

PUBLIC NOTICE

HEALTH

THE COMMISSIONER

HOSPITAL LICENSING STANDARDS

Notice of Action on Petition for Rulemaking

Definitions and Patient Rights

N.J.A.C. 8:43G-1.2 and 4.1(a)

Petitioner: Lisa D. Taylor, Esq., of Inglesino, Webster, Wyciskala and Taylor, LLC of Parsippany, NJ.

Take notice that the Department of Health (Department) has determined to deny the petition for rulemaking described below that was filed by Lisa D. Taylor, Esq., of Inglesino, Webster, Wyciskala and Taylor, LLC of Parsippany, NJ. (petitioner).

The Petition

N.J.A.C. 8:43G-4.1(a) establishes a hierarchy of individuals whom a hospital is to contact to provide consent for a patient when the patient is unable to consent to a discharge to a nursing home, including a patient's next of kin. The petitioner requests the Department amend N.J.A.C. 8:43G-1.2 to define the term, "next of kin," as used at N.J.A.C. 8:43G-4.1(a)7, to include a close friend or other adult who is familiar with the patient's health care preferences.

The petitioner asserts that there are instances when an individual is transported to a hospital for emergency treatment, and then, after the emergency has been resolved, the patient might become a candidate for discharge from the hospital for continued treatment at a skilled nursing facility but is unable, due to mental incapacity,

to consent to the discharge and transfer. Skilled nursing facilities are reluctant to accept such a patient without written consent. The petitioner states, “there are patients who have no family or whose family members are unwilling to be involved for a number of reasons but may have a close friend or other adult who is familiar with the patient’s preferences. However, in the absence of a specific basis for authorization and in an exercise of caution, many health care providers decline to accept consent from a friend or other adult.” The petitioner further states that, although the filing of an emergency petition for medical guardianship is an option, this course of action can be costly and time-consuming.

The Department’s Response to the Petition

The Department has determined to deny petitioner’s request to define the term “next of kin” and add it to the definition section at N.J.A.C. 8:43G. The term “next of kin” is generally understood to include a spouse or a blood-relative, such as a parent, sibling, or offspring, and may include a relation by marriage. See, *Black’s Law Dictionary*, 2nd Edition.

The New Jersey Revised Statutes and the Rules Governing the Courts of the State of New Jersey establish the substantive and procedural requirements by which a person can be appointed to serve as guardian of the person and property of an incapacitated person. See generally N.J.S.A. 3B:12-1 et seq., and New Jersey Court Rule 4:86-1 et seq. While preference is accorded to a ward’s relatives, the statutes and rules authorize the Superior Court to appoint an interested person to serve as guardian, who may be, as the petitioner suggests, a close friend or other adult who is familiar with

an incapacitated person's preferences, in the absence of an appropriate family member. N.J.S.A. 3B:12-25 and R. 4:86-6.

Absent the continuing judicial oversight created by a guardianship proceeding (see N.J.S.A. 3B:12-36, establishing the court's continuing jurisdiction over the guardianship following an appointment of a guardian), the Department would exceed its authority to permit, by rulemaking, individuals who are not related by blood or marriage to make discharge and transfer decisions for a patient who is unable to provide consent. To do so would be imprudent and could lead to undesirable results. For example, should there be two or more individuals involved who seek to express an opinion regarding a patient's discharge or treatment, hospital employees would be placed in the undesirable position of attempting to determine which friend has more pertinent knowledge of the patient's preferences. An even more undesirable situation could arise if a hospital relied on information from a patient's friend to commence a particular course of treatment, then subsequently discovered the patient's health care desires were different than that expressed by the first friend, when a second friend presents conflicting information.

Moreover, allowing an interested friend to authorize a patient's discharge to a facility providing a less acute level of care would simply postpone the need for the appointment of a person with continuing decision-making authority with respect to the patient's social, medical, and financial needs, when a patient is unlikely to return to full mental capacity. For example, discharge of a patient to a rehabilitation or long-term care facility requires execution of financial agreements to cover the costs associated with a patient's admission to the facility, and may require consent to other decisions

over time respecting a patient's ongoing care. The Department is without authority to authorize, by rule, a patient's friend to execute these forms. Only the New Jersey Superior Court has authority to appoint a permanent guardian of a patient's person and property.

Existing N.J.A.C. 8:43G-4.1(a)7 sets forth options that can be pursued when seeking consent for medical treatment in the event a patient is unable to do so, which include consideration of and granting deference to either the patient's advance directive for health care or the judgment of a patient's next of kin or guardian. The Department believes it is neither necessary nor prudent to include a patient's friends in this decision-making process and the means to deal with the situation posited by the petitioner rests exclusively within the jurisdiction of the New Jersey Superior Court through the guardianship process.

A copy of this notice has been mailed to the petitioner as required by N.J.A.C. 1:30-4.2.