



Governor's Advisory Council for Exceptional Citizens (GACEC)
516 West Loockerman St., Dover, DE 19904
302-739-4553 (voice) 302-739-6126 (fax) <http://www.gacec.delaware.gov>

MEMORANDUM

DATE: May 31, 2019

TO: The Honorable Members of the Delaware General Assembly

FROM: Ann C. Fisher, Chairperson
GACEC

RE: **House Substitute 1 for House Bill No. 123 (Limited Guardianship) and Senate Concurrent Resolution 30**

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed **House Substitute 1 for House Bill No. 123 and Senate Concurrent Resolution 30**. HS 1 for HB 123 will allow the Public Guardian to act as a representative payee for Social Security benefits or as a VA fiduciary for Department of Veterans Affairs benefits. It also will allow the Court to appoint a guardian with limited powers, to act as guardian for specific areas of decision-making or for a specific term. Council reviewed this proposed legislation in conjunction with SCR 30 that creates the "Non-Acute Patient Medical Guardianship Task Force." Council **endorses the concept** of the legislation and would like to share the following observations and concerns.

With this legislation, the Court of Chancery may craft a guardianship order that is limited in scope or in duration. 3901(d)(2)(b). The intention with this particular section (which is expounded upon in SCR 30) would allow acute care facilities (though it is not limited to them) to petition for limited guardianship to assist them in discharging individuals. It creates a "quickie" guardianship to assist acute care facilities. Acute care facilities can sometimes be "stuck" with patients who no longer require acute care but have nowhere to go, at least absent a payment source. In situations where a person or their family is not cooperating with discharge or with applying for Medicaid or other assistance, this bill would allow the facility and/or the Public Guardian to petition for a limited short-term guardian to take over that process. It is unclear but may be assumed that the patient would still need to meet the legal criteria for requiring a guardian found in 12 Del. Code 3901(a)(2). It would be problematic to think that a certain subset of individuals could be subject to guardianship irrespective of capacity, or that the fact

that a person does not apply for Medicaid or cooperate with discharge is *per se* evidence that they meet the definition of “person with a disability” under the guardianship statute.

House Bill 123 makes it easier to obtain guardianships, which runs contrary to current trends, at least in other states. This aside, the bill does not address the main root causes for patients being “stuck” in acute care facilities, which among other things are a lack of community services and placements and discriminatory admissions practices by nursing homes, especially towards individuals who have dementia or behavior issues.

Council is concerned by the possibility that individuals transitioning from acute care facilities due to the decisions of the Office of the Public Guardian (OPG) may be vulnerable and find themselves without resources during the process. Benefits may be terminated during the transition leaving individuals in difficult situations.

Council would also like to note that it is critical that OPG be allotted appropriate resources to take on this expanded role. Taking on a role that has traditionally been held by the Division of Developmental Disabilities Services (DDDS) will add to the caseload at OPG. An additional concern is that the statute allows OPG to decline to serve in any situation where there is a relative who is either able OR willing to serve as a payee. This may put some clients of DDDS (and their families) in a bind, and as noted above, there is concern that DDDS ensure that a person who OPG decides not to assist has access to alternative payee services. The Social Security Administration (SSA) will stop payment when there is no payee in place for an individual who has been deemed to need one. There is a lack of clarity regarding consequences if OPG cedes responsibility to a family member. If OPG limited guardianship is used to assist in discharging a person from a facility, will OPG then be available to assist the individual once they are discharged? Is this contemplated by the language in the legislation?

Council would like additional clarification about whether individuals who are overstaying their discharge at acute care facilities are being subjected to a lesser standard for incapacity under Title 12 as mentioned above. We are also concerned that it appears the guardianship law is being amended to benefit the health care industry at the expense of individual rights.

Since SCR 30 will impact persons with disabilities, Council would suggest more representation by individuals with disabilities on the Taskforce it creates. This would ensure the needs and perspective of individuals with disabilities would be heard and addressed in relation to medical guardianship services.

Thank you in advance for your time and consideration of our observations. Please feel free to contact me or Wendy Strauss at the GACEC office should you have any questions.