IN THE MATTER OF A.D., AN ALLEGED INCAPACITATED PERSON	SUPREME COURT OF NEW JERSEY DOCKET NO.: 088942 Civil Action ON PETITION FOR CERTIFICATION FROM FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-2563-21 A-2652-21 SAT BELOW: Hon. Francis J. Vernoia, P.J.A.D Hon. Katie A. Gummer, J.A.D. Hon. Kay Walcott-Henderson, J.A.D.

BRIEF OF AMICUS CURIAE ATTORNEY GENERAL OF NEW JERSEY

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PRELIMINARY STATEMENT

The central questions this case presents implicate both whether an alleged incapacitated person is entitled to counsel regardless of his or her ability to pay, and if so, how counsel may be provided. The Attorney General wholeheartedly agrees that indigent individual alleged incapacitated persons (AIPs) are entitled to counsel. But the provision of such counsel, contrary to counsels' arguments in this case, is not funded by state or county agencies, but instead falls under this State's long and celebrated tradition of pro bono services.

Indigent AIPs have a right to counsel under New Jersey law. While there are different forms of guardianship proceedings applicable to different contexts, they are united by a common role: guardianship proceedings help protect one of the most vulnerable populations in New Jersey by ensuring that the interests and rights of incapacitated persons are spoken for and protected. Because these individuals are typically unable to advance their own interests, the appointment of counsel is paramount, and thus is ensured by multiple state statutes and Rule 4:86-4(a)(8). That representation cannot be contingent on any AIP's individual assets, especially as the majority of guardianship proceedings are not initiated by the AIP themselves. So if the AIP or his or her estate has funds for counsel, the funds must be expended on retention. But where the AIP lacks such funds, he or she does not lose the right to be represented in these proceedings.

Appointed counsel, however, is incorrect to claim that the money for their work must come from the very public entities whose limited funding is already expended on direct substantive services for this community. Instead, this Court has long established a robust system for the appointment of pro bono counsel to protect the interests of highly vulnerable persons whose representation needs lie outside the Office of the Public Defender's purview. See Madden v. Delran, 126 N.J. 591 (1992); R. 1:21-11. For decades, courts have appointed attorneys to offer pro bono assistance, as part of their obligations as members of the New Jersey bar. These appointments expressly include the guardianship context, as already recognized by this Court's own Notice to the Bar, a form order from the Administrative Office of the Courts, and other Judiciary publications, and it also reflects the routine practice in most locales. The contrary rule would draw from the limited coffers that state and local agencies have for the provision of services to the vulnerable population that needs them, and would do so even where the agency may disagree with appointed counsel's ultimate approach.

This Court thus need say little new to resolve this dispute and affirm the Appellate Division's decision. This Court can confirm indigent AIPs have a right to counsel under New Jersey law, consistent with the governing statutes and Rules, and that counsel should be provided pro bono, in line with Madden and multiple court documents. This Court can also guide trial courts to provide

clear notice that these appointments are pro bono, to avoid a situation in which counsel are confused on this. But it should reject counsels' proposed approach, which is both inconsistent with New Jersey law and unworkable.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

Initially, Amicus provides the following short overview of guardianship proceedings in New Jersey, to aid the Court in identifying and addressing the potential ramifications of this appeal.

A. Guardianship Proceedings.

Although guardianships may be initiated by a number of entities or parties and may proceed under varying enabling statutes, the essential components, purposes, and processes, as well as the issues which trial courts must resolve, are related. Generally, guardianship proceedings are brought under N.J.S.A. 3B:12-24 to -28, which empowers courts to adjudge whether an individual is incapacitated. The term "incapacitated individual" is defined to mean

> an individual who is impaired by reason of mental illness or intellectual disability to the extent that the individual lacks sufficient capacity to govern himself and manage the individual's affairs.
>
> The term incapacitated individual is also used to designate an individual who is impaired by reason of physical illness or disability, substance use disorder, or

[1] Because they are closely related, these sections are combined for efficiency and the Court's convenience.

> other cause (except minority) to the extent that the individual lacks sufficient capacity to govern himself and manage the individual's affairs.
>
> The terms incapacity and incapacitated refer to the state or condition of an incapacitated individual as hereinbefore defined.
>
> [N.J.S.A. 3B:1-2.]

A guardian may be appointed to represent the incapacitated individual's person only, his or her estate only, or both the person and the estate. N.J.S.A. 3B:12-24.1; N.J.S.A. 3B:12-25. All such appointments may be plenary or limited in scope. N.J.S.A. 3B:12-24.1(b).

Additional statutes authorize particular guardianships in specific contexts. See N.J.S.A. 52:27D-416 (enabling County Adult Protective Services (APS) agencies to file guardianship proceedings to protect vulnerable adults); N.J.S.A. 30:4-165.5 (requiring the Commissioner of the Department of Human Services to initiate guardianship proceedings for certain minors receiving services from the Division of Developmental Disabilities); N.J.S.A. 30:4-165.7 (enabling "any parent, spouse, relative, or interested party, on behalf of an alleged incapacitated person who is receiving functional or other services" to initiate guardianship proceedings for adults with developmental disabilities).

In New Jersey, a significant percentage of guardianship proceedings are initiated by the Bureau of Guardianship Services (BGS) within the Department

of Human Services. See N.J.S.A. 30:4-165.1 to -165.16. BGS may only serve as guardian of the person, not the estate, and may only serve as guardian for persons receiving services from the Division of Developmental Disabilities. N.J.S.A. 30:4-165.4. Amicus represents BGS in filing between approximately 95 and 140 guardianships brought pursuant to N.J.S.A. 30:4-165.1 to -165.16 and Rule 4:86-2 annually.

The State psychiatric hospitals—Ancora Psychiatric Hospital, Ann Klein Forensic Center, Greystone Park Psychiatric Hospital, and Trenton Psychiatric Hospital—also initiate a substantial number of mental health guardianship proceedings for incapacitated patients pursuant to N.J.S.A. 3B:12-24 to -28 and Rule 4:86-2. Amicus represents the State psychiatric hospitals in roughly 32 mental health guardianships annually. Amicus further represents the State psychiatric hospitals in about eight special medical guardianships pursuant to Rule 4:86-12 annually, which provide for temporary appointments of a guardian exclusively for emergent medical decision-making.

The Office of the Public Guardian, in the Department of Human Services, is routinely called upon to serve as guardian of the person and/or estate of many New Jersey residents, when family or friends are unavailable or unable to serve. N.J.S.A. 52:27G-20 to -31; see N.J.S.A. 3B:12-25. The Office may only serve as guardian for persons age 60 and up. N.J.S.A. 52:27G-22(b).

Particularly in the context of guardianship proceedings initiated by public entities or calling upon public entities to serve as guardian, it is common that the AIP is indigent. In Amicus's experience, many courts specify that court-appointed counsel for an indigent AIP in such proceeding is to serve pro bono. The Department of Health reports that 100% of the guardianship proceedings initiated by the State's psychiatric hospitals of which they are aware have been for indigent AIPs, and in 100% of those cases over the last decade the trial court successfully appointed pro bono counsel to represent the AIP. For its part, the Department of Human Services, Division of Aging Services advises that there were roughly 156 guardianships initiated by the County APS agencies in 2023, with many of those guardianships involving indigent AIPs in which the court routinely appointed pro bono counsel to represent the AIP from the beginning of the proceedings. BGS adds that, in guardianships brought by private hospitals where BGS is requested to serve as guardian of the person for an indigent AIP, trial courts occasionally direct the petitioning hospital to pay court-appointed counsel fees—but that is the infrequent exception, not the rule.

B. A.D.'s Proceeding.

For the details of A.D.'s case, Amicus primarily adopts the Procedural History and Counter-Statement of the Matter Involved set forth in the brief of Respondent Sussex Division of Social Services, Office of Adult Protective

Services, filed January 24, 2024. (Rb2; Rb3-7).[2] Amicus notes the following key aspects of this case.

The trial court appointed Petitioner Steven J. Kossup, Esq., as counsel and Petitioner Brian C. Lundquist, Esq., as temporary guardian. (PKa4-4). Initially, the trial court erroneously appeared to contemplate those appointments as being for payment rather than pro bono, notwithstanding A.D.'s confirmed lack of assets. (Rb3-5). As the Appellate Division explained below, that was amplified by Petitioners' misreading of the Judiciary's form Order Fixing Guardianship Hearing Date and Appointing Attorney for AIPs, since the form's language "if taken in isolation and without consideration of the language from the following sentence, 'the court may direct that the appointed attorney be paid,'" may have led court-appointed counsel to wrongly believe they are promised or entitled to compensation for the appointment. (PKa20-21).

However, as the courts below ultimately held, Petitioners in fact were not entitled to attorneys' fees. Because A.D. is indigent, he and his estate lack the funds to pay attorneys' fees under R. 4:86-4(e) and N.J.S.A. 3B:12-24.1(c)(9). Instead, Petitioners demanded payment from Respondent, Sussex APS. But as

[2] "Rb" refers to Respondent's brief before this Court; "PKb" refers to Kossup's brief before this Court; "PLb" refers to Lunquist's brief before this Court; "PKa" refers to Kossup's appendix before this Court; and "RAa" refers to Respondent's appendix before the Appellate Division.

the trial court recognized, a fee-shifting order is improper here. (Pka26-28 (analyzing the fee applications under R. 4:42-9, In re Farnkopf, 363 N.J. Super. 382 (App. Div. 2003), and In re Guardianship of DiNoia, 464 N.J. Super. 562 (App. Div. 2019)); see also PKa30 (citing Madden, 126 N.J. 591) ("Because so many AIPs are financially vulnerable and have no assets or income, the judiciary relies heavily upon court-appointed attorneys, guardians ad litem, and temporary guardians to represent AIPs in guardianship matters.")).

The Appellate Division affirmed in its comprehensive published opinion, finding the controlling law is clear. As the Appellate Division held, Rule 4:86-4(e) directs Petitioners' fees, if any, be paid from A.D.'s estate "'or in such other manner as the court shall direct,'" but APS's own enabling statute does "not give courts the authority to order APS to pay fees under these circumstances." (PKa17-18 (citing N.J.S.A. 52:27D-406 to -425)). The Appellate Division held instead that appointments like this are provided on a pro bono basis when the AIP lacks the ability to pay, emphasizing that:

> In reaching that conclusion [to affirm], we are mindful of the temporal and financial sacrifices appellants and their firms made in their laudable efforts on behalf of Hank, the court, and the legal profession in this case. We acknowledge in particular Lundquist's firms' payment of Dr. Williams's fee. We join the judge in her praise and expressions of gratitude, but given the applicable statutes and court rules, we can do no more.
>
> [PKa22.]

The Appellate Division also recognized that while there may be instance where an APS has to pay attorneys' or guardians' fees in the event of misconduct by the agency, that exception was inapplicable here. (PKa19-20).

ARGUMENT

APPOINTED COUNSELS' DEMAND FOR FUNDS FROM APS AGENCIES IS INCONSISTENT WITH NEW JERSEY LAW.

The Attorney General agrees with the courts below and with the parties that indigent AIPs are entitled to counsel in guardianship matters. Where the AIP or his or her estate has available funding, counsel is entitled to fees from those funds. But if the AIP lacks the ability to pay, counsel should be appointed on a pro bono basis—consistent with this Court's precedents, the Rules and judiciary documents, and New Jersey public policy, and not from APS agencies' limited funds. Courts can make the pro bono nature of this appointment clear at the outset. Appointed counsels' contrary arguments are unavailing.

As an initial matter, the Attorney General agrees—and no party appears to dispute—that AIPs are entitled to counsel in guardianship proceedings, even if they cannot pay for one. Indeed, both state statutes and court rules mandate the appointment of counsel for the AIP in guardianship proceedings. See R. 4:86-4(a)(8) ("If the [AIP] is not represented by counsel, the order shall include the appointment by the court of counsel for the [AIP]."); R. 4:86-10(c) (in cases

brought by BGS, stating court "shall" appoint the Office of Public Defender, but if OPD is unavailable, then "the court shall appoint an attorney to represent the [AIP]"); N.J.S.A. 30:4-165.14 (same); N.J.S.A. 3B:12-24.1 (noting "the [AIP]'s attorney or attorney appointed by the court to represent the [AIP]").

Consistent with these statutes and rules, the Judiciary's forms state plainly that "the court will appoint an attorney to represent the AIP." N.J. Courts, Adult Guardianship, Overview, Order Fixing Guardianship Hrg. Date & Appointing Attorney for AIP, https://www.njcourts.gov/courts/civil/guardianship (last visited July 19, 2024). It could hardly be otherwise, because the purpose of the proceeding is to assess allegations that the AIP "is impaired by reason of mental illness or intellectual disability to the extent that the individual lacks sufficient capacity to govern himself and manage the individual's affairs," and therefore logically requires an attorney to advocate on his or her behalf in the proceeding where the individual cannot do so. See N.J.S.A. 3B:1-2; supra at 3-8.[3]

[3] The mandatory nature of these appointments are especially clear in contrast to other rules that allow for greater discretion. For example, the appointment of a temporary guardian or guardian ad litem (GAL) for an AIP is not mandated. R. 4:86-4(d) (in any guardianship proceeding, "where special circumstances come to the attention of the court by formal motion or otherwise, a guardian ad litem may, in addition to counsel, be appointed") (emphasis added); N.J.S.A. 3B:12-24.1(c)(1) (in any guardianship proceeding, "the complaint may also request the appointment of a temporary guardian of the person or estate, or both, pendente lite"). And other appointments—Special Medical Guardianships, a temporary appointment solely for emergent medical decision-making—are only mandated when possible. See R. 4:86-12(c) ("Whenever possible an attorney shall be

It is also undisputed that an appointed counsel is entitled to payment from the AIP's estate if such funds are available. Among other things, the governing Rule expressly states that compensation for court-appointed counsel and/or GAL "if any, may be fixed by the court to be paid out of the estate of the alleged incapacitated person or in such other manner as the court shall direct." R. 4:86-4(e) (emphasis added). And state statutes provide that any court-appointed GAL "shall be entitled to receive reasonable fees for his services, as well as reimbursement of his reasonable expenses, which shall be payable by the estate of the alleged incapacitated person or minor." N.J.S.A. 3B:12-24.1(c)(9). Compare N.J.S.A. 30:4-165.14 (in unique context of guardianships brought by BGS, providing that where OPD is unavailable and court must appoint a private attorney as counsel, "[n]o attorney's fee is payable for the rendering of this service by the private attorney" regardless of available funds).

But appointed counsel err in demanding funds from county APS agencies where AIP clients lack the ability to pay; instead, this Court should hold that these appointed services are generally provided on a pro bono basis. New Jersey courts have long emphasized "[t]he strong policy in favor of pro bono legal

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appointed to represent the patient."). (That said, in Amicus's experience, while R. 4:86-12(c) may allow a special medical guardianship without appointment of counsel in deeply exigent circumstances, counsel is appointed in every case as a matter of practice.) By contrast, there is no similar discretionary language or caveat when it comes to ensuring AIPs receive court-appointed counsel.

services." In re Opinion No. 17-2012 of Advisory Committee on Professional Ethics, 220 N.J. 468, 484 (2014). "Volunteering one's time and expertise to help people who need legal services that they cannot afford is in keeping with the finest traditions of the practice of law. That noble tradition spans centuries." Ibid. (internal citations omitted); see also In re Adoption of a Child by C.J., 463 N.J. Super. 254, 259 (App. Div. 2020) ("The fair administration of justice as well as indigent litigants who are entitled to counsel rely on the generous and diligent efforts of pro bono counsel, both volunteer and assigned."); State v. Finneman, 458 N.J. Super. 383, 387-88 (App. Div. 2019) ("'Lawyers who act pro bono fulfill the highest service that members of the bar can offer to indigent parties and to the legal profession.'") (quoting Parkell v. Danberg, 833 F.3d 313, 320 n.1 (3d Cir. 2016)). And decades ago, this Court affirmed a comprehensive and robust system for pro bono appointment of attorneys. See Madden, 126 N.J. at 594; R. 1:12-11; see also N.J. Courts, Pro Bono, Pro Bono Requirements in N.J. Attys., https://www.njcourts.gov/attorneys/pro-bono (last visited July 19, 2024) ("The New Jersey bar performs pro bono work for indigent litigants in cases where the legislature has made no provision for a public defender.").

Myriad materials confirm that Madden's decades-long framework should govern the appointment of counsel in guardianship proceedings where the AIP lacks the ability to pay, and that the services should be provided pro bono, rather

than paid for by APS agencies. As explained above, the relevant statutes and court rules provide that fees, if any, come from the AIP's assets, see supra at 5-6. Amicus is not aware of a statute or court rule suggesting that a county APS agency or state equivalent would be required to pay. To the contrary, a wide range of Judiciary documents implementing Madden establish explicitly that the State's pro bono appointment system covers guardianship proceedings.

The Court's March 4, 2021 Notice to the Bar could hardly be clearer on this point. Court Rules explain that individuals who perform other sufficient pro bono services are discharged from eligibility for an appointment pursuant to Madden. See R. 1:21-12 (25 hours of pro bono service exempts individual from Madden appointment for that cycle). The March 4, 2021 Notice confirms that framework and adds that "[t]he Madden exemption is available to attorneys who are appointed by the court to serve as (i) attorney for an alleged incapacitated person; (ii) Guardian Ad Litem in a guardianship matter; (iii) temporary pendente lite guardian; (iv) permanent guardian of an adjudicated incapacitated person; or (v) special medical guardian." (RAa37-38 (March 4, 2021 Notice to the Bar)). That is telling: because Madden obligations are discharged only by pro bono service, and because those discharges expressly include service as the court-appointed counsel for an AIP, this Court clearly placed the bar on notice that such guardianship appointments would be for pro bono work.

Other documents from the Judiciary, implementing its authority from the guardianship statutes and court rules and from Madden itself, confirm that these services are provided on a pro bono basis if the AIP is indigent. The Judiciary's "Guidelines for Court-Appointed Attorneys in Guardianship Matters" inform appointed counsel to seek fees "if the AIP possesses assets," while noting that "[i]n matters where funds are not available, the court-appointed attorney may be appointed to serve pro bono with the appreciation of the court." N.J. Courts, Guidelines for Court-Appointed Attys. in Guardianship Matters at 7, 9 (May 2021), https://www.njcourts.gov/sites/default/files/forms/12756_gdnshp_crt-app_atty.pdf. And as noted in the Appellate Division's decision, see (PKa7-8), the Judiciary's form Order Fixing Guardianship Hearing Date and Appointing Attorney for Alleged Incapacitated Person provides, under paragraph 5:

> SELECT ONE:
>
> ___ The attorney appointed to represent the alleged incapacitated person is appointed pro bono (without cost).
>
> OR
>
> ___ The attorney appointed to represent the alleged incapacitated person is to be paid. Pursuant to R. 4:86-4(d), the court may direct that counsel be paid from the assets of the alleged incapacitated person or in such manner as the court shall direct.
>
> [PKa8.]

Although the form Order includes a reference to trial court discretion, the only options that it spells out specifically are to "be paid from the assets of the [AIP]" or to be "appointed pro bono."

Historical practice bolsters what the statutes, court rules, court documents, and precedent already establish: the appointment of counsel in guardianship proceedings for indigent AIPs should generally be handled a pro bono basis. As recounted above, see supra at 6. State psychiatric hospitals report that, in the last decade, all court appointed attorneys for indigent AIPs in the proceedings these hospitals initiated have provided their services on a pro bono basis. Both the Division of Aging Services and the Bureau of Guardianship Services in the Department of Human Services report that pro bono appointments is likewise a standard practice, even if not universal, while the Division of Aging Services noted that the court routinely appoints pro bono counsel to represent an indigent AIP from the beginning of the proceedings in their matters too. See supra at 6. In affirming the Appellate Division, this Court would simply be confirming what our law and decades of practice have already made clear on the ground.

A contrary rule would have tremendously detrimental impacts on the work of county APS agencies and the state agencies that likewise provide services to this vulnerable population. As Respondent explains and as the record confirms, APS agencies have limited funding—Respondent's budget allocation was just

$85,808[4] in 2020[5]—and they must expend that funding on increasing numbers of clients and expenses. (RAa39-44). As explained in Sussex County Division of Social Services Director Burseo's August 5, 2021 certification, its statutory "obligation is and should be the safety and wellbeing of our vulnerable adults who have been abused, neglected, or exploited while lacking the capacity to care for or defend themselves." (RAa43). But requiring Respondent and analogous agencies to pay for attorneys' fees would directly undermine their ability to do so; petitioning entities like APS lack endless funding to bear the concentrated burden of fees in every case, and further face a serious risk of a chilling effect on filing applications for vulnerable individuals if they knew it would come at such a high cost to them. Whereas the burden of fees would be unworkable if concentrated on individual petitioning parties like APS, the burden is far more limited when justly spread across the bar, as it has been for decades.

In addition to these profound budgetary impacts, there is a second issue: an order that a county APS agency or state agency is required to fund the court-

[4] As Director Burseo certified, Sussex APS's annual expenses already far exceed this budget allocation, with "[t]h balance of the costs of salaries and benefits [] absorbed directly by Sussex County." (RAa42).

[5] County APS funding allocations were stagnant between 2013 and 2020, and Sussex APS's allocation has actually dropped since 2020, being $85,807 as of 2024. It is further of note that six of the 21 county APS agencies in New Jersey are non-profit private entities.

appointed counsel would create extraordinary difficulties where counsel and the petitioning agency advance adverse interests in the proceeding. Since funding is not unlimited, decisions must always be made in any case regarding how best to allocate expanses, including attorney hours to expand or ancillary services to retain. Cf. In re Cannady, 126 N.J. 486, 493 (1991) (recognizing that even when OPD does not represent an indigent defendant but is only underwriting ancillary services, such as expert fees, OPD still maintains "the right to determine what expenditures are necessary and how much money should be spent when outside counsel applies for services at the OPD's expense"). But in this circumstance, that can produce an untenable conflict: whereas a petitioning entity necessarily advocates for a declaration of incapacity and appointment of a guardian for the AIP, court-appointed counsel may advocate to the contrary. That would create an untenable circumstance in which an APS is expected to review the bills and decide whether ancillary services are budgetarily justified for a party advocating a contrary view. In short, adopting the rule that Petitioners advocate—shifting counsel fees onto the petitioning entity—can result in either an extreme conflict of interest or effectively require a blank check to appointed counsel.

To be clear, the Attorney General recognizes there may be exceptions in extraordinary cases to the rule that appointed counsel for indigent AIPs provide their services on a pro bono basis. See (PKa8 (after recognizing that appointed

counsel obtains fees from the AIP or offers pro bono services, recognizing safety valve for other funding as the trial court may direct)); R. 4:86-4(e) (same). One example demarcating the narrow corridor in which fee shifting to the petitioning party can be appropriate is In re Guardianship of DeNoia, 464 N.J. Super. 562 (App. Div. 2019), on which Petitioners heavily rely, (PKb11; PKb14-19; PLb12-16). In DiNoia, the Appellate Division upheld a trial court decision requiring a county APS to pay the court-appointed counsel's fee application, because that agency in that case had failed to satisfy its obligations to investigate the AIP's financial situation under Rule 4:86-2(b) and ignored requests to produce records, protracting the litigation. But as the Appellate Division explained below, that case was narrow and readily distinguishable: there is "no abuse of discretion in the trial court's decision [in DiNoia] to require APS to pay the attorneys' fees" specifically "[g]iven that misconduct." (PKa19). Cases of misconduct, or where a petitioning party is responsible for court-appointed counsel's mistaken belief that they will receive attorneys' fees, are instances in which it may be justified to allow for extraordinary fee shifting under R. 4:86-4(e).

But there is nothing to warrant such an extraordinary order here. Initially, and as is undisputed, no party has alleged and no court has held that Sussex APS engaged in any misconduct here. Instead, although Petitioners believed that they would be entitled to fees in this case based on statements by the trial court, there

is no basis to demand fees from Sussex APS. Initially, although the trial court did err in suggesting fees would be available, a wide range of authorities placed Petitioners on notice that they were not in fact guaranteed compensation. See, e.g., R. 4:86-4(e); (RAa37-38 (March 4, 2021 Notice)); N.J. Courts, Guidelines for Court-Appointed Attys. in Guardianship Matters at 7, 9 (May 2021). For clarity to the Bench and Bar alike, this Court may wish to provide guidance to trial courts that they should state clearly in guardianship proceedings involving indigent AIPs (or AIPs who may become indigent) that the representation is or likely will be pro bono. See In re Adoption of A Child by E.T., 302 N.J. Super. 533, 538-39 (App. Div. 1997) (recognizing that it is "essential" for an attorney to have an understanding of whether "the legal services he is being directed to provide are likely to be pro bono"). But the misstatement in this case is not a basis to require payment of fees when the law was otherwise clear.

Moreover, to the extent that Petitioners wish to treat the trial court's own early misstatements as establishing equitable estoppel, they cannot use this as a basis for funds from Respondent. See O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987) (estoppel may only be invoked against government if claimant also establishes that alleged misrepresentation by government was knowing and intentional). In this case, APS was clear to the court and all persons involved that A.D. was indigent and that APS's enabling statute forecloses payment of

counsel appointments. See (PKa5-6; PKa9). Petitioners' confusion is therefore simply not a basis to demand any money from Respondent.[6]

At bottom, this Court need say little new to resolve this case. This Court should confirm, in line with the governing statutes and Rules, that indigent AIPs are entitled to court appointed counsel. This Court should also confirm, in line with the same sources, precedent, and practice, that these services should be provided on a pro bono basis. And while there may be extraordinary cases in which fee shifting may be warranted despite the grave impacts, this case is not one of them. This Court may wish to provide guidance to ensure that court-appointed attorneys for indigent AIPs understand that their legal services should be provided on a pro bono basis, but there is no cause to require Sussex APS to pay for court-appointed counsel here. This Court should affirm.

[6] Nor does the fact that one Petitioner retained experts suggest an extraordinary condition that would warrant fee shifting—particularly given the concomitant impact on Sussex APS's budget and services. Members of the bar are protected from untenable situations or unrealistic expenses when appointed pro bono. See R. 1:21-12. Petitioner could have approached the Court before retaining expert services to determine whether the vicinage had available funding, and whether the court and parties agreed an expert was genuinely necessary here. Petitioner is not free, however, to simply hire an expert and then demand the funding come from an agency of limited funding that had no role in the retention.

CONCLUSION

This Court should affirm the Appellate Division's decision.

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Dated: July 24, 2024