

WHEREAS, the Petitioner refiled her petition for guardianship on July 15, 2022;⁶ on July 26, 2022, I issued a preliminary order reappointing the AAL and scheduling a hearing for August 25, 2022;⁷

WHEREAS, in his August 23, 2022 report, the AAL reported that A.J. objected to the petition;⁸ thus, the August 25th hearing was cancelled, and A.J. was provided the opportunity to hire his own attorney or contact the Court for the appointment of a second attorney *ad litem*;⁹ A.J. did the latter and on September 8, 2022, Kristopher Starr, Esquire (the “Second AAL”) was appointed as the second attorney *ad litem*;¹⁰

WHEREAS, I heard the contested petition for guardianship on January 27, 2023;¹¹ after the close of evidence, I expressed my concerns that the Petitioner had failed to prove that A.J. needed a guardian by the required clear and convincing evidence, but I allowed the Petitioner to submit documentation in support of incapacity;¹² the Petitioner submitted various documents on January 30, 2023;¹³

WHEREAS, on January 31, 2023, I issued a letter order reiterating my doubt

⁶ D.I. 13.

⁷ D.I. 14.

⁸ D.I. 16.

⁹ D.I. 17-18.

¹⁰ D.I. 20, 22.

¹¹ *See* D.I. 28.

¹² *Id.*

¹³ D.I. 29.

that the admissible evidence was sufficient to establish by clear and convincing evidence that A.J. needed a guardian, but, in light of the Petitioner's *pro se* status, the *prima facie* case of incapacity, and the AAL's support for guardianship, I directed the AAL to arrange for an independent evaluation of A.J.'s capacity and set forth a procedure to address the findings of that evaluation and the pending petition for guardianship;¹⁴

WHEREAS, on February 3, 2023, the Second AAL objected to the evaluation and extended proceedings on behalf of his client;¹⁵ in light of the objection, I issued a temporary stay of my order and directed the AAL and the Petitioner to respond to the objection by February 17, 2023;¹⁶

WHEREAS, the AAL and the Petitioner both timely responded;¹⁷ the AAL reiterated his position that A.J. needs a guardian but agreed with the Second AAL that A.J. should not be subjected to an involuntary medical examination on the record developed;¹⁸ the AAL recommended that the petition be denied without prejudice;¹⁹ the Petitioner, in her response, argues that her documentation should be

¹⁴ D.I. 30.

¹⁵ D.I. 32.

¹⁶ D.I. 33.

¹⁷ D.I. 34-35.

¹⁸ D.I. 34.

¹⁹ *Id.*

accepted and considered as evidence and that the petition should be granted;²⁰

WHEREAS, “[f]undamental to human liberty is the right to autonomy over one’s own body, including freedom to choose what medical treatment shall be imposed upon one’s body. This basic liberty interest is protected by the due process guarantees of the United States Constitution[;]”²¹ “[o]utside of the criminal arena, imposition of a guardianship represents the most significant deprivation of the right to self-determination a court can impose[;]”²² thus, “imposition of a guardianship must be supported by evidence that is clear and convincing, and not merely by a preponderance of the evidence[;]”²³ “[c]lear and convincing evidence is evidence that produces an abiding conviction that the truth of the contention is ‘highly probable[;]’”²⁴

WHEREAS, a person with a disability is someone who “[b]y reason of mental or physical incapacity is unable properly to manage or care for their own person or property, or both, and, in consequence thereof, is in danger of dissipating or losing such property or of becoming the victim of designing persons or, in the case where a guardian of the person is sought, such person is in danger of substantially

²⁰ D.I. 35. To her response, the Petitioner attached a consent to the petition signed by A.J., Sr., A.J.’s father. *Id.*

²¹ *In re L.M.R.*, 2008 WL 398999, at *2 (Del. Ch. Jan. 24, 2008).

²² *In re J.T.M.*, 2014 WL 7455749, at *1 (Del. Ch. Dec. 31, 2014).

²³ *Id.* at *3.

²⁴ *In re Martin*, 105 A.3d 967, 975 (Del. 2014).

endangering person's own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons;"²⁵

IT IS HEREBY ORDERED this 10th day of March, 2023, as follows:

1. The petition for guardianship is DENIED and DISMISSED, without prejudice.

2. I first address the challenge to my order for an independent evaluation. The Second AAL invokes Court of Chancery Rule 35, which permits parties to move for a mental examination of another party and questions the Court's ability to order such relief *sua sponte* based on the qualifier in Rule 35(a) that the order "be made only on motion for good cause."²⁶ This argument raises an interesting question that, as best I can tell, has not been addressed in Delaware; similar state and federal rules have been interpreted conflictingly.²⁷ But, I find I need not answer this unanswered question, because (a) my ruling was not premised on Rule 35 and (b) the order for evaluation is hereby rescinded in favor of dismissal.

a. The evaluation contemplated in my letter order was not borne out

²⁵ 12 Del. C. § 3901(a)(2).

²⁶ Ct. Ch. R. 35(a).

²⁷ Compare *Gary v. DeKalb Cnty. Gov't*, 352 Fed. Appx. 360, 362 (11th Cir. 2009) ("Because an order to submit physical examination 'may be made only on motion' by a party, Fed.R.Civ.P. 35(a)(2)(A), the court could not *sua sponte* order [a party] to undergo such a procedure.") with *Wade v. Wade*, 124 So. 3d 369, 374 (Fla. Dist. Ct. App. 2013) (implying that a *sua sponte* order is permissible if there is an adequate record that the party's mental condition is in controversy and there is good cause for the evaluation).

of Rule 35. Rather, it was ordered as an expansion of the AAL’s court-ordered investigatory powers. When a petition for guardianship is filed, the Court undertakes an initial review to determine if there is a *prima facie* claim of incapacity sufficient to support the appointment of an attorney *ad litem*. This review is essential because once an attorney *ad litem* is appointed, they are charged, under Court of Chancery Rule 176, with “conduct[ing] a reasonable investigation into the allegations of the petition, the fitness of the proposed guardian, and all pertinent facts.”²⁸ This is an intrusive inquiry and attorneys *ad litem* are granted access to all medical and financial records of the person with an alleged disability. Through this Court’s preliminary order, the person with an alleged disability is also compelled to meet with the attorney *ad litem* and under Court of Chancery Rule 177 “[t]he Court, in its discretion, may require that the person with an alleged disability be produced” for a hearing on the petition for guardianship. And, although not done frequently, I find an attorney *ad litem* can be compelled to arrange for an independent examination of a person with an alleged disability.²⁹

²⁸ Ct. Ch. R. 176(a).

²⁹ A court-ordered evaluation is expressly contemplated by the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. *See* 12 *Del. C.* § 39A-104(a)(3). Similar relief was also ordered *sua sponte* by then-Magistrate in Chancery Glasscock in *In re LMR*, 2008 WL 398999, at *1 (Del. Ch. Jan. 24, 2008). *In re LMR* is, however, distinguishable from this action because there was no dispute regarding incapacity and the Court, contemporaneously with the *sua sponte* order, appointed a limited interim guardian. *Id.* (explaining an earlier order for an independent evaluation before ruling on plenary guardianship).

b. Notwithstanding this precedent, I have reconsidered my order for an independent evaluation. Most persuasive in that reconsideration is the recommendation of the AAL. In addition to their investigatory role, attorneys *ad litem* serve, and advocate for, the best interest of the person with an alleged disability. The AAL represents that, notwithstanding his position that guardianship is necessary, a court-ordered independent evaluation would not be in A.J.'s best interest. The AAL recommends, instead, that the petition be denied. I hereby adopt that recommendation.

3. The petition should be denied and dismissed, without prejudice. The Petitioner has been provided every opportunity to prove her claim and failed to do so. The Petitioner was provided notice of the scheduled evidentiary hearing two months in advance, providing her with sufficient time to collect her documentation and arrange for witness testimony in support of her petition. The scheduling letter also provided deadlines for witness lists and exhibits. Yet the Petitioner came to the hearing armed only with her personal recollection of her son's medical and personal history. Even accepting her unsupported testimony, which was credible and concerning, the Petitioner failed to present clear and convincing evidence that A.J. is currently a person with a disability under Delaware law.

4. This is a Magistrate in Chancery's Final Report and exceptions may be

filed under Court of Chancery Rule 144.

5. If no exceptions are filed, the AAL and Second AAL shall submit their fee affidavits no later than April 10, 2023.

/s/ Selena E. Molina
Selena E. Molina
Magistrate in Chancery