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*Via E-mail (Comments.Mailbox@njcourts.gov)*

April 15, 2022

The Honorable Glenn A. Grant, J.A.D.  
 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: Comments of Legal Services of New Jersey Regarding Proposed Background Screening Policy for Guardians of Incapacitated Persons; Proposed Amendments to Rule 4:86-2(b)(3)**

Dear Judge Grant:

As you know, Legal Services of New Jersey (LSNJ) coordinates and supports the statewide network of non-profit legal services programs providing free legal assistance in civil cases to low-income individuals statewide. We appreciate the opportunity to provide comments on the Supreme Court's proposed amendments to Rule 4:86-2(b)(3), which would require that an alleged incapacitated person's parent(s) or spouse/partner must file an affidavit or certification of criminal and civil judgment history before appointment as a guardian. Under the current rule, no such certification is required.

Through our Hotline and Legal Assistance to Medical Patients (LAMP) project, we routinely provide advice and representation to individuals seeking guardianship of alleged incapacitated adults, often in instances where the applicant is a parent, sibling, or spouse or partner of the alleged incapacitated adult. Through these experiences we observe that the rule amendment may not protect alleged incapacitated individuals and may instead disadvantage them by discouraging family members from applying for guardianship.

As we set forth in previous comments regarding proposed amendments to R. 4:86<sup>1</sup>, we are concerned that requiring a certification detailing the potential guardian's civil and criminal judgment history may result in a "chilling effect" and discourage otherwise well-qualified, responsible and capable individuals from serving as guardians for incapacitated individuals -- at a time when they are needed the most. Given the State's limited resources and considering the best interests of the incapacitated individual, this is deeply concerning. We have witnessed first-hand the devastating effect when a severely disabled individual lacks capacity to make emergency medical decisions for themselves, but no guardian is available.

We understand and appreciate the court's duty to protect vulnerable senior citizens and disabled individuals from financial exploitation. New Jersey, however, has successfully implemented many protections and mechanisms that protect incapacitated people from financial abuse by guardians including annual accountings, bond requirements (if the incapacitated person has more substantial assets), and educational videos and materials that must be reviewed prior to guardianship.

Additionally, while civil judgments may be reflected in a guardian's financial history, alone, they do not present a full and accurate picture of a potential guardian's character, financial acumen or ability to make medical decisions on behalf of a loved one. Moreover, isolating a history of judgments as a determining factor in a guardianship may have a disproportionate impact on low-income people who are more likely to have civil judgments issued against them. Similarly, in our observed experience, most bankruptcies are not caused by reckless spending but rather by financial hardship; many are filed by low-income New Jerseyans who simply cannot afford to deal with unexpected expenses stemming from the loss of a job, death in a family or accrual of medical bills (which, ironically, may have been incurred by the same incapacitated person now in need of a guardian).

As to the consideration of criminal records, we observe, as we did in our above-referenced previous submission, the potential for disparate impact on racial and ethnic minorities. We would suggest therefore, that any restrictions on potential guardianships due to criminal convictions be exercised only where strictly necessary under the circumstances and with appropriate time limitations applied. Best practices in the use of criminal records would also suggest that the applicant should only be required to disclose any criminal history in the later stages of the approval process, not during the initial application. *See, e.g., N.J.S.A. 34:6B-11, et seq. (Opportunity to Compete Act).*

Ultimately, we would suggest that parents, spouses and siblings who are proposed as guardians be exempt from filing the proposed affidavit or certification. However, if the court ultimately deems it necessary, then the requirements set forth in the certification should be appropriately limited, as follows:

- Although we have opposed bifurcating guardianships in most instances for our clients, any application for guardianship of the person and not guardianship of the estate, no certification concerning civil judgments or bankruptcy should be required;
- Any proposed guardian should be asked to disclose only civil judgments within the past seven years;
- Only indictable convictions (not disorderly persons or lesser offenses) involving relevant crimes such as fraud or physical violence should be considered, and only within the past five years;
- Expunged convictions should not be considered.

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<sup>1</sup> See Comments of Legal Services of New Jersey Regarding Proposed Background Screening Policy for Guardians of Incapacitated Persons; Proposed Amendments to Rule 4:86 from Legal Services of New Jersey dated January 26, 2021

