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THEODORE N. STEPHENS, II
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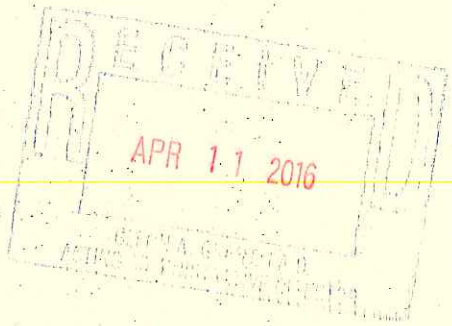


April 6, 2016

Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director
Administrative Office of the Courts
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625

RE: Comments from the New Jersey Surrogates to
2016 Report of the Civil Practice Committee

Dear Judge Grant:

As the Surrogate's Section Chief for Constitutional Officers Association New Jersey (COANJ) I am writing this letter to you at the unanimous request of all 21 Surrogates. The purpose is to make our formal written comments on the proposed rule changes set forth in the 2016 Report of the Civil Practice Committee. Although letters sent by some Surrogates may have preceded this, please know that this missive serves to supplement same.

First, please know that the Surrogates universally appreciate and echo the concerns of the New Jersey Supreme Court that more needs to be done to monitor the efforts and activities of guardians whose already significant role in society will become even greater in the near future. Surrogates have been supportive of the Guardian Monitoring Program ("GMP") from the outset. As I am sure you recall, the Surrogates were initially advised that the GMP would be administered by the Superior Court Clerk's office with volunteers who were to be supervised by local vicinage state judiciary employees. We were assured that our role would be limited to providing operating space for the volunteers and access to our files. While this charge seemed innocuous, some Surrogates were unsure of how making these accommodations would affect already over-burdened staffs. Nonetheless, we made the necessary adjustments and accommodations.

The Surrogates have several specific concerns pertaining to the proposed guardianship rules, specifically R. 4:86-6(f) ("Duties of Surrogate") and R. 4:86-3A ("Action on Complaint"). Our review of the recommended Rule amendments reveal changes that create a new significantly compelling role for Surrogates and go far beyond the initial "duty to accommodate" the state's facilitation of the GMP in our court facilities. This unfunded mandate imposes primary and subjective obligations on Surrogate's Courts that far exceed our current or foreseeable staff capacities, expertise and resources. In addition to the proposed Rules, as promulgated, seeking to formalize the GMP, they significantly change our role and the use of our staffs in the process by effectively shifting the "monitoring" responsibilities from State employees to the County employees as proposed Rules 4:86-6(f)5 and (f)6, place this responsibility, and more, squarely on the County Surrogates.

Additionally, these proposed Rule amendments raise several legal questions pertaining to the legal authority of the AOC to codify GMP through Court Rule. GMP appears to be an issue of substantive law, necessitating codification by the legislature rather than the AOC. Codification, as a whole, raises several constitutional questions specifically with the separation-of-powers clause as established in the New Jersey Constitution. Further review and analysis of this legal issue appears to be of threshold importance.

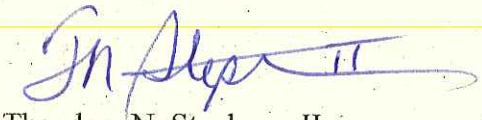
For several years, Probate Judges were encouraged to require that guardians file an annual report of well being. While the probate code has permitted the Court to make this a requirement since 2005, they were rarely ordered. With the new rules emphasizing this report and the model judgment also including a provision for it, the well being reporting is becoming the rule in most guardianship actions. Accordingly, the issue of tracking, enforcing, reviewing and acting on these reports is now relevant and significant warranting a revision of N.J.SA. 3B:12.

If nothing more, it is our consensus that the above supports a sufficient basis to abandon the proposed Rule changes in question. In addition to the paramount legal issues, practically, Surrogates can neither meet these proposed new responsibilities with our current staffs nor do we have the means to hire additional qualified personnel. If the requisite funding cannot come from the State, it is unlikely that the counties will be willing to accept this financial burden. There is also the very serious concern of whether the proposed Rules 4:86-6(f)5 and (f)6 expose Surrogates to unanticipated risks. During the last Judiciary-Surrogates Liaison Committee meeting, the Surrogates expressed concern to the Committee Chairman, Honorable Ronald E. Bookbinder, A.J.S.C., that clarification was needed as to whether Surrogates, as elected officials, are insulated with the same judicial immunity as Superior Court judges. Resolving this question seems paramount to any issues about staffing and funding.

Unquestionably, the proposed Rule changes reflect a dramatic shifting of duties and responsibilities to the Surrogates. It may be argued that some change in New Jersey procedure is needed to protect the increasing needs of the incapacitated public. Although we are not sure of the exact factors which led to the proposed Rule amendments, we Surrogates are ready and willing to participate in that discussion. It is respectfully asserted, however, that the proposed plans will not meet the intended purposes without creating a plethora of issues, for the Surrogates

and AOC, for which there currently are no viable resolutions. Accordingly, it is the considered and unanimous position of the Surrogates that the subject Rules changes should not be implemented.

Respectfully Submitted,



Theodore N. Stephens, II
Essex County Surrogate

cc: All New Jersey Surrogates