

**MEMORANDUM**

**From:** Eric Crowder, Luminis Health Associate General Counsel  
**To:** Tim Adelman, General Counsel/Chief Legal Officer  
**CC:** Davion Percy, Vice President, Community Relations and Public Policy  
**Date:** August 18, 2023  
**Re:** Two Reforms to Propose to Guardianship Law in Maryland

This memorandum proposes two legislative reforms that would greatly benefit Maryland hospitals each time they undertake the recurring task of petitioning a Maryland Circuit Court to appoint a guardian for a hospital patient lacking the capacity to make decisions regarding his or her own person or property. The benefit Maryland hospitals will enjoy by these reforms will also serve a pressing public policy goal: efficient management of hospital patient throughput from hospital sites of care such as emergency departments and inpatient units to less restrictive sub-acute sites of care such as skilled nursing facilities, long term care placements, or in-home health services.

The manner in which Maryland Circuit Courts process guardianship petitions is largely dictated by three sources of state law: i) the Maryland Code, Estates and Trusts Article; ii) Title 10 of the Maryland Rules entitled “Guardians and other Fiduciaries”; and iii) *In Re: Sonny E. Lee*, 754 A.2d 426 (Md. Ct. Spec. App. 1999). Taken together, these legal authorities impose restrictions on the Circuit Courts that force hospitals to wait weeks (and, more recently, often months) before a Court assigns a guardian of a hospital patient who can assist with executing a patient’s hospital discharge plan. One of the restrictions that creates this unfortunate reality causing hospital patients to remain unnecessarily in an acute care setting is Section 13-203 of the Estates and Trusts Article. The other restriction is the holding in *In Re: Sonny E. Lee* requiring a hearing be held prior to the appointment of a guardianship hearing. Two sensible, limited legislative reforms can eliminate these restrictions without unfairly violating the due process rights of hospital patients.

**Reform to Section 13-203**

Currently, Section 13-203 authorizes a Circuit Court to appoint a temporary guardian of property of an alleged disabled person “while a petition for appointment of a guardian ... is pending.” Section 13-203 goes on to significantly limit the Court’s authority to appoint such a guardian only when “specific facts shown by affidavit that immediate, substantial, and irreparable injury will result to the...disabled person before an adversary hearing can be held.” Hospital attorneys have long tried, and failed, to convince Circuit Court judges that a hospital patient’s continued

medically unnecessary stay at a hospital despite no acute care need represents an “immediate, substantial, and irreparable injury.” Section 13-203 could be reformed to include one additional, limited justification for a Circuit Court to appoint a temporary guardian of the property. Specifically, Section 13-203 could be appended with the following as Section 13-203(b)(4):

*(4) The court may appoint a temporary guardian of the property to act on behalf of an alleged disabled person who is a patient at a Maryland hospital if it appears from specific facts shown by affidavit that the temporary guardian of the property will, in collaboration with the hospital, secure a safe and appropriate discharge to a subacute health care facility capable of caring for the alleged disabled person until an adversary hearing is held.*

This straightforward, limited addition to Section 13-203 would resolve an unavoidable reality of our health care delivery model: Sub-acute health care facilities are under no obligation to accept patients unless and until they are satisfied they will be adequately compensated for their services. To determine whether a hospital patient for whom transfer to such a facility is sought will be able to pay the facility, it is vitally important to authorize a guardian of the property to ascertain a patient’s assets or eligibility for public benefits and marshal those assets or benefits and leverage them to pay a sub-acute care facility that is medically appropriate for the patient. Until a guardian of the property is legally empowered to do this work, a hospital patient stands no chance to proceed from an unnecessary stay in a hospital bed to a sub-acute facility where the patient can thrive to the utmost of his or her capabilities.

### **Codification of Expedited Limited Healthcare Fiduciaries (“ELHFs”)**

In Maryland, unless a hospital patient selected a health care agent to make health care decisions on behalf of the patient, a Maryland Court’s ability to make such a selection for an alleged incapacitated hospital patient is confined by the Maryland Code and the *In re: Sonny E. Lee*. Maryland Courts can appoint a Guardian of the Person for such incapacitated hospital patients but only after a hearing. Furthermore, such hearings are only conducted after the presiding judge is satisfied that all persons with an interest in the proceeding have been served with notice of the hearing and have been given a chance to respond to the guardianship petition. Each hospital patient for whom a guardianship is sought presents his or her own personal, familial and social circumstances. Perfecting service on hospital patients’ “Interested Persons” (as defined by Maryland law) can require extensive time and effort. And, during this time, a hospital patient who has no need for acute care hospital services remains in the hospital without anyone authorized to consent to a safe and appropriate discharge plan for the patient. Other states,

including Tennessee, have solved this puzzle by authorizing ELHFs to serve in the role of temporary decision maker for hospital patients. Pursuant to these laws authorizing ELHFs (e.g. [Tennessee Code § 34-1-133](#) ), individuals or local governmental agencies are expeditiously appointed when a hospital cannot rely on a patient to meaningfully participate in the discharge planning process and no family members are willing, or capable, to help the patient. With statutory authority, ELHFs minimize unnecessary hospitalization of patients while also respecting the due process rights of patients to a hearing where a Court can decide whether a patient lacks sufficient understanding or capacity to make or communicate responsible health care decisions and no less restrictive form of intervention is available to the hospital patient.