

HIGHLIGHTS OF THE NEW NEW JERSEY GUARDIANSHIP STATUTE
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Introduction: On January 11, 2006, the New Jersey Legislature enacted L 2005, Chapter 304 which made major revisions to Chapter 12 of Title 3B of the New Jersey Statutes. Chapter 12 of Title 3B governs governing guardianships of incapacitate adults and of minors within the State of New Jersey. These revisions are the result a years of effort on the part of members of the New Jersey Bar to bring the New Jersey Guardianship practice into alignment with the national trend toward more autonomy for those of diminished capacity. The revisions now give the Court broader powers to impose limited guardianships and provide greater protections for the incapacitated individual. In addition, the revisions have dropped the term “mental incompetent” and replaced it with “incapacitated person” throughout the statute. Notably, these revisions also include “domestic partner” in all areas where “spouse” was used prior to the revisions.

In New Jersey, all Guardianships are governed by the provisions of Title 3B of the New Jersey Statutes, Chapter 12 and New Jersey court rules (Rule 4:86, et seq.). A guardianship is the imposition of an involuntary court supervised decision maker over an individual who has been determined, by the court, to suffer from an incapacity that diminishes their own ability to manage their affairs. Guardianships are commenced when an individual’s disability is such that he or she is no longer sufficiently competent to plan for his or her property management by executing a General Durable Power of Attorney or seeking a Conservatorship, or to plan for the management of his or her person by executing an Advanced Directive and Durable Medical Power of Attorney. The revisions to Title 3B enacted on January 11, 2006 are comprehensive and, along with the Court Rules set forth in Rule 4:86, should be followed carefully when seeking appointment of a guardian.

The Appointment of A Guardian: These provisions are set forth in Article 4 of Title 3B, Section 12. Section 3B:12-24 which provides that the issue of incapacity is triable without jury unless jury is demanded is now followed by a completely new section 3B:12-24.1. These new provisions, set forth in subparagraphs (a) through (h), guide the court in determining the need for Guardianship services and the specific services the ward may require. The provisions of subsection (a) require the court, upon the finding that an individual is incapacitated, to appoint a general guardian to exercise “all rights and powers of the incapacitated person.”

Subsection (d) specifically authorizes physicians and psychologists to disclose medical information regarding an alleged incapacitated person in affidavits filed with the court.

Subsection (e) requires the alleged incapacitated person to appear in court unless the plaintiff and the court appointed attorney certify that the alleged incapacitated person is unable to appear because of physical or mental incapacity. Subsection (f) requires that all reasonable means of communication with the alleged incapacitated person be attempted including written, spoken, sign or non-formal language and including translation and the use of adaptive equipment when it appears that there is a receptive or expressive communication deficit.

Appointment of a Temporary Guardian Pendente Lite: Section 3B:12-24.1(c) clarifies the court’s authority to appoint a temporary guardian, pendente lite. Prior to these changes there appeared to be disagreement among the county chancery courts regarding whether or not 3B:12 granted the authority for the appointment of a temporary guardian pendente lite. Under 3B:12-24.1(c) it is now clear that under the appropriate circumstances the court has the authority to appoint a temporary guardian prior to the capacity hearing. The temporary guardian pendente lite is given authority to take care of those specific financial, social, medical or mental health issues on behalf of the alleged incapacitated person necessary to meet the critical needs

laid out in the complaint. The statute makes it clear that the pendente lite temporary guardian is limited to act only for those services determined by the court to be necessary to deal with critical needs or a risk of substantial harm to the alleged incapacitated person. Notice of the appointment of a pendente lite temporary guardian must be given to the court appointed attorney or other attorney for the alleged incapacitated person and the appointment of a pendente lite temporary guardian *does not have the effect* of an adjudication of incapacity or limitation on the legal rights of the alleged incapacitated individual *OTHER THAN* those specified in the court order appointing the pendente lite temporary guardian. The statute provides the alleged incapacitated person with the opportunity to appear and move for the dissolution of the pendente lite temporary guardian, or modification of the provisions of the order appointing, on two day's notice to the plaintiff and to the temporary guardian. In addition, every order appointing a pendente lite temporary guardian that is granted without notice must expire within 45 days after appointment unless, within that time, the court extends it for good cause. An extension cannot be longer than 45 days (3B:12-24.1(c)(8)).

Limiting the Guardians Authority: Of particular note are the provisions of 3B:12-24.1(b) which allow the court to find that the ward lacks the capacity for some, but not all tasks and to appoint a limited guardian of the person, or the estate, or a limited guardian of both the person and the estate. The court must make specific findings regarding the individual's capacity or lack thereof with respect to decision making regarding residence, education, medical care, legal issues, vocational and financial decision making and such other areas as the court deems appropriate. This means that it has become imperative for the attorneys involved in the guardianship process to provide the court with sufficient evidence, in the form of medical or

psychological evaluations and/or witness testimony, of the alleged incapacitated individual's capacity or lack thereof with regard to each aspect of life.

Under 3B:12-24.1(b) a judgment of limited guardianship may specify the limitations on the authority of the guardian or, in the alternative, the judgment may specify the areas of decision making retained by the person. 3B:12-37 now requires that, if the court limits the power of the guardian, the limitations must be stated in the certificates of letters of guardianship when they are issued. However, subsection (g) allows the limited guardian, after appointment, to request, on notice to all interested parties, for a court determination that the person is in need of guardian services regarding additional subject areas thus requiring an enlargement of the powers of the guardian and subsection (h) allows the court, after the appointment of a guardian and on notice to all interested parties, to limit the powers conferred on the guardian at the request of the guardian, the incapacitated person or another person.

Who is entitled to letters of guardianship: 3B:12-25 has been amended to allow the court to consider surrogate decision-makers chosen by the incapacitated person before incapacity by way of a durable power of attorney, health care proxy or advance directive, but does not require the court to appoint such agents as guardian. The statute provides that letters of guardianship shall be granted in the following order:

1. to the spouse or domestic partner as defined in section 3 of P.L. 2003, c 246 (C.26:8A-3), provided that the spouse or domestic partner is living with the incapacitated person at the time the incapacitation arose; or
2. the incapacitated person's heirs or friends; or
3. if no spouse, heirs or friends then first consideration must be given to the Office of the Public Guardian for Elderly Adults for those aged 60 or older; and

4. if the OPG will not accept or it is proven that appointment of none of the above will be in the best interest of the incapacitated person or the estate then to any other proper person as will accept appointment.

The Guardian's Reporting Requirements: The reporting requirements of a guardian have been clarified and expanded by the revisions to 3B:12-42. The guardian is now required to report on the condition of the ward and the condition of the ward's estate subject to the guardian's possession or control at such times as indicated by the court. The court now has the authority to appoint an individual to review the report, interview the ward or guardian and make any other investigation the court directs. The contents required in the report by the guardian are set forth in detail in 3B:12-42

Government Benefits Planning Codified: Revisions to 3B:12-49 now specifically give the court the authority to exercise the ward's right to an elective share in the estate of the ward's deceased spouse *or* domestic partner and *to engage in planning utilizing public assistance programs consistent with the current law*. This codifies the New Jersey Supreme Court decision in *In re Keri*, 181 N.J. 50 (2004).

The Minor Not Quite Ready to Handle the Funds: The revisions to 3B:12 added a new section, 3B:12-54.1 which allows the parent or legal guardian of a minor heir of an intestate's estate may apply to the Superior Court, Chancery Division, Probate Part, for permission to place all or any part of the funds in a separate trust for the exclusive benefit of the child. The terms of the trust are set forth at 3B:12-54.1(b).

Clarification of Powers and Duties of Guardians: Revisions to sections 3B:12-56 and 3B:12-57 clarify the powers and duties of guardians, including requiring the guardian of the person to act consistently with the terms of previously executed powers of attorney

for health care or advance directives pursuant to 26:2H-53 unless revoked or altered by the court. Since the form of order issued by the Administrative Office of the Courts includes a paragraph revoking all prior powers of attorney and health care documents, care should be taken in the guardianship proceeding to have the court determine the validity of such prior executed documents and make a ruling as to whether they should be revoked or continue in force. The revisions now grant to the guardian of the person the authority to initiate the voluntary admission (defined in 30:4-27.2) of a ward to a State or private psychiatric facility and a ward so admitted is entitled to have the guardian execute, on the ward's behalf, all of the rights of a voluntarily admitted patient consistent with the ward's wishes except where compliance with those wishes would create a significant risk to the health or safety of the ward. If the ward objects to the voluntary admission or continued voluntary admission, the State's procedures for involuntary commitment pursuant to 30:4-27.1 et seq will apply (involuntary commitment procedures). In exercising the powers granted under 3B:12-57 the guardian of the person is now required encourage the ward to participate with the guardian in the decision-making process to the maximum extent of the ward's ability in order to encourage the ward to act on his own behalf whenever he is able to do so, and to develop or regain higher capacity to make decisions in those areas in which he is in need of guardianship services, to the maximum extent possible.

Moving a Ward out of or Into New Jersey: New sections 3B:12-66.1 3B:12-66.2 were added to outline the steps necessary for the guardian to remove the ward from the State of New Jersey the transfer the guardianship to another state or importing a guardianship from another state to the State of New Jersey.

Conclusion: The changes to Title 3B are significant and will effect everyone practicing in the area of guardianships and planning for incapacity. It is important to become familiar with all of the provisions of 3B:12 in order to provide your clients with the full extent of the advantages now provided in the New Jersey statutes.