

To: Members of the Probate Fiduciary Panel

From: Gerald I. Fisher, Presiding Judge, Probate & Tax Division

Subject: Disability Services Reform Amendment Act of 2018

Date: July 25, 2018

As most of you are aware by now, the "Disability Services Reform Amendment Act of 2018" (the "DSRAA") became law in May of this year and will go into effect on August 3, 2018. Title II of the DSRAA is codified at D.C. Code §§ 7-1301.01 *et seq.*, and it comprehensively repeals and amends various sections of the "Citizens with Intellectual Disabilities Constitutional Rights and Dignity Act of 1978" (D.C. Law 2-137), such that there will be no new admissions and no new commitments of people with intellectual disabilities, with the exception of people found incompetent in criminal cases.

The DSRAA also specifically amends Section 411(a) of D.C. Law 2-137, in pertinent part, to require the Court to terminate the commitment of a person with an intellectual disability, other than a person found incompetent in a criminal case, at the annual review hearing unless there is a finding that the person or an authorized substitute decision-maker "provides informed consent to continue the person's commitment." D.C. Code § 7-1304.11(a)(2)(A). The subject of the Habilitation Court proceedings is presumed to be capable of consenting to or refusing continued commitment. However, to the extent the person lacks capacity to give informed consent, the DSRAA identifies a hierarchy of nine people authorized to consent on the person's behalf. At the top of the hierarchy are "[a] court-appointed general guardian or limited guardian of the person with an intellectual disability whose scope of appointment includes the authority to consent to the continued commitment of the person." D.C. Code § 7-1304.11. If no one within the hierarchy is available, the DSRAA authorizes the Court to appoint a guardian *ad litem* for the sole purpose of providing consent to continued commitment. The label we most often use when appointing Fiduciary Panel members to serve as guardians in intervention cases where the subject/ward has an intellectual disability is "limited *health care* guardian."

The DSRAA allows a person who occupies a lower position in the statutory hierarchy to challenge the decision to continue or end commitment made by a guardian or limited guardian if that person is found "to have better knowledge of the wishes of the person, or, if the wishes of the person are unknown and cannot be ascertained, is better able to demonstrate a good-faith belief as to the interests of the person." D.C. Code § 7-1304.11 (a)(6).

By this memorandum I am informing all Probate Fiduciary Panel members who are serving as general guardians or limited health care guardians for intellectually disabled wards who are committed pursuant to the Intellectual Disabilities Act of 1978 that your duties will include the authority to serve as the substitute decision-maker regarding the issue of recommitment of the ward where the ward lacks the capacity to give informed consent. As the substitute decision-maker, the general guardian or limited guardian is required to become personally acquainted with the ward and make the recommitment decision "based on the express wishes of the person or, if the wishes of the person are unknown and cannot be ascertained, on a good faith belief as to the best interests of the person." D.C. Code § 7-1304.11 (a)(3). In order to satisfy this requirement, the general guardian or limited guardian must communicate with the ward and, if possible, ascertain his/her position on recommitment; become sufficiently knowledgeable about the ward's circumstances, the services being provided to the ward, and the alternatives if consent is withheld, so that the ward's best interests can be achieved; and become familiar with the recommitment process and participate in that process to the extent necessary to convey to the Court the decision on recommitment. Probate Fiduciary Panel members who are serving as either a general guardian or a limited guardian will be able to seek compensation in their yearly intervention case fee petitions for the time they have spent related to the Habilitation Court proceedings and the recommitment decision.



Presiding Judge
Probate & Tax Division
D.C. Superior Court

