burden in an Article 81 proceeding is on the Petitioner, and there is typically no discovery in a Special Proceeding (without court permission). Gathering financial information could be useful in meeting the burden as to need and proving breach of fiduciary duty.

REVOCATION OF ADVANCE DIRECTIVES AND/OR OTHER CONTRACTS, CONVEYANCES, OR DISPOSITIONS

Whenever there is a finding by the Court that there has been a breach of fiduciary duty as to an attorney-in-fact under a Power of Attorney, the Court has the authority to revoke the Power of Attorney document.

A Power of Attorney is governed by NY General Obligations Law §§5-1501 (as to the POA form itself), 5-1505 (as to the standards for a fiduciary) and 5-1506 (as to compensation).

Keep in mind that under 5-1505, an attorney-in-fact **SHALL** keep records of all expenditures, receipts, etc. and **SHALL** release copies of such records within **15 DAYS** of a written request by a Court Evaluator appointed under Article 81 of the Mental Hygiene Law.

Use your Court Evaluator if you are a Petitioner and if you are a Court Evaluator, remember that you have that power. See NY Gen Oblig L §5-1505.

Also, note that an attorney-in-fact **SHALL NOT** receive compensation for services as such unless it is expressly stated in the Power of Attorney document. See NY Gen Oblig L §5-1506.

REASONS FOR REVOCATION OF A POWER OF ATTORNEY DUE TO FINANCIAL ABUSE

There are varying degrees of financial abuse surrounding a Power of Attorney document. Some cases may include:

- A Power of Attorney that was obtained while the principal was incapacitated - sometimes these POA's are innocently obtained (a quick fix to help a family member or friend) but a lot of times, these POA's are obtained at a time when the principal lacked capacity and may have never chosen this individual as her agent when cognitively intact
- Evidence at the hearing of breach of fiduciary duty:
- Actions of Breach - uncompensated transfers of funds, transfers of real property (I once had a case where the AIP, who was getting rehab in a facility, insisted that she was returning to her home that she owned yet her two daughters had already sold the house using a POA, while she was in the nursing home, and used all the proceeds - one used her share to throw a lavish wedding and another used hers in Atlantic City while residing in her car); payment of bills that are not the AIP's; self-dealing transactions;
- Failure to Act is also a Breach - failure by the agent to address the principal's needs such as failure to pay bills, allowing real property to go into foreclosure, failure to pay taxes, failure to apply for benefits, failure to take steps to protect the assets and income of the principal - allowing others to take advantage (we could do an entire segment on other forms of financial abuse in elders - internet schemes, lottery and sweepstakes scams, etc.)

Matter of CW, 2016 NY Misc. LEXIS 1934 (Sup Ct Dutchess Cnty 2016): This is an interesting case with respect to provisional remedies because here, after a showing of physical, emotional and financial abuse by the Petitioner, and an application by counsel for the AIP for provisional remedies under 81.23, the Court revoked the Power of Attorney and Health Care Proxy, which is covered under Article 81, but also issued an Order of Protection, which is not mentioned in 81.23 at all, stating that an Order of Protection is an injunction against further contact with the AIP, and injunctions are part of 81.23 of the Mental Hygiene Law.

The Court also has the power to invalidate any contract or conveyance that took place at the time when the AIP was incapacitated.

For example, there may not be a POA. There may be transfers and bill payments, deed transfers, etc that the AIP made herself, at the bequest of others, while she was cognitively impaired. So long as the Petitioner is able to demonstrate that the AIP lacked capacity at the time of the conveyance or transfer, the guardianship Court can invalidate those transactions.

Matter of Caryl S.S. (Valerie L.S.), 47 Misc.3d 1201(A); 15 N.Y.S.3d 710 (Sup. Ct. Bx Cnty 2015): Court set aside the IP's Health Care Proxy, Power of Attorney, and deed transfers finding them to be the result of exploitation of a relationship of trust and confidence to overwhelm the IP to a point that she could not resist.

Most times, this is done in a separate proceeding from the hearing that is brought for the appointment of a Guardian because then the Guardian has the ability to obtain the necessary documentation that he/she needs to establish the proof that is required. But sometimes, you are able to make application for this relief at the commencement of the proceeding. It will be case-specific in that regard. But the remedy is there.

****A Guardianship Court SHALL NOT invalidate or revoke any Will or codocil during the lifetime of an Incapacitated Person.** See NY Mental Hygiene L. §81.29(d)**

DISCOVERY AND TURNOVER PROCEEDINGS PURSUANT TO SECTION 81.43 OF THE MHL

Provisional Remedies and the Revocation of Advance Directives are typically addressed at the commencement of the proceeding and/or during the course of the proceeding up to the appointment of a full Guardian. However, Article 81 provides a post-judgment mechanism to address financial exploitation which is referred to as a Discovery and Turnover Proceeding pursuant to Section 81.43 of the Mental Hygiene Law.

Section 81.43 of the Mental Hygiene Law provides:

(a) To the extent that it is consistent with the authority otherwise granted by the court a guardian may commence a proceeding in the court which appointed the guardian to discover property withheld. The petition shall contain knowledge, or information and belief of any facts tending to show that any interest in real property or money or other personal property, or the proceeds or value thereof, which should be delivered and paid to the guardian, is in the possession, under the control, or within the knowledge or information of respondent who withholds the same from the guardian, whether such possession or control was obtained before or after the appointment of the guardian, or that the respondent refuses to disclose knowledge or information which such person may have concerning the same or which will aid the guardian in making discovery of such property. The petition shall request that respondent be ordered to attend an inquiry and be examined accordingly and deliver property of the incapacitated person if it is within his or her control. The petition may be accompanied by an affidavit or other written evidence, tending to support the allegations thereof. If the court is satisfied on the papers so presented that there are reasonable grounds for the inquiry, it must make an order accordingly, which may be returnable forthwith, or at a future time fixed by the court, and may be served at any time before the hearing. If it shall appear from the petition or from the answer interposed thereto, or in the course of the inquiry made pursuant to the order that a person other than the respondent in the proceeding claims an interest in the property or the proceeds or the value thereof, the court may by the original order or by supplemental order, direct such additional party to attend and be examined in the proceeding in respect of his or her adverse claim, and deliver the property if in his or her control or the proceeds or value thereof. Service of such an order must be made by delivery of a certified copy thereof to the person or persons named therein and the

payment or tender, to each of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in such court.

(b) If the person directed to appear submits an answer denying any knowledge concerning or the possession of any property which belongs to the incapacitated person or should be delivered to the guardian, or shall make default in answer, he or she shall be sworn to answer truly all questions put to him or her regarding the inquiry requested in the petition. Any claim of title to or right to the possession of any property of the incapacitated person must be made by verified answer in writing. If such answer is interposed, the issues raised thereby shall be tried according to the usual practice of the court as a litigated issue but the interposition of such answer shall not limit the right of the guardian to proceed with the inquiry in respect of property not so claimed by the verified answer. If possession of the property is denied, proof on that issue may be presented to the court by either party. The court may in an appropriate case make interim decrees directing the delivery of property not claimed by verified answer and may continue the proceeding for determination of any litigated issue. If it appears that the guardian is entitled to the possession of the property, the decree shall direct delivery thereof to the guardian or if the property shall have been diverted or disposed of, the decree may direct payment of the proceeds or the value of such property or may impress a trust upon said proceeds or make any determination which a court of equity might decree in following trust property funds. In any case in which a verified answer is served and the court after a trial or hearing determines the issue, the court may in its discretion award costs not exceeding fifty dollars and disbursements to be paid by the unsuccessful party.

The Order and Judgment Appointing Guardian outlines all of the powers of the Guardian and one of the powers, under Section 81.21 of the Mental Hygiene Law, is to commence a discovery and turnover proceeding. This proceeding is a separate proceeding that is brought by the Guardian to recover property that was misappropriated or improperly transferred prior to the appointment of the Guardian and that rightfully belongs in the possession of the IP.

The proceeding is brought by Order to Show Cause and Petition. The Petition must include knowledge or information and belief of facts tending to show that there is an interest in real property or money or other personal property or the proceeds from any of the above, that should be paid to

and/or delivered to the Guardian. The petition may also be brought against a person who may not actually have possession of the missing monies/property but who refuses to give information as to the whereabouts.

The Order to Show Cause shall seek the following:

- (1) directing that an inquiry be held regarding assets of the IP in possession of the respondent;
- (2) directing that the respondent attend the inquiry;
- (3) directing that respondent deliver the property being sought to the guardian, or, in the alternative, granting a judgment against the respondent for the value in favor of the IP;

If it appears that there are other individuals with knowledge, other than the respondent, the Court can also direct them to attend the inquiry.

Matter of Mitchell, 2016 NY Misc LEXIS 2025 (Sup Ct. Kings Cnty 2016): A Guardian successfully brought a discovery and turnover proceeding and after an evidentiary hearing, the Court, *inter alia*, found that the attorney-in-fact exploited his position and awarded a money judgment against him on behalf of the IP.

Sadly, however, it is usually difficult to recover the monies; the 81.43 proceedings are not brought unless there is money to be recovered because they are time consuming and costly; and based on experience, it is incredibly difficult for the District Attorneys' Offices to prosecute these cases where there are capacity issues and the abusers are 90% family.

WHO PROTECTS THIS VULNERABLE POPULATION?

The statistics show that most victims of financial abuse are being subjected to this abuse by family members or persons in a position of trust. Who, then, can protect them? The statute has several highly effective mechanisms to address financial abuse at all stages of the proceeding - at commencement, during the proceeding, and post-judgment. But how does it get before a judge??

Section 81.06 of the Mental Hygiene Law provides a list of eligible Petitioners, which currently includes the Department of Social Services/Adult Protective Services and the Chief Executive Officer of a facility in which the AIP is a patient or resides (meaning hospitals and nursing homes).

There is much discussion about a change to the statute to prohibit hospitals and/or nursing homes from petitioning. However, sometimes, it is the nursing home who brings these situations to light. In many instances, these cases of financial abuse are revealed once a nursing home applies for Medicaid benefits, which are denied for illegitimate transfers.

While it may be true that a Petitioner/nursing home stands to benefit from the appointment of a Guardian in that the IP will have someone there to pay its bill and to apply for benefits, the result is still that the IP has someone to protect assets that may have once been subject to abuse.

CASE OF INTEREST - QUEENS COUNTY

Our office handled a case recently for one of our nursing home clients and the facts are disturbing:

Mildred Jones was admitted to ABC Nursing Home in March, 2017 after a short hospitalization at NY Presbyterian. Mildred was able to walk with a cane but she was pleasantly confused. She needed assistance with shopping and cleaning. She had been living in the first floor apartment of her own two-family home, where she resided for over 40 years with her late husband, until December, 2016, when her close friends and neighbors, the Burkes, “bought” her 2 family Queens, NYC, home from her for \$385,000.00. The actual value of the home was much higher as evidenced by a reverse mortgage with a value of over \$780,000.00 (\$360,000.00 of it was used from May 2015 - November 2016 and Mildred could not account for any of it). Mildred was supposed to retain a life estate in the property but that did not happen. Other than the Burkes, Mildred had no other family except a cousin who lived across the street (and was also friendly with the Burkes), but claimed to be uninvolved (yet was joint on the bank accounts). In December, 2016, after the sale, the Burkes moved Mildred from the first floor apartment to the second floor apartment (Mildred used a cane to walk) and Mildred “agreed” to pay the Burkes \$20,000.00 extra, as requested by them, in exchange for the Burkes to clean and shop for her. Mildred was also supposed to live rent-free for the remainder of her life but she was actually paying rent to the Burkes according to her bank statements. Mildred was hospitalized in March, 2017 and subsequently admitted to the nursing home, after the Burkes called 9-1-1 because Mildred was agitated and depressed. The Burkes were involved in the admissions process at ABC Nursing Home as they were her only contacts and insisted that she could no longer be maintained in the home, even when offered home care services. They wanted long-term admission. The Burkes also told the nursing home social worker, when questioned about the state

of Mildred's finances, that Mildred played a lot of scratch-offs and lotto, so most of the money could not be accounted for, and that she randomly sent \$29,000.00 to a stranger in Florida because he had promised her a chance to win \$1 Million Dollars. Mildred did not want to remain in the nursing home and she cried to be discharged back to her home with home care. But the Burkes would not accept her back and she was no longer an owner of the property. The nursing home had no other choice but to commence a guardianship proceeding for Mildred.

2017 New York Laws

SOS - Social Services

Article 9-B - ADULT PROTECTIVE SERVICES

Title 1 - (473) PROTECTIVE SERVICES

473 - Protective services.

Universal Citation: [NY Soc Serv L § 473 \(2017\)](#)

473. Protective services. 1. In addition to services provided by social services officials pursuant to other provisions of this chapter, such officials shall provide protective services in accordance with federal and state regulations to or for individuals without regard to income who, because of mental or physical impairments, are unable to manage their own resources, carry out the activities of daily living, or protect themselves from physical abuse, sexual abuse, emotional abuse, active, passive or self neglect, financial exploitation or other hazardous situations without assistance from others and have no one available who is willing and able to assist them responsibly. Such services shall include:

- (a) receiving and investigating reports of seriously impaired individuals who may be in need of protection;
- (b) arranging for medical and psychiatric services to evaluate and whenever possible to safeguard and improve the circumstances of those with serious impairments;
- (c) arranging, when necessary, for commitment, guardianship, or other protective placement of such individuals either directly or through referral to another appropriate agency, provided, however, that where possible, the least restrictive of these measures shall be employed before more restrictive controls are imposed;
- (d) providing services to assist such individuals to move from situations which are, or are likely to become, hazardous to their health and well-being;
- (e) cooperating and planning with the courts as necessary on behalf of individuals with serious mental impairments; and

(f) other protective services for adults included in the regulations of the department.

2. (a) In that the effective delivery of protective services for adults requires a network of professional consultants and services providers, local social services districts shall plan with other public, private and voluntary agencies including but not limited to health, mental health, aging, legal and law enforcement agencies, for the purpose of assuring maximum local understanding, coordination and cooperative action in the provision of appropriate services.

(b) Each social services district shall prepare, with the approval of the chief executive officer, or the legislative body in those counties without a chief executive officer, after consultation with appropriate public, private and voluntary agencies, a district-wide plan for the provision of adult protective services which shall be a component of the district's multi-year consolidated services plan as required in section thirty-four-a of this chapter. This plan shall describe the local implementation of this section including the organization, staffing, mode of operations and financing of the adult protective services as well as the provisions made for purchase of services, inter-agency relations, inter-agency agreements, service referral mechanisms, and locus of responsibility for cases with multi-agency services needs. Commencing the year following preparation of a multi-year consolidated services plan, each local district shall prepare annual implementation reports including information related to its adult protective services plan as required in section thirty-four-a of the social services law.

(c) Each social services district shall submit the adult protective services plan to the department as a component of its multi-year consolidated services plan and subsequent thereto as a component of its annual implementation reports and the department shall review and approve the proposed plan and reports in accordance with the procedures set forth in section thirty-four-a of this chapter.

3. Any social services official or his designee authorized or required to determine the need for and/or provide or arrange for the provision of protective services to adults in accordance with the provision of this section, shall have immunity from any civil liability that might otherwise result by reason of providing such services, provided such official or his designee was acting in the discharge of his duties and within the scope of his employment, and that such liability did not result from the willfull act or gross negligence of such official or his designee.

4. For the purpose of developing improved methods for the delivery of protective services for adults, the department with the approval of the director of the budget, shall authorize a maximum of five demonstration projects in selected social services districts. Such projects may serve

a social services district, part of a district or more than one district. These demonstration projects shall seek to determine the most effective methods of providing the financial management component of protective services for adults. These methods shall include but not be limited to: having a social services district directly provide financial management services; having a social services district contract with another public and/or private agency for the provision of such services; utilizing relatives and/or friends to provide such services under the direction of a social services district or another public and/or private agency and establishing a separate public office to provide financial management services for indigent persons. The duration of these projects shall not exceed eighteen months. Furthermore, local social services districts shall not be responsible for any part of the cost of these demonstration projects which would not have otherwise accrued in the provision of protective services for adults. The total amount of state funds available for such financial management services demonstration projects, exclusive of any federal funds shall not exceed three hundred thousand dollars. The commissioner shall require that a final independent evaluation by a not-for-profit corporation be made of the demonstration projects approved and conducted hereunder, and shall provide copies of such report to the governor and the legislature.

5. Whenever a social services official, or his or her designee authorized or required to determine the need for, or to provide or arrange for the provision of protective services to adults in accordance with the provisions of this title has a reason to believe that a criminal offense has been committed, as defined in the penal law, against a person for whom the need for such services is being determined or to whom such services are being provided or arranged, the social services official or his or her designee must report this information to the appropriate police or sheriff's department and the district attorney's office when such office has requested such information be reported by a social services official or his or her designee.

6. Definitions. When used in this title unless otherwise expressly stated or unless the context or subject matter requires a different interpretation:

(a) "Physical abuse" means the non-accidental use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly physically restrained.

(b) "Sexual abuse" means non-consensual sexual contact of any kind, including but not limited to, forcing sexual contact or forcing sex with a third party.

(c) "Emotional abuse" means willful infliction of mental or emotional anguish by threat, humiliation, intimidation or other abusive conduct, including but not limited to, frightening or isolating an adult.

(d) "Active neglect" means willful failure by the caregiver to fulfill the care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment, willful deprivation of food, water, heat, clean clothing and bedding, eyeglasses or dentures, or health related services.

(e) "Passive neglect" means non-willful failure of a caregiver to fulfill care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment or denial of food or health related services because of inadequate caregiver knowledge, infirmity, or disputing the value of prescribed services.

(f) "Self neglect" means an adult's 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.

(g) "Financial exploitation" means improper use of an adult's funds, property or resources by another individual, including but not limited to, fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets.

7. Notwithstanding any other provision of law, for the purposes of this article an Indian tribe that has entered into an agreement with the office of children and family services pursuant to section thirty-nine of this chapter, which includes the provision of adult services by such Indian tribe, shall have the duties, responsibilities and powers of a social services district or a social services official for the purpose of providing adult protective services.

8. The office of children and family services shall create and keep current best practice guidelines for the provision of adult protective services pursuant to this article. Such guidelines shall be distributed for use to local social services districts, and posted on such office's website, and shall include, but not be limited to, the procedures for:

(a) reviewing any previous child or adult protective involvement;

(b) assessing and identifying abuse and neglect of persons believed to be in need of protective services;

(c) interviewing persons believed to be in need of protective services and their caretakers;

(d) reviewing when it is appropriate to seek a warrant to gain access to persons believed to be in need of protective services;

(e) identifying and making referrals for appropriate services; and

(f) communicating the rights of persons believed to be eligible for protective services.

2017 New York Laws
MHY - Mental Hygiene
Title E - GENERAL PROVISIONS
Article 81 - (81.01 - 81.44) PROCEEDINGS
FOR APPOINTMENT OF A GUARDIAN
FOR PERSONAL NEEDS OR PROPERTY
MANAGEMENT
81.23 - Provisional remedies.

Universal Citation: [NY Ment Hygiene L § 81.23 \(2017\)](#)

81.23 Provisional remedies.

(a) Temporary guardian.

1. At the commencement of the proceeding or at any subsequent stage of the proceeding prior to the appointment of a guardian, the court may, upon showing of danger in the reasonably foreseeable future to the health and well being of the alleged incapacitated person, or danger of waste, misappropriation, or loss of the property of the alleged incapacitated person, appoint a temporary guardian for a period not to extend beyond the date of the issuance of the commission to a guardian appointed pursuant to this article. The powers and duties of the temporary guardian shall be specifically enumerated in the order of appointment and are limited in the same manner as are the powers of a guardian appointed pursuant to this article. Prior to the expiration of the term of appointment, the temporary guardian shall report to the court all actions taken pursuant to the order appointment. The court may approve a reasonable compensation for the temporary guardian; however, if the court finds that the temporary guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the amount of compensation or remove the temporary guardian.
2. Notice of the appointment of the temporary guardian shall be given to the person alleged to be incapacitated and to any person having custody or control over the person or property of the person alleged to be incapacitated in such manner as the court may prescribe.

3. The authority and responsibility of a temporary guardian begins upon the issuance of the commission of temporary guardianship.
4. The court may require the temporary guardian to file a bond in accordance with section 81.25 of this article.

(b) Injunction and temporary restraining order.

1. The court may, at any time prior to or after the appointment of a guardian or at the time of the appointment of a guardian with or without security, enjoin any person, other than the incapacitated person or the person alleged to be incapacitated from selling, assigning, or from disposing of property or confessing judgment which may become a lien on property or receiving or arranging for another person to receive property from the incapacitated person or the person alleged to be incapacitated or doing or suffering to be done any act or omission endangering the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated when an application under this article seeks such an injunction and it satisfactorily appears from the application, affidavits, and other proofs that a person has done, has suffered to be done or omitted to do, or threatens to do or is about to do an act that endangers the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated or has acquired or is about to acquire any property from the incapacitated person or person alleged to be incapacitated during the time of that person's incapacity or alleged incapacity without adequate consideration. Such order shall be made upon an order to show cause or upon the initiative of the court and may, upon the application for the appointment of a guardian, in the discretion of the court, be continued for ten days after the appointment of a guardian. Notice of any injunction shall be given to any person enjoined, to the incapacitated person or the person alleged to be incapacitated, and to any person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated in such manner as the court may prescribe.

2. A temporary restraining order may be granted with or without security when an application seeks an injunction under paragraph one of this subdivision and where the court is satisfied that in the absence of

such restraining order, the property of the incapacitated person or person alleged to be incapacitated would be dissipated to that person's detriment or that the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated would be endangered. Notice of the temporary restraining order shall be given to any person restrained, to the incapacitated person or the person alleged to be incapacitated, and to any person having custody or control over the person or property of the incapacitated person or person alleged to be incapacitated in such manner as the court may prescribe. Such temporary restraining order shall neither be vacated nor modified except upon notice to the petitioner and to each person required to receive notice of the petition pursuant to paragraph one of subdivision (g) of section

81.07 of this article.

3. When the court is satisfied that the interest of the incapacitated person or person alleged to be incapacitated would be appropriately served, the court may provide in a temporary restraining order that such temporary restraining order shall have the effect of:
 - (i) a restraining notice when served in a manner and upon such persons as the court in its discretion shall deem appropriate;
 - (ii) conferring information subpoena power upon the attorney for the petitioner when the court in its discretion shall deem appropriate.
4. Where such a temporary restraining order provides for a restraining notice a person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated is forbidden to make or suffer any sale, assignment, transfer or interference with any property of the incapacitated person or the person alleged to be incapacitated except pursuant to the order of the court.
5. Where such a temporary restraining order provides the petitioner's attorney with information subpoena power, service of a copy of the order together with an information subpoena shall require any person so subpoenaed to provide petitioner's attorney with any information concerning the financial affairs of the incapacitated person or the person alleged to be incapacitated.

Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 22. Judiciary
Subtitle A. Judicial Administration.
Chapter II. Uniform Rules for the New York State Trial Courts
Part 202. Uniform Civil Rules for the Supreme Court and the County Court (Refs & Annos)

22 NYCRR 202.7

Section 202.7. Calendaring of motions; uniform notice of motion form; affirmation of good faith

(a) There shall be compliance with the procedures prescribed in the CPLR for the bringing of motions. In addition, except as provided in subdivision (d) of this section, no motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion, and (2) with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.

(b) The notice of motion shall read substantially as follows:

_____ COURT OF THE STATE OF NEW YORK
COUNTY OF _____

_____ x

A.B.,

Notice of Motion Index No.

Plaintiff,

-against-

C.D., Name of Assigned Judge

Defendant.

_____ x

Oral argument is requested []

(check box if applicable)

Upon the affidavit of _____, sworn to on _____, 19 _____, and upon (list supporting papers if any), the . . . will move this court (in Room _____) at the _____ Courthouse, _____ New York, on the _____ day of _____, 19 _____, at _____ (a.m.) (p.m.) for an order (briefly indicate relief requested).

The above-entitled action is for (briefly state nature of action, e.g., personal injury, medical malpractice, divorce, etc.).

This is a motion for or related to interim maintenance or child support. []

(check box if applicable)

An affirmation that a good faith effort has been made to resolve the issues raised in this motion is annexed hereto.

(required only where the motion relates to disclosures or to a bill of particulars)

Pursuant to CPLR 2214(b), answering affidavits, if any, are required to be served upon the undersigned at least seven days before the return date of this motion. []

(check box if applicable)

Dated:

(print name)

Attorney¹ (or attorney in charge
of case if law firm) for moving party.

Address:

Telephone number:
(print name)

TO: _____

Attorney¹ for (other party)

Address:

Telephone number:
(print name)

Attorney¹ for (other party)

Address:

Telephone number:

¹If any party is appearing pro se, the name, address and telephone number of such party shall be stated.

(c) The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held.

(d) An order to show cause or an application for ex parte relief need not contain the notice of motion set forth in this section, but shall contain the affirmation of good faith set forth in this section if such affirmation otherwise is required by this section.

(e) Ex parte motions submitted to a judge outside of the county where the underlying action is venued or will be venued shall be referred to the appropriate court in the county of venue unless the judge determines that the urgency of the motion requires immediate determination.

(f) Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by the giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application. This subdivision shall not be applicable to orders to show cause or motions in special proceedings brought under article 7 of the Real Property Actions and Proceedings Law, nor to orders to show cause or motions requesting an order of protection under [section 240 of the Domestic Relations Law](#), unless otherwise ordered by the court.

Credits

Sec. filed Jan. 9, 1986; amds. filed: Feb. 16, 1988; July 31, 2006; Feb. 20, 2007; June 14, 2007 eff. June 11, 2007. Amended (f).

Current with amendments included in the New York State Register, Volume XXL, Issue 37 dated September 12, 2018. Court rules under Title 22 may be more current.

22 NYCRR 202.7, 22 NY ADC 202.7

STATE OF NEW YORK
COUNTY OF : SUPREME COURT

**INFORMATION SUBPOENA
WITH RESTRAINING NOTICE**

Original Index No. [REDACTED]

RE: [REDACTED], Judgment-Debtor(s)
SSN (last 4 numbers): [REDACTED]

**THE PEOPLE OF THE STATE OF NEW YORK
TO JUDGMENT-DEBTOR(S):**

WHEREAS, in an action in [REDACTED], Index No. [REDACTED], between the parties listed above, a Judgment was entered on, in favor of said Judgment-Creditor and against the Judgment Debtor(s), [REDACTED], in the amount of [REDACTED], of which [REDACTED] remains due, plus interest at from [REDACTED].

NOW, THEREFORE WE COMMAND YOU, that you answer in writing under oath, separately and fully, each question in the questionnaire accompanying this Subpoena, each answer referring to the question to which it responds; and that you return the answers together with the original of the questions within seven (7) days after your receipt of the questions and this Subpoena.

TAKE FURTHER NOTICE that pursuant to subdivision (b) of §5222 of the Civil Practice Law and Rules, which is set forth herein, you are hereby forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property or pay over or otherwise dispose of any such debt, except as therein provided.

CIVIL PRACTICE LAW AND RULES

Section 5222(b)- Effect of restraint; prohibition of transfer; duration. A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except as set forth in subdivisions (h) and (i) of this section, and except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in

[REDACTED]

specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice except as set forth in subdivisions (h) and (i) of this section. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except as set forth in subdivisions (h) and (i) of this section, and except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs. A judgment creditor or support collection unit which has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.

TAKE FURTHER NOTICE THAT DISOBEDIENCE OF THIS RESTRAINING NOTICE OR FALSE SWEARING OR FAILURE TO COMPLY WITH THIS SUBPOENA MAY SUBJECT YOU TO FINE AND IMPRISONMENT FOR CONTEMPT OF COURT. NON-COMPLIANCE WITH THE INFORMATION SUBPOENA SHALL FIRST SUBJECT YOU TO THE PENALTIES UNDER CPLR 2308(b).

Dated:

Attorney for [REDACTED]

[REDACTED]

STATE OF NEW YORK

██████████ COURT : COUNTY OF ██████████

██████████
██████████
against
██████████
██████████

**INDIVIDUAL
QUESTIONNAIRE**

Index No. ██████████

1. Q. What is your full name? A.

2. Q. Where do you reside? A.

3. Q. Do you rent or own? A.

4. Q. If rent,
 - (a) what is the landlord's name and address? A.
 - (b) what is the monthly rent?
 - (c) who pays the rent? A.
 - (d) is it paid by cash or check?

5. Q. If own,
 - (a) who are all parties holding title? A.
 - (b) who holds mortgages and what are the current balances? A.
 - (c) what are the monthly payments thereon? A.
 - (d) if none of the monthly mortgage payments includes an escrow for taxes, what are the

annual property taxes? A.

(e) who pays the mortgages and taxes? A.

(f) are they paid by cash or check? A.

6. Q. What is your occupation or profession? A.
7. Q. Are you engaged in business in an individual, partnership or corporate form? A.
8. Q. If engaged in business give your business address and name of your firm. A.
9. Q. If employed give your employer's name and address. A.
10. Q. What is the average salary you receive or income you derive from your occupation or business on a monthly basis? A.
11. Q. When is your salary payable or when do you derive income from your business? A.
12. Q. Is it payable by check or in cash? A.
13. Q. What other any bonus or emolument do you receive from your business or employment? A.
14. Q. Do you receive any income from any other source, and if so, explain? A.
15. Q. What amount of income have you received from your trade or profession during each of the two years immediately preceding the entry of judgment in this action? A.

-
- 15a. Q. Advise your taxable and net income by attaching to your answers a copy the last two federal tax returns you filed, to include the W-2 forms and schedules. A. See attached tax returns.
16. Q. What amount of income have you received from other sources during each of these two years?
A.
17. Q. Have you a bank, checking or savings account? A.
18. Q. If so, give names and addresses of banks where you have accounts. A.
19. Q. Have you closed any bank account since the summons in this action was served on you? A.
20. Q. If so, give name and address of bank. A.
21. Q. How much was on deposit at time the account was closed? A.
22. Q. Are you married? A.
23. Q. What is your spouse's full name? A.
24. Q. Is your spouse engaged in an independent business? A.
25. Q. What is the name and address of the business? A.

-
26. Q. What is the nature of the business? A.
27. Q. Is your spouse employed? A.
28. Q. What is the name and address of the employer? A.
29. Q. What salary does your spouse receive? A.
30. Q. Does your spouse own any real estate or have any interest in real estate? A.
31. Q. Does your spouse hold any chattel mortgages or security agreements? A.
32. Q. Does your spouse own an automobile, truck, airplane or boat? A.
33. Q. If so, what are the year make and model of each? A.
34. Q. Are any covered by a chattel mortgage, conditional sale or other security agreement? A.
35. Q. If so, for each who holds the security agreement and how much is the balance owed on the collateral? A.
36. Q. Has your spouse a bank, check or savings account? A.

-
37. Q. If so, at what banks? A.
38. Q. Is your spouse an officer, director or stockholder in any corporation? A.
39. Q. Does your spouse own any stocks, bonds, defense bonds or other securities? A.
40. Q. Identify each such item. A.
41. Q. How many children have you, and what are their ages? A.
42. Q. Do you own an automobile, truck, airplane or boat? A.
43. Q. If so, describe the make, year and model, serial and license number. A.
44. Q. Are any covered by any chattel mortgage, conditional sales or other security agreement?
A.
45. Q. If so, for each who holds the security agreement and how much is the balance owed on the collateral? A.
46. Q. Where do you keep those items? A.
47. Q. Do you own any interest in real estate? A.

-
48. Q. If so, identify each street address and describe the improvements thereon. A.
49. Q. Have you sold, conveyed or assigned any of your property real or personal within the past 2 years? A.
50. Q. If so, describe each item of property, indicate the name and address of the purchaser and the consideration received. A.
51. Q. Have you made a gift of any of your real or personal property to anyone since the summons in the above entitled action was served on you? A.
52. Q. If so, describe each item and provide the name, address and relationship of the recipient. A.
53. Q. Do you own any stocks, bonds, defense bonds or other securities? A.
54. Q. Describe each item. A.
55. Q. Are you an officer, director or shareholder in any corporation? A.
56. Q. If so, explain. A.
57. Q. Do you own any collections of art, stamps, coins, recordings, antiques or other collectibles? A.
58. Q. If so, describe each collection, specify its location and provided an estimate as to its current

value. A.

59. Q. What property have you in pawn and where was it pawned? A.
60. Q. Is there an income execution or wage assignment presently against your wages or has an installment payment order been granted directing you to make payments to any judgment creditor? A.
61. Q. If so, how much is so paid, how frequently, to whom and what is the current outstanding balance on the applicable debt? A.
62. Q. Do you receive any money from others to help support yourself? A.
63. Q. If so, what are the names and addresses of such persons. A.
64. Q. What are the amounts that such persons contribute for your support. A.
65. Q. Do you keep any records relating to your income and expenses? A.
66. Q. What is the name and address of your accountant? A.
67. Q. Have you been involved in any automobile accident, or in any way been injured through any person's fault, within the last three years? A.
68. Q. If so, give the date of the accident or injury, the name of the insurance company, and the name of

your attorney, if any. A.

69. Q. Are there any other judgments against you? A.

70. Q. If so, give the following information with respect to each judgment:

(a) Name of court and date of judgment.

(b) Name of plaintiff and amount of judgment.

71. Q. Are you presently making any payments pursuant to any court order or income execution? If so, explain fully. A.

72. Q. Does anyone owe you any money? A.

73. Q. If you answered Question 72 affirmatively, attach to your answers a list identifying each receivable by amount, due date and name and address of the party or entity which owes you the money.

74. Q. Detail what your average monthly expenses are by inserting an amount in the following list:

AMOUNT	DESCRIPTION
\$ _____	Mortgage or rent
\$ _____	Electricity and heating fuel
\$ _____	Water and sewer
\$ _____	Telephone
\$ _____	Cable TV
\$ _____	Auto payment or rental
\$ _____	Auto insurance
\$ _____	Auto maintenance and fuel
\$ _____	Life insurance

\$ _____ Health insurance
\$ _____ Homeowners' property insurance
\$ _____ Property tax not included in mortgage
\$ _____ Home maintenance and repair
\$ _____ Food
\$ _____ Clothing
\$ _____ Laundry and dry cleaning
\$ _____ Medical/dental expenses
\$ _____ Recreation/clubs/newspapers/magazines
\$ _____ Charitable contributions
\$ _____ Other installment payments
\$ _____ Alimony, maintenance and support payments
\$ _____ Other (explain)

75. Q. How do you propose to satisfy this judgment?

Deponent is the recipient of an information subpoena herein, of the original and a copy of questions accompanying said subpoena and a prepaid self-addressed return envelope.

Sworn to before me this _____ day
of _____, 20__.

Notary Public

2017 New York Laws
MHY - Mental Hygiene
Title E - GENERAL PROVISIONS
Article 81 - (81.01 - 81.44) PROCEEDINGS
FOR APPOINTMENT OF A GUARDIAN
FOR PERSONAL NEEDS OR PROPERTY
MANAGEMENT
81.29 - Effect of the appointment on the
incapacitated person.

Universal Citation: [NY Ment Hygiene L § 81.29 \(2017\)](#)

81.29 Effect of the appointment on the incapacitated person.

- (a) An incapacitated person for whom a guardian has been appointed retains all powers and rights except those powers and rights which the guardian is granted.
- (b) Subject to subdivision (a) of this section, the appointment of a guardian shall not be conclusive evidence that the person lacks capacity for any other purpose, including the capacity to dispose of property by will.
- (c) The title to all property of the incapacitated person shall be in such person and not in the guardian. The property shall be subject to the possession of the guardian and to the control of the court for the purposes of administration, sale or other disposition only to the extent directed by the court order appointing the guardian.
- (d) If the court determines that the person is incapacitated and appoints a guardian, the court may modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, 5-1505, or 5-1506 of the general obligations law or section two thousand nine hundred sixty-five of the public health law, or section two thousand nine hundred eighty-one of the public health law notwithstanding section two thousand nine hundred ninety-two of the

public health law, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, 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. In such event, the court shall require that the agent account to the guardian. The court shall not, however, invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person.

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Article 81 - (81.01 - 81.44) PROCEEDINGS
FOR APPOINTMENT OF A GUARDIAN
FOR PERSONAL NEEDS OR PROPERTY
MANAGEMENT
81.43 - Proceedings to discover property
withheld.

Universal Citation: [NY Ment Hygiene L § 81.43 \(2017\)](#)

81.43 Proceedings to discover property withheld.

- (a) To the extent that it is consistent with the authority otherwise granted by the court a guardian may commence a proceeding in the court which appointed the guardian to discover property withheld. The petition shall contain knowledge, or information and belief of any facts tending to show that any interest in real property or money or other personal property, or the proceeds or value thereof, which should be delivered and paid to the guardian, is in the possession, under the control, or within the knowledge or information of respondent who withholds the same from the guardian, whether such possession or control was obtained before or after the appointment of the guardian, or that the respondent refuses to disclose knowledge or information which such person may have concerning the same or which will aid the guardian in making discovery of such property. The petition shall request that respondent be ordered to attend an inquiry and be examined accordingly and deliver property of the incapacitated person if it is within his or her control. The petition may be accompanied by an affidavit or other written evidence, tending to support the allegations thereof. If the court is satisfied on the papers so presented that there are reasonable grounds for the inquiry, it must make an order accordingly, which may be returnable forthwith, or at a future time fixed by the court, and may be served at any time before the hearing. If it shall appear from the petition or from the answer interposed thereto, or in the course of the inquiry made pursuant to the order that a person other than the respondent in the proceeding claims an interest in the property or the proceeds or the value thereof, the court may by the original order or by supplemental order, direct such additional party to attend and be examined in the proceeding in respect of his or her adverse claim, and deliver the property if in his or her control or the proceeds or value thereof.

Service of such an order must be made by delivery of a certified copy thereof to the person or persons named therein and the payment or tender, to each of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in such court.

- (b) If the person directed to appear submits an answer denying any knowledge concerning or the possession of any property which belongs to the incapacitated person or should be delivered to the guardian, or shall make default in answer, he or she shall be sworn to answer truly all questions put to him or her regarding the inquiry requested in the petition. Any claim of title to or right to the possession of any property of the incapacitated person must be made by verified answer in writing. If such answer is interposed, the issues raised thereby shall be tried according to the usual practice of the court as a litigated issue but the interposition of such answer shall not limit the right of the guardian to proceed with the inquiry in respect of property not so claimed by the verified answer. If possession of the property is denied, proof on that issue may be presented to the court by either party. The court may in an appropriate case make interim decrees directing the delivery of property not claimed by verified answer and may continue the proceeding for determination of any litigated issue. If it appears that the guardian is entitled to the possession of the property, the decree shall direct delivery thereof to the guardian or if the property shall have been diverted or disposed of, the decree may direct payment of the proceeds or the value of such property or may impress a trust upon said proceeds or make any determination which a court of equity might decree in following trust property funds. In any case in which a verified answer is served and the court after a trial or hearing determines the issue, the court may in its discretion award costs not exceeding fifty dollars and disbursements to be paid by the unsuccessful party.

At a Guardianship Part of the Nassau County Court held at the County Court, located at the Supreme Court of the State of New York, held in and for the County of Nassau, at the courthouse located at 100 Supreme Court Drive, Mineola, New York on the ____ day of _____ 2016.

PRESENT: _____
 HON. [REDACTED]

-----X

In the Matter of the Appointment of

[REDACTED]

[REDACTED]

[REDACTED]

Index No.: [REDACTED]

ORDER TO SHOW CAUSE

as Successor Temporary Property Management Guardian of

[REDACTED],
an Incapacitated Person,

-----X

Upon the annexed Petition of [REDACTED]

[REDACTED]

[REDACTED] as Assignee of [REDACTED], as Successor Temporary Property Management Guardian, dated October 7, 2016;

LET the Defendant [REDACTED], show cause, at an I.A.S. Part ____ of this Court, to be held at the Courthouse, located at 100 Supreme Court Drive, Mineola, New York, in and for the County of Nassau on the ____ day of _____, 2016, at 9:30am, why an order should not be made and entered:

- (1) Directing an inquiry be held regarding assets of the Incapacitated Person in the possession of [REDACTED];
- (2) Directing that said [REDACTED] attend the inquiry and be examined accordingly; and
- (3) Directing [REDACTED] to deliver to the Property Guardian the property of [REDACTED] in his control; or, in the alternative,
- (4) Granting a judgment in against [REDACTED] and in favor of [REDACTED], to the extent that [REDACTED] is unable to return any of the property of [REDACTED]; and
- (5) For such other and further relief as this Court deems just and proper.

ORDERED that, sufficient cause appearing therefore, let service of this order to show cause, together with copies of the supporting papers upon [REDACTED], [REDACTED], MENTAL HYGIENE LEGAL SERVICE, AND THE NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES by overnight delivery service pursuant to CPLR (b)(6), on or before the _____ day of _____, 2016 shall be deemed good and sufficient service.

And let it be **ORDERED**, that answering papers, if any, are to be delivered to Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, 3 Dakota Drive, Suite 300, Lake Success, New York, 11042 attorneys for Petitioner, at least three (3) days prior to the return date of this Order, six (6) days if by mail.

ENTER :

J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

In the Matter of the Appointment of

[REDACTED]

Index No.: [REDACTED]

VERIFIED PETITION

as Successor Temporary Property Management Guardian
of

[REDACTED],

an Incapacitated Person,

-----X

STATE OF NEW YORK)

) ss.:

COUNTY OF NASSAU)

I, [REDACTED], being duly sworn, deposes and says:

1. That pursuant to Mental Hygiene Law Section 81.43, your Petitioner respectfully states to the Court that this proceeding is to recover the personal property of [REDACTED] (the "IP"), which should be delivered to [REDACTED] [REDACTED] (the "Property Guardian").
2. Petitioner makes this application for an order (a) directing an inquiry be held regarding assets of the Incapacitated Person in the possession of [REDACTED]; (b) directing that said [REDACTED] attend the inquiry and be examined accordingly; and (c) directing [REDACTED] to deliver to the Property Guardian the property of [REDACTED] in his control; and/or (d) granting a judgment against [REDACTED] and in favor of [REDACTED], to the extent that [REDACTED] is unable to return any of the property of [REDACTED] [REDACTED]; and (e) for such other and further relief as this Court deems just and proper.

3. On February 9, 2015, this Court declared [REDACTED] incapacitated to manage his financial affairs by Order and Judgment Appointing Guardian (the “February 2015 Order”). The Court appointed [REDACTED] as the Guardian of the Personal Needs and Property Management Guardian of the IP. A copy of the Order and Judgment Appointing Guardian is attached hereto and made a part hereof as **Exhibit “A”**.
4. Thereafter the Court Examiner commenced a proceeding for the removal of [REDACTED] as Property Management Guardian. In response, this honorable Court appointed [REDACTED], as the Successor Temporary Property Management Guardian on May 17, 2016 (the “May 2016 Order”). A copy of the Order and Judgment Appointing Successor Temporary Guardian is attached hereto and made a part hereof as **Exhibit “B”**.
5. The May 2016 Order empowered [REDACTED] with the same authority as granted to the Property Management Guardian in the February 2015 Order. *See* Exhibit B at pg. 3.
6. In turn, on September 16, 2016, [REDACTED] assigned to your Petitioner, the right to pursue the instant action. A copy of the September 16, 2016 Assignment is attached hereto and made a part hereof as **Exhibit “C”**.
7. [REDACTED] was admitted to [REDACTED] on or about May 7, 2014 and continues to reside there to date. Prior thereto and continuing subsequent to admission, [REDACTED] converted assets belonging to the IP and, although given ample opportunity, he has failed to account for the use of these funds for the benefit of IP.
8. Specifically, the IP held Chase Account xxxxx [REDACTED], into which his monthly Social Security income of \$1,490.00 was deposited during the time period of May 2014 through

November 2014. During this time period, the IP resided in [REDACTED] and [REDACTED]. [REDACTED] had access to this account. Each month, the IP's monthly Social Security income was withdrawn from this account primarily from locations in Florida, where [REDACTED] resides. Copies of sample account statements and cancelled checks from Chase Account xxxxx-[REDACTED] are attached hereto and made a part hereof as **Exhibit "D"**. To date, [REDACTED] has failed to account for the use of the IP's Social Security benefits during this time.

9. Additionally, the IP owned Fidelity Annuity xxxx-8[REDACTED] (the "Fidelity Annuity"), which, during the relevant time period, generated a monthly income of \$865.46. For the time period of May 1, 2015 to September 30, 2015, this monthly payment, to which [REDACTED] had access, was not utilized for the benefit of the IP. Copies of the Fidelity checks are attached hereto and made a part hereof as **Exhibit "E"**. Again, [REDACTED] has failed to offer any account for these annuity payments, which belonged to the IP.
10. Outrageously, [REDACTED] misappropriation of the IP's funds continued even after this Court appointed him as the IP's guardian. Rather than use the IP's meager assets to provide for the IP, [REDACTED] used the guardianship account as his personal piggy bank. He took thousands of dollars as unauthorized "reimbursements." He then went on to systematically deplete the IP's account by ordering telephonic transfers to another Chase account, which, upon information and belief, belongs to him and not the IP. Copies of sample account statements and cancelled checks for Chase Account xxxxx-[REDACTED] are attached hereto and made a part hereof as **Exhibit "F"**. This

blatant breach of his fiduciary obligations must be redressed in the context of this proceeding.

11. In total, [REDACTED] has, without consideration, received \$32,967.30 of the IP's assets. Although given ample opportunity, [REDACTED] has failed to provide any documentation of his use of these funds.
12. The property in question is the rightful property of the IP and is not the property of [REDACTED] and should be turned over to Property Guardian. [REDACTED] continuous refusal to relinquish assets held by him is depriving the IP of assets which are rightfully his.
13. Not only does [REDACTED] continue to enjoy control over the IP's assets, to which he has demonstrated no entitlement, but also his continued failure to provide the requested information places the IP's continued receipt of Medicaid benefits in jeopardy.
14. The IP received a provisional award of Medicaid upon the filing of the underlying Order to Show Cause in this matter. A copy of the September 24, 2014 Notice of Intent to Establish a Liability Toward Chronic Care is attached hereto and made a part hereof as **Exhibit "G"**.
15. However, once the Property Guardian was appointed, the Nassau County Department of Social Services required verification of the IP's eligibility for Medicaid. At this juncture, the failure to provide explanations of the disposition of assets transferred to [REDACTED] without fair consideration will result in a discontinuance of the IP's Medicaid benefit. A copy of the Document Requirement Checklist is attached hereto and made a part hereof as **Exhibit "H"**.

16. Accordingly, this honorable Court should direct [REDACTED] to account for his use of \$32,967.30 for the benefit of the IP and/or direct him to return this property to the Property Guardian, and/or enter a judgment against [REDACTED] and in favor of the IP.
17. No prior application has been made for the relief requested herein to this Court or any other Court of competent jurisdiction.

WHEREFORE, your Petitioner prays that the Court: (a) directing an inquiry be held regarding assets of the Incapacitated Person in the possession of [REDACTED]; (b) directing that said [REDACTED] attend the inquiry and be examined accordingly; and (c) directing [REDACTED] to deliver to the Property Guardian the property of [REDACTED] in his control; and/or (d) granting a judgment against [REDACTED] and in favor of [REDACTED], to the extent that [REDACTED] is unable to return any of the property of [REDACTED]; and (e) for such other and further relief as this Court deems just and proper.

Dated: _____ 2016

[REDACTED]
[REDACTED], Petitioner

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

I, [REDACTED] being duly sworn, deposes and say: I am the Petitioner in the within action; I have read the foregoing Verified Petition and know the contents thereof; and the same is true to my own knowledge, except as to the matters therein states to be alleged upon information and belief, and as to those matters, I believe them to be true.

Sworn to before me this
__ day of _____, 2016

Notary Public