

**RECORD IMPOUNDED**

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3168-11T3

IN THE MATTER OF C.F.C.,  
AN INCAPACITATED PERSON

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Submitted April 16, 2013 – Decided May 9, 2013

Before Judges Lihotz and Ostrer.

On appeal from the Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. 138-738.

A.B., appellant pro se.

The Arnette Law Firm, LLC, attorneys for respondent J.B. (Scott C. Arnette, on the brief).

PER CURIAM

At issue in this appeal is the trial court's order confirming the appointment of a testamentary guardian of C.F.C. (Carl)<sup>1</sup>, an incapacitated adult, pursuant to N.J.S.A. 3B:12-30. Carl's late mother designated in her will that Carl's sister, J.B. (Jane), should serve as Carl's guardian. Another sister, A.B. (Abigail), sought appointment in place of Jane. After a two-day evidentiary hearing, the court concluded that Jane would

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<sup>1</sup> We will utilize first name pseudonyms throughout, for the reader's convenience.

serve Carl's best interests, confirmed the appointment, and ordered that Carl reside with Jane, subject to limited visitation by Abigail.

We are constrained to reverse the trial court's order. The court reached its decision without an expert opinion or other cognizable evidence as to Carl's current capacity and best interests. Inquiry should also have been made regarding Carl's own preferences, if any, pertaining to the appointment and his place of residence. Carl should also have been represented by counsel at the hearing.

I.

We discern the following facts from the record. Carl is a fifty-two-year-old man with Down's syndrome. He was deemed incapacitated in 1985 and his mother and father were appointed co-guardians. His father predeceased his mother in 1986. Carl lived with his mother until she died on April 23, 2011 at the age of 93.

As a child, Carl attended special educational programs. He needs no assistance in activities of daily living, such as personal hygiene, and he assists in household chores. Although he did not learn to read, he held gainful employment, albeit arranged by family members, for extended periods. He worked at home, assembling information packets for a medical equipment

company, for twelve to thirteen years, until the firm relocated. Thereafter, he worked for a pet store for five to six years, cleaning cages and feeding the animals, until the store closed. He has not worked since the 1990s.

Over the years, he has participated in a variety of recreational and athletic activities including Special Olympics competitions, sailing, swimming, horseback riding, and bowling. He is an avid sports fan, and attends local collegiate sporting events with family members.

While his mother was alive, Carl did not receive services through the Division of Developmental Disabilities (DDD), although he participated in programs sponsored by The Arc of the United States (Arc), where his mother was active. Since her passing, as we discuss below, he qualified for and began to receive DDD services.

Although Carl's mother appointed Jane as testamentary guardian, she also expressed the wish in her will that three other siblings share equally in Carl's care. The will, executed in January 2009, stated:

I am the Guardian of my son [Carl], by Order of the Superior Court of New Jersey. I do hereby appoint my daughter [Jane] as Guardian upon my death and assert to all necessary actions that need be taken to formalize this appointment. While [Jane] is the legal guardian of [Carl], it remains my heartfelt desire that my four children,

[Jane, J.C. (Jennifer), Abigail and R.C. (Ronald)], share in the life and assist in the caretaking of their brother, [Carl], together.<sup>2</sup> I would wish that they each take an equal hand in his caretaking, three months each, so he can share in their lives, and they in his. [Carl]'s only wish in this life is for his whole family to be together, and I have promised him that I will do all that I can to make this wish a reality. I would hope that all family functions would be enjoyed by him when he is with each of them in their care.

Less than a week after her mother's passing, Abigail filed a motion in the Probate Part to be appointed substituted guardian of the person of Carl. Abigail suggested that the court appoint an independent expert to provide an evaluation of Carl's best interests. Abigail provided the curriculum vitae of a proposed expert. Jane cross-moved pursuant to N.J.S.A. 3B:12-30 for confirmation of her appointment.<sup>3</sup>

In a June 10, 2011 order, the court appointed an attorney "to evaluate the best interest and welfare of [Carl] . . . and submit a written report to the Court[.]"<sup>4</sup> The attorney was also

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<sup>2</sup> Omitted from the list were siblings W.C. (William) and G.C. (Greg).

<sup>3</sup> Abigail should have filed a complaint, not a motion apparently filed under the closed 1985 guardianship case. See R. 4:86-1. Likewise, Jane's application for confirmation of her appointment should have been commenced by complaint as a summary action. N.J.S.A. 3B:12-30; R. 4:67.

<sup>4</sup> The parties apparently were present in court in June 2011. However, a transcript of that day's proceeding was not provided to us.

authorized to engage professionals to examine Carl. Although subsequent proceedings reflected the court's and counsel's apparent confusion regarding the attorney's role, the court ultimately viewed the attorney as a guardian ad litem (GAL). We therefore will refer to her as such.

While the GAL's work was still ongoing, Jane and Jennifer wrote various ex parte letters to the judge, another judge, the Surrogate, and the Assignment Judge, protesting the course of the GAL's investigation. In her report, the attorney expressly viewed herself not as a guardian ad litem, but as "court-appointed counsel" for Carl. Her report reflected that she had interviewed Carl, Abigail, Jane, and various other relatives. There is no indication that she interviewed Jane with her attorney present.

The GAL concluded that Abigail was more involved than Jane in Carl's life and would be more likely to facilitate Carl's participation in appropriate activities and programs, and employment. She recognized that the relationship between Jane and Abigail was strained and each accused the other of attempting to manipulate Carl. She concluded that a co-guardianship was impractical given their animosity. She also concurred in the consensus of all Carl's siblings that rotating him through households for three-month periods would be

disruptive and ill-advised. The GAL concluded Abigail would be more likely than Jane to facilitate Carl's contacts with other family members. The GAL concluded that, in her opinion, Abigail's appointment would serve his best interests.

Referring to In re M.R., 135 N.J. 155 (1994), the GAL added:

[A]n attorney's role when representing a client whose ability to make adequately considered decisions is impaired is not to determine whether the client is competent to make the decision but to advocate the decision the client has made; however the Court in [M.R., supra, 135 N.J. at 176] further noted that "the attorney's role does not extend to advocating decisions that are patently absurd or that pose undue risk of harm to the client."

However, the report did not state whether Carl had expressed a preference regarding who should serve as his guardian or where he wished to live.

At a case conference on September 9, 2011, the judge referred to the GAL alternately as the "court-appointed attorney" for Carl, and as "guardian." The judge disclosed she spoke ex parte and apparently off-the-record with the GAL about her report and told her she "should have explained [her recommendation] a little bit more[.]" Consequently, the GAL agreed to file an addendum.

The judge also reported that she directed the GAL not to appear, stating,

[I]f we have a trial I usually do not have the court-appointed attorney here taking part because it just causes more legal fees th[a]n are necessary[.] . . . [I]n these kind[s] of cases, . . . I excuse that attorney unless maybe they might come to give some special testimony or something.

Counsel for Abigail and Jane did not object.

The court expressed uncertainty about the necessity of appointing an expert, which Abigail had recommended. The judge stated, "[W]e can hire professionals to evaluate [Carl], but I'm not so sure . . . he or she would say anything different th[a]n we know already. . . . [W]e know his condition." Jane's counsel stated appointment would be unnecessary. Abigail's counsel stated, "I think it might be valuable." Counsel then retreated from Abigail's initial suggestion, stating, "But if the trial can happen quickly, Your Honor, I think that will be just as valuable." The court thereafter did not appoint an expert.

The court was also informed that Abigail had attempted to apply for DDD services for Carl, but was unable to complete the process because she was not a guardian. The court rejected Abigail's request to be appointed temporary guardian, and appointed Jane instead, directing her to complete the DDD

application. Absent the parties' agreement, the court ordered Jane to provide Abigail visitation with Carl ten days a month, and barred family members from disparaging each other in Carl's presence. The court also expressly precluded any evidence of Abigail's allegations that Jane and her husband had mistreated her as a child forty years earlier, which the GAL found credible. The court also orally ordered Jane and Abigail to participate in mediation, although that was omitted from the order.

The court conducted a two-day trial in December 2011. Carl was not present, nor was he represented. In the course of Jane's counsel's opening, confusion about the GAL's role was apparent. Preparing to rebut the GAL's recommendations, Jane's counsel stated, "Now, Your Honor did appoint a guardian ad litem . . . ." The judge responded that the appointee "wasn't guardian ad litem." After expressing some confusion, the court concluded, "So she was . . . appointed as the attorney for [Carl]." Before testimony began, the court also secured Jane's and Abigail's agreement that Carl was incapacitated, and confirmed their agreement that an expert was unnecessary as "a report from another person really would not have done anything more than the original court appointed attorney."



Abigail, eleven years older than her brother but seven years younger than Jane, asserted she was better suited than her sister to serve as Carl's guardian. She claimed she had been much more involved in his life when his mother was alive. She asserted she coached Carl's Special Olympics track and field team, and served as a volunteer in support of her brother's other activities. During her mother's final illness, Abigail claimed Carl lived with her for extended periods of time.

She testified she was retired and had ample time to assist her brother. She resided near Carl's various programs. She noted that her brother had various emerging medical needs that required attention, and, since her mother's death, she had begun to address them. She asserted that her daughter, who worked for Arc, was pursuing a social work degree, lived at home, and would assist in supervising and assisting her uncle.

She also asserted that notwithstanding her estrangement from her other siblings, she would inform them of Carl's activities. She would also ensure that Carl spent time in South Carolina with his sister, Jennifer, and vacationed with Jane in upstate New York. She claimed that Jane had prevented her from visiting with Carl for a two-month period after their mother's funeral.

Abigail also claimed that Jane had stated, before their mother's death, that she could not handle the guardianship. Abigail testified that her mother intended to appoint Abigail co-guardian, but was too ill to formalize that change before her death. Abigail's assertion was supported by her husband's testimony, who recounted a conversation with his ailing mother-in-law, in which she inquired whether he and his wife were sure they wanted to be Carl's guardian.

Jane testified that she too had been involved in Carl's life, and that Carl had been included in numerous family gatherings and social events involving Jane and many of her siblings and their families. She testified that Abigail had withdrawn from virtually all interactions with her and other siblings since 2007. Jane stated that she was aware of Carl's medical needs and was attending to them. She also disputed Abigail's claim of a change in their mother's intentions. She stated that she confirmed with her mother her willingness to serve as Carl's guardian. She also explained that she did not express an unwillingness to serve, as Abigail asserted; rather, she expressed uncertainty that she could handle all the burdens before her, including her mother's imminent death and the responsibility of caring for her brother.

Three of Jane's and Abigail's siblings - Ronald and William, who lived in Monmouth County, and Jennifer, who lived in South Carolina - filed certifications supporting Jane as guardian. Ronald and Jennifer also testified as did two nieces and a nephew. Jennifer asserted that during her mother's final illness, she stayed in her mother's apartment with Carl, and Abigail's supervision of Carl during that time was not as significant as she alleged.

Jane and her supporting family members portrayed Jane's household as a focal point for family gatherings and socializing. They alleged that, in keeping with their mother's wishes, Carl was a welcome participant and found those interactions rewarding. Jane referred to her home as having a "revolving door."

However, Abigail suggested the constant comings and goings would be inconsistent with the more peaceful lifestyle with which Carl had been accustomed with his mother, and which Abigail would be better able to replicate. Abigail also asserted that Carl too often played the role of spectator while living with Jane, as opposed to participant in his own activities. She also questioned whether it would be in Carl's best interests to interrupt his own activities, in order to send

him to South Carolina in the winter for several weeks, while Jane and her husband took their regular vacation in Florida.

Jane and her supportive siblings generally portrayed Abigail as estranged from the rest of the family and prone to erratic actions. They asserted that Abigail had ceased contact with her mother and Carl for three months, after the same event in late 2007 that triggered Abigail's lengthier estrangement from other family members. Jane and her supporting siblings claimed that their mother wished Jane to serve as guardian. They argued that if Abigail were appointed guardian, Carl would not likely maintain contact with his other siblings.

In a lengthy oral decision, the court summarized the testimony of the various witnesses. The judge referred to the GAL's report, this time expressly identifying her as a guardian ad litem, and not Carl's counsel. The court minimized isolated factual errors in the GAL's report, but otherwise did not expressly respond to her findings and recommendation.

The court observed that the record lacked essential evidence regarding Carl's current condition, and capacity. As a result, the court considered an expert evaluation of Carl

prepared in support of the original guardianship application over twenty-five years earlier.<sup>5</sup> The judge stated:

I think there's a tremendous lack of proof in this case. I did not receive any updated reports from doctors, reports from DDD, reports from ARC about his condition. I didn't - I - I don't know what his medical condition is now except from what's been told to me by the parties here. I don't know his mental state. We do know, though, that he was taken to - to the ARC to see if he needed some grief counseling, and he didn't need it. We know that.

But no one, and - and that's why I ordered the file from the Surrogate's Office. I have a 1985 file that just says he has Down's Syndrome. We don't have anything now saying what is his - what is his mental state? What is his health?

The court found that a current examination and expert opinion should have been prepared, although the court, as we noted above, responded negatively to Abigail's initial recommendation for the appointment of an expert, and later concluded that the appointment of the attorney was a sufficient substitute for an expert. The court stated:

I would think that someone . . . in this case would have had him examined. And - on the return day of one of the motions I mentioned that, when I talked about the fact that we had to have a trial here, and that [the GAL's] report was insufficient and we needed a trial. I said, "well, maybe we should have some sort of expert look at

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<sup>5</sup> The report was not entered into evidence and is not before us.

him." And I think I meant and note[d] at that point it may be there would be a recommendation, but nobody wanted to do that.

But I think someone in this case should have come forward with an expert that could have told us what - what is happening with this 51-year-old man, okay? What is his health? What does he need? What would be in his best interests? And no one has done that. All they're talking about is me, me, me, me, me.

. . . .

As I said, I am tremendously concerned that no one saw fit to have an evaluation of [Carl] before the [c]ourt so that I could determine what is in his best interests in that way.

. . . .

I'm also concerned - I was the one who raised the question what did [Carl] do up until his mother's death? Nobody [saw] fit to tell me that. I didn't know that he worked - that he had jobs. I'm the one who asked that question.

. . . .

So, there are so many unanswered questions. I don't know why he's not working now. And I noticed that . . . he got jobs that . . . other family members got him. The first job that he got was gotten through [Jennifer], because she worked there. And he worked at that place for a long time. Then when he couldn't work at that job any longer then [Ronald] got him a job with his in-laws, and he worked at the pet store and that went out of business.

So, I'm kind of concerned what level is [Carl]? Maybe he should get a job now. I mean, I - I don't know. And there was nothing - you know, he's just had a DDD evaluation, and that wasn't even given to me. So, I really don't know what's in his best interest when it comes to the activities he has.

Notwithstanding the court's reservations about the sufficiency of the proofs, the court reached a decision. The court concluded that while it must give due regard to the testamentary wishes of the deceased guardian, the court was guided by the best interests of the incapacitated person. The court concluded Jane's appointment would serve Carl's best interests. The court relied on two factors: she was the choice of Carl's mother; and she would be more likely to facilitate Carl's contact with other family members.

The court ultimately found that while Carl's mother may have expressed support for Abigail's proposal to serve as guardian, she did so to appease Abigail; her expressed written preference for Jane never changed. The judge also discounted any expressions by Jane that she was unwilling or unable to accept the guardianship.

The court found that there was a deep division between Abigail on one side, and Jane and her other siblings on the other. Granting guardianship to Abigail, the court found, would estrange Carl from the rest of the family. Cognizant that

Carl's mother expressed her wish in her will that Carl be involved in family activities, the court concluded that Jane would best be able to fulfill that intent.

This appeal followed. Now pro se, Abigail argues the court erred in concluding that Jane, and not she, would best serve Carl's interests.

## II.

In reviewing a non-jury trial, we give great deference to the judge's findings and conclusions, based on his or her ability to perceive witnesses and assess credibility. See Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974); see also Pascale v. Pascale, 113 N.J. 20, 33 (1988); Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 400 (App. Div. 2007). We do not "engage in an independent assessment of the evidence as if [we] were the court of first instance." State v. Locurto, 157 N.J. 463, 471 (1999) (citation omitted). We review the record to determine if the court's findings are supported by adequate, substantial and credible evidence. Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292, 305 (App. Div. 2010) (citing Rova Farms Resort, supra, 65 N.J. at 484).

However, we review de novo the trial court's interpretation of the law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,



140 N.J. 366, 378 (1995). Consequently, we exercise de novo review of the court's application of due process principles. Saffos v. Avaya Inc., 419 N.J. Super. 244, 264 (App. Div. 2011).

We turn to a review of the law on testamentary guardians of incapacitated persons. The law authorizes a current guardian to identify a person to take the guardian's place upon his or her death. N.J.S.A. 3B:12-30. However, the appointment is not self-effectuating; the person designated must seek confirmation of the appointment. Ibid. The court shall then determine the testamentary guardian's fitness and "make any order touching the testamentary guardianship as may be for the best interest and welfare of the incapacitated person." N.J.S.A. 3B:12-34. Thus, a court "must take as definitive the only legislatively stated preference, 'the best interest and welfare of the mental incompetent,' which is to be applied giving due regard to the testator's expressed design." In re Queiro, 374 N.J. Super. 299, 311 (App. Div. 2005); cf. In re Guardianship of Hoppe, 32 N.J. Super. 460, 464 (Cty. Ct. 1954) (rejecting testamentary guardian for minor child where best interests supported selection of another).

In selecting a guardian, the court must be mindful that in its parens patriae role, it is the protector of the personal rights of an incapacitated adult. M.R., supra, 135 N.J. at 166;

In re Conroy, 98 N.J. 321, 345 (1985). Our Court recognized, "A guardianship can be a 'drastic' restraint on a person's liberty." M.R., supra, 135 N.J. at 171 (citation omitted). "[T]he public policy of this State is 'to maximize the developmental potential of [developmentally-disabled persons] while affording them the maximum feasible personal liberty.'" Id. at 166 (quoting N.J. Ass'n for Retarded Citizens v. Human Servs., 89 N.J. 234, 252 (1982)). A court is not bound by agreements of the parties, and must independently consider the evidence in determining whether a person is incapacitated, who shall serve as guardian, and where the person shall live. In re Guardianship of Macak, 377 N.J. Super. 167, 176-78 (App. Div. 2005) (reversing finding of incapacity where alleged incapacitated person entered into settlement declaring him incapacitated).

A guardian's powers should only extend as far as necessary. The M.R. Court advised trial courts to consider limited, rather than general, guardians where only limited guardianship is required. Supra, 135 N.J. at 171. Our law was subsequently amended in 2005 to formalize the court's duty to consider limited guardianships. L. 2005, c. 304, § 12 (effective Jan. 11, 2006) (codified at N.J.S.A. 3B:12-24.1).

The court shall appoint counsel for an alleged incapacitated person. R. 4:86-4(b). Among other duties, counsel shall interview the incapacitated adult; inquire of persons knowledgeable of his or her circumstances, physical and mental state; and provide a report to the court making recommendations concerning the issue of incapacity and a delineation of those areas where the incapacitated adult is capable of decision-making. Ibid. The report shall also state whether the incapacitated person "has expressed dispositional preferences and, if so, counsel shall argue for their inclusion in the judgment of the court." Ibid.

We recognize that Rule 4:86-4 addresses the role of counsel in the context of an application for the initial appointment of guardian for an "alleged incapacitated person," as opposed to the appointment of a testamentary guardian for an adult previously deemed incapacitated. However, we see no difference in the need for counsel. Even if the issue of the nature and extent of the person's incapacity is uncontested, the confirmation of a testamentary guardian, or the appointment of another, implicates fundamental interests of the incapacitated adult that warrant legal representation. "An adversarial role for the attorney recognizes that even if the client's incompetency is uncontested, the client may want to contest

other issues, such as the identity of the guardian or, as here, the client's place of residence." M.R., supra, 135 N.J. at 176; see also Judiciary-Surrogates Liaison Committee, Guidelines for Court-Appointed Attorneys in Guardianship Matters 3 (May 2005) (stating that even if incapacity is uncontested, appointed counsel is obliged to represent incapacitated person's opinions and preferences "for example, about the identity of the proposed guardian or where they want to live"). We need not reach the issue whether the incapacitated adult has a constitutional right to appointed counsel in such proceedings.<sup>6</sup> We construe our Court Rule as requiring representation in a proceeding to confirm appointment of a testamentary guardian under N.J.S.A. 3B:12-30.

The role of a counsel for an incapacitated person is distinct from that of a guardian ad litem. Compare R. 4:86-4(d)

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<sup>6</sup> See, e.g., Gilbuena v. Moore, 209 Cal. Rptr. 556 (Cal. Ct. App. 1985) (recognizing constitutional right to appointed appellate counsel for indigent challenging trial court order granting conservatorship of gravely disabled person); In re St. Luke's-Roosevelt Hosp. Ctr., 675 N.E.2d 1209, 1210 (N.Y. 1996) (stating that alleged incompetent person had a right to counsel at guardianship proceeding "and if she could not afford counsel, the court was obliged to assign counsel because required to do so by statute . . . and because her constitutionally protected liberty interests were at stake"); Towne v. Hubbard, 3 P.3d 154, 159 (Okla. 2000) (holding that prospective ward has constitutional due process right to representation in guardianship proceeding, which poses risk of "massive curtailment of liberty" and "adverse social consequences"); cf. In re Evatt, 722 S.W.2d 851, 852 (Ark. 1987) (recognizing due process right to counsel at hearing to review ex parte appointment of temporary guardian).

(setting forth duties of guardian ad litem), with R. 4:86-4(b) (describing duties of counsel for incapacitated adult). As the M.R. Court explained:

[T]he role of the representative attorney is entirely different from that of a guardian ad litem. The representative attorney is a zealous advocate for the wishes of the client. The guardian ad litem evaluates for himself or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment.

[M.R., supra, 135 N.J. 173-74 (internal citation and quotation omitted).]

As a result of their different roles, "the attorney and guardian ad litem may take different positions, with the attorney advocating a result consistent with the incompetent's preferences and the guardian urging a result that is different but in the incompetent's best interests." Id. at 175; see also In re Mason, 305 N.J. Super. 120, 127 (Ch. Div. 1997) ("Court appointed counsel is an independent legal advocate for the alleged incompetent and takes an active part in the hearings and proceedings, while the GAL is an independent fact finder and an investigator for the court.").

Their approaches differ as well. "When interviewing interested parties, the attorney for an incompetent should proceed through counsel, but often a guardian ad litem may communicate directly with other parties." M.R., supra, 135 N.J.

at 175. The attorney for the incompetent must do more than "merely file a report," but "should zealously advocate the client's cause." Ibid.

The court shall also consider the preferences of the incapacitated adult. Id. at 171. "A person who is incapacitated may nonetheless still be able to express an intelligent view as to his choice of guardian, which view is entitled to consideration by the court." Macak, supra, 377 N.J. Super. at 176. The court must consider as distinct questions, who will serve as guardian and where the incapacitated adult shall live. "Even without the interrelationship between the choice of guardian and [] place of residence, the choice of residence involves numerous other issues, including those pertaining to the availability of adequate educational, employment and recreational activities." M.R., supra, 135 N.J. at 172 (suggesting that an incapacitated adult conceivably could choose to live someplace other than with the guardian); see also Queiro, supra, 374 N.J. Super. at 304 (noting that court interviewed incapacitated person to determine whether she had a preference). In M.R., the Court vindicated the right of developmentally disabled persons to determine where they will live, if they are capable of doing so.

Applying these principles, we are constrained to reverse because (1) there was insufficient credible evidence in this case, in the form of medical, psychological, or expert evidence, upon which to determine Carl's best interests; (2) Carl was denied appointed counsel with clear direction to represent his interests; and (3) the court did not consider Carl's own preferences, or determine he was incapable of expressing them. We address these points in turn.

The court aptly recognized the inadequacies of the proofs in the case. Notwithstanding the late stage of the case, the court should have exercised its discretion to reopen the record, appoint an expert, and resume the hearing once a report was filed and the expert was available to testify. See State v. Wolf, 44 N.J. 176, 191 (1965) ("The authorities are plain that in a civil or criminal case the trial court has discretion to reopen a case for the introduction of additional evidence while the jury is deliberating upon its verdict."); N.J.R.E. 611. The court noted that the record lacked a current evaluation of Carl's mental or physical health, his capacities, or his vocational, psychological, or medical needs. The judge's comments acknowledge that absent that information, the court was unable to properly assess who would be best able to meet those

needs. Instead, the court's decision was grounded solely in Carl's presumed need to socialize with family members.

We do not have before us the evaluation prepared in support of the 1985 guardianship application. However, the court recognized its inadequacy. Much may have changed in terms of Carl's capacities. Moreover, the law has changed as well. Since the 1985 order, our case law and statutory law has clearly endorsed the principle that a guardian's power should only extend as far as necessary to meet a person's incapacities. Absent a current assessment, the court maintained the general guardianship. We recognize that neither Abigail nor Jane questioned the scope of the guardianship. However, in its parens patriae role, the court was obliged to consider it, in light of relevant evidence.

As we have discussed, Carl was entitled to appointment of counsel. The record reflects confusion regarding the role of the attorney appointed in this case. The initial order directed counsel to prepare a report assessing Carl's best interests. It did not refer to the attorney as counsel for Carl. The confusion continued, but ultimately the judge recognized in her opinion that the attorney served as a GAL, who provided a



report.<sup>7</sup> The attorney did not serve as Carl's personal counsel obliged to zealously advocate for his interests.

Carl was entitled to counsel who would "take[] an active part in the hearings and proceedings[.]" Mason, supra, 305 N.J. Super. at 127. Here, the attorney was essentially dismissed before the hearing.

Appointed counsel was obliged to ascertain Carl's preferences and, unless they were "patently absurd or . . . pose[d] an undue risk of harm," M.R., supra, 135 N.J. at 176, to advocate for them. There is no indication that the attorney in this case did so. Moreover, consistent with M.R., the trial court was then obliged to abide by Carl's wishes regarding where he was to live, unless it was proved by clear and convincing evidence that he lacked the capacity to make that decision. See id. at 171 ("On remand, if M.R. again expresses a preference for living with her father, M.R.'s mother will bear the burden of proving by clear and convincing evidence that M.R. is not competent to make that choice.").

We finally note that Carl was apparently not present at any of the proceedings. Cf. R. 4:86-5 (stating that an "alleged incapacitated" person should be present at a hearing to appoint

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<sup>7</sup> Consistent with the role of a GAL, the attorney apparently conducted her interviews of the parties without their attorneys present.

a guardian initially, unless there's proof that it would harm him or her). It is not clear from the record whether Carl was ever asked whether he wished to attend, or whether family members determined that attendance would be harmful to him. On remand, the court should make the determination whether Carl would suffer harm from attending. If he would not, then he should be entitled to decide whether to attend or not.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION