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In the Matter of T.S., An Alleged Incapacitated Person.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: PROBATE PART UNION COUNTY DOCKET NO. O-8725 CIVIL ACTION

POST-TRIAL BRIEF OF T.S.

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STATEMENT OF THE CASE[1]

The guardianship system is designed to protect individuals who are unable to care for themselves due to incapacity. Unfortunately, the guardianship system in the instant case has been abused by a greedy son attempting to exploit his father and gain control of his father's assets. In disregard of T.S.'s privacy, obvious competence and personal dignity, plaintiff F.S. and his team of lawyers embarked on a campaign seeking to have T.S. declared incapacitated and appointing F.S. as his guardian.

Twenty-five months after the Order to Show Cause was filed, the eight-day trial concluded. During the trial, although they failed to diagnose T.S. with any psychiatric illness, F.S.'s experts asserted that T.S. suffered from a "history" of depression and symptoms of paranoia, which they claimed somehow rendered T.S. incapable of managing his affairs. F.S. and his wife P.S. tried to portray themselves as devoted caregivers whose only concern was the best interests of T.S.

The credibility of F.S. and P.S. was seriously eroded by both their words and their deeds, as detailed in Point Three, *infra.* In preparation for filing this lawsuit, F.S. and/or P.S. began taking T.S. from doctor to doctor, under the guise of adjusting his medications, and "fed" those doctors with false information regarding T.S.'s alleged strange behavior. This information was cited in doctor's reports, became part of T.S.'s medical records, was passed on and cited by subsequent doctors, and eventually used by plaintiff's experts to support their claims of incapacity. F.S. induced his father to sign

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[1] This brief refers to the trial transcripts as follows: "T1" refers to the Transcript of Trial of March 16, 2009; "T2" refers to the Transcript of Trial of March 17, 2009; "T3" refers to the Transcript of Trial of June 1, 2009; "T4" refers to the Transcript of Trial of June 2, 2009; "T5" refers to the Transcript of Trial of June 3, 2009 (morning); "T6" refers to the Transcript of Trial of June 3, 2009 (afternoon); "T7" refers to the Transcript of Trial of August 20, 2009 (morning); "T8" refers to the Transcript of Trial of August 20, 2009 (afternoon); "T9" refers to the Transcript of Trial of August 21, 2009; "T10" refers to the Transcript of Trial of December 14, 2009.

a deed making F.S. a co-owner of valuable real estate and removed $97,000 from one of his father's bank accounts.

With F.S. and P.S.'s motivations and actions thus exposed, it is clear that T.S.'s reaction to F.S. and P.S. was not paranoia, but was a well-founded suspicion based upon fact.

If F.S.'s greed was the motivating factor behind the decision to file this action, T.S.'s companion J.D. was the catalyst. F.S. testified that he began gathering evidence in order to institute this proceeding because he saw his father putting trust in, and spending money on, J.D. [T2:163]. Curiously, one of plaintiff's experts, Dr. H.G., in his initial report, conditioned his opinion that T.S. was incapable of managing his affairs "**as long as he is involved in this relationship... with J.D.**" [T1:187].

T.S. has always acknowledged making gifts to J.D., and has maintained a healthy and well-reasoned view of his relationship with her. As T.S. explained to Dr. B.H.,

> He said that she is here to help me in the evenings. "I enjoy her company. She enjoys mine. We have similar personalities. We happen to relate to the world the same way. We enjoy each other's company. Because she is here, I am able to go out to eat on a regular basis. I am able to travel"…. [he was] completely aware of what he was getting out of the relationship and what J.D. was getting out of the relationship.

[T3:131, 136]. After talking with T.S. about his relationship with J.D., T.S.'s long-time trusted attorney, M.H., Esq., also concluded,

> T.S. knew what he was doing and his rationale for doing it made sense…. He was kind of isolated and alone without having anyone for good social interplay, except when his son visited. He also need[ed] to have someone there to take care of him…. he has some physical infirmities…. And she provided two things, both this coverage ... and also provided social

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> interaction, someone to talk to that T.S. enjoyed, it was a positive thing in his life. She brought her children and they moved in, and T.S. enjoyed the children.... I think it's helped keep him young. But he said, look, I've got this relationship. She needs financial assistance, I need some social interaction and I need someone that I like taking care of me during -- during the 24/7, and so I felt it was a reasonable tradeoff to give her the -- give her money or spend money on her behalf in exchange for her coming and providing those services.

[T4:164-65].

T.S.'s competence and the rationality of his relationship with J.D. was shown by the testimony of T.S. and was supported by the medical testimony and evidence, as well as by the testimony of fact witnesses who appeared on his behalf.

Mr. M.H., who has known T.S. for over twenty years, testified that T.S. is competent to manage his own affairs and this guardianship action was motivated not over F.S.'s concern for his father, but out of F.S.'s anger that he has been unable to control his father's actions and his father's assets. Mr. M.H.' opinion of T.S.'s capacity is confirmed by physicians B.H., D.O., C.M.D., and Z.S., M.D., and the other witnesses testifying on his behalf.

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As set forth in detail in Point Four, *infra*, the most powerful testimony in this trial came from T.S. himself, who gave cogent and lengthy testimony on all aspects of his life. Any question raised by F.S. as to T.S.'s capacity was persuasively answered by T.S.'s testimony. As T.S. testified, he was eighty-seven years of age at the time of trial, having been born on ... . [T5:46-47]. He was married to K.H. for "two months short of 62 years," when she died. [T5:47]. He and his wife had three children: plaintiff F.S., T.S., and C.S. [Id.]. He earned his Ph.D. in organic chemistry from Purdue University. [T5:47]. He retired in 1984 as the Executive Director of ... . [T5:48].

By all accounts, T.S. is an extremely intelligent man. In 2003 and 2004, when he was approximately eighty-three years of age, he returned to college and obtained two Associates Degrees, one in psychology and one in criminal justice. [T9:81].

M.H. described him as,

> a strong willed individual. He's exceptionally intelligent and has a remarkable knowledge of current events and distant events. He's not loud and pushy, but he stands his ground when he has a position that he's -- that he feels is right.

[T4:145]. Geriatric Care Manager M.C. described the impression that she formed of T.S.:

> He... appeared to me as a person who flouts convention, and was very, fairly non-traditional in his outlook his whole life; that was the impression I had, of someone who was iconoclastic. He was not conventional, not a traditional person.
>
> And, I was left with the feeling that this is a person who was probably going to live a non-traditional life, a non-conventional life, and he was. He was living a non-traditional life.

[T9:93].

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It is apparent from the evidence that T.S. is the victim of his son and daughter-in-law's self-interest, combined with the recognized "double standard" that plagues elders in our society:

> Society is unwilling to tolerate in a seventy or eighty-year-old person 'the same silly decision' that would go unchallenged if made by an individual in the prime of her life.

Andrews, M., The Elderly in Guardianship: A Crisis of Constitutional Proportions, 5 Elder L.J. 75, 94 (Spring 1997). T.S. asks the Court to be mindful of the family's self-motivation and the double standard at play here, as well as the gravity of this action in terms of T.S.'s personal rights:

> Despite the seemingly benevolent nature of the guardianship system, the consequences of guardianship are very harsh. When a court appoints a guardian, the ward loses all rights to determine anything about [his] life. "The typical ward has fewer rights than the typical convicted felon -- they can no longer receive money or pay their bills.…By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen.…

Gottlich, V., The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective, 7 Md. J. Contemp. Legal Issues 191, 197 (Fall/Winter 1995-1996) (quoting House Subcomm. on Health and Long-Term Care of the House Special Comm. on Aging, Abuses in Guardianship of the Elderly and Infirm: A National Disgrace, H.R. Doc. No. 641, 100th Cong., 1st Sess. 4 (1987)).

In our country, one of the paramount rights of all citizens is the freedom to do as we wish within very broad parameters of acceptable conduct. We place serious restrictions on the ability to involuntarily commit a person. The deprivation of freedom inherent in a guardianship is almost as severe as in a commitment.

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Recognizing this, our Supreme Court has directed that,

> **unless they endanger themselves or others, competent people ordinarily can choose what they want, even if their choices are irrational or dangerous.**

In re M.R., 135 N.J. 155, 167 (1994) (emphasis supplied). In other words, it is beyond question that a competent person has a right to make choices about his life, "even if that [choice] seems to his family and friends to be an impractical or risky choice." In re Macak, 377 N.J. Super. 167, 177 (App. Div. 2005).

In the instant case, T.S. has chosen to reject his son's increasingly abusive attempts to control his life, and has chosen to associate with J.D. and her family over

his son's objection. This is a choice that T.S. is fully capable of making and one that he has the right to make. These decisions are neither "irrational" nor "dangerous." As stated by our Supreme Court, persons such as T.S. are permitted to so choose **even if** those decisions were irrational or dangerous. In re M.R. Simply put, T.S. is competent and plaintiff cannot sustain its burden of proving otherwise.

For the reasons set forth herein, T.S. asks that the Court put this litigation to an end, and to enter judgment dismissing F.S.'s guardianship application and awarding T.S. costs, including his attorney fees and the charges of the guardian *ad litem*.

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LEGAL ARGUMENT

POINT ONE

PLAINTIFF BORE THE BURDEN OF PROVING INCAPACITY BY CLEAR AND CONVINCING EVIDENCE.

"The clear public policy of this State, as reflected in [the State Constitution, legislative acts, administrative regulations and judicial decisions] is to respect the right of self-determination of all people." In re M.R., 135 N.J. 155, 166 (1994). The Court is considered the guardian of personal rights, with a "special responsibility to protect the right of self-determination." Id. (*quoting* In re Conroy, 98 N.J. 321 (1985)). Therefore,

> unless they endanger themselves or others, competent people ordinarily can choose what they want, even if their choices are irrational or dangerous.

In re M.R., 135 N.J. at 167.

Consequently, **even in cases in which the alleged incapacitated person chooses not to testify**, "the court must still independently consider all of the evidence, including the doctors' reports and the report of the court appointed attorney." The application for guardianship must be denied unless the petitioner proves by **clear and convincing evidence** that the person is incapacitated. In re Macak, 377 N.J. Super. 167, 175-6 (App. Div. 2005) (*citing* R. 4:86-6; In re M.R., *supra*, 135 N.J. at 169; N.J.S.A. 52:27G-29a; In re Farnkopf, 363 N.J. Super. 382, 390 (App. Div. 2003)).

Thus, in the instant guardianship action, it is the plaintiff's burden to prove, by clear and convincing evidence, the alleged incapacitated person's incapacity. Macak, *supra*, 377 N.J. Super. at 175-6 (further citation omitted). As set forth herein, plaintiff's proofs did not show that T.S. is incapacitated by any standard, much less by clear and convincing evidence.

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POINT TWO

PLAINTIFF'S PROOFS FAILED TO SATISFY THE LEGAL DEFINITION OF INCAPACITY.

Under New Jersey law, the Court may appoint a guardian "if [it] finds that an individual is incapacitated as defined in N.J.S.A. 3B:1-2...." An "incapacitated individual," in turn, is defined by N.J.S.A. 3B:1-2 as,

> an individual who is impaired **by reason of mental illness or mental deficiency** to the extent that he **lacks sufficient capacity to govern himself and manage his affairs**.[2]

(Emphasis supplied). Under this two-prong definition, a plaintiff must prove (1) that the alleged incapacitated person "is impaired by reason of mental illness or mental deficiency"; and (2) that the alleged incapacitated person suffers from this illness/deficiency "to the extent that he lacks sufficient capacity to govern himself and manage his affairs." It is this two-part definition that governs the within action.[3]

When plaintiff's evidence is examined in the context of the correct legal definition, it is clear that plaintiff has failed to demonstrate that T.S. meets the definition of an "incapacitated individual."

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A. PLAINTIFF FAILED TO PROVE THAT T.S. SUFFERS FROM A "MENTAL ILLNESS OR MENTAL DEFICIENCY" AS REQUIRED PURSUANT TO THE FIRST PRONG OF THE STATUTORY DEFINITION OF INCAPACITY.

The first element of the statutory definition of an "incapacitated person" requires that the person alleged to be incapacitated suffer from a "mental illness or mental

[2] While the term "incapacitated person" can also be defined as a person who is "impaired by physical illness or disability, chronic use of drugs, chronic alcoholism or other cause (except minority) to the extent that he lacks sufficient capacity to govern himself and manage his affairs," N.J.S.A. 3B:1-2, there has been no allegation that T.S.'s Parkinson's disease or any other physical disabilities render him incapacitated; in fact, the only experts offered by the plaintiff in this matter were psychiatric experts.

deficiency." N.J.S.A. 3B:1-2. As demonstrated at trial, plaintiff failed to establish this threshold element of the statutory definition.

As set forth below, the differences between plaintiff's experts and T.S.'s experts were plain. F.S.'s experts, H.H., M.D. and H.G., M.D., are both psychiatrists with no specialty in geriatrics; T.S.'s experts, B.H., D.O. and Z.S., M.D., are physicians who both specialize in geriatric medicine. Both of T.S.'s medical experts, as well as his expert geriatric social worker, performed a battery of standardized objective tests that are accepted by the American Geriatric Society and the American Medical Association. [T3:100; T7:23]. With the exception of the mini-mental status examination, plaintiff's experts performed none. [T1:198]. Rather, they relied solely upon their subjective impression of T.S., based upon brief meetings and prejudicial input from F.S. and P.S.

Dr. H.H. does not specialize in geriatric psychiatry; in fact, his practice comprises only 20 to 30 percent geriatric patients. [T1:68]. Prior to issuing his first report opining that T.S. required a guardian, Dr. H.H. spent a total of 45 minutes to an hour with Dr. T.S.; and an equal amount of time with the plaintiff and his wife. [T1:84].

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Similarly, Dr. H.G. does not have a specialty in elder psychiatry, and he does not specialize in any age group in his practice. [T1:179-80]. He does not perform competency evaluations as part of his practice. [T1:180-81]. **In fact, before meeting T.S., Dr. H.G. had never done an evaluation to determine legal capacity.** [T1:181]. He spent two hours with T.S. and an hour with F.S./P.S. prior to first report. [T1:129].

[3] Although plaintiff had initially claimed that T.S. is being unduly influenced by J.D., at trial plaintiff's counsel represented that "undue influence is not part of this action." [T1:83-84]. Thus, no further argument will be asserted herein with regard to the validity of the now-abandoned claim.

T.S.'s expert B.H., D.O., is board-certified in geriatric medicine [T4:91], and her training and education qualify her to diagnose and manage psychiatric disorders and to prescribe medications for those disorders. [T4:93]. She has evaluated more than 100 elderly individuals over the years. [T3:72].

T.S.'s expert Z.S., M.D., is board-certified in internal medicine, board-certified in geriatrics, with a two-year fellowship in the specialty from Robert Wood Johnson Medical School, and board-certified in end-of-life care. [T7:4-6]. For the past eleven years, Dr. Z.S. has worked at a veteran's hospital; for the past five years, she has been the attending physician of the geriatric psychiatry ward, a locked unit in which all patients have a primary psychiatric diagnosis. [T7:6-7, 9]. She also teaches the geropsychiatric fellow and the psychiatric residents from Robert Wood Johnson. [T7:7]. Dr. Z.S. estimates that, in the past eleven years, she has performed more than 300 capacity evaluations.

Plaintiff's experts contended that there is no objective test to determine judgment or insight, in an effort to render their opinions difficult to examine and, they hoped, "untouchable." T.S.'s experts disagreed with this. As eloquently shown by T.S.'s experts [T3:94-5], the assertion that there are no objective tests is simply not tenable.

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Plaintiff's experts' claimed expertise would have been convincing if they had actually been able to diagnose T.S. with a psychiatric disorder, or if they had agreed on a psychiatric diagnosis.[4] As Dr. B.H. pointed out, neither of these psychiatrists gave any psychiatric diagnosis whatsoever. [T4:96]. As Dr. Z.S. concurred, neither of plaintiff's experts made any primary psychiatric diagnosis of T.S.. [T7:44; T9:43].[5]

When asked why he believed that T.S. was in need of a guardian, Dr. H.G. testified as follows:

> I don't think that he -- I think that he was ruled by his emotions and that his emotions were impairing his judgment and he was making decisions that were only alienating himself from the people who cared most about him, were most supportive of him,[6] and putting himself in a very tenuous situation with a woman who is a relative stranger, and he was acting in a way which was so totally uncharacteristic of his previous behaviors....

[T1:142]. When asked on direct examination whether his opinion as to incapacity was based upon "any psychiatric illness that he was suffering from," Dr. H.G. replied, "**not per se, no**." [T1:134].

Although Dr. H.H. attempted to deny at trial that he had not diagnosed T.S. with "any mental illness, mental disease or condition" [T1:65], in his deposition he unequivocally testified that he had **not** diagnosed T.S. with a mental illness, disease or condition. [T1:65].

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[4] Although Dr. H.H. testified at deposition that he did not diagnose T.S. with "any mental illness, mental disease or condition" [T1:65], he later testified at trial: "My diagnosis of T.S. including mid-stage or advanced Parkinson's disease, diabetes mellitus, from a psychiatric point of view, Dr. T.S. was clearly in my opinion suffering from a presenile dementia with associated depressive features." [T1:22-23]. On the other hand, Dr. H.G. testified that he "didn't see any evidence of dementia.... I know he's not demented," and that he observed no symptoms of clinical depression in T.S.. [T1:170-71, 201].

[5] Although they claim that T.S. exhibits paranoia, Dr. Z.S. explained that paranoia is a symptom, rather than a diagnosis that might qualify as a "mental illness or deficiency" under the first prong of the two-part statutory definition of incapacity.[T7:46].

[6] This opinion regarding T.S.'s alienation from his family is contrasted by T.S.'s expert's opinion that "he has not been the one that has alienated his family, I believe that his family has chosen because of the situation to alienate themselves from him." [T3:138-39].

Although the specters of dementia, depression and paranoia were raised by plaintiff's experts, plaintiff utterly failed to prove at trial that T.S. suffers from these, or any other, "mental illness or mental deficiency" as required by the first prong of statutory definition of incapacity.

1. Plaintiff Failed to Prove that T.S. Suffers from Dementia

Plaintiff's own experts contradicted each other with regard to the central issue of T.S.'s cognitive abilities. Moreover, Dr. H.H. not only contradicted Dr. H.G. in this respect; he actually also contradicted himself.

Dr. H.H. admitted that he himself performed a mini-mental status examination on T.S.. Dr. H.H. admitted that the test evaluates orientation, the ability to retain memory and understand, the ability to register concepts or words or numbers and retain them for a period of time; the ability to focus attention to the extent necessary to receive and communicate information; abstract reasoning ability; the ability to recall past events and retain numbers or words at a later time; and the ability to use language appropriately. [T1:59-62]. Although he attempted to minimize the importance of this examination, Dr. H.H. admitted that scoring well on the mini-mental status exam indicates that the person's "**cognitive capacities are intact**." [T1:62-63]. Dr. H.H. admitted that T.S. attained a "**perfect score**" on the mini-mental status examination performed by Dr. H.H. himself. [T1:58-59, 61]. [7]

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[7] Although Dr. H.H. highlighted a Genesis record indicating that Dr. T.S. scored 25 out of 30 on a mini-mental status exam performed shortly after his hip surgery [Exhibit P-26, PS092E], Dr. H.H. also admitted that he "assumed" Dr. T.S. was on medication at the time the test was administered; that OxyContin was among his registered medications [T1:90-91]; and that there was a "legitimate question" as to the way the test was scored. [T1:95]. With regard to the Genesis mini-mental score, Dr. Z.S. later explained that two of the questions ("Ask resident to write the sentence" and "Ask resident to copy the design shown here") had been scored "zero" [T9:23] and that, assuming T.S. was unable to write the sentence or copy the design because of tremors resulting from his Parkinson's disease, the proper way to

Dr. H.H. testified that T.S. "has a great deal of superficial cognitive capacity[8]" [T1:27], he testified that "the superficial cognitive integrity of Dr. T.S., I had no doubt about that... But underneath that cognitive integrity is a significant impairment of insight and judgment...." [T1:37]. Dr. H.H. stated that Dr. T.S.'s "impairment of judgment is superficially characterized by what psychiatrists call confabulation,... [which is] characteristic, it's almost pathognomonic for a psychiatrist's definition and interpretation and diagnosis of dementia." T1:42].

When asked on direct examination what his diagnosis was in this case, Dr. H.H. testified: "My diagnosis of T.S. including mid-stage or advanced Parkinson's disease, diabetes mellitus, from a psychiatric point of view, Dr. T.S. was clearly in my opinion suffering from a presenile dementia with associated depressive features." [T1:22-23]. Given the results of the mental status test, this opinion strains credulity.

Dr. H.H.'s opinion was called into question on cross-examination. Although at trial Dr. H.H. initially denied that he had failed to diagnose T.S. with any mental illness, mental disease or condition [T1:65], this was a clear contradiction of his prior deposition testimony:

> **Q: Have you diagnosed Dr. T.S. with a mental illness, disease or condition?**
> **A: No.**

When confronted with this contradiction, he replied, "I'm not sure where we went on with that." [T1:65].

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score the test would not be a 25 out of 30, but a 25 out of 28, putting him in the normal range even at this post-operative stage. [T9:24].

[8] Dr. B.H., on the other hand, testified that "there's only one kind of integrity. And, you know, I don't know what he's talking about with superficial cognitive integrity...there's nothing in the literature...." When asked whether there is such a distinction in the medical literature concerning a superficial integrity versus a deeper level judgment, Dr. B.H. replied, "No, no. There are no levels of integrity." [T3:97-99].

In contrast to Dr. H.H.'s ever-changing "opinion," plaintiff's other expert, Dr. H.G., plainly testified: "**I didn't see any evidence of dementia**." [T1:170-71]. As he testified later, "**I know he's not demented**." [T1:201].[9]

Dr. H.G. testified that Dr. T.S. is not cognitively impaired; "he's very capable, and I don't dispute that at all." [T1:150]. In fact, he testified that, based on T.S.'s high score on the mini-mental test, he felt that it was not necessary to administer the test again. Dr. H.G. stated that T.S. is capable of exercising cognitive abilities to reason about intellectual matters. [T1:169].

2. Plaintiff Failed to Prove that T.S. Suffers from Depression

With regard to depression, Dr. H.H. testified that "the records reflect that Dr. T.S. has been treated with psychotropic medication, psychiatric medication, primarily Zoloft, which is a antidepressant... [Dr. T.S.] agreed he had some difficulties with depression. He said he had been through some rough times, as I remember." [T1:44-45]. However, **Dr. H.H. admitted that he did not diagnose T.S. with clinical depression**. [T1:64-65].

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Dr. H.G. testified that Dr. T.S. had a "history" of depression [T1:132]. When specifically asked whether he diagnosed Dr. T.S. with any psychiatric illness, he replied "I diagnosed him with a **history** of major depression, recurrent, seasonal affective disorder which it's also called in the lay literature and in the behavioral science literature as a winter depression." [T1:135]. Dr. H.G. testified that **he never observed any sympT.S.s of clinical depression in T.S..** [T1:153].

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[9] T.S.'s experts agreed with Dr. H.G. on this point: Dr. Z.S. testified that she found no signs of dementia. [T7:44].Dr. B.H. concurred. [T3:89-113].

In fact, even the plaintiff admitted at trial that his father was a "happy person" most of the time. [T2:178].

3. Plaintiff Failed to Prove that T.S. Suffers from Paranoia

As an initial matter, although there were claims by plaintiff's experts that T.S. exhibits paranoia, T.S.'s experts both reminded the Court that paranoia is a **sympT.S.**, rather than a **diagnosis.** [T7:46; T3:113; see also T4:81][10]. As such, it falls short of the statutory requirement of proving a "mental illness, mental disease or condition" to establish the first prong of the two-prong test for incapacity.

Moreover, as set forth in Point Four, *infra*, particularly given plaintiff's motivations for maintaining this action and plaintiff's actions taken in preparation for commencing this action, the evidence shows that T.S.'s feelings toward his son and daughter-in-law constitute well-founded mistrust, rather than paranoia. Plaintiff's experts failed to establish that T.S. suffers from paranoia.

In fact, when asked on direct examination to state his diagnosis of T.S., Dr. H.H. did not even mention the word "paranoia." [T1:22-23]. The closest he came to an opinion regarding paranoia was in response to prompting by plaintiff's counsel's question, "Do you have an opinion with regard to paranoia and whether or not Dr. T.S. suffers from that?" Dr. H.H.'s vague response was that T.S. has "**given evidence of** a longstanding paranoid personality disorder." [T1:50].

Ironically, when asked on direct whether he ever spoke to T.S. or his family regarding a history of paranoia, Dr. H.G. testified, "**the first suggestion about it came from P.S.**...." [T1:155]. Dr. H.G. testified that he obtained information regarding

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T.S.'s history of paranoia from his family members. [T1:155]. He went on to opine that T.S. gave him examples that were "so egregious that and so pervasive in his misperception I believe of P.S. and her intentions and even in other contexts regarding his son F.S. and his intentions, and it bespoke a man who is so paranoid and mistrustful and afraid of being dominated and controlled by others, that he is willing to forego relationship with them...." [T1:161-62]. Dr. H.G. later made a passing reference to T.S.'s "paranoid perception and orientation to the world." [T1:171]. Contrary to this testimony, it is submitted that there is persuasive evidence that T.S.'s perception of his son and daughter-in-law's conduct was quite accurate and not a misconception.

The vague references by plaintiff's experts, lacking factual support, fall far short of proof that T.S. suffers from paranoia.

B. ASSUMING, *ARGUENDO*, THAT PLAINTIFF HAD PROVEN THAT T.S. SUFFERS FROM A "MENTAL ILLNESS OR MENTAL DEFICIENCY" AS REQUIRED PURSUANT TO THE FIRST PRONG OF THE STATUTORY DEFINITION OF INCAPACITY, PLAINTIFF FAILED TO PROVE, PURSUANT TO THE SECOND PRONG OF THE STATUTORY DEFINITION, THAT T.S. SUFFERS FROM SUCH ILLNESS OR DEFICIENCY TO THE EXTENT THAT HE LACKS SUFFICIENT CAPACITY TO GOVERN HIMSELF.

1. Plaintiff Failed to Prove that T.S. Has Made Poor Judgments; Even Assuming that He Has Made Poor Judgments, Such Judgments Were Insufficient to Establish Incapacity Under New Jersey Law

As set forth *supra,* it is beyond question that a competent person has a right to make choices about his life, "even if that [choice] seems to his family and friends to be an impractical or risky choice," Macak, *supra,* 377 N.J. Super. at 177, and that,

> unless they endanger themselves or others, competent people ordinarily can choose what they want, **even if their choices are irrational or dangerous**.

[10] As Dr. Z.S. explained, "Paranoia is a symptom. Meaning that when [a] patient has [a] fever, that's a symptom. But what is it due to. Is it due to pneumonia or urine infection. You have to find the cause. It's just a symptom in isolation." [T7:45].

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In re M.R., *supra*, 135 N.J. at 167 (emphasis supplied).

In the instant case, T.S. has chosen to associate with J.D. and her family over his son's bitter objection. This is a choice that T.S. is fully capable of making. Although these decisions are neither "irrational" nor "dangerous," our Supreme Court has held that a person such as T.S. would be permitted to so choose **even if** those decisions were irrational or dangerous. In re M.R. As Dr. Z.S. testified,

> [T.S.] is a person that I find has his cognitive abilities and [is] able to function independently in his home. He is a gentleman who can make choices. Whether those choices are good or bad, that is his decision.

[T9:15].

Dr. H.H. made a sweeping statement that "Dr. T.S.'s judgment is impaired to that degree that he cannot make those decisions which are basic to his best interests." [T1:54]. Similarly, Dr. H.G. testified that T.S. needs a guardian "because his judgment is profoundly impaired."

Like Dr. H.H. [T1:116], Dr. H.G. claims that there is no formal instrument available to measure judgment [T1:150]; and that such determinations must be made by interviews conducted by a person in the mental health field who is skilled in that "art." [T1:148].

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At trial, plaintiff's witnesses made claims of isolated instances of alleged poor judgment on T.S.'s part, many of which events occurred years before the guardianship action was even contemplated. However, the few isolated cases of claimed lack of judgment that plaintiff strained to put into evidence do not establish incapacity, as a matter of law.

a. Judgment as to Personal Matters

Dr. H.G. testified that his interview of T.S. and his family revealed his lack of judgment solely because Dr. H.G. had come to the conclusion that F.S. and P.S.'s intentions were benevolent. [T1:154-62]. Although T.S. explained to Dr. H.G. the bases for his mistrust of plaintiff and plaintiff's wife (such as P.S. influencing Dr. T.S.'s former aide, Joel, to spy on him), Dr. H.G. dismissed this explanation as an "egregious" misperception of F.S. and P.S. [T1:161].

Using his "art" of interviewing T.S., F.S. and P.S., Dr. H.G. also likened J.D. to a "cult leader," even though he never interviewed J.D. [T1:185, 193]. He admitted that the information he obtained regarding the relationship between T.S. and J.D. was basically from P.S., F.S. and T.S.'s daughter, C.S. [T1:195].

Dr. H.G. admitted at trial that, in his expert report, he made a conclusion that amounted to conditional incapacity: "I do not believe that [Dr. T.S.] is capable of making rational decisions regarding his financial assets and medical treatment **as long as he is involved in this relationship... with J.D.**" [T1:187]. However, at trial, he amended that opinion by testifying that, "at this point, I could say that it's independent of J.D." [T1:189].

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Contrary to plaintiff's claim, Dr. B.H. testified that T.S. utilized good judgment with respect to the issues central to the case. Allowing J.D. and her family to move into his home was actually "a very thoughtful process in which he stayed at J.D.'s home for approximately three weekends for her children to get to know him, and him them, to make sure they were compatible." [T3:129].

b. Judgment as to Medical Issues

Dr. H.H. admitted that T.S. has a long history of following his own beliefs with respect to his medical needs, although sometimes those beliefs conflicted with advice he received from doctors. [T1:75].

In fact, Dr. H.G. testified that "He's a highly intelligent man, very well read in the medical field, and I'm sure that anything he didn't know he would research himself and read about." [T1:152-53].

Examples of claimed "poor judgment" as to medical issues included such things as: not seeking medical assistance immediately after getting a bruise or a bump on the head [T1:158]; driving; shoveling snow; and attempting to scrape away ("debride") a foot sore with a knife.[11] These alleged incidents occurred over a span of time that began in the year 2005 or earlier. [T9:29].

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[11] In this 2005 much-discussed incident, T.S. went to his doctor after the at-home debriding did not solve the problem; Dr. Patel treated the ulceration by further debridement in the office, followed by use of an antibacterial cream. This course of action produced the desired result: the medical condition was successfully resolved. [Exhibit D-56-7, PS0067-68, July 27, 2005 Chart Note].

i. Hip Fractures; Checking Himself Out of Rehabilitation Facilities

Plaintiff claimed that T.S.'s decision to wait several hours before going to the hospital after the second fall and hip fracture was an example of poor judgment. Certainly, others might have chosen to rush to the hospital the moment of the fall, rather than wait, as T.S. did, to see if the discomfort subsided. However, geriatric social worker M.C. testified that it isn't unusual that T.S. waited several hours before calling for medical help. As she pointed out,

> People with Parkinson's fall a great deal. And they generally try not to go back to the hospital.

[T9:142].

Although Dr. H.H. was highly critical of this decision, and testified on direct examination that T.S.'s management of his hip injuries, and his decision to check himself out of medical facilities, indicated that his judgment was impaired [T1:47-48], Dr. H.H. acknowledged, "I certainly don't propose myself as an expert on what consequences may be associated with a broken hip." [T1:46].

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With respect to T.S. leaving the rehabilitation facilities[12], Dr. H.H. further admitted that T.S. "may have" told him about his subsequent rehabilitation, including seeking extensions for physical therapy. [T1:66]. When asked whether, based upon what T.S. told him, Dr. H.H. concluded that Dr. T.S.'s actions indicated that he was capable of managing his own medical problems with regard to his hip injury, Dr. H.H. finally admitted, "Based on what he told me, I did not question how he managed his hip injury problems." [T1:67-68].

[12] Incidentally, as Dr. Z.S. noted, a nursing home would not allow an incompetent individual to check themselves out against medical advice without a psychiatric consult. [T7:63-5].

Dr. B.H. testified that T.S.'s decisions to discharge himself from rehabilitation were not indicative of incapacity, explaining that "he each time comes out of the rehab facilities and goes to outpatient therapy and continues the therapy as long as it is recommended. And he stops when he has plateaued out, when he's no longer making anymore progress." [T3:155]. Dr. B.H. further opined, "This is somebody who managed to get out of the hospital and back home after of a second hip--hip fracture within 10 days and he was ambulatory. It's just amazing. This was a survivor." [T3:137].

M.H. spoke to both F.S. and T.S. when T.S. was considering checking himself out of Arbor Glenn in 2006. F.S. had called Mr. M.H. to see whether he could convince T.S. to stay at Arbor Glenn. Mr. M.H. discussed the issue with T.S. "T.S. said there was no useful purpose in staying. It was a weekend, they weren't doing anything. He could get the same sort of care, the same sort of rehabilitation on an outpatient basis and he did not care to stay... [And] he did [get outpatient rehabilitation]." [T4:170]. As T.S. himself later explained,

> I called M.H. about it. He said I was permitted to leave. I was put in a room that didn't have air conditioning. It was hot as hell. There was a person there with dementia talking all night. So I had to sleep over in the Rec. Room. The next day I asked about physical therapy, and they said, no we don't have it on the weekends. So I didn't see any point of staying there.... [W]hen I told [my orthopedic physician, Dr. M.] that I signed myself out, he said, "I don't understand why it took you so long."

[T5:93-95].

Mr. M.H. and T.S. also discussed the issue of T.S.'s leaving Genesis/Westfield Center following his June 2008 hip fracture:

> I was there at the time that he left the facility. And I felt that with J.D. there to take care of him at home and with rehab on a formal basis, there really wasn't any good reason for him to stay at that facility... [And] he

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> did [make appropriate arrangements to assure his continuing recovery at home.]

[T4:171-72]. T.S. explained that he left Genesis because they were trying to have him take medications that were different from those he was prescribed. [T5:98-9].

When asked whether he speaks with his doctors regarding his medical concerns and about the types of medical treatment he wants, T.S. replied,

> Well, I, I tell them what I'm taking and what the results are. And they, they always take to blood tests, urine tests, and then they tell me what they recommend.

[T5:103].

ii. Diabetes

A central focus of plaintiff's case alleging lack of judgment was T.S.'s alleged failure to manage his diabetes. Although plaintiff devoted a great deal of effort in trying to establish this claim, these efforts were obliterated when T.S.'s long-time treating endocrinologist, Dr. R.R., testified as a fact witness that T.S.'s diabetes was under control, as discussed more fully in Point Four, *infra*.

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Before Dr. R. essentially destroyed plaintiff's claim of poor diabetes management, Dr. H.G. had testified that T.S. "disputed the diagnosis" of diabetes but "nonetheless led me to believe that he was compliant and took Glucophage on a nightly basis." [T1:132]. As further questioning revealed, at his deposition Dr. H.G. had testified that Dr. T.S. was able to relate to him that he had diabetes and Parkinson's disease, and about his medications. [T1:164-66].

Although Dr. B.H. confirmed that T.S. doesn't like to use the term "diabetes," she stated that "his actions speak louder than words, because he takes the Glucophage regularly, and he, he maintains his diet regularly." [T3:87]. Dr. B.H.'s review of the

laboratory tests over time revealed that T.S. followed medical recommendations, taking medications appropriately and following an appropriate diet to maintain an appropriate weight. [T3:145-46; 191]. He purchased a Glucometer and monitored his home blood sugars and, at the point that it was appropriate, he went on Glucophage. [T3:197].

Although he has a problem with the term "diabetes," T.S. testified that his body has a problem regulating his blood sugar, and that he takes Glucophage and gets blood testing done every four months. [T5:103-4].[13]

iii. Parkinson's Disease

Plaintiff also claimed that T.S.'s decision to delay taking medication for his Parkinson's disease demonstrated poor judgment on his part. However, Dr. H.H. admitted that he has no special expertise in evaluating the neurological treatment of Parkinson's disease. [T1:68]. When asked whether, in the normal course, a patient should delay taking medication for Parkinson's as long as possible because the medication loses its effectiveness over time, Dr. H.H. replied that "There's some element of truth to that." [T1:70]. In his deposition testimony, Dr. H.H. testified, "usually in the treatment of Parkinson's disease... the patient does not start with a diagnosis and medication. Medication is put off as long as possible and a minimal dosage is used because the medication's effects wear off unfortunately." [T1:71].

In contrast to the lack of expertise of plaintiff's experts, Dr. B.H. has extensive training in all of the syndromes of geriatrics, including Parkinson's disease. [T3:87]. She evaluated T.S. and concluded that he takes his Parkinson's medication (Sinemet) at the

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[13] Dr. Z.S. also testified that T.S. was able to tell her his medications, the dosages of those medications, and why he was taking each of his medications. [T8:14].

appropriate time and in the appropriate dosage. She also clarified negative references that had been made to T.S.'s reluctance to begin taking the medication:

> ... there was also conversation in the Summit Medical Group notes stating that he was resistant to taking medications. Well, it turns out that they're wrong and he was right, in that, you want to start Sinemet as late as possible, because it tends to wear off, the efficacy of this medication. So the sooner it starts, the sooner he's not going to be able to have a good result from it.

[T3:88-89; see also T3:146-47].

c. J.D.

Perhaps the heart of plaintiff's claim of poor judgment was T.S.'s decision to maintain a relationship with J.D. Although plaintiff tried to convince the Court that T.S.'s relationship with J.D."bespeaks incompetence," the proofs demonstrated otherwise.

Although F.S. and P.S. testified at trial that J.D. interfered with T.S. making his own medical decisions, when F.S. was confronted with his own deposition testimony to the contrary, he simply stated, "I would probably beg or differ with my [deposition] answer." [T2:207].

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Contrary to the bald assertion of plaintiff, the rationale for this relationship is cogent and a legitimate exercise of T.S.'s rights.

As T.S. had explained to Dr. B.H.,

> "[J.D.] is here to help me in the evenings. I enjoy her company. She enjoys mine. We have similar personalities. We happen to relate to the world the same way. We enjoy each other's company. Because she is here, I am able to go out to eat on a regular basis. I am able to travel"…. there was nothing in the tests that I administered or any of my observations that would make me believe that he wasn't completely aware of what he was getting out of the relationship and what J.D. was getting out of the relationship."

[T3:131, 136].

When asked whether the fact that T.S. has made gifts[14] to J.D. indicates that he is incompetent, Dr. B.H. testified as follows:

> No. None--not whatsoever ... Because he said that it is his money. It is his choice, and he had even been asked a number of times from a number of different professionals, do you think that there's a possibility that she's taking advantage of you? And he said yes, there's that possibility, but I think that she's an honest person and that, you know, this isn't--he said he was just going to take it, see how it all works out... He was getting companionship and increased freedom. He was getting the ability to interact with children on a daily basis.... He--he was very up front about the money that he had spent.

[T3:134]. With regard to T.S.'s expectations of the relationship with J.D., Dr. B.H. opined,

> He said that it might work out, it might not, but that right now everything is--is fine and they'll take it day to day and the personal care contract is such that either one can terminate it at their own will at any point in time.... He said to me that he would be very happy for [J.D.] if she wanted to get married [to someone else] and that he would not at all be upset.

[T3:139-40]. When asked whether T.S. understands that J.D. may have her own motives for continuing the relationship, Dr. B.H. continued,

> Yes, and he's very aware that she is benefiting financially from it. He is aware and he feels that it is--it's his decision. It's not for anybody to question. And throughout his life, he has made decisions that many might think are not in his best interest but he has made them and he has survived. He's done fine...because he has that capacity I believe that he--there's no reason to be questioning.

[T3:140]. As Dr. B.H. concluded,

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[14] Incidentally, as M.H. testified, "[T.S.'s] financial problems developed almost entirely as a result of this proceeding and the costs associated with it, not from any loans or expenses with respect to J.D.." [T5:15].

> He said numerous times that it's his money and it's his decision to do with it what he pleases. And he feels that his family is trying to control him with it.

[T3:141].

Dr. Z.S. opined that T.S. understands that people may think that J.D. is taking advantage of him, but that he is also taking advantage of her by giving him socialization and quality of life, helping him with his physical disability, and being present in case he needs assistance. He recognizes that there is a risk involved in his relationship with J.D.; that it is not a permanent relationship and it can end at any time. [T7:49]. As she explained,

> He was a gentleman who had spent a good life and he wanted to continue to enjoy. He has a physical limitation from his illness. He needs help with it, 24-hour help. He's aware of that. Otherwise, he said he would have to end up in an assisted living [facility]. J.D.'s presence is preventing all that.

[T7:49-50].

Notably, even the records of Dr. Z., to whom F.S. and P.S. took T.S. in the same month that they have admitted to consulting with their litigation attorney in this case, clearly show that T.S. has always had a healthy perspective regarding the risks and benefits of his association with J.D.:

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> When asked about the possibility that his friend J.D., may be trying to exploit him, he indicated that this is possible but that he has no proof of this.... Discussed ongoing concern that his friend, J.D., may be taking advantage of him. He recognizes that there may be some reason to be concerned, but feels that her intentions are honest.

[Exhibit P-15, PS0921].

Although he claimed not to recall his prior deposition testimony during the trial, F.S. had testified at deposition that T.S. told him that living with J.D. and her children

”might just be temporary. We’ll just see how it goes, and if it doesn’t work out, then they’ll move out.” [T2:204-05].

As the above demonstrates, these claimed examples of poor judgment were rational decisions that a competent individual is permitted to make. As Dr. Z.S. testified, “all of us go through life making good and bad judgments... Whether [T.S.’s] choices are good or bad, that is his decision.” [T9:15, 29].

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POINT THREE

DEFENDANT'S PROOFS ESTABLISHED THAT T.S.'S BEST INTERESTS WERE NOT THE MOTIVATION FOR THIS LAWSUIT.

Although F.S. and P.S.[15] attempted to portray themselves at trial as the benevolent and devoted relatives attempting to rescue T.S. from harm by bringing this action, the proofs established otherwise.[16]

M.H. testified as to whether F.S. has T.S.'s best interests at heart:

> I believe that this whole thing is money based. F.S.--F.S. is--was first afraid that his inheritance might be spent which, of course, his father had an absolute right to do. Secondly, he's desperately trying to get control of that ... property that his father owns because that's where F.S. operates his -- his ... practice.

[T4:183]. Perhaps T.S. said it best, in response to a question by plaintiff's counsel on cross-examination regarding whether he had ever been the victim of a con artist:

> I was warned by [P.S. and F.S.] all the time ... about con artists... What I remind you of is **my reading said that 80 percent of the time when you get ripped off it's by your own family.**

[T6:50].

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As set forth herein, F.S.'s motivation for this lawsuit explains T.S.'s progressive feelings of mistrust toward his family members[17]; and renders substantial portions of T.S.'s medical records unreliable.

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[15] Inasmuch as T.S., Jr. admitted to having no personal contact with his father **since 2006** [T3:34], his actions are not discussed herein.

[16] Although it is defendant's understanding that T.S.'s capacity is the only issue before the Court at this time, defendant notes that plaintiff's motivations and actions in this litigation are also relevant with respect to the issue of attorney fees, to be addressed more fully following the outcome of the capacity hearing.

[17] As T.S. himself recognized, "It's all about money.... He and his wife, his wife disputed her family's Wills and settlements. And I think that, you know, that's part of the harassment, to make me paranoid, and then say I'm paranoid because they... had the neighbors call the police, call DYFS, call this, call that." [T5:96-97].

A. THE … PROPERTY.

M.H. testified that, since the 1980s, F.S. and his father had an oral lease agreement for the … property [T4:156], in which F.S. paid his father rent for use of the … property that T.S. owns and on which F.S. maintains his … practice. However, F.S. has made increasingly blatant attempts (including the instant guardianship action) to gain control of the property that his father rightfully owns.

First, F.S. admitted that, in April 2007, he took his father to an attorney because "I wanted to be sure that the [...] property would continue to pass the way his Will had intended it to go, that it would go directly to me." The attorney F.S. chose was not Mr. M.H., whom F.S. knew as T.S.'s long-time estate planning attorney. [T2:201]. Although Mr. M.H. had been T.S.'s estate planning attorney for many years, and has prepared three wills for T.S. over the years, Mr. M.H. testified that F.S. took T.S. to another attorney to prepare two deeds:

> One was a deed to the house in … he changed it from T.S.'s name alone to T.S. with a 99 percent interest, and C.S., his daughter, with one percent interest. And he created a deed for the … property giving T.S. a 99 percent interest and F.S. and P.S. a one percent interest. In both cases purporting to create a joint tenancy... [the new deeds] would've rendered his -- his planning completely nonexistent. Because assuming that they created legitimate or legally valid joint tenancies, and I don't think they did, those -- those properties would've passed outside of the will so that everything we were doing from the standpoint of the will and then with an inter vivos trust would've had no effect whatsoever. [T4:162-63]...What he did was to make it impossible for [T.S.] to sell or transfer those assets, which I believe are necessary in order, particularly with respect to the … property, to have sufficient as -- income or, or funds, liquid assets to, to cover his bills in the coming years. So that it had significant adverse effect on, on T.S.'s ownership interest. And I'm, I'm pretty sure F.S. understood that when he did this. [T5:24].

T.S. has filed a lawsuit seeking to void the deeds signed that day. [T2:203].

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F.S.'s next attempt to gain control of the ... property came at about the time that he instituted the guardianship action, when he abruptly stopped paying T.S. rent on the ... property. Although he is currently obligated to pay rent to T.S. on the ... property [T4:158], F.S. stopped the rental payments in October 2007. At that point, Mr. M.H. called F.S.:

> I said, "F.S., why aren't you paying the rent that you owe?" And he said, "Because I don't like the way my father is spending his money."

[T4:159].

As a result of a motion made in this proceeding, F.S. paid the back rent in the spring of 2008. However, thereafter he and his wife had an epiphany that they actually owned the property. Based on this, F.S. stopped paying rent again and instituted suit in Somerset County, claiming that F.S. and P.S. own the ... property. [Exhibit D-80; T2:118].

This new-found claim is meritless. In fact, during his testimony on another issue, F.S. let slip his practice of making in-person "payments covering the **rent** on the building," although he quickly recovered himself and said, "not the rent, taxes...." [T2:169].

It is telling that service of process in the Somerset action, commenced after the instant action challenging his father's capacity had been pending for almost a year, was made personally on T.S. at his home, and not on T.S.'s personal attorney, litigation attorney, or the guardian *ad litem* whose appointment plaintiff had claimed was vital to protect his father's interests. T.S. learned of the lawsuit when a process server served him at his home. He testified that he read the complaint, understood it and, in response, contacted his personal attorney, M.H. [T5:109-110].

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B. THE $97,000 ACCOUNT.

F.S. secretly removed $97,000 from one of T.S.'s bank accounts prior to instituting this action. Even though this withdrawal was not disclosed to T.S., F.S. testified that he never intended to steal his father's $97,000, but that he closed his father's World Savings account to give his father the "option to do **whatever he agreed** to do with it." [T2:167]. Mr. M.H.' opinion of F.S.'s actions were different:

> [F.S.] took [the $97,000] out inappropriately. He did so without telling his father, without his father having any knowledge of it, and his father was making financial decisions...There's a difference between what you have the power to do [as an agent] as opposed to what is the proper thing to do. The proper role of the agent and as an attorney in fact is to do what's necessary for the principal. In other words, F.S. had no authorization to take money out for his own account, nor to make it unavailable to his father or indeed to result in no interest being earned. Instead, he took the check out and kept it for over a month until his father inquired about it ... at which point he disclosed that he had taken the money out.

[T4:198-89].

C. F.S./P.S.'S ACTIONS TAKEN IN ANTICIPATION OF LITIGATION.

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P.S. admitted at trial that, after becoming aware of J.D.'s relationship with T.S., she and F.S. entered T.S.'s home, sometimes when T.S. was not at home, to look through and copy T.S.'s personal notes, papers and checkbook. [T2:31, 131-32]. She obtained and photocopied credit card receipts that she found in his house. [T2:47]. She admitted that T.S.'s former aide, Joel, was giving her private information about T.S. [T2:36]; Joel called her to report that T.S. had fallen and had a bump on his head [T2:91-92]. She admitted that she and her husband obtained copies of T.S.'s checks, using the power of attorney T.S. gave F.S. [T2:39].

As testimony continued, it became apparent that these were not actions of a concerned family member trying to assist an incapacitated loved one; instead, these

were secretive actions of someone trying to "build a case" behind that family member's back for his own self interest. For example, although P.S. questioned T.S. about certain checks she saw, when she and F.S. obtained copies of some other checks, she did not ask T.S. about them, apparently because she recognized that T.S. would become aware that she and F.S. were obtaining his private banking information without his consent:

> Q: And did you ask T.S. about this particular check for Card Services?
> A: No, no, I did not ask him about that check because he--when we got copies of these checks, some of these checks would be written out of a checkbook that we wouldn't see. He was keeping --I--he kept checkbooks that we didn't see.

[T2:51-52].

At trial, P.S. revealed the extent of her campaign against J.D. She admitted that she called Adult Protective Services, the Westfield Police Department and the … Police Department. [T2:136-37]. P.S. also admitted that she hired a private investigator in July 2007. [T2:148]. P.S. admitted that, when T.S. fractured his hip in June 2008, without asking T.S., she contacted the … Police Department, reported that she was entering his house because she wanted to terminate J.D.'s services. [T2:137-38]. The police report states that P.S. reported that the caregiver was "assaulting" T.S.[18]; however, at trial, she testified that she had not used the word "assault," but that the police must have "translated" her statement that he was not receiving adequate care into the term "assault." [T2:139]. P.S. also let slip her characterization of J.D.'s diction as "Jamaican gang-speak." [T2:139].

Mr. M.H. provided further testimony regarding the police incident that occurred after T.S.'s second hip fracture. Mr. M.H. received a call from J.D. that P.S. was at

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T.S.'s house with the police, trying to throw J.D. out of the house. [T4:149-50]. Mr. M.H. went to the house with his power of attorney, and informed the police that J.D., and not P.S., had a right to be in the house, at which time J.D. was allowed to go back into the house. [T4:150].

F.S.'s testimony exposed his own credibility issues. He began his testimony professing his concern for his father and his father's financial well-being:

> I don't even want to think about that [the possibility that T.S. was being scammed]. I mean, it's happened to other people. They've been devastated financially over a period of just a year or two. And it looked to me like this was the start of something like that. I mean, you go on the Internet and you read these scams left and right. I mean, I couldn't live with it if I didn't do anything.

[T2:164]. He claimed to be pursuing the litigation as an almost passive litigant, stating that "I talked to my wife about this at length and we decided that, you know, that while the behavior in my opinion was bizarre if we got professional advice to the contrary that we wouldn't go any further with [the litigation]." [T2:159].

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Contrary to F.S.'s self-portrayal as a passive litigant, F.S.'s actions went far beyond that of a typical concerned son. F.S. and P.S. instituted various investigations of J.D.. According to Mr. M.H.' conversations with F.S. and P.S. into the fall of 2007, "those investigations came up negative, which to me helped to establish that, that their opinion of J.D. was not correct." [T5:31-32]. Nevertheless, F.S. and P.S. persisted with zeal.

F.S. testified that, while he and his wife were entering T.S.'s house and secretly making photocopies of T.S.'s personal papers, "**I never in my wildest dreams**

[18] F.S. admitted at trial that he never witnessed or heard of anyone else witnessing J.D. physically abusing T.S. [T2:208].

thought I was going to be filing a guardianship action.... I had no idea that option was available." [T2:182]. He further testified that, when he was obtaining copies of his father's checks from the Merck credit union account, "**I had no plan to file any guardianship action at this point**." [T2:184]. However, F.S. was later confronted with some of the exhibits he had attached to his complaint, including checks dated through October 2007. [T2:187]. F.S. then admitted that he had requested copies of the checks for August, September and October 2007. [T2:188]. He in turn had to admit that, contrary to his previous testimony, he and P.S. had consulted Tiboni & Tiboni, his guardianship litigation counsel, in July 2007, **months before** many of those checks were requested. [T2:188; see also T2:100].

D. BECAUSE OF F.S./P.S.'S ACTIONS TAKEN IN ANTICIPATION OF LITIGATION, SUBSTANTIAL PORTIONS OF T.S.'S MEDICAL RECORDS ARE UNRELIABLE.

In the same month that they consulted with their guardianship attorney, F.S. and/or P.S. began taking T.S. from doctor to doctor, under the guise of adjusting his medications, and "fed" those doctors with their own false statements regarding T.S.'s alleged strange behavior. The false statements then became part of T.S.'s medical records, which were passed on and used to support conclusory statements of subsequent doctors, and eventually used by plaintiff's experts to support their claims of incapacity.

For these reasons, those portions of the medical records post-dating July 2007 that are based upon statements made by T.S.'s family members, or that rely upon medical opinions that were based upon those statements, should be rejected by the Court as unreliable.

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For example, P.S. testified that she arranged for T.S. to see Dr. S. (a non-treating physician)[19] in July 2007. [T2:102]. Dr. S.'s July 16, 2007 report states that T.S. came to see him "for his Parkinson's disease." However, his report states that T.S.'s "**daughter-in-law reports** that he has been acting strangely.... The **daughter-in-law also reports** that he is paranoid...." [Exhibit D-57, PS0126]. Dr. S. then states that, "**given the views of the family member** who came with him, and the argumentativeness which he told me about voluntarily, I think that he **may** be having some psychiatric issues," and recommended a psychiatric consultation. [Id.].

An August 22, 2007 report by Dr. V., which was addressed to F.S.'s attorney in this guardianship action, recounts T.S.'s "recent behavior," and states that "**this information comes from his children** who are quite concerned about his behavior." The report then states, "You will note that Dr. S. ... found him quite argumentative and paranoid...." citing the information provided by F.S./P.S. and the above-referenced statement from Dr. S. [Exhibit D-57, PS0134]. The only information Dr. V. independently reports is that T.S. is within the normal range in the Mental Status test, and that he has "no sign of dementia." Nevertheless, based upon Dr. S.'s statement (which in turn was based on P.S.'s claims) that T.S. "may" be having psychiatric issues [id., PS0126], Dr. V. concludes that T.S. "has a history consistent with psychiatric disease which will include paranoia," and that T.S. therefore "has significantly impaired judgment ... that ... stems from a psychiatric involvement." Because Dr. V.'s only opinion based upon his own examination/testing was that T.S. is within the normal range in the Mental Status test, and that he has "no sign of dementia," the only

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[19] As Dr. H.H. admitted, Dr. S. consulted with T.S. twice; he was not T.S.'s treating physician. [T1:107].

possible bases for his somewhat surprising conclusion that T.S. "has significantly impaired judgment ... that ... stems from a psychiatric involvement" are the statements of Dr. S. and F.S./P.S..

Next, T.S. was referred "**by his son and daughter-in-law**" to Dr. Z. on July 27, 2007, based on "**concerns that they had** about erratic behavior and poor judgment." [Exhibit P-15, PS0913]. Dr. Z.'s notes state that **F.S. and his wife "have expressed significant concerns** about the patient's behavior and judgment." As did Dr. V., Dr. Z. parroted that "Dr. S. noted that T.S. "appear[ed] to be somewhat paranoid." Dr. Z. later spoke to Dr. S., who, according to Dr. Z., "wondered" whether T.S.'s behavior "might" reflect paranoia. However, Dr. Z. concluded that the "P[atien]t does not appear to [be] suffering from acute paranoia or psychosis. He also appears cognitively intact." [Id., PS0919]. Dr. Zaubler also notes that,

> In talking with the **patient's internist, Dr. C.**, Dr. C. noted that the patient does not have any significant history of cognitive deficits or affective instability. **He has been treating the patient since July 2006. He does note that the patient's son and daughter-in-law have expressed concerns about the patient's behavior, however, has not witnessed any problems in his own evaluations of the patient**.... According to Dr. C., who has been working with him since July 2006, the patient **has not had any depressive episodes in the entire time he has worked with the patient nor any cognitive or affective symptoms at all.**

[Id., PS0914, PS0918].

Dr. Z.'s diagnosis was "major depression recurrent, **in full to partial remission**." His diagnoses included to "rule out" mood disorder, cognitive disorder and personality changes due to the increased dosage of Sinemet. [Id., PS0917].

Dr. Z. then recorded an additional meeting with **F.S. and P.S.** for 45 minutes, in which "**they** provided further history":

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> **P.S. indicated** that she did feel that the p[atien]t may have had some mood cycling in the past.... **They noted** that the p[atien]t has always been paranoid.... They could not [c]ite specific evidence of any delusional thinking presently other than that the p[atien]t has accused them of scamming him.

[Id., PS0920]. Upon later discussion with T.S., Dr. Z. reports, "When asked about the possibility that his friend J.D., may be trying to exploit him, he indicated that this is possible but that he has no proof of this. He did not become overly defensive about this." [Id., PS0921]. Dr. Z. again indicates that T.S. "does not appear to be depressed or psychotic." [Id.].

The Cleveland Clinic records[20] of March 26 and 27, 2008 include a March 26 report by Darlene Floden, Ph.D., which states,

> Legal proceedings regarding competency and guardianship had been filed by Dr. T.S.'s children.... I also had the opportunity to interview **Dr. T.S.'s daughter.... She also reported** problems with decreased arousal and a marked change in his judgment and reasoning, [including] unusual spending practices related to J.D..... **She reported** longstanding issues with paranoia....

[Id., PS0895]. Ms. Floden thus concluded, "there is evidence of longstanding psychiatric and personality disturbance which appears to have continuing influence on his interpersonal relationships." [Id., PS0897].

The Progress Notes of the Cleveland Clinic's Dr. I. state,

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[20] There are other disturbing aspects of the Cleveland Clinic records that cast further doubt on their reliability. Dr. H.H. relies on the Cleveland Clinic conclusions of a Ph.D. [T1:36-38] but later admits that T.S. "did not take his morning medications" prior to the evaluation, and "was initially in an off state" [T1:104]; he admitted that the failure to evaluate T.S. at his baseline "may have" affected the outcome of the Cleveland Clinic testing. [T1:104]. In fact, Dr. Z.S. testified that T.S. had told her that they had arrived in Cleveland late the night before the appointment, that because he was being so rushed to go to the evaluation he did not take his medication, and thus was not at his baseline during the evaluation. [T9:27-28]. Moreover, as Dr. B.H. pointed out, the Cleveland Clinic records were internally inconsistent: although they denied T.S. candidacy for surgery due to their assumption that he had longstanding psychiatric and personal disturbance, their own testing showed that there was no clinically relevant elevations on indices of psychopathology. [T3:152-53]. This contradictory information within the Cleveland Clinic records concerned Dr. Z.S. as well. [T7:85].

> **his daughter communicated** that he may have problems with judgment and managing his finances. Specifically, **his daughters reported** an inappropriate relationship with a person 50 years his junior that involved transferring large sums of money to this person. Also, **his daughters report** excessive sleepiness and difficulty with maintaining nocturnal sleep.

[Exhibit P-16, PS0898]. As a result of C.S.'s reporting, the Cleveland Clinic concluded that T.S.'s "psychiatric and cognitive issues" made him a poor candidate for surgery.

In sum, all of these records are based upon claims made by T.S.'s children, which then became part of T.S.'s medical records, and were passed on and cited by subsequent doctors to support conclusory statements, and eventually used by plaintiff's experts to support their claims of incapacity. Because they are based upon biased histories provided by F.S. and P.S. (and C.S.) in anticipation of (and in furtherance of) this litigation, those records are unreliable.

As T.S. himself recognized:

> Dr. S. ... all those negative things he said about me came from P.S., their conversations. That I was lying to her, that I was paranoid.

[T6:47]. When he was asked whether he feels that plaintiff's experts, Dr. S. and Dr. Z., found him to have psychiatric problems because of the information given to them by F.S. and P.S., he replied, "Yeah, they did what they were paid for doing." [T6:47].

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E. F.S. AND P.S.'S OTHER INCONSISTENT TESTIMONY/CREDIBILITY.

There were many other instances at trial in which F.S. and P.S.'s credibility was called into question.

As an initial matter, P.S. testified that, after this litigation was commenced, and T.S.'s attorney advised plaintiff's attorney that T.S. wanted no further contact with F.S. and P.S., F.S. and P.S. "honored" T.S.'s wishes. [See T2:87]. It seems curious that

concerned children (particularly when they have displayed no aversion to litigation) would choose to "honor the wishes" of an eighty-five-year-old father whom they claim is incapacitated, and thereby cease all contact with that beloved father for more than two years.

One of many examples of F.S.'s lack of candor was discussed by his own expert, Dr. H.G., regarding what transpired prior to his initial evaluation of T.S.:

> I had asked his son, F.S., to inform Dr. T.S. in advance of the purpose of our meeting. When we got together, F.S., his wife and Dr. T.S. were together in the waiting room and I came to greet them. I pulled Dr. F.S. aside and asked him if he had the opportunity to prepare his father. He said no, he was afraid that his father would bolt the interview and leave summarily. Frankly, I felt a little flat footed that -- I wasn't quite sure how to proceed because it's always my practice to always inform people and let them know the purpose of our meeting.

[T1:181-82]. This testimony is contrary to F.S.'s evasive testimony about what he informed his father of prior to Dr. H.G.'s competency evaluation:

> Q: But you never told your father you were having his competency evaluated, did you?
> A: I wouldn't call it competency. I would say, I thought he was acting a little strange and doing odd things and I needed to know he was all right.
> Q: But did you tell your father that you were going to have him evaluated to see if he was all right mentally?
> A: That's what a psychiatrist is. Yeah, he did not know he was going to a psychiatrist.
> Q: Well did you tell him that then, sir?
> A: Yes.
> Q: You told him.
> A: Yes.

[T2:188-89].

F.S. and P.S.'s testimony at trial revealed a number of other inconsistencies. For example, at trial, F.S. initially testified as follows:

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Q: Sir, have you ever been stopped by J.D. from talking privately with your father when you were at your father's home?
A: Yeah. I would say the answer to that's yes.

[T2:209]. However, when F.S. was then confronted with his prior inconsistent deposition testimony, he was forced to retreat from this claim, explaining, "I maybe [sic] not have understood the question." [T2:210].

Despite their claims that T.S. was extremely frugal, P.S. was forced to admit that T.S. paid F.S.'s undergraduate education at Purdue [T2:126]; F.S. admitted that he also paid for three semesters of his schooling at Parson's [T2:179] and the first semester at ... school [T2:179, T2:126]; that T.S. paid for 90% of the ... building [T2:126, T2:179] and helped with the down-payment on F.S. and P.S.'s house [T2:127]. P.S. also claimed that T.S.'s $40,000 loan to an acquaintance was simply an investment in an automobile business [T2:127-30], but Mr. M.H. later opined that P.S.'s testimony that it was an investment, not a loan, is "just not a true statement." [T4:169].

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P.S. claimed that, prior to the guardianship litigation, she and T.S. had an "excellent" relationship [T2:4]; but P.S. also testified that T.S. accused her of spying on behalf of Merck back in the 1980s [T2:123]. She testified that, over the 32 years she knew him, if she questioned him, he'd become agitated [T2:73]; but later she testified that, although he always had strong opinions, "there was a time when you could talk to him about his opinions and he would listen to you." [T2:125].

F.S. and P.S.'s actions and motivations in this matter did not go unnoticed by T.S.'s witnesses. For example, Mr. M.H. testified that T.S. and F.S. had a very close relationship between 2005 and 2007: "I think that F.S. developed such a relationship

that he was able to control much of what T.S. was doing. That relationship cooled off and became downright arctic after T.S. ... developed a relationship with J.D. in the spring of 2007." [T4:148]. Mr. M.H. testified as to F.S. and P.S. entering T.S.'s house without permission [T4:147]; F.S. withdrawing money from T.S.'s account without permission [T4:147]; F.S. and/or P.S. contacting the ... police and ... police departments and hiring a private investigator to investigate J.D. [T4:148-49].

As Dr. B.H. explained,

> [T.S.] talked a lot about his daughter-in-law... and it's clear that ... he had some, some less than positive things to say about her, but that, given the whole picture in terms of what I saw happening to him over this period of time, I wouldn't call that paranoid. I would call that being justifiably suspicious.

[T3:117]. She further explained,

> [T.S. was] suspicious of his family and what was going on. Because he felt like everybody had turned against him. He had a Detective C. come and interview him... [Detective] C. had done some intensive looking into J.D.'s background, and, and the money issues.... He was aware that he had not been receiving any rent from his ... property, despite the fact that he owns it. And then he told me that he had to take his son to court to retrieve that money.... So, we're not talking anymore about just a closing of a CD account the day before he got sick, and he wasn't told for approximately a month period because he was going through various tests. He wasn't hospitalized at that time. He was getting an outpatient workup for abdominal reasons... None of these tests were any reason for F.S. to not tell him, that [he] had closed the CD.... [J]ust knowing that he has this suspiciousness, it just doesn't make sense to me why the family wouldn't be totally forthcoming....

[T3:124-25].

Dr. B.H. provided the following insight into T.S.'s relationship with F.S.:

> He is very hurt and disappointed about how this has progressed to such a point where he finds himself having to go to court to maintain his autonomy and his civil liberties. And he's frightened.... He feels betrayed.

[T3:142].

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POINT FOUR

THE PROOFS AT TRIAL ESTABLISHED THAT T.S. IS CAPABLE OF GOVERNING HIMSELF AND MANAGING HIS AFFAIRS.

As set forth *supra*, plaintiff has utterly failed to meet his burden of proving, by clear and convincing evidence, that T.S. is incapacitated. Moreover, although T.S. is not required to come forth with proof of his capacity in order for this action to be dismissed, the proofs at trial have plainly established that T.S. is capable of governing himself and managing his affairs.

A. PLAINTIFF'S WITNESSES.

A review of the testimony of plaintiff's experts, and of plaintiff himself, can lead to no other conclusion but that T.S. is capable of managing his affairs.

Dr. H.G. testified that T.S. is capable of exercising cognitive abilities to reason about intellectual matters in a global way. [T1:169]. He testified that T.S. is capable of communicating [T1:170]; that he is oriented as to time, place and person; that his memory is intact for immediate, recent and remote memory; that he displays no evidence of dementia [T170-71]; that he's taken the necessary steps in order for his food to be prepared for him; that he can relay health information to his doctors; that he can "absolutely" count change [T1:172]; that he "would certainly think" T.S. can balance a budget and understands the consequences of not paying his bills; that he can dress with assistance [T1:175]; that he's "very capable" of budgeting to make certain his house and automobile expenses and repairs and maintenance are taken care of [T1:176-77, 178].

Dr. H.G. confirmed his prior deposition testimony:

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> Q: You don't have an opinion on whether he can look at a set of facts and decide on a course of action amongst a number of alternatives. Is that what you're telling me?
> A: It would depend on how needy he may be at that particular, psychological needy, and/or how much his pride system was involved. But that's the best answer I can give you but in general for many things he could. He's capable of making decisions.

[T1:176].

Dr. H.H. testified that T.S. received a "fine" score when Dr. H.H. administered the mini-mental status examination [T1:61], and that such a score indicates that the patient's cognitive capacities are intact. [T1:63].

With prodding, and confrontation with his prior deposition testimony, F.S. admitted to the wide range of activities that his father was capable of managing as of his last contact with T.S., including knowing what medications he takes and complying with his medications; cooking, bathing and hygiene, with assistance; relaying symptoms and information to his medical providers; keeping his home heated in the winter and cool in the summer; and handling investment decisions. [T2:190-99].

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B. THE GUARDIAN *AD LITEM.*

Christopher Armstrong, Esq. was appointed as T.S.'s guardian *ad litem* in May 2008 as a result of plaintiff's claim that "there is a real and imminent threat to the welfare and security of T.S." [April 25, 2008 Certification of Joseph B. Tiboni, Esq. in support of Order to Show Cause for appointment of guardian *ad litem*]. However, Mr. Armstrong never deemed it necessary to intervene or make application to the Court on T.S.'s behalf during the pendency of the litigation. Moreover, after several personal visits and numerous telephone conversations with T.S., Mr. Armstrong concluded that T.S. "knew what he was about."

C. T.S.'S WITNESSES.

Testifying as experts on behalf of T.S. were Dr. B.H., D.O. and Dr. Z.S., M.D., both of whom specialize in geriatric medicine; and geriatric social worker M.C..

Both of T.S.'s medical experts, as well as his expert geriatric social worker, performed a battery of standardized objective tests that are accepted by the American Geriatric Society and the American Medical Association. [T3:100; T7:23].

Drs. B.H. and Z.S. concluded that, in their professional opinion, T.S. is capable of making his own personal, medical and financial decisions, and that his decision-making capacity is not impaired. [T3:162-63; T7:68-70]. M.C. also concluded, in her professional opinion, that T.S. does not need someone to make personal or financial decisions for him. [T9:122].

1. Dr. B.H.

Testifying on behalf of T.S. was B.H., D.O., who concluded that T.S. was not suffering from psychiatric problems. [T3:117].

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As part of her evaluation of T.S., Dr. B.H. administered a number of formalized, standardized, validated, reproducible, objective tests. [T3:90]. She administered the Clock Drawing test, designed to evaluate executive function, from which she concluded that T.S.'s executive function is intact. [T3:90-93; Exhibit D-9]. Dr. B.H. administered the multidisciplinary screening test, which tests executive function, abstract thinking, judgment and insight, and T.S. performed very well on each section. [T3:95-100]. She administered the mini-mental exam[21], testing orientation, alertness, registration,

[21] Dr. B.H. testified that the mini-mental exam is a screening test: "It doesn't do anything in terms of saying why somebody might be cognitively impaired. So that if somebody doesn't do well in it, you'd have no idea why. It, it can't differentiate, it's not very specific. It's very sensitive, but not very specific." [T3:112].

attention and calculation, the ability to follow a command, and visual spatial testing, and T.S. scored 27 out of 30. [T3:101-03]. She administered the Modified Boston Naming test, which evaluates word-finding difficulties (an indication of a first symptoms of dementia or mild cognitive impairment), which indicated that T.S. has no word-finding difficulties. [T3:104-06]. She administered a Word Comprehension test (because reading comprehension is one of the first symptoms of dementia); T.S. scored perfectly. [T3:107]. She administered two tests: the Geriatric Depression Scale and the SIG E CAPS test, to see whether depression is affecting his abilities to function or make decisions; she found "no active depression whatsoever." [T3:108-09]. Dr. B.H. testified at length as to the objective tests that she performed on T.S. that led to her conclusion that he did not suffer from dementia, and that his executive functioning was intact. [T3:89-113].

As Dr. B.H. described T.S.'s current living arrangement, "he loved [J.D.'s] children, loved to see the, the delight of, of children playing and, and between the birds and the dogs and the children, I think that, that T.S. really had an opportunity to have the full spectrum of various aspects of life instead of many elderly people being put in a nursing home and never seeing anybody else except other elderly people, and the caregivers.... He was able to show that this is successful aging." [T3:75].

Dr. B.H. testified that T.S. knows the extent of his estate and understands the natural objects of his bounty; that he is capable of making medical decisions. [T3:143-44].

As Dr. B.H. concluded,

> I came to the conclusion that he is really the epitome of successful aging. And that, although I understand that his family has concerns about him,

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it's clear that he maintains his decision making capacity, and, and is therefore free to choose how to live his life.

[T3:113].

2. Dr. Z.S.

Dr. Z.S. also testified that T.S.'s executive functioning was intact [T7:35]; and that his abstract thinking was good [T7:38-9].

As part of her evaluation of T.S., Dr. Z.S. administered a number of objective tests during her evaluations of January 30, 2008 and February 11, 2009. [T7:26-27]. She administered the mini-mental status exam, on which T.S. scored 28 out of 28 both times [Exhibits D-12, D-18; T7:25-29]; the Clock Drawing test, on which he performed perfectly on both occasions [Exhibits D-13, D-19; T7:29-31]; the Geriatric Depression Scale, which indicated that T.S. is not depressed [Exhibits D-15, D-21; T7:31-33]; the Multidisciplinary Task test, which evaluates abstract thinking and insight, which indicated that T.S. has good abstract thinking and insight, and that his judgment is intact [Exhibits D-14, D-20; T7:31, 36-42]; the Instrumental Activities of Daily Living test, designed to evaluate whether the patient's higher brain function is intact, which indicated that T.S.'s higher executive functions were intact [Exhibit D-16, T7:33-36]; and the Activities of Daily Living test, which indicated T.S.'s independence in basic activities and his ability to function independently [Exhibit D-17; T7:36].

Dr. Z.S. testified that, based upon the results of her testing and the history T.S. had given her, his memory is intact; his speech and language is good; his judgment and insight are intact; and he has no disorganized thought processes or elements of psychosis. [T7:40-42].

3. M.C.

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Geriatric care manager M.C. conducted a Saint Louis University Mental Status test, which includes the Folstein Mini Mental Status test as well as more complex tests for abstract thinking and mental functioning. [T9:102-03]. T.S. scored perfectly, leading Ms. M.C. to conclude that T.S. is "very mentally acute." [T9:103]. He also scored perfectly on the Clock Test, the earliest indicator of mild cognitive impairment. [T9:104].

M.C. is a Licensed Clinical Social Worker in the State of New Jersey; and is a Medicare Certified Psychotherapist. [T9:59]. She has also been certified as a Mental Health Screener for the Psychiatric Emergency Screening program since 1999. [T9:60]. She has a thirty-three year background in geriatrics. Her background includes a Masters degree in social work, and she has received several awards for developing services and programs for older adults. She was appointed by the General Assembly to be on the Suicide Prevention Advisory Council, a panel of experts who work in the area of mental illness to educate the public to look for symptoms of depression in older adults, since 1995. Since 1990, she has been a member of the Forum of New Jersey Healthcare Professionals, a group that the Alzheimer's Association selected to assist with psychiatric problems in people with dementia. [T9:56-8]. Ms. M.C. teaches at Rutgers University in their Advanced Clinical Gerontology program, where she teaches a course on differentiating diagnoses of delirium, dementia and depression [T9:59, 68]; and has been an expert consultant to Boston University Institute of Geriatric Social Work. [T9:59]. She has also conducted courses and training for Adult Protective Service Supervisors and workers in New Jersey on recognizing different abusive situations and undue influence. [T9:71]. She has taught national and state conferences on elder

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abuse. [T9:71]. The New Jersey Office of the Public Guardian also subcontracts Ms. M.C.'s services in cases of undue influence and/or abuse. [T9:72]. She is very familiar with the physical limitations caused by Parkinson's disease, having worked with over 100 Parkinson's patients throughout her career. [T9:63-4].

Ms. M.C. met with T.S. in his home on January 2, 2008 and June 28, 2008. [T9:76]. The first meeting was announced; the second meeting was unannounced. [T9:77]. Knowing that she likes to observe elders "at the worst time possible," because she wants to develop a plan of care based upon the person's real needs, both meetings occurred at approximately 6:00 p.m., which she described as the "witching hour" in houses with young children. [T9:77-78]. At both meetings, she also met J.D. [T9:81].

Ms. M.C. described the relationship between T.S. and J.D. as "very comfortable." [T9:84]. She perceived no deterioration of Dr. T.S.'s thinking or reasoning with respect to J.D. between the first and second meetings: at both meetings, T.S. described his relationship with J.D. as "mutually beneficial." [T9:82, 88-89]. According to Ms. M.C., T.S. "definitely" understands that J.D. is benefiting from her relationship with him. [T9:116]. As Ms. M.C. testified,

> He said that he was happy, that before J.D. and the children moved in, he felt very much alone since his wife had died. He, he talked about the children, how he loved having the children around. He spoke of the, he said, "myself and my dog can't wait till the children come home from school." He when he spoke about the children, he had a smile on his face. He appeared to gain great satisfaction from having these children in his life.

[T9:90]. She first became involved in this case when T.S.'s attorney contacted her, asked her to perform an assessment of T.S., and told her only that the case involved a significantly younger woman with three children caring for his client in his house.

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[T9:125]. Ms. M.C. testified that, before meeting with T.S. the first time, she "absolutely" felt that there was a potential for undue influence or exploitation in the case. [T9:85]. However, she testified that her feelings changed after meeting with T.S., J.D. and her children:

> The first visit, one of the children was, was doing their homework, and they would come over and, and say, you know, very meekly, "T.S., can you help me with this?" And he would help them with, help them with his homework.
>
> Another child, when he walked by T.S. would very gently put his arm on his shoulder and, and it was a -- I felt very different in that house than I felt when I rang the doorbell the first time... I guess my antenna was raised very high when I heard the, the facts of this case, what I knew about this. I anticipated to see something that would be very distressing to me. And I was quite amazed when I left the house to feel completely different than I thought I would.

[T9:91].

> With regard to T.S.'s insight into his medical condition, M.C. testified:
>
> He knew very well the prognosis of someone with Parkinson's disease. He knew medications he was taking. He was very attuned to medications. He understood what having diabetes meant, and what, what he would have to do to control his diabetes. He also was very aware about what the road lay ahead of him what to anticipate in terms of his disease process. He was more, more aware than most.
>
> He knew that in Parkinson's disease, he probably would experience falls, that he was looking toward a life that he would not be as mobile as he is now. He might one day need a wheelchair, that he might one day need special equipment....
>
> He did not have rose colored glasses on about his prognosis.... I think he felt that he wasn't, and he said this, that he wanted to be as independent as possible for as long as possible. And that kind of attitude, in my experience, helps people cope with, really the traumatic events that happen in this illness.

[T9:94-95]. Ms. M.C. also described T.S.'s awareness of his care options, if J.D. were no longer living with him:

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> He knew there was a possibility that he wouldn't be able to remain at home without a great deal of help, that a nursing home would be an option. Assisted living might be an option too. [T9:108].

In her professional opinion, Ms. M.C. opined that T.S. is pursuing an appropriate and cost-efficient care plan, that his decision to have J.D. live with him makes sense financially, and that his quality of life is better than it would be at a long-term care facility. [T9:108-10]. She described the quality of care that J.D. and the aides are providing to T.S. as "exemplary." [T9:120]. She testified that, based upon her evaluation of T.S. as a Geriatric Social Worker, T.S. is able to live independently with his current care arrangements, and that his decision to do so is appropriate to his age and physical condition. [T9:121.]:

> ... [h]e's being well cared for. He has a great quality of life. He has a great attitude. He is a strong spirit and a strong constitution. It's a tribute to his age and his ability.

[T9:146].

4. Dr. R.R.

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Dr. R.R., T.S.'s treating endocrinologist since 2002, testified as a fact witness on behalf of T.S.. He testified that T.S.'s diabetes is under reasonably good control. [T6:73]. Dr. R.R. testified,

> I have been able to have a meaningful healthcare relationship with him that certainly from my perspective as his physician and doctor taking care of his diabetes, I've been satisfied that he's been compliant with the medical regimen that I have recommended.... I've had no reason to suspect that he was not in large part following my medical recommendations.

[T6:73-74]. He further testified that, over the years, he has seen no significant change in T.S.'s understanding; and no deterioration in his ability to communicate with him. [T6:79-80].

5. M.H., Esq.

M.H., Esq. has known T.S. personally since the 1980s and has represented him in various matters since approximately 1988, including preparing several wills for T.S.; doing his tax returns since 1991; representing him in the claim resulting from his house fire and in minor litigations relating to his dog; and providing him with general advice on miscellaneous matters. [T4:143-45].

According to Mr. M.H., although T.S. went through a difficult period around the time of his wife's death in 2005, "since at least mid-2007, he's had a substantial improvement so that I would say his -- his state of mind and mental condition are probably better today than they were at any time in the last ten years." [T4:145-46]. Mr. M.H. based his testimony on the particularly close contact he has had with T.S. since the litigation began. [T4:146].

When J.D. entered his life, and F.S. and P.S. contacted Mr. M.H. with their concerns, Mr. M.H. discussed the situation with T.S.. As a result of his discussions with T.S., as set forth *supra*, Mr. M.H. concluded,

> T.S. knew what he was doing and his rationale for doing it made sense.... He was kind of isolated and alone without having anyone for good social interplay, except when his son visited. He also need[ed] to have someone there to take care of him.... he has some physical infirmities.... And she provided two things... But he said, look, I've got this relationship. She needs financial assistance, I need some social interaction and I need someone that I like taking care of me during -- during the 24/7, and so I felt it was a reasonable tradeoff to give her the -- give her money or spend money on her behalf in exchange for her coming and providing those services.

[T4:164-65]. In fact, Mr. M.H. discussed the financial arrangements with T.S. in detail:

> I also asked him, I said, Well, what about the car? He says, "I was careful to put the car in my name, not her name," so he kept control of that asset. He did pay some bills of her[s] to cover some credit card bills

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> because he could put them in zero interest accounts so they could pay it off -- she could pay it off at a lower rate.

[T4:165-66]. Mr. M.H. testified that T.S. "absolutely" appeared to understand the amount he had spent on J.D., and they discussed it on several occasions. T.S. never denied spending the money on J.D. [T4:165-66].

Mr. M.H. then reported back to F.S. that, in his opinion, "whether you agree with how T.S. was spending his money, it was his money and his rationale for why he was doing it was certainly sensible. It's not his duty to save the money for his children." [T4:167].

Mr. M.H. has seen T.S.'s financial records, prepares his tax returns and has had monthly conversations with T.S. about his assets during the course of the litigation. [T4:151-53]. Mr. M.H. confirmed that T.S. knows the extent of his assets. [T4:153].

Although in the course of his career he has terminated a signing ceremony for a client because of competency concerns, Mr. M.H. testified that he has never questioned T.S.'s capacity to execute any estate documents. [T4:161]. He has prepared three wills for T.S. over the years, and his estate plan reflects consideration and thought by T.S. T.S. does not take estate planning decisions lightly. [T4:161-62].

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Mr. M.H. testified that he believes T.S. is capable of making medical decisions and handling his personal and financial affairs. [T4:181-83]. He testified that, based upon his more than twenty years of knowing T.S., he believes that T.S. is not in need of a guardian for any reason. [T4:184].

Although Mr. M.H. initially was suspicious of J.D., he has since come to know her as "a very nice, clean cut person who seems to be very direct and forthright. She's caring with T.S., taking care of the house and him. She seems like a very -- a very

lovely individual.... I was convinced that -- that she was there for his best interest." [T4:168].

Mr. M.H. summed up the relationship between T.S. and J.D. as follows:

> They have a nice cordial relationship. T.S., I think, has both his state of mind and his mental acuity have improved with her presence. She's been a very positive influence in his life. When she's brought him over to my office on several occasions, I've seen her at his house on occasion when I've been there. They have a -- it's a cordial relationship and one that seems to be based on mutual respect....

[T4:173].

6. K.J., Esq.

Also testifying on behalf of T.S. was K.J., Esq., the attorney representing T.S. in his personal injury claim based upon his hip fracture at Summit Medical Center. During the course of his representation of T.S., which began in or around January 2008, T.S. came to Mr. K.J.'s office alone for private meetings with Mr. K.J., discussed details of the personal injury matter, entered into a retainer agreement with Mr. K.J. [T4:111-15], had various appointments during the course of the retainer for various reasons, and always appeared dressed appropriately for those appointments. He and T.S. prepared and reviewed answers to interrogatories together, discussed litigation strategies, and T.S. appeared to have a "clear understanding of the information I was imparting." [T4:117-21]. He was deposed in the action on two occasions, in April and November 2008. [T4:123]. Mr. K.J. followed his usual procedure of preparing a client for the depositions for 15 to 20 minutes. [T4:124-25]. Mr. K.J. had "No [question] at all" about whether T.S. could understand and follow his deposition preparation. [T4:125]. T.S. listened to the questions and provided appropriate responses during the depositions. [T4:125; *see* Exhibit D-54]. Mr. K.J. testified that, although it manifested itself in

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"tremors and the like," T.S.'s Parkinson's disease never "influence[d] his cognition or ability to understand and respond appropriately to the questions." [T4:126].

Mr. K.J. testified that, although in the course of his career he has questioned the capacity of potential clients, he has never questioned the capacity of T.S. [T4:115-16]. When asked whether, in his opinion, T.S. is in need of a guardian, he responded, "Not at all":

> From the first time I met T.S., ... obviously he's a man with some physical affliction... and while I've seen the obvious physical limitations, ambulation limitations, I've never seen any evidence of any lack of mental acuity, lack of personal ability. I've never seen any absence of orientation, capacity to understand, capacity to intelligently and personally communicate. I've just seen evidence of a physical condition with no evidence that I've noticed about his mental disorientation.

[T4:127].

In Mr. K.J.'s one meeting with J.D., he was "overwhelmingly favorably impressed by her intelligence, her ability to articulate," and he concluded that she is "just a remarkably impressive woman." [T4:128-29].

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D. T.S.'S TESTIMONY.

If there had been any doubt as to T.S.'s capacity, it should have been dispelled by his hours of credible and articulate testimony at trial.[22]

T.S.'s testimony answered questions ranging from mundane topics ("Q: When did you last vote? A: The School Election in April." [T5:49]) to emotional topics ("Q: How would you describe your relationship with your son F.S. at present? A: Well, it doesn't exist. There is no contact." [T5:49]); to current business events ("Q: You sued [Merck], did you not? You were terminated by [Merck] because you disagreed with

[Merck's] president... you are an opinionated person? A: Well, let me ask you, how has Merck done? They have more suits than they can handle." [T5:115]). Questions ranged from remote events (specifics of a loan to a friend in the 1980s [T5:53-55]; signing himself out of the hospital after surgery in 1947 [T5:101]) to excruciatingly detailed questioning regarding his medical and personal life in recent years.

When asked about his own frugality, T.S. stated that he would not consider himself a frugal man, but he is "careful in some respects. I don't gamble. I don't smoke. I don't buy excessive amounts of alcohol." [T5:52]. T.S. testified that, in the 1980s, he loaned a friend, J.L., $30,000. After Mr. J.L. died without repaying the loan, T.S. testified that Mr. J.L.'s wife "was inundated with problems. So I didn't pursue it... I have more faith in people than that, to go after them when they don't have the money." [T5:55].

His relationship with F.S. changed in 2007, because T.S. "felt [F.S.] was not trustful anymore." [T5:49]. He provided a detailed account of the incident in which F.S. had taken approximately $97,000 from T.S.'s bank account without T.S.'s knowledge:

> Q: [D]o you remember when that occurred?
> A: It occurred, he took it out in June of '07.
> Q: And how much was removed?
> A: $97,400.
> Q: Did you confront F.S. about him taking the money?
> A: Not directly, What, what happened is, when I got home with my Aide, who was a young fellow in the house at that time; he calls P.S. to tell her that we went down to the bank and couldn't, couldn't get money out of the bank because they claimed that F.S. had closed it out. So then he [F.S.] came on the phone and said, he'd bring the check right down.
> Q: ... And did you have any discussion with him about why he had a check... your money?

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[22] The strength of T.S.'s trial testimony was bolstered by his videotaped deposition given on November 18, 2008 in his personal injury action. [Exhibit D-54, certified copy of T.S.'s videotaped deposition]. T.S.'s cogent testimony in that deposition is another illustration of T.S.'s cognitive abilities.

A: He never really explained it to me adequately.
* * *
Q: Do you know how long he had the money?
A: It was about six and a half, seven weeks.

[T5:58-59].

T.S. testified that he became aware that F.S. and P.S. were entering his home and going through his personal documents when copies of those checks appeared as exhibits to F.S.'s guardianship complaint ("I only knew it when I was served with that December [Complaint] ... I saw the, the checks photographed in there"). [T5:59]. "When I saw the exhibits that they had in their complaint, I realized they were stolen. [F.S.] even went to the Credit Union and had the Credit Union present him with some of my checks." [T5:60]. In addition, one of T.S.'s caregivers was calling P.S. and reporting his activities to F.S. and P.S. [T5:59-60].

With regard to F.S.'s power of attorney, T.S. testified that he revoked the power of attorney because "I felt he exceeded his authority.... I felt he had betrayed me in several ways, and it was time to hand the Power of Attorney to somebody else." [T5:56-57; Exhibit D-53]. Because he felt he could no longer trust F.S., T.S. testified that he appointed M.H. as his new agent. When asked why he appointed Mr. M.H., T.S. reasoned:

> Well, he certainly knows my business. And I've trusted him and known him since 1980. And I feel I need somebody to represent me if I'm not capable.

[T5:58].

T.S. testified about the various investigations of himself and J.D. that have been initiated since J.D. entered his life. With regard to the DYFS investigation, T.S. testified that, "I can't say who [contacted them]. But a representative [from DYFS] came to

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the house one night and spent an evening interviewing the children," as well as J.D. and himself; they notified him later that there had been nothing adverse found, and took no further action. ("[DYFS] sent me a letter there was nothing ... that they could cite. The children were well cared for.") [T5:61-62]. He also was contacted by police Detective C., and he was "pretty well aware that F.S. and P.S. were calling [the detective]":

> He was concerned about J.D., saying that he felt she might be in some illegal business.... **I asked him for facts, but he didn't have any**... And sometime later, he ... stopped in passing the house. Again, he had no facts, and I told him so. I don't want to hear rumors or that, the problems are theoretical. **I wanted to know if there, she had any problems. She didn't have any problems.**

[T5:62-63].

With respect to the ... property, T.S. testified that F.S. had made monthly rental payments since 1980, but that he stopped making the payments as of December 2008. ("[H]e's refusing to pay... The last payment he made was November of '08. He's not paid anything since December of '08 through '09"). [T5:63-64].

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T.S. gave well-reasoned answers for why he told Dr. H.H. that he had no idea about his finances and that his attorney took care of his finances ("I wanted to be polite. I didn't want to tell him. I wasn't going to tell him. I was not going to tell him because M.H. told me not to. I wasn't, I wasn't going to relate that to him. I wanted to be more pleasant; that's what I said. It's a matter ... I didn't want to deal with... I consider it a private matter." [T5:68-69]). T.S. answered general questions about his finances:

> Q: ... Do you own real estate?
> A: Yes.
> Q: Do you keep money in bank accounts?

A: Yes.
Q: Do you receive Social Security benefits?
A: Yes.
Q: You've hired caregivers to help with your personal needs, and you pay them, right?
A: Yes.
Q: Okay. Do you pay your taxes?
A: Yes.

[T5:87-88]. He answered questions about his medications:

Q: ... Does anyone help you in getting and taking [y]our medication?
A: No, I take care of that myself.
Q: Does somebody buy it for you at the, the drug store?
A: No, the, the doctors fax it into Drug Fair, which is now Walgreens. And J.D. goes down and picks it up.

[T5:107]. He answered questions about his day-to-day abilities and limitations:

Q: Does J.D. or another aide assist you in preparing your meals?
A: Yes.
Q: Do you need assistance with eating or drinking?
A: Yeah. Sometimes the tremor gets bad, then I need assistance.
Q: When you need assistance, do you get the assistance that you need?
A: Yes.
Q: Do you need help in going to the bathroom?
A: No.
Q: Do you need help in transferring between a bed and a chair for example?
A: No.
Q: Do you need help to bathe or groom?
A: No.
Q: Do you need assistance with getting dressed and undressed?
A: No, not really. But sometimes I'm in a hurry, and I need help to get, get out on time.
Q: When you need the help, do you obtain the help?
A: Yes.
Q: Do you need help with keeping your house clean?
A: Yes, I do.
Q: Do you have a cleaning lady come in at all?
A: We had a, I have a cleaning lady come once in two weeks and spends a day there cleaning up.
Q: Does J.D. help with the food shopping?
A: She does all the food shopping.
Q: Okay. Can you make phone calls on your own?

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A: Yes.

[T5:107-09]. T.S. also logically answered a series of hypothetical questions:

Q: What would you do if you smelled smoke in the house and you were home alone?
A: We'll, I'd probably call the Fire Department pretty fast.
* * *
Q: ... [I]f it occurred, that you couldn't meet your medical needs, because you, your condition got worse, what would you do?
A: I can't visualize it. If it works that I can't do anything about it, get nursing help.
Q: ... What would you do if you noticed a large monetary withdraw[al] from one of your bank accounts?...
A: Try to find out who took it.
Q: What would you do if you received a bill for something and you didn't recognize it as a valid charge?

A: I'd either call them or write a note expressing my doubts that this is my item.

[T5:111-12].

T.S. put it succinctly when he testified his rationale for allowing J.D. and her children to move into his home: "I wanted somebody in the house when I needed them.... And J.D. would be in a position to, to help me 24 hours [a] day if needed." [T5:80-81]. T.S. described J.D.'s duties to him as follows:

> She's in charge of the house. She takes care of the house. Any problems that occur, she calls in a contractor or somebody to help or, she has friends that are mechanics. She cleans up the house. She does the washing along with the other Aide that's there in the daytime. She's responsible for her own children. [T5:71].[23]

She is also available to him during the night ("she has a cell phone by her bed...and I can call her at any time"). [T5:72]. When asked how his life has changed since his relationship with J.D. began, he explained:

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[23] J.D.also testified about the tasks she performs for T.S.: "Just to get him cleaned up properly, grocery shopping, laundry, maintaining the dogs.... And just to--just to have someone there, just even have a normal lifestyle, basically." [T10:13-14].

> Well, the first thing is, I, I have no worries. She takes care of anything. And if I want something, she'll do it right away....If I need something from the store, she runs down and gets it. And also, it gives me a security feeling that I can contact her 24 hours a day if I have a problem.

[T5:83].

T.S. testified that he has entered into a Loan Agreement with J.D. to ensure that some of the money he has paid to her will be returned if J.D.'s house is sold at a profit [T5:76-77; Exhibit D-56][24] and a Personal Care Agreement memorializing their employment relationship [T5:78; Exhibit D-55]:

> ... [S]he takes care of the house. She, she cleans the house, does the washing, supervises the other Aide, takes care of any problems that arise, goes shopping for all the groceries. If there was anywhere that I have to go that I need a ride or something, take me to the Doctor.

[T5:78].

When asked how F.S. feels about T.S.'s relationship with J.D., T.S. stated, "Well, **I think he sees his potential inheritance going down the drain**." [T5:72-73].

He also explained that, although he is satisfied with the duties she is performing now, J.D. and her family could decide that they're going to move out at some point in the future ("That's true, yes") and he could ask her to do so at any time. ("Yes, she would; she knows."). [T5:84-85].

T.S. explained why he has continued his relationship with J.D. despite his family's feelings:

> **I don't think you're obligated to, to sponsor your children all through their life. I think you're responsible to educate them and get them started in life. And later on, I think it's your decision what you want to do.**

[24] J.D. also testified about the Loan Agreement, stating that, "once I sell my house in …, I plan on giving him everything. That's all -- that's all I have. I mean, I feel that's the least I can do for him, he's done so much for me. I'm eternally grateful to him." [T10:23].

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[T5:73].

T.S. explained his check-writing practice. He testified that, since early 2007, he has had others write out checks because his tremor makes it difficult for him to do so. [T5:73]:

> ... When I get the bills in or the statements, and I, I mark on what's to be paid. They write out the check except the signature, and I sign and put the check and the, and the bill in the envelope and mail it.
> Q: Okay. Do you review the checks before they go out?
> A: Oh, yes.
> * * *
>
> Q: Do you review, do you get the statements from your various bank accounts [and] do you review them?
> A: Oh, yes.
> Q: Are you familiar with your financial situation?
> A: Oh, yes.

[T5:74-75].

With respect to their employment agreement, T.S. explained that J.D. performs specified duties for him and with respect to the house, and he pays her $1,200 per month. [T5:78].

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T.S. testified that, when F.S. brought his most recent lawsuit against his father, concerning ownership of the ... property, and T.S. was served personally with that lawsuit (but T.S.'s personal lawyer, litigation counsel and guardian *ad litem* were not), T.S. reviewed the complaint and then contacted M.H. about it. [T5:109-10].

In sum, T.S. testified that he does not believe he needs a guardian because "I function now in all these categories without any problems." [T5:113-14].

T.S. testified that he no longer trusts F.S.; does not want F.S. to know about his financial affairs; and does not want F.S. to be involved in his personal or medical

decisions. [T5:113]. Because plaintiff failed at trial to prove that T.S. is incapacitated, these are decisions that T.S. has every right to make.

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CONCLUSION

For all of the reasons set forth herein, judgment should be entered dismissing the within guardianship action, with prejudice, and awarding T.S. the costs of this action, including reasonable attorney fees and the charges of the guardian *ad litem*.

Respectfully Submitted,
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Dated: January 25, 2010

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