NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

IN THE MATTER OF THE ESTATE OF ANN F. McNIERNEY, AN ADJUDICATED INCAPACITATED PERSON.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET No. BER-P-89-10 CIVIL ACTION OPINION

Argued: June 18, 2010

Decided: June 21, 2010
Honorable Peter E. Doyne, A.J.S.C.

Anne S. Burris, Esq. and Sergio S. Simoes, Esq. appearing on behalf of the plaintiffs, Mary Ellen Hannigan and Edward McNierney, Jr. (Lindabury, McCormick, Estabrook & Cooper, P.C.).

Patrick J. McNierney appearing pro se.

Robert J. Maloof, Esq. appearing as the court appointed attorney for Ann F. McNierney (Robert J. Maloof, L.L.C.).

Elizabeth Speidel, Esq. appearing on behalf of the State of New Jersey Department of the Public Advocate, Ombudsman for the Institutionalized Elderly (State of New Jersey).

Introduction

Before the court is a request by the plaintiffs, Mary Ellen Hannigan and Edward McNierney, Jr. ("Mary Ellen" and "Edward" individually; "plaintiffs" or "guardians" collectively), two of Ann F. McNierney's ("Ann" or "incapacitated") children and her

guardians, seeking the court's instruction with respect to the scope of their authority as plenary guardians to control the visitation rights of their mother.[1]

Procedural and Factual Background

Ann is a seventy-eight year old widow who suffers from dementia. She has five children: Edward (52 years old), Patrick McNierney (48), Mary Ellen (46), Brian McNierney (45), and Anne Marie Tarleton (42) ("Patrick", "Brian" and "Anne Marie" respectively).

In or about August 2006, Edward J. McNierney, Sr. ("Edward Sr.") was admitted to Valley Hospital and received an emergency tracheotomy. Edward Sr.'s long struggle with emphysema was in its final stage. [Mary Ellen Certification, Sept. 21, 2006, ¶2–3.] At this time, Ann was involved in a "multi-jurisdictional car chase which required the Police to literally run into her vehicle to stop her", thereby demonstrating she could no longer care for herself. [Mary Ellen Cert., ¶5.] Ann was thereafter hospitalized at the Bergen Regional Medical Center ("BRMC") on August 31, 2006. The plaintiffs certified Ann suffered from delusions.

On October 3, 2006, Kevin P. Kelly, Esq. ("Kelly"), counsel for plaintiffs, filed a verified complaint and order to show cause why Ann should not be declared incapacitated. Robert J. Maloof, Esq. ("Maloof") was appointed as counsel for Ann. Submitted with the order to show cause were certifications of consent from all the siblings waiving their rights to serve as guardians of Ann in favor of Mary Ellen and

[1] "Plenary" and "general" guardian shall be used interchangeably to connote a guardian with full authority encompassed by statute.

Edward, as well as reports of two doctors who examined Ann and found she was unfit and unable to govern herself or manage her affairs.

On October 25, 2006, Patrick filed an answer and a response to Mary Ellen's certification. In same, Patrick revoked his earlier consent to the plaintiffs serving as guardians asserting Mary Ellen made many false statements in her certification. He additionally requested he be considered as the guardian. According to Patrick's opposition, he was concerned about his siblings being named guardian as Edward had had a "drunk driving incident and [was required] to attend Alcoholics Anonymous meetings." In addition, Patrick stated "Edward's graduation from college was not in good academic standing, (with a final Grade Point Average of approx. 1.95), [and] I was concerned about his ability to understand the duties and limitations of guardianship." [Patrick's Answer, Pg. 19–20.] As noted, Edward is now 52. Furthermore, Patrick was concerned with Mary Ellen being guardian as she had apparently received a loan from Ann to open a flower store which subsequently failed resulting in litigation between mother and daughter.

On November 9, 2006, Maloof submitted a report acknowledging Ann was incapacitated and recommending a guardian *ad litem* be appointed to determine who should serve as guardian.

By way of new counsel Lan Hoang, Esq. ("Hoang") of the then Gibbons, Del Deo, Dolan, Griffinger & Vecchione ("Gibbons"), on November 13, 2006, the plaintiffs submitted certifications in response to Patrick's answer and assertions. Counsel asserted Ann should be declared incapacitated; the plaintiffs should be named as co-guardians, not Patrick; and the appointment of a guardian *ad litem* was an unnecessary expense as the

plaintiffs "are the most appropriate individuals to serve as Mrs. McNierney's guardians." [Plaintiff's letter brief, November 13, 2006, Pg. 10.] Counsel also sought legal fees pursuant to R. 4:42-9(a)(2).

On November 22, 2006, the parties signed a consent order declaring Ann incapacitated and appointing Mary Ellen and Edward as temporary guardians, posting bond in the amount of $500,000, pending the return of the final judgment for guardianship. The same permitted the plaintiffs immediate authority to relocate Ann from BRMC to Brighton Gardens ("Brighton"). Final judgment was thereafter executed on December 4, 2006 declaring Ann incapacitated and appointing the plaintiffs as her guardians.

The final judgment, in relevant part, provided:

- The plaintiffs are to serve as co-guardians over the person and property of Ann, posting bond in the amount of $500,000;
- The co-guardians shall have all powers vested pursuant to N.J.S.A. 3B:12-48;
- All prior powers of attorney are revoked;
- The co-guardians shall advise Brian, Patrick and Anne Marie of all significant developments with respect to Ann.

On December 23, 2006, Edward Sr. passed away. His assets passed to Ann. Letters of Guardianship were issued to the plaintiffs on January 16, 2007.

Ann was thereafter relocated to Brighton, an assisted living facility. Brighton came under new management on or about December 1, 2008, and was renamed Emeritus.[2]

[2] For the sake of simplicity, when referencing the facility, the court will use "Brighton".

Thereafter, although unsupported by affidavits or certifications, former counsel for plaintiffs indicates the staff at Brighton provided the plaintiffs with "numerous reports . . . that their mother became agitated and upset during and after visits from her son, Patrick." [Complaint, March 8, 2010, ¶6.] As a result, plaintiffs decided, at the recommendation of staff at Brighton, an aide should supervise Patrick's visits.

Although the plaintiffs purportedly attempted to contact Patrick to set up a visitation schedule, according to them, he would not discuss this issue. Patrick contests this allegation stating his then attorney, Donald McHugh, Esq. ("McHugh") had discussed his visitation schedule with Brighton's counsel, Brian Rath, Esq. ("Rath") and plaintiffs' counsel, Hoang. The plaintiffs nonetheless decided to schedule an aide on Sunday afternoons, when Patrick apparently regularly visited, and communicated the same to Brighton and Patrick.

Brighton thereafter advised the plaintiffs Patrick was disregarding the visitation schedule and was acting strangely during his visits, including waking up Ann at 11:00 pm. The staff purported they felt threatened by Patrick's behavior. Plaintiffs provide neither affidavits nor information as to who made these suggestions or the nature of the purported threats. [Patrick's Answer, Pg. 12.] Patrick denies the allegations.

On December 29, 2007, Mary Ellen updated Ann's "Generalized Service Plan" at Brighton to indicate "Ann's Son Patrick can not visit her anymore, if he does we are to call the authorities to have him removed." [OOIE Brief, Exhibit A.] Apparently, in the spring of 2008 the plaintiffs advised Patrick he could no longer visit their mother unless he abided by the visitation schedule and supervised visits. Patrick refused to do the same and thus was denied access by Brighton.

On four occasions that spring, Brighton staff contacted the police regarding Patrick's unauthorized visits. According to Patrick, the police did not acknowledge either the facility or the guardians as having authority to bar Patrick's visitation. Consequently, he was not arrested on any of these occasions. Thereafter, Patrick's counsel, McHugh, sent a letter to the Paramus Police Department, Brighton, and Michelle Santiago, an employee at Brighton, stating "if the current unwarranted threats are followed through, I must and will respond in kind", referencing the department's statement to Patrick heralding his arrest for criminal trespass. [Patrick's Answer, Pg. 38; May 21, 2008 Letter to Paramus Police Department.]

Patrick contacted the New Jersey Department of Health and Senior Services ("DHSS") on or about April 28, 2008, to report he was denied visitation. DHSS thereafter contacted Brighton to gather more information on the effects of Patrick's visits on Ann. DHSS purportedly told Brighton the guardians had the authority to determine access to the ward. Patrick was also advised by Brighton and the Paramus Police he would be arrested for criminal trespassing if he continued to come to the facility without arranging for an aide to supervise the visit.

On or about May 13, 2008, Patrick filed a complaint with the Office of the Ombudsman for the Institutionalized Elderly ("OOIE") stating Brighton "was violating Ann F. McNierney's right to visitors of her own choosing."[3] [Complaint, ¶4.] McHugh

[3] In their brief, the OOIE provides "investigation was opened . . . after we received a complaint alleging that Mrs. McNierney's co-guardians, Ed McNierney and Mary Ellen Hannigan, were restricting visitation with Mrs. McNierney by her son Patrick McNierney, in part, by instructing Brighton Gardens at Paramus . . . to prohibit Patrick from visiting his mother." [OOIE Brief, Pg. 4.]

contacted Brighton on or about May 16, 2008 and was advised again of the plaintiffs' full authority concerning visitation.

According to counsel for the OOIE, the OOIE investigated the matter from May to September meeting with Ann, Patrick, Edward and Mary Ellen, as well as reviewing the facility records and speaking with staff. [OOIE Brief, Pg. 4.]

On September 16, 2008, Field Investigator Frederick Golz ("Golz") apparently advised Brighton he had investigated the matter and for the next sixty days Patrick was entitled to supervised visits on Sundays from 1–5 p.m. The visits were to take place in a common space with a personal aide paid for by the guardians, in an effort to determine whether Patrick's visits were disruptive to Ann. [OOIE Brief, Pg 5.] According to plaintiffs, Golz stated the plaintiffs, as guardians, lacked the authority to restrict visitors. This period was set to end November 15, 2008.

Golz's report was issued to the plaintiffs, Patrick and Grace Cosgrove, the administrator at Brighton. [Orlowksi Certification, May 25, 2010, ¶13.] Plaintiffs assert they did not receive any communications from the OOIE after November. The OOIE provides from November 2008 until February 2009 its findings and recommendations were conveyed "to all interested parties." [OOIE Brief, Pg. 5.]

After the 60 days ended, Brighton permitted Patrick unlimited visits, as per the OOIE's decision. The "OOIE concluded that Mrs. McNierney welcomed the visits of her son Patrick (though she was sometimes confused as to who he was), and that she had enjoyed a close relationship with Patrick while still residing in her marital home." [OOIE Brief, Pg 4–5.] Patrick's visits were found not disruptive to Ann or the other residents at Brighton. [OOIE Brief, Pg. 5.] The OOIE apparently told Brighton to defer to them, as

opposed to the guardians, on visitation issues. Brighton thereafter refused to provide the plaintiffs information on Patrick's visits and Ann's reactions to the same.

Plaintiffs provide, on November 23, 2008, as noted by the staff, Patrick visited Ann despite her stating she did not want to see him. For the days following the visit Ann seemed especially agitated and apparently told staff she had been assaulted and raped. On November 25, Ann was brought to the emergency room for unrelated health reasons. Brighton staff failed to report her above mentioned statements to the hospital staff.

Plaintiffs voiced concerns "they could no longer effectively monitor the effect of Patrick's visits on their mother's well-being and make decisions regarding visitation in her best interests." [Complaint, ¶16.] As such, plaintiffs contacted Ombudsman Deborah Branch ("Branch") in or around December 2008. They were then told to contact Assistant Public Advocate Jo Astrid Glading ("Glading") which they did in early 2009.

The plaintiffs emailed John Donadio ("Donadio") the Executive Director of Brighton on February 21, 2009 providing a background as to Ann's recent hospital stay and medical conclusions. Importantly, the email set forth:

> Mom was also seen by another psychiatrist. He confirmed that mom suffers from severe dementia and is not lucid and cannot express clear thoughts or make rational choices. We continue to give due to [sic] all of mom's expressed preferences as we decide all matters relating to her and continue to take all 6 psychiatric evaluations we have of mom's level of functioning into consideration when doing so. We allow mom to make as many decisions as possible while protecting her from the possible harmful effects of bad decisions she does not fully understand.
>
> . . .

> Should you wish to challenge our authority as General Guardians, attempt to override our instructions and act in our place by creating your own visitation schedules, please do so in the Court to which we are fully answerable in our duty as General Guardians.

The plaintiffs also outlined visitation restrictions discussed below.

According to the OOIE, however, on February 21, 2009 Mary Ellen also emailed the then-Ombudsman Branch providing the co-guardians had decided to limit all visitation to Sundays between 1–4 p.m. and forbid anything be left with Ann, including photos and gifts, without their consent. Those who did not abide by these restrictions would be asked to leave Brighton. The email also states any challenges to the co-guardians "authority as General Guardians" should be addressed in court. [OOIE Brief, Exhibit C.]

On February 24, 2009, the plaintiffs wrote a letter to Glading complaining about the investigation conducted by the OOIE. Glading apparently referred the plaintiffs to Gwen Orlowski ("Orlowski"), who was then Director of the Division of Elder Advocacy at the Department of the Public Advocate (and currently is the Ombudsman).[4] Orlowski reviewed the investigatory file from March 2009 to July 2009.[5] [OOIE Brief, Pg. 6.]

On or about March 15, 2009, Branch told Brighton to follow her directions, not the guardians'. [OOIE Brief, Exhibit C.] Branch purportedly had not been in contact with the plaintiffs nor did she respond to their email dated February 21, 2009. [OOIE Brief, Exhibit C.]

[4] According to the OOIE's brief, Orlowski was appointed Ombudsman for the Institutionalized Elderly on or about December 22, 2009.

[5] The brief provides "March 2010 and July 2010". However, as at the time of this decision July 2010 has yet to arrive, the court assumes this was a typographical error and 2009 was intended.

Plaintiffs also reported the alleged assault and rape to the OOIE. With respect to this allegation, the OOIE responded by letter on May 1, 2009 stating there was insufficient evidence to verify the charges. Plaintiffs provide "[r]egardless of the truth of their mother's allegation . . . their mother's behavior following Patrick's visit further demonstrates that their concern about the visits on their mother's emotional well being is warranted." [Complaint, ¶14.] According to plaintiffs, Ann's anxiety and agitation medication was increased at this time.

Patrick asserts any allegation Ann did not want to see him is either false or a misunderstanding based on a staff member mishearing or misconstruing his conversations with his mother. He adds it is "very odd" of the plaintiffs to make allegations of assault and rape without any evidence to justify the same. [Patrick's Answer, Pg. 43.]

On July 31, 2009, plaintiffs received a letter from Orlowski writing on behalf of Glading. Orlowski indicated she had reviewed "their" original complaint from May 13, 2008 and the Public Advocate's interpretation of In re M.R., 135 N.J. 155 (1994).[6] She agreed with the findings of the OOIE that plenary guardians lack the authority to make decisions regarding the visitation rights of their ward and indicated the plaintiffs would have to make application to this court to restrict the visits of Patrick.

On October 12, 2009, Anne was sent to Valley Hospital because of abdominal pain. She was discharged soon thereafter and it was recommended she receive physical and occupational therapy, services not provided at Brighton. As such, on October 20, 2009, Ann was relocated to Van Dyck Manor Nursing Home ("Van Dyck") to receive

[6] The court notes, according to what has been provided by counsel, Patrick filed a complaint on May 13, 2008, not the plaintiffs.

those services. Ann was to reside in a unit specifically for those who suffer memory impairments. However, no special units were available upon her arrival. As such, Ann currently has a twenty-four hour live-in aide until such a time that she can be transferred.

On March 8, 2010, then counsel on behalf of the plaintiffs, Amy E. Duff, Esq. ("Duff") filed a one-count verified complaint seeking instructions regarding the scope of the guardianship. This application is the focal point of this decision and from which much of the above stated information was gleaned. Specifically, plaintiffs request, although prospectively, clarity as to whether a plenary guardian has the authority to make decisions regarding visitation, to ascertain if they must defer to the OOIE's direction should it become an issue at Van Dyck. Plaintiffs assert the OOIE position is contrary to N.J.S.A. 3B:12-24.1(a), N.J.S.A. 3B:12-48, and N.J.S.A. 3B:12-57.

On April 12, 2010, Patrick filed an extensive objection to plaintiffs' request for instructions. To begin, Patrick asserts the complaint was filed in retaliation for his questioning Anne Marie whether the fees paid to plaintiffs' counsel for the initial guardianship application had been returned to the estate as they were "subsequently rejected by the court as being excessive." Patrick recounts the final judgment did not provide for fees to Gibbons and Anne Marie had provided a check, from Edward Sr.'s account, for $40,000 to counsel when the action was initiated. Patrick adds Ann's funds have been used to support the current application and if they were not approved by the court, he requests the court order they be returned.[7]

[7] As Patrick's requests were not presented by cross application, they will not be formally addressed. R. 1:6-2(a); R. 4:52.

With respect to the substantive issues in question, Patrick asserts the guardians were not given the authority to deny access to Ann in the final judgment. Furthermore, Brighton's "Residents' Rights"; the OOIE's "Nursing Home Residents' Bill of Rights" pursuant to N.J.S.A. 30:13-5; and the "Manual for Guardians" ("Manual") issued by the Supreme Court Judiciary-Surrogates Liaison Committee, all provide Ann has the right to choose her visitors. Patrick reads the Manual to provide for the payment of legal fees from the ward's funds only by court approval. He adds, as no order provided for fees, these payments were not lawfully provided.

Finally, Patrick seeks the court order: (1) all legal fees paid to Hinkle and Gibbons be reimbursed to Ann, (2) the cost of a 24 hour live-in aide be refunded to Ann as this expense was unnecessary and would have been avoided if she had stayed at Brighton, and (3) the cost of the aid in 2008, to supervise Patrick's visits, be returned to Ann's funds. Maloof provided his report to the court on April 21, 2010. In same he concludes:

> [P]roofs to support either position are lacking . . . the real issue is the ward's right to visitation with her immediate family. No medical documentation is available to shed light on the question whether Ann McNierney has the mental capacity to make a rational choice on the issue of visitation; nor is there evident a qualified professional opinion as to the impact of visitations by family members on Ann's physical and mental condition.

However, Maloof acknowledges Ann has expressed a desire to be visited by her children. Since Maloof's obligation is to advocate for Anne's preferences, not her best interest, he suggests the visits be permitted, as well as the appointment of a guardian *ad litem*.

Maloof apparently engaged in several conversations with the Ombudsman Orlowski who allegedly provided "her office has no authority to issue an order regarding the right of any individual to visit an elderly ward that is institutionalized in a facility such as a nursing home or an assisted living compound. . . . No order was issued to that facility but merely recommendations." [Maloof Report, Pg. 6.]

The OOIE filed a notice of appearance on April 21, 2010. This court responded on April 23, 2010, providing the Ombudsman may submit a brief on the issue of whether guardians have the authority to determine visitation, as opposed to whether these co-guardians may limit Patrick's visits.

By way of a letter dated April 28, 2010, S. Paul Prior, Esq. ("Prior") of Hinkle indicated the plaintiffs terminated the firm's representation and shall proceed in a pro se capacity. The court thereafter informed counsel he must submit a motion to withdraw. Such a motion was submitted and set to return on May 28, 2010. Prior to this date, although counsel failed to notify the court, Anne Burris ("Burris") of Lindabury, McCormick, Estabrook & Cooper, P.C. ("Lindabury") was substituted for Prior.

On April 29, 2010, Audrey L. Anderson, Esq. ("Anderson"), General Counsel for the Department of the Public Advocate, Division of Elder Advocacy, Ombudsman for the Institutionalized Elderly, requested this court adjourn the matter to allow the OOIE adequate time to brief the relevant issue. Anderson received the consent of all parties involved. The matter was rescheduled to be heard on June 18, 2010.

Patrick filed a response to Maloof's report on April 30, 2009. Patrick contests or comments on several remarks made by Maloof, as well as the letter attached as an exhibit written by Orlowski. Of relevance, Patrick states the plaintiffs have gifted "significant

funds" from his parents' joint account and he was excluded from these distributions, contrary to that which was reported by the plaintiffs. He states the Ombudsman's role, as defined on the Office's website, is to protect the elderly "by intervening in or instituting proceedings involving their interests" and thus is "better prepared to protect the interests of our mother than either of the guardians by employing qualified, licensed professionals." [Patrick Letter, April 29, 2010, Pg. 4.] Patrick also points out despite plaintiffs' assertions of ample evidence of the effect of Patrick's visits on Ann, none has been provided nor are there certifications or affidavits to that effect. As such, Patrick concludes by requesting a guardian *ad litem* be appointed to work with the Ombudsman and prevent continuous and excessive legal fees from being required.

From March 2010 to May 2010, Orlowski was invited by the plaintiffs to visit Ann at Van Dyck. On May 17, 2010 such a visit was made, along with Elizabeth Speidel, Esq. ("Speidel"), an Assistant Deputy Public Advocate for the Office of the Ombudsman. Also present was Ann's nurse, Rita Broni ("Broni"), Mary Ellen, and Mary Ellen's attorney Sergio D. Simoes, Esq. (Simoes"). [Reply Brief, Pg. 4.] Ann was interviewed for 20-25 minutes. According to plaintiffs' counsel, Orlowski never interviewed Patrick nor observed any of his visits with Ann.[8] Ann was apparently very fragile and confused during the May meeting believing her deceased husband had been in the room and her deceased parents lived across the hallway. Several other incidents are reported as well. [Reply Brief, Pg. 4.]

[8] When questioned during oral argument whether the Ombudsman had purposefully refrained from advising the court as to the nature of the May 17 visit to Ann, Speidel indicated, at the guardians' request and as a result of the OOIE's extensive involvement in this matter, the current Ombudsman felt it important to visit Ann. When challenged, counsel added it was not a "fact-finding mission" but just a "visit".

On May 28, 2010, counsel on behalf of the OOIE submitted its brief in response to plaintiffs' application. Presumably based on their earlier investigation and their meeting with Ann, the OOIE provides:

> [A] general guardian cannot make the broad determination that he or she will be making all decisions as to visitation without demonstrating with clear and convincing evidence that the ward does not have the capacity to make that decision herself at this time and that there is no evidence as to what decision she would make if she had capacity.
>
> [OOIE Brief, Pg. 3-4.]

Counsel for the plaintiffs filed the reply on June 1, 2010 along with the certifications of Mary Ellen and Broni, a Certified Nursing Assistant and Ann's primary caretaker. Broni states Patrick's visits are often disruptive to Ann as he appears to not understand the extent of her memory loss and constantly tries to remind her of things. [Broni Certification, ¶7.] Specifically, Broni recounts Patrick gave Ann the phone to talk to strangers, told Ann he would never marry or have kids because Ann and Edward Sr. always fought, and reminded Ann her husband was dead. [Rita Certification, ¶7–10.] All these situations resulted in Ann being very upset for several days, at least according to Broni.

Counsel for the plaintiffs asserts the co-guardians "have always endeavored to elicit from Ms. McNierney what her wishes would be, and thereafter, act accordingly, when such wishes are not adverse to her well being or in her best interests." [Reply Brief, Pg. 5.] She adds,

> Ms. McNierney however, is unable to make decision or judgment on her own or for her own best interest or safety. Thus, the objective of this application is not to permanently restrict Patrick from access to his mother, but to clarify the

> authority of the co-guardians to monitor, oversee, and schedule visitations so that disruptions to her are kept to a minimum and so that her treatment and care are preserved.
>
> [Reply Brief, Pg. 5.]

As such, counsel seeks to confirm the co-guardians' authority over Ann's visitation. Counsel posits this is a legal, not a factual determination, and thus despite Maloof's suggestion, a guardian *ad litem* is improper; Patrick improperly relies on the Manual which is non-binding; the OOIE has exceeded its authority in stating the co-guardians cannot oversee visitation as they were established to investigate matters concerning health care facilities, not guardians and their wards.

On June 20, 2010, Patrick filed an unauthorized sur-reply. Making his way through the OOIE's submissions, Patrick first states it does not appear Edward has counsel, but rather only Mary Ellen is represented by Lindabury. Second, he argues Broni is not an expert with respect to determining "harmful behavior" but rather a lay person. In addition, Broni is paid by the plaintiffs and thus implies her assertions would obviously be consistent with theirs.

Patrick counters Broni's allegations of being disruptive by arguing she lacks the qualifications to evaluate his ability to understand his mother's condition or her condition. He adds several of her statements are "clearly and utterly false, rais[ing] serious questions as to her competency to serve as an aide for my mother." [Patrick Surreply, June 10, 2010, Pg. 6, ¶9.] Patrick concludes stating plaintiffs' allegations are not verifiable by any expert witness and "the reliance by Anne Burris to establish a causal nexus based solely on a lay witness, and not an expert witness, opens the door to

disciplinary action against Anne Burris." [Patrick Surreply, Pg. 8.] Accordingly, Patrick requests legal fees to Lindabury be denied.

Oral argument was entertained on June 18, 2010. During colloquy with Speidel, counsel for the OOIE, several positions were clarified. Speidel indicated the letters to Brighton, Patrick and the plaintiffs, in response to the OOIE's investigation, were intended as recommendations, and not as directives. When questioned as to whether this position was made clear to the relevant parties, counsel responded "[t]he way our Office works is we don't have any governing authority over facilities." The following inquiries were also made:

> Question: "Do you now wish to be heard for the proposition your client has and had no authority to make a direction that the facility should follow your suggestion or your directive?"
> Answer: "Our role, at all times, is to advocate for the position of a resident. So, what we were doing in that case, was advocating on behalf of the resident and her rights to visitation."
> Question: "And would that role encompass a criticism of a guardian's actions?"
> Answer: "Yes. There are times that it would."
> Question: "And would it encompass the authority to direct the guardian to do x or y?"
> Answer: "I do not believe we have the authority to direct the guardian to do anything."
> Question "Are you satisfied then that your client made clear that it had no authority to direct the guardian to do anything?"
> Answer: "Yes. …"
> Question: "Would you agree with me, Ms. Speidel, that at least from the papers, it appears the Brighton facility understood your 'suggestion' as a direction?"
> Answer: "It seems as though they [Brighton] viewed it as a direction."

Speidel admitted, multiple voices speaking with purported authority created confusion in this case. She added, however, her "Office does not see itself as any substitution for the court." Importantly, the following colloquy took place:

> Question: "Is it your position, or your client's position, that it has the right to overrule the directives of the guardian as it relates to visitation."
> Answer: "No. Our role is as advocate for the resident. And we do not feel we can override what the guardian says. If there are issues between somebody who comes to us and the guardian, than that has to be resolved with the court."
> Question: "So whether it is federal law that you seek to review, or state law, you view your client's role as either advisory, as a mediator, as a facilitator, but not as a director as it pertains to the guardian's role concerning visitation."
> Answer: "Correct."

Law

Plenary guardian

"'General guardian' means an individual or agency appointed by a court of competent jurisdiction to make all decisions in a person's life pursuant to N.J.S.A. 3B:12-12(a).[9] N.J.A.C. 10:43-1.3. "The New Jersey guardian of an incompetent's person and property is required to provide for the care, safe-keeping and support of the incompetent."[10] Gay v. Stengel, 61 N.J. Super. 411 (App. Div. 1961).

---

[9] Examining this codification, there appears to be no section "a". In addition, N.J.S.A. 3B:12-12 only covers the "Jurisdiction of surrogate to appoint guardians for minors". This definition, nonetheless, is provided in the definitions section of the provisions of the New Jersey Department of Human Services, Division of Development Disabilities.

[10] In 1997, the New Jersey Legislature amended N.J.S.A. 3B:1-2. The amendment replaced the term "mental incompetent" with "incapacitated person" and applied same to the entire statute. 1997 N.J. Laws 379. As such, when not referencing a quotation, the proper term "incapacitated person" shall be utilized.

There are several provisions of the New Jersey Statutes Annotated that address the authority and responsibility of a plenary guardian. To begin, N.J.S.A. 3B:12-24.1, on the "[d]etermination by the court of need for guardianship services", states:

> General Guardian. If the court finds that an individual is incapacitated as defined in N.J.S.A. 3B:1-2 and is without capacity to govern himself or manage his affairs, the court may appoint a general guardian **who shall exercise all rights and powers of the incapacitated person**. The general guardian of the estate shall furnish a bond conditioned as required by the provisions of N.J.S.A. 3B:15-1 et seq., unless the guardian is relieved from doing so by the court.
>
> [(Emphasis added).]

N.J.S.A. 3B:12-48 addresses the power a guardian may exercise stating:

> A guardian of the estate of . . . an incapacitated person has all of the powers conferred upon the guardian by law and the provisions of this chapter **except as limited by the judgment.** These powers shall specifically include the right to file or defend any litigation on behalf of the ward, including but not limited to, the right to bring an action for divorce or annulment on any grounds authorized by law.
>
> [(Emphasis added).]

The instant judgment provided the plaintiffs were appointed to serve as co-guardians over the person and property of Ann, were to post bond in the amount of $500,000, and had "all powers vested pursuant to N.J.S.A. 3B:12-48." Thus, the order provided no limitations to the plaintiffs' general guardianship.

N.J.S.A. 3B:12-57 elaborates providing the powers and duties of a guardian of the person:

> f. [A] guardian of the person of a ward shall exercise **authority over matters relating to the rights and best interest of the ward's personal needs, only to the**

> **extent adjudicated by a court of competent jurisdiction.** In taking or forbearing from any action affecting the personal needs of a ward, **a guardian shall give due regard to the preferences of the ward, if known to the guardian or otherwise ascertainable upon reasonable inquiry.** To the extent that it is consistent with the terms of any order by a court of competent jurisdiction, the guardian shall:
>
> (3) provide for the care, comfort and maintenance and, whenever appropriate, the education and training of the ward;
>
> (4) subject to the provisions of subsection c. of N.J.S.3B:12-56, **give or withhold any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service**;
>
> . . .
>
> g. In the exercise of the foregoing powers, the guardian shall encourage the ward to participate with the guardian in the decision-making process to the maximum extent of the ward's ability in order to encourage the ward to act on his own behalf whenever he is able to do so, and to develop or regain higher capacity to make decisions in those areas in which he is in need of guardianship services, to the maximum extent possible.
>
> [(Emphasis added).]

The statute was amended in 2005 to:

> [C]larify that a guardian of the person of a ward is required to exercise authority over matters relating to the rights and best interest of a ward's personal needs **only to the extent ordered by the court**. This section provides that a guardian is required to give due regard to the preferences of the ward, if known to the guardian or otherwise ascertainable upon reasonable inquiry. **This section also provides that to the extent that it is consistent with the terms of any order by a court, the guardian shall:** take custody; **provide for visitation**; provide for the care, comfort, maintenance and education; provide for necessary consents or approvals; provide for possessions; institute

> any necessary actions; develop a plan of supportive services; and receive money and tangible personal property.
>
> [Statement to Senate, No. 224 (dated: December 1, 2005) (emphasis added).]

Although the guardian has the authority over matters relating to the rights and best interests of the ward, as stated above, this is guided by a ward's self-determination or rather, the guardian should defer to the preferences of its ward if not contrary to the ward's best interest.

> Incompetent persons have a common-law right of self-determination, the same as that of competent persons, except that the right of self-determination of adjudicated incompetents **must be balanced by the court with concern for their best interests**. In re M.R., 135 N.J. 155, 167 (1994). This is because an adjudicated incompetent, "like a minor child, is a ward of the state, and the state's parens patriae power supports the authority of its courts to allow decisions to be made for an incompetent that serve the incompetent's best interests." In re Conroy, 98 N.J. 321, 364–65 (1985). The decision maker's responsibility is to carefully balance the incompetent's right to self-determination with considerations of best interests and the protection of the incompetent's person and property. See M.R., supra, 135 N.J. at 167.
>
> The incompetent's right to self-determination must be preserved to the extent possible. Some elderly nursing home patients, who are generally incompetent and unable to govern their own affairs, have lucid periods during which they can once again communicate their wishes clearly. See Conroy, supra, 98 N.J. at 382. Even those who are generally incompetent vary widely in their degree of alertness and in their ability to communicate. Thus, a patient may be competent to make a decision regarding a course of medical treatment "even if the patient previously had been adjudicated an incompetent and had a general guardian appointed pursuant to N.J.S.A. 3B:12-25." Id.

> If a patient is not competent to make a particular decision, the guardian has a duty to determine subjectively, to the extent possible, the course an incompetent would have taken regarding a particular decision if competent and apply a substituted judgment or subjective test. Conroy, supra, at 361–64. If some trustworthy evidence of an incompetent's intent can be found, but not enough to fully determine subjective intent, this can be taken into account in determining the incompetent's best interests, and a limited-objective test should be used. M.R., supra, 135 N.J. at 167; Conroy, supra, 98 N.J. at 365-66.
>
> [Matter of Roche, 296 N.J. Super. 583, 588–589 (Ch. Div. 1996) (emphasis added).]

The above provides the groundwork to evaluate the current question presented. However, as the court sees the question presented, it need only determine whether "a" guardian may control the visitation rights of its ward, not whether "these" guardians may do so under the facts as presented.

Patient's Bill of Rights

In 1976 the New Jersey Legislature determined "that the well-being of nursing home residents in the State of New Jersey requires a delineation of the responsibilities of nursing homes and a declaration of a bill of rights for such residents." N.J.S.A. 30:13-1. N.J.S.A. 30:13-5 discusses the rights of nursing home residents. Specifically, it states "[e]very resident of a nursing home shall . . . [h]ave the right to unrestricted communication, including personal visitation with any persons of his choice, at any reasonable hour." N.J.S.A. 30:13-5(h). The legislative findings in support of the statute state "that the well-being of nursing home residents in the State of New Jersey requires a delineation of the responsibilities of nursing homes and a declaration of a bill of rights for such residents." N.J.S.A. 30:13-1.

Manual for Guardians

In the 1990's, Chief Justice Robert N. Wilentz requested recommendations from the Judiciary-Surrogates Liaison Committee Concerning Guardianships ("JSLCCG") to better address guardianship matters. The February 1995 "Report of the Supreme Court Committee on Court Appointment of Fiduciaries" discusses a report issued by the JSLCCG recommending training materials be provided by the court to guardians at the time of their appointment. As of April 4, 2004 a "manual" was created for this purpose.[11]

Office of the Ombudsman for the Institutionalized Elderly

In January of 2006, the Legislature reconstituted the Department of the Public Advocate ("DPA") and the Division of Elder Advocacy ("DEA") See N.J.S.A. 52:27EE-2(a). The Office of the Ombudsman for the Institutionalized Elderly ("OOIE"), which was already in existence, was then subsumed within the DEA. See N.J.S.A. 52:27EE-61 to -65. [OOIE Brief, Pg. 1.][12] The current hierarchy is as follows: the OOIE is a part of the DEA, which is a division of the DPA.[13]

---

[11] The above information was provided by the AOC Civil Practice Division.

[12] Orlowski certifies the DPA, as per N.J.S.A. 52:27EE-5(f), has the authority to "issue subpoenas to compel the attendance and testimony of witnesses or the production of books, papers and other documents." Citing to N.J.S.A. 52:27EE-63(a), (c), -64(a)–(c), Orlowski implicates certain authority as a result of her position as Director of Elder Advocacy. Specifically, to "represent the public interest in such administrative and court proceedings as the Public Advocate deems shall best serve the interests of elderly adults." [Orlowski Certification, May 25, 2010, ¶ 5.] The Court notes, however, as of December 22, 2009, Orlowski was appointed the Ombudman for the Institutionalized Elderly and no longer is the Director of the Division of Elder Advocacy.

Orlowski notes "public interest" is defined as "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27EE-12.

Finally Orlowski states the Ombudman for the Institutionalized Elderly is charged under the Federal Older American Act, 42 U.S.C. 3058g(a)(1)(E) (2000). This position is called a "State Long-Term Care Ombudsman". The functions include:

(A) identify, investigate, and resolve complaints that—
(i) are made by, or on behalf of, residents; and
(ii) relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents

---

(including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payees), of—

(I) providers, or representatives of providers, of long-term care services;

(II) public agencies; or

(III) health and social service agencies;

(B) provide services to assist the residents in protecting the health, safety, welfare, and rights of the residents;

(C) inform the residents about means of obtaining services provided by providers or agencies described in subparagraph (A)(ii) or services described in subparagraph (B);

(D) ensure that the residents have regular and timely access to the services provided through the Office and that the residents and complainants receive timely responses from representatives of the Office to complaints;

(E) represent the interests of the residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

(F) provide administrative and technical assistance to entities designated under paragraph (5) to assist the entities in participating in the program;

(G) i) analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State;

(ii) recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and

(iii) facilitate public comment on the laws, regulations, policies, and actions;

(H) (i) provide for training representatives of the Office;

(ii) promote the development of citizen organizations, to participate in the program; and

(iii) provide technical support for the development of resident and family councils to protect the well-being and rights of residents; and

(I) carry out such other activities as the Assistant Secretary determines to be appropriate.

[13] The DEA, according to N.J.S.A. 52:27EE-63:

[M]ay protect the interests of the elderly by:

a. intervening in or instituting proceedings involving the interests of the elderly before any department, commission, agency, or board of the State leading to an administrative adjudication or administrative rule as defined in section 2 of P.L.1968, c.410 (C.52:14B-2);

b. instituting litigation on behalf of the elderly when authorized to do so by the Public Advocate; and

c. commencing negotiation, mediation, or alternative dispute resolution prior to, or in lieu of, the initiation of any litigation.

N.J.S.A. 52:27EE-64 provides for the “additional powers and duties” of the DEA stating:

Codified in 1977, N.J.S.A. 52:27G-1 provides:

> [T]here should be established as an agency of the State Government the Office of the Ombudsman for the Institutionalized Elderly, to receive, investigate and resolve complaints concerning certain health care facilities serving the elderly, and to initiate actions to secure, preserve and promote the health, safety and welfare, and the civil and human rights, of the elderly patients, residents and clients of such facilities.

The "Ombudsman" is the administrator and chief executive officer of the Office of the Ombudsman for the Institutionalized Elderly. N.J.S.A. 52:27G-2.

The Office's objective is "that of promoting, advocating and insuring, as a whole and in particular cases, the adequacy of the care received, and the quality of life experienced, by elderly patients, residents and clients of facilities within this State." N.J.S.A. 52:27G-6. The Office is to investigate, respond and resolve any complaints;

> a. The Division of Elder Advocacy shall report to the Governor and the Legislature on recommendations that will further the State's ability to secure, preserve, and promote the health, safety, and welfare of New Jersey's elderly.
>
> b. The Division of Elder Advocacy shall have the authority to hold a public hearing on the subject of any investigation or study. The division shall hear testimony from agency and program representatives, the public in general, and such others as may be deemed appropriate.
>
> c. The Division of Elder Advocacy shall have access to the records and facilities of every agency, funded entity, or other recipient of public funds to the extent that any such records and facilities are related to the expenditure of public funds, provided that the division complies with all privacy and confidentiality protections applicable to those records and facilities, notwithstanding any contrary provision of law. Notwithstanding the foregoing, the Division of Elder Advocacy shall have access to any facility or institution, whether public or private, offering health or health-related services for the institutionalized elderly which is subject to regulation, visitation, inspection or supervision by any government agency, provided such access is permitted by State or federal law. All agencies shall cooperate with the Division of Elder Advocacy and, when requested, shall provide specific information in the form requested.

however the statute refers specifically to complaints against facilities and/or their employees, not individual persons or guardians. N.J.S.A. 52:27G-7.

Importantly, it is the responsibility of the Office to:

> c. **[R]ecommend to the relevant government agency changes** in the rules and regulations adopted or proposed by such government agency, which do or may adversely affect the health, safety, welfare or civil or human rights of any patient, resident or client in a facility.
>
> h. [R]eport to the Governor and the Legislature on or before September 30 of each year, which report shall summarize its activities for the preceding fiscal year, document the significant problems in the systems of care and services for the elderly, indicate and analyze the trends in such systems of care and services, and set forth any opinions or recommendations which will further the State's capacity in resolving complaints, encouraging quality care and ensuring the health, safety, welfare or civil and human rights of elderly patients, residents and clients of facilities, including **suggestions or recommendations for legislative consideration and for changes in the policy or rules and regulations of government agencies**. The annual report shall be available to the public.
>
> [N.J.S.A. 52:27G-9 (emphasis added).]

DHSS

The Health Care Facilities Planning Act, N.J.S.A. 26:2H, provides for the responsibilities and regulations health care facilities, including assisted-living facilities, must provide their patients. The "Declaration of Public Policy" generally provides:

> [T]he State Department of Health shall have the central responsibility for the development and administration of the State's policy with respect to health planning, hospital and related health care services and health care facility cost containment programs, and all public and private institutions, whether State, county, municipal, incorporated or not incorporated, serving principally as residential health care facilities, nursing or maternity homes or as facilities

> for the prevention, diagnosis, or treatment of human disease, pain, injury, deformity or physical condition, shall be subject to the provisions of this act.
>
> [N.J.S.A. 26:2H-1.]

Although a patient's rights to visitation do not appear to be specifically codified, the rights of a domestic partner to visit are explicitly provided inferring domestic partners are entitled to equal rights under the law as a spouse or familial relation. As such, this codification may provide a useful parallel to the facts of this case, regarding access to a parent. It states:

> a. A health care facility . . . shall allow a patient's domestic partner . . . the children of the patient's domestic partner, and the domestic partner of the patient's parent or child to visit, **unless** one of the following conditions is met:
> (1) No visitors are allowed;
> (2) The health care facility **reasonably determines that the presence of a particular visitor would endanger the health or safety of a patient, a member of the staff of the facility, or another visitor to the facility, or would significantly disrupt the operations of the facility**; or
> (3) The patient has indicated to health care facility staff that the patient does not want the person to visit.
> b. The provisions of subsection a. of this section shall not be construed as prohibiting a health care facility from otherwise establishing reasonable restrictions upon visitations, including restrictions upon the hours of visitation and number of visitors.
>
> [N.J.S.A. 26:2H-12.22 (emphasis added).]

Analysis

To begin, the defendant asserts his right to visit his mother has been improperly restricted. Defendant correctly argues plaintiffs' allegations of problems, abuse, agitation, and causing harm are speculative and "not supported by any verifiable facts or

any statements from any witnesses. The mere allegation that our mother was seen agitated AFTER my visit to her does not create a causal nexus for the source of her agitation and my visit to her." [Patrick's Answer, Pg. 7, 25.] In addition, substantially all allegations made are based on apparent events which occurred over two years ago.

The court agrees with this proposition. However, the plaintiffs seek a very narrow determination. Specifically, clarity as to whether a plenary guardian has the authority to make decisions regarding visitation, particularly as to a ward living in a residential facility. The plaintiffs do not seek a court determination on the authority to restrict Patrick from visiting Ann. As such, although Patrick correctly points out evidence as to allegations of abuse and agitation appear to be lacking, these proofs are not required for the determination currently posed.

By way of summary, the DHSS was involved in this matter in April 2008 when Patrick contacted them to report he was denied visitation. The DHSS apparently thereafter contacted Brighton to gather information on Ann's response to Patrick's visits. The DHSS then told Brighton the guardian determines who may see the ward. Thereafter, no party makes mention of the DHSS's involvement in this matter.

As discussed above, it appears the DHSS is to provide certain regulations for "the prevention, diagnosis, or treatment of human disease, pain, injury, deformity or physical condition." N.J.S.A. 26:2H-1. Subsumed within this legislation are certain rights, including those specified above for domestic partners. However, beyond the same, while the DHSS may, though there is no evidence it has, dictate what an assisted living facility must do, this is not the relevant question. Rather, the focus here is on the extent of a plenary guardian's authority. Thus, while a facility may be required to provide visitation,

which is within the DHSS's realm, whether the guardian may then restrict the same is not within its scope of authority.

Nonetheless, the DHSS maintained a limited role in this conflict. The input made, importantly, informed the facility the guardian has discretion concerning visitors. Accordingly, a more detailed and evaluative discussion of the scope and extent of the DHSS's authority are not necessary.

The OOIE, on the other hand, has become significantly involved in this family dispute. To begin, on or about May 13, 2008, Patrick filed a complaint with the OOIE again stating Brighton was violating Ann's rights to choose her visitors. The OOIE then sent an investigator to Brighton who determined Patrick should have supervised visits for sixty days to evaluate the issue. The OOIE states this was merely a suggestion and not an order. However, the OOIE purportedly told Brighton to defer to their "suggestions" as opposed to the directions of the guardians.

The guardians were thereafter denied access to records of Ann's visitors. Finding no reports had been made of the alleged assault and abuse of Ann, the plaintiffs reported the allegations to the OOIE in the winter of 2008. The OOIE responded by letter stating the OOIE lacked sufficient evidence to properly investigate the allegations.

McHugh states in his letter to plaintiffs' counsel dated May 21, 2008 "[t]his is not a situation for the Ombudsman's involvement since there is no allegation of abuse of the elder by the institution which is the sole jurisdiction of the Ombudsman's Office. They do not serve as a mediator in a family feud." This court agrees.

In its brief, the OOIE argues "an individual retains her fundamental rights after she is adjudicated incapacitated and appointed a general guardian" and "when making a

decision on behalf of a ward, the guardian is required to preserve the fundamental rights of the ward to the greatest extent possible." The OOIE provides a guardian is appointed to assist and encourage but not to control a ward.[14]

Importantly, there are additional fundamental rights, counsel asserts, incapacitated individuals maintain such as the right to vote, see IMO Absentee Ballots Case by Five Residents of Trenton Psychiatric Hospital, 331 N.J. Super. 31 (App. Div. 2000) (holding voters who are involuntarily committed residents of a psychiatric hospital are presumed

---

[14] For this proposition counsel cites to an unpublished opinion In re Goldemberg, No. BER-P-460-05, which was decided by this court on February 7, 2006. Rule 1:36-3 states "[n]o unpublished opinion shall constitute precedent or be binding upon any court." For thoroughness alone, this court will briefly discuss Goldemberg.

In this opinion this court discussed the role and use of a limited guardianship to "protect the person while limiting the intrusion on the incapacitated person's autonomy and independence." It acknowledged:

> Individuals like [the ward] suffering from dementia, may retain some competent mental functioning, such that their best interest might be better served by limited guardianship. The doctrine of the least restrictive alternate should be considered when an individual's liberty interests are at issue, and where not contraindicated by health and safety concerns. This would permit each individual's particular disability to be addressed, while respecting the individual's right to the dignity of self determination.
>
> [(Internal citation omitted).]

Thus, it is recognized where a "limited" guardianship is in place, the incapacitated may still possess the competence to make certain decisions.

On the other hand, where there is a plenary guardianship, these rights are not necessarily preserved. This court found:

> Incompetent persons have a common-law right of self-determination, the same as that of competent persons, except that the right of self-determination of the adjudicated incompetents must be balanced by the court with concern for their best interests…The decision maker's responsibility is to carefully balance the incompetent's right to self-determination with considerations of bests interests and the protection of the incompetent's person and property.
>
> [In the Matter of Roche, 296 N.J. Super. 513, 588 (Ch. Div. 1996).]

Therefore, it appears, where best interests and self-determination align, the wishes of an incapacitated should be followed.

competent and therefore to challenge their votes requires a particularized showing of incompetence), and privacy rights, see In re Grady, 85 N.J. 235, 261 (1981) (finding sterilization of an incapacitated nineteen year old called for court intervention, as opposed to the parental guardians ability to decide alone). Lastly, the freedom of association is protected by the First and Fourteenth Amendments of the United States Constitution and applies to visits with family. Shaumbaugh v. Wolk, 302 N.J. Super. 380 (Ch. Div. 1996) (holding a hearing should be held to determine whether a mother, who was committed to a psychiatric unit, desires to be visited by her daughter where the daughter was restricted from visiting her by her step-father).

Understanding these rights and the balance with best interests, the Ombudsman further cites to the guardianship statute and the regard due to a ward's preferences and involvement in the decision-making process "to the maximum extent of the award's ability". See N.J.S.A. 3B:12-57(f), (g). The OOIE applies a three-prong test, usually employed in the context of privacy issues and disputes over physical autonomy. The first prong "assumes a person retains the capacity to exercise their fundamental rights unless the challenger shows specific incapacity by clear and convincing evidence." See M.R., supra, 135 N.J. at 168-69; IMO Absentee Ballots, supra, 247 N.J. Super. at 470; D.R., supra, 331 N.J. Super. at 38. Counsel cites to M.R. and the proposition although a person is generally incapacitated does not direct they are incapacitated for all purposes. Rather, the decision as to what an incapacitated can determine is fact-specific and must consider the potential risks associated with the decision. Id. at 169.

Upon demonstrating clear and convincing evidence of a lack of capacity to make a specific decision, the court employs the second, or "substituted judgment", prong. In re

Conroy, supra, 98 N.J. at 360. When exercising substituted judgment, the guardian must effectuate, as far as possible, the decision the patient would have made if competent, as determined from their actions, statements, prior relevant decisions, or intent. Id. at 361-63.

Where there is no evidence as to how the ward would decide, the final prong requires an analysis of the ward's "best interest". Id. at 364–66.

The OOIE concludes "given the broad request of the guardians to give them the authority to make all decisions regarding visitation" and the potential for the same to violate Ann's fundamental rights of self-determination, the OOIE request this court deny the request pending further evidence. For example, as set out above, clear and convincing evidence Ann can not make the decision; if this is satisfied, whether she would decide this way if she had capacity; and if her decision is unknown, whether denial of certain visitation is in her best interest.

The OOIE provided incapacitated individuals are entitled to fundamental rights, such as voting. However, the legal support cited for this proposition is not factually parallel to the facts at hand. In In re Absentee Ballots, the Appellate Division held "voters who are involuntarily committed residents of a psychiatric hospital pursuant to N.J.S.A. 30:4-24 to -80 are presumed competent to vote. Therefore, they cannot be challenged as voters nor their ballots segregated, absent a particularized showing of incompetence." Supra, 331 N.J. Super. 31, 34 (App. Div. 2000). The court explicitly stated the individuals were not presumed incapacitated and thus can not be challenged as voters. In this case, Ann's incapacity is not in question. Thus, apparently, the OOIE attempts to argue despite incapacity, certain rights remain.

This conclusion is supported by In re Grady, also cited by the OOIE, when the Supreme Court addressed whether a nineteen year old with severe mental retardation was able to decide between sterilization or procreation. Supra, 85 N.J. at 250-251. The Supreme Court determined:

> [B]ecause of her severe mental impairment, Lee Ann does not have the ability to make a choice between sterilization and procreation, or between sterilization and other methods of contraception a choice which she would presumably make in her "best interests" had she such ability. But her inability should not result in the forfeit of this constitutional interest or of the effective protection of her "best interests." If the decision whether or not to procreate is "a valuable incident of her right of privacy, as we believe it to be, then it should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice." To preserve that right and the benefits that a meaningful decision would bring to her life, it may be necessary to assert it on her behalf. . . . The question of who besides the parents has standing to represent the purported interests of the incompetent can await future determination. Nevertheless, we believe that an appropriate court must make the final determination whether consent to sterilization should be given on behalf of an incompetent individual. It must be the court's judgment, and not just the parents' good faith decision, that substitutes for the incompetent's consent.
>
> [Ibid. (internal citations omitted).]

The Supreme Court's distinguished In re Quinlan, 70 N.J. 10, cert. denied, 429 U.S. 922 (1976), from the facts in Grady. Specifically, the Court found the "only practical way to preserve the comatose patient's right to discontinue artificial life-support was to allow the guardian and family 'to render their best judgment, subject to . . . qualifications . . . as to whether she would exercise it in these circumstances.'" Grady, supra, 85 N.J. at 251. In Grady, however, the court felt the issue of sterilization,

especially with respect to incapacitated persons, had historically been abused. Thus, "[s]ince the sterilization decision involves a variety of factors well suited to rational development in judicial proceedings, a court can take cognizance of these factors and reach a fair decision of what is the incompetent's best interest", as opposed to deferring to parental guardians. Id. at 252. The best interest standard is then evaluated at length by the Court. Id. at 262–67.[15]

Although these cases provide guidance concerning guardianship authority, as this court need not determine whether the current co-guardians are permitted to restrict Patrick's visitation, but rather only whether a guardian may do so, further discussion of or elaboration on Grady or Quinlan is unnecessary. Furthermore, although these cases reflect a respect for the fundamental rights of incapacitated individuals, the factual context is so dissimilar from the matter at hand as to provide little illumination on the issue presented.

As provided above, the OOIE is to "to receive, investigate and resolve complaints **concerning certain health care facilities** serving the elderly, and to initiate actions to secure, preserve and promote the health, safety and welfare, and the civil and human rights, of the elderly patients, residents and clients **of such facilities**." N.J.S.A. 52:27G-1

[15] The Court outlines a four-step evaluation process a trial court should follow when determining whether to authorize the sterilization of an incapacitated person. First, as it "is ultimately the duty of the court rather than the parents to determine the need for sterilization…the court must be satisfied that sterilization is in the best interests of the incompetent person". Id. at 264. Second, the court should appoint an independent guardian *ad litem* as soon as possible and receive independent medical and psychological evaluations by qualified professional. Ibid. Third, "the trial judge must find that the individual lacks capacity to make a decision about sterilization and that the incapacity is not likely to change in the foreseeable future. …The trial court should be reluctant to substitute its consent for any person who may be capable of making a decision for himself. Therefore, the proponent of sterilization should have the burden of proving by *clear and convincing evidence* that the person to be sterilized lacks the capacity to consent or withhold consent." Id. at 265 (internal citations omitted). Lastly, "the trial court must be persuaded by *clear and convincing* proof that sterilization is in the incompetent person's best interests." Id. at 266.

(emphasis added). Sections G-6 and G-7 thereafter provide the Office is to investigate complaints against facilities, etc. Here, Patrick did present the OOIE with a complaint against the facility as they denied him access to his mother. However, this restriction was provided by the guardian, not the facility. Thus, the issue presented is not the extent to which a facility must follow the guardian, but rather, whether the guardian has discretion over visitation. This again, as discussed in the context of the DHSS, is not within the scope of responsibilities of the OOIE.

The OOIE may appropriately attempt to determine whether a facility is abusing or creating a situation in which it is risking the safety and welfare of its patients. Nothing in the enabling legislation appears to reference or discuss the OOIE's role with respect to enforcing the rights of a ward against the guardian. However, a facility, which is subject to the OOIE, is required to bow to the discretion of the guardian who is, in essence, stepping into the shoes of his or her ward.

In the present case, although the OOIE addressed its communications to Brighton, as Brighton was abiding by the expressed preferences of the guardian, Brighton did not engage in any abuse or otherwise impair the health and safety of Ann. Rather, Brighton attempted to follow the wishes of Ann, as expressed through her guardian. Were these wishes deemed to be inappropriate or abusive, Brighton, the defendant, or possibly the OOIE should have sought the appropriate relief from the court. The OOIE lacked authority to dictate what actions the guardian could exercise with regard to visitation, thereafter command Brighton to confer with them on future visitation decisions, and restrict the guardians' access to files and reports concerning Ann.

Importantly, the OOIE is granted the task of informing the Legislature and relevant government agencies of suggested changes in rules and regulations. N.J.S.A. 52:27G-9. This responsibility should permit the OOIE to take the necessary steps to address the current difficulty or request the Legislature examine the scope of a guardian's authority to determine rights which may conflict with the obligations of a facility. This, however, does not appear to have been done.

In addition to the authority of the DHSS and the OOIE, Patrick appears to rely almost entirely on the Manual. [Def. Answer, Pg. 21.] He argues if it were correct a plenary guardianship trumps the regulatory rights outlined in N.J.S.A. 26:2H-1; N.J.A.C. 8:36-1 to -21, "then why [would] the above mentioned 'Statement of Resident's rights' … be posted in both the assisted living areas ***and*** the dementia wing." [Def. Answer, Pg. 26.] Finally, Patrick states if the plaintiffs wish to limit or deny visitation, they need to apply to the court for a restraining order. [Def. Answer, Pg. 28.] Patrick provides no legal authority supporting the proposition a guardian must seek a restraining order to limit visitation to its ward.

To begin, the Manual was issued by the Supreme Court Judiciary-Surrogates Liaison Committee in an effort to provide guidance for guardians. This court has been unable to identify a directive the Manual is to be given the force of law or is anything other than a useful layman's guide to the responsibilities of a guardian. It was not passed by the Legislature and is not authoritative with respect to the law or legal interpretation.

What is evident, however, is a guardian should look to the Manual as a precept for appropriate behavior. Therefore, although Patrick rightly examined the Manual for direction, he incorrectly, but understandably, viewed it as the rule of law. As discussed at

length above, there are numerous provisions of the New Jersey Statutes Annotated which discuss the authority of guardians and subsequent case law which elaborate on these principles. Furthermore, and importantly, there is nothing in the Manual which contradicts that which is set forth herein.

Patrick adds the plaintiffs must seek a restraining order to bar or limit his visitation. However, to the contrary, as this court's prior judgment established, and as will be discussed further below, a plenary guardian subsumes the rights of his or her ward. Thus, the guardian is capable of making all decisions with respect to financial and personal matters without further court intervention. On the other hand, one who objects to those actions or decisions may seek a restraining order or the removal or replacement of the guardian. As such, the burden lies with the challenger, in this case Patrick, not the converse.

Lastly, a plenary guardian has "all of the powers conferred upon the guardian by law and the provisions of this chapter **except as limited by the judgment."** N.J.S.A. 3B:12-48 (emphasis added). The judgment herein provides no limit to the guardians' authority. The Legislature appears to have intended the guardian make all decisions with the consideration of the ward's preferences and consent, where the same can be expressed and completely obtained. Roche, supra, 296 N.J. Super. at 588-589.

In Shambaugh v. Wolk, 302 N.J. Super. 380, 406 (Ch. Div. 1996), the court was asked to determine whether a daughter had certain visitation rights with her institutionalized mother despite her stepfather's efforts to limit the same. The court determined the "plaintiff continues to enjoy the right to visitational access to and privacy with her natural mother to the extent that her natural mother thus consents, on her own,

and without undue or inappropriate interference." Id. Interestingly, the court made clear to differentiate a situation where the mother still had the ability to make such determinations, and those where a guardian or healthcare agent had been appointed. Specifically, the court emphasized this was not a guardianship situation and thus, visitational access was warranted "but only to the extent to which [the mother] affirmatively consents." Id. at 403. Deductively, therefore, it may be concluded where a guardian is in place, the wishes or consent of the incapacitated do not carry the same level of persuasion or influence, but rather should be considered along with the individual's best interests. Ibid. (stating "defendant's stated concerns about his wife's mental competency and physical condition may ultimately warrant a different result than the decision herein reached.").

Thus, the guardian is expected to fulfill both the preferences of the incapacitated and their best interests. Where those two considerations are mutually exclusive the guardian must make a decision. Should a party disagree with the choice elected or if the guardian is not fulfilling his or her statutory responsibilities, that individual may seek the court's intervention.

Conclusion

A guardian is appointed by the court who determines the extent to which the guardian may exercise decision-making choices with respect to his or her ward. Here, a state agency has unreasonably interfered without authority. It has acted to restrict the autonomy of the guardian not previously limited by the court. Had the plaintiffs' not filed the current request, it could be suggested the agency's actions created disorder in the realm of guardianships by attempting to act in an unauthorized jural manner. These

actions, albeit in good faith, have engendered confusion and uncertainty for the guardians, interested parties, facilities and others. As such, this decision is afforded to reestablish the rights of plenary guardians to utilize the appropriate discretion to determine the visitation rights of his or her ward. Should anyone disagree with the determinations of the guardian, he or she may seek the court's intervention.

For the foregoing reasons, this court finds the plaintiffs, as plenary guardians, possess the authority to control, monitor and schedule visitation with the incapacitated consistent with N.J.S.A. 3B:12-57.

Plaintiffs' counsel shall prepare and submit an appropriate form of order in conformity with this decision pursuant to the five day rule.