

#012



NEW JERSEY STATE BAR ASSOCIATION

THOMAS HOFF PROL, PRESIDENT
Laddey Clark & Ryan, LLP
60 Blue Heron Road, Suite 300
Sparta, NJ 07871-2608
973-729-1880 • FAX: 973-729-1224
tprol@lclaw.com

September 30, 2016

Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts Rules Comments
Hughes Justice Complex
Box 037
Trenton, NJ 08625-0037

Re: Comments on Proposed Revised and New Model Forms-Guardianship of Incapacitated Adults

Dear Judge Grant:

Thank you for the opportunity to review and comment on the report and recommendations of the Supreme Court Civil Practice Committee on the proposed revised and new model forms related to Guardianship of Incapacitated Adults, as an adjunct to proposed amendments to the New Jersey Rules of Court.

The New Jersey State Bar Association recommends that the Court not adopt these standardized forms. While it may be prudent to have “model forms” as a guide, these “required forms” fall far short from being able to meet the varying and sometimes complex facts presented in guardianship matters. We have heard from experienced practitioners that each guardianship matter is unique, and it would be difficult to create one form sufficient for all purposes. Of particular concern is that, in some instances, the proposed forms do not appear to collect enough information required to meet the guardianship standards established by Court Rule. Ultimately, the NJSBA believes the proposed forms, if not supplemented, will cause confusion, at best, and delays, at worst, in guardianship actions, leaving some of the most vulnerable individuals in our state without protection for longer than is necessary. If the Court decides to move forward with adoption of the forms, the NJSBA offers specific comments and suggestions for revisions below.

At the outset, again, the association believes that while standardized forms may streamline the guardianship process and provide more efficient judicial review, it is important to note that standard forms cannot account for or anticipate all situations. Therefore, it is essential that there be flexibility in the use of any required form, to allow deviation from the standardized form when a particular situations warrants it. Further, there is no standardized form of complaint, but reference to R. 4:86-1 should be included within the package of forms so applicants know where to find the requirements applicable to a verified complaint.

Our comments on each proposed form are as follows:

Adult Guardianship Case Information Statement (new form)

1. The Case Information Statement (CIS) seeks information that is already required to be included in the Complaint for Guardianship, so the form is duplicative of information already being provided to the Court.
2. While the Case CIS is the basis for the Guardianship Monitoring system, all of the information required by the form is not always readily available within the timeframe with which it must be completed. For example, while the date of birth of the alleged incapacitated person (AIP) may be readily available, the social security number often is not. If that is not filled out or is only partially filled out (i.e., listing only the last four numbers of a social security number), the Court has the right to reject the filing because it is incomplete, thereby preventing the AIP from receiving the attention in the Court system that is desperately needed.
3. The form is written with the anticipation that an individual will be completing it, and it requires detailed information about the proposed guardian and all interested parties. However, many applications are brought by organizations/agencies (i.e., hospitals, long-term care facility, Adult Protective Services) that may not have all of that information. Language should be added allowing the applicant to provide supplemental information as soon as practicable.
4. The form asks whether an accommodation for a disability is needed, but it is unclear as to whom it is intended to apply. This need would apply quite often with regard to the alleged incapacitated person (AIP), however, the court appointed attorney and plaintiff will not certify whether the AIP will attend the hearing until later in the proceedings. Many times, the in-person requirement is waived on the part of the AIP, or alternatively, the AIP may be permitted to participate by telephone. Accordingly, if this question seeks to determine if an accommodation is required for someone noticed on the guardianship application other than the AIP, the form should clearly request that information from the applicant.
5. Some of the language on the CIS form may not be easily understandable to a layperson. For example, a layperson may not appreciate the importance of the distinctions among the listed case types (Title 30 (DDD), Title 3B DD) and Title 3B (All Others). An explanation of the differences should be included in the packet, "How to File a Motion in a Guardianship Case."
6. In addition to a request for an interpreter, applicants should be able to request the assignment of a court appointed attorney who speaks the parties' native language.

Certification of Assets (new form)

1. The proposed form expects that the plaintiff has complete knowledge of an AIP's finances and assets; however, that is not often the case. The plaintiff may only have partial or outdated information. The form would facilitate the guardianship process better if, next to the box indicating "None" was a box indicating "Unknown."

2. Schedule E, Miscellaneous Personal Property should eliminate the word "personal" as it is too restrictive. This category should include not only tangibles but also interests under a trust and other intangible property.

Certification of Physician or Psychologist (new form)

1. The proposed certification form is less detailed than most forms that are currently routinely used by attorneys who regularly file guardianships. Because of this, it is likely to produce less specific reports upon which the court is to rely in determining capacity. In particular, the form is not likely to elicit the "particularity" requirement of R. 4:86-2.

Use of this form as proposed will likely lead to delays or denials of appointments of guardians for the most vulnerable persons. To address this, the form should be accessible in Word format to allow the insertion of additional text by physicians/psychologists, and additional language should be added to permit inclusion of supplemental material so the treating physician/psychologist has an opportunity to provide the complete medical picture of the patient. In addition, many doctors who regularly perform competency exams have templates on their own systems, and many attorneys who regularly represent clients in guardianship hearings have forms of certification that provide the necessary detail. If those forms are compliant with the requirements of the rules, they should be allowed.

2. In Paragraph 4, the phrase "New Jersey physician" should be changed because it implies that only a physician licensed in New Jersey can provide a Certification to the Court. N.J.S.A. 30:4-27.2(t) defines physician as "a person who is licensed to practice medicine in any one of the United States or its territories, or the District of Columbia." While most of the time this provision may not be problematic, sometimes an AIP may be actively under the care of a physician within the metropolitan area, but outside of New Jersey. Since that incapacitated person is well-known by that treating physician, it makes no sense to prohibit that non-New Jersey physician from rendering an opinion and forcing the person to submit to evaluation by a physician unfamiliar with treatment; indeed, the applicable statute seemingly direct otherwise.

Order Fixing Guardianship Hearing Date and Appointing Attorney for Alleged Incapacitated Person (revised form)

1. In paragraph 4, the form should include a reference to R. 4:86-1, which sets forth the requirements of the verified complaint.
2. In paragraph 5, space should be provided for the address and phone number of the Appointed Attorney to ensure easier access for a pro se respondent. It should also allow the attorney to make reasonable inquiries into any "other testamentary substitutes," in addition to the will. Finally, language should be included in the section addressing whether the court appointed attorney should serve pro bono or be paid from the AIC's assets to indicate that the Court may direct otherwise at a later date. This is because complete asset information may not be available at the start of a guardianship proceeding, and a change in the Court's determination on the question of payment maybe warranted once further asset information becomes available.

3. Paragraph 6 authorizes retention of private counsel by an AIP; however, if an Appointed Attorney continues to serve, it could raise a conflict of interest. The responsibility of a court-appointed attorney following retention of private counsel should be clarified, and the guide for such attorneys should be updated accordingly.
4. Paragraph 7 directs that pleadings be immediately served upon the Court Appointed Counsel. Yet, in some counties, the Order is signed in the Judge's Chambers and faxed to the Court appointed attorney, but not the filing attorney. This is generally done to determine if there are conflicts with the appointment, court dates, etc., prior to the pleadings be served on counsel, who may not be able to participate for one reason or another. Sometimes there can be a delay of up to 2 weeks between receipt by the Court appointed attorney and receipt by the filing attorney. The term "Immediately" needs to be defined, and it needs to be clarified whether unfiled copies transmitted to the Court Appointed Counsel will be sufficient.
6. Paragraph 8 should specifically reference financial and legal documents pertaining to the AIP. In our experience, financial institutions see the HIPAA reference and improperly believe that the provision is only meant for medical documentation. Lawyers have been denied access on various occasions to financial documentation and have needed to ask the Court to enter a specific order authorizing access to financial documents. In addition, when attempting to locate Wills, Powers of Attorneys or Advanced Directives, prior counsel for the AIP have also denied access as a result of the attorney-client privilege, necessitating a Court Order. Consideration should be given to adding language for obtaining financial and legal documents as well.
7. While electronic medical records are common practice, an attorney is often not given complete access to such records for a variety of reasons. Yet, it is critical that an attorney be able to review an AIP's complete medical record, and not just certain records deemed important by the provider. For example, nurse's notes can provide insight into a person's mental status, sometimes the names and contact information for family and friends are included in the records, and, often, the need for particular procedures performed is documented in a patient's chart in a different place from the information about the procedure itself. Therefore, the order should require medical care providers to produce a complete written chart to be provided to the attorney.
8. Paragraph 10 requires next-of-kin/parties-in-interest to serve any answering pleading on "the attorney for the plaintiff and the attorney for the alleged incapacitated person at the address set forth above." By taking out the address of the court-appointed attorney in paragraph 5, as mentioned above, the language in paragraph 10 appears somewhat inconsistent and could make it more challenging for a *pro se* respondent to find contact information for the court-appointed attorney.
9. Paragraph 11 regarding guardianship training should reflect that some potential guardians are exempt from the training pursuant to R. 4:86-4(a)(6) (i.e. the Office of the Public Guardian). In addition, since guardians are often not decided upon until the actual hearing, a guardian may not have been aware of the training requirement. Others may have difficulty completing the required training within the timeframe due to, for example, insufficient access to the internet or a language barrier. The Court should require the Guardian to complete guardianship training within 30 days of his/her/their appointment, but allow them to act in the interim so as not to

impede the guardianship process. The issuance of the letter of Guardian could be delayed until the training is completed. Finally, the Court should clarify that when an attorney is appointed as a guardian, if the attorney has previously completed the training in connection with another guardianship action, the previous training will suffice.

Judgment of Incapacity and Appointment of Guardian(s) of the Person and Estate (revised form)

Judgment of Incapacity and Appointment of the Guardian(s) of the Person (new form)

The recommended changes apply to both forms unless otherwise indicated in this section.

1. The shift from a “model judgment” to a “required form” misplaces the emphasis that guardianship actions are “cookie cutter” cases. While certainly there are simple guardianships that have no special nuances, they are most often very fact specific and preparation of a proposed judgment is an important role in advocating for a client as well as the AIP. While the revised court rule requires the proposed form be used, “except to the extent that the court explicitly directs otherwise,” its application is impracticable. We would prefer a system where each judgment can be specifically modeled to the nuances of each case. In addition, we believe the form is extremely hard to follow, and will be particularly difficult for *pro se* individuals.
2. The form has various boxes to check which many attorneys may not be able to replicate on their computer systems. There should be additional space provided to add any further language deemed appropriate.
3. Paragraph 1 on both forms is confusing in its reference to “GENERAL (FULL) GUARDIANSHIP” or “LIMITED GUARDIANSHIP” and should be clarified by clearly explaining the difference between the two options for guardianship.
4. Paragraphs 13/11 “COUNSEL FOR INCAPACITATED PERSON” on both forms speak only to fee awards for the court-appointed attorney. There is no separate provision here or elsewhere on the form to address when plaintiff’s counsel is entitled to be paid fees from the incapacitated person’s estate. Moreover, the form directs the guardian of the person to pay attorney’s fees and expenses; however, the guardian of the person has no authority over a ward’s assets. This needs to be clarified to be consistent with the Order for Hearing and to specifically reflect who is responsible for payment of the fees.
5. The Judgment relating to guardianship of an individual’s estate makes a specific reference to the AIC’s non-retention of the right to possess firearms. There are many other rights that should be considered and acted upon the Court, as well, that are not reflected, such as the right to privacy, the right to vote, the right to travel, the right to marry and, perhaps most importantly, the right to maintain a driver’s license.
6. The amendments to R. 4:86-7 set forth seven very specific areas, which should also be part of any Judgment of Incapacity. These rights include:

(1) The right to be treated with dignity and respect; (2) The right to privacy; (3) The right to equal treatment under the law; (4) The right to have personal information kept confidential; (5) The right to communicate privately with an attorney or other advocate; (6) The right to petition the court to modify or terminate the guardianship, including the right to meet privately with an attorney or other advocate to assist with this legal procedure, as well as the right to petition for access to funds to cover legal fees and costs; and (7) The right to request the court to review the guardian's actions, request removal and replacement of the guardian, and/or request that the court restore rights as provided in N.J.S.A. 3B:12-28.

7. It is important to note that a proposed form of judgment needs to be submitted 10 days before a hearing. As noted above, the plaintiff may not have all of the pertinent information about an AIP at that point to address all of the concerns in a proposed judgment. The NJSBA had previously recommended shortening this timeframe to ensure the best information is used in crafting the judgment, and that recommendation is renewed here.

Motion Kit for Self-Represented Litigants (new form)

The definition section of the motion kit should contain the full-name of commonly used acronyms related to Incapacitated Adults so that the forms are more easily understood by a lay person (i.e., HIPAA, AIP, Title 30 DDD).

The NJSBA appreciates and values the opportunity to review and comment on the proposed guardianship forms. The use of the forms will have a significant impact on the practice of law in New Jersey as it relates to some of our most vulnerable citizens. Thank you, once again, for allowing to the association to participate in the process.

If you have any questions regarding our recommendations, please do not hesitate to contact me.

Sincerely,



Thomas H. Prol
President

/sab

cc: Robert B. Hille, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director