HPF Hinkle Prior & Fischer
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Representing people with disabilities and their families since 1974

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Via Email (Comments.Mailbox@njcourts.gov)
Mr. Glenn A. Grant
Administrative Director of the Courts
Proposal to Amend Rule 4:86-2(b)(3)
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Proposal to Amend Rule 4:86-2(b)(3) Relating to Guardianship Matters

Dear Mr. Grant:

Upon review of the proposed changes to New Jersey R. 4:86-2(b)(3), we respectfully request the proposed rule amendments, specifically R. 4:86-2(b)(3)(H)(i) to (ii), not be adopted. The requirement for parents to submit an affidavit or certification setting forth their criminal and civil judgment history will, and has already, caused parents pursuing guardianship unnecessary embarrassment. We believe this rule, if adopted, will have a chilling effect on parents pursuing guardianship on behalf of their now adult child, leaving vulnerable individuals with disabilities unprotected.

This firm represents parents of individuals with special needs exclusively in a variety of matters, including guardianship. Our firm has represented parents of individuals with disabilities for nearly 50 years. Many of our attorneys and support staff are family members of individuals with special needs. Most of our attorneys have previously or presently serve on the boards of trustees of many of New Jersey's leading disability advocacy organizations including, but not limited to, the Arc of New Jersey, Special Olympics New Jersey, PLAN-NJ, Autism New Jersey (formerly COSAC), NAMI Mercer, NAMI New Jersey, the Arc Mercer, United Cerebral Palsy of New Jersey, and Eden Autism Services. Attorneys with our firm hold many of the leading New Jersey Appellate Division and Supreme Court cases addressing the rights of people with disabilities and their families including our Supreme Court's leading case on guardianship, In the Matter of M.R.. Our firm has handled thousands of guardianship matters on behalf of parents of individuals with disabilities. As a result, we believe our experiences give us a unique perspective on this issue. We hope this perspective will be accorded significant weight.

In the overwhelming majority of incapacity proceedings where a child with a disability turns eighteen (18) years of age, the proposed guardians are either the natural or adoptive parents who have cared for their child from birth, making decisions regarding their child's health, well-being and education, as well as providing financial support. In these cases, it is likely the child will become eligible for a social security benefit and the Social Security Administration will appoint a parent to serve as the Representative Payee, a designation which is not dictated by the

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guardianship. Therefore, when parents seek to be appointed guardians, they are asking the Court to formally acknowledge the regular tasks they have performed for 18 years and allow them to do so for the rest of their lives.

Please consider the following challenges parents of children with disabilities already experience, without the additional burden and humiliation of submitting an affidavit or certification setting forth their criminal and civil judgment history. Depending on the nature of the disability, parents often devote untold hours caring and providing the most basic needs including feeding, bathing, toileting, dressing, educating and more. In many instances, parents must counteract the behavioral aspects of the child's disability which subjects the parents to being hit, bit, scratched, kicked and the like. Parents are almost constantly called upon to advocate for the child's needs in special education matters, battle with insurance carriers to cover medically necessary services or navigate endless bureaucratic labyrinths of services in order to obtain various forms of government assistance benefits.

Those are the hallmarks the Court should rely on to determine if a parent is an appropriate guardian. The Court should ask, have they cared for this child? Have they acted in and made decisions in the best interest of the child? Whether the parent has a criminal history does not speak to their ability to care for and make decisions for the child. Nor does filing for bankruptcy mean a parent is irresponsible with money. In fact, it is difficult to understand how a criminal or civil background history is more revealing of the parent's ability to serve as guardian than the history of the care already provided.

In like manner, parents frequently suffer extreme financial hardships in order to pay for items such as adult diapers, durable equipment, accessible vehicles and special foods. Similarly, they also spend countless sums on doctors, specialists, therapists, tutors, behavior analysts, experts and attorneys. Parents do this because they want to improve the life of their child. Parents also continue to do all this long after their other typically developing children attain functional independence.

After enduring the above, parents must then face the pain and loss of their once anticipated future for their child, by having to ask the Court to declare their son or daughter "mentally incapacitated" and request they be granted the legal right to do as they have done for the last 18 years. Our clients often describe this process as bringing about extreme pain, heartache and loss. Many families also experience feelings of embarrassment, humiliation and failure. Almost all parents understand the need for formality of the guardianship process but resent it all the same. The proposed rule treats parents as suspects, even in instances where there is nothing to disclose. It is understandable why parents view this as yet another affront from what many perceive as a system which is stacked against them. We believe the Courts can, and should, be more sensitive to parents. The guardianship process should be made less painful for parents, not more so.

Additionally, this firm has represented parents as proposed guardians who now must disclose their criminal history, including minor criminal charges which occurred decades ago.

Worse yet, in some instances criminal or arrest records have been expunged but are still discovered or disclosed. The public policy underlying expungements is clearly undermined when expunged records are needlessly disclosed in a guardianship proceeding. Since an affidavit or certification setting forth the proposed guardian's criminal and civil judgment history becomes part of the evidentiary record, such certification will needlessly be disclosed to various governmental agencies, such as the Social Security Administration, New Jersey Division of Developmental Disabilities, New Jersey Division of Medical Assistance and Health Services, and the New Jersey Office of the Attorney General. In addition, these certifications are also provided to family members who are parties in interest, including other children and siblings, who may otherwise be unaware of these criminal or financial issues and will again, cause needless embarrassment in these situations. If the true interest of the Court is to protect individuals with disabilities, then at the very least the criminal and civil background history certification should be submitted to the Court only and not shared with any other individuals or entities.

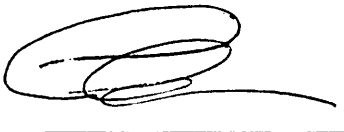
As illustrated above, life, and the process of becoming a guardian, is difficult enough for parents. Adding an additional requirement necessitating parents to certify they are neither criminals nor financially irresponsible will further cause parents to resent or abandon the process of becoming their child's guardian and further subject them to pain, embarrassment and humiliation. Parents should be encouraged to become their child's guardian when such an arrangement is necessary. Otherwise, in the absence of family, the responsibility of becoming guardian may default to the State of New Jersey, which is an absurd result.

We believe all the same considerations outlined herein relative to parents are equally applicable to those who seek to become guardian of their spouse.

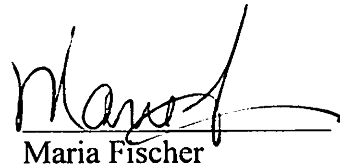
Therefore, clear practical and public policy supports exempting parents and spouses from the proposed requirement of filing an affidavit or certification setting forth their criminal and civil judgment history and, considering the burden parents and spouses already face, we respectfully request R. 4:86-2(b)(3)(H)(i) to (ii) not be adopted.

Thank you for your consideration of these comments.

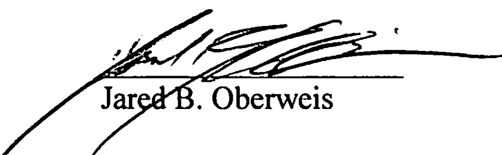
Respectfully,



S. Paul Prior



Maria Fischer



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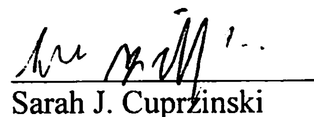

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