

Comments of NJ National Association of Elder Law Attorneys

MEMORANDUM

TO: Laura Ergood, Esq.
Chair, NJNAELA

FROM: Melanie R. Costantino, Esq.
Dana Bookbinder, Esq., CELA
Daniel Jurkovic, Esq., CELA
Lori McNeely, Esq.
Joanne M. Sarubbi, Esq., CELA

DATE: January 11, 2021

RE: Recommendations/Comments Concerning the Proposed Changes to R. 4:86

INTRODUCTION

This Committee was formed to review and prepare comments and recommendations concerning the proposed changes to Rule Changes to R. 4:86 et seq.

Overall, more guidance and specificity is necessary to determine the effectiveness and fairness of the proposed changes to R. 4: 86-2(b)(3). There are concerns that parts of the proposed rule may be too restrictive for proposed guardians who may have poor credit, or a minor criminal infraction in his/her past. The Committee is also concerned that there may be a disparate effect on minority populations.

There are also instances where potential guardians who want to serve but have been estranged from the AIP for reasons not related to lack of love, are “discovered” during the investigation of Court-appointed counsel. To add additional protocols and restrictions upon such good-faith individuals would ultimately increase the burden upon the Office of the Public Guardian (“OPG”). This issue of the “estranged” relative becomes more poignant when the individual is under the age of 60 and not a candidate for the OPG.

The Committee also finds that parts of the proposed changes to the Rule may be not restrictive enough, notably as it comes to domestic violence offenders, or elder abuse, which is frequently unreported. This is addressed hereinbelow.

The proposed changes to R. 4:86-4(7), which would require, in part, “background screening policy for proposed guardians of incapacitated adults as promulgated by the Administrative Director of the Courts” must be more specific. A major concern is that any “background checks” and “fingerprinting” could lead to a disparate effect/chilling effect on some persons who may wish to become a guardian but do not qualify due to events that may have happened many years ago.

**POINT 1: PROPOSED CHANGES TO R. 4:86-2(3)(A) AND (B) ARE FLAWED
BECAUSE A SERIES OF OFFENDERS WOULD
SLIP THROUGH THE CRACKS**

The Committee finds that the “exceptions” to 4:86-2(3)(A) and (B) are troubling as it allows blanket exceptions to parents, children, and spouses. These exceptions do not take into account that there could be DYFS or APS files that could have been opened, but would be missed (or never discovered) if there was a blanket exception as provided in the proposed changes to the Rule. Further, the “exceptions” also do not address domestic violence matters, whether current or resolved, that may not be part of DYFS or APS files. There are instances where APS files are never opened simply because the caseworker could not gain access to a residence to investigate the allegations. In this instance, APS would likely close the file and conduct no further action.

The Committee’s recommendation is not inconsistent with current public policy. On or about 1/14/2020, the N.J. Assembly proposed that a domestic violence registry be established. See NJ A1921(creates domestic violence Internet registry for certain public access; mandates counseling and community service and increases fines for certain domestic violence offenders). To the best of our understanding, this bill is still in committee.

The Committee would recommend at a minimum, that the Rule include, in addition to the proposed investigations of prospective guardians, that each Surrogate send a written request to APS and DYFS agencies and review the courts records as it concerns e.g. domestic violence matters, etc. to verify the existence or non-existence of any files against the prospective guardian and the said agencies be required to respond within a specific time period, which response must be received and reviewed prior to the final appointment of the guardian. Clearly, such investigation would be crucial to ensure the safety of the incapacitated adult. The Surrogate or Court can reserve the right to conduct an *in camera* review of the records.

**POINT 2: THE COMMITTEE ALSO RECOMMENDS BRIGHT LINE RULES FOR
THE AFFIDAVITS/CERTIFICATIONS FOR THE SAKE OF CLARITY AND
FAIRNESS**

Affidavits/certifications concerning a proposed guardian’s criminal and civil judgment history as mandated by the proposed changes to R. 4:86-4(7) need to be specific enough to not disqualify potential guardians who, for instance, may have a clean record but may have had a misdemeanor offense or a past bankruptcy. The background history should be appropriately narrow insofar as which criminal and civil judgments that need to be considered, as well as make sure the timeframes for such checks are appropriately set. Additionally, the affidavit/certification should only include criminal convictions only.

The Committee recommends the following timeframes for the depth of the checks that a potential guardian would need to certify to:

1. Bankruptcies within seven (7) years;

2. Civil judgments within seven (7) years;
3. Misdemeanor convictions should be excluded with the exceptions of such convictions of a personal/sexual or financial nature within five (5) years;
4. Convictions concerning crimes “involving moral turpitude” from the fifteen (15) years would need to be evaluated case-by-case. Examples of crimes involving moral turpitude include, but are not limited to:
 - a. Criminal intent or recklessness is normally an element of a crime against a person that will have immigration consequences. Examples include, but are not limited to:
 - i. Murder, NJSA 2C:11-1
 - ii. Voluntary Manslaughter, NJSA 2C:11-4
 - iii. Rape, NJSA 2C:14-2
 - iv. Kidnapping, NJSA 2C:13-1
 - v. Robbery, NJSA 2C:15-1
 - vi. Assault, NJSA 2C:12-1a
 - vii. Assault by Auto, NJSA 2C:12-1c
 - viii. Aggravated Assault, NJSA 2C:12-1b
 - ix. Crimes of Domestic Violence
 - x. DWI, 39:4-50
 - xi. Leaving the Scene of an Accident, 39:4-129
 - xii. Leaving the Scene of an Accident Resulting in Serious Bodily Injury, 2C:12-1.1
 - xiii. Stalking, NJSA 2C:12-10
 - b. Criminal offenses that involve fraud as well as the intent to permanently deprive often implicate moral turpitude. Examples include, but are not limited to:
 - i. Theft, NJSA 2C:20-3, NJSA 2C:20-4
 - ii. Theft of Services, NJSA 2C:20-8
 - iii. Shoplifting, NJSA 2C:20-11
 - iv. Passing Bad Checks, NJSA 2C:21-5
 - v. Burglary, 2C:18-2
 - vi. Arson, NJSA 2C:17-1
 - vii. Forgery, NJSA 2C:21-1
 - viii. Offenses Involving False Government Documents, NJSA 2C:21-2.1
 - ix. Receiving Stolen Property, 2C:20-7
 - c. Crimes of a sexual nature or involving a family relationship. Examples include, but are not limited to:
 - i. Rape, NJSA 2C:14-2
 - ii. Criminal Sexual Contact, NJSA 2C:14-3
 - iii. Endangering the Welfare of a Child, NJSA 2C:24-4
 - iv. Incest, NJSA 2C:24-2
 - v. Lewdness, NJSA 2C:14-4

- vi. Possession of Child Pornography, NJSA 2C:24-4
- vii. Prostitution, NJSA 2C:34-1

d. Crimes against the government that *may* involve moral turpitude. Examples include, but are not limited to:

- i. Tax evasion and fraud
- ii. Perjury, NJSA 2C:28-1
- iii. Obstruction of Administration of Law or Governmental Function, NJSA 2C:29-1
- iv. Hindering Apprehension or Prosecution, NJSA 2C:29-3
- v. Bribery, NJSA 2C:27-2
- vi. Insurance fraud, NJSA 2C:21-4.6

- 5. Persons who have not complied with Court Orders would be subject to disqualification
- 6. Persons subject to past APS or DYFS investigations would be subject to disqualification.
- 7. Persons convicted of making terroristic threats would be subject to disqualification.

Some guidance insofar as the policy for background checks could be found with P.L. 1999, c. 432 (C. 15A:3A-1), which lists the background check requirements for youth sports instruction/coaching. Those background checks include:

- 1. Any crime of disorderly persons offense as set forth in N.J.S.2C:11-1 et seq., N.J.S.2C:12-1 et seq., N.J.S.2C:13-1 et seq., N.J.S.2C:14-1 et seq. or N.J.S.2C:15-1 et seq.
- 2. Crimes against the family, children or incompetents, crimes involving theft as set forth in Chapter 20 of Title 2C of the New Jersey Statutes;
- 3. Crimes involving theft as set forth in chapter 20 of Title 2C of the New Jersey Statutes; and
- 4. Crimes involving any controlled dangerous substance or controlled substance as set forth in Chapter 35 of Title 2C of the New Jersey Statutes except paragraph (4) of subsection a. of N.J.S.2C:35-10.

However, this is not an exhaustive list, and this Committee's proposals are more comprehensive.

The Committee recommends that the affidavit/certification form must be widely available, e.g. within pro bono packet, and that it should be a pre-requisite to filing the guardianship petition when possible. Submission of this information when filing, will also allow the court to determine if further investigation of the prospective pro se guardian is needed at the beginning of the process versus at the end of the guardianship process.