SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3297-18
A-1309-20

IN THE MATTER OF
RUTH GORDON, an
alleged incapacitated person.

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Argued January 12, 2022 – Decided March 24, 2023

Before Judges Gilson, Gooden Brown and Gummer (Judge Gummer dissenting in part, concurring in part).

On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. 218218.

Anat Gordon, appellant, argued the cause pro se.

Yaakov Pollak argued the cause for respondent Eliezer Gordon (Burton Jacobovitch Law Group, LLC, attorneys; Yaakov Pollak, on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

These consolidated appeals arise out of the guardianship of Ruth Gordon, an incapacitated person, and attendant disputes among her adult children—her

daughter, Anat Gordon, and sons, Eliezer and Avi Gordon.[1] Although the parties do not dispute the court's finding that their mother is incapacitated, in A-3297-18, Anat, a licensed attorney representing herself, appeals from various orders culminating with the August 30, 2017 order appointing her brother, Eliezer, as Ruth's guardian, and the November 7, 2018 and November 18, 2019 orders approving Eliezer's first and second accountings, respectively, detailing the expenses associated with the guardianship. In A-1309-20, Anat appeals from the November 25, 2020 order approving Eliezer's third annual accounting.

In A-3297-18, Anat raises the following points for our consideration:

> POINT I – THE LOWER COURT ERRED IN GRANTING 'SUMMARY' DECISION IN GUARDIANSHIP HEARING SINCE THERE ARE RELEVANT DISPUTES IN FACT REGARDING RUTH'S [POWER OF ATTORNEY], DIRECTIVES AND WISHES BEFORE AND AFTER A MASSIVE STROKE SINCE THERE MUST BE A CLEAR DIRECTIVE BY RUTH TO APPOINT A GUARDIAN AS A MATTER OF LAW; THEREFORE, DISCOVERY AND PLENARY HEARING SHOULD HAVE FOLLOWED. THE STANDARD OF REVIEW ON APPEAL IS TRIAL DE NOVO; HERE SUFFICIENT DISPUTES IN THE FACTS JUSTIFY

[1] Because the parties share a common surname, we will refer to them by their first names in this opinion for clarity and ease of reference and intend no disrespect. Although Anat Gordon appears alternately in the record as Anat Gordon Applebaum, her professional name is Anat Gordon. Avi Gordon is not participating in this appeal.

REVERSAL WITH DISCOVERY AND PLENARY HEARING ON REMAND.

POINT II – THE COURT MADE PLAIN ERROR IN NOT APPOINTING A GUARDIAN AD LITEM TO ACT IN THE BEST INTERESTS OF . . . RUTH SINCE RUTH'S INCAPACITY WAS UNDISPUTED AND ONLY A GUARDIAN AD LITEM CAN GIVE RECOMMENDATIONS FOR HER BEST INTEREST.

POINT III – [THE] COURT MADE PLAIN ERROR IN NOT ACCEPTING ON A SUMMARY DECISION [ANAT'S] EXCEPTIONS TO GUARDIAN ACCOUNTING FOR THE PAST YEAR AND A HALF SINCE RENT CHARGED OF $30,000 OF THE WARD WAS CLEARLY EXCESSIVE FOR BASEMENT LIVING IN HIS HOME AND THERE WAS UNSUBSTANTIATED 'ASSISTED LIVING' CHARGED BY GUARDIAN SINCE VENDORS SUCH AS AIDES, TRANSPORTATION, MEDICAL AND FOOD WERE DISBURSED SEPARATELY FROM HER FUNDS ALTOGETHER $116,000 PER YEAR, AN EXCESSIVE AMOUNT FOR BASEMENT LIVING WITH UNLICENSED AIDE; GERIATRIC MANAGER SHOULD BE APPOINTED FOR SAFETY CONCERNS.

POINT IV – ON REMAND THE MATTER SHOULD BE ASSIGNED TO ANOTHER JUDGE SINCE THE TRIAL COURT MADE CONCLUSIONS REGARDING CREDIBILITY AND WAS NOT IMPARTIAL WITH REGARD TO THE REPRIMAND OF ONE SIDE OVER ANOTHER (NOT RAISED BELOW).

In A-1309-20, Anat raises the following single point:

> POINT I – [THE COURT] ON NOVEMBER 9, 2020 HEARING ON THE EXCEPTIONS TO THE 2019-2020 ACCOUNTING MADE PLAIN ERROR IN RELYING ON STALE AND FRAUDULENT OR FALSE STARMARK APPRAISAL WHICH WAS REQUIRED BY [THE COURT] IN THE PREVIOUS HEARINGS IN 2018 AND 2019 TO JUSTIFY AN[] ILLEGAL 'SELF-ASSISTED LIVING' SALARY OR PROFIT FOR THE SON OF THE WARD WHILE SHE WAS RESIDING IN HIS BASEMENT BEDROOM AND BATHROOM AND COMMON AREA.

Having considered the arguments and applicable law, we affirm.

I.

We glean these facts from the record. Since 2002, Ruth and her husband Isaac lived together in Lakewood, New Jersey. Eliezer and Avi also lived in Lakewood with their respective wives and children, while Anat lived with her family in Edison. In 2002, Ruth executed a General Power of Attorney (POA), which had been prepared by Ruth's long-time attorney, Abraham M. Bielory. The POA appointed Isaac as agent, Eliezer as first alternate agent, and Avi as second alternate agent.

On October 21, 2013, Ruth executed a Living Will (2013 Living Will) appointing Eliezer, and, in the alternative, Anat, as her representative for medical decisions. That same day, Ruth signed a POA appointing Anat, and, in

the alternative, Eliezer, as her agent (2013 POA). On the same date, Ruth also executed a Last Will and Testament (2013 LWT) bequeathing Anat her piano and jewelry and dividing the remainder of her estate between Anat and Eliezer. The 2013 documents were all prepared by Bielory.

In February 2014, Isaac passed away. Thereafter, on June 4, 2014, Ruth suffered a massive stroke that resulted in severe cognitive deficits, difficulty walking, and paralysis of her left arm. As a result of disputes between Anat and Eliezer regarding the appropriate rehabilitation centers and medications for their mother, on June 25, 2014, Bielory prepared a letter at Eliezer's request in an attempt to clarify the conflict between the parties designated as agents in the 2013 Living Will and the 2013 POA.

The letter stated in pertinent part:

> [I]n the Living Will, Ruth . . . specifically asked that her son be named first as he was a Rabbinical authority as to how to act in extreme situations.
>
> By way of history, [Ruth] was in my office on several occasions both with her late husband and after his demise. At the time, we discussed the Powers of Attorney, Living Will and Will. She had indicated she wanted her son, Eliezer . . . , as the person who was to take charge. This was particularly pronounced by [Ruth] as she resides in Lakewood and had been there for some period of time. It is her son, as she indicated, [who] is the basic source of succor and health care during the course of her residence in Lakewood. There

> is in fact a third sibling that she excluded for personal reasons that she had expressed to me which are beyond the purpose of this letter.
>
> This letter again is to clarify that Eliezer . . . and Anat . . . are of equal powers under both the Powers of Attorney, and Living Will. However, the reason Anat . . . was included in both documents was by [Ruth] as she did not want to have her daughter feel slighted in any way. However, again I must stress that she was clear in her expression that her son Eliezer . . . was the one in whom she had greater reliance.

After being hospitalized in an acute care hospital and rehabilitation center ultimately agreed upon by the parties for Ruth's rehabilitation following the stroke, Ruth returned to her Lakewood home on August 15, 2014, with a full-time home health aide. On March 1, 2015, Anat arranged a meeting between Michele Meiner, Esq., and Ruth at Anat's home to execute a general POA and a medical POA prepared by Meiner (the March 1, 2015 POAs). The general POA appointed Anat as Ruth's agent and Eliezer as the alternate, and the medical POA appointed Anat as Ruth's attorney-in-fact, and Eliezer and Avi as alternates. The medical POA also provided that Anat was to "serve as [Ruth's] guardian, special medical guardian, conservator, or in any similar representative capacity."

Shortly thereafter, on March 10, 2015, Ruth met with Bielory and signed a Living Will (the March 10, 2015 Living Will), prepared by Bielory, appointing

Eliezer and Avi as her medical agents to make medical decisions for her. The March 10, 2015 Living Will stated:

> I, RUTH GORDON, being of sound mind, make this statement as a directive to be followed if for any reason I become unable to participate in decisions regarding my medical care.
>
> I am a woman of the Orthodox Jewish persuasion. Accordingly, there are certain dictates by which I have lived my life and wish to conduct the treatment for any illness that I incur.
>
> I entrust all decisions to be made by my sons, ELIEZER . . . and AVI . . . to be considered and adhered to, to the greatest extent lawfully allowed as these individuals have earned and retained my complete and utter confidence in all matters inclusive of those concerning my health and well[-]being. They are also observant Orthodox Jews and they will be guided by the tenets of our religion.

That same day, Ruth signed a POA, also prepared by Bielory, appointing Eliezer as her attorney-in-fact, with Avi as her alternate (the March 10, 2015 POA). The March 10, 2015 POA is not in the record.

On March 12, 2015, Bielory wrote a letter to Anat and Meiner responding to an apparent accusation that he had "misled" Ruth in connection with "the documents she ha[d] signed." In the letter, Bielory reiterated that he had "known the Gordon family for . . . ten to fifteen years," and "ha[d] represented them" since 2002. He stated that in advising Ruth regarding the Living Will and POA,

he had been acting "in compliance with [her] direction," and had reaffirmed that "she want[ed] the documents as [he had] drafted." According to Bielory, Ruth had indicated to him "that on no occasion" had she "solicit[ed]" Meiner's services but had been "tricked" and "intimidated into signing the documents" prepared by Meiner.

Bielory further explained,

> [Ruth] has indicated that due to the fostering, care and concern displayed by her sons living in Lakewood[,] Lakewood has and continues to be her choice[.]
>
> . . . .
>
> Accordingly, I again advise you that it is [Ruth's] request that Eliezer . . . and Avi . . . be sole Powers of Attorney and agents under the terms of the Living Will. All these changes have been made at the direction of Ruth . . . who specifically states that she does not want any one, other than these two individuals, to have control. Unfortunately, that reiteration has been necessitated by Anat attempting to isolate her from family, in the day to day care, sustenance and fostering of her life in Lakewood.

In response, in a March 31, 2015 letter, Anat accused Eliezer of using Ruth's assets for Eliezer's financial benefit, demanded that Bielory stop representing Ruth, accused Bielory of ethical violations and exerting undue influence over Ruth, and requested Bielory's file.

On March 10, 2016, after a brief hospital stay, Ruth was discharged to Anat's care against medical advice. Ruth had rejected the hospital's recommendation that she be discharged to a facility with skilled nursing care. On March 21, 2016, Eliezer and Avi filed a verified complaint and order to show cause (OTSC) in the Chancery Division, General Equity Part, seeking to validate the March 10, 2015 Living Will and POA, and enjoin Anat from "attempting to exercise any power or authority under any other purported [POA]." The complaint alleged that Anat removed Ruth from the hospital "against medical advice," "deprived [Ruth] of needed medical care," and "interfered with [Eliezer's and Avi's] attempt to communicate with her."

In an affidavit opposing the OTSC, Anat certified that she had been "[her] mother's [a]gent . . . since 2013" pursuant to an "October 21, 2013 . . . [POA]," a "March 1, 2015 . . . [POA]," and a "May 4, 2015 . . . [POA]" wherein "[her] mother [had] signed an updated [POA] in the presence of a witness and a notary, which revoked all prior powers of attorney except for the one she had signed on October 21, 2013[,] and March 1, 2015." In the May 4, 2015 POA that was prepared by Meiner and submitted with Anat's opposing certification, Ruth had executed an identical document to the March 1, 2015 POA previously prepared by Meiner, including a March 2015 date line.

Anat further certified that "[t]here [was] no allegation . . . that [Ruth] lacked capacity to sign any of the aforesaid documents," or that Ruth "lack[ed] capacity to select her agents or govern herself." Anat averred that she "did receive a letter dated January 31st purporting to remove [her] as [POA]" but she "did not receive any new [POA] at that point in time" and "did not see the purported March 10th [POA] until [she] read the . . . verified complaint." Anat also indicated that Ruth "wanted to come to [her] home," and that Ruth "ha[d] not been deprived of any needed medical care."

On March 23, 2016, the return date for the OTSC, Eliezer and Avi both testified that since Ruth's discharge from the hospital, they had been denied telephonic and in-person access to Ruth. They requested authority to have their mother evaluated by an independent medical expert to assess her health. Following the hearing, the judge denied Eliezer's and Avi's emergent application for temporary restraints. The judge found that Ruth had the requisite capacity "to participate in her own health care decisions" and there had been no contrary allegation. The judge noted that if the hospital had believed that Ruth did not have the capacity to make her own medical decision, it would have sought the appointment of a guardian before discharging her against medical advice.

Further, the judge pointed out that temporary restraints were not appropriate given the "series of . . . powers of attorney as well as medical directives, which have been executed [ad] seriatim" and the dispute regarding "[t]he legal effect . . . of the[] various documents." Instead, the judge ordered "expedited discovery" to resolve the disputes. To that end, the judge allowed Eliezer and Avi "to retain medical experts at their own expense for the purpose of . . . examining [Ruth] to determine her medical well-being as well as her mental capacity." The judge also ordered Anat to give her brothers "reasonable access" to their mother, "unlimited phone contact between 9:00 in the morning and 9:00 at night," and "unrestricted physical access" "at any time, day or night."

On April 14, 2016, Eliezer and Avi amended their OTSC, seeking to restrain Anat from traveling with Ruth over the Passover holiday. After reviewing medical records submitted by the parties, the judge denied the application. The judge again found "[n]o indication" that Ruth lacked the capacity to make her own decisions and "no indication that it would be unsafe for her" to travel.

On August 22, 2016, Anat filed an OTSC. Anat's OTSC is not in the record. On August 29, 2016, the parties appeared again before the judge and agreed to a consent order (the August consent order) which provided that: (i)

Ruth would reside with Eliezer and Avi, but Anat would be permitted "unlimited [and] unrestricted reasonable access" to visit and speak with Ruth on the telephone; (ii) Anat could take her mother for visits, provided Ruth was returned "at the conclusion of such visits"; (iii) any party could arrange "at their own expense to have Ruth . . . examined to determine her mental capacity and . . . underlying medical conditions"; and (iv) the brothers were to provide to Anat "statements of any and all [of Ruth's] financial accounts . . . over which they have any custody or control," "the names, contact information [and] credentials of [Ruth's] caretakers," and "a list of [Ruth's] current medications."

Despite the August consent order, the parties continued to litigate various disputes concerning their mother. On September 30, 2016, Anat filed another OTSC seeking emergent restraints based on her claim that her brothers had violated the August consent order by refusing to give her unlimited access to Ruth to allow her to spend the religious holidays with Ruth. The judge denied the application, reiterating that the parties had provided no proof that Ruth could not make her own decisions. The judge explained that unlimited access did not require Ruth to go where she did not want to go. On October 27, 2016, the return date of the OTSC, Anat continued to argue that her brothers had violated the August consent order by, among other things, limiting her access to Ruth. After

recounting the "substantial" history in the case and emphasizing the absence of any competency evaluation, the judge ordered Anat to "make[] an appointment with a physician for the purpose of determining [Ruth's] competency." The judge also directed the brothers to refrain from participating in the visitation between Anat and Ruth, whether in person or by telephone, and precluded Anat from having any overnight visits with Ruth unless Ruth indicated otherwise.

As a result of the October 27, 2016 order, in November 2016, two doctors separately examined Ruth and opined that Ruth was mentally incompetent and unable to manage herself and her affairs based on several factors, including the cognitive deficits caused by the 2014 stroke and the results of a Folstein Mini-Mental Status examination. Relying on the doctors' opinions, Anat moved for reconsideration of the October 27, 2016 order, arguing that the medical examinations demonstrated Ruth's inability to make medical, legal, financial, or residential decisions. Anat also filed a motion to enforce litigant's rights, asserting her brothers continued to violate the October 27, 2016 order, which enforced the terms of the August consent order. By that time, Ruth was residing with Eliezer in Lakewood. The brothers opposed Anat's motions and submitted a December 15, 2016 certification prepared by Bielory attesting to the contents of his June 25, 2014 and March 12, 2015 letters. In the certification, Bielory

reiterated that Ruth preferred to live in Lakewood and wanted her sons "to be sole Powers of Attorney and agents under the terms of the [2015] Living Will."

On December 16, 2016, following oral argument, the judge denied Anat's motion for reconsideration. The judge explained that "there[was] still no application before the [p]robate court" seeking a determination of incapacity, and he could not deem Ruth "incompetent based on the[] doctors' certifications without a determination by the [probate] court." As to the enforcement motion, the brothers agreed to provide Anat with Ruth's financial records as well as the names and qualifications of Ruth's caregivers in accordance with the August consent order. Further, Anat was allowed to visit Ruth at Eliezer's home "as often as she wishe[d]" and was allowed to have "overnight visits" with Ruth "as long as . . . all parties agree[d]." In all other respects, the October 27, 2016 order "remain[ed] in full force and effect."

On December 21, 2016, Anat filed a verified complaint in the Probate Part of the Chancery Division, seeking adjudication of Ruth's incapacity and appointment as Ruth's guardian pursuant to N.J.S.A. 3B:12-24.1 and Rules 4:86-1 to -8. The complaint also sought a judgment "[r]evoking any and all Powers of Attorney signed by Ruth . . . after her [2014] stroke" and "[r]evoking any and all healthcare proxy designations executed by Ruth . . . naming Eliezer . . . [as]

her healthcare agent." In a January 3, 2017 order, the probate judge scheduled a guardianship hearing for February 14, 2017, and appointed Adam Pfeffer, Esq. to represent Ruth and make recommendations to the court at the hearing.

At the February 14, 2017 hearing, the judge was informed that neither Eliezer nor Avi had been served with the pleadings as a result of Anat's unsuccessful attempt to withdraw the guardianship complaint following her mother's recent hospitalization. The judge adjourned the hearing and requested Pfeffer to conduct a preliminary assessment and submit recommendations to the court in the interim.

In accordance with this directive, Pfeffer submitted a May 5, 2017 report stating that he had met with Ruth and the siblings; inspected Ruth's living arrangements; acquired Ruth's LWT, Living Will, and POA prepared by Bielory; and reviewed Ruth's financial records as well as the guardianship pleadings. According to Pfeffer, during his visit, "[Ruth] had an aide present who . . . [was] there 24/7." Pfeffer described Ruth's "living quarters" as a "basement apartment in Eliezer's home which included a full kitchen, living area, bedroom and bathroom," with "direct access from the basement to the outside." Pfeffer stated that "based upon [his] personal inspection, the living quarters [were] suitable."

He added that he was subsequently advised by Eliezer "that a chair lift ha[d] been installed in the home as [Ruth] is currently wheelchair bound."

Pfeffer also spoke to Bielory and obtained a copy of Bielory's December 15, 2016 certification and accompanying June 25, 2014 and March 12, 2015 letters. During their discussion, Bielory had reiterated to Pfeffer that "Ruth . . . wanted Eliezer . . . to be in charge of her general well[-]being and affairs." Additionally, Pfeffer learned that Ruth's financial holdings included her mortgage-free Lakewood home, assessed at $377,200, and bank accounts with an approximate balance of $271,000. "[B]ased upon all the proofs," Pfeffer concluded that "[Ruth] intended to have Eliezer . . . as the Guardian of her affairs" and recommended that Ruth be found incapacitated and "Eliezer . . . be appointed guardian."

In his May 5, 2017 report, Pfeffer had noted that after his initial visit to Eliezer's home, he had again visited Ruth on May 3, 2017, at Care One, a skilled nursing facility in Jackson where she had been sent after being hospitalized. Pfeffer had stated that Ruth seemed comfortable and, for continuity purposes, had been accompanied by the same aide who had assisted her in Eliezer's home. A few days later, on May 8, 2017, the parties appeared before the judge on an emergent application filed by Anat objecting to Ruth's discharge from Care One

and return to Eliezer's home. Citing safety concerns, Anat sought temporary restraints to remove Ruth from Eliezer's home and return her to Care One or another skilled nursing facility, and the appointment of a "temporary guardian" for Ruth "to evaluate the situation." After hearing oral argument, including representations by Pfeffer consistent with his May 5, 2017 report, the judge found "[no] emergent circumstances present" as required under the governing caselaw and denied Anat's application. The judge pointed out that Anat's concerns would be addressed at the guardianship hearing scheduled for the following week and asked Pfeffer to investigate the concerns in the interim.

On May 15, 2017, the parties appeared again before the judge for the guardianship hearing. Pfeffer represented that at the court's direction, he had again inspected Eliezer's home, reviewed the prior pleadings, examined Bielory's entire file, and attempted to contact Meiner. Pfeffer confirmed that "a chair-lift [had been] installed" in Eliezer's home, and stated that Ruth "had both an aide and a nurse" and "seemed to be doing well." While reviewing Bielory's entire file, Pfeffer had specifically asked Bielory about the March 10, 2015 Living Will and POA and was told that "those documents . . . were in response to [Meiner's] documents that were done while [Ruth] was at Anat['s] . . . house"

and "in [Anat's] care." Pfeffer said Bielory had insisted that it was Ruth's desire that "Eliezer should be the guardian," as reflected in the March 10, 2015 POA.

Thereafter, Pfeffer had tried to contact Meiner because she was "the only other attorney" who had prepared a POA to dispute the validity of the March 10, 2015 POA. However, despite his efforts, he could not find any current contact information for Meiner in either "the [L]awyer's [D]iary" or "the judiciary website," and was informed by Anat's attorney that Anat "had no contact information for [Meiner]." Based on his supplemental investigation, Pfeffer renewed his recommendation that "Eliezer . . . be appointed as a permanent guardian." Pfeffer added that he had also interviewed Avi, who agreed with the recommendation.

At the hearing, Anat disagreed with Pfeffer's recommendation and maintained that she should be appointed Ruth's "permanent guardian." In the alternative, she requested the appointment of an independent temporary guardian, discovery to "depose . . . Bielory or review" his file to "evaluate what [was] in [Ruth's] best interests," and a plenary hearing to "assess the credibility of . . . Bielory and all the parties before making a finding of fact." In her written submission to the judge prior to the hearing, Anat had also requested the appointment of a "guardian ad litem for Ruth."

At the conclusion of the hearing, finding "no genuine issue of material fact," the judge determined that "an adjudication of incapacity" was warranted "from a medical standpoint and otherwise." In support, the judge relied on "the two doctors' reports whose opinions remain[ed] uncontroverted." Turning to the selection of the guardian, the judge appointed Eliezer as Ruth's "permanent guardian of the person and property." To support his ruling, the judge relied on the August consent order, Ruth's wishes, Bielory's final POA, and Pfeffer's recommendation.

Regarding the August consent order, the judge explained:

> That consent order, in this [c]ourt's eyes, is relevant for a number of reasons. By inference, it indicates a preference as to residency. If there were issues raised by [Anat] as to her mother's wishes or as to her mother being compromised in terms of her safety and her residency, she clearly had the opportunity to raise any and all such issues before the [c]ourt. She did not do so. In fact, she was represented by one of her various prior attorneys and entered into a consent order thereby recognizing that [Ruth] was, indeed, residing in Lakewood with her son in accordance with her pattern, her conduct and . . . where she had elected to reside for over a decade and a half. That is one of the findings upon which this [c]ourt relies that's uncontroverted. There's no genuine issue of material fact related thereto. It's a consent order entered before the Superior Court with all parties having an opportunity to have been heard, to have retained any and all attorneys of their choosing, and if aggrieved by said order, to have had the opportunity to file any relevant appeal. No appeal

> was filed . . . . The [consent] order continues in full force and effect.

Significantly, in denying Anat's related discovery request, the judge pointed out that Anat had had the opportunity to obtain discovery during the years of litigation but instead chose to sign the consent order agreeing to Ruth's residence.

Regarding Ruth's wishes, the judge stated that Ruth had expressed her preference for the Lakewood community, "not just in words, but by her actions by continuing to elect to live in that community." He added that "[a] sense of community is especially important in terms of interaction[, i]n this case, with her two sons, both of whom also reside in Lakewood Township."

Turning to Pfeffer's report, the judge accepted Pfeffer's recommendation that Eliezer "would be appropriate to serve as [Ruth's] permanent guardian." In that regard, the judge explained that Pfeffer had communicated with Ruth, reviewed the doctors' reports, and digested "all the overall facts" and "circumstances involving her residence, . . . her desires, [and her] wishes."

Regarding Bielory's final POA, the judge elaborated:

> Additionally, the [c]ourt has before it, the [POA] prepared by . . . Mr. Bielory. . . . A true and exact copy of same was provided and attached to and incorporated in the certification of the attorney, Mr. Bielory and the [c]ourt does not need to engage in speculation as to the

> course of events, the chain of events and the manner in which they occurred previously. It suffices to say that [Ruth], herself, had a long-time relationship with Mr. Bielory. He states [the] same in his certification, and the fact that he also represented her late husband . . . is also part of a consistent pattern of representation, confidence in an attorney and interaction with that attorney.
>
> The last [POA] document . . . indicates a preference expressed by [Ruth]. Clearly, under the case law, under the statute with respect to guardians, even when an individual might be deemed to be incapacitated[,] to the best extent possible, a court must recognize and adhere to the wishes expressed by that person, as long as those wishes do not compromise or jeopardize the safety of the individual from a number of perspectives.

The judge concluded that there was no need for a temporary guardian, discovery, or a plenary hearing given the evidence in the record. However, the judge acknowledged that "some visitation component" consistent with the prior court orders was appropriate. Thus, the judge incorporated a "visitation arrangement" in the guardianship judgment that "provide[d] the opportunity for [Ruth] to have visitation if requested in an appropriate, reasonable and safe manner." The judge also required "notification . . . on a reasonable basis as to any material changes in [Ruth's] medical circumstances[,] . . . course of treatment . . . and . . . residency."

On August 30, 2017, a conforming judgment of incapacity was entered

appointing Eliezer as guardian of Ruth's person and estate, setting the bond at $318,000, and requiring the submission of "a formal accounting to the [c]ourt not later than six months after . . . appointment and . . . accountings on an annual basis thereafter." Notwithstanding the entry of the judgment, motion practice continued between the parties.

At Eliezer's request, on January 3, 2018, Samuel Levi of Starmark Appraisals provided a market analysis of the residence and services Eliezer provided to Ruth. The appraisal reported that Ruth resided in a 1,400-square-foot basement apartment in Eliezer's home. The basement apartment "include[d] a main living area, bedroom, kitchen area and a full bathroom." The "main living area" on the "[first] floor of the home" was "handicap accessible" to Ruth via a chair lift, and a room on the first floor was designated "as a daytime sleep area" for Ruth. In addition, the appraisal stated that Eliezer provided Ruth with "meals, assistance with bathing, grooming, housekeeping, dressing, personal hygiene, laundry and mobility assistance as well as social activities, with the requisite care and supervision."

The appraisal continued:

> It is clear that what [Eliezer is] providing goes well beyond the realm of just a place to live, but includes much of[,] if not most of what typically [is] included in [an] assisted living facility. As such, an

> estimate of the potential fair market rents would need to incorporate these amenities and services, and I have analyzed several assisted living facilities in the immediate area. I have considered the various similarities and dissimilarities, and it is my opinion that the living area and services provided, as compared to assisted living facilities, would have a potential rent of $2,500 per month.

On August 7, 2018, Eliezer filed a verified complaint for settlement of the first formal accounting for Ruth's expenses for the period August 30, 2017, through February 28, 2018 (the first accounting). Included in the first accounting was a fee of $2,500 per month in rent, totaling $15,000, listed in the accounting as "E. Gordon–Assisted Living." Eliezer submitted the Starmark appraisal in support. Anat filed exceptions to the first accounting, arguing among other things that Eliezer was "double billing" by charging excessive rent and also submitting separate expenses for services Ruth received.

In an order entered on November 7, 2018, a second probate judge approved the first accounting for the reasons stated on the record when the parties appeared for oral argument on November 5, 2018. In her oral opinion, after reviewing the Starmark appraisal upon which the $2,500 monthly rent was based, the judge rejected Anat's objection and found that the figure was "a fair and reasonable assessment." The judge noted that "[q]uite frankly, if this ward was in assisted living, she would be paying a whole lot more than that." The

judge was also satisfied that she was "provided with a reasonable explanation as to how th[e figure] was calculated" and denied Anat's request for further discovery. According to the judge, it was proper to include in the calculation a portion of the "utilities," "maintenance fees," "taxes," and "mortgage" payment on the home.

To support her decision, the judge also referred to Pfeffer's May 5, 2017 report prepared at the first probate judge's direction. In the report, in assessing Ruth's basement apartment as suitable, Pfeffer had explained to the court:

> [I]n Lakewood Township, finished basements are the "norm" and construction is done in a way so as to have the basement utilized just as if they were on the main floor. . . . I ask the [c]ourt to "ignore" any negative connotation that a basement residence may bring to mind as I can tell you, based upon my personal inspection, the living quarters are suitable.

On December 10, 2018, Anat moved for reconsideration of the November 7, 2018 order. In support, she provided an appraisal by Gizzi Appraisals, which assessed the rental value of Ruth's living space at $975 per month. On February 4, 2019, the judge denied the motion, again rejecting Anat's argument that the rental expense of $2,500 per month was excessive. The judge again found the figure "fair and reasonable given the explanation and the evidence that was presented," and determined that Anat had failed to meet the standard for

reconsideration. Nonetheless, substantively, the judge reviewed and rejected the Gizzi appraisal "because it did not account for the services and the amenities" Ruth enjoyed in Eliezer's home, but instead accounted only for the rental value of the space she occupied. Moreover, according to the judge, because the conclusion was formed "without even inspecting or entering the premises," the Gizzi appraisal constituted an "inadmissible net opinion."

In Eliezer's opposition to Anat's reconsideration motion, he had requested restraints and sanctions against Anat to stop her harassing litigation. Although the judge denied Eliezer's request, she noted that "the guardian's fees continue[d] to mount because of [Anat's] vexatious litigation." The judge pointed out that "[m]any of [Anat's] motions lack[ed] merit, others [were] repetitive, having already been decided by th[e c]ourt, and that's not to mention the numerous . . . motions in the Appellate Division which have been denied." The judge acknowledged that while "there[was] quite a lot of merit to [Eliezer's] application," she "hesitate[d] to grant such extraordinary relief," but warned Anat to stop her harassing behavior. The judge entered a memorializing order on February 13, 2019.

A few months later, Eliezer submitted to the court for approval an accounting for the period March 1, 2018, to February 28, 2019 (the second

accounting). In response, Anat filed the same objections the court had previously addressed and rejected as without merit. On November 18, 2019, the judge approved the second accounting, noting the "tortured history" of the case and that Anat's objections had already been "addressed in prior orders."

Thereafter, on November 9, 2020, the parties appeared before a third probate judge for approval of Eliezer's third accounting for the period March 1, 2019, to February 28, 2020. Once again, Anat filed objections, primarily disputing the $2,500 monthly rent for Ruth's care at Eliezer's home, which totaled $30,000 for the year. After reviewing the prior proceedings in the case, the judge approved the third accounting. In making her decision, the judge relied on the prior judge's finding that the rent was "fair and reasonable."

According to the third judge,

> [The prior judge] found that it was based on an appraisal that outlined . . . that it was rent for residency and assisted living services, and that was a market analysis that was performed on January 30[], 2018. . . .
>
> [The prior judge] noted at the time of that hearing that if, in fact, [Ruth] were in an assisted living facility, . . . those numbers would be exponentially higher. She also found that it was a fair and reasonable estimate, and that she had been provided a reasonable explanation for the expenses.
>
> There was a motion for reconsideration that was heard by [the prior judge] . . . that resulted in

> a[n] . . . order where she reiterated her findings, even in the face of a subsequent appraisal that was submitted by [Anat] that came in at a substantially less figure. [The prior judge] essentially rejected that market analysis. She gave clear and cogent reasons on the record.

The third judge entered a memorializing order on November 25, 2020, and these appeals followed.

II.

We begin by addressing the arguments raised in A-3297-18. Anat first challenges the appointment of Eliezer as guardian, arguing the court erred by not permitting discovery and conducting a plenary hearing. Anat asserts "the court should have allowed discovery . . . since there were no findings as a matter of law that Ruth chose Eliezer . . . as her primary caretaker."[2]

The State's authority to appoint a guardian for an incapacitated person is "derive[d] from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of an innate

[2] In line with this argument, Anat also argues the court erred in not determining Eliezer's fitness and character to be appointed guardian, citing instances of Eliezer's aggression. However, because Anat never raised this issue in any prior court proceeding, we decline to address it. "[O]ur appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available." J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)).

legal disability." In re Grady, 85 N.J. 235, 259 (1981). "[T]he [S]tate's parens patriae power supports the authority of its courts to allow decisions to be made for an incompetent that serve the incompetent's best interests, even if the person's wishes cannot be clearly established." In re Conroy, 98 N.J. 321, 364-65 (1985).

An action for guardianship of an alleged incapacitated individual is governed by statute and court rule. N.J.S.A. 3B:12-24 to -29; R. 4:86-1 to -12. A guardianship complaint should include affidavits from two physicians who examined the alleged incapacitated individual setting forth opinions as to whether the person can govern himself or herself and manage his or her affairs. R. 4:86-2(b)(2). Notice of the guardianship hearing should be given to the alleged incapacitated person, individuals named by that person in a POA or health care directive, and the person's children. R. 4:86-4(a)(2).

"If the alleged incapacitated person is not represented by counsel," the court shall appoint counsel for the alleged incapacitated person, R. 4:86-4(a)(8), to serve as "an independent legal advocate for the alleged incapacitated person." In re Guardianship of Macak, 377 N.J. Super. 167, 176 n.3 (App. Div. 2005). Appointed counsel should "interview the alleged incapacitated person," as well as people who are knowledgeable about the person's circumstances, and "make

reasonable inquiry to locate any will, powers of attorney, or health care directives previously executed." R. 4:86-4(b)(1). The appointed counsel is also required to file a report and make recommendations to the court. R. 4:86-4(b)(2).

Furthermore, Rule 4:86-6(a) provides:

> Unless a trial by jury is demanded by or on behalf of the alleged incapacitated person, or is ordered by the court, the court shall, after taking testimony in open court, determine the issue of incapacity. The court, with the consent of counsel for the alleged incapacitated person, may take the testimony of a person who has filed an affidavit or certification pursuant to [Rule] 4:86-2(b) by telephone or may dispense with oral testimony and rely on the affidavits or certifications submitted.

A finding of incapacity following a guardianship hearing must be supported "by clear and convincing evidence." S.T. v. 1515 Broad St., LLC, 241 N.J. 257, 281 (2020) (citing In re M.R., 135 N.J. 155, 169 (1994)). After determining whether a guardianship is appropriate, "the court must then appoint an individual to serve as the guardian." Id. at 282 (citing R. 4:86-6(c)). In determining who should be appointed guardian, "the court should consider the recommendations of the court-appointed attorney and the wishes of the incapacitated person, if expressed." Macak, 377 N.J. Super. at 176. If protective proceedings are commenced, the court may consider as guardian an individual

nominated by the principal as her attorney-in-fact. N.J.S.A. 46:2B-8.4(b). Moreover, any information bearing on a person's intent, including a living will, oral directives, a durable POA, or religious beliefs may aid in determining an incapacitated person's wishes. In re Hughes, 259 N.J. Super. 193, 200 (App. Div. 1992); see also Conroy, 98 N.J. at 361 (listing sources from which an incompetent adult's intent may be inferred).

Once a judge determines a person is incapacitated, the judge possesses "broad powers and maintains far-reaching discretion in guardianship appointments." In re Mason, 305 N.J. Super. 120, 128 (Ch. Div. 1997). Nevertheless, the Legislature has identified an order of preference for selection of a guardian commencing with the spouse or domestic partner and proceeding to the incapacitated person's heirs and then friends. N.J.S.A. 3B:12-25. Consideration shall also be given to surrogate decision-makers designated by the incapacitated person while able to do so. Ibid. When the "[t]he proofs before the court [are] documentary, and . . . raise[] a substantial issue of fact, a plenary hearing . . . [is] necessary." In re Est. of Baker, 297 N.J. Super. 203, 207 (App. Div. 1997).

Given a probate judge's broad powers, we review a determination made by that judge for an abuse of discretion. See In re Est. of Hope, 390 N.J. Super.

533, 541 (App. Div. 2007) ("Remedies available to courts of equity 'are broad and adaptable.'" (quoting In re Mossavi, 334 N.J. Super. 112,121 (Ch. Div. 2000))); see also Wolosoff v. CSI Liquidating Tr., 205 N.J. Super. 349, 360 (App. Div. 1985). "The exercise of . . . discretion will be interfered with by an appellate tribunal only when the action of the trial court constitutes a clear abuse of that discretion." Salitan v. Magnus, 28 N.J. 20, 26 (1958). A trial court decision will only constitute an abuse of discretion where "the 'decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" United States ex rel. U.S. Dep't of Agric. v. Scurry, 193 N.J. 492, 504 (2008) (alteration in original) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

If the court appoints a person, consistent with the statute, who has demonstrated that he or she seeks to act in the best interests of the incapacitated person, we will not disturb the guardianship appointment in the absence of the mistaken exercise of the considerable discretion vested in the judge. See In re Queiro, 374 N.J. Super. 299, 311 (App. Div. 2005) (reversing appointment of guardian despite satisfaction of statutory criteria due to application of incorrect legal standard); see also In re Quinlan, 70 N.J. 10, 53, 55 (1976) (discharging court-appointed guardian in favor of incapacitated adult's father where father's

"general suitability as guardian" presented "no valid reason to overrule the statutory intendment of preference to the next of kin"). Nonetheless, challenges to legal conclusions as well as a trial judge's interpretation of the law are subject to de novo review. Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010).

Applying these principles, we are satisfied that the first probate judge acted within his discretion in appointing Eliezer as Ruth's guardian. The guardianship proceeding comported with Rule 4:86-6(a), which permits the court to dispense with oral testimony and rely on affidavits or certifications, as occurred here, in determining incapacity. Indeed, Anat does not dispute the incapacity determination, but instead contests the appointment of Eliezer as Ruth's guardian without affording Anat the opportunity to engage in discovery or participate in a plenary hearing to resolve disputed issues. However, Ruth was represented by independent counsel, and the judge's factual findings, including those supporting his appointment of Eliezer instead of Anat, are supported by clear and convincing evidence. In short, notwithstanding the lack of discovery and summary hearing, the judgment of incapacity and Eliezer's appointment as Ruth's guardian comported with the "due process safeguards required by our court rules and statutes." S.T., 241 N.J. at 280-82.

"In general, we apply an abuse of discretion standard to decisions made by our trial courts relating to matters of discovery." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). Under that standard, "[w]e generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Ibid. (alteration in original) (quoting Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div. 2005)). As we have explained:

> The public policies underpinning our discovery rules include "expeditious handling of cases, avoiding stale evidence, and providing uniformity, predictability and security in the conduct of litigation." In furtherance of those policies, "[t]he discovery rules were designed to eliminate, as far as possible, concealment and surprise in the trial of law suits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel."
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> [Mernick v. McCutchen, 442 N.J. Super. 196, 199-200 (App. Div. 2015) (alteration in original) (first quoting Zaccardi v. Becker, 88 N.J. 245, 252 (1982); and then quoting Oliviero v. Porter Hayden Co., 241 N.J. Super. 381, 387 (App. Div. 1990)).]

Here, we see no reason to upset the first probate judge's exercise of discretion in adjudicating the guardianship complaint without allowing Anat to engage in further discovery. The focus of Anat's discovery argument appears to

be directed at obtaining Bielory's file and deposition testimony to assess the conflicting POAs executed in 2013 and 2015. However, despite extensive motion practice and multiple hearings in 2015 and 2016, including the March 23, 2016 order granting expedited discovery to resolve the parties' disputes, Anat never requested a court order for the file's production or Bielory's deposition. Instead, on August 29, 2016, she signed a consent order agreeing to Ruth residing in Eliezer's home. Although the consent order did not address Ruth's incapacity, it resolved the issue of Ruth's residency. Anat acknowledges her agreement to the execution of the consent order but asserts the consent order only addressed a temporary situation. However, nothing in the consent order signified a temporal element, particularly since Ruth had resided in Lakewood for fifteen years and considered the Lakewood community her home.

In addition to the consent order, other evidence supporting the judge's decision to appoint Eliezer as guardian included Ruth's expressed preference to live in Lakewood, Pfeffer's recommendation, and the March 10, 2015 Living Will and POA prepared by Bielory. In the March 10, 2015 Living Will, Ruth made clear her commitment to the tenets of Orthodox Judaism and her trust in Eliezer and Avi to implement her wishes. It was reasonable for the judge to rely on that evidence in appointing Eliezer to serve as Ruth's guardian instead of

Anat. See In re Chandler, 337 N.J. Super. 600, 609 (App. Div. 2001) ("[C]ourts . . . are required to respect the intention expressed by an incapacitated person prior to the onset of incapacity unless the record establishes that a different result is necessary.").

Anat contends there were "clear inconsistencies between the affidavit[] of . . . Bielory and the [2013] POA signed by Ruth before the stroke." However, the judge did not rely on the 2013 documents but instead relied on the 2015 documents to determine Ruth's wishes. Anat disputes Ruth's capacity to execute the March 10, 2015 documents prepared by Bielory, stressing that the documents were executed after Ruth's stroke. However, Anat's claim is undermined by her own 2016 affidavit attesting to Ruth's capacity to sign the March 1, 2015 documents prepared by Meiner only nine days before Ruth signed the March 10, 2015 documents prepared by Bielory. Anat's attempt to challenge Ruth's capacity to sign the latter documents is also belied by the fact that the hospital allowed Ruth to sign herself out in 2016 against medical advice.

Additionally, Pfeffer's recommendation to the court to appoint Eliezer as Ruth's guardian after conducting a thorough investigation of the facts and circumstances constitutes strong evidence supporting the judge's decision. Among other things, Pfeffer's recommendation was informed by a review of

Bielory's entire file as well as discussions with Bielory to ascertain Ruth's wishes and the chain of events leading to the execution of the 2013 and 2015 documents prepared by Bielory. Notably, Pfeffer's attempt to interview Meiner to assess the circumstances under which the March 1 and May 4, 2015 POAs were executed was stymied by his inability to obtain Meiner's current contact information even from Anat.

Anat argues that Bielory had a conflict of interest because he had represented Eliezer in other legal matters. However, Bielory never represented any party in this litigation, and even if Bielory had represented Eliezer in other matters, he was Ruth's long-time attorney and had represented both Ruth and her husband over the years. See In re Op. No. 17-2012 of Advisory Comm. on Pro. Ethics, 220 N.J. 468, 477-79 (2014). In any event, given Pfeffer's role as Ruth's independent court-appointed attorney and his recommendation to the court predicated upon a comprehensive investigation, neither further exploration nor a more fulsome hearing was required to justify the decision appointing Eliezer as Ruth's guardian.

For the first time on appeal, Anat argues Eliezer had no "standing" to be appointed guardian because he did not file a timely answer to the guardianship complaint in compliance with the court rule. Rule 4:86-5(d) provides that "any

person receiving notice of [a guardianship] hearing" who "intends to appear by an attorney . . . shall . . . file an answer" at least "ten days before the hearing." Eliezer filed an answer on May 5, 2017, and the hearing occurred ten days later on May 15, 2017. Thus, contrary to Anat's contention, Eliezer complied with the rule's requirements.

Our dissenting colleague would remand for a trial on who, between Eliezer and Anat, should be Ruth's guardian. Eliezer was appointed to be Ruth's guardian on August 30, 2017. At that time, no one disputed that Ruth was incapacitated. The year before, in August 2016, Anat had signed a consent order agreeing that Ruth should live with Eliezer and Avi in Lakewood, Ruth's hometown and chosen residence since 2002. Anat had the opportunity to conduct discovery on Eliezer's suitability to be guardian but did not avail herself of that opportunity. More critically, she could point to no evidence that it was not Ruth's longstanding choice that Eliezer should be her guardian should she become incapacitated. Instead, Anat sought to cross-examine Ruth's attorney, who had consistently averred that Ruth wanted Eliezer to be her guardian.

Anat first appealed the August 30, 2017 order appointing Eliezer as guardian almost two years after it was entered in April 2019. Moreover, Anat's appeal was only filed after the court had approved two years of annual

accounting while Eliezer was Ruth's guardian. We agree that in certain circumstances, a trial concerning the appointment of a guardian is necessary. Given the procedural history of this case, however, we cannot say that the probate judge abused his discretion in not conducting a trial. In our view, a remand for a trial would only prolong this protracted dispute among siblings and would provide no benefit to Ruth.

III.

Next, Anat argues the court erred by not appointing a guardian ad litem (GAL) to advocate for the best interests of Ruth because Pfeffer was "biased and not a neutral party."

"At any time prior to entry of judgment, where special circumstances come to the attention of the court by formal motion or otherwise," the court may appoint a GAL, "in addition to counsel, . . . to evaluate the best interests of the alleged incapacitated person." R. 4:86-4(d). For example, "[i]f there is a significant issue as to the appropriate choice of guardian, or as to the underlying issue of incapacity, the court may appoint a guardian ad litem to advise the court as to the person's best interests." Macak, 377 N.J. Super. at 176.

Our courts have discussed the difference between a court-appointed attorney and GAL as follows:

> The court-appointed attorney thus acts as an "advocate" for the interests of his client and the GAL acts as the "eyes of the court" to further the "best interests" of the alleged incompetent. Court-appointed counsel is an independent legal advocate for the alleged incompetent and takes an active part in the hearings and proceedings, while the GAL is an independent fact[-]finder and an investigator for the court. The court-appointed attorney, subject to the aforementioned concerns, thus subjectively represents the client's intentions, while the GAL objectively evaluates the best interests of the alleged incompetent.
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> [Mason, 305 N.J. Super. at 127.]

For the first time on appeal, Anat argues that the court should have appointed a GAL because Pfeffer was biased. To support her claim of bias, Anat asserts that Eliezer and Pfeffer both resided in the same small community and knew each other. However, Anat has failed to set forth any credible evidence of bias on the part of Pfeffer, see State v. Copling, 326 N.J. Super. 417, 438 (App. Div. 1999) (explaining that "friendship alone, without more, should not preclude effective representation"), and there is no evidence in the record to support the appointment of a GAL in addition to the court-appointed attorney, see In re M.F., 468 N.J. Super. 197, 213 (App. Div. 2021) (holding appointment of GAL warranted where ward's wishes were "not easily or readily ascertainable" and ward's appointed counsel and legal guardian had "sharply divergent views" as to ward's best interests). Indeed, on this record, the judge

had ample evidence to discern what was in Ruth's best interest without the appointment of a GAL.

IV.

Anat also challenges the court's approval of Eliezer's first and second accountings, primarily disputing the finding that $30,000 per year for rent was fair and reasonable. Anat reiterates that consistent with the Gizzi appraisal submitted with her reconsideration motion, Ruth's living area was only worth $975 per month.

Our "review of a judgment entered in a non-jury case regarding findings of a trial court is limited. Our courts have held that the findings upon which a non-jury judgment is based should not be disturbed unless they are so clearly insupportable as to result in their denial of justice." Est. of Ostlund v. Ostlund, 391 N.J. Super. 390, 400 (App. Div. 2007) (citing Rova Farms Resort v. Invs. Ins. Co., 65 N.J. 474, 483 (1974)). However, we review de novo the trial court's interpretation of the law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The role of a guardian of an incapacitated person's estate is largely statutory. In re Guardianship of A.D.L., 208 N.J. Super. 618, 623 (App. Div. 1986); see also In re Keri, 181 N.J. 50, 57 (2004) (explaining that under the

statutory scheme, guardians are authorized to manage the estates of incompetent persons (citing N.J.S.A. 3B:12-36 to -64)). In managing an incapacitated person's estate, a guardian may

> expend or distribute so much or all of the income or principal of his ward for the support, maintenance, education, general use and benefit of the ward . . . , in the manner, at the time or times and to the extent that the guardian, in an exercise of a reasonable discretion, deems suitable and proper.
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> [N.J.S.A. 3B:12-43.]

N.J.S.A 3B:17-2 and -3 and Rule 4:86-6(e)(3) direct the guardian of the incapacitated person to file annual financial accountings. A guardian should file a complaint for approval of the accounting, R. 4:87-1, and an interested party may file exceptions, R. 4:87-8. Under N.J.S.A. 3B:17-6, a party who raises objections "may examine the accountant, on oath, concerning the truth and fairness of the account." However, the person objecting has the burden of proof. In re Est. of Perrone, 5 N.J. 514, 521 (1950).

N.J.S.A. 3B:12-2 provides:

> The court may authorize, direct or ratify any contract, trust or other transaction relating to the . . . incapacitated person's . . . financial affairs . . . if the court determines that the transaction is in the best interests of the . . . incapacitated person . . . .

The court maintains authority over the estate of an incapacitated person, N.J.S.A. 3B:12-36, and may authorize expenditures for the support, care or benefit of an incapacitated person that are "reasonably necessary," N.J.S.A. 3B:12-45. Clearly, rent is a reasonably necessary cost of providing care for a ward.

Here, the second probate judge found it permissible for the $2,500 monthly rent to include a portion of utilities, taxes, and mortgage payments on the home as well as the value of the significant services Eliezer provided to Ruth. Even if the cost of Ruth's food was minimal as Anat suggests, the judge found that Eliezer provided services to Ruth that were comparable to the services provided in an assisted living facility, but at a much lower cost. Likewise, the judge rejected Anat's contention that the costs were not properly compensable as monthly rent because Eliezer delegated the tasks to aides and other professionals. The judge's determination is supported by competent evidence in the record and is entitled to our deference.

In making the determination that the rent was reasonable, the judge's reliance on the Starmark appraisal was entirely appropriate and we reject Anat's contention that the Gizzi appraisal should have been considered instead. First, Anat did not present the Gizzi appraisal until she had filed her motion for

reconsideration. Thus, when the judge approved Eliezer's first accounting, she was only presented with the Starmark appraisal. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (holding denial of reconsideration appropriate when the "factual predicates" of the motion were available but not raised in the initial application). Second, in denying Anat's motion for reconsideration, the judge substantively reviewed and rejected the Gizzi appraisal, finding that it did not take into consideration the amenities Eliezer was providing to Ruth.

Anat argues further that Eliezer's home should not be characterized as an assisted living facility because Section 7.15 of the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 to -26, provides standards for a residence qualifying as an assisted living facility and Eliezer did not meet those standards. Notwithstanding Eliezer's characterization of his home as a "self-assisted living" facility, we do not interpret his characterization as an attempt to qualify his home as an assisted living facility under the statute. Rather, the term was used to encapsulate the Starmark appraisal's assessment that Eliezer was providing to Ruth more than "just a place to live," but included "most of what typically [is] included in [an] assisted living facility." Accordingly, the $2,500 per month for rent incorporated those "amenities and services" as well as living space.

V.

In A-1309-20, Anat argues that the third probate judge erred in approving the third accounting because the Starmark appraisal was stale and false. According to Anat, although the Starmark appraisal was dated January 2018, the third accounting was submitted two years later. As the objector, Anat had the burden of proof in challenging the accounting. However, she presented no credible evidence to show that the $2,500 monthly rent was unreasonable, stale, or false. See Perrone, 5 N.J. at 521. Thus, we discern no basis to intervene.

To the extent any argument raised by Anat has not been explicitly addressed in this opinion, it is because either our disposition makes it unnecessary or the argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

GUMMER, J.A.D., dissenting in part and concurring in part.

Today, my colleagues affirm a judgment issued in a contested litigation in which the "trial" court denied plaintiff's request to take limited discovery, denied plaintiff's request to take testimony from a key witness, and refused to conduct a trial on the contested issues. I respectfully dissent from the affirmance of paragraph 2 of the August 30, 2017 judgment appointing a guardian. I otherwise concur.

The contested litigation at issue is a guardianship action. Although this case was not the first lawsuit filed by the parties, it is the only lawsuit filed regarding the incapacity of and appointment of a guardian for Ruth Gordon.[1] The rights involved in a guardianship case go to the heart of what makes us "free and independent" beings. N.J. Const., art. I, ¶ 1. "The right of individuals to determine their unique destiny through the decisions they make – to govern and manage their own affairs – is an implicit guarantee of the New Jersey Constitution . . . ." S.T. v. 1515 Broad St., LLC, 241 N.J. 257, 274 (2020).

The importance of the court's role in guardianship cases – determining whether a person has capacity and, if incapacitated, who shall be entrusted with

[1] Consistent with the majority opinion, I will refer to the parties by their first names.

the profound responsibility of making all life decisions on behalf of the incapacitated person – cannot be overstated. A decision in which a court fails to fulfill that role cannot stand. See, e.g., S.T., 241 N.J. at 280 (reversing a judgment, finding "[b]y abdicating the Judiciary's nondelegable oversight and factfinding function, the trial court did not proceed in the constitutional manner prescribed by both Rule 4:86-1 to -8 and N.J.S.A. 3B:12-24 to -35 for the appointment of a guardian of an alleged mentally incapacitated person.").

Rules 4:86-1 to -8 and N.J.S.A. 3B:12-24 to -35 govern actions for guardianship of an alleged incapacitated individual. S.T., 241 N.J. at 280. Those rules and statutes contain "[r]igorous procedural safeguards [to] protect the subject of a guardianship hearing because a finding of incapacity results in an individual's loss of the right of self-determination." Id. at 280-81. Those safeguards apply equally to the determination of incapacity and the appointment of a guardian because once a court determines a person is incapacitated, he or she loses the right of self-determination and the ability to make choices for himself or herself, including the right to choose a guardian.

What happened in this contested guardianship lawsuit? After plaintiff filed the complaint, the Probate Part judge assigned to the case issued an order on January 3, 2017, scheduling a hearing for February 14, 2017; appointing

attorney Adam Pfeffer as independent counsel for Ruth and directing him to conduct an investigation and submit a written report containing findings and recommendations; and directing "[a]ny next-of-kin and other party-in-interest who wishes to be heard with respect to any of the relief requested in the verified complaint" to file "a written answer, answering affidavit, or a motion."

After denying plaintiff's requests to withdraw the complaint following Ruth's recent hospitalization or, alternatively, adjourn the hearing, the judge conducted a conference on February 14, 2017, in which plaintiff's then counsel and Pfeffer participated. Plaintiff had not yet served her brothers with the complaint. Following the hearing, plaintiff's counsel served Eliezer, Avi, and their counsel with the complaint, the exhibits to the complaint, and the January 3, 2017 order. Even though the order expressly directed any interested party who wanted to be heard regarding the requested relief to file an answer, affidavit, or motion, Eliezer and Avi did not file a response in February, March, or April 2017.

On May 4, 2017, plaintiff's new counsel submitted an emergent application based on concerns about Ruth's safety and pending discharge from a Care One facility. In his letter brief to the judge, counsel stated his "understanding that no interested party ha[d] filed an answer or opposition to

[the c]omplaint and that there will not be a challenge to the doctors' reports that conclude [Ruth] to be an incapacitated individual." The next day, Eliezer's counsel filed Eliezer's certification, in which he stated Ruth had "made it clear to her attorney, Abraham M. Bielory, that she wants her son, Eliezer, as the person who was to take control"; Eliezer's answer and certification, in which he asserted he, not Anat, should be appointed Ruth's guardian; and Avi's answer and certification, in which he asked the judge to grant "full guardianship" of Ruth to Eliezer. With the submission of those May 5 documents, the guardianship action became a contested lawsuit.

On May 5, 2017, Pfeffer submitted his report, recommending the judge find Ruth incapacitated and appoint Eliezer as her guardian. Pfeffer based his recommendation in part on documents prepared by and information he had received from Bielory, the attorney referenced in Eliezer's certification. One of the documents Pfeffer considered in forming his recommendation was a December 15, 2016 certification Bielory had submitted in a prior litigation, Anat Gordon v. Eliezer and Avi Gordon, No. OCN-C-133-16. Pfeffer attached as an exhibit to his report that certification and other letters written by Bielory. In the certification, Bielory stated Ruth had indicated she wanted Eliezer "as the person who was to take control" and had included Anat in a 2013 living will and power

of attorney only so that Anat would "not feel slighted." Pfeffer conducted at least three interviews of Bielory, who, Pfeffer reported, had "reiterated" his opinion that Ruth wanted Eliezer "to be in charge of her general well being and affairs."

On May 8, 2017, the judge heard argument on plaintiff's emergent application. During argument, plaintiff's counsel expressly requested plaintiff "be allowed discovery in terms of getting Mr. Bielory's complete file," contending Bielory's assertions appeared to contradict Ruth's pre-stroke decision to designate Anat as her agent in the 2013 power of attorney Bielory had prepared and as co-executor in the 2013 last will and testament he had prepared.[2] Even though the case was now contested as a result of the May 5 submissions and even though Pfeffer had just issued his report recommending

[2] According to my colleagues, Anat "could point to no evidence that it was not Ruth's longstanding choice that Eliezer should be her guardian should she become incapacitated." Ante at 37. The 2013 power of attorney – the only power of attorney signed by Ruth before she in 2014 "suffered a massive stroke that resulted in severe cognitive deficits," ante at 5 – is evidence that Ruth may have chosen Anat as her guardian. There is no evidence that Ruth made a "longstanding choice that Eliezer should be her guardian should she become incapacitated." Ante at 37. Evidence that she may have chosen him is limited to the 2013 living will, the post-stroke documents executed in 2015, and the out-of-court statements of Eliezer, Avi, and Bielory. Given that conflicting evidence, the judge should have permitted discovery and allowed the parties to present evidence at a trial.

the judge appoint Eliezer as Ruth's guardian, the judge did not issue a case management order or discovery schedule or otherwise permit the parties to engage in discovery. Instead, he did not grant plaintiff's counsel's request for discovery, denied plaintiff's emergent application, and kept on the calendar a previously-scheduled May 15, 2017 hearing, intending to consider at that time, "whether or not a permanent guardianship [was] warranted and supported; if so, what individual, individuals or entity might be considered for the permanent guardian."

Before the May 15 hearing, plaintiff's counsel sent the judge a letter, expressing concern the judge did not "have a full record that supports the appointment of a guardian for Ruth, the requirements for her current level of care, or what decision would be in her best interests." Counsel asked the judge to enter a case management order allowing the parties to conduct discovery and scheduling a plenary hearing "[s]ince the matter did not become contested until May 5, 2017[,] when [Eliezer's counsel] entered an appearance . . . ." Counsel included in his submission plaintiff's certification. In her certification, in addition to the appointment of a temporary guardian or guardian ad litem, plaintiff asked the judge to give her an opportunity to testify at a plenary hearing and to obtain Bielory's entire file and Ruth's current medical records.

At the May 15, 2017 hearing, Pfeffer reported, among other things, that in the last week, he again had met with Bielory and had reviewed his entire file. He repeated his recommendation that the judge appoint Eliezer as Ruth's guardian. Plaintiff's counsel again asked the judge to allow the parties to conduct discovery, noting plaintiff only recently had learned the basis of Pfeffer's recommendation. Counsel pointed out the role Bielory's information had played in Pfeffer's recommendation and that plaintiff had not had the opportunity to review Bielory's file, which Pfeffer had reviewed in the prior week, or to depose Bielory. Counsel expressly requested leave to depose Bielory "[i]f the court is going to focus on documents that Abe Bielory may or may not have prepared . . . ." Plaintiff's counsel also again asked that "the matter be set down for a plenary hearing, so the court can address or assess the credibility of Mr. Bielory and all the parties before making a finding of fact." Eliezer's attorney opposed plaintiff's counsel's request regarding Bielory, contending the judge already had Bielory's December 15, 2016 certification in the OCN-C-133-16 matter and that "there would be nothing additional that [Bielory] would provide to this court . . . ."

Given the undisputed medical reports and positions of the parties on the issue of Ruth's capacity, the judge held Ruth was incapacitated. Even though

the parties disputed who should be appointed as Ruth's guardian, the judge decided that issue as well, without allowing the parties to take limited discovery on that contested issue, present testimony and other evidence at a trial, or test the credibility of witnesses through cross-examination. See State v. Basil, 202 N.J. 570, 591 (2010) (finding "[o]ur legal system has long recognized that cross-examination is the 'greatest legal engine ever invented for the discovery of truth'" (quoting California v. Green, 399 U.S. 149, 158 (1970))); State v. Fort, 101 N.J. 123, 131 (1985) (finding a "trial, although inevitably an adversarial proceeding, is above all else a search for truth").

In yet another procedural anomaly, the judgment was issued on August 30, 2017, more than three months after the decision was placed on the record on May 15, 2017. The Probate Part judge who signed the judgment was not the Probate Part judge who had rendered the decision on the record on May 15, 2017. The judgment gives no indication as to why the judge who rendered the decision did not sign the judgment or what, if anything, the new judge had reviewed or decided in issuing the judgment.

In rendering his decision and in denying plaintiff the right to take discovery and present testimony at a plenary hearing, the first Probate Part judge relied extensively on Bielory's documents, including his certification, and on the

prior lawsuits between the parties. He characterized this guardianship lawsuit as "a redo" of those lawsuits and questioned "[w]hy should we reopen a matter which has already been decided?" But those prior lawsuits weren't actions seeking to declare Ruth incapacitated and appoint a guardian for her, and none of them resulted in a judgment about Ruth's incapacity or the appointment of a guardian.

In their March 21, 2016 complaint, Eliezer and Avi sought to validate a March 10, 2015 living will and power of attorney and enjoin Anat from acting under any other power of attorney. On June 3, 2016, Anat filed a verified complaint against Eliezer and Avi, alleging, among other things, defendants had wrongfully converted Ruth's assets for their own purposes, and seeking a judgment vacating Ruth's prior powers of attorney and setting aside the transfer of Ruth's funds to defendants.[3] No one sought in those lawsuits a declaration that Ruth was incapacitated or the appointment of a guardian. And a concession about residency is not the same thing as a decision about a guardianship. Moreover, Ruth was not a party in any of those lawsuits and was not in any way represented in them. Even if the judge found that Anat was somehow bound by

[3] Anat filed that complaint in Middlesex County, where it was assigned Docket No. MID-C-82-16. A Middlesex County judge issued an order transferring the case to Ocean County, where it was assigned Docket No. OCN-C-133-16.

orders issued in those cases, Ruth, who was not a party to those lawsuits, could not be bound by them.

Perhaps if the discovery and testimony plaintiff sought was inconsequential, the lack of discovery or trial would be of no substantive import. But plaintiff sought discovery of and testimony from Bielory, a critical witness whose documents and out-of-court statements Pfeffer relied on in his report and recommendations and the judge relied on in his decision to appoint Eliezer as Ruth's guardian. In this contested lawsuit, plaintiff was deprived of the right to obtain documents from him, depose him, and cross-examine him at trial.

Maybe Eliezer is the right person to be entrusted with the responsibility of being Ruth's guardian. But that issue was contested, and the decision to appoint him as guardian should not have been reached in a process missing critical "procedural safeguards [designed to] protect the subject of a guardianship hearing" and our justice system's essential tools in the search for truth. S.T., 241 N.J. at 280-281. As our Supreme Court found in S.T., the issue is not whether there was sufficient evidence to support the decision; "[t]he issue is that the trial court failed to conduct the hearing . . . with the due process safeguards required by our court rules and statutes." Id. at 282. How could a decision reached without discovery and without a trial comport with those due

process safeguards? Certainly, Anat, and perhaps more importantly Ruth, was entitled to an actual trial on the issue of Ruth's guardianship.

For these reasons, I respectfully dissent from the affirmance of paragraph 2 of the August 30, 2017 judgment appointing Eliezer as Ruth's guardian. I otherwise concur.