STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WAYNE

In the Matter of LORI JOHNSON,
an individual with a developmental disability

File No. 2009-740061DD
Judge Milton L. Mack, Jr.

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OPINION

STATE OF MICHIGAN
WAYNE COUNTY PROBATE COURT

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File No: 2009-740061-DD
Hon. Milton L. Mack, Jr.

OPINION

INTRODUCTION

This matter is before the court on the petition of the guardian, Cheree Garner, to resign as guardian and appoint Siporin & Associates, Inc. (Siporin) as successor guardian; and the petitions of the ward, Lori Johnson, to instead appoint Stacy Rhodes as her successor partial guardian, to reserve to her the power to make program and placement decisions, and to order that she be returned to Michigan from her placement in Florida. A trial was held on February 14-16, 2011.

For the reasons set forth below, the court finds that the appointment of Siporin as successor partial guardian is in Ms. Johnson's best interests and there is no other person competent, suitable and willing to serve as partial guardian. The court will also order that the partial guardian have the authority to make program and placement decisions. Therefore, the petition to return Ms. Johnson from her placement in Florida will be denied.

BACKGROUND

On February 6, 2009, Jan Rosner, a supports coordinator with the Wayne Center, filed a petition with the Wayne County Probate Court seeking the appointment of Cheree Garner as partial guardian for Lori Johnson. It was alleged that Ms. Johnson was disabled due to mental retardation, seizure disorder, depressive disorder and a personality disorder. The report which accompanied the petition included a comprehensive psychological evaluation dated April 18, 2008.

According to the report, Ms. Johnson was 28 years old and developmentally disabled. Tests indicated that she had mild mental retardation and a history of numerous psychiatric hospitalizations. She was diagnosed with depressive disorder and maladaptive behaviors that interfered with daily living. In addition to these diagnoses, Ms. Johnson had been hit by a drunk driver on August 8, 1988, when she was 8 years old, and suffered a traumatic brain injury. Ms. Johnson receives personal protection insurance benefits (PIP) from AAA of Michigan (AAA) for her care, recovery and rehabilitation as a consequence of the injury.

A full hearing was held on March 10, 2009, before Judge David J. Szymanski, after which the court appointed Cheree Garner partial guardian for a period of five years. The order appointing the partial guardian reserved certain powers to Ms. Johnson, including the right to make program and placement decisions; however, the Letters of Authority granted the power to make program and placement decisions to the partial guardian.

On February 25, 2010, Cheree Garner filed a petition to resign as partial guardian and asked that Siporin be appointed as successor partial guardian. A hearing was held on February 26, 2010. An attorney appeared on behalf of Ms. Johnson and requested the appointment of Siporin as partial guardian. Ms. Johnson appeared by way of interactive video from BCA Stonecrest (BCA), where she had been admitted for psychiatric treatment, and objected to continuing the guardianship. At the hearing it was reported that Ms. Johnson had been at Rainbow Rehabilitation (Rainbow) where she was on one-on-one supervision, but had eloped. Ms Johnson described Rainbow as a "living hell". She had been admitted to BCA due to extremely poor judgment, self-harm behavior, threats of suicide, and attacking people. She also suffered from diabetes and did not comprehend her need for treatment. Her treatment at Rainbow was paid for by AAA, the insurance carrier responsible for paying her PIP benefits.

The court accepted the resignation of Cheree Garner as partial guardian, appointed Siporin & Associates, Inc., as temporary partial guardian, ordered that an attorney be appointed for Ms. Johnson, and set the question of termination of the guardianship for trial on April 8, 2010. The court reserved certain powers to Ms. Johnson, including the right to arrange travel decisions up to 5 blocks, to make monetary decisions of up to $44.00 per month and to make decisions regarding daily program activities and daily dress. The court gave the guardian the authority to make program and placement decisions.

Ms. Johnson did not appear for trial on April 8, 2010, because she had again eloped from Rainbow. The partial guardian filed a petition on April 9, 2010, seeking authorization from the court to transfer Ms. Johnson to the Florida Institute for Neurological Rehabilitation (FINR). The petition alleged that Ms. Johnson had been located in Phoenix, Arizona, by Adult Protective Services and that she was en route to Michigan via bus. It was claimed that her current placement in Rainbow was no longer sufficient to protect Ms. Johnson and the general public. The partial guardian sought authority to transfer her to FINR and stated that the transfer had been approved by her treating physician and the insurance adjuster for AAA. The court granted the petition.[1]

On November 9, 2010, Michigan Protection & Advocacy Service, Inc. (MPAS) filed a petition on behalf of Ms. Johnson to modify the guardianship and appoint Stacy

[1] The court did not grant the petition on its own motion as claimed by Michigan Protection & Advocacy Services, although that language appears on the order. The clerk added the language "court's own motion" in error.

Rhodes as successor partial guardian. On November 17, 2010, MPAS filed a petition to return Ms. Johnson to Michigan.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following the appointment of Cheree Garner as partial guardian on March 10, 2009, Ms. Johnson was admitted to Rainbow on April 14, 2009. MPAS argues that this admission was improper because the partial guardian's letters of authority erroneously gave the partial guardian the power to make program and placement decisions. It is claimed that this caused Ms. Johnson's behavior to become worse and led to her current problems. No evidence was introduced to support this theory. In fact, all of the evidence introduced was exactly to the contrary.[2]

Dr. Mariann Young, the Clinical Director at Rainbow, testified that at the time of Ms. Johnson's admission, Ms. Johnson wanted residential treatment. She was eager and committed to the goals of increasing her abilities. The progress report from Rainbow, dated June 3, 2009, supports this testimony. Ms. Johnson displayed a willingness to increase her level of independence. This testimony was uncontradicted. Thus, it would appear that, if the Letters were in error, that error was harmless in light of Ms. Johnson's consent. In fact, at trial, Ms. Johnson testified that her reason for eloping was not because she hated Rainbow. She was not clear as to why she left.

Dr. Young had known of Ms. Johnson for 10 years. Ms. Johnson's treating physician, Dr. Edward Dabrowski, had contacted Dr. Young from time to time over the years asking if Rainbow would admit her on an emergency basis. However, Ms. Johnson did not actually appear until April of 2009.

Ms. Johnson was initially placed in a townhouse with two other women because there was no room in Rainbow's AFC homes, which were more restrictive. Over time, her behavior got worse. She could not get along with her roommates, refused to take direction, was physically and verbally abusive to her peers and staff, and refused to share in household duties like cooking and cleaning. She failed to adhere to a diabetic diet despite her diabetes. She would fake seizures and was manipulative across situations.

Dr. Young testified that while Ms. Johnson's IQ measured at 65-66, her IQ does not capture her brain injury. Ms. Johnson suffered a catastrophic brain injury when she was hit by the drunk driver when she was 8 years old. This injury impaired further brain development. As a consequence, she cannot use logic, and her sexual feelings are uninhibited. She had also been a victim of sexual abuse as a child. Her learning curve is very limited. She functions as an 8 year old in a 30 year old body. Dr. Young described Ms. Johnson as a vulnerable adult.

It was established during Dr. Young's testimony that Ms. Johnson gave birth to a child some years ago, but her parental rights were terminated and her child was adopted

[2] Evidence was not produced at trial to establish whether the letters were in error. If they were, Ms. Johnson could have sought modification of the letters. She took no action.

by an aunt. Dr. Young stated that Ms. Johnson's brain injury left her unable to care for a child because she is too egocentric. Also, Ms. Johnson has inappropriate sexual thoughts about children. The record reflects that Ms. Johnson stated she wanted to have sex with her daughter. While living independently, she had been taken advantage of, and had lost, or given away, all of a settlement (which was in excess of $100,000), and had become homeless.

Dr. Young testified that Ms. Johnson had eloped from Rainbow and took her "fiancé" to Toledo because she wanted to get pregnant again. She was missing for two nights. After her return, due to her escalating behavior, Ms. Johnson was transferred to an AFC home. There, she attacked a client who could not defend himself. She could not manage her diet, putting her at risk for a diabetic coma. She was not compliant with her medication, had poor work compliance, and was dishonest and manipulative. She had suicidal ideation and engaged in self harm, burning herself with cigarettes on multiple occasions. Dr. Young stated that while Ms Johnson's suicidal threats may have been attention seeking activity, the more times she acted out in this way, the greater the risk of success.

Ms. Johnson was transferred to a second AFC home where she exhibited the same behavior and hurt several employees. During one month, she had 29 incident reports. During her one year stay at Rainbow, she demonstrated seizure like symptoms and headaches and was transported to Botsford Hospital Emergency Room on 18 separate occasions.

Her behavior led to her admission to BCA for psychiatric treatment in February, 2010. It was during this admission that Siporin was appointed as temporary partial guardian. Her case was scheduled for trial on April 8, 2010, and an attorney was appointed to represent her. The issue of whether she should continue to have a guardian and what powers a guardian should have were to be determined at trial. Ms. Johnson had the right to an independent medical examination to assist in determining the need for guardianship and what powers a guardian should have. Instead, Ms. Johnson eloped from Rainbow and did not appear for trial.

Shortly before her trial date, on April 4, 2010, Ms. Johnson had stated she felt like she was going to faint. She fell backward and hit her head on a table. She was then admitted to Botsford Hospital for possibly having a seizure. Once the IV was disconnected from her in preparation for discharge, she promptly eloped from the hospital to avoid going back to Rainbow. She took another challenged individual she characterized as her "fiancé," and took a bus to Chicago and then to Phoenix, Arizona.

The notes from Rainbow reflect that Ms. Johnson called from Arizona on April 8, 2010, to negotiate her return. She was told that her return would not be negotiated and that she would go to FINR upon her return. Ms. Johnson agreed to return. Siporin advanced the funds to secure transportation for her and her "fiancé" to return to Detroit. Ms. Johnson was met at the bus station. Ms. Johnson was initially upset about going to

FINR and called her pastor. Following that conversation, Ms. Johnson agreed to go to FINR.

Ms. Johnson testified at this trial that she wanted Stacy Rhodes to be her successor guardian. Ms. Rhodes testified that she has known Ms. Johnson for 12 years. Her son is developmentally disabled and suffers from a traumatic brain injury. Her son has also been treated at Rainbow. She was not familiar with personal injury protection benefits or CMH (Community Mental Health). She also said she did not know what Ms. Johnson's needs were.[3] In fact, she had never heard of Ms. Johnson's behavioral issues. She only sees Ms. Johnson one to two times per year at church for a few hours.

Ms. Rhodes' son is not aggressive and does not have behavior problems. Ms. Rhodes is helping to raise 5 grandchildren in addition to her son. She sat in court and listened to enough testimony to cause her to state that she did not have enough information to decide whether to serve as guardian. Ms. Rhodes was unaware that Ms. Johnson expressed an interest in having sex with her son. She testified that she would respect the views of Rainbow, Siporin and Ms. Johnson's doctor, Dr. Edward Dabrowski, as well as Dr Young and Dr. Bridget Shore as to serving as guardian or determining Ms. Johnson's placement.

Dr. Edward Dabrowski is Ms. Johnson's treating physician. He is the Chief of Rehabilitation at Children's Hospital. He is familiar with FINR and has a number of patients there. He testified that he feels that FINR is the least restrictive environment for Ms. Johnson at this time. He reported that she had a number of issues, that she was imploding and needed structure at the time of her admission to FINR. He last saw Ms. Johnson before she left for FINR, but receives updates from FINR and tracks her progress. He testified that he knows Siporin, and has, in fact, had other cases with him, and described him as an excellent guardian.

Dr. Bridget Shore, the Clinical Program Director at FINR, testified as to Ms. Johnson's progress at FINR. She described FINR as located on a 900 acre campus with several lakes in a rural area. They have 127 beds on campus. All levels of care are available, from a skilled medical facility to community group homes in Sarasota. The campus includes several cabins and buildings. Elopement is extremely difficult due to geography. FINR receives patients from all over the country because the comprehensive array of services available at FINR is not available in those other states, including Michigan. FINR has 20 patients from Michigan. Dr. Shore testified that Ms. Johnson is at the high end of difficulty among the patient population. The average length of stay varies depending on age and onset of traumatic brain injury. All of the patients have traumatic brain injury.

Ms. Johnson was diagnosed at FINR with developmental disability, TBI (traumatic brain injury), history of pseudo seizures, diabetes and glaucoma. She is

[3] Her testimony was in direct contradiction to the Trial Brief for Petitioner which asserted that Ms Rhodes was "...familiar with Ms. Johnson's needs as well as the services available to Ms. Johnson through both Community Mental Health and No-Fault insurance."

physically aggressive to staff and peers, throws objects, destroys property and engages in inappropriate sexual behavior. She appears naked, makes verbal threats, threatens suicide, engages in head banging, makes multiple calls of abuse to agencies and threatens to elope. During her neuropsychological evaluation on May 7, 2010, she said that when she was angry she wanted to set fires, kill others, and gouge her eyes out.[4]

According to Dr. Shore, Ms. Johnson's biggest problem is her inability to follow rules. She has been told that, if she can follow rules she can return to Michigan. However, Ms. Johnson is still trying to have sex with a peer so that she can get pregnant. She is still non-compliant with her medical needs, participating in programs and peer relations.

A behavior analyst meets with Ms. Johnson daily to reinforce her care plan. This begins with improving her behavior. This means compliance with rules and with her diet and taking her medicine. She is part of her treatment plan.[5] She is debriefed after every incident and is continuously told that compliance is the first step.

Ms. Johnson is currently in transitional living with visual supervision due to her sexual preoccupation with a peer. FINR would like to move her to a less restrictive setting in order to see if she can be successful. She has measurable goals and is aware of them.

Dr. Shore listened to Stacy Rhodes' testimony. She testified that she was concerned that Ms. Rhodes had lots of people to care for and was not knowledgeable enough to handle Ms. Johnson. She testified that Ms. Johnson needs a professional guardian. She testified that Ms. Johnson cannot handle program and placement decisions due to her behavior and her history, and that she is currently in the least restrictive environment suitable to her condition.

Marsha Baker, of Feinberg Consulting, is the independent case manager hired by Siporin to make sure appropriate services are provided to Ms. Johnson at FINR. She works with catastrophic brain injured people like Ms. Johnson. She has 11 cases at this time with 5 at FINR. All have severe behavior problems. Over the years, her clients have stayed at FINR from 10 months to 5 years before discharge.

As case manager, she makes sure appropriate levels of service are provided. She finds that people like Ms. Johnson, who have a private payer (AAA), typically receive a higher level of service and better access to care. She testified that the services available through CMH are not comparable to FINR. CMH is overburdened with high numbers of clients and issues regarding access.

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[4] Exhibit C.

[5] Based on one unsigned document from Rainbow, MPAS argues that Ms. Johnson has been shut out of her treatment plan. That argument is not supported by any evidence. Dr. Shore testified that the original documents with signatures were kept elsewhere. Ms. Johnson never claimed she was left out of the treatment plan.

She reported that Ms. Johnson is in the least restrictive setting now. Ms. Johnson cannot make program and placement decisions and her behavior is still a problem. She lacks judgment regarding her behavior and impulsivity as well as her medical needs, diabetes and birth control. Ms. Baker last saw Ms. Johnson on February 10, 2011. Ms. Johnson told her Ms. Baker she would be returning to Michigan by February 16, 2011, and asked Ms. Baker to contact "section 8" for her housing. Ms. Baker described Ms. Johnson as polite and engaging, but still required a guardian.

She testified that the treatment team will make the call as to discharge. Non-compliant behavior by Ms. Johnson is still the main barrier. When she shows a period of compliance with success, discharge planning can go forward. She is currently on a 7 day behavior contract which is reviewed every month for success. She is currently non-compliant on a daily basis.

Ms. Baker also listened to Stacy Rhodes' testimony and testified that Ms. Rhodes would not be able to manage Ms. Johnson. Ms. Johnson is good at manipulation and Ms. Rhodes would not be able to keep up with her duties as guardian, particularly in light of her other family obligations.

Jack Rickert, the Director of Administration at Special Tree, located in Michigan, testified that his facility provides treatment for persons with traumatic brain injury. He was called as a witness for Ms. Johnson. He testified that they would be willing to visit Ms. Johnson at FINR and assess whether they could meet her needs. If she were admitted, he would not rule out a return to FINR. They do decline certain clients if they become overly aggressive or combative or present great risk for harm to self or others. He knows Dr. Dabrowski and would rely on his opinion in making the decision to admit Ms. Johnson. He would not take Ms. Johnson if Dr. Dabrowski advised against it. He also described Siporin as someone who has great respect for his patients, has the highest ethics and chooses the least restrictive settings for his clients in order to maximize self-reliance. He said if Siporin believed FINR was the best setting that would also be a factor in deciding whether to accept Ms. Johnson. Siporin testified that he would be willing to consider Special Tree, but would have to discuss their commitment to not discharging her prematurely if she became too difficult to manage.

Risa Coleman, the Director of Clinical Services for Detroit Wayne County Community Mental Health (DWCCMH), testified on behalf of Ms. Johnson. She testified that she oversees 65,000 recipients of mental health services in Wayne County, but that DWCCMH does not provide direct services. She testified that a wide range of services are available in Michigan but acknowledged that in rare cases, placement out of state is utilized.

She had never met Ms. Johnson and was not present to evaluate her treatment. She expressed no opinion as to the suitability of Ms. Johnson's placement at FINR and had never been to Rainbow or FINR. She acknowledged that DWCCMH does not keep track of the number of people released from DWCCMH who are now in jail.

Although MPAS argues that the court must determine, "in conjunction with" the appropriate community mental health services program whether a placement is appropriate, DWCCMH had no opinion in Ms. Johnson's case, despite sitting through two days of testimony.[6]

Steven Siporin, the owner of Siporin & Associates, Inc. testified that he primarily provides guardianship services to persons with TBI, including TBI secondary to substance abuse. He carries 120-130 active files at any one time. The majority are receiving personal injury protection benefits to pay for their care. He receives referrals from courts across Michigan, as well as hospitals, doctors, insurance companies, plaintiff's counsel and defense counsel.

Mr. Siporin reported that he does not use CMH first for his clients because of a federal mandate that private sources be used first. He also cited concerns about quality and access. Medicaid clients have workers who are overworked and underpaid. Clients walk away from their treatment. He testified that 60% of brain injured people end up in jail.

Siporin considered locations in Michigan for Ms. Johnson before deciding on FINR. He consulted with Dr. Young, Dr. Dabrowski and staff and decided that Ms. Johnson needed more structure. He was familiar with what was available in Michigan, but due to Ms. Johnson's elopement risk, behavior and safety issues, FINR was the only alternative.

He testified that he spoke with Stacy Rhodes about her plans if she were the partial guardian. He testified that she said she would get an apartment for Ms. Johnson and if she misbehaved, cut her loose. He felt she could not manage Ms. Johnson.

Siporin testified that FINR has the best education program in the country for TBI patients. He hoped that Ms. Johnson would show a sustained period of success so that she could be moved back to Michigan, possibly as soon as the end of the year.

Ms. Johnson testified after everyone else. She stated she wanted Ms. Rhodes to be her guardian. When asked why she left Rainbow, she said she did not want to stay, but not because she hated Rainbow. She thought she could live at Special Tree or CMH. However, CMH does not provide direct services. Ms. Johnson did not attempt to rebut any other testimony.

Ms. Johnson has apparently abandoned her earlier request to terminate the guardianship so the first issue to be determined by the court is who should serve as

[6] Later in this opinion the court will address the inapplicability of MCL 330.1623(3) to this case. Even if this provision applied to this proceeding, it offers no guidance as to what "in conjunction with" means. By law, the court is charged with deciding this case based on the evidence presented. In this proceeding, the evidence presented by DWCCMH only assists the court to the extent that it supports out of state placement in certain cases.

successor partial guardian.[7] MPAS argues that section 5106 of the Estates and Protected Individuals Code (EPIC) is the standard to be applied in determining who should serve as successor guardian. That provision provides that the court may appoint a professional guardian under section 600 of the Mental Health Code (MHC) only if no other person is competent, suitable and willing to serve and it is in Ms. Johnson's best interests.

However, this provision of EPIC is in direct conflict with the express provisions of MCLA 330.1628 of the Mental Health Code which permits the court to appoint any suitable agency or individual, while directing the court to make a reasonable effort to question the ward for the ward's preference and give any preference due consideration.

MCL 330.1604 explicitly states that a guardian for a developmentally disabled person shall be made "only pursuant to this chapter." The Court of Appeals in *In re Neal,* 230 Mich App 723; 584 NW2d 654 (1998) held that it was error for the court to appoint a guardian for a person with developmental disabilities under the Revised Probate Code (the predecessor code to EPIC) and held that the proceedings should have been conducted only according to chapter 6 of the Mental Health Code.

Michigan jurisprudence has long held that statutory interpretation is a legal question and therefore is a matter for the court. *Cotter v Blue Cross and Blue Shield of Michigan*, 94 Mich App 129, 135; 288 NW 2d 594 (1979). Where, by reasonable construction, two statutes can be reconciled and the purpose of each can be served, it is the duty of the courts to reconcile and enforce them. *Manville v Board of Governors of Wayne State University*, 85 Mich App 628, 635; 272 NW 2d 162 (1978). Also, where two statutes deal with the same subject, the specific statute rather than the general statute controls. *Sutton v Cadillac Area Schools*, 117 Mich App 38, 44; 323 NW 2d 582 (1982). Pursuant to the forgoing, and per *Neil, supra*, it would appear that the appointment of a guardian for a developmentally disabled individual must be made pursuant to the provisions of the Mental Health Code and not the Estates and Protected Individuals Code

In addition, a compelling argument could be made that 1994 PA 327, which amended 1978 PA 642 (the Revised Probate Code and predecessor to EPIC[8]) impermissibly attempted to amend 1974 PA 258 (the Mental Health Code) in clear violation of Article 4, Sec. 25 of the Michigan Constitution, which provides:

> Sec. 25. No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length.

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[7] The court has already determined that Ms. Johnson is developmentally disabled and established a guardianship that will expire on March 10, 2014.

[8] The provisions of 1994 PA 327 were carried over into EPIC in 1998 PA 386. This act added language to EPIC that a professional guardian may be appointed if it is in the ward's best interests and no other person is competent, suitable and willing to serve.

Alan v Wayne County, 388 Mich 210, 200 NW 2d 628 (1972) provided the following guidance regarding the operation of Article 4, Sec. 25:

> In short, it is a simple and speedy task to determine which of all statutes in existence may be affected in any direct or substantial way by a bill currently under consideration-in fact it takes much less time and effort to do this job than it takes a reader to wade through this opinion.
>
> If the search reveals statutes which appear to be affected and are not intended to be so, then this should be made clear by simply inserting appropriate language into the bill under consideration specifically excluding its operation upon the other statutes revealed in the search. But whether or not this is done we hold that in the absence of specific legislative intent to amend or alter other statutes we will treat them as in existence and interpret them as they are written unaffected by subsequent statutes. If, on the other hand, it *is* intended to amend or alter those other statutes revealed in this search, then it should be stated specifically and those statutes must be amended or altered directly and republished as contemplated by Const.1963, art. 4, sec 25.

388 Mich 210, 284, 285 (emphasis added; italics in original).

Similar to the enactment of 1994 PA 327, the legislature adopted 1972 PA 347, the Soil Erosions and Sedimentation Act, which attempted to create a new requirement in the Subdivision Control Act, 1967 PA 228, without amending the Subdivision Control Act. The Attorney General found that this violated Const. 1963, art. 4 sec. 25, and wrote: "If the legislature wishes to require that Act 347 be complied with before a proprietor's certificate on a final plat may be obtained under Act 288, then Act 288 must be specifically amended to so provide." Mich.Op.Atty.Gen 1974-4828, pg. 202.

Likewise, if the legislature wishes to make it more difficult to appoint a professional guardian for persons with developmental disabilities under the Mental Health Code, then, it would seem that the Mental Health Code, specifically, MCL 330.1628 must be amended.

However, because the court finds that Ms. Garner's petition to appoint a professional guardian also meets the criteria under EPIC, the court need not decide the constitutionality of 1994 PA 327.[9] On the basis of the expert testimony offered and her own ambivalence, the court finds that Stacy Rhodes is not presently competent, suitable and willing to serve as Ms. Johnson's guardian. At present, Ms. Johnson needs a high level of care and supervision, which Ms. Rhodes cannot provide. It is also equally clear

[9] A court does not grapple with a constitutional issue except as a last resort. *Taylor v Auditor General*, 360 Mich 146, 154; 103 NW 2d 769 (1960), citing *United States v Lovett*, 328 US 303, 66 S Ct 1073, 90 L Ed 1252 (1946).

that it is in Ms. Johnson's best interests that Siporin & Associates, Inc. be appointed as her partial guardian.

The court is also satisfied, based on the expert testimony, that Ms. Johnson does not have the capacity to make decisions regarding her programs and placement. No credible evidence was offered to support the claim that Ms. Johnson is capable of making program and placement decisions. Because the court finds that Ms. Johnson lacks the ability to make program and placement decisions, the court will grant that authority to the partial guardian. Since the guardian is granted that power, the petition to return Ms. Johnson to Michigan will be denied.

MPAS argues that is was error for the court to grant the petition to authorize placement of Ms. Johnson at FINR because the court did not make that determination in conjunction with the appropriate community mental health program, citing MCL 330.1623(3), to determine whether that placement was adequate and appropriate and was the least restrictive program available. Any error was harmless because the court, pursuant to MCL 330.1623(1), had already given the temporary partial guardian the authority to make program and placement decisions on February 26, 2010, when the court appointed the temporary partial guardian. The subsequent order sought, and obtained, by the temporary partial guardian was not necessary for compliance with the Mental Health Code. It is possible it was necessary for some other purpose.

MCL 330.1623 governs how individuals may be placed in a facility and consists of three distinct subsections. Subsection one provides that a guardian has the power to place an individual in a facility only if given the power by court order.[10] Subdivision two addresses the ability of the court to authorize placement of a *respondent* in a facility.[11] In these cases, the respondent is the subject of a pending petition for guardianship and no guardian has been appointed.[12] Subdivision three addresses those cases where a guardian has been appointed but does not have the authority to place the individual in a facility.[13] In cases where a guardian has not been appointed or the guardian does not have the power to make placement decisions, the court is directed to make a determination as to a specific facility "in conjunction with" the community mental health services program.

In this case, since the temporary partial guardian was given the authority to make program and placement decisions, further authorization by the court was not necessary. In any event, the testimony at trial was overwhelming that Ms. Johnson is in the least restrictive environment that is adequate and appropriate to meet her needs. No evidence was offered to rebut this testimony. FINR has the necessary medical facilities to eliminate Ms. Johnson's frequent trips to emergency rooms which create the opportunity for

[10] A guardian, whether plenary or partial, appointed under this chapter shall not have the power, unless specified by court order, to place an individual with a developmental disability in a facility. MCL 330.1623(1).

[11] Before authorizing the placement of a respondent in a facility, the court shall inquire into and determine the appropriateness of the placement. MCL 330.1623(2).

[12] "Respondent" means the individual who is the subject of a petition for guardianship filed under this chapter. MCL 330.1600(f).

[13] MCL 330.1623(3).

elopement. While Ms. Johnson need not prove anything, the court is required to decide the case on the basis of the evidence presented. No evidence was offered to counter the extensive testimony that Ms. Johnson is currently in the least restrictive environment that is adequate and appropriate to meet her needs.

Contrary to the claim of MPAS that Ms. Johnson's rights are being restricted to maintain insurance benefits, the effort by all the professionals in this case is to use those benefits to enable her to exercise more of her rights and avoid homelessness and incarceration.

Pursuant to MCR 2.602, the court will prepare an order in accordance with this decision.

Milton L. Mack, Jr.
Chief Probate Judge

Dated: FEB 2 2 2011