

To: Deb Holtz

From: Kia Thrasher

Date: March 27, 2012

Re: Admission to Nursing Facilities for Persons Who are Isolated and Incapacitated

**I. ISSUE: PERSONS WHO SEEM /APPEAR TO LACK CAPACITY ARE BEING DENIED
ADMISSION TO NURSING FACILITIES**

Recently, academics and advocates of the aging community have demonstrated a growing interest in addressing the needs of a rapidly emerging population: the isolated (or 'unbefriended')¹ and incapacitated community. These individuals are among the most vulnerable in the entire aging population. They are persons who no longer have family or friends to support them, or give them a voice. They are persons who do not have a voice, even in their own decision making, due to incapacity because of aging and illness.

Unfortunately, these individuals need someone to speak for them and assist in their decision making. What happens when a person is required to have someone give their consent for them, but no one is available or able to do so? What if an incapacitated and isolated individual's consent is required to get adequate care and housing in a nursing facility, but there is no one to consent for them?

**II. RULE: IS IT LEGAL FOR NURSING FACILITIES TO DENY ADMISSION
BASED ON INCAPACITY AND ISOLATION?**

Applicable Federal Law

There are a variety of federal laws which are designed to protect persons who are isolated and lack capacity. However, some federal laws designed to help individuals in this situation may actually harm these individuals due to overly cumbersome requirements.

A. Preadmission Screening and Resident Review

One federal law that may be preventing some isolated and incapacitated individuals from accessing nursing facilities is the Preadmission Screening and Resident Review (PASRR). This

¹ Author's Note: While many academics who have written on this topic have chosen to refer to this population as 'unbefriended', the author has chosen to use the term 'isolated' instead. The term 'isolated' accurately describes the entirety of the situation surrounding this population of individuals. In some situations these individuals may have friends and/or family; but no one who can speak on their behalf. For the aforementioned reasons, the term 'isolated' will be used throughout this article.

law was added into federal law as part of the Omnibus Budget Reconciliation Act of 1987.² The PASRR process is designed to ensure that the needs of patients are being met according to their age and/or disability.³ Under these guidelines, a person is redirected from receiving nursing facility services if they have a MI/MR diagnosis. However, it is possible that some individuals who lack capacity (perhaps those with dementia or Alzheimer's) are being misdiagnosed at the screening process as MI/MR.

B. Americans with Disabilities Act of 1990

If individuals are being denied admission based on the fact that they are incapacitated and without a guardian, there is a violation of the Americans with Disabilities Act (ADA) of 1990. To have a claim under the ADA, a person must be considered 'disabled' under the Act. Persons who are considered incapacitated by nature will fit under this definition, because they have a mental impairment (incapacity) which substantially limits one or more of their major life activities. "Major life activities" that are substantially limited for a person who is incapacitated will vary case by case, but it is likely that the incapacitated individual is limited in at least one of the following activities: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working".⁴ According to the ADA, if a person's disability limits their ability to perform one or more of these activities, they have a disability for purposes of the ADA.

If a person is incapacitated, it is likely that they are disabled under the ADA. As such, the ADA prohibits that public accommodations discriminate against isolated and incapacitated individuals based on their disability. "No individuals shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation...".⁵ A nursing facility is a place which provides goods, services, facilities, privileges and accommodations to persons who are in need of those services. Additionally, the Act specifically articulates that "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any...facilities..."⁶ is a form of discrimination.

A nursing facility would likely be considered a public accommodation under the statute, even if it is a private facility. Under the ADA, a public accommodation is defined as follows:

² 42 C.F.R. § 483.106

³ For more information, visit

http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_163309#P19_5410 (last visited March 27, 2012)

⁴ 42 U.S.C.A. § 12102

⁵ 42 U.S.C.A. § 12182

⁶ *Id.*

The following private entities are considered public accommodations for the purposes of this subchapter, if the operations of such entities affect commerce--...a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment;...⁷

Even if a nursing facility is a private entity, for the purposes bringing a claim under the ADA, it is a 'public accommodation'. As such, it must be held to the standards of the ADA. This means that nursing facilities may not discriminate against persons for admission to facilities on the basis of their capacity, or lack thereof.

C. Code of Federal Regulations- Requirements for States and Long Term Care Facilities

Federal law permits nursing facilities to make a determination of an individual's required level of care, and, based on that determination, the facility may admit the individual. The regulation which permits admission by this standard does not articulate that the individual *needs* a guardian or a person with the power and capacity to make health care determinations for them. The regulations merely states "If the State mental health or mental retardation authority determines that a resident or applicant for admission to a NF requires a NF level of services, the NF may admit or retain the individual..."⁸ When a person who is incapacitated is applying for admission to a nursing facility, it appears that federal law allows for the NF to make the determination of whether they are in need of services. This necessarily means that the incapacitated and isolated individual does not *need* a third party to 'vouch for them' for admission to a nursing facility.

It is possible that some facilities are requiring third party input for access to facilities for incapacitated individuals because they are concerned about payment. The Code of Federal Regulations makes it very clear that a facility must not require a third party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility.⁹ If this is the case, the facility may be violating this section of federal law as well.

Applicable State Minnesota Law

A. Nursing Home Admission Contracts

Various Minnesota state laws protect the admission rights of incapacitated and isolated individuals. Additionally, these laws protect nursing facilities by permitting them to admit individuals who may lack capacity and do not have a guardian or representative. When creating the nursing home admission contract, the facility is held to the following standards:

Before or at the time of admission, the facility shall make reasonable efforts to communicate the content of the

⁷ 42 U.S.C.A. § 12181

⁸ 42 C.F.R. § 483.116

⁹ 42 C.F.R. § 483.12

admission contract to, and obtain on the admission contract the signature of, the person who is to be admitted to the facility and the responsible party. The admission contract must be signed by the prospective resident unless the resident is legally incompetent or cannot understand or sign the admission contract because of the resident's medical condition.¹⁰

If the individual cannot sign the admission contract, all the facility needs to do is document the reason in the resident's medical record by the admitting physician.¹¹ This law clearly does not preclude nursing facilities from admitting individuals who are incapacitated and without a guardian or representative. However, it does not make their admission mandatory.

Guiding Secondary Resources

One secondary source that is discussed at length in a later portion of this article is written by Naomi Karp and Erica Wood. The article, "Incapacitated and Alone" illustrates the growing problems associated with the isolated and incapacitated population. Many scholars on aging have articulated the many issues associated with this rapidly growing population of isolated and incapacitated individuals. Below is a list of useful articles and annotations of those articles to peruse in conjunction with this article.

- Frank, Casey. "Surrogate Decision-Making for 'Friendless' Patients" 34 Colo. Law 71 (April 2005).
 - o This article reviews surrogate decision making procedures and outcomes. It discusses, generally, impersonal informed consent (i.e. when consent/health care decisions are made for individuals by other uninterested individuals). The author articulates a growing need to develop processes which select surrogate decision makers as the number of the friendless population continues to grow.
- Hubbard, Kim. "Protective Proceedings for Elder and Dependent Adults: A Model Program to Assist the Unbefriended" 46 Orange County Law. 4 (January 2004).
 - o This proposal presents an 'ideal' program to assist isolated, incapacitated elders and vulnerable adults in decision making and surrogate decision making. This program contains responsibilities for different agencies, courts, and various services that are implicated in choosing a surrogate decision maker for an incapacitated, isolated vulnerable adult. It holds Ombudsmen responsible for vulnerable adult patients' rights in licensed facilities.
- Karp, Naomi and Wood, Erica. "Incapacitated and Alone: Healthcare Decision Making for Unbefriended Older People" 31 Hum. Rts. 20 (Spring 2004).
 - o This study discusses the rapidly growing problems associated with individuals who do not have friends or family and are incapacitated. When these individuals

¹⁰ Minn. Stat. § 144.6501

¹¹ Id.

also do not have an advance directive, or decision maker available to them, long term care decision making becomes nearly impossible. There is little data on the size of these individuals, likely due to the nature of this problem: they are isolated and vulnerable individuals. Some states have developed legislative paths to healthcare decision making for isolated patients. These paths include things like: statutorily designated surrogate decision maker; committees of trained volunteers who become joint decision makers; public guardianship; and appointment of decision maker through judicial process.

- Kapp, Marshall. "Health Care in the Marketplace: Implications for Decisionally Impaired Consumers and Their Surrogates and Advocates" 24 S. Ill. U. L. J. 1 (1999).
 - o This article reviews the growing concern of the implications of surrogacy decision making on incapacitated individuals. Particularly, it discusses a challenge presented by a 'free marketplace' design in health care: it allows facilities, long term care providers, and others to turn down individuals who lack capacity and family. LTC providers allow this discriminatory practice under the assumption that beneficiaries of LTC planning should be fully aware of how to create and manage a plan. This practice, unfortunately, deprives some people of potential benefits, because of their disabilities. Kapp presents potential solutions to this growing issue. Cognitive impairment and capacity for decision making should not be 'all or nothing', but rather be individualized. This allows for individuals who can do some of their planning to assist in their own long term care development. Ultimately, this probably rests on the courts to alter, since they guide the surrogate decision making process, and capacity assessments. These processes are essential in the case of isolated, incapacitated elders/vulnerable adults where 'family consent' is not available.

- Kapp, Marshall. "The 'Voluntary' Status of Nursing Facility Admissions: Legal, Practical and Public Policy Implications" 24 New Eng. J. on Crim. & Civ. Confinement (Winter 1998).
 - o This article critiques the nursing home admission process, and whether admissions are always voluntary, as they should be as a matter of law. He notes that nursing home admissions often result directly from hospital discharge planning processes. However if this is not the case, or if it is the case but the person is not mentally competent, a nursing home can still turn incapacitated individuals away based on 'potential behavioral issues'. The author also discusses the problematic outcome of *Zinermon v. Burch*, a Supreme Court case which held the state of Florida civilly liable for permitting a mentally incompetent person to admit themselves to a mental institution voluntarily.

- National Long-Term Care Ombudsman Resource Center. "Minnesota Unbefriended Elders Brochure" *available at* <http://www.ltcombudsman.org/sites/default/files/ombudsmen-support/training/MN-Unbefriended-Elders-Brochure.pdf> (last visited March 27, 2012).

- Ortiz, Jessica E. Brill. "Advocating for the Unbefriended Elderly: An Informational Brief" The national Long-Term Care Ombudsman Resource Center (August 2010) *available at* http://www.ltcombudsman.org/sites/default/files/ombudsmen-support/training/Informational-Brief-on-Unbefriended-Elders_0.pdf (last visited March 27, 2012).
- Rackauskas, V. "Self-Determination at the End-of-Life: Considerations for the Unbefriended" Social Work Leadership Institute (2009) *available at* http://socialwork.nyam.org/nsw/students/journals/Self-Determination_at_the_End-of-Life.pdf (last visited March 27, 2012).
- Rassen, Amy. "Improving Care for Unbefriended Elderly in San Francisco" 27 BIFOCAL 1 (2006).
 - o This article suggests that one possible solution for aiding incapacitated and isolated individuals is to have a countywide bioethics committee to improve care for the isolated and incapacitated elderly. The study demonstrates that nursing facilities in San Francisco do not have such committees, but that hospitals do.
- Sabatino, Charles. "Statutory, Institutional and Judicial Approaches to Surrogate Medical Decision Making" 2000 NAELA Inst. 4-1 (2000).
 - o This article reviews some general problems that exist with surrogate medical decision making. Part IV particularly addresses the issue of decision making for the isolated patient. The study focuses on the difficulties that exist with decision making in the nursing home setting, with incapacitated individuals. However, it does not spend much time discussing how those individuals came to be there in the first place.
- United States Government Accountability Office, "Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People". *Testimony Before the Special Committee on Aging* U.S. Senate (2006) *available at* <http://www.gao.gov/new.items/d061086t.pdf> (last visited March 27, 2012).
 - o This report primarily discusses the failures of court oversight in the relationship between guardian and incapacitated person. It recognizes the difficulty in even assessing the number or type of abuse that occurs, since data on guardianships is lacking. The study consisted of data gathered from state laws, and court monitoring of guardianships. The GAO identified 4 courts as having exemplary oversight and training for guardians. These courts went above what the state laws required them to do in training and oversight. Unfortunately, the report noted that the state courts and federal agencies have little coordination on monitoring guardians, even though they often work to serve the same group of individuals.
- Volunteers of America, Minnesota. "Unbefriended Elders: Matching Values with Decisions" (2010) *available at* <http://www.mngero.org/downloads/UnbefriendedElders.pdf> (last visited March 27, 2012).

III. ANALYSIS AND POLICY RECOMMENDATION: WHO IS NOT ADEQUATELY SERVED? HOW IS THE LAW APPLIED?

State Ombudsman's Interpretation of Issue

Below is a series of responses from a variety of state ombudsman. The issue of incapacity and admission to nursing facilities is addressed in each state in a variety of ways. In some states, admission of the incapacitated is not an issue, due to the fact that state facilities are allowed by state statutes to admit incapacitated individuals without a guardian. In other states, however, it is a complex issue, and nursing homes are under the impression that they are permitted to deny admission to certain individuals based on the results of their initial screenings.

Arizona

In Arizona, a public fiduciary would be appointed. The person who would begin this process could be a social worker from a hospital, or from whatever facility the person came from. The facility will not deny admission, but they will need someone to sign on behalf of the resident. This could pose some serious issues in the case of an isolated and incapacitated individual.

- Syble Oliver, Arizona State Long Term Care Ombudsman

California

In California, a facility may decide to admit a resident at any time, as long as they can meet the patient's needs. The facility is allowed to pursue a conservator or a public guardian later if they wish. Alternatively, the facility may use the method allowed by State Law, 1418(e) Informed Consent. Under this method, a facility interdisciplinary team (IDT) may make decisions for the resident based on the best interests of the resident.

- Joseph Rodrigues, California State Long Term Care Ombudsman

Connecticut

In Connecticut, when a person is incapacitated and alone, Protective Services for the Elderly generally handles the issue. If an individual approaches a nursing facility with a request for admission and is incapacitated and alone, it is likely that the individual would be conserved and PSE appointed.

- Nancy Shaffer, Connecticut State Long Term Care Ombudsman

Delaware

In Delaware, the state-owned facilities are the facilities of last resort to citizens of Delaware who cannot be served in the community or a private nursing facility, including if this is due to incapacity and solitude. The state-owned facilities offer emergency admission to a Delaware citizen for whom there is no other viable option.

- Victor Orija, Delaware State Long-Term Care Ombudsman

Missouri

Missouri facilities admit people who are isolated and incapacitated. If guardianship is necessary for some reason, the facility approaches the Public Administrator in their county. As elected officials, it is the job of Public Administrators to be the guardian when there is no one

else or when there is conflict among family members, including allegations of abuse. The Department of Health and Senior Services formerly had attorneys who would take the case to court. However since funding and staff have been cut, it is up to the facility to take the lead on these cases.

- Carol Scott, Missouri State Long-Term Care Ombudsman

New Mexico

New Mexico facilities do not accept an individual who is not competent to sign for admission and for care. The facilities call Adult Protective Services (APS) for a safety check and recommendation for guardianship. Then, the facility or APS notifies ombudsmen to help ascertain if there is a registered surrogate decision maker available. If a person is available, they are available to cover the admission and time during the guardianship process.

- Sondra Everhart, New Mexico State Long Term Care Ombudsman

Ohio

Ohio does not have a public guardian, so situations arising where someone is incapacitated and trying to be admitted to a nursing facility are handled on a case-by-case basis. If someone needs a surrogate to get admission, it would be up to the facility to contact probate court to have a guardian appointed. Each county is different and Ohio has had an increase in volunteer guardianship programs for courts to utilize. Occupancy of facilities in Ohio averages at about 85%, so nursing facilities do not often refuse, though it is possible that facilities do refuse admission on this basis.

- Beverley Laubert, Ohio State Long-Term Care Ombudsman

Rhode Island

In Rhode Island, sometimes a petition to instruct can be used if there is a disability or an illness. If an ombudsperson can convince the facility that they have ensured a guardian is secured then they may take the person. However, this process is a hurdle and complex. It often involves calling in favors from attorneys used by the state Alliance for Better Long Term Care office. Volunteer guardianship is usually not able to respond except to notify the state Alliance for Better Long Term Care office that the incapacitated person may go on a waiting list. Sometimes, the hospitals do not conduct thorough searches for relatives, and additional, more complete searches may be conducted to find alternative friends, family or relatives.

- Kathy Heren, Rhode Island Alliance for Better Long Term Care

Texas

Texas nursing facilities are allowed to deny admission if they have concerns about "meeting a person's needs", however, it is fairly common to admit such individuals, especially if the person appears to be Medicaid-eligible. APS will sometimes place a person who lacks capacity, but they do not serve as a guardian for that person. Physicians have approved persons to transfer from a hospital to a nursing home, with the facility agreeing to then take responsibility. Nursing facilities may choose to do this because social security can make the nursing home the representative payee.

Guardianships in Texas are cumbersome to acquire. No agency serves as a guardian of last resort. Guardianship can be sought by making a referral to a court with probate jurisdiction. If the court has adequate resources, there may be a paid and/or volunteer guardian program.

Additionally, Texas State law articulates that a nursing facility should determine if a person has capacity to consent. If the person lacks capacity, the nursing facility should diligently attempt to locate a surrogate decision maker from an appropriate list (see Chapter 313 of Texas Health and Safety Code). If there is no one available, nursing facilities do not have a surrogate decision making committee.

- Patricia Ducayet, Texas State Long Term Care Ombudsman

Wyoming

In Wyoming, so long as a person has not been adjudicated as 'incompetent', they may admit themselves. If they are in need of additional assistance, the community long term care agencies assist. If it is determined that the individual needs a guardian, the Wyoming Guardianship Corporation may appoint a guardian if they have no one else who is close to them. Each community has a team of senior service providers that work together, and they may initiate a Title XXV by asking their doctor to order a mental health evaluation. APS may be the entity to initiate the valuation toward getting them to be Title XXV.

- Jamie Lookingbill, Wyoming State Long-Term Care Ombudsman

Population in Minnesota: Who is Affected and How?

It is difficult to assess the affected population of isolated and incapacitated individuals in Minnesota. In large part, this is due to the nature of the population. These individuals are alone and unless someone comes into contact with them and helps them, or they are admitted to a hospital, it is unlikely that anyone is aware of their existence. If advocates and others are not aware of their existence, it is nearly impossible to address their needs.

A. Rural Facilities vs. Urban Facilities

It is equally challenging to assess whether the needs of these individuals are being met by nursing facilities or not. Conversations with Regional Ombudsman, Daniel Tupy, in St. Cloud, MN helped illuminate how this problem is addressed in facilities located in rural Minnesota. Not surprisingly, rural facilities (as compared to urban facilities) have a smaller need for nursing facilities. Their occupancy rates are lower, and they often have more beds available compared to facilities located in urban areas.

Additionally, in rural communities when a person who needs a guardian lacks a guardian and needs to be admitted quickly, an emergency guardian can be granted and placed within days. Generally, emergency guardianships are granted when there is an incapacitated individual who has been admitted to the Geriatric Care Unit and is in need of care immediately thereafter, but has no one to consent for them.

In the most complex and time consuming cases encountered by ombudsmen in rural counties, there are family members around the incapacitated individual. Issues for their placement arise because the family members do not agree on care, or the family members choose not to step forward. Again, in those circumstances an emergency guardian is found, and the

incapacitated and isolated individual is transferred directly from the Geriatric Care Unit to the nursing facility. Thus, their incapacity and lack of familial support does not affect their admission to the nursing facility.

ADD BRAD'S INFO RE COUNTIES WHEN HE GETS BACK

B. Senior LinkAge Line

A new process for housing has been developed in Minnesota to ensure that older persons obtain adequate housing. This is being executed by a mandatory consultation process on housing through the Senior LinkAge Line.¹² As of October 1, 2011, amendments to Minn. Stat. § 256B.0911 require that all prospective residents receive consultation service and verification of consultation prior to executing a lease or contract with any registered housing with services provider.¹³ This consultation is executed by way of the Senior LinkAge Line, a telephone service, though face to face consultations can also be provided. These consultations are necessary in order to enter into a lease with a resident care facility, including assisted living facilities. Consumers may decline counseling and will still receive a verification code, however they must provide why they are refusing the counseling.

With the implementation of this new process, incapacitated individuals who are isolated could be identified by Senior LinkAge Line specialists and employees who are seeking to speak to a consumer. The Senior LinkAge Line staff member always tries to speak with the consumer themselves first. If the person is incapacitated, the staff member can give the verification code to any legally authorized persons, including legal guardians and power of attorneys.

When verifying a representative, the staff member will ask whether the caller is signing a lease on behalf of the ward. Additionally, they will ask for the setting liaison to fax a written release from the registered housing with services provider stating the consumer has designated this person as their representative. Sometimes a person may not be incapacitated, but would rather have a family member or friend receive the counseling and verification code. Senior LinkAge line permits this with a written release.

This mandatory process creates a great opportunity to find individuals who are incapacitated and isolated. If a person is incapacitated, and they call in to get housing, a Senior LinkAge staff member will find out about that person, and hopefully assist in finding the best possible housing for them. Additionally, these staff members provide another means of finding these individuals so they can get the help that they need.

C. Lack of Proactive Support

¹² See generally, <http://www.mnaging.org/advisor/SLL.htm> (last visited March 27, 2012).

¹³ For general information, see http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16_164210.pdf (last visited March 27, 2012).

At present, Minnesota and Federal laws do little to proactively assist persons who are incapacitated and alone in terms of their admission to nursing facilities. If nursing facilities in Minnesota did not hesitate in admitting incapacitated and isolated individuals, this would not be problematic. In some states, facilities do not hesitate to admit any of these individuals. However, some are reluctant to do so in this state, due to a variety of reasons.

D. Reasons for Facility Hesitancy to Admit Isolated and Incapacitated Individuals

Liability concerns are among the reasons for facility reluctance to admit incapacitated individuals. Nursing facilities are fearful of admitting persons with apparent diminished capacity out of fear of being prosecuted for violating due process rights embedded in the concept of 'informed consent'. One case that demonstrates this came before the U.S. Supreme Court in 1990. The plaintiff, who later was found to have diminished capacity, was found wandering a highway, injured and in need of care. He was assessed at a state Mental Illness facility and signed a form for voluntary treatment. The plaintiff later alleged he was incapacitated at the time he gave voluntary consent, that he was unable to give consent as such, and that the facility held him against his will, and violated his due process rights.¹⁴ Even claims such as these that are unsuccessful still cause facilities to hesitate to admit incapacitated individuals. This is problematic of course. If the facility is unable to assume consent, and there is no one else available to do so, the burden will ultimately fall on the state to find someone to provide consent. However, the physician or hospital personnel may be most fit to place these individuals and provide healthcare decision making and consent. If institutions were permitted to do this without concern for liability, the costly guardianship process could be avoided entirely.

Nursing facilities may also be hesitant to admit isolated and incapacitated individuals if their bed capacity is reaching a limit. An incapacitated person with family members or a representative has someone to speak for them, which means there is someone to complain on their behalf if they are not being admitted. Nursing facilities do not have the same clientele to deal with when there is an incapacitated individual who does not have a representative.

It is possible that facilities have a difficult time admitting these individuals due to hurdles in confidentiality. It is possible that hospitals are unable to, or fearful of disclosing the disposition of some incapacitated and isolated individuals to nursing facilities. Due to this lack of disclosure, nursing facilities may not even be aware of these individuals.

E. Who are these individuals and where are they?

It is evident that the quantity is unclear of individuals who are incapacitated and isolated. One thing is certain however; these individuals do exist, and are in need of representation. These individuals are sometimes already in nursing facilities, and need help remaining there. These individuals can also be located in Geriatric Care Units of hospitals, and are awaiting support so they can find housing. Estimates of the size of this population are unclear, but some estimates

¹⁴ Zinermon v. Burch, 494 U.S. 113; 110 S. Ct. 975 (1990).

indicate around 3-4% of the nursing home population is made up of incapacitated and isolated individuals.¹⁵

F. Who can speak for isolated and incapacitated individuals?

The intent of this analysis is to discover the kinds of support that states are providing for their incapacitated citizens who lack decision making support through a family member, a friend or a guardian. Naomi Karp and Erica Wood have articulated some options in their article, "Incapacitated and Alone". Ideally, these persons have directed decision making through written instructions, such as a directive or a living will. Unfortunately, this is usually not the case. Alternatively, their decision making is delegated to an agent through a healthcare power of attorney. Again, this requires planning prior to incapacity, which does not always happen, or preferences are not always known.¹⁶

Next, decision making can occur through default surrogate-consent laws. These laws allow family members or others to make decisions regarding treatment if there is no advance directive. Incapacitated and isolated persons may be able to receive help to become admitted to nursing facilities under these laws if the "others" category is broad enough to include individuals that they may know or come to know through the social work system, or perhaps decision making authorities and entities designated in hospitals or nursing facilities. The last resort in these cases is "displaced decision making", which refers to a judicial intervention through guardianship or other court transactions. These proceedings are costly, and often are unable to accurately assess the needs of the individual in a timely matter. For that reason, a hospital or nursing facility ethics committee designed to select placement for these individuals, and admit these individuals to nursing facilities would be a preferred route.¹⁷

IV. CONCLUSION: HOW CAN ADVOCATES HELP?

Change can occur in Minnesota at a legislative level. Karp and Wood have identified some existing legislative paths that states use for isolated and incapacitated patients. Some states have enacted statutory authorization for healthcare consent without judicial action. These statutes often delegate a great deal of authority to the attending physician, sometimes in conjunction with an institutional ethics committee. Many states have enacted public guardianship programs for the isolated population. As it articulated by state ombudsman above, however, these programs are often severely underfunded. A handful of states have enacted a court process to seek consent for healthcare appointment or for the appointment of an individual to give healthcare consent. Lastly, a few states have enacted laws authorizing external committees of trained volunteers to make healthcare decisions on behalf of isolated individuals through an administrative hearing

¹⁵ See generally, Karp, Naomi and Wood, Erica. "Incapacitated and Alone: Healthcare Decision Making for Unbefriended Older People" Human Rights Magazine (Spring 2004) available at http://www.americanbar.org/publications/human_rights_magazine_home/irr_hr_spring04_incapacitated.html (last visited March 12, 2012).

¹⁶ *Id.*

¹⁷ See generally, *Id.*

process. This is a very modern process, and could be a very beneficial one for Minnesota to emulate.¹⁸

Alternatively, advocates can push for change at the institutional level. Some facilities have ethics committees or procedures that do policy making for these individuals, but generally do not actually make decisions for these individuals. A few more modern ethics committees have begun to give healthcare consent for these individuals. Sometimes, healthcare providers and institutions develop their own procedures for consent to treatment, called 'administrative consent'. This follows the dictates of ethical decision making; however, it may not meet all of the legal requirements. On the plus side, it preserves a great deal of judicial resources by avoiding the costly guardianship process. One institution found had an informal surrogate system to address the decision making needs of potentially isolated residents. This was a large system with many resources, which may not be plausible for smaller facilities.¹⁹

There is one incredibly innovative effort in California which was organized by Kim Hubbard, an Elder Law Attorney. Hubbard recognized that isolated and incapacitated persons had a huge hurdle to overcome when trying to get a conservatorship. This process, which is already expensive and cumbersome, is intensified by the fact that isolated elders have no interested parties to begin the process for them. This is where there is potential for advocates to really get involved. Hubbard along with advocacy organizations (including Adult Protective Services and the Ombudsman's office) designed a team of four individuals: an attorney, a third year elder law student, a graduate or student of the private, professional fiduciary credentialing program, and a member of the Professional Fiduciary Association of California.²⁰ This team of advocates and academics assists the isolated and incapacitated individual in acquiring a conservator. Advocates in Minnesota could consider developing a similar program in conjunction with the Center for Elder Justice and Policy at William Mitchell.

¹⁸ See generally, Id.

¹⁹ See generally, Id.

²⁰ 46 Orange County Lawyer (Jan. 2004) at 7