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Nursing Home Petitioners and Guardianship

An article appearing in the *New York Times* on January 25, 2015, sent chills through a subset of the guardianship bar. The article, titled "To Collect Debts, Nursing Homes Are Seizing Control Over Patients,"[1] was targeted at attorneys who represent nursing homes as petitioners in guardianship proceedings. The charge was that many of these attorneys use New York's guardianship statute, codified at Article 81 of the Mental Hygiene Law (MHL), to hurt rather than help institutionalized incapacitated people. The article featured a devoted husband forced to defend a guardianship proceeding filed by his wife's nursing home to collect a large and growing receivable.

Article 81

Using guardianship to collect a debt owed by an incapacitated person is antithetical to the language and spirit of Article 81. This is beyond dispute. From the legislative findings and the purpose as set forth in MHL § 81.01, through the final provision on post-death proceedings, the statute is there to protect the Alleged Incapacitated Person (AIP). What is not beyond dispute, however, is how and when nursing homes can *permissibly* resort to guardianship to protect their incapacitated residents.

In her article, the author wrote:

> In a random, anonymized sample of 700 guardianship cases filed in Manhattan over a decade, Hunter College researchers found more than 12 percent were brought by nursing homes. Some of these may have been prompted by family feuds, suspected embezzlement or just the absence of relatives to help secure Medicaid coverage. But lawyers and others versed in the guardianship process agree that nursing homes primarily use such petitions as a means of bill collection – a purpose never intended by the Legislature when it enacted the guardianship statute in 1993.[2]

The interesting question raised by the article is whether and when a nursing home that is motivated by a desire to get paid on an AIP's account should be able to use the guardianship system.

Not surprisingly, providers of long-term care have had a long and intimate relationship with the guardianship statute. After all, nursing homes and Article 81 both serve people who, due to compromised capacity, lack the ability to manage their own financial and/or personal affairs. So what does a healthy relationship between the nursing home industry and the guardianship judiciary look like, and is reform needed?

Article 81 was born of pragmatism. When the committeeship and conservatorship statutes stopped serving the public's needs, because they either required a draconian finding of incompetence or provided only for financial management, the Legislature got to work. In drafting New York's modern day guardianship statute, legislators envisioned a system whereby court-appointed fiduciaries would be given specifically tailored powers designed to dovetail with an AIP's particular functional deficits when no less-restrictive alternative was available to protect the AIP's interests.

From a purely pragmatic perspective, guardianship should be readily available to address the number-one need of incapacitated individuals who require in-patient care: to wit, having access to that care.

Risk of Discharge

In New York State, a nursing home resident who has no means of financing his or her care is at risk of discharge for non-payment under regulations promulgated by the Department of Health. Nursing homes, like other providers of goods and services, are not obligated to render care without being paid for doing so. An AIP, even one

who resides in a long-term care facility, *is* therefore in need of protection for the purposes of Article 81.

A candidate for the appointment of a guardian must meet a two-pronged test under § 81.02. First, "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."[3] Second, "that the person agrees to the appointment, or that the person is incapacitated."[4] Nursing home residents with dementia and complex medical needs, who have no payment source for their nursing home care and are therefore at risk of discharge, meet this two-pronged test. So what is the problem?

The problem is that a successful guardianship petition filed by a nursing home means that the nursing home gets paid, even though Article 81 was not passed to ensure the solvency of long-term care providers. This is true. But is the nursing home's financial stake in the proceeding relevant? Would "a facility in which the person alleged to be incapacitated is a patient or resident" have unqualified standing to commence a guardianship proceeding under § 81.06 if the nursing home petitioner's pecuniary interest was a legitimate concern? The answer to this rhetorical question is no.

Nonetheless, the perception persists that nursing homes overreach when they petition for guardianship. Therein lies the need for reform. In the world of long-term care providers and incapacitated nursing home residents, there lives an intractable problem for which no solution presently exists. That problem is a nursing home's inability to establish an abandoned incapacitated nursing home resident's Medicaid eligibility without judicial intervention.

Public Benefits

According to the Department of Health, 90% of New York State nursing home residents depend on public benefits to finance their long-term care needs, typically Medicaid. While the Department of Health describes the Medicaid application process as "comprehensive," that is an understatement. Applicants for long-term Medicaid coverage must submit five years of banking records, explain and document deposits to and withdrawals from their accounts, and provide proof of their income, citizenship and residency. Private attorneys charge thousands of dollars to complete a Medicaid application. A nursing home resident with senile dementia and no support network in the community is hard-pressed to document his or her eligibility for Medicaid.

While most nursing homes have a Medicaid department, only the resident or the resident's legal representative has the legal standing to access the private records that must be submitted to the Department of Social Services (DSS) in support of a Medicaid application. Every nursing home resident who lacks the capacity to sign a release of information, or to appoint an authorized Medicaid representative, is a potential AIP.

Right now, a guardianship is the only tool in a nursing home attorney's arsenal when help is needed documenting an incapacitated resident's Medicaid eligibility. But, nursing homes petitioning for guardianship do not only provoke the ire of *New York Times* reporters; they are also a thorn in the side of the judiciary.

Imagine a comatose nursing home resident with no family whose only known source of income is Social Security. The resident's landlord finds a single bank statement in the resident's apartment showing a small checking and savings account in the resident's sole name. When the nursing home's attorney files for guardianship, because the bank will not release five years of statements without the resident's consent, the judge is understandably concerned that there will be no funds available to pay a court evaluator, court-appointed counsel, the petitioner's fees, and/or the guardian's compensation.

Different judges take different approaches to the problem of low-asset incapacitated nursing home residents needing, but lacking the capacity to pursue, Medicaid coverage. Some judges pressure DSS's guardianship program to accept the appointment. Others appoint the nursing home administrator as property management guardian. One judge authorized the court evaluator to compile the AIP's Medicaid documentation, and another judge adjourned the hearing so petitioner's counsel could track down the AIP's recalcitrant power of attorney. Sometimes judges appoint a non-profit guardianship program. These appointments give rise to other problems related to inadequate staffing and experience. Additionally, Medicaid budgeting methodologies that deduct the guardian's compensation from the facility's reimbursement leave the facility with a shortfall that grows month by month – often from the time of the guardian's appointment through the resident's date of death.

Conclusion

In an optimum post-reformation world, guardianship attorneys representing nursing home petitioners would not be faulted for looking to Article 81 when they have no other way to establish an incapacitated resident's Medicaid eligibility. The judiciary would see an alignment between the interests of the AIP, who needs to have a way of paying for medically necessary in-patient care, and the nursing home that is entitled to be paid for providing that care. And the system would be streamlined so fiduciaries could be empowered to process an AIP's Medicaid application while incurring only minimal court-ordered fees and expenses. There is, in short, a perfect solution for what is currently a most imperfect system. ■

1. Nina Bernstein, *To Collect Debts, Nursing Homes Are Seizing Control Over Patients*, N.Y. Times, Jan. 25, 2015.
2. *Id.*
3. MHL § 81.02(a)(1).
4. MHL § 81.02(a)(2).