

# BROKEN TRUST:

## FINANCIAL EXPLOITATION AND POWER OF ATTORNEY ABUSE



**A Guide for PSA Professionals In New York State**



**BROOKDALE CENTER**  
for Healthy Aging

Hunter College / The City University of New York

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# INTRODUCTION

Financial Exploitation is a serious situation that requires an equally serious and thorough response by social services agencies charged with protecting adults from abuse. PSA professionals must be able to recognize financial exploitation in its many forms and the factors that increase the risk of this type of abuse.

This Guide outlines your responsibilities as a PSA professional when confronted with a report of actual or possible financial exploitation. The Guide covers common forms of financial exploitation, investigating these situations and reporting abuses to criminal and civil justice authorities, and steps you can take to protect persons under your assessment or care from financial exploitation.

The following laws and regulations were referenced when possible:

- NYS Social Services Law
- New York Codes Rules and Regulations, Title 18
- Penal Law
- Criminal Procedure Law
- Family Court
- Mental Hygiene Law
- NYS Banking Law
- Special Court Proceedings



# SECTION 1: FINANCIAL EXPLOITATION DEFINED

## 1.1 Legal Definition of Financial Exploitation

[NYS Social Services Law, Section 473 (6) (g)]

Financial exploitation, as defined under New York State Law, is the improper use of an adult's funds, property, or resources by another individual. It includes, but is not limited to, fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers, or denial of access to assets.

## 1.2 Warning Signs of Financial Exploitation

[NYS Social Services Law, Section 473 (6) (g)]

Any of the following changes – at home, in the person's demeanor, in their financial transactions, and in their family, friends or caregivers – can be signs of financial exploitation and should be treated seriously.

### *Warning Signs in the Home*

- A large amount of new collection notices
- Utilities that are disconnected for non-payment
- Lack of food in the home
- Evidence of physical neglect
- Missing valuables
- Missing bank statements, passbook(s) or checkbook(s)
- Missing funds

### *Warning Signs in Person's Demeanor*

- New concerns or confusion about their finances, especially missing funds
- Incessant talk about needing more money
- Inability to remember making financial transactions or signing financial documents, or offering implausible explanations about how they spend their money
- Fears that they will be evicted or institutionalized unless money is given to a particular person
- Afraid to answer questions in the presence of another
- Increasing isolation

### *Questionable Financial Transactions*

- Increased number ATM transactions
- Large withdrawals from the person's bank account
- Signatures on withdrawal forms that are suspicious
- Amounts and signatures that seem to be written with different pens
- Concern by banking staff that in-person transactions might be coerced
- New bank loans or debts

### *Suspicious Relationships (Caregivers, Friends, Relatives, etc.)*

- New "friends" or relatives who are suddenly spending a lot of time with the person and appear too interested in the person's finances
- The person is becoming increasingly isolated and dependent on a single relative, friend, or professional caregiver
- A caregiver who speaks for the person, in a silencing way
- The person seems nervous around or afraid of a particular relative, friend, or caregiver
- Someone inexplicably gains control over the person's finances

### 1.3 Persons at Risk of Financial Exploitation

Any adult can be a victim of financial exploitation. Studies show, however, that women, individuals who are 80 years or older, and people who live alone are the most common victims of financial exploitation. In addition, the following conditions, especially in combination, make individuals more vulnerable to financial exploitation:

- Decreased physical health and mobility
- Confusion, forgetfulness, and a general decline in mental acuity
- Social isolation
- Increased dependency on caregivers
- Being cared for by someone who has a mental health issue



## SECTION 2: INVESTIGATING REPORTS OF FINANCIAL EXPLOITATION

[NYS Social Services Law, Section 473; Regulation 18 NYCRR, Part 457]

New York State Law requires PSA to accept and investigate all reports of financial exploitation in which the alleged victim or individual at risk of abuse qualifies for protective services.

In some cases, reports of financial exploitation involve adults who are already receiving protective services; more often, however, the report triggers an assessment for protective services that encompasses an investigation of financial abuse.

### 2.1 Information to Gather and Assess

Investigating a report of financial abuse requires gathering and assessing as much relevant information as possible from:

- The alleged victim, through observations and interviews
- All persons/agencies involved in providing services to the alleged victim, including the individual's physicians and other caregivers
- Friends, neighbors, family members, and others who are familiar with the alleged victim
- Any person(s) suspected of engaging in financial abuse



Remember victims of financial exploitation will very often refrain from asking for help for the following reasons:

- **Fear of retaliation** – victims may fear that identifying the abuser may result in retaliation with no one to protect them from escalating forms of abuse
- **Inability** – diminished mental functioning or physical incapacity may prevent a victim from detecting and/or taking action against an exploiter
- **Denial** – “This isn’t me!” - either consciously or unconsciously, some victims are unable to acknowledge that they are being exploited
- **Loyalty** – for the victim, the relationship and/or history between the victim and exploiter may mitigate the exploitation
- **Self-blame** – “How did I get to this (low) point?” – over time, any exploitation erodes a person’s self-esteem. A victim may believe that they deserve to be exploited or have, in some way, caused the abuse
- **Shame** – the humiliation of being exploited by a trusted family member, friend or caregiver.
- **Dependency** – victims may depend on the exploiter for some vital aspect of their care

## 2.2 Collecting Financial Documents

[NYS Social Services Law 144-a; NYS Banking Law, Section 4]

Assessing whether or not financial abuse has occurred or is occurring often requires reviewing the alleged victim’s banking and any other financial records. Under State Law, financial institutions are required to provide such records upon request by a social services agency including, but not limited to: bank statements and account statements for mutual funds, stocks, bonds, certificates of deposit (CDs).

## 2.3 Taking Protective Measures While You Investigate

As you assess the nature and extent of any financial exploitation that has occurred or is occurring, you are likely to learn about events and situations that require immediate action in order to protect the person's assets.

The sample scenarios below represent common occurrences in cases of financial abuse. The suggested initial responses are likely to be helpful but are not the only possible actions you could take, and not necessarily the right first step in every case. The circumstances and individuals involved should guide your initial response and all subsequent protective measures. Some of the protective measures mentioned below (e.g. Guardianship, Representative Payees, and Power of Attorney) are discussed in detail in Section 3 of this Guide.

Whenever you uncover information suggesting that a crime has occurred, you must notify the police and the District Attorney. Involving the criminal justice system is discussed in Section 3 below.

*You discover an increase or inconsistency in expenditures or funds withdrawn from the person's bank account for no clear purpose.*

- Consider asking the bank to put an alert, restriction, or block on all accounts.

*You discover forged signatures on checks.*

- Notify the bank immediately. The bank has a responsibility to replace the funds if bank employees cashed checks with forged signatures.

*Jewelry, money, or other valuables are missing from the person's home.*

- Take steps to safeguard the client's remaining valuables

*You learn that a friend or companion has recently moved in to help the person with banking, shopping, and other life tasks.*

- Interview the person and friend/companion separately to begin to assess whether the person is at risk of financial exploitation.
- Consider placing alerts, restrictions, or freezes on the person's bank accounts and lines of credit.
- In high-risk situations, consider initiating Guardianship proceedings with a Temporary Restraining Order.

*You discover that a caregiver is delinquent in paying bills and the utilities have been turned off.*

- Take steps immediately to have the utilities turned on.
- Considering having a Representative Payee appointed where appropriate (see section 6.2 below); or if the person is mentally capable, discuss the possibility of creating a Power of Attorney and naming a trusted relative or friend as the Agent.

*You suspect that the person's attorney or accountant is engaging in financial exploitation.*

- Report to the person and suspicious activity to the appropriate professional disciplinary board.

*You notice a suspicious transfer of property, sale of a home or new home equity loan.*

- Check public records for deeds and titles.
- Consult with your agency's general counsel about next steps, in particular, the possibility of initiating Guardianship proceedings in an effort to recover stolen properties.

## SECTION 3: INVOLVING THE CRIMINAL JUSTICE SYSTEM

[NYC Social Services Law, Section 473.5; Regulation 18 NYCRR, Part 457.15; 97 ADM-2; 95 INF-10 Model Protocol Concerning the Working Relationship between Police and PSA]

Financial exploitation is a crime. If your investigation reveals any evidence of financial abuse, you must inform your local police or sheriff's department and also the District Attorney without delay. This requirement applies even if the victim does not want you to involve the criminal justice system. Remember, PSA workers are required by law to make a report regarding abuse of an adult, if there is reason to believe a crime has been committed. Workers are not expected to know the elements of financial crimes.

To determine whether to make a report, review and evaluate, as necessary, the following:

- information obtained from observing and interviewing the client;
- information obtained from other persons, agencies, offices or organizations who are involved in providing services to the client, including the client's personal physician, other health care and services providers, law enforcement agencies and informal caregivers;
- information obtained from others who have general knowledge about the client such as friends, neighbors, family members; and
- information obtained from the person(s) who are suspected of committing a crime(s) against the client.

You should share any information or suspicions you may have about the person or persons responsible for the abuse. You can and should report the crimes even if you do not know who committed them.

*When contacting the police and District Attorney, be sure to:*

- Identify yourself and your office.
- Provide a telephone number or email address where you can be reached.
- Identify and describe the victim.
- Describe the alleged abuse and condition of the victim.
- Identify and describe the abuser, if known.

### **3.1 The Role of Law Enforcement and the District Attorney**

When the police and the district attorney are contacted, these agencies are responsible for reviewing the information you provide; conducting their own investigation, which includes taking statements from the victim, if possible, and any witnesses; and then filing criminal charges against the alleged perpetrator(s) if the facts support such action.

Many victims of financial exploitation are afraid or otherwise reluctant to cooperate with law enforcement and prosecutors, especially if the abuser is family member or familiar caregiver. Or the victim may be too impaired to provide credible information about the abuse. In these situations, law enforcement and prosecutors **may** have to investigate and build a case without help from the victim and are likely to rely more on you and your agency to gather sufficient information.<sup>1</sup>

While not all cases can be prosecuted or proceed to trial, the involvement of law enforcement and the District Attorney can deter further financial abuse and preserve the person's existing assets.

<sup>1</sup> For more information, consult the Model Protocol Concerning the Working Relationship between Police and PSA (95 INF-10) available online at <http://www.ocfs.state.ny.us/main/policies/external/>

### 3.2 Temporary Restraining Orders and Orders of Protection

[Family Court Act, Article 8; Criminal Procedure Law, Article 530]

While the police investigation is underway, the prosecutor can ask a criminal court judge to issue a Temporary Restraining Order (TRO) on a bank account to prevent an alleged perpetrator from further depleting the victim's resources or a Temporary Order of Protection to prevent further contact with the person. Longer-term restraining and protective Orders may be issued if the abuser is found guilty. By law, police must arrest anyone who violates the conditions of the Order.



## SECTION 4: SPECIFIC FINANCIAL CRIMES AGAINST THE ELDERLY AND OTHER VULNERABLE POPULATIONS

Law enforcement professionals in New York State utilize the New York State Penal Law to assess whether or not a PSA client has been the victim of a criminal act. Many of the crimes outlined in the Penal Law may apply to PSA cases. You should contact your local police or DA's office to determine whether the circumstances of a particular situation would constitute a crime.

### **4.1 Endangering the Welfare of a Challenged or Physically Disabled Person**

[Penal Law, Section 260.25; 99 OCFS INF – 5]

Someone is guilty of endangering the welfare of a challenged or physically disabled person when he/she knowingly acts in a manner likely to harm the physical, mental, or moral welfare of a person who is unable to care for him or herself because of physical disability, mental disease, or defect. This class-A misdemeanor includes financial abuse.

### **4.2 Scheme to Defraud in the First Degree**

[Penal Law, Sections 190.65 and 260.30 ]

It is a felony to commit fraud against vulnerable elderly persons. This law increases the severity of the crime of fraud to a felony, if the perpetrator engages in a scheme to defraud more than one vulnerable elderly person. "Vulnerable elderly person" is defined as someone 60 years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental, or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care.

### 4.3 Assault in the Second Degree (Granny's Law)

[Penal Law, Section 120.05] [of the]

It is a Class D violent felony, if the victim is a person 65 years of age or older and the perpetrator is more than 10 years younger than the victim. This law can be used if the perpetrator physically assaults the victim in the course of engaging in financial exploitation.

### 4.4 Identity Theft/Fraud

[ Penal Law , Sections 190.78, 190.79, 190.80]

Identity theft, also known as identity fraud, occurs when someone uses another person's name, Social Security number, credit card number, or other personal information to make unauthorized purchases, gain access to bank accounts, apply for a credit card, or obtain loans under the person's name.

Identity theft can be difficult to discover. Be alert to the following warning signs:

- Unfamiliar or unauthorized charges on the person's credit card, billing statements for a credit card the person never applied for, or notices from a collection agency regarding payment of these debts.
- A billing cycle passes without the person receiving his/her credit card statement and perhaps other expected mail (because the perpetrator has diverted the person's mail to another address).
- Bank statements that include transfers or withdrawals the individual does not remember making, missing checks, or new blank checks that never arrive in the mail (because they have been sent to a different address).
- Applications for a credit card, mortgage, or other loan that are denied because of debts the person never knew about.



Because identity theft can have sweeping consequences and perpetrators are difficult to identify and stop, it requires an immediate and thorough response.

- **Take action immediately.** The most important thing to do if you discover or suspect identity theft is to take action right away.
- **Contact the police.** File a report with the police and be sure to keep a copy. Banks and creditors may require a copy of the police report, and the court will need it to include the value of time spent responding to the crime as part of any restitution. [Chapter 346 laws of 2007]
- **Investigate missing mail.** If you suspect that mail is being diverted to another address, check with the local post office to see whether a change of address form was filed.
- **Alert the bank and open new accounts.** Notify the bank at once if an ATM card has been stolen, if checks are missing, or if unauthorized transfers or withdrawals have been made. When opening new accounts, establish a password/PIN that is required for anyone to access information about the account or to withdraw or transfer funds. Avoid using a PIN that can be easily discovered, such as the person's birth date or the last four digits of the person's Social Security number.
- **Monitor credit card activity and close accounts if necessary.** Call credit card issuers immediately if cards are missing or if statements do not arrive on time. If you discover unauthorized transactions, or accounts that were established without the person's permission, close these accounts. Be sure to speak with someone in the security or fraud department and follow up your call with a letter detailing the fraudulent activity. Send your letter to the address provided to report billing errors unless otherwise directed.
- **Contact the three main credit bureaus.** Canceling credit cards stops thieves from using these accounts, but they can still apply for new credit cards or other lines of credit under the person's name. To prevent this from occurring, contact the fraud departments of each of the three major credit bureaus listed below and ask them to "flag" the file. This warning includes

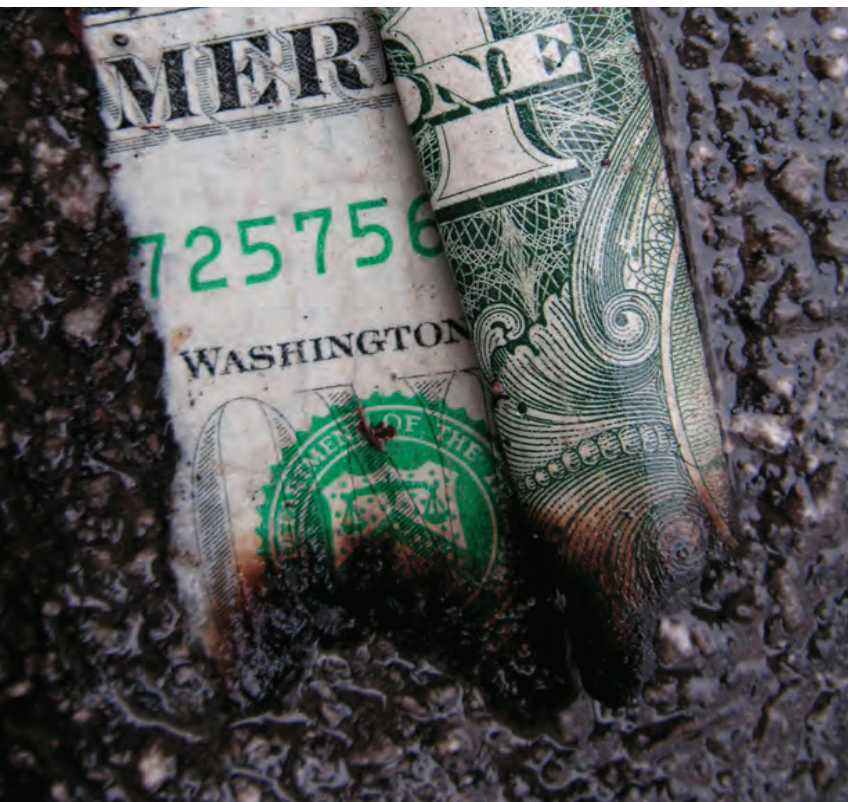
a statement that creditors should call to get permission before approving new credit cards or loans in the person's name. After calling each of the three credit bureaus, follow up in writing.

Experian: 1-888-397-3742

Equifax: 1-888-766-0008

Trans-Union: 1-800-680-7289

- **Maintain a record.** Maintain a log of all telephone calls and keep copies of all written correspondence regarding fraudulent financial transactions.



## SECTION 5: SPECIAL PROTOCOLS IN CASES INVOLVING DEVELOPMENTALLY DISABLED ADULTS RESIDING IN THE COMMUNITY

Section 16.19 of the Mental Hygiene Law, as amended by Chapter 536 of the Laws of 2005 and Chapter 356 of the Laws of 2006; 07-OCFS-ADM-04, PSA Memorandum of Understanding (MOU) with Office of Mental Retardation and Developmental Disabilities (OMRDD) , available online at <http://www.ocfs.state.ny/main/policies/external>.

This provision makes the Office for Persons with Developmental Disabilities (OPWDD, formerly OMRDD) primarily responsible for investigation of reports of abuse and neglect of adults with developmental disabilities who reside in the community. However, there remains a role for PSA to play in many cases. The statute requires that PSA and the appropriate OPWDD Developmental Disability Services Office (DDSO) enter into a MOU that sets out the respective responsibilities of both agencies, as well as of the voluntary agencies working under the supervision of the DDSO.

Your district's MOU with the DDSO should cover:

- Eligibility criteria for PSA and OMRDD services
- The inter-agency referral process
- Service delivery
- Procedures for investigating financial exploitation
- Referrals to law enforcement
- Dealing with high-risk cases
- Information sharing
- Conflict resolution

## SECTION 6: PREVENTION OF FINANCIAL EXPLOITATION (WHAT CAN BE DONE?)

The following arrangements, in which financial decisions and asset management are either shared with or legally allocated to someone else, can prevent vulnerable adults from becoming victims of financial exploitation. It is important that the person possessing this authority be trustworthy. Otherwise, these preventive measures themselves can lead to financial exploitation. Each arrangement is briefly described below, followed by what to do if you suspect financial abuse by someone with authority over the person's assets.

### 6.1 Joint Bank Accounts

[NYS Banking Law Art 13-E, Section 675(a)]

Joint bank accounts can ensure that an elderly or impaired person pays his or her bills accurately and on time. Often a family member's name is added to the account for this purpose. There is no oversight of joint bank accounts, however, and either party can withdraw funds without any prior notice or subsequent explanation. Transfers or withdrawals that are inconsistent with an elderly or impaired person's lifestyle or that leave the person without sufficient funds to meet basic needs can be signs of financial exploitation.

#### *What to do if funds appear to be missing from a joint bank account:*

- If the person has the capacity to consider the situation, discuss the possibility of closing the account and reopening it under the person's name alone.
- Inform the bank.

Consider taking actions to protect the person's assets, such as requesting a Restraining Order on bank accounts (see section 3.2 for information on Restraining Orders ) or initiating Guardianship proceedings if you believe the person lacks the capacity to understand and respond to the gravity of the threat (see below for more information on Guardianship).

- Contact the police if you suspect financial abuse.

## 6.2 Representative Payee

[Social Security: 20 C.F.R. Section 404. 2001 – 2075; Supplemental Security Income (SSI) 20 C.F.R. Section 416.601 -665; Veterans Administration (for Appointment of a Fiduciary): 38 C.F.R. §3.353; 84 INF – 8]

A Representative Payee may be appointed for a recipient of Social Security or Supplemental Security Income benefits if the agency determines the beneficiary is not able to manage or direct the management of his/her own benefit payments, and therefore, "the interest of the beneficiary will be served by representative payment rather than direct payment."

The Social Security Administration (SSA) approves Representative Payee applications, giving special consideration to whether the proposed representative is in a position to look after the beneficiary's needs. SSA must obtain documented proof of the applicant's identity, verify his/her Social Security number, and conduct a personal interview with applicant if practical. SSA must also determine whether the applicant was ever convicted of a Social Security felony or dismissed as a Payee for misuse of funds; and, if so, the applicant will not be appointed unless SSA determines it is in the beneficiary's best interest.

If SSA or a court determines that the Representative Payee is abusing his/her fiduciary duty or neglecting the beneficiary, payments must cease and the Payee must be replaced. If SSA fails to investigate or monitor a Representative Payee who engages in financial abuse, SSA is required to replenish the misused funds and seek restitution from the Payee.

### *What to do if you suspect financial abuse by a Representative Payee:*

- Question the beneficiary for possible explanations of the Payee's actions.
- Contact the local Social Security office regarding your concerns.
- Be sure to ask if SSA conducted a face-to-face interview with the Payee and criminal background check before the appointing the person.
- Consider asking SSA to replace the Payee. If no one else is available to act as Payee, PSA must be appointed.
- Contact law enforcement if you believe a crime has been committed.

### **6.3 Power of Attorney**

[General Obligation Law Title 15 (5-1501 – 5-1514)]

Assigning Power of Attorney to a trusted family member or friend can be an effective way for a person to prepare for a time when they may not be able to manage their own finances. The person ("Principal") who creates a Power of Attorney authorizes someone else ("Agent" or "Attorney-in-Fact") to act in his/her place. The Agent receives only those powers explicitly stated in the Power of Attorney form. Any adult who has the mental capacity to understand the nature and significance of creating a Power of Attorney may do so.



## *Fiduciary duties of the Agent under a Power of Attorney [5-1505]*

An Agent acting under a Power of Attorney has a fiduciary duty to the Principal and may be liable for conduct or omissions that violate this duty. The fiduciary duty includes the following obligations:

- 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.
- To keep the Principal's property separate and distinct from any property owned or controlled by the Agent, except for property that is jointly owned by the Principal and Agent. The Agent may not transfer the Principal's property to himself or herself without specific authorization from the Principal.
- To keep a record of all disbursements and transactions on behalf of the Principal and to make these records available to the Principal upon request.

## *Major gifts and large asset transfers [5-1514]*

The Principal must expressly grant the Agent authority to make major gifts and other large asset transfers by initialing the "Major Gifts and Other Transfers: Statutory Major Gifts Rider," on the Power of Attorney short form. An Agent making such gifts must act in accordance with the instructions of the Principal and in the absence of such instructions, in the Principal's best interests.

## *Obligations of third parties [5-1504]*

A bank or other financial institution must accept a validly executed Power of Attorney without requiring that it be the institution's own form. *However, the law provides that a financial institution can reasonably refuse to honor a Power of Attorney under the following circumstances:*

- The Agent refuses to provide an original or certified copy of the Power of Attorney; [.]
- The bank has made a good faith referral of the Agent and Principal to the local PSA unit; [.]
- The bank knows of a third-party report to the local PSA unit alleging physical or financial abuse, neglect, exploitation or abandonment of the principal by the Agent; [.]
- The bank knows or reasonably believes that the Principal is deceased; [.]
- The bank has information suggesting that the Principal was mentally incapacitated when the Power of Attorney was created; [.]
- The bank knows or reasonably believes that the Power of attorney was procured through fraud, duress or undue influence; or
- The bank knows that the Power of attorney has been terminated or revoked.

## *Abuses of Power of Attorney*

Creating a Power of Attorney can protect a person from financial exploitation. However, family members, friends and/or caretakers can succeed in manipulating the arrangement for their own benefit – pressuring vulnerable adults into giving them Power of Attorney and then using their powers to siphon the person's assets.



## *What to do if you suspect financial abuse by an Agent acting under a Power of Attorney:*

- Contact the Agent and ask for an explanation.
- Ask to see a copy of the Power of Attorney and examine the signature and date.
- Determine if the Principal had the mental capacity to understand the Power of Attorney when it was created. Contact the person's physician and review medical records as part of making this determination.
- If the person has the mental capacity to understand the situation, discuss whether the person would consider revoking the Power of Attorney and appointing a more trustworthy Agent. See below for information about the revocation process. In addition, discuss whether the person would also like to appoint someone to monitor the Agent's actions. A Monitor can request that the Agent provide the Monitor with a copy of the Power of Attorney and a copy of the documents that record the transactions the Agent has carried out for the Principal, and can seek court action if such records are not timely provided by the Agent, or if the Monitor otherwise believes that the Agent is not acting in the best interests of the Principal.
- Ask the Agent for a record of all receipts, disbursements, and transactions. By law, the Agent must comply within 15 days. If the Agent fails to respond, PSA is authorized by law to commence a special court proceeding. See below for information on a special court proceeding.
- If the client lacks the mental capacity to revoke the Power of Attorney, consider initiating Guardianship proceedings. See sections 7.4 and 7.5 below for information about Guardianship.
- Notify the police and District Attorney to explore possible criminal charges.

### *Revoking a Power of Attorney [5-1511]*

A Principal may revoke a Power of Attorney, terminating the agent's authority, by delivering a written, signed, and dated revocation of the power of attorney to the Agent. The Agent must comply with the revocation regardless of the actual or perceived mental capacity of the Principal, unless the Principal is under Guardianship as defined by Article 81 of the NYS Mental Hygiene Law.

A Principal may also revoke a Power of Attorney by delivering a formal revocation to any financial institution (or other third party) that the Principal believes has acted upon the Power of Attorney. The PSA worker should seek help from the County Attorney in drafting a Revocation letter.

### *Special Court Proceeding [5-1510]*

When investigating a report of financial exploitation, PSA can request in writing that the Agent make the Power of Attorney and all records of receipts, disbursements, and transactions available within 15 days. If the Agent fails to comply, PSA may commence a special proceeding in Supreme or County Court to compel the Agent to produce these documents.



A special court proceeding also may be commenced for any of the following reasons:

- To determine whether the Power of Attorney is valid
- To determine whether the Principal was mentally capable at the time the Power of Attorney was executed
- To determine if the Power of Attorney was procured through duress, fraud, or undue influence
- To determine whether the Agent is entitled to receive compensation and whether the amount received is reasonable for the responsibilities performed
- To approve the record of all receipts, disbursements, and transactions entered into by the Agent on behalf of the Principal
- To remove an Agent who has violated

If a Power of Attorney is suspended or revoked pursuant to a special court proceeding, the court may require the Agent to provide a record of all receipts, disbursements, and transactions (if such documents were not already presented in court), and to deliver any property belonging to the Principal and records concerning the Principal's property and affairs to a successor Agent, PSA, other government agency, or the Principal's legal representative.

## 6.4 Article 81 Guardianship

[NYS Mental Hygiene Law, Article 81; 92 INF – 40; 93 INF – 14]

A Guardian is a person appointed by the court to assist an incapacitated person (“IP”) with personal needs and/or property management. Under Article 81 of the NYS Mental Hygiene Law, the court may appoint a Guardian for any incapacitated adult, including persons who are mentally retarded and developmentally. The decision to appoint a Guardian is based on a careful review of the person’s mental capacity and life circumstances. A Guardian is a fiduciary and as such must act with trust, loyalty, and fidelity, making reasoned decisions that protect the IP’s personal and financial interests.

### *Role and authority of the court evaluator [81.09]*

Once a petition for guardianship is filed, a court evaluator will be appointed. The evaluator is to act as an independent investigator assisting the court in its determination of the person’s capacity and needs. The court evaluator has the authority to:

- Retain an independent medical expert to assess the alleged incapacitated person
- Apply to the court for permission to inspect the person’s medical records
- Conduct any other necessary investigations and make recommendations the court deems appropriate to serve the interests of the alleged incapacitated person

In addition, the court evaluator can take steps to prevent the waste, misappropriation, or loss of the alleged incapacitated person's property pending the outcome of the Guardianship hearing. This authority is crucial when the person is a victim of financial exploitation or at risk of such abuse. For example, if the person keeps large amounts of cash in the house where it easily could be stolen or misappropriated, the court evaluator has the authority to open a bank account and deposit the money. The court evaluator must document and explain any such actions taken in his/her report to the court.

### *Guardianship as a response to financial abuse*

In situations where there are signs of financial abuse, Article 81 provides both immediate and long-term solutions:

- The court may appoint a Temporary Guardian at any time prior to the appointment of a Guardian if there is evidence that an allegedly incapacitated person is in danger now or in the reasonably foreseeable future. [81.23(a)]
- Prior to appointing a Guardian, the court may issue an injunction to stop someone from transferring or disposing of the person's property, or acting in a manner that threatens to endanger the allegedly incapacitated person. If abuse is suspected, bank accounts can be frozen and banks can be ordered to not honor an existing Power of Attorney. [81.23(b)]
- As mentioned above, the court evaluator can take steps to preserve the person's assets and property.
- If an Agent acting under a Power of Attorney has allegedly engaged in financial abuse, the court has the authority to demand an accounting covering the entire period of Agency and to vacate the Power of Attorney if the court finds that the Agent violated his/her fiduciary duty. [81.29]
- Once the court appoints a Guardian, that person can commence a Summary Discovery Turnover Proceeding in which the Guardian can compel testimony by any individual whom the Guardian believes is holding

property that belongs to the incapacitated person. The Guardian can also subpoena records in an effort to find evidence of financial exploitation. If financial abuse is discovered, the Guardian can obtain a court order compelling the abuser to relinquish the property to the Guardian. This is often the most efficient way to recover assets of significant value, such as real estate. [81.43]

### *What to do if you suspect financial abuse by an Article 81 Guardian:*

- File a motion with the court to remove the Guardian. The PSA Commissioner has this authority and so does the person (“Court Examiner”) assigned by the court to examine initial and annual reports about the IP. [81.35] The court may remove any Guardian who is guilty of misconduct, or for any other just cause. The court will appoint an Interim Guardian until the successor Guardian is appointed. [81.38]
- If the Guardian who engaged in financial abuse is an attorney, report him/her to the Disciplinary Board of the NYS Bar Association.
- Inform the police and District Attorney.

## **6.5 Article 17-A Guardianship**

[Article 17-A of the Surrogates Court Procedure Act]

This guardianship statute can only be used to safeguard adults who are mentally retarded or developmentally disabled. In this case, the Surrogates Court creates an Order to protect the financial assets and/or personal interests of a mentally retarded or developmentally disabled person. The Order includes the appointment of a Guardian. Unlike Article 81, there is no requirement that these Guardians submit annual reports to the court, making it more difficult to detect and respond to financial abuse when it occurs.

### *What to do if you suspect financial abuse by an Article 17-A Guardian:*

- Consult the Memorandum of Understanding between your office and the NYS Office of Mental Retardation and Developmental Disability to determine your role and responsibilities in responding to financial abuse.
- Where appropriate, petition the Surrogates Court to modify the Order by removing the current Guardian and appointing a successor. See below for more information. [1755]
- If the guardian is an attorney, contact the Disciplinary Board of the NYS Bar Association.
- Inform the police and District Attorney.

### *Modification Order [1755]*

Any person can petition the Surrogates Court on behalf of a mentally retarded or developmentally disabled person with a Guardian to modify the Guardianship Order. Upon receiving the request, the court may appoint a Guardian ad Litem while the court reviews the situation. The court will modify the Guardianship Order if the interests of the Guardian are adverse to those of the mentally retarded or developmentally disabled person, or if the interests of justice will be better served by appointing a new Guardian.





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