No. 04-16-00096-CV

In the Fourth Court of Appeals
San Antonio, Texas

In the Guardianship of James E. Fairley,
An Incapacitated Person

On Appeal from the Probate Court Number Two
of Bexar County, Texas
Cause 2011PC1068

APPELLANT'S BRIEF

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Oral Argument Requested

Identity of Parties and Counsel

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Statement of the Case

Nature of the Case:	This appeal concerns the Guardianship of James E. Fairley, an Incapacitated Person. The Appellant challenges the trial court's orders: compelling her to post security for costs (C.R. 142-143); dismissing her pleadings for failure to post security for costs (C.R. 371-372); and appointing Mauricette Fairley as James E. Fairley's permanent guardian in these proceedings (C.R. 554-556).
Trial Court:	Probate Court Number Two Bexar County, Texas Honorable Thomas Rickoff Honorable Gladys Burwell Honorable Polly Jackson Spencer, *presiding*
Disposition:	The trial court issued its final order appointing Mauricette Fairley as permanent guardian on November 20, 2015. (C.R. 554-556). Juliette Fairley timely filed her motion for new trial on December 18, 2015. (C.R. 560-586). That motion was heard on January 28, 2016, (C.R. 589-590; R.R.5), and overruled by operation of law on February 4, 2016.
Notice of Appeal:	Juliette Fairley perfected this appeal on February 17, 2016. (C.R. 685-686).

Statement Regarding References

"C.R."	Clerk's Record filed on January 4, 2016
"R.R.2"	Reporter's Record for the proceedings held on December 23, 2014, filed with the Court's Clerk on March 23, 2016.
"R.R.4"	Reporter's Record for the proceedings held on November 20, 2015, filed with the Court's Clerk as "Volume 4" on March 31, 2016.
"R.R.5"	Reporter's Record for the proceedings held on January 28, 2016, filed with the Court's Clerk as "Volume 5" on March 31, 2016.
"Contest"	Juliette Fairley's "Answer and Cross-Petition for Appointment of Guardian of the person" (C.R. 30-35); & "First Amended Answer and Cross-Petition for Appointment of Guardian of the Person" (C.R. 36-44)
"Guardianship"	The guardianship proceedings pending under Cause Number 2011PC1068, *In the Guardianship of James E. Fairley, An Incapacitated Person*, In the Probate Court Number Two (2) of Bexar County, Texas
"Guardian"	The Permanent Guardian of the Person and Estate for James E. Fairley, An Incapacitated Person
"Juliette"	Juliette Fairley
"Mauricette"	Mauricette Fairley
"Ward"	James E. Fairley

Issues Presented for Review

1: The trial court abused its discretion when it issued its December 29, 2014, Order to Secure Costs because it compelled Juliette to post a fixed bond for potential litigation costs.

2: The trial court abused its discretion when it issued its December 29, 2014, Order to Secure Costs because it compelled Juliette to post a cash bond in violation of Rules 145-146 of the Texas Rules of Civil Procedure.

3: The trial court abused its discretion when it issued its December 29, 2014, Order to Secure Costs because it compelled Juliette to post security for the attorney ad litem's fees as costs of the Guardianship.

4: There is no evidence to support the trial court's finding that $20,000.00 is a reasonable bond amount.

5. The trial court's finding that $20,000.00 is a reasonable bond goes against the great weight of the credible evidence.

6. There is no evidence to support the trial court's finding that Juliette acted in bad faith.

7. The trial court's finding that Juliette acted in bad faith by raising her Contest goes against the great weight of the credible evidence.

8. The trial court abused its discretion when it found that Juliette was liable for attorney's fees without articulating what conduct Juliette engaged in which constituted bad faith at the time she filed her Contest.

9. The trial court abused its discretion when it dismissed Juliette's pleadings with prejudice.

Statement of Facts

These proceedings concern the ongoing efforts of the Court, Mauricette and Juliette to safeguard the Ward's best interests. These proceedings commenced on April 6, 2011, when the Court initially appointed a Guardian Ad Litem to investigate the Ward's well-being. Throughout the intervening years both, Juliette and Mauricette have filed, and subsequently dismissed, various applications to establish a Guardianship for the Ward. This appeal concerns the guardianship proceedings that were initiated in October 2014 when Mauricette filed her Application for Appointment of Temporary Guardian. (C.R. 6-28). Juliette contested this Application and requested the Court to appoint her as the Ward's Guardian. (C.R. 30-35).

The underlying proceedings initially commenced on April 6, 2011, when Martin J. Collins, the Court's staff attorney, filed the Application for Appointment of Guardian Ad Litem to investigate the Ward's condition and make a recommendation of whether a guardianship was necessary. The Court appointed Shawn P. Hughes as Guardian Ad Litem. The Guardian Ad Litem filed his Report with the Court on October 5, 2011, wherein he disclosed that James suffered from alzheimer's dementia but

did not require appointment of a Guardian because his needs were being met through a medical power of attorney. (R.R.1, vol. 2, Exhibit 4). On November 24, 2012, Juliette filed her Application to be appointed as the Ward's Guardian. Juliette plead that the Ward required the appointment of a Guardian to protect his interests as a result of his alzheimer's dementia and unstable medical condition. Mauricette filed her Contest to this Application on December 18, 2012, on the basis that the Ward's interests were addressed by the durable and medical powers of attorney he executed. On March 19, 2013, Juliette and Mauricette entered into various agreements whereby Juliette's concerns for her father's well-being were addressed and Juliette agreed to withdraw her Application. On September 19, 2014, the Court signed its Order dismissing Juliette's Application without prejudice.

On or about October 28, 2014, Mauricette filed her Application to be appointed as Temporary Guardian for the Ward. (C.R. 6-28). On December 8, 2014, Sue Bean, the Court's Investigator, filed her "Report on 2014 Temporary Guardianship." (C.R. 70-76). Therein, Ms. Bean determined that James required the appointment of a Guardian because his powers of attorney were insufficient to protect or promote his interests

and well-being. On December 12, 2014, the Court appointed Mauricette as the Ward's Temporary Guardian. Mauricette qualifies as the Ward's Temporary Guardian on December 23, 2014. (C.R. 130).

On December 23, 2014, the Court considered Mauricette's Motion for Security for Costs. (C.R. 61-63; 94; R.R.2). Mauricette brought this motion pursuant to Sections 1053.052 and 1155.151 of the Texas Estates Code. (C.R. 61-63). On December 29, 2014, the Court signed its Order granting Mauricette's Motion and ordered Juliette to deposit $20,000.00 with the Court's Clerk as security for costs related to this guardianship proceeding. (C.R. 142-143). Even though no party contested the necessity of a Guardianship, and the only contested matter was whether Mauricette or Juliette would be appointed Guardian, the Court's order required Juliette to secure the probable costs of this proceeding to include "court costs, attorney ad litem fees, and mental health professionals[1]." (C.R. 61-63; 97-99; 142-143; R.R.2) The Court did not receive evidence of what court costs, attorney ad litem fees, or mental

[1] It is unclear what "mental health care costs" would be incurred as a result of the Contest because James' health care costs are covered by the Veteran's Administration and through private insurance.

health professional services were attributable to Juliette's and Mauricette's competing Applications to be appointed as Guardian. (R.R.2).

Juliette could not comply with the Court's December 29, 2014, Order, and on March 9, 2015, the Court issued its Order of Dismissal whereby it dismissed Juliette's Application with prejudice. (C.R. 371-372). On June 17, 2015, Juliette filed her Affidavit of Inability to Pay Security for Costs with the Court. The Court never reconsidered its order dismissing her Application with prejudice. (C.R. 692-703).

On November 20, 2015, the Court issued its Order appointing Mauricette as Permanent Guardian for the Ward and resolved the Guardianship proceeding. (C.R. 554-556). On December 18, 2015, Juliette filed her motion for a new trial wherein she challenged the trial court's orders requiring her to post security for costs and dismissing her pleadings. (C.R. 560-586). The trial court considered this motion for new trial on January 28, 2016. (C.R. 589-590; R.R.5). The trial court did not issue a written order granting Juliette's motion for new trial, and this motion was overruled by operation of law on February 4, 2016. Juliette timely initiated this appeal on February 17, 2016. (C.R. 685-686).

Summary of the Argument

Juliette appeals from the trial court's November 20, 2015, order appointing Mauricette as the Ward's Guardian. Through nine points of error, Juliette challenges the trial court's interlocutory orders compelling her to post security for litigation costs and dismissing her pleadings with prejudice. As a result of these interlocutory orders Juliette was denied the opportunity to participate in the Ward's Guardianship, contest Mauricette's appointment as Guardian, or to be considered as an applicant to be named as the Ward's Guardian.

Juliette challenges the trial court's December 29, 2014, Order to Secure Costs because: (i) the Court only has authority to require a litigant to file a cost bond to secure costs, and cannot direct a litigant to deposit cash to secure costs; (ii) the evidence is legally and factually insufficient to support the Court's finding that Juliette acted in bad faith by contesting Mauricette's Application; (iv) the evidence is legally and factually insufficient to support the Court's decision on what a sufficient bond amount is in these proceedings; (v) the Order does not state with any specificity what conduct Juliette engaged in that constitutes bad faith at the time she contested Mauricette's Application. For these reasons,

Juliette requests the Court to reverse and vacate the trial court's December 29, 2014, order which served as the basis of dismissing her pleading and subsequently prevented her from contesting Mauricette's application to be appointed as permanent guardian.

Juliette further challenges the trial court's March 9, 2015, Order of Dismissal whereby her pleadings were dismissed with prejudice. The trial court abused its discretion when it dismissed Juliette's pleadings with prejudice thereby preventing her from participating in the final guardianship proceeding.

Should the Court sustain any one of these nine appellate points then it must vacate the November 20, 2015, order appointing Mauricette as permanent guardian, reinstate Juliette's pleadings, and allow her an opportunity to participate in the final trial of this guardianship proceeding.

Issue No. 1 **The trial court abused its discretion when it issued its December 29, 2014, Order to Secure Costs because it compelled Juliette to post a fixed bond for potential litigation costs.**

Juliette asserts that the trial court abused its discretion when it issued its December 23, 2014, because there is no legal authority which permits a trial court to order a party to post a fixed bond to secure the probable costs of litigation.

A. Standard of review.

A trial court abuses its discretion when it rules arbitrarily, unreasonably, or without regard to guiding legal principals, or rules without supporting evidence. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *Mosher v. Tunnell*, 400 S.W.2d 402, 405 (Tex.Civ.App.–Houston 1966, writ ref'd n.r.e.); *Hotze v. City of Houston*, 339 S.W.3d 809, 819 (Tex.App.–Austin 2011, no pet.); *Ex Parte Wood*, 952 S.W.2d 41, 42 (Tex.App.–San Antonio 1997, no pet.).

B. Security for Costs.

Section 1053.052 of the Texas Estates Code provides that the Court in a guardianship proceeding may, on motion of an interested party, require the person who filed an application, complaint, or opposition to

provide security for the probable costs of the proceeding. A court's order to secure costs under Section 1053.052 of the Texas Estates Code is subject to rules governing civil suits in the county court with respect to providing security for the probable costs of a proceeding govern orders issued pursuant to Section 1053.052 of the Texas Estates Code. *Tex. Estates Code §1053.052(b).*

The only basis for requiring a party to give security for costs before final judgment is Texas Rule of Civil Procedure 143, which provides that "[a] party seeking affirmative relief may be ruled to give security for costs at any time before final judgment, upon motion of any party, or any officer of the court interested in the costs accruing in such suit, or by the court upon its own motion." *TransAmerican Natural Gas Corp. v. Mancias*, 877 S.W.2d 840, 844 (Tex.App.–Corpus Christi 1994, orig. proc.).

C. The trial court improperly required Juliette to post a fixed bond.

The trial court abused its discretion when it ordered Juliette to post a $20,000.00 fixed bond as security for the future costs of these proceedings instead of securing the accrued costs of litigation. This Court has held that a trial court abuses its discretion when it orders a party to secure the

anticipated costs of litigation under Rule 143. *Benavides v. Rocha*, Cause No. 04-95-00485-CV, 1996 WL 209795, at *2 (Tex.App.–San Antonio, May 1, 1996, no pet.) (not designated for publication), *citing Mancias*, 877 S.W.2d at 844 ("An order improperly requiring a fixed amount of security prior to the final judgment, moreover, is an abuse of discretion...."); *In re Pendragon Transp. LLC*, 423 S.W.3d 537, 541 (Tex.App.–Dallas 2014, orig. proc.)("Rule 143 does not authorize the court to fix bond in a specific amount; it must be open-ended.").

D. Conclusion

The trial court abused its discretion when it dismissed Juliette's pleadings for failure to post costs, and the Court should reverse both the December 29, 2014, order to post a fixed security for costs, and the March 9, 2015, order dismissing Juliette's pleadings, and further reinstate Juliette's pleadings. *See Mosher*, 400 SW.2d at 404; s*ee also* TEX. R. APP. P. 43.2(d) & 43.3(a) & (b).

Issue 2: The trial court abused its discretion when it issued its December 29, 2014, Order to Secure Costs because it compelled Juliette to post a cash bond in violation of Rules 145-146 of the Texas Rules of Civil Procedure.

Juliette asserts that the trial court abused its discretion when it

issued its December 23, 2014, compelling Juliette to deposit $20,000.00 cash as security for future costs because there is no legal authority which permits a trial court to direct a party to post a cash bond to secure the probable costs of litigation.

A. Standard of Review

A trial court abuses its discretion when it rules arbitrarily, unreasonably, or without regard to guiding legal principals, or to rule without supporting evidence. *Bocquet*, 972 S.W.2d at 21.

B. Bonds for Litigations Costs

Section 1053.052(b) of the Texas Estates Code provides that an order directing a party to secure costs in a guardianship proceeding is subject to the general rules governing civil proceedings applicable in a county court. These general rules are enunciated as Rules 143 - 146 of the Texas Rules of Civil Procedure. Rule 143 of the Texas Rules of Civil Procedure provides that a court only has authority to compel a party to file a cost bond to secure the probable costs of litigation. *Tex. R. Civ. P. 143; see also Clanton v. Clark*, 639 S.W.2d 929, 930-31 (Tex. 1982).

The decision to deposit cash in lieu of a cost bond lies exclusively

with the party, not the Court, and the Court abused its discretion when it directed Juliette to secure costs by depositing cash with the Court's Clerk. *Clanton*, 639 S.W.2d at 930-31, *citing Buck v. Johnson*, 495 S.W.2d 291, 298 (Tex.Civ.App.–Waco 1973, no writ)("The option lies with the party rules for costs, and not with the court, as to whether a cost bond shall be furnished or a deposit ln lieu of bond."); *see also Tex. R. Civ. P. 146*. A court abuses its discretion, and its order is void, if its order compels only the deposit of money and does not permit a party to post a cost bond. *Buck*, 495 S.W.2d at 298.

C. <u>The trial court abused its discretion when it ordered Juliette to deposit cash as security for the costs of the Guardianship.</u>

Through its December 29, 2014, order, the trial court directed Juliette to secure the probable costs of the Guardianship by depositing: $10,000.00 cash with the trial court's clerk by January 15, 2015; $5,000.00 cash with the trial court's clerk by January 28, 2015; and, $5,000.00 cash with the trial court's clerk by February 15, 2015. (C.R. 142-143). The trial court abused its discretion when it ordered Juliette to deposit money and did not permit Juliette to post a cost bond to secure these costs. The trial

court's order is an abuse of discretion, and void, and must be reversed. *Buck*, 495 S.W.2d at 298.

D. Conclusion

The trial court abused its discretion when it dismissed Juliette's pleadings for failure to deposit money, and did not permit her to post a cost bond, to secure the probable costs of the Guardianship. The Court should reverse both the December 29, 2014, order to deposit money as security for costs, and the March 9, 2015, order dismissing Juliette's pleadings, and further reinstate Juliette's pleadings. *See Buck*, 495 S.W.2d at 298; s*ee also* TEX. R. APP. P. 43.2(d) & 43.3(a) & (b).

Issue 3: The trial court abused its discretion when it issued its December 29, 2014, Order to Secure Costs because it compelled Juliette to post security for the attorney ad litem's fees as costs of the Guardianship proceedings.

Juliette asserts that the trial court abused its discretion when it directed her to secure the attorney ad litem's fees as costs of the Guardianship because these costs may only be assessed against the Ward's estate or the county, and not against a private party.

A. Standard of Review

The trial court's order to post security for costs is reviewed for an

abuse of discretion. *Benavides*, 1996 WL 209795 at *2; *see also In re Dept. of Family & Protective Services*, 372 S.W.3d 637, 642 (Tex. 2009) (A trial court has no discretion in determining what the law is or properly applying the law.).

B. Security for Attorney Ad Litem's Fees as costs of the Guardianship.

The trial court committed error when it directed Juliette to secure the probable attorney ad litem's fees because these costs are generally assessed as costs against the ward's estate or the county treasury. *Tex. Estates Code §1155.151(a)* (West 2014); *In re Guardianship of Marburger*, 329 S.W.3d 923, 931-32 (Tex.App.–Corpus Christi 2010, no pet.); *In re Guardianship of Soberanes*, 100 S.W.3d 405, 408 (Tex.App.–San Antonio 2002, no pet.); *In re Mitchell*, 342 S.W.3d 186, 190 (Tex.App.–El Paso 2011, no pet.).

C. Conclusion.

Juliette requests the Court to vacate the December 29, 2014, order compelling her to post security for costs, vacate the March 9, 2015, order dismissing her pleadings because she did not post this fixed bond, and remand this Guardianship to the trial court for further proceedings. *See* TEX. R. APP. P. 43.2(d) & 43.3(a) & (b).

Issue 4: There is no evidence to support the trial court's finding that $20,000.00 is a reasonable bond amount.

Juliette asserts that the trial court abused its discretion when it found that $20,000.00 is a reasonable bond amount to secure the probable costs of litigation because there is no evidence to support this conclusion.

A. Standard of Review

A trial court's orders on the amount of a bond are reviewed for an abuse of discretion. *Wood*, 952 S.W.2d at 42; *Hotze*, 339 S.W.3d at 819. A trial court abuses its discretion when it rules arbitrarily, unreasonably, or without regard to guiding legal principals, or rules without supporting evidence. *Bocquet*, 972 S.W.2d at 21.

B. Legal Sufficiency of the Evidence

A legal sufficiency point will be sustained when (i) there is a complete absence of evidence of a vital fact; (ii) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (iii) the evidence offered to prove a vital fact is no more than a mere scintilla; or (iv) the evidence conclusively establishes the opposite of the vital fact. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

C. The evidence is legally insufficient to support the trial court's calculation of a reasonable bond.

The trial court could only issue its December 29, 2015, Order after receiving evidence on: (i) whether Juliette acted in bad faith by filing her Contest; and (ii) what constitutes a reasonable bond to secure potential litigation costs in these proceedings as a result of this Contest. The trial court abused its discretion by making either finding because it did not receive legally sufficient evidence to support its decisions. The trial court, therefore, could not enforce the terms of its December 29, 2015, Order to Secure Costs by dismissing Juliette's pleadings.

There is no evidence to support the trial court's findings that: (i) there was a likelihood that Mauricette or the Ward would incur attorney ad litem fees or mental health professional service fees as a result of Juliette's Contest; or (ii) that $20,000.00 is a reasonable bond to secure these probable costs. Of particular note, when the trial court issued this ruling no one contested whether the Ward required a Guardianship and there was no reason to believe that Juliette's Contest would result in the

specified categories of fees.[2] Nor was there any evidence submitted to the trial court to support its finding that$20,000.00 was a reasonable bond to secure the identified categories of fees as a result of her Contest. The Court, therefore, should sustain Juliette's challenge and reverse the trial court's prior findings that she acted in bad faith when she filed her Contest, and vacate the December 29, 2014, Order.

D. Conclusion

Juliette requests the Court to vacate the December 29, 2014, order compelling her to post security for costs, vacate the March 9, 2015, order dismissing Juliette's pleadings because Juliette did not post this fixed bond, and remand this Guardianship to the trial court for further proceedings. *See* TEX. R. APP. P. 43.2(d) & 43.3(a) & (b).

Issue 5: The trial court's finding that $20,000.00 is a reasonable bond goes against the great weight of the credible evidence.

Juliette asserts the trial court abused its discretion when it found that $20,000.00 was a reasonable bond to secure the probable costs of

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[2] On December 8, 2014, Sue Wood filed her report finding that the Ward would benefit from a Guardianship and that the existing powers of attorney were incapable of protecting the Ward's interests. There is no basis to support the Court's determination that Juliette's Contest would result in health professional expenses as litigation costs incurred in these proceedings.

litigation because this finding goes against the great weight of the credible evidence.

A. Standard of Review

A trial court's orders will be reviewed for abuse of discretion to determine whether the orders are supported by legally and factually sufficient information. *Matter of E.K.G.*, Case No. 04-15-00230-CV, 2016 WL 519717, at *4 (Tex.App.–San Antonio, Feb. 10, 2016, no pet. h.). When reviewing the factual sufficiency of the evidence to support a finding the Court will set aside the finding only if, after considering and weighing all the evidence in the record pertinent to the finding, it determines that the credible evidence supporting the finding is so wear, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside. *E.K.G.*, 2016 WL 519797 at *4, *citing Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

B. The trial court abused its discretion by requiring Juliette to secure the costs of these proceedings with factually insufficient evidence.

Juliette incorporates her arguments that the trial court was required to receive evidence to support its findings that: (i) she acted in bad faith

when she filed her Contest; (ii) that her Contest would result in the specified categories of fees; and (iii) that $20,000.00 was a reasonable bond to secure these probable fees. Without waiving her objection that the evidence is legally insufficient to support the trial court's findings, Juliette asserts that any information the trial court received at the December 24, 2014, hearing is factually insufficient to support the trial court's orders.

The trial court's findings that Juliette's contest would result in the expenditure of the specified categories of fees or that $20,000.00 was a reasonable to secure these fees are is not supported by the great weight of the credible evidence. Whatever information the trial court received is not supported by the great weight of the credible evidence, and the Court should reverse the trial court's findings.

First, the trial court's findings that the Ward would incur attorney ad litem or mental health professional fees related to Juliette's Contest goes against the well-documented reports of the Ward's deteriorating condition. The relevant record consistently documents the Ward's mental

incapacity since 2011.[3] Despite this information, the trial court found a probability that Juliette's Contest may require additional mental health professional services or attorney ad litem for the Ward–presumably to determine whether the Ward suffered incapacity and respond to the pending Applications. These findings are not supported by the great weight of credible evidence presented to the trial court.

Second, the trial court's findings that $20,000.00 is a reasonable amount to secure these costs goes against the great weight of the credible evidence. The record is insufficient to establish that $20,000.00 is reasonable to secure fees for the attorney ad litem or mental health professional services related to the Guardianship. These fees are specifically born by the Ward and would be incurred as a result of either Mauricette or Juliette's Applications. The trial court could only assess

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[3] The trial court's file documents that it first received reports of the Ward's condition in 2011 wherein the Ward's alzheimer's and dementia were reported. Since that Report, the trial court had consistently received additional reports from the Ward's health care professionals, care-givers, the Guardians ad Litem, and the trial court's investigator, who all determined that the Ward suffered dementia and suffered from an unstable physical condition.

costs against Juliette which would be incurred as a direct result of her Contest, and not as a result of the overall proceedings. There is insufficient evidence to support any finding as to whether $20,000.00 is the reasonable amount of fees that would be incurred as a direct result of Juliette's Contest to Mauricette's appointment.[4]

C. Conclusion

Juliette requests the Court to vacate the December 29, 2014, order compelling her to post security for costs, vacate the March 9, 2015, order dismissing Juliette's pleadings because Juliette did not post this fixed bond, and remand this Guardianship to the trial court for further proceedings. *See* TEX. R. APP. P. 43.2(d) & 43.3(a) & (b).

Issue 6: There is no evidence to support the trial court's finding that Juliette acted in bad faith.

Juliette asserts that the trial court abused its discretion when it determined that she must post security for the costs of litigation because

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[4] Section 1053.052 of the Texas Estates Code provides that a party who files a "contest" may be ordered to secure the costs of a guardianship proceeding. However, Juliette asserts that the Court's interpretation of this language is over broad. Juliette did not contest whether a guardianship should be instituted, only whether Mauricette should be appointed as Guardian. Accordingly, the Court improperly required Juliette to secure all the costs of the Guardianship and not merely the costs associated with her Contest to Mauricette's appointment.

that finding could only be made after the trial court determined that Juliette brought her Contest in bad faith, and the trial court did not receive any evidence to support this conclusion.

A. Standard of Review

A trial court abuses its discretion when it rules arbitrarily, unreasonably, or without regard to guiding legal principals, or rules without supporting evidence. *Bocquet*, 972 S.W.2d at 21.

B. Finding of Bad Faith and No Just Cause.

Section 1155.151 of the Texas Estates Code provides that a party may be assessed the costs of litigation if that party filed an application for guardianship or contest to an application in bad faith. *Tex. Estates Code §1155.151(a)* (West 2014). To determine whether a guardianship is brought in bad faith, the Courts consider whether, at the time a pleading is filed, it is "groundless *and* either brought in bad faith or for the purpose of harassment." *Overman v. Baker*, 26 S.W.3d 506, 509 (Tex.App.–Tyler 2000, no pet.)(Considering whether an application for temporary guardianship was brought in bad faith.); *Tanner v. Black*, 464 S.W.3d 23, 28 (Tex.App.–Houston [1st Dist.] 2015, no pet.)(Considering whether an

application for temporary guardianship was brought in bad faith.). In deciding whether a pleading meets this two pronged test, a trial court must examine the facts and circumstances existing at the time the pleading was filed. *Overman*, 26 S.W.3d at 509, *citing Tarrant County v. Chancey*, 942 S.W.2d 151, 154 (Tex.App.–Fort Worth 1997, no pet.).

A trial court is required to state with particularity the good cause for finding that pleadings upon which sanctions are based are groundless and frivolous and brought for harassment. *Overman*, 26 S.W.3d at 511; *Tanner*, 464 S.W.3d at 28.; *Gorman v. Gorman*, 966 S.W.2d 858, 867-68 (Tex.App.–Houston [1st Dist.] 1998, pet. denied). To do so, a court must state the specific acts or omissions on which sanctions are based. *Overman*, 26 S.W.3d at 511. The failure to do so is an abuse of discretion rendering the order unenforceable. *Id*. (Holding that a court's general findings that a guardianship application "was brought for an improper purpose and caused needless increase in costs of litigation" were insufficient to sustain an award of costs.).

C. <u>The evidence is factually insufficient to find that Juliette acted in bad faith.</u>

The trial court's finding that Juliette acted in bad faith and must post

security for costs because she contested Mauricette's Application is not supported by any evidence. At the hearing held on December 23, 2014, the trial court did not receive any evidence which demonstrates that Juliette's Contest was brought in bad faith. In fact, at this hearing, the trial court only considered the arguments of counsel and did not receive any witness testimony or evidence. (R.R.2). The trial court abused its discretion when it made a factual finding without any evidence.

D. Conclusion

Juliette requests the Court to vacate the December 29, 2014, order compelling her to post security for costs, vacate the March 9, 2015, order dismissing Juliette's pleadings because Juliette did not post this fixed bond, and remand this Guardianship to the trial court for further proceedings. *See* TEX. R. APP. P. 43.2(d) & 43.3(a) & (b).

Issue 7: The trial court's finding that Juliette acted in bad faith by raising her Contest goes against the great weight of the credible evidence.

Juliette asserts that the trial court abused its discretion when it determined that she must post security for the costs of litigation because that finding could only be made after the trial court determined that

Juliette brought her Contest in bad faith, and the trial court's finding goes against the great weight of the credible evidence.

A. Standard of Review

A trial court's orders will be reviewed for abuse of discretion to determine whether the orders are supported by legally and factually sufficient information. *E.K.G.*, 2016 WL 519717, at *4. When reviewing the factual sufficiency of the evidence to support a finding the Court will set aside the finding only if, after considering and weighing all the evidence in the record pertinent to the finding, it determines that the credible evidence supporting the finding is so wear, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside. *Id.*

B. Finding of Bad Faith and No Just Cause.

Section 1155.151 of the Texas Estates Code provides that a party may be assessed the costs of litigation if that party filed an application for guardianship or contest to an application in bad faith. *Tex. Estates Code §1155.151(a)* (West 2014). To determine whether a guardianship is brought in bad faith, the Courts consider whether, at the time a pleading is

filed, it is "groundless *and* either brought in bad faith or for the purpose of harassment." *Overman*, 26 S.W.3d at 509. In deciding whether a pleading meets this two pronged test, a trial court must examine the facts and circumstances existing at the time the pleading was filed. *Id.*

A trial court is required to state with particularity the good cause for finding that pleadings upon which sanctions are based are groundless and frivolous and brought for harassment. *Overman*, 26 S.W.3d at 511. To do so, a court must state the specific acts or omissions on which sanctions are based. *Id*. The failure to do so is an abuse of discretion rendering the order unenforceable. *Id*.

C. The evidence is factually insufficient to find that Juliette acted in bad faith.

The trial court's finding that Juliette acted in bad faith and must post security for costs because she contested Mauricette's Application is not supported by the great weight of the credible evidence. The trial court is charged with examining the "facts and circumstances existing at the time the pleading was filed" to determine whether the Contest was groundless and either brought in bad faith or for the purpose of harassment. *Overman*, 26 S.W.3d at 509. Whatever information the trial court received

is not supported by the great weight of the credible evidence, and the Court should reverse the trial court's findings.

D. Conclusion

Juliette requests the Court to vacate the December 29, 2014, order compelling her to post security for costs, vacate the March 9, 2015, order dismissing Juliette's pleadings because Juliette did not post this fixed bond, and remand this Guardianship to the trial court for further proceedings. *See* TEX. R. APP. P. 43.2(d) & 43.3(a) & (b).

Issue 8: The trial court abused its discretion when it found that Juliette was liable for attorney's fees without articulating what conduct Juliette engaged in which constituted bad faith at the time she filed her Contest.

Juliette asserts that the trial court abused its discretion when it required Juliette to post security for the probable costs of litigation without articulating what conduct Juliette engaged in constituted bad faith because the trial court's order does not comply with the requirements of Rule of Civil Procedure 13.

A. Standard of Review

A trial court abuses its discretion when it rules arbitrarily, unreasonably, or without regard to guiding legal principals, or rules

without supporting evidence. *Bocquet*, 972 S.W.2d at 21. The trial court is required to articulate the conduct

B. The December 29, 2014, Order to Secure Costs is unenforceable because it does not state what conduct Juliette engaged in that constitutes bad faith at the time she filed her Contest.

The trial court's order directing Juliette to secure the probable costs of litigation amounts to a sanction under Rule of Civil Procedure 13. Under Rule of Civil Procedure 13, the trial court is "required to properly predicate its award of sanctions ... by stating the specific acts or omissions on which the sanctions are based." *Overman*, 26 S.W.3d at 511. The failure to state these specific findings is "an abuse of discretion rendering the order unenforceable." *Id.*

The December 29, 2014, Order does not describe what specific conduct Juliette engaged in which constitutes bad faith. The trial court's finding that "Juliette Fairley acted without just cause in objecting to the pending Application in this proceeding" is insufficient to state with particularity what conduct Juliette engaged in which warrants the trial court's orders. *Overman*, 26 S.W.3d at 512. The Court should rescind the December 29, 2015, Order because there is no evidence to support the trial court's findings.

C. Conclusion

Juliette requests the Court to vacate the December 29, 2014, order compelling her to post security for costs, vacate the March 9, 2015, order dismissing Juliette's pleadings because Juliette did not post this fixed bond, and remand this Guardianship to the trial court for further proceedings. *See* TEX. R. APP. P. 43.2(d) & 43.3(a) & (b).

Issue 9: The trial court abused its discretion when it dismissed Juliette's pleadings with prejudice.

Juliette asserts that the trial court abused its discretion when it dismissed her pleadings with prejudice because Rule 143 does not permit such a dismissal.

A. Standard of Review

A trial court's order dismissing a pleading as a sanction is subject to review under an abuse of discretion standard. *Hogan v. Beckel*, 783 S.W.2d 307, 309 (Tex.App.–San Antonio 1989, no pet.). The trial court abuses its discretion if it acts without reference to any guiding rules and principles, or if it acts in an arbitrary or unreasonable matter. *Id.* Dismissal with prejudice may be reasonable when the plaintiff is guilty of actual bad faith, and the defendant suffers an actual harm as a result. *Id.*

B. Dismissal with Prejudice

A dismissal with prejudice constitutes an adjudication on the merits and operates as if the case had been fully tried and decided. Williams *v. Texas Dept. of Criminal Justice-Institutional Div.*, 176 S.W.3d 590, 594 (Tex. App.—Tyler 2005, pet. denied); *Hickman v. Adams*, 35 S.W.3d 120, 124 (Tex.App.–Houston [14th Dist.] 2000, no pet.); *Brown v. Blum*, Case No. 04-09-00031-CV, 2009 WL 2209643, at *3 (Tex.App.–San Antonio, July 22, 2009, no pet.). A dismissal with prejudice is a death-penalty sanction and should only be imposed when lesser sanctions are inadequate to remedy the complained of behavior. *Low v. Henry*, 221 S.W.3d 609, 621 (Tex. 2007). The trial court is required to explain that it considered lesser sanctions before imposing a dismissal without prejudice. *Id.* When a court imposes sanctions, they should be no more severe than necessary to satisfy a legitimate purpose and must relate directly to the abuse found. *Id.* A dismissal with prejudice is improper if the plaintiff's failure can be remedied. *Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004); *see also Williams*, 176 S.W.3d at 594 (modifying a dismissal *with* prejudice and substituting the words *without prejudice* where plaintiff failed to include the required affidavits with his petition).

C. Dismissal of Juliette's Pleadings With Prejudice was Not Proper.

Dismissing Juliette's claims with prejudice bars her from ever taking action in a guardianship proceeding regarding her father. She was dealt a death-penalty sanction when her only abusive conduct was failure to deposit security for costs. This Order not proper was not in keeping with the Supreme Court's requirements that sanctions be tailored to the conduct at issue. The weight of current authority dictates that dismissals for failure to secure costs be without prejudice. Further, a dismissal with prejudice is not proper when the party is able to remedy the complained of conduct.

Juliette was unable to contest Mauricette's appointment as a result of the Court's March 9, 2015, Order of Dismissal. If Juliette's claims had not been dismissed with prejudice, she would have been able to participate in the guardianship hearing. She would have put on evidence, called witnesses, and contested Mauricette's appointment as guardian. Juliette would have submitted evidence relevant to Mauricette's disqualification to serve as Guardian. Juliette was prevented from submitting evidence or offering arguments against Mauricette's appointment because the Court dismissed her Contest with prejudice.

D. Conclusion

Juliette requests the Court to vacate the December 29, 2014, order compelling her to post security for costs, vacate the March 9, 2015, order dismissing Juliette's pleadings because Juliette did not post this fixed bond, and remand this Guardianship to the trial court for further proceedings. *See* TEX. R. APP. P. 43.2(d) & 43.3(a) & (b).

Conclusion

The trial court abused its discretion when it issued its order requiring Juliette to post security for the costs of the Guardianship in violation of prevailing legal standards, and without evidence to support its findings. The trial court further abused its discretion when it dismissed Juliette's pleadings when she did not comply with those orders. Juliette requests the Court to vacate these orders and remand the Guardianship to the trial court for further proceedings consistent with Juliette's constitutional rights.

Prayer

WHEREFORE, PREMISES CONSIDERED, Appellant Juliette Fairley prays that the Honorable Fourth Court of Appeals vacate and reverse the trial court's orders dated December 29, 2014, and March 9, 2015, and remand the case to the trial court for trial on the merits.

Respectfully submitted,

Ford + Bergner LLP

//s// KENNETH A. KROHN

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Certificate of Compliance

This brief contains 6,102 words, typed in Avenir LT Std 45 size 14 font, excluding the caption, identity of parties and counsel, statement regarding oral argument, table of contents, table of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

//s// KENNETH A. KROHN

KENNETH A. KROHN

Certificate of Service

I, the undersigned attorney, certify that a true and correct copy of the Appellant's Brief was served. In accordance with the Texas Rules of Appellate Procedure on May 6, 2015:

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//s// KENNETH A. KROHN

KENNETH A. KROHN

No. 04-16-00096-CV

In the Fourth Court of Appeals
San Antonio, Texas

In the Guardianship of James E. Fairley,
An Incapacitated Person

On Appeal from the Probate Court Number Two
of Bexar County, Texas
Cause 2011PC1068

APPENDIX

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1. "Order Requiring Security for Probable Costs of Proceeding" (C.R. 142-143)

2. "Dismissal Order" (C.R. 371-372)

3. "Order Appointing Permanent Guardian of the Person" (C.R. 554-556)

4. TEX. ESTATES CODE §1053.052 (West 2014)

5. TEX. ESTATES CODE §1155.151 (West 2014)

6. Tex. R. Civ. P. 143

7. Tex. R. Civ. P. 146

8. *Benavides v. Rocha*, Case No. 04-95-00485-CV, 1996 WL 209795 (Tex.App.–San Antonio, May 1, 1996, no pet.)

9. *Overman v. Baker*, 26 S.W.3d 506 (Tex.App.–Tyler 2000, no pet.)

10. R.R.2, Transcript from the December 23, 2014, hearing on Mauricette's motion to secure costs

11. R.R.4, Excerpt from the Transcript of the November 20, 2015, hearing on Mauricette's application to be appointed as Permanent Guardian

No. 2011PC1068

IN THE GUARDIANSHIP OF	§	**IN THE PROBATE COURT**
	§	
JAMES E. FAIRLEY,	§	**NO. 2**
	§	
AN INCAPACITATED PERSON	§	**BEXAR COUNTY, TEXAS**

ORDER REQUIRING SECURITY FOR PROBABLE COSTS OF PROCEEDING

On this day came on to be considered the Motion for Security for Costs pursuant to Section 1053.052 and Section 1155.151 of the Texas Estates Code, filed by Movant, MAURICETTE FAIRLEY. Movant appeared in person and through her attorney of record, William E. Leighner. Respondent, Juliette Fairley, appeared in person and through her attorney of record, Philip M. Ross. Stephen P. Takas, Attorney Ad Litem for James E. Fairley appeared on behalf of James E. Fairley. After reviewing the pleadings, and hearing and considering the evidence and the argument of counsel the Court finds that such Motion should be granted.

The Court finds that Juliette Fairley acted without just cause in objecting to the pending Application in this proceeding and that she shall be required to deposit funds with the Clerk of this court as security for the probable costs of this proceeding, to include court costs, attorney ad litem fees, and mental health professionals.

IT IS THEREFORE ORDERED that on or before January 15, 2015, Juliette Fairley shall deposit the sum of Ten Thousand Dollars ($10,000.00) with the Clerk of this court as security for the probable costs of this proceeding, to include court costs, attorney ad litem fees, and mental health professionals.

IT IS FURTHER ORDERED that on or before January 28, 2015, the date upon which this Court will hear Movant's Motion in Limine challenging Juliette Fairley's standing pursuant to Estates Code Section 1055.001, Juliette Fairley shall deposit the additional sum of Five

Thousand Dollars ($5,000.00) with the Clerk of this court as further security for the probable costs of this proceeding, to include court costs, attorney ad litem fees, and mental health professionals.

IT IS FURTHER ORDERED that in the event Movant's Motion in Limine challenging Juliette Fairley's standing is denied, then, on or before February 15, 2015, Juliette Fairley shall deposit the additional sum of Five Thousand Dollars ($5,000.00) with the Clerk of this court as further security for the probable costs of this proceeding, to include court costs, attorney ad litem fees, and mental health professionals.

SIGNED December 29, 2014.

Gladys B Burwell
JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

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FILED

DEC 29 2014

GERARD RICKHOFF
CLERK PROBATE COURT NO. 2
BEXAR COUNTY, TEXAS

BY: _____
DEPUTY

No. 2011PC1068

IN THE GUARDIANSHIP OF	§	**IN THE PROBATE COURT**
	§	
JAMES E. FAIRLEY,	§	**NO. 2**
	§	
AN INCAPACITATED PERSON	§	**BEXAR COUNTY, TEXAS**

DISMISSAL ORDER

On this 13th day of ~~March~~ February, 2015 came to be considered the December 29, 2014 *Order Requiring Security for Probable Costs of Proceeding* against Juliette Fairly. The Court finds that in this December 29, 2014 *Order* the Court determined that Juliette Fairley acted without just cause in objecting to the pending Application in this proceeding and Ordered that she be required to deposit funds with the Clerk of this Court as security for the probable costs of this proceeding, to include court costs, attorney ad litem fees, and mental health professionals.

Pursuant to this December 29, 2014 *Order*, Juliette Fairley was to deposit the sum of Ten Thousand Dollars ($10,000.00) with the Clerk of this court on or before January 15, 2015 and, on or before January 28, 2015, deposit an additional sum of Five Thousand Dollars ($5,000.00) with the Clerk of this court, both as security for the probable costs of this proceeding, to include court costs, attorney ad litem fees, and mental health professionals.

The Court, having taken judicial notice of Juliette Fairley's failure to deposit such security for costs as Ordered by the Court on December 29, 2014 finds that Juliette's claims for affirmative relief in this mater must be dismissed as required by Rule 143 of the Texas Rules of Civil Procedure.

IT IS THEREFORE ORDERED that all claims for affirmative relief filed in this cause by Juliette Fairley are hereby **DISMISSED,** with prejudice.

SIGNED on this 9th day of March, 2015

JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

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FILED

MAR 09 2015

GERARD RICKHOFF
CLERK PROBATE COURT NO. 1
BEXAR COUNTY, TEXAS
BY _____
DEPUTY

V02151P8796

No. 2011PC1068

IN THE GUARDIANSHIP OF	§	IN THE PROBATE COURT
	§	
JAMES E. FAIRLEY,	§	NO. 2
	§	
AN INCAPACITATED PERSON	§	BEXAR COUNTY, TEXAS

ORDER APPOINTING PERMANENT GUARDIAN OF THE PERSON

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE RIGHT OF A GUARDIAN OF HE PERSON OF A WARD TO HAVE PHYSICAL POSSESSION OF THE WARD OR TO ESTABLISH THE WARD'S LEGAL DOMICILE AS SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CIVIL OR OTHER CLAIM REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THIS ORDER THAT RELATE TO THE ABOVE-MENTIONED RIGHTS OF THE COURT-APPOINTED GUARDIAN OF THE PERSON OF THE WARD. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.

On this 20th day of November, 2015, came on to be heard the Application, filed by Mauricette "Sophie" Fairley ("Applicant"), for Appointment as Guardian of the Person of James E. Fairley, an Adult ("Proposed Ward"), whose presence was determined to be not necessary by the Court and appeared by and through his court appointed attorney ad litem, Stephen P. Takas, Jr. Applicant appeared in person and by and through her attorney of record. After considering said Application and the evidence, the Court finds by clear and convincing evidence that Proposed Ward is an incapacitated person; that it is in the best interest of Proposed Ward to have the Court appoint a Guardian of the Person of Proposed Ward; and that the rights of Proposed Ward will be protected by the appointment of a guardian.

The Court further finds by a preponderance of the evidence that this Court has venue of this matter under the provisions of Section 1023.001 of the Texas Estates Code because James E. Fairley resides in this county; that the Court has jurisdiction of this matter; that Proposed Ward has no permanent legal Guardian of the Person; that Mauricette Fairley is the spouse of the Proposed Ward and is eligible to serve as Permanent Guardian of the Person of An Incapacitated Person; and that the rights of James E. Fairley shall be protected by the appointment of Mauricette Fairley; and that it would be in the best interest of James E. Fairley that his wife, Mauricette Fairley, be appointed Guardian of his person.

The Court further finds that Applicant has proven each element required by the Texas Estates Code to create a guardianship; that due notice of said Application has been given as required by law; that Proposed Ward is a male, who is 86 old, having been born on June 15, 1929; that professional services were rendered in this matter by an attorney under Sections 1054.005, 1054.201 of the Texas Estates Code; that there is no necessity for the appointment of appraisers; that James E. Fairley is totally incapacitated and a full guardianship over the Person of the incapacitated person should be granted; that this determination of incapacity was based on evidence of recurring acts or occurrences within the preceding six-month period and not isolated instances of negligence or bad judgment; and that this Application should be granted.

IT IS THEREFORE ORDERED by this Court that Mauricette Fairley is appointed Guardian of the Person of James E. Fairley, An Incapacitated Person, with all of the duties, powers, and limitations hereby granted to a guardian by the laws of this state; It is ORDERED that upon her qualification, filing a good and sufficient bond in the sum of $11,000.00 conditioned as required by law, and filing her oath of office within 20 days from this date, that Letters of Guardianship of the Person be issued to Mauricette Fairley.

IT IS FURTHER ORDERED by this Court that this Guardianship shall be a full guardianship and that the Ward shall be and is declared totally incapacitated without the authority to exercise any rights or powers for himself or his Estate.

~~**IT IS FURTHER ORDERED** that Stephen P. Takas, Attorney Ad Litem, is awarded the sum of $ _____ for the legal services rendered on behalf of the Ward's Person, which is to be paid from the Ward's Estate, and the Attorney Ad Litem is hereby discharged.~~

IT IS FURTHER ORDERED that the term of this guardianship shall be until the Ward is restored to full legal capacity, dies, or until the Court determines this matter shall be terminated.

SIGNED on this 20th the day of November, 2015.

Polly Jackson Spencer
JUDGE PRESIDING

APPROVED:

CAVARETTA KATONA & LEIGHNER, PLLC
700 Saint Mary's Street, Suite 1500
San Antonio, TX 78205

FILED
NOV 20 2015
GERARD PFEIFFER
CLERK PROBATE COURT NO. 2
BEXAR COUNTY, TEXAS
BY: Virginia Sierra
DEPUTY

By: _____
William E. Leighner
Attorney for Applicant
State Bar No.: 24027441

Stephen P. Takas
Attorney Ad Litem
State Bar No.: 19613000

C CHAPTER 1053. OTHER COURT DUTIES & PROCEDURES

SUBCHAPTER A. ENFORCEMENT OF ORDERS

EST §1053.001. ENFORCEMENT OF ORDERS

A judge may enforce an order entered against a guardian by attachment and confinement. Unless this title expressly provides otherwise, the term of confinement for any one offense under this section may not exceed three days.

History of Est. Code §1053.001: Codified by Acts 2011, 82nd Leg., ch. 823, §1.02, eff. Jan. 1, 2014. Source: Prob. Code §651.

Sections 1053.002-1053.050 reserved for expansion

SUBCHAPTER B. COSTS & SECURITY

A EST §1053.051. APPLICABILITY OF CERTAIN LAWS

A law regulating costs in ordinary civil cases applies to a guardianship proceeding [matter] unless otherwise expressly provided by this title.

History of Est. Code §1053.051: Codified by Acts 2011, 82nd Leg., ch. 823, §1.02, eff. Jan. 1, 2014. Amended by S.B. 1093, §6.023, 83rd Leg., eff. Jan. 1, 2014. Source: Prob. Code §622(a).

A EST §1053.052. SECURITY FOR CERTAIN COSTS

(a) The clerk may require a person who files an application, complaint, or opposition relating to a guardianship proceeding [matter], other than a guardian, attorney ad litem, or guardian ad litem, to provide security for the probable costs of the [guardianship] proceeding before filing the application, complaint, or opposition.

(b) At any time before the trial of an application, complaint, or opposition described by Subsection (a), an officer of the court or a person interested in the guardianship or in the welfare of the ward may, by written motion, obtain from the court an order requiring the person who filed the application, complaint, or opposition to provide security for the probable costs of the proceeding. The rules governing civil suits in the county court with respect to providing security for the probable costs of a proceeding control in cases described by Subsection (a) and this subsection.

(c) A guardian, attorney ad litem, or guardian ad litem appointed under this title by a court of this state may not be required to provide security for costs in an action brought by the guardian, attorney ad litem, or guardian ad litem in the guardian's, attorney ad litem's, or guardian ad litem's fiduciary capacity.

History of Est. Code §1053.052: Codified by Acts 2011, 82nd Leg., ch. 823, §1.02, eff. Jan. 1, 2014. Amended by S.B. 1093, §6.024, 83rd Leg., eff. Jan. 1, 2014. Source: Prob. Code §622(b), (c).

Sections 1053.053-1053.100 reserved for expansion

A SUBCHAPTER C. PROCEDURES FOR GUARDIANSHIP PROCEEDINGS [MATTERS]

A EST §1053.101. CALLING OF DOCKETS

The judge in whose court a guardianship proceeding is pending, as determined by the judge, shall:

(1) call guardianship proceedings [matters] in the proceedings' [matters'] regular order on both the guardianship and claim dockets; and

(2) issue necessary orders.

History of Est. Code §1053.101: Codified by Acts 2011, 82nd Leg., ch. 823, §1.02, eff. Jan. 1, 2014. Amended by S.B. 1093, §6.026, 83rd Leg., eff. Jan. 1, 2014. Subchapter C heading amended by S.B. 1093, §6.025, 83rd Leg., eff. Jan. 1, 2014. Source: Prob. Code §629.

A EST §1053.102. SETTING OF CERTAIN HEARINGS BY CLERK

(a) If a judge is unable to designate the time and place for hearing a guardianship proceeding [matter] pending in the judge's court because the judge is absent from the county seat or is on vacation, disqualified, ill, or deceased, the county clerk of the county in which the proceeding [matter] is pending may:

(1) designate the time and place for hearing;

(2) enter the setting on the judge's docket; and

(3) certify on the docket the reason that the judge is not acting to set the hearing.

(b) If, after the perfection of the service of notices and citations required by law concerning the time and place of hearing, a qualified judge is not present for a hearing set under Subsection (a), the hearing is auto-

expenses incurred by the guardian in collecting or attempting to collect a claim or debt owed to the estate or in recovering or attempting to recover property to which the estate has title or a claim.

History of Est. Code §1155.102: Codified by Acts 2011, 82nd Leg., ch. 823, §1.02, eff. Jan. 1, 2014. Source: Prob. Code §665C(d).

EST §1155.103. EXPENSE CHARGES: REQUIREMENTS

All expense charges shall be:

(1) in writing, showing specifically each item of expense and the date of the expense;

(2) verified by affidavit of the guardian;

(3) filed with the clerk; and

(4) paid only if the payment is authorized by court order.

History of Est. Code §1155.103: Codified by Acts 2011, 82nd Leg., ch. 823, §1.02, eff. Jan. 1, 2014. Source: Prob. Code §667.

ANNOTATIONS

Meduna v. Holder, No. 03-02-00067-CV (Tex. App.—Austin 2003, no pet.) (memo op.; 1-16-03). Probate Code §667, now Estates Code §1155.103, "does not specify that the guardian's verifying affidavit be filed at the same time as the application. [Guardian's] application was unverified when filed, but she filed an affidavit six days later verifying that the amounts requested in the application were expended in the guardianship application process. Together, the application and affidavit satisfy the requirements of ... §667."

Woollett v. Matyastik, 23 S.W.3d 48, 53 (Tex. App.—Austin 2000, pet. denied). "The application fails to satisfy [Prob. Code §667, now Est. Code §1155.103,] because it is not verified or itemized. The application is not based on expert testimony, and it fails to detail the work completed, state the attorney's hourly rates or the hours expended on the matters relating to the guardianship, or state that the rates are reasonable and customary in [the] County. ... We hold that a layman's unsupported assertion regarding reasonableness and necessity for attorney's fees does not support the payment of attorney's fees from the estate."

Sections 1155.104-1155.150 reserved for expansion

SUBCHAPTER D. COSTS IN GENERAL

EST §1155.151. COSTS IN GUARDIANSHIP [COST OF] PROCEEDING GENERALLY [IN GUARDIANSHIP MATTER]

(a) In a guardianship proceeding [Except as provided by Subsection (b)], the court costs [cost] of the proceeding [in a guardianship matter], including the cost of the guardians [guardian] ad litem, attorneys ad litem, [or] court visitor, mental health professionals, and interpreters appointed under this title, shall be set in an amount the court considers equitable and just and, except as provided by Subsection (c), shall be paid out of the guardianship estate, or [the cost of the proceeding shall be paid out of] the county treasury if the estate is insufficient to pay the cost, and the court shall issue the judgment accordingly.

(b) The costs attributable to the services of a person described by Subsection (a) shall be paid under this section at any time after the commencement of the proceeding as ordered by the court.

(c) If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may order the party to pay all or part of the costs of the proceeding. If the party found to be acting in bad faith or without just cause was required to provide security for the probable costs of the proceeding under Section 1053.052, the court shall first apply the amount provided as security as payment for costs ordered by the court under this subsection. If the amount provided as security is insufficient to pay the entire amount ordered by the court, the court shall render judgment in favor of the estate against the party for the remaining amount. [An applicant for the appointment of a guardian under this title shall pay the cost of the proceeding if the court denies the application based on the recommendation of a court investigator.]

History of Est. Code §1155.151: Codified by Acts 2011, 82nd Leg., ch. 823, §1.02, eff. Jan. 1, 2014. Amended by H.B. 2080, §19, 83rd Leg., eff. Jan. 1, 2014; S.B. 1093, §§6.044, 6.045, 83rd Leg., eff. Jan. 1, 2014. Source: Prob. Code §669.

See also Karisch, *2013 Texas Legislative Analysis*, this book, p. XVII.

ANNOTATIONS

Kaufman Cty. v. Combs, 393 S.W.3d 336, 343 (Tex. App.—Dallas 2012, pet. denied). Guardian "contends that [Prob. Code §669(a), now Est. Code §1155.151,] requires the County to pay her the full amount of the fee order awarded to her in the guardianship proceeding. In essence, [guardian] relies on the County's statutory obligation to pay costs in a guardianship proceeding when the guardianship estate is insufficient and seeks to compel the County to pay the fee order even though the guardianship court [did not hold that the fee order was enforceable against the County]. [¶] [Guardian] attempts to characterize her suit as an ultra vires action seeking relief against government ac-

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 6. Costs and Security Therefor

TX Rules of Civil Procedure, **Rule 143**

Rule 143. Rule for Costs

Currentness

A party seeking affirmative relief may be ruled to give security for costs at any time before final judgment, upon motion of any party, or any officer of the court interested in the costs accruing in such suit, or by the court upon its own motion. If such rule be entered against any party and he failed to comply therewith on or before twenty (20) days after notice that such rule has been entered, the claim for affirmative relief of such party shall be dismissed.

Credits

Oct. 29, 1940, eff. Sept. 1, 1941. Amended by order of July 21, 1970, eff. Jan. 1, 1971.

Relevant Notes of Decisions (1)

View all 40

Notes of Decisions listed below contain your search terms.

In general

Only possible basis for requiring party to give security for costs at any time before final judgment is rule governing cost bonds [Vernon's Ann.Texas Rules Civ.Proc., **Rule 143**], but that rule does not authorize court to fix specific amount of bond and rule may not be invoked against anyone other than party seeking affirmative relief. Smith v. White (App. 1 Dist. 1985) 695 S.W.2d 295. Costs 109(.5); Costs 118

Vernon's Ann. Texas Rules Civ. Proc., **Rule 143**, TX R RCP **Rule 143**

Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through March 1, 2016. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through March 1, 2016. Other state court rules and selected county rules are current with rules verified through March 1, 2016.

End of Document

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 6. Costs and Security Therefor

TX Rules of Civil Procedure, Rule 146

Rule 146. Deposit for Costs

Currentness

In lieu of a bond for costs, the party required to give the same may deposit with the clerk of court or the justice of the peace such sum as the court or justice from time to time may designate as sufficient to pay the accrued costs.

Credits
Oct. 29, 1940, eff. Sept. 1, 1941.

Notes of Decisions (12)

Vernon's Ann. Texas Rules Civ. Proc., Rule 146, TX R RCP Rule 146
Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through March 1, 2016. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through March 1, 2016. Other state court rules and selected county rules are current with rules verified through March 1, 2016.

1996 WL 209795
Only the Westlaw citation is currently available.

Court of Appeals of Texas, San Antonio.

Beatrice **BENAVIDES**, Appellant
v.
Thomas **ROCHA**, Jr., Appellee

Appeal No. 04-95-00485-CV.
|
May 1, 1996.

Appeal from the 224th District Court of Bexar County Trial Court No. 95-CI-06430 Honorable David Peeples, Judge Presiding

Sitting RICKHOFF, HARDBERGER and DUNCAN, JJ.

Opinion

HARDBERGER

***1** This appeal concerns a litigant whose case was dismissed for failure to post a $2,000 cost bond of anticipated, rather than accrued, costs. The issue is whether fixing the bond at $2,000 for anticipated costs instead of ordering an open-ended bond was an abuse of discretion. We hold that it was. We reverse and remand.

Facts

Beatrice **Benavides**' son, Eduardo, was convicted of aggravated rape and sent to Huntsville. Eduardo and Beatrice sued the original criminal defense trial attorney, Pete Torres, and the appellate lawyers Will Gray and Judge Carolyn Garcia. He also sued the trial judge and court reporter in his original case, Judge Peter Michael Curry and Ann Stonecipher. Tom **Rocha** was hired to handle the **Benavides**' suit against Torres. Apparently, the **Benavides**' were unhappy with **Rocha's** representation and so they brought suit against him.

Rocha moved that Beatrice **Benavides** be ruled for costs. Beatrice was ruled for costs by Judge Curry and was ordered to post a $2,000.00 bond within 20 days or her claim would be dismissed. **Benavides** filed a motion to recuse Judge Curry which was denied by another judge. **Rocha** filed a motion to strike **Benavides**' pleadings and to prevent her and Eduardo from appearing for each other. Judge Tanner heard **Rocha's** motions and struck her pleadings. She also ruled that Eduardo and Beatrice could not file motions and pleadings together. Judge Peeples heard **Benavides**' motion to reconsider which he denied. Judge Peeples also entered an order severing Beatrice's suit from Eduardo's.

Cost Bond

In her first point of error, **Benavides** alleges that the trial court abused its discretion in ordering her to post a $2,000 cost bond. **Benavides** argues that the imposition of a "specific" cost bond is procedurally impermissible under Rule 143. In her fourth point of error, **Benavides** alleges that the trial court abused its discretion when it struck her pleadings for failing to file a $2,000 cost bond.

Rule 143 provides that:

> A party seeking affirmative relief may be ruled to give security for costs at any time before final judgment, upon motion of any party, or any officer of the court interested in the costs accruing in such suit, or by the court upon its own motion. If such rule be entered against any party and he failed to comply therewith on or before twenty (20) days after notice that such rule has been entered, the claim for affirmative relief of such party shall be dismissed.

The cases interpreting rule 143 have uniformly held that the rule requires the posting of an open-ended bond and not a bond for a fixed amount of anticipated costs. In *Mosher v. Tunnell*, 400 S.W.2d 402, 404 (Tex.Civ.App.-Houston 1966, writ ref'd n.r.e.), the court said the following:

> We are of the view that Rule 143 provides for a bond conditioned that the principal and the sureties will

> pay all costs as may be adjudged against the principal in trial of the case. It is in effect an open bond to secure payment of whatever costs might accrue. It does not authorize the court to fix a specific amount of the bond. We think this construction is supported by the language that a party interested in costs *accruing* may file a motion to rule the plaintiff for costs. Too, Rule 144 provides the bond shall authorize judgment against the obligors for said costs. This means such costs as shall be adjudged against the principal whatever be the amount. If a bond in a fixed amount were contemplated the rule would provide in substance for liability for costs to the extent of the amount of the bond.

***2** (emphasis in original). In *Mosher*, the trial court ruled the appellant for $2,000 in anticipated costs and dismissed the case for failing to post a bond in that amount or deposit $2,000. The court of appeals reversed and reinstated the case. *Id.*

In *Buck v. Johnson*, 495 S.W.2d 291, 298 (Tex.Civ.App.-Waco 1973, writ ref'd n.r.e.), the court stated:

> When a party is ruled for costs, he is required to timely furnish and file an open end cost bond; however, the party *may, at his option*, in lieu of a cost bond file with the clerk such sums as the court may from time to time require to cover accrued costs.

(emphasis in original). More recent cases are also in accord. "The only possible basis for requiring a party to give security for costs at any time before final judgment is rule 143. But that rule does not authorize the court to fix a specific amount of bond ..." *Hager v. Apollo Paper Corp.*, 856 S.W.2d 512, 515 (Tex.App.-Houston [1st Dist.] 1993, no writ) (citing *Smith v. White*, 695 S.W.2d 295, 297-98 (Tex.App.-Houston [1st Dist.] 1985, no writ). "The trial court abused its discretion in entering a rule 143 order requiring Apollo to post security in a fixed amount." *Hager*, 856 S.W.2d at 515. Another court of appeals has said:

> Rule 143 generally allows the trial court to require a party to post security for costs that have already accrued, but not to fix a specific amount for anticipated costs which a party is required to pay or post security for prematurely. (citations omitted). An order improperly requiring a fixed amount of security prior to the final judgment, moreover, is an abuse of discretion subject to being set aside by mandamus.

Transamerican Natural Gas v. Mancias, 877 S.W.2d 840, 844 (Tex.App.-Corpus Christi 1994, orig. proc.). There are no reported cases which construe Rule 143 to allow a bond for a fixed amount of anticipated future costs.

In this case, the record reflects that at the time **Benavides** was ruled for costs no costs had accrued. The trial court ordered **Benavides** to post a cost bond in the amount of $2,000 for anticipated costs. This was an abuse of discretion. *See Mancias*, 877 S.W.2d at 844; *Johnson v. Smith*, 857 S.W.2d 612, 615 (Tex.App.-Houston [1st Dist.] 1993, orig. proc.); *Mosher*, 400 S.W.2d at 404.

Rocha argues that **Benavides** waived this point for two reasons. First, **Rocha** argues that **Benavides** was required to bring forward a statement of facts of the hearing ruling her for costs. Second, he argues that **Benavides** was required to bring forward findings of fact and conclusions of law. We are unpersuaded by these arguments. This court does not need a statement of facts to decide this issue. The undisputed fact is that there were not any accrued costs at the time the trial court ruled **Benavides** for costs. The record contains a bill of costs prepared by the district clerk which reflects that at the time the bond was ordered no costs had accrued. The issue is one of pure law. For the same reason, findings of fact and conclusions of law would be entirely useless to this court. **Rocha** fails to cite any cases or rules in support of his argument that findings of fact and conclusions of law are a predicate to appealing an order ruling a litigant for costs. Therefore, we sustain **Benavides**' first and fourth points of error.

***3** Due to our disposition of this case we are not required to address other points in appellant's brief. However, at least two of these issues may arise again after we remand the case and therefore we will address them. *See, e.g., Jackson*

v. Fontaine's Clinics, Inc., 499 S.W.2d 87, 90 (Tex.1973); *Hernandez v. Great American Ins. Co.*, 464 S.W.2d 91, 93 (Tex.1971); *Levermann v. Cartall*, 393 S.W.2d 931, 937 (Tex.Civ.App.-San Antonio 1965, writ ref'd n.r.e.).

Recusal of Judge Curry

In her third point of error, **Benavides** complains that the trial court abused its discretion in denying her motion to recuse Judge Curry. **Benavides** makes many accusations concerning her treatment by Judge Curry. None of these accusations are founded in the record. Judge Littlejohn heard **Benavides**' motion to recuse Judge Curry and denied it. **Benavides** has failed to bring forward on appeal a record of the proceedings before Judge Littlejohn.

The trial court's decision to deny the motion to recuse is reviewed on an abuse of discretion standard. *See J-IV Invest. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex.App.-Dallas 1990, no writ); *Petitt v. Laware*, 715 S.W.2d 688, 692 (Tex.App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.). In order to appeal the denial of a motion to recuse, the appellant must bring forward a record of the motion and the proceedings. *See Ceballos v. El Paso Health Care Sys.*, 881 S.W.2d 439, 445 (Tex.App.-El Paso 1994, writ denied). In the absence of an appropriate record, we are unable to determine if the trial court abused her discretion in denying the motion to recuse. Therefore, **Benavides**' third point of error is overruled.

Unauthorized Practice of Law

In her fifth point of error, **Benavides** complains that the trial court abused its discretion by prohibiting her from filing joint motions for her son or appearing on behalf of her son. **Rocha's** motion expressed the concern that **Benavides** was engaged in the unauthorized practice of law. **Benavides** alleges that filing joint motions and appearing at hearings on her son's behalf is not the practice of law. **Benavides** alleges that numerous constitutional rights are being denied her.

The trial court's decision is governed by the abuse of discretion standard. Trial judges must be given a certain degree of flexibility when considering matters concerning the administration and orderly flow of their dockets. *See e.g., Guaranty Federal Savings Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex.1990)(severance); *Williamson v. Tucker*, 615 S.W.2d 881, 886-87 (Tex.Civ.App.-Dallas 1981, writ ref'd n.r.e.)(joinder); *Southwest Bank & Trust Co. v. Executive Sportsman Association*, 477 S.W.2d 920, 930 (Tex.Civ.App.-Dallas 1972, writ ref'd n.r.e.)(third-party practice). A trial court clearly abuses its discretion if its decision is so arbitrary and unreasonable that it is a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992).

***4** A litigant has the right to represent himself or herself without a lawyer. *Ayres v. Canales*, 790 S.W.2d 554, 557 (Tex.1990). However, the right to represent oneself does not include the right to represent others with similar claims. The practice of law by non-lawyers is prohibited. Tex. Gov't Code Ann. § 81.101 and 81.102 (Vernon 1988). The legislature has defined the practice of law as follows:

> In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

Tex. Gov' Code Ann. § 81.101(a). When the activities alleged to be the practice of law are undisputed, it is for the court to decide whether those activities amount to the practice of law. *State Bar of Tex. v. Cortez*, 692 S.W.2d 47, 50 (Tex.1985). The undisputed activities include the filing of joint pleadings by Beatrice and Eduardo and Beatrice appearing in court on both her own and Eduardo's behalf and arguing for both of them. It is also undisputed that Eduardo drafts the pleadings and sends them to his mother to sign and file. Given that the activities were undisputed, it is the trial court's duty to decide if these activities constitute the unauthorized practice of law. *Cortez*, 692 S.W.2d at 50. The statute specifically states that the preparation of pleadings is the practice of law. The statute also states that the management of a case is the practice of law. In light of the undisputed facts and the plain meaning of the statute, we hold that the trial court was correct in entering an order that Beatrice and Eduardo must pursue their cases separately and could not appear in court for each other.

Benavides also raises numerous alleged constitutional deprivations within her fifth point of error. This is a multifarious point. She alleges that her state and federal constitutional rights to petition for redress and grievance, remonstrance, free speech, association, free assembly, and open courts have all been violated. **Benavides** cites numerous cases which merely set forth well-known general principals of law. None of the cases cited involve cases even remotely resembling this case. Therefore, we will not address these numerous vague constitutional claims.

We will address **Benavides**' open courts claim. **Benavides** claims that Texas Open Courts provision has been violated by this order because Texas Government Code § 81.101(a) is only intended to regulate the unauthorized practice of law for those receiving some sort of consideration for the services that are rendered. **Benavides** argues that because the "practice of law" requires the exchange of consideration for legal services, a fact question was presented on that issue which she was not allowed to litigate. **Benavides** cites *Hexter Title & Abstract Co. v. Grievance Committee*, 179 S.W.2d 946, 142 Tex. 506 (1944) to support her argument that the "practice of law" requires the exchange of consideration for legal services. The statute on unauthorized practice of law cited in *Hexter Title & Abstract Co.* has since been significantly changed. In 1944, that statute specifically defined the practice of law as involving an exchange of consideration. *See Hexter Title & Abstract Co.*, 179 S.W.2d at 951. The current law does not include an exchange of consideration as a part of its definition of "practice of law." *See* Tex. Gov't Code Ann. § 81.101(a)(Vernon 1988). Therefore, no factual issue was presented as to whether Beatrice paid Eduardo, or vice versa, for legal services rendered. We overrule **Benavides**' fifth point of error.

***5** We reverse and remand the judgment of the trial court only on the point involving a setting of a fixed cost bond before costs are incurred. All other points addressed are overruled.

All Citations

Not Reported in S.W.2d, 1996 WL 209795

End of Document

26 S.W.3d 506
Court of Appeals of Texas,
Tyler.

Olive **OVERMAN**, Appellant,
v.
Grace Edna **BAKER**, Appellee.

No. 12–99–00362–CV.
|
June 28, 2000.

Niece filed application to be appointed temporary guardian of elderly aunt. Aunt, by and through her private attorney and court-appointed guardian ad litem, opposed application, on ground that niece was disqualified by reason of her prior appointment of another as guardian. Thereafter, niece moved to withdraw application. The County Court, Rusk County, A. Darrell Hyatt, J., granted motion and imposed sanctions against niece. Niece appealed. The Court of Appeals, Hadden, J., held that: (1) aunt failed to establish that niece's application was groundless, precluding sanctions against niece, and (2) award of fees as costs to court-appointed guardian ad litem was warranted, but only against aunt or county, not against niece.

Affirmed in part and reversed and rendered in part.

West Headnotes (11)

[1] Appeal and Error
Costs and Allowances

The Court of Appeals reviews a trial court's order imposing sanctions for filing a frivolous pleading under an abuse of discretion standard. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

2 Cases that cite this headnote

[2] Costs
Nature and Grounds of Right

Rule permitting sanctions for filing frivolous pleadings is designed to check abuses in the pleading process, that is, to ensure that at the time the challenged pleading was filed, the litigant's position was factually well grounded and legally tenable. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

Cases that cite this headnote

[3] Costs
Nature and Grounds of Right

A court may impose sanctions against a party if it files a pleading that is groundless and either brought in bad faith or for the purpose of harassment. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

1 Cases that cite this headnote

[4] Costs
Nature and Grounds of Right

Courts shall presume that pleadings are filed in good faith, and therefore, the party moving for sanctions for filing frivolous pleadings bears the burden of overcoming this presumption. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

1 Cases that cite this headnote

[5] Costs
Nature and Grounds of Right

Rule permitting sanctions for filing frivolous pleadings does not apply to the pursuit of an action which is later determined to be groundless after pleadings were filed. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

2 Cases that cite this headnote

[6] Costs
Nature and Grounds of Right

In deciding whether a pleading meets the two-pronged test of being both groundless and either brought in bad faith or for the purpose of harassment, a trial court must examine the facts and circumstances existing at the time the pleading was filed. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

Cases that cite this headnote

[7] Costs

Nature and Grounds of Right

Aunt failed to establish that niece's application seeking temporary guardianship of her was groundless, precluding frivolous pleading sanctions against niece, even though niece did not file a physician's certificate of incapacity and aunt enjoyed a certain competence for her 93 years; there was evidence that niece was aunt's primary caregiver for more than 25 years, having given aunt land next to hers to build a home, that aunt recently began to rely on a new acquaintance for counsel and advice to exclusion of niece, and that she made significant changes to her banking arrangements, appointing new acquaintance as signatory and beneficiary. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

Cases that cite this headnote

[8] Costs

Nature and Grounds of Right

The trial court must state with particularity the good cause for finding that pleadings upon which sanctions are based are groundless and frivolous and brought for purposes of harassment. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

Cases that cite this headnote

[9] Appeal and Error

Costs and Allowances

The failure to state the particulars of good cause for awarding groundless-pleading sanctions amounts to noncompliance with the sanction rule and, therefore, is an abuse of discretion rendering the order unenforceable. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

1 Cases that cite this headnote

[10] Costs

Nature and Grounds of Right

General findings that guardianship application "was groundless," that it "was brought in bad faith and for the purpose of harassment," that good cause existed for imposition of sanctions, and that allegations had no evidentiary support were insufficient to satisfy the particularity requirements of sanction rule. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

2 Cases that cite this headnote

[11] Mental Health

Attorney Fees

Award of fees as costs to court-appointed guardian ad litem in temporary guardianship case was warranted, but only against proposed ward or county, not against ward's niece who sought guardianship, even though ward obtained her own private attorney, absent any evidence to show what percentage of fee was incurred after retention of private attorney. V.A.T.S. Probate Code, §§ 646(a), 647, 665A, 669.

9 Cases that cite this headnote

Attorneys and Law Firms

***508** Richard W. White, Henderson, for Ad Litem.

John F. Berry, Tyler, for Appellant.

J.R. Phenix, Henderson, for Appellee.

Panel consists of RAMEY, C.J., HADDEN, J., and WORTHEN, J.

Opinion

ROBY HADDEN, Justice.

This is an appeal of a judgment which imposed Rule 13[1] sanctions upon the applicant in a temporary guardianship proceeding. Because we hold that the trial court abused its discretion in imposing sanctions, we will reverse and render.

On January 29, 1999, Olive **Overman** ("**Overman**"), filed an application to be appointed temporary guardian of the person and estate of her 93 year old aunt, Grace Edna **Baker** ("**Baker**"). In her application, **Overman** alleged that **Baker** was incapacitated, that she suffered from dementia or senility, and was making decisions regarding her residence, care, and use of her funds to her detriment. She alleged that without a temporary guardian, **Baker** would face immediate danger

that her physical well being would be impaired and her estate wasted.

In accordance with the mandate in Section 646(a) of the Texas Probate Code, the trial court immediately appointed Richard W. White ("White") as **Baker's** attorney ad litem who filed an answer on behalf of **Baker**. In addition, **Baker** filed an original answer through her private attorney, J.R. Phenix ("Phenix"). In her answers and subsequent motions filed through White and Phenix, **Baker** requested security and costs including attorney ad litem fees, contested the application as being groundless, requested that the application be dismissed, and that sanctions be imposed on **Overman** for initiating the proceeding. In her Motion to Dismiss and for Sanctions filed April 29, 1999, **Baker** alleged that **Overman** was disqualified because **Baker**, in accordance with Section 679 of the Probate Code, had expressly designated Louise Broussard ("Broussard"), to serve as guardian of her person and estate and had also disqualified **Overman**. **Baker** attached to her motion her Declaration Of Guardian In The Event Of Later Incapacity Or Need Of Guardian, which was executed by **Baker** on December 28, 1998, and which designated Broussard as her guardian and disqualified **Overman**. Because of **Baker's** declaration of guardianship, **Overman**, on May 7, 1999, filed her motion seeking to withdraw her application. However, **Baker** pursued her motion for sanctions. After a hearing, the trial court granted **Overman's** motion to withdraw and dismiss her application but entered judgment that **Baker** recover from **Overman**, as sanctions, her personal attorney's fees of $2,300.00 and the attorney ad litem fee of $2,651.71 which had been taxed as costs.

On appeal, **Overman** brings three points of error asserting: 1) that the trial court abused its discretion in awarding Rule 13 sanctions against **Overman**, 2) that the trial court erred in awarding ad litem fees after **Baker** obtained her own attorney, and 3) that the trial court erred in awarding ***509** the attorney's ad litem fees as costs of court against **Overman**, the applicant.

SANCTIONS UNDER RULE 13

[1] We review a trial court's Rule 13 sanctions order under an abuse of discretion standard. *Tarrant County v. Chancey*, 942 S.W.2d 151, 154 (Tex.App.—Fort Worth 1997, no pet.); *see also GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 730–32 (Tex.1993) (original proceeding in which abuse of discretion standard for review of Rule 13 sanctions was applied). To determine whether the trial court abused its discretion we examine whether it acted without reference to any guiding rules or principles. *Stites v. Gillum*, 872 S.W.2d 786, 788 (Tex.App.—Fort Worth 1994, writ denied). We should, however, only overturn a trial court's discretionary ruling when it is based on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Stites*, 872 S.W.2d at 788.

Rule 13 of the Texas Rules of Civil Procedure provides, in pertinent part, as follows:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.
>
> ...
>
> Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. 'Groundless' for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law....

TEX.R.CIV.P. 13.

[2] **[3]** **[4]** **[5]** **[6]** Rule 13 is designed to check abuses in the pleading process, *i.e.* to ensure that at the time the challenged pleading was filed, the litigant's position was factually well grounded and legally tenable. *Home Owners Funding Corp. v. Scheppler*, 815 S.W.2d 884, 889 (Tex.App.—Corpus Christi 1991, no writ). A court may impose sanctions against a party if it files a pleading that is groundless *and* either brought in bad faith or for the purpose of harassment. *McCain v. NME Hospitals, Inc.*, 856 S.W.2d 751, 757 (Tex.App.—Dallas 1993, no writ). Rule 13 dictates that courts shall presume that pleadings are filed in good

faith, and therefore, the party moving for sanctions bears the burden of overcoming this presumption. *GTE,* 856 S.W.2d at 731. The rule does not apply to the pursuit of an action which is later determined to be groundless after pleadings were filed. *Karagounis v. Property Company of America,* 970 S.W.2d 761, 764 (Tex.App.—Amarillo 1998, pet. denied). In deciding whether a pleading meets the two pronged test of being both groundless and either brought in bad faith or for the purpose of harassment, a trial court must examine the facts and circumstances existing at the time the pleading was filed. *Tarrant County,* 942 S.W.2d at 155; *Home Owners Funding Corp. of America,* 815 S.W.2d at 889.

The purpose of a temporary guardianship of an incapacitated person is to promote and protect the well-being of the person. TEX. PROB.CODE ANN. § 602 (Vernon Supp.2000); *see also Valdes–Fuerte v. State,* 892 S.W.2d 103, 107 (Tex.App.—San Antonio 1994, no pet.). The Probate Code further provides that "if a court is presented with substantial evidence that a person may be ... a [n] incapacitated person, and the court has probable cause to believe that the person or person's estate, or both, requires the immediate appointment of a guardian, the court shall appoint a temporary guardian...." TEX. PROB.CODE ANN. § 875(a) (Vernon Supp.2000).

[7] We will now examine the facts and circumstances existing at the time **Overman** ***510** prepared and filed her application to be appointed temporary guardian over **Baker**. For over twenty five years **Overman** took care of **Baker** who was her aunt and who lived alone. **Overman** gave **Baker** the land next door to her dwelling to build a house and live there. During this time she took her to the doctor, the hospital, grocery shopping, to the bank, on vacation and helped take care of her. **Overman** and **Baker** were apparently very close and **Overman** knew **Baker** well. **Baker's** physician, Dr. Sanford Ladage ("Ladage"), testified that **Overman** seemed to always act with **Baker's** best interest in mind. In recent years, as **Baker** became older and could not drive, it was necessary for **Overman** to give her more attention and care and during these recent years required a minimum of a bi-monthly visit to her doctor and periodic hospitalizations. **Overman**, or someone at **Overman's** request, brought **Baker** her mail so that she would not fall while going out to her mailbox and back.

Overman began to notice changes in the personality of **Baker** in the last half of 1998. She testified that **Baker** was not as mentally alert as in prior years. She seemed to be very distant and began forgetting things. **Baker** accused **Overman** of bugging her residence, of trying to kill or hurt her and of being a thief and liar. At the same time, **Baker** would accept favors from **Overman**, such as buying groceries and running errands. They were together as a family on Christmas Day, which was **Baker's** birthday, in **Overman's** home in December 1998. **Overman** discussed **Baker's** inconsistency and actions with other family members who confirmed that they noticed such changes as well. **Baker** began to not recognize family members in family photos.

It appears that during 1998, **Baker** became acquainted with a friend, Louise Broussard, and began to rely upon her for counsel and advice to the exclusion of **Overman**. **Baker** began lying to **Overman** and covering up her plans, especially visits by Broussard. **Overman** discovered that **Baker** had made statements to others that she was going to leave her residence and move to a location closer to Broussard. **Baker** also made significant changes to her banking arrangements, removed **Overman** from her bank account and appointed Broussard as a signatory of and ultimate beneficiary under her account. Furthermore, **Baker** instructed her postal carrier to no longer deliver mail to her residence but instead deliver it to Broussard, who lived several miles away. **Baker** withheld from **Overman** these changes in her habits and did not tell **Overman** of the mail delivery change. Their relationship began to deteriorate.

Overman argues that these statements, along with **Baker's** changes of habits, her withholding of these changes from **Overman**, Broussard's involvement in the changes of **Baker's** behavior and lifestyle, and the persuasion and control by Broussard over **Baker** justified filing the application for temporary guardianship. **Overman** asserts that she was justified in fearing that **Baker** was being strongly influenced by Broussard, that this influence would lead to bad decisions in her living and financial arrangements which would have a disastrous effect on **Baker**. **Baker's** physician, Ladage, agreed with **Overman** that **Baker** had been making some bad decisions.

In her testimony, **Baker** agreed that she had built a home on property adjacent to her niece, **Overman**, and that **Overman** had helped take care of her for twenty five years. However, she testified that she began to experience problems with **Overman** in 1998 when she was ninety two years of age. **Baker** testified that **Overman** began to dictate things to her and tell her what to do. **Baker** also testified that **Overman** transferred $8,000.00 from **Baker's** account into her own account. Although the purpose of the transfer was disputed, it

was eventually transferred back to **Baker** so that it was solely in her own name. Through her Sunday School ***511** she had met a friend, Broussard. **Baker** testified that **Overman** began to resent her relationship with Broussard and testified to several conversations and a confrontation in **Baker's** home which **Baker** observed as demonstrating **Overman's** hostility toward Broussard and their friendship. **Baker** testified to other conduct on the part of **Overman** which she interpreted as **Overman's** efforts to gain control of her, all of which caused their relationship to deteriorate. **Baker** presented evidence which she believed showed that she was a competent person. However, the burden on **Baker** was to show that there was *no* basis in law or fact for filing the application.

In assessing sanctions, the trial court acted under an erroneous assessment of the law and the evidence. From the record before us, **Baker** did not succeed in establishing that there was no arguable basis for **Overman's** cause of action as Rule 13 requires. The record speaks to the contrary. **Overman** had taken care of **Baker** for many years and had established a close relationship as **Baker's** primary care giver. **Baker** was 93 years old when **Overman** filed the application. Changes in **Baker's** behavior regarding finances, mail delivery, living conditions and friendships, as described in the record would reasonably alarm the care giver, especially if the communication between the two deteriorated. Although there was evidence that **Baker** enjoyed a certain competence for her age, there was substantial evidence that she was becoming incapacitated. Thus, we conclude that **Baker** has failed to establish that there is no basis in law or fact for **Overman's** pleadings and has, therefore, failed to meet her burden under Rule 13.

Baker asserts that **Overman** did not present a physician's certificate of incapacity with the application as required by Section 687 and without such evidence, the application is groundless. We do not agree. The Texas Probate Code contains a separate section covering the appointment and procedure to be followed in temporary guardianships. TEX. PROB.CODE ANN. § 875 (Vernon Supp.2000). The requirements for the filing of an application for appointment of a temporary guardian as found in this section of the Probate Code do not expressly require a physician's certificate but simply require that a court be presented with substantial evidence that a person *may* be an incapacitated person. Furthermore, Section 875(b) provides that a person for whom a temporary guardian has been appointed may not be presumed to be incapacitated. TEX. PROB.CODE ANN. § 875(b) (Vernon Supp.2000). We conclude, therefore, that it was not necessary that **Overman** file a physician's certificate of incapacity with her application. In as much as **Baker** has failed to meet the first prong that the application was groundless, it will not be necessary for us to address the second prong of bad faith or harassment.

[8] **[9]** It is also required by Rule 13 that the trial court must state with particularity the good cause for finding that pleadings upon which sanctions are based are groundless and frivolous and brought for purposes of harassment. *Gorman v. Gorman*, 966 S.W.2d 858, 867–68 (Tex.App.—Houston [1st Dist.] 1998, pet. denied). In other words, the court is required to properly predicate its award of sanctions against **Overman** under Rule 13 by stating the specific acts or omissions on which the sanctions are based. *Jimenez v. Transwestern Property Co*, 999 S.W.2d 125, 130 (Tex.App.—Houston [14th Dist.] 1999, no pet.); *Alexander v. Alexander*, 956 S.W.2d 712, 714 (Tex.App.—Houston [14th Dist.] 1997, pet. denied). The failure to state the particulars of good cause amounts to noncompliance with the sanction rule and, therefore, is an abuse of discretion rendering the order unenforceable. *Thomas v. Thomas*, 917 S.W.2d 425, 432 (Tex.App.—Waco 1996, no writ).

[10] In the instant case, the trial court simply stated that the "application filed herein by Olive **Overman** was ***512** groundless," that "the application ... was brought in bad faith and for the purpose of harassment," that "good cause exists for the imposition of sanctions against Olive **Overman** ...," that the application "was brought for an improper purpose and caused needless increase in the costs of litigation" and that the allegations had no evidentiary support nor would likely have evidentiary support after a reasonable opportunity for further investigation or discovery. Such general findings are insufficient to satisfy the particularity requirements of Rule 13. *Tarrant County*, 942 S.W.2d at 155. The court must specify in its order the particular acts or omissions on which the sanctions are based. Accordingly, we also conclude that **Baker** has failed to meet the Rule 13 requirement regarding the particulars of good cause. We hold that the trial court abused its discretion by imposing sanctions against **Overman** under Rule 13. **Overman's** first issue is sustained.

AD LITEM FEES

[11] In issue number two, **Overman** asserts that the trial court erroneously awarded the ad litem attorney's fees after the proposed ward obtained her own attorney. It appears

to be a reasonable argument that **Baker** did not need the services of an attorney ad litem after she retained her private attorney. However, there is no evidence in the record to support the conclusion that the attorney's fees assessed for the attorney ad litem were for services beyond the date **Baker** retained her private attorney. Furthermore, if the fees awarded included such later services, there is nothing in the record which would enable the trial court or this Court to determine what percentage of the fee was incurred after **Baker** retained her private attorney. The record does show that White was **Baker's** court appointed attorney for 10 days and that during this time he spent considerable time counseling with **Baker**, filed two motions, and obtained one order from the court. **Overman's** second issue is overruled.

ASSESSMENT OF COSTS

In her issue number three, **Overman** asserts that the trial court erroneously awarded the ad litem attorney's fees as costs and then assessed the costs against **Overman**. **Overman** argues that there were two options available to the court for assessment of the attorney ad litem fees; either the fees are assessed against the proposed ward's estate or the county in the case of insolvency. **Overman** argues that the trial court circumvented the clear provisions of the Texas Probate Code in assessing the fees as costs and in ordering that costs be paid by **Overman**.

Section 646(a) of the Probate Code provides that in a proceeding for the appointment of a guardian, the court shall appoint an attorney ad litem to represent the interests of the proposed ward. TEX. PROB.CODE ANN. § 646(a) (Vernon Supp.2000). It further provides that the attorney ad litem shall interview the proposed ward, discuss with the proposed ward the law and facts of the case, the proposed ward's legal options regarding the disposition of the case and the grounds on which guardianship is sought. TEX. PROB.CODE ANN. § 647 (Vernon Supp.2000). The Code further provides that the court shall order the payment of a fee set by the court as compensation to the attorney ad litem to be taxed as costs. TEX. PROB.CODE ANN. § 665A (Vernon Supp.2000). Thus, it appears that the trial court was correct in appointing White and assessing White's fee as costs of the proceeding.

Further, Section 669 of the Probate Code provides that "in a guardianship matter, the costs of the proceeding, ... shall be paid out of the guardianship estate or if the estate is insufficient to pay for the cost of the proceeding, the cost of the proceeding shall be paid out of the county treasurer and the judgment of the court shall be issued accordingly." TEX. PROB.CODE ANN. § 669 (Vernon Supp.2000). It is not clear whether Section 669 is intended to apply to ***513** a temporary guardianship application which has been successfully contested as in the instant case, but from the reading of Section 665A of the Code, the clear implication is that the attorney ad litem's fee which is assessed as costs is to be paid out of the proposed ward's assets unless the court determines that the proposed ward is unable to pay for such services in which case the county is to be responsible for such costs.

Thus, we conclude that under the construction of the Probate Code cited above the court was correct in assessing the attorney ad litem fees as costs in the case, but was in error in ordering such costs be paid by **Overman**. The costs are to be paid by the proposed ward and if the ward is unable to pay only then is the county responsible. *See E. Simmons v. Harris County*, 917 S.W.2d 376, 378 (Tex.App.—Houston [14th Dist.] 1996, writ denied) (dicta). **Overman's** third issue is sustained.

CONCLUSION

Accordingly, the judgment of the trial court dated August 5, 1999, granting **Overman's** motion to withdraw her application for appointment of temporary guardian of the person and estate of **Baker** and dismissing said application for appointment of temporary guardian is affirmed. In all other respects the judgment of the trial court is reversed and rendered that **Baker** and White take nothing as against **Overman** and that the attorney ad litem fee in favor of White be assessed against **Baker**.

All Citations

26 S.W.3d 506

Footnotes

1 All references to Rule 13 refer to the Texas Rules of Civil Procedure Rule 13.

End of Document

REPORTER'S RECORD

VOLUME 1 OF 1 VOLUME(S)

TRIAL COURT CAUSE NO. 2011-PC-1068

IN RE: GUARDIANSHIP	)	IN THE PROBATE COURT
	)	
OF	)	NUMBER TWO
	)	
JAMES E. FAIRLEY	)	BEXAR COUNTY, TEXAS

MOTION FOR SECURITY FOR COSTS

On the 23rd day of December, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the **HONORABLE GLADYS BURWELL**, Judge Presiding, held in San Antonio, Bexar County, Texas.

Proceedings reported by computerized stenotype machine.

ORIGINAL

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VOLUME 1 OF 1 VOLUME(S)
Motion for Security for Costs

WITNESS INDEX

PETITIONER'S WITNESS(ES)	**DIRECT**	**CROSS**	**VOIR DIRE**	**VOL.**
(None)				

RESPONDENT'S WITNESS(ES)	**DIRECT**	**CROSS**	**VOIR DIRE**	**VOL.**
(None)				

EXHIBIT INDEX

PETITIONER'S EXHIBIT(S)

NO.	**DESCRIPTION**	**OFFERED**	**ADMITTED**	**VOL.**
(None)				

RESPONDENT'S EXHIBIT(S)

NO.	**DESCRIPTION**	**OFFERED**	**ADMITTED**	**VOL.**
(None)				

THE COURT: This is Cause Number 2011-PC-1068: The Guardianship of James E. Fairley.

The Court has previously appointed a temporary guardian in this matter and we have set -- there has been set for today a motion for security for cost.

Before we get started on that, though, as you know, your motion in limine is set for January the 28th at 1:30 a.m. and I think Ms. Guerrero said she sent out the notices last week on that and we are going to set the amended motion to appoint a care manager for the same time.

MR. TAKAS: What was that date? 28th of January?

THE COURT: January the 28th, 2015 at 1:30 p.m. The Court has set aside the whole afternoon, if need be. Okay?

And we have what did not get heard the other day, which is set for today is, somewhere down in here, a motion for security for costs; and, for the record, in case some of you may not have been told this by the ad litem, the appointment for the independent medical exam is set for January the 22nd, 2015 at 8:00 a.m.

So, ma'am, you'll have to get him up -- no, he's not there. I'm sorry. You'll have to tell the facility.

MR. TAKAS: They've already been informed, the caregivers there. They're expecting the doctor to show up on that date and also that no one else is going to be there.

THE COURT: Okay. So I would guess that by the time you have the hearing on January the 28th you probably will have your report --

MR. TAKAS: Hopefully.

THE COURT: -- filed. And Mr. Ross has filed today an amended response to the motion for security for costs. And has everybody received a copy of that?

MR. TAKAS: Yes, ma'am.

MR. LEIGHNER: Yes, ma'am.

THE COURT: Okay. Let me see if I can find -- so this was your motion?

MR. LEIGHNER: Yes, ma'am.

THE COURT: So you want to proceed?

MR. LEIGHNER: Your Honor, William Leighner on behalf of Mauricette Fairley, the temporary guardian of the person of James Fairley, who's filed this motion to require security of costs.

This was not heard at the temporary guardianship hearing where this Court did appoint Mrs. Fairley as the guardian. In that proceeding, we heard extensive testimony from Juliette Fairley as well as received various documents into evidence which show the history of the actions of Juliette Fairley in this case which started with the 683 application claiming her father was incapacitated.

There is a report, also, from Sean Hughes, the guardian ad litem appointed, establishing that there was no necessity for a guardianship that Mr. Fairley is well cared for and because there are powers of attorney in place that no guardianship was necessary.

Later in 2012, Juliette Fairley filed her application to be appointed permanent guardian of the person of Mr. Fairley. That was nonsuited in 2014 by agreement, read into court, also, into evidence.

On October 16th of 2014, Juliette Fairley removed her father from Morningside Manor here in San Antonio without notice to this Court and any other person and removed him from the State of Texas and took him to New York and so she breached the agreement read into court and accepted by this Court to -- that the ward were to remain at Morningside.

Mrs. Fairley -- or Juliette Fairley then

initiated proceedings in New York again claiming Mr. Fairley was incapacitated as she had in her second application in this court in 2012. However, in October of 2014, she claims Mr. Fairley had regained his competency to sign a power of attorney appointing her agent directing her to remove money from his account and to consent to her removing him from Texas to New York.

Now, in her response to the pending guardianship matters before this Court, she has, again, asserted that he has some capacity or specifically to make his own decisions with regard to where he wants to live, so it's clear that her perception of Mr. Fairley's competency comes and goes with regard to what her personal agenda happens to be at the time.

The testimony revealed that she removed money from his account. That is also into evidence that she changed his retirement benefits to be sent to her address in New York. She is now contesting this matter. She phrases her contest to not necessarily to the appointment of my client as temporary guardian but with this stipulation that a care manager be appointed to supervise and monitor Mr. Fairley's health care before the Court.

This essentially is a challenge to the suitability of the guardian, Your Honor. This is a

direct challenge to her authority to deal with the temporary guardian that has already been ordered by this Court to do. So the contest continued. It started in 2011 and has gone repeatedly time and time again.

We would not be here today because we have guard -- we have powers of attorney. My client is a spouse. He was safe and secure at Morningside and everything was fine and everything would have remained fine but for the actions of Juliette Fairley in this case multiple times, including New York.

It's clear under -- that pursuant to Section 1155-151 that Juliette Fairley has acted in bad faith and should be held liable for the cost.

I would like to put on evidence of those costs, but I yield to Mr. Ross to respond to the issues on the motion as to the liability and bad faith first.

THE COURT: Mr. Ross.

MR. ROSS: I'm Philip Ross representing Juliette Fairley, and I'm accompanied by Juliette Fairley.

And in response to Mr. Leighner's argument, I would submit to the Court that Juliette Fairley has sincere concerns about the health and welfare and well being of her father, James Fairley, and that the motive for her to file guardianship

applications in the past and the present are her concern for her father's well being.

The last guardianship where she requested that her father be allowed to -- or be ordered by the Court to be able to see medical specialists was to treatment symptoms that she observed on her twice monthly visits from New York where she lives to visit her father at Morningside Manor.

That last guardianship was nonsuited but she didn't understand and her lawyer apparently didn't explain to her that the Court didn't have jurisdiction over the issue that he raised with the Court that preceded the dismissal of the case to consider the application to order that Mr. Fairley be allowed to see medical specialists.

As it turned out that the symptoms that Mr. Fairley was exhibiting were serious symptoms that needed medical attention but Mrs. Fairley --

THE COURT: Just a moment. Cell phones are a no-no in the court. I'm sorry, sir.

MR. ROSS: Not a problem. The symptoms of Mr. Fairley was exhibiting were a concern to Juliette because, as she testified, they caused him to have coughing spells and that interfered with his ability to eat and to maintain his weight and his health.

And when Ms. Fairley assisted her father to travel to New York to visit with her, her primary objective was that he be allowed to see medical specialists that he had been deprived of that opportunity under his wife's power of attorney and his care at Morningside Manor.

Juliette Fairley testified to the Court at our last hearing that Mr. Fairley's health improved while he was under her care and assistance for six weeks in New York and that his medications were changed by the health specialist in New York and that he responded, that his symptoms of coughing while he was --

MR. LEIGHNER: Your Honor, I'm just going to object that this testimony was objected to and not -- and not accepted by this Court as evidence because she was not competent to testify to this medical testimony and all of Mr. Ross' arguments are inconsistent with what the Court heard as evidence but I recognize the Court is well aware of what's in evidence and what is not.

For the record, I state my objection.

THE COURT: And I understand your objection, sir, but I'm going to let Mr. Ross -- the Court remembers the evidence. The Court can filter out what is normally not admissible.

MR. ROSS: Thank you, Your Honor. And when Juliette Fairley applied for a guardianship in New York she was not aware that there was a residency requirement and that the Court did not have jurisdiction over the matter.

However, the Court in New York decided that Mr. Fairley needed to return to Texas and she ordered that as an emergency matter that special co-guardians would be appointed, including Mrs. Fairley, and a court investigator from the court in New York.

However, when Mr. Fairley was returned to San Antonio, upon information and belief that although the judge in New York had ordered 24-hour professional health care attendance, there was nobody waiting to meet Mr. and Mrs. Fairley when they arrived in San Antonio.

Mr. Fairley was transferred not back to Morningside assisted living as ordered by the judge in New York but he was taken to Lakeside -- I don't remember the exact name of the facility but he was placed in a memory care unit and that was something other than what was ordered by the court in New York and Mrs. Fairley testified in New York that Mr. Fairley couldn't go back to Morningside because he had lost his bed when he left.

However, I believe Juliette testified that

there was vacancies at Morningside and Mrs. Fairley could have taken him back to his prior residence which was a lot less restrictive as an assisted living facility than a memory care facility. And I'm sure the Court is aware of the differences in the restrictions.

To date, I don't believe that there is any medical evidence that Mr. Fairley needs to be in a memory care unit. The Court has ordered that visitation by Mr. Fairley's daughters needs to be supervised and Juliette Fairley does not have any opposition or objection to supervised visitation with her father.

She is grateful that the Court understands that she and her father love each other and they need to be able to visit with each other and that it's a benefit to both of them but particularly to Mr. Fairley who -- in a memory care unit he's not allowed to leave, ordinarily, and there's a restriction on who can come and visit him and when they can visit him and whether they have any privacy in visitation, so it's very important to Mr. Fairley to have the ability to visit with his immediate family who are people that he recognizes and who he expects to give him the attention that he desires.

So Juliette Fairley is grateful that the Court understands that and accommodates Mr. Fairley's

needs and also hers. Juliette Fairley's concern over her father's health, given the fact that his health condition improved during the six weeks that he was with her in New York and was seeing doctors that were apparently more attentive or at least arguably more attentive to his specific health conditions and medical needs, that there be a care manager appointed if Mrs. Fairley is going to be the temporary guardian pending contest. And Juliette Fairley is doing the best she can to do what she believes her father -- what's in her father's best interest and also to cooperate with her mother's desire and her right to be the temporary guardian of her father.

Juliette Fairley understands that she cannot afford to be her father's permanent guardian, but she wants to make sure that her mother has the assistance that she needs in order to be able to adequately care for her father who I think everybody agrees needs a guardian because he needs some court or independent supervision of his care management and that's why Juliette Fairley submits that her participation in this proceeding is in good faith and also in Mr. Fairley's best interest because she's the only one that's advocating for the type of care management that will benefit him and which given the --

his experiences previously indicate that he needs so that her positive input into this proceeding is done in good faith and that if she is required to post a security for costs it would probably be cost prohibitive for her to be able to continue to be able to participate in these proceedings.

She has incurred substantial cost in order to try and help her father when he came to New York. The money that was withdrawn from his account went to his necessary expenses including his meals, his 24-hour custodial services that he received in New York, transportation back and forth to doctor's appointments, and other necessities which he wanted to pay for himself and she tried to accommodate him but she didn't receive any financial benefit from incurring the responsibility for taking care of her father so that Juliette has also incurred substantial court costs in New York which are imposed by the judge there.

She's being required to pay for all the court-appointed lawyers that were appointed to -- both the investigators as well as the attorney ad litem and so that with her income she can't well afford the additional expense of trying to help her father against the opposition of her mother who doesn't welcome her participation or her concerns or her actions, looking

out for what she perceives to be her father's best interest and for which her mother doesn't perceive to be her father's best interest.

So I would submit that it would be unfair to Mr. Fairley that his daughter would be required to post security for costs if that prevented her from continuing to be involved in the judicial proceedings.

I would also submit that there's controverted evidence of Mrs. Fairley -- or Juliette Fairley's motives but there is substantial evidence that it's necessary for Mr. Fairley to have the expressed concern of his daughter, Juliette, to be able to participate as much as she can.

She goes to substantial expense to come visit him as often as she can incurring travel expenses and motel expenses and car rental expenses to come visit her father a few hours twice a month and she's been doing this routinely and that gives her the ability to monitor his health and to utilize her observations to try and help him get the medical attention that he needs.

Her actions have been frustrated by her inability to effectively establish a guardianship in the past, but she welcomes the opportunity to have a workable guardianship with the assistance of care

manager established by this Court as a permanent benefit for her father who will not be able to take care of himself completely because of his partial incapacity.

I would also submit that Juliette Fairley took reasonable steps to make sure that her father was well cared for in New York and that she didn't violate any legal requirements. She did not abduct her father.

In Texas, under the health and safety code, even a person who lacks capacity can revoke a medical power of attorney, which Mr. Fairley did when he signed a health care proxy in New York, and Juliette Fairley believed that with the revocation of the medical power of attorney that her mother who had previously been his medical agent did not have the authority to override her father's decision that he was revoking that medical power of attorney in choosing that he wanted his daughter to have -- be his medical agent and that was beneficial to him.

I submit that it was a good decision on his part. It didn't last very long but hopefully the discoveries by the doctors in New York which uncovered previously undiagnosed infection that they were able to treat and that the medication changes which appear to have been beneficial to Mr. Fairley will continue.

And in conclusion, I submit that Juliette

Fairley's intervention and her participation in this proceeding has been a benefit to the Court. Even though the court investigator recommended a care manager, Mrs. Fairley is opposed to it.

I think the Court has good information that a care manager will be beneficial to Mr. Fairley considering the limitations that his wife has if she's not a health care professional and can't take the time to review his medical charts and talk to his caregivers and make sure he's getting the care that he needs.

So I would encourage the Court to deny the application for -- or the motion for security for costs because Juliette Fairley's participation in this proceeding is in good faith and it benefits her father.

THE COURT: Mr. Takas.

MR. TAKAS: For the record, my client does not want a guardianship; but if he has to have one, he wants his wife. Period. Those are my client's words.

There are a few things that keep coming to my mind is this. She says that she has no medical training so she couldn't make decisions for him. She has no medical training so she goes and tells all the doctors in New York you need to do this, this, and this. She has absolutely no qualification to do that.

The other thing is this bit about "does he

need a guardianship," well, she testified that when she came to San Antonio and stowed him on an airplane that he had capacity to tell her that he wanted to leave the nursing home he was in because it was nice and go to New York and be with her.

And then she gets into New York and within seven days files a motion to have him declared guardianship for his incompetency. Well, either she preserved some miracle or it's total fabrication on her part. She has had ample opportunity to follow the wishes of various judges, various court-appointed ad litems, and she disregards everything that was done in the past where they created a thing with the least restrictive environment and she was there when she did it when that was done and she said then, because I was in the courtroom, "I don't like it but I agree with it." We are here only because of that woman's mendacity and I think you should rule her for costs.

I have almost 32 hours in this case, at least 12 talking long distance to the lawyers in New York. I sent my entire previous files what had transpired here along with Sean Hughes' things and that judge bought it and sent it back here. All this is because of her and nothing else.

That's all I have to say.

THE COURT: Okay. Sir, do you want to present your information by witnesses or...

MR. LEIGHNER: Well, we have -- Mr. Takas can testify as to the cost of Dr. Schiller Strong (phonetic). It's $900?

MR. TAKAS: $900, Judge. We have a check that's going out to him this afternoon.

MR. LEIGHNER: I have the original check, and I have the mailing instructions that Mr. Takas signed by my client on her personal account to pay that. We will forward that out today for $900.

THE COURT: Will you give Mr. Ross a copy of it, please.

(Handing)

MR. LEIGHNER: And here is a copy of the check, Your Honor.

Your Honor, I have an affidavit for more billing statements and including my attorney's fees as well as the costs which include the filing fee for the temporary guardianship as well as the bond amount.

Those two amounts are $327.39. My attorney's fees to date for responding to Juliette Fairley's actions in New York are $13,378.75.

THE COURT: 13,000...

MR. LEIGHNER: $13,378.75 in fees and

$327.39 in costs.

THE COURT: And this is for the New York information?

MR. LEIGHNER: Since October 16, 2014 to date only.

THE COURT: Were you ordered to submit those to the Court in New York?

MR. LEIGHNER: No, I was not.

THE COURT: Okay.

MR. LEIGHNER: And, Your Honor, we have also some bills that we have not received yet, and I believe the statute requires the probable cost.

We've had -- we made significant efforts to get Mr. Fairley served in New York but Juliette had him living in her apartment sharing a bunk bed and our process server was not able to get into the building.

We even paid the process server. We provided the New York process server with photos of Mr. Fairley as well as Juliette and had them basically stake out the apartment so that they can serve him if he left. So we expect to receive a bill from the process server between $800 and $1,000 for the prior attempt to serve him with our temporary guardianship in an effort to get him back from New York.

Also, the court transcripts of the prior

hearing, we have not received yet. We also do not have a bill yet. We estimate that to be between five and $700 for those court transcripts. We're going to be -- we'll be moving forward on Juliette's contest to this guardianship, which if she has, in fact, filed one and she also has demanded a jury trial.

To the extent that this goes forward to a jury trial, the additional fees for court transcripts and additional costs are probably two to three times what they are to date just on this temporary guardianship. And it's hard to anticipate what those probable costs -- what those probable costs would be if this actually goes to a full jury trial. Obviously Mr. Takas' fees would be considerably higher as well. I would expect reasonably to triple the cost from where they are today to address the contest that's pending to be filed by Juliette Fairley.

Again, the statute says that to the extent that what is ordered today to be put in as security for costs. If that is deficient, this Court can order a judgment against Juliette; and, also, if there's an excess amount, that would be returned to Juliette. I would request that this Court rule in favor of Mr. Fairley to have those costs comfortably assigned so that they are protecting Mr. Fairley's interest and Mrs.

Fairley's as well to the extent that they would then be returned to Juliette.

We already have a $32,000 attorney's fees bill in New York that we expect the Court to sanction Juliette on. We also have --

THE COURT: I'm sorry. You have a...

MR. LEIGHNER: $32,000 bill for the New York attorneys to respond to and get the court orders ordering Mr. Fairley returned to Texas.

The Court is addressing those attorney's fees and it's expected, as Juliette testified, that she will probably be held liable for those fees, but we don't have that yet. These are amounts of money that Mr. and Mrs. Fairley simply do not have.

And so these proceedings time after time again are just slowly bankrupting these two people. The attorney's fees to respond to every little motion, including now another rehearing, even though this Court has already denied the care manager, we're going to be back here again and again; and as this goes forward -- these are not wealthy people, Your Honor, and that is why it's important to order these costs -- order them liberally and make sure that Juliette is at least to the extent allowable by this Court and statute be held responsible for the havoc that she is causing on this

family. Thank you.

THE COURT: Okay. I have a question. The New York order that I saw last week had fees of 2900, something like that -- no, it wasn't fees. It was money she was ordered to reimburse from monies taken out of the bank account. Correct?

MR. LEIGHNER: Correct.

THE COURT: Okay.

MR. LEIGHNER: She has not paid that.

THE COURT: And that's not part of this 32,000 that you're talking about.

MR. LEIGHNER: No, Your Honor. That would be, I believe, enforced with -- through the New York court who had ordered it.

THE COURT: Okay. Mr. Ross, do you want to cross-examine him on any of the things in his affidavit?

MR. ROSS: No. I believe that his statement of the amount of time that he spent and the hourly rate and the reasonableness and necessity of his fees is accurate.

However, I submit that Juliette Fairley has really made only one request to date and that is that she is willing to agree that her mother be the temporary guardian pending contest as long as a care

manager is appointed for her father and there's no reason that she should be required to pay substantial costs that are being claimed and argued for that simple request that she has offered to pay for the cost of a care manager.

Again, her mother is opposed to having anybody independently overseeing her guardianship of her husband. I believe that the Court and the court investigator have some concern that Mrs. Fairley needs some assistance in being able to adequately care for her husband and Juliette Fairley is willing to pay the expense for the care manager so it won't cost her father or her mother anything even though it's for their benefit.

I would submit that it would be appropriate for the Court on its own motion to refer this matter to mediation in order to avoid prospective unnecessary expenses of going forward on this case because if we are able to settle the matter on terms that would be acceptable to both sides, I think that the appointment of a care manager or that the money would be better spent on the cost of a care manager if Mrs. Fairley is willing to agree that a care manager be appointed as recommended by the court investigator and also advocated by Juliette than to be spent on

attorney's fees.

Juliette has incurred her own attorney's fees in the past, which she has paid or is paying; and she has prospective attorney's fees in the future and other costs and she is not trying to make this proceeding any more expensive to anybody because she knows that what's in her father's best interest doesn't necessarily have to cost that much.

She's concerned about his health and a care management. If the cost -- the expense of two to four or six hours per month to have a registered nurse or a professional care manager be involved and keep the Court apprized of Mr. Fairley's treatment and condition and his needs that that's a benefit that is in Mr. Fairley's interest and at no cost to him.

So if we could be referred to the Bexar County Dispute Resolution Service prior to any further proceedings in this matter, I would suggest that they've been in the past in my experience well able to accommodate court orders for mediation without any unnecessarily delay and that if we could resolve this matter that way Juliette Fairley has not violated any court order and she is not to be presumed to intend to violate any court order.

It was her understanding when she assisted

her father to go to New York that he was not under any court order to remain at Morningside Manor and she felt that her mother had breached her fiduciary duty to adequately care for her father which justified her actions to bring him to New York to see a specialist so --

MR. TAKAS: With all due respect, Mr. Ross has already gone over this in his opening remarks.

THE COURT: I understand.

MR. TAKAS: It's repetitious.

THE COURT: And I understood that there had been an agreement in the past.

MR. TAKAS: Yes, ma'am.

THE COURT: And that was why the last proceeding in this Court was dismissed because there had been an agreement between the parties.

MR. TAKAS: I've been through Kelly Cross, Faris, Mark Smith and Chris Heinrich, five other lawyers -- four other lawyers, yeah, I can't count, four other lawyers and we're still hearing again today bleeding money from people that don't have it because she won't accept any agreement.

I object to going to mediation. Mediation is based on the fact that two people get together work out something and then give it a whirl and see if they

can live up to it and she won't. It's always about what she wants not what anybody else in the family wants.

She's had her day in court on at least three occasions. Everybody bent over backwards to accommodate her, and you just can't trust her. That's all I have to say.

THE COURT: And you have some evidence that you can give the Court of your costs?

MR. TAKAS: I can give you my testimony.

THE COURT: Yes.

MR. TAKAS: I've been a lawyer since December of 1968. I am board certified in criminal trial law since 1965. I'm licensed in the Supreme Court, the State of Texas. I'm licensed in the Supreme Court of the United States of America on brief and argument.

I am AV rated peer review Preeminent. I've been practicing -- my hourly wage is $300 an hour. I have at least 10 to 14 -- I don't have my calendar with me -- ten to 14 hours just on the phone with all the New York people, another two or three hours talking to Sue Bean so we could communicate with the New York people all the stuff that was in the file and I've sat through -- this is the second hearing. I think the first one was like five hours or six hours -- six hours

and this one I've been here since one o'clock. So it's seven hours. So whatever that totals up to times three. That's what I've incurred.

And I emphasize that we don't need to keep bleeding money.

MR. ROSS: May I reply, Your Honor.

THE COURT: Yes.

MR. ROSS: I would submit that we're in a different situation now. If, as a result of a mediated settlement there's a guardian appointed, that creates a different situation as far as the ability to enforce the settlement agreement.

The Court will have continuing jurisdiction over Mr. Fairley's care and his health and well being. The Court will have the ability to supervise through a care manager, if one is appointed, the activities of the guardian as well as whether the nursing home is able to adequately provide for Mr. Fairley's medical and social needs.

Juliette Fairley has no intention of breaching any agreement and she understands that the Court would have authority to punish her if she did violate an agreement.

In the past, there was a power of attorney but no guardianship and the Court didn't have -- the

Court decided that it didn't have jurisdiction over the matter and because Mr. Fairley is presumed under the health and safety code to be able to decide whether he wants to revoke the medical power of attorney without regard to his capacity that is something that is legal for him to do and the presumption is that without any controverting evidence that at the time that Mr. Fairley was residing in New York for six weeks he either didn't have a medical agent or he had appointed Juliette to be his medical agent.

When the Court ordered her to bring him back -- or to bring him to court, which was against the medical advice of his treating physicians, she brought him to court -- or actually the -- she made available -- he had access to him available through the court-appointed attorney to bring him to court.

It was not a happy experience for Mr. Fairley to be separated from his daughter and from the caregivers that she had provided for him in New York and to come back to San Antonio to be placed in a memory care unit where he was not allowed to visit with his daughter unless, according to the attorney for Lakeside, that he was supervised by Adult Protective Service personnel.

That made it impossible for Juliette to be

able to visit with her father except through the intervention of Sue Bean who was able to convince the nursing home that she would supervise the visitation so that Mr. Fairley and Juliette could visit each ear.

So I would again request the Court on its own motion to refer the matter to meditation to see if we can work this out prior to making a ruling on an order for security for costs so that Juliette can demonstrate her willingness to go along with a cost effective resolution of this matter without any further expense at utilizing the Bexar County Dispute Resolution services which are volunteer mediators.

In my experience, they've provided excellent services in the past, as good as any of the baby mediators.

THE COURT: Well, sir, let me say this: If I were to order mediation, I would order that the case be mediated by a former statutory probate court judge who would be able to understand the issues in the matter.

However, I'm only a visiting judge here and while if I were sitting on the bench permanently I might order some things differently. I do try to follow the concepts, I guess you want to say, of the court where I am presiding on a temporary basis and I do not

believe that this is a case and Judge -- you can urge a motion for that to Judge Rickhoff but I personally do not believe that this would be a case that a volunteer mediator should be assigned to it -- or should be assigned to a volunteer mediator.

I am going to order some security for costs and I'm going to stagger it for various different times understanding that there may be -- when the Court and Judge Rickhoff hears the motion in limine, that may resolve a lot of the issues in this case and so what I'm going to do is order that she deposit with the Clerk of the Court a security for costs the sum of $10,000 by January the 15th and depending on -- and another 5,000 by January the 28th and then depending on what the ruling is on the motion in limine. If it's granted, that will be the total amount that I'm asking -- that I'm going to order deposited. If it is denied, then I'm going to order that by February the 15th she deposit another 5,000.

So it's 15,000 if the motion in limine is granted; and it's 20,000 if the motion in limine is not granted. And the motion in limine is set for January the 28th. I don't think anybody -- and then also the motion for the -- the amended motion to appoint a care manager is also set for January the 28th at 1:30 p.m. in

front of Judge Rickhoff.

And, sir, would you get me an order?

MR. LEIGHNER: Yes, ma'am.

THE COURT: I will be here Monday and Tuesday of next week. I know you will be out of town but the court will be open tomorrow and Friday. Bexar County is not very nice to its staff.

MR. TAKAS: Amen to that.

THE COURT: So there will be staff here and if you can send it by Mr. Ross and the ad litem to approve it as to form only.

MR. TAKAS: Judge, I'll announce in open court that he has permission to sign my name because I know what it's going to say, the amount of money, and the dates and that's it, because I may go out of town.

MR. LEIGHNER: I'll probably do this today, Your Honor. I'll go back now and do it.

THE COURT: Okay.

MR. LEIGHNER: Using the order that we submitted it would be -- are we -- the total fees are 20,000 paid as follows and then we'll recite the language that you just provided us regarding the staggering of the payments.

THE COURT: It's 15,000 if you prevail on the motion in limine. It's 20,000 if you lose the

motion in limine.

MR. LEIGHNER: Thank you, Your Honor. May we be excused?

MR. TAKAS: May we be excused?

THE COURT: You may be excused.

STATE OF TEXAS)
COUNTY OF BEXAR)

I, Maria E. Fattahi, Official Court Reporter in and for Probate Court Number 2 of Bexar, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $238.00 and was paid/will be paid by Ford & Bergner.

WITNESS MY OFFICIAL HAND on this the 23rd day of March, 2016.

ORIGINAL

/s/ Maria E. Fattahi
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REPORTER'S RECORD

TRIAL COURT CAUSE NO. 2011-PC-1068

COURT OF APPEALS NO. 04-16-00096-CV

IN THE GUARDIANSHIP OF	)	IN PROBATE COURT
	)	
JAMES FAIRLEY	)	NUMBER 2
	)	
AN INCAPACITATED PERSON	)	BEXAR COUNTY, TEXAS

VOLUME 4 OF 6

MOTIONS

On the 20th day of November, 2015, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Polly Jackson Spencer, Judge Presiding, held in San Antonio, Bexar County, Texas.

Proceedings reported by computerized stenotype machine.

Volume 4

Motions

November 20, 2015

WITNESS INDEX

EXHIBITS OFFERED BY THE APPLICANT

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	VOL.
1	Doctor's letter	20	20	v4

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(Proceedings begin, 9:42.)

THE COURT: In 2011-PC-1068, the Guardianship of James Fairley what was set for this morning was a hearing on the original application for appointment of a permanent guardian of the person that Mr. Leighner filed on behalf of Ms. Mauricette Fairley, is that correct?

MR. LEIGHNER: Yes, Your Honor.

THE COURT: Okay. And all the proper citations have been issued in connection with that?

MR. LEIGHNER: Yes, Your Honor. I don't know if the --

THE COURT: It's a rather extensive file. I think I've looked at it before. I didn't go back and look at it just this morning.

MR. LEIGHNER: I do have file-stamped copies of the waivers by the -- just in case they didn't make it into the file.

THE COURT: And at the time this was originally filed, Mr. Takas, you were --

Mr. Leighner, you are ready to proceed on your application.

MR. LEIGHNER: I am, Your Honor.

THE COURT: Mr. Takas, you were appointed the attorney ad litem.

MR. TAKAS: Yes, ma'am, I was appointed. And actually it's 17 days shy of being three years since I became involved in this case.

THE COURT: And you're ready to proceed.

MR. TAKAS: Oh, yes, ma'am.

THE COURT: Okay. And then, Mr. Ford, you have filed both a petition for bill of review and a motion for continuance, correct?

MR. FORD: Correct.

THE COURT: Actually I made you attach to that an email. I was busy yesterday afternoon. I didn't see it. I'm just now looking at it.

MR. FORD: I did email that to you and Mr. Leighner yesterday.

THE COURT: And as I said, I was busy doing something else and thought it was appropriate to go forward on this hearing. And, you know, at this point Ms. Fairley's pleadings have been struck so, you might address I guess your motion for continuance.

MR. FORD: Sure. Your Honor --

THE COURT: And you are here on behalf of Juliette.

MR. FORD: I'm here on behalf of Juliette Fairley, that is right. This is my first appearance in this case. I realize there's a lengthy history in this

case, but this is my first appearance.

We filed a motion for continuance yesterday based on the filing of our petition for bill of a review. The petition for bill of review obviously is not ripe to be heard today, but just kind of brief snapshot of that issue.

There was -- as you're aware last -- at the end of last year Judge Burwell sitting by assignment in this court heard a motion to secure costs. In that motion Mr. Leighner asked that the Court find that Juliette had acted in bad faith in prosecuting her application and that the Court order her to post security for costs, not only for costs -- well, it did not ask for costs that had been accrued to that date, it asked for probable future costs that might be accrued.

We have cited in the bill of review significant authority that says you cannot order the deposit for security for probable future costs, you can only order costs for what has accrued to the date of the order. It's a mandamus issue, believe it or not. I didn't know that, but it is.

And so, as a result of that order when you got assigned to this case, Juliette had not filed -- had not posted the $20,000 that Judge Burwell had ordered, and you dismissed her case. And you dismissed

her case with prejudice. I don't know if that was your intention at the time or not, but the case was dismissed with prejudice. We have cited to authority, although the authority is not nearly as clear --

THE REPORTER: I'm sorry, I'm having trouble understanding you. Please slow down.

MR. FORD: I'm sorry. You're not the first court reporter to ever say that to me, believe it or not.

We have cited you to authority, and the authority is not as clear on this issue, but it appears and it makes sense that a dismissal for failure to secure costs would only be without prejudice and would not be with prejudice. And so this Court's order when it -- when the Court dismissed the case with prejudice, I believe that that was incorrect -- apologize for the statement of that, but I don't believe that was the accurate way to do that, the correct way to do that.

And I think also that the order requiring the security for costs in December which then led to the dismissal order was also not proper. And that was the -- the one that is more clearly not proper because it did clearly order probable costs for the future.

Now Mr. Leighner has recited in his original motion and he's recited to me on the phone

there's this 1155.151 of the Estates Code which is the new provision and only has been in existence for a couple of years which allows the Court to tag a unsuccessful party who's found to be in bad faith with all of the costs that were -- that my client was required to post as security for costs, attorney ad litem, guardian ad litem, mental health professionals, all of those type of costs.

However, if you look at the statute, it clearly anticipates that that would be at the conclusion of trial of the contested issue and that had the Court previously required a security for costs, then that would be applied to what was the judgment against the party and then any excess would remain as the judgment against the party.

The finding of good faith or bad faith is a trial issue for the trier of fact. There is a jury demand on file in this case. I think that's the other issue that --

THE COURT: From your client.

MR. FORD: A jury demand from my client.

THE COURT: Right.

MR. FORD: I think that's the other issue that I don't believe Judge Burwell got correct, and I hesitate to say that because I don't think I've ever

disagreed with a ruling of Judge Burwell, but I disagree this one time. I don't think that -- I don't think that finding bad faith in a simple motion that could be served with three days notice is the correct way to do that.

That is an issue for the trier of fact. It's an issue that you have to prove at trial to entitle yourself to have your attorneys fees paid and all of those kinds of things. And so when Judge Burwell decided that issue with less than 45 days notice and wasn't decided by the trier of fact I think that was just the incorrect way to do that.

So our bill of review is based on the incorrect finding of bad faith, the incorrect timing of the finding of bad faith, the incorrect amount of the deposit -- of the order for costs. And then the subsequent order for dismissal with prejudice that even if the amount of the costs had been properly set, that the case should have been dismissed without prejudice and not with prejudice.

And so based on those three issues, we filed the bill of review, which I think still makes this a contested case. There was, I will note, a motion in limine that was filed in the case, but the motion in limine was set to be heard at some time in January or

February of this year.

In the intervening period of time Judge Rickhoff recused himself. Judge Cross recused herself. You got assigned to the case. And before that was ever heard -- and I've looked at every piece of paper in the Court's file this morning, and I do not see an order that's signed on the motion in limine.

So based on that, I do not believe that there's been a finding that my client has an adverse interest. I think that her pleadings have been dismissed as a result of failure to post costs, which I think is predicated upon the order that was not done correctly.

And so, that's the reason we filed the motion for continuance because ultimately we think those issues are ripe for bill of review and should be reconsidered on bill of review.

THE COURT: Suppose I agreed with all or any of that, would you not agree that Mrs. Fairley is the priority person to serve?

MR. FORD: I agree that absent any disqualification, Ms. Fairley is the priority person to serve.

THE COURT: So what then would be -- would you try to a jury her qualification or lack

thereof?

MR. FORD: I think that would be the issue. I think that would be the issue. And I think that's -- and I haven't gone back and studied all of the pleadings from the very beginning, but I think that was the issue that has been raised from the beginning is whether or not she's qualified to serve.

I have said to Mr. Leighner, and I don't mind repeating this to the Court, I believe that the parties could attend mediation and could try to work some of these issues out. And that would be my hope is that before we ever tried anything, that we would mediate the issues and we would try to get them worked out.

And I would also note for the Court that Mr. Cantu who Your Honor suggested as a supervisor has come down to the court this morning in case the Court is interested in kind of a report from him about the visits or, you know, how he might be able to facilitate any conversation between the parties.

THE COURT: Mr. Takas.

MR. TAKAS: Counsel has just been on this case just briefly. The hearing where the pleadings were struck and the ruling for costs here was identical to the ruling for costs in New York. The judge in

Manhattan heard the same facts that have been reiterated time and time again, and ruled her for costs, told her to post moneyand also the fact that he ruled that she basically kidnapped her father.

The only reason we're here is because this lady, the daughter, refuses to follow the laws and the orders of not only this court, but the courts in New York. She worked under a power of attorney to take her father to New York, and then when she got him to New York, she went ahead and filed an application for guardianship up there that said that she didn't -- he didn't have capacity, which the judge threw out and ordered him brought back here.

I mean that is why she was ruled for costs was her malicious disregard for -- from the orders issued by two courts in two states. And I would submit too that she has -- she said she was poor. She flies down here. She hired a -- I'm sure he's not working for nothing, as I am. I've been on this 17 days short of three years. And we're hearing the same stuff over and over again.

THE COURT: Would it be fair to summarize your statements by saying you oppose the continuance?

MR. TAKAS: Yes, I oppose everything. This needs to be -- she's needs -- she needs closure.

It's costing her a bundle. I don't see that -- if the daughter was such a great person, why wouldn't she give any money to help ease her mother's economic problems.

THE COURT: Mr. Leighner.

MR. LEIGHNER: Your Honor, we oppose the continuance. I don't think that Juliette Fairley has standing to bring the continuance. I think the suggestion that striking her pleadings without prejudice is a plausible remedy is nonsensical. To strike her pleadings only to allow her to refile them the next day would render the whole statute meaningless which allows this Court to strike her pleadings.

As to the motion in limine and motion to strike which we had filed seeking to find Juliette Fairley an adverse party to the ward because of her kidnapping of him and taking him to New York against his will, Mr. Ford is correct that there was no order on that. And that is because this Court found that moot by striking Juliette's pleadings for failure to post security for costs.

Mr. Takas raises an interesting point that while Ms. Fairley or Juliette Fairley could not pay any of the Court-ordered security for costs, she has what I expect to be approximately $400-an-hour attorney flying down here for this hearing as well as in prior

meetings, and she does fly down here from New York at least twice a month.

And despite the argument that there are some things that Mr. Ford thinks should not be included in security for costs upon finding of bad faith, which as he noted I disagreed with him on that, the fact remains that she has not posted any security for costs. Not a dime. Not a dollar.

It was proper for this Court to strike her pleadings. And that is the current order of this Court. While he has the bill of review filed, he said it's not set for today. It's not ripe for today. The question is whether or not he can have it heard. But right now he can't file the continuance. And we're ready to proceed on the guardianship, the permanent.

MR. FORD: Brief response, Your Honor. First of all, Mr. Takas talks about the New York ruling. The New York ruling is up on appeal and expected to -- the decision of the New York appellate courts -- I don't understand exactly how that process works, but the court that's reviewing the appeal in New York is expected in December. So it's a fairly short period of time before that is expected to be released.

Neither Mr. Leighner nor Mr. Takas really addresses the legal issues that we've raised, which is

the setting of the costs was not the proper way to do that. It created an undue burden that if my client can't post $20,000, then her pleadings get dismissed. Had it been properly done, and the amount was $5,000, as may have been appropriate at that time, she may well have been able to do that.

And so it foreclosed her option to continue to proceed because she couldn't get over this huge hurdle and -- and a smaller, much smaller hurdle would have been easier to get over.

I find it interesting that Mr. Takas argues that Sophie needs closure. His client is the proposed ward. And so, I appreciate the fact that he's advocating for Sophie, but, you know, it seems to me that it's the ward's interest to have both his wife and his daughter involved.

You know, so, the -- the standing issue clearly the order that -- that would have taken my client's standing away or the order that we are asking the Court to review on bill of review, which we have a statutory right to do, that would reinvoke the standing. And if we were to prevail on that, then we would have a right to a jury trial on the ultimate guardianship issue.

I realize -- and I -- and it is not lost

on me at all that this case has been going on for three years and that these gentlemen have been involved for a very long period of time. However, there are some what I believe to be pretty clear legal issue that prevent the Court from being able to going forward today on the guardianship.

THE COURT: Is that it?

MR. FORD: That's it.

THE COURT: Your motion for continuance is denied.

Mr. Leighner.

MR. LEIGHNER: Your Honor, I would like the Court to --

THE COURT: I'm completely willing to hear your bill of review at some point in the future.

MR. FORD: Thank you, Your Honor.

THE COURT: And if you care to address the mandamus issue, that's what appellate courts are for. So --

MR. FORD: No. No. I find it interesting that that's -- that that was the remedy. I didn't know that.

MR. TAKAS: I have only one question. Has she got a legal aid attorney for the appeal in New York?

MR. FORD: I have no idea.

MR. TAKAS: I doubt if she does. So she can afford to pay for a New York appeal and get a copy of the transcript and everything that went up.

MR. FORD: That's an issue we'll take up later. I have not visited with her about that.

MR. TAKAS: Just saying.

THE COURT: You're just saying.

Mr. Leighner.

MR. LEIGHNER: Your Honor, I think you started by acknowledging that all of the notice requirements have been met for the guardianship. We have -- obviously Mrs. Fairley -- Juliette Fairley has counsel here today, as well as Dorothy Fairley. We have the affidavit -- or the waiver from her, the other daughter. And then we have the waiver from the director of Lakeside nursing home which is where the ward currently resides. We also have the physician's report of Dr. Schillerstrom. And I believe that's in the file as well. I believe that was court ordered and nonetheless I'd like it admitted into evidence.

MR. FORD: I have not seen it.

MR. TAKAS: I'm butting in, but for the benefit of Houston counsel, the proposed ward was down here. He was on that witness stand. He testified in

response to questions by his client's lawyer at that time, and me and Bill. And the vein to everything that he said was, I don't want a guardianship, pause, but if I have to have one, I don't want anybody but Sophie. Is that a correct regurgitation of what was testified to?

MR. LEIGHNER: That's what I recall.

THE COURT: And that's your position on behalf of your client.

MR. TAKAS: That has been my position since two months after I got appointed on this case.

THE COURT: And furthermore you'd ask to have his appearance waived?

MR. TAKAS: Yes.

THE COURT: Because?

MR. TAKAS: Because of the simple fact that he doesn't need to be here. When he went through coming to court last time he was bonkers for five or six days afterwards. And I don't think he needs to go through that again.

THE COURT: So --

MR. TAKAS: The record shows what he wants.

THE COURT: And it would be your representation that it would not only not be productive to bring him here, it might be affirmatively bad for

him?

MR. TAKAS: Yes.

THE COURT: And you'd ask that his appearance be waived?

MR. TAKAS: That it be waived at this point in time.

MR. FORD: We have no objection.

MR. TAKAS: He's already made a couple appearances.

THE COURT: Okay. Then I make the finding that it's not necessary for him to be present.

MR. FORD: Your Honor, on the doctor's letter, I have obviously no option but to object as to hearsay.

MR. LEIGHNER: Is it admitted, Your Honor?

THE COURT: It was court ordered; is that correct?

MR. LEIGHNER: Yes, it was. It was court ordered pursuant to the temporary guardianship.

THE COURT: Since it's a court-ordered evaluation, you will have it marked as Applicant's Exhibit 1.

MR. LEIGHNER: Your Honor, I move to admit Exhibit A 1 into evidence.

(Applicant's 1 was offered)

THE COURT: Mr. Ford objects because of hearsay?

MR. FORD: I do, Your Honor .

THE COURT: Mr. Takas.

MR. TAKAS: I have no objection.

THE COURT: It's admitted.

(Applicant's 1 was admitted)

MR. LEIGHNER: Your Honor, I'd like to --

THE COURT: Would you let me see it?

MR. LEIGHNER: Yes. It's not -- I thought it was in the file.

THE COURT: It might be in the file, but it's easier to look at the exhibit.

MR. LEIGHNER: Qualify my client if I may, Your Honor?

Ms. Fairley --

You want her to take the witness stand or can we just do it here?

THE COURT: Let's have her take the stand.

Ms. Fairley, I believe you came down here a week or so ago when the hearing got canceled and all of us failed to let you know that and I sincerely apologize for that.

MRS. FAIRLEY: Thank you.

MAURICETTE FAIRLEY,

having been first duly sworn, testified as follows:

THE WITNESS: That's correct.

THE COURT: Okay.

DIRECT EXAMINATION

BY MR. LEIGHNER:

Q. Ms. Fairley, can you state your full name for the record, please?

A. My official name is Mauricette Fairley, yes.

Q. And you go by Sophie.

A. I go by Sophie, yes.

Q. And you're married to James E. Fairley?

A. Yes.

Q. The proposed ward. And you filed to be appointed as permanent guardian for your husband Mr. Fairley?

A. Yes.

Q. And you are over the age of 18, aren't you?

A. Ha ha, yes.

Q. And you have never been the subject of a guardianship proceeding yourself or been declared incapacitated, have you?

A. No, I haven't.

Q. And would you consider yourself to be a person

of notoriously bad conduct in the community?

A. Of bad conduct?

Q. Yes.

A. No. I was a teacher for 22 years. And I don't -- no, I think I have -- I have -- I am a good person.

Q. Okay. And do you owe Mr. Fairley any money?

A. No.

Q. Does Mr. Fairley owe you any money?

A. No.

Q. Other than this lawsuit, are you involved in any legal proceedings against Mr. Fairley or is Mr. Fairley involved in any legal proceeding with you?

A. No.

Q. And is it your request that the Court appoint you as permanent guardian of the person of your husband James E. Fairley?

A. Yes, it is.

MR. LEIGHNER: I'll pass the witness, Your Honor.

MR. TAKAS: I have no questions. Pass the witness.

THE COURT: Ms. Fairley, you've never been investigated by Adult Protective Services. Well, let me -- you've -- there has never been a finding of

abuse or neglect by an investigation by Adult Protective Services.

THE WITNESS: No.

THE COURT: Have your been accused of any terroristic act?

THE WITNESS: No, Your Honor, I have not.

THE COURT: Although this application was filed in 2011, would you like to investigate the availability of alternatives in supports and services?

MR. LEIGHNER: With my client, Your Honor?

THE COURT: Uh-huh. Are you calling any other witness?

MR. LEIGHNER: No, I am not. Your Honor, I didn't bring my Estate Code with me. I brought the wrong book. That's why I went on the short list. I am not familiar with what you're asking me to do specifically, Your Honor. Mind if I borrow your Estates Code?

THE COURT: This one doesn't have it either because this is an old one also.

MR. TAKAS: Are you asking during the course of this whole thing have we tried to do less alternative --

THE COURT: That's exactly --

MR. TAKAS: Well, I can do this if you want me to. You've --

THE COURT: Wait. Let --

Q. (BY MR. LEIGHNER) Mrs. Fairley, you have a power of attorney?

A. Yes.

Q. And for your husband both medical and financial?

A. Exactly. We did it together in 1999.

Q. And you've been managing his affairs under the medical power of attorney and durable power of attorney?

A. Right.

Q. And is it -- is it true that your daughter Dorothy is the one who initiated the guardianship proceedings over your husband?

A. Dorothy?

Q. I mean -- I'm sorry -- Juliette?

A. Yes.

Q. And in response to that you responded to be appointed yourself.

A. Exactly.

Q. But for Juliette's filing of the temporary -- of the guardianship, would it have been necessary in your opinion to seek a guardianship for your husband?

A. No.

Q. Okay.
A. No. I'm his wife.
Q. And given the actions and conduct of Juliette Fairley, do you find it necessary now to be appointed guardian of Mr. Fairley rather than acting under the power of attorney?
A. Yes, I do.
THE COURT: And no other alternatives would work under the circumstances.
THE WITNESS: Such as, Your Honor?
THE COURT: Nothing less restrictive in creating a guardianship. Is that correct?
THE WITNESS: Yes. I'm sorry. Yes.
MR. LEIGHNER: Your Honor, we tried those -- we -- those pleadings -- or those positions were in place at the time. They have been tried and attempted and have failed.
Q. (BY MR. LEIGHNER) And do you feel that you have the experience and abilities to manage your husband's personal affairs?
A. I have for the last five years, yes. I think I have done very well under the circumstances.
MR. LEIGHNER: Your Honor, I'll pass the witness.
MR. TAKAS: No questions.

MR. FORD: Is that me?
MR. LEIGHNER: Did I miss something, Your Honor?
THE COURT: I presume that a criminal background check was done.
MR. LEIGHNER: I'm sorry. Background. Oh, I'm sorry.
THE WITNESS: I was a teacher. I had to be checked. My background had to be checked.
THE COURT: I'm not sure, Mr. Ford, that you are really entitled to participate in this.
MR. FORD: Are you kicking me out of the party?
THE COURT: Do you feel you need to ask any questions?
MR. FORD: I would like to ask a couple questions. I will not be long.
THE COURT: Okay.

CROSS-EXAMINATION

BY MR. FORD:

Q. Ms. Fairley, you and I had a chance meet briefly before court this morning. I represent your daughter Juliette.

A. Yes.

Q. I just have a couple of quick questions I'm

going to ask you. I understand there's been some amount of conflict between you and your daughter; is that correct?

A. Because of my daughter's attitude.

Q. And what would you mean by her attitude?

A. Well, telling me that -- no, suing me for not taking care of her father, for example.

Q. And -- but other than this present guardianship action, was there conflict between you and your daughter before the guardianship action?

A. Before she took me to court, no. I thought we had a good relation.

Q. Okay. And if the Court were to appoint you as guardian of your husband, would you be willing to let your daughter continue to have visits with her father?

A. Oh, I was never, never against her visiting her father. Never.

Q. Okay. And would you allow her to talk with him on the telephone?

A. Yes.

Q. Okay. Would you be willing to share some of her father's medical information with her when it's appropriate?

A. Well, I think that would depend on the Judge. I mean, why -- her father is taken care of in the

facility.

Q. But you can understand, can't you, that a daughter, any daughter, not just your daughter, would have -- would have interest in wanting to know how a parent is doing medically?

A. Well, you know, she yet is doing that trying to find something wrong. She hasn't been able to. I mean every time, it has been negative, turned against her.

Q. Okay.

A. So that's why she wants the records.

Q. So you would not --

A. Find something wrong.

Q. So you would not be willing to share medical information with her.

A. Well, if the Judge tells me I should, then I will.

Q. Okay. And are you -- would you be willing to enter into any kind of counseling with Juliette to see if y'all could repair your relationship?

MR. TAKAS: I object. What is the relevancy of that question?

MR. FORD: Your Honor, clearly --

THE COURT: Your objection's overruled.

MR. FORD: Thank you.

Q. (BY MR. FORD) Would you be willing to enter into any kind of counseling with your daughter if it would help to repair your relationship and facilitate the relationship with your husband?

A. The relationship with my husband?

Q. Well --

A. My husband --

Q. Would you agree with me that your relationship with your daughter may be negatively impacting your husband?

A. No. He does not realize -- he does not realize what his daughter has been doing and is doing.

Q. Okay. And so I'll go back to my original question. Would you be willing to go to counseling with your daughter to see if y'all could repair your relationship?

A. I think my daughter needs counseling more than I do.

Q. But would you be willing to participate in joint counseling?

A. I visit my husband every day. I spend two hours with him every day. I have my activities. I need to keep those activities going. And I don't see any time that I could give to counseling.

Q. Okay.

A. And in my opinion I do not need counseling.
Q. Okay. And so, back to some of the questions Mr. Leighner was asking you, are you able to manage all of your finances and your husband's finances without the guardianship?
A. I have --
Q. Okay.
A. -- been doing well with the finances even though we have lost a lot of money because of Juliette.
Q. Okay. And are you able to communicate with your husband's doctors and make medical decisions without being the guardian?
A. That's what I've been doing, but -- I have been taking care of him medically all these years, yes.
Q. Okay. Thank you. I'll pass --
A. But it would make me feel stronger if I could have a document saying I'm his official permanent guardian so I would not have this threat of Juliette over my head.
Q. Okay. But you do have a medical power of attorney.
A. Yes, I do.
Q. Okay. Thank you. I'll pass the witness.

REDIRECT EXAMINATION

BY MR. LEIGHNER:

Q. Mrs. Fairley, I have just a few more questions regarding a question I asked you about notorious bad conduct. Have you ever been convicted of a sexual offense including a sexual assault or anything similar to that?

A. No.

Q. Have you ever been convicted of aggravated assault against any person?

A. No. I get angry, but I do not --

Q. Have you been convicted of injury to a child or an elderly individual or disabled individual?

A. No.

Q. Okay. And have you ever been -- ever been convicted of abandoning or endangering a child?

A. No.

Q. And I believe you previously testified that you had never been convicted of a terroristic threat or violence -- continuous violence against a family member or the ward?

A. No.

MR. LEIGHNER: Pass the witness, Your Honor.

MR. TAKAS: I don't have any questions.

MR. FORD: No further questions, Your Honor.

THE COURT: Okay. Thank you. You may step down.

THE WITNESS: Thank you.

MR. LEIGHNER: Your Honor, I have two proposed orders. The question --

THE COURT: You rest?

MR. LEIGHNER: Pardon. I rest, Your Honor.

MR. TAKAS: Rest.

MR. FORD: Rest, Your Honor.

MR. LEIGHNER: The question I have on the proposed order is how we handle the ad litem's fees in light of the current order requiring Juliette to post security for costs on that. Still have it come out of the estate now?

THE COURT: Is there an estate?

MR. LEIGHNER: There is. There's the community property estate, what's left of it after all of these proceedings.

THE COURT: And that's where they should come from.

MR. LEIGHNER: Okay.

THE COURT: Are we going to hear

testimony from Mr. Takas about his fees?

MR. TAKAS: Well, I have a question off the record.

(Off the record)

THE COURT: Back on the record. Since they have rested on this, and this application has been on file, I would make a finding that Ms. Mauricette Sophie Fairley is a person who is qualified to serve as guardian. You want to --

MR. FORD: Can I at least make my objection before you rule?

THE COURT: Yes.

MR. FORD: Your Honor, based on the testimony it sounds as though they have not met the burden to show that there are inadequate supports and services. There are powers of attorney in place that have allowed Ms. Fairley to transact her husband's business and to make medical decisions for him for all of these years, to quote her. And so based on the fact that there are adequate alternatives to the guardianship, we'd ask that the Court dismiss the guardianship and find that there's no necessity for a guardianship.

MR. TAKAS: Well, Judge, there is a need for the guardianship. The practical need for a

guardianship is simply this: She was brought back from New York --

THE COURT: Bill, bring me that book.

MR. TAKAS: -- because there was a guardianship pending. If she had taken him up there and only thing she had was a power of attorney, we wouldn't have got the assistance and the rulings out of the New York court.

MR. FORD: Your Honor, with all due respect to Mr. Takas, and I understand he may be a well-respected attorney here in town, his obligation is to defend against the guardianship. He is -- he is sacrificing --

MR. TAKAS: Don't tell me what my obligation is, Counsel.

MR. FORD: He's the attorney ad litem. He has a duty to defend against the guardianship. And he's asking the Court to grant the guardianship.

THE COURT: Well, he has an obligation to do what his client wants him to do.

MR. FORD: His client can't consent to a guardianship.

MR. LEIGHNER: Your Honor, if Mrs. Fairley had been guardian rather than agent under a power of attorney, the kidnapping would not have

occurred.

MR. FORD: That is a statement that's not supported by the evidence.

MR. LEIGHNER: By being guardian we'll be able to prevent that from happening again. The allegation and assertion made by Juliette Fairley is Dad decided he wanted to go to New York with me and he was fine to do so. Except for six days later, he was totally incapacitated again when she filed her pleadings up there.

The issue was clearly that, as you well know, that an agent under a power of attorney can not necessarily override the free will of the principal under that power of attorney without a finding of incapacity. Had he been under a guardianship, she could have set the rules regarding all of his conduct including leaving the facility with Juliette Fairley.

MR. FORD: We've no objection to the Court entering an order finding he is incapacitated. The issue is whether there's a necessity for a guardianship. And we'd argue that there's no necessity based on the powers of attorney that Ms. Fairley has testified about.

THE COURT: Is that it on that?

MR. FORD: Yes, Your Honor.

THE COURT: I believe that the changes in the law regarding alternatives in supports and services which probably existed before they made the law changes this year but were certainly highlighted by the changes, those are effective for applications filed on or after the 1st of September of this year but in addition to that, I would take note of the information that's been brought forward and the statements by Mrs. Fairley that this would -- I believe it was -- relieve her of the threat of Juliette's actions. I think that's close to a quote from what she said.

And under the circumstances and given the fact that Mr. Ford has just indicated they really don't have an objection to a finding of incapacity and Dr. Schillerstrom's report seems to indicate that Mr. Fairley is in fact incapacitated and to such a degree that it would be considered in the eyes of the law total incapacity, she has requested a guardianship of the person. I would find that she is qualified to serve as such. And I would also take note of the fact that her statements seem to support the concept that less restrictive alternatives will not be effective, that they have been considered and found not to be feasible.

So under the circumstances I will create

a guardianship of the person, appoint Mrs. Fairley guardian, give her full authority to make personal decisions for Mr. Fairley, and require of her an $11,000 bond.

Mr. Ford, you addressed the concept of visitation and the sharing of medical records. I think that that is appropriate. I think that earlier when I got involved in this, I entered an order that allowed for visitation for Ms. Fairley with her father subject to supervision.

It's been your representation in emails I have seen that the visits with Mr. Cantu now serving as a visit supervisor have gone well. I would think it might be appropriate to amend the existing order for visitation to change it from Mr. Augsburger to Mr. Cantu assuming he is willing to continue to act in that situation.

And I would certainly ask that information about Mr. Fairley's medical condition be shared with all of the family members, which I think is appropriate. Should it become obvious that there is some turmoil over the sharing of those records, I might reconsider that given the unusual nature of this proceeding.

MR. LEIGHNER: Your Honor, I would only

like to clarify that in the past whenever Juliette Fairley has had access to the medical records that it's resulted in official complaints with the Medical Board against those practitioners as well as other lawsuits. And I understand my --

THE COURT: Should that turmoil continue, then I would certainly reconsider the concept of the sharing of those records.

MR. LEIGHNER: Are you ordering that Juliette has direct access to his medical records --

THE COURT: No, that they --

MR. LEIGHNER: -- or just to forward --

THE COURT: That information be shared --

MR. LEIGHNER: By the guardian.

THE COURT: -- by the guardian possibly through you to Ms. Fairley's counsel. But I certainly want her to be aware of his medical condition.

MR. LEIGHNER: All right. Thank you.

MR. FORD: Thank you, Your Honor. On the -- on -- I appreciate the visitation and medical records information issues.

It's my hope that after several months of successful visits with no issues, assuming that this guardianship continues in its current state, that maybe we could revisit the issue of whether or not all of

those visits need to be supervised or not. And so that is an issue that we will obviously reserve to bring back to you at some point in the future.

THE COURT: I'm certainly open to that concept.

MR. FORD: Thank you, Your Honor.

THE COURT: Anything further for today?

MR. LEIGHNER: No, Your Honor.

THE COURT: Thank you. Close the record.

(Proceedings Conclude)

STATE OF TEXAS

COUNTY OF BEXAR

I, Veronica Lugo Bowles, Certified Court Reporter in and for Bexar County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $234. and was paid/will be paid by Ford Bergner.

WITNESS MY OFFICIAL HAND this the 28th day of December, 2015.

/s/Veronica Lugo Bowles
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