

2004

Gerald R. Homeyer v. Stagg & Associates, conservator for Margaret Cannatella : Brief of Appellee

Utah Court of Appeals

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In the Matter of

An Incapacitated Person,

Appellant,

v.

Appellee.

[illegible]

Court of Appeals No.: 20040938-CA
District Court Case No.: 043900019

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ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURT
JUL 05 2005

In the Matter of

MARGARET CANNATELLA,

An Incapacitated Person,

Gerald R. Homeyer,

Appellant,

v.

STAGG & ASSOCIATES, conservator for
Margaret Cannatella,

Appellee.

[illegible]

Court of Appeals No.: 20040938-CA
District Court Case No.: 043900019

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INTRODUCTION

Appellant Gerald R. Homeyer took over \$116,000 from his 97-year old, incapacitated mother and used about \$85,000 of it to buy a house. This left his mother, Margaret Cannatella, financially destitute and unable to pay for essential nursing care. According to Mr. Homeyer, his mother desired this outcome. Fortunately, Medicaid was persuaded by Ms. Cannatella's court-appointed conservator to pay for her nursing care on the ground that she was essentially the victim of a theft; had she actually given away all her money, as Mr. Homeyer implausibly claims, under Medicaid regulations she would not have been entitled to any assistance at all.

The district court ordered Mr. Homeyer to provide an accounting of his mother's funds and to turn over to her conservator all such funds in his possession. Mr. Homeyer simply ignored the order. The district court issued an order to show cause why he should not be held in contempt for failing to provide the accounting and turn over the funds. Mr. Homeyer appeared at the hearing. A core issue at the hearing was whether Mr. Homeyer in fact possessed any of his mother's funds: he obviously couldn't be held in contempt for failing to turn over funds he never had in the first place. The court heard testimony and took evidence on this point. It was established beyond dispute – the financial records were clear and Mr. Homeyer admitted it – that Mr. Homeyer took over \$116,000 of his mother's money. Mr. Homeyer claimed his actions were in accordance with his mother's wishes. But not surprisingly, the district court was unconvinced. Even assuming Ms. Cannatella had the capacity to consent to Mr. Homeyer taking all of her money (she didn't), it is utterly implausible that she would consent to leave herself totally

destitute and without any means to provide for her own care. The district court held Mr. Homeyer in contempt of court and – based on the undisputed evidence at the hearing and consistent with its own prior ruling that he turn over all of Ms. Cannatella’s funds – ruled that Mr. Homeyer was liable to Ms. Cannatella’s conservator for the converted monies.

On appeal, Mr. Homeyer claims he was denied due process at the contempt hearing. However, Mr. Homeyer waived this issue by not raising it in the trial court. Although at the hearing Mr. Homeyer appeared pro se, he was still required to bring his due process concerns to the attention of the trial court. He failed to do so. Mr. Homeyer never objected, even in laymen’s terms, to any part of the hearing, and certainly didn’t lodge a formal due process objection. Later, Mr. Homeyer retained competent legal counsel (now appellate counsel), who filed a Rule 60(b) motion based on the very due process issue presented on appeal. But Mr. Homeyer withdrew this motion before the conservator could file an opposition and before the court could address it. Thus, the due process issue was never brought to the attention of the district court. Absent extraordinary circumstances, which are not present here, the law is clear that Mr. Homeyer cannot raise this issue for the first time on appeal.

In any event, Mr. Homeyer received all the process he was due. The contempt hearing addressed whether Mr. Homeyer had converted his mother’s funds because resolving that issue was necessary – or at least appropriate – for determining whether he should be held in contempt for not turning over such funds. That was by no means a violation of due process.

ADOPTION BY REFERENCE

Appellee Stagg & Associates, conservator for Margaret Cannatella (hereafter “the Conservator”) fully concurs in Mr. Homeyer’s jurisdictional statement and concurs in his statement of controlling constitutional/statutory provisions with one exception. Inasmuch as the Fifth Amendment to the United States Constitution does not apply to the states, it does not have any bearing on this appeal. The relevant federal constitutional provision is the due process clause of the Fourteenth Amendment.

STATEMENT OF THE ISSUE

In the context of a contempt hearing, was Mr. Homeyer denied due process when the district court took evidence and ruled that he had improperly converted his mother’s funds, where resolving that issue was necessary to determine whether he should be held in contempt for failing to turn over such funds?

Failure to Preserve Issue/Standard of Review. As set forth below, Mr. Homeyer failed to raise this issue in the trial court and thus it has not been properly preserved for appeal. Accordingly, this Court’s review is under the onerous “plain error” standard, which requires that “an error must be obvious and harmful.” Heslop v. Bank of Utah, 839 P.2d 828, 839 (Utah 1992).

STATEMENT OF THE CASE

A. Nature of the Case.

The district court ordered Mr. Homeyer to provide an accounting of his mother’s funds and to turn such funds over to his mother’s Conservator. Mr. Homeyer refused and the district court issued an order to show cause why he should not be held in contempt of

court. At the contempt hearing, the district court took evidence and heard testimony concerning funds that Mr. Homeyer admittedly took from his mother but had not returned. At the conclusion of the hearing, the district court held Mr. Homeyer in contempt. It also ruled, based on clear and convincing evidence, that Mr. Homeyer is liable to the Conservator for the conversion of all funds taken from his mother during a specified period. On appeal, Mr. Homeyer argues that the district court violated his due process rights by addressing issues that allegedly went beyond the scope of the contempt hearing. The Conservator maintains that Mr. Homeyer waived this issue by not raising it in the district court and, in any event, that the issues addressed at the hearing were well within the scope of the contempt proceeding.

B. Course of Proceedings.¹

On January 6, 2004, ElderCare Consult, Inc. (“ElderCare”) and Appellee Stagg & Associates, PC, petitioned the Third District Court for an order appointing ElderCare as guardian and Stagg & Associates as the Conservator for Margaret Cannatella, an incapacitated person. R. 1-3. The case was assigned to Judge Leslie A. Lewis and Probate Judge Paul A. Maughan. R. 1. After proper notice (R. 4-16), on January 28, 2004, Probate Judge Maughan held a hearing at which Mr. Homeyer objected to the petition. R. 17; 185 at 2-6 (transcript). Accordingly, Judge Maughan referred the petition to Judge Lewis for resolution. R. 17. On April 15, 2004, Judge Lewis held a

¹ In Homeyer’s Statement of the Case, which serves as his statement of the course of proceedings, Homeyer lists proceedings from another case. See Brief of Appellant (“Brf. Applt.”), at 2-4. Those proceedings may be relevant to the substantive issues in this case, but they are technically not part of the course of proceedings of this case and therefore will not be included in the following statement. To the extent relevant, such proceedings will be noted in the Statement of Facts below.

hearing on the petition and appointed ElderCare and Stagg & Associates as guardian and conservator, respectively. R. 33-36; 186 at 18.

On May 13, 2004, the Conservator filed a motion for an order requiring Mr. Homeyer to provide an accounting of Ms. Cannatella's funds for the period of April 1, 2002 through April 30, 2004, and to turn over to the Conservator all of her funds in his possession or under his control. R. 41-43. Mr. Homeyer was served with the motion and (proposed) order via mail on May 12, 2004 (R. 44, 53), but he did not file any objection or response. R. 45-46. On June 9, 2004, the court entered an order requiring Mr. Homeyer to provide the accounting and to turn over Ms. Cannatella's funds. R. 51-53. Although the order provided that Mr. Homeyer could be served by mail (R. 52), the Conservator had Mr. Homeyer personally served on July 7, 2004. R. 54-56.

On July 21, 2004, the Conservator filed a verified motion for an order to show cause why Mr. Homeyer should not be held in contempt of the court's June 9 order (R. 57-61), a copy of which was served on Mr. Homeyer that same day. R. 61. On July 21, 2004, the court granted the order to show cause and set a hearing date of August 10, 2004. R. 67-68. Mr. Homeyer was personally served via constable with the order to show cause on July 29, 2004. R. 67.

On August 11, 2004,² the district court held a hearing on the order to show cause, which Mr. Homeyer attended. R. 70-71; 187 (transcript). At the hearing, the Court took documentary evidence and heard testimony regarding Mr. Homeyer's failure to provide an accounting and his failure to turn over his mother's funds. R. 72; 187, *passim*. The

² The Conservator and Mr. Homeyer appeared on August 10, 2004, but because Judge Lewis was ill the hearing was continued to the following day.

court then held Mr. Homeyer in contempt and ordered him to serve 30 days in jail. R. 70; 187 at 51. On September 23, 2004, the court entered its finding of facts and conclusions of law. R. 73-80. On the same day, the court also entered an Order and Judgment against Mr. Homeyer in the amount of \$116,181.26, representing the total amount of Ms. Cannatella's funds he had converted, while allowing for an offset for any funds he had spent on Ms. Cannatella's behalf. R. 81-82.

On October 22, 2004, Mr. Homeyer filed his notice of appeal. R. 102-03. Mr. Homeyer's appeal pertains solely to the due process issue; he does not challenge the correctness of the contempt sanction.

C. Statement of Facts.

1. Background.

The background of this case is not essential to the due process issue presented on appeal, but it does provide a helpful context.³

Margaret Cannatella is approximately 97 years old and incapacitated. R. 16, 76.⁴ According to a January 27, 2004 letter from her doctor, Ms. Cannatella has "breast cancer, which her family has elected not to treat, adult onset diabetes, hypertension, osteoarthritis, osteoporosis, and dementia, which is currently at a severe stage." R. 16. Moreover, she "is unable to understand her medical or financial condition", "has no

³ Some of the following background is taken from statements Homeyer made at various court hearings. To the extent relied on herein, those statements are assumed true only for purposes of this appeal.

⁴ There is some disagreement in the record about Ms. Cannatella's age, with her doctor putting it at 93 as of January 2004 and her son, Mr. Homeyer, putting it at 97. The record appears to use the 97 figure more often and thus it will be used in this brief.

ability to understand any interventions necessary for [her] conditions”, “is entirely unable to communicate her wishes”, and thus, according to her doctor, “is incompetent.” R. 16.

As explained below, on April 20, 2004, the district court appointed an independent guardian and conservator for Ms. Cannatella. Before then, apparently beginning around November 2001, Ms. Cannatella’s son, Gerald Homeyer, managed her finances under a general power of attorney and had a significant role in directing her care. R. 72, Exhibit 6 (power of attorney).

Sometime after 2001, Mr. Homeyer placed his mother in an assisted care facility called Regency Assisted Living Facility (“Regency”), where she enjoyed her own apartment and some degree of independence. R. 186 at 11. In about 2002, while trying to get out of bed, Ms. Cannatella fell and broke her hip, which required major surgery and the insertion of a plate. R. 186 at 11-12. Upon the recommendation of the hospital after the surgery, Mr. Homeyer placed his mother in Christus St. Joseph’s Villa (“St. Joseph’s”) for rehabilitative care. R. 186 at 12. Although Ms. Cannatella was about 97, Mr. Homeyer still hoped she would recover quickly and be able to go back to the assisted living facility where she could again be independent and where the care was far less expensive. R. 186 at 12.

When Ms. Cannatella’s recovery did not go as he desired, Mr. Homeyer blamed St. Joseph’s. He alleged that Ms. Cannatella’s rehabilitation program was inadequate – first too rigorous with insufficient pain medication; then too lax with too much medication – and that as a result she became wheelchair bound. R. 185 at 4; 186 at 12. Mr. Homeyer also complained because a doctor at St. Joseph’s allegedly recommended a

radical mastectomy to treat her breast cancer, whereas another doctor at Cottonwood Hospital had recommended against it. R. 186 at 15. (Mr. Homeyer elected not to treat his mother's cancer. R. 16.) He also complained about the high cost of the care at St. Joseph's; indeed, he accused St. Joseph's of attempting to "plunder" his mother's resources. R. 186 at 13, 15.

Despite disagreements over his mother's care, Mr. Homeyer did not transfer Ms. Cannatella to a different rehabilitation facility. Instead, he left her at St. Joseph's and simply refused to pay for her care and medical bills. R. 186 at 4-5, 13, 15-16. As a result, on or about October 4, 2002, St. Joseph's brought an action against Ms. Cannatella in the Third District Court, No. 020910515 (hereafter the "collection action") to collect over \$90,000 in unpaid medical bills. See R. 35; 186 at 4-5. Judge Glenn K. Iwasaki was assigned to the case and Mr. Homeyer was appointed Ms. Cannatella's guardian ad litem to represent her interests in that litigation. R. 185 at 2-3; 186 at 4-6. Almost a year later – with Mr. Homeyer having done nothing to defend the case and, indeed, after a certificate of default had already been entered – Mr. Homeyer retained attorney Michael A. Jensen to represent his mother's interests. R. 186 at 5. Without a real disagreement that Ms. Cannatella actually owed St. Joseph's the amounts claimed, judgment was entered against her. R. 186 at 5.

The collection court authorized St. Joseph's to terminate Ms. Cannatella's residency (R. 186 at 9) and ordered Mr. Homeyer to find another care center for his mother, but Mr. Homeyer did not and would not comply. R. 185 at 3; 186 at 6, 14. Mr. Jensen then withdrew as counsel. R. 186 at 5. At a hearing on April 15, 2004,

Mr. Homeyer stated that a year and a half earlier he had unsuccessfully attempted to find another facility, but gave no indication of further efforts or that he currently had anything in mind. R. 186 at 14. Further, Mr. Homeyer was again failing to make payments for his mother's care. R. 186 at 5.

With Mr. Homeyer doing nothing and Ms. Cannatella in a state of "limbo" (R. 185 at 3), St. Joseph's went to the office of the public guardian for assistance. The public guardian in turn contacted Dr. Lois Brandriet of ElderCare Consult, Inc. and appellee Stagg & Associates and requested that they act as Ms. Cannatella's guardian and conservator, respectively. R. 186 at 6. ElderCare and Stagg & Associates retained Mr. Jensen, who focuses his practice on elder law.

2. Appointment of a Guardian and Conservator – the April 15, 2004 Hearing.

The facts directly relevant to this appeal began on January 6, 2004 with the filing of a petition to appoint ElderCare as guardian and Stagg & Associates as conservator for Ms. Cannatella. R. 1-3. At a hearing on January 28, 2004 before Probate Judge Maughan, Mr. Homeyer appeared and objected to the petition on the ground that he was her "guardian" and only living relative. R. 185 4-5. He asserted that Mr. Jensen, who had filed the petition on behalf of ElderCare and Stagg & Associates, had a conflict of interest because of his representation of Ms. Cannatella in the prior collection action. R. 185 at 5. Mr. Homeyer also argued that his mother was "not that incapacitated" (R. 185 at 5), a position directly at odds with her doctor's professional evaluation (R. 16). Because the petition was opposed, Judge Maughan cut the hearing short and referred the

matter to Judge Lewis, the trial judge, without making any substantive rulings on the issues Mr. Homeyer raised. R. 17; 185 at 3-4, 6.

On about March 8, 2004, St. Joseph's moved the collection court to remove Mr. Homeyer as his mother's guardian ad litem and to appoint in his stead Dr. Lois Brandriet, president of ElderCare. R. 25. Judge Iwasaki granted the motion on March 16, 2004. R. 24. This terminated any possible argument that Mr. Homeyer was legally his mother's guardian.

On April 15, 2004, Judge Lewis held a hearing on the petition. R. 33; 186. Mistakenly thinking that Mr. Jensen was representing St. Joseph's and thus had a conflict of interest, Mr. Homeyer soon objected to Mr. Jensen's participation. R. 186 at 3-4. However, Mr. Jensen clarified that he was representing the petitioners and explained that there was no conflict of interest because in both the collection case and this case he was representing the interests of Ms. Cannatella. R. 186 at 4-5. Judge Lewis also asked questions of counsel that established the absence of any conflict. R. 186 at 9 (court clarifying that Mr. Jensen and counsel for St. Joseph's "represent independent clients and have independent interests here although they may overlap").

Mr. Jensen informed the court that "Ms. Cannatella's bank accounts have been cleaned out in the last few months," which raised the issue of whether she could rely on Medicaid to fund her care. R. 186 at 7. Tom Christensen, appointed counsel for Ms. Cannatella for purposes of the guardianship proceeding, spoke in support of the petition. R. 186 at 10-11. Although he had not filed a formal objection (R. 19), Mr. Homeyer was allowed to speak at length against the petition. He asserted that

Ms. Cannatella had not received proper care; sought to justify his refusal to pay the bills for her care and his failure to place her in an alternative facility as ordered by the collection court; argued that he should be Ms. Cannatella's guardian; and accused St. Joseph's of trying to take "the last penny that she has" and of taking all of Ms. Cannatella's assets. R. 186 at 11-18. Mr. Homeyer's accusation that St. Joseph's had cleaned out his mother's assets was a patent misrepresentation: as conclusively established in a subsequent hearing, it was Mr. Homeyer, not St. Joseph's, who had taken the last of Ms. Cannatella's assets so as to purchase a house for himself. R. 73-78.

At the close of the hearing, the court granted the petition. R. 186 at 18; see R. 33-36 (order). Judge Lewis noted for the record that Mr. Homeyer "ha[d] been abusive to my clerk on the phone and had difficulty communicating with her, hanging up on her, making it almost impossible for her to communicate with him", something the Judge herself had "experienced . . . today in court" with Mr. Homeyer. R. 186 at 19.

3. Order for an Accounting and Return of Cannatella's Funds.

Shortly after the hearing, Mr. Jensen, on behalf of the Conservator, subpoenaed two years of Ms. Cannatella's bank records. R. 187 at 4-5. Analysis of the records revealed that approximately \$75,000 had been removed from one of Ms. Cannatella's bank accounts on November 13, 2003, and that \$7,746 had been removed from another account on January 22, 2004. R. 74; 187 at 5. Only two persons – Ms. Cannatella (then incapacitated) and Mr. Homeyer – had access to those accounts. Id.

After making this discovery, the Conservator successfully applied for Medicaid support to help ensure Ms. Cannatella's long-term care.⁵ R. 74. Then, on May 13, 2004, the Conservator filed a motion for an order requiring Mr. Homeyer to provide an accounting of his mother's funds for the period of April 1, 2002 through April 30, 2004, and to turn over any such funds in his possession or under his control.⁶ R. 41-44. Mr. Homeyer was served with the motion and the proposed order via mail on May 12, 2004. R. 44, 48. Mr. Homeyer did not file a response and, on June 9, 2004, the court granted the motion and entered the order. R. 49-52. The June 9 order required Mr. Homeyer to provide the accounting no later than June 15, 2004 and to turn over all of his mother's funds no later than five business days following service. R. 51-52. It also

⁵ Ms. Cannatella met the eligibility requirements for Medicaid only because the Conservator convinced Medicaid that her assets had been converted, not gifted. Utah's regulations governing Medicaid eligibility preclude a person from transferring away her assets and then going on Medicaid. When a person applies for Institutional Medicaid, a "look-back period" of 36 months for transfers is established such that any transfers to a third party within 36 months of the application will subject the applicant to sanctions. See Medicaid Program Standards (Utah Department of Health Services), Vol. III-M (hereafter "MPS") § 575(4)(B). The number of months a person is ineligible to receive Medicaid is computed by dividing the value of the asset transferred by the private-pay rate for Medicaid in effect at the time of the transfer. MPS § 575(4)(B)(5). Here, Mr. Homeyer alleges that his mother wanted to transfer to him approximately \$116,000. With a private-pay rate at the time of \$3118, if she had indeed intentionally transferred that amount, Ms. Cannatella would have been rendered destitute and ineligible for Medicaid assistance for approximately 37 months. Given her every advanced age and medical conditions, she probably would have died long before the sanction period ended.

⁶ The district court had jurisdiction over Mr. Homeyer. He had already voluntarily appeared before the court in two prior hearings regarding his mother and had been both his mother's guardian ad litem and her agent under the power of attorney. Moreover, under Utah Code Ann. § 75-1-302, "the [district] court has jurisdiction over all subject matter relating to the . . . protection of . . . incapacitated persons," including "full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it." See also id. § 75-5-433 (court has authority to order person who conceals, embezzles, or conveys away any of the money of the ward or protected person to turn over such funds to the conservator).

provided that “[s]ervice [of the signed order] on Mr. Homeyer may be made by first class US Mail.” R. 52.

In the past, Mr. Homeyer had repeatedly refused to accept service of documents by U.S. mail. Despite the court’s rejection at the April 15 hearing of his allegations of a conflict of interest, and despite the obvious fact that Mr. Jensen now represented his mother’s guardian and conservator, Mr. Homeyer still would not open mail of any sort from Mr. Jensen. R. 74-75; 187 at 24-25. He also refused to accept certified mail from the Conservator even when the mail contained no indication it was from Mr. Jensen. R. 74-75; 187 at 25. Thus, to ensure that he received the signed order, Mr. Jensen decided also to serve it on Mr. Homeyer by constable.⁷ This occurred on July 7, 2004. R. 54-56. Mr. Homeyer tried to return the document to the constable, but he apparently refused to take it back. R. 47.

Nevertheless, as the trial court expressly found, it is clear that Mr. Homeyer was aware of the court’s order and had the ability to provide some sort of accounting and to turn over his mother’s funds or their proceeds – he merely refused to do so. R. 187 at 51. Although the due date for the accounting (though not the turn over of funds) had passed by the time Mr. Homeyer could be served in person by the constable, there is no evidence

⁷ Although the record shows that Mr. Homeyer was served via mail with the proposed order on May 12, 2004, for some reason the record does not contain a certificate of service indicating that the signed order was mailed to Mr. Homeyer. Nevertheless, for the Court’s information, Mr. Jensen attests that he did indeed mail a copy of the signed order to Mr. Homeyer on or about June 9 as 23ly permitted by the order itself, and then also effected service by constable to be certain that notice was not an issue. Of course, since Mr. Homeyer refused to open any mail from Mr. Jensen, he did not see the signed order until the constable presented it to him on July 7.

he made the slightest effort to comply with the court's order or to call the court or Mr. Jensen for a clarification or extension of the deadlines. He simply ignored the order.

4. Order to Show Cause and the August 11, 2004 Hearing.

The district court and the Conservator allowed Mr. Homeyer ample time to comply with the order to provide an accounting and turn over Ms. Cannatella's funds. Not until July 21, 2004 – fourteen days after Mr. Homeyer had been served by the constable with the signed order, over five weeks since service of the signed order by mail, and over two months since service of the identical proposed order – did the Conservator file and serve a motion for an order to show cause why Mr. Homeyer should not be held in contempt for failing to comply with the court's order. R. 57-61. The district court issued the order the same day. R. 57-61. The order provided:

IT IS HEREBY ORDERED that Gerald Homeyer appear before this Court on the 10th day of August 2004, at the hour of 2:00 p.m. 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. 67-68.]

On July 29, the constable served the order on Mr. Homeyer. R. 66.

Mr. Homeyer appeared at the hearing on August 11, 2004 (postponed a day because Judge Lewis was sick) and spoke on his own behalf. R. 187, *passim*. The issue of his failure to provide an accounting was addressed. The court first cleared up Mr. Homeyer's misconception that, despite the court's order, he was somehow legally

exempt from providing an accounting. R. 187 at 9-11.⁸ When the court then asked if he was “willing to file an accounting,” Mr. Homeyer responded that he “ha[d] no information to file an accounting with” and that he could not assemble such information because “none of those records are available to [him].” R. 187 at 11. Contrary to Mr. Homeyer’s suggestion on appeal (see Brf. Applt. at 9), Mr. Homeyer was not merely stating that he didn’t have records with him at the hearing, much less implying that had he been given better notice of the scope of the hearing he would have produced the necessary documents. Quite the contrary, he was stating the simple fact that he did not have such records because “all those records ha[d] been destroyed” by him “at least 6 – 8 months ago or more when the [Cannatella] accounts were closed.”⁹ R. 187 at 12, 13; see R. 77 (court’s findings of fact; stating that Homeyer destroyed financial records). Indeed, at no time did Mr. Homeyer object or complain that the subject matter or scope of the

⁸ Mr. Homeyer claimed that in the earlier collection action Mr. Jensen had informed him that he was not legally obligated to give an accounting. That was legally correct with respect to St. Joseph’s, since (absent a court order) Mr. Homeyer did not owe that institution any sort of duty to account for his use of the power of attorney. But Mr. Jensen never suggested that Mr. Homeyer would be exempt from providing an accounting when ordered by a court to do so. Moreover, under the power of attorney that Mr. Homeyer had used to manage his mother’s financial affairs, it expressly states that he “shall provide an accounting for all funds handled and all acts performed as my Agent, if I so request or if such a request is made by any authorized personal representative or fiduciary acting on my behalf.” R. 72, Exhibit 6 at 2; see also R. 77 (finding of fact that that power of attorney required Mr. Homeyer to provide an accounting); see Utah Code Ann. § 75-5-501(5) (power of attorney statute requires agent to give accounting to principle’s conservator). Mr. Jensen never suggested to Mr. Homeyer that he would be exempt from this duty.

⁹ At the hearing, Mr. Homeyer claimed that the reason he had no records was that during the collection action Mr. Jensen had advised him to destroy them. This allegation is both false and absurd. Mr. Jensen, who is co-counsel on this brief and an elder law attorney with a spotless reputation, categorically denies that he ever advised Mr. Homeyer to destroy any records associated with Ms. Cannatella.

hearing exceeded the notice he had been given or that he had been denied due process or a fair opportunity to present his side of the story.

After ordering Mr. Homeyer to open all mail from Mr. Jensen (R. 187 at 15), the court next turned to whether Mr. Homeyer had failed to return Cannatella funds in his possession or under his control – that is, whether he had such funds to begin with. See R. 187 at 15-16. Mr. Homeyer asserted that “the only thing they’re [i.e., the conservator] trying to do is take every last nickel [Ms. Cannatella] has and put her in poverty.” R. 187 at 15. However, the evidence presented at the hearing proved precisely the opposite: that it was Mr. Homeyer who had plundered Ms. Cannatella’s assets for his own benefit. Through clear and convincing evidence – most of which Mr. Homeyer frankly conceded – it was established that Mr. Homeyer took tens of thousands of dollars from his mother’s accounts and used such funds for his own ends rather than to provide for her care. Mr. Homeyer expressly admits as much on appeal. Brf. Applt. at 8.

To summarize the evidence: Mr. Homeyer admitted, and the financial records established, that he had endorsed three checks from U.S. Bank consisting of the proceeds of three of Ms. Cannatella’s CDs. R. 72, Exhibit 2 (checks); 75; 187 at 29-34. Two of these checks were dated November 13, 2003 and had a combined total of \$74,937.21. Id. Another, dated January 22, 2004, was for \$7,746.05. Id. Through documents and admissions by Mr. Homeyer, it was established that these checks from Ms. Cannatella’s accounts at U.S. Bank were then deposited into one of Mr. Homeyer’s personal accounts at Deseret First Credit Union. R. 76; 187 at 29-34. Mr. Homeyer was also shown a copy of a check issued from Ms. Cannatella’s account at the Emigrant Savings Bank in

New York in the amount of \$9,900. R. 72, Exhibit 4. He admitted that he had endorsed the check and obtained Ms. Cannatella's funds through the power of attorney. R. 76; 187 at 36-37. On November 6, 2003, Mr. Homeyer deposited this check into one of his accounts at Deseret First Credit Union. Id.

Mr. Homeyer was also shown copies of several checks representing monthly Social Security benefits for Ms. Cannatella and pension benefits from United National Retirement Fund. R. 72, Exhibit 1; 76; 187 at 26-28. The monthly amounts for such benefits are \$852 from Social Security and \$112.50 from United National Retirement Fund. Id. Mr. Homeyer admitted that he had either deposited these amounts into his own account or that they were directly deposited into his or his mother's accounts. Id.

Mr. Homeyer admitted that he never used any of his mother's savings to pay St. Joseph for her care. R. 76; 187 at 28, 37. He did claim that he had used some of his mother's funds for her benefit in the form of storage fees for her personal property. R. 77; 187 at 37-38. Mr. Homeyer also claimed he had made other payments on his mother's behalf, but he could not provide any specific information or details. R. 77; 187 at 38-39. Because Mr. Homeyer's actions have rendered his mother impecunious, Medicaid funds are currently paying to support her and provide for her medical care at St. Joseph's. R. 76.

It is undisputed that Mr. Homeyer used his mother's money for his own purposes. On or about April 15, 2004, Mr. Homeyer purchased a new house in Riverton, Utah. R. 77; 187 at 33-34. Mr. Homeyer used Ms. Cannatella's funds for an \$83,000 down payment on the house and to pay \$1,916.82 in closing costs. R. 77; 187 at 34. Despite

purchasing the house with his mother's funds, Mr. Homeyer put the house solely in his own name; Ms. Cannatella had no ownership interest whatsoever in it. R. 77; 187 at 34.

After the court compelled him to testify on the issue, Mr. Homeyer's sole explanation for why he had liquidated his mother's assets was that it was by her verbal "consent." R. 187 at 33-35. Mr. Homeyer admitted "there is no physical evidence" that his mother gifted the money to him – no document or instrument evidencing the gift. R. 187 at 35. Indeed, he failed to identify any corroborating evidence whatsoever. He simply stated that prior to purchasing the house he had several "conversations" with his mother where she had indicated "her desire that [he] . . . purchase another house." R. 187 at 35.

Having heard the evidence, which established that Mr. Homeyer had made no effort to provide an accounting and that he had failed to turn over funds which he had taken from his mother for his own use, the district court held him in contempt and sentenced him to immediately serve 30 days in jail. The court ruled:

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

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

Counsel, I'm going to ask you, Mr. Jensen, to prepare findings consistent with the testimony today. The sums alluded to in the Exhibits were taken by Mr. Homeyer for his personal use. That there's no document showing that he had anybody's permission to take all of this money and treat it as his own, leaving his mother without any resources for her own

care. In fact the one document he alludes to, the power of attorney, makes it clear that he had a duty of accountability.

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

R. 187 at 51.

5. Findings of Fact and Conclusions of Law, Order and Judgment, and Withdrawn Post-Judgment Motion.

In accordance with the court's directions, Mr. Jensen prepared and submitted a (proposed) Findings of Fact and Conclusions of Law on Order to Show Cause, which was served on Mr. Homeyer on August 16, 2004. R. 80. Mr. Homeyer was in jail at the time serving his 30-day sentence, which had begun on August 11. However, the district court delayed in entering it until September 23, 2004, which gave Mr. Homeyer nearly two weeks post-incarceration to file any objection. See R. 73. No objection was filed.

The court found "[b]y clear and convincing evidence" that "Mr. Homeyer had used his mother's funds for his own benefit, leaving Ms. Cannatella without any assets to pay for her long-term care. Without such assets, Medicaid funds are now supporting Ms. Cannatella while Mr. Homeyer enjoyed ownership of a new home paid for solely from his mother's funds." R. 78. The court also found, "[b]y clear and convincing evidence," that Mr. Homeyer "had (a) knowledge of this Court's Order; (b) knowledge and possession of Ms. Cannatella's funds; (c) the capacity and ability to provide an accounting; and (d) the capacity and ability to turn over his mother's funds." R. 78. The court restated its conclusions regarding contempt and ruled that a judgment against Mr. Homeyer for the amount of his mother's funds would be proper. R. 78. The court's June 9 order had already mandated that Mr. Homeyer turn over all his mother's funds.

The undisputed evidence and Mr. Homeyer's admissions at the August 11 hearing conclusively established the amount he needed to turn over so there was nothing left to determine.

On September 23, 2004, the district court entered an Order and Judgment against Mr. Homeyer in the amount of \$116,181.26, which represented the amount of funds he had taken from his mother.¹⁰ R. 81-82. The Order and Judgment also permitted Mr. Homeyer to offset any documented amounts he had used for the benefit of Ms. Cannatella. R. 82.

On October 6, 2004, the Conservator filed a motion for an order requiring Mr. Homeyer to convey real property, purchased in part with Ms. Cannatella's converted funds, to Ms. Cannatella. R. 86-92. Now represented by counsel, on October 22, 2004, Mr. Homeyer filed an opposition to that motion. R. 108-10. On the same day, Mr. Homeyer also filed (1) a Rule 62 request for stay of proceedings to enforce judgment (R. 118-20); and (2) a Rule 60(b) motion for relief from judgment or order, with supporting memorandum, in which he raised essentially the same due process arguments now presented on appeal. R. 121-28.

However, on November 1, 2004 – before the Conservator could file an opposition or reply to these documents – Mr. Homeyer withdrew his Rule 60(b) motion, his opposition to the motion to convey Mr. Homeyer's property to Ms. Cannatella, and his request for stay of proceedings to enforce the judgment. R. 159-61. Accordingly, the

¹⁰ Based on the evidence from the hearing, the total consisted of \$82,683.26 in liquidated CDs from U.S. Bank; \$9,900 from an account at Emigrant Savings Bank; \$20,448 for 24 months of Social Security checks; and \$3,150 for 28 months of Unite National Retirement Fund checks. R. 82.

trial court never had the opportunity to review or rule on Mr. Homeyer's due process arguments. Instead, Mr. Homeyer sought to pursue this appeal.

SUMMARY OF THE ARGUMENT

Mr. Homeyer's appeal should be rejected. He failed to properly preserve his due process issue in the district court despite ample opportunities to do so. Never once, even after retaining legal counsel, did he present his due process concerns to the district court. Under these circumstances, it is well established that he cannot raise that issue for the first time on appeal. At any rate, the hearing on the order to show cause did not violate Mr. Homeyer's due process rights. He received timely and adequate notice of the date, time, place, and subject matter of the order to show cause hearing. At the hearing itself, the district court properly conducted an inquiry into those factual issues that were necessary to determine (1) whether Mr. Homeyer was in contempt of the court's order to account for and turn over his mother's funds, and (2) if so, how severe his sanction should be. The undisputed evidence and Mr. Homeyer's own admissions clearly and convincingly established not only that he had failed to provide the mandated accounting, but that he had also taken his mother's funds for his own purposes and then refused to return them as the court had ordered. The court's findings on these issues in no way violated Mr. Homeyer's due process rights, and nothing would be served by a remand to the district court.

ARGUMENT

I. Mr. Homeyer's Due Process Arguments Were Not Properly Preserved and Thus May Not Be Considered on Appeal.

Mr. Homeyer has raised a single issue on appeal – whether “the trial court deprive[ed] [him] of due process of law” when, on August 11, 2004, it allegedly “[held] an evidentiary and adversarial hearing on the merits” rather than confining itself to the contempt issue. Brf. Applt. at 1. However, Mr. Homeyer failed to raise this issue in the district court, both at the August 11 hearing and subsequently. Because Mr. Homeyer did not properly preserve the due process issue in the trial court, and because the “plain error” exception to the preservation rule does not apply in this case, this Court should hold that the issue is waived and dismiss the appeal.

A. Absent Plain Error or Exceptional Circumstances, Failure to Raise an Issue in the Trial Court Waives that Issue for Purposes of Appeal.

It is a basic rule of appellate practice that “appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances.”

Groberg v. Housing Opportunities, Inc., 2003 UT App 67, ¶ 11, 68 P.3d 1015 (quoting State v. Brown, 856 P.2d 358, 359 (Utah App. 1993)).¹¹

This Court recently summarized how an issue may be properly preserved for appeal and the policy reasons for requiring preservation in the trial court:

¹¹ See also Espinal v. City Board of Education, 797 P.2d 412, 413 (Utah 1990) (“With limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time on appeal.”); US Xpress, Inc. v. Utah State Tax Commission, 886 P.2d 1115, 119 (Utah App. 1994) (“It is well settled that, absent extraordinary circumstances or plain error, issues cannot be raised for the first time on appeal.”); Progressive Acquisition, Inc. v. Lytle, 806 P.2d 239, 242 (Utah App. 1991) (“axiomatic” that claims not before trial court may not be advanced for first time on appeal).

In order to preserve an issue for appeal, it “must be raised in a timely fashion, must be specifically raised such that the issue is sufficiently raised to a level of consciousness before the trial court, and must be supported by evidence or relevant legal authority.” State v. Schultz, 2002 UT App 366, ¶ 19, 58 P.3d 879 (quotations and citations omitted). “The trial court is considered ‘the proper forum in which to commence thoughtful and probing analysis’ of issues.” Brown, 856 P.2d at 360 (citation omitted). The preservation rule allows “the trial court an opportunity to ‘address the claimed error, and if appropriate, correct it.’” State v. Cram, 2002 UT 37, ¶ 10, 46 P.3d 230 (quoting State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346). Additionally, “[f]ailing to argue an issue and present pertinent evidence in that forum denies the trial court ‘the opportunity to make any findings of fact or conclusions of law’ pertinent to the claimed error.” Brown, 856 P.2d at 360 (citation omitted).

State v. Richins, 2004 UT App 36, ¶ 8, 86 P.3d 759 (emphasis added); State v. Steggell, 660 P.2d 252, 254 (Utah 1983) (to preserve a procedural issue for appeal, a party must raise a “timely and proper objection . . . in the trial court”).

Failure to properly preserve an issue for appeal almost always results in waiver. In State v. Brown, 853 P.2d 851, 853-54 (Utah 1992), the Utah Supreme Court held that issues raised for the first time on appeal may be addressed only if the trial court proceedings demonstrated “plain error.” See also US Express, Inc. v. Utah State Tax Commission, 886 P.2d 1115, 1119 (Utah App. 1994) (“It is well established that, absent extraordinary circumstances or plain error, issues cannot be raised for the first time on appeal.”). The plain error standard is very difficult to satisfy.

Plain error will be found only if the appellate court determines that (1) the error “should have been obvious to a trial court ... [; and (2)] the error must be harmful in that it affects the substantial rights of the accused.” [Citing State v. Brown, 853 P.2d 851 (Utah 1992).] The plain error exception acts as “a safety device to make certain that manifest injustice does not result from the failure to consider an issue on appeal.” State v. Archambeau, 820 P.2d 920, 923 (Utah App. 1991).

Brown, 856 P.2d at 363 (emphasis added). As this Court noted in Davis v. Grand County Service Area, 905 P.2d 888, 892 n.8 (Utah App. 1995), the plain error standard is even “more rigorous than the abuse-of-discretion standard”. Not surprisingly, cases where this Court has found plain error as an exception to waiver have been rare. Typically, Utah appellate courts hold that failure to preserve an issue in the trial court precludes consideration on appeal. See, e.g., Burgers v. Maiben, 652 P.2d 1320, 1323 (Utah 1982) (The Utah Supreme Court “has repeatedly stated that an issue which has not been raised in the trial court will not be considered for the first time on appeal.”).

These preservation standards apply even when someone, like Mr. Homeyer, chooses to represent himself in the trial court. “As a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar.”¹² Nelson v. Jacobsen, 669 P.2d 1207, 1213 (Utah 1983) (citations omitted). See also Wurst v. Dept. of Employment Security, 818 P.2d 1036, 1213 n.3 (Utah App. 1991) (same). The fact that Mr. Homeyer chose to appear *pro se* at the contempt hearing and elected not to retain legal counsel until after the district court had entered judgment does not entitle him to any special indulgences on the preservation question. As the Oregon Court of Appeals succinctly put it, “*pro se* litigants are bound

¹² To be sure, “a layperson acting as his or her own attorney ‘should be accorded every consideration that may reasonably be indulged’” in the trial court. Wurst, 818 P.2d at 1213 n.3 (quoting Nelson, 669 P.2d at 1213). But that does not mean that the trial court is required to help the *pro se* party prosecute his case or preserve his defenses. The Utah Supreme Court stated in Nelson that “[r]easonable consideration for a layman acting as his own attorney does not require the court to interrupt the course of proceedings to translate legal terms, explain legal rules, or otherwise attempt to redress the ongoing consequences of the party’s decision to function in a capacity for which he is not trained.” Nelson, 669 P.2d at 1213.

by the same preservation rules that bind all other parties.” State v. Morrow, 86 P.3d 70 (Or. App. 2004) (finding waiver). Hence, in a case analogous to this one, the Utah Supreme Court in Burgers v. Maiben, 652 P.2d 1320, 1323 (Utah 1982), held that it would not consider a *pro se* party’s due process challenge to a contempt ruling where the party had failed to raise the issue (“a request to confront a witness”) “at the order to show cause hearing” in the trial court.

B. Mr. Homeyer Did Not Preserve the Due Process Issue in the District Court.

Mr. Homeyer complains that the district court denied him due process at the August 11 contempt hearing. But never once at that hearing, or even after, did he make a due process objection to any part of the proceeding or to the sufficiency of the notice. Although not challenged on appeal, the same is true of the Findings of Fact and Conclusions of Law and the Order and Judgment. That is, Mr. Homeyer did not present the due process issue (by name or otherwise) to the district court in any specific way.

To be sure, after the judgment had been entered, Mr. Homeyer retained legal counsel who filed several documents, including a Rule 60(b) motion, that expressly raised due process concerns. Hence, there is no question Mr. Homeyer became fully aware of the due process issue while there was still time to present it to the district court. Indeed, that appeared to be a principal purpose of his post-judgment filings, especially his Rule 60(b) motion. See R. 121-58. But Mr. Homeyer chose to withdraw his motion and objections before the Conservator could respond and before the district court could consider the issue and correct whatever error it allegedly made.

In short, Mr. Homeyer's due process arguments were never presented for consideration to the district court and thus he has waived his right to appellate review of that issue. Again, Mr. Homeyer is not entitled to any special concessions or to a more lenient standard because he chose not to retain an attorney until late in the case; and particularly not when, after retaining legal counsel, he intentionally withdrew the due process issue from the district court's consideration after initiating efforts to raise it. Cf. Burgers, 652 P.2d at 1322-23 (pro se party's belated due process objection to contempt proceeding not presented to the district court and thus waived on appeal).

Not only did Mr. Homeyer not make a formal due process objection, he never even complained about the August 11 hearing or the hearing notice until this appeal. In his opening brief, Mr. Homeyer maintains that at the hearing he told the court he had not come prepared with financial documents or to answer questions about finances (Brf. Applt. at 9 & 17), as if that alone were enough to preserve a due process issue for appeal. They are not.

But even granting a generous construction, such statements are irrelevant to the preservation issue here. The issue Mr. Homeyer seeks to raise on appeal is whether the district court exceeded the proper scope of the August 11 contempt hearing by allegedly "holding an evidentiary and adversarial hearing on the merits," *i.e.*, on whether Mr. Homeyer had illicitly taken his mother's money, rather than just addressing the narrow issue of contempt. Brf. Applt. at 1. But not once at the August 11 hearing did Mr. Homeyer make the slightest objection to the scope of the hearing or the court's substantive inquiry into how much money he had taken from his mother and whether that

was proper. Nor did he claim at the hearing to have any information or documents at home (or elsewhere) to dispute the Conservator's hard evidence, which mostly consisted of checks bearing his own signature. In fact, just the opposite is true: Mr. Homeyer denied having any financial documents to use in preparing an accounting because (as he testified) he had destroyed them months earlier and couldn't obtain them otherwise from other institutions. R. 187 at 12, 13; 77. More fundamentally, at the hearing he frankly admitted taking funds from his mother for his own use, something he also concedes on appeal. R. 187 at 33-35; Brf. Applt. at 8.

Even on the issue of whether Ms. Cannatella wanted him to have the money – his sole justification for taking it – Mr. Homeyer testified that the only evidence of that intent consisted of conversations she had with him in which she allegedly expressed that desire; he denied there was any documentary evidence. R. 187 at 35. He never so much as hinted, for instance, that if only he had been given proper notice of the scope of the hearing he would have been able to produce witnesses to corroborate his story, or even that there was anyone else who might know of his mother's alleged desires. Mr. Homeyer gave his testimony regarding his mother's alleged intent without once suggesting that he had been caught by surprise or was being denied a fair proceeding or needed additional time to prepare.

As stated earlier, to properly preserve an issue for appeal it “must be raised in a timely fashion, must be specifically raised such that the issue is sufficiently raised to a level of consciousness before the trial court, and must be supported by evidence or relevant legal authority.” Schultz, 2002 UT App, ¶ 19. Like the *pro se* defendant in

Burgers, 652 P.2d 1320, Mr. Homeyer did not comply with any of these requirements. The district court was never made aware of potential due process concerns nor allowed the opportunity to address them. Accordingly, Mr. Homeyer waived the due process issue.

C. This Appeal Does Not Present an Issue of Plain Error.

The plain error exception to waiver does not apply in this case. To paraphrase this Court in Brown, no “manifest injustice [will] result from the failure to consider [Mr. Homeyer’s due process] issue on appeal.” Brown, 856 P.2d at 363. The bottom line is that Mr. Homeyer admits to using a power of attorney to take his incapacitated mother’s money for his own purposes, which undisputedly left her unable to pay for her essential care. Requiring him to return money he wrongfully took from his mother, and to which he had no right in the first place, works no injustice. As the next section demonstrates, even assuming *arguendo* a due process error occurred in the August 11 hearing, the error was neither obvious to the district court nor did it abridge Mr. Homeyer’s substantial rights. See id. Mr. Homeyer cannot satisfy the stringent criteria for plain error.

Mr. Homeyer waived the due process issue and the plain error rule does not apply. This Court should decline to consider the issue presented on appeal.

II. In Any Event, Mr. Homeyer’s Due Process Rights Were Not Violated at the August 11 Hearing.

Mr. Homeyer’s request for relief neatly illustrates why his due process challenge is without substance. In his Conclusion, Mr. Homeyer requests that this Court “reverse the decision of the trial court and remand the matter back to the trial court to allow [him]

to first prepare, and then and there present evidence concerning the whereabouts of Ms. Cannatella's funds." Brf. Applt. at 20. But the "whereabouts of Ms. Cannatella's funds" is undisputed: at the August 11 hearing, Mr. Homeyer frankly admitted to taking the funds and using them for his own ends, including purchasing a new house. R. 187 at 33-35. That fact remains undisputed on appeal. Brf. Applt. at 8 ("Mr. Homeyer admitted to this [i.e., that he "had taken money out of his mother's bank accounts to make a down payment on a new home in Riverton]"). Thus, Mr. Homeyer seeks a remand so he can conduct a factual inquiry into undisputed facts that have already been conclusively established. This makes no sense at all. The heart of due process is fairness. It was hardly unfair for the district court to take evidence establishing what Mr. Homeyer himself frankly admits.

In short, it was not a denial of due process when, at the August 11 hearing, the district court allowed the Conservator to present irrefutable evidence that Mr. Homeyer had flagrantly violated the court's order by doing nothing to provide an accounting of his mother's finances and by refusing to return over \$100,000 of her money. While all court orders must be obeyed, it is surely appropriate in a contempt hearing to establish the nature, magnitude and impact of the disobedience so that the penalty can fit the "crime." The evidence presented at the August 11 hearing did just that and thus was highly relevant to the core contempt issue. Mr. Homeyer was not denied due process.

Before addressing Mr. Homeyer's due process arguments, it is important to clarify what is not at issue in this appeal. Most importantly, Mr. Homeyer has not appealed the correctness of the district court's contempt sanction and has not challenged in his briefing

the correctness of the final order and judgment. Nor is he appealing the district court's refusal to disqualify Mr. Jensen from representing the Conservator.

A. Fairness Is the Heart of Procedural Due Process.

The Conservator has no quarrel with the basic principles of procedural due process set out in Mr. Homeyer's brief. Brf. Applt. at 12-14. A party is of course entitled to fair notice of a proceeding and an opportunity to present objections. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). No one denies that. But it is also important to underscore that "due process is not a technical concept that can be reduced to a formula with a fixed content unrelated to time, place, and circumstances. Rather, the demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved." Nelson v. Jacobsen, 669 P.2d 1207, 1213 (Utah 1983) (citation and internal quotation marks omitted). Procedural due process focuses not on irrelevant technicalities but on the substantive fairness of the proceeding.

B. The District Court Properly Took Evidence at the August 11 Hearing to Establish the Nature and Extent of Mr. Homeyer's Disobedience to the Court's June 9 Order.

Mr. Homeyer's due process challenge boils down to two closely related arguments: (1) that the order to show cause itself did not provide adequate notice; and (2) that the August 11 hearing exceeded the proper scope of a contempt proceeding. Brf. Applt. at 14-19. Neither argument is valid.

The lead-up to the August 11 hearing shows that Mr. Homeyer had both adequate notice and time to prepare for the substance of the hearing. The order to show cause

specifies the date, time, and place of the hearing. R. 67-68. Given the proceedings leading up to the August 11 hearing, Mr. Homeyer had more than adequate time to prepare. On May 12, 2004, the Conservator served Mr. Homeyer with the motion for an order to provide an accounting and turn over all his mother's funds, together with the proposed order itself. R. 44, 48. Mr. Homeyer did not oppose the motion. The signed order (dated June 9) was served on him by mail on or about June 9 and then by constable on July 7. R. 54-55. After Mr. Homeyer failed to comply, the Conservator filed a motion for an order to show cause, which was served on Mr. Homeyer on July 21. R. 57-61. To ensure that Mr. Homeyer's stubborn refusal to open mail did not defeat his receiving notice of the hearing, on July 29 the signed order to show cause was served on him in person by a constable. R. 57-61, 66. Given all this, Mr. Homeyer had more than enough time to prepare for the subject matter of the August 11 hearing. For months he had been receiving notice that he would be required to provide an accounting and to turn over his mother's funds.

Of course, the fact that Mr. Homeyer chose not to carefully read some of the foregoing documents (refusing even to accept service from the constable) or to prepare for the hearing is entirely his own fault and of no consequence in the due process analysis. Cf. Brf. Applt. at 14-15 (asserting that Mr. Homeyer should "be forgiven" for misunderstanding court documents he refused to fully read and sought to discard). There is nothing in Utah law suggesting that as a matter of due process Mr. Homeyer should be shielded from the consequences of his refusal to respect the judicial process. The decision in Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983), which Mr. Homeyer cites,

says nothing of the sort. To the contrary, Nelson emphasizes that a pro se litigant like Mr. Homeyer will not be relieved of the “consequences” of his “decision to function in a capacity for which he is not trained.” Id. at 1213.

The order to show cause also gave adequate notice of the nature and purpose of the hearing: “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. 67-68. Under Mr. Homeyer’s theory, this notice strictly limited the trial court to inquiring only into whether he had failed to provide an accounting or to turn over the funds and why, but did not allow for presentation of any evidence regarding which funds he had failed to turn over and what he had done with them.

But that narrow view makes little sense – especially here – and is not supported by any precedent that Mr. Homeyer has provided or that the Conservator can find. “As a general rule, in order to prove contempt for failure to comply with a court order it must be shown that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so.” Von Hake v. Thomas, 759 P.2d 1162, 1172 (Utah 1988). To hold a person in contempt, the trial court must also issue detailed findings of fact – based on clear and convincing evidence – and conclusions of law to ensure an appropriate factual and legal justification for the sanction. Id. Thus, at the August 11 hearing the Conservator (who had sought the order to show cause) had the

burden of proving by clear and convincing evidence that Mr. Homeyer deserved to be held in contempt.

To do that, counsel for the Conservator introduced extensive evidence – bank checks bearing Mr. Homeyer’s signature, social security checks, bank account histories, deposit slips (R. 72) – establishing the existence of the precise funds Mr. Homeyer was required to account for and turn over. Since Mr. Homeyer had been ordered to turn over “all of his mother’s funds,” counsel put on evidence of “all” the assets and monies he had taken from his mother but failed to account for or turn over. Counsel also introduced evidence of where the money had gone so the court could have a full picture of the situation. As related above, none of this evidence was disputed – Mr. Homeyer acknowledged taking the monies, most of which he admitted using for the purchase of a house solely for himself. R. 187 at 33-35.

All of this evidence was relevant – arguably essential – to establish a clear and convincing basis for a finding of contempt against Mr. Homeyer. To prove that a person failed to account for and turn over particular funds it is entirely appropriate to establish which funds are at issue and their whereabouts; a district court would typically not hold a person in contempt for failing to turn over funds the person never possessed or controlled in the first place. Here, the importance of the location and title of such funds was essential to show that they were in Mr. Homeyer’s possession and were not being properly held for the benefit of his mother. Moreover, such evidence was directly relevant to how severe a sanction the court should impose. As a matter of due process, contempt sanctions cannot be excessive. See Department of Registration of Department

of Business Regulation v. Stone, 587 P.2d 137 (Utah 1978) (per curiam). The egregiousness of Mr. Homeyer's conduct was therefore directly at issue. Obviously, failure to account for and return \$10 is of far less gravity than failing to do so for \$100,000. Establishing just how much of his mother's money Mr. Homeyer had refused to account for and return was essential to establishing the appropriateness of the stern 30-day jail sentence he received for his contempt of court – a sentence he does not challenge on appeal.

Mr. Homeyer's complaint that he was unprepared for the scope of the August 11 hearing cannot be taken seriously. As noted already, he had plenty of time to prepare and, more importantly, the reason he did not bring any relevant financial documents to the hearing is because he didn't have any; by his own testimony he had destroyed them many months earlier. R. 77, 187 at 12, 13. In any event, he has never disputed (1) the accuracy of the documents or testimony that were presented, (2) the factual conclusion that he took his mother's money, or (3) the amount he took.

At the hearing, the only explanation Mr. Homeyer offered was that it was his mother's desire that he take her money and buy a house. On appeal, Mr. Homeyer acknowledges that the court "was free to disbelieve" this excuse and he does not appear to challenge the fact that it obviously did. See Brf. Applt. at 16. Rather, his argument on appeal is that "the court went beyond the issue of contempt" and instead addressed "the specific issue [of] the whereabouts of Ms. Cannatella's funds." Id. at 17. But just to be clear, Mr. Homeyer's assertion that his mother desired him to take all her money was objectively unbelievable and irrelevant. While Ms. Cannatella may well have wanted her

son to inherit her estate and use the money to buy a house, it is utterly implausible to suggest that she wanted him to take all her money while she yet lived and thus render her both unable to pay for critical care and unqualified to receive Medicaid funds. See footnote 5, *supra*. And even if *arguendo* she had desired that result, Mr. Homeyer had no right or authority to comply with it. Ms. Cannatella was incapacitated at the time and incapable of making such decisions on her own, which was why Judge Iwasaki had appointed Mr. Homeyer to be her guardian ad litem. See R. 186 at 4-5. While serving as his mother's agent under the authority of the power of attorney, Mr. Homeyer had a legal duty to act solely in his mother's best interests. See R. 72, Exhibit 6 at 2 (Cannatella/Homeyer power of attorney: "Agent shall be liable for willful misconduct or the failure to act in good faith while acting under the authority of this Power of Attorney."); Compare Utah Code Ann. § 75-5-417 (conservator acts as a fiduciary for the ward); see e.g., In re Conant Estate, 343 N.W.2d 593, 595 (Mich. 1984) (power of attorney creates fiduciary duty). He had absolutely no right to transfer his mother's money to himself when that was manifestly contrary to her best interests. Taking his mother's money and leaving her financially destitute was theft, not the result of a lawful gift. The district court properly rejected Mr. Homeyer's far-fetched excuse for failing to turn over his mother's funds.

In brief, the evidentiary inquiry the district court conducted at the August 11 show-cause hearing was entirely proper. Mr. Homeyer received timely notice of the hearing and, furthermore, the subject matter of the hearing was directly related to the nature and seriousness of Mr. Homeyer's refusal to obey the district court's June 9 order

– the very issue identified in the order to show cause. Mr. Homeyer’s due process rights were not violated at the August 11 hearing.

CONCLUSION

Mr. Homeyer waived the due process issue by not raising it in the district court. In all events, he received all the process he was due. The proceedings below should be affirmed.

ORAL ARGUMENT REQUESTED

Oral argument is requested to assist the Court in addressing the factual and legal issues presented in this appeal.

DATED this 5th day of July, 2005.

KIRTON & McCONKIE


Alexander Dushku
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July, 2005, I mailed two true and correct copies of the **APPELLEE'S BRIEF**, postage prepaid, to each of the following:

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