

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00179-CV

**Philip M. Ross, in his Individual Capacity and His Capacity as Trustee of the
Sybil B. Sims Blind Trust, Appellant**

v.

Sybil B. Sims; Harold Sims, Jr.; and Cynthia Kirkland, Appellees

**FROM THE COUNTY COURT AT LAW NO. 1 OF COMAL COUNTY
NO. 2015-GDA-0021, HONORABLE RANDAL C. GRAY, JUDGE PRESIDING**

MEMORANDUM OPINION

In this guardianship proceeding, Philip M. Ross, in his individual capacity and in his capacity as trustee of the Sybil B. Sims Blind Trust (the Trust), appeals from the trial court's orders voiding the Trust and removing funds to the Comal County Court at Law and awarding reimbursement and payment of attorney's fees and expenses. For the following reasons, we affirm the challenged orders.¹

¹ Pending before this Court is a motion to dismiss filed by appellee Cynthia Kirkland. She argues that the appeal is moot because Sybil Sims, who was the subject of the guardianship proceeding, died during the pendency of this appeal. We conclude, however, that the issues raised in this appeal concerning the estate of Sybil Sims are not moot and, thus, deny the motion. *See Zipp v. Wuemling*, 218 S.W.3d 71, 73–74 (Tex. 2007) (per curiam) (discussing whether appeal was moot after ward died during pendency of guardianship proceeding and concluding that appeal was not moot because dispute remained as to whether guardian was properly removed and whether guardian had legally cognizable interest in fees and costs); *cf. In re Guardianship of Hatch*, No. 09-14-00006-CV, 2015 Tex. App. LEXIS 11096, at *5 (Tex. App.—Beaumont Oct. 29, 2015, no pet.) (mem. op.) (dismissing appeal in guardianship proceeding as moot after ward died and

BACKGROUND²

Sybil Sims had three children: Harold Sims, Jr., Cynthia Sims Kirkland, and Suzanne Sims Baker.³ After Sybil had a stroke in December 2014, disputes arose between Sybil's children about her care and control of her assets. Shortly after she suffered the stroke, Sybil signed a durable power of attorney appointing Suzanne as her "agent (attorney-in fact)." Acting as Sybil's agent under this power of attorney, Suzanne filed an eviction suit in August 2015 against Harold, who was living in Sybil's house.

Central to the parties' dispute in this appeal is the Trust that was purportedly created on September 8, 2015, pursuant to two separate trust agreements that Ross signed as the trustee. In one of the trust agreements, Suzanne signed as Sybil's "agent pursuant to a Durable Power of Attorney," and Sybil signed the other trust agreement on her own behalf, as well as signing: (i) a "contract for legal services," hiring Ross as her attorney, (ii) a special warranty deed transferring her house to Ross, as trustee, and (iii) a bill of sale transferring her personal property to Ross, as trustee. Suzanne, as agent for Sybil pursuant to the durable power of attorney, contemporaneously signed a "bill of sale," also transferring Sybil's personal property to the trust.⁴

noting only remaining issue was to close guardianship estate).

² Because the parties are familiar with the facts of the case and its procedural history, we do not recite them in this opinion except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4.

³ We refer to Sybil and her children by their first names for clarity.

⁴ In August 2015, Suzanne also signed a contract for legal services, hiring Ross to represent Suzanne and Sybil. When asked by the trial court why Suzanne signed the documents on behalf of Sybil in September if Sybil had the capacity to make her own decisions as Ross contended, Ross responded: "Because [he] knew that Sybil's capacity was being challenged by other people and so

A few days after the Trust was purportedly created, Harold filed an application for appointment of permanent guardian of the person and estate of Sybil Sims in Bexar County.⁵ Harold alleged that Suzanne was moving Sybil, who was 91 years old, and Sybil's property from her house in San Antonio to "an undisclosed location." He sought to be appointed the guardian of the person and for his sister Cynthia to be appointed the guardian of the estate. Cynthia subsequently joined as an applicant for appointment of a guardian in an amended application. The trial court appointed an attorney ad litem, *see* Tex. Est. Code § 1054.001 (requiring appointment of attorney ad litem in proceeding for appointment of guardian), and a court investigator filed a report with the trial court. *See id.* §§ 1054.151–.153 (addressing court investigator and report). The court investigator reported about the transfer of Sybil's assets to the Trust and about Sybil's mental and physical condition, including that Sybil had "a diagnosis of dementia rated from mild to moderate since December 2013," that she had a stroke in December 2014, and that she did "not have decision making capacity."

Sybil and Suzanne, by and through their attorney Ross, entered a special appearance and motion in limine in the guardianship proceeding, and Sybil, by and through Ross, filed a motion

as a backup I had Suzanne, as Sybil's agent, always sign." In response to questions from the trial court, Ross also listed the assets that were in the Trust, including Sybil's house, a money market account, a checking account, and personal property.

⁵ Ross represents to this Court in his briefing: "One of the considerations for creation of the Trust was a prospective guardianship proceeding, which was anticipated to be filed by Harold. . . . Thus, the decision was made on September 8, 2015 to transfer most of Sybil's assets from her estate into an irrevocable spendthrift trust, where they could be managed for her benefit during her lifetime, be sheltered from potential taxation for court costs and other expenses of a prospective guardianship proceeding, and be distributed to her heirs without the expense of probate proceedings after her death."

to remove attorney ad litem and appoint Ross as Sybil's retained attorney. The parties thereafter agreed to transfer the case to Comal County because Sybil and Suzanne had moved to an apartment in that county. After the case was transferred, Sybil, by and through Ross, filed an answer contesting the guardianship; the trial court appointed a guardian ad litem and authorized an independent medical examination of Sybil; and Harold and Cynthia filed a motion to show authority, challenging Ross's authority to represent Sybil. *See* Tex. R. Civ. P. 12 (addressing procedure to challenge attorney's authority to represent party in pending litigation); *see also* Tex. Est. Code § 1054.006 (addressing representation by ward or proposed ward by retained attorney in guardianship proceeding).

A hearing was held on the motion to show authority on January 13, 2016. At the hearing, the psychiatrist who examined Sybil pursuant to the court-ordered medical examination testified about her medical conditions, including dementia and Alzheimer's Disease, and his written report was admitted as an exhibit without objection. Based on his observations and testing of Sybil in November 2015, he concluded with "virtual medical certainty" that Sybil had not had "decision-making capacity" after having a stroke in December 2014.⁶ Ross cross-examined the

⁶ The psychiatrist testified as follows:

Q. Is there any scenario under which Sybil Sims on September 8, 2015, could have read and understood and made decisions, informed decisions, to sign this Irrevocable Blind Trust?

A. No.

Q. Is there any room for you to think that there is any possibility that she could have understood that she was transferring her home into this trust?

psychiatrist and called Suzanne to testify about her mother's decision-making capacity on September 8, 2015, the date that she signed the disputed documents hiring Ross and creating the Trust. Suzanne testified that Sybil "seemed clear and understood what she was doing." Ross also called a psychiatrist who he had hired to examine Sybil, but the trial court sustained objections to the psychiatrist's testimony. At the conclusion of the hearing, the trial court stated its concerns with Ross's representation of both Suzanne and Sybil and orally granted the motion to show authority,

A. No.

Q. Is there any possibility that she could have understood that all of her personal property, including her cash, was going to be transferred into this trust?

A. No.

Q. Do you believe she had the decision-making capacity to hire a lawyer?

A. No.

Q. Do you believe she had the decision-making capacity to sign a deed?

A. No.

Q. Do you believe she had the decision-making capacity to execute any legal document?

A. No.

Q. Do you believe that she had the capacity to change Powers of Attorney?

A. No.

Cynthia had been handling Sybil's financial affairs pursuant to a power of attorney signed by Sybil in 2006. During the January hearing, Ross attempted to admit a power of attorney that was signed by Sybil in April 2014 appointing Suzanne as Sybil's agent, but the trial court sustained objections to that power of attorney because, among other reasons, it was not disclosed prior to the hearing.

removed Ross from representing Sybil in the guardianship proceeding, and instructed him to turn over all documents related to Sybil to the attorney ad litem.

On February 2, 2016, Harold and Cynthia filed a motion to set trial on the non-jury docket. Approximately one week later, Ross filed a plea in intervention pursuant to Texas Rule of Civil Procedure 60, *see* Tex. R. Civ. P. 60, and asserted that he had standing and capacity to intervene as a person interested in the welfare of Sybil pursuant to sections 1002.018 and 1055.001 of the Texas Estates Code. *See* Tex. Est. Code §§ 1002.018(2) (defining “interested person” to include “person interested in the welfare of an incapacitated person”), 1055.001 (addressing standing to commence or contest guardianship proceeding). In his plea, Ross contested the need for the appointment of a guardian for Sybil and asserted that Harold and Cynthia were disqualified from being appointed Sybil’s guardian. The following day, Ross also filed a response to a non-jury trial setting, alleging that he had paid a jury fee and demanded a jury trial pursuant to section 1055.052 of the Texas Estates Code. *See id.* § 1055.052 (entitling party in contested guardianship proceeding to jury trial on request).

A few days after Ross filed the plea in intervention, Howard and Cynthia filed a motion to strike the plea in intervention and jury demand. They also filed an application for an emergency ex parte temporary restraining order and temporary injunction, seeking to enjoin the withdrawal of any money from any account associated with Sybil or the transfer or sale of any of Sybil’s property. They alleged that, despite the trial court’s ruling that Ross did not have authority to represent Sybil, Ross had filed a plea in intervention in the eviction suit against Harold pending in Bexar County, in which Ross represented that he was the “owner” of Sybil’s house. Harold and

Cynthia attached a copy of Ross's pleading from the Bexar County eviction suit in which Ross made the representation and attached the special warranty deed dated September 8, 2015, purporting to transfer Sybil's house to Ross as trustee.

The trial court granted a temporary restraining order against Suzanne and Ross on February 17, 2016, precluding them from, among other actions, withdrawing money from Sybil's accounts or selling, transferring, or conveying Sybil's property. After Ross was served with the temporary restraining order, he filed an answer to the application for injunctive relief, demanding a jury trial and alleging that he had paid a jury fee pursuant to section 1055.052 of the Texas Estates Code. *See* Tex. Est. Code § 1055.052. Around this time, Ross also executed a "Trustee's Declaration of Irrevocable Blind Trust" pursuant to section 112.001(1) of the Texas Property Code. *See* Tex. Prop. Code § 112.001(1) ("A trust may be created by: (1) a property owner's declaration that the owner holds the property as trustee for another person."). He named the trust the "Sybil B. Sims Trust," and identified Sybil's property as trust property that was transferred to Ross as trustee by Sybil and Suzanne, "as agent of [Sybil], pursuant to a valid durable power of attorney."

The trial court held a hearing on Howard and Cynthia's application for a temporary injunction and motions to strike intervention and jury demand on February 24, 2016. The trial court granted the motions to strike Ross's intervention and jury demand, finding that Ross's intervention was not timely and that his position was adverse to Sybil. *See* Tex. Est. Code §§ 1055.001, .003(c) (giving trial court discretion to grant or deny intervention by interested person and to consider if "intervention will unduly delay or prejudice the adjudication of the original parties' rights"). The trial court then instructed Ross that he was not a party and to "[g]o ahead and have a seat in the

gallery” and turned to the pending application for a temporary injunction. The trial court, considering its ruling from the January hearing that Ross “ha[d] no authority to do anything regarding Sybil Sims,” the evidence from that hearing, and Ross’s actions as purported representative of Sybil after that hearing, granted a temporary injunction against Ross. Ross was temporarily enjoined from, among other actions, withdrawing any money from any account associated with Sybil or transferring, selling, or conveying any of Sybil’s property. After the hearing was adjourned, Ross objected on the record to the trial court’s “ruling that [Ross was] not a party,” asserting that he was a party because he was served with the temporary restraining order and filed an answer to the application for temporary injunction and he re-asserted his demand for a jury trial “as to the allegations contained in the Application for a Temporary Injunction,” and his objections to the setting of a non-jury trial and the trial court’s “denial of [his] request to be heard as a denial of due process.”

On March 9, 2016, the trial court signed an “Amended Order from January 13, 2016 voiding the Sybil B. Sims Trust and Removing Funds to the Comal County Court at Law,” and signed the following orders on March 21, 2016: (i) order granting motion in limine and striking Ross’s plea in intervention, and (ii) order granting motion to strike jury setting. A few days later, the trial court also signed an amended interim order and “Supplemental Order from January 13, 2016 voiding the Sybil B. Sims Trust and removing funds to the Comal County Court at Law.” The amended interim order recited the trial court’s findings and orders from the January 2016 hearing, including that it found that Sybil “did not have requisite mental capacity to contract with Philip M. Ross on September 8, 2015 regarding the legal services he offered,” to contract or

dispose of her property regarding the Trust, or to sign the Statutory Power of Attorney dated December 31, 2014, and that Suzanne did not have authority under any statutory power of attorney to create a trust on behalf of Sybil or to transfer Sybil's assets thereto. The trial court further ordered Ross removed as attorney of record for Sybil and that "[a]ll pleadings filed in this matter by Philip M. Ross on behalf of Sybil Sims are hereby stricken."⁷

Other than their titles, the "Amended Order from January 13, 2016 voiding the Sybil B. Sims Trust and Removing Funds to the Comal County Court at Law" and the "Supplemental Order from January 13, 2016 voiding the Sybil B. Sims Trust and Removing Funds to the Comal County Court at Law" are substantively the same. In these two orders, the trial court took judicial notice of its file and all matters presented in this case and found and ordered the documents at issue that were signed by Sybil or Suzanne as Sybil's agent, such as the trust agreements, the bills of sale, and the durable power of attorney, to be void. The court also ordered bank accounts holding funds that were purportedly transferred to the Trust closed and the funds from those accounts placed with the County Court at Law "for the benefit of Sybil B. Sims."

The trial of the guardianship proceeding occurred on March 23, 2016. Cynthia and Harold both testified, but Ross did not appear or participate at trial. Following the trial, the court signed an order appointing Cynthia as the permanent guardian over the person and estate of Sybil. In the order, the trial court found "by clear and convincing evidence that Sybil Sims [was] an

⁷ The amended interim order replaced the interim order that was signed by the trial court on February 18, 2016. In the interim order, the trial court made the same orders, but it did not include findings.

incapacitated person.” Ross filed a motion for new trial and a supplement to the motion for new trial, which were overruled by operation of law. This appeal followed.

ANALYSIS

This Court’s Jurisdiction

As a preliminary matter, we address arguments made by appellees concerning this Court’s jurisdiction. In his briefing, the guardian ad litem questions whether this Court has jurisdiction over the orders that Ross challenges on appeal because they are interlocutory. As a general rule, an interlocutory order is not appealable until it is merged into a final judgment. *In re Guardianship of Benavides*, 403 S.W.3d 370, 374 (Tex. App.—San Antonio 2013, pet. denied); *see* Tex. Civ. Prac. & Rem. Code § 51.014 (listing interlocutory orders that are subject to appeal). But “probate and guardianship proceedings are often exceptions to the ‘one final judgment’ rule.” *Benavides*, 403 S.W.3d at 374 (citing *De Ayala v. Mackie*, 193 S.W.3d 575, 578 (Tex. 2006)). “In probate and guardianship proceedings, ‘multiple judgments final for purposes of appeal can be rendered on certain discrete issues.’” *See id.*

Based on our review of the record, we conclude that the orders voiding the Trust and removing funds to the Comal County Court at Law that Ross challenges on appeal “concluded a discrete phase of the guardianship proceedings” and, thus, that they are final and appealable. *See id.* (discussing whether motion to show authority was final and appealable order and concluding that it was because it “concluded a discrete phase of the guardianship proceedings”); *see also De Ayala*, 193 S.W.3d at 578–79 (discussing exceptions to “‘one final judgment’ rule” in context of probate proceedings); *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995) (describing test for

determining if final and appealable order for probate appeals). We also conclude that, even if the challenged orders were not final and appealable when signed, they were merged into the final judgment so that Ross's issues are properly before us. *See Benavides*, 403 S.W.3d at 374. Ross timely filed a third amended notice of appeal after the final judgment was signed, including among the orders being appealed the orders voiding the Trust and removing Sybil's funds. *See* Tex. R. App. P. 26.1 (setting deadline for filing notice of appeal after judgment signed).

Appellees Harold and Cynthia argue that this appeal should be dismissed because Ross lacks standing, essentially arguing that he was not a party to the underlying suit. Ross, however, filed a plea in intervention in the trial court and was subsequently served with the temporary restraining order and temporarily enjoined by the trial court. Thus, we conclude that he was a party in the guardianship proceeding and that he has standing to raise his issues on appeal. *See* Tex. R. App. P. 25.1 (addressing who may file notice of appeal); *see also Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (citation omitted) ("The general test for standing in Texas requires that there '(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.'"). Having concluded that we have jurisdiction over this appeal, we turn to Ross's issues.⁸

⁸ The guardian ad litem also argues that this Court should affirm the trial court's orders because Ross's briefing does not comply with Texas Rule of Appellate Procedure 38.1. *See* Tex. R. App. P. 38.1(i) (requiring brief to contain "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"). Based on our review of his briefing, we conclude that it sufficiently complies with Rule 38.1. *See id.*

Ross's Due Process Challenge

In his first and second issues, Ross challenges the “Amended Order from January 13, 2016 voiding the Sybil B. Sims Trust and Removing Funds to the Comal County Court at Law” and the “Supplemental Order from January 13, 2016 voiding the Sybil B. Sims Trust and Removing Funds to the Comal County Court at Law” on due process grounds. He argues that, in his capacity as trustee of the Trust, he was deprived of property without due process of law. *See* U.S. Const. amend. V; Tex. Const. art. I, § 19. He “submits that the trial court’s amended and supplemental Orders voiding the Trust and transferring funds to the Comal County Court at Law resulted in a taking of Trust property for payment of costs of court including reimbursement of Applicants’ attorney’s fees and expenses and payment of the fees and expenses of the attorney ad litem and guardian ad litem.” He further argues that the payment of those costs was an obligation of Sybil’s estate or the Comal County treasurer, but not an obligation of his, as trustee of the Trust, and that the trial court erred in paying those fees “from Trust funds, which were unlawfully transferred to the registry of the trial court.”

To the extent Ross is arguing a Takings Clause violation based on the voiding of the Trust and the transfer of Sybil’s funds to the trial court’s registry, we conclude that his arguments are without merit. *See* U.S. Const. amend. V (prohibiting private property from being “taken for public use, without just compensation”). Ross has not cited, and we have not found, any authority that would support the conclusion that Ross, in his capacity as the Trustee of the Trust, would be entitled to “just compensation” based on the trial court’s removal of Sybil’s funds from the Trust and placement of those funds into the trial court’s registry “for the benefit of Sybil B. Sims.” Further,

costs such as attorney's fees generally are properly assessed against an estate in a guardianship proceeding. *See* Tex. Est. Code §§ 1155.054 (addressing payment of attorney's fees out of ward's estate unless estate "is insufficient to pay the amounts"), 1155.151 (addressing costs in guardianship proceeding generally); *see also id.* §§ 1054.001 (requiring appointment of attorney ad litem "to represent the proposed ward's interests"), .051 (addressing appointment of guardian ad litem).

To the extent that Ross is arguing that his due process rights were violated because he was denied a trial on the merits before the trial court voided the Trust and removed funds to the trial court's registry, we similarly find this argument to be without merit. It is true that the "right to be heard" is fundamental to the concept of due process and that a litigant's right to be heard generally includes "the right to a full and fair hearing before a court having jurisdiction over the matter," "the right to introduce evidence and to examine witnesses," and "the right to have judgment rendered only after a trial on the merits." *Soefje v. Jones*, 270 S.W.3d 617, 625 (Tex. App.—San Antonio 2008, no pet.) (citation omitted); *see Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) (recognizing that Texas Constitution's "due course of law provision at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner" (citing *University of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995)); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (noting that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment" and that "some form of hearing is required before an individual is finally deprived of a property interest"). "However, a party's right to due process

does not mean that a case may never be disposed of before a trial.” *Soefje*, 270 S.W.3d at 625 (citation omitted).

Here, Ross argues that the trial court violated his due process rights because the trial court “rendered a final order” again him, in his capacity as Trustee, “without allowing him the right to meaningfully participate in an evidentiary hearing or jury trial on the merits.” *See* Tex. R. Civ. P. 262 (addressing rules governing trials by court), 265 (directing order of proceeding on trial by jury). The specific orders voiding the Trust, however, were based on evidence presented at the January 2016 hearing. Ross fully participated in that hearing in which the trial court considered his authority to represent Sybil in the guardianship proceeding and Sybil’s decision-making capacity. Ross had the opportunity to argue his positions; present evidence to support his positions that Sybil had decision-making capacity to hire him as her attorney and to transfer her assets to the Trust and that she did not need to have a guardian appointed; and cross-examine the court-appointed psychiatrist. *See Soefje*, 270 S.W.3d at 625.

As to the following hearing in February, Ross similarly had the opportunity to participate. At that hearing, the trial court considered Harold and Cynthia’s motions to strike Ross’s plea in intervention and jury demand and their request for a temporary injunction. After hearing arguments from the parties, including Ross, the trial court found that Ross’s position was adverse to Sybil and that his intervention was not timely and struck his plea in intervention and corresponding jury demand. *See* Tex. Est. Code §§ 1055.001(b)(2)–(3) (prohibiting “person who has an interest adverse to a proposed ward or incapacitated person” to contest creation of guardianship or appointment of person as guardian), (c) (requiring court to determine “standing of

a person who has an interest that is adverse to a proposed ward or incapacitated person”), .003(c) (giving trial court discretion to deny intervention based on timeliness and “adverse relationship” with proposed ward). Although the trial court advised Ross that he was not a party and instructed him to sit in the gallery after striking his plea in intervention and before turning to the temporary injunction portion of the hearing, Ross does not raise an issue challenging the trial court’s temporary injunction on appeal, so any due process complaint about the temporary injunction has been waived. *See* Tex. R. App. P. 25.1(d) (listing required contents of notice of appeal).⁹ We also observe that, at the conclusion of the hearing on the temporary injunction, the trial court asked if there was anything else to take up, and Ross answered that he needed to make a record of his objections, which the trial court allowed him to do on the record after the hearing was adjourned.

As part of his arguments that his due process rights were violated, Ross also argues, in his capacity as trustee, that the trial court improperly denied his demand for a jury trial before declaring the Trust void and transferring its assets. *See* Tex. Const. art. I, § 15 (“The right of trial by jury shall remain inviolate.”); *see also* Tex. Est. Code § 1055.052 (entitling party in contested guardianship proceeding to jury trial on request). Ross, however, has not cited, and we have not found, authority that would support his position that he was entitled to a jury trial in this guardianship proceeding. *See Benavides*, 403 S.W.3d at 374–75 (concluding that motion to show

⁹ The focus of the temporary injunction portion of the hearing was the preservation of Sybil’s assets in light of actions taken by Ross after the January 2016 hearing. The trial court, referring back to its ruling and the evidence at that hearing, asked to be provided with the necessary orders to make it clear that Ross “ha[d] no authority whatsoever because [the court found] based upon the testimony of [the court-appointed psychiatrist] that she lacked—Sybil Sims lacked testamentary capacity as of December of 2014. So, any documents executed by her thereafter are null and void.”

authority in guardianship proceeding did not involve determination of ultimate issues of fact for jury and rejecting argument that trial court could not determine motion because determination touched on proposed ward's capacity); *see also* Tex. Est. Code §§ 1055.001(c) (requiring court to determine person's standing to commence or contest proceeding), .003(c) (giving court discretion to grant or deny intervention by interested person).

Further, Ross's demands for a jury trial were not pending or were not applicable at the time that the trial court signed the challenged orders. Ross demanded a jury in pleadings that he filed as Sybil's attorney, in pleadings filed as intervenor, and in his response to the application for temporary injunction. But, after his plea in intervention was struck, his request for a jury trial as an intervenor was moot. Similarly, after the trial court granted the motion to show authority and removed him from representing Sybil, the pleadings that he filed as Sybil's attorney were struck, including her request for a jury demand. *See* Tex. R. Civ. P. 12. And, regardless of his demand for a jury trial, he was not entitled to one as to the application for a temporary injunction. *See* Tex. R. Civ. P. 680–683 (addressing procedural rules for temporary injunctions); *Benavides*, 403 S.W.3d at 374 (“Only ultimate issues of fact are to be submitted to a jury.” (quoting *Miller v. Stout*, 706 S.W.2d 785, 787 (Tex. App.—San Antonio 1986, no writ))).¹⁰

We also conclude that Ross has not shown how any of the alleged due process violations probably caused the trial court to render an improper judgment or prevented him from presenting his case to this Court. *See* Tex. R. App. P. 44.1. Ross's issues do not challenge the trial

¹⁰ The order appointing Cynthia as the permanent guardian of Sybil did not contain injunctive relief or refer to Ross.

court’s appointment of Cynthia as the permanent guardian of Sybil and, in the order appointing Cynthia, the trial court found “by clear and convincing evidence that Sybil Sims [was] an incapacitated person.” This finding was supported by, among other evidence, the court-appointed psychiatrist’s testimony that it was “a virtual medical certainty [Sybil had] not had decision-making capacity since the time of her stroke.” The psychiatrist also testified that he examined Sybil in November 2015 and that she could not tell him “anything” about the Trust. *See Decker v. Decker*, 192 S.W.3d 648, 652 (Tex. App.—Fort Worth 2006, no pet.) (defining “‘mental capacity’ [to] mean [] that the grantor at the time of the execution of the deed must have had sufficient mind and memory to understand the nature and effect of his act”).

Based on our review of the record, we conclude that Ross has failed to show that his due process rights were violated when the trial court voided the Trust and ordered Sybil’s funds placed with the trial court for Sybil’s benefit or that any such violation caused the rendition of an improper judgment or prevented him from presenting his case to us. Thus, we overrule Ross’s first and second issues.¹¹

¹¹ To the extent Ross argues that the trial court abused its discretion at the January 2016 hearing in excluding the testimony of the psychiatrist who Ross hired to examine Sybil, Ross has failed to show that the exclusion of this evidence, even if the trial court abused its discretion in doing so, probably resulted in the rendition of an improper judgment or prevented him from presenting his case to this Court. *See Tex. R. App. P. 44.1.*

Ross also argues that the trial court did not comply with section 112.054(a) of the Texas Property Code and that the attorney ad litem did not have standing or capacity to file a motion to void the Trust, citing section 112.054(a) of the Texas Property Code. *See Tex. Prop. Code* § 112.054(a) (addressing judicial modification or termination of trusts). Ross did not raise these arguments with the trial court and, thus, has not preserved them for our review. *See Tex. R. App. P. 33.1.*

Challenge to Attorney’s Fees and Expenses

In his third issue, Ross argues that the trial court’s orders awarding reimbursement and payment of attorney’s fees and expenses should be reversed and remanded to the trial court with instructions to the trial court to rescind the orders and return the trust assets to Ross as the trustee. Ross’s argument in this issue follows from his first two issues that request the reversal of the orders that voided the Trust and removed funds to the trial court. Because Ross’s third issue is dependent on this Court sustaining his first or second issue, we need not address his third issue further. We, however, observe that Ross does not challenge the amount of the awards or expenses and that a trial court is required to pay the costs of the guardian ad litem and the attorney ad litem out of the guardianship estate if the estate is sufficient to pay the costs. *See* Tex. Est. Code §§ 1155.054 (addressing payment of attorney’s fees out of ward’s estate unless estate “is insufficient to pay the amounts”), 1155.151 (addressing costs in guardianship proceeding generally). We overrule Ross’s third issue.

CONCLUSION

For these reasons, we affirm the trial court’s orders voiding the Trust and removing funds to the Comal County Court at Law and awarding reimbursement and payment of attorney’s fees and expenses.¹²

¹² To the extent Ross raises new issues in his reply brief, we decline to address those issues. *See* Tex. R. App. P. 38.1, 38.3; *Cebcor Serv. Corp. v. Landscape Design & Constr., Inc.*, 270 S.W.3d 328, 334 (Tex. App.—Dallas 2008, no pet.) (noting that “a party may not present arguments for the first time in its reply brief”); *Yazdchi v. Bank One, Tex., N.A.*, 177 S.W.3d 399, 404 n.18 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (declining to consider arguments made for first time in reply brief).

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: February 15, 2017