NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5852-08T2

IN THE MATTER OF ROBERT COHEN,
AN ALLEGED INCAPACITATED PERSON.

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Argued April 5, 2011 - Decided July 5, 2011

Before Judges Carchman, Graves and St. John.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Bergen County, Docket No. P-157-09.

Peter G. Verniero argued the cause for appellants Ronald Perelman and Samantha Perelman (Sills, Cummis & Gross, P.C., and Walder, Hayden & Brogan, P.A., attorneys; Justin P. Walder, K. Roger Plawker, Rebekah R. Conroy and Lin C. Solomon, of counsel and on the brief).

Benjamin Clarke argued the cause for respondent James Cohen (DeCotiis, FitzPatrick & Cole, L.L.P., attorneys; Frank Huttle, III, of counsel; Mr. Clarke, Russell J. Passamano and Irene Stavrellis, on the brief).

Christopher L. Weiss argued the cause for respondent Robert Cohen (Ferro, Labella & Zucker, L.L.C., attorneys; Mr. Weiss, of counsel and on the brief; Russell T. Brown, on the brief).

PER CURIAM

This appeal represents a part of the array of litigation pending between these and related parties. Plaintiffs Ronald Perelman, as Executor of the Estate of Claudia[1] Cohen (the Estate), his former wife, and Samantha Perelman, his and Claudia's daughter, appeal from an order of the Probate Part denying plaintiffs' application to have defendant Robert Cohen, Claudia's father, declared incapacitated for the purposes of litigation pending between the parties.

The probate matter arose from the separate complaint in the Chancery Division against Robert and defendant James Cohen, Robert's son, Claudia's brother and Samantha's uncle, which alleged, in part, that Robert failed to abide by a promise to Claudia,[2] that she would share equally in his estate.

Judge Koblitz, sitting in the Probate part, determined that Robert was not incapacitated and rejected the appointment of a guardian ad litem. She also declined to appoint independent counsel pursuant to Rule 4:86-4(b), as Robert was properly represented by counsel.

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[1] For ease of reference, we refer to the various Cohen parties by their first names.

[2] Plaintiffs were unsuccessful in that action. That matter is presently the subject of a separate appeal.

We conclude that the judge's determination that Robert was not incapacitated, despite his physical disabilities, was supported by substantial credible evidence. We also reject plaintiffs' additional arguments raised on the appeal and affirm.

I.

Consideration of the facts and the merits of the appeal require a brief exploration of the unique procedural history of this litigation.

In April 2008, plaintiffs filed an amended complaint in the Chancery Division (the Chancery Action) against Robert and James, Estate of Claudia Cohen v. Cohen, No. C-134-08, alleging fraud, unjust enrichment, undue influence, tortious interference and promissory and equitable estoppel. This action related to an alleged oral promise Robert made to Claudia that she would share equally with James in Robert's estate.

The first phase of the trial considered whether a guardian ad litem should be appointed for Robert. Plaintiffs sought to establish that Robert, who suffers from Parkinson's Disease and a related condition identified as progressive supranuclear palsy, was incapacitated in his general decision-making and that a guardian ad litem should be appointed. The judge noted that no incapacitation complaint had been filed, and that she would

not make such a determination regarding general incapacity in the Chancery Action.

Accordingly, plaintiffs filed another complaint in the Probate Part (the Probate Action) seeking a guardian to be appointed for Robert due to his alleged incapacity. Specifically, they sought a declaration that Robert was mentally incapacitated, and the appointment of an independent counsel, a guardian ad litem pending the determination of the guardianship application, and a permanent guardian. They also sought an injunction barring any further transfers of Robert's assets without court approval other than those needed for his care and welfare and the maintenance of his home.

Trial in the Chancery Action continued through May 2009. On June 1, 2009, Judge Koblitz rendered an oral decision declining to appoint a guardian ad litem for Robert for the purpose of conducting that litigation.

She then heard additional testimony in the Probate Action and denied plaintiffs' application.

II.

We provide an expansive review of the facts adduced from the record.

Robert, who was eighty-three at the time of trial, was the owner of Hudson News, a nationwide distributor of newspapers,

magazines and specialty items. His wife suffers from Alzheimer's disease. As of 2006, Robert's net worth was valued at approximately $400 million, and his assets included a house in Englewood, half-interest in an apartment in Manhattan, a nearly half interest in a Palm Beach estate, ownership of money market funds and bonds and a nearly half-interest in Hudson News.

Perelman was married to Claudia from 1985 to 1994 when they were divorced. They had a daughter, Samantha, who was born in 1990.

In the late 1990s, Robert observed that he had trouble maintaining his balance while walking. He consulted with Dr. Susan Bressman, M.D., a neurologist. By 2001, Robert began experiencing stiffness in his legs as well, and by 2003, his speech had become affected. After years of testing, a 2004 positron emission tomography (PET) scan revealed that Robert's brain abnormality, an atrophy or degeneration of his frontal lobe, had worsened dramatically since the previous PET scans in 1999 and 2000 and was consistent with Parkinson's Disease.

By 2005, Robert required the use of a wheelchair and had difficulty communicating clearly. That year, Bressman diagnosed Robert as suffering from progressive supranuclear palsy (PSP), a neurodegenerative disease that initially affects an individual's

balance, and then motor movements such as the ability to speak and to swallow. It also can lead to general body stiffness and spasms as well as back and forth eye movement. Other symptoms include slowness in verbal responses and deterioration in the frontal lobe of the brain. PSP is similar to Parkinson's Disease but progresses more rapidly and is less responsive to treatment.

Robert's condition prompted observations by others. According to Robert's former attorney, in June 2005, James told London that Robert's "mind was gone," and that Robert "can't function." However, Alan Dlugash, Perelman's accountant, testified that he had a conversation with Robert in November 2005 at which time, Robert discussed, in detail, his assets and the income he was providing to Claudia.

The condition required careful monitoring. As early as the end of 2005, Robert began having hallucinations. He was hospitalized for ten days in January 2006 for pneumonia. Bressman stated that in 2006, Robert reported having hallucinations; as a result, she decreased the dosage of a drug Robert was taking for his condition, amantadine, and the hallucinations stopped.

Bressman saw Robert in August 2007, and she noted that he was alert, attentive and oriented. In an affidavit submitted

shortly thereafter, Bressman opined that Robert was mentally competent and had the ability to discuss and give intelligent consideration to all issues, including financial matters.

In November 2007, Bressman witnessed a will signed by Robert. At the time, Bressman believed Robert's cognition was only mildly impaired, in that he primarily suffered slowness of thought and difficulty coming up with names. However, she added that he was able to understand situations and actions that needed to be taken, although the PSP required him to take time in responding to questions.

By 2007, Robert's ability to walk had deteriorated, and his speech deteriorated as well, taking on a slow and strained quality. He suffered from an increased risk of falling, unintelligible speech and dysphagia (difficulty swallowing). The swallowing problem required the insertion of a feeding tube. Robert took two medications to combat his PSP, as well as an antidepressant and a muscle relaxant.

In December 2008, Robert again had hallucinations. Bressman discontinued the amantadine, and the hallucinations stopped. He had fainting spells the same month, and by 2009, Robert could not use his hand to sign any documents.

Paul Greene, M.D., a neurologist, saw Robert in 2007 and 2008. He stated that Robert's PSP condition had worsened

considerably between the visits. His speech was slurred, making him difficult to understand. Nonetheless, Robert was responsive and answered questions in an appropriate manner.[3]

Various health care providers testified regarding Robert's evolving medical condition. Harvey Klein, Robert's physician, noted that Robert had a percutaneous endoscopic gastrostomy (PEG) tube inserted to help him eat and prevent him from choking. According to Klein, the only time Robert had hallucinations was when he was on the drug, Eldepryl. Maura O'Dea, a registered nurse who provided care for Robert for several years preceding trial, stated that Robert had deteriorated during the three years she had been his nurse, including rigidity of body, spasms, voice and vision impairments. She described incidents in 2006 and 2008 when Robert had hallucinations. His medication was adjusted after each incident and, according to O'Dea, he did not have any hallucinations thereafter.

At the time of trial, Robert went to his office several days a week and read documents placed on his desk. O'Dea described him as "very strong willed" and said he read all the documents related to the litigation. She described his reaction

[3] A cognitive assessment test proved inconclusive because of difficulties in communication.

to the lawsuit as "angry and upset." O'Dea, who conducted cognitive assessments on her patients, stated that Robert had responded appropriately on a cognitive basis during their interactions, and he was oriented as to time, place and person.

Donna Fabiano, Robert's executive assistant, also testified that as of the time of trial, Robert still went into his office several days per week for four or five hours per day. However, he arrived later than he used to and did not use the phone.

Bressman next saw Robert in January 2009. He did not report any hallucinations, but his speech had become more arduous and time-consuming. Bressman saw Robert at his home in April 2009 because he was having increasing problems swallowing. She believed that Robert understood everything they were discussing, and he remained mentally competent.

In Robert's videotaped deposition of November 5, 2008, he was aware of the date and day of the week and denied having hallucinations as a result of the medication he was taking. When asked if he knew "why [he was] here today," Robert responded, "Bullshit case." He further stated that it was his idea to submit an affidavit as part of the litigation, and he had prepared it with his attorney.

When asked if he had read the complaint in the case, Robert indicated that he had. He knew that James was a party to the

lawsuit, he was not a plaintiff, but like Robert, a defendant. Robert gave an affirmative response when asked whether his family business was at stake in the lawsuit. He stated that he was suffering from Parkinson's Disease, but that the disease had no effect on his mental capacity.

Robert also testified at trial from his office as plaintiffs' witness. He was asked about his assets and changes he had made to his will, and demonstrated, by way of yes and no answers, familiarity with his holdings.

He stated that he had asked Bressman, but not Greene, for a letter attesting to his mental capacity. He could not recall who witnessed the 2007 and 2008 versions of his will and denied ever promising Claudia that any of her future children would receive a share of his estate, or, contrary to Perelman's claim, that he ever intended to divide his estate equally amongst his children. Robert also agreed that it was always his intention to give the bulk of his business assets to James, and that James never pressured him to make such transfers.

He answered in the negative when asked whether he wanted the court to appoint a guardian for him, and in the affirmative when asked if he wanted his current counsel to continue to represent him.

Plaintiffs offered a number of expert witnesses in the Chancery Action. Michelle Tagliati, M.D., and Martin Goldstein, M.D., both neurologists, submitted a joint report in which they concluded that the findings of their neurological examination revealed that Robert suffered from "profound cognitive deterioration consistent with the diagnosis and degenerative pattern typical of PSP." In particular, they found that Robert showed "severe deficiencies in those cognitive functions routinely recruited to execute proper judgment, including acquiring, retaining and processing information." These "executive functions" represented higher level cognitive processes necessary for an individual to use and mentally manipulate information, respond to novel situations and make informed judgments.

They opined that Robert suffered from the Richardson Syndrome form of the disease, which tends to have a more severe onset. In addition, they found that Robert's medication regimen contributed to his cognitive problems and did not believe that prior tests assessing Robert's cognitive abilities had been specific enough.

Tagliati examined Robert on November 11, 2008, at her hospital office. She found that his registration, attention and calculation were normal, and he could recall three words after a

five minute interval. In addition, he could name objects and repeat sentences, his reading and comprehension abilities were intact, and he was able to execute simple commands. On a Mini Mental Status Examination (MMSE), Robert's score was 28 out of 30. More detailed testing revealed that he was able to perform basic mental exercises, such as naming nine animals in one minute, and identifying colors. In addition, Tagliati found that Robert had a fairly well-preserved language fluency.

However, Robert had difficulty with more concrete thinking, such as executing complex orders in sequence, identifying love and hate as opposites rather than emotions, keeping his eyes open on one clap while closed on two claps and following Tagliati's instruction to look at her after looking at his nurse.

Tagliati described "perseveration," the repetition of a particular response after a new subject has been introduced, which was the result of frontal lobe dysfunction caused by the PSP. She described Robert's disability as so advanced that he was completely dependent in every aspect of his daily life. She concluded that he suffered from the Richardson Syndrome because he had not responded to the drugs given him. She claimed that the results of Robert's 2006 CAT scan showed a fairly advanced degree of frontal lobe atrophy, or loss of brain tissue.

Tagliati concluded that because of his inability to process complex information, she did not believe he could make proper decisions regarding his finances.

Goldstein examined Robert on November 13, 2008, and January 14, 2009. He described Robert as having significantly impaired speech. Robert scored low average on an information multiple choice test, and impaired on a similarities multiple choice test, proverb interpretation and matrix reasoning. He also noted that Robert incorrectly reported both the designation and the duration of his neurological condition.

According to Goldstein, Robert perseverated during the examination, which Goldstein described as a symptom of impairment of the frontal lobe. He diagnosed Robert with the Richardson's Syndrome subtype of PSP and cognitive impairment and found that Robert was suffering from bradyphrenia, or slow mental functioning. Goldstein added that PSP does not affect areas of the brain that are involved in memory and coding but, as in Robert's case, causes atrophy or shrinkage in the frontal lobe.

Tagliati issued a supplemental report based on a review of additional documents in which she found that atrophy appeared to be particularly severe in the frontal lobes. This confirmed her prior conclusion that Robert demonstrated profound impairments

in the cognitive domains crucial for meaningful and accurate information processing, and that he was incapable of making important decisions such as his finances and his medical care.

Joel Morgan, a psychologist, submitted an affidavit concluding, based on his view of Robert's testimony and the experts' testimony, that Robert's clinical presentation and neuropsychological test performance demonstrated "significant cognitive compromise in the form of impaired mental abilities." Specifically, Morgan claimed that Robert's PSP disproportionately affected his frontal lobes and with it the higher level cognitive processes, such as abstraction and reasoning. As a result, Morgan concluded that Robert lacked the capacity to make informed decisions on complex matters such as finances and litigation.

A report was issued by Lisa Ravdin, a neuropsychologist, based on her review of the record. Ravdin also concluded that Robert demonstrated significant cognitive decline in his executive function.

Defendants offered several experts in the Chancery Action. Bressman, Robert's primary neurologist, indicated that the cognitive defects that accompany PSP are mild, not severe, and that Robert's defects were mild. Rather, the primary abnormalities were motor related. She believed that Robert

always was competent. She also denied that PSP inevitably leads to dementia. She did not believe Robert needed neuropsychological testing because cognitive issues were not a major factor in his condition. She also noted that PET scans were not helpful in Bressman's assessment or treatment of Robert because they merely confirmed the PSP diagnosis. Finally, she noted that Robert was not apathetic, which was atypical with PSP.

Alessandro DiRocco, M.D., a neurologist, also examined Robert. He concluded that Robert was fully oriented to self, place and time, and that his memory was intact. He was able to execute a three-stage command and his total MMSE score was 27/28, his only mistake was identifying the mid-March date of the interview as Spring instead of Winter. Robert also exhibited normal higher cognitive functions on a Frontal Assessment Battery (FAB) test. However, as with the MMSE, some of the test subsets could not be administered because of Robert's motor disability and speech impairment. DiRocco concluded that there was no evidence of cognitive dysfunction, diminished mental capacity or other intellectual impairment, and Robert was capable of making decisions. He did not find Robert to be apathetic.

DiRocco criticized the Tagliati and Goldstein report because they relied on "erroneous diagnostic conclusions, erroneous choice and utilization of neuropsychological test[s] to assess mental capacity, and the erroneous use of a very specific subset of neuropsychological evaluation to determine mental capacity." In his experience, such tests are not given to a person with severe PSP. He opined that their conclusions of impaired mental capacity were inconsistent with Robert's performance on the MMSE test, and any individual with Robert's score would be considered capable of making decisions regarding his or her care or other personal matters.

DiRocco further found that the tests Tagliati and Goldstein used to measure executive function were not ideal to test mental capacity and global intellectual functioning, particularly in PSP patients who often have profound physical disabilities. DiRocco did not believe neuropsychological testing was an accurate tool for assessing the cognitive status of patients with PSP because those patients' physical disabilities impair their ability to perform the tests.

DiRocco also observed that the matrix reasoning test was inappropriate because of Robert's restricted visual-spacial scanning ability. The appropriate tool with such patients was a

general interview and examination. Finally, many people treated for Parkinsonism develop drug-induced hallucinations.

David Marks, M.D., a neurologist, who also examined Robert, concluded, beyond a reasonable degree of medical certainty, that Robert "has intact mental capacity and is competent to make decisions" regarding his finances. He described Robert as fully oriented. Robert understood complex questions and gave correct and appropriate responses.

Marks found that what Tagliati and Goldstein called perseveration was the result of Robert's physical limitations, not impaired mental capacity. Robert's scores on the MMSE examinations highly correlated with competence. He criticized Tagliati's and Goldstein's reliance on formal neuropsychological testing because those tests did not take into account Robert's physical limitations. Observation and evaluation over a number of years, as Bressman had done, was a more reliable method.

Finally, Barry Reisberg, M.D., a geriatric psychiatrist, concluded that despite Robert’s physical limitations, Robert was cognitively competent. Robert performed better than one would expect for a person his age on a cognitive rating scale. In addition, he described Robert's concentration and calculation abilities as "fully intact.” He characterized the tests

performed by Tagliati and Goldstein as "exotic and irrelevant" to the issue of Robert's capacity.

On June 1, 2009, in determining the guardian ad litem question in the Chancery Action, Judge Koblitz stated:

> There is no question that Mr. Cohen's thought processes have slowed and that at times he has difficulty finding words
> . . . .
>
> So that the scoring of the tests appeared to me to be unfair given Robert Cohen's disabilities. However, what the tests did reveal to me is his ability to answer questions and be on target most of the time.
>
> It seems to me, what the Court is interested in in terms of cognitive abilities and competence is his functional competence, and Mr. Cohen is functionally competent.

She relied heavily on Bressman's testimony:

> Of great importance to me is the fact that Dr. Bressman not only placed repeatedly in Robert Cohen's medical records that he was only mildly impaired, with mental competence preserved and comments to that effect, but she acted on her belief that he was competent.
>
> . . . .
>
> In my view, the continuity of care provided by Dr. Bressman and her understanding acquired over the years, far outweighs the results of the tests that were inappropriately administered to Robert Cohen.

Judge Koblitz concluded:

> I conclude from what the doctors asked him and what he answered to the doctors, that in fact, he is able to understand, and when questions are posed to him in a way that's appropriate for his disability, he can give answers that reflect his understanding of the question and his decision-making capability.
>
> So in reviewing the evidence, I find that the Plaintiffs have not demonstrated to me by clear and convincing evidence, nor by a preponderance of the evidence that Robert Cohen requires a guardian ad litem in this matter. His attorneys have indicated that they do not have trouble communicating with him, at least not to the extent where they would support a guardian ad litem. They are very strongly against the appointment.
>
> I am convinced by his treating doctor and by the other evidence as I have outlined, that Robert Cohen is able to assist his attorneys and to conduct the defense as a litigant needs to do, and therefore I will not appoint a guardian ad litem in this matter.

In her decision regarding capacity in the Probate Action, Judge Koblitz incorporated by reference her June 1 decision. She added that she believed that subjecting Robert to further medical examinations would be unfair, noting "[t]his is not an incapacitation complaint that is being brought because there is an individual who is in dire [straits] and can't take care of himself, or an individual in a nursing home." She perceptively noted:

> To suggest that I should appoint somebody to interview the alleged

incapacitated person, make inquiry of persons having knowledge of his circumstances, after I've had seven weeks of testimony from all of the individuals who this appointed lawyer would go and talk to is unreasonable. I've heard, either in person or video tape deposition, from treating doctors of Robert Cohen, specialists retained by both sides to opine on his capacity, [and] the people who worked for Robert Cohen and continue to work for Robert Cohen . . . . These are exactly the people that I would be delegating somebody else to talk to. I've had the best possible evidence . . . .

I do not need a court appointed attorney's recommendation concerning my determination as to incapacity. . . .

. . . .

So I think it would be inhumane to require Robert Cohen to undergo further examination. I think it would be pointless and fruitless to appoint somebody to go and find out about a small proportion of what I already know about the facts, circumstances and mental condition of Robert Cohen.

If my decision on June 1st is in any way unclear . . . as to my view of Robert Cohen's capacity, I find that he does have capacity. He has functional capacity. There has been minimal intellectual impairment.

. . . .

The man is not incapacitated legally. There is no question in my mind by any standard, certainly by the standard of clear and convincing evidence.

The judge dismissed plaintiffs' complaint, and this appeal followed.

III

On appeal, plaintiffs assert that the judge erred by not appointing independent counsel as "required" by Rule 4:86-4(b); by relying on the record made in the Chancery Action; by failing to consider the severity of Robert's physical disability and incapacity in making its incapacitation determination; by utilizing a non-independent translator for Robert's testimony, and by dismissing the complaint with prejudice as Robert's capacity will decline in the future. We address the issues seriatim.

A.

Plaintiffs first contend that the judge erred by not appointing independent counsel. They assert that this is mandated by the operative rule.

Actions for the determination of incapacity and for the appointment of a guardian fall within the scope of Rule 4:86. In setting an order for hearing on an incapacitation complaint, the order

> shall include the appointment by the court of counsel for the alleged incapacitated person. Counsel shall (1) personally interview the alleged incapacitated person; (2) make inquiry of persons having knowledge of the alleged person's circumstances, his

> or her physical and mental state and his or her property; (3) make reasonable inquiry to locate any will, powers of attorney, or health care directives previously executed by the alleged incapacitated person or to discover any interests the alleged incapacitated person may have as beneficiary of a will or trust. At least three days prior to the hearing date counsel shall file a report with the court and serve a copy thereof on plaintiff's attorney and other parties who have formally appeared in the matter. The report shall contain the information developed by counsel's inquiry; [and] shall make recommendations concerning the court's determination on the issue of incapacity. . . . The report shall also make recommendations concerning whether good cause exists for the court to order that any power of attorney, health care directive, or revocable trust created by the alleged incapacitated person be revoked or the authority of the person or persons acting thereunder be modified or restricted. If the alleged incapacitated person obtains other counsel, such counsel shall notify the court and appointed counsel at least five days prior to the hearing date.
>
> [R. 4:86-4(b)(emphasis added).]

The judge also has the discretion to order that the alleged incapacitated person submit to an examination, Rule 4:86-4(c), and, where special circumstances exist, to appoint a guardian ad litem prior to entry of judgment to evaluate the best interests of the alleged incapacitated person and to present that evaluation to the court. R. 4:86-4(d).

Here, in addition to her findings in the Probate Action, Judge Koblitz observed at the start of the Chancery Action that she would not appoint an independent counsel:

> [I]f it was a matter in probate court where capacity was being fought out and litigated, I would expect the allegedly incapacitated person's lawyer to be fighting and promoting the position that the client was not incapacitated, and in that litigation I wouldn't sit there and think well, maybe he's not capable of directing the litigation, so I'll appoint a guardian ad litem who interviews everybody to decide whether he really wants to promote the position that he is not incapacitated. It's just not helpful, not practical, not sensible, and I don't think it is in this situation either.
>
> So, I think Robert Cohen is appropriately represented by the attorneys who represent him.

Plaintiffs urge that the judge was required to appoint an attorney to represent Robert under Rule 4:86-4(b), even though Robert was represented by an attorney. They focus on the use of "shall" as prescribing a mandate.

Generally, unless a contrary meaning is justified by the character of a legislative enactment, the use of the term "shall" conveys a mandatory meaning. Dugan v. Camden Cnty. Clerk's Office, 376 N.J. Super. 271, 276 (App. Div.), certif. denied, 184 N.J. 209 (2005). However, this presumption may be overcome after consideration of the entire rule and statute and

of the objects sought to be accomplished. Diodato v. Camden Cnty. Park Comm'n, 136 N.J. Super. 324, 327 (App. Div. 1975).

The "shall" in Rule 4:86-4 was added in 1980 to "require[] the court to appoint counsel if the alleged incompetent has not retained counsel. Under the prior rule, such appointment was discretionary." 2 New Jersey Practice, Court Rules Annotated Rule 4:86-4, at 582 (John H. Klock) (rev. 5th ed. 2000) (emphasis added). The rule was never intended to require the appointment of counsel where the alleged incompetent already had retained counsel. Rather, the rule eliminated the discretionary decision once available to the judge with respect to the appointment of counsel for an unrepresented alleged incompetent person. This prompts the use of "shall" rather than "may."

There is statutory support for this conclusion. N.J.S.A. 3B:12-24.1(c), permits the appointment of a temporary pendente lite guardian with the requirement that notice of the appointment be given to the alleged incapacitated person's attorney "or attorney appointed by the court." N.J.S.A. 30:4-165.13, relating to the filing of a complaint for the appointment of a guardian for a person in a state correctional facility, requires the court to "appoint an attorney where the alleged incapacitated person is not represented by an attorney." While that statute requires the court-appointed attorney to

investigate the matter and to conduct an interview with the alleged incapacitated person, evaluation of the individual's level of function and whether a guardian should be appointed is to be made by a "report of an independent expert professionally qualified to render an opinion on issues pertaining to incapacity[.]" Ibid.

Further, in In re Farnkopf, 363 N.J. Super. 382, 388-89 (App. Div. 2003), an action for the appointment of a conservator, the trial court appointed an attorney for the subject of the action, who was already represented by retained counsel, pursuant to Rule 4:86-4(b). We concluded that the appointment was erroneous because the action was not one for guardianship; rather, the applicable rule was Rule 4:86-11(b), which, unlike Rule 4:86-4(b), left the appointment of counsel to the trial court's discretion. Id. at 388 n.3. However, we noted that since the conservatee was already represented by counsel, the court's appointment of another attorney to represent him was "unnecessary." Ibid.

The structure of the rule supports Judge Koblitz's decision. A court-appointed attorney in an incompetency matter represents the client's wishes in the same manner as an attorney would represent a client in a particular legal dispute. In re Mason, 305 N.J. Super. 120, 125 (Ch. Div. 1997).

In In re M.R., 135 N.J. 155 (1994), the Court addressed the question of whether the role of appointed counsel for an alleged incapacitated person is to zealously advocate for that person or to inform a court of counsel's perception of the person's best interests. Id. at 172. In distinguishing the role of an attorney from a guardian ad litem, the Court observed that the "representative attorney is a zealous advocate for the wishes of the client," while the guardian ad litem evaluates the individual's best interests. Id. at 173-74. "The attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes . . . . Advocacy that is diluted by excessive concern for the client's best interests would raise troubling questions for attorneys in an adversarial system." Id. at 176.

Following M.R., Rule 4:86-4 was amended to revise paragraph (b) to its present form, and to add paragraph (d), to distinguish the role of the guardian ad litem from that of the court-appointed attorney. In re Mason, supra, 305 N.J. Super. at 126-27. While a court-appointed attorney acts as an advocate for the client, collecting information about the client and asserting to the court the client's wishes, desires and preferences, the guardian ad litem acts as the "eyes of the court" to further the best interests of the alleged

incapacitated person. Id. at 127. See also In re Adoption of a Child by E.T., 302 N.J. Super. 533, 539 (App. Div.) (noting similar, distinct difference between a law guardian under Rule 5:8A and a guardian ad litem under Rule 5:8B), certif. denied, 152 N.J. 12 (1997).

Plaintiffs' expressed desire to have an "objective" determination in the Probate Action is accomplished by the appointment of a pendente lite, guardian ad litem under Rule 4:86-4(d), rather than an additional attorney under Rule 4:86-4(b).[4]

Moreover, the mandatory appointment of counsel requirement in Rule 4:86-4(b) is related to the summary nature of a probate action under Rule 4:86. An extensive record is not anticipated in such an action. R. 4:67-2(b); R. 4:83-1. Here, however, an extraordinary and extensive record was made in the Chancery Action and incorporated into the Probate Action. The record in this matter was not the sparse one typical of summary proceedings. The rationale for the appointment of an independent counsel, who would issue a report to the court, is absent here.

[4] Plaintiffs raised the issue of the appointment of a guardian ad litem in their pleadings but did not advance the issue at trial. In any event, the proofs do not support the appointment of a guardian ad litem.

Finally, it is difficult to conceive of what additional services or representation could have been provided by appointed counsel. To suggest that both sides zealously advocated for their respective clients would be an understatement.

We conclude that the judge correctly determined that the appointment of counsel was not mandated by the rule or warranted here.

B.

Plaintiffs next suggest that the judge erred by incorporating and relying on the record in the Chancery Action rather than by hearing additional testimony.

As we have previously noted all actions brought in the Probate Part "shall be brought in a summary manner . . . pursuant to R[ule] 4:67." R. 4:83-1. Under Rule 4:67-2(b):

> If the court is satisfied that the matter may be completely disposed of on the record (which may be supplemented by interrogatories, depositions and demands for admissions) or on minimal testimony in open court, it shall . . . fix a short date for the trial of the action, which shall proceed in accordance with R[ule] 4:67-5, insofar as applicable.

Trial on the pleadings and affidavits is permitted when there is no genuine issue as to any material fact. R. 4:67-5.

The reference to "minimal testimony" has been construed as testimony that will probably not exceed one day. Pressler and

Verniero, Current N.J. Court Rules, comment on R. 4:67-2 (2011). Obviously, this is not a fixed time constraint but reflects the intent of the rule that the testimony is generally limited and relatively brief. Moreover, the court may take testimony or, with the consent of counsel, may dispense with testimony and rely on the affidavits submitted. R. 4:86-6(a). Unless a trial by jury is requested by the alleged incapacitated person, the court, after taking testimony in open court, will determine the issue of incapacity. Ibid.

Here, in response to the Probate Action, the parties filed over 4000 pages of materials, consisting of the medical reports offered in the Chancery Action, transcripts of the Chancery Action, depositions, and other documents. Plaintiffs submitted an attorney certification regarding Robert's assets, and affidavits from Morgan and Tagliati. Moreover, and contrary to plaintiffs' assertion, the judge heard two days of testimony from Perelman and James. Judge Koblitz satisfied the dictates of Rule 4:67 and Rule 4:86, notwithstanding her reliance on the record in the Chancery Action. That record provided more evidence, much of it offered by plaintiffs, to support the judge's determination.

Plaintiffs contend that reliance on the record developed in the Chancery Action was improper because the substance and

complexity of Robert's finances was not decided in that action. However, the issue in the Probate Action was Robert's capacity for guardianship purposes, not whether he understood every detail of his finances and assets. As the judge commented in a post-decision colloquy with counsel: "I don't think it's important to find out what his financial situation is. I mean, I actually have heard quite a bit about his financial arrangements, but I don't think that that's required for a determination of capacitation."

While plaintiffs are correct that the judge indicated she would not be ruling on Robert's capacity to manage his financial affairs in the Chancery Action, it does not follow that the extensive evidence introduced as to capacity in that action cannot be used to resolve the question of his capacity in the Probate Action. In any event, plaintiffs offer no support for their claim that the judge acted improperly in relying on the record in the Chancery Action in reaching her findings and conclusions. Plaintiffs were not prejudiced. They were fully represented in both actions and the Probate Action was an adjunct of an issue raised in the Chancery Action.

Finally, plaintiffs seek by way of additional relief, a remand for further testimony in the nature of a guardianship petition. We have set forth in our expansive rendition of the

facts the extraordinary testimony that has been amassed as to Robert's physical and mental condition. As Judge Koblitz noted, to require more by way of testing and examination borders on the "inhumane" and as she further noted, "would be pointless and fruitless." In total, the proceedings to test Robert's capacity exceeded seven days of testimony. No matter how styled and in what form, Robert's capacity has been established, and to require more testimony hardly serves the interests of justice or the parties.

The judge did not err in considering the Chancery Action record.

C.

Plaintiffs next argue that the court erred by not focusing on capacity as a "task specific" question, namely, Robert's ability to manage his financial assets in light of what plaintiffs claim were his diminished executive functions. They maintain that a limited guardian should have been appointed to oversee his financial affairs. Plaintiffs claim that the judge erred by failing to consider the extent and progression of Robert's physical incapacity in making her determination.

We conclude that plaintiffs failed to demonstrate by clear and convincing evidence that Robert was incapacitated, and that

the judge did not abuse her discretion in declining to appoint a limited guardian.

Although plaintiffs attempt to frame the applicable standard of review as a motion to dismiss the complaint under Rule 4:6-2(e), such a standard of review is inapplicable if matters outside the pleadings are considered, as they were here. Ibid. Moreover, the standard of review for actions seeking the appointment of a guardian recognizes that the trial court possesses and retains broad powers and maintains far-reaching discretion in making its determination. In re Mason, supra, 305 N.J. Super. at 128. In addition, great deference is accorded to the trial court's findings regarding capacity, as long as they are supported by substantial credible evidence. In re Queiro, 374 N.J. Super. 299, 307 (App. Div. 2005). We will not disturb the factual findings and legal conclusions of the trial judge unless we are clearly convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonable credible evidence as to offend the interests of justice. Ibid. (citing Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)).

An incapacitated person is defined 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.

> The term . . . is also used to designate an individual who is impaired by reason of physical illness or disability . . . to the extent that he lacks sufficient capacity to govern himself and manage his affairs.
>
> [N.J.S.A. 3B:1-2.]

An adjudication of incompetency with respect to whether a guardian should be appointed because the individual is unable to prosecute or defend a lawsuit, as in the Chancery Action, is not required. In re Commitment of S.W., 158 N.J. Super. 22, 25-26 (App. Div. 1978). However, where the effect of the action is to deprive an individual of the control and management of his or her business and personal affairs, as was proposed in the Probate Action, such a declaration is required. Id. at 26.

> This cannot be done without the institution of an action in accordance with R[ule] 4:83 for the determination of his or her mental incompetency and the appointment of a general guardian for that person, the submission of medical proof that the alleged incompetent is unfit and unable to govern himself or herself and to manage his or her affairs, and an adjudication by the court of such incompetency after a hearing.
>
> [Ibid.]

Because self-determination is a fundamental right, In re M.R., supra, 135 N.J. at 166, incapacity must be demonstrated by clear and convincing evidence. In re Guardianship of Macak, 377 N.J. Super. 167, 176 (App. Div. 2005). The court must

independently consider all of the evidence, including the doctors' reports and the report of any court-appointed attorney, and must make findings by clear and convincing evidence as to whether the person is incapacitated. Id. at 175-76. To be considered clear and convincing, the proof must produce "'a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" In re Jobes, 108 N.J. 394, 407-08 (1987) (alteration in original) (quoting State v. Hodge, 95 N.J. 369, 376 (1984)).

If a court finds an individual incapacitated, it may appoint a general guardian to exercise all rights and powers of the individual, N.J.S.A. 3B:12-24.1(a), or, if the court finds that the individual lacks the capacity to do some, but not all, of the tasks necessary to take care of himself or herself, a limited guardian of the person, the estate, or both may be appointed. N.J.S.A. 3B:12-24.1(b). In the latter situation, the court

> shall make specific findings regarding the individual's capacity, including, but not limited to which areas, such as residential, educational, medical, legal, vocational and financial decision making, the incapacitated person retains sufficient capacity to

> manage. A judgment of limited guardianship may specify the limitations upon the authority of the guardian or alternatively the areas of decision making retained by the person.
>
> [Ibid.]

Plaintiffs rely on observations made by the court early in the Chancery Action to support their claim that neither general capacity nor financial capacity were addressed in the Chancery Action. This requires some background.

Judge Koblitz previously appointed a discovery master, who on March 3, 2009, informed the parties that Judge Koblitz, apparently due to a dispute regarding Robert's ability to submit a certification, intended "to determine whether Robert Cohen is presently incapacitated, before she adjudicates (or perhaps even before she takes proofs on) any other issues." This led to a disagreement regarding how to proceed and to the precise nature of the incapacitation claim. Plaintiffs' counsel indicated that they were seeking to demonstrate that Robert "is incapacitated to the extent that he cannot make complex decisions necessary to deal with this litigation in general, and that he is incapacitated for many other purposes." Plaintiffs' counsel further stated that they would "continue to make more than an adequate showing of significant cognitive . . . deficiencies

that affect his ability to do anything that requires him to do complex reasoning."

The court noted that "[t]here is no complaint filed for a guardian ad litem on the basis of a general [in]capacity," and that the issue of general capacity "is not before me." During an ensuing colloquy with counsel, the judge remarked:

> I'm not talking about incapacitation for all purposes, which is what you seem to think this was about, because I'm not considering that. So -- I'm not going to make a finding that he is or is not incapacitated for purposes of a decision having to do with health and finances and so on, because I really think that process is a different process, and that's not what this case is about.
>
> However, I think that I could, within the context of this case, find that he lacked the capacity to direct his case here.

In her decision in the Probate Action, the judge stated:

> I agree with plaintiff that I did not render a decision as to capacity. In my view, the Court, absent a valid complaint alleging incapacity, should not be deciding capacity. On the other hand, to decide whether a litigant requires a guardian ad litem, requires the court to engage in the same legal analysis as a capacity determination, and when I indicated to plaintiffs' counsel that this was not a capacity trial and that belonged in the probate part, that was not by way of suggesting that a capacity complaint be filed in the probate part. It was merely by way of saying that the Court should address those issue[s] squarely before it, and not issues that are not

brought properly before the Court.

Plaintiffs are correct that the court's reliance in its Chancery Action decision on Robert's conversation with Dlugash in November 2006 regarding his finances was not necessarily reflective of his understanding of his finances over two years later. However, the complexity of an individual's finances, by itself, is insufficient for a finding of incapacity. As the judge stated after rendering her decision in the Probate Action: "I don't think it's important to find out what his financial situation is. I mean, I actually have heard quite a bit about his financial arrangements, but I don't think that that's required for a determination of capacitation." She added: "I don't think the complexity of his testamentary documents is a part of the capacitation decision."

With respect to plaintiffs' argument that the court did not give sufficient consideration to Robert's physical limitations, the record supports the judge's determination that Robert was not incapacitated despite his physical afflictions and limitations. While his physical limitations were conceded, evidence was offered that Robert can still communicate, still maintains his office and reviews paperwork, and receives care and support for his physical ailments. It is not just physical disability that is required for a determination of incapacity,

but physical disability to the extent that the individual "lacks sufficient capacity to govern himself and manage his affairs." N.J.S.A. 3B:1-2. The trial judge's determination that this was not the case with respect to Robert was supported by substantial credible evidence. The judge did not abuse her discretion in finding that Robert was not incapacitated, and there was no need for the appointment of a guardian.

D.

Plaintiffs claim that the judge's use of Robert's personal speech therapist to interpret Robert's testimony in the Chancery Action was improper because the translator was not independent and the translation, in some instances, was not correct. In addition, plaintiffs assert that the transcripts do not properly reflect Robert's testimony.

At Robert's deposition before the special master, plaintiffs objected to the use of Katherine Malmrose, Robert's speech pathologist, to aid in the translation of Robert's testimony. The special discovery master asked Malmrose whether she understood that her obligation was to just say what Robert was saying. Malmrose replied, "I understand. He's my patient. I am a professional speech pathologist. I would just say what he said. And I understand this is a legal proceeding."

Prior to Robert's May 12, 2009 trial testimony, plaintiffs objected to using Malmrose to translate his testimony claiming that in his prior testimony she interpreted, rather than translated, and that she took part in preparing Robert for trial. Robert's attorney responded that it would be "a severe disadvantage" not to have Malmrose translate because of her familiarity with Robert's speech pattern. In overruling plaintiffs' objection, Judge Koblitz said:

> It seems to me that part of her utility is the experience that she has dealing with him. . . . She's not an interpreter . . . I view her as an aide. . . . And I think that it would not be fair to put in somebody brand new who doesn't have that experience . . . . Understanding that there is a risk that she will throw in her own answers to help him. That risk is there. I did not observe it [in his earlier testimony], but it's there.
>
> . . . .
>
> I think it's as fair as it can be under the circumstances. It would be to me extremely unfair to deprive Mr. Cohen of a speech pathologist who has been working with him for many years. And on balance weighing the potential risk that she will in some way inject herself into the process . . . against his physical condition and his need for assistance, I find it much more compelling that he needs the help . . . . [I] don't find it to be a significant risk. And it's certainly greatly outweighed by the assistance that she can provide in terms of making him or helping him to be more understandable.

In general, an interpreter should not be appointed unless necessary to the conduct of the case; that being, where the witness's natural mode of expression is not intelligible to the court. State in the Interest of R.R., 79 N.J. 97, 116 (1979). However, "no matter how disinterested an interpreter might be, there always exists a possibility that he will inadvertently distort the message communicated by the primary witness." Ibid. The decision whether an interpreter is required is a matter within the trial court's discretion. Id. at 117.

Here, because Robert's mode of expression was unintelligible to the judge,[5] she did not abuse her discretion in concluding that an interpreter was needed. Plaintiffs maintain, however, that Malmrose was not a disinterested interpreter because she was Robert's speech pathologist. The Court has recognized that although interpreters should be completely disinterested, unusual circumstances arise necessitating accommodation to meet unique needs. The Court has stated:

> In theory an interpreter should be totally impersonal. That is, his role is merely that of a conduit from the primary witness to the trier of fact. As such, he should not aid or prompt the primary witness in any way, nor should he merely render a

[5] We had the benefit of a DVD of Robert's deposition testimony for our review. It demonstrated the need for Ms. Malmrose's assistance.

> "summary" of what the primary witness has stated. Instead, as far as is possible, he should translate word-for-word exactly what the primary witness has said.
>
> Any interpreter selected should also ordinarily be an individual who has no interest in the outcome of the case. This is so because the danger that a primary witness' message will be distorted through interpretation is compounded when the interpreter is biased one way or the other.
>
> It has been recognized, however, that situations may arise in which it is necessary to appoint an "interested" interpreter. Courts have agreed, however, that such an interested person should not be utilized unless and until the trial judge is satisfied that no disinterested person is available who can adequately translate the primary witness' testimony. Even if this requirement is satisfied, however, the trial judge must still interrogate the "interested" interpreter in order to gauge the extent of his bias, and to admonish him that he must translate exactly what the primary witness has said.
>
> [R.R., supra, 79 N.J. at 117-18 (citations omitted).]

Here, the judge did not interrogate Malmrose to gauge the extent of her bias in her role as Robert's speech pathologist. Nor did the judge "admonish" Malmrose as the discovery master had done at Robert's deposition. Nonetheless, during a colloquy prior to Robert's second day of testimony, the judge commented:

> Miss Malmrose . . . does not impair my ability to observe Mr. Cohen and hear his answers such as they are. She's not able always to understand what he's saying.

> [S]he's not, in my view, at all making up answers and giving her answers instead of his answers, or coaching him so that he gives the right answers, and she's somewhat helpful . . . .

Moreover, after Robert had finished his testimony, the judge stated:

> There were times this morning where I understood what he said and Miss Malmrose did not understand what he said . . . . So . . . I don't take what Miss Malmrose says as some gospel from down high as to what Mr. Cohen says . . . .
>
> I really in hearing Robert Cohen testify for [sic] trial I found it in many occasions difficult to understand him. Miss Malmrose found it difficult to understand him. He wasn't very helpful frankly.

Even assuming plaintiff's claim of error, the court's handling of Malmrose can be considered harmless in light of the judge's finding that Robert's testimony was not "very helpful," as well as the numerous other witnesses who testified with respect to his capacity, and the voluminous record.

Plaintiffs also challenge the trial court's decision not to let their speech pathologist testify. Plaintiffs informed the court on April 9, 2009, that they would have their own speech pathologist, Geralyn Schultz, monitor Robert's testimony. Prior to Robert's trial testimony, plaintiffs requested that their speech pathologist be permitted to stand next to Robert while he was testifying. The judge concluded that plaintiffs'

pathologist could "sit close," but could not "supplant" Malmrose.

Near the conclusion of the Chancery Action, plaintiffs requested that Schultz be permitted to testify as a rebuttal witness. Schultz proposed to testify that many of Malmrose's interpretations of Robert's testimony were unreliable because Robert was often unintelligible, perseverated throughout his testimony, and would often respond yes and no to the same question. The judge denied the motion[6], stating:

> If you wanted to call your speech pathologist in your case that would have been a different situation. As to whether I would have permitted the type of expert testimony, I don't think it would have been admissible at that point either. But if your speech pathologist had an example of a comment that Miss Malmrose improperly related, then that would have been the time to do it, not by way of rebuttal.
>
> In addition, I just finished . . . Mr. Cohen's video taped deposition with Miss Malmrose by his side with your office conducting the deposition and that was available to your speech pathologist by way of critique of Miss Malmrose . . . . And . . . your experts conducted the neuro psychological testing in which Mr. Cohen spoke. So to the extent that his speech patterns were indicative of cognitive problems, your neurologist and cognitive neurologist could have and perhaps did in part comment on that speech. So I think

[6] The court did not admit Schultz's proffer into evidence, but did include it in the record.

> it's really not fair at this rebuttal point to have a speech pathologist who you are proffering as an expert without an expert report, as well as a fact witness[,] not just to critique a particular interpretation of a comment by Mr. Cohen, but to opine on speech patterns . . . .
>
> . . . .
>
> [T]o wait until rebuttal to proffer testimony that his speech patholog[ist] who has been with him for years misinterpreted things that he said is not the right time to do it. I would have allowed you to present during your case a witness to say . . . that's not really what he said. . . .

The decision to admit or exclude expert testimony lies within the sound discretion of the trial court. Muise v. GPU, Inc., 371 N.J. Super. 13, 58 (App. Div. 2004). Similarly, admission of rebuttal testimony, which is generally limited to contradicting subjects introduced in the testimony of defense witnesses, State v. Carroll, 256 N.J. Super. 575, 604 (App. Div.), certif. denied, 130 N.J. 18 (1992), is a matter within the court's wide discretion and will not be disturbed in the absence of gross abuse. State v. Cooper, 113 N.J. Super. 34, 39 (App. Div. 1971).

Plaintiffs called Robert to testify as their witness in their direct case. Had they wanted to question the accuracy of Malmrose's interpretation of that testimony, they could have called Schultz after Robert had finished testifying. Rebuttal

evidence is permissible when necessary because of new subjects introduced on direct or cross-examination of defense witnesses. State v. Cook, 330 N.J. Super. 395, 418 (App. Div.), certif. denied, 165 N.J. 486 (2000). Because Robert was not a defense witness, the judge did not abuse her significant discretion in ruling that Schultz could not testify on rebuttal.

Plaintiffs further claim that the transcript of Robert's deposition and trial testimony did not accurately reflect his testimony. They maintain that the DVDs of that testimony should be consulted. On September 8, 2009, plaintiffs filed a motion, under Rule 2:2-5(a), asking us to determine the accuracy of Robert's trial and deposition testimony by comparing the DVDs of the testimony with the transcripts. On September 21, 2009, the clerk's office informed plaintiffs that it had determined that the transcripts in question were properly transcribed.

Moreover, plaintiffs did not move below to settle the record, as required by rule. "A party who questions whether the record fully and truly discloses what occurred in the court or agency below shall . . . apply on motion to that court or agency to settle the record." R. 2:5-5(a). Instead of applying to the trial court, plaintiffs applied to us. They did not make a similar motion with respect to Robert's deposition, as required by Rule 4:16-4(d). While we may order a correction of the

record on our own motion, Rule 2:5-5(a), the clerk's office, as noted, has already determined that the transcripts were properly transcribed. That determination and plaintiffs' failure to ask the trial court to settle the record precludes plaintiffs' request for a DVD/transcript comparison.

We conclude that any error in the procedures used by the trial judge with respect to Malmrose should be considered harmless, and plaintiffs' failure to move to settle the record below is fatal to their claim regarding the accuracy of the transcripts of Robert's testimony.

E.

Finally, plaintiffs contend that the trial judge erred in entering judgment with, instead of without, prejudice because the question of Robert's capacity will inevitably arise again due to the nature of his illness. As a result, according to plaintiffs, the judgment has the potential of forever precluding the appointment of a guardian. We disagree. We conclude that the matter was decided on the merits, and this does not preclude a new guardianship action if plaintiffs can demonstrate that circumstances have changed.

The determination of whether a judgment of dismissal should be with or without prejudice is within the trial court's sound exercise of discretion. Spencer v. Steel, 23 N.J. Super. 504,

509 (App. Div. 1952). As a general rule, a dismissal on the merits is with prejudice. Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 415 (1991). That is what occurred here. The judge considered plaintiffs' request that Robert be declared incapacitated and a guardian ad litem be appointed, and after hearing testimony and considering the record in the Chancery Action, denied that relief.

Past determinations of capacity are not dispositive of the issue of present capacity. The preclusive effect of a judgment entered with prejudice is to be determined by the court in any subsequent action between the parties. As stated in Restatement (Second) of Judgments § 31(3) (1982) (emphasis added):

> The determination of a person's status in an action other than one whose purpose is to determine or change that status is conclusive upon the parties to the action, in accordance with the rules of issue preclusion, except in a subsequent action whose purpose is to determine or change the status in question.

See In re Strozzi, 814 P.2d 138, 142 (N.M. Ct. App. 1991) (holding that a judgment in an action to appoint a guardian was conclusive on all parties to the litigation, and noting that the prior "proceeding does not determine Strozzi's competence for all time"). Similarly, that the judgment entered in this matter was with prejudice does not determine Robert's competence "for

all time," and does not preclude a future action under Rule 4:86 based on a change of status.[7]

We conclude that the trial judge correctly concluded that Robert was not mentally incapacitated despite his physical disabilities.

Affirmed.[8]



[7] We do not suggest by our comments that plaintiffs are at liberty to refile a new action without a good faith belief that circumstances have changed warranting further action. As the trial judge noted during the proceedings, this is not an action where Robert was without representation and assistance in advancing his position or acting in his own best interests. He was able to do so without the necessity of appointed parties prompted by his adversaries.

[8] On February 23, 2010, we reserved decision on the motion by respondent James Cohen to strike those documents, and references to such documents, that were not made part of the record before the trial court from appellants' appendix and brief. We now decide the motion order in M-2750-09, and it is denied as moot.