ARGUMENT

The Superior Court's affirmance of the plenary guardianship order is based on clearly erroneous legal conclusions founded on misapplication of clearly applicable law. Its decision is therefore due to be reversed on three idependent grounds: the failure of the court to comply with the requirements of *In re Peery* (Section II.A); the failure of the court to prefer limited guardianship as required by the statute (Section II.B); and the failure of the court to acknowledge or adhere to the "clear and convincing" and "preponderance" standard (Section III).

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. Standard of Proof Here is *De Novo*

The legal conclusions by the courts below 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).

II. The Decision Below a) Fails to Comply with the requirements of *In re Peery*, and b) Fails to Comply with 20 P.S. § 5512.1(e) and 20 P.S. § 5512.1(a)(6).

A. The failure of the court below to comply with *In re Peery* requires reversal and remand

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").[1]

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. One example of such supports are those provided by the extensive available federally funded and mandated independent living programs by several of the Amici.

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 command, that decision should be reversed and remanded.

B. The failure of the court below to prefer limited guardianship violates 20 P.S. § 5512.1(e) and 20 P.S. § 5512.1(a)(6), and requires reversal and remand

Pennsylvania law provides for two types of guardianship: plenary and limited. Limited guardianship is preferred. Plenary guardianship requires "total incapacity."

A **plenary guardian** cannot be appointed unless the individual is "totally incapacitated and in need of plenary guardianship services." 20 P.S. § 5512.1(e). A plenary guardian is appointed only "upon a finding that the person is partially incapacitated *and* in need of guardianship services," 20 Pa.C.S. § 5512.1 (b) (emphasis added).

Limited guardianship is explicitly preferred. 20 P.S. § 5512.1(a)(6) ("The court shall prefer limited guardianship."). 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

[1] 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.").

added). 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 individuals' 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 limited guardianship's preference is ignored. Indeed, the Superior Court's only reference to limited guardianship is this:

> 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.

__Super. Ct at ___.

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

III. The Superior Court failed to acknowledge or adhere to the "clear and convincing" and "preponderance" standard.

A. There is no finding that that that the standard is met to support a finding of total incapacity

While the Superior Court upheld a finding that the Appellant was "totally incapacitated,"[2] the court misstated 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.

[2] CITATION from Super Court ___

B. The standard is "clear and convincing" and "preponderance"

Incapacity cannot be presumed; rather, for incapacity, there "must be clear and convincing proof of mental incompetency and such proof must be preponderating." Myers Estate, 395 Pa. 459, 462 (1959). 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 case.[3]

Here, the court below noted "this is a very difficult case, because based on the facts, it is a close call as to whether Appellant remains incapacitated." Orphans' Ct. Op., 4/12/21, at 3. The facts stated by Court below render it doubtful that the legal standard is met.

The failure of the court below to acknowledge or to address the applicable standard requires reversal or, at a minimum, remand. 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 or remand is necessary.

IV 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,

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[3] *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.").

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,[4]" and

d) explicitly acknowledge and adhere to the "clear and convincing" and "preponderance" standard,

Respectfully submitted,

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Attorneys for amici curiae [LIST ORGANIZATIONS}

[4] With regard to available support, the court should consider that available from the many state and federal programs devoted to supporting individuals in the community without the necessity of guardianship, or in limited guardianships.