

SCR 155



The Judiciary, State of Hawaii
Testimony to the Twenty-Fifth State Legislature, Regular Session of 2010
Senate Committee on Health

The Honorable David Y. Ige, Chair
The Honorable Josh Green, M.D., Vice Chair
Friday, March 19, 2010, 3:00 p.m.
State Capitol, Conference Room 016

By
Moira T. Chin, Director
Office of the Public Guardian, Intergovernmental & Community Relations Department

Bill No. and Title: Senate Concurrent Resolution No. 155, Requesting the Attorney General to Review the Guardianship Process with Respect to the Issue of Patients in Hospitals Who are Waitlisted for Post-Acute Care.

Purpose: Requests the Attorney General to review the current guardianship process and to initiate changes without amending the law to expedite the process of appointing a guardian for patients in hospitals who are waitlisted for post-acute care and ready for discharge.

Judiciary's Position:

The Office of the Public Guardian (OPG) does not support the passage of this resolution. At the present time, procedures are already in place for the courts to appoint a private/family guardian or OPG as a last resort in an unlimited or limited capacity on a regular or emergency basis.

Upon appointment of a guardian of the person, certified orders of guardianship are issued. The guardian can then intervene and make decisions in behalf of the client. The responsibility to serve as a legal decision maker especially when unlimited in scope is a grave and serious matter not to be taken lightly. Once appointed, OPG investigates the client's personal history, finances and preferences to determine an appropriate course of action. No funds from OPG appropriations are used for the client's care, education, health or welfare. OPG must access the client's resources or apply for, manage and coordinate all assets and income received by the client. The guardian must intervene and make contact with financial institutions, Social



Senate Concurrent Resolution No. 155, Requesting the Attorney General to Review the Guardianship Process with Respect to the Issue of Patients in Hospitals Who are Waitlisted for Post-Acute Care.

Senate Committee on Health

Friday, March 19, 2010

Page 2

Security, Medicare, Medicaid, employers, insurance agencies, etc. on behalf of the client so that a decision can be made to redirect resources if necessary. It is not unusual for this investigation to extend beyond a few weeks if not a month before a complete financial picture can be understood and entitlements applied for and approved if necessary to pay for the client's post acute care.

Pursuant to statute, when an adult is deemed incapacitated, appointment of OPG is the last resort. Ideally, guardianship should be granted to family members or individuals with priority status. Due to potential for conflict of interest, OPG does not file petitions for guardianship. When a need occurs, and a petition is filed either on an emergency or nonemergency basis, the court sets a hearing date and OPG is served with notice by the petitioner. The court can consider expediting the process and appoint an emergency guardian for 90 days when the court finds that substantial harm to the respondent's health, safety or welfare may otherwise occur.

OPG serves as statewide court-appointed guardians of the person for approximately 730 incapacitated adults who do not have anyone willing and able to serve as decision makers. The majority of OPG clients are developmentally disabled. Other clients are elderly, aged 65 and over with an average age of 85, or mentally ill or incapacitated due to brain injury, substance abuse or non elderly dementia. The majority of incoming new referrals is petitioned by Adult protective Services (APS) of the Department of Human Services for aging clients as victims of financial exploitation or self neglect/abuse. Acute care or residential health-care facilities are also a major source of referrals because decision makers are needed for medical treatment, finances, and/or for discharge planning purposes.

In conclusion, declaring an individual incapacitated and ordering guardianship are necessary on occasion when the individual failed to properly plan for this possibility. Family, friends or those with priority status should be provided the opportunity to serve; however, if they are not available or unwilling to serve, OPG is appointed as a last resort. The petition process can be expedited when there is a threat of substantial harm and an emergency guardian can be appointed for 90 days. In regards to the post hearing assignment and delays, any guardian, be it OPG or a private/family guardian will require time to investigate the personal and financial affairs of the ward before making decisions.

Thank you very much for this opportunity to testify.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010**

ON THE FOLLOWING MEASURE:

S.C.R. NO. 155, REQUESTING THE ATTORNEY GENERAL TO REVIEW THE GUARDIANSHIP PROCESS WITH RESPECT TO THE ISSUE OF PATIENTS IN HOSPITALS WHO ARE WAITLISTED FOR POST-ACUTE CARE.

BEFORE THE:

SENATE COMMITTEE ON HEALTH

DATE: Friday, March 19, 2010 **TIME:** 3:00 p.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Mark J. Bennett, Attorney General, or
Andrea J. Armitage, Deputy Attorney General

Chair Ige and Members of the Committee:

The Department of the Attorney General opposes this concurrent resolution because it is unnecessary.

This concurrent resolution requests the Attorney General to review the current guardianship process and develop an expedited guardianship process for patients in hospitals who are waitlisted for post-acute care and ready for discharge once a guardian has been identified. The Attorney General is also requested to make efforts to initiate changes that can be made without the necessity of amending the law, and submit a report to the Legislature of his findings and recommendations, including proposed legislation, if any, to the Legislature within twenty days prior to the convening of the Regular Session of 2011.

This measure is unnecessary because expedited processes already exist in Hawaii law that would allow incapacitated patients to be transferred from an acute care facility to a long-term care facility. Section 327E-5, Hawaii Revised Statutes (HRS), provides for the appointment of a surrogate to make health-care decisions on behalf of an incapacitated

patient. No legal guardianship is required. The surrogate can be someone designated by the patient, or determined by consensus of family members and other interested persons. No judicial approval is required.

Section 551-35, HRS, provides that the father and mother of an incapacitated person "are jointly and severally the person's natural guardians and conservators. They shall have equal powers and duties with respect to the person" This provision is also a process by which health-care decisions can be made on behalf of an incapacitated adult without a judicial guardianship proceeding having to be filed.

Only in cases where there is an incapacitated adult patient in an acute care facility who needs to be transferred to a long-term care facility, and has no family members or other interested persons to be appointed the patient's surrogate or natural guardian, would there need to be a legal guardianship proceeding filed pursuant to part 3 of article V of chapter 560, HRS. In these cases, the Office of the Public Guardian would need to serve as guardian under the authority of chapter 551A, HRS. In such cases, the legal requirements and protections of the guardianship process are necessary. There are notice requirements to ensure that family members are contacted. The Office of the Public Guardian is not authorized to be a legal guardian if there is a suitable person available and willing to accept the guardianship appointment (see section 551A-3, HRS). The notice requirements can be, and are, waived by the Family Court when requested and good cause is shown. Although the hearings may be set a few months in the future, expedited hearings may be requested, again, with good cause shown, and the Family Court often grants these requests as well.

We respectfully ask the Committee to hold this concurrent resolution.



SENATE COMMITTEE ON HEALTH
Senator David Ige, Chair

Conference Room 016
March 19, 2010 at 3:00 p.m.

Supporting SCR 155.

The Healthcare Association of Hawaii represents its member organizations that span the entire spectrum of health care, including all acute care hospitals, as well as long term care facilities, home care agencies, and hospices. Thank you for this opportunity to testify in support of SCR 155, which requests the Attorney General to develop an expedited guardianship process for patients in hospitals who are waitlisted for post-acute care and ready for discharge once a guardian has been identified.

On any given day there are an average of 200 patients in Hawaii's hospitals who have been treated so that they are well enough to be transferred to long term care, but who are waitlisted because long term care is not available. Waitlisting is undesirable because it represents an inappropriate quality of care for the patient and creates a serious financial drain on hospitals. Waitlisted patients also unnecessarily occupy hospital beds that could otherwise be used by those who need acute care. Patients may be waitlisted for a matter of days, weeks, or months, and in some cases over a year.

Hospitals continue to lose money because of waitlisted patients. A report issued by Ernst & Young in late 2009 reported that Medicaid pays for only 20% to 30% of the actual costs of care for waitlisted patients, representing uncompensated hospital costs of approximately \$72.5 million in 2008.

The Healthcare Association has addressed different aspects of the waitlist problem through various legislative measures. One measure addresses financial issues so that long term care facilities receive sufficient Medicaid payments to cover the costs of caring for waitlisted patients with complex medical conditions. Another measure creates a presumptive Medicaid eligibility process to reduce the length of time to process Medicaid applications for waitlisted patients.

The ultimate objective of SCR 155 is to reduce time taken to determine guardianship for waitlisted patients. Although this group represents a relatively small part of the waitlist population, they are typically waitlisted for a very long period of time and therefore represent relatively large amounts of uncompensated costs.

For the foregoing reasons, the Healthcare Association of Hawaii supports SCR 155.