

July 18, 2023

Glenn A. Grant  
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**Re: Comments on Recommendations of the Judiciary Working Group on Elder Justice**

Dear Judge Grant:

Disability Rights NJ is the designated federally funded protection and advocacy system for individuals with disabilities. Disability Rights NJ advocates for the human, civil, and legal rights of individuals with disabilities. Disability Rights NJ represents clients with disabilities, which often includes vulnerable members of society, including elder adults and persons subject to guardianship. Many of Disability Rights NJ's clients are individuals with intellectual and developmental disabilities (I/DD).

As the U.S. Supreme Court has held, people have a fundamental right to make decisions regarding their health care, property, living arrangements, and marriage. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (recognizing the significant liberty interest in refusing unwanted medical treatment); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (recognizing the decision to marry as a fundamental right); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503-06 (1977) (finding the Constitution protects the ability of relatives to live together); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972) (broadly interpreting the right to own and control private property). Consequently, guardianship proceedings should be subject to the highest constitutional standards because guardians limit the civil rights of individuals and their property. The demand for heightened due process in guardianship proceedings reflects the fundamental nature of the rights at stake.

Overall, Disability Rights NJ believes that the recommendations set forth by the Judiciary Working Group on Elder Justice will be beneficial to older adults and individuals with disabilities who may be the subject of a guardianship proceeding. The recommendations encourage the use of less restrictive alternatives to guardianship and provide additional protections to individuals who may be seeking a restoration to capacity or a modification of a guardianship. While the Supreme Court is working to protect vulnerable members of society and looking at necessary changes and improvements in this area, Disability Rights NJ has

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comments which address both elder adults and those younger groups that are subject to the same guardianship laws. In addition, we want to ensure that any accepted recommendations apply equally to non-elderly individuals with disabilities, especially those with I/DD.

**Recommendation 1: Create an Elder Justice webpage**

Disability Right NJ supports creating a webpage for justice issues facing this community on the Judiciary's website. The beta version of this website links to the Judiciary's "Resource Center for Adult Guardianships." This is the page for pro se litigants to receive information and assistance in guardianship matters. However, the website only includes information about initiating a guardianship. There is no information about how to defend against a guardianship action or commence a return to capacity action. DRNJ strongly believes it is important for the Judiciary to create these materials and share them on the Guardianship self-help page so individuals have information about how they can defend their autonomy and decision-making or seek to have a guardianship terminated.

**Recommendation 2: Perform a gap analysis and develop training**

Disability Rights NJ especially agrees with the need to develop training programs to educate interested groups about supported decision-making and other alternatives to guardianship, the risks and consequences associated with filing for guardianship, and the rights of "incapacitated" adults. Disability Rights NJ suggests adding to the list of trainings the groups/agencies that work with individuals I/DD such as school districts, the NJ Department of Education, and the Division of Developmental Disabilities.

**Recommendation 6: Amend Court Rule 4:86-7 to clarify procedures for restoration of rights of incapacitated adults**

Disability Rights NJ believes the recommended amendments to Court Rule 4:86-7 will be beneficial to individuals seeking a restoration of their rights. We believe that the appointment of an attorney for otherwise unrepresented individuals subject to guardianship seeking review is important to ensure that an individual's rights are protected as legal proceedings are challenging for any individual. However, we would like to note that under current rules, an attorney for the incapacitated individual seeking a restoration of rights can have difficulty obtaining medical records and evidence to support the restoration, especially if the guardian does not agree and blocks access. Any attorney representing an individual seeking a review must be able to have access to third parties, including doctors, to be able to adequately assist with the legal procedure to review, modify, or terminate the guardianship.

In addition, shifting the burden after prima facie evidence has been produced that the guardianship should be terminated or modified will minimize the obstacles an individual experiences while trying to regain their rights, and ensure that their rights to self-determination will be protected.

Disability Rights NJ believes that clarification of 4:86-7(c) will assist individuals who are seeking a review of their guardianship. However, it is important that individuals subject to a guardianship know their rights. Most individuals under a guardianship do not know that they have this right and do not know how to file a motion to review the guardianship. We think that this information should be provided to an alleged incapacitated individual at the beginning of the guardianship proceeding so that they know they have the right to seek review of the guardianship and how to proceed. Disability Rights NJ also suggests amending the language to: “may seek review of a guardian’s conduct, including removal of the current guardian and/or review of a guardianship.”

**Recommendation 7: Request the Legislature to consider potential amendments to New Jersey Statutes**

Disability Rights NJ highly encourages the Legislature to review and consider amendments to N.J.S.A. 3B:12-28. The statute currently provides that competency can be restored “if the court is satisfied that the person has recovered his sound reason and is fit to govern himself and manage his own affairs.” DRNJ would like to see this language amended to include that a person can modify or seek to terminate their guardianship if they have found less restrictive alternatives that would be suitable to meet the individual’s support needs.

Disability Rights NJ also encourages the Legislature to review and consider amendments to N.J.S.A. 30:4-165.7, which provides for the appointment of a guardian who receives services from the Division of Developmental Disabilities. First, we believe that the requirement that there only needs to be one affidavit stating an individual is incapacitated makes it too easy to obtain a guardianship over an individual. We believe the standard should be the same for individuals with intellectual and developmental disabilities (I/DD) as for all other individuals. If the legislature chooses to leave the requirement of only one affidavit for an individual with I/DD, then the law should be modified to require only one affidavit supporting a restoration of capacity before the burden shifts to the individual defending the guardianship. Finally, we believe that the statute should be amended to require the consideration of alternatives to guardianship such as supportive decision-making.

**Recommendation 13: Adopt a New Jersey Bill of Rights to enhance the rights of persons subject to guardianship**

Disability Rights NJ supports the adoption of a New Jersey Bill of Rights for individuals subject to guardianship. Included in the Bill of Rights should be the right of the individual to have an attorney who can have full access to all third parties that have information relevant to the guardianship, including medical professionals. The inability to have access to third parties can prevent an individual from being able to access their rights to have capacity restored or the guardianship modified.

**Other Recommendations**

Disability Rights NJ generally agrees with the other recommendations of the Judiciary Working Group on Elder Justice and believes that they will be beneficial for individuals with disabilities.

Thank you for the opportunity to provide comments regarding these important recommendations. Should you have any questions or wish to discuss further, please contact me at [mciccone@disabilityrightsny.org](mailto:mciccone@disabilityrightsny.org).

Sincerely,

DISABILITY RIGHTS NEW JERSEY

/s/ Mary A. Ciccone

By: Mary A. Ciccone  
Director of Policy