2010 WL 5853984 (Ill.) (Appellate Brief)
Supreme Court of Illinois.

In re ESTATE OF Mary Ann WILSON, A Disabled Person.
Arnetta Williams, Guardian of the Estate of Mary Ann Wilson, Petitioner-Appellant,
v.
Karen A. Bailey, Respondent-Appellee.

No. 108487.
April 6, 2010.

Appeal from the Appellate Court of Illinois, First Judicial, District, Sixth Division
Trial Court No. 06 P 03549
Honorable Maureen E. Connors, Judge Presiding

Brief of Appellee

George H. Klumpner, Law office of G. H. Klumpner, Attorney for Respondent-Appellee, Karen A. Bailey, 2021 Midwest Road, Suite 200, Oak Brook, IL 60523, (630)705-5260, Cook County I. D. #12164.

ORAL ARGUMENT REQUESTED

1 *POINTS AND AUTHORITIES

ISSUES PRESENTED FOR REVIEW

Whether the Appellate Court correctly interpreted section 2-1001(a)(3) of the Code of Civil Procedure.

Whether all subsequent orders entered after the date of November 6, 2006 when the motion for substitution of judge for cause was denied are void.

STATUTES INVOLVED

§2-1001(a)(3) of the Code of Civil Procedure. Substitution of Judge.

(3) Substitution for cause. When cause exists.

(i) Each party shall be entitled to a substitution or substitutions of judge for cause.

***4** (ii) Every application for substitution of judge for cause shall be made by petition, setting forth the specific cause for substitution and praying a substitution of judge. The petition shall be verified by the affidavit of the applicant.

(iii) Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition. The judge named in the petition need not

testify but may submit an affidavit if the judge wishes. If the petition is denied, the case shall be assigned back to the judge named in the petition. 735 ILCS 5/2-1001(a)(3).

§2-10 of the Illinois Power of Attorney Act.

§ 2-10. Agency-court relationship. Upon petition by any interested person (including the agent), with such notice to interested persons as the court directs and a finding by the court that the principal lacks the capacity to control or revoke the agency: (a) if the court finds that the agent is not acting for the benefit of the principal in accordance with the terms of the agency or that the agent's action or inaction has caused or threatens substantial harm to the principal's person or property in a manner not authorized or intended by the principal, the court may order a guardian of the principal's person or estate to exercise any powers of the principal under the agency, including the power to revoke the agency, or may enter such other orders without appointment of a guardian as the court deems necessary to provide for the best interests of the principal; or (b) if the court finds that the agency requires interpretation, the court may construe ***5** the agency and instruct the agent, but the court may not amend the agency. Absent court order directing a guardian to exercise powers of the principal under the agency, a guardian will have no power, duty or liability with respect to any property subject to the agency or any personal or health care matters covered by the agency. Proceedings under this Section shall be commenced in the county where the guardian was appointed or, if no Illinois guardian is acting, then in the county where the agent resides or, if the agent does not reside in Illinois, then in any county. 755 ILCS 45/2-10.

STATEMENT OF FACTS

Petitioner's Statement of Facts is inadequate due to its omission of both the family relationships of Respondent, Respondent's husband, David Service, and Clifford Service to Petitioner and the procedural history of this case. Respondent respectfully submits verbatim the Statement of Facts presented to the Appellate Court in her brief with changes, deletions and additions as noted below in accordance with the convention for changes in statutory language.

Karen A. Bailey first met Mary Ann Wilson approximately 15 years ago. Vol. 6 of 8, R. C13. They became close friends. Vol. 6 of 8, R. C16. At the time they met Mary Ann Wilson was approximately 73, childless and widowed due to the recent death of her husband Charles Wilson. Vol. 6 of 8, R. C16, 20 and 23.

***6** Charles Wilson was good friends with Clifford Service.[1] Clifford Service had also known Mary Ann Wilson since the 1940's or 1950's. Vol. 6 of 8, R. C176-7. After the death of Charles Wilson in approximately 1989-90, Clifford Service moved into Mary Ann Wilson's home at 10963 S. Sangamon in approximately 1990 and remained there until he was forcibly removed on May 3, 2006. Vol. 6 of 8, R. C23; Vol. 7 of 8, R. C4-6. After the death of Charles Wilson, Clifford, Mary Ann, Clifford's son David and Karen A. Bailey spent all of the major holidays together. Vol. 6 of 8, R. C16-17, 178. In 2004 Mary Ann asked Karen A. Bailey to become her agent under powers of attorney for healthcare and property. Vol. 6 of 8, R. C25-26. Before accepting this responsibility, Karen asked to formalize this relationship through written powers of attorney which she prepared and were properly signed and witnessed on January 16, 2004 in Cook County Commissioner Jerry Butler's conference room.[2] Vol. 6 of 8, R. C36-8. Numerous people were present for the signing which occurred publically during regular business hours. Vol. 6 of 8, R. C37. In addition to signing the Power of Attorney for Healthcare (a photocopy appears at Vol. I, R. C56-62), Mary Ann also ***7** signed a Power of Attorney for Property (photocopy at Vol. I, R. C40-55), a Last Will and Testament (photocopy at Vol. I, R. C63-67) and an Advanced Healthcare Directive (photocopy Vol. I, R. C68-71). Prior to signing these documents, Karen A. Bailey had assisted both Mary Ann and Clifford Service in daily living needs and payment of living expenses. Vol. 6 of 8, R. C77, 81, 83, 87; Vol. 5 of 8, R. C33-4.

After execution of the powers of attorney, Karen instituted a formal record-keeping procedure. She purchased a 3 foot tall white Tupperware box kept in a corner of the dining room at 10963 S. Sangamon where she kept most of her original receipts for

expenditures. Vol. 6 of 8, R. C49-50. She kept some original receipts at her home in Crete, Illinois (Vol. 7 of 8, R. C20) and also kept duplicates of some of the original receipts in the Tupperware box at her home. Vol. 7 of 8, R. C51, 136. She testified that she tried to keep receipts for every expenditure or action she took with Mary Ann's money. Vol. 7 of 8, R. C136. She also took Mary Ann and Clifford Service to their medical appointments (Vol. 6 of 8, R. C83) and at their request purchased diabetic shoes for Clifford Service (Vol. 5 of 8, R. C17, 48) and a massage chair for Mary Ann which had been suggested by case worker Don Devitt at Metropolitan Family Services. Vol. 5 of 8, R. C62. She arranged for and paid two part-time care givers, one a registered nurse (Vol. 5 of 8, R. C31; Vol. 6 of 8, R. C78-9) and another a certified nurse assistant from the Veterans Administration Hospital for the **elderly** couple. Vol. 5 of 8, R. C26. She also arranged for lawn service and snow removal at both Mary Ann's house and Clifford Service's house at 10213 S. May where he no longer resided. Vol. 5 of 8, R. C27-8. At one time Mary Ann had a personal driver which Karen discontinued ***8** since she believed this was unnecessary. Vol. 5 of 8, R. C28. Mary Ann owned a horse in St. Anne's County, Illinois which David Service had purchased for her. Vol. 7 of 8, R. C161, 175.

Mr. Don Devitt at Metropolitan Family Services visited Mary Ann and Clifford Service on 5 occasions - **January 12, 2006** (Vol. 6 of 8, R. C112-3), **January 17, 2006** (Vol. 6 of 8, R. C116), **February 3, 2006** (Vol. 6 of 8, R. C122-3), **March 27, 2006** (Vol. 6 of 8, R. C124) and **April 26, 2006** (Vol. 6 of 8, R. C129) at Mary Ann's home and on each occasion found them to be clean, well supplied with good food, living in a clean home, with no foul odors and in clean clothes. Vol. 6 of 8, R. C114-5, 122, 124 and 129. Three of Mr. Devitt's visits were unannounced. Vol. 6 of 8, R. C122, 125 and 127. [3] Mary Ann herself denied having poor care at home. Vol. I, C5.

By pooling their social security checks, civil service retirement checks, railroad retirement checks (Vol. 1 of 8, R. C121), a personal injury settlement of Clifford Service, and inheritances from Clifford Service's wife, Robietta, and two brothers (Vol. 6 of 8, R. ***9** C47) the couple had amassed the sum of approximately $200,000 by 2005. Vol. I, R. C35, 37. While the majority of these funds were the property of Clifford Service (Vol. 3 of 8, R. C529-30; Vol. 5 of 8, R. C203; Vol. 6 of 8, R. C45-6), they were commingled with funds of Mary Ann and placed in accounts under her name only. Vol. 5 of 8, R. C204. The majority of these funds were, according to uncontradicted sworn testimony of Karen A. Bailey, withdrawn at the specific request of Mary Ann Wilson and placed in a locked box in a locked closet in the master bedroom. Vol. 5 of 8, R. C71-2; Vol. 5 of 8, R. C23, 146, 170, 185-6, 194, 195 and 200. Karen A. Bailey testified that she was unaware of the box in the closet containing this large sum of cash until 2005, when Mary Ann took her to the closet and showed her the cash. Vol. 5 of 8, R. C34-6, 70. She testified that her initial reaction was to ask Mary Ann if she thought it was a good idea to keep such an amount of cash in her home (Vol. 6 of 8, R. C35-6), to which Mary Ann responded that she wanted it there because her relatives were trying to get her money. Vol. 5 of 8, R. C195, 207.

On May 3, 2006 in the morning several squad cars of Chicago police, a representative from the City Department of Aging, Sherri Ponce DeLeon, Arnetta Williams and her husband Walter Williams appeared at Mary Ann's home and demanded entrance. Vol. 7 of 8, R. C4-6. Mary Ann and Clifford Service were removed from 10963 S. Sangamon and transported to St. Mary of Nazareth Hospital. Vol. 7 of 8, R. C87-8. Mary Ann was put in the psych unit (Vol. 7 of 8, R. C9) despite the fact that she had no prior history of mental illness. Vol. 7 of 8, R. C10. Mr. Clifford Service was put in a different part of the hospital where he stayed for about 2 weeks then was transferred ***10** to Cook County Hospital where he stayed for approximately 4 to 7 days. Vol. 7 of 8, R. C24. When he was discharged from Cook County Hospital, his son placed him in the Glenwood Nursing Home. Vol. 7 of 8, R. C24. This was because he could not return to 10963 S. Sangamon after May 176, 2006 when Arnetta Williams had the locks changed (Vol. 7 of 8, R. C81-2; Vol. II, R. C21) in violation of the court order appointing her temporary guardian which had been entered May 15, 2006. Vol. II, R. C87-8.

On June 8, 2006 Karen A. Bailey appeared for the first time before the trial court with her attorney Everette A. Braden. [4] Over the request of her attorney Mr. Braden that the court schedule a hearing (Vol. II, R. C25), the trial judge instead had Karen Bailey sworn and conducted a vigorous and sarcastic questioning of Mr. Braden's client. Vol. II, R. C26-59. The matter had been noticed on Mr. Braden's emergency motion to vacate order (Vol. I, C29-73) and requested that all prior orders of court

be vacated until a hearing could be held pursuant to section 2-10 of the Durable Power of Attorney Law. 755 ILCS 45/2-10. It attached as exhibits the extant powers of attorney for healthcare and property granted by Mary Ann Wilson to Karen A. Bailey and argued that such powers of attorney were still in force unless and until revoked. Vol. I, C33. It also brought the court's attention to the fact that Clifford Service no longer had a place to live since the temporary guardian, Arnetta Williams, had changed the locks on May 176, 2006. Vol. I, C35-6.

On June 8, 2006 the trial court entered an order denying Karen Bailey's ***11** emergency motion to vacate order, motion for injunction and motion for temporary restraining order without either requiring responsive pleadings or setting any of these motions for hearing.' Vol. II, R. C44; Vol. I, C75. A second motion to dismiss emergency petition to revoke agency and for accounting was filed by Mr. Braden. Vol. I, C95-101. It also was denied by the trial court without requiring either responsive pleadings or a hearing. Vol. II, R. C65-66, 70-76.

On June 15, 2006 various interested persons pursuant to agreement and with court approval were granted entry into 10963 S, Sangamon by the temporary guardian Arnetta Williams' key. Vol. II, R. C70. The purpose was to determine whether or not the approximately $200,000 cash in the closet was still there. Uniformed Chicago police were present at the scene at the request of George H. Klumpner, one of Karen Bailey's attorneys. Vol. 6 of 8, R. C61-2.

Upon exiting the home it was agreed there were no signs of forced entry, that the home had been ransacked and the money was missing. Vol. 6 of 8, R. C62-3. Karen A. Bailey filled out a sworn report of theft immediately with the Chicago police officers who were present. Vol. 6 of 8, R. C63.

After additional court appearances on June 29, 2006 (Vol. II, R. C61-112) and July 5, 2006 (Vol. I, C118, 119, 120, 122-3), Mr. Braden filed a motion for substitution of judge for cause on October 16, 2006 (Vol. 2 of 8, C313-4) which came on initially for hearing on October 17, 2006. Vol. 2 of 8, C356. The essence of Mr. Braden's motion for substitution of judge for cause was that since the proceedings on June 8, 2006 the trial court had assumed the role of an advocate without remaining impartial towards his ***12** client. Vol. 2 of 8, C314. The motion requested that it be referred for hearing to another judge pursuant to section 2-1001(3)(iii) of the Code of Civil Procedure. Vol. 2 of 8, C361.

By order entered November 6, 2006 the trial court found that Mr. Braden's motion for substitution of judge for cause did not meet a threshold showing of prejudice, therefore she would not refer it to another judge for hearing and it was denied. Vol. 2 of 8, C494.

On November 11, 2006 hearing commenced on the guardian ad litem's emergency petition to revoke agency and for accounting previously filed June 8, 2006. Vol. 5 of 8, R. C2. It continued on December 7, 2006 (Vol. 5 of 8, R. C104), February 21, 2007 (Vol. 5 of 8, R. C224), February 23, 2007 (Vol. 6 of 8, R. C93), February 28, 2007 (Vol. 6 of 8, R. C223), March 7, 2007 (Vol. 7 of 8, R. C99), March 21, 2007 (Vol. 7 of 8, R. C199), March 27, 2007 (Vol. 8 of 8, R. C81), March 28, 2007 (Vol. 8 of 8, R. C165) and March 29, 2007 (Vol. 8 of 8, R. C199). At the conclusion of the hearing the trial court entered judgment revoking all powers of attorney granted by Mary Ann Wilson to Karen A. Bailey and entered judgment in favor of the estate of Mary Ann Wilson and against Karen A. Bailey in the amount of $297,708.95. Vol. 4 of 8, R. C821-2.

13** ***ARGUMENT

I.

THE PLAIN MEANING OF THE STATUTE SHOULD BE GIVEN EFFECT

Standard of Review: A court has no authority to depart from the plain meaning of the law by reading into it an exception, limitation, or condition that the legislature did not intend. *Town & Country Utilities, Inc. v. Illinois Polution Control Board*, 225 Ill. 2d 103, 117, 866 N.E.2d 227, 235 (2007).

As the Appellate Court correctly held "A two-stage hearing process in which the first judge decides whether the allegations are sufficient and the second judge decides whether they are true violates the clear mandate: "*[u]pon the filing* of a petition for substitution of judge for cause, *a hearing* to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition." (Emphasis added.) 735 ILCS 5/2-1001(a)(3)(iii) (West 2006). If the legislature wanted the initial judge to control the disposition of a petition seeking his or her substitution for cause, the legislature could have included conditional or limiting language to that effect. The legislature did not provide for a "threshold screening" before a civil action is transferred for hearing by another judge, and we have no authority to depart form the plain language of a law by reading into it an exception, limitation, or condition that the legislature did not intend. *Town & Country Utilities*, 225 Ill 2d at 117, 866 N.E.2d at 235. We believe the procedure described in *In re Marriage of Schweihs*, 272 Ill. App. 3d 653, 650 N.E.2d 569 (1995)) is what the legislature envisioned." Slip Opinion at 17.

***14** The ability of the trial court here to control whether or not Respondent's motion for substitution of judge for cause would be transferred to another judge for a hearing effectively denied Respondent the remedy granted her in the statute. 735 ILCS 5/2-1001(a)(3). The denial of such a remedy is not trivial since it implements every litigant's right to a fair and impartial hearing. As the Appellate Court stated: "Transferring the motion for consideration by a judge whose neutrality is not in question is in accord with the spirit of the law, which demands that every case be fairly and impartially tried. *People v. Dieckman*, 404 Ill. 161, 164, 88 N.E. 433, 434 (1949)." Slip Opiniion at 21.

The opinion of the Appellate Court below is in accord with the first reviewing court precedents interpreting the statute after the statute was amended. Pub. Act 87-949, §1, eff. January 1, 1993. *Jiffy Lube International v. Agarwal*, 277 Ill. App. 3d 722, 661 N.E.2d 463 (1996) and *In re Marriage of Schweihs*, 272 Ill. App. 3d 653, 650 N.E.2d 569 (1995). After reviewing the legislative history, the plain meaning of the statute and its interpretation in the *Jiffy Lube* case, the Appellate Court concluded "...the statutory provision at issue does not authorize an Illinois judge accused of bias or prejudice in a civil proceeding to control the disposition of a petition seeking change of judge for cause.." Slip Opinion at 16.

Petitioner's argument reduced to its simplest form is that Respondent's right to a fair and impartial hearing is subordinate to the presumption that a judge is impartial. Such an argument ignores human nature and the checks and balances in our Republic to control it. It also ignores the well documented possibility, presumably known to the legislature in enacting this remedial statute, that judges sometimes do not act impartially. ***15** *See, for example, Diamond Mortgage Corp. v. Armstrong*, 116 Ill. App. 3d 64, 530 N.E.2d 1041 (1998); *Goshey v. Dunlap*, 16 Ill. App. 3d 29, 305 N.E.2d 648 (1973).

II.

THE TRIAL COURT ASSUMED AN ADVERSARIAL ROLE TOWARDS RESPONDENT AT HER FIRST COURT APPEARANCE

Standard of Review: A judge should avoid extensive questioning and must not advocate a particular position. *Olson v. Staniak*, 260 Ill. App. 3d 856, 864, 632 N.E.2d 168, 175 (1994).

All court hearings prior to Respondent's first court appearance on June 8, 2010 were *ex parte* and without notice of any type to either Respondent or her attorney. Vol. I, C4; Vol. I, C12-16; Vol. I, C21 and Vol. II, R. C3-10. This despite the fact that as a known holder of powers of attorney (Vol. I, C8-11) Respondent was entitled by statute to notice. 755 ILCS 45/2-10.

On June 8, 2006 when she first appeared in court, accompanied by her counsel, Everette A. Braden, for a status report, it was the intention of her attorney to obtain a briefing schedule and a hearing date on her motion to vacate the prior *ex parte*

order appointing a temporary guardian, for injunctive relief and for an accounting from Petitioner, who then was in unlawful possession of Mary Ann Wilson's home having changed the locks on May 16, 2010 without legal authority. Vol. I, C32-73; Slip Opinion at 6-8; Vol. II, R. C87-88 and 95-96. Instead, what occurred was "Bailey was then placed ***16** under oath and the court questioned her regarding Wilson's assets and health. The court's examination of Bailey spans 15 pages in the 50-page transcript of the June 8, 2006, proceedings." Slip Opinion at 8. At the conclusion of her questioning, the trial court denied Respondent's motion for a temporary restraining order in the absence of either a written response of Petitioner or a hearing and on its own motion ordered Respondent to file an accounting within 19 days. Slip Opinion at 10-11.

The examination by the trial court, and frequent interruptions by the trial court of Respondent's attorney when he attempted to speak on behalf of his client, is quoted extensively by the Appellate Court. Slip Opinion at 8-11. The entire transcript appears at Vol. II, R. C11-60.

Respondent's motion for substitution of judge for cause alleged as grounds that the judge disregarded the function of a judge and assumed that of an advocate and also predetermined a pending motion. Slip Opinion at 18. Respondent's request that her motion for substitution of judge for cause be heard by a different judge was also made repeatedly. Slip Opinion at 11-12.

As the Appellate Court correctly stated "Thus, there are instances when questions from the bench are warranted. Even so, "the instances are rare and the conditions exceptional which would justify *** an extensive examination of a witness." *Goshey v. Dunlap*, 16 Ill. App. 3d 29, 31, 305 N.E.2d 648, 650 (1973). Notably, "[w]hen the court conducts a lengthy examination it is difficult for the judge to preserve a judicial attitude and the appearance of impartiality, and counsel may find himself in the embarrassing position of objecting to what he deems are improper questions." ***17** *Goshey*, 16 Ill. App. 3d at 31, 305 N.E.2d at 650." Slip Opinion at 19.

III.

ATTORNEYS SHERYL FUHR AND SANDRA THIEL HAVE DISREGARDED THEIR OBLIGATIONS UNDER RULES 3.3(a) AND (b) OF THE RULES OF PROFESSIONAL CONDUCT BY FAILING TO CORRECT MATERIAL STATEMENTS OF FACT KNOWN BY THEM TO BE FALSE

Standard of Review: An attorney in Illinois has an obligation to report violations of disciplinary rules to the Attorney Registration and Disciplinary Commission. *In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790 (1989).

Rule of Professional Conduct 3.3(a)(1)(4) and (b) is quoted below:

"(a) In appearing in a professional capacity before a tribunal, a lawyer shall not:

(1) make a statement of material fact or law to a tribunal which the lawyer knows or reasonably should know is false;

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures;

(b) The duties stated in paragraph (a) are continuing duties and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

The false statement of a material fact originally made in the Report of Guardian Ad Litem of attorney Sandra Thiel is quoted below from the record on appeal:

***18** *"Dr. Handrup* He reported "found in home by cousin, totally abandoned, in feces, confused, cannot talk or walk, had lost a lot of weight and protective services was called." She "lived with her confused husband and she is unkempt, responds poorly to questions, is disoriented, has tremors." Vol. I, C6 (Emphasis in original).

The foregoing statement was repeated by attorney Sheryl Fuhr in the Brief of Petitioner-Appellee at page 1 of that brief, Appellate Court Docket Number 06-2115, in the case of *In re Estate of Wilson*, 373 Ill. App. 3d 1066, 869 N.E.2d 824 (2007).

The foregoing statement was at all times contested by Respondent and was also specifically contradicted by the impartial witness, Don Devitt, of Metropolitan Family Services. A transcript of Mr. Devitt's testimony appears in the record on appeal at Vol. 6 of 8, R93-222. The false statement referred to above originally by attorney Thiel, repeated by attorney Fuhr (including in briefs filed with this Honorable Court) [5] was contested at all times by Respondent in her briefs filed before the Appellate Court in docket number 06-2115 including in her Petition for Rehearing filed in that cause to no avail.

It is respectfully submitted that under Rule of Professional Conduct 3.3(a)(1)(4) and (b) both attorneys Fuhr and Thiel had affirmative professional obligations to correct this misstatement of a material fact once it became known to them. They did not do this and attorney Fuhr has even repeated such false statements to this Honorable Court. See footnote 5. Their silence, and in Fuhr's case continued misrepresentation, misled the ***19** Appellate Court in *In re Estate of Wilson*, 373 Ill. App. 3d 1066, 869 N.E.2d 824 (2007) to believe the truth of these falsehoods, and rely on them in a published precedent.

The following fees were awarded to Sandra Thiel and Sheryl Fuhr through the date of the trial court's judgment of March 29, 2007.

Date:	***Payee:***	***Amount:***	***Record Page:***
2/23/07	Fuhr	$29,531.25 Vol.	3 of 8, R. C746
2/23/07	Thiel	$ 2,726.75 Vol.	3 of 8, R. C746
2/23/07	Thiel	$8,768.41 Vol.	3 of 8, R. C746

The net effect of all of these fee awards was to transfer the wealth that an **elderly** African-American couple had accumulated over a lifetime of hard work to attorneys completely unknown to them, one of whom was court appointed. These fee awards should also be reversed since the action of both attorneys Thiel and Fuhr did not benefit the disabled person who was living happily, independently and in her own home prior to Thiel and Fuhr's involvement. This Honorable Court has the authority under Supreme Court Rule 366(a)(5) to summarily reverse such fee awards due to the failure of attorneys Thiel and Fuhr to correct the materially false statement that Mary Ann Wilson was "found in her home by cousin, totally abandoned, in feces."

IV.

BY SUA SPONTE EXAMINING RESPONDENT BAILEY DURING A STATUS REPORT AND ANNOUNCING THE OUTCOME OF A MOTION WHICH HAD NOT BEEN HEARD, THIS PARTICULAR PETITION MADE A THRESHOLD SHOWING OF JUDICIAL BIAS

***20** *Standard of Review:* All orders entered by the same judge after failure to refer a motion for substitution of judge for cause to another judge for hearing are void. *Jiffy Lube International, Inc. v. Agarwal*, 277 Ill. App. 3d 722, 727, 661 N.E.2d 463, 467 (1996).

Karen A. Bailey filed a motion for substitution of judge for cause which came on for hearing on October 17, 2006. Vol. 2 of 8, C313-4, 356. The motion specifically advised the trial court that the applicable statute required that a hearing be conducted by a different judge other than the one named in the motion. Vol. 2 of 8, R. C361.

Even though the Appellate Court stated it did not agree with decisions which allow for a threshold screening in a civil action (Slip Opinion at 21), the Appellate Court correctly distinguished the cases of *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 248, 854 N.E.2d 774, 783 (2006), which relied on *Alcantar v. Peoples Gas Light & Coke Co.*, 288 Ill. App. 3d 644, 649, 681 N.E.2d 993, 996-97, which relied on *People v. Damnitz*, 269 Ill. App. 3d 51, 55, 645 N.E.2d 465, 468-69 since "they did not involve allegations that the judge had assumed an advocacy role or had predetermined the outcome of the very matter pending before that judge." Slip Opinion at 22. The Appellate Court correctly concluded that in such a situation, amply demonstrated by the extensive citation of record proceedings, all orders entered by the trial court here were void and must be vacated. *Slip Opinion at 22*.

V.

THE TRIAL COURT ERRED BY NOT GRANTING THE MOTION TO DISMISS THE EMERGENCY PETITION TO REVOKE AGENCY AND FOR ***21** *ACCOUNTING*

Standard of Review. A guardian ad litem is not required after a plenary guardian of the person is appointed. *In re Mark W.*, 371 Ill. App. 3d 81, 96 (2006). A guardian ad litem owes the court a duty to act impartially and not take a position adverse to one of the litigant's interests. *In re Mark W., 371 Ill.* App. 3d 81, 95 (2006).

In this case the guardian ad litem on June 8, 2006 after conducting one brief interview of the alleged disabled person on Sunday May 14, 2006, filed an emergency petition to revoke agency and for accounting that became the basis for the hearing in this case. Vol. II, R. C64; Vol. 4 of 8, C821. Even after a plenary guardian was appointed July 5, 2006 (Vol. I, C119), the guardian ad litem participated in hearings on her petition on November 20, 2006; December 7, 2006; February 21, 2006; February 23, 2006; February 28, 2007; March 7, 2007; March 21, 2006; March 27, 2006; March 28, 2007 and March 29, 2007 over the objections of Karen A. Bailey. Vol. I, C97-8; Vol. 5 of 8, R. C245-6. The guardian ad litem also submitted a bill for services rendered from May 12, 2006 through August 7, 2006 for $2,726.75 (Vol. 1 of 8, C115-7) and a second fee petition for $8,768.41 (Vol. 4 of 8, C763-5) both of which were erroneously approved by the trial court. Vol. 3 of 8, C746.

The lack of impartiality of the guardian ad litem substantially interfered with the trial court proceedings. This case was filed May 12, 2006 at 1:38P.M. Friday (Vol. I. C3) and Sandra Thiel was appointed guardian ad litem the same afternoon. Vol. I, C4. The order appointing her directed her to file a written report and be present at a hearing ***22** the following Monday morning, May 15, 2006. The report she filed was based on one interview she conducted Sunday May 14, 2006 at the hospital which according to her time records lasted 100 minutes. Vol. 1 of 8, C116.

While Ms. Thiel's report stated "She [Mary Ann Wilson] ***may*** have been found in her own feces" (Vol. I, C5)(emphasis supplied), it is clear that this equivocal statement could not have been based on personal observations of Sandra Thiel since the only personal observation by her of Mary Ann Wilson up to that time was at the hospital. Vol. 1 of 8, C116. This inflammatory statement was vigorously contested at the hearing, was never supported by testimony of anyone and in fact was specifically contradicted by the sworn testimony of everyone who personally observed Mary Ann Wilson prior to her forced hospitalization on May 3, 2006. (See, for example, testimony of Don Devitt, the caseworker assigned by Metropolitan Family Services which appears at Vol. 6 of 8, R. C104-170, the testimony of Karen A. Bailey appearing at Vol. 5 of 8, R. C11-90; Vol. 6 of 8, R. C7-91 and the testimony of David Service appearing at Vol. 6 of 8, R. C173-220, 231-249; Vol. 7 of 8, R. C2-45.

Due to Ms. Thiel's unknown reason for over dramatization, the trial court on May 15, 2006 appointed Arnetta Williams temporary guardian without compliance with the statutory requirement that the "order shall state the actual harm identified by the court that necessitates temporary guardianship". See order appointing temporary guardian at Vol. I, C13; 755 ILCS 5/11a-4. On May 16, 2006, within one day after her appointment, Arnetta Williams had the locks changed despite the fact that the order appointing her temporary guardian gave her no such authority and prior to the time that the alleged ***23** disabled person was even served with summons. (Mary Ann Williams was not served with summons until June 15, 2006. Vol. I, C88.)

By the time Everette A. Braden appeared with his client, Karen A. Bailey, for the first time on June 8, 2006, Mary Ann Wilson had been forcibly removed from her home on May 3, 2006 never to return again, Clifford Service had been forcibly removed from the home never to return again, summons had not been served upon Mary Ann Wilson, the holder of the powers of attorney Karen A. Bailey had not been given notice as required by statute (755 ILCS 5/11a-8), a temporary guardian had been appointed without notice and in the absence of required court findings and the temporary guardian had violated the court order of May 15, 2006 appointing her temporary guardian by entering the home and changing the locks on May 16, 2006 preventing the **elderly** couple from ever returning to their home where they had lived for at least 16 years. Vol. I, C35-6. Rather than require responsive pleadings to Mr. Braden's well-taken motion and setting a hearing date as would have been accepted court procedure, the trial court after first determining that the temporary guardian was in possession of the home under color of her prior order of May 15, 2006, **but specifically in violation of that order** (Vol. II, R. C87-8), proceeded to examine Mr. Braden's client in an adversarial manner. Vol. II, R. C26-59. The tone of this examination was sarcastic and inappropriate. Vol. I, R. C26-59. The proceedings were in violation of clear procedural requirements requiring responsive pleadings and a hearing on the matters presented by Mr. Braden's motion. *Jurco v. Stuart*, 110 Ill. App. 3d 405, 409 (1982); *Lawler International v. Carroll*, 107 Ill. App. 3d 938, 942 (1982). The trial court did not even make the most basic ***24** arrangements to determine whether or not Mary Ann Wilson had been served, was able to attend court, wanted to be represented by *independent* counsel and otherwise assert her rights to her liberty and property. Instead, by following the mislead of the appointed guardian ad litem, the whole proceeding became now focused on whether or not Karen A. Bailey had done anything wrong rather than the paramount concern of what was in the best interests of the alleged disabled person and how to gather *facts* to make that determination.

Arguably Karen A. Bailey, David Service, Clifford Service and Mary Ann Wilson were in the best possession of these facts. Yet, inexplicably, the trial court denied them all even the most basic opportunity to be heard.

The result has become a tragedy for Mary Ann Wilson, Clifford Service and Karen A. Bailey. Normal understandable intimate human relations that had occurred daily for decades were summarily destroyed by a trial court that did not listen, was not impartial and rushed to judgment essentially by not following numerous provisions of the Probate Act intended to safeguard the rights of an alleged disabled person. See 755 ILCS 5/11a-8 (contents of petition), 5/11a-4 (order appointing temporary guardian to state actual harm), 5/11a-10 (limited powers of guardian ad litem), 5/11a-11 (rights of respondent to a hearing, jury trial, independent medical examination and independent counsel of her choice).

Perhaps this all could have been avoided if the trial court had the decency and courtesy to simply listen to Mr. Braden. Her inappropriate dismissive and condescending attitude to Mr. Braden, failure to follow established procedures and demonstrated lack of ***25** impartiality on the record caused Mr. Braden to seek a change of judge for cause. Vol. 2 of 8, R. C313-4. As previously stated, the trial court even refused to follow the statute in that regard by requiring such a hearing before a different judge. 735 ILCS 5/2-1001(a)(3)(i) and (iii).

VI.

THERE IS NO AUTHORITY UNDER THE PROBATE ACT TO "SUSPEND" AN AGENT'S POWER OF ATTORNEY

Standard of Review. The language of the statute is considered the most reliable indicator of the legislature's objectives in enacting a particular law. *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill. 2d 103, 117, 866 N.E.2d 227, 235 (2007).

On May 15, 2006, the first business day after the case was filed, and without notice of any type to either principal or agent, the trial court "suspended" the powers of attorney for healthcare and property granted by Mary Ann Wilson to Karen A. Bailey. Vol. I, C16. While authority exists in Illinois to revoke an agent's power of attorney after the filing of a petition, notice, a hearing and specific court findings (755 ILCS 45/2-10), no authority exists under Illinois statutes to "suspend" a power of attorney. This simple fact was pointed out to the trial court *ad nauseum* by Karen Bailey's attorney, Mr. Braden. Vol. I, C32-38; Vol. I, C92-101; Vol. I, C105, 110-115. On each such occasion, the trial court failed to follow the law. Vol. I, C75, 123. The stated reason given was that she had merely "suspended" the powers of attorney and not revoked them. ***26** Vol. II, R. C8, 25. While this is a distinction without a difference, the trial court failed to cite any legal authority in support of this novel proposition. The record does show that the guardian ad litem, who originated the proposition that this could be done (Vol. II, R. C8), was an enthusiastic supporter. Vol. II, R. C48.

The testimony is clear that Mrs. Bailey did her best to keep receipts of all expenditures and withdrawals. After Mary Ann's request that Karen become her agent (Vol. 6 at 8, R. C25-26), Karen decided to formalize this relationship, as is appropriate, by having formal powers of attorney for healthcare, property, a last will and testament and an advanced healthcare directive all signed and witnessed. Vol. 6 of 8, R. C36-8. These documents were all signed in Cook County Commissioner Jerry Butler's conference room, before numerous witnesses, during regular business hours and notarized. Vol. 6 of 8, R. C36-8. The very first court appearance by Mr. Braden on behalf of Karen A. Bailey on June 8, 2006 referenced these documents which were attached to his initial pleading. Vol. I, C40-73. After signing these documents in the august location of a Cook County Commissioner's conference room in the county building, Mrs. Bailey purchased a 3 foot high Tupperware box that she kept in a corner of the dining room where she kept almost all of the original receipts. Vol. 6 of 8, R. C49-50. She testified that she kept a few original receipts at her home (Vol. 7 of 8, R. C20) and she also kept some duplicate receipts of the original receipts at her home. Vol. 7 of 8, R. C51, 136. She also testified that she has no criminal history and that prior to being hired by Commissioner Butler she passed a thorough background check. Vol. 6 of 8, R. C9-10.

***27** At her first court appearance on June 8, 2006 the trial court in addition to cross-examining her at its own instance, ordered Mrs. Bailey to prepare an accounting in 19 days. Vol. II, R. C45-6. This occurred on the same date that Mr. Braden's well-taken motion to vacate the prior order appointing a temporary guardian was summarily denied as was his request for injunctive relief and accounting without requiring responsive pleadings or even a hearing.

It is helpful to recall that at this time the locks to the home at 10963 S. Sangamon, Mary Ann's and Clifford Service's residence for the past 16 years, had been changed by the temporary guardian, Arnetta Williams. Vol. 7 of 8, R. C81-2; Vol. II, R. C21. This occurred on May 16, 2006 **and was without lawful authority. Vol. II, R. C87-8.** By the time Karen Bailey and Mr. Braden were able to get back into the home on June 15, 2006, a mere 7 days after the initial court hearing, the home had been ransacked, the cash in the closet was missing, various items of personal property were missing and the 3 foot high Tupperware box containing the original receipts was gone.

It can not be over emphasized that the temporary guardian, Arnetta Williams, had no lawful authority to enter the home and change the locks which occurred May 16, 2006. Vol. II, R. C87-8. When the trial court first became aware of this unlawful entry, rather than punish the wrongdoer, Arnetta Williams, for violation of a court order, the trial court amazingly commented that perhaps it could expand Arnetta Williams authority. Vol. II, R. C87-8.

Mrs. Bailey's inability to produce receipts kept in the 3 foot high Tupperware receipt box was a direct consequence of the unlawful possession of the home by the ***28** temporary guardian after May 16, 2006. Mrs. Bailey testified that she did not enter the home from May 3, 2006 to May 16, 2006. Vol. 6 of 8, R. C48-9.

Mrs. Bailey through her attorney Mr. Braden complained to the court on numerous occasions that it was not possible to prepare a complete accounting without her original receipts. Vol. II, R. C70; Vol. 1 of 8, C3; Vol. 2 of 8, C305. Mr. Braden also on numerous occasions requested production of such receipts from counsel for the temporary guardian. Vol. 2 of 8, C305. The trial court did not fulfil its judicial function by compelling the production of the receipts and a sworn statement by the party producing the documents that the production was complete in accordance with the request. See Supreme Court Rule 214. The record on appeal also contains Mrs. Bailey's formal request for production at Vol. 3 of 8, C738.

The standard for record-keeping of an agent in Illinois acting under a power of attorney is statutory. It is found at 755 ILCS 45/2-7 and specifically states that "*The agent shall not be liable for any loss due to error or judgment nor for the act or default of any other person.*" The plain meaning of the above sentence is that if Karen A. Bailey was either 1) acting at the specific direction of her principal Mary Ann Wilson prior to May 12, 2006 to make the requested withdrawals or 2) she is unable through no fault of her own to produce receipts kept in the home after she no longer had access to the home and it had been ransacked, that she should not be personally liable for a judgment in any amount.

***29 VII.**

THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR $297,708.95 IN FAVOR OF THE ESTATE OF MARY ANN WILSON AND AGAINST KAREN A. BAILEY SINCE ALL ORDERS ENTERED BY THE SAME JUDGE AFTER THE IMPROPER DENIAL OF THE MOTION FOR SUBSTITUTION OF JUDGE FOR CAUSE ARE VOID

Standard of Review: All orders entered by the same judge after the improper denial of a motion for substitution of judge for cause are void. *Jiffy Lube International, Inc. v. Agarwal*, 277 Ill. App. 3d 722, 727, 661 N.E. 2d 463, 467 (1996).

Karen A. Bailey is the sole beneficiary under the last will and testament of Mary Ann Wilson. Vol. I, C63-67. This will was executed January 16, 2004, was properly witnessed and notarized as required by statute. 755 ILCS 5/4-3(a).

There is no evidence in the record to determine how the sum of $297,708.95 was computed. While the amount by its un-rounded nature suggests mathematical precision, no proof of this sum exists in the record.

The strange amount is probably determined from the temporary guardian's issuance of a citation supposedly pursuant to 755 ILCS 5/16-1 *et seq*. The citation on its face assumes the very fact at issue - that funds were taken by Karen Bailey in that amount. Vol. 1 of 8, C151. It also makes the completely unwarranted assumption that all of the funds held in accounts titled under the name of Mary Ann Wilson were equitably hers *in toto*.

The trial court was specifically advised that Clifford Service claimed an equitable interest in these funds. Vol. 3 of 8, R. C529-30; Vol. 5 of 8, R. C203; Vol. 6 of 8, R. ***30** C45-6. Pleadings filed in opposition to the citation asserted this interest of Clifford Service and also asserted his right to a jury trial pursuant to 755 ILCS 5/16-3. Vol. 3 of 8, C527-532; Vol. 4 of 8, C752-3. This testimony is from family members who credibly testified to the reason why Clifford Service's ownership was hidden. Vol. 5 of 8, R. C204. This testimony was also un-rebutted. The trial court completely ignored testimony that Clifford Service was a part owner of the funds, if not the majority owner, in spite of detailed un-rebutted testimony as to the source of the funds. Vol. 6 of 8, R. C47.

The process of entering a personal judgment against Karen A. Bailey must be more complicated than simply taking a number off a citation page. This process utilized by the trial court is not supported by evidence, did not determine the competing interest of Clifford Service despite the fact that such interest was repeatedly asserted and was entered long after Mr. Braden's motion for substitution of judge for cause was improperly denied. According to the holding in the case of. *Jiffy Lube International, Inc. v. Agarwal*, 227 Ill. App. 3d 722, 727, 661 N.E.2d 463, 467 (1996) it is void and must be vacated. Respondent Karen A. Bailey also respectfully argues that this judgment is a reflection of the consistent prejudice of the trial court against both Karen A. Bailey and her attorney, Everette A. Braden, throughout these proceedings. It should be vacated and held for naught.

CONCLUSION

For the foregoing reasons, Respondent, Karen A. Bailey, respectfully requests ***31** this Honorable Court to affirm the judgment of the Appellate Court of Illinois, First Judicial District, on review, to award Respondent her allowable costs and for such other and further relief as may be just in these premises.

Footnotes

1 In addition to representing Karen A. Bailey, it has been this attorney's privilege to represent Clifford Service whose petition to intervene (see Vol. 3 of 8, R. C711-2) was granted by the trial court on February 1, 2007. Vol. 3 of 8, R. C716. Clifford Service passed away January 14, 2008 and his death is hereby spread of record. 55 ILCS 5/13-209(a)(1).

2 Karen A. Bailey is **at that time was** the executive secretary of Commissioner Jerry Butler. Vol. 6 of 8, R. C9.

3 The observations of Mr. Devitt together with the sworn testimony of Karen A. Bailey, David Service and Mary Ann's own denial of having poor care at home, contrast with this **the Appellate Court's** prior opinion **of** *In re Estate of Mary Ann Wilson*, 373 Ill. App. 3d 1066, 1067 (2007). **No sworn testimony was ever presented to support the "facts" stated in this prior opinion. The basis of the "facts" were the hearsay statements contained in the report of the guardian ad litem, Sandra Thiel, which appears in this record at Vol. I, R. C6. They have been repeated on numerous occasions by Petitioner's attorney, Sheryl Fuhr.**

4 Everette A. Braden is a retired judge of the Circuit Court of Cook County, Illinois and the Appellate Court of Illinois, First Judicial District.

5 *See*, Petition for Leave to Appeal at 3, 12; Brief and Argument of Arnetta Williams at 4, 35.