

ELDER JUSTICE NAVIGATOR PROJECT

ELDER ABUSE DESK GUIDE

FOR

JUDGES AND COURT STAFF

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INTRODUCTION

The Elder Justice Navigator Project was funded by a grant from the Administration for Community Living, U.S. Department of Health and Human Services, and is a partnership between Center for Elder Law & Justice (CELJ), the New York State Unified Court System (NYS-UCS), and Chautauqua County Department of Health and Human Services (DHHS). The Project aims to help older victims of abuse and exploitation in Chautauqua County through their court experience by improving accessibility, effectiveness, and community collaboration.

The Elder Justice Navigator Project is a one-stop referral source, whereby courts can refer victims and potential victims of elder abuse for needs assessment and services, including case review by the Chautauqua County Elder Abuse Enhanced Multi-Disciplinary Team¹, civil legal services and law enforcement, and case management and senior services through Adult Protective Services and the Office for the Aging.

Additionally, the Navigator Project will assist with accessibility issues by acting as court advocates and arranging for court accommodations as needed, and will utilize remote filing and video conferencing for Family Court Temporary Orders of Protection. The project will also track important data resulting from its implementation, such as changes in the number of elder abuse cases reported, rates of utilization of the court system, and case outcomes.

The overarching goal of the Navigator Project is to reduce harm and empower elder abuse survivors by addressing systemic barriers and improving victims' experience and

¹ Enhanced Multi-Disciplinary Teams are a newer model for addressing elder financial exploitation. They are a collaboration of numerous community stakeholders, including representatives from the District Attorney's Office, law enforcement, civil legal services, Adult Protective Services, and banks. Their aim is to increase the prosecution of elder financial exploitation crimes and to ensure the various needs of victims are being met. Chautauqua County's EMDT formed in June 2017.

confidence in the court system. The first step in reaching this goal is to provide education to community stakeholders regarding the prevalence and types of elder abuse, how to identify elder abuse and exploitation, and the tools available to combat it. By educating not only the courts, but also law enforcement, banks, and social services organizations, we as a community can work together to prevent elder abuse, and empower its survivors to seek the support and outcomes they deserve.

HOW TO USE THIS MANUAL AND THE NAVIGATOR PROJECT

This training manual is meant to be used as a desk guide for judges and court staff. It covers a variety of topics, including how to identify elder abuse, relevant state laws, what to remember when working with elders, and local resources and information. It can be used as a quick reference source for substantive information and as a resource guide. The Navigator Project partners hope that this guide will be a tool through which the courts and community may work together to address and combat the victimization of our elders.²

With increased awareness comes increased identification of elder abuse. When elder abuse or exploitation is a clear factor in a case before you, or when suspicion arises that elder abuse may be an underlying factor, a referral to the Navigator Project can provide numerous benefits to, and improve outcomes for, survivors of abuse.

REFERRAL PROCESS. The referral criteria for the Navigator Project is simple: any older adult appearing in any of the Chautauqua County courts is eligible for a referral to the Navigator Project. Generally speaking, the project aims to assist individuals 60 and over. However, there will be exceptions to this rule, and the project does not expect judges and court staff to enquire into litigant age. Rather, the Navigator Project asks that the court refer any older individual suspected of being a victim of any form of maltreatment or exploitation, regardless of knowledge of his or her age.

² A similar desk guide is being created for law enforcement and social services organizations, so that the various community stakeholders can utilize the same information and tools in working together through the Navigator Project.

Referral from the court to the Elder Justice Navigator Project occurs with the simple provision of Elder Justice Navigator Project informational materials to the older adult. These materials provide information about elder abuse, explain the various services available through the project's collaboration with community resources and Chautauqua County, and contact information for the Navigator Project.

The Navigator Project also asks that all referrals to the Project be followed up with an **email to Kayleah Feser, MSW, at kfeser@elderjusticenyny.org**, indicating that a referral has been made. While these emails needs not contain any identifying information of the referred individual, if the court, in its discretion, provides identifying information, including a mailing address, the Navigator Project will send a letter to the referred individual indicating they have been referred to the project. The letter will ask them to contact us if they would like to discuss assistance available through the Navigator Project. Where the court cannot or chooses not to provide identifying information to the project, the Navigator Project relies upon the referred individual contacting us directly upon referral by the court.

INTAKE. Upon initial contact with the older adult, the Navigator Project social worker will assess the older adult's situation globally. Some referred individuals may already be represented by counsel in the case before the court, but may benefit from senior services or case management. Others may have no representation and may be appropriate for provision of civil legal services through the Navigator Project lead partner, Center for Elder Law and Justice. Still other referred individuals may have representation on the particular case before the court, but may desire to pursue separate legal remedies against their abuser, either civil or criminal.

For individuals who have not yet contacted the police, the Navigator Project can assist with an initial report and follow up. For those that have reported their abuse, the Navigator Project can work with the law enforcement agency on appropriate cases through the Elder Abuse Enhanced Multi-Disciplinary Team. In all cases, the Navigator Project will assess the older adult for accessibility barriers to their court action, and work with the court to provide appropriate accessibility devices and considerations as their cases move forward.

SERVICES. The Navigator Project relies on the collaboration of numerous community resources and stakeholders. While the named partners on the project are Center for Elder Law and Justice, the New York State Unified Court System, and Chautauqua County Department of Health and Human Services, the project relies upon the important partnerships with other community organizations and collaborations. These include Adult Protective Services, the Chautauqua Elder Abuse Enhanced Multi-Disciplinary Team, Chautauqua County Office for the Aging, and the Chautauqua County Council on Elder Abuse. Together, these partnerships can address the various needs of victims of elder abuse.

The Navigator Project will assess referred individuals for the following needs and provide direct or indirect assistance as appropriate:

- ***Civil legal representation pertaining to elder abuse***, including but not limited to:
 - Ejectment or eviction proceedings, revocation or execution of Power of Attorney documents, special proceedings for Power of Attorney accountings and breaches, family offense petitions, including remote filing for temporary orders of protection

- *Law enforcement assistance*, including with initial police report filing, follow up, and case review in furtherance of prosecution through the Enhanced Multi-Disciplinary Team
- *Adult Protective Services*, including investigation, case management, representative payee status, and guardianship
- *Court advocacy and support* at court dates
- *Courtroom accessibility assistance*, including provision of various devices for addressing physical and cognitive impairments, such as hearing amplifiers, document magnifiers, and wheelchairs, as well as addressing lack of transportation or lack of mobility
- *Senior Services*, including referrals for assistance with care giving, housekeeping, and social connections

EMERGENT SITUATIONS. The Navigator Project is not set up to be, nor is it capable of acting as, an emergency responder to an imminent or emergent risk of harm. Any such concerns should be immediately reported to the police and adult protective services.

DATA COLLECTION. The Navigator Project, as a grant-funded project through Administration for Community Living, must report on its effectiveness in reaching its goal of improving court access and outcomes for victims of elder abuse. As such, the Navigator Project will be providing each court with data collecting tools for keeping track of numbers of referrals, usage of accessibility devices, and various other reportable data. The Navigator Project relies upon your assistance in recording and reporting this data as requested by the project director.

CONTACT INFORMATION. For referral information or general questions about the Elder Justice Navigator Project, please call Project Director Nicole K. Parshall, Esq., at (716) 853-3087 x 231, or Social Worker Kayleah Feser, MSW, at (716) 853-3087 x 261. Please report all individual referrals, as discussed above, to kfeser@elderjusticenyc.org.

ELDER POPULATION AND ELDER ABUSE IN NEW YORK

The number of older adults in the United States is growing, and it is estimated that by 2050, the population of people aged 65 and older will almost double to 83.7 million.³ Chautauqua County has a population of approximately 129,000 people, and adults who are 65 years old or older make up 18% of the population.⁴ As the population of older adults has increased by 2% in the past four years, the prevalence of elder abuse also continues to grow.⁵

Recent reports have found that, nationally, at least 10% of older adults experience abuse.⁶ A 2011 study in New York State found that approximately 260,000 older adults had experienced some form of elder abuse in the past year.⁷ Additionally, since turning age 60, 141 out of 1,000 older New Yorkers have experienced some type elder abuse.⁸ It is also an underreported crime, with an estimated 1 in 15 to 1 in 24 cases ever being reported.⁹ This growth of the aging population, coupled with the growing occurrence of elder abuse, creates a need to evaluate and improve on the core systems that are currently in place to help older adults in their recovery from maltreatment.

³ United States Census Bureau, 2014.

⁴ United States Census Bureau, 2016.

⁵ NATIONAL COUNCIL ON AGING, ELDER ABUSE FACTS, <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/#intraPageNav1>

⁶ *Id.*

⁷ LIFESPAN OF GREATER ROCHESTER, INC., WEILL CORNELL MEDICAL CENTER OF CORNELL UNIVERSITY, NEW YORK CITY DEPARTMENT OF AGING, UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY 2 (2011).

⁸ *Id.* at 4

⁹ NATIONAL COUNCIL ON AGING; UNDER THE RADAR, at 2.

WHAT IS ELDER ABUSE?

Elder abuse is a significant threat to the health and overall wellbeing of older adults. Elder abuse often leads to a decline in functional abilities which can contribute to dependency, social isolation, a sense of helplessness, and a cycle of increasing stress and psychological decline.¹⁰ Compared to individuals of the same age, and medical and social circumstances, seniors who have experienced any kind of abuse are three times more likely to die within three years than older adults who have not experienced maltreatment.¹¹ Elder abuse typically does not refer to an isolated event, but a sequence of actions or failures to act that cause harm to an older adult.¹² Elder abuse can take many forms including financial, physical, sexual, emotional maltreatment, or neglect.

PHYSICAL ABUSE. Physical abuse of an older person is defined in New York's Social Services Law as the non-accidental use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly restrained.¹³ Injuries sustained by an older individual can have much more serious consequences than similar injuries imposed on a younger person.¹⁴ For instance, physical abuse can result in nursing home placement, permanent disability, or death.¹⁵

¹⁰ LAURA MOSQUEDA, JUDICIAL COUNCIL OF CALIFORNIA, ELDER ABUSE POCKET REFERENCE: A MEDICAL/LEGAL RESOURCE FOR CALIFORNIA JUDICIAL OFFICERS 8 (2012).

¹¹ UNDER THE RADAR, at 8.

¹² ELDER ABUSE POCKET REFERENCE, at 8.

¹³ McKinney Social Services Law § 473B.

¹⁴ UNDER THE RADAR, at 8.

¹⁵ *Id.*

FINANCIAL EXPLOITATION. Financial exploitation is the unauthorized use of a person's funds or property by another person. New York's Social Services Law states that financial exploitation includes but is not limited to fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers, or denials of access to assets.¹⁶ Because this abuse happens late in life, older adults have fewer opportunities and less time to recoup lost assets following exploitation. Elder financial exploitation is particularly disturbing because it can deny older adults of resources needed for the necessities of life. This is significant because as people age it is not uncommon for individuals to require the assistance of professional caregivers. Those who have been exploited may be unable to afford the care they need in later life.¹⁷

Financial exploitation is the most common form of elder abuse and it often goes unrecognized.¹⁸ For every one case of financial exploitation reported, it is estimated that as many as twenty-four cases go unidentified and unreported.¹⁹ Financial abuse can occur at the hands of both trusted individuals, like caregivers, family, and friends, and by strangers.

SEXUAL ABUSE. Sexual abuse is defined as contact with a person without their consent, which includes but is not limited to forcing sexual contact or forcing sex with a third party.²⁰ Sexual abuse of an older adult can also include forcing the older adult to watch sex acts or view pornographic material, or forcing the older adult to undress. Inappropriate touching during routine care is also considered sexual abuse.

¹⁶ McKinney's Social Services Law § 473B.

¹⁷ UNDER THE RADAR, at 8.

¹⁸ J.C. PETERSON, ET AL., *Financial Exploitation of Older Adults: A Population-Based Prevalence Study*, in JOURNAL OF GENERAL INTERNAL MEDICINE, VOL.29 NO. 12, AT 1615-23 (2014).

¹⁹ NATIONAL COUNCIL ON AGING, ELDER ABUSE FACTS, <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/#intraPageNav1>

²⁰ McKinney's Social Services Law § 473B.

EMOTIONAL ABUSE. New York’s Social Services Law defines emotional abuse as the willful infliction of mental or emotional anguish by threat, humiliation, intimidation, or other abusive conduct including, but not limited to, frightening or intimidating an adult.²¹ Emotional maltreatment includes speaking to or treating a person in a way that causes emotional pain or distress. This can be verbal or nonverbal and can take the form of yelling, making threats, ridiculing, ignoring or isolating. Emotional abuse can be psychological and can include the purposeful creation of lose-lose situations by the abuser, as well as forced isolation of the elder.

NEGLECT. Neglect is the failure to fulfill caretaking obligations. Neglect can be active, passive, or self-inflicted. New York’s Social Services Law defines active neglect as the willful failure of a caregiver to fulfill the care-taking function and responsibilities assumed by the caregiver. These include, but are not limited to, abandonment, willful deprivation of food, water, heat, clean clothing and bedding, eye glasses or dentures, or health-related services.²²

Passive neglect, according to New York’s Social Services Law, is the non-willful failure of a caregiver to fulfill care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment or denial of food or health-related services because of inadequate caregiver knowledge, infirmity, or disputing the value of prescribed services.²³

New York’s Social Services Law defines self-neglect as an adult’s inability, due to physical and/or mental impairments, to perform tasks essential to caring for oneself, including but not limited to, providing essential food, clothing, shelter and medical care; obtaining goods

²¹ McKinney’s Social Services Law § 473B.

²² *Id.*

²³ *Id.*

and services necessary to maintain physical health, mental health, emotional well-being and general safety; or managing financial affairs.²⁴

²⁴ McKinney's Social Services Law § 473B.

WARNING SIGNS OF ELDER ABUSE:²⁵	
<i>Physical Abuse</i>	<ul style="list-style-type: none"> • Inadequately explained injuries, including fractures, bruises, welts, cuts, sores or burns • Failure to take medication as prescribed or to report drug overdose • Indications of being restrained such as rope marks on wrists • Refusal by caregiver to allow older adult to be interviewed alone
<i>Financial Exploitation</i>	<ul style="list-style-type: none"> • Significant withdrawals from accounts • Sudden changes in financial condition • Items or cash missing from household • Suspicious changes in wills, power of attorney, titles, and or policies • Unpaid bills or lack of medical care, although the older adult has enough money to pay for them • Unnecessary services, goods, subscriptions • Caregiver has control of older adult's money but fails to meet the elder's needs
<i>Sexual Abuse</i>	<ul style="list-style-type: none"> • Unexplained sexually transmitted diseases • Bruising around the breasts, inner thighs, upper arms and or genital area • Difficulty walking or sitting • Hypervigilance • Shying away from being touched • Victim appears to be embarrassed or shameful
<i>Emotional Abuse</i>	<ul style="list-style-type: none"> • Unexplained changes in alertness and/or behavior, including withdrawal from normal behaviors • Caregiver exhibits controlling, threatening behaviors • Caregiver is verbally aggressive • Caregiver isolates the older adult
<i>Neglect</i>	<ul style="list-style-type: none"> • Lack of heat, water, electric • Extreme filth and clutter • Strong odors, poor hygiene, soiled clothing • No food and/or spoiled food • Unsafe living space • Damaged assistive devices

²⁵ THE NATIONAL CENTER ON ELDER ABUSE, RED FLAGS OF ABUSE (2015), <https://ncea.acl.gov/Resources/docs/Red-Flags-Elder-Abuse-NCEA-2015.pdf>

TYPES OF FINANCIAL EXPLOITATION²⁶	
<i>Financial Abuse by Family Members or Caregivers</i>	<ul style="list-style-type: none"> • Taking the older adult’s money or property • Borrowing money repeatedly and not paying it back • Denying services or medical care to conserve funds • Persuading the older adult to part with an asset when to do so is likely to harm the older adult • Using abuse or neglect to get the older adult to give up assets • Giving away or selling the elder’s possessions without permission • Signing or cashing pension or social security checks without permission • Forcing the older adult to part with resources or sign over property • Misuse of legal instruments such as powers of attorney, including: falsification of records, using funds for the personal benefit of the person holding the power of attorney rather than the benefit of the principal
<i>Financial Abuse by Strangers</i>	<ul style="list-style-type: none"> • Lottery scams • Telemarketing and mail fraud • Prizes or sweepstakes that induce the older adult to send money to cover fees; the prize may never arrive, or if it does it may be of little to no value • Convincing an older adult to invest in nonexistent companies or worthless property, or inappropriate investment vehicles such as annuities that are unlikely to pay out during the older adult’s lifetime • Convincing an older adult to enter into a predatory lending scheme or a reverse mortgage that does not benefit the elder

²⁶ NATIONAL COUNCIL ON AGING, ELDER ABUSE FACTS, <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/#intraPageNav1>

DYNAMICS OF ELDER ABUSE²⁷

There is no universal explanation for elder abuse, as it is a multifaceted problem rooted in many different causes. However, it is important to keep in mind that as stress increases, the potential for abuse and neglect increases as well. Maladaptive behaviors in interpersonal relationships and caregiver stress often contribute to elder abuse. In most cases, the abuser is known to the victim, as approximately 90% of abusers are family members or other trusted individuals.²⁸ Often in cases involving perpetrators who are close to the older adult, there are established dysfunctional and violent dynamics that have existed throughout the relationship. These dynamics may increase in severity as the elder becomes more vulnerable and dependent.²⁹ Adult children in a family with a history of domestic violence may seek revenge by abusing their elderly parent when in a position of power, such as that of a caregiver.³⁰ Sometimes, however, it is an older adult who initiates the abuse, especially in cases when the older adult has a form of dementia.

Financial burdens associated with multigenerational households and overcrowded living spaces can cause interpersonal tension that can elicit abusive behaviors. As an older person's needs and requirements of care increase, the caregiver may not have received proper education and training, thus leading to feelings of frustration and anger that can precipitate abuse. It is important to keep in mind that caregiving can be extremely stressful and caregivers with

²⁷ This section is adapted from AMERICAN PSYCHOLOGICAL ASSOCIATION, ELDER ABUSE & NEGLECT: IN SEARCH OF SOLUTIONS, <http://www.apa.org/pi/aging/resources/guides/elder-abuse.aspx>

²⁸ NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION, ELDER FINANCIAL EXPLOITATION, <http://www.napsa-now.org/policy-advocacy/exploitation/>

²⁹ L. MOSQUEDA, JUDICIAL COUNCIL OF CALIFORNIA, ELDER ABUSE POCKET REFERENCE: A MEDICAL/LEGAL RESOURCE FOR CALIFORNIA JUDICIAL OFFICERS 12 (2012).

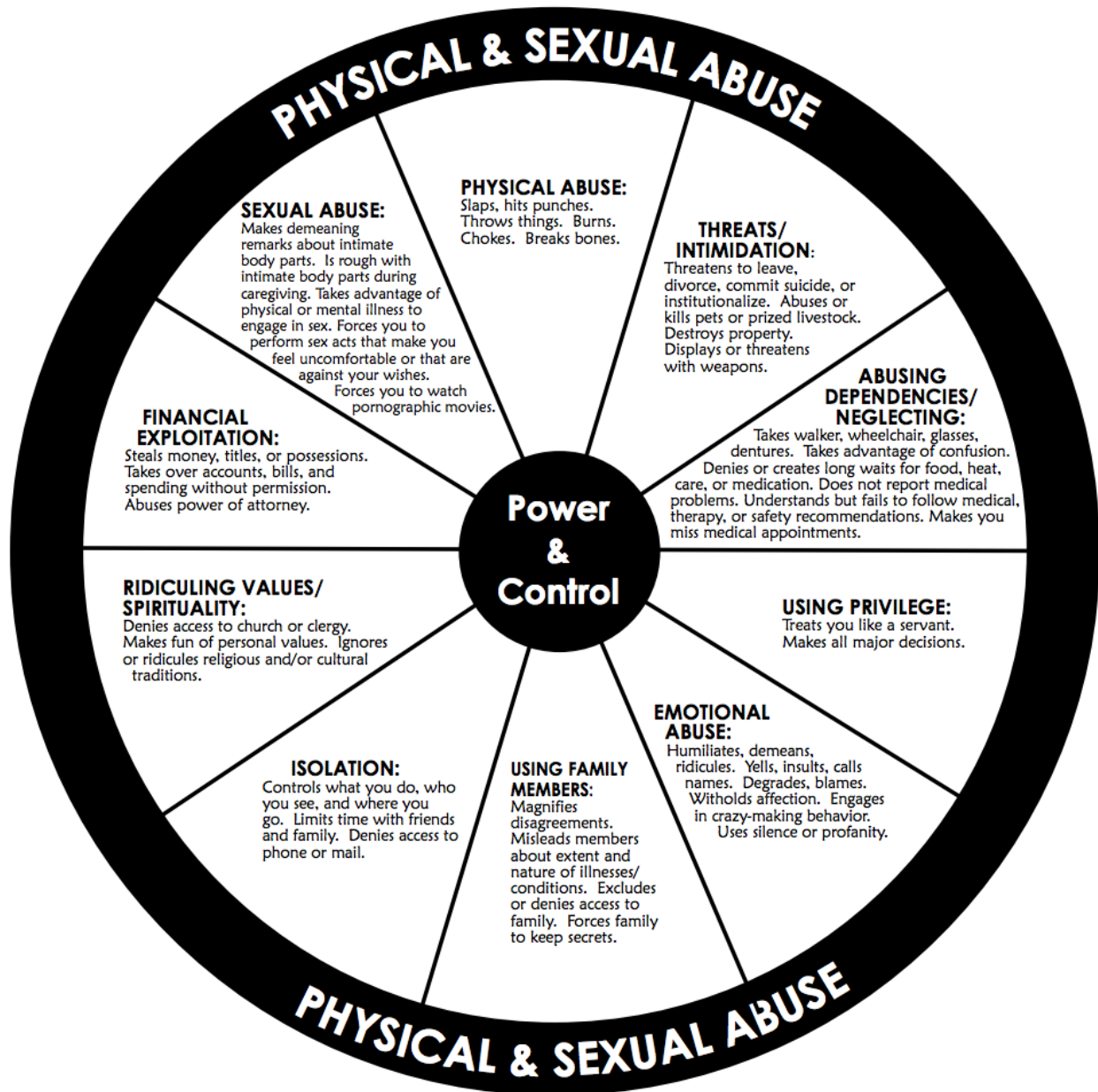
³⁰ AMERICAN PSYCHOLOGICAL ASSOCIATION, ELDER ABUSE & NEGLECT: IN SEARCH OF SOLUTIONS.

predisposed emotional, psychological, and chemical dependency problems are more at risk for abusing older adults.³¹

Elder abuse affects individuals of all genders, socioeconomic, racial, ethnic, and religious backgrounds. While there is not a single profile for victims of elder abuse or their abusers, certain factors can predict an increased risk of elder abuse.

³¹ AMERICAN PSYCHOLOGICAL ASSOCIATION, ELDER ABUSE & NEGLECT: IN SEARCH OF SOLUTIONS.

FAMILY VIOLENCE IN LATER LIFE



*A. Horn, R. Johnson, & S. Watts, Intersectionality 605, Domestic Violence Across Race, Sexuality, and Age (2017), <http://intersectionality605.web.unc.edu/group-3/>

RISK FACTORS FOR ABUSE³²	
<i>Victim</i>	<i>Abuser</i>
<ul style="list-style-type: none"> • Dependent on the abuser • Physical or mental frailty • Socially isolated • Verbally or physically aggressive • History of substance or mental health issues • Hesitant to use social services system 	<ul style="list-style-type: none"> • Intimate or familial relationship with the victim • Dependent on the victim • Younger • Suffering from a disturbed psychological state • Resentful of providing care • History of substance abuse or mental health issues • Previous history of elder abuse in caregiving context

³² L. MOSQUEDA, at 12.

FACTORS AFFECTING AN ELDER'S WILLINGNESS OR ABILITY TO REPORT ABUSE³³

Older adults who have been abused may be reluctant to report maltreatment for a variety of reasons. This hesitation is often attributed to the abused not wanting to see themselves as a victim, feelings of denial and shame, belief that the abuse is their fault, or fear of getting the abuser in trouble.

Alternately, the victim's reluctance to report abuse may be a result of manipulation and other threatening tactics by the abuser. These threats may include playing into fears already held by many older adults regarding loss of freedom and independence. To justify their conduct, perpetrators of elder abuse may attempt to depict the older adult victim as an unreliable and forgetful witness.

Non-English speaking victims face additional challenges, such as the lack of access to culturally and linguistically familiar assistance. Further, differences in cultural practices may affect whether abuse is reported, as what is considered elder abuse in American culture may not be seen as elder abuse by someone of another culture. This is important to keep in mind, considering the sizable and growing Spanish speaking population in Chautauqua County.

³³ This section is adapted from L. MOSQUEDA, JUDICIAL COUNCIL OF CALIFORNIA, ELDER ABUSE POCKET REFERENCE: A MEDICAL/LEGAL RESOURCE FOR CALIFORNIA JUDICIAL OFFICERS 13 (2012).

FACTORS THAT MAY AFFECT AN OLDER ADULT’S WILLINGNESS OR ABILITY TO REPORT ABUSE³⁴	
<i>The Victim</i>	<ul style="list-style-type: none"> • Dependence on the abuser for care and companionship • Dementia or other mental health issues • Frailty or lack of mobility • Fear of reprisal, abandonment, or loss of independence (placement in nursing home) • Fear of involvement in the legal system • Not knowing where to turn for help • Having responsibilities as the caregiver for the abuser
<i>If the abuser is the older adult’s own child there may be particularly complicated dynamics which lead the older adult to minimize abuse. These include:</i>	<ul style="list-style-type: none"> • Parent’s inclination to protect their child rather than consider their own personal safety • Feelings of guilt, shame, or embarrassment because the older adult attributes the abuse to poor child raising • Desire to maintain contact with children and grandchildren • Fear that the child will become homeless if the older adult reports the abuse • The abuser’s manipulation of the older adult’s emotions, including parental love

³⁴ *Id.* at 13.

IMPACT OF FINANCIAL EXPLOITATION³⁵

Financial exploitation is the most prevalent form of elder abuse and costs older adults billions of dollars annually.³⁶ One in 20 seniors indicate that, over the past year, they have experienced some form of alleged financial exploitation.³⁷ Nationally, financial exploitation accounts for 30.2% of all founded Adult Protective Services reports.³⁸

Financial exploitation can be financially devastating to older adults. Unlike younger individuals, seniors who have been financially exploited are usually unable to recoup lost assets through employment and often become reliant on government safety net programs. It is estimated that, as a direct result of the exploitation, 10% of financial abuse victims will require enrollment in Medicaid.³⁹

Victims of financial exploitation suffer more than solely monetary losses. Older adults who have been financially exploited often experience loss of trust in others, loss of security, depression, and feelings of fear, shame, guilt, anger, self-doubt, remorse, and worthlessness. Further, transitions from home to institutionalized settings, such as assisted living facilities and nursing homes, are not uncommon for victims of elder financial abuse.⁴⁰

³⁵ This section is adapted from NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION, ELDER FINANCIAL EXPLOITATION, <http://www.napsa-now.org/policy-advocacy/exploitation/>

³⁶ CONSUMER FINANCIAL PROTECTION BUREAU, CFPB ISSUES ADVISORY AND REPORT FOR FINANCIAL INSTITUTIONS ON PREVENTING ELDER FINANCIAL ABUSE (2016), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-advisory-and-report-for-financial-institutions-on-preventing-elder-financial-abuse/>

³⁷ NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION.

³⁸ S.L. HUGHES, AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING, CAN BANK TELLERS TELL? LEGAL ISSUES RELATING TO BANKS REPORTING FINANCIAL ABUSE OF THE ELDERLY (2003).

³⁹ NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION.

⁴⁰ *Id.*

INCREASED VULNERABILITY AS WE AGE: THE AGING PROCESS

PHYSIOLOGICAL AGING.⁴¹ The pace of physical changes, as well as the prevalence of health issues, increase as we age. These changes affect each person differently, and health statuses among individuals of the same age can vary greatly. Some individuals are active and healthy, while others are frail with multiple comorbidities. Approximately 92% of older Americans aged 65 or older have at least one chronic condition, and close to 77% have two or more. Heart disease, cancer, stroke, and diabetes contribute to two thirds of deaths among adults age 65 years old or older.

HEARING.⁴² Hearing impairment is widespread among older adults, affecting 25% of individuals between the ages of 65 and 74, and 50% of adults aged 75 or older. While hearing loss is generally mild to moderate, it can have significant effects on older adults. Beyond the challenges hearing impairment imposes on an individual's daily life, this condition can be socially isolating for older adults, which can in turn lead to other health issues, including depression.

VISION.⁴³ Vision changes in older adults are common and include problems such as slower reading speed, difficulty reading small print, and difficulty driving at night.

BONES AND JOINTS.⁴⁴ As a person ages, the bone deteriorates in composition, structure, and function, which leads to an increased risk of osteoporosis and fractures, as well as a decrease

⁴¹ This section is adapted from AMERICAN PSYCHOLOGICAL ASSOCIATION, *OLDER ADULTS' HEALTH AND AGE-RELATED CHANGES: REALITY VERSUS MYTH* (2017), <http://www.apa.org/pi/aging/resources/guides/older.aspx>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ This section is adapted from O. DEMONTIER, C. VIDAL, & G. DUQUE, *Aging and Bone Loss: New Insights for the Clinician*, in *THERAPEUTIC ADVANCES IN MUSCULOSKELETAL Disease* 2012 4(2), at 61-76 (2011).

in strength and the ability for bones to repair themselves. The decline in bone mass is associated with genetics, hormonal, biochemical, and environmental factors. Nutrition, physical activity, drugs, and comorbid medical conditions also affect age-related bone deterioration. Due to the increased risk of fractures and the decreased ability to heal, fall prevention, balance training, and the utilization of necessary adaptive equipment such as wheelchairs, walkers, or canes is recommended.

*SKIN.*⁴⁵ As we age, our skin changes as a result of the general aging process, an individual's genetic makeup, and lifestyle choices, such as exposure to the sun and smoking. The most noticeable changes to the skin include dryness, wrinkles, changes in color, and an increased risk of benign and pre-cancerous growths. These changes are often seen as inevitable, unavoidable, and somewhat superficial. However, the disruption to the skin's function and immune response can have significant effects on the physical health of older adults.

The epidermis, which protects the body from the external environment, thins progressively with age, leading to an increased risk of pressure damage. Skin elasticity declines overtime, which causes the blood vessels to lose support, in turn causing the skin to become more susceptible to damage. The decrease in rate of skin regeneration, the loss of dermal connective tissue and general atrophy of the skin, and the decreasing effectiveness of the immune response, effect the skin's ability to heal.

Further, the simultaneous use of numerous medications, reduced mobility and dexterity, general frailty, and the possibility of cognitive decline, as well as comorbid conditions such as diabetes, peripheral vascular disease, and incontinence, increase the risk of skin disorders in older adults. The utilization of corner guards and or tables with rounded edges are suggested to

⁴⁵ This section is adapted from D. VOEGELI, *Understanding the Main Principles of Skin Care in Older Adults*, in ART & SCIENCE DERMATOLOGY SUPPLEMENT 27(11), at 59-68 (2012).

mitigate the occurrence of skin tears, and the use of moisturizing, gentle soaps and lotions are recommended to prevent skin breakdown.

COMMON SKIN DISORDERS IN OLDER ADULTS
<ul style="list-style-type: none"> • Pressure Ulcers; • Xerosis (dry skin); • Pruritus (severe itching); • Asteatotic dermatitis (pruritic, dry, cracked, and polygonally fissured skin with irregular scaling); • Infections – bacterial (impetigo/folliculitis, cellulitis); • Infestations – pediculosis (lice), scabies; • Eczematous reactions (eczema due to an allergic reaction) • Photodermatoses (abnormal reaction to the sun) • Neoplastic changes – benign (rough, scaly skin patch; skin tags; skin growth; cherry angiomas; thickened white patches inside the mouth; low grade tumors) or malignant (lip inflammation, basal cell carcinoma, squamous cell carcinoma, malignant melanoma); • Immunological – bullous pemphigus and bullous pemphigoid (formation of blisters); • Chronic venous insufficiency – stasis dermatitis (pools of blood in the veins of the lower legs); • Cutaneous drug reactions; • Nutritional changes.
CLINICAL SIGNIFICANCE OF AGING SKIN
<ul style="list-style-type: none"> • Reduced barrier function and drying of skin; • Uneven skin pigmentation; • Increased susceptibility to damaging effects of sunlight; • Reduced skin immune response; • Impaired wound healing; • Increased movement of skin layers leading to wrinkles and increased susceptibility to shearing forces; • Increased risk of pressure damage; • Poor healing and weak scar tissue; • Reduced perception of pressure and light touch; • Impaired thermoregulation and increased risk of heat stroke; • Reduced cushioning; • Increased risk of hypothermia.

PSYCHOLOGICAL AGING.⁴⁶ Certain behaviors and communication traits are often projected onto or associated with older adults, such as repetition of the same story multiple times, being forgetful, or worrying incessantly over minute details. Unfortunately, these behaviors are often experienced by those engaging with an older adult as frustrating or challenging.

For professionals to effectively work with older adults, it is important for them to understand that these behaviors and communication traits are a natural result of the aging process. From a developmental perspective, older adults are at a point where they are reflecting on their life's meaning and solidifying their legacy, while simultaneously trying to maintain control over various aspects of their lives. This desire to maintain control is directly related to the significant losses typical of older adulthood, including loss of health, strength, independence, peers, and authority. The urgency felt by individuals at this stage of life can manifest itself in repeated storytelling, perceived lack of urgency, anxiety over small details, meandering from subject to subject, or going off on tangents. It is imperative for professionals to keep in mind that these behaviors are not necessarily a result of diminished capacity, but are instead a natural reaction to and a means of resolving the unique challenges of this developmental stage.

MENTAL HEALTH.⁴⁷ As our population continues to age, the number of older adults with behavioral and mental health problems is expected to increase. Mental health disorders, including depression and anxiety, adversely impact physical health problems and one's ability to perform activities of daily life. Problems common in later life, such as coping with physical health problems, caring for a loved one with dementia, grieving the death of a loved one, and managing conflict, can result in depression and anxiety. Improving access to mental health

⁴⁶ This section is adapted from AMERICAN PSYCHOLOGICAL ASSOCIATION, OLDER ADULTS' HEALTH AND AGE-RELATED CHANGES: REALITY VERSUS MYTH (2017), <http://www.apa.org/pi/aging/resources/guides/older.aspx>.

⁴⁷ This subsection is adapted from AMERICAN PSYCHOLOGICAL ASSOCIATION, PSYCHOLOGY AND AGING: ADDRESSING MENTAL HEALTH NEEDS OF OLDER ADULTS (*n.d.*), <http://www.apa.org/pi/aging/resources/guides/psychology-and-aging.aspx>.

services for older adults can result in improved physical health, decreased disability, reduced emotional suffering, and a better quality of life.

COGNITIVE CHANGES.⁴⁸ The aging process affects each person differently. While it is often assumed that cognitive capabilities decline with age, this is not always the case. It is true that changes in thinking, such as reduced problem-solving abilities, slower reaction times, and the speed of information encoding, storage, and retrieval, slow down as a person ages. However, these cognitive changes are mild in most older adults and do not generally affect day-to-day functioning. Short-term memory decline is normal, whereas changes in long-term memory are less expected as a person ages. The ability to learn new skills, as well as expressions of wisdom and creativity, continue through late life.

DEMENTIA.⁴⁹ Dementia is not a normal part of the aging process nor is it a specific disorder. Instead, dementia is a broad term used to describe a cluster of symptoms. Dementia is associated with a decline in memory and cognitive skills severe enough to interfere with a person's ability to perform activities of daily living. Memory loss in and of itself is not necessarily an indicator of dementia, as there are numerous causes of memory problems. While dementia symptoms can vary widely, at least two of the following mental functions must be significantly impaired for a diagnosis of dementia: memory, communication and language, ability to focus and pay attention, reasoning and judgment, and visual perception. Dementia is generally a progressive disorder and is caused by damage to brain cells. Brain cells in the hippocampus, the area of the brain associated with learning and memory, are often the first to be damaged.

⁴⁸ This section is adapted from AMERICAN PSYCHOLOGICAL ASSOCIATION, OLDER ADULTS' HEALTH AND AGE-RELATED CHANGES: REALITY VERSUS MYTH (2017), <http://www.apa.org/pi/aging/resources/guides/older.aspx>.

⁴⁹ This section is adapted from the ALZHEIMER'S ASSOCIATION, WHAT IS DEMENTIA? (n.d.), <https://www.alz.org/what-is-dementia.asp>.

*ALZHEIMER'S DISEASE.*⁵⁰ Alzheimer's disease is the most common type of dementia, affecting approximately 60 to 80 percent of cases. Mild memory loss is typically the first sign of Alzheimer's disease. The disease is progressive, and individuals with late-stage Alzheimer's lose the ability to communicate and interact with their environment. Other symptoms of Alzheimer's disease include: disorientation; mood and behavioral changes; deepening confusion about events, time and place; unfounded suspicions of family, friends, professional caregivers, and trusted advisors; and difficulty speaking, swallowing, and walking. Currently, there is no treatment nor cure for Alzheimer's disease. Alzheimer's is the sixth leading cause of death in the United States.

⁵⁰ *Id.*

TYPES OF DEMENTIA⁵¹

<i>Type of Dementia</i>	<i>Symptoms</i>	<i>Brain Changes</i>
<i>Alzheimer's disease</i>	<ul style="list-style-type: none"> • Difficulty remembering recent conversations, names, or events • Apathy and depression • Impaired communication • Poor judgement • Disorientation • Confusion • Behavior changes • Difficulty speaking, swallowing, and walking 	<ul style="list-style-type: none"> • Deposits of the protein fragment beta-amyloid (plaques) and twisted strands of the protein tau (tangles) • Nerve cell damage and death in the brain
<i>Vascular dementia</i>	<ul style="list-style-type: none"> • Impaired judgement or ability to make decisions, plan, or organize 	<ul style="list-style-type: none"> • Blood vessel blockage or damage
<i>Dementia with Lewy Bodies</i>	<ul style="list-style-type: none"> • Memory loss and thinking problems • Sleep disturbances • Visual hallucinations • Slowness, gait imbalance, or other parkinsonian movement features 	<ul style="list-style-type: none"> • Abnormal aggregations of the protein alpha-synuclein
<i>Parkinson's disease</i>	<ul style="list-style-type: none"> • Problems with movement (slowness, rigidity, tremor, changes in gait) 	<ul style="list-style-type: none"> • Alpha-synuclein aggregations in the deep area of the brain called the substantia nigra • Degeneration of the cells that produce dopamine
<i>Frontotemporal dementia</i> *Includes dementias such as behavioral-variant frontotemporal lobar degeneration (FTLD), primary progressive aphasia, Pick's disease, corticobasal degeneration, and progressive supranuclear palsy.	<ul style="list-style-type: none"> • Changes in personality and behavior • Difficulty with language 	<ul style="list-style-type: none"> • Changes to the nerve cells in the front and side regions of the brain

⁵¹ The section is adapted from ALZHEIMER'S ASSOCIATION, TYPES OF DEMENTIA, (n.d.), <https://www.alz.org/dementia/types-of-dementia.asp>.

<p><i>Creutzfeldt-Jakob disease</i> *Occurs in humans and certain other mammals believed to be caused by consumption of products from cattle affected by mad cow disease.</p>	<ul style="list-style-type: none"> • Impairs memory and coordination • Behavior changes 	<ul style="list-style-type: none"> • Misfolded prion protein causes “domino effect” in which prion protein throughout the brain misfolds and therefore malfunctions
<p><i>Normal pressure hydrocephalus</i></p>	<ul style="list-style-type: none"> • Difficulty walking • Memory loss • Inability to control urination 	<ul style="list-style-type: none"> • Buildup of fluid in the brain
<p><i>Huntington’s disease</i></p>	<ul style="list-style-type: none"> • Abnormal involuntary movements • Severe decline in cognitive and reasoning skills • Irritability, depression, and other mood changes 	<ul style="list-style-type: none"> • Gene defect causes abnormalities in a brain protein
<p><i>Wernicke-Korsakoff Syndrome</i> *Wernicke-Korsakoff Syndrome is caused by severe deficiency of thiamine (vitamin B-1). Alcohol misuse is the most common cause.</p>	<ul style="list-style-type: none"> • Memory problems are significantly severe, while other cognitive and social skills remain comparatively unaffected 	<ul style="list-style-type: none"> • Low thiamine levels
<p><i>Mixed dementia.</i> With mixed dementia irregularities associated with more than one cause of dementia occur at the same time in the brain. The likelihood of mixed dementia increases with age and approximately half of older adults with dementia present evidence of more than one type of dementia. Mixed dementia is most prevalent among individuals aged 85 and older. Most common is Alzheimer’s disease combined with vascular dementia, then Alzheimer’s disease with dementia with Lewy bodies, and Alzheimer’s with vascular dementia and dementia with Lewy bodies.</p>		

CAPACITY⁵²

Capacity is an individual's functional ability, with or without extra help, to understand the significance of making a particular decision. It also can describe mental skills, such as logic and memory, decision-making ability, and behavioral and physical functioning.⁵³ Capacity may fluctuate in persons with cognitive impairments, such that they may experience good days and bad days, lucid intervals, and times when they are confused and disoriented. "Sundowners Syndrome" is a common phenomenon in which individual may be able to think clearly and make sound decisions earlier in the day, but just before nightfall they experience sadness, agitation, fear, delusions and hallucinations.⁵⁴ Capacity may also be affected by medications and vitamin deficiencies, depression, physical illness, such as urinary tract infections or thyroid problems, excessive alcohol use, or abuse and neglect. In these cases, a change in status or circumstances may lead to recovered capacity.

It is important to note that the spectrum of capacity ranges and deficits are often not inclusive. An individual may be completely capable of making independent decisions in some areas, require help in others, and lack decision-making capability altogether in others. For example, an older adult may be able to manage decisions concerning day-to-day activities, such as personal grooming, cooking, and cleaning, but unable to make meaningful decisions about her medical treatment. Nevertheless, she may be capable of understanding what is involved in, and

⁵² This entire section is adapted from D. FREEDMAN, *On Competency and Capacity of Older Adults to Make Decisions*, in *JOURNAL OF AGING LIFE CARE* (2013), <http://www.aginglifecarejournal.org/on-competency-and-capacity-of-older-adults-to-make-decisions/>

⁵³ L. MOSQUEDA, JUDICIAL COUNCIL OF CALIFORNIA, ELDER ABUSE POCKET REFERENCE: A MEDICAL/LEGAL RESOURCE FOR CALIFORNIA JUDICIAL OFFICERS 19 (2012).

⁵⁴ AGINGCARE.COM, UNDERSTANDING AND MINIMIZING SUNDOWNERS SYNDROME, <https://www.agingcare.com/articles/sundowners-syndrome-133187.htm>

therefore able to execute, a Health Care Proxy. Thus, the question is not, “is she competent?” but rather, “is she capable of making the particular decision to be presented to her?”⁵⁵

When informally assessing capacity, one should consider if the individual:

- Understands her role in the decision-making process (that she has a choice)
- Possesses the requisite basic cognitive skills to receive, store, recall, and process information necessary for meaningful decision-making in the context at hand
- Understands the implications of alternative courses of action for her objective future well-being, as well as her individual goals and values
- Has the ability to weigh the advantages and disadvantages of alternative courses of action
- Has the ability to maintain stable choices long enough for them to be effectively implemented
- Has the capacity to formulate short-term and long-term objectives in relation to the matter at hand
- Possesses the ability to distinguish between immediate and long-term needs, and to plan accordingly
- Has the ability to remember and apply past experience to new situations
- Has the capacity to recognize the general quality of personal relationships, e.g., distinguishing between relatives, friends, strangers
- Possesses the ability to communicate decisions effectively, whether through nonverbal or verbal means

⁵⁵ D. FREEDMAN.

Capacity is hard to define and pin down. It describes mental skills, such as logic and memory, decision-making ability, and behavioral and physical functioning.⁵⁶ Capacity is rarely lost completely, except in the most severe cases, and it varies by the complexity of the decision or task at hand. Capacity should always be evaluated in relation to the particular act at issue; the more significant the decision and its consequences, the higher the level of capacity required.

⁵⁶ L. MOSQUEDA, JUDICIAL COUNCIL OF CALIFORNIA, ELDER ABUSE POCKET REFERENCE: A MEDICAL/LEGAL RESOURCE FOR CALIFORNIA JUDICIAL OFFICERS 19 (2012).

WHAT SHOULD COURTS KEEP IN MIND WHEN DEALING WITH CAPACITY ISSUES?⁵⁷

Courts must ascertain whether elder litigants have the capacity to care for themselves, take various actions that may have legal implications, or participate in litigation. Courts can and should order capacity assessments, modify orders to address increased or decreased capacity, and be flexible and creative in calendaring cases to accommodate older adults. Courts should inquire into medications being taken by older adults and any physical conditions that might limit capacity, even temporarily. Additionally, courts should consider whether restraining orders or orders of protection are necessary, and whether litigants could benefit from appropriate social services.

KEEP IN MIND:

- Older adult may be taking medications that can affect capacity – ask about medications and physical ailments that may affect capacity
- Order a capacity assessment when the case calls for it
- Orders can and should be modified to address changes in capacity
- Restraining orders and orders of protection, civil or criminal, may be required where an incapacitated person can't understand that their best interest requires them to stay away from a perpetrator
- Courts can and should make appropriate outside referrals

⁵⁷ This section is adapted from L. MOSQUEDA at 19-21.

REVIEWING THE CAPACITY ASSESSMENT⁵⁸

Courts must often order capacity assessments when an abused person's capacity is in question. Once the assessment by a medical professional is complete, a report will often be submitted to the court. The following should be considered:

- How recently was the evaluation conducted?
- How long was the evaluation?
- Was an evaluation conducted more than once?
- At what time of day was the evaluation?
- Does the report state whether the individual was on any medication at the time of the evaluation?
- Does the report indicate the possible impact of the medication(s) being taken by the subject on the results of the evaluation?
- In what setting was the evaluation conducted?
- Was anyone else present during the evaluation? Who?
- What tests were performed as part of the evaluation?
 - Neurological, psychological, medical exams?
 - Assessment of Activities of Daily Living (ADLs)?
 - Assessment of Instrumental ADLs?
- Were records reviewed for the evaluation?
- Did the evaluator speak to anyone else about the subject of the evaluation? Who?

⁵⁸ This section is adapted from LORI STIEGEL, AMERICAN BAR ASSOCIATION COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, ELDER ABUSE IN THE STATE COURTS – THREE CURRICULA FOR JUDGES AND COURT STAFF, (1997).

- What is the evaluator's background and expertise in these matters?
- What was the evaluator's knowledge of the abused person's case history?
- Who paid for and arranged the evaluation?
- Does the evaluator have any relationship or history with the abused person, the abuser, or any other relevant party?

CAPACITY IN THE LEGAL CONTEXT⁵⁹

There are many legal contexts within which the courts must consider capacity. Courts may be called upon to evaluate past, present, and/or future capacity, such as in guardianship proceedings, special proceedings under the General Obligations Law, and criminal and civil actions for fraud and exploitation.

In guardianship proceedings, the overall present and future capacity of the alleged incapacitated person for personal care and/or property management is central. There, the Mental Hygiene Law provides the basis for a determination of incapacity.⁶⁰ When a will, contract, or Power of Attorney document is contested, courts may be called upon to determine past capacity. General Obligations Law § 5-1501 2(c), pertaining to Power of Attorney contracts, provides its own definition of capacity, as the “ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.”

Additionally, criminal courts may have to determine past, present, and future capacity. This may be required in the context of determining whether an individual is able to understand and assist in his or her defense, or in assessing whether a victim fits the definition of “vulnerable elderly person” under the penal code, which is defined as “a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care.”⁶¹

⁵⁹ This section is largely adapted from LORI STIEGEL, AMERICAN BAR ASSOCIATION COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, ELDER ABUSE IN THE STATE COURTS – THREE CURRICULA FOR JUDGES AND COURT STAFF, 27 (1997).

⁶⁰ McKinney’s Mental Hygiene Law § 81.02.

⁶¹ McKinney’s Penal Law § 260.31(3).

Incapacity is generally accepted as a risk factor for elder abuse. Questions of capacity will almost always be present in cases of alleged elder abuse. Some examples of this are:

- An APS petition for guardianship or an order authorizing protective services where the older person has refused such services but may lack the capacity for that decision.
- A family member petitioning the court, claiming that an older adult's guardian is abusing or exploiting the senior, and the senior either still lacks capacity and requires the appointment of a new guardian, or has capacity and the guardian should thus be discharged.
- A lawyer representing an older adult who has been exploited argues that her client lacked capacity to make a gift or execute a Power of Attorney, while the defense argues the older adult understood the nature of the transaction and had the capacity to enter into it.
- A party seeking to overturn a will might allege that the decedent was unduly influenced by a beneficiary who had been abusing or exploiting him or her.

ELDER ABUSE AND THE COURTS⁶²

Elder Abuse can present in court in many forms; sometimes as the clear substantive issue, other times as an underlying issue that might not be immediately identified as such. Elder abuse can enter the court in the form of various types of cases, including:

1. Criminal;
2. Family law;
3. Civil actions and special proceedings;
 - a. POA accounting and other statutory special proceedings;
 - b. Civil conversion, fraud, and breach of contract;
4. Cases regarding health care decisions of incapacitated persons;
5. Guardianship;
6. Domestic violence;
7. Probate;
8. Proceedings brought by Adult Protective Services;
9. Evictions;
10. Foreclosures;
11. Consumer defense;
12. Adult adoptions;
13. Juvenile (abuse of elder);
14. Lawsuits against facilities;
15. Traffic;
16. Personal injury

⁶² This section is adapted from LAURA MOSQUEDA, JUDICIAL COUNCIL OF CALIFORNIA, "ELDER ABUSE POCKET REFERENCE: A MEDICAL/LEGAL RESOURCE FOR CALIFORNIA JUDICIAL OFFICERS," 2012, and LORI STIEGEL, AMERICAN BAR ASSOCIATION COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, ELDER ABUSE IN THE STATE COURTS – THREE CURRICULA FOR JUDGES AND COURT STAFF, 1997.

APPOINTING COUNSEL FOR AN ABUSED OLDER PERSON⁶³

Many statutes provide for the appointment of counsel for the allegedly incapacitated person. These include the Adult Protective Services petitions for involuntary short-term protective services and guardianship proceedings. When appointment of counsel is required, such appointment should be at the earliest possible point in the proceedings. In cases involving vulnerable older adults, where it is not required that counsel be appointed, an early referral to a free legal services provider can benefit both the individual and the court.

⁶³ This section is adapted from L. STIEGEL, at 31.

UNDUE INFLUENCE

“Undue influence’ is the misuse of one’s role and power to exploit the trust, dependency, or fear of another to deceptively gain control over that person’s decision-making.”⁶⁴ Undue influence does not itself constitute elder abuse, but it is a means by which elder abuse may be carried out through manipulation and coercive behaviors. While undue influence does not require the target to suffer capacity issues, the presence of capacity issues makes it much easier for an abuser to exert undue influence on an elder.⁶⁵

When undue influence is at play, the elder abuse victim seems to agree to acts or omissions that lead to their own loss of property or independence.⁶⁶

WARNING SIGNS OF UNDUE INFLUENCE

- Isolation of the older adult by the abuser
- The abuser increasing the elder’s dependence on him or her
- Manipulation of the older adult’s vulnerabilities
- Victim being unable to explain the reasons for a decision clearly against their best interest and in the interest of a third party

⁶⁴ L. MOSQUEDA, at 21.

⁶⁵ *Id.*

⁶⁶ *Id.*

POWER OF ATTORNEY ABUSE⁶⁷

Powers of Attorney (hereinafter “POA”) are private contracts implemented under state law. They are a popular financial planning and management tool whereby the Principal delegates legal authority to an agent or agents to make decisions regarding finances, property, and other legal transactions. Their relative low cost, widespread access, ease of execution, and broad scope of authority, while useful, also make them ripe for abuse.

A general durable power of attorney (power of attorney that survives the principal’s incapacity, which is the standard New York State short form document), without restrictions, grants broad powers to the agent to conduct the transactions involving the principal’s real and personal property. This delegated authority begins immediately upon execution, which requires only the principal’s signature and notarization. The POA, unless expressly required through a modification or the designation of a monitor, does not require routine oversight of the agent’s conduct. It does require, however, that the agent act at the direction of the principal and, if no such direction has been or can be provided, in the best interest of the principal.⁶⁸

General Obligations Law § 5-1505 provides that an agent “shall observe the standard of care that would be observed by a prudent person dealing with the property of another.” It further states that the agent acting under a power of attorney has a fiduciary relationship with the principal, and must act at the instruction of the principal or, where there are no instructions, in the best interest of the principal. Additionally, the agent must keep the principal’s property

⁶⁷ This section is derived, in part, from SUSAN KEILITZ, PAULA HANNAFORD-AGO, & JARRET HANN, ADDRESSING POWER OF ATTORNEY ABUSE: WHAT COURTS CAN DO TO ENHANCE THE JUSTICE SYSTEM RESPONSE, retrieved from http://www.eldersandcourts.org/~media/Microsites/Files/cec/POA%20White%20Paper%20Final%209_3_2013.aspx

⁶⁸ McKinney’s General Obligations Law § 5-1501.

“separate and distinct from any other property owned or controlled by the agent,” with some exceptions; keep records of all transactions and disbursements entered into on behalf of the principal; and provide records and copies of transactions and disbursements to the principal within fifteen (15) days of a request from the statutorily-enumerated individuals and entities who may request them.⁶⁹

Unfortunately, both because of the broad authority granted by a Power of Attorney designation, and because of the lack of understanding by many regarding the standard of care required of the agent, the Power of Attorney document is often the tool by which elder exploitation takes place.

POA abuse is most commonly seen by the courts 1) in challenges to the validity of the POA document or its use by an agent, 2) in the context of a guardianship proceeding, or 3) as an Adult Protective Services complaint.⁷⁰ POA abuse, however, is not always so obvious. It may in fact be an underlying factor in cases involving debt collection, evictions and foreclosures, changes in property title, or divorce proceedings filed by agents on behalf of the principal. Judges should therefore be alert to indicators of Power of Attorney abuse and make appropriate inquiries.

⁶⁹ McKinney’s Gen. Ob. Law § 5-1505(1)-(3).

⁷⁰ S. KEILITZ at 9.

Indicators of Power of Attorney Abuse, What to ask	
<i>Observed in Court</i>	<i>Questions to Ask</i>
Elder defendant always paid bills on time but is now behind	Where have the funds to pay these bills gone? Is someone new managing the elder's funds?
Elder cannot pay for essential needs, such as food or housing	Who has control of funds? How is money being spent?
A Power of Attorney document or an agent is present in court	Did the agent act in the principal's best interest, or fail to act? Does the agent have financial records to account for how money was spent?
Is someone other than the older adult defendant or victim, or his or her attorney, speaking on their behalf?	Ask the older person why someone is speaking on his or her behalf. Is there someone with a superior relationship to the defendant or victim who should be involved on his or her behalf, if they cannot speak for themselves?

Where the matter before the court is a petition to compel a Power of Attorney accounting, judges can set clear and definite deadlines for submission of the agent's accounting. As with other proceedings involving older adults, courts should consider having strict continuance and extension of time policies due to the realities of cognitive decline and physical health concerns.⁷¹

⁷¹ *Id.* at 10.

COURT RESPONSES TO ELDER ABUSE⁷²

There are a myriad of ways in which courts can manage elder abuse cases to ensure accessibility and an even playing field for the elder abused person. Courts should consider the particular needs of the older adult and keep in mind the various ways in which the aging process affects elders physiologically, mentally, and emotionally.

SUGGESTED CASE HANDLING

- Provide priority case-setting for elder abuse cases;
- Be flexible in scheduling court appearances, keeping in mind the fluidity of capacity at various times of day;
- Be cognizant of the elder's need for medication, meals, and rest when scheduling appearances;
- Limit unnecessary continuances and delays, and expedite hearings and trials, as lengthy court proceedings may be particularly difficult for individuals whose capacity and ability to testify is declining and who are nearing the end of their lives;
- Take more frequent breaks
- Arrange courtrooms to increase accessibility and utilize accessibility assisting devices in the courtroom
- Utilize court advocates to assist elders with the courthouse and the court process

⁷² This section was loosely adapted from L. MOSQUEDA, JUDICIAL COUNCIL OF CALIFORNIA, ELDER ABUSE POCKET REFERENCE 22-23 (2012).

COMMUNICATING WITH ELDERS⁷³

When communicating with older adults, it is important to understand the aging process as well as the developmental tasks typically associated with this age group. Hearing and vision impairments are common in older adults, and some seniors have experienced a decline in cognitive ability that can pose a challenge to communication. Further, typical communication traits associated with the elderly, such as retelling stories and forgetfulness, can be frustrating. It is therefore essential that professionals are patient and take prudent care when communicating with older adults. When interacting with older adults it is suggested that we:

- Ensure the use of (appropriate) assistive devices such as hearing aids, reading glasses, and document magnifiers;
- Allow documents to be read out loud to the older adult;
- Use writing as an alternative means of communicating;
- Reduce distracting lighting and background noise;
- Ensure that the older adult is physically and emotionally comfortable;
- Schedule matters involving elders neither late in the day nor early in the morning;
- Recognize that medications can affect an elder's level of awareness and ability to communicate.
- Allow elders additional time to answer questions and respond on examination

⁷³ This section is adapted from L. MOSQUEDA, JUDICIAL COUNCIL OF CALIFORNIA, ELDER ABUSE POCKET REFERENCE, 24 (2012).

FURTHER CONSIDERATIONS FOR COURTS WHEN HEARING ELDER ABUSE CASES⁷⁴

1. A support person should be made available throughout the proceeding, and for all aspects of the case. In a criminal proceeding, this should include during interviews with law enforcement, prosecutors, and defense attorneys.
2. If the abused has testified, consideration should be taken as to whether the judge might provide instructions to the jury regarding the credibility of an elder witness. Courts should ask whether it is appropriate to instruct the jury that the elder is no more or less credible due to their cognitive or mental impairment, or difficulty with communication.
3. Courts can and should encourage victims to provide impact statements at sentencing.
4. Use of alternative methods of obtaining and preserving testimony of older victims, such as those below, should be considered, as necessary.

ALTERNATIVE METHODS OF OBTAINING AND PRESERVING TESTIMONY OF OLDER VICTIMS⁷⁵

- Depositions
- Telephonic Hearings
- Substituting an elder's court appearance with a conditional examination using a magistrate or court reporter
- Videoconferencing
- Using videotaped testimony

⁷⁴ This section is taken from L. MOSQUEDA, JUDICIAL COUNCIL OF CALIFORNIA, ELDER ABUSE POCKET REFERENCE, 22 (2012).

⁷⁵ *Id.*

CRAFTING EFFECTIVE ORDERS IN CASES INVOLVING ELDER ABUSE⁷⁶

ALL COURTS SHOULD CONSIDER:

1. The safety of the abused person.

- a. Has the abused person been encouraged to prepare or assisted with the preparation of a safety plan?
- b. Should a restraining order or an order of protection be granted?
- c. If appropriate and permitted by law, has the court considered requiring the abuser to surrender his or firearms and weapons?
- d. Should the abuser or abused be removed from the setting?
- e. Should a protective order prohibit specific types of behavior, such as threats, harassment, or stalking?
- f. If this is a case of self-neglect, has the individual undergone a health assessment or a capacity evaluation?

2. Does the abused person wish to maintain a relationship with the abuser, if possible, without sustaining further harm?

- a. Should counseling be ordered for the abuser? In a civil matter, if determined to be safe and only when the abuser has accepted responsibility, should joint counseling be considered?
- b. What kinds of counseling are appropriate given the particular case of abuse?

⁷⁶ This section and each underlying subsection is taken either in whole or in part from LORI STIEGEL, ABA COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, ELDER ABUSE IN THE STATE COURTS – THREE CURRICULA FOR JUDGES AND COURT STAFF 41-43 (1997).

- c. Should visitation, with or without supervision, be authorized?

3. *Has the abused person been linked to appropriate services?*

- a. Has Adult Protective Services been involved? Should they be?
- b. Are any services being provided to the elder through the Office for the Aging?
Are the available services appropriate?
- c. Is a referral to a domestic violence program, shelter, or victim assistance program appropriate?
- d. Are there any other services in the community from which the elder could benefit?

4. *Protecting others from abuse by the abuser.*

- a. Are there other persons who are at risk of abuse? From within the family, the neighborhood, of the facility?
- b. Is the abuser a risk to society generally?

5. *Making the victim whole.*

- a. Is there a basis for ordering the return of property to the victim?
- b. Is there a basis for ordering restitution to the victim?
- c. Does the abuser have assets that can be attached, or wages that can be garnished?
Is there any other process that can be used to obtain payment?
- d. Is it appropriate to order a payment schedule?

ADDITIONAL CONSIDERATIONS FOR CIVIL COURTS

1. Protecting the abused person's assets.

- a. Is a restraining order, injunction, accounting, order of divestiture, or any other order necessary to protect the elder's assets?
- b. Is there a durable power of attorney or some other arrangement that needs to be terminated and replaced with a new power of attorney or a guardianship?

2. Maintaining the independence of the abused person.

- a. Does the abused person have capacity?
- b. Is a capacity evaluation or health assessment necessary?
- c. Are there services available that will help the elder stay in their domestic setting rather than a long term care facility or institution?
- d. Are there any alternatives to guardianship that will address the problems facing the abused person?
- e. If a guardianship is necessary, would a limited guardianship be appropriate?
- f. If placement in a long term care facility or institution is necessary, have the least restrictive alternatives available been considered?
- g. Should the abuser provide financial support to the abused?

3. Conditions accompanying settlement negotiations involving the courts.

- a. Is the abused person safe?
- b. Is the abused person being made whole?
- c. Is a repayment schedule appropriate?
- d. Are escalating sanctions in the agreement appropriate?

ADDITIONAL CONSIDERATIONS FOR CRIMINAL COURTS

1. Conditions accompanying law enforcement investigation.

- a. Should an emergency protective order be issued, where available?
- b. Is a restraining order or other special court order necessary to protect the victim or the victim's assets?

2. Conditions for orders of release, release on bail, or release on own recognizance.

- a. Is the victim at risk of further abuse or retaliation?
- b. Are there other persons who may be at risk for further abuse or retaliation?
- c. Is the general public at risk?
- d. Is a no contact/stay away order appropriate?

3. Adequate punishment of the abuser.

- a. Is the sentence severe enough to indicate to the abuser, the abused elder, and society generally that the courts take elder abuse seriously?
- b. Is restitution appropriate?

4. Conditions for probation or other case disposition.

- a. Is the victim at risk of further abuse or retaliation?
- b. Are there other persons at risk of abuse or retaliation?
- c. Is the general public at risk?
- d. Is payment of restitution an appropriate condition of probation?
- e. Is ongoing monitoring of restitution payments appropriate?

- f. Is the ordering of mental health or substance abuse treatment for the abuser appropriate?

5. *Conditions for negotiated guilty pleas between the prosecution and defense.*

- a. Have the law enforcement officers, prosecutor, and/or judge, where appropriate, discussed with the victim the alternatives that may be available for punishing the abuser?
- b. Does the agreement meet the needs of the elder abused person, including that they are protected from further abuse?
- c. Does the agreement make the elder as whole as possible?

6. *Rehabilitation of the abuser.*

- a. Should counseling be ordered for the abuser? What types of counseling? Should the court consider taking a leadership role in developing treatment programs for adult children who commit elder abuse?
- b. Is there any type of rehabilitation program that might be useful to the abuser, such as substance abuse, education, literacy or job skills programs?

ENFORCING ORDERS⁷⁷

Court orders are only as effective as they are enforceable and enforced. Even the most carefully crafted of orders requires appropriate monitoring to ensure compliance. The following are suggestions for ensuring compliance with court orders:

- Orders should be drafted with specificity and clarity so that the defendant and a victim can understand them. Many judges explain their orders to the defendant and/or the victim so that they are assured that their orders are fully understood.
- Orders should be drafted with specificity and clarity so that law enforcement officers can enforce them.
- Judges should tell the abuser that only the court can change the order and that the actions or statements of the victim are irrelevant.
- Mutual orders should be discouraged because (1) they are generally unenforceable and (2) they communicate a message that both parties are responsible for the problem and its solution. Mutual orders are only appropriate where there has been service on each party, specific allegations of abuse by each party, and an evidentiary hearing with specific findings by the court.
- Orders should specify in detail the consequences and penalties that defendants will face for violating them. An order on its face should reflect whether its violation constitutes a crime for which an officer may make an arrest.

⁷⁷ This section is adapted from L. STIEGEL, at 44.

- An order should indicate its duration or expiration date. “Indefinite” restraining or protection orders may be difficult to enforce in the future; a specified expiration date with instructions to apply for a new order, if indicated, is usually the better approach.
- Judges may want to consider automatically giving a copy of orders to the sheriff/chief of police. This action may enhance the ability of law enforcement to enforce those orders and it may also further impress upon the subject of the order its seriousness.
- Officers must be able to confirm the existence and contents of orders at any time of the day; systems should be created or modified to accomplish this.
- Judges should keep jurisdiction over these cases and so that enforcement will be more effective, and to ensure continuity of judicial oversight.
- A court may want to consider setting periodic reviews of compliance with its orders, if authorized to do so by statute and if possible given the court’s docket.

A NATIONAL MOVEMENT TO ADDRESS ELDER ABUSE THROUGH INCREASED COORDINATION

Numerous jurisdictions have already taken the lead on elder abuse projects within their courts,⁷⁸ and the American Bar Association has issued a Resolution specifying ways in which the attitudinal and systemic barriers to state courts by victims of elder abuse can be overcome. These recommendations include (1) training on topics related to elder abuse; (2) encouraging the training of other relevant professionals; (3) providing accommodations to older persons with physical or mental impairments; (4) understanding capacity and capacity issues, including ordering capacity assessments; (5) expediting elder abuse cases on court calendars; (6) adequately tailoring plea agreements to the needs of elder abuse victims; (7) utilization of alternative methods of obtaining testimony; and (8) ensuring that judges are aware of cases involving elder abuse that might be ongoing in different courts.⁷⁹

The Resolution also called for the coordination of the state judicial system with other community resources. It recommended that courts “[e]ncourage and support the development and continued operation of elder abuse multidisciplinary teams,” and “[e]nsure that judges and court personnel are familiar with APS, aging, and other social services providers in their community and have brochures or other materials from those agencies so that they can direct an older person to appropriate service providers.” It further recommended that courts [e]ncourage and support the development of a ‘court social worker’ or ‘court ombudsman’ program to help older, disabled, incapacitated, or other individuals by giving them information about social services and other community organization, linking them to social services and other community

⁷⁸ Elder abuse courts have been created in Contra Costa County and Alameda County Supreme Courts in California, and Elder Justice Centers have been created in Florida.

⁷⁹ AMERICAN BAR ASSOCIATION, RESOLUTION, ADOPTED BY THE HOUSE OF DELEGATES AUGUST 6-7 (2012).

organizations, assisting them with the completion of pro se documents, and helping them understand the court process.”⁸⁰

The recommendations of the American Bar Association encourage the same collaboration, awareness, and will to combat elder abuse that the Navigator Project seeks to foster. Together, through community collaboration, the Elder Justice Navigator Program will continue to increase awareness of elder abuse within the courts and community, find solutions that increase accessibility to and within the courts, and provide links, to other service providers in the community. Your use of the Navigator Project Referral System will help us fulfill our goal of reducing harm and empowering elder abuse survivors in our community.

⁸⁰ *Id.* at 6.

NEW YORK STATE LAWS CONCERNING ELDER ABUSE

Numerous laws may be relevant to a particular elder abuse case. This section provides a non-exhaustive list of various statutes that may come up in elder abuse cases in criminal and civil court. The language below is not taken from the statutes verbatim, but is a brief summary of each statutory provision. For exact statutory language, the reader should refer to the actual statute cited.

PENAL LAW:

§§ 260.34, 260.32: Endangering the Welfare of a Vulnerable Elderly Person or an Incompetent or Disabled Person in the first and second degree

§§ 260.25, 260.24: Endangering the Welfare of an Incompetent or Physically Disabled Person in the first and second degree

§ 155.05 Larceny

- a. By trespassory taking, trick, embezzlement, or false pretenses;
- b. By acquiring lost property;
- c. By issuing a bad check;
- d. By false promise;
- e. By extortion

§§ 165.40 – 165.55 Criminal Possession of Stolen Property

§§ 140.20 – 140.30 Burglary

§§ 140.05 – 140.17 Criminal Trespass

§ 190.05 Issuing a bad check

§ 190.25 Criminal Impersonation

§§ 190.77 - 190.80 Identify Theft

§§ 190.60, 190.65 Scheme to Defraud

§ 240.75 Aggravated Family Offense

§ 120.10 Assault

§§ 120.13 – 120.15 Menacing

§§ 135.05, 135.10 Unlawful Imprisonment

§§ 135.60, 135.65 Coercion

§§ 125.00 – 125.60 Homicide

§§ 130.05 – 130.96 Sexual Abuse and Rape

§§ 170.00 – 170.75 Forgery and Criminal Possession of a Forged Instrument

§ 190.81 Unlawful possession of personal identification information in the third degree

ADULT PROTECTIVE SERVICES (SOCIAL SERVICES LAW):

§ 473 (1)(a) – (e): Protective Service for individuals, without income criteria, because of mental or physical impairments who are unable to manage their own resources, carry out activities of daily living, or protect themselves from abuse, which shall include:

§ 473(1)(a) Receiving and investigating reports;

§473(1)(b) Arranging for medical and psychiatric services to evaluate and when possible safeguard and improve the circumstances of impaired individuals;

§ 473(1)(c) Arranging, when necessary, for commitment, guardianship, or other protective placement either directly or through referral to another appropriate agency using the least restrictive measures before the imposition of more restrictive (Soc. Serv. Law

§ 473(1)(d) Providing services to assist impaired individuals to move from hazardous or likely to become hazardous situations.

§ 473(1)(e) Cooperating and planning with the courts as needed on behalf of individuals with serious mental impairments.

§ 473(5) Mandatory report to police or sheriff, and, where requested, the district attorney's office any reason to believe that a criminal offense as defined in the penal code has been committed against the person for whom services are being determined or to whom such services are being provided or arranged.

§ 473-a Short-term Involuntary Protective Services petitions to the supreme and county courts for endangered adults where there is imminent risk of death or of serious physical harm and the individual lacks capacity to comprehend the nature and consequences of remaining in the current circumstances.

§ 473-b Immunity from civil liability for those who report that an individual may be an endangered adult, or who testifies in a proceeding arising from such report, if such report or testimony is made in good faith.

§ 473-c Petitions to supreme or county court for an order to gain access to a person believed to be in need of protective services for adults, where access is refused by that person or another individual.

Note: There is no mandatory reporting of suspected elder abuse in New York State, making New York the only state in the nation without such a mandate. APS is required, however, to make a report to law enforcement and the District Attorney's Office where

there is suspicion of a criminal offense against an endangered adult. Office for the Aging is a mandated reporter.

Note: Regulations pertaining to Adult Protective Services can be found beginning at 18 NYCRR § 457.

GUARDIANSHIP (MENTAL HYGIENE LAW):

§§ 81.05, 81.06 Petitions for guardianship to supreme or county court, commenced by various individuals or entities, including facilities and Adult Protective Services.

§ 81.02 Court appointment of a guardian of person and/or property where:

§81.02(a)(1) 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; and

§ 81.02(a)(2) the person agrees to the appointment, or the person is incapacitated as defined in the mental hygiene law

§ 81.20 Duties of a Guardian

§ 81.21 Powers of Guardian, property management

§ 81.22 Powers of Guardian, personal needs

§81.23 Provisional Remedies, including:

§ 81.23(a)(1) Temporary Guardian, appointed at the commencement of the guardianship proceeding, or at any subsequent stage of the proceeding, upon a showing of danger in the reasonably foreseeable future to the health and wellbeing of the alleged incapacitated persons, or danger of waste, misappropriation, or loss of the property of the AIP

§ 81.23(b)(1) Injunction and temporary restraining order, ordered at any time prior to, at the time of, or after the appointment of a guardian, enjoining enjoin any person other than the IP or AIP from selling, assigning, or disposing of property or confessing judgment, or receiving or arranging for another to receive property from the IP or AIP, or from doing or suffering to be done any act or omission endangering the health, safety or welfare of the IP or AIP.

Temporary restraining order, when court so provides, shall have effect of:

§ 81.23(3)(i) A restraining notice when appropriately served, and

§ 81.23(3)(ii) Conferring information subpoena power upon the attorney for the petitioner when the court in its discretion deems appropriate

§ 81.43 Proceedings to discover property withheld, a guardian may commence a proceeding in the court that appointed the guardian to discover property withheld, based upon knowledge or information and belief, for any real or personal property, or the value thereof, that should be delivered and paid to the guardian.

FAMILY OFFENSE PETITIONS (FAMILY COURT ACT):

§ 821. Originating proceedings. A proceeding may be commenced by the filing of a petition containing an allegation that the respondent assaulted or attempted to assault his or her:

- Spouse
- Former spouse
- Parent
- Child, or
- Other member of the same family or household

Or engaged in:

- disorderly conduct
- harassment
- sexual misconduct
- forcible touching
- sexual abuse in the third or second degree
- stalking
- criminal mischief
- menacing
- reckless endangerment
- criminal obstruction of breathing or blood circulation
- identity theft in the first, second, or third degree
- coercion in the second degree

§ 821-a. Preliminary procedure.

§ 822. Person who may originate proceedings. (a) Any person in the relation to the respondent of spouse, or former spouse, parent, child, or member of the same family or household; (b) A duly authorized agency, association, society, or institution; (c) A peace officer, acting pursuant to his special duties, or a police officer; (d) A person on the court's own motion.

§ 828 Temporary Order of protection.

§ 842 Order of protection. Shall set forth reasonable conditions of behavior to be observed for a period not in excess of two years by the petitioner or respondent or for a period not in excess of five years upon where the court finds the existence of aggravating circumstances, or the court finds a violation of a valid order of protection. The court may

also, upon motion, extend the order of protection for a reasonable period of time upon a showing of good cause or consent of the parties.

Any order of protection issued pursuant to this section may require the petitioner or the respondent:

(a) to stay away from the home, school, business or place of employment of any other party, the other spouse, the other parent, or the child, and to stay away from any other specific location designated by the court

(b) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods;

(c) to refrain from committing a family offense, or any criminal offense against the child or against the other parent or against any person to whom custody of the child is awarded, or from harassing, intimidating or threatening such persons;

(d) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in this proceeding or in any other proceeding or action under this act or the domestic relations law;

(f) to pay the reasonable counsel fees and disbursements involved in obtaining or enforcing the order of the person who is protected by such order if such order is issued or enforced;

(g) to require the respondent to participate in a batterer's education program designed to help end violent behavior, which may include referral to drug and alcohol counselling

(h) to provide, either directly or by means of medical and health insurance, for expenses incurred for medical care and treatment arising from the incident or incidents forming the basis for the issuance of the order;

(j) 1. to promptly return specified identification documents to the protected party, in whose favor the order of protection or temporary order of protection is issued, meaning an of the following:

(A) exclusively in the name of the protected party: birth certificate, passport, social security card, health insurance or other benefits card, a card or document used to access bank, credit or other financial accounts or records, tax returns, any driver's license, and immigration documents including but not limited to a United States permanent resident card and employment authorization document; and

(B) upon motion and after notice and an opportunity to be heard, any of the following, including those that may reflect joint use or ownership, that the court determines are necessary and are appropriately transferred to the protected party: any card or document used to access bank, credit or other financial accounts or records, tax returns, and any other identifying cards and documents; and

(k) to observe such other conditions as are necessary to further the purposes of protection.

DURABLE POWER OF ATTORNEY STATUTE (GENERAL OBLIGATIONS LAW):

§ 5-1501B Creation of a valid power of attorney, when effective

§§ 5-1502A – 1502N Construction of authority-granting provisions

§ 5-1504 Acceptance of statutory short form power of attorney. No third party located or doing business in New York shall refuse to honor a properly executed short form power of attorney without reasonable cause.

§ 5-1504(1)(a) Reasonable cause includes but is not limited to:

§ 5-1504(1)(a)(2) the third party-s good faith referral of the principal and the agent to the local adult protective services unit;

§ 5-1504(1)(a)(3) actual knowledge of a report having been made by any person to the local adult protective services unit alleging physical or financial abuse, neglect, exploitation or abandonment of the principal by the agent;

§5-1504(1)(a)(6) actual knowledge or a reasonable basis for believing that the principal was incapacitated at the time the power of attorney was executed;

§ 5-1505(1)(a)(7) actual knowledge or a reasonable basis for believing that the power of attorney was procured through fraud, duress or undue influence

§ 5-1505 Standard of care; fiduciary duties; compelling disclosure of record. **(1)** Standard of care. In dealing with property of the principal, an agent shall observe the standard of care that would be observed by a prudent person dealing with property of another.

(2) Fiduciary duties. **(a)** An agent acting under a power of attorney has a fiduciary relationship with the principal. The fiduciary duties include but are not limited to each of the following obligations:

(1) To act according to any instructions from the principal or, where there are no instructions, in the best interest of the principal, and to avoid conflicts of interest.

(2) To keep the principal's property separate and distinct from any other property owned or controlled by the agent, except for property that is jointly owned by the principal and agent at the time of the execution of the power of attorney, and property that becomes jointly owned after the execution of the power of attorney as a result of the agent's acquisition of an interest in the principal's property by reason of the agent's exercise of authority granted in a statutory gifts rider or in a non-statutory power of attorney signed and dated by the principal with the signature of the principal duly acknowledged in the manner prescribed. . . .

(3) To keep a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal and to make such record and power of attorney available to the principal or to third parties at the request of the principal. The agent shall make such record and a copy of the power of attorney available within fifteen (15) days of a written request by any of the following:

- (i) A monitor;
- (ii) A co-agent or successor agent acting under the power of attorney;
- (iii) A government entity, or official thereof, investigating a report that the principal may be in need of protective or other services, or investigating a report of abuse or neglect;
- (iv) A court evaluator appointed pursuant to section 81.09 of the mental hygiene law;
- (v) A guardian ad litem appointed pursuant to section seventeen hundred fifty-four of the surrogate's court procedure act;
- (vi) The guardian or conservator of the estate of the principal, if such record has not already been provided to the court evaluator or guardian ad litem;
or
- (vii) The personal representative of the estate of a deceased principal if such record has not already been provided to the guardian or conservator of the estate of the principal.

The failure of the agent to make the record available pursuant to this paragraph may result in a special proceeding under subdivision one of section 5-1510 of this title.

§ 5-1505(2)(b) The agent may be subject to liability for conduct or omissions which violate any fiduciary duty.

§ 5-1506 Compensation. 1. An agent is not entitled to receive compensation from the assets of the principal for responsibilities performed under a power of attorney unless the principal specifically provides for compensation in the power of attorney. 2. An agent shall be entitled to receive reimbursement from the assets of the principal for reasonable expenses actually incurred in connection with the performance of the agent's responsibilities.

§ 5-1508 Co-agents and successor agents.

§5-1510 Special proceedings. (1) If the agent has failed to make available a copy of the power of attorney and/or a record of all receipts, disbursements, and transactions entered into by the agent on behalf of a principal to a person who may request such record pursuant to subparagraph three of paragraph (a) of subdivision two of section 5-1505 of this title, that person may commence a special proceeding to compel the agent to produce a copy of the power of attorney and such record.

(2) A special proceeding may be commenced pursuant to this section for any of the following additional purposes:

- (a) to determine whether the power of attorney is valid;

(b) to determine whether the principal had capacity at the time the power of attorney was executed;

(c) to determine whether the power of attorney was procured through duress, fraud or undue influence;

(d) to determine whether the agent is entitled to receive compensation or whether the compensation received by the agent is reasonable for the responsibilities performed;

(e) to approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal;

(f) to remove the agent upon the grounds that the agent has violated, or is unfit, or unwilling to perform, the fiduciary duties under the power of attorney;

(g) to determine how multiple agents must act;

(h) to construe any provision of a power of attorney

(i) to compel acceptance of the power of attorney in which event the relief to be granted is limited to an order compelling acceptance.

(3) A special proceeding may be commenced pursuant to subdivision two of this section by any person identified in subparagraph three of paragraph (a) of subdivision two of section 5-1505 of this title, the agent, the spouse, child or parent of the principal, the principal's successor in interest, or any third party who may be required to accept a power of attorney.

(4) If a power of attorney is suspended or revoked under this section, or the agent is removed by the court, the court may require the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal and to deliver any property belonging to the principal and copies of records concerning the principal's property and affairs to a success agent, a government entity or the principal's legal representative.

§ 5-1511 Termination or revocation of power of attorney; notice

§ 5-1514 Certain gift transactions; formal requirements; statutory form. (1) If the principal intends to authorize the agent to make gifts other than gifts authorized by subdivision fourteen of section 5-1502I (limiting total gift amount to \$500.00 annually).

STATE LONG TERM CARE OMBUDSMAN PROGRAM:

Pub. Law 89-73, 1965. Mandated in every state by federal law as a condition of receiving federal money under the Older Americans Act, the Long Term Care Ombudsman Program (LTCOP) is a federal advocacy program dedicated to protecting people living in long term care facilities. In New York State, the Office for the Aging operates LTCOP through its Office of the State Long Term Care Ombudsman.⁸¹

45 CFR Parts 1321 and 1327, Federal Regulations, U.S. Dept. of Health and Human Services, Administration on Aging

9 NYCRR 6660.2 – 6660.12

⁸¹ <https://labor.ny.gov/stats/olcny/long-term-care-ombudsman.shtm>

RESOURCE GUIDE

Elder Justice Navigator Project

716-853-3087 x261

Kfeser@elderjusticenyny.org

Center for Elder Law and Justice

716-261-3275

Chautauqua County Sheriff's Office

716-753-4232

Dunkirk Police Department

716-366-2266

Jamestown Police Department

716-483-7536

Office for the Aging/NY Connects Helpline

Mayville 716-753-4582

Jamestown 716-661-7582

Dunkirk 716-363-4582

Protective Services for Adults

Mayville 716-753-4447

Jamestown 716-661-7447

Dunkirk 716-363-4447

***In the event of an emergency contact 911**