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In the Matter of Ann F. McNierney, An Incapacitated Person	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION PROBATE PART BERGEN COUNTY DOCKET NO: P-089-10 **ORDER**

THIS MATTER having been opened to the Court by the Ombudsman for the Institutionalized Elderly, through its counsel, for an Order amending the findings entered in the above-entitled action;

AFTER REHEARING the motion seeking reconsideration of the cause on the basis of the records in the proceeding and arguments of counsel, ~~it appears to the court~~ arguing that judgment previously entered in the cause does not correctly state the judgment of the court by reason that it went beyond the matter before the court and overlooked certain laws governing the Ombudsman for the Institutionalized Elderly; accordingly,

IT IS on this 14th day of September, 2010 ordered that the ~~previously entered in the above-entitled action be altered and amended in the following respects~~: motion is DENIED ★

1. ~~the~~ Ombudsman ~~has the~~ authority to advocate on behalf of residents living in long-term care facilities, as governed by federal and state law, and includes situations that involve guardians of residents; and

★ See attached rider

2. the findings that the Ombudsman unreasonably interfered without authority by restricting autonomy of the guardians of Ann F. McNierney are withdrawn on the grounds that these issues were beyond the scope of the case at hand as defined by the court.

IT IS FURTHER ORDERED that a copy of this Order shall be served upon counsel for all parties or parties themselves if they are not represented by counsel within seven (7) days from the date of entry.

Peter E. Doyle J.S.C.

(X) Opposed
( ) Unopposed

IN THE MATTER ANN F. McNIERNEY, an incapacitated person
DOCKET No. P-89-10

RIDER TO ORDER DATED SEPTEMBER 14, 2010

Counsel on behalf of the Office of the Ombudsman for the Institutionalized Elderly, Division of Elder Advocacy ("OOIE"), filed a notice of motion for reconsideration of this court's order dated July 6, 2010 decision on July 30, 2010. In the written opinion dated June 21, 2010, this court affirmed plenary guardians possess the authority to control, monitor and schedule visitation with the incapacitated consistent with N.J.S.A. 3B:12-57 and the OOIE acted unreasonably by usurping that authority. Specifically, the OOIE commanded the facility in which the incapacitated resided to confer with them on future visitation decisions, and restricted the guardians' access to files and reports concerning Ann. This court acknowledged, however, the "OOIE may appropriately attempt to determine whether a facility is abusing or creating a situation in which it is risking the safety and welfare of its patients. Nothing in the enabling legislation appears to reference or discuss the OOIE's role with respect to enforcing the rights of a ward against the guardian." [June 21, 2010 Decision, Pg. 35.]

A motion for reconsideration pursuant to R. 4:49-2 "shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or to which it has erred." Id.

Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either (1) court has expressed its decision based upon palpably incorrect or irrational basis, or (2) it is obvious that the court either did not consider or failed to appreciate the significance of probative, competent evidence. See, Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). Further, a motion for reconsideration must

contain a statement of controlling decisions which counsel believes the court has overlooked. See, Lahue v. Pio Costa, 263 N.J. Super. 575, 598 (App. Div. 1993).

Alternatively, if a litigant wishes to bring new or additional information to the court's attention, which it could not have provided on first application, the court should, in the interest of justice and in exercise of sound discretion, consider such evidence. R. 4:49-2. Disagreement, however, is not a valid ground for a motion for reconsideration. See, D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990) ("a litigant should not seek reconsideration merely because of dissatisfaction with a decision of the court"). Motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. See, Cummings, supra, 295 N.J. Super. at 384. Thus, the court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.

Plaintiff's counsel relies upon R. 1:7-4 and R. 4:49-2 in seeking relief. Both rules require the movant to prosecute the motion no later than 20 days after the service of the judgment or order upon all parties. The burden is on the movant to establish timeliness of the application so as to establish the jurisdiction to entertain the motion. The court's decision was memorialized in an order dated July 6, 2010, which required the order to be served on all parties within seven days. Counsel for the OOIE certifies the order was received on July 9, 2010. Thus to be timely, the motion must be filed within twenty days, or on or before July 30, 2010.[1] This motion was filed on July 30 and, thus, is timely.

By way of its motion, counsel seeks the decision be amended to find: (1) the Ombudsman has general authority to advocate on behalf of residents, including where the

[1] Movant asserts pursuant to R. 1:3-3, where service is made by regular mail, three days are to be added to the date the mail is sent. Thus, in this case, as the order was sent July 9, the 20 days would begin July 12 and end August 2. Either way, the motion is timely as it was filed July 30, 3 days before August 2.

resident is the ward of a guardian, consistent with state and federal law, (2) the Ombudsman did not unreasonably interfere without authority by restricting the autonomy of Ann F. McNierney ("Ann"), as the court's determination was beyond the scope of the case and the OOIE did not have the opportunity to brief the issues addressed.

Counsel argues it understood the issue before the court as "whether a plenary guardian has the authority to control the visitation of his or her ward contrary to the preferences of the ward." [Brief in Support, Pg. 5.] Thus, movant asserts it "never understood the issue to be the Ombudsman's authority to overrule the guardian." [Brief in Support, Pg.3.] Counsel adds "[t]he Court's decision did not discuss the limitations of a guardian's control over issues involving fundamental rights."[2] As basis for these assumptions, counsel references its communications with the court in which the court permitted the OOIE additional time to submit its opposition adding the "Ombudsman may submit a brief on the issue of whether guardians have the authority to determine visitation, as opposed to whether these co-guardians may limit Patrick's visits." [June 21, 2010 Decision, Pg. 13.][3]

Additionally, counsel cites to 42 U.S.C. 3058g, which was referenced in its brief in opposition to the original motion and this court's opinion by footnote, asserting the Ombudsman possesses the authority to "resolve complaints that are made by, or on behalf

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[2] This court's decision evaluated any parties which may seek to determine the visitation rights of an incapacitated individual. This included whether the rights belonged to a plenary guardian, the OOIE, the Department of Health and Senior Services, and whether the Manual for Guardians or the Patient's Bill of Rights addressed the issue. In its discussion of the plenary guardian's authority over visitation, the court discussed legal support for an individual's self-determination and analyzed over five-pages whether visitation rights rested with the individual alone. The court did not ultimately determine this issue stating "[a]lthough these cases provide guidance concerning guardianship authority, as this court need not determine whether the current co-guardians are permitted to restrict Patrick's visitation, but rather only whether a guardian may do so, further discussion of or elaboration on Grady or Quinlan is unnecessary." Thus, it does not appear counsel's assertion, as to this court's treatment of fundamental rights, is accurate.

[3] The time extension was additionally premised upon internal changes within the agency which made a timely response difficult.

of, residents; and relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents (including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payee), of providers, or representative of providers, of long-term care services." 42 U.S.C. 3058g(a)(3)(A). Counsel concedes, as it did during oral argument, it does not have the authority to "direct or order any outside entity of person to take or not take a particular action, except to cooperate with the Ombudsman's investigation." [Brief in Support, Pg. 3.] Nonetheless, according to federal and state law, the Ombudsman is empowered to advocate for residents in many ways, and "no language in these sections of the Older Americans Act [] prohibits the Ombudsman's involvement simply because a particular individual or entity, such as a guardian, is allegedly responsible for impairing the health, safety, welfare, or rights of the resident." [Brief in Support, Pg.4.]

To begin, as stated above, a motion for reconsideration is not to permit "repetitive bites at the apple." Cummings, supra, 295 N.J. Super. at 384. Thus, the court is to be "sensitive and scrupulous in its analysis of the issues in a motion for reconsideration." Evaluating the movant's arguments. it does not appear this case presents an exception. The arguments raised are not unique and counsel had previously addressed that which it asserts it neglected to brief. Thus, the current application is denied.

Notwithstanding the same, in the interest of thoroughness, the court will address the arguments raised. Counsel first submits it misunderstood the court's response to its request to submit a brief as an "interested party" and only briefed the issue of a plenary guardian's authority over visitation as opposed to a ward's fundamental right to visitation. The court's response to the OOIE had asked the agency to narrow its

discussion to whether the guardians had the authority to limit visitation, not whether these co-guardians had the right to limit the visitation of their sibling.

Counsel did not request clarification and submitted a brief on May 26, 2010. The first two pages of the brief discussed the statutory authority of the OOIE. Specifically, counsel cited to 42 U.S.C. 3058g(a)(1)(E) stating the Ombudsman is "charged under the federal Older American Act to 'represent the interests of the residents before governmental agencies and seek administrative, legal and other remedies to protect the health, safety, welfare, and rights of residents.'" [OOIE Brief in Opp. To Motion, May 26, 2010, Pg.2.] Counsel elaborated according to N.J.S.A. 52:27G-1 the Ombudsman is to "investigate and resolve complains[sic] concerning certain health care facilities serving the elderly, and to initiate actions to secure, preserve and promote the health, safety and welfare, and the civil and human rights, of the elderly patients, residents and clients of such facilities." [OOIE Brief in Opp. To Motion, May 26, 2010, Pg.2.]

It appears counsel had, and took advantage of, the opportunity to discuss the authority of the OOIE. Thereafter, counsel discussed a ward's fundamental rights. While discussing the federal law, counsel did not cite the specific section alluded to now. Additionally, counsel only now provides, its position is supported by the omission of language restricting its involvement.

The court, therefore, remains unconvinced a federal statute permitting resolution of complaints permits the OOIE to issue directives or instruct a facility not to provide certain information to a guardian or follow his or her directions. This is exactly what occurred. The court does not question the OOIE's authority to investigate, report, contact a facility about concerns, review law and address concerns with the legislature, or initiate

legal remedies, where necessary. In fact, this is exactly what is suggested in this court's decision – the OOIE should seek the court's intervention and not attempt to override its authority by issuing it own mandates. The court obviously does not condemn the OOIE's authority with respect to what is outlined in the statute. However, the OOIE took steps beyond that envisioned and stated in the code, and conceded during oral argument its actions were viewed as directives.

During oral argument, this court provided in its initial comments the "real" issue was not the ward's right to visitation with her immediate family, but rather, whether any guardian has the right to structure visitation. During colloquy, this court specifically questioned the OOIE whether its letter to the institution was only a recommendation or an opinion and sought counsel's opinion as to whether it was appropriate for the Ombudsperson to intervene and attempt to impose a determination, or whether it is preferable to compel the aggrieved relative to seek judicial recourse.

As elaborated in this court's decision, counsel provided its role was to advocate the position of a resident.[4] Notwithstanding, counsel additionally stated the OOIE does not have the authority to direct the guardian to do anything but agreed the institution/facility seemed to have viewed the OOIE's report as a directive. [June 21, 2010 Decision, Pg. 17.]

The line of questioning clearly focused on the OOIE's role in ordering who may visit the ward. Even if the OOIE had initially innocently misunderstood the court's intended focus as addressing the guardian's authority over visitation versus the ward's preferences, instead of the guardian's authority over visitation versus that of the facility

[4] This position is interesting considering, although after this application was filed, the court appointed counsel to represent the ward, as opposed to the OOIE.

or state agency, there could be no confusion at the time of oral argument. Counsel heard the court's initial comments, answered its questions, and at no time stated it had briefed a different issue nor sought the opportunity to clarify its position as it now does.

Thus, based on the provided above, movant has not adequately presented a case warranting reconsideration. The facts have not changed and counsel's concessions remain compelling. Nothing in the federal or state law provides the OOIE may order the guardian to act in a certain manner. Through the OOIE's extensive authority to protect the health, safety, welfare and rights of residents, it may seek the relief of the court where its opinions differ from those of the court appointed guardian. The thrust of the earlier decision was to preserve the rights of a guardian, absent a court order, and to avert the confusion engendered by the actions of the OOIE. As the OOIE has conceded it had no authority to do what it was perceived to have done, and as the earlier decision addressed plaintiff's request for instruction, there is no need to reconsider.

By way of movant's reply it is again acknowledged that the OOIE has no authority to direct a guardian or a facility to follow its recommendations. Rather, this motion was filed premised upon the OOIE's concern a finding was made that it unreasonably interfered without authority in this matter. Although movant's concern may be understandable, it misperceives the nature of the original application – that is, the co-guardians sought instructions whether they had the authority to control, monitor and schedule visitation with their ward. Being mindful the OOIE wishes to be heard for the proposition its intervention was misunderstood and that steps had been taken to remedy the same, the court's earlier decision answered the direct question posed in the affirmative. There is no need to reconsider that decision.

Oral argument was conducted on September 10, 2010. At that time the Ombudsman's most capable counsel Elizabeth Speidel, Esq. ("Speidel") advised the court of her clients two specific concerns as it related to the court's earlier decision.

The first concern had to do with the first full paragraph found at page 35 of the court's decision. Speidel indicated that the "Elder Law Bar" had expressed chagrin at the purported limitation of the OOIE's role as set forth in the court's decision. Having reread that paragraph the court is not satisfied the Bar's purported concerns are well founded.

The second concern addresses page 29, the last full paragraph. Counsel stressed that paragraph may be read to indicate the Ombudsman's involvement may only be occasioned when there is an allegation of abuse of the elderly by the institution and such a limitation unnecessarily limits the ombudsman's jurisdiction. Plaintiff's counsel wishes to be heard for the proposition the ombudsman's authority is limited to only those situations when the purported abuse is committed by the institution.

As the role of the ombudsman in investigating abuse, and whether that abuse need necessarily be committed by the institution for the ombudsman involvement, was not the focal point of the court's decision it sees no need to further comment upon the same. Any such discussion would be merely *dicta* as the issue presented was whether the ombudsman has the authority to direct the guardian concerning the guardian's role in setting visitation rights for his or her ward, exploration of the issue sought is unnecessary and therefore unwise.

The motion is denied.

Dated: 9/14/10

PETER E. DOYNE, A.J.S.C.