

Supreme Court of Pennsylvania

Case Number : 625 MAL 2021

In Re: David Italiano, an alleged incapacitated person,
Petitioner

***AMICI CURIAE* BRIEF FOR CENTER FOR ESTATE
ADMINISTRATION REFORM, *et al.* IN SUPPORT OF
PETITIONER**

Rick Black, Executive Director-CEAR on
behalf of the Center for Estate
Administration Reform and the more than
3,000 families nationwide that it
represents.
Cornelius, NC 28031

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The Center for Estate Administration Reform and the Kasem Cares Foundation seek leave to file the accompanying brief as *amici curiae*.

Amici include advocacy groups, individuals whose loved ones have been victimized by predatory attorneys, guardians, and conservators in guardianship proceedings.

Petitioner consented to the filing of this brief. *Amici* seek to provide this Court with information concerning the prevalence of the issue presented by the petition, both in terms of the number of Americans affected and the amount of money at stake. They also seek to explain to the Court the nature of the legal problem presented by the petition.

These matters provide important, and new, perspectives on why the Court should grant the petition.

Respectfully submitted,

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STATEMENT OF INTEREST

The *Center for Estate Administration Reform (CEAR)* is a volunteer 501(c)(3) organization dedicated to the rights and interests of victims, and their loved ones, of predatory attorneys in fraudulent durable power of attorney, trust, adult guardianship/conservatorship and probate actions. Countless innocent Americans and their families have been exploited in illegitimate adult guardianships via a court-based scheme designed to isolate innocent vulnerable citizens, particularly those with assets, for the purpose of unjustly enriching the stakeholders in the guardianship system at the expense of the vulnerable adult.

Kasem Cares Foundation is a volunteer 501(c)(4) organization dedicated to the rights of all vulnerable adults to visitation and socialization with loved ones and the prevention of forced isolation. The mission of Kasem Cares is to eliminate all forms of elder abuse, including isolation, through education and awareness, as well as support of social change and legislative action.

New Mexico Family Guardianship/Conservatorship Coalition is a coalition of New Mexicans working to build awareness of injustices in the system that governs court-appointed guardians and conservators over incapacitated or otherwise vulnerable persons.

SUMMARY OF ARGUMENT

“Elder abuse by opportunistic court guardians is one of those issues in American society that has reached critical mass in recent years, and some statistics indicate that it might soon achieve a dubious parity with child abuse.” David Holmberg, *The Scourge of Elder Abuse: Don't Be Afraid to Speak Up*, FORBES (Oct. 18, 2019).¹

The petition in this case arises from this systemic abuse—and presents this Court with an ideal vehicle by which to address it. *Amici* urge this Court to do so.

The problem of involuntary and unnecessary adult guardianships and downstream isolation is rampant nationwide. Court-appointed guardians and conservators oversee more than 1.3 million adult Americans and are estimated to control more than \$250 billion in assets. The media is filled with stories of fraud and theft by “guardians.” One state audit found fraud in ten percent of court-appointed guardianships. If that held true across the country, it would mean more than 130,000 instances of fraud against vulnerable Americans involving as much as \$25 billion in assets.

And, as this case demonstrates, estate or entitlements trafficking extends well beyond the confines of court-established guardianships to a variety of schemes perpetrated by predatory attorneys. The petition here involves allegations that attorneys conspired to conscript a vulnerable adult and isolate him in a Medicaid qualified institution via an involuntary and unnecessary adult guardianship.

Even without outright theft, estate assets routinely are drained through protracted and unnecessary state-court proceedings in which end-of-life documents simply are ignored.

To say that this case presents a recurrent and important issue worthy of this Court’s discretionary review would be an understatement.

¹<https://www.forbes.com/sites/davidholmberg/2019/10/18/the-scourge-of-elder-abuse-dont-be-afraid-to-speak-up/#2bbf9d19637e>.

ARGUMENT

The petitioner in this case presents an important issue affecting thousands of elderly or otherwise vulnerable Americans: their inability to obtain redress via the court when not provided zealous independent counsel, involuntarily conscripted into an unnecessary adult guardianship, and isolated from all previous relations and family.

Aging Americans are counseled *ad nauseam* to protect themselves by executing instruments like durable powers of attorney, healthcare advance directives, trusts, joint bank accounts, and so on. But these instruments provide cold comfort when courts remain free to thrust them aside. All too often, proceedings involving estates serve no purpose other than to line the pockets of unscrupulous attorneys and professional “guardians” with the savings, or the federal entitlements, at the expense of the very people the system claims to serve and protect.

Each day, thousands of American families find themselves trapped in the vortex of guardianship and similar proceedings that are seemingly endless—or whose end all too often coincides with the exhaustion of an elderly person’s life savings. And all of this occurs despite the existence of unambiguous end-of-life documents, state and federal statutes, and the lucid ward’s expressed interests.

Amici believe the time has come for this Court to step into the void, grant the petition, and clarify that a court may not simply cast aside trusts, durable powers of attorney, and similar documents in connection with guardianship or similar proceedings.

- 1. The petition presents a recurring and important issue involving hundreds of Pennsylvanians and tens of millions of dollars annually.**

We are in the midst of the greatest intergenerational transfer of wealth in human history. Jess Stonefield, *Are Boomers Ready to Make the Greatest Wealth Transfer in History?*, FORBES (May 21, 2018). Over the next two decades, Baby Boomers will transfer more than \$30 trillion in wealth to younger generations. Mark Hall, *The Greatest Wealth Transfer*

in History: What's Happening and What Are the Implications, FORBES (Nov. 11, 2019).²

Guardianships affect a substantial portion of these transfers. The National Center for State Courts estimates that more than 1.3 million American adults—holding an aggregate \$50 billion in assets—are under the supervision of a court-appointed guardian. CENTER FOR ELDERS AND THE COURTS, ADULT GUARDIANSHIP COURT DATA AND ISSUES RESULTS FROM AN ONLINE SURVEY 14 (Mar. 2, 2010).³ Other sources estimate the amount as being far greater—more than \$250 billion. See Arian Campo-Flores & Ashby Jones, *Abuse Plagues System of Legal Guardians for Adults*, WALL ST. J. (Oct. 30, 2015).⁴

And with the aging of the baby boomers, these numbers will increase. Susan B. Garland, *Calls for Court Reform as Legal Guardians Abuse Older Adults*, N.Y. TIMES (July 28, 2017).⁵

Unfortunately, abuse runs rampant. Examples abound. A well-known and popular professional guardian in Florida charged with stealing more than \$500,000 from a 92-year-old man in her care. A Nevada professional guardian sentenced to 16 years in prison for her rampant theft. See Pam Zubeck, *How courts and guardians exploit the elderly and their estates and get away with it*, COLORADO SPRINGS INDEP. (Jan. 8, 2020).⁶

In New Mexico, the CEO of a non-profit trust company imprisoned for stealing \$4.8 million in funds under his control—almost all of it from elderly, disabled, and other vulnerable New Mexicans. U.S. Attorney's Office, District of New Mexico, *Paul Donisthorpe Pleads Guilty to Federal Wire Fraud and Money*

²<https://www.forbes.com/sites/markhall/2019/11/11/the-greatest-wealth-transfer-in-history-whats-happening-and-what-are-the-implications/#e5752314090a>.

³ http://aja.ncsc.dni.us/pdfs/GuardianshipSurveyREport_FINAL.pdf.

⁴<https://www.wsj.com/articles/abuse-plagues-system-of-legal-guardians-for-adults-1446225524>.

⁵ <https://www.forbes.com/sites/nextavenue/2018/05/21/are-boomers-ready-to-make-the-greatest-wealth-transfer-in-history/#3b0a5a44677d>.

⁶ <https://www.csindy.com/coloradosprings/how-courts-and-guardians-exploit-the-elderly-and-their-estates-and-get-away-with-it/Content?oid=21038322>.

Laundering Charges Arising Out of Scheme to Embezzle \$4.8 Million from Client Trust Accounts (Nov. 27, 2017).⁷

The operators of an Albuquerque guardianship company imprisoned for their roles in a scheme to embezzle more than \$11 million from hundreds of vulnerable client accounts. U.S. Attorney's Office District of New Mexico, *Ayudando Guardians' President and Chief Financial Officers Plead Guilty to Conspiracy, Mail Fraud, Identity Theft, and Money Laundering Charges as Part of Multi-Million Dollar Financial Scheme* (July 12, 2019).⁸

The New Mexico state auditor performed a random survey of 300 cases with court-appointed guardians or conservators—and found 194 risk factors for fraud, including numerous cases of checks written directly to the guardians and conservators. Colleen Heild, *New Mexico guardians get a new watchdog*, ALBUQUERQUE J. (June 25, 2020).⁹

Similarly, a Texas audit of guardianship cases found fraud in nearly ten percent of all court-imposed guardianships. Garland, *supra*.

These abuses are all endorsed by predatory or negligent litigators who have a statutory obligation to the party compensating them. In all guardianship cases that is the ward. However, in Florida, a jury returned a \$16.4 million verdict against two attorneys for breaching their fiduciary duties to a person and running up unnecessary fees in a guardianship and trust proceeding. John Pacenti, *Jury hits lawyers with \$16.4M for doing senior wrong in guardianship*, PALM BEACH POST (Aug. 4, 2017).¹⁰

Consider one ward's nightmare.

In 2008, Britney Jean Spears, a mother of two and fully functioning international celebrity was being unduly influenced by her ex-husband in child custody proceedings, her managers,

⁷<https://www.justice.gov/usao-nm/pr/paul-donisthorpe-pleads-guilty-federal-wire-fraud-and-money-laundering-charges-arising>.

⁸<https://www.justice.gov/usao-nm/pr/ayudando-guardians-president-and-chief-financial-officer-plead-guilty-conspiracy-mail>.

⁹<https://www.abqjournal.com/1470013/new-mexico-guardians-get-a-new-watchdog.html>.

¹⁰<https://www.palmbeachpost.com/news/jury-hits-lawyers-with-for-doing-senior-wrong-guardianship/6CnikAZ7x3K9z960lz09BN/>.

her family, and several attorneys involved in her affairs. Several of those parties conspired to petition Ms. Spears into a plenary conservatorship.

Ms. Spears, much like David Italiano, was not deemed incapacitated by a legitimate neuropsych professional, nor afforded independent and zealous counsel of her choosing by the court. Over the next 13 years, over a dozen attorneys were paid over \$30 million from Ms. Spear's estate in their efforts to continue the conservatorship and continuously deny Ms. Spear's expressed, written, and best interests.

On June 23, 2021, thanks to the ardent activism of #FreeBritney leadership, CEAR, and many other groups, Ms. Spear's demanded to be heard by the court concerning her conservatorship, her exploitation by those controlling her via court order, and her desires. Her testimony that day and the subsequent petitioning of civil rights attorneys, including the ACLU, gained Ms. Spear's her freedom in late 2021. The reconciliation of her estate continues to be litigated in California.

This is just one of the many similar stories from across the country. The petition presents an issue affecting legions of Americans at the most vulnerable time in their lives. *Amici* urge the Court to grant the petition and confront this problem.

2. This Court should grant review of due process obligations and enforcement of Pennsylvania Consolidated Statutes Title 20, § 5502. Recognizing that...the purpose of this chapter is to promote the general welfare of all citizens by establishing a system which permits incapacitated persons to participate as fully as possible in all decisions which affect them, which assists these persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources and developing or regaining their abilities to the maximum extent possible and which accomplishes these objectives through the use of **the least restrictive alternative.**

This case commenced when Huntington, Bedford and Fulton County Area Agency on Aging gained an order for adult guardianship (Huntington County Orphan's Court, 2019-177) over Huntington County resident David Italiano.

Mr. Italiano has the right to counsel of his choosing, per the statutory and due process rights to counsel of one's choice.

As a person under guardianship, Mr. Italiano is subject to the authority of the Orphan's court. By definition, this is a deprivation of certain rights and liberties. Given the significance of the deprivation of rights that accompany guardianships, Pennsylvania state law recognizes the right to an attorney at key stages of the guardianship process, including in any proceedings to terminate a guardianship; proceedings to remove a guardian; or any proceeding for a court order affecting the legal capacity of a ward. Having created a statutory right to counsel in guardianship proceedings, Pennsylvania has conferred to wards an interest in effective assistance of counsel that is protected by the due process clause of the United States Constitution and the associated rights enshrined by the Sixth Amendment. Courts reach this conclusion because, even though conservatorship proceedings are not criminal in nature, the "liberty interests at stake in a guardianship proceeding are significant." (Conservatorship of David L., *supra*, 164 Cal.App.4th at 711; see also *Michelle K. v. Superior Court* (2013) 221 Cal.App.4th 409, 445.)

Thus, courts have affirmed that the right to counsel for wards that includes a right to counsel that is effective and independent. Courts have identified a right to be heard by the court if the ward believes their attorney is not providing effective assistance in guardianship proceedings, a right adopted from the Sixth Amendment, and derived from similar interests and rights to autonomy and liberty. The right to choose one's own attorney is a core element of the right to counsel, that should also attach to the rights of a person under guardianship. In 1932, the United States Supreme Court noted that, "it is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.

"Isolate the victim, defame legitimate protectors, and liquidate the estate" is the modus operandi of all estate and entitlements traffickers. David has been isolated from all loved ones since being removed from his home and institutionalized in 2019. His continued isolation and institutionalization during the pandemic an added health risk.

The state also has an obligation to protect the rights of David in accordance with Chapter 42 CFR 438.100(b)(2)(v) which prohibits the institutionalization and isolation of Medicaid recipients and requires the patient, "be free from any form of restraint or seclusion used as a means of coercion, discipline, convenience or retaliation, as specified in other Federal regulations on the use of restraints and seclusion.

For over 3 years David has been exploited (isolated and silenced) by the negligence of the lower court and their endorsement and protection of predatory parties. This court has the right and obligation to ensure justice for and the civil rights of David Italiano.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant in favor of the petitioner.

Respectfully submitted,

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I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than nonconfidential information and documents

Respectfully Submitted By,

Name Richard W. Black Date: May 24, 2022

VERIFICATION

I verify that the statements made in this Petition and Affidavit are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. §4904, relating to unsworn falsification to authorities

Name Richard W. Black Date: May 24, 2022