

2004

Gerald R. Homeyer v. Elder Care Consult, Inc., : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

In the Matter of

MARGARET CANNATELLA,

An Incapacitated Person

Gerald R. Homeyer,

Appellant,

v.

Elder Care Consult, Inc.,

Appellee.

APPEAL FROM THE THIRD
DISTRICT COURT, SALT LAKE
COUNTY, STATE OF UTAH

Trial Court Judge: Lewis

Trial Court No. 043900019

Appellate Court No. 20040938-CA

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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LIST OF ALL PARTIES

1. Gerald R. Homeyer
2. Elder Care Consult., Inc.

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JURISDICTIONAL STATEMENT

Jurisdiction of the Utah Court of Appeals in this matter is proper pursuant to Utah Code Annotated § 78-2a-3(2)(j).

ISSUES PRESENTED AND STANDARD OF REVIEW

Question presented: Did the trial court deprive Gerald Homeyer of the due process of law, by summoning him to appear at an order to show cause hearing concerning why he should not be held in contempt of court for disobeying the court's prior order, but then going beyond the issue of contempt, and holding an evidentiary and adversarial hearing on the merits, when Mr. Homeyer demonstrated that he was not there and then prepared for such, when he appeared pro se and opposite an attorney whom he had previously hired, when he was immediately sentenced to 30 days in jail for contempt, when he was not named as a defendant in the proceeding, and when the order to show cause gave him no notice that such a trial would take place? (R: 51-53, 54-56, 57-61, 66-68, 70-71, 72, 73-80, 81-83). (See Transcript of August 11, 2004 hearing at pp. 3, 8, 11-12, 23, 48-49, 51).

Standard of review: Constitutional issues, including that of due process, are questions of law which the Court of Appeals reviews for correctness. *See State in Interest of K.M.*, 965 P. 2d 576, 578 (Utah App. 1998); *see also State v. Holland*, 921 P. 2d 430, 433 (Utah 1996).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Const. U.S., Amd. V. No person shall be . . . deprived of life, liberty, or property, without due process of law.

Const. U.S., Amd. XIV. No state . . . shall deprive any person of life, liberty, or property, without due process of law.

Const. Utah, Art. I, § 7. No person shall be deprived of life, liberty or property without

due process of law.

STATEMENT OF THE CASE

On or about October 4, 2002, Christus St. Joseph's Villa filed a law suit against Margaret Canatella for non payment of her nursing home bills. Case No. 020910515. (See Transcript of January 28, 2004 at p. 2 and Transcript of April 15, 2004 at p. 4).

The court appointed Ms. Canatella's son, Gerald Homeyer, as her guardian ad litem for the purposes of that litigation. (See Transcript of January 28, 2004 at pp. 2-3 and Transcript of April 15, 2004 at p. 5).

On or about September 15, 2003, Michael Jensen filed a notice of appearance of counsel for Mr. Homeyer. (See Transcript of April 15, 2004 at p. 5).

On or about December 8, 2003, the court entered a default judgment in favor of St. Joseph's and against Ms. Canatella in the amount of approximately \$91,315.85. (See Transcript of January 28, 2004 at p. 3 and Transcript of April 15, 2004 at p. 5). On the same day, Mr. Jensen filed a notice of withdrawal of counsel.

On or about March 16, 2004, the court terminated Mr. Homeyer as Ms. Canatella's guardian ad litem.

On or about January 7, 2004, Elder Care Consult Inc., represented by Mr. Jensen, filed a probate complaint, (Case No. 043900019), and a petition for a court order to determine that Ms. Canatella is an incapacitated person and for an order to appoint Elder Care Consult Inc. as guardian and Stagg & Associates as conservator of said protected person. (R: 1-3). (See Transcript of January 28, 2004 at p. 2).

A first hearing on the petition was held on January 28, 2004, (R: 17), and a second hearing

was held on April 15, 2004. (R: 33).

At the April 15 hearing the court granted the petition and appointed one Dr. Brent Wright of Elder Care Consult Inc. as Ms. Canatella's guardian and Stagg & Associates as her conservator. (R: 34-36). (See Transcript of April 15, 2004 at pp. 6,18).

On or about May 13, 2004, the conservator, via Mr. Jensen, filed a motion for an order requiring an accounting and turnover of funds. (R: 41-44). (See Transcript of August 11, 2004 at p. 5).

On or about June 9, 2004, the court signed the order requiring an accounting and turnover of funds. (R: 51-53).

On or about July 7, 2004, Mr. Homeyer was served with the order requiring an accounting and turnover of funds. (See Transcript of August 11, 2004 at p. 6).

On or about July 21, 2004, because Mr. Homeyer failed to respond to the order, the petitioner filed a verified motion for an order to show cause. (R: 57-61).

On or about July 21, 2004, the court granted the motion and signed the order. (R: 57-61).

On or about July 29, 2004, a constable served the order on Mr. Homeyer, and proof thereof was filed with the court on or about August 6, 2004. (R: 66-68).

On or about August 11, 2004, the court held a hearing on the order to show cause. Mr. Homeyer was present. (R: 70-71). (See Transcript of August 11, 2004 at p. 3).

At the August 11 hearing, various exhibits were admitted into evidence. (R: 72). The court found Mr. Homeyer to be in contempt of court and sentenced him to thirty days in jail. (See Transcript of August 11, 2004 at p. 51).

On or about September 23, 2004, the court entered its finding of fact and conclusions of

law, (R: 73-80), and entered a judgment against Mr. Homeyer and in favor of Ms. Canatella's conservator in the amount of \$116,181.26. (R: 81-83).

On or about October 6, 2004, the conservator filed a motion, and memorandum in support thereof, for an order requiring Mr. Homeyer to convey his real property to Ms. Canatella's ward. (R: 86-88).

On or about October 22, 2004, Mr. Homeyer filed a notice of appeal. (R: 102-103).

STATEMENT OF FACTS

Sometime in 2002 Gerald Homeyer (hereinafter "Mr. Homeyer") brought his elderly mother, Margaret Canatella (hereinafter "Ms. Canatella), from New York to Utah. He placed her in an assisted care facility, "Regency Assisted Living Facility," where she had her own apartment. (See Transcript of April 15, 2004 at p. 11 and Transcript of August 11, 2004 at p. 13). Mr. Homeyer managed his mother's finances using a power of attorney. (See Transcript of August 11, 2004 at p. 48).

Soon thereafter Ms. Canatella fell and broke her hip, so Mr. Homeyer placed her in Christus St. Joseph's Villa for rehabilitative treatment. (See Transcript of August 11, 2004 at pp. 11-12).

At some point a dispute arose between Mr. Homeyer and St. Joseph's regarding his mother's treatment. According to Mr. Homeyer, St. Joseph's were not providing his mother with the proper treatment they had contracted to provide. (See Transcript of January 18, 2004 at pp. 4-5, Transcript of April 15, 2004 at pp. 12-13, and Transcript of August 11, 2004 at p. 28). St. Joseph's wanted to give Ms. Canatella a "radical mastectomy," but when Mr. Homeyer contacted a physician at Cottonwood Hospital the physician told him that under no circumstances should a

woman of Ms. Canatella's age undergo such a procedure. (See Transcript of April 15, 2004 at p. 15). Because of these disputes Mr. Homeyer ceased paying St. Joseph's for his mother's nursing and medical bills. (See Transcript of January 28, 2004 at pp. 4-5 and Transcript of April 15, 2004 at p. 13).

As a result, on October 4, 2002, St. Joseph's filed a lawsuit against Ms. Canatella in order to recover their fees (Case No. 020910515). The court appointed Mr. Homeyer as his mother's guardian ad litem for the purposes of that litigation. (See Transcript of January 28, 2004 at pp. 2-3 and Transcript of April 15, 2004 at pp. 5-6).

Sometime in September of 2003, Mr. Homeyer hired an attorney, one Michael Jensen. (See Transcript of January 28, 2004 at p. 5 and Transcript of April 15, 2004 at pp. 3,5). On September 15, 2003, Mr. Jensen filed a notice of appearance of counsel for Mr. Homeyer. On the same day, St. Joseph's filed a motion for an order of judgment by default.

A hearing on the motion was held on November 10, 2003, and on December 8, 2003, the court entered a default judgment in favor of St. Joseph's and against Ms. Canatella in the amount of approximately \$91,315.85. (See Transcript of January 28, 2004 at p. 3 and Transcript of April 15, 2004 at p. 5). On the same day, Mr. Jensen filed a notice of withdrawal of counsel.

The court also ordered Mr. Homeyer to find an alternative facility for Ms. Canatella. According to Mr. Homeyer he had tried to, but to no avail. (See Transcript of April 15, 2004 at pp. 6,14).

Soon thereafter St. Joseph's, desperate to collect their fees, went to the office of the public guardian, and the office in turn contacted Mr. Jensen's clients, Dr. Brent Wright of Elder Care Consult Inc. and Stagg & Associates, to see if they could serve as Ms. Canatella's guardian and

conservator respectively. (See Transcript of April 15, 2004 at pp. 6). Thus, on January 7, 2004, Mr. Jensen filed a petition for a court order to determine that Ms. Canatella is an incapacitated person and for an order to appoint Elder Care Consult Inc. as guardian and Stagg & Associates as conservator. (R: 1-3). (See Transcript of January 28, 2004 at p. 2).

A first hearing on the petition was held on January 28, 2004. (R: 17). At that hearing Mr. Homeyer represented that he had refused to pay St. Joseph's because they were not providing his mother with the proper rehabilitative treatment they had contracted to provide. (See Transcript of January 28, 2004 at pp. 4-5). Further, Mr. Homeyer informed the court that, "Mr. Jensen was my attorney for that matter which I think is a conflict of interest in his part." (See Transcript of January 28, 2004 at p. 5). The court postponed deciding the issue due to Mr. Homeyer's objections. (See Transcript of January 28, 2004 at p. 3-4, 6).

A second hearing was held on April 15, 2004. (R: 33). St. Joseph's, via their attorney, Lawrence Dingivan, was also present. (See Transcript of April 15, 2004 at p. 2). Mr. Homeyer reiterated his concern about Mr. Jensen stating that "Mr. Jensen was hired by me, paid over \$3,000. I consider this . . . a conflict of interest." (See Transcript of April 15, 2004 at p. 3). Mr. Homeyer seemed to be under the impression that Mr. Jensen was working for the nursing home, St. Joseph's. The court then informed Mr. Homeyer that Mr. Dingivan represented St. Joseph's, but Mr. Homeyer still reiterated his impression that he felt St. Joseph's was working behind the scenes to collect their judgment via Mr. Jensen. Apparently, the court stated that it understood Mr. Homeyer's position. (See Transcript of April 15, 2004 at pp. 3-4). Later, Mr. Dingivan represented that he and Mr. Jensen represented independent clients with interests which may overlap. (See Transcript of April 15, 2004 at p. 9). Also present at the hearing was one Tom

Christensen, acting as attorney for Ms. Canatella. He represented that Ms. Canatella was a “very delightful old lady” and that she was doing well (See Transcript of April 15, 2004 at pp. 10, 14). Mr. Jensen then represented to the court that Mr. Dingivan had told him that it looked like Ms. Canatella’s bank accounts were empty. (See Transcript of April 15, 2004 at pp. 6-7). The court then granted the petition and appointed Elder Care as guardian and Stagg & Associates as conservator. (See Transcript of April 15, 2004 at p. 18). (R: 34-36).

A short time after the April 15 hearing Mr. Jensen contacted Mr. Dingivan concerning the bank accounts. (See Transcript of August 11, 2004 at p. 4). Mr. Jensen discovered that a large withdrawal had been made, and on May 13, 2004, filed a motion for an order requiring both an accounting and a turnover of funds from Mr. Homeyer. (See Transcript of August 11, 2004 at p. 5). (R: 41-44). On June 9, 2004 the court granted the order, (R: 51-53), and it was served on Mr. Homeyer on or about July 7. (See Transcript of August 11, 2004 at p. 6). The order required Mr. Homeyer to give an accounting of his mother’s funds for the period April 1, 2002, through April 30, 2004, and to do so no later than June 15, 2004. It also ordered Mr. Homeyer to turn over to the conservator all of the funds in his possession and under his control that belonged to his mother, and to do so within five days of service of the order. (R: 51-53, 54-56).

According to Mr. Homeyer, when he was served with the order on July 7 he noticed that the deadline for responding, at least with regards to the accounting, i.e., June 15, had already passed. Mr. Homeyer then gave the order back to the constable who threw it to the ground. According to Mr. Homeyer, the paper fell into a wet gutter where it stayed. ((See Transcript of August 11, 2004 at p. 47).

On July 21, 2004. Mr. Jensen filed a motion for an order to show cause which the court

granted on the same day. (R: 57-61). It was served on Mr. Homeyer on July 29. (R: 66-68).

The order states in part:

IT IS HEREBY ORDERED that Gerald Homeyer appear before this Court . . . to show why he should not be held in contempt of this Court's Order served on him by constable on July 7, 2004, because of his failure to provide an accounting of his mother's funds for the period April 1, 2002 through April 30, 2004, and for his failure to turn over all of his mother's funds in his possession or under his control.

(R: 66-68).

Mr. Homeyer obeyed the order and appeared at his contempt hearing on August 11, 2004. (R: 70-71). The court commenced by announcing that the August 11 hearing was an order to show cause hearing. (See Transcript of August 11, 2004 at p. 3).

At the hearing Mr. Jensen presented various exhibits 'against' Mr. Homeyer in order to demonstrate that Mr. Homeyer, using the power of attorney, had taken money out of his mother's bank accounts to make a down payment on a new home in Riverton. (R: 72). (See Transcript of August 11, 2004 hearing at pp. 8, 23). Mr. Homeyer admitted to this, but stated that his mother had consented to him using the money in this way and that she was lucid when she said this, and that she had even made the initial suggestion. (See Transcript of August 11, 2004 hearing at pp. 34-35, 41-42, 48-49). When asked for proof, Mr. Homeyer asserted that he did not have any physical proof, but that it was based on a various "conversations" he had with her. Apparently, Mr. Homeyer had lost his home in a divorce and it was Ms. Canatella's desire that he use her money to buy himself a home. (See Transcript of August 11, 2004 at p. 35).

As far as the accounting was concerned, the court told Mr. Homeyer that he was responsible for giving an accounting and that it would sign an order to that effect. (See Transcript of August 11, 2004 at p. 10). Mr. Homeyer also informed the court that at some point

in the past, presumably during the initial litigation by St. Joseph's when he had hired Mr. Jensen, that "counsel" had advised him that he was not required to give an accounting. (See Transcript of August 11, 2004 at p. 11). Then the court asked him what he would be "able to do in the future." Mr. Homeyer responded that he "would try to get – but none of those records are available to me." (See Transcript of August 11, 2004 at p. 11). The court also asked him whether he was aware that he "could go to jail today?" (See Transcript of August 11, 2004 at p. 12).

At various stages of the August 11 proceeding, when questioned about records and accounting Mr. Homeyer responded that he had not come to the hearing prepared to answer such questions or with documents at the ready. For example, "I have no way to provide you with that kind of information. I don't have that information with me," (See Transcript of August 11, 2004 at p. 12), "I had no idea what records they might need but I can provide them to the Court," (See Transcript of August 11, 2004 at p. 48), and "I did not bring anything with me. I didn't know what the attorney would be –," (See Transcript of August 11, 2004 at p. 49). According to Mr. Homeyer, he had come on the order to show cause and the "cause" for which he had not provided an accounting was because of the prior advice of counsel, and because the date on the order had expired by the time it was served on him. (See Transcript of August 11, 2004 at p. 11, 42, 47). Although Mr. Homeyer admitted that he had destroyed some records based on the advice of counsel, he did state that he was willing to now obey the court's order and bring what he could. (See Transcript of August 11, 2004 at p. 11). Further, he also stated that he had expended other funds on his mother's behalf and that he had or could get records related to those. (See Transcript of August 11, 2004 at pp. 37-38).

At the conclusion of the hearing the court found that Mr. Homeyer was in contempt for

failing to obey the court's prior order and sentenced him to serve "30 days in jail forthwith." (See Transcript of August 11, 2004 at p. 51). The court also ordered Mr. Homeyer to provide an accounting and open all mail sent to him from Mr. Jensen. The court entered judgment against Mr. Homeyer in the amount of \$116,181.26, but stated that Mr. Homeyer could offset from the judgment all payments he used for the benefit of his mother, if supported by documents submitted to the conservator no later than September 15, 2004. (R: 81-83).

The court entered its order and judgment on September 23, 2004, (R: 81-83), and on October 22, 2004, Mr. Homeyer filed a notice of appeal. (R: 104).

SUMMARY OF ARGUMENT

The trial court violated Mr. Homeyer's constitutional rights by depriving him of his property without due process of law guaranteed under the federal and state constitutions. Const. U.S., Amd. V., Const. U.S., Amd. XIV, and Const. Utah, Art. I, § 7.

The court served Mr. Homeyer with an order to show cause why he should not be held in contempt of court for failing to obey the court's prior order which required him to give an accounting of his mother's, Ms. Canatella's, funds. The order to show cause was served on Mr. Homeyer on July 29, 2004, and a hearing was held 13 days later on August 11, 2004. The court itself identified the hearing as an order to show cause hearing. Mr. Homeyer explained his reasons for failing to obey the court's prior order, including the prior advice of counsel, the fact that the deadline for compliance had expired by three weeks by the time he had been served with the prior order, and the fact that he had given the order back to the constable who subsequently threw the order on the ground.

Nevertheless, the court found Mr. Homeyer in contempt and sentenced him to 30 days in

jail. However, at the same time the court held an evidentiary hearing on the particular issue concerning the whereabouts of and accounting for Ms. Canatella's funds. The order never specifically mentioned this. Evidence was presented against Mr. Homeyer by an attorney who Mr. Homeyer had previously retained to represent his mother in an earlier case. Mr. Homeyer was clearly unprepared for the trial. At times the court indicated that it would require some future accounting, but then came to a decision and found Mr. Homeyer liable for converting his mother's funds over his objection that she had gifted the funds to him in order to buy a home and that he was not prepared. Although the court did give Mr. Homeyer until September 15 to prepare and file documents in order to offset the judgment, it then immediately sentenced him to 30 days in jail to be served forthwith and without any opportunity to take care of his affairs.

The order did not give Mr. Homeyer timely and adequate notice concerning the exact nature of the August 11 hearing. *See Nelson v. Jacobsen*, 669 P. 2d 1207, 1211 (Utah 1983); see also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). The order was not adequate because, other than the contempt issue, it did not mention that there would be a trial on the "particular" and "specific" issue of the whereabouts of and accounting for Ms. Canatella's funds. (R: 66-68). *See Nelson*, 669 P. 2d at 1212-1213; see also *State in Interest of K.M.*, 965 P. 2d 576, 579 (Utah App. 1998). Further, 13 days is not sufficient time for an unrepresented layperson to prepare for a trial in which he could be held civilly liable for more than \$100,000. *See Nelson*, 669 P. 2d at 1213-1214. Also, the courts have noted that a contempt action is separate from the principal action. *See Burgers v. Maiben*, 652 P. 2d 1320, 1322 (Utah 1982).

Further, it was procedurally unfair to give Mr. Homeyer what seemed like adequate time

i.e., until September 15, to prepare and submit documents in order to offset his judgment, but simultaneously sentence him to 30 days in jail to be served forthwith and without any opportunity to take care of his affairs, medical or otherwise.

ARGUMENT

- I. THE TRIAL COURT DEPRIVED GERALD HOMEYER OF THE DUE PROCESS OF LAW BY SUMMONING HIM TO APPEAR AT AN ORDER TO SHOW CAUSE HEARING CONCERNING WHY HE SHOULD NOT BE HELD IN CONTEMPT OF COURT FOR DISOBEYING THE COURT'S PRIOR ORDER BUT THEN GOING BEYOND THE ISSUE OF CONTEMPT AND HOLDING AN EVIDENTIARY AND ADVERSARIAL HEARING ON THE MERITS WHEN MR. HOMEYER DEMONSTRATED THAT HE WAS NOT THERE AND THEN PREPARED FOR SUCH, WHEN HE APPEARED PRO SE AND OPPOSITE AN ATTORNEY WHOM HE HAD PREVIOUSLY HIRED, WHEN HE WAS IMMEDIATELY SENTENCED TO 30 DAYS IN JAIL FOR CONTEMPT, WHEN HE WAS NOT NAMED AS A DEFENDANT IN THE PROCEEDING, AND WHEN THE ORDER TO SHOW CAUSE GAVE HIM NO NOTICE THAT SUCH A TRIAL WOULD TAKE PLACE.**

“Timely and **adequate** notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness.” Emphasis Added. *See Nelson v. Jacobsen*, 669 P. 2d 1207, 1211 (Utah 1983); *see also Worrall v. Ogden City Fire Dept.*, 616 P. 2d 598, 601-02 (Utah 1980); *Goss v. Lopez*, 419 U.S. 565, 579, 95 S. Ct. 729, 738, 42 L. Ed. 2d 725 (1975).

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) the United States' Supreme Court held that:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The information must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Id.

A party is deprived of due process where notice is ambiguous or inadequate to inform him of the nature of the proceedings against him. *See Nelson*, 669 P. 2d at 1212; *citing Graham v. Sawaya*, 632 P. 2d 851 (Utah 1981). In *Nelson* the court held that in order to “satisfy an essential element requisite of procedural due process, a ‘hearing’ must be prefaced by timely notice which adequately informs the parties of the specific issues they must prepare to meet.” *Id.* at 1213, *quoting State v. Gibbs*, 500 P. 2d 209, 215 (Idaho 1972). Further, the court stated that “due process is not a technical concept that can be reduced to a formula with a fixed content . . . [but demands] ‘a procedure appropriate to the case and just to the parties involved.’” *Id.*, *quoting Rupp v. Grantsville City*, 610 P. 2d 338, 341 (Utah 1980). *Nelson* involved a pro se (unrepresented) client. *Id.* at 1211. In deciding that notice had been inadequate thereby depriving the defendant of due process of law, the court took into consideration his pro se status holding that, “[t]o a member of the bar . . . setting a case for “hearing” could have been understood as setting a case for ‘trial’ [but] to this uneducated and inexperienced defendant, a setting for ‘hearing’ was not a clear notice that the defendant had to be ready for trial on that date.” *Id.* at 1213. The court also recognized that although pro se parties are held to the same standard of knowledge and practice as any qualified member of the bar, a layperson acting as his own attorney should nevertheless be “accorded every consideration that may reasonably be indulged.” *Id.*, *quoting Heathman v. Hatch*, 372 P. 2d 990, 991 (Utah 1962). In *Nelson* the court was concerned with what had happened, not at the trial, but “before” the trial, eventually holding that two days was insufficient notice for an unrepresented party. *Id.* at 1214.

There is a myriad of case law on this topic. *See State in Interest of K.M.*, 965 P. 2d 576, 579 (Utah App. 1998) (parties to a judicial proceeding are entitled to notice that a particular issue

is being considered by a court and must be given an opportunity to present evidence and argument on that issue before decision); *see also Fuller-Toponce Truck Co. v. Public Service Commission*, 96 P. 2d 722, 725 (Utah 1939) for an earlier case; and *State ex rel. A.H.*, 493 Utah Adv. Rep 15 (Utah App. 2004) for a more recent one.

In relation to contempt hearings, the Utah supreme court has held that “a contempt action is separate from the principal action.” *See Burgers v. Maiben*, 652 P. 2d 1320, 1322 (Utah 1982), *citing Robinson v. City Court for City of Ogden*, 185 P. 2d 256 (Utah 1947).

In the instant matter Mr. Homeyer had never been named as a “defendant” in the case, at least not in a way that an unrepresented layperson would understand it. Rather, it was a probate matter. Also, when served with the order requiring an accounting and turnover of funds, Mr. Homeyer testified that he looked at the paper given him by the constable, saw that the date for responding had already expired, and then handed it back to the constable who then dropped it in front of Mr. Homeyer. Mr. Homeyer testified that he did not then pick it up because it had fallen into a wet gutter and because it was outdated. (See Transcript of August 11, 2004 hearing at p. 47). First, a layperson could be forgiven for thinking that in a case entitled “In the Matter of” instead of the traditional “v.”, that he was not actually a defendant in the matter who could be found civilly liable. Second, such a person could also be forgiven for not understanding the mechanism of service of process whereby a constable is entitled to merely identify the person he is serving and drop the paperwork, whatever it may be, in front of that person, and thereby effectuate service. It is evident from reading Mr. Homeyer’s testimony that he was surprised that the constable acted in this way. A layperson as was Mr. Homeyer should be “accorded every consideration that may reasonably be indulged.” *See Nelson v. Jacobsen*, 669 P. 2d 1207, 1213

(Utah 1983) , *quoting Heathman v. Hatch*, 372 P. 2d 990, 991 (Utah 1962). Third, a review of the record corroborates Mr. Homeyer's story concerning the dates. The order requiring an accounting and turnover of funds was issued on June 9, 2004. (R: 51-53). By its terms, it required Mr. Homeyer to provide an accounting "no later than June 15, 2004." (R: 51). However, it was not served on Mr. Homeyer until July 7, 2004, almost three weeks after the deadline had expired. (R: 66-68) (See Transcript of August 11, 2004 hearing at p. 6). A closer scrutiny of the order also shows that although the first part of the order concerning the June 15 deadline appears on the first page of the order, (R: 51), the second part of the order regarding a turnover of funds within five days of service only appears on the second page of the order. (R: 52). This lends itself to Mr. Homeyer's explanation in that he probably only looked at the first page of the order before giving it back to the constable. Mr. Homeyer also explained to the court that he not think he needed to give an accounting based upon the prior advice of counsel. (See Transcript of August 11, 2004 hearing at p. 11). By this time Mr. Jensen had already withdrawn as counsel for Mr. Homeyer and Mr. Homeyer was unrepresented.

In any event, the court issued an order to show cause. It was served on Mr. Homeyer on July 29, 2004, approximately 12-13 days before the scheduled hearing. (R: 66-68). It ordered Mr. Homeyer to appear in court on August 10 "to show why he should not be held in [c]ontempt . . . because of his failure to provide an accounting . . . and for his failure to turn over" funds. (R: 66-68). The order clearly indicated that the August 10 hearing (it was later moved to August 11) would be a contempt hearing. Further, on August 11 the court commenced proceedings by announcing that "[w]e're here today for an order to show cause." (See Transcript of August 11, 2004 hearing at p. 3). The order made no mention of the fact that the hearing would be an

evidentiary hearing on the specific issue of the accounting and turnover of funds. In fact, it states that the purpose of the hearing is to determine cause why Mr. Homeyer should not be held in contempt “because of his failure to provide an accounting [and] turn over” of funds. (R:66-68). This raises certain questions concerning whether the order constituted “timely and adequate notice” that more than just a contempt proceeding would be held i.e., that in addition to the issue of contempt, Mr. Homeyer would more or less appear as a defendant in an evidentiary and adversarial trial-like proceeding on the specific issue of the accounting in which he could be held civilly liable. *See Nelson v. Jacobsen*, 669 P. 2d 1207, 1211 (Utah 1983) (“timely and adequate notice . . . are the very heart of procedural fairness). It is evident that the order was ambiguous and inadequate to inform Mr. Homeyer of the nature of the proceedings against him, thereby depriving him of procedural fairness and hence due process. *Id.* at 1211-1212; *see also* Const. U.S., Amd. V., Const. U.S., Amd. XIV, and Const. Utah, Art. I, § 7. Further, it is evident that the criteria set forth in *Nelson*, that to “satisfy an essential element requisite of procedural due process, a ‘hearing’ must be prefaced by timely notice which adequately informs the parties of the specific issues they must prepare to meet,” *Id.* at 1213, has not been met here. The only “specific issue” which the order indicated that Mr. Homeyer should be prepared to meet is the issue concerning why he should not be held in contempt for failing to obey the court’s prior order. (R: 66-68). Mr. Homeyer came prepared to answer this “specific issue,” giving the court his reasons for not following the prior order. (See Transcript of August 11, 2004 hearing at pp. 11, 47). The court was free to disbelieve Mr. Homeyer’s reasons, and in fact did so, holding him in contempt and sentencing him to 30 days in jail. (See Transcript of August 11, 2004 hearing at pp. 51).

However, during the hearing the court went beyond the issue of contempt, and a trial with accompanying testimony and exhibits ensued on the specific issue concerning the whereabouts of Ms. Canatella's funds. In fact, Mr. Jensen, whom Mr. Homeyer had hired in the previous litigation between St. Joseph's and Ms. Canatella, (See Transcript of January 28, 2004 hearing at p. 5 and Transcript of April 15, 2004 hearing at pp. 3, 5), put Mr. Homeyer on the witness stand and introduced evidence 'against' him in order to show that Mr. Homeyer had misappropriated funds in excess of \$100,000 and that he should be held liable for such. (R: 72). (See Transcript of August 11, 2004 hearing at pp. 23-52). Mr. Homeyer gave his reasons, informing the court that his mother had gifted him the money and that she had told him to apply it to the purchase of a new home. (See Transcript of August 11, 2004 hearing at pp. 34-35, 41-42, 48-49). Mr. Homeyer argued that she was "lucid" at the time she said this, *Id.*, and there was some evidence presented at the earlier April 15 hearing that around that time Ms. Canatella was doing well and could converse sensibly with people. (See Transcript of April 15, 2004 hearing at pp. 10, 14).

The court disbelieved Mr. Homeyer's story, but this is not at issue here. What is evident is that Mr. Homeyer was unprepared on August 11 for an evidentiary and adversarial hearing on the merits of the principal case, rather than just the contempt issue. When questioned about records Mr. Homeyer responded, "I don't have that information with me," "I had no idea what records they might need but I can provide them to the Court," and "I did not bring anything with me. I didn't know what the attorney would be --." (See Transcript of August 11, 2004 at pp. 12, 48-49). At times, even the court itself implied that this was not a conclusive trial on the accounting issue. The court told Mr. Homeyer that he was responsible for giving an accounting and that it would sign an order to that effect. (See Transcript of August 11, 2004 at p. 10). The court also asked

him what he would be able to do “in the future,” (See Transcript of August 11, 2004 at p. 11), and the minutes to the August 11 hearing mention that the court ordered Mr. Homeyer to provide an accounting as well as open all mail sent to him by Mr. Jensen. (R: 81-83). Although Mr. Homeyer admitted having destroyed some records, albeit on the advice of counsel, he did state that he would now obey the court’s order and bring what documents he could. (See Transcript of August 11, 2004 at p. 11). The court also appeared interested to see what records Mr. Homeyer could produce to show what funds he had used on his mother’s behalf, (See Transcript of August 11, 2004 at pp. 37-38), and in its order the court stated that Mr. Homeyer could offset from the judgment which was eventually entered against him any amounts used on her behalf provided he tendered documentary proof thereof. (R: 81-83). Thus, there is ample evidence that Mr. Homeyer was unprepared for such a trial-like scenario and that even the court anticipated “future” accounting.

Mr. Homeyer appeared pro se. Although such a layperson is held to the same standard as a full fledged attorney, in *Nelson* the court drew a distinction between what happens at a trial and what happens “before.” See *Nelson*, 669 P. 2d at 1214. The issue on appeal here also concerns what happened “before” the August 11 hearing i.e., whether the order to show cause served on July 29 was procedurally sufficient to give Mr. Homeyer timely and adequate notice of the specific issue which would be addressed at that hearing. In *Nelson* the court held that two days notice was insufficient for an unrepresented party. *Id.* Also, that notice of a “hearing,” though understood by an attorney to mean a “trial”, could not constitute clear notice to an unrepresented defendant that he had to be ready for a trial on the day of the hearing. *Id.* at 1213. Like the defendant in *Nelson*, Mr. Homeyer, as an unrepresented layperson, should be “accorded every

consideration that may reasonably be indulged.” *Id.* The order to show cause gave Mr. Homeyer about 13 days to prepare for the contempt hearing. If it had just been a “contempt hearing”, then that may have been time enough. However, Mr. Homeyer immediately found himself subjected to an adversarial trial-like proceeding in which he more or less was a defendant and for which he was evidently unprepared. The order did not adequately inform Mr. Homeyer of the “specific issue” that he had to prepare to meet, unless that specific issue was just the contempt issue. *See State in Interest of K.M.*, 965 P. 2d 576, 579 (Utah App. 1998) (parties to a judicial proceeding are entitled to notice that a particular issue is being considered by a court and must be given an opportunity to present evidence and argument on that issue before decision). As such, the order cannot be said to have been “reasonably calculated, under all the circumstances, to apprise” Mr. Homeyer of the nature of the proceeding in that it ended up being more than just a contempt proceeding. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Further, the Utah supreme court has held that “a contempt action is separate from the principal action.” *See Burgers v. Maiben*, 652 P. 2d 1320, 1322 (Utah 1982), *citing Robinson v. City Court for City of Ogden*, 185 P. 2d 256 (Utah 1947). The principal action in this case was Elder Care’s petition for an accounting and turnover of funds. However, the court treated the contempt action and the accounting action as one action, not separate actions, and this worked to deprive Mr. Homeyer of the due process of law.

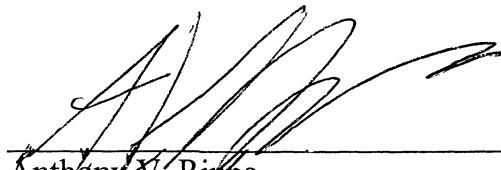
Finally, although at the August 11 hearing the court did give Mr. Homeyer until September 15, 2004 to submit records in order to obtain an offset from his judgment, it then sentenced him to 30 days in jail and he was immediately taken into custody without any opportunity to “take care of [his] affairs”, medical or otherwise. (See Transcript of August 11,

2004 hearing at pp. 51-52).

CONCLUSION

For the foregoing reasons this court should reverse the decision of the trial court and remand the matter back to the trial court to allow Mr. Homeyer to first prepare, and then and there present evidence concerning the whereabouts of Ms. Canatella's funds.

DATED this 31st day of March, 2005.



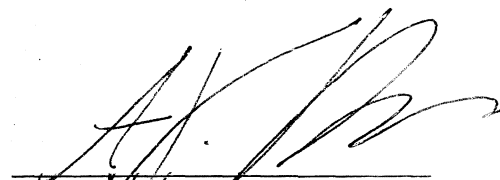
Anthony V. Rippa
Attorney for Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of March, 2005, I caused to be served a true and correct copy of the foregoing, to the following, postage prepaid:

Michael A. Jensen
Attorney at Law
P.O. Box 571708
Salt Lake City, Utah 84157-1708

Clerk of the Court
Utah Court of Appeals
Scott M. Mattheson Courthouse
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230



Anthony V. Rippa
ABBOTT & WALKER
Attorneys for Appellant.

ADDENDUM

1. Docket for Case No. 020910515
2. Docket for Case No. 043900019
3. Order requiring accounting and turnover of funds
4. Order to show cause
5. Extracts from Transcript of August 11, 2004 hearing
6. Order and judgment

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

CHRISTUS ST JOSEPH'S VILLA vs. MARGARET CANAT

CASE NUMBER 020910515 Contracts

CURRENT ASSIGNED JUDGE
GLENN K. IWASAKI

PARTIES

Plaintiff - CHRISTUS ST JOSEPH'S VILLA
Represented by: WILLIAM H CHRISTENSEN

Plaintiff - CHRISTUS ST JOSEPH'S VILLA
Represented by: LAWRENCE R DINGIVAN

Defendant - MARGARET CANATELLA

Guard Consvtor Adult - GERALD R HOMEYER

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	268.25
	Amount Paid:	268.25
	Credit:	0.00
	Balance:	0.00

TRUST TOTALS	Trust Due:	5,032.35
	Amount Paid:	5,032.35
	Credit:	0.00
	Trust Balance Due:	0.00
	Balance Payable:	5,000.00

REVENUE DETAIL - TYPE: COMPLAINT 10K-MORE
Amount Due: 140.00

Amount Paid:	140.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	0.75
Amount Paid:	0.75
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: WRIT OF ATTACHMENT

Amount Due:	35.00
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Page 1

CASE NUMBER 020910515 Contracts

Amount Paid:	35.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES

Amount Due:	2.50
Amount Paid:	2.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due:	4.00
Amount Paid:	4.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES

Amount Due:	12.00
Amount Paid:	12.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due:	4.00
Amount Paid:	4.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: WRIT OF EXECUTION

Amount Due:	35.00
Amount Paid:	35.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: WRIT OF EXECUTION

Amount Due:	35.00
Amount Paid:	35.00
Amount Credit:	0.00
Balance:	0.00

TRUST DETAIL

Trust Description:	Interest Bearing
Recipient:	THIRD DISTRICT COURT
Amount Due:	5,032.35
Paid In:	5,032.35
Paid Out:	32.35

CASE NOTE

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CASE NUMBER 020910515 Contracts

PROCEEDINGS

10-04-02 Case filed by karries
10-04-02 Judge IWASAKI assigned.

10-04-02 Filed: Complaint 10K-MORE
 10-04-02 Fee Account created Total Due: 140.00
 10-04-02 COMPLAINT 10K-MORE Payment Received:
 Note: Code Description: COMPLAINT 10K-MORE
 10-08-02 Filed: Plaintiff's ex parte rule 17(c)(4) U.R.C.P.
 appointment of guardian ad litem for defendant
 12-24-02 Filed: Memorandum in support of plaintiff's ex part
 17(c)(4) U.R.C.P. motion for appointment of guardia
 for defendant
 12-30-02 Filed order: Order Granting Plaintiff's Ex Parte Ru
 U.R.C.P. Motion for Appointment of Guardian At Lite
 Defendant
 Judge giwasaki
 Signed December 30, 2002
 01-31-03 Filed: Ex Parte URCP Rule 4(b) Motion for Additiona
 Serve Process; Rule 4(d) Motion for Alternative Ser
 02-03-03 Filed order: Order Granting Plaintiff's Ex Parte Ru
 Motion for Additional Time for Service of Process a
 Motion for Alternative Service
 Judge giwasaki
 Signed February 03, 2003
 02-05-03 Filed: Notice of filing process server's affidavit
 02-06-03 Fee Account created Total Due: 0.75
 02-06-03 COPY FEE Payment Received:
 02-07-03 Filed: Notice of entry of order granting plaintiff'
 rule 4(b) U.R.C.P. motion for additional time for s
 process and rule 4(d) motion for alternative servic
 02-13-03 Filed return: Summons
 Party Served: CANATELLA, MARGARET
 Service Type: Personal
 Service Date: February 06, 2003
 04-21-03 Filed: Ex Parte Motion for Prejudgment Writ of Atta
 (Without Notice)
 04-21-03 Filed: Memorandum in Support of Ex Parte Motion for
 Writ of Attachment
 04-21-03 Filed: Affidavit in Support of Ex Parte Motion for
 Writ of Attachment
 04-21-03 Filed: Certificate of Service
 04-23-03 Filed: Copy of Order on Ex Parte Motion for Prejudg
 Attachment (Without Notice)
 04-23-03 PREJUDGMENT WRIT OF ATTACHM scheduled on May 01, 20
 AM in Fourth Floor - W44 with Judge IWASAKI.
 04-24-03 Filed return: Order granting plaintiff's ex parte r

U.R.C.P. motion for appointment of guardian ad lite

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CASE NUMBER 020910515 Contracts

defendant

Party Served: Gerald R Homeyer

Service Type: Personal

Service Date: April 17, 2003

04-25-03 Issued: Writ of Attachment

Judge GLENN K. IWASAKI

04-25-03 Trust Account created Total Due: 5032.3

04-25-03 Interest Bearing Payment Received: 5,

04-28-03 Filed: Undertaking for prejudgment writ of attachment
defendant's personal property

04-28-03 Filed: Notice of hearing on prejudgment writ of attachment
defendant's personal property

04-28-03 Filed order: Order on ex parte motion for prejudgment
attachment (No return of service attached)

Judge giwasaki

Signed April 23, 2003

04-28-03 Issued: Writ of Attachment

04-28-03 Fee Account created Total Due: 35.00

04-28-03 WRIT OF ATTACHMENT Payment Received:

Note: Code Description: WRIT OF ATTACHMENT

04-30-03 Note:

04-30-03 Note: Check #29057 payee changed to AOC from THIRD
COURT

04-30-03 Interest Bearing Check # 29057 Trust Payout:

05-01-03 Minute Entry - Minutes for Law and Motion

Judge: GLENN K. IWASAKI

Clerk: janetmb

PRESENT

Plaintiff's Attorney(s): WILLIAM H CHRISTENSEN

Other Parties: GERALD HOMEYER

Video

Tape Number: 10:28

HEARING

TAPE: 10:28 On record

This case comes before the Court on a Motion for Pr of Attachment.

Based upon the representation of counsel and Mr. Ho modifies the Prejudgment Writ of Attachment as follo

1) The saving's account will be subject to attachme

2) The Prejudgment Writ of Attachment on checking a lifted and will be used for payments.

3) Mr. Homeyer is to provide an accounting as to de assets.

4) Counsel is directed to prepare the appropriate o

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Page 4

CASE NUMBER 020910515 Contracts

05-06-03 Filed: Notice of hearing on prejudgment writ of att defendant's personal property

05-08-03 Filed: Letter to Mr Homeyer from William Christense

05-08-03 Filed: Letter to Court from Gerald Homeyer

05-08-03 Filed order: Order extending prejudgment writ of at Judge giwasaki

Signed May 08, 2003

06-10-03 Filed return: Affidavit of service of subpoena duce Leaving with Michael Sloan

Party Served: Leo Stowikowski manager Asp

Service Type: Personal

06-18-03 Filed: First Amended Complaint

06-19-03 Fee Account created Total Due: 2.50

06-19-03 Fee Account created Total Due: 4.00

06-19-03 CERTIFIED COPIES Payment Received:

06-19-03 CERTIFICATION Payment Received:

07-14-03 Filed: Plaintiff's request for entry of default

08-18-03 Notice - NOTICE for Case 020910515 ID 5698047

We are unable to enter the default judgment/certificate case for the following reasons:

No return or proof of service.

Dated this ____ day of _____, 20____.

District Court C

08-25-03 Filed return: Affidavit of service & and amended co

Party Served: Gerald Homeyer

Service Type: Personal

Service Date: August 19, 2003

08-27-03 Filed: Letter about service from Lawrence Dingivan

08-27-03 Filed return: Letter and certificate of service for writ etc.

Party Served: US BANK, DAR-LYNN BEARD

Service Type: Personal

Service Date: August 25, 2003

09-05-03 Filed: Plaintiff's amended request for entry of default

09-10-03 Filed: Default certificate

09-15-03 Filed: Notice of appearance (Michael Jensen) for George

09-15-03 Filed: Plaintiff's Motion for order of judgment by request for hearing

09-15-03 Filed: Memorandum of points and authorities in support of plaintiff's motion for order of judgment by default
09-15-03 Filed: Affidavit of Daniel J Foster Concerning St J Villa's provision of Health Care services to Marga Cannatella
09-26-03 Filed: Plaintiff's for Order of Judgment by Default for Hearing
10-10-03 Filed: Notice to Submit for Decision (MOTION FOR OR JUDGMENT BY DEFAULT)
10-22-03 PLA'S MO ORDER OF JUDGMENT scheduled on November 10 11:00 AM in Fourth Floor - W44 with Judge IWASAKI.
11-03-03 Filed: Motion to modify order entered May 8, 2003, Mr Homeyer from filing an accounting of defendant's
11-10-03 Minute Entry - Minutes for Law and Motion
Judge: GLENN K. IWASAKI
Clerk: janetmb
PRESENT

Plaintiff's Attorney(s): LAWRENCE DINGIVAN
Guardian Conservator Adult: GERALD R HOMEYER
Attorney for the Guardian/Conservator Adult: MICHAEL
Video
Tape Number: 11:10

HEARING

TAPE: 11:10 On record
Appearances as shown above.

This case comes before the Court oral argument on P Motion for Order of Judgment by Default.

Lawrence Dingivan is present and representing the p Michael Jensen is present and representing Gerald Ho Ad Litem for defendant.

Based upon the representation of respective counsel being no response to the motion and on it's merits, the following:

- 1) Judgment of default is granted as stated for the
- 2) As to attorney fees, if applicable are to be sub affidavit.
- 3) Parties are to get together within 10 days to fi

appropriate transfer of Ms. Canatella.

4) Mr. Dingivan is directed to prepare the appropri

11-10-03 Filed: Exhibit List

11-17-03 Filed: Letter to Court from Attorney Lawrence Dingi

11-24-03 Tracking started for Exhibit. Review date Apr 10,

11-24-03 Filed: Affidavit of William H Christensen Concernin

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Page 6

CASE NUMBER 020910515 Contracts

incurred by the plaintiff

12-05-03 Filed order: Judgment and Order on Plaintiff's Moti
of Judgment by Default

Judge giwasaki

Signed December 05, 2003

12-05-03 Case Disposition is Judgment

Disposition Judge is GLENN K. IWASAKI

12-08-03 Filed: Notice of withdrawal (Michael Jensen)

12-08-03 Judgment #1 Entered

Creditor: CHRISTUS ST JOSEPH'S VILLA

Debtor: MARGARET CANATELLA

90,922.93 Principal

392.92 Costs

91,315.85 Judgment Grand Total

12-08-03 Filed judgment: Judgment and Order on Plaintiff's M
Order of Judgment by Default @J

Judge giwasaki

Signed December 05, 2003

12-12-03 Fee Account created Total Due: 12.00

12-12-03 Fee Account created Total Due: 4.00

12-12-03 CERTIFIED COPIES Payment Received:

12-12-03 CERTIFICATION Payment Received:

12-15-03 Filed: Certificate of service of plaintiff's memora
costs

12-19-03 Filed: Letter to Court from Attorney Lawrence Dingi

12-31-03 Filed: Praecipe for Writ of Execution

12-31-03 Issued: Writ of Execution - Salt Lake County

Clerk jaredf
 12-31-03 Issued: Writ of Execution
 12-31-03 Fee Account created Total Due: 35.00
 12-31-03 WRIT OF EXECUTION Payment Received:
 Note: Code Description: WRIT OF EXECUTION
 01-21-04 Filed return: Writ of execution on defendant's pers
 property (personal service UNSERVED POSTED on door
 writ Certified mail 1/7/2004)
 Party Served: HOMEYER, GERALD R
 Service Type: Personal
 Service Date: January 02, 2004
 02-18-04 Issued: First Supplemental Writ of Execution on Def
 Personal Property
 Clerk evangelb
 02-18-04 Issued: Writ of Execution - Salt Lake County
 02-18-04 Fee Account created Total Due: 35.00
 02-18-04 WRIT OF EXECUTION Payment Received:
 Note: Code Description: WRIT OF EXECUTION
 03-08-04 Filed: Ex parte motion for termination of appointme
 guardian ad litem and for appointment of sucessor g
 litem
 03-10-04 Filed return: First supplemental writ of execution

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Page 7

CASE NUMBER 020910515 Contracts

defendant's personal property
 Party Served: HOMEYER, GERALD R
 Service Type: Mail
 Service Date: February 20, 2004
 03-16-04 Filed order: Order on plaintiff's ex parte motion f
 termination of appointment of guardian ad litem and
 appointment of successor guardian ad litem
 Judge giwasaki
 Signed March 16, 2004
 03-26-04 Filed return: Return of service
 Party Served: HOMEYER, GERALD R

Service Type: Mail

Service Date: March 19, 2004

03-26-04 Filed return: Return of service

Party Served: Aspen Cove Lc

Service Type: Personal

Service Date: March 19, 2004

03-26-04 Filed: Return of Service Posted

04-09-04 Filed return: Certificate of service NO ATTACHMENTS

Party Served: U.S. BANK

Service Type: Personal

Service Date: March 19, 2004

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE GUARDIAN/CONSERVATORSHIP OF MARGAR

CASE NUMBER 043900019 Guardianship

CURRENT ASSIGNED JUDGE
LESLIE A. LEWIS

PARTIES

Other Party - STAGG & ASSOCIATES PC
Salt Lake City, UT 84111

Other Party - GERALD HOMEYER
Riverton, UT 84065
Represented by: ANTHONY V RIPPA

Other Party - LAURA M GRAY
Salt Lake City, UT 84106

Incomp/Incap Person - MARGARET CANNATELLA
Salt Lake City, UT 84115
Represented by: LAURA M GRAY

Petitioner - ELDER CARE CONSULT INC
Salt Lake City, UT 84107
Represented by: MICHAEL A JENSEN

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	463.25
	Amount Paid:	463.25
	Credit:	0.00
	Balance:	0.00

BAIL/CASH BONDS	Posted:	300.00
-----------------	---------	--------

Applied:	0.00
Forfeited:	0.00
Balance:	300.00

REVENUE DETAIL - TYPE: COMPLNT-NO AMT PROBA

Amount Due:	155.00
Amount Paid:	155.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES

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Page 1

CASE NUMBER 043900019 Guardianship

Amount Due:	4.00
Amount Paid:	4.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	0.75
Amount Paid:	0.75
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due:	32.00
Amount Paid:	32.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY

Amount Due:	15.00
Amount Paid:	15.00
Amount Credit:	0.00

Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due: 2.00
Amount Paid: 2.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: GARNISHMENT

Amount Due: 35.00
Amount Paid: 35.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: APPEAL

Amount Due: 205.00
Amount Paid: 205.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due: 4.25
Amount Paid: 4.25
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES

Amount Due: 0.50

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Page 2

CASE NUMBER 043900019 Guardianship

Amount Paid: 0.50
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	0.75
Amount Paid:	0.75
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due:	4.00
Amount Paid:	4.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES

Amount Due:	1.00
Amount Paid:	1.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due:	4.00
Amount Paid:	4.00
Amount Credit:	0.00
Balance:	0.00

BAIL/CASH BOND DETAIL - TYPE: CASH BOND: Appeals

Posted By: GERALD HOMEYER	
Posted:	300.00
Forfeited:	0.00
Refunded:	0.00
Balance:	300.00

PROCEEDINGS

01-07-04 Case filed

01-07-04 Judge LEWIS assigned.

01-07-04 Filed: Complaint No Amount Probate

01-07-04 Fee Account created Total Due: 155.00

01-07-04 COMPLNT-NO AMT PROBA Payment Received:

Note: Code Description: COMPLNT-NO AMT PROBA

01-08-04 Filed: Petition to Appont Guardians and Conservator
1/28

01-09-04 Filed: Notice of Petition and Hearing to Trust Comp

01-14-04 Notice - NOTICE for Case 043900019 ID 5831307

Notice is hereby given that on January 07, 2004 ELDE

INC filed a petition for an Order from the Court det

Printed: 03/30/05 16:24:17

Page 3

CASE NUMBER 043900019 Guardianship

Margaret Cannatella is an Incapacitated Person and f
appointing Elder Care Consult, INC. as Guardian and
Associates as Conservator of said Protected Person,
bond

A copy of the petition is on file with the clerk of
may be reviewed upon request.

The petition has been set for hearing in this court
DISTRICT COURT, 450 SOUTH STATE STREET, SLC, UTAH, o
2004, at 09:00 o'clock a.m. in Third Floor - W37 Bef
G. MAUGHAN.

Dated: January 14, 2004

Deputy Clerk

MICHAEL A JENSEN
PO BOX 571708
SALT LAKE CITY, UT 84157-1708
(Attorney)

CERTIFICATE OF POSTING

I posted copies of the attached notice in three pub
SALT LAKE COUNTY, as follows:

Third District Court

450 South State
Salt Lake City UT 84111

Third District Court - Sandy
210 West 10000 South
Sandy UT 84070

S L County Government Center
2001 South State
Salt Lake City UT 84190

01-14-04 APPT GUARD & CONSERV - ICP scheduled on January 28,
09:00 AM in Third Floor - W37 with Judge MAUGHAN.
01-14-04 Filed: Notice of Petition and Hearing
01-28-04 Filed: Letter from Dr. Mary Jane Norman, MD
01-28-04 Minute Entry - Probate Minutes
Judge: PAUL G. MAUGHAN

Printed: 03/30/05 16:24:17

Page 4

CASE NUMBER 043900019 Guardianship

Clerk: julier
PRESENT

Petitioner's Attorney: MICHAEL A JENSEN
Attorney for the Incompetant/Incapacitated person: L
Other Parties: GERALD HOMEYER
Video

Petition for an order from the court determining tha
Cannatella is an incapacitated person and for order
Elder Care Consult, Inc as Guardian and Stagg & Asso
conservator of said protected person, comes now befo
for hearing. The court having considered and based
objection of Gerald Homeyer and the motion of Michae

temporary orders until this is resolved, the court n
matters to the trial judge. (Judge Lewis)

03-09-04 Filed: NOTE; CASE 020910515 PENDING TERMINATION AND
OF GUARDIAN AD LITEM

03-24-04 GUARDIAN CONSERVATOR scheduled on April 15, 2004 at
Fourth Floor - N44 with Judge LEWIS.

03-29-04 Filed: Motion to Withdraw From or Defer Probate Med

03-29-04 Filed: Notice of Successor Guardian Ad Litem

03-29-04 Filed: Notice of Hrg - 4/15/04 @ 11:30 with Iwasak

04-15-04 Minute Entry - Probate Minutes

Judge: LESLIE A. LEWIS

Clerk: chells

PRESENT

Petitioner's Attorney: MICHAEL A JENSEN

Other Parties: GERALD HOMEYER

TOM CHRISTENSEN

LAWRENE DINGVIAN

BECKY ALLRED

Video

Tape Number: 11:35 am

Counsel/parties argue the issue of the appointment o
conservator. The Court orders Becky Allred, Stagg &
appointed as guardian conservator. Counsel to prepar

04-20-04 Filed order: Appointment of Guardian and Conservato

Judge llewis

Signed April 15, 2004

04-21-04 Fee Account created	Total Due:	4.00
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04-21-04 Fee Account created	Total Due:	0.75
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04-21-04 Fee Account created	Total Due:	32.00
------------------------------	------------	-------

04-21-04 CERTIFIED COPIES Payment Received:
04-21-04 COPY FEE Payment Received:
04-21-04 CERTIFICATION Payment Received:
04-21-04 Filed: 2 Acceptance of Appointment
04-21-04 Filed: Letters of Guardian - Eler Care Consult Inc
04-21-04 Filed: Letters of Conservator - Stagg & Associates,
04-21-04 Case Disposition is Granted
Disposition Judge is LESLIE A. LEWIS
05-13-04 Filed: Motion for Order Requiring Accounting and Tu
Funds (expedited disposition)
05-27-04 Filed: Request to Submit for Decision on Motion for
Requireing Accounting and Turn Over of Funds
06-09-04 Filed: Certificate of Service
06-09-04 Filed order: Order requiring Accounting and Turn ov
Judge llewis
Signed June 08, 2004
07-14-04 Filed: Copy of Order Requiring Accounting and Turn
Funds Filed June 9, 2004 - Signed by Judge Lewis
07-21-04 ORDER TO SHOW CAUSE scheduled on August 10, 2004 at
Fourth Floor - N44 with Judge LEWIS.
07-26-04 Filed: Verified Motion for Order to Show Cause
08-06-04 Filed: Subpoena Duces Tecum
08-06-04 Filed: Constables Proof of Service
08-10-04 ORDER TO SHOW CAUSE rescheduled on August 11, 2004
Reason: Conflict in Judge Schedule.
08-11-04 Fee Account created Total Due: 15.00
08-11-04 VIDEO TAPE COPY Payment Received:
08-11-04 Filed: Return receipt fact from jail (minutes) ok
08-11-04 Minute Entry - Minutes for PROBATE MINUTES, ORDER
Judge: LESLIE A. LEWIS
Clerk: chells
PRESENT

Petitioner's Attorney: MICHAEL A JENSEN

Other Parties: GERALD HOMEYER

REBECCA M ALLRED

Video

Tape Number: 10:15 am

Before the Court is an order to show cause, the Cour
ordered Mr Homeyer to provide an accounting from 4/1

4/30/04, and to turnover his mothers' assests. The C
Mr Homeyer to provide an accounting as provided by l
is also ordered to openall mail sent to him from Mr
am Rebecca Mary Allred is sworn and examined. 10:32
Homeyer is sworn and examined. THE COURT NOW ORDERS
HOMEYER IS TAKEN INTO CUSTODY, FORTHWITH TO SERVE 30

Printed: 03/30/05 16:24:19

Page 6

CASE NUMBER 043900019 Guardianship

SALT LAKE COUNTY JAIL. NO ANKLE MONITORING, NO WORK
CONTEMPT. The Court further orders Mr Homeyer may p
the jail time by paying \$2622.00 to St. Joseph's Car
Proof of payment is to be provided to the court, for
release from jail. The amount owed is for medical at
provided to mother. Exhibits 1-6 are offered and re
evidence. Mr Homeyer has provided his current addres
number.

08-11-04 Filed: Description of exhibits

08-11-04 Filed: 1 envelope of exhibits

08-23-04 Tracking started for Exhibit. Review date Dec 11,

09-23-04 Filed order: Findings of Fact & Conclusions of Law

Judge llewis

Signed September 21, 2004

09-23-04 Filed order: Order and Judgment

Judge llewis

Signed September 21, 2004

09-23-04 Note: order with judgements

09-24-04 Judgment #1 Entered

Debtor: GERALD HOMEYER

Creditor: MARGARET CANNATELLA

7,746.05 Other

74,937.21 Other

9,900.00 Other

3,150.00 Other

20,448.00 Other

116,181.26 Judgment Grand Total

09-24-04 Filed judgment: Order and Judgment @J
 Judge llewis
 Signed September 21, 2004

09-24-04 Fee Account created Total Due: 2.00

09-24-04 COPY FEE Payment Received:

10-06-04 Filed: Application for Non Wage Garnishment

10-06-04 Issued: Writ of Garnishment Non Wage- Deseret First
 Union

 Clerk evangelb

10-06-04 Issued: Garnishment

10-06-04 Fee Account created Total Due: 35.00

10-06-04 GARNISHMENT Payment Received:

 Note: Code Description: GARNISHMENT

10-06-04 Filed: Motion for an Order Requireing Gerald Homeye
 his Real Property to the Ward

10-06-04 Filed: Memorandum in Support of Motion for an Order
 Gerald Homeyer to Convey his Real Property to the W

10-12-04 Filed return: Writ of Garnishment With Interrogator
 Service Type: Personal
 Service Date: October 06, 2004

10-20-04 Filed: Request to Submit for Decision on Motion for
 Requiring Gerald Homeyer to Convey his Real Propert

Printed: 03/30/05 16:24:20

Page 7

CASE NUMBER 043900019 Guardianship

 Ward

10-22-04 Filed: Notice of Appeal

10-22-04 Fee Account created Total Due: 205.00

10-22-04 Bond Account created Total Due:- 300.00

10-22-04 APPEAL Payment Received:

 Note: Code Description: APPEAL

10-22-04 Bond Posted Payment Received:

10-22-04 Filed: Notice of Appearance of Counsel - Anthony Ri
 Gerald R Homeyer

10-22-04 Filed: *Objection* to Notice to Submit for Decision

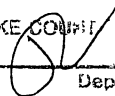
10-22-04 Filed: Memorandum in Opposition to Motion for an Or

MICHAEL A. JENSEN (7231)
Attorney at Law
Counsel for Petitioners
PO Box 571708
Salt Lake City, Utah 84157-1708
(801) 519-9040; Fax: 519-9264

FILED DISTRICT COURT
Third Judicial District

JUN 9 - 2004

SALT LAKE COUNTY

By  Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN SALT LAKE COUNTY, STATE OF UTAH

450 South State Street
PO Box 1860, Salt Lake City, Utah 84111-1860
Court Clerk: 238-7480; Court Clerk: In-Court Clerk: 238-7513/7514 (Michele/Salome) N44

In the Matter of

MARGARET CANNATELLA,

An Incapacitated Person.

ORDER REQUIRING ACCOUNTING
AND TURN OVER OF FUNDS

Case No. 043900019

Judge Leslie A. Lewis

The Court, having reviewed the Conservator's Motion for Order Requiring Accounting and Turn Over of Funds, and finding no memorandum filed in opposition to the Motion, and finding good cause therein, now grants the Motion and

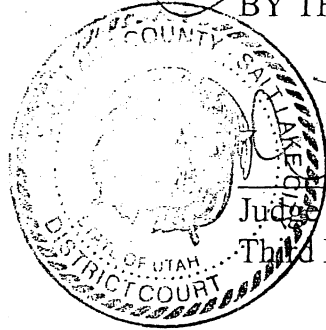
IT IS HEREBY ORDERED that Gerald Homeyer provide an accounting of his mother's funds for the period April 1, 2002 through April 30, 2004, and to do so no later than June 15, 2004.

IT IS FURTHER ORDERED that Gerald Homeyer turn over to the Conservator all of the funds in his possession that belong to his mother and all funds under his control

that belong to his mother, and to do so no later than five (5) business days following service of this Order on Mr. Homeyer. Service on Mr. Homeyer may be made by first class US Mail.

DATED this 8th day of June 2004.

BY THE COURT:



Leslie A. Lewis
Judge Leslie A. Lewis
Third District Court Judge

MICHAEL A. JENSEN (7231)
Attorney at Law
PO Box 571708
Salt Lake City, Utah 84157-1708
(801) 519-9040; Fax: 519-9264

Counsel for Conservator

FILED DISTRICT COURT
Third Judicial District

JUL 21 2004

SALT LAKE COUNTY

By _____ Deputy Clerk

FILED DISTRICT COURT
04 AUG -4 AM 9:22
SALT LAKE DEPARTMENT
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT
IN SALT LAKE COUNTY, STATE OF UTAH

450 South State Street
PO Box 1860, Salt Lake City, Utah 84111-1860
Court Clerk: 238-7480; Court Clerk: In-Court Clerk: 238-7513/7514 (Michele/Salome) N44

In the Matter of

MARGARET CANNATELLA,

An Incapacitated Person.

ORDER TO SHOW CAUSE

Case No. 043900019

Judge Leslie A. Lewis

The Court, having reviewed the Conservator's Motion for Order To Show Cause,
and finding good cause therein, now grants the Motion and

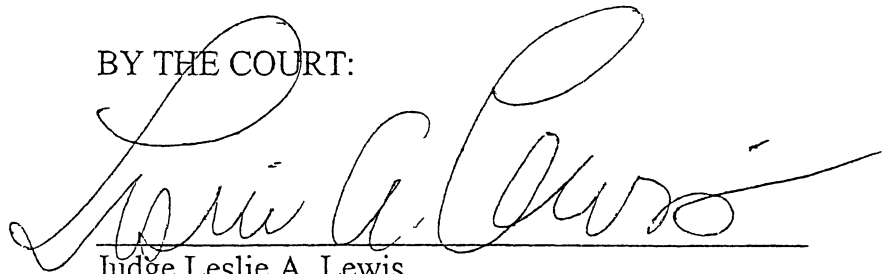
IT IS HEREBY ORDERED that Gerald Homeyer appear before this Court on the
10th day of August 2004, at the hour of 2:00 pm to show why he
should not be held in contempt of this Court's Order served on him by constable on
July 7, 2004, because of his failure to provide an accounting of his mother's funds for the

Served PERSON
Relationship -
Time 2:00 Date 7-29-04
Address 1218 E 2420

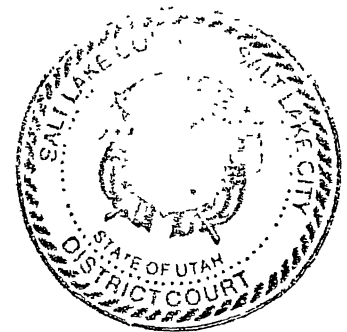
period April 1, 2002 through April 30, 2004, and for his failure to turn over all of his mother's funds in his possession or under his control.

DATED this 21st day of July 2004.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Leslie A. Lewis", written over a horizontal line.

Judge Leslie A. Lewis
Third District Court Judge



P R O C E E D I N G S

(Electronically recorded on August 11, 2004)

MR. JENSEN: (Inaudible) and Becky Allred representing
Stagg & Associates the (inaudible).

THE COURT: Stagg & Associates?

MR. JENSEN: As the conservator, yes. They're a CPA
firm --

THE COURT: Yes, I understand that. All right, and
your last name again, ma'am?

MS. ALLRED: Allred, A-l-l-r-e-d.

THE COURT: And you are --

MR. HOMEYER: Gerald Homeyer.

THE COURT: Spell your last name please.

MR. HOMEYER: H-o-m-e-y-e-r, Mrs. Cannatella's son.

THE COURT: I beg your pardon.

MR. HOMEYER: I'm Mrs. Cannatella's --

THE COURT: Yes, I'm aware of that. We're here today
for an order to show cause that was scheduled yesterday and I
was ill so we reset it for today. Mr. Jensen, would you like
to make a brief opening statement?

MR. JENSEN: Yes, your Honor, if I may.

THE COURT: Feel free to turn around the podium. We
turned it yesterday. We had a (inaudible). See how tough he
is? That's what he's trying to prove.

MR. JENSEN: Thank you, your Honor. On April 15, we

1 met here in the same court room --

2 THE COURT: Right.

3 MR. JENSEN: -- and the Court then granted at that
4 time the appointment of the guardian and conservator for
5 Ms. Cannatella, whose 97 years old and a resident of
6 St. Joseph's Villa and at that time Mr. Homeyer appeared and
7 objected to the appointment of the guardian/conservator but the
8 Court did appoint Stagg & Associates as the conservator and
9 Dr. (inaudible) as the guardian.

10 Immediately after that time and the -- it was on order
11 entry -- I believe that order was on approximately April -- on
12 April 20th and the following day I issued a -- well, I called
13 Mr. Dingivan. Mr. Dingivan, is the attorney with Callister,
14 Nebeker --

15 THE COURT: Yes.

16 MR. JENSEN: -- and he was representing St. Joseph's
17 Villa and he had subpoenaed U.S. Bank for Ms. Cannatella's bank
18 records and so as not to duplicate that I asked him if I could
19 have a copy of those and he said, yes, but I should first issue
20 a subpoena, which I did.

21 So I issued a subpoena to Callister, Nebeker and then
22 he delivered forthwith a stack of documents of all the bank
23 records for, oh, up to two years for Ms. Cannatella.

24 THE COURT: And in June I had ordered full accounting
25 (inaudible).

1 MR. JENSEN: Right, and I turned those over to the
2 conservator who then did an analysis and discovered that the
3 funds, at least \$75,000 approximately had been taken out of the
4 account on November 13th, 2003 and Ms. Cannatella, of course,
5 couldn't have done that.

6 There were only two people who had access to the bank
7 account and that was Mr. Homeyer and Ms. Cannatella. So then I
8 filed a motion for an order requiring the accounting turn over
9 the funds and we entered that order, your Honor, on the 8th day
10 of June --

11 THE COURT: Yes.

12 MR. JENSEN: -- and the -- and I think it's important
13 just to -- because that's the issue here, the order to show
14 cause is, there were two parts to the order.

15 One is order that Mr. Homeyer provide and accounting
16 of his mother's funds for the period of April 1st, 2002 to
17 April 30th, 2004 --

18 THE COURT: Right, I have that.

19 MR. JENSEN: -- and the second part was to turn over
20 all of her assets --

21 THE COURT: Yes.

22 MR. JENSEN: -- forthwith. The order also allowed that
23 the order could be served on him by First Class mail. We've
24 had a history that Mr. Homeyer noted that he refuses mail and I
25 have returned envelopes that he has refused and the conservator

1 also has sent -- I sent mine by First Class mail, she sent hers
2 by Certified mail but they went unclaimed so Mr. Homeyer --

3 THE COURT: Can't do anything better than sending them.

4 MR. JENSEN: Right. Now, that's what we tried at
5 first, but now I've decided that even though the order allowed
6 First Class mail, but since he refused them I decided to take
7 the extra step and have him personally served by a constable.

8 THE COURT: Excellent.

9 MR. JENSEN: And so that was done and that order was
10 filed and he was served on the -- on July 7th. It would be
11 order requiring the turn over of the files and the accounting.

12 Since he then didn't respond to that after a number of
13 days, then I filed a motion, court order to show cause and the
14 Court issued that order and Mr. Homeyer was served in June --
15 or July 29th with the order to show cause and why he should be
16 held in contempt for not complying with the order for the
17 accounting and for the turn over (inaudible) --

18 THE COURT: So at this juncture, he's turned over
19 (inaudible) no accounting. Is that a fair statement?

20 MR. JENSEN: That's correct. The other thing is that
21 just as a prelude because I believe it will come up as an
22 (inaudible) is that in order to determine -- first of all I had
23 to locate Mr. Homeyer, because after I found out that he had
24 left his employer and that he had moved from his apartment, and
25 so the concern was to actually locate him.

1 disparaging the other side.

2 MR. HOMEYER: Okay. Mr. Jensen, by virtue of Counsel,
3 he was my counsel prior to this under --

4 THE COURT: I remember that.

5 MR. HOMEYER: -- Judge Iwasaki. Okay, presented to the
6 judge at that time that there was a law that he helped write
7 that I was not responsible to give an accounting since I was
8 the only heir in this matter --

9 THE COURT: Well, let me --

10 MR. HOMEYER: -- to my mother.

11 THE COURT: -- be clear, sir, legally you're
12 responsible for giving an accounting and I will sign an order
13 to that effect.

14 MR. HOMEYER: Well, there's a law that says opposite,
15 your Honor so --

16 THE COURT: No.

17 MR. HOMEYER: -- this is what I went by --

18 THE COURT: No.

19 MR. HOMEYER: -- by Counsel, by advice of Counsel --

20 THE COURT: Okay, I can understand in the past you may
21 have thought something different. I want to see if we can make
22 this easier today. I want to be clear with you. You are
23 required by law to file an accounting. There is no question
24 about that. Secondly, I have signed an order making you
25 accountable --

1 MR. HOMEYER: Right.

2 THE COURT: -- for an accounting.

3 MR. HOMEYER: Right.

4 THE COURT: So there's no justification for not filing
5 an accounting.

6 MR. HOMEYER: I have no information.

7 THE COURT: Wait. Are you willing to file an
8 accounting?

9 MR. HOMEYER: I have no information to file an
10 accounting with.

11 THE COURT: We have no bank records?

12 MR. HOMEYER: That's correct.

13 THE COURT: So you can't put together any information?

14 MR. HOMEYER: That's correct, based on the advice of
15 Counsel at that time I was told I was not required to and I did
16 not.

17 THE COURT: I know you did not. I'm asking what you
18 are able to do in the future.

19 MR. HOMEYER: In the future I would try to get -- but
20 none of those records are available to me. They can get them
21 by subpoena. When I try to get the records they're not
22 available to me --

23 THE COURT: Do you realize, sir, that if the evidence
24 shows that you have withheld information they'll be filing
25 accounting, they'll be turned over, funds that you could be

1 THE COURT: Not now, no, you're a witness.

2 GERALD HOMEYER

3 having been first duly sworn,

4 testifies as follows:

5 DIRECT EXAMINATION

6 BY MR. JENSEN:

7 Q. Now, Mr. Homeyer, would you please state your full
8 name for the record.

9 A. Gerald R. Homeyer.

10 Q. And your date of birth?

11 THE COURT: You need to lean into the microphone so
12 that we have a chance of seeing you and hearing you.

13 THE WITNESS: Yes, ma'am.

14 A. Gerald R. Homeyer, 9-21-36.

15 Q. And your social security number?

16 A. 059-30-2365.

17 Q. Okay. Mr. Homeyer, you previously lived at what
18 address. You mentioned that you live in Riverton now, but what
19 was your address previous to that?

20 A. 1865 Independent School of Art, Salt Lake City,
21 Apartment J.

22 Q. And since I'm not sure exactly what mail you received
23 or didn't receive, I just want to show you a letter dated
24 May 6th and I wanted to know if you have seen that letter before
25 or not.

1 THE WITNESS: No, I have not.

2 THE COURT: And you've never accepted any mail from
3 Stagg & Associates?

4 THE WITNESS: No. I had received mail when he was my
5 attorney. I have not received mail after that.

6 THE COURT: Okay, that isn't what I asked but that's
7 fine.

8 Go ahead, Counsel.

9 Q. BY MR. JENSEN: What day did you vacate your apartment
10 then at one -- at the address you just gave us?

11 A. The end of April, no later.

12 Q. And you weren't there into May at all?

13 A. No, I was not.

14 Q. Okay. What was your last -- where were you employed?

15 A. I was employed with Avanta Bank Corporation and was
16 laid off.

17 Q. And what day were you laid off?

18 A. Just after the 15th of April.

19 Q. Are you employed now?

20 A. I am not.

21 Q. What's the source of your income now?

22 A. Social Security check.

23 Q. I want to show you exhibits in all these
24 pre-marked Exhibit 1 and, your Honor, I'm just going to leave
25 it on the stack, the exhibits have been pre-marked already with

1 THE COURT: Just so I understand, so this money that
2 was withdrawn, this \$83,000 was used to purchase the home that
3 you live in; is that correct?

4 THE WITNESS: It was a down payment, that's correct.

5 THE COURT: And who was shown as the owner of the home?

6 THE WITNESS: I am the owner of the home.

7 THE COURT: The sole owner?

8 THE WITNESS: That's correct, and that was with my
9 mother's consent.

10 MR. JENSEN: If I may, your Honor, this is another
11 exhibit here Number 5.

12 Q. BY MR. JENSEN: Does that check there from Deseret
13 First Credit Union in the amount of \$83,000 look familiar to
14 you?

15 A. Yes, it does.

16 Q. It's made out to Landmark Title.

17 A. That's correct.

18 Q. Regarding -- and your name below it, correct?

19 A. That's correct.

20 Q. And that's to you -- that was the down payment then
21 for the home?

22 A. This was the down payment; that's correct.

23 Q. Okay, and then on page 2 of Exhibit 5, there's another
24 check also in the amount of \$1,916 from the same account. Does
25 that also represent cost's going towards your closing costs?

1 A. Those are the closing costs.

2 Q. What was the price of the home that you paid?

3 A. \$180,000.

4 Q. And what evidence do you have that your mother gifted
5 this money or this house to you?

6 A. My conversation with my mother, there is no physical
7 evidence.

8 Q. And when was this conversation? When did --

9 A. Prior to purchasing the house when I started looking
10 for a house, I had conversation with my mother. They say she's
11 incapacitated, she's physically incapacitated. She was lucid
12 and we've had several conversations concerning this and that
13 was her desire that I -- since, you know, I had lost the -- my
14 prior house through a divorce, that I purchase another house.

15 Q. I need to refresh my memory, I went back and looked at
16 the video tape for a hearing here on April 15th and I don't have
17 -- transferred them here but I just want to see if it
18 refreshes your memory.

19 When you stood at this podium can here you pointed to
20 Mr. Dingivan and said that they took all of the money out of
21 your mother's account so in April 15th and you further said that
22 if they wanted to know where the money went, they should look
23 in their own bank account. But isn't it true that you took
24 \$75,000 plus another \$7,000; isn't that correct?

25 A. No, your statement is not correct.

1 A. Yes, on November, 6.

2 Q. And there's an amount of \$9,900?

3 A. That's correct.

4 Q. And on page 2 of Exhibit 4, there's a check made
5 payable to you from, Immigrant Savings Bank in New York. Isn't
6 this your mother's account? Wasn't this your mother's account
7 in New York?

8 A. Yes, that was a CD account, I believe that expired.

9 Q. And you obtained those funds through the power of
10 attorney that you had?

11 A. That's correct.

12 Q. Just to make it clear, you have not paid with any of
13 your mother's monies, the monies we talked about here today,
14 Social Security, pension check, this immigrant account here of
15 \$9,900, or any other funds you took from this bank. You've not
16 paid any of those to St. Joseph's; is that correct?

17 A. To St. Joseph?

18 Q. Correct.

19 A. Directly, no.

20 Q. Have you paid any of those fund on her behalf?

21 A. Yes.

22 Q. And to whom?

23 A. They were done every month for storage for her old
24 clothing that I brought out from New York or bedroom furniture
25 that she wanted to keep. I was paying a Medicare policy at the

1 Q. It's the last page in Exhibit 1 and it's dated May
2 10th. And you endorsed that one too, didn't you?

3 A. Now she was suppose to have a direct deposit monthly
4 and I'm showing that there's more than one month between those
5 two deposits.

6 Q. I don't know when you deposited them but --

7 A. Yeah, they were suppose to be direct deposit.

8 THE COURT: Listen to the question.

9 Q. BY MR. JENSEN: But in Exhibit 1, all of the checks
10 that we went through in Exhibit 1, you deposited into your
11 account, correct?

12 A. If it was this POA account, it was a joint account.

13 Q. Okay, do you believe that you're holding any of your
14 mother's money?

15 A. I'm holding a small amount for her funeral expenses.

16 Q. And do you believe that the home that's owned by you
17 is somehow owned by your mother in part at all?

18 A. No, because it was her request that I do that.

19 MR. JENSEN: That's all I have, your Honor.

20 THE COURT: Ordinarily an attorney representing you,
21 Mr. Homeyer, could cross examine so if you want to make a
22 statement you can by way of proxy.

23 MR. HOMEYER: The only statement I have to make is that
24 anything that was handled on this was done with my mother's
25 permission and with her consent and in some cases with her

1 initial request.

2 THE COURT: So let me see if I've got this. You don't
3 believe you're responsible for providing an accounting to the
4 Court, is that correct?

5 MR. HOMEYER: Based on prior Counsel's advise.

6 THE COURT: Just answer the question.

7 MR. HOMEYER: That's correct.

8 THE COURT: And you believe that any asset of your
9 mother's is basically yours?

10 MR. HOMEYER: No, only ones that she has told me to do
11 things like to purchase the house or those other --

12 THE COURT: Well, what else would there be. What
13 other assets.

14 MR. HOMEYER: There was a --

15 THE COURT: You've now purchased the house so --

16 MR. HOMEYER: That's correct --

17 THE COURT: -- so her Social Security checks --

18 MR. HOMEYER: -- there was a (inaudible).

19 THE COURT: -- listen to me.

20 MR. HOMEYER: Sorry.

21 THE COURT: Now, they do not belong to you, do they?

22 MR. HOMEYER: Which?

23 THE COURT: Her Social Security checks now do not
24 belong to you, do they?

25 MR. HOMEYER: No, I don't get those.

1 THE COURT: And so you believe that apart from her
2 Social Security checks now, everything else that has been an
3 asset of hers belongs to you?

4 MR. HOMEYER: Per her requests; that's correct, your
5 Honor.

6 THE COURT: And you don't owe anyone an accounting and
7 you don't -- and you have acknowledged that you've destroyed
8 records; is that correct?

9 MR. HOMEYER: Yes, that's correct now.

10 THE COURT: And who do you think ought to be
11 responsible for paying St. Joseph's?

12 MR. HOMEYER: Since the payment to St. Joseph that was
13 under conflict. Eventually if they would have settled properly
14 they would have been paid by me. They choose --

15 THE COURT: Who do you --

16 MR. HOMEYER: -- not to provide service.

17 THE COURT: -- think ought to be responsible for
18 paying St. Joseph's, which no one disputes is where your mother
19 is and is being taken care of. Who should be responsible for
20 paying them?

21 MR. HOMEYER: St. Joseph's, since they did not
22 provide --

23 THE COURT: Oh, you think --

24 MR. HOMEYER: -- the care that --

25 THE COURT: -- they're responsible for taking --

1 THE COURT: Yes. I said you may.

2 MR. HOMEYER: As far as the service on July 7th that was
3 suppose to have been served to me. It was presented to me,
4 when I looked at it the date of the appearance had way gone by.
5 I gave it back to the process server, he proceeded to take
6 it -- he was in his car, he proceeded to take it and throw it
7 in the gutter. There was water going down the gutter from
8 people that were watering heir lawn.

9 THE COURT: It doesn't matter, you got here. You're
10 here now.

11 MR. HOMEYER: And that's the reason I didn't show up
12 for that.

13 THE COURT: You're here now, sir so --

14 MR. HOMEYER: Yes, ma'am.

15 THE COURT: You may stand down.

16 MR. HOMEYER: Thank you.

17 THE COURT: There's nothing further, both sides can
18 make a closing. I assume you don't intend to call any
19 witnesses.

20 MR. HOMEYER: I have no witnesses, your Honor.

21 THE COURT: Fine.

22 MR. HOMEYER: May I get a glass of water, your Honor?

23 THE COURT: We'll, get one for you.

24 MR. HOMEYER: Okay.

25 THE COURT: Mr. Jensen?

1 MR. JENSEN: Your Honor, I believe that the evidence is
2 overwhelming that the -- and both by the paper trail and also
3 by his admission that he did take Ms. Cannatella's money --

4 THE COURT: And destroyed records.

5 MR. JENSEN: And that he has used that money and that
6 money now is in the form of equity in the home that he purchase
7 on April 15th, your Honor.

8 I believe that the Court should not only hold him in
9 contempt but I'd like to have findings in this matter that were
10 consistent with the evidence presented here today that would
11 allow us to move for a judgement against
12 Mr. Cannatelli in either this case or in a new case for the
13 funds that he has taken from his mother, your Honor.

14 THE COURT: All right. Would you like to say anything?

15 MR. HOMEYER: Yes, your Honor, the funds that were
16 taken were taken with the full consent of my mother and legally
17 through my power of attorney.

18 THE COURT: Where is that power of attorney?

19 MR. HOMEYER: Where is it, your Honor?

20 THE COURT: Yes.

21 MR. HOMEYER: I have it home.

22 THE COURT: Well, today would have been the day to
23 bring it.

24 MR. HOMEYER: I had no idea what records they might
25 need but I can provide them to the Court.

1 THE COURT: And you talk about accounting records and
2 how you don't have anything to provide. You don't have any of
3 the records you've talked about to show me today including any
4 power of attorney.

5 MR. HOMEYER: I don't -- I did not bring anything with
6 me. I didn't know what the attorney would be --

7 THE COURT: And I interrupted you, go ahead.

8 MR. HOMEYER: No, but the thing was, this is not money
9 that was stolen from my mother. This was money that was taken
10 with her consent. She was lucid and in our conversation she
11 had -- she told me that her main wish right now is to die.
12 She's 97 years old. She's been put into this situation by the
13 lack of treatment that she did not receive from St. Joseph's
14 and she is just laying there.

15 We have conversations when I visit her and I tell her
16 what my, you know, what I would like to do, hopes and so forth
17 and since she has no use for the money she say's, "Well, I want
18 you to do this."

19 THE COURT: She has no use for the money?

20 MR. HOMEYER: That's correct, ma'am.

21 THE COURT: Doesn't she have to be fed and cared for
22 each day?

23 MR. HOMEYER: And St. Joseph's took over \$100,000 to do
24 that ma'am and she would not be there in the first place if
25 they had performed their duties as they said they would when

1 THE COURT: It's crystal clear that an accounting is
2 required. I ordered an accounting. Mr. Homeyer was aware of
3 the Court's order.

4 It is this court's finding that he not only had
5 knowledge of an existing court order to turn over the funds and
6 to provide an accounting and could have done so, had the
7 ability to provide an accounting and turn over the funds and
8 chose not to do so, failed to comply with the Courts order so
9 I'm finding him to be in contempt and I'm ordering him to
10 provide the accounting, do what he needs to do and I'm also
11 ordering him to do 30 days in jail forthwith.

12 Counsel, I'm going to ask you, Mr. Jensen, to prepare
13 finding consistent with the testimony today. The sums alluded
14 to in the Exhibits were taken by Mr. Homeyer for his personal
15 use. That there's no document showing that he had anybody's
16 permission to take all of this money and treat it as his own,
17 leaving his mother without any resources for her own care. In
18 fact the one document he alludes to the power of attorney makes
19 it clear that he had a duty of accountability.

20 He didn't even put his home in joint tenancy and he
21 acknowledged that today. And then you may take a judgement for
22 the money due on it.

23 MR. HOMEYER: Your Honor?

24 THE COURT: He may purge ten days of the 30 days in
25 jail by paying the \$874 to St. Joseph's. Other than that he'll

1 be doing the full 30 days in jail. Did you have a question?

2 MR. HOMEYER: Yes, your Honor, since I have a medical
3 condition, high blood pressure, diabetes, may I enter myself
4 into the jail.

5 THE COURT: Nope.

6 MR. HOMEYER: So I'm not to receive any medical
7 attention?

8 THE COURT: No, you are to receive medical attention
9 and in the minute entry we send down to the jail, we'll
10 indicate that you have medical problems that you have indicated
11 to us. You have diabetes, et cetera and you're to be given
12 medical attention immediately.

13 MR. HOMEYER: So, I'm not allowed to take care of my
14 affairs before I go in?

15 THE COURT: Nope. Did you hear the part about purging
16 yourself?

17 MR. HOMEYER: No, ma'am I didn't understand what you
18 said.

19 THE COURT: If you wish to pay the \$874 that is owing
20 to St. Joseph's then you can get out after 20 days instead of
21 30 days.

22 MR. HOMEYER: What is this amount for, I have no idea?

23 THE COURT: You didn't listen?

24 MR. HOMEYER: I'm listening to you.

25 THE COURT: It's what Medicaid and Social Security did

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Submitted 08/16/2004

Counsel for Conservator

**IN THE THIRD JUDICIAL DISTRICT COURT
IN SALT LAKE COUNTY, STATE OF UTAH**

450 South State Street

PO Box 1860, Salt Lake City, Utah 84111-1860

Court Clerk: 238-7480; Court Clerk: In-Court Clerk: 238-7513/7514 (Michele/Salome) N44

In the Matter of

MARGARET CANNATELLA,

An Incapacitated Person.

ORDER AND JUDGMENT

Case No. 043900019

Judge Leslie A. Lewis

The Court, having issued and served an Order to Show Cause on Ms. Cannatella's son, Gerald R. Homeyer, and having conducted a hearing on August 11, 2004 where the Conservator's agent, Becky Allred, and Mr. Homeyer both testified, and having entered its Findings of Fact and Conclusions of Law, now orders and

IT IS HEREBY ORDERED AND ADJUDGED that Gerald R. Homeyer is in contempt of this Court's order served on him on July 7, 2004, and is required to serve 30 days in the Salt Lake County Jail. Notwithstanding this sanction, Mr. Homeyer may purge 10 days of such sanction by paying to St Joseph Villas the amount of \$2,622, representing three months at \$874 per month for unpaid funds for Ms. Cannatella's care.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered against Gerald R. Homeyer in favor of Margaret Cannatella in the following amounts:

1. **\$74,937.21** for the two US Bank checks taken by him on November 13, 2003.
2. **\$7,746.05** for the US Bank check taken by him on January 22, 2004.
3. **\$9,900** for the Emigrant Savings Bank check taken by him on November 6, 2003.
4. **\$20,448** for 24 months of Social Security checks taken by him in the amount of \$852 per month from April 2002 through April 2004.
5. **\$3,150** for 28 months of Unite National Retirement Fund checks taken by him in the amount of \$112.50 per month from April 2002 through August 2004.

The total judgment amount for the foregoing items is **\$116,181.26**.

Further, Mr. Homeyer may offset from this judgment all payments, from the funds listed above, that he used for the benefit of Ms. Cannatella, provided that such payments sought for offset are supported by documents submitted to the Conservator no later than September 15, 2004, and that are accepted by and approved by the Conservator.

DATED this _____ day of August 2004.

BY THE COURT:

Judge Leslie A. Lewis
Third District Court Judge