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APPENDIX 1

FILE COPY

RE: Case No. 22-0797
DATE: 8/18/2023
COA #: 05-22-00645-CV
TC#: PR-18-03799-2
STYLE: IN REMERLO

Today the Supreme Court of Texas denied the petition for writ of mandamus, as supplemented, in the above- referenced case. The Motion for Leave to File Supplemental Petition for Writ of Mandamus is granted. The Motion to Consolidate is dismissed as moot.

MR. CHARLES W. MCGARRY
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* DELIVERED VIA E-MAIL *

APPENDIX 2

Order entered August 9, 2022



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-22-00645-CV

IN RE KENDALL MERLO, Relator
Original Proceeding from the Probate Court
No. 2 Dallas County, Texas, Trial Court Cause
No. PR-18-03799-2

ORDER

Before Justices Molberg, Pedersen, III, and Garcia

Based on the Court's opinion of this date, we **DENY** relator's petition for writ of mandamus and **DENY** as moot relator's Motion to Consolidate Petition for Writ of Mandamus With Related Appeal.

/s/ DENNISE GARCIA JUSTICE

DENY and Opinion Filed August 9, 2022

**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-22-00645-CV

IN RE KENDALL MERLO, Relator

**Original Proceeding from the Probate Court
No. 2 Dallas County, Texas
Trial Court Cause No. PR-18-03799-2**

MEMORANDUM OPINION

Before Justices Molberg, Pedersen, III, and Garcia
Opinion by Justice Garcia

In this original proceeding, relator Kendall Merlo asks this Court for a petition for writ of mandamus ordering the probate court to vacate its May 10, 2022 Order Appointing Guardian ad Litem and its June 10, 2022 combined Order Denying the Motion to Set Aside Order Appointing Guardian ad Litem and Amended Order Appointing Guardian ad Litem and Expanding Powers. Before the Court is also relator's Motion to Consolidate Petition for Writ of Mandamus with Related Appeal (Motion to Consolidate).

Entitlement to mandamus relief requires relator to show that the trial court clearly abused its discretion and that relator lacks an adequate appellate remedy. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–

36 (Tex. 2004) (orig. proceeding). After reviewing relator's petition and record, we conclude that relator has failed to demonstrate a clear abuse of discretion. Accordingly, we deny the petition for writ of mandamus. *See* TEX. R. APP. P.52.8(a). We also deny the Motion to Consolidate as moot.

/Dennise Garcia/
DENNISE GARCIA JUSTICE

APPENDIX 3

No. PR-18-03799-2

IN THE ESTATE OF CHRISTOPHER J. MERLO,
DECEASED

IN THE PROBATE COURT
NUMBER TWO OF
DALLAS COUNTY, TEXAS

**ORDER DENYING THE MOTION TO SET
ASIDE ORDER APPOINTING GUARDIAN AD
LITEM AND AMENDED ORDER APPOINTING
GUARDIAN AD LITEM
AND EXPANDING POWERS**

On June 6, 2022, the Court conducted a hearing on the motion filed by KENDALL MERLO, Individually, titled the Objection to the Appointment of a Guardian ad Litem and Motion to Vacate Appointment; and the Motion to Set Aside the Order Appointing Guardian ad Litem filed by CHARLES STANLEY CHURCHWELL, JR., Co-Trustee of the Christopher J. Merlo Revocable Trust¹ ("CMRT").

The Court considered the arguments of counsels; Trustee's Brief in Support of his Motion to Set Aside Order Appointing Guardian ad Litem, filed by the

¹ James Merlo is the other Co-Trustee of the CMRT as reflected in paragraph 2 of the Plea in Intervention for Declaratory Judgment and Application for Injunctive Relief.

CMRT; the Brief on Authority to Appoint Guardian ad Litem and the Guardian ad Litem's First Report both filed by the Guardian ad Litem; and Defendant Mark Merle's Response and Supporting Brief related to Plaintiff Kendall Merlo's Objection to Order Appointing a Guardian ad Litem and Motion to Vacate accompanied by Defendant Mark Merlo's Response and Supporting Brief Related to Plaintiffs Charles Stanley Churchwell's Motion to Set Aside Order Appointing Guardian ad Litem.

The Court finds KENDALL MERLO is in need of a Guardian ad Litem to represent her in all matters pending in this cause number². KENDALL MERLO's interests are not being adequately represented. The Court being of the opinion that DON D. FORD, III, a licensed Attorney practicing before the Texas Bar, is a suitable person and is not disqualified to serve as such Guardian ad Litem.

The Guardian ad Litem shall have complete access to medical and psychological testing records, and any and all financial records, including banking and brokerage institutions. This access is authorized by this order, Texas Estates Code §1054.003, and 45CFR 164.512(e)(1)(i), the Health Insurance Portability and

² The current litigation involves 1. CMRT's request to Remove the Independent Executor of the Estate of Christopher J. Merlo, 2. the Plea in Intervention for Declaratory Judgment and Application for Injunctive Relief filed by Jim Merlo , sole Trustee of the Christopher J. Merlo Irrevocable Life Insurance Trust, 3) Mark Merlo's, as a beneficiary, Demand for Accounting and Inspection Pursuant to the Trust Agreement and for Statutory Accounting, and 4) Beneficiary's Petition for Accounting and Distribution of Estate filed by the CMRT and Kendall Merlo.

Accountability Act (HIPAA), which authorizes covered entities, when responding to a court order, to disclose protected health information in the course of any judicial or administrative proceeding.

The Guardian ad Litem is entitled to review all financial records in which KENDALL MERLO has a pecuniary interest pending in this matter, including but not limited to the Decedent's estate and trusts for which she is a beneficiary.

IT IS THEREFORE ORDERED the motions to vacate and set aside the appointment of DON D. FORD, III, are DENIED. The objection the appointment of a guardian ad litem is OVERRULED.

IT IS FURTHER ORDERED, the Guardian ad Litem is authorized to file a request for a statutory accounting on behalf of KENDALL MERLO from the personal representative of the Estate of Christopher J. Merlo, the CMRT and the Christopher J. Merlo Irrevocable Life Insurance Trust (ILIT) , with prior court approval.

IT IS FURTHER ORDERED, the Guardian ad Litem will review the Settlement Agreement between James Merlo, Charles Stanley Churchwell, acting as Trust Protector of the ILIT, and Samuel Mendicino. He will file a report on whether the Court should approve the Motion of James Merlo to dismiss Merle ' s petition with prejudice.

IT IS FURTHER ORDERED, the Guardian ad Litem is authorized to respond to the appeal pending in

cause number 05-22-00499-CV pending before the Fifth District Court of Appeals.

IT IS FURTHER ORDERED, the Guardian ad Litem is authorized to request an expansion of his powers.

SIGNED this 10th day of June, 2022.

/s/
INGRID M. WARREN
JUDGE PRESIDING

APPENDIX 4

No. PR-18-03799-2

IN THE ESTATE OF CHRISTOPHER J. MERLO,
DECEASED

IN THE PROBATE COURT

NUMBER TWO OF

DALLAS COUNTY, TEXAS

ORDER APPOINTING GUARDIAN AD LITEM

On this day, it appearing to the Court that Kendall Merlo, is in need of a Guardian ad Litem to represent her interests in connection with this Cause. And the Court being of the opinion that Don D. Ford, III, a licensed Attorney practicing before the Texas Bar, is a suitable person and is not disqualified to serve as such Guardian ad Litem.

IT IS THEREFORE ORDERED that Don D. Ford, III is hereby appointed Guardian ad Litem for Kendall Merlo.

SIGNED this 10th day of May, 2022

/s/

INGRID M. WARREN
JUDGE PRESIDING

APPENDIX 5

REPORTER'S RECORD
VOLUME 001 OF 001
CAUSE NO. PR-18-03799-2
CAUSE NO. PR-22-02235-2

IN THE ESTATE OF
CHRISTOPHER J. MERLO,
DECEASED and
GUARDIANSHIP OF
KENDALL MERLO

IN PROBATE COURT
NO. 2 OF
DALLAS COUNTY, TEXAS

HEARING ON MOTIONS

On the 16th day of February, 2023, the above-styled and numbered cause came on to be heard before the Court and the following was had before the Honorable Ingrid Warren, Judge presiding, held in Dallas, Dallas County, Texas;

Proceedings reported by computerized Stenotype Machine; Reporter's record produced by computer-assisted transcription.

Lisabeth L. Kellett, Texas CSR, 4416, Official Court Reporter - Probate Court No. 2, 1201 Elm Street, Ste. 2200-A, Dallas, Texas 75207.

A P P E A R A N C E S

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P R O C E E D I N G S
(Proceedings held in open court.)

THE COURT: We'll go ahead and get started. The time is now 10:29 a.m. The Court will consider the following two matters: The first is Cause Number PR-22-02235-P-2, styled in the Guardianship of Kendall Merlo, an alleged incapacitated person. In that matter, the Court has a motion pending to dismiss the guardianship proceeding and, likewise, a response to that. And in the matter of Cause Number PR-18-03799-P-2, the Estate of Christopher J. Merlo, there are several matters pending there. There is a motion to vacate the guardian ad litem's appointment. There is a response to that motion. Trial is scheduled in that matter for next week. There is a motion for continuation of that trial filed by the Claimant,

Charles Stanley Churchwell, along with the guardian ad litem, and I believe also the defendant -- the independent executor of the estate has also filed a motion to continue joinder in the guardian ad litem's motion to continue. There are also several discovery disputes, motion to quash the protective order, motion to compel non-parties responses to subpoenas, and there has also been a motion filed to allow access to the Respondent in

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the guardianship proceeding, as well as a motion to enforce the Court's order authorizing an accounting and request for sanctions. All right. I believe I've covered everything.

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MR. MCGARRY: Your Honor, Cause Number 22-02235 is a court-initiated guardianship. In a court initiated guardianship, there are only two parties, the investigator and my client. I do not believe -- and the statute goes further to say that no other parties are contemplated because the only person who is allowed to file a guardianship application in a court-initiated guardianship is the investigator. It doesn't contemplate any other parties and nobody else here is a party to that case, and I don't believe anyone else has standing to oppose it.

THE COURT: Well, I don't know that I see it quite that narrowly. I mean, certainly the whole purpose of creating the court-initiated guardianship was derived from the estate case.

MR. MCGARRY: Well, the letter was presented in the estate case, but you opened a new case and put the letter and the appointment of the

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investigator in the new cause number, and the statute itself says that only the investigator who conducted the investigation can file an application in that case. And since he found that no guardianship was necessary, there is nothing left that can be done in that case, there is nothing left to do. I think it's a ministerial act to dismiss it because it can't go forward.

THE COURT: I do these every day and that's new to me. So, go ahead.

MR. FORD: Your Honor, the -- his motion -- first of all, I was not Eerved with a copy of his motion, but it came to my attention that it was pending on Friday afternoon when all the lawyers had a conference call. The -- the Court's order of me, appointing me, was made in the estate case and there is language that you would typically expect to see in a guardianship case order, although I didn't snap to the fact until I saw his motion on Friday, and you didn't actually make the order in the guardianship case as well. That's why I didn't file a response in the guardianship case because I haven't actually technically been appointed in that case. You do have the ability to appoint a guardian ad litem in the court-initiated guardianship case on top of the appointment of the court investigator. And my thought is that probably that issue may need to

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get cleaned up procedurally before you then take up the question of whether or not it's appropriate, because I have been appointed with all those same powers.

THE COURT: Right.

MR. FORD: And I've got concerns about resolving that issue at this point, but I think procedurally probably we need to clean that up procedurally.

THE COURT: Okay.

MR. MCGARRY: Statute says you can appoint an ad litem or an investigator, you have to choose and you chose an investigator. It doesn't allow both.

MR. FORD: I just don't think that's what the law is, Your Honor. I mean, I've been in numerous cases, in numerous courts, in numerous counties where there is both a guardian ad litem and a court investigator appointed. In statutory probate court, you know it happens all the time. The court investigator has to be appointed in every case, and very frequently, there is a guardian ad litem appointed at top. So I just don't - I believe that the statute does say "or" but I don't think that that's a limiting. I think it's just giving you the option, you know, to choose from and I don't think that's a limit.

MR. MCGARRY: Cases that have both are

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cases where the investigator has found that a guardianship is warranted, then an ad litem gets appointed, but the statute does say "or" as everybody concedes, and or means or, one or the other.

MR. FORD: Yeah, that's just factually incorrect. I mean, I've been in plenty of cases where there is both pre -- court-initiated guardianship and the court appoints both an ad litem and a court investigator at the same time to investigate the need.

MR. WEBER: Your Honor, if the court investigator found that Kendall Merlo was incapacitated and felt that a guardianship would be appropriate, then a guardianship application would have been filed, and at that point, the Estate's Code requires an attorney ad litem for the proposed ward. And then the Court has discretion to appoint a guardian ad litem. But until -- up until the point where the court investigator has determined the two things that they're authorized to do under 1102, is the person incapacitated and do they need -- is a guardianship necessary. Until that happens, you don't need both. You can't have both. Now that the court investigator has said there is no guardianship necessary, that should end this matter. Anything further is simply improper.

MR. FORD: Your Honor, I'm going to --

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right back to where you started, the need for an evidentiary hearing. I had a long conversation with the court investigator after she issued her report, and

I dug into, what did you do, what findings did you make, all of those kinds of things. And she said, look, I think she can feed and clothe herself –

MR. WEBER: Objection; hearsay.

MR. FORD: Your Honor, I'm the guardian ad litem. I'm the guardian ad litem, I can testify as to hearsay.

THE COURT: Well, this isn't an evidentiary hearing. I mean, that's my point.

MR. WEBER: It's absolutely improper for him to be doing that.

THE COURT: But that's my point. My point is, I need more evidence than an opinion. And so in order for this Court to be able to determine whether or not her opinion in and of itself is conclusive, I need a little bit more, because I have all this evidence. Not evidence - - well some of it is -- and argument in the decedent's estate. I have never laid eyes on Kendall Merlo in her dad's estate, and so it just -- it just makes one want to scratch their head when I have -- I have her uncle and her father's will and a ton of other things saying she has deficiencies.

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MR. MCGARRY: Your Honor –

THE COURT: And then I have -- I'm just saying -- I'm just saying, gentlemen, I'm not comfortable at this point relying on a report. And I routinely appoint both, the court investigator -- the court investigator is

a a social worker; she's not a lawyer. She can't file a pleading, in any event.

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THE COURT: Well, I wanted it set because I saw it wasn't served on everyone else, and so that's why I thought it would be better to have -- you know, to bring it to the light and let everybody see it and then we can talk about how best to deal with it. So with that said, it appears that I need to appoint the guardian ad litem in the guardianship proceeding. And so -- and to me, that's tangential with the motion that he's filed for access.

MR. FORD: That's correct, Your Honor.

MR. MCGARRY: Do you want to address that now?

THE COURT: Well, organizationally perhaps we could. I don't know if it's going to take a -- is it going to be --

MR. FORD: I think it's a pretty straightforward, five-minute discussion, Your Honor.

THE COURT: Okay.

MR. MCGARRY: I would agree. We have not denied access. We have just insisted that she have counsel present when Mr. Ford interviews her. She has a constitutional right to have counsel of her choice, and if Mr. Ford is a representative of the Court, a representative of the government, and if he is going to

question my witness, she has an absolute right to counsel

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THE COURT: I'd like to continue the order to vacate the guardian ad litem's appointment. At this

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point, it seems like if I'm going to appoint him in the guardianship and give him an opportunity to confer with Ms. Merlo, then we should delay that.

MR. WEBER: Your Honor, I -- excuse me -- I don't object to continuing that, but if we're going to continue that hearing, it is a threshold issue. Everything else either falls or rises depending on whether Mr. Ford is properly appointed or not. So I would suggest that we continue everything if Your Honor wants to continue the hearing on a motion to vacate. All the sanctions and all that other stuff is putting the cart before the horse, and I'm happy to elaborate if Your Honor would like, but that's my preliminary thought. Would Your Honor like me to elaborate?

THE COURT: Well, I need to process it. I'm thinking it through as you're saying it. So, you know, I'm just thinking it through, and I would like more food for thought.

MR. WEBER: Sure, sure. So it's -- we know the court investigator did her job. She didn't just go talk to Kendall; she reviewed medical records. There is a

report from a psychiatrist. This is more than just a social worker making a determination. She's relied on the psychiatrist report, and we don't think that a guardian ad litem is appropriate in light of that report.

APPENDIX 6

**IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS**

NO. 22-0797

In re KENDALL MERLO,

Relator,

**SUPPLEMENTAL PETITION
FOR WRIT OF MANDAMUS**

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ATTORNEY FOR KENDALL MERLO

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 52.3(a) of the Texas Rules of Appellate Procedure, the following is a complete list of the parties in the trial court, as well as the names and addresses of their trial and appellate counsel:

Kendall Merlo
Beneficiary/Relator

Estate of Christopher J. Merlo
Defendant/Real Party in Interest

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Charles Stanley Churchwell

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Co-Trustee,
Chris Merlo Revocable Trust
Plaintiff/Real Party in Interest

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901 Main Street, 33'd Floor
Dallas, Texas 75202

Robert McGuire
FISHMAN JACKSON RONQUILLO
13155 Noel Road, Suite 700
Dallas, Texas 75240

Appointed Guardian ad Litem
For Kendall Merlo

James Merlo

Former Trustee,
Christopher J. Merlo Irrevocable Life Insurance
Trust¹

¹ James Merlo had intervened in his capacity as Trustee of the Christopher J. Merlo Irrevocable Life Insurance Trust, but as of the date of this petition his claims had already been settled and he has filed a nonsuit of his intervention. James is also not representing the Chris Merlo Revocable Trust in this litigation and so is no longer a real party in interest.

Co-Trustee, Chris Merlo Revocable Trust

Cleveland G. Clinton
Gregory W. Sampson
GRAY REED & MCGRAW LLP
1601 Elm Street, Suite 4600
Dallas, Texas 75201

Counsel for *James Merlo*

Hon. Ingrid M. Warren
Presiding Judge
Probate Court No. 2
Renaissance Tower
1201 Elm Street, Suite 2200-A
Dallas, Texas 75270

Respondent

This list is furnished so that members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

[TABLE OF CONTENTS OMITTED]

[INDEX OF AUTHORITIES OMITTED]

STATEMENT OF THE CASE

Nature of the Case: appointment of guardian ad litem for the competent adult beneficiary of an estate; refusal to close a court-initiated guardianship proceeding where the court's own investigator concludes there is no basis for a guardianship

Respondent:

Hon. Ingrid M. Warren
Presiding Judge
Probate Court No. 2
Renaissance Tower
1201 Elm Street, Suite 2200-A
Dallas, Texas 75270

Respondent's Actions from Which Relief is Sought:

In an action to remove the Executor of an Estate for misconduct, the probate court *sua sponte* entered an order appointing a guardian ad litem for an adult beneficiary of the estate on May 10, 2022. In response to two motions to vacate the appointment, the probate court entered an order on June 10, 2022 denying the motions and instead expanding the powers of the guardian ad litem.

The probate court then initiated a guardianship proceeding, and appointed the court's Investigator to determine whether a guardianship was needed for the beneficiary. When the court's investigator concluded that the beneficiary was competent and did not require assistance, the probate court refused to accept the investigator's report and appointed the same guardian ad litem to challenge the report.

Real Parties in Interest: Mark Merlo, as executor

Chris Merlo Revocable Trust is the primary Beneficiary of the estate and the plaintiff in the action to remove the executor. Charles Stanley Churchwell is representing the trust as co-trustee. James Merlo is the other co-trustee but is not representing the Trust in the litigation against his brother Mark.

Kendall Merlo is a beneficiary of the estate and the proposed ward in the court-initiated guardianship

Don D. Ford III is the appointed guardian ad litem for Kendall Merlo in both the removal action against the Executor and the court-initiated guardianship against Kendall Merlo

Date Petition Filed in Court of Appeals:
June 29, 2022

Court of Appeals:
Fifth District Court of Appeals at Dallas

Panel and Author of Court of Appeals:

Justice Ken Molberg, Justice William Pedersen, III, and Justice Denisse Garcia. Both opinions were authored by Justice Garcia

Court of Appeals' Disposition: The petition in case number 05-22-00645-CV was denied on August 9, 2022.

Related case: The same issues are pending in this Court in a subsequent mandamus petition filed by Charles Stanley Churchwell, Jr., as trustee of the Christopher J. Merlo Revocable Trust, in case number 22-0802

STATEMENT OF JURISDICTION

This Court has jurisdiction over this original proceeding under Tex. Govt Code §22.002(a). Mandamus is normally the proper remedy to review an order appointing a guardian ad litem. Tex. R. Civ. Proc. 173.7(a).

SUPPLEMENTAL ISSUES PRESENTED

5. The Probate Court Abused its Discretion in Refusing to Close its Court-initiated Guardianship and Refusing to Accept its own Investigator's Report that Kendall Merlo is a competent adult and does not require a guardianship because Section 1102.001 of the Texas Estates Code only permits an application for guardianship in a court-initiated case to be filed by the investigator who conducted the investigation, and only when the investigator concludes that a guardianship is necessary.
6. The Probate Court Abused its Discretion in authorizing the guardian ad litem to appear in the court-initiated guardianship in cause number PR-22-00257-2 to contest the conclusions of the Court's Investigator for two

reasons: (1) Section 1102.001 of the Texas Estates Code clearly allows the court to appoint either a court investigator or a guardian ad litem for the purpose of determining Kendall's competency; it does not allow the court to appoint both; and (2) because the appointed guardian ad litem has such a clear and glaring conflict of interest as to amount to a denial of Kendall's constitutional right to due process.

SUPPLEMENTAL STATEMENT OF FACTS

When Kendall Merlo filed a motion to vacate the appointment the guardian ad litem the probate court had appointed *sua sponte* in cause number PR-18-03799-2, (App. V), Mark Merlo filed a response (App. W) and an appendix which contained an information letter stating Mark Merlo's belief that Kendall was incapacitated. (App. X,X-1). Based on this response, the probate court sent a letter on June 10, 2022 to the Probate Court's Investigator's Office, directing it start an investigation under Chapter 1102. (App. Y).

The Probate Court's June 10, 2022 letter, originally filed in Cause No. PR-18-03799-2, was also used to open a court-initiated guardianship case for Kendall Merlo in Cause No. PR-22-00257-2, without notice to Kendall. The guardianship case was discovered when the Investigator filed her final report in that cause. (App. EE – under seal).

The Investigator, Ms. Alma Garcia-Torrez, interviewed Kendall on August 24, 2022. She also interviewed Kendall's psychiatrist, Dr. Mark Blotcky,

and reviewed a recent neuropsychological reassessment conducted by Dr. Michelle Lurie, a clinical psychologist with Pediatric Neuropsychology Services, PLLC. Dr. Lurie's assessment concluded that "Kendall is a neurotypical adult who is perfectly capable of performing age appropriate daily living skills. She is not a special needs person." The investigator's report found that Kendall "appears to be substantially able to provide food, shelter, and clothing for herself, able to manage her physical health, and able to manage financial affairs with the supports and services that are currently in place." (App. EE – under seal).

Based on the investigator's report, Kendall filed a motion to accept the report and close the guardianship proceeding. (App. GG). A hearing was held on February 16, 2023. (App. II). Kendall argued that because it was a court-initiated guardianship, the only parties were Kendall and the investigator, and no one else had standing to oppose the investigator's report. (App. II, p. 8). She further argued that because the investigator had found that no guardianship was needed, no application to appoint a guardian could ever be filed in the case and the court had a ministerial duty to close the case. (App. II, p. 9).

Don Ford, III, the guardian ad litem in the removal case, then said that he had "concerns" about the investigator's report, and that he would have filed a response opposing the dismissal of the guardianship case but had not been appointed in that case. He then suggested that he be appointed in the guardianship case as well. (App. II, pp. 9-10).

Kendall's counsel responded that section 1102.001(a) states that *either* guardian ad litem *or* a court investigator may be appointed in a guardianship case for the limited purpose of determining whether someone is incapacitated, but not both. Both Ford and the court responded that both get appointed "all the time." (App. II, pp. 10, 13).

The probate court stated that she was not comfortable accepting her own investigator's report, and that she would appoint the guardian ad litem in the guardianship case. (App. II, pp. 13-14). There has still never been a competency hearing justifying the appointment of a guardian ad litem in either the removal case or the guardianship case.

SUMMARY OF THE ARGUMENT

Kendall Merlo is a competent 22-year-old woman. Her Uncle Mark is the only person alleging that Kendall is incapacitated, and he made the allegation as a putative defense to an action to remove him as executor. His allegation resulted in the probate court ordering its investigator to determine whether Kendall is in need of a guardian under Tex. Estates Code §1102.001. The investigator filed a report concluding that Kendall is not incapacitated and does not require a guardianship. (App. EE).

This supplemental petition complains about the probate court's recent decisions not to accept the report of its own investigator, refusing to close the court-initiated guardianship and instead appointing the guardian ad litem in the guardianship case to

oppose the investigator's findings. Each ruling constitutes an abuse of discretion for some of the same reasons that the appointment of the guardian ad litem in the removal case was an abuse of discretion.

First, the appointment of the guardian ad litem in the guardianship case also occurred without there first being a competency hearing. The appointment of a guardian ad litem in a guardianship case requires a finding that the person is incapacitated. Tex. Estates Code §1054.051. The hearing to make that determination must comport with due process. *Thomas v. Humfield*, 916 F. 2d 1032, 1034 (5th Cir. 1990). Appointing a guardian ad litem for Kendall in this guardianship case flies in the face of the finding that Kendall is not incapacitated. Appointing a guardian ad litem for a competent adult violates that person's basic human right to self-determination, as well as her constitutional rights to free speech, to free association, to due process and to the right to counsel of one's own choosing.

Second, the only statute which does not first require a competency hearing, Tex. Estates Code §1102.001(a), clearly allows the court to appoint *either* the court investigator *or* a guardian ad litem for the limited purpose of determining Kendall's capacity; it may not appoint both. Nor does the statute allow more than one investigation.

The investigator's findings that Kendall is not incapacitated and not in need of a guardianship leaves the court-initiated guardianship case with nowhere to go, because the investigator who conducted the investigation is the only person who

can file a guardianship application, and then only if the investigator concludes that the person is incapacitated and in need of a guardianship. Tex. Estates Code §1102.004. A report that that no guardianship is necessary should end the case and impose on the probate court a ministerial duty to close the case, because the mere existence of a court-initiated guardianship unfairly stigmatizes a person who does not require a guardian.

Moreover, the fact that the guardian ad litem has now been acting without there first having been a competency hearing has created a glaring conflict of interest so significant as to deprive Kendall Merlo of her due process right to a fair and impartial determination of her capacity. The validity of Don Ford, III's appointment as guardian ad litem now depends on a finding that Kendall Merlo is incapacitated and in need of a guardian. If Ford's appointment is void for lack of a competency hearing, he will not get paid for his work. He now has a huge financial incentive to overturn the investigator's findings and seek a finding that Kendall is incapacitated. Kendall's due process right to a fair and impartial competency hearing is violated where the guardian ad litem who owes her fiduciary duties, has a conflict of interest breaching those duties, because he won't get paid unless he sacrifices Kendall's human and constitutional rights by subjecting her to a court-initiated guardianship.

ARGUMENTS AND AUTHORITIES

5. The Probate Court Abused its Discretion in authorizing the guardian ad litem to appear

in the court-initiated guardianship in cause number PR-22-00257-2 to contest the conclusions of the Court's Investigator for three reasons: (1) there has still not been a competency hearing for Kendall Merlo; (2) Section 1102.001 of the Texas Estates Code clearly allows the court to appoint either a court investigator or a guardian ad litem for the purpose of determining Kendall's competency; it does not allow the court to appoint both; and (3) because the appointed guardian ad litem has such a clear and glaring conflict of interest as to amount to a denial of Kendall's constitutional right to due process.

A. THE PROBATE COURT'S RECENT APPOINTMENT OF DON FORD III AS GUARDIAN AD LITEM IN THE GUARDIANSHIP CASE IS AN ABUSE OF DISCRETION FOR MANY OF THE SAME REASONS THE ORIGINAL APPOINTMENT IN THE REMOVAL CASE IS AN ABUSE OF DISCRETION.

The Probate Court's Investigator, Ms. Alma Garcia-Torrez, filed her final report in the court-initiated guardianship case, cause number PR-22-02235-2. The report found that Kendall "appears to be substantially able to provide food, shelter, and clothing for herself, able to manage her physical health, and able to manage financial affairs with the supports and services that are currently in place." (App. EE – under seal). The report was supported by a recent neuropsychological reassessment conducted by Dr. Michelle Lurie, a clinical psychologist with

Pediatric Neuropsychology Services, PLLC. Dr. Lurie's assessment concluded that " Kendall is a neurotypical adult who is perfectly capable of performing age appropriate daily living skills. She is not a special needs person." (App. EE – under seal).

Based on the investigator's report, Kendall filed a motion to accept the report and close the guardianship proceeding in cause number PR-22-00257-2. (App. GG). A hearing was held on the motion on February 16, 2023. (App. II). The probate court stated that she was not comfortable accepting her own investigator's report, and that she would appoint Don Ford, III as guardian ad litem in the guardianship case as well. (App. II, pp. 13-14). The court declined to rule on a motion by Churchwell to vacate the original appointment of the guardian ad litem, given that she was now also appointing him in the guardianship case. (App. II pp. 21-22).

This new order appointing a guardian ad litem in the guardianship case repeats the same error the probate court made in originally appointing guardian ad litem in the removal case – there was no competency hearing and the appointment violated Kendall Merlo's rights to due process. The Texas Estates Code allows a probate court to appoint guardian ad litem in only two instances. It may appoint guardian ad litem for an incapacitated person in a guardianship proceeding. Tex. Estates Code §1054.051. Once a guardian has been appointed in a guardianship proceeding, the Court may also appoint guardian ad litem for the ward in other litigation. Tex. Estates Code §1054.052. That's it. Both require the filing of a guardianship proceeding, as well as an

actual finding that the proposed ward is incapacitated. There has never been a competency hearing.

B. SECTION 1102.001 OF THE TEXAS ESTATES CODE CLEARLY ALLOWS THE COURT TO APPOINT EITHER A COURT INVESTIGATOR OR A GUARDIAN AD LITEM FOR THE PURPOSE OF DETERMINING KENDALL'S COMPETENCY; IT DOES NOT ALLOW THE COURT TO APPOINT BOTH

Nor could the probate court appoint guardian ad litem in the guardianship case under Tex. Estates Code §1102.001(a). Section 1102.001 allows a probate court to appoint *either* guardian ad litem *or* a court investigator for the limited purpose of determining whether a person is incapacitated and a guardianship is necessary. Tex. Estates Code §1102.001(a). The statute expressly states that one or the other may be appointed; there is no provision allowing both to be appointed. The court elected to appoint a court investigator for this purpose. (App. Y). Nor is there any provision in the statute allowing more than one investigation to be conducted to determine whether a person is incapacitated and a guardianship is necessary.

The probate court's insistence that she appoints both guardian ad litem and court investigators "all the time" (App. II, p. 13).almost certainly refers to situations where a court investigator finds that a person is incapacitated and that a guardianship is necessary under Tex. Estates

Code §1102.001(a), and then guardian ad litem is appointed under Tex. Estates Code §1054.051.

C. APPOINTING DON FORD, III AS GUARDIAN AD LITEM IN THE GUARDIANSHIP CASE VIOLATES KENDALL MERLO'S RIGHT TO DUE PROCESS BECAUSE FORD NOW HAS A GLARING CONFLICT OF INTEREST.

The determination of Kendall Merlo's competency must comport with the requirements of due process. *Thomas v. Humfield*, 916 F. 2d 1032, 1034 (5th Cir. 1990). At a competency hearing, it must be proven that the individual is "incapable of properly caring for their own interests in the litigation" before guardian ad litem may be appointed. *Magallon v. Livingston*, 453 F.3d 268 (5th Cir. 2006); *Lindly v. Lindly*, 113 S.W. 750, 753 (Tex. 1908). Due process requires, at a bare minimum, a "fair trial in a fair tribunal." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997)

The fact that Don Ford, III has now been twice appointed as guardian ad litem without there first having been either a competency hearing or a finding that Kendall is incapacitated has created a glaring conflict of interest so significant as to deprive Kendall Merlo of her due process right to a fair and impartial competency hearing.

Because the law is clear that guardian ad litem cannot be lawfully appointed to represent a competent adult, the validity of Don Ford, III's appointment as guardian ad litem now depends on a finding that Kendall Merlo is incapacitated and in

need of a guardian. If Ford's initial appointment is void for lack of pleadings, notice and a competency hearing, then he will not get paid for his work. He now has a huge financial incentive to overturn the investigator's findings and seek a finding that Kendall is incapacitated.

When an attorney has a conflict of interest, it may result in ineffective assistance of counsel. *Ex parte Morrow*, 952 S.W.2d 530, 538 (Tex. Crim. App. 1997) (citing *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The Sixth Amendment guarantees the right to reasonably effective assistance of counsel, which includes the right to conflict-free representation. *See Strickland*, 466 U.S. at 692; *Cuyler v. Sullivan*, 446 U.S. 335, 348-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

The same should be true for guardian ad litem. A guardian ad litem owes fiduciary duties of loyalty to the person he is appointed to represent. Proceeding with a conflict of interest violates that fiduciary duty. *See Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179 (Tex. App. – Houston [14th Dist.] 2002, no pet.); *see also Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22-23 (Tex. App.--Tyler 2000, pet. denied)

Kendall Merlo's due process right to a fair and impartial competency hearing is violated when the guardian ad litem who owes her a fiduciary duty of loyalty and a duty to put her best interests first finds himself in a position where he can only get paid by finding her to be incapacitated and thereby sacrificing her basic human right to self-determination as well as her constitutional rights to free speech, freedom of

association, due process and the right to counsel of her choosing. There is really no other way to explain why Ford would instinctively oppose the court investigator's finding that Kendall Merlo is not incapacitated and does not require a guardianship.

6. The Probate Court Abused its Discretion in Refusing to Close its Court-initiated Guardianship and Refusing to Accept its own Investigator's Report that Kendall Merlo is a competent adult and does not require a guardianship because Section 1102.001 of the Texas Estates Code only permits an application for guardianship in a court-initiated case to be filed by the investigator who conducted the investigation, and only when the investigator concludes that a guardianship is necessary.

A. WHAT WEIGHT MUST THE PROBATE COURT GIVE TO ITS INVESTIGATOR'S FINDING THAT KENDALL MERLO IS NOT INCAPACITATED AND DOES NOT REQUIRE A GUARDIANSHIP?

In a court-initiated guardianship proceeding under Tex. Estates Code §1102.001(a), there are only two parties: the court-appointed investigator and the proposed ward. Indeed, the statute contemplates that there would not be any other parties, because if the investigator believes that the person is an incapacitated person and that a guardianship is necessary, then it is that investigator who must file an application for the appointment of a guardian. Tex. Estates Code §1102.004. In that situation, the court may also appoint guardian ad litem for the ward

under Tex. Estates Code §1054.051. But the point remains that the investigator and the ward are still the only parties to the case, and only the ward has standing to oppose the investigator's application.

But the statutes governing court-initiated guardianship proceedings do not address the effect of an investigation that reaches the opposite conclusion, *i.e.*, that the person is not incapacitated and does not require a guardianship. Who would have standing to oppose that determination? The investigator and the would-be ward are still the only parties. Without a competency hearing or a finding of incapacity, there is no legal basis for the appointment of a guardian ad litem. And such a determination results in a situation where no one is authorized to file an application for guardianship, because Tex. Estates Code §1102.004 only permits an application to be filed by the investigator in a court-initiated guardianship, and then only if the investigator has concluded that the person is an incapacitated person and that a guardianship is necessary. Even Tex. Estates Code §1102.003, which creates a window for the proposed ward to challenge the appointment of the investigator, measures that window in terms of the filing of an application under section 1102.004. It does not contemplate a report which precludes such an application.

In short, an investigator's report concluding that Kendall Merlo is not incapacitated and not in need of a guardianship leaves the court-initiated guardianship in a position where it cannot proceed. At the same time, the mere existence of the

guardianship proceeding subjects Kendall to possible stigmatization. *See Humfield*, 916 F.2d at 1033.

Nor would it be either fair or lawful for the probate court, not being satisfied with the findings of its investigator, to embark on a second investigation using a guardian ad litem. As noted earlier, section 1102.001 allows a probate court to appoint *either* guardian ad litem *or* a court investigator for the limited purpose of determining whether a person is incapacitated and a guardianship is necessary. Tex. Estates Code §1102.001(a). The statute expressly states that one or the other may be appointed; there is no provision allowing both to be appointed. Nor is there any provision in the statute allowing more than one investigation to be conducted to determine whether a person is incapacitated and a guardianship is necessary.

Given the fact that a guardianship necessarily deprives a person of her basic human right to self-determination as well as her constitutional rights to free speech, freedom of association, due process and the right to counsel of her choosing, something akin to *res judicata* or double jeopardy ought to attach to a court officer's finding that a person is not incapacitated and that a guardianship is not necessary. This Court should hold that a report concluding that the proposed ward in a court-initiated guardianship is not incapacitated and not in need of a guardianship imposes a ministerial duty on the probate court to close the guardianship case. The probate court's refusal to do so in this case constitutes and abuse of discretion for which mandamus relief is appropriate.

PRAYER

WHEREFORE, PREMISES CONSIDERED, relator prays that this Court issue a writ of mandamus directing respondent to: (1) vacate its Order Appointing Guardian Ad Litem in cause number PR-18-03799-2, (2) vacate its Order Denying the Motion to Set Aside Order Appointing Guardian Ad Litem and Amended Order Appointing Guardian Ad Litem and Expanding Powers in cause number PR-18-03799-2, (3) vacate its order appointing the same Guardian ad litem in cause number PR-22-02235-2, and (4) directing the respondent to close cause number PR-22-02235-2, and granting relator such other and further relief to which she may be justly entitled.

Respectfully submitted,

LAW OFFICE OF CHARLES McGARRY

/s/ Charles W. McGarry

Charles W. McGarry

Texas Bar No. 13610650

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McKinney, Texas 75072

(214) 748-0800

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ATTORNEY FOR KENDALL MERLO

RULE 52.3(j) CERTIFICATION

I hereby certify that I have reviewed this supplemental petition and have concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

/s/ Charles W. McGarry
Charles W. McGarry

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this document was sent to the guardian ad litem and to all counsel of record on March 1, 2023 by electronic filing manager.

/s/ Charles W. McGarry
Charles W. McGarry
]

CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared the foregoing petition using Microsoft Word 2010® software, a 14-point Times New Roman font for all text and a 12-point Times New Roman font for any footnotes. According to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contain 3,240 words, including footnotes.

/s/ Charles W. McGarry
Charles W. McGarry

APPENDIX 7

**IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS**

NO. 22-0797

In re KENDALL MERLO and CHARLES STANLEY
CHURCHWELL, JR., TRUSTEE OF THE
CHRISTOPHER J. MERLO REVOCABLE TRUST,

Relators,

PETITION FOR WRIT OF MANDAMUS

Charles W. McGarry
Texas Bar No. 13610650
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McKinney, Texas 75072
(214) 748-0800
cmcgarry@ix.netcom.com

ATTORNEY FOR KENDALL MERLO

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 52.3(a) of the Texas Rules of Appellate Procedure, the following is a complete list of the parties in the trial court, as well as the names and addresses of their trial and appellate counsel:

Kendall Merlo
Beneficiary/Relator

Defendant/Real Party in Interest

Charles W. McGarry
200 Adriatic Parkway, Suite 102
Dallas, Texas 75072

Counsel for
Kendall Merlo

Kenneth E. Walker
Walker & Chambers
Shops at Waterview Park,
150 E. Highway 67, Suite 240
Duncanville, Texas 75137

Attorney for Mark Merlo

Mark Merlo

Executor,
Estate of Christopher J. Merlo

Attorney for Mark Merlo

Charles Stanley Churchwell

Counsel for *Churchwell*

Co-Trustee,
Chris Merlo Revocable Trust
Plaintiff/Real Party in Interest

Don D. Ford III
Ford + Bergner LLP
901 Main Street, 33'd Floor
Dallas, Texas 75202

Robert McGuire
FISHMAN JACKSON RONQUILLO
13155 Noel Road, Suite 700
Dallas, Texas 75240

Appointed Guardian ad Litem
For Kendall Merlo

James Merlo

Scott D. Weber
NORRIS & WEBER, PLLC
3811 Turtle Creek Blvd., Suite 400
Dallas, Texas 75219-4423

\Former Trustee,
Christopher J. Merlo Irrevocable Life Insurance
Trust¹

¹ James Merlo had intervened in his capacity as Trustee of the Christopher J. Merlo Irrevocable Life Insurance Trust, but as of the date of this petition his claims had already been settled and he has filed a nonsuit of his intervention. James is also not

Co-Trustee, Chris Merlo Revocable Trust

Cleveland G. Clinton
Gregory W. Sampson
GRAY REED & MCGRAW LLP
1601 Elm Street, Suite 4600
Dallas, Texas 75201

Counsel for *James Merlo*

Hon. Ingrid M. Warren
Presiding Judge
Probate Court No. 2
Renaissance Tower
1201 Elm Street, Suite 2200-A
Dallas, Texas 75270

Respondent

This list is furnished so that members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

representing the Chris Merlo Revocable Trust in this litigation and so is no longer a real party in interest.

[TABLE OF CONTENTS OMITTED]

[INDEX OF AUTHORITIES OMITTED]

STATEMENT OF THE CASE

Nature of the Case: appointment of guardian ad litem for adult beneficiary of an estate

Respondent:

Hon. Ingrid M. Warren
Presiding Judge
Probate Court No. 2
Renaissance Tower
1201 Elm Street, Suite 2200-A
Dallas, Texas 75270

Respondent's Actions from

Which Relief is Sought: In an action to remove the Executor of an Estate for misconduct, the probate court *sua sponte* entered an order appointing a guardian ad litem for an adult beneficiary of the estate on May 10, 2022. In response to two motions to vacate the appointment, the probate court entered an order on June 10, 2022 denying the motions and instead expanding the powers of the guardian ad litem.

Real Parties in Interest: Mark Merlo, as executor

Chris Merlo Revocable Trust is the primary Beneficiary of the estate and the plaintiff in the action to remove the executor. Charles Stanley Churchwell is representing the trust as co-trustee. James Merlo is the other co-trustee but is not representing the Trust in the litigation against his brother Mark.

Kendall Merlo is a beneficiary of the estate

Don D. Ford III is the appointed guardian ad litem

Dates Petitions Filed in Court of Appeals:

Two petitions raising the same issue were filed in the court of appeals – Kendall Merlo filed a petition on June 29, 2022 in case number 05-22-00645-CV. Charles Stanley Churchwell, Jr., as trustee of the Christopher J. Merlo Revocable Trust, filed a petition on August 1, 2022 in case number 05-22-00747-CV. Both petitions sought review of the trial court’s order appointing a guardian ad litem for Kendall Merlo.

Court of Appeals:

Fifth District Court of Appeals at Dallas

Panel and Author of Court of Appeals:

Both petitions were heard by the same panel – Justice Ken Molberg, Justice William Pedersen, III, and Justice Denisse Garcia. Both opinions were authored by Justice Garcia

Court of Appeals’ Disposition:

The petition in case number 05-22-00645-CV was denied on August 9, 2022. The petition in case number 05-22-00747-CV was denied on September 1, 2022.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this original proceeding under Tex. Govt Code §22.002(a). Mandamus is normally the proper remedy to review

an order appointing a guardian ad litem. Tex. R. Civ. Proc. 173.7(a).

This case presents an important question of first impression: is it ever permissible to appoint a guardian ad litem for a competent adult, or does doing so always violate a person's human and constitutional rights to self determination? This Court has addressed the improper appoint of a guardian ad litem for a minor, *Ford Motor Co. v. Stewart, Cox and Hatcher, P.C.*, 390 S.W.3d 294 (Tex. 2013), but it has never addressed the implication of appointing a guardian ad litem for a competent adult.

ISSUE PRESENTED

1. The probate court abused its discretion in appointing a guardian ad litem for an adult beneficiary of an estate, who is presumed to be competent, when there is no guardianship proceeding pending, and the order was entered *sua sponte* and without notice or an evidentiary hearing. There is no legal basis for the appointment of a guardian ad litem, and there is no evidence to support the probate court's finding that: "The Court finds KENDALL MERLO is in need of a Guardian ad Litem to represent her in all matters pending in this cause number."

BACKGROUND AND STATEMENT OF FACTS

Christopher J. Merlo died on November 13, 2018. (App F, p.2). Prior to his death, he formed the

Chris Merlo Revocable Trust (“CMRT”), into which he transferred substantially all his assets. (App. D). A Will dated March 4, 2018, and a First Codicil dated July 27, 2018 were admitted into probate. (App. D). The Will was a "pass through" will directing that nearly all assets of the Estate were to be transferred to the CRMT, except that the decedent’s airline miles were to be transferred directly to Kendall Merlo, the decedent’s daughter. (App. B).

There is also a second trust, the Christopher J. Merlo Irrevocable Life Insurance Trust (“ILIT”), for which Kendall Merlo is the sole beneficiary. (App. A).

The co-trustees of the CMRT are the decedent’s brother, James Merlo, and the decedent’s long-time friend and law partner, Charles Stanley Churchwell. (App. L). The executor of the Estate is the decedent’s other brother, Mark Merlo. (App. B). James Merlo was also formerly the trustee for the ILIT; the ILIT currently has a corporate trustee, Cumberland Trust. (App. A).

Kendall Merlo and Charles Stanley Churchwell, as co-trustee of the CMRT, brought an action to remove Mark Merlo as executor. (See App. E, G). The grounds for removal included the following: (1) Mark Merlo had come into possession of approximately \$325,000 in cash for the estate, and subsequently spent it all on himself and on excessive legal fees, despite there being no reason to incur such fees prior to the removal action. He never distributed anything to either beneficiary. (2) he remained in possession of the titles to numerous automobiles and to a time share condominium, all of which had been

transferred to the CMRT during the decedent's lifetime and were therefore non-probate assets. He nonetheless refused to transfer title to these non-probate assets to the CMRT, causing waste to these assets. (3) He refused to sign the 706 tax return for the Estate that had been prepared by the estate's own accountants, causing a seven-figure tax lien to be levied against CMRT property. (4) He used many of the airline miles bequeathed to Kendall for himself, and let the rest of them expire unused, while refusing to distribute them to Kendall. (App. E, G). (5) He has been demanding the payment of large sums of money from the CMRT in exchange for resigning as executor. (App. E, G).

Mark answered with a plethora of would-be "affirmative defenses," first and foremost of which was an allegation that Kendall lacked capacity to sue him because she was mentally incapacitated. He also alleged that Churchwell had "unclean hands" because he was somehow taking advantage of Kendall and the CMRT. (App. F).

Kendall withdrew herself from the removal suit to render moot the allegation that she lacked capacity to sue. (App. E). Churchwell filed a motion for partial summary judgment, seeking (1) to compel Merlo to sign over the non-probate assets; (2) to compel Merlo to sign the 706 tax return; and (3) alleging that there was no evidence to support any of Mark Merlo's affirmative defenses, and further seeking the dismissal of many of those defenses on the ground that they did not constitute valid defenses. (For example, that an equitable defense of unclean hands could not be raised against a statutory cause of

action for removal, and that Kendall’s capacity to sue was immaterial since she was not suing).

The motion for partial summary judgment was filed on August 13, 2021 (App. G), but the probate court did not set it for hearing until April 19, 2022. (App. GG, RR 1).

Mark Merlo’s response to the motion for summary judgment consisted of a long rant about how he was trying to protect his “special needs” niece from Churchwell, who he alleged was an “interloper” because he was not a family member, and who he alleged was in “sole control” of Kendall’s \$12 million fortune and was allegedly spending it on himself. (App. R). His response concludes that “clearly Plaintiff, Kendall Merlo lacks capacity to file a lawsuit as a result of her severe physical and mental disabilities,” and then proceeds to state that he was withdrawing all other affirmative defenses. (App. R, p. 35). The response was combined with a verified amended pleading but referenced no other summary judgment evidence. The response contained no real evidence of Kendall’s alleged incapacity, with Mark merely verifying his conclusory allegations of such.

Neither did Mark Merlo’s response attempt to explain his behavior in spending the entire corpus of the estate, leaving it insolvent, without making a single distribution, or his refusal to hand over non-probate assets, or his attempts to extort money out of the CMRT.

In his deposition, Mark Merlo admitted many of the claims made in the removal petition and that

were included in the motion for partial summary judgment. He admitted that he had come into possession of at least \$200,000 in cash for the estate, and possibly over \$300,000, but that there was only \$26 left in the estate as of the date of his deposition. (App. U, p. 48). He admitted that his refusal to sign the 706 tax return had caused the assessment of a \$115,228 tax penalty. (App. U, p. 48). He admitted refusing to transfer the airline miles to Kendall, stating that he would instead transfer them to his brother James when the estate was closed. (App. U, pp. 14, 26, 77). He admitted that the automobiles had all been transferred to the Trust during the decedent's lifetime, but he would not transfer the titles until after the estate was closed. (App. U, pp. 24, 26, 77, 114-16). He admitted that the timeshare, along with all other property, had all been transferred to the Trust during the decedent's lifetime, but he would not transfer the timeshare until after the estate was closed. (App. U, pp. 26, 83, 85).

At the hearing on the motion for partial summary judgment (App. GG, RR 8), the court complained about the length of the summary judgment motion, stating that it made it hard for her to follow the legal arguments, and announcing that she had entered an administrative order limiting the length of all filings. The court also complained that the summary judgment response had been combined with an amended pleading, further confusing matters. (App. GG, RR 14). The court suggested breaking up the summary judgment into "digestible pieces," and pushing back the trial date. (App. GG, RR 15-16).

The court then announced that it was appointing a guardian ad litem for Kendall Merlo. (App. GG, RR 15-16). Moments later the court objected to the undersigned counsel speaking for Kendall, stating that she was not a participant in this proceeding because she was not a summary judgment movant. (App. GG, RR 20). This ignored the fact that she had just been made the subject of the court's *sua sponte* appointment of a guardian ad litem. Kendall also had a motion for an accounting from the executor set for the same hearing, which the probate court re-set for another date. The court also re-set the summary judgment hearing from April to July, even though it had taken eight months to get the first hearing. (App. GG, RR 61-62).

On May 10, 2022, the probate court signed an order appointing Don D. Ford, III as guardian ad litem for Kendall Merlo. The order states no legal authority for doing so, but states only that “it appearing to the Court that Kendall Merlo, is in need of a Guardian ad Litem to represent her interests in connection with this Cause.” (App. T).

Both Churchwell (App. AA) and Kendall Merlo (App. X) filed motions to vacate the appointment, alleging both the absence of a legal basis and the absence of evidence for doing so. Mark Merlo filed separate but nearly identical responses to both. (App. Y, BB). He also filed nearly identical appendices to both responses, which contained an information letter stating Mark Merlo's belief that Kendall was incapacitated. (App. Z, CC). This authorized the court to appoint *either* an ad litem or a court investigator to determine whether Kendall was, in fact,

incapacitated. Tex. Estates Code §1102.001. In response to the motions and responses, the probate court sent a letter on June 10, 2022 to the Probate Court's Investigator's Office, directing it start an investigation under Chapter 1102. (App. EE).

However, on the same date, the probate court also entered an order denying the motions to vacate the ad litem appointment, citing Texas Estates Code §1054.003, and 45 CFR 164.512(e)(1)(i), the Health Insurance Portability and Accountability Act (HIPAA), as authority for the appointment. (App. FF). The order contains two findings, despite there never being an evidentiary hearing: "The Court finds KENDALL MERLO is in need of a Guardian ad Litem to represent her in all matters pending in this cause number. KENDALL MERLO's interests are not being adequately represented." (App. FF). The order also greatly expands the guardian ad litem's powers to represent her in all legal proceedings before the court, including the pending appeal, presumably replacing her counsel of choice, and grants the guardian ad litem full access to all her finances, including the trusts for which she is a beneficiary. (App. FF).

The Probate Court's Investigator, Ms. Alma Garcia-Torrez, interviewed Kendall Merlo on August 24, 2022. At the conclusion of the interview, Ms. Garcia-Torrez expressed her opinion to Kendall and to the undersigned counsel that Kendall was doing well and would not require a guardianship. (App. A). However, no written report has yet been filed.

In the meantime, the guardian ad litem appointed by the probate court has never attempted

to speak to Kendall Merlo, and has made no efforts to investigate the allegations that executor Mark Merlo wasted the entire estate belonging to the CMRT and Kendall Merlo, and has instead focused his efforts solely on requiring the CMRT and the ILIT to provide him with accountings.

SUMMARY OF THE ARGUMENT

Kendall Merlo is a competent 22-year-old woman. She had the bad fortune to lose her father and become the beneficiary of two trusts containing several million dollars each. She had the further bad fortune of having a greedy Uncle Mark put in charge of her father's estate, which he promptly spent to near zero, and who is holding non-probate assets hostage and has caused a tax lien to be placed on trust property, while he attempts to extort a large payment of money from the trust that is for Kendall's benefit.

Uncle Mark is the only person who has alleged that Kendall is incapacitated, and he made the allegation as a putative defense to an action to remove him as executor. His allegation, however, was sufficient for the probate court to order its investigator to determine whether Kendall is in need of a guardian under Tex. Estates Code §1102.001. Kendall has no complaint about that order, and the investigator has already expressed an opinion that Kendall is not in need of a guardian.

However, the probate court had no factual or legal basis to also appoint a guardian ad litem to completely take over the representation of Kendall Merlo in all matters. The initial order appointing the

guardian ad litem cited no legal basis for the appointment. The order denying the motions to vacate the appointment expanded the guardian ad litem's powers, and cited Texas Estates Code §1054.003, and 45CFR 164.512(e)(1)(i), the Health Insurance Portability and Accountability Act (HIPAA), as authority for the appointment.

Those laws, however, concern the appointment of an attorney ad litem in a guardianship proceeding, and authorize the attorney ad litem to have access to the ward's health records. There is no guardianship proceeding. There was no evidentiary hearing upon which the court could justify its findings that "KENDALL MERLO is in need of a Guardian ad Litem to represent her in all matters pending in this cause number," and that "KENDALL MERLO's interests are not being adequately represented." The probate court wouldn't even allow her attorney to speak.

The probate court's order goes far beyond access to health records, and the probate court's order to its investigator adequately serves the purpose of developing facts upon which a determination can be made as to whether Kendall Merlo is incapacitated in any way. The probate court's appointment of a guardian ad litem effectively presumes Kendall's incapacity, and makes Mr. Ford both a guardian ad litem and an attorney ad litem without any legal or factual basis, and serves no purpose but to deprive Kendall Merlo of the right to be represented by legal counsel of her choosing, and forcing her to be represented by a lawyer of the court's choosing, which she will presumably have to pay for. Appointing a

guardian ad litem for a competent adult violates that person's constitutional rights to free speech, to free association, to due process and to the right to counsel of one's own choosing.

ARGUMENTS AND AUTHORITIES

1. **The probate court abused its discretion in appointing a guardian ad litem for an adult beneficiary of an estate, who is presumed to be competent, when there is no guardianship proceeding pending, and the order was entered sua sponte and without notice or an evidentiary hearing. There is no legal basis for the appointment of a guardian ad litem, and there is no evidence to support the probate court's finding that: "The Court finds KENDALL MERLO is in need of a Guardian ad Litem to represent her in all matters pending in this cause number."**

A. MANDAMUS RELIEF IS APPROPRIATE IN THIS CASE

Mandamus is an extraordinary remedy, available only when a trial court clearly abuses its discretion and when there is no adequate remedy on appeal. *In re Southwestern Bell Tel. Co., L.P.*, 226 S.W.3d 400, 403 (Tex. 2007). Mandamus is generally the proper remedy to review an order appointing a guardian ad litem. Tex. R. Civ. Proc. 173.7(a).

B. THE PROBATE COURT LACKS BOTH LEGAL AND FACTUAL JUSTIFICATION TO

APPOINT A GUARDIAN AD LITEM FOR KENDALL MERLO.

Kendall Merlo is 22 years old (App. AA, p.1), which makes her a legal adult. Tex. Civ. Prac. & Rem. Code Ann. §129.001(age of majority is eighteen (18) years). The law presumes that an adult person is of sound mind and is capable of managing her own affairs, and that presumption is not destroyed merely by allegation. *Lindly v. Lindly*, 113 S.W. 750, 753 (Tex. 1908)

To appoint a guardian ad litem for a perfectly competent adult is to deprive that person of her most fundamental human right – her agency, her fundamental human and constitutional right to make her own decisions for herself. “Due process considerations attend an incompetency finding and the subsequent appointment of a guardian ad litem.” *Ferrelli v. River Manor Health Center*, 323 F.3d 196, 203 (2d Cir. 2003). The appointment of a guardian ad litem without a competency hearing violates due process. *Thomas v. Humfield*, 916 F. 2d 1032, 1034 (5th Cir. 1990). At a competency hearing, it must be proven that the individual is “incapable of properly caring for their own interests in the litigation” before a guardian ad litem may be appointed. *Magallon v. Livingston*, 453 F.3d 268 (5th Cir. 2006); *Lindly*, 113 S.W. at 753.

“The appointment of a guardian ad litem deprives the litigant of the right to control the litigation and subjects him to possible stigmatization.” *Humfield*, 916 F.2d at 1033. The right to address the court as one sees fit is a First

Amendment right. So is the right to associate with counsel of her choosing and to not associate with counsel of the court's choosing. The Sixth Amendment right to counsel includes the right to be represented by the counsel of one's choosing. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1270-72 (11th Cir. 2016).

The probate court's original order appointing Mr. Ford as guardian ad litem for Kendall Merlo did not cite any legal basis for the appointment. (App. T). It also came without any kind of notice, pleading or competency hearing. (App. GG). The probate court's subsequent order denying the motions by Kendall and the CMRT to vacate the appointment, however, cited Texas Estates Code §1054.003, and 45 CFR 164.512(e)(1)(i), the Health Insurance Portability and Accountability Act (HIPAA), as authority for the appointment. (App. FF). The order contains two findings, despite there never having been an evidentiary hearing: "The Court finds KENDALL MERLO is in need of a Guardian ad Litem to represent her in all matters pending in this cause number. KENDALL MERLO's interests are not being adequately represented." (App. FF). The order also greatly expands the guardian ad litem's powers to represent her in all legal proceedings before the court, including this original proceeding, presumably replacing her counsel of choice, and grants the guardian ad litem full access to all her finances, including the trusts for which she is a beneficiary. (App. FF). There had still been no competency hearing of any kind.

Neither the Texas Estates Code §1054.003, nor 45 CFR 164.512(e)(1)(i), the Health Insurance Portability and Accountability Act (HIPAA), offer any support for the appointment of a guardian ad litem for Kendall Merlo in this case. Both Section 1054.003 of the Estates Code and the HIPAA regulation merely grant an *attorney ad litem* appointed in a *guardianship proceeding* under Section 1054.001 access to the ward's health care records. Neither of these laws have any relevance to this case because there is no guardianship proceeding. Nor is there likely to ever be a guardianship proceeding, given the court investigator's preliminary opinion that Kendall is not in need of a guardianship.

Nor is there any other law that authorizes the appointment of a guardian ad litem in this case. The Texas Estates Code allows a probate court to appoint a guardian ad litem in only two instances. It may appoint a guardian ad litem for an incapacitated person in a guardianship proceeding. Tex. Estates Code §1054.051. Once a guardian has been appointed in a guardianship proceeding, the Court may also appoint a guardian ad litem for the ward in other litigation. Tex. Estates Code §1054.052. That's it. Both require the filing of a guardianship proceeding, as well as an actual finding that the proposed ward is incapacitated. There is no guardianship proceeding. Nor has there ever been a competency hearing.

The Family Code permits a guardian ad litem to be appointed for a minor in a suit brought by government seeking termination of parent-child relationship or appointment of a conservator for child. Tex. Fam. Code §§ 107.001(a); 107.021(a)(3). Kendall

is not a minor, and no suit has been brought by the government.

The Texas Property Code allows for the appointment of a guardian ad litem “to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate.” Tex. Prop. Code §115.014(a). Kendall is not a minor, nor is she incapacitated.

Nor does Rule 173 authorize the appointment of a guardian ad litem in this case. The Rule only allows the appointment of a guardian ad litem for parties who are represented by Next Friends or by guardians, and only when (1) the next friend or guardian appears to the court to have an interest adverse to the party; or (2) the parties agree. Tex. R. Civ. P. 173.2(a). Kendall Merlo is not a ward of an existing guardianship, and she is not a party represented by a next friend because she is not a minor and presumed competent. In fact, as the probate court noted, she is not a party to the removal litigation at all, but merely the adult beneficiary of her father’s estate. (App. GG, RR 20; see also App. E).

The only authority for appointing a guardian ad litem without a competency hearing and a finding of incapacity is Texas Estates Code Section 1102.001, which allows a probate court to appoint *either* a guardian ad litem *or* a court investigator for the limited purpose of determining whether a person is incapacitated and a guardianship is necessary. Tex. Estates Code §1102.001(a). It may do so only with

probable cause to believe the person is incapacitated, and probable cause may be established by an “information letter” that complies with Tex. Estates Code §1102.003. Mark Merlo filed such an information letter, authorizing the appointment of *either* a guardian ad litem *or* a court investigator for the limited purpose set forth in the statute. The probate court elected to appoint a court investigator for this limited purpose. The statute does not authorize the probate court to also appoint a guardian ad litem for the same purpose or for other purposes.

The court investigator has expressed her opinion that Kendall Merlo does not need a guardian (App. A), although no formal report has been filed yet. But Kendall’s competency further underscores the harm being done to her rights by the appointment of a guardian ad litem for her.

Section 1102.001 imposes other requirements on the contents of an “order” appointing a court investigator. Tex. Estates Code §1102.001(b). The probate court’s letter does not comply with these requirements, but relator Kendall Merlo does not complain about these technical deficiencies and welcomes the investigation. She does, however, complain about the two orders appointing the guardian ad litem and the scope of the powers granted to the guardian ad litem in those orders.

Had the Probate Court simply waited for the court investigator’s office to do its job – determine whether Kendall was incapacitated and, if so, whether she needed a guardianship, there would have been no need to ever appoint a guardian ad litem.

Instead, the Probate Court went ahead and unilaterally decided, without notice or hearing, that Kendall was both incapacitated and not being adequately represented and then appointed a guardian ad litem with expansive powers, thereby depriving Kendall Merlo of her right to make her own decisions about her life, about the estate and trusts that are for her benefit, and about who will represent her in the underlying litigation.

PRAYER

WHEREFORE, PREMISES CONSIDERED, relators pray that this Court issue a writ of mandamus directing respondent to vacate its Order Appointing Guardian Ad Litem and its Order Denying the Motion to Set Aside Order Appointing Guardian Ad Litem and Amended Order Appointing Guardian Ad Litem and Expanding Powers, and grant relators such other and further relief to which they may be justly entitled.

Respectfully submitted,

LAW OFFICE OF CHARLES McGARRY

/s/ Charles W. McGarry

Charles W. McGarry

Texas Bar No. 13610650

200 Adriatic Parkway, Suite 102

McKinney, Texas 75072

(214) 748-0800

cmcgarry@ix.netcom.com

ATTORNEY FOR KENDALL MERLO

RULE 52.3(j) CERTIFICATION

I hereby certify that I have reviewed this petition and have concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

/s/ Charles W. McGarry
Charles W. McGarry

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this document was sent to the guardian ad litem and to all counsel of record on September 7, 2022, by electronic filing manager.

/s/ Charles W. McGarry
Charles W. McGarry

CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared the foregoing petition using Microsoft Word 2010® software, a 14-point Times New Roman font for all text and a 12-point Times New Roman font for any footnotes. According to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contain 3,765 words, including footnotes.

/s/ Charles W. McGarry
Charles W. McGarry

APPENDIX 8

**IN THE
COURT OF APPEALS
FIFTH COURT OF APPEALS DISTRICT
DALLAS, TEXAS**

NO. 05-22-00645

In re KENDALL MERLO

Relator,

PETITION FOR WRIT OF MANDAMUS

Charles W. McGarry
Texas Bar No. 13610650
LAW OFFICE OF CHARLES McGARRY
200 Adriatic Parkway, Suite 102
McKinney, Texas 75072
(214) 748-0800
cmcgarry@ix.netcom.com
ATTORNEY FOR RELATOR

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 52.3(a) of the Texas Rules of Appellate Procedure, the following is a complete list of the parties in the trial court, as well as the names and addresses of their trial and appellate counsel:

Kendall Merlo

Beneficiary/Relator

Defendant/Real Party in Interest

Charles W. McGarry
200 Adriatic Parkway, Suite 102
Dallas, Texas 75072

Counsel for
Kendall Merlo

Kenneth E. Walker
Walker & Chambers
Shops at Waterview Park,
150 E. Highway 67, Suite 240
Duncanville, Texas 75137

Attorney for Mark Merlo

Mark Merlo

Executor,
Estate of Christopher J. Merlo

Attorney for Mark Merlo

Charles Stanley Churchwell

Counsel for *Churchwell*

Co-Trustee,
Chris Merlo Revocable Trust
Plaintiff/Real Party in Interest

Don D. Ford III
Ford + Bergner LLP
901 Main Street, 33'd Floor
Dallas, Texas 75202

Robert McGuire
FISHMAN JACKSON RONQUILLO
13155 Noel Road, Suite 700
Dallas, Texas 75240

Appointed Guardian ad Litem
For Kendall Merlo

James Merlo

Scott D. Weber
NORRIS & WEBER, PLLC
3811 Turtle Creek Blvd., Suite 400
Dallas, Texas 75219-4423

Former Trustee,
Christopher J. Merlo Irrevocable Life Insurance
Trust¹

¹ James Merlo had intervened in his capacity as Trustee of the Christopher J. Merlo Irrevocable Life Insurance Trust, but as of the date of this petition his claims had already been settled and he has filed a nonsuit of his intervention. James is also not

Co-Trustee, Chris Merlo Revocable Trust

Cleveland G. Clinton
Gregory W. Sampson
GRAY REED & MCGRAW LLP
1601 Elm Street, Suite 4600
Dallas, Texas 75201

Counsel for *James Merlo*

Hon. Ingrid M. Warren
Presiding Judge
Probate Court No. 2
Renaissance Tower
1201 Elm Street, Suite 2200-A
Dallas, Texas 75270

Respondent

This list is furnished so that members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

representing the Chris Merlo Revocable Trust in this litigation and so is no longer a real party in interest.

[TABLE OF CONTENTS OMITTED]

[INDEX OF AUTHORITIES OMITTED]

STATEMENT OF THE CASE

Nature of the Case: appointment of guardian ad litem for adult beneficiary of an estate

Respondent:

Hon. Ingrid M. Warren
Presiding Judge
Probate Court No. 2
Renaissance Tower
1201 Elm Street, Suite 2200-A
Dallas, Texas 75270

Respondent's Actions from

Which Relief is Sought: In an action to remove the Executor of an Estate for misconduct, the probate court *sua sponte* entered an order appointing a guardian ad litem for an adult beneficiary of the estate on May 10, 2022. In response to two motions to vacate the appointment, the probate court entered an order on June 10, 2022 denying the motions and instead expanding the powers of the guardian ad litem.

Real Parties in Interest: Mark Merlo, as executor

Chris Merlo Revocable Trust is the primary Beneficiary of the estate and the plaintiff in the action to remove the executor. Charles Stanley Churchwell is representing the trust as co-trustee. James Merlo is the other co-trustee but is not representing the Trust in the litigation against his brother Mark.

Kendall Merlo is a beneficiary of the estate

Don D. Ford III is the appointed guardian ad litem

STATEMENT OF JURISDICTION

This Court has jurisdiction over this original proceeding under TEX. GOVT CODE §22.221(b). Mandamus is normally the proper remedy to review an order appointing a guardian ad litem. TEX. R. CIV. PROC. 173.7(a). However, Rule 173 does not apply where the appointment of a guardian ad litem is governed by another statute. TEX. R. CIV. PROC. 173.1.

There is some authority holding that an order appointing a guardian ad litem under the Estates Code is an appealable order. *In re Guardianship of Phillips*, 2016 Tex. App. LEXIS 6373 (Tex. App. – Houston [1st Dist.] 2016, no pet.). In that case, the Houston First District Court expressly held that an order appointing a guardian ad litem was an appealable order under the Texas Estates Code provision allowing a party to "appeal from an order or judgment appointing a guardian." TEX. EST. CODE § 1152.001. *Phillips*, 2016 Tex. App. LEXIS 6373 at *24-25.

There is an interlocutory appeal pending before this Court seeking review of the same orders that are the subject of this mandamus. *In The Estate Of Christopher J. Merlo, Deceased*, No. 05-22-00499-CV. However, this Court has expressed some doubt whether the order at issue is appealable. *Id.*, No. 05-22-00499-CV (June 14, 2022 order). Therefore, in the interest of judicial economy, a motion to consolidate this petition for writ of mandamus with the interlocutory appeal accompanies this petition, so

that the court may address the jurisdictional issue at the same time that it addresses the merits.

ISSUE PRESENTED

1. The probate court abused its discretion in appointing a guardian ad litem for an adult beneficiary of an estate, who is presumed to be competent, when there is no guardianship proceeding pending, and the order was entered *sua sponte* and without notice or an evidentiary hearing. There is no legal basis for the appointment of a guardian ad litem, and there is no evidence to support the probate court's finding that: "The Court finds KENDALL MERLO is in need of a Guardian ad Litem to represent her in all matters pending in this cause number."

BACKGROUND AND STATEMENT OF FACTS

Christopher J. Merlo died on November 13, 2018. (App F, p.2). Prior to his death, he formed the Chris Merlo Revocable Trust ("CMRT"), into which he transferred substantially all his assets. (App. D). A Will dated March 4, 2018, and a First Codicil dated July 27, 2018 were admitted into probate. (App. D). The Will was a "pass through" will directing that nearly all assets of the Estate were to be transferred to the CRMT, except that the decedent's airline miles were to be transferred directly to Kendall Merlo, the decedent's daughter. (App. B).

The co-trustees of the CMRT are the decedent's brother, James Merlo, and the decedent's long-time friend and law partner, Charles Stanley Churchwell. (App. L). The executor of the Estate is the decedent's other brother, Mark Merlo. (App. B).

Kendall Merlo and the CMRT brought an action to remove Mark Merlo as executor. (See App. E, G). The grounds for removal included the following: (1) Mark Merlo had come into possession of approximately \$325,000 in cash for the estate, and subsequently spent it all on himself and on excessive legal fees, despite there being no reason to incur such fees prior to the removal action. He never distributed anything to either beneficiary. (2) he remained in possession of the titles to numerous automobiles and to a time share condominium, all of which had been transferred to the CMRT during the decedent's lifetime and were therefore non-probate assets. He nonetheless refused to transfer title to these non-probate assets to the CMRT, causing waste to these assets. (3) He refused to sign the 706 tax return for the Estate that had been prepared by the estate's own accountants, causing a seven-figure tax lien to be levied against CMRT property. (4) He used many of the airline miles bequeathed to Kendall for himself, and let the rest of them expired unused, while refusing to distribute them to Kendall. (App. E, G). (5) He has been demanding the payment of large sums of money from the CMRT in exchange for resigning as executor. (App. E, G).

Mark answered with a plethora of would-be "affirmative defenses," first and foremost of which was an allegation that Kendall lacked capacity to sue

him because she was mentally incapacitated. He also alleged that Churchwell and the CMRT had “unclean hands” because he was somehow taking advantage of Kendall and the CMRT. (App. F).

Kendall withdrew herself from the removal suit to render moot the allegation that she lacked capacity to sue. (App. E). CMRT filed a motion for partial summary judgment, seeking (1) to compel Merlo to sign over the non-probate assets; (2) to compel Merlo to sign the 706 tax return; and (3) alleging that there was no evidence to support any of Mark Merlo’s affirmative defenses, and further seeking the dismissal of many of those defenses on the ground that they did not constitute valid defenses. (For example, that an equitable defense of unclean hands could not be raised against a statutory cause of action for removal, and that Kendall’s capacity to sue was immaterial since she was not suing).

The motion for partial summary judgment was filed on August 13, 2021 (App. G), but the probate court did not set it for hearing until April 19, 2022. (App. GG, RR 1).

Mark Merlo’s response to the motion for summary judgment consisted of a long rant about how he was trying to protect his “special needs” niece from Churchwell, who he alleged was an “interloper” because he was not a family member, and who he alleged was in “sole control” of Kendall’s \$12 million fortune and was allegedly spending it on himself. (App. R). His response concludes that “clearly Plaintiff, Kendall Merlo lacks capacity to file a lawsuit as a result of her severe physical and mental

disabilities,” and then proceeds to state that he was withdrawing all other affirmative defenses. (App. R, p. 35). The response was combined with a verified amended pleading but referenced no other summary judgment evidence. The response contained no real evidence of Kendall’s alleged incapacity, with Mark merely verifying his conclusory allegations of such.

Neither did Mark Merlo’s response attempt to explain his behavior in spending the entire corpus of the estate, leaving it insolvent, without making a single distribution, or his refusal to hand over non-probate assets, or his attempts to extort money out of the CMRT.

In his deposition, Mark Merlo admitted many of the claims made in the removal petition and that were included in the motion for partial summary judgment. He admitted that he had come into possession of at least \$200,000 in cash for the estate, and possibly over \$300,000, but that there was only \$26 left in the estate as of the date of his deposition. (App. U, p. 48). He admitted that his refusal to sign the 706 tax return had caused the assessment of a \$115,228 tax penalty. (App. U, p. 48). He admitted refusing to transfer the airline miles to Kendall, stating that he would instead transfer them to his brother James when the estate was closed. (App. U, pp. 14, 26, 77). He admitted that the automobiles had all been transferred to the Trust during the decedent’s lifetime, but he would not transfer the titles until after the estate was closed. (App. U, pp. 24, 26, 77, 114-16). He admitted that the timeshare, along with all other property, had all been transferred to the Trust during the decedent’s lifetime, but he would not

transfer the timeshare until after the estate was closed. (App. U, pp. 26, 83, 85).

At the hearing on the motion for partial summary judgment (App. GG, RR 8), the court complained about the length of the summary judgment motion, stating that it made it hard for her to follow the legal arguments, and announcing that she had entered an administrative order limiting the length of all filings. The court also complained that the summary judgment response had been combined with an amended pleading, further confusing matters. (App. GG, RR 14). The court suggested breaking up the summary judgment into “digestible pieces,” and pushing back the trial date. (App. GG, RR 15-16).

The court then announced that it was appointing a guardian ad litem for Kendall Merlo. (App. GG, RR 15-16). Moments later the court objected to the undersigned counsel speaking for Kendall, stating that she was not a participant in this proceeding because she was not a summary judgment movant. (App. GG, RR 20). This ignored the fact that she had just been made the subject of the court’s *sua sponte* appointment of a guardian ad litem. Kendall also had a motion for an accounting from the executor set for the same hearing, which the probate court re-set for another date. The court also re-set the summary judgment hearing from April to July, even though it had taken eight months to get the first hearing. (App. GG, RR 61-62).

On May 10, 2022, the probate court signed an order appointing Don D. Ford, III as guardian ad

litem for Kendall Merlo. The order states no legal authority for doing so, but states only that “it appearing to the Court that Kendall Merlo, is in need of a Guardian ad Litem to represent her interests in connection with this Cause.” (App. T).

Both the CMRT (App. AA) and Kendall Merlo (App. X) filed motions to vacate the appointment, alleging both the absence of a legal basis and the absence of evidence for doing so. Mark Merlo filed separate but nearly identical responses to both. (App. Y, BB). He also filed nearly identical appendices to both responses, which contained an information letter stating Mark Merlo’s belief that Kendall was incapacitated. (App. Z, CC). This authorized the court to appoint *either* an ad litem or a court investigator to determine whether Kendall was, in fact, incapacitated. TEX. ESTATES CODE §1102.001. In response to the motions and responses, the probate court sent a letter on June 10, 2022 to the Probate Court’s Investigator’s Office, directing it start an investigation under Chapter 1102. (App. EE).

However, on the same date, the probate court also entered an order denying the motions to vacate the ad litem appointment, citing Texas Estates Code §1054.003, and 45 CFR 164.512(e)(1)(i), the Health Insurance Portability and Accountability Act (HIPAA), as authority for the appointment. (App. FF). The order contains two findings, despite there never being an evidentiary hearing: “The Court finds KENDALL MERLO is in need of a Guardian ad Litem to represent her in all matters pending in this cause number. KENDALL MERLO’s interests are not being adequately represented.” (App. FF). The order also

greatly expands the guardian ad litem's powers to represent her in all legal proceedings before the court, including the pending appeal, presumably replacing her counsel of choice, and grants the guardian ad litem full access to all her finances, including the trusts for which she is a beneficiary. (App. FF).

SUMMARY OF THE ARGUMENT

Kendall Merlo is a competent 22-year-old woman. She had the bad fortune to lose her father and become the beneficiary of a \$12,000,000 trust. She had the further bad fortune of having a greedy Uncle Mark put in charge of her father's estate, which he promptly spent to near zero, and who is holding non-probate assets hostage and has caused a tax lien to be placed on trust property, while he attempts to extort a large payment of money from the trust that is for Kendall's benefit.

Uncle Mark is the only person alleging that Kendall is incapacitated. His allegation was sufficient for the probate court to order its investigators to determine whether Kendall is in need of a guardian under TEX. ESTATES CODE §1102.001. Kendall has no complaint about that order.

However, the probate court has no factual or legal basis to also appoint a guardian ad litem to completely take over the representation of Kendall Merlo in all matters. The initial order appointing the guardian ad litem cited no legal basis for the appointment. The order denying the motions to vacate the appointment expanded the guardian ad litem's powers, and cited Texas Estates Code

§1054.003, and 45CFR 164.512(e)(1)(i), the Health Insurance Portability and Accountability Act (HIPAA), as authority for the appointment.

Those laws, however, concern the appointment of an attorney ad litem in a guardianship proceeding, and authorize the attorney ad litem to have access to the ward's health records. There is no guardianship proceeding. There was no evidentiary hearing upon which the court could justify its findings that "KENDALL MERLO is in need of a Guardian ad Litem to represent her in all matters pending in this cause number," and that "KENDALL MERLO's interests are not being adequately represented." The probate court wouldn't even allow her attorney to speak.

The probate court's order goes far beyond access to health records, and the probate court's order to its investigator adequately serves the purpose of developing facts upon which a determination can be made as to whether Kendall Merlo is incapacitated in any way. The probate court's appointment of a guardian ad litem effectively presumes Kendall's incapacity, and makes Mr. Ford both a guardian ad litem and an attorney ad litem without any legal or factual basis, and serves no purpose but to deprive Kendall Merlo of the right to be represented by legal counsel of her choosing, and forcing her to be represented by a lawyer of the court's choosing, which she will presumably have to pay for. Appointing a guardian ad litem for a competent adult violates that person's constitutional rights to free speech, to free association, to due process and to the right to counsel of one's own choosing.

ARGUMENTS AND AUTHORITIES

1. The probate court abused its discretion in appointing a guardian ad litem for an adult beneficiary of an estate, who is presumed to be competent, when there is no guardianship proceeding pending, and the order was entered sua sponte and without notice or an evidentiary hearing. There is no legal basis for the appointment of a guardian ad litem, and there is no evidence to support the probate court's finding that: "The Court finds KENDALL MERLO is in need of a Guardian ad Litem to represent her in all matters pending in this cause number."

A. MANDAMUS RELIEF IS APPROPRIATE IN THIS CASE

Mandamus is an extraordinary remedy, available only when a trial court clearly abuses its discretion and when there is no adequate remedy on appeal. *In re Southwestern Bell Tel. Co., L.P.*, 226 S.W.3d 400, 403 (Tex. 2007). Mandamus is generally the proper remedy to review an order appointing a guardian ad litem. TEX. R. CIV. PROC. 173.7(a).

Although there is also authority holding that an order appointing a guardian ad litem under the Estates Code is an appealable order, *In re Guardianship of Phillips*, 2016 Tex. App. LEXIS 6373 (Tex. App. – Houston [1st Dist.] 2016, no pet.), this Court has expressed doubt about its jurisdiction in a pending interlocutory appeal seeking review of the same issues presented in this petition. *In The*

Estate Of Christopher J. Merlo, Deceased, No. 05-22-00499-CV (June 14, 2022 order). Consequently, in the interest of judicial economy, a motion to consolidate this mandamus with the interlocutory appeal accompanies this petition, so that this Court may decide the jurisdictional issue at the same time it addresses the merits.

B. THE PROBATE COURT LACKS BOTH LEGAL AND FACTUAL JUSTIFICATION TO APPOINT A GUARDIAN AD LITEM FOR KENDALL MERLO.

Kendall Merlo is 22 years old (App. AA, p.1), which makes her a legal adult. TEX. CIV. PRAC. & REM. CODE ANN. §129.001(age of majority is eighteen (18) years). The law presumes that an adult person is of sound mind and is capable of managing her own affairs, and that presumption is not destroyed merely by allegation. *Lindly v. Lindly*, 113 S.W. 750, 753 (Tex. 1908)

To appoint a guardian ad litem for a perfectly competent adult is to deprive that person of her most fundamental human right – her agency, her fundamental human and constitutional right to make her own decisions for herself. “Due process considerations attend an incompetency finding and the subsequent appointment of a guardian ad litem.” *Ferrelli v. River Manor Health Center*, 323 F.3d. 196, 203 (2d Cir. 2003). The appointment of a guardian ad litem without a competency hearing violates due process. *Thomas v. Humfield*, 916 F. 2d 1032, 1034 (5th Cir. 1990). At a competency hearing, it must be proven that the individual is “incapable of properly caring for

their own interests in the litigation” before a guardian ad litem may be appointed. *Magallon v. Livingston*, 453 F.3d 268 (5th Cir. 2006); *Lindly*, 113 S.W. at 753.

“The appointment of a guardian ad litem deprives the litigant of the right to control the litigation and subjects him to possible stigmatization.” *Humfield*, 916 F. 2d at 1033. The right to address the court as one sees fit is a First Amendment right. So is the right to associate with counsel of her choosing and to not associate with counsel of the court’s choosing. The Sixth Amendment right to counsel includes the right to be represented by the counsel of one’s choosing. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1270-72 (11th Cir. 2016).

The probate court’s original order appointing Mr. Ford as guardian ad litem for Kendall Merlo did not cite any legal basis for the appointment. (App. T). It also came without any kind of notice, pleading or competency hearing. (App. GG). The probate court’s subsequent order denying the motions by Kendall and the CMRT to vacate the appointment, however, cited Texas Estates Code §1054.003, and 45 CFR 164.512(e)(1)(i), the Health Insurance Portability and Accountability Act (HIPAA), as authority for the appointment. (App. FF). The order contains two findings, despite there never having been an evidentiary hearing: “The Court finds KENDALL MERLO is in need of a Guardian ad Litem to represent her in all matters pending in this cause number. KENDALL MERLO’s interests are not being adequately represented.” (App. FF). The order also

greatly expands the guardian ad litem's powers to represent her in all legal proceedings before the court, including the pending appeal, presumably replacing her counsel of choice, and grants the guardian ad litem full access to all her finances, including the trusts for which she is a beneficiary. (App. FF). There had still been no competency hearing of any kind.

Neither the Texas Estates Code §1054.003, nor 45 CFR 164.512(e)(1)(i), the Health Insurance Portability and Accountability Act (HIPAA), offer any support for the appointment of a guardian ad litem for Kendall Merlo in this case. Both Section 1054.003 of the Estates Code and the HIPAA regulation merely grant attorney ad litem appointed in a guardianship proceeding under Section 1054.001 access to the ward's health care records. Neither of these laws have any relevance to this case because there is no guardianship proceeding.

Nor is there any other law that authorizes the appointment of a guardian ad litem in this case. The Texas Estates Code allows a probate court to appoint a guardian ad litem in only two instances. It may appoint a guardian ad litem for an incapacitated person in a guardianship proceeding. TEX. ESTATES CODE §1054.051. Once a guardian has been appointed in a guardianship proceeding, the Court may also appoint a guardian ad litem for the ward in other litigation. TEX. ESTATES CODE §1054.052. That's it. Both require the filing of a guardianship proceeding, as well as an actual finding that the proposed ward is incapacitated. There is no guardianship proceeding. Nor has there ever been a competency hearing.

Nor does Rule 173 authorize the appointment of a guardian ad litem in this case. The Rule only allows the appointment of a guardian ad litem for parties who are represented by Next Friends or by guardians, and only when (1) the next friend or guardian appears to the court to have an interest adverse to the party; or (2) the parties agree. TEX. R. CIV. P. 173.2(a). Kendall Merlo is not a ward of an existing guardianship, and she is not a party represented by a next friend because she is not a minor and presumed competent. In fact, as the probate court noted, she is not a party to the removal litigation at all, but merely the adult beneficiary of her father's estate. (App. GG, RR 20; see also App. E).

The only authority for appointing a guardian ad litem without a competency hearing and a finding of incapacity is Texas Estates Code Section 1102.001, which allows a probate court to appoint *either* a guardian ad litem *or* a court investigator for the limited purpose of determining whether a person is incapacitated and a guardianship is necessary. TEX. ESTATES CODE §1102.001(a). It may do so only with probable cause to believe the person is incapacitated, and probable cause may be established by an "information letter" that complies with TEX. ESTATES CODE §1102.003. Mark Merlo filed such an information letter, authorizing the appointment of *either* a guardian ad litem *or* a court investigator for the limited purpose set forth in the statute. The probate court elected to appoint a court investigator for this limited purpose. The statute does not authorize the probate court to also appoint a guardian ad litem for the same purpose or for other purposes.

Section 1102.001 imposes other requirements on the contents of an “order” appointing a court investigator. TEX. ESTATES CODE §1102.001(b). The probate court’s letter does not comply with these requirements, but relator Kendall Merlo does not complain about these technical deficiencies and welcomes the investigation. She does, however, complain about the two orders appointing the guardian ad litem and the scope of the powers granted to the guardian ad litem in those orders.

PRAYER

WHEREFORE, PREMISES CONSIDERED, relator prays that this Court issue a writ of mandamus directing respondent to vacate its two orders appointing a guardian ad litem for Kendall Merlo and grant relator such other and further relief to which she may be justly entitled.

Respectfully submitted,
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ATTORNEY FOR RELATOR

RULE 52.3(j) CERTIFICATION

I hereby certify that I have reviewed this petition and have concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

/s/ Charles W. McGarry
Charles W. McGarry

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this document was sent to the guardian ad litem and to all counsel of record on June 29, 2022, by electronic filing manager.

/s/ Charles W. McGarry
Charles W. McGarry

CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared the foregoing petition using Microsoft Word 2010® software, a 14-point Times New Roman font for all text and a 12-point Times New Roman font for any footnotes. According to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contain 3,390 words, including footnotes.

/s/ Charles W. McGarry
Charles W. McGarry

APPENDIX 9

No. PR-18-03799-2

IN THE ESTATE OF
CHRISTOPHER J. MERLO,
DECEASED

IN PROBATE COURT
NO. 2
DALLAS COUNTY, TEXAS

**KENDALL MERLO'S OBJECTION TO THE
APPOINTMENT OF A GUARDIAN AD LITEM
AND MOTION TO VACATE THE
APPOINTMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Kendall Merlo, a beneficiary of the Estate of Christopher Merlo, who makes the following objections to the appointment of a guardian ad litem to represent her and this motion to vacate the appointment, and in support thereof would respectfully show the Court as follows:

I.

On April 19, 2022, there was a hearing that was supposed to be about Charles Stanley Churchwell's motion for partial summary judgment on the only litigation pending before this Court, which is the removal of Mark Merlo as Executor of the

Estate of Christopher J. Merlo. Even though that motion had been pending for eight months, and even though Mark Merlo filed a response “withdrawing” his affirmative defenses and making no effort to support them with evidence, the Court declined to rule on the motion and re-set it for months down the road. Instead, the Court then announced, *sua sponte*, that it was appointing a guardian *ad litem* for Kendall Merlo, who is not even a party to the removal action. She is simply a beneficiary of the Estate.

II.

Kendall Merlo objects to the appointment of a guardian *ad litem* to represent her, because, in short, this Court has no authority to appoint one. None. As every party to this case is well aware, Kendall Merlo is a perfectly competent adult represented by counsel. She sat for an hours-long videotaped deposition and was questioned extensively by counsel for Mark Merlo. She answered every question honestly and thoroughly, and with poise and intelligence. She required no assistance from her legal counsel, and not a single objection was made to any question. She fully negated any suggestion that she suffers from any type of mental disability. She has attended college and maintained an “A” average. Even Mark Merlo’s counsel stated afterward that he would be proud to have Kendall Merlo as his daughter.

And yet, executor Mark Merlo continues to tell this Court that “this case is about Kendall Merlo being a special needs person,” without offering a shred of evidence. Indeed, he pleaded as an affirmative defense that Kendall is completely

incompetent, as if that somehow excused Mark Merlo's wrongful conduct in depleting one hundred percent (100%) of the assets of the Estate without making a single distribution. But when a no-evidence motion for summary judgment was filed, claiming no evidence to support the allegation of Kendall's incompetence, Mark Merlo filed a response "withdrawing" the defense, and offering no proof whatsoever. Not even an excerpt of the videotaped deposition.

This is because there is no evidence that Kendall is special needs or incompetent. When Mark Merlo tells the Court that "this case is about Kendall Merlo's special needs," he is gaslighting this Court. He is distracting the Court from the only real cause of action before it, which is Mark Merlo's bad conduct in looting and pillaging the entire estate entrusted to him, and leaving it insolvent without making a single distribution. Kendall Merlo's mental competence is not an issue before this Court, or over which it has any authority.

III.

To appoint a guardian *ad litem* for a perfectly competent adult (which this Court is required by law to presume that she is, until it hears evidence to the contrary), is to deprive that person of her most fundamental human right – her agency, her fundamental human and constitutional right to make her own decisions for herself. "Due process considerations attend an incompetency finding and the subsequent appointment of a guardian ad litem." *Ferrelli v. River Manor Health Center*, 323 F.3d. 196,

203 (2d Cir. 2003). “The appointment of a guardian *ad litem* deprives the litigant of the right to control the litigation and subjects him to possible stigmatization.” *Thomas v. Humfield*, 916 F. 2d 1032, 1034 (5th Cir. 1990).

IV.

The law supports these objections. The Texas Estates Code allows a probate court to appoint a guardian *ad litem* in only two instances. It may appoint a guardian *ad litem* for an incapacitated person in a guardianship proceeding. TEX. ESTATES CODE §1054.051. Once a guardian has been appointed in a guardianship proceeding, the Court may also appoint a guardian *ad litem* for the ward in other litigation. TEX. ESTATES CODE §1054.052. That’s it. Both require the filing of a guardian proceeding, as well as an actual finding that the proposed ward is incapacitated. There is no guardianship proceeding. Nor will there ever be, because such a proceeding would be frivolous in light of what all the parties have seen for themselves about Kendall Merlo.

V.

The Texas Rules of Civil Procedure govern the appointment of a guardian *ad litem* outside of a guardianship proceeding. But they, too, required that the person for whom the *ad litem* is appointed be either a minor represented by a Next Friend, or a ward represented by a guardian. TEX. R. CIV. PROC. 173.2. Kendall Merlo is neither a minor nor the ward of a guardianship.

WHEREFORE, PREMISES CONSIDERED, Kendall Merlo prays that the Court enter an order vacating the appointment of a guardian *ad litem* for her, and she have such other and further relief, at law or in equity, to which she may show herself justly entitled.

Respectfully Submitted,

/s/ Charles W. McGarry

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Attorney for Kendall Merlo

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent to all counsel of record on May 17, 2022, by electronic filing manager.

/s/ Charles W. McGarry

Charles W. McGarry