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	:SUPREME COURT OF NEW JERSEY
	:Docket No:_____
	: App. Div.: A-2652-21
In the Matter of A.D,	:
An allegedly incapacitated person	:
	: Civil Action
	:
	: Sat Below in the Appellate Division:
	: Hon. Francis J. Vernoia,J.A.D
	: Hon. Katie A. Gummer, J.A.D
	: Hon. K. Walcott-Henderson, J.A.D
	:
	:Sat Below in the Chancery Division:
	: Hon. Maritza Berdote-Byrne, JSC

PETITION AND APPENDIX FOR CERTIFICATION FOR REVIEW OF THE FINAL JUDGMENT OF THE APPELLATE DIVISION ENTERED NOVEMBER 29, 2023

BY: STEVEN J. KOSSUP, ESQ.
ON THE BRIEF AND APPENDIX

DATED: December 14, 2023

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The within certification is presented to the Supreme Court for review of the following:

1) when fee shifting is permitted under R. 4:42-9 (a)(3) and R. 4:86-4(e) in APS filed guardianship cases where the AIP lacks the funds to pay Court appointed personnel (attorney and guardian).

2) In addition, the Court must review whether R. 4:42-9 (a)(3) and R. 4:86-4(e) permit fee shifting in APS cases.

This case commenced on June 1, 2020 when the Sussex County Division of Social Services, Office of Adult Protective Services (hereinafter APS) filed a verified complaint for Temporary and Permanent Guardianship of an Alleged Incapacitated Person and vulnerable adult, A.D under docket [redacted] (hereinafter AIP or "Hank"). The Verified Complaint alleged that Hank was a vulnerable adult and is unable to govern himself or manage his affairs and also further alleged that the AIP suffers from a condition that "renders him without the necessary cognitive capacity to govern himself in all areas (including medical, legal, residential, educational, and vocational) and therefore he requires a general (full) guardian of the person and estate". On June 11, 2020,

[1] The Procedural History and Statement of Facts have been combined for judicial economy.

the Surrogate Court entered an Order appointing Steven J. Kossup, Esq. as attorney for Hank (hereinafter CAA). Brian Lundquist, Esq. was appointed as the temporary guardian for Hank (hereinafter GAL). The Court Order of June 11, 2020, using a form approved by the Supreme Court, (Pa20-Pa21, footnote 3) specifically identified that Mr. Kossup "is to be paid" and declined the pro bono designation for Mr. Kossup.

The CAA, once appointed, was unable to make a final recommendation on guardianship because Hank was living with a friend and appeared to be able to function independently. On September 8, 2020, the CAA submitted his initial report to the Court, outlining that the CAA and GAL were then presently investigating whether Hank's friend and roommate could continue to provide certain care giving services and whether this could be approved by the Division of Developmental Disabilities (DDD).

Thereafter, on October 5, 2020, the CAA filed a supplemental report with the Surrogate Court recommending a plenary guardian with additional support provided by the Hank's friend (as approved by DDD). The Bureau of Guardian Services adjourned the guardianship hearing to "allow time for the temporary guardian to reach out to SCARC to see if it can, instead, serve as guardian of the person and property for Hank. The hearing date was rescheduled for December 8, 2020 (thereafter adjourned to December 9, 2020

by the Court.) During the time from September 2020 to December 2020, the GAL and CAA actively worked quite hard to obtain services for the AIP such that he could continue his present living arrangements without interruption and with the benefit of the new social services provided by DDD. The GAL and CAA worked through this complex situation all toward the goal of continued independence for Hank; these efforts addressed his limitations while geared towards preservation of his civil liberties and rights.

The GAL obtained an expert report of Dr. Leslie Williams at the GAL's personal expense - this provided a counter opinion to the APS experts' reports; without this report Hank would have suffered legal prejudice in the proceedings for lack of an opposing narrative. The CAA and GAL established continued personal contact and interaction with Hank and the service providers – the CAA and GAL confirmed that Hank could maintain his desired independence on the Social Services structure now in place – with these Social Services programs he was able to function as noted and maintain his independence. As of December 1, 2020, the CAA withdrew his recommendation that the Hank required a guardian, as he could now prove the Hank had been, and could, live independently.

On August 4, 2021, the Hon. Maritza Berdote-Byrne, JSC entered an Order granting a limited guardianship where Hank was able to retain his right

to live independently though he had to have someone appointed to handle his legal and financial decisions. The Court reserved a determination on payment of fees to the CAA and GAL and permitted the GAL and CAA to file certifications. The GAL and CAA moved for payment from the APS's budget at the Sussex County Division of Social Services; APS then opposed the CAA and GAL's request that it should be required to pay counsel fees associated with the guardianship action. On March 28, 2022, the Court entered an order denying payment to both the CAA and GAL (Pa23-Pa31).

The CAA and GAL both appealed the March 28, 2022 determination of the Trial Court (*Docket A-2563-21 for the GAL's appeal and Docket A-2652-21 for the CAA's appeal*). These actions were consolidated and reviewed together. The Appellate Court heard oral argument on the consolidated appeals on October 12, 2023, and the Appellate Division rendered their opinion on November 29, 2023 (Pa4-Pa22). On December 13, 2023, Petitioner filed a Notice of Petition with the Supreme Court (Pa1-Pa3). The within petition for certification to the Supreme Court followed.

PRELIMINARY STATEMENT

This issue of payment of fees in an APS filed guardianship cases requires review by the Supreme Court due to the conflict/disconnect between the APS statute (N.J.S.A. 52:27D-406 to N.J.S.A. 52:27D-425, the holding in

Matter of Guardianship of DeNoia, 464 N.J. Super. 562, 567–68, 237 A.3d 951, 955 (App. Div. 2019) and the 'fee shifting rules' (R.4:42-9 and R. 4:86-4.)

There is no dispute here that the GAL and CAA's efforts to preserve Hank's civil liberties and freedoms were lauded by the Trial Court as 'remarkable' and 'herculean' (Pa28)- this sentiment was further mirrored by the Appellate Court in their November 29, 2023 opinion (Pa22). There is also no dispute that this situation will re-occur. Presently, neither attorney was compensated for their extraordinary efforts and both Courts made reference to the disconnect between the Rules and the APS statute (Pa29 and Pa18-Pa19).

There is certainly a public policy concern regarding expenditures required to protect otherwise indigent disabled persons. "Public policy" is often "broadly" defined as the "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society." *Black's Law Dictionary* at 1351 (9th ed. 2009).
An attorney who accepts appointment to these cases does so without immediate knowledge of what will be required for the AIP. The attorney is, under the Appellate Division's decision sub judice, burdened with production of all funds for a proper defense of the AIP lest he capitulate to the APS's demand for residential placement and loss of the AIP's liberties. Here, and

hereafter, appointed counsel are required to pay for the AIP's defense and medical proofs from their own account and will work without recompense despite exceptional efforts recognized as a basis for fee shifting under DeNoia. Neither prospect is acceptable where the AIP lacks the funds to pay the Court appointed attorney and guardian.

Presently, the Trial Court denied fees under the interpretation that permitting fee shifting under R. 4:86-4(e) would act as legislative revisions – nevertheless fee shifting was granted in DeNoia under the fee shifting Rules [R. 4:42-9 (a)(3) and R. 4:86-4(e)]. On appeal, the three judge Panel affirmed the Trial Court's determination under a different standard - *the APS statute review* (N.J.S.A. 52:27D-409 and N.J.S.A. 52:27D-418) - but bypassed the fee shifting rule [R. 4:42-9(a)(3) and R. 4:86-4(e)].

There is a conflict with the APS statute (N.J.S.A. 52:27D-418) in that it contradicts the prevailing caselaw in this area (DeNoia, Farnkopf[2]) and this requires review by the Supreme Court.

APS, its Counsel, and all social service providers have been paid through government funding. The CAA and GAL provided Court ordered

[2] Matter of Guardianship of DeNoia, 464 N.J. Super. 562, 567–68, 237 A.3d 951, 955 (App. Div. 2019) In re Farnkopf, 363 N.J. Super. 382, 833 A.2d 89 (App. Div. 2003).

'protective services' (noted in N.J.S.A. 52:27D-407) were not compensated at all, even as to expenses paid. Further, the Order of Appointment specified that the CAA was to be paid (Pa8). Note that, at oral argument, our Appellate panel specifically inquired of APS as to why any attorney would accept these appointments with no guarantee of payment for that work that lie ahead, nor with any promise to compensate the attorney who used his own funds to protect his client's civil liberties.

STATEMENT OF THE MATTER INVOLVED

The within certification is presented to the Supreme Court for review for clarification and revision on when fee shifting is permitted under R. 4:42-9 (a)(3) and R. 4:86-4(e) in APS filed guardianship cases where the AIP lacks the funds to pay Court appointed personnel (attorney and guardian). In addition, the Court must review whether R. 4:42-9 (a)(3) and R. 4:86-4(e) permit fee shifting in APS cases. The Appellate Panel, in affirming the Trial Court's determination to deny fee shifting under R. 4:86-4 (e), relied on two cases:

1) Matter of Guardianship of DeNoia, 464 N.J. Super. 562, 567–68, 237 A.3d 951, 955 (App. Div. 2019) and

2) In re Farnkopf, 363 N.J. Super. 382, 833 A.2d 89 (App. Div. 2003).

Petitioner maintains that In re Farnkopf is not applicable, and the within matter prompts the Supreme Court to review Matter of Guardianship of DeNoia as to when fee-shifting can occur in APS cases.

Presently, the Legislature has no reproducible standard of review to determine when fee shifting is appropriate and permitted in APS cases where the AIP's estate has insufficient funds to pay Court appointed counsel:

A) If the Court contends, as the Appellate Division found here, that fee shifting is never permitted under the APS statute, then DeNoia must be overturned.

B) However, if the Court contends that DeNoia is the standard for when fee shifting can occur, then a standard must be identified and streamlined to create a multi-factor test under which subsequent cases can be reviewed.

If DeNoia is the standard, then the Appellate Division should be reversed, and the Supreme Court should consider clarification or guidance in future cases as follows:

1. that fee shifting is allowed in APS cases if certain conditions are met concerning exceptional efforts of counsel, State agency malfeasance, or other provision as the Court deems necessary and proper;

2. that the APS statute doesn't preclude fee shifting when certain criteria noted under DeNoia and R. 4:42-9 have been met; and

3. the reproducible standard for fee shifting in APS cases should be determined in accord with the eight enumerated criteria found in R. 4:42-9, or in DeNoia,

> namely extraordinary efforts and/or agency malfeasance.

There is presently no multi-factor test or method by which the Court can make this determination under the Court Rules or the APS statute. The issue is ripe for review by the Supreme Court and a granting of certification is appropriate.

POINT ONE
THE QUESTION PRESENTED FOR REVIEW

The following questions are of general public importance which require review by the Supreme Court:

1. Whether fee shifting as found in Matter of Guardianship of DeNoia is in contradiction to the APS statute (N.J.S.A 52:27D-406 to 425);

2. When, and if, the Court is permitted to fee shift in APS cases;

3. If the holding in DeNoia is sound, then what is the standard for review on APS fee shifting cases that will ensure a reproducible outcome for cases in the future.

Presently, litigants are faced with two conflicting standards:

Firstly, under the APS statute, Court appointed personnel who perform protective services pursuant to N.J.S.A 52:27D-418 (*attorneys and guardians*) are without funding for any purpose unless the AIP's estate can support such a payment.

Secondly, and conversely, DeNoia, permitted fee shifting in an APS case (*in contradiction to N.J.S.A 52:27D-418*) when the Court found (a) "exceptional effort" expended by the Court appointed attorney and (b) that APS did not meet certain statutory obligations.

The DeNoia Court relied on R. 4:42-9(a)(3) and R. 4:86-4 (e) in justification of fee shifting. However, there is no such "exceptional effort" standard or test in the Court Rules, nor in the APS statute, which would alleviate the conflict between DeNoia and the APS statute; the two cannot co-exist.

If DeNoia is good law, then Petitioner herein should have been awarded fees, as the efforts of the CAA and GAL were recognized as "herculean" and similarly recognized by the Appellate Panel as "laudable" (Pa15, Pa22, Pa28). A similar result may have been granted to the GAL.

Note that the Appellate Panel opined they were constrained due to their inability to "create rules to make our civil justice system more fair." (Pa22). However, the Appellate holding makes is clear that there is a the conflict between DeNoia and the APS statute.

POINT TWO
Errors of The Appellate Panel

Petitioner has identified the following errors by the Appellate Panel that warrant review by the Supreme Court:

1) The Appellate Panel improperly relied on N.J.S.A 52:27D-409(e) and N.J.S.A 52:27D-418 to affirm the Trial Court's decision to deny fees, both of which are in conflict with the holding in DeNoia and therefore contradict R. 4:42-9(a)(3) and R. 4:86-4(e);[3]

2) The Appellate Panel improperly relied on Farnkopf – the case is inapplicable on its facts and because R. 4:42-9(a)(3) was amended following the Farnkopf decision specifically to include a fee shifting provision for guardianship cases;

3) The Appellate Panel affirmed the Trial Court's determination in reliance on the APS Statute (N.J.S.A 52:27D-418) that there are no fees awarded except out of the AIP's own Estate. This is in direct contradiction to DeNoia, in which fee shifting was ordered by the Court. The DeNoia Court required certain conditions be present (extraordinary efforts/ 'agency malfeasance'). The standard is limited to this case and no such standard exists in the APS statute, nor in R. 4:42-9 or R. 4:86-4.

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[3] The APS Statute (Section 409) concerns immunity from suit, not immunity from payment of fees or expenses: Section E of the statute states:

> "A county adult protective services provider and its employees are immune from criminal and civil liability when acting in the performance of their official duties, unless their conduct is outside the scope of their employment, or constitutes a crime, actual fraud, actual malice, or willful misconduct." *N.J.S.A 52:27D-409*

The APS Statute (Section 418) states:

> "The court may order payments to be made by or on behalf of the vulnerable adult for protective services from his own estate." N.J.SA. 52:27D-418.

This language does not limit the source of payments to the AIP's own estate.

4) The Appellate Panel criticizes Petitioner for his reliance on the Court Order of Appointment (Pa20) since the Order was signed by the Surrogate and not the Trial Court Judge yet acknowledges the confusion in the language of the Order and suggested revision to the form to avoid "misapprehensions" (Pa21).

5) The Appellate Panel misstated the amount of fees requested by Petitioner (Pa13).

Initially (#1 above), the Appellate panel incorrectly relied on N.J.S.A 52:27D-409 to deny an award of fees, however N.J.S.A 52:27D-409 is not relevant to these proceedings. This section of the APS statute speaks to immunity of the APS employees from civil or criminal *suit* and does not speak to fee shifting of protective services attorneys' fees under a guardianship action. There is no such civil or criminal suit in the underlying guardianship action that would trigger the immunity clause in N.J.S.A. 52:27D-409.

Further, the Appellate Panel relied on N.J.S.A 52:27D-418, which required that fees for protective services are to be paid out of the Estate of the AIP. However, this is in direct contradiction to the award of fee-shifting in DeNoia and the language of Section 418 does not limit the source of payments only to the AIP's own estate.

Secondly (#2 above), the Appellate panel improperly relied on the holding in Farnkopf to affirm the Trial Court's opinion. In Farnkopf, the Court reversed an award of fees against the Office of Aging to pay the interim

conservator. Unlike the underlying case here, in Farnkopf, there were no exceptions to the American Rule available to Farnkopf which would justify fee shifting. Following Farnkopf, R. 4:42-9(a)(3) was amended to include the guardianship provision.[4] There is no specification or limitation in R. 4:42-9(a)(3), or R. 4:86-4(e) from what fund the Court may allow such a fee to be paid. One distinct difference between Farnkopf and the present matter, upon which the Appellate panel did not comment, was that Farnkopf actually had the ability to pay the conservator out of his own Estate as allowed by N.J.S.A 52:27D-418, so Farnkopf did not reach the issue presented here. The case, to that extent, is inapplicable on its facts. Nevertheless, neither R. 4:42-9(a)(3) nor R. 4:86-4(e) provide a standard as to when it is appropriate for the Court to award fees in guardianship actions and out of what fund the fees should be paid. The language of R. 4:86-4 (e) provides that payment may be made "*or in other such manner as the Court shall direct*" and, as noted by the Appellate Panel, Petitioner relied on this language in anticipating payment for his services rendered under language of the Supreme Court's form of Order (Pa21). The Appellate Panel did not, however, identify how the Petitioner was

[4] "In a guardianship action, the Court may allow a fee in accordance with R. 4:86-4(e) to the attorney for the party seeking guardianship, counsel appointed to represent the allegedly incapacitated person, and the guardian ad litem." R. 4:42-9(a)(3).

incorrect in his reliance on this language, but instead merely commented, unfairly so, that the Petitioner 'disregarded what he described as "the qualifier" in the next sentence, which makes clear the court's discretion" (Pa20).

Thirdly (#3 above), these Rules conflict with the Appellate Panel's determination that the APS statute (N.J.S.A 52:27D-418) permits payment for protective services only out of the Estate of the AIP. To the contrary, the language of Section 418 does not limit the source of payment to the AIP's estate and presumes there is an estate from which these funds can be drawn ab initio. This area of the law requires Supreme Court review for clarification and interpretation on when fee shifting is permitted.

The APS Statute, enacted in 1993, has seen no revisions since then. The present issue before the Court has not been addressed by the Legislature (regarding payment only out of the AIP's estate) and the Appellate Panel also did not address the imbalance between the prevailing caselaw in this area (Farnkopf and DeNoia), the APS Statute, and the fee shifting rules.

The Appellate panel did recognize, at Pa19, that the DeNoia Court required APS to pay the fees of the CAA, which is in direct contradiction to the APS statute that mandates fees are to be paid out of the Estate of the AIP. The APS Statute does not address 'agency malfeasance' or 'extraordinary

efforts of counsel.' Further, R. 4:42-9 and R. 4:86-4 do not contain any such provision that would permit such a finding by the Court. Instead, the DeNoia Court made this fee shifting determination and the Appellate Division reviewed the matter under the 'abuse of discretion' rule; Petitioner herein argued the same 'abuse of discretion' concept, all of which was rejected by the Appellate Panel.

Further (#4 above), the Appellate Panel criticizes the Petitioner for his reliance on the Surrogate Court's Order stating that the CAA "is to be paid" and then acknowledges, in the footnote on page 18 of the Appellate opinion, that the form of order used by the Surrogate court was the correct form of Order (Pa21), but on page 4 of the Appellate opinion inquire why the Order was not issued by the Trial judge (Pa7, Pa21). Petitioner relied, to his detriment, on an Order of the Surrogate Court, which could be disregarded by the Trial Court at any time. It was not fair for the Appellate Panel to allege Petitioner was short sighted in his reliance on the "is to be paid" and then criticize Petitioner for his reliance on the R. 4:86-4 language "or any such manner as the court shall direct" because the language is in the Rules. If counsel should not rely on this language, as the Appellate Panel suggests, then why is the language permitted to remain in the Rules?

Fifthly (#5 above) Scrivener's Error - Finally, the Appellate Court incorrectly stated that the amount requested by Petitioner was $3,767.50 (Pa13). As submitted to the Surrogate in a certification dated October 19, 2021, which appeared in the Appellate appendix (not attached here). The actual amount incurred by the CAA was $5,225.00, voluntarily reduced by the CAA from $6,650.00.[5]

POINT THREE
WHY CERTIFICATION SHOULD BE ALLOWED

Petitioner seeks a grant of certification by the Supreme Court to establish a standard of review for fee-shifting in guardianship actions filed by APS (under N.J.S.A 52:27D-406 et seq.,) where an AIP lacks the assets to pay Court appointed personnel. Fee shifting was permitted in the DeNoia matter under R. 4:42-9(a)(3), and consequently R. 4:86-4(e), in contradiction to N.J.S.A 52:27D-409 and N.J.S.A 52:27D:418. R. 4:86-4(e) provides the necessary language that the fees for compensation to the CAA and GAL "may be fixed by the court to be paid out of the estate of the alleged incapacitated person *or in such other manner as the court shall direct.*" However, the Rule does not provide guidance as to out of where the funds could be paid, if so

[5]Also, an additional 1.3 hours were voluntarily not billed as submitted to the Court on October 4, 2020.

ordered by the Court. Review of the present matter before the Supreme Court is necessary, as DeNoia established a standard of review in fee shifting that is not found in the APS statute nor the applicable fee shifting Rules. That standard required State agency malfeasance and the extraordinary effort of the assigned counsel in order to trigger fee shifting.

This is not the first time that the Court been tasked with the efforts of streamlining caselaw to establish a multi-factor test in order to ensure the uniformity of review. In the area of disability pensions under Title 43, the Court was faced with similar review and noted as we see here:

> "With all of the shortcomings of that standard in establishing a fairly ascertainable gauge for determining eligibility for accidental disability pension benefits, and even granting that the judicially crafted three-pronged test for satisfying the "traumatic event" standard provides no uniformly workable basis for confidently predicting the outcome in any typical case (...) we are not at liberty to depart from either. Caminiti v. Board of Trs., Police & Firemen's Ret. Sys., 394 N.J. Super. 478, 482

The Petitioner's prayer for Certiorari vaults the same threshold. The issue before this Court has now risen to the level of Supreme Court review required to resolve the conflict noted. Petitioner submits that the Supreme Court must create a multi-factor test by which the Trial Courts can uniformly establish when fee shifting is appropriate consistent with the rules, law, and caselaw.

POINT FOUR
COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

Further, the Appellate Court during oral argument raised several issues that were not addressed in the published opinion, namely,

1. The Appellate Panel (Hon. Francis J. Vernoia, J.A.D) engaged in a strenuous inquiry with Appellant Lundquist as to whether or not there was a standard for review under which it is appropriate to request an award of fees and that 'good cause' may be the standard of review.

2. Judge Vernoia also inquired of Petitioner if there was any other source of payment other than APS (since the AIP lacked the funds) (such as budgetary allotment).

3. The Hon. Katie A. Gummer, J.A.D. focused on the preservation of Hank's civil liberties by the CAA and GAL and further sought an explanation from APS as to what law required the GAL to personally pay for the expert that ultimately resulted in the preservation of Hank's rights.

4. Judge Gummer also inquired why any attorney would accept appointment in APS cases if there was no prospect for repayment of expenses or for payment of counsel fees.

5. The Hon. Kay Walcott-Henderson, J.A.D. inquired of APS if there were any circumstances where a GAL or CAA could ask for funds, to which APS counsel responded he had never encountered such a circumstance.

However, none of these inquiries were memorialized in the Appellate opinion.

Instead, the opinion focused only on the two prevailing cases as noted herein, and the disconnect between the Statute and the Rules. Essentially, the

Appellate Court did not possess the authority to amend the Rules to either comport with the APS statute on non-payment in APS cases or further clarify the Rules pursuant to the standards for fee-shifting created by DeNoia.

CONCLUSION

As identified herein, the question of fee-shifting under R. 4:42-9(a)(3) and R. 4:86-4(e) and the APS guardianship cases with an indigent AIP requires review by the Court. There is a lack of guidance in this area and conflict with Statutes, Rules and caselaw, for which Petitioner respectfully requests that the Supreme Court should review the within matter in order to create a workable standard by which the Trial Courts may determine where fee shifting is permitted and the criteria required.

I certify that the within petition represents a substantial question and is filed in good faith and not for purposes of delay.

Law Office of Steven J. Kossup, PC

By: _____
Steven J. Kossup, Esq.

Dated: December 14, 2023