Appeal No. 625 MAL 2021

IN THE SUPREME COURT OF PENNSYLVANIA

IN RE ITALIANO, An Alleged Incapacitated Person

On Petition for Leave to Appeal from a Final Judgment
of the Superior Court of Pennsylvania
No. 202 MDA 2021
Affirmed the Huntingdon County Orphans Court at No. 2019-177

PETITION FOR LEAVE TO FILE AMICI CURIAE BRIEF

[CORRECTED – typos at page 1]

DAVID FERLEGER, ESQ.(for notice)
413 Johnson St., Suite 203
Jenkintown, PA 19046
david@ferleger.com

THOMAS H. EARLE, ESQ.
112 N. 8th Street, Suite 600
Philadelphia, PA 19107
thomasearle@libettyresources.com

LANDON R. HODGES, ESQ,
Steinbacher, Goodall & Yurchak
328 S. Atherton St.
State College, PA 16801
LHodges@paeldercounsel.com

Attorneys for Amici Curiae

Petitioners Pennsylvania Statewide Independent Living Council; Pennsylvania Council on Independent Living; Harrisburg Center For Independent Living; Liberty Resources, Inc.; Roads to Freedom Center for Independent Living of North Central Pa; Disabled in Action of Pa; Adapt PA, pursuant to Rule of Appellate Procedure. respectfully move this Honorable Court to grant leave to file the attached *Brief for Amici Curiae*, pursuant to Pa.R.A.P. 531(b)(1)(3).

In support of this petition, Amici represent that they have perspectives not currently before the Court, and that they have currently unrepresented expertise and experience to address legal issues in this case.

Amici further represent that they believe legal questions exist which the Court can decide *de novo*, and which are dispositive.

Finally, Amici demonstrate in the brief that the issues before the Court raise matters of state-wide and national concern regarding guardianship which profoundly affect individuals who were, are or may be subject to guardianship proceedings, as well as their families, guardians, agencies and courts.

WHEREFORE, Petitioners respectfully move this Honorable Court to grant leave to file the attached Brief for Amici Curiae.

Respectfully submitted,

DAVID FERLEGER, ESQ.(for notice)

THOMAS H. EARLE, ESQ.

LANDON R. HODGES, ESQ,

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Motion for Leave to File Amici Curiae Brief, together with Brief for Amici Curiae, on all other counsel in this case, by sending said documents to them by overnight delivery, and by United States mail, on April 18, 2022.

Ray A. Ghaner
Gill, McManamon & Ghaner
200 Penn St,
Huntingdon, PA 16652

Michael Markus Kipphan,
Address: 219 Mifflin St
Po Box 361
Huntingdon, PA 16652-1435

David Ferleger

Appeal No. 625 MAL 2021

IN THE SUPREME COURT OF PENNSYLVANIA

IN RE DAVID ITALIANO, an Alleged Incapacitated Person

On Petition for Leave to Appeal from a Final Judgment
of the Superior Court of Pennsylvania
No. 202 MDA 2021
Affirmed the Huntingdon County Orphans Court at No. 2019-177

AMICI CURIAE BRIEF
by
PENNSYLVANIA STATEWIDE INDEPENDENT LIVING COUNCIL;
PENNSYLVANIA COUNCIL ON INDEPENDENT LIVING;
HARRISBURG CENTER FOR INDEPENDENT LIVING;
LIBERTY RESOURCES, INC.;
ROADS TO FREEDOM CENTER FOR INDEPENDENT LIVING OF NORTH CENTRAL PA;
DISABLED IN ACTION OF PA;
ADAPT PA

DAVID FERLEGER, ESQ.(for notice)
413 Johnson St., Suite 203
Jenkintown, PA 19046
david@ferleger.com

THOMAS H. EARLE, ESQ.
112 N. 8th Street, Suite 600
Philadelphia, PA 19107
thomasearle@libettyresources.com

LANDON R. HODGES, ESQ,
Steinbacher, Goodall & Yurchak
328 S. Atherton St.
State College, PA 16801
LHodges@paeldercounsel.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes and Regulations

Other Authorities

General Accounting Office, *Collaboration Needed to Protect Incapacitated Elderly People,* GAO-04-655 (Washington, D.C.: July 13, 2004); 6

NASDDS and HSRI, National Data Brief, April 2019, https://www.nationalcoreindicators.org/upload/core-indicators/NCI_GuardianshipBrief_April2019_Final.pdf 8

National Council on Disability, *Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination* (2018) 7, 8

U.S. Senate Special Committee on Aging press release, October 1, 2021) https://www.aging.senate.gov/press-releases/in-case-you-missed-it-casey-in-buzzfeed-on-fixing-americas-guardianship-system 7

Wood*, State-Level Adult Guardianship Data: An Exploratory Survey* (American Bar Association Commission on Law and Aging for the National Center on Elder Abuse (August 2006) 6

Workforce Innovation and Opportunity Act, 29 USC Ch. 32**,** Pub. L. 113–128, §1(a), July 22, 2014, 128 Stat. 1425. The Final Rule (is at https://www.federalregister.gov/documents/2016/10/27/2016-25918/independent-living-services-and-centers-for-independent-living 81 FR 74682. The Center for Independent Living Program is at Subpart C at 45 CFR 1329. The regulation was issued under the authority of 29 U.S.C. 709; 42 U.S.C. 3515e. 1

INTERESTS OF THE AMICI CURIAE

A. Amici under Federal Statute and Regulation

Five Amici are Pennsylvania organizations which, under applicable federal statute and regulation, are funded and regulated through the United States Administration on Community Living. These Centers for Independent Living and supporting state entities, have a responsibility and obligation under federal law to provide certain core services to eligible individuals, including advocacy. *See* Workforce Innovation and Opportunity Act (Act) and the final rule adopted by the federal Administration on Community Living.[1] These Amici serves individuals who have been, are, or are at the risk of involvement in guardianship proceedings,.

The following five Amici are established under the law and regulations cited in the preceding paragraph:

The **Pennsylvania Statewide Independent Living Council (SILC)** is a federally mandated and funded cross-disability, consumer-controlled organization, the mission of which to use our collective power and legal mandate to develop and secure public policies that ensure civil rights and expand options for all people with disabilities in all aspects of life. **SILC** meets the section 705 of the Act and is authorized to perform the functions outlined in section 705(c) of the Act in the State, SILC ensures that CILs meet the requirements for the State Plan for

---

[1] 29 USC Ch. 32, Pub. L. 113–128, §1(a), July 22, 2014, 128 Stat. 1425. The Final Rule (published October 27, 2016) is at https://www.federalregister.gov/documents/2016/10/27/2016-25918/independent-living-services-and-centers-for-independent-living 81 FR 74682. The Center for Independent Living Program is at Subpart C at 45 CFR 1329. The regulation was issued under the authority of 29 U.S.C. 709; 42 U.S.C. 3515e.

Independent Living (SPIL)[2], and Center for Independent Living standards and assurances;

The Pennsylvania Council on Independent Living (PCIL) is a membership association of Centers for Independent Living (CILs) in Pennsylvania. Currently 15 of the 17 CIL's in PA are active PCIL Board Members. PCIL supports systemic advocacy efforts to restore the rights of individuals with disabilities under guardianship to least restrictive settings. Consistent with the Independent Living principles, PCIL supports guardianships only after lesser restrictive or limited guardianship alternatives are ruled out, when necessary to assure the safety and welfare of the individual. Through services provided by its members, PCIL has becoming increasingly concerned with the significant number of restrictive, unnecessary and abusive guardianship cases.

Liberty Resources, Inc. ("LRI") is the federally-funded Center for Independent Living for persons with disabilities (our "consumers") in the Philadelphia area. Pursuant to the Rehabilitation Act of 1973, Section 504, Part C funding, LRI is federally mandated to provide independent living, community-based core services, including nursing home transitions and deinstitutionalization work. Many of LRI's consumers are at risk of placement in nursing and other facilities for their long-term care services and supports. LRI seeks to ensure that people with disabilities across Pennsylvania can live in the least restrictive manner in their communities of choice, receiving long-term care services and supports appropriate to their individual needs. Guardianship should be limited to seeking the services and supports needed by the individual in the least restrictive setting appropriate for the person with the disability. When utilized, limited guardianship

[2] 2021-2023 State Plan for Independent Living (SPIL), https://pasilc.org/independent-living/state-plan-for-independent-living/

should be preferred, as is provided by Pennsylvania law.This is consistent with the civil rights of people with disabilities protected under Title II of the Americans with Disabilities Act and the landmark U.S Supreme Court's ruling in *Olmstead v. L.C.*, 527 U.S. 581 (1999).

Center for Independent Living of South Central PA (CILSCPA) is the federally funded Center for Independent Living for People with disabilities in the South Central Pennsylvania area. CILSCP individuals in the seven (7) Counties of Blair, Cambria, Fulton, Huntingdon, and Indiana and Somerset. Like the other Centers which are Amici, CILSCPA is mandated to provide independent living, community-based services, including nursing home transition and advocacy services.

CILSCPA seeks to improve community living outcomes for the individuals it serves, including implementation of the right to live and receive services in the least restrictive setting, in the communities of our choosing, based on our needs.

Roads to Freedom Center for Independent Living of North Central PA (RTFCIL) is a disability led social justice organization federally mandated and authorized to provide community services to people of all disabilities. RTFCIL, in compliance with its federal mandate, promotes the applicable standards under federal law. Consistent with the Guardianship Code's preference for limited guardianship, and state law's "least restrictive alternative' approach, RTFCIL works to increase the availability and improve the quality of community options for independent living. RTFCIL's clients, historically and at present, include individuals subject to guardianship proceedings, who have been adjudicated incapacitated, and for whom guardians have been appointed.

B. Amici Consumer Advocates

Disabled in Action of PA ("DIA") is a grassroots cross-disability organization advocating for civil rights. Many of DIA's members are people with

disabilities at risk of placement in nursing or other restrictive facilities for their long-term care services and supports. DIA advocates, both individually and collectively, to ensure that people with disabilities across Pennsylvania receive their long-term care services and supports in the least restrictive setting appropriate to their individual needs in the community. DIA supports guardianships only as a last resort, and only when necessary for the safety and well-being of the individual. DIA recognizes that limited guardianship is preferred, as such guardianship maximizes personal autonomy and seeks the services and supports needed by the individual in the least restrictive setting appropriate for the individual. DIA's organizational and members' interests are adversely impacted and infringed upon with when guardianships are misapplied.

PA ADAPT is an unincorporated association of members with disabilities who live independently across the Commonwealth of Pennsylvania. PA ADAPT is a chapter of national ADAPT, a United States grassroots disability rights organization with chapters in 30 states and Washington, D.C. ADAPT works to change laws, policies, and services affecting disabled people, but also to challenge stigmatizing stereotypes and to empower disabled people to advocate on their own behalf. PA ADAPT is deeply concerned about the risks posed to persons with disabilities by misapplied guardianships that force individuals into nursing homes and other restrictive placements. Unnecessary guardianship placements are especially dangerous because of the high infection and fatality rates due to the ongoing global Covid-19 pandemic. PA ADAPT considers guardianship as a last resort for truly incapacitated persons and only when implemented in the least restrictive setting (community placement) appropriate to the individual's needs. Members of PA ADAPT are fearful of the risk posed by mistaken or erroneous application of the law, and use of full guardianships which deprive individuals of self-determination and other rights.

• • • •

No person or entity other than the *amicus curiae*, its members, or counsel paid in whole or in part for the preparation of this *amicus curiae* brief or authored in whole or in part this *amicus curiae* brief.

STANDARD OF REVIEW IS *DE NOVO*

This brief sets forth legal errors by the Superior Court. Those errors are subject to *de novo* review.

While courts "employ a deferential standard when reviewing a decree entered by the orphans' court. *In re Estate of Smaling*, 2013 PA Super 294, 80 A.3d 485 (Pa.Super. 2013), and findings of fact are reviewed for abuse of discretion, reviewing courts in guardianship cases "are not constrained to give the same deference to any resulting legal conclusions." *In re Estate of Fuller*, 2014 Pa. Super 39, 87 A.3d 330, 333 (2014). *Accord*, *In re Estate of Walterman*, 116 A.3d 704 (Pa. Super. Ct. 2014); *In re Peery*, 556 Pa. 125, 129 (1999).

STATEMENT OF THE CASE

A. The National Importance of the Guardianship Issues Here

Critiques of the guardianship system are growing and area matter of serious state and national concern. Famously, the 1987 comprehensive AP report, *Guardians of the Elderly: An Ailing System* found that "the nation's guardianship system, a crucial last line of protection for the ailing elderly, is failing many of

those it is designed to protect."[3] Similar conclusions have been exposed over the years.[4]

The need for protections will likely increase as "baby boomers" advance in years. "According to the U.S. Census Bureau, by the year 2025, the number of Americans aged 65 and older will increase by 60 percent. As citizens age, they may become physically or mentally incapable of making or communicating important decisions for themselves, such as those required to handle finances or secure their possessions."[5]

Guardianship impacts more than a million individuals who are under guardianship (and their families, friends, state and other agencies, and the courts as well). Although data is difficult for researchers to collect, most commonly cited is that about 1.3 million guardianship or conservatorship cases are active at any given time in the United States, [6] managing assets that total at least $50 billion for people whose rights have essentially been stripped from them, according to the United State's National Council on Disability's 2019 report to then-President Trump.[7]

---

[3] Bayles & McCartney, *Guardians of the Elderly: An Ailing System* (Associated Press, (1987).

[4] "More recent press accounts (Wendland-Bowyer ,Detroit Free Press, 2000; Rubin, Phoenix New Times, 2000; Kilzer & Lindsay, Rocky Mountain News, 2001; Leonnig, The Washington Post, 2003; Glaberson, The New York Times, 2004; Leonard, Los Angeles Times, 2005) mirror the AP claims, despite continuing reform efforts." Wood*, State-Level Adult Guardianship Data: An Exploratory Survey* (American Bar Association Commission on Law and Aging for the National Center on Elder Abuse (August 2006) at 9." ("Wood").

[5] General Accounting Office, Report to the Chairman, Special Committee on Aging, U.S. Senate, *GUARDIANSHIPS: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* (GAO -10-1046 (2010). ((cover letter to Senate committee chair).

[6] See Wood, supra at 9 (citing a number of reports). See GAO, *Collaboration Needed to Protect Incapacitated Elderly People,* GAO-04-655 (Washington, D.C.: July 13, 2004); and *Little Progress in Ensuring Protection for Incapacitated Elderly People*, GAO-06-1086T (Washington, D.C.: September 7, 2006)

[7] The national Council on Disability is a federal agency, the members of which are appointed by the President. On the $1.3 million, see "*The National Center for State Courts estimates that*

The case at bar is an example of "overuse of plenary guardianship."[8] Much of the research and literature in the field supports the use of limited guardians (just as Pennsylvania law supports limited guardianship, as we discuss below). However, in practice, limited guardianships are underutilized.

> Empirical studies indicate that courts do not take advantage of the limited guardianship option and rarely limit a guardian's authority. * * * As one scholar postulated, "[a]s long as the law permits plenary guardianship, courts will prefer to use it," even though such guardianships are only appropriate in a sub-set of cases. Quoted in NCD at 87-88 Internal citations omitted).[9]

There is thus good reason that this Court has long required "utmost caution and conservatism." in imposition of guardianship. *Hoffman's Estate*, 209 Pa. 357, 359 (1904). Guardianships can be misused. Those under guardianships have been taken advantage of. The he 2010 United States General Accounting Office study found hundreds of allegations of physical abuse, neglect and financial exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010, as well as theft of $5.4 million in assets from their wards.[10]

---

approximately 1.3 million people in the US live under a guardianship or conservatorship ruling." U.S. Senate Special Committee on Aging press release, October 1, 2021)

https://www.aging.senate.gov/press-releases/in-case-you-missed-it-casey-in-buzzfeed-on-fixing-americas-guardianship-system

[8] National Council on Disability, *Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination* at 87-88 (2018) (NCD). "[Overuse of plenary guardianship" is the heading of a section in the National Council on Disability NCD report. NCD is an independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.

[9] Quoted in NCD at 87-88 (internal citations omitted)

[10] General Accounting Office, Report to the Chairman, Special Committee on Aging, U.S. Senate, *GUARDIANSHIPS: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* (GAO -10-1046 (2010).

Guardianship, including those adjudicated in good faith and in accordance with the law, can impact individuals negatively:

> Guardianship orders impact the very decisions that define people as human beings, and thus have significant impact on the daily lives of people subject to them. Studies have found that, when a person loses the right to make his or her own decisions, there will likely be a negative impact on the person's functional abilities, physical and mental health, and general well- being. One scholar talks about the "constructive isolation of guardianship" and its impact on people. People subject to guardianship can "feel helpless, hopeless, and self-critical" and experience "low self-esteem, passivity, and feelings of inadequacy and incompetency," as well as significantly decreased "physical and mental health, longevity, ability to function, and reports of subjective well-being."[11]

Similar findings are reported in another government supported report:

> When a guardian's decision substitutes for that of the individual with IDD [individuals with developmental disabilities], the following losses may result:
>
> - People may not be included in conversations where important decisions are made about their lives;
> - People don't develop the skills necessary to participate in decisions (e.g., individual service plan) because they must rely on others;
> - When they want to make a purchase, get married, open a bank account or enter into a legal agreement, people must ask permission;
> - They are deprived of the "dignity of risk";
> - Doctors, dentists and other medical professionals may not include the person in any treatment planning.
>
> Research on the negative impact of the imposition of guardianship on the quality of life of the individual indicates:
>
> - A person is denied the ability to be a causal agent in his/her life and often "feels helpless, hopeless, and self-critical";

[11] NCD at 87-88.

- "Low self-esteem, passivity and feelings of inadequacy and incompetency" associated with loss of autonomy and self-determination also result in decreased functioning;
- Being subject to guardianship may affect subjective well-being including physical and mental health. [12]

B. The Facts

For the purposes of this brief, Amici accept and incorporate the Superior Court's statement of the facts relevant to the discussion in the argument below. The Superior Court "incorporate[s] our above discussion of the [trial] court's opinion," and therefore, Amici do as well.

The guardianship proceeding was filed by a government agency (which subsequently was appointed his guardian); the proceeding was prompted by Appellant's then-wife. The agency expressed to the Orphans Court its deep concern that she was abusing Appellant physically and not feeding him, and that she stole opiate pain medicine from him; she subsequently pleaded guilty to the opiate theft.[13] To keep Appellant away from his abusive wife, "Appellant "was even given a different name to refer to[,] instead of his own," and was essentially "hidden from her so she could not continue the pattern of abuse[.]"[14] During the

---

[12] NASDDS and HSRI, National Data Brief, April 2019, https://www.nationalcoreindicators.org/upload/core-indicators/NCI_GuardianshipBrief_April2019_Final.pdf (footnotes omitted).

[13] Slip Op. at 2:

> The Agency alleged he was not capable of caring for himself. It was also alleged that Appellant was being abused by his wife; her actions "include[ed] jumping on . . . his back, and causing back injury, putting him in women's clothing while she has designer purses and things, [and] not feeding him. [Appellant] would have to get someone to take him to the food bank to get food." N.T., 1/12/21, at 21. Appellant's wife also "[stole] Oxycodone from him," for which she subsequently pleaded guilty.

[14] Slip Op. at 3.

proceedings, and before the final adjudication challenged in this appeal, the abusive wife died.[15]

The Orphan's Court found (and the petitioning agency declared) that "Appellant, now 72 years old, 'has made substantial progress in regard to both his physical and medical condition since the initial [October 2019] decree finding incapacity[,] and there is substantial evidence showing that, **with appropriate support**, he can live very independently." Orphans' Ct. Op. at 3 (emphasis added). ***see also*** N.T., 1/12/21, at 32. The court then concluded "it is the need for such support that renders [Appellant] incapacitated." Orphans' Ct. Op. at 3."[16] 2021 Pa . Super. Unpub. LEXIS 2893 *; Slip Opinion at 13 (emphasis added by Superior Court);

The Orphans Court received a letter from the then-guardian advising "Appellant is competent and does not need a guardian to make personal and health care decisions for him[;]."[17] That guardian submitted to the court the evaluation of a psychologist, which stated to the Orphans Court, as quoted by the Superior Court, that "None of the standardized tests completed by [Appellant] on May 18, 2020 indicate any cognitive impairment."[18]

A psychiatrist report to the court stated, "Perhaps he could go onto completely independent living eventually but it would be good to see he can

---

[15] Slip Op. at 3.:

[16] Of course, the need for support in the community does not, in and of itself, require plenary guardianship. *See* discussions below of *In re Peery* and limited guardianship.

[17] Slip Opinion at 3.

[18] Slip Op. at 3.

function adequately and safely with more liberty than what is available to him here [at the nursing home]."[19]

Appellant's estate consists of two vehicles and a former home which appears to now be unlivable. He receives Social Security income of approximately $1,000 monthly and Medicaid with nursing home benefits. Slip.Op. at 6-7. Appellant's needs include help with some daily living activities. some level of community residential support and supervision; this is how the nursing home's physician/medical director explained that Appellant might become a "victim of designing persons."[20]

> Dr. Wiegand testified as to Appellant's need for supervision: [Appellant is] very impressionable and he can be led astray very easily. He makes poor decisions frequently as far as taking his medications, [and] what his belief of what needs to be done for his health. So without some type of supervision on some level, I think he could very easily not take his medications and end up not being able to provide for himself and may possible be left on the street.

Slip Op**.** at 6. Dr. Wiegand "very much" believed that Appellant could "be the victim of designing persons[.]" ***Id.*** at 7.

However, Dr. Wiegand agreed Appellant did not require a skilled nursing facility, as he is "totally functional with taking care of activities of daily living." N.T., 1/12/21, at 8. A "personal care or [an] assisted living home would be more appropriate for" him. ***Id.*** Nevertheless, Appellant needed oversight of his finances and "someone to just help him with his decisions at times[,]" for example, to eat regularly, take his medications, follow up with doctors, and to ensure he is not

---

[19] Slip Op. at 5.

[20] Slip. Op. at 6.

"easily led astray" by other people who "tell him [when] things aren't completely true or that are not in his best interests[.]"

While the psychiatrist and nursing home director expressed concern that Appellant could be a "victim of designing persons," the petitioning agency's protective services worker, "agreed, however, that Appellant could live 'in a less restrictive setting.'"[21]

The Superior Court agreed with the Orphans Court, that "there is substantial evidence showing that, with appropriate support, he can live very independently." And that the court then concluded "it is the need for such support that renders [Appellant] incapacitated."[22]

The Superior Court upheld the plenary guardianship order, in what it (and the trial court) called a "close call."[23] The Superior Court and the Orphans Court noted, "this is a very difficult case, because based on the facts, it is a close call as to whether Appellant remains incapacitated."[24]

As discussed below, the Superior Court did not discuss limited guardianship, did not follow the two-part analysis required by *In re Peery*, and did not recognize that a "close call" does not meet the applicable standard of proof.

---

[21] Slip Op. at 7.

[22] Slip Op. at 13.

[23] Slip Op. at 9

[24] *Id.*

ARGUMENT

This appeal raises profound issues of state-wide and national importance, affecting countless individuals who are or may be under guardianship, their families, and the agencies which serve them. The questions here arise on questions of law which may be straightforwardly resolved *de novo* on the facts before the court.

The Superior Court failed to acknowledge or seriously consider the Guardianship Code's express preference for limited guardianship over plenary guardianship. That preference conforms to the statute's mandate that courts must employ 'least restrictive' methods of accomplishing its purposes. 20 Pa.C.S. § 5502.

This 'least restrictive' statutory language is binding and sufficient to reverse the decision below. We urge the Court here to apply the more robust community integration mandate in Title II of the Americans with Disabilities Act (ADA)[25] and the United States Supreme Court's landmark ruling in *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 591 (1999), that require services and supports for people with disabilities to be provided to individuals in the most integrated setting appropriate to the needs of the individual. In the Commonwealth and many other states, people with disabilities, such as Appellant, have been placed in isolated restrictive facilities like nursing homes and other institutional settings instead of being providing needed services and supports in integrated community-based settings; remediation of this institutional bias is stated as a top priority among the Amici groups. *See Helen L. v. DiDario***,** 46 F.3d 325 (3d Cir. 1995) (Pennsylvania

[25] Title II, 42 U.S.C. §§ 12131–12134. *See* 28 CFR PART 35 (Nondiscrimination on the Basis of Disability in State and Local Government Services).

violated the ADA by requiring that plaintiff receive required care services in a nursing home rather than in her own home through an attendant care program).

Consistent with *Olmstead*, the Superior Court accepted that Appellant "did not require a skilled nursing facility, as he is totally functional with taking care of [his] activities of daily living" and that a "personal or [an] assisted living home would be more appropriate for him." [26]

The Superior Court's decision is based on clearly erroneous legal conclusions, Its decision should be reversed on three independent grounds: the failure of the court to prefer limited guardianship as required by the statute (Section II); the failure of the court to comply with this Court's requirements in *In re Peery* (Section III); the failure of the court to adhere to the "clear and convincing" and "preponderance" standard. Calling this case a "close call," by definition, establishes that the standard is not met (Section IV);

For at least 110 years, this Court has directed that guardian statutes must "be administered by the courts with the utmost caution and conservatism." *Hoffman's Estate*, 209 Pa. 357, 359, 58 A. 665, 666 (1904). *Accord*, *Denner v. Beyer*, 352 Pa. 386, 388 (1945). As we show below, the court below did not rule with the required "utmost caution and conservatism."

I. THE COURT BELOW FAILED TO PREFER LIMITED GUARDIANSHIP

The court below did not consider a limited guardianship, as required by 20 P.S. § 5512.1(e) and 20 P.S. § 5512.1(a)(6).

Pennsylvania's guardianship statute eloquently "establish[es] a system which permits incapacitated persons to participate as fully as possible in all

[26] Slip Op. at 6 (citing Orphans Court evidence).

decisions which affect them . . . protect[s] their rights . . . [and] develop[s] or regain[s] their abilities to the maximum extent possible." 20 P.S. §5502.[27] The statute "accomplishes these objectives through the use of the *least restrictive alternative*." *Id.* (emphasis added).

This Court has emphasized that the statute "compel[s] courts to narrowly tailor every guardianship order" and to "accomplish the goal of assisting these persons while employing the 'least restrictive' methods of doing so. 20 Pa.C.S. § 5502. Guardians should be appointed only when such services are necessary." *Gavin v. Loeffelbein*, 205 A.3d 1209, 1222 (Pa. 2019). *Accord*, *Estate of Phillips*, 201 A.3d 846 (Pa. Super. Ct. 2018) ("least restrictive alternative").

Pennsylvania law provides for two types of guardianship: plenary and limited. Implementing the Code's "least restrictive alternative" principle, Limited guardianship is explicitly preferred. Plenary guardianship requires "total incapacity."

A **plenary guardian** is discretionary. "The court may appoint a plenary guardian of the person only upon a finding that the person is totally incapacitated and in need of plenary guardianship services." 20 P.S. § 5512.1(c). (guardian of the person). Similarly: "A court may appoint a plenary guardian of the estate only upon a finding that the person is totally incapacitated and in need of plenary

---

[27] 20 P.S. §5502:

> Recognizing that every individual has unique needs and differing abilities, it is the purpose of this chapter to promote the general welfare of all citizens by establishing a system which permits incapacitated persons to participate as fully as possible in all decisions which affect them, which assists these persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources and developing or regaining their abilities to the maximum extent possible and which accomplishes these objectives through the use of the least restrictive alternative; and recognizing further that when guardianship services are necessary, it is important to facilitate the finding of suitable individuals or entities willing to serve as guardians.

guardianship services. 20 P.S. § 5512.1(e). (guardian of the estate). (emphasis added).

Limited guardianship is unequivocally preferred. 20 P.S. § 5512.1(a)(6) ("The court shall prefer limited guardianship" in all cases.). If the individual is "partially incapacitated," then "the court shall enter an order appointing a limited guardian of the person. . . ." 20 P.S. § 5512.1(b) (emphasis added); even in that situation, the order is further limited; the limited guardian's powers must be "consistent with the court's findings of limitations." (guardian of the person). When the person in "partially incapacitated," "the court shall enter an order appointing a limited guardian of the estate . . . ." 20 P.S. § 5512.1(d). Thus, absent total incapacity, the Orphans Court has no choice; it shall appoint a limited guardian.

The requirement of limited guardianship for those who are partially incapacitated has a reasonable and practical foundation. Plenary guardianship has a blunderbuss impact which is inappropriate for individuals who are not fully incapacitated. Limited guardianships are nuanced and calibrated to the individual's circumstances. As the Superior Court put it, a limited guardianship can be "carefully crafted." *In re Sabatino*, 159 A.3d 602 (Pa. Super. Ct. 2016) (upholding limited guardian, because limited guardianship was "carefully crafted" as it declared the person incapable of entering contracts, gave guardian authority to make appropriate medical decisions, and to oversee disagreements between team and family).

Except in a few conclusory phrases reciting its adjudication of Appellant as "totally incapacitated," the court below engages in no analysis of why it finds that Appellant is totally incapacitated and why the law's preference of a limited guardianship is ignored. Indeed, the Superior Court's only reference to limited guardianship is to quote – but not respond to – Appellant's suggestion:

> Appellant suggests that a limited guardian may be appropriate, but "based on the medical evidence, [he] does not meet the threshold of someone who is incapacitated and in need of a Guardian of his Person and Estate." *Id.* at 10 [citing Appellant's brief]. We conclude no relief is due.
> Slip Op. at 10.

In just six words ("We conclude no relief is due") and with no explanation, the court below rejects limited guardianship.

II. THE COURT BELOW FAILED TO COMPLY WITH *IN RE PEERY*

The court below erred in in conflating "incapacity" with "need for a guardian." These are two separate issues, as this Court has held. *See In re Peery*, 556 Pa. 125, 129, 727 A.2d 539, 540 (1999) ("dual issues").[28]

This Court importantly found that the statutory procedure for the determination of incapacity, 20 Pa.C.S. § 5512.1(a), "*requires* the court, in determining incapacity, to weigh the available support of others. We have no difficulty concluding, therefore, that a person cannot be deemed incapacitated if his impairment is counterbalanced by friends or family or other support." *In re Peery*, 556 Pa. 125, 130, 727 A.2d 539, 541 (1999) (emphasis in original).

Ignoring the two-part analysis required by *Peery*, the court below failed to consider whether Appellant's incapacity was "counterbalanced" by other supports.

The "dual issues" under *Peery* requires, first, a determination of whether the individual is incapacitated (and whether fully or partially). Separately, the need for a guardian must be determined.

a. As to the first *Peery* issue, the courts below never squarely addressed whether Appellant was partially incapacitated.

[28] The statute itself references the "dual issues" discussed by the Court in *In re Peery*. 20 P.S. § 5512.1(a)(6) (the statute is titled, "Determination of incapacity and appointment of guardian.").

b. As to the second *Peery* issue, the courts below never squarely addressed whether a guardian was needed or, if so, whether the guardian should be Limited or Plenary.

c. Thus, in violation of *Peery*, the court did not balance what supports were or could be available, which might affect any need for guardianship and, in a guardian was needed, whether it would be the preferred limited guardianship or plenary.

As we discuss above, there was substantial and *uncontradicted* evidence that Appellant was in many respects able to take care of himself, that he should be receiving least restrictive support living in the community. That evidence also showed that his needs were of the sort commonly fulfilled by an aide, social worker, or similar support. For example, as quoted above, Appellant is "totally functional with taking care of activities of daily living," a "personal care or [an] assisted living home would be more appropriate for him," and he "need[s] oversight of his finances" and "someone to just help him with his decisions at times" such as to eat regularly, take his medications, follow up with doctors." (citations omitted; punctuation cleaned up).

The need for application of a fair and consistent guardianship jurisprudence requires that *Peery*'s thoughtful analytic structure be applied in this case, as in others. Because the court below failed to acknowledge or implement *Peery*'s commands, that decision should be reversed and remanded.

III. THE COURT BELOW FAILED TO ADHERE TO THE "CLEAR AND CONVINCING" AND "PREPONDERANCE" STANDARD. A "CLOSE CALL" DOES NOT MEET THAT STANDARD

While the Superior Court upheld a finding that the Appellant was "totally incapacitated,"[29] the court ignored the standard of proof. The standard is that the proof must be "clear and convincing" and "preponderating." The Superior Court does not mention or consider that standard at all. The court below and the Orphans Court each explicitly found the case a "close call." By definition, a "close call" does not the "clear and convincing" standard.

Incapacity cannot be presumed; rather, for incapacity, there "must be clear and convincing proof of mental incompetency and such proof must ." *Myers Estate*, 395 Pa. 459, 462 (1959) (emphasis added). Why is the standard set so high? "A statute of this nature places a great power in the court. The court has the power to place total control of a person's affairs in the hands of another. This great power creates the opportunity for great abuse." *Estate of Haertsch*, 415 Pa. Super. 598, 601, 609 A.2d 1384, 1386 (1992).

The court below cites two cases. *Smith v. Smith*, 529 A.2d 466, 468 (Pa. Super. 1987), and *In re Estate of Duran*, 692 A.2d 176, 178 (Pa. Super. 1997). *Smith* is cited solely on the "abuse of discretion" principle. *Duran* is cited solely on the conclusiveness of a trial court's findings of facts; *Duran* was not a guardianship case; it was a contract case on ownership of a decedent's life insurance policy. In *Smith*, unlike the case at bar, the Superior Court addressed and made a finding that the "clearly convincing" standard was met in that guardianship

[29] Slip Op. at 15.

case.[30] The court "close call" below The conclusion establishes that the legal standard is not met.

The failure of the court below to address the applicable standard requires reversal. Given the direction that guardian statutes must "be administered by the courts with the utmost caution and conservatism." *Hoffman's Estate*, 209 Pa. 357, 359, 58 A. 665, 666 (1904), reversal is necessary.

CONCLUSION

For the above reasons, Amici respectfully pray that the judgment of the Superior Court upholding the adjudication of total incapacity and appointing a plenary guardian be reversed and remanded, with the instruction that the Orphans Court

a) apply the required standard of review,
b) prefer limited guardianship, including services and supports in the least restrictive setting, such as attendant assistance,
c) comply with *In re Peery's* two-part analysis, and take evidence regarding whether Appellant is impaired and whether any impairment is counterbalanced by friends or family or other support, and
d) explicitly acknowledge and adhere to the "clear and convincing" and "preponderance" standard.

Respectfully submitted,

David Ferleger
Thomas H. Earle
Landon R. Hodges

[30] *Smith v. Smith*, 365 Pa. Super. 195, 201, 529 A.2d 466, 469 (1987) ("we hold that the trial court acted within its sound discretion in finding that appellees proved appellant's mental illness by clear and convincing evidence.").

Attorneys for amici curiae

PENNSYLVANIA STATEWIDE INDEPENDENT LIVING COUNCIL;
PENNSYLVANIA COUNCIL ON INDEPENDENT LIVING;
HARRISBURG CENTER FOR INDEPENDENT LIVING;
LIBERTY RESOURCES, INC.;
ROADS TO FREEDOM CENTER FOR INDEPENDENT LIVING OF NORTH CENTRAL PA;
DISABLED IN ACTION OF PA;
ADAPT PA

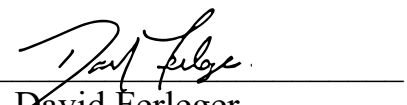
CERTIFICATE OF COMPLIANCE
WITH Pa.R.A.P. 127

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

David Ferleger

CERTIFICATE OF COMPLIANCE
Technical Compliance

I certify that this brief complies with word length compliance; it is 5,431 words. The brief is 20 pages long. It is in 14 point type, with footnotes in 12 points, and one inch margins.



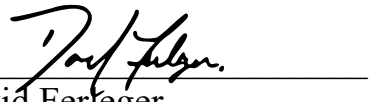
David Ferleger

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Motion for Leave to File Amici Curiae Brief, together with Brief for Amici Curiae, on all other counsel in this case, by sending said documents to them by overnight delivery, and by United States mail, on April 18, 2022.

Ray A. Ghaner
Gill, McManamon & Ghaner
200 Penn St,
Huntingdon, PA 16652

Michael Markus Kipphan,
Address: 219 Mifflin St
Po Box 361
Huntingdon, PA 16652-1435



David Ferleger