

Model Final Order on Suggestion of Capacity

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IN THE CIRCUIT COURT FOR THE 21st
JUDICIAL CIRCUIT IN AND FOR LUCID
COUNTY, FLORIDA

IN RE: GUARDIANSHIP OF
JOHN SMITH,

PROBATE DIVISION

CASE NO.: 2019-123-4567

the Ward.

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ORDER ON THE WARD'S PETITION FOR SUGGESTION OF CAPACITY

THIS CAUSE was heard by this court on June 1, 2019, on John Smith's (the "Ward") Petition for Suggestion of Capacity. Having carefully considered: (1) the report of the court-ordered medical examination performed by Dr. Victoria Brilliant and sworn testimony from Dr. Brilliant expounding upon her findings; (2) medical records and sworn testimony from the Ward's primary physician Dr. Robert Fripp; (3) a forensic psychiatric report and sworn testimony from a board certified forensic psychiatrist Dr. Stanley Lee; (4) the

Response in Opposition to the Suggestion of Capacity filed by Steve Smith and Gillian Smith; (5) the Ward's sworn testimony (with the consent of his court appointed counsel); and (6) the judicial record in this matter, the court hereby makes the following findings of fact and conclusions of law:

I. FINDING OF INCAPACITY, GUARDIANSHIP, AND SUGGESTION OF CAPACITY

In 2003, the Ward was declared totally incapacitated, which resulted in the Ward losing the rights to: (1) marry; (2) vote; (3) apply for government benefits; (4) travel; (5) seek or retain employment; (6) contract; (7) sue and defend lawsuits; (8) apply government benefits; (9) manage property and make gifts; (10) determine residence; (11) consent to medical and mental health treatment; (12) make decisions about her social environment. A non-adversarial guardianship proceeding was initiated in this Court wherein Alison Smith (the "Guardian") was selected to serve as the plenary guardian of the Ward. On January 1, 2019 the Ward's court appointed counsel filed a Suggestion of Capacity. The Siblings filed a Response to the Ward's Suggestion of Capacity on January 10, 2019. On January 20, 2019 the court appointed Dr. Victoria Brilliant to examine the Ward. Dr. Brilliant evaluated the Ward on February 1, 2019, and filed her report with the court on February 29, 2019 (the "Brilliant Report"). On June 1, 2019, the court held a hearing on the Ward's Suggestion of Capacity (the "Capacity Hearing").

II. APPLICABLE SUBSTANTIVE LAW

Under Florida law, the Ward retains the right to have continuing review of the need for restriction of his rights and to be restored to capacity at the earliest possible time. See Florida Statute §744.3215. Florida Statute §744.464 sets forth the requirements for the restoration of the Ward's capacity. Once a suggestion of capacity is filed, the Court shall give priority to the suggestion of capacity and shall advance the Capacity Hearing on the calendar. See Florida Statute §744.464(4). The purpose of the Capacity Hearing is for the court to determine whether the Ward has regained capacity so that rights previously removed from the Ward can be restored. See Florida Statute §744.464(3).

Unlike in hearings adjudicating incapacity, where the burden is clear and convincing evidence, see Florida Statute §744.331(5)(c), the Ward need only establish that a restoration of his rights is appropriate by a preponderance of the evidence. See Florida Statute 744.464(3)(b).

This court "recognize[s] that the very nature of an inquiry into mental [capacity] of [the Ward] necessarily requires a determination of [capacity] at a specific time, and does not preclude an inquiry into [capacity] at a subsequent date upon a showing of a change of condition." *In re McDonnell*, 266 So.2d 87, 89 (Fla. 4th DCA 1972). Thus, Florida law mandates that this court determine only whether the Ward is currently capable of exercising some or all of the rights that were removed. Since the question is whether the Ward currently has capacity, the Ward's prior medical history and prior capacity reports are of limited probative value, if any. *Linde v. Linde*, 199 So.3d 1102, 1106 (Fla. 3d DCA 2016) (holding that trial court did not abuse its discretion by precluding evidence of prior incapacity from restoration hearing and quoting Fla. Stat. § 744.464(2)(a)) (emphasis added).

In making the determination as to whether the Ward currently has capacity, the court need not consider whether the Ward will make good or even objectively reasonable decisions. Rather, the focus of the inquiry is whether the Ward is capable of exercising his rights, i.e., understanding the facts, engaging in reasoning, understanding the consequences of his decisions, and communicating his decisions. *Cf. Losh v. McKinley*, 86 So.3d 1150, 1153 (Fla.

3d DCA 2012) (“[U]nder the Florida guardianship statutes, before depriving an individual of all of his or her civil and legal rights, ‘the individual must be incapable of exercising his rights at all, whether wisely or otherwise.’”) (emphasis added) (quoting *McJunkin v. McJunkin*, 896 So.2d 962, 963 (Fla. 2d DCA 2005)). In fact, numerous courts have emphasized that “in our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights.” *In re Emmanuelle Maynes-Brilliant*, 746 So.2d 564, 565 (Fla. 3d DCA 1999) (reversal of finding of incapacity of a ward based on the trial court’s consideration of “the possibility that she might make future harmful decisions”) (quoting *In re McDonnell*, 266 So.2d 87, 88 (Fla. 4th DCA 1972)); see also *McJunkin*, 896 So.2d at 963 (holding the trial court committed reversible error when refusing to restore capacity based on its belief that the ward might make some decisions that could harm him in the future) (citing *Maynes-Brilliant*, *id.*).

III. FINDINGS OF FACT

A. Court-Appointed Examiner Dr. Victoria Brilliant

The court appointed Dr. Victoria Brilliant to examine the Ward and issue a report regarding the Ward’s current decision-making capacity. Counsel for the Ward stipulated at the commencement of the Capacity Hearing that Dr. Brilliant is qualified to render psychiatric forensic expert opinions. In her report, Dr. Brilliant concluded: “The Ward does not have any useful capacity for independent decision-making and he should have no rights restored.” The Brilliant Report was submitted into evidence without objection. Dr. Brilliant’s sworn testimony supplemented and explained her report. Dr. Brilliant testified that did not review any medical or psychiatric records, nor did she request them. Dr. Brilliant did not call or speak with the Guardian, but she received a telephone call from Gillian Smith and Steve Smith before she conducted her psychiatric examination of the Ward. After the examination, Dr. Brilliant did call and briefly spoke with the Ward’s primary care physician Dr. Stanley Lee, and separately, the Ward’s psychologist, a Dr. Bombay.

Dr. Brilliant conducted a 20-minute evaluation of the Ward on January 17, 2015, the same day she prepared the Brilliant Report. Dr. Brilliant made the following findings: (1) the Ward was oriented to his name, date of birth, address, and with a little difficulty, he was able to calculate his own age, but he did not know his daughter Alison’s date of birth; (2) the Ward stated he wanted to sell his unit at Sunset Endings Condominium and purchase a new condominium at Vitality Vistas because his building is in disrepair and the loud music from the polka rave club next door prevents him from getting sleep; (3) the Ward knew the amount of his current monthly condominium association maintenance fee; (4) the Ward described condominium unit that he has visited several times with his realtor and wishes to purchase; (5) the Ward knew the address of the condominium in Coral Gables, the precise number of bedrooms and bathrooms, and the purchase price; (6) the Ward stated that he has no access to his money, he knows he has “millions and millions and millions of dollars,” but he could not state his exact assets because a family trust is in litigation in New Mexico; (7) the Ward understands that the Guardian handles his finances including paying his bills but is unsure about where the money comes from; (8) the Ward stated he does not drive but “claims a chauffeur” drives him to places; and (9) the Ward knew that his primary doctor was Dr. Robert Fripp and could correctly recall his name and telephone number from memory, but “did not disclose” the name of his psychologist, Dr. Bombay.

Dr. Brilliant testified that she finds the idea of a chauffeur to be “fanciful” and “hard to believe,” but if true, “it’s a waste because he doesn’t need a private chauffer.” Dr. Brilliant found the Ward’s desire to purchase what she

characterizes as an “unnecessarily large and overly expensive” condominium was unjustified, because the Ward lives alone, he can sleep in a bedroom away from the side of the building facing the club, and the condominium board will repair the building upon request if it presents a hazard. Dr. Brilliant testified she did not ask whether anyone has already requested the condominium board repair the premises. Dr. Brilliant also reported the Ward stated he intends to invite other family members to visit and stay with him at the Coral Gables condominium, and even mentioned that relatives might move in with him. When Dr. Brilliant asked the Ward why his daughter Alison (whom the Court notes is also his legal Guardian) “doesn’t simply buy the apartment herself and let you live there,” Dr. Brilliant took issue with the Ward’s response that Alison wanted to use the Ward’s money to buy him the condominium unit, and that maybe he would invite Alison to live with him too. This led Dr. Brilliant to conclude in the Brilliant Report that the Guardian is “completely in charge of the Ward’s money,” she is attempting to use the Ward’s assets “for her own benefit,” and the Ward “has absolutely no insight whatsoever into what’s going on here.” At trial, Dr. Brilliant was unable to articulate any specific facts to justify her conclusion that the Guardian is improperly using assets of the Guardianship to benefit herself, other than her brief telephone call with Steve Smith and Gillian Smith.

The court notes that Dr. Brilliant’s conclusion about the Ward’s lack of insight is inconsistent with her own findings that (1) the Ward is aware of the fact he is under a Guardianship, (2) the Ward knew his daughter Alison is his Guardian, (3) the Ward knew Alison handles his finances and pays his bills, and (4) the Ward reported that his assets are in litigation in New Mexico involving a family trust. The court further notes that the Brilliant Report indicates the Ward reported a history of a serious dispute between the Guardian and her siblings, Gillian and Steve Smith, focusing on a dispute over the family trust. Dr. Brilliant reported that the Ward told her he loves all of his children and speaks with them frequently, and none of them really discuss the details of the trust dispute. According to Dr. Brilliant, the Ward had little insight into the nature of the dispute, and how it affects him and his Guardianship. Dr. Brilliant concluded that the Ward “lacks the ability to process and understand his conflicted feelings about his children,” citing this as a finding in support of her opinions about his decisional capacity.

After the 20-minute interview, which led Dr. Brilliant to conclude by her own account that the Ward was “superficial and immature, and not capable of making reasoned and independent decisions,” she immediately called and spoke with the Ward’s primary physician, Dr. Fripp, and subsequently, his treating psychologist, Dr. Bombay. As Dr. Brilliant herself characterized it, she advised these physicians of her opinions and they disagreed with her. According to Dr. Brilliant, Dr. Fripp said he had never observed any schizophrenic tendencies or indicia of substance abuse in the Ward. But according to the Brilliant Report, Dr. Fripp eventually “admitted” that in his opinion, some of the Ward’s political beliefs were “probably a bit extreme,” though Dr. Brilliant did not inquire further. In her live testimony, Dr. Brilliant found particular significance in Dr. Fripp’s comment that the Ward had never truly accepted his longtime diagnoses of schizophrenia, bipolar disorder, and obsessive-compulsive disorder.

Dr. Brilliant reported that Dr. Bombay believed the Ward to be “inconsistent,” which Dr. Brilliant concluded interferes with the Ward’s ability to “make informed decisions about anything.” Based on what he described as a brief conversation with Dr. Bombay, Dr. Brilliant wrote in his report that the Ward “is said to have bipolar disorder,” that he “also appears to have a personality disorder,” and that there “appears to be a dynamic of substance abuse.” Based solely on his report, Dr. Brilliant testified the Ward has an “active and ongoing substance abuse problem” that “[the Guardian] ignores”

active and ongoing substance abuse problem that [the Guardian] ignores and for which his doctors have “dropped the proverbial medicine ball.” Dr. Brilliant believes the Ward is “not going to stop the substance abuse because he’s a longtime addict” and cites this as a basis for her opinions concerning decisional capacity. “Well, obviously, I considered [the Ward’s] substance abuse problem in reaching my expert opinions. It would be highly irresponsible to allow a pill-popping addict to go out and get a fix.”

B. Primary Treating Physician Dr. Robert Fripp

At the Capacity Hearing, the court heard from Dr. Robert Fripp, who has been an internist and geriatrician in South Miami for 16 years. Dr. Fripp obtained his doctorate from 21st Century University in 1997, and completed his residency in internal medicine and geriatrics at Einstein Relativistic Institute in Minneapolis in 1999. Dr. Fripp is a clinical instructor at the University of Coral Gables School of Medicine, where he has full privileges. Dr. Fripp’s clinical practice consists of about 70% geriatrics, 20% substance abuse diagnosis and treatment, and 10% treatment of legal professionals. In his practice, Dr. Fripp takes care of patients with different arrays of medical conditions, such as high cholesterol, high blood pressure, diabetes, and mental illness, including depression, dementia, schizophrenia, bipolar, OCD, and severe adult attention deficit disorder in probate lawyers. Dr. Fripp’s clinical evaluations include the evaluation of psychiatric conditions, and he routinely sees patients in the psychiatric unit.

Dr. Fripp has been the Ward’s primary physician continuously since 2008, and sees the Ward at his office approximately once per month. The purpose of these visits is to assess the Ward’s physical well-being and mental status, as well as to discuss the Ward’s medical complaints, medications, and personal matters that the Ward chooses to discuss. When Dr. Fripp first started treating the Ward, he communicated frequently with licensed practical nurse Penelope Perfect, who was retained by the Guardian to monitor the Ward weekly as part of the Guardianship. As the Ward’s mental status improved, there was no longer a need for Nurse Perfect to attend the Ward’s office appointments. Eventually, the weekly visits with Nurse Perfect were reduced to bi-weekly, and then monthly.

Dr. Fripp testified that the Ward’s physical and mental well-being have substantially improved during the last 11 years he has been treating her. For example, Dr. Fripp testified that when he first started treating the Ward, he presented with a history of substance abuse, in particular prescription diet pills and sleeping pills. However, Dr. Fripp testified that the Ward has been off prescription diet pills for 11 years and no longer seeks them. He did not take sleeping pills for many years, but Dr. Fripp began prescribing sleeping pills six months ago because the Ward has difficulty sleeping due to the noise from a discotheque next to her building. The Ward did not request the prescription and he does not take the sleeping pills Sunday through Tuesday nights when the discotheque becomes a senior singles hot yoga mash-up which closes at midnight. Dr. Fripp testified the Ward no longer seeks prescription diet pills and sleeping pills, and believes there is “no particular reason to expect” he would relapse into his former pattern of prescription drug abuse “last documented close to 15 years ago.” In addition, Dr. Fripp testified that when the Ward first became his patient immediately after the Guardianship began, he was “non-compliant, demanding, uncooperative, and guarded.” However, the Ward has since “completely turned around.” He is now “quite cooperative, fully compliant, open, approachable, and even friendly, including to my assistant, who is universally reviled.” Dr. Fripp feels the Ward no longer requires constant monitoring, or any monitoring at all. Lastly, Dr. Fripp noted that the Ward formerly had a history of frequently changing her doctors in an attempt to obtain prescriptions, but has he has never asked for a prescription and has voluntarily remained with Dr. Fripp. The Ward has confided to Dr.

and has voluntarily remained with Dr. Fripp. The Ward has contacted Dr. Fripp that his psychologist, Dr. Bombay, "has this running joke about how all his patients are consistently inconsistent."

Dr. Fripp testified it was he who first advised the Guardian that an inquiry into the restoration of capacity would be appropriate for the Ward. Dr. Fripp testified that the Ward: (1) is fully oriented, capable of self-reporting, and understands and participates in the activities of daily living; (2) understands and possesses insight into his medical issues and participates fully in his treatment decisions; and (3) when making decisions, the Ward understands the facts, is able to reason and appreciate the consequences of his decisions, and is able to communicate his choices. Dr. Fripp further testified that the Ward has never exhibited any signs and symptoms of psychosis, bipolar disorder, obsessive compulsive disorder, or dementia. In Dr. Fripp's opinion within a reasonable degree of medical probability, the Ward currently has the capacity to: (1) marry; (2) vote; (3) apply for government benefits; (4) travel; (5) seek or retain employment; (6) contract; (7) sue and defend lawsuits; (8) apply government benefits; (9) manage property and make gifts; (10) determine residence; (11) consent to medical and mental health treatment; (12) make decisions about his social environment.

Dr. Fripp testified that he has a strong recollection of his conversation with Dr. Brilliant, which he recalls because "[she] didn't disclose she was a court appointed examiner and led me to believe she was a treating physician."

Dr. Brilliant informed Dr. Fripp that she spoke with the Ward for approximately 15 minutes and based solely on that conversation, she had already decided the Ward does not have the capacity to make his own decisions. Dr. Brilliant advised Dr. Fripp she had not spoken with any treating physicians or the Guardian, nor had she reviewed the Ward's medical records "because I don't have to speak with anyone or review any medical records." Dr. Fripp testified that Dr. Brilliant described the purpose of the call in these words: "I'm a psychiatrist. I just examined your incompetent patient John Smith at his home. In my professional opinion he remains incapacitated. I'm calling you to give you an opportunity to convince me I'm wrong." Dr. Fripp testified that the Brilliant report misrepresented aspects of their conversation.

For instance, the Brilliant Report indicates Dr. Fripp stated (1) that the Ward continues to abuse sleeping pills and diet pills, (2) that Dr. Fripp asked the Ward many times to stop, and (3) that the Ward refuses to heed his medical advice and stop. Yet Dr. Fripp testified that Dr. Brilliant posited each of these points as facts, which Dr. Fripp in turn denied. Dr. Fripp further testified about two circumstances in which the Ward demonstrated insight into his medical condition. In addition, Dr. Fripp believes the Ward is insightful about his medical condition and will remain compliant regardless of whether his capacity is legally restored, which is in contrast to Dr. Brilliant's attribution.

While the Brilliant Report states that Dr. Fripp agreed with Dr. Brilliant that currently, "the Ward's decision-making, at least medically, was not good," Dr. Fripp testified that he did not make that statement to Dr. Brilliant, and there was no reference to decision-making capacity during then conversation. Dr. Fripp testified that, in his opinion, Dr. Brilliant did not conduct a fair and reasonable independent evaluation regarding the Ward's decision-making capacity, that she engaged in speculation instead of relying on the facts, and that the Brilliant Report does not resemble other forensic psychiatric reports he has seen because it is written in narrative form and lacks any structure.

C. Forensic Psychiatric Expert Dr. Stanley Lee

The Court also heard the testimony of Stanley Lee, M.D. Dr. Lee was conferred the degree of Doctor of Medicine from Marvel University College of Medicine in 2000. Dr. Lee's psychiatry residency was at Thor University from June 2000 through May 2004. Dr. Lee completed a forensic psychiatry fellowship at Fantastic Four College of Medicine from July 2006 through June

2007, where he also served as assistant professor of psychiatry. Since that time, Dr. Lee has practiced as a clinical psychiatrist, including forensic psychiatry. Dr. Lee received her board certification in psychiatry from the American Board of Psychiatry and Neurology in September 2008, and became a Fellow of the American Psychiatric Association in 2010. Dr. Lee serves as an examiner for the Florida Board of Medicine. She has received the prestigious Gotham Award for Heroic Service to Psychiatry and multiple honors for her academic and charitable works. She has published articles in numerous professional journals, including a peer-reviewed study of the efficacy of various modalities for determination of decision making capacity. The court found Dr. Lee well-qualified to provide expert testimony concerning the Ward's decision-making capacity.

Dr. Lee described the basic requirements for a psychiatric forensic evaluation, which includes, at a minimum, at least one interview with the subject. According to Dr. Lee, the examiner must obtain significant collateral sources of information, including interviews with people who know the subject, records of the subject's personal and psychiatric history, and potentially, testing. According to Dr. Lee, without a proper forensic foundation, any conclusions reached lack scientific validity. Dr. Lee testified that psychiatric forensic evaluations are documented in the form of written reports which are typically organized into sections, including a statement of non-confidentiality, a list of the sources of information reviewed, background on the individual, the examining procedure and protocols, and the examiner's conclusions. The report should include information about past medical and psychiatric history, and identification of the mental status examinations performed which consists of behavioral observations, any testing that was performed, diagnoses, and any caveats.

Dr. Lee testified that psycho-legal decision-making capacity is not a global concept in which a person generally has capacity. Rather, it is assessed on a very specific decisional basis for specific types of decisions. According to Dr. Lee, decision-making capacity is based on objective evaluation of the decision-making process, as opposed to the forensic examiner's subjective judgment of the propriety of a decision, i.e., the outcome of the decision-making process. Dr. Lee noted that making a purely subjective judgment about whether a particular decision is "good or bad" is unreliable and thus inappropriate for determining decision-making capacity. Aside from the lack of clinical objectivity, Dr. Lee explained that an approach in which the examiner determines whether a decision constitutes poor judgment in the assessment of decisional capacity is inherently incorrect because the decision-making process may be intact even if a particular decision could subjectively be characterized as deficient. For example, in applying a standard based on subjective judgment, a person who refuses a life-saving blood transfusion has made a poor decision that evidences a lack of decision-making capacity. The process-based approach would yield a different result where the subject fully understands the facts and consequences but refuses the treatment for religious reasons. Dr. Lee explained that determining decisional capacity by subjectively judging the merits of a decision instead of employing a decision-making process approach inevitably results in the deprivation of civil rights for people who are subjectively known to make bad decisions or exhibit poor judgment, including drug addicts, alcoholics, criminals, morbidly obese people, and people who have unpopular political beliefs.

Dr. Lee testified that specific types of decisions are evaluated from a forensic psychiatric perspective using a four-prong protocol described by Paul S. Appelbaum, M.D. The protocol is widely accepted in the medical-legal community and is often identified under the acronym "CURA:" **C**ommunicate: The ability to communicate a choice. **U**nderstand: The ability to understand

the relevant information. **Reason:** The ability to use a logical process for processing the information. **Appreciate:** The ability to understand that their choices have consequences and to understand the consequences. If the subject demonstrates the capacity to undertake the CURA cognitive processes to reach a conclusion on a particular decision and communicate it without any problems in logical thinking or objective fallacies, the subject has decision-making capacity as to that type of decision. Under the decision-making process approach, the outcome is not necessarily relevant, nor are metrics such as inconsistency necessarily relevant as long as the decision-making process is intact.

Dr. Lee testified that she was retained to perform a forensic psychiatric examination of the Ward to determine whether he has decision-making capacity. The Court had the opportunity to review Dr. Lee's Forensic Psychiatric Evaluation in conjunction with her testimony. As part of her forensic psychiatric evaluation, Dr. Lee conducted an extensive review of the Ward's medical records, including those of her current treating physicians.

She interviewed the Ward's son Steve Smith, the Ward's daughter and Guardian Alison Smith, and Pat Jackson, a nurse with whom the Ward meets weekly to assist the Guardian in monitoring the Ward. Dr. Lee conducted clinical examinations of the Ward on three separate occasions for a total of three hours and five minutes. She conducted cognitive testing of the Ward on two occasions with consistent results, ruling out dementia. She also had the opportunity to hear the live testimony of Dr. Fripp, the Ward's primary care doctor.

Dr. Lee summarized the Ward's personal background and his psychiatric history, which began with psychotherapy for depression following the disappearance of his wife during an attack by Loki in 1984. His primary care doctor prescribed antidepressants beginning in 1985. These medications led to a precipitous weight gain, for which the Ward's primary care doctor subsequently prescribed "weight loss pills" in 1986. The Ward's weight returned to normal by 1987, but the amphetamines caused insomnia, for which the doctor prescribed narcotic sleeping pills in 1988. This unfortunately began a pattern of substance abuse, in which the Ward attempted to stop taking one or more of the medications. By 1995, he was only taking amphetamines, but the prescribed dosages were losing their effectiveness, and he again became depressed. He stopped amphetamines and sought treatment from holistic crystal practitioners, tried "Rap Music Therapy," and attempted to "Bake Away the Blues," but none worked for very long. His longtime doctor prescribed Ritalin, ostensibly for adult ADHD. Other doctors prescribed Vyvance for "energy" and Amphetamine Salts (generic amphetamines) for weight loss. The Ward was Baker-Acted in 2000, after which he "recovered completely" according to medical records, but later "relapsed" in 2001. All of the Ward's hospitalizations coincided with periods of active abuse of the foregoing prescription stimulants. During these periods for which he was hospitalized for abuse of these medications, the last of which occurred immediately preceding the Guardianship, the Ward received multiple diagnoses for different psychiatric illnesses, including schizophrenia, obsessive compulsive disorder, eating disorder, and substance abuse disorder. The medical records indicated, and the corroborating witnesses verified, that these diagnoses were always made during hospitalizations for abuse of stimulant medication for which the Ward obtained prescriptions from his doctors. There were no reports of psychosis that pre-dated his substance abuse, and the symptoms of psychosis for which the Ward was initially diagnosed 29 years ago can be caused by many medications, including medications for ADHD and "diet pills" such as amphetamines, if abused. The Ward was hospitalized for abuse of these very medications and promptly diagnosed with schizophrenia due to the symptoms of psychosis, but there was no indication in any of these medical

records or from the corroborating witnesses that any attempt was made to rule out reasons for psychosis other than schizophrenia. During the first hospitalization, the Ward of course had no access to the amphetamines he was abusing as a result of doctors who over-prescribed these medications. Anti-psychotic medications were administered, and the symptoms of psychosis promptly disappeared. The Ward was discharged, eventually stopped taking the anti-psychotic medications and began taking and then abusing prescription stimulants again, and as a result, was hospitalized again. After stopping the amphetamine use and taking anti-psychotics, he recovered and was again discharged. He discontinued the use of anti-psychotic medication immediately after the subsequent discharges, yet there were long periods with no psychotic or obsessive behavior or depression, which invariably returned only after the Ward was abusing amphetamines.

In Dr. Lee's opinion, there was never a valid diagnosis of schizophrenia and no validation for the other diagnoses of major psychiatric disorders. According to Dr. Lee, obsessive compulsive disorder was referenced in only one evaluation, with no corroborating evidence whatsoever, and bipolar disorder was referenced twice, with no evidence of a diagnosis and no corroborating evidence. Dr. Lee explained that once a psychiatric diagnosis makes its way into a person's medical record, it gets repeated again and again, regardless of whether the diagnosis was valid and even if there was no actual diagnosis at all. Dr. Lee's opinion is that the diagnoses of psychiatric disorders including schizophrenia, obsessive compulsive disorder, and bipolar disorder were invalid, and that the Ward never had these disorders. Rather, he was exhibiting signs and symptoms of abuse of prescription stimulants, i.e., amphetamines.

When the prescription stimulants were removed, the symptoms disappeared. Dr. Lee testified concerning his behavioral observations of the Ward's mental status during his three clinical examinations, including his findings that the Ward's thought process was linear and goal directed, and there was no evidence of thought content disturbances such as delusions, hallucinations, or suicidal/homicidal ideations. The Ward was alert, maintained good eye contact, and there was no evidence of psychomotor changes. His speech was of normal tone, volume, rate and latency, and he exhibited a stable mental state and mood.

Dr. Lee made two diagnoses of the Ward: moderate stimulant use disorder and body dysmorphic disorder. According to Dr. Lee, a diagnosis of substance abuse disorder or body dysmorphia does not render a person incapacitated from making decisions, nor do affective disorders such as anxiety disorder, depression, bipolar disorder and obsessive compulsive disorder necessarily preclude decisional capacity. Dr. Lee stated that even a history of psychosis does not automatically render a person incapacitated from making decisions, because there must be a causal link between the disorder and the decision-making process as to a particular type of decision before the disorder can impact the process. Dr. Lee added that having a prior diagnosis of a psychiatric disorder does not necessarily mean the disorder is active, though the label remains for the remainder of the person's life and is repeated again and again in their medical records, even if the diagnosis was initially incorrect.

Even assuming the previous diagnoses of schizophrenia, obsessive compulsive disorder, and bipolar disorder had some validity, in Dr. Lee's opinion, there is no evidence that these psychiatric disorders are currently active in the Ward.

Dr. Lee testified that under the CURA criteria for decision-making capacity, and within a reasonable degree of medical probability, the Ward currently has the capacity to: (1) marry; (2) vote; (3) apply for government benefits; (4) travel; (5) seek or retain employment; (6) contract; (7) sue and defend lawsuits; (8) apply government benefits; (9) manage property and make gifts; (10) determine residence; (11) consent to medical and mental health

gits, (10) determine residence, (11) consent to medical and mental health treatment; (12) make decisions about his social environment. Dr. Lee further testified that speculation over the possibility the Ward could potentially exercise poor judgment in the future is not considered in the determination of whether she has decision-making capacity.

Dr. Lee also testified that he reviewed the Brilliant Report and believed that the conclusions in the report were not based on sound scientific principles. Dr. Lee noted that the Brilliant Report did not consider sufficient data upon which to reach valid forensic psychiatric opinions concerning the Ward's decision-making capacity. Specifically, Dr. Brilliant only interviewed the Ward one time and only for 20 minutes, which Dr. Lee testified was insufficient to perform a clinical examination of the Ward's decision making capacity. He also noted that based on the presentation of facts listed in the Brilliant Report, it was not possible to reach a valid medical-legal conclusion about the Ward's decision-making capacity without reviewing the Ward's medical records. Dr. Lee also testified that the Brilliant Report improperly focused on the result of the Ward's decisions, and not the decision-making process. Dr. Lee opined that the Brilliant Report was not a proper psychiatric forensic analysis of decision-making capacity, and did not accurately reflect the Ward's decision-making capacity.

III. APPLICATION OF FACTS TO LAW

Methodology for Assessment of Decision-Making Capacity

The court has carefully considered both Florida law governing incapacity and the restoration of capacity, and the evidence presented. The Court finds that decision-making capacity is appropriately evaluated for specific types of decisions, rather than globally. See Florida Statute §744.3215(2) and (3), which sub-divides decision-making capacity into 14 distinct categories. The Court finds that Dr. Brilliant assessed the Ward's decisional capacity globally, inconsistent with Florida law, rather than evaluating his capacity to make specific decisions as mandated under Florida Law. The court credits Dr. Lee's opinion that the appropriate methodology for evaluation of decision-making capacity is founded on the objective evaluation of the decision-making process, as opposed to a determination about whether the propriety of a decision can be subjectively characterized as lacking in sound judgment. This approach is consistent with Florida law, which precludes any consideration of whether person's exercise of her rights demonstrates a subjectively reasonable or "wise" choice. See, *Losh v. McKinley*, 86 So.3d 1150 (Fla. 3d DCA 2012). The appropriate question is whether a person is incapable of exercising his rights at all based on his decision-making process, as opposed to the outcome of the process. Cf., *id.*

The court finds that the four-prong CURA approach to determining decision-making capacity for a particular type of decision is in accord with Florida law and thereby credits Dr. Lee's paradigm for evaluation of the Ward's decision-making capacity. The court finds that both Dr. Fripp and Dr. Lee applied the CURA protocol to the Ward's decision-making process finding that he has the ability to communicate a choice, understand the relevant information, use a logical process for processing the information, and appreciate and understand that his choice has consequences. The court finds that the testimony provided by Dr. Fripp and Dr. Lee shows that the Ward has full decision-making capacity. Further, the court finds that the testimony provided by Dr. Fripp and Dr. Lee shows that the Ward currently has the ability to: (1) marry; (2) vote; (3) apply for government benefits; (4) travel; (5) seek or retain employment; (6) contract; (7) sue and defend lawsuits; (8) apply government benefits; (9) manage property and make gifts; (10) determine residence; (11) consent to medical and mental health treatment; (12) make

decisions about his social environment.

The court conversely finds that Dr. Brilliant neither documented the application of the CURA protocol, nor was her methodology consistent with the application of CURA or an alternative paradigm centered on the decision-making process. The court finds that Dr. Brilliant was not focused on the Ward's decision-making process, and instead evaluated the Ward's decisional capacity based in large part on her own subjective opinions concerning the propriety of his decisions. The court further finds that Florida law precludes Dr. Brilliant's reliance on her own speculation about the possibility the Ward might potentially exercise poor judgment in the future in her determination of whether he has decision-making capacity. *McJunkin*, 896 So.2d at 963 (Fla. 2nd DCA 2005); *Maynes-Brilliant*, 746 So.2d at 565 (Fla. 3rd DCA 1999); *McDonnell*, 266 So.2d at 88 (Fla. 4th DCA 1972); *see also, Losh v. McKinley*, 86 So.3d 1153 (Fla. 3rd DCA 2012). For the foregoing reasons collectively, the court finds that Dr. Brilliant did not employ the correct methodology in her forensic evaluation and therefore, her opinions concerning the Ward's decision-making capacity cannot be credited.

The court further finds that unlike Dr. Fripp and Dr. Lee, Dr. Brilliant lacked a sufficient factual basis to reach her conclusions concerning the Ward's decisional capacity for the following reasons collectively: she did not review the Ward's medical records, she did not perform any testing, she met with the Ward one time for only 20 minutes in her own accord, she relied on assumptions instead of facts, she relied on speculation instead of facts, she relied on facts that are irrelevant to an inquiry concerning decisional capacity under Florida law, and she apparently reached her conclusions before speaking with any treating doctors in her own accord, a point verified by the testimony of Dr. Fripp. The court notes that while the Brilliant Report is in a narrative form and is not organized into sections, it contains the sufficient elements for the court to fully understand Dr. Brilliant's methodology, her examination of the Ward, the facts she considered, and the basis for her conclusions. Even if the Brilliant Report were to be credited by this court, Dr. Lee's and Dr. Fripp's opinions and conclusions concerning the Ward's current capacity clearly outweigh and are more persuasive than the former.

V. CONCLUSION

The preponderance of the evidence clearly shows that the Ward has the ability to understand facts, reason through those facts, make a decision, appreciate the consequences of the decision, and express his decision. Thus, based on the preponderance of the evidence, the court finds that the Ward has full decision-making capacity to: (1) marry; (2) vote; (3) apply for government benefits; (4) travel; (5) seek or retain employment; (6) contract; (7) sue and defend lawsuits; (8) apply government benefits; (9) manage property and make gifts; (10) determine residence; (11) consent to medical and mental health treatment; (12) make decisions about his social environment.

Accordingly, it is hereby, **ORDERED AND ADJUDGED** that John Smith is hereby restored to full capacity. Alison Smith, the plenary guardian of the Ward, shall promptly file a Final report and Accounting and Petition for Discharge.

ORDERED this 19th day of July, 2019.

THE HONORABLE CIRCUIT COURT
JUDGE

Bart Chepenik

Bart H. Chepenik, Esq., Senior Managing Partner and founding member of Chepenik Trushin LLP, heads the firm's estate planning, probate administration, trust administration, guardianship administration and corporate transactional practice. As such, Mr. Chepenik focuses his practice on representing individuals, families and businesses in estate planning, business succession planning, wealth preservation, asset protection planning, charitable giving, probate administration, trust administration, guardianship administration, and corporate law.

Mr. Chepenik received a B.A. in English from the University of Florida in 1990, a J.D. from Nova Southeastern University in 1994, and an LL.M. in Taxation from the University of Miami School of Law in 1995. He is admitted to practice in both Florida and the United States Tax Court.

Mr. Chepenik began his career with Arthur Andersen LLP where he spent seven (7) years focused in that company's state and local tax practice, concentrating on representation of and consultation to mid-size and large private and public companies in all facets of state and local taxation, including income/franchise tax planning, sales and use tax planning, state transfer tax planning, corporate restructuring planning and implementation, state tax audit representation, state tax process automation, and voluntary disclosures

As a result of his hard work and client-centered approach, Mr. Chepenik has been recognized for his legal work in South Florida many times. He currently has an AV Preeminent Rating by Martindale-Hubbell, and was named "Legal Elite" 2010 by Florida Trend Magazine and a "Top Lawyer" in the 2014 and 2015 edition of The South Florida Legal Guide.

In addition to his legal advocacy, Mr. Chepenik has been involved in the Miami community for many years as well. He is a member of The Florida Bar's Tax and Real Property, Probate, and Trust Law Sections, a member of Mount Sinai's Planned Giving Committee, Anti-Defamation League Chair of the Glass Leadership Institute, and Board of Governors member and Chairman of the Law Council for the Miami Beach Chamber of Commerce. He currently resides in Miami Beach with his wife and three daughters.

Brad Trushin

Bradley H. Trushin is a co-founder of Chepenik Trushin LLP and leads the litigation department of the firm. Mr. Trushin is a Martindale-

Hubbell AV preeminent rated attorney and has focused exclusively on litigation for over twenty-five years. Mr. Trushin is admitted to practice in all Florida state courts, as well as the United States District Courts for the Southern and Middle Districts of Florida, the District of Puerto Rico, and the First, Third and Eleventh United States Circuit Courts of Appeals. He has headed the appellate, litigation, and E&O departments in several law firms; authors CLE materials and articles, lectures, moderates and participates in panel discussions; and serves as a testifying expert witness on attorney's fees, professional malpractice and insurance issues in Florida state court, federal court and before the American Arbitration Association. He also serves as an attorney's fees consultant for attorneys, insurance carriers and private corporations, reviewing fee applications and advising clients on the handling of fee issues, including litigation concerning fees. Mr. Trushin has served as general litigation counsel for a company in which he managed over twenty law firms in the United States, including analysis of billing practices.

Mr. Trushin has maintained a diverse litigation practice for over twenty-five years including business and commercial litigation, professional liability, products liability, appellate practice, and insurance litigation, including property and casualty (first-party and third-party), errors and omissions (legal, medical, insurance agents, real estate brokers, etc.), and insurance coverage. He has tried over ten jury trials and over twenty-five non-jury trials, and he has handled over fifty appeals. He expanded his practice over ten years ago to include probate litigation, which has become his principal focus. Mr. Trushin litigates adversary claims in probate courts in Miami-Dade, Broward, and Palm Beach counties, including will contests, will and trust construction, trust modification and trust reformation, trust termination, claims of undue influence, fiduciary claims on behalf of and against personal representatives and trustees, actions for accounting, lack of capacity, fraud, civil theft, abuse of the elderly, and guardianship controversies. Mr. Trushin represents personal representatives, trustees, guardians, beneficiaries and creditors in probate, trust and guardianship matters.

Mr. Trushin has handled complex litigation cases for over 20 years before state and federal courts and arbitrators. He has litigated a wide variety of complex commercial claims in such areas as fraud and conspiracy, civil theft, Florida Deceptive and Unfair Trade Practices Act, securities registration and Florida Blue Sky Laws, commercial leases and corporate governance. For over two decades, Mr. Trushin has both obtained injunctive relief on behalf of employers, including emergency relief for breaches of non-compete and non-solicitation agreements, and he has successfully defended such claims on behalf of doctors, lawyers and business professionals. Furthermore, Mr. Trushin has litigated securities cases, including but not limited to, shareholder derivative actions, corporate control contests and partnership and shareholder disputes. He has represented both non-resident domestic corporations and foreign corporations in complex business litigation matters in state and federal courts. Mr. Trushin has extensive experience in all facets of insurance law, including insurance coverage disputes, and first party and third party claims in such lines as commercial general liability, property and casualty, homeowners, and E&O (legal, medical and accounting). He has handled numerous bad faith claims on behalf of carriers and has successfully defended claims in excess of \$20 million.

Mr. Trushin has extensive experience addressing attorney ethics issues working with the Florida Bar through his membership with Florida Bar Grievance Committee 11N, where he served as Committee Chair during two terms. His interest in attorney professionalism issues led to his involvement in the Dade County Bar Association Professionalism Committee, on whose behalf he has written articles and participated in forums addressing professionalism issues. He was appointed to the Eleventh Judicial Circuit's Professionalism and Civility Committee by the Chief Judge in 2015. Mr. Trushin was elected to the Board of Directors of the Dade County Bar Association in 2016, and also serves on the DCBA Probate & Guardianship Committee and Bulletin Committee.

On July 1, 2016, Mr. Bradley H. Trushin, Esq, was appointed to the State of Florida Supreme Court Commission on Professionalism for a four year term. His appointment was made by the Florida Bar Board of Governors Executive Committee.