Mission of Georgia Appleseed: To increase justice in Georgia through law and policy reform

Georgia Appleseed Center for Law & Justice is a non-partisan nonprofit organization devoted to law that serves the public interest. Using the skills of hundreds of volunteers, Georgia Appleseed focuses on achieving systemic changes to laws and policies that unfairly impact children, the poor and other large groups of marginalized people in Georgia.

Georgia Appleseed seeks a Georgia where the voices of the poor, the children and the marginalized are heard and where injustices that no one should endure are resolved.

Our Georgia Appleseed Team: Several members of the Georgia Appleseed staff contributed to this report:

Rob Rhodes, Director of Projects
Sharon Hill, Executive Director
Leena Sidhu, Director of Development and Communications
Patsy White, Program Assistant

Georgia Appleseed
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309
Phone 404-685-6750
www.GaAppleseed.org

ACKNOWLEDGEMENTS

The Georgia Appleseed Center for Law and Justice would like to thank all the volunteers on this report who worked diligently on behalf of “unbefriended elders” and other incapacitated individuals.

We offer our sincere thanks to our volunteers:

Mary Benton
Kim McWhorter
Joe Bolling
Julia Dempewolf
Ronnie Gosselin
Melissa Gworek
Jessica Hartzog
Pamela Lina
Lauren Tapson
Chris Tuten
Diane Wizig
Esther Yu
Georgia Appleseed also thanks our dedicated Advisory Committee Members:

Barbara Baxter, Woodstock Nursing & Rehabilitation Center and Georgia State Board of Nursing Home Administrators, Woodstock, GA

Mary Benton, Alston & Bird, Atlanta, GA

Betsy Cavendish, Appleseed, Washington, D.C.

Marie-Therese (MT) Connolly, Wilson Center, Washington, D.C.

Kim Grier, Division of Aging Services, Georgia Department of Human Resources, Atlanta, GA

Joanne Grubbs, Georgia Health Care Association, Atlanta, GA

Brandi Hackett, LMSW, Roy Davis Funeral Home and West Georgia Crematory, Canton, GA

Sarah Harris, Harris & James, Macon, GA

Jane Jordan, Emory University, Atlanta, GA

Naomi Karp, AARP, Washington, D.C.

Steve Krumm, Senior Citizens Law Project, Atlanta Legal Aid Society, Atlanta, GA

David McGuffey, Elder Law Committee, Georgia Bar Association and Elder Law Practice of David L. McGuffey, Dalton, GA

Melanie McNeil, Division of Aging Services, Department of Human Services, Atlanta, GA

Mary F. Radford, Professor of Law, Georgia State University Law School, Atlanta, GA

Judge Jeryl Debra Rosh, Probate Court of DeKalb County, Decatur, Georgia

Judge William Self, Probate Court of Bibb County, Macon, GA

Erica Wood, ABA Commission on Law & Aging, Washington, D.C.

A special thank you to the wonderful Alston & Bird Marketing Department for designing this report.

FOREWORD

It is hard to imagine someone more alone and lonely than an elderly person who has outlived all relatives and friends and who has become incapable of making important personal health care decisions. While we do not know the total number of such “unbefriended elders” in this country, some estimates are that as many as three percent of nursing home residents may fall into this category. As modern science increases our longevity, this vulnerable population can be expected to grow.

Health care providers serving these incapacitated patients are often faced with making critical health care or end-of-life decisions in the absence of advance directives and without access to anyone authorized to consent to or refuse treatment. In 2010, the Georgia General Assembly enacted legislation designed to address this critical void by authorizing probate court judges to appoint temporary medical consent guardians to act on behalf of unbefriended elders and other incapacitated individuals.

The Georgia Appleseed Center for Law & Justice believes that it is important to assess the effectiveness and impact of curative legislation, such as the 2010 law, so that legislators and affected stakeholders can evaluate the law and suggest any necessary supplemental legislation or other follow-up efforts. To begin at least an initial assessment, volunteer lawyers from the Atlanta office of the law firm of Alston & Bird, working in collaboration with Georgia Appleseed, conducted interviews with probate court judges from around the state to obtain their views on the new law.

The following report summarizes the views expressed by the probate court judges and makes recommendations for actions designed to address certain challenges identified during the review process. The report also calls for continued monitoring and assessment of the law’s implementation.
“WHAT ARE WE GOING TO DO ABOUT MRS. JOHNSON?”

Thelma Henderson was born in Stone Mountain, Georgia, on May 5, 1931. She was the only child of parents who were both teachers in the DeKalb County school system. Thelma married her high school sweetheart, Bart Johnson, when she was 18. Bart was a talented mechanic who worked at a local auto repair shop for several years and then took over the business with the help of a loan from his parents.

A year after the marriage, Thelma gave birth to Bartholomew J. Johnson, Jr. who the family called “B.J.” The family lived a quiet happy life as Bart’s business did well and Thelma was active in her church and in the PTA at the schools that B.J. attended. B.J. was an excellent student athlete and his parents looked forward to cheering him on at college football games. Much to their surprise, however, B.J. announced just days before his graduation that he had decided to defer his college education and enlist in the United States Marine Corps.

On June 6, 1968, Thelma and Bart received word that B.J. had been killed in action in Vietnam. They were devastated at the loss of their only child. Within the next year both of Thelma’s parents passed away and Thelma again was hit hard by this loss.

Thelma and Bart were not blessed with any more children. They had each other though and their relationship deepened so that people would say that they had never known a couple so devoted to each other. The couple was so devoted and mutually dependent that they felt they did not “need” other friends and so did not nurture close relationships with others.

Bart retired in 2001 and the couple began to do a bit of travelling in their old camper. Bart began noticing that “something was just not right” right with Thelma and, following a series of doctor appointments and tests, she was diagnosed as suffering from Alzheimer’s disease. Bart lovingly cared for Thelma in their home for several years until her worsening condition and his advanced years made that impossible and she was placed in a residential care facility. Bart visited Thelma every day although she eventually came to the point that she only knew that a nice gentlemen would come to sit and talk with her and sometimes bring flowers.

Bart died in 2009. Although the staff tried to explain that he was gone, Thelma would everyday ask “Where is that nice man?” A year later, Thelma fell on way to dinner and broke her wrist. She was taken to the emergency room at a nearby hospital and the arm was set. The emergency room physician was troubled by the results of some of the lab tests that had been administered and admitted her to the hospital for additional evaluation. The doctor soon determined that she was suffering a chronic renal disease that could be treated by regular dialysis. In addition, she had an advanced stage of cancer that could be treated through radiation or chemotherapy but such treatment would prolong her life only by a few months at best.

Upon receiving the results of the tests, the doctor called the Executive Director of Thelma’s residential care facility and asked: “What are we going to do about Mrs. Johnson?”

CARING FOR GEORGIA’S UNBEPFRIENDED ELDERS
Views from the Probate Bench on the 2010 Amendments to the Surgical and Medical Consent Statute
THE CHALLENGE OF THE UNBEFRIENDED ELDER

There is no Thelma Johnson; or rather every year there are likely many Thelma Johnsons in Georgia who have outlived all of their relatives and friends, have not provided any formal medical treatment advance directives, and have become unable make informed decisions about their health. These "unbefriended elders" present special challenges to health care providers faced with difficult decisions about treating medical conditions.

Georgia law has long identified the persons who may make health care decisions on behalf of an incapacitated individual. The list includes a spouse and then various relatives in priority order. Relatively recently, an "adult friend" of the patient was added to the list. The Thelma Johnsons in our state, however, have no surviving relatives or friends so that, short of the establishment of formal guardianship, no one was authorized to make critical health decisions on their behalf—until 2010.

THE GENERAL ASSEMBLY’S RESPONSE

In 2010, amendments to the surgical and medical consent and guardianship laws of Georgia were enacted to address the situation presented when an unbefriended person is in need of a guardian to make medical decisions. (For convenience, the new provisions are referred to collectively in this report as the "Amendment.") The Amendment provides for an expedited judicial appointment of a temporary medical consent guardian, pursuant to O.C.G.A. Section 29-4-18, when no one who is otherwise authorized to serve as guardian is available. Specifically, the Amendment provides that:

The court shall have the authority to appoint as a temporary medical consent guardian any individual the court deems fit with consideration given to any applicable conflict of interest issue so as long as such individual is: (1) willing and able to become involved in the proposed medical consent ward’s health care decisions and (2) willing to exercise reasonable care, diligence, and prudence and to consent in good faith to medical or surgical treatment or procedures which the proposed medical consent ward would have wanted had he or she not been incapacitated. Where the proposed medical consent ward’s preferences are not known, the temporary medical consent guardian shall agree to act in the proposed medical consent ward’s best interests. However, a temporary medical consent guardian shall not be authorized to withdraw life-sustaining procedures unless specifically authorized by the court pursuant to this Code section.

---

1 For a detailed discussion of the plight of the unbefriended elder in this country, see AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING, INCAPACITATED AND ALONE: HEALTH CARE DECISION-MAKING FOR THE UNBEFRIENDED ELDERLY (2003).
2 O.C.G.A. § 31-9-2(a)(6). A person is deemed to be unable to consent for himself or herself if there is a determination in the person’s medical records made by a physician who has personally examined the patient that the person “lacks sufficient understanding or capacity to make significant responsible decisions regarding his or her medical treatment or the ability to communicate by any means such decisions.” Id. § 31-9-2(c). We refer to such persons in this report as “incapacitated.”
3 The list includes an adult child of the patient, the parent of the patient, the adult brother or sister of the patient, the grandparent of the patient, an adult grandchild of the patient, or an adult niece, nephew, aunt or uncle of the patient.
4 O.C.G.A. § 31-9-2(a)(7). An “adult friend” means an adult who has exhibited special care and concern for the patient, who is generally familiar with the patient’s health care views and desires, and who is willing and able to become involved in the patient’s health care decisions and to act in the patient’s best interest. The adult friend is required to sign and date an acknowledgment form provided by the hospital or other health care facility in which the patient is located for placement in the patient’s records certifying that he or she meets such criteria.
5 Id. §§ 29-4-18 & 31-9-2(a.1).
6 Id. § 29-4-18(i).
A temporary consent guardian may be appointed by the court for a period not to exceed 60 days, absent earlier termination by the court, the earlier appointment of a permanent guardian, or the earlier termination of hospitalization or of the current stay at another health care facility.\footnote{Id. § 29-4-18(j).}

**THE GEORGIA APPEASEED ASSESSMENT**

The Georgia Appleseed Center for Law & Justice ("Georgia Appleseed") and attorneys from the Atlanta office of the law firm of Alston & Bird partnered to assess the effectiveness of the 2010 Amendment in addressing the unbefriended elder challenge by seeking the views of experienced probate court judges.

**Scope of the Effort**

Alston & Bird lawyers interviewed probate judges across Georgia to learn more about judicial awareness and implementation of the Amendment. The Alston & Bird volunteers reached out to probate judges in 16 Georgia counties and were able to interview one hearing officer and nine probate judges across Georgia to determine the effectiveness of the Amendment. The issues addressed included: (1) the extent of the judge’s application of the Amendment; (2) who is appointed as a guardian; (3) the duration of appointment; (4) whether courts need additional resources to address family disputes; (5) the judge’s opinion as to the Amendment’s effectiveness, and (6) how end-of-life decisions should be treated under the Amendment. Alston & Bird, thus, requested feedback on the usefulness and effectiveness of the Amendment and ideas on how to improve the provision of guardians for the unbefriended elderly.

**Key Findings**

**A. Use of Georgia’s Temporary Consent Guardian Statute**

The interviews showed that while most probate judges are aware of the Amendment, many have not appointed a temporary consent guardian and are unsure about specific provisions and procedures within the county. Less than half of the judges interviewed have been presented with petitions for the appointment of temporary medical consent guardians and the majority of these petitions were either withdrawn by the petitioner or dismissed for lack of a volunteer. Only two of the interviewed judges have implemented the Amendment.

Those judges who have made appointments under the Amendment had petitions brought by the legal staff of local hospitals or received a request from Adult Protective Services ("APS"). Six of the seven remaining judges were aware of the Amendment but had not been requested to use it personally. One of these judges, however, has a colleague in the same court who has applied the Amendment at the request of a local nursing home. Only one judge was completely unaware of the Amendment. Despite the overall limited use of the Amendment, most judges indicated that they believe the Amendment as drafted is sufficient and does not need improvement.

**B. Who Will Serve as Guardian**

Many judges concurred that the effectiveness of the Amendment is inhibited by a shortage of persons willing to serve as guardians. The judges interviewed have widely varying opinions on the ease (or difficulty) of identifying an individual to serve as guardian under the Amendment. The judges set forth proposals to increase the pool of guardians ranging from compensating individuals to serve as guardians to training a pool of voluntary guardianship ombudsmen to relying on state employees.

One judge would appoint a county employee if a volunteer was not named in the temporary consent guardianship filing. A second judge would appoint the Clerk of the Superior Court. However, some judges believe it is not the role of the courts to appoint an unwilling temporary medical consent guardian, nor is it in the best interests of the unbefriended elder-patient to appoint an unwilling guardian. For example, one interviewed judge refuses to appoint an unwilling individual (i.e., any
individual not named on the petition or any individual who, when questioned, does not appear fully willing to serve) and dismisses temporary consent guardianship petitions with directions to re-file once such an individual can be named. Some judges believe that many people, even those petitioning for guardianship, are afraid of the responsibility of serving as guardian. This fear also inhibits the court’s ability to facilitate the use of adult friends as guardians.

Although this assessment focused primarily of the plight of the unbefriended elder, Alston & Bird also asked for the judges’ views on the relatively new option of appointing an “adult friend” to serve as guardian. The judges disagreed over whether manipulation or coercion by an “adult friend” is likely, and therefore had differing opinions as to whether further controls over potential elder fraud and abuse need to be incorporated into the temporary consent guardianship process. Some judges felt that such manipulation is not at all likely, while others believed that not only is it an important concern, but the court must monitor the relationship once a guardian is found.

At least one judge believes that the issue of the “villain friend” is significant enough that it must be resolved and suggested that none of the following individuals should be permitted to serve as the temporary consent guardian: a beneficiary under the will; a life insurance beneficiary; or a joint tenant of the elder’s accounts. Conversely, another judge suggested that those who seek to take advantage of an incompetent generally do not seek status from the court, so such the potential for abuse is remote.

C. Duration of Appointment

All of the judges interviewed felt that the 60-day duration of the temporary guardianship was sufficient and only one recommended an automatic renewal provision. Most felt that if decisions need to be made past 60 days, a permanent guardian should be appointed; the Amendment should not be used in lieu of a permanent guardianship. (The judge who suggested a possible one-time automatic renewal agreed that the need for any further extensions would warrant appointment of a permanent guardian.) The judges disfavored an automatic renewal provision in part because they believe that the court’s periodic involvement helps protect the incapacitated individual’s interests.

One judge considers it best practice to receive feedback from a temporary guardian within 10 days of appointment to determine whether a permanent guardianship is needed. The same judge opined that the incapacitated individual should be able to request review of the guardianship and seek early termination. None of the other judges recommended additional provisions for early termination of the guardianship.

D. Effectiveness

The judges were split on their opinions as to whether the Amendment is effective. A minority of judges believe that the Amendment is useful and effective, even if not used often. For example, the new provision serves the growing population of retirees who may not have local friends or family. Furthermore, health care providers that are aware of the Amendment are able to request its use for a patient. However, while a provider such as a hospital could always file a petition themselves and nominate an unaffiliated individual to serve as guardian, the health care provider is generally precluded from appointing any staff members to serve as guardian. Thus, while the Amendment allows for health care providers to identify and act upon an individual’s need for a guardian, the Amendment leaves open the question of who will serve as guardian.

However, many of the interviewed judges felt that the Amendment is not serving its intended purpose because health care providers and social workers are largely unaware of the change in the law, and even when courts, health care providers and social workers are aware of the Amendment, it often goes unimplemented due to the difficulty of finding guardians to appoint. Moreover, even if a temporary consent guardian is found, the guardian is often not trained regarding medical issues, end of life care and the impact those options will have on a specific patient. Some judges also believed that the Amendment is not needed because emergency guardianships can serve the same function. At least one judge believes that the Amendment is used by health care providers to avoid liability for medical decisions and placement.
One judge suggested raising awareness by including a legislative update during the semiannual probate judge required training. This judge also suggested providing a continuing education session for estate lawyers as well as social workers. Social workers are usually involved in petitions for a permanent guardian, so the judge thought that social workers in the county may not be aware of the Amendment.

**E. Decisions about Life-Sustaining Measures**

With respect to decisions about life-sustaining measures, all but three of the nine judges concur that a court order should always be required. Note that, as quoted above, the Amendment provides that a temporary guardian is not authorized to withdraw life-sustaining procedures unless specifically authorized by the court.

One judge believes that a court order is not needed if the guardian’s authority to make decisions concerning life-sustaining measures is discussed at the time of the initial appointment. A second judge believes that the guardian should only seek a ruling from the court when there is a dispute that arises regarding maintaining life sustaining treatment (or in the case that the Department of Human Services was appointed as the guardian because that entity will not terminate life support without a court order per state agency policy). A third judge believes that decisions surrounding life-sustaining measures are highly fact specific, and the guardian should have discretion to make the decision without judicial intervention. According to this judge, the purpose of the Amendment is to provide a patient with someone who is competent and aware of the patient’s changing health needs. Therefore, the temporary consent guardian, and not a judge, is the most qualified individual to make informed decisions about maintaining life sustaining treatment.

**F. Need for Advance Directives**

All of the judges interviewed concurred that more individuals need to have advance directives in place, and we need to focus on having individuals complete these documents earlier. According to the judges, raising awareness about advance directives could decrease the need for temporary consent guardians. Health care providers and estate planners should be urged to emphasize the importance of advance directives to patients and clients as part of their interactions and should point out that guardianships and conservatorships are costly and involved, and that advance directives and powers of attorney may eliminate the need for those appointments.

One judge proposed requiring hospitals to require that patients execute an advance directive upon admission. Education on the importance of advance directives should be disseminated by organizations that deal with the elderly and are already involved in the family/personal life of their members such as religious groups, senior centers, and estate planning attorneys. These groups should provide information about directives so that an appointed guardian does not become responsible for these decisions.

**G. Family Disputes**

As noted earlier, this assessment was primarily concerned with the challenges presented by unbefriended elders. The Alston & Bird team, however, did ask whether the judges faced any problems caused by disagreements among family members over health care decisions. The judges interviewed have varying experiences with family disputes. However, all who responded believe that the law currently provides adequate tools to deal with and resolve family disputes. Thus, the judges did not recommend any changes to the law to address family disputes. However, at least one judge noted that it would also be helpful if the medical facility had staff trained to work out family disputes.
**RECOMMENDATIONS**

**Increased Use of Advance Directives**

We agree with the recommendation of the probate court judges that efforts should be made to encourage increased use of advance directives. Since 1990, the federal Patient Self Determination Act has required medical facilities (including hospitals, skilled nursing facilities, home health agencies, and hospices) that seek Medicare or Medicaid payments to make certain disclosures to all patients at the time of admission. These disclosures include notice of the rights under state law of a patient to formulate an advance health directive and an explanation of the medical facility’s policies respecting such directives. In addition, the federal law requires that the patient’s medical records document whether or not an advance directive has been executed. Note, however, that both federal law and the state law discussed below provide that no patient can be required to sign an advance directive as a condition for receiving medical treatment.

In 2007, the Georgia General Assembly enacted the “Georgia Advance Directive for Health Care Act.” This law established a single form designed to allow both for the appointment of a “health care agent” (previously accomplished by use of a durable power of attorney) and for directions relating to end of life decisions (previously accomplished by a “living will”). Explanations of the relatively new law as well as copies of the statutory form are readily available from multiple sources including the State of Georgia, the State Bar of Georgia, multiple health care facilities, nonprofit organizations, and many other sources.

Despite these federal and state efforts, most people have not executed advance directives. In a 2008 Report to Congress, the U.S. Department of Health and Human Services concluded, based on multiple studies that it reviewed, that only 18 to 36 percent of Americans had completed an advance directive. Individuals with serious medical conditions reportedly had completed advance directives at a rate only slightly ahead of the general population; less than half of terminally ill patients had advance directives. The Department also expressed concern that studies suggested that two-thirds of doctors with patients who did have advance directives were not aware that the directives existed.

The Agency for Healthcare Research and Quality has suggested that among the solutions to the lagging use of advance directives would be a continuing commitment by trusted health care professionals to engage in a structured process for advance care planning as part of routine outpatient office visits and upon hospital admission. Although health care providers are most likely to interact with the broadest socio-economic range of persons who should consider advance directives, other professionals (for example, financial advisers and trust and estate lawyers) should also continue to be encouraged to counsel clients in this area.

---

8 42 U.S.C. §§ 1395cc(f), 1396a(w).
9 O.C.G.A. §§ 31-32-1 et seq.
10 Id. § 31-32-4. Durable powers of attorney and living wills that were valid prior to the effective date of the new law remain valid unless revoked. Id. § 31-32-3.
13 E.g., www.emoryhealthcare.org/patient-relations/advanced-directives.html/.
15 We are very aware that some segments of Georgia’s population do not have ready access to or familiarity with online resources.
17 Id.
18 Id.
Perhaps such efforts could be fostered by an initiative of a consortium of health care stakeholders and senior citizens advocacy groups to develop a sensitive but effective communications campaign pointing out the availability of the advance directive as well as the peace of mind that having the directive in place can provide both to the person establishing the directive and to his or her loved ones.

It must be noted, however, that the use of advance care directives is not an absolute panacea for unbefriended elders. Certainly, the existence of a directive will provide critically important guidance as to the patient’s treatment preferences in connection with a terminal condition or permanent unconsciousness. On the other hand, there are other medical decisions that will often arise short of these catastrophic circumstances that would normally be in the hands of the health care agent named in the advance directive. It is likely, however, that most patients will have named a close relative to serve in that capacity. Unfortunately, the Thelma Johnsons of the world will have outlived their designated agents.

**Encouraging Service as Temporary Consent Guardians**

One of the most significant challenges faced by some judges seeking to implement the Amendment appears to be the unavailability of persons who are willing to serve as temporary consent guardians. While there is no easy answer to this challenge, the Amendment will simply not be effective absent an adequate supply of persons willing and capable of serving in this capacity. One option would be for government to fund a program that would train and compensate persons to serve as temporary medical consent guardians. This could be done, for example, by explicitly establishing this responsibility within an existing state agency. We recognize that this option would involve the allocation of limited state resources which may be difficult in these economic times.

To the extent that volunteers will continue to be a primary source of guardians, perhaps some of the nonprofit organizations that are already doing an excellent job of helping to enhance health care in general or to fight a specific disease or condition could add programs designed to recruit and train persons who would be willing to be called upon by the courts from time to time to serve.

We suggest that the monitoring initiative discussed below should specifically be designed to track this issue and to determine the extent to which the unavailability of persons willing to accept an appointment as a temporary medical consent guardian is standing in the way of implementing the Amendment.

**Professional Training**

The continuing professional education opportunities for judges, lawyers, health care providers, and others who serve the elderly should include regular updates on the Amendment. Perhaps more important than reviewing the letter of the law will be the opportunity for these professionals to share their experiences in implementation of the Amendment and to identify best practices that can be emulated by others.

**Monitoring**

Georgia Appleseed believes that stakeholders should carefully monitor the implementation of the Amendment over the next two years to determine its effectiveness in addressing the challenges faced by Georgia's unbefriended elders. We will seek to work with the judicial council, the Bar, organizations representing the health care sector, state government and others to design an effective program for this purpose. The findings of this monitoring process could then be provided to appropriate committees of the General Assembly to assist in determining whether legislative changes are warranted to assure effective implementation of the law.
CONCLUSION

We do not really know how many Thelma Johnsons there are in Georgia. We are not sure that anyone is counting. The 2003 American Bar Association (“ABA”) report referred to above suggests that 3-4% of the nursing home population may be unbefriended. Given the rapid growth of the senior segment of the population and our increased longevity, unbefriended elders are likely to be a very large and growing segment of the population nationally and in Georgia.

The incapacitated senior citizens unknowingly embroiled in an unbefriended elder situation are inherently powerless and marginalized. The same ABA report quotes a bioethicist at a major urban hospital as saying that unbefriended elders “... are the most vulnerable patients because no one cares deeply if they live or die.” The 2010 Amendment is one attempt to show that we in Georgia do “care deeply” if our most vulnerable citizens live or die. But it is important that the law be implemented effectively for it to make a meaningful difference in our state.

---

Note 1 supra.

Id.