IN THE COURT OF APPEALS OF GEORGIA

IN RE: DOROTHY R. WILSON, PROPOSED WARD	)))	**Appeal Case Number: A24A1325**

BRIEF OF APPELLEE

COMES NOW Dorothy R. Wilson, Proposed Ward ("Appellee"), and pursuant to Georgia Court of Appeals Rule 24 files this *Brief of Appellee* in response to the *Brief of Appellant* submitted by Tami Clarke and Tracy Walker (collectively, "Appellants"), the petitioners below for appointment of a guardian and conservator for Appellee. Appellee respectfully shows this Honorable Court should AFFIRM the judgment.

I. Jurisdictional Statement

Appellee is satisfied with the Jurisdictional Statement set forth in the *Brief of Appellant*. Ga. Ct. App. R. 25(b).

II. Statement of the Case

This matter is before the Court in a unique posture, with Appellants appealing a determination of the Fulton County Probate Court (the "Probate Court"), upon final hearing, that Appellee does not need a guardian or conservator. Appellants filed their *Petition for Appointment of a Guardian and/or Conservator for a Proposed Ward* (hereinafter "*Petition*") on October 21, 2022. (V1-13 – V1-29.) In their *Petition*, Appellants identified themselves as "friend[s]" of Appellee. (V1-13.) They

requested Appellant Tami Clarke ("Mrs. Clarke") be made Appellee's guardian and the county conservator be appointed her conservator. (V1-16.) On October 27, 2022, a court-appointed evaluator evaluated Appellee and concluded she did not need a guardian or conservator. (V1-49 – V1-51.) The evaluator described Appellee as a 96-year-old woman who "appeared alert and oriented to her full name, date of birth, current month, current year and her physical home address." (V1-49.) She was "well groomed," exhibited "good eye contact," "communicative," and "appropriate in her responses." (V1-49.) The evaluator found (as is indeed undisputed) Appellee needed assistance with physical activities but was not confused and did not "present as having memory deficits or mental health challenges." (V1-49 – V1-50.)

The court-appointed evaluator's conclusion Appellee did not need a guardian or conservator was consistent with an October 10, 2022, evaluation of Appellee at Northside Neurology in Forsyth County, Georgia (the "Northside Neurology Report"). (V1-86 – V1-87.) The Northside Neurology Report described Appellee as "alert[,] oriented and appropriate." (V1-86.) It included a Mini Mental Status Exam, on which Appellee scored a 26 out of 30, a score within the "normal cognition" range. (V1-86.) The Northside Neurology Report concluded Appellee needed assistance but was "totally cognizant enough to assign the appropriate person." (V1-87.) The Northside Neurology Report was admitted into evidence at trial, by stipulation. (T3-84.)

On November 20, 2022, Appellee filed her *Objection to Petition for Appointment of a Guardian and/or Conservator for a Proposed Ward* (hereinafter "*Objection*"). (V1-36 – V1-48.) Appellee alleged she had the ability to make and communicate significant responsible decisions concerning (among other things) her health, safety, and management of her property, *see* O.C.G.A. § 29-4-1, § 29-5-1, and for those reasons did not need a guardian or conservator. (V1-36 – V1-37.) She further pointed out she had two professional caregivers, including a nurse, and alleged there were no issues with her care. (V1-36.) Appellee specifically objected to the appointment of Tami Clarke as guardian, citing as her reasons that she had not been in contact with Mrs. Clarke for months; interacted with her only a few times; Mrs. Clarke was not her friend; Mrs. Clarke had not acted in Appellee's best interest or consistent with her wishes during a period of illness Appellee experienced; and Appellee desired to sever her relationship with Mrs. Clarke and her husband, Tim Clarke, Appellee's long-time forester. (V1-37 – V1-38.)

While the guardianship and conservatorship proceeding was pending, in January 2023, Appellee filed a lawsuit against Mrs. Clarke's husband, Tim Clarke, and his company, Central Georgia Land Mgt., Inc., asserting (among other claims) claims for fraud and breach of contract (the "Fayette County Action"). Mr. Clarke moved to dismiss the Fayette County Action, contending, based on the pending guardianship and conservatorship proceeding, Appellee lacked capacity to maintain

a lawsuit. (V1-71; V1-75.) The Fayette County Superior Court stayed the lawsuit out of caution. (V1-71 – V1-72; V1-76.)

Appellee subsequently filed a *Response to Evaluator's Report* in the probate action pursuant to O.C.G.A. § 29-4-11(d)(6) and O.C.G.A. § 29-5-11(d)(6), arguing the Probate Court should dismiss the *Petition* for lack of probable cause. (V1-73 – V1-119.) Appellee emphasized the proceeding was interfering with her ability to obtain relief in the Fayette County Action and appeared to be merely an effort by the Clarkes to thwart her claims. (V1-76.) The Probate Court held a hearing on the issue prior to the commencement of the final hearing on the *Petition* and *after* the conversation between the Court and Proposed Ward about which Appellants complain but ultimately denied Appellee's request to dismiss the *Petition*. (T1-16—T1-18)

The guardianship and conservatorship proceeding came to trial on October 23, 2023. "At the request of the parties," just before the trial, the judge held an off-record conversation with Appellee, her counsel, and Appellants' counsel. (V1-4; T1-11.) On the record just prior to the commencement of the final hearing on the *Petition*, counsel for Appellee moved again to dismiss the case for lack of probable cause, essentially arguing the then-pending *Motion to Dismiss* . (T1-7 – T1-11; T1-13 – T1-18.) The Probate Court denied Appellee's motion and proceeded with the evidentiary, final hearing. (T1-18.)

In its written *Final Order*, the Probate Court summarized much of the evidence, which featured testimony from *eight* witnesses: both Appellants, Harmon Caldwell (Appellee's estate-planning attorney), Dr. Tim Cummings (who treated Appellant from February 2022 to July 2022), Tim Clarke, Appellee, Chyril Johnson (Appellee's live-in nurse), and Elizabeth Jones. (V1-3 – V1-12.) Importantly, there was evidence to show Appellee experienced a period of impairment while in the care of Appellants, due to medications prescribed to treat a bout of neuralgia, but her cognition improved when she weaned off the medications, consistent with Dr. Cummings's testimony about the effects of said prescription and expectations regarding the same. (V1-4 – V1-6; V1-10; T2-67; T3-74.) Appellee testified Appellants did not take good care of her, but she was pleased with the care she received from her daughter and Ms. Johnson, and her health is improving under Ms. Johnson's care. (V1-10.) Appellee directs what she wants to wear and eat, gives input on her healthcare, and manages her affairs with her daughter's assistance. (V1-10 – V1-11.) The Court also considered the October 10, 2022, Northside Neurology evaluation, which as noted concluded Appellant had capacity to select an appropriate person to assist her. (V1-6 – V1-7.)

After summarizing the most directly relevant testimony and evidence, the Court noted additional circumstances:

> After considering the entire record, the Court notes the following: given the age of [Appellee], the Court takes judicial notice

> that she would have health issues from time to time; Mr. Clarke installed cameras (video and audio) throughout [Appellee's] home without her knowledge or consent; On October 7, 2022, [Appellee's] attorney sent a Demand letter to Tim Clarke, (husband of Tami Clarke) notifying him that his Power of Attorney had been revoked and requested certain contractual information from him; two weeks later, on October 21, 2022, the Petitioners, ([Appellants]) filed their [*Petition*] three (3) months after their last in-person visit with [Appellee]; in their Petition, Petitioners stated, in Exhibit A, that "physically her vision and endurance are worsening causing her to fall and become less alert. [Appellee] is losing mental and physical capacities"; in January 2023, [Appellee] filed a lawsuit against Mr. Tim Clarke and his company. Said lawsuit is stayed until the outcome of this Petition; two different evaluators examined [Appellee] and found that she has capacity to make and communicate significant responsible decisions concerning her health and property; further, the Court held a pre-hearing direct conversation with [Appellee], and [Appellee's] statement was weighed heavily.

(V1-11 – V1-12.) The Probate Court concluded Appellants failed to present clear and convincing evidence that Appellant needed a guardian or conservator and denied the *Petition*. (V1-12.) This appeal followed.

III. Summary of the Argument

The Court should affirm the *Final Order* finding Appellee does not need a guardian or conservator. Appellants' sole enumeration of error is the Probate Court improperly considered Appellee's statement made in an off-the-record conversation. Appellants did not object to the conversation or to the court considering its observations of Appellee; in fact, Appellants jointly requested and participated in the conversation through counsel, as Appellants' counsel attended the meeting during which the conversation took place. Appellants cannot predicate error on an

issue they did not raise in the trial court. Moreover, even assuming the trial court should not have considered matters outside those in evidence, Appellants do not challenge the sufficiency of the record evidence, which amply showed Appellee had capacity to make and communicate significant responsible decisions concerning her health, safety, finances, and other affairs, as of the time Appellants filed their Petition and the time of trial—an unnecessary showing given the clear and convincing evidentiary burden *Appellants* had at trial. Put differently, the evidence in the record of the case is plainly insufficient to satisfy the clear and convincing burden which rested entirely upon Appellants at trial. Appellants have not shown reversible error.

IV. Argument

Appellants are seeking to overturn the Fulton Probate Court's determination Appellee does not need a guardian or conservator on the sole ground the trial court considered an off-the-record conversation, but they did not preserve the issue for review, and they do not even try to show the record evidence which the trial court considered fails to support its decision. Appellants do not mention the fact they cross-examined Appellee twice, on two different days, after the conversation about which they now complain took place. The Fulton County Probate Court was correct in its determination Appellee should retain her rights, and it should be affirmed.

A. Standard of Review

"[I]n reviewing an order on a petition for guardianship, we will not set aside the Probate Court's findings unless they are clearly erroneous, and when such findings are supported by any evidence, they will be upheld on appeal." *In the Interest of M. P.*, 338 Ga. App. 696, 697 (2016) (cleaned up).

B. Appellants Fail to Comply with Rule 25.

Appellants violate this Court's rules by failing to identify how they preserved the enumerated error. Rule 25(a)(5) requires an appellant's statement of the case to "identify how each enumerated error was preserved for review, with appropriate citations to the record." *Id.* Furthermore, Rule 25(d)(1)(i) requires "[e]ach enumerated error shall be supported in the brief by specific reference to the record or transcript." *Id.* "In the absence of a specific reference, the Court will not search for and may not consider that enumeration." Ga. Ct. App. R. 25(d)(1)(i).

Consistently, this Court has held it will not consider errors not raised below, will not search for errors, and, in the absence of a record citation supporting the error, it may consider the error abandoned. *See, e.g.*, *Stewart v. Johnson*, 358 Ga. App. 813, 813-14 (2021). Updates to the rule language have not changed the Court's approach. For example, in *Bell v. Lopez*, 368 Ga. App. 101 (2024), issued less than two months ago, the Court discussed a pro se brief which failed to identify how the enumerated errors were preserved (among other shortcomings). *Id.* at 101-02. After

noting the appellant's pro se status did not excuse noncompliance, the Court reiterated the principle that "[i]n the absence of specific citations to the record, we are entitled to treat [the appellant's] claims of error as abandoned." *Id.* at 102. The Court exercised its discretion to consider the appellant's claims of error "because the record in this case is not large and the appellees have provided sufficient citations to the record in their brief," but emphasized "'if we miss something in the record or misconstrue an argument due to the nonconforming brief, the responsibility rests with [the appellant].'" *Id.* (quoting *Stewart*, 358 Ga. App. at 814).

Appellants enumerate as error that "[t]he Trial Court erred when [it] denied Appellant's Petition for Appointment of a Guardian and/or Conservator based on information not in evidence before the Trial Court." *Brief of Appellant*, at 2, 4. As further discussed *infra*, Appellants' factual basis for this enumeration is a pre-hearing discussion the trial judge had with Appellee with all parties' attorneys present and at their request. The judge evidently gave the discussion some weight in her final ruling. Violating Rule 25(a)(5) and (d)(1), nowhere in Appellants' Statement of the Case or, indeed, in their *Brief* as a whole, do Appellants identify how they preserved the alleged enumerated error. To the best of undersigned counsel's ability to discern, Appellants never raised any argument below that the court ought not consider its off-the-record discussion with Appellee or otherwise objected to the conversation taking place. Indeed, Appellants' counsel thanked the

judge on the record for taking time to speak with Appellee in chambers and stated, "I hope that was helpful."[1] (T1-11.) And this is not a case where the record is "not large," *Bell*, 368 Ga. App. at 102; indeed, the trial transcripts alone exceed seven hundred pages in length. The Court would be well within its discretion to deem the enumerated error abandoned. *See Bell*, 368 Ga. App. at 102.

Appellants further fail to comply with Rule 25 because they do not cite any authority which applies to conservatorship proceedings. Rule 25(a)(7) requires that an appellant "must cite the authorities relied on." *Id.* "Any enumeration of error that is not supported in the brief by citation of authority or argument may be deemed abandoned." Ga. Ct. App. R. 25(d)(1). Appellants cite O.C.G.A. § 29-4-12(d)(4), which is part of the chapter on guardianships, but do not cite any law pertaining to conservatorships, even though they are apparently also seeking to overturn the Probate Court's ruling Appellee does not need a conservator.[2] By failing to cite

[1] To the extent counsel's comments might be read as urging the Court to consider the discussion, Appellants' enumeration is barred by the doctrine of invited error. The doctrine of invited error holds appellants "will not be heard to complain of error induced by their own conduct, nor to complain of errors expressly invited by them." *Mary Allen Realty & Mgmt., LLC v. Harris*, 354 Ga. App. 858, 862 (2020). Thus, should the Court view counsel's comments as inviting the Probate Court to consider Appellee's off-the-record statements, this would be an additional reason for the Court to affirm the judgment.

[2] Appellee readily acknowledges the similarities between Chapter 4 and Chapter 5 of Title 29 of the Official Code of Georgia Annotated as said provisions relate to the procedures, burden, and the like in connection with guardianship and conservatorship proceedings, respectively.

applicable authority, Appellants have abandoned their argument Appellee needs a conservator.

Accordingly, Appellee respectfully requests the Court AFFIRM the judgment of the Probate Court.

C. Appellants Fail to Show Reversible Error Because the Court Considered the Evidence Contemplated by O.C.G.A. § 29-4-12(d)(4), and Appellants Do Not Challenge the Sufficiency of the Evidence.

Appellants' rule violations aside, Appellants fail to establish a ground for reversal on the merits as well. They contend O.C.G.A. § 29-4-12(d)(4) allows a trial court to consider evidence taken at the guardianship hearing, the court-appointed evaluator's report, and any response by the proposed ward, and they cite without discussion *Cousins v. Macedonia Baptist Church of Atlanta*, 283 Ga. 570, 573 (2008), as an example of a judgment being reversed because a court considered material outside the record evidence. But *Cousins* does not stand for the proposition that considering extraneous material is always reversible error and, in fact, *Cousins* is easily distinguishable.

Cousins considered whether a trial court violated rights enshrined in the Constitution of the State of Georgia by the way it conducted an injunction hearing. At the hearing, attorneys for the parties appeared and were prepared to present witnesses and documentary evidence. *Id.* at 571-72. But instead of allowing the presentation of evidence by the parties to proceed, the court questioned church

members without placing them under oath, contacted non-parties of its own initiative, and conducted its own examination of witnesses without ever affording the parties an opportunity to present argument or evidence. *Id.* at 572-73. The Georgia Supreme Court concluded the trial court violated fundamental constitutional rights, including due process, the right of access to the courts, and the right to a neutral arbiter:

> The trial judge's conduct of the injunction hearing was clearly improper.
>
> > "The constitution of this state guarantees to all persons due process of law and unfettered access to the courts of this state. [Cit.] These fundamental constitutional rights require that every party to a lawsuit … be afforded the opportunity to be heard and to present his claim or defense, i.e., to have his day in court. [Cits.]" [Cit.]
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> *Morrow v. Vineville United Methodist Church*, 227 Ga. App. 313, 316 (1) (489 SE2d 310) (1997). See also Ga. Const. of 1983, Art. I, Sec. I, Pars. I, XII. Integral to these rights is the ability to present witnesses and other lawful evidence; thus, limitations imposed by a trial judge that "prevent[ ] a full and meaningful presentation of the merits of the case" mandate reversal. *Newton Commonwealth Property v. G + H Montage GmbH*, 261 Ga. 269, 270 (404 SE2d 551) (1991). In this case, Cousins and the other defendants who appeared at the hearing (hereinafter, the "Cousins Defendants"), despite being prepared to offer testimony by several witnesses and documentary evidence in support of their position, were never afforded the opportunity to offer evidence, give argument, or otherwise present their cases. In issuing a ruling without first allowing the Cousins Defendants to be heard, the trial judge violated their rights to due process and access to the courts. *See Newton*, supra, 261 Ga. at 270 (reversing judgment where court imposed limits on filing of motions and length of presentation of parties' cases and witness testimony); *Julian v. State*, 134 Ga. App. 592 (2) (215 SE2d 496) (1975) (reversing judgment where trial court limited defendant's presentation of character witnesses).

> In addition, by attempting to himself procure evidence and elicit testimony in the case, the trial judge stepped beyond the role of arbiter and into that of advocate. *See Paul v. State*, 272 Ga. 845, 846 (1) (537 SE2d 58) (2000) (conviction reversed where judge "took a prosecutorial role in the trial of the case"). Indeed, in initiating out-of-court contacts with the involved banks and other witnesses, on whose various hearsay statements he apparently relied in making his findings, the judge also failed to heed this Court's admonition that "judges must scrupulously avoid ex parte communications." *Ivey v. Ivey*, 264 Ga. 435, 438 (3) (445 SE2d 258) (1994). In so doing, the judge "'jeopardized [the rights of the Cousins Defendants by] abandon[ing] the tried and proven court procedure of admitting only relevant evidence and producing witnesses who are subject to cross-examination.'" (Citation omitted.) *Arnau v. Arnau*, 207 Ga. App. 696, 696 (1) (429 SE2d 116) (1993) (reversing due to court's ex parte communications with court-appointed expert).
>
> In short, the improprieties in the conduct of the hearing effectively deprived the Cousins Defendants of their right to be heard before a neutral arbiter and thus mandate reversal of the entirety of the injunctive and extraordinary relief awarded in this case.

Id. at 573-74. The Court went on to reverse the trial court's finding of contempt against the appellant, because the trial court did not give him an opportunity to defend himself and the finding was based "at least in part on unsworn statements, unauthenticated bank documents, and other unreliable "evidence" improperly obtained by the judge in an ex parte manner." *Id.* at 575.

Appellants in this case were not denied due process, access to the courts, or a neutral arbiter, nor do they explicitly contend they were. Unlike in *Cousins*, where the parties had no opportunity to call or examine witnesses, in this case, eight witnesses called by the parties testified regarding Appellee's capacity, including

Appellee herself—twice. Appellants presented a robust case in chief which spanned two days. (*See* T1-3; T2-3.) Appellants cross-examined Appellee on two different occasions during the hearing, *after* the conversation between the Probate Court Judge, Appellee, Appellee's counsel, and Appellants' counsel occurred. (*See* T2-3; T3-3.) Appellants never sought to object to, impeach, clarify, explore, or otherwise contest her off-the-record statements. Appellants point to no limitations imposed by the trial court which impaired their ability to make such objections or to conduct examinations, or otherwise to present their case on the merits. *See Cousins*, 283 Ga. at 574. The Probate Court did not call any witnesses, exclude any witnesses, or engage in any ex parte communications or other forms of advocacy. *See id.* Thus, the trial court's gross mishandling of the injunction hearing in *Cousins* was nothing like what occurred in this case, in which a properly conducted, three-day-long trial occurred.

In addition, any error was harmless:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

O.C.G.A. § 9-11-61. "[A]n appellant must show harm as well as error to require reversal of the judgment." *Ideal Pool Corp. v. Champion*, 157 Ga. App. 380, 381

(1981). In contrast to Appellants' reading of *Cousins*, this Court has held the consideration of unsworn, out-of-court statements can be harmless error, particularly when there is cumulative evidence on the same point. *See, e.g.*, *Igle v. State*, 223 Ga. App. 498, 499 (1996); *Pound v. Smith*, 101 Ga. App. 500, 501 (1960).

Appellants fall utterly short of showing how the Probate Court affected their substantial rights by considering the pre-hearing conversation. Notably, the Probate Court did not say that it weighed the conversation in Appellee's favor. And Appellants do not try to show the evidence of record was insufficient to support the judgment. They barely even discuss the evidence, which included *two* professional evaluations supporting Appellee's legal capacity and Appellee's own live testimony.[3] Indeed, they concede the trial court heard evidence which conflicted

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[3] Describing Appellee's knowledge of her affairs, Appellants claim "Appellee was apparently unaware that she had filed suit against Mr. Clarke." *Brief of Appellants*, at 4. Appellee's testimony was she knew she sued him:

> BY MR. DEUTSCH:
> Q. Ms. Wilson, at some point you filed a lawsuit against Tim's company, correct, and Tim?
> A. Did I file a lawsuit? My daughter requested from him, on my behalf, papers from his office, and he refused. And this --
> Q. You filed -- then at some point you filed the lawsuit against him?
> A. Em-hmm.
> Q. And it -- do you -- in that lawsuit you accused Mr. Clarke and his company of fraud, correct?
> A. Correct.

(T2-165 – T2-166.)

with their case in chief. *Brief of Appellants*, at 5. This concession requires affirmance under the any-evidence standard of review. *M.P.*, 338 Ga. App. at 697. Moreover, *Cousins*, upon which Appellants rely without discussion, does not contradict the harmless-error rule; instead, it is an example of harmful error, where the trial court's conduct of the proceeding affected specific substantial rights of the parties. The evidence adduced at trial in this case does not suffer from the pervasive "infirmities" identified with respect to the contempt finding in *Cousins*. The fact Appellants have enumerated only one error in a three-day-long hearing—and devote approximately one page of text to their argument—speaks volumes about how properly the Probate Court conducted the trial and how solid the evidence was upon which it relied.

Appellants have failed to show reversible error. Therefore, Appellee respectfully requests the Court AFFIRM the judgment of the Probate Court.

V. Conclusion

Appellants have not shown how they preserved the enumerated error; they barely cite applicable authority and have not identified any which supports reversal; and they have failed altogether to apply the harmless-error standard and show how the Probate Court's consideration of an off-the-record conversation to which all parties consented affected their substantial rights. Their failure to do so is particularly galling given two professional evaluators determined Appellee was not in need of a guardian and conservator—and none found to the contrary. The Probate

Court heard testimony from both Appellants as well as a lawyer and physician testifying on their behalf. The Probate Court also heard the testimony of Appellee, her nurse, and her daughter, who offered testimony to show Appellee is capable of making her own decisions and is receiving the help she needs. Appellants simply failed to persuade the Probate Court Appellee needs a guardian or conservator. There is no ground for reversal.

Therefore, Appellant respectfully requests the Court AFFIRM the judgment of the Probate Court.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 17th day of July, 2024.

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CERTIFICATE OF SERVICE

I certify I have on this day in compliance with Ga. Ct. App. R. 6 served the forgoing *Brief of Appellee* upon the following via email:

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I further certify there is a prior agreement with Appellants' above-named counsel to allow documents in a PDF format sent via email to suffice for service.

This 17th day of July, 2024.

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