



NEW JERSEY STATE BAR ASSOCIATION

February 12, 2024

Via Electronic Mail

The Honorable Nicholas P. Scutari
67 Walnut Avenue
Clark, New Jersey 07066

Re: S2332 (Scutari) – Allows complaint for guardianship of minor to be filed six months before minor reaches age 18 under certain circumstances; establishes certain standards for filing guardianship complaints

Dear Senate President Scutari:

On behalf of the New Jersey State Bar Association, we applaud your introduction of S2332 (Scutari), because it facilitates the ability of a petitioner to file a guardianship complaint for a developmentally disabled child 180 days prior to the individual's 18th birthday. This paves the way for continuity of care for the individual. Currently, such application cannot be brought until the individual turns 18, causing a potential gap in care and potentially significant hurdles for those attempting to secure care for an individual who is incapacitated. With this in mind, we offer one amendment to resolve a potential inconsistency with current law regarding the standard for adjudicating a person as incapacitated.

Section 12(i)(2) of the bill addresses when a complaint for guardianship may be withdrawn – when there is “a showing that the individual is deceased or has capacity.” We recommend the following amendment to resolve any potential implication that the burden shifts to an individual who turns 18 and is the subject of a complaint for guardianship to demonstrate capacity:

Section 12(i)(2): The complaint and accompanying documentation shall not be withdrawn absent a showing that the individual is deceased or ~~has capacity~~ **is not incapacitated.**

An individual is presumed to have capacity when that individual turns 18, while minors are presumed “incompetent.” See In re Matter of M.R., 135 N.J. 155, 176 (1994); see also NJ Rules of Prof. Conduct 1.14(a). The importance of this concept is that when an individual turns 18 and a person attempts to file guardianship over that individual, there becomes a necessity to demonstrate that this individual is incapacitated by clear and convincing evidence and not on the individual to prove capacity. Id. at 168-69.

The language in the bill seems to imply that in order to withdraw a complaint – which would be done by the petitioner – there must be a showing that an individual has capacity. But since capacity is presumed, a petitioner who brings a complaint for guardianship alleging *incapacity* of an individual must show by clear and convincing evidence that the individual is incapacitated. As written, the language potentially shifts this important burden onto the individual to show capacity, which is not the law.

The NJSBA supports this bill as an important one to protect alleged incapacitated persons turning 18 and avoid an interruption of care. The proposed amendment is anticipated to resolve any inconsistencies with current law and avoid confusion that a burden shift was intended by this proposed legislation.

We appreciate your consideration of this amendment to clarify the language in this bill. 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: Senator Joseph F. Vitale
Timothy F. McGoughran, Esq., NJSBA President
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