LeadingAge™PA

House Aging & Older Adult Services Hearing

Testimony on Guardianship

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Chairman Day, Chairman Samuelson and members of the House Aging & Older Adult Services Committee. As a representative for LeadingAge PA, thank you for the opportunity to speak today on the guardianship system in Pennsylvania. LeadingAge PA represents more than 380 nonprofit providers of senior health care, housing, and community services across the Commonwealth.

My name is Steven Montresor. I've been a practicing attorney in the Commonwealth of Pennsylvania since 1995, and I have been with the law firm of Latsha Davis and Marshall P.C. since 1997. Our firm serves as General Counsel to LeadingAge PA and provides legal services to many of its members throughout the Commonwealth. These organizations provide services to some of the most frail, elderly, and vulnerable citizens of Pennsylvania. Because we represent senior living communities from Philadelphia to Erie, I have been through the guardianship process in a number of counties in the Commonwealth. In addition, by virtue of the clients that we represent, our intersection with the guardianship process is different from a typical law firm or general practitioner, who are often engaged directly by a family member or agent.

A typical guardianship case in our office starts with a call from one of our nursing facility or personal care home clients. There are a few different scenarios in which the need for a guardian typically arises. The facility or community may be proactive in seeking the appointment of a guardian because the resident has become incapacitated and may not have anybody to manage their health care decisions or their finances, either because that individual has never executed a Power of Attorney instrument, or because the designated agent under the Power of Attorney no longer wishes to serve as an agent, or in some cases, has died.

Sadly, the more common scenario is that an incapacitated person is suffering from financial abuse. That financial abuse is often at the hands of their agent, who is, more often than not, someone who was thought to be a trusted family member. Usually, in these cases, we will seek the appointment of a professional guardianship services agency to make health care decisions and manage the finances for the victim. The consequences of this type of financial abuse can be profound. Not only is the victim robbed of their savings, but the issue is compounded when the Medical Assistance program imposes a penalty because the resident's resources were transferred through no fault of their own, during which time the program will not pay for the victim's nursing facility stay. If the theft or misappropriation is substantial, an individual may be without a payment source for

his or her nursing facility care for a substantial period of time. While there are opportunities to mitigate these losses through collection activities or by seeking a waiver of the penalty, those options are often costly and time consuming and the outcome far from certain.

As a practitioner, the lack of consistency and uniformity of guardianship practice and procedure can make multi-county practice a challenge. While the substantial revisions to the guardianship rules that went into effect in June of 2019 greatly standardized practice across the Commonwealth, some variations in local practice remain. One of these issues is how the court will handle the appointment of an attorney for the alleged incapacitated person. This issue brings us to House Bill 1928. As you probably know, many counties will appoint an attorney for the alleged incapacitated person at the outset of the case. Others will wait for the attorney filing the guardianship petition to indicate whether counsel has been retained, and even then, may not appoint an attorney unless the petitioning counsel specifically requests the court to do so.

House Bill 1928 will standardize the approach to court-appointed counsel. Given that an individual's rights will be severely impacted by the determination of incapacity and appointment of a guardian, I believe that House Bill 1928 will help safeguard the rights of citizens of the Commonwealth. I believe that it will be beneficial for each individual to have an independent court-appointed advocate to investigate the allegations contained in the petition, meet with the alleged incapacitated person, discuss the matter with the pertinent interested parties, and ultimately make a recommendation to the court.

A more amorphous issue is the role of court-appointed counsel in these matters. House Bill 1928 would be an opportunity to clarify these obligations. The bill states that "Counsel for an alleged incapacitated person shall, as far as reasonably possible, maintain a normal client-attorney relationship with the client." The intent of that sentence is not entirely clear. The bill also requires attorneys to comply with the Rules of Professional Conduct. I would submit that the proposed language is unnecessary, given that all attorneys are already bound by the Rules of Professional Conduct.

Finally, the proposed language of House Bill 1928 requires counsel to advocate for the client's expressed wishes consistent with the client's instructions, to the extent the client is able to express those wishes and instructions. This may present a challenge in the long-term care setting. Most of the cases that arise in the long-term

care setting involve residents who are suffering from dementia, and who very often have other health issues.

In one matter in which I was involved, the court-appointed attorney met with her client, who in the course of that meeting expressed a desire to return home, as do many nursing facility residents. The attorney then objected to the guardianship petition and actively sought to manage the resident's discharge from the nursing facility to her client's home. The problem is that the resident suffered from dementia, faced mobility challenges, was prone to falls, and did not have the proper modifications made to her home in order to ensure the safe discharge and living arrangements. In the long-term care setting, residents often lack the self-awareness to understand the consequences and safety issues associated with their expressed desires to return home. To be clear, I am not taking the position that the discharge of a resident to his or her home is always inappropriate. Rather, my concern instead goes to whether such actions by court-appointed counsel are within his or her scope of representation contemplated by the proposed legislation. I am concerned that directing court-appointed attorneys to unwaveringly honor their client's wishes may lead to more difficult cases like this one, and, if court-appointed counsel does not appreciate the unique issues involved with a client in a long-term care setting, may ultimately wind up placing their clients in positions of greater risk of harm.

I can recall another case where we filed a petition for a personal care home resident who was in need of a transfer to a nursing facility and had a diagnosis of dementia. Despite repeated outreach to her agent, the facility staff received no communication or assistance in the transfer of the resident from personal care to nursing, where she could receive medically necessary nursing care. The facility strongly suspected financial misappropriation was occurring, and went so far as to involve the local Area Agency on Aging. Court-appointed counsel met with the client, who expressed a desire to be discharged to the care of the non-communicative agent. To my surprise, the attorney advocated for a discharge from the facility to the non-responsive agent of the resident. Indeed, these cases are outliers in my experience. However, I'm concerned that the language of the statute would result in more outcomes like these, which take a resident out of an institutional care setting where they are safe, and place them in a setting where the risk to their physical health and safety only increases.

Defining the scope of representation and the role of counsel is a legitimate debate and a conversation that should be had. Currently, in my experience, the generally accepted practice is for court-appointed counsel to verify the need for a guardianship by meeting with the resident and reviewing his or her medical records, and to interview the agent and other relevant people in the alleged incapacitated person's life to determine the accuracy of the allegations, obtain their perspective, verify whether they wish to serve in any role, determine whether the requested remedy – meaning the nature of the guardianship – is appropriate and warranted, and make a report to the court on all of the foregoing. I submit that this approach would help ensure consistent outcomes, protect alleged incapacitated persons from overreach, and facilitate the timely and efficient disposition of cases.

With respect to House Bill 1890, I understand the intent is to prohibit people who are convicted felons from serving as guardian. A guardian owes a fiduciary relationship to the individuals they serve. Public trust is increased when safety measures are in place to protect individuals. Likewise, public trust is eroded when those individuals or entities appointed by the court are later found to have committed financial crimes.

As I indicated earlier, often, we become involved in these cases precisely because an individual has been the victim of financial abuse. Generally, we support the passage of this legislation. However, I can identify a few issues that may be of concern to this legislative body. First, the bill indicates the court can appoint individuals, corporate fiduciaries, nonprofit corporations, guardianship support agencies, or county agencies in no particular order of preference. However, Pennsylvania Orphans' Court Rule 14.6 requires the court to consider the eligibility of individuals to serve as guardian in a particular order, mainly favoring family and close friends over a professional guardian. Strict adherence to the family first model can be problematic in the long-term care setting. I believe there should be consistency between the guardianship statute and the Orphans Court Rule.

As already mentioned, many cases in which we pursue a guardianship involve an agent who is typically a family member who appears to be misappropriating assets. In cases of misappropriation of assets, focusing on family first can create an inherent conflict for the court-appointed guardian. For example, hypothetically, if the son or a daughter of nursing facility resident has been stealing the resident's money, and a sibling expresses interest in serving as guardian, the court is required

to give that person preference. Appointing that person, however, places that person in the position of having to potentially utilize the legal process against his or her sibling or reporting his or her sibling to law enforcement. A professional guardian does not have this inherent conflict and will likely have utilized these processes before.

There is another benefit to appointing a professional guardianship agency. Often, the incapacitated nursing facility resident needs to apply for Medical Assistance benefits. This can be an overwhelming and frustrating process for the layperson guardian, especially if he or she works a fulltime job and has family. Reputable and effective professional guardianship agencies have the expertise and experience to complete these applications timely and efficiently and pursue hardship waivers with the Department of Human Services on behalf of their wards.

In addition, I am concerned about the logistics of the criminal background check requirement as it pertains to emergency guardianship situations. While a guardianship agency or professional guardian would presumably always have a current background check available, it is unlikely that a family member will. In cases where an individual who is incapacitated has an emergent medical need, requiring the prospective guardian to go through federal criminal background process can result in a delay in the appointment. I would suggest that in such cases, an exception be made to allow the immediate appointment, subject to later submission of the criminal background check.

Finally, the statute requires the resubmission of the criminal background check every three years. It is not exactly clear from the statute to whom the submission should be made.

On behalf of myself and the membership of LeadingAge PA, thank you for the work you do to support and protect seniors and senior service providers across Pennsylvania. LeadingAge PA looks forward to working with you to help long-term care providers across the continuum. I would be happy to answer any questions you have.