

MEMORANDUM

TO: Senator Richard Sears, Senate Committee on Judiciary, Chair

FROM: Stuart G. Schurr, General Counsel, DAIL *sgs*

RE: Draft No. 1.1- S.133, An act relating to authorizing the Probate Division to reopen guardianship proceedings to correct or remedy manifest injustice

DATE: February 3, 2022

Thank you for the opportunity to comment on the strike-all amendment to S.133. Having reviewed the amendment, the Department of Disabilities, Aging, and Independent Living (DAIL), the department within which the Office of Public Guardian is established, has significant concerns with the proposed language.

In addition to the current grounds upon which relief from a judgment or order may be granted and upon which closed proceedings may be reopened, as fully set forth in Vermont Rules of Probate Procedure Rules 60 and 60.1(d), respectively, the amendment seeks to create an additional basis in Title 14, exclusive to guardianship proceedings, for setting aside a judgment or order. Specifically, the amendment provides, without limitation, that a party may be relieved from a final judgment or order in a terminated guardianship proceeding upon a showing that relief is necessary to address or prevent a manifest injustice. More significantly is that such relief may provide the grounds for granting a motion by any interested party to reopen those proceedings. Of note, and of particular concern, is that "manifest injustice" is defined by a single example (i.e., a circumstance in which the court issued the guardianship order in violation of a right of the person under guardianship under State or federal law), which, seemingly, invites not only the filing of such motions whenever one is aggrieved by a decision of the court in a guardianship proceeding, but also legal actions for monetary damages as a result of the alleged violation of law.

Presumably, the finite list of grounds in the Vermont Rules of Probate Procedure upon which relief from judgments and orders of the Probate Division may be granted, and the period of time in which those grounds remain available to assert, was developed thoughtfully, intentionally, and in the interest of ensuring the finality of judgments. The Department asserts that any expansion of these grounds, given the unique circumstances surrounding guardianships, could have unintended impacts on those involved in these proceedings.

First, authorizing motions for relief from judgments in terminated guardianships and to reopen those proceedings, based solely on a claim of preventing manifest injustice, will not only result in increased court filings but also will require judicial resources to consider each motion. It must be noted that parties aggrieved by a judgment or order of the court currently have available to them appellate remedies, and, if allowed to raise a claim of manifest injustice at any time, it is not unreasonable to imagine that an individual might refrain from seeking relief until a new presiding judge is assigned, calculating that the new judge would be more receptive to the individual's argument than the judge who entered the final order or judgment. This concept of "judge shopping" is antithetical to the principles of our judicial system, creates an appearance of impropriety, and has been universally condemned.

If, following the termination of a guardianship, an interested person asserts that the person formerly under guardianship still or again requires a guardianship to prevent a manifest injustice, the interested party could simply move for relief from the final order and to reopen the prior proceedings. Taking this approach, as opposed to filing a new petition for guardianship, would, in theory, avoid the statutory requirement that a new guardianship evaluation be conducted.

The potential impact of this change extends beyond the Judiciary. By its plain language, this amendment could result in the reinstatement of more involuntary guardianships. This alone should be of grave concern to both self-advocates and those who advocate for persons under guardianship (e.g., Disability Law Project of Vermont Legal Aid, Inc.). As guardianships are terminated for a multitude of reasons, including, but not limited to, a movement toward less restrictive options such as Supported Decision Making, and the challenges of serving, through public guardianship, individuals who actively reject and resist the services offered by their guardians, the potential consequences of creating a process through which an interested person can seek to revive these arrangements should not be ignored.

For the foregoing reasons, DAIL opposes Draft No. 1.1, the strike-all amendment to S.133. Please do not hesitate to communicate with me if you have any questions or comments.