SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002734-22

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CIVIL ACTION

In the Matter of Peter D. Brumlik,

An Alleged Incapacitated Person

ON APPEAL FROM
SUPERIOR COURT, PROBATE DIVISION
SOMERSET COUNTY

- -

Hon. Margaret Goodzeit, PJ sat below

AMICI CURIAE BRIEF
of Spectrum Institute, Easterseals New Jersey, The Arc of New Jersey, American Academy of Developmental Medicine and Dentistry, Quality Trust for Individuals with Disabilities, Inc., Mental Health Advocacy Services, New Jersey State Office of the Public Defender, Autistic Self Advocacy Network, Center for Estate Administration Reform, and the Alternatives to Guardianship Project, in support of Appellant Peter D. Brumlik

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Ed. Note: Throughout this brief, terms that may be considered pejorative have been reluctantly used. The caption of the case, for example, refers to Peter Brumlik as "An Alleged Incapacitated Person." It would be preferable for captions to label someone subject to a guardianship complaint as a "defendant" much like a person is called a "defendant" in a criminal case rather than "an alleged criminal." The person alleged to be incapacitated could also be called a "respondent," a term used in civil cases or appeals. Referring to an adult who has been declared incapacitated as "an incompetent" should be discontinued. Matter of M.R., 135 N.J. 155, 175 (N.J. 1994). Some states more respectfully refer to a person declared incapacitated as a "protected person." In re Guardianship of Lefever, 453 P.3d 393 (Nev. 2019); Chavis v. Patton, 683 N.E.2d 253, 256 (Ind. Ct. App. 1997) Also see: "Disability Terminology: The Supreme Court Sets the Tone" (Daily Journal 2020) https://www.dailyjournal.com/articles/360915-disability-terminology-the-california-supreme-court-sets-the-tone

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Statement of the Case

Peter Brumlik is an intelligent and articulate 20-year old with hopes and dreams for a successful future. Peter is now attending college. Like many young adults his age, he knows what he likes and dislikes and who he wants to spend time with. He is happy living with his father. He fears his mother and says that he has been abused by her.

Soon after Peter moved out of his mother's house just before turning 18, she filed a complaint in the Superior Court, claiming that Peter was fully incapacitated and needed a plenary guardian. Peter denied the allegations and demanded jury trial. He developed a strong defense, executing a supported decision-making (SDM) agreement and powers of attorney (POAs) for health care and finances. He lined up an array of a dozen witnesses to testify at trial to affirm his capacity.

Shortly before trial, Peter's mother withdrew the complaint and sought an unconditional dismissal. Peter agreed. The guardian ad litem did not oppose it.

This appeal challenges conditions of dismissal imposed by the court, *sua sponte*, restricting Peter's rights despite the lack of any valid finding of incapacity.

Amici Curiae otherwise adopts the statement of facts and procedure stated in Appellant's Opening Brief.

ARGUMENT

I

The Conditions of Dismissal Violate Peter's Right of Self-Determination

Despite having a developmental disability, when Peter turned 18, he was presumed to have the capacity to make decisions regarding his life. N.J.A.C. § 10:43-3.3(b); N .J. Stat. § 30:4-24.2(c). Incapacity must be shown by clear and convincing evidence – something sorely lacking in this case. Matter of M.R., 135 N.J. 155, 169-171 (N.J. 1994).

Peter's basic civil and contractual rights include "the right to contract, sue, be sued and defend civil actions, apply for and be appointed to public employment, apply for and be granted a license or authority to engage in a business or profession subject to State regulation, serve on juries, marry, adopt children, . . . consent to medical and surgical treatment, execute a will, and to inherit, purchase, mortgage or otherwise encumber and convey real and personal property." N.J. Stat. § 9:17B-1(a) In other words, when he turned 18, Peter enjoyed all of the rights associated with adulthood. Sometimes this collection of rights is referred to as the right of self-determination.

Self-determination is universally acknowledged as a fundamental right. The Covenant on Civil and Political Rights, a treaty ratified by the United States, calls on

members of the United Nations to create conditions that will enable all individuals to enjoy their civil, political, economic, and social rights. While the treaty does not mention people with developmental disabilities, it states that all people have the right of self-determination, including freedom of association and the right of privacy. In re Mark C.H., 28 Misc. 3d 765, 784, fn. 47 (N.Y. Misc. 2010)

Public policy in New Jersey, as evidenced by legislative enactments and judicial decisions, clarifies that the right of self-determination applies to adults with developmental disabilities.

"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, which provides that '[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.' N..J. Const. art. I, ¶ 1." S.T. v. 1515 Broad St., LLC, 241 N.J. 257, 274-75 (N.J. 2020)

"There is a right of personal autonomy and self-determination with respect to an individual's control of his or her own body and destiny. " Procaine by Procaine v. Cillo, 97 N.J. 339, 364 (N.J. 1984) The "right of self determination is a fundamental right, id. at 166, and as such, the burden of proof must fall upon the challenger of that right,"

I/M/O Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital, 331 N.J. Super. 31, 38 (N.J. Super. 2000) "Our endeavor is to respect everyone's right of self-determination, including the right of the developmentally disabled." Matter of M.A., 135 N.J. 155, 178 (N.J. 1994) "The clear public policy of this State . . . is to respect the right of self-determination of all people, including the developmentally disabled." Ibid, at p. 166.

The Legislature has declared that adults with developmental disabilities have a right of self-determination. "Adults with disabilities should be afforded the opportunity to make decisions for themselves, live in typical homes and communities and exercise their full rights as citizens." N.J. Stat. § 30:6D-34 "New Jersey citizens with disabilities want the same things in life as the other residents of this State: to be productive citizens who contribute to the communities in which they live, to be good family members and good neighbors, and to work hard at jobs that provide satisfaction and independence. These individuals deserve the recognition and support of State, county and local governments to protect their rights and to reach their full potential." The Legislature has also declared: "Disability is a natural part of the human experience that does not diminish the right of individuals with developmental disabilities to live independently, [and] exert control and choice over their own lives . . ." N.J. Stat § 30:1AA-1.1.

The right of self-determination for people with developmental disabilities has also been affirmed by Congress as a matter of national policy. In 1975, Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act, P.L. 94-103, 89 Stat. 486. 42 U.S.C. §§ 15001 to 15009 (2007) (mandating protection of civil rights of persons with developmental disabilities and providing funding to achieve that goal). Congress found that: "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society" and "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101.

To obtain federal funding, New Jersey enacted its own Developmentally Disabled Rights Act (DDRA) in 1977. N.J. Stat. § 30:6D 1 to 12. Furthermore, the judicial branch of New Jersey receives federal funding which obligates it to conform to the mandates of the Rehabilitation Act of 1974 in the delivery of services. The administration of justice is a service of the judicial branch.

It is the policy of the United States that all programs, projects, and activities receiving federal funding shall be carried out in a manner consistent with the principles of "respect for individual dignity, personal responsibility, self-determination" and the "respect for privacy" of the individuals. 29 U.S.C. § 701(c)

The conditions of dismissal imposed on Peter by the court below trampled on his right of self-determination as guaranteed by federal and state laws. While mental incapacity may be an exception to the right of self-determination, such an exception does not apply in this case. This right may yield to the *parens patriae* power of the state to protect those who cannot protect themselves, i.e, children and incapacitated adults. However, Peter is not a child. Furthermore, he was not legitimately found to be incapacitated. His demand for a jury trial on this issue was not honored. The record below is devoid of any admissible evidence of incapacity. Peter's due process right to an evidentiary hearing on the issue of incapacity was not respected. The lower court's rationale for imposing restrictive conditions on Peter as a prerequisite to dismissing the case refers to matters that are grounded solely in allegations, untested opinions, and subjective judicial "concerns" about his mental health.

That Peter was diagnosed with a developmental disability or that he was treated for a mental condition did not negate the presumption of his mental capacity. N.J. Stat. § 30:4-24.2(c); In re Weeks, 29 N.J. Super. 533, 543 (N.J. Super. 1954). The record lacks clear and convincing evidence, much less any admissible evidence, that Peter was mentally incapacitated. As a result, the presumption of his mental capacity remains intact. Matter of Will of Libel, 260 N.J. Super. 519, 524 (App. Div. 1992); In re Estate of Hoover, 21 N.J.Super. 323, 325 (App. Div. 1952).

The court misunderstood the limits of its *parens patriae* authority when it imposed the liberty-infringing conditions of dismissal. The doctrine of *parens patriae* relates to the jurisdiction of the chancery courts relating to the welfare of "children and incompetents." Franklin v. Dept. of Human Serv., 225 N.J. Super. 504, 528 fn. 13 (N.J. Super. 1988); Matter of Conroy, 98 N.J. 321, 364-65 (N.J. 1985). Peter is neither. "The state's parens patriae power supports the authority of its courts to allow decisions to be made for an incompetent." Ibid.

Once a judge determines a person is incapacitated, the court possesses broad powers in a guardianship proceeding. In re Mason, 305 N.J.Super. 120, 128 (Ch. Div. 1997). But a determination of capacity was never made in this case. Furthermore, the court did not follow the statutes and rules governing the determination of incapacity. N.J. Stat. § 3B:12-24; Rule 4:86-6(a). Once Peter demanded a jury trial, a determination of incapacity could no longer be made by the judge alone. However, even if it could, the court did not conduct an evidentiary hearing as required by law. Ibid. Neither Peter nor his attorney waived the right to an evidentiary hearing, nor did they consent to the issue of incapacity being determined solely on affidavits or certifications.

Finally, the *parens patriae* authority of the court must be exercised in a manner that is consistent with procedural and substantive due process. Matter of D.C, 146 N.J.

31, 49 (N.J. 1996); In re Commitment of J.M.B, 197 N.J. 563, 598 (N.J. 2009). That did not occur here. As a result, Peter retained his right of self-determination, thereby rendering the conditions of dismissal invalid.

While the right of self-determination is not absolute, it may not be restricted without due process of law. Matter of D.C, 146 N.J. 31, 49 (N.J. 1996).

II

The Conditions of Dismissal Violate Peter's Medical Rights

The court ordered Peter to attend mental health therapy for two years. It also designated the guardian ad litem as Peter's "personal representative" under the federal Health Insurance Portability and Accountability Act, also known as HIPAA. These orders are an invalid infringement on Peter's medical rights – decisional, informational, constitutional, and statutory – under state and federal law.

Medical Decisions

As someone over 18 years of age, Peter has the statutorily declared right to make his own medical decisions. N.J. Stat. § 9:17B-1(a) He also has a "general Fourteenth Amendment liberty interest in medical self-determination, including the right to refuse unwanted medical care." Hart v. City of Jersey City, 308 N.J. Super. 487, 494-95 (N.J. Super. 1998). In addition, the right to accept or decline medical treatment is also

"embraced within the common-law right to self-determination." Matter of Conroy, 98 N.J. 321, 348 (N.J. 1985)

"The patient's ability to control his bodily integrity through informed consent is significant only when one recognizes that this right also encompasses a right to informed refusal. . . . Thus, a competent adult person generally has the right to decline to have any medical treatment initiated or continued." Matter of Conroy, 98 N.J. 321, 347 (N.J. 1985). Peter is presumed to be competent. The record has no competent and reliable evidence to the contrary.

By issuing orders that infringed on Peter's medical rights, the court below failed to remember that it is a "constant goal" of New Jersey courts to ensure that the medical preferences of patients are respected. Hall v. Rodricks, 340 N.J. Super. 264, 273 (N.J. Super. 2001). The fact that Peter has a developmental disability does not diminish his right to make medical decisions. "Persons with developmental disabilities, as any other citizen, have the right to . . . refuse medical treatment." N.J.A.C. § 10:48B-1.1(a)(1)(I).

The Legislature has acknowledged a "constitutionally-protected right to refuse treatment." NJ Stat § 26:2H-67(c); See also: N.J. Stat. § 26:2H-137(a).

Whether Peter continued to see his treating psychiatrist for mental health therapy should have been his choice, not a requirement imposed by court order. By taking that

choice away from him, the court ignored substantive law. It also ignored procedural requirements necessary to place restrictions on medical decision-making rights.

The Legislature has established procedures whereby a doctor can determine whether a patient with a developmental disability lacks the capacity to make a particular health care decision. N.J. Stat. § 26:2H-60(c) That procedure was not used in this case. No medical professional determined that Peter currently lacked the capacity to choose or decline mental health therapy.

Furthermore, the court ordered Peter into therapy without adhering to Rule 4:86-12. There are four criteria that must be satisfied before a court orders medical treatment without a patient's consent, only one of which (#2) was satisfied here: (1) Evidence and a finding by the court that the patient is incapacitated, unconscious, underage, or otherwise unable to consent to medical treatment. (2) There is no guardian. (3) Evidence and a finding by the court that prompt medical treatment is necessary to deal with a substantial threat to the patient's life of health. (4) Evidence that the patient has not designated a health care representative.

Medical Privacy

As an adult who was not declared to lack capacity to make medical decisions, Peter has a reasonable expectation of privacy in the content of his therapy sessions and

records. "Patients have a privacy right in their medical records and medical information." Smith v. Datl, 451 N.J. Super. 82, 99 (N.J. Super. 2017)

"Patients need to be able to trust that physicians will protect information shared in confidence. They should feel free to fully disclose sensitive personal information to enable their physician to most effectively provide needed services. Physicians in turn have an ethical obligation to preserve the confidentiality of information gathered in association with the care of the patient." American Medical Association Code of Medical Ethics, Section 3.2.1.

Mental health records are privileged. N.J. Stat. § 45:14B-28; N.J.R.E. § 505 (psychologist-patient privilege); N.J.R.E. § 506 (physician-patient and psychiatrist-patient privilege). Kinsella v. Kinsella, 150 N.J. 276, 297 (N.J. 1997). "'Confidential communications' means such information transmitted between a mental-health service provider and patient in the course of treatment. . ." N.J.R.E. § 534.

Peter had a constitutionally-based right of privacy, protecting him from the disclosure of personal information. Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 96 (N.J. 1992). The court below violated that right by conferring authority on the guardian ad litem to gain access to and to disclose to third parties information pertaining to Peter's therapy sessions with his psychiatrist – all without making any

legitimate finding that Peter lacked the capacity to make decisions regarding medical treatment or decisions regarding the disclosure of medical information.

"Grounded in the Fourteenth Amendment's concept of personal liberty, the right of privacy safeguards at least two different kinds of interests: 'the individual interest in avoiding disclosure of personal matters,' and 'the interest in independence in making certain kinds of important decisions.' *Whalen v. Roe*, 429 U.S. 589, 598 n. 23, 599-600, 97 S.Ct. 869, 876 and n. 23, 51 L.Ed.2d 64, 73 and n. 23 (1977). Those interests have been characterized as the 'confidentiality' and 'autonomy' strands of the right of privacy. *Shields v. Burge*, 874 F.2d 1201, 1209 (7th Cir. 1989). The right to confidentiality encompasses two strands: 'the right to be free from the government disclosing private facts about its citizens and from the government inquiring into matters in which it does not have a legitimate and proper concern.'" John Doe v. Poritz, 142 N.J. 1, 77-78 (N.J. 1995).

The conditions imposed by the court in the instant case violated both dimensions of the constitutional right of privacy: Peter's right to accept or decline therapy, and his right to control the disclosure of information and records related to his therapy sessions. As discussed below, these infringements occurred without any evidentiary showing of a compelling *state* interest.

Furthermore, the order of the court below is contrary to a strong tradition in New Jersey of protecting medical privacy. “The privilege imposes an obligation on the physician to maintain the confidentiality of a patient's communications. Stempler v. Speidell, 100 N.J. 368 , 495 A.2d 857 (1985). This obligation of confidentiality applies to patient records and information and applies not only to physicians but to hospitals as well. . . This duty of confidentiality has been the subject of legislative codification which reflects the public policy of this State. N.J.S.A. 2A:84A-22.1et seq. The patient must be able ‘to secure medical services without fear of betrayal and unwarranted embarrassing and detrimental disclosure. . . .’ Piller v. Kovarsky, 194 N.J. Super. 392 , 396, 476 A.2d 1279 (Law Div. 1984). The privacy right on which the privilege is based has been held to a level warranting constitutional protection. . . .” Estate of Behringer v. Medical Center, 249 N.J. Super. 597, 632 (N.J. Super. Law Div. 1991).

There court had no evidentiary basis to intrude on Peter’s right to decide whether, and to whom, to release information or records regarding his mental health therapy sessions. As discussed below, the release of this information to the guardian ad litem, who was given authority to release it to Peter’s mother, is particularly troubling since Peter has alleged that she abused him in various ways as a child. As a result of this order, Peter may decline to share thoughts and feelings about the alleged

abuse, and any resulting trauma he is experiencing, knowing that the content of therapy sessions may be disclosed by the GAL with Peter's mother.

HIPAA Violation

The court's order designating the guardian ad litem as Peter's "personal representative" under HIPAA is invalid. The order does not comply with the requirements of federal law.

While the court purported to designate the GAL as Peter's "personal representative" for purposes of federal statutes governing medical confidentiality, the court failed to make the factual findings necessary for such a designation. Absent Peter's consent, federal law allows only a surrogate duly appointed under state law for medical decision-making to have access to a patient's medical records as a "personal representative."

The court never made a valid finding that Peter lacked capacity to make medical decisions. The court never authorized the GAL to make medical decisions for Peter as a surrogate. Further, New Jersey law does not allow a GAL to engage in th functions of a guardian. N.J. Stat. § 3B:1-1 As a result, the GAL is not authorized to obtain confidential medical information and records as Peter's "personal representative" under federal law.

In 1996, Congress created federal medical privacy protections by enacting The Health Insurance Portability and Accountability Act ("HIPAA"), Pub.L. No. 104-191, 110 Stat. 1936 (1996). HIPAA requires healthcare providers covered by the law to provide safeguards for protecting the confidentiality of patient information. The regulations that implement this law are known as the HIPAA Privacy Rule.

HIPAA essentially implements the ethical obligations that medical doctors have to protect patient confidentiality. AMA Code of Medical Ethics, § 3.2.1 The preamble to confidentiality section of the Code of Ethics recognizes: "Patients need to be able to trust that physicians will protect information shared in confidence. They should feel free to fully disclose sensitive personal information to enable their physician to most effectively provide needed services. . . In general, patients are entitled to decide whether and to whom their personal health information is disclosed."

The rules regarding disclosure of patient information to a "personal representative" are found in federal regulations. "Health Information Policy: Personal Representatives," 45 C.F.R. 164.502(g) The regulation states:

> "Under the Rule, a person authorized (under State or other applicable law, e.g., tribal or military law) to act on behalf of the individual in making health care related decisions is the individual's 'personal representative.'"

> "In general, the scope of the personal representative's authority to act for the individual under the Privacy Rule derives from his or her authority under applicable law to make health care decisions for the individual. Where the person has broad authority to act on the behalf of a living individual in making decisions related to health care, such as is usually the case with a parent with respect to a minor child or a legal guardian of a mentally incompetent adult, the covered entity must treat the personal representative as the individual for all purposes under the Rule, unless an exception applies. . . "
>
> "Where the authority to act for the individual is limited or specific to particular health care decisions, the personal representative is to be treated as the individual only with respect to protected health information that is relevant to the representation."

In Peter's case, the GAL is not the legal guardian of an incapacitated adult. Peter retains the presumption of capacity. No judicial finding was made that he lacked medical decision-making capacity. No guardian was appointed. Furthermore, the GAL was not given broad or even limited authority to make health care decisions for Peter. As a result, the GAL is not entitled under HIPAA to have access to records related to Peter's psychiatric treatment without Peter's consent.

Any release of records or information by Peter's psychiatrist would violate HIPAA. Any attempt to access such information by the GAL would be unauthorized.

To the extent that the court order attempts to circumvent the privacy protections of HIPAA, it is invalid because HIPAA preempts state laws to the contrary.

The doctrine of preemption arises from the Supremacy Clause of the U.S. Constitution. See U.S. Const. art. VI, cl. 2; Allis-Chambers Corp. v. Lueck, 471 U.S. 202, 208 (1985). "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent." Allis-Chambers, supra, at p. 208 (internal quotation marks omitted).

In HIPAA, Congress expressly provided for preemption of inconsistent state medical privacy laws except when those laws are more stringent than the standards that HIPAA gives HHS the authority to promulgate. HIPAA § 264(c)(2), 110 Stat. 1936, 2033-2034. National Abortion Federation v. Ashcroft (S.D.N.Y., Mar. 18, 2004, 03 Civ. 8695 (RCC)) [pp. 7-8]

"HIPAA expressly provides for its interaction with conflicting state laws concerning patient privacy. Crenshaw v. MONY Life Ins. Co., 318 F.Supp.2d 1015, 1028 (S.D.Cal.2004). The general rule, as reflected by the regulations, is that HIPAA preempts any 'contrary' state law. 45 C.F.R. § 160.203. The regulations define a 'state law' to 'mean a constitution, statute, regulation, rule, common law, or other State

action having the force and effect of law.' 45 C.F.R. § 160.202. State laws are contrary to HIPAA if: (1) it would be impossible for the health care provider to comply simultaneously with HIPAA and the state directive; or (2) the state provision stands as an obstacle to the accomplishment of the full objectives of HIPAA. 45 C.F.R. § 160.202(1), (2)." Wade v. Vabnick-Wener, 922 F. Supp. 2d 679, 686 (W.D. Tenn. 2010)

The GAL is not a surrogate health care decision-maker for Peter. There is no valid order finding Peter incapacitated to make medical decisions. The court did not give the GAL such authority, nor could it in view of a statute precluding a GAL from acting as guardian. The court did not follow the statutory procedures to appoint a special guardian to make medical decisions. Peter has not voluntarily consented to the GAL acting as his personal representative under HIPAA.

Thus, the order purporting to designate the GAL as Peter's personal representative is an obstacle to the accomplishment of the full objectives of HIPAA. Peter's therapist, being a licensed psychiatrist, is bound not only by medical ethics to respect Peter's medical confidentiality, he cannot comply with the court's order to release information to the GAL and also comply with HIPAA.

III

The Conditions of Dismissal Violate Peter's Fundamental Rights Without a Compelling State Interest

Conditions of dismissal imposing restrictions on Peter's life – infringements on his freedom of speech, freedom of association, and autonomy in making medical decisions – are serious deprivations of his liberty. Doing this without a finding of incapacity after a jury trial, as was demanded, violates Peter's fundamental rights without a compelling *state* interest.

The conditions require Peter to: meet with a therapist for the next two years; to meet with the GAL every six months and to answer his questions regarding school, work, medical issues, and his social life. Not only does this order violate his right to informational privacy, it violates his freedom of speech, freedom of association, and his personal autonomy. By treating him like a child or a person lacking mental capacity, it infringes on his dignity and personhood.

The First Amendment, which applies to the states via the Fourteenth Amendment, protects "freedom of association and the corollary right not to associate" as well as "freedom of speech and the corollary right not to speak." Wilkins v. Daniels, 744 F.3d 409, 414 (6th Cir. 2014); Corbie, "The First Amendment Rights Against Compelled Listening," 89 Boston U. Law Rev. 939 (2009)

The Supreme Court of New Jersey has affirmed the right of adults with developmental disabilities, including those who have been declared to be incapacitated, to make important life decisions, absent clear and convincing evidence that capacity is lacking on the specific issue in question. In re M.R., 135 N.J. 155, 169-170 (1994) The court cautioned about the need to show enhanced respect for the autonomy of adults with developmental disabilities. The order of dismissal in the instant case did just the opposite. It trampled on Peter's freedom of speech and freedom of association – requiring him to meet and cooperate with the GAL and submit to an interrogation by him – as though he was a minor child.

Fundamental rights, such as freedom of speech and freedom of association, are not absolute. They can be restricted if a compelling *state* interest requires it. In this case, the interest being served, above all others, is the private interest of Peter's mother.

"When the State attempts to regulate a fundamental right or suspect class, it must establish that a compelling state interest supports the classification and that no less restrictive alternative is available." Sojourner v. N.J.D.H.S. 350 N.J. Super. 152, 163-64 (N.J. Super. 2002) ; affirmed Sojourner A. v. N.J.D.H. 177 N.J. 318, 324 (N.J. 2003)

The compelling state interest test is also used for purposes of analyzing infringements on fundamental rights under the New Jersey Constitution. Worden et al. v. Mercer Cty. Bd. of Elections, 61 N.J. 325, 346 (N.J. 1972)

Where an important personal right is affected by governmental action, the New Jersey Supreme Court requires a government entity to demonstrate a greater "public need" than is traditionally required in construing the federal constitution. Taxpayers Ass'n v. Weymouth Township, 80 N.J. 6, 43 (N.J. 1976).

Here, there was no evidence of any compelling *state* interest. There was no evidence that Peter suffered from a mental illness that posed any imminent threat to the public. If such had been shown, a petition would have been filed under the state's Mental Health Law.

Under that statutory scheme, "'[d]angerous to others or property' means that by reason of mental illness there is a substantial likelihood that the person will inflict serious bodily harm upon another person or cause serious property damage within the reasonably foreseeable future."

There was no hearing on whether Peter had a mental illness that posed an imminent threat of danger. The GAL stated that, in his opinion, Peter did not pose such a threat. (Respondent-Appellant's Appendix (hereinafter referred to as "Ra") at pp. 129-137; 143-146)

The conditions of dismissal seem specifically tailored to serve the private interests of Peter's mother who had withdrawn her petition but nonetheless expressed concerns for her son. (Ra, pp. 138-140) Since Peter refused to meet with his mother and the mother had no contact with him for over two years, the conditions of Peter meeting with the GAL and the therapist for two years – with semi-annual reports being sent to the mother – seem designed to satisfy the mother's frustration about having no current information about the details of her son's life. The fact that the court modified the order to delete the requirement of the GAL sending reports to the court underscores that it is private interests, not governmental, that are being served by these conditions. (Ra, p. 151)

IV

The Conditions of Dismissal Constitute Disability Discrimination

Discrimination on the basis of disability is against public policy in New Jersey. Lasky v. Borough of Hightstown, 426 N.J. Super. 68, 71 (N.J. Super. 2012). Disability discrimination not only harms an individual victim, it harms the state. "[B]ecause of discrimination, people suffer personal hardships, and the State suffers a grievous harm." N.J. Stat. § 10:5-3 (2022)

The Law Against Discrimination (LAD) applies to public entities. Thomas v. County of Camden, 386 N.J. Super. 582 (App. Div. 2006). The superior court is a public entity.

A court order imposing conditions on a disabled adult that would not be imposed on an adult without disabilities, absent an adjudication of incapacity, is a form of disability discrimination.

Since the court did not conduct an evidentiary hearing on the issue of Peter's capacity, nor did it make a valid finding that he was incapacitated, the restrictions imposed on Peter appear to be based on his alleged mental disabilities. State action restricting a person's liberty based on his disability status, without a finding of incapacity to manage his personal affairs, is tantamount to discrimination on the basis of disability. Such discrimination by a public entity in the administration of services – in this case, a judicial proceeding – violates Title II of the Americans with Disabilities Act (ADA) and New Jersey's Law Against Discrimination (LAD).

A court is a public entity governed by Title II of the ADA. Tennessee v. Lane, 541 U.S 509 (2004) Discrimination by public entities is prohibited by the LAD. Ptaszynski v. Uwaneme, 371 N.J. Super. 333, 346-347 (App. Div. 2004)

Unfortunately, as it pondered imposing conditions of dismissal, it appears the court did not properly consider the public policy of New Jersey to respect the rights of

people with disabilities. New Jersey citizens with disabilities, such as Peter, "want the same things in life as the other residents of this State: to be productive citizens who contribute to the communities in which they live, to be good family members and good neighbors, and to work hard at jobs that provide satisfaction and independence." N.J. Stat. § 30:6E-1(a) The court failed to afford Peter the recognition and support he deserves to protect his rights and to reach his full potential. N.J. Stat. § 30:6E-1(b)

Furthermore, the conditions imposed by the court failed to respect "the dignity, individuality and constitutional, civil and legal rights" that Peter is entitled to enjoy. N.J. Stat. § 30:6D-2. While the court's actions may have been well-intentioned, the conditional dismissal was an inappropriately paternalistic overreach.

V

The Court Exceeded The Limits of Its *Parens Patriae* Authority

In its order denying the motion for reconsideration, the court asserted that its authority to impose conditions and delay an outright dismissal for two years was based on its *parens patriae* authority in conjunction with Rule 4:37-1(b) which authorizes a dismissal of an action to be premised "upon such terms and conditions as the court deems appropriate."

It should be noted that Rules of Court are limited solely to matters related to "practice and procedure." The court is not authorized to expand or restrict the rights of adults beyond what is authorized by the Legislature or required by the Constitution. The Legislature makes laws. The courts interpret and implement them.

"The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the *practice and procedure* in all such courts." N.J. Const. Art. VI, Sec. II(3). (Emphasis added.)

Rule 4:37-1(b) must be interpreted and applied as a rule of practice and procedure. It may not be used as a means of enlarging or restricting the constitutional or statutory rights of litigants. In this case, the court used it to infringe on Peter's right to make his own medical decisions, to control access to his medical records and information, to limit his constitutional and common law right of privacy, and to infringe his constitutional right to liberty.

The order denying reconsideration relied on the court's *parens patriae* authority to impose these restrictions. The court misunderstood the extent of such authority and failed to comprehend the limits on the exercise of such authority.

"Translated literally as 'parent of the nation,' the *parens patriae* power has been described both as an inherent right and equitable authority of the sovereign to protect those persons within the state who cannot protect themselves. In re Grady, 85 N.J. 235,

259, 426 A.2d 467 (1981)." In re J.B., 469 N.J. Super. 576, 600 fn. 15 (N.J. Super. 2020)

"The doctrine of *parens patriae* relates to the jurisdiction of the chancery courts over private disputes relating to the welfare of children and incompetents. " Franklin v. Dept. of Human Serv, 225 N.J. Super. 504, 528 fn. 13 (N.J. Super. 1988) Peter was neither a child nor an "incompetent."

The court has *parens patriae* authority to appoint a guardian ad litem for children and incapacitated adults. "The factual justification for the appointment of a guardian ad litem must be established in either circumstance. In the one the fact of infancy must be proved; in the other, the fact of incompetency and unfitness to defend must be made evident. Ammon v. Wiebold, 61 N.J. Eq. 351;48 Atl. Rep. 950." East Paterson v. Karkus. 136 N.J. Eq. 286, 289 (N.J. 1945).

Peter was an adult who was presumed to have capacity to make his own decisions. The court never made a valid finding that Peter was incapacitated. The fact that Peter had been in psychiatric therapy could not give rise to any presumption of incapacity. In re W.S , 152 N.J. Super. 298, 302 (N.J. Super. 1977)

"There is no doubt that the State may have a compelling interest, under its *parens patriae* power, in providing care to its citizens who are unable to care for themselves because of mental illness Addington v Texas, 441 U.S. 418, 426, supra. For

the State to invoke this interest, 'the individual himself must be incapable of making a competent decision concerning treatment on his own. Otherwise, the very justification for the state's purported exercise of its parens patriae power — its citizen's inability to care for himself * * * would be missing.'" Rivers v. Katz, 67 N.Y.2d 485, 496 (N.Y. 1986)

Furthermore, actions of a court under its *parens patriae* authority are at all times "bounded by constitutional procedural guarantees" and must be balanced against an individual's interest in his or her liberty. In re Commitment of J.M.B, 197 N.J. 563, 598 (N.J. 2009)

In other words, an order made pursuant to a court's *parens patriae* authority must comply with both substantive and procedural due process protections. In re S.L. 94 N.J. 128, 139 (N.J. 1983); In re Raymond S., 263 N.J. Super. 428 , 431-432 (App.Div. 1993). "These constraints serve to prevent arbitrariness, unfairness, and potential abuse and to protect individual rights and interests." Matter of D.C., 146 N.J. 31, 49 (N.J. 1996)

The order in the instant case did neither. It infringed on Peter's constitutional right to privacy, his personal liberty, and autonomy, all without complying with his right to procedural due process.

By ordering Peter to undergo therapy for two years, and revoking his right to control the release of medical information – without a valid finding of incapacity – the court exceeded the bounds of its *parens patriae* authority. Riga, "Compulsory Medical Treatment of Adults," The Catholic Lawyer (Vo. 2, No. 22 1976) p. 105.

As Justice Louis Brandeis once wrote, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent…The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well meaning but without understanding." Olmstead v. U.S., 277 U.S. 438 (1928).

VI

There Was No Statutory Authority for the Conditions of Dismissal

The Legislature has adopted specific statutes conferring powers on courts when a guardianship proceeding is initiated. N.J. Stat. § 3B:12-24.1

General Guardian. "*If the court finds that an individual is incapacitated* as defined in N.J.S.3B:1-2 and is without capacity to govern himself or manage his affairs, the court may appoint a general guardian who shall exercise all rights and powers of the incapacitated person." (Emphasis added) N.J. Stat. § 3B:12-24.1(a)

Limited Guardian. "*If the court finds that an individual is incapacitated* and lacks the capacity to do some, but not all, of the tasks necessary to care for himself, the

court may appoint a limited guardian of the person, limited guardian of the estate, or limited guardian of both the person and estate." (Emphasis added) N.J. Stat § 3B:12-24.1(b)

Temporary Guardian. "*Pending a hearing for the appointment of a guardian*, the court may for good cause shown and upon a finding that there is a critical need or risk of substantial harm" appoint a temporary guardian. (Emphasis added) N.J. Stat § 3B:12-24.1(c) A temporary guardian may arrange for *interim* medical services. A pendente lite temporary guardian appointment shall not have the effect of an adjudication of incapacity.

Special Guardian. "The court may appoint a special guardian to assist in the accomplishment of any protective arrangement or other transaction *authorized under this article* who shall have authority conferred by the order and shall serve until discharged by the order after reporting to the court of all matters done pursuant to the order of appointment." (Emphasis added) N.J. Stat. § 3B:12-4

Guardian ad Litem. "'Guardian' means a person who has qualified as a guardian of the person or estate of a minor or incapacitated individual pursuant to testamentary or court appointment, *but excludes one who is merely a guardian ad litem*." (Emphasis added) N.J. Stat § 3B:1-1

Other Protective Arrangement. The Legislature has adopted statutes that allow the court to order a protective arrangement short of a guardianship, but only to protect the estate of an alleged incapacitated person. N.J. Stat § 3B:12-1 Even then, the protective arrangement for finances must be based on a finding of incapacity and the person has the right to a trial on this issue. There is no similar statute conferring authority on a court, short of an order of guardianship or limited guardianship, to order arrangements to protect the person of an individual.

Disclosure of Information. "Physicians and psychologists licensed by the State are authorized to disclose medical information, including but not limited to medical, mental health and substance abuse information *as permitted by State and federal law*, regarding the *alleged incapacitated person* in affidavits filed pursuant to the Rules Governing the Courts of the State of New Jersey. (Emphasis added) N.J. Stat. § 3B:12-24.1(d)

Right to Jury Trial. An alleged incapacitated person has the right to a trial on the issue of incapacity. N.J. Stat. § 3B:12-5; N.J. Rev Stat. § 3B:12-24

The imposition of restrictive conditions on Peter – an adult with presumed capacity and against whom a valid finding of incapacity was never made – is not authorized by any statute. The court did not have statutory authority to appoint a guardian or limited guardian since that may only occur after a hearing. The court

lacked statutory authority to appoint a temporary guardian since that is only authorized pending a hearing on the issue of capacity. Such a hearing never occurred. It was taken off calendar. The court did not have statutory authorization to appoint a special guardian since that can only occur for a protective arrangement authorized by guardianship statutes. The only protective arrangement, short of a guardianship, authorized by the statutory scheme pertains to protecting the estate or property of an alleged incapacitated person. N.J. Stat. § 3B12-1 to 12-5. There is no similar provision for protecting the person of an alleged incapacitated person.

What the court did was to continue the appointment of the guardian ad litem. There was no statutory authorization for this action. The Legislature has specified that a guardian ad litem may not act as a guardian – whether full, limited, temporary, or special. N.J. Stat. § 3B:1-1

VII

The Court Distorted the Role of a Guardian ad Litem

Guardians ad litem receive their authority primarily through Rules of Court. "The court may appoint a guardian ad litem for a minor or *alleged* or adjudicated *incapacitated person* on its own motion." Rule 4:26(2)(b)(4)

A guardian a litem of an alleged incapacitated person has the following duties under the Rules of Court: *conduct an independent investigation* as to the alleged incapacity as defined in N.J. Stat. § 3B:1-2; Following the investigation, the guardian ad litem shall *submit a report* to the court containing the results of the investigation and recommending whether the best interests of the alleged incapacitated person require the filing of an action for adjudication of incapacity and appointment of a guardian in the Superior Court, Chancery Division, Probate Part in accordance with R. 4:86-1. (Emphasis added) Rule 4:26(2)(c)(2)

"The guardian ad litem shall *not have authority to make decisions* on behalf of the alleged incapacitated person. To the extent feasible, the proceedings under this Rule shall be *completed in a reasonably timely manner*, as specified in a case management order or otherwise by the court."

The court had authorization, under this court rule, to appoint a guardian ad litem for Peter in his capacity as an alleged incapacitated person. The GAL acted in this capacity for two years. He did his investigations and filed his reports. Ultimately, he declined to recommend that a guardian be appointed, instead deferring that function to the jury. (Ra, p. 137)

Since Peter is not an adjudicated incapacitated person, the GAL can only perform duties in his role as guardian ad litem for an *alleged* incapacitated person.

Peter fit into that category until the time that his mother withdrew her petition. Once that happened, and the court decided not to appoint a special guardian to prosecute the case, Peter was no longer an *alleged* incapacitated person. No one was making this allegation any longer.

Since the Legislature has specified that a GAL my not serve as a guardian, and the role of a GAL is limited to alleged or adjudicated persons, the legal authority of the GAL ended once the petition was withdrawn and the court declined to appoint a special guardian to prosecute the case. At that point, the court lacked statutory jurisdiction to do anything other than dismiss the case.

VIII

The Court Violated Separation of Powers

The New Jersey Constitution divides state government into three branches, each with its own designated functions. "No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." N.J. Const., art III, ¶ 1.

The power to legislate is assigned by the Constitution to the Legislature. N.J. Const., art IV, § 1, ¶ 1. The judicial branch is assigned the authority, through the Supreme Court, to "make rules governing the administration of all courts in the State

and, *subject to the law*, the practice and procedure in all such courts." N.J. Const., art VI, § 2, ¶ 3. (emphasis added) The Superior Court is given the power to "hear such causes, as may be provided by the rules of the Supreme Court." N.J. Const., art VI, § 3, ¶ 3. The phrase "subject to law" refers to laws that are "substantive in content" that define rights and duties. Hon. Maria L. Garivaldi, "The New Jersey Experience: Accommodating the Separation Between the Legislature and the Judiciary," Seton Hall Law Rev., Vol. 23:3, p. 7.

The Legislature, subject to constitutional limits, establishes rules of conduct to which individuals must conform. Courts should apply such legislative determinations even though they may conflict with the court's own philosophy. Egan v. Erie R. Co., 29 N.J. 243, 252 (N.J. 1959).

Substantive law lies within the exclusive domain of the Legislature, while practice and procedure are exclusively within the realm of the Supreme Court. Substantive law defines the rights and duties of individuals, whereas procedural law regulates the methods by which those rights and duties are enforced. N.J. Bar Ass'n v. State, 387 N.J. Super. 24, 48 (App. Div. 2006).

Courts are under a duty to apply the standard laid down in statutes. Everhart v. Newark Cleaning Dyeing Co., 120 N.J.L. 474, (N.J. 1938) In the instant case, the court failed to adhere to this judicial role, instead creating its own standards by which

to limit the substantive rights that Peter enjoyed. In doing so, the court violated the constitutional requirement of separation of powers.

Mandated Therapy

As an adult, Peter has a legislatively conferred right to make his own medical decisions. N.J. Stat. § 9:17B-1(a) This includes the right to refuse medical treatment. NJ Stat § 26:2H-67(c); See also: N.J. Stat. § 26:2H-137(a).

The Legislature has defined the standard to be used for the judicial removal of the right of an adult to make medical decisions. Incapacity to make health care decisions requires a medical determination that a patient lacks the "ability to understand and appreciate the nature and consequences of a particular health care decision, including the benefits and risks of, and alternatives to, the proposed health care, and to reach an informed decision." N.J. Stat. § 26:2H-60(g) When a patient has a developmental disability, a physician with appropriate specialized training in this area is required to make that determination. N.J. Stat. § 26:2H-60(c)

In the instant case, the court used its own criteria to remove Peter's right to medical self-determination. When it ordered him to attend therapy for two years, the court relied on generalized *allegations* of incapacity by medical professionals attached to the guardianship petition, and a generalized opinion of incapacity by a court-appointed expert in a report that was never properly admitted into evidence. By doing

so, the court replaced legislatively mandated criteria with its own vague standards, thus encroaching on legislative prerogatives.

Criteria for Dangerousness

The guardianship petition in this case was based on allegations that Peter was incapacitated and as a result was unable to manage his personal affairs and finances. There were no allegations made that he was a danger to others, nor was the statutory scheme for civil commitment based on dangerousness invoked.

Without a request from petitioner, and despite the opinion of the guardian ad litem that Peter was not a danger to others, on the court's own initiative and without advance notice, the guardianship proceeding morphed into a de facto outpatient civil commitment proceeding. This was done without adhering to legislative definitions of dangerousness. The court used its own subjective criteria, namely its "concerns" about Peter's mental health based on the unsubstantiated and untested opinion of a court-appointed expert who never testified and whose report was not properly admitted into evidence. Substituting its own criteria for that established by the Legislature was an assumption of legislative functions in violation of separation of powers.

In response to Peter's mother withdrawing the petition, the GAL filed a letter with the court on February 1, 2023. (Ra, pp. 143-145) The letter, in which the GAL found no reason for the court to exercise its *parens patriae* jurisdiction, stated:

"Both Dr. Mack and Dr. Bressler do not believe Peter is incapacitated based upon neuropsychological testing. Peter's cognitive limitations are not sufficient to justify a finding of incapacity based upon these experts" (Ra, p. 143)

"According to Dr. Mack based upon his antisocial beliefs and delusional/psychotic thinking, Peter has 'an ongoing potential to be dangerous to society going forward.' Based upon this observation, Dr. Mack concludes that Peter is in need of a guardian to 'monitor Peter's behavior' and intervene when necessary. As I understand it, this is not the proper test of whether an individual lacks capacity so as to justify a finding of incapacity by clear and convincing evidence." (Ra, p. 144)

"I believe that Peter would benefit from continued therapy with Dr. Harper or any other mental health professional. I am advised by Peter's lawyer that Peter has every intention of continuing with his therapy and remaining in school." (Ra, p. 145)

The court considered an expert's report suggesting that Peter might have a propensity to violence. (Reporter's Transcript (hereinafter referred to as "RT" at 1-20-23, p. 32) The court noted, however, that Peter is not in trouble with the law and there

have been no reports of actual violence. (Ibid.) The court also noted that the GAL did not believe that Peter was in imminent danger or a threat to society. (Id, p. 250)

The court never conducted a hearing on whether Peter had a mental illness that posed an imminent threat of danger to the public. The GAL's report specifically stated that, in his opinion, Peter did not pose such a threat. (Ra, pp. 129-137; 143-146)

"'Dangerous to others or property' means that by reason of mental illness there is a substantial likelihood that the person will inflict serious bodily harm upon another person or cause serious property damage within the reasonably foreseeable future. This determination shall take into account a person's history, recent behavior and any recent act or threat." N.J. Stat. § 30:4-27.2(I)

The court's rationale for imposing restrictive conditions on Peter's liberty for two years was based, in part, on its "concerns" that he might pose a danger to society. The use of this judicially-created criteria of dangerousness conflicts with legislative definitions of dangerousness and thus violates separation of powers.

IX

The Court Arbitrarily Rejected Supported Decision-Making

Knowing his case was headed toward a jury trial, Peter developed a strong defense, executing a supported decision-making (SDM) agreement and powers of attorney (POAs) for health care and finances. Peter lined up an array of a dozen

witnesses to testify at trial – a forensic psychiatrist, his therapist, an accountant, the lawyer who drafted the SDM and POA documents, a teacher, relatives, and other trusted adults – to affirm his capacity to manage his own affairs despite having autism. Several of those witnesses would have testified about their role in Peter's supported decision-making arrangement. (Ra, pp. 114-115)

Peter's proposed jury instructions were based on statutes, court rules, and case law relevant to the issues posed by a guardianship case. (Ra, pp. 93-107) One such issue was that supported decision-making may be an alternative to guardianship. Peter submitted a list of exhibits to be used or introduced into evidence at trial. (Ra, p. 115) Among them was Peter's supported decision-making plan and his powers of attorney.

When Peter's mother moved the court to withdraw her Petition, the jury trial was taken off calendar. But the supported decision-making plan remained in place, as did his intention to voluntarily continue with therapy.

Notwithstanding the time and money expended by Peter to develop this supported decision-making agreement which involved several trusted adults as supporters, the court summarily dismissed the significance of SDM as an alternative to court supervision.

The court demonstrated its misunderstanding of the important role that SDM can play in a guardianship case. When the court first learned in June 2022 that supported

decision-making would be a central issue to the defense (RT, 6-23-22, p.4), it responded: "I have no idea what is that, never heard of it before . . ." From the court's understanding of the law, the sole issue in a guardianship is capacity. Period. (Ibid.) That is not so. Petitioner had the burden of proving that less restrictive alternatives, such as supported decision-making, would not be viable.

The misunderstanding of the role of supported decision-making as a reason to avoid judicial oversight of a disabled adult is evident in the court's order denying the motion to reconsider the imposition of conditions for a dismissal. (See fn. 1 of the order: Ra, p. 255)

The court erroneously believed that the SDM agreement did not exist prior to the issuance of the order of dismissal. It did. Citations to the record to prove this point are found in a letter to the court filed in May 12, 2023, advising the court that it made a clerical error in misstating when the SDM agreement was executed. (Ra, p. 267)

The letter advised the court:

> "At page four of the April 24, 2023 Order denying reconsideration, the court wrote: "Peter's Powers of Attorney and Supported Decision-Making Agreement, which were created after the February 9 Order was issued and solely for purposes of this Motion for Reconsideration, do not change the court's decision. [Fn. 1]"

> "In fact, the supported decision-making agreement was executed and signed on November10, 2022 – months before the court entered an order of dismissal. (See Exhibit I to the attached Certification of Petitioner dated February 17, 2023, which was filed with the court by Petitioner in connection with a motion for fees).

"The order denying reconsideration also states that the powers of attorney were created after the February 9 Order was issued and solely for purposes of this Motion for Reconsideration." The only information before the court about when the POAs were created and the purpose of them is contained in two documents: a Certification filed by me on February 2, 2023 and my letter to the court dated January 13, 2023, in which I listed exhibits to be introduced at trial. (See Attachments).

> "In my Certification, I explained the purpose was for my client's defense regarding the 'suitability of less restrictive alternatives.' (See Paragraph 23). Also, the invoice of the attorney who prepared the SDM agreement and the POAs was attached to my Certification as Exhibit C. An entry to the invoice dated 9/30/22 states: 'Review edits to supported decision-making plan; emails with D. Giles regarding timing of preparing power of attorney documents.'

> “In the letter listing exhibits, item #4 referred to ‘Peter’s Supported Decision-making Plan and Powers of Attorney.’”

What is surprising about the court’s lack of awareness of SDM and the important role it can play in avoiding court supervision for an adult with developmental disabilities, is the fact that SDM is specifically mentioned in guidelines approved by the New Jersey Supreme Court.

The guidelines suggest areas for such attorneys to investigate as they fulfill their duties. “Guidelines for Court-Appointed Attorneys in Guardianship Matters,” New Jersey Courts, p. 13. See section titled: “Recommendations Concerning the Suitability of Less Restrictive Alternatives/Areas of Decision-making That the Alleged Incapacitated Person May be Capable of Exercising”

> “25. I have specifically considered the following types of arrangement less restrictive than a plenary guardianship (check all that apply): □ Limited guardianship / □ Protective arrangement per N.J.S.A. 3B:12-1 et seq. □ Conservatorship □ Durable Power of Attorney □ Advanced Directive for Healthcare □ Advanced Directive for Mental Healthcare □ Supported Decision-making”

(https://www.njcourts.gov/sites/default/files/forms/12756_gdnshp_crt-app_atty.pdf)

The alternative of supported decision-making also appears on other government websites and in various brochures and educational materials. SDM is explained in a brochure jointly developed by the New Jersey Department of Education (Office of Special Education), New Jersey Department of Human Services (Bureau of Guardianship Services), and the New Jersey Department of Children and Families (Office of Education and the Children's System of Care). The brochure is titled: "Preparing for the Age of Majority: Supported Decision-Making and Other Support Options."

(https://www.nj.gov/education/specialed/parents/docs/GuardianshipBrochureForPrinting.pdf)

Weeks before the court imposed the conditions of dismissal and later downplayed the role of supported decision-making in protective proceedings, the court was made aware of SDM through a proposed jury instruction submitted by Peter's attorney. (See "Instruction No. 9. Guardianship of the Person – Less Restrictive Alternatives" and "Instruction No. 11. Supported Decision-Making")

Proposed instruction No. 9 stated: (Ra, p. 104) " a. It cannot be determined that respondent is in need of a guardian unless petitioner has met their burden of proving by clear and convincing evidence that no less restrictive alternatives are an adequate substitute for guardianship.

"b. For example, petitioner must demonstrate by clear and convincing evidence that no alternatives to guardianship, such as supported decision-making or powers of attorney, are sufficient to assist the person to govern themselves or manage their affairs."

Proposed instruction No. 11 stated: (Ra, p. 105) "a. Supported decision-making (SDM) is a potential alternative to guardianship. SDM allows individuals with disabilities to make choices about their own lives with support from a person or team of people. Individuals with disabilities choose people they know and trust to be part of a support network to help with decision-making. ¶ b. Not every young adult with a disability requires a legal guardian when they turn 18, since many are capable of making informed decisions on their own. There are several support options to consider, such as supported decision-making and powers of attorney, the least restrictive option being supported decision–making."

The following references, authorities, and comments were submitted to the court in support of Proposed Instruction No. 11:

a. "Q&A: What is Supported Decision-Making?" (New Jersey Council on Developmental Disabilities - Jan. 24, 2019) https://njcommonground.org/qa-what-is-supported-decision-making/

b. “Preparing for the Age of Majority: Supported Decision-Making and Other Support Options” (Collaboration of Department of Education, Department of Human Services, and Department of Children and Families)

(https://www.nj.gov/education/specialed/parents/docs/GuardianshipBrochure2.pdf)

Other: Supportive decision-making allows individuals with disabilities to retain their rights and make decisions for themselves by appointing trusted advisors to help them make their own choices. SDM can be a viable alternative to guardianship for families and people with developmental disabilities, empowering them to reach their full potential.

(https://tcms.njsba.com/PersonifyEbusiness/Default.aspx?TabID=1699&productId=65026910)

Other: The concept of supported-decision-making recognizes that an individual’s right to make decisions about his life is one of the cornerstones of American jurisprudence. (New Jersey Law Revision Commission – 2018)

(https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/58035/l4152018.pdf?sequence=1&isAllowed=y105)

The court's lack of awareness of supported decision-making, coupled with its mistaken belief that the SDM agreement was executed by Peter solely for purposes of supporting the motion for reconsideration, show that its refusal to accept SDM as a substitute for court supervision and its imposition of restrictions on Peter's liberty as a condition of dismissal were arbitrary decisions.

X

The Court Exceeded Its Authority in Ordering Peter to Visit with His Mother

Various comments from the court indicate that it had difficulty viewing Peter as an adult. "I want to call him a child . . ." (RT, 1-15-21, p. 48) The court called the guardian ad litem "the child's Guardian ad Litem." (RT, 1-19-21, p. 25) When commenting on the role of Peter's father in an IEP process with the school system, the court stated: "He refused, he refused to take the child." (RT, 2-10-21, p. 33) At another point, the court stated: "The child has been receiving services." (Id, p. 34)

Peter's attorney stressed that Peter is not a child. "I mean, we refer to him as a child, but right or wrong, he's 18 years old. He's stepped into adulthood." (Id., p. 35)

The court's difficulty in viewing Peter as an adult may have been based in part on the court's perspective as a sometimes family court judge. "I'm a little wearing my family Judge, family Judge hat . . . " (RT, 1-15-21, p. 36) At one point, the court was

considering "reunification therapy" – something that is common with minors and parents in a divorce proceeding. (Id., p. 13).

Perhaps the court's view of Peter as a child influenced its decision to order Peter to attend Zoom sessions with his mother twice a week. Mandating that a child visit with a parent is common in divorce proceedings. Such an order has no place in an adult guardianship proceeding.

It is important to remember that Peter's freedom to speak and not to speak, and his freedom to associate and not to associate, are grounded in the First Amendment as made applicable to the states through the Fourteenth Amendment. Wilkins v. Daniels, 744 F.3d 409, 414 (6th Cir. 2014) These fundamental rights apply to adults with developmental disabilities, absent a finding of incapacity – something lacking in this case. In re M.R., 135 N.J. 155, 169-170 (1994) In formulating its order of mandatory visitation, the court failed to consider Peter's constitutional rights as an adult.

The issue of mandatory visits of an adult with a parent has not been the subject of any reported appellate decisions in New Jersey. However, in other jurisdictions where the issue has been litigated, mandatory visitation orders have been reversed.

A California decision is instructive, especially since it involved the reversal of an order of mandatory therapy sessions of an adult daughter with her father – a parent whom she said had sexually abused her. The woman argued that forced visitation with

her father was unconstitutional and an abuse of judicial discretion. The appellate court avoided the constitutional issues by ruling that the court lacked statutory authority to order mandatory visits with the father. The court observed: “An adult conservatee's disability does not put them in the legal position of a minor.” Conservatorship of Navarrete, 58 Cal.App.5th 1018, 1030-1031 (Cal. Ct. App. 2020) Even in the context of family law, “the trial courts have no authority to order adult disabled children to visit with a parent.” Ibid. The court added: “the trial court's attempt to intervene in the dispute between a disabled adult and her estranged father based on its own judgment about her best interests overstepped its role.” Id, p. 1032. The same can be said here.

A case in Illinois presented an issue of “whether the circuit court may order visitation between a mentally disabled adult and his estranged father” in a divorce proceeding. In Re Marriage of Casarotto, 36 Ill.App. 3rd 567 (Ill.App. Ct. 2000). Kevin Casarotto, who was an adult when the visitation order was entered, has Down's syndrome. Although Kevin expressly objected to visiting his father, the court ordered visitation anyway. Kevin argued that the order was unconstitutional and was not authorized by statute. Th appellate court avoided the constitutional issue by ruling that, without statutory authorization, the trial court lacked subject matter jurisdiction to order a disabled adult to visit with a parent. Casatotto, supra, at p. 571.

A decision in Pennsylvania held that an adult with Down Syndrome cannot be ordered to visit with a parent. The court stated: "Kimberly Schmidt is chronologically an adult. She has not been adjudicated incompetent. Her mental limitations do not compel the conclusion that she lacks capacity to make rational decisions regarding parental preferences. Because she is an adult she enjoys many of the same rights and privileges enjoyed by other adult citizens. These include a constitutionally protected freedom of choice to make certain basic decisions regarding marriage, procreation, family life and privacy." Schmidt v Schmidt, 313 Pa. Super. 83, 86 (Pa. Super. Ct. 1983) It added: "choice, it would seem, should include the same right which an adult has to refuse to visit a parent. In the absence of an adjudication of incompetency, a handicapped adult should not be deprived of the freedom to make for himself or herself the same family related decisions which other adults enjoy. Such a person has the same needs as other adults for social approval, respect and privacy, as well as freedom to make important decisions regarding personal preferences and associates." Id., pp. 86-87.

Conclusion

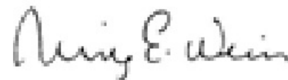
While this appeal involves the rights of a singular individual, the precedent it sets will have ramifications for thousands of other adults with developmental disabilities who may find themselves the subject of a guardianship petition in the future.

Most of these adults will not have the resources to defend their rights as vigorously as Peter has done. Many will not have his level of intelligence. Many will not be as articulate. Most will not have a special needs trust to finance a vigorous defense. Few, if any, will be willing to resist and protest unconstitutional court orders like Peter has. Even fewer will demand a jury trial. Rare will be an appeal.

Because cases like this hardly ever make it to the appellate level, it is not only important that this Court provide justice for Peter, but that it take this opportunity to make broad pronouncements on substantive law and procedural matters that will minimize the risk of similar injustices from happening to others in the future.

For the reasons stated above, amici curiae urge this Court to direct the court below to strike the conditions it attached to the order of dismissal and to enter an unconditional order of dismissal.

August 23, 2023 Respectfully submitted:



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