

The Use and Misuse of Guardianship by Hospitals and Nursing Homes

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ABSTRACT: While guardianship can be an appropriate and effective tool in some situations, this paper examines the ways in which hospitals and nursing homes contribute to the misuse of guardianship, the impact of guardianship on vulnerable individuals, and strategies to better protect individuals by avoiding, limiting, or terminating guardianships and offering individuals more robust protections throughout the guardianship process.

I. Introduction

While much has been written about the failings of the guardianship system in states across the country, there has been more limited examination of how hospitals and nursing facilities contribute to the unnecessary and inappropriate disempowerment of vulnerable individuals through guardianship.¹ In some cases, statutory and procedural barriers to utilizing less restrictive alternatives, gaps in the safety net, and practical realities leave health care facilities no option but guardianship. In other cases, the institutions' own interests including hospitals' financial imperative to reduce patient length of stay, the need to free beds for those with more acute care needs, institutions' liability concerns, facilities' interest in having reliable bill payors, and punitive responses to challenging patients and residents set the stage for guardianships that may be inappropriate. Once initiated, these petitions are frequently granted, resulting in likely benefits for institutions but no assurance they will protect the individual's best interests or honor their rights.

While guardianship can be an appropriate and effective tool in some situations, this paper examines the ways in which hospitals and nursing homes contribute to the misuse of guardianship, the impact of guardianship on vulnerable individuals, and strategies to better protect individuals by avoiding, limiting, or terminating guardianships and offering individuals more robust protections throughout the guardianship process.

¹ The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act uses the term "guardianship" to refer to the power to make decisions about the personal affairs of another person and "conservatorship" to refer to the power to manage another person's property and financial affairs. UNIF. GUARD., CONSERV. & PROT. ARR., ACT, §101 .(UNIF. L. COMM'N 2017), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7218ba8f-df8a-2cc1-3a29-053345ffd12c&forceDialog=0>. State laws often use the terms differently. For simplicity, we will use the term "guardian" or "guardianship" to refer to any fiduciary appointed by a court for a person in need of protection.

II. Hospital Incentives for Initiating Guardianship

a. Facilitating Transfer to Another Level of Care for Patients with Cognitive Impairments

For many individuals, guardianship is initiated when an individual is in the hospital, appears to lack capacity, has no apparent or available legal representative, and needs to be moved to another level of care.² Nationally, hospital stays are short – on average, only 4.6 days³ – so discharge planning has to start promptly.⁴ Unfortunately, for patients hospitalized for all manner of emergencies, surgery, or illness, the assessment of capacity to determine what comes next likely occurs very promptly after admission on what might be the patient’s worst day. Trauma, medications, urinary tract infections, electrolyte imbalances, dehydration, or other short-term conditions can all diminish patient’s capacity⁵ even if the individual’s cognitive

² Because data regarding guardianships is scarce across the country, it is difficult to know what percentage of guardianships is initiated by or at the behest of hospitals and nursing homes. One study of 700 guardianship cases in New York determined that 17% of guardianship petitions were filed by hospitals and 12% were initiated by nursing homes. Nina Bernstein, *To Collect Debts, Nursing Homes Are Seizing Control Over Patients*, N.Y. TIMES (Jan. 25, 2015), <https://www.nytimes.com/2015/01/26/nyregion/to-collect-debts-nursing-home-seizing-control-over-patients.html?hp&action=click&pgtype=Homepage&module=second-column-region®ion=top-news&WT.nav=top-news>. However, since in some cases, a family member or other individual may be directed by the hospital or nursing home to file to obtain guardianship over an individual to facilitate placement, payment, or decision-making, the actual number of petitions filed regarding institutionalized individuals would be challenging to document.

³ William J. Freeman, et al., *Overview of U.S. Hospital Stays in 2016: Variation by Geographic Region*, AG’Y FOR HEALTHCARE RES. & QUAL., Statistical Brief #246 (last modified 12/13/2018), <https://www.hcup-us.ahrq.gov/reports/statbriefs/sb246-Geographic-Variation-Hospital-Stays.jsp>

⁴ A resource written by staff at Houston Methodist Hospital on the impact of Diagnostic Related Groupings on Length of Stay advises staff to begin discharge planning on the day of admission and identify barriers to discharge early in the patient’s stay. Aileen DeJelo & Tali Edge, *Diagnosis Related Groups (DRGs) and Impact on Hospital Length of Stay (LOS)*, NAHSE HOUS. CHAPTER (June 24, 2019), <https://www.nahsehouston.org/2019/06/24/diagnosis-related-groups-drGs-and-impact-on-hospital-length-of-stay-los/>.

⁵ There is no single factor that brings on hospital-induced delirium. Once in the hospital, delirium can be caused by a combination of factors, including surgery, infection, isolation, dehydration, poor nutrition and medications such as painkillers, sedatives and sleeping pills. Roger Collier, *Hospital-induced Delirium Hits Hard*, CAN. MED. ASS’N J. (Jan. 10, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3255198/>.

abilities will likely improve. Up to a third of patients 70 years old and older experience delirium in the hospital—which typically lasts from a couple days to a few weeks-- and the rate is much higher for those in intensive care or undergoing surgery.⁶ Because nursing homes require the person or a representative to consent to admission and care, if a patient without a surrogate decision-maker is incapable consenting to transfer or making arrangements for care at home, hospital staff sometimes pivot to the guardianship system to resolve the dilemma.

Unfortunately, the information presented to the court about the person’s abilities or, more frequently, their deficits, is often based on only a brief evaluation by a doctor or psychologist during what may be a patient’s moment of crisis. That hospital staff person can likely report on test scores, lab results, medications, and diagnoses, but may have no prior relationship with the person, no occasion to observe the individual’s ability to function in day-to-day life, and a reluctance or lack of opportunity to predict the likelihood the person will regain capacity. Better solutions are necessary for providing supports and ensuring safe discharges without compromising a person’s rights for the rest of their life.

b. Reducing “Length of Stay”

As lawyers who serve as counsel to a Massachusetts hospital acknowledged, “The scramble to secure guardians for incapacitated patients is a major yet mostly hidden source of stress at American hospitals.⁷ One of the most powerful incentives to pursue guardianship is hospitals’ desire to reduce patients’ length of stay, a key determinant of profitability which is

⁶ *Id.*

⁷ Wendoly Ortiz Langlois, JD, and Dianne Yacovone, JD, *Improving the Guardianship Process: Better for Hospitals and Better for Patients*, HEALTHCITY (May, 13, 2019), <https://www.bmc.org/healthcity/policy-and-industry/guardianship-process-change-better-patients-and-hospitals>

used to gauge the efficiency of the hospital.”⁸ Medicare reimbursement, which accounts for more than 40 percent of hospitals’ revenues,⁹ depends on the diagnostic-related groups (DRGs) assigned to the patient.¹⁰ If the patient is an outlier who requires a longer stay than the typical patient assigned to the same DRG, the hospital generally loses money. Since obtaining a guardian usually delays discharge and increases costs,¹¹ hospitals can be eager to petition for the appointment of a guardian as soon as there is an indication a patient may need one.

c. Other Financial Incentives

Another motivation for invoking the help of the court is the desire to have a capable person ensure the hospital bill is paid from the patient’s assets or a Medicaid application is initiated. If these tasks seem challenging for the patient and no legal representative or informal

⁸ Hyunyoung Baek et al., *Analysis of Length of Hospital Stay Using Electronic Health Records: A Statistical and Data Mining Approach*, PLOS ONE (Apr. 13, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5898738/> (“The length of stay (LOS) is an important indicator of the efficiency of hospital management. Reduction in the number of inpatient days results in decreased risk of infection and medication side effects, improvement in the quality of treatment, and increased hospital profit with more efficient bed management.”). *See also Decreasing the Patient Length of Stay*, CENTRACK, <https://centrak.com/blog-decreasing-patient-length-of-stay/#:~:text=The%20average%20length%20of%20stay,cost%20of%20%2410%2C400%20per%20day> (last visited Feb. 17, 2021); Virginia Public Guardian and Conservator Program, *Biennial Report of the Virginia Department for Aging and Rehabilitative Services* 9 (2018), <https://rga.lis.virginia.gov/Published/2017/RD597/PDF> (“[H]ospitals . . . have a strong financial incentive to initiate guardianship proceedings . . .”).

⁹ Given the disparity between the public and private reimbursement levels, the average payment a hospital receives depends on its payer mix. According to the American Hospital Association, 40.8 percent of hospital costs are attributable to Medicare, 33.4 percent to private payers, 18.5 percent to Medicaid, and 4.2 to uncompensated care. *Trendwatch Chartbook 2018*, AM. HOSP. ASS’N 39 (2018), <https://www.aha.org/system/files/2018-07/2018-aha-chartbook.pdf>

¹⁰ *See Design and Development of the Diagnosis Related Group (DRG)*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Oct. 2019), [https://www.cms.gov/icd10m/version37-fullcode-cms/fullcode_cms/Design_and_development_of_the_Diagnosis_Related_Group_\(DRGs\)](https://www.cms.gov/icd10m/version37-fullcode-cms/fullcode_cms/Design_and_development_of_the_Diagnosis_Related_Group_(DRGs)). Prospective payment rates based on Diagnosis Related Groups (DRGs) have been established as the basis of Medicare’s hospital reimbursement system. The DRGs are a patient classification scheme which provides a means of relating the type of patients a hospital treats (i.e., its case mix) to the costs incurred by the hospital.

¹¹ Daniel J. Ricotta, et al., *The Burden of Guardianship: A Matched Cohort Study*, J. of HOSP. MED. (Sept. 1, 2018) (Study concluded that “the guardianship process was associated with prolonged hospital stay and higher total hospital charges even when compared with matched controls.”) <https://pubmed.ncbi.nlm.nih.gov/29401209/>

support is available to help, guardianship may be the most efficient way for hospitals to assure they get paid.^{12 13}

Another potential financial incentive relates to §3025 of the Patient Protection and Affordable Care Act.¹⁴ Under that provision, hospitals are penalized through reduced reimbursements for excess readmissions. If patients go home to situations in which there may be “gaps in care, gaps in communication, [and] gaps in adequate preparation for patients and families,”¹⁵ they may be more likely to require readmission. Hospitals are therefore incentivized to engage in whatever discharge planning—including the possible appointment of a guardian to transfer the person to a nursing home—they believe will reduce the risk of rehospitalization.

d. Freeing Beds for Patients with More Acute Needs

Hospitals also have other motivations for pursuing guardianship promptly. Recently, during the COVID-19 pandemic, many hospitals were overwhelmed, short-staffed, and experiencing bed shortages.¹⁶ In these situations, hospital staff were understandably frustrated turning away acutely ill potential patients while patients who were ready for discharge continued

¹² Ken Labowitz and Veronica E. Williams, *Hospital Sponsored Guardianships: How to Respond*, <https://static1.squarespace.com/static/5807a480d482e9eb1f5d9c54/t/589f5d746b8f5b048ef72261/1486839157722/hospital-sponsored-guardianships-how-to-respond.pdf>

¹³ Some observers object to the use of guardianship as a mechanism for debt collection. See discussion *infra* in Section VI. Similarly, in a 2019 Richmond Times-Dispatch series on guardianship, Sally Balch Hurme, a national expert on guardianship noted that when fiduciaries are appointed for the purpose of paying health care institutions’ bills, “That is the court serving as debt collector.” Bridget Balch, *Unguarded: Part 3: He Asked for a Lawyer. The Person Charged with Protecting His Rights Thought He Didn’t Need One*. RICH. TIMES-DIS. (Nov. 30, 2019), https://richmond.com/news/local/he-asked-for-a-lawyer-the-person-charged-with-protecting-his-rights-said-she-thought/article_21363dc4-715f-5be9-bb7d-13d0fea1e2fa.html. She termed the use of the guardianship system to save hospitals money and to collect nursing home debts “an abuse of the court process.” *Id.*

¹⁴ 42 U.S.C. 18001 (2010)

¹⁵ Anna Gorman & Heidi de Marco, *Gaps in Care Persist in Transition from Hospital to Home*, KAISER FAMILY FOUNDATION (Dec. 20, 2016)

¹⁶ See, e.g., Reed Abelson, *COVID Overload: Hospitals are Running Out of Beds for Patients*, N.Y. TIMES (Nov. 27, 2020), <https://www.nytimes.com/2020/11/27/health/covid-hospitals-overload.html>

to occupy a bed until decisions about a safe discharge could be made by the patient or other decisionmaker. If a surrogate is required to participate in discharge planning, the hospital may wish to have a guardian appointed promptly. Depending on the court and other factors, that process could take from a couple days to several months.^{17 18}

e. Fear of Negative Consequences Resulting from Unsafe or Inappropriate Discharges

Hospitals also may fear consequences if they discharge a person of questionable or limited capacity to a situation that proves unsafe. Medicare conditions of participation require hospitals to make “appropriate arrangements for post-hospital care.”¹⁹ Hospitals are required to determine the availability of, and a patient’s access to, the post-hospital services²⁰ necessary to protect against adverse health consequences.²¹ If a patient lacks capacity as well as a legal representative or informal supports, his or her access to appropriate services would likely be limited, potentially resulting in foreseeable harm to the individual and concerns about violation of the conditions of participation. Hospitals likely also fear the possibility of both civil liability and negative media coverage if they discharge an incapacitated patient to an unsafe situation and the individual comes to harm.²² One hospital discharge planner remarked that as soon as doctors

¹⁷See, e.g., Langlois and Yacovone, *supra*, note 7.

¹⁸ The Delaware legislature recently addressed the difficulties hospital face when they are unable to discharge patients who no longer require acute care. Senate Bill 246, enacted in 2020, creates a process through which hospitals can seek the appointment of a guardian for patients who appeared to have been abandoned by their families. The hospital must provide two notices of the “need to seek a guardian for the patient” to the patient, the patient’s surrogate, or the patient’s family if there is no surrogate before pursuing guardianship. <https://delcode.delaware.gov/title16/c025/> at §2519.

¹⁹ 42 CFR 482.43(a)(1) (2019)

²⁰ 42 CFR 482.43(a)(2) (2019)

²¹ 43 CFR 482.43(a) (2019)

²² See, e.g., Eileen Croke, *Nurses, Negligence and Malpractice*, AM. J. OF NURSING, (Sept., 2003), https://www.nursingcenter.com/journalarticle?Article_ID=423284&Journal_ID=54030&Issue_ID=423107 and Stella Fitzgibbons, *Liability Mistakes You Want to Avoid*, TODAY’S HOSPITALIST (Nov. 2009), https://www.nursingcenter.com/journalarticle?Article_ID=423284&Journal_ID=54030&Issue_ID=423107

note in the chart that a person is, at least temporarily, slightly confused, lives alone, and has no one to provide the round-the-clock care the patient requires, it's the "kiss of death."²³

Guardianship proceedings will be initiated.²⁴ Those proceedings will almost inevitably lead to the appointment of a guardian and, because 24 hour coverage at home is often not available or is challenging to arrange, placement in an institution. After guardianship is established, factors including the extent to which the person recovers capacity, state statutes and rules, court practice, and whether the patient has access to advocates and supporters will all affect the patient's chances of terminating the guardianship or returning to the community.

Similarly, if a patient's records from a previous hospitalization state that the person was incapacitated at that time, the discharge planner noted doctors are reluctant to counter that assessment even if the patient has substantially improved.²⁵ In those cases, doctors fear the hospital will be accused of negligence if there is any adverse outcome when the patient goes home because the hospital should have been aware of the individual's past cognitive impairment.²⁶

III. Hospital Process for Obtaining Guardianship

In some cases, hospitals are able to persuade family or friends to file promptly for guardianship or rely on them to make decisions informally. In other cases, especially if the patient has no informal supports or is a victim of abuse, neglect, or exploitation by a fiduciary or family member, the hospital might involve Adult Protective Services and that agency might

²³ Telephone Interview with D.C., hospital discharge planner who requested anonymity (Feb. 12, 2021).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

pursue guardianship. But in many cases, the hospital itself will take responsibility for initiating the petition or for supporting family members through the process of petitioning for guardianship. Many hospitals contract with outside counsel to file these petitions realizing that private attorneys often have more experience in these types of cases than in-house counsel or social work staff and have relationships with court staff that can help expedite cases.²⁷ As in-house counsel for one busy Boston hospital noted, “In early 2018 — before an extensive overhaul of our guardianship process — the median length of stay for a [Boston Medical Center] patient needing a guardian was about 100 days, compared to a hospital-wide average length of stay of just 5 days. In extreme cases, some patients without guardians have stayed at BMC for more than a year after they were ready for discharge.”²⁸ Bringing in outside counsel to address these issues was an obvious choice; hospital leadership swiftly determined that the financial benefit of freeing up the hospital beds more quickly would far outweigh the costs of retaining outside counsel.²⁹ The hospital’s array of guardianship initiatives including, primarily, the use of outside counsel, resulted in many other positive outcomes for the hospital:

Since April 2018, when we put the new process in place, the average length of stay for patients needing guardianship has dropped from 150 days to 39 days — a 75% reduction — and the median length of stay has dropped from about 100 days to 34 days.

Implementing the new system has also freed up an average of 5 to 10 beds per day....

The intervention has also relieved the workload for our social work team... We estimate the team's overall guardianship workload has decreased by 30%... The cost savings to the

²⁷ Langlois and Yacavone, *supra*, note 7.

²⁸ *Id.*

²⁹ *Id.*

hospital have been considerable.³⁰

IV. Conflicts of Interest and Abuses in Hospital-Initiated Guardianship Proceedings: the Virginia Commonwealth University Health System Case Study

While the imposition of guardianship can have negative consequences for any patient, serious concerns arise when the hospital controls or influences not only who files the petition but also who is appointed as guardian ad litem and guardian. A year -long investigation by the Richmond Times-Dispatch revealed an egregious example of one hospital’s interests permeating every aspect of the guardianship process. The investigation documented that a law firm representing Virginia Commonwealth University (VCU) Health System took hundreds of hospital patients to court and frequently asked the court to appoint one of the firm’s lawyers as the patients’ guardians.³¹ In addition, the hospital attorney often recommended to the court the individual who should be appointed as guardian ad litem and that individual, who was supposed to be an impartial court investigator, was also paid by the hospital at a rate higher than she would have received from the Commonwealth pursuant to state law³² The guardian-ad-litem returned the hospital attorney’s favor by usually recommending the court appoint him as guardian.³³

In the VCU cases, an array of ethical problems arose both because the courts allowed

³⁰ *Id.*

³¹ Editorial, “Unguarded:” *Protecting the Vulnerable*, RICH. TIMES-DIS., Dec. 7, 2019 https://richmond.com/opinion/plus/editorial-unguarded-protecting-the-vulnerable/article_ba24cbd1-f57e-5281-b84e-7b37c247972a.html

³² *Id.*

³³ Bridget Balch, *Unguarded: Part 3: He Asked for a Lawyer. The Person Charged with Protecting His Rights Thought He Didn’t Need One*. RICH. TIMES-DIS. (Nov. 30, 2019), https://richmond.com/news/local/he-asked-for-a-lawyer-the-person-charged-with-protecting-his-rights-said-she-thought/article_21363dc4-715f-5be9-bb7d-13d0fea1e2fa.html

important procedural protections to be waived and failed to intervene to prevent obvious conflicts of interest. For example, VCU's counsel always filed a request to waive the requirement that the hearing notice and the petition be mailed to any known family of the alleged incapacitated person at least seven days before the scheduled hearing.³⁴ While this waiver was presumably supposed to be limited to emergency situations, VCU's routine request benefitted the hospital by expediting cases and limiting objections from families but disserved the hospital patient whose family might, without notice of the hearing, have no opportunity to inform the court of less restrictive means of decision-making that were already in place, seek guardianship themselves, retain a lawyer for the alleged incapacitated individual, or otherwise advocate for the patient. And although the guardian ad litem reported that she always notified the individual of his or her rights, those individuals rarely exercised them. Only a handful of the respondents were represented by counsel and the individuals only occasionally appeared at their hearings, even by teleconference.³⁵

Since the hospital's ubiquitous counsel and guardian ad litem apparently garnered a significant portion of their income from the hospital,³⁶ their obligation to serve the best interests of the individual and their duties to the court must have repeatedly come into conflict with their desire to honor the hospital's desire to discharge individuals swiftly. The guardian ad litem might have been reluctant to recommend against guardianship, request counsel for the individual, or advocate in favor of appointing a family member as guardian if those results could have

³⁴ *Id.*

³⁵ Bridget Balch, *Unguarded: Discharged Part 1* (Nov. 16, 2019) https://richmond.com/news/local/unguarded-a-three-part-series-on-how-richmond-s-guardianship-process-leaves-vulnerable-people-unprotected/article_d39e242e-9213-5600-8150-da9566c143b7.html

³⁶ *Id.*

slowed the discharge process. Similarly, the guardian might have been unwilling to recommend a delay in discharge to obtain placement in a better quality nursing home or to arrange home and community based services. Although the court appointed the hospital's counsel as a "limited" guardian,³⁷ the guardian alone could determine what was in the individual's best interest. The guardianship order stated that the guardian's decision "shall not be subject to question by any person."³⁸

According to the Post-Dispatch report, these guardianship orders were issued, often on the recommendation of the guardian ad litem even when there were loving and involved family members available to serve and even on some occasions when there was medical testimony that the individual had capacity.³⁹ Once appointed, the hospital attorney did not regularly visit the individuals,⁴⁰ and sometimes placed them in substandard nursing homes or was unaware of harm that befell them in the institutions in which he placed them.⁴¹ Moreover, in some cases, remarkably, even when the guardian resigned, the hospital lawyers reserved the right, without any further court order, examination of the circumstances, or contemporaneous capacity evaluation, to resume authority to make medical and discharge decisions if the individual ended up back at VCU.⁴²

³⁷ Bridget Balch, *Unguarded: Part 2: A Paralyzed Man Owed VCU \$86,000. VCU's Lawyer Asked to Be His Guardian or Have Him Put On the Street*, RICH. TIMES-DIS. (Nov. 23, 2019) https://richmond.com/news/local/a-paralyzed-man-owed-vcu-health-86-000-vcu-s-lawyer-asked-to-be-his/article_c75b2d6c-f168-5522-a12b-c71b6bb3e4b0.html; Bridget Balch, *Unguarded: Discharged Part 1* (Nov. 16, 2019) https://richmond.com/news/local/unguarded-a-three-part-series-on-how-richmond-s-guardianship-process-leaves-vulnerable-people-unprotected/article_d39e242e-9213-5600-8150-da9566c143b7.html

³⁸ Bridget Balch, *Part 1, supra*, note 35.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* In contrast, Virginia's well-regarded public guardianship program sets a caseload limit of 20 individuals, requires monthly visits, and requires a person-centered approach. *Id.*

⁴² *Id.*

While the VCU example is certainly not typical practice for hospitals or courts,⁴³ appointment of a hospital’s attorney to serve as the hospital patient’s guardian is not unique to the VCU cases. A Michigan court removed a lawyer from several guardianship cases in which the lawyer was paid by the hospital pursuant to an undisclosed agreement to petition for guardianship and serve as guardian.⁴⁴ In South Carolina, an attorney who served as hospital general counsel received a public reprimand after she agreed to serve as a patient’s guardian and conservator.⁴⁵

V. Consequences for Hospital Patients who are the Subject of Guardianship Petitions

The benefits for hospitals – including those who are acting entirely ethically -- of expediting guardianship petitions are clear and numerous. But it is unlikely that hospital discharge planners or physicians or psychologists who attest to a hospital patient’s incapacity imagine the magnitude and permanence of the losses that may ensue from their routine efforts to

⁴³ It should be noted that other hospitals in the Richmond area did not follow VCU’s example. According to the Times-Dispatch, Bon Secours Health System, which operates seven hospitals in Virginia and Sentara Healthcare, which operates 11 Virginia hospitals, hire attorneys to bring guardianship petitions but they do not allow those attorneys to also serve as the patients’ guardians. Bridget Balch, *Part I, supra*, note 35. Following the publication of the Time-Dispatch investigative report, VCU announced it was meeting with community partners to explore alternatives to guardianship, Bridget Balch, *Bill Inspired by RTD “Unguarded” Series Passes Unanimously*, RICH. TIMES-DIS (March 8, 2020) https://richmond.com/news/plus/bill-inspired-by-rtd-unguarded-series-passes-unanimously/article_71e632a6-ca74-5c71-8470-66647894df2c.html, and the Virginia legislature unanimously passed a bill to “prohibit, except for good cause shown, the court from appointing a guardian or conservator for the respondent an attorney who has been engaged by the petitioner to represent the petitioner within three calendar years of the appointment.” SB 1072 (2020) <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB1072>

⁴⁴ Beth LeBlanc, *Judge Requests Investigation of Lansing Lawyer, Removes Her from Cases*, LANS. ST. J. (Oct. 3, 2017), <https://www.lansingstatejournal.com/story/news/local/2017/10/03/judge-requests-investigation-lansing-lawyer-conflicts-interest-judge-requests-investigation-lansing/712704001/>; Debra Cassens Weiss, *Cases Raise Questions about Adult Guardianship and Lawyer-Hospital Relationships*, ABA J. (Oct. 10, 2017) https://www.abajournal.com/news/article/questions_are_raised_about_guardian_oversight_and_lawyer_hospital_relations

⁴⁵ *Id.*

achieve a short-term hospital goal. The chain of events that begins soon after a patient arrives at the hospital to facilitate discharge may become an immutable force that alters the rest of the individual's life.

Commentators often tout the importance of avoiding prolonged hospital stays to reduce the risk of hospital-borne infections.⁴⁶ However, a few extra days in a hospital may be sufficient for some patients to avoid nursing home placement where there is also a significant concern with infections,⁴⁷ as well as increased isolation from family and friends and, frequently, a lower quality of care.⁴⁸ Accelerating the judicial proceedings also gives the patient less time to recover capacity and for other less restrictive legal and practical alternatives to emerge, thus catapulting the patient into a swift and significant deprivation of rights.

Once the guardian is appointed and the hospital's needs have been substantially addressed, the patient's fate depends on the quality and diligence of the guardian. Will that person be competent and caring? Will it be an individual the patient chooses or someone who is familiar with the patient's values and preferences? Will the guardian promptly arrange to have necessary services available at home or, if long term care placement is advisable, choose a high-quality facility that is well-suited to the patient's needs and desires? Will the guardian continue to assess the patient's progress and arrange for different services or placements to respond to the

⁴⁶ Ricotta, *supra*, note 11.

⁴⁷ According to the Government Accountability Office, GAO-20-576R, 82% of nursing facilities surveyed between 2013-2017 were cited for infection control deficiencies and half had persistent problems that were cited across multiple years. <https://www.gao.gov/assets/710/707069.pdf>

⁴⁸ Toby Edelman, *How to Prevent Re-Hospitalization of Nursing Home Residents: More Physicians and Nurses in Nursing Homes*, CENTER FOR MEDICARE ADVOCACY ALERT (April 18, 2019) <https://medicareadvocacy.org/how-to-prevent-re-hospitalization-of-nursing-home-residents-more-physicians-and-nurses-in-nursing-homes/>

patient's changing circumstances? And will the guardian initiate modification or termination of the guardianship if that becomes appropriate?

Unfortunately, the appointment of a guardian is no guarantee that the patient will have both a protector and an advocate. Too often, each stakeholder in the guardianship process passes the buck to the next player, trusting the system to work well to protect the individual with little assurance that it actually does. This was apparent in the VCU cases when the guardian “[trusted] the state departments of health and social services to ensure the licensed facilities where [the individuals under his guardianship] are living are safe,”⁴⁹ and the judge trusted guardians to perform their duties appropriately even though the required annual reports were missing from approximately one fifth of the cases the Times-Dispatch reviewed and reports that could be found provided little detail or acknowledged the guardians rarely or never visited the individuals for whom they were responsible.⁵⁰

While guardians are often necessary and important, even those who are appointed to resolve a short-term crisis can make life-altering decisions and cause devastating losses. Many professional guardians will only accept a case if the individual is going to be institutionalized because oversight of a person who receives 24-hour care is far easier than helping to manage an individual in the community.⁵¹ In some states, the change of residence does not need to be

⁴⁹ Bridget Balch, *Part 1, supra*, note 35.

⁵⁰ *Id.*

⁵¹ See, e.g., Naomi Karp & Erica Wood, *Choosing Home for Someone Else: Guardian Decisions on Long-Term Services and Supports*, AARP Public Policy Institute (Aug. 2013) at 7 (“[C]ommunity settings are more difficult for guardians to arrange and supervise.” Also, “Sometimes pressure for hospital discharge forces guardians to make decisions on the spot with scant information. Nursing home placement often becomes the default.”). The VCU lawyer profiled in the Times-Dispatch series illustrated the preference for institutional placement when discussing a 67-year-old man with substance use disorder who entered the hospital with frostbite and gangrene. The lawyer placed him first in a rehab facility and then in a nursing home but reserved the right to suspend his duties as guardian, explaining, “I can’t keep up with a fellow like that after he leaves the facility.” Bridget Balch, *Unguarded, Part 3, supra*, note 13. Moreover, Pam Walz, a long-time supervising attorney in Community Legal Services’

approved by the court. In a matter of a few weeks after the fateful capacity evaluation at the hospital, guardians can clean out the individual's home and dispose of all their possessions.⁵² Even if individuals are eventually able to terminate their guardianships, they will be unable to resume their prior lives or regain their belongings.

VI. Nursing Homes Incentives for Initiating Guardianship

Nursing homes initiate petitions for guardianship for some of the same reasons hospitals do. But because nursing homes are often longer-term placements for individuals, decisions about

Healthcare and Independence Unit in Philadelphia noted that in her experience, as in the authors' experience, professional guardians prefer institutional placements. She observed that while guardians are eligible for a \$100/month fee from the income of a nursing home resident who is a Medicaid beneficiary, they have no way to be paid for individuals who receive Medicaid-funded home and community-based services. Email from Pam Walz, Supervising Attorney, Community Legal Services, to Alison Hirschel, Director, Michigan Elder Justice Initiative (March 31, 2021, 18:00 EDT) (on file with the author). She also noted that professional guardians believed that managing individuals in the community required much more work. *Id.* This conclusion seems undeniable. For example, for individuals on Medicaid, the guardian would generally have to pay only one bill each month for an institutionalized individual but would have to manage multiple bills including utilities, property taxes, rent or mortgages, insurances, credit card bills, service providers, and more for an individual in the community. Similarly, if the individual experiences a crisis in the middle of the night in a facility, staff will be on hand to ensure the individual is safe and take necessary action such as summoning an ambulance or providing immediate medical care. For an individual in the community, it will likely be up to the guardian to arrange emergency assistance. And while a nursing home or assisted living facility generally can arrange for all necessary medical services and supports for residents, for an individual in the community, the guardian will likely be responsible for care coordination, hiring and supervising service providers, making appointments and arranging transportation for medical care, and a host of other tasks.

⁵² See, e.g., Rachel Aziz, *How the Elderly Lose Their Rights*, NEW YORKER (Oct. 2, 2017), <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>. April Parks, the guardian profiled in Aziz's story, who reportedly disposed of priceless heirlooms and valued personal possessions from the individuals for whom she served as guardian, was sentenced to 16-40 years in prison after pleading guilty to charges of elder exploitation, theft, and perjury. See, David Ferrara, *Ex-Nevada Guardian to Serve 40 Years Behind Bars*, LAS VEGAS REV. J. (Jan. 4, 2019), <https://www.reviewjournal.com/crime/courts/ex-nevada-guardian-to-serve-up-to-40-years-behind-bars-1565690/> and Nicki Bowers, *April Parks, 2 Co-Defendants Sentenced in Nevada's Largest Elder Exploitation Case*, 8NewsNow (Jan. 4, 2019), <https://www.8newsnow.com/news/local-news/april-parks-2-co-defendants-sentenced-in-nevadas-largest-elder-exploitation-case/>. See also, Nina A. Kohn & David M. English, *Netflix's 'I Care A Lot' Should Worry You*, THE HILL, <https://thehill.com/opinion/civil-rights/540212-netflixs-i-care-a-lot-should-worry-you> noting that in most states, placing an individual under guardianship in a nursing home and selling the individual's home is a routine matter that does not require court approval. Pam Walz, the Community Legal Services attorney, also noted that, she has been involved in cases in which guardians expeditiously dispose of her clients' home and possessions shortly after appointment. Email from Pam Walz, *supra*, note 51. Local long-term care ombudsmen have also reported similar situations.

how to proceed rarely need to be made with the same sense of urgency hospital staff experience. Sometimes, facilities are compelled to petition so that a legal representative can consent to care for a resident who lacks capacity. Not infrequently, fractious families disagree over care decisions for a resident the nursing home has deemed incapable of making his or her own decisions. If the resident has not engaged in advance planning—and sometimes even if he or she has-- the facility may file to obtain clarity about who is in charge. Mounting bills due to resident incapacity, malfeasance or ineptitude by whomever is managing the resident's funds, or the need to file a Medicaid application may also result in nursing homes seeking the appointment of a guardian.⁵³ Finally, in the authors' experience, some nursing homes may threaten or initiate guardianship petitions when a resident or family member is considered challenging. In those cases, the nursing home may seek a more agreeable party with whom to interact or use guardianship as a punitive or retaliatory measure.⁵⁴

Bill collection efforts are likely the most common reasons for facilities to move to or at least threaten to file for guardianship.⁵⁵ In a recent case, a nursing facility administrator contacted a local ombudsman to advise her the facility wished to petition for emergency

⁵³ As an example, a Michigan professional guardian, Charlene Distler, noted that of the 18 individuals in nursing homes for whom her company serves as guardian, 14 were referred to her because of facility requests for payment and difficult family dynamics. E-mail from Charlene Distler, President and Owner, Probate Support Specialists, LLC to Alison Hirschel, Director, Michigan Elder Justice Initiative (March 29, 2021, 16:57 EDT) (on file with author). Ms. Distler also noted that 80-85% of her cases last year came from nursing homes primarily because the resident's families failed to obtain Medicaid coverage for them or failed to arrange payment out of the resident's funds. Email from Charlene Distler to Katharyn Barron, State Public Administrator (Feb. 21, 2021, 12:28 EST) (on file with author).

⁵⁴ Pam Walz, the Community Legal Services Attorney, noted that she is aware of cases in which nursing homes threaten or initiate guardianship proceedings in some instances in which family have been aggressive advocates for residents. Email from Pam Walz, *supra*, note 51.

⁵⁵ Nina Bernstein, *To Collect Debts, Nursing Homes are Seizing Control Over Patients*, N.Y. TIMES, (Jan. 25, 2015) <https://www.nytimes.com/2015/01/26/nyregion/to-collect-debts-nursing-home-seizing-control-over-patients.html?hp&action=click&pgtype=Homepage&module=second-column-region®ion=top-news&WT.nav=top-news>

guardianship for seven residents who had unpaid bills ranging from \$7000-\$14,000.⁵⁶ She explained that each of the residents had a family member or an agent under a power of attorney who had access to the resident's income but was failing to pay the resident's bill.⁵⁷ The administrator asked the ombudsman to assist the facility in pursuing guardianship.⁵⁸ When the ombudsman questioned whether the residents lacked capacity, why this was an emergency, and whether less restrictive measures had been attempted, the nursing home agreed to give the matter further consideration.⁵⁹ Within a matter of just a few days, all the cases were resolved without court intervention.⁶⁰ Had the cases gone forward, however, the petitions would almost certainly have been granted. According to the most recent Michigan Supreme Court data, in 2019, 10,372 guardianship petitions were granted and only 174—fewer than two percent-- were denied.⁶¹

Although it is common practice for nursing homes to pursue guardianship to resolve resident debt, some courts have objected to the use of the guardianship process for this purpose. In one New York case, the court opined, “[t]he purpose for which this guardianship proceeding was brought, to wit, for the nursing home to be paid for its care of the person, was not the Legislature’s intended purpose when Article 81 of the Mental Hygiene Law was enacted in 1993.”⁶² The court denied the petition and directed the nursing home to seek other means of redress to resolve its payment issue.⁶³ In 2015, legislation was introduced in the New York Assembly to prohibit guardianship proceedings brought solely for the purpose of collecting a bill

⁵⁶ Email from a local long-term care ombudsman, to Alison Hirschel, Director, Michigan Elder Justice Initiative from local ombudsman (1/11/21, 19:41 EST) (on file with author).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Telephone call with the Local Ombudsman, (Jan. 20, 2021, 12:00 EST).

⁶⁰ *Id.*

⁶¹ Michigan Supreme Court, *Statewide Caseload Report* (2019)

<https://courts.michigan.gov/education/stats/Caseload/Pages/2019-Caseload-Reports.aspx>

⁶² *Matter of S.K.*, 13 Misc.3d 1045 (Sup. Ct., Bronx Co. 2006).

⁶³ *Id.*

or resolving a dispute regarding the payment.⁶⁴ Although the measure has been re-introduced several times,⁶⁵ it has not been enacted.

Facilities may also petition for guardianship to retain residents. In one case, when 98 year old Margaret Roush entered a nursing home, she was determined not to be able to participate in medical decision-making.⁶⁶ Her advance directive was activated and a family friend, Robert Gallagher, began making medical decisions for her.⁶⁷ Within a short period of time, however, Ms. Roush appeared to recover capacity and told facility staff she wished to return home.⁶⁸ The facility physician and Mr. Gallagher believed it was in her best interest to remain in the facility, however, and Mr. Gallagher directed the facility not to discharge her.⁶⁹ Ms. Roush and her family then embarked on a variety of strategies to obtain her release.⁷⁰ They called the police who determined Ms. Roush was very sharp and left the facility with the mistaken impression that she would be released.⁷¹ Next, Ms. Roush met with a lawyer to revoke her advance directive, thus stripping Mr. Gallagher of any authority, but the facility still refused to let her go home⁷². Ms. Roush's attorney then filed a habeas corpus petition but it was dismissed after she was unable to testify because her nursing home physician asserted she was not well enough to attend the hearing.⁷³ The facility then assisted Mr. Gallagher in filing for guardianship and the nursing home once again prevented Ms.

⁶⁴ S4642A would have “prohibit[ed] appointment solely for the purposes of bill collection or resolving a bill collection dispute”. Versions of this bill were introduced other legislative sessions as well (including 2017-2018; 2019-2020; and 2021-2022). See <https://www.nysenate.gov/legislation/bills/2015/s4642/amendment/a>

⁶⁵ *Id.*

⁶⁶ Supplemental Brief for Appellee at 1, Estate of Roush v. Laurels of Carson City, No. 150882 (Mich. Oct. 30, 2015).

⁶⁷ *See Id.*

⁶⁸ *See Id.*

⁶⁹ Brief for Michigan Elder Justice Initiative et al. as Amici Curiae Supporting Appellee at 5, Estate of Roush v. Laurels of Carson City, No. 150882 (Mich. Feb. 17, 2016).

⁷⁰ *Id.*

⁷¹ *Id.* at 5-6.

⁷² *Id.* at 6.

⁷³ *Id.*

Roush from attending her hearing.⁷⁴ After Ms. Roush’s attorney filed a motion to show cause, the court ordered the nursing home to produce her.⁷⁵ At that hearing, Mr. Gallagher himself, the guardian-ad-litem, and her attorney all asserted that Ms. Roush had capacity.⁷⁶ The guardian-ad-litem noted Ms. Roush was “a woman who[se] liberty interests are being compromised based on the opinion of one [nursing home] doctor.”⁷⁷ The judge denied the guardianship petition and Ms. Roush finally returned home.⁷⁸

Although the court made the correct decision in this case, in similar cases, the resident might not have had a lawyer and the judge might have accepted the doctor’s statement that the resident was too ill to attend. Without the resident or her lawyer in court, the judge might have accepted the doctor’s and Mr. Gallagher’s assertion that the resident required institutional care—especially given her very advanced age-- and, in short order, granted the petition.

VII. Nursing Home Residents’ Barriers to Full Participation in Judicial Proceedings

While important advances have occurred to preserve individual rights of persons subject to guardianship, the practical reality is that individuals in nursing homes who are at risk of or under guardianship must often overcome multiple hurdles to assert their rights or extricate themselves from the guardianship system.⁷⁹ The very circumstances that land individuals in a

⁷⁴ *Id.*; see also Supplemental Brief for Appellee, Ex. 2.

⁷⁵ See Supplemental Brief for Appellee at 2.

⁷⁶ See Brief for Michigan Elder Justice Initiative at 6-7.

⁷⁷ *Id.*; Supplemental Brief for Appellee at 2.

⁷⁸ Brief for Michigan Elder Justice Initiative at 7.

⁷⁹ National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination*, March 22, 2018; See also, Patrick Michels, *Who Guards the Guardians*, Texas Observer, July 6, 2016, <https://www.texasobserver.org/texas-guardianship-abuse/>

nursing home also serve as barriers to protecting or asserting their rights in proceedings initiated or supported by the facility. The institutions control the individual's medical records, employ the healthcare and social services staff who may be called upon to evaluate the individual, have access to experienced legal counsel who may have long-standing relationships with judge and court staff, and are privy to copious amounts of sometimes detrimental information about the individual. In addition, every aspect of responding to a proceeding including retaining counsel, identifying witnesses, securing documents, and obtaining transportation or virtual access to a hearing can become almost impossible for individuals who, on top of their health limitations, may not have regular access to their phones, computers, files, funds, and informal supports. In some cases, facility staff who are petitioning for or supporting the petition for guardianship or resisting the termination or modification of the guardianship actively limit the individual's access to necessary resources, documents, and the court hearings and isolate the individual from family, friends, and advocates.

The individual under guardianship may be thwarted by his or her guardian as well as by the nursing home staff. It is the experience of the authors, who have a combined more than fifty years of experience providing legal services and supporting nursing home residents, families, and long-term care ombudsmen, that if the individual balks at his or her circumstances or if friends and family try to intervene, guardians may take away the individual's phone, direct the nursing home or assisted living facility to block calls and visits, limit access to lawyers and long term care ombudsmen, control the person's assets, and make it nearly impossible for the person to seek help.

Further barriers arise if legal services providers who might be able to represent the individual insist on being contacted by the individual directly instead of by a surrogate seeking

help on the person's behalf.⁸⁰ Even if the individual manages to contact a lawyer to assist with appealing the guardianship or petitioning to modify or terminate it, some judges will not permit the lawyer to represent the individual, asserting that a person under guardianship cannot retain a lawyer. This argument is thoroughly rejected by Professors Nina Kohn and Catheryn Koss.⁸¹ Some judges also limit how often an individual under guardianship can seek to terminate or modify his or her guardianship. As each month goes by in which the person is institutionalized and disempowered, it becomes less likely the individual will ever be able to return to the community.⁸²

VIII. The Impact of Guardianship on Nursing Home Residents' Lives

The impact on nursing home residents of having a guardian cannot be overstated. Residents often lose control of both the smallest and biggest decisions in their lives—what food they are permitted to eat, with whom they can communicate, whether they are allowed to leave the building for recreational activities, what medication and treatment they can receive, and whether they will ever be discharged. The Michigan Long Term Care Ombudsman Program, for which one of the authors serves as Senior Legal Counsel, has advocated for residents whose guardians have denied the resident permission to have a single Cherry Coke each day, attend services at their lifelong church, communicate with their children, obtain a COVID-19

⁸⁰ A little know provision in the Legal Services Corporation (LSC) rules allows lawyers funded by the Legal Services Corporation to accept case referrals from long term care ombudsmen and other similar advocates, 45 C.F.R. §1638.4 (c)(1997), but many legal services programs fear running afoul of the LSC rule against solicitation, 45 C.F.R. §1638.1(1997), and require direct contact by the potential client.

⁸¹ Nina A. Kohn and Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, WASH. L. REV (2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2788912#

⁸² Greg Arling et al., *Targeting Residents for Transitions from Nursing Homes to Community*, HEALTH SERV. RES (June 2010) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2875755/>

vaccination, review their medical records, live in the unlocked portion of the facility, see their spouse, share a room with their sister, smoke a cigarette, marry another resident, and return to their longtime home as well as a host of other issues. Moreover, placement decisions may be made for the convenience of the guardian—especially if the guardian has placed several other individuals in the same facility—rather than the needs and preferences of the individual. In Michigan nursing homes, staff routinely refer to a resident under guardianship as “not her own person anymore,” a poignant reminder of all the resident has lost.

Guardianship is a particular barrier for residents who want to move to the community. Nursing facility transition programs, such as Money Follows the Person,⁸³ and nursing home social work staff cannot proceed with transition planning if the guardian is not agreeable no matter how keen the resident is to leave. During COVID, individuals under guardianship faced even greater obstacles if they remained in nursing homes. Visitation bans extended not only to family members, but also to legal counsel and ombudsmen. Residents were often prohibited from leaving the nursing home or threatened with being locked out or isolated for fourteen days if they did leave the premises. Moreover, unless residents had their own telephones, computers, or other communication devices, access to those provided by the facility was inconsistent and harried staff rarely had time to assist with arranging communications. Being forced to remain in a nursing home during the pandemic has therefore likely been a particularly terrifying and dispiriting experience for residents who are already frustrated that their guardians can require their continued and indefinite institutionalization.

⁸³ Authorized in Section 6071 of the Deficit Reduction Act of 2005 (P.L. 109-171), as amended by Section 2403 of Patient Protection and Affordable Care Act (P.L. 111-148), the Medicaid Extenders Act of 2019 (P.L. 116-3), the Medicaid Services Investment and Accountability Act of 2019 (P.L. 116-16), the Sustaining Excellence in Medicaid Act of 2019 (P.L. 116-39), Sec 205: Further Consolidated Appropriations Act, 2020 (P.L. 116-94), and Sec 3811: Coronavirus Aid, Relief, and Economic Security Act, 2020 (P.L. 116-136).

IX. Getting to Solutions

This paper has identified circumstances in which guardianship is used to facilitate discharge of an individual in a hospital who lacks capacity and for whom no legal or practical less restrictive alternative exists. In those cases, however, the petition is initiated, at least in part, to benefit the hospital. Those efforts will fail the person if the hospital or the court do not consider and, when appropriate, employ, less restrictive alternatives; the guardianship remains in effect after the person regains capacity or when a less restrictive alternative emerges; or when the guardian fails to fulfill his or her fiduciary responsibilities by safeguarding the individual. We also discuss situations in which guardianships are initiated including when a nursing home files a petition as a punitive or retaliatory measure against a resident who is perceived as difficult or for redress when a bill is unpaid. Nursing homes may also pursue guardianship because they misunderstand when guardianship is appropriate as in the case described above in which a facility sought an ombudsman's help in obtaining guardianship for seven individuals who did not ultimately require a guardian to resolve their payment issue.⁸⁴

Despite the fact that other entities benefit from the appointment of a third-party decision-maker, guardianship is rooted in the state's *parens patriae* power.⁸⁵ Given both its origin and the magnitude of the deprivation of rights that guardianship entails, the process must serve no master

⁸⁴ The Michigan Crime Victims Legal Assistance Project also recently represented an individual with clear capacity and no difficulty managing her affairs. In that case, the social worker who filed the successful petition for emergency guardianship explained she did so because the person did not have an advance directive and the social worker worried that if, in the future, the person lost capacity, there would be no one to make decisions for her. She testified that the practice of filing for guardianship in these situations was commonplace. Although this case involved an individual who was receiving home and community-based services, the same social worker had previously filed more than a dozen petitions for guardianship when she served as a nursing home social worker. Email from Emily Miller, Managing Attorney, Crime Victims Legal Assistance Project, Michigan Poverty Law Program to Alison Hirschel, Director, Michigan Elder Justice Initiative (March 17, 2021, 21:53 EDT)(on file with author); Telephone Call with Katharyn Barron, State Public Administrator, Dep't of the Attorney General, March 19, 202, 9:45 a.m.

⁸⁵ Erica Wood, *Recharging Adult Guardianship Reform: Six Current Paths Forward*, J. of Aging, Longevity, Law & Pol, <https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1002&context=jallp>

but the good of the individual. In crafting remedies to ills that often accompany guardianships initiated by hospitals and nursing homes, we present an array of less restrictive alternatives and safeguards that can be employed by hospitals, nursing homes, and the courts. These include the implementation of processes that protect the individual’s rights -- including representation by counsel—and ensure alternatives to full guardianship are considered.

a. Identifying a Surrogate for Admission, Transfer, Discharge and Addressing Immediate Needs

We have noted the pressure hospital staff face to discharge patients when those individuals cannot consent to transfer and treatment and their presence in the nursing home without a surrogate decision-maker may put the nursing home at risk of a citation from the oversight agency.⁸⁶ While extremely limited data exists, courts report anecdotally that this situation is the major impetus for hospital-initiated petitions.⁸⁷

In some cases, a person with legal authority to make decisions on behalf of the patient may exist but not be known to the hospital. If the patient is unable to share this critical information, guardianship might be initiated unnecessarily.⁸⁸ In Ohio, hospitals are turning to legal counsel to perform next of kin searches.⁸⁹ Through this process, the patient’s family is

⁸⁶ 42 CFR 483.10(b)(3)-(7), State Operations Manual, Appendix PP (11-22-17), Procedures for 483.10(b)(3)-(7), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/GuidanceforLawsAndRegulations/Downloads/Appendix-PP-State-Operations-Manual.pdf>

⁸⁷ One Michigan probate court clerk described a weekly ritual in which local hospitals “beat a path to the courthouse door” every Friday seeking temporary guardianships to facilitate the discharge of patients who lacked capacity. Presentation by Steven Burnham, Kalamazoo Probate Court Register, Lansing Community College-West Campus (Nov. 14, 2018).

⁸⁸ DeMartino, ES, Dudzinski DM, Doyle CK, et al, Who Decides When a Patient Can’t? Statutes on Alternate Decision Makers. *N Engl J Med.* 2017; 376(15):1478-1482.

⁸⁹ Best practices for resolving patient incapacity issues by Tess G. Tannehill, Jan. 31, 2020, <https://www.bricker.com/people/tess-tannehill/insights-resources/publications/best-practices-for-resolving-patient-incapacity-issues>

often located quickly, frequently resulting in decreased costs, reduced hospital stays, and improved outcomes as well as the opportunity to avoid guardianship proceedings⁹⁰

Even if family is located, they may not always have been empowered through a power of attorney or advance directive to act on the patient's behalf. Family or surrogate consent laws provide legal authority for making healthcare and, sometimes, placement decisions without the imposition of a guardian when no legally authorized agent for the person exists.⁹¹

To address situations where individuals have no identified relative or friend who can be involved in decision-making, several states permit judicial authorization for medical treatment or designate a "temporary medical treatment guardian" for the purpose of making health care decisions.⁹² Not all state laws that allow the appointment of surrogate healthcare decision-makers for those without family address the transfer of the individual from one setting to another. Some states have however specifically addressed the need to appoint a decision-maker for such purposes. An "expedited limited healthcare fiduciary" can be appointed by a court in Tennessee, for example, to make decisions about discharging an individual who no longer needs hospital care but lacks capacity or a surrogate decision-maker.⁹³ These fiduciaries are appointed for 60 days and their authority is limited to "consenting to discharge, transfer, and admission and consenting to any financial arrangements or medical care necessary to affect such discharge, transfer or admission to another healthcare facility."⁹⁴

⁹⁰ *Id.*

⁹¹ Wynn, Shana, *Decisions by Surrogates: An Overview of Surrogate Consent Laws in the United States*, *Bifocal*, Vol. 36, No. 1, Sept-Oct 2014. Forty-four states have surrogate consent laws.

⁹² Karp, Naomi and Erica Wood, *Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly*, American Bar Association Commission on Law and Aging, 2003

⁹³ Thaddeus M. Pope, *Unbefriended and Unrepresented: Better Medical Decision-Making for Incapacitated Patients Without Surrogates*, 33 *Ga St U L Rev*, 923 (2017)

⁹⁴ Tenn. Code. Ann. §34-1-133 (2016), *Id.*

If surrogate decision-makers are empowered to consent to medical care or to transfer and placement, but not both, a person who lacks capacity to make these decisions could be subject to a disjointed process that results in delays and higher costs. The individual would be best served by a coordinated plan that addresses both placement and the need for ongoing care and services.

The UGCOPAA addresses these situations through its provisions for emergency guardianship⁹⁵ or protective arrangements.⁹⁶ The Act specifically states that less restrictive alternatives to guardianship or conservatorship, such as protective arrangements, are to be used if they would meet the person's needs.⁹⁷ Emergency guardianship is available if required to prevent substantial harm to the person and there is no other person with the authority and willingness to act on the person's behalf.⁹⁸ The emergency guardianship provisions are limited to a maximum of 60 days which can be extended only one time⁹⁹ and the court is required to immediately assign an attorney to represent the person in the guardianship proceeding.¹⁰⁰ Additionally, the court determines how long the guardianship should last and establishes what reports the guardian will have to make during the emergency guardianship.¹⁰¹

Safeguards, however, should be instituted during an emergency guardianship. Because many individuals do recover, the emergency guardian should be prohibited from selling or otherwise disposing of the individual's house or property unless there are no other options for covering the cost of care and necessary expenses and the court approves in advance each significant transaction. While expediting efforts to dispose of property may serve everyone

⁹⁵ UGCOPAA Section 312 (2017)

⁹⁶ UGCOPAA Article 5 (2017)

⁹⁷ UGCOPAA Section 301(b)

⁹⁸ UGCOPAA Section 312(a)(1)-(2)

⁹⁹ Section 312(b)

¹⁰⁰ Section 312(c)

¹⁰¹ Section 312(d)

else's desire for efficiency and, often, financial gain, individuals stand to lose all they have acquired and treasured in a lifetime over the course of a few terrible weeks.

Protective arrangements offer the court the option for issuing a limited order specifically “tailored to the individual’s circumstances and needs.”¹⁰² For example, under a protective order, the court could authorize or direct a particular medical treatment,¹⁰³ admission to a specified place,¹⁰⁴ an action to establish eligibility for benefits¹⁰⁵ (such as Medicaid), or authorize an individual to arrange for personal care or supportive services.¹⁰⁶ While we expressed concern above about piecemeal and disjointed decision-making for individuals whose surrogates have been given only limited power, protective arrangements can offer appropriate limitations for individuals who do not require a surrogate to have more comprehensive control.

These provisions are helpful in addressing important immediate needs while allowing the individual a chance to recover his or her decision-making ability. It would defeat their purpose, however, if, in practice, they become a glidepath to full guardianship in situations in which that result is not warranted. That danger exists because some judges may make negative assumptions about the current capacity of a person whose decisions were made by an emergency guardian or through family consent. In the rushed and flawed proceedings that too often characterize guardianship decisions, those assumptions can lead swiftly to the imposition of a full guardianship.

Moreover, given many courts’ busy dockets and lack of resources, judges may be resistant to interventions that are for short durations or address only very targeted needs. They

¹⁰² UGCOPAA Section 501, Comment (2017)

¹⁰³ Section 502(b)(1)(A)

¹⁰⁴ Section 502(b)(1)(B)

¹⁰⁵ Section 503(c)(1)(A)

¹⁰⁶ Section 503(c)(1)(E)

may prefer more permanent and comprehensive strategies that will minimize the need for future court intervention. Attorneys who practice frequently in these courts may realize that an incremental approach that more carefully responds to an individual's changing condition will frustrate some judges who want to assure in the most expeditious way that the individual is protected.

b. Improving Due Process Protections

Because hospital patients and nursing home residents face such extraordinary obstacles to achieving a level playing field in court, they must receive the most rigorous due process protections. Courts should agree to waive notice requirements only in truly exceptional circumstances. Given the power imbalance between the individual and the institution in these cases, the difficulty of ensuring due process for institutionalized individuals, and the enormity of changes that may befall these individuals as the result of the guardianship, counsel must be appointed in every case unless the individual already has counsel or refuses it. Even in instances in which the person's at least partial incapacity is indisputable, issues like the selection of the guardian or ways to limit the guardianship in light of the person's specific needs and abilities could be better addressed by the court with the vigorous advocacy of the individual's lawyer.

If the individual is unable to travel to the location at which the hearing is being held—and few hospital patients would be-- the location should be moved to the hospital or nursing home or the court should at least ensure the individual and the judge can participate virtually. If the court appoints a guardian other than the person the individual prefers or inconsistent with state law prioritization, the court must provide detailed justification for the departure. Finally, if the individual loses the initial guardianship hearing or wishes to challenge a part of the guardianship

order, a lawyer should be provided to pursue any possible appeal or subsequent attempt to modify or terminate the guardianship.

c. Giving Courts the Tools and Resources to Find Better Solutions

When courts become aware of an individual's limitations and needs during an emergency hearing, the only way they can help the individual is by entering orders that restrict the person's autonomy, or in some jurisdictions by authorizing protective arrangements. There may be no one in the courtroom with expertise in assessing individuals' functional abilities, determining eligibility for and arranging supports and services, making appropriate referrals, and putting the person on the path to maximum autonomy.¹⁰⁷ Courts could, however, use the appointment of an emergency or temporary guardian, or a protective arrangement, to trigger a more thorough investigation of the individual's circumstances and potential for recovery. This could be accomplished by appointing court investigators with social services background to closely monitor the status of the individual, visit the individual at regular intervals, and report to the court on the individual's condition and progress towards regaining capacity. The investigator could evaluate whether the provision of services and supports or referrals to other agencies could sufficiently address the individual's limitations. In cases in which a more permanent guardianship might be necessary, the investigator could also provide information to allow the court to appoint the most appropriate guardian. In addition to requiring testimony from the court investigator, the court could require an assessment of the person's circumstances and capacity by whatever professional is most appropriate. Armed with both a social services and capacity assessment, the court would be well positioned to decide whether to extend the emergency

¹⁰⁷ While the social workers who serve as discharge planners at hospitals have some knowledge of these issues, they do not generally have sufficient time to work with the patient when he or she is able to engage in that process. Similarly, staff who serve as nursing home social workers may have no formal social work qualifications and are often under pressure to perform many other functions.

guardianship, remove or modify the guardianship, or recommend a petition for permanent guardianship or other protective order.

The courts have an important role not only in ensuring the individual's rights are protected but also that the best decisions are being made on individuals' behalf. Detailed social work investigations, clinical evaluations, and an understanding of the array of available services and supports that could address the individual's deficits can be essential to determining if a permanent guardianship is necessary or how any future guardianship should be limited. These tasks are at the heart of the court's role but, without the right people in the courtroom or the necessary information in the record, courts may not have the knowledge and information to make thoughtful and appropriate determinations. And although we made this recommendation in the context of an emergency guardianship, the social services assessment could be deployed to advantage in other guardianship proceedings as well. Although these measures will increase costs in the short run, they will better inform courts, better protect individual rights, and may reduce the court's long term guardianship caseload, resulting in savings of both time and money.

d. Establish a Guardianship Ombudsman

Due to the numerous barriers facing a nursing home resident who wants to challenge or modify a guardianship, it would be especially helpful to have an ombudsman empowered to address guardianship concerns. While residents are eligible for services from long term care ombudsmen, these individuals are usually not lawyers and are rarely able to pursue legal remedies to inappropriate guardianships. Similarly, although nursing homes are heavily regulated, state licensing agencies would not generally become involved in issues involving guardianship of residents unless the facility was alleged to have violated the resident's rights.

And, as noted above, residents may have difficulty obtaining legal representation in guardianship matters.

To ensure the availability of an advocate to support those subject to guardianship, states could establish a guardianship ombudsman, a dedicated individual or program at the state level to investigate guardianship complaints by residents and others. While the individual should not be limited to addressing concerns from individuals in hospitals or nursing homes, those individuals likely have among the most compelling need for assistance. In addition to investigating complaints, the individual or program could also provide technical assistance and education, track data and trends in guardianships, propose reforms and perform other responsibilities as appropriate. While no state currently has such an entity, the Michigan legislature considered establishing one,¹⁰⁸ the Michigan Supreme Court appointed a short-term one,¹⁰⁹ and Wayne county in Michigan has a guardianship ombudsman.¹¹⁰

A guardianship ombudsman could be housed in the Office of the Attorney General or other suitable state agency or in a non-profit organization. The oversight agency or, in the case of a private non-profit, the state governmental entity to which it reports should be empowered to take appropriate action to remedy any malfeasance by the guardian, judge or court staff, appointed counsel, or guardians ad litem. In the case of professional guardians, guardians ad litem, or counsel who are found to have grievously violated their duties in one case or county, the oversight agency should immediately notify other courts in which the individuals may practice and, if appropriate, review other cases in which the individual is or was involved.

¹⁰⁸ <https://www.legislature.mi.gov/documents/2003-2004/billanalysis/House/htm/2003-HLA-4016-s.htm>; <http://www.justiceweaver.us/ombudsman.php>, <http://www.tcsg.org/guard.htm>

¹⁰⁹ *Michigan Guardianship Ombudsman Project Not Funded by Legislature; Ombudsman Headed Back to Appeals Court*, Guardianship & Alternatives, CENTER FOR SOC. GER. (2004), <http://www.tcsg.org/guard.htm>

¹¹⁰ <https://www.wcpc.us/Info/ombud.htm>.

e. Require Guardians to Develop and Follow a Guardianship Plan

When guardianship is necessary, guardians should be required to develop a plan that is person-centered and focused on restoring the individual's rights to the greatest extent possible. Guardians should report to the court regularly on the person's progress consistent with the plan. If barriers exist to implementing the plan, guardians should be required to propose strategies for overcoming obstacles or revise the plan to acknowledge changing circumstances or goals. If taken seriously by the guardians and the courts, these plans could be the key to better ensuring that guardians provide both protection and advocacy to the people whose lives they control. Especially for individuals in nursing homes, the guardians' involvement in developing and monitoring the plans could be an important extra safeguard that the nursing home is caring appropriately for the resident and honoring the resident's rights. Failure to comply with these requirements should, when appropriate, result in the suspension of guardianship fees or termination of the guardian.

f. Preserving Appropriate Areas in Which the Person under Guardianship Can Retain Control

For nursing home residents and other individuals under guardianship, court rules, statutes, and judges should ensure the individual retains as much control as possible over personal and daily decisions that are important to them, including eating food or wearing clothes of their choice, communicating with people they choose, and participating in facility activities and outings. These decisions should be routinely carved out of full guardianships unless they are absolutely necessary. Guardianship orders can be tailored to recognize all rights the individual maintains or, in the alternative, presumed pursuant to state law to exclude certain types of decisions unless they are specifically noted in the order. These protections would be consistent

with National Guardianship Standards and the UGCOPPA that promote individual participation in decision-making to the greatest extent possible.^{111 112}

g. Authorize Swing Beds to Permit Slightly Extended Hospital Stays

A few more days in the hospital might allow hospital discharge planners to identify a less restrictive solution to the prompt –and often ex parte-- appointment of a temporary guardian or a less restrictive placement option than a nursing home. First, of course, even 24 to 72 hours could be enough for some patients to begin to regain their cognitive abilities as they recover from illness or injury or stop taking medications that cause confusion. For patients who remain confused, more time might enable hospital staff to identify an appropriate and willing family member or friend to serve as surrogate decision-maker or individuals who already have decision-making authority but were not immediately known to the hospital. More time would be especially helpful to enable transitions to home and community based services which likely require the completion of an assessment, care planning, and the identification of home care staff before a transfer home can occur.¹¹³ In other circumstances, family members who might be willing to care for the patient at home temporarily might need a few days to obtain necessary durable medical equipment, arrange for time off from work, obtain a temporary ramp or other modifications, coordinate with other family members, and juggle their other obligations. In cases in which the individual is able to go home after just a few extra days in the hospital, the

¹¹¹ National Guardianship Association Standards of Practice, Adopted 2000, Fourth Edition 2013, Standard 9

¹¹² UGCOPPA Section 313(b)

¹¹³ Depending on available services and protocols, these arrangements may be able to be made quickly in some locations and circumstances but require more time to arrange in others. For example, only limited staff conduct the initial assessments in many home and community-based waiver programs and these individuals often work only during business hours. They may not be able to complete an assessment and the necessary care planning that follows as quickly as a hospital might be able to obtain an emergency guardianship from a cooperative local court. In areas with shortages of home care workers, patients and families may need to be creative and flexible in arranging for necessary coverage, another circumstance that might require a short delay before discharge.

patient would be spared the disorienting effects of an additional short-term placement in a nursing home.

Because a few days can make an enormous difference in the ability of the person to avoid guardianship and return to the community, the expanded use of swing beds in hospitals should be explored. While, except for temporary expansions during the pandemic,¹¹⁴ only rural hospitals with fewer than 100 beds are eligible to utilize swing beds, expanding this option could address the immediate care needs of the person, offer additional time for the person to recover or identify a surrogate decision-maker, and provide a payment source for the hospital.¹¹⁵

IX. Conclusion

Individuals without capacity to make decisions about healthcare and placement who lack surrogate decisionmakers need protection and assistance. Petitions for guardianship filed by hospitals or nursing homes should be viewed cautiously especially because of the extraordinary imbalance of power between the healthcare institution and the individual. Great care should be taken to avoid conflicts of interest when health care facilities are involved in the litigation. Without rigorous due process protections and careful evaluation, hospital patients and nursing home residents are at risk of a complete and permanent loss of autonomy. Alternatives to guardianship and limited protective orders should be exhausted before the courts consider appointing a partial or full guardian. Creative solutions and aggressive oversight by the court

¹¹⁴ See <https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf> at 7-8.

¹¹⁵ Eligible hospitals are able to provide acute or post-hospital skilled nursing facility care in swing beds. Available for rural hospitals with less than 100 beds, <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/SNFPPS/SwingBed>; also <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/SwingBedFactsheet.pdf>

must be implemented to ensure the system protects the rights of the individual, rather than prioritizing the interests of the institutions.