

SENATE, No. 2876

STATE OF NEW JERSEY
219th LEGISLATURE

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Sponsored by:

Senator JAMES BEACH

District 6 (Burlington and Camden)

SYNOPSIS

Revises and updates law pertaining to guardianship to encourage ethical conduct by guardians and to provide stronger protections for wards and proposed wards.

CURRENT VERSION OF TEXT

As introduced.



1 AN ACT concerning guardianship arrangements, supplementing
2 chapter 12 of Title 3B of the New Jersey Statutes, and amending
3 various sections of the New Jersey Statutes.

4
5 **BE IT ENACTED** *by the Senate and General Assembly of the State*
6 *of New Jersey:*

7
8 1. (New section) a. A ward or proposed ward shall be
9 represented by counsel throughout the course of guardianship
10 proceedings and, if a guardianship arrangement is established, until
11 such time as the arrangement is terminated.

12 b. Counsel shall personally interview the ward or proposed
13 ward, as the case may be, not more than 72 hours before each
14 scheduled hearing related to guardianship, and shall certify to the
15 court that the interview has been performed.

16 c. If the ward or proposed ward is, at any time, not represented
17 by counsel and is unable to afford counsel, the court shall appoint
18 counsel therefor.

19
20 2. N.J.S.3B:12-37 is amended to read as follows:

21 3B:12-37. Letters of guardianship to state any limitations at the
22 time of appointment or later.

23 a. A court establishing a guardianship arrangement shall
24 authorize the level of intervention that the court finds to be least
25 restrictive of the proposed ward's rights while being consistent with
26 the protection of the ward's welfare and safety. The basis for this
27 finding shall be included in the record of the court.

28 b. A court may:

29 (1) either at the time a guardian is appointed or at any time
30 thereafter while the guardianship arrangement is ongoing, expand or
31 limit the powers of the guardian that have been conferred by this
32 chapter or by a previous order of the court. If the court limits any
33 power conferred on the guardian, the limitation shall be [so]
34 expressly stated in [certificates of] the applicable letters of
35 guardianship [thereafter issued]; and

36 (2) revoke or revise, at any time, the expansion or limitation of
37 powers that has been ordered by the court pursuant to paragraph (1)
38 of this subsection.

39 (cf: P.L.2005, c.304, s.25)

40
41 3. N.J.S.3B:12-38 is amended to read as follows:

42 3B:12-38. Title to ward's property vested in guardian as trustee.

43 a. The appointment of a guardian of the estate of a minor or
44 [an] incapacitated person vests in [him] the guardian title as
45 trustee to all property of [his] the ward, presently held or thereafter

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is
not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 acquired, including title to any property theretofore held for the
2 ward by **attorneys in fact** attorneys-in-fact. The appointment of a
3 guardian is not a transfer or alienation within the meaning of
4 general provisions of any **Federal** federal or State statute or
5 regulation, insurance policy, pension plan, contract, will, or trust
6 instrument, **imposing** that imposes restrictions upon, or penalties
7 for, the transfer or alienation by the ward of **his** the ward's rights
8 or interest, but this section does not restrict the ability of **persons**
9 any person to make specific provision by contract or dispositive
10 instrument relating to a guardian.

11 b. If a court finds that a guardian of the estate of a minor or
12 incapacitated person has breached the guardian's fiduciary duties to
13 the ward by taking action that is outside the scope of the
14 guardianship arrangement or that violates the rights of the ward,
15 contradicts or violates the ward's best interests, or is otherwise
16 deemed by the court to be improper for a fiduciary, the guardian of
17 the estate shall be liable to the ward or other interested persons for
18 damage or loss resulting from breach of fiduciary duty to the same
19 extent as a trustee of an express trust.

20 (cf: P.L.2005, c.304, s.26)

21

22 4. N.J.S.3B:12-42 is amended to read as follows:

23 3B:12-42. Reporting condition of ward's person and property to
24 court.

25 **A guardian shall report at** At time intervals **as** ordered by
26 the court, **unless otherwise waived by the court,** but not less often
27 than every six months during the course of a guardianship
28 arrangement, the guardian shall report to the court, under oath, the
29 condition of the ward and the condition of the ward's estate which
30 has been subject to the guardian's possession or control as ordered
31 by the court.

32 a. A report submitted by **the** a guardian of the person,
33 pursuant to this section, shall state or contain:

34 (1) the current mental, physical, and social condition of the
35 ward;

36 (2) the living arrangements for all addresses of the ward during
37 the reporting period;

38 (3) the medical, educational, vocational, and other services
39 provided to the ward, and the guardian's opinions as to the adequacy
40 of the ward's care;

41 (4) a summary of the guardian's visits with the ward and
42 activities undertaken by the guardian on the ward's behalf, and an
43 indication as to the extent to which the ward has participated in
44 decision-making;

45 (5) if the ward is institutionalized, an indication as to whether or
46 not the guardian considers the current plan for care, treatment, or
47 habilitation to be in the ward's best interest;

1 (6) plans for future care; and
2 (7) a recommendation as to the need for continued guardianship
3 and any recommended changes in the scope of the guardianship.

4 b. **【The court may appoint an individual to review a report,**
5 **interview the ward or guardian and make any other investigation the**
6 **court directs】** A report submitted by a guardian of the estate,
7 pursuant to this section, shall state or contain:

8 (1) an itemized inventory identifying and appraising all of the
9 real and personal property that has come into the guardian's hands
10 or control or has come into the hands of any other person, on the
11 guardian's behalf, during the reporting period, under the auspices of
12 the established guardianship arrangement; and

13 (2) a formal accounting showing each expenditure and
14 disbursement that has been made by the guardian from the ward's
15 estate during the reporting period.

16 c. Agencies authorized to act pursuant to P.L.1985, c. 298
17 (C.52:27G-20 et seq.), P.L.1985, c. 145 (C.30:6D-23 et seq.),
18 P.L.1965, c. 59 (C.30:4-165.1 et seq.), and P.L.1970, c. 289
19 (C.30:4-165.7 et seq.), and public officials appointed as limited
20 guardians of the person for medical purposes for individuals in
21 psychiatric facilities listed in R.S.30:1-7, shall be exempt from the
22 provisions of this section.

23 d. The court shall review the reports received pursuant to this
24 section, on at least an annual basis, to ensure that the guardian is
25 properly fulfilling the guardian's duties with respect to the ward or
26 the ward's estate, or both, as the case may be, and is operating in a
27 manner that is consistent with the ward's best interests. The court
28 may, at any time, and shall, whenever a report submitted pursuant
29 to this section indicates that a guardian may not be properly
30 fulfilling the guardian's duties or acting in the ward's best interests,
31 appoint a third-party to interview the ward and guardian and
32 undertake any other investigation the court may direct.
33 (cf: P.L.2005, c.304, s.29)

34
35 5. N.J.S.3B:12-43 is amended to read as follows:

36 3B:12-43. Expenditures to be made by guardian out of ward's
37 estate.

38 a. A guardian of the estate of a minor or incapacitated person
39 may expend or distribute so much or all of the income or principal
40 of 【his】 the ward for the support, maintenance, education, care,
41 general use, and benefit of the ward and 【his】 the ward's
42 dependents and other household members, in the manner, at the
43 time or times, and to the extent, that the guardian, in an exercise of
44 a reasonable discretion, deems suitable and proper, taking into
45 account the requirements of the "Prudent Investor Act," P.L.1997,
46 c.36 (C.3B:20-11.1 et seq.)【,】 and the considerations specified in
47 N.J.S.3B:12-44 and N.J.S.3B:12-45.

1 b. The expenditure or distribution of funds pursuant to this
2 section may occur either with or without court order **[, with]**.

3 c. A guardian expending or distributing funds pursuant to this
4 section:

5 (1) shall give due regard to the duty and ability of **[any person]**
6 other persons to support or provide for the ward if the ward is a
7 minor, **[and without due regard to]** but shall not consider the duty
8 and ability of any person to support or provide for the ward if the
9 ward is an incapacitated person**[, and with or without regard to]**;
10 and

11 (2) shall be authorized, but not required, to consider whether
12 any other sources of funds, income, or property **[which may be]** are
13 available for **[that purpose]** the purposes specified in this section.

14 d. All decisions made by a guardian of the estate with respect
15 to the expenditure or distribution of funds pursuant to this section
16 shall be consistent with the ward's best interests and the specified
17 wishes and preferences of the ward, to the extent that the ward
18 retains the capacity to express such wishes and preferences.

19 (cf: P.L.2005, c.304, s.30)

20
21 6. N.J.S.3B:12-44 is amended to read as follows:

22 3B:12-44. Recommendations to be considered by guardian of
23 ward's estate in making expenditures.

24 a. In making expenditures **[under]** and distributions pursuant
25 to N.J.S.3B:12-43, the guardian of the estate of a minor or
26 incapacitated person shall consider any recommendations relating to
27 the **[appropriate standard of]** expenditure and distribution of estate
28 funds for the support, education, care, general use, and benefit **[for]**
29 of the ward, the ward's dependents, and other members of the
30 ward's household, which are made by **[a parent or]** the following
31 persons:

32 (1) the ward, to the extent that the ward is capable of making
33 such recommendations;

34 (2) if the ward is a minor, the parents of the ward, if any;

35 (3) if the ward is an incapacitated person, the spouse of the ward
36 and any adult children of the ward or, if the incapacitated ward has
37 no adult children, the person or persons who are closest in degree of
38 kinship to the ward;

39 (4) the guardian of the ward's person, if any; and

40 (5) the person or persons with whom the ward resides or, if the
41 ward resides in an institution, the chief administrator of that
42 institution.

43 b. The guardian of the estate **[may not be surcharged]** shall be
44 subject to pay a penalty surcharge for any sums that are paid or
45 distributed thereby, pursuant to the recommendation of a person
46 listed in subsection a. of this section, to persons or organizations
47 actually furnishing support, education, or care to the ward

9

11 3B:12-45. Other factors to be considered by guardian of ward's
12 estate in making expenditures.

20 a. **[The]** the size of the ward's estate;

c. **[The]** the accustomed standard of living of the ward, the
ward's dependents, and other members of the ward's household;

28 e. the wishes and preferences of the ward, to the extent that the
29 ward is capable of expressing those wishes and preferences.

31

33 3B:12-57. Powers and duties of a guardian of the person of a
34 ward.

36 b. (Deleted by amendment, P.L.2005, c.304.)

38 d. (Deleted by amendment, P.L.2005, c.304.)

f. In accordance with Section 12 of P.L.2005, c.304 (C.3B:12-24.1), a guardian of the person of a ward shall exercise authority over matters relating to the rights and best interest of the ward's personal needs, only to the extent adjudicated by a court of competent jurisdiction. In taking or forbearing from any action affecting the personal needs of a ward, a guardian shall give due regard to the preferences of the ward, if known to the guardian or otherwise ascertainable upon reasonable inquiry. To the extent that

1 it is consistent with the terms of any order by a court of competent
2 jurisdiction, the guardian shall:

3 (1) take custody of the ward and establish the ward's place of
4 abode in or outside of this State;

5 (2) personally visit the ward or if a public agency which is
6 authorized to act pursuant to P.L.1965, c.59 (C.30:4-165.1 et seq.)
7 and P.L.1970, c.289 (C.30:4-165.7 et seq.) or the Office of the
8 Public Guardian pursuant to P.L.1985, c.298 (C.52:27G-20 et seq.)
9 or their representatives which may include a private or public
10 agency, visits the ward not less than once every three months, or as
11 deemed appropriate by the court, and otherwise maintain sufficient
12 contact with the ward to know **【his】** the ward's capacities,
13 limitations, needs, opportunities, and physical and mental health;

14 (3) provide for the care, comfort and maintenance, and,
15 whenever appropriate, the education and training of the ward;

16 (4) subject to the provisions of subsection c. of N.J.S.3B:12-56,
17 give or withhold any consents or approvals that may be necessary to
18 enable the ward to receive medical or other professional care,
19 counsel, treatment, or service;

20 (5) take reasonable care of the ward's clothing, furniture,
21 vehicles and other personal effects, and, where appropriate, sell or
22 dispose of such effects to meet the current needs of the ward;

23 (6) institute an action for the appointment of a guardian of the
24 property of the ward, if necessary for the protection of the property;

25 (7) develop a plan of supportive services for the needs of the
26 ward and a plan to obtain the supportive services;

27 (8) if necessary, institute an action against a person having a
28 duty to support the ward or to pay any sum for the ward's welfare in
29 order to compel the performance of the duties;

30 (9) receive money, payable from any source for the current
31 support of the ward, and tangible personal property deliverable to
32 the ward. Any sums so received shall be applied to the ward's
33 current needs for support, health care, education, and training in the
34 exercise of the guardian's reasonable discretion, with or without
35 court order, with or without regard to the duty or ability of any
36 person to support or provide for the ward and with or without
37 regard to any other funds, income, or property that may be available
38 for that purpose, unless an application is made to the court to
39 establish a supplemental needs trust or other trust arrangement.
40 However, the guardian may not use funds from the ward's estate for
41 room and board, which the guardian, the guardian's spouse or
42 domestic partner as defined in section 3 of P.L.2003, c.246
43 (C.26:8A-3), or the ward's parent or child have furnished the ward,
44 unless agreed to by a guardian of the ward's estate pursuant to
45 N.J.S.3B:12-41, or unless a charge for the service is approved by
46 order of the court made upon notice to at least one of the heirs of
47 the ward, if possible. The guardian shall exercise care to conserve
48 any excess funds for the ward's needs; and

1 (10) If necessary, institute an action that could be maintained
2 by the ward including but not limited to, actions alleging fraud,
3 abuse, undue influence, and exploitation.

4 g. In the exercise of the foregoing powers, the guardian shall:

5 (1) act, at all times, in the ward's best interests;

6 (2) consider the expressed wishes and preferences of the ward,
7 to the extent that the ward is capable of expressing those wishes and
8 preferences, and encourage the ward to participate with the
9 guardian in the decision-making process, to the maximum extent of
10 the ward's ability **in order to**; and

11 (3) encourage the ward to act on **his** the ward's own behalf,
12 whenever **he** the ward is able to do so, and to develop or regain
13 higher decision-making capacity **to make decisions**, to the
14 maximum extent practicable, in those areas in which **he** the ward
15 is in need of guardianship services**,** to the maximum extent
16 possible**.**

17 (cf: P.L.2005, c.304, s.39)

18
19 9. This act shall take effect immediately.

20 21 22 STATEMENT

23
24 This bill revises the law pertaining to guardianship in order to
25 provide stronger protections for wards and proposed wards,
26 encourage ethical conduct by guardians, with a particular focus on
27 guardians of the estate, and ensure that the laws pertaining to
28 guardianship of the estate are consistent with the laws pertaining to
29 conservatorships.

30 Specifically, the bill makes the following substantive changes to
31 strengthen the existing guardianship law:

32 The bill requires a ward or proposed ward to be represented by
33 counsel throughout the course of guardianship proceedings and, if a
34 guardianship arrangement is established, until such time as the
35 arrangement is terminated. The bill further requires counsel to
36 personally interview the ward or proposed ward not more than 72
37 hours before each scheduled hearing related to guardianship and
38 certify to the court that the interview has been performed. If the
39 ward or proposed ward is, at any time, not represented by counsel
40 and is unable to afford counsel, the bill would require the court to
41 appoint counsel for the person.

42 The bill further requires a court, in establishing a guardianship
43 arrangement, to authorize only that level of intervention that the
44 court finds to be least restrictive of the proposed ward's rights while
45 being consistent with the protection of the ward's welfare and
46 safety. The bill clarifies that the court may, at any time, expand or

1 limit the powers of the guardian or revoke or revise any previously
2 ordered expansion or limitation of powers.

3 The bill also specifies that all actions undertaken by a guardian,
4 whether by a guardian of the person or by a guardian of the estate,
5 are to be undertaken with due regard to, and are to be consistent
6 with, the ward's best interests and the ward's expressed wishes and
7 preferences, to the extent that the ward is capable of expressing
8 those wishes and preferences.

9 Current law recognizes that a guardian of the estate holds title as
10 trustee to the property of the ward. The bill would clarify that,
11 whenever a court finds that a guardian has breached the guardian's
12 fiduciary duties to the ward by taking an action that is outside the
13 scope of the guardianship arrangement or that violates the rights of
14 the ward, contradicts or violates the ward's best interests, or is
15 otherwise deemed by the court to be improper for a fiduciary, the
16 guardian of the estate will be liable to the ward or other interested
17 parties for damage or loss resulting from breach of fiduciary duty to
18 the same extent as a trustee of an express trust.

19 Current law also requires a "guardian" to submit reports to the
20 court, at time intervals ordered by the court, but it only imposes
21 specific content requirements in association with reports that are
22 submitted by guardians of the person; not guardians of the estate.
23 The existing law also authorizes the court to waive the reporting
24 requirement entirely, and it does not require the court to actually
25 review any of the submitted reports. The bill would amend the law
26 to: 1) require a report to be submitted by both the guardian of the
27 person and the guardian of the estate at time intervals ordered by
28 the court, but not less often than every six months during the course
29 of the guardianship arrangement; 2) specify the content that must be
30 included in reports submitted by guardians of the estate; 3)
31 eliminate the court's discretion to waive the reporting requirement;
32 and 4) require the court to review the reports submitted pursuant to
33 the bill, on at least an annual basis, in order to ensure that each
34 guardian is properly fulfilling the guardian's duties with respect to
35 the ward or the ward's estate, or both, as the case may be, and is
36 operating in a manner consistent with the ward's best interests. The
37 bill would also authorize the court, at any time, and require the
38 court, whenever its annual review of the submitted reports reveals
39 that the guardian may not be properly fulfilling the guardian's
40 duties or acting in the ward's best interests, to appoint a third-party
41 to interview the ward and the guardian and undertake any other
42 investigation the court may direct.

43 The existing law requires a guardian of the estate to consider the
44 recommendations of the ward's parent or the guardian of the ward's
45 person when expending and distributing funds from the ward's
46 estate; however, an incapacitated person often does not have a
47 living parent, and the guardian of the person may be the same as the
48 guardian of the estate, meaning that, under existing law, there will

1 often be no available third-party to provide recommendations to the
2 guardian of the estate. The bill would, therefore, amend the law to
3 require the guardian of the estate to consider the recommendations
4 of all of the following individuals: 1) the ward, to the extent that
5 the ward is capable of making the recommendations; 2) if the ward
6 is a minor, the ward's parent; 3) if the ward is an incapacitated
7 person, the spouse and any adult children of the ward or, if there are
8 no adult children, the person or persons who are closest in degree of
9 kinship to the ward; 4) the guardian of the ward's person; and 5) the
10 person or persons with whom the ward resides or, if the ward
11 resides in an institution, the chief administrator of that institution.
12 This change will make the law consistent with the law pertaining to
13 conservatorship, which requires a conservator to consider the
14 recommendations of all these persons.

15 The bill also amends the existing guardianship law to modernize
16 and clarify the existing language and paragraph and sentence
17 structure and ensure that language is used consistently and in an
18 active and direct voice throughout the law.