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	:SUPREME COURT OF NEW JERSEY
	:Docket No.: 088942
	: App. Div.: A-2652-21
In the Matter of A.D,	:
An allegedly incapacitated person	:
	: Civil Action
	:
	: Sat Below in the Appellate Division:
	: Hon. Francis J. Vernoia,J.A.D
	: Hon. Katie A. Gummer, J.A.D
	: Hon. K. Walcott-Henderson, J.A.D
	:
	:Sat Below in the Chancery Division:
	: Hon. Maritza Berdote-Byrne, JSC

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIFICATION BY PETITIONER STEVEN J. KOSSUP, ESQ, PRO SE

BY: STEVEN J. KOSSUP, ESQ.
ON THE BRIEF AND APPENDIX

DATED: January 18, 2024

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Petitioner adopts the Procedural History and Statement of Facts filed with his December 14, 2023 brief as if contained herein and supplements as follows:

Following Petitioner's filing of his Petition for Certification on December 14, 2023, GAL Brian Lundquist filed a Notice of Petition for certification to the Supreme Court on December 15, 2023, with his petition following on December 29, 2023. Respondent APS filed a consolidated opposing brief and appendix on January 9, 2024. The within reply followed.

Contrary to the Counter Statement of Facts filed by Respondent APS at Db6, Petitioner took repeated actions to confirm the AIP was in fact indigent and determine if the contents of his father's Last Will and Testament offered no inheritance or financial security to the AIP (Petitioner's Appellant brief at Pb 9-10, Appellate Pa78-80), to which Respondent agreed (Appellate Pa34-Pa61).

PRELIMINARY STATEMENT

Petitioner relies on the Petition for Certification filed on December 14,

[1] The Procedural History and Statement of Facts have been combined for judicial economy.

2023 as if contained herein and provides this response to Respondent's brief filed January 9, 2024. Respondent's brief fails to address the issues raised in the within petition for certification - that Supreme Court review in this matter is necessary to create a standard of review and uniformity in the law upon which a Trial Court can rely to determine whether support fee shifting under R. 4:86-4 is appropriate (in APS filed cases with an indigent AIP). This issue now presented to the Supreme Court transcends the question of payment to the parties and the focus for certification is on the contradictions between the APS statute[2], Court Rules and the prevailing caselaw[3]. Still, Petitioner welcomes a reversal of the Appellate decision such that an award of fees and costs could be granted.

POINT ONE
RESPONDENT MAKES ADMISSION AT DB14 AND DB17 THAT SUPPORT PETITIONER'S PRAYER FOR A GRANT OF CERTIFICATION

Respondent states that the DeNoia Court did not "address the extent to which N.J.S.A 52:27D-409 prohibits an award of counsel fees against APS" (Db 14). This statement certainly supports Petitioner's prayer for certification in this matter and is the very issue raised in Petitioner's brief at Pb9-Pb10

[2] N.J.S.A 52:27D-406 to N.J.S.A 52:27D-425.
[3] Matter of Guardianship of DiNoia, 464 N.J. Super. 562 and In re Farnkopf, 363 N.J. Super. 382

(*discussion of whether* DeNoia *is actually bad* law). Further, Respondent's argument at Db17 that compensation may be paid in other such manner as the Court shall direct, but not by APS, is an additional reason that the within matter should be granted certification. There is conflict between DeNoia (award of fees pursuant to R. 4:86-4), Farnkopf (denial of fees under APS statute and the Rules, since no exception to the American Rule existed as that time) and the present matter (denial of fees and costs under the APS statute). There is no uniformity of review of APS cases seeking fee-shifting and a grant of certification is necessary.

Petitioner seeks Supreme Court review of this matter for a determination on (a) when fee shifting is appropriate under R. 4:86 and (b) if it is ever appropriate to fee shift in APS cases (Pb16-Pb17). Petitioner does not seek a boilerplate confirmation that APS should always pay in indigent cases is not sought, but rather the qualifier of 'exceptional effort' found in DeNoia must be expanded to create a reproducible standard (DeNoia, *supra*, 568), contrary to the result sub judice.

Respondent argues that the within matter does not rise to the level of "extraordinary circumstances" found in DeNoia and therefore the denial of fees was appropriate (Db17). This is in error. The DeNoia Court did not find "extraordinary circumstances" but instead found "exceptional effort" by the

Court appointed counsel (Matter of Guardianship of DiNoia, 464 N.J. Super. 562, 568). Respondent opines that this case does not meet the DeNoia 'standard', but yet the Trial Court noted the efforts of within counsel as "herculean" (Pa14 - Appellate) and the Appellate Panel reiterated a similarly strong sentiment (Pa22). If "herculean" efforts do not rise to the level of "exceptional effort", then how can any case ever meet the 'standard'?

The within Appellate Panel spent a great deal of time during oral argument on whether there was any standard for fee shifting in APS guardianship cases. Petitioner confirmed that there was no defined standard of review that exists other than the loose determination in DeNoia where the Court shifted fees pursuant to R. 4:86-4 to wit: in such cases, a CAA or GAL must meet the following:

1) Exceptional Efforts of Counsel (DeNoia, *supra*, 568); and/or

2) Agency Misfeasance by APS. (DeNoia, *supra*, 569)[4]

"Exceptional effort" is, therefore, a presently subjective concept and so the Trial Court has no objective test to apply in order to make this finding. Likewise, "agency misfeasance" is also equally nebulous. There is no reproducible test for determination on when fee-shifting in APS cases is

[4] Note, DeNoia does not use the term misfeasance when describing APS's failure to take certain actions. The term misfeasance was used by the Trial Court in the within action (Pa15-Appellate).

appropriate and, as here, no future case can ever rise to these elusive standards, because no clear standard exists.

In this area, there are typically "Basic Guardianships" and "Complex Guardianships". Basic Guardianships can be described as uncontested APS cases where the AIP is indigent and where there exists no genuine issue of incapacity. In these cases, the parties will be generally in agreement that an AIP requires guardianship and work to that end. There is usually no "exceptional effort" in a Basic Guardianship.

However, in "Complex Guardianships," where the APS complaint is contested and the AIP is indigent, an opposition to the guardianship is needed. The AIP will not have the funds to protect his interests. At this point, the efforts of counsel should be deemed "exceptional"[5]. A Complex Guardianship brings with it additional costs and expenses not otherwise contemplated by a Basic Guardianship, such as expert fees and costs. Here, the processing of the

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[5] In 1952, when Congress used the word in (and today, for that matter), "[e]xceptional" meant "uncommon," "rare," or "not ordinary." Webster's New International Dictionary 889 (2d ed. 1934); see also 3 Oxford English Dictionary 374 (1933) (defining "exceptional" as "out of the ordinary course," "unusual," or "special"); Merriam-Webster's Collegiate Dictionary 435 (11th ed. 2008) (defining "exceptional" as "rare"); *Noxell Corp.* v. *Firehouse No. 1 Bar-B-Que Restaurant*, 771 F.2d 521, 526, 248 U.S. App. D.C. 329 (CADC 1985) (R. B. Ginsburg, J., joined by Scalia, J.) (interpreting the term "exceptional" in the Lanham Act's identical fee-shifting provision, 15 U. S. C. § 1117(a), to mean "uncommon" or "not run-of-the-mill").Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 553-554

"Complex Guardianship" has now extended past the "Basic Guardianship" in that the AIP desires to maintain his freedoms, liberties, and rights, and the counsel is required to perform duties outside of the scope of a Basic Guardianship, where, as here, the attorney was required to personaly underwrite the indigent AIP's litigation in order to secure his rights against the Government funded APS.

Much like the determination by the Court in Gideon v. Wainwright, appointment of counsel for an indigent AIP is a fundamental right to secure the AIP's civil liberties[6].

At this point, upon filing a responsive oppositional pleading, the Court under R. 4:86-4 should determine that, going forward, fee shifting for the costs of Court appointed protective services, expenses, and costs is appropriate, subject to approval by the Court.

It is an unfair concept to require Court appointed CAA and GAL to finance litigation in APS "contested cases" when APS has the means to amend their annual budget in the event the Court determines that fee shifting is

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[6] "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." Gideon v. Wainwright, 372 U.S. 335, 344-345

appropriate under the above proposed criteria. A review by the Supreme Court is required to address this issue which is certain to be repeated in the future.

POINT TWO
RESPONDENT ADMITS THAT THE RULES PERMIT PAYMENT OF FEES OUTSIDE OF THE AIP'S ESTATE

Respondent admits that R. 4:86-4 provides the Court with authority for payment of counsel fees in "a manner other than by payment from the estate of the alleged incapacitated person" but doesn't provide that APS can be ordered to pay fees (Db 17 - Db18). This statement by Respondent supports the crux of Petitioner's position – that R. 4:86-4 and DeNoia must be clarified as to when and how fee shifting is permitted in guardianship cases.

POINT THREE
PETITIONER DOES NOT HAVE THE BENEFIT OF THE MADDEN EXEMPTION, CONTRARY TO RESPONDENT'S ARGUMENT

As argued below, Petitioner does not have the benefit of the Madden exemption since the Madden exemption was amended by the Court to include guardianship actions *after* the within litigation commenced [Madden v. Delran, 126, N.J. 591 (1992)]. Further, the Madden exemption is for pro bono assignments and Petitioner, under the Court Order of June 11, 2020, was not appointed pro bono (Pa20-Pa21). The CAA in this matter would not have met the requirements for a Madden exemption. Finally, the Appellate Panel did not

find Respondent's Madden argument below compelling such that the Panel did not even address Respondent's position in their November 29, 2023 Decision.

POINT FOUR
ANALYSIS OF RESPONDENT'S RELIANCE ON STATE V. GOMES AND WINBERRY V. SALISBURY

Initially, the Court should note that Respondent did not raise the issue of Statutes taking precedence over the Court Rules to the Appellate Panel below. Notwithstanding this omission, please take notice of the following:

Petitioner submitted below that R. 4:86-4 permits fee shifting as found in DeNoia. Petitioner does not demand that the APS statute should yield to the Court Rules (as stated by Respondent at Db18) and Petitioner does not misinterpret R. 4:86-4 as requiring APS to pay fees for protective services.

Next, Gomes does not support Respondent's position; Gomes speaks to applying weight to the most recent Statutory enactment and does not address conflicting Rules versus conflicting Statutes.

> "First, the most recent statutory enactment ordinarily supersedes, or at least qualifies or illuminates, language that was adopted in earlier statutes. *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)" State v. Gomes, 253 N.J. 6, 28.

Next, Gomes elucidates "A second guiding interpretative principle we bear in mind is that a more specific statutory provision usually controls over a

more general one." State v. Gomes, 253 N.J. 6, 28. Gomes is not on point and differs factually from the present issue before the Court.

Respondent further relies on Winberry v. Salisbury, 5 N.J. 240 (1950); this case provides a theoretical analysis on the history of amendments to the State Constitution with an in-depth discussion as to the duties of the Supreme Court versus the duties of Legislature. Petitioner agrees, in part, that the holding in Winberry speaks to the Legislature taking precedence over the Court Rules.[7] However, Winberry also supports Petitioner's position that the Court needs to review the present matter and determine if DeNoia is actually bad law. The Winberry Court found,

> "The phrase "subject to law" in Article VI, Section II, paragraph 3 of the Constitution thus serves as a continuous reminder that the rule-making power as to practice and procedure must not invade the field of the substantive law as such." Winberry v. Salisbury, 5 N.J. 240, 248.

DeNoia has created this "invasion" into the APS statute (which does not permit an award of fees unless from the AIP's estate) and yet the DeNoia Court permitted fee this shifting under the Rules, in conflict with the APS

[7] We therefore conclude that the rule-making power of the Supreme Court is not subject to overriding legislation, but that it is confined to practice, procedure and administration as such. Winberry v. Salisbury, 5 N.J. 240, 255

statute. If the Court relies on Winberry, then DeNoia should be overturned or declared unconstitutional.

CONCLUSION

As noted in the New Jersey State Constitution,

> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness" (N.J. Const., Art. I, Para. 1).

The within matter is capable of repetition but evading review under the conflict prevented, to the determent of future indigent AIPs and their appointed counsel in APS cases. In these cases, the appointed counsel will be rendered ineffective where the AIP is without funds for defense. Wherefore, for the reasons stated in the Petition for Certification filed herein, review by the Supreme Court is necessary and certification should be granted pursuant to R. 2:12-4.

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Dated: January 18, 2024