

Vulnerable Adult Justice Project
Neglect Issue Provider Meeting
Friday, November 12, 2010 from 12-2pm
William Mitchell College of Law, Room 223

Present: Iris Freeman (Center for Elder Justice and Policy), Kevin Hansen (Ombudsman office), Karolyn Stirewalt (Minnesota Medical Association), Darrell Shreve (Aging Services), Deb Petersen (Assistant Attorney General), J.J. Hasbargen (Assistant Attorney General), Toby Pearson (Care Providers), Nate Swanson (Voigt, Klegon, and Rode), Sue Stout (Hospital Association), Pat Jump (Home Care Association)

- I. 8 proposals that have gained the consensus of all the parties
- II. Felony Neglect: amendment identifying the most severe kinds of neglect and harm—deprivation and outright abandonment—and raising those crimes to felonies. There have been past discussions on this.
 - A. This is our last small group meeting.
 - B. Consensus and Decision-making
 1. No other opposition to Amendment than from providers. We are looking for common ground with providers. The Nurse’s Association’s representatives have told Iris that they cannot come today, but they accept those changes on behalf of the Nurse’s Association. While we’d like to strive for consensus, that may not be possible.
 2. For the future, it’s a good idea to talk to the organizations that you represent, and bring those concerns in soon—this amendment may soon go forward, under the banner of another group if not under VAJP.
 - C. Language concerns
 1. Discussion of where the language is actually defined in the statute (Minn. Stat. § 609.232)
 2. Karolyn:
 - a. The language looks good, but needs to be clearer in a number of areas
 - b. “Vulnerable Adult” should cite to another statute section
 - c. Other terms, similar to (b) should be defined. Otherwise, it’s okay.
 3. “Reasonably Able”
 - a. This version has “reasonably able” in it to account for situations in which the staffing simply isn’t there and split second decisions have to be made
 - b. The reasonable situation language is raised: in a triage situation, we aren’t going to punish people for having to make a decision. This is the express purpose of putting this language in, and that’s the effect the language is intended to raise.
 - c. This statute is not about leaving residents unattended on a toilet—prosecutors here say that it doesn’t fall within the statute. It’s a disciplinary action between employer and employer, and may result in licensing action, but to her perspective, it’s not within the statute. This may affect Medicare/Medicaid funding, but again, that isn’t affected by this statute. Also, the concern is raised that just because prosecutors here wouldn’t charge it doesn’t mean that others wouldn’t.
 - d. The purpose of the amendment is addressing the *intent* to withdraw, deprive, abandon or withhold assistance. What this statute is intended to penalize is a bad faith withholding of care.

4. "Operator."
 - a. This is within the current gross misdemeanor statute; it's simply being reaffirmed in this amendment
 - b. While the prosecutors here have not personally seen this done, operators may be punished by deliberate understaffing for a long period of time, and other severe issues like this. You would have to show a deliberate disregard for the care of the residents; you can still do that for the current gross misdemeanor statute now. You would have to trace that conduct to individuals or boards or entities in charge of the organization, which can be extremely difficult; it's less likely this would be done for a gross misdemeanor.
 - c. How far up can you go? Most of the time, appointed government officials have official immunity while acting within the scope of their job.
- D. Iris wanted to ask organizations and representatives: What's on your mind about this amendment?
 1. Is it a strong position that no punishment no more stringent than gross misdemeanors be attached?
 2. Are these mostly family cases? Will we see it more in the home care arena?
 3. In some cases, billing for services not provided can be punished more severely than a person dying on a provider's watch due to neglect.
 4. Some are failing to see how the current law fails.
- E. Concerns about the level of punishment:
 1. Iris: for those representing organizations in the most skeptical positions, where there is *significant deprivation or abandonment* of a vulnerable adult by someone who is in a legal duty to care, should we have a higher punishment? Does it make sense to put all kinds of neglect or behavior in the same category of gross misdemeanor despite the degree or severity of the neglect? This is a good question for your organizations.
 2. What other tools do we have to punish people in these circumstances?
 - a. We have no other tools in this toolbox. Manslaughter doesn't fit
 - b. In some of these situations, if all you have is signed timecards, this may be the only way you can prove criminal behavior. Remember, as a prosecutor, you have an ethical obligation only to charge crimes you have a reasonable belief that you can actually prove. Crimes against persons are charged differently than crimes against property, with different regulations—more tools in the toolkit for crimes against a person.
 - c. A theoretical approach is that if you neglect, you defraud, but this goes into crimes against property, which alters the kind of punishments that can result.
 - d. You cannot use assault for neglect, and there's no per se charge for this.
 - e. There are different statutes regarding children—there are felonies for care providers regarding children.
 - f. We have neglect of animals and abuse of animals, neglect of children and abuse of children, but only gross misdemeanor neglect of vulnerable adults—there seems to be an unexplained discrepancy.
 - g. Are we looking at the wrong section? Perhaps we should be reexamining the felony abuse statute?
 - i. Felony neglect playing out: it tends to be more a systemic failure to perform a duty over time (examples used to illustrate the *failure to act*, to do what needed to be done)

- ii. Abuse is an affirmative act, intending to cause harm.
- iii. The two are opposites in the way they are defined, which makes it hard to punish severe neglect through abuse statutes
- iv. What if you are taking a walk and neglect to help someone? Could you be punished? No. This statute is intended to punish those to *affirmatively assume* the legal duty of caregiver.

F. Does the language need a time element to it?

- 1. There are neglectful situations which are hard to put time frames on
- 2. These tend to be cases in which there are patterns and sustained neglect

G. Due to funding programs, certain facilities are not able to afford all necessary care for vulnerable adults. Can a facility or individual be punished for not provided chemo?

- 1. Patient's Bill of Rights: Patients and residents shall have the right to appropriate medical and personal care based on individual needs. Appropriate care for residents means care designed to enable residents to achieve their highest level of physical and mental functioning. This right is limited where the service is not reimbursable by public or private resources. Minn. Stat. § 144.651 Subd. 6
- 2. We're looking for ways to zero in on people who have the means to assist others, but are not. This is what this statute is intended to impact.
- 3. We're also trying to zero in on individuals who have bad faith/bad intent/deliberately choosing in bad faith to do something that is wrong—again, we aren't looking for those who are making tough decisions or triaging.
- 4. Prosecutors have heavy caseloads, and may not be inclined to attack a facility unable to provide chemotherapy or other care due to difficult funding problems.
- 5. Jurisdiction of Prosecutors
 - a. Gross misdemeanor is currently prosecuted by city prosecutors where they have the jurisdiction
 - b. County prosecutors will be making the decision to prosecute felony neglect.

H. Brief discussion of regulatory mechanism which punished facilities in similar situations; the department regulating the activity asked the legislature to repeal it. Here, though, as discussed in (G), we don't have other mechanisms to deal with this.

I. No exception for providers

J. The answer to all these questions and problems: pass this amendment