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### **Program for Indigent Elderly at Risk**

WHITE PLAINS - Carla D. Glassman, the counsel for the Family Service Society of Yonkers, the agency that serves as guardian for incapacitated persons in Westchester County, recalls representing Anne, a fragile 69-year old incapacitated woman.

Anne was found neglected and asleep in a dark bedroom in her own home, possibly drugged by the home health care aide who, while living with her had moved her own family into the elderly woman's house. After an evaluation found that Anne was not in a safe environment, FSSY moved the woman to a nursing home.

Ms. Glassman initiated legal action to remove the health care aide and her family from the residence.

"Cases like these show how critical intervention can be," said Ms. Glassman, a White Plains Lawyer at Glassman & Brown, who also does work for FSSY. "For many of these elderly individuals who have no relatives or someone to act in their best interest, a guardian is necessary for that person's survival."

But according to FSSY's treasurer, Mark Mirsky, the pro bono legal services provided to its elderly incapacitated indigent clients may not be around for long due to funding constraints.

The Family Service Society of Yonkers, a not-for-profit, health care and social service agency licensed by the state, began its Guardianship program in November 1996 after Ms. Glassman and Justice Louis C. Palella, the judge in charge of the mental health part of Westchester Supreme Court, recognized the growing need of the incapacitated elderly in Westchester County.

The program offers a variety of services, including management of an individual's resources, location of an appropriate place for an individual to live after discharge from a hospital, or initiation of litigation on their behalf against a relative believed not to be acting in their best interest.

In just a few years, the program has grown from 28 cases in January 1998 to a caseload now over 100 cases, with at least 33 cases involving indigent and other low-income individuals. To date, the agency has not turned down a case.

Yet unlike the community guardianship system in New York City, where the Human Resources Administration funds three agencies to serve the elderly indigent population, FSSY receives no funding from the county.

Although Mr. Mirsky said that the guardianship program is operating at a deficit, he refused to provide financial details. The program, he explained, is funded by fees collected from the ward's assets as well as investment income from the agency's endowment.

A Form 990 tax return obtained from the State Attorney General's Office showed the agency with \$2.3 million invested in securities at the end of 1999. Last year, the entire agency's total net assets were \$3.2 million, with a profit of \$98,726.

Generally, appointment of a guardian can cost anywhere from \$8,000 to \$10,000, including the doctor, legal, court evaluator and court fees to file the petition. If a guardianship is contested, the cost of an appointment can double. After appointment, legal fees are then assessed by the court, depending on the complexity of the functions that the ward needs and the amount of assets.

"Our endowment is being depleted much more than we anticipated, and the problem is it has become more difficult for FSSY to look for other programs that would help the public at large," Mr. Mirsky said.

Although Justice Palella has appointed FSSY as the "Guardian of Last Resort" for most indigent Westchester residents, he said he realizes FSSY carries a heavy burden. The judge said he appoints FSSY to nearly 90 percent of the indigent cases, which make up 20 percent of the mental health part's caseload.

Once, he tried to assign a temporary guardianship case to the Westchester County Department of Social Services to test their position on the issue. County Attorney Alan D. Scheinkman appealed the decision, prompting the judge to issue a new order, appointing FSSY.

In the January 29, 1999, order, the judge commented, "It should be noted that FSSY . . . takes on difficult cases with the hope of little or no compensation. It is to be commended for patching an apparent hole in that 'safety net' which is purportedly in place for the poor of Westchester County."

Despite the fact that Social Services Departments in Dutchess and Orange Counties take on representation for indigent adults, County Attorney Scheinkman steadfastly maintains that funding for indigent adults is not the county's responsibility under Article 81 of the New York State Mental Hygiene Law.

"Our view is that there is nothing in the law that makes us the 'Guardian of Last Resort,'" he said. "The Family Court Act mandates us to care for handicapped children, but says nothing about indigent adults."

Deputy County Executive Jay Hashmall admitted that the county ends up making a "judgment call" on which projects need money. Currently, the county allocates funds to the Pace Women's Justice Center to help victims of domestic violence, and in a month, will announce a new initiative for victims of child abuse.

"At this moment, because the non-profits are providing a good service, there really isn't any 'urgent need' for the government to focus on," explained Mr. Hashmall.

At least one local lawyer had another explanation for what is going on in the mental health part.

#### Role Has Evolved

"Basically what has happened is that FSSY has become the 'go-to guy,'" explained Howard S. Krooks, a lawyer with Littman Krooks LLP & Roth PC in White Plains and New York City who has been handling guardianship cases for 10 years. "FSSY was not designated by statute to serve the county's indigent. It just has evolved that way, and since they are already doing a good job, there is no incentive for the county to pay. We just have to hope that no one is falling through the cracks."

Mr. Krooks, who has been appointed by the New York State Bar Association to chair a special committee looking into the procedure for fiduciary appointments, said he believes the FSSY and other similar non-profits have a strong argument for entitlement to county funding.

But other lawyers like Linda Roberts of Covey Roberts Buchanan & Carmody-Roberts LLP in Katonah think getting the money will be difficult because representation for the elder indigent is not mandated by law, as contrasted with payment for counsel for poor criminal defendants. Ms. Roberts, co-chair of the Westchester County Bar Association's Elder Law Committee, has been handling guardianship cases for 15 years.

Another problem, she said, is that the public does not perceive the lack of guardianships for the elderly to be a crisis. In her practice, she advises her clients to do estate planning including a power of attorney and health care proxy early as a way of avoiding the possibility of a guardianship down the road.

"People don't want to think about becoming disabled or elderly," she noted. "They don't want to think that they one day may lose their physical, financial and emotional independence, so the issue is not really looked at."

#### Public Guardianship

What needs to happen, said Bernard A. Krooks, chair of the New York State Bar Association's Elder Law Section and an attorney with his brother Howard at Littman Krooks LLP, is enactment of a public guardianship system. A public guardianship, which would require enactment by the State Legislature, would be a specific agency invested with the power to take care of incapacitated people and manage their property. Such an agency would receive state or county government aid.

"If there was a charter to do a public guardianship, there never would be the problem with an agency failing to take on a case because it's too complicated. The agency would get all the cases, which would be a much better system. It just come down to funding," said Mr. Krooks.

He said that there is no noticeable support for such a system, however, because the indigent elderly lack the political clout to attract a sponsor and support.

Another option may be to get the courts involved. In *Matter of Skinner v. Lyles*, (NYLJ, February 21, 1997), Manhattan Justice Louis B. York ordered a New York hospital that successfully petitioned to have a guardian appointed for an incapacitated indigent to pay the guardian's fee.

Although Mr. Hashmall said the county has not seen a need to fund these services, Mr. Krooks of the State Bar's Elder Law Section sees the need as relative.

"If you're that one person that fails to receive care, it's a crisis for that person and their family," he declared. "The question then becomes, at what level does it rise to a county-wide crisis?"