



NEW JERSEY STATE BAR ASSOCIATION

November 3, 2023

Via Electronic Mail

The Honorable Angela V. McKnight
2324 John F. Kennedy Boulevard
Jersey City, New Jersey 07304

Re: A5133 (McKnight) – Allows court to consider previous care when granting letters of guardianship for incapacitated person

Dear Assemblywoman McKnight:

On behalf of the New Jersey State Bar Association, I share with you concerns raised regarding A5133, which would allow the court to consider previous care when granting letters of guardianship for incapacitated persons. The association is appreciative of the opportunity to present its concerns of the unintended consequences of this bill on alleged incapacitated persons (AIP). For the reasons set forth below, the NJSBA asks for your reconsideration in moving this bill.

For purposes of our comments, it may be helpful to review the process involved in identifying an appropriate guardian for the AIP. Once an application for guardianship is filed, the court is required to independently determine whom to appoint as a guardian.¹ A court-appointed attorney has the duty to advocate for the AIP (the client) both with respect to capacity as well as the choice of guardian. If the AIP has a preference for a specific guardian, the court appointed attorney has a duty to advocate for that person and that preference is entitled to consideration by the court. If there is a significant issue as to the appropriate choice of guardian, or as to the underlying issue of incapacity, then the court has the ability to appoint a guardian ad litem (different than a guardian) to advise the court as to the AIP's best interests.² The guardian ad litem is independent of the AIP and is tasked with evaluating the best interests for the AIP through interviews with the parties. They most often issue a report to the court with their determination as to what they believe is in the best interests of the AIP, which may or may not be consistent with the court-appointed attorney's position.

To the extent that this bill attempts to prioritize prior caregivers above the spouse, domestic partner, heirs or friends – if they are not one and the same – there is a potential risk to the AIP that the most appropriate guardian has not been identified. The risk with designating a priority as to guardians beyond the spouse or domestic partner, then heir, and then friend is that it

¹ In re Guardianship of Macak, 377 N.J. Super. 167, 176 (App. Div. 2005).

² Matter of M.R., 135 N.J. 155, 176-78 (1994).

stands in the way of the court's duty to "independently determine" the most appropriate guardian for an AIP, whether that person is a family member, friend or the Office of the Public Guardian. Specifically in this bill, granting priority to someone who "previously gave care" is ambiguous as it does not define what this means. Furthermore, the fact that the person previously cared for the AIP may be the very reason the person is not in the position to be named a guardian at the time of the application.

For this reason, we urge you to reconsider this bill as the current process would achieve this purpose with the additional protections in place by way of the appointment of an attorney and possibly a guardian ad litem. We would appreciate an opportunity to discuss this further with you in order to answer any questions regarding our notes and also to make any recommendations if we fail to appreciate your goal in this legislation.

We thank you for considering our comments. Please feel free to contact me at lchapland@njsba.com, 732-214-8510 (office) or 732-239-3356 (cell). On behalf of the NJSBA, thank you for your continued leadership.

Very truly yours,

Lisa Chapland

Lisa Chapland, Esq.

cc: Timothy F. McGoughran, Esq., NJSBA President
William H. Mergner, Jr., Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director