

Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION

ELDER # 4

February 28, 2017

S. 4083

By: Sen. Golden

A. 1350

By: M of A Weinstein

Senate Committee: Mental Health and
Developmental Disabilities

Assembly Committee: Judiciary

Effective Date: 180th day after it shall have
become a law

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.

LAW & SECTION REFERRED TO: Section 81.03 of the mental hygiene law.

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THIS LEGISLATION

The Elder Law and Special Needs Section opposes this legislation as presently drafted. The primary intent of this bill is to prevent a health care provider from commencing a guardianship proceeding against an individual in its facility for the primary purpose of bill collection. We agree that the Guardianship Court should not be used as a forum to litigate disputes over medical bills where there is a suitable representative acting on behalf a compromised patient. However, the Guardianship Court provides the appropriate forum to adjudicate the needs of individuals without a suitable representative and for whom bill payment is only one aspect of his/her overall health and safety issues. Although we agree that abuses in bill collection/dispute practices must be prevented, we believe that the proposed legislation goes too far and will jeopardize the health and safety of some of the most vulnerable New Yorkers: those that are socially isolated or victims of financial abuse/neglect.

This legislation overlooks the inextricable relationship between an Alleged Incapacitated Patient's ("AIP") finances and his/her ability to access and coordinate appropriate care where there is no person acting responsibly on his/her behalf. The failure of an AIP to pay his/her facility bill is often a symptom of a more significant ongoing problem that cannot be resolved by a traditional collection action. A collection action is limited to adjudicating liability for a specific debt; only a Guardianship Court can appoint a fiduciary charged with addressing and paying for the specific needs of the

AIP to assure maintenance of their continued health and safety. As such, healthcare providers should not be stripped of their ability to commence an Article 81 proceeding in these circumstances.

Finally, the proposal conflicts both internally and with the existing statute. A more detailed analysis of those sections of this bill that we oppose appears below. In the interest of brevity we have not commented on those sections with which we agree or do not oppose.

Sections 2, 5 and 7 of the bill would prohibit a facility where the AIP resides from bringing an Article 81 guardianship proceeding where the petition is brought primarily for bill collection purposes. It would require an attestation to that effect. Courts would be prohibited from authorizing a guardian to compromise or satisfy a claim invoked by the petitioner against the AIP. The bill would only permit a facility where a person resides to bring a guardianship proceeding where a guardian is needed to "apply for or engage in planning necessary to establish eligibility for" Medicaid and there is no other available resource to do so.

Section 9 of the bill would prohibit facilities and certain others from serving as guardian for their residents under any circumstances.

We oppose Sections 2, 5, 7, and 9 of the bill for the following reasons:

1. The bill would prevent facilities from bringing a guardianship proceeding where someone in control of the AIP's financial affairs (i.e. a power of attorney or joint account holder) breaches his/her fiduciary responsibility resulting in non-payment of the medical bill. A common example would be an agent under a power of attorney who uses the AIP's funds to support himself instead of the resident.

2. Further, the bill would prevent a facility from bringing a guardianship proceeding for a socially isolated person. Such AIPs present two common scenarios. First, the AIP may be eligible for Medicaid but unable to secure the documentation necessary to verify same. Alternatively, the person may have assets but has given no one the authority to access them in order to pay bills necessary for needed care.

3. Guardianship Courts are uniquely qualified to deal with situations where individuals are socially isolated or being financially neglected/abused by a representative. Under such circumstances the individual needs the protections of the guardianship court (i.e. court-appointed counsel and/or court evaluators) to not only address the issue of payment for his/her immediate care but to execute a plan for continued support and maintenance.

4. In addition, this bill also could result in longer and possibly more restrictive placements in hospitals and nursing homes because facilities would be unable to arrange for the appropriate care/discharge of an AIP for whom bills could not be paid.

5. Section 2 of the bill, which attempts to carve out an exception to the prohibition against bringing a guardianship proceeding for debt collection purposes, is ambiguous, too narrowly drafted, and likely in direct conflict with Section 7 of the proposal. First, by making the exception conditional on the need for Medicaid, it does not address AIPs who have assets, but no reliable representative. Second, by restricting this exception to situations “where there is no other legally authorized or otherwise available resource”, it would prohibit the facility from bringing the proceeding if available resources exist whether or not such resource is willing to act in a reliable way. Further, it is not clear what the phrase "engage in planning necessary to establish eligibility for" Medicaid means. If the intent is to allow the provider to petition for the purposes of authorizing an allowable Medicaid spend-down, this provision is in direct conflict with Section 7 of the bill that prohibits the Court from authorizing an appointed guardian to satisfy a creditor’s claim “invoked by a petitioner.” To qualify for Medicaid, an individual’s assets must be spent on medical bills and under this proposal the Court would be prohibited from authorizing the payment of medical bills, thereby negating the intent to allow for Medicaid planning.

6. Section 7 of the bill would unjustifiably prohibit a court from authorizing a guardian to compromise or satisfy a creditor's claim invoked by a petitioner. Article 81.08(a)(9) requires all petitioners to set forth every known claim against an AIP, including healthcare providers. As such, healthcare provider’s claims will *always* be “invoked” by the petitioner and a guardian must have the authority to pay for the debts of an incapacitated person. There is no public policy in favor of depriving a guardian of this critical duty.

7. Lastly, Section 9 of the bill would prohibit facilities, creditors and certain other entities from serving as a person’s guardian under any circumstances. However, in limited circumstances, such as where documentation is necessary to complete a Medicaid application and there are no assets to pay a guardian, a facility may be an appropriate guardian. The statute already limits the appointment of facility as guardian to situations where "no other person or corporation is available or willing to act as guardian or to provide needed services for the incapacitated person." As such, Section 9 of the bill that prohibits facilities, creditors and certain other entities from serving as a person's guardian under any circumstances is too restrictive.

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