

No.

**IN THE
SUPREME COURT OF THE UNITED STATES**

YOSEF GAVRIEL TIRAT-GEFEN, PhD, NCG

Petitioner,

v.

CELIA ALMEIDA

Respondent

**ON PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of Virginia**

PETITION FOR A WRIT OF CERTIORARI

**YOSEF GAVRIEL TIRAT-GEFEN, PhD, NCG,
Pro-Se
13314 Arctic Ave.
Rockville, MD 20853-3072
Phone: 571-328-8430
e-mail: yosefgavriel@gmail.com**

QUESTIONS PRESENTED

I. Settlement agreements are considered contracts. Contracts can be voided due to fraud, undue influence, duress, or withholding of facts or evidence. All citizens, including incapacitated adults, have a constitutional fundamental right to due process. Petitioner reported to the state courts: lack of discovery, fraud, duress and withholding of evidence. The state courts refused to conduct an evidentiary hearing. Should this settlement agreement over a guardianship of an incapacitated elderly parent be modified?

II. State courts typically grant co-guardianship of minors to both parents, even when they are in conflict. But state courts prefer to appoint third party guardians of an incapacitated parent, when adult children disagree about care. The guardian-ad -litem recommended co-guardianship; petitioner accepted; but respondent rejected, forcing a third party guardian appointment. Should conflicting adult children have the same constitutional protection afforded to parents of minors: co-guardianship to have priority over a third party guardian?

PARTIES TO THE PROCEEDINGS

Yosef Gavriel Tirat-Gefen, PhD, National Certified Guardian (NCG), pro-se petitioner.

Celia Almeida, respondent. Her counsel of record is John A. DiNucci, Esq.

Jean G. Ball, Esq., guardian and conservator of Ms. Catharina Maria De Souza Batista, an elderly incapacitated adult parent, who is a dual citizen of Brazil and the United States; and widowed mother of the petitioner, the respondent, and Ms. Carmem Lucia de Souza Batista.

Anthony Mark Christopher, Esq., guardian ad litem (GAL) for Ms. Catharina Maria De Souza Batista.

Carmem Lucia de Souza Batista, pro se, a citizen of Brazil, is the oldest daughter of Ms. Catharina Maria de Souza Batista. She lives in Brazil.

CORPORATE DISCLOSURE STATEMENT

Yosef Gavriel Tirat-Gefen, PhD, is a National Certified Guardian (NCG) by the Center for Guardianship Certification (CGC), a Member of the National Guardianship Association (NGA), and Associate Member of the American Bar Association (ABA). He is a citizen of the United States, and he is filing this petition pro se as an individual.

TABLE OF CONTENTS

Opinions presented	i
Parties to the proceedings	ii
Corporate disclosure statement	ii
Table of authorities	ix
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved .	2
Statement of the case	2
Reasons for granting the petition	9
I. A settlement agreement in a guardianship case of an elderly incapacitated adult is voidable due to violations of due process. It should be modified to make the injured parties whole.	9
A. A guardianship settlement is a contract and therefore is voidable or can be set aside. . .	12
B. All citizens, including incapacitated elderly adults, have a constitutional fundamental right to due process.	13
C. Fraud, duress and withholding of facts and evidence were reported but the state courts refused to perform an evidentiary hearing to vacate the settlement.	15

D.	The state courts did not appoint an independent counsel for an elderly incapacitated adult.	18
E.	The required up-to-the-date medical evaluation of the incapacitated adult was not produced.	19
F.	As a matter of public policy, adult guardianship agreements, when gained through violations of due process, should be modified to make the injured parties whole.	20
II.	This court recognized, under the US Constitution, the fundamental right of parents to raise and care for their children, even when they conflict. The same protections should be given to the adult children of an incapacitate elderly parent: to receive priority to be appointed as co-guardians and co-conservators, even when disagree about care. A co-guardianship agreement should have precedence over other arrangements in this case	23
A.	Divorced parents of minors, and responsible adult children of an incapacitated elderly parent receive different treatments by the state courts; similar duties but different rights.	28

- B. State filial obligation laws impose the duty of adult children to support and care for their elderly incapacitated parent. These laws ought to be balanced with a right of adult children to receive priority in making decisions about the care of an incapacitated parent. 30

- C. As a matter of public policy, co-guardianship by adult children over third party guardian appointments should be preferred over third party guardian appointments, because the role of adult children is essential to the well being of the incapacitated parent 32
 - 1. The U.S. population is aging 32
 - 2. Number of dementia cases among the elderly population is fast increasing rapidly 33
 - 3. Impoverished elderly incapacitated adults reliance on public benefits is unsustainable due to state and federal budgets constraints. 33
 - 4. Current preference to third party guardians forces conflicting families to pursue costly litigation; or adopt informal unsafe guardianship arrangements. . . . 34
 - 5. Litigation over guardianship of an incapacitated parent, that could have been solved through a co-guardianship, wastes scarce judicial resources. 35
 - 6. Co-guardianship offers better safeguards against abuse of an elderly incapacitated adult. 36

D. The 2014 Chicago Declaration on Rights of Older Persons asks for respect to interdependence and caring relationships.	36
E. The guardian ad litem recommended co-guardianship of the widowed elderly parent; petitioner accepted; but respondent rejected, forcing a third party guardian appointment. The state courts should have given higher priority to a co-guardianship arrangement	38
Conclusion	40

Appendices

A. – Supreme Court of Virginia Order denying Petition for Rehearing (Record No. 161829) on 21 of November 2017.....	3a
B. – Supreme Court of Virginia Order denying Petition for Appeal (Record No. 161829) on 19 of July 2017.....	4a
C. – Circuit Court of Fairfax County Order of denial of second statement of facts in lieu of transcripts (Case CL 2014-05376 – an incapacitated adult) on 29 of December 2016.....	5a
D. – Circuit Court of Fairfax County Order of denial of first statement of facts in lieu of transcripts (Case CL 2014-05376) on 6 of December 2016.....	6a

Agreed Order entered on 27th of September 2016.....	8a
E. – Circuit Court of Fairfax County Order of denial of Motion for Reconsideration (Case CL 2014-05376) on 6 of December 2016.....	20a
F. – Constitutional and statutory provisions involved.....	21a
1. U.S. Constitution, Amendment V.....	21a
2. U.S. Constitution, Amendment XIV.....	21a
3. The Constitution of Virginia, Article 1. § 1 and 11.....	22a
4. Va. Code Ann. Title 64.2. Wills, Trusts, and Fiduciaries. Chapter 20. Guardianship and Conservatorship. § 64.2-2005. Evaluation report.....	23a
5. Va. Code. Ann. Title 64.2. Wills, Trusts, and Fiduciaries. Chapter 20. Guardianship and Conservatorship. § 64.2-2006. Counsel for respondent.....	25a
6. Va. Code Ann. § 64.2-2019. Duties and powers of guardian.....	25a
7. Va. Code Ann. Title 18.2. Crimes and Offenses Generally. Chapter 8. Crimes Involving Morals and Decency. § 18.2-369. Abuse and neglect of incapacitated adults; penalty.....	28a

8. Va. Code Ann. § 20-88 - Support of Parents by Children.....	30a
G. – Excerpts of the Guardian ad Litem Report of 12 December 2014.....	34a

TABLE OF AUTHORITIES

CASES

Alaska—Worland v. Worland, 193 P.3d 735 (Alaska 2008)	12
Associates Financial Services Co. of Hawai'i, Inc. v. Mijo, 87 Haw. 19, 950 P.2d 1219 (1998).	12
Boddie v Connecticut, 401 US 371, 374 (1971).	13
In re Marriage of Smith, 518 N.E.2d 450, 115 Ill.Dec. 925 (1987)	16, 17
Jacobs v Jacobs, 237 SE 2d 124, 218 Va. 264 at 3 (1977)	16
Jones v. Willard, 224 Va. 602, 607, 299 S.E.2d 504, 508 (1983)	14
Mack v Polson Rubber Co., 14 Ohio St. 3d 34 (1984)	17
Mathews v Eldridge, 424 US 319, 333 (1976).	14
Pecos Const. Co. v. Mortgage Inv. Co. of El Paso, 80 N.M. 680, 459 P.2d 842 (1969).	12
Santosky Ii v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)	28

Selvage v. Emnett, 181 Ohio App. 3d 371, 2009- Ohio-940, 909 N.E.2d 143 (4th Dist. Scioto County 2009)	13
Tennessee v Lane, 541 US 509 (2004).....	14

CONSTITUTIONS

U.S. Const. amend. V, § 1	21
U.S. Const. amend. XIV, § 1	21
Constitution of Virginia. Article 1. Section 1	21
Constitution of Virginia. Article 1. Section 11 . . .	21

STATUTES AND RULES

VA Code § 18.2-369	20
VA Code § 20-88.	31
VA Code § 64.2-2005	19
VA Code § 64.2-2006	18
VA Code § 64.2-2019	21

OTHER AUTHORITIES

Alzheimer's Association, <i>Latest Facts & Figures Report</i> , https://www.alz.org/facts/ , (2017)	33
Ann Brenoff, <i>The System Of Court-Appointed Guardians Continues To Fail The Elderly</i> www.huffingtonpost.com (2017).....	35

Charles E. Friend, <i>The Law of Evidence in Virginia</i> § 10-17, at 338 (5th Ed. 1999)	15
Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611, U.N. Doc. A/RES/61/611, art. 12 (Dec. 6, 2006).	14
Jennifer M. Ortman, Victoria A. Velkoff, and Howard Hogan, <i>An Aging Nation: The Older Population in the United States Population Estimates and Projections, US Census Bureau</i> (2014).	32
National Association to Stop Guardianship Abuse (NASGA), <i>An Open Letter</i> https://stopguardianabuse.org/an-open-door/	29
US General Accounting Office, <i>A Report to Congress. The Nation's Retirement System A Comprehensive Re-evaluation Is Needed</i> (2017). . .	33
Ralph Ruebner, Teresa Do and Amy Taylor (editors), <i>International and Comparative Law of the Rights of Older Persons</i> (2015)	37
National Conference of Commissioners on Uniform Laws, <i>Uniform Adult Guardianship and Protective Proceedings Jurisdiction</i> (2007)	39

OPINION BELOW

The Supreme Court of Virginia did not issue an opinion. They provided a single page Order denying of the Petition for Rehearing (Record No. 161829), listed in Appendix A; and another single page Order denying the Petition for Appeal, listed on Appendix B.

The Circuit Court of Fairfax County in Virginia did not issue an Opinion, but they provided the following single page Orders for case CL-2014-0005376 (Re.: Catharina Maria De Souza Batista, an incapacitated person):

- i. Order of denial of second statement of facts in lieu of transcripts on Appendix C.
- ii. Order of denial of first statement of facts in lieu of transcripts on Appendix D.
- iii. Order of denial of Motion for Reconsideration on Appendix E.

JURISDICTION

The judgment of the Supreme Court of Virginia on the Petition for Rehearing (Record No. 161829) was entered on November 21, 2017. (Appendix A)

The Judgment of the Supreme Court of Virginia on the Petition for Appeal (Record No. 161829) was entered on July 19, 2017. (Appendix B).

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a). This Petition was timely filed after the judgment on the Petition for Rehearing. Please note that February 19, 2018, is a US Supreme Court Federal Holiday: President's Day.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in detail in the Appendix to this petition (Appendix F):

- U.S. Constitution, Articles V & XIV, § 1.
- The Constitution of Virginia. Article 1, § 1 and 11.
- Va. Code. Ann. Title 64.2. Wills, Trusts, and Fiduciaries. Chapter 20. Guardianship and Conservatorship.
 - § 64.2-2006. Counsel for respondent.
 - § 64.2-2005. Evaluation report.
- Va. Code Ann. Title 18.2. Crimes and Offenses Generally. Chapter 8. Crimes Involving Morals and Decency.
 - § 18.2-369. Abuse and neglect of incapacitated adults; penalty.

STATEMENT OF THE CASE

Catharina Maria de Souza Batista (“Mrs. Batista”), a 78-year-old woman, is the mother of three adult children: Carmen Lucia de Souza Batista, Celia Almeida, also known as Celia Maria de Souza Batista (“Ms. Almeida”), and Yosef Gavriel Tirat-Gefen (“Mr. Tirat-Gefen”).

This litigation started when Ms. Almeida attempted to become the sole guardian of Mrs. Batista by filing a guardianship petition in April

2014. Mr. Tirat-Gefen proposed mediation, and to establish a joint guardianship arrangement.

Ms. Almeida refused mediation, and insisted in having a bench trial, hoping to become the sole guardian. Mr. Tirat-Gefen hired legal counsel; and offered again a co-guardianship arrangement. Ms. Almeida refused it.

Mr. Tirat-Gefen filed a cross petition, through counsel, opposing a sole guardianship appointment for Ms. Almeida, and requested either the appointment of a third party guardian, or for him to be appointed sole guardian of Mrs. Batista. Mr. Anthony Mark Christopher was appointed the guardian ad litem ("GAL"), for Mrs. Batista by the Circuit Court of Fairfax County, and started to work with both Mr. Tirat-Gefen's and Ms. Almeida's counsels, to find a solution for this guardianship litigation.

A joint guardianship was considered as a solution and proposed to both Mr. Tirat-Gefen and Ms. Almeida. Mr. Tirat-Gefen accepted, but Ms. Almeida refused again. Ms. Almeida changed counsel and continued with the litigation.

The GAL filed his report to the court in December 2014, and recommended a joint guardianship of Mrs. Batista by both Ms. Almeida and Mr. Tirat-Gefen. However, Ms. Almeida refused to consider it.

A trial date was set for March 2015. Meanwhile Ms. Almeida did not let Mr. Tirat-Gefen see his mother Mrs. Batista, for close to a whole year.

Mrs. Batista was declared incapacitated in accordance with the court order signed on April 16, 2015, appointing Ms. Jean G. Ball ("Ms. Ball") as her guardian and conservator. This court order was based on the settlement agreed by the Parties on March 8, 2015.

Months after the court order was entered, Mr. Tirat-Gefen discovered that the court order contained text not agreed to by him in the settlement. Mr. Tirat-Gefen's counsel notified the other Parties, and sought for the Order to be corrected. The unauthorized text was related to the payment of costs of the guardian and conservator, and geriatric care manager.

Ms. Almeida filed a second Petition on February 23, 2016 seeking modification of the court order entered on April 16, 2015 and the appointment of Ms. Almeida as the sole Guardian and Conservator of Mrs. Batista. Mr. Tirat-Gefen filed a counter petition in response to Ms. Almeida second petition on March 15th, 2016.

The counter petition claimed unclean hands and fraud upon the court by Ms. Celia Almeida and her counsel due to the unauthorized text inserted in the April 16, 2015 court order.

Mr. John DiNucci, Ms. Almeida's attorney, sought counsel for himself, because he was expected to be called to be deposed during the trial regarding the fraud upon the court matter.

Ms. Almeida's substantially delayed for several, months her response to the discovery requests by Mr. Tirat-Gefen.

Mr. Tirat-Gefen counsel had to send five demand letters in order get a response from Ms. Almeida, whose response remained incomplete, for example it did not discuss the reasons or medical details and specialists involved in the treatment of a hand injury to Mrs. Batista while at Ms. Almeida's home, which were listed in the expenses receipts sent by Ms. Almeida in 2015 to Ms. Ball and Mr. Tirat-Gefen.

The hand injury is really concerning, as it may indicate neglect or abuse of Mrs. Batista.

Mr. Tirat-Gefen requested through his counsel that Ms. Ball produce the full medicals records of Mrs. Batista, which would hopefully clarify the hand injury, which required many months of treatment.

Ms. Ball's counsel moved instead to quash Mr. Tirat-Gefen discovery request and refused to provide any medical records.

Mrs. Batista brain CT/MRI scans also suggested, she had a normal pressure hydrocephalus (NPH), a condition that leads to irreversible brain damage if left untreated.

Mrs. Batista was scheduled for an exam at world known John Hopkins Hydrocephalus Center prior to the trial date in 2016.

Ms. Almeida was against the examination, and with the consent of Ms. Ball postponed the exam until after the trial, effectively preventing the results to be available for the trial.

Mr. Tirat-Gefen's counsel requested postponement of the trial on September 27th, 2016 so proper

discovery could be concluded and the fairness of the trial assured, but the trial court denied this request.

An Agreed Order was entered on September 27, 2016. Mr. Tirat-Gefen filed a motion to reconsider and vacate the same order on October 11, 2016, stating that he was deprived of the full medical record of Ms. Batista, which jeopardized the chances of a fair trial, and requesting the matter to be set for a trial on its merits. This motion was denied on October 13, 2016. On October 17, 2016, Mr. Tirat-Gefen timely filed a second motion to reconsider and/or partially vacate the agreed order, which was not adjudicated.

The trial court did not hold hearings or allow for depositions prior to or on the scheduled day of the trial (September 27th, 2017), therefore the court record is limited to motions and a limited set of documents added to the record. The bulk of the documents related to this case was exchanged between the lawyers of Mr. Tirat-Gefen and Ms. Almeida, but not included in the trial court record.

Mr. Tirat-Gefen filed two statements of facts in lieu of transcripts to supplement the trial court record, but they were rejected by the trial court.

Mr. Tirat-Gefen referenced his motions for reconsideration of the trial court's Orders in his appeal to the Virginia Supreme Court, and that he was under duress when he signed the Agreement, because without it Ms. Almeida could have become the sole guardian of Mrs. Batista at the bench trial. Ms. Almeida would cancel the normal pressure

examination of Mrs. Batista, denying Mrs. Batista a life saving treatment.

Moreover, Mrs. Almeida had a prior history of denying Mr. Tirat-Gefen access to Mrs. Batista. She forbade him from meeting with Mrs. Batista for close to year prior to the first settlement.

Mr. Tirat-Gefen also included in his motions for reconsideration to the Circuit Court of Fairfax County, and Petition for Appeal to the Virginia Supreme Court, the fraud, duress and withholding of facts and evidence that had occurred during the proceedings in the trial court., e.g.:

- Ms. Almeida purposely refused to disclose the nature of the event and circumstances related to the hand injury.
- Ms. Ball did not provide the requested medical data about the hand injury.
- The John Hopkins exam which was postponed to after the trial.

Mr. Tirat-Gefen's Petition for Appeal to the Virginia Supreme Court also requested for an oral argument.

Mr. Tirat-Gefen's Petition for Appeal at the US Supreme Court of Virginia was denied in July 2017 without him having the opportunity to present an oral argument. The single page denial Order stated that the record was insufficient to enable the Virginia Supreme Court to evaluate and resolve the assignments of error. Although most of evidence about the fraud, duress, and withholding of facts and evidence was available in the discovery material exchanged between the lawyers, and

therefore could have been added as a supplement to the record if the Petition for Appeal had been accepted.

Moreover, the Virginia Supreme Court could have ordered that an evidentiary hearing be conducted by the trial court, but it did not.

Mr. Tirat-Gefen also filed a Petition for Rehearing in the Virginia Supreme Court, but it was denied on November 21, 2017. This Petition for a Writ of Certiorari to the US Supreme Court is taken from the Order denying Mr. Tirat-Gefen's Petition for Rehearing.

Contested settlement clauses

Mr. Tirat-Gefen, on his second Motion for Reconsideration to the Circuit Court of Fairfax County, listed the contested clauses that, in his view, were gained through violations of due process during the settlement negotiation.

Mr. Tirat-Gefen proposed changes to the settlement agreement to make the injured parties whole. These proposed modifications included that:

- A new guardian would be appointed, other than Ms. Ball, or that a **co-guardianship** be ordered.
- Mrs. Batista's time at Mr. Tirat-Gefen's home would be extended: from late Saturday to Monday noon, to Friday to Monday.
- Mr. Tirat-Gefen and Ms. Almeida equally share and pay back any balance due by Mrs.

Batista to Medicaid, if Mrs. Batista would lose her eligibility for those benefits.

- The costs to pay the third party guardian, in case a co-guardianship is not established, would be equally shared at all times by Mr. Tirat-Gefen and Ms. Almeida.
- The costs to pay a geriatric care manager (GCM) would be equally shared by Mr. Tirat-Gefen and Ms. Almeida.
- The trial judge would have the full and unrestricted authority to assign attorney and court costs to either Party or neither of the Parties, in any lawsuit related to Mrs. Batista's guardianship.

These proposed modifications are also included in the Petition for a Writ of Certiorari to the US Supreme Court, as a possible fair and equitable way to solve the controversy about the due process violations.

REASONS TO GRANT THE PETITION

- I. **A settlement agreement in a guardianship case of an elderly incapacitated adult is voidable due to violations of due process. It should be modified to make the injured parties whole.**

A settlement agreement is treated as contract in Virginia, and as such it is subject to the general principles of contract interpretation. A contract can

be voided or declared voidable under certain conditions, including violations of due process.

An incapacitated adult has a constitutional right to due process, despite lack of cognitive ability. Therefore, Mr. Tirat-Gefen and his incapacitated mother, Mrs. Batista, are entitled to due process, as any other parties to a contract are.

Mr. Tirat-Gefen pleaded to the state courts regarding the fraud, duress, and the withholding of facts and evidence that took place during the negotiations of the settlement agreement relating to the guardianship of Mrs. Batista. The Circuit Court of Fairfax County and the Supreme Court of Virginia did not order an evidentiary hearing to clarify the matter.

The state courts did not appoint an independent counsel to protect Mrs. Batista's, an incapacitated person, rights to due process. The independent counsel could have protected Mrs. Batista's interest in the full disclosure of her medical data, ensuring that the details of her hand injury would be scrutinized, prior to the trial.

Although required by a Virginia statute, an up-to-the-date medical evaluation of Mrs. Batista was not provided, rather, the state courts relied on a medical report, more than two years old, which did not address Mrs. Batista's medical issues at the time of the settlement negotiations in 2016, which might have affected the outcome of a guardianship trial, if one had been held.

An incapacitated adult guardianship settlement, although treated as a contract, addresses the welfare of a person that is unable to properly voice her preferences or concerns.

As a matter of public policy, simply setting aside a guardianship agreement when it is gained through violation of due process is detrimental to the incapacitated person. An incapacitated person needs a guardian or co-guardians to be always ready and available to make decisions about her care.

Moreover, the injured parties may fear bringing a lawsuit to set aside a guardianship settlement, gained through due process violations, out of concern for the incapacitated adult.

A better approach, as a matter of public policy, would be to modify the contested clauses in a guardianship settlement, when those clauses are achieved through violations of due process. On the other hand, if this Court remains silent, it will almost certainly ensure that additional violations of due process rights will occur nationwide in these cases. As such, the contested clauses in the settlement agreement should be modified and remanded back to the lower courts.

A. A guardianship settlement is a contract and therefore is voidable or can be set aside.

The following cases illustrate the case law about settlements gained through violation of due process:

- Under governing Virginia law, settlement agreements are treated as contracts subject to the general principles of contract interpretation. *Bangor-Punta Operations, Inc. v. Atlantic Leasing, Ltd.*, 215 Va. 180, 207 S.E.2d 858, 860 (1974).
- As contracts, settlement agreements must be entered into voluntarily and knowingly; they cannot be the product of misrepresentation, *Alaska—Worland v. Worland*, 193 P.3d 735 (Alaska 2008).
- A party induced to enter into a compromise and settlement agreement may be entitled to relief, *Pecos Const. Co. v. Mortgage Inv. Co. of El Paso*, 80 N.M. 680, 459 P.2d 842 (1969).
- A settlement can be coerced either by the power of the parties, by a strong judge in a settlement conference, or by inexorable trial dates, *Associates Financial Services Co. of Hawai'i, Inc. v. Mijo*, 87 Haw. 19, 950 P.2d 1219 (1998).

- A settlement agreement can be set aside for fraud. *Selvage v. Emnett*, 181 Ohio App. 3d 371, 2009-Ohio-940, 909 N.E.2d 143 (4th Dist. Scioto County 2009)

Likewise, a guardianship settlement agreement is a contract. Therefore, it can be interpreted by the general principles of a contract. *Bangor-Punta Operations, Inc. v. Atlantic Leasing, Ltd.*

A guardianship settlement agreement can be declared void or voidable because of due process violations, such as fraud, *Selvage v. Emnett*; undue influence or duress, *Associates Financial Services Co. of Hawai'i, Inc. v. Mijo*; or withholding of facts of evidence, *Alaska—Worland v. Worland*.

Therefore, the guardianship settlement of Mrs. Batista can be declared void or voidable if fraud, duress, or withholding of facts or evidence were used to procure it.

B. All citizens, including incapacitated elderly adults, have a constitutional fundamental right to due process.

It is a major principle of our constitutional jurisprudence that no person shall be deprived of life, liberty or property” without due process of law”, under the Fifth and Fourteenth Amendments of the United States Constitution, and state constitutions, Appendix at 22a. “At its core, the right of due process reflects a fundamental value in our American constitutional system,” *Boddie v. Connecticut*, 401 US 371, 374 (1971).

Moreover, when the State acts to remove an adult person's decision-making power, this depriving such persons of control over decisions affecting their life, liberty or property, the constitutional guarantees of due process requires notice, access and a meaningful opportunity to be heard, *Tennessee v Lane*, 541 US 509 (2004).

An incapacitated adult with cognitive disabilities (e.g. dementia) is no less entitled to these constitutional guarantees of due process than persons who are not under a disability. "Persons with disabilities have a right to recognition everywhere as persons before the law . . . [and] enjoy legal capacity on an equal basis with others in all aspects of life." Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611, U.N. Doc. A/RES/61/611, art. 12 (Dec. 6, 2006).

Moreover, the right to due process is extended to civil proceedings. "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Mathews v Eldridge*, 424 US 319, 333 (1976).

Therefore, an incapacitated widowed elderly parent like Mrs. Batista should be entitled to the same **due process** safeguards afforded to other parties in guardianship procedures.

C. Fraud, duress and withholding of facts and evidence were reported but the state courts refused to perform an evidentiary hearing to vacate the settlement.

Fraud, duress, or withholding of facts and evidence are reasons for voiding a contract.

A judgment obtained by intrinsic fraud, such as perjury, forged documents, or other incidents of trial related to issues material to the judgment, is "voidable by direct attack at any time before the judgment becomes final; the judgment of a court, procured by extrinsic fraud, ... by conduct which prevents a fair submission of the controversy to the court, is void and subject to attack, direct or collateral, at any time." *Jones v. Willard*, 224 Va. 602, 607, 299 S.E.2d 504, 508 (1983).

Therefore., the occurrence of fraud and withholding of evidence and facts during the negotiations of Mrs. Batista's guardianship, as reported by Mr. Tirat-Gefen, are reasonable grounds to set aside the agreed Order (Appendix at 8a) as discussed in *Jones v Willard*, supra.

Virginia law recognizes a spoliation or missing evidence inference, which is understood as "[w]here one party has within his control material evidence and does not offer it, there is [an inference] that the evidence, if it had been offered, would have been unfavorable to that party." Charles E. Friend, *The Law of Evidence in Virginia* § 10-17, at 338 (5th Ed. 1999). Likewise, Ms. Almeida withheld documents about Mrs. Batista's health during discovery. The

presumption is that these undisclosed documents were unfavorable to Ms Almeida.

Duress is a reason to set aside a settlement agreement. See *Jacobs v Jacobs*, 237 SE 2d 124, 218 Va. 264 at 3 (1977), holding that a real estate deed procured under duress could be set aside. Mrs. Jacobs filed a motion to set aside the deed due to duress. The trial court agreed. Mr. Jacobs did not testify but appealed. The VA Supreme Court affirmed, stating that “it is our conclusion that the uncontradicted testimony introduced by the appellant, when considered with all the surrounding circumstances, clearly and convincingly established the allegation by Mrs. Jacobs that she executed ... under duress.”

Settlement agreements in divorce can be also set aside for duress. But see *In re Marriage of Smith*, 518 N.E.2d 450, 115 Ill.Dec. 925 (1987). A request to set aside a settlement was denied by the trial court and affirmed by the Appellate Court of Illinois, holding that there was sufficient evidence to support a finding that the settlement agreement was not unconscionable and was not procured by coercion or duress. Wife was not able to prove duress with clear and convincing evidence.

Like in *Jacobs v Jacobs*, Mr. Tirat-Gefen was under ongoing duress due to his concerns about the delay of Mrs. Batista exam at John Hopkins Hydrocephalus Center, which was postponed until after the trial date. He feared that restricted access

to Mrs. Batista would be imposed by Ms. Almeida, as she did before. He was concerned about Ms. Almeida's strong opposition to the exam at John Hopkins involving a life-threatening condition: normal pressure hydrocephalus. Ms. Almeida and Ms. Ball refused to fully comply with discovery requests about the medical records of Mrs. Batista. As opposed to *In re Marriage of Smith*, there was clear evidence that the medical records were incomplete. An evidentiary hearing would have shown that. Mr. Tirat-Gefen went to the guardianship trial with his hands tied. He was forced to sign the settlement under duress.

It is a reasonable expectation that courts should request an evidentiary hearing, when there are allegations of fraud, duress, misrepresentation and withholding of evidence. Differently from *Mack v Polson Rubber Co.*, 14 Ohio St. 3d 34 (1984), which states that "in the absence of allegations of fraud, duress, undue influence, or of any factual dispute concerning the existence or the terms of a settlement agreement, a court is not bound to conduct an evidentiary hearing prior to signing a journal entry reflecting the settlement agreement." Mr. Tirat-Gefen had the set of documents produced by Ms. Celia during discovery, where there were not medical data about the hand injury. The concealment of evidence was clear, an evidentiary hearing was warranted but denied by the trial court and the Virginia Supreme Court.

D. The state courts did not appoint an independent counsel for an elderly, incapacitated adult.

Incapacitated persons have the right to have access to independent counsel as “the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” *Powell v Alabama*, 287 US 45, 68-69 (1937).

VA Code § 64.2-2006, Appendix at 25a, states that:

“The respondent has the right to be represented by counsel of the respondent's choice. If the respondent is not represented by counsel, the court may appoint legal counsel upon the filing of the petition or at any time prior to the entry of the order upon request of the respondent or the guardian ad litem.”

Mrs. Batista was not appointed an independent counsel. Ms. Ball refused to comply with a discovery request about Mrs. Batista's medical history. Mr. Tirat-Gefen could have had better success in getting documents relating to the hand injury in addition to other relevant issues, if an independent counsel for Mrs. Batista had been appointed.

Because these issues could have been used in the guardianship trial to decide better care arrangements and residential assignment for Mrs. Batista; and to inform the court who would be the

best guardian, or co-guardians, of Mrs. Batista. The lack of an independent counsel for Mrs. Batista contributed to the violations of her due process rights.

Moreover, the refusal of Mr. Tirat-Gefen's Petition for Rehearing by the Virginia Supreme Court harmed both his and Mrs. Batista's due process rights.

E. The required up-to-the-date medical evaluation of the incapacitated adult was not produced.

VA Code § § 64.2-2005, Appendix at 23a, states that:

“A report evaluating the condition of the respondent shall be filed, under seal, with the court and provided to the guardian ad litem, the respondent, and all adult individuals and all entities to whom notice is required under subsection C of § 64.2-2004 within a reasonable time prior to the hearing on the petition. The report shall be prepared by one or more licensed physicians or psychologists or licensed professionals skilled in the assessment and treatment of the physical or mental conditions of the respondent as alleged in the petition. If a report is not available, the court may proceed to hold the hearing without the report for good cause shown, absent any objection by the guardian ad litem, or may order a report

and delay the hearing until the report is prepared, filed, and provided.”

Mrs. Batista’s medical evaluation report was produced in February 2014. The guardianship trial date was set for September 2016, more than two and half years later. Mrs. Batista’s medical condition changed during this period. It is unreasonable to not provide an up-to-the-date medical report, which would have allowed the disclosure of issues surrounding her hand injury, which might have indicated abuse or neglect as understood by VA Code § 18.2-369, Appendix at 28a.

Therefore, Mr. Tirat-Gefen and Mrs. Batista were deprived of due process rights by the absence of an up-to-the-date report, which also can be considered withholding of facts and evidence.

F. As a matter of public policy, adult guardianship agreements, when gained through violations of due process, should be modified to make the injured parties whole.

As discussed above, an incapacitated adult guardianship settlement can be treated as a contract. In contrast to a commercial contract or a divorce in a childless divorce, a guardianship settlement is quite similar to a divorce between parents of minor children.

There is no unheard third party that will be affected, when we set aside a commercial contract involving an object or a childless marriage. The two sides involved in the litigation are assumed to have equal access to judicial resources and to be able to seek or be assigned capable counsel as needed.

An incapacitated adult has no capability to be fully heard about the impact of having her guardianship order vacated. This person needs a guardian, or co-guardians, ready and available 24/7, so the decisions affecting her welfare and care are not delayed, as discussed in state statutes, such as VA Code § 64.2-2019, duties and powers of the guardian. Appendix at 25a.

An incapacitated adult guardianship settlement, although treated as a contract, addresses the welfare of a person that is unable to properly voice her preference or concerns.

Moreover, if the jurisprudence regarding a guardianship settlement gained through violations of due process, becomes such that these settlements must be vacated, the injured parties may prefer to not bring a suit to modify these agreements, out of fear. This outcome will hurt the incapacitated adult, in addition to being a miscarriage of justice.

Therefore, as a matter of public policy, simply setting aside a guardianship agreement gained through violation of due process is not necessarily beneficial to the ward.

But the courts cannot remain silent to violation of due process. The rule of law should be enforced in all judgements, including in elderly incapacitated adult guardianship cases.

A possible trade-off between the need for justice and the welfare of the ward, is to partially modify the settlement by changing or eliminating those clauses that benefitted the parties responsible for the violation of due process; but also by making the modified settlement provide, as much as possible, equal rights and duties to all parties in the litigation, including siblings, like for example, Mr. Tirat-Gefen and Ms. Almeida. This trade-off makes the injured parties (e.g. Mr. Tirat-Gefen) of the settlement whole, without being unfair to the other interested sibling.

This settlement agreement in a guardianship case of an elderly incapacitated adult is voidable due to violations of due process. It should be modified to make the injured parties whole, but also ensure equal rights and duties to both parties in the litigation. This Court should order the modification of the agreement as suggested by the Petitioner, and remand this case back to the lower courts in Virginia.

- II. This court recognized, under the US Constitution, the fundamental right of parents to raise and care for their children, even when they conflict. The same protections should be given to the adult children of an incapacitate elderly parent: to receive priority to be appointed as co-guardians and co-conservators, even when disagree about care. A co-guardianship agreement should have precedence over other arrangements in this case.**

This Court and other state courts have recognized the fundamental right of parents to raise and care for their children. The practical application of this ruling, is that divorced parents do not lose custodial rights to their children when they have an adversarial divorce. But the courts can abrogate this right for the sake of the best interests of the child, when a parent endangers the safety and well-being of the minor child.

If a divorcing parent wants full custody, i.e. sole custody of the minor, this parent has the burden of proof to show why joint custody is not warranted. Moreover, the courts will not appoint a third party independent guardian just because the parents are in conflict about how they should care and raise their children. Likewise, the guardian ad litem in a guardianship of a minor should have to show why a joint custody is not preferred, before recommending a third-party guardian arrangement. Divorced

responsible parents usually have joint priority to be the co-custodians of their children.

Sometimes adult children disagree about the care arrangements of an elderly widowed incapacitated parent, e.g., the parent has dementia, and they disagree where the parent should live. A guardianship litigation is started, which has many of the characteristics of a divorce involving minors.

Like the case of divorcing parents with minors, the adult children of an incapacitated elderly parent are the main caregivers and surrogate decision makers for their parent. They love their incapacitated parent, but they will sometimes fight for both the privilege to care for her and the ability to make decisions about her care.

However, apart from the case of divorcing parents of minors, adult children in an elderly incapacitated parent litigation will face different legal treatment by the state courts, which will typically give priority to a third party independent guardian in cases where there may be conflict among the adult children. Co-guardianship is typically assigned when the adult children are not in conflict, but in those cases, there may be no need for court adjudication of the rights and responsibilities of the parties.

This different legal treatment is also at odds in how state filial responsibility laws require adult children to support their impoverished elderly parents, in the same way that parents have to

support their minor children. For example, a parent can be sent to jail for not paying child support for their minor children. In some states, an adult child can also be sent to jail for not supporting and caring for their impoverished elderly incapacitated parent. But while a divorcing parent, in normal circumstances, will have first priority in gaining custody of his children, the conflicting but responsible adult children in an incapacitated parent guardianship litigation will have to accept a third-party guardian being appointed by the state courts. Divorced parents have similar duties as the adult children of an incapacitated parent, but the latter have significantly fewer rights than the former.

As a matter of public policy, co-guardianship by responsible adult children, of an incapacitated elderly widowed parent, should have priority over the appointment of a third-party guardian, even if the adult children may disagree about the parent's care arrangements for the reasons discussed below.

First, the US population is aging, and birth rates are dropping. Second, the number of dementia cases in our elderly population is increasing rapidly, leading to more adult children having to provide care for their incapacitated elderly parent, due to cognitive losses.

Second, the state and federal public benefits structure was designed for a time when life expectancy was lower, and the ratio of active workers to elderly individuals was much higher

than now. Both states and the federal government have increasingly strained budgets because that ratio is now much lower. Therefore, adult children must, in the future, be ready to support their elderly parents, possible even if they are not incapacitated.

Third, current preference for third party guardians in state courts causes responsible adult children to forego litigation, even when such litigation would produce a favorable result for the incapacitated parent. This problem results in the incapacitated parent being in an unsafe situation, because a legal guardian, or co-guardians, are not in place, leading to delays in health care and other important decisions. In the alternative, adult children may choose to litigate, knowing that most likely, only one of them will be granted guardianship, or a third-party guardian will be appointed. This all or nothing scenario leads to high guardianship litigation costs, diverting money and time that could be used for the care of the incapacitated parent.

Fourth, litigation over a guardianship of an elderly incapacitated parent wastes scarce judicial resources that should only be used when there is clear abuse, or neglect of the ward, or when a third-party guardian must be appointed, because there are no relatives available or willing to accept the appointment.

Fifth. Co-guardianship offers a safer alternative to a third-party guardian, who typically is a

professional guardian who will rarely visit the ward. The adult children know the needs of the incapacitated parent much better than a person outside of the family. The very fact they are in conflict sometimes, provides an assurance to the court that abuse or neglect will not happen, because the siblings will police each other to ensure the care provided to their parent is the best.

New developments in international elder law suggest that it is good public policy to give preference to co-guardianship of an incapacitated parent to the adult children of that parent. For example, the 2014 Chicago Declaration on Rights of Older Persons asks for respect for interdependent and caring relationships. As such, the solidarity between generations of the same family should be encouraged. The current state court preference for third party guardians is at odds with that.

In this case, the guardian ad litem recommended co-guardianship by the litigating adult children since 2014, which was accepted from the very beginning by Mr. Tirat-Gefen, but refused by Ms. Almeida, forcing the appointment of a third-party guardian.

It is unlikely that guardianship of a minor child would be given to a third-party guardian, just because one parent does not want to share custody. In an elderly incapacitated parent case, a litigating adult child can prevent a co-guardianship by just saying no, forcing the other adult child to waste large sums of money in a multi-year long guardianship litigation. This is not an acceptable

outcome and a failure of our family law justice system.

This Court should declare the fundamental right of responsible adult children to have priority to be appointed co-guardians of their incapacitated elderly widowed parent, even when they may be in conflict, just like responsible divorced parents have priority to be granted joint custody of their minor children.

Therefore, this case should be remanded to the lower courts, with the direction that an evidentiary hearing be held, to determine how a co-guardianship by the responsible adult children will be structured.

A. Divorced parents of minors, and responsible adult children of an incapacitated elderly parent receive different treatments by the state courts; similar duties but different rights.

Divorced parents and adult children of an incapacitated elderly parent have similar roles. The former care and raise their children, the latter care for their parent, who has become cognitively unable to make decisions about her own care.

Divorced parents typically receive joint custody of their children from the state courts, even though they may be in conflict, or not be model parents.

In particular, the United States in *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) stated that:

“The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. A parental rights termination proceeding interferes with that fundamental liberty interest. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”

Adult children in an incapacitated elderly parent guardianship litigation case face very different treatment. For example, the National Association to Stop Guardianship Abuse (NASGA) states at <https://stopguardianabuse.org/an-open-door/>:

“The day you take the matter to court is the day you stand to lose your loved one! Almost without exception, when a family feud is involved, no matter who is right and who is wrong, the judge will appoint a third-party guardian – regardless of whether advance directives (durable power of attorney, health proxy, wills, trusts, etc.) are in place or not.

The courts are known to be biased against the family. Why? Two basic reasons: While most families love and take care of their elderly or

disabled parents, those who don't often get press coverage which result in horrific articles which stick in our memory and eventually create a false impression that family is the largest category of abusers of the elderly. Second, bias is often encouraged by the guardian ad litem and attorneys in the case. They are to benefit most monetarily, if they can keep the disagreement going which leads to a forced guardianship / conservatorship. The judge will appoint a professional or public guardian, citing the long-standing family dispute as the end that justifies the means. In other words, the ward is punished because his/her family "can't get along."

An adult child will have a difficult time arguing for co-guardianship in a case where there is sibling conflict regarding the care of their incapacitated parent. Different than the divorced parent of a minor child, a sibling in a parental guardianship case has no fundamental recognized right to preference in being appointed co-guardian, no matter how dedicated he or she may be to the welfare of his incapacitated parent.

B. State filial obligation laws impose a duty by adult children to support and care for their elderly incapacitated parent. These laws ought to be balanced with the right of adult children to receive priority in making decisions about the care of an incapacitated parent.

Filial responsibility laws obligate adult children to provide necessities like food, clothing, housing, and medical attention for their impoverished parents. Many states allow a civil court action to obtain financial support or cost recovery, and a few states impose criminal penalties on children who do not support their parents, with some states allowing both civil and criminal actions, like Virginia in VA Code § 20-88 - Support of Parents by Children, Appendix at 30a:

“It shall be the joint and several duty of all persons eighteen years of age or over, of sufficient earning capacity or income, after reasonably providing for his or her own immediate family, to assist in providing for the support and maintenance of his or her mother or father, he or she being then and there in necessitous circumstances.”

The VA Code § 20-88 even assigns jail sentences for failure to support an impoverished parent:

“Any person violating the provisions of an order entered pursuant to this section shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$500 or imprisonment in jail for a period not exceeding twelve months or both.”

This punishment is similar to what a divorced parent receives who fails to pay child support for their minor children, but a parent has preference in

receiving joint custody of his children. An adult child of an incapacitated parent has the duty to support the elderly incapacitated parent, but not the fundamental right to become a co-guardian in a case where he is a party, and is asking the court to be appointed guardian, or co-guardian, for his incapacitated elderly parent.

Therefore, filial responsibility laws ought to be balanced with the right of adult children to receive priority in making decisions about the care of their incapacitated parent.

C. As a matter of public policy, co-guardianship by adult children should be preferred over third-party guardian appointments, because the role of adult children is essential to the well being of the incapacitated parent.

There are important public policy reasons for adult children of an incapacitated elderly parent receiving priority to be appointed co-guardians, even though they might be in conflict over their parent's care. The federal and state governments need the active engagement of adult children. There are not enough government resources to supply what responsible adult children can.

1. The U.S. population is aging.

According to the US Census Bureau.

“In 2050, the population aged 65 and over is projected to be 83.7 million, almost double its estimated population of 43.1 million in 2012. The baby boomers are largely responsible for this increase in the older population, as they began turning 65 in 2011. By 2050, the surviving baby boomers will be over the age of 85.”

Jennifer M. Ortman, Victoria A. Velkoff, and Howard Hogan, *An Aging Nation: The Older Population in the United States Population Estimates and Projections*, US Census Bureau (2014).

2. The number of dementia cases among the elderly population is increasing rapidly.

The Alzheimer’s Association reports that
 “Every 66 seconds, someone in the United States develops Alzheimer’s dementia. By 2050, someone in the United States will develop Alzheimer’s dementia every 33 seconds.”

Alzheimer’s Association, *Latest Facts & Figures Report*, <https://www.alz.org/facts/>, (2017).

3. Impoverished elderly incapacitated parents’ reliance on public benefits is unsustainable due to state and federal budgets constraints.

The General Account Office reports that

“Researchers have found that about 70 percent of those age 65 or older are likely to

need long-term services and supports at some point in their lives, for an average of 3 years; 20 percent will need that care for at least 5 years. As the size of the older population grows, so will the number of older adults needing long-term services and supports, particularly those 85 or older. According to the Congressional Budget Office (CBO), expenditures on long-term services and supports for elderly individuals accounted for an estimated 1.3 percent of GDP in 2011, and CBO projected that the percentage would rise to between 1.9 and 3.3 percent of GDP by the year 2050. “

US General Accounting Office, *A Report to Congress. The Nation's Retirement System A Comprehensive Re-evaluation Is Needed* (2017).

4. Current preference for third party guardians forces conflicting families to pursue costly litigation, or adopt informal unsafe guardianship arrangements.

Adult children who are in conflict about how to care for their incapacitated parents are faced with two choices.

First, the adult children can keep the conflict unresolved, during which period there is no formal guardian in place. The elderly parent may suffer delays in decisions regarding medical care and other aspects of her life, because of the uncertain legal status of her de-facto co-guardians.

Second, the adult children may start a litigation, like in this case, where two siblings, Mr. Tirat-Gefen and Ms. Almeida are in disagreement as to who should have primary responsibility for the care of their mother. As a consequence, three lawyers have been required, an elder law counsel for each sibling and a guardian ad litem, which, at an average hourly cost for each lawyer of about \$330, in the Greater Washington D.C. area, has totaled about \$1000 per hour. The money spent in litigation could have been better utilized in the care of the incapacitated parent.

5. Litigation over guardianship of an incapacitated parent, that could have been solved through a co-guardianship, wastes scarce judicial resources.

Pamela B. Teaster, director of the Center for Gerontology at Virginia Tech, states that

“the current guardianship system needs better oversight — and that the examples of abuse we see are likely just a fraction of what goes on. Multiple elderly advocacy platforms, including the National Council on Aging, agree that elder fraud and abuse are greatly under-reported.”

Ann Brenoff, *The System Of Court-Appointed Guardians Continues To Fail The Elderly*, www.huffingtonpost.com (2017).

The courts have scarce resources to devote to important guardianship cases. An ongoing litigation over the guardianship of an elderly parent that could have been resolved through a co-guardianship, is a bad allocation of these scarce judicial resources.

6. Co-guardianship offers better safeguards against abuse of an elderly incapacitated adult.

The prejudice of the state courts against assigning responsible though conflicting adult children as co-guardians of an incapacitated parent is not warranted. Those adult children can provide better assurances to a court, that the elder will not be abused or neglected, than what a third party independent guardian can provide, who will rarely visit the elder.

The adult children will police each other to ensure that the quality of care of their parent is outstanding. This level of policing cannot be replicated by a third-party guardianship.

D. The 2014 Chicago Declaration on Rights of Older Persons asks for respect to interdependence and caring relationships.

This declaration lists core principles that emphasize the importance of interdependence, caring relationships, family relationships and intergenerational solidarity. Ralph Ruebner, Teresa Do and Amy Taylor (2015):

“The principles recognized by this Declaration are:

1. Respect for inherent dignity;
2. Respect for individual autonomy, including the freedom to make one’s own choices;
3. Respect for the independence and capabilities of older persons;
4. **Respect for interdependence and caring relationships;**
5. Respect for non-discrimination and equality under law;
6. **Respect for family relationships and intergenerational solidarity;**
7. Respect for full and effective participation and inclusion in society;
8. Respect for and recognition of older persons as part of human and cultural diversity; and
9. Respect for aging as an integral and continuous part of life.”

The current non-preferential treatment of co-guardianship by adult children, who are parties in an incapacitated parent guardianship case, is currently at odds with the core principles of the declaration above and other developments in international elder law. Ralph Ruebner, Teresa Do and Amy Taylor, *International and Comparative Law of the Rights of Older Persons* (2015).

E. The guardian ad litem recommended co-guardianship of the widowed elderly parent; petitioner accepted; but

respondent rejected, forcing a third-party guardian appointment. The state courts should have given higher priority to a co-guardianship arrangement.

The GAL on his report to the court dated the 12th of December 2014 states, at Appendix at 34a-38a:

“...the pleadings also describe that they have a shared history of caring for Catharina [Mrs. Batista], each being the primary caregiver or providing oversight at different periods. I believe there could be conditions under which their joint appointment could be in the best interests of Catharina and resolve the case.”

The GAL continues his analysis in favor of a joint co-guardianship.

“I have also been considering whether a joint guardianship may be most in-line with the presumed desire of the Ward when she was of sound mind. Catharina did not voice a preference of one child over the other. I realize that she may not have the present capacity to do so. However, she was oriented as to person; she knew who she was and who her immediate family members are. In addition, there is a history of each of her US-based children having looked after her for extended periods of time (mostly at different periods) while Catharina has been in the United States.”

The GAL points to the uniform guardianship laws supporting an interstate co-guardianship.

“A reason to grant co-guardianship to both Yosef [Mr. Tirat-Gefen] and Celia [Ms. Almeida] lies in changes to the law. Maryland, like Virginia, has recently enacted the Uniform Adult Guardianship and Protective Proceeding Jurisdiction Act (the "UAGPPJA") [Maryland Code, Estates and Trusts, §13.5401, et. seq.]”

Unfortunately, Ms. Almeida refused the GAL's recommendations, and Mr. Tirat-Gefen and Mrs. Batista have endured four years of litigation, including this Appeal to the United States Supreme Court. It is unfair for one party to hold back the resolution of a case just by saying no to a co-guardianship, as recommended by the Guardian Ad Litem.

A possible co-guardianship arrangement between the conflicting adult children (Mr. Tirat-Gefen and Ms. Almeida) was not given proper consideration by the state courts.

Therefore, the settlement agreement should be remanded back to the lower courts in Virginia, where the co-guardianship appointment of Ms. Almeida and Mr. Tirat-Gefen should be given priority over the appointment a third-party guardian.

The right of adult children to care for their incapacitated adult parents should be recognized as a fundamental constitutional right, in addition to being the stated goal of American public policy.

CONCLUSION

This Court should order the modification of the settlement agreement as suggested by Petitioner, remand this case back to the lower courts in Virginia, with the direction that the co-guardianship appointment of Ms. Almeida and Mr. Tirat-Gefen be given higher priority than the appointment of a third-party guardian.

Moreover, the right of adult children to care for their incapacitated adult parents should be recognized as a fundamental legal right, guaranteed and protected by the United States Constitution.

Respectfully submitted,

Yosef Gavriel Tirat-Gefen, PhD, Pro se
National Certified Guardian (NCG)
Member of National Guardianship Association
Associate Member of the American Bar Association
13314 Arctic Ave. Rockville, MD 20853-3072
e-mail: yosefgavriel@gmail.com
Phone: 571-328-8430