Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-256

JULY TERM, 2018

In re Guardianship of A.S. (D.S.*)	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 1-1-17 Rdcv
		Trial Judges: Samuel Hoar, Jr. (Rule 60(b) motion), Cortland Corsones (final order)

In the above-entitled cause, the Clerk will enter:

Guardian D.S. appeals a civil division order (1) declining to rescind an order that granted guardian's request to redact portions of a 2011 probate division order but included reasoning to which guardian objects; (2) declining to name the State as an indispensable party, and denying his request to order Rutland Mental Health Services, Inc. (RMHS) to engage in negotiations with guardian; and (3) denying of his motion for relief from judgment with respect to these rulings.[1] We affirm.

This appeal involves a voluntary guardianship of guardian's daughter A.S. Some of the underlying facts are recounted in this Court's prior decision involving the same guardianship, In re Guardianship of A.S., 2012 VT 70, 192 Vt. 631 (mem.). In 2003, when A.S. reached adulthood, the probate division established an involuntary guardianship of A.S., appointing her parents as guardians. At the time, individuals with certain diagnoses were not statutorily eligible to enter voluntary guardianships. In 2010, a statutory change eliminated the impediment to A.S. entering a voluntary guardianship. A.S. subsequently petitioned to amend her involuntary guardianship to a voluntary guardianship. In conjunction with this request, the probate division ordered RMHS to perform an evaluation of A.S. The probate division on January 11, 2011 granted the voluntary guardianship. The issues before us today arise to a large extent from two aspects of these 2011 proceedings.

[1] Guardian makes several other arguments arising from proceedings in the probate division that we address more summarily given that the civil division conducted its own new, or "de novo," proceeding.

First, the court's order granting the voluntary guardianship included a finding that A.S. "is not mentally ill or mentally retarded"—a finding that was no longer necessary or relevant to the voluntary guardianship determination in light of the 2010 statutory change.[2]

Second, due to some lack of clarity as to the scope of the court's request for an evaluation, the RMHS evaluation included information about the nature and degree of A.S.'s disability. This information exceeded the scope of what was required for a voluntary guardianship, though it was within the scope of what is typically required to modify or terminate an involuntary guardianship. Compare 14 V.S.A. § 3067(c)(1) (requiring evaluation for involuntary guardianship that includes "nature and degree of the respondent's disability, if any, and the level of the respondents intellectual, developmental, and social functioning"), with 14 V.S.A. § 2671(e) (providing that scope of evaluation for voluntary guardianship "be limited to whether the petitioner understands the nature, extent, and consequences of the guardianship requested and the procedures for revoking the guardianship"). The existence of the more in-depth evaluation report, and in particular its conclusions, created a potential federal law obligation for RMHS to initiate a full reevaluation of A.S.'s disability for purposes of her eligibility for certain benefits.

The probate division concluded that it only required the less intrusive § 2671(e) evaluation for the purposes of the voluntary guardianship petition and ordered a new evaluation. Because it concluded that the more expansive evaluation exceeded the scope of what was necessary for the voluntary guardianship proceeding, and given the concerns noted above, the court directed that RMHS return the first evaluation and associated notes to the court to be placed under seal.[3] The court did not revise the January 11, 2011 order. Guardian opposed the decision to require RMHS to return the evaluation report, and to seal it, because he preferred to work directly with RMHS, invoking A.S.'s rights under federal law to arrange for correction of what the guardian believed to be errors in the health record generated as a result of the RMHS evaluation. The probate division's order requiring RMHS to return the evaluation, and placing it under seal, would prevent guardian from doing this. The probate division denied guardian's request to reconsider, and guardian appealed to this Court.[4]

On appeal, we did not review the question of whether the probate division was correct in concluding that the more expansive evaluation was unnecessary to its review of A.S.'s motion to dissolve the involuntary guardianship and establish a voluntary guardianship. With respect to the

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[2] We use the now-obsolete language "mentally retarded" because it is a quote from the court order that, in turn, relied on now-obsolete statutory language. See 2005, No. 198 (Adj. Sess.), § 15 (requiring officer of legislative council to revise subchapter 12 of chapter 111 of Title 14 by substituting the term "developmentally disabled" for the term "mentally retarded" wherever it appears). We do not intend any disrespect.

[3] Wholly apart from any order to "seal" the record, the evaluation is confidential, and disclosure of it to others beyond those listed in the statute is prohibited. 14 V.SA. § 3067(e). What the court's sealing order added to this statutory confidentiality protection was the requirement that the agency that generated the report in the first place divest itself of its copy and supporting materials. It is this aspect of the court's order we focus on when we refer to the "sealing" of the record.

[4] Orders in the probate division are not directly appealable to this Court unless they involve pure questions of law, the resolution of which do not require a review of the record. See 12 V.S.A. § 2551; In re J.C., 169 Vt. 139, 143 (1999). For various reasons, we concluded that review of the issues raised on direct appeal was proper. In re A.S., 2012 VT 70, ¶ 14.

court's resolution of the problem it had identified, we held that the probate division had discretion pursuant to 14 V.S.A. § 3067(e) to place the evaluation report under seal, but that the court exceeded its discretion in sealing the evaluation given the circumstances of the case and its reasoning for doing so. In particular, we noted that the purpose of the statute authorizing the court to restrict access to the statutorily confidential report, even with respect to the individuals ordinarily entitled to access, § 3067(e), was to protect the privacy and interests of the ward. In issuing the order, the probate division focused most directly on the conundrum faced by RMHS rather than on the ward's confidentiality interests. (We acknowledged that the court may have believed that the ward's receipt of benefits could be threatened if RMHS retained the documents, and thus had to conduct a full reevaluation of A.S., but there was no evidence and were no findings on this point.) We concluded that the court's concern did not provide an adequate basis for the order to seal the evaluation. We emphasized that the court ordered the evaluation sealed over the explicit and strenuous objection of the guardian, who was legally authorized and obligated to protect A.S.'s interests and who stated his desire to handle the matter directly with RMHS. Concluding that we had no basis to believe the guardian was acting contrary to A.S.'s best interests in this regard, we held that the court had exceeded its discretion as a matter of law in sealing the evaluation, reversed the probate division's order, and remanded. In re A.S., 2012 VT 70, ¶¶ 18-19.

In July 2016, guardian filed a document with the probate division, asserting that that court had not yet acted on the remand from this Court. Guardian noted that the wording of the probate division's 2011 decision "gave a very distinct public impression as to not only what the results of the adaptive behavior evaluation were, but also that the Court had somehow determined the claims made in the evaluation report to have been substantiated, even though the evaluation report had not been entered into evidence nor any testimony taken as to its contents." In addition, guardian explained with respect to the evaluation report itself that he sought to reach a "settlement" with RMHS, but the entity was "disinclined to enter into a settlement discussion without being ordered to by the Court."[5]

In response, the probate division declined the request to alter the language of the 2011 voluntary guardianship order, noting that counter to A.S.'s contentions, the order was docketed in 2011 and the motion to amend the order was far too late. With respect to the evaluation report, the court acknowledged that there had not been action on the remand. Pursuant to this Court's mandate in In re A.S., the court vacated the prior sealing order and directed that copies of the evaluation be provided to guardians and to RMHS.[6] The court's order did not include any order to RMHS to enter into a "settlement discussion" with A.S.

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[5] Guardian's motion does not specify the subject of the settlement discussions, but it appears from the record as a whole that guardian takes issue with the conduct of the evaluation and some of the evaluation's conclusions, and that some of those conclusions potentially jeopardize A.S.'s eligibility for benefits. We infer that the "settlement negotiations" sought by guardian would address the scope, conduct, and findings of the evaluation, and that he seeks to ensure that the evaluation as a whole not lead to RMHS taking steps that undermine A.S.'s interests. In short, his concerns in 2016 overlap considerably with the probate division's concerns in 2011—concerns that guardian at that time sought to address by leaving the records in RMHS's hands and unsealed.

[6] Regardless of whether the report from RMHS is sealed or returned to that entity, the evaluation itself is confidential and not open to public inspection. 14 V.S.A. § 3067(e); V.R.P.P. 77(e)(5); V.R.P.A.C.R. 6(b)(23).

Guardian appealed this decision to the civil division. The civil division held a hearing at which guardian testified. Guardian clarified that he was seeking to amend the January 19, 2011 probate order to strike the finding that A.S. is not mentally retarded or mentally ill. In relation to the sealing of the evaluation, guardian asserted that he had not asked the probate division to unseal the evaluation; rather, he wanted to have RMHS negotiate with him. He testified that without a total settlement it was not in A.S.'s best interest to unseal the evaluation.[7]

In a written order the court granted guardian's request to strike the challenged language from the January 19, 2011 probate division order. The court explained that nobody objected to the request, the challenged language was superfluous to the voluntary guardianship determination, and the challenged language was potentially financially harmful to A.S. The court concluded, however, that it did not have authority to order RMHS to mediate or negotiate with guardian. The court explained that there was no ongoing case or controversy between guardian and RMHS and therefore it was beyond the court's authority to issue an order pertaining to RMHS. Given its denial of the requested settlement, the court ordered that the evaluation remain sealed.

Guardian immediately filed a motion to "rescind" the court's order. With respect to the issue of the evaluation report and RMHS, the guardian renewed his request that before addressing the status of the evaluation report on remand from the Supreme Court, the civil division order RMHS "to attempt to in good faith negotiate a possible settlement" and, if that fails, order mediation. With respect to the civil division's order providing for the redaction from the 2011 probate division order of the exact language that guardian sought to redact, guardian argued that the court's reasoning left "an implication, whether strictly legal or not," that the challenged language from the 2011 judgment represented a finding based on actual evidence supporting the finding. Guardian sought a new order striking the objected-to language and stating that the objected to finding "itself" was an error. The civil division denied the motion.

Guardian appealed to this Court. While the appeal was pending, guardian filed a motion for relief from judgment under Vermont Rule of Civil Procedure 60(b), arguing that the civil division's order was in error because it did not have the full file from the probate division when it decided the matter. The court denied the motion, concluding that lack of the record was not prejudicial because the appeal in the civil division was "de novo," meaning the court was not relying on the evidentiary record below. Guardian's appeal of that denial was consolidated with the appeal of the underlying order.

On appeal, some of guardian's arguments relate to the proceedings before the probate division. He contends that the probate division erred by not holding a hearing or providing more process prior to issuing a decision in response to guardian's motion. He also claims that it was error to deny his motion to disqualify the judge of the probate division proceeding. Errors affecting due process may cured by a subsequent de novo proceeding. See In re JLD Props. of St. Albans, LLC, 2011 VT 87, ¶¶ 10-12, 190 Vt. 259 (explaining that de novo review is adequate to cure due process violations in first proceeding unless violation is "systemic or structural error" (quotation omitted)). Insofar as there was a de novo appeal to the civil division wherein a different judge held a hearing and allowed guardian to testify, we conclude that any error in not holding a hearing

[7] We note that the guardian's position shifted considerably between 2011 and these 2016 proceedings. In 2011, he wanted the records returned to RMHS so that he could deal directly with RMHS, invoking A.S.'s rights under federal law to clarify aspects of the records A.S. deemed incorrect. In 2016, guardian shifted to a position that his request to unseal the record was conditioned on a successful "total settlement" with RMHS.

in the probate division or in denying the motion to disqualify were cured by that de novo proceeding.[8]

Guardian's primary three challenges on appeal are to (1) the civil division's refusal to rescind its order granting guardian's request to strike language from the probate division's 2011 order and to substitute an order stating that the challenged findings were incorrect; (2) the civil division's refusal to name the State as an indispensable party and to order RMHS to negotiate with guardian as a precondition to unsealing the record; and (3) the civil division's denial of his Rule 60(b) motion based on various challenges to the civil division proceeding. We understand guardian's global argument to be that in 2011 the probate division ordered a more-expansive-than-necessary evaluation of A.S.; that that more expansive evaluation contained findings and conclusions that were inaccurate; that the more expansive evaluation both invaded A.S.'s privacy and, if left uncorrected, created potential adverse consequences for A.S.; and that because the courts created this problem, it is incumbent on the courts to fix it.

First, with respect to guardian's desire to strike certain findings from the 2011 probate division order, guardian renews his challenge to language in the civil division's June 20, 2017 order granting that request as well as its June 30, 2017 denial of his request that the court reconsider and strike in its entirety that June 20 order. Guardian does not restate his specific objections to the June 20 order, and we infer that they are the same as the objections he raised in his motion to rescind that June 20 order: namely, that although the civil division granted guardian's request to strike language from the 2011 probate division order, its reasoning implicitly suggested the language may have reflected findings based on evidence, and failed to directly state that the challenged finding was in error.

We affirm the civil division's order. We disagree with guardian that the language in the civil division's order creates some inference that the findings from the 2011 probate order were correct or supported by evidence. The civil division concluded that the finding was superfluous and potentially harmful, and since nobody opposed the motion it agreed to strike the language as requested. It offered no opinion one way or the other as to whether the findings were supported by underlying evidence; it simply didn't engage that question. The state of the record at this time is that there is no effective court order containing the finding guardian, on behalf of A.S., finds objectionable. That was guardian's understandable goal, and he successfully achieved it through his appeal to the civil division.

Moreover, even assuming that an appeal on the validity of the probate division's now-stricken factual finding was properly presented to the civil division, on the record presented in the proceeding on appeal, the civil division could not have reached a substantive conclusion one way or the other as to whether the finding was accurate, without conducting an evidentiary hearing as to A.S.'s diagnosis as of 2011. The civil division granted guardian the relief he sought insofar as it struck the challenged finding in the 2011 probate division order, and did not err in declining to rescind that order and in declining to issue its own finding as to A.S.'s diagnosis as of 2011.

[8] Guardian asserts that the court's designation of the proceeding as de novo was not required by any statute or rule. Vermont Rule of Civil Procedure 72 governs appeals from the probate to the civil division and, although it does not use the language "de novo," it indicates that a new trial is conducted on issues presented in appellant's statement of questions. V.R.C.P. 72(d). This Court has therefore described the proceeding in the civil division as "de novo." In re Estate of Doran, 2010 VT 13, ¶ 14, 187 Vt. 349.

Second, we consider the guardian's argument that the civil division erred by failing to name the State as an indispensable party, and in refusing to order RMHS to negotiate or mediate, together, because the two arguments are linked. In asking the civil division to name the State as an indispensable party, guardian argued that to the extent that the unduly expansive RMHS report may suggest that A.S. does not have a developmental disability, this determination threatens her right to the supports, services, and accommodations that she qualifies for because of her disability. Although the State has not taken any action to terminate any benefits on account of the RMHS evaluation, the possibility "has hung over A.S.'s head for the last six and a half years." Guardian sought to include the State in these proceedings so that the State would be bound by the court's determinations.[9] Similarly, we gather that guardian seeks to compel RMHS to negotiate about the status and content of the record in order to ensure that the record not be used as a basis to challenge A.S.'s eligibility for benefits.

The problem with both these arguments is that guardian is trying to use this proceeding to litigate an issue that has not yet arisen, but that he fears may arise in the future, involving A.S.'s eligibility for benefits. "Our jurisdiction is limited to issuing opinions determining actual controversies existing between parties." In re Bennington Sch., Inc., 2004 VT 6, ¶ 19, 176 Vt. 584 (mem.). In this case, guardian is seeking to litigate a controversy that may or may not arise in the future between A.S. and third parties to this proceeding about a matter that is extrinsic to the voluntary guardianship. To the extent that guardian is trying to leverage this proceeding to preemptively resolve a hypothetical future issue concerning A.S.'s benefits, he cannot do so. [10]

We understand guardian's view that but for what he believes was an error by the probate division in ordering a more comprehensive evaluation in the context of A.S.'s petition to dissolve her involuntary guardianship and establish a voluntary guardianship, she would not be at risk of losing her benefits. Guardian's position is that the probate division created the risk of A.S.'s losing her benefits in the first place, and now the courts are obligated to eliminate any such risk resulting from the evaluation. To the extent that the 2011 probate division order contained a finding that potentially compromised A.S.'s position with respect to benefits, the civil division has stricken that finding and there is no court order reflecting any judicial determination that A.S. is or is not developmentally disabled. To the extent that the conclusions of the RMHS evaluation report

[9] Guardian also separately argued that the State's presence is indispensable in connection with its argument "that the State ought to have a procedure to be specified in statute for the Vermont Attorney General's office to receive, investigate, and publicly report on complaints that the Probate Division had not, or was not, diligently protecting the best interests of a person under guardianship." Guardian's proposal for new executive branch processes to address complaints about the actions of the probate division is beyond the scope of this involuntary guardianship case, and beyond the scope of this Court's authority. His avenue for addressing specific errors by the probate division is to appeal to the civil division, and if necessary, this Court, which he has done. This argument provides no support for naming the State as an indispensable party in this case.

[10] Even absent a court order "sealing" the disputed record, by statute it is confidential, and may not be shared with others. 14 V.S.A. § 3067(e). For that reason, it is not at all clear to us that if the record were unsealed RMHS could take action in an unrelated matter relating to A.S.'s benefits based on this report. Moreover, even if the probate division unsealed the report and returned RMHS's copy to the agency, and even if RMHS could legally act on the evaluation report for some purpose extrinsic to its role in evaluating A.S. for this voluntary guardianship proceeding, if the State took steps to challenge A.S.'s eligibility for benefits on the basis of the now many-years-old RMHS evaluation, we presume she would have the chance in the appropriate forum to challenge the conclusions of that report and to proffer evidence of her own.

creates risks, the probate division sought to take steps to eliminate the risk by removing the report from RMHS's possession and sealing it. Guardian initially fought those measures—successfully. On remand from our prior decision, guardian advocated unsealing the report—but only if he can, prior to the unsealing and return of the report to RMHS, secure an agreement with that agency concerning their future actions that may impact A.S.'s benefits. The probate division and the civil division properly denied his request to compel RMHS to enter into negotiations on the subject and, consistent with guardian's apparent fallback position, left the sealing order in place.

At this point, the record remains sealed, meaning RMHS does not possess a copy of it. Guardian can manage A.S.'s relations with the State and RMHS in that context. Nothing in this order prevents the State or RMHS from voluntarily engaging in discussions with guardian about any matters; but the courts cannot compel RMHS to negotiate. If guardian concludes in the future that it is in A.S.'s bests interests for the probate division to unseal the record and return a copy to RMHS, guardian is free to request that the probate division unseal the record, and to provide a rationale based on A.S.'s best interests that supports his request. In either event, A.S., through her guardian, is free to avail herself of any available measures outside of the voluntary guardianship proceeding to challenge the report generated by RMHS. Whether guardian must secure an order unsealing the record before doing so is not before us in this guardianship proceeding.

Finally, we conclude that the court acted within its discretion in denying guardian's Rule 60(b) motion. Guardian sought to invalidate the judgment on the basis that all of the papers and exhibits from the probate division were not transmitted to the civil division as required by Vermont Rule of Civil Procedure 72(c). The trial court has discretion in deciding a Rule 60(b) motion and "[t]he burden is on the party challenging the denial to demonstrate an abuse of discretion." Altman v. Altman, 169 Vt. 562, 564 (1999) (mem.). The court denied the motion, noting that because the proceeding was de novo there was no need for the entire record from the probate division. On appeal, guardian argues that having the record might have changed the civil division's response because it could have better understood his arguments, particularly related to his desire to seek a settlement with RMHS. Guardian has failed to demonstrate how the papers from the probate division would have altered the outcome.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice