

Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION

ELDER # 20

February 17, 2016

S. 5451-B

By: Sen. DeFrancisco

A. 3461-B

By: M of A Magnarelli

Senate Committee: Mental Health and
Developmental Disabilities

Assembly Committee: Judiciary

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THIS BILL WHICH WOULD ENACT PETER FALK'S LAW RELATING TO A GUARDIAN'S DUTIES UPON THE DEATH OR HOSPITALIZATION OF A PERSON SUBJECT TO AN ARTICLE 81 GUARDIANSHIP

This bill would require an Article 81 guardian to advise certain relatives of an incapacitated person (the "IP") subject to an Article 81 guardianship upon the passing or hospitalization of the IP. The Elder Law and Special Needs Section of the New York State Bar Association (the "Section") opposes this bill. The Section has the following concerns about this proposed legislation.

First, the legislation would require notice to "relatives." The term "relatives" is not defined anywhere in Article 81. It is therefore not clear from the legislation how far down a family tree a guardian needs to go with regard to who gets notice. This can put an undue burden on a guardian to locate people for whom the guardian has no contact information and who have not been in contact with the IP during the duration of the guardianship, especially when there are no "close" relatives like a spouse, children or siblings.

Second, the legislation does not allow for notice to significant others and friends. Given the number of nontraditional families, this is a serious concern.

Third, the legislation does not authorize the elimination of notice to "relatives" who, have stated that they do not want to be notified, are estranged, have engaged in abusive behavior, or who the incapacitated person does not want to receive notice. For example, what happens if an incapacitated person who resides in a battered women's shelter because she was physically abused by her husband is hospitalized. It does not make sense that the husband should be entitled to notice.

Fourth, the legislation uses the terms "elder", "dependent incapacitated adult", and "medical facility". These terms are not defined anywhere in Article 81. Mental Hygiene Law sec. 81.03 does define the terms "facility" and "mental hygiene facility".

Fifth, the legislation does not define the word “inform”. Is it sufficient to “inform” by regular mail if that is the only contact information available? Is sending an email or leaving a phone message sufficient, especially if time is of the essence (burial within 24 hours)? What if time is of the essence and the guardian has no quick means to inform relatives?

Sixth, the legislation does not differentiate between the duties of a guardian of the person and the duties of a guardian of the property. This can be an important distinction with respect to knowledge about relatives. In cases where only an independent (Part 36) property management guardian is appointed, that guardian may have little current information about the IP’s relatives.

The lack of any provision for judicial discretion with regard to who is entitled to receive the proposed notices makes this legislation extremely problematic. We also note that current New York law and practice may make the concerns that are the basis for this legislation less significant than they are in other jurisdictions.

Under present New York law an Article 81 guardian only has the right to control the disposition of the remains of a deceased IP if there is no surviving spouse, domestic partner, child over the age of 18, parent, or sibling over the age of 18. See Public Health Law sec. 4201.

In addition, it is the practice of many guardianship judges, in appropriate cases, to require personal needs guardians to consult with family members before medical decisions are made unless an emergency precludes such consultation.

Based on the foregoing, the Elder Law and Special Needs Section OPPOSES this legislation.

Memorandum prepared by: Ira Salzman, Esq.
Section Chair: JulieAnn Calareso, Esq.