

## **TO COLLECT DEBTS, NURSING HOMES ARE SEIZING CONTROL OVER PATIENTS**

**By NINA BERNSTEIN** JAN. 25, 2015

Lillian Palermo tried to prepare for the worst possibilities of aging. An insurance executive with a Ph.D. in psychology and a love of ballroom dancing, she arranged for her power of attorney and health care proxy to go to her husband, Dino, eight years her junior, if she became incapacitated. And in her 80s, she did.

Mr. Palermo, who was the lead singer in a Midtown nightclub in the 1960s when her elegant tango first caught his eye, now regularly rolls his wife's wheelchair to the piano at the Catholic nursing home in Manhattan where she ended up in 2010 as dementia, falls and surgical complications took their toll. He sings her favorite songs, feeds her home-cooked Italian food, and pays a private aide to be there when he cannot.

But one day last summer, after he disputed nursing home bills that had suddenly doubled Mrs. Palermo's copays, and complained about inexperienced employees who dropped his wife on the floor, Mr. Palermo was shocked to find a six-page legal document waiting on her bed.

It was a guardianship petition filed by the nursing home, Mary Manning Walsh, asking the court to give a stranger full legal power over Mrs. Palermo, now 90, and complete control of her money.

Few people are aware that a nursing home can take such a step. Guardianship cases are difficult to gain access to and poorly tracked by New York State courts; cases are often closed from public view for confidentiality. But the Palermo case is no aberration. Interviews with veterans of the system and a review of guardianship court data conducted by researchers at Hunter College at the request of The New York Times show the practice has become routine, underscoring the growing power nursing homes wield over residents and families amid changes in the financing of long-term care.

In a random, anonymized sample of 700 guardianship cases filed in Manhattan over a decade, Hunter College researchers found more than 12 percent were brought by nursing homes. Some of these may have been prompted by family feuds, suspected embezzlement or just the absence of relatives to help secure Medicaid coverage. But lawyers and others versed in the guardianship process agree that nursing homes primarily use such petitions as a means of bill collection — a purpose never intended by the Legislature when it enacted the guardianship statute in 1993. At least one judge has ruled that the tactic by nursing homes is an abuse of the law, but the petitions, even if they are ultimately unsuccessful, force families into costly legal ordeals.

“It’s a strategic move to intimidate,” said Ginalisa Monterroso, who handled patient Medicaid accounts at the Mary Manning Walsh Nursing Home until 2012, and is now chief executive of Medicaid Advisory Group, an elder care counseling business that was representing Mr. Palermo in his billing dispute. “Nursing homes do it just to bring money.”

“It’s so cruel,” she added. “Mr. Palermo loves his wife, he’s there every single day, and they just threw him to the courts.”

Brett D. Nussbaum, a lawyer who represents Mary Manning Walsh and many other nursing homes, said Mr. Palermo’s devotion to his wife was irrelevant to the decision to seek a court-appointed guardian in July, when the billing dispute over his wife’s care reached a stalemate, with an outstanding balance approaching \$68,000.

“The Palermo case is no different than any other nursing home bill that they had difficulty collecting,” Mr. Nussbaum said, estimating that he had brought 5,000 guardianship cases himself in 21 years of practice. “When you have families that do not cooperate and an incapacitated person, guardianship is a legitimate means to get the nursing home paid.”

Guardianship transfers a person’s legal rights to make some or all decisions to someone appointed by the court — usually a lawyer paid with the ward’s money. It is aimed at protecting people unable to manage their affairs because of incapacity, and who lack effective help without court action. Legally, it can supplant a power of attorney and a health care proxy.

Although it is a drastic measure, nursing home lawyers argue that using guardianship to secure payment for care is better than suing an incapacitated resident who cannot respond.

Mr. Palermo, 82, was devastated by the petition, brought in the name of Sister Sean William, the Carmelite nun who is the executive director of Mary Manning Walsh. “It’s like a hell,” he said last fall, speaking in the cadences of the southern Italian village where he grew up in poverty in a family of eight. “Never in my life I was sued for anything. I just want to take care of my wife.”

A court evaluator eventually reported that Mr. Palermo was the appropriate guardian, and questioned why the petition had been filed. But the matter still dragged on, and Mr. Palermo, who had promised to pay any arrears once Medicaid completed a recalculation of the bill, grew distraught as his expenses fighting the case reached \$10,000.

In the end, Medicaid’s recalculation put his wife’s monthly copay at \$4,558.54, almost \$600 less than the nursing home had claimed, but still far more than the \$2,642 Mr. Palermo had been paying under an earlier Medicaid calculation. As soon as the nursing home cashed his check for the outstanding balance, it withdrew the guardianship petition.

“They chose to use a strong-arm method, asking for somebody to be appointed to take over her funds, hoping for a rubber stamp to do their wishes,” said Elliott Polland, Mr. Palermo’s lawyer.

Many judges go along with such petitions, according to lawyers and others involved in the process. One judge who has not is Alexander W. Hunter Jr., a longtime State Supreme Court justice in the Bronx and Manhattan. In guardianship cases in 2006 and 2007, Justice Hunter ordered the nursing homes to bear the legal costs, ruling they had brought the petitions solely for the purpose of being paid and stating that this was not the Legislature's intent when it enacted the statute, known as Article 81 of the Mental Hygiene Law.

Last year Justice Hunter did appoint a guardian in response to a petition by Hebrew Home for the Aged at Riverdale, but in his scathing 11-page decision, he directed the guardian to investigate and to consider referring the case for criminal prosecution of financial exploitation.

The decision describes a 94-year-old resident with a bank balance of \$240,000 who had been unable to go home after rehabilitative treatment because of a fire in her co-op apartment; her only regular visitors were real estate agents who wanted her to sell. After Hebrew Home's own doctor evaluated her as incapable of making financial decisions, the decision says, the nursing home collected a \$50,000 check from her; it sued her when she refused to continue writing checks, then filed for guardianship.

"It would be an understatement to declare that this court is outraged by the behavior exhibited by the interested parties — parties who were supposed to protect the person, but who have all unabashedly demonstrated through their actions in connection with the person that they are only interested in getting paid," he wrote.

Jennifer Cona, a lawyer for the nursing home, called the decision "grossly unfair to Hebrew Home," but said she could not discuss details because the record was sealed. Many cases in which judges grant nursing homes' guardianship petitions never come to light. But one that challenges the legal propriety of such petitions for bill collection is now pending before the Appellate Division of the State Supreme Court. Without explanation, that record, too, is sealed from public scrutiny.

"There is no transparency in the whole process," said Alexandra Siskopoulos, a lawyer who represents a relative of the nursing home resident in the appellate case — a relative who had wanted to take the resident home. "Unfortunately, people's eyes are not opened until it's their family member, and at that point, it's too late."

Throughout the country, data is lacking on the most basic facts about guardianships, even how many there are. In New York State, with different rules in 62 counties and no centralized database, it has taken a team of researchers more than two years to collect information from a fraction of case files in 14 counties, said Jean Callahan, the director of the Brookdale Center on Healthy Aging at Hunter College.

Preliminary findings of the center's study are not expected until later this year, but at the request of The Times, the researchers undertook a breakdown of the petitioners in a sample of the 3,302 guardianship cases filed in Manhattan from 2002 to 2012. More frequent petitioners than nursing homes (12.4 percent) were hospitals (16.1 percent), friends and family (25.3 percent) and Adult Protective Services (40.1 percent).

New York's guardianship statute was part of a national movement to limit guardianships to the least restrictive alternatives necessary to prevent harm. A petition is supposed to be brought only by someone with the person's welfare at heart, and guardianship is to be tailored to individual needs, taking into account the person's wishes.

Instead, Ms. Callahan said, "it has become a system that's very focused on finances." One afternoon, Mrs. Palermo dozed in her wheelchair while her husband described their careful preparations for old age, and the shock of discovering that papers drawn up by an elder law specialist were insufficient protection.

He recalled the fear and anger he felt when he first read the nursing home's petition, on his bus ride back to a rent-stabilized apartment on East 36th Street filled with mementos of their happy marriage. They have no children. "Who better than me, the husband for 47 years, that she gave power of attorney?" he asked.

As his voice grew anguished, Mrs. Palermo began to moan and cry out incoherently. "Are you O.K., baby?" he asked, jumping up to embrace her. "Now, don't do that. Come on, give me a hug."

He soothed her in Italian, speaking of the polenta he had made for her that morning. He wheeled her to the dining room. Later, he would serenade her.

But in the night, again he could not sleep for worry. He fingered drafts of his own petitions, hand-lettered pages that he debated sending to nursing home administrators. One was addressed "To God and to whom it may concern."

"I'm trapped in a web of people and lawyers that will exhaust my 50 years of sacrifices and savings," he wrote. "Please, dear God, grant me strength and wisdom to take care of my wife."