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Senior Citizens Council

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April 14, 2016

Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex, P.O. Box 37
Trenton, New Jersey 08625

Re: Report of the Supreme Court Civil Practice Committee: Rule Amendments to Rule 4:86 (the "Rule Recommendations")

Dear Judge Grant:

On behalf of the Senior Citizens Council of Union County, please accept our comments on the proposed rule changes as they pertain to Rule 4:86 regarding Guardianship proceedings. Founded in 1971, the Senior Citizens Council is a grassroots non-profit organization dedicated to improving our lives as we grow older. Serving as a voice for our community, we provide a wide range of informational and educational programs, including our bi-monthly publication, *Senior News/Third Wave News*. Our base spans a population from 55 to 100 years of age.

Our focus in making these comments relates to their impact on older Americans. The word "older" encompasses a very broad definition. It is not just one's chronological age; it is a state of mind and also includes factors such as health, education, income, family relationships, the person's community support network and personal history. Thus, there can be no single bright line rule defining "older person" in the context of Guardianship law. Guardianship law as it relates to older Americans is case specific. We cannot assume that someone who is ninety years of age must be in need of a guardian.

As our population continues to live longer, many of our seniors are being drawn into Guardianship actions. Guardianship should not be a punishment for them. On the contrary, it should only be sought as a protection to ensure proper safety and care, usually after significant financial and/or health issues arise. Because the fundamental right of self-determination protected by the New Jersey Constitution is paramount, Guardianship, according to the New Jersey Department of Human Services, "should only be a solution of last resort."

Guardianship rules require a balance. On the one hand, if an older adult needs protection and does not object, the court should move quickly to appoint a guardian to help. On the other hand, if a person resists the appointment of a guardian, the court should allow the older adult a fair opportunity to object and present his/her position.

However, even if a matter is contested, the proceeding should not be lengthy. If the party bringing the action for Guardianship has strong factual support for filing the complaint, why is full-blown discovery required? If the basis for bringing a Guardianship action is for a person's safety and protection, isn't this by its very nature an exigent matter?

By statute, there is a high burden of proof required to remove another person's civil rights. The plaintiff's proof should be disclosed up front when the complaint is filed, rather than created from extensive and prolonged discovery. A lengthy proceeding only adds to the angst of the older person and the passage of time clearly does not inure in his/her favor. It also exacerbates family relationships at a time when support is most needed.

With this in mind, I am attaching a copy of a recent article from our publication, *Senior News/Third Wave News*, describing the real-life struggle of a woman in her late eighties who fought a Guardianship action brought by her estranged son.

Our specific comments on the Rule Recommendations are as follows:

Rule 4:86-1(c). Guardianship Monitoring Program. The Senior Citizens Council welcomes the adoption of a Guardianship Monitoring Program. We note that the proposal delegates establishment of the functions of Guardianship support and monitoring to the Administrative Director of the Courts. We hope we will have an opportunity to comment on proposals that set forth the scope of such Guardianship support and monitoring. We believe monitoring should look at whether or not the danger to which the alleged incapacitated was exposed has ended (perhaps because of recovery from illness) and whether or not, as a consequence, the Guardianship should be terminated or limited.

Rule 4:86-2(a). Scope of the Complaint. We suggest that any plaintiff in a Guardianship action also be required to provide information in the complaint detailing his/her contacts with the alleged incapacitated person during the past twelve months prior to bringing the action. Plaintiff should also provide specific examples of how the alleged incapacitated person is at risk and the steps that plaintiff has taken or attempted to take in order to reduce those risks. Such information should be in the form of an affidavit or certification. Additionally, plaintiff should be required to provide the names and addresses of other known interested parties, including other relatives and close friends who have had contact with the alleged incapacitated person. These requirements would help show the motivation of the plaintiff.

Rule 4:86-2(b)(2). Form of Physician Affidavit or Certification. We hope we will have the opportunity to comment on the form that is to be promulgated by the Administrative Director of Courts. We would oppose any form that is pro forma in nature or "fill in the box." Guardianship is unique to an individual and should not be a bureaucratic exercise when seeking to take away a person's rights.

We believe that the information recited by the physician or psychologist completing the form should be required to be based on reports obtained from third parties or based on examination(s) of the alleged incapacitated person and not merely a repetition of allegations made by the plaintiff. Such reports should be included with the affidavit or certification.

Rule 4:86-3(a). Action on Complaint. As drafted, Rule 4:86-2 provides for certain required information in the complaint. While we appreciate that such information is helpful, if such information is mandatory, it may prevent the speedy bringing of an action when a guardian is urgently required. Proposed Rule 4:86-3A says that "[i]f a complaint is not substantially complete in all respects, the Surrogate shall process the complaint in accordance with R. 1:5-6" (emphasis added). This may result in return of papers and substantial delay. There should be greater flexibility in bringing a Guardianship complaint, and it should be recognized that Guardianship is an exigent proceeding very different from normal civil litigation. However, the complaint must be "materially" complete based on the circumstances and the relief sought by the plaintiff.

Rule 4:86-4(a). Time of Hearing. If the alleged incapacitated person contests the hearing, the plaintiff should be required to provide detailed specific information on the proof it will offer, and the names of its witnesses, five days prior to the initially scheduled hearing. Defendants should not be put to the trouble of defending vague accusations ("forgetful", "incapable of doing her bills") unless real hard evidence is produced (e.g. "her bills have not been paid for the last six months and her electricity has been turned off"). The hearing should then commence no later than 10 days after this information is received by the defendant, unless the defendant, shows, for good cause, that additional time is needed to address plaintiff's proofs. Both plaintiff and defendant should be required to be present at the initial hearing. This would allow the hearing to be meaningful and possibly result in an early resolution, rather than merely a prelude to a litigation battle.

Rule 4:86-4(b). Appointment of Counsel. If the alleged incapacitated person appoints his or her own counsel, the court-appointed counsel should be dismissed upon notice of appearance by private counsel.

Rule 4:86-5(b). Completion of Guardianship Training. Given the exigent nature of Guardianship actions, we do not believe there will be time for a proposed guardian to complete Guardianship training prior to appointment. Most guardians are family members and have no experience in these matters. This proposal also seems inconsistent with the provisions of proposed Rule 4.86-6(d) which say that qualification is needed 30 days after appointment. There is no reason why Guardianship training cannot start following appointment.

Rule 4:86-6(c). Appointment of Guardian. We believe the list set forth in subsection (c) is too limited. The current presumption in favor of sons and daughters should be given less weight. Close relatives and friends, if capable and if willing to perform the functions of guardian, should be considered. The court should take into account and give significant consideration to the preferences of the alleged incapacitated person to the extent the alleged incapacitated person is capable of expressing an opinion. In most cases, such person will be able to do so. An older person is much more likely to co-operate and accept help from someone they are comfortable with, say a friend or a cousin, than from an estranged son or daughter. An effective guardian is in the best interest of the

alleged incapacitated person. Although plaintiff may not be selected as guardian, the plaintiff should accept that the monitoring system and a bond, if required, will provide protection of the older person and supervision of the appointed guardian.

Rule 4:86-6(e) (3), (4), (5). Reporting of Guardian. We welcome the requirement that guardians be required to file reports. We have concerns, however, as to whether the Surrogate Offices have the necessary resources to fulfill the responsibilities assigned to them in the proposed rule. Also implicit in this rule is that the Surrogate will review the reports and take action if the guardian is found to be performing inadequately. The New Jersey Department of Human Services already acts in Guardianship matters and deals with "red flags" on a continual basis. Perhaps they may be a better option to serve in the position of gatekeeper.

Rule 4:86-6(f). Duties of Surrogate. Please see above comment for Rule 4:86-6(e), (3), (4), (5).

Rule 4:86-7(a) (5) (6) (7). Rights of an Incapacitated Person. The ability of an incapacitated person to obtain counsel and demand review of the guardian and the decision of incapacity are excellent goals. However, if the guardian controls both the estate and the person, these "rights" may never be realized. Can an incapacitated person contract for legal services? Unless it is clear that the attorney is validly hired, it will chill the ability of an alleged incapacitated person to obtain competent counsel and make any review of incapacity difficult. The courts (subject to review of the attorney fees) would need to allow for such services. Please see comment below on Rule 4:86-7(b).

Rule 4:86-7(b). Proceedings for Review of Guardianship. We strongly support the rights of a person determined incapacitated to ask for a review as circumstances change. It is important to restore the constitutional rights of a person if possible. We question, however, whether these rules can override statute and case law since the appointment of a guardian removes the rights of the incapacitated party on a practical level, such as hiring an attorney. Legislative change may be needed.

We also suggest some standard of proof is provided in these proceedings for Review of Guardianship. Is the burden on the ward? Or is there a continuing requirement for a guardian to produce "clear and convincing evidence" as was required in the original hearing? We believe the latter to be more appropriate.

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Limited Discovery. We would like to make an additional comment on an issue not mentioned in the proposed rules. At present, discovery is allowed in Guardianship proceedings in a similar manner to other civil cases. We think this is wrong. If a plaintiff is bringing an action for Guardianship, the plaintiff should already have sufficient grounds to do so, and, absent extraordinary circumstances, not be allowed to conduct depositions, send interrogatories or ask for other information that bolsters his case or manufactures evidence. Once substantial discovery is allowed, delay is inevitable and the purpose of Guardianship proceedings, protection of the alleged incapacitated person, is lost in procedural delay. Thus, we would suggest that very limited

discovery be allowed to the plaintiff in Guardianship proceedings that are contested by the alleged incapacitated person.

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In conclusion, we understand that every Guardianship action is very fact specific. We recognize that it is extremely difficult to produce rules that work well in every instance. In our view the key issue is quick resolution of the issues, either to get help to a person who needs it or to dismiss a case which has questionable merit. This should be the most important goal.

We are grateful for the opportunity to submit these comments. If you have any questions or require additional information, please do not hesitate to contact me at (908) 964-7555 or our counsel, Peter Humphreys of Hogan Lovells at (212) 918-8250.

Very truly yours,

Ellen Steinberg
Chair, Senior Citizens Council of Union County

Enclosures

cc: Peter Humphreys, Esq.

AS SEEN IN

SENIOR NEWS and THIRD WAVE NEWS

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Stephie's Story: A System That Needs Change

By Ellen Steinberg

In 2009 at age 83, Stephie had a heart problem and was taken to the hospital. Her son wasted no time. He applied for guardianship of his mother and her money. But Stephie recovered. A month after Stephie came out of rehab, she fought the action for permanent guardianship in court. At the first hearing date, the judge dismissed the case.

Fast forward to summer 2014. The son comes back for round two after Stephie got into a minor motor vehicle incident (no injuries, $600 in damages). The son hires an attorney who sends him to two "experts" who both certify that his mother is incapacitated. All it takes is a complaint with the two certifications and Stephie is hauled back into court.

Before the initial court date in October 2014, Stephie saw her treating physician and a care assessor. Both certified that she was NOT incapacitated. Stephie also made out a Power of Attorney and a Health Care Directive naming her nephew to assist her. When she went to court the judge would not make a decision on capacity, saying that a trial was needed, which the judge scheduled for March 2015. Stephie continued to live alone at home using her nephew as her power of attorney and health care representative.

In January 2015 Stephie filed a motion to dismiss the case. The judge denied it and required Stephie to be seen by an independent doctor and her son's expert doctor.

The reports came back in March 2015. The independent doctor said that Stephie was NOT incapacitated. The son's expert doctor stated that Stephie understood that although she loved her son, she didn't want him in charge of herself and her money. Rather, Stephie wanted to continue having her nephew assist her.

In April 2015 the judge now ordered Stephie to be seen by the son's original two certifying doctors for the purpose of determining who Stephie would want to assist her if the judge ruled that Stephie was incapacitated (even though the March reports said Stephie wanted her nephew to help). The judge rescheduled the trial to July 2015.

In June 2015 the judge ordered that Stephie, now age 89, must sit for an unlimited deposition (a questioning) by the son's attorney. After four hours of interrogation on one day and two hours on another, the judge now scheduled the trial for August 2015. During this entire time Stephie continued to live alone at home. Additional requests for dismissal were denied.

August 2015 came and the judge rescheduled the trial for January 2016, almost a year and a half after the son filed his complaint. But the trial never took place. Stephie passed away on December 16, 2015. The judge dismissed the case on December 23. After all, dead people do not need guardians.

This is a sad story. Most children care for their parents out of love not by court order. Whatever the merits of the case, the last year of Stephie's life was spent in a contentious litigation with her son. Instead of spending this time in the love of her family, she spent it asserting her lack of trust in her son and trying to escape his control. The case dragged on.

Perhaps the judge could have been more proactive in scheduling, but judges are busy and this was just another case on the calendar.

Guardianship is not supposed to be a punishment. It is meant to protect people who are at immediate risk and unable to care for themselves. Because it removes the ability of a person to make decisions about the way she lives and takes away her rights, including the control and direction of her money, it should be a step of last resort.

Guardianship actions should not be prolonged litigation. Presumably if a guardianship action is filed claiming that a person is incapacitated, it is because immediate help is needed. It should be incumbent upon the judge to have the matter resolved as fast as possible—to protect the person who is at risk or to dismiss the complaint as not meeting the necessary clear and convincing standard of proof. Stephie's case deteriorated into months of discovery, depositions and delay. If she needed help, she didn't get it from the court. All she received was the stress of a case hanging over her like the proverbial sword ready to drop and sever her rights to live her own life as she pleased.

Reform is needed. Sons or daughters or whoever files in court as a plaintiff seeking to take over the money and dictate the care of an aged person, should not simply be allowed to initiate a case based on the say so of two people who are beholden to the plaintiff or plaintiff's counsel. This is especially true if the alleged incapacitated person objects to having his/her rights taken away. Plaintiff should have to produce all the evidence at the time the case is filed and not be permitted to engage in prolonged discovery designed to find or develop a case or produce new evidence. Mere allegations should not be sufficient to tie a person up in court for over a year. Tangible evidence and actual testimony by the plaintiff should be required at the onset. All guardianship actions should be resolved within 30 days of filing. If the person needs help, she should get it. If the person is in danger, steps should be taken to prevent the risk. It is vital to resolve these matters as soon as possible. If the facts cannot be established, the case should be dismissed. It can always be brought again if the situation changes.

The New Jersey Constitution recognizes that everyone has the right to self-determination, the right to decide how he or she wants to live. It may not be the way your son or daughter wants you to live. But too bad. As we get older, our rights should be protected, not easily removed. Stephie's case is not about whether she needed help or not. Stephie's case is about whether she received justice and care from the court system. It is about whether the system works properly. Justice delayed is justice denied. And Stephie's case was delayed almost a year and a half. Other people should not have to suffer this same indignity, this same stress, this same heartache. Change is needed.

Senior News/Third Wave News is published by the Senior Citizens Council of Union County, a non-profit organization founded in 1971 to improve the lives of older Americans. Located at 2204 Morris Avenue in Union, the Senior Council is often the first place our seniors and their caregivers go for information and assistance. We can be reached at 908-964-7555.