



Petitioner argues that Counsel must be disqualified because he is a necessary witness in this action and there is a conflict of interest; namely, the Cross-Petitioner argues that Counsel drafted a power of attorney for L.W. that is highly relevant to the competing petitions for guardianship and his representation of L.W. in connection therewith is in conflict with Counsel's current representation of Petitioner; Counsel disagrees he is a necessary witness, arguing the power of attorney is irrelevant, but represents that he "agreed that he will not serve as trial counsel" based on the Cross-Petitioner's intent to call him as a witness, rendering the issue moot;<sup>6</sup>

WHEREAS, Counsel noticed the depositions of B.S.W. and A.S.W. for September 24, 2021;<sup>7</sup> subpoenas were served on B.S.W. and A.S.W. on September 10, 2021;<sup>8</sup> but neither appeared for their deposition and Counsel filed a motion for rule to show cause or, alternatively, *in limine* to preclude on September 27, 2021 (the "First Deposition Motion");<sup>9</sup>

WHEREAS, Counsel noticed the depositions of M.W. and C.M.W. (B.S.W., A.S.W., M.W., and C.M.W. will be addressed collectively as the "Third-Party Witnesses") for September 29, 2021;<sup>10</sup> a special process server confirmed he was

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<sup>6</sup> D.I. 65.

<sup>7</sup> See D.I. 35-36.

<sup>8</sup> *Id.*

<sup>9</sup> D.I. 56.

<sup>10</sup> See D.I. 62.

unable to personally serve M.W. or C.M.W. with the subpoenas;<sup>11</sup> neither appeared for their deposition and Counsel filed a motion for rule to show cause or, alternatively, *in limine* to preclude on September 30, 2021 (the “Second Deposition Motion”, together with the First Deposition Motion, the “Deposition Motions”);<sup>12</sup>

WHEREAS, an evidentiary hearing on the cross-petitions is scheduled for October 13, 2021 (the “Trial”);<sup>13</sup>

WHEREAS, the Cross-Petitioner moved to disqualify Counsel under Delaware Rule of Professional Conduct 3.7(a), but “use of Rule 3.7(a) as a sword is problematic and disfavored[;]”<sup>14</sup> as such, the Cross-Petitioner “must prove, by clear and convincing evidence, both (1) the existence of a conflict and (2) how the conflict will prejudice the fairness of the proceedings;”<sup>15</sup> the Cross-Petitioner must also demonstrate “that there is a reasonable likelihood that [opposing] counsel will be a *necessary* witness in the same litigation[;]”<sup>16</sup>

WHEREAS, a rule to show cause may be issued when a person subject to this Court’s jurisdiction has failed to comply with an order or rule of this Court; under Court of Chancery Rule 45(e) “[f]ailure by any person without adequate excuse to

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<sup>11</sup> D.I. 54-55. Revised affidavits were filed a few days later reflecting the subpoenas were posted on their front door on September 24, 2021, three business days before the depositions. D.I. 62.

<sup>12</sup> D.I. 63.

<sup>13</sup> D.I. 24.

<sup>14</sup> *In re Straight Path Commc ’ns Inc. S’holder Litig.*, 2021 WL 2913069, at \*2 (Del. Ch. July 12, 2021).

<sup>15</sup> *Id.* (citations omitted).

<sup>16</sup> *Id.* (citation and quotation marks omitted, alteration in original).

obey a subpoena served upon the person may be deemed a contempt[;]” “[c]ontempt sanctions may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard[;]”<sup>17</sup> “[t]he purpose of the sanction for civil contempt is to compel compliance with the order or to compensate [the movant] for the contumacious conduct . . . [;]”<sup>18</sup>

IT IS HEREBY ORDERED, this 5<sup>th</sup> day of October 2021, as follows:

1. The motion to disqualify is DENIED IN PART AS MOOT. Counsel will not be formally disqualified but he is expected to follow through with his offer not to act as trial counsel and is expected to be available to testify, if called.<sup>19</sup>

a. The claimed conflict in Counsel’s prior representation of L.W. and his current representation of the Petitioner is concerning. Further, I find inquiry into the power of attorney (how it came to be, who did what, when, etc.) is highly relevant to the question of *who* should be appointed as guardian; Counsel is also a necessary witness regarding such topic.

b. But disqualification is disfavored, and the Cross-Petitioner has not met his high burden of presenting clear and convincing evidence of prejudice to

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<sup>17</sup> *DiSabatino v. Salicete*, 671 A.2d 1344, 1349 (Del. 1996) (citations and quotation marks omitted).

<sup>18</sup> *State ex rel. Oberly v. Atlas Sanitation Co., Inc.*, 1988 WL 88494, at \*3 (Del. Ch. Aug. 17, 1988).

<sup>19</sup> I find *In re Estate of Waters* distinguishable because Counsel has voluntarily stepped aside as trial counsel and will not “appear simultaneously as a trial advocate and testify as a witness on the contested issues presented.” 647 A.2d 1091, 1092 (Del. 1994).

the proceedings, particularly considering Counsel's offer. Further, L.W. is represented by an attorney *ad litem*, who has not voiced any concerns from, or claimed prejudice to, L.W.

c. Counsel has offered to step aside as trial counsel. I take him up on that offer and raise him—Counsel shall make himself available to testify. The parties shall meet and confer regarding the appropriate limitations on Counsel's participation in the Trial. I expect Counsel would be treated like any other witness rather than as a "second chair"; any disagreements or concerns about his participation may be raised and addressed at the start of the Trial.

2. The Deposition Motions are DENIED without prejudice.

a. Guardianship cases must proceed expeditiously. This leaves little time for pre-trial discovery and begs for all parties to act cooperatively and reasonably with each other to make the best and most efficient use of their time. It appears, however, that pre-trial discovery in this action has been fraught. I implore all parties to refocus and recommit to litigating this action in the Delaware way.

b. The Petitioner has not requested compulsory sanctions and rather seeks a finding of contempt, with appropriate sanctions, to preclude the testimony of the Third-Party Witnesses, and to strike their objections.

i. Although this Court cannot tolerate willful disregard of its subpoenas, it would be a distraction to move forward with remedial contempt

proceedings against the Third-Party Witnesses before, or concurrently with, the Trial. A request for civil remedial sanctions may be resubmitted after a final order is issued in this action and will be considered after notice and an opportunity to be heard.

ii. Even assuming proper notice, the opportunity to respond, and a finding that the Third-Party Witnesses acted contemptuously, I find preclusion of their testimony would not be an appropriate sanction. The Third-Party Witnesses are not permitted to affirmatively present evidence or argument at the Trial. The only way they will testify is if called by the Petitioner or the Cross-Petitioner, neither of whom control the Third-Party Witnesses. I will not bar any party from calling the Third-Party Witnesses, but any side who calls the Third-Party Witnesses should appreciate that their conduct during discovery will be a fair line of inquiry.

iii. I appreciate the Petitioner's concern about the Third-Party Witnesses' written objections. Because I am not inclined to rely on those objections in making my final decision, I decline, however, to strike them from the record. If any party seeks to admit or rely on the objections during the Trial, a proper foundation will need to be laid, evidentiary objections will be entertained, and, if admitted, I will give such exhibits the weight and credibility I find each deserves.

3. This is a final report under Court of Chancery Rules 143 and 144 and exceptions are stayed until a final order is issued on the cross-petitions for guardianship.

**IT IS SO ORDERED.**

/s/ Selena E. Molina  
Magistrate in Chancery