

**SUPREME COURT OF NEW JERSEY  
DOCKET NO.: 088942**

<b>In the Matter Of</b>  <b>A.D.,</b>  <b>An Alleged Incapacitated Person.</b>	<b>On Petition for Certification from the Superior Court of New Jersey Appellate Division Consolidated Docket Nos. A-002563-21/A-002652-21</b>  <b>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.</b>  <b>Sat Below in the Chancery Division: Hon. Maritza Berdote Byrne, P.J.Ch.</b>
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**BRIEF IN OPPOSITION TO PETITION FOR CERTIFICATION ON  
BEHALF OF PLAINTIFF/RESPONDENT  
COUNTY OF SUSSEX DIVISION OF SOCIAL SERVICES,  
OFFICE OF ADULT PROTECTIVE SERVICES**

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**PRELIMINARY STATEMENT**

Consistent with previous jurisprudence, the Trial Court declined to Order the County of Sussex, Division of Social Services, Adult Protective Services Unit (hereinafter, “APS”) to pay almost \$20,000 in counsel fees to the court-appointed attorney and court-appointed temporary guardian in a guardianship proceeding brought by APS pursuant to the Adult Protective Services Act (hereinafter, the “Act”). The Appellate Division affirmed the Trial Court in a well-reasoned decision.

If this decision is reversed, the results could be catastrophic, gravely impacting the ability and chilling the readiness of APS agencies statewide to render statutorily mandated “protective services;” the public policy inherent in the Legislature’s enactment of the Adult Protective Services Act, N.J.S.A. 52:27D-406, et seq. (the “Act”), would be undermined. The decision below was fully consistent with the applicable law and amply justified by the facts.

The Act does not permit the award of counsel fees against APS for either court-appointed attorneys or temporary guardians. Even if it did, the Appellate Division properly found that the Trial Court correctly exercised its discretion in denying the application to compel APS to pay the counsel fees of the Petitioners.

## PROCEDURAL HISTORY

On June 1, 2020, APS filed a verified complaint seeking the appointment of a temporary and plenary guardian of A.D. (hereinafter referred to as “Hank”) and the appointment of counsel. 1Pa23<sup>1</sup> By order dated June 11, 2020, Brian Lundquist, Esq., was appointed Temporary Guardian for Hank and Steven Kossup, Esq., was appointed his counsel. 1Pa51 On August 4, 2021, a Judgment of Legal Incapacity and Appointment of a Limited Guardian was entered on behalf of Hank. 1Pa107. The court reserved decision with respect to the applications of the Petitioners to compel APS to pay their fees.

Briefs and certifications were filed with the Court. Oral argument was heard on February 16, 2022. On March 28, 2022, the Trial Court entered an Order and Statement of Reasons denying the applications of the Petitioners to require APS to pay counsel fees and costs. 1Pa136. The Petitioners appealed the trial court’s decision. The Appellate Division heard oral argument on October 12, 2023. On November 28, 2023, in a well-reasoned opinion, the Appellate Division affirmed the trial court. Both Petitioners have filed Petitions for Certification with this Court.

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<sup>1</sup> 1Pa refers to the Appendix filed in the Appellate Division on behalf of Petitioner Brian Lundquist, Esq., in A-002563-21.

**COUNTER-STATEMENT OF THE MATTER INVOLVED**

After receiving reports concerning Hank, APS undertook an appropriate investigation pursuant to its statutory mandate. That investigation led APS to request medical examinations of Hank. Once those examinations concluded that Hank lacked capacity in all areas, APS filed a Verified Complaint and supporting documents seeking the appointment of a plenary guardian. 1Pa23.

In Paragraph 37 of the Verified Complaint, APS indicated the following: “Pursuant to R. 4:86-2, APS has made a reasonably diligent inquiry regarding the real and personal property and income of Hank.” 1Pa28. In Paragraph 38 of the Verified Complaint the following information was provided: “As indicated in the Certification of Assets included with this Complaint, Hank has no significant assets known to APS. 1Pa28. Paragraph 39 of the Verified Complaint stated the following: “Upon information and belief, Hank has no savings.” 1Pa28. Paragraph 40 of the Verified Complaint likewise stated as follows: “Hank was receiving \$671.00 monthly from Social Security Disability and \$163.25 in Supplemental Security income directly deposited into his checking account until it was mistakenly terminated. He currently has no income.” 1Pa28.

Paragraph 43 of the Verified Complaint, as originally drafted and sent to the Sussex County Surrogate for filing, included the following: “Pursuant to

New Jersey Court Rule 4:86-4, APS is requesting the appointment of an attorney for Hank, that the attorney be compensated from the Estate, if any, of Hank, and that APS bear no responsibility for the costs and fees associated with the appointment of an attorney for Hank pursuant to N.J.S.A. 52:27D-409.” 1Pa29. Paragraph 44 of the Verified Complaint, as originally drafted and sent to the Sussex County Surrogate for filing, included the following: “Pursuant to N.J.S.A. 3B:12-24.1c, APS is requesting the appointment of a temporary guardian for Hank, that the temporary guardian be compensated from the Estate, if any, of Hank pursuant to N.J.S.A. 3B:12-24.1c(9), and that APS bear no responsibility for the costs and fees associated with the appointment of a temporary guardian for Hank pursuant to N.J.S.A. 52:27D-409.” 1Pa29

When the verified complaint was returned to counsel by the Sussex County Surrogate, portions of paragraphs 43 and 44 of the Verified Complaint were stricken, with the notation: “Per M.B.B. P.J. Ch. 6/11/2020.” 1Pa29. By letter dated June 16, 2020, Counsel for APS objected in writing to the unilateral modification of the Verified Complaint. Ra<sup>2</sup>. No response was received.

Included with the Verified Complaint was a Certification of Assets

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<sup>2</sup> Ra refers to the Appendix filed in the Appellate Division on behalf of Respondent County of Sussex Division of Social Services, Office of Adult Protective Services.



executed by APS Social Worker Elizabeth Krajick-Larsen, where she indicated that, to the best of her knowledge, Hank had no assets and monthly income of \$834.25 from SSD/SSI, which was suspended. 1Pa49. Pursuant to the Order of the Sussex County Surrogate, Petitioner Steven Kossup, Esq., was appointed as Hank's attorney and Petitioner Brian Lundquist, Esq., was appointed to be his temporary guardian. 1Pa51. Both Petitioners were provided with copies of all filed papers, including Ms. Krajick-Larsen's Certification of Assets and counsel's June 16, 2020, letter.

Mr. Kossup was tasked with making inquiries as to Hank's property and to discover any interests Hank may have as a beneficiary of a will or trust and to make a written report of findings and recommendations. 1Pa51. Mr. Kossup submitted an Interim Report dated September 8, 2020. 2Pa65.<sup>3</sup> At that time, Mr. Kossup did not note whether he had confirmed Hank's income or inquired as to whether Hank had any assets or was the beneficiary of any will or trust. 2Pa65. He noted that Hank was in need of a plenary guardian. 2Pa65. By letter dated October 5, 2020, Mr. Kossup provided a Supplemental Report in which he indicated that Hank had no significant assets, owned no real or personal property

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<sup>3</sup> 2Pa refers to the Appendix filed in the Appellate Division by Petitioner Steven J. Kossup, Esq., in A-002562-21.

and to his knowledge is not named in any will or trust. 2Pa69. At that time, he indicated that the appointment of a plenary guardian was appropriate. 2Pa71.

There was no indication at that time that Mr. Kossup undertook any further investigation into the contents of the will of Hank's father, who died on April 7, 2020, had been providing Hank with housing, and was the representative payee for his Social Security benefits. Mr. Kossup filed an Updated Recommendation of Court Appointed Counsel dated February 11, 2021. Ra13. In the updated recommendation, Mr. Kossup withdrew his previous recommendation for the appointment of a plenary guardian. In the meantime, at the request of APS, Dr. Ballan reevaluated Hank and submitted a report dated February 12, 2021, in which he stated that he found no reason to change his initial impression that Hank needed a plenary guardian. 1Pa93.

Temporary guardian Brian Lundquist, Esq., filed an initial Certification regarding Hank dated February 17, 2021. 1Pa57. With respect to Hank's finances, Mr. Lundquist indicated that he was receiving rental assistance, that his monthly contribution was \$222.10, and that his public assistance benefits resumed as of May 1, 2020. 1Pa62. Dr. Sancho Mora, at the request of APS, also reevaluated Hank on March 8, 2021, and again opined that he need a guardian of his person and property. 1Pa102.

Joan Bruseo is the Director of the Sussex County Division of Social Services. She provided a detailed Certification to the Trial Court setting forth the work performed by APS and the budgetary constraints under which they operate. Ra39. As persuasively set forth by Ms. Bruseo, APS does not have the funds available to satisfy the fee applications of Mr. Kossup and Mr. Lundquist. Ra39.

On March 1, 2021, the New Jersey Supreme Court amended Court Rule 1:21-12 to permit attorneys who provide at least 25 hours of pro bono legal representation or other services, such as serving as a temporary guardian, over the course of one year, to request an exemption from court-appointed pro bono services under Madden v. Delran, 126 N.J. 591 (1992). Ra37. Petitioners requested that the Trial Court Order APS to pay their attorneys' fees and costs. The Trial Court heard oral argument on February 16, 2022, after receiving legal briefs from all counsel. In a written opinion dated March 28, 2022, both applications were denied. That decision was subsequently affirmed on appeal.

**COMMENTS WITH RESPECT TO THE  
APPELLATE DIVISION DECISION**

**POINT I**

**THERE ARE INSUFFICIENT  
GROUNDS TO GRANT THE  
PETITIONS FOR CERTIFICATION**

Rule 2:12-4 establishes the criteria necessary for this Court to grant certification. Petitioners fail to meet those standards. Specifically, the Appellate Division's decision is not in conflict with any prior decisions; the decision does not require this Court's intervention to settle a matter of general public importance; and the interests of justice do not require a grant of certification.

In its decision, the Appellate Division properly reconciled its prior decisions in In Re Farnkopf, 363 N.J. Super. 382 (App. Div. 2003) and In Re Guardianship of DiNoia, 464 N.J. Super. 562 (App. Div. 2019). Specifically, the Court stated that “we perceive no conflict in those decisions.” 3Pa19.<sup>4</sup> As a result, the decision of the Appellate Division is not in conflict with any prior decision and this Court’s intervention is not required to settle a matter of general public importance. Both Petitions for Certification should be denied.

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<sup>4</sup> 3Pa refers to the Appendix filed in the within matter by Petitioner Steven J. Kossup, Esq.

## POINT II

### STANDARD OF REVIEW

Whether a statute or Court Rule authorizes an award of counsel fees is a matter of legal interpretation. Wiese v. Dedhia, 188 N.J. 587, 592 (2006). Accordingly, the review of the initial determination of whether counsel fees are permissible is on a de novo basis. Occhifinto v. Olivo Constr. Co., 221 N.J. 443, 453 (2015). However, if a trial judge's decision is authorized by law, the Appellate Court will not overturn a decision to award or withhold counsel fees, absent "a clear abuse of discretion." Packard- Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). "Where a trial court has authority to grant attorney's fees, [however,] we grant it broad discretion and will not disturb its decision unless there has been a clear abuse of that discretion." DeMarco v. Stoddard, 434 N.J. Super. 352, 381 (App. Div. 2014). "A trial court decision will constitute an abuse of discretion where 'the decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Saffos v. Avaya Inc., 419 N.J. Super. 244, 271 (App. Div. 2011) (citations omitted.)

As more fully set forth below, the requirement that Sussex County pay the counsel fees of the Petitioners is inconsistent with the plain language of the

Adult Protective Services Act and is, therefore, not authorized by law. The Appellate Division correctly found as much in its decision. 3Pa19.

Even assuming that the Trial Court was authorized to award attorneys' fees in the within matter, the Appellate Division properly found that it did not abuse its discretion when it correctly refused to do so. The Trial Court based its decision not to require APS to pay the fees of the Court-Appointed attorney and temporary guardian upon sound legal principles, which was rationally explained and supported by the factual record. That decision was properly affirmed on appeal.

### **POINT III**

#### **THE APPELLATE DIVISION PROPERLY AFFIRMED THE TRIAL COURT'S RULING THAT THE SUSSEX COUNTY OFFICE OF ADULT PROTECTIVE SERVICES CANNOT BE COMPELLED TO SATISFY THE FEES AND EXPENSES OF THE PETITIONERS**

Adult Protective Services is a legislative response to “the risks and dangers of abuse, neglect and exploitation faced by our older, infirm and vulnerable citizens, as well as all other adults who are physically or mentally disabled or deficient.” In re Farnkopf, 363 N.J. Super. 382, 385 (App. Div. 2003). “To meet these concerns, the Act created an efficient system for reporting the neglect, abuse and exploitation of vulnerable adults, and established the

authority by which the Superior Court may intervene, on an expedited basis, to protect these ‘vulnerable adults.’” Id. at 385-386. “Upon receiving a report that a vulnerable adult is being or has been the subject of abuse, neglect or exploitation, a county adult protective services provider (provider) ‘shall initiate a prompt and thorough evaluation of the report within 72 hours.’” Farnkopf at 386.

The Farnkopf Court also noted that:

If there is “reasonable cause” to believe a “vulnerable adult has been the subject of abuse, neglect or exploitation,” the provider is **required** to “determine the need for protective services” and make formal referrals to state, county and local agencies, and hospitals and organization, for services. N.J.S.A. 52:27D–411a. The provider is also **required** to “follow up on referrals,” N.J.S.A. 52:27D–411a, and may seek injunctive relief against a caretaker or any other person who interferes with the providing of protective services, N.J.S.A. 52:27D–412a. (emphasis added) [Id.]

In the Farnkopf case, APS received a referral indicating that Mr. Farnkopf may be the subject of financial exploitation. Id. at 386-87. APS filed an application for protective services, which resulted in the appointment of a temporary custodian. Once the appointment was terminated, the temporary custodian sought an order requiring the county office of aging to pay his fees. Id. at 389.

After determining that the Act permitted the appointment of a temporary custodian, the court examined whether the Office of Aging could be compelled to pay his fees. The Farnkopf Court concluded that “Our review of the possible legal sources for the shifting of fees to the Office on Aging leads to the inexorable conclusion that there simply is **no legal or factual basis for the order in question.**” Id. at 395 (emphasis added).

The plain language of the Act supports that conclusion. The definition of “protective services” at N.J.S.A. 52:27D-407 provides APS is to “arrang[e] for guardianship. . .” It does not require APS to pay for costs and expenses associated with guardianship proceedings. Furthermore, N.J.S.A. 52:27D-418 provides that “The court may order payments to be made by or on behalf of the vulnerable adult for the protective services *from his own estate.*” The Act contains no provision for the payment of “protective services” by APS. Most importantly, the Act specifically exempts APS from “civil liability when acting in the performance of [its] official duties. . .” N.J.S.A. 52:27D-409. As a result, the requirement that APS pay counsel fees of either a court-appointed temporary guardian or court-appointed counsel is not authorized by the Act and was beyond the authority of the Trial Court. As the Supreme Court has determined, courts may not “rewrite a plainly-written enactment of the Legislature or presume that



the Legislature intended something other than that expressed by way of the plain language.” O’Connell v. State, 171 N.J. 484, 488 (2002).

This Court has previously held that courts cannot “write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment,” Craster v. Bd. of Comm’rs of Newark, 9 N.J. 225, 230 (1952), or “engage in conjecture or surmise which will circumvent the plain meaning of [an] act.” In re Closing of Jamesburg High School, 83 N.J. 540, 548 (1980). A Court’s “duty is to construe and apply the statute as enacted.” Ibid.

A reversal of the Appellate Division’s decision would have a chilling effect on the implementation of the Act because county adult protective service providers statewide would hesitate to implement “protective services” if they risk being saddled with costs not specifically authorized by the Act. That would clearly thwart the Legislature’s efforts to protect against “the risks and dangers of abuse, neglect and exploitation faced by our older, infirm and vulnerable citizens. . .,” Farnkopf at 385, and would be contrary to public policy.

The Appellate Division considered this issue in In the Matter of Guardianship of DiNoia, 464 N.J. Super. 562 (2019). There, the Court stated that “In Farnkopf, we determined that fee shifting to an organization providing protective services to pay counsel fees of a court-appointed counsel is not

warranted unless the trial judge finds that one of the exceptions to the American Rule is present. In the event such an exception does not exist, then the fees must be paid from the estate only.” Id. at 568. However, the DiNoia Court did not address the extent to which N.J.S.A. 52:27D-409 prohibits an award of counsel fees against APS.

Should this Court grant Certification, it should take the opportunity to affirm the decision in Farnkopf and rule that such an award is not legally authorized by the Act. As properly stated by the Appellate Division, “the language of N.J.S.A. 52:27D-409(e) remains the same and prohibits a court from ordering payment from APS unless APS’s employees’ conduct was ‘outside the scope of their employment, or constitutes a crime, actual fraud, actual malice or willful misconduct.’” 3Pa19.

Contrary to Mr. Kossup’s assertion, the application of N.J.S.A. 52:27D-409(e) is not limited to instances where APS has been subjected to suit. There is no language in the Act which limits its application solely to lawsuits. The language used is criminal or civil liability. Here, the Petitioners attempted to hold APS “liable” for the fees and expenses they incurred in assisting Hank. The clear language of the Act prohibits the imposition of such liability, unless one of the enumerated exceptions apply. In this case, there were no facts which

would support a finding that the conduct of APS constituted a crime, actual fraud, actual malice, or willful misconduct. No such facts have been identified by the Petitioners. As a result, the Court lacked the legal authority to require APS to pay the fees requested.

It is important to note that the DiNoia decision did not stand for the proposition that APS is generally responsible for the payment of attorneys' fees in all guardianship cases it pursues, as the Petitioners suggested below. Instead, the holding is limited to the particular and extraordinary facts found in that case in which the Appellate Division found that the Trial Court did not abuse its discretion in awarding fees under the particular facts found in that case.

The present case is legally and factually distinguishable from DiNoia. Here, it was made abundantly clear from the outset that Hank had no assets. Included with the Verified Complaint was a certification of assets in which Ms. Krajick-Larsen indicated that Hank had no assets and that his only source of income was Social Security benefits. In Paragraphs 37-40 of the Verified Complaint, it was clearly indicated that Hank had no significant assets and that his only income appeared to be his Social Security benefits. Both the Verified Complaint and Certification of Assets, along with the other supporting documents, were provided to both Petitioners.

Both Petitioners were provided with ample notice, by the language that was improperly excised from paragraphs 43 and 44 of the verified complaint, and in counsel's June 16, 2020, letter to the Court, that APS would object to any application to order it to reimburse their counsel fees. Both Petitioners accepted their appointments with the full knowledge that APS would take that position and would rely on the plain language of the APS statute in doing so.

Neither Petitioner located any additional income or assets. As a result, both were fully aware that Hank had no assets which could satisfy their fees. APS fulfilled its statutory duties in full and was compelled to file the guardianship complaint once it obtained the assessments indicating that Hank needed a plenary guardian. It was not until a contrary expert opinion was presented on behalf of Hank that it was able to amend its position.

During the matter, there were no extraordinary legal filings that needed to be addressed by the Petitioners. The length of time to resolve this matter was due to questions by both Petitioners as to whether Hank required the appointment of a plenary guardian. Mr. Kossup initially concurred that a plenary guardian was appropriate. Later, both Petitioners objected to the appointment of a guardian. Once a doctor of their own choosing examined Hank, it was

determined that limited guardianship was necessary. The Petitioners did not undertake any actions that APS should have undertaken. The extraordinary circumstances found by the DiNoia trial court to justify ordering APS to pay the counsel fees are not present in this case. The Appellate Division review of the matter confirmed that the circumstances that justified the imposition of fees in DiNoia were lacking.

Both Petitioners urge this Court to grant certification to resolve a conflict between Court Rule 4:86-4 and N.J.S.A. 52:27D-409(e). However, there is no such conflict. The Court Rule merely states that “The compensation of the attorney for the party seeking guardianship, appointed counsel, and of the guardian ad litem, if any, 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.” That language does not require that the party seeking the appointment of a guardian, as APS was in the instant matter, is responsible for the payment of the fees of appointed counsel or guardian ad litem. Petitioners’ reliance on “in such other manner as the court shall direct” is misplaced. That language merely gives the Court the authority to direct the payment of fees in a manner other than by payment from the estate of the alleged incapacitated person. It

does not compel the Court to order APS, or any other party seeking guardianship, to pay the fees and expenses of appointed counsel.

Even if there were a conflict between Court Rule 4:86-4 and N.J.S.A. 52:27D-409(e), it is the statute that controls, not the Court Rule. See, e.g., State v. Gomes, 253 N.J. 6, 19 (2003); Winberry v Salisbury, 5 N.J. 240 (1950). Petitioners have conveniently ignored this legal principle and, instead insist that the APS statute must yield to the Court Rule, while, also misinterpreting the court rule to require that APS pay their fees.

Lastly, but perhaps most importantly, ordering APS to pay counsel fees of appointed counsel and guardians ad litem in most, if not all cases, will have a substantial detrimental impact on the ability of APS to perform its core functions. As set forth by Ms. Bruseo in her certification, APS must meet its obligations to the community on a very limited budget. Ra39. APS exists to assist the most vulnerable members of society. Oftentimes, APS represents the last hope for these individuals. If APS were required to pay counsel fees for each guardianship application it files, it would easily overwhelm its entire budget, leaving no room for the provision of emergency services, doctor's assessments, or the balance of its responsibilities. APS simply does not have the funds to pay

the fees and expenses of appointed counsel and guardians ad litem who agree to assist with these cases.

Fortunately, this Court has seen fit to provide a tangible benefit to attorneys like the Petitioners. They, along with other members of the Bar who agree to accept these appointments on a pro bono basis, can request an exemption from the pro bono requirements established by Madden v. Delran, 126 N.J. 591 (1992). This Court amended the rule to permit this benefit presumably since attorneys often voluntarily perform these services in APS cases, knowing that the clients rarely have funds available to pay these costs. This is at least a tacit acknowledgement that there are circumstances when it is not possible for court-appointed counsel to be paid for their services. Unfortunately, those are the circumstances that APS clients often present with. APS does not have the ability to decline to assist these people. APS exists to assist these and other members of our society. If this Court reverses the decision of the Appellate Division rules that APS can be compelled to pay legal fees and expenses of court appointed counsel and guardians, it will undoubtedly have a chilling effect statewide. The decisions of the courts below were consistent with the applicable law and amply supported by the factual record. The lower court did not abuse its discretion in refusing to require APS to pay the requested fees

and the Appellate Division properly affirmed that decision on appeal. Should this Court grant Certification, it should rule that APS cannot be compelled to pay counsel fees and expenses of court-appointed counsel or guardians unless the specific exemptions set forth in N.J.S.A. 52:27D-409(e) are present. To do otherwise would impermissibly ignore the plain language of the APS act.

### CONCLUSION

For the reasons more fully set forth above, it is respectfully requested that, should this Court grant Certification, it should affirm the Appellate Division's decision affirming the Trial Court's denial of the Petitioner's applications to order APS to pay the attorneys' fees and costs incurred in this matter.

Respectfully Submitted,

JOHNSON & JOHNSON, ESQS.

By: /s/ William G. Johnson  
William G. Johnson, Esq.

Dated: 1/24/2024