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In the Matter of A.D.,
An allegedly incapacitated person

:
: SUPREME COURT OF NEW JERSEY
: Docket No.: 088942
: App. Div.: A-2652-21
:
: 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

**PETITIONER'S BRIEF IN RESPONSE TO THE BRIEF OF AMICUS
CURIAE SUBMITTED BY THE ATTORNEY GENERAL OF THE
STATE OF NEW JERSEY**

BY: STEVEN J. KOSSUP, ESQ.
ON THE REPLY BRIEF

DATED: August 15, 2024

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PRELIMINARY STATEMENT

Amicus' overriding sentiment is a wholehearted agreement that an indigent AIP requires protection in these cases. Amicus recognizes (a) that such individuals are "one of the most vulnerable populations in New Jersey" and (b) that the interest and rights of incapacitated persons must be spoken for and protected. Amicus further agrees (c) these individuals do not lose the right to be effectively represented even without the funding at issue (Ab1), and agrees that (d) the guardianship proceeding itself logically requires an attorney to advocate the AIP's behalf (Ab10).

Amicus next argues that appointment of counsel serve indigent AIPs pro bono is enough - Amicus avoids the fact that an indigent AIP also cannot afford to pay for expert fees and other costs of litigation. The reason an indigent AIP needs counsel in defense includes the concomitant need for means to effectively oppose the action against him. There is no provision for payment of these expenses.

R. 1:13-2(b) expressly states that appointed counsel have no obligation to pay for expert's fees. In those instances, an indigent AIP has no effective means of defense unless appointed counsel pay those costs of litigation expenses, but if the mission of APS is to ensure the rights of the vulnerable are "protected" (Ab1) then there comes a point where fee shifting in these matters

is required. Presently there is no clear guidance or standard in the law and Amicus' argument is inconsistent with the realities and Legislative intent.

Petitioner has otherwise raised the issue of the conflict between the APS statute, Court Rules, and relevant caselaw and when/if fee-shifting should be permitted before the Court for resolution. Amicus' brief is discussed further below.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

Petitioner adopts the Procedural History and Statement of Facts filed with his Petition for Certification submitted on December 14, 2023 and Reply Brief submitted on January 18, 2024 as if contained herein.

POINT ONE **AMICUS CONCEDED EXCEPTIONS WILL REQUIRE FEE-SHIFTING**

Amicus, at Ab17-18 conceded that there are exceptions where fee-shifting would be appropriate and relies on DiNoia to support his position.² The DiNoia Court required additional conditions (exceptional effort of counsel and agency misfeasance or misconduct) to trigger fee-shifting; however, these conditions are not found in R. 4:86-4 or in the relevant section of the APS Statute (N.J.S.A 52:27D-418). Amicus, at Ab18, agrees that situations such as the present matter might justify fee-shifting:

¹ The Procedural History and Statement of Facts have been combined.

² Matter of Guardianship of DiNoia, 464 N.J. Super. 562

“Cases of misconduct, or where a petitioning party is responsible for court-appointed counsel’s mistaken belief that they will receive attorney’s fees, are instances in which it may be justified to allow for extraordinary fee-shifting under R. 4:86-4(e).” (Ab18)

In Amicus’ statement above, the “petitioning party” is APS, and the “court-appointed counsel” is the undersigned Petitioner. The contention supports both a) Petitioner’s argument on fee-shifting and b) Petitioner’s prayer that the Court establish a standard on when fee-shifting is appropriate and permitted (PKrb4-7).

Amicus, contrary to this statement, next argued that the present matter does not justify fee-shifting; the argument focused on counsel fees and disregarded costs of experts and litigation costs. Authorities cited by Amicus post-date the present appointment (explained in Point Three below).

Amicus effectively asks the Court to foist the costs of litigation onto private counsel under a suggestion, or threat, that otherwise APS will refrain from filing due to a chilling effect (Ab16). This is contrary to its legislative intent to protect the interest of an indigent AIP but supports Petitioner’s arguments at PKb9-15 that the Bar requires a standard for guidance on when, and how, fee-shifting is appropriate so that APS will diligently serve its litigation function and appointed counsel will not be effectively made to bear the financial burden of the indigent AIP’s defense.

POINT TWO
**AMICUS DOES NOT ADDRESS THE CONFLICT BETWEEN THE APS
STATUTE, COURT RULES, AND PREVAILING CASELAW**

Petitioner has brought the issue of conflict in the APS statute (N.J.S.A 52:27D-406 to 425), Court Rules, and caselaw to the forefront, and has sought review of this Court to establish a standard for when fee-shifting in APS guardianship cases would be appropriate.

Amicus does not address the disconnect between these authorities but contends that N.J.S.A 3B:12-24.1(c)(9) directs the CAA was not to be paid; This section concerns the Guardian only and does not bar compensation to Petitioner as Court appointed attorney.

Amicus focused on the issue of payment only and maintains that hardship could result to the Counties and State if payment were made to the within CAA and GAL. This argument suggests that APS will be compelled to pay the CAA or GAL in all indigent AIP guardianship cases versus contested cases with an indigent AIP as presented sub judice The Court is herein asked to set a standard so that the Bar may identify at a pre-trial hearing trial when, and how, fee-shifting would be determined once the matter is reported as 1) a contested guardianship with an indigent AIP which notes that the AIP's defense will require exceptional or unusual effort as distinct from those in which the disability is conceded at an earlier stage, and 2) that the Court

acknowledges the proceedings to follow will require additional expert fees and costs (as noted in PKb8-10 and PKrb3-6). The Court may then direct payment as appropriate. This approach is in accord with the holding in State v. Horton, 34 N.J. 518, 534-535 (1961) where the Court determined that out-of-pocket expenses of defense should not be borne by the assigned attorney and the holding in In re Cannady, 126 N.J. 486, 493 (1991) which further noted such expenses may be paid by the Office of the Public Defender for the indigent.

POINT THREE
AMICUS' POSITION WITH RESPECT TO THE MADDEN
EXEMPTION IS NOT APPLICABLE; THE MADDEN EXEMPTION
WAS NOT AVAILABLE TO THE WITHIN CAA OR GAL

Amicus' analysis (at Ab11 and Ab20) incorrectly posits that the Madden exemption was available to the CAA and GAL below.³ The exemption was not available, and further the Appellate Court made no finding as to the applicability of a Madden exemption or whether counsel should have sought same (PKrb7-8).

Amicus' assertion that R. 1:21-12 "protects members of the bar" is without application here. This Rule, which was adopted July 22, 2014 to be effective January 1, 2015, makes a clear distinction between "voluntary pro bono" work as opposed to "Court-Appointed pro bono" work. The March 4,

³ Madden v. Delran, 126 N.J. 591(1992)

2021 Notice to Bar thereafter permitted court appointed attorneys in guardianship actions to seek a Madden exemption, but on June 11, 2020 (Order of appointment), R. 1:21-12 did not permit the exemption for Court-appointed attorneys.

Amicus further does not address that the Madden exemption has no provision for reimbursement of expert fees or expenses of litigation incurred in representing the indigent AIP.

The Judiciary recognized that the present status of pro bono assignments is no longer an equitable model, with some attorneys absorbing more pro bono assignments than other attorneys. In 2023, the Judiciary created a “Working Group on Attorney Pro Bono Assignments.” This Group made recommendations that should be considered by the within Court in review of Amicus’ arguments on the Madden exemption:

1. Legislation should be enacted to expand the charge of the OPD to handle domestic violence contempt hearings; parole revocation hearings; guardianship cases for people receiving NJ Division of Developmental Disability (DDD) services;...
2. The Legislature should be called upon to fund the provision of effective representation to indigent people in all cases where there is a right to counsel; specifically:
 - a. Funding should be provided to the OPD for its expanded mandate.
 - b. Funding should also be provided to LSNJ so that it can handle specialty case types that fall under Madden, such as contested private adoptions.

3. County government should be called upon to fund payment of public defenders in areas the Legislature fails to fund.

(4 – 5 omitted as not applicable herein)

6. Current tracking methods for case types that are presently handled under Madden should allow for proper statistical analysis....
Working Group on Attorney Pro Bono Assignments Report and Recommendations, (2023) Pages 4-5.

This group recommended, among other things, Public/Private Funding Options as Alternative to Current System. Further still, as noted in the report,

“The Working Group recommends, and the LSNJ agrees, that LSNJ handle specialty cases such as guardianship matters and private adoptions. Specialty cases make up a minority of Madden assignments (8%) and clearly require counsel with specialized skills. Data collected during the 2022 court year reveals that approximately 30 Madden assignments related to guardianship and/or contested private adoptions were made” (*Ibid*, Page 10).⁴.

Wherefore, the Madden exemption argument as a justification of non-payment in the underlying case fails in its application here because a) the

⁴ Madden assignment statistics were broken down by County and case type, from 2017 to 2022 (Appendix C, Working Group). However, since the Madden exemption was not available in guardianship actions until 2021, only statistics from 2021 and 2022 are relevant here. In 2022 (in guardianship proceedings), one attorney claimed a Madden exemption and in 2021 three attorneys claimed Madden exemption; all exemptions were claimed in Cumberland/ Gloucester and Salem counties. (*Ibid*, Appendix C). Of note, the Working Group provided statistics on Madden exemptions in guardianship actions in years prior to the March 4, 2021 Notice to the Bar. In 2017 none were claimed. In 2018, seven were claimed. In 2019, one exemption was claimed and in 2020, two were claimed.

exemption was not available to the CAA and GAL at the time of assignment, b) the assignments were not identified as pro bono by Court Order; c) attorneys representing indigents are not required to expend any personal funds or out of pocket expenses in the prosecution of the cause [as noted in R. 1:13-2(b)]; and d) the appointed attorneys who accept pro bono assignments and/or who claim Madden exemptions would have to personally finance the indigent AIP's litigation if they are to be effective in their role as appointed counsel.

POINT FOUR
**AMICUS' ARGUMENT ON THE STATE'S LACK OF FUNDING
LACKS MERIT**

Petitioner seeks guidance from this Court as to the standard for when fee- shifting would be appropriate in APS cases with indigent AIPs. Not all APS guardianship cases would rise to a level which required payment of counsel fees by APS once a standard has been established (PKrb 4-6); in a given case, APS can take the necessary steps to seek funding from the Division of Aging's budget which is capable of absorbing the costs of one or two contested guardianship cases per year. Amicus' threat that ordering such payment to CAA and GAL would have a chilling effect on filing APS decision in future cases is speculative and contrary to the Legislative intent (Ab16).

The majority of Amicus' argument revolves around funding, or lack thereof, for payment of counsel fees, expert fees, or expenses of litigation in

guardianship actions. Petitioner has suggested a standard for a hearing to determine whether fee-shifting is proper once a contested matter is identified indigent AIP matters (Pkrb4-6). At such a hearing, the Court could choose an expert from a proposed list of approved independent experts or direct payment in a given case to a private expert identified by counsel. The Court can also set the hourly rate for appointed counsel from rates established for these proceedings; these would be set in a manner similar to that used for OPD Pool counsel, or the attorney may elect to receive a Madden exemption at that time.

There are adequate funds for these select cases. The NJ Legislature proposed a 6.1% increase in the Department of Health and Human services budget for 2024 (total budget: \$27.07 billion). Analysis of the New Jersey Budget Fiscal Year, 2023-2024, Department of Human Services, Page 2 (April 2023). Each of the five major divisions under the Department of Health and Human services have budgets of over \$200 million each (*Ibid*, Page 2). The Division of Aging alone has a recommended 2024 Budget of \$288.7 million (an increase of \$19.2 million - 7.1% - from the fiscal year 2023) (*Ibid*, Page 5). However, based on the figures provided in the certification of Joan Bruseo (RAa39-44) the Sussex County Division of Social Services (in 2021) only received \$85,808.00 from the Division of Aging (Sussex County's 2024 budget is not our possession at this time) evidence of a large gap between the

funding received by the County and the total funds allotted for the Division of Aging. Costs to house and care for an indigent individual subject to plenary guardianship in a State-funded residential care facility (over \$200,000.00 per year) versus the lower amount of services available if the AIP is successful and able to remain living on his/her own even under the guidance of the social workers and the Department of Disability Determination Services (estimated at \$35,000.00 per year) presents a calculus which could pay the cost of litigation and counsel fees in complex guardianship cases under the new fee-shifting standard.

CONCLUSION

Wherefore, for the reasons stated in the Petition for Certification, Reply Brief submitted January 18, 2024 and the within reply, Petitioner seeks review by this Court to reverse the decision of the Appellate Division and provide guidance on the question of fee-shifting, payment of Court appointed counsel fees, costs of litigation and to recommend or establish standards on his the lower Courts may address these questions in future cases.

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Dated: August 15, 2024