

APS Legal Practice- Part 1- The “Law” of APS and its application to practice

Introduction

There are two large handouts of materials, that include portions of statutes, regulations, and OCFS directives as well as some ethical opinions and some forms. We won't be discussing every one of those, but I want to have them just in case you do have some APS practice, but just not enough to have it always fresh in your mind where to find some of this material- I hope that this will at least give you something to start with. The handouts are meant to be for both Part 1 and Part 2 of my presentation. I did not put in copies of the cases that I will be talking about, but the citations are in the other participant handout, so you can look those up and Shepardize them if needed.

One area of practice that I am not going to talk about to any great extent is Art. 81 guardianship, there isn't enough time in this presentation to do that topic justice, and there are other trainings that are available.

I. “Law” of APS

a. Statutes

1. Social Services Law

SSL 473 Protective Services

473-a Short Term Involuntary Protective Services Orders

473-b Reporting of Endangered Adults; Persons in Need of Protective Services

473-c An Order to Gain Access to Persons Believed to be in Need of Protective Services for Adults

473-d Community Guardianship

473-e Confidentiality of Protective Services for Adults Records

2. Other Statutes (GOL, SCPA, MHL, etc.)

Some of the other statutes that are worth being familiar with in your practice are:

Surrogate's Court Procedure Act Article 17-a, which concerns guardianship of intellectually disabled or developmentally disabled persons

General Obligations Law Article 5, Title 15, which concerns power of attorney.

Public Health Law 29-c Health Care Proxy

Public Health Law Article 29-CC – Family Health Care Decisions Act

Family Court Act Article 8, which has to do with orders of protection in family offense cases in Family Court

The most recent statute that might affect APS practice is Elder Law 225, which has to do with Enhanced Multi-disciplinary teams and went into effect on July 1, 2021.

- b. Regulations
- c. OCFS Directives (ADM's, LCM's, etc.)
- d. OCFS best practices guidelines

II. Application of the "Law" to the Practice

a. Eligibility

18 NYCRR 457.1(c), which says:

18 NYCRR 457.3 Eligibility for PSA.

b. APS Services

§473 Protective Services

18 NYCRR 457.1(d).

18 NYCRR 457.7 Coordination and utilization of community resources.

c. Duties and Responsibilities of APS

SSL 473(1)

1. Investigation of Referrals

18 NYCRR 457.1(d) Services.

2. Voluntary Clients

3. Involuntary Clients

18 NYCRR 457.6 Serving involuntary clients.

4. Access Orders

SSL 473-c

18 NYCRR 457.11

12-OCFS-ADM-05

Best practices guideline.

d. APS Records and Confidentiality

1. Case Record

18 NYCRR 457.2 PSA client case record

2. Confidentiality

§473-e Confidentiality of Protective Services for Adults Records

18 NYCRR 457.16 Confidentiality

e. Financial Exploitation

1. Misuse of Power of Attorney

2. Investigation of FE (bank letters, POA accounting, and MDT's,)

Bank Letters- Federal Gramm-Leach-Bliley Act (15 USC 6802)

The Financial Exploitation Suite of Investigative Tools ("FEIST")

POA Accounting and Special Proceeding

"15 Day Letter" General Obligations Law §5-1505

Special proceeding General Obligations Law §5-1510.

Revocation of power of attorney General Obligations Law §1511.

Multi-Disciplinary Teams and Law Enforcement

Social Services Law §473(5)

f. Alternatives to Art. 81 guardianship

1. Short Term Involuntary Protective Services Orders (STIPSO)

Social Services Law §473-a Short Term Involuntary Protective Services Orders

2. Orders of protection

Family Court Act §812

3. Health Care proxy

Public Health Law Article 29-c- Health Care Proxy

4. SCPA 17-a Guardianship

Surrogate's Court Procedure Act Article 17-a

5. Community Guardianship

SSL §473-d Community Guardianship

g. Caseworker Liability Issues-

1. Caseworker liability

Social Services Law §473.3

18 NYCRR 457.9(a).

Maldovan v Erie County, 188 AD3d 1597 (4th Dept., 2020), leave to appeal denied 191 AD3d 1404

APS Legal Practice- Part 2- Capacity Issues and Ethical Issues

a. Introduction

Capacity Issues

A. Legal Requirements to Determine APS Client Decision Making and Capacity

1. Statute

§473 Protective Services

2. Regulations

18 NYCRR 457.6 Serving involuntary clients.

3. Capacity to Consent to Release of Records Pursuant to APS Client's Written Permission

§473-e Confidentiality of Protective Services for Adults Records-

4. Other capacity issues related to APS legal practice

a. Capacity for Executing Various Legal Documents

1. Last Will and Testament

i. Statute:

Article 3 of the Estates, Powers and Trusts Law.

EPTL §3-1.1 Who may make wills of, and exercise testamentary powers of appointment over property

Every person eighteen years of age or over, of sound mind and memory, may by will dispose of real and personal property and exercise a power to appoint such property.

ii. Case law:

- *Matter of Kumstar*, 66 N.Y.2d 691 (1985) “It is the indisputable rule in a will contest that “[t]he proponent has the burden of proving that the testator possessed testamentary capacity and the court must look to the following factors: (1) whether she understood the nature and consequences of executing a will; (2) whether she knew the nature and extent of the property she was disposing of; and (3) whether she knew those who would be considered the natural objects of her bounty and her relations with them“ (*Matter of Slade*, 106 AD2d 914, 915; see also, *Matter of Delmar*, 243 NY 7)
- *Matter of Henderson*, 80 N.Y.2d 388, 392, (1992), citing *Loder v Whelpley*, 111 NY 239, 250), describes the “capacity” to make a will as follows: “A basic tenet in our system is that “[a] person of sound mind, acting with full knowledge of her affairs, competent to understand her relations to those whom she wished to benefit, may bestow her bounty as she likes.”

2. Power of Attorney

i. Statute

General Obligations Law Article 5- Power of Attorney

§5-1501. Application and definitions

b. Capacity and Medical Decision Making

1. Generally

Under New York common law, a competent adult generally has the right to make health care decisions, including the right to refuse life-sustaining treatment, *Matter of M.B.*, 6 N.Y.3d 437, 439 (2006), citing *Matter of Fosmire v Nicoleau*, 75 NY2d 218 (1990).

2. Health Care Proxy

i. Statutes

Public Health Law Article 29-c- Health Care Proxy

ii. Case Law:

Matter of Rose S., 293 A.D.2d 619 (2nd Dept., 2002):

For the purposes of Public Health Law § 2981, every adult is presumed competent to appoint a health care agent (see Public Health Law § 2981 [1] [b]). In light of the presumption of competency, the burden of proving mental incompetence is upon the party asserting it (see *Smith v Comas*, 173 AD2d 535; *Feiden v Feiden*, 151 AD2d 889; *Matter of Obermeier*, 150 AD2d 863, 864). However, where there is medical evidence of mental illness or a mental defect, the burden shifts to the opposing party to prove by clear and convincing evidence that the person executing the document in question possessed the requisite mental capacity (see *Hubbard v Gatz*, 130 AD2d 622, 623; see also *Matter of Shapiro*, NYLJ, Apr. 19, 2001, at 25, col 1).

The testimony fails to demonstrate that Rose was competent at the time she signed the health care proxy. In fact, the petitioner is the only witness who testified that Rose was competent at the time she executed the health care proxy, and despite his testimony to that effect, he also testified that his reason for having Rose execute a health care proxy was because the hospital told him that she was incompetent.

iii. More Statutes

PHL §2983. Determination of lack of capacity to make health care decisions for the purpose of empowering agent

PHL §2985. Revocation

3. New York Public Health Law Article 29-CC – Family Health Care Decisions Act

i. Statutes

§2994-b. Applicability; priority of certain other surrogate decision-making laws and regulations

ii. Case Law:

Matter of Maldonado v R.J., 93 A.D.3d 46 (1st Dept., 2012):

Clear and convincing evidence—namely, respondent's testimony and the testimony of two attending physicians at the hospital, one of whom was a board-certified psychiatrist—supports the court's determination that respondent lacks decision-making capacity (see Public Health Law § 2994-c [6]; *Addington v Texas*, 441 US 418, 431-433 [1979]; *Rivers v Katz*, 67 NY2d 485, 497 [1986]). Respondent's testimony was consistent with the psychiatrist's diagnosis of schizophrenia and showed that he lacked decision-making capacity because of his mental illness.

Matter of Marietta Mc. (Forest Hills Hosp.), 125 A.D.3d 581 (2nd Dept., 2015):

Contrary to the appellant's contention, the petitioner established by clear and convincing evidence that the appellant lacked “the capacity to make a reasoned decision” with respect to the proposed medical treatment, i.e., a below-the-knee amputation of her left leg (*Rivers v Katz*, 67 NY2d 485, 497 [1986]; see *Matter of Jay S. [Barber]*, 118 AD3d 803 [2014]; *Matter of Maldonado v R.J.*, 93 AD3d 465, 466 [2012]; *Matter of Simone D.*, 32 AD3d 931 [2006], *affd* 9 NY3d 828 [2007]; *Matter of Harvey U.*, 116 AD2d 351 [1986], *revd on other grounds* 68 NY2d 624 [1986]; see also Public Health Law § 2994-a [5]). *2 In particular, the testimony of an examining psychiatrist and a vascular surgeon, as well as the appellant's testimony, established, among other things, that the appellant, who was diagnosed with schizoaffective disorder, lacked the capacity to understand the nature or severity of her medical condition, or the severe consequences that would likely result if the condition were left untreated (see *Matter of William S.*, 31 AD3d 567, 568 [2006]; *Matter of Paris M. v Creedmoor Psychiatric Ctr.*, 30 AD3d 425, 426 [2006]; *Matter of Mausner v William E.*, 264 AD2d 485 [1999]; *Matter of Adele S. v Kingsboro Psychiatric Ctr.*, 149 AD2d 424, 424-425 [1989]; see also Public Health Law § 2994-a [5]).

4. New York Public Health Law Article 29-CCC (Non-hospital Do Not Resuscitate Orders)

i. Statutes

PHL §2994-aa. Definitions

PHL §2994-cc. Consent to a nonhospital order not to

ii. Case Law:

Matter of Nofal, 35 A.D.3d 1132 (3rd Dept., 2006)

Her November 2002 medical records reveal her to be alert, oriented to her surroundings and not overtly depressed or withdrawn. Her doctors confirmed that she was lucid until the date of her death, even to the extent of coherently conversing with them before signing her own “Do Not Resuscitate” order during her final hospitalization.

c. Capacity and Involuntary Interventions

1. STIPSO

i. Statute

§473-a Short Term Involuntary Protective Services Orders

2. Guardianship

i. Statutes

MHL §81.01 Legislative Findings and Purpose

MHL §81.02 Power to appoint a guardian of the person and/or property; standard for appointment

MHL §81.10 Counsel

Caselaw:

Matter of Azzi (Trapani), 141 AD3d 1159 (4th Dept., 2016) In an Art. 81 case the judge is obliged to tell the AIP of their right to counsel, and if appointing a temporary guardian is obliged to appoint counsel unless satisfied that the AIP is represented by counsel of their own choosing.

Art 17-a Guardianship

SCPA§1750. Guardianship of persons who are intellectually disabled

SCPA §1750-a. Guardianship of persons who are developmentally disabled

d. *Guardian ad Litem*

1. In Courts other than Surrogates Court:

i. Statute

CPLR Art. 12:

ii. Caselaw:

Matter of Turetsky v Murray, 177 A.D.3d 653 (2nd Dept., 2019)

Matter of Marie ZZ. (Jeanne A.), 140 A.D.3d 1216 (3rd Dept., 2016)

Matter of Jesten J.F. (Ruth P.S.), 167 A.D.3d 1527 (4th Dept., 2018)

iii. NYC Civil Court: *Guardian Ad Litem Program*

2. In Surrogates Court

i. Statute

- SCPA §402

e. Assessing Capacity:

98-OCFS-INF-05 Mental Health Referral Instrument

- f. Lack of Capacity as Disability- laws to protect the disabled that may be used to protect the client with diminished capacity

Example- Fair Housing Act

Matter of Prospect Union Assoc. v DeJesus, 167 A.D.3d 540 (1st Dept., 2018)

642-654 Whippersnapper LLC v Mahoney, 63 Misc.3d 46 (Supreme Court, Appellate Term, First Department, 2019).

Ethical Issues in APS Legal Practice

Introduction

- I. APS Client Ethics
 - a. NAPSA Code of Ethics
 - b. NAPSA (or APS) Practice Guidelines

- II. Attorney Ethical Rules
 - a. NEW YORK RULES OF PROFESSIONAL CONDUCT (Effective April 1, 2009)
 - i. A LAWYER'S RESPONSIBILITIES (partial)
 - ii. RULE 1.1: COMPETENCE
 - iii. RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER
 - iv. RULE 1.4: COMMUNICATION
 - v. RULE 2.1: ADVISOR

- vi. RULE 3.1: Non-Meritorious Claims and Contentions

- b. Who is the attorney representing?
 - i. New York State Bar Association Committee on Professional Ethics Opinion 986 (10/25/13)

 - ii. RULE 1.13: ORGANIZATION AS CLIENT

- c. Other parties ethical issues that might affect you
 - i. RULE 1.14: CLIENT WITH DIMINISHED CAPACITY
Matter of S.B (E.K.), 66 Misc.3d 452 (Supreme Court, Chemung County, 2019).

 - ii. Ethical Issues in the Courtroom
RULE 3.3: CONDUCT BEFORE A TRIBUNAL

- d. RULE 4.3: COMMUNICATING WITH UNREPRESENTED PERSONS
RULE 3.7: LAWYER AS WITNESS

- e. Conflict of Interest? New York State Bar Association Committee on Professional Ethics Opinion 1083 (1/21/16)

- f. Ethical issues that may affect a County Attorney, DSS Attorney or an attorney who contracts with a LDSS.
 - i. New York State Bar Association Committee on Professional Ethics Opinion 1153 (5/24/2018)

 - ii. New York General Municipal Law §801- Conflicts of Interest Prohibited

 - iii. New York State Bar Association Committee on Professional Ethics Opinion 1074 (11/13/15)

 - iv. New York State Bar Association Committee on Professional Ethics Opinion #859 (03/25/2011)

 - v. New York State Bar Association Committee on Professional Ethics Opinion 1148 (4/2/2018)

Questions/Answers