STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: July 1, 2014)

IN RE: ESTATE OF JOYCE C. WILLNER, by and through her GUARDIAN	**:** **:** **:**	**C.A. No. WP-2013-0400**

DECISION

K. RODGERS, J. This family dispute finds its way to this Court on the appeal of Michael Willner (Michael[1]) and Joyce C. Willner (Joyce, and collectively Appellants) from various orders of the South Kingstown Probate Court filed on July 16, 2013, July 25, 2013 and August 19, 2013. Michael had been duly appointed as the guardian over the person and the estate of Joyce, his mother, but removed as guardian by order dated August 19, 2013, following the efforts of Kurt Willner (Kurt), Joyce's husband and Michael's father, and Yaffa Willner (Yaffa, and collectively, Appellees), Joyce and Kurt's daughter and Michael's sister. The crux of this family disharmony lies in Joyce's participation in making important life decisions, including where she should live.

Jurisdiction is pursuant to G.L. 1956 § 33-21-1. For the reasons set forth herein, the orders of the Probate Court are vacated.

I

Facts and Travel

Having reviewed the testimony and evidence presented by both parties, this Court makes the following findings of fact.

[1]Because numerous family members with the surname Willner are parties to this probate appeal, this Court will refer to each such family member by his or her first name. No disrespect is intended

Joyce is 88 years old and suffering from advanced dementia. Joyce and Kurt were married in Israel in 1948; Joyce is a Holocaust survivor. Joyce and Kurt emigrated to the United States in 1957 with their two children, Michael and Yaffa. In the 1960s, Joyce and Kurt purchased a second home located at 21 Tomahawk Trail South in Wakefield, Rhode Island (the property), which they used as a summer home for many years. In the 1980s, Joyce and Kurt made that property their full-time residence. Kurt resides in that property today. At all times relevant hereto, Michael has resided in Virginia, and Yaffa has resided in Boston, Massachusetts. Joint Ex. 3.

Joyce and Kurt originally owned their property as joint tenants. In or about 1993, the property was transferred to Joyce, but later was transferred back to Joyce and Kurt as tenants by the entirety. In 1993, Joyce also granted to Kurt a general power of attorney. In 2004, Joyce granted to Michael a general power of attorney. Appellants' Ex. 11.[2]

In 2006, Joyce was diagnosed with Alzheimer's Disease and Kurt was battling his own serious medical issues. It was at this time that a family discussion took place among Joyce, Kurt, Michael and Yaffa and, for the first time, the notion of selling the house and moving to a nursing home or assisted living facility was broached. Joyce and Kurt emphatically responded that they wanted to continue to live in their house with assistance as necessary. Thereafter, Michael installed in his parents' home a computer with a webcam and a closed-circuit television which allowed Michael and his parents to

[2]Based upon a preliminary discussion with counsel on the record prior to the start of trial, it is clear to this Court that the three-page document introduced as Appellants' Ex. 11 in full was intended to correspond with Appellees' Ex. O, marked for identification. However, pages two and three of Appellants' Ex. 11 appear to be the second and third pages of the 1993 general power of attorney granted to Kurt, while Appellees' Ex. O appears to include the correct second and third pages of the 2004 general power of attorney granted to Michael. As needed, this Court will refer to Appellees' Ex. O in place of the erroneously produced Appellants' Ex. 11.

communicate between thirty and sixty minutes daily, and at the same time allowed Michael to view his parents while he remained in Virginia. Additionally, Michael activated long-term health insurance for his parents and hired aides and private duty nurses to attend to them. Michael was able to communicate to the health care workers through the video feed he installed. By doing all this, Joyce and Kurt were able to stay in their home for several years. In that time, Kurt recovered from his serious medical issue.

In 2010, Joyce and Kurt's long-term health insurance was depleted and the family came together again to discuss the financial realities that Joyce and Kurt faced if they were to remain in their home. It was decided at that time that, in order to reduce the expenses of engaging a home health care aide, Michael would travel to Rhode Island for two weeks out of every month to stay with his parents, and Yaffa would come from Boston every Sunday to her parents' house. This arrangement lasted through 2011.

On April 11, 2012, Joyce was taken from her home to South County Hospital where she was admitted and treated for pneumonia. Joyce was placed in the intensive care unit and her family was told that Joyce's prognosis was grave. Joyce received hospice care, including a morphine drip, as it was believed she was near death. At that time, dissension arose between Michael, Kurt and Yaffa regarding the use of morphine; Michael believed it should be used only as needed, and Kurt and Yaffa believed it should be continually administered. Eventually, the morphine drip was discontinued and, according to Michael, Joyce "became as lucid as she had been in six years."

Apparently against all odds, Joyce had satisfactorily recovered from pneumonia and was released from hospice care at South County Hospital. The family then faced the important question of where Joyce should go upon her discharge from the hospital.

Joyce, Kurt, Michael and Yaffa participated in that discussion and it was decided that Joyce would be transferred to Roberts Health Centre in North Kingstown for rehabilitation, rather than return immediately to her home. Joyce was admitted to Roberts Health Centre on May 9, 2012, at which time Shahzad Khurshid, M.D. (Dr. Khurshid) was assigned as Joyce's attending physician. Joyce's overall health at the time was poor, prompting another discussion among the family concerning Joyce's placement in hospice care. Michael and Joyce posited that there was no need for Joyce to receive hospice care, but rather, she should participate in physical therapy to strengthen her body; physical therapy would not be provided to her if she were receiving hospice care. Kurt and Yaffa, on the other hand, insisted that Joyce continue to receive hospice care. Dr. Khurshid placed Joyce in hospice care and physical therapy services were discontinued. Michael, however, continued to engage Joyce in physical therapy-type exercises himself.

Once again defying the odds, Joyce recovered from her grave condition by the summer of 2012 and expressed to Michael that she felt well and wanted to return to her home. Michael, Kurt and Yaffa discussed Joyce's request to return home; Michael promoted Joyce's return home and Kurt and Yaffa expressed their desire to have Joyce reside at Roberts Health Centre for the remainder of her life.

In September 2012, Kurt retained an attorney to assist in procuring Medicaid benefits on Joyce's behalf. See Joint Ex. 1. Kurt's then-counsel also prepared a quitclaim deed dated September 5, 2012, and recorded in the South Kingstown Land Evidence Records on September 19, 2012, through which Joyce and Kurt's interest in their property was conveyed to Kurt alone. Joint Ex. 2. Kurt executed the quitclaim deed as the "agent in fact for Joyce C. Willner," purportedly pursuant to a Durable Power of

Attorney recorded in the South Kingstown Land Evidence Records on September 11, 2012.[3] See id. at 1, 2.

On September 24, 2012, Michael filed a Petition for Limited Guardianship in the South Kingstown Probate Court seeking to become Joyce's guardian. That petition was supported by a decision making assessment tool (DMAT) prepared by Dr. Andrew S. Rosenzweig (Dr. Rosenzweig), a geriatric psychiatrist who examined Joyce on September 7, 2012. See Joint Ex. 3; Appellants' Ex. 1. In the DMAT dated September 21, 2012, Dr. Rosenzweig summarized his findings as they relate to Joyce's decision-making ability in the four designated areas as follows:

> "(A) FINANCIAL MATTERS: Although patient is capable of simple arithmetical calculations, she requires assistance with major financial decisions as a result of her short-term memory deficits, fluctuating lucidity, and lack of knowledge of her personal affairs.
> "(B) HEALTH CARE MATTERS: Patient's memory problems and fluctuating lucidity make it essential that she have assistance in major health care decisions, but she should be permitted and encouraged to contribute to these decisions in view of her strong convictions and opinions.
> "(C) RELATIONSHIPS: Patient is capable of choosing with whom to associate, and she consistently expresses a preference for her son to be her primary proxy decision-maker.
> "(D) RESIDENTIAL MATTERS: Patient is capable of expressing a clear preference for returning home, and realizes she will need personal care assistance. Due to her dementia and fluctuating lucidity, she requires assistance to ensure her safety and personal care needs are met." Appellants' Ex. 1, at 5.

[3]This Durable Power of Attorney was not introduced into evidence at trial, nor was any testimony offered relative to this document. By contrast, Michael testified that Kurt executed the September 2012 quitclaim deed on Joyce's behalf pursuant to a 1993 power of attorney that Joyce had granted to Kurt. Michael's testimony in this regard is clearly not supported by the text of the September 2012 quitclaim deed. See Joint Ex. 2.

Dr. Rosenzweig opined[4] that Joyce required a guardian in financial matters and a limited guardian in health care and residential matters; no substitute decision-maker was needed with respect to relationships. Id. He also expressly stated that Joyce did "not appear to require nursing home level of care presently, as her care needs could likely be met in a less restrictive setting, i.e., at home with home health aides. She (when in a lucid interval) consistently expresses a preference to be in her home, and if there are resources available she should be permitted to have a trial at home or in a different but less restrictive setting." Id.

Over Kurt's objection, Michael was appointed temporary guardian on September 27, 2012, in accordance with § 33-15-10. The Probate Court also appointed a guardian ad litem, George J. Bauerle, Esq. (Bauerle), in accordance with § 33-15-7. Bauerle met with Joyce on October 15, 2012, at Roberts Health Centre. See Appellants' Ex. 3, at 1, 3-4.

On or about October 11, 2012, Dr. Rosenzweig met with Joyce for the second time and issued a second DMAT dated October 29, 2012. See Appellants' Ex. 2, at 2. This second DMAT took into consideration Joyce's medical records. See id. at 5. While his summary of Joyce's decision-making ability in each of the four areas was substantially the same as the September 21, 2012 DMAT, see id. at 5, cf. Appellants' Ex. 1, at 5, Dr. Rosenzweig's later opinion was that Joyce required a guardian in financial, health care and residential matters, and a limited guardian with respect to relationships. Appellants' Ex. 2, at 5. He also stated, "However, I continue to believe she could live in

[4]The opinions in Dr. Rosenzweig's September 21, 2012 DMAT were expressly made subject to review of Joyce's medical records, which had not yet been made available to him.

a less restrictive setting if resources permitted, i.e., at home with 24 hour supervision or in assisted living." Id.

In a report filed on November 29, 2012, Bauerle recommended that Michael be appointed permanent guardian and that Joyce be allowed to return to her home or to the home of Joyce and Kurt's neighbors, Marshall Feldman (Feldman) and Karla Steele (Steele), with round-the-clock supervision. See Appellants' Ex. 3. Bauerle's report is replete with references to the strained relationship and animosity between Kurt and Michael that developed in dealing with Joyce's treatment while first at South County Hospital and then at Roberts Health Centre. See id. After summarizing his interviews with Michael, Joyce, Kurt, Steele, Dr. Rosenzweig, various health care professionals at Roberts Health Centre, and Long Term Care Ombudsman Colleen Pendergast (Pendergast), Bauerle recommended the following:

> "3. That Joyce Willner should be allowed to return home as long as financially feasible, which I believe would be possible, as long as Michael Willner provides that every other week 24 care and there is a 24/7 home health care aide. I do not see any medical issues to prevent this from occurring.
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> "4. That if in fact it is not possible for Joyce Willner to return to her home, I would suggest that she be placed in the home of Karla Steele, who I believe has indicated she would ensure the care for Mrs. Willner and place her back close to her home. I do not feel the 24/7 care would be necessary, but there would be a need for a home health aide.
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> "5. That if in fact it is impossible for the situation to be for her to return to her home, I think the parties should pursue an assisted living facility rather than a nursing home." Id. at 9.

The then-sitting South Kingstown Probate Court judge appointed Michael permanent guardian of the person and estate of Joyce on December 14, 2012. Joint Exs. 8, 9. The December 14, 2012 order specified Michael's obligations as permanent guardian and, in part, reflected the animosity between Kurt and Michael. See generally Joint Ex. 8. That order provided as follows:

> "3. Michael Willner and Kurt Willner shall visit with the Ward, Joyce C. Willner, and make every effort to visit when the other party is not present.
> "3.a. Either Michael Willner or Kurt Willner may be permitted to take Joyce Willner from the facility where she presently reside[s] as long as it is approved by said facility for brief period[s] of time.
> "4. With respect to the financial guardianship, he is limited to a review of financial assets and an investigation of same. He has no present authority to expend funds.
> "5. Joyce C. Willner's residency shall remain status quo until Michael Willner submits a proposed plan for her care to be approved by this Court." Id.

Following his appointment as permanent guardian, Michael engaged in further discussions with Kurt to address a health care plan for Joyce's care at home. Michael sought Kurt's cooperation in this regard, including a determination as to how a Home Health Care Plan could be funded. In January 2013, Michael met with Kurt and Joyce at Roberts Health Centre. During that meeting, Kurt maintained that he was unable to ensure Joyce's safety at home due to his advanced age and medical condition; Joyce expressed her desire to return home; and Michael promoted Joyce's return home with his bimonthly visits and a possible reverse mortgage of their home. A Home Health Care Plan dated January 3, 2013, was executed by Michael and Kurt, which provided for round-the-clock coverage by one or more paid home health care aids, weekly or more frequent visits by a private duty nurse to monitor Joyce's medical condition and

administer medications, and the assistance of family and friends. Appellants' Ex. 5, at 3. Additionally, it provided that Joyce would live in a first-floor bedroom in which a hand rail and hospital bed would be installed. Id. at 4. Michael proposed to fund the plan from Joyce's current income—supplemented by borrowings collateralized by the equity in her home—along with Medicaid, which would cover substantially all of Joyce's home care expenses exceeding her monthly income. Id. at 5. On that same date, Michael and Kurt executed a Financial Arrangement through which they agreed that Kurt and Joyce's income and interest in their home would be split evenly and placed into separate accounts, with Kurt at all times having the right to pre-approve expenditures made from Joyce's account or otherwise be resolved by way of mediation. See Joint Ex. 12, at 2.

By February 2013, Kurt reneged on both agreements that he had executed. On February 13, 2013, Kurt executed a quitclaim deed to his home to his daughter, Yaffa, for one dollar and reserved for himself a life estate in the property. See Joint Ex. 11. That quitclaim deed was notarized by Kurt's then-counsel who had previously prepared the September 2012 quitclaim deed conveying all of Kurt and Joyce's interest in the property to Kurt alone. See id. at 2; cf. Joint Ex. 2. By April 2013, Kurt had engaged present counsel and Michael was faced with numerous efforts of counsel to reverse course on the previously-issued Probate Court orders. For instance, Michael was forced to file a motion to enforce the previous agreement that Kurt and Michael had reached relative to the Financial Arrangement. See Joint Ex. 12. Moreover, on April 22, 2013, Kurt executed a Removal Petition, which was filed with the South Kingstown Probate Court on April 25, 2013, and which sought Michael's removal as guardian based upon Michael's alleged failure to act in Joyce's best interest. Joint Ex. 14. It was clear by the

spring of 2013 that the battle lines between Michael and Kurt had been redrawn and the animosity between father and son had returned.

In the spring of 2013, Michael, with the assistance of Homefront Health Care and its nurse manager, Patricia M. Miller, R.N. (Miller), created a second plan for Joyce's care that would allow for Joyce to stay at the home of neighbors Feldman and Steele in the event that Kurt continued to oppose Joyce's return home. See Joint Ex. 17. The plan included the services of a recommended CNA three days per week for two hours each day, with supervision of Joyce otherwise provided by Michael, Feldman and Steele. Id. at ¶ 10 and Ex. 1. Miller, who conducted an assessment of Joyce on May 8, 2103, noted that Joyce "ambulates well with the assistance of caregiver or walker," is "[a]ble to maneuver onto and off of chair/toilet without difficulty," and can "provide some of her own personal care with stand-by assistance." Id. at Ex. 1. Miller also concluded that, with minor modifications, the Feldman/Steele home would be a suitable residence for Joyce. Id. at Ex. 1. Feldman and Steele have been and continue to be supportive of Joyce's proposed placement in their home. Id. at Ex. 2, at 3.

Michael presented this proposed plan to the South Kingstown Probate Court by way of a Motion for Approval of Home Health Care Plan, filed by his present counsel, Jefferson Melish (Melish), on or about July 9, 2013. See id. On that same date, Michael moved for access to Joyce's income and assets, arguing that Joyce's interest in the marital property had been deeded away, that, because Michael was barred from representing himself as guardian,[5] he needed access to Joyce's funds to pay for counsel to

[5]By order dated July 16, 2013, after hearing on June 20, 2013, the then-newly-appointed South Kingstown Probate Judge denied Michael's Motion to Appear Pro Se and struck all pro se filings made by Michael. Joint Ex. 21. In that order, the Probate Court also denied

defend any challenge to the Home Health Care Plan, and that Michael otherwise needed access to Joyce's income and assets in order to carry out his fiduciary responsibilities as guardian. Joint Ex. 18. Kurt, through counsel, opposed both motions. See Joint Exs. 19, 20.

The Probate Court denied both motions on July 25, 2013. Joint Ex. 22. Michael, as guardian, appealed the July 16 and July 25, 2013 orders to this Court on July 31, 2013, by filing a Claim of Appeal with the Probate Court on August 1, 2013; Reasons of Appeal filed by Appellant Estate of Joyce C. Willner in this Court on August 1, 2013, also reflect the appeal from the July 16 and July 25, 2013 orders. See Joint Ex. 26. In the meantime, Kurt's previously-filed Removal Petition, to which an objection was filed on or about July 9, 2013, was originally scheduled for hearing before the Probate Court on July 18, 2013, and on that date was rescheduled to September 19, 2013.

On August 14, 2013, Kurt, through present counsel, filed a Miscellaneous Petition in the Probate Court seeking to expedite the September 19, 2013 hearing on his Removal Petition and to conduct a hearing on August 22, 2013. Joint Ex. 29. In support thereof, Kurt averred that Michael was not acting in Joyce's best interest, was not fulfilling his appointed duties to Joyce, was using his position as guardian to further his own personal agenda and vendetta against other family members, and, as Joyce's guardian, filed a Complaint for Divorce in the Washington County Family Court, a copy of which was attached to the Miscellaneous Petition. Id. On that same day, the Probate Court notified the offices of Michael and Kurt's present counsel, respectively, by telephone and email, that a hearing on the Miscellaneous Petition and Removal Petition would be conducted

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Melish's Entry of Appearance on behalf of the Estate of Joyce C. Willner but granted Melish's Entry of Appearance on behalf of Michael as guardian. Id.

the following day. It is undisputed that neither the guardian nor the ward received direct notice from the Probate Court or from Kurt's present counsel that a hearing would take place on August 15, 2013. It is also undisputed that Michael's present counsel, Melish, was out of town on August 14 and 15, 2013.

The Probate Court conducted a hearing on the Miscellaneous Petition and Removal Petition as an "emergency," with Melish forced to participate by way of telephone. Melish objected to the August 15, 2013 proceedings as well as to the Probate Court's jurisdiction to hear the petitions after Michael perfected his appeal from two earlier orders. See Joint Ex. 23, at 1-3. While the Probate Court concluded that an evidentiary hearing was not warranted, see id. at 4, the Probate Court judge proceeded to consider evidence presented by Kurt's present counsel and to issue findings of fact without any cross-examination or opportunity for the guardian or ward to present evidence. Specifically, the Probate Court judge stated:

> "I find as a fact that [Kurt] Willner senior is incapable of providing a safe level of care for Mrs. Willner at his home.
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> . . . .
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> "I also reject as the plan submitted by Michael Willner . . . for Mrs. Willner to be taken and placed in the Feldman home. I do not believe as I look at that, that Mr. Michael Willner comes anywheres [sic] close to fulfilling his obligations and the duties under [§] 33-15-8. . . . I think it is a cruel hoax to let Mrs. Willner think that she can go home . . . . The letter that I rely on that Mr. Willner cannot take care of her is that of Louisa Skoble, M.D., 2/28, and it was dated 2/28/2013. With all this in mind, I'm going to remove Mr. [Michael] Willner from the guardianship." Id. at 7, 11.

Without inquiring into her qualifications or relationship with Joyce, the Probate Court judge sua sponte appointed Yaffa to serve as guardian over Joyce, noting that Yaffa is "the right choice because I think you're a calm in this storm." Id. at 14.

On August 20, 2013, Michael, as guardian, filed an Amended Claim of Appeal in the South Kingstown Probate Court to include a review of the August 15, 2013 decisions removing Michael and appointing Yaffa as guardian over Joyce. Joint Ex. 25. An Amended Reasons of Appeal was thereafter filed in this Court on August 20, 2013, by the Estate of Joyce C. Willner.

The matter came on for trial before this Court sitting without a jury on April 14-15, 2014. On the first day of trial, Appellees filed a pretrial Motion to Dismiss and for Judgment on the Pleadings Pursuant to 12(c) of the Rhode Island Rules of Civil Procedure (Motion to Dismiss and for Judgment on the Pleadings). Having just been handed this Motion on the morning of trial and Appellants[6] having no opportunity to adequately review and respond thereto, this Court permitted oral argument prior to the start of trial and reserved its decision. This Court will address such issues herein.

The substantive issues presented on appeal from the Probate Court's various orders are: (1) whether Michael should be removed as Joyce's guardian; (2) whether Michael's Motion for Approval of Home Health Care Plan should be granted; (3) whether Michael's Motion to Access the Ward's Income and Assets should be granted;

[6] Prior to trial, the Rhode Island Disability Law Center, Inc. (Disability Law Center) moved to intervene on behalf of Joyce individually. This Court granted that motion and, thus, Joyce had individual representation before this Court. The arguments raised by counsel from the Disability Law Center mirrored the multitude of arguments raised by Melish, with the additional focus on the public policy which promotes and encourages disabled individuals to reside in the community.

(4) whether Michael may represent himself pro se; and (5) whether Melish should be permitted to represent both the Estate of Joyce C. Willner and Michael as guardian.

II

Presentation of Witnesses

Appellants presented the testimony of Michael and Feldman; Appellees presented the testimony of Dr. Khurshid and Pendergast. Additionally, through videotaped discussions between Michael and Joyce, Joyce's preference concerning her physical placement was made known to the Court. See Appellants' Exs. 10(a) – 10(e).

Michael was subject to lengthy questioning. Although geographically distant from his parents, Michael has provided ample care for them over the years. He appeared attentive to both his parents prior to Joyce's hospitalization and by all accounts had enjoyed a good relationship with his parents. Although trained as a lawyer but not presently practicing, Michael may believe that he is more experienced in matters in which he is not trained than he actually is, including, for instance, medical issues. Nonetheless, such arrogance does not necessarily mean Michael is off base in his beliefs. It does, however, provide reason for health care professionals to not react favorably to him. The records of Roberts Health Centre bear this out.

Michael's testimony and demeanor revealed that he cares deeply for Joyce and respects her wishes. It is reasonable to infer that life for Michael would be easier if Joyce remained at Roberts Health Centre and he did not have to worry and expend significant time and resources coordinating Joyce's care if she returned home or resided with Feldman and Steele. Michael is driven, however, by the expressed desires of his strong-willed mother who has survived the worst of times, both historically and personally in the

last two years. He simply wants his mother to be where she wants to be, so long as it is safe and appropriate.

This Court is simply not persuaded that Michael presents such a danger or is not acting in Joyce's best interest as Appellees repeatedly assert. Michael testified that he has taken Joyce out of Roberts Health Centre on occasion with staff knowledge for her benefit, including many visits to the Feldman/Steele home. He travels from Virginia to visit with Joyce. He had attempted to address his parents' financial situation until such time as Appellees stifled those efforts. He attempted to conserve resources by moving to appear pro se until Appellees objected to that as well. In short, he acted in a manner which was carrying out the desires of his mother, which desires conflicted with those of his father and sister.

Feldman presented as a caring, sincere and unbiased individual. He has known Joyce and Kurt since 1999, living two doors away, and treats all the Willners like family. He displayed and expressed no hostility toward Kurt or Yaffa, but rather, was genuine in his focus of the good times that they had all shared together in the past, including spending holidays together, dining together; Yaffa's 60th birthday celebration was even held at the Feldman/Steele home. Feldman has faithfully visited with Joyce at her home, while she was at South County Hospital, and while she has resided at Roberts Health Centre. He appeared saddened that he has been forbidden by Yaffa, without explanation, from visiting with Joyce since September 2013.

Feldman has little incentive to thrust himself into a family dispute involving a family other than his own. However, it is evident to the Court that Feldman cares so deeply for Joyce that he and Steele have offered their home as a means of allowing Joyce

to return to her community. This Court was favorably impressed by Feldman's unselfishness and willingness to enter into the fray for Joyce's benefit, while concomitantly demonstrating respect for Kurt and Yaffa. Feldman's testimony was both credible and persuasive.

Pendergast has a bachelor's degree in social work and has been employed with the Alliance for Better Long Term Care (the Alliance) for three years. As described by Pendergast, the Alliance houses the office of ombudsman, a position authorized by the Older Americans Act and Rhode Island statute to serve as an advocate for elderly patients. Funded through federal and state grants, the ombudsman attempts to resolve healthcare issues on behalf of patients when such situations are reported through the Department of Elderly Affairs, healthcare providers or facilities, or individuals.

Pendergast's involvement with Joyce began in September 2012 when Michael sought information from the Alliance concerning the role of the ombudsman's office. Michael had expressed concern at that time that Kurt had put Joyce into a nursing home and was able to keep her there against her will. Pendergast investigated by reviewing medical records, speaking with healthcare professionals, as well as speaking with Joyce, Kurt and Michael. Pendergast characterized her involvement as having initially began as an inquiry into whether Joyce was forced to reside in a nursing home against her will that morphed into something else completely. Although having only met with Joyce four or five times between September 2012 and March 2014, two meetings in which Joyce did not speak to Pendergast, and providing scant details concerning those meetings, this Court finds it difficult to accept that Pendergast had, at any time, developed a full appreciation of Joyce's wants and needs. Rather, it was evident to this Court that

Pendergast strongly disapproved of Michael's methods and conduct in dealing with Joyce from the time the Alliance became involved and was quick to line herself with Kurt and Yaffa. While some of Pendergast's concerns may have validity,[7] this Court finds that Pendergast was biased and gives little weight to her testimony.

Dr. Khurshid is Joyce's attending physician at Roberts Health Centre and offered testimony concerning Joyce's physical condition. Clearly qualified as a physician, and having worked with geriatric patients since 2001, Dr. Khurshid explained what physical conditions an elderly patient with Alzheimer's and/or dementia typically experiences, such as difficulty swallowing. Dr. Khurshid noted that Joyce presently has advanced Alzheimer's and difficulty swallowing; she also has sleeping problems, gets frequent respiratory infections and is dependent on blood transfusions every couple months. Although diagnosed with Alzheimer's and dementia, Dr. Khurshid could not quantify how Joyce's cognitive or physical condition has worsened since he became her treating physician upon her admission to Roberts Health Centre in May 2012. He testified that, while dementia is progressive in nature, in his assessment, Joyce is confused but has not experienced major changes in her condition since May 2012. However, he also opined that because dementia is a condition that is not likely to improve, Joyce will experience a gradual decline. Dr. Khurshid testified that he never advised Michael that Joyce could not go home.

[7]By way of example, Michael videotaped Joyce on various occasions, one of which captured her just leaving a bathroom at Roberts Health Centre, dressed in a hospital gown and expressing her desire to return home. Another video captured Joyce sitting in her hospital-like bed with a hospital gown draping off her and again expressing her desire to return home when prompted. Some videos that Michael had taken were posted on the internet by Michael in his quest to raise funds so he and Joyce can fight the legal battle waged by Appellees. Pendergast opined that Joyce's privacy rights were significantly compromised by such actions. This Court agrees.

Dr. Khurshid concluded that Joyce needs long term nursing care which she currently receives at Roberts Health Centre, but that she would not receive in a private home setting. On cross-examination, however, it became clear that the medication and treatments that Dr. Khurshid concluded could not be safely and effectively provided at home were medications and treatments that Joyce is no longer receiving at Roberts Health Centre. Thus, Dr. Khurshid's conclusion has only limited value to this Court in analyzing all of the evidence presented.

Finally, Joyce has expressed a clear desire to return home and to have Michael serve as her guardian. The videos presented, while not appropriate for posting on the internet, do reveal a strong-minded woman, consistent in her statement and in her delivery, and determined to return to her community. The Court finds no undue influence or manipulation exercised over Joyce, but rather a conversational tone between mother and son and a firm response by Joyce that she wishes to return home or to live with Feldman and Steele. It is abundantly evident to this Court that Joyce wishes to live with Feldman and Steele if she cannot return to her home and that she loves and trusts Michael to serve as her decision-maker. Those wishes are reasonable and appropriate and deserve consideration.

Suffice to say that emotions run high in family disputes, and this case is no different. However, to portray Michael as dangerous, coercive and appalling in his behavior as Appellees contend is unsupported and a gross exaggeration based upon the testimony before this Court. This Court was unable to assess the demeanor and testimony of Appellees because they were not presented as witnesses, and therefore this

Court is unable to conclude that Kurt and Yaffa's emotions are also running high. In any event, high emotions should not be confused with evil intent or zealous behavior, and this Court cannot fault any family member for displaying strong emotions for a loved one.

III

Standard of Review

Section 33-23-1 of the Rhode Island General Laws authorizes a person aggrieved by an order or decree of a probate court to appeal to the Superior Court in the county in which the probate court is located. In hearing a probate appeal, "the [S]uperior [C]ourt is not a court of review of assigned errors of the probate judge, but is rather a court of retrial of the case de novo." In re Estate of Paroda, 845 A.2d 1012, 1017 (R.I. 2004) (citing Malinou v. McCarthy, 98 R.I. 189, 192, 200 A.2d 578, 579 (1964)); see § 33-23-1(d). Further, "the findings of fact and/or decisions of the probate court may be given as much weight and deference as the [S]uperior [C]ourt deems appropriate[, however,] the [S]uperior [C]ourt shall not be bound by any such findings or decisions." See id.

Appellants are entitled to de novo review of each of the issues raised in the July 16, July 25 and August 15, 2013 orders. The appointment of a guardian is governed by § 33-15-5, which requires an evidentiary hearing at which the respondent/ward has the right to be present and to compel witnesses, present evidence and confront and cross-examine witnesses. The standard of proof in a guardianship petition is clear and convincing evidence. Sec. 33-15-5(4). It stands to reason that the same standard of proof applies to a petition to remove a guardian.

IV

Analysis

A

Appellees' Motion to Dismiss and for Judgment on the Pleadings

Appellees' Motion to Dismiss and for Judgment on the Pleadings alleges that this Court lacks jurisdiction because the appeal from the Probate Court was not properly perfected. Specifically, Appellees contend that Michael, as guardian, did not perfect his appeal inasmuch as he did not file a certified copy of the identical claim with this Court in a timely manner as required by § 33-23-1; that the Estate of Joyce C. Willner is not a person and therefore cannot appeal, nor is it the same party that filed the Claim of Appeal and Amended Claim of Appeal with the Probate Court; and that the Estate of Joyce C. Willner is a non-entity and is not a real party in interest. Appellees' Mot. to Dismiss and for J. on the Pleadings, at ¶¶ 10-18. In the absence of a perfected appeal, Appellees contend that this Court lacks jurisdiction and must dismiss this appeal. Id. at ¶ 19. Appellees' contention is without merit.

Appellees' motion is based upon two procedural rules: Rule 17(a) and Rule 12(c) of the Rhode Island Rules of Civil Procedure. Rule 17(a) requires that every action "be prosecuted in the name of the real party in interest." Super. R. Civ. P. 17(a). "The purpose of this rule is '. . . to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata.'" Esquire Swimming Pool Prods., Inc. v. Pittman, 114 R.I. 238, 239-40, 332 A.2d 128, 130 (1975) (quoting Advisory Committee Note to 1966 Amendment to Fed. R. Civ. P. 17(a)). However, in order to invoke Rule 17(a)'s

protection, "a defendant must object with reasonable promptness to the plaintiff's bringing suit." Id. at 240, 332 A.2d at 130. "Undue delay in making such a challenge may result in the defendant's being deemed to have waived his right to raise this objection." Id. (citing 1 Kent, R.I. Civ. Prac. § 17.1 (1969); 6 Wright & Miller, Federal Practice & Procedure: Civil § 1554 (1971)). "The determination of what constitutes 'reasonable promptness' may vary with the circumstances of each case and should rest within the sound discretion of the trial justice." Id.

In Esquire, the plaintiff sought to recover the cost of services rendered pursuant to a contract. Id. at 238, 332 A.2d at 129. At the time of the events leading to the action, plaintiff was doing business under the name of Aquacade Pools, Inc. Id. at 239, 332 A.2d at 129. Prior to bringing suit, the plaintiff changed its name to Esquire Swimming Pool Products, Inc. Id. When the case was heard before the Superior Court sitting without a jury, the defendants challenged for the first time Esquire's right to bring suit, arguing that Aquacade, not Esquire, was the real party in interest. Id. at 239, 332 A.2d at 130. At the close of the evidence, the trial justice determined that the defendants had raised the party in interest issue in an untimely manner and thereby waived that defense. Id. The Supreme Court affirmed and held in pertinent part:

> "The Superior Court Rules of Civil Procedure, including Rule 17(a), were designed 'to secure the just, speedy, and inexpensive determination' of the rights and liabilities of the litigants in every action in the Superior Court. These rules represent a rejection of the practice of using procedural rules to trick or catch one's opponent off guard. . . . Thus, this court will not permit a defendant to withhold his objection under Rule 17(a) until the eleventh hour in order to entrap the plaintiff." Id. at 240-41, 332 A.2d at 130 (internal citations omitted).

The Esquire Court also went on to note that, since there was nothing in the record to suggest the defendants were ignorant of the real party in interest or the actual claims, there was no prejudice to the suit being brought in the name of Esquire rather than Aquacade. Id. at 241, 332 A.2d at 130-31,

The Supreme Court's reasoning in Esquire is applicable to the instant matter. Here, on July 31, 2013, Michael filed on behalf of himself, as guardian, a Claim of Appeal from the July 16 and July 25, 2013 orders. See Joint Ex. 26. Michael, as guardian, filed an Amended Claim of Appeal with the Probate Court on August 20, 2013, to include the August 15, 2013 decision removing Michael and appointing Yaffa as guardian. See Joint Ex. 25. Both the Reasons of Appeal and the Amended Reasons of Appeal filed in this Court list the case as "In Re: Estate of Joyce C. Willner, by and through her guardian," and identified the parties as Joyce C. Willner, ward, Michael Willner, court-appointed guardian and son of the ward, and the Estate of Joyce C. Willner. A review of the entire record clearly demonstrates that Michael and Joyce were always the parties in interest seeking relief from the various Probate Court orders, and Appellees have failed to demonstrate that they were unaware who the real parties in interest are. Thus, no prejudice has inured to Appellees.

Moreover, Appellees failed to object with reasonable promptness and instead waited until the first day of trial to play the party in interest card. See Esquire, 114 R.I. at 240, 332 A.2d at 130. Indeed, such a last-minute motion is the type of procedural trickery the Esquire Court declined to allow and which the Rules of Civil Procedure sought to address. This Court is likewise disinclined to let a party sit on his or her rights for nine months so as to entrap an opposing party, particularly where, as here, there is no

confusion over the real parties in interest or the actual claims on appeal. Appellees have waived their right to raise this defense. Id. Accordingly, Appellees' Motion to Dismiss pursuant to Rule 17(a) is denied.

Turning now to Appellees' Motion for Judgment on the Pleadings pursuant to Rule 12(c), that rule reads, in pertinent part, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Super. R. Civ. P. 12(c). A party is entitled to judgment on the pleadings if the party "is able to demonstrate to a certainty that the plaintiff will not be entitled to relief under any set of facts that might be proved at trial." Haley v. Town of Lincoln, 611 A.2d 845, 847 (R.I. 1992).

As an initial matter, this Court is fully cognizant of the well-settled principle that the question of subject-matter jurisdiction can be raised at any time in the proceeding. See, e.g., Rogers v. Rogers, 18 A.3d 491, 493 (R.I. 2011) (quoting Pine v. Clark, 636 A.2d 1319, 1321 (R.I. 1994)); Pollard v. Acer Group, 870 A.2d 429, 433 (R.I. 2005) (citing La Petite Auberge, Inc. v. Rhode Island Comm'n for Human Rights, 419 A.2d 274, 280 (R.I. 1980)); see also Super. R. Civ. P. 12(b)(1), 12(h)(2).[8] Likewise, this Court recognizes that the deadlines set forth in §§ 33-23-1(a)(1) and (2) are jurisdictional and may not be extended. Kelly v. Jepson, 811 A.2d 119, 123 (R.I. 2002); In re Estate of Speight, 739 A.2d 229, 231 (R.I. 1999). Notably, the jurisdictional bar that Appellees argue here is premised upon a different party filing the Claim of Appeal and Amended

[8]So as not to place form over substance, this Court will consider the portion of Appellees' present dispositive motion framed as a Rule 12(c) Motion for Judgment on the Pleadings as a Rule 12(b)(1) Motion to Dismiss for lack of jurisdiction, which is not waived in accordance with Rule 12(h)(2). Thus, this Court will not consider whether this Motion to Dismiss was sought in an untimely manner and/or delayed the trial. See Super. R. Civ. P. 12(c).

Claim of Appeal in the Probate Court—Michael as guardian—than the party filing the Reasons for Appeal and the Amended Reasons for Appeal in this Court—the Estate, and the Estate not being a real party in interest. This Court has already concluded that Appellees have at all times been aware of who was prosecuting an appeal and for what specific reasons. To assert otherwise at this late juncture is placing form over substance and attempting to catch Appellants off guard. See Esquire, 114 R.I. at 241, 332 A.2d at 130. Having waived their defense that the real party in interest is not before this Court, Appellees cannot now contend that the parties before this Court failed to comply with the deadlines set forth in §§ 33-23-1(a)(1) and (2) to confer jurisdiction in this Court.

Additionally, Appellees' assertion that the Estate of Joyce C. Willner is a non-entity is without merit. An estate is a legal entity with the capacity to bring suit and to be sued. See In re Estate of Dermanouelian, 51 A.3d 327 (R.I. 2012) (estate filing appeal challenging a Superior Court ruling); Griggs v. Estate of Griggs, 845 A.2d 1006 (R.I. 2004) (estate defending probate appeal filed by ward's daughters); In re Estate of Speight, 739 A.2d 229 (heirs and estate filed appeal from probate court; estate filed appeal to Supreme Court).

In sum, Appellees' dispositive motion filed on the morning of trial is without merit. Appellees' real party in interest claim is untimely and has been waived. In any event, Appellees have at all times been cognizant that Michael as guardian, Joyce as the ward, and the Estate have maintained that they have all been aggrieved by the three Probate Court orders at issue. Appellees have in no way been prejudiced by the Appellant being identified in the Reasons for Appeal and Amended Reasons for Appeal filed in the Superior Court as only the Estate of Joyce C. Willner, whereas both Michael

as guardian and Joyce as the ward are also identified therein as the parties to the case. Finally, the Estate of Joyce C. Willner is a specific entity recognized by courts as having the ability to serve as both a petitioner and respondent in probate appeals, and, therefore, Appellees' contention that the Estate of Joyce C. Willner could not appeal the Probate Court orders is wholly meritless. For all these reasons, this Court has jurisdiction over the within matter on appeal from various Probate Court orders. Appellees' dispositive motion filed on the first day of trial is denied in its entirety.

B

Removal of Michael as Guardian

Turning now to the heart of Appellants' arguments, Appellants first argue that the Probate Court's August 15, 2013 removal of Michael as Joyce's permanent guardian was erroneous because Appellees failed to satisfy both the procedural and substantive requirements of Rhode Island's Guardianship Act, codified at §§ 33-15-1, et seq. For the following reasons, this Court agrees.

1

Lack of Notice

Section 33-22-7(4) reads in pertinent part: "Every probate court shall, before proceeding, give notice to all parties known to be interested in . . . any complaint for the removal of [a] . . . guardian." Section 33-22-3 requires that the petitioner, or his attorney, send notice "by mail, postage prepaid" to those persons entitled to notice "at least ten (10) days before the date set for hearing on the petition . . ." Section 33-22-11 also requires notice by advertisement "once a week for at least two (2) weeks" in all cases in which notice is required. Where legal notice is not given as statutorily required, the

probate court is without jurisdiction to act, even when all the parties were represented by counsel at the proceeding. Briggs v. Probate Court of Westerly, 23 R.I. 125, 50 A. 335, 336 (1901) (probate court lacked jurisdiction to revoke letters testamentary on petition by another for letters as co-executor where legal notice had not been given to the executor whose removal was sought, despite participation in proceeding by counsel for all parties).

Notice to all interested parties on Kurt's most recent effort to remove Michael as guardian, as required by § 33-22-7, was not provided. The Removal Petition was filed on April 25, 2013, see Joint Ex. 14, and originally scheduled for hearing on July 18, 2013, see Joint Ex. 15; it was then rescheduled for hearing on September 19, 2013. In the interim, on August 14, 2013, Kurt filed a Miscellaneous Petition to expedite the hearing date to August 22, 2013. See Joint Ex. 29. The Probate Court expedited the hearing date even more and abruptly rescheduled the hearing for August 15, 2013, after it was revealed that a divorce petition was filed in the Washington County Family Court to dissolve the marriage between Joyce and Kurt. Importantly, this Miscellaneous Petition identified three additional grounds for the removal of Michael as guardian beyond the original contention that Michael was not acting in Joyce's best interest: (1) not fulfilling his appointed duties to the ward; (2) using his position as guardian to further his own personal agenda and vendetta against other family members; and (3) as guardian, having filed a Complaint for Divorce against Kurt on Joyce's behalf. Joint Ex. 29; cf. Joint Ex. 14.

As the guardian of Joyce's person and estate, there is little doubt that Michael was an interested party entitled to notice of the August 15, 2013 hearing. Joyce, as the ward, was also an interested party entitled to notice. The undisputed facts conclusively

demonstrate that neither Michael nor Joyce received any notice of the August 15, 2013 hearing from the Probate Court, by mail from Kurt as petitioner or from Kurt's counsel, and there was no advertisement of the same. An email was sent to and a telephone message left for Michael's present counsel on August 14, 2013, but such means of communication fails to satisfy the requirements of providing notice to Joyce as ward, nor does it supplant the obligations of Kurt as petitioner to provide written notice by mail at least ten days prior to the hearing or the required advertisement.[9] See §§ 33-22-3 and 33-22-11.

While the Probate Court judge may have believed emergent circumstances abrogated the mandatory language of § 33-22-7(4), see Joint Ex. 23 at 1, 3, that position finds no support in statutory or case law. Rather, the plain language of § 33-22-7(4) evinces an explicit directive from the legislature that all interested parties, to wit, guardians and wards, must be given sufficient notice from the probate court before a hearing on a removal petition. Even where Michael's present counsel participated in the August 15, 2013 Probate Court proceeding by way of telephone, such participation cannot serve as a substitute for the required notice. Briggs, 23 R.I. 125, 50 A. at 336. This Court concludes that, in the absence of proper notice by the Probate Court under

[9]Appellees also argue that a Miscellaneous Petition to Waive the Notice Provision of R.I.G.L. 3-15-17.1, filed by Michael's then-counsel for hearing on September 27, 2012, see Appellees' Ex. I, set the precedent in this case that statutory notice can be waived in an emergency situation. Appellees' argument is off base. Permitting one particular hearing to proceed without the required five-day notice is not akin to a universal waiver of all notice requirements. To the contrary, waiving all notice requirements in probate proceedings would have required a written assent executed by all interested parties. Sec. 33-22-5. No such written waiver executed in accordance with § 33-22-5 is alleged to exist here.

§ 33-22-7 and/or the required advertisement under § 33-22-11,[10] the Probate Court lacked jurisdiction to entertain and rule upon Kurt's Miscellaneous Petition. Briggs, 23 R.I. 125, 50 A. at 336. Accordingly, the decision removing Michael and appointing Yaffa as guardian is vacated.

2

Failure to Satisfy the Substantive Requirements of § 33-15-18

In addition to the Probate Court's failure to follow the notice requirements of §§ 33-22-7(4) and 33-22-11, the Probate Court's decision to remove Michael and appoint Yaffa as guardian is substantively flawed. Title 33, chapter 15 governs limited guardianships and guardianships of adults. Section 33-15-18 specifically governs removal of guardians and permits removal of a guardian only as follows:

> "(a) Removal may be requested by the ward or anyone acting on behalf of the ward, including the limited guardian, guardian or conservator. The ward may retain counsel for this purpose.
>
> "(1) The court shall remove any limited guardians, guardian or conservator appointed or approved by it upon finding that the limited guardian, guardian or conservator has not fulfilled, or is no longer able to fulfill, the duties of the appointment as set forth by the order itself and/or the limited guardianship and guardianship law.
>
> "(2) The court shall remove any limited guardian or guardian or conservator upon finding that the ward, based on a decision making assessment tool, has the capacity to make decisions regarding his or her health care, finances, residence, and/or relationships.
>
> "(b) A limited guardian or guardian or conservator may resign. . . . " Sec. 33-15-18 (emphasis added).

[10]By comparison, the failure of the petitioner to provide at least ten-day written notice as required under § 33-22-3 does not serve to defeat the jurisdiction of the court. Sec. § 33-22-7.

First, the record before the Probate Court is bereft of any competent evidence upon which the Probate Court could make findings of fact that Michael has failed to fulfill or can no longer fulfill his duties as guardian. No witnesses or evidence was presented on August 15, 2013. Michael, through counsel, was not given the opportunity to cross-examine witnesses or present any evidence in support of his objection to being removed as guardian, nor was Joyce given notice or an opportunity to be heard. Instead, the Probate Court relied upon arguments of Kurt's counsel and what appears to have been a negative interaction between Michael and the Probate Court judge,[11] and concluded, "I do not believe . . . that Michael Willner comes anywheres [sic] close to fulfilling his obligations under 33-15-8." There was no determination by the Probate Court as to which particular obligations Michael had failed to or was unable to fulfill.

[11]The Probate Court judge stated:

> "I've seen Michael Willner . . . I believe every month this matter has been on the calendar and it's painful to watch unfold. It took me a while to catch on to it. I think it's a cruel hoax to let Mrs. Willner think that she can go home and sit on her deck . . . at Indian Lake. . . . I've also watched – this is Michael Willner I'm talking about. Mr. Michael Willner has shown a disregard of his responsibilities. Mr. Willner, junior, has shouted out grossly inappropriately [sic], particularly for an attorney at law in the District of Columbia, "My father is stealing my mother's money." Mr. Willner, Michael Willner, has followed me to my car in the parking lot and apologized for his conduct which I let, you know I let that slide. I understand it's, the stakes are heavy. I entered an order. I didn't enter one he favored and he called me at my office and I don't let that slide. It's a gross ex-parte contact. An attorney should know better. He's totally unsuited for the task." Joint Ex. 23, at 11.

Second, the record before this Court is equally void of evidence that supports the removal of Michael as guardian. Appellees' argument is generally premised on the assertion that it is in Joyce's best interests to continue to reside at Roberts Health Centre, rather than her home. However, this does not constitute evidence of neglect or misconduct on the part of Michael which warrants his removal as guardian. Additionally, Appellees maintain that it was Michael's incompetence in not preparing a Home Health Care Plan that has prevented Joyce from returning home, and that Michael failed to carry out his fiduciary duties as guardian in failing to inquire about Joyce's assets and file an inventory with the court. Notably, Appellees fail to recognize that each of these efforts that Michael did undertake by way of motions before the Probate Court was met with an objection by Kurt, and the relief sought ultimately was denied by the Probate Court.

Not only have Appellees failed to establish by clear and convincing evidence that Michael should be removed as guardian, but also this Court finds from the evidence presented at trial that Michael has acted in Joyce's best interest in pursuing her return to a less restrictive environment than a nursing home. After he was appointed permanent guardian, Michael diligently sought to carry out his duties, preparing numerous Home Health Care Plans to meet Joyce's needs in accordance with the recommendations of Dr. Rosenzweig and Bauerle, only to be road-blocked by Appellees at every turn. The guardian ad litem report and Dr. Rosenzweig's DMATs, as well as his deposition testimony, also support the notion that Michael is, indeed, acting in the best interests of his mother. See Appellants' Exs. 1, 2, 3. Dr. Rosenzweig testified in his deposition that it would be better for Joyce to return home, rather than stay at Roberts Health Centre. He noted:

> "[A] person with dementia deserves to be in the least restrictive environment possible to maintain their personal care and safety and quality of life, and that . . . in Joyce's case a nursing home was not the least restrictive environment to make that happen." Appellants' Ex. 4, at 27:12-19.

He further testified:

> "Joyce doesn't require nursing home level of care . . . there is a continuum of care for the elderly with dementia . . . most of the five and-a-half million people with dementia in this country, far and away most of them live at home, you know, with varying levels of help from usually family and professional caregivers ranging from low-paid private-duty aids all the way up to skilled nurses. And so the actual percentage of people with dementia who are in a nursing home is pretty low throughout the country." Id. at 41:26-42:2.

Appellees' viewpoint as to how Joyce should be cared for is not evidence that Michael has failed to fulfill his duties or is incapable of fulfilling them and is actually contrary to the substantial evidence that demonstrates that Michael is acting in his mother's best interests by pursuing a feasible Home Health Care Plan for her to return to the community where she prefers to be, with appropriate supervision and assistance that will be provided for her health, safety and welfare. Accordingly, Appellees have failed to establish by clear and convincing evidence that Michael should be removed as guardian pursuant to § 33-15-18(a)(1).[12]

Equally absent before both the Probate Court and this Court is clear and convincing evidence that Yaffa should be appointed as guardian. No evidentiary hearing

[12]It is undisputed that Joyce needs a permanent guardian and is unable to make her own medical decisions. Accordingly, removal pursuant to § 33-15-18(a)(2) is inapplicable. Likewise, removal pursuant to § 33-15-18(b) is inapplicable because Michael did not resign as permanent guardian; he was involuntarily removed.

took place in which the Probate Court considered Yaffa's qualifications, nor was any consideration given to Joyce's preference on who should serve as guardian. See § 33-15-5 (requiring evidence and opportunity for respondent/ward to be present and compel witnesses, present evidence and confront and cross-examine witnesses); § 33-15-6(b) (requiring court to first consider proposed guardian's criminal background, capacity to manage financial resources, ability to meet unique needs of the case and meet legal requirements); § 33-15-6(e) (requiring court to consider wishes expressed by individual found to be incapacitated). Before this Court, there was no evidence whatsoever concerning Yaffa's qualifications. Although listed as a witness, Yaffa was never called to testify. Appellees have wholly failed to sustain their burden of proof in having Yaffa appointed as Joyce's permanent guardian.

Appellees failed to demonstrate by clear and convincing evidence that Michael should be removed under any grounds contained in § 33-15-18 and that Yaffa should be appointed as guardian pursuant to §§ 33-15-5 and 33-15-6. Accordingly, for this additional reason, this Court vacates the August 15, 2013 decision of the Probate Court, and Michael shall be reinstated as guardian of Joyce's person and estate.

C

Home Health Care Plan

The next issue on appeal involves the Home Health Care Plan filed on July 9, 2013. See Joint Ex. 17. For the reasons that follow, this Court vacates the order dated July 25, 2013, and approves the Home Health Care Plan.

The legislative intent in enacting Title 33, chapter 15 reflects the General Assembly's desire to serve individuals with disabilities by maximizing their individual autonomy. Section 33-15-1 provides:

> "**Legislative intent.** The legislature finds that adjudicating a person totally incapacitated and in need of a guardian deprives that person of all his or her civil and legal rights and that this deprivation may be unnecessary . . . . Recognizing that every individual has unique needs and differing abilities, the legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them[.]" Sec. 33-15-1 (emphasis added).

To that end, § 33-15-4(a)(1), governing limited guardianships, further requires that the probate "court must strike a delicate balance between providing the protection and support necessary to assist the individual and preserving, to the largest degree possible, the liberty, property and privacy interests of the individual." Additionally, individuals subject to guardianship proceedings are provided with significant procedural protections wherein, before a guardian is appointed, an individual has the right to be present at the hearing, present evidence, compel witnesses and cross-examine witnesses. See § 33-15-5. The guardian ad litem provisions, § 33-15-7, also outline additional protections to ensure an individual has the right to choose or object to the appointment of a guardian, the right to counsel, and the right to participate in all decisions affecting her.

The evidence of record demonstrates that Joyce has consistently and emphatically expressed a desire to return home.[13] She has expressed this desire to Dr. Rosenzweig; to the guardian ad litem; to her neighbors and good friends, Feldman and Steele; to her son,

[13]Conversely, there has been no evidence that Joyce ever expressed a preference to remain at Roberts Health Centre. Any suggestion that Joyce has been manipulated into stating that she wishes to return to her community is belied by this lack of evidence.

Michael; and to the nursing facility staff at Roberts Health Centre. Specifically, in both of his DMATs, Dr. Rosenzweig noted that Joyce was capable of expressing a clear preference to return home. Appellants' Exs. 1, 2. Bauerle likewise found, "Joyce was clear in her desire to return home and was lucid in our discussions." Appellants' Ex. 3, at 4. Feldman and Steele also stated under oath in their affidavit in support of the Home Health Care Plan that Joyce, without solicitation, would bring up the subject of her desire to go home. See Joint Ex. 17, at Ex. 2. Feldman and Steele conveyed a sample of some of the things Joyce would say, which included: "I want to go home. When am I going home?" "Why must I suffer like this? Why are they making me [stay here and] suffer like this?" "I understand why I came here when I was sick, but now I'm well. Why can't I go home now?" "If I had to live here the rest of my life, I would kill myself." Id. Finally, Joyce's desire to return home was also captured in videos made by Michael. See Appellants' Exs. 10(a)-(e).

Moreover, the overwhelming evidence shows that Joyce's needs can be met in the community outside Roberts Health Centre. Both the guardian ad litem and Dr. Rosenzweig subscribe to the plan to allow Joyce to return to her community and that Joyce's medical and cognitive issues should not prevent that from happening. See Appellants' Ex. 3, at 9 (Bauerle recommendation that 24/7 care unnecessary but home health aide at Feldman/Steele home appropriate); Appellants' Ex. 4 at 41:26- 42:2 (Dr. Rosenzweig recognizes varying levels of help from family and professional caregivers that allow most dementia patients to live at home). In specifically analyzing the Feldman/Steele home, Miller's assessment further supports a finding that Joyce is

capable of living in the Feldman/Steele home with some minor modifications. See Joint Ex. 17, at Ex. 1.

Finally, recent medical records from Roberts Health Centre indicate Joyce has not experienced any significant decline due to dementia. See Joint Ex. 38. Yaffa corroborated this fact when she indicated that Joyce's condition remains stable in her January 15, 2014 Annual Status Report. See Joint Ex. 28. Such evidence is not disputed by Appellees' witnesses. Dr. Khurshid testified that Joyce had medically improved from the time of her initial admission to the nursing facility. While he did not think that Joyce could get comparable nursing services at home, he was uncertain whether that was true for all of the services. Dr. Khurshid also testified that he never advised Michael that Joyce could not go home.

In light of this evidence, particularly the feasibility of the Home Health Care Plan proposed by Michael, and most especially Joyce's much-expressed desire to return home, this Court finds that the Probate Court erred in denying the Motion For Approval of Home Health Care Plan. Accordingly, the Probate Court's July 25, 2013 order is reversed insofar as it relates to the Home Health Care Plan.

D

Whether the Probate Court Erred by Denying Michael's Motion to Access the Ward's Income and Assets

Appellants next contend the Probate Court erred in its July 25, 2013 order when it denied Michael access to Joyce's funds while he was guardian. Once again, this Court must agree.

One of the purposes behind Rhode Island's Guardianship Act is to assist incapacitated persons "in managing their financial resources[.]" Sec. 33-15-1. To that end, § 33-15-29 enumerates the duties of guardians, and reads in pertinent part:

> "Every limited guardian or guardian with authority to make decisions with respect to the person of his or her ward shall exercise authority in the best interest of his or her ward . . . [and] shall manage the estate frugally, without waste, and shall apply the income and profits from the estate . . . to the support and maintenance of the ward and his or her household and family."

Additionally, § 33-15-19(a) requires a guardian to, within thirty days of his or her appointment, return to the probate court "an inventory and appraisement of all the real and personal property of his or her ward[.]"

Michael was appointed guardian of Joyce's person and estate on December 14, 2012, based upon the guardian ad litem's recommendation that Joyce "needs a substitute decision-maker in reference to her financial and healthcare matters." Appellants' Ex. 3, at 9. Dr. Rosenzweig's DMATs also indicated that Joyce was in need of financial and health care decision-makers. See Appellants' Exs. 1, 2. Therefore, in order to represent Joyce's best interests, Michael was required to "manage the estate frugally, without waste[,]" and to also provide the Probate Court with an inventory of Joyce's assets. See §§ 33-15-29 and 33-15-19(a). Yet, even after Michael's appointment, Joyce's assets and income were completely controlled by Kurt, as evidenced by his unilateral conveyance of the marital home without Joyce's knowledge. While Michael was not required to file a motion to access Joyce's income and assets, because access to such things was essential to carrying out his duties under § 33-15-19(a), the Probate Court erred in denying Michael's motion to access Joyce's income and assets. The July 25, 2013 order to that

extent is reversed. Accordingly, Michael will be allowed access to Joyce's income and assets to carry out his duties as guardian of Joyce's Estate and Person.

E

Whether the Probate Court Erred by Denying Michael's Motion to Represent Himself Pro Se

Appellants next contend the Probate Court erred when it denied Michael's request to represent himself pro se in the guardianship proceeding. This Court agrees.

Rhode Island General Laws § 33-15-2 states in relevant part that, "[a]ny person may file . . . a verified petition for the appointment of a guardian." There are no known reported cases in this jurisdiction in which a Probate Court has denied a petitioner for guardianship the right to self-representation, and this Court is not inclined to find so now.

On May 14, 2013, Marvin Homonoff, Esq. (Homonoff), filed a Withdrawal with the Probate Court by which he withdrew his appearance as attorney for Michael. Michael then filed an Entry of Appearance by which he entered his appearance pro se. Appellants' Ex. 7. Kurt opposed Michael's Entry of Appearance pro se. See Appellants' Ex. 8. The Probate Court accepted Homonoff's Withdrawal on May 23, 2013, and indicated an intent to strike Michael's Entry of Appearance pro se, but ordered the parties to brief the issue. On July 16, 2013, the Probate Court denied Michael's Entry of Appearance while accepting the appearance of Melish as Michael's attorney. (Joint Ex. 21.)

While the Probate Court may have presumed that Michael, as Joyce's guardian, would be effectively representing himself and Joyce, thus creating a conflict of interest, the presumption is erroneous. Michael filed a Petition for Limited Guardianship or Guardianship, petitioning the Probate Court to appoint a guardian for Joyce and

indicating his willingness to serve as guardian. (Joint Ex. 3.) The Petition was clearly filed by Michael on his own behalf, not by Joyce nor by Michael as a representative of Joyce. See Joint Ex. 3. This Court is unable to find that a conflict of interest exists as Appellees argue.

Moreover, if it was the Probate Court's intention to protect Joyce against any potential conflict of interest, this Court points out that wards are already well-protected in Rhode Island guardianship proceedings. Upon the filing of a petition for guardianship, § 33-15-7 requires the appointment of a guardian ad litem whose duties include informing the incapacitated person of all aspects of the proposed guardianship, such as the ward's right to "contest the petition, to request limits on the guardian's powers, to object to a particular person being appointed guardian, to be present at the hearing, and to be represented by legal counsel." If the ward wishes to contest the petition or requests legal counsel, or if the guardian ad litem determines it is in respondent's best interests to have legal counsel and legal counsel has not been secured, "the court shall appoint legal counsel." See § 33-15-7(d), (e). Here, Joyce did not object to the appointment of her son as guardian, she did not request legal counsel, nor did the guardian ad litem request legal counsel on Joyce's behalf. Accordingly, the Probate Court's July 16, 2013 order denying Michael the ability to represent himself as guardian is reversed.

F

Whether the Probate Court Erred When it Prohibited Melish from Representing Both Michael and Joyce's Estate

Finally, Appellants contend that the Probate Court's order denying Melish's Entry of Appearance on behalf of the Estate of Joyce C. Willner was in error. This Court, once again, agrees with Appellants.

Rule 1.7 of the Rules of Professional Conduct prevents a lawyer from representing a client if "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Rule 1.7 of Article V of the Rules of Professional Conduct.

Here, the record evidence makes it abundantly clear that both Michael and Joyce are advocating the same position, i.e., Joyce's return home. Therefore, Melish's representation of Michael is not in direct conflict with Joyce's Estate, nor does it materially limit his ability to represent the Estate of Joyce C. Willner. This Court finds that Melish is entitled to represent both Michael as guardian as well as the Estate of Joyce C. Willner, and the July 16, 2013 order of the Probate Court is reversed.

V

Conclusion

For the foregoing reasons, the Probate Court's orders of July 16, 2013, July 25, 2013, and August 19, 2013 are reversed in their entirety. This Court further orders that Michael be reinstated as guardian of the person and estate of Joyce C. Willner, that he be given access to Joyce's income and assets, and that Melish be appointed attorney for both Michael as guardian and the Estate of Joyce C. Willner.

Moreover this Court retains jurisdiction over this matter. This Court does not exercise such authority lightly. Rather, under the unique circumstances of this case and the history between the parties, such continued jurisdiction in this Court is warranted.

Any further litigation[14] concerning the issues relating to this ward and/or this guardianship shall be addressed to this Court by way of motion filed on the Formal and Special Cause Calendar, with no less than ten days notice to all interested parties provided by counsel or a self-represented litigant.

Counsel for Appellants shall prepare an order consistent with this Decision.

[14] To the extent the Home Health Care Plan that should have been approved by the Probate Court in 2013 requires modification due to changes in any circumstances, whether on Joyce's part or on the part of Feldman or Steele, further motion thereon shall be presented to this Court for its consideration consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**In re: Estate of Joyce C. Willner, by and through her Guardian**
CASE NO:	**C.A. No. WP-2013-0400**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**July 1, 2014**
JUSTICE/MAGISTRATE:	**Kristin E. Rodgers**
ATTORNEYS:	
For Plaintiff:	**H. Jefferson Melish, Esq.** **Anne M. Mulready, Esq.**
For Defendant:	**Alan M. Barnes, Esq.** **Robert J. Connelly, III, Esq.**