Case No. 21-1582

Supreme Court of the United States

Jack R. Finnegan
Petitioner
v.
RICHARD A. MARSHACK and HONORABLE JACKI C. BROWN
Respondents

On Petition for Writ of Mandamus

Superior Court of California Case No. S271232,
Court of Appeal, CA, Fourth Appellate District,
Division Three Case No. G058635
Trial Court Case No. 30-2019-01047364-PR-CE-CJC

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

D. EDWARD HAYS, #162507
ehays@marshackhays.com
LAILA MASUD, #311731
lmasud@marshackhays.com
MARSHACK HAYS LLP
870 Roosevelt, Irvine, California 92620
Telephone: (949) 333-7777; Facsimile: (949) 333-7778
Attorneys for Respondent
RICHARD A. MARSHACK, in his capacity as the Chapter 7 Trustee of the Bankruptcy Estate of Jack Richard Finnegan

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. Statement of the Case

History is wrought with tales of iron curtains and walls meant to separate or enclose. The architects of these structures include Ch'in Shih-Huang and Nikita Krushchev. In this case, the story began over a decade ago and involves a wall, its collapse, and the collateral and continuing damage inflicted by its architect and the appellant in this case, Mr. Jack Richard Finnegan.

In about 2010, Appellant erected not one but two unpermitted and unsafe retaining walls at one of his properties located in Dana Point, California. Despite repeated demands and warnings by the city, Appellant remained obstinate in his refusal to take down the walls. These decisions led to the point where (i) Appellant was criminally prosecuted which case culminated in a jury trial, conviction, and probation; and (ii) a receiver was appointed over the property to take down the deficient retaining walls. During this process, Appellant lashed out suing everyone including the Superior Court judge and his

clerk. These frivolous lawsuits resulted in Appellant incurring almost $2 million in creditor claims.

Ultimately, Appellant filed a voluntary Chapter 11 bankruptcy case. The bankruptcy court quickly found cause to appoint a bankruptcy trustee who is the Respondent in this case. Appellant has vexatiously made criminal referrals about his bankruptcy judge and Respondent. The bankruptcy case has now been converted to a Chapter 7 liquidation case. Under federal law, one of Respondent's duties is to liquidate property of the estate to generate funds to repay creditors. Appellant's primary asset is his home in San Clemente, California, located atop a ridge which includes an ocean view. There was several million dollars of non-exempt equity in the property. Normally, a bankruptcy trustee would seek a court order for the debtor to vacate and turn over possession of the property so it could be sold. If a debtor refused to vacate, the bankruptcy trustee would obtain a writ of assistance for the United States Marshals Service to forcibly remove all

occupants. The trustee would then sell the property to pay creditors.

In this case, Appellant is 88 years old and Respondent was justifiably concerned that he was not competent to manage his finances and understand that the consequences of his vexatious lawsuits was going to leave him homeless. To determine if Appellant should be subject to a conservatorship over his finances, Respondent initiated this action in the Probate and Mental Health Department of the Superior Court. Appellant refused to meet with the court's investigators and the matter proceeded to trial.

Continuing with his crusade of uncooperativeness and papering of the courts with nonsensical pleadings, Appellant refused to attend trial. Instead, on the morning of trial, Appellant walked into the courthouse and filed a notice of appeal prior to any witnesses being called or any decision having been rendered. During the one-day trial, Respondent put forth substantial, credible evidence that Appellant was (and remains) a danger to himself financially.

After trial, and recognizing the abundance of evidence put on by Respondent, the trial court succinctly described "almost ten years' worth of [Appellant's] refusal to conduct himself rationally when it comes to legal responsibilities and financial decisions." To that end, the trial court granted Respondent's petition finding that "by clear and convincing evidence, [Appellant] has shown to be a person who is substantially unable to manage his own financial resources."

Now, after waiving all arguments by failing to appear at trial, Appellant seeks to reverse the trial court's order appointing a conservator of the estate based on incoherent arguments unsupported by law or facts. Appellant's brief is inundated with irrelevant and unrelated statutes and cases in support of his unintelligible arguments.

First, Appellant makes allegations that Respondent has perpetrated fraud upon the bankruptcy court and Superior Court. Appellant does so by sporadically citing to statutes and case law on the matters of controversy, ripeness, personal and subject matter jurisdiction, and sections of Title

11 of the United States (Bankruptcy) Code relevant to the bankruptcy court's authority and procedure in converting a Chapter 11 case. From there, Appellant alleges 26 purported violations of law, without proof or explanation, that can be generally sorted into the following categories (1) the conservatorship action was unfit for adjudication and filed for an improper purpose; (2) conversion of the bankruptcy case from Chapter 11 to a Chapter 7 was improper; and (3) Respondent and certain state court judges have violated a series of federal and state law statutes.

Second, Appellant makes allegations, without proof, that there has been a violation of protections afforded to him under the U.S. Constitution by a "void" order of the "disqualified" bankruptcy court judge in granting Trustee leave to file the petition for conservatorship in state court. Appellant cites to federal statutes relevant to federal court jurisdiction, the matter of disqualification of judges, and the doctrine of preemption to argue a confused and misguided interpretation of the law.

Third, Appellant makes unfounded allegations that Respondent has violated numerous sections of

the Probate code and has therefore perpetrated fraud upon the court.

Fourth, Appellant appears to argue, without proof or explanation, that the trial court judge was a temporary judge and therefore her order(s) are void.

Fifth, Appellant appears to allege violations of state and federal laws by the trial court judge for denying him a jury trial even though he failed to timely post his jury fees.

Based on the above, Appellant requests that this court vacate (a) all orders entered in the bankruptcy court; (b) the order appointing the trial court's judgment appointing a conservator over his estate and dismiss the conservatorship action with prejudice; and (c) certain actions against Respondent and his attorneys be "reinstate." As set forth below, none of Appellant's arguments have merit and none are grounded in reality but are rather collateral attacks on multiple final orders entered in various courts. Indeed, Appellant's nonsensical arguments are unsupported by the law or the facts which include: (1) Appellant filed a *voluntary* petition under Chapter 11 of Title 11 of the United States

Code to avail himself of the protections afforded to him under federal bankruptcy law, thus bringing himself under the jurisdiction of the bankruptcy court; (2) Respondent is the duly-appointed Chapter 7 Trustee of Appellant's bankruptcy estate (*See*, Notice of Appointment of Trustee and Fixing of Bond; Acceptance Of Appointment as Trustee, filed September 17, 2018, copy attached as Appendix C to Respondents Opposition to Petition); (3) the bankruptcy court judge was never "disqualified" (Appellant's motion to recuse the bankruptcy court judge was denied by a different bankruptcy court judge); (3) the bankruptcy court's order granting Respondent leave to file a conservatorship action was procedurally proper and granted for the benefit of Appellant in the hopes of finding an alternative solution to fund payment to creditors without rendering him homeless[1]; (4) the trial judge presiding over the conservatorship action, the Honorable Jacki C. Brown, was not a "temporary"

[1] Ultimately, a reverse mortgage was determined to be not feasible by his Conservator and Appellant's residence was sold to fund payment to his creditors.

judge; (5) Appellant was on notice regarding the need to timely pay fees due for procurement of a jury to avoid waiver of any right to a jury trial; (6) Appellant failed to pay the necessary jury fees; and (7) rather than appear at trial and be heard, Appellant instead filed a premature appeal to the trial court's judgment *prior to* the commencement of the trial itself and judgment being rendered.

At trial, Respondent presented clear and convincing evidence of multiple incidents and facts demonstrating Appellant is incapable of managing his own financial resources. The trial court cited to these facts in correctly appointing a conservatorship of Appellant's estate. For the reasons set forth below, this Court should affirm the trial court's judgment appointing a conservator of the estate for Appellant, and disregard all Appellant's collateral attacks on final orders.

II. Statement of Facts and Procedural History

A. Litigation with the City of Dana Point and the Receivership

Appellant formerly owned real property located at 25146 Manzanita Drive, Dana Point, CA ("Manzanita Property"). Prior to 2011, Appellant built two retaining walls on the Manzanita Property without obtaining the requisite permits and inspections from the City of Dana Point ("City"). The City became aware of the violations in approximately November 2011 and attempted to address the violations with Appellant through notices of violation, stop work orders, and eventually criminal citations. Appellant refused to bring the Manzanita Property into compliance and, thereafter, the City commenced criminal legal proceedings against Appellant.[2] After trial, the Orange County Superior Court found Appellant guilty and imposed a sentence of two years' informal probation and ordered Appellant to take action concerning the retaining walls. Appellant ignored the court's order

[2] City initiated a criminal action against Appellant in March 2013, initiating *People v. Finnegan*, case no. 12HM02960;

resulting in revocation and termination of probation and levying of substantial monetary fines against him. Thereafter, Appellant initiated three *separate* actions in an attempt to appeal the underlying determinations, all of which were unsuccessful.[3]

Three years later, on September 19, 2014, the City filed a petition to appoint a Receiver to do what Appellant refused to do - **take down the retaining walls**.[4] On December 1, 2014, the court issued an order granting the City's petition and appointing a Receiver to take possession of the Manzanita Property, correct the outstanding violations, and to pay the City its attorneys' fees and costs out of the receivership estate. This order was affirmed on appeal. Subsequently, the Receiver had to sell the Manzanita Property to pay for the cost of repairs in the Receivership. Ultimately, the cost of the Receivership and repairs exceeded the equity in the Manzanita Property.

---

[3] Criminal appellate cases, Case Nos. 30-2013-00678435 and 30-2014-00741578

[4] *Finnegan v. Marshack*, BAP No. CC-18-1150.

Unsatisfied and continuing with his obstinate behavior, Appellant filed multiple state court appeals and several lawsuits in the United States District Court with appeals to the Ninth Circuit Court of Appeals related to the receivership and fee awards, all of which – again - were unsuccessful.

B. Bankruptcy Case

On March 6, 2018, Appellant filed a *voluntary* petition seeking relief under Chapter 11 of Title 11 the United States Code, in the United States Bankruptcy Court, Central District, Santa Ana Division, initiating Case No. 8:18-bk-10762-TA ("Bankruptcy Case"). The Honorable Theodor C. Albert was assigned to the Bankruptcy Case.

In his Bankruptcy Case schedules, Appellant claimed an ownership interest in his residence located at 871 Avenida Acapulco, San Clemente, CA ("Acapulco Property"). The Acapulco Property was Appellant's only known asset available to repay Appellant's creditors. Although Appellant valued the Acapulco Property at $5.9 million, the value of the property was closer to $2.95 million.

After being given quite a bit of leeway by the bankruptcy judge in terms of advancing the Bankruptcy Case, on May 24, 2018, the bankruptcy court entered an order ("Appointment Order") directing the United States Trustee to appoint a chapter 11 trustee. On May 25, 2018, Richard A. Marshack ("Respondent") was appointed trustee.

On June 1, 2018, Appellant filed a motion for disqualification of the bankruptcy judge presiding over the Bankruptcy Case. On August 2, 2018, after the hearing on the motion, to which Appellant did not appear, the motion was denied by a different bankruptcy judge.

On June 11, 2018, Appellant filed a notice of appeal challenging the Appointment Order, which was subsequently dismissed.[5] Appellant thereafter filed at least two motions for rehearing - both denied - which he appealed to the Ninth Circuit.[6] Ultimately, after a flurry of additional motions, including a motion for reconsideration, the Ninth

[5] *Finnegan v. Marshack*, BAP No. CC-18-1150.

[6] *Finnegan v. Marshack*, Case No. 19-60001.

Circuit affirmed the Appointment Order. (*See*, Mandate, filed November 14, 2019, copy attached as Appendix D to Respondents Opposition to Petition).

On August 22, 2018, due to Appellant's repeated failure to cooperate with Respondent in the discharge of his duties as Chapter 11 trustee, Respondent filed a motion to convert the case to Chapter 7.

On September 14, 2018, the Bankruptcy Case was converted to one under Chapter 7 and, on September 17, 2018, Respondent was appointed as the Chapter 7 Trustee. (*See* Notice of Appointment of Trustee and Fixing of Bond; Acceptance Of Appointment as Trustee, filed September 17, 2018, copy attached as Appendix C to Respondents Opposition to Petition).

In direct violation of his duties under federal law and the bankruptcy court's order, Appellant has failed to appear at over 35 separate meetings of creditors, his court-ordered Rule 2004 examinations, and has failed to produce any documents. Notwithstanding his failure to appear for examination, Appellant has filed dozens of pleadings

consistently taking positions which are unsupported by law or facts and inundated with irrelevant and unrelated statutes and cases in support of his random statements of law. Additionally, Appellant has taken the position that he does not owe certain creditors money, including the Receiver. In reality, a total of ten creditor claims for $1,934,641.48 have been filed in the Bankruptcy Case based in large part by court orders and judgments which Appellant has unsuccessfully appealed. Indeed, on August 7, 2018, the Receiver filed a proof of claim for the amount of $208,541.15. Moreover, on September 12, 2018, the City filed a proof of claim for the amount of $142,530.00.

Appellant's filings as well as his numerous lawsuits which are largely unintelligible and lack merit, have achieved nothing other than unnecessary creditor claims and bankruptcy court administrative expenses. Because the Acapulco Property is the only known asset of the estate available to pay Appellant's creditors, and Respondent wished to avoid removal of an 88-year-old person from their home, on August 22, 2018,

Respondent moved for an order authorizing him to file a petition in Superior Court to determine whether a conservator should be appointed. Appellant's demonstrated lack of ability to manage his financial affairs has put him at risk of becoming homeless.

Accordingly, on September 13, 2018, the bankruptcy court granted Respondent's motion authorizing him to seek a determination in the Superior Court regarding whether a conservator of the estate should be appointed.

C. Probate Case

On January 16, 2019, Respondent filed a petition for appointment of conservator ("Petition"), initiating case number 30-2019-1047364-PR-CE-CJC ("Conservatorship Action").

On February 7, 2019, Appellant filed an *ex parte* motion to dismiss the Petition ("*ex parte* MTD").

On March 21, 2019, Respondent filed an opposition to the *ex parte MTD*.

On April 16, 2019, Appellant filed a second motion to dismiss the Petition, but did not mail a copy of such motion to Respondent ("2nd MTD").

On May 17, 2019, Respondent filed an opposition to the 2nd MTD.

On June 5, 2019, the court denied Appellant's 2nd MTD.

On August 20, 2019, a Trial Setting Conference was held.

On October 4, 2019, a Mandatory Settlement Conference was held.

On December 5, 2019, a trial was conducted in the Conservatorship Action. Appellant ***failed*** to appear at trial. Nevertheless, trial proceeded with statements, witness testimony, and admission of evidence. At the conclusion of trial, the court made substantial findings of facts and conclusions of law on the record and granted Respondent's petition for appointment of a conservator as to the estate for Appellant. Oddly enough, Appellant filed a notice of appeal with respect to the Conservator Action on the same day as the trial he failed to appear at,

initiating the instant appeal, Case No. G058635 (“Appeal”).

On January 15, 2020, the Court filed a Minute Order (“Minute Order”) and Order Appointing Probate Conservator of the Estate ("Conservator Order"). (*See*, Minute Order, filed January 15, 2020, copy attached as Appendix B to Respondents Opposition to Petition). The Conservator Order specifically provides that:

> "Unless otherwise authorized by this Court pursuant to an express written order, ***JACK RICHARD FINNEGAN ("Conservatee"), lacks the capacity*** to commence or continue any litigation, lawsuit, or other legal proceeding including, but not limited to, filing any pleading or notice of appeal in any federal or state court. Instead, any such pleadings, lawsuits, or appeals may only be filed by Conservator, PETER KOTE."

See, Appendix A-7 to Respondents Opposition to Petition). Emphasis added.

On June 16, 2020, Appellant filed an *Ex Parte* Petition (1) For Order Directing Appointment of Conservator and (2) For Confirmation of Conservator's Acts and Instructing Conservator. On June 22, 2020, the Court granted Appellant's Ex Parte Petition. (*See*, Minute Order, filed June 22, 2020, copy attached as Appendix E to Respondents Opposition to Petition).

On July 1, 2020, Peter Kote ("Conservator") filed Letters of Conservatorship.

D. Appeal of the Orders Denying Appellant's Earlier Motion to Dismiss, and the Order Appointing a Conservator

On December 5, 2019, Appellant filed an appeal in the Conservatorship Action from orders entered on (i) June 15, 2019, denying Appellant's motion to dismiss the Conservatorship Action, and (ii) December 5, 2019, granting a probate conservatorship over Appellant's estate. The trial court entered a formal order granting the probate conservatorship on January 15, 2020 ("Conservator Order"). (*See,* Order Appointing Conservator, filed

January 15, 2020, copy attached as Appendix A to Respondents Opposition to Petition).

On June 29, 2020, the California Court of Appeal entered an order allowing Appellant's appeal to proceed "as one taken from the order granting of letters of conservatorship and the orders leading up to that appealable [Conservator Order]."

On July 24, 2020, this Court dismissed the appeal based on Appellant's failure to properly designate the record and deposit costs required for preparation of the record.

On August 11, 2020, Appellant filed a motion to vacate the dismissal entered on July 24, 2020 and to reinstate the appeal.

On August 17, 2020, the Appellate Court denied Appellant's motion to vacate the dismissal and reinstate the appeal for having shown no good cause for vacating the dismissal.

On August 21, 2020, Appellant filed a second motion to vacate the dismissal entered on July 24, 2020.

On August 24, 2020, the Court granted Appellant's motion to vacate the dismissal and

reinstate the appeal for having shown good cause for vacating the dismissal, "in that [Appellant] is attempting to address deficiencies in his designation of the record, but misunderstood the form and the clerk's description of the deficiencies."

Ultimately, on August 30, 2021, the California Court of Appeal entered its decision affirming the order granting the petition to appoint a conservator of the estate ("Court of Appeal Decision"). (*See,* Opinion, filed August 30, 2021, copy attached as Appendix F to Respondents Opposition to Petition). On December 23, 2020, Appellant filed his opening brief.

On October 7, 2021, Mr. Finnegan filed a Petition for review with regard to the Court of Appeal Decision, initiating the California Supreme Court Case Number S271232. On December 1, 2021, the Supreme Court denied the Petition for review.

Now, Appellant has filed a petition for writ of mandamus with this Court. Wherefore, Respondent now files this brief in response.

III. Argument

A. Appellant's Arguments Not Raised in Trial Court Are Waived on Appeal

Appellant requests that the Court vacate the trial court's judgment and dismiss the Conservatorship Action with prejudice, raising issues of standing, jurisdiction, fraud, and violation of the United States Constitution, California Constitution, and an array of state and federal laws. None of these issues were raised with the trial court and, as such, are waived or forfeited.

1. Legal Standard

As a general rule, issues not raised at the trial court cannot be raised for the first time on appeal and are waived. *Lambert v. Carneghi,* 158 Cal. App. 4th 1120, 1129 (2008). *Nellie Gail Ranch Owners Assn. v. McMullin*, 4 Cal. App. 5th 982, 997 (2016). Despite this general rule, courts have discretion to consider a new theory on appeal if it involves a legal question based on undisputed facts. *Cox v. Griffin*, 34 Cal. App. 5th 440, 450 (2019).

2. Issues Previously Raised in Appellant's Motion to Dismiss the Conservatorship Action

Shortly after the filing of the Conservatorship Action, Appellant filed at least two motions to dismiss (previously, defined as *ex parte* MTD and 2nd MTD) the Petition, alleging the Conservatorship Action was in violation of the automatic bankruptcy stay, and made general allegations that the Petition was also in violation of the United States Constitution, California Constitution, and state and federal statutes. All these arguments were without merit. Appropriately, Respondent opposed each motion detailing:

(1) Per the plain language of the 11 U.S.C. §362, the automatic stay was inapplicable to the Petition;

(2) Prior to proceeding with the Petition, and in an abundance of caution, Respondent obtained express authority from the bankruptcy court, in the form of an order.

(3) The Petition did not violate either the United States or California Constitution, as

Appellant was not being denied due process; and

(4) Lastly, the Petition did not violate the sections of the Probate code cited by Appellant, specifically Probate Code §§ 1970(a)-(b) and 1821, which are inapplicable or provide no basis for dismissal of the Petition.

After reviewing the pertinent pleadings, the trial court denied Appellant's requests to dismiss the Conservatorship Action, stating that "nothing in the automatic bankruptcy stay statutes appear[ed] to apply to the [Conservatorship] proceeding," and that the court was "not persuaded that the Petition must be dismissed as violating the automatic stay caused by an appeal in [Appellant's] bankruptcy proceeding, or as violating any provision of the Federal Constitution, California Constitution, or any state or federal statute cited by [Appellant]."

To the extent that Appellant again raises the issue of being denied due process, this argument is not supported by the undisputed facts. Respondent has been provided copies of every pleading filed and

Appellant has had knowledge and the ability to respond to these filings, as evidenced by his responses, oppositions, and numerous appeals. As such, Appellant is being afforded due process.

3. Even if the Court Considers the Plethora of Legal Theories Appellant Raises for the First Time on Appeal, it Will Find These Theories are Unsupported by Law or Fact

a. Appellant's Arguments are Unsupported by Law

Appellant presents the Court with numerous legal arguments unsupported by law. The petition, which raises arguments on matters of standing, jurisdiction, and alleges violations of many state and federal laws, is inundated with irrelevant and unrelated statutes and cases in support of Appellant's confusing and misguided conclusory statements of law. Appellant makes many legal arguments and provides little, if any, factual context from which the Court may assess the issues Appellant is trying to raise.

b. Appellant's Arguments are Unsupported by Undisputed Facts

At its crux, Appellant alleges that Respondent is not the "legally appointed" bankruptcy trustee and therefore has perpetrated fraud and violated a multitude of state and federal laws by actions taken. Appellant also alleges that the orders of the trial and bankruptcy courts are "void" for being issued by judges which were "disqualified," "temporary," or otherwise lacked jurisdiction and, ultimately, that he was denied his right to a jury trial. These arguments are wholly unmeritorious.

The truth of the matter is that none of Appellant's allegations are supported by the facts of this case. Rather, the facts set forth in this Brief, and those specifically cited below, show that Appellant's appeal and his utter refusal to cooperate with Respondent, the bankruptcy court, and trial court stem from his refusal (or inability) to acknowledge and accept their proper authority.

First, Appellant filed a *voluntary* petition under Chapter 11 of Title 11 of the United States

Code to avail himself of the protections afforded to him under federal bankruptcy law, thus bringing himself and any matter affecting his property under the jurisdiction of the bankruptcy court.

Second, Respondent is the duly-appointed Chapter 7 Trustee of Appellant's bankruptcy estate. Although Appellant attempted to challenge the Appointment Order, his efforts were denied by the Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals. Because the Appointment Order is a final order, the Trustee is the chapter 7 trustee of Debtor's bankruptcy estate – whether or not Appellant accepts (or is capable of understanding) that truth.

Third, the bankruptcy court judge *was never* "disqualified" from presiding over the Bankruptcy Case. While Appellant filed a motion for disqualification of the bankruptcy judge presiding over the Bankruptcy Case, a hearing was held on the matter and the motion was denied. As is routine for Appellant, he failed to attend the hearing. (*Id.)*

Fourth, the bankruptcy court's order granting Respondent leave to file a conservatorship action

was procedurally proper and granted after the filing of a motion and hearing. Indeed, the discussions that culminated in the filing of the motion was done with an eye towards finding an alternative solution to funding payment to Appellant's creditors without the need to evict him from his home and rendering him homeless at the age of 88 (and now in a pandemic).

Fifth, the trial judge presiding over the Conservatorship Action was not, as Appellant argues, a "temporary" judge. The Honorable Jacki C. Brown, who presided over the Conservatorship Action and trial, is a Judge of the Superior Court.

Sixth, contrary to Appellant's assertions, he was on notice concerning the necessary jury fees due for procurement of a jury panel and possible waiver of the right to a jury trial for failure to pay the requisite fees. Because Appellant failed to pay the necessary jury fees, and failed to request that he be relieved from his waiver of a jury trial due to failure to pay fees, he ultimately waived his right to a jury trial.

Seventh, rather than appear and be heard at trial in the Conservatorship Action, Appellant

instead filed a premature notice of appeal to the trial court's ultimate judgment – the Conservator Order - *prior to the commencement of the trial itself and judgment being rendered*.

As set forth above, because Appellant's arguments on standing, jurisdiction, fraud, that the bankruptcy and trial court order(s) are "void," and the purported violation of related federal and state laws are unsupported by the law and the undisputed facts, the Court should affirm the subject judgment.

B. Substantial Evidence Supports the Trial Court's Appointment of a Conservator

Notwithstanding Appellant's copious arguments in favor of vacating the Conservator Order and dismissing the Conservatorship Action with prejudice, substantial evidence exists in support of the trial court's order appointing a conservator of the estate for Appellant.

Respondent, as the Chapter 7 Trustee of the bankruptcy estate of the Appellant, has the responsibility under federal law to administer Appellant's bankruptcy estate to generate funds to

repay creditors. According to Appellant's bankruptcy schedules, Appellant's residence was the only asset from which funds could be generated to pay his creditors. Appellant tried, to no end, to meet with Appellant to discuss matters of his bankruptcy estate in an attempt to avoid having to evict Appellant and sell his residence to generate the requisite funds. Appellant has rebuffed Respondent's efforts by failing to appear at over 35 separate meetings of creditors, failing to appear at his court ordered Rule 2004 examinations, and failing to produce requested documents. Instead, Appellant filed a multitude of pleadings and appeals, which have done nothing but generated unnecessary administrative expenses. These administrative expenses must now be paid in addition to his creditor claims.

It is Appellant's inability to understand the consequences of his actions, including those detrimental to his financial well-being, which prompted Respondent to initiate the Conservatorship Action. Because there was and is reasonable, credible, and sound evidence that

Appellant is a financial danger to himself, this Court should affirm the trial court's judgment. **Standard of Review**

The standard of proof for the appointment of a conservator is by clear and convincing evidence. *Conservatorship of Wendland*, 26 Cal. 4th 519, 546 (2001). A trial court's decision to appoint a conservator is reviewed for substantial evidence. *Conservatorship of Ramirez*, 90 Cal. App. 4th 390, 401 (2001). The appellate court will review the record as a whole in the light most favorable to the trial court judgment to determine whether it discloses substantial evidence. *Conservatorship of Carol K.*, 188 Cal. App. 4th 123, 134 (2010). Substantial evidence is "evidence that is reasonable, credible, and of solid value." *Id.* "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." *Conservatorship of Walker*, 206 Cal.App.3d 1572, 1577 (1989). An appellate court "will sustain the trial court's factual findings if there is substantial evidence to support those findings, even if there

exists evidence to the contrary." *Conservatorship of Amanda B.*, 149 Cal. App. 4th 342, 347 (2007).

1. There is Substantial Evidence in Support of the Trial Court's Judgment

At trial, Respondent presented evidence of multiple incidents, spanning the last decade, that show that Appellant is substantially unable to manage his own financial resources and therefore, the trial court should appoint a conservator for Appellant's estate. These incidents, much like this appeal, evidence Appellant's repeated failure or inability to understand the consequences of his actions, including those detrimental to his financial well-being, and his failure to accept the reality of what various different courts have ordered.

First, beginning in 2011, Appellant was cited by the City of Dana Point for building two retaining walls on a piece of real property without acquiring the requisite permits. (. After numerous attempts to gain his compliance through notices, stop work orders and citations, the City initiated litigation

against Appellant which resulted in Appellant being convicted of criminal violations for noncompliance after a jury trial. (After refusing to comply with a court order to remove the walls, the City obtained compliance through appointment of a Receivership. Subsequently, the property had to be sold to cover some of the costs to the City and of the Receivership, but not before Appellant was provided with the opportunity to pay back the costs and fees that the City and the receiver incurred, which he refused to do. The costs and expenses of the receivership were substantially higher than typical, in part because of Appellant's appeals and the multiple lawsuits against various trial court judges and a court clerk that followed his conviction, all of which were dismissed. In all, the City spent hundreds of man hours and accumulated hundreds of thousands of dollars in attorney's fees to remedy the problems with the retaining walls and which Appellant refused to do.

Second, prior to bankruptcy, Appellant stopped paying the mortgage on his residence, the Acapulco Property. Additionally, he failed to pay his

real property taxes for the Acapulco Property for 2017 and 2018. At the same time, Appellant filed a lawsuit against his mortgage lender, contending *Appellant* was owed millions of dollars based on Appellant's misreading of the loan documents. Appellant argued that, based on the loan documents, he had an absolute right to borrow 133% of the original mortgage, when in reality the note simply stated that despite the adjustable rate on his mortgage, the mortgage balance would never exceed 133% of the original principal. The lawsuit was unsuccessful, as were Appellant's subsequent appeals.

Third, upon feeling pressure from his creditors seeking to enforce their claims, which were largely the result of Appellant's frivolous litigation efforts, Appellant filed a voluntary Chapter 11 bankruptcy petition. Due to the complex nature of a Chapter 11, the bankruptcy judge implored Appellant to hire counsel, which he refused to do. The bankruptcy judge thereafter appointed Respondent as the Chapter 11 Trustee, and thereafter as the Chapter 7 Trustee.(Respondent, after review of Appellant's

bankruptcy schedules, determined that the only asset to be administered which would generate funds pay Appellant's creditors' claims was Appellant's residence, the Acapulco Property, valued at $1.9 million. (Per the Bankruptcy Case claim register, ten creditor claims in the total amount of $1.934 million were filed, some which are willing to negotiate settlements provided Appellant's lawsuits cease, but Respondent refuses to discuss these matters with Appellant. While Respondent attempted to engage with Appellant on the matters concerning his bankruptcy estate, Appellant flatly refused to cooperate by failing to attend every single meeting of creditors – over 35 in total – or his court ordered 2004 examinations

Instead, not liking the fact that the court appointed a representative of the bankruptcy estate to manage the estate assets, Appellant filed appeals to the Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals, which were unsuccessful. The Appointment Order appointing Respondent as bankruptcy trustee is therefore final whether Appellant chooses (or is able) to accept it or not. In

addition, Appellant filed a motion to disqualify the bankruptcy judge, which was decided by a different judge and also denied. Appellant thereafter refused to appear in the bankruptcy court for any proceeding and Respondent sought a court order to commence the Conservatorship Action. While Respondent could have easily immediately moved for turnover of the Acapulco Property with the aid of the U.S. Marshals, Respondent did not, believing that Appellant's history of litigation and appeals might be a manifestation of Appellant's inability to fully understanding the financial consequences of his actions The trial court, after listening to hours of testimony and other evidence admitted during trial, agreed with Respondent, finding:

> "[A]s presented, not only in the [trial] exhibits, but by the witnesses, the three witnesses that [were] called, that by clear and convincing evidence, **[Appellant] has shown to be a person who is substantially unable to manage his own financial resources**."
>
> …

> "[T]he evidence [was] not proved solely by an isolated incident of negligence or improvidence. **What we show is almost ten years' worth of [Appellant's] refusal to conduct himself rationally when it comes to legal responsibilities and financial decisions**."

Additionally, the trial court noted for the record that, while Appellant is completely verbal, articulate, submits written material for which he does volumes of research, he "does not make any sense" and "writes things that make no sense." Appellant has been provided plenty of opportunities to prevent the consequences of his bad decisions, but Appellant "refuses to see that they were bad decisions even when he has lost everything."

As noted by the trial court, Appellant conducts himself "with the public and with positions of authority with the idea that there is a war, and he is going to outlast them," which is "not a realistic, rationalistic position to take. Most importantly, it is not evidence of substantial ability to manage one's financial resources, and that's proven by the fact

that everything has gotten lost." Indeed, the trial court specifically found that these incidents "are multiple, consistent, and without end. Each time one proceeding ended with a final judgment after appeal was denied, he file[d] something else. **And it will not end**." (emphasis added). Truer words could not have been spoken, as evidenced by this Appeal.

Based on all of the above, the trial court found by clear and convincing evidence that a conservatorship of the estate is necessary because Appellant is a financial danger to himself as has been clearly and convincingly demonstrated for more than a decade. Accordingly, this Court should find that substantial evidence exists in the record to affirm the trial court's judgment.

IV. Conclusion

As a fiduciary to the bankruptcy estate, Respondent felt compelled to determine if Appellant was capable of making decisions regarding his financial affairs. The evidence at trial clearly and convincingly proved that Appellant lacked the competence to understand the position he is in as a result of his own actions. For the reasons set forth

above, Respondent respectfully requests that the Court affirm in its entirety the trial court's judgment appointing a conservator for Appellant's estate detailed in the Conservator Order, as well as any other order denying Appellant's numerous motions to dismiss the Petition.

Dated: August 1, 2022

MARSHACK HAYS LLP

D. Edward Hays

By:_____

D. EDWARD HAYS

LAILA MASUD

Attorneys for Respondent,

RICHARD A. MARSHACK