

Amicus Curiae Committee
Probate and Estate Planning Section of the State Bar of Michigan

Application for Consideration

If you believe that you have a case that warrants involvement of the Probate and Estate Planning Section of the State Bar of Michigan ("Section"), based upon the Section's Policy Regarding Consideration of Amicus Curiae Matters, please complete this form and submit it to the Chair of the Amicus Curiae Committee, along with all relevant pleadings of the parties involved in the case, and all court orders and opinions rendered.

Date 1/30/18

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Attach Additional Sheets as Required

Name of Case In the Matter of Dorothy Redd

Parties Involved Early Redd, Dorothy Redd, Thomas Fraser, Nicole Legardy

Current Status Please contact Anne Argyroff

Deadlines (248) 615-4493

Issue(s) Presented

- 1) Default standard is typically preponderance. In this case, court used clear & convincing.
- 2) Question as to what substantive considerations should be used to set aside and then appoint a replacement guardian.
- 3) Court's failure to consider wishes/choice of Ms Redd.

Michigan Statute(s) or Court Rule(s) at Issue MCL 700.5306

Common Law Issues/Cases at Issue See brief

Why do you believe that this case requires the involvement of the Probate and Estate Planning

Section? Case has potential to influence future probate practice.

Do you believe that a decision in this case will substantially impact this Section's attorneys and

their clients? If so, how? Could result in identifying a default evidentiary standard, may also make new law as it relates to other items in the issues section.

Thank you for your consideration.

Skidmore, David

From: Marlane Teahan <mteahan@fraserlawfirm.com>
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To: piatkowski.law@chartermi.net
Cc: Skidmore, David
Subject: FW: State Bar of Michigan Probate Committee Amicus Request
Attachments: REGA - Supreme Court application - final - distribute.pdf

Ms. Piatkowski:

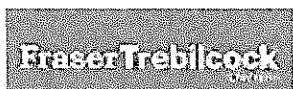
Thank you for your recent call and the email, below. I am copying David Skidmore, the chair of our Amicus Committee. Individuals desiring the Probate and Estate Planning Section to submit a motion and amicus brief must submit an application to the Amicus Committee. The Committee will review your application and give the Probate Council a recommendation. Council will then vote on the recommendation. Please communicate with Mr. Skidmore on any other questions that you may have.

David, please forward an application to Ms. Piatkowski at your earliest convenience.

Thank you both.

Marlaine

Marlaine C. Teahan, Chair of the Council
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----- Original Message -----

From: [Christine P. Piatkowski, Esq.](mailto:Christine.P.Piatkowski@chartermi.net)
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Sent: Friday, January 26, 2018 12:24 PM
Subject: State Bar of Michigan Probate Committee Amicus Request

Ms. Teahan,

Pursuant to my recent telephone message, please find attached a brief that may be of interest to the Amicus Subcommittee of the State Bar of Michigan Probate Committee. The case involves the replacement of a court-appointed guardian over the wishes of a competent court ward. Additional issues include, but are not limited to, the following:

1. Evidentiary default standard. Usually, preponderance is the standard; here, however, the standard mentioned is clear and convincing-at least in MCL.
2. There is a question as to what substantive considerations should be used in setting aside and then appointing a replacement guardian.
3. The court failed to consider the wishes of the court ward (competent elderly woman) and issued orders contrary to her wants and in-court testimony.
4. Other matters involved such as constitutional rights; safety of ward, etc.

If your group finds this case compelling, an amicus brief filing would be appreciated. I have copied Anne Argiroff. Her contact information can be found on the first page of the brief. If I can be of further assistance, please do not hesitate to contact my office. Thank you so much for your help and consideration regarding this matter.

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STATE OF MICHIGAN
IN THE SUPREME COURT

In the Matter of Dorothy Redd,
Legally Incapacitated Individual.

Supreme Court No.
Court of Appeals No. 335152

Gary Redd,
Respondent-Appellant.

Oakland County Probate Court
Case No. 14-356995-GA

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APPELLANT GARY REDD'S APPLICATION FOR LEAVE TO APPEAL

SEPTEMBER 19, 2017 COURT OF APPEALS PUBLISHED DECISION

In re Guardianship of Dorothy Redd

Matter of First Impression: Statutory Construction of

EPIC - MCL 700.5310 - Resignation or removal of guardian

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This issue affects a significant number of Michigan citizens who are incapacitated or caring for an incapacitated individual. The Court of Appeals erred in affirming the trial court and removing Mr. Redd as a guardian and in holding that the standard for removal is that a “guardian is no longer suitable and willing to serve based on a preponderance of the evidence.” 28

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PUBLISHED DECISION APPEALED
In re Dorothy Redd, __ Mich App __ (2017)

On October 10, 2016, Appellant Gary Redd filed an appeal of right from the August 11, 2016 Order removing/terminating him as a guardian of his mother, Dorothy Redd (reconsideration denied on September 19, 2016 and entered in ROA September 27, 2016). See Orders, attached as **Appendix A and A-1, respectively.**

On September 19, 2017, the Court of Appeals issued a published decision, In re Dorothy Redd, __ Mich App __ (2017) addressing an issue of first-impression, the statutory construction of MCL 700.5310. **Appendix K.**

Appellant Gary Redd now files this Application for Leave to Appeal.

STATEMENT OF QUESTIONS INVOLVED

Should Leave to Appeal be granted from this published Court of Appeals decision determining a significant issue of first impression: the statutory construction of EPIC, MCL 700.5310, and the grounds and evidentiary standard of proof necessary for removal of a guardian and the appointment of a successor guardian of an incapacitated person, where:

A. Mr. Redd has been and is a suitable and willing guardian under the statute. The trial court erred and abused its discretion by entering the order revoking Mr. Redd's guardianship under any evidentiary standard and moving Dorothy Redd out of a stable and caring home and appointing Petitioner the successor co-guardian and the Court of Appeals erred in affirming;

B. In this first impression issue of statutory construction, the appropriate evidentiary standard of proof should be clear and convincing evidence of non-suitability required to remove Mr. Redd and clear and convincing evidence of suitability for the appointment of a successor co-guardian.

1. Petitioner did not meet her Burden of Proof, whether preponderance or clear and convincing.
2. The trial court erred in failing to articulate and in failing to apply an appropriate evidentiary level of proof;

C. The trial court committed legal error, abused its discretion, and clearly erred concerning its factual findings;

D. The trial court failed to properly honor Dorothy's preference;

E. Remand to a different judge is appropriate;

F. The decision is not in the interests of Dorothy Redd;

and the order should be reversed or vacated and Mr. Redd's guardianship reinstated?

Appellant says Yes. The trial court and Court of Appeals said No.

SUMMARY OF ISSUES - REASONS FOR GRANTING LEAVE

This application involves an issue of first impression: the statutory construction of EPIC¹ provision MCL 700.5310 and the grounds and evidentiary standard of proof necessary for removal of a guardian of an incapacitated person. This construction is a significant jurisprudential issue affecting a significant number of wards and guardians and the state of the law in Michigan.

1. **Issue of First Impression.** As noted by the Court of Appeals, “EPIC does not set forth a specific standard for removal of a guardian.” *Redd*, slip op at 4. Further, “EPIC does not define the term” “suitable,” and EPIC “does not provide for” the evidentiary standard to use for removal of a guardian. *Id* at 5. The trial court also acknowledged that there were no clear standards. This is the first time the appellate courts have construed and determined the substantive standard (suitable as “qualified and able to provide for a ward’s care, custody, and control”) and the evidentiary standard (preponderance of the evidence) concerning removal of a guardian.
2. **Relevant Statutes.** The Court of Appeals construed MCL 700.5310, in conjunction with MCL 700.5306 and MCL 700.5313(2) and held that “when a preponderance of the evidence weighs against the suitability of the ward’s current choice for guardian, the probate court must remove that person as guardian.”
 - a. MCL 700.5306 provides for court *appointment* of a guardian for an incapacitated person. Section (1) states that a court may appoint a guardian “if the court finds by **clear and convincing evidence** both that the individual for whom a guardian is sought is incapacitated and that the appointment is necessary as a means of providing

¹ EPIC - Estate and Protected Individuals Code. Article V, part 3 of EPIC, MCL 700.5301 *et seq*, concerns guardians for incapacitated individuals (“wards”).

continuing care and supervision” of that person. This initial appointment would by definition include a determination of suitability per MCL 700.5313. See Appendix I, statutory provisions.

- b. MCL 700.5313 addresses guardian qualifications. The person must be competent, (MCL 700.5313(1)) and suitable and willing to serve, MCL 700.5313(2). See Appendix I.
- c. MCL 700.5306a sets out a series of rights of the individual for whom a guardian is sought or has been appointed. These rights include the right to object to an appointment of a guardian or a successor guardian, (1)(a); the right to be present at a hearing, including all practical steps to ensure the right to be present, (1)(g); the right to hear all evidence concerning appointment of a guardian, (1)(h); to be informed of each person seeking to be guardian, (1)(p); to require proof of incapacity and the need for a guardian to be proven by clear and convincing evidence, as provided in section 5306, (1)(q); **and the right to choose the person who will serve as guardian, if the chosen person is suitable and willing to serve as provided in section 5313,** (1)(aa). See Appendix I.
- d. MCL 700.5310 applies to *resignations or removals of guardians* and the appointment of a successor guardian. MCL 700.5310(4) includes language that “the same procedures to safeguard the ward’s rights” in appointing a guardian, “apply” before removing a guardian, appointing a successor guardian, modifying the guardianship’s terms, or terminating a guardianship.” Appendix I. The Court of Appeals did not address MCL 700.5310(4).

- e. MCL 700.5313(2) sets out the order of priority for appointing a guardian. The wording of the statute is mandatory: “the court shall appoint a person, if suitable, and willing to serve, in the following order of priority:...” Emphasis is placed on the choice of the ward.²
3. **In pari materia.** Statutes in *pari materia* relate to the same subject or share a common purpose, and must be read and construed together as one law. See e.g. *Simicropi v. Mazurek*, 273 Mich.App. 149, 156-157 (2006); *Aichele v. Hodge*, 259 Mich App 146, 161 (2003). Here, the statutes pertain to the appointment, termination, and successor appointment of guardians for incapacitated persons.
4. **Protection of the Ward.** MCL 700.5306(1) requires the more stringent standard of proof – clear and convincing evidence – as a mechanism to protect the ward when originally appointing a guardian. This is the only section that sets out an evidentiary level of proof. And, Section 3 emphasizes throughout the rights and choices of the ward or potential ward as crucial in determining a guardian. Stringent protections apply to the original appointment, and stringent protections must be afforded the ward in removing a guardian under MCL 700.5310 and potentially appointing a new guardian. The clear and convincing evidentiary

² (2) In appointing a guardian under this section, the court shall appoint a person, if suitable and willing to serve, in the following order of priority:

- (a) A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in another state.
- (b) A person the individual subject to the petition chooses to serve as guardian.
- (c) A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition.
- (d) A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney.

level of proof acts as a barrier to removing guardians without sufficient evidence, ensuring that a ward's environment is not altered and changed in the absence of compelling reasons, particularly when the ward desires that the guardian remain in that role. See MCL 700.5313(2)(choice of ward given priority; mandatory appointment by court); MCL 700.5306(1)(aa)(right of ward to choose the person who will serve as guardian consistent with section 5313).

Leave to appeal should be granted by this Court to address the construction of the various statutes and address both the substantive standard and, crucially, the level of proof applied by the Court of Appeals in an issue that is a fundamental part of EPIC.

OVERVIEW

Mr. Redd, the former guardian, consistently provided a loving and caring long-term home for his mother – helping her regain her health keeping her sound and happy. Mrs. Redd – who is now 93 – is currently a strong woman thanks to Mr. Redd’s care, with definite opinions about how she wants to live her life. Throughout the lower court proceedings, her testimony was clear and unequivocal: she was happy and content living with Mr. Redd, and she wanted him to remain her guardian. The Court of Appeals decision, affirming the trial court and construing the applicable statutes as it has, results in her being removed from what she considers her home, contrary to her choice, and from the son who has cared so well for her. This is a jarring and sad outcome, imposed upon a woman who is capable of making her own choice.

STATEMENT OF FACTS

Procedural Background: On June 2, 2014, Gary Redd petitioned to be appointed guardian of his then 90-year old mother.³ She had been living with other sons at her own home who were not caring for her – she was malnourished and hallucinating and her house was infested with bed bugs. Tr. 8/4/16, p. 3-4; 21-22. Mr. Redd was appointed guardian. On June 12, 2014, a guardian ad litem was appointed (Eric Carver).

On September 3, 2014, Mr. Redd’s niece, Katrina Tao-Muhammad filed a petition to terminate Mr. Redd’s guardianship. An initial hearing was held on September 24, 2014. Dorothy Redd was present and stated that her family members were not prohibited from seeing her. Tr. 9/24/16, p. 3. The trial court set a hearing date for November 2014.

³ Tr 8/4/16, 2. Dorothy Redd has five sons: Gary Redd (Respondent), Jerome Redd, Michael Redd, Sr., Sean Burke and Antonio Burke. Tr 8/1/16,153; 8/4/16, 82. Two granddaughters are involved in this litigation: Katrina Tao-Muhammad (Jerome’s daughter) and Nichole Legardy (Gary Redd’s daughter).

At the November 19, 2014 hearing, Mr. Redd was represented by counsel. The GAL supported Mr. Redd. Although Ms. Tao-Muhammad disagreed, the court appointed Mr. Redd and Jennifer Carney as co-guardians, in an attempt to appease Ms. Muhammad.⁴ The court also suggested appointment of a conservator and set a review hearing for January 2015.

At the January 20, 2015 review hearing, only Mr. Redd, his counsel, and Ms. Carney were present. No other family members (interested persons) appeared. Ms. Carney and Mr. Redd were subsequently appointed co-conservators.

At the February 6, 2015 review hearing, the court addressed the status of Dorothy Redd's home (where some of her other sons were still living).⁵ The court recognized that Mr. Redd's brothers (specifically Michael Redd) had been living at Dorothy Redd's home and not paying rent. The court allowed Michael Redd and the other brothers to stay in the home as long as the brothers paid their *pro rata* share of taxes and insurance, which the court stated would not amount to much. Tr. 2/ 6/ 15, pp. 60-61. The court emphasized that making Mr. Redd and Ms. Carney co-conservators:

“gives them authority to actually go file suit and have people evicted. If -- on that issue if Dorothy Redd is not in those houses [sic], there's no reason for her to continue having those houses or any obligation connected with them or any expense. So either you -- whoever wants the house to stay in the family or with the people who are living there, if anyone, then, they need to offer to purchase it, period.” *Id* at 2.

The court wanted the house out of Dorothy Redd's name. *Id* at 7.

As for family visitation, Ms. Carney had sent an invitation for visitation to the other family members. Ms. Tao-Muhammad stated that she did not get along with her cousin, Nichole Legardy (Gary Redd's daughter) and she was not comfortable attending anything at her home or Gary Redd's home.

⁴ Ms. Carney is an attorney with Munger & Associates PLLC, a firm that does probate work.

⁵ As discussed later, Gary Redd is also a half owner of the house in Detroit with Dorothy Redd and he had rights concerning the house, including when the brothers did not pay for rent or utilities.

Tr. 2/6/15, p. 3-4. She did not want visitation with Gary Redd, Nichole Legardy, Gary's ex-wife, or Nichole's mother present.

Ms. Carney's Petition for Instructions: On March 5, 2015, co-guardian Jennifer Carney filed a petition for instructions, requesting that the trial court give guidance on how to handle the difficult family members (Ms. Tao-Muhammad and the other brothers) who refused to visit if various other family members were present. See Appendix B, Petition.

At the March 25, 2015 review hearing, the court had information that "Jerome Redd is refusing to meet with his mother unless his mother will meet with Jerome Redd's daughter, Katrina Tao-Muhammad." The court found this short-sighted. Tr. 3/25/15, p. 3. Ms. Carney submitted a letter from Dorothy Redd's primary physician, which was read by the court into the record:

Court: "Ms. Redd is a patient I've been treating for many years. She is currently experiencing undue stress and anxiety as a result of being ordered," by me, bad guy, "to have visitation with members of her family that she does not wish to see. It is recommended her wishes be honored to avoid any unnecessary exacerbation of her conditions. She has the capacity to make such a choice. An evaluation for competency completed at Beaumont Hospital by the Department of Geriatric Assessment confirms this. If you have any additional questions or concerns please -- please feel free to contact me." And 8 that's signed by Dr. Wasim, W-a-s-i-m, Qazi, Q-a-z-i, M.D., Internal Medicine. There you go." Tr. 3/25/15, pp. 4-5.

The court made a new visitation order: that Dorothy Redd may have visitation with whomever she chooses. Tr. 3/25/15, p. 8 See Appendix C, March 25, 2015 Order.

At the June 16, 2015 status conference, the court dismissed another petition filed by Katrina Tao-Muhammad for failure to properly serve the interested parties and failure to show at the hearing. See Appendix D, June 2015 Order.⁶ Almost a year passed with few filings.

On May 26, 2016, there was yet another petition to terminate the guardianship, this time filed by

⁶ The court further ordered that "Michael C. Redd, Jerome C. Redd, Katrina Tao-Muhammad, or anyone acting in her behalf, must file a one thousand dollar bond before filing any further petitions with this Court."

Nichole Legardy (Mr. Redd's daughter), resulting in the order now before this Court.

An evidentiary hearing on the petition was held on July 26, 2016, August 1, 2016 and August 4, 2016.⁷ On August 11, 2016, the court issued its ruling on the record after closing arguments. A review hearing was held on September 26, 2016.

Evidentiary Hearing Testimony:

Testimony of Gary Redd [also referred to as Gary]: Mr. Redd testified on August 4, 2016. At the hearing, Mr. Redd was 63 years old. Tr 8/4/16, 1. He is currently employed in the construction business part time as a general contractor, doing home remodeling. He has a Master's degree in engineering management and had been in engineering management at Chrysler for 35 years. He retired in 2006. Tr 8/4/16, 2. He has lived in his current house in Southfield for about 20 years. Tr 8/4/16, 3.

His testimony concerning Dorothy Redd: Dorothy has lived with Gary for 4 ½ years. She moved in with him because she was undergoing a lot of distress in her house 16623 Lawton, in Detroit. Tr 8/4/16, 3, 78. He got a call from a neighbor that Dorothy was wandering around the neighborhood in her nightgown claiming there were people in her home trying to kill her. Tr 8/4/16, 4. When he got to his mother's house, his daughter Nichole A. Legardy – the current Petitioner – was there. Tr 8/4/16, 4.

His mother stayed at her own house that night, but Gary went back the next day to survey the situation. Tr 8/4/16, 12-3. Two of his brothers, Jerome and Sean, lived with her at her house, paying rent when they could. They were in fact not helping to support her financially. Gary was told for the first time, by Sean, that their mother had been acting strange lately. Tr 8/4/16, 13-4, 18-9.

Gary found that Dorothy's bed was infested with hundreds of bedbugs, and his brothers had no idea of the situation. He got Dorothy changed into a new set of clothes, and had her stay with his

⁷ It was during this time (June 2016) that the court issued a new visitation order requiring that exchanges be at the Southfield Police Department as chosen by Nichole. See discussion in Argument. See Appendix E, June 22, 2016 Order.

daughter Nichole at first because his house was not set up for her. Tr 8/4/16, 15.

Gary then called a family meeting at Dorothy's house, so they could discuss how to keep their mother in her house because that was where she wanted to be. At this time, Gary had been estranged from his brothers Jerome and Michael for some years. Tr 8/4/16, 16, 19. Gary, Nichole, and Helen Ross Jackson (a former daughter-in-law and Jerome's former spouse) attended the meeting. Michael, invited through Nichole, told her that he had no problem with anything they wanted to do. Nichole also talked to Jerome. Neither Michael nor Jerome came to the meeting. Tr 8/4/16, 18.

The original plan was for Helen to wash Dorothy's clothes, Nichole to cook her food (along with the food she prepared for her own family), and Gary to do everything else that was necessary. Tr 8/4/16, 19. This plan did not work because everybody got busy except for Nichole; Nichole stayed true to the plan. Eventually, as dividing these responsibilities became more difficult, Gary took Dorothy into his house. From this point on, in helping with Dorothy, Nichole was his "rock." Tr 8/4/16, 20.

Dorothy moves in with Gary: Dorothy moved in with Gary in June 2012. Tr 8/4/16, 71. When Dorothy first moved in with him, she was not well. She was still having some hallucinations. She seemed unhappy away from her home. He tried to comfort her keeping in mind her situation: bedbugs, hallucinations, and malnutrition. She significantly improved after he began taking her to the doctor, and over the last two years she has done extremely well. Tr 8/4/16, 21-2.

On a typical day, they wake up in the morning and he gets her a cup of coffee and fixes her a hot breakfast. They sit and talk, sometimes outside. At lunch time, he usually makes a sandwich or fruit, or occasionally gets her a treat like Kentucky Fried Chicken. In the evening, he usually cooks her a hot meal. Tr 8/4/16, 22-3.

He takes Dorothy to her primary care physician every two months regularly. He also cooks and cleans for her, sits and visits with her, runs errands for her, picks up her medication and food she wants

from the supermarket. Tr 8/4/16, 55-6. Gary has had Dorothy's durable medical power of attorney for many years and helped her with her medical matters before 2012. Tr 8/4/16, 74. Jerome also took her to the doctor when he was living in his mother's house. Tr 8/4/16, 74.

Gary works as a contractor part-time. He has a crew that is on site, and he inspects. If he must go for any extended period, his former spouse Kimberly Johnson stays with her. Tr 8/4/16, 56. Dorothy also spends time with his fiancé, Laurie Keyes. Tr 8/4/16, 65.

Dorothy wants to stay living with Gary: Dorothy has told him that she wants to stay with him, just as she has testified in court. Tr 8/4/16, 69. See Testimony of Dorothy Redd, pp.15-18.

Guardian, conservator and attorney in fact: He is both Dorothy's co-conservator and co-guardian. Tr 8/4/16, 54. His role in as guardian is to do what God wants him to do: facilitate what Dorothy's wishes are. That is what he has done since 2012. Tr 8/4/16, 55. He saw Dorothy take care of her own mother and do everything for her. It says in the Bible to "Honor thy mother and my father" and he tries to be a good example of that. When he saw his mother in dire straits, he stepped in. Dorothy means everything to him, and he sure that she means everything to his brothers. She always tells him that she loves all of them, but she does not want to see them right now. Tr 8/4/16, 70-1.

He is also her co-conservator. Tr 8/4/16, 56. He takes care of her finances, paying her life insurance, Beaumont medical alert, and home taxes. Tr 8/4/16, 57. He has had Dorothy's power of attorney for the last 12 years. Tr 8/4/16, 72. Dorothy told him not to tell his brothers that he had the power of attorney, because they were not responsible and he was the most responsible son. Tr 8/4/16, 73. There was not a big problem when his brothers found out in 2012. Tr 8/4/16, 76.

His name is on the title of the Lawton residence with Dorothy's, and he has paid its real property taxes. Tr 8/4/16, 77. His brothers Michael and Sean had been ordered to pay Dorothy rent; no one paid anything, nor did they pay taxes or utilities. Tr 8/4/16, 57. See Appendix F, 2/6/15 Order; 10/8/15

Petition and Order. Gary evicted them from the house in 2015. No one else had lived there until three weeks prior to trial. Tr 8/4/16, 78. He does not recall being asked to take his name off title to the Lawton residence. Tr 8/4/16, 79.

He is required to file an accounting with the court, and there was testimony that he was late with that accounting. Jennifer Carney (the co-guardian and co-conservator) filed the first accounting; he prepared the second. Carney's office called him multiple times asking him for additional information and documentation for some of the accounting entries. He has sent everything they requested. For example, they needed documentation on his loan to his mother to replace the boiler in her house, spending \$6,000. He and Dorothy co-own her Lawton house, but Dorothy does not have that money so he recorded her portion as a loan. Tr 8/4/16, 57-9.

His testimony concerning Nichole: When Gary met his daughter Nichole at Dorothy's house when Dorothy was first having trouble, he and Nichole had not spoken for the prior three years because of an incident on Easter Sunday 2009. Tr 8/4/16, 4, 9-10.⁸ He testified that it was good to see Nichole after this period of time because she is his only child. He told her he appreciated her supporting her grandmother. Tr 8/4/16, 12. At the time of the family meeting – before Dorothy moved in with him – he and his daughter became close again working for Dorothy. Tr 8/4/16, 17.

In December 2015, however, there was a domestic situation between Nichole and her husband, and Gary intervened in that situation at his son-in-law's request. The result was that since that time, he and Nichole have not talked at all, and he has not been able to see her children. What little communication he got from her was disrespectful. She nevertheless has been to his house many times since then to visit with Dorothy because he never denied her access. Dorothy also went to Nichole's

⁸ This incident and the trial court striking the testimony over objection is discussed in the Argument.

house perhaps once or twice a week. Tr 8/4/16, 24, 34.

Mother's Day 2016, he was at his home with Dorothy when Nichole arrived unannounced with flowers for Dorothy,⁹ and walked into his house without saying anything to him. He allowed her to do this because she was coming to visit Dorothy. He thought they should address the problems between them. Tr 8/4/16, 34. He had not seen his grandchildren in five months, and thought this conversation was overdue. He heard her talking about him in his house in a negative way to Dorothy. Tr 8/4/16, 35. This included an accusation he was not handling the family situation correctly. It did not bother him that Nichole was telling her grandmother to visit his brothers, and in Dorothy's presence, he told Nichole that he never kept Dorothy from seeing any family member. He also told Nichole that she was not going to disrespect him, walk into his house without talking to him or greeting him, and talk about him as if he was not there. Tr 8/4/16, 36-7. She said "Now let me tell you one thing. I'm a grown, --expletive-- woman. I'm forty-two years old -- another expletive. You and nobody else can tell me when to come and see my grandmother. I can see my grandmother anytime I want to, whenever I want to, how often I want to, little man, little miserable man." He challenged her talking to him that way and told her to leave the house. Dorothy told Nichole to show her father respect. Tr 8/4/16, 38. Nichole got angrier and challenged him to hit her. He stepped back and told her to leave. Tr 8/4/16, 39. As she was leaving, he reached to unlock the door and she slapped his hand, hit him in the chest with her elbow, and took her keys and attacked his head. He grabbed her as she was trying to get into the kitchen -- because many times before she had used a knife in an argument with her husband -- put her on the ground, and sat on her. He defended himself and defused the situation; he did not assault her, but subdued her because she was out of control. He told Nichole to leave his house and not come back; she left. He called the police, who arrived, took pictures of him (his head and face), and interviewed him, Dorothy, and his fiancé,

⁹ She would not talk with her father.

Laurie Keyes, who was present. The police told him that Nichole was at the police precinct trying to file a complaint. After an interview, the police concluded that Nichole had come to his house. Tr 8/4/16, 40-2, 101-3.

As of the date of the hearing, there was a criminal complaint pending against Nichole and a Personal Protection Order (PPO) against her that is in effect. Nichole has tried to get the PPO dismissed in front of Judge Langton, but it remains in effect. Tr 8/4/16, 42-3. See Appendix G, PPO.

Before their recent estrangement, Nichole never told him that he was interfering with Dorothy's relationship with her other family members. She never claimed he was influencing Dorothy. Tr 8/4/16, 33.

Dorothy's other sons: Gary has not communicated much with his four brothers since Dorothy moved in with him. He loves his brothers, and has always encouraged Dorothy to see them. But for a long time, they had refused to visit him in his home. Tr 8/4/16, 20. His brothers have not called him once about their mother over the last two years. Tr 8/4/16, 25.

But his brothers' refusal to visit their mother was not limited to the times that she was at Gary's house. While Dorothy was visiting Nichole, she invited Michael and Jerome to come visit their mother. Michael showed up sometimes, and Jerome never. Tr 8/4/16, 20-1. Over the last two years, while Dorothy was living with him, he thinks Dorothy may have visited at Nichole's house over 100 times. During all those occasions, Jerome never visited her, Sean may or may not have, and Michael did see her. Nichole never prevented them from coming to her house, and she has had a good relationship with Michael and Sean at least. Tr 8/4/16, 25.

He believes that Dorothy has a good relationship with four of her sons (Gary, Michael, Sean, and Tony) but not with Jerome because he does not come around. He does not believe that his mother is necessarily in danger with his brothers, but he did have to remove her from a bad and unhealthy situation

(bedbugs etc.) when Jerome was living with her. Jerome refused to talk to him about the conditions in which she was living. Tr 8/4/16, 82. Sean on the other hand, who was also living with Dorothy, supported Gary's efforts. She always says she loves all her sons, but she does not like what her other sons are doing. Tr 8/4/16, 83.

When he has not been able to talk to his brothers, he has worked with Nichole to reach out with them. Tr 8/4/16, 84. He has discussed with Nichole his disappointment in his brothers not seeing their mother. He has never discussed with her his not allowing his brothers to see Dorothy nor has he ever done this. Tr 8/4/16, 96. He had no objection to Nichole taking Dorothy to see any of her family members. Tr 8/4/16, 97.

Dorothy sees her family and friends: Dorothy sees friends and family regularly. She has not seen much of Michael or Jerome, although they have always been invited to come and participate. Tr 8/4/16, 23. She sees friends and family whenever he gives her mother a birthday party, a Mother's Day party, or just a fish fry or gathering. Gary has first and second cousins from his father's side who usually come. He always tries to reach out to his other family. When Nichole was with working with him, he always told her that because she had relationships with family members that he did not have, she should reach out to them, even if they did not want to talk to him. Nichole reached out to his brothers on many occasions – on his instructions – to facilitate visitation. They were always more than welcome. Tr 8/4/16, 23, 123. These parties also included Dorothy's great-grandchildren, and she saw them all the time, up to January 2016. Tr 8/4/16, 24.

Pictures from Exhibit 1 show Dorothy's life with Gary, taken at a variety of events and times between 2014 and 2016, including at his house and Nichole's. His brothers were not in pictures with Gary's father's side of the family because they are not as active in the family as Gary. Tr 8/4/16, 66.

He cares for Dorothy and facilitates interactions with all her family, even family members

involved in this litigation, although that has not always happened easily over the last few years. Tr 8/4/16, 69. He has no problem with her seeing other family members, but the invitations go out and nobody shows up. Tr 8/4/16, 70. He is always tried to facilitate the judge's orders, and will continue to do so Tr 8/4/16, 70.

She has continued to see Valerie and her grandsons. Tr 8/4/16, 83. Dorothy has access to a telephone, and can call other people as she wants as Jeanette and Helen have all testified. Tr 8/4/16, 85. He is aware that Kimberly Johnson has taken Dorothy places including to visit family members that Dorothy requested, and he has not objected to this. Tr 8/4/16, 86.

In May 2014, Gary found his niece (and Dorothy's granddaughter) Katrina Tao-Muhammad (Jerome's daughter) at his house visiting with Dorothy without her having let him know that she was coming by. He heard her tell Dorothy that she would be back at 5 o'clock to pick her up for Jerome's birthday party. He asked Katrina why he was not told about the visit or taking Dorothy to the party. Katrina told him she did not have to tell him. It was not a problem with her going to Jerome's birthday party, but rather the problems were the last-minute nature, not being told, and her argumentative demeanor. He did not intend to prevent Dorothy from leaving with Katrina are going to Jerome's party at any time. If she had called and arranged it, he would have had no problem. He believes it is important for Dorothy to see people, he tries to facilitate that. Tr 8/4/16, 44-5.

He did object to Katrina taking Dorothy places without telling him where she was going, because Dorothy was in his care. He recognized that Katrina loved Dorothy, and she has been to his house several times to visit Dorothy. He did not think that Katrina posed any danger to Dorothy. Tr 8/4/16, 120.

The judge ordered Jennifer Carney to be a co-guardian help facilitate visitation with other family members, because his brothers would not talk to him. His brothers, Nichole, and Jennifer Carney's office

all have his cell number. He always waited on Ms. Carney to give him a call, because he did not want to stand in the way of her setting up visitation. She did so a couple of times, the last being May or June 2015 after the last court date. Tr 8/4/16, 26-7.

There was an earlier time in 2014 when Ms. Carney called Gary about a visit with Katrina, but he and Dorothy had planned to go out of town. Gary gave Ms. Carney the dates, and she said she would try to reschedule. At the last minute, Dorothy decided not to go out of town and stayed at home. He did not tell anyone about Dorothy changing her mind, because Carney said she would reschedule. He never received a call from Carney's office about rescheduling. Tr 8/4/16, 31-2.

The judge had ordered that his mother could see Katrina or any other family member she desired. He worked with attorneys Carney, Carver, and Wise on this. There was a teleconference at which Dorothy was present; Dorothy said she did not want to see Katrina because her granddaughter was spoiled, a troublemaker, and had lied in court. She did say she wanted to see her other sons, so he arranged a meeting. Tr 8/4/16, 28-9. Michael is the only brother that came to the meeting. Ms. Carney's report stated that Jerome declared that he would not come unless Katrina was allowed as well. Tr 8/4/16, 30. Gary never received any other calls from Ms. Carney, Tr 8/4/16, 30.

Court ordered visitations: Around June 2016 – just prior to the evidentiary hearing, the court ordered that the family have visitations with Dorothy to take place at the Southfield police station. On the way to the first visitation at the police station, Gary told Dorothy where they were going and that he was facilitating visitation. Dorothy told him she did not want to go; they went anyway. Tr 8/4/16, 47. Gary was bringing Dorothy up the steps when his former sister-in-law Helen Ross Jackson approached with flowers and said that she would take Dorothy in. Gary said he would bring her in, however, so the authorities could see that he had followed the court's order. Tr 8/4/16, 46.

When they arrived at the police lobby, he told Lieutenant Habel that the PPO against Nichole

was in effect, and that Dorothy had told him that she did not want to come to this visitation. Tr 8/4/16, 106. Upon the discussion about the PPO, Nichole left the area. He told Lieutenant Habel that he was there to facilitate the visitation, but Dorothy was already telling Helen that she did not want to be there, and was going home. At this point, Gary was standing about 15 yards away from his mother. Tr 8/4/16, 48. Lieutenant Habel asked him to step outside so Nichole could visit with her grandmother; he agreed and waited outside. The visitation took about 30 minutes. Lieutenant Habel came and got him, and told him that Dorothy had emphatically told the rest of the family that she did not want to go with them and wanted to go home. Tr 8/4/16, 49-50.

On the way to the second court ordered police station visitation, he explained to Dorothy that they had to have a visitation every other Saturday and Wednesday, and that was what they were doing. If she changed her mind and wanted to go with Nichole or the rest of the family, he told her that she could. He always tells her that is good to see all her sons. Tr 8/4/16, 51. Officer Stephen Schneider was present at the second court ordered police station visitation.¹⁰ Gary did not agree with Schneider, and thought he did a good job of facilitating that visitation. Tr 8/4/16, 46, 50. As he walked in with his mother, Katrina and Jerome both had their cell phones out and were filming. Tr 8/4/16, 50. Dorothy got annoyed, and told him to stop filming. He sat Dorothy down and went to the sergeant's desk to let

¹⁰ **Testimony of Officer Stephen Schneider:** Officer Stephen Schneider testified that on June 29, 2016 he was working the front desk of the Southfield Police Department and met Nichole and a group of family members. They said they were there for a visitation with Dorothy. Dorothy and Gary arrived after Nichole and her group had waited for 15 or 20 minutes. There was some discussion in the lobby about that visit and Dorothy said she did not want to visit with the rest of the family. As this was a civil matter, the police simply were there to keep the peace. Tr 7/26/16, 8-9. He observed Gary bring Dorothy into the station. Gary did not leave, or actively discourage the meeting, or facilitate a friendly-type meeting. During this meeting, Gary apparently understood he was subject to a court order. Gary spoke to him, but he did not recall exactly what he said. He recalled that Gary was concerned and wanted to talk about the family's custody battle. Tr 7/26/16, 10-1. Discussion between the parties took place in front of Dorothy. Dorothy seemed to want to stay with Gary, and seemed agitated to be at the meeting. Tr 7/26/16, 12-3.

him know he had obeyed the court order. The family surrounded Dorothy. Dorothy emphatically told Nichole that she did not want to see her or go to her home. Dorothy told her that she was surprised at Nichole for requiring these visitations. That visit took perhaps a half an hour. Gary did not conclude the visitation; he never concluded any meeting. The visitations ended when Dorothy wanted to go home. Tr 8/4/16, 52-3.

They had six visits at the police station, and all went similarly. He never prevented Dorothy from speaking anyone, never told her she should not see anyone, and never talked disparagingly about family members in front of Dorothy. Tr 8/4/16, 53.

Testimony of Dorothy Redd. Dorothy wants to live with her son Gary

Dorothy Redd testified that she has lived with her son Gary for several years. She had two sons – Jerome and Sean - living with her who were not doing anything for her at all. Tr 7/26/16, 53-4. They would not work around the house. Gary decided he would keep her at his own house and help her out, and that is how they got so close. He found out that she needed help with washing, cooking, grocery shopping, and cleaning, but had no one to help. Tr 7/26/16, 53, 55.

She went to live with Gary and was very happy; he took good care of her. She has grandchildren who would come to see her, tell her they loved her, but not do anything for her. Gary was the only one who did anything for her. Tr 7/26/16, 54. Gary has been taking good care of her. He takes her to her doctor appointments, picks up her medicine, cooks for her, and takes her restaurants. Tr 7/26/16, 60. She talks to Gary about all sorts of things; they do not sit together in silence. Sometimes they talk about how disobedient children can be to their parents, and how children can be spoiled, and they can be jealous and angry. Tr 7/26/16, 71.

She testified that she wants to continue living with Gary at his Southfield house. She enjoys living there and is very happy. Tr 7/26/16, 64; 8/1/16, 127. She would not want to live anywhere other than

at Gary's house, because no one would treat her as well. Tr 7/26/16, 65. Gary treats her very well, he takes care of her, and she loves the way he does it. He takes good care of her the way she took care of her own mother. She feels comfortable living with Gary, and would rather live with him than anyone else that she knows. She loves her other children, but she does not want to stay with them. Tr 8/1/16,127-8.

Gary has always treated her well. He is not the kind of person to treat her badly. She knows that Gary loves her. Tr 8/1/16,127-8. No one in the family has ever harmed her or mistreated her, they just have not done anything for her. Tr 7/26/16, 66.

She testified that her family was trying to take her out of her house, and she was not going anywhere. And she was not going to a home. Tr 8/1/16,133. When she was at the police station for visitation, she said that she heard her granddaughter Nichole Legardy talk to someone else about putting her in a nursing home. And Nichole told her that she was not looking good that day. Tr 8/1/16,135. Katrina Tao-Muhammad, another granddaughter, also talked about a nursing home. Tr 8/1/16,136. She heard this when everyone was talking at the police station. Tr 8/1/16,142. She does not want to visit with them now; she wants to go home, get some rest, and be taken care of by Gary. They have a lot of fun together. Tr 8/1/16,132-3.

Dorothy questioned whether her family loves her because there they are trying to get her away from Gary and her home. She does not believe that Gary is trying to get her away from the rest of her family. Tr 8/1/16,129-30. She is angry at her family because they want to be angry at her and tell lies about Gary. Tr 7/26/16, 68. The lies include him not wanting the family to visit her. Tr 7/26/16, 68.

Her family is free to see her: Gary never stopped anyone from seeing her and she never ordered them not to visit. She would like to see her family, but they have been a little bit jealous of her ever since she moved in with Gary. Tr 7/26/16, 62, 64. Gary never told her that she could not see some family member. Tr 7/26/16, 67. She never told anyone that she would love to see her family but Gary

prevented it. Tr 7/26/16, 70. Gary never prevented any family member from seeing her or coming to his house to see her; he never turned anyone down. Her family could have visited anytime; Gary never prevented them from coming. The family members who said that he would not let them see her are lying. Tr 8/1/16,128-30.

Relatives have visited her while she lived with Gary, including relatives on her mother's side of the family. Sometimes they come for a birthday party, or visit on a Saturday. Friends visit as well. Tr 7/26/16, 61. They would come by to talk or watch television. Nichole came to visit a lot. Tr 7/26/16, 62. She is happy to see the young children in the family. Tr 7/26/16, 66. A lot of friends come to visit her as well; they have tea, coffee and donuts. And she talks with her other family members. Tr 8/1/16,133-4.

Dorothy has issues with some of her family members: When her granddaughter Nichole would come to visit her at her father Gary's house, she would disrespect her father. She would not even say hello to him, even when Dorothy asked her to. Tr 7/26/16, 55. She thought that if Nichole came to her father's house, she had to show him respect. Tr 7/26/16, 72. Gary and Nichole got into a big fight, with her cursing at him. Dorothy thought the Nichole had been drinking and smoking, but she had not seen her do this. She testified that Nichole always has some whiskey around. Tr 7/26/16, 56, 58-9.

Her son Michael did not come to visit her at Gary's house, but she did see him at Nichole's house. She also had dinner with him at a restaurant with Jennifer Carney. Tr 8/1/16,140. Gary did not say anything to her about Michael. Tr 8/1/16,139. She has not seen Sean, but would like to. Gary has told her that all the family members are welcome in his house. Tr 8/1/16,141. Jennifer Carney had called and asked if she wanted to see her sons, and if so she would help arrange a visit. Dorothy told Ms. Carney that she did want to see her sons, and had the dinner with Michael. Jerome, however, said that if his daughter Katrina could not visit, he would not come. So, she did not see Jerome, although Katrina

does come by other times and see her. Tr 7/26/16, 63; 8/1/16,140.

She testified that Katrina is telling lies about Gary not wanting her to go to Jerome's birthday party; Katrina took her to that party. Tr 7/26/16, 69. Katrina has been in her face and spoiled all her life. Tr 7/26/16, 70. Katrina acts like she does not care about the family. The only thing that she has heard Gary say about Katrina was that he cannot be bothered with her. Tr 8/1/16,139.

There were times when her sons Jerome and Michael, and her granddaughters Katrina and Nichole did not seem like they cared much. They did not come to see her. Tr 8/1/16,134.

She has gone to visitation at the Southfield police station: Gary has taken her to the Southfield police station for visitation with some her family members. The visits were quick because she and Gary just had to show up. She and her family spoke to each other, but she did not want a longer visit because she was not there for a long visit. She did not want to have a longer meeting with them because did not seem to her like they cared about her. She came to the police station because she had to come. Tr 8/1/16,131-2. When she went police station, the family embraced her and she embraced them back. Tr 8/1/16,142. She agrees that her family loves her. Tr 8/1/16,126. She still loves her family members. Tr 8/1/16,143. She just does not want to hear any more about the family. Tr 8/1/16,143.

Testimony of Co-Guardian Jennifer Carney: Jennifer Carney was appointed co-guardian and co-conservator as a means of reducing some of the conflicts between family members through use of a neutral party. The court then largely ignores what she has to say about various important issues in this case.

2015 Petition for Instructions: Ms. Carney's Petition for Instructions (filed March 5, 2015) is instructive as to the relationship between Dorothy and various other family members, and how Gary was not the disruptive force described by the court. Among other things, this neutral observer notes that despite the court's order, it was Dorothy who emphatically refused to visit with Katrina. The court order

itself caused Dorothy significant distress according to her physician Wasim A. Qazi, MD who wrote that she was “experiencing undue stress and anxiety as a result of being ordered to have visitation with members of her family that she does not wish to see. It is recommended her wishes be honored to avoid any unnecessary exacerbation of her conditions.” B, Petition, Sections 7-8, 15.

Ms. Carney also stated that she and Dorothy and Gary’s attorneys persuaded Dorothy to agree to visit with three of her sons - Jerome, Michael and Sean - and Ms. Carney took steps to arrange the visit. The attorneys hoped that a successful visit would encourage Dorothy to include Katrina in subsequent visits, as a baby step toward gradually reintroducing family visits. As a courtesy, Ms. Carney notify Katrina of the planned visit. Katrina’s response was to accuse Gary’s attorney of misconduct and threaten to file a grievance against him. Jerome Redd angrily declined the invitation stating, among other things, that the invitation was a “slap in the face” and that he would not attend any visit with Dorothy unless they included his daughter Katrina. Jerome did not visit with his mother. Sean never even responded. Michael attended, and had a pleasant visit. Petition, Sections 10-14.

Ms. Carney’s conclusion was that Dorothy’s continued resistance to Katrina, and Jerome and Sean’s failure to participate, suggested that she would not be successful in facilitating family visitation per the court order. Petition, Section 16.

Ms. Carney testified that she spoke to several family members about visitation. She noted the one instance where she came up with a date and time that did not work because Gary and Dorothy were going out of town. Tr 8/1/16, 103. She then scheduled a second visitation at a restaurant, which worked for Gary and Dorothy. She attempted to reach the other sons by telephone. That visitation occurred but not with all of the sons; she could not recall who did and who did not attend. Tr 8/1/16, 104.¹¹

¹¹ Gary testified that he worked with Ms. Carney and the other attorneys to facilitate visitation for Dorothy. He brought Dorothy to a meeting / teleconference in his attorney’s office. The attorneys asked Dorothy – not him – if she would like to see Katrina. Dorothy said no, because Katrina is spoiled,

Ms. Carney received communications from Gary, Nicole and Katrina. Katrina texted her at least 10 times about the facilitating visitations. Her office did not reach out to Gary facilitating visitations with Gary in response to these texts. Tr 8/1/16, 105. She did not testify that Gary interfered with any visitation. Her office and Gary were working together to prepare financial disclosures. Gary was responsive to requests for documentation. Tr 8/1/16, 106.

Testimony of Guardian ad Litem Eric Carver: Mr. Carver was Dorothy's attorney guardian ad litem. He told the court that he had met with Dorothy for probably ten hours, over six different visits, and spent considerable time with her, speaking to her, and every time, as Ms. Carney pointed out, she wanted to stay where she was and be with her son. And she was consistent with her intent, and she was clear-headed. She found her direct, and not fuzzy minded. She just wants to be left alone to rest. She loves all of children, but told them that she did not want to see them now. He thought she should stay at Gary's, and give her the peace of mind that she has earned at ninety-two. He advised against upheaving her and putting her somewhere else. He confirmed that in his discussions with her, she confirmed that Gary had never hurt her or disrespected her, she was comfortable his house, and wanted to stay there. Gary has provided her a place to live out her life. Tr 7/26/16, 45-51.

Testimony of Kimberly Johnson: Ms. Johnson lives in Southfield, and is Gary's former spouse. She married him in 1979 and they were married for a few years. Tr 8/1/16, 144-5. She has known Dorothy for many years as a mother-in-law and an ex-mother-in-law. Dorothy has always been a very jovial, friendly person who loved her family, and was very good to everyone. She still sees her

and has been a troublemaker. Then Ms. Carney asked Dorothy if she wanted to see her other sons, and she said she would. This was in May or June 2015. Gary helped arrange a meeting because it was what his mother wanted; he told the attorneys that this was fine with him. Only Michael showed up at the visitation. Ms. Carney reported that Jerome said that if Katrina, his daughter, was not invited to this visitation, then he was not coming. He never received a call from Ms. Carney for any other visitations. Tr 8/4/16, 28-30.

about once a week because Dorothy enjoys their visits. Gary is usually present at these visits, and he has never prevented them. Tr 8/1/16,145-6. She has visited with Dorothy this way for years. Tr 8/1/16,151. She has tried to stay out of this family conflict; she has always loved the people in this family. Tr 8/1/16,164. She believes everyone in the family loves Dorothy. She has never seen anyone mistreat or abuse her. Tr 8/1/16,171.

Living with Gary, Dorothy is well fed and well groomed. She speaks about her family all the time. Tr 8/1/16,146.

Kimberly was very surprised at the testimony she had heard earlier that day. Dorothy is tired of all the family dissension. She loves her family, but feels like they are taking her through a lot of unnecessary changes. Dorothy feels that she has always been available for anyone of them to come to Gary's home to visit her, and that they do not show up, although on occasion, Katrina visits. Tr 8/1/16,146.

Ms. Johnson also lived at Gary's house for a couple of years, from 2013 to about 2015. There was a guardianship proceeding at that time. Dorothy thought it was ridiculous that her family was taking her to court. She was shocked hearing the charge that Gary was preventing family members from seeing Dorothy. They have been invited to visit Dorothy at Gary's house several times, and they have not showed up. She has witnessed Gary inviting these family members to his house to see Dorothy; Jerome, Michael, Katrina, and Michael Jr. She has heard him speak to every one of his relatives telling them that they are welcome to come to his home. Gary has made everyone welcome to his home. Tr 8/1/16,147-9. She is not aware of any family members were not welcome at Gary's house. Tr 8/1/16,152.

During the time that she lived with Gary recently, Sean visited once, and it was a nice visit. This probably occurred before 2015. Tr 8/1/16,152. She has never seen Michael there that she can recall. Antonio Burke lives out of state, and so she has not seen him. She does not recall seeing other relatives

there since May 2016. She recalls Dorothy visiting Nichole's house often. She has not seen any family around in recent months. Tr 8/1/16,153-4. Dorothy has said to her that she would like Jerome to visit and it is a shame that Michael does not come to visit. Tr 8/1/16,150.

Dorothy talks to her about the family discord. Tr 8/1/16,155. She is aware of the court proceedings because she is aware of what goes on around her, and is a very intelligent 90-year-old woman. Tr 8/1/16,156.

Gary is a loving son to his mother, and a super guy. She has never seen him disparage other family members in front of Dorothy. Dorothy has never told her that she's being prevented from seeing other family members. Tr 8/1/16,150. She never heard any negative statements Gary made about his brothers. He does not like that they do not have a good relationship. Tr 8/1/16,161.

Testimony of Petitioner Nichole Legardy: Dorothy is her paternal grandmother. Tr 7/26/16, 73. She is the petitioner in this matter. She has petitioned the court to revoke Gary's guardianship and conservatorship, facilitate visitation, schedule family member visitations with Dorothy, and to give petitioner access to her medical and financial information. The court ordered visitations to the Southfield Police Department are insufficient because she claims that Gary is manipulating Dorothy and forcing her to turn against her family. Tr 7/26/16, 74.

Nicole seeks to remove Dorothy from Gary's house and, having "done some research" proposes putting her in some sort of senior facility. Tr 7/26/16, 75.

She claims that Gary has told Dorothy that she should not see other family members. Tr 7/26/16, 76. She also claims that Dorothy told her to gather all the family (other than Gary) at Nichole's house, and that she was going to come and live with her. Tr 7/26/16, 78.¹²

Nichole admitted that in the prior year she saw Dorothy any time she wanted to. And other

¹² When Nichole stated this, Dorothy said "That's a lie." Tr 7/26/16, 78.

family members saw her as well. Tr 7/26/16, 79. She denied that Dorothy was upset with her for fighting with Gary on Mother's Day. Tr 7/26/16, 80. She seemed to deny that there was a fight, but had to admit that she was arrested, on what she claimed was a technicality. Tr 7/26/16, 80. She acknowledged that she has a pending court matter for assault and battery and a PPO that says she is to have no contact with Gary. Tr 7/26/16, 81. She said she had no problem fighting with her father in this way. Tr 7/26/16, 82.

She testified that Dorothy should go into a senior facility because it supports her age group, it supports the things that Nichole feels is important in terms of her cognitive ability, it will support her having independence. Tr 7/26/16, 84. In connection with this proposal, however, she has not made any investigation as to her grandmother's finances. Tr 7/26/16, 85.

She also claimed that Gary had not complied with court orders regarding the turnover financial or medical information. Tr 7/26/16, 87.¹³

Other witnesses also testified.¹⁴

Court Decision:

On August 11, 2016, the court heard closing arguments and then issued its ruling on the record. The court commented that there is "no standard" for determining the suitability of a guardian. The court entered an Order that day removing Mr. Redd as co-guardian, appointing Nichole Legardy as co-guardian (effectively moving Dorothy Redd out of Gary Redd's home), and setting a review hearing for September

¹³ Jennifer Carney confirmed her office is working with Gary as to the accountings, and that he has delivered to her office Dorothy's medical information as required. Tr 7/26/16, 89.

¹⁴ Jerome Redd said he had not visited with his mother in two years. Tr 7/26/16, 98. He never saw Gary telling his mother not to speak with him. Tr 7/26/16, 104. Jerome's ex-wife has never seen Gary tell his mother not to have a relationship with Jerome. Tr 8/1/16, 29, 31. Eleanor Caddell is Gary's ex-wife and Nichole's mother. She and Gary are still close and she remains close to Dorothy, who now seems content and alert. Tr 8/4/16 #2, 29-31. William Ligon, Jr. has known Gary for about 30 years. He was married to Eleanor, and is Nichole's stepfather. Gary is a man of integrity and cares about other people. Tr 8/4/16 #2, 57. He considers Gary an outstanding family man. He stops by occasionally to visit Dorothy. Gary provides for her very well. Tr 8/4/16 #2, 58.

2016. See Appendix A. The ruling is discussed in detail in the Argument.

Motion for Reconsideration:

On September 1, 2016, Respondent filed a Motion for Reconsideration. See Appendix H.

September 26, 2016 Review Hearing: At the review hearing, Mr. Redd stated that his mother is not comfortable at her new placement. She is staying in her great-grandsons' bedroom while the boys sleep on a couch. The home is noisy, making her anxious. She went from a peaceful house where she had her own room, her own television, and privacy. Dorothy Redd wants to talk to the judge, but Ms. Legardy did not bring her to court. Mr. Redd stated that he brought his mother to court every time. Tr. 9/26/16, p. 21-22.

Opinion and Order Denying Reconsideration

On September 27, 2016, the court entered the Opinion and Order denying Reconsideration. Appendix A-1.

Mr. Redd filed his appeal of right.

September 19, 2017 Published Court of Appeals Opinion

On September 19, 2017, the Court of Appeals issued its published Opinion in this case. See Attachment J, In re Dorothy Redd, ___ Mich App ___ (2017). The decision is discussed in the Summary of Argument and in the Argument. Appendix K.

Appellant Gary Redd now files this Application for Leave to Appeal in this Court.

ARGUMENT

Leave to Appeal should be granted from this published Court of Appeals decision determining a significant issue of first impression: the statutory construction of EPIC, MCL 700.5310, and the grounds and evidentiary standard of proof necessary for removal of a guardian of an incapacitated person.

Standard of Review: Leave to appeal is discretionary. MCR 7.303B(1). The proceedings in this case are governed by the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq* (MCL 700.5301 *et seq*, concerns guardians for incapacitated individuals). Issues involving statutory construction are reviewed de novo by this Court. *Moshier v Whitenwater Twp*, 277 Mich App 403, 407 (2007). Appeals from a probate court decision are based on the record. *In re Temple Marital Trust*, 278 Mich.App. 122, 128; 748 N.W.2d 265 (2008). “The trial court's factual findings are reviewed for clear error, while the court's dispositional rulings are reviewed for an abuse of discretion.” *Id.* Issues of law are reviewed de novo. *Auto Club v General Motors*, 217 Mich App 594, 552 NW2d 523 (1996).

Overview: Under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, the probate court has exclusive subject-matter jurisdiction over “a proceeding that concerns a guardianship, conservatorship, or protective proceeding.” MCL 700.1302(c). Article V, part 3 of EPIC, MCL 700.5301 *et seq*, concerns guardians for incapacitated individuals (“wards”).

MCL 700.5306 provides for court appointment of a guardian for an incapacitated person. Section (1) provides that a court may appoint a guardian if the court finds by clear and convincing evidence both that the individual for whom a guardian is sought is incapacitated and that the appointment is necessary as a means of providing continuing care and supervision of that person. See Appendix I, statutory provisions. This is apparently the only evidentiary standard of proof set out in terms of the guardian appointment or removal.

MCL 700.5306a sets out a series of rights of the individual for whom a guardian is sought or has been appointed. These rights include the right to object to an appointment of a guardian or a

successor guardian, (1)(a); the right to be present at a hearing, including all practical steps to ensure the right to be present, (1)(g); the right to hear all evidence concerning appointment of a guardian, (1)(h); to be informed of each person seeking to be guardian, (1)(p); to require proof of incapacity and the need for a guardian to be proven by clear and convincing evidence, as provided in section 5306, (1)(q); and the right to choose the person who will serve as guardian, if the chosen person is suitable and willing to serve as provided in section 5313, (1)(aa). See Appendix I.

MCL 700.5310 applies to resignations or removals of a guardian. MCL 700.5310 applies to *resignations or removals of guardians* and the appointment of a successor guardian. MCL 700.5310(4) includes language that “the same procedures to safeguard the ward’s rights” in appointing a guardian, “apply” before removing a guardian, appointing a successor guardian, modifying the guardianship’s terms, or terminating a guardianship.” The provisions also allows courts to send an observer who may report to the court. Appendix I. The Court of Appeals did not address MCL 700.5310(4).

MCL 700.5313 addresses guardian qualifications. MCL 700.5313 addresses guardian qualifications. The person must be competent, (MCL 700.5313(1)) and suitable and willing to serve, MCL 700.5313(2). See Appendix I.

Here, Petitioner did not support her burden for termination of Mr. Redd’s guardianship nor her burden for appointment as co-guardian by preponderance of the evidence, let alone clear and convincing evidence. The trial court erred in failing to articulate and apply any evidentiary standard: thus it simply inserted its judgment. It erred and abused its discretion in revoking Mr. Redd’s guardianship and appointing Ms. Legardy as co-guardian. Its decision was not properly supported by the evidence and is based on multiple erroneous factual findings, as well as is contrary to the relevant statutes, including those emphasizing the choice of the ward. This is a situation where remand to a different trier of fact is warranted. The decision was not in the interests of Mrs. Redd and ignored

her desires and wishes. The order revoking Mr. Redd's guardianship should be vacated or reversed and the guardianship reinstated.

A. Mr. Redd has been and is a suitable and willing guardian under the statute. The trial court erred and abused its discretion by entering the order revoking Mr. Redd's guardianship under any evidentiary standard and moving Dorothy Redd out of a stable and caring home and appointing Petitioner the successor co-guardian, and the Court of Appeals erred in affirming.

1. **Suitability Standards.** MCL 700.5306 provides that a court may appoint a guardian if it finds by *clear and convincing evidence* that the individual is incapacitated and that the appointment is necessary to provide continuing care and supervision. While MCL 700.5313(1) applies a suitability requirement (a guardian must be suitable and willing to serve, although not defined), it does not set out specific substantive considerations or an evidentiary level of proof. Section 5306(1) would include a determination of suitability when appointing a guardian.¹⁵

2. **Mr. Redd is a Suitable and Willing Guardian.** Mr. Redd was determined to be suitable at the beginning of this process, as acknowledged by the trial court in November 2014. Tr. 9/24/14, p. 47-48. As shown throughout the proceedings, Dorothy Redd was well cared for living with Gary Redd. She had significantly improved after living with Gary beginning in 2012. He began taking her to the doctor, and over the last number of years she has done extremely well. Tr 8/4/16, 21-2.¹⁶

¹⁵ See *In re Martin*, 450 Mich 204 (1995) (in a different context, "we view the clear and convincing standard not as a decision-making standard, but as an evidentiary standard of proof," applying that standard to all decisions regarding termination of treatment, regardless of the decision-making standard employed).

¹⁶ See Statement of Facts, *supra*: "On a typical day, they wake up in the morning and he gets her a cup of coffee and fixes her a hot breakfast. They sit and talk, sometimes outside. At lunch time, he usually makes a sandwich or fruit, or occasionally gets her a treat like Kentucky Fried Chicken. In the evening, he usually cooks her a hot meal. Tr 8/4/16, 22-3. He takes Dorothy to her primary care physician every two months regularly. He also cooks and cleans for her, sits and visits with her, runs errands for her, picks up her medication and food she wants from the supermarket. Tr 8/4/16, 55-6."

MCL 700.5313(2).

The focus of these proceedings is Dorothy Redd. When Mr. Redd was appointed guardian, he provided a letter from Dorothy Redd's treating physician, who stated that in 2012, prior to living with Gary Redd, her medical condition had severely worsened. Since living with Gary, however, she has progressed tremendously, gaining weight with improved health. Gary brings her to all her clinical visits – prior to that she missed appointments. The doctor recommended a full guardianship by Gary. See Appendix J, Letter for Wasim A. Qazi, dated 6/20/14.

Mr. Redd is knowledgeable about his mother – what she needs, what she likes, what stresses her, what makes her comfortable. As a woman over 90 years old, she needs stability, consistency, and peace. She likes a quiet, orderly home. She likes having privacy – her own room and her own television. This decision is not in her interests and the trial court erred and abused its discretion in taking her away from a suitable and willing son and guardian who more than met her needs and provided a loving home. Gary Redd has been a suitable and appropriate guardian.

B. In this first impression issue of statutory construction, the appropriate evidentiary standard of proof should be clear and convincing evidence of non-suitability required to remove Mr. Redd and clear and convincing evidence of suitability for the appointment of a successor co-guardian.

1. Petitioner did not meet her Burden of Proof, whether preponderance or clear and convincing.

Petitioner(s) did not meet the necessary burden of proof to show Mr. Redd was unsuitable and remove him as a guardian. There is a legal question, as acknowledged by the lower court, as to what is the evidentiary level of proof is necessary to show a guardian is no longer suitable and a new guardian is suitable.

MCL 700.5306(1) requires *clear and convincing* evidence for an appointment of a guardian.

MCL 700.5313 sets out requirements for a guardian: that a guardian must be suitable and willing.

Under MCL 700.5310 (resignation or removal of a guardian), subsection (4), the same procedures that safeguard the ward's rights when appointing a guardian, apply before removing a guardian, and appointing a successor guardian.

Statutes *in pari materia* relate to the same subject or share a common purpose, and must be read and construed together as one law. See e.g. *Siniropi v. Mazurek*, 273 Mich.App. 149, 156-157, 729 N.W.2d 256 (2006); *Aichele v. Hodge*, 259 Mich.App. 146, 161, 673 N.W.2d 452 (2003). Here, the statutes pertain to the appointment, termination, and successor appointment of guardians for incapacitated persons.

Section 5310(4) provides language that the same procedures to safeguard a ward apply to appointment of a guardian, removal of a guardian, and appointment of a successor guardian.¹⁷ The only evidentiary standard used in Section 3 is the clear and convincing evidentiary standard in section 5306(1). This initial appointment would include a determination of suitability. It is logical that if *clear and convincing* evidence is required for appointment of a guardian under section 5306 (1) (as to whether the ward is incapacitated *and* the guardian appointment is necessary to provide continuing care and supervision), then that same standard would be applicable to the requirements for determining the necessity of a removing a guardian and appointing a successor guardian under section 5310. Further, the suitability and willingness requirements under section 5313 do not include an evidentiary standard of proof. But determining suitability is subsumed in the original appointment of a guardian.

Application of a clear and convincing level of proof would be appropriate also for

¹⁷“(4) Before removing a guardian, appointing a successor guardian, modifying the guardianship's terms, or terminating a guardianship, and following the same procedures to safeguard the ward's rights as apply to a petition for a guardian's appointment, the court may send a visitor to the present guardian's residence and to the place where the ward resides or is detained to observe conditions and report in writing to the court.”

The provision contains the preface language, and also permits a trial court to use an observer.

determining suitability, whether applied to the current guardian or a potential successor guardian.

Petitioner Legardy did not support either removal or appointment of herself as a co-guardian by a preponderance, let alone clear and convincing evidence. Dorothy Redd is going from a peaceful environment where she has privacy and her own room (a very important consideration for an older person who no longer has their own home) to an admittedly noisier more chaotic house with young children which she finds disturbing. She is sleeping in a young boys' room and the children are sleeping in the living room. This is not a matter of whether she loves her granddaughter or her great-grand children, but it is a matter of her right to choose – which is statutorily protected.¹⁸ Ms. Legardy testified about placing Dorothy in a “senior” facility. Statement of Facts, p. 23-24. She did not show that she could offer a better or safer or more comfortable home than Mr. Redd, or that anyone in the family could pay for a senior facility. And, as argued by the Guardian ad litem (Mr. Carver) the emphasis on Dorothy's right to choose was priceless. See Tr. 7/26/16, 47-51. Her own doctor recognized that she was capable of making up her own mind as to whom to see (as reflected in the March 25, 2015 visitation order, which remained in effect until June 2016). See also discussions in sections C, D, and E, *infra*. She did not prove that Gary Redd should be removed as a guardian by clear and convincing evidence (or by a preponderance) nor unsuitability or suitability by clear and convincing evidence (or preponderance of the evidence).

2. The trial court erred in failing to articulate and in failing to apply an evidentiary level of proof.

Further, the trial court committed legal error in abandoning the basic standard of having the

¹⁸ See MCL 700.5306a(1), which includes: the right to be present at a hearing, including all practical steps to ensure the right to be present, (1)(g); the right to hear all evidence concerning appointment of a guardian, (1)(h); to be informed of each person seeking to be guardian, (1)(p); to require proof of incapacity and the need for a guardian to be proven by clear and convincing evidence, as provided in section 5306, (1)(q); and the right to choose the person who will serve as guardian, if the chosen person is suitable and willing to serve as provided in section 5313, (1)(aa).

burden of proof on the petitioner by clear and convincing evidence. The trial court stated:

“... You say it’s their burden of proof. Yeah, admittedly some evidence has to be presented by someone that Dorothy Redd’s preference, you know, the person nominated is not suitable so logically it would come from them.

But when we think of someone having a burden of proof, we think of the standard of proof where it’s – there’s clear and convincing evidence with regard to the need for a guardian. There isn’t really a – a standard of proof stated for determining whether one’s suitable. It’s a fact, I guess, to be decided by the judge, and then, a decision to appoint is an exercise of discretion by the judge. So I have to find whether Gary Redd is suitable or not. And I’m – and I honored her wishes as I said, but try as I might, I – I don’t know that I can find Gary Redd suitable any longer.” Tr 8/11/16, 22-3.

The trial court did not articulate the proper evidentiary burden of proof – or any burden of proof - and failed to apply any standard. It instead inserted its own opinion – not supported by the record or the actual facts. The court does not have unfettered discretion, which amounts to an improper assertion of judgment. Rather, Mr. Redd believes a decision must be based on the record by clear and convincing evidence.¹⁹

Conclusion. Questions by an interrogating attorney or party are not evidence. *Bartlett v Sinai Hospital of Detroit*, 149 Mich App 412, 417, 385 NW2d 805 (1986) (statements by counsel not evidence).²⁰ A decision must be based on competent evidence. *Dobrzanski v Dobrzanski*, 208 Mich App 514, 515, 528 NW2d 827 (1995); *Hisaw v Hayes*, 133 Mich App 636, 644, 350 NW2d 302 (1984); *Napuche v Mich Liquor Control Comm’n*, 336 Mich 398, 403, 58 NW2d 118 (1953)(due

¹⁹ There are times when nothing “in the appearance or the testimony of the witnesses would place the trial to judge their credibility.” See *e.g. Alderink v Alderink*, 336 Mich 11, 21, 57 NW2d 309, 313 (1953). This is especially true when there is a dispositional decision that involves a highly subjective, personal, and individual focus. And, the fact that there is only one trier-of-fact in subjective and emotional family cases such as guardianships makes it all the more important for that trier of fact to be an objective decision maker. See Tribe, *American Constitutional Law*, p. 503-504 (Foundation Press, 1978)(danger of action motivated by some substantively impermissible factor is heightened whenever a specific individual is the focus of a decision by a trier of fact).

²⁰ For example, questioning by Ms. Legardy is not “evidence. Her comments in her role as interrogator should not be relied upon (for example, when she was stating her own claims when questioning Gary Redd).

process so requires); *Adams v Adams*, 100 Mich App 1, 14, 298 NW2d 871 (1980)(error where findings not established by record evidence, but based on speculation, mere conclusions and improper consideration of visitation problems).

Ms. Legardy did not support her burden of finding Mr. Redd unsuitable (he fully functioned as a caretaker and supervisor for his mother), nor that she should be appointed as a successor co-guardian by clear and convincing evidence. The trial court did not articulate the correct evidentiary level of proof, let alone apply it. Applying a discretionary standard is far from clear and convincing evidence. And, as discussed in section C, *infra*, the trial court clearly erred in its factual findings. The order terminating the guardianship of Gary Redd should be reversed or vacated, and Mr. Redd should be reinstated as co-guardian.

C. The trial court committed legal error, abused its discretion, and clearly erred concerning its factual findings.

The court states its many attempts to ease tensions and solve conflicts have been unsuccessful. As time has gone on, more and more people have been alienated from Dorothy, but not due the actions of Mr. Redd. The court does not weigh the actions of the other family members. It has been Mr. Redd who has consistently cared for his mother. This is not a case where there is much money involved. It is a case in which responsibility is the key.

The court claims that Gary disobeyed his order to facilitate visitation with the other family members. Tr 8/11/16, 23. Testimony from Gary and Dorothy make clear that not only did Gary facilitate this visitation, he took Dorothy to this visitation contrary to her wishes.²¹

²¹ As noted in his Response to the petition to remove him as co-guardian, Gary stated that upon telling Dorothy about the court ordered police station visitation, she steadfastly refused to be made to see anyone that she did not want to see. Dorothy stated that “we went through this last year, when the judge and all the lawyers try to get me to see Katrina. And, the judge told me that if I didn’t want to see any family member, I didn’t have to. It was my choice. I didn’t want to see Katrina and the others then... But I don’t want to see them now!” Dorothy told Gary that she was not leaving with them and

Testimony from Officer Schneider, Dorothy and Gary that Gary brought Dorothy to the visitation was unrefuted.

The court accuses Gary of canceling scheduled visitations. Tr . 8/11/16, 29-30. Jennifer Carney was named co-guardian in order to facilitate visitations, yet only scheduled two. As Gary testified, one of these visitations was scheduled when Gary and Dorothy were to be out of town, a trip that the nonagenarian canceled at the last minute. Ms. Carney's office never rescheduled this visitation. The second Carney visitation was supposed to be with her sons Michael and Jerome; Jerome never showed up. Other scheduled visitations took place at the Southfield Police Department, where Gary had to talk Dorothy into going. The court, based on the one cancelled visitation, makes a finding that Gary cancelled scheduled visitations. Tr 8/11/16, 29.

The court also adopts a point made by Nichole that Gary was wrongfully present at the police station visitations. The court notes Gary Redd did not drop off, but rather "stood there during the entire visitation except for a brief period that he was willing to leave to allow Nichole Legardy to come in and visit with my granddaughter...I don't even think Gary Redd should have been there. I don't know why he was there, but I know he was there, and I can kind of see he really doesn't want to give anybody any privacy to visit with his mom, not while he's guardian."

Tr.8/11/16 , p. 31. The controlling court order provides:

It is ordered that: scheduled visitation for Dorothy Redd at Nichole Legardy's house every other Wednesday and every other Saturday from 11 AM until 7 PM starting on Saturday, 6/25/16 and the following Wednesday on 6/29/16 and alternating thereafter. The pick up/drop off location will be Southfield police station. See Appendix F.

Gary was not doing anything contrary to the court's order, nor was he the obstacle in this visitation.

It was Dorothy that did not want to visit, did not want to participate, refused to leave the police

not to leave the police station because she wanted to be taken back home after she talked to Nichole. Exhibit A to Gary Redd's Response to Petition to Remove Gary Redd As Co-Guardian and to Establish Visitation Schedule and for Access to Medical and Financial Records.

station, and limited the time for the visitation. See Statement of Facts, pp. 15-18.

The court finds contrary to the evidence and testimony that Gary disobeyed court orders as to turning over medical and financial information. Tr 8/11/16, 22-4. Jennifer Carney testified to the contrary. Tr 7/26/16, 89. Testimony from both Gary and Jennifer Carney make clear that Gary worked with Ms. Carney's office providing revisions and documentation as requested concerning his financial reporting.

Having made unsupported findings that Gary disregarded his orders, the court then says "So Gary Redd has this habit of not doing what my order says and claiming in his testimony that it was somebody else's responsibility." Tr 8/11/16, 24. The court accuses Gary of ignoring its orders and keeping Dorothy from visiting with her family members. Tr 8/11/16, 24. But he ignores the testimony of Gary, Dorothy, Kimberly Johnson, and even Nichole Legardy herself as to the many visits and contacts Dorothy had with family members that had made their animosity to Gary clear. Statement of Facts, pp. 10-14, 16-17, 19-23. The court criticizes Gary's relationship with Nichole, and his failure to explain the reasons for their estrangement, which it said left it flabbergasted:

"[T]he day where he was notified that Dorothy Redd needed help he shows up there, and who's there, Nichole Legardy, somebody that he hadn't talked to since Easter of 2009, five²² years apparently according to him, if he has to dates right. Who knows why? I don't know that we got into it much. She – he claimed that – well, I struck the testimony so I won't go into that. But he hadn't talked to his daughter for five years. I did strike that testimony about

²² It was actually a period of three years. The testimony of Gary Redd stricken by the judge addressed this period: Easter Sunday 2009, there was a gathering at Nichole's house on Northlawn in Detroit with Gary, Nichole, and Nichole's mother, among others. Nichole had too much to drink, became confrontational with Gary and everyone else in the family, and assaulted him twice; he had done and said nothing. Tr 8/4/16, 9-10.

The judge states that discussion of this 2009 incident and the ongoing animosity between Gary and Nichole have nothing to do with this case, and is irrelevant to his decision. Tr 8/4/16, 10-1. When Gary's counsel points out that they had been testimony from the rest of the family about past events, the judge says that with Gary's testimony they are only getting one side of the 2009 incident. So, he strikes Gary's testimony about the incident, despite counsel's arguments to the contrary. Tr 8/4/16, 11. The court then refers to this in his dispositional ruling.

what happened. So I won't talk about that, but it was five years according to his testimony that he didn't talk daughter, Nichole Legardy."

The court stopped Gary from testifying to the background of their estrangement (striking the testimony), and then it in its opinion, criticizes him for not explaining this background. Tr 8/11/16, 24-5. Gary's counsel argued that the information was relevant. (Tr. 8/4/16, p. 11). Mr. Redd's testimony should not have been stricken as stale and he should have been allowed to testify about this period – especially since the trial court relied on it (a lack of explanation) in its dispositional ruling. Tr. 8/11/16, p. 24-25. A decision must be based on record evidence, *Redding; Adams, supra*.

The court also apparently missed testimony as to Gary's intervention into Nichole's relationship with her husband – apparently invited by Nichole's husband – that renewed Nichole's animosity towards Gary. Gary's feeling that he has been disrespected by Nichole does not occur in a vacuum. She is treating him badly, it is from that intervention, and it led to this petition. Tr 8/11/16, 26. The court makes no attempt to reconcile the criminal charges against Nichole and the PPO (acknowledged by the court, Tr 8/11/16, 27, see Appendix G), with its discussion of the new estrangement between Gary and Nichole. The court wonders "why on earth does Gary Redd need a PPO against his daughter?... None of that had to happen." The court also says:

"I mean, Judge Langton out of nowhere ordered a PPO? ...Well if you want to defend the PPO go in Judge Langton's court. I just don't understand. That's part of the problem. Gary Redd in my view never needed to get a PPO. It -- is it possible that Nichole -- Nichole Legardy committed a criminal assault against Mr. Redd? Yes. Yet it is: PPOs are to keep people from going after people, chasing them down, stalking them, all that kind of stuff... That's what they're for... I think it's nuts that he has a PPO against his daughter I just do that's just my opinion. It's not a legal opinion. **It's a personal opinion...** Oh, I know it's in order of the Circuit Court judge. It has to be or you wouldn't have to PPO." Tr 8/11/16, 47-8 (emphasis added).

The court disregards Judge Langton's determination. The court specifically states that this is an opinion, "not a legal opinion ... a personal opinion." This is the definition (and acknowledgment) of insertion of a court's own judgment, which is not based on the record. The court refuses to take the

PPO as any indication that the problem in the relationship between Gary and Nichole is due to Nichole's actions.²³

The court is not accurate concerning Kimberly Johnson's testimony on her taking Dorothy to visit Valerie Bland, saying she was afraid for Gary to find out about the visit. Tr 8/11/16, 29. Ms. Johnson made clear that she and her former mother-in-law had their own relationship and their visit to Ms. Bland was in that context. In discussing gatherings that certain members of Dorothy's family do not attend, the court makes a number of findings contrary to the evidence. It says the Gary Redd's witnesses show that certain family members are not present. Tr 8/11/16, 31-2. Gary's witnesses, and the other witnesses as well, confirm that Dorothy saw all these family members during the time she was with Gary. The court claims that Katrina and Nichole are banned from Gary's house. Testimony indicates that Katrina has seen Dorothy at Gary's house, and any restrictions now on Nichole are due to the criminal charges against her and the PPO (after Mother's Day, 2016, immediately before the evidentiary hearing). See Statement of Facts, p. 10-11.

The court even criticizes Dorothy for taking Gary's side in his conflict with Nichole, saying that Dorothy should have stopped Gary. Tr 8/11/16, 32. This makes sense only if the court decides to favor Nichole over Gary contrary to the evidence and testimony. And it ignores the ward's preferences in choosing a guardian (and the long term visitation order prior to the June 2016 visitation order where Dorothy was permitted to choose who she would see).

The court does not hide its feelings about Gary, and its assumptions to put him in the worst possible light:

"You know, and you can see sort of a self-righteousness in Gary Redd throughout. I mean, even about the condition his mother was in back at the beginning when he got the call from, I don't know, and ex-wife, I guess Nichole's mother, and some friend who lived in the

²³ The court talks about the bad relationships Gary has with Nichole and his niece Katrina, but does not weigh their behavior Tr 8/11/16, 27-8.

neighborhood. You know, it was obvious to me from Gary Redd's testimony that he had no idea how his mother was living, none. And then to visit her. It – that's the impression I got. He had no clue what the mental and physical condition of his mother was until he got there that day... And certainly the brothers living – you know, her sons living with her bare a lot of blame and even shame for their mother getting in that condition, but Gary Redd has no business being self-righteous about it... You think a son would know, but he was busy doing other things it seems to me." Tr 8/11/16, 32-3.

This passage points out a striking oddity about the court's findings. The primary complaining parties in this matter are Dorothy's granddaughters: Nichole and Katrina. Both of them, however, saw Dorothy – testimony indicates frequently – notwithstanding the condition of their relationship with Gary (or at one time each other or as to Katrina, with other members of the family). They seem to be complaining that Dorothy is not seeing her sons enough. But these sons go largely unmentioned in the court's findings. Unrefuted testimony indicates that Jerome (Katrina's father) did not take the opportunity to see his mother. Michael and Sean apparently did see her, though infrequently. Importantly, Dorothy was frequently at Nichole's house, and yet Jerome, Michael, and Sean seem not to have taken advantage of any opportunity to visit with her at Nichole's. Neither Gary nor Dorothy are responsible for the separation between these three sons and their mother. Further, Dorothy was living with Jerome and Sean when she went into her decline, and Michael and Sean both had to be evicted from Dorothy (and Gary's) house for not paying rent, and yet the court questions why Dorothy sometimes resists seeing her other sons and wants to remain and be taken care of by Gary.²⁴

The court, based upon these unsupported findings, rules that Gary is not suitable to serve as guardian. Tr 8/11/16, 33. It finds that visitation will not be handled in any reasonable way while Gary remains as guardian and as long as Dorothy stays in Gary's house. It finds, based upon examples given, that Gary has not followed the court's orders and tried to alienate Dorothy from her

²⁴ Antonio lived out of state, and is not really involved.

granddaughters. It finds Gary complicit – based on what the court calls “circumstantial evidence” – in turning their mother against her sons. Tr 8/11/16, 34. The court ignores the wishes of the ward, and focuses exclusively on the strained family relations between Gary and two of Dorothy’s granddaughters (Nichole and Katrina), one of her sons (Jerome), and to a lesser extent another son (Michael).

The court finds Gary unsuitable as co-conservator, although no evidence was put forth as to any financial mismanagement.²⁵ The trial court’s order removing Gary Redd as guardian is not supported by the evidence (neither by preponderance or by clear and convincing evidence), is based on material errors concerning the facts, and should be vacated and Mr. Redd reinstated as the guardian.

D. The trial court did not properly honor Dorothy’s preference.

In its ruling on the record, the trial court states that the law provides that the person nominated by the ward is to be given preference for guardianship, and it is up to the court to decide whether the person suitable. The court continues that it has steadfastly followed the law for two years, through several hearings, and is bound by Dorothy’s preference. Tr. 8/11/16, p. 20. See MCL 700.5306a(1)(aa).

But the court then comments:

“But the interesting thing for me is I saw [Dorothy] coming to all these hearings one after another after another. No matter what time of day, she’s here. She looks great. If she can do that, why can’t she visit? Why can’t she go to people’s houses? Why does Gary Redd have to hover over her like he does in this picture? She does pretty well for herself it seems like. So I don’t know.” Tr 8/11/16, 35.

In making this statement, the court ignores that Gary has taken care of his mother for many years and that she “looks great” because of his care. According to her treating physician she is doing

²⁵ The trial court’s attitude about Gary first appeared after Gary’s original attorney was late for trial and the other family members – apparently in raised voices – began their complaints to the judge.

wonderfully under his care, and most significantly, Dorothy has clearly stated for over two years that she wants to live with her son Gary and have him as her guardian. See e.g. Statement of Facts, pp. 15-18. She has the right to “choose the person who will serve as guardian, if the chosen person is suitable and willing to serve, as provided in section 5313.” MCL 700.5306a(1)(aa). Priority is to be given to her choice. MCL 700.5313(1)(b).

As shown in 2015, when the trial court read the letter of her treating physician into the record at the 3/25/15 review hearing, Ms. Redd is capable and has the capacity to articulate what she wants, who she wants to see, and who cares for her. The trial court both acknowledges this (Tr. 8/11/16, p. 35) and ignores it.

The court also stated that Dorothy has been at “all these hearing” (which is her right, MCL 700.5306a(1)(g), but then erroneously puts the burden on her to make an effort as to visitation. She has a right to be at all hearings concerning appointment of a guardian.²⁶

The trial court mentions that Dorothy’s choice should be controlling, but gives it no real weight. The trial court has committed error, including failing to follow the controlling statutes, especially in light of Gary Redd’s overall suitability. The order should be vacated or reversed.

E. Remand to a different judge is appropriate.

Notwithstanding the requirements of MCR 2.003, in reversing orders and remanding, this Court has acknowledged in some cases that it would be beneficial to order future proceedings to be heard by a new trial judge. E.g., *Hawkins v Murphy*, 222 Mich App 664, 674(1997); *Kiefer v Kiefer*, 212

²⁶ See MCL 700.5306a(1) including: the right to object to the appointment of a successor guardian, (1)(a); the right to be present at a hearing, including all practical steps to ensure the right to be present, (1)(g); the right to hear all evidence concerning appointment of a guardian, (1)(h); to be informed of each person seeking to be guardian, (1)(p); to require proof of incapacity and the need for a guardian to be proven by clear and convincing evidence, as provided in section 5306, (1)(q); and **the right to choose the person who will serve as guardian, if the chosen person is suitable and willing to serve as provided in section 5313, (1)(aa).**

Mich App 176, 182, 536 NW2d 873, 876 (1995)(remanding for new judge where trial court made findings of fact regarding alimony issue without reviewing all the evidence, and transcript suggests trial judge has settled predisposition). See also; *Truitt v Truitt*, 172 Mich App 38, 48, 431 NW2d 454 (1988) ²⁷ *Flaberty v Smith*, 87 Mich App 561, 565, 274 NW2d 72 (1978). In addition, a judge can be disqualified, even in the absence of proof of personal bias, when due process concerns override the personal bias rule, *Crampton v Dep't of State*, 395 Mich 347, 350-355, 357-358, 235 NW2d 352 (1975)(due process disqualifies decision maker without actual bias showing where experience shows probability of actual bias too high to be constitutionally tolerable).

And under MCR 7.216(A), this Court has broad discretion to order miscellaneous relief, including to “enter any judgment or order or grant further or different relief as the case may require.” MCR 7.216(A)(7).

The court shows a disposition against Gary, both by its comments made about him and his testimony and by limiting his attempts to make his case. This case is about intra-family discord, and background on why the many family members involved do not get along is necessary to understand the dynamics of this attempt to displace Gary as his mother’s guardian and conservator. The court limits this as discussed in section (C), *supra* (concerning the 2009 Easter Sunday incident). The court not only limits Gary’s testimony about his issues with Nichole prior to the guardianship and other family dynamics, It ignores the testimony of Dorothy Redd and Kimberly Johnson, and all of the other witnesses for that matter, on both sides of the issue, that Dorothy did see her family members. The court ignores consistent testimony from Dorothy, Gary, and Kimberly Johnson and many of petitioner’s witnesses as well, that Gary did not keep his brothers from seeing their mother. When Jerome and Sean were living with Dorothy they allowed her to slide into delusions and infestations.

²⁷ This Court stated: “Due to the trial judge’s apparent moral indignation, he will be spared revisiting the issue in this case. Rehearing will be held before a different circuit judge.”

And when she moved in with Gary, they refused to visit her at his house – or at Nichole’s house. Gary cannot be held responsible that his brothers have avoided seeing or caring for their mother.

The court not only limits Gary’s testimony about his issues with Nichole prior to the guardianship and other family dynamics. It ignores the testimony of Dorothy Redd and Kimberly Johnson, and all of the other witnesses for that matter, on both sides of the issue, that Dorothy did see her family members. The court ignores consistent testimony from Dorothy, Gary, and Kimberly Johnson that Gary did not keep his brothers from seeing their mother. When Jerome and Sean were living with Dorothy they allowed her to slide into delusions and infestations. And when she moved in with Gary, they refused to visit her at his house – or at Nichole’s house. Gary cannot be held responsible that his brothers have avoided seeing or caring for their mother. The Court of Appeals “counts” witnesses, but does not address the real substance of the testimony.

The trial court appears displeased with Dorothy’s plainly expressed desire to stay with Gary.²⁸

The court also seems unhappy that Dorothy is talking about the case with Gary, picking up on a complaint made by Petitioner that Dorothy had learned about what is happening in the case from Gary:

“...the only way she could find out if -- is if someone tells her... Okay. It doesn’t really matter what her answer is anyway. I mean, it’s an obvious thing. She’s denying she saw it, and she won’t admit the obvious that there’s only two ways to know.” Tr 8/1/16, 157-8

But Mrs. Redd has a right to be at the hearing, to have notice, to choose her guardian and have a say in her life. See MCL 700.5306a(1)(rights of protected person).

²⁸ “-- why do you -- listen! You know what, ma’am? You want to make this choice of Gary Redd. You want to say these things against your children and grandchildren. I’m going to ask you specific questions. I want specific answers so you can show me that you understand what’s going on. Do you understand me?” Tr 7/26/16, 58

At one point, Gary said that when his mother first fell into distress, Nichole had stepped in and helped him take care of Dorothy. He had referred to her as “my rock.” See Tr 8/4/16, 20. Later, when Gary describes their subsequent estrangement and her disrespect toward him, the court appears to criticize his using the term “my rock.” Tr 8/4/16, 34. The court showed it was predisposed against Gary before any evidence had been presented or testimony heard. Early in the first day of hearing, the court began questioning Eric Carver, Dorothy’s guardian ad litem.

COURT: Then why then -- did she tell you why she refuses to visit with them?

CARVER: She just wants to be left alone to rest. That’s -- I did ask her that.

COURT: And not visit with her children or her grandchildren?

CARVER: Yes. She loves them all. I asked her that. And yes, she doesn’t have -- dislikes any of them. She loves them --

COURT: But never wants to --

CARVER: -- but she wants to be left alone...

COURT: Not even see them?

CARVER: Correct. She said I don’t want to see them now.

COURT: I guess since you’re her attorney I don’t expect you to answer. You can treat this --

CARVER: Right.

COURT: -- as a rhetorical.

CARVER: Okay.

COURT: Does that seem normal to you? You don’t have to answer. Tr 7/26/16, 45-6.

Dorothy herself responds to the court’s question:

DOROTHY: Well, all they want to do is just come to my house. They don’t actually do anything for me. All they want to do is just --

COURT: I’ll let you talk.

DOROTHY: -- how you doin’ grandma.

COURT: I’ll let you -- hang on a second.

DOROTHY: And that’s all. Gary is the only...-- somebody that takes care of me -

COURT: Just hold on, ma’am.

DOROTHY: -- and do for me. Tr 7/26/16, 46-7.

Mr. Carver states that he believes that she should stay at Gary’s, because it would give her peace of mind, which she has earned at age 92. Prior to any testimony being given or evidence presented, the court has already suggested that Dorothy is a victim of undue influence (no claim of undue influence was made in this matter), that Gary has alienated Dorothy from her family and specifically alienated

her from her other sons, and that leaving Dorothy with Gary would be wrong, all before getting to any facts. And, significantly, the court pointedly ignores Dorothy's responses to the court's rhetorical questions.²⁹

²⁹ The court then makes a series of statements showing it may have prejudged the matter:

COURT: But if the facts...indicate that Gary Redd has unduly influenced her, do I still leave her there?

CARVER: Well -- but the -- the answer is possibly.

DOROTHY: All that comes from is Katrina....

CARVER: Possibly because she's our pride and joy. She's a senior citizen here in the United States, and she should live the way she would want to... --

COURT: But even if that choice was unduly influenced by the son whom she expresses -- for whom she -- she has a preference?

CARVER: Um-hum.

COURT: You say yes?

CARVER: Yes, there is the possibility.

COURT: And we should -- we -- and we as Americans should be proud --

CARVER: Yes.

COURT: -- of that kind of situation where a son has alienated a senior citizen from her entire family.

...

CARVER: She's proud -- we're proud -- she's a proud citizen in the United States who's trying to live out her life in the best way possible.

COURT: I agree. But see it's in my court, Mr. Carver.

CARVER: Yes, sir. It --

COURT: And that's a problem.

DOROTHY: I don't want --

CARVER: -- and it --

DOROTHY: -- to be bothered.

CARVER: -- it -- and what it is, it's not a perfect world, Your Honor, and she deserves the very best. And I'm not sure --

COURT: So I should deliberately choose as a judge something that I believe is wrong?

...

CARVER: ... That's why I say it's not a perfect world, but at ninety-two I hope I have a say in where I'm going to stay. And I -- I hope I have that opportunity that she has. And she has told me that she wants to stay with Gary.

COURT: But looking forward, I don't know how many children you have, would you want it to be the case that at ninety-two that you're happy that one of your children alienated you from all of your others?

CARVER: Or supplied a place for her to out -- to live out her life in a --

COURT: Okay. You --

CARVER: -- very happy way.

COURT: -- that -- I think that was a pretty straight question, and you're not answering it. Never mind.

DOROTHY: Well I'm happy with Gary --

COURT: Never mind. This is all --

In such situations, remand to a new trier of fact may be appropriate.

E. The decision is not in the interests of Mrs. Redd.

Gary's disqualification was based on family members who uniformly testified that this is a family that does not get along. But the fact that Gary does not get along with his brother, or Dorothy does not get along with some of her sons or grandchildren, or Nichole does not get along with her father, is not relevant to whether Gary is qualified to serve as Dorothy's guardian – particularly where Dorothy is not mentally incapacitated, was able to clearly express both her preference for staying under Gary's care and her strong disinclination to see certain family members when she did not want to see them. This was not a case of Gary exerting any inappropriate influence over Dorothy and that he prevented Dorothy from maintaining relationships with several family members. This was Gary carrying out Dorothy's wishes.

The order removes Mrs. Redd from her desired peaceful environment – where the care was focused solely on her and offered her privacy and choices, and places her in a more chaotic and less private environment, among other things, most significantly ignoring her consistent and emphatic wishes to remain with her son Gary. See sections (A)-(D), supra; Statement of Facts, pp. 15-18, Tr 7/26/16, 47-51 (court colloquy with Mr. Carver, quoted above in fn. 29). The focus is on the fight between the family members and not on the person who is to be protected. The order is not in the interests of Mrs. Redd and should be vacated or reversed and the co-guardianship of Gary Redd should be reinstated.

DOROTHY: -- that's one thing, okay?

COURT: -- philosophical --

CARVER: Understood, Your Honor.

COURT: -- and we need to get to the facts. So....

Tr. 7/26/16, 47-51.

CONCLUSION: Leave to appeal should be granted to address an important construction of the statutes appointing and removing guardians (and appointing successor guardians) under EPIC.

RELIEF

Appellant respectfully requests that this Court grant leave to appeal to address the significant issues involved, reverse or vacate the order terminating Respondent's co-guardianship and appointing Petitioner as co-guardian, reinstate Mr. Redd as co-guardian, and grant any other relief deemed appropriate, including in lieu of granting leave, grant oral argument on application, or issue immediate relief as requested.

Respectfully submitted,

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Attorney for Appellant

Dated: October 31, 2017