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Estate Planning Basics

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ESTATE PLANNING

ELDER LAW & SPECIAL NEEDS

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Disclaimer

PLEASE NOTE, THIS IS AN OVERVIEW – NOT A COMPLETE STATEMENT OF THE LAW AND IS NOT TO BE CONSIDERED LEGAL ADVICE

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Trusts & Estates - Preserving Assets for the Next Generation
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Kathleen A. Redalieu concentrates her practice in Trusts and Estates, Elder Law, Special Needs Planning, Guardianship and Medicaid planning. Together with a team of lawyers, Kathleen works with hundreds of families each year on creating Wills, Powers of Attorney, Health Care Directives, Trusts (including Revocable, Irrevocable, Living and Testamentary). Kathleen also helps with estate administration and the windown of trusts payable when a loved one passes away. Kathleen also handles emergency adult Guardianship matters, including contested estate or guardianship proceedings.

Admissions

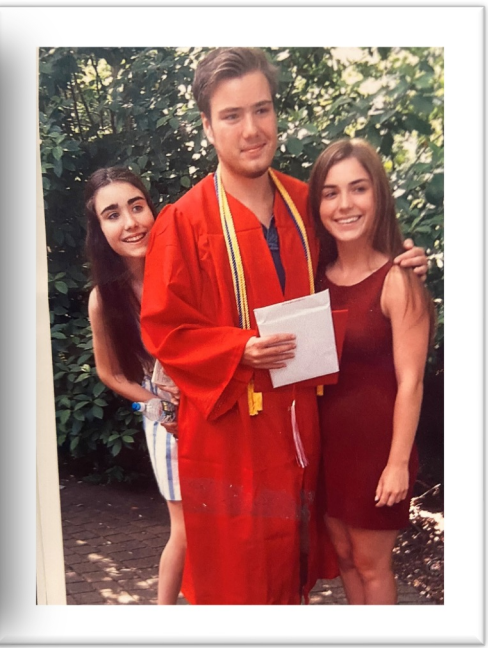
New York
Connecticut
U.S. District Court Southern District of New York
U.S. District Court Eastern District of New York

Professional Associations & Activities

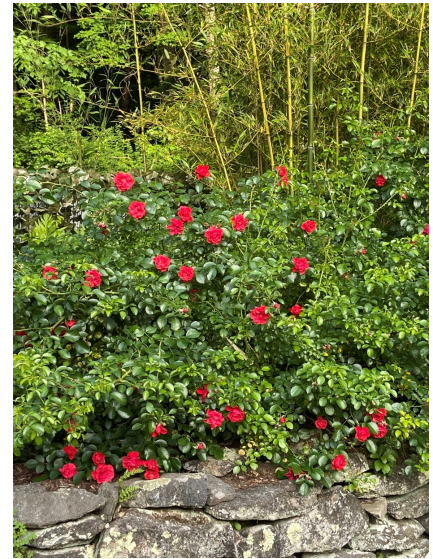
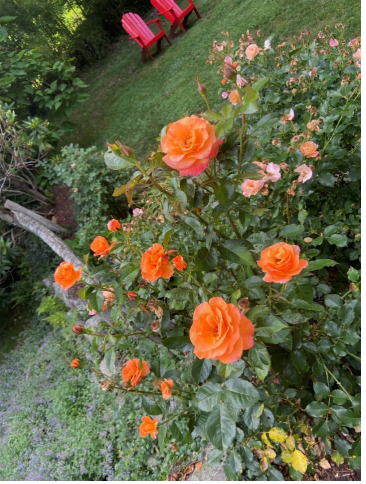
Member, New York State Bar Association Elder Law Section
Member, Westchester County Bar Association
Member, Westchester Women's Bar Association
Board Member, Westchester Women's Bar Association's Foundation
Co-Chair, Westchester County Bar Association's Guardianship Committee

Education

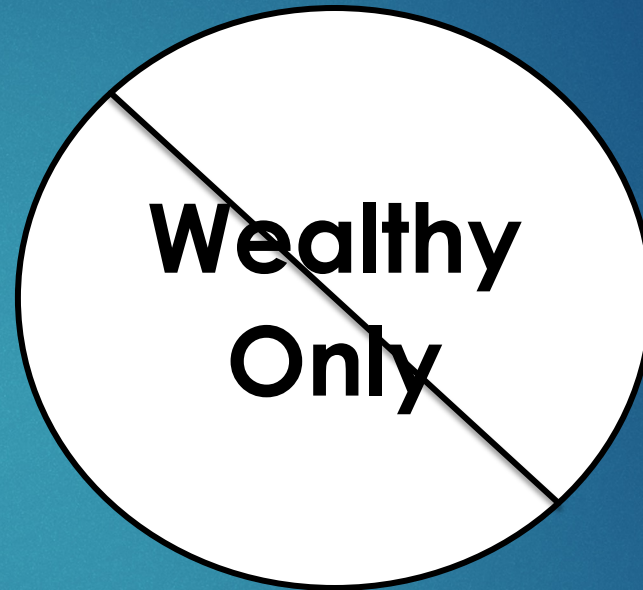
Pace University School of Law, J.D.,
• Recipient of Julian H. Hyman, Esq. Memorial Scholarship for Distinguished Achievement in Trusts and Estates
Siena College, Cum Laude







Estate
Planning
is for
Everyone



Why?



To protect

- 1) ourselves
- 2) our loved ones
- 3) the assets we plan to use to do that with (\$)

What does basic estate planning include?



Advance Medical Directives

- 1) Health Care Proxy – medical decision maker
- 2) Living Will – end of life medical care wishes
- 3) HIPAA Authorization – information release





Power of Attorney

Durable Power of Attorney

- ▶ Allows agent to manage financial affairs
- ▶ Critically important document in avoiding adult guardianship proceeding
- ▶ NOTE: expires immediately on death of principal

Power of Attorney

- ▶ Power of Attorney Statutes
(2009 with amendments in 2010; Revised again in 2021)
 - ▶ Gifting powers need to be documented
 - ▶ Agent must act in accordance with specific instructions, but where there are no specific instructions, in principal's best interest

Adult Guardianship Article 81 of the Mental Hygiene Law

Background

Article 81 of the Mental Hygiene Law, Appointment of a Guardian for Personal Needs and/or Property Management, became law in New York State in 1992 and went into effect April 1, 1993. The statute repealed Articles 77 and 78 of the Mental Hygiene Law and replaced them with one guardianship statute.

Adult Guardianship Article 81 of the Mental Hygiene Law

Purpose

Article 81 authorizes a proceeding based on the concept of the least restrictive alternative - one that authorizes the appointment of a guardian whose authority is appropriate to satisfy the needs of an incapacitated person, either personal or financial, while at the same time tailored and limited to only those activities for which a person needs assistance.

Adult Guardianship Article 81 of the Mental Hygiene Law

Least Restrictive Form of Intervention

- ▶ guardian authority appropriate to the needs of IP
- ▶ tailored and limited to only those activities for which a person needs assistance
- ▶ personal wishes, preferences and desires of the person
- ▶ maximum independence of the person

Adult Guardianship Article 81 of the Mental Hygiene Law

- ▶ Article 81 is:
 - ▶ Not medical or diagnostic driven
 - ▶ Functional test

Power to Appoint a Guardian: MHL 81.02

The court may appoint a guardian for a person if the court determines:

1. that 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 81.02(a)(1); **and**
2. the person agrees to appointment 81.02(a)(2), **or**
3. finding of incapacity 81.02(a)(2).

Legal Standard: MHL 81.02 – Necessity

Sufficiency and Reliability of Available Resources

- Power of Attorney
 - Durable
 - Powers (i.e. gifting)
 - Are there allegations of financial abuse or overreaching?
 - Is the agent willing to act?
- Health Care Proxy
 - Powers

Legal Standard: MHL 81.02 – Finding of Incapacity

Finding of Incapacity MHL 81.02(b)(1),(2)

The determination of incapacity shall be based on **clear and convincing evidence** (burden of proof) and shall consist of a determination that a person is likely to suffer harm because:

- ▶ That a person is unable to provide for person needs and or property management, and
- ▶ The person cannot adequately understand and appreciate the nature and consequences of such inability.
- ▶ If a person is found to be incapacitated, he/she is identified as an Incapacitated Person (IP).

Conclusion

- ▶ Guardianship is expensive
- ▶ Last resort
- ▶ Examine all other available resources and/or alternatives first
- ▶ Explain guardian requirements to client

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