

Bill: SB 0759 Estates and Trusts – Guardianship of the Person of a Disabled Person – Expedited Proceedings

Position: Unfavorable

February 19, 2024

The Maryland Long-Term Care Ombudsman Program advocates for residents in nursing homes and assisted living facilities in Maryland. Ombudsmen work to resolve complaints that can have adverse effects on the quality of care, safety, health, and quality of life of the citizens that reside in these facilities. In Maryland, ombudsmen provide these services to the over 50,000 citizens that live and receive services in nursing homes and assisted living facilities. Many of these residents were discharged from hospitals and admitted to these settings.

It is critical that individuals have a right to make informed decisions about their care. Guardianship should only be explored as a last resort since it takes the decision-making rights away from the individual. The Long-Term Ombudsman Program has seen cases where guardianship was granted when an individual was delirious and was temporarily unable to make their own decisions. Once the individual recovered from their illness, they were able to make their own decisions. In one case, the court appointed guardian had placed them in a nursing home and worked with the guardian of property that also had been appointed during this time. This individual's family home was sold when the individual still had a Medicare benefit and a spend down process for Medicaid was not needed. If the individual had been given time to recover from delirium and the other alternatives to guardianship had been explored, the individual would have been able to keep their home. In other cases, court appointed guardians have arranged for placement in nursing homes and assisted living facilities without any input from the individual or those that know them. Expediting this process would not allow for informed decision making around placement to occur or provide the opportunity to explore other options including care at home or other alternatives.

This bill is also concerning because ten days may not be enough time for the individual, their attorney and other interested parties to prepare and to participate in the guardianship process. It may take more than ten days to find the family and friends of the individual and to give them notice of the situation including information about the court hearing and legal process. Additionally, time is needed to determine if there is any advance care planning documentation including a health care agent document, living will, or financial power of attorney documents.

It may take time for the court to appoint counsel for the alleged disabled person. Once appointed, the attorney needs time to prepare for this important work including looking at less restrictive alternatives such as surrogacy and supported decision making.

The default for hearings should be in person and virtual hearings should be requested only if needed. There are many issues for individuals with disabilities using virtual platforms including accessibility issues. For instance, it may be difficult for the individual to use this medium effectively and there can be issues with connectivity, access to a computer, and access to the internet. If there are communication barriers such as hearing, speech, vision, and cognitive deficits, these platforms are not an effective means of communication or assessment.

At times, there are barriers related to discharge from the hospital. These include a lack of community resources, lack of placement options, and training needed for caregivers. Often a short length of stay is required by insurance companies and by hospitals. Discharge planning takes time and expedited guardianship does not offer a solution to these issues.

What are some other considerations? In 2016 the American Bar Association (ABA) developed a guide that helps lawyers identify and implement decision-making options that are less restrictive than guardianship, including supported decision making. Additionally, the ABA has other resources that are useful in these cases:

https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/supported-decision-making/

In 2022, the Supported Decision Making Law was passed. Supported Decision Making is also a reasonable accommodation under the Americans with Disabilities Act (ADA). The ADA requires that people with disabilities have equal access to services and programs as those without disabilities. Equal access can include tools to ensure effective communication, which means that whatever is written or spoken must be as clear and understandable to people with disabilities as it is for people without disabilities.

Once an individual is appointed a guardian, it is often difficult and sometimes impossible for the guardianship to be overturned. The Long-Term Care Ombudsman Program has assisted individuals with this process, but it often is very difficult for an individual to regain their rights for many reasons including the complexity of the assessment and legal processes involved.

If an individual is very ill, their mental status and communication abilities have changed or worsened because of delirium related to an illness or because of an illness or injury, then ten days often is not enough time for an individual to recover. An individual's right to make decisions should not be taken away hastily when they have had a serious medical issue, and a hospital wants to discharge them.

I respectfully submit my comments for consideration. Guardianship should not be expedited for placement purposes. There are alternatives.

Sincerely,

Stevanne Ellis, Maryland State Long-Term Care Ombudsman

