

MEMORANDUM

A.2536 (Weinstein)/S.3523-A (Parker)

AN ACT to amend the mental hygiene law, in relation to requiring petitioners for appointment of a guardian to identify other persons who may be able to manage the affairs of an incapacitated person

This legislation is intended to prevent the use of property guardianships under Article 81 of the Mental Hygiene Law by nursing homes and other providers to pursue payment from incapable residents for their services, when the residents or their representatives fail to pay for such services. LeadingAge New York supports the underlying intent of the bill, but is concerned about the potential consequences of implementing the legislation as drafted.

Section 8 of the legislation would effectively preclude a nursing home, when its only interest is that of a creditor, from serving as a guardian. LeadingAge New York would agree that this is a helpful reform which would broadly address the obvious conflict of interest that arises when a guardian is primarily interested in repaying itself.

But apart from that section, we believe the legislation would actually harm nursing home residents by forcing nursing homes to pursue remedies for non-payment of legitimate bills that are far more adverse to residents – and families – than guardianship proceedings.

To illustrate this point, consider a scenario which is not all that uncommon: an elderly nursing home resident with dementia lacks capacity; she has \$150,000 in assets controlled by a son who is her Power of Attorney (POA). The son stops paying the nursing home – for some pretextual reason or no reason at all – and allows the bills to fall into arrears amounting to \$50,000 and growing. In this situation, the nursing home essentially has four options:

1. Continue to provide services indefinitely without being paid. The resident will not be eligible for Medicaid because her assets have not been expended;
2. Bring a lawsuit to collect the arrears, and bring additional lawsuits as the unpaid bills continue to accumulate;
3. Terminate the admission agreement due to non-payment and discharge the resident as permitted by state and federal regulations; or
4. Petition for the appointment of a guardian of the property. The guardian can and should be someone other than the son – who allegedly is unwilling to pay the legitimate bills of the alleged incapacitated person – and other than the nursing home, which has a conflict of interest.

Option 1 is unfair and potentially financially ruinous to the nursing home, would invite all families to cease making payments and ultimately threaten access to high quality care. Options 2 and 3 are harsher to the resident and the resident's family than guardianship proceedings. Option 4 – guardianship – is a fair and humane approach to this situation. If the son/POA has a legitimate argument for non-payment, that will act as a powerful defense to the guardianship. If he does not, then he should be displaced by an independent guardian of the

property. This guardian would be bound by the strict rules of Article 81, including the “least restrictive means” requirement and the guardian’s obligation to submit periodic accountings.

It is true that the guardianship statute was not intended to help creditors. Rather, its purpose is to assist incapacitated persons. To fulfill this purpose, the guardianship statute was very much intended to ensure that another party would be able to manage the property affairs of a person who could not manage them personally. A central obligation of a guardian is to pay the lawful bills of the incapacitated person, and prevent harmful lawsuits, evictions and other consequences of ignoring those obligations. Accordingly, a petition for guardianship to ensure that someone will “pay such bills as may be reasonably necessary to maintain the incapacitated person” [see MHL § 81.21(a)(15)] is central to the purpose of the guardianship statute.

Additionally, nursing homes can cite numerous cases when family members have been appointed as legal representatives of incapacitated residents, and these individuals fail to pay legitimate bills or to cooperate as needed to establish Medicaid eligibility for the resident. As further evidence of this phenomenon, a statewide survey of nursing homes was conducted which revealed that in 2012 over 10 percent of all Medicaid cost-sharing amounts (i.e., resident contributions to the cost of care required under Medicaid rules) went unpaid, and that “non-compliance and refusal to pay/funds otherwise spent” was the single biggest reason for failure to pay. Survey respondents reported family member refusals to pay these amounts, as well as instances of residents’ family members/other responsible parties deliberately misappropriating the funds for their own personal use. In these instances, the individual’s representative was clearly not acting in the best interest of the resident and, may in fact have engaged in elder financial abuse.

In some cases, nursing homes will pursue unpaid bills through legal proceedings, but in other instances the individual amounts owed are not sufficient to justify the significant legal expenses associated with pursuing them. As a result, these uncollectable amounts must be written off as bad debts and – together with associated legal fees that are expended and delays in cash flow – place a significant financial burden on the facilities.

For these reasons, LeadingAge New York supports the central purpose of the legislation, which is to preclude a nursing home or other person or corporation from serving as a guardian, when its only interest is that of a creditor. However, we are concerned about the significant implications of implementing this legislation as proposed and its failure to address the underlying reasons for nursing homes and other providers having to resort to this practice. We would welcome an opportunity to address these issues with the bill sponsors and arrive at consensus legislation that protects incapacitated individuals as contemplated by Article 81 while ensuring that guardians and other responsible parties of these individuals meet their lawful financial obligations.

LeadingAge New York represents nearly 500 not-for-profit and public long term care providers, including nursing homes, home care agencies, senior housing, retirement communities, assisted living, adult care facilities, adult day health care and managed long term care.

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