

# **Residents' Rights/Elder Care Neglect & Abuse**

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## Ways to ID Abuse and/or Neglect:

### Look -

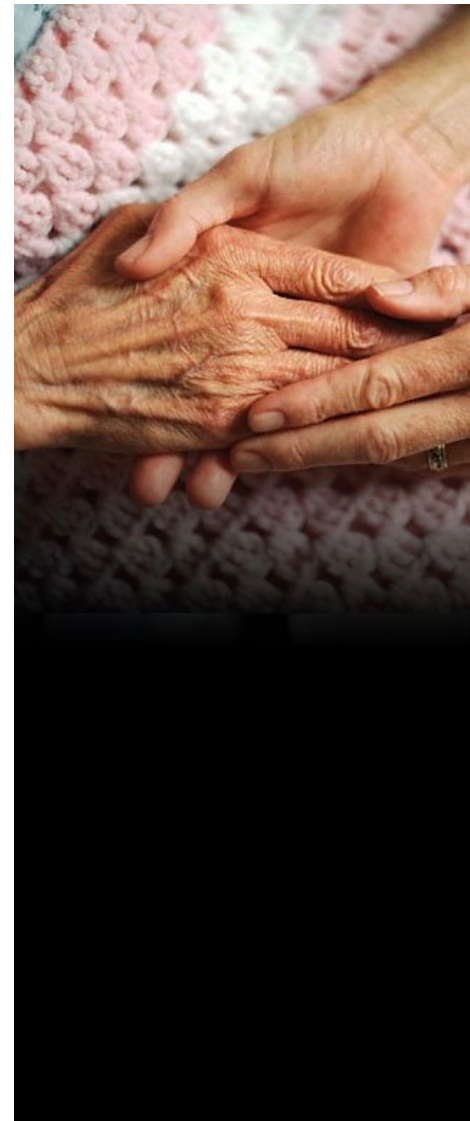
- Is resident well cared for?
- Has resident lost weight?
- Does resident have bruises or bed sores?

### Listen –

- What is the resident saying? Complaints?
- Do you hear staff engaging in verbal abuse?
- Is the resident no longer interested in pursuing activities he/she used to participate in?

### Smell -

- Is there a urine odor in the resident's room?
- Are there foul smells in the resident's room?



## Statutes and Regulations Protecting NH Residents:

- Federal Law – **The 1987 Nursing Home Reform Act** – (42 USC§1395i-3, 1396 r)  
– The basic objective is to ensure that residents of nursing homes receive **quality care** that will result in their achieving or maintaining their “**highest practicable**” **physical, mental and psychosocial well-being**. Established a **survey/certification process with enforcement**. (Updated 2016)
- Federal Regulations – Department of Health and Human Services – **42 CFR Part 483** – Established **specific standards and regulations** governing nursing home care.
- New York State Statutes – **Public Health Law Article 28** (PHL §2801-d) – Private right of action for violation of rights.
- New York State Regulations:
  - **10 NYCRR Part 415** – Nursing Homes
  - **18 NYCRR Parts 487 – 490** – Adult Homes
  - **10 NYCRR Part 100** – Assisted Living Residences
  - **10 NYCRR Parts 763 & 766** – Home (Health) Care

## New York State Public Health Law §2801-d(1):

- “Any residential health care facility that **deprives any patient of said facility of any right or benefit, ..., shall be liable** to said patient **for injuries suffered** as a result of said deprivation, except as hereinafter provided.”
- “For purposes of this section a “right or benefit” of a patient of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by the terms of any *contract*, by any state *statute, code, rule or regulation* or by any applicable federal *statute, code, rule or regulation,...*”

**THE FACILITY IS LIABLE FOR ALL INJURIES SUFFERED WHERE THERE IS A VIOLATION OF A NEW YORK STATE RULE or REGULATION or VIOLATION OF FEDERAL REGULATION.**

## Immunity Legislation:

On March 23, 2020, Governor Cuomo issued **Executive Order 202.10** that afforded all physicians, physician assistants, nurse practitioners and nurses immunity from civil liability for any injury or death alleged to have been sustained as a result of an act or omission by such medical professional in the course of providing medical services in support of the State's response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the *gross negligence* of such medical professional.

The NYS Legislature then passed the **Emergency or Disaster Treatment Protection Act** on April 2, 2020 that in essence expanded Governor Cuomo's Executive Order regarding immunity to include "health care facilities", which were defined to include nursing homes, and "health care professionals", which were defined to include nursing attendants and certified nurse aides. Immunity was also now afforded for criminal liability and for "arranging for" health care services with this Act.

## Immunity Legislation: (Continued)

On August 3, 2020, the Governor signed the **NYS Legislature's Bills (S. 8835/A.10840)** into law, thereby *amending* the immunity provisions that were enacted in the Emergency or Disaster Treatment Protection Act. Immunity was **limited to** healthcare professionals/facilities providing diagnosis or treatment/care for ***confirmed and suspected COVID-19 patients***, and did not apply to the ***prevention of COVID-19***, the care of ***non-COVID patients*** or the ***arranging*** of healthcare services.

This legislation took effect immediately and was applied prospectively to cases accruing after its enactment.

On April 6, 2021, Governor Cuomo signed Bill S5177 into law to **fully repeal** the **blanket immunity** NY granted healthcare facilities and nursing homes.

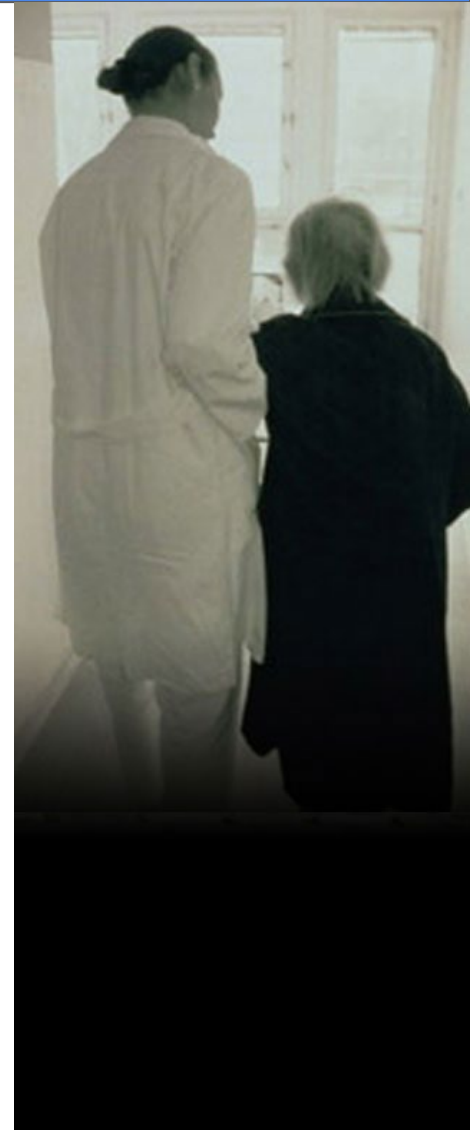
## Analysis:

- The standard of **good and accepted nursing home care**, under the Federal and New York State regulations, involves a **repetitive analysis**:
  - Did the home fulfill its duty to properly **assess** the resident and the resident's risks for certain injuries?
  - After assessment, was a proper **plan of care** (or **care plan**) designed?
  - Did the "care plan" call for **appropriate interventions** to avoid or lessen the specific risk of injury?
  - Was the "care plan" **actually implemented**?
  - Was the "care plan" appropriately **updated** and **kept current**?
    - After a passage of time; or
    - Due to intervening changes of condition; or
    - Due to incidents of injuries to the resident.

## Code of Federal Regulations

### Regulation 42 CFR 483.24 **Quality of Life**

Quality of life is a **fundamental principle** that applies to **all care and services provided** to facility residents. Each resident must receive and the facility must provide the **necessary care and services** to attain or maintain the **highest practicable physical, mental, and psychosocial well-being**, consistent with the resident's comprehensive assessment and plan of care.





## New York Codes, Rules and Regulations

### Regulation 10 NYCRR 415.12 **Quality of Care**

Each resident shall receive and facility shall provide the **necessary care and services** to attain or maintain the **highest practicable physical, mental and psychosocial well-being**, in accordance with the comprehensive assessment and plan of care subject to the resident's right of self-determination.

## What **types** of **neglect** do we commonly see in my firm?

- “We just found out that mom developed these terrible **bed sores** at the nursing home.”
- “We never saw them.”
- “The nurse at the hospital just told us about them.”

## Code of Federal Regulations

### Regulation 42 CFR 483.25 **Quality of Care**

#### **(b) Skin Integrity – (1) Pressure Ulcers**

*Based on the comprehensive assessment of a resident, the facility must **ensure** that:*

- *A resident receives care, consistent with professional standards of practice, to **prevent pressure ulcers** and does not develop pressure ulcers unless the individual's clinical condition demonstrates that they were unavoidable; and*
- *A resident with pressure ulcers receives necessary treatment and services, consistent with professional standards of practice, to **promote healing, prevent infection and prevent new ulcers from developing.***

## New York Codes, Rules and Regulations

### Regulation 10 NYCRR 415.12 **Quality of Care**

(c) **Pressure sores.** Based on the comprehensive assessment of a resident, the facility shall **ensure** that:

- (1) a resident who *enters the facility without pressure sores* **does not develop pressure sores** unless the individual's clinical condition demonstrates that they were unavoidable *despite every reasonable effort to prevent them*; and
- (2) a *resident having pressure sores* receives necessary treatment and services **to promote healing, prevent infection and prevent new sores from developing.**

## What **types** of **neglect** do we commonly see in my firm?

- “Dad just **fell and fractured his hip.**”
- “They called us three times in the past month about dad falling.”
- “Dad had prior bruises on his legs.”
- “Dad had prior bruises on his face.”



## Code of Federal Regulations

### Regulation 42 CFR 483.25 **Quality of Care**

(d) **Accidents**. The facility must **ensure** that—

(1) The resident environment remains as **free of accident hazards as is possible**; and

(2) Each resident receives **adequate supervision** and **assistance devices** to prevent accidents.

## New York Codes, Rules and Regulations

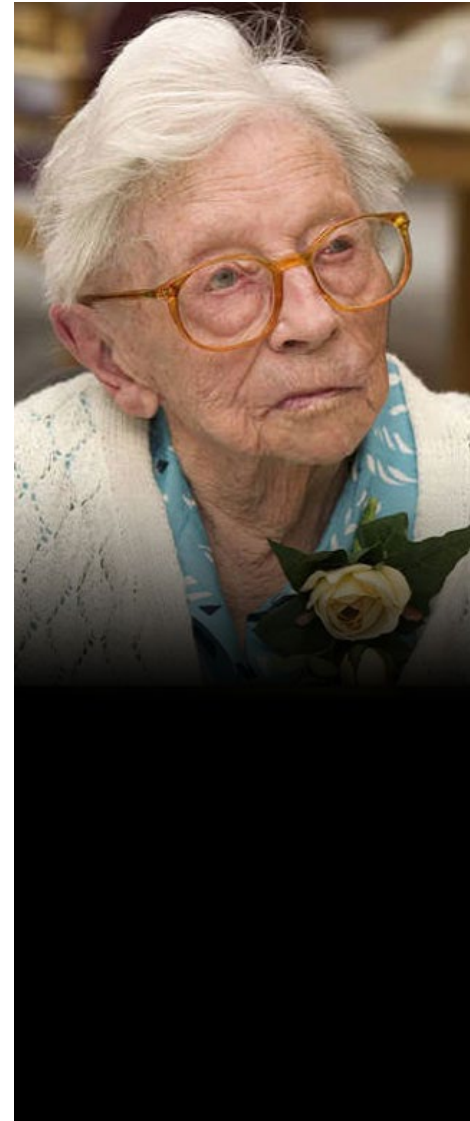
### Regulation 10 NYCRR 415.12 Quality of Care

(h) **Accidents**: The facility shall *ensure* that:

- (1) the resident environment remains as **free of accident hazards as is possible**; and
- (2) each resident receives **adequate supervision** and **assistive devices** to prevent accidents.

## What **types** of **neglect** do we commonly see in my firm?

- “My aunt has **lost 30 pounds** and has no energy.”
- “She can barely move now.”
- “She is **dehydrated** and has kidney damage.”





## Code of Federal Regulations

### Regulation 42 CFR 483.25 **Quality of Care**

(g) **Assisted Nutrition and Hydration**. Based on a resident's comprehensive assessment, the facility must **ensure** that a resident:

- (1) **Maintains** acceptable parameters of nutritional status, such as **usual body weight** or **desirable body weight range** and electrolyte balance, unless the resident's clinical condition demonstrates that this is not possible or resident preferences indicate otherwise;
- (2) Is offered sufficient fluid intake to **maintain proper hydration** and health; and
- (3) Is offered a therapeutic diet when there is a nutritional problem and the health care provider orders a therapeutic diet.

## New York Codes, Rules and Regulations

### Regulation 10 NYCRR 415.12 **Quality of Care**

- (i) **Nutrition**: Based on a resident's comprehensive assessment, the facility shall *ensure* that a resident:
  - (1) **Maintains acceptable parameters of nutritional status**, such as **body weight** and **protein levels**, unless the resident's clinical condition demonstrates that this is not possible; and
  - (2) Receives a therapeutic diet when there is a nutritional problem.
- (j) **Hydration**: The facility shall provide each resident with sufficient fluid intake to **maintain proper hydration** and health.

## New York State Public Health Law §2801-d(5)

Will a recovery in a lawsuit impact future Medicaid eligibility?

- The amount of any damages recovered by a patient, in an action brought pursuant to this section shall be *exempt for purposes of determining initial or continuing eligibility for medical assistance* under title eleven of article five of the social services law; and
- Shall neither be taken into consideration nor required to be applied toward the payment or part payment of the cost of medical care or services available under said title eleven.

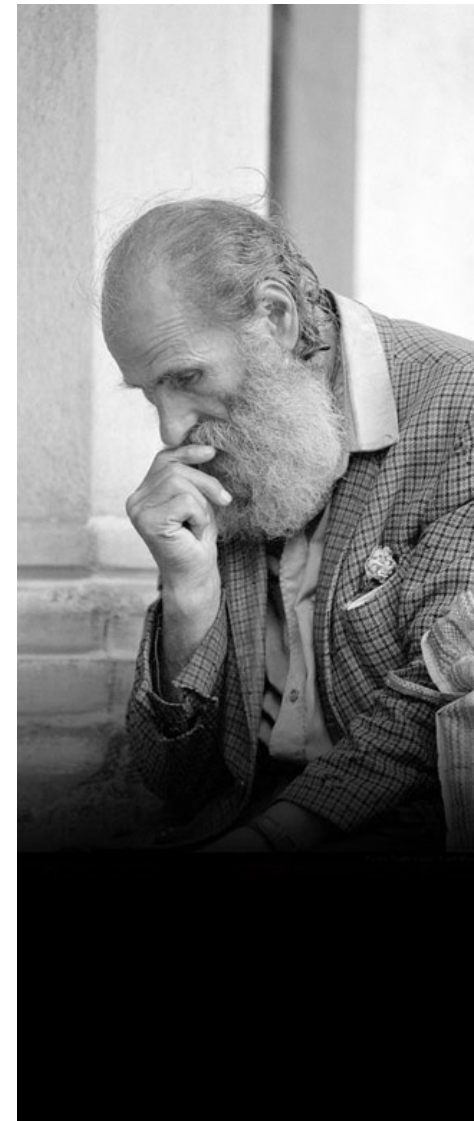
## New York State Public Health Law §2801-d(10)

- No person shall **discriminate** against any **patient** of a residential health care facility because such patient has brought or caused to be brought **any action** pursuant to this section.
- Or against any **patient** or **employee** of a residential health care facility because such patient or employee has given or provided or is to give or provide **testimony** or other evidence for purposes of said action.
- This is the **“Whistle blower protection”**.

## Ways to **prevent** Abuse and Neglect

What we suggest to families of residents:

- Be *involved* in the resident's care; *ask questions*.
- *Don't leave the room* when the resident is being changed.
- Find out about the *resident's diet, activities and medications*.
- Ask for *meetings* with the **Director of Nursing** or **Administrator** if you don't feel the resident is being properly cared for.
- *Visit resident* as often as possible.
- Review [www.Medicare.gov](http://www.Medicare.gov) and [www.profiles.health.ny.gov](http://www.profiles.health.ny.gov) to find out the history of complaints/inspections involving a facility and staffing levels before a loved one is admitted.



## Nursing Home Admission Agreements

### General Advocacy Tips: \*

Review admission agreement and addendums carefully.

- o Entering a nursing home, whether for short-term rehabilitation or long-term care is very stressful to the resident and representative. **Review the agreement and addendums carefully.** The resident or representative has the **right to cross out provisions** he/she does not agree with or are otherwise improper, i.e. **mandatory arbitration** and **venue selection clauses**.
- o If resident or representative has questions about anything, ask! **The nursing home is required to explain the terms of its agreement and addendums.**

\* Center for Elder Law & Justice

**HIPAA:** Acronym that stands for the **Health Insurance Portability and Accountability Act**, a US law designed to provide **privacy standards to protect patients' medical records and other health information** provided to health plans, doctors, hospitals and other health care providers.

These standards provide patients with access to their medical records and more control over how their personal health information is used and disclosed.

HIPAA took effect on April 14, 2003.

## New York State Family Health Care Decisions Act:

- Establishes the authority of a patient's family member or close friend to make health care decisions for the patient in cases where the patient no longer has decision making capacity and did not appoint a health care agent.
- This “Surrogate” decision maker would also be empowered to direct the withdrawal or withholding of life-sustaining treatment when standards set forth in the statute are satisfied.

The key provisions of the FHCDA became effective on June 1, 2010.



## How can we work together to **improve the quality of care** in nursing homes?

- Residents and their families need to be **empowered** and to **know the rights and services** available to them;
  - i.e. **Ombudsman Program, Family Councils, Filing Complaints with the DOH and Medicaid Fraud Control Unit (NYS Attorney General's Office), and pursuing PHL §2801-d claims.**
- The more PHL §2801-d and all of the rights and services available to families are utilized, the greater the likelihood that facilities will improve their quality of care.

# **Elder Law/Planning Documents**

# Health Care Proxy\*

\*information taken from [health.state.ny.us](http://health.state.ny.us)

## What is a Health Care Proxy?

- The **New York Health Care Proxy Law** allows you to **appoint someone you trust** - for example, a family member or close friend — **to make health care decisions** for you if you lose the ability to make decisions yourself. By appointing a health care agent, you can make sure that health care providers follow your wishes.
- Your agent can also decide how your wishes apply as your medical condition changes. Hospitals, doctors and other health care providers must follow your agent's decisions as if they were your own. You may give the person you select as your health care agent as little or as much authority as you want. You may allow your agent to make all health care decisions or only certain ones. You may also give your agent instructions that he or she has to follow. This form can also be used to document your wishes or instructions with regard to organ and/or tissue donation.

## Why should I choose a **health care agent**?

- If you become unable, even temporarily, to make health care decisions, someone else must decide for you. Health care providers often look to family members for guidance. Family members may express what they think your wishes are related to a particular treatment. **Appointing an agent lets you control your medical treatment** by:
  - allowing your agent to make health care decisions on your behalf as you would want them decided;
  - choosing one person to make health care decisions because you think that person would make the best decisions;
  - choosing one person to avoid conflict or confusion among family members and/or significant others.
- You may also appoint an alternate agent to take over if your first choice cannot make decisions for you.

## How do I **appoint** a health care agent?

- All competent adults, 18 years of age or older, can appoint a healthcare agent by signing a form called a Health Care Proxy. You don't need a lawyer or a notary, just two adult witnesses. Your agent cannot sign as a witness.

## When would my health care agent **begin to make healthcare decisions for me?**

- Your health care agent would begin to make health care decisions after your doctor decides that you are not able to make your own health care decisions. As long as you are able to make health care decisions for yourself, you will have the right to do so.

## What **decisions** can my health care agent make?

- Unless you limit your health care agent's authority, your agent will be able to make any health care decision that you could have made if you were able to decide for yourself. Your agent can agree that you should receive treatment, choose among different treatments and decide that treatments should not be provided, in accordance with your wishes and interests.
- However, your agent can only make decisions about artificial nutrition and hydration (nourishment and water provided by feeding tube or intravenous line) if he or she knows your wishes from what you have said or what you have written.
- The Health Care Proxy form does not give your agent the power to make non-health care decisions for you, such as financial decisions.

## Is a Healthcare Proxy the same as a **living will**?

- **No.** A **living will** is a document that provides specific instructions about health care decisions. You may put such instructions on your Health Care Proxy form. The Health Care Proxy allows you to choose someone you trust to make health care decisions on your behalf.
- Unlike a **living will**, a Health Care Proxy does not require that you know in advance all the decisions that may arise. Instead, your health care agent can interpret your wishes as medical circumstances change and can make decisions you could not have known would have to be made.



## How is Lack of Capacity Determined?

**New York State's Family Health Care Decisions Act creates a set of procedures that go into place in determining if person is incapacitated:**

**All adults are presumed to have decision-making capacity unless determined otherwise**, or unless there has been a legal guardian appointed or court order. PHL § 2994-c(1).

The **initial determination** of incapacity must be made by an attending physician or attending nurse practitioner to a reasonable degree of medical certainty.

An attending physician or attending nurse practitioner must confirm the patient's **continued lack of capacity** for future treatment decisions after the initial determination. PHL § 2994-c(7).

A **concurring determination** of incapacity, including the same considerations as required for the initial determination, is required in several situations, including (PHL § 2994-c(3)):

## How is Lack of Capacity Determined? (Continued)

- In a **nursing home**, a social worker or other health practitioner must independently confirm that the patient lacks decision-making capacity.

If the concurring determination **disagrees** with the initial determination, then the matter must be referred to the ethics review committee at the facility. PHL § 2994-c(3)(d).

Once a determination of incapacity has been made, the facility must give **notice** as follows (PHL § 2994-c(4)):

- to the **patient**, where there is any indication of the patient's ability to comprehend the information;
- to at least one person on the **surrogate** list highest in order of priority listed.

## How is Lack of Capacity Determined? (Continued)

If the **patient objects** to a determination of incapacity, or to the selection of surrogate, or to the specific health care decision made by a surrogate, then **the patient's objection shall prevail**, unless (PHL § 2994-c(6)):

- a court of competent jurisdiction has determined that the patient lacks decision-making capacity or the patient is or has been adjudged incompetent for all purposes and, in the case of a patient's objection to treatment, makes any other finding required by law to authorize the treatment, or
- another legal basis exists for overriding the patient's decision.

**The **MOLST** (Medical Orders for Life-Sustaining Treatment) serves as a single document that contains a patient's goals and preferences, based upon conversations between the patient and his/her doctor, regarding:**

- Resuscitation instructions when the patient has no pulse and/or is not breathing
- Instructions for intubation and mechanical ventilation when the patient has a pulse and the patient is breathing
- Treatment guidelines
- Future hospitalization and transfer
- Artificially administered fluids and nutrition
- Antibiotics
- Other instructions about treatments not listed

## **Power of Attorney\***

**\*information taken from [oag.state.ny.us](http://oag.state.ny.us)**

## What is a Power of Attorney?

- A **Power of Attorney** is a legal instrument that is **used to delegate legal authority to another**. The person who signs a Power of Attorney is called the *Principal*. The Power of Attorney gives legal authority to another person (called an *Agent* or *Attorney-in-Fact*) to make property, financial and other legal decisions for the Principal.
- A Principal can give an Agent broad legal authority, or very limited authority. The Power of Attorney is frequently used to help in the event of a Principal's illness or disability, or in legal transactions where the principal cannot be present to sign necessary legal documents.

## Are there **different types** of Powers of Attorney?

- **Yes.** There are "**Nondurable**," "**Durable**," and "**Springing**" Power of Attorney. A "Nondurable" Power of Attorney takes effect immediately. It remains in effect until it is revoked by the Principal, or until the Principal becomes mentally incompetent or dies.
- A "**Nondurable**" Power of Attorney is often used for a specific transaction, like the closing on the sale of residence, or the handling of the Principal's financial affairs while the Principal is traveling outside of the country.
- A "**Durable**" Power of Attorney enables the Agent to act for the Principal even after the Principal is not mentally competent or physically able to make decisions. The "Durable" Power of Attorney may be used immediately, and is effective until it is revoked by the Principal, or until the Principal's death.
- A "**Springing**" Power of Attorney becomes effective at a future time. That is, it "springs up" upon the happenings of a specific event chosen by the Power of Attorney. Often that event is the illness or disability of the Principal.
- The "Springing" Power of Attorney will frequently provide that the Principal's physician will determine whether the Principal is competent to handle his or her financial affairs. A "Springing" Power of Attorney remains in effect until the Principal's death, or until revoked by a court.

## What kinds of **legal authority** can be granted with Powers of Attorney?

- Whether "Nondurable," "Durable," or "Springing," a Power of Attorney can be used to grant any, or all, of the following legal powers to an Agent:
  - Buy or sell your real estate
  - Manage your property
  - Conduct your banking transactions
  - Invest, or not invest, your money
  - Make legal claims and conduct litigation
  - Attend to tax and retirement matters
  - Make gifts on your behalf



## Can a Power of Attorney grant an Agent the authority to make **medical decisions** for the Principal?

- **No.** In New York State, the proper legal instrument for delegating health-care decisions to another is called a Health Care Proxy. There is a form Health Care Proxy approved by the State Legislature.
- It can be found on line at: [www.health.ny.gov/forms/doh-1430.pdf](http://www.health.ny.gov/forms/doh-1430.pdf).

## Do I need a lawyer to prepare a Power of Attorney?

- No. You're not required to hire a lawyer. However, because a Power of Attorney is such an important legal instrument, the careful consumer will consult a lawyer who can:
  - provide legal and other advice about the powers that are appropriate to be delegated
  - provide counsel on the choice of an Agent
  - Outline the Agent's legal and fiduciary obligations while acting under a Power of Attorney; and
  - ensure that the Power of Attorney is properly executed and meets all legal requirements.
- The typical Fee for preparing a Power of Attorney is modest. Before engaging a lawyer to prepare a Power of Attorney, inquire about the fee, and feel free to get prices from other lawyers and law firms.
- **Effective June 13, 2021, New York State reformed the Statutory Short Form Power of Attorney for purposes of financial and estate planning.**

# **Guardianship\***

**\*information taken from guardianship.org**

## Guardianship Overview:

- **Guardianship**, also referred to as Conservatorship, is a legal process **utilized when a person can no longer make or communicate safe or sound decisions** about his/her person and/or property or has become susceptible to fraud or undue influence.
- Because establishing a guardianship may remove considerable rights from an individual, it should only be considered after alternatives to guardianship have proven ineffective or are unavailable

## **Alternatives to Guardianship:**

- Trusts
- Durable Powers of Attorney for property
- Health Care Proxy
- Living Wills
- Joint checking accounts
- Family Health Care Decisions Act

## Guardianship of the **Person**:

- When the court appoints a guardian of the person, the guardian may have the following **responsibilities**:
  - Determine and monitor residence
  - Consent to and monitor medical treatment
  - Consent and monitor non-medical services such as education and counseling
  - Consent and release of confidential information
  - Make end-of-life decisions
  - Act as representative payee
  - Maximize independence in least restrictive manner
  - Report to the court about the guardianship status at least annually

## Guardianship of the **Estate** or **Property**:

- “**Estate**” is defined as **real and personal property, tangible and intangible**, and includes anything that may be the subject of ownership.
- When the court appoints a guardian of the estate, the guardian is assigned the following **responsibilities**:
  - Marshall and protect assets
  - Obtain appraisals of property
  - Protect property and assets from loss
  - Receive income for the estate
  - Make appropriate disbursements
  - Obtain court approval prior to selling any asset
  - Claims and Litigation
  - Report to the court on estate status

## Guardian **Ad Litem**:

- When an infant or other disabled person has not had a Guardian appointed to represent them or when the Court feels that such Guardian cannot adequately represent them, the Court can appoint a Guardian ad Litem.
- Typically, the Guardian ad Litem will act as the representative of the person under disability and protect his or her interests in a **Court case**.

SCPA 405 provides the procedure for the Guardian ad Litem to be paid for services rendered.



## Guardianship Due Process:

- Because establishing guardianship is a legal process that involves the removal of the individual's rights, **considerable due process protection** often exists when the guardianship is established.
- These include:
  - Notice to the individual of all proceedings
  - Representation of the individual by counsel
  - Attendance of the individual at all hearings/court proceedings
  - Ability of the individual to compel, confront and cross examine all witnesses
  - Allowance of the individual to present evidence

## For further information:

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We welcome everyone attending today as well as residents and their families to contact us if they have questions or concerns regarding resident's rights or care, and to view our website: [www.YourNYAdvocate.com](http://www.YourNYAdvocate.com) where we have answers to many frequently asked questions regarding Neglect and Abuse and other topics.

**Thank you for your time and attention!**