

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

BARNSTABLE DIVISION

DOCKET No. BA05P-1100-GII

IN RE: GUARDIANSHIP OF KENNETH E. SIMON

JUDGMENT

(on Temporary Guardians First and Final Account filed 6/16/06)

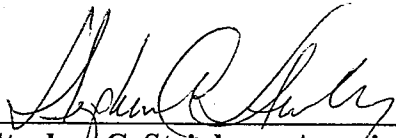
All persons interested having been notified in accordance with the law, this matter came on for trial on October 27, 28, 29, November 3, December 1, 15, 16, 2008, January 6, 7, 8 and February 10, 2009 the Honorable Stephen C. Steinberg presiding. The Guardian, E. James Veara (hereafter "Veara"), appeared and was represented by Attorney Gerald Nissenbaum (hereafter "Nissenbaum"). Kenneth E. Simon, Jr. (hereafter "Ken, Jr."), Brenda Corliss Simon (hereafter "Brenda"), and Christopher Simon (hereafter "Chris") (hereafter referred to collectively as "the Objectors") did not appear but were represented by Attorney Owen Todd (hereafter "Todd") and Attorney Charles Waters (hereafter "Waters"). After hearing and evaluating all credible evidence it is

ORDERED and ADJUDGED that:

1. The First and Final Account of the Temporary Guardian is hereby **DENIED**.
2. Veara shall return the sum of \$107,741.75 to Ken, Jr. as Executor of the Estate of Kenneth E. Simon within thirty (30) days from the date of this judgment.
3. Nissenbaum shall return the sum of \$199,859.94 to Ken, Jr. as Executor of the Estate of Kenneth E. Simon within thirty (30) days from the date of this judgment.
4. Nissenbaum and Veara paid \$21,169.28 to Thomas Grady, Advantage Group and National Legal Research. The Court finds these expenses to be unreasonable and unnecessary and therefore Nissenbaum and Veara shall reimburse Ken, Jr. as Executor of the Estate of Kenneth E. Simon for these expenses within thirty (30) days from the date of this judgment. Nissenbaum shall reimburse the estate in the amount of \$10,584.64. Veara shall forthwith reimburse the estate in the amount of \$10,584.64. These sums shall be paid to Ken, Jr. as Executor of the Estate of Kenneth E. Simon.
5. Veara shall forthwith amend his First and Final Account to reflect payment of these expenses back to the Estate of Kenneth E. Simon and shall present the amended account to this Court for approval.

1-14-10

Date


Stephen C. Steinberg, Associate Justice
Plymouth County Probate & Family Court

**COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT**

BARNSTABLE DIVISION

DOCKET No. BA05P-1100-GII

IN RE: GUARDIANSHIP OF KENNETH E. SIMON

FINDINGS OF FACT, RATIONALE & CONCLUSIONS OF LAW

(on Temporary Guardians First and Final Account filed 6/16/06)

All persons interested having been notified in accordance with the law, this matter came on for trial on October 27, 28, 29, November 3, December 1, 15, 16, 2008, January 6, 7, 8 and February 10, 2009, the Honorable Stephen C. Steinberg presiding. The Guardian, E. James Veara (hereafter "Veara"), appeared and was represented by Attorney Gerald Nissenbaum (hereafter "Nissenbaum"). Kenneth E. Simon, Jr. (hereafter "Ken, Jr."), Brenda Corliss Simon (hereafter "Brenda"), and Christopher Simon (hereafter "Chris") (hereafter referred to collectively as "the Objectors") did not appear but were represented by Attorney Owen Todd (hereafter "Todd") and Attorney Charles Waters (hereafter "Waters"). After hearing and evaluating all credible evidence, the Court (Steinberg, J.) hereby enters the following.

RELEVANT PROCEDURAL HISTORY

1. On August 11, 2005, Nissenbaum (on behalf of the Objectors) filed a Petition for Appointment of Guardian of a Mentally Ill Person.
2. On same date, Veara was appointed Temporary Guardian of the ward, Kenneth E. Simon Sr. (hereafter "the ward").
3. On same date, Nissenbaum and Veara filed a Motion to Issue a Temporary Restraining Order, Trustee Process on Merrill Lynch and T.D. Bank North Accounts and Writs of Attachment on Real Property. This Motion was allowed on same date.
4. On same date, the Court (Kaplan, J.) issued Findings and Order of Approval on Attachment on Trustee Process.
5. On same date, the Court (Kaplan, J.) issued a Writ of Attachment of \$3,000,000.00 on goods or the estate of the ward.
6. On same date, a summons was issued to Merrill Lynch, Trustee.
7. On same date, the Court (Kaplan, J.) issued Findings and Order of Approval of Attachment on Trustee Process.

8. On same date, the Court (Kaplan, J.) issued a Writ of Attachment of \$500,000.00 on goods or the estate of the ward.
9. On same date, a summons was issued to T.D. BankNorth, Trustee.
10. On same date, the Court (Kaplan, J.) issued Findings and Order on Approval for Attachment.
11. On same date, the Court (Kaplan, J.) issued a Writ of Attachment of \$2,000,000.00 on the ward's Boston Harbor Towers Condominium.
12. On same date, the Court (Kaplan, J.) issued Findings and Order of Approval of Attachment.
13. On same date, the Court (Kaplan, J.) issued a Writ of Attachment of \$2,000,000.00 on the ward's real estate located at 317 Lower County Road, Harwichport, Massachusetts.
14. On same date, a Complaint for Divorce was filed.
15. On August 16, 2005, Mrs. Simon filed a Motion for an Independent Examination of the ward. This motion was allowed on same date.
16. On same date, Veara filed a Motion for Order Restraining Mrs. Simon from Removing Household Furniture from 317 Lower County Road, Harwichport, Massachusetts. This motion was allowed on same date.
17. On same date, the Court (Menno, J.) issued a Temporary Restraining Order preventing Mrs. Simon from removing the household furnishings.
18. On same date, Veara filed a Motion to Restrain Credit Card Spending. This motion was allowed on same date.
19. On same date, the Court (Menno, J.) issued a Temporary Restraining Order restraining Mrs. Simon's credit card spending.
20. On same date, Veara filed a Motion to Expand Attachment to include Mrs. Simon's interests.
21. On same date, the Court (Menno, J.) issued Findings and Order on Approval of Attachment on Trustee Process.
22. On same date, the Court (Menno, J.) issued a Writ of Attachment of \$3,000,000.00 on the goods or estate of Mrs. Simon.

23. On same date, the Court issued a summons to Merrill Lynch, Trustee.
24. On same date, the Court (Menno, J.) issued Findings and Order on Approval of Attachment on Trustee process.
25. On same date, the Court (Menno, J.) issued a Writ of Attachment of \$500,000.00 on the goods or estate of Mrs. Simon.
26. On same date, a summons issued to T.D. BankNorth, Trustee.
27. On same date, the Court (Menno, J.) issued Findings and Order on Approval of Attachment.
28. On same date, the Court (Menno, J.) issued a Writ of Attachment of \$2,000,000.00 on the goods or estate of Mrs. Simon.
29. On same date, the Court (Menno, J.) issued an Order which provided that:
 - a. All existing powers of attorney are suspended.
 - b. The Motion for an Independent Examination is allowed.
 - c. All subpoenaed documents are to be produced within thirty (30) days.
30. On same date, the Court (Menno, J.) issued a Temporary Decree for Guardian extending the appointment of Veara until November 14, 2005.
31. On August 18, 2005, Veara filed an Assented to Motion to Permit the Guardian to have Control Over and Access to Funds in the Ward's Accounts. This motion was allowed on same date.
32. On August 29, 2005, Veara filed a General Petition for Permission to Prepare Estate Plan.
33. On same date, Veara filed a Motion for Expedited Appointment of Guardian *ad litem*.
34. On September 2, 2005, Attorney Thomas Rugo filed a Notice of Withdrawal as Counsel for Ann Simon.
35. On same date, Mrs. Simon filed a Motion for Attorney's Fees.
36. On September 6, 2005, Veara filed a bond with sureties.
37. On same date, Veara filed a Motion to Strike Appearance of Thomas Rugo as Counsel for Ann Simon.
38. On same date, Veara's bond was approved.

39. On September 7, 2005, the Motion for Expedited Appointment of GAL was allowed by the Court (Terry, J.).
40. On same date, Joseph Lian, Jr. was appointed as Guardian *ad litem*.
41. On same date, Veara filed a Motion to Amend the Complaint for Divorce to Include Grounds of Cruel and Abusive Treatment.
42. On same date, Veara filed an Amended Complaint for Divorce.
43. On September 9, 2005, the Court (Scandurra, J.) issued an Order on the Motion to Strike the Appearance of Thomas Rugo declaring the Motion to be moot as Attorney Rugo had already withdrawn.
44. On same date, Attorney Rugo filed a Motion to Quash Subpoena.
45. On same date, Attorney Rugo filed a Motion for a Protective Order that Deposition of Thomas. R. Rugo Exclude Privileged Testimony.
46. On same date, Veara filed a Motion for Sanctions Regarding Mrs. Simon's Failure to Attend Deposition and For Other Relief.
47. On same date, Veara filed a Motion to Compel Attorney Rugo's Deposition Testimony and for Sanctions.
48. On same date, Veara filed a Motion for Consolidation.
49. On same date, Veara filed a Motion to Waive Notice Requirement on Motion to Compel Rugo, Motion to Compel Mrs. Simon and Motion for Consolidation.
50. On same date, Attorney Jennifer Joakim filed a Motion to Withdraw as Counsel for Mrs. Simon. This motion was allowed by the Court (Scandurra, J.) on same date.
51. On same date, Attorney Joakim filed a Motion to Determine Attorney's lien. This motion was allowed by the Court (Scandurra, J.) on same date.
52. On same date, the Court (Scandurra, J.) issued a Further Order which:
 - a. Allowed Attorney Joakim's lien for attorney's fees;
 - b. Allowed Attorney Joakim to withdraw; and
 - c. Denied Attorney Rugo's Motion for Counsel Fees.
53. On September 12, 2005, Mrs. Simon filed a Motion to Clarify the Order dated August 16, 2005. This motion was denied by the Court (Menno, J.) on same date.

54. On same date, Attorney Rugo filed a Motion to File Notice of Limited Appearance and a Motion for Attorney's Fees.
55. On September 16, 2005, Veara filed a Complaint for Contempt from Order of the Court dated August 16, 2005 and a Motion for Early Return Date on the Complaint for Contempt. The motion was allowed by the Court (Scandurra, J.) on same date.
56. On September 19, 2005, Veara filed an Objection to Attorney Rugo's Motion to File Notice of Limited Appearance, Renewed Motion for Attorney's Fees and Request for Evidentiary Hearing.
57. On same date, Veara filed a Motion to Restrain Mrs. Simon from Working on the Marital Home.
58. On same date, Veara filed a Motion to Restrain Mrs. Simon from Excluding the Guardian from Access to the Marital Home.
59. On same date, Veara filed a Motion to Waive Notice Requirement and to Permit Guardian to Increase Margin Loan.
60. On same date, Veara filed a Motion to Permit Guardian's Counsel to Communicate Directly with New Expert Chosen by Mrs. Simon to Require Video and Audio Taping of Evaluation of Kenneth E. Simon.
61. On same date, Veara filed a Motion to Restrain Matthew Flaherty (Mrs. Simon's son) from Access to the Marital Home.
62. On same date, Veara filed a Motion to Waive Notice on Guardian's Emergency Motions.
63. On September 20, 2005, a capias was issued for the arrest of Mrs. Simon.
64. On September 22, 2005, Attorney Rugo's Motion to Quash was denied.
65. On same date, Attorney Rugo's Motion for a Protective Order was denied.
66. On same date, Veara's Motions to Consolidate the Guardianship, Divorce and Annulment Actions and for a Speedy Trial were denied.
67. On same date, Attorney Rugo's Motion to File a Limited Appearance was denied.
68. On same date, Attorney Rugo's Motion for Attorney's fees was denied.
69. On same date, Veara's Motion to Restrain Matthew Flaherty from Access to the Marital

Home was denied.

70. On same date, Veara's Motion to Waive Notice was allowed.
71. On September 28, 2005, Nissenbaum withdrew as counsel for Kenneth E. Simon, Jr., Christopher Simon and Kurt Simon.
72. On same date, Veara filed a Motion to Waive Notice Requirement and Permit Guardian to Increase Margin Loan.
73. On September 30, 2005, the Guardian *ad litem* filed his report.
74. On October 4, 2005, Veara filed a Motion to Conduct a Deposition of Mrs. Simon and for Video and Audio Taping of Examination of the ward.
75. On same date, Veara filed a Motion to Waive Notice on Emergency Motion for Video and Audio Taping.
76. On October 5, 2005, Attorney Russell N. Wilkins filed a Notice of Appearance as counsel for Kenneth E. Simon, Jr., Kurt N. Simon and Christopher Simon.
77. On October 7, 2005, Attorney Burton Chandler filed a Notice of Appearance on behalf of Mrs. Simon.
78. On same date, Ken, Jr., Chris and Kurt filed their Assents to the Petition to Prepare Estate Plan.
79. On October 12, 2005, Veara filed an Emergency Motion to Revoke the Stay of Jail Sentence and for Further Relief.
80. On same date, Veara filed an Emergency Motion to Enter Judgment on the Petition to Establish Estate Plan.
81. On same date, Veara filed a Motion to Waive Notice Requirement on Emergency Motions.
82. On same date, Veara filed a Motion to Enter Judgment Granting Petition for Guardianship and Appointment of E. James Veara as Guardian.
83. On same date, Mrs. Simon filed an Answer to the Petition to Prepare Estate Plan.
84. On same date, the Court (Scandurra, J.) denied Veara's Motion to Enter Judgment on Petition to Establish Estate Plan.

85. On October 26, 2005, Veara filed a Motion to Require Transfer of Funds from T.D. BankNorth Accounts to Merrill Lynch Cash Management Account.
86. On October 28, 2005, Veara filed a Motion to Provide the Court with Information Regarding Credit Card Charges Assessed to Mrs. Simon.
87. On same date, the Objectors filed a Motion to Appoint Permanent Guardian or in the alternative for the Appointment of E. James Veara As Temporary Guardian to be Extended.
88. On October 31, 2005, Veara filed a Motion for a Do Not Resuscitate and Do Not Intubate Order.
89. On same date, Veara filed a Motion for a Guardian *ad litem*.
90. On same date, Veara filed a Motion to Permit Temporary Guardian to Sell Stock.
91. On same date, Veara filed a Motion for Short Order of Notice. This motion was allowed on same date.
92. On same date, Veara filed a Motion to Bring Contempt Forward. This motion was allowed on same date.
93. On same date, Veara filed a Motion to Order Hospital to Produce Records.
94. On same date, Brian E. Blakeslee was appointed as Guardian *ad litem*.
95. On same date, Veara filed a Motion to sell the ward's real estate and automobiles.
96. On November 2, 2005, Mrs. Simon filed a Motion to File Answer Late.
97. On same date, Mrs. Simon filed an Answer to the Petition for Guardianship.
98. On same date, Attorney Wilkins filed a Motion to Extend Temporary Guardianship.
99. On same date, the Objectors filed their Assents to the Motion Requesting the Court to Enter a Do Not Resuscitate and Do Not Intubate Order and for Appointment of a GAL.
100. On same date, the Guardian *ad litem* filed his report and an Assent to the Motion for Authority to Consent to a DNR and Do Not Intubate Order.
101. On same date, Nissenbaum filed a Motion to Impound the GAL Report. This Motion was allowed by the Court (Scandurra, J.) on same date.

102. On same date, the Court (Scandurra, J.) allowed the Motion for Authority to Enter a Do Not Resuscitate and Do Not Intubate Order.
103. On same date, the Court (Scandurra, J.) entered an Order for Temporary Guardian's Authorization to Consent to a Do Not Resuscitate and Do Not Intubate Decision on Behalf of the Ward with Authority to Make Extraordinary Medical Decisions.
104. On same date, Mrs. Simon filed an Answer to the Complaint for Divorce.
105. On November 9, 2005, Veara filed a Suggestion of Death of the ward.
106. On November 14, 2005, Mrs. Simon filed a Motion to Dismiss the Guardianship Petition and Discharge All Interlocutory Orders and Mesne Process.
107. On same date, Mrs. Simon filed a Motion to Dismiss the Complaint for Divorce.
108. On December 2, 2005, Attorney Burton Chandler filed a Motion to Withdraw as Counsel for Mrs. Simon.
109. On December 27, 2005, Veara filed his Inventory.
110. On January 19, 2006, Ken, Jr. Filed a Motion to Substitute Plaintiff. This motion was allowed by the Court (Scandurra, J.) on March 1, 2006.
111. On same date, the Court (Scandurra, J.) entered a Judgment of Dismissal on the Complaint for Divorce.
112. On June 16, 2006, Veara filed his First and Final Account.
113. On August 28, 2006, Kevin V. Daley filed a Notice of Appearance on behalf of Mrs. Simon in Objection to the First and Final Account.
114. In September of 2006, all matters concerning the ward's widow, Ann Flaherty Simon, were settled per the terms of a written agreement.
115. On September 15, 2006, Veara filed a Motion to Enter Judgment Approving the First and Final Account.
116. On September 21, 2006, Veara and Nissenbaum presented to the Court (Scandurra, J.) an Assented-to First and Final Account. This Account was denied by the Court.
117. On November 3, 2006, the Court (Scandurra, J.) appointed the Honorable George Jacobs (Ret.) as Master to assess whether Veara and Nissenbaum's fees were reasonable.

118. On April 25, 2007, Ken, Jr. and Chris withdrew their assents to the First and Final Account.
119. On May 17, 2007, Attorney Wilkins filed a Motion to Withdraw as counsel for the Objectors. This Motion was allowed by the Court (Scandurra, J.) on June 14, 2007.
120. On June 8, 2007, the Master filed his report.
121. On July 5, 2007, Veara filed a Motion for Action on Master's Report and an Objection to the Master's Report.
122. On July 25, 2007, Veara filed a Motion to Strike the Withdrawals of Assents and Repudiations of Affidavits filed by the Objectors.
123. On August 3, 2007, Veara filed a Motion to Amend the Account and for Other Relief.
124. On August 6, 2007, Attorney Susan Huettner entered her appearance on behalf of Ken, Jr.
125. On August 29, 2007, Veara filed a Motion to Refer Issue of Appointment of Temporary Guardian to the Honorable Randy Kaplan.
126. On same date, Veara filed a Motion to Eliminate Bond or Alternatively, Reduce to Reflect the Actual Amount in Question.
127. On October 3, 2007, the Court (Scandurra, J.) allowed Veara's Motion to Amend the Account.
128. On same date, the Court (Scandurra, J.) allowed Veara's Motion for Action on the Master's Report.
129. On same date, the Court (Scandurra, J.) denied Veara's Motions to Strike the Withdrawals of Assent and Repudiations of Affidavits of the Objectors.
130. On same date, the Court (Scandurra, J.) allowed Veara's Motion to Refer Issue of Appointment of Temporary Guardian to the Honorable Randy Kaplan.
131. On same date, the Court (Scandurra, J.) allowed Veara's Motion to Eliminate the Bond, or Alternatively, Reduce it to Reflect the Actual Amount in Question.
132. On October 19, 2007, Attorney Owen Todd entered his appearance on behalf of Ken, Jr.
133. On same date, Ken Jr. filed a Motion to Stay or Quash Deposition Notices Served on Ken Jr. and Brenda.

134. On November 7, 2007, Veara filed a Motion to Ask More Than 30 Interrogatories of Ken, Jr. and Chris.
135. On November 23, 2007, Ken Jr. and Chris filed a Motion to Quash Temporary Guardian's Second Set of Interrogatories.
136. On same date, Ken Jr. and Chris filed their Objection to Temporary Guardian's Motion to Ask More Than 30 Interrogatories.
137. On November 29, 2007, Veara filed his Objection to Ken, Jr.'s Motion to Stay or Quash Deposition Notices Served on the Objectors.
138. On same date, Veara filed his Objection to the Motion to Quash Temporary Guardian's Second Set of Interrogatories.
139. On March 5, 2008, Ken, Jr. and Chris filed a Motion for Leave to File an Appearance and Objection to the First and Final Account for the Estate of Kenneth E. Simon.
140. On March 31, 2008, Veara filed his Objection to Ken, Jr. and Chris's Motion for Leave to File Late Appearance and Objection to the First and Final Account.
141. On April 23, 2008, Veara filed a First Motion to Compel Discovery, for Sanctions and for Other Relief Against Brenda and Ken, Jr.
142. On same date, Veara filed a Second Motion to Compel Discovery for Sanctions and Other Relief Against Chris.
143. On same date, Veara filed a Motion for Letters Rogatory for Deposition in New York and a Motion for Appointment of a Commissioner in New York.
144. On same date, Veara sent Notice of his intent to take Chris Simon's Deposition.
145. On April 24, 2008, Veara filed a First Motion in Limine.
146. On April 30, 2008, the Objectors filed their Opposition to all of Veara's motions.
147. On May 1, 2008, the Court (Steinberg, J.) denied all of Veara's Motions including his Motion to Compel Discovery from the Objectors.
148. From May 1, 2008 through present, Nissenbaum and Veara have continued to file pleadings in their efforts to have the First and Final Account approved. The Court does not find these pleadings to be exceptionally relevant to its decision and therefore has not included an account of these pleadings in this decision.

FINDINGS OF FACT

GENERAL BACKGROUND

1. On or about August of 2005, the children of the ward became concerned about their father's well being. The children had been estranged from their father due to his marriage to Mrs. Simon. Mrs. Simon had served jail time for running a prostitution ring on Cape Cod. The children became concerned for their father's well being after being notified that he was in a nursing home and that the nursing home had not been receiving payment.
2. After receiving this information, the children enlisted the help of Attorney Gerald Nissenbaum in order to establish guardianship over their father to protect his well being and his assets. It was initially discussed that Ken, Jr. would be the guardian. Nissenbaum advised the children that the Court was not likely to appoint Ken, Jr. due to the conflict between the children and Mrs. Simon.
3. When asked by the Court for potential candidates to serve as guardian for the ward, Nissenbaum suggested Attorneys Brian D. Bixby, Edwin C. Hamada and E. James Veara.
4. On August 11, 2005, Veara was appointed Temporary Guardian of the ward. The Court (Kaplan, J.) appointed Veara because he was located on Cape Cod.
5. The ward died on November 2, 2005. The temporary guardianship lasted approximately eighty-three (83) days. Throughout this period, Veara and his counsel, Nissenbaum, charged the ward's estate approximately \$500,000.00 in attorney's fees and guardian fees. This figure does not include payments that Veara and Nissenbaum made to counsel for Mrs. Simon.

VEARA'S APPOINTMENT

6. Veara was first contacted by Nissenbaum's office about the Simon case in early August 2005. Veara spoke with Wendy Overbaugh Hickey, Nissenbaum's associate, about the case.
7. Upon deciding that he would take the case, Veara increased his hourly rate from between \$100-\$300 per hour to \$400.00 per hour even though he had never before been a guardian or temporary guardian. The Court finds that Veara increased his hourly rate simply because he knew he could and because the ward could afford it.
8. Veara claimed other factors he considered when increasing his hourly rate included his expectation that he would have to turn away business, the case would negatively impact his reputation and the case would impact his staff. Veara could not point to any case his

law firm turned away due to the Simon case. He openly spoke to the media and paid Nissenbaum to do the same. Nissenbaum's office handled almost all of the legal and administrative tasks associated with the case. The Court does not credit any of Veara's testimony as to why he increased his hourly rate.

9. Before being appointed, Veara agreed to hire Nissenbaum as his attorney. Veara never considered anyone other than Nissenbaum and in the past had received approximately \$200,000.00 in fees from cases referred by Nissenbaum.
10. Upon being hired by Veara to represent him, Nissenbaum continued to represent the children. Nissenbaum did not withdraw from representing the children until September 28, 2005, when ordered to do so by the Court (Scandurra, J.).
11. When Veara was appointed he waived any conflict of interest that may have existed between himself in his capacity as guardian and the children so that Nissenbaum could represent him and the children. Veara did this before he talked to the ward.
12. Veara also waived the ward's attorney-client privilege. Veara agreed to waive the attorney-client privilege for the Simon children but not for Mrs. Simon. There was no evidence presented that the ward would have wanted his attorney-client privilege waived for his children but not for his wife.
13. Veara testified that he agreed to continue the terms of the engagement letter that Nissenbaum had entered into with the children. Veara agreed to do this even though many of the provisions in the engagement letter would have been detrimental to the ward's interests. Some of these provisions included the ward waiving his right to a jury trial and paying Nissenbaum's fees if he reported him to the Board of Bar Overseers (hereafter "the BBO"). Veara and Nissenbaum never entered into a separate fee agreement and Veara never signed any fee agreement with Nissenbaum.
14. Veara first met with and spoke to the ward on August 16, 2005. This was five days after Veara had been appointed as temporary guardian. Hanson Reynolds testified that Veara had an obligation to speak with the ward as quickly as he could. The Court finds that Veara failed to do so.
15. Veara claims that he was unable to speak with the ward because the ward had been moved from Pleasant Bay Nursing Home and he had no idea where he was. The Court does not credit this testimony as evidence was introduced that the ward was discharged from Pleasant Bay Nursing Home to the Royal (an assisted living facility) pursuant to a medical discharge plan. Between his appointment on August 11, 2005, and the return date of August 16, 2005, Veara never saw or spoke to the ward. Veara's time records do not indicate that he ever called Pleasant Bay Nursing Home and there is no memo or email in the file indicating that he could not find the ward. Veara never called the police to report the ward missing.

16. Veara claimed under penalty of perjury in his affidavit and during his testimony at trial that Mrs. Simon had illegally removed the ward from the nursing home. Veara declared this even though he received a fax from Attorney Hickey, Nissenbaum's Associate, on August 17, 2005, stating that the ward was discharged by Dr. Bickford to a rehabilitation facility.
17. On August 16, 2005, the Court (Menno, J.) extended Veara's appointment as temporary guardian for the ward.

VEARA'S BILLING PRACTICES

18. Veara billed all of his time in quarter hour (.25) increments. Even if he only spent a couple of minutes on a task he still billed for one quarter of an hour. The Court finds that it was improper for Veara to bill in quarter hour increments.
19. Nissenbaum billed in one tenth of an hour increments. Veara should have billed in one tenth of an hour increments.
20. Veara did not keep accurate track of his time. He frequently recorded his time as processing and reviewing materials. It is impossible for the Court to determine exactly what Veara did by reviewing his time records.
21. Veara's failure to keep accurate time records required Veara to go through his file step by step and explain to the Court exactly what he did on each day of the guardianship. Veara should have recorded this information on his time sheets.

THE WARD'S ASSETS

22. The ward oversaw a successful mutual fund in Texas during his lifetime and as a result accumulated a large amount of wealth.
23. The ward had an account at Merrill Lynch which was valued at approximately 1.8 million dollars when he married Mrs. Simon. This account had a margin account from which the ward could borrow funds.
24. From the time of the ward's marriage to Mrs. Simon until the beginning of the guardianship, the margin loan balance increased by several hundred thousand dollars. At the time the guardianship was instituted, Mrs. Simon had a check pending for \$400,000.00.
25. Merrill Lynch stopped payment on this check because they questioned the authenticity of Mr. Simon's signature.

26. The ward's real estate in Harwichport, Massachusetts was valued at sum in excess of one million dollars. Mrs. Simon was seeking the \$400,000.00 from the Merrill Lynch margin account in order to make renovations to the Harwichport home. Mr. Simon told Veara that he had authorized this check and that he was well aware of the renovations. Nissenbaum and Veara chose to ignore this fact.
27. The Harwichport home was titled in the names of Mrs. Simon and the ward as tenants by the entirety.
28. Including the Merrill Lynch account and the Harwichport home, the ward's assets at the time of the guardianship were valued at approximately 4.5 million dollars.
29. At the outset of the guardianship, Veara and Nissenbaum obtained writs of attachment and trustee process on the ward's assets in order to prevent Mrs. Simon from obtaining/squandering these assets. These actions taken by Veara and Nissenbaum proved to be valuable to the ward and his estate.

VEARA AND NISSENBAUM'S STRATEGY

30. Veara's and Nissenbaum's strategy for the guardianship proceedings was to put as much pressure on Mrs. Simon as they could so she would agree to a settlement based on their terms. They wanted to force her to settle so she would waive her interest in certain assets.
31. In emails, Nissenbaum stated "how will Ann have to be paid to go away and never have contact with your father?" Nissenbaum's and Veara's objective was to get Mrs. Simon to leave Mr. Simon for a sum of money.
32. On August 30, 2005, Nissenbaum indicated in an email to Veara that they need to put more pressure on Ann, "the sooner the better."
33. On August 20, 2005, Nissenbaum sent an email to Veara and others stating that they should not tell Mrs. Simon or Winnie Eldridge (the ward's caretaker) about moving the ward in case they tried something desperate.
34. Nissenbaum also suggested to Veara through email that they should have the phone number in the ward's room unlisted and block caller ID so that Mrs. Simon could not contact the ward. It was also discussed that the ward would not be given the phone number so he could not give it to his wife.
35. Nissenbaum and Veara worked diligently to have Mrs. Simon arrested and thrown in jail. Nissenbaum requested that the Court put Mrs. Simon in jail many times for violating court orders. On November 2, 2005 (the day the ward died), Nissenbaum argued vigorously that Mrs. Simon should be jailed for contempt, even though he knew the

ward's death was imminent.

36. Nissenbaum and Veara spent approximately \$20,000.00 on a private investigator, Thomas Grady. Mr. Grady worked collaboratively with Nissenbaum, Veara and Detective Brackett from the Harwich Police Department. Nissenbaum and Veara hired Mr. Grady in order to find out whether Mrs. Simon was engaged in any illegal activity. A private investigator was stationed outside Mrs. Simon's Somerville apartment for four days and four nights. The results did not yield any criminal activity.
37. There was no evidence presented that Mr. Simon authorized or would have condoned payment of these expenses by Veara.
38. Nissenbaum and Veara talked about putting a homing device on Mrs. Simon's car.
39. Another facet of Nissenbaum's and Veara's strategy was to bombard Mrs. Simon, and any unwitting Attorney who chose to represent her, with pleadings. Nissenbaum quips in one of his emails that they (meaning him, Veara, and Wendy Overbaugh Hickey) are "crazy attorneys filing enough pleadings to choke a horse."
40. Nissenbaum's and Veara's strategy was to use the legal process to intimidate anyone who got in the way of their agenda.
41. At one point, Nissenbaum emailed Attorney Rosenfeld and asked him if he and Veara had an ethical obligation to tell Mrs. Simon about the ward's death when they deposed her.
42. During Mrs. Simon's deposition, Nissenbaum called Mrs. Simon a "freakin idiot."
43. On August 19, 2005, Nissenbaum penned an email stating, "I explained how we felt about the issues and the numbers, how I wanted the lawyers to be paid, say, \$25,000.00 as a fee, no matter what work they actually did, if we could get to a quick settlement."

THE WARD'S RELATIONSHIP WITH HIS WIFE

44. The ward and Mrs. Simon were married in July of 2004. They had known each other for eleven years prior to their marriage and the ward visited Mrs. Simon when she was in prison.
45. The ward and Mrs. Simon traveled extensively during their marriage, taking trips to Mexico, Hawaii, Texas, Bermuda and New York City.
46. The ward's children did not approve of his relationship with Mrs. Simon. They refused to attend the wedding and, as a result, the ward became estranged from his children.

47. Attorney Rugo testified credibly that he met with the ward and Mrs. Simon on July 29, 2005. He believed them to be a loving couple and stated that Mrs. Simon was kind to the ward.
48. Attorney Rugo had prepared a power of attorney for the ward. The ward wanted Mrs. Simon to be his power of attorney because he was in a nursing home and an addition was being made to the marital home. Mr. Simon wanted the addition in order to accommodate his health needs and he wanted it finished before Christmas.
49. In his initial meeting with Veara on August 16, 2005, the ward told Veara over and over again that everything was fine between himself and Mrs. Simon. Veara brushed this off as the ward having been coached. The ward told Veara that he loved his wife and that he did not want a divorce.
50. Veara and Nissenbaum introduced letters written by Mrs. Simon to the ward purporting to show that she did not care for him. The Court interprets these letters as showing just the opposite. The letters indicate to the Court that Mrs. Simon did indeed care for her husband and wanted him to be more conscious of his hygiene and his health problems.
51. Nissenbaum and Veara ignored any signs that the ward actually loved his wife. It was their goal to get her out of the ward's life as quickly as possible.

CHANGING THE WARD'S ESTATE PLAN

52. On or about September 8, 2004, two months after his marriage, the ward executed a will.
53. The ward intentionally provided for his wife in his will. He left her \$150,000.00 in cash, the Harwichport home and \$120,000.00 in an education trust. The residue of the ward's estate passed through to a generation skipping trust for his grandchildren. There was no evidence presented that the ward lacked testamentary capacity when he executed his will.
54. Nissenbaum and Veara tried to revoke the ward's will even though an experienced guardian and guardianship lawyer would have known that this was prohibited. Nissenbaum and Veara prepared a new estate plan for the ward which cost the estate \$3,500.00.
55. Nissenbaum and Veara filed a petition to create a new estate plan for the ward. Veara spoke with Wendy Overbaugh, Nissenbaum, Ken, Jr., Attorney Cohen and Attorney Roth in Texas about the new estate plan. He never spoke to the ward or to Mrs. Simon about the new estate plan.
56. The new estate plan consisted of the preparation of a realty trust and a revocable trust. It was prepared by Attorney Cohen who charged \$500.00 per hour for his time. Veara was named as the trustee and, in his capacity as guardian, beneficiary of these trusts.

Ultimately, the Court (Scandurra, J.) denied Nissenbaum and Veara's petition to change the ward's estate plan. This cost the ward's estate thousands of dollars and it never came to fruition.

DEPOSITIONS

57. Nissenbaum and Veara spent approximately \$80,000.00 taking depositions. Some of these depositions and the costs include:
 - a. Ann Simon for approximately \$60,000.00;
 - b. Attorney Thomas Rugo for approximately \$14,000.00;
 - c. Mr. Swazowski, a construction worker, for approximately \$5,000.00;
 - d. Attorney Kennan for approximately \$1,543.00.
58. On or about September 5, 2005, Nissenbaum charged the estate for 2.3 hours of time or \$1,380.00 to drive to Brewster to talk to Veara. Veara and Nissenbaum then each billed the estate for two more hours to talk to each other. Veara claims they spoke in detail about the deposition of Mrs. Simon.
59. The deposition of Mr. Swazowski took one hour and twenty minutes. It produced a seventy-two (72) page transcript. Veara sat in the room while Nissenbaum conducted the deposition. He still charged the estate \$400.00 per hour.
60. Veara admitted that he was capable of taking the deposition himself and that if he was doing it for a client he would have charged between \$95.00 and \$300.00 per hour. He saw nothing wrong with charging \$100.00 more an hour than his highest billing rate to merely observe the depositions conducted in this case.
61. On September 6, 2005, Nissenbaum deposed Attorney Rugo. The deposition of Attorney Rugo took fifty-seven (57) minutes and produced a forty-seven (47) page transcript. Veara admitted once again that he was capable of taking this deposition and saw no problem with charging the estate \$400.00 per hour to observe it. The second deposition of Attorney Rugo lasted approximately thirty-eight (38) minutes. Veara charged \$400.00 per hour to observe.
62. The deposition of Attorney Keenan lasted thirty-nine (39) minutes and produced a forty (40) page transcript. The whole deposition of Attorney Keenan related to his notarizing a power of attorney for the ward. This deposition was completely unnecessary. Once again, Veara was present and charged the estate \$400.00 per hour to observe the deposition.

MINISTERIAL TASKS AND DUPLICATION OF EFFORT

63. Much of the work performed by Veara was ministerial in nature. Some of this work included going to the ward's house, going to district court, going to the police station,

signing medical releases, meeting with the ward, filling out paperwork and reviewing letters and emails. Veara did not find it necessary to reduce his billing rate from \$400.00 per hour (which was \$100.00 over his highest billing rate) even though he was not providing legal services to the ward.

64. Nissenbaum and Veara had the ward's address changed to Nissenbaum's law office. This resulted in duplication of efforts as all correspondence was reviewed twice, once by Nissenbaum, and once by Veara, with both charging the ward's estate.
65. Nissenbaum retained control over the ward's bank accounts. Any payments made from the accounts were drawn up by Nissenbaum's associate, Wendy Overbaugh Hickey (whose time was billed), and then sent to Veara with the check and the invoice. Veara then reviewed the invoice and the check prepared by Hickey and signed off on them. Veara then billed for his time. Veara had no explanation when asked why someone in his office could not handle the ward's accounts and bill payments.
66. Nissenbaum and Veara both charged for review of pleadings. Nissenbaum's office would review legal pleadings and charge the estate. Nissenbaum would then send the same pleadings to Veara who would review them and also charge the estate.
67. Veara would prepare his bills and then send them to Nissenbaum who would prepare a check and send it to Veara. Veara would then sign his own check. Veara did not maintain the check books or any other accounts for the ward. He only signed the checks.
68. Nissenbaum received all of the ward's mail and paid all of his bills. Veara reviewed every invoice Nissenbaum sent to him. Nissenbaum's office would write checks to pay themselves. Veara charged the estate to review invoices and checks from Nissenbaum's office and Nissenbaum charged to write the checks and prepare/review the invoices. Veara paid all of Nissenbaum's bills. He never rejected one single bill and signed every check.
69. Veara testified that it never occurred to him that it would be cheaper to have one person managing/handling the ward's accounts. The Court finds this testimony very disingenuous.
70. Nissenbaum and Veara would often send faxes back and forth trying to determine who should make certain decisions. For example, Nissenbaum and Veara went back and forth trying to determine who should order USA Today for the ward.
71. Nissenbaum's office charged to prepare letters and checks that were sent to Veara for his signature. Veara then charged to once again review and sign these checks/letters.
72. Nissenbaum would also charge thousands of dollars to prepare lengthy emails that amounted to streams of consciousness. For example, on October 8, 2005, Nissenbaum

spent 2.3 hours writing an email and charged the ward's estate \$1,380.00. On September 14, 2005, Nissenbaum charged the estate \$720.00 to write an email. Veara would then charge the estate to read these emails.

73. On August 23, 2005, Veara sent his brother to the ward's house to let a tradesman into the house, sit there and then lock the house back up. The ward's estate was charged for two hours of time for this ministerial task which cost the estate \$300.00.
74. On November 2, 2005 (the day the ward died), Veara's brother was again sent to the house to meet a locksmith. The ward's estate was charged for two and one half (2.5) hours of time which cost the estate \$375.00. Veara knew that the ward was going to die but still sent his brother over to change the locks on the house that Mrs. Simon was inevitably going to own.
75. Veara sent an associate in his office to retrieve the ward's personal property from the Royal and charged the estate for one hour of time.
76. On September 16, 2005, Veara charged the estate for 1.25 hours of time which cost the estate \$500.00 in order to drive to Barnstable to file a complaint for contempt and deliver it to the Sheriff's Office. He did not consider having a junior member of his staff do this and never considered charging less for travel.
77. On September 27, 2005, Nissenbaum charged the estate \$1,620.00 in order to withdraw as counsel for the children and file *pro se* appearances on their behalf. On September 28, 2005, Veara charged the estate another \$400.00 to file these pleadings. Once again he did not think it was necessary to charge less for these ministerial tasks.
78. Nissenbaum charged the estate to prepare pleadings for the children after he had withdrawn as their counsel. Nissenbaum prepared pleadings for Attorney Wilkins when Wilkins became the attorney for the children.
79. Nissenbaum and Veara charged the estate to speak to the media even though the children had repeatedly requested that they not speak to the media. Veara paid Nissenbaum to speak with the Boston Herald, Cape Cod Times, 48 Hours, Inside Edition and 20/20. These are not legal tasks for which Nissenbaum should have been paid \$600.00 per hour.
80. Veara testified that he visited the ward every five to ten days but did not bill for it. The Court does not credit this testimony.

NISSENBUAM AND VEARA'S PAYMENTS AND RETAINERS

81. Nissenbaum and Veara paid themselves from the margin loan on the ward's Merrill Lynch account and each kept an "evergreen retainer," meaning that they never allowed the retainer held by them to go below a certain sum. Nissenbaum always required a

retainer of \$50,000.00 and that any outstanding balance be paid. Veara also kept a retainer of between \$25,000.00 and \$30,000.00. Nissenbaum replenished his retainer from the ward's estate on at least two separate occasions including once on November 1, 2005, the day before the ward died. Nissenbaum did this knowing full well that a "do not resuscitate order" was being put into place.

82. Keeping these retainers replenished using the margin loan account cost the estate interest. Leaving the money in the margin loan account would have saved the estate money.

THE DIVORCE AND ANNULMENT COMPLAINTS

83. Veara and Nissenbaum hatched a plan to get the ward divorced before Veara was even appointed as guardian and before either of them had spoken to the ward.
84. Veara stated that he believed it was a good idea to file for divorce based on the information he received from the children and because of the automatic restraining order that would issue against Mrs. Simon. The Court does not credit this testimony.
85. Vera admitted that he never spoke with the ward about the divorce complaint because he did not believe he would be able to comprehend the subject matter. The divorce complaint was prepared before Veara was appointed and was filed on the day of Veara's appointment. Veara did not review the complaint before it was filed and actually billed for three hours of time for reviewing it two days after it was filed.
86. On August 30, 2005, Veara authorized amending the divorce complaint to include cruel and abusive treatment as grounds for the divorce. On the same day, he authorized the filing of an annulment complaint. Once again, this was done without speaking to the ward about the matter.
87. Veara authorized the complaint for annulment because he believed it would survive the death of the ward, who was terminally ill at this point. He also authorized the complaint for annulment because, if allowed, it would change the ward's estate plan and title to the house.
88. Veara believed that an annulment action would survive death but did not conduct any research confirming his belief before he filed the annulment action.
89. Veara hired National Research to research the issue of whether an annulment action in Massachusetts would survive death. National Research informed Veara that Massachusetts would likely fall with the majority rule and that an annulment action would not survive death. Despite receiving this information, Veara pressed forward with the annulment action. Veara paid National Research approximately \$3,500.00 to conduct research.

90. Veara's other motive for amending the Divorce Complaint to include cruel and abusive treatment was the possibility of getting a speedier trial date.
91. Nissenbaum and Veara based the complaint for annulment and the amended divorce complaint solely on allegations made by a fellow inmate (and supposed lover) of Mrs. Simon who told them that she and Mrs. Simon had hatched a plan wherein Mrs. Simon would marry the ward and kill him. Nissenbaum and Veara subjected Mrs. Simon's fellow inmate to a lie detector test which indicated that she was lying. Neither Nissenbaum nor Veara felt it necessary to inform the court or anyone else of the results of the lie detector test. They merely pressed forward with the annulment complaint and the amended divorce complaint. Nissenbaum stated in an email that if the inmate was telling the truth they would give the results of the test to the police and if she was lying "no one would be the wiser."
92. Nissenbaum and Veara also charged for time to investigate whether Mrs. Simon's previous marriage in Nevada had been legally terminated. The marriage had in fact ended in divorce.
93. They hired the Advantage Group to investigate whether Mrs. Simon's marriage to Mr. Simon was valid.
94. Veara testified that he based his decision to file for divorce on letters he had seen that were written by Mrs. Simon to the ward. He believed these letters proved that Mrs. Simon had no interest in being married to Mr. Simon. Veara admitted on cross examination that it was impossible for him to base his decision to file for divorce on these letters as the divorce complaint was filed on August 11, 2005 and Veara did not receive a copy of these letters until October 7, 2005.

NISSENBAUM, VEARA AND THE HARWICH POLICE DEPARTMENT

95. Veara contacted the Harwich Police Department many times. On August 22, 2005, he gave the police permission to search the ward's house without ever having made an assessment of the house himself. While at the house on this day, Veara had the locks changed.
96. On August 24, 2005, Veara and Nissenbaum had the ward's safe deposit box drilled open. Once again, Veara brought along Detective Brackett from the Harwich Police Department to search the box even though this could have subjected the ward to criminal liability.
97. Detective Brackett testified that he agreed to help Nissenbaum and Veara if it was within his job description. Nissenbaum and Veara would call Detective Brackett in order to obtain information about Mrs. Simon and her son, Matt Flaherty.

98. Detective Brackett furnished Nissenbaum and Veara with police reports, information about the ward's BMW and information about Mrs. Simon's and Matt Flaherty's criminal records. Detective Brackett testified that he spent hours watching the ward's house.
99. Veara allowed Detective Brackett to search the ward's house many times. Detective Brackett had never searched the ward's house prior to Veara's appointment. Veara allowed Detective Brackett to search the house and the safe deposit box before he did because he did not want there to be any chain of custody issues. This shows that Veara was not concerned for the ward but was only concerned with having Mrs. Simon arrested.
100. Veara also allowed Detective Brackett access to the ward's medical records. The ward had never allowed Detective Brackett access to his medical records.
101. Veara allowed Detective Brackett to search the ward's car. The ward never allowed Detective Brackett to search his car.
102. Throughout the guardianship proceedings, and even after, Veara and Nissenbaum worked diligently to have Mrs. Simon arrested. Detective Brackett told Veara and Nissenbaum numerous times that the District Attorney would not bring charges against Mrs. Simon for minor offenses yet they continued in their pursuit.

THE SUPERIOR COURT ACTION

103. Nissenbaum and Veara charged the ward's estate to file a case against Mrs. Simon in Superior Court for conversion. They alleged that Mrs. Simon had stolen property from Mr. Simon. Mr. Simon was never made aware of this suit and never consented to it. Once again, Nissenbaum and Veara filed the tort action because it would survive the ward's death.
104. On October 19, 20, and 21, 2005, Nissenbaum and Veara charged the estate approximately \$5,900.00 to draft the Superior Court Complaint and Restraining Orders. Nissenbaum and Veara filed the Superior Court case even though they had already been granted trustee process and attachments in the Probate and Family Court.

THE DNR

105. On October 5, 2005, the ward was moved from Pleasant Bay Nursing Home to Cape Cod Hospital because his kidneys were failing.
106. On October 7, 2005, Nissenbaum talked to Attorney Roth about a Do Not Resuscitate Order for the ward.
107. On October 12, 2005, Wendy Overbaugh Hickey advised the Private Investigator, Thomas Grady, to get his bills in fast.

108. On October 19, 2005, the ward was not doing well at all.
109. On October 22, 2005, Nissenbaum reviewed and revised a draft motion for a DNR Order and proposed order prepared by his associate.
110. On October 27, 2005, Veara had a telephone conference with the Cape Cod Hospital attorney regarding a DNR for the ward.
111. At the end of October 2005, the ward was placed on ventilation and was on morphine and two other drugs which were keeping him alive.
112. The DNR Motion was filed on October 31, 2005 and marked for hearing on November 2, 2005.
113. On October 24, 2005, Veara transferred \$30,000.00 to the Zisson and Veara Account.
114. On October 25, 2005, Nissenbaum was paid approximately \$30,000.00 and was asking for another \$32,000.00 in order to keep his evergreen retainer at \$50,000.00.
- ~~115. On November 1, 2005, Nissenbaum's client account was restored to \$50,000.00.~~
116. On the same day that the DNR Motion was filed, motions were filed to sell more of the ward's stock and his automobiles.
117. On October 31, 2005, Veara transferred \$20,000.00 from the ward's Merrill Lynch account to the Zisson and Veara account. On November 2, 2005, Veara transferred \$10,000.00 from the ward's Seaman's Bank Account to the Zisson and Veara account.
118. On October 31, 2005 and November 2, 2005, Nissenbaum and Veara went ahead with scheduled depositions and a contempt hearing.
119. Nissenbaum and Veara took all of these steps because they knew the ward was going to die. They wanted to make sure they spent every last dime they could before they would no longer have control of the ward's assets.
120. Between October 28, 2005 and November 1, 2005, Veara spent 8 hours researching a guardian's authority to withhold medical care from a ward. This cost the estate \$3,200.00. This research was completely unnecessary as the decree was clear about Veara's authority in this realm and the Court had appointed a GAL to advise the Court as to whether a DNR order should be issued. The guardian ad litem was already charging the estate for his work. The DNR motion was filed on October 31, 2005, a GAL was appointed, but yet a day later Veara still found it prudent to research the issue.
121. Even though Veara had thoroughly researched the issues surrounding the DNR, he still

felt it necessary to have Nissenbaum present at the hearing on November 2, 2005. Veara charged the estate \$1,600.00 to be at this hearing and between travel and time spent at the hearing, Nissenbaum charged the estate \$5,580.00.

THE DEATH OF THE WARD

122. On November 2, 2005, the ward died. On the same day, Nissenbaum and Veara were in court requesting that Mrs. Simon be put in jail for contempt. The Court (Scandurra, J.) refused because of the imminency of the ward's death.
123. Nissenbaum and Veara charged the estate \$900.00 to attend the ward's funeral.

THE WARD'S FAMILY AND FRIENDS

124. Veara and Nissenbaum claim that they were unable to find any of the ward's friends and the only friend of the ward that they spoke with was Detective Brackett. Detective Brackett testified that he and Mr. Simon were not friends and that he did not know any of Mr. Simon's friends.
125. John Plaikis was named in the ward's will as one of his friends. Veara never attempted to speak with Mr. Plaikis.
126. Winnie Eldridge was the ward's home health care aid. Veara testified that he never spoke with Winnie Eldridge because he did not think she had any information to offer him. Veara did not believe Winnie Eldridge had a close enough relationship with the Simons in order to offer an opinion about their marriage. Veara did value the opinion of Detective Brackett, however, who testified that he and the ward were not friends.
127. Veara and Nissenbaum only chose to speak to people that they believed would help further their agenda.

AGGRESSIVE AND HOSTILE TACTICS

128. Attorney Rugo testified that he had never seen such aggressive behavior in his fifteen years as an attorney. He was baffled by the amount of pleadings, memoranda and threats of being reported to the Board of Bar Overseers.
129. In his first interaction with Nissenbaum Attorney Rugo described Nissenbaum as very abrasive. Nissenbaum threatened to report Rugo to the BBO and told him he needed a lawyer. Veara kept suggesting to Attorney Rugo that he would be a witness in the case and that therefore he could not represent the Simons and if he did he would have issues with the BBO.
130. Veara and Nissenbaum attempted to bully Attorney Rugo. They were abrupt, ordered

him around and made him feel like his license to practice law was at risk.

131. Nissenbaum and Veara told Attorney Rugo that they would pay his bill if he forced Mrs. Simon to settle on their terms. Nissenbaum asked Judge Scandurra to report Attorney Rugo to the BBO, but called Attorney Rugo the next day and said "we can forget about the motion if we can settle this matter, and you'll get paid."
132. Attorney Rugo filed many motions for attorney's fees. On one occasion, Attorney Rugo requested that Veara pay him \$8,000.00. Veara and Nissenbaum refused to pay Attorney Rugo and instead filed an opposition, motion for sanctions and asked the court to report Attorney Rugo to the BBO. In order to avoid paying Attorney Rugo \$8,000.00, Nissenbaum charged the estate \$6,200.00. These charges were incurred before any of the motions were heard by the court.
134. Nissenbaum and Veara filed numerous requests for sanctions and complaints for contempt. These actions created hostilities which in turn increased litigation costs.

SETTLEMENT WITH MRS. SIMON

- ~~135. After all of their efforts to get Mrs. Simon out of Mr. Simon's life and to force her into a settlement which would give her less than she was entitled to, Mrs. Simon ended up with more than what she would have received under the ward's will.~~
136. Throughout the guardianship proceedings, Mrs. Simon rejected numerous settlement offers presented by Nissenbaum and Veara. The ultimate goal of the guardianship (to get Mrs. Simon to settle) consistently failed.
137. In the end the divorce, estate plan and annulment actions all failed. After all of the money spent, hostility and bullying, Mrs. Simon walked away with more than she would have received under the ward's will.

SUBSTITUTED JUDGMENT

138. Veara testified at trial that substituted judgment is when you do what is in the best interest of the ward. This is not the substituted judgment standard and is, in fact, the best interest standard.
139. Veara saw no difference between the substituted judgment standard and the best interest standard.
140. Nissenbaum and Veara did not use the substituted judgment standard. Veara never even talked to the ward before he filed for divorce. The failure to use the proper standard highly inflated legal fees and costs to the ward's estate.

EXPERT TESTIMONY

141. Attorney Brian Barreira testified credibly that this guardianship should have cost between \$20,000.00 and \$40,000.00.
142. Attorney Barreira is a member of the Massachusetts Guardian Association and has spoken extensively in the guardianship area.
143. Barreira has been a guardian and represented guardians dozens of times. He has served as a Guardian *ad litem* and has reviewed accountings in multiple counties.
144. Barreira opined that the guardian should have been concerned with filing the initial pleadings, whether the ward was receiving proper health care and whether the ward was safe. The guardian should not have been concerned with filing a divorce complaint, an annulment complaint and a petition to change the ward's estate plan.
145. Veara did not speak to the ward concerning any of the major decisions he made. Attorney Barreira testified credibly that part of substituted judgment is talking with the ward and evaluating the ward's position on these issues.
146. Attorney Arnold Rosenfeld testified as an expert for Veara and Nissenbaum. Attorney Rosenfeld is a 1967 graduate of Boston College Law School and became involved in this case in August of 2005 when Nissenbaum called him.
147. Nissenbaum wanted to know whether a conflict of interest existed with his representation of the children and the guardian. Rosenfeld informed Nissenbaum that there was no conflict of interest.
148. Nissenbaum and Veara hired Attorney Rosenfeld to represent them in front of the Board of Bar Overseers in matters arising from their handling of this case.
150. Rosenfeld admitted on cross examination that he has never served as a guardian or represented anyone who was a guardian in the Probate and Family Court.
151. Rosenfeld never examined Nissenbaum and Veara's time records in connection with this case.
152. The Court finds that the testimony of Attorney Rosenfeld was more geared towards the conflict of interest issue than the reasonableness of the fees charged by Nissenbaum and Veara. The Court does not find this testimony helpful in determining whether the fees charged by Nissenbaum and Veara were reasonable.
153. Attorney Hanson Reynolds also testified as an expert for Nissenbaum and Veara.

154. Reynolds is a member of the Trusts and Estate Council and served as President of this Council from 1999 to 2000. Reynolds is co-editor of the Massachusetts Probate Manual, a Massachusetts Continuing Legal Education Publication.
155. Reynolds has been appointed as a guardian between three and six times, but at the time of trial had not served as a guardian in approximately twelve (12) years.
156. Reynolds was contacted by Nissenbaum in early 2007. He reviewed Nissenbaum's bills, the engagement letter, Nissenbaum's files, which were broken down into probate court proceedings, deposition files, superior court files, financial records and medical records, and the petition to amend the ward's estate plan. Reynolds prepared his report on April 18, 2007. Reynolds never reviewed Veara's deposition testimony and testified that he only reviewed what he was given to review.
157. As part of his investigation, Reynolds spoke with Nissenbaum, Veara and Wendy Overbaugh Hickey.
158. Reynolds testified that it is a guardian's obligation to obtain the ward's will, review it and make sure it complies with the ward's wishes. The guardian can engage in estate planning for the ward but cannot write a will for the ward. The guardian can create and funds trusts that overcome the provisions of the ward's will if the trusts conform to the wishes of the ward as best can be ascertained.
159. Reynolds opined that substituted judgment means what the ward would have done if he was competent.
160. Reynolds testified that Nissenbaum oversaw the legal strategy in the case and that Veara's primary duty was to attend to and protect the ward.
161. Reynolds admitted that Veara's charging in .25 increments was not necessarily the best practice and it is more accurate to record time in lower increments.
162. Reynolds also admitted that an experienced guardianship attorney would have known that you cannot revoke the ward's will.
163. In his affidavit, Reynolds states that he could quibble with the time and money spent on deposing Mrs. Simon and the amount spent on the preparation of a new estate plan for the ward.
164. Reynolds acknowledged that many of the tasks performed by Veara were ministerial in nature and that Veara did not reduce his hourly rate for these tasks.
165. Reynolds agreed that a temporary guardian should be frugal.

THE MASTER'S REPORT

166. On or about November 3, 2006, the Court (Scandurra, J.) appointed the Honorable George Jacobs as Master to determine whether the fees charged by Nissenbaum and Veara were reasonable.
167. On March 27, 2007, an Assented to Motion to Enlarge Time to May 1, 2007 for the Filing of the Master's Report was filed. This motion was allowed on April 25, 2007.
168. On April 25, 2007, Ken Jr., and Christopher withdrew their assents to the First and Final Account.
169. On same date, the Master filed a Motion to Enlarge Time to May 8, 2007 for the filing of the Master's Report. This motion was allowed on same date.
170. On May 8, 2007, the Master filed a draft Master's Report.
171. On same date, the Master filed a Motion to Enlarge Time to June 8, 2007 for the filing of the Master's Report. This motion was allowed on same date.
172. On June 8, 2007, the Master filed his final report.
173. When the Master was appointed by the Court, the proceedings were not adversarial. The proceedings became adversarial in April of 2007 when Ken, Jr. and Christopher withdrew their assents to the account. The withdrawal of assents occurred during the Master's investigation.
174. By the Master's own admission, he never spoke with the children and only considered evidence presented to him by Veara and Nissenbaum.
175. The children attempted to send information to the Master for his consideration, however, the Master felt that it was beyond the scope of his appointment to examine this evidence.
176. The Court finds that the Master should have examined evidence presented by the children during the Master's proceedings and his failure to do so constitutes an error of law. Therefore, the Court does not accept the Master's subsidiary findings.

RATIONALE AND FURTHER FINDINGS

This matter involves an approximately eighty-three (83) day guardianship in which the guardian and his counsel seek fees of approximately \$500,000.00. Under G. L. c. 206, § 16, "an executor administrator, guardian, conservator or trustee shall be allowed his reasonable expenses, costs and counsel fees incurred in the execution of his trust, and shall have such compensation for services as the court may allow." G. L. c. 206, § 16 (LexisNexis 2009). The

key word in this statute is reasonable. It is not reasonable that Veara and Nissenbaum paid themselves approximately \$500,000.00 for a temporary guardianship that lasted eighty-three days.

From the very beginning of this case, the tactics undertaken by Nissenbaum and Veara were improper. Nissenbaum drafted a divorce complaint before a guardian for the ward had even been appointed and filed the complaint on the date of Veara's appointment. Veara never even reviewed the complaint before it was filed and then billed the estate for reviewing the complaint after it was filed. Veara's testimony that he could not find the ward for the first five days of his appointment is completely implausible. The ward had been discharged to a rehabilitation facility according to a discharge plan. The fact that nursing homes are highly regulated facilities makes it highly unlikely that Veara would have been told that Mr. Simon had been moved but that no one knew where he was. Veara never made any notes to his file concerning the whereabouts of the ward. Veara's proposed findings state that he called Pleasant Bay Nursing Home in order to ascertain the whereabouts of the ward on August 13, 2005. There is no notation in Veara's bills that he made this phone call. According to Veara's bills, the only thing he did on August 13, 2005 was review a divorce complaint that had already been filed.

Veara testified that he did not charge for some of the work he did. One of the things that Veara states he did not charge for was visiting the ward every five to ten days. According to the first and final account, in approximately the first month of the guardianship alone, Veara paid himself almost \$36,000.00. ~~The Court finds it hard to believe that based on this sum, Veara did any work that he did not charge for.~~

Another problem that existed from the outset of this guardianship was Veara's hourly rate. Veara had never before been a guardian or temporary guardian. Veara's average billing rate was between \$100-\$300 per hour with his highest rate being \$300 per hour. Veara saw nothing wrong with increasing his billing rate to \$400.00 per hour for the Simon case even though he had no experience in the area of guardianships. Veara also saw nothing wrong with increasing his hourly rate even though he had every intention of hiring legal counsel to handle all of the legal aspects of this case; leaving his work to be mostly ministerial. The Court finds Veara's reasons for increasing his hourly rate to be pretextual. Veara increased his hourly rate because he figured he could get away with it and the ward's estate could afford it. Veara should not have increased his hourly rate to \$400.00 per hour; a reasonable rate for the work performed by Veara was \$200.00 per hour.

Nissenbaum and Veara wildly spent the ward's money. They hired a private investigator for \$20,000.00, they hired a research firm to investigate whether Mrs. Simon's first marriage ended in divorce, they hired a legal research firm to investigate whether an annulment action would survive death, they spent nearly \$80,000.00 taking depositions, they spent almost \$4,000.00 on a new estate plan for the ward and they paid themselves nearly \$6,000.00 to prepare complaints to sue the ward's wife in Superior Court. Veara and Nissenbaum did not present any evidence that the ward would have consented to these expenses had he been aware of them or that these are expenses the ward would have authorized had he been of sound mind.

Nissenbaum and Veara made this litigation unnecessarily hostile which increased fees. Their strategy from the beginning of the litigation was to remove Mrs. Simon from the picture. This resulted in her being uncooperative and hostile in return. The fact that Nissenbaum and Veara hatched a plan to get the ward divorced before Veara had even been appointed guardian

and before anyone had even spoke to the ward makes clear that the goal of the guardianship was to get rid of Mrs. Simon. Nissenbaum and Veara were far less concerned with the ward and his health than they were with getting rid of Mrs. Simon and the ward's money.

Above are just a few examples of the egregious behavior of Nissenbaum and Veara. These examples illustrate the modus operandi of Nissenbaum and Veara throughout the guardianship and beyond. It is impossible for the Court to go through the hundreds of pages of bills submitted into evidence and precisely determine which hours were proper and which hours were not. Even if the Court were to engage in this undertaking, a scientifically exact amount of fees would not be determined. Based on the above examples, all of the testimony presented, and the totality of the circumstances, the Court finds that fifty percent (50%) of the time billed by Nissenbaum and Veara was improper. Therefore the Court finds reasonable fees for Nissenbaum (including out of pocket expenses) to be \$115,517.72. The Court finds reasonable fees for Veara (including out of pocket expenses) to be \$21,227.04.

The guardianship of the ward commenced on August 11, 2005 when Veara was appointed temporary guardian. The guardianship terminated on November 2, 2005, when the ward died. The first and final account states that Nissenbaum and Veara turned over control of the ward's assets to Ken, Jr. as executor on November 22, 2005. Nissenbaum continued to pay himself from funds taken from the guardianship estate until January 5, 2006 (this is the date when his ever green retainer was exhausted). Veara continued to pay himself from funds taken from the guardianship estate until April 7, 2006. The Court arrived at a calculation of Nissenbaum's fees for the guardianship by calculating all of his time from August 11, 2005 until November 2, 2005. This number was then reduced by fifty percent (50%). The Court allowed Nissenbaum almost all of his out of pocket expenses up to November 2, 2005, except expenses for National Research and Private Investigation Services as the Court finds these expenses to be unreasonable and unnecessary. The Court will allow Nissenbaum reasonable fees for preparation of the first and final account (three (3) hours of time times \$600.00 per hour equals \$1,800.00).

The Court arrived at a calculation of Veara's fees for the guardianship by calculating all of his time from August 11, 2005 until November 2, 2005. This number was then reduced by fifty percent (50%) and Veara's hourly rate was reduced to \$200.00 per hour. The Court allowed Veara all of his out of pocket expenses up to November 2, 2005 as the Court finds these expenses to be reasonable and necessary. The Court finds the fees paid by Nissenbaum and Veara to Thomas Grady, the private investigator, Advantage Group and National Research to be unreasonable and therefore Nissenbaum and Veara shall reimburse the ward's estate for same. The Court declines to order the return of fees after January 5, 2006, for Nissenbaum and after April 7, 2006, for Veara as any further payments received after these dates were received from Ken, Jr. as Executor. The Court declines to award Nissenbaum and Veara any fees for the defense of their first and final account as their egregious behavior and outrageous fees necessitated the defense.

CONCLUSIONS OF LAW

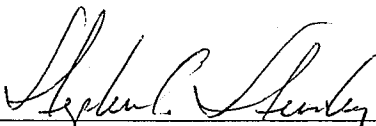
1. An executor, administrator, guardian conservator or trustee shall be allowed his reasonable expenses, costs and counsel fees incurred in the execution of his trust, and

shall have such compensation for services as the court may allow. G. L. c. 206, § 16 (LexisNexis 2009).

2. It is lawful in Massachusetts to act in a dual role as fiduciary and attorney for an estate. When acting in both capacities, it is permissible to receive compensation for the discrete fiduciary and lawyer functions. Grimes v. Perkins School for the Blind, 22 Mass.App.Ct. 439 (1986).
3. What is a reasonable fee is a question of fact for the trial judge. McMahon v. Krapf, 323 Mass. 118 (1948).
4. The factors a court should take into account when approving fees under c. 206, § 16, include the size of the estate, the marketable nature of the assets, the factual and legal questions involved in administering the estate, the time reasonably required to do the work, the skill and ability employed, the amounts usually paid others for similar work and the results accomplished. McMahon v. Krapf, 323 Mass. 118 (1948).
5. As to an attorney's charges the factors include the ability and reputation of the lawyer, the demand for services of the lawyer by others, the special skills which may have been brought to bear, the complexity of the case, the size of the case in dollars, the fees usually charged for work of the kind involved, time spent, and the success achieved. Cummings v. National Shawmut Bank, 284 Mass. 563 (1933).
6. With respect to expenses costs and fees, G.L.c. 206, s 16 establishes that their allowance rests to a large extent in the discretion of the Probate Court judge. The award may be presumed to be right and ordinarily ought not be disturbed. McMahon v. Krapf, 323 Mass. 118, 123 (1948); Smith v. Smith, 361 Mass. 733, 738 (1972).
7. An award of fees by a Probate Court will not be overturned unless plainly wrong. Taylor v. Trefrey, 282 Mass. 555, 557 (1933).
8. In an action to be tried without a jury, the court must accept the mater's subsidiary findings of fact unless they are clearly erroneous, inconsistent, unwarranted by the evidence before the master as a matter of law or are otherwise tainted by error of law. Mass.R.Civ.P. 53(h)(1).
9. Faced with a battle of the experts, the fact finder may accept one reasonable opinion and reject the other. Robinson v. Contributory Retirement Appeal Bd., 20 Mass. App. Ct. 634, 639 (1985).
10. To protect the incompetent person within its power, the State must recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons. Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 746 (1977). We give effect to those rights by using a

substituted judgment standard to approximate best what the incompetent person would have wanted were she able to communicate her wishes. Cohen v. Bolduc, 435 Mass. 608, 619 (2002).

1-14-10
Date



Stephen C. Steinberg, Associate Justice
Plymouth County Probate & Family Court