

No. _____

In The
Supreme Court of the United States

—————◆—————
IN RE: GUARDIANSHIP OF
CHARLES INNESS THRASH, AN ADULT,

—————◆—————
On Petition For A Writ Of Certiorari
To The Texas Supreme Court

—————◆—————
PETITION FOR A WRIT OF CERTIORARI

November 18, 2021

PHILIP M. ROSS
1006 Holbrook Road
San Antonio, Texas 78218
Phone: 210/326-2100
Email: ross_law@hotmail.com

QUESTIONS PRESENTED

Question No. 1: Whether the Court of Appeals' Memorandum Opinion and Judgment, dated March 31, 2021, dismissing the appeal by Charlie, by and through Billy Duncan, as next friend, due to lack of jurisdiction, and affirming the trial court's May 29, 2019 Second Amended Order Granting Motion for Sanctions were entered in error because Charlie had, or should have had, a right appeal by and through his next friend, and the sanctions order was so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Question No. 2: Whether the Second Amended Order Granting Motion for Sanctions finding that Petitioners should be required to pay \$226,974, plus \$80,000 in the event of unsuccessful appeals, as pre-trial sanctions was entered in error and an abuse of discretion because it effectively deprived Petitioners including Charlie of a final hearing on the merits, notwithstanding their jury demand.

Question No. 3: Whether the trial court's order that Phil should be required to pay \$222,974 punitive and/or compensatory sanctions, plus \$80,000 in the event of unsuccessful appeals, jointly and severally with his clients Laura and Brittany, as a sanction for his litigation efforts was entered in error and an abuse of discretion because Phil's zealous advocacy was not vexatious, the trial court's findings were so contrary to the overwhelming weight of the evidence as to be clearly wrong, and Petitioners' attorney's actions were protected by attorney immunity.

PARTIES TO THE PROCEEDING

The following Defendants (now Petitioners herein) asserted claims in the trial court below¹:

Charles I. Thrash, by and through, Billy Duncan, as next friend; Laura A. Martinez, Brittany A. Martinez and Philip M. Ross

The following individual was Plaintiff in the trial court below and is Respondent herein:

Charles I. Thrash, by and through, Tonya M. Barina, guardian of the Estate; and Mary C. Werner, guardian of the person.

RELATED CASES

In re: Guardianship of Charles Inness Thrash, an incapacitated person, No. 2017-PC-2912, Probate Court No. 2, Bexar County, Texas. Order appointing guardian entered November 15, 2018.

In re: Guardianship of Charles Inness Thrash, an incapacitated person, No. 2017-PC-2912, Probate Court No. 1, Bexar County, Texas. Order granting new trial and appointing guardian entered January 29, 2019; Order annulling marriage entered March 21, 2019; Order denying TRO entered March 29, 2019; Order granting motion to strike pleadings and denying intervention entered April 9, 2019; and Second Amended Order granting sanctions entered May 29, 2019.

RELATED CASES – Continued

In the Interest of Brittany Alexandria Martinez, an adult, No. 2019-CI-004422, 150th Judicial District Court, Bexar County, Texas. Order setting aside adoption entered March 22, 2019.

In the Interest of Jose Humberto Martinez, an adult, No. 2019-CI-004424, 150th Judicial District Court, Bexar County, Texas. Order setting aside adoption entered March 22, 2019.

In re: Guardianship of Charles Inness Thrash, an incapacitated person, No. 04:19-00135-CV, Fourth Court of Appeals, Texas.

Mandamus Opinion and Judgment regarding TRO entered March 24, 2019.

In re: Thrash, No. 19-0266, Texas Supreme Court, Petition for Writ of Mandamus regarding TRO denied June 7, 2019.

Charles I. Thrash, et al. v. Tonya M. Barina, et al., No 5:19-CV-00467-FB, United States District Court for the Western District of Texas, San Antonio, Texas, notice of voluntary dismissal entered August 26, 2019.

In re: Guardianship of Charles Inness Thrash, an incapacitated person, No. 04:19-00104-CV, Fourth Court of Appeals, Texas.

Memorandum Opinion and Judgment regarding orders appointing guardians entered December 4, 2019.

RELATED CASES – Continued

In re: Marriage of Thrash, No. 04:19-00236-CV, Fourth Court of Appeals, Texas. Memorandum Opinion and Judgment entered April 29, 2020.

In re: Guardianship of Charles Inness Thrash, an incapacitated person, No. 04:19-00477-CV, Fourth Court of Appeals, Texas.

Memorandum Opinion and Judgment regarding intervention entered July 15, 2020.

In re: Guardianship of Charles Inness Thrash, an incapacitated person, No. 04:19-00555-CV, Fourth Court of Appeals, Texas.

Memorandum Opinion and Judgment regarding sanctions entered March 31, 2021.

In re: Thrash, No. 20-0058, Texas Supreme Court, Petition for Review regarding orders appointing guardian denied March 13, 2020.

In re: Thrash, No. 20-0595, Texas Supreme Court, Petition for Review regarding marriage denied October 2, 2020.

In re: Thrash, No. 20-0655, Texas Supreme Court, Petition for Review regarding intervention denied October 16, 2020.

In re: Thrash, No. 21-0577, Texas Supreme Court, Petition for Review regarding sanctions denied October 20, 2021.

RELATED CASES – Continued

Laura A. Martinez, et al. v. Hon. Oscar J. Kazen, in his official capacity, No. 2021-CI-07488, 150th Judicial District Court, Bexar County, Texas. Case pending.

Tonya Barina v. Netflix, et al., No. 2021 CI 04501, 285th Judicial District Court, Bexar County, Texas. Case pending. Order denying Netflix, Inc.'s motion to dismiss pursuant to TCPA § 27.001, et seq. entered on August 6, 2021.

Netflix, et al. v. Tonya Barina, No. 04 21 00327 CV, Fourth Court

Commission for Lawyer Discipline v. Philip Martin Ross, No. 2020 CI 05671, 224th Judicial District Court, Bexar County, Texas. Case pending.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek a Writ of Certiorari to the Supreme Court of the State of Texas.

**OPINION BELOW**

The Opinion of the Texas Court of Appeals for the Fourth Judicial District was entered on March 31, 2021 and was published, and is attached to the Appendix hereto as App. 1. It is hereafter referred to as the Opinion below. Appellants' motion for rehearing was denied on May 5, 2021. Appellants' motion for rehearing en banc was denied on June 2, 2021. Petition for Review to the Texas Supreme Court was denied on August 20, 2021.

**JURISDICTION**

The Second Amended Order Granting Motion for Sanctions of the Bexar County, Texas Probate Court was entered on May 29, 2019. The Opinion of the Texas Court of Appeals for the Fourth Judicial District was entered on March 31, 2021 and was published, and is attached to the Appendix hereto as App. 1. It is hereafter referred to as the Opinion below. Appellants' motion for rehearing was denied on May 5, 2021. Appellants' motion for rehearing en banc was denied on June 2, 2021. Petition for Review to the Texas Supreme Court was denied on August 20, 2021. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

**Constitution of the United States of America
Amendments I & XIV, § 1**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



STATEMENT OF THE CASE

Introduction

This case involves an extreme example of the failure or refusal of Texas courts to allow freedom of

speech, association and petition as well as equal protection and due process to Charles I. Thrash (Charlie), an adult under guardianship, and Petitioners, who were advocating to protect his rights under the First and Fourteenth Amendments. The Fourth Judicial District Court's decision affirmed the trial court's orders, which denied Charlie's rights to petition, equal protection and due process, when it denied his right to an attorney and/or representation by his next friend in the dispute with his guardians over their use of his money to pay \$262,391.77 to the guardians' attorneys to get pre-trial sanctions in the amount of \$226,974, plus another \$80,000 in the event of unsuccessful appeals, against Petitioners, jointly and severally, and to restrain them from testifying at a trial on the merits.

Petitioners including Charlie asserted claims for infringement or denial of rights of free speech, association and petition under the First Amendment in the trial court and on appeal. They also asserted a right to substantive due process under the Fourteenth Amendment, where pre-trial monetary and injunctive sanctions pursuant to a final, appealable order unconstitutionally infringed or denied their rights to freedom of speech, association and petition as well as equal protection and due process rights to a jury trial.

Charlie was denied equal protection and/or due process as well as his right to petition, when he was denied representation by an attorney or next friend notwithstanding the fact that the actions of his guardians, who caused his estate to be billed \$262,391.77 attorneys' fees and expenses to punish Petitioners for

their efforts to help him restore his capacity, remove his guardians, maintain his lifestyle, protect his family-based support network, and help him recover his freedom to make his own decisions and manage his affairs, with appropriate supports and services, to the best of his ability.

Factual Background

This guardianship proceeding arises out of the trial court's decision to impose a full guardianship over Charles I. Thrash (Charlie), based on an application by Tonya M. Barina (Tonya), granddaughter of Charlie's estranged brother, when Charlie and Laura A. Martinez (Laura), who was Charlie's long-time companion and/or common law wife, agent under durable and medical powers of attorney, and principal heir, refused to pay half of Charlie's estate to settle the guardianship. Outdated medical evidence of incapacity that was more than 12 months old, was used to prove total incapacity, notwithstanding the fact that Charlie was taking good care of himself, living within his financial means, engaged in his self-employment and hobby activities, and enjoying his life to the fullest, with adequate supports and services provided by Petitioners and others.

Uncontroverted evidence in the record shows that soon after Tonya was appointed guardian of Charlie's estate on November 15, 2018, she changed the locks at his automotive shop and prevented him from engaging in his livelihood and hobby activities. About a week

later, Charlie's treating physician Manuel Naron, M.D. wrote a letter, dated January 16, 2019, at the request of Charlie and Laura, stating: "It is my understanding that there is a question about his mental competence, and based on our visits and conversations, it is my opinion that he is mentally capable of making financial and health care decisions for himself. Furthermore, he still has the capacity to care for himself with regard to activities of daily living and is able to participate and enjoy hobbies and work pertaining to his automotive shop. He is always accompanied by Laura Martinez, his "common law wife," for his appointments because she helps him with the comprehension of his medical conditions and administration of medications."

On January 31, 2019, Tonya obtained an order appointing Mary C. Werner (Mary), a politically connected professional guardian, as guardian of Charlie's person. When Petitioners attempted to protest against Charlie's court-appointed guardians' adverse actions, his guardians incurred hundreds of thousands of dollars to pay their five attorneys to block every attempt to restore Charlie's capacity, remove the guardians, reopen his automotive shop, maintain his family based support network, regain control of his personal finances, and keep possession of his collection of cars, trucks, hot rods, motorcycles and airplanes.

In February 2019, it came to the guardians' and the trial court's attention that Petitioners were participating in the production of a Netflix documentary about Charlie's guardianship. In response, the

guardians filed requests for temporary restraining order, temporary injunction and sanctions against Petitioners to prevent them from advocating publicly about guardianship abuse generally and Charlie's case, in particular.

On March 4, 2019, Charlie's guardian Mary, who was married to the Mayor of Shavano Park, where Charlie and Laura lived, engaged six officers from the local police department to remove Charlie from his home and obtained an ex parte restraining order to prevent contact between Charlie, Petitioners and others. Within months, Charlie's guardians incurred \$262,391.77 legal fees and expenses to isolate Charlie from the Petitioners and get a final, appealable order for \$226,974 pre-trial sanctions, plus \$80,000 in the event of unsuccessful appeals against them. Then, the guardians obtained court approval to sell Charlie's house, condominium, aircraft hangar, new Corvette, airplanes, and other prized possessions to pay litigation costs, disband his household and personal life, and estrange him from his loved ones, friends and support network.

The damage to Charlie and his estate included the loss of substantially all of his protected liberty and property interests including (1) his family based support network, his personal relationships, love, affection and/or support of Laura, her adult children, his employees and friends; (2) personal liberty and control over his activities of daily living; (3) his livelihood, income and hobby activities; (4) his home, aircraft hangar, condominium, new Corvette, airplanes, and

other prized possessions; and (5) hundreds of thousands of dollars spent on legal services to punish the Petitioners.

The guardians' denial of Charlie's liberty together with court-sanctioned isolation and liquidation of substantially all of his non-income producing assets left him without the ability to defend himself against his guardians and their oppressive actions in violation of his First and Fourteenth Amendment rights, privileges and immunity.

In March, 2020, a Netflix guardianship documentary featuring Charlie's guardianship case was broadcast, which attracted worldwide attention to the national issue of guardianship abuse in America, much to the embarrassment of the guardians, trial court and the Texas judicial system, which had failed Charlie and allowed his guardians to strip him of his liberty and drain his estate. However, that didn't stop Tonya, who filed a multi-million dollar defamation case against Netflix and the Petitioners. The last chance to prevent what may be generally viewed by the American public as a total failure of the American judicial system to provide relief in this case lies with this Court.

Procedural Background

On November 15, 2018, Probate Judge Thomas E. Rickhoff revoked Charlie's durable and medical powers of attorney and appointed Tonya as permanent

guardian of Charlie's estate, appointed Laura as permanent guardian of Charlie's person.

On January 29, 2019, Probate Judge Oscar J. Kazen held a non-evidentiary hearing, and after considering competing motions for new trial or reconsideration of the November 15, 2018 Order appointing guardians, ruled that Phil did not have authority to represent Charlie, and granted Tonya's motion to remove Laura and appoint Mary as a professional guardian of Charlie's person without findings of fact or legally and factually sufficient grounds.

On February 4, 2019, the trial court considered Phil's notice of appearance as retained counsel for Charlie and ruled that he could not represent Charlie. Phil made a bill of exception including Laura and Charlie's testimony about his preferences regarding his property, social and work activities, and their dissatisfaction with the court-sanctioned guardianship.

On February 8, 2019, the trial court conducted a non-evidentiary hearing to consider Charlie's request for temporary restraining order and temporary injunction and ruled that Charlie had been adjudicated to lack capacity to hire or consent to legal representation by Phil. The trial court also ruled that Charlie's motion to restore capacity was premature.

On February 20, 2019, the trial court considered Laura's application for temporary restraining order. The trial court stated that the motion for temporary restraining order had some requests by Charlie, which

the court would certainly consider, but observed that Charlie had no attorney to represent his interest

On February 22, 2019, the trial court held a non-evidentiary hearing on Laura's amended motion for temporary restraining order, which was denied without any findings regarding her standing and capacity.

On February 25, 2019, Charlie filed another handwritten letter to the Court requesting an independent medical examination.

On March 14, 2019, the guardians filed their original petition for ex parte temporary restraining order and temporary injunction against Petitioners.

On March 21, 2019, Laura and Brittany filed a motion for special leave to file a sworn application to restore capacity or modify the guardianship with attached affidavit.

On March 22, 2019, Laura filed a motion for independent medical exam and appointment of an attorney ad litem.

On April 1, 2019, the guardians filed their motion for sanctions and response to a motion to recuse with 300 pages of attachments.

On April 10, 2019, the trial court heard the guardians' motion for sanctions. On May 8, 2019, the guardians filed a First Amended Original Petition and joint application for temporary restraining order and permanent injunction.

On May 10, 2019, Tonya filed an amended application for sale of real property including Charlie's home and condominium. The trial court granted the amended application to sell property on May 27, 2019.

On May 23, 2019, the guardians filed a notice of filing attorneys' fees appendix showing \$262,391.77 billed for five attorneys for adoption, marriage, TRO/sanctions, motion to strike pleadings and recusal.

On May 29, 2019, the trial court signed a Second Amended Order Granting Motion for Sanctions including \$226,974 punitive and/or compensatory sanctions, plus \$80,000 in the event of unsuccessful appeals, against Petitioners. The guardians filed an appendix and application to pay attorneys' fees.

On July 12, 2019, the trial court signed an Order authorizing the sale of Charlie's 2016 Corvette and 2014 Honda Goldwing motorcycle.

A few months later, Tonya filed a second application to sell Charlie's 2014 Chev pickup truck, 2007 Corvette, 2006 Cadillac, 2008 Harley-Davidson, and two airplanes as well as his airplane hangar at Boerne Airport.

On August 19, 2019, Appellants filed a notice of appeal. On August 20, 2019, Appellants filed an amended notice of appeal. On January 15, 2020, Appellants filed a corrected amended notice of appeal.

On August 26, 2019, Tonya and Mary filed an application to expend funds and attached invoices from AA Care Services, which showed that Charlie's estate

was billed \$48,104.52 for professional supports and services for about three months from April 29, 2019 through July 21, 2019.



REASONS FOR GRANTING THE PETITION

The first reason for granting the petition is to address the national guardianship-abuse crisis, which was brought to national attention by the 2020 Netflix documentary about this case. Petitioners submit that this case provides a compelling opportunity for this Court to give direction to Texas courts to exercise due diligence to protect state and federal civil rights of vulnerable persons, who are being exploited by unscrupulous guardians. This case is an extreme example of how unscrupulous guardians have abused their power over a defenseless person and his assets to isolate him from his family-based support network and deny his liberty. The Texas trial court's orders and appellate court's opinion condoned extreme guardianship abuse in this case, which infringed and/or denied First and Fourteenth Amendments protections, so as to create a meaningful issue worthy of granting certiorari.

The second reason for granting the petition is to address the Texas court's refusal to acknowledge Charlie's right to counsel and/or representation by a next friend to defend himself against his unscrupulous guardians, protect his liberty and property, regain his capacity, and/or assert his state and federal rights to equal protection and due process. The denial

of Charlie's right to legal counsel and/or representation by next friend in this case infringed and/or denied First and Fourteenth Amendments protections, so as to create a meaningful issue worthy of granting certiorari.

The third reason for granting the petition is recognize and uphold Petitioners' rights to freedom of speech, association, petition and due process as advocates for Charlie, who was deemed to lack capacity to defend himself against his unscrupulous guardians, protect his liberty and property, regain his capacity, and/or assert his state and federal rights. This case is an extreme example of the use of sanctions to punish advocates for a defenseless person to the point of marginalizing their ability to advocate, and to isolate the person, who needs their help. This case provides a unique opportunity for this Court to give direction to Texas and other state courts to consider the best interests of persons under guardianship, when, as here, there is a dispute between a defenseless person and his oppressed advocates against guardians and their attorneys' state court-sanctioned breaches of fiduciary duties including misapplication of a "protected" person's assets, which implicate First and Fourteenth Amendments rights, privileges and immunity, so as to create a meaningful issue worthy of granting certiorari.



SUMMARY OF ARGUMENT

The Court of Appeals' Memorandum Opinion and Judgment, dated March 31, 2021, dismissing the appeal by Charlie, by and through Billy Duncan, as next friend, due to lack of jurisdiction, and affirming the trial court's May 29, 2019 Second Amended Order Granting Motion for Sanctions were entered in error because Charlie had, or should have had, a right appeal by and through his next friend, and the sanctions order was so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The Guardians and their attorneys were responsible for breaches of their fiduciary duties because they incurred \$262,391.77 for unreasonable and unnecessary attorneys' fees, which were paid by Charlie's estate to contest Charlie's right to counsel, marriage, adoption, recusal and sanctions issues without substantial benefit to Charlie, when they already knew Laura and Brittany A. Martinez were indigent.

The Second Amended Order Granting Motion for Sanctions finding that Petitioners should be required to pay \$226,974, plus \$80,000 in the event of unsuccessful appeals, as pre-trial sanctions were entered in error and an abuse of discretion because it effectively deprived Petitioners including Charlie of a final hearing on the merits, notwithstanding their jury demand.

The trial court's finding that the undersigned counsel should be required to pay \$222,974 punitive and/or compensatory sanctions, plus \$80,000 in the event of unsuccessful appeals, jointly and severally

with his clients Laura and Brittany, as a sanction for his litigation efforts was entered in error and an abuse of discretion because Phil's zealous advocacy was not vexatious, the trial court's findings were so contrary to the overwhelming weight of the evidence as to be clearly wrong, and Petitioners' attorney's actions were protected by attorney immunity.

The Fourth Court of Appeals Opinion and Judgment and the Texas Supreme Court's decision not to hear this case pursuant to Texas Rule of Appellate Procedure 56.1(a) were in error because (1) the justices of the court of appeals disagree on an important point of law; (2) there is a conflict between the courts of appeals on an important point of law; (3) this case involves the construction or validity of a statute; (4) this case involves constitutional issues; (5) the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and/or (6) the court of appeals has decided an important question of state law that should have been resolved by the Texas Supreme Court.



ARGUMENT

Question No. 1: Whether the Court of Appeals' Memorandum Opinion and Judgment, dated March 31, 2021, dismissing the appeal by Charlie, by and through Billy Duncan, as next friend, due to lack of jurisdiction, and affirming the trial court's May 29, 2019 Second Amended Order Granting Motion for Sanctions were entered in error because Charlie had, or should have had, a right appeal by and through his next friend, and the sanctions order was so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Charlie has standing to challenge breaches of fiduciary duty by his guardians, who authorized and paid \$262,391.77 from his estate in order to obtain an ill-advised, uncollectable sanctions order. In a suit by a next friend for an incompetent, the incompetent is the real party. *McGinnis v. McGinnis*, 267 S.W.2d 432, 435 (Tex. Civ. App. – San Antonio 1954). If not Billy Duncan, as next friend, the trial court or court of appeals should have appointed a next friend, guardian ad litem and/or attorney ad litem. The failure or refusal to do so discriminated against Charlie on the basis of his perceived disability or incapacity and denied him due process and/or equal protection under the law. Tex. Const. Art. 1 Section 19, U. S. Constitution First and Fourteenth Amendments.

The guardians and their attorneys had irreconcilable conflicts of interest with Charlie, which precluded their representation of him in the trial court or

on appeal. To wit, the guardians and their attorneys billed Charlie's estate \$262,391.77 in unnecessary and unreasonable fees for contesting Charlie's right to counsel, restoration of capacity or modification of the guardianship, removal of the guardians, right to marry Laura and adopt her adult children, and suing indigent parties for sanctions with no reasonable hope of reimbursement.

Petitioners submit that no ethical guardian or reputable attorney would incur \$262,391.77 in attorneys' fees at the expense of an incapacitated client without any prospect for reimbursement to his estate, under the facts and circumstances of this proceeding. When the trial court adjudicated incompetence and appointed guardians, it assumed responsibility to protect the incapacitated person's best interest. Tex. R. Civ. P. Rule 44; *McGinnis v. McGinnis*, 267 S.W.2d 432, 435 (Tex. Civ. App. – San Antonio 1954).

Charlie's best interests were not represented, when the trial court failed or refused to appoint an attorney or guardian ad litem but allowed his guardians to incur \$262,391.77 billed by their five attorneys to obtain sanctions against the Petitioners but paid by his estate. The court of appeals' dismissal of Billy Duncan's appeal on jurisdictional grounds and denial of legal representation to Charlie, sets a precedent that encourages unscrupulous guardians and attorneys to exploit their incapacitated clients with abandon because the court of appeals ruling renders wards of unscrupulous guardians and their attorneys defenseless,

regardless of conflicts of interest and breaches of fiduciary duties.

This petition for writ of certiorari presents this Court with the opportunity to declare that guardians and their attorneys have fiduciary duties to their wards, such that there can be legal and equitable consequences for guardians and their attorneys, who cause waste to a ward's estate. This proceeding is an extreme example, which has gained worldwide attention due to being featured in the Netflix "Dirty Money" Season 2 episode, "Guardianship, Inc." Petitioners request this Court to take judicial notice of the Netflix "Dirty Money" Season 2 episode, "Guardianship, Inc.", which was published worldwide from March-October 2021.

Furthermore, Tonya Barina, individually, not as guardian of Charlie's estate, has used the Order Granting Motion for Sanctions to bolster her claims in Cause No. 2021-CI-04501, in the District Court, 285th Judicial District, Bexar County, Texas, against the Petitioners, Netflix, Inc. and others for defamation, intentional infliction of mental distress, and more than a million dollars in alleged damages to her reputation. Petitioners request this Court to take judicial notice of *Tonya Barina v. Netflix, Inc., et al.*, Cause No. 2021-CI-04501, in the District Court, 285th Judicial District, Bexar County, Texas. Such self-serving use of the pre-trial Order Granting Motion for Sanctions gives the appearance of finality, notwithstanding the fact that the Appellants have not yet received due process including a jury trial on the merits.

If a person is represented by a guardian or next friend, rule 173 authorizes a trial court to appoint a guardian ad litem, when (1) “the next friend or guardian appears to the court to have an interest adverse to the party” or (2) the parties agree to the appointment. Tex. R. Civ. P. 173.2(a)(1), (2); *King v. Payne*, 292 S.W.2d 331, 335 (Tex. 1956) (stating that rule 173 provides for situation in which conflict of interest arises between minor and her guardian or next friend – “a contingency not covered by Rule 44”).

Because guardians had a conflict, they could not represent Charlie, and a next friend was required. *Gardner v. Parson*, 874 F.2d 131 (3d Cir. 1989) citing 3A J. Moore, W. Taggart & J. Wicker, *Moore’s Federal Practice* p. 17.26 (2d ed. 1987) (“[I]f the representative is unable or refuses to act or his interests conflict with the person represented, the infant or incompetent may sue in federal court by his next friend or by a guardian ad litem.”); see also 6 C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 1570 (1971) (“if the infant or incompetent has a general representative who refuses to act or his own interests conflict with those of the person he is supposed to represent . . . [c]ourts, both state and federal, always have had the power to appoint special representatives under these circumstances, and the decided cases indicate that this power has been preserved by Rule 17(c).” (footnotes omitted)).

The trial court’s orders granting motion for sanctions and requiring Charlie’s estate to pay \$262,391.77 for unreasonable and unnecessary attorneys’ fees, under the facts and circumstances of this proceeding, were so arbitrary and unjust, without any regard for

Charlie's best interests, that common sense, equity and justice require reversal. Therefore, the court of appeals' denial of jurisdiction and dismissal of Billy Duncan's appeal, which was actually Charlie's appeal, by and through Billy Duncan as next friend, should be reversed and rendered.

Alternatively, this Court should decide the jurisdictional issue, reverse the dismissal of Charlie's appeal by and through Billy Duncan, as next friend, and remand to the Texas Supreme Court and/or Fourth Court of Appeals with instructions to consider the appeal filed by Charlie or appoint another legal representative for Charlie to contest the guardians' adverse actions including denial of independent counsel, and wrongful expense of \$262,391.77 for unreasonable and unnecessary attorneys' fees to contest his right to counsel, restoration of capacity, removal of the guardians, right to marry Laura and adopt her adult children, and suing indigent parties for sanctions.

Question No. 2: Whether the Second Amended Order Granting Motion for Sanctions finding that Petitioners should be required to pay \$226,974, plus \$80,000 in the event of unsuccessful appeals, as pre-trial sanctions was entered in error and an abuse of discretion because it effectively deprived Petitioners including Charlie of a final hearing on the merits, notwithstanding their jury demand.

The guardians' claims for sanctions against the Petitioners should be barred by the doctrine of unclean

hands because the guardians and their attorneys contributed to or caused unnecessary and unreasonable expense to Charlie's estate due to their own negligence, bad judgment, conflicts of interest and/or breaches of fiduciary duty to Charlie, who was the real party-in-interest.

The Petitioners acted in good faith with authority in their capacities as interested persons and legal counsel pursuant to Texas Estates Code § 22.018(2). Petitioners advocated zealously for Charlie's best interests including right to counsel, restoration of capacity or modification of the guardianship, removal of the guardians, less restrictive alternatives including available supports and services, and right to marry Laura and adopt her adult children.

Charlie's rights were disserved by the Guardians and their attorneys' hostile actions including opposing Charlie's right to counsel, changing the locks at his automotive shop, abducting him from his home, substituting paid help for family-based supports and services, opposing motions to restore capacity or modify the guardianship, evicting Charlie's informal family from their home, annulling his marriage, setting aside the adult adoptions, opposing Charlie's Go Fund Me project, and spending hundreds of thousands of Charlie's money to get an order for sanctions, when they already knew that Laura and Brittany were indigent.

A fiduciary relationship existed, or should have existed, between Charlie and his guardians and their attorneys. *Franks v. Roades*, 310 S.W.3d 615 (Tex. App. –

Corpus Christi – Edinburg 2010). Additionally and alternatively, a court treats parties in guardianship proceedings as fiduciaries. “If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may require the party to reimburse the ward’s estate for all or part of the attorneys’ fees awarded under this section and shall issue judgment against the party and in favor of the estate for the amount of attorneys’ fees required to be reimbursed to the estate.” Estates Code Sec. 1155.054(d).

Under such conditions, equity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity and benefits of the transaction that it is fair and reasonable. *Stephens County Museum v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974) (citing Pomeroy, *Equity Jurisprudence* § 956 (5th ed. 1941); *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965); *Cooper v. Lee*, 12 S.W. 483 (Tex. 1889); see also *Tippett v. Brooks*, 67 S.W. 512, writ ref’d (1902)).

It was not necessary or reasonable for the Guardians to incur fees for five attorneys including \$262,391.77 of Charlie’s money to contest Charlie’s marriage and adult adoptions and seek sanctions against the Petitioners, when they could simply have requested the trial court to appoint a guardian and/or attorney ad litem. The trial court could have avoided conflicts of interest, breaches of fiduciary duties, waste of judicial resources, and the shameful expense of

\$262,391.77 of Charlie's money. Equity and justice demand that the Guardians and/or their attorneys, not the Petitioners, should be sanctioned for breach of their fiduciary duties to Charlie and his estate, and the unnecessary and unreasonable fees paid should be disgorged and paid back to Charlie's estate.

Question No. 3: Whether the trial court's order that Phil should be required to pay \$222,974 punitive and/or compensatory sanctions, plus \$80,000 in the event of unsuccessful appeals, jointly and severally with his clients Laura and Brittany, as a sanction for his litigation efforts was entered in error and an abuse of discretion because Phil's zealous advocacy was not vexatious, the trial court's findings were so contrary to the overwhelming weight of the evidence as to be clearly wrong, and Petitioners' attorney's actions were protected by attorney immunity.

Phil asserts the defense of attorney immunity. It is well-settled in Texas that a third party may not generally hold an attorney liable for conduct undertaken in the representation of a client. See, e.g., *Alpert v. Crain, Caton & James, PC*, 178 S.W.3d 398, 406 (Tex. App. – Houston [1st Dist.] 2005, pet. denied). This general rule is designed to encourage “loyal, faithful, and aggressive representation by attorneys employed as advocates,” which might be compromised if attorneys were subject to suit by third parties. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting

Mitchell v. Chapman, 10 S.W.3d 810, 812 (Tex. App. – Dallas 2000, pet. denied)).

An attorney is thus “given latitude to ‘pursue legal rights that he deems necessary and proper’ precisely to avoid the inevitable conflict that would arise if he were ‘forced constantly to balance his own potential exposure against his client’s best interest.’” *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 405). The scope of the rule turns “on the type of conduct in which the attorney engages, rather than on whether the conduct was meritorious in the context of the underlying lawsuit.” *Renfro v. Jones & Associates*, 947 S.W.2d 285, 288 (Tex. App. – Fort Worth 1997, writ denied). Hence, if an attorney conclusively establishes that his conduct was within the scope of his legal representation of a client, attorney immunity applies. *Cantey Hanger*, 467 S.W.3d at 481. Consequently, the Guardians’ claim for sanctions against Phil is without merit and must be dismissed.

Charlie’s best interests including freedom of speech and association, right to petition, due process and equal protection were at issue in this proceeding, but the trial court and court of appeals denied Charlie’s representation by legal counsel, and the Texas Supreme Court denied a petition for review. The trial court should have applied a similar three-factor due process test in this guardianship case as articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to determine whether due process required appointment of guardian ad litem for Charlie as an adult under guardianship in this case. *Lassiter v. Department of*

Social Svcs., 452 U.S. 18, 27 (1981). These factors include (1) the private interests at stake, (2) the government's interest, and (3) the risk of error. *Id.* When, as here, the Court is presented with a best-interests consideration, trial courts should consider only the best interest of the person with a disability. *Greg Abbott v. G.G.E., E.M.B, and G.D.E.*, 463 S.W.3d 633 (Court of Appeals of Texas, Austin 2015) (citing *Urbish v. 127th Judicial Dist. Court*, 708 S.W.2d 429, 432 (Tex. 1986)).

Charlie's right to representation pursuant to Texas Estates Code Section 1202.103(a) appears to be an issue of first impression under the facts of this case. No prior opinions of Texas courts of appeals or the supreme court have addressed this specific issue in the guardianship context including constructive denial of a right to counsel by striking pleadings without following Texas Rules of Civil Procedure Rule 12 procedure.

This Court should rely on the plain meaning of the language of Section 1202.103(a) and rule that Charlie had the right to retain counsel, and Phil had authority to represent Charlie. To rule otherwise, would deny Charlie's rights to petition, due process and/or equal protection because the trial court struck Charlie's pleadings that Phil filed, but failed or refused to appoint legal counsel pursuant to Section 1202.101 to pursue Charlie's legal remedies including a motion for leave to file a motion to restore his capacity or modify the guardianship.

Furthermore, the Bill of Rights for Persons under Guardianship, Texas Estates Code Section 1151.351

provides: “A person under a guardianship retains all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted.” The Orders appointing guardian do not specifically limit Charlie’s right to representation, either court-appointed or retained, to petition the Court, complain about violations of his rights, restore capacity or modify the guardianship, and file an appeal.



CONCLUSION

The shocking reality of guardianship abuse in America, which is typified by the facts in this case, is attracting nationwide and worldwide attention. Millions of at-risk Americans are rightfully concerned whether they will live to enjoy the fruits of their labor or whether their aspirations to the American Dream of personal achievement and success will be dashed the way that Charlie and Laura had their life and dreams destroyed. Whether Texas courts will continue to be seen as turning a blind eye, or worse, aiding and abetting guardianship abuse depends on this Court providing guidance and protection to fundamental human rights to dignity, fairness and justice in the face of this home-grown attack on the American Dream.

Charles I. Thrash, by and through Billy Duncan as next friend, Laura A. Martinez, Brittany A. Martinez,

and Philip M. Ross respectfully submit that this Court should grant certiorari to the Texas Supreme Court with instructions to reverse the court of appeals' dismissal of the appeal of Billy Duncan, as next friend of Charles Thrash, and remand the appeal to the court of appeals with instructions to consider Charles Thrash's appeal. Petitioners also submit that this Court should declare that guardians and their attorneys have fiduciary duties to their wards. Petitioners request reversal of the opinion and judgment of the court of appeals, reversal of the second amended order granting motion for sanctions, and remand to the trial court for further proceedings including a jury trial. Petitioners request such further relief to which they may be justly entitled.

◆

PRAYER

For all of the foregoing reasons, Petitioners respectfully pray that the United States Supreme Court grant certiorari.

Respectfully submitted,

PHILIP M. ROSS
Texas State Bar No. 17304200
1006 Holbrook Road
San Antonio, Texas 78218
Phone: 210/326-2100
Email: ross_law@hotmail.com