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

January 27, 2021

The Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Proposed Background Screening Policy for Guardians of Incapacitated Persons; Proposed Amendments to Rule 4:86
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

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. Additionally, we advocate for low-income individuals statewide and those unable to afford an attorney. We appreciate the opportunity to provide comments on the Supreme Court's proposed amendments to Rule 4:86, which suggest additional measures to help protect incapacitated adults from certain risks associated with guardianship. We apologize for the delay in providing these comments.

Through our Legal Assistance to Medical Patients (LAMP) project, we routinely provide assistance to individuals seeking guardianship of incapacitated adults, often in instances where the incapacitated adult is a family member, sibling or lives in the same household. Under the proposed amendments, however, certain proposed guardians would be subject to a background check of "Judiciary systems, a fingerprint or computerized criminal history check and, at the discretion of the judge, a civil judgment search." The court currently evaluates guardians for fitness but does not require a background screen.

As an initial matter, we fear that imposing a background screen requirement 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.

We would suggest that exemptions from the proposed background screen requirement for prospective guardians - which currently include parent or spouse of the incapacitated individual - be extended, to other family members including grandparents and siblings, particularly where there is a co-parent relationship. It is not uncommon especially for low-income individuals and families to care for incapacitated adults, if and when those needs arise. Such an extension of the exception would recognize the important and vital role of family members in the guardianship context and avoid placing an unnecessary and potentially prohibitive background screening burden on individuals who would care for incapacitated family members.

Further, we are also concerned that the cost of fingerprint-based background reports such as those obtained through the New Jersey State Police might be burdensome on a prospective guardian, particularly those with low-income or lesser means.¹ Given the availability of sufficient and reliable statewide electronic databases maintained by the courts, we hope that any such required reporting could be satisfied through those means, rather than requiring prospective guardians to pay costs associated with reports provided by other agencies or third-party providers. If there are fees for any Judiciary-generated reports, however, it should be waived for those who qualify as low-income, indigent or with a demonstrated inability to pay, pursuant to *R. 1:13-2(a)*.

Lastly, we also observe the potential for disproportionate impact on racial and ethnic minorities through the use of a "criminal record" background check requirement for guardianship applicants, particularly given the disproportionate arrest, prosecution and conviction of Black people. If records of criminal or juvenile justice system involvement are to be used in the guardianship application process, they should not necessarily bar candidates from guardianship of an incapacitated adult. We would ask the Court to consider setting appropriate guidelines for judges to follow in this context, such as providing that records only be considered if the underlying offenses are serious, recent (within the past five years) and most importantly, relevant to the guardianship. Further, the proposed guardian should have an opportunity to challenge the accuracy of the background information, in addition to the ability to present any evidence of rehabilitation in further support of the guardianship.

We hope you find these comments helpful.

Thank you for your consideration.

Respectfully submitted,
Legal Services of New Jersey

By: s/Akil Roper
Akil Roper
Senior Vice President and Assistant General Counsel

¹ A "fingerprint-based" Criminal History Records Report provided by the New Jersey State Police through its third-party vendor IDEMIA costs \$42.80.