FILED, Clerk of the Supreme Court, 24 Jan 2024, **088942**, **AMENDED**

SUPREME COURT OF NEW JERSEY
Docket No. 088942

In the Matter Of, A.D., An Alleged Incapacitated Person.	:	A Petition for Certification from the November 29, 2023, Judgement of the SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-2652-21 Sat Below: Hon. Francis J. Vernoia, J.A.D. Hon. Katie A. Gummer, J.A.D. Hon. K. Walcott-Henderson, J.A.D.

AMENDED REPLY BRIEF IN SUPPORT PETITION FOR CERTIFICATION OF APPELLANT-PETITIONER, BRIAN C. LUNDQUIST, ESQ., PRO SE

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Dated: January 19, 2024

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PRELIMINARY STATEMENT

By respondent, County of Sussex Division of Social Services, Office of Adult Protective Services' (hereinafter "APS" or "Respondent") own admission, "i[t] was not until a contrary expert opinion was presented on behalf of [A.D. (hereinafter "Hank")], that [APS] was able to amend its position," and seek a "limited" guardianship in lieu of a judgment of incapacity in "all areas." (Rb16.)

Ergo, but for the undersigned court-appointed guardian *ad litem* ("GAL") having voluntarily reached into his own pocket to both retain and personally pay for a third-party expert opinion, APS would have proceeded uninterrupted with its pursuit to deprive Hank of decision-making in "all areas" despite overwhelming, objective evidence militating in favor of "limited" guardianship only. If there was any curiosity, this Court will also not be surprised to learn that the GAL's retained expert, Dr. Williams, would not accept so-called "Madden credits" as legal tender for payment in full. (Rb19.)

And yet, despite this remarkable outcome, which in no way resembles the ending sought by APS for more than a full year, Respondent remains unmoved. Rather, it continues to insist that a system that (currently) relies entirely upon the individual willingness and personal financial contributions of court-appointed counsel is more than adequate to protect the rights and liberties of vulnerable, indigent adults throughout this State.

As a consequence, it makes even more transparent that APS is motivated principally by financial self-interest, rather than by genuine consideration for the need to ensure that future, good faith contests of guardianship actions filed by "state agencies" are zealously advocated and funded. This includes, but is not limited to, cases such as the instant matter, where APS openly acknowledges it would have been content to deprive Hank of decision-making in "all areas" absent the undersigned GAL's eventual production of a self-funded, contrary medical opinion.

In effect, what APS is asking this Court to do is to add the final brick in the wall between their ability to pursue nearly any "plenary" guardianship action they like, and any attempt by court-appointed counsel to thereafter seek fees and costs against them as permitted by R. 4:86-4(e) (even where the self-financed efforts of court-appointed counsel proximately result in APS radically modifying the final relief sought).

Essentially, what APS is seeking is nearly total immunity. However, because what Respondent desires implicates prior decisions painfully in conflict; poses genuine questions of general of public importance; and profoundly impacts the interests of justice, Petitioner respectfully submits this matter is a compelling candidate for certification pursuant to R. 2:12-4.

LEGAL ARGUMENT

I. BECAUSE THIS MATTER CONCERNS CONFLICTING DECISIONS, QUESTIONS OF GENERAL PUBLIC IMPORTANCE, AND MATTERS AFFECTING THE INTERESTS OF JUSTICE, CERTIFICATION PURSUANT TO R. 2:12-4 IS WELL DESERVING.

Try as APS might to distract this Court and suggest otherwise, it cannot be credibly stated that this matter is not deserving of certification. Much to the contrary, inasmuch as this matter objectively features decisions in conflict, questions of general public importance, and matters deeply affecting the interests of justice, Petitioner respectfully submits this matter comfortably satisfies all three criteria articulated in R. 2:12-4, and certification should therefore be granted.

First, regarding decisions in conflict, if the below decision is permitted to stand, trial judges charged with reviewing future fee applications in "state agency" guardianship proceedings will be tethered by an asynchronous menu of legal standards hopelessly bickering with itself. By way of example, in future APS matters, as Respondent suggests, it might indeed be logical to first look to APS' enabling statute, N.J.S.A. 52:27D-418, as well as the Appellate Division's holding in In re Farnkopf, 363 N.J. Super. 382 (App. Div. 2003) for guidance, which both command that fees may only be awarded against APS in the presence of "conduct outside the scope of [APS'] employment, or which constitutes a crime, actual fraud, actual malice, or willful misconduct." In re Farnkopf, 363 N.J. Super. 382, 403 (App.

Div. 2003). Seems straightforward enough, so long as this theoretical trial judge is also willing to ignore the threshold fact that In re Farnkopf was decided several years before the fee-shifting exception to the "American Rule" at issue here (i.e. R. 4:86-4(e)) was adopted.

If same trial judge is willing to give themselves this substantive accommodation (i.e. ignore that Farnkopf was decided pre-R. 4:86-4(e)), then granting or denying such fee applications should be neatly accomplished following the court's determination whether "state agency" fraud, malice, or other "willful misconduct" is present. In re Farnkopf, 363 N.J. Super. 382, 403 (App. Div. 2003). If present, then a fee application can be granted. If not, then such fee applications against "state agencies" must obviously be denied.

Problem is, also lingering in the ether, which makes no mention of "willful misconduct" at all, is the Appellate Division's subsequent published decision In the Matter of the Guardianship of DiNoia, 464, N.J. Super. 562 (App. Div. 2019). Plainly put, directly contrary to Farnkopf and N.J.S.A. 52:27D-418, DiNoia affirms a trial court's grant of fees and costs against APS citing only (i) APS "protracting the litigation by not supplying the financial analysis and investigation required by R. 4:86-2(b)" and (ii) the "exceptional efforts expended" by the AIP's court-appointed attorney. DiNoia, 464 N.J. Super. at 568-69. It makes no mention of

"conduct outside the scope of [APS'] employment," "crime," "actual fraud," "actual malice," or "willful misconduct."

Additionally, a careful reading of DiNoia further reveals that the expressions "state agency misfeasance" and "extraordinary circumstances," which the trial court newly deemed here as "necessary" evidentiary preconditions for fee awards, also do not appear. Most important, DeNoia indeed affirms a grant of attorneys fees and costs against APS, specifically pursuant to R. 4:86-4(e), despite the trial court's lack of any finding of the lofty "willful misconduct," etc. requirements commanded by Farnkopf and N.J.S.A. 52:27D-418. As a further consequence, it is inexorably true that the several review standards now separately present in (i) Farnkopf, , (ii) N.J.S.A. 52:27D-418, (iii) DiNoia, and (iv) here, are prohibitively in conflict requiring certification and review by this Court.

Second, concerning questions of general public importance, due to the Appellate Division's decision below, it is now the law of this State that any good faith contest of a guardianship action filed by a state agency must be personally financed by the professional(s) appointed to represent the AIP. This includes not just attorneys fees, but also all litigation costs, as well as expert fees. As a consequence, every professional appointed to represent an AIP in a "state agency" guardianship action now knows: no matter how much time they invest, and no matter how remarkable the result, unless their "state agency" adversary participates in

affirmative "misconduct," the chances for recoupment of fees and costs are zero. And while it would be easy to attempt to reconcile this dynamic by diverting attention to our sworn oaths to the Bar and our clients to provide zealous advocacy in nearly all events, this very Court has previously acknowledged "financial pressures on unpaid counsel can affect their performance." Madden v. Township of Delran, 126 N.J. 591, 607 (1992).

Unless this Court is content to guarantee that court-appointed professionals will not be paid to champion good faith disputes of guardianship actions filed by state agencies absent affirmative "misconduct," this matter obviously also presents a question of general public importance further warranting certification and review.

Third, inasmuch as this matter verifiably presents a case where a good faith dispute of a state agency guardianship action was not only deserving, but, in fact, ultimately successful, basic notions of justice command certification and review by this Court. Again, following the filing of the underlying action, and for more than a year thereafter, APS sought to have Hank adjudged incapacitated in "all areas." It was not until the undersigned GAL retained and personally paid for a further evaluation by a board certified psychologist that APS relented in their pursuit of a "full" guardianship. As a proximate result, rather than almost immediately being placed in a residential, nursing home-style facility during the height of the COVID-19 pandemic – likely for the rest of his life – Hank has, and continues to live largely

independently out of his own one-bedroom apartment in Sussex County. As a further result, it is neither exaggeration nor hyperbole to protest that, but for the undersigned's individual willingness to personally finance Hank's defense, Hank's ongoing existence and continued ability to make day-to-day decisions would be drastically restricted.

And while the individual willingness of a single attorney here may have served as a satisfactory mechanism to protect and preserve Hank's rights to the greatest extent possible, basic notions of justice hardly favor this system as a permanent solution. It is not just likely, but, in fact, certain that there will be more vulnerable adults like Hank who find themselves subject to "plenary" guardianship actions filed by "state agencies," including APS, in the future. As a result, it is not just likely, but, in fact, also certain that the professionals appointed to represent similar AIPs in the future will also need to hire and personally pay for their own experts (possibly through trial) in their own efforts to advocate for the preservation of the rights and liberties of their vulnerable clients.

APS can continue to dangle the purported utility of Madden v. Township of Delran, 126 N.J. 591, 607 (1992), and its subsequent pro bono "exemption" progeny, all it likes as a purported "fair trade" for the significant unpaid time and expense incurred by the GAL and CAA here. (Rb19.) But the practical fact of the matter is that so-called "Madden credits" are of no use to most practitioners with their own

bills to pay, never mind the significant unpaid fees and costs (including expert fees) they stand to incur should they endeavor to wage a good faith dispute of guardianship action filed by a "state agency," ultimately in the absence of that agency's "willful misconduct," etc. in prosecuting the matter.

Basic interests of justice demand that something greater than the individual willingness and finances of a single attorney be embedded in our State's law to ensure that good faith disputes of similar "plenary" guardianship actions will be sufficiently funded and resourced. For this reason as well, this matter is a deserving candidate for certification pursuant to R. 2:12-4.

II. SUSSEX COUNTY, NOT RESPONDENT, WILL BE THE PAYOR OF ANY AWARD OF FEES AND COSTS ISSUED AGAINST APS.

Briefly, and not unlike APS' attempt to argue the same in the Appellate Division, APS once again blatantly misrepresents that "APS does not have the funds available to satisfy the fee applications of Mr. Kossup and Mr. Lundquist." (Rb7.) As was already disproven in the Appellate Division, however, at best, this once again represents a clear misstatement of fact by APS requiring correction.

As confirmed by counsel for Respondent, County of Sussex Division of Social Services, Office of Adult Protective Services, William G. Johnson, Esq.'s own billing invoices submitted to "County of Sussex" for payment during 2020 and 2021, a collection of which are annexed to co-petitioner, Steven J. Kossup, Esq.'s Appellate Division Appendix already filed herein at Pa90-158, the actual payor of

any award of fees charged "against APS" pursuant to R. 4:86-4(e) would be the County of Sussex, New Jersey, not "APS." See e.g. Kossup Pa90-92.

Accordingly, it is a clear misstatement of fact to suggest that "APS does not have the funds available to satisfy the fee applications" at issue, or, to insinuate that there exists some dollar-for-dollar correlation between any award of fees against APS and their annual operational budget. (Rb7.)

[*Remainder of page intentionally left blank*.]

CONCLUSION

For the above reasons, Petitioner asks this Court to grant the petition pursuant to R. 2:12-4 and reverse the Appellate Division's judgment.

Respectfully submitted,

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