

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS
HOUSTON, TEXAS

In re
Barbara Latham, ET AL.,
Relators

The Honorable Mike Wood,
Harris County Probate Judge, Respondent

PETITION FOR WRIT OF MANDAMUS

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TEXAS STATUTES AND RULES

Tex. R. Civ. P. 124

Tex. Civ. Prac. & Rem. Code Ann. § 10.001

Tex. Gov't Code Ann. § 22.221(b)

Tex. Est. Code 1251.003

Tex. Est. Code 1051.102

Tex. Est. Code 1051.104

Tex. Est. Code 1051.106

APPENDIX REFERENCES

The attached Appendix consists of the following:

1. Affidavit of Compliance 9/11/17
2. Application for appointment of third party guardian 7/18/17
3. Hearing Transcript, May 23, 2017
4. Hearing Transcript, November 28, 2017
5. Hearing Transcript, December 12, 2017
6. Hearing Transcript Sanctions Hearing May 29, 2018
7. Hearing Transcript Hearing July 19, 2018
8. Houston Federal Judge Allows State Judge to be Sued
9. May 30, 2018 Order for Sanctions
10. Motion for sanctions and reimbursement of Michele Goldberg
11. Response to Motion for Sanctions
12. Order (void) purportedly appointing Goldberg temporary guardian
13. Return January
14. Return of service unserved 7/21/17
15. Return of Service unserved 6/8/2017
16. Return of Service 5/25/2017
17. Return of Service unserved 4/7/2017
18. Return of Service served by private process server re: Donald Mintz' application for guardianship of Muriel L. Mintz 4/4/2017

19. Donald Mintz Application for Guardianship 3/27/2017
20. Cause No. 17-03875; Latham vs. Wood 4th Amended Complaint
21. Cause No. 17: 03875; Notice of Appeal
22. Letter to bonding company of Michele Goldberg 5.29.28
23. Order from Judge Lee Rosenthal
24. Transcript from purported appointment of Goldberg, 9.19.17

STATEMENT OF THE CASE

Nature of the Case

Judge Mike Wood acted in the absence of all jurisdiction, issuing void orders concerning the person and property of Muriel L. Mintz, deceased, by failing to verify Muriel was lawfully served and failing to follow statutory mandates of Texas Estates Code Chapter 1251. As a result, all orders issued in this case are void ab initio and no valid guardianship was created. Muriel Mintz' daughters, Barbara Latham and Estelle Nelson filed suit in the United States District Court for the Southern District of Texas, Houston Division, for emergency injunctive relief to save their mother's life. Latham and Nelson amended their complaint with claims for violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 1983, and wrongful death alleging gross negligence, conscious / deliberate indifference on the part of Judge Mike Wood and Michele Goldberg, Harris County, and others. U.S. District Court Judge Vanessa Gilmore dismissed claims against Wood and Goldberg with prejudice, prompting Relators to appeal to the 5th Circuit Court of Appeals. The appeal is pending.

Latham and Nelson's attorney, Candice Schwager, notified Wood and Goldberg's bonding companies of the lawsuit as a prerequisite to making a claim on their bonds pursuant to Tex. Est. Code 1201.003. These letters were not filed in any case pending in Judge Wood's court by Attorney Schwager. Goldberg attached the

letter Schwager e-mailed her surety to her May 29, 2018 Motion for reimbursement against Latham and Nelson and sanctions against Candice Schwager. Goldberg contends that Attorney Schwager failed to comply with proper procedure to make a claim on her bond, which she insists is a surcharge action against her in Judge Wood's court. to indemnify the bonding company for attorneys' fees incurred to investigate Latham and Nelson's claims. Goldberg seeks \$3800 from Latham and/or Nelson's inheritance of funds which were not subject to probate or the Irrevocable Muriel Mintz family trust. The Trust was created in 2015 for the benefit of Muriel's three children: Barbara Latham, Estelle Nelson and Donald Mintz. Muriel retained no right title or interest in the Irrevocable trust, such that Goldberg lacks standing to demand Trust funds.

Judge Mike Wood granted Michele Goldberg's motion for attorneys' fees against the estate and sanctions against Candice Schwager, for which Michele Goldberg seeks an order to show cause as to why Schwager should not be held in contempt-- in the absence of all jurisdiction. Due to the imminent threat that Candice Schwager stands to suffer by this unlawful order to pay Goldberg \$10,000 or subject to contempt by a judge with no lawful jurisdiction to order this, Candice Schwager seeks a Writ of Injunction and Writ of Mandamus against the Hon. Mike Wood, enjoining the enforcement of the May 30, 2017 Order for lack of jurisdiction. The Order is void for failure to lawfully serve Muriel Mintz prior to any purported

appointment of a temporary guardian. The failure to provide statutory notice via citation through sheriff or constable deprived the court of jurisdiction to enter any lawful guardianship. Failure to comply with chapter 1251¹ further prevented a valid guardianship from forming. Section 1251 is very specific in terms of advanced notice, citation and service by constable or sheriff. The Order is arbitrary and unreasonable constituting a clear abuse of discretion for which no adequate remedy by appeal exists due to looming threats of contempt.

Respondent

Judge Mike Wood, Harris County Probate Judge, Court No. 2

Relief Requested

Respondent should be compelled to vacate the May 30th, 2018, Order for fees,

¹ Sec. 1251.003. APPLICATION. (a) A sworn, written application for the appointment of a temporary guardian shall be filed before the court appoints a temporary guardian.

(b) The application must state:

(1) the name and address of the person who is the subject of the guardianship proceeding;

(2) the danger to the person or property alleged to be imminent;

(3) the type of appointment and the particular protection and assistance being requested;

(4) the facts and reasons supporting the allegations and requests;

(5) the proposed temporary guardian's name, address, and qualification;

(6) the applicant's name, address, and interest; and

(7) if applicable, that the proposed temporary guardian is a private professional guardian who is certified under Subchapter C, Chapter 155, Government Code, and has complied with the requirements of Subchapter G, Chapter 1104.

sanctions and contempt as a void order issued in the absence of all jurisdiction. The Order constitutes an abuse of discretion for which there is no adequate remedy by appeal and relief is urgently required.

STATEMENT OF JURISDICTION

This court's mandamus jurisdiction is governed by section 22.221 of the Texas Government Code. A court of appeals may issue writs of mandamus against (1) a judge of a statutory probate county... court in the court of appeals district... Tex. Gov't Code Ann. § 22.221(b). Jurisdiction cannot be conferred by the parties. Jurisdiction is fundamental, where none exists, all proceedings and judgments are void ab initio and cannot be made valid. *Gallien vs. Wells Fargo Home Mortgage, Inc. 033-17-00472-cv (Tex.App—Houston [1st Dist] 2017)*. Judge Mike Wood is the statutory probate judge of Court No. 2 of Harris County, Texas and the Court of Appeals has jurisdiction under the Texas Govt Code Ann § 22.221(b) to mandate that Judge Mike Wood vacate the May 30, 2018 Order for fees, sanctions and contempt.

REQUEST FOR EXPEDITED DECISION

Relators respectfully request that the Court expedite its decision on an emergency basis due to the looming threat of arrest for “automatic contempt” for her inability to pay \$10,000 to Goldberg now or in the near future.

ISSUES PRESENTED

Does a trial court have discretion to maintain a proceeding over which it does not have, nor ever properly obtains, jurisdiction?

Does a trial court have discretion to issue an order for fees, sanctions, and contempt in a proceeding over which it does not have proper jurisdiction?

Does a trial court have discretion to issue an order for fees, sanctions, and contempt that is not directly related to the alleged offensive conduct, that is more severe than necessary to satisfy its legitimate purpose, and that is imposed in absence of consideration of the availability of lesser sanctions?

INTRODUCTION

This original proceeding involves a void order issued against Barbara Latham and Estelle Nelson for attorneys' fees of \$3548.40 from the trust or estate of Muriel Mintz, and \$10,000 in sanctions against Candice Schwager without just cause or proof of bad faith, intent to harass or increase litigation costs to overcome the presumption of good faith Relators enjoy, and automatic contempt for failure to comply by June 8, 2018. The Order constitutes a clear abuse of discretion for the failure to follow applicable law regarding attorneys' fees, sanctions and/or contempt, constituting excessive unconstitutional fees that violate Rule 10.001 and the due process clause. RELATORS have no adequate remedy by appeal due to the looming threat of arrest for contempt, because Candice Schwager is unable to comply, as sworn to by affidavit. Relators pray this Court of Appeals will order the Honorable Mike Wood to immediately vacate its May 30, 2018 sanctions, fees and contempt order fully and finally and not attempt to reform this order.

Mandamus must issue to correct a clear abuse of discretion for which the relator has no adequate remedy on appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding). "A trial court has no 'discretion' in determining what the law is or applying the law to the facts," and "a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of

discretion.” *Walker*, 827 S.W.2d at 840. A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law, or if it clearly fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam); *Walker*, 827 S.W.2d at 839. When a challenged order is void for lack of jurisdiction, the relator is not required to establish that he has no adequate remedy by appeal. *In re S.W. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (per curiam). Mandamus is available to correct a clear abuse of discretion and when a court issues an order beyond its jurisdiction, such as here. *Walker*, 827 S.W.2d at 840. When an order is void, there is no need to show no adequate remedy by appeal. *In re Southwestern Bell Tel. Co.*, 35 S.W.3d at 605.

BACKGROUND

This case involves a failed attempt to appoint Michele Goldberg as temporary guardian of Muriel Luba Mintz, now deceased. The proceeding was fatally defective from the outset for failure to lawfully serve citation on Muriel Mintz prior to the court's appointment of a temporary guardian in a hearing that complies with all statutory mandates of Chapter 1251 of the Texas Estates Code. The Texas Estates Code mandates a proposed ward over the age of 12 be served personally by a sheriff or constable as a prerequisite to the Court's power to act in any guardianship proceeding. Texas Estates Code, Section 1051.106 prohibits action by any court in a guardianship until the proposed ward is personally served by Sheriff or Constable and no earlier than the Monday following the expiration of the 10-day period beginning on the date service of notice and citation has been made as provided by Sections 1051.102, 1051.103, and 1051.104(a)(1).

Absent personal service by a sheriff or constable, the Court had no jurisdiction over the person or estate of Muriel Mintz. Tex. Est. Code 1251.003- 1251.009. As such, all orders in this case are *void ab initio* and no proof is required of an inadequate remedy by appeal for mandamus to issue.

The record proves, as a matter of law, that Muriel Mintz was never served by a constable or sheriff with any guardianship application proposing Michele Goldberg as temporary or permanent guardian. And, when apprised for the failed service,

neither the applicant, the temporary guardian, nor the respondent court made any attempt to correct this failure. The failure to comply with the foregoing mandates renders this attempted temporary guardianship *void ab initio*. Whether the Court considers *the series of citation returns “unserved”, the September 11, 2017 affidavit of Stacy Kelly, counsel for Donald Mintz (applicant) swearing that no service was accomplished by constable or sheriff, or the many instances in which Hon. Mike Wood admitted that without personal service on Muriel Mintz by a sheriff or constable he lacked the jurisdiction to do anything, the record unambiguously shows this Court never acquired jurisdiction over Muriel Mintz or her estate.* Returns in this case reveal Muriel Mintz, deceased, was never lawfully served prior to her death; yet the Court proceeded to issue various objectionable orders over the person and estate of Muriel Mintz, including non-probate assets over which the court had no jurisdiction.

STATEMENT OF FACTS

Donald Mintz filed for guardianship of Muriel Mintz in March of 2017 but failed to obtain service by sheriff or constable prior to abandoning the pleading upon being informed by Judge Wood that he would not consider it due to family conflict. Donald then filed a third-party guardianship application, not a temporary guardianship. He did not specify the guardian proposed, necessarily depriving Muriel Mintz of notice before appointment in violation of the Code. Chapter 1251 mandates the proposed ward be notified more than 10 days prior to the hearing and service of citation be made by a sheriff or constable.

Wood's purported appointment of Michele Goldberg in violation of Chapter 1251 notice and presence requirements renders the proceeding void for lack of jurisdiction and failure to comply with statutory mandates. Despite the lack of jurisdiction over Muriel's person and estate, Judge Wood entered void orders which were relied upon by medical professionals and financial institutions to Relators' detriment, resulting in the death of Muriel Mintz, who was not terminal but placed on hospice through gross negligence, reckless and callous disregard for her rights by denying Muriel constitutionally mandated appropriate medical care by someone capable of providing informed consent, such as Latham or Nelson, both experienced registered nurses. Goldberg wrongfully usurped their role caring for their mother,

blocking their access to physicians, hospice, medical providers, records, information, and Muriel, banning them from even being able to provide critical medical data to medical providers, and violating the Constitutional rights of Latham, Nelson and Muriel by interfering with their right to freedom of familial association.

Latham and Nelson filed a federal lawsuit for civil rights violations and wrongful death against the bonds of Judge Mike Wood and Michele Goldberg, *See Cause No. 03875; Latham vs. Wood et al; S.D. Texas, Houston, Judge Vanessa Gilmore presiding*. Prior to filing, counsel for relators notified the sureties of both Wood and Goldberg of their intention to sue on their respective bonds. *See attached letters send to bonding companies*. Relators' notice was provided in the same manner as was done in *Johnston vs. Dexel*, a landmark case in which Judge Lee Rosenthal ruled that a statutory probate judge could be sued on their judicial bonds under Tex. Est. Code 1201.003 for gross negligence or recklessness resulting in wrongful death. *See Cause No. 2014-03215; Johnston vs. Dexel*,²

Muriel Mintz died before her daughters could save her, prompting them to immediately amend their claims for violations of ADA, Section 1983 and wrongful death. *See 3rd Amended Complaint, attached hereto and incorporated by reference*.

Judge Vanessa Gilmore dismissed Plaintiffs' claims against Judge Mike Wood and

² *See Cause No. Johnston vs. Dexel, S.D.Tex 2016; "Houston Federal Judge Allows State Judge to be sued" by David Yates, S.E. Texas Reporter, May 16, 2018. Cause No. 17-03875; Latham vs. Wood, et al; S.D. Texas, 2017;*

Michele Goldberg based on immunity, at odds with the decision issued by Judge Lee Rosenthal just before on May 15, 2018. Relators filed a notice of appeal the claims Gilmore dismissed on May 10, 2018, in the Fifth Circuit Court of Appeals.

Relators' counsel notified Wood and Goldberg's bond companies on Christmas Day of the impending lawsuit in federal court for wrongful death. Goldberg did not object for five months until two days after Judge Lee Rosenthal ruled that a state probate judge could be sued on their bond in federal court for wrongful death. *Johnston vs. Dixel; Cause No. 03215*. However, Goldberg insists that Schwager's notification to Goldberg's bond company violated "the rules".

Michele Goldberg cited no legal authorities for her narrow proposition, which purports to limit Relators to suing her and/or Wood in Wood's court for surcharge action—a blatant violation of Texas Constitution Article V Section 11, which would disqualify Judge Wood. Wood has no jurisdiction to assess whether a wrongful death lawsuit of which he is a co-defendant—is frivolous or harassing and he is disqualified by the Texas Constitution from entertaining such a question. Tex. Const. Art. V, Sec. 11. A surcharge in the court which is itself a defendant and which appointed the co-defendant cannot be the exclusive means of making a claim for a judicial or guardian bond limits. Schwager violated no rule in notifying Goldberg's bonding company of the federal lawsuit. Goldberg has yet to identify any such rule.

JUDGE MIKE WOOD had no jurisdiction to sanction SCHWAGER and

his actions constitute a clear abuse of discretion. The Court heard MICHELE GOLDBERG'S MOTION on May 29, 2018: Judge Mike Wood exploded in the hearing May 29, 2018, revealing his baseless grounds for this void order, a letter written to the bonding company to give notice of the federal lawsuit. Wood had no jurisdiction under the Texas Constitution, Art. V, Section 11 to sanctions SCHWAGER, given he is a defendant in an ongoing 5th Circuit Court appeal of Cause No. 03875; Barbara Latham vs. Mike Wood, et. Al. The following excerpt is from the May 29, 2018 hearing:

THE COURT: The Federal case is gone. It's been dismissed.

MS. SCHWAGER: It's been appealed.

THE COURT: You've been ordered not to refile it and you've been ordered not to file anything in Federal Court.

...

MS. SCHWAGER: No. I have not received anything that said that.

MS. SCHWAGER: I did not file the motion for appeal, Mr. Wynne did. There is an appeal pending. I think it's premature for her to be asking for this. P. 11.

THE COURT: This is based on your letter of December 25th, 2017. I'm amazed you wrote the letter.

MS. SCHWAGER: That letter had to be written before we could file a Federal case and make a claim on the bond.

THE COURT: You don't have the right under the Rules to write a letter that says what you said. It was one of the most unprofessional documents I've ever seen. So, I'm going to grant the motion for sanctions. I'm going to order \$10,000 sanctions against you personally, and I'm going to allow her to pay back the fees that she incurred out of her pocket to pay for the bond because she has an obligation to pay that. She's already paid it. I'm going to reimburse her from the estate and if it's not paid from the estate within 15 days, I'm going to order that in

addition to the \$10,000 against you. P. 12.

MS. SCHWAGER: I don't think, Judge, you have jurisdiction to be making that judgment on the wrongful-death case.

THE COURT: I -- it's not a wrongful-death case. It's a case for sanctions because you accused her of wrongful death, discrimination and retaliation --

MS. SCHWAGER: That case is on appeal. P. 13.

THE COURT: No, not today. I'm talking about a letter written December 25th.

MS. SCHWAGER: I didn't write that in this court. I wrote it to a bond company.

THE COURT: But it's filed in this court because it's about this case.

MS. SCHWAGER: She filed it in this court.

THE COURT: It's about this case.

MS. SCHWAGER: She can't drag any document that I happen to have had out in the public and file it in the court and sanction me for it. I didn't file it in here. P.14-15.

...

THE COURT: I've already said I'm going to grant the sanctions of \$10,000 for filing the claim against the bond which is improper. You can't file a claim writing a letter to the bonding company. You should know that. You have to file a claim. You didn't do that.

MS. SCHWAGER: I did file a claim.

THE COURT: They rejected it.

MS. SCHWAGER: I filed it in Federal Court.

THE COURT: Federal Court is not how you make a claim against a guardian on the bond. You are making all this up. P. 14.

MS. SCHWAGER: I can't very well make a claim in a court where I'm making claims against the parties. There's no jurisdiction in that court.

THE COURT: I don't know what you're talking about. I don't think you do.

MS. SCHWAGER: Article 5, Section 11, Texas Constitution.

THE COURT: Oh, well, that rarely comes up in Probate Court. I've made my ruling. If you'll prepare an order, sanctions against Ms.

Schwager for \$10,000. P. 15.

THE COURT: Yeah. You need to prepare an order that says specifically sanctions against her for \$10,000 for filing the way she did and against the estate for \$3,548.40 to reimburse you. If there's not money in the estate, then from the trust.

MS. SCHWAGER: She has not demonstrated -- she's not overcome the presumption of good faith that's in the law nor has even approached it.

THE COURT: Counsel, you have overcome any presumption of good faith by your conduct in this case in the presence in open court and by documents you have filed. P. 16.

MS. SCHWAGER: The law is not being applied. P. 15.

THE COURT: Right.

MS. SCHWAGER: There's no jurisdiction for this. The jurisdiction ended when Ms. Muriel Mintz died.

THE COURT: No. P. 16.

Wood's accusations were consistently derogatory and biased against Barbara Latham and Candice Schwager without provocation. Regardless of the merits of Relator's objections and legal arguments, bias is overwhelmingly against them: See e.g. May 23rd transcript, p. 9.

MS. SCHWAGER: Your Honor, I just have a general objection. I have not had the time to set my motions that I filed this weekend. I have a verified motion to transfer venue, to compel arbitration. And so, I just want to put an objection on the record

to the hearing going forward as without jurisdiction in the sense that the only trustee who is acting at this point by admission is Barbara Latham who lives in Brazoria County and the accounts that she operates are in Brazoria County. And so exclusive venue under the Texas Trust Code, Section 115.002(b), says, It shall be brought where the trustee resides or the situs of administration of the trust. And so, I want to put in that preliminary objection.

...

And the second is that the trust itself, it requires arbitration, according to the Supreme Court decision of Reitz -- Rachal versus Reitz, which is 2013, and I have a copy for you and I also filed it as an exhibit. But the language in that case is almost the same as this. It says, I -- It's my desire, you know, that the arbitration occur.

THE COURT: That's not a proper objection to evidence.

MS. SCHWAGER: It's a proper objection to the entire hearing.

THE COURT: You have not filed a motion to compel arbitration.

MS. SCHWAGER: Yes, sir.

THE COURT: And you haven't set it for motion to compel arbitration.

MS. SCHWAGER: I've also filed a request for accommodation under the ADA because of pain that I have experienced --...

MS. SCHWAGER: It goes to the ADA coordinator and it's supposed to go to you.

THE COURT: I haven't gotten it.

MS. SCHWAGER: Okay. Well, I've asked that it be forwarded to the ADA coordinator and to you.

THE COURT: I don't have an ADA coordinator. P. 11.

MS. SCHWAGER: Harris County does. The probate division.

MS. SCHWAGER: I'm surprised everybody doesn't know that.

THE COURT: Are they aware of that? I've been here 24 years.

MS. SCHWAGER: Well, I guess, I'm very surprised about that, given that we deal with disabilities every day. But, yes, they're aware of that.

P. 11-12.

THE COURT: And I'm going to go forward with the hearing, and you can do whatever you need to do on the other stuff. p.14. It would be nice if I saw the motion to compel arbitration. That would be great. You haven't filed it.

MS. SCHWAGER: Yes, I have, Your Honor. Would you like to see it?

THE COURT: No. Because it's not set today. And you didn't bring it up two weeks ago when you were here. You didn't mention anything about it. P. 15-16.

THE COURT: Well, you're arguing something that's not before me. So, state your objection. It's overruled. Go forward.

MS. SCHWAGER: My objection is that --

THE COURT: You've already stated your objection. I overruled it.

MS. SCHWAGER: Okay. Thank you. P. 17.

MS. SCHWAGER: Your Honor, just as a preliminary objection, I wasn't -- I never got to cross-examine Ms. Goldberg before Stacy took over...

THE COURT: Well, you started to cross-examine her about things that were not before me today.

MS. SCHWAGER: Okay. The temporary injunction requires proof of imminent harm that cannot be remedied under the law.

THE COURT: That's not even close to correct

MS. SCHWAGER: Okay. What does it require, then? Tell me, please.

THE COURT: I don't -- do I look like a lawyer professor? I know what it requires. P. 18 - 19.

THE COURT: You are -- here is what you're going to do: You are going to stay on point. You are famous around the courthouse for going off everywhere but not on point. Okay. So, stay on point. Anything you go into other than what's on point on the application is overruled. P. 28-29.

MS. SCHWAGER: I'm not allowed to ask her that she knows -- whether she knows or not that this is an irrevocable trust and what the terms state?

THE COURT: It has nothing to do with her being temporary guardian of the ward's estate.

MS. SCHWAGER: -- you granted her show cause order based on this trust. P. 29.

THE COURT: The -- your request to cross-examine the temporary guardian about the trust is denied.

MS. SCHWAGER: Okay. Thank you.

MS. SCHWAGER: So, I'm not being permitted to cross-examine the witness.

THE COURT: Well, but -- okay. Cross-examine him on something that's relevant. ...She's already made her case. P. 46.

Judge Wood allowed Michele Goldberg, a witness only, but became hostile

when Schwager made the same objection:

THE COURT: "I'm the one that says that. You don't get to decide that. Do you understand? She is my guardian and she is telling me what your client is doing that's wrong.

MS. SCHWAGER: She's telling you hearsay and she's not telling you the whole story.

THE COURT: Well, because we -- you haven't shut up and let her finish. All right. P. 59.

JUDGE MIKE WOOD confirmed his overwhelming bias for which he should have disqualified himself in the final hearing on this matter, attacking Candice Schwager's co-counsel, Robert Lemus, for aligning himself with her alone. The Court held its final hearing before closing the guardianship on July 19, 2018. Attorney Robert Lemus appeared in place of Candice Schwager due to her son's illness. See Transcript of Hearing from July 19, 2018. The Court first began to berate Schwager for not appearing on page 5, revealing animosity and impropriety in Wood's continuing exercise of jurisdiction under Article V, Section 11, Texas Constitution, p.5-6:

MR. LEMUS: Your Honor, Ms. Schwager contacted me earlier this afternoon and stated that she was not going to be able to make it because of an illness that has befallen her little boy. And she asked if I would not -- appear on her behalf in order to at least defend the clients under the circumstances. And so, I ask that you allow me to represent the clients and argue the motion to the extent the Court allows.

THE COURT: Well, the problem is she didn't file an affidavit saying even that her child was sick. She has --

MR. LEMUS: I can show you.

THE COURT: -- a tendency to not show up places and say, I'm not well. I want -- I want accommodations under the Americans with Disabilities Act. This is the first time she's tried it with her child.

THE COURT: Because she waited until the last minute.

MR. LEMUS: That may be the case, and I'm not here to defend her, Your Honor.

THE COURT: So, the child just became ill this morning. She was going to be here. She had no idea she was not.

Pg. 7.

Robert Lemus asked the Court whether Wood was releasing Goldberg's sureties, referencing claims the estate and/or heirs may continue to have against her.

Wood responded:

THE COURT: If you have any lawsuits you want to file, feel free. I'm sure Ms. Schwager, when her child recovers, praise the Lord, I'm sure she'll be filing lots of cases --

MR. LEMUS: Yeah, well --

THE COURT: -- hundreds of pages.

MR. LEMUS: -- Your Honor, that is not the way that I personally practice. So...

THE COURT: Well, you're here.

MR. LEMUS: I am here. And I am not -- THE COURT: You are here.

MR. LEMUS: But please do not lump me in that same category. I appreciate it.

THE COURT: You -- I'm sorry, sir. You lumped yourself in that category because you appeared on behalf of Ms. Schwager.

MR. LEMUS: No, I --

THE COURT: Don't say, "I'm not her." Because you are her. You appeared on her behalf.

MR. LEMUS: Your Honor, I am here on behalf of Barbara Latham and Estelle Nelson. p. 10-11.

ARGUMENT

A. JUDGE WOOD'S MAY 30, 2018 ORDER FOR FEES, SANCTIONS AND CONTEMPT IS VOID FOR LACK OF JURISDICTION

Before a court may enter judgment against a party, the court must have obtained jurisdiction over that party pursuant to applicable rules or statutes. *See* Tex. R. Civ. P. 124; *Whatley vs. Walker*, 302 S.W.3d 314 (Tex. App.—Houston (14th Dist.) 2010; citing *Ross v. Nat'l Center for the Employment of the Disabled*, 197 S.W.3d 795, 796-97 (Tex.2006); *Vance v. Davidson*, 903_S.W.2d_863, 866 (Tex.App.- Houston [14th Dist.] 1995, orig. proceeding). A trial court's jurisdiction is a question of law an appellate court reviews *de novo* by examining the pleadings and any other evidence relevant to the determination. *In re Erickson*, 208_S.W.3d 737, 740 (Tex.App.-Texarkana 2006, no pet.).

1. THE FAILURE TO LAWFULLY SERVE MURIEL MINTZ DEPRIVES THE COURT OF JURISDICTION

In re Ella V. Mask presents an analogous fact pattern to Mintz with virtually identical facts presented in this case. In both cases, temporary guardianship orders was signed without lawful service or the attendance of the proposed ward at the hearing prior to appointment. Tex. Est. Code 1251.103. Both cases alleged a vague emergency constituting imminent danger to excuse their failure to serve notice consistent with the code. *In re Mask*, the Court held the order void for lack of service

of process, a prerequisite to jurisdiction. A void order has no force or effect and confers no rights; it is a mere nullity. *In re B.A.G.*, 794 S.W.2d at 511; *In re Garza*, 126 S.W.3d 268, 271 (Tex. App.—San Antonio 2003, orig. proceeding). A void order is not subject to ratification, confirmation, or waiver. *In re B.A.G.*, 794 S.W.2d at 511;. A judgment is void when it is apparent that the court lacked jurisdiction of either the parties or the subject matter. *In re Bokeloh*, 21 S.W.3d, 784, 794 (Tex. App.—Houston [14th Dist] orig. proceeding).

Jurisdiction over a party is acquired by voluntary appearance, service of process as provided by law, or waiver of service. *See* Tex. R. Civ. P. 124; *Werner vs. Colwell*, 909 S.W.2d 866, 869, 870 (Tex. 1995). A trial court lacks jurisdiction to enter a judgment or order against a respondent unless the record shows proper service of citation on the respondent or an appearance by the respondent at the time the order / judgment was entered. Tex. R. Civ. P. 124. If a trial court enters judgment before it acquires jurisdiction of the parties, the judgment is void. *In re Guardianship of B.A.G.*, 794 S.W.2d 510, 511-512 (Tex. App—Corpus Christi, no writ).

The Texas Estates Code mandates service of citation / notice occur upon the proposed ward in any temporary guardianship before a temporary guardian is appointed to be valid. Tex. Est. Code 1251.003 Mintz had neither been lawfully served nor appeared in the case at the time the trial court entered the temporary guardianship order. The Court lacked jurisdiction to sign any order, rendering the

subject order void. *See In re B.A.G.*, 794 S.W.2d at 511-512.³

Sec. 1051.103. SERVICE OF CITATION FOR APPLICATION FOR GUARDIANSHIP. (a) The sheriff or other officer shall personally serve citation to appear and answer an application for guardianship...(1) on a proposed ward who is 12 years of age or older

Section 1051.106 prohibits action by any court in a guardianship until the proposed ward is personally served by Sheriff or Constable and no earlier than the Monday following the expiration of the 10-day period beginning on the date service of notice and citation has been made as provided by Sections 1051.102, 1051.103, and 1051.104(a)(1).

B. JUDGE WOOD’S MAY 30TH, 2018 ORDER FOR FEES, SANCTIONS AND CONTEMPT CONSTITUTES A CLEAR ABUSE OF DISCRETION FOR WHICH THERE IS NO ADEQUATE REMEDY BY APPEAL

1. GOLDBERG IS NOT ENTITLED TO RECOVER ATTORNEYS’ FEES

Texas law only permits the recovery of attorneys’ fees if authorized by statute or contract. *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299 (Tex. 2006). Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party’s fees. *Id.*, *see e.g.*, *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 602, 121

³ Personal jurisdiction requires both that the respondent be amenable to the jurisdiction of the court and that the court’s jurisdiction be invoked by valid service of process on the respondent or an acceptable alternative. *Kawasaki*, 699 S.W.2d at 200; *Furst v. Smith*, 176 S.W.3d 864, 872-73 (Tex. App.--Houston [14th Dist.] 2005, no pet.).

S.Ct. 1835, 149 L.Ed.2d 855 (2001). CPRC 10.001 permits a party to recover fees only where

- (1) the pleading or motion is presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) falsely certifying that each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) where allegations in pleadings or motions lack evidentiary support and/or are likely to lack such support after reasonable opportunity for further investigation or discovery; or for
- (4) bad faith denials of factual contentions which are not warranted by evidence or a reasonable informed belief;

Courts shall presume that pleadings, motions and other papers are filed in good faith. *Id.* Judge Wood failed to specify any conduct which overcomes the good faith presumption. Rule 10 Sanctions are usually only justified where evidence shows: (a) the attorney did not read the pleadings, (b) did not conduct adequate investigation into facts, (c) claims are groundless and brought in bad faith, (d) groundless and to harass, (e) groundless and brought to needlessly increase the cost of litigation; and/or (f) made knowingly false. **Rule 10** requires that it be proven that (1) the pleading or motion was brought for an improper purpose, (2) there were no grounds for the legal arguments advanced, or (3) the actual allegations or denials lacked evidentiary support; *See* Tex. Civ. Prac. & Rem. Code Ann.§ 10.001 (Vernon 2002); *Low*, 221 S.W.3d at 614; *Armstrong v. Collin County Bail Bond Bd.*, 233

S.W.3d 57, 62 (Tex. App.—Dallas 2007, no pet.). The order imposing sanction under Chapter 10 fails to satisfy the mandate of describing “the conduct the court has determined violated § 10.005.” Sanctions cannot be issued without a showing of good cause and bad faith, “the particulars of which must be stated in the sanction order.” This was not done, mandating the order be vacated. Mandamus is requested accordingly.

2. SANCTIONS ISSUED ARE SO ARBITRARY & UNREASONABLE AS TO CONSTITUTE A CLEAR PREJUDICIAL ERROR OF LAW

Judge Wood had no basis upon which to pull \$10,000, much less twice that amount out of *thin air* and the order does not include any conduct that caused \$10,000 in damage to Michele Goldberg. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (*orig. proceeding*) (*per curiam*); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (*orig. proceeding*). The law was not followed or applied. “Goldberg cited no authority which would entitle her to force Latham, Nelson or Schwager to pay her attorneys’ fees incurred to indemnify her bonding company for \$3538.40 and fails to satisfy Rule 10.005. Without identifying any means by which Schwager caused her harm, violated Rule 10⁴, evidence of the

⁴ (a) A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.

(b) The sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated.

(c) A sanction may include any of the follow- ing:

(1) a directive to the violator to perform, or refrain from performing, an act;

(2) an order to pay a penalty into court;

amount of harm allegedly caused, evidence to overcome the presumption of good faith enjoyed by Schwager, or mandatory causal nexus between Schwager's conduct and Goldberg's alleged damage, Goldberg's motion is frivolous and sanctionable, rather than Schwager's actions.

The sanctions are excessive and unreasonable. under § 10.007(c), which limits monetary sanctions that can be assessed against a person to the payment of reasonable attorneys' fees, fines to the court, and prohibits excessive fines mandating they be no greater than necessary to secure compliance or deterrence. *Low v. Henry*, 221 S.W.3d 609, 620-21 (Tex. 2007). The Court also noted that Tex. Const. art. I §13 prohibits excessive fines. *Id.* at 620 n.4

and

(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees.

(d) The court may not award monetary sanctions against a represented party for a violation of Section 10.001(2).

(e) The court may not award monetary sanctions on its own initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party or the party's attorney who is to be sanctioned.

3. CONTEMPT CANNOT ISSUE FOR FAILURE TO PAY EXCESSIVE FINES IN VOID ORDERS

The Order's attempt to deem non-compliance CONTEMPT OF COURT violates the U.S. and Texas Constitutional guarantee of due process of law, the guarantee of a jury and potentially appointment of counsel in a notice proceeding where all constitutional mandates are followed. 42 U.S.C. 1983, the 14th Amendment, Texas Constitution, 18 USC 241, 242. Where the order itself is void and the fee is excessive, the Court may not issue contempt for failure to follow it.

4. CLEAN HANDS DOCTRINE PROHIBITS GOLDBERG FROM AN AWARD OF FEES OR SANCTIONS AGAINST RELATORS.

When seeking an equitable remedy, a party must do equity and come to the court with clean hands. *Breaux v. Allied Bank*, 699 S.W.2d 599, 604 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). The clean-hands doctrine is [t]he principle that a party cannot seek equitable relief or assert an equitable defense if that party had violated an equitable principle, such as good faith. . . Such party is described as having unclean hands. Sanctions and fees have been denied where the party seeking them lacked "clean hands" such as evidence of impropriety or bad faith on their part. A party who seeks equity must do equity. *Furr v. Hall*, 553 S.W.2d 666, 672 (Tex. Civ. App. Amarillo 1977, writ ref'd n.r.e.); *Ligon v. E.F. Hutton & Co.*, 428 S.W.2d 434, 437 (Tex. Civ. App.C Dallas 1968, writ ref'd n.r.e.).

Whether for continuing to insist her appointment is valid with clear evidence Muriel Mintz was never served , Goldberg's awareness that no guardianship is valid due to her absence from the hearing under Chapter 1251, (with the 9/19/2017 transcript showing she was on the phone, not in court), Goldberg knowingly making bad faith groundless arguments to take property from Relators over which she lacks standing to demand and the Court lacks jurisdiction to convey, Goldberg's conduct shows bad faith and unclean hands, justifying all fees she was paid be disgorged, not more windfalls. For this reason, RELATORS pray this Court issue mandamus to correct JUDGE MIKE WOOD'S clear abuse of discretion for which there is no adequate remedy by appeal. Specifically, Relators are entitled to relief simply by JUDGE MIKE WOOD'S lack of jurisdiction in this matter to issue the void orders at issue.

CONCLUSION AND PRAYER

Relators respectfully request that the Court grant this petition for **writ of mandamus** and direct Respondent immediately to vacate its May 30, 2018, Order for attorneys' fees, sanctions and contempt against Barbara Latham, Estelle Nelson and/or Candice Schwager. Relators respectfully request that the Court expedite its decision given the looming threats to Relators' liberty threatened by this order. Relators further request all additional relief to which they are entitled at law or in equity.

Respectfully submitted,

SCHWAGER FIRM

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RULE 52.3(J) CERTIFICATION

I have reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

Candice Schwager

Candice L. Schwager
Counsel for Relators

CERTIFICATE OF SERVICE

I certify that, because of the imminent nature of this proceeding, courtesy copies of the foregoing were provided in electronic form at the same time this instrument was filed with the Court to counsel listed below. I likewise certify that true and correct copies of the foregoing document will be formally served on the Hon Mike Wood, Respondent, by hand delivery, and counsel listed below, by hand delivery on the 10th day of AUGUST 2018, as follows:

The Honorable Mike Wood
Harris County Probate Judge

Harris County, Texas
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Houston, TX 77002

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Bellaire Texas 77401

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Candice Schwager

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B) because it contains 3,405 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(2)(B).

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: August 10, 2018.

Candice Schwager

Candice Schwager
Counsel for Relators

APPENDIX 4

1 ROUGH DRAFT - MINTZ 11-28-17

2 THE COURT: Cause No. 456,059, the Estate of
3 Muriel Luba Mintz. Could I have appearances?

4 MS. KELLY: Stacy Kelly for Donald Mintz.

5 MS. GOLDBERG: Michele Goldberg, temporary
6 guardian pending contest.

7 MS. SCHWAGER: Candice Schwager for Barbara
8 Latham.

9 MS. CHAPITAL: Aldrinette Chapital for the
10 ad litem, Teresa Pitre.

11 THE COURT: Okay. So you have filed a
12 motion to show cause?

13 MS. GOLDBERG: Correct, Your Honor. And I
14 did receive -- I was -- Ms. Schwager did notice me.
15 Actually, she noticed all attorneys, I believe it was
16 Sunday evening, of her motion for continuance. Even this
17 morning, what we can access from the Court's Website, I
18 didn't see any orders signing her -- approving her
19 appearance in the --

20 THE COURT: That's because I didn't sign it
21 until this morning --

22 MS. GOLDBERG: Oh, okay. Well, I had filed
23 a response --

24 THE COURT: -- but it was signed.

25 MS. GOLDBERG: I had prepared a response to

1 the motion for continuance but I didn't e-file it because
2 I didn't think she was -- I was not apprised that she was
3 an attorney of record. I am prepared to respond, though,
4 if the Court is going to hear her motion for continuance.

5 THE COURT: Yeah, I'll hear it.

6 MS. SCHWAGER: Thank you, Judge. Well, I
7 first just would like to point out what you just have
8 pointed out that I submitted a request to substitute in as
9 counsel which I understand you signed this morning. I
10 thought it was signed yesterday. I filed my emergency
11 motion on Saturday evening on the grounds that I had
12 insufficient notice. I have not had time to review the
13 bank statements which I understand are the only ones
14 outstanding after the over \$100,000 that Michele took out
15 of Ms. Mintz's account, her personal account and a trust
16 account which Muriel Mintz established in 2015 which not
17 only benefits -- well, it benefits all three children,
18 Donald Mintz included.

19 MS. GOLDBERG: Objection, Your Honor. This
20 has nothing to do with motion for continuance. It's
21 procedural. Motion for continuance is based on procedural
22 grounds.

23 THE COURT: Yes.

24 MS. SCHWAGER: The show cause hearing is to
25 address these things.

1 THE COURT: Well, but the basis of your
2 continuance...

3 MS. SCHWAGER: I would argue that there's
4 good cause. I have not made it through all of the
5 pleadings, so if I have any mistaken statements in my
6 motion, I apologize and will correct that. I pulled as
7 many as I could, read them as quickly as I could. But I
8 have --

9 THE COURT: I have no idea why you had
10 transcripts from Court 4 in an unrelated case attached to
11 your motion. I have no idea why you had a
12 disqualification of your firm in a bankruptcy.

13 MS. KELLY: Well, she's asking for Jason.
14 But Jason is not on this case.

15 THE COURT: Well, I know. But, I mean, it
16 was about a disqualification in Bankruptcy Court.

17 MS. SCHWAGER: I can answer that. It
18 affects credibility.

19 THE COURT: It's a motion for continuance.
20 The only question on a motion for continuance is why the
21 hearing should be delayed. It has nothing to do with
22 evidence in the case at all.

23 MS. SCHWAGER: Well, I believe --

24 THE COURT: Now if you say you need time to
25 discover --

1 MS. SCHWAGER: Yes, sir.

2 THE COURT: -- they're not producing any
3 documents. That's time you need to spend with your
4 client.

5 MS. SCHWAGER: Right.

6 THE COURT: You said she's ill, but you
7 didn't say that in any kind of a way that's grounds for
8 continuance.

9 MS. SCHWAGER: She was ill the last couple
10 of days that I spoke with her and so I wasn't able to meet
11 with her to go through the statements.

12 THE COURT: Well, that -- to do that, you
13 have to have a doctor's letter that says the person is
14 ill. You can't just say, My client is not feeling well
15 and can't meet with me.

16 MS. SCHWAGER: Well, if you would like to
17 hear from her, she can be sworn in and testify that she's
18 ill.

19 THE COURT: Is she here?

20 MS. SCHWAGER: Yes, she's here.

21 THE COURT: Well, why isn't she up here?

22 MS. SCHWAGER: She's right there
23 (indicating).

24 THE COURT: Have her come on up.

25 MS. SCHWAGER: Ms. Latham.

1 (Barbara Latham approached the Bench.)

2 THE COURT: I'm sorry you're ill. But the
3 question is: Are you going to produce the documents that
4 I ordered you to produce by the beginning of last month I
5 think?

6 MS. LATHAM: I'm really not aware -- are
7 you --

8 THE COURT: Well, let me explain something.

9 MS. LATHAM: What is it I'm lacking?

10 THE COURT: You are acting -- you acted
11 under a power of attorney --

12 MS. LATHAM: Uh-huh.

13 THE COURT: -- or as a trustee under a
14 trust. I'm not sure which. But when you act in those
15 capacities, you have a fiduciary duty to the
16 beneficiaries. Which means you have to produce every bit
17 of information you have to justify everything you've done.
18 If you don't produce it, you lose. It's not like a
19 typical lawsuit where the burden is on the person who is
20 complaining to prove things. In a fiduciary case, the
21 burden is on the fiduciary to justify everything that's
22 done.

23 So if you took a dollar in the last two
24 years, last four years, you have to explain what that
25 dollar was taken for. You haven't done that. The

1 guardian is acting on behalf of the ward because I
2 appointed her and told her to do so. She's asking for
3 those documents so she knows what's been taken and she can
4 take whatever action she needs to to get it back.

5 So the quicker you can get every single
6 piece of paper that you have to justify every single
7 dollar you spent, the better off. The longer you delay --
8 and I know we've had this conversation with your prior
9 counsel in my Chambers several months ago. So you do know
10 what I'm talking about.

11 MS. LATHAM: Well, sir, I -- when it -- if
12 it was in your Chambers, I was not privy to that. And if
13 it was up here --

14 THE COURT: You were there.

15 MS. LATHAM: -- I can't hear back there.

16 THE COURT: You were there. You were in my
17 Chambers.

18 MS. SCHWAGER: I believe her counsel told
19 you that they couldn't communicate with her. And I can
20 attest to that fact because I have no problem
21 communicating with her.

22 THE COURT: You have no problem?

23 MS. SCHWAGER: No.

24 THE COURT: Okay. Well, I don't know why
25 they said it was an issue.

1 MS. SCHWAGER: Well, it was an issue because
2 she wasn't informed of everything that she was supposed to
3 disclose. And many of the e-mails that were forwarded to
4 prior counsel were not sent to her.

5 THE COURT: Well --

6 MS. KELLY: Your Honor, along those lines,
7 I've sent discovery asking for the same exact information
8 and that was due last week and she hasn't, you know,
9 served me with her responses. So there's definitely just
10 a sitting back, I'm not going to do what I'm told.

11 MS. GOLDBERG: Additionally, Your Honor, I
12 would like this on the record. I had Ms. Latham served
13 with citation on November 10th of my motion for show cause
14 to which I attached the transcript from the status
15 conference hearing. And even if it is indeed correct that
16 her previous attorneys didn't properly communicate with
17 her, she could read what was in the transcript where you
18 ordered her to have all of those documents to my office by
19 Friday of that week. We were in your Chambers on October
20 31st.

21 MS. SCHWAGER: I believe she's also entitled
22 to an attorney who actually can communicate with her and
23 go through the documents to insure that you get what you
24 need and I'm here to do that for her now.

25 THE COURT: So what date are you going to

1 get all the documents?

2 MS. SCHWAGER: Can we have two weeks, ten
3 days, something of that nature?

4 MS. LATHAM: Well, how far back are we
5 talking documents?

6 THE COURT: Well, the statute of limitations
7 is, I think, four years. Isn't it?

8 MS. KELLY: Four.

9 THE COURT: So...

10 MS. LATHAM: Well, I can -- if I go online,
11 I have no more access to these accounts.

12 MS. SCHWAGER: We will see what we can pull
13 together.

14 THE COURT: Yeah. If you don't, as I told
15 you, you acted as a fiduciary. And if you don't have the
16 documents to prove that you acted properly as fiduciary
17 you lose and you have to give the money back. You
18 probably don't have the money so that may be a problem.
19 But what I'm suggesting to you is you can't not do
20 anything. You can't --

21 MS. LATHAM: Isn't --

22 THE COURT: -- you can't say, I'm not
23 feeling well. I can't deal with this. I want you all to
24 go away and leave me alone. You can't do any of those
25 things. Okay? So you need to face this. Get your

1 lawyer's help to explain it all to you. I'm trying to
2 explain it to you in layman's terms. You just need to get
3 all the information you have in your possession and get it
4 to the counsel that has asked for it in writing and get it
5 to the guardian.

6 MS. LATHAM: I actually thought I had given
7 Errin Brown that information.

8 MS. GOLDBERG: Your Honor, as I put in my
9 pleading and I've written in numerous and I attached the
10 numerous and various written correspondence to all
11 attorneys and to Ms. Latham directly that there are --
12 Ms. Latham put in her application for guardianship which
13 was filed in, I believe, April 7th -- something like
14 that -- 2017, April of 2017, that her mother had about
15 225,000 in her estate.

16 From the records that I have been able to
17 access that still have the name of Muriel Mintz on them,
18 there's about \$107,000 which means there are various
19 transfers and I've been asking for them and I've been
20 asking for this account that appears to be in Ms. Latham's
21 name. So when she says she can't get records, we need to
22 see her accounts. Because there's transfers of more than
23 half of her mother's assets into accounts that appear to
24 be in her name. I'm not saying the money is not there.
25 I'm assuming it is there. But we need to see it and where

1 is it?

2 And I have a real problem, Your Honor,
3 because as a neutral third party and as the
4 court-appointed temporary guardian, I'm charged with the
5 duty of making sure that Ms. Mintz is in a -- is
6 appropriately placed in a place that is safe and secure
7 for her and I need to know how to pay for it. So with the
8 transfers that I have been able to view and access thus
9 far, Ms. Mintz's assets are very limited. She's got about
10 3,000 a month in income. Her cash assets to which I have
11 access as I said are about 107,000. And with the kind of
12 transfers that Ms. Latham appears to have made using a
13 power of attorney, Ms. Mintz will be totally disqualified
14 from applying for -- I can't even apply for her for
15 nursing home Medicaid coverage once her 107,000 in assets
16 are spent down because of these transfers that will be
17 considered fraudulent and criminal under the Federal law.

18 So Ms. Latham -- I want Ms. Latham to be
19 apprised of that, that there are serious criminal
20 consequences if she has transferred money into her own
21 name. And if it's there, it just needs to come back.
22 That's all. That's all I want, get the money back so I
23 can take care of her mother.

24 MS. SCHWAGER: Regarding the TRO --

25 THE COURT: You're nodding "no."

1 MS. LATHAM: Well, I'm -- I'm not sure
2 what -- how far back this goes.

3 MS. SCHWAGER: We'll talk about it.

4 MS. LATHAM: Okay.

5 THE COURT: Well, you said in March of this
6 year that your mother had \$225,000.

7 MS. GOLDBERG: 225.

8 MS. LATHAM: I believe that the lawyer was
9 just -- seemed to just copy verbatim what Donald had on
10 his application.

11 MS. GOLDBERG: I'm sorry. Ms. Latham had to
12 sign it. An application for guardianship is verified.
13 She signed it. Everything was true and correct.

14 MS. LATHAM: And when I asked about what
15 does this means, I was told it doesn't mean anything.
16 It's a bottom or a top figure.

17 THE COURT: Well, you may have a lawsuit
18 against your lawyer. I don't know. I'm not suggesting
19 that. I don't know. I wasn't there for the conversations
20 but you did sign that, a pleading, that said it was true
21 and correct.

22 So you think ten days?

23 MS. SCHWAGER: I think we can do it in ten
24 days. Don't you think?

25 MS. LATHAM: Yeah. I think so.

1 MS. SCHWAGER: I have a hearing on the 6th.
2 What is that, eight days?

3 MS. GOLDBERG: I've been asking since
4 September 20th, Your Honor.

5 MS. SCHWAGER: Well, Your Honor, it's not
6 going to go anywhere. I mean, it's --

7 THE COURT: Well, it has gone, over half of
8 the money has gone somewhere.

9 MS. SCHWAGER: There's a family trust that
10 Muriel Mintz established for her three children. I
11 suspect that may be where some of it is. I don't know.

12 MS. GOLDBERG: I have access to the trust.
13 It's not there. It's been transferred out of the trust.

14 I just want to get something on the record,
15 and I want Ms. Latham to understand something. I'm trying
16 to do this -- once again, I'm a neutral, third party -- I
17 am trying to take care of Muriel Mintz and make sure that
18 there's enough money.

19 I -- if I don't get these records and I
20 can't get this straightened out, as an officer of the
21 Court I have -- I will have a duty, I believe, anyway, I
22 will file a surcharge action. I will be forced to file
23 surcharge action against her, an action for conversion of
24 the assets and to report her client -- and to report
25 Ms. Schwager's client to the appropriate law enforcement

1 agencies for taking her mother's funds.

2 I don't want to do that. I don't want to
3 take such serious measures. I don't want this to be ugly.
4 It's already ugly. And I don't want it to be more ugly.
5 We're just trying to take care of a 93 year old woman.

6 MS. SCHWAGER: And are you saying that
7 Ms. Mintz had no authority to transfer her own money, even
8 though she was only found incompetent July 9th or June
9 9th?

10 MS. GOLDBERG: That's not before the Court
11 today. That's not before the Court.

12 THE COURT: I would suggest to her -- you
13 understand the law, I think. I'm not sure -- but you
14 understand that she has a duty.

15 MS. SCHWAGER: Yes.

16 THE COURT: If she spent one dollar of her
17 mother's money, she has a duty to justify it. Not -- they
18 don't have to ask for her to justify it. She has to
19 justify it. She has to have the justification available
20 instantly to give to anybody who asks.

21 MS. SCHWAGER: I understand that. So if
22 there's justification --

23 THE COURT: If the justification is it's my
24 money --

25 MS. SCHWAGER: No.

1 THE COURT: -- then it will show that.

2 MS. SCHWAGER: Okay. What if the
3 justification is that Muriel Mintz signed it and
4 transferred it?

5 THE COURT: Well, then you're going to have
6 to establish she was competent to do that. There may be
7 some question about that.

8 MS. SCHWAGER: Well, I didn't realize that
9 was my duty or my burden. But if it's within the last few
10 months, I do understand that.

11 THE COURT: If you're representing -- if
12 you're representing the person who took the money, yeah.

13 MS. SCHWAGER: Well, I would also point out
14 that I think Muriel Mintz needs to be re-evaluated. She
15 has a hearing problem that nobody seems to have noticed
16 and macular degeneration. Many of the tests were -- that
17 were done were visual. So it's no wonder she failed them.

18 THE COURT: That's certainly not before me,
19 and I don't know whether you're qualified to say that.
20 But...

21 MS. GOLDBERG: That's not before the Court.
22 But since Ms. Schwager has put it before the Court, I
23 would like on the record, I want the Court to be aware,
24 that on Friday afternoon of Thanksgiving holiday, of
25 Thanksgiving weekend, fortunately, I was in the office,

1 Ms. Latham called and said she was ill. She couldn't take
2 care of her mother. I should come get her.

3 I asked her to bring her -- there's more to
4 the conversation -- I asked her to please bring her mother
5 to the office. I would arrange for -- I would make
6 arrangements for her mother. She dropped her off at my
7 office at about 3:00 o'clock on Friday afternoon. Since
8 that time we've had an evaluation of her -- we've been
9 having medical evaluations of her -- and under
10 Ms. Latham's care -- and I know Ms. Latham is an RN -- and
11 maybe it's not her fault. Maybe that's just because it's
12 a 93-year-old woman who is ill -- she has lesions in her
13 mouth. Her fingernails are cracked. She's had hair loss.
14 She does have vision problems and she's had significant
15 memory loss. And the doctors are saying -- the doctor and
16 nurse that evaluated her at Gardens of Bellaire where I'm
17 looking for placement -- said that it is because of
18 malnourishment. So I'm -- I have additional concerns of,
19 not only for the money, but she wants to bring it up. So
20 I want to bring this to the Court's attention.

21 And also, if the Court will allow,
22 Ms. Schwager made, on behalf of her client, made numerous
23 allegations against me personally and against me as a
24 professional. And I just want to get a few things on the
25 record. It will be brief, Your Honor. But I'm asking the

1 Court to allow --

2 THE COURT: Well, I didn't see that. Where
3 is that mentioned?

4 MS. GOLDBERG: It's in her motion for
5 continuance.

6 THE COURT: Okay.

7 MS. SCHWAGER: Would you like a copy?

8 THE COURT: That's all right. I saw it.

9 MS. GOLDBERG: Well, I just have a few
10 things. On page 7 Ms. Schwager asked where I got the
11 power of the KGB to seize Muriel against her will.

12 So, first of all, her client dropped her off
13 at my office. I didn't seize anything.

14 But I do want to make an announcement to
15 this Court -- it's on Page 7.

16 THE COURT: Yes.

17 MS. GOLDBERG: I want to make an
18 announcement to this Court -- and while I'm here and it's
19 on the record -- to the Federal Government and to the
20 Department of Homeland Security that I am not affiliated
21 in anyway with the KGB and I never have been.

22 THE COURT: I don't think that was serious,
23 a serious charge. Maybe it is.

24 MS. GOLDBERG: It's in the public record
25 now, Your Honor.

1 MS. SCHWAGER: Figure of speech.

2 MS. GOLDBERG: There is, additionally, on
3 page --

4 THE COURT: It's not a figure of speech.

5 MS. SCHWAGER: She has been ordered --
6 ordering my client --

7 THE COURT: You realize that pleadings filed
8 in Court, that there's a qualified privilege?

9 MS. SCHWAGER: Yes, I do.

10 THE COURT: To slander?

11 MS. SCHWAGER: I don't believe that is
12 slander. I believe, as you --

13 THE COURT: To say that a lawyer that's
14 appointed is a representative of the KGB?

15 MS. SCHWAGER: Ms. Goldberg has gone beyond
16 the authority that I have seen given to her in the order
17 which she was appointed for which a motion for temporary
18 guardianship that I noticed was never even filed and
19 ordering my client during certain time periods to bring
20 her there and acting very ugly and hostile when --

21 THE COURT: Did you -- I mean, but that
22 doesn't justify you say she's related to the KGB. You
23 cannot possibly prove that. So you know when you say
24 those crazy things, you know it's untrue. You have to
25 know it's untrue.

1 MS. SCHWAGER: I do know --

2 THE COURT: You've made --

3 MS. SCHWAGER: -- that's not true. I didn't
4 mean it as a true statement.

5 THE COURT: Well, then, why did you put it
6 in a court pleading and sign it?

7 MS. SCHWAGER: I put it in a court --

8 THE COURT: Have you read the rules?

9 MS. SCHWAGER: I could put it in a court
10 pleading because I feel like my client is in a witch hunt.
11 Donald Mintz retired from the trust in order to do just
12 this.

13 THE COURT: I would suggest to you that you
14 limit your arguments to this Court to be arguments of law.
15 The motion for continuance, in attaching as it did,
16 transcripts from hearings in another court by another
17 lawyer in another case is not persuasive. It's just --
18 it's stupid. It doesn't make any sense.

19 You attached something from the Whatley
20 case. I don't know whether you were even practicing law
21 when the Whatley case was going on. And I don't -- if you
22 want to claim credit for anything that happened to that
23 man, I would suggest you not do it in this court. Because
24 what happened to him was he was -- he was -- had his
25 entire estate stolen from him by lawyers, some of whom

1 you're associated with, and non-lawyers that practice law.

2 But the point is: I would limit your
3 pleadings in writing to things that you can demonstrate
4 are true.

5 MS. SCHWAGER: Well, that's why I attached
6 the transcripts to show that some of the officers of this
7 court are acting less than forthcoming.

8 THE COURT: He -- whoever you -- I think
9 you're talking about Mr. Ostrom.

10 MS. SCHWAGER: Yes.

11 THE COURT: He's not counsel in the case.

12 MS. SCHWAGER: His name is on the pleadings.

13 THE COURT: His -- no. Stacy Kelly's name
14 is on the pleading. She's an --

15 MS. SCHWAGER: With Jason.

16 THE COURT: -- she's an associated partner,
17 but what difference does that make? So you want to say
18 you should win this case, you should win your point in
19 this case because another lawyer said something else in
20 another case and he's so bad in that other case, then --
21 do you understand that that's not useful?

22 MS. SCHWAGER: I understand that my point
23 was just simply to have my client treated fairly, instead
24 of --

25 THE COURT: Then why don't you say --

1 MS. SCHWAGER: -- presumed in the wrong.

2 THE COURT: -- why don't you say, I want my
3 client treated fairly?

4 MS. SCHWAGER: Okay.

5 THE COURT: I don't think you need to say
6 that. I treat everybody fairly.

7 MS. SCHWAGER: I didn't say anything towards
8 you, Your Honor. It was about --

9 THE COURT: Well --

10 MS. SCHWAGER: -- the attacks on her
11 credibility and the seeming inquisition.

12 THE COURT: Has she done what I ordered her
13 to do?

14 MS. SCHWAGER: No.

15 THE COURT: No.

16 MS. SCHWAGER: But I explained to you her
17 attorneys were less than --

18 THE COURT: Well, then, that's something you
19 can take up with them.

20 MS. SCHWAGER: Uh-huh.

21 THE COURT: Rather than taking the time to
22 file that motion for continuance, which had to have taken
23 a couple of hours to write, it was fairly lengthy, you
24 could have spent the time with your client trying to
25 respond to the discovery.

1 MS. SCHWAGER: Well, it's kind of hard to do
2 Saturday night when the banks are closed, but I understand
3 the point.

4 THE COURT: Well, I didn't know why you
5 waited until Saturday.

6 MS. SCHWAGER: Because I wasn't appointed in
7 this case. I wasn't substituted in.

8 MS. GOLDBERG: You weren't on Saturday,
9 either.

10 THE COURT: You could -- you could have
11 acted in the case. I mean --

12 MS. SCHWAGER: Her attorneys filed nothing.
13 I figured I ought to file something for her. And if you
14 accepted it, I would appreciate it. That was my
15 perspective at the time.

16 THE COURT: Well...

17 MS. GOLDBERG: Your Honor, there are some
18 other points. I'll be quick. But there are some other
19 points. She's made very serious allegations against me I
20 just want to put on the record. I just need a record of
21 this, Your Honor, please.

22 On Page 7 Ms. Schwager, on behalf of
23 Ms. Latham, alleged that I took IRS funds -- IRA funds
24 belonging to the ward and that I removed the funds,
25 incurring penalties and interest.

1 I didn't remove any IRA funds. I didn't
2 remove IRA funds. I don't know why they have that. I did
3 restyle the account. I put my name on it and I took
4 Barbara Latham's name off where she can't get access to
5 it.

6 On Page 8 Ms. Schwager states that Goldberg
7 is appointed every time there is big bucks. And there is
8 proof the random appointment statute is being violated.

9 I don't even know what that means. I'm
10 trying to find where the money is. Once again, it's her
11 client who has removed the big bucks.

12 I want her -- throughout her pleadings,
13 throughout her motion for continuance, Ms. Schwager, on
14 behalf of Ms. Latham, has accused Donald Mintz of all
15 kinds of stuff. I have asked Donald Mintz since we've
16 started -- and all attorney are always copied -- I've
17 asked him for all kinds of records. Anything I've asked
18 from him, he has delivered to my office promptly and
19 quickly. If I had a question, he responded. He -- his
20 attorney gave him permission to speak directly with me for
21 efficiency and so as not to run up legal fees.

22 So I'm treating -- once again, I'm neutral.
23 I keep saying it -- but I consider myself neutral. And
24 I'm asking both sides for the same. I'm getting nothing
25 from Ms. Latham. I'm getting cooperation from Mr. Mintz.

1 Ms. Ms. Schwager on Page 4 states, I filed
2 an inventory. It's complete. And the Court approved it.
3 Making it a point moot to ask for more.

4 I don't even know what that means. But she
5 should know --

6 MS. SCHWAGER: Well, let me read you the
7 statute.

8 MS. GOLDBERG: -- she should know that I can
9 always amend the inventory as I receive more information
10 and I'm going to have to report any changes to the estate
11 on the annual account. So to say it's moot for me to ask
12 for more information, I don't even know what that means.

13 I already addressed that...

14 THE COURT: Today is the 28th of November.

15 MS. GOLDBERG: I think that's all I have
16 right now.

17 THE COURT: So have the documents --

18 MS. GOLDBERG: Here is an order, a turn over
19 order.

20 THE COURT: -- have the documents to the
21 temporary guardian by Friday, the 8th of December. And
22 file a -- don't just take a stack of documents. File some
23 kind of statement saying this is all the documents that
24 relate to what I have, what I took, what I moved because
25 she's going to have to justify them.

1 MS. SCHWAGER: Sure.

2 THE COURT: And it would be quicker and
3 easier and save more money for the ward if it's done
4 basically by agreement.

5 MS. SCHWAGER: Can we have an agreement that
6 the ward appear, given the doctor said she should and can
7 and it's not harmful?

8 MS. GOLDBERG: No.

9 THE COURT: Do what?

10 MS. GOLDBERG: I do not agree.

11 MS. SCHWAGER: Well, I suspected that. But
12 the ward, it has been said by the physician, that she
13 should be able to appear; that's it's not a danger for her
14 to appear; that she shouldn't be in the most restrictive
15 environment, which is what Ms. Goldberg is seeking,
16 apparently. And some of these issues are properly
17 addressed by Ms. Mintz.

18 MS. LATHAM: Can I --

19 MS. SCHWAGER: If she signed documents, at
20 least she can be asked is this her signature.

21 THE COURT: If the doctor -- well, number
22 one, you said can't see. But...

23 MS. GOLDBERG: But the transfers --
24 Ms. Latham did the transfers, made the transfers. She
25 made the transfers. I'm not talking about transfers that

1 Muriel Mintz made.

2 THE COURT: No. She said that she made
3 them.

4 MS. GOLDBERG: Authorized them?

5 MS. KELLY: If we can get into the TRO, that
6 might clear up a little bit of this.

7 THE COURT: Okay.

8 MS. CHAPITAL: Your Honor, can I explain the
9 question, please, regarding the date?

10 THE COURT: This is original petition and
11 application for removal of trustee. Is that it?

12 MS. GOLDBERG: Yes.

13 MS. SCHWAGER: Your Honor, this wasn't
14 noticed. And the other issue is the Trust and Property
15 Code states that any action for removal of a trustee -- I
16 believe it is Section 115, under Title 9 on Trust, at
17 115.01, Jurisdiction: Except as provided by Section D,
18 District Court has original jurisdiction and exclusive
19 jurisdiction over all proceedings by or against a trustee
20 and all proceeding concerning trusts, including
21 proceedings to -- you go down -- appoint and remove a
22 trustee, determine the powers, responsibilities, duties,
23 and liability of the trustee. So --

24 THE COURT: Believe it or not, since I've
25 been a Statutory Probate Judge for 24 years, I'm aware the

1 jurisdiction of this court includes jurisdiction of a
2 trust. I have concurrent jurisdiction with District
3 Courts over trusts. So that's just not an issue. Maybe
4 you don't know that. I don't need you to do any research
5 to tell you.

6 MS. SCHWAGER: It's under the related to
7 statute which I believe --

8 THE COURT: It's not related -- it's not
9 related to. The trust is in this court. The ward is in
10 this court. The grantor of the trust in this court. So
11 this court has jurisdiction.

12 MS. SCHWAGER: Well, then, I believe the
13 grantor should be permitted to be here and is relevant.

14 MS. LATHAM: That's true.

15 THE COURT: We have a temporary restraining
16 order. I've already disposed of everything else. Your
17 going to get -- your client -- you've agreed your client
18 is going to get every document she has related to the
19 transfers --

20 MS. SCHWAGER: Correct.

21 THE COURT: -- to the temporary guardian by
22 what date?

23 MS. SCHWAGER: By the 8th of December.

24 THE COURT: Okay.

25 MS. GOLDBERG: Here is an order. I've

1 altered the order I prepared. I put December 8th.

2 Everything to my office, please.

3 MS. CHAPITAL: Your Honor, are you going to
4 put a time on that?

5 MS. GOLDBERG: I had 5 o'clock. I would
6 ask --

7 THE COURT: 5:00 o'clock.

8 MS. GOLDBERG: Since it's a Friday, I would
9 ask the Court to make that 3:00 o'clock.

10 THE COURT: Okay.

11 MS. GOLDBERG: Everybody leaves my office
12 early.

13 THE COURT: 3:00 o'clock.

14 MS. GOLDBERG: Thank you.

15 THE COURT: Okay.

16 MS. SCHWAGER: I would also point out that
17 in reference to this TRO she's arguing, which is supposed
18 to be considered on paper, that statements made about
19 Mr. Mintz are untrue and I have documents to prove it.

20 THE COURT: I haven't found the application
21 for TRO.

22 MS. SCHWAGER: Okay.

23 THE COURT: What I was handed -- I don't
24 know who handed it to me -- but it's got a bunch of blank
25 pages in it. Okay.

1 MS. KELLY: Just concerning the transfers
2 that were made since the guardianship was filed made into
3 Barbara Latham's personal account, and I would like that
4 money -- I would like her enjoined from spending that
5 money and they were massive amounts. And my client -- I
6 know this isn't an evidentiary hearing. That's usually on
7 the next one, but my client is here. He is on the same
8 account where the accounts [sic] came out of as
9 co-trustee. And he can testify that \$92,398.96 was
10 transferred into a Bank of America account ending in 7007
11 which Ms. Latham's attorneys have admitted is her personal
12 account.

13 MS. SCHWAGER: Mr. Mintz is no longer
14 trustee.

15 MS. KELLY: It has medical disability, too,
16 which I don't understand why she did that.

17 MS. GOLDBERG: As temporary guardian, I back
18 that up.

19 MS. KELLY: I don't know if it's still in
20 Account 7007 or if she's moved it somewhere else. That's
21 why I would like to enjoin her from spending the 92,000
22 and enjoin Bank of America from allowing her to access any
23 Merrill Lynch account just to keep the status quo.

24 MS. CHAPITAL: I don't have a copy of that.

25 MS. KELLY: It was filed late. I'm sorry.

1 MS. CHAPITAL: Some of the documents
2 wouldn't come through.

3 MS. KELLY: I'll make sure Teresa gets it.
4 I'll e-mail it.

5 MS. CHAPITAL: Thank you.

6 MS. KELLY: No problem.

7 MS. CHAPITAL: She will be back Thursday.

8 MS. KELLY: I'll get it out today. I don't
9 want her to not have it.

10 THE COURT: You're going to serve Bank of
11 America?

12 MS. KELLY: Yes, sir.

13 THE COURT: Do you have an order?

14 MS. KELLY: Yes, Your Honor.

15 MS. GOLDBERG: It's right here. Is that it?

16 MS. KELLY: That's it.

17 MS. GOLDBERG: Make sure that's what you
18 want him to have.

19 MS. KELLY: No, that's it.

20 MS. SCHWAGER: Your Honor, I would just
21 object to the extent it applies to her personal account.
22 She can be enjoined herself from spending any money
23 properly belonging to Muriel, but I don't think it's
24 appropriate that her personal checking account be
25 enjoined.

1 THE COURT: That's where she put the money
2 when she stole it or whatever.

3 MS. KELLY: I mean --

4 MS. SCHWAGER: That's what you're --

5 MS. KELLY: -- we have documents.

6 MS. SCHWAGER: -- surmising. But at any
7 rate, I believe Muriel Mintz authorized these transfers
8 and there's also her own personal funds in that account.
9 So by freezing that account, you are freezing her access
10 to the funds that are hers.

11 MS. KELLY: I'm not asking to freeze the
12 entire account, just \$92,398.96 of it. Everything else,
13 do with it as you please.

14 MS. GOLDBERG: She can transfer it back to
15 the guardianship account.

16 MS. KELLY: I mean, instead of enjoining, if
17 she would agree to transfer that amount back to Michelle,
18 I would be find with that.

19 THE COURT: Will she do that?

20 MS. LATHAM: What is the situation for other
21 beneficiaries who may be needing help with their
22 maintenance and support?

23 MS. SCHWAGER: If the funds belong to
24 Muriel, you'll transfer them back, correct?

25 MS. KELLY: No.

1 THE COURT: No.

2 MS. LATHAM: Why --

3 MS. KELLY: I want \$92,398.96 transferred
4 back.

5 MS. LATHAM: I would like to see where that
6 figure came from.

7 MS. KELLY: Okay. Let me read the testimony
8 from --

9 MS. LATHAM: I mean, I would like a copy of
10 it.

11 MS. KELLY: Well, it's your account and
12 you're on it --

13 MS. LATHAM: What?

14 MS. KELLY: -- as co-trustee.

15 MS. LATHAM: I've never seen this before.

16 MS. KELLY: Really? Bank of America?
17 Because you've been pulling money out.

18 MS. LATHAM: What's -- is that --

19 MS. KELLY: -- Bank of America in the
20 name --

21 MS. LATHAM: Is that --

22 MS. KELLY: -- of the trust?

23 MS. LATHAM: Wait a minute. Are you for
24 real?

25 MS. SCHWAGER: Your Honor, the trust is

1 not --

2 MS. KELLY: Isn't this your name?

3 MS. SCHWAGER: -- in Muriel's name.

4 MS. KELLY: Aren't you on this account?

5 THE COURT: I'm sorry.

6 MS. SCHWAGER: The trust is not in Muriel's
7 name. So that's 2015 --

8 COURT REPORTER: I'm sorry.

9 MS. GOLDBERG: I'm sorry. Ms. Schwager
10 keeps saying she hasn't had time to look at anything.
11 She's making these --

12 MS. LATHAM: I have to look at things --

13 MS. GOLDBERG: -- affirmative statements
14 about these accounts.

15 MS. LATHAM: -- and my lawyer has to look at
16 these things.

17 MS. KELLY: Okay. Then, I'll just.

18 MS. LATHAM: This makes no sense to me.

19 THE COURT: Here is -- here is what I'm
20 going to tell you one more time: You have an absolute
21 obligation as a trustee to account for that 62,000 --
22 \$92,000. You can't say, I don't know what's going on.
23 Because you have an absolute burden as trustee to say
24 where that money is. Okay? You can't say, I don't know
25 anything about that. That doesn't work.

1 MS. SCHWAGER: We've agreed that we would do
2 that.

3 THE COURT: Okay.

4 MS. LATHAM: And so, for example, if I say I
5 spent \$239 on a wheelchair for my mother, am I in trouble
6 for doing that?

7 THE COURT: That's a different issue, if you
8 actually spent money for your mother for a wheelchair.
9 That's \$239, you say --

10 MS. LATHAM: Uh-huh.

11 THE COURT: -- but they're concerned about
12 90-some-odd-thousand dollars.

13 MS. KELLY: Well, I've got a 5,000; a
14 31,000; a 50,000; a 7,500; a 3,800. That is what equals
15 the 92,000. All of that was transferred into her personal
16 account after we filed the guardianship. It started one
17 week after we filed the guardian.

18 MS. LATHAM: I -- I also have another
19 beneficiary who needs help with maintenance and support.
20 Am I not allowed to help that other beneficiary?

21 MS. KELLY: The trust actually says that if
22 you gift to one child, you have to gift the equal amount
23 to all three.

24 MS. LATHAM: Oh, no.

25 MS. KELLY: Yes, it does. So I don't know

1 where she's going to get two times 92,000.

2 MS. LATHAM: She's talking about -- Donald
3 referred to it as a revocable living trust. It's an
4 irrevocable trust.

5 MS. KELLY: Basically, Your Honor, it's like
6 a crummey trust. This lady didn't have the funds to do it
7 this way.

8 MS. GOLDBERG: Yeah.

9 MS. KELLY: It was so that she could funnel
10 money to her children and qualify for Medicaid.

11 MS. LATHAM: No. She was --

12 MS. KELLY: They got a bad trust.

13 MS. LATHAM: Well, yeah.

14 MS. SCHWAGER: We're talking about --

15 MS. KELLY: Which we will deal with later.

16 MS. LATHAM: She was scammed, as I was, into
17 it.

18 MS. SCHWAGER: We're talking about two
19 different accounts, Your Honor. We're talking about her
20 personal account and a trust account. It's not the same
21 account.

22 MS. GOLDBERG: I agree. We just need to
23 protect the funds. An argument over what the funds are --
24 just protect them.

25 MS. LATHAM: I did ask Don to go to the bank

1 with me and my mother and Estelle and let's give her our
2 money back.

3 MS. GOLDBERG: That's not before the Court.
4 We just need to protect her. Once again, if her money is
5 spent -- if Muriel Mintz's money is spent down, Your
6 Honor, and I need to apply for Medicaid, nursing home
7 Medicaid, I'm not going to be able to until -- unless we
8 can account for every single penny and where it's gone.
9 Anything that was in the name of Muriel Mintz for the past
10 five years has to be accounted for because of Medicaid
11 rules.

12 MS. LATHAM: And there was no --

13 MS. SCHWAGER: I think this order is
14 superfluous, given the fact that we just committed to be
15 back on the 8th and give these documents.

16 THE COURT: Well, it's just --

17 MS. GOLDBERG: They're to be delivered to my
18 office.

19 THE COURT: Right.

20 MS. KELLY: I'm talking about cash money
21 here that she has stolen.

22 MS. LATHAM: Stolen? Now that sounds rather
23 slanderous to me.

24 THE COURT: What did you do with \$50,000?
25 If you took it out of that trust, you were supposed to

1 give it to each of the beneficiaries.

2 MS. LATHAM: There are -- when new money is
3 added --

4 THE COURT: \$50,000.

5 MS. LATHAM: -- there is money that can be
6 given to the beneficiaries, to three beneficiaries, that
7 is equal and that was done. Estelle, myself, and Don did
8 get that money.

9 MS. SCHWAGER: I have a check to Donald
10 Mintz, who says he had no control, possession of money,
11 for \$14,000.

12 MS. GOLDBERG: They each had a check for
13 14,000. I saw that in the records. I already brought
14 that up in previous hearings -- a previous hearing.

15 MS. LATHAM: He has also --

16 MS. SCHWAGER: I think we can resolve this
17 best on the 8th.

18 MS. LATHAM: Okay.

19 THE COURT: No, we're not going to have a
20 hearing on the 8th. You're going to have the documents in
21 her office by the 8th.

22 MS. SCHWAGER: That's fine.

23 THE COURT: The hearing is going to be on
24 December the 12th.

25 MS. GOLDBERG: What's the hearing on

1 December 12th? On the temporary?

2 MS. LATHAM: I've been slandered --

3 THE COURT: The temporary injunction.

4 MS. LATHAM: -- something awful during this
5 case.

6 MS. GOLDBERG: December 12th, what day is
7 that? I have a trial.

8 TRIAL COORDINATOR: We have a trial at 9:00,
9 Judge. We can have it at 1:30. Hopefully, the 12th will
10 be gone.

11 MS. GOLDBERG: What day of the week is that?

12 THE COURT: December 12th is the regular
13 docket, isn't it?

14 TRIAL COORDINATOR: Yes. But we have that
15 common law trial, Dubose. Remember?

16 THE COURT: On Tuesday?

17 TRIAL COORDINATOR: Yes.

18 MS. GOLDBERG: Your Honor, may I just check
19 my calendar? May I get my calendar?

20 TRIAL COORDINATOR: Yeah. We discussed that
21 at the last hearing to put it on Tuesday.

22 THE COURT: Well, what about all of the rest
23 of the dockets on Tuesday?

24 TRIAL COORDINATOR: We passed everything.

25 THE COURT: Oh.

1 TRIAL COORDINATOR: Well, we didn't have
2 anything set at the moment. So we just --

3 THE COURT: Okay. So 1:30 on --

4 MS. GOLDBERG: I think I have to be in Fort
5 Bend County. If you don't mind I am checking.

6 THE COURT: Well, it can't be over 14 days.

7 MS. GOLDBERG: Oh, it can't be over 14 days.

8 THE COURT: And I only have Mondays and
9 Tuesdays to use this courtroom, occasional Fridays.

10 MS. GOLDBERG: Oh, 12th, no. 12th I can be
11 here. I'm sorry. The 11th is Monday. Fort Bend does
12 all -- all the courts in Fort Bend do probate on Monday.
13 The 12th I'm fine. Sorry.

14 THE COURT: So the 12th of December, at 1:30
15 p.m.

16 MS. GOLDBERG: December 12th, 1:30.

17 Your Honor, I just want to make one brief
18 statement as well. Due to lack of cooperation on
19 Ms. Schwager's client's behalf, for whatever reason, maybe
20 her previous attorneys weren't clear with her, I have no
21 idea. That's not the point --

22 THE COURT: There is a temporary restraining
23 order.

24 MS. GOLDBERG: -- this has taken so much
25 time that it shouldn't have. I shouldn't have had to

1 spend as much time as I've had to spend on this. It's
2 unfortunate. I try real hard -- my office, we take pride
3 on being very efficient and it's very difficult to be
4 efficient in this matter, under these circumstances.

5 THE COURT: I understand. Hopefully, in the
6 future we're going to get over this bump and have some
7 more corporation --

8 MS. GOLDBERG: Thank you, Your Honor.

9 THE COURT: -- by all parties. All right.
10 I've signed the order to produce documents and I've signed
11 the TRO. And so I'll see you on the 12th.

12 MS. GOLDBERG: Thank you, Your Honor.

13 THE COURT: That gives you a chance to get
14 documents and report back --

15 MS. GOLDBERG: Figure out what's going on --

16 THE COURT: -- to Ms. Goldberg on the status
17 of those. All right. Thank y'all.

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APPENDIX 5

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REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL CAUSE NO. 462,505

IN RE: * IN PROBATE COURT
*
THE MURIEL L. MINTZ * NUMBER TWO (2) OF
*
FAMILY TRUST * HARRIS COUNTY, TEXAS

MOTION FOR TEMPORARY INJUNCTION

BE IT REMEMBERED that beginning on the 12th day of December, 2017, came on to be heard outside the presence of a jury, in the above-entitled and -numbered cause; and the following proceedings were had before the Honorable Mike Wood, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by Computerized Stenotype Machine, Reporter's Record produced by Computer-Assisted Transcription.

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A P P E A R A N C E S

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EXHIBIT INDEX

No.	Description	Offered	Admitted	Vol
P-1	Statement from the Muriel Mintz Family Trust Statement 1-21-17 to 2-16-17	7	15	1
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P-3	Statement from Bank of America for Interest Checking Preferred Rewards Platinum Honors Account ending in 7007 For Barbara A. Latham Steven Latham, Beneficiary Statement 9-28-17 to 10-27-17	21	21	1
P-4	Muriel L. Mintz Family Trust Documents Dated: 10-28-15	33	33	1

EXHIBIT INDEX continued

2	No.	Description	Offered	Admitted	Vol
3	P-5	Wells Fargo PhotoCopy Request	37	37	1
4		Recon plus debit certificates			
5		in process - cashier's check			
6		Made payable to Barbara Latham			
7		Check No. 24702096			
8		In the amount of \$52555.47			
9		Issued on 12-24-17			
10		Account ending 2861			
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1 THE COURT: Calling Cause No. 462,505,
2 Muriel Mintz Family Trust. Could I have appearances?

3 MS. KELLY: Stacy Kelly for Donald Mintz.

4 MS. GOLDBERG: Michele Goldberg, temporary
5 guardian pending contest.

6 MS. SCHWAGER: Candice Schwager for Barbara
7 Latham.

8 THE COURT: Okay. So what do we have?

9 MS. KELLY: I would like to put on a little
10 bit of evidence. I would like to call Michele Goldberg.

11 THE COURT: Okay. Can you just do it from
12 where you are sitting?

13 MS. KELLY: Yeah. I can do it from here.

14 MS. GOLDBERG: That would be great.

15 THE COURT: You've got to talk up, though.
16 We don't have a sound system.

17 MS. KELLY: Okay.

18 THE COURT: We have one, but we can't seem
19 to make it work.

20 MS. GOLDBERG: My disclaimer is I'm a little
21 sick and congested. So I don't know how loud my voice
22 comes out.

23 THE COURT: Well, you can come sit up here
24 closer if she can't hear you.

25 MS. GOLDBERG: No. I tend -- I have a lot

1 of volume. I might be too loud.

2 THE COURT: Okay.

3 MS. GOLDBERG: Some may say I yell.

4 THE COURT: All right. Go ahead.

5 MICHELE GOLDBERG,
6 having been first duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 QUESTIONS BY MS. KELLY:

9 Q. Would you please state your name for the Court,
10 please.

11 A. Michele Goldberg.

12 Q. And you're the temporary guardian of Muriel Mintz
13 pending contest; is that correct?

14 A. Yes.

15 MS. KELLY: As part of this, Your Honor, I
16 would ask you to take judicial notice of your file.

17 THE COURT: So noted.

18 MS. KELLY: Okay.

19 Q. (BY MS. KELLY) Now, as part of your duties, did
20 you attempt to collect all of Muriel Mintz's financial
21 assets?

22 A. Yes.

23 Q. And did you receive some of that information from
24 Barbara Latham?

25 A. Some of the information, yes.

1 Q. I'm going to show you what I've marked as
2 Plaintiff's Exhibit 1. I'm showing counsel a copy. Do
3 you recognize this document?

4 A. Yes.

5 Q. Where did you receive this document?

6 A. I received this -- actually, I can't remember if
7 I received it from Barbara. But I may have received it
8 from Donald Mintz. I can't -- I can't remember.

9 Q. Okay. And what is this?

10 A. This is a statement of an account that is the
11 Muriel Mintz Family Trust.

12 Q. And what is the date of this statement?

13 A. The ending balance is February 16th, 2017.

14 Q. And is this a true and correct copy of what you
15 received?

16 A. Yes.

17 MS. KELLY: Your Honor, I would ask that
18 Plaintiff's Exhibit 1 be admitted.

19 MS. SCHWAGER: Your Honor, I just have a
20 general objection. I have not had the time to set my
21 motions that I filed this weekend. I have a verified
22 motion to transfer venue, to compel arbitration. And so I
23 just want to put an objection on the record to the hearing
24 going forward as without jurisdiction in the sense that
25 the only trustee who is acting at this point by admission

1 is Barbara Latham who lives in Brazoria County and the
2 accounts that she operates are in Brazoria County. And so
3 exclusive venue under the Texas Trust Code, Section
4 115.002(b), says, It shall be brought where the trustee
5 resides or the situs of administration of the trust. And
6 so I want to put in that preliminary objection.

7 And the second is that the trust itself, it
8 requires arbitration, according to the Supreme Court
9 decision of Reitz -- Rachal versus Reitz, which is 2013,
10 and I have a copy for you and I also filed it as an
11 exhibit. But the language in that case is almost the same
12 as this. It says, I -- It's my desire, you know, that the
13 arbitration occur.

14 THE COURT: That's not a proper objection to
15 evidence.

16 MS. SCHWAGER: It's a proper objection to
17 the entire hearing.

18 THE COURT: You have not filed a motion to
19 compel arbitration.

20 MS. SCHWAGER: Yes, sir.

21 THE COURT: And you haven't set it for
22 motion to compel arbitration.

23 MS. SCHWAGER: Because I couldn't set it
24 before this hearing --

25 THE COURT: And we should take that up.

1 MS. SCHWAGER: But I don't want --

2 THE COURT: It's not set for this hearing.
3 There's nothing --

4 MS. SCHWAGER: Right. And I'm not waiving
5 that objection by the inability to set it before she's
6 proceeding with this.

7 THE COURT: This was set two weeks ago --

8 MS. SCHWAGER: I understand that.

9 THE COURT: -- and you haven't filed
10 anything. If you want to compel arbitration and say I
11 don't have jurisdiction -- you had two weeks. What have
12 you done?

13 MS. SCHWAGER: I've also filed a request for
14 accommodation under the ADA because of pain that I have
15 experienced --

16 MS. GOLDBERG: I have not been copied on
17 that.

18 MS. SCHWAGER: -- over the last few weeks.

19 MS. GOLDBERG: I have not been copied on
20 that.

21 THE COURT: I haven't seen that.

22 MS. SCHWAGER: You are not entitled to
23 receive it, if you knew the law. It's under the ADA.
24 It's confidential. It goes to the ADA coordinator and
25 it's supposed to go to you.

1 THE COURT: I haven't gotten anything.

2 MS. SCHWAGER: Okay.

3 THE COURT: You have been e-mailing to my
4 guardianship coordinator. That is not a proper way to
5 communicate with the Court.

6 MS. SCHWAGER: I have CC'd the other
7 attorneys when I've done that; Ms. Goldberg has not and
8 calls it ex parte and says she's disinterested.

9 THE COURT: Well, it is ex parte for you to
10 communicate directly with the staff on a contested case.
11 You should send it to the clerk and then set a hearing and
12 then all of the parties will have copies of it and we can
13 discuss it.

14 MS. SCHWAGER: ADA accomodation requests are
15 confidential. They are not entitled to receive it. And
16 they are to go directly to the Court. That is one of the
17 few ex parte communications --

18 THE COURT: I haven't gotten it.

19 MS. SCHWAGER: Okay. Well, I've asked that
20 it be forwarded to the ADA coordinator and to you.

21 THE COURT: I don't have an ADA coordinator.

22 MS. SCHWAGER: I don't know why that wasn't
23 done.

24 THE COURT: I don't have an ADA coordinator.
25 I don't think I do.

1 MS. SCHWAGER: Harris County does.

2 THE COURT: Okay.

3 MS. SCHWAGER: The Probate Division does.

4 THE COURT: The Probate Division does?

5 MS. SCHWAGER: Yes.

6 THE COURT: Or the County Clerk?

7 MS. SCHWAGER: Well, the County Clerk,
8 right.

9 THE COURT: The Probate Division has an ADA
10 coordinator?

11 MS. SCHWAGER: Yes.

12 THE COURT: Are they aware of that?

13 MS. SCHWAGER: I'm surprised everybody
14 doesn't know that.

15 THE COURT: Are they aware of that? I've
16 been here 24 years.

17 MS. SCHWAGER: Right.

18 THE COURT: This has never come up.

19 MS. SCHWAGER: Well, I guess, I'm very
20 surprised about that, given that we deal with disabilities
21 every day. But, yes, they're aware of that. And the way
22 that it's supposed to be handled is confidentially because
23 I have HIPAA rights as well.

24 THE COURT: So they're supposed to -- I'm
25 supposed to stop doing anything until the clerk --

1 MS. SCHWAGER: That --

2 THE COURT: -- brings me something? And
3 what do I --

4 MS. SCHWAGER: I was merely alluding to the
5 fact that you asked me why it wasn't set. And I told you
6 I have been in chronic pain and I have been going through
7 thousands of documents trying to get the accounting done
8 as well as look at the issues in this case and the fraud
9 that occurred in filing a sworn affidavit --

10 THE COURT: Well, you can stop testifying
11 and just -- none of that is a reason not to file a motion
12 to compel arbitration. I would think that would be the
13 first thing you'd do --

14 MS. SCHWAGER: No.

15 THE COURT: -- before you kept on going. Or
16 the first thing you should do is the ADA thing if you
17 think that's going to stop us from going forward because
18 of your --

19 MS. SCHWAGER: It is the first thing I did.

20 THE COURT: Okay. Well, then you didn't
21 bring it up at the hearing two weeks ago. When you were
22 here, you didn't say anything about it.

23 MS. SCHWAGER: Because I was not in pain,
24 and I was doing all right.

25 THE COURT: All right. Well, I don't -- I'm

1 not familiar with the ADA enough to know about an attorney
2 being able to file something and stop proceedings. Can I
3 go forward? Do I need to call the clerk and have them
4 bring it to me so I can see what it is?

5 MS. SCHWAGER: I have a copy of it. I don't
6 believe I have it in writing, but I have it on my
7 computer.

8 THE COURT: I assume you have it in writing,
9 if you gave it to the clerk.

10 MS. SCHWAGER: I didn't bring it with me in
11 writing is what I'm saying.

12 THE COURT: Okay. All right. Well, I'll
13 call the clerk. But I set this hearing on an application
14 for temporary injunction.

15 MS. SCHWAGER: Yes.

16 THE COURT: And I'm going to go forward with
17 the hearing, and you can do whatever you need to do on the
18 other stuff.

19 MS. SCHWAGER: I just want to preserve my
20 objections. I'm not waiving objections to venue or
21 arbitration being compelled.

22 MS. GOLDBERG: Your Honor --

23 MS. KELLY: Your Honor, first of all, there
24 are two co-trustees, according to the terms of the trust;
25 and that's part of what I'll put on here eventually. And

1 so she's quoting the wrong section of 115.002(b). It's
2 when there are multiple non-corporate trustees, I can
3 bring it in any County where one of the trustees has
4 resided in the last four years. My client resides in
5 Harris County. I brought the trust action in Harris
6 County. You have proper venue.

7 THE COURT: Well, that's not --

8 MS. GOLDBERG: Additionally, Your Honor,
9 she's --

10 THE COURT: -- before me, either.

11 MS. GOLDBERG: I'm sorry.

12 THE COURT: Go ahead.

13 MS. GOLDBERG: She's waived her right to
14 file a motion to change venue by entering an appearance in
15 this contest and filing her motion for continuance. The
16 time to file her motion to transfer -- transfer venue was
17 at the last hearing when she appeared and filed pleadings
18 with the Court. She's waived her right.

19 THE COURT: Well, let me see the exhibit.
20 The exhibit is admitted.

21 (Plaintiff's Exhibit No. 1 was admitted.)

22 MS. GOLDBERG: That's TRCP, Rule 86.

23 MS. KELLY: I'm going to continue to
24 question her.

25 THE COURT: Okay. Thank you.

1 Q. (BY MS. KELLY) Will you look at Exhibit 1 that's
2 been admitted, Ms. Goldberg?

3 A. Yes.

4 MS. SCHWAGER: I believe that Rule deals
5 with the answer and what must be pled. The first thing I
6 pled in my answer is a verified motion to transfer venue.
7 Nevertheless, a motion to compel arbitration is
8 enforceable.

9 MS. KELLY: Your Honor, may I proceed with
10 my temporary injunction hearing?

11 THE COURT: Yes. It would be nice if I saw
12 the motion to compel arbitration. That would be great.
13 You haven't filed it.

14 MS. SCHWAGER: Yes, I have, Your Honor.

15 THE COURT: Well, it --

16 MS. SCHWAGER: Would you like to see it?

17 THE COURT: No. Because it's not set today.
18 And you didn't bring it up two weeks ago when you were
19 here. You didn't mention anything about it.

20 MS. SCHWAGER: When I was here two weeks ago
21 you signed my appearance that morning. I had just got in
22 the case.

23 THE COURT: Well, you --

24 MS. SCHWAGER: I don't know how I am
25 supposed to have gone through an entire --

1 THE COURT: You filed -- you filed your
2 appearance several weeks before --

3 MS. SCHWAGER: These lawyers have been in
4 this case since April.

5 THE COURT: -- I signed it.

6 MS. SCHWAGER: And they have told you it's
7 Muriel Mintz's trust. It's not. It is a misnomer. It's
8 a family trust. It has nothing to do with her estate.
9 And that is why they filed a separate trust lawsuit.

10 MS. GOLDBERG: Objection, Your Honor. She's
11 stating conclusions of law.

12 THE COURT: Well, you're arguing something
13 that's not before me. So state your objection. It's
14 overruled. Go forward.

15 MS. SCHWAGER: My objection is that --

16 THE COURT: You've already stated your
17 objection. I overruled it.

18 MS. SCHWAGER: Okay. Thank you.

19 THE COURT: Go ahead.

20 Q. (BY MS. KELLY) Okay. Exhibit No. 1,
21 Ms. Goldberg, how is this account titled?

22 A. Muriel Mintz Family Trust; Donald Mintz, Trustee,
23 Barbara A. Latham, Trustee. I don't know what "UA" is.

24 Q. So it's in the name of the Muriel Mintz Trust?

25 A. Correct, Family Trust.

1 Q. Family Trust. What was the balance on February
2 16th, 2017?

3 A. \$123,454.50.

4 Q. I'm going to show you what I've marked as
5 Plaintiff's Exhibit 2 and ask if you recognize that
6 document? It's actually four documents. Do you recognize
7 them?

8 A. I have three.

9 Q. Okay. I'm sorry. Three, three pages.

10 A. Yes, I do recognize these.

11 Q. And what is this document?

12 A. This is a document that I received from Erinn
13 Brown who was Barbara Latham's previous attorney at my
14 request for bank statements for any money that Muriel
15 Mintz had. She sent me this.

16 Q. Is this a true and correct copy of what you
17 received from Barbara Latham's attorney, Erinn Brown?

18 A. Yes.

19 MS. KELLY: Your Honor, I would ask that
20 Exhibit 2 be admitted.

21 MS. SCHWAGER: No objection.

22 THE COURT: Exhibit 2 is admitted. This one
23 is not marked with an exhibit number.

24 (Plaintiff's Exhibit No. 2 was admitted.)

25 MS. KELLY: I was going to give the court

1 reporter the ones that are marked.

2 THE COURT: All right. Well, you're walking
3 away with that one. I was going to look at it. I just
4 won't give any of these that you are showing me to the
5 court reporter.

6 MS. KELLY: I'll keep a pile so we don't get
7 confused.

8 THE COURT: Okay.

9 Q. (BY MS. KELLY) Okay. What is the date on this
10 document?

11 A. September 12th, 2017.

12 Q. Okay. I will ask you if you will look at the
13 activities starting on March 15th, one week after Donald
14 Mintz filed his application for guardianship.

15 A. Okay.

16 Q. What occurs on that date, on March 15th?

17 A. There's a transfer from Savings Account 5966 to
18 this account that ends in 7007 in the amount of \$3,898.96.

19 Q. And Saving Account 5996, what is that?

20 A. That is the account number on the Muriel Mintz
21 Family Trust that we just looked at.

22 Q. On Exhibit 1?

23 A. On Exhibit 1.

24 Q. On March 20th, is there another transaction?

25 A. Yes. There's a transaction, on-line transfer

1 from Savings Account 5966, which is this Muriel Mintz
2 Family Trust, to this -- to this account for \$7,500.

3 Q. And on April 10th what occurs?

4 A. There is an on-line banking transfer from Savings
5 Account 5966, once again, the Muriel Mintz Family Trust,
6 to this account that ends in 7007 for \$50,000.

7 Q. Okay. And then on September 12th, is there
8 another transaction?

9 A. September 12th, yes. On September 12th,
10 transferred from Account No. 5996, the Muriel Mintz Trust,
11 of -- \$31,000 was transferred into this account ending in
12 7007.

13 Q. I'm going to show you what I've marked as
14 Plaintiff's Exhibit No. 3. Do you recognize that
15 document?

16 A. Yes.

17 Q. And where did you receive this document?

18 A. I received this from Ms. Schwager, who is sitting
19 here, on behalf of her client, from her client, Barbara
20 Latham.

21 Q. And what is this document?

22 A. This is a checking account statement for an
23 account ending in 7007.

24 Q. And is this a true and correct copy of what you
25 received from Ms. Latham's attorney, Ms. Schwager?

1 A. Yes.

2 MS. KELLY: Your Honor, we would ask that
3 Plaintiff's Exhibit No. 3 be admitted into evidence.

4 MS. SCHWAGER: No objection.

5 THE COURT: Plaintiff's 3 will be admitted.

6 (Plaintiff's Exhibit No. 3 was admitted.)

7 Q. (BY MS. KELLY) What is -- how is this account
8 titled?

9 A. B of A, Bank of America, Interest Checking
10 Preferred Rewards Platinum Honors in the name of Barbara
11 Latham and Steven Latham, beneficiary.

12 Q. And what are the last four digits of this
13 account?

14 A. 7007.

15 Q. So does that match up with the Exhibit 2 where we
16 showed transfers going into this 7007 account?

17 A. Yes.

18 Q. And that's Barbara Latham's account?

19 A. Yes, with her husband as beneficiary.

20 MS. KELLY: I pass this witness.

21 CROSS-EXAMINATION

22 QUESTIONS BY MS. SCHWAGER:

23 Q. Have you read the -- Well, let me put it this
24 way: You -- your billing indicates that you spent a
25 substantial amount of time reviewing the Muriel Mintz

1 Family Trust, correct?

2 MS. GOLDBERG: I object to the question,
3 Your Honor. I don't know what she's talking about.
4 That's not before the Court today. I'm not going to
5 answer.

6 THE COURT: What are we --

7 MS. SCHWAGER: I'm getting -- the point I'm
8 getting to is that she understands the terms of the trust
9 because she's reviewed it and researched it.

10 THE COURT: What --

11 MS. SCHWAGER: What relevance does it have?

12 MS. KELLY: I don't understand the
13 relevance.

14 MS. SCHWAGER: We're sitting here putting
15 documents in for it and suggesting that they -- suggesting
16 some sort of malfeasance by Barbara Latham when the trust
17 permits her to do just what she did which is why I have no
18 objection to her entering it.

19 MS. KELLY: The trust does not permit her to
20 remove \$92,000, all of what was in the Muriel Mintz Trust
21 account, except for 6 cents which is left, into her
22 personal account.

23 MS. SCHWAGER: First and foremost,
24 Ms. Goldberg never had standing to demand these documents,
25 and I suspect that's why Stacy Kelly filed the trust

1 lawsuit because they finally wanted to acknowledge that
2 the guardianship estate had no relevance to it.

3 Second of all --

4 THE COURT: I can't hear you when you're
5 sitting down.

6 MS. SCHWAGER: I'm sorry. I said,
7 Ms. Goldberg had no standing to compel this accounting.
8 You know, the first step should have been -- we've got the
9 cart, like, way before the horse -- it should have been an
10 accounting under the Texas Property Code, Section 113, a
11 request for an accounting, which never happened. You
12 can't even file a suit for accounting until you do the
13 request. But we've jumped way ahead of that and are suing
14 for a breach when under the expressed terms of the
15 trust --

16 THE COURT: Well, this is not --

17 MS. SCHWAGER: They've failed to identify
18 any -- any transaction that Ms. Latham made that wasn't
19 authorized. The terms of the trust are so broad that --

20 THE COURT: She can take all the money?

21 MS. SCHWAGER: No. That is not what I'm
22 saying.

23 THE COURT: Well, but she did take all the
24 money.

25 MS. SCHWAGER: She can protect the trust

1 from Donald Mintz.

2 THE COURT: She did take all the money.

3 MS. SCHWAGER: She's protecting --

4 THE COURT: The question --

5 MS. SCHWAGER: -- the money.

6 THE COURT: Oh, okay. The question is
7 whether I should grant an injunction against her
8 protecting any more money by taking it, not anything else.
9 I'm not -- I'm not deciding whether ultimately she is
10 entitled to a hundred percent of the money --

11 MS. SCHWAGER: She's not entitled --

12 THE COURT: -- or ultimately her brother --

13 MS. SCHWAGER: -- to a hundred percent.

14 THE COURT: -- or ultimately her mother.

15 That's not before me today. Before me today, the only
16 question is whether or not there should be an injunction.

17 MS. SCHWAGER: The -- she's not entitled to
18 all of it. That's not what I'm saying. She's not
19 spending it. That's not what I'm saying.

20 THE COURT: Well --

21 MS. SCHWAGER: She's protected it. She has
22 transferred it.

23 THE COURT: Again, you're missing the point.
24 The question is whether I should grant an injunction
25 against her continuing to protect the money by taking it.

1 She may come back and prove before a jury at some point
2 that she was not really taking the money. She was
3 protecting it. But right -- this is way before that.
4 That's not before --

5 MS. SCHWAGER: That's easy to prove and
6 we've established that.

7 THE COURT: We're not deciding the ultimate
8 issues here. We're deciding whether there should be an
9 injunction to preserve the status quo. That's the only
10 question before me today.

11 MS. SCHWAGER: Subject to the
12 jurisdiction/arbitration arguments/objections that I made,
13 I would -- and the terms as they have stated in this draft
14 they prepared for you, prohibiting her from defending
15 herself -- which is one of the tactics they use to cripple
16 their opponent and make them settle, force a settlement
17 when it's not equitable -- I would say that I don't have
18 any problem with her agreeing not to spend that money.

19 THE COURT: That was all argument
20 ad hominem. I don't even know what you're talking about
21 "they." But -- so I'm not sure even what --

22 MS. SCHWAGER: Mr. Mintz seems to have
23 trouble separating his intent from Barbara's actions. He
24 has spent four years taking his mother's money. She's
25 just merely trying to protect --

1 MS. GOLDBERG: Your Honor, that's not before
2 the Court today. I object to this rambling.

3 THE COURT: Yeah. That's --

4 MS. SCHWAGER: There's been no evidence of
5 wrongdoing. All I'm saying is --

6 THE COURT: Well, there's also no evidence
7 of Mr. Mintz taking money for four years.

8 MS. SCHWAGER: Mr. Mintz relinquished
9 control, whatever that means. I would say that's a breach
10 of fiduciary duty, and that he's a co-tortfeasor unless
11 he's resigned.

12 THE COURT: I have no idea what you're
13 talking about.

14 MS. SCHWAGER: It's just -- it's funny to
15 me, Your Honor, that he is the one who had this trust
16 drafted. He sought the lawyer. He picked the terms. And
17 Barbara is the one --

18 MS. KELLY: Your Honor, I object to her
19 testifying of facts that aren't in evidence. This has to
20 do with --

21 THE COURT: Yeah. I don't know what you're
22 talking about.

23 MS. KELLY: This has to do with her client
24 moving money. And I'm going to show some more and then --

25 THE COURT: Okay.

1 MS. KELLY: -- I'll let the Court rule.

2 THE COURT: All right. Go ahead.

3 MS. KELLY: I call Donald Mintz. Would you
4 like him to come stand up there or --

5 THE COURT: No. He can sit there if he can
6 be heard.

7 Raise your right hand to be sworn.

8 (Witness sworn.)

9 THE COURT: If you want to -- if everybody
10 wants to come up here and stand, you can; or you can just
11 sit where you are.

12 MS. SCHWAGER: Your Honor, just as a
13 preliminary objection, I wasn't -- I never got to
14 cross-examine Ms. Goldberg before Stacy took over and
15 went --

16 THE COURT: Well, you started to
17 cross-examine her about things that were not before me
18 today. If you have any questions about the temporary
19 injunction, only -- you were asking about her bills. You
20 were asking about her knowledge. That's not before me.

21 MS. SCHWAGER: Okay. The temporary
22 injunction requires proof of imminent harm that cannot be
23 remedied under the law.

24 THE COURT: That's not even close to
25 correct.

1 MS. SCHWAGER: Okay. What does it require,
2 then? Tell me, please.

3 THE COURT: I don't -- do I look like a
4 lawyer professor? I know what it requires. So...

5 MS. SCHWAGER: They have stated the
6 standard, and it's probable right of success on the
7 merits. And we've proven nothing, except for a few bank
8 transfers. And all I want to ask her is: Did she read
9 the trust?

10 THE COURT: That is not relevant to the
11 issue of whether or not there should be an injunction
12 against your client for taking money.

13 MS. SCHWAGER: Your Honor --

14 MS. GOLDBERG: Your Honor --

15 MS. SCHWAGER: -- the Court is not
16 authorized to intervene in every trust matter. The trust
17 document controls. And the Court should not be
18 contradicting that language and the power given to the
19 trustee.

20 MS. KELLY: Your Honor, this is a trust
21 action. Ms. Goldberg is not even a party to the trust
22 action. She's just testifying because she received
23 documents as guardian that I needed in. Whether she read
24 the trust is irrelevant. She is not a party to the trust
25 action.

1 THE COURT: Okay.

2 MS. SCHWAGER: When there's an 18,000-dollar
3 bill for concluding that, it is relevant.

4 THE COURT: You are -- here is what you're
5 going to do: You are going to stay on point. You are
6 famous around the courthouse for going off everywhere but
7 not on point. Okay. So stay on point. Anything you go
8 into other than what's on point on the application is
9 overruled.

10 MS. SCHWAGER: I'm not allowed to ask her
11 that she knows -- whether she knows or not that this is an
12 irrevocable trust and what the terms state?

13 THE COURT: It has nothing to do with her
14 being temporary guardian of the ward's estate.

15 MS. SCHWAGER: Your Honor, you --

16 THE COURT: She is not the trustee.

17 MS. SCHWAGER: -- you granted her show cause
18 order based on this trust.

19 MS. KELLY: No, no, no.

20 MS. SCHWAGER: So why do all of this?

21 MS. KELLY: No. The show cause was so that
22 Ms. Goldberg could get documents, bank documents.

23 MS. SCHWAGER: Bank documents concerning the
24 trust and my client's personal account.

25 MS. KELLY: Because she was taking money

1 from the trust and putting it in her personal account.

2 MS. GOLDBERG: Yeah. I have the trust
3 documents. I didn't need a show cause for that, Your
4 Honor. I was asking -- I wanted to know what her -- what
5 Ms. Latham, Ms. Schwager's client, did with the money.
6 That's all.

7 THE COURT: Right.

8 MS. GOLDBERG: And I've said numerous times
9 on the record: I'm not accusing her of using the money
10 for herself. I was not accusing her at the time, until I
11 got the records.

12 THE COURT: Well, but --

13 MS. GOLDBERG: Just where is it? Where is
14 the money?

15 THE COURT: The -- your request to
16 cross-examine the temporary guardian about the trust is
17 denied.

18 MS. SCHWAGER: Okay. Thank you.

19 THE COURT: Go ahead.

20 MS. KELLY: Do you have any other questions
21 concerning the temporary injunction or are you passing?

22 MS. SCHWAGER: I just -- I guess, in
23 general, would like to know what basis you think it should
24 be granted.

25 THE COURT: That's an argument on the

1 ultimate issue. We're not to final argument. She's
2 putting on her evidence.

3 MS. SCHWAGER: Right.

4 THE COURT: Then when she's through putting
5 on her evidence, I assume she will let me know the basis
6 upon which she wants it granted.

7 Q. (BY MS. SCHWAGER) Well, let me ask you this:
8 Out of every document produced to you, can you point to
9 any transaction that was in violation of the trust or
10 fraudulent?

11 A. Yeah. I can -- I can point to it from the
12 documents that your client gave me -- and I don't have
13 copies from the Court. I'm not asking to admit it -- in
14 one year she transferred with her handwriting -- you gave
15 me these documents, these ledgers -- she transferred
16 \$71,391.62. She used them for her own expenses and for
17 her sister, Estelle's. Yes, 71,900 something.

18 Q. And for her -- they were used for her mother's
19 care?

20 A. No. That's what she used for herself. I
21 highlighted those. For her mother is minimal compared to
22 what she used. I didn't tally up what she used for her
23 mother because they were minimal. It was for herself.

24 She paid property taxes for Brazoria County.
25 It's her house. She transferred \$50,000 for lawyer's

1 fees; for Barbara, Muriel and Estelle's laptop, internet
2 service of chairs. I don't even know what that is. She
3 paid for Estelle's credit card balance and there's more.
4 She paid for Estelle's rent for several months. She paid
5 for attorney's fees for Estelle, \$3,930. This was all
6 within one year.

7 Q. The trust allows her --

8 A. You sent me this document. You sent me this
9 ledger.

10 Q. Yes, I did, because I have nothing to hide.

11 A. Did you tally it up?

12 Q. The trust permits her to spend, with her
13 discretion, to support, maintenance and the needs -- based
14 upon the needs of the beneficiary, right?

15 A. I'm not arguing with the trust. I'm telling you
16 as the guardian --

17 THE COURT: Let's go on and get the
18 evidence.

19 THE WITNESS: Yeah, okay.

20 MS. KELLY: Have you been sworn in?

21 THE COURT: Yes.

22 MS. KELLY: You can just sit.
23
24
25

1 DONALD MINTZ,
2 having been first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 QUESTIONS BY MS. KELLY:

5 Q. I'm going to show you what's been marked as
6 Plaintiff's Exhibit No. 4. Do you recognize this
7 document?

8 A. Yes.

9 Q. And what is this document?

10 A. This is my mother's trust mother had drawn up.

11 THE COURT: Speak up a little bit. The
12 court reporter has got to be able to hear you.

13 A. This is my mother's trust that she had drawn up.

14 Q. (BY MS. KELLY) Is this a true and correct copy
15 of the trust?

16 A. Yes.

17 MS. KELLY: Your Honor, I would ask that
18 Exhibit 4 be admitted.

19 THE COURT: Objection?

20 MS. SCHWAGER: No objection.

21 THE COURT: Exhibit 4 is admitted.

22 (Exhibit No. 4 was admitted into evidence.)

23 Q. (BY MS. KELLY) Who are the trustees of this
24 trust?

25 A. My sister, Barbara, and myself.

1 Q. I'm going to show you what's been previously
2 admitted as Plaintiff's Exhibit No. 2. That's a printout
3 from your sister's bank account at Bank of America ending
4 in 7007. If you'll turn to Page 2.

5 On March 15th, the transfer for \$3,898.96,
6 did you make that transfer?

7 A. No.

8 Q. Did your sister tell you about this transfer?

9 A. No.

10 Q. Did she discuss it with you at all before she
11 made the transfer?

12 A. No.

13 Q. On March 20th, there is a transfer for 7,500. Do
14 you see that right above it?

15 A. Yes.

16 Q. Did you make that transfer?

17 A. No.

18 Q. Did your sister, Barbara, the co-trustee, tell
19 you about this transfer?

20 A. No.

21 Q. Did she discuss it with you before she made it?

22 A. No.

23 Q. And on April 10th, do you see a transfer for
24 50,000?

25 A. Yes.

1 Q. Did you make that transfer?

2 A. No.

3 Q. Did your sister, Barbara, the co-trustee, tell
4 you about that transfer before she made it?

5 A. No.

6 Q. Did she discuss it with you?

7 A. No.

8 Q. If you go back to Page 1 -- we're going in the
9 opposite order -- at the very top on September 12th, do
10 you see a transfer for 31,000 into Barbara's personal
11 account, very top?

12 A. Yes, I see it.

13 Q. Okay. Did you make that 31,000-dollar transfer?

14 A. No.

15 Q. Did your sister, Barbara, the co-trustee, discuss
16 that with you before she did it?

17 A. No.

18 Q. Did she tell you she was going to do it?

19 A. No.

20 Q. Mr. Mintz, as co-trustee, are you aware of
21 another bank account for the Muriel L. Mintz Family Trust
22 that existed this year? Are you familiar with one --

23 A. Yes.

24 Q. -- at another bank?

25 A. Yes.

1 Q. What bank is that?

2 A. Wells Fargo.

3 Q. And did you go by Wells Fargo today?

4 A. Yes, I did.

5 Q. And did you ask them about this trust or the
6 account Muriel Mintz Family Trust account at Wells Fargo?

7 A. Yes, I did.

8 Q. I'll show you what I've marked as Plaintiff's
9 Exhibit 5. Do you recognize these?

10 A. Yes, I do.

11 Q. What are these?

12 A. These -- these are documents that show mother's
13 account was closed out.

14 Q. When you say your "mother's account," do you mean
15 the Muriel Mintz Family Trust account?

16 A. Yes.

17 Q. Okay. And these were given to you by Wells Fargo
18 today?

19 A. Yes.

20 Q. Because you're co-trustee of the trust?

21 A. Yes.

22 Q. And this was a trust account?

23 A. Yes.

24 Q. Is this a true and correct copy of what you
25 received from the bank today?

1 A. Yes.

2 MS. KELLY: Your Honor, I would ask that
3 Exhibit 5 be admitted into evidence.

4 MS. SCHWAGER: Objection based upon
5 authentication and hearsay.

6 MS. KELLY: He just authenticated it.

7 MS. SCHWAGER: It's not a certified copy.
8 It's not -- I mean, she could have even got a certified
9 copy.

10 MS. KELLY: He is co-trustee.

11 MS. SCHWAGER: This could have easily have
12 been --

13 MS. KELLY: He went to the bank.

14 MS. SCHWAGER: -- distorted, forged, like
15 other documents I've seen in probate courts.

16 THE COURT: Objection is overruled. Exhibit
17 5 will be admitted.

18 (Exhibit No. 5 was admitted into evidence.)

19 Q. (BY MS. KELLY) Is this a copy of a cashier's
20 check made on that account?

21 A. Yes, it is.

22 Q. What's the amount of that cashier's check?

23 A. \$52,555.47.

24 Q. And who is the cashier's check made out to?

25 A. It's made out to Barbara Latham.

1 Q. As trustee or just Barbara Latham, individually?

2 A. Just individually. There's no other --

3 Q. Do you see on Page 2 where she's closing this
4 account?

5 A. Uh-huh.

6 Q. And it asks the reason for closing?

7 A. Yes.

8 Q. What does it say?

9 A. It says, "No longer needs account."

10 Q. And when was this closed?

11 A. Let's see. It looks like October 24th, 19 --
12 2017.

13 Q. So just a month and a half ago?

14 A. Yes.

15 Q. So in addition to the 92,000 we've identified
16 that went into her account at Bank of America 7007,
17 there's another 52,000 that she pulled out of a trust
18 account and got a cashier's check in her own personal
19 name, correct?

20 A. Yes.

21 MS. KELLY: No further questions, Your
22 Honor.

23

24

25

CROSS-EXAMINATION

1
2 QUESTIONS BY MS. SCHWAGER:

3 Q. Mr. Mintz -- Mr. Mintz, you're familiar with this
4 trust -- the statement?

5 A. I didn't understand what you said.

6 Q. Did you -- you hired Mulder Law Group, Jim Mulder
7 to prepare the trust; is that right?

8 A. Barbara suggested that we go to see him.

9 Q. Isn't he a friend of yours from high school?

10 A. I knew him from high school, yes.

11 Q. Did he -- was he in your class?

12 A. Yes.

13 Q. Was he your friend or Barbara's friend?

14 A. He was my friend.

15 MS. GOLDBERG: Relevance, Your Honor. I
16 object.

17 MS. KELLY: Your Honor, how is this relevant
18 to whether this money should be frozen?

19 MS. SCHWAGER: It's relevant to whether your
20 client has any credibility because he's perjured himself.
21 He says one thing in the prior lawsuit and another thing
22 in this one.

23 MS. KELLY: Your Honor, we've presented
24 documents, five pieces of evidence that show --

25 THE COURT: Right.

1 MS. KELLY: -- over 140,000 being in the
2 last seven months.

3 MS. SCHWAGER: We haven't gotten to the
4 evidence yet that the trust says it can be transferred.

5 THE COURT: Well, I'm not sure -- I guess
6 your objection is sustained. Let's try to keep on point.

7 MS. SCHWAGER: And I really fail to see how
8 this is not on point, Your Honor.

9 THE COURT: When you're trying to attack
10 credibility of witnesses by who went to high school with
11 somebody and then you are saying he perjured himself
12 because of something he said in another case. That's not
13 in evidence. What he said in another case is not in
14 evidence.

15 MS. SCHWAGER: It is in evidence. There's
16 an affidavit attached to the guardianship application.

17 THE COURT: And that was perjury because he
18 went to school with --

19 MS. SCHWAGER: No. Because he said,
20 "irrevocable trust of his mother's." And now suddenly
21 it's not.

22 MS. KELLY: Your Honor, I will take full
23 responsibility for the scrivener's error and not having
24 "i-r" before revocable. We all know it's a --

25 MS. SCHWAGER: Oh.

1 MS. KELLY: -- irrevocable trust.

2 THE COURT: Well, that's --

3 MS. KELLY: You find that funny? I mean,
4 that happens all the time.

5 MS. SCHWAGER: I don't find it funny. I
6 find it outrageous that you would say that. You are
7 signing an affidavit. And irrevocable and revocable,
8 that's a big difference.

9 MS. KELLY: Yes, it is a big difference.

10 THE COURT: But it doesn't make any
11 difference what an affidavit says. Because what the trust
12 is is controlled by the trust document.

13 MS. SCHWAGER: And I'm trying to get into
14 the trust.

15 THE COURT: And a trustee can't change the
16 trust document by whatever they say about it in an
17 affidavit or otherwise.

18 MS. SCHWAGER: And I'm not doing that.

19 THE COURT: So -- well, but you're -- I've
20 seen --

21 MS. SCHWAGER: I'm establishing that he
22 understands the trust --

23 THE COURT: I've seen a lot of pleadings
24 where -- you filed where they're all about him committing
25 perjury.

1 MS. SCHWAGER: If you would let me question
2 him, maybe I could establish that.

3 THE COURT: Why? We're not trying to decide
4 whether he's a perjurer.

5 MS. SCHWAGER: Because she's using him as
6 her witness and you're relying on his testimony.

7 THE COURT: As to a cashier's check your
8 client got in October, after this case was already going
9 on in this Court.

10 MS. SCHWAGER: And as to his claims to, I
11 didn't do anything wrong and I didn't know and I
12 relinquish control; but I'm still a trustee.

13 THE COURT: I didn't hear -- that's not, any
14 of that -- that's you saying what somebody said. That's
15 not before me today.

16 MS. SCHWAGER: It's in the pleadings that
17 were sworn.

18 THE COURT: But it's not --

19 MS. SCHWAGER: I'm just trying to get to the
20 truth, Your Honor, and to establish to you that this trust
21 is completely separate from the guardianship estate and
22 whatever happened with the trust. He understands the
23 terms and that the actions that he complains of are
24 authorized. I suppose I can just count on the document to
25 speak for itself, but I would like for him to answer my

1 questions.

2 MS. KELLY: Whether --

3 THE COURT: It's not a deposition.

4 MS. KELLY: Whether the trust authorizes the
5 co-trustees to make distributions to the three children is
6 one thing. Commingling trust funds in your own personal
7 account is a breach of fiduciary duty; and we have shown
8 \$140,000 going into her account, personal account. If she
9 wants to make distributions out of the trust, they go from
10 the trust to the beneficiary. They don't go to her in her
11 personal account.

12 MS. SCHWAGER: Your Honor, that's not
13 even -- this account is a separate operating account that
14 she set up with the trust. It's not like her personal
15 checking account with her husband or something. It's --

16 THE COURT: Well, it actually was.

17 MS. KELLY: Yeah, it is.

18 THE COURT: It was an account with her and
19 her husband.

20 MS. SCHWAGER: Well, I haven't seen -- I'm
21 sorry. That is not something I was aware of. But the
22 trust itself has language in there saying she can close
23 the accounts --

24 THE COURT: She can take all the money
25 herself and not give any to the other beneficiaries?

1 MS. SCHWAGER: No. And that's not what she
2 was doing.

3 THE COURT: But that's what she did.

4 MS. SCHWAGER: It says, she can close
5 accounts. She can move them. She can give gifts that are
6 required based upon needs.

7 THE COURT: And she needs 120 -- \$140,000 of
8 the trust assets?

9 MS. SCHWAGER: No, Your Honor. I've already
10 explained to you that she used -- in her -- her intent has
11 always been to protect the trust --

12 THE COURT: By taking --

13 MS. SCHWAGER: -- from her brother.

14 THE COURT: -- money and putting it in her
15 personal name?

16 MS. SCHWAGER: I don't know that she --

17 THE COURT: \$52,555 was withdrawn from the
18 trust account and put in -- payable to her personally, not
19 as trustee, not payable to the trust.

20 MS. SCHWAGER: All I know about this -- I
21 don't have personal knowledge, of course, you know that --

22 THE COURT: Well, then why are you
23 testifying?

24 MS. SCHWAGER: No, I'm just -- I'm not
25 testifying.

1 THE COURT: You are saying she took money
2 out for trust purposes and they were perfectly valid,
3 proper withdrawals.

4 MS. SCHWAGER: I'm saying the trust permits
5 her to close accounts, move accounts, move money as long
6 as -- disburse to herself, disburse to her sister,
7 disburse to her brother, which she has, and approved. And
8 he hasn't also established that he's asked for
9 disbursements or needed them. The trust is based upon
10 need and the circumstances. There's a lot more involved
11 here than just, Oh, she moved money. We're going to take
12 it. And she can -- it says, Authorize or establish any
13 type of bank account of any banking institutions.

14 THE COURT: Do you have any other questions
15 of him other than asking him to interpret the trust
16 document which is kind of my province?

17 MS. SCHWAGER: Your Honor, he's a trustee.

18 THE COURT: Right.

19 MS. SCHWAGER: Are you suggesting that he
20 doesn't need to know the terms?

21 THE COURT: I'm suggesting this is not a
22 deposition. I'm suggesting this is a hearing on
23 Ms. Kelly's application for temporary injunction.

24 MS. SCHWAGER: And it's extraordinary relief
25 that she has the burden of proof on.

1 THE COURT: It has to be probable --

2 MS. SCHWAGER: So I'm not being permitted to
3 cross-examine the witness.

4 THE COURT: Well, but -- okay.
5 Cross-examine him on something that's relevant. I'm not
6 going to have you take his deposition about the document.
7 You can set his deposition and take it any time you want,
8 but that's not now. Probable right and probable injury or
9 right by a trustee for property taken from the trust,
10 probable injury. She's already made her case.

11 MS. SCHWAGER: Your Honor, they have already
12 placed holds on IRAs that are -- that belong to Barbara as
13 an individual, her retirement accounts, federally insured
14 accounts. So I fail to see how an injunction would even
15 be authorized because they have a remedy at law. They've
16 already put freeze orders on the IRAs. And --

17 THE COURT: You said she's taken all the
18 money. Does she have personal accounts that she can
19 establish ownership of other than the money in dispute
20 here? Or is all of the money in her accounts, has it come
21 in in the last year or so when she's taken --

22 MS. SCHWAGER: Her IRAs are her retirement
23 accounts. Those are hers exclusively. They have nothing
24 to do with the trust.

25 MS. KELLY: She -- when we presented Bank of

1 America with the temporary restraining order, she had
2 moved everything out of Account 7007, conveniently. And
3 so they froze --

4 MS. SCHWAGER: So Ms. Goldberg emptied the
5 account.

6 MS. KELLY: -- they froze 92,000 of three
7 different accounts to get to the total of 92,000. I'm not
8 aware if it's an IRA or not. But, I mean, she can't --
9 she needs to account to where this 92,000 went. Now I've
10 got an extra 52,555. I have no idea where that went.

11 So there could be other bank accounts at
12 other banks, but --

13 THE COURT: Well, if there -- if she has
14 money in IRAs that were established before this dispute
15 started, I don't think it's appropriate for us to freeze
16 those. They're her money. This is not about collecting
17 any potential judgment that you might have against her --

18 MS. KELLY: Correct.

19 THE COURT: -- because you don't have that
20 yet. You're hundreds of miles away from a judgment.

21 MS. KELLY: But we have no idea where all
22 this money was. It's all Bank of America, her moving it
23 right and left into different accounts.

24 MS. SCHWAGER: I can give you the account
25 numbers of the IRAs if that will be helpful because I've

1 been asked that they be restrained from trying to place
2 holds on. She has no intent of taking her IRA funds out.

3 MS. GOLDBERG: Your Honor, may I just add
4 something? On the Texas Credit -- the Texas Dow
5 Employee's Credit Union account that Muriel Mintz had set
6 up years ago -- she has an account and an IRA and Barbara
7 Latham was listed as an agent under a power of attorney.
8 But on October 24th, which is the same day that she
9 removed the 52,000, whatever that amount was, from Wells
10 Fargo, she went to the credit union and put herself -- on
11 October 24th, 2017, after I was appointed, after my
12 appointment as temporary guardian pending contest -- put
13 herself on as a joint owner of this account.

14 And then Ms. Schwager in her pleadings
15 accused me -- accused me in a public document of stealing
16 money from her client because this money belongs half to
17 her. I took possession of the accounts as a guardianship
18 account.

19 MS. SCHWAGER: I'm not speaking about this
20 credit union.

21 MS. GOLDBERG: Excuse me.

22 MS. SCHWAGER: I'm talking about the \$6,000
23 that she took out of Barbara's personal account --

24 MS. GOLDBERG: Which personal account are
25 you referring?

1 MS. SCHWAGER: -- 7007, which is now another
2 number that was emptied.

3 MS. GOLDBERG: She's accusing me of
4 stealing. You are on the record. Are you accusing me of
5 stealing in a public courtroom?

6 MS. SCHWAGER: I'm not accusing you of
7 stealing that.

8 MS. GOLDBERG: Well, what are you accusing
9 me of? That's what you said in your pleading.

10 MS. SCHWAGER: I said, you took the money
11 out.

12 MS. GOLDBERG: I have no access to her
13 account, and I don't steal.

14 MS. SCHWAGER: I didn't say you stole. I
15 said you took it out.

16 THE COURT: Yeah, you did.

17 MS. GOLDBERG: Yeah, you sure did. And her
18 client --

19 MS. SCHWAGER: No, I did not.

20 MS. GOLDBERG: -- when I took possession of
21 the Bank of America account that had had I don't know how
22 many -- 80,000 in it -- it's down when I got it. It's
23 87,000 -- her client went to the Pearland Police and
24 accused me of stealing.

25 A detective from the Pearland Police called

1 me and questioned me. I was on the phone for 45 minutes
2 with him explaining what was going on, walking him through
3 the court documents on the website. He had to set up an
4 account so he could access our documents. But she -- she
5 was trying to get me arrested. And now she's accusing me
6 of stealing.

7 MS. SCHWAGER: Your Honor, I can tell you
8 from my own experience with my client that she doesn't
9 understand all of the intricacies of these issues or her
10 rights which I explained to take possession of certain
11 assets, though I have not seen orders authorizing these
12 actions, particularly for Stacy Kelly to go seize her
13 IRAs. I haven't seen anything authorizing that. I've
14 never accused anybody of stealing. I have merely --

15 THE COURT: You just did.

16 MS. SCHWAGER: -- stated in my pleading what
17 occurred.

18 THE COURT: You just said, She took. You
19 said, You took --

20 MS. SCHWAGER: "Took" means stole?

21 THE COURT: -- \$6,000.

22 MS. GOLDBERG: In your pleadings --

23 MS. SCHWAGER: "Took" doesn't necessarily
24 mean stole.

25 MS. GOLDBERG: In your pleadings you say it.

1 THE COURT: Well, I'm going to grant the
2 temporary injunction. We need to set the bond for at
3 least the amount that's being taken.

4 I would suggest that Bank of America is on
5 very thin ice if they took IRAs away from her or held them
6 in connection with this. We don't have anything to do
7 with her IRAs, unless you can establish that it was money
8 that was taken improperly at some point. I think we're a
9 long way from that. I would suggest that y'all focus on
10 the ward and quit filing papers.

11 MS. GOLDBERG: Thank you, Your Honor. As
12 temporary guardian --

13 THE COURT: Pardon?

14 MS. GOLDBERG: I'm sorry. I interrupted
15 you.

16 MS. SCHWAGER: Your Honor, are you ordering
17 them to take their freeze off of her IRAs?

18 THE COURT: I'm not ordering -- I didn't
19 order them to put a freeze. I don't think they put the
20 freeze on.

21 MS. SCHWAGER: Yes, they did.

22 THE COURT: I think Bank of America put the
23 freeze on because they inadvertently let your client take
24 the money out of the account that they weren't supposed
25 to. They were trying to get some money seized to protect

1 themselves. That's between the bank and you-all to figure
2 all that out.

3 MS. SCHWAGER: Well, I think we need a Court
4 order to clarify to the bank what is permissible to hold
5 and what is not.

6 THE COURT: File an application for
7 something if you want a Court order. I'll grant the
8 temporary injunction.

9 MS. KELLY: Your Honor, also the temporary
10 restraining order -- just because Ms. Schwager has made it
11 very clear that her client doesn't understand all of
12 this -- this temporary injunction, as the restraining
13 order does, prohibits her from spending any money that she
14 has pulled out of the Muriel Mintz Family Trust since this
15 action started, that includes the 92,000 and the 52,555
16 that we put on today. So she's restrained -- she's
17 enjoined from that. At the end of the day, your client
18 better have \$146,000.

19 MS. SCHWAGER: Your Honor, I think that this
20 injunction violates the expressed terms of the trust. And
21 this really just matches the article that Keith Morris
22 wrote on how to cripple your opponent --

23 MS. KELLY: He wrote with you, Your Honor.

24 MS. SCHWAGER: -- and make them unable to
25 fight.

1 MS. KELLY: On a temporary injunction, I
2 believe, I have to have a trial date setting in the order
3 for it to be effective.

4 THE COURT: Yes. What should the bond be?
5 92,000?

6 MS. KELLY: 92,000.

7 THE COURT: I'm just going to make it
8 95,000.

9 MS. SCHWAGER: Mr. Mintz is paying a
10 92,000-dollar bond?

11 MS. KELLY: 95,000.

12 THE COURT: \$95,000. Trial date?

13 MS. SCHWAGER: Can I have clarification that
14 the injunction is not intended to violate the expressed
15 terms of the trust?

16 MS. KELLY: She's enjoined from spending the
17 92,000 and the 52,000.

18 MS. SCHWAGER: Your Honor, she has to do an
19 accounting, a forensic accounting, and the trust has to
20 fund that. And she's entitled to hire professionals and
21 consultants if she needs it. And this injunction is too
22 broad.

23 MS. KELLY: She shouldn't have taken the
24 money out of the trust and put it in her personal account.

25 MS. SCHWAGER: Stacy Kelly has not proven

1 that my client has breached her duty in any way. Until
2 such time, she's allowed to defend herself.

3 THE COURT: Well, and she needs -- she has
4 an absolute duty as a fiduciary to account.

5 MS. SCHWAGER: She does.

6 THE COURT: She doesn't have to be asked.
7 And whether she can continue to steal money from the trust
8 and pay forensic accountants -- I mean, she should have
9 all -- 100 percent of the records for the last year
10 wherein she took all this money and what she did with it.
11 So I don't know why she has to hire forensic accountants.

12 MS. SCHWAGER: She's disorganized, probably
13 that's why.

14 THE COURT: Well, that's not --

15 MS. SCHWAGER: I would know that on a
16 firsthand basis.

17 THE COURT: That's not a very good
18 admission.

19 MS. SCHWAGER: I did my best to get
20 everything in.

21 THE COURT: Can you call Yolanda to get a
22 trial date?

23 GUARDIANSHIP COORDINATOR: How far do they
24 want? I've got Monday, January 29th.

25 THE COURT: Well, no, we can't try it in six

1 weeks. I would say after the summer.

2 GUARDIANSHIP COORDINATOR: Oh.

3 THE COURT: I mean, I don't know that we --

4 MS. KELLY: That's fine. It just needs a
5 trial date.

6 THE COURT: Yeah. Well, I don't have it
7 here. Maybe I can look at this calendar.

8 MS. SCHWAGER: Your Honor, can we write two
9 things into this order?

10 THE COURT: I'm sorry?

11 MS. SCHWAGER: Would you be willing to write
12 two things into this order? Since you think it's
13 inappropriate for IRA funds to be held, could you merely
14 state that in the order?

15 THE COURT: Well, the order doesn't effect
16 IRAs, IRA funds.

17 MS. SCHWAGER: Okay. And regarding her
18 ability to hire an accountant, period, or an attorney,
19 period, to defend the trust, the trust further says he
20 forfeits his interest if he files a lawsuit on it. It's
21 supposed to be arbitrated. And so I would think this is
22 real shaky ground to be on and that she should be
23 expressly authorized to hire an accountant and an
24 attorney. She's being sued as trustee.

25 If it turns out later that you find or

1 another arbitrator or Court finds that she owes it, well,
2 Stacy has already found her IRAs. It seems to me there's
3 no --

4 THE COURT: I'm not, in this temporary
5 injunction, going to say what she can spend money on. You
6 should file an application for whatever expenditures you
7 think she needs to make. But since she's taken \$140,000
8 and put it into her account in the last year, there ought
9 to be enough left. I don't know why she needs to hire an
10 accountant.

11 MS. SCHWAGER: She hasn't done an
12 accounting, and this is what should have been done before
13 this lawsuit was filed. I mean, it's frivolous to the
14 extent that she can sit down and show in writing where
15 everything went and that it's authorized.

16 MS. KELLY: I don't have to ask for an
17 accounting before I bring a trust action.

18 THE COURT: No, you don't.

19 Here are the exhibits.

20 MS. SCHWAGER: He's a trustee, Your Honor.
21 He should know whether or not --

22 COURT REPORTER: I'll take them, Judge.

23 THE COURT: No. These don't have any
24 numbers on them. She's going to give them to you.

25 MS. KELLY: Oh, I skipped you. I'm sorry.

1 I just packed them up.

2 MS. GOLDBERG: Your Honor, while we're here,
3 can I just say something?

4 THE COURT: Yeah.

5 MS. GOLDBERG: You've heard a lot already,
6 though.

7 Ms. Schwager, maybe your client doesn't
8 understand, but when my ward was in the hospital last
9 week, your client called -- I reported to her that her
10 mother was in St. Luke's Hospital. I let her know. I let
11 her sister know that she was at St. Luke's Hospital. She
12 had fallen. And she specifically asked me: You're not
13 the guardian anymore, right, because the guardianship
14 lasts for 60 days?

15 I said, No, that's a temporary guardian.
16 I'm temporary guardian pending contest. Under the *Estates*
17 *Code*, that lasts for nine months. I'm still the guardian.
18 I told her she could visit her mother at St. Luke's any
19 time after 7:00 o'clock.

20 At 7:00 o'clock -- and I know all of this
21 because the charge nurse called me and the supervisor, the
22 nursing supervisor called me -- she went to the hospital
23 with expired powers of attorney, tried to get medical
24 records, tried to get my ward to sign a release to be
25 released from the hospital. The nursing supervisor

1 wouldn't allow it because I had already sent my
2 certificate of appointment of guardianship.

3 He told her that he had a Court order from
4 2017 which overrode her powers of attorney. She carried
5 on so much that they had to call security to get her off
6 of there. I was on the phone for I don't know how long,
7 on and off the phone trying to get it under control.

8 They brought two other women to the room
9 there that I don't know who they were. Neither Barbara
10 nor Estelle, neither sister would identify them. They
11 were demeaning to the staff. And that is why I -- and
12 she's trying to interfere with my ability to take care
13 of -- my duty as a guardian. She's getting in the way.
14 She told --

15 MS. SCHWAGER: Well, why did you --

16 MS. GOLDBERG: Among the things she was
17 screaming up there -- I was told --

18 MS. SCHWAGER: Hearsay, objection. I mean,
19 are you going to testify? It's hearsay. Are you going to
20 bring a witness? This is not before the Court.

21 THE COURT: Can she finish?

22 MS. KELLY: Barbara told the nurses --

23 MS. SCHWAGER: This isn't before the Court.
24 This case isn't before the Court.

25 THE COURT: I'm the one that says that. You

1 don't get to decide that. Do you understand? She is my
2 guardian and she is telling me what your client is doing
3 that's wrong.

4 MS. SCHWAGER: She's telling you hearsay and
5 she's not telling you the whole story.

6 THE COURT: Well, because we -- you haven't
7 shut up and let her finish. All right.

8 MS. GOLDBERG: Ms. Schwager is saying that
9 her client doesn't understand what she's supposed to do or
10 not do. I'm saying --

11 THE COURT: Does she not understand that
12 powers of attorney are not valid?

13 MS. SCHWAGER: She did not understand that
14 the medical power of attorney was not valid. In fact,
15 Michele asked me for a copy of it because she said --
16 after I told her it's criminal medical battery to make
17 medical decisions for someone for which you cannot give
18 informed consent, she said, The family needs to be making
19 these decisions --

20 MS. GOLDBERG: I didn't ask --

21 MS. SCHWAGER: -- and asked for the POA.

22 MS. GOLDBERG: That's not what I said --

23 MS. SCHWAGER: So why are we getting these
24 mixed messages?

25 MS. GOLDBERG: -- and I have it in writing,

1 Your Honor.

2 THE COURT: Well, I don't know what this
3 criminal -- I saw your references to criminal battery.

4 MS. SCHWAGER: She asked -- she didn't even
5 know where --

6 THE COURT: She is the guardian.

7 MS. SCHWAGER: And she's supposed to consult
8 with the family. That's her duty.

9 THE COURT: That's not her duty.

10 MS. GOLDBERG: No, it's not my duty.

11 THE COURT: Her duty is to take care of the
12 ward. If her family is in the way, the family needs to be
13 out of the way.

14 MS. SCHWAGER: She has two daughters who are
15 RNs, and she won't even speak to Estelle.

16 THE COURT: They're up there -- the nursing
17 supervisors are calling for help --

18 MS. GOLDBERG: At night.

19 THE COURT: -- calling security because your
20 two RNs are up there being abusive to staff.

21 MS. SCHWAGER: How do you know this?

22 MS. GOLDBERG: They told me. I -- what I
23 asked Ms. Schwager was the nursing home where I have her,
24 where I enrolled her and have her admitted to live now,
25 asked me to sign DNRs. I said, I just want the -- all the

1 family's opinion. If I'm going to sign something that
2 could be an end-of-life decision, I at least want to know
3 what the family has to say about that.

4 I know that my guardianship paperwork
5 overrules a medical power of attorney. But Barbara Latham
6 was up there -- the nurses told me Barbara Latham was up
7 there saying that I am appointed on a lot of cases, that
8 I'm only in this for the money. I'm Jewish and I've
9 already gotten 100,000 of her dollars.

10 MS. SCHWAGER: This is more hearsay and it's
11 irrelevant and minutia. Can we get to the point? The
12 point is that Muriel Mintz --

13 THE COURT: The point is your client is
14 not -- needs to be informed of --

15 MS. SCHWAGER: I have informed her.

16 THE COURT: Then why was she up there --

17 MS. SCHWAGER: But I can't respond until I
18 hear a complaint.

19 MS. GOLDBERG: I'm complaining.

20 MS. SCHWAGER: You can complain to me.

21 MS. GOLDBERG: I'm complaining.

22 MS. SCHWAGER: You don't have to get a bunch
23 of hearsay in and spout it off on the record. At any
24 rate --

25 THE COURT: Was your client there?

1 MS. SCHWAGER: My client? She went to see
2 her mother. Ms. -- before she even went, before any
3 visits ever occurred, Ms. Goldberg instructed her and her
4 sister, who is a geriatric RN, that they could not ask any
5 questions concerning their mother's medical care, what's
6 going on with her and they --

7 THE COURT: They couldn't talk to --

8 MS. SCHWAGER: -- went into a panic because
9 they have been --

10 MS. GOLDBERG: Talk about hearsay.

11 MS. SCHWAGER: Barbara has taken care of her
12 for eight months and she's not complained one bit about
13 her care.

14 MS. GOLDBERG: That's the hearsay.

15 MS. SCHWAGER: Your Dr. Poa --

16 MS. GOLDBERG: I told the staff that. I
17 didn't tell that to those two women.

18 MS. SCHWAGER: Dr. Poa --

19 MS. GOLDBERG: Who I did inform that their
20 mother was in the hospital. And Barbara's license, by the
21 way, is not active.

22 MS. SCHWAGER: I have an e-mail where you
23 tell them that they can't talk about the stuff. And then
24 you tell them the next day, Well --

25 THE COURT: Well --

1 MS. SCHWAGER: -- you've misbehaved. You're
2 revoked.

3 THE COURT: -- the general rule is that once
4 a guardian is appointed, no one else can communicate with
5 the staff of the hospital about medical care.

6 MS. SCHWAGER: Isn't that quite dangerous?
7 Because the guardianship standards require that she be
8 educated as to the ward's health or she can't give
9 informed consent.

10 MS. GOLDBERG: Well, Your Honor --

11 THE COURT: She does -- I mean, that's --
12 you're just totally wrong about that.

13 MS. SCHWAGER: I am?

14 THE COURT: Yes.

15 MS. GOLDBERG: Ms. Schwager --

16 MS. SCHWAGER: A Federal Judge did not agree
17 with that.

18 MS. GOLDBERG: Ms. Schwager, when we had her
19 admitted -- when I had her admitted to the Gardens where
20 she's living and there was a medical assessment done by
21 both a medical doctor and an active RN, not an RN whose
22 licence is inactive as is your client's, that he was
23 concerned, the doctor was concerned, that she was
24 suffering from malnutrition because of the lesions inside
25 of her mouth --

1 MS. SCHWAGER: Your Honor --

2 MS. GOLDBERG: -- the way her fingernails
3 were --

4 MS. SCHWAGER: -- that is even more hearsay.

5 MS. GOLDBERG: -- and her hair was falling
6 out.

7 MS. SCHWAGER: If she wants to bring this
8 doctor in here, I'm happy to bring him in here.

9 MS. GOLDBERG: I'm not --

10 MS. SCHWAGER: Dr. Poa stated to you that
11 she needs 24-hour supervision. As soon as she gets
12 possession of Ms. Mintz, a couple of days later she's
13 fallen and she's in the hospital, maybe broke a hip. We
14 don't know. She won't let us know. We can't know. We're
15 prohibited.

16 MS. KELLY: Your Honor, for the Court's
17 information --

18 MS. SCHWAGER: How is that in the best
19 interest? How?

20 MS. KELLY: Just before we had the hearing
21 on the IME, Ms. Mintz was supposed to come down here and
22 she couldn't make it because she fell while in the care of
23 her daughter and was in the hospital. That's why
24 Ms. Mintz wasn't at the initial IME hearing. So this
25 is --

1 MS. SCHWAGER: And that gives you notice
2 that she's a fall risk. She's also blind. You've got her
3 in a place where they only check on her every two hours --

4 MS. KELLY: I don't have her anywhere, Your
5 Honor.

6 MS. SCHWAGER: -- when your expert says she
7 requires 24-hour supervision. This is a problem.

8 MS. GOLDBERG: We've got a real problem
9 here.

10 MS. SCHWAGER: I would ask for a restraining
11 order based upon --

12 MS. GOLDBERG: A real problem.

13 MS. SCHWAGER: She's in imminent danger,
14 maybe not right this moment because she's in the hospital.

15 THE COURT: Well, you're --

16 MS. SCHWAGER: But this place where she
17 placed her is not an appropriate placement. She can't
18 live in assisted living. She's blind. She drinks
19 stuff -- she can pick up a bottle of lotion.

20 THE COURT: She was living with your client
21 for eight months --

22 MS. SCHWAGER: Right.

23 THE COURT: -- when she was blind. And your
24 client by herself was giving her 24/7 care?

25 MS. SCHWAGER: Her husband is there, too.

1 THE COURT: Oh, well, that makes it a whole
2 lot better.

3 MS. SCHWAGER: He's an RN as well.

4 MS. GOLDBERG: They're not licensed.

5 MS. SCHWAGER: It doesn't matter if they're
6 licensed currently. They're retired.

7 MS. GOLDBERG: I don't practice law if my
8 license hasn't been renewed --

9 MS. SCHWAGER: It is not practicing
10 medicine --

11 MS. GOLDBERG: -- is not active.

12 MS. SCHWAGER: -- to take care of your
13 mother. But at least she has a degree and some background
14 in it. She's not a trust lawyer. I mean, she's got 30
15 years' experience as a psychiatric nurse. Her sister is a
16 geriatric care nurse. How in the world would this Court
17 want them not to have any input? I don't understand that.

18 THE COURT: Well, she called and asked for
19 input. The problem is -- and it's a problem -- your
20 clients couldn't take care of their mother. That's why
21 we're here. If your clients had been taking care of their
22 mother, then we wouldn't never had come to Probate Court.
23 None of this --

24 MS. SCHWAGER: That's not why we're here.

25 THE COURT: -- would have started.

1 MS. SCHWAGER: We're here because he filed a
2 fraudulent affidavit that there is a revocable trust that
3 belongs to Muriel Mintz. We never said anything about her
4 health or she would have been seized like the trust was.
5 I mean, her health has been fine. And if she has any
6 issues right now, most of them have been longstanding, but
7 I would say it was stress because she's constantly
8 threatening my client.

9 THE COURT: The problems in her mouth,
10 according to you, were not from malnutrition?

11 MS. SCHWAGER: I don't know. She's telling
12 you hearsay. I think we need to get a doctor in to answer
13 the questions. But I have a tape recording that I heard
14 that shocked me of Muriel screaming at her son for filing
15 this case. She doesn't sound incapacitated to me, but I'm
16 not a doctor. But the point is she was stressed. So I
17 would expect her -- that possibly she hasn't been eating
18 as much as she usually does. I don't know. I'm not a
19 nurse or a doctor. But they are and they were.

20 THE COURT: They were nurses.

21 MS. SCHWAGER: 30 years. So you just lose
22 all that?

23 MS. GOLDBERG: Her client dropped her mother
24 off -- as I said this in the previous hearing --

25 THE COURT: Yeah.

1 MS. GOLDBERG: -- at 3:00 o'clock on Friday
2 after Thanksgiving. Dropped her off. Said, I can't take
3 care of her anymore. Come and get her.

4 I said, I can't come down there. Will you
5 drop her at my office? She brought her to my office
6 building in Bellaire and dropped her off. Estelle was
7 there. They -- your client didn't even ask me what I was
8 going to do with her. I don't know what she thought I was
9 going to do with her 93-year-old mother who was not well
10 on Friday after Thanksgiving, but she dropped her off.

11 MS. SCHWAGER: She dropped her off because
12 you're the guardian and you've been harassing her since
13 this thing started. And Mr. Mintz has been calling the
14 cops and doing well-checks and APS and they called Harris
15 County APS and they dismissed it. So they called Brazoria
16 County APS. I mean, how much harassment are you expected
17 to take before you say, Forget it, I can't do this?

18 MS. GOLDBERG: Well, then back off.

19 MS. KELLY: If we're going to talk about
20 hearsay, no, APS did not not find anything wrong. Barbara
21 Latham refused to be interviewed by them and they reached
22 a stalemate where they couldn't go any further on the APS
23 report. My client was doing welfare checks because
24 Barbara Latham refused to let him or his two children and
25 grandchildren visit his mother. That's why he filed the

1 guardianship action because she had been taken out of
2 Clarewood against her will and moved to Brazoria County --

3 MS. SCHWAGER: That is a lie.

4 MS. KELLY: -- and shut off from all --

5 MS. SCHWAGER: You need to have evidence of
6 it. She was not taken out of her will anywhere.

7 THE COURT: How did she get to your client's
8 house?

9 MS. SCHWAGER: She wanted to --

10 THE COURT: She drove herself?

11 MS. SCHWAGER: -- go there with her. She
12 wanted nothing to do with her son. We have a tape
13 recording I can play for you.

14 MS. GOLDBERG: That's not what -- that's not
15 what my ward told me. She didn't tell me that.

16 MS. SCHWAGER: What? Okay. So now you're
17 saying she's incapacitated on one hand. She can't come to
18 court. She can't talk for herself. And now you're going
19 to rely upon her statements.

20 THE COURT: Well, you were going to play a
21 tape recording of her.

22 MS. SCHWAGER: I do --

23 MS. KELLY: After being worked by Barbara
24 and Estelle. Yeah, after they got her all worked up,
25 yeah, of course she's screaming.

1 MS. SCHWAGER: No.

2 THE COURT: Well, I signed the order. I've
3 given it to the clerk.

4 MS. KELLY: Thank you.

5 MS. GOLDBERG: Thank you, Your Honor.

6 MS. SCHWAGER: I filed a TRO and I don't
7 have an order on it yet but it covers these medical
8 issues.

9 THE COURT: You need to file it.

10 MS. SCHWAGER: I did file it.

11 THE COURT: It hasn't been brought to the
12 Court.

13 MS. SCHWAGER: Well, I don't understand why
14 you are not getting my filings.

15 THE COURT: Well, I mean, I saw -- I saw an
16 application for something. It wasn't verified or signed.

17 MS. SCHWAGER: No. I have -- both pleadings
18 I filed this weekend were verified, three affidavits.
19 So --

20 THE COURT: Well, I haven't seen the
21 affidavits.

22 MS. SCHWAGER: I would ask you to please
23 look at them.

24 MS. GOLDBERG: The clerk's office rejected
25 them, Your Honor.

1 THE COURT: Pardon me?

2 MS. GOLDBERG: I got a message that the
3 clerk -- I got some filing from 5:30 on Saturday
4 afternoon, but the Clerk's office rejected it. So I don't
5 know whether it's really filed.

6 MS. KELLY: They had account numbers in it.

7 MS. SCHWAGER: That was refiled. So if you
8 don't have it, you should get it. But I guess --

9 THE COURT: Normally, what's done with a TRO
10 is you bring it to the Court and present it to the Court.
11 You don't present any evidence. You don't have to give
12 notice to the other side. It's a TRO.

13 MS. SCHWAGER: I understand.

14 THE COURT: That hasn't been done yet.

15 MS. SCHWAGER: I did it as a courtesy. I
16 gave notice this weekend. It was rejected. So I refiled
17 it.

18 THE COURT: Okay.

19 MS. SCHWAGER: It's been refiled.

20 THE COURT: The filing of it doesn't get it
21 before the Court. You need to bring it to the Court and
22 say, Here is an application for TRO. And you don't make
23 any -- don't offer any evidence. You just go on the basis
24 of the application --

25 MS. SCHWAGER: Right.

1 THE COURT: -- and the affidavit.

2 MS. SCHWAGER: I understand. Okay. I'll
3 come back up here tomorrow.

4 THE COURT: And then if I grant it, I'll set
5 it for hearing. If I deny it, I'll set it for a
6 hearing --

7 MS. SCHWAGER: Okay.

8 THE COURT: -- the TRO. You are set for a
9 hearing on a temporary injunction.

10 MS. SCHWAGER: All right. I appreciate
11 that.

12 THE COURT: It's getting to be
13 Christmastime. I don't know that the Court is going to be
14 open. I think it's Dead Week from Christmas day through
15 the 1st of January, December 25th through January 1st.
16 And there's not going to be many people around next week,
17 the 19th, 20th, and the 21st. So you need to make sure
18 you call ahead. But there will not be any hearings the
19 following week, Dead Week.

20 MS. SCHWAGER: Well, can I get a hearing
21 today? It's already on file.

22 THE COURT: Okay.

23 MS. SCHWAGER: Because I'm worried that
24 Muriel may have broken a hip and anything may have
25 happened. We just don't know. We're not being allowed

1 knowledge. Her daughters know her intimately and her
2 medical care and they should not -- the guardianship
3 standards require her to apply for some information from
4 that and that's not happening.

5 THE COURT: It requires her to find out
6 information, not necessarily people -- not necessarily
7 from the warring parties.

8 MS. SCHWAGER: Well, I don't know who she's
9 going to get it from because her daughter --

10 THE COURT: Well, her medical records. The
11 way all medical professionals get information about
12 medical history is from medical records of the patients.

13 MS. SCHWAGER: Your Honor, attorneys are not
14 qualified to read and interpret medical records; and
15 Ms. Mintz is in danger.

16 THE COURT: Well --

17 MS. SCHWAGER: She's in the hospital. I
18 mean, why do we have to go through all of this? Why can't
19 we just cooperate regarding her care? They can be mad as
20 they want regarding the transfers, but that's a different
21 issue.

22 THE COURT: She called your clients and told
23 them they could come down and visit. They ended up
24 getting --

25 MS. SCHWAGER: And now they --

1 THE COURT: They ended up getting thrown out
2 of the hospital by the hospital, not by the guardian, the
3 hospital.

4 MS. GOLDBERG: Risk Management. They called
5 Risk Management, Your Honor.

6 MS. SCHWAGER: Barbara was or Estelle was
7 told that Donald was on the phone saying he was the
8 guardian and kick them out.

9 MS. GOLDBERG: They have some -- whatever
10 the sibling -- whatever it is -- rancor, I have no idea.
11 All I know is that I was on the phone at 7:00, 7:30, 8:20,
12 8:45. I agreed with the nursing survivor that they could
13 stay until 8:45 and then they would have to leave. If
14 not, security was to remove them. And the supervisor told
15 them that and they did leave on their own at 8:45. But
16 according to the supervisor, Risk Management was there,
17 the nursing supervisor was there, and security was there
18 present. And they had two other women in the room which
19 they wouldn't identify.

20 MS. SCHWAGER: Are we trying to protect her
21 or protect you, I would like to know?

22 MS. GOLDBERG: I asked what they looked
23 like. I thought maybe Ms. Schwager was there. And the
24 nursing supervisor said, It's two olden women. One has a
25 cane.

1 MS. SCHWAGER: I don't know who visited her.
2 Maybe she has friends. I mean --

3 MS. GOLDBERG: Nobody knew she was there.

4 MS. SCHWAGER: I don't know. But are they
5 allowed to visit? Are they allowed to get information? I
6 mean, they've --

7 THE COURT: They're not allowed to get --

8 MS. GOLDBERG: They're not allowed to get
9 information --

10 THE COURT: -- information from the nursing
11 staff.

12 MS. GOLDBERG: -- and to bully them.

13 MS. SCHWAGER: Are they allowed to get
14 medical information from Ms. Goldberg so they can help
15 their mother and help her make educated decisions?

16 MS. GOLDBERG: Well, I'm given them -- I was
17 trying to give them medical information but they abused
18 it.

19 MS. SCHWAGER: No, you haven't given me
20 anything. I've asked you three times.

21 THE COURT: Not you. You're not asking --
22 you're saying your clients.

23 MS. SCHWAGER: She hasn't given it to my
24 clients, either. My client -- she hasn't called Estelle.
25 She's not communicated at all.

1 MS. GOLDBERG: I called both of them.
2 That's how they got there. That's how they knew she was
3 there. I called them.

4 MS. SCHWAGER: She told them they could go.
5 That's it. And then there was e-mail of all this. It was
6 so predictable. It was almost like a template. But the
7 point is: Yes, your mother falls and she's in the
8 hospital and may have a broken hip because she said her
9 back and her spine hurt or may have a fractured spine.
10 So -- and her daughters are upset and she's surprised
11 about that. And then she makes it worse by banning them.
12 I mean, so are they banned? Is that what the Court is
13 going to hold, that they're banned?

14 THE COURT: I'm not saying anything about
15 the care.

16 MS. SCHWAGER: Are you saying that that's
17 okay for her to do?

18 MS. GOLDBERG: I said that while she's
19 recuperating and resting they needed to stay away and I
20 would notify them when they could visit. I would not keep
21 a 93-year-old lady from her daughters.

22 THE COURT: Well, I would try to get them as
23 much access as you can.

24 MS. GOLDBERG: Yeah. I would prefer they
25 have access, in my opinion. She's 93. Everybody should

1 be seeing her.

2 MS. SCHWAGER: I think it's reckless for you
3 to not have her medical information. I would ask you to
4 be transparent.

5 MS. GOLDBERG: I got her medical records --
6 I got her medical information from the doctor that Barbara
7 took her to. It's at the Gardens.

8 THE COURT: We generally get medical
9 information from treating physicians and staff, not from
10 family members.

11 MS. SCHWAGER: Really?

12 THE COURT: Yes.

13 MS. SCHWAGER: She's been taking care of her
14 mother for eight months.

15 THE COURT: What has happened in the last
16 two days to her mother? She doesn't know.

17 MS. SCHWAGER: She doesn't know. You are
18 right.

19 THE COURT: She doesn't know. That is why
20 we rely on the nursing staff at the hospital and the
21 doctors at the hospital to tell what's going on with the
22 patient.

23 MS. SCHWAGER: St. Luke's is not her
24 treating doctor. How in the world are they going to know?
25 I mean, normally don't they ask questions?

1 THE COURT: Because they have medical
2 records.

3 MS. SCHWAGER: Wow. So that's okay?

4 MS. KELLY: This is kind of like how my
5 client probably felt for the seven months Barbara wouldn't
6 let him visit his mother.

7 THE COURT: Off the record.

8 (End of proceedings.)

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1 THE STATE OF TEXAS)

2 COUNTY OF HARRIS)

3 I, TINA K. WHITE, Official Court Reporter in
 4 and for Probate Court No. 2 of Harris County, State of
 5 Texas, do hereby certify that the above and foregoing
 6 contains a true and correct transcription of all portions
 7 of evidence and other proceedings requested in writing by
 8 counsel for the parties to be included in this volume of
 9 the Reporter's Record, in the above-styled and numbered
 10 cause, all of which occurred in open court or in chambers
 11 and were reported by me.

12 I further certify that this Reporter's Record
 13 of the proceedings truly and correctly reflects the
 14 exhibits, if any, admitted, tendered in an offer of proof
 15 or offered into evidence.

16 I further certify that the total cost for the
 17 preparation of this Reporter's Record is \$_____ and
 18 was paid by _____.

19 WITNESSED MY OFFICIAL HAND this the 24th day
 20 of December, 2017.

21
 22 /s/ Tina K. White
 Tina K. White, CSR, RPR
 Official Court Reporter
 Probate Court No. 2
 Certificate No. 5488
 Expires: December 31, 2018
 201 Caroline, Suite 680
 Houston, TX 77002
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 832-927-1449

Official Court Reporter - Probate Court No. 2

APPENDIX 6

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REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL CAUSE NO. 456,059

IN RE: THE GUARDIANSHIP OF * IN PROBATE COURT
*
MURIEL LUBA MINTZ, * NUMBER TWO (2) OF
*
AN INCAPACITATED PERSON * HARRIS COUNTY, TEXAS

MOTION FOR SANCTIONS

BE IT REMEMBERED that beginning on the 29th day of May, 2018, came on to be heard outside the presence of a jury, in the above-entitled and -numbered cause; and the following proceedings were had before the Honorable Mike Wood, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by Computerized Stenotype Machine, Reporter's Record produced by Computer-Assisted Transcription.

A P P E A R A N C E S

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1 THE COURT: Your deal is the one that had
2 the temporary injunction which I signed last week. So I'm
3 not sure what we're doing.

4 MS. GOLDBERG: These are separate.

5 THE COURT: Yeah.

6 MS. SCHWAGER: Did you get your copy from
7 your clerk I filed?

8 THE COURT: I'm sorry?

9 MS. SCHWAGER: Did you get the copy of my
10 response I filed with the clerk?

11 THE COURT: No.

12 MS. GOLDBERG: I haven't gotten a response.

13 MS. SCHWAGER: Well, I had extras. I gave
14 Jason one. You need to grab -- can you borrow --

15 MS. GOLDBERG: No. I need one. We're here
16 on separate causes. We're not law partners.

17 MS. SCHWAGER: Well, I don't have an extra
18 one for you. You could have pulled it off of your e-mail.

19 MS. GOLDBERG: My assistant informed me that
20 Ms. Schwager sent me an e-mail at 2:30 in the morning. I
21 didn't see it.

22 THE COURT: Yeah. Let's -- I guess we'll
23 just deal with the issues. Go ahead.

24 MS. GOLDBERG: Okay.

25 THE COURT: I read your motion.

1 MS. GOLDBERG: My motion?

2 THE COURT: Yes.

3 MS. GOLDBERG: Okay. Your Honor, I'm
4 Michele Goldberg. I was appointed by this Court as
5 temporary guardian pending contest for Muriel Mintz. I
6 qualified. I was appointed on September 19th. I
7 qualified on September 25th. Muriel Mintz died on
8 Christmas Eve, December 24th, 2017.

9 After her death, Ms. Schwager, on her own
10 behalf and on behalf of Barbara Latham and Estelle Nelson,
11 Muriel's two surviving daughters, went directly to the
12 bonding agent, making full demand for full payment of the
13 limits of the bond and attached her Federal lawsuit that
14 you're familiar with because you're a party to that as
15 grounds to demand the bond.

16 The bonding agent I used is Higdon Compton.
17 John Compton sent the demand to SureTec, the insurance
18 company, and they forwarded the demand to their attorneys,
19 which is Strasburger Price -- they've changed their name,
20 but it was Strasburger Price -- who had to research and
21 defend the bond. And on the bonds we have to sign when we
22 sign for her bond and pay the premium, we have to sign an
23 indemnification. The bond --

24 THE COURT: Right.

25 MS. GOLDBERG: -- includes an

1 indemnification clause stating that if I have to -- if
2 they have to defend the bond, I have to pay the attorney's
3 fees. So I did. I had to pay attorney's fees. I
4 attached a copy of the check for 3,500, about \$3,500. I
5 got a detailed -- more than 3,500 -- \$3,548.40 to be exact
6 and I sent that. I paid that a few weeks ago.

7 I got a detailed invoice from Strasburger
8 Price. Their fees were fair. They spent the time to
9 research this. And in researching it, they found -- and
10 we all know -- that Ms. Schwager totally circumvented
11 proper procedure for making demand on a bond. She should
12 have filed a surcharge claim in this Court where the
13 guardianship is pending.

14 And under that, due process demands that I
15 be allowed the opportunity to defend the claims that were
16 made against me. Of course, she claims, among the claims
17 are wrongful death. I have nothing to say. But I didn't
18 even have that opportunity, and now I'm stuck with this
19 bill.

20 So under TCPRC Section 10.001, as we all
21 know as Members in good standing with the Bar, anything
22 signed by an attorney or a party in the case constitutes a
23 certificate to that person's best knowledge, information
24 and belief, formed after reasonable inquiry: The document
25 is not being presented for any improper purpose including

1 to harass or cause unnecessary delay or needlessly
2 increase the cost of litigation and so forth.

3 The purpose of sanctions that I'm asking
4 for -- first, I'm asking for sanctions because this entire
5 lawsuit, it's claim after claim after claim, but now that
6 I've had to not only spend time and I've lost money in my
7 office, now I've had to specifically write a check, is to
8 force the parties to comply with the Rules. And if
9 they're not going -- if Ms. Schwager is not -- her
10 parties, her clients are not attorneys, but she should
11 know -- if she's going to blatantly violate the Rules,
12 then she needs to pay for it. She needs to be held
13 responsible.

14 And the other purpose of -- another purpose
15 for sanctions is to deter other litigants from violating
16 these Rules. They file claim after claim after claim.
17 They're heinous. They're unfounded. They're
18 inflammatory. In addition to their postings, Ms. Schwager
19 and her posse of people --

20 MS. SCHWAGER: I don't have a posse.

21 MS. GOLDBERG: -- Barbara Latham and Estelle
22 Nelson and Sherry Johnston, who has nothing to do with
23 this case, have all -- and then she sent my motion for
24 sanctions to somebody named Rik, R-I-K, Munson. I had to
25 figure out who he was. He was involved on the Federal

1 lawsuit with Ms. Schwager, suing both judges in Probate
2 Court 4 of Harris County, all of the appointees in that
3 case and that was also dismissed. They have it on appeal.

4 Rik Munson, immediately, the same day that I
5 filed the motion for sanctions, sent me an e-mail -- I
6 have it -- threatening me and challenging me to meet him
7 and argue out these points.

8 Ms. Schwager -- I have proof -- that
9 Ms. Schwager forwarded my motions for sanctions to him. I
10 don't even think he lives in Texas. The same day --

11 THE COURT: I wouldn't meet him.

12 MS. GOLDBERG: The same day -- the same day
13 that I filed the motion for sanctions, Ms. Schwager sent
14 me -- or within a day -- Ms. Schwager sent me e-mail
15 correspondence telling me that she intends to go after the
16 bond again. She's not accepting this. She's going to go
17 after it again.

18 I'm asking the Court to grant my motion for
19 sanctions to stop this vexatious litigation. It's
20 vexatious litigation. Her online -- her online postings,
21 in addition to all of the people that are attached to her,
22 personally attack me, my family, my ethics, my morals and
23 my religion. There's posting after posting that she
24 posts, she herself posts, against my religion and against
25 my family and certainly against me. I'm asking the Court

1 to grant sanctions to try to get some of this under
2 control and stop it.

3 In the alternative, in case the Judge rules
4 against it, I am asking that the Court allow me to be
5 reimbursed the \$3,548.40 plus interest as an expense
6 against the estate so that I'm reimbursed. I did not
7 incur this expense. I was appointed by the Court.

8 THE COURT: Correct.

9 MS. GOLDBERG: I had nothing to do with this
10 case until I was appointed by the Court. I'm asking it be
11 taxed as an expense against the estate. Unfortunately --
12 unfortunately, and I have -- I'm finishing up my final
13 account -- I have verification of funds on deposit on the
14 date of death from -- verified from T.D.E.C.U, Dow Credit,
15 Dow Employees Credit Union, Texas Dow Employees Credit
16 Union, on the date of death, Muriel Mintz had a balance of
17 84,000 in that account. Within a week of her death,
18 Ms. Latham, under the direction of Ms. Schwager, went and
19 cleaned out the bank account. She stole her own mother's
20 money.

21 So I'm also asking for sanctions because
22 under this guardianship, Ms. Schwager's client, Barbara
23 Latham, abused her mother, her 93-year-old mother and I
24 have proof of that. She abused her.

25 Ms. Latham, under her direction and while

1 being represented by Candice Schwager, stole her mother's
2 money. And then her sister, Ms. Schwager's other client,
3 Estelle Nelson, profited from it. They cleaned out these
4 accounts. They had the monies transferred into their own
5 accounts. We have proof of it.

6 The accounting that Ms. Schwager's client
7 said -- the application for guardianship that
8 Ms. Schwager's client filed said that her mother at the
9 time that she filed her application had approximately
10 \$225,000. I could never find \$225,000 because her client
11 had moved it into accounts in her own name. Now there's
12 absolutely nothing in there.

13 So we have proof that her client, Barbara
14 Latham and -- Barbara Latham and Estelle Nelson profited
15 from Muriel Mintz's money in the approximate amount of
16 \$200,000. So I'm asking the Court to file sanctions
17 against her, grant my motion for sanctions to let her know
18 that this is unacceptable, it's vexatious litigation, it's
19 unacceptable and it can't be continued.

20 THE COURT: Response?

21 MS. SCHWAGER: Your Honor, first of all,
22 this Court has lost plenary power over any issue except
23 her accounting. It's been six months since Muriel's
24 death. You've asked her twice to get it in. She still
25 doesn't have it in. I don't know how -- if she's got so

1 much proof, where is it?

2 But the second point is there is no
3 jurisdiction in this Court over Estelle Nelson. She's not
4 a party. She's not appeared. She's only appeared in the
5 Federal case. And if Michele has a problem with the
6 Federal case, then she needs to go to the Fifth Circuit.

7 THE COURT: The Federal case is gone. It's
8 been dismissed.

9 MS. SCHWAGER: It's been appealed.

10 THE COURT: You've been ordered not to
11 refile it and you've been ordered not to file anything in
12 Federal Court.

13 MS. SCHWAGER: Nobody's been ordered to --
14 ordered me --

15 THE COURT: The Federal Court said you could
16 not file anything in that case without her permission.

17 MS. SCHWAGER: No. I have not received
18 anything that said that.

19 THE COURT: I don't know whether you
20 received it.

21 MS. SCHWAGER: I did not file the motion for
22 appeal, Mr. Wynne did. There is an appeal pending. I
23 think it's premature for her to be asking for this.

24 THE COURT: I still have jurisdiction until
25 her accounting is approved.

1 MS. SCHWAGER: That's right.

2 THE COURT: And so I have --

3 MS. SCHWAGER: But not over any other
4 substantive issues to be brought up.

5 THE COURT: This is not substantive. This
6 is --

7 MS. SCHWAGER: That's what the case says.

8 THE COURT: This is based on your letter of
9 December 25th, 2017. I'm amazed you wrote the letter.

10 MS. SCHWAGER: That letter had to be written
11 before we could file a Federal case and make a claim on
12 the bond.

13 THE COURT: You don't have the right under
14 the Rules to write a letter that says what you said. It
15 was one of the most unprofessional documents I've ever
16 seen. So I'm going to grant the motion for sanctions.
17 I'm going to order \$10,000 sanctions against you
18 personally, and I'm going to allow her to pay back the
19 fees that she incurred out of her pocket to pay for the
20 bond because she has an obligation to pay that. She's
21 already paid it. I'm going to reimburse her from the
22 estate and if it's not paid from the estate within 15
23 days, I'm going to order that in addition to the \$10,000
24 against you. I've never seen a less -- well, I've seen a
25 lot from you, counsel, but this document --

1 MS. SCHWAGER: I don't think, Judge, you
2 have jurisdiction to be making that judgment on the
3 wrongful-death case.

4 THE COURT: I -- it's not a wrongful-death
5 case. It's a case for sanctions because you accused her
6 of wrongful death, discrimination and retaliation --

7 MS. SCHWAGER: That case is on appeal.

8 THE COURT: -- against Latham and Nelson.
9 You say you didn't represent Nelson. This is written in
10 this case. You're saying you're writing this on behalf of
11 Nelson in this case. You said she never made an
12 appearance.

13 MS. SCHWAGER: I said I made a special
14 appearance today for her.

15 THE COURT: No, not today. I'm talking
16 about a letter written December 25th.

17 MS. SCHWAGER: I didn't write that in this
18 court. I wrote it to a bond company.

19 THE COURT: But it's filed in this court
20 because it's about this case.

21 MS. SCHWAGER: She filed it in this court.

22 THE COURT: It's about this case.

23 MS. SCHWAGER: She can't drag any document
24 that I happen to have had out in the public and file it in
25 the court and sanction me for it. I didn't file it in

1 here.

2 THE COURT: You can appeal it if you want
3 to. I'm going to grant --

4 MS. SCHWAGER: I will be appealing it.

5 THE COURT: I've already said I'm going to
6 grant the sanctions of \$10,000 for filing the claim
7 against the bond which is improper. You can't file a
8 claim writing a letter to the bonding company. You should
9 know that. You have to file a claim. You didn't do that.

10 MS. SCHWAGER: I did file a claim.

11 THE COURT: They rejected it.

12 MS. SCHWAGER: I filed it in Federal Court.

13 THE COURT: Federal Court is not how you
14 make a claim against a guardian on the bond. You are
15 making all this up.

16 MS. SCHWAGER: I can't very well make a
17 claim in a court where I'm making claims against the
18 parties. There's no jurisdiction in that court.

19 THE COURT: I don't know what you're talking
20 about. I don't think you do.

21 MS. SCHWAGER: Article 5, Section 11, Texas
22 Constitution.

23 THE COURT: Oh, well, that rarely comes up
24 in Probate Court. I've made my ruling. If you'll prepare
25 an order, sanctions against Ms. Schwager for \$10,000.

1 MS. GOLDBERG: Oh, okay. I'll file --
2 I'll --

3 THE COURT: Yeah. You need to prepare an
4 order that says specifically sanctions against her for
5 \$10,000 for filing the way she did and against the estate
6 for \$3,548.40 to reimburse you. If there's not money in
7 the estate, then from the trust.

8 MS. SCHWAGER: She has not demonstrated --
9 she's not overcome the presumption of good faith that's in
10 the law nor has even approached it.

11 THE COURT: Counsel, you have overcome any
12 presumption of good faith by your conduct in this case in
13 the presence in open court and by documents you have
14 filed. I haven't read this because it was filed at 2:30
15 a.m. before the hearing. That's not appropriate. I'm not
16 going to read it before the hearing. If you want to file
17 a response, file it at least before close of business the
18 day before. So I'm sure if I look at it, it's got all
19 kinds of stuff in there that's --

20 MS. SCHWAGER: It's got --

21 THE COURT: -- further sanctionable.

22 MS. SCHWAGER: -- the Rules in there which
23 you are not letting me put on the record.

24 THE COURT: You don't need to put the Rules
25 on the record. The Rules are in the law. You don't have

1 to put that on the record. But you can keep this
2 (indicating).

3 MS. SCHWAGER: The law is not being applied.

4 THE COURT: Right.

5 MS. SCHWAGER: There's no jurisdiction for
6 this. The jurisdiction ended when Ms. Muriel Mintz died.

7 THE COURT: No.

8 MS. SCHWAGER: Everything else is moot.

9 THE COURT: In the guardianship I have to do
10 a final account in the guardianship, and I can do the
11 decedent's estate in a guardianship. I haven't had
12 anybody file for it yet, but I could.

13 MS. GOLDBERG: I'm a creditor now. I might
14 be filing it.

15 THE COURT: Yeah.

16 MS. GOLDBERG: I don't want to.

17 THE COURT: You can go ahead and keep the
18 papers because it is -- there was something filed this
19 morning, e-filed.

20 MS. GOLDBERG: Thank you, Your Honor.

21 THE COURT: Thank you.

22 MS. GOLDBERG: May we be excused?

23 THE COURT: Yes.

24 (End of proceedings.)

25

1 THE STATE OF TEXAS)

2 COUNTY OF HARRIS)

3 I, TINA K. WHITE, Official Court Reporter in
 4 and for Probate Court No. 2 of Harris County, State of
 5 Texas, do hereby certify that the above and foregoing
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19 WITNESSED MY OFFICIAL HAND this the 6th day
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 22 /s/ Tina K. White
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Official Court Reporter - Probate Court No. 2

APPENDIX 7

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REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL CAUSE NO. 456,059

IN RE: THE GUARDIANSHIP OF * IN PROBATE COURT
*
MURIEL LUBA MINTZ, * NUMBER TWO (2) OF
*
AN INCAPACITATED PERSON * HARRIS COUNTY, TEXAS

Motion to Approve Final Accounting
Motion to Quash & Motion for Protective Order

BE IT REMEMBERED that beginning on the 19th day of July, 2018, came on to be heard outside the presence of a jury, in the above-entitled and -numbered cause; and the following proceedings were had before the Honorable Mike Wood, Judge Presiding, held in Houston, Harris County, Texas.

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A P P E A R A N C E S

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Also present:
Lauren Robbins, Personal Attorney for Michele Goldberg

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1 THE COURT: 462,505 and 456,059, could I
2 have appearances? And tell me what cause number you're
3 appearing in.

4 MR. LEMUS: Robert Lemus, Your Honor, here
5 on behalf of Barbara Latham and Estelle Nelson. I'm
6 appearing in both of these matters.

7 MS. GOLDBERG: I guess we'll get
8 appearances, and then I have something to say.

9 I'm Michele Goldberg. I am appearing -- I'm
10 temporary guardian pending contest in 456,059, in the
11 guardianship matter.

12 MS. ROBBINS: I'm Lauren Robbins. I'm
13 personal counsel for Ms. Goldberg --

14 COURT REPORTER: Louder, please. It's the
15 carpeting [indicating].

16 MS. ROBBINS: Oh, I'm sorry. Lauren
17 Robbins, personal counsel for Michele Goldberg, who is not
18 a party to the trust lawsuit.

19 THE COURT REPORTER: Thank you.

20 THE COURT: There's no microphone here. It
21 may look like one down there, but it's only for her court
22 reporting equipment. That's doesn't help.

23 MS. KELLY: Stacy Kelly for Donald Mintz.
24 And I also have my second-year law student, Colton Tobias,
25 with me so he can see how much fun this is.

1 THE COURT: Yeah, really.

2 MS. KELLY: Oh, I'm sorry. And we're in the
3 trust Cause No. 462,505.

4 MR. OSTROM: Jason Ostrom for Donald Mintz
5 in the trust Cause No. 462,505.

6 THE COURT: Okay.

7 MS. GOLDBERG: May I?

8 THE COURT: Yes.

9 MS. GOLDBERG: Your Honor, I set the first
10 matter on this docket and that is a -- I set the hearing
11 to ask the Court to approve my account for final
12 settlement and to discharge me on the surety from the
13 bond. However, Candice Schwager is the attorney for that
14 lawsuit.

15 Mr. Lemus has not filed -- I don't see any
16 sort of notice of appearance or motion to substitute in.
17 In his own pleadings, he said he's not certified. Perhaps
18 he got certified last night. I don't know. But I object
19 to his being here. This is for Ms. Schwager to be here.
20 She filed the response asking the Court not to approve my
21 accounting. Well, she's not in the courtroom.

22 THE COURT: Yes, sir.

23 MR. LEMUS: Your Honor, Ms. Schwager
24 contacted me earlier this afternoon and stated that she
25 was not going to be able to make it because of an illness

1 that has befallen her little boy. And she asked if I
2 would not -- appear on her behalf in order to at least
3 defend the clients under the circumstances. And so I ask
4 that you allow me to represent the clients and argue the
5 motion to the extent the Court allows.

6 THE COURT: Well, the problem is she didn't
7 file an affidavit saying even that her child was sick.
8 She has --

9 MR. LEMUS: I can show you.

10 THE COURT: -- a tendency to not show up
11 places and say, I'm not well. I want -- I want
12 accommodations under the Americans with Disabilities Act.
13 This is the first time she's tried it with her child.

14 MR. LEMUS: Your Honor, I certainly
15 understand that. I haven't --

16 THE COURT: And you're not certified.

17 MR. LEMUS: And I understand that as well.
18 I have an e-mail from her, which I'm happy to show the
19 Court, that relays exactly what I just said.

20 THE COURT: The way to do this is you file a
21 written motion for continuance and then you have a
22 doctor's letter --

23 MR. LEMUS: Your Honor --

24 THE COURT: -- if you want to claim it.

25 MR. LEMUS: -- I certainly understand that.

1 But given the time pressures, there was no way to do it.

2 So I will --

3 THE COURT: Because she waited until the
4 last minute.

5 MR. LEMUS: That may be the case, and I'm
6 not here to defend her, Your Honor.

7 THE COURT: So the child just became ill
8 this morning. She was going to be here. She had no idea
9 she was not.

10 MR. LEMUS: Well, then, Your Honor, I
11 respectfully ask the Court to continue this until
12 Ms. Schwager can appear or until I get formally certified
13 in order to appear in this matter. Although, given the
14 circumstances, I'm not sure that being certified as a
15 guardian or being certified under the guardian CLE is
16 required in order to make an objection with regard to a
17 temporary -- with regard to a final accounting or a final
18 report.

19 THE COURT: I think it's required to be
20 involved in any guardianship case at all.

21 MR. LEMUS: Well, my understanding, Your
22 Honor -- and I'm not saying that I understand it fully or
23 that I'm correct -- but it is in order to represent the
24 guardian or to represent the guardianship estate that that
25 is required.

1 THE COURT: Okay. I'm going to approve the
2 final accounting. I read her written response.

3 You said you had \$8,000 on hand still?

4 MS. GOLDBERG: No, no. There's only
5 about -- on hand, there's only about 1,500 left.

6 THE COURT: Okay. So whatever is on hand,
7 other than the \$100 to leave in the account to keep it
8 open, you should pay towards your outstanding balance on
9 fees.

10 MS. GOLDBERG: Okay. Thank you, Your Honor.

11 THE COURT: I'm going to approve the final
12 accounting.

13 MS. GOLDBERG: Thank you.

14 THE COURT: Because there's nothing else to
15 do. There's no other money. There's nothing to do. I
16 mean, she, Ms. Schwager, wants to argue all day long. She
17 can do it in the estate -- well, there's not an estate --
18 in the trust case if she wants to. There is no reason to
19 argue over no money, especially when there's, what,
20 40,000 -- you have \$30,000 in fees?

21 MS. KELLY: I have \$40,000 in fees.

22 THE COURT: The ad litem has \$8,000, \$6,000
23 in fees.

24 MS. GOLDBERG: Well --

25 THE COURT: You have fees that have been

1 approved that haven't been paid.

2 MS. GOLDBERG: Correct.

3 THE COURT: And I'm sure you're going to
4 have a fee statement. When you have nothing better to do,
5 file your fee statement.

6 MS. GOLDBERG: Yes, I have.

7 MR. LEMUS: Your Honor, just for the sake of
8 clarification, does that mean that you're also approving
9 the discharge of her bond and surety or --

10 THE COURT: Uh-huh. The -- I don't think
11 the bond secures the Federal Court lawsuit, but it's been
12 dismissed anyway.

13 MR. LEMUS: Your Honor, this is not for the
14 Federal Court lawsuit, which is on appeal; but this would
15 be for the claims that the estate and/or the trust may
16 have against Ms. Goldberg.

17 THE COURT: She didn't serve in the trust.
18 She served in the estate.

19 MR. LEMUS: I'm sorry?

20 THE COURT: She didn't serve in the -- she
21 was appointed over the ward.

22 MR. LEMUS: Yes, sir. I --

23 THE COURT: She never took possession of any
24 assets in the estate.

25 MR. LEMUS: I understand that, Your Honor.

1 However --

2 THE COURT: Your client took all the assets,
3 all of the assets -- not your client. Your client's
4 client took all the assets.

5 MS. KELLY: Actually, the lawyer took them
6 all.

7 MR. LEMUS: Your Honor, but my
8 understanding, at least, is that both the trust and that
9 the estate may have claims against Ms. Schwager for her
10 conduct as the temporary guardian.

11 THE COURT: I assume you don't mean
12 Ms. Schwager. Although, you might be right.

13 MR. LEMUS: No, Ms. Goldberg.

14 THE COURT: But that may well be the case
15 but she's done and I'm done. So I'm signing the order,
16 approving her final accounting and it's done.

17 MR. LEMUS: Okay.

18 THE COURT: If you have any lawsuits you
19 want to file, feel free. I'm sure Ms. Schwager, when her
20 child recovers, praise the Lord, I'm sure she'll be filing
21 lots of cases --

22 MR. LEMUS: Yeah, well --

23 THE COURT: -- hundreds of pages.

24 MR. LEMUS: -- Your Honor, that is not the
25 way that I personally practice. So...

1 THE COURT: Well, you're here.

2 MR. LEMUS: I am here. And I am not --

3 THE COURT: You are here.

4 MR. LEMUS: But please do not lump me in
5 that same category. I appreciate it.

6 THE COURT: You -- I'm sorry, sir. You
7 lumped yourself in that category because you appeared on
8 behalf of Ms. Schwager.

9 MR. LEMUS: No, I --

10 THE COURT: Don't say, "I'm not her."
11 Because you are her. You appeared on her behalf.

12 MR. LEMUS: Your Honor, I am here on behalf
13 of Barbara Latham and Estelle Nelson.

14 THE COURT: But you can't substitute in
15 without filing a motion to substitute and a motion to
16 withdraw by their present counsel. And they're not here
17 either, I noticed.

18 MR. LEMUS: Your Honor, I understand. I
19 think that they may not be here because they might be
20 waiting in Probate Court No. 1.

21 MR. OSTROM: They actually just walked in.

22 MR. LEMUS: They just walked in.

23 MS. LATHAM: We were not told you were here.

24 THE COURT: Well --

25 MR. LEMUS: Yeah. I had to go --

1 MS. NELSON: They sent us to the wrong
2 courtroom.

3 MR. LEMUS: -- find somebody to go figure
4 out where we were.

5 THE COURT: I'm sorry. I'm not on hall
6 patrol, but there are signs out there. Why don't you go
7 consult with your clients, if you want to; but I want to
8 move on with this. So...

9 MR. LEMUS: You've made your order, Your
10 Honor, and that's fine.

11 THE COURT: Yes.

12 MR. LEMUS: Okay. I understand your ruling.

13 THE COURT: So what's next?

14 MS. GOLDBERG: The next on the docket, Your
15 Honor, is I filed a motion to quash. Mr. Lemus and
16 Mr. Wynne served me with notice of deposition in the trust
17 lawsuit -- I am not a party nor an attorney in that
18 lawsuit -- with a subpoena duces tecum --

19 THE COURT: Right.

20 MS. GOLDBERG: -- I can never say that --
21 with 54 requests for production, most of which have
22 nothing to do with the trust litigation, which I have
23 nothing to do with anyway. And I filed a motion to quash
24 and a motion for protective order.

25 THE COURT: Do y'all have anything?

1 MS. KELLY: Well, I --

2 MR. OSTROM: We're here because of the trust
3 action involves the --

4 THE COURT: Well, that's --

5 MR. OSTROM: Right. We don't have a motion
6 on file but our position is that Ms. Goldberg --

7 COURT REPORTER: I'm sorry, Ms. Ostrom. Can
8 you speak up over the --

9 MS. ROBBINS: Between the banging and the
10 carpet...

11 COURT REPORTER: I'm sorry.

12 MR. OSTROM: Our position was that
13 Ms. Goldberg's actions with the trust -- the trust action
14 was merely a removal action, vis-a-vis the trustees.
15 Presently that action is still pending, but as this Court
16 pointed out, we don't believe there's any funds in the
17 trust.

18 THE COURT: Okay. Well, I'm going to grant
19 the motion to quash.

20 MS. GOLDBERG: Thank you.

21 THE COURT: No more -- you don't have to
22 respond to the subpoena duces tecum.

23 MS. GOLDBERG: Thank you, Your Honor.

24 THE COURT: Anything else?

25 MR. LEMUS: Your Honor, just for

1 clarification, are we allowed to subpoena Ms. Goldberg
2 under the estate?

3 THE COURT: Well, the estate is closed.

4 MR. LEMUS: I'm sorry. The probate estate,
5 I believe, was just given a new number because it was
6 transferred.

7 THE COURT: You filed it. You filed it.
8 Your client filed the probate in Brazoria County, and I
9 don't have any jurisdiction in Brazoria County. You filed
10 a will for probate in Brazoria County. This is Harris
11 County.

12 MR. LEMUS: Your Honor --

13 THE COURT: So you go to Brazoria County.

14 MR. LEMUS: Your Honor, that cause of action
15 has been transferred to your Court.

16 MR. OSTROM: We think it has been
17 transferred. I haven't see the order yet --

18 THE COURT: I haven't --

19 MR. OSTROM: -- on that. But I think it --

20 MR. LEMUS: And I saw the cause number that
21 was just --

22 MR. OSTROM: We've submitted the paperwork.

23 THE COURT: Until there is somebody
24 appointed to handle that, there can't be any discovery.
25 But if it's a will probate, there's no basis to do any

1 discovery. You file the will for probate and it's
2 probated.

3 MR. LEMUS: I understand that, Your Honor.
4 I guess my question is: Are you saying, then, that the
5 Estate of Muriel L. Mintz has no claims against anyone?
6 Or are we allowed to --

7 THE COURT: It doesn't exist yet. It hasn't
8 been opened. You don't do discovery before there's an
9 executor appointed to hire a lawyer to file a lawsuit to
10 do discovery. If you want to do discovery, file a
11 lawsuit.

12 MR. LEMUS: I understand, Your Honor. That
13 was why we were trying to do it under the trust because
14 all these things are related. However, I understand your
15 ruling. I understand your ruling, Your Honor.

16 THE COURT: What --

17 MR. LEMUS: Yes, sir.

18 THE COURT: -- all the money is in
19 Ms. Latham's hands, 100 percent of the money is in
20 Ms. Latham's hands. If it's gone, it's gone; but I don't
21 have any jurisdiction over it.

22 MR. LEMUS: Yes, Your Honor.

23 THE COURT: It's just gone. And I don't
24 have any way to create money. If I would, I would pay
25 people to not to tear up the --

1 MS. ROBBINS: Be banging.

2 THE COURT: -- courthouse.

3 MR. LEMUS: I understand that, Your Honor.

4 MS. KELLY: Well, it's probably going to end
5 up in the estate. There's no money in the estate. There
6 is a \$10,000 life insurance policy payable to the estate.
7 And the company holding it and the gentleman in charge of
8 it has -- I've asked that it be put in the registry. I've
9 asked for different things. Ms. Schwager does not even
10 respond as to what her position is. There's no way
11 Ms. Latham is ever serving as personal representative of
12 this estate.

13 MR. LEMUS: Your Honor --

14 MS. KELLY: There's no way. And there's no
15 way Estelle is. There's probably no way my client is. So
16 what's probably going to happen is there's going to end up
17 being just a Rule 11 agreement that the life insurance
18 policy proceeds go to Ms. Goldberg for her fees or us for
19 our fees. I mean, there's simply nothing to do in the
20 estate.

21 MR. LEMUS: Your Honor, with regard to the
22 life insurance policy, I think the concern of the
23 insurance company is that if they do interplead the funds,
24 then those funds will be diminished with regard to their
25 attorney's fees. And so they would prefer that there's an

1 agreement between the parties, which we are happy to
2 discuss, and I have discussed with Jason tangentially.
3 Although, we haven't really gotten into the meat of it.

4 THE COURT: You can do that without my help.

5 MR. LEMUS: We don't need your help on that,
6 Your Honor.

7 THE COURT: I wouldn't talk much about a
8 \$10,000 dollar insurance policy.

9 MR. OSTROM: No.

10 MR. LEMUS: There's not much to talk about,
11 Your Honor. I agree.

12 THE COURT: If you talk about it very long,
13 it will be gone.

14 MR. LEMUS: Yes, sir.

15 THE COURT: See y'all.

16 MR. LEMUS: Thank you, Your Honor.

17 MS. GOLDBERG: Thank you.

18 (End of proceedings.)
19
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25

1 THE STATE OF TEXAS)

2 COUNTY OF HARRIS)

3 I, TINA K. WHITE, Official Court Reporter in
 4 and for Probate Court No. 2 of Harris County, State of
 5 Texas, do hereby certify that the above and foregoing
 6 contains a true and correct transcription of all portions
 7 of evidence and other proceedings requested in writing by
 8 counsel for the parties to be included in this volume of
 9 the Reporter's Record, in the above-styled and numbered
 10 cause, all of which occurred in open court or in chambers
 11 and were reported by me.

12 I further certify that this Reporter's Record
 13 of the proceedings truly and correctly reflects the
 14 exhibits, if any, admitted, tendered in an offer of proof
 15 or offered into evidence.

16 I further certify that the total cost for the
 17 preparation of this Reporter's Record is \$_____ and
 18 was paid by _____.

19 WITNESSED MY OFFICIAL HAND this the 26th day
 20 of July, 2018.

21
 22 /s/ Tina K. White
 Tina K. White, CSR, RPR
 Official Court Reporter
 Probate Court No. 2
 Certificate No. 5488
 Expires: December 31, 2018
 201 Caroline, Suite 680
 Houston, TX 77002
 832-927-1440

Tina K. White, CSR, RPR
 832-927-1449

Official Court Reporter - Probate Court No. 2

APPENDIX 10

NO. 456,059

GUARDIANSHIP OF	§	IN THE PROBATE COURT
	§	
MURIEL LUBA MINTZ,	§	NUMBER TWO (2) OF
	§	
AN INCAPACITATED PERSON	§	HARRIS COUNTY, TEXAS

**MOTION FOR SANCTIONS AGAINST BARBARA LATHAM, ESTELLE NELSON
AND CANDICE SCHWAGER
and ALTERNATIVE APPLICATION FOR REIMBURSEMENT OF ATTORNEY'S
FEES CHARGED TO GUARDIAN BY BONDING CO.**

MICHELE K. GOLDBERG ("Movant") files this Motion For Sanctions Against Barbara Latham ("Latham"), Estelle Nelson ("Nelson") and Candice Schwager ("Schwager"), collectively "Respondents", under Rule 13 of the Texas Rules of Civil Procedure and Texas Civil Practice and Remedies Code §§9.011-10.006, and alternatively, Application for Reimbursement of Attorney's Fees Charged to Guardian by Bonding Co.

I.

Movant was appointed Temporary Guardian Pending Contest in the Guardianship of the Person and Estate of MURIEL LUBA MINTZ, An Incapacitated Person ("Ward"), by Order of this Court on September 19, 2017, and qualified to act as such in accordance with the laws of the state of Texas on September 25, 2017. Movant has served in such capacity continuously since that time. The Ward passed away on December 24, 2017. Movant is the process of closing out the Guardianship of the Estate of the Ward. As one of MANY various pleadings and attacks on Movant, Respondents circumvented procedural remedies and filed a claim on Movant's bond, by going directly to the bonding agent. The bonding agent, surety, and their counsel investigated and responded to Schwager that the claim was unfounded. However, their necessary investigation of the claim resulted in direct out-of-pocket expenses charged to Movant by the

Bonding Surety in the amount of \$3,548.40. Movant requests this Court to issue Sanctions against Respondents jointly and severally in the amount of \$3,548.40, plus statutory interest from the date she paid it on May 8, 2018, and attorneys' fees related to this Motion.

II.

The purpose of sanctions is to secure the parties' compliance with the rules, punish those that violate the rules, and deter other litigants from violating the rules. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844,849 (Tex. 1992). This Court has statutory authority to impose sanctions against Latham, Nelson, and Schwager under Texas Civil Practice and Remedies Code (TCP) §§ 10.001-10.004, and further under Texas Rule of Civil Procedure (TRCP) 13. Moreover, the Court has inherent power to impose sanctions as it sees fit and just for abuses of the judicial process not covered by rule or statute. *Ezeoke v. Tracy*, 349 S.W.3d 679, 685 (Tex.App.—Houston [14th Dist.] 2011, no pet). Respondents, primarily Latham and Schwager, have filed and published MANY heinous and completely unfounded pleadings, affidavits, and public media postings regarding Movant accusing her of everything from neglect to outright murder to literal theft of the Ward's deceased body. Further, many of these pleadings and postings include crass and utterly bigoted references to Movant's religion and financial status. One of the most egregious examples of their utterly groundless and relentless effort to harass, humiliate, and financially crucify Movant is the correspondence sent from Ms. Schwager, on behalf of Latham and Nelson, to the Compton Insurance Agency, a true and correct copy of which is attached hereto as Exhibit "A". Under TCP §10.001, anything signed by an attorney or party in a case constitutes a certificate that to that person's best knowledge, information, and belief, formed after reasonable inquiry, the document is not being presented for any improper purpose, **including to harass or to cause unnecessary delay or needless increase**

in the cost of litigation; that each claim, defense, or other legal contention in the document is warranted by existing law; and that every allegation or factual contention has evidentiary support. Likewise, TRCP 13 provides that “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.” Further, the Court is specifically authorized to impose sanctions against both attorneys and individual parties for submitting documents such as Exhibit “A” (and its supporting documents, which are an array of rambling, inaccurate, accusatory and inflammatory ‘affidavits’ submitted by Respondents in the multiple various cases instigated by Respondents related to the Ward), pursuant to TCPRC §10.004. Sanctions may be imposed in the form of directives, an order to pay a penalty to the Court, an order to pay the other party reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorneys’ fees.

III.

The Ward’s daughters, BARBARA LATHAM (“Latham”), ESTELLE NELSON (“NELSON”) and their attorney, CANDICE SCHWAGER (“Schwager”), attempted to make a claim on Movant’s Bond as Guardian, which is underwritten by SureTec Insurance Company, by contacting the Bonding Agent, HIGDON COMPTON AGENCY, directly. The claim which they presented to the bonding agent, including the many attachments, is attached hereto as Exhibit “A”. Respondents exhibited blatant disregard for legal procedures by attempting to file a claim directly with SureTec. The proper remedy to make a claim on a Fiduciary Bond is to file a Surcharge Action in the Probate Court, for breaches of Fiduciary duties to the Ward. No such

action was ever investigated by Latham, Nelson or Schwager, and no legal action was filed. Instead, they attempted to circumvent established legal procedures for making a claim through the province and supervision of this Court, and to therefore seek relief against Movant without any basis in law or fact, or due process of law. This constitutes blatant abuse of judicial process. Further, the bonding company's investigation concluded that there was no basis in the Respondents' claims against Movant. See correspondence sent from the bonding company's attorneys to Schwager, attached hereto as Exhibit "B".

Movant therefore respectfully again requests this Court to issue Sanctions against Respondents jointly and severally in the amount of \$3,548.40, plus statutory interest from the date she paid it on May 8, 2018, and attorneys' fees related to this Motion.

IV.

In the alternative, should the Court decline to impose Sanctions against Respondents for Movant's expenses related to this "claim", Movant seeks authority from the Court for reimbursement from the Ward's estate in the amount of \$3,548.40. Attached hereto as Exhibit "C" is correspondence from Movant remitting payment to SureTec, via their counsel, for their investigation of the "claim. Movant was appointed as Temporary Guardian Pending Contest by this Court. She did not apply for that position. She served in such capacity and fulfilled her duties properly and respectfully throughout the remainder of the Ward's life. Movant submits that she is entitled to be reimbursed for expenses incurred by her personally as a direct and unnecessary result of Respondents' harassment and unfounded claims.

As a practical matter, however, Movant has become aware recently that Latham closed out Ward's accounts and received almost all of the Ward's remaining assets shortly after the Ward's death (raising its own and separate questions regarding Respondents' tortious and illicit

behavior). Please see correspondence from TDECU attached hereto as Exhibit "D". Therefore, Movant again urges the Court to order Respondents to pay these fees to Movant as sanctions.

WHEREFORE PREMISES CONSIDERED, Movant prays this Court to Order Sanctions against Respondents, BARBARA LATHAM, ESTELLE NELSON, AND CANDICE SCHWAGER, specifically ordering them, jointly and severally, to pay directly to Movant Michele K. Goldberg, by a date certain, the amount of \$3,548.40, plus statutory interest accruing from May 8, 2018, and reasonable attorneys fees attributable to this Motion; or alternatively to enter an Order authorizing Movant Michele K. Goldberg to be reimbursed in the amount of \$3,548.40 to be paid from funds belonging to the Estate of MURIEL LUBA MINTZ, an Incapacitated Person.

Respectfully submitted,

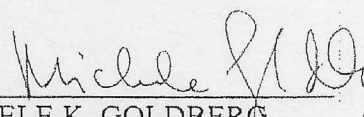


MICHELE K. GOLDBERG
TBC # 00793819
6750 West Loop South, Suite 615
Bellaire, Texas 77401
Tel: 713-218-8800
Fax: 713-839-0142
lawmkg@sbcglobal.net

TEMPORARY GUARDIAN PENDING CONTEST

CERTIFICATE OF SERVICE

I hereby certify that the foregoing notice was served to all parties and counsel of record according to the Texas Rules of Civil Procedure on this the 17th day of May, 2018.



MICHELE K. GOLDBERG

APPENDIX 16



STAN STANART
COUNTY CLERK, HARRIS COUNTY, TEXAS
PROBATE COURTS DEPARTMENT

County Probate Court No. 2

PERSONAL CITATION

The State of Texas { Docket No. 456059 Receipt No. PB-2017-51302 05-17 \$75
County of Harris { In the Estate of: Muriel Luba Mintz, Incapacitated

To: Muriel Luba Mintz, 12808 W. Airport, Suite 255C, Sugar Land, Texas 77478.

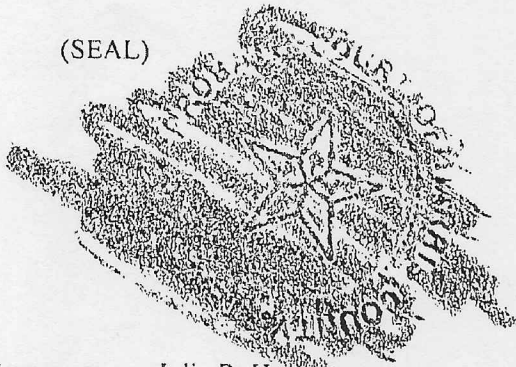
RETURNED
UNSERVED

Greetings:

You are hereby commanded to appear by filing a written contest or answer on said Answer of Attorney Ad Litem in Guardianship Proceeding, filed May 11, 2017, Application for Appointment of Permanent Guardian of the Person and Estate, filed March 8, 2017, & Motion for Independent Medical Examination, filed March 8, 2017 hereto attached before the Honorable County Probate Court No. 2, of Harris County, Texas, on or before 10 o'clock a.m. of the Monday next after the expiration of 10 days after the date of service hereof.

Issued and given under my hand of said court, at Houston, Texas, on this the 18th day of May, 2017.

(SEAL)



Stan Stanart, County Clerk
County Probate Court No. 2
201 Caroline, Room 800
Harris County, Texas

Allen Hurley
Deputy County Clerk

Attorney: Julia R. Hayes
1235 North Loop West, Suite 907
Houston, Texas 77008
713-863-8891

RETURN TO COURT
FOR OUT OF COUNTY
SERVICE

FILED
2017 JUN -8 AM 9:05
Stan Stanart
COUNTY CLERK
HARRIS COUNTY, TEXAS

P.O. Box 1525 • Houston, TX 77251-1525 • (713) 274-8585

www.cclerk.hctx.net

THE STATE OF TEXAS
COUNTY OF _____

OFFICER'S RETURN

PERSONALLY APPEARED before me, the undersigned authority, _____

(Name of Serving Officer) _____, who being by me duly sworn, deposes and says that in

the County of _____, State of Texas, on _____ day of _____,

came to hand a true copy of the Citation, together with the _____ was delivered to the person directed to be served at the following time(s) and place(s), to-wit:

NAME	DATE			TIME		PLACE
	Month	Day	Year	Hour	Min.	

Constable _____ Sheriff _____ County, Texas

Sworn to and subscribed before me, this _____ day of _____

(SEAL)

Fees for Serving: \$ _____ (Give name and official capacity such as Notary Public) _____

OFFICER'S RETURN

Came to hand on _____, at _____ o'clock _____ M. and executed on _____, at _____ o'clock _____ M. by causing a true copy hereof to be published one time at least 10 days before the return day hereof in the _____, a newspaper published at _____, in Harris County, Texas. This return is accompanied by the affidavit of the publisher of said newspaper as required by law.

Sheriff-Constable, Harris County, Texas

Fee: \$ _____ By _____ Deputy

OFFICER'S RETURN

Came to hand on _____, at _____ o'clock _____ M. and executed on _____, at _____ o'clock _____ M. by posting a true copy of the above Citation for ten days, exclusive of the day of posting, before the return day thereof, at the Courthouse door, of County of Harris, State of Texas, to-wit: _____, thru _____.

Sheriff-Constable, Harris County, Texas

Fee: \$ _____ By _____ Deputy

APPENDIX 16



STAN STANART
COUNTY CLERK, HARRIS COUNTY, TEXAS
PROBATE COURTS DEPARTMENT

J06716835

County Probate Court No. 2

PERSONAL CITATION

RETURNED
SERVED

The State of Texas

{ Docket No. 456059

Receipt No. PB-2017-52161 05-22 \$75

County of Harris

{ In the Estate of: Muriel Luba Mintz, Incap.

To: Muriel Luba Mintz, 12808 W. Airport. Ste. 255C, Sugar Land, Texas 77478, or other location.

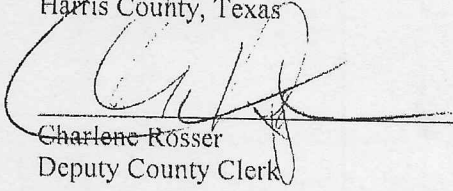
Greetings:

You are hereby commanded to appear by filing a written contest or answer on said **Application for Appointment of Permanent Guardian of the Person and Estate** filed March 8, 2017; **Motion for Independent Medical Examination** filed March 8, 2017 & **Answer of Attorney ad Litem in Guardianship Proceeding** filed May 11, 2017 hereto attached before the Honorable County Probate Court No. 2, of Harris County, Texas, on or before 10 o'clock a.m. of the Monday next after the expiration of 10 days after the date of service hereof.

Issued and given under my hand of said court, at Houston, Texas, on this the 22nd day of May, 2017.

(SEAL)

Stan Stanart, County Clerk
County Probate Court No. 2
201 Caroline, Room 800
Harris County, Texas


Charlene Rösser
Deputy County Clerk

ATTORNEY: Jason Ostrom
6363 Woodway, Ste. 300
Houston, TX 77057
713-863-8891

FILED
MAY 25 PM 1:03
Stan Stanart
COUNTY CLERK
HARRIS COUNTY TEXAS

P.O. Box 1525 • Houston, TX 77251-1525 • (713) 274-8585

www.cclerk.hctx.net

THE STATE OF TEXAS §
COUNTY OF _____ §

OFFICER'S RETURN

PERSONALLY APPEARED before me, the undersigned authority, _____

(Name of Serving Officer) _____, who being by me duly sworn, deposes and says that in

the County of _____, State of Texas, on day of _____,

came to hand a true copy of the Citation, together with the _____, was delivered to the person directed to be served at the following time(s) and place(s), to-wit:

NAME	DATE			TIME		PLACE
	Month	Day	Year	Hour	Min.	

Constable _____ Sheriff _____ County, Texas

Sworn to and subscribed before me, this _____ day of _____.

(SEAL)

Fees for Serving: \$ _____

(Give name and official capacity such as Notary Public) _____

OFFICER'S RETURN

Came to hand on _____, at _____ o'clock _____ M. and

executed on _____, at _____ o'clock _____ M. by

causing a true copy hereof to be published one time at least 10 days before the return day hereof in the _____

County, _____, a newspaper published at _____, in Harris

Texas. This return is accompanied by the affidavit of the publisher of said newspaper as required by law.

Sheriff-Constable, Harris County, Texas

Fee: \$ _____

By _____ Deputy

OFFICER'S RETURN

Came to hand on _____, at _____ o'clock _____ M. and

executed on _____, at _____ o'clock _____ M. by posting a true copy of the above Citation for ten days, exclusive of the day of posting, before the return day thereof, at the Courthouse door, of County of Harris, State of Texas, to-wit:

_____ thru _____

Sheriff-Constable, Harris County, Texas

Fee: \$ _____

By _____ Deputy

Constable Return Of Individual

Cause #: 456059

Tracking #: J06716835

In the case of THE STATE OF TEXAS VS IN THE ESTATE OF: MURIEL LUBA MINTZ.
INCAPACITATED a CITATION and attached APPLICATION FOR APPOINTMENT OF PERMANENT
GUARDIAN OF THE PERSON AND ESTATE was issued by the Probate Court No. 2 court of Harris
County, TX and came to hand on the 23 day of May, 2017 at 8:16AM to be delivered at 201
CAROLINE ST, HOUSTON, Tx 77002 by delivering to: MURIEL LUBA MINTZ

Service of Individual

Executed in Harris County County, Texas by delivering to each of the within name defendant(s) by
PERSONAL SERVICE; a true copy of this CITATION together with the accompanying copy of the
APPLICATION FOR APPOINTMENT OF PERMANENT GUARDIAN OF THE PERSON AND
ESTATE, at the following times and places:

Name	Date	Time	Full Address of Service
MURIEL LUBA MINTZ	5/23/2017	9:10AM	201 CAROLINE ST HOUSTON Tx 77002

Fee \$ 0.00 ~~7.00~~

by Deputy Oliver Davis
Printed

Deputy Signature Oliver Davis

Attempts: 2

Alan Rosen, Constable Precinct #1
Harris County Texas

1302 Preston, 3rd Floor Houston Texas 77002

PITRE

LAW GROUP

8303 SW Freeway, Ste. 110
Houston, TX 77074

Teresa K. Pitre
281-972-9676

APPENDIX 19

Cause No. 456,059

IN THE GUARDIANSHIP OF	§	IN THE PROBATE COURT
MURIEL LUBA MINTZ,	§	NUMBER TWO (2) OF
AN INCAPACITATED PERSON	§	HARRIS COUNTY, TEXAS

APPLICATION FOR APPOINTMENT OF
THIRD-PARTY GUARDIAN OF THE PERSON AND ESTATE

TO THE HONORABLE JUDGE OF SAID COURT: 2 Per by IN

NOW COMES, Donald M. Mintz, ("Applicant"), and makes and files this Application for Appointment of a Third-Party Guardian of the Person and Estate of Muriel Luba Mintz, an incapacitated person, ("Proposed Ward") pursuant to Section 1101.001 of the Texas Estates Code, and would respectfully show the Court the following:

I.

That Proposed Ward is a female who is 92 years old, having been born on September 5, 1924. The Proposed Ward currently resides at Clarewood House located at 7400 Clarewood Drive #518, Houston, Harris County, Texas 77036. The Proposed Ward is not currently under a guardianship.

Barbara Latham, whose address is 1022 Northwick Drive, Pearland, Brazoria County, Texas 77584, holds a Statutory Durable Power of Attorney signed by the Proposed Ward.

II.

The names, addresses, and relationships to the Proposed Ward of those relatives required to be listed in this Application by Section 1101.001(11) of the Texas Estates Code, to the best of the Applicant's knowledge are as follows:

Name: Donald M. Mintz
Address: 3519 Yupon St.
Houston, TX 77006
Relationship to Proposed Ward: Son

Name: Barbara Latham
Address: 1022 Northwick Dr.
Pearland, TX 77584
Relationship to Proposed Ward: Daughter

Name: Estelle Claire Mintz Nelson
Address: 1333 Eldridge Pkwy, #816
Houston, TX 77077
Relationship to Proposed Ward: Daughter

Name: Patrick Pfeifer
Address: 7400 Clarewood Dr.
Houston, TX 77036
Relationship to Proposed Ward: Executive Director of Clarewood House

III.

Applicant is the son of the Proposed Ward and his address is 3519 Yupon St., Houston, Harris County, Texas 77006. Applicant desires to have a third party appointed Guardian of the Person and Estate of Proposed Ward which Estate is valued over \$10,000.00, including any compensation, pension, insurance, or allowance to which the Proposed Ward may be entitled. Applicant's interest in the appointment of a third-party guardian is as a relative of the Proposed Ward.

IV.

This Court has venue over these proceedings because Muriel Tuba Mintz resides in this county.

V.

Proposed Ward is an adult, and is incapacitated because of a mental condition. The nature of her incapacity is a major neurocognitive disorder, the degree of her incapacity is total, and the severity of her incapacity is the Proposed Ward is able to assist in her activities of daily

APPENDIX 11

CAUSE NO. 456059

IN THE GUARDIANSHIP OF § IN THE PROBATE COURT OF
MURIEL MINTZ, DEC. § HARRIS COUNTY TEXAS
§ PROBATE COURT NO. 2

**RESPONSE TO MOTION FOR SANCTIONS
OR REIMBURSEMENT OF MICHELE GOLDBERG**

COMES NOW, CANDICE SCHWAGER, and BARBARA LATHAM, WITH ESTELLE NELSON filing a special appearance only pursuant to TRCO 120a. SCHWAGER AND LATHAM file the substantive response to this misplaced, unethical, attempt to coerce, intimidate, and retaliate against LATHAM AND SCHWAGER'S protected speech advocating for the disabled and mandatory notice to her bonding company to maintain their claim once litigation ends. Schwager files a special appearance for ESTELLE NELSON for purposes of answering GOLDBERG'S per se frivolous, harassing, MOTION FOR SANCTIONS. ESTELLE has never been a party to the guardianship or trust cases, was not sued and has never entered an appearance. She has merely given complimentary notice of some proceedings. As such, she's not a proper party to this Motion, nor does this Court have personal jurisdiction over her to enter any order, notwithstanding the complete lack of jurisdiction to enter orders against SCHWAGER, LATHAM, OR anyone but perhaps MICHELE GOLDBERG for not complying with her statutory duty to account, given the plenary power of this Court expired January 23, 2018, one month after Muriel Mintz died.¹, (collectively "Plaintiffs" in Cause No. 4:17; Latham vs. Wood, Goldberg, et al; currently appealed to the 5th Circuit court of appeals).

¹ ESTELLE NELSON is not filing an appearance in this case. Schwager is merely defending the rights of her client in a federal case. Nelson files this special exception to the jurisdiction of this court over her.

SPECIAL APPEARANCE

Pursuant to Texas Rule of Civil Procedure 120a, ESTELLE NELSON enters only a special appearance for purposes of defending herself against MICHELE GOLDBERG'S vexatious attempts to wrongfully take her inheritance through tortious interference and breach of fiduciary duty via these sanctions. Only to the extent necessary to protect her interests, Candice Schwager files this special appearance, as she represents ESTELLE in a federal proceeding regarding MURIEL MINTZ' death. As such, on her clients' behalf, SCHWAGER objects to the court attempting to take jurisdiction over NELSON at all. TRCP 120a. She reserves her right to dispute jurisdiction over her person or the subject matter in any proceeding as well as this one.

SUBJECT TO SPECIAL APPEARANCE

MICHELE GOLDBERG'S MOTION FOR SANCTIONS AGAINST ESTELLE NELSON, BARBARA LATHAM AND CANDICE SCHWAGER must be denied for the following reasons: (1) this court has lost plenary power to issue any orders or entertain any substantive motions in this case² and may only approve the accounting MICHELE GOLDBERG refuses to produce to date after ordered by the court, (2) This Court has no jurisdiction over ESTELLE NELSON, who was neither sued nor has appeared in this court, other than as an observer, (3) This Court has no jurisdiction to decide whether the Federal case filed against Goldberg for wrongful death was frivolous and the case is on appeal; (4) Goldberg seeks this Court's cooperation in violating 42 U.S.C. 12203 (prohibited intimidation, retaliation and coercion under the ADA), (5) Goldberg is seeking to violating Plaintiffs' civil rights under 18 U.S.C. 241,

² Plaintiff contend that the Court never acquired jurisdiction in this guardianship case because Muriel Mintz was never served with process by a constable as the law mandates. To the extent it ever acquired jurisdiction, it ended no later than December 24, 2017 when Muriel died.

242, to weaponize this court against Plaintiffs and violate their right to free speech under Art. I Sec 8 of the Texas Constitution and the First Amendment, (6) Neither Latham, Nelson nor Schwager have violated Rules 9, 13, or 10, as falsely pled by Goldberg, (7) This court has no jurisdiction over a "letter" sent to Goldberg's bond company, a prerequisite to recovering on her bond for harm to Muriel Mintz, deceased and/or her estate (8) Chapter 9 doesn't apply because this case is purportedly guardianship, not personal injury or defamation, which are in the jurisdiction of the federal courts, (9) The required nexus is missing; (10) Inherent power should almost never be used, (11) Goldberg is not entitled to relief where she has unclean hands³; and (12) Plaintiffs plead the Texas Anti-Slapp Act & Texas Defamation Mitigation Act, along with the litigation privilege to Goldberg's false accusations on letters to her bond company and issues of public concern advocating for the...⁴In support of this Motion, Plaintiffs assert the following on their behalf and non-party, Estelle Nelson:

I. ARGUMENTS AND AUTHORITIES

(1) The court has lost plenary power to issue any orders or entertain any substantive motions in this case⁵ and may only approve the accounting MICHELE GOLDBERG refuses to produce to date after ordered by the court,

³ Goldberg's motion is the exact document which the Texas Rules of Professional Conduct, Texas Rules of Civil Procedure 10 and 13 deem sanctionable and subject to the Bar's discipline for vexatiously filing a frivolous "pleading" in a court of law with no jurisdiction to grant it, out of malice to harass and increase the costs of litigation and her bill.

⁴ Notably, Muriel Mintz, who did not attend Synagogue but was Jewish by descent, was Unitarian, though Candice Schwager's clients are Jewish. Goldberg falsely accuses Schwager and Latham, Jewish, of Anti-Semite statements while participating in euthanizing Muriel Mintz, deceased, on Christmas Eve and claiming Schwager and Latham are "financially crucifying her". That was clearly an attempt to demean Schwager and Latham's known Christian faith.

⁵ Plaintiff contend that the Court never acquired jurisdiction in this guardianship case because Muriel Mintz was never served with process by a constable as the law mandates. To the extent it ever acquired jurisdiction, it ended no later than December 24, 2017 when Muriel died.

To the extent a court of competent jurisdiction was formed in the guardianship, which is denied, it ended the moment of Muriel Mintz' death, with the court losing plenary power 30 days later to do anything but approve the non-existent accounting⁶. This Court should be sanctioning Michele Goldberg for violating the Estates Code in refusing the Judge's commands twice to produce an accounting. This means that this motion is per se frivolous, vexatious and harassing under Rules 10 and 13, for which Michele Goldberg deserves to be sanctioned and made to pay attorneys' fees and costs of Plaintiffs. A request is made for the same against GOLDBERG with sanctions under Rules 10 and 13. Tex. R. Civ. P. 10, 13, A court cannot issue an order imposing sanctions after its plenary power has expired. *Unifund CCR Partners v. Villa*, 299 S.W. 3d 92, 95 (Tex. 2009) (Chapter 10 sanctions); *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 n. 2 (Tex. 1996) (Rule 13 sanctions); *Law Offices of Robert D. Wilson v. Texas University-Frisco, Ltd.* 291 S.W.3d 110, 113 (Tex. App.–Dallas 2009, no pet.) (Rule 13 sanctions); *Sims v. Fitzpatrick*, 288 S.W.3d 93, 105-06 (Tex. App.–Houston [1st Dist.] 2009, no pet.) (inherent power to sanction). If a motion for sanctions is pending when a final judgment is signed, the trial court has until its plenary power expires to grant sanctions. After that, the court loses jurisdiction to grant sanctions. *Mantri v. Bergman*, 153 S.W.3d 715, 718 (Tex. App.–Dallas 2005, pet. denied).

(2) This Court has no jurisdiction over ESTELLE NELSON, who was neither sued nor has appeared in this court, other than an observer

It is axiomatic that a Court may not issue any order over a person whom it holds no personal or subject matter jurisdiction over. *International Shoe Corp*, 326 U.S. 310 (1945). ESTELLE NELSON has never appeared in this case, as anything other than an observer, if even

⁶ Plaintiff contend that the Court never acquired jurisdiction in this guardianship case because Muriel Mintz was never served with process by a constable as the law mandates. To the extent it ever acquired jurisdiction, it ended no later than December 24, 2017 when Muriel died.

that. She was not sued by Donald Mintz and never entered an appearance. As such, the Court lacks personal jurisdiction over her to enter any order concerning Nelson. This means Goldberg's motion is frivolous as a matter of law, sanctionable, and meant to intimidate, extort, harass and coerce, in violation of federal and State law.

(3) This Court has no jurisdiction to decide whether the Federal case filed against Goldberg was frivolous and the case is on appeal.

The gist of Goldberg's frivolous motion violating Rules 10, 13 and the Bar ethics rules, as well as federal and state law, is she is requesting for this Court to pass judgment on the merits of a federal case within the jurisdiction of the 5th Circuit court of appeals that remains pending. It is highly improper for Goldberg to come into this Court and ask for sanctions or reimbursement with no statutory authority, twisting Rules 9 and 13 in ways they were never intended, to sanction Plaintiffs in a federal case that this court lacks jurisdiction to rule upon. The Texas Constitution prohibits this Court from issuing any such ruling under Article 5, Section 11, which states:

No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Appeals, or any member of any of those courts shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

Tex. Const. Art. 5, Sec. 11. Given the Texas Estates Code renders this Court liable for any dereliction of duty of Michele Goldberg, the Court would be making a ruling upon which the Court has an interest on the Court's bond enunciated under Tex. Est. Code. 1201.003. Section 1201.001 and 1201.003 provides:

Sec. 1201.001. DETERMINING GUARDIAN'S PERFORMANCE OF DUTIES. The court shall use reasonable diligence to determine whether a guardian is performing all of the duties required of the guardian that relate to the guardian's ward.

Sec. 1201.003. JUDGE'S LIABILITY. A judge is liable on the judge's bond to those damaged if damage or loss results to a guardianship or ward because of the gross neglect of the judge to use reasonable diligence in the performance of the judge's duty under this subchapter.

Michele Goldberg is attempting to have the Court exonerate her from liability by making a declaration that the claims were frivolous but the claims are inextricably intertwined with issues which would make the judge assess the Court's interests in the case. This is prohibited by the Texas Constitution Article 5, Section 11 and the Court is disqualified from providing such an opinion. It would necessarily be void. The proper venue for Michele Goldberg to make such a claim is federal court and it's not been asserted there. Only Judge Gilmore has the authority to entertain such a motion, which has curiously not been filed in Federal Court. Given the matter is on appeal due to contrary ruling on the Chief Justice, Hon. Lee Rosenthal in Cause No. 4:16:03125: *Johnston vs. Dexel*, the courts have divergent opinions and the matter clearly isn't frivolous. Goldberg has already deceived the Court into believing she ordered the medical records of Muriel Mintz, deceased, when she was purportedly appointed in September of 2017, the day after Stacy Kelly swore by affidavit that Muriel Mintz, deceased, was never served by constable as required by law.⁷

(4) Goldberg seeks this Court's cooperation in violating 42 U.S.C. 12203 (prohibited intimidation, retaliation and coercion under the ADA)

⁷ Notably, Kelly deceived Judge Gilmore in telling her that "officer" for purposes of serving a potential ward with citation under the Texas Estates Code included private process servers, yet she told this Honorable Judge that she had a problem because Harris County constables would not serve in Brazoria County, in response to the Court repeatedly telling Kelly she was not complying with the Code in seeking to serve Muriel Mintz.

MICHELE GOLBERG is outrageously trying to impose liability against the County by asking this Court to knowingly retaliate against Schwager, Latham and Nelson for suing her while they were advocating for the rights of a "qualified individual with a disability" under 42 U.S.C. 12203.

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to subchapter I, subchapter II and subchapter III, respectively.

42 U.S.C. 12203. (Anti-coercion, intimidation and retaliation provision of ADA). The County's liability for violating the ADA is based upon respondeat superior, which is why Goldberg seeks for this Honorable Judge to weaponize this court against Plaintiffs for exercising their right to seek redress in the courts, win or lose.

(5) Goldberg is seeking to violate Plaintiffs' civil rights under 18 USC 241, 242 to weaponize this Court against Plaintiffs

Goldberg is asking the judge to weaponize this court to retaliate against Plaintiffs and violate their right to free speech under Art. I Sec 8 of the Texas Constitution and the First Amendment to the U.S. Constitution. Section 18 U.S.C. 242 and 241, respectively provide:

18 U.S.C. 242:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different

punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. 241:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;

18 U.S.C. 241, 242.

Part of the complaints in Goldberg's frivolous harassing intimidating, coercive and retaliatory motion for sanctions and reimbursement from an estate that does not exist, given Muriel had only non-probate assets aside from \$10,000 life insurance policy she doesn't qualify to receive--seeks to virtually gag the Plaintiffs from talking about what she did to their mother, which they continue to assert is true. **This violates Article I, Section 8 of the Texas Constitution and the 1st Amendment.** *See Anti-Slapp law and Anti-Slapp motion.* If she wanted to make such a claim, she should have pursued it in the proper forum, not this one. Much like she seeks reimbursement for medical records to answer federal subpoenas granted by Judge Gilmore to obtain medical records she never obtained while Muriel was still alive (as Schwager warned), but not until 1/31/18, long after Muriel's death--in this proceeding, rather than the federal proceeding where she has no right to them, she seeks sanctions and reimbursement not statutorily allowed in this court rather than

through Gilmore. But she should not be seeking to convince this court to violate federal law with her under color of State law. 18 U.S.C. 241, 242.

(6) Neither Latham, Schwager nor Nelson have violated Rules 9, 13, or 10, as falsely pled by Goldberg

RULE 13 SANCTIONS

The *signatures of attorneys or parties* constitute a certificate by them that they *have read* the pleading, motion, or other paper⁸; 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*. Attorneys or parties who shall bring a *fictitious suit* as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose or shall make statements in pleading which they *know to be groundless and false*, for the purpose of *securing a delay of the trial* of the cause, shall be held guilty of a *contempt*. If a pleading, motion or other paper is *signed* in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.

PRESUMPTION OF GOOD FAITH

In Texas, sanctions may not issue unless the **MOVANT** **overcomes the presumption of good faith** that the Plaintiffs enjoy. The presumption of good faith creates a rebuttable presumption that is subjective and objective, with both components required to be proven before it's overcome and it requires **PROOF, NOT MERE SUPPOSITION** that the party/attorney filed the objectionable **pleading or motion (not letter outside the entire jurisdiction of this court)**

⁸ IMPLIED IS THE FACT THAT THE PLEADING MOTION OR OTHER PAPER WAS FILED IN THE COURT, not mail sent to an outside party not in this case. It's Goldberg's burden to prove that the letter Schwager sent as a prerequisite to making a claim against her in any court can be sanctioned. She failed.

in bad faith with improper purpose, bad faith and malicious intent, to needlessly increase the costs of litigation, with "bad faith." *Falk & Mayfield L.L.P. v. Molzan*, 974 S.W.2d 821, 824 (Tex. App.--Hous. [14th Dist.] 1998, pet. denied). The letter did not needlessly increase the cost of any litigation because it wasn't even part of this case.

This **presumption of good faith**, mandates actual evidence--**proof of subjective and objective bad faith**, aside from the requirement that the sanction not be arbitrary or unreasonable. *Id.* Notably, negligence or even bad judgment, which is not admitted, is insufficient to sanction an attorney under either Rule 10 or 13. Both require proof of malicious intent, which is absent. 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. Key concepts to note about TRCP 13 are:

- attorneys and parties who sign
- pleading, motion, or other paper
- must read the instrument before signing
- to the best of their knowledge, information, and belief
- formed after reasonable inquiry
- not groundless and brought in bad faith
- not groundless and brought for the purpose of harassment
- fictitious suit as an experiment to get an opinion of the court
- make statements in pleading which they know to be groundless and false
- for the purpose of securing a delay of the trial of the cause
- shall be held guilty of a contempt
- upon motion or upon its own initiative
- after notice and hearing
- shall impose an appropriate sanction
- available under Rule 215-2b
- upon the person who signed it, a represented party, or both
- presume good faith

- good cause
 - the particulars must be stated in the sanction order
 - "Groundless" means no basis in law or fact
 - Does not apply to the amount of requested damages, as the letter did outside of this case
- **Failure to Read.** Rule 13 requires the signing attorney or signing party to read the instrument before they sign it. *See Keever v. Finlan*, 988 S.W.2d 300, 313 (Tex. App.--Dallas 1999, pet. denied) (failure to read affidavit before signing it was sanctionable).
 - **Pleadings, Motions, Papers.** Rule 13 applies only to pleadings, documents and other papers. *See Tarrant Restoration v. TX Arlington Oaks Apts., Ltd.*, 225 S.W.3d 721, 733 (Tex. App.--Dallas 2007, pet. dismiss'd w.o.j.). *Accord, Skelley v. Hayden*, 2001 WL 856610, *2 (Tex. App.--Dallas 2001, no pet.) (unpublished) (Rule 13 and Tex. Civ. Prac. & Rem. Code ch. 10 apply only to documents filed with a court).
 - **Knowledge vs. Information vs. Belief.** The first sentence of Rule 13 involves the signer's "knowledge, information, and belief." There is a difference between *knowing* something, and *having information* about something, and *believing* something. A requirement of knowledge also appears in the second sentence of Rule 13, regarding making a statement in a pleading that the signer *knows* to be groundless and false. *This calls for a subjective assessment of what the signer knows at the time of signing. For the second sentence of Rule 13 to be triggered, it is necessary to show: (1) that a statement in a pleading is groundless or false, (ii) that the signer knew that the statement was groundless and false; that the signer knowingly made the groundless and false assertion for the purpose of securing a delay of the trial.*
 - **Reasonable Inquiry.** "Reasonable inquiry means the amount of examination that is reasonable under the circumstances of the case." *Monroe v. Grider*, 884 S.W.2d 811, 817 (Tex. App.—Dallas 1994, writ denied); *accord, Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 896 (Tex.

App.-- Houston [14th Dist.] 2002, no pet.). Note that the inquiry is into both the *legal* and *factual* basis for the claim. See *Lake Travis Independent School Dist. v. Lovelace*, 243 S.W.3d 244, 254 (Tex. App.--Austin 2007, no pet.).

- **What Constitutes Groundless.** “Groundless” is defined in Rule 13 as having “no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.” Courts are divided on whether the ruling on the merits of a claim is the measure for groundless. The Austin Court of Appeals has said: “*A trial court may not base rule 13 sanctions on the legal merit of a pleading or motion. Merely filing a motion or pleading that the trial court denies does not entitle the opposing party to rule 13 sanctions.*” *Lake Travis Independent School Dist. v. Lovelace*, 243 S.W.3d 244, 254 (Tex. App.--Austin 2007, no pet.); accord, *D Design Holdings, L.P. v. MMP Corp.*, 339 S.W.3d 195, 204 (Tex. App.--Dallas 2011, no pet.) (“**Filing a motion or pleading that the trial court denies does not entitle the opposing party to rule 13 sanctions**”). In *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 900 (Tex. App.--Houston [14th Dist.] 2002, no pet.), the court said: “judges should consider the complexity of the claim and underlying statute.”

- **Reasonable Inquiry vs. Groundless.** “To determine if a pleading was groundless, the trial court uses an objective standard: did the party and counsel make a reasonable inquiry into the legal and factual basis of the claim?” *In re United Servs. Auto. Ass’n*, 76 S.W.3d 112, 116 (Tex. App.--San Antonio 2002, orig. proceeding); accord, *Lake Travis Independent School Dist. v. Lovelace*, 243 S.W.3d 244, 254 (Tex. App.--Austin 2007, no pet.), *Great Western Drilling, Ltd. v. Alexander*, 305 S.W.3d 688, 698 (Tex. App.--Eastland 2009, no pet.). Whether an instrument was groundless involves a determination of whether an instrument had no basis in law or fact, which is a different question from reasonable inquiry. However, **a sanction cannot be imposed**

unless a pleading is both groundless and there was no reasonable inquiry.

- **Brought in Bad Faith.** “A party cannot obtain rule 13 sanctions unless the party proves that the claims are groundless and that the opposing party brought the claim in bad faith or to harass the party.” *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 896 (Tex. App.—Houston [14 Dist.] 2000, no pet.). “Because Peltier failed to establish bad faith or harassment as a motive for filing the petition, **Rule 13 sanctions would not be warranted even if Dike's petition was groundless.**” *Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179, 191 (Tex. App.—Texarkana 2011, no pet.). “Bad faith’ is not simply bad judgment or negligence but means the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose.” *Campos v. Ysleta Gen. Hosp., Inc.*, 879 S.W.2d 67, 71 (Tex. App.—El Paso 1994, writ denied).

- **Subjective Test for Bad Faith.** Courts have discussed the subjective component of the grounds for Rule 13 sanctions. Several cases say that sanctions for frivolous pleadings require **proof of the offender’s state of mind.** *R.M. Dudley Const. Co., Inc. v. Dawson*, 258 S.W.3d 694, 710 (Tex. App.—Waco 2008, pet. denied) (“The party moving for sanctions must prove the pleading party's subjective state of mind”); *Estate of Davis v. Cook*, 9 S.W.3d 288, 298 (Tex. App.—San Antonio 1999, no pet.) (“a party must demonstrate that the claim was motivated by a malicious or discriminatory purpose”).

RULE 10 SANCTIONS

Sec. 10.001. SIGNING OF PLEADINGS AND MOTIONS. The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

- i. the pleading or motion is not being presented for any improper purpose, including to harass or to

- cause unnecessary delay or needless increase in the cost of litigation;
- ii. each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- iii. each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- iv. each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

Within the context of sanctions, the following terms are defined:

- **Improper Purpose.** TCP&RC § 10.001 allows a sanction where a pleading is presented for any improper purpose. The Texarkana Court of Appeals has said: “We construe the phrase ‘improper purpose’ as the equivalent of ‘bad faith’ under Rule 13.” *Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179, 183-84 (Tex. App.--Texarkana 2011, no pet.).
- **Subjective State of Mind.** Some courts have said that “[t]he party moving for sanctions must prove the pleading party's subjective state of mind.” *Dawson*, 258 S.W.3d at 710 (involving Chapter 10 sanctions); compare with *Thielemann v. Kethan*, 2012 WL 159949, *6 (Tex. App.--Houston [1st Dist.] 2012, no pet.) (Rule 13). This idea needs to be explored. In *Low v. Henry*, 221 S.W.3d 609, 617 (Tex. 2007), the Supreme Court said, in a Chapter 10 sanction case, that the parties seeking sanctions against the plaintiff's lawyer were “not required to specifically show bad faith or malicious intent, just that Henry certified that he made a reasonable inquiry into all of the allegations when he did not and that he certified that all the allegations in the petition had evidentiary support or were likely to have evidentiary support.”

- **Lack of Reasonable Basis in Law.** TCP&RC
- § 10.001 allows a court to sanction for filing pleadings that lack a reasonable basis in law. *Unifund CCR Partners v. Villa*, 299 S.W. 3d 92, 97 (Tex. 2009). Section 10.001 provides that “each claim, defense, or other legal contention in the pleading or motion” must be “warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” Each claim asserted in the alternative must have a reasonable basis in fact and law. *Low v. Henry* 221 S.W.3d 609, 614 (Tex. 2007). The fact that a claim was reversed on appeal does not of itself indicate that the claim was not warranted.
- **Lack of Reasonable Basis in Fact.** TCP&RC § 10.001 allows a court to sanction for filing pleadings that lack a reasonable basis in fact. *Unifund CCR Partners v. Villa*, 299 S.W. 3d 92, 97 (Tex. 2009). The party seeking sanctions must show that a reasonable inquiry into the allegations in the pleading would have disclosed “that not all the allegations in its pleadings had or would likely have evidentiary support” and that the plaintiff “did not make a reasonable inquiry before filing suit.” *Unifund*, 299 S.W. 3d at 97. A party is not required to have evidence to support each factual allegation at the time the lawsuit is filed. *Low v. Henry*, 221 S.W.3d. 609, 622 (Tex. 2007).

(7) This court has no jurisdiction over a “letter” sent to Goldberg’s bond company, which is a prerequisite to filing a claim on her bond in federal court

Plaintiffs are not limited to surcharge against Goldberg and they may file an action on her bond for the wrongful death of Muriel Mintz, deceased, because she is not immune, as will be shown on appeal. The entire purpose of the bond is to protect against losses to the proposed ward and their families to the estate and person. Given Michele never ordered Muriel’s medical records until one month plus after her death (to defend herself, not protect Muriel, showing gross

negligence or worse--not disclosed to the court, who thought she had the records as indicated in the Court's 11/28/17 hearing transcript), she is liable on her bond because she has demonstrated there is a good faith basis to assert gross negligence. She also delegated her medical decision-making authority to a man Houston Hospice said has untreated mental health problems and financial problems, DONALD MINTZ. She cannot delegate a non-delegable duty and assumed one whether her appointment was legitimate or not. The chief justice of the Southern District held there is at best, limited immunity in a case that could mirror this one. *See Rosenthal's order in Johnston vs. Dexel, Cause No. 4:16: 03215 (2018)* (holding that the bond is the limit of liability and there is no immunity to that point). Judge Gilmore never ruled that Michele is immune and did not explain her ruling, but merely dismissed, so the basis of her decision was unclear. This is nevertheless not a matter for this court to decide, but the 5th Circuit.

(8) Chapter 9 doesn't apply because this case is purportedly guardianship, not personal injury or defamation, which are in the jurisdiction of the federal courts

"Chapter 9 only applies to actions in which a claimant seeks (1) damages for personal injury, property damage, or death, or (2) damages from any tortious conduct." *Armstrong v. Collin County Bail Bond Bd.*, 233 S.W.3d 57, 61 (Tex. App.--Dallas 2007, no pet.); accord, *Sprague v. Sprague*, 2012 WL 456936, *13 (Tex. App.--Houston [14 Dist.] 2012, pet. pending) (Chapter 9 of the Civil Practice and Remedies Code provides for sanctions in cases involving a tort claim or a claim for damages based upon personal injury, property damage, or death). The court-ordered sanction part of Chapter 9 does not apply to proceedings in which TCP&RC Chapter 10 or Tex. R. Civ. P. 13 apply. TRCP&RC § 9.012 (h); *Low v. Henry* 221 S.W.2d 609, 614 (Tex. 2007), which greatly limits the usefulness of Chapter 9 for court-ordered sanctions. Given this proceeding is neither, it's not relevant to this case. Chapter 9 doesn't apply and the Court has no jurisdiction to sanction under it.

APPENDIX 12

No. 456,059

IN THE GUARDIANSHIP OF	§	IN THE PROBATE COURT
MURIEL LUBA MINTZ,	§	
	§	NO. TWO (2)
AN INCAPACITATED PERSON	§	
	§	HARRIS COUNTY, TEXAS

ORDER APPROVING ATTORNEY'S FEES

On this day, the Court considered the foregoing MOTION FOR SANCTIONS AGAINST BARBARA LATHAM, ESTELLE NELSON AND CANDICE SCHWAGER and ALTERNATIVE APPLICATION FOR REIMBURSEMENT OF ATTORNEY'S FEES CHARGED TO GUARDIAN BY BONDING CO. and the Court finds that MICHELE K. GOLDBERG, Temporary Guardian Pending Contest of MURIEL LUBA MINTZ, An Incapacitated Person ("Ward"), is entitled to Sanctions against BARBARA LATHAM, ESTELLE NELSON, AND CANDICE SCHWAGER as stated in the Motion, and should be paid.

It is therefore ORDERED, ADJUDGED, AND DECREED that Respondents, BARBARA LATHAM, ESTELLE NELSON, AND CANDICE SCHWAGER are hereby ORDERED, JOINTLY AND SEVERALLY, to pay directly to MICHELE K. GOLDBERG, the amount of \$3,548.40 and reasonable attorneys' fees in amount of \$ _____, plus statutory interest on the total at the rate of _____% accruing from May 8, 2018, such payment to be delivered to MICHELE K. GOLDBERG at 6750 West Loop South, Suite 615, Bellaire, TX 77401, not later than _____, 2018. Failure to comply with this ORDER shall constitute contempt of this Court and will result in further sanctions and penalties against BARBARA LATHAM, ESTELLE NELSON, AND CANDICE SCHWAGER.

SIGNED this ____ day of _____, 2018.

JUDGE PRESIDING

SEND CONFORMED COPY TO:

Michele K. Goldberg

TBC# 00793819

6750 West Loop South, Suite 615

Bellaire, TX 77401

lawmkg@sbcglobal.net

LAW OFFICES OF CANDICE SCHWAGER

Tel: 832.315.8489
candiceschwager@icloud.com
<http://www.schwagerfirm.com>

Fax: 713.456.2453
1417 Ramada Drive
Houston, Texas 77062



December 25, 2017

Higdon Compton,
John H. Compton,
Higdon Oscar Compton, Jr.
SURETEC BOND COMPANY

RE: #3390760; Notice of federal civil rights and wrongful death lawsuit against Michele Goldberg for wrongful death / manslaughter in Case 456059; Guardianship of Muriel Luba Mintz, deceased (causing her death in 3 weeks through gross neglect and conscious indifference)

Dear Messrs. Compton:

This letter will serve as notice that BARBARA LATHAM AND ESTELLE NELSON demand the full limits of her bond from SURETEC for causing their elderly mother to die a horrific death of starvation, and gross neglect / conscious indifference THREE WEEKS AFTER MICHELE ASSUMED CUSTODY AND CONTROL OF THE DECEDENT, MURIAL MINTZ. Her death was proximately caused by MICHELE'S decision to starve, neglect and deny MURIEL MINTZ adequate hydration for weeks, as she placed her in hospice for no terminal condition –other than aging.



Current claims made in the attached lawsuit, in federal court, BARBARA LATHAM VS. JUDGE MIKE WOOD; ET AL.; Cause No. 4-17:3875, Hon. Vanessa Gilmore presiding; include:

- Wrongful death and survival: Texas Civil Practice & Remedies Code section 71.002 (“Wrongful Death Statute”)
- Discrimination and retaliation against LATHAM AND NELSON as an agent of Harris County Guardianship which violate the Americans with Disabilities Act, 42 U.S.C. 12101, et seq. and Section 504 of the Rehabilitation Act (“Section 504”).
- 42 U.S.C. 1983 for violations of fundamental constitutional rights and deprivations of privileges and immunities, as well as property taken in the absence of all jurisdiction by MCIHELE GOLDBERG including the 1st, 4th, 5th, 6th, 7th, 8th and 14th Amendments to the United States Constitutions.
- Clear and convincing evidence of GROSS NEGLIGENCE and RECKLESS DISREGARD FOR HUMAN LIFE is plentiful as Goldberg has verbally and psychologically abused my clients through a premeditated campaign of harassment designed to cover up her utter incompetence in hastening the death of MURIEL MINTZ in less than three weeks not knowing even what a bedsore is—a sign of gross neglect.

BARBARA AND ESTELLE are both experienced registered nurses with over 30 years of experience in psychiatric and geriatric home health. MURIEL had almost no problems in her 93-year life save macular degeneration and MILD congestive heart failure,

APPENDIX 22

LAW OFFICES OF CANDICE SCHWAGER

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1417 Ramada Drive
Houston, Texas 77062



December 25, 2017

Higdon Compton,
John H. Compton,
Higdon Oscar Compton, Jr.
SURETEC BOND COMPANY

RE: #3390760; Notice of federal civil rights and wrongful death lawsuit against Michele Goldberg for wrongful death / manslaughter in Case 456059; Guardianship of Muriel Luba Mintz, deceased (causing her death in 3 weeks through gross neglect and conscious indifference)

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This letter will serve as notice that BARBARA LATHAM AND ESTELLE NELSON demand the full limits of her bond from SURETEC for causing their elderly mother to die a horrific death of starvation, and gross neglect / conscious indifference THREE WEEKS AFTER MICHELE ASSUMED CUSTODY AND CONTROL OF THE DECEDENT, MURIAL MINTZ. Her death was proximately caused by MICHELE'S decision to starve, neglect and deny MURIEL MINTZ adequate hydration for weeks, as she placed her in hospice for no terminal condition –other than aging.

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- Wrongful death and survival: Texas Civil Practice & Remedies Code section 71.002 (“Wrongful Death Statute”)
- Discrimination and retaliation against LATHAM AND NELSON as an agent of Harris County Guardianship which violate the Americans with Disabilities Act, 42 U.S.C. 12101, et seq. and Section 504 of the Rehabilitation Act (“Section 504”).
- 42 U.S.C. 1983 for violations of fundamental constitutional rights and deprivations of privileges and immunities, as well as property taken in the absence of all jurisdiction by MCIHELE GOLDBERG including the 1st, 4th, 5th, 6th, 7th, 8th and 14th Amendments to the United States Constitutions.
- Clear and convincing evidence of GROSS NEGLIGENCE and RECKLESS DISREGARD FOR HUMAN LIFE is plentiful as Goldberg has verbally and psychologically abused my clients through a premeditated campaign of harassment designed to cover up her utter incompetence in hastening the death of MURIEL MINTZ in less than three weeks not knowing even what a bedsore is—a sign of gross neglect.

BARBARA AND ESTELLE are both experienced registered nurses with over 30 years of experience in psychiatric and geriatric home health. MURIEL had almost no problems in her 93-year life save macular degeneration and MILD congestive heart failure,

which I believe your client ignored causing fluid to build in her lungs because fluid would not have accumulated if MICHELE had simply paid attention when BARBARA gave her MURIEL'S medications and the critical instructions she found so boring. MICHELE needs to consider the purpose of guardianship—PROTECTION. GOLDBERG not only killed her own ward in 3 weeks through gross neglect or worse, she exploited her on top of it. A seasoned trust attorney can read a trust in a matter of hours at a maximum, with trust provisions typically quite standard. Her need to research trust issues at this juncture in her career suggests fraud or incompetence. Then again, attorneys are known for churning the files to exaggerate fee bills. It is still theft in my mind.

You should be aware that the Court never served Muriel Mintz, something MICHELE GOLDBERG knows or should know. As such, nothing she did is legally authorized and we seek disgorgement in addition to policy limits at a minimum for the wrongful death of MURIEL MINTZ and retaliatory intentional infliction of emotional distress MICHELE inflicted upon my clients, ESTELLE NELSON AND BARBARA LATHAM, AS THEIR MOTHER LAID DYING. They begged for a second opinion or any information whatsoever and were banned from further access, such that MURIAL died alone. I honestly cannot put a number on the amount of liability MICHELE GOLDBERG has but let me assure you that I gave her every escape opportunity possible and she refused to acknowledge that she is incompetent when it comes to caring for the elderly.

MICHELE'S intentions towards MURIEL have been blasé and malicious from the outset of this nightmare. Her billing indicates a similar lack of regard for the "person" over whom she took guardianship, with only 13 hours devoted to MURIEL MINTZ and

approximately 51 hours devoted to seizing MURIEL'S assets along with mine as she engaged in a fraudulent hunt of money in a family trust that she knew was not part of MURIEL'S estate, but solely the property of MURIEL'S three adult children.

MICHELE has lied to every facility MURIEL has been falsely imprisoned at and concealed her whereabouts with secret registrations and threats to my client and her sister – which you have been complicit with at your own risk. Reports have been made for violation of the ADA to the Department of Justice with respect to Title III, the Department of Aging and Disability, and Adult Protective Service, as well as law enforcement.

BARBARA AND ESTELLE are devastated by having to watch MURIEL starve to death as they are banned and threatened with trespass by your business. GOLDBERG knows absolutely nothing about MURIEL'S medical history and never was competent to give informed consent, which creates quite a problem for her now because she refused to stop and listen to reason and caused MURIEL'S death. She is an extremely dishonest woman who apparently believes she is above the law, as evidenced by recent court orders which purport to ratify embezzlement with a backdated authorization.

Witnesses have come forward to confirm the same and report the reprehensible actions wrought upon MURIEL MINTZ. MURIEL MINTZ was not terminally ill from ANY chronic or acute illness, but was permitted to happen. MICHELE stood to GAIN substantially more in terms of finances if MURIEL died than if she lived. If you read Dr. Edward Poa's report, you will note he mandates 24-hour supervision for MURIEL and with full notice of its contents, knowing MURIEL is a fall risk and blind, MICHELE placed

her in assisted living where they checked on each 2 hours and predictably found her in the floor injured, according to Goldberg.

MICHELLE GOLDBERG has repeatedly lied along with hospice staff doing her bidding to keep my clients in the dark. Clearly, the objective is to prevent them from having even a window of opportunity to intervene. GOLDBERG has been so dishonest that we no longer have confidence that anything she reports is true. Strangely, almost immediately after MURIEL MINTZ was hospitalized, Michele no longer mentioned the alleged fall and my client observed no visible signs that this was even true. Hospice staff have acted outrageously and treated my client and her sister with contempt unlike anything I have ever witnessed. It is the most unprofessional abuse of authority I could even imagine. ATTACHED ARE RELEVANT DOCUMENTS. Should you have questions or concerns that we need to work out so that my client is not deprived of seeing her mother as you hasten her death, you should call immediately. My number is 832.315.8489. If I do not answer, you may email candiceschwager@icloud.com

Sincerely,

Candice Schwager

Candice L. Schwager

LAW OFFICES OF CANDICE SCHWAGER

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January 3, 2018

Higdon Compton,
John H. Compton,
Higdon Oscar Compton, Jr.
SURETEC BOND COMPANY

Harris County Commissioners
Judge Ed Emmett, County Judge

RE: Notice of federal civil rights and wrongful death lawsuit against Judge Mike Wood, Individually and Officially; for wrongful death / manslaughter in Case 456059 and 462505; Guardianship of Muriel Luba Mintz, deceased and Trust case

Dear Messrs. Compton:

This letter will serve as notice that BARBARA LATHAM AND ESTELLE NELSON demand the full limits of JUDGE MIKE WOOD'S BOND from the bonding company, whether SURETEC, or otherwise, for causing their elderly mother to die a horrific death of starvation, and gross neglect / conscious indifference THREE WEEKS AFTER MICHELE ASSUMED CUSTODY AND CONTROL OF THE DECEDENT, MURIAL MINTZ. Her death was proximately caused by MICHELE'S decision to starve,

neglect and deny MURIEL MINTZ adequate hydration for weeks, as she placed her in

hospice for no terminal condition –other than aging. No second opinion was obtained despite her RN daughters demanding it because they saw she was not terminal and something very wrong was going on.

Current claims made in the attached lawsuit, in federal court, BARBARA LATHAM VS. JUDGE MIKE WOOD; ET AL.; Cause No. 4-17:3875, Hon. Vanessa Gilmore presiding; include:

- Wrongful death and survival: Texas Civil Practice & Remedies Code section 71.002 (“Wrongful Death Statute”)
- Discrimination and retaliation against LATHAM AND NELSON as an agent of Harris County Guardianship which violate the Americans with Disabilities Act, 42 U.S.C. 12101, et seq. and Section 504 of the Rehabilitation Act (“Section 504”).
- 42 U.S.C. 1983 for violations of fundamental constitutional rights and deprivations of privileges and immunities, as well as property taken in the absence of all jurisdiction by MCIHELE GOLDBERG including the 1st, 4th, 5th, 6th, 7th, 8th and 14th Amendments to the United States Constitutions.
- Clear and convincing evidence of GROSS NEGLIGENCE and RECKLESS DISREGARD FOR HUMAN LIFE is plentiful as Goldberg has verbally and psychologically abused my clients through a premeditated campaign of harassment designed to cover up her utter incompetence in hastening the death of MURIEL MINTZ in less than three weeks not knowing even what a bedsore is—a sign of gross neglect.

BARBARA AND ESTELLE are both experienced registered nurses with over 30 years of experience in psychiatric and geriatric home health. MURIEL had almost no problems in her 93-year life save macular degeneration and MILD congestive heart failure, which I believe your client ignored causing fluid to build in her lungs because fluid would not have accumulated if MICHELE had simply paid attention when BARBARA gave her MURIEL'S medications and the critical instructions she found so boring. MICHELE needs to consider the purpose of guardianship—PROTECTION. GOLDBERG not only killed her own ward in 3 weeks through gross neglect or worse, she exploited her on top of it

You should be aware that the Court never served Muriel Mintz, and now they are covering up for it. Reports have been made for violation of the ADA to the Department of Justice with respect to Title III, the Department of Aging and Disability, and Adult Protective Service, as well as law enforcement.

BARBARA AND ESTELLE are devastated by having to watch MURIEL starve to The illegal wrongful guardian knows absolutely nothing about MURIEL'S medical history and never was competent to give informed consent, which creates quite a problem because she refused to stop and listen to reason and caused MURIEL'S death. She is an extremely dishonest woman who apparently believes she is above the law, as evidenced by recent court orders which purport to ratify embezzlement with a backdated authorization. Judge Wood was advised of all of these problems and said I was wrong and refused to act. Witnesses have come forward to confirm the same and report the reprehensible actions wrought upon MURIEL MINTZ. MURIEL MINTZ was not terminally ill from ANY chronic or acute illness, but was permitted to happen.

Hospice staff have acted outrageously and treated my client and her sister with contempt unlike anything I have ever witnessed. It is the most unprofessional abuse of authority I could even imagine. ATTACHED ARE RELEVANT DOCUMENTS. Should you have questions or concerns that we need to work out, you should call immediately. My number is 832.315.8489. If I do not answer, you may email candiceschwager@icloud.com

Sincerely,

Candice Schwager

Candice L. Schwager

CANDICE L SCHWAGER
SCHWAGER LAW FIRM
Tel: 832.315.8489
Fax: 713.456.2453



MAY 29, 2018

Ryan DeLaune
Strasburger
Attorneys at Law
Ryan.delaine@strasburger.com
214.659.4195

Re: Bond No. 3390760; Michele Golberg; Wrongful Death of Muriel Mintz, deceased
Cause No. 4:17; 03875; In the Southern District of Texas, Houston Division, Notice of Appeal to 5th
Circuit

Mr. DeLaune:

By letter dated January 11, you informed me that you lacked sufficient evidence indicating that Michele Goldberg, purported temporary guardian of Muriel Mintz, deceased, failed to perform her duties as alleged temporary guardian. I will first include Chapter 1251 governing temporary guardianship appointments so that you see Goldberg's appointment was invalid. She assumed the fiduciary duty nonetheless towards Muriel Mintz and interfered with the lawful durable and medical power of attorney, resulting in the death "hastened" on hospice of Muriel, who was not terminal.

First and foremost, as a fiduciary, which Goldberg undoubtedly was, regardless of the validity of her appointment (she was not in court but at home on the phone and gave no prior notice, so her appointment violated Chapter 1251), she could not delegate a fiduciary duty as she clearly does by the attached letter, to a man whom Houston Hospice noted had obvious mental health problems and financial problems. She did so to absolve herself of responsibility for the death, though her gross neglect and recklessness caused Muriel's death.

Attached is the letter purportedly appointing Donald Mintz, the son of Muriel, who had untreated mental health problems, as her agent to make medical decisions. She blocked the lawful medical power of attorney from receiving or giving medical information to and from medical personnel during Muriel's last hospitalization. She and Donald made the decision to end her life on hospice when she was not terminal or gravely injured before Michele took over.

Michele got custody and control of Muriel 11/24/17 and that same day delegated her authority for which you insured her, to Donald Mintz. She blocked Estelle Nelson, 30 year RN in geriatric home health,

Barbara Latham, 30 year psychiatric RN who was caring for her mother before Goldberg terrorized her into not being able to care for her mother. Michele found when appointed that Muriel was well cared for in Barbara's neat and tidy home and only changed her tune when Barbara was so terrorized by APS reports and harassing well checks that she could no longer care for her mother, on the verge of a breakdown.

Suddenly, she made up false accusations of neglect, while at the same time reporting Barbara to the licensing board for "skilled nursing services" being provided to her mother in order to damage her career and reputation.

From the outset of the guardianship, Cause No. 456059; Michele knew she had no standing to demand documents from the Mintz "family" trust, which Muriel retained no right, title or interest to in creating the irrevocable trust. She billed over \$16,000 to hunt down money to which she had no standing to demand. She spent an ungodly amount of hours chasing money and a bit over \$1200 protecting Muriel and ensuring she was safe. The bill is included. Then she obtained an allowance for 3 months of care at Gardens of Bellaire that she knew Muriel was never going to receive, asking for a check after she and Donald put her on hospice and knew she was never leaving the hospital. She didn't pay the over \$15,000 back.

She received refunds from Jewish Funeral Services and to my knowledge, never returned the money. She wrote checks straight from a joint account with Barbara Latham designated primary and Muriel secondary, somehow getting Barbara's name removed as a joint account holder. TDECU saw the error and put Barbara's name back on it, but Michele had taken tens of thousands out which wasn't returned. Now, she hasn't performed her statutory mandated accounting for over six months after Judge Wood adamantly demanded it be done. As you see, she did the accounting last fall, so it should not have been that difficult. I believe she is having trouble "swearing" to how much money she took accurately.

In retaliation against me and my client, she is seeking sanctions for filing a claim with the bonding company, which is what we are supposed to do to provide you with notice before suit. Judge Lee Rosenthal ruled recently in a landmark ruling 4:16: 03215: Johnston vs. Dixel, that the Judge (and Guardian) are not immune, but liable to their bond limits. Based on this ruling with nearly identical facts (given I represented Johnston and Jason Ostrom's firm represented Larry Mills, who put his mother on hospice as Donald Mintz did in collusion with the guardian, the rulings should be the same once the 5th Circuit court of appeals has had the chance to review them and rule on the divergent decisions.

Significantly, I have substantial medical records because Goldberg told the Judge she did not know for certain that Muriel's body is in Muriel's casket, which I consider beyond gross negligence. She had the audacity to say "good question" and that she would be sure to check on the next body when Judge Gilmore questioned her about how we can be certain the right body was buried in the right casket. I have attached relevant portions of that transcript. In contrast, her dishonesty is seen in the probate transcript where suddenly she knows nothing as I ask her.

All of the money taken from Muriel Mintz's accounts is fiduciary theft or embezzlement in my opinion. Her so called guardianship was mired in controversy and gross neglect. The code mandated for her to not just chase down the money, but get Muriel's medical records immediately upon "appointment" which she contends was valid, even though I contend it was not. She did not order the medical records until after

Muriel's death to cover up her liability. Without medical records, she could not possibly make informed decisions regarding her health, resulting in her death. If you examine the docket sheet for the guardianship, she filed the records in the guardianship despite the fact that they were subpoenaed in the federal case pursuant to Judge Gilmore's order to start depositions and discovery immediately upon hearing that Michele cannot even confirm the location of Muriel's burial or that she was buried at all.

I include documents from St. Luke's Hospital which reveal that Muriel was screaming to get out and Michele and co-conspirator Donald decided to consent to Haldol, a drug they knew Muriel could not tolerate, to stop her from screaming to get out, knowing she was going to be put on hospice for continuous care, in which she died in 72 hours by a toxic cocktail that is dangerous for elderly dementia patients with heart problems as she knew Muriel had.

I demanded an autopsy, a second opinion and for her to stop getting in the way of Barbara Latham handling the remains and funeral. The code requires that she get a court order to take charge of the funeral but she did not and refused to back off and allow my client, agent for disposition of remains, to handle it. I notified Houston Hospice that I would sue them if they persisted in their seemingly illegal, unethical violations of federal and state law and Muriel's civil rights. She refused to stop. Houston Hospice almost refused Muriel as a patient to hasten her death and apparently Michele talked them into going through with "her plan." You may want to know what that plan was.

I have medical records and I am happy to share. But, so does Michele. I am under the impression that she is supposed to tell your client, SureTec, about litigation against her. Instead, she wants to sanction me and make me or the estate pay for her investigation fee. That should set off alarm bells. Judge Wood has adamantly demanded the last two hearings that she do an accounting and she has yet to do it.

This isn't an isolated pattern and practice of recklessness, gross neglect and improper behavior in hospice for her. She uses a network of secret private ambulances, lies to families and uses the same modus operandi to alienate the children and medical/durable power of attorney so that she can take over their finances. Ask Elizabeth Mason about her mother, Lily Mason, who is still alive, but Michele was planning her funeral the last I checked with Lily still having over \$100,000 in assets.

I notify you so that you have the evidence you need. I believe you have a responsibility to truly investigate. This case is headed to the 5th Circuit on the heels of the landmark case that I started with Susan Norman, Johnston vs. Dixel, order attached. The case concludes that guardians are not immune to the amount of their bonds. You should be concerned because there are many more. I understand Michele Goldberg has over 600 to date. If you have questions or need documents, please call me. I would much prefer that to turning a blind eye.

Regards,

Candice Schwager

Candice Schwager
Enclosures

which I believe your client ignored causing fluid to build in her lungs because fluid would not have accumulated if MICHELE had simply paid attention when BARBARA gave her MURIEL'S medications and the critical instructions she found so boring. MICHELE needs to consider the purpose of guardianship—PROTECTION. GOLDBERG not only killed her own ward in 3 weeks through gross neglect or worse, she exploited her on top of it. A seasoned trust attorney can read a trust in a matter of hours at a maximum, with trust provisions typically quite standard. Her need to research trust issues at this juncture in her career suggests fraud or incompetence. Then again, attorneys are known for churning the files to exaggerate fee bills. It is still theft in my mind.

You should be aware that the Court never served Muriel Mintz, something MICHELE GOLDBERG knows or should know. As such, nothing she did is legally authorized and we seek disgorgement in addition to policy limits at a minimum for the wrongful death of MURIEL MINTZ and retaliatory intentional infliction of emotional distress MICHELE inflicted upon my clients, ESTELLE NELSON AND BARBARA LATHAM, AS THEIR MOTHER LAID DYING. They begged for a second opinion or any information whatsoever and were banned from further access, such that MURIAL died alone. I honestly cannot put a number on the amount of liability MICHELE GOLDBERG has but let me assure you that I gave her every escape opportunity possible and she refused to acknowledge that she is incompetent when it comes to caring for the elderly.

MICHELE'S intentions towards MURIEL have been blasé and malicious from the outset of this nightmare. Her billing indicates a similar lack of regard for the "person" over whom she took guardianship, with only 13 hours devoted to MURIEL MINTZ and

approximately 51 hours devoted to seizing MURIEL'S assets along with mine as she engaged in a fraudulent hunt of money in a family trust that she knew was not part of MURIEL'S estate, but solely the property of MURIEL'S three adult children.

MICHELE has lied to every facility MURIEL has been falsely imprisoned at and concealed her whereabouts with secret registrations and threats to my client and her sister – which you have been complicit with at your own risk. Reports have been made for violation of the ADA to the Department of Justice with respect to Title III, the Department of Aging and Disability, and Adult Protective Service, as well as law enforcement.

BARBARA AND ESTELLE are devastated by having to watch MURIEL starve to death as they are banned and threatened with trespass by your business. GOLDBERG knows absolutely nothing about MURIEL'S medical history and never was competent to give informed consent, which creates quite a problem for her now because she refused to stop and listen to reason and caused MURIEL'S death. She is an extremely dishonest woman who apparently believes she is above the law, as evidenced by recent court orders which purport to ratify embezzlement with a backdated authorization.

Witnesses have come forward to confirm the same and report the reprehensible actions wrought upon MURIEL MINTZ. MURIEL MINTZ was not terminally ill from ANY chronic or acute illness, but was permitted to happen. MICHELE stood to GAIN substantially more in terms of finances if MURIEL died than if she lived. If you read Dr. Edward Poa's report, you will note he mandates 24-hour supervision for MURIEL and with full notice of its contents, knowing MURIEL is a fall risk and blind, MICHELE placed

her in assisted living where they checked on each 2 hours and predictably found her in the floor injured, according to Goldberg.

MICHELLE GOLDBERG has repeatedly lied along with hospice staff doing her bidding to keep my clients in the dark. Clearly, the objective is to prevent them from having even a window of opportunity to intervene. GOLDBERG has been so dishonest that we no longer have confidence that anything she reports is true. Strangely, almost immediately after MURIEL MINTZ was hospitalized, Michele no longer mentioned the alleged fall and my client observed no visible signs that this was even true. Hospice staff have acted outrageously and treated my client and her sister with contempt unlike anything I have ever witnessed. It is the most unprofessional abuse of authority I could even imagine. ATTACHED ARE RELEVANT DOCUMENTS. Should you have questions or concerns that we need to work out so that my client is not deprived of seeing her mother as you hasten her death, you should call immediately. My number is 832.315.8489. If I do not answer, you may email candiceschwager@icloud.com

Sincerely,

Candice Schwager

Candice L. Schwager

Strasburger
ATTORNEYS AT LAW

January 11, 2018

RYAN B. DELAUNE
(214) 651-2115
Direct Fax (214) 659-4195
ryan.delaune@strasburger.com

VIA E-MAIL - candiceschwager@icloud.com

Candice L. Schwager
LAW OFFICES OF CANDICE SCHWAGER
1417 Ramada Drive
Houston, Texas 77062

Bond No.: 3390760
Principal: Michele Goldberg
Proceeding: *In the Guardianship of Muriel Luba Mintz, An Incapacitated Person,*
Cause No. 456,059; In the Probate Court Number Two of Harris
County, Texas

Dear Ms. Schwager:

I represent SureTec Insurance Company ("SureTec") in connection with the above referenced bond and am in receipt of your letter, dated December 25, 2017, in which you appear to demand the full limits of the bond. Please be advised that at this time SureTec has not been provided with and is not aware of any document or information indicating that the bond principal, Michele Goldberg, failed to perform the duties required of her as Temporary Third-Party Guardian of the Person and Estate of Muriel Luba Mintz. If you have any questions or would like to discuss this matter further please feel free to give me a call.

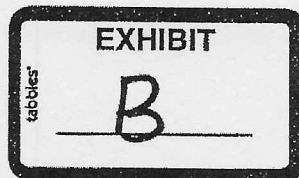
SureTec reserves all rights at law and equity, and nothing herein is intended to be a waiver of such rights.

Sincerely,



Ryan B. DeLaune

cc: Michele Goldberg



Strasburger & Price, LLP

901 Main Street, Suite 6000 | Dallas, Texas 75202-3794 | 214.651.4300 tel | 214.651.4330 fax | www.strasburger.com
Austin | Beaumont | Collin County | Dallas | Houston | San Antonio | New York, N.Y. | Washington, D.C. | Mexico City - Strasburger & Price SC

MICHELE K. GOLDBERG

ATTORNEY & COUNSELOR AT LAW

JULIE M. DALLISON

OF COUNSEL

Telephone 713.218-8800

THE FROST BANK BUILDING
6750 West Loop South, Suite 615
Bellaire, Texas 77401
lawmkg@sbcglobal.net
www.lawmichelegoldberg.com

Facsimile 713.839-0142

Barbara J.H. McDowell, Legal Assistant
lawmkgassist@sbcglobal.net

May 8, 2018

Clark Hill Strasburger
Attn: Ryan B. DeLaune
901 Main Street
Suite 6000
Dallas, TX 75202-3794

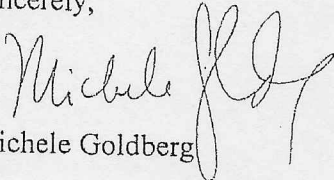
Re: Bond No.: 3390760
Principal: Michele Goldberg
Matter: *In the Guardianship of Muriel Luba Mintz, An Incapacitated Person; Cause*
NO. 456,059; In the Probate Court No. Two of Harris County, TX

Mr. DeLaune,

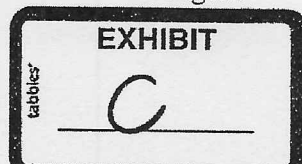
In satisfaction of the indemnity reimbursement claim demanded by SureTec for the above referenced bond, please find enclosed check # 1044, in the total amount of \$3,548.40; this is the full and final payment for services rendered in defending the bond.

Should you have any questions or need more information, please do not hesitate to contact this office.

Sincerely,


Michele Goldberg

c: John Compton, Higdon Compton Insurance Agent



Mintz

Law Office of Michele K. Goldberg

From: Corbette Greak [CGreak@tdecu.org]
Sent: Tuesday, May 15, 2018 12:15 PM
To: Michele Goldberg
Cc: Michele Goldberg
Subject: RE: MIntz-Memeber # 8128268
Attachments: noreply@tdecu.org_20180515_121137.pdf

VOF TDECU

Ms. Goldberg,

Attached is the VOF. Please note that the amounts listed are the amounts as of the Dec. date. To date there is a zero balance on all accounts belonging to Ms. Mintz, as indicted in the statements we previously provided.

The original will be mailed out to you today.

Regards,
Corbette

From: Michele Goldberg [mailto:Lawmkg@sbcglobal.net]
Sent: Monday, May 14, 2018 3:40 PM
To: Corbette Greak
Cc: Michele Goldberg
Subject: MIntz-Memeber # 8128268

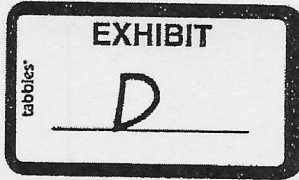
Mr. Greak-

Attached please find that Verification of Funds on Deposit for the above stated Member's date of death. Kindly fill it out, sign before a notary and return to this office for filing with the court when we present the final accounting; the VOF is required.

Please scan it when ready, then mail the original.

Thank you,

Michele K. Goldberg
Attorney at Law
Frost Bank Building
6750 West Loop South, Suite 615
Bellaire, Texas 77401
713.218-8800
713.839-0142 Fax
lawmkg@sbcglobal.net
www.lawmichelegoldberg.com



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In compliance with regulations issued by the Internal Revenue Service, we inform you that any federal tax advice contained in this communication including any attachments was not written to be used and may not be used by any person to avoid any penalties under the Internal Revenue Code.

CAUSE NO. 456059

GUARDIANSHIP OF

MURIEL LUBA MINTZ,

AN INCAPACITATED PERSON

§
§
§
§
§

IN PROBATE COURT

NUMBER TWO (2) OF

HARRIS COUNTY, TEXAS

VERIFICATION OF FUNDS ON DEPOSIT

The undersigned, an officer of the financial institution named below, hereby certifies that Michele K. Goldberg, Temporary Guardian Pending Contest of the Person and Estate of MURIEL LUBA MINTZ, An Incapacitated Person, has on deposit with this institution in TDECU Checking Act.#: 924544752, funds belonging to said estate, and that as of December 24, 2017, the balance in such account is: \$ 5,049.30; and in IRA Share Act.#: 924544794, funds belonging to said estate, and that as of December 24, 2017, the balance in such account is: \$ 15,171.11; and in Checking Act.#: 925423972, the balance on hand as of December 24, 2017, is: \$ 64,029.79.

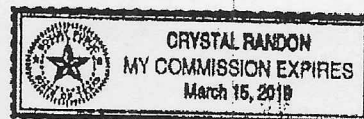
SIGNED this 14th day of May, 2018.

BY: Fa'oumu Willis

PRINTED NAME: Fa'oumu Willis

POSITION: Settlement Services Specialist

TDECU



Crystal Randon

No. 456,059

IN THE GUARDIANSHIP OF	§	IN THE PROBATE COURT
MURIEL LUBA MINTZ,	§	NO. TWO (2)
AN INCAPACITATED PERSON	§	HARRIS COUNTY, TEXAS

**ORDER GRANTING MOTION FOR SANCTIONS
AND APPROVING ATTORNEY'S FEES**

On this day, the Court heard and considered Movant MICHELE K. GOLDBERG'S MOTION FOR SANCTIONS AGAINST BARBARA LATHAM, ESTELLE NELSON AND CANDICE SCHWAGER and ALTERNATIVE APPLICATION FOR REIMBURSEMENT OF ATTORNEY'S FEES CHARGED TO GUARDIAN BY BONDING CO. After hearing the testimony and considering the pleadings and evidence, the Court finds that CANDICE SCHWAGER has disregarded legal procedures by attempting to file a claim against the bond posted by MICHELE K. GOLDBERG, Temporary Guardian Pending Contest of MURIEL LUBA MINTZ, An Incapacitated Person ("Ward"), directly with Higdon Compton Insurance Agency and with SureTec Insurance Company, for maliciously, recklessly and without merit or evidence accusing Movant of causing the Ward "to die a horrific death or starvation, gross neglect/conscious indifference to the Ward, of "dishonesty, embezzlement, lying to hospital staff, incompetence", among other such unprofessional and unethical accusations found within CANDICE SCHWAGER'S court documents, and for repeatedly posting demeaning, disparaging, and ridiculing comments about Movant, her family and her religion on various internet and social media sites, and is therefore entitled to Sanctions against CANDICE SCHWAGER in the amount of TEN THOUSAND DOLLARS (\$10,000.00); that said Sanctions should be paid directly to MICHELE K. GOLDBERG by CANDICE SCHWAGER. The Court

further finds that the Ward's Estate is responsible for reimbursement of the attorney's fees that MICHELE K. GOLDBERG paid SureTec Insurance Company to defend said bond in the amount of THREE THOUSAND, FIVE HUNDRED AND FORTY EIGHT DOLLARS AND FORTY CENTS (\$3,548.40); and, that Movant MICHELE K. GOLDBERG'S Motion For Sanctions And Application For Reimbursement Of Attorney's Fees Charged To Guardian By Bonding Co. is hereby GRANTED.

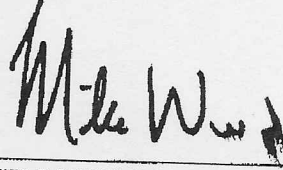
It is therefore ORDERED, ADJUDGED, AND DECREED that Movant MICHELE K. GOLDBERG is hereby AWARDED sanctions against Respondent CANDICE SCHWAGER and Respondent CANDICE SCHWAGER is ORDERED to pay directly to MICHELE K. GOLDBERG the amount of TEN THOUSAND DOLLARS (\$10,000.00), together with interest thereon which shall accrue from the date of this Order until the \$10,000.00 is paid in full; said interest shall be calculated at the current legal rate; said payment shall be delivered to the office of MICHELE K. GOLDBERG located at 6750 West Loop South, Suite 615, Bellaire, TX 77401 during normal business hours on or before June 8, 2018 at 3:00 p.m. Failure to comply with this ORDER shall constitute contempt of this Court and will result in further sanctions and penalties against CANDICE SCHWAGER.

It is further ORDERED, ADJUDGED, AND DECREED that Movant MICHELE K. GOLDBERG is hereby AWARDED expenses incurred in the total amount of THREE THOUSAND, FIVE HUNDRED AND FORTY EIGHT DOLLARS AND FORTY CENTS (\$3,548.40); said expenses shall be taxed as costs in this cause and that payment in the amount of \$3,548.40, plus statutory interest accruing from the date of this Order, shall be paid to MICHELE K. GOLDBERG, Temporary Guardian Pending Contest, out of funds belonging to the Estate of MURIEL LUBA MINTZ, held in the guardianship checking account number

No. 456,059

XXXX-XXXX-2977 at Bank of America.

SIGNED this 30 day of May, 2018.



JUDGE MIKE WOOD

SEND CONFORMED COPY TO:

Michele K. Goldberg
TBC# 00793819
6750 West Loop South, Suite 615
Bellaire, TX 77401
lawmkg@sbcglobal.net

FILED

2018 JUN -1 PM 1:59

Stan Stewart
COUNTY CLERK
HARRIS COUNTY, TEXAS

APPENDIX 23

ENTERED

August 18, 2017

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

SHERRY LYNN JOHNSTON,

Plaintiff,

v.

DAVID DEXEL, *et al.*,

Defendants.

§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. H-16-3215

MEMORANDUM AND OPINION

Sherry Johnston’s elderly mother, Willie Jo Mills, died in a nursing home. Johnston alleges that Mills received improper and negligent care that led to her death. Johnston asserts a long list of legal claims against a long list of defendants, all of whom she alleges played some role in Mills’s death. The defendants moved to dismiss, Johnston responded, and the defendants replied. (Docket Entries No. 17, 18, 20, 21, 24, 25, 27, 28, 31).

Based on the complaint, the motions and responses, and the applicable law, the motions to dismiss are denied in part and granted in part. The following claims are dismissed with prejudice: all currently pleaded claims against Judge Christine Butts and Sherry Fox (though Johnston may amend her complaint to allege a claim under Section 1201.003 of the Texas Estate Code on Judge Butts’s bond); and all claims under 42 U.S.C. § 1983 against David Dexel, Ginger Lott, GSL Care Management, LLC, and Clarinda Comstock.

The following claims are dismissed without prejudice and with leave to amend: the claims under § 1983 against Harris County; all claims for disability discrimination and retaliation under the

Americans with Disabilities Act and the Rehabilitation Act; all of the Texas state-law claims against Harris County and Clarinda Comstock; the claim for civil conspiracy to breach fiduciary duties; the claim for intentional infliction of emotional distress; the claim for wrongful death against David Dixel; and any claims that Johnston intended to assert for fraud, defamation, violation of statutory duties, or commission of “ultra vires” illegal acts.

The claim for breach of fiduciary duty is adequately pleaded as to Dixel and Lott, and may proceed. The claim for wrongful death is adequately pleaded as to Lott, and may also proceed. Any amended complaint must be filed by September 18, 2017.

The reasons for these rulings are explained in detail below.

I. Background

This factual recitation is drawn from Johnston’s complaint. The well-pleaded factual allegations are taken as true for the purposes of the motions to dismiss. In 2008, Johnston and her sister, Cindy Pierce, sued their brother for conversion of Mills’s property and financial assets. A June 2008 report by a court investigator found that Johnston was Mills’s preferred guardian. A year later, the presiding probate judge appointed Howard Reiner as Mills’s attorney ad litem and David Dixel as Mills’s temporary guardian of the person and estate. The parties to that litigation signed a settlement agreement. The probate court appointed Dixel as Mills’s guardian of the person on a continuing basis. Reiner was discharged as attorney ad litem.

Dixel hired Ginger Lott and GSL Care Management, LLC,¹ to manage Mills’s care. Between

¹ All parties appear to treat Lott and GSL Care Management as interchangeable. Lott and GSL filed a joint motion to dismiss, and the motion does not make any effort to distinguish the two entities (one natural, one legal) from each other for liability purposes. This opinion refers to Lott and GSL collectively as “Lott.”

2009 and 2012, Johnston frequently visited Mills at Silverado, the nursing home where Mills resided. In 2012, Silverado changed management. Johnston perceived a decline in the quality of Mills's care after the change. Beginning in 2012 and into 2013, Johnston complained to Dixel about her mother's care. Mills was hospitalized on several occasions with urinary tract infections during that time. Johnston complained that the infections resulted from poor medical care. Dixel refused to move Mills to a different nursing home. As a result, Johnston and Dixel's relationship deteriorated.

In May 2013, Dixel moved Mills to a different section of Silverado, for residents who required a higher level of care. According to the complaint, this section's residents had behavioral issues and were aggressive toward Mills. During the same month, Johnston's complaints about Silverado's treatment of Mills led it to ban Johnston from the premises. Johnston alleges that Dixel "worked with" Silverado to ban Johnston. In June 2013, Mills fell out of her wheelchair, breaking several bones in her right leg. Dixel discontinued Mills's physical therapy during her recuperation. Johnston alleges that this made Mills's muscle problems worse. That same month, Dixel allegedly made a "secret, *ex parte*, oral motion" (which he filed in writing with the court three days later) to have Clarinda Comstock appointed as Mills's guardian ad litem. Judge Butts, the presiding probate judge, granted this motion and instructed Comstock to investigate Mills's condition and treatment and report to the court. Dixel allegedly failed to notify both Johnston and Pierce of his intention to seek Comstock's appointment.

Mills's condition continued to deteriorate. By September 2013, she could no longer hold a cup or fork, had lost 30 to 40 pounds, and suffered from recurring urinary tract infections. Johnston continued to demand that Dixel move Mills to a different nursing home, and she threatened to ask

the court to replace Dexel. In response, Dexel filed an application to resign and to have the court appoint a successor guardian for Mills. On September 13, 2013, Dexel notified interested parties—including Johnston—of a hearing set for September 24, 2013. On September 16, 2013, Comstock filed her report about Mills’s condition and treatment. Johnston alleges that the following day—one week before the hearing date—Dexel, Lott, Comstock, and Judge Butts had a “secret, *ex parte* meeting/hearing” during which Judge Butts appointed Lott as Mills’s successor guardian, replacing Dexel.

In October 2013, Lott moved Mills from the Silverado nursing home to the Hampton nursing home. In December 2013, Johnston filed an emergency application for a temporary restraining order with Sherrie Fox, Judge Butts’s Court Coordinator. She alleges that Mills was “dehydrated, not eating, weak, and . . . declin[ing] fast.” Ten days later, Judge Butts held a status conference. Both Johnston and Pierce testified. They were able to reach an agreement with Lott, including bringing outside food into the Hampton nursing home, scheduling a regular swallow test, placing a drop camera and phone apparatus in Mills’s room, and reinstating Johnston’s visitation rights.

Johnston alleges that, in March 2014, Mills’s doctor advised Lott that Mills needed to see a cardiologist and an endocrinologist, but Lott failed to follow the doctor’s orders. Judge Butts reappointed Reiner as Mills’s attorney ad litem. The following month, April 2014, Johnston texted Lott that Mills “was delirious and unresponsive with pus in her catheter” and needed to go to the emergency room immediately. Lott did not respond to Johnston’s text, so she called 911. Lott allegedly told Hampton’s personnel to send the paramedics away when they arrived, and called a separate ambulance. Although Lott was the only person with legal authority to sign Mills in to the hospital, Lott allegedly never went to the hospital, leaving Mills to sign herself in. During the next

month, Johnston and Pierce filed applications for guardianship, triggering Reiner's termination as attorney ad litem.

Johnston continued to investigate the Hampton's alleged mistreatment of Mills. Johnston alleges that Lott allowed Mills's caretakers to put two diapers on her, even though she had a history of urinary tract infections. She also alleges that Lott used an out-of-hospital do-not-resuscitate order to have the Hampton withhold nutrition and hydration from Mills, even though the hospital had found no swallowing problems. Unfortunately, on September 27, 2014, Mills passed away. Johnston alleges that Mills died of starvation after Lott ordered the nursing home staff to withhold food and give Mills nothing but water.

On December 19, 2016, Johnston filed this suit. She asserted 11 causes of action, which are summarized as follows:²

1. All defendants allegedly violated the Americans with Disabilities Act (ADA), specifically, 42 U.S.C. § 12132, 29 C.F.R. § 35.130, and 29 U.S.C. § 790 *et seq.*, through their "habit, pattern, and practice of disability discrimination."
2. All defendants allegedly violated 42 U.S.C. § 12203, the ADA provision prohibiting retaliation.
3. Dixel, Lott, Comstock, Reiner, Judge Butts, and Fox allegedly violated Johnston's

² In addition to the list of claims that follows, the introduction to Johnston's complaint makes a passing reference to a cause of action for fraud. However, that is the only reference to fraud; it is not identified or pleaded against any defendant at any other point in the complaint. A brief mention in an introductory paragraph, unaccompanied by detailed pleading in the body of the complaint, is not sufficient to state a claim for relief. To the extent that Johnston intended to plead a fraud claim, it is dismissed without prejudice. The complaint contains similar passing references to defamation (in the form of slander or libel), without formally asserting a cause of action for defamation or pleading facts supporting the elements of that cause of action. To the extent that Johnston intended to plead a cause of action for defamation, it too is dismissed without prejudice.

and Mills's First Amendment rights, specifically, freedom of speech and freedom of association, and therefore violated 42 U.S.C. § 1983.

4. Harris County and its agents, Dexel, Lott, Comstock, and Reiner, allegedly violated Mills's Fifth Amendment right to due process through their deliberate ignorance of necessary food, nutrition, and medical attention for Mills, and therefore violated § 1983.
5. Harris County and its agents, Dexel, Lott, Comstock, and Reiner, allegedly violated Mills's Fourteenth Amendment right to due process, and therefore violated § 1983.
6. Unspecified defendants conspired to violate unspecified persons' civil rights, in violation of 42 U.S.C. § 1985.³
7. Reiner, Dexel, Comstock, Lott, Judge Butts, and Fox allegedly conspired to, and did, breach their fiduciary duties to Mills.
8. All defendants allegedly intentionally inflicted severe emotional distress on both Johnston and Mills by retaliating against them and denying their right to association.
9. All defendants allegedly caused Mills's "wrongful[,] premature death" through their "wrongful [and] deliberately indifferent care or lack of care."
10. All defendants allegedly "fail[ed] to fulfill statutory duties."⁴

³ This cause of action is a bare heading, reading in its entirety "Seventh Cause of Action - Conspiracies to Violate Civil Rights - 42 U.S.C. § 1985." It is titled the seventh cause of action rather than the sixth because earlier in the complaint, the numbering jumped. Other than this heading, the complaint does not evince an intent to bring a claim under this statute. To the extent that Johnston intended to press a claim under § 1985, it is dismissed, without prejudice and with leave to amend, for failure to state a claim.

⁴ Once again, this cause of action is a bare heading without accompanying factual allegations as to the elements of a claim. The complaint does not identify what statutory duties were breached or which defendants breached them. To the extent Johnston intended to plead a claim for the breach of some

11. Dexel, Lott, Comstock, Fox, Judge Butts, and Reiner allegedly engaged in a long list of “*ultra vires* illegal, criminal, and wrongful acts.”

The defendants moved to dismiss, Johnston responded, and the defendants replied. After the motions and replies were filed, Johnston stipulated to Reiner’s dismissal with prejudice and the court dismissed Reiner from the case. (Docket Entry No. 29, 30). The claims as to each remaining defendant and the grounds urged for dismissal are examined below.

II. The Legal Standard

Rule 12(b)(6) allows dismissal if a plaintiff fails “to state a claim upon which relief can be granted.” In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), the Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires “a short and plain statement of the claim showing that the pleader is entitled to relief,” FED. R. CIV. P. 8(a)(2). To withstand a Rule 12(b)(6) motion, a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570; *see also Elsensohn v. St. Tammany Parish Sheriff’s Office*, 530 F.3d 368, 372 (5th Cir. 2008). In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court elaborated on the pleading standards discussed in *Twombly*. The Court explained that “the pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555). *Iqbal* explained that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556).

“[I]n deciding a motion to dismiss for failure to state a claim, courts must limit their inquiry

unidentified statutory duty, the claim is dismissed, without prejudice and with leave to amend.

to the facts stated in the complaint and the documents either attached to or incorporated in the complaint.” *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996). A court may “consider documents integral to and explicitly relied on in the complaint, that the defendant appends to his motion to dismiss, as well as the full text of documents that are partially quoted or referred to in the complaint.” *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 882 (S.D. Tex. 2001) (internal quotation marks omitted). Consideration of documents attached to a defendant’s motion to dismiss is limited to “documents that are referred to in the plaintiff’s complaint and are central to the plaintiff’s claim.” *Scanlan v. Tex. A & M. Univ.*, 343 F.3d 533, 536 (5th Cir. 2003) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000)). The court can also consider government documents and similar matters of public record without converting the motion into one seeking summary judgment. *See Funk v. Stryker Corp.*, 631 F.3d 777, 780 (5th Cir.2011); *Isquith v. Middle S. Utils., Inc.*, 847 F.2d 186, 193 n.3 (5th Cir. 1988) (quoting 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366); *Jathanna v. Spring Branch Indep. Sch. Dist.*, No. CIV.A. H-12-1047, 2012 WL 6096675, at *3 (S.D. Tex. Dec. 7, 2012).

III. Analysis

A. The Claims Against Judge Butts and Sherry Fox

The claims against Judge Butts and Sherry Fox must be dismissed. Judge Butts performed the actions that form the basis of this suit in her judicial capacity. *Twilligear v. Carrell*, 148 S.W.3d 502, 505 (Tex. App.—Houston [14th Dist.] 2004) (probate judges’ actions in conducting guardianship proceedings “are both judicial acts and within the jurisdiction of the probate judges by whom they are required . . .”). She is presumptively entitled to absolute immunity for performing those acts. *Stump v. Sparkman*, 435 U.S. 349, 355–56 (1978). While there are exceptions to

absolute immunity for actions taken outside of the judicial capacity or “in the complete absence of all jurisdiction,” *id.*, Johnston does not allege or argue that either of these exceptions applies. Instead, she makes two unpersuasive arguments for why Judge Butts is not entitled to immunity.

First, Johnston argues that judicial immunity does not apply to Texas statutory probate judges. She does not cite cases or any other authority to support this proposition, and the court’s research did not reveal any. The ordinary test for judicial immunity is easily met here. “In the Fifth Circuit, the test is whether: ‘(1) the precise act complained of . . . is a normal judicial function; (2) the events involved occurred in the judge’s chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity.’” *Odonnell v. Harris Cty.*, 227 F. Supp. 3d 706, 757 (S.D. Tex. 2016), *reconsideration denied*, No. CV H-16-1414, 2017 WL 784899 (S.D. Tex. Mar. 1, 2017) (quoting *Harper v. Merckle*, 638 F.2d 848, 858 (5th Cir. 1981)). **Managing a guardianship is a core judicial responsibility for a judge with jurisdiction over guardianship matters. *Twiligear*, 148 S.W.3d at 505 (applying the federal standard).** Mills’s case was before Judge Butts, the decisions were made in her court, and the dispute arose from those decisions. The fact that Judge Butts is a Texas statutory probate judge rather than a constitutional county judge is of no moment.

Johnston’s other argument is closer to the mark but still fails, at least on the current complaint. Johnston claims that Texas waived immunity for probate judges in § 1201.003 of the Texas Estate Code. **Section 1201.003 provides that a “judge is liable on the judge’s bond to those damaged if damage or loss results to a guardianship or ward because of the gross neglect of the judge to use reasonable diligence in the performance of the judge’s duty under this subchapter.” The section creates a “a limited waiver of judicial immunity, allowing recovery for losses directly tied**

to the judge's duties under" the subchapter. *James v. Underwood*, 438 S.W.3d 704, 714 (Tex. App.—Houston [1st Dist.] 2014). The subchapter imposes on probate judges a set of duties plausibly related to this case, including the "use of reasonable diligence to determine whether an appointed guardian is performing the required duties," annual inspection of the well-being of each ward, ensuring that guardians have posted solvent bonds, and the like. *Id.* The immunity waiver is limited. It applies only to actions on the judge's bond for gross neglect of the duties imposed in the subchapter, and only to the extent of the bond's value. It does not, contrary to Johnston's arguments, open judges to generalized liability for violations of other statutes or common-law duties. And Johnston did not sue under this section or assert that Judge Butts violated any of the specific statutory duties that it contains.

The claims against Judge Butts in the current complaint are dismissed with prejudice, and without leave to amend, because Judge Butts is entitled to absolute judicial immunity and amendment would be futile. However, Johnston has leave to amend her pleading to state a single claim on Judge Butts's bond under § 1201.003 for Judge Butts's alleged violations of her duties under that subchapter of the Texas Estates Code. The claim against Judge Butts must clearly and explicitly plead specific facts about Judge Butts's actions; identify the specific statutory duties that these actions violated; and clarify that Johnston seeks only to recover against, and up to the amount of, Judge Butts's bond.

Sherry Fox, Judge Butts's Court Coordinator, is entitled to derivative absolute immunity, which protects court personnel who are sued for their actions taken in the course of "assisting the judge in carrying out" the judge's judicial functions. *Mitchell v. McBryde*, 944 F.2d 229, 230–31 (5th Cir. 1991); *Norris v. Warder*, No. 3:02-CV-412-P, 2002 WL 31415920, at *2 (N.D. Tex. Oct.

21, 2002). Fox is not subject to the narrow waiver of immunity in § 1201.003, which applies only to judges and only to the extent of their bond. The claims against Fox are dismissed with prejudice, and without leave to amend, because amendment would be futile.

B. The Claims Under § 1983 and § 1985 Against the Other Defendants

“Section 1983 provides a remedy against ‘any person’ who, under color of state law, deprives another of rights protected by the Constitution.” *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120 (1992). Local governments are not vicariously liable under § 1983 for their employees’ or agents’ violations of federal constitutional rights. It is only “when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government entity is responsible under § 1983.” *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978). To allege a plausible claim under § 1983 against a municipality, “a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right.” *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009).

The § 1983 claims against the court-appointed guardians—Dexel, Lott, and Comstock—are dismissed with prejudice, and without leave to amend. Court-appointed guardians and attorneys ad litem are not state actors for purposes of § 1983. In *Polk County v. Dodson*, 454 U.S. 312 (1981), the Supreme Court held that a public defender does not act under color of state law in representing a defendant merely because he or she is a public defender rather than in private practice. The Court began by observing that “a person acts under color of state law only when exercising power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” *Id.* at 317–18 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

While the source of the attorney's paycheck was "certainly a relevant factor," the public defender did not act under color of state law simply by virtue of his position. Public defenders, unlike other state employees, have independent professional obligations to their clients, taking them out of the "state actor" category for § 1983 purposes. *Id.* at 321.

Following *Dodson*, courts have held that guardians and attorneys ad litem are not state actors merely by virtue of their appointment by courts. *Kirtley v. Rainey*, 326 F.3d 1088, 1095 (9th Cir.2003) (per curiam) (a child's appointed guardian ad litem did not act under color of state law solely by virtue of being court-appointed); *Meeker v. Kercher*, 782 F.2d 153, 155 (10th Cir.1986) (same); *Parkell v. South Carolina*, 687 F. Supp. 2d 576, 587 (D.S.C. 2009) ("Guardians ad litem are not state actors for purposes of § 1983, because they give their 'undivided loyalty to the minor, not the state.'"); *Nelson v. Kujawa*, No. 07-C-741, 2008 WL 2401260, at *2 (E.D. Wis. June 11, 2008) ("[S]tate-appointed guardians ad litem are not state actors subject to liability under 42 U.S.C. § 1983."); *Schiavo ex rel. Schindler v. Schiavo*, 358 F.Supp.2d 1161, 1164-65 (M.D. Fla.2005) ("Contrary to Plaintiffs' argument, Michael Schiavo, as court appointed guardian for Theresa Schiavo, was not acting under color of state law."); *Chrissy F. ex rel. Medley v. Miss. Dep't of Public Welfare*, 780 F. Supp. 1104, 1116 (S.D. Miss.1991), *rev'd on other grounds*, 995 F.2d 595 (5th Cir.1993). This court reached the same conclusion in *Hall v. Dixon*, No. CIV A. H 09-2611, 2010 WL 3909515, at *40 (S.D. Tex. Sept. 30, 2010), *aff'd sub nom. Hall v. Smith*, 497 F. App'x 366 (5th Cir. 2012).

Johnston does not respond to the guardian defendants' argument on this point. Because the cases clearly reject the analysis that would allow a conclusion that Dixel, Lott, or Comstock acted under color of state law, the § 1983 claims against them fail as a matter of law. These § 1983 claims

are dismissed with prejudice and without leave to amend, because amendment would be futile.

The claims against Harris County fail for a different reason. “[U]nder § 1983, local governments are responsible only for their own illegal acts. They are not vicariously liable under § 1983 for their employees’ actions.” *Connick v. Thompson*, 563 U.S. 51, 60 (2011). Plaintiffs seeking to impose liability on a local government under § 1983 must allege that “‘action pursuant to official municipal policy’ caused their injury.” *Id.* The allegations must include specific facts describing the policy or custom and tying it to the constitutional violation alleged. *George*, 2012 WL 2744332, at *16. The plaintiff must identify, at minimum: (1) an official policy or custom with force of policy; (2) promulgated by a policymaker; (3) that caused the violation of a constitutional right. *Peterson*, 588 F.3d at 847.

Johnston’s complaint fails because she has not plausibly alleged the existence of a policy or a custom with the force of policy, promulgated by a Harris County policymaker. The only allegation that comes close is the barebones statement that “Harris County has a habit and practice of violating the due process rights of wards in guardianship by not allowing them access to justice in the form of attending hearings at which their rights are compromised.” (Docket Entry No. 10 at 33). This allegation is conclusory and, under the applicable law, clearly insufficient. “The description of a policy or custom and its relationship to the underlying constitutional violation . . . cannot be conclusory; it must contain specific facts.” *Spiller v. City of Tex. City Police Dept.*, 130 F.3d 162, 167 (5th Cir.1997). Nor may a plaintiff “infer a policy ‘merely because harm resulted from some interaction with a government entity,’ and instead must identify the policy or custom that caused the violation.” *Batiste v. Theriot*, 458 F. App’x 351, 358 (5th Cir. 2012) Johnston’s complaint does not identify instances of similar conduct by Harris County actors. A single course of conduct against

the plaintiff in a particular case is generally insufficient as a matter of law to support an inference of a pattern or practice. *George*, 2012 WL 2744332, at *16. Johnston's allegation does not satisfy the requirements of the applicable law. Absent allegations of a policy or custom, a decisionmaker, and a clear causal relationship between the policy or custom and the injury that Mills suffered, Johnston's claim cannot survive a motion to dismiss. The § 1983 claim against Harris County fails as a matter of law and must be dismissed. The dismissal is without prejudice and with leave to amend.

The complaint mentions § 1985 in a heading, but does not allege any facts or legal basis for a cause of action under that statute. To the extent that the complaint alleges a claim under § 1985 at all, the claim fails. It is dismissed, without prejudice and with leave to amend.

C. The Disability-Discrimination Claims

Johnston alleges that all of the defendants engaged in illegal disability discrimination and retaliation, in violation of the Americans with Disabilities Act and § 504 of the Rehabilitation Act. Claims under these statutes are evaluated using the same framework and legal standards. *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011). To state a prima facie case of discrimination under either statute, the plaintiff must allege that: (1) she has a qualifying disability; (2) she was denied benefits or otherwise discriminated against; and (3) the discrimination was because of her disability. *Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011). To show discrimination on the basis of a disability, a plaintiff may either show disparate treatment—that the defendant treated her worse than a similarly situated but non-disabled person—or that the defendant failed to reasonably accommodate her disability. *Arce v. Louisiana*, 226 F. Supp. 3d 643, 651 (E.D. La. 2016). Johnston alleges that Mills was mistreated, not that the defendants failed to make reasonable requested

accommodations.

Johnston does not plead facts that, if proven, would show that the defendants' alleged mistreatment was because of Mills's disability. Failing to provide medical care to a disabled person is not enough, on its own, to allege disability discrimination. The allegations must include facts showing that the plaintiff was treated differently than other similarly situated individuals who did not have a disability. *Nottingham v. Richardson*, 499 F. App'x 368, 377 (5th Cir. 2012). Johnston has not alleged any facts that support a plausible inference that Mills was treated worse than a similarly situated non-disabled elderly person. The complaint alleges in general terms that Mills was disabled, that Mills was mistreated, and that both Johnston and Mills were mistreated in retaliation for their advocacy against that mistreatment. The complaint does not allege a plausible causal connection between Mills's disabilities and the defendants' actions. Despite the fact that the defendants raised this problem in their motions to dismiss and briefed it in detail, Johnston's response does not even mention the issue. The disability-discrimination claim fails as a matter of law. The retaliation claim fails for the same reason: Johnston has not made nonconclusory factual allegations that would plausibly support the conclusion that she and her mother were treated worse than otherwise similarly situated individuals on account of their advocacy or other protected conduct protesting actions against Mills.

The disability discrimination and retaliation claims are dismissed, without prejudice and with leave to amend.

D. The Texas State-Law Claims

1. The Immunity Defenses

The state-law claims against Harris County must be dismissed, because the Texas law on

sovereign immunity shields the County from liability. “Subject to certain exceptions, sovereign immunity protects local government entities such as Harris County from liability from state-law tort claims.” *Brown v. Harris Cty., TX*, No. CIV.A. H-07-0644, 2010 WL 774138, at *13 (S.D. Tex. Mar. 2, 2010), *aff’d sub nom. Brown v. Harris Cty., Texas*, 409 F. App’x 728 (5th Cir. 2010) (citing *General Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001)); *see also Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). That sovereign immunity protects the State from liability even for its agents’ intentional torts. TEX. CIV. PRAC. & REM. CODE § 101.057; *Taylor v. Gregg*, 36 F.3d 453, 457 (5th Cir. 1994) (per curiam), *overruled in part on other grounds by Castellano v. Fragozo*, 352 F.3d 939, 949 (5th Cir. 2003) (en banc). Johnston’s argument that Texas’s sovereign immunity does not protect Harris County because sovereign immunity only protects states and not their political subdivisions is contrary to well-established law. *E.g., Brown*, 2010 WL 774138, at *13. Johnston does not plead or otherwise identify exceptions to the immunity doctrine that would justify liability here, and the court is not aware of any. However, out of an abundance of caution, the court will allow Johnston an opportunity to amend her complaint to allege an exception to Texas’s sovereign immunity, consistent with Rule 11 of the Federal Rules of Civil Procedure. The claims against Harris County are dismissed, without prejudice and with leave to amend.

Comstock, who served as Mills’s guardian ad litem, is similarly shielded from liability under Texas law. Section 1054.056 of the Texas Estate Code provides that guardians ad litem are “not liable for civil damages arising from a recommendation made or an opinion given in the capacity of guardian ad litem.” There are exceptions to this immunity rule for recommendations or opinions that are “wilfully wrongful”; those given “with conscious indifference to or reckless disregard for the

safety of another”; “with malice” or “in bad faith”; or those that are “grossly negligent.” *Id.* Johnston does not allege that Comstock acted outside her role as a guardian ad litem. The complaint does not make any nonconclusory factual allegation that Comstock made recommendations or gave opinions that fall into any of the immunity exceptions.

To be sure, Johnston liberally peppers the allegations with the language of purposeful impropriety. Johnston alleges that Comstock’s work was “replete” with misrepresentations; “deliberately mischaracterized” Johnston’s understanding of her mother’s health problems with “gross exaggerations”; and attempted to “malign” Johnston. (Docket Entry No. 10 at 21). But the complaint does not allege facts sufficiently specific to make the conclusory language a basis to plead a plausible claim. The allegations lack facts from which the court could infer that Comstock acted willfully, maliciously, or with the “conscious indifference” to Mills’s welfare that is required to find gross negligence. *See Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981) (gross negligence is “that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.”). The fact that a guardian ad litem’s report contains falsehoods is not sufficient. There must be factual allegations showing that the guardian was either affirmatively aware that the statements were false or made the statements with reckless, conscious indifference to their truth. That in turn requires factual allegations what information the guardian knew and how that differed from what the guardian’s report represented. The closest the complaint comes to pleading around immunity is the allegation that Comstock “never called key witnesses, such as Willie Jo Mills’ primary caretaker, who would have confirmed the neglect and dangerous conditions at Silverado” (Docket Entry No. 10 at 20-21). This factual allegation may plausibly support

an inference of negligence. But Johnston does not include factual allegations that would justify an inference that Comstock was *grossly* negligent—that her failure to contact a given witness was the product of an “entire want of care” showing “conscious indifference” to Mills’s well-being. *Burk Royalty Co.*, 616 S.W.2d at 920.

The Texas-law claims against Comstock are dismissed, without prejudice and with leave to amend. To survive a subsequent motion to dismiss, Johnston must plead specific facts—not labels, descriptions, or conclusions—from which the court could infer that her characterizations of Comstock’s state of mind are plausible.

2. The Remaining Claims and Defendants

a. The Claims for Breach of Fiduciary Duty and Civil Conspiracy

The claims against the remaining individual defendants require more detailed evaluation. The first Texas-law cause of action charges that the only remaining individual defendants—Dexel and Lott—conspired to, and did, breach their fiduciary duties to Mills. Under Texas law, “[t]he elements of breach of fiduciary duty are (1) the existence of a fiduciary relationship, and (2) a breach of duty by the fiduciary (3) that causes damages to the client or improper benefit to the fiduciary.” *First State Bank of Mesquite v. Bellinger & Dewolf, LLP*, 342 S.W.3d 142, 150 (Tex. App.—El Paso 2011, no pet.). Each defendant’s arguments for dismissal are considered in turn.

Dexel argues that Johnston has not pleaded a plausible causal link between his conduct and harm to Mills. Dexel argues that the fact that he was discharged as Mills’s guardian more than a year before she died means that he is not liable for her death. He insists that the fact that the court (rather than Dexel) appointed Lott as a successor guardian breaks any causal link between his acts and Mills’s deterioration. These arguments are unpersuasive. Johnston’s complaint, construed as a

whole and taking all factual allegations as true, plausibly alleges that before Dexel's discharge as guardian, he breached his duties to Mills by repeatedly disregarding warnings about the Silverado nursing home's alleged mistreatment of Mills and about Mills's deteriorating physical condition and by ending Mills's physical therapy. (Docket Entry No. 10 at 12-13). Johnston alleges that, as a result of Dexel's actions, Mills suffered broken bones and a rapid and preventable decline in her physical condition that left her unable to feed herself, which contributed to her malnutrition. (*Id.*). Dexel's causation argument, which focuses on events after he was discharged and on Mills's death, does not address these alleged breaches and injuries.

Dexel also argues that Johnston's failure to link her factual allegations to the elements of a claim for breach of fiduciary duty means that the complaint fails. Dexel's complaint stems from the structure of Johnston's complaint, which includes an extensive and sometimes muddled set of factual allegations as to each defendant, and in a different section, gives a conclusory recitation of the elements of the causes of action. Dexel is correct that Johnston's complaint is not a model of clear pleading. Johnston must clarify the relationship between her factual allegations and the elements of the causes of action she asserts in any future amended complaint. In each cause of action, Johnston should state the specific factual allegations she believes support a given element of her claim. Johnston's current approach requires the defendants and the court to sift through her lengthy complaint looking for factual allegations to map onto the elements of a cause of action. This violates the requirement that a complaint provide a short, plain, and clear statement of the claim. Nonetheless, under applicable law, the court must "view[] the complaint as a whole, rather than any one statement in isolation." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 289 (5th Cir. 2004). The court has already explained why, viewed as a whole, the complaint states a breach of

fiduciary duty claim against Dixel.

Finally, Dixel claims that self-dealing is a critical part of a claim for breach of fiduciary duty. He argues that a plaintiff must plausibly allege that the fiduciary personally benefitted from the breaches of his or her duties. In support, he cites *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2003, pet. denied). That case does state the proposition that an improper benefit is part of a breach of fiduciary duty claim. But this does not appear to be the general rule in Texas cases. Instead, the persuasive weight of authority is that *either* an injury to the party to whom the fiduciary duties are owed *or* an improper benefit to the fiduciary is sufficient to state a claim. *E.g.*, *Anderton v. Cawley*, 378 S.W.3d 38, 51 (Tex. App.—Dallas 2012, no pet.); *PAS, Inc. v. Engel*, 350 S.W.3d 602, 610 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied).

Kimleco's discussion focuses on claims against attorneys. The court drew a line between legal malpractice claims and breach of fiduciary duty claims against an attorney by pointing to self-dealing as an important distinguishing feature. Other cases that recite propositions similar to *Kimleco* similarly focus on “the attorney-client context” *E.g.*, *Neese v. Lyon*, 479 S.W.3d 368, 386 (Tex. App.—Dallas 2015, no pet.). It is interesting to note that, even though *Neese* states that “a fiduciary-duty claim focuses on whether the attorney’s conduct involved his or her integrity and fidelity, *and whether the attorney obtained an improper benefit from representing the client*,” the case’s statement of the elements acknowledges that “injury to the plaintiff” is sufficient to make out a claim. *Id.* Texas law does not appear to require an improper benefit to the fiduciary to state a claim that the fiduciary breached his duties. Johnston has adequately pleaded an injury to Mills. Dixel’s arguments fail.

Lott advances several arguments. First, she argues that issue preclusion bars Johnston's claim for breach of fiduciary duty. Lott points to the order discharging her from service as Mills's guardian. The probate court found that Lott had fulfilled her duties in good faith and made decisions based on proper medical advice, and stated that Lott should be discharged from her duties with no further liability. (Docket Entry No. 24-1). Issue preclusion is an affirmative defense on which Lott bears the burden. Issue preclusion, or collateral estoppel, bars

. . . a party from litigating an issue already raised in an earlier action between the same parties only if: (1) the issue at stake is identical to the one involved in the earlier action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a necessary part of the judgment in that action.

Petro–Hunt, L.L.C. v. United States, 365 F.3d 385, 397 (5th Cir. 2004) (footnotes and citation omitted). “Collateral estoppel does not preclude litigation of an issue unless both the facts and the legal standard used to assess them are the same in both proceedings.” *Copeland v. Merrill Lynch & Co., Inc.*, 47 F.3d 1415, 1422 (5th Cir.1995) (citation omitted). Lott provides neither argument nor authority explaining why the probate court's discharge order satisfies these conditions. It is not clear whether Johnston was a party to the prior proceeding in the relevant sense (“an earlier action between the same parties”). Lott has not demonstrated that the issue of whether she executed her duties in good faith involved the same issues, facts, or legal standard as the present action. Nor has she shown that the issue was actually litigated in the probate court or that it was necessary to the order discharging her as Mills's guardian. Lott is free to reurge this argument at a later stage in the proceedings. And Dixel, to the extent that he believes that his own discharge order has a preclusive effect here, may also raise this defense at a later stage in the proceedings. The present record, however, does not justify dismissing the claims against either Lott or Dixel on the basis of

preclusion.

Lott next argues that the complaint does not adequately allege a causal link between her actions as guardian and the harms Mills allegedly suffered during Lott's guardianship. This argument is unpersuasive. The complaint alleges that Lott disregarded medical advice that she take steps to see that Mills received certain care; obstructed Johnston's efforts to get Mills emergency care during a medical crisis; disregarded evidence that the Hamptons nursing home was neglecting Mills's medical needs; and inappropriately relied on a do-not-resuscitate order to withhold food from Mills, contributing to her death. (Docket Entry No. 10 at 17-19). These allegations state a claim for a breach of fiduciary duty. The breach of fiduciary duty claim against Lott may proceed.

Johnston also alleges civil-conspiracy liability for these breaches of fiduciary duty. "A civil conspiracy is a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Goldstein v. Mortenson*, 113 S.W.3d 769, 778-79 (Tex.App.—Austin 2003, no pet.) (citing *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex.1983)); see also *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex.1968). A civil conspiracy claim involves two or more persons, who agreed on an object to be accomplished or a course of action; the commission of one or more unlawful, overt acts; and damages as the proximate result. *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996) (quoting *Massey*, 652 S.W.2d at 934). "Once a conspiracy is proven, each co-conspirator 'is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination.'" *Carroll v. Timmers Chevrolet*, 592 S.W.2d 922, 926 (Tex.1979) (quoting *State v. Standard Oil Co.*, 130 Tex. 313, 329, 107 S.W.2d 550, 559 (1937)). "[C]ivil conspiracy requires specific intent. For a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the inception of

the combination or agreement.” *Triplex Commc 'ns, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995).

A common intent to accomplish a given goal, plus a tort in furtherance of that goal, are not enough.

The parties must have agreed to accomplish an unlawful goal or to accomplish a lawful goal by

unlawful means. *Juhl*, 936 S.W.2d at 644.

The conspiracy allegations fail. Even assuming that the other elements are met, Johnston has not adequately alleged the required agreement, or meeting of the minds. Johnston’s only factual allegation on this point is that, on September 17, 2013, Dexel, Lott, Comstock, and Judge Butts had a “secret, *ex parte* meeting/hearing . . . in which Judge Butts appointed Lott as successor guardian to Dexel” (Docket Entry No. 10 at 14, 17). This is far from a factual allegation that those present at that meeting reached an agreement to deny Mills proper medical care and hasten her death. Nor is it a basis from which the court could infer such an agreement. The claim for conspiracy to breach fiduciary duties is dismissed, without prejudice and with leave to amend. To survive a subsequent motion to dismiss, Johnston must allege specific facts that, if proven, would support a plausible inference that the defendants entered into an agreement with the specific intent to pursue an unlawful goal or to unlawfully pursue a lawful goal relating to Mills’s care.

b. The Claim For Intentional Infliction of Emotional Distress

To recover damages for intentional infliction of emotional distress, a plaintiff must plead factual allegations showing that: (1) the defendant acted intentionally or recklessly; (2) the defendant’s conduct was extreme and outrageous; (3) the defendants actions caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. Extreme and outrageous conduct is conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

community.” *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex.1993). “Generally, liability for intentional infliction of emotional distress has only been found in those cases in which a recitation of the facts to an average member of the community would lead him to exclaim, ‘Outrageous!’” *Foye v. Montes*, 9 S.W.3d 436, 440 (Tex. App.—Houston [14th Dist.] 1999). “The mere fact that a defendant’s conduct is tortious or otherwise wrongful does not, standing alone, necessarily render it ‘extreme and outrageous.’” *Bradford v. Vento*, 48 S.W.3d 749, 758 (Tex. 2001). Whether a defendant’s conduct is “extreme and outrageous” is a matter of law for the court to decide. *Id.*; see also *Brewerton v. Dalrymple*, 997 S.W.2d 212, 216 (Tex. 1999).

The defendants argue that the complaint allegations do not describe behavior that any civilized person would regard as “outrageous” or “beyond all possible bounds of decency.” Therefore, they say, Johnston has not adequately alleged a claim for intentional infliction of emotional distress. Johnston did not respond to this argument. Her response to the motions to dismiss does not address her intentional infliction of emotional distress claim at all. Johnston appears to have abandoned the claim. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006). Even assuming that Johnston still intends to press the claim, the defendants’ argument is persuasive. The allegations against the defendants, taken as true, clearly allege tortious and blameworthy acts. But that is not “extreme and outrageous.” The complaint does not allege the level of depraved or heinous conduct necessary to impose liability for intentional infliction of emotional distress. The claim is dismissed, without prejudice and with leave to amend.

c. The Wrongful Death Claim

“In a wrongful death action” under Texas law, “a plaintiff must show (1) wrongful or negligent conduct of the defendant, and (2) the proximate cause resulting in death.” *Schippers v.*

Mazak Properties, Inc., 350 S.W.3d 294, 298 (Tex. App.—San Antonio 2011). The defendants' arguments focus on causation.

Dexel argues that the complaint does not allege proximate cause for two reasons: because he was discharged over a year prior to Mills's death, and because the complaint affirmatively alleges that it was Lott who caused Mills's death by improperly relying on a do-not-resuscitate order to prevent medical personnel from feeding Mills, causing her to starve to death. Johnston's brief response—unaccompanied by additional argument or authority—is that she does not allege “that Dexel, himself, starved Mills to death—he simply recruited Lott to slide into his place and let her take over.” (Docket Entry No. 25 at 24).

Texas law supports Dexel's argument. “Even where a defendant's actions would be considered a substantial factor and a but-for cause of harm, the defendant may be relieved of liability where there is a ‘superseding cause’—a third party or a force that is beyond the defendant's anticipation or control, which intervenes and destroys the causative chain between the defendant and the harm.” *Walters v. Allways Auto Grp., Ltd.*, 484 S.W.3d 219, 22-26 (Tex. App.—Corpus Christi 2016). An intervening tort by a third party is typically such a superseding cause. The critical inquiry is whether the third party's actions were foreseeable. *E.g., Davis-Lynch, Inc. v. Asgard Techs., LLC*, 472 S.W.3d 50, 64 (Tex. App.—Houston [14th Dist.] 2015), *reh'g overruled* (Aug. 27, 2015); *Dyess v. Harris*, 321 S.W.3d 9, 14 (Tex. App.—Houston [1st Dist.] 2009).

Johnston's argument that there is no superseding cause because Lott simply continued Dexel's neglect is undermined by her complaint allegations. Johnston repeatedly, explicitly, and affirmatively alleges that Mills died because Lott denied her food, causing her to starve to death. (Docket Entry No. 10 at 18-19; 38; 40; 46-47). There is no allegation, much less a well-pleaded and

plausible allegation, that Lott's alleged action was a continuation of Dexel's alleged misconduct that was foreseeable to Dexel. The wrongful death claim against Dexel is dismissed, without prejudice and with leave to amend. To survive a subsequent motion to dismiss, the amended complaint must allege specific facts about what Dexel knew about Lott or the circumstances that would make Lott's decision, months later, to withhold food foreseeable to Dexel.

Lott similarly argues that the complaint does not plausibly allege that she proximately caused Mills's death. This argument is unpersuasive given the complaint's repeated, specific, and detailed allegations that Mills's death was a direct result of Lott's decision to deny Mills food. (Docket Entry No. 10 at 18-19; 38; 40; 46-47). That is a factual allegation, not a legal conclusion. On a motion to dismiss, it must be taken as true. Lott's causation argument fails.

Lott also advances what appears to be a limitations argument. She argues that, when "a decedent's own cause of action was barred by governmental immunity, or statute, or release, or res judicata, or any other affirmative defense, there is no wrongful death action to accrue," and urges that the wrongful death claim against her must be dismissed. (Docket Entry No. 24 at 18). If Lott is arguing that the order discharging her as guardian is preclusive as to the wrongful death claim, that argument fails for the reasons Lott's similar preclusion argument addressed earlier failed. If Lott is arguing that Mills could not have sued her, the basis for that argument is unclear at best. Second, citing the Texas medical malpractice statute, Lott argues that the wrongful-death cause of action accrued at the time of the alleged tortious conduct, not when Mills died. As a result, Lott argues, the claim is untimely because it was filed more than two years after Lott allegedly began denying Mills food. This argument is also unpersuasive. Lott cites § 73.251 of the Texas Civil Practice & Remedies Code, but this statute applies only to tort claims against healthcare providers and related

professionals. The statute does not purport to apply to tort claims against guardians. The wrongful-death claim that Johnston asserts accrued on the date Mills died—September 27, 2014—and was filed in Texas state court exactly two years later—September 27, 2016. The claim is timely under Texas law. *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 63 (Tex. 2014) (the statute of limitations for wrongful death actions is two years).

The wrongful death claim against Lott is adequately pleaded and can proceed.

d. “Ultra Vires” Acts

The final heading in Johnston’s complaint is “*Ultra Vires* Illegal, Criminal, and Wrongful Acts.” (Docket Entry No. 10 at 46). The heading is followed by two and a half pages of vague allegations that the defendants’ actions amounted to: criminal injury to the elderly; unauthorized practice of medicine and pharmacy; and criminal recklessness. The complaint does not allege any specifics as to the statutes or regulations that the defendants’ conduct violated, identify any private causes of action stemming from the asserted violations, identify the elements of any causes of action, or plead specific facts plausibly alleging a cause of action. To the extent that Johnston intended to assert any specific cause of action against a particular defendant in this section, the claim is dismissed for failure to state a claim. The dismissal is without prejudice and with leave to amend.

IV. Conclusion

For the reasons stated in this opinion, the defendants’ motions to dismiss are granted in part and denied in part. The following claims are dismissed with prejudice:

- all claims against Judge Christine Butts and Sherry Fox (save that Johnston may amend her complaint to allege a claim under Section 1201.003 of the Texas Estate Code on Judge Butts’s bond);

- all claims under 42 U.S.C. § 1983 against David Dexel, Ginger Lott, GSL Care Management, LLC, and Clarinda Comstock.

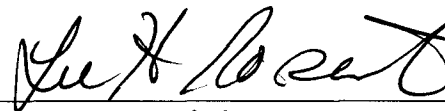
The following claims are dismissed without prejudice and with leave to amend:

- the claims under § 1983 against Harris County;
- the claims for disability discrimination and retaliation under the Americans with Disabilities Act and the Rehabilitation Act;
- all of the Texas-law claims against Harris County and Clarinda Comstock;
- the claim for civil conspiracy to breach fiduciary duties;
- the claim for intentional infliction of emotional distress;
- the claim for wrongful death against David Dexel; and
- any claims that Johnston intended to assert for fraud, defamation, violation of statutory duties, or commission of “ultra vires” illegal acts.

The claim for breach of fiduciary duty is adequately pleaded as to Dexel and Lott, and may proceed. The claim for wrongful death is adequately pleaded as to Lott, and may also proceed.

Any amended complaint must be filed by **September 18, 2017**.

SIGNED on August 18, 2017, at Houston, Texas.



Lee H. Rosenthal
Chief United States District Judge

APPENDIX 24

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REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL CAUSE NO. 456,059

IN RE: THE GUARDIANSHIP OF * IN PROBATE COURT
*
MURIEL LUBA MINTZ, * NUMBER TWO (2) OF
*
AN INCAPACITATED PERSON * HARRIS COUNTY, TEXAS

MOTION TO TRANSFER

APPOINTMENT OF TEMPORARY GUARDIAN

BE IT REMEMBERED that beginning on the 19th day of September, 2017, came on to be heard outside the presence of a jury, in the above-entitled and -numbered cause; and the following proceedings were had before the Honorable Mike Wood, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by Computerized Stenotype Machine, Reporter's Record produced by Computer-Assisted Transcription.

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1	Clarewood House Discharge	10	11	1
	Papers for Muriel Luba Mintz			
	Dated: 4-26-17			

1 THE COURT: Cause No. 456,059, could I have
2 appearances?

3 MS. KELLY: Stacy Kelly and Ken Scott for
4 Donald Mintz.

5 MS. PITRE: Teresa Pitre, attorney ad litem.

6 MR. MAHONEY: Matt Mahoney and Erinn Brown
7 for Barbara Latham.

8 THE COURT: Okay. Go forward on your
9 motion.

10 MR. MAHONEY: I'm sorry?

11 THE COURT: Proceed on your motion.

12 MR. MAHONEY: Yes, sir.

13 Oh, there she is.

14 We're ready, Judge.

15 THE COURT: She's going to testify?

16 Anybody who is going to testify, raise your
17 right hand to be sworn.

18 (Witnesses sworn.)

19 THE COURT: Go ahead.

20 MR. MAHONEY: Thank you, Judge. I call
21 Barbara Latham.

22

23

24

25

1 BARBARA ANN LATHAM,
2 having been first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 QUESTIONS BY MR. MAHONEY:

5 Q. Would you tell us your name?

6 A. Barbara Ann Latham.

7 Q. Ms. Latham, you are the daughter of Muriel Mintz;
8 is that correct?

9 A. Yes, sir.

10 Q. You're also the movant in this motion to
11 transfer; is that correct?

12 A. Yes, sir.

13 Q. Where -- at the time, where is Muriel Mintz
14 residing?

15 A. With me at 1022 Northwick Drive, Pearland, Texas
16 77584, Brazoria County.

17 Q. And you're asking the Court to transfer this --
18 these applications that have been filed to Brazoria
19 County; is that correct?

20 A. Yes, sir.

21 Q. Are you a resident of Brazoria County?

22 A. Yes, I am.

23 Q. Is there a -- currently an APS investigation
24 that's being done in Brazoria County?

25 A. Yes. There are --

1 MR. MAHONEY: Objection. Nonresponsive
2 after "yes."

3 THE WITNESS: Okay.

4 Q. (BY MR. MAHONEY) Are all of the records from
5 that investigation in Brazoria County?

6 A. I believe so.

7 Q. That's being done by the Brazoria County Adult
8 Protective Services, correct?

9 A. Yes, sir.

10 Q. There's also bank records that are kept in
11 Brazoria County; is that correct?

12 A. That's correct.

13 Q. And those records would be more easily accessible
14 to all of the parties involved from the bank there in
15 Brazoria County?

16 MR. SCOTT: Your Honor, if I may --

17 A. Absolutely. Yes, sir.

18 MR. SCOTT: Your Honor, If I may object to
19 the leading nature of the questions. I think the witness
20 is being lead, and I object.

21 THE COURT: Sustained.

22 Q. (BY MR. MAHONEY) Does your mom -- or does the
23 ward have a bank account?

24 A. Yes, she does.

25 Q. Okay. And where is that bank account?

1 A. She has one bank account at Bank of America, a
2 checking account. She has another account at a credit
3 union in Pearland. She has -- which is -- well, two
4 accounts, an IRA and a saving account.

5 Q. And are those bank accounts that you speak of in
6 Brazoria County?

7 A. Yes, they are.

8 Q. Are you asking the Court to grant your motion to
9 transfer and transfer the pending applications to Brazoria
10 County?

11 A. Yes, sir.

12 MR. MAHONEY: I pass the witness.

13 MS. KELLY: Real quick, Your Honor, if I
14 could. It was my understanding at the last hearing you
15 said the focus of today's hearing would be whether Muriel
16 Mintz had capacity on April 26th when Ms. Latham moved her
17 to Brazoria County. I haven't heard anything --

18 THE COURT: Yes.

19 MS. KELLY: Okay. What I have, Your Honor,
20 on March 8th we filed an application for guardianship.

21 THE COURT: Right.

22 MS. KELLY: On April 7th, they filed an
23 application for guardianship saying she needed a guardian.
24 On April 26th, Ms. Latham moved her out of Harris County
25 with her power of attorney. Ms. Mintz did not move

1 herself.

2 I would say their application that is
3 currently on file for a guardianship that has never been
4 amended, modified, changed in any way, is a judicial
5 admission of incapacity on April 7th when they filed it.
6 And then they moved her on April 26th to get her out of
7 this jurisdiction. Now, I mean, just their judicial
8 admission alone says she didn't have capacity on April
9 26th when she was moved because they had a guardianship
10 application pending in this Court.

11 MR. MAHONEY: May I reopen, Judge, and put
12 on some more testimony that's going to contradict those
13 statements of the attorney? I apologize.

14 THE COURT: Go ahead.

15 Q. (BY MR. MAHONEY) Ms. Latham, when did you --
16 when did your mother move from Harris County to Brazoria
17 County?

18 A. It was March 13th, 2017.

19 Q. And that was before you filed this application in
20 this case; is that correct?

21 A. Yes, sir, that's correct.

22 THE COURT: Mr. Mahoney, do you have a --

23 MR. MAHONEY: I do, Judge.

24 THE COURT: -- CLE certificate?

25 MR. MAHONEY: And I brought several copies.

1 May I?

2 THE COURT: Yes.

3 MR. MAHONEY: I'll pass the witness, Judge.

4 THE COURT: So...

5 CROSS-EXAMINATION

6 QUESTIONS BY MS. KELLY:

7 Q. Well, Ms. Latham, is that your signature right
8 there (indicating)?

9 A. I --

10 Q. Is that your signature?

11 A. I -- excuse me. I need to read this form.

12 Q. I'm asking you if this is your signature at the
13 bottom? Do you not recognize your own signature? Do you
14 know your own signature?

15 MR. MAHONEY: Judge, I'm going to object to
16 the argumentative nature of the question.

17 MS. KELLY: I'm asking --

18 THE COURT: Well, it's a simple question:
19 Is that your signature?

20 MS. KELLY: -- is this your signature?

21 MR. MAHONEY: I understand.

22 Q. (BY MS. KELLY) Is this your signature?

23 A. 4/26.

24 Q. I'm not asking the date. I'm asking: Is this --

25 A. Well, I -- I --

1 THE COURT: Ma'am, is that your signature?

2 Q. (BY MS. KELLY) Is that your signature?

3 A. It appears to be my signature.

4 Q. Okay. Is this your signature (indicating)?

5 A. That appears to be my signature.

6 MS. KELLY: Your Honor, these are discharge
7 papers from Clarewood.

8 MR. MAHONEY: Wait a second.

9 MS. KELLY: I'm going to ask that they be
10 admitted.

11 MR. MAHONEY: Okay.

12 MS. KELLY: She signed them with her power
13 of attorney, checking the proposed ward, not the ward, the
14 proposed ward out of Clarewood on April 26th.

15 MR. MAHONEY: Judge, may I see the exhibit
16 before she tenders it to the Court to see if I have any
17 valid objections?

18 THE COURT: Yes.

19 THE WITNESS: That's the furniture. I can
20 explain it to you.

21 MS. BROWN: Shhh.

22 MR. MAHONEY: Judge, I'm going to object to
23 these documents as they're clearly hearsay.

24 MS. KELLY: Clearly hearsay. I'm just going
25 for the date she signed it with her power of attorney and

1 the date at the bottom. It's not hearsay. She just said
2 that was her signature.

3 MR. MAHONEY: Well, may I respond?

4 THE COURT: They're not -- she's not
5 offering it to prove the truth of the matters in that
6 document. Just that she signed that document -- those
7 documents on the date on them.

8 MR. MAHONEY: Okay.

9 THE COURT: And the results of those
10 documents was that she was physically discharged from
11 where she had been living -- how long had she lived at
12 Clarewood House?

13 THE WITNESS: Two years, approximately.
14 About two years.

15 THE COURT: Your objection is overruled.
16 And I'm not admitting them for the truth --

17 MR. MAHONEY: I understand.

18 THE COURT: -- of all the matters in there.

19 MR. MAHONEY: Yes, sir.

20 THE COURT: Do you have any questions?

21 MS. PITRE: Yes.

22 CROSS-EXAMINATION

23 QUESTIONS BY MS. PITRE:

24 Q. Ms. Latham, what was the reason why your mother
25 was removed from Clarewood?

1 A. My mother was not removed from Clarewood. My
2 mother wanted to come home with me on March 13th because
3 she received a phone call from her son that the next
4 morning a constable was going to come to her apartment and
5 serve her papers and that she would be in a lot of trouble
6 if she were not there as would I. She wanted to come home
7 with me and I -- what I did -- I wanted to call her
8 attorney, her -- that had filled out her --

9 MR. MAHONEY: Judge, I'm going to object.

10 A. -- her papers.

11 MR. MAHONEY: It's not responsive at this
12 point.

13 THE COURT: Sustained. Just answer the
14 question. Don't give speeches.

15 A. Okay. What was the question?

16 Q. (BY MS. PITRE) I'll ask another question.
17 You've already -- I think you've answered that one
18 already.

19 What reason did you give Clarewood House for
20 removing her or for her moving?

21 A. I initially gave them no reason. However, when I
22 moved her furniture on April 26th, I explained to them
23 that I did not give them -- I told them that morning when
24 I arrived at 8:00 o'clock that I was moving her. I gave
25 them no advance notice. I apologized. But I believed

1 that my brother was going to create quite a scene if he
2 had advance knowledge of that.

3 And, in fact, I was detained once my
4 brother -- Clarewood notified APS. My brother was
5 notified. I was detained by five HPD officers in the
6 office there. I would have been arrested had I not handed
7 them a copy of my power of attorney. That is the exact
8 reason I did not give advance notice.

9 THE COURT: Well, so when you think there's
10 a threat against you, your approach is to steal the ward
11 and take her out of the jurisdiction of the Court --

12 THE WITNESS: I just --

13 THE COURT: -- because you know better, not
14 your brother, because you don't like your brother. So you
15 don't want your brother to have anything to do with it.
16 So your approach when your brother said this Court was
17 going to exercise jurisdiction over your -- you just took
18 her?

19 THE WITNESS: He did not tell me that.

20 THE COURT: You didn't tell the Court.

21 THE WITNESS: He did not tell me that.

22 THE COURT: I don't care what he told you.
23 The point is if I say that she's going to stay in Harris
24 County, are you going to just say, No, she's not and
25 you're going to take her? And then you're going to say,

1 Sorry, Judge.

2 THE WITNESS: Well, that would be quite a
3 different --

4 THE COURT: That's what you did.

5 THE WITNESS: -- order.

6 THE COURT: That's exactly what you did.

7 MR. MAHONEY: Judge.

8 THE COURT: You filed an application for me
9 to create a guardian because your mother was
10 incapacitated. And then you went out and took her out of
11 where she had lived for several years and took her home in
12 another county.

13 THE WITNESS: She wanted --

14 MR. MAHONEY: Judge, may I respond to that?
15 Just because I don't -- I think what -- well, I think
16 we're getting a little out of -- procedurally out of our
17 realm here. She's testified that she moved her in March.
18 The applications were filed in April. And so I don't
19 want -- I don't want to play a game with the dates, but
20 she's testified that she moved her in March after a phone
21 call that the ward received from the brother.

22 So there was no Court order. There was
23 no -- you know, and her application was filed after the
24 application of the brother because this was -- at that
25 point this would have been the Court where there was a

1 pending lawsuit. So this would have been done --
2 according to her testimony, this would have been done a
3 month before anything was even -- had been filed with the
4 Court.

5 MS. KELLY: They filed their application on
6 April 7th, and in their application they say that she is a
7 resident of Clarewood House in Harris County, Texas, and
8 she swears to that in her affidavit or her verification at
9 the back on March 24th. Some 11 days supposedly after
10 she's moved her for some -- to Brazoria County, she's
11 telling this Court that the ward is still in Clarewood and
12 is asking this Court to take jurisdiction and appoint a
13 guardian.

14 MR. MAHONEY: Okay.

15 MS. KELLY: And now -- and then we had the
16 IME, and this Court made some pretty strong rulings on the
17 attorneys and told them to watch the money. And that's
18 when they filed their transfer to Brazoria County --

19 MR. MAHONEY: Judge --

20 MS. KELLY: -- when they stopped liking
21 these orders.

22 MR. MAHONEY: Can I respond to that, Judge?

23 THE COURT: Yes.

24 MR. MAHONEY: Because this is the -- this is
25 the second time that for whatever reason -- and I don't

1 know this lady. I've never had a conversation with her.
2 Okay -- but for whatever reason, this is the second
3 time --

4 THE COURT: You might try having
5 conversations with opposing counsel outside the presence
6 of the Court.

7 MR. MAHONEY: I understand.

8 THE COURT: It might be something that you
9 might --

10 MR. MAHONEY: It may be fruitful, right? It
11 may --

12 THE COURT: Have you called her?

13 MR. MAHONEY: It may prevent us from having
14 to stand up here and make allegations of illegal
15 conduct --

16 THE COURT: Look --

17 MR. MAHONEY: -- against the other attorney.

18 THE COURT: -- the bottom line is this, she
19 swore under oath in this court that her mother was
20 incapacitated and needed a guardian. I don't know where
21 the mother was. I know where she said she was. Okay? So
22 that's what I go on is what's in the application.

23 MR. MAHONEY: I understand.

24 THE COURT: So I have jurisdiction.

25 MR. MAHONEY: Okay.

1 THE COURT: You move her later, I don't
2 think I lose jurisdiction.

3 MR. MAHONEY: I understand. I don't -- it's
4 a motion to transfer, Judge.

5 THE COURT: I know.

6 MR. MAHONEY: I understand. You rule one
7 way or the other --

8 THE COURT: Okay.

9 MR. MAHONEY: -- and then we'll proceed to
10 the next step. I don't --

11 THE COURT: Okay. Do you have anything
12 else?

13 MS. KELLY: No, Your Honor.

14 THE COURT: Motion to transfer is denied.

15 MR. MAHONEY: Yes, sir.

16 THE COURT: We need to schedule this if it's
17 really contested. If it's not contested except who the
18 guardian is -- I don't do trials of contested
19 guardianships between children unless they're going to pay
20 their attorneys themselves. I don't pay the children's
21 attorney's fees out of the ward's estate because it will
22 go on forever if they don't have to pay their own
23 attorney's fees.

24 So I'm going to appoint an independent third
25 party as guardian. We can have a hearing, a contested

1 hearing, over who should be guardian that would last a
2 long time, three or four days, except for right now we
3 really can't have contested hearings. But it would take a
4 lot of time and you-all would be paying your own money to
5 the lawyers and not paying with your mother's money. So
6 at the end of that I would probably decide neither of you
7 should be guardian, and then I would ask you to go out in
8 the hall and agree on an independent third party. I'm
9 suggesting you save some money and just go out in the hall
10 and agree on an independent third party so that we can
11 place her under a guardianship and protect her and her
12 assets pending the contest and then figure out if we can
13 figure it, something to settle the contest which is going
14 to include an investigation by the independent third party
15 of what happened to her assets before the guardianship.
16 The guardian doesn't decide anything. But if the guardian
17 decides that somebody took assets they weren't entitled
18 to, the guardian will take whatever actions are
19 appropriate.

20 So show him the order.

21 MS. KELLY: And I have an order for the
22 appointment of a third-party guardian that was supposed to
23 be heard last Tuesday.

24 THE COURT: Right.

25 MS. KELLY: I do currently have an order.

1 THE COURT: Well, why don't y'all talk about
2 it and bring it up to me if you can. If not, I'll just
3 pick somebody to appoint. But I don't know where she's
4 going to stay, if she's going to stay at her daughter's
5 or what you are going to do about that.

6 MS. PITRE: Your Honor, I did speak with
7 Clarewood House regarding the ward, the proposed ward,
8 prior to her being moved to her daughter's house. And the
9 counselor there seemed to indicate that she was doing fine
10 in the independent-living facility there. Now, of course,
11 the medical report shows that she does need some -- does
12 need a guardianship. But I don't see why Clarewood House
13 wouldn't be an option for her.

14 THE COURT: Okay. Well, let's talk. Y'all
15 talk about a guardian and then talk about where she's
16 going to be. I would rather you-all talk instead of doing
17 things presumptively because that will cost less than
18 attorney's fees and probably ultimately benefit the ward.
19 All right.

20 MR. MAHONEY: Yes, sir.

21 THE COURT: Thank y'all.

22 MR. MAHONEY: May we stand down, Judge?

23 THE COURT: You may. I'll be here if you
24 want me to sign something.

25 (Recess.)

1 (The following proceedings were held in
2 Chambers:)

3 THE COURT: Your co-counsel is not here?

4 MS. BROWN: No, Judge. He got summoned to a
5 Family Court, but I'm here.

6 THE COURT: All right. Well, rather than us
7 sitting around staring at each other -- this is a
8 continuation of the hearing in 456,059, the Guardianship
9 of Muriel Luba Mintz. All parties are present except one
10 co-counsel.

11 So you wanted to make a record of something.
12 I'm about to sign the order appointing Teresa Goldberg as
13 guardian of the person and estate pending contest. Or is
14 this not pending contest?

15 MS. KELLY: No.

16 THE COURT: Is this a permanent
17 guardianship?

18 MS. KELLY: Permanent.

19 THE COURT: Okay.

20 MS. BROWN: Wait a minute. No, no. I --
21 I -- I --

22 THE COURT: But -- but --

23 MS. BROWN: -- I thought we were appointing
24 Michele Goldberg as the temporary independent until we
25 have our final trial.

1 MS. KELLY: Well, that wasn't what I was
2 going to do. He said he wasn't going to have a trial
3 with, you know, at the end of the day with sisters and
4 brothers fighting. There was going to be a third party
5 anyway.

6 THE COURT: Well --

7 MS. BROWN: Well, we filed a jury request --

8 MS. KELLY: Okay.

9 MS. BROWN: -- on that issue.

10 THE COURT: Here is the thing. I've got to
11 appoint a guardian now because there are not going to be
12 any juries, perhaps, in this court until I retire in 18
13 months.

14 MS. BROWN: No, I understand, Judge. But if
15 you were appointing her on a temporary basis, that's what
16 I thought the Court was doing.

17 THE COURT: I'm not -- that's all I had
18 planned to do was temporary.

19 MS. BROWN: Okay.

20 MS. KELLY: Okay. Well, then we can put
21 temporary.

22 MS. BROWN: Yeah. Because we are -- we are
23 seeking --

24 THE COURT: Why don't you make those
25 changes.

1 MS. BROWN: -- a jury trial on the final.
2 And I understand it may not be for 18 months. I get that.

3 THE COURT: Well, I mean --

4 MS. KELLY: Okay. So then what goes back on
5 the record is even more important. At the first hearing
6 at the IME, you ordered both parties to do an accounting;
7 and you admonished Ms. Barbara Latham's attorneys to make
8 sure they weren't taking money from her and for Ms. Latham
9 to account for all of the money that she's been spending
10 of her mother's.

11 We did an accounting, my clients did, of all
12 the money they've touched of hers and the other side has
13 not done an accounting. And we think that's very
14 important because the ward is -- their client is spending
15 money on the other sister every month.

16 MS. PITRE: And, Your Honor, I did also ask
17 the counsel for the -- for Barbara Latham to provide that
18 accounting, reminded her that the accounting was due, that
19 you had asked for one and never got a response to that.

20 And one other thing along the lines of the
21 order, I should be discharged today because my role should
22 be completed because we have a temporary ad litem or
23 permanent -- I mean, a permanent guardian or temporary
24 guardian. But Mr. Mintz has not seen his mother in over
25 seven months. I attempted to get a visitation. And I

1 told Ms. Latham that I would be there to make sure that
2 Mr. Mintz didn't do anything inappropriate with the
3 mother. She refused to allow the mother to go on a
4 visitation without her being -- without Barbara Latham
5 being present. We have now since talked with Ms. Brown
6 and she said that she will make that happen. I would like
7 to stay on for a little bit longer.

8 THE COURT: I'm not planning to release you.

9 MS. PITRE: Okay.

10 THE COURT: I mean, I don't know why -- it's
11 just a temporary.

12 MS. PITRE: Okay. I got you.

13 THE COURT: You're around until the
14 permanent trial.

15 MS. PITRE: Makes sense.

16 THE COURT: Sorry.

17 MS. PITRE: Thank you.

18 THE COURT: But your role is really just
19 about the, you know --

20 MS. PITRE: Pretty much ends other than --

21 THE COURT: Yes.

22 (Phone rings.)

23 (Brief pause.)

24 (Attorney Michele Goldberg joined the
25 hearing via speaker phone.)

1 THE COURT: Okay. I have you on the speaker
2 phone now.

3 MS. GOLDBERG: Thank you.

4 THE COURT: We're here on the contested
5 guardianship of Muriel Luba Mintz.

6 MS. GOLDBERG: Okay.

7 THE COURT: The parties have -- are
8 proposing to agree for you to become the temporary
9 guardian pending contest.

10 MS. GOLDBERG: Oh, God.

11 THE COURT: And I thought it was
12 appropriate for us to talk to you before we appointed you.

13 MS. GOLDBERG: Yeah. Well, I just -- I just
14 wanted to let you know, depending on where the proposed
15 ward --- where the ward is, my house -- I'm at my house
16 now. I was very, very badly hit in the flood. I do have
17 a two-story house. I'm sitting on the second floor right
18 now that's okay.

19 THE COURT: That's probably not safe,
20 either.

21 MS. GOLDBERG: I'm kind of overwhelmed. So
22 I'm kind of overwhelmed with stuff to do, and I've got
23 Rosh Hashanah this week. So if it's an
24 emergency-emergency, as honored as I am, I'm going to have
25 to decline. If it can wait until next week when I can get

1 to it, I would be honored. You know, I would be honored
2 to help.

3 MS. KELLY: I think it can wait.

4 MS. PITRE: Yeah, it can wait.

5 THE COURT: I think it can wait until next
6 week. It's not that big an emergency. You need to be
7 available by phone so that you can talk to them about
8 where she's going to move. Right now she's staying with
9 one of the warring children out of county.

10 MS. BROWN: Pearland.

11 MS. GOLDBERG: Do we need to get her placed?
12 Is that the problem?

13 THE COURT: Well, she had a place at --

14 MS. KELLY: Clarewood.

15 MS. PITRE: Clarewood House.

16 THE COURT: -- and they would probably
17 welcome her back.

18 MS. GOLDBERG: Okay.

19 THE COURT: But the bond is going to be
20 \$250,000. I assume you can post a bond like that.

21 MS. GOLDBERG: Oh, yeah. That's -- yeah,
22 yeah. That's not a problem.

23 THE COURT: All right. So I'm going to go
24 ahead and sign the order appointing you.

25 MS. GOLDBERG: Okay. Thank you.

1 THE COURT: And you will be in touch -- do
2 you know who all the lawyers are?

3 MS. GOLDBERG: I know Erinn and Matt. We
4 took a -- and Matt Mahoney. We were just on a very
5 contested case in Brazoria County and we worked together.
6 I don't know who else -- well, wait. Before I accept, who
7 else is on this, Judge?

8 THE COURT: Are you going to announce
9 yourself?

10 MS. KELLY: Stacy Kelly.

11 MS. GOLDBERG: Okay. That's fine. You've
12 got all good attorneys.

13 THE COURT: Okay. Thank you.

14 (Brief pause.)

15 MS. GOLDBERG: Okay. Once again, my
16 disclaimer is: Wednesday night until Friday morning, I
17 don't even pick up the phone because it's Rosh Hashanah.
18 I will pick it up on Friday. It's still the holiday, but
19 I will pick it up on Friday. And next week, from Friday
20 afternoon through till Sunday is Yom Kippur. I do not
21 pick up the phone. Okay?

22 MS. BROWN: And, Judge, the clients are all
23 Jewish, too.

24 MS. GOLDBERG: I just want them to know if
25 they need me, I will not be available.

1 THE COURT: The clients are all Jewish,
2 also.

3 MS. GOLDBERG: That doesn't mean that they
4 care, but anyway.

5 MS. BROWN: No, no, they do.

6 THE COURT: She says they celebrate also, so
7 that shouldn't be a problem.

8 MS. GOLDBERG: Okay.

9 THE COURT: All right. Thank you.

10 (Brief pause.)

11 THE COURT: I said on the Bench on the
12 accounting, go ahead and get it.

13 MS. BROWN: We're working on it, Judge, yes,
14 sir.

15 THE COURT: I mean, an agent under a power
16 of attorney has a duty to account.

17 MS. BROWN: Yes, sir.

18 THE COURT: And if the ward is
19 incapacitated, then the guardian is the one who asserts
20 that duty.

21 MS. BROWN: Yes, sir. And also their client
22 had a valid power of attorney for a duration of the time,
23 and yet they've provided an accounting that said "none".
24 So, you know, there's issues with the accounting, I get
25 it, and that's why we -- Michele will --

1 THE COURT: Okay.

2 MS. BROWN: -- I'm sure will address the
3 issue again.

4 THE COURT: All right. Thank you.

5 (End of proceedings.)
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1 THE STATE OF TEXAS)

2 COUNTY OF HARRIS)

3 I, TINA K. WHITE, Official Court Reporter in
 4 and for Probate Court No. 2 of Harris County, State of
 5 Texas, do hereby certify that the above and foregoing
 6 contains a true and correct transcription of all portions
 7 of evidence and other proceedings requested in writing by
 8 counsel for the parties to be included in this volume of
 9 the Reporter's Record, in the above-styled and numbered
 10 cause, all of which occurred in open court or in chambers
 11 and were reported by me.

12 I further certify that this Reporter's Record
 13 of the proceedings truly and correctly reflects the
 14 exhibits, if any, admitted, tendered in an offer of proof
 15 or offered into evidence.

16 I further certify that the total cost for the
 17 preparation of this Reporter's Record is \$_____ and
 18 was paid by _____.

19 WITNESSED MY OFFICIAL HAND this the 6th day
 20 of January, 2018.

21
 22 /s/ Tina K. White
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 Official Court Reporter
 Probate Court No. 2
 Certificate No. 5488
 Expires: December 31, 2018
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 832-927-1440

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