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NYSBA

Elder and Special Needs Law Journal

A publication of the Elder Law and Special Needs Section of the New York State Bar Association

Invalidating Legal Documents and Transactions in Article 81 Guardianship Proceedings

The Guardianship Trial – Practitioner Tips Part I

Shedding Light on Guardianship: Rethinking Confidentiality in Article 81 Proceedings

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Publication and Editorial Policy

This publication is a benefit of membership of the Elder Law and Special Needs Section of the New York State Bar Association. Persons interested in writing for this newsletter are welcomed and encouraged to submit their articles for consideration to Joel Krooks (jkrooks@littmankrooks.com) and Lauren Enea (l.enea@esslawfirm.com).

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Message From the Section Chair

Dear fellow members of the Elder Law and Special Needs Section,

I am honored and very proud to serve as your chair for this year. The hallmark of our section is the collegiality of our members, and the willingness to share ideas and empathize with the trials and tribulations that we all go through in serving the elderly and disabled population of the State of New York. I especially want to thank Britt Burner for her outstanding leadership in the past year. I have learned a great deal from Britt (and from Fern Finkle, Chris Bray, Tara Pleat, and all past chairs etc.), and have valued my time serving as past chair of the Medicaid and legislative committees. The chief lessen I learned from Britt is, "Don't worry, everything turns out fine in the end," which so far (fingers crossed) has turned out to be the case!

Under the new bar membership model, we have a unique opportunity to grow our membership by speaking with our colleagues who are members of other sections and encouraging them to join our section. It is also especially important to actively encourage younger attorneys who are interested in this intellectually stimulating and fulfilling area of the law to join our section, become involved in one of our standing committees, and attend our section meetings as well. All of us have a role to play in achieving this goal.

Richard A. Marchese

Newer attorneys to our section should realize that they get their most "bang for the buck" by asking and responding to questions on our incredibly active Listserve, which really serves as a repository for learning the rules regarding Medicaid eligibility, the ins and outs of drafting trusts agreements, guardianship practice, etc. We have many "prolific posters" who are always willing and able to answer questions running from the most basic to the very complicated. Reading the posts is sometimes like attending a master class in Elder Law/Special Needs Planning!

There will be many challenges in the year ahead for practitioners in this field. As the governor stated in her Final Master Report on the Aging, the state is at an "inflection point" in its

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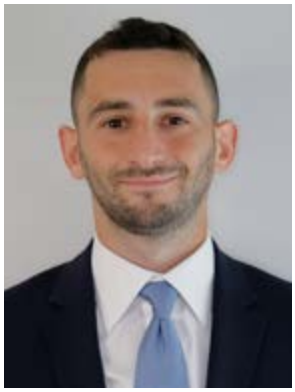
Message From the Co-Editors

Lauren C. Enea



Joel Krooks

By the time you are reading this, we will likely be full swing into the fall/holiday season! We hope everyone had an enjoyable summer!

First and foremost, I would like to take a moment to introduce you to the Publication Section's new co-chair and my co-editor, Joel Krooks, Esq. Joel is an attorney at Littman Krooks, LLP, focusing his practice on elder law, special needs planning and estate administration. I am happy to welcome him to our committee and look forward to working with him to produce educational and interesting journals for our section. Please also make sure to read our Member Spotlight on page 6 to learn more about Joel!

This issue showcases six comprehensive articles, three of which focus on guardianship proceedings, which can often be a daunting and confusing area of Elder Law.

We begin with our Special Education Column featuring a heartfelt letter from Irina Roller, Irina recently traveled to Israel and sheds some light on a rehabilitation village she visited, known as the Jewel of Negev.

Our next article is from our friend, and frequent contributor Paul S. Forester with a State of Estates update. This State of Estates covers a number of interesting topics for the estate administration and probate practitioner!

Then, Sheila E. Shea provides us with an update and outline regarding civil commitments in New York and some updates contained in the 2026 Executive Budget. This article is a must read for anyone whose practice also covers mental health law.

After that, Bret Cahn, provides us with a very clear overview of the process to invalidate legal documents and transactions in an Article 81 guardianship proceeding. This article can be an extremely useful reference when seeking to have documents such as a Power of Attorney or deed revoked due to misuse or fraud.

We then hear from Linda Redlisky and Edmond Wong with part one of a two-part article regarding guardianship trials and practitioners tips! Again, an excellent reference for a guardianship attorney!

Last, but certainly not least, Elizabeth Adinolfi sheds light on Confidentiality in Article 81 proceedings.

Please make sure to also read the summer meeting recap from the summer meeting co-chairs, Kristen Casper and Miles Zatkowsky. This year's summer meeting took place in Baltimore, Maryland and looked to be an educational and festive few days! We are sorry to have missed it!

Our next journal will be released in winter of 2026 and content is due to our committee on **October 30, 2025.** Please send all submissions to Lauren C. Enea and Joel Krooks at L.Enea@esslawfirm.com and jkrooks@littmankrooks.com.

Thank you and Happy Reading!

Lauren Enea & Joel Krooks

Message From the Section Chair *continued from page 3*

ability to provide safe, quality services and programs for the elderly. Federal cuts to state funding for Medicaid may very likely have a cascading impact on critical services and programs supported by the Medicaid program. That, coupled with workforce reductions for services for veterans and the imposition of more restrictive eligibility criteria for SNAP benefits, etc. will impact a significant portion of the population we serve. Our continued advocacy for the elderly and disabled will be more important than ever. We are lucky to have attorneys in our section who have years of experience in the legislative process to help guide our efforts for lobbying in Albany, and fortunate to have long standing lobbyists (Josh Oppenheimer and Jane Preston) who work tirelessly on our behalf.

We had a great summer meeting in Baltimore! Thanks so much to our co-chairs for the meeting, Kristen Casper and Miles Zatkowsky. The programming for the CLE presentations kept everyone's attention, generated much discussion afterward, and was very well received. We were pleased to be joined by the Monroe County Surrogate Christopher Ciaccio, who led a very interesting discussion on the history and purpose of the Surrogate Court as a court of equity. We also learned a lot about the economics of running a law practice from Michael Garibaldi (focus on your account receivables!), and Tim O'Rourke and Donna Steffans gave a very thorough presentation on the ins and outs of the Secure Act. Between presentations and afterward on our boat cruise of the Inner Harbor, all of us had a chance to catch up with fellow section members on not only their practice and how they are doing, but also to trade war stories and learn more about their personal lives and their families.

This will be a very busy year for our section. Some of the proposed legislation we will be closely monitoring include bills proposing safeguards relating to financial exploitation of the elderly, clarification of the treatment of jointly owned bank accounts and, most important, the Medicaid Aid in Dying Act (MAID). After hearing from both our section and other interested sections and committees, NYSBA submitted a memo in support of MAID. With the support of the State Bar, along with other organizations, the MAID bill (A136/S138) passed both the Assembly and the Senate, and will be delivered to the governor for her approval or veto sometime before the end of this year.

Finally, we are all looking forward to our fall meeting in Lake Placid! The High Peaks resort is a great venue for our meeting, and I am sure we will all enjoy crisp fall weather and clean mountain air in the Adirondacks! Co- Chairs David Kronenberg and Robin Goeman have been working tirelessly to put together a unique program on topics that should be of great interest and import to all.

In closing, I thank all of you for your support, and I send special thanks to to my fellow officers, Past Chair Britt Burner, Chair-Elect Tammy Lawlor, Vice-Chair Lindsay Heckler, Secretary David Kroneberg, Treasurer Debra Ball, and our stellar financial officer, Sal DiCostanzo. I am looking forward to a wonderful year ahead and am grateful for the opportunity to serve as your chair. Please reach out to me with any questions you may have, or comments.

Cheers!
Rick

Member Spotlight: Joel Krooks

Q: Where are you from?

A: I am from Chappaqua, New York in Westchester County. I currently live in Mamaroneck, NY.

Q: Where is your favorite place you have traveled to?

A: My favorite place I have traveled to is a close call between South Africa and Vietnam. I think South Africa has a slight edge.

Q: What led you to work in the field of elder law?

A: As many of you know, my father, Bernard Krooks, has been a leading figure in the field of elder law for many years. Witnessing the impact of his work and the legacy he built inspired me to follow in his footsteps and pursue a similar path.

Q: What is your favorite part about your job?

A: The favorite part of my job is really making an impact and helping families in need. When everything actually works out, those are the best days.

Q: What did you want to be when you were younger?

A: I wanted to be a sports agent. I always thought I was going to end up in sports, but each decision kept leading me to my current job as an elder law and special needs attorney instead.

Q: Tell me a little about your family.

A: I am married to my beautiful wife, Leeor. We met at the Benjamin N. Cardozo School of Law. In June, we welcomed our first child, Kaia Evelyn Krooks!

Q: Are there hobbies you look forward to outside of work?

A: I like to play as much golf as I can outside of work. I also really enjoy watching my favorite sports teams: the New York Giants, the New York Yankees, the New York Knicks and the Wisconsin Badgers.

Q: If you could have one superpower, what would it be?

A: I think mind control is the best superpower. Would make life a lot easier.

Q: If you could have dinner with one person in the world who would it be?

A: Great question, I'm going to say Derek Jeter, but it is really tough to choose one person. If anyone can make this happen, please do.

Q: What's a fun fact about you?

A: I have a movie rating website on the side. If anyone is interested in movie ratings check out Joelrated.com.

Q: Do you have any advice to give to attorneys just starting off in the field?

A: My advice is that everything gets better with time. At first this field can be very challenging, but the more knowledge and experience you gain the better it gets.

Special Education Column

By Irina Roller

Dear Colleagues,

As another summer ends and students with and without disabilities get ready for another school year, we reflect on how we spend time exploring programs for children and adults with disabilities. As many of us do, I spent time traveling this summer. During a recent visit to Israel, I had the privilege of exploring ADI Negev–Nahalat Eran, a remarkable 40-acre rehabilitation village often referred to as "The Jewel of the Negev." It's not just a beautiful phrase but truly captures the spirit of this place. Founded in 2005 by the family of Eran Almog, who was born with severe autism and cognitive disabilities, ADI Negev was created so that people of all backgrounds and abilities could live, heal, and grow together.

It's hard to capture just how moving this village is, or how thoughtfully every detail is designed for true inclusion. More than a care facility, it's a thriving community, home to over 170 residents ranging from infants to older adults with complex disabilities, alongside more than 200 special education students, local families, and more than 850 dedicated professionals of diverse backgrounds. Children with and without disabilities learn side by side in kindergarten classes, building empathy and understanding from the very start. Adults with disabilities find real purpose working on the village's farms and gardens. In the hydrotherapy pools, residents, local students, and even community leaders swim and receive therapy together. There's an adapted gym where residents in wheelchairs play basketball, and sensory rooms where children can relax and feel calm, the smiles on their faces said it all.

There were so many moments that stayed with me. The Kaylie Rehabilitation Medical Center provides world-class care and research, while keeping families close to home when they need it most. Ground-breaking research and treatment methodologies are being used internationally as well. Another highlight was simply walking through the grounds and seeing people with disabilities and complex medical needs living with dignity in fully accessible spaces surrounded by gardens, playgrounds, horses, and a petting zoo.

People from every background – Jews, Christians, Arabs, Bedouins, Druze – come together here as residents and professional staff. Differences are set aside so that everyone is treated with dignity, compassion, and respect. I left ADI Negev–Nahalat Eran inspired and reminded that disability can touch every one of us, and that building truly inclusive communities isn't just an ideal, but a reality we should all strive for.

We plan to have professionals from ADI present at an upcoming Special Education Committee meeting in the fall. If you would like more information on the village, do not hesitate to contact me.

I hope everyone had an amazing summer and wish all our families a successful school year.

Irina

Irina Roller is the founder/owner of the law offices of Irina Roller. Irina has dedicated her law practice to helping families obtain either appropriate public educational programs and services, or private school funding, for their children. She believes that every child can learn and flourish in the right learning environment, and with appropriate support. Irina and her staff work to ensure that children obtain the services and education they need, deserve and are entitled to by law.

State of Estates

By Paul S. Forster

As we endure what has been predicted to be a frigid winter, herewith for your indoor enjoyment are some interesting cases involving everything from a holding that substantial compliance with the formalities of will execution can be sufficient to sustain probate to the dismissal of an attempt to sue a decedent's "estate" without the appointment of a fiduciary. Enjoy!

Substantial Compliance With Formalities of Execution May Be Sufficient To Sustain Probate, and 'Publication' and 'Acknowledgement' Can Be Effectuated by an Agent

On the application of the decedent's granddaughter, the nominated executor, the decedent's 2021 will was admitted to probate. Thereafter, a beneficiary in a prior (2019) will (George) sought to vacate the probate decree. He subsequently petitioned for probate of the 2019 will. His application to vacate the probate decree was supported by an affidavit from Carol, one of the "witnesses" to the 2021 will, wherein Carol recited a series of allegations that conflicted with the assertions she previously made in her affidavit of attesting witness in support of the probate of the 2021 will, most notably that she did not witness the decedent sign the 2021 will. Eventually, the matter was set for trial. It appeared from the testimony that in March of 2021, the decedent asked her friend and caretaker, Diane, to help her prepare a new will because she was concerned about the cost of hiring an attorney. Diane testified the decedent was determined to change her will to leave her estate to her grandchildren, Currey and Keagan. Over the following weeks, Diane met multiple times with the decedent to discuss and document the decedent's intentions for her will. The decedent clearly stated she wished her properties to be left to her grandchildren and asked Diane to obtain the real property deeds to accurately identify them in the will. The decedent also explicitly requested that Diane and her neighbor, Carol, act as witnesses to the execution of the will. Thereafter, Diane met the decedent at her home to finalize the 2021 will. Diane reviewed the terms with the decedent, who then read and signed the document in the presence of Diane and Currey (the granddaughter-beneficiary). Diane signed as an attesting witness upon the decedent's request. Currey observed her grandmother signing the 2021 will and heard her ask Diane to sign as a witness, but refrained from signing herself as a witness, as she was a named beneficiary. Carol, intended as the second witness, was unable to be present at the decedent's house that day due to recent surgery. However, Carol knew the decedent was working on writing the 2021 will with Diane's assistance, had discussed the decedent's plans with the decedent and was anticipating signing the 2021 will as a witness. Thus, after the decedent signed the 2021 will, with Diane and Currey present, by telephone Carol instructed Currey to bring the 2021

will to her to obtain her signature as they had previously discussed. Currey complied, taking the document the next day directly to Carol, who was aware of the decedent's intentions and subsequently signed as the second attesting witness from her home. Both Diane and Carol confirmed in their testimony that the decedent clearly expressed her intent to leave her entire estate to her grandchildren, that they supported and encouraged her to do so, and agreed to sign her 2021 will as witnesses. The decedent passed away three days after executing her 2021 will. The court distinguished the case from cases summarily denying probate for lack of due execution because the 2021 will already had been admitted to probate based on ample evidence of due execution at that time. The court stated that a petition seeking to vacate a decree of probate must demonstrate a substantial basis for its contest and a reasonable probability of success through competent evidence that would have probably altered the outcome of the original probate proceeding. The court found that George had met his burden by virtue of the stark contradiction between Carol's attesting witness affidavit and her subsequent testimony that she never saw the decedent sign the 2021 will, which was corroborated by Currey, who verified that she brought the 2021 will from the decedent's house to Carol's house for her to sign. George asserted that the decedent's failure to directly and physically acknowledge her signature and declare the instrument to be her will to Carol were fatal defects, but the court disagreed.

The court stated that while acknowledgment and publication are each necessary, differences in both the timing of the acknowledgment and publication and the manner that each are communicated have been sustained, adding that the testamentary occasion is not to be bounded by time alone, or to be broken by a change of the place where the transaction commenced, for the persons concerned may well maintain a continuous relation to the ceremony of will making and to each other's acts in that regard, despite the lapse of time or a change in their own location. The court added that a slight variance from the usual formality in the execution of a will, unattended by any other circumstances throwing suspicion on a will, does not render a will invalid. The court ruled that the fact that Carol signed as a witness to the 2021 will but not in the presence of the decedent, and the decedent did not acknowledge her signature in the presence of Carol, did not necessarily mean the 2021 will was *per se* invalid. The court held that the use of an agent or proxy in connection with a will execution ceremony is not, in itself, a fatal defect under New York law but that it is a recognized and accepted practice, provided the statutory purpose is fulfilled: that the will is executed with the testator's knowledge, intent, and request (whether express or implied) that those individuals serve as witnesses. Given the clear evidence of substantial compliance with the formalities of execution, the court stated it was unwilling to impose an overly strict interpretation that would subvert the beneficial purpose of the statute. The court found that Currey was acting as the decedent's agent and as such effectively completed the requisite "acknowledgement" and "publication" elements of due execution. Consequently, The court denied the petition to vacate the decree of probate of the 2021 will. *Matter of Swing,* 2025 N.Y. Slip Op. 50518 (Surr. Ct., Oneida Co., Surr. Gigliotti, 3/31/25)

Public Assistance Recipient Who Challenged the Government's Action Granted Attorney's Fees Under the 'Catalyst' Theory, Even Though the Government Mooted the Controversy by Changing Its Position During the Litigation

This is a public assistance case involving the granting of attorney's fees to the public assistance recipient who prevailed against the government. After the plaintiff-recipient sued the agency, the government changed its position, rendering the action moot, but the court nonetheless granted fees to the plaintiff under the Equal Access to Justice Act (EAJA) (CPLR 8601) utilizing what is known as the "catalyst" theory. The government appealed. The Appellate Division affirmed. The Appellate Division stated that the core purposes of EAJA are to improve access to justice by the state's most economically challenged citizens, and to reduce and correct erroneous decisions by state agencies. The Appellate Division added that the EAJA's provision of attorneys' fees to prevailing parties ensures that state decisions can be challenged by the people affected by them – people who might otherwise be forced to acquiesce in erroneous decisions that profoundly affect their lives. In the view of the Appellate Division, the 'catalyst' theory serves these objectives. The Appellate Division explained that under the catalyst theory, an Article 78 Court may award attorneys' fees to low-income petitioners where the state grants relief before a court rules on the merits, pointing out that cases where the state folds its hand before being forced to do so by a court are often those that are most clearly meritorious. The Appellate Division noted that the threat of fee shifting even in the absence of an adjudication provides added incentive for state agencies to improve their decision-making. The Appellate Division found that the Supreme Court correctly had applied the catalyst theory to the record in the case and concluded that the Article 78 petition caused the agency to change its determination. *Jaquez v. Tietz*, 2025 N.Y. Slip Op. 02009 (1st Dep't., 2025)

Summary Judgment Denied to Grantor and Trustee of Irrevocable Trust Which Had Been Drained by Trustee in Favor of the Grantor, on Grounds That Questions of Fact Existed as to Whether Grantor Understood the Documents and Intended To Make a Gift to Plaintiffs

This matter was framed as a constructive trust case. The defendant Sandler created an irrevocable trust for the ben-

efit of his two daughters, who were the plaintiffs in the action. The defendant Greenbaum was named as trustee. The plaintiff daughters commenced the action, *inter alia*, to impose a constructive trust against, among others, Sandler and Greenbaum, alleging that Greenbaum violated the trust by disbursing its funds to Sandler and others for Sandler's benefit. Sandler and Greenbaum separately moved for summary judgment dismissing the complaint insofar as asserted against each of them and declaring that the trust was void *ab initio* on the ground that they misunderstood the trust documents and did not intend to make an *inter vivos* gift to the plaintiffs. The Supreme Court, among other things, granted defendants' motions and the plaintiffs appealed. The Appellate Division found that Sandler and Greenbaum had established their prima facie entitlement to judgment as a matter of law by submitting their affidavits explaining that they misunderstood the trust documents and that Sandler did not intend to confer an inter vivos gift upon the trust or the plaintiffs. However, the Appellate Division ruled that the plaintiffs had raised a triable issue of fact in opposition by submitting the trust instrument, signed by Sandler, which stated in plain language that the trust was solely for the benefit of the plaintiffs and that Sandler understood that he would no longer have any entitlement to funds deposited into the trust. The affidavit of one of the plaintiffs also raised a triable issue of fact as to Sandler's intent when creating the irrevocable trust. Accordingly, the Appellate Division held that the Supreme Court should have denied the separate motions of Sandler and Greenbaum for summary judgment dismissing the complaint insofar as asserted against each of them and declaring that the trust was void ab initio. [Note: the case does not discuss whether the elements of a constructive trust were present and satisfied, which from the facts presented, does not appear to be the case. In that event, rather than move for summary judgment, the defendants might have moved under CPLR 3211(a) (7) (absence of a cause of action)] *Venezia v. Greenbaum*, 226 A.D.3d 210 (2nd Dep't., 2024).

Grantor's Action To Reform a Deed Which Did Not Retain for Him a Life Estate as He Had Been Led to Believe Is Allowed To Proceed Alleging Mutual Mistake or Unilateral Mistake With Fraud, Undue Influence, and Unjust Enrichment/Constructive Trust

Plaintiff sold his farm to his daughter and son-in-law, the defendants. A third defendant held a mortgage on the property. The plaintiff believed he would be given a life estate from the purchaser defendants as part of the transfer but later learned that no life estate had been created. Plaintiff brought suit seeking, *inter alia*, conversion and reformation of the deeds that transferred ownership of the farm to the defendants. Plaintiff amended his pleadings asserting, in addition to conversion, claims for reformation or rescission and damages based on "mutual mistake or unilateral mistake with fraud;" undue influence; and "unjust enrichment/constructive trust." The purchasers and the mortgagee moved to dismiss the actions. The Supreme Court granted the defendant-purchasers' motion insofar as it sought dismissal of the claims asserting "mutual mistake or unilateral mistake with fraud"and "undue influence" and insofar as it sought dismissal of the claim asserting "unjust enrichment/constructive trust," except to the extent that plaintiff claimed to have relied upon an unfulfilled promise that he could live in his house until he died. The court also granted the mortgagee's motion, dismissing the amended complaint against it. The plaintiff appealed. After a detailed exposition on pleading unilateral mistake with fraud, undue influence and constructive trust, the Appellate Division reversed and restored those claims as to both sets of defendants. *Barker v. Gervera*, 236 A.D.3d 1318 (4th Dep't., 2025).

In Terrorem Clause Provisions Not Triggered by Actions by Trust Beneficiaries To Force Trustees To Comply with Terms of Trust

Plaintiff was a beneficiary of a revocable trust that, she asserted, entitled her to certain real property and income. The trust included an *in terrorem* clause, which would dispossess a beneficiary or other challenger who contested or sought to nullify the trust. The issue on the appeal was whether plaintiff triggered the clause when she commenced the underlying action against the trustee and thereby forfeited her bequests. The court of Appeals, reversing the Appellate Division and Supreme Court, concluded that because plaintiff did not seek to challenge the trust, but merely sought to enforce its provisions as the grantor wrote and intended them, she did not violate the *in terrorem* clause. *Carlson v Colangelo*, 2025 N.Y. Slip Op. 02264 (Ct. of Appeals, 2025).

Distributee Whose Share of Estate Under Propounded Will Exceeds Intestate Share Lacks Standing To Contest Will; Attempt To Object to Will Did Not Trigger *In Terrorem* Clause Because 'Objectant' Lacked Standing To Object

The decedent was survived by five children and by a grandchild who was the child of a predeceased child. The propounded will contained an *in terrorem* clause. The estate consisted of personal property valued at $15,000 and real property valued at $1,265,000. One of the decedent's children, who received a devise of 20% of the real estate, appeared *pro se* and filed "objections." Her objections did not object to the petitioner's appointment as the nominated executor under the propounded instrument, did not contain allegations objecting to the due execution of

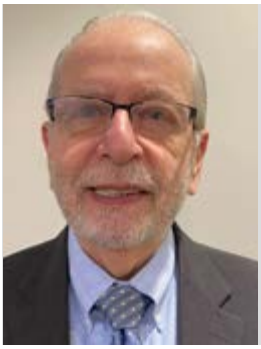
the propounded instrument, or the capacity of the decedent at the time the will and codicil were executed, or include allegations that the propounded instrument was the product of undue influence or fraud. The objectant's handwritten narrative contained allegations of the decedent's behavior during her lifetime regarding the management of the decedent's house and the management of the house by others after the decedent's death. The petitioner moved for summary judgment dismissing the objections and admitting the propounded instrument to probate. The court dismissed the objections for lack of standing. The court stated that under SCPA 1410, any "person interested" in the estate, who is defined as a person adversely affected by admission of the will, may file objections. The court opined that in determining whether a distributee will be adversely affected by probate, the legacy in the offered will is compared with what the potential objectant would take in intestacy, adding that if the distributee would realize a pecuniary gain by the probate of the will, the distributee would not be "adversely affected" within the meaning of SCPA 1410 and would therefore not have standing to file objections. The court calculated that the respondent's testate share would be over $40,000 greater than her intestate share based upon the estate assets. Since the respondent's interest under the will was greater than that in intestacy, her pecuniary interest was not adversely affected by the will, and thus the court concluded she had no standing to object. In construing whether the *in terrorem* clause had been triggered by the respondent's filing of her objections, the court noted that although *in terrorem* clauses are enforceable, they are not favored and must be strictly construed. Having determined that the respondent's objections were a legal nullity, the court held that the propounded instrument's *in terrorem* clause was legally inoperative against the respondent, as she had no standing to object or participate in a will contest. *Matter of Branch*, 2025 N.Y. Slip Op. 50329, (Surr. Ct., Kings Co., Surr. Graham, 3/10/25) [Note: the decision proceeded in accord with the widely held but incorrect belief that a will only can be construed after it is admitted to probate, which is not supported by the relevant statute – SCPA 1420(3) & (4)].

Attempt To Sue a Decedent's 'Estate' Without the Appointment of a Fiduciary Dismissed

In a contract action, the plaintiff brought suit against the decedent's "estate" and against the decedent's widow, asserting claims sounding in breach of contract and money had and received. Plaintiff alleged that he had agreed to purchase the rights to some of the decedent's recordings, royalties, and other assets. Defendants *inter alia* moved under CPLR 3211 (a) (7) to dismiss the claims against the "estate" because under New York law, an estate has no independent legal status and may not be named directly as a defendant to an action. The court agreed. The court stated that an estate is not a legal entity, and that as a result, any action for or against the estate must be by or against the executor or administrator in his or her representative capacity. The court added that for this reason, a plaintiff may not commence an action during the period between the death of a potential defendant and the appointment of a representative of the estate. The court pointed out that plaintiff did not bring claims against a personal representative of the decedent's estate and instead attempted to sue the "estate" directly, which it may not do. The court rejected the plaintiff's attempts to evade the force of the black-letter principles by asserting that it *had* brought claims against the estate's representative, because the complaint defined "estate" as the legal representative of the estate. The court found the effort to define away the fundamental infirmity in plaintiff's claims against the estate creative but unavailing. Plaintiff also contended that naming the "estate" as a defendant served as a valid placeholder for the currently unknown legal representative of the estate. The court also found this contention unpersuasive because plaintiff did not allege that any legal representative of the estate had been appointed, and because plaintiff could not properly assert pre-appointment claims against the estate itself. *Elevate Music Fund 3 LP v. Estate of Scaife*, 2025 N.Y. Slip Op. 50651 (Sup. Ct., New York Co., Justice Lebovits, 4/16/25).

Brief brief

In a will contest and a proceeding to invalidate an *inter vivos* trust which were consolidated for trial, the court sustained both and provided an erudite dissertation on the elements of a confidential relationship, undue influence, and the burden of proof in a family context. *Matter of Mantia*, 2024 N.Y. Slip Op. 51445 (Surr. Ct., Suffolk Co., Surr. Messina, 9/30/24).



Paul S. Forster is a sole practitioner in Tuckahoe, New York. He is co-chair of the Trusts and Estates Law Section's Estate and Trusts Administration Committee.

Civil Commitment in New York

By Sheila E. Shea

1. Introduction

The 2026 Executive Budget contained substantial new investments in mental health services and included chapter amendments to Article 9 of the Mental Hygiene Law (MHL), our state's civil commitment statute. The process for admission and retention to psychiatric hospitals is procedurally complex and can be confounding to the general public, clinicians and members of the bar. This article is intended to unlock some of the assumptions and misconceptions around civil commitment in New York.

Every year, over 100,000 people are admitted to hospitals licensed or operated by the Office of Mental Health (OMH). Admissions may be voluntary or involuntary. For example, in 2020, there were over 113,000 legal status admissions to inpatient mental hygiene facilities and approximately 73,000 were involuntary.[1]

Case law recognizes that involuntary civil commitment constitutes a "massive curtailment of liberty," which is constitutionally permissible only if stringent substantive and procedural due process standards are met.[2] Even the "willing patients" (voluntary and informal in New York) are not immune from such loss of liberty, as there is always the potential for these individuals to become involuntary patients (e.g., by improper classification or through court involuntary retention). They, too, are entitled to constitutional protections.[3]

New York subscribes to a medical model for inpatient admission rather than a strictly legal or judicial model – that is, involuntary admission to a psychiatric hospital for a period of up to 60 days is accomplished solely on the certifications of examining physicians, without mandatory judicial review. During this initial admission period, judicial review is elective, and a challenge to involuntary hospitalization must be affirmatively exercised by the patient or others. Mandatory judicial review comes into play only for long-term retention. The statutory provisions governing admission and retention are set forth in Article 9 of the Mental Hygiene Law.[4]

2. Admission and Retention

A person may be civilly admitted to a hospital only pursuant to Article 9.[5] This statutory scheme has been in effect since 1965 and established a two-tiered process for admission and retention of patients in hospitals. The first stage employs the medical model, allowing up to 60 days' confinement without mandatory judicial review. For patients in need of continued involuntary inpatient

confinement beyond 60 days, the second stage provides for periodic court orders of retention.

It has been argued that the medical model is constitutionally impermissible, or at least suspect; and indeed, most states do afford every involuntary patient a probable cause hearing within five to 15 days of admission. However, both the New York Court of Appeals and the United States Court of Appeals for the Second Circuit have held that New York's statutory scheme is constitutional due to its procedural due process protections, which include the availability of Mental Hygiene Legal Services (MHLS).[6]

3. Mental Hygiene Legal Service

MHLS (formerly the Mental Health Information Service), operates pursuant to Article 47 of the MHL. MHLS is an agency of the New York Supreme Court, Appellate Division. MHLS has several functions that are defined by statute and uniform regulations of the Appellate Departments.[7] These duties include, among other things, providing protective legal services, advice and assistance to people who are mentally ill or developmentally disabled and residents of facilities as defined in § 1.03 of the MHL or any other place that is required to have an operating certificate pursuant to Articles 16 or 31 of the MHL and to persons alleged to be in need of care and treatment in such facilities.

The objectives of MHLS are to ensure that persons with mental disabilities are afforded due process and equal protection under the law; to provide legal counsel for its clients in judicial proceedings concerning admission, retention, transfer, care and treatment; to study and review the admission and retention of all patients; to investigate and take legal action relative to cases of abuse or mistreatment; and to make appropriate referrals for other needed legal services.

Notice of Status and Rights

Adequate notice is a cornerstone of due process. Immediately upon admission or upon conversion to another legal status, each patient must receive a written notice, prescribed by the OMH commissioner, setting forth the patient's rights under the MHL and the availability of MHLS. Additionally, notices must be conspicuously posted throughout hospitals stating the availability of MHLS and the rights of patients in general.[8] There must also be periodic notice of rights given to voluntary patients.[9]

4. Legal Admission Statuses

A. Voluntary (Willing) Admissions

Mentally ill persons may be admitted as *voluntary* or *informal* patients.[10] To be suitable for admission on, or conversion to, voluntary or informal status, a person must understand the nature of the facility, that he or she is making an application for admission, and the nature of the status and the provisions governing release or conversion to involuntary status. Patients need not have legal capacity to contract.[11] Formal written application is not required for informal status and the patient shall be free to leave the hospital at any time.[12] There is no time limit on hospitalization and no provision for conversion to involuntary status, if release has been requested.

Any person in need of care and treatment who voluntarily makes written application may be admitted as a voluntary patient. If a mentally ill person is under 16, written application must be made by such person's parent, legal guardian, next of kin or certain public officials having custody. If the mentally ill person is over 16 but under 18, the facility director may, in his or her discretion, admit the minor on the minor's own application. There is no time limit on the admission.[13]

There is a statutory preference for voluntary status. A person requesting voluntary admission, who is suitable therefor, shall be admitted only on voluntary status – or informal status, if the person is mentally ill. A mentally ill person specifically requesting informal status shall be so admitted.[14] Any involuntary patient suitable for and willing to become voluntary shall be converted thereto; but to guard against inappropriate placement on voluntary status, a patient converted thereto is entitled to a court hearing.[15]

A voluntary or informal patient who has not sought release but who is either unwilling or unsuitable for voluntary or informal status must either be released or converted to involuntary status pursuant to the provisions for involuntary admission or medical certification. The suitability and willingness of a voluntary (or informal) patient to remain in such status shall be reviewed annually. If MHLS finds grounds to doubt suitability or willingness, it shall make application for a court order determining those questions.[16]

Written request for release may be made by a voluntary patient of any age, by MHLS, by the family or applicant for a minor voluntary patient.[17] When a written

request for release is made, the patient must be released immediately; however, if there are reasonable grounds to believe that the patient may be "in need of involuntary care and treatment," the facility director may retain the patient for a period not to exceed 72 hours. Before the expiration of the 72-hour period, the director shall either release the patient or apply to the supreme court or county court for a judicial order of retention pursuant to MHL Article 9. As discussed below, the patient is entitled to a hearing on the application within three days of demand. If the court determines the patient is "in need of retention," it shall order the patient retained for a period not to exceed 60 days.

B. Involuntary Admissions

There are several means of involuntary admission under New York's medical model. To the extent that such stringent, detailed requirements make involuntary admission less than easy, they reflect the gravity of the liberty interests at stake. Full compliance with statutory requirements is expected.[18] Prior to 2025, all involuntary admissions were effectuated upon opinions of physicians. With the enactment of the 2026 Executive Budget, and upon its effective date, opinions of nurse practitioners will in some circumstances satisfy procedural requirements under the medical model.

- **Involuntary Admission on Medical Certification**

A hospital may receive as an involuntary patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certification of two examining physicians, or upon certificates of an examining physician and a psychiatric nurse practitioner (new) accompanied by an application for admission. The application must be written and contain facts supporting allegations of the need for admission; it must be executed under penalty of perjury and signed *only* by one of the parties enumerated in the statute within 10 days prior to admission.[19] The examination may be conducted jointly, but each examiner must execute a separate certificate (known as the two-physician certificate, or "2 PC"). The examiners must consider less restrictive alternatives to admission and, if possible, consult with those who provided prior treatment.

Prior to admission on or conversion to an involuntary status, the need for involuntary care and treatment must be confirmed by a third physician on the staff of the hospital.[20] A 2 PC is valid for up to 60 days from the date of admission.

At any time during those 60 days, the patient, MHLS or any relative or friend may, on behalf of the patient, make a written request for a court hearing. The facility director must forward forthwith a copy of the request to the supreme or county court.[21] The court must calendar the hearing for a date not later than five days after the date the court receives the request.[22] If the court denies the patient's release, the patient may be retained for a period not to exceed 60 days from the date of admission or 30 days from the date of the court's order denying release, whichever is greater.[23]

- **Emergency Admission for Immediate Observation, Care and Treatment**

For a period of up to 15 days, a hospital approved by OMH[24] may admit any person who, upon the examination of a staff physician, is alleged to have a mental illness for which immediate observation, care and treatment in a hospital is appropriate, and which likely would result in serious harm to that person or others. Likelihood to result in serious harm is defined as

> a substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself; or
>
> a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.[25]or
>
> **[new] A substantial risk of physical harm to the person due to an inability or refusal as a result of their mental illness to provide for their own essential needs such as food, clothing, necessary medical care, personal safety or shelter**.[26]

While the emergency admission is valid for 15 days, the patient may not be retained for more than 48 hours, unless a staff psychiatrist confirms the need for hospitalization.

At any time after admission, the patient, a relative or friend, or MHLS may demand a hearing, which shall be held as soon as practicable, but no more than five days after the court receives the request. The court must

determine the matter in accordance with the foregoing standard for admission.

Involuntary hospitalization beyond 15 days may be continued by the execution of a two-physician certificate, but if a hearing was previously requested pursuant to MHL § 9.39, it should be conducted under that section. In practice, most hospitals will attempt to merge the emergency admission and the 2 PC hearing. Since MHL § 9.39 has a higher substantive standard than § 9.27, such a merger should be contested.[27]

An additional facility, called a "comprehensive psychiatric emergency program" or "CPEP,"[28] was created to address the large number of patients, particularly in the New York City who were held in hospital emergency rooms for extended periods of time while awaiting the availability of an inpatient psychiatric bed. CPEPs began to operate in 1990. Section 9.40 of the MHL provides for the admission of patients who are alleged to be mentally ill and dangerous. The initial examination must be conducted within six hours, and it may result in a 24-hour admission, with an extension to 72 hours based on a confirming examination by a second physician. Notice and hearing provisions are in accordance with MHL § 9.39. Continued hospitalization is permitted by means of MHL §§ 9.39 or 9.27.

- **Involuntary Admission on Certificate of Director of Community Services[29]**

The director of community services (DCS) is the chief mental health official in each county (in New York City, it is the city commissioner of mental health). A hospital, upon application by the DCS or an examining physician designated by the DCS and approved by the commissioner, may admit and retain a person who, in the opinion of the DCS or the director's designee, has a mental illness that is likely to result in serious harm to himself or others,[30] and for which immediate inpatient care treatment in a hospital is appropriate. In rural counties, a non-medical DCS may admit a patient.[31] The application must be based on a personal examination.

The need for immediate hospitalization shall be confirmed by a hospital staff physician prior to admission and again within 24 hours when the applicant is a non-medical DCS. Involuntary retention of the patient beyond 72 hours is accomplished by having another

psychiatrist on the staff of the hospital file a certificate of examination, thereby extending the admission to 60 days. The patient's retention is subject to all the requirements of notice and hearing applicable to other involuntarily confined (2 PC) patients.

• Removal from the Community

A person alleged to be mentally ill and dangerous may be brought to a hospital approved by the OMH commissioner for purposes of evaluation for emergency admission:

1. By peace officers and police officers;[32]
2. By order of courts of inferior or general jurisdiction;[33]
3. By order of the DCS;[34]
4. By direction of a qualified psychiatrist who is treating or supervising the treatment of the patient at an outpatient mental health clinic or program;[35]
5. By the director of a general hospital, as defined in Article 28 of the PHL, that does not have a psychiatric unit.[36]

On February 18, 2022, the OMH commissioner and chief medical officer issued interpretive guidance which set for the circumstances under which courts have determined that the MHL permits persons who appear to be mentally ill and who display an inability to meet basic living needs can be mandated into emergency psychiatric assessments and/or retained involuntarily in a psychiatric hospital. With respect to removals, the OMH document states:

> there is often a misconception amongst both police officers as well as front-line mental health crisis intervention workers that a person with a mental illness must present as 'imminently dangerous' in order to be removed from the community to a hospital or CPEP setting for evaluation, admission and treatment, meaning that they need to present an immediate overt risk of violence to others or an immediate overt risk of physical harm to themselves in order for removal to be implemented. This is not the case.[37]

The OMH guidance was issued during the pandemic and during a period when homelessness, particularly in New York City, had reached its highest level since the Great Depression. OMH estimated that one-third of the more than 48,000 people unhoused in New York City suffer from a serious mental illness, and that the numbers were even higher for homeless single individuals. The 2025 chapter amendments to the MHL provide that if a police officer directs the removal of a person who is conducting themselves in a manner "likely to result in serious harm" for failure to provide for their own essential needs, that transport should be conducted by emergency medical services, if practical, "based on: the person's potential medical needs and the capacity limits of the local medical services agencies…"

• Court Ordered Retention

While persons held involuntarily on medical certification or emergency admission status have elective judicial review, retention beyond the 2 PC maximum of 60 days requires prior judicial approval. The facility director must apply to the court for retention before the medical certification expires.[38]

Notice of application must be given to the patient or resident, who then has five days to request a hearing on the application. If no hearing is requested by or on behalf of the patient, and the court is satisfied that the patient meets the retention standard, entry of an order of retention is permitted. If a hearing is demanded, it is calendared in five days from when the notice of demand is received and conducted in accordance with MHL §§ 9.31 and 15.31.

Retention is time limited, with mandatory periodic judicial review for continued retention. For the mentally ill patient, the first period of retention is six months. Continued retention is for one year, followed by consecutive two-year orders of retention. The court may authorize shorter periods. The facility may discharge the patient whenever release is clinically appropriate.

A person confined in a hospital has the right to counsel in civil commitment proceedings.[39] MHLS has a standing statutory appointment to serve as counsel for patients in all proceedings concerning admission, retention, transfer, care and treatment.[40] There is no indigency test to satisfy as all patients are entitled to the services of MHLS regardless of financial means.

Although the MHL is silent as to burden of proof, the United States Supreme Court has held that due process requires that the hospital prove the need for commitment by clear and convincing evidence.[41] The New York courts have also adopted this standard.[42] In order to authorize the involuntary retention or to deny the

release of a patient, the court must find that the patient is in need of retention – that the person (1) suffers from a mental illness as statutorily defined, (2) that care and treatment for such condition as an inpatient in a hospital is essential to the person's welfare, and (3) that the person's judgment is so impaired that they are unable to understand the need for such care and treatment.[43]

In addition to the foregoing statutory requirements, in *In re Scopes*,[44] the court ruled that in order to satisfy substantive due process requirements, "the continued confinement of an individual must be based upon a finding that the person to be committed poses a real and present threat of substantial harm to himself or others"; such a finding does not require proof of a recent overtly dangerous act.[45]

Cases following *Scopes* refined the concept of dangerousness to self or others. An inability to meet one's need for food, clothing and shelter is sufficient to establish dangerousness to oneself.[46] However, the fact that a patient can be stabilized in a hospital setting with medication and continuous supervision and care does not necessarily lead to the conclusion that the patient can function safely in an outpatient setting, especially where evidence exists to the contrary.[47] To supply a basis for commitment, the dangerousness must be linked to the patient's mental illness – that is, there must be clear and convincing evidence that the dangerousness results from the mental illness.[48] Thus, refusing to accept treatment for a medical condition is, in and of itself, insufficient.[49] The court must also determine whether there are any less restrictive alternatives to hospitalization – such as halfway houses, community residences, health-related facilities or outpatient clinics – that would adequately meet the patient's needs. The right to the least restrictive alternative has been recognized by the New York Court of Appeals.[50] The right to live in the most integrated setting is also guaranteed by the federal Americans With Disabilities Act (ADA).[51]

Courts are often called to make inquiries into certain procedural issues in civil commitment cases including the facial adequacy of the admission papers and court applications and the timeliness of applications to the court. An application for retention filed untimely, or an application that is improperly or incompletely executed, may be dismissed and the patient released.[52] Where a patient retained in a state hospital is ordered immediately released following a hearing, the order is self-executing and not subject to an automatic stay upon the filing of a

notice of appeal.[53] Also, a person released by court order has the right to adequate discharge planning, which includes the preparation of a written service plan.[54]

Expert medical (i.e., psychiatric) opinion is obviously critical to the outcome of MHL hearings. However, the Second Circuit has held that the federal due process clause does not require the state to provide indigent patients with a consulting or advocate psychiatrist in retention proceedings.[55] Patients may, of course, bring into court their own independently retained witnesses, but few have the financial or practical means to do so. Therefore, the patient may seek appointment by the court of up to two psychiatrists, certified psychologists or physicians at the state's expense.[56] Some caveats: such appointment is discretionary with the court, the independent witness may oppose the patient's release, the independent physician is the court's witness (the patient may be unable to bar testimony he or she feels is unfavorable) and the limited compensation allowed often makes it difficult to secure independent medical opinion.

A patient (or others on such person's behalf) may obtain as a matter of right a rehearing and review of a court order denying release or authorizing retention within 30 days after such order.[57] A jury trial may be demanded at this stage of the proceeding.[58] A rehearing should be conducted as a trial *de novo*; it is governed by the same principles as the original hearing.[59]

Court papers under MHL Article 9 are filed with the county clerk and shall be sealed. Court papers shall be exhibited, upon an order of the court, only to the parties to the proceeding or to someone properly interested.[60]

5. Presumption of Capacity

Finally, no form of involuntary admission or retention shall be a determination that a patient is incompetent or is unable to adequately conduct personal or business affairs.[61] "Absent a judgment of incapacity, a person involuntarily admitted to the hospital retains the right to object to the administration of medications,[62] marry, draft a will, sue in his own name, vote[63] and generally manage his affairs."[64] Proceedings to find an individual legally incapacitated are brought in the Supreme Court under MHL Article 81.

6. Conclusion

Article 9 of the MHL has come under increasing scrutiny because of the perceived dysfunction of the mental health system. For over approximately a four decade span there has been a demonstrated migration of people with mental illness from hospitals to the criminal justice system or the streets.[65] Both the New York State Bar Association and the Unified Court System convened task forces to study mental illness and its impacts on the civil and criminal justice systems.[66] This article attempts to demystify Article 9 for members of the bar and the general public at a crucial time when federal authorities are urging states to make greater use of civil commitment to address homelessness.[67] Article 9 is only one part of a complex mental health system. There is considerable work that still needs to be done to foster a clear understanding of the limits of the civil commitment process and promotion of enhanced community mental health resources. For continued reading on the subject, members of the bar are encouraged to -consult the 2023 report of the NYSBA Task Force on Mental Illness and Trauma Informed Representation.

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Endnotes

1. According to statistics maintained by the Mental Hygiene Legal Service.
2. *Humphrey v. Cady*, 405 U.S. 504 (1972).
3. *In re Buttonow*, 23 N.Y.2d 385, 297 N.Y.S.2d 97 (1968).
4. The following narrative discussing admission and retention procedures borrows from the author's chapter on *Rights in Facilities*, which appears in the three-volume treatise Disability Law and Practice, published by the New York State Bar Association.
5. MHL §§ 9.03. Criminal defendants may also be admitted to hospitals and schools pursuant to Criminal Procedure Law (CPL) article 730 (incapacitated defendants) or section 330.20 (those found not responsible by reason of mental disease or defect).
6. *Project Release v. Prevost*, 551 F. Supp. 1298 (E.D.N.Y. 1982), *aff'd*, 722 F.2d 960 (2d Cir. 1983); *Fhagen v. Miller*, 29 N.Y.2d 348, 328 N.Y.S.2d 393 (1972).
7. *See* N.Y. Comp. Codes R. & Regs. tit. 22, pts. 622 (1st Dep't), 694 (2d Dep't), 823 (3d Dep't), 1023 (4th Dep't) (N.Y.C.R.R.).
8. MHL § 9.07.
9. MHL § 9.19.
10. MHL §§ 9.13, 9.15.
11. MHL §§ 9.17, 9.21.
12. MHL § 9.15. *Paradies v. Benedictine Hosp.*, 77 A.D.2d 757, 431 N.Y.S.2d 175 (3d Dep't 1980). In practice, however, hospitals rarely if ever employ informal status and only rely upon it when an administrative error occurs and an involuntary status has "lapsed" without a timely application being made to continue retention.
13. MHL § 9.13.
14. MHL § 9.21.
15. MHL § 9.23.
16. MHL §§ 9.17(b), 15.15(b), 9.25, 15.23. *In re Harold F.*, 147 Misc. 2d 593, 558 N.Y.S.2d 474 (Sup. Ct., Albany Co. 1990).
17. MHL §§ 9.13.
18. *See People ex rel. Delia v. Munsey,2*6 N.Y.3d 124 (2015).
19. MHL § 9.27, *see Reuda v. Charmaine D.*, 17 N.Y.3d 522, 934 N.Y.S.2d 72 (2011).
20. MHL § 9.27 (e); see *also In re Pilgrim Psychiatric Ctr.*, 197 A.D.2d 204, 610 N.Y.S.2d 962 (2d Dep't 1994).
21. MHL § 9.31(b).
22. MHL §§ 9.31(c), 15.31(c).
23. MHL §§ 9.33.
24. MHL § 9.39(a).
25. MHL § 9.39(a)(1), (2).
26. Added by L. 2025 c.57. Effective August 7, 2025. The 2025 chapter amendment could be said to have codified existing law. *See* https://omh.ny.gov/omhweb/guidance/interpretative-guidance-involuntary-emergency-admissions.pdf.
27. MHL § 9.39(b).
28. MHL §§ 1.03(37), 9.40, 31.27.
29. MHL § 9.37.
30. *See* 2025 chapter amendments and new definition of "likelihood to result in serious harm" codified at MHL § 9.01.

31. MHL § 9.37(c).
32. MHL § 9.41; *see also Rivera v. Russi*, 243 A.D.2d 161, 674 N.Y.S.2d 42 (1st Dep't 1998).
33. MHL § 9.43.
34. MHL § 9.45; *see also Ruhlmann v. Ulster Cnty. DSS*, 234 F. Supp. 2d 140 (N.D.N.Y. 2002).
35. MHL § 9.55.
36. MHL § 9.57.
37. OMH subsequently amended its 2022 guidance in 2025, but the agency's substantive guidance explaining its interpretation of existing case law did not change. https://omh.ny.gov/omhweb/guidance/interpretative-guidance-involuntary-emergency-admissions.pdf.
38. MHL §§ 9.33.
39. *People ex rel. Woodall v. Bigelow*, 20 N.Y.2d 852, 285 N.Y.S.2d 85 (1967); *see also People ex rel. Rogers v. Stanley*, 17 N.Y.2d 256, 270 N.Y.S.2d 573 (1966); N.Y. Judiciary Law § 35.
40. MHL art. 47; 22 N.Y.C.R.R. pts. 622, 694, 823, 1023.
41. *Addington v. Texas*, 441 U.S. 418 (1979).
42. *In re Harry M.*, 96 A.D.2d 201, 468 N.Y.S.2d 359 (2d Dep't 1983); *In re Scopes*, 59 A.D.2d 203, 398 N.Y.S.2d 911 (3d Dep't 1977); *In re Carter*, 102 Misc. 2d 867, 424 N.Y.S.2d 833 (Sup. Ct., Suffolk Co. 1980); *see In re Bethune M.*, 12 A.D.3d 605, 785 N.Y.S.2d 478 (2d Dep't 2004); *In re Richard E.*, 12 A.D.3d 1019, 785 N.Y.S.2d 580 (3d Dep't 2004); *In re Jill A.B.*, 9 A.D.3d 428, 779 N.Y.S.2d 790 (2d Dep't 2004); *In re Luis A.*, 13 A.D.3d 441, 786 N.Y.S.2d 560 (2d Dep't 2004); *N.Y. City Health & Hosps. Corp. v. Brian H.*, 51 A.D.3d 412, 857 N.Y.S.2d 530 (1st Dep't 2008).
43. MHL §§ 9.01.
44. 59 A.D.2d 203, 398 N.Y.S.2d 911 (3d Dep't 1977).
45. *Id.* at 205; *see also In re Francine T.*, 302 A.D.2d 533, 755 N.Y.S.2d 276 (2d Dep't 2003). *See also*, https://omh.ny.gov/omhweb/guidance/interpretative-guidance-involuntary-emergency-admissions.pdf.
46. *Id.* at 204; *In re Carl C.*, 126 A.D.2d 640, 511 N.Y.S.2d 144 (2d Dep't 1987); *Boggs v. N.Y. City Health & Hosps. Corp.*, 132 A.D.2d 340, 523 N.Y.S.2d 71 (1st Dep't 1987), *appeal dismissed*, 70 N.Y.2d 972, 525 N.Y.S.2d 796, *reconsideration denied sub nom. Anonymous v. N.Y. City Health & Hosp. Corp.*, 71 N.Y.2d 994, 529 N.Y.S.2d 278, *motion dismissed*, 70 N.Y.2d 981, 526 N.Y.S.2d 429 (1988).
47. *Boggs*, 132 A.D.2d at 341; *Ford v. Daniel R.*, 215 A.D.2d 294, 626 N.Y.S.2d 784 (1st Dep't 1995); *Donaldson v. Daley*, 206 A.D.2d 298, 614 N.Y.S.2d 525 (1st Dep't 1994); *Seltzer v. Hogue*, 187 A.D.2d 230, 594 N.Y.S.2d 781 (2d Dep't 1993); *Robinson v. Sanchez*, 168 Misc. 2d 546, 639 N.Y.S.2d 897 (Sup. Ct., Bronx Co. 1996); *see Anthony M. v. Sanchez*, 229 A.D.2d 322, 645 N.Y.S.2d 23 (1st Dep't 1996); *Arnold v. Donaldson*, 215 A.D.2d 302, 627 N.Y.S.2d 10 (1st Dep't 1995); *In re Yvette S.*, 163 Misc. 2d 902, 622 N.Y.S.2d 879 (Sup. Ct., Queens Co. 1995).
48. *Charles T. v. Sanchez*, 215 A.D.2d 235, 626 N.Y.S.2d 492 (1st Dep't 1995).
49. *Gilliard v. Sanchez*, 219 A.D.2d 500, 631 N.Y.S.2d 330 (1st Dep't 1995).
50. *Kesselbrenner v. Anonymous*, 39 A.D.2d 410, 334 N.Y.S.2d 738 (2d Dep't 1972), *rev'd*, 33 N.Y.2d 161, 350 N.Y.S.2d 889 (1973); *see also Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Project Release v. Prevost*, 551 F. Supp. 1298 (E.D.N.Y. 1982), *aff'd*, 722 F.2d 960 (2d Cir. 1983).
51. *Olmstead v. L.C.,* 527 U.S. 581 (1999).
52. N.Y. Civil Practice Law & Rules 201 (CPLR). *See In re Nancy H.*, 177 Misc. 2d 30, 675 N.Y.S.2d 774 (Sup. Ct., Rockland Co. 1998); *In re Gladstone*, 143 Misc. 2d 646, 540 N.Y.S.2d 960 (Sup. Ct., Bronx Co. 1989); *In re Sherman*, 98 Misc. 2d 431, 414 N.Y.S.2d 78 (Sup. Ct., N.Y. Co. 1979); *but see People ex rel. Noel B. v. Jones*, 230 A.D.2d 809, 646 N.Y.S.2d 820 (2d Dep't), *lv. to appeal dismissed without opinion*, 88 N.Y.2d 1065, 651 N.Y.S.2d 408 (1996); *Rebecca Y. v. Brunswick Hall Psychiatric Ctr.,* 76 A.D.3d 1028, 908 N.Y.S.2d 101 (2d Dep't 2010).
53. *In re Nile W.,* 64 A.D.3d 717, 882 N.Y.S.2d 690 (2d Dep't 2009).
54. *Dix ex rel. Craig AA v. Maul,* 38 A.D.3d 972, 831 N.Y.S.2d 564 (3d Dep't 2007).
55. *Goetz v. Crosson*, 967 F.2d 29 (2d Cir. 1992), *on remand,* 838 F. Supp. 136 (S.D.N.Y. 1993), *aff'd*, 41 F.3d 800 (2d Cir. 1994); *cf. In re Marvin B.*, 167 Misc. 2d 904, 639 N.Y.S.2d 656 (Sup. Ct., Queens Co. 1996).
56. Judiciary Law § 35(4).
57. MHL §§ 9.35, 15.35.
58. *Sporza v. German Sav. Bank*, 192 N.Y. 8 (1908).
59. *Arnold A. v. Sanchez*, 166 Misc. 2d 493, 634 N.Y.S.2d 343 (Sup. Ct., Bronx Co. 1995); *Maureen A. v. Wack*, 153 Misc. 2d 600, 582 N.Y.S.2d 333 (Sup. Ct., N.Y. Co. 1991); *see Launcelot T. v. Mullen*, 264 A.D.2d 697, 701 N.Y.S.2d 57 (2d Dep't 1999).
60. MHL §§ 9.31(f), 15.31(f).
61. MHL § 29.03.
62. *Rivers v. Katz*, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986).
63. *See* Sheila Shea & Sadie Ishee,, *Make Every Vote Count: Reform New York's Election Law to Protect the Franchise for People with Disabilities,* 14 Alb. Gov't Law Rev.1 (2020-2021).
64. *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1971); *see also In re Buttonow*, 23 N.Y.2d 385, 297 N.Y.S.2d 97 (1968).
65. In an article published by the New York Times on September 16, 1984 called *Suffering in the Streets*, deinstitutionalization was described as a "22 -letter mouthful that once referred to reform of the mental health system. Now it should be read as a euphemism for official cruelty," https://www.nytimes.com/1984/09/16/opinion/suffering-streets-deinstitutionalization-22-letter-mouthful-that-once-referred.html.
66. See report of NYSBA Task Force on Mental Illness and Trauma Informed Representation: https://nysba.org/wp-content/uploads/2023/06/final-report-Task-Force-on-Mental-Health-and-Trauma-Informed-Representation-June-2023.pdf and the NYS Judicial Task Force on Mental Illness: https://ww2.nycourts.gov/nys-judicial-task-force-mental-illness/index.shtml.
67. On July 25, 2025, the White House issued an Executive Order entitled *Ending Crime and Disorder on America's Streets*, maintaining as a central premise that "shifting homeless individuals to long-term institutional settings through the appropriate use of civil commitment will restore public order," https://www.whitehouse.gov/presidential-actions/2025/07/ending-crime-and-disorder-on-americas-streets/.

Summer 2025 Meeting

Summer 2025 Meeting

Elder Law and Special Needs Section 2025 Summer Meeting Recap

By Kristen M. Casper and Miles P. Zatkowsky

The Elder Law and Special Needs Section summer meeting was held from July 17 through July 19, 2025, at the Sheraton Inner Harbor Hotel in Baltimore, Maryland. This year's program offered 12.0 MCLE credits, covering professional practice, skills, law practice management, and ethics.

We gratefully acknowledge the generosity of our sponsors. NYSARC Trust Services provided refreshments during Thursday afternoon's break, and Arthur B. Levine, Surety Agent, sponsored Friday morning's breakfast. Midland Trust Company generously sponsored the speakers' dinner at Blackwall Hitch Baltimore, providing faculty and section officers an opportunity to gather and connect in appreciation of their contributions to the program. We also thank our exhibitors – Advocacy Trust, New York Financial Organizers, Dalli & Marino LLP, Contour Mortgage Trust Lending, Hightower RDM Financial Group, Anchor Health, Lackner Group, and Trusted-The Surplus Solution – for their support of this year's program. Attendees were encouraged to visit the exhibitor hall to learn more about their products and services throughout the meeting.

These sponsorships would not have happened without our section's Sponsorship Committee, which is responsible for getting the commitments that provide a substantial portion of the funding to hold a live meeting. That committee is chaired by Abby Carol Zampardi of Fern Finkel & Associates, PLLC, Brooklyn, N.Y. Her vice chairs are Sarah Amy Steckler, Esq., Warshaw Burstein LLP, New Rochelle, N.Y., and Julia Lyn Santo, Abrams Fensterman, LLP, Lake Success, N.Y. The Sponsorship Committee meets over Zoom as needed. Everyone is welcome to join.

We were honored to welcome Kathleen Sweet, president of the New York State Bar Association, who joined us for the summer meeting and attended the Executive Committee meeting. Her presence underscored the importance of the work being done within our section and her ongoing support of elder law and special needs practitioners across the state.

The meeting commenced on Thursday with welcoming remarks and a section update from Chair Richard A. Marchese. CLE sessions began with a Medicaid update presented by Peter Travitsky (New York Legal Assistance Group), followed by David A. Cutner (Lamson & Cutner, P.C.) addressing unauthorized practice of law issues in Medicaid applications. The Honorable Christopher S. Ciaccio (Monroe County Surrogate's Court) provided timely insights into emerging trends in Surrogate's Court

practice, and John C. Florsch, IV (Rowlands, LeBrou & Griesmer, PLLC) concluded the day with strategies for Medicaid crisis planning. The evening wrapped up with a welcome cocktail reception on the Potomac Terrace overlooking Baltimore's Inner Harbor.

Friday's sessions centered on practice management and innovation. Michael J. Garibaldi, CPA (Garibaldi Group) and Judith D. Grimaldi (Grimaldi Yeung Law Group) shared strategies for maximizing profitability and financial best practices for elder law and special needs practices. Daniel R. Miller (Miller & Miller Law Group, PLLC) delivered an engaging presentation on leveraging apps, software, and automation to streamline practice operations. Karen Peltz Strauss, a nationally recognized disability access consultant and historian, concluded the morning with a compelling session on accessibility barriers and federal mandates affecting older Americans. The afternoon offered free time for attendees to explore Baltimore, followed by a scenic dinner cruise along the Inner Harbor that evening.

Saturday's programming focused on timely legal developments and advanced planning strategies. Moriah Adamo (Abrams Fensterman, LLP) began with an analysis of the Supreme Court's landmark *Loper Bright Enterprises v. Raimondo* decision and its impact on administrative law and Medicaid appeals. The Honorable Timothy O'Rourke (O'Rourke Seaman LLP) presented a step-by-step visual guide to post-death RMD rules under SECURE 2.0 and the 2024 final regulations and later joined Donna M. Stefans (Stefans Law Group PC) to discuss practical retirement benefits planning techniques. The program concluded with an ethics panel featuring Hon. Christopher S. Ciaccio, Daniel R. Miller, and Hon. Timothy O'Rourke, addressing real-world ethical challenges unique to elder law, including client capacity, conflicts of interest, undue influence, and confidentiality in multigenerational representation.

Baltimore's vibrant Inner Harbor and cultural attractions provided a dynamic backdrop for both professional development and networking. Attendees enjoyed the opportunity to explore the city's culinary and historical highlights in between sessions, fostering collegiality and a strong sense of community within our Section.

As we reflect on the success of this year's summer meeting, we extend our heartfelt thanks to the sponsors, exhibitors, faculty, and attendees whose participation made the program possible. We also extend our sincere gratitude to President Kathleen Sweet for taking the time to join us and support our section's work. It is our honor to serve this vibrant community of elder law and special needs practitioners, and we look forward to welcoming everyone at our fall 2025 meeting, which will be held October 23-24, 2025, at the High Peaks Resort in Lake Placid, New York.

Kristen Casper, program co-chair, is of counsel at Wertime, Ries & Van Ullen, P.C. in Albany, New York, where her practice is focused on estate planning, estate administration and probate, and real estate law. She serves on the Executive Committee of the Elder Law and Special Needs Section and is also a member of the Trusts and Estates Law Section. Super Lawyers named her a Rising Star in Estate Planning and Probate from 2017 through 2025.

Miles Zatkowsky, program co-chair, focuses on elder law, including Medicaid and nursing home planning, asset protection, sophisticated estate planning, special needs planning, probate and estate administration, and guardianships. He is a member of the Executive Committee of the Elder Law and Special Needs Section and former co-chair of the Monroe County Bar Association Elder Law Section. He is also a member of the National Academy of Elder Law Attorneys. He is also a founding trustee of the Future Care Pooled Supplemental Needs Trust.

Invalidating Legal Documents and Transactions In Article 81 Guardianship Proceedings

By Bret Cahn

Much has been written about courts invalidating instruments or transactions after a person's death. Courts invalidating instruments or transactions during a person's lifetime are less often examined. A mechanism for doing so is found in Article 81 of the Mental Hygiene Law (MHL), which governs proceedings to appoint a guardian for an alleged incapacitated person's (AIP) personal needs or property management. This article examines how courts use MHL § 81.29(d) to protect incapacitated people.

MHL § 81.29(d) grants the court with the discretion to "modify, amend, or revoke" various legal documents or transactions of an incapacitated person if they were executed or effectuated during that person's incapacity (MHL § 81.29[d]). This provision covers numerous legal documents and transactions, with one significant exception: the statute specifies that the court cannot revoke a will or codicil while the incapacitated person is alive.

Here are some examples of how courts use MHL § 81.29(d) to protect an incapacitated person and their interests.

Advanced Directives. Article 81 seeks to safeguard the AIP and further their best interest by using the least restrictive form of intervention. Advanced directives, such as a power of attorney (POA) or a health care proxy, are far less restrictive than guardianship and can eliminate the need for one if the advance directives work properly (*Matter of Isadora R.*, 5 A.D.3d 494 [2d Dep't 2004]).

That said, if the advance directives of an incapacitated person are ineffective, misused, or executed during their incapacity, the court can revoke them. For instance, in the case of *Matter of Susan Jane G.*, the Supreme Court revoked the incapacitated person's POA due to her incapacity when she signed it. The Second Department affirmed the decision (*Matter of Susan Jane G.*, 33 A.D.3d 700, 701 [2d Dep't 2006]).

Even if the principal (*i.e.*, the person who created the POA) was competent when they executed the POA, MHL § 81.29(d) also provides the court the discretion to revoke it if it finds the agent breached their fiduciary duties (*Matter of Walter K.H.*, 31

Misc 3d 1233[A], 1233A, 2011 NY Slip Op. 50969[U], *5 [Sup Ct, Erie County 2011]). In such cases, the former agent must account to the guardian (*id.*; MHL § 81.29[d]).

Trusts. In *Rita R.,* the Appellate Division, Second Department upheld the Surrogate's Court order that invalidated a trust agreement, power of attorney, and health care proxy (*Matter of Rita R.*, 26 A.D.3d 502, 503 [2d Dep't 2006]). The Second Department then went one step further by invalidating Rita's will, which was executed around the same time. Critically, this decision preceded the Legislature's amendment of MHL § 81.29(d) in 2008, which prohibited a court from revoking an incapacitated person's will or codicil.[1]

Although MHL § 81.29(d) cannot currently be used to invalidate a will, when a court invalidates a lifetime trust based on the grantor's lack of capacity and the exercise of undue influence on the grantor, those findings may act as claim preclusion in a later proceeding to probate the will of the incapacitated person executed on the same date as the lifetime trust (*Matter of Kronik*, 192 A.D.3d 489, 490 [1st Dep't 2021]).

Gifts. With an aging population, it is becoming increasingly common for courts to set aside alleged gifts made by incapacitated individuals in guardianship proceedings (*see Matter of Shapiro*, 2001 N.Y. Misc. LEXIS 1359 [Sup. Ct., Nassau County, Apr. 19, 2001]). In *Shapiro*, the incapacitated person, Florence, "gave" $680,000 – nearly all her liquid assets – to her next-door neighbor and her four children, with whom she lived for five weeks under questionable circumstances. When Florence tried to leave the neighbor's home, she was carried back over the neighbor's husband's shoulder to the neighbor's residence. While living with the neighbor and her family, Florence was taken to the bank, where she "gave" her neighbors $680,000. The Supreme Court voided the dubious transactions.

Deeds. Litigation over deed fraud and similar matters also seems to be on the rise. In *Matter of Nurse*, Rupert A.N. conveyed a 50% ownership interest in his property to his stepson (*Matter of Nurse*, 160 A.D.3d 745, 746 [2d Dep't 2018]). Soon after, his biological children petitioned to become their father's guardians. After a hearing established that Rupert had dementia, the Supreme Court adjudicated him as an incapacitated person and appointed his biological children as his co-guardians. Then, the petitioners moved to set aside the deed on the grounds of undue influence and Rupert's incapacity at that time. After another hearing, the court determined that the petitioners had proved, by clear and convincing evidence, that Rupert was incapacitated when the deed was executed and that the instrument resulted from the stepson's undue influence. The court declared the deed null and void, and the Appellate Division, Second Department, affirmed.

Marriages. Some of the more interesting cases involve undoing the marriage of an incapacitated person.[2] Recently, in *Matter of John M.*, the Appellate Division, First Department affirmed the Supreme Court order which determined that John M. was incapacitated when he entered into a marriage, and thus "the marriage was null and void and of no effect ab initio" (*Matter of John M.,* 234 A.D.3d 487, 488 [1st Dep't 2025]).[3] The First Department explained that marriage is a contract, and under MHL § 81.29(d), that contract can be revoked if it is established that it was made while the person was incapacitated (*id.*).

The hearing in the Supreme Court uncovered some interesting facts. John M., a Yale Law School graduate, began experiencing memory issues in 2019 (*Matter of John M.*, 79 Misc. 3d 1230[A], 2023 NY Slip Op. 50750[U], *2 [Sup. Ct., NY County 2023]). The following year, he moved from his apartment in New York City to a senior living community in Connecticut. In 2021, John began experiencing difficulties, including getting lost and locking himself out of his residence. One night, he even belted out the French national anthem at the door of another resident. The senior living community required John to have a full-time aide in order to continue residing there. In September 2021, when John moved back to his apartment, his aide, Helen E., followed him. While under Helen's "care," he left his stove on several times, fell victim to a scam, and neglected to pay his taxes, maintenance, and utilities.

John's daughter discovered that her father's aide, Helen, had moved in with him, isolated him, and tried to marry him in order to obtain U.S. citizenship. As a result, his daughter initiated a guardianship proceeding. In September 2022, the Supreme Court determined that John was incapacitated and appointed an independent guardian to manage his personal needs, while John's daughter served as guardian of his property.

When the guardians discovered that John and Helen were married in June 2022, they brought an application to annul the marriage on the grounds that John lacked capacity to enter into a marriage. During the hearing, it was established that before successfully marrying John, Helen had made two attempts that were thwarted because John did not have a copy of his divorce decree, and a clerk considered John incompetent to marry. Based on these facts, the Court declared the marriage "null and void and of no effect *ab initio*" (*id.*).

In *John M.*, the First Department noted that petitioner "proved by clear and convincing evidence that John M. was incapacitated at the time of the parties' marriage" (*John M.*, 234 A.D.3d at 488). Notably, as Justice Knobel explained in *Matter of Nunziata*, MHL § 81.29(d) does not state with which burden of proof should be applied, clear and convincing evidence or preponderance of the evidence (*Matter of Nunziata*, 74 Misc 3d 255, 267 [Sup Ct, Nassau County 2021]). In *Matter of Berk*, the Second Department held that the burden of proof was upon the decedent's representatives to establish by

a preponderance of the evidence that the decedent was mentally incapacitated and incapable of consenting to the marriage (*Matter of Berk*, 133 A.D.3d 850, 852 [2d Dep't 2015]). But, as Justice Knobel notes, several First and Second Department cases instead "refer to the clear and convincing standard without adopting it or declaring that it is the movant's burden of proof standard" (*Matter of Nunziata*, 74 Misc 3d at 268; *citing Matter of Nurse*, 160 A.D.3d 745, 746 [2d Dep't 2018]; *Kaminester v. Foldes*, 51 A.D.3d 528, 529 [1st Dep't 2008]; *Matter of Rose S.*, 293 A.D.2d 619, 621 [2d Dep't 2002]). As many cases examine the validity of a marriage, one can expect some clarity on the burden of proof issue soon.

To sum up, MHL § 81.29(d) is an effective tool to invalidate certain documents and transactions in guardianship proceedings. But courts are wary of parties engaging in predeath estate litigation for their own benefit rather than that of the AIP. Article 81 indeed empowers the court to charge a petitioner for the attorney's fees incurred by court appointees if the petition to appoint a guardian is either dismissed or withdrawn and the proceeding was initiated in bad faith (*Matter of Marjorie T.*, 84 A.D.3d 1255, 1255 [2d Dep't 2011]).[4] So it is crucial to examine the facts holistically to ensure that your clients are acting in the genuine best interest of the AIP.

Bret Cahn is a trusts and estates and Article 81 guardianship litigator representing individuals and families across New York. Bret handles a full range of will contests, discovery and turnover proceedings, removal proceedings, contested accountings, disputes related to the spousal right of election, and contested Article 81 guardianship proceedings. Appearing regularly before Surrogate's Court and Supreme Court, Bret drafts and argues substantive and procedural motions, engages in settlement negotiations, examines witnesses, and runs a successful appellate practice.

Endnotes

1. There are several reasons the Legislature distinguished wills from other instruments. First, the objective of a guardianship proceeding is to safeguard an AIP during their life. Wills become effective only after death, so their validity is not the guardianship court's concern. Second, wills are ambulatory and less capacity is required for a will than for any other legal document in this state, so a valid will can be created even after a person is adjudicated incapacitated under MHL Article 81. Third, the parties involved in guardianship and probate proceedings often differ, raising due process concerns if a guardianship court invalidates a will that adversely affects parties who were not notified. Fourth, guardianship proceedings are special proceedings governed by CPLR Article 4, which allows for significantly less discovery is allowed than in a will contest.
2. *See for example*, *Matter of Edgar V.L.*, 228 A.D.3d 549, 551 (1st Dep't 2024).
3. "Unlike an annulled marriage, a marriage revoked pursuant to Mental Hygiene Law § 81.29(d) is void ab initio" (*id.*; *citing Kaminester v Foldes*, 51 A.D.3d 528, 529 [1st Dept 2008]).
4. This is particularly true when petitioners know of advance directives for the AIP (*Matter of Schwarz*, 33 Misc. 3d 1203(A) [Sup. Ct. 2011] ["The case law has consistently held that in cases where petitioner had knowledge of advance directives and there was no evidence of harm or loss to the alleged incapacitated person, petitioner is responsible to pay for the court evaluators fees"], *affd as mod sub nom*, *Matter of In re Samuel S.*, 96 A.D.3d 954 [2d Dep't 2012]).

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Guardianship

Authors
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This practice guide is designed to help the practitioner navigate this complex area of law. *Guardianship* examines the major provisions of Article 81 of the N.Y. Mental Hygiene Law (MHL) along with relevant case law. Article 81 of the MHL balances the competing aims of protecting the person in need of assistance with preserving their rights.

This title provides valuable assistance to attorneys practicing in this area with topics that discuss the necessity of appointment; standards for the appointment of a guardian; procedural protections for the AIP; procedures covering the appointment of a guardian; and subsequent supervision, modification and education requirements for guardians.

The Guardianship Trial – Practitioner Tips Part I

By Linda Redlisky and Edmond Wong

Sophisticated and nuanced litigation is occurring with more frequency in contested guardianship matters. Despite these being summary proceedings where petitioners are faced with the statutory mandate of only having 28[1] days to prepare, petitioners must prepare themselves to conduct hearings akin to trials in other contested matters. We have condensed portions of our presentation in Montreal at the Elder Law and Special Needs section Summer Meeting in 2024, with the goal of covering the various parts of a contested guardianship hearing, including practical tips and considerations, in an easily digestible format. This installment focuses on the opening statement, evidence considerations, and preparing direct and cross examinations from the petitioner's point of view. We will explore defending the Alleged Incapacitated Person (AIP) in another article.

Two points, right off the bat, while preparing for the hearing:

First, keep in mind that each Judge conducts a guardianship hearing slightly differently, and conferring with colleagues who have appeared before the judge presiding over your upcoming proceeding is an excellent place to start your preparation. Despite this, we hope to offer *some* certainty (and solace) when it comes to preparing and trying a contested guardianship matter before any judge.

Second, the rules of evidence apply,[2] despite the rules being a bit relaxed. Review your rules of evidence and anticipate your objections. Evidence and specific objections will be discussed more fully in another installment but are worth mentioning here.

Pre-Hearing Preparation

Preparing for your hearing starts when you put pen to paper in drafting the order to show cause and petition. Draft your petition carefully, making only those allegations that you can demonstrate with clear and convincing evidence through various witnesses and evidence, and plead with sufficient particularity[3] to withstand a potential motion to dismiss. The petition must be tailored to reflect the least restrictive alternative available on behalf of the AIP. Once the initial hurdles are cleared, prepare for the hearing.

First, consider which witness has personal knowledge to testify as to the various facts you need to establish. For example, you may have one witness with personal knowledge as to the AIP's inability to manage their finances, but who is unfamiliar with whether the AIP has a power of attorney, trust or other informal supports that may obviate the need for a property management guardian. Perhaps there is a neighbor who has personally observed the hoarded conditions of the inside

of the AIP's home but who is unwilling to testify. You should consider whether or not you will need to issue a trial subpoenas to secure that person's testimony. Do not rely on the court evaluator's (CE) report to help make your *prima facie* case. While there are cases to support that a CE report may be considered to defeat a motion to dismiss,[4] MHL § 81.12 is clear that the burden of proof is on the petitioner. Budget time to prepare the witnesses who are willing to testify. Hearing preparation starts before you step into the courtroom.

The Opening Statement

Opening statements are more commonly used in jury trials. That fact notwithstanding, if you ask the court to permit a brief opening, use the time as an opportunity to provide the Court with a preview of the anticipated testimony, exhibits, and other evidence that petitioner will bring forward in support of its case. Your opening should do the following:

- Grab the judge's attention immediately with something compelling. For example: "We are here today because the evidence will show that Ms. Jones was financially exploited by the very person who was supposed to protect her."
- Signal to the Court you know the law. For example, "Petitioner will demonstrate by clear and convincing evidence that the appointment of a guardian is necessary to protect the AIP from harm, and that Ms. Jones is incapacitated within the meaning of Article 81."
- Fairly explain what you expect the evidence to prove, who will testify and what the testimony will reveal.

Do not argue the case here, else you may get a motion to strike from respondent's counsel. Your argument is for the closing. There are a fair number of judges who ask you to waive the opening. If you have a complex case (either procedurally or factually) do not hesitate to try and persuade the judge that your opening will be beneficial to the Court, specifically to lay out a brief overview of your theory of the case and a roadmap that will assist the Court. If the Court isn't interested, you have not wasted your time. Rather, in preparing for the opening, you have distilled your arguments, increasing the likelihood of a clean presentation of your case.

Direct Examination

As petitioner, you have the burden of proof to demonstrate by clear and convincing evidence[5] that: 1) the guard-

ianship is necessary and 2) the alleged incapacitated person (AIP) is incapacitated (within the statutory definition) or consents.[6] When crafting your direct examination, you should fully understand the magnitude of this burden. Specifically, clear and convincing means "the evidence makes it *highly probably* that what he claims is actually true."[7] This is the highest standard of proof in a civil trial. Depending upon the complexity of the case, you may have only one witness or several. For each witness you call to the stand, establish the length and nature of their relationship to the AIP. Petitioner should start with a line of questioning that establishes necessity, and then incapacity (unless the AIP consents to the appointment of a guardian), depending upon which witness is competent to establish either of those prongs. A showing of necessity means "the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care or safety and/or to manage the property and financial affairs of that person."[8] Petitioner also generally demonstrates that either the AIP does not have advanced directives such as a durable power of attorney, health care proxy, representative payee, trust or informal supports in the community, or that the AIP's advanced directives are insufficient or unreliable. If Petitioner cannot make that *prima facie* case, the case may be dismissed.[9]

Direct examination questions are open ended. They are formulated to elicit an answer from the witness that demonstrates the witness' personal knowledge of the facts. If, for example, you want to demonstrate that the AIP's home is hoarded, dangerous and uninhabitable, consider the following line of (abridged) questioning:

Q: Where does the AIP reside?

Q: Does the AIP own this property?

Q: How do you know?

Q: How long has the AIP lived there?

Q: Have you ever been inside this property?

Q: When?

Q: Did you observe the condition of the property when you were there?

Q: What is the condition of the AIP's property?

Practice tip: Most guardianship hearings are bench trials. The Court understands that when you ask the question, "Does the AIP own this property?" it presumes the witness either knows the answer and will say so, or does not. It is not necessary to first ask, "*Do you know* if the AIP owns this property?" which calls for a yes or no answer, only to follow up with "Does the AIP own this property." If you ask your witness, "Do you know…" in Justice Lisa A. Sokoloff's guardianship part, you will be educated, and then reminded to mind your form if you continue to ask questions in that manner. An effective direct examination has concise questions that shine the spotlight on the witness and their knowledge of the facts elicited. This allows the Court to focus on listening to the testimony and assessing their credibility, rather than getting mired in objections and irritated with sloppy questioning from counsel. It is perfectly acceptable to write out your direct examination questions, with the understanding that you may have to rephrase if an objection is sustained.

Practice tip: If you are asked to rephrase a question, take your time and gather your thoughts. Distill your prior question to something simpler and more digestible. Knowing the bases for objections will help you avoid this pitfall, and will also help you out of one if you come across an objection.

Remember to focus on the statutory standard in determining incapacity.

Evidence in Your Direct Examination: Who Is Competent?

While testimony of a witness with knowledge is critical, so too is relevant and admissible documentary evidence. In considering what documents you need (if any) to establish your *prima facie* case (i.e., necessity and incapacity), you must also understand which of your witnesses is competent to lay the foundation for that particular document. For example, if you need to introduce a power of attorney executed by the AIP, you might consider calling a witness who observed the AIP sign the power of attorney, or the appointed agent if they observed the execution, or the attorney who supervised the execution. Assuming the proffered document is relevant, your witness must establish a proper foundation. It is critical to prepare "for which piece of evidence is being offered by whom."

While you may be able to recall a witness if you forget to use them to admit a document, it is entirely within the court's discretion to allow it and opposing counsel may object (unless they consent to admitting the document). Furthermore, you also expose your witness to further cross-examination. Do your research as how to lay a foundation once you have identified the appropriate witness to do so and, of course, anticipate all possible objections to admissibility. Objections will be discussed in another installment.

Cross-Examination

On cross-examination, you as the attorney should control the narrative. One technique to do so is to ask questions in a way that elicits a "yes" or "no" answer, to the extent possible. Avoid open-ended questions which give the witness the opportunity to explain away inconsistencies you may have highlighted. For example:

Q. Earlier this morning you testified that the last time you saw the AIP, she could walk independently, isn't that correct?

Q. But isn't it true that the last time you saw the AIP was five years ago?

Q. So if the last time you saw her was 5 years ago, you have no personal knowledge as to whether or not the AIP can walk independently as we sit here today, correct?

In this way, you can attack the witnesses' credibility and knowledge, and highlight facts that support your client's position. It is also critical to debunk opposing counsel's assessment of the AIP's capacity, the necessity for a guardianship, and the least restrictive alternatives to a guardianship. On cross, you must skillfully expose, minimize, and discredit the testimony that challenges petitioner's *prima facie* case regarding the AIP's inability to manage personal or financial needs.

The golden rule on cross remains "don't ask questions you don't know the answer to," which of course is easier said than done. However, impeachment of a witness on cross examination can be incredibly useful. For example, let us assume we have a cross-petitioner who is the agent under the AIP's power of attorney (which was already admitted into evidence). She wants to remain acting as the AIP's agent, and she testifies that she has paid all of the AIP's bills in a timely manner for years. You, however, are aware that the AIP's home is in foreclosure. Consider the following sample impeachment:

Q. Ms. Jones, you testified on direct that you have been the agent under the AIP's durable power of attorney for five years, correct?

Q. And during that time, you faithfully fulfilled your duties as an agent under that POA, right?

Q. And you have always taken care to pay all of the AIP's outstanding financial obligations, isn't that true?

Q. But isn't it a fact that the AIP's mortgage hasn't been paid for three years?

Q. And isn't it a fact that there is a foreclosure action pending by the mortgage company against the AIP for failing to pay the mortgage?[10]

There is no need to inquire further, having received your answer of "yes," and to the extent that the witness tries to explain, you should ask the Court to strike any testimony after "yes" as non-responsive. Even if the Court permits an explanation, the cross-examination remains effective.

Cross-examination of the Court Evaluator

The court evaluator (CE) is the eyes and the ears of the Court. While it is the Court that ultimately makes the findings, practically, the recommendation of the Court Evaluator carries tremendous weight. In most instances, the Court Evaluator will testify in the narrative once the Petitioner and other interested parties rest their cases. As Petitioner, if the CE makes recommendations that are inconsistent with your petition, a strong cross-examination is critical.

How do we do this *generally*?

> MHL § 81.09 lists the duties of the court evaluator.
>
> The evaluator's report *must* include answers to the 17 questions set forth therein [MHL § 81.09(c)(5)(i)-(xvii)].
>
> Remember, no open-ended questions. You want to elicit yes or no answers that highlight deficiencies. Here is a general (and simplified) sample:
>
> You have been a court evaluator before haven't you?
>
> In fact, you have had over 50 appointments in the past eight years, correct?
>
> You've prepared reports in connection with all those appointments?
>
> And have testified in all if not almost all of those hearings?
>
> Familiar with requirements of 81.09 as it relates to your report (if they plead ignorance, you should have the statute handy to refresh their recollection).
>
> One of the requirements as part of your investigation is to advise the court as to the approximate value and nature of the financial resources of the person alleged to be incapacitated, correct?
>
> Isn't it true that your report fails to include any information regarding the approximate value and nature of financial resources of AIP?
>
> Indeed, you never obtained any financial information in connection with the AIP, did you?
>
> Isn't it true that you have absolutely no idea as to the financial condition of the AIP?
>
> Since you failed to obtain financial information, you have no idea who, if anyone, is paying the AIP's bills.

Do not underestimate the value of a well-executed cross-examination. You also do not need to beat a dead horse to make your point. Remember that guardianship are generally bench trials, so that we can reserve the theatrics for our jury trials.

Petitioner's Closing

Request a verbal closing. If granted, consider the following.

Reiterate the theme of your opening:

- [Petitioner:] I told this Court that the evidence would demonstrate that Mr. Jones, as agent under the AIP's 2015 Power of Attorney, breached his fiduciary duty to the AIP, such that his authority as agent must be revoked. Petitioner's evidence demonstrated precisely that.

Connect the *admitted** evidence to your theme and why it supports your argument. If respondent was successful in keeping out evidence, respondent should note that in the closing.

> Point out inconsistencies and weaknesses in cross-petitioner or AIP's case.
>
> Note that the court evaluator's report supports the relief requested in your petition or bring out how you exposed the deficiencies in the Court Evaluator's investigation/report and that the recommendation is not reliable.
>
> If petitioner: reiterate why and how the appointment of a guardian (or whatever other relief prayed for, e.g., MHL § 81.16) constitutes the least restrictive alternative.

Practice Tip: You cannot reference exhibits or testimony that were not admitted into evidence. Use an exhibit list to keep track of what evidence was admitted.

Overall, preparation and a firm understanding of your case, which witnesses will be called, and what evidence will be properly elicited from those witnesses are the key to a clean presentation of a guardianship case as a petitioner.

"Before anything else, preparation is the key to success."

– Alexandrer Graham Bell

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Endnotes

1. MHL § 81.07(1) states, "Upon the filing of the petition, the court shall … set the date on which the order to show cause is heard no more than twenty-eight days from the date of the signing of the order to show cause. The court may for good cause shown set a date less than twenty-eight days from the date of the signing of the order to show cause. The date of the hearing may be adjourned only for good cause shown."
2. *In re: Seidner*, NYLJ, Oct. 8, 1997 (Nassau Co.) Petition dismissed where medical evidence against AIP was excluded. AIP did not waive the patient-physician privilege overtly or by affirmatively placing his condition at issue.
3. MHL § 81.08; *see* In *Matter of Onondaga Cty. Department of Social Services v Parker*, 162 Misc.2d 733; 619 N.Y.S.2d 238 (Sup. Ct., Onondaga Cty., 1994), the petition was dismissed for failure to comply with pleading provisions of §81.08 requiring petition to include, *inter alia*, a description of AIP's functional level, specific factual allegations as to personal actions and/or financial transactions or other occurrences which demonstrate that person is likely to suffer harm.
4. *In the Matter of Michael B. v. Famulari* 170 A.D.3d 713 (2nd Dep't 2019) ("… to the extent that the petition was conclusory and otherwise deficient, the court-appointed evaluator's report sufficiently remedied any pleading defects.").
5. MHL § 81.12(a).
6. See MHL §81.02(a).
7. See Prince-Richardson on Evidence § 3-205 [ed.], quoting 1 N.Y. PJI2d (Supp), P.J.I. 1:64.
8. See MHL § 81.02(a).
9. See *Matter of Rose*, 26 Misc. 3d 1213 (A), 2012 N.Y. Slip Op. 50087 (U) (Sup. Ct. Dutchess Co. 2010), the alleged incapacitated person ("AIP") had executed a valid health care proxy and power of attorney and since the directive has not been revoked, the court determined that the AIP's personal and property management needs were being taken care of and the appointment of a guardian was not "the least restrictive form of intervention."
10. If the witness denies this fact, you can request that the court take judicial notice of the NYSCEF filings in the foreclosure proceeding (a copy of which you will have available for the court and all counsel) pursuant to 2.01 (2) Judicial Notice of Facts of the Guide to NY Evidence.

Shedding Light on Guardianship: Rethinking Confidentiality in Article 81 Proceedings

By Elizabeth Adinolfi

> Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.
>
> - Supreme Court Justice Louis D. Brandeis, 1913

In October of 2017, The New Yorker published *How the Elderly Lose Their Rights*, an article that sent shockwaves through the guardianship bar. It highlighted the rampant abuses and lack of due process protection in Nevada's guardianship system. In Nevada, a complete stranger could file a petition and obtain temporary guardianship over someone. No neutral evaluator was assigned to gather information for the court and the person alleged to be in need of a guardian was not provided with counsel. Family members received no notice of what was happening to their loved ones. Those family members fortunate enough to find out about and attend the hearings often met with hostility and derision from the court, prompted by the guardian's unfounded allegations of neglect or abuse. The temporary guardian was often made a permanent guardian at hearings that lasted only a matter of minutes. Elderly people routinely had strangers assume complete control over their lives, were separated from their families, were placed in assisted living facilities with no court oversight, and had all of their assets liquidated. Worst of all, all of this was hidden from the public for years under the guise of protecting the privacy of the individuals placed under guardianship. The article was so upsetting I felt physically ill by the time I finished reading

As the article made its way around social media, I started getting panicked messages from friends: "Could this happen to my parents?," "Could this happen to me?," and the worst one, "Is this what you do?" I tried to assuage their fears and explain that New York has far more robust protections: court-appointed counsel, neutral court evaluators, mandatory notice requirements, etc. I did not think our system in New York was vulnerable to the same kinds of criticism and attack as Nevada.

Looking back, I see that I was naïve. I could not have predicted the #FreeBritney movement and the media's utter failure to accurately investigate and report on the truth and reality of the Britney Spears conservatorship. Since Britney Spears, the headlines have remained full of cases involving celebrities who have been the subject of guardianship proceedings: Amanda Bynes. Nichelle Nichols. John Amos. Brian Wilson. Michael Oher. Mavis Leno, Jay Leno's wife. Elijah Allman, Cher's son. And most recently, Wendy Williams. The coverage is rarely positive, and the public's trust in our guardianship system is eroding.

However, all of the blame cannot be laid at the media's feet. They cannot get access to case dockets to read the parties' filings or judicial decisions. They, and members of the public, are often prohibited from being present in courtrooms. Accurate reporting has been made nearly impossible by the cloak of secrecy over the guardianship systems across the United States.

It is not just cases involving celebrities, and it is not just inaccurate, negative, or critical media coverage. The guardianship system is losing the ability to attract and keep practitioners. I have had more than one attorney, who is new to guardianship practice, describe it as a "star chamber" or "kangaroo courts." I have allowed my Part 36 registration to lapse, and I am hearing from other attorneys that they either have done the same, are strongly considering doing so, or simply decline appointments when asked. Others are leaving the guardianship practice altogether. I've heard several reasons for the hesitation: concerns about media exposure, challenges in getting paid – whether due to delays in court approval of fee awards, the judge slashing fees, or discovering at the end of a case that the AIP lacks sufficient assets, and unease with the procedural ambiguity surrounding how these cases are handled. If even practitioners are losing faith in the system, how can we expect the public to believe that people's rights are truly being protected?

As a legal community, it is past time that we ask ourselves, and the court system, difficult questions: Are there practices that interfere with the public's trust in the fair administration of justice when the state exercises the power to completely abrogate a person's liberty and rights? What obligations do we, as practitioners, have to make sure that we, and the courts, are not taking actions that erode the legitimacy of guardianships in the public mind? Does the court system's practice of closing courtrooms and the dockets of guardianship cases to the public promote or hinder the pursuit of justice and public trust in the guardianship system? Does the secrecy and lack of public scrutiny enable litigants and attorneys to engage in conduct and utilize tactics that interfere with the fair administration of justice? Does the lack of public scrutiny, and poorly defined procedural rules, result in practices that compromise litigants' rights and the fair administration of justice?

It is not just cases involving celebrities, and it is not just inaccurate, negative, or critical media coverage. The guardianship system is losing the ability to attract and keep practitioners.

These questions have gnawed at me for years. I started writing this article in 2018 but never finished it because I was hesitant about making this critique public. However, over the past eight years my belief that the courts' and practitioners' desire to protect the privacy of AIPs does more damage than good has only grown stronger. After seeing the recent lawsuit filed in the Southern District of New York by Wendy Williams' ex-husband, allegedly on her behalf, against 33 individuals and entities involved in her guardianship, I decided it was time to finish what I started eight years ago and make my concerns public.

As practitioners, we are often quick to ask for courtrooms to be closed and for files to be sealed. Keeping private sensitive financial information, or embarrassing facts, about AIPs takes precedence over the deeply held principle embedded in New York Judiciary Law § 4 that "The sittings of every court within this state shall be public, and every citizen may freely attend the same[.]" Yet this secrecy fails to serve its purpose, and results in procedural anomalies, inaccurate and at times inflammatory media coverage, and litigation within and outside of the guardianship proceedings that drains AIPs assets and places practitioners and guardians at risk, all to the detriment of AIPs and IPs.

In evaluating the wisdom of keeping the public and the media out of Article 81 proceedings, we can look to the experience of the Family Court, which has similar concerns regarding privacy as it shares the purpose of protecting vulnerable individuals. When the Family Court was created in 1962, it was intended to be open to the public. Yet, as a matter of practice, courtrooms were routinely closed to the public and the media. The secrecy was intended to protect the privacy of people embroiled in intimate family battles, and prevent children from having highly sensitive information, such as having been victims of sexual abuse, follow them for the rest of their lives.

But journalists and others pushed for access, arguing that the closed doors shielded judges and other public officials from scrutiny.[1] For 35 years the secrecy continued, until 1997 when the horrific murder of six-year-old Elisa Izquierdo, whom the Family Court had returned to her abusive mother, led then Chief Judge Judith Kaye to issue rules opening the family courts.[2]

In announcing the new rules, Chief Judge Kaye echoed Justice Brandeis, "Sunshine is good for children."[3] She stated that, as an important public institution, the Family Court required public scrutiny: "It is vital that the public have a good understanding of the court and confidence in the court process[.]"[4] Judge Lippman echoed her sentiment, stating "[t]he Chief Judge, myself and the administrative board all feel it is very important to make it clear that the court is open to public scrutiny and accountable to the public."[5]

After Chief Judge Kaye announced the new rules, The New York Times ran an editorial that echoes the criticisms of the guardianship system that are becoming more prevalent every day:

> For decades it has been allowed to operate as a closed institution, keeping the press and public outside except in rare cases. Judges have used vague and generalized concerns about the privacy of litigants to shield their decisions, and the performance of the agencies who regularly appear before them, from public scrutiny and possible criticism. . . . The goal here is [to] change the court's traditional culture of secrecy and get it to pay attention to the presumption in existing law that hearings and other proceedings ought to be open.[6]

Like the Family Court, the Guardianship Court is an important, vital public institution that requires public scrutiny and must be accountable to the public.

Our practice is truly at a crossroads. As our population continues to age, and as the prevalence of diseases like Alzheimer's and other forms of dementia continues to increase, the resources necessary for the guardianship courts to meet the needs of individuals who require guardians will likely increase.

Without attorneys willing to take appointments, and the state allocating adequate resources for the courts to manage these increasing caseloads, the system cannot function. If the public cannot see the need for resources because our guardianship proceedings are closed, or worse, the public believes the guardianship system is abusive and corrupt, we risk the continued viability of the system that is supposed to protect the most vulnerable adults from abuse, exploitation, and harm.

It is time to heed Justice Brandeis' and Chief Judge Kaye's wisdom and let in the sunlight for everyone's benefit: AIPs, practitioners, the courts, and the public.

Endnotes

1. https://www.nytimes.com/1997/09/13/nyregion/opening-the-doors-on-family-court-s-secrets.html.
2. https://web.archive.org/web/20160304044007/http://old.post-gazette.com/regionstate/20010924d2courtmainreg2.asp.
3. https://web.archive.org/web/20160304044007/http://old.post-gazette.com/regionstate/20010924d2courtmainreg2.asp.
4. https://www.nytimes.com/1997/06/19/nyregion/chief-judge-in-new-york-tells-family-courts-to-admit-public.html.
5. https://www.nytimes.com/1997/06/19/nyregion/chief-judge-in-new-york-tells-family-courts-to-admit-public.html.
6. https://www.nytimes.com/1997/06/22/opinion/prying-open-family-court.html.

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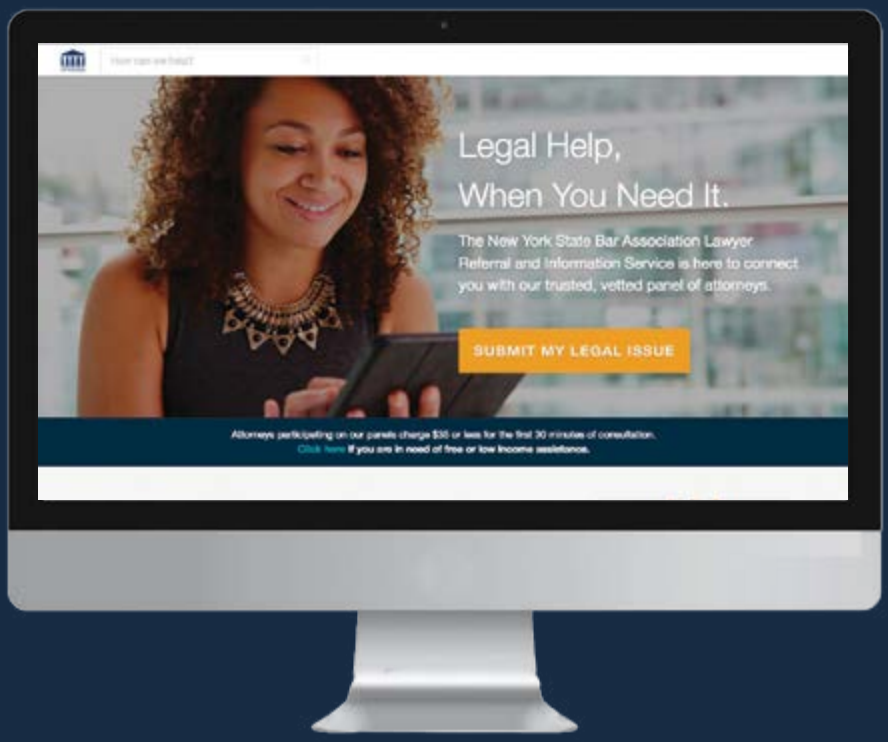

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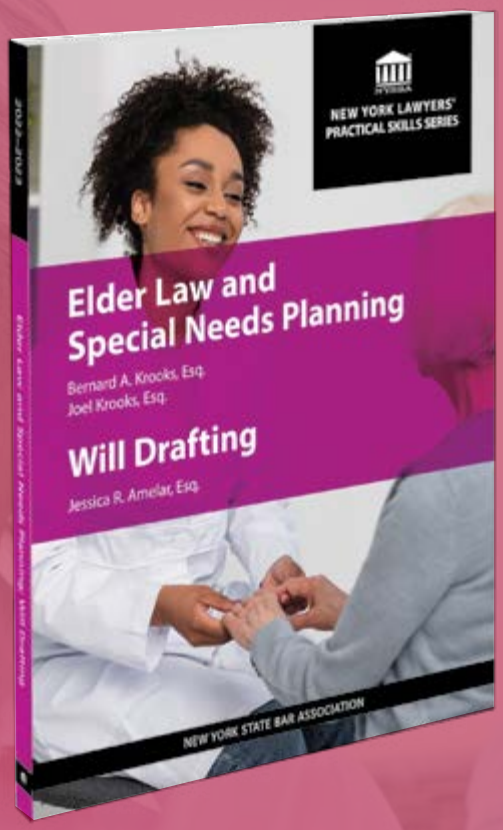

This practice guide provides an extensive overview to the practice of elder law, special needs planning and will drafting for attorneys entering this field. Health care proxies and related documents, conflicts of interest and ethical considerations, guardianships under MHL Article 81, and Medicaid law, estate and gift tax statutes, and trusts, long-term care insurance, and basic will provisions are all considered.

Part One examines the scope and practice of elder law in New York State. Part Two gives the attorney a step-by-step overview of the drafting of a will. Includes sample letters, forms, checklists and downloadable forms.

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