

MEMORANDUM IN SUPPORT

ELDER LAW AND SPECIAL NEEDS SECTION

ELDER # 18

May 10, 2018

**The Elder Law and Special Needs Section (Section) Supports
the proposed amendment of the Rule Relating to Appointments by the Court
(22 NYCRR Part 36) to Increase the Income Cap for Appointees**

The Administrative Board of the Courts is seeking public comment on a proposed Amendment of the Rules Relating to Appointments by the Court (22 NYCRR Part 36).

The proposed amendment would do two things.

- a. It would enlarge the income caps that court appointees in Article 81 guardianship proceedings (and other kinds of cases) can receive and still be eligible for additional appointments the following calendar year; and,
- b. It would make certain changes with regard to the appointment of attorneys for children. The Section takes no position on this part of the proposed Amendment.

Summary of the Proposed Amendment: The proposal seeks to amend 22 NYCRR §36.2(d)(2) to increase the amount that a person or entity may be awarded in aggregate Part 36 compensation in a calendar year from \$75,000 to \$100,000 or \$125,000 while remaining eligible for additional compensated appointments in the following year. Among others, this cap covers the appointment of counsel, court evaluators and guardians in Article 81 guardianship proceedings.

Analysis: The income cap under Part 36 has not been raised since 2008. Section members report that they are frequently told by guardianship judges that there is a shortage of experienced practitioners to handle more complex cases because the cap makes those experienced practitioners unavailable for appointments. Sometimes this happens because on average, experienced practitioners get appointments and fee awards in a single calendar year which exceed the cap. However, this is not the only reason the practitioners are subject to the cap. Often, payments to appointees are not evenly spaced out. It is common for appointees to work for multiple years on multiple matters and then get paid for all of those matters in one year. When this happens practitioners are prevented from accepting appointments in the following year even though, based on a yearly average computed over time, the fees received by the appointee would be below the cap. Many judges have been expressing frustration with the current system.

Moreover, it takes trained office staff to efficiently handle the demands of guardianship cases, including the preparation and review of accountings. In order to support an appropriate level of office staff, an attorney needs to have an appropriate volume of cases. The cap makes it less economical for an appointee to accept an appointment in a case where the assets are lower and the fees are smaller.

The cap was promulgated after the issuance of the Birnbaum report which expressed concern that too many of these appointments were being used as a form of political patronage. However, there is another cap that will remain in place that prohibits an appointee from taking another case in a year in which that appointee has received a prior appointment that is expected to result in a fee of \$15,000 or more. The Section believes that this is an effective deterrent to political patronage.

Additional Considerations: The last time the cap was raised in February, 2008 it was made retroactive to January, 2007. The reason for the retroactivity was that the cap effects the ability to accept appointments in the following year. By making the last change retroactive to January 1, 2007 the courts made it possible for people who made up to \$75,000 in 2007 to accept appointments in 2008. We urge that the increase in the cap to \$125,000 be made retroactive to January 1, 2017 as otherwise the proposed amendment will not take effect until 2019.

Further, in order to avoid another ten year gap in an increase of the cap, we urge consideration of an annual consumer price index adjustment be included in this amendment to Part 36.

Based upon the foregoing, the Elder Law and Special Needs Section **SUPPORTS** a proposal to increase the Part 36 income cap to \$125,000.