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An Alternate Source of Payment for Long-Term Care: Lawful Third Party Guarantees

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The recent passage of the Deficit Reduction Act of 2005 ("DRA")[1] reflects a legislative attitude that restricting individuals from transferring their property prior to qualification for public benefits for long-term care assistance will result in less monies being spent by the federal and state governments to provide health care for our frail and elderly population. Many concerns underlie this attitude, particularly the rising cost of health care, the rising percentage of elderly with greater health needs, the shrinking state and federal budgets allocated for social services, and arguably, the misperception that elders are giving away thousands of dollars to their children in the pursuit of Medicaid eligibility. While the correctness of this attitude, policy, and the law itself will by necessity be debated heavily, nursing facilities, elder law practitioners, and individuals seeking long-term care must adapt to the new rules. Those rules are: a five year lookback period for transfers of insufficient consideration (i.e. gifts); and, in situations where a penalty period is assessed, a penalty that will now commence either on the first day of the month in which the transfer was made, or on the date the individual is otherwise eligible for Medicaid, whichever is later.[2] These harsher rules impose a practical question for the nursing facility: if an impoverished resident does not qualify for Medicaid, and has no long-term care insurance or private resources with which to pay for the cost of his care, to whom does the nursing home look for payment? This article will explore one alternative source of payment: third-party guarantees of payment for nursing facility care.

Generally, long-term care can be paid for by three means: private pay (including long-term care insurance), Medicare (for up to 100 days of skilled care[3]) or Medicaid. A nursing facility may choose to accommodate only private pay residents and not accept residents with coverage under Medicare and Medicaid. Given the high cost of care provided by nursing facilities, it is unlikely that most residents can afford to pay from their own resources for any length of time, and therefore it is unlikely that many facilities can

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afford to accept only private-pay residents. For the very small percentage of nursing facilities that are not Medicaid or Medicare certified, the payment guarantee provisions discussed in this article do not apply (if a resident is private-pay only, but resides in a Medicare or Medicaid certified facility, these provisions do apply to that resident.[4]

Since the majority of nursing facilities are Medicaid and Medicare certified, they are subject to the Nursing Home Reform Act ("NHRA"), also commonly known as OBRA '87, and contained within Title XIX of the Social Security Act.[5] The requirements for Medicare and assuring quality of care in skilled nursing facilities are found at 42 U.S.C.A. § 1395i-3, while the Medicaid requirements for nursing facilities are found at 42 U.S.C.A. § 1396r.[6] Corresponding regulations are found at 42 C.F.R. § 483 et seq. Both the statutes and regulations contain provisions governing admission policies for facilities.

Among a list of requirements for nursing facilities is the provision which states that a nursing facility cannot require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility.[7] At first glance, this provision is surprisingly straightforward: it clearly prohibits a nursing facility from *requiring* a third party to incur personal financial liability in order to secure admission for a resident. Understanding the heightened emotional and stressed state of most people who are in the process of admitting a loved one to a nursing facility, the law affords protection to a vulnerable consumer. As Shirley Podolsky, one of the plaintiffs in a California case which struck down a nursing facility's agreement as deceptive, testified: "I would've signed anything in order to make sure that my husband would have a safe place to stay. In addition, I wanted to return to my husband as soon as possible."[8]

Under the construction provisions, the NHRA further states that this provision shall not be construed as preventing a facility from requiring an individual who has legal access to a resident's available income or resources to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care.[9] By allowing the nursing facility to require a legal representative to execute a contract for the care and services it will provide, and ensure payment for these services from the resident's income and resources, the federal legislation clearly strikes a balance between consumer protection in a disproportionate bargaining power situation, and financial protection for the nursing facility.

The NHRA provides further protection for the consumer resident by including transfer and discharge rights.[10] Although nonpayment is a permitted reason for discharge of a resident, the nursing facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.[11] In addition, the NHRA prohibits discrimination against individuals entitled to Medicare or Medicaid benefits by prohibiting the facility from requiring oral or written assurance that residents are not eligible, or will not apply for, Medicare or Medicaid benefits.[12]

Given the high level of medical need necessary to qualify for admission to a facility, it can be assumed that most residents in nursing facilities are impaired, and are accompanied at time of admission by a family member, or hopefully, an agent appointed under a power of attorney. Even in this likely scenario, in which the resident does not have the capacity to contract for the services, the facility is clearly prohibited from requiring a legal representative to incur personal liability for payment. The federal law anticipates that payment will be made from the resident's resources; and if those resources are insufficient, the income and resource requirements for Medicaid will be met.

Unfortunately, this provision does not anticipate an impoverished resident who is unable to qualify for Medicaid due to imposition of a transfer penalty, or even failure to file the Medicaid application. This situation is frequently anticipated by nursing facilities and admissions contracts often contain personal liability provisions for third par-

ties, usually espoused as a guarantor or legally responsible person. The author has personally reviewed admission contracts which require a legal representative/guarantor to incur personal financial liability, particularly if the resident is unable to qualify for Medicaid. Additionally, the author is awaiting a response from a nursing facility regarding whether they will pursue collection against a son who personally signed a promissory note to pay a $14,000.00 arrearage incurred by his mother for care at the facility, but only at the insistence of the facility that she would be discharged to his care if he did not sign, and only to have her die four days after he signed.

As expected, the majority of cases are initiated by the nursing facilities, under a claim of breach of contract against the responsible party or guarantor, and a request for damages of unpaid fees for service. Although only a handful of these cases have been brought (or are published or available for review), it is clear that oftentimes, the available defense of a NHRA violation is not even raised. Without this defense, the court looks at the admissions agreement simply as a contract, and applies the principles of contract law and construction. In *Care Center of Kansas City v. Willye Horton*,[13] the Court held that the terms of a one-page admissions contract were unambiguous and the arrearage of $14,773.27 was enforceable against the agent daughter who signed as responsible party. The court identified the contractual language "in consideration of the services rendered to resident, she hereby individually obligates herself to pay the account of the facility in full at discharge," and found the pro se respondent liable in spite of evidence that she made clear to the nursing home at time of admission that she was on a fixed disability income and could not afford to be personally responsible for her father's account; to which the admissions representative responded, "you don't have to worry about it."[14]

In a Wisconsin case, the Court of Appeals found that the resident's son had executed the contract as "responsible party," and that the contract provided that the resident and "responsible party" were jointly and severally liable for nursing home expenses. Because the contract was clear and unambiguous, the son could not attack the contract by parol evidence of his intention to the contrary, and he was liable to the nursing home for payment.[15] In a very similar case decided not long after the NHRA was passed, the New York Supreme Court Appellate Division held a defendant son liable for payment to the plaintiff nursing facility for services provided to his father, because the son signed an agreement as a responsible party stating he would pay. The court found that the contract was clear and unambiguous, and that it unmistakenly obliged the defendant to insure payment.[16] It is possible that these cases were brought by private pay facilities only, and they are not subject to the NHRA; however, this is highly unlikely given the small percentage of private pay only facilities. Regardless, these cases highlight how easily the rights guaranteed by the federal law can be overlooked if not brought to the court's attention.

When the defense of an NHRA violation is raised, the courts carefully consider both the form and substance of the agreement. Consider *Manor of Lake City, Inc. v. Hinners*,[17] where the Supreme Court of Iowa held that the form of the agreement caused the signing party to become personally liable, and clearly violated federal law if it was a condition of admission. The form Agreement stated: "Acknowledgment by Responsible Party. The Responsible Party agrees to be bound in his or her individual capacity by all of the terms and conditions of the Agreement pertaining to the Resident." The plaintiff asserted that the defendant signed the contract voluntarily, and therefore waived his rights under the NHRA, because the contract was not presented to him as a requirement for admission; however, the plaintiff failed to offer any evidence that the defendant voluntarily surrendered a known right. Therefore, the court reversed and remanded for entry of judgment in favor of the defendant on the claim of personal liability.[18]

Contrast this with the decision in *Sunrise Healthcare Corporation v. Azarigia*,[19] in which the court distinguished the above holding by finding that the contractual language at issue did not violate the third-party guarantee provision because "it specifically eschews personal liability on the part of the 'responsible party' regarding payments to the plaintiff." The specific contractual language noted by the court states: "responsible party does not personally guarantee or serve as surety for payment as described in Section II, Paragraphs (1) through (5). The responsible party agrees that his or her liability for the failure to

perform any of the other obligations set forth in this agreement shall be determined in accordance with these Paragraphs." Further, the court stated that the contract obligates the defendant to use the resident's assets for payment of services, by stating "responsible party agrees that these funds shall be used for the resident's welfare, including but not limited to, making prompt payments in accordance with the terms of this agreement."

The court determined that this was not a contractual agreement imposing personal liability, but rather, the defendant was liable for her handling of the resident's assets and only to the extent that these assets would cover outstanding payments owed to the plaintiff. Because the nursing facility plaintiff sought to recover moneys that belonged at all times to the resident, rather than to the defendant, the defendant's liability depended on a showing of her misuse of the resident's assets in violation of the contract. The court analogized this liability to a trustee's liability for an unauthorized use of trust property, and found that the defendant was obligated to make prompt payment to the plaintiff out of the resident's funds. After making prompt payment to the plaintiff, the defendant was free to use the resident's funds for the resident's welfare, but using the resident's funds to make gifts for estate planning purposes and to pay a personal companion for the resident did not constitute payments for the resident's welfare, i.e. basic necessities. Therefore, the defendant was ordered to pay $78,779.09 to the plaintiff.[20]

The court further distinguished the defendant's obligations as an agent versus responsible party, and found that the defendant expressly assumed responsibility under the contract when she signed as "responsible party." Because the defendant executed the contract both as the resident's agent under a power of attorney and as the responsible party, the defendant's liability was heightened beyond that of the principal-agent relationship created by the power of attorney, and extended to the obligations specifically set forth under the contract for the responsible party. Since these obligations extended to the defendant personally, she could not escape liability because she had breached her obligation to the nursing facility as the party responsible for prompt payment from the resident's funds.

The court's analysis highlights the exception to the general rule regarding the agent's liability: generally, an agent is not personally liable to a third party, unless the agent has pledged his individual responsibility and becomes bound by engaging expressly to perform the principal's obligations.[21] As applied in *Walton v. Mariner Health of Maryland, Inc.*, "An agent is not personally liable for the resident's nursing home care costs, unless the agent, voluntarily and knowingly, agrees to pay for the resident's care with the agent's own funds."[22] Since the defendant had expressly stated in the agreement that she did not "knowingly and voluntarily agree" to use her own resources to pay for her mother's nursing home care, she did not incur personal responsibility for the principal's obligation.[23]

The California Court of Appeals, in *Podolsky*,[24] discussed use of the term "responsible party." Numerous plaintiffs brought the action against defendant, owner of 42 nursing homes across California. Although the action originally filed contained numerous complaints of unfair business practices, including solicitations by the defendants for third party guarantees of payment, the defendant revised its admission agreement and removed the third party guarantee provisions from its agreements for Medicare and Medi-Cal (California's Medicaid program) patients. The remaining issue for the court focused on the new guarantee form, which would be used for private pay patients only.

The court found that California Welfare and Institutions Code defined a responsible party as one other than the patient who signs or co-signs a nursing home admission agreement and agrees to assume personal liability for payment of the resident's bills. As this definition was so similar to the legislative intent behind the federal ban on third party guarantees, the court determined a responsible party under California law is no different than a third party guarantor under federal Medicare and Medicaid law. However, the court further determined that neither federal nor state law prohibits solicitation by the nursing facility of otherwise voluntary third party guarantors. Instead, the applicable statutes make it unlawful to *require* third party guarantees as a condition of admission or continued residence in such facilities.[25]

The *Podolsky* court continued, finding that the proposed guarantee agreement was deceptive in that it

failed to provide any additional disclosure to the third party which could be qualified as consideration in exchange for the payment guarantee, such as information about the existing federal and state law provisions regarding third party guarantees and resident's discharge rights. Consequently, the agreement violated the California Business and Professions Code because it was a deceptive practice.

More importantly, the court questioned the sufficiency of the consideration. The agreement conferred to the third party receipt of monthly bills and 15 days written notice before discharge, but these were rights already granted to the resident by state and federal law. The court noted, "When recited consideration consists of nothing more than a preexisting obligation or duty, it cannot be consideration of a promise. Consideration consists of any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled."[26] In granting direction to the trial court, the court stated that any future third party guarantee agreements should:

> ...fully, accurately and conspicuously set forth: (1) the notification rights and notification time periods available under federal and state law to both mentally competent and incompetent nursing home residents; (2) the notification rights and notification time periods available under state and federal law to a resident's family members or third party guarantor; and (3) that these rights exist even if no third party guarantee is signed. The third party guarantee agreement must also state that such an agreement is not required as a condition of admission to or continued stay in the nursing home. We also believe that a full and complete oral explanation of these matters should precede or accompany the presentation and solicitation of a third party guarantee and that a third party guaranty agreement should provide for the guarantor's signature acknowledging that such explanation has been made. The court and the parties might also consider allowing the solicitation of third party guarantees no sooner than one day *after* the admission agreement is signed to clearly separate the admission documents from the third party guarantee agreement.[27]

The cases reviewed clearly indicate that, in order to obtain a lawful third party guarantee of payment, the nursing facility must ensure that the third party's consent is given voluntarily, with full knowledge of all provisions of rights afforded by law; and that an additional obligation is imposed on the guarantor as responsible party which is bargained for, exchanged and supported by sufficient consideration. For the nursing facility, the question remains—what consideration is adequate to evidence the voluntary and knowing nature of the guarantee, and what should be offered to the third party in exchange?

Although there is no clear answer to this question, the courts have indicated that a voluntary and knowing guarantee cannot exist without the nursing facility ensuring that the prospective third party displays adequate understanding of the third-party guarantee prohibition; safe discharge plan and discharge notice requirements; the prohibition against a written or oral assurance that the resident is not eligible, and will not apply for, Medicare or Medicaid benefits; and the numerous other rights afforded the resident by federal and state law. If all of this were given, who would volunteer this personal obligation? The obvious answer is this scenario: a child of an impoverished resident, who cannot take care of Mom or Dad at home, who understands that Medicaid ineligibility might occur due to prior gifts to the child, and who believes he has a moral obligation to be responsible for payment. While playing on the guilt and assumed moral obligations of the family might help a nursing facility obtain a voluntary third party guarantee in this particular scenario, the reality is that most family members cannot afford the high cost of long-term care any more than the nursing home can afford to maintain non-paying residents.

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1. Pub. L. 109-171, Sections 6011 to 6021 (2005.)
2. Pub. L. 109-171, Sections 6011(A) and (B).
3. Skilled care is defined as ongoing nursing or therapy care, and is distinct from custodial level of care which provides assistance with activities of daily living, such as bathing, dressing, eating and transferring.
4. The prohibition against third-party guarantees applies to all residents and prospective residents regardless

of the payment source in both Medicaid nursing facilities and Medicare skilled nursing facilities. Medicare and Medicaid Requirements for Long Term Care Facilities, 56 Fed. Reg. 48826, 39 (1991)

5. The Nursing Home Reform Act was passed as part of the Omnibus Reconciliation Act of 1987 and is codified at 42 U.S.C.A. § 1396 et seq.

6. Under the Medicare requirements, skilled nursing facility is defined as:

(a) an institution which—

(1) is primarily engaged in providing to residents—

(A) skilled nursing care and related services for residents who require medical or nursing care, or

(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons;

and is not primarily for the care and treatment of mental diseases.

Under the Medicaid requirements, nursing facility is defined as:

(a) an institution which—

(1) is primarily engaged in providing to residents—

(A) skilled nursing care and related services for residents who require medical or nursing care,

(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons, or

(C) on a regular basis health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities, and is not primarily for the care and treatment of mental diseases.

7. 42 U.S.C.A § 1395i-3(c)(5)(A)(ii) (2006); 42 U.S.C.A. § 1396r(c)(5)(A)(ii) (2006).

8. *Podolsky. v. First Healthcare Corporation*, 50 Cal.App.th 632, 638 (Cal 2 Dist. 1996).

9. 42 U.S.C.A. § 1395i-3(c)(5)(B)(ii) (2006); 42 U.S.C.A. § 1396r(c)(5)(B)(ii) (2006).

10. 42 U.S.C.A. § 1395i-3(c)(2); 42 U.S.C.A. § 1396r(c)(2).

11. 42 U.S.C.A. § 1395i-3(c)(2)(C); 42 U.S.C.A. § 1396r(c)(2)(C).

12. 42 U.S.C.A. § 1395i-3(c)(5)(A)(i)(II); 42 U.S.C.A. § 1396r(c)(5)(A)(i)(II).

13. 173 S.W.3d 353 (Mo. Ct. App. 2005).

14. *Horton* at 355.

15. *St. Francis Home v. Sharon*, 179 Wis.2d 851 (Wis. Ct. App. 1993)

16. *Daughters of Sarah Nursing Home Company, Inc. v. Lipkin*, 145 A.D.2d 808 (N.Y.A.D. 3 Dept. 1988)

17. 548 N.W.2d 573 (Iowa 1996).

18. In an interesting end, this case came again before the Supreme Court of Iowa on March 25, 1998, 576 N.W.2d 592. Upon remand to the trial court, the question of the defendant's personal liability for breach of contract was again presented to the jury and resulted in a judgment for the nursing facility. Although it was clear that the defendant had been named in the complaint, both personally and as trustee, both the jury instruction and verdict omitted any reference or recovery against the trustee. The Court held that the plaintiff nursing facility's claim against the defendant as trustee should have been submitted for jury consideration. Since it was not, and it was the plaintiff's responsibility to shepherd the claim through trial to submission, the judgment against the defendant as trustee was dismissed. Because the Court had previously dismissed the judgment against defendant personally, the nursing facility was prevented from recovering against him in either capacity.

19. 821 A.2d 835 (Conn. App. Ct. 2003).

20. *Azarigan* at 843.

21. 2 Am. Jur. 2d Agency § 297 (2002).

22. 894 A.2d 584 (Md. 2006).

23. *Walton at* 598.

24. See *Podolsky*.

25. *Podolsky* at 645.

26. *Podolsky* at 655.

27. *Poldosky* at 656.

Ex-wife May Be Liable for Former Husband's Nursing Home Costs

In ***Mountrail Bethel Home v. Lovdahl*, 2006 ND 180, 2006 WL 2359414 (N.D. 2006)**, the Supreme Court of North Dakota considered a breach of contract action brought by a nursing home against the ex-wife of a resident. The Court clarified under what circumstances the ex-wife would be liable for nursing home care charges incurred by her former husband after the marriage was dissolved.

Colin Lovdahl suffered a severe stroke and entered Mountrail Bethel Home in December, 2000. At the time he was admitted, Colin asked his wife, Bonnie, to sign the admission agreement on his behalf. Prior to entering the nursing home, Colin had transferred all of his real property to Bonnie, who later transferred this property to their children. Colin and Bonnie Lovdahl divorced in April 2002, at which time Colin's account with Mountrail Bethel was current, with the majority of his costs paid by Medicaid. In June 2002, Medicaid determined that Colin Lovdahl did not receive any of the assets available to him in the divorce decree, thereby finding him ineligible for continued coverage. Medicaid stopped payment from June until December, when Medicaid determined he was once again eligible. Medicaid paid Colin Lovdahl's nursing home costs un-

til his death, but did not pay the outstanding $30,828.03 for the period of his ineligibility, June to December, 2002.

In October of 2004, Mountrail Bethel sued both Colin Lovdahl and Bonnie Lovdahl for breach of contract. Mountrail Bethel was granted summary judgment against Colin Lovdahl's estate, which did not have the assets to satisfy the judgment. The breach of contract claim against Bonnie Lovdahl proceeded to trial, where the district court ruled that Bonnie Lovdahl was not liable for the outstanding debt. The district court reasoned that any obligation Bonnie Lovdahl had for her husband's debts ended with their divorce, and since the debt accrued after the divorce, she could not be held liable. The district court did not rule on whether Bonnie Lovdahl was herself a party to the contract by signing the admission agreement, and therefore liable for the unpaid amount independent of her marriage to Colin Lovdahl.

Mountrail Bethel appealed, arguing that the district court erred in not addressing whether Bonnie Lovdahl was a party to the contract because she signed the admission form as "resident or responsible party." The Supreme Court of North Dakota agreed with Mountrail Bethel that the district court, in determining Bonnie's liability, should have determined whether a contractual relationship existed between Bonnie Lovdahl and Mountrail Bethel independent of Bonnie Lovdahl's marriage to a Mountrail Bethel resident. The Court reasoned that nothing in the admission agreement itself released Bonnie Lovdahl from liability in the case of a divorce, nor did the Lovdahl's divorce decree mention Colin Lovdahl's agreement with Mountrail Bethel. The Supreme Court found no case law to support the contention that a direct party to a contract could escape liability because said party divorced the spouse who benefited from the contract. Therefore, the Court declared that if Bonnie Lovdahl signed the agreement solely on behalf of her then-husband Colin Lovdahl, she is not liable for all the reasons stated by the district court; if, however, Bonnie Lovdahl was a party to the contract, Mountrail Bethel may recover unpaid amounts regardless of the Lovdahls' divorce. The Court reversed and remanded the case for further proceedings on this issue.

Court Required to Appoint Guardian Duly Nominated Under Indiana Law

The Court of Appeals of Indiana recently ruled that the nomination of a guardian must be honored by the court absent showing of good cause or disqualification. ***In re Guardianship of Hollenga,* 2006 WL 2371868 (Ind. Ct. App. 2006).** Dorothy Hollenga, an elderly widow with no children and a considerable estate, owned property across the street from her residence, which she rented to Daniel Cook beginning in 1998. In 2002, Hollenga discovered with Cook's assistance that she was being taken advantage of by her financial advisor and attorney-in-fact. Hollenga subsequently created annuities in favor of Cook and executed a will leaving her estate to Cook. In August of 2003, Hollenga's neighbor, Gene Stephen Harris, and Harris' two friends from church, filed a petition for appointment of a guardian over Hollenga's estate. In response, Hollenga executed a durable power of attorney, effective on her incapacity as determined by her physician. The durable power of attorney nominated Cook as her attorney-in-fact.

In December of 2003, the trial court denied the petition by Harris to set aside Hollenga's durable power of attorney, and denied Harris's petition for temporary guardianship of Hollenga's estate. However, in March of 2004, the court found Hollenga incapable of managing her property and granted Harris's petition to establish guardianship over Hollenga's estate. The court named Harris and his two friends as co-guardians without addressing the nomination of Cook in Hollenga's power of attorney.

In May of 2005, Hollenga fell at home and was hospitalized; her doctor determined that Hollenga was incapacitated, and her power of attorney became effective. The co-guardians of her estate petitioned a second time to have Hollenga's power of attorney set aside. The district court issued an order in July of 2005 setting aside Hollenga's power of attorney; in October, the court reiterated its order, declared Cook unfit to serve as guardian, and appointed Hollenga's nieces as guardians of their aunt. Hollenga appealed; Cook, after intervention, appealed as well. The Court of Appeals

of Indiana considered this appeal under an abuse of discretion standard.

The Court of Appeals did not directly address the order setting aside the power of attorney because it found the trial court erred when it named Harris and his friends as guardians, despite a duly signed and executed nominating instrument naming Cook. The trial court is constrained by **Ind. Code Ann. § 29-3-5-4**, which says "The court shall appoint as guardian a qualified person or persons most suitable and willing to serve, having due regard to the following: (1) Any request made by a person alleged to be an incapacitated person, including designations in a durable power of attorney under IC 30-5-3-4(a)." The referenced statute, **Ind. Code Ann. § 30-5-3-4**, says, "The court shall make an appointment in accordance with the principal's most recent nomination in a power of attorney except for good cause or disqualification." The Court of Appeals noted the use of "shall" in both statutes, and reasoned that Hollenga's designation of Cook as her attorney-in-fact must be honored by the court unless there is a showing of good cause or disqualification. Because the trial court did not invalidate Hollenga's designation of power of attorney prior to appointing Harris and friends as guardians, that nomination was effective. Therefore, under Indiana law, the district court was required to appoint Cook, Hollenga's most recent nomination, as guardian of her estate. The Court of Appeals reversed and remanded with instructions for the trial court to appoint Cook guardian, absent a timely challenge with good cause or disqualification.