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STATE OF NEW JERSEY  
DEPARTMENT OF HUMAN SERVICES  
BUREAU OF GUARDIANSHIP SERVICES  
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TRENTON, NJ 08625-0705

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Chief

September 30, 2016

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 Model Guardianship Forms

Dear Judge Grant:

On behalf of the Bureau of Guardianship Services (BGS), I respectfully submit the following comments regarding the proposed guardianship forms that will be required for all guardianships adjudicated in New Jersey.

BGS is the State entity within the Department of Human Services, responsible for filing guardianships and serving as guardian of the person when family is not able, for eligible consumers of the Division of Developmental Disabilities (DDD). BGS is the only State entity charged with these responsibilities. Accordingly, we file an average of 200 guardianships per year and presently serve as guardian of the person for over 2500 people. Our office may file seeking the appointment of family or BGS as the guardian. Unfortunately, we are only able to handle the most urgent cases and many families whom we are unable to represent, seek our advice when filing matters privately or pro-se. I offer these comments based on BGS' experience in preparing guardianships and acting as a guardian from a practical perspective with sensitivity to the rights of people with intellectual

and developmental disabilities. It is my hope that the information will be beneficial to the people we serve.

The comments below reference the forms page by page and offer recommendations for your consideration.

#### Pro-Se Instructions

There are no instructions for people filing pro-se. Title 30 was amended this year to allow families greater access to filing a low cost guardianship for their developmentally disabled family members. To this end, the court should include an instructional packet that outlines the types of documents the court may accept in a guardianship action for each type of guardianship. This will mutually benefit the court and consumers.

#### Case Information Statement

The form lists Case Type and has check-off boxes for Title 30 (DDD), Title 3B (DD) and Title 3B (all others), however, these 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.

Social Security Numbers: the inclusion of Social Security Numbers puts our consumers at unnecessary risk of identity theft. The Guardianship pleadings are mailed to all parties-of-interest. See R. 4:86-4(a). This may include people with criminal histories. If this information must be included on the CIS, we ask that the CIS be sealed.

#### Certification of Assets

Title 30 guardianships seek the appointment of a guardian of the person only. BGS seeks clarification regarding the need to submit this form with our pleadings. Also, BGS notes "State-funded Personal Needs Allowance" might be added to the text after the first check box, immediately after "Social Security benefits." A small Personal Needs Allowance may be provided by the State to a client who has no income.

### Certification of Physician or Psychologist

Section number seven requires the clinician to describe their findings, but leaves only two lines to do so. The form will 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. Please consider allowing the clinician to attach a complete report. N.J.A.C. 10:43 outlines specific requirements of the clinician's report which allow for a more comprehensive picture of the person and their decision making ability. The parenthetical should read: "(describe findings or attach report)". We would also recommend that additional space for the clinician's factual findings be added to the form itself.

In section number nine the second check box which, addresses limited guardianship, requires the clinician to identify areas in which the person can make decisions. This presumes that a person loses all of their abilities to manage their affairs. The clinician then has to prove where the person retains decision making rights, rather than the standard of presuming all people have capacity to make their own decisions unless there is compelling evidence to the contrary. The major areas of decision making are considered by each clinician when conducting their assessment. This allows them to provide concrete examples from their interview. It is virtually impossible to itemize all areas of decision making that are not encompassed in these five identified areas. Therefore, listing the areas in which the person can make decisions may result in unnecessarily stripping someone of their decision making rights simply because the clinician did not list a decision making area. I recommend that the second check box in this section read as follows: "unfit and unable to govern herself/himself and to manage her/his affairs in some areas, specifically, he/she does NOT have capacity in the areas listed below (select all that apply):

This language is consistent with the court decision in In re M.R., 135 N.J. 155 (1994) that provides guidance for limited guardianships and more appropriately protects the rights of the developmentally disabled.

Similarly, section number ten should read: "My opinion is based upon the examination of \_\_\_\_\_, and the history of her/his condition. The factual basis for my diagnosis and prognosis is:"

Also, as requested above, please consider allowing the clinician to attach a complete report and provide additional space for the clinician's factual findings to be added to the form itself.

#### Judgment of Incapacity and Appointment of Guardian of the Person

The proposed "Judgment of Incapacity and Appointment of Guardian(s) of the Person" requires 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. It 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.

Because it is not possible to list every area of decision-making, the proposed form may 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.

BGS proposes that the judgment 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). For the reasons set forth above regarding the Certification of Physician or Psychologist, this would appropriately protect the rights of the developmentally disabled. 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." ).

The limited guardianship section of the Judgment under number one should be changed to read as follows:

"Limited Guardianship: \_\_\_\_\_, is an incapacitated person and is unfit and unable to govern himself/herself and manage his/her affairs with respect to the following areas: \_\_\_\_\_, but in all other respects is fully able to manage his/her affairs."

Further, please remove the statement identifying the subject of this guardianship as an incapacitated person as a result of developmental disability. The relevance of this statement is not clear.

Section number seven, reporting, please add a check box that reads as follows: "The filing of a report of well-being is not required pursuant to N.J.S.A. 3B:12-42(c)."

In section number twelve, I recommend making the following change in language to more clearly instruct the guardian in decision making:

"Any power of attorney previously executed by \_\_\_\_\_ be and hereby is revoked. Any advance directive for healthcare previously executed by \_\_\_\_\_ is voided as to proxy designation, but the guardian(s) shall consider (as opposed to be guided by) the preferences expressed in the advance directive when exercising their authority.

Finally, it is suggested that paragraphs three and four 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).

Thank you for the opportunity to comment on the proposed guardianship forms. If you need further information or assistance, please don't hesitate to contact me.

Respectfully Submitted,



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Jessica Anastasi  
Chief, Bureau of Guardianship Services