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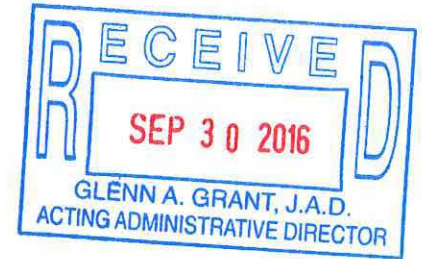
CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
PO Box 700
TRENTON NJ 08625-0700

September 30, 2016

ELIZABETH CONNOLLY
Acting Commissioner



Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments – Guardianship Forms
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Comments on Proposed Guardianship Forms

Dear Judge Grant:

On behalf of the Department of Human Services (DHS), I write to offer comments on the proposed new guardianship forms. Under the newly adopted amended court rules, use of these forms will be required for all guardianships.

DHS, particularly the Department's Bureau of Guardianship Services (BGS) and the Division of Mental Health and Addiction Services (DMHAS), regularly utilize the forms when preparing petitions for guardianship for our clients, including patients who are involuntarily committed to the State psychiatric hospitals and developmentally disabled clients of the Division of Developmental Disabilities (DDD). We believe certain changes to the proposed guardianship forms are needed to benefit these DHS clients and other individuals for whom guardianship is sought.

Our comments primarily pertain to five of the proposed forms: the two proposed judgment forms - Judgment of Incapacity and Appointment of Guardian(s) of the Person, and Judgment of Incapacity and Appointment of Guardian(s) of the Person and Estate; the proposed Certification of Physician or Psychologist; the proposed Adult Guardianship Case Information Statement and the proposed certification of assets. We also offer proposed corrections to some of the other proposed forms.

- 1. The proposed judgment forms for the appointment of guardians of the person and guardians of the person and estate do not appropriately recognize an individual's decision-making abilities in a limited guardianship.**

Limited guardianships are often sought for developmentally disabled clients of DDD and BGS, as well as for patients of the State psychiatric hospitals. For limited guardianships, the proposed judgment forms require a listing of the areas in which the person retains decision-making ability, rather than a list of those areas in which the person is not able to make decisions.

The proposed "Judgment of Incapacity and Appointment of Guardian(s) of the Person" also states that the incapacitated person is "unfit and unable to govern himself/herself and manage his/her affairs in all areas except" in specified areas. The form thus presumes that the person is incapacitated except for the enumerated areas. The proposed Judgment of Incapacity and Appointment of Guardian(s) of the Person and Estate similarly require a list of the areas of decision-making authority retained by the person. Thus, for both forms, if an area is not listed, the person's autonomy in that area is removed. The petitioner and the court will therefore need to identify every specific right to make decisions that the person retains, or risk wrongfully stripping the person of his or her decision-making rights.

The new proposed judgment forms also provide a space, at paragraph 5, to list limitations on the guardian's powers. But, if a decision-making area is not included on the list of limitations, and is also not included on the list of decision-making areas retained by the person, then the person would evidently be stripped of that area of decision-making.

Because it is not possible to list every area of possible decision-making, the proposed forms may very well result in unnecessary and unintentional removal of a person's autonomy in particular areas of the person's life where he or she may actually be able to make decisions. Limited guardianship can afford the least restrictive guardianship alternative, permitting a person to exercise all decision-making of which he or she is capable.

We therefore propose that the judgments should instead provide for a listing of the areas of decision-making in which a guardian is needed because the person is unable to make decisions in those areas, as is consistent with N.J.S.A. 3B:12-24.1(b). As the Court found in In re M.R. 135 N.J. 155, 166 (1994), it is the public policy of the State to afford developmentally disabled individuals "the maximum feasible personal liberty." (quotation and citation omitted). And see IMO C.F.C. an Incapacitated Person, 2013 N.J. Super. Unpub. LEXIS 1104 (App. Div. 2013), (interpreting M.R., and finding that "[a] guardian's powers should only extend as far as necessary."). See also N.J.A.C. 10:43-1.1 ("Restricting a person's decision-making authority shall be limited to only those areas in which the person has demonstrated a lack of capacity as determined by a clinical assessment.").

Thus, for limited guardianships, the judgment forms should provide for a listing of the areas of decision-making where a guardian is needed, based on the clinician's assessment of the

areas in which the person lacks decision-making capacity. The judgment should state that in all other respects the person is fully able to manage his or her own affairs.

- 2. The proposed Certification of Physician or Psychologist is conclusory and does not contain enough space for the clinician to explain his or her opinions. Further, the Certification does not appropriately recognize an individual's decision-making abilities in a limited guardianship.**

The proposed clinician certification form does not contain enough space for the clinician to express his or her opinions. It is primarily a checklist, and provides little space for the facts and reasons for the conclusions stated. The form will thus provide the courts with minimal information upon which to base a reasoned decision. If the need for a guardianship is not contested, this will be the sole information available to the court upon which to base its decision. We recommend that additional space be added to the form.

The clinician certification also requires the clinician to list the areas in which the person has decision-making capacity, rather than the areas in which the person lacks such capacity. The form further requires the clinician to state the factual basis for his or her opinion "as to any areas in which the individual retains capacity." (Paragraph 10). The form thus requires the clinician to list and provide evidence of the areas of decision-making capacity retained by the person, rather than those areas of decision-making in which the clinician has determined that the person lacks capacity.

Requiring the clinician to prove that the person is competent in certain areas, rather than to prove that the person is incompetent in certain areas, improperly flips the presumption of capacity on its head. The presumption should properly be that the person is competent except as specifically assessed by the clinician.

For the reasons set forth above with respect to the judgment forms, we recommend that the clinician certification form instead provide for a listing of the areas of decision-making where a guardian is needed, based on the clinician's assessment of the areas in which the person lacks decision-making capacity. Further, the form should require the clinician to state the basis for his or her opinion that the person lacks capacity in any decision-making area, rather than the basis for an opinion that the person retains capacity in any particular areas. For limited guardianships, this will provide the courts with a proper basis to find that the person needs a guardian to make decisions in particular areas, based on the clinician's assessment.

- 3. By requiring the Social Security number of the alleged incapacitated person, the proposed Adult Guardianship Case Information Statement risks identity theft. It should be sealed to avoid this risk.**

The inclusion of the person's Social Security number on the Adult Guardianship Case Information Statement will place the person at risk of identity theft, even though the CIS states that it is not a public form. This is because, if it is treated like the complaint and supporting papers, the universe of parties who must be served with the complaint and supporting papers is quite broad. See R. 4:86-4(a). We therefore recommend that the new CIS be sealed by the court.

4. Certification of Assets

Typically the business Managers at the state psychiatric facilities are not always able to ascertain assets of the individual independently. As such, the individual may be unable to assist and there may be no ability to independently access bank accounts, individual personal property or other financial documents by the facility. In those instances, there should be an option for the business manager to indicate that assets may be "unknown".

5. Suggested clarifications.

We also recommend that the forms be clarified as suggested below.

- a. On the clinician certification form, it is suggested that paragraphs 3 and 4 be amended to recognize that DDD employees who are not licensed by the State as psychologists are permitted to conduct psychological evaluations as part of their duties with the agency. See N.J.S.A. 45:14B-6(a)(1).
- b. In the judgment forms, the reporting requirements in paragraph 7 of the Judgment of Incapacity and Appointment of Guardian(s) of the Person, and paragraph 8 of the Judgment of Incapacity and Appointment of Guardian(s) of the Person and Estate, should be amended to add a third check box and the following text:

"Or
The filing of a report of well-being is not required to be filed pursuant to N.J.S.A. 3B:12-42(c)."
- c. The CIS form includes check boxes for the following Case Types: "Title 30 (DDD)," "Title 3B (DD)" and "Title 3B (All Others)." These case types are not defined and it is unclear what is intended. We note that DDD does not file guardianship petitions. Rather, BGS files guardianship petitions on behalf of DDD clients, and such petitions may also be filed by relatives. We also note that the State psychiatric hospitals file guardianship petitions on behalf of patients who are involuntarily committed there.
- d. On the Certification of Assets, it is suggested that "State-funded Personal Needs Allowance" be added to the text after the first check box, immediately after "Social Security benefits." It is further recommended that a checkbox be added with an option to indicate "unknown" after each section to reflect that after inquiry assets may

exist, though are not known to the business manager or individual that is making the certification. A small Personal Needs Allowance may be provided by the State to a patient committed to a State psychiatric hospital who has no income.

Thank you for the opportunity to comment on the proposed guardianships forms.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'BEF', is written over a horizontal line.

Bonny E. Fraser, Director,
Legal and Regulatory Affairs

C: Lisa Ciaston, DMHAS
Jessica Anastasi, BGS
Gene Rosenblum, DOL