

Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION

Elder # 13

November 20, 2015

S. 4642-A
A. 6510-A

By: Senator Golden
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 AND 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 the bill as presently drafted. We believe that there are certain circumstances in which it may be appropriate for a healthcare facility to commence an Article 81 proceeding, but believe that there is an inherent conflict of interest in having a healthcare facility serve as a temporary guardian or guardian under Article 81. The bill, as presently drafted, does not have adequate safeguards for the individual patient. Many of the provisions of the bill are worthy of consideration and adoption, but we believe there are additional nuances that need to be addressed to protect the individual patient.

A more detailed analysis of the eight sections of this proposed legislation appears below.

Section 1 of the bill would redefine the term "available resources" in the statute to include "all persons identified in subparagraphs (i) through (iv) of Paragraph 1 of subdivision (g) of Section 81.07 of this article." What this provision of law appears to be trying to do is to make it clear that family members are to be considered an available resource. This is a laudable goal but this proposed statute as drafted is ambiguous. The cross referenced statute concerns individuals who are entitled to service of process in a guardianship proceeding. Under those sections of the law, certain close relatives are entitled to service. If none of those individuals are known to the petitioner, the notice has to be given to at least one or not more than three of the living relatives of the alleged incapacitated person to the nearest degree of kinship who are known to the petitioner. As drafted it is not clear whether the people who would only be entitled to service of process if close relatives are not known would be still need to be listed as available resources. This bill should therefore be revised to state that available resources include, "All persons entitled to notice pursuant to subparagraphs (i) through (iv) of Paragraph 1 of subdivision (g) of Section 81.07 of this article."

Subdivision 2 of the legislation would prohibit all healthcare facilities from bringing an Article 81 guardianship proceeding "where the petition is brought primarily for purposes of bill

collection or resolving a bill collection dispute." The justification section of the proposed bill only makes reference to nursing homes. However, this section of the law refers to a petition being brought by a "facility." Mental Hygiene Law Section 81.03(k) defines the term "facility" to mean "a facility, hospital, or school, or an alcoholism facility in this state as such terms are defined in Section 1.03 of this chapter, a substance abuse program as such term is defined in Article 19 of this chapter, an adult care facility as such term is defined in Section 2 of the social services law, or a residential healthcare facility or a general hospital as such terms are defined in Section 2801 of the public health law." This bill if enacted would therefore not just affect nursing homes, it would affect all healthcare facilities and all residential care facilities of whatever type within the state of New York. We believe there are circumstances where health care facilities including nursing homes should be able to commence a guardianship proceeding.

Section 3 of the bill would clarify which agents acting under power of attorney are entitled to notice of a guardianship proceeding. We believe this is a good technical correction.

Section 4 of the bill would amend the statutes by requiring petitioners to identify steps taken to identify available resources and state specifically why available resources are not sufficient or reliable enough to meet the alleged incapacitated person's needs without the appointment of a guardian. We support this section.

Section 5 of the bill would require that guardianship petitions contain contact information for all available resources and include any documents known to petitioner that grant legal authority to available resources. It would further require the petition to state the reasons why it is requesting the revocation of any power of attorney or healthcare proxy. It would also require an affirmative statement that the petition is not brought primarily for the purposes of bill collection or resolving a bill collection dispute. We **OPPOSE** the requirement of the affirmative statement. There are circumstances where a guardianship may be required for these purposes, such as to secure government benefits.

Section 6 of the bill would make a technical correction to the list of duties of the court evaluator with regard to powers of attorney. We support this section.

Section 7 of the bill makes a technical correction to the bill with regard to reference to powers of attorney. We support this section.

Section 8 of the bill would prohibit courts from appointing a creditor or healthcare provider as a guardian. Under present law the court is permitted to do this if no one else is available to act. We **OPPOSE** this section of the bill and believe that the law should remain unchanged. The appointment of a healthcare provider or creditor as a guardian is extremely rare. The courts should continue to have the discretion to make such appointments when they are appropriate. For example, sometimes the only reason that a guardian is necessary is so that document need for a Medicaid application can be obtained. A healthcare provider might be an appropriate guardian under these circumstances.

For the reasons stated above, the Elder Law and Special Needs Section of the New York State Bar Association **OPPOSES** this legislation.

Person who prepared this Memorandum: Ira Salzman, Esq.

Section Chair: JulieAnn Calareso, Esq.