

NO. A10-716

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State of Minnesota  
In Court of Appeals

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Peggy Greer,

*Appellant,*

v.

Professional Fiduciary, Inc.; Wells Fargo Bank, N.A.; Wells Fargo  
Investments, L.L.C. d/b/a Wells Fargo Private Bank Elder Services;  
and Ruth Ostrom,

*Respondents.*

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**BRIEF AND APPENDIX OF  
RESPONDENT PROFESSIONAL FIDUCIARY, INC.**

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## STATEMENT OF THE ISSUE

**Whether Appellant's guardianship claims that challenge Respondent Professional Fiduciary, Inc.'s prior decisions and actions as a court-appointed guardian—decisions which were or could have been challenged during the prior probate proceedings and which were approved by the probate court through final probate orders—are barred as an impermissible collateral attack on the prior probate proceedings under principles of res judicata.**

The probate court, the Honorable Marilyn J. Kaman presiding, ruled that these claims were barred by principles of res judicata. (ADD-17.)

### **Apposite Authorities:**

*Bengtson v. Setterberg*, 227 Minn. 337, 35 N.W.2d 623 (1949)

*Pangalos v. Halpern*, 247 Minn. 80, 76 N.W.2d 702 (1956)

*In the Matter of Hormel Trusts*, 543 N.W.2d 668 (Minn. App. 1996)

*Anderson v. Werner Continental, Inc.*, 363 N.W.2d 332 (Minn. App. 1985)

## STATEMENT OF THE CASE

This is a lawsuit brought by 86-year-old Peggy Greer against her former court-appointed guardian (Professional Fiduciary, Inc. a/k/a “PFI”), her former court-appointed conservator (Wells Fargo Bank), and the attorney for PFI, Ruth Ostrom. (APP-1 to 16.) The complaint included two types of claims against former guardian PFI: (1) claims relating to decisions made by PFI during the guardianship on Ms. Greer’s medical care and living situation (the “guardianship claims”); and (2) claims relating to the actions of PFI after the guardianship was terminated (the “post-guardianship claims”). (APP-1 to 16.) In its Answer, PFI denied all claims, and affirmatively alleged that the “guardianship claims” were barred by res judicata (a/k/a claim preclusion), and were thus an impermissible collateral attack on prior final probate orders. (PFI APP 1-6.)

PFI moved for dismissal of all claims under Rule 12.02(e) and 12.03. (APP-19 to 20.) By order filed November 9, 2009, the probate court held that the guardianship claims against PFI were barred by principles of res judicata. (ADD-17; see also ADD-12 to 16.)<sup>1</sup> The probate court did not dismiss the post-guardianship claims against PFI. (ADD-17 to 21.) Subsequently, Ms. Greer and PFI stipulated that the post-guardianship claims would be dismissed without prejudice. Since all claims against PFI and the other parties were dismissed, either by the November 9, 2009, order or through stipulation, the probate court entered final judgment in the case. (APP-540 to 541.) Ms. Greer appeals from this final judgment.

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<sup>1</sup> The Court also dismissed all claims against former conservator Wells Fargo and PFI attorney Ruth Ostrom. (ADD-1 to 26.)

## STATEMENT OF FACTS

In this case, the probate court determined that the guardianship claims in this lawsuit are barred by orders and decisions in the prior probate proceedings. (ADD-17.) Therefore, the facts outlined below will start with a chronological recitation of these prior probate proceedings, as gleaned from the public pleadings and filings in the prior probate files. These public pleadings and filings were submitted to the probate court in connection with the Rule 12 motion. (APP-49 to 139.)

### **I. THE PRIOR GUARDIANSHIP PROCEEDINGS.**

#### **a. Probate Court Appoints PFI as Guardian.**

On July 2, 2004, Ms. Greer's daughter, Judith Wryk, filed a Petition for Appointment of Guardian and Conservator for her mother in the Probate/Mental Health Division for the Fourth Judicial District Court ("petition"). (APP-55 to 64.) The petition alleged that Ms. Greer suffered from dementia and chemical dependency, and she was unable to arrange for her medical care or manage her estate. (APP-55 to 58.)

On December 15, 2004, before the petition went to a hearing, Judith filed a Petition for Emergency Appointment of Guardian and Conservator ("emergency petition"). (APP-66 to 71.) The emergency petition alleged that Ms. Greer had been living in an "unsafe environment," had an emergency admission to the intensive care unit of a local hospital, and required an emergency guardian for her own protection and safety. (APP-67 to 68.)

A day earlier, on December 14, 2004, the director of Social Work Services at Fairview University Medical, where Ms. Greer had been hospitalized, filed a Petition for

Judicial Commitment, asking that Ms. Greer be committed to a long-term facility (“commitment petition”). (APP-73 to 75.) The commitment petition noted Ms. Greer was admitted to the hospital with malnourishment, dehydration, lethargy, pressure sores, and bacterial sepsis. (APP-74.) The commitment petition also noted that Ms. Greer’s son, Charles Heintz, had been her caregiver; that Charles had opposed her admission to the hospital; and that Fairview personnel believed that Ms. Greer would be in “imminent danger if she returns home to [her] previous living situation” with Charles. (APP-74.)

The probate court held a hearing on January 21, 2005. (APP-77.) Ms. Greer appeared personally and by her attorneys, Jeff Levy and Glenn Bruder. (APP-77.) Also attending were her daughter Judith, Judith’s attorney, a social worker from Hennepin County Adult Protective Services, a social worker from Fairview University Medical Center, PFI’s attorney, and Ms. Greer’s son, Terry Greer. (APP-77.) At the hearing, a settlement was reached wherein Judith and Ms. Greer agreed to seek the appointment of PFI as guardian and Wells Fargo Bank as conservator. (APP-77.)<sup>2</sup>

On March 8, 2005, the probate court issued an Order Appointing General Guardian and Conservator. (APP-77 to 81.) The probate court found Ms. Greer to be incapacitated and unable to manage her own affairs. (APP-77 to 81.) The order noted that Ms. Greer had been hospitalized twice, had been transferred to a rehabilitation center, and needed assistance and supervision to properly take her medications. (APP-78 to 79.) The order appointed PFI as guardian and Wells Fargo Bank as conservator,

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<sup>2</sup> Judith’s original petition had sought her own appointment as guardian and conservator, along with her brother, Terry Greer. (APP-59.)

pursuant to Judith and Ms. Greer's settlement. (APP-77 to 81.) The guardianship powers included the power to establish place of abode, to provide for food, clothing, and shelter, to give consent for medical treatment, and to exercise supervisory power over Ms. Greer. (APP-78, 80.) The order specifically made mention of Ms. Greer's right to appeal as provided by law. (APP-81.)

**b. Ms. Greer Files a Petition to Remove PFI as Guardian.**

Six months later, on September 19, 2005, Ms. Greer and her son Terry filed a joint petition to replace PFI as the court-appointed guardian. (APP-83 to 87.) According to the joint petition, Ms. Greer disagreed with PFI's decision that she could not return home until her son Charles was removed from her home. (APP-84.)

Ms. Greer and Terry were afforded a hearing on January 16, 2006, concerning their joint petition to replace PFI. (APP-89.) Ms. Greer appeared personally and by her attorney Glenn Bruder. (APP-89.) Also appearing were Judith, Charles, Wells Fargo Bank by its attorney, and PFI by its attorney. (APP-89.) The probate court issued a scheduling order setting forth discovery deadlines leading up to a putative trial scheduled for April 20-21, 2006, concerning the propriety of replacing PFI as Ms. Greer's guardian.

On September 14, 2006, Ms. Greer's new attorney, William Peterson, wrote to the probate court notifying it that a settlement had been reached concerning Ms. Greer's petition to remove PFI as a guardian. (APP-91 to 92.) According to Peterson, an agreement in principal had been reached that was being reduced to a written stipulation. (APP-91.) No such stipulation was ever filed.

**c. First Annual Accounting Filed and Approved.**

On June 14, 2006, Wells Fargo Bank, in its role as conservator, appeared before the probate court and presented the First Annual Account. (APP-94.) The accounting necessarily included all receipts, disbursements, and distributions made by the conservator, including all sums paid for medical care and housing for Ms. Greer for the period ending March 31, 2006. (APP-208 to 212; *see* Minn. Stat. §524.5-420.) Ms. Greer and her attorney did not file any objections to the accounting. The probate court ordered that the First Annual Account was “settled and allowed.” (APP-94.)

**d. Ms. Greer Continues to Challenge Decisions of PFI and Wells Fargo.**

In November 2006, Ms. Greer’s son Charles died. (APP-97.) About two weeks later, Ms. Greer was returned to her home with in-home care. (APP-135 to 136.) On December 18, 2006, Ms. Greer wrote a letter to Wells Fargo Bank demanding that it resign as her conservator and help facilitate the appointment of Terry Greer as its conservatorship successor. (APP-96 to 97.) Ms. Greer also noted that she had fired her most recent attorney, William Peterson, and was seeking court appointment of a new attorney. (APP-96 to 98.)

On December 20, 2006, and again on January 9, 2007, Ms. Greer filed a Petition for Appointment of a Successor Guardian and Conservator, complaining that the level and cost of care she was receiving was excessive, among other things. (APP-103 to 110, 112, 116.) She sought appointment of sons Michael and Terry Greer as successor guardian and conservator. (*Id.*) On January 18, 2007, Ms. Greer’s new court-appointed attorney, Brent Primus, filed a Petition for Restoration of Capacity. (APP-118.)

**e. Second Annual Accounting Filed and Approved.**

On March 2, 2007, the probate court held a hearing on Ms. Greer's petitions along with the petition of her daughter, Judith, objecting to Ms. Greer's restoration and successor guardian and conservator petitions. (APP-125 to 126.) Ms. Greer, Michael, and Terry did not appear personally. (APP-125 to 126.) On the date of the hearing, Ms. Greer faxed a letter to the probate court, stating that she had fired her latest court-appointed attorney, Brent Primus, and wanted to postpone the hearing. (APP-120 to 123.) The probate court denied Ms. Greer's request for a continuance, noting there had been a history of continuances and last minute changes in attorneys, and dismissed Ms. Greer's Petition to Appoint a Successor Guardian and Conservator, as well as the Petition for Restoration of Capacity. (APP-125 to 126.)

By separate order also dated March 2, 2007, the probate court also allowed the Second Annual Account of the conservator, Wells Fargo Bank. (APP-128.) The accounting included all sums paid for medical care and housing, among other things, for the period ending January 31, 2007. (APP-218 to 221.) The court noted that although the costs of returning Ms. Greer to her home were large, "the expenditures for home care for Ms. Greer in a chaotic situation were not unreasonable." (APP-128.)

In follow-up to these orders, and by letter to Ms. Greer dated April 26, 2007, Probate Court Referee Wolfson noted the deadline had passed for a new trial motion, cautioned Ms. Greer to be mindful of the appeal period for his orders, and urged her to seek legal counsel. (APP-130.) On May 10, 2007, Ms. Greer, along with Michael and Terry, filed an objection to the appointment of attorney Brent Primus. (APP-132.)

**f. Additional Accountings Filed and Approved.**

On July 6, 2007, after a hearing, the probate court issued an order terminating the guardianship and conservatorship. (APP-134 to 139.) At the hearing, Ms. Greer was represented by her fourth court-appointed attorney, Allan Poncin. (APP-135.) PFI did not object to the petition to terminate the guardianship. (APP-134 to 139.)

On June 22, 2007, conservator Wells Fargo Bank had filed an interim accounting, which included some additional medical and housing expenses incurred by Ms. Greer. (APP-235 to 237.) After the guardianship and conservatorship were terminated, conservator Wells Fargo Bank filed its final accounting on August 21, 2007. (APP-252 to 255.) The final account was settled and allowed, by order filed October 2, 2007. (APP-259.) None of the probate orders were further challenged or appealed.

**II. THE GUARDIANSHIP CLAIMS IN THIS LAWSUIT.**

About 18 months after all prior probate proceedings had terminated, Ms. Greer brought this civil lawsuit against former guardian PFI, as well as former conservator Wells Fargo Bank, and the attorney for PFI, Ruth Ostrom. (APP-1 to 16.) As noted above, the complaint included two types of claims against former guardian PFI: (1) claims relating to decisions made by PFI during the guardianship on Ms. Greer's medical care and living situation (the "guardianship claims"); and (2) claims relating to the actions of PFI after the guardianship was terminated (the "post-guardianship claims"). (APP-1 to 16.)

The guardianship claims challenge the decisions made by PFI with respect to medical care and place of abode, and the financial implications of those decisions. (APP-1 to 16.) Specifically, the allegations include:

- a. Failing to provide services in the least restrictive manner possible;
- b. Creating inappropriate conflicts of interest;
- c. Refusing to provide Ms. Greer, her attorneys, and her family members with medical records and other confidential documents to which she was entitled upon her repeated requests;
- d. Failing to take reasonable steps to return Ms. Greer to her home;
- e. Failing to provide Ms. Greer with the most appropriate and least restricting living arrangement available;
- f. Failing to reassess Ms. Greer's physical and mental health;
- g. Failing to obtain sufficient knowledge of Ms. Greer's improved health so as to make appropriate decisions on her behalf; and
- h. Failing to protect Ms. Greer's civil rights.

(APP-9 to 11.) Essentially, the allegations state that PFI should have returned Ms. Greer to her home at an earlier date. (APP-7 to 8.) Also, the allegations state that once Ms. Greer was home, PFI approved excessive home health care services. (APP-7 to 8.) The specific claims pled include: (1) breach of fiduciary duty, (2) negligence, (3) intentional and negligent infliction of emotional distress. (APP-6 to 12.) In its Answer, PFI denied all claims, and affirmatively alleged that the "guardianship claims" are an impermissible collateral attack on final probate orders and barred by claim preclusion, and also barred by the probate statutes. On a Rule 12 motion, the probate court agreed, and dismissed all

guardianship claims with prejudice, on the grounds that such claims were barred by res judicata. (ADD-17; *see also* ADD-12 to 16.)

### ARGUMENT

The guardianship claims in this lawsuit relate to decisions made and actions taken by a court-appointed guardian in the context of the guardianship proceedings, with respect to medical care and place of abode, as well as the financial implications of those decisions. Those decisions were already submitted to and approved by the probate court, in the context of several separate accountings. Ms. Greer had the opportunity, through her numerous attorneys, to challenge these accountings and make objections. Ms. Greer either did not challenge these accountings, or the probate court did not find any substance to her challenges to the accountings. In sum, the guardianship claims brought in this lawsuit have already been litigated in the prior probate proceedings, and these claims are barred by the principles of res judicata.

#### **I. STANDARD OF REVIEW.**

A party may move for judgment on the pleadings if a plaintiff fails to set forth a legally sufficient claim for relief. *See* Minn. R. Civ. P. 12.03. Appellate courts conduct a *de novo* review of a Rule 12 dismissal. *Krueger v. Zeman Constr. Co.*, 781 N.W.2d 858, 861 (Minn. 2010); *Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 172 (Minn. App. 2009). In considering a Rule 12 motion, courts accept the facts alleged in the complaint as true and give the nonmoving party the benefit of all favorable inferences. *Krueger*, 781 N.W.2d at 861 (affirming Rule 12 dismissal). In a motion for judgment on the pleadings, the court may consider affirmative defenses

asserted in an answer, including *res judicata* (a/k/a claim preclusion). *See, e.g., Matter of Trusts by Hormel*, 543 N.W.2d 668 (Minn. App. 1996).

**II. THE GUARDIANSHIP CLAIMS ARE AN IMPERMISSIBLE COLLATERAL ATTACK ON FULLY CONCLUDED PROBATE PROCEEDINGS, BARRED BY PRINCIPLES OF RES JUDICATA.**

**A. MS. GREER HAD THE RIGHT TO CHALLENGE THE DECISIONS AND ACTIONS THAT FORM THE BASIS OF THIS LAWSUIT DURING THE PROBATE PROCEEDINGS.**

Guardianship proceedings are highly regulated by statute. Minn. Stat. §§ 524.5-301 to 524.5-317. Under the statutes, PFI, as Ms. Greer’s court-appointed guardian, was subject to the “control and direction” of the probate court at all times. Minn. Stat. § 524.5-317. Ms. Greer, as a ward, had the right to a court-appointed attorney—a right she repeatedly exercised during her guardianship process. Minn. Stat § 524.5-304(b). The probate court’s establishment of PFI’s guardianship over Ms. Greer required a hearing, and the probate court was required to find by “clear and convincing evidence” that Ms. Greer was incapacitated, and that her needs could not be met via a less restrictive means. Minn. Stat §§ 524.5-301, 524.5-313(c). In granting powers to a guardian, the probate court could grant only those necessitated by the situation and PFI was required to report to the court at least annually. Minn. Stat § 524.5-316.

If Ms. Greer or an interested person was dissatisfied with PFI, he or she could move to terminate the guardian, to appoint a temporary substitute guardian, or to modify the guardianship powers—a right also exercised by Ms. Greer and her sons. *See, e.g.,* Minn. Stat § 524.5-317 (court may terminate guardianship or modify powers), § 524.5-312 (temporary substitute guardian); *see also* APP-83 to 87, APP-103 to 110, APP-112-

116. In addition, the guardian must report to the court at least annually or whenever ordered by the court, Minn. Stat § 524.5-316(a), and the ward or an interested person could dispute the guardian's report and "may petition the court for an order that is in the best interests of the ward *or for other appropriate relief*", Minn. Stat § 524.5-216(b) (emphasis added).

Similarly, the conservator, Wells Fargo Bank, was required to file—and did file—intermediate and final accountings which reflected the financial implications of the guardian's decisions on medical care and place of abode, on at least an annual basis, which the probate court could allow or modify, after notice and hearing. Minn. Stat § 524.5-420(a); *see also* APP-208 to 211, APP-218 to 221, APP-239 to 242, APP-252 to 255. Ms. Greer or an interested person likewise could dispute the accountings, file objections, ask for a contested hearing, or request other relief.

Clearly, Ms. Greer had the right during her probate proceedings to challenge the various decisions and actions she complains of in this case, as well as the right to seek "appropriate relief" and appeal rulings related to the decisions and actions made during her guardianship and conservatorship.

**B. THE PROBATE PROCEEDINGS AND ORDERS ARE BINDING AND CONCLUSIVE FINAL JUDGMENTS, NOT SUBJECT TO COLLATERAL ATTACK IN A SUBSEQUENTLY FILED CIVIL LAWSUIT.**

Minnesota appellate courts have repeatedly held that the decree of a probate court in a matter in which it has jurisdiction is *res judicata* and binding on the parties, unless reversed or modified on appeal or in a direct proceeding. *See, e.g., Bengtson v. Setterberg*, 227 Minn. 337, 340, 35 N.W.2d 623, 628-29 (1949). As such, the district

court properly concluded that Ms. Greer's lawsuit "presents an appropriate situation" for this Court to apply the doctrine of res judicata to dismiss the guardianship claims against PFI, because these guardianship claims "are barred by the prior and unappealed orders entered in the Greer Conservatorship/Guardianship proceedings \* \* \* ." (ADD-12.)

In *Bengtson*, the Supreme Court held that a probate order which had mistakenly assigned a homestead to a widow "in fee," instead of through a life estate, could not be challenged by a separate declaratory judgment action. 35 N.W.2d at 628-29; *see also Pangalos v. Halpern*, 247 Minn. 80, 83, 76 N.W.2d 702, 706-07 (1956). In *Pangalos*, the Supreme Court held that a probate court order awarding attorney fees to attorneys who had represented the estate in litigation was not subject to collateral attack by a separate action. 247 Minn. at 83, 76 N.W.2d at 706-707. The court also held that even though the order was entered through a compromised settlement between the parties, it was still binding and conclusive, and not subject to a collateral attack through a separate action, in the absence of fraud. *Id.*; *see also In the Matter of Hormel Trusts*, 543 N.W.2d 668 (Minn. App. 1996) ("A court-approved accounting serves as a final judgment on all matters during that accounting period \* \* \* [a]ll court-approved matters determined in an approved accounting are res judicata."). These cases rest on the doctrine of *res judicata*, or claim preclusion, which is designed to prevent re-litigation of causes of action already determined in a prior action. *Beutz v. A.O. Smith Harvestore Prods.*, 431 N.W.2d 528, 531 (Minn. 1988).

**C. PRINCIPLES OF RES JUDICATA BAR MS. GREER'S FROM BRINGING THE GUARDIANSHIP CLAIMS ALREADY CONSIDERED AND RULED UPON IN THE PRIOR PROBATE PROCEEDINGS.**

Res judicata (a/k/a claim preclusion) bars a party from bringing a second action to litigate additional claims arising out of the same operative facts. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). *Res judicata* has three elements: (1) a final judgment on the merits, (2) a second suit involving the same cause of action, and (3) identical parties or parties in privity. *In re Matter of Hormel Trusts*, 543 N.W.2d at 671.<sup>3</sup> The principle underlying the rule of claim preclusion is that once an aggrieved party has had the opportunity to litigate a claim before an appropriate tribunal, such party ought not to have another chance to do so. 47 Am. Jur. 2d *Judgments* § 464. Thus, res judicata serves to promote judicial economy and finality, to prevent repetitive litigation and multiplicity of lawsuits, to prevent inconsistent results, and to increase certainty in judicial proceedings. *Id.* § 465 (“the doctrine of res judicata is a manifestation of the recognition that endless litigation leads to confusion or chaos” and “reflects the refusal of the law to tolerate a multiplicity of, or needless, litigation to the harassment and vexation of a party opponent”).

Here, Ms. Greer challenges PFI's actions as her guardian, made during the course of long-ago-concluded guardianship proceedings, which actions concern her medical care

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<sup>3</sup> Literally, *res judicata* means “a thing adjudged” and has been more freely translated as “a matter decided,” “a thing judicially acted upon or decided,” or “a thing or matter settled by judgment.” 47 Am. Jur. 2d *Judgments* § 463 (updated Apr. 2010). PFI's actions and decisions as a guardian for Ms. Greer, actions and decisions that the probate court supervised and approved, were clearly matters that were “acted upon or decided” or “settled by judgment” in the probate proceedings.

and place of abode, as well as the financial cost of such decisions. Ms. Greer's "guardianship claims" "arise out of the same set of *factual circumstances*" that were already litigated, or could have been litigated, in the prior probate proceedings. *Hauschildt*, 686 N.W.2d at 840 (emphasis added). If Ms. Greer had wished to challenge any of the decisions or actions she now laments, she could have and should have raised her complaints in the context of the probate proceedings through her court-appointed attorney, through filing objections and requesting a contested hearing, and through subsequent appeals. She cannot now reopen those proceedings and collaterally attack final probate orders allowing the accountings and expenses incurred. All three elements of *res judicata* are met.

**1. The Probate Orders are Final Judgments on the Merits.**

Orders and decrees of the probate court are final judgments which are binding and conclusive. *Hormel Trusts*, 543 N.W.2d at 671-72; *Bengston v. Setterberg*, 227 Minn. 337, 347-48, 35 N.W.2d 623, 628 (1949); *Wise v. Bix*, No. C4-88-2366, 1989 WL 35605, at \*2 (Minn. App. April 18, 1989) ("Determinations of the probate court are essentially final judgments which are binding and conclusive.") (APP-140 to 143.) Here, the orders of the probate court, including with the appointment, accountings, and termination concerning PFI's role as guardian, are final, binding and conclusive judgments.

**2. The Guardianship Claims Involve the Same Cause of Action.**

The second element is whether the claims involve the same cause of action. Contrary to Ms. Greer's assertions otherwise, the particular *legal* claims involved the two court proceedings need not be identical for *res judicata* to apply. The guardianship

claims are identical if the “same evidence would sustain both actions.” *Hormel Trusts*, 543 N.W.2d at 672. Moreover, the doctrine of res judicata bars both claims actually litigated—and claims that “could have been litigated”—in the prior case. *Id.*

Here, this lawsuit challenges decisions and actions of the guardian—and financial implications of those decisions—with respect to medical care and place of abode, which were either directly at issue, or could have been challenged, in the prior probate proceedings, through motions or through objections and challenges to the submitted annual and final accountings. Ms. Greer’s complaint alleges that PFI “forced Ms. Greer to remain at Hillcrest of Wayzata” and “approved unreasonably excessive home health care” after November 2006. (APP-7 to 8.) The specific claims include failing to provide services in the least restrictive manner possible, failing to take reasonable steps to return Ms. Greer to her home, and failing to provide the least restrictive living arrangements possible, resulting in “monetary damages.” (APP-7 to 8.)

In the prior probate proceedings, the decisions on medical care and place of abode—and the financial implications of those decisions—were directly at issue and subject to challenge, objections, a contested hearing, and appeal. Indeed, Ms. Greer directly challenged certain decisions. For example, Ms. Greer challenged the PFI’s decision to delay a return to her home. (APP-83 to 87.) Her challenge proceeded through the discovery process and was ultimately settled. (APP-89, 91, 92.) In addition, PFI’s decisions and their financial implications—now challenged in this instant lawsuit—were reflected in the annual accountings, including the First Annual Account approved

by the court in June 2006, and the Second Annual Account approved in May 2007, as well as the Final Accounting. (APP-94, 128, 259.)

As such, the guardianship claims in this lawsuit, and any claimed monetary losses arising from those claims, have already been asserted in the probate proceeding, or could have been asserted, and clearly arise out of the same factual circumstances—that is, decisions made by the guardian regarding medical care and place of abode. While a party may establish the applicability of res judicata by showing that two claims rest on identical evidence, a party may also demonstrate the applicability of res judicata to claims involving different legal theories, provided that the actions share a common *nucleus* of operative fact. *Anderson v. Werner Continental, Inc.*, 363 N.W.2d 332, 335 (Minn. App. 1985); *see also Roberts v. Flanagan*, 410 N.W.2d 884, 887 (Minn. App. 1987). Ms. Greer chose not to appeal from the orders of the probate court. Ms. Greer cannot now bring a separate lawsuit to re-litigate or re-open her probate proceedings. *See Anderson*, 363 N.W.2d at 334-35 (public policy favors the simultaneous adjudication of all claims arising from the same transaction or occurrence).

### **3. PFI and Ms. Greer were Parties to the Probate Proceedings.**

Res judicata's third element is whether the parties to both proceedings are the same. *Hormel Trust*, 543 N.W.2d at 671. Both Ms. Greer and PFI were "parties" to the prior probate proceedings for purposes of res judicata. They need not be precisely aligned as plaintiffs and defendants in both proceedings for res judicata to apply:

Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. **Identity of parties is not a mere matter of form, but of substance.** Parties nominally the same may be, in legal effect, different and parties nominally different may be, in legal effect, the same. A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them.

*Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-404 (1940) (internal citations omitted). Both received notice and both had the opportunity to attend all proceedings. The principles of res judicata support dismissal of this action.<sup>4</sup>

**D. WISE V. BIX IS DIRECTLY ON POINT.**

This Court has addressed a very similar fact situation to this case and refused to allow a collateral attack on final probate orders. *Wise v. Bix*, No. C4-88-2366, 1989 WL 35605 (Minn. App. April 18, 1989) (APP-141 to 143.)<sup>5</sup> In *Wise*, the “primary point of contention” was the ward’s desire to return to her home, and the conservator’s belief that the ward would be better provided for in a nursing home. 1989 WL 35605, at \*1. The ward filed a petition to remove the conservator and to appoint a successor conservator. The probate court initially refused to remove the conservator, then later allowed the ward

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<sup>4</sup> Ms. Greer argues that her lawsuit did not arise from the same facts or at the same time as her guardianship proceedings. To the contrary, Ms. Greer’s guardianship claims explicitly challenge PFI’s decisions and actions *made during the guardianship*—challenges that could have been brought as *PFI’s decisions and actions were being made and during the guardianship proceedings*. As such, the result in *Care Institute, Incorporated v. County of Ramsey*, 612 N.W.2d 443 (Minn. 2000), is clearly distinguishable. In *Care Institute*, the “same evidence [did] not sustain both actions.” *Id.* at 448. Here, evidence related to PFI’s alleged negligence and breach of fiduciary duties as Ms. Greer’s conservator would necessarily be the same as evidence that could have been presented by Ms. Greer in the probate proceedings as part of a petition to terminate the guardianship, or object to the accountings, or ask for other relief.

to return home and removed the conservator. *Id.* The ward then brought a lawsuit against the conservator for decisions made during the conservatorship. *Id.* at \*1-2.

The trial court summarily dismissed the case as a collateral attack on the probate court orders, a decision affirmed by this Court. *Id.* This Court held that the determinations of the probate court are essentially “final judgments” which were “binding and conclusive,” unless reversed or modified on appeal or in a direct proceeding. *Id.* at \*2. The Court held that the ward should have addressed her grievances within the probate proceedings. *Id.*

Similarly, Ms. Greer’s guardianship claims regarding her medical care and place of abode are “based on the same transactions which [were] the subject of the probate court’s orders” and should have been addressed during the probate proceedings. *Id.* Six months after the appointment of PFI, Ms. Greer moved to remove PFI as guardian. (APP-83 to 87.) Ms. Greer repeatedly voiced her disagreement with the level of medical care and place of abode, both personally and through sons and court-appointed attorneys. (See APP-83 to 87, 96-101, 103-110, 112-116, 120-123.) PFI’s decisions and the probate court’s rulings were subject to challenge within the context of the probate proceeding, through the annual and final accountings, and through any subsequent appeals. The probate proceedings cannot be collaterally attacked in this lawsuit, as this Court properly held in the *Wise* case. As these cases demonstrate, the issue is not whether a ward can challenge the decisions made by a guardian, but where and how those decisions can be challenged.

The Minnesota appellate court decisions are rife with examples of wards challenging the guardian and conservator decisions in the context of the probate proceedings. *See, e.g., In Re Conservatorship of Brady*, 607 N.W.2d 781 (Minn. 2000) (place of abode challenged in context of probate proceedings); *In Re Medworth*, 562 N.W.2d 522 (Minn. App. 1997) (place of abode challenged in probate proceedings). These decisions include challenges concerning the financial implications of guardian and conservator decisions—but again, the challenges are brought only within the probate proceedings in which the decisions were made. *See In Re Estate of Kroyer*, 385 N.W.2d 31 (Minn. App. 1986) (appeal from final accounting in probate proceeding regarding guardian’s decision to revoke Totten trust); *In Re Guardianship of Glenn*, 363 N.W.2d 348, 351 (Minn. App. 1985) (appeal from a final accounting addressing decision to not reinvest assets for a more favorable and aggressive interest rate).

As these cases demonstrate, all of Ms. Greer’s complaints in her “guardianship claims” could have been litigated in the context of the probate proceedings, including the interim and final accountings. This lawsuit represents an impermissible collateral attack on the final probate orders, and should be dismissed under principles of *res judicata*.

**CONCLUSION**

The guardianship claims in this lawsuit are undoubtedly based on the same transactions which were the subject of the underlying probate proceedings, which have been concluded, and for which the appeal period has long passed. Ms. Greer's lawsuit constitutes an impermissible collateral attack on her probate proceedings as her claims are barred by principles of res judicata. For these reasons, PFI respectfully requests that the Court affirm the Rule 12 dismissal of Ms. Greer's guardianship claims.

Dated: July 19, 2010

Respectfully submitted,

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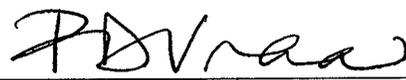
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**CERTIFICATION OF BRIEF LENGTH**

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing brief in Times New Roman, a proportional 13-point font, on 8 ½ x 11 inch paper with written matter not exceeding 6 ½ by 9 ½ inches. The resulting principal brief contains 5,372 words, as determined by employing the word counter of the word-processing software, Microsoft Word XP, used to prepare it.

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