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Mental Health: Financial management Retarded persons

34 MRJAS 2065-2069

DEPARTMENT OF THE ATTORNEY GENERAL

34 MRJAS 2513-A

18 MRJA 3701

DA



Memo From

RICHARD F. HOWARD
STAFF ATTORNEY
COUNSEL, MENTAL HEALTH & CORRECTIONS

Date: 11 January 1977

To: Richard Bogh, Acting Superintendent Dept: Pineland Center

Subject: FINANCIAL MANAGEMENT SERVICES

SYLLABUS:

The Bureau of Mental Retardation may provide financial management advice and assistance to discharged Pineland residents, but may not act as representative payee for federal benefits. The superintendent of the Pineland Center may act as representative payee for certain federal benefits for Pineland residents, but is not authorized to manage the personal funds of the residents. The Bureau may seek guardianship for a discharged resident, with a preference for a private guardian, or may assist a resident in seeking his or her own conservator. When acting as public guardian, the Bureau would be liable for mismanagement of a ward's funds at least up to the posted bond. We cannot give an authoritative answer on the extent of liability of the Bureau or social workers acting for the public guardian until the Legislature enacts governmental liability legislation. Costs of public guardianship should ultimately be borne by the ward.

FACTS:

The Pineland Center is considering the discharge of many residents no longer in need of training, education, treatment and care. Pineland now provides extensive financial services for residents and has asked several questions:

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QUESTIONS AND ANSWERS:

Question 1: How can financial management services be provided for mentally retarded persons discharged from Pineland Center?

Answer: (See Reasons)

Question 2: Can a private, non-profit organization or bank provide this service?

Answer: Yes.

Question 3: What would the liability be for community social workers if they were co-signers for SSI checks?

Answer: We must wait for legislative action to answer this question. (See Reasons)

Question 4: How can financial management services be provided for discharged residents in need of guardianship or conservatorship?

Answer: (See Reasons)

Question 5: Who will assume the financial responsibility for processing of guardianship and conservatorship requests?

Answer: Ultimately, the ward of the guardian or conservator.

REASONS:

Regarding the general issue of how the Bureau of Mental Retardation or Pineland Center can provide financial management services in the community, I refer you to 34 M.R.S.A. §§2065 - 2069 authorizing the Bureau to provide "protective and supportive services" for the mentally retarded persons outside of institutions. The language in 34 M.R.S.A. §2066(2) and (3) indicates that protective and supportive services "shall include, but need not be limited to" certain specified activities, the purpose of which is "to protect an incapacitated person from himself and from others" and "to make it possible for an incapacitated person to become rehabilitated or self-sufficient to the maximum extent possible." Because of this expansive language, we are of the opinion that both "protective" and "supportive" services may include advice and assistance in managing financial affairs.

Although the Bureau may provide such assistance, we are of the opinion that the

Bureau of Mental Retardation can take no responsibilities as representative payee. I refer you to our informal opinion of August 17, 1976, from Mr. Kelleher to Harold Siefken in the Bureau of Mental Retardation. For Pineland's authority, we look to 34 M.R.S.A. §2513-A which authorizes the superintendent to act as representative payee for certain benefits including those from the Social Security Administration, the Veterans Administration, and the Railroad Retirement Board. The same provision directs the superintendent to apply such benefits in accordance with charges made by the department, and any surplus is "to be held in a personal account at the hospital in the name of such patient, and shall be available for such patient's personal needs." The statute provides us no assistance in determining what role the superintendent should have in disbursements from these "personal accounts." Federal law regarding the role of "representative payee" defines that role for those receiving federal benefits.

This situation could be viewed as either an application of the Supremacy Clause in Article VI of the United States Constitution, or as an adoption by the State legislature of federal law relating to representative payees. If this is an application of the Supremacy Clause, then federal law would control in any instances where state and federal law might conflict, such as a difference in the obligations imposed on a superintendent as representative payee. If this is an adoption of federal standards by the state then the state theoretically retains the option to vary those standards. We construe the statute not to intend any conflict with federal law, but to adopt federal standards for the obligations of representative payee.

Federal regulations, promulgated pursuant to provisions of the Social Security Act, 42 U.S.C. §1302 and 1383, describe obligations which create fiduciary responsibilities in a representative payee of Supplemental Security Income (SSI) benefits, 20 C.F.R. §416.601 - 416.690 (1974). The regulations provide for approval of a representative payee regardless of the legal competency of a recipient

of benefits, 20 C.F.R. §416.601, and therefore, do not contemplate a full guardian/ward relationship. However, the regulations do provide that the representative payee take on certain obligation to use the moneys for the benefit of the recipient, 20 C.F.R. §416.620, specifically for the "personal needs" of the recipient, as well as maintenance expenses not met by Medicaid funds, 20 C.F.R. §416.640(a) and (b). The representative payee has a further obligation to use those moneys "in a manner which will facilitate the recipient's earliest possible release from the institution or which otherwise will help the recipient live as normal a life as practicable in the institutional environment." 20 C.F.R. §416.640(c). The federal statute authorizing railroad retirement benefits also provides for representative payees, 45 U.S.C. §2285 (1976). Regulations pursuant to that section imposes obligations almost identical to those quoted above, 20 C.F.R. §266.6 and §266.9 (41 Fed. Reg. §22558 (1976)). The same is true of the statute and regulations relating to social security old age and disability benefits, 42 U.S.C. §405, §427 and §1302 and 20 C.F.R. §404.1601 - 404.1610. The veterans' benefits authorization has a similar provision, 38 U.S.C. §3202. Although not as explicit as those for social security and retirement benefits, the applicable regulations do impose affirmative fiduciary obligations on a representative payee, 38 C.F.R. §13.55 - 13.61. (40 Fed. Reg. 54247 (1975)).

With these obligations in mind, we interpret 34 M.R.S.A. §2513-A to allow the superintendent, as representative payee, to use portions of patients' federal benefits for purposes other than charges of the Department of Mental Health and Corrections. This authority would apply to personal needs and also to maintenance expenses while still a patient of Pineland. Please note that this modifies our earlier opinion of February 27, 1975, to Mr. Walton at the Bangor Mental Health Institute, in that it expands the superintendent's authority as representative payee. However, we emphasize that this is not a guardianship arrangement. Exercise of this authority should be tailored to the ability of each resident to make expenditure decisions himself.

this authority of the superintendent to manage federal benefits does not affect personal funds of the residents from other sources. Funds entrusted to the superintendent by family or friends of a resident can be expended in accordance with the terms of that entrustment. Personal funds of a resident, whether possessed at admission or acquired during residency, may not be expended by the superintendent without voluntary and knowing consent of the resident. If a resident is incapable of understanding a request for permission to use his personal funds, then that money may not be used without resort to guardianship or conservatorship discussed below.

This authority to manage funds does not extend to discharged residents. We should point out that, by authority of 22 M.R.S.A. §7905, the Department of Human Services may authorize an operator or agent of a boarding care facility to manage the funds of a mentally retarded resident of that boarding care facility. This authorization may be given by Human Services only if a guardian or conservator for the resident either cannot be found or does not exist. If Human Services does give such authority, it may request the Bureau of Mental Retardation to develop a plan for management of these funds. Under this arrangement, the operator is required to maintain an itemized accounting of a resident's funds and to keep supporting documentation for every expenditure in excess of two dollars. Department of Human Services regulations (Regulations Governing the Licensing and Functioning of Boarding Care Facilities, 12.A.2) do not allow an operator, except in special circumstances, to serve as guardian or conservator for a resident. Regarding inspection of these records, I refer you to our March 8, 1976 informal opinion from Mr. Perry to Kevin Baack, Director of the Bureau of Mental Retardation. In that opinion, we indicate that the Department of Human Services may inspect any records of boarding care facilities and the Bureau of Mental Retardation may inspect records relevant to wards of the Bureau as public guardian.

Another possibility is for the Bureau to seek public guardianship. Under 18 M.R.S.A. §3635, Pineland is required to examine any person to be released from the Center and to make a determination of whether guardianship is appropriate. In cases where guardianship is deemed appropriate, parents or next of kin may be advised of the

need for guardianship. Failing their petition for a private guardian, section 3635 provides that Pineland seek the appointment of the public guardian. However, under 18 M.R.S.A. §3624(3), the Bureau of Mental Retardation may refuse its nomination as public guardian, and the Bureau itself is empowered to seek a private guardian for an incapacitated person under the protective services provision, 34 M.R.S.A. §2066(3). We read the three provisions together to retain the preference for a private guardian in 18 M.R.S.A. §3635, and to allow the Bureau itself to seek a private guardian if parents or next of kin decline to do so. In addition, the Bureau is authorized to seek its own appointment as public guardian.

Still another possibility you suggest is that a conservator be appointed under 18 M.R.S.A. §3701. In order to meaningfully assist you, we consider it appropriate to advise you of differences between a conservator and a guardian: 1) A conservator has no custody of the person but only control of the disabled person's financial affairs; 2) the disabled person under conservatorship is explicitly protected from "disfranchisement", i.e. loss of rights of free citizens, and 3) the conservator is nominated by the disabled person himself. We interpret 18 M.R.S.A. §3702 to allow dismissal of a conservator at the request of the disabled person with the approval of the probate judge.

We have found no legal reason why a bank or "private non-profit organization" could not participate in providing financial management services as advisor, guardian or conservator. In 34 M.R.S.A. §2068, the Bureau of Mental Retardation is authorized to "pay for protective and supportive services for incapacitated persons from its own resources by mobilizing available community resources or by the purchase of services from voluntary or state agencies." Furthermore, it would appear that the respective federal agencies could appoint a bank or private organization as representative payee for social security (SSI) and railroad retirement benefits. It is less clear that they could be appointed as representative payee for veterans benefits of persons not minors or adjudicated incompetent. The enabling statute

provides for payment to "some other person for the use and benefit of the beneficiary regardless of any legal disability on the part of the beneficiary," 38 U.S.C. §3202. The new regulations mention this statutory change, 40 Fed. Reg. 54246 (11/21/75), but still refer to a beneficiary "who is mentally ill (incompetent) or under legal disability by reason of minority or court action," 38 C.F.R. 13.55(a) (40 Fed. Reg. 54247).

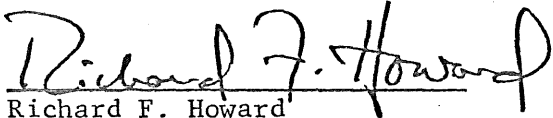
I am not certain what you mean by "cosigners" in the third question. If the public guardian is appointed, social workers could be assigned to the public guardian by the Department of Mental Health and Corrections under 18 M.R.S.A. §3622. The authority to endorse checks could be delegated to them by the Director of Mental Retardation, but they would not be "cosigners". As employees of the Department of Mental Health and Corrections, those social workers have had limited personal liability because of the protection of sovereign immunity.

However, the Supreme Judicial Court has recently abolished sovereign immunity in Maine effective February 1, 1977, Davies v. City of Bath, 364 A. 2d 1269 (Me. 1976), modified November 30, 1976. This decision raises questions as to possible liability of state employees. However, I will not be able to provide an authoritative opinion on this question until we have seen how the legislature decides to handle the problem. It should be noted that the Bureau itself may incur liability in its exercise of duties as public guardian. The public guardian has a fiduciary relationship with each ward and is explicitly given the statutory duties of private guardians of adults, 18 M.R.S.A. §3628. As a fiduciary, the public guardian is obligated to use the utmost good faith in management of each ward's estate. Consistent with the duties of guardian, the public guardian is required by 18 M.R.S.A. §3629 to post a surety bond which is reviewed annually to assure it is sufficient to cover all assets held by the public guardian. However, we will have to wait to see what action the Legislature takes before determining the extent of the Bureau's potential liability.

Your last question is answered by 34 M.R.S.A. §2068 which provides: "The

bureau may pay for protective and supportive services . . . To the extent that assets are available to the incapacitated persons or wards, the cost of services all be borne by the estate of persons receiving the services." The necessary implication is that the Bureau of Mental Retardation may pay for those authorized services, including guardianship or conservatorship proceedings, and should seek reimbursement from those persons served in amounts that those persons are reasonably able to pay.

I hope these responses will be helpful in making your plans.

A handwritten signature in cursive script that reads "Richard F. Howard". The signature is written in dark ink and is positioned above the typed name.

Richard F. Howard
Assistant Attorney General

RFH/vv

STATE OF MAINE

Inter-Departmental Memorandum Date September 13, 1976

To William Kelleher, Assistant Attorney General Dept. Mental Health and Corrections

From George A. Zitnay, Superintendent Dept. Pineland Center

Subject _____

Could you please provide us with information regarding the following:

In light of the recent decisions regarding the Class Action Suit and movement toward discharge, we have begun to plan the discharge process and would very much like information regarding Pineland Center's role as it pertains to representative payee and guardianship. Specifically, as you know, Pineland has provided many financial services, such as handling monthly board, savings accounts, and mortuary trust accounts. It is our understanding that we will not be able to provide these services once a resident is discharged and we would like a written statement in this regard.

What is your opinion as to private, non-profit organizations assuming this responsibility and what would your opinion be of a bank in each region assuming some of this responsibility? What would the liability be for community social workers if they were cosigners for SSI checks? In assessing the need for guardianship, it is important for those residents to be discharged to know how these services can be provided in the community - specifically those residents in need of guardianship or conservatorship. Who will assume the financial responsibility for the processing of the guardianship and conservatorship requests? These are just some general questions that we have in regard to this process. I raise them because they will be raised by people in the community, particularly boarding home and nursing home operators.

Thank you for your help in this matter.

GAZ/dbis