MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Guardianship of Carol Stalions, an Alleged Incapacitated Adult;

Randy Stalions,

Appellant-Intervenor,

v.

Benjamin Stalions[1] and Beth Sullivan-Summers,

Appellees-Petitioners.

March 14, 2022

Court of Appeals Case No. 21A-GU-978

Appeal from the Morgan Superior Court

The Honorable Brian H. Williams, Judge

Trial Court Cause No. 55D02-2002-GU-10

[1] Benjamin Stalions changed the spelling of his last name to "Stallions." In this opinion, his last name will be spelled as "Stalions," as it appears in the trial court record.

Najam, Judge.

Statement of the Case

[1] Randy Stalions ("Randy") appeals from the trial court's order that denied his motion to dismiss the petition to establish guardianship over Carol Stalions ("Carol") that was filed by Benjamin Stalions ("Ben") and Beth Sullivan-Summers ("Beth"). Randy raises two issues for our review, which we restate as:

1. Whether the trial court abused its discretion when it found that Carol lacked sufficient mental capacity on February 28, 2020, to execute a general durable power of attorney and a power of attorney for healthcare and quality of life.

2. Whether the trial court committed fundamental error by violating Randy's due process right to a fair trial before an impartial decision maker.

[2] We affirm and remand with instructions.

Facts and Procedural History

[3] Carol is a seventy-five-year-old woman who, until widowed in 2020, lived with her husband Wilbur Stalions ("Wilbur") in Martinsville, Indiana, in a home the couple built in 1972. Earlier in her life, Carol had an aneurism that required brain surgery and caused her to suffer neurological limitations, including blackouts and seizures, that have continued throughout her life. She has suffered from epilepsy since she was twenty years old. Carol graduated from

the Art Institute of Chicago and worked as an artist and as a filing clerk. She and Wilbur were married for fifty-two years.

[4] Carol and Wilbur had three children, Ben, Laura, and Randy. Ben, the couple's eldest son, is married and has been living in Virginia since 2009. Ben moved out of the family residence in 2009 but would return to visit with his parents and Randy once or twice per year. Laura currently lives in Oregon and is estranged from the family. Randy, the youngest son, who was around forty-one years old at the time the events relevant to this appeal took place, has lived with his parents his entire life and has served as his parents' caretaker. Randy has never been married and has no children. He works "part time, here and there[,]" installing television antenna systems and restoring golf equipment. Tr. Vol. 2 at 177.

[5] Wilbur passed away in January 2020. In his later years, he suffered from Alzheimer's Disease. During the two to three years that preceded Wilbur's death, Ben noticed a strong smell of urine in his parents' house—primarily in the family room where Wilbur spent most of the time—and that the smell became progressively worse. When Ben expressed his concern to Randy, Randy did not take the matter seriously and told Ben, "[I]f my dad's peeing on the carpet and we clean it, dad's just going to pee on the carpet after we clean the carpet." *Id.* at 25.

[6] During one of Ben's visits, in either October or December of 2019, Ben discovered in his parents' basement a deep freezer that had been unplugged and

was filled with spoiled food. Ben was concerned that Carol would consume rotten or moldy food. When Ben told Carol and Randy about the freezer, Carol "didn't have a whole lot of reaction[,]" and Randy said, "well that's not good." *Id.* at 52. On another visit in October 2019, Ben and Randy installed a video surveillance camera on the front porch of their parents' house. Video captured by the camera showed that on October 15, Randy kicked Wilbur in his upper right leg while Wilbur sat on a porch swing.

[7] In early January 2020, unbeknownst to Randy, Ben installed two "nanny" cameras inside of their parents' home because, after having seen Randy kick Wilbur in October 2019, Ben "wanted to keep an eye on [his] dad." *Id.* at 34, 35. Within two hours of Ben installing the cameras, Ben's wife, who was watching the video feed from a different location, called Ben and told him that the feed showed Randy physically and verbally mistreating Wilbur. Randy's mistreatment of Wilbur continued over the next several days. The videos showed that, on January 4 and 6, Randy punched Wilbur in the left side of his head, punched Wilbur in the back twice and called him stupid, forcefully moved Wilbur from a couch to a wheelchair, smacked Wilbur's hands away from his face, and kicked Wilbur in the leg.

[8] Ben contacted Adult Protective Services ("APS") and provided the agency with the videos. On January 7, APS had Wilbur removed from his home and placed in a care facility. On January 17, Randy was charged with battery resulting in

bodily injury to an endangered adult, as a Level 5 felony, and neglect of a dependent, as a Level 6 felony.[2]

[9] While Wilbur was in the care facility, he contracted pneumonia and was transported to the hospital. He died on January 19, and his funeral was held on February 1. During the funeral, Carol became confused and did not recognize Ben. She believed that her son Ben was actually her brother James Long ("Jim"), even though Carol had last seen Ben two weeks before the funeral.

[10] Ben decided to seek guardianship of Carol after he "spoke with [APS] in detail[,]" and APS "strongly advised" that Ben do so, "due to what [had] happened to [Wilbur]." *Id.* at 63. On February 3, Ben had Carol sign a durable financial power of attorney ("February 3 POA"). Ex. at 3-15. Nine days later, on February 12, Ben and Beth[3] (collectively, "the Guardians") filed an emergency petition for appointment of guardian over Carol ("Emergency Petition").[4] The Guardians alleged that Carol was unable to maintain and care for her financial affairs and person because she suffered from several incapacities, including dementia; Carol was a "poor historian, has very poor personal hygiene and lack of self-care, fails to follow-up on medical care, fails to

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[2] On January 28, 2021, Randy pleaded guilty to neglect of a dependent, as an Alternate A misdemeanor, and was sentenced to 365 days in jail, with six days to be served and the remainder of the sentence suspended pending satisfactory completion of the terms of a two-year probation.

[3] APS recommended that Beth, a licensed attorney who resides in Mooresville, serve as a co-guardian of Carol because Ben lives outside of Indiana.

[4] Laura gave her written consent to the guardianship, which was filed on February 13, 2020. Appellant's App. Vol. II at 4.

remember medical visits and gets angry easily and very defensive"; Carol was "an immediate threat to herself[d]ue to her cognitive defects and mental impairment"; "[Randy] may pose a threat to [Carol's] safety and welfare" because Wilbur "was removed from the home on January 7, 2020 due to [Randy's] neglect and battery of his father"; and "[t]here is currently no homeowner's insurance on [the Martinsville] house because the insurance company has determined the house is uninsurable due to the condition of the house."[5] Appellant's App. Vol. II at 16-18.

[11] The Guardians attached to their Emergency Petition a report that was prepared by Advanced Nurse Practitioner Lu Sclair, who had known Carol for six years and medically examined Carol on January 14, 2020. The report provided, among other things, a diagnosis for Carol of dementia and progressive memory changes, and Sclair indicated in the report that a guardianship for Carol would be helpful.[6]

[12] On February 13, Randy took Carol to meet with Dale Coffey, who was then in his twenty-fourth year as an estate planning attorney. Coffey, who had not met Carol before, spoke privately with Carol for about forty-five minutes about her

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[5] The Guardians alleged in the Emergency Petition in relevant part that there was no balcony for the sliding patio door that was located in the second-floor master bedroom.

[6] At the hearing held on March 6, 2020, for the Emergency Petition, the trial court considered Sclair's medical report. However, at the hearing held approximately one year later on Randy's motion to dismiss the temporary guardianship that the trial court had imposed on March 6, 2020, the report was not entered into evidence. The trial court sustained Randy's objection to the introduction of the report on grounds of hearsay.

estate planning needs. Coffey was not informed of the pending guardianship proceedings, which he first learned of a year later. Carol asked Coffey to draft for her a will, a general durable power of attorney, and a healthcare power of attorney.

[13] Coffey drafted the documents and sent them to Carol for review. Randy and Carol then returned to Coffey's office on February 28 for a follow-up consultation. Coffey again met alone with Carol and asked Carol if she had questions about the documents. Carol indicated that "everything looked good[,]" and she signed the general durable power of attorney and the healthcare power of attorney (hereinafter referred to collectively as the "February 28 POAs"), both of which named Randy as her primary attorney-in-fact and her brother, Jim, as her secondary attorney-in-fact.[7] Tr. Vol. 2 at 92. The general durable power of attorney gave Randy complete control over Carol's finances and provided in relevant part:

> 8. Effective Date and Incapacity. This Power of Attorney shall be effective as of the date of its execution and my disability or incompetence shall not affect or terminate this Power of Attorney. *This Power of Attorney shall terminate only upon the execution and recordation of a written revocation of this Power of Attorney with the Recorder's Office of the County of my domicile*.

[7] Carol executed the will that was prepared by attorney Dale Coffey; however, there is no copy of the will in the record. *See* Tr. Vol. 2 at 104.

Appellant's App. Vol. II at 37 (emphasis added).

[14] The court held a hearing on the Emergency Petition on March 6. Randy and Carol received notice of the hearing on March 5, but Randy did not attend because he had difficulty finding an attorney to represent him. Following the hearing, the trial court issued an order that found that Carol was in need of a guardian "by reason of her incapacity, that she is mentally unable to give her consent, and that it is in the best interest of [Carol] that a [g]uardian be appointed over her and her property." Appellees' App. Vol. 2 at 3. The court appointed Ben and Beth as temporary guardians over Carol's person and estate. The court set a second hearing for May 1 to determine whether a permanent guardian was needed.

[15] The Guardians then attempted to locate Carol, but they were unable to find her because Randy and Carol were "staying low" at the home of a family friend. Tr. Vol. 2 at 182. Randy wanted to first obtain legal advice regarding the March 6 order. On March 9, the Guardians filed an "Emergency Petition for Pick-Up Order," and, the next day, the trial court issued an emergency pick-up order for Carol. Appellees' App. Vol. 2 at 5-7, 8-10. That same day, on March 10, Randy was served with the pick-up order, and he then delivered Carol to The Springs of Mooresville, an assisted-living facility, where Carol continues to reside.

[16] On March 13, Randy filed a motion to intervene as an interested person in the guardianship proceeding, and, on the same date, Randy filed a verified petition

to vacate the temporary guardianship. In his petition, Randy asked the court to vacate its March 6 order, appoint a guardian ad litem to represent Carol's best interests, and appoint Randy as Carol's guardian if the court determined that she needed one. Randy's petition did not inform the court that Carol had signed the February 28 POAs that appointed him as her attorney-in-fact. The trial court granted Randy's motion to intervene on March 18.

[17] In the following months, Carol underwent psychiatric evaluations at two different facilities, and she was examined by a total of four individuals. On April 1, Carol underwent an assessment and neuropsychological evaluation at Greenhouse Mental Healthcare, that was performed by a clinician. The clinician noted in his report that Carol described herself as having difficulty with short term memory, but further noted that her long-term memory appeared to be "generally intact." Appellant's App. Vol. II at 50. The clinician concluded that Carol "is living with moderate stage dementia accompanied by moderate to severe short and intermediate term memory loss as well as moderate intellectual disfunction secondary to psychomotor epilepsy" and major depression. *Id.* He recommended "24/7 nursing care . . . for her safety and her physical and mental care. Given her impaired judgment, it is recommended that she have help in making informed decisions about her health and legal issues, i.e., a guardian is recommended." *Id.* On June 6-13, Carol underwent psychiatric and medical evaluations at Brightwell Behavioral Health where she was examined by three individuals—a board certified family nurse practitioner, an advanced-practice registered nurse, and a physician. The

medical reports on the evaluations revealed a "diagnostic impression" of Carol that included major neurocognitive disorder with dementia. *Id.* at 59.

[18] On July 6, and based on the onset of the coronavirus pandemic, the trial court issued an order that clarified that the appointment of the temporary Guardians would continue in effect, and that time limitations would be tolled. The court appointed a guardian ad litem ("GAL"), and it directed the GAL to investigate whether a guardianship was needed and to provide a report that identified the person who, in the GAL's best judgment, should be appointed as Carol's guardian.

[19] On July 23, the trial court appointed attorney Kele Bosaw to serve as the GAL for the proceedings. Between November 5, 2020, and January 29, 2021, Bosaw interviewed Randy; Ben; Ben's wife; Carol; Beth; and Brandon Hislope, the Director of Social Services at the assisted-living facility where Carol resides. On February 11, 2021, Bosaw filed her report with the court. Bosaw reported that Ben had told her that "Carol can't climb stairs, can't drive, and can't be left alone[,]" and that Hislope told her that Carol's situation was "a sad story[,]" and "Carol has dementia and doesn't always understand things." Appellees' App. Vol. 2 at 19, 20. The GAL also provided notes from her visit with Carol at the assisted-living facility that took place on January 29, 2021. Specifically,

> Carol appeared happy in her room and was pleasant. . . . I asked her how many children she had and she said 3, but that they are all grown. . . . I asked her what year it was and she said 1971. I asked her if she drives and she said yes, before but not now. She said she had a black Buick that her father gave her. . . . She said

> her husband died and her son had her leave home right after. She said her big house is sitting empty and she's not sure what to do with it. . . . She did not become upset at any time and remained pleasant and enjoyed our visit. I spoke with Ashlee Yoder, an assistant who works with Carol. She said that Carol is clearly not competent. She said Carol is doing much better now than before and said that Carol gets upset talking about family and court matters.

Id. at 21-22.

[20] Bosaw summarized her report as follows:

> [Carol] is 73 years old, widowed, and suffers from dementia, memory loss, epilepsy, and other minor health issues. . . . I have reviewed medical records from Brightwell Behavioral Health and Greenhouse Mental Healthcare which I have attached. Carol is unable to care for herself without assistance and supervision. There have been reports of falls by both family and medical [sic]. Carol sometimes does not recognize her own son or know what year it is. Carol is not able to handle her own financial affairs.

Id. at 22. Bosaw recommended that "a permanent guardianship over the person and estate of [Carol] be ordered" by the court and that Ben and Beth remain as the Guardians. *Id.* at 23.

[21] Bosaw filed a supplemental GAL report on March 22, 2021, in which she noted the following regarding her interview with Carol's brother, Jim:

> On March 19, 2021, I spoke with [Jim], the younger brother of [Carol]. . . . He said the last time he saw Carol was at her husband's funeral in January 2020, a month prior to the execution of [the February 28 POAs]. He said Carol appeared

> confused. She did not recognize her own son, Ben. She was confused about several people. It is his opinion that she was not of a stable mind at that time. He has not seen her since the funeral due to COVID, but he has received cards and letters and talked to her on the phone. He said she mostly makes sense but is still confused with people. It is his opinion that Carol was not competent at the time she executed the[February 28 POAs].

Id. at 37. Bosaw's recommendation from her supplemental report reads:

> It is my belief that [Carol] was not competent at the time she allegedly signed the [February 28 POAs], therefore it is my opinion that [the documents are] not valid. This is supported by [Sclair's report] dated January 14, 2020, as well as the medical report from Greenhouse Mental Healthcare which was attached to my first report. Even if it is determined to be valid, I recommend that Randy not be able to serve in any capacity due to past abuse and neglect of his father[.]
>
> I recommend that a permanent guardianship over the person and estate of [Carol] be ordered by this Court. I recommend that [Ben] and [Beth] remain as [the Guardians.]

Id. at 38.

[22] After several continuances, a hearing on the guardianship matter was set for February 19, 2021. However, that morning, Randy filed a motion to dismiss the guardianship and a separate motion for a more definite statement.[8] In his

[8] This information comes from the chronological case summary, as the parties did not provide this Court with a copy of Randy's motion for a more definite statement. *See* Appellant's App. Vol. II at 10.

motion to dismiss, Randy argued that the February 28 POAs gave him the exclusive right under Indiana Code Section 30-5-3-4(d)[9] to make decisions regarding Carol's healthcare and her property and that, given the existence of the February 28 POAs, the guardianship should be dismissed. In his pleading, Randy informed the court that he did not disclose the existence of the February 28 POAs until the filing of his motion to dismiss because he "did not previously understand the total legal effects of [the] documents[.]" Appellant's App. Vol. II at 32. Randy asked the court to hear his motion that day, but the trial court declined, given the short notice, and instead determined that the motion would be heard along with the Guardians' Emergency Petition. On March 5, the Guardians filed a response to Randy's motion for a more definite statement, indicating that the Guardians intended to argue that Carol was not mentally competent at the time she executed the February 28 POAs and that, in the alternative, if the February 28 POAs were found to be valid, the Guardians would argue that Randy should not be permitted to serve as Carol's attorney-in-fact.

[23] The hearing on the Emergency Petition and Randy's motion to dismiss was held on March 24 and concluded on March 29. The parties stipulated to the

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[9] Indiana Code Section 30-5-3-4(d) provides:

> (d) A guardian does not have power, duty, or liability with respect to property or personal health care decisions that are subject to a valid power of attorney. A guardian has no power to revoke or amend a valid power of attorney unless specifically directed to revoke or amend the power of attorney by a court order on behalf of the principal. A court may not enter an order to revoke or amend a power of attorney without a hearing. Notice of a hearing held under this section shall be given to the attorney in fact.

admission of the GAL reports, which contained the letter from Hislope, the Director of Social Services at the assisted-living facility where Carol resides, and the reports from the psychological evaluations that were performed by Greenhouse Mental Healthcare and Brightwell Behavioral Health.

[24] On April 22, 2021, the trial court issued its final order. In its order, the court noted that the purpose of the hearing was "to determine whether [Ben] and [Beth] should be appointed [g]uardians of [Carol], or alternatively, whether said [g]uardianship should be terminated and [Randy] appointed as [Carol's] Power of Attorney and Healthcare Representative pursuant to the [February 28 POAs]." *Id.* at 13. The court found that Carol "did not have sufficient mental capacity on February 28, 2020[,] to execute" the February 28 POAs. *Id.* The court further found that the "allegations contained in the [Guardians' Emergency] Petition are true" and that Carol was in need of a guardian "by reason of her incapacity, that she is mentally unable to give her consent, and that it is in the best interest of [Carol] that a [g]uardian be appointed over her and her property and that [Ben] and [Beth] are suitable persons to serve as her [g]uardians." *Id.* at 14. The court denied Randy's motion to dismiss and appointed Ben and Beth as guardians of Carol's person and estate. This appeal ensued.

Discussion and Decision

Standard of Review

[25] The trial court is vested with discretion in making determinations as to the guardianship of an incapacitated person. *In re Guardianship of Atkins*, 868 N.E.2d 878, 883 (Ind. Ct. App. 2007) (citing Ind. Code § 29-3-2-4 (2001)), *trans. denied.* Therefore, we review the trial court's judgment for an abuse of discretion. *In re Guardianship of M.N.S.*, 23 N.E.3d 759, 765 (Ind. Ct. App. 2014). In determining whether the trial court abused its discretion, we review the court's findings and conclusions, and we may not set aside the findings or judgment unless they are clearly erroneous. *Id.* at 766. We will not reweigh the evidence nor will we reassess the credibility of witnesses; instead, we will consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. *Id.* We review questions of law de novo and owe no deference to the trial court's legal conclusions. *In re Guardianship of Phillips*, 926 N.E.2d 1103, 1107 (Ind. Ct. App. 2010).

Issue One: Carol's Mental Capacity to Execute the February 28 POAs

[26] Randy argues that the trial court abused its discretion when it found that Carol did not have sufficient mental capacity on February 28, 2020, to execute the February 28 POAs. However, before we decide this issue, we first address the Guardians' contention that Randy is "estopped" from raising on appeal the issue of Carol's mental competency. Appellees' Br. at 19. According to the Guardians, because Randy testified that he believed that a guardianship should be created for Carol and that Carol "needed care," he "cannot now be heard to

complain that the [t]rial [c]ourt found Carol incapacitated or that a guardianship was established for her." *Id.* at 18, 21. And he cannot assert on appeal that "Carol's [February 28] POAs are valid and that . . . the [February 28] POAs negate or supplant the need for a guardianship." Tr. Vol. 2 at 191-92; Appellees' Br. at 21. The Guardians maintain that, in raising such an argument, "Randy is now taking a position inconsistent with the position he maintained in the [t]rial [c]ourt, which cannot serve as a basis for error[,] and Randy is estopped from challenging the imposition of Carol's guardianship." Appellees' Br. at 21. We cannot agree.

[27] The Guardians focus on certain testimony that Randy provided at the March 2021 hearing but do not acknowledge his other testimony that cuts against their argument. For example, the Guardians note that, when Randy was questioned by the GAL, Randy testified as follows regarding whether Carol needed a guardian at the time the March 2021 hearing was taking place:

> QUESTIONING BY MS. BOSAW:
>
> Q. [Randy], after hearing all of the testimony thus far, what is it that you want the Court to decide today?
>
> A. Basically what's been laid out. *Whether mom needs a guardian, who it should be*.
>
> Q. Do you believe that there should be a guardianship?
>
> A. I think that . . .

[RANDY'S COUNSEL]: I object to the extent that the question asks for a legal conclusion. If it's asking about what his opinion of his . . . of her care, that's fine.

THE COURT: Objection is overruled. You can answer the question.

Q. Do you believe that there should be a guardianship?

A. *I think there probably should be at this moment*.

Q. Who should be the guardians?

A. *I believe I should*.

Q. Do you believe that your mother needs care?

A. Yes.

Tr. Vol. 2 at 191-92 (emphases added). But the Guardians seem to ignore that Randy presented additional testimony from several witnesses, including the attorney who drafted the February 28 POAs, who all testified that Carol appeared to be mentally competent on, and prior to, February 28.

[28] In its final order, the trial court stated that the March 2021 hearing was held to determine whether Ben and Beth should be appointed Guardians of Carol, "or alternatively," whether the guardianship should be terminated and Randy appointed as Carol's "Power of Attorney and Healthcare Representative pursuant to the related documents executed by [Carol] on February 28,

2020." Appellant's App. Vol. II at 13. This was a combined hearing on Ben and Beth's Emergency Petition for appointment of guardian and Randy's motion to dismiss. The trial court concluded that Carol did not have sufficient mental capacity to execute the February 28 POAs and denied Randy's motion to dismiss.

[29] At the hearing, Randy presented testimony and evidence that Carol was mentally competent to execute the February 28 POAs, but he also testified that at the time of the hearing, a guardianship over Carol was "probably" necessary. Tr. Vol. 2 at 191. On appeal, the Guardians contend that, "By the time the hearing had concluded, Randy's position was *only* that he should be the person appointed as Carol's guardian." Appellee's Br. at 18 (emphasis added). Thus, the Guardians argue that, "Randy cannot take the position at trial that the court should decide whether Carol needs a guardianship, and then complain on appeal that a guardianship was set up for her." *Id.* at 21. The Guardians characterize Randy's position on appeal as an "about face," which they attribute to a legal theory and strategy that the best chance for Randy to prevail on appeal, and for him to remain in control of Carol's person and estate, would be for this Court to re-instate the February 28 POAs. *Id.*

[30] The Guardians contend that Randy's argument that the February 28 POAs are valid is simply intended to "negate or supplant the need for a guardianship." *Id.* But we conclude that, when Randy testified at the March 2021 hearing that Carol "probably" needed a guardian, he did not abandon his contention that the February 28 POAs were valid, and he is not "estopped" from raising that

issue on appeal. Tr. Vol. 2 at 191; Appellees' Br. at 19. As a matter of law, the validity of the February 28 POAs and the need for the appointment of a guardian are not per se mutually exclusive, that is, the February 28 POAs would not necessarily "negate or supplant the need for a guardianship." Appellees' Br. at 21. However, if the POAs were valid, that would buttress Randy's claim that, as the person designated in a durable power of attorney, he would be entitled to priority in consideration for appointment as Carol's guardian and that he should be appointed as guardian. *See* Ind. Code § 29-3-5-5(a)(1) (a person "designated" in a durable power of attorney is first in the order of consideration for appointment as a guardian). But, as Carol's attorney-in-fact, Randy would not be entitled to appointment, only to consideration for appointment. Further, Carol's February 28 general durable power of attorney did not nominate Randy as her preferred guardian. *See* Ind. Code 30-5-3-4(a) (a principal may nominate a guardian for consideration by the court). In sum, even as attorney-in-fact, Randy would not necessarily have priority over his sibling, Ben, and Beth, an attorney. *See* I.C. § 29-3-5-5(b) ("With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as guardian.")

[31] Rather, as the Guardians point out, a court is required to appoint "a qualified person or persons most suitable and willing to serve[.]" I.C. § 29-3-5-4(a); s*ee also* Appellees' Br. at 19. At the hearing on February 19, 2021, the trial court noted that Randy had been convicted of neglect of a dependent, under a plea agreement, which caused the court "significant concern about his fitness." Tr.

Vol. 2 at 4-5. But even if, for sake of argument, the February 28 POAs were valid, and Randy were not disqualified, that may not be the last word. As we have already noted, a power of attorney would not necessarily obviate the need for a guardianship. And the trial court would still have discretion to appoint Ben and Beth as guardians for Carol. In that case, as a practical matter it would be difficult for the attorney-in-fact and the Guardians to exercise simultaneous authority over Carol's person and estate. To avoid the inevitable conflicts and confusion under those circumstances, after notice and a hearing, the trial court would have ultimate authority and discretion to direct the Guardians to revoke or amend the powers of attorney on behalf of the principal. *See* I.C. § 30-5-3-4(d).

[32] The question remains whether the trial court abused its discretion when it found that Carol did not have sufficient mental capacity on February 28 to execute the February 28 POAs. Initially, we observe that a power of attorney is a contractual agency relationship, and incapacity may in general be a defense to contracts undertaken by a party. *See Scherer v. Scherer*, 405 N.E.2d 40, 47 (Ind. Ct. App. 1980) (citing 6 I.L.E. Contracts § 61 at 115; *Reinskopf v. Rogge*, 37 Ind. 207 (1871); and *Cummings v. Henry*, 10 Ind. 109 (1858)). The mental capacity required to enter into a contract "is whether the person was able to understand in a reasonable manner the nature and effect of his act" on the date of the agreement. *Wilcox Mfg. Group, Inc. v. Mktg. Servs. of Ind., Inc.*, 832 N.E.2d 559, 562, 563 (Ind. Ct. App. 2005); *see also Duncan v. Yocum*, 179 N.E.3d 988, 1002 (Ind. Ct. App. 2021) (holding that Appellants failed to establish that ninety-five-

year-old man lacked the contractual capacity necessary to revoke his prior power of attorney and execute a new one). In order to avoid a contract, the party must not only have been of unsound mind, but also must have had no reasonable understanding of the contract's terms due to the individual's instability. *Wilcox Mfg. Group.*, 832 N.E.2d at 562-63.

[33] In support of his argument, Randy relies largely on *Farner v. Farner*, 480 N.E.2d 259 (Ind. Ct. App. 1985). In *Farner*, we affirmed the trial court's determination that Carl Farner, at seventy-six years old, was competent to make a will at the time he did so in early 1973. We explained:

> The trial court acknowledged that Carl was sometimes uncharacteristically confused and irritable but his condition was commensurate with his age. These findings are supported by the evidence. The attorney who drafted Carl's will testified when he met with him, Carl understood what his property included and indicated who his relatives were. On both the day the will was drafted and the day it was executed Carl expressed his desire that Bub[, the sole beneficiary and executor of the Carl's will,] receive everything. There was documentary and oral evidence Carl's mental state fluctuated following the execution of the will but he was considered competent as late as 1975.

Id. at 259.

[34] Randy likens the instant case to *Farner* and argues, essentially, that there was insufficient evidence presented at the hearing to support the trial court's finding regarding Carol's mental capacity. According to Randy, other than his and Ben's testimony, "the only competent evidence of probative value on the issue

of whether Carol was of sound mind to execute the [February 28 POAs]" came from the testimony of the attorney who prepared the documents and the testimony of two friends of the Stalions' family, Sheryl Hoss and Melody Mallory. Appellant's Br. at 18. Randy maintains that there is "no competent evidence of probative value nor any reasonable inferences that [can] be drawn from" the two medical evaluations that were admitted into evidence at the hearing. *Id.* at 19, 20. Randy adds that "[t]he only *nonmedical* evidence offered on the issue of whether Carol *did not have* sufficient mental capacity to execute [the February 28 POAs]" came from Ben and Carol's brother, Jim. *Id.* at 20 (emphases added). We conclude, however, that the case before us is distinguishable from *Farner*.

[35] At the hearing on the Emergency Petition and Randy's motion to dismiss, several witnesses presented conflicting testimony regarding Carol's mental competency on or preceding February 28, 2020. Ben testified that, in January and February of 2020, some days Carol would know what year it was and "some days she probably couldn't." Tr. Vol. 2 at 75. Ben told the court that Carol "knew who Randy was most of the time," but would confuse Ben with her brother Jim. *Id.* At 75. Jim testified as follows regarding Carol's mental state at Wilbur's funeral:

> As Ben has said, she was confused. I was sitting right behind her . . . at the funeral, and Ben walks up, and she didn't recognize who he was. And I kind of looked at my wife, and then finally [Ben] said to her, he said, I'm your son. . . . I mean she just wasn't all knowing. . . . [Ben] walked up to her, and she just didn't recognize who he was.

Id. at 82. When Jim was asked on cross-examination if he believed Carol was of "sound mind," he answered: "As I said before, when she doesn't know her own son, and get[s] confused with that, I'd say no." *Id.* at 87.

[36] Attorney Coffey testified that he had devoted his legal practice solely to estate planning. *Id.* at 90. He further testified that, when he met with Carol on February 28, 2020, Carol "definitely knew the objects of her bounty, in that she knew she had three children, she knew how she wanted to leave her property in regard to those three children, [and] she appeared to be competent to me." *Id.* at 93. In sum, Coffey testified that, in his opinion, Carol had testamentary capacity. He further testified that Carol appeared to be "clear" regarding "what [she was] doing." *Id.* Coffey also testified to the process he uses to determine a client's competency, specifically:

> Well, I generally do a lot of observing. I go out to the waiting room, meet the client, ask them how they're doing, ask them to come back to my office. I generally watch how they're walking, watch, you know, kind of seeing if their balance is okay, and coming in my office, and again just kind of observe their general appearance. I again ask them how their day has been. And then [again, at] the initial consultation, we talk about what they're there to do. What kind of documentation they are seeking, at least what they think. . . . And I can obviously observe how they're tracking when we're having those discussions. If they are following what's being told, what type of questions they have. So generally, through the process of just having a conversation with someone for a period of time, I think I'm a pretty good judge of whether or not I know that they know what the heck they're doing, or they don't. So that in general terms that's usually what happens.

Id. at 98. He testified that he "[did not] have any doubts that [Carol] understood" the documents she signed. *Id.* at 100. He told the court that sometimes he checks to see if an elderly client has a guardianship in place, but he observed nothing in his meeting with Carol that made him suspect that he should check for the existence of a guardianship.

[37] Hoss had been a friend of Carol for approximately ten years, and she spent time with Carol at church as well as outside of church. Hoss testified that, in her opinion, she "couldn't find anything wrong with [Carol] that would cause her not to be" mentally competent, Carol did not act confused in her presence, and she did not recall ever seeing Carol appear disoriented. *Id.* at 108, 112, 114.

[38] Mallory, another friend of the family, also testified. She told the court that her son and Randy have been friends since around 1990, and that approximately four years before Carol went into the assisted-living facility, she and Carol became closer. Mallory told the court that the night before Carol "was forced into the nursing home[,]" she stayed in Mallory's home and that Carol was able to discuss the guardianship, her will, and the power of attorney. *Id.* at 120-121.

[39] Robert Shoulders was the Stalions' neighbor for twenty-seven years until he moved away in February 2018. He testified that, based upon his interactions with Carol, he "had no reason to believe that she was unable to make a decision on her own." *Id.* at 140. However, he also testified that, since his move in 2018, he had only interacted with Carol on one occasion. And Randy testified that all he knew of his mother's mental condition was "from what I've been

told from the medical reports from the [assisted-living facility] and [Sclair] who came in and interviewed her." *Id.* at 192.

[40] However, in addition to the testimony presented at the hearing, the trial court also had before it, for its consideration, the GAL's reports that were admitted into evidence by stipulation of the parties. The GAL's reports contained the results from psychiatric evaluations that Carol underwent at two different facilities in April and June 2020, and the psychiatric reports concluded that Carol had dementia. Additionally, the GAL concluded in her reports that Carol suffers from dementia and memory loss and that, in her opinion, Carol was not mentally competent when she signed the February 28 POAs.

[41] Attorney Coffey testified that he believed Carol understood what she was signing and that she appeared competent on February 28, 2020. When questioned by the GAL, however, he stated that when he and Carol met, he was unaware of the pending guardianship. *Id.* at 100-01. At that time, he was also unaware of the criminal charges pending against Randy for neglect of a dependent, the no-contact order issued on January 23, 2020, that Randy have no contact with Wilbur,[10] or that APS had been involved with the family. *Id.* at 103. And, while Hoss, Mallory, and Shoulders were friends of

[10] The no-contact order was filed in Randy's criminal case under cause number 55D03-2001-F5-110. Neither party has provided this Court with a copy of the order. However, pursuant to Indiana Evidence Rule 201(b)(5), we may take judicial notice of the records of a court of this state, and judicial notice may be taken at any stage of the proceedings, including on appeal. Ind. Evidence Rule 201(d). Thus, we take judicial notice of the no-contact order that is contained in Odyssey.

Carol, their observations were not equivalent to a clinical diagnosis. And Shoulders had seen Carol only once between February 2018 and February 2020.

[42] Randy's arguments are merely an invitation for this Court to reweigh the evidence presented at the hearing, which we cannot do. *M.N.S.*, 23 N.E.3d 759, 766. After considering the evidence, the trial court ultimately determined that Carol lacked sufficient mental capacity on February 28 to execute the February 28 POAs. The evidence supports that determination, and the trial court's judgment is not clearly erroneous. Thus, we hold that the trial court did not abuse its discretion when it found that Carol did not have sufficient mental capacity on February 28 to execute the February 28 POAs.[11]

[43] We note that the trial court's determination that Carol lacked mental capacity to execute the February 28 POAs does not mean that the trial court did not credit Coffey's testimony that she had testamentary capacity. *See* Tr. Vol. 2 at 93. It is well-settled that the law recognizes a distinction between testamentary capacity and contractual capacity. *See, e.g.*, *In re Rhoades*, 993 N.E.2d 291, 299 (Ind. Ct. App. 2013) (testamentary capacity); *Duncan*, 179 N.E.3d at 1002

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[11] Randy also points us to the fact, and believes it is "of significance," that when Carol signed the *February 3 POA*, Ben also signed the document and "certified under the penalties of perjury that to the best of his knowledge . . . Carol had capacity to execute the power of attorney[,]" yet, nine days later, Ben "affirm[ed] under the penalties of perjury in his [Emergency Petition] filed February 12, 2020 . . . that: "Due to her cognitive defects and mental impairment, [Carol] is not capable of making financial and personal decisions in her best interest[.]" Appellant's Br. at 21. Again, this is an invitation for this Court to reweigh the evidence, which we will not do.

(contractual capacity). The court's determination means only that the court was required to weigh Coffey's testimony together with all the other evidence that was unavailable to him, including that a guardianship proceeding was pending as well as the GAL's reports and recommendations and the psychiatric evaluations, which showed that Carol had been examined at two different facilities by a total of four individuals—a clinician, a board certified family nurse practitioner, an advanced-practice registered nurse, and a physician—all of whom concluded that Carol had dementia.

[44] As for the general durable power of attorney that Carol signed on February 28, the document gave Randy complete control over Carol's finances, and, again, paragraph 8 of the document provides in relevant part that the power of attorney "terminate[s] only upon the execution and recordation of a written revocation of this Power of Attorney with the Recorder's Office of the County of [Carol's] domicile." Appellant's App. Vol. II at 37. Based upon our holding that the trial court did not abuse its discretion when it found that Carol lacked sufficient mental capacity to execute the February 28 POAs, and in light of Indiana Code Section 30-5-3-4(d), we remand with instructions to the trial court to enter an order declaring the February 28 POAs null and void and directing that said order be recorded in the Office of the Recorder of Morgan County.

Issue Two: The Right to an Impartial Decisionmaker

[45] Next, Randy argues that the trial court committed fundamental error when it violated his due process right to a fair trial before an impartial decisionmaker. As our Supreme Court has provided:

> We afford trial judges ample "latitude to run the courtroom and maintain discipline and control of the trial." *Timberlake v. State*, 690 N.E.2d 243, 256 (Ind. 1997). Particularly in bench trials, courts have considerable discretion to question witnesses sua sponte "to aid in the fact-finding process as long as it is done in an impartial manner." *Taylor v. State*, 530 N.E.2d 1185, 1187 (Ind. 1988) (quoting *Swift v. State*, 255 Ind. 337, 341, 264 N.E.2d 317, 320 (1970)). We even tolerate a "crusty" demeanor towards litigants so long as it is applied even-handedly. *Harrington v. State*, 584 N.E.2d 558, 562 (Ind. 1992) (quoting *Rowe v. State*, 539 N.E.2d 474, 477 (Ind. 1989)). Yet judges at all times "must maintain an impartial manner and refrain from acting as an advocate for either party," *Beatty v. State*, 567 N.E.2d 1134, 1136 (Ind. 1991)—because a "trial before an impartial judge is an essential element of due process," *Everling v. State*, 929 N.E.2d 1281, 1287 (Ind. 2010) (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009)).
>
> * * *
>
> Recognizing the well-settled due process right to an impartial court as necessary to a fair proceeding, we have found fundamental error when trial judges' comments, demeanor, or conduct indicated bias.

In re J.K., 30 N.E.3d 695, 698-99 (Ind. 2015). However, because the law presumes that the trial court is unbiased, "the party asserting bias must establish that the trial judge has a personal prejudice for or against a party." *Richardson v. Richardson*, 34 N.E.3d 696, 703 (Ind. Ct. App. 2015). "[A] party must show that the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced that party's case." *Id*. at 703-04 (internal quotation marks omitted).

[46] Randy first takes issue with an exchange between Randy's counsel and the trial court regarding the admissibility of the videos that showed Randy mistreating Wilbur. Randy's counsel objected to testimony describing Randy's mistreatment of Wilbur as viewed by a witness who had watched the videos. The trial court asked counsel to clarify and expound upon his argument and to explain how the admissibility of the videos related to whether the videos were improperly obtained. Counsel clarified that he would have objections to the actual videos if they were offered into evidence, but then counsel, effectively, withdrew his objection to the witness's testimony describing the videos. The exchange between the court and counsel was as follows:

> THE COURT: And just so we're clear then Mr. Wisco your objection is what?
>
> MR. WISCO: My objection is that those [videos] were improperly obtained and therefore should not be admissible, nor any discussion of them as it pertains to the inside. The . . . I think his responses to my questions were that he didn't have written or implied consent of any nature [to install nanny cameras inside of the residence]. And I think that I could ask, but I think it's clear from his responses that we're talking about a time period in which I don't know that his dad would have been able to give consent, and I think his mom didn't and was in another part of the house.
>
> THE COURT: When you say improperly obtained, how does that make them inadmissible under the Indiana Rules of Evidence versus it creating a mere cause of action against him?

> MR. WISCO: Well, there's no proper foundation for his ability to . . . hang on just a second, Judge.
>
> THE COURT: Yeah, you're losing me, so take your time.
>
> MR. WISCO: Okay. Judge, I would intend to renew my objection upon their actual video being offered into evidence as in [R]ule 901, the rules of evidence, among others possibly, but as it stands at present, his testimony alone, I don't have an objection, but would simply point to its weight without the video.
>
> THE COURT: 901 authentication?
>
> MR. WISCO: I mean upon their attempt, if they intend to introduce the actual videos, I think I would have some questions and an objection under that rule and think that . . .
>
> THE COURT: Okay. Objection is overruled. Next question. Or finish up where you were.

Tr. Vol. 2 at 34-35.

[47] Later during the examination of the witness, Randy's counsel objected on the basis of the best evidence rule, arguing that the witness's testimony was based upon viewing the video evidence that had not been introduced into evidence. The court overruled the objection, ruling that the witness could testify as to what he saw on the video. The exchange between court and counsel was as follows:

> MR. WISCO: Judge, I'm going to object as to best evidence. His explanation of how he perceived evidence that is

> otherwise . . . is unavailable I guess to the Court, or hasn't been presented.
>
> THE COURT: Response?
>
> [OPPOSING COUNSEL]: We can present the evidence to the Court. We've got the videos and they're submitted as part of Ms. Bosaw's report, so we can get to that.
>
> THE COURT: Well maybe that's what we need to do.
>
> [OPPOSING COUNSEL]: Revisit this issue, that's not a problem.
>
> THE COURT: I think he can testify as to what he saw on the video. I don't think that it's . . . particularly if the video is available. I mean we're running under a silent witness, and . . . all right. Objection is overruled.

Id. at 37-38.

[48] Randy argues that, during these exchanges, the trial court "crossed the barrier of impartiality, . . . became an advocate[,] . . . [and violated his] right to due process" when, according to Randy, the court "interject[ed] a legal basis for the inclusion of evidence not raised by any party[.]" Appellant's Br. at 27. We cannot agree. Nothing about these exchanges or the court's questioning was improper. Therefore, we cannot say that the exchanges cited by Randy indicate that the court was impartial, acted as an advocate, or violated Randy's right to due process.

[49] Randy next argues that the trial court cross-examined attorney Coffey in a manner that Randy characterizes as adversarial. Randy takes issue with the following exchange between the court and Coffey:

> QUESTIONING BY THE COURT:
>
> Q. So you were not aware that the guardianship had been filed the day before you first met with her?
>
> A. I was not.
>
> Q. Just to put a point on it. You indicated she had described being upset over a son that had made her sign some papers, and if I understand it then she was without the ability to describe to you what it was that she had signed exactly?
>
> A. Right, yeah. She . . .
>
> Q. Were you able to have a further conversation where you kind of . . . I don't want to have to call it, pried out of her, but kind of put the dots together that it had been a power-of-attorney, or did you never really come to a conclusion about what you thought that document might have been?
>
> A. I, you know, I did, Judge. I know that she was upset about it. In my way of thinking I think at that point I was thinking that, that you know, had it been a power-of-attorney document, then obviously the new ones we were going to draft would have revoked any previous power-of-attorney, in my mind. And so, I didn't have any . . . I didn't ask about a guardianship. I had no reason at that point to believe that there was anything in the works with a guardianship.

Q. And with regard to the prior document that's signed, was there any assertions or claims that something inappropriate had been done to her with her finances or anything in light of that signature?

A. I don't guess I understand the question.

Q. Well, it's one thing to say, you know, I signed . . . I was supposed to sign a document, and then it would be the next step would be, and then now my money is gone, or something . . .

A. Oh, there was no . . . there was no (inaudible).

Q. No harm to her as a result of that, I guess, maybe.

A. Not . . . there wasn't any indication that she gave me that anything like that had happened.

Q. Okay. All right. Now the first meeting you had with her was on February 13th, is that correct?

A. Yes.

Q. And you say you're certain that Randy brought her to that appointment?

A. I'm fairly certain, yeah.

Q. Okay. Now were you aware of the criminal charges that were filed against Randy at that point?

A. I was not.

Q. And so you were not aware of a no[-]contact order that had been issued on January 23rd?

A. No.

Q. Did she express any understanding or awareness of the fact that he had been arrested for neglect of a dependent, or for anything?

A. No.

Q. And did she express any understanding that there was a no[-] contact order in place?

A. No.

Q. Did she discuss any involvement with Adult Protective Services?

A. She did not.

Tr. Vol. 2 at 102-03. Again, we find nothing in this exchange that exhibits bias or adversarial conduct on the court's part. To the contrary, in an impartial manner, the court asked supplemental questions of the witness to help the court sort out the facts of the case, which the court is permitted to do. *See J.K.*, 30 N.E.3d at 698 ("Particularly in bench trials, courts have considerable discretion to question witnesses sua sponte to aid in the fact-finding process as long as it is done in an impartial manner.")

[50] Finally, Randy directs our attention to three additional instances during the hearing where, according to Randy, the court "[became] an advocate and fail[ed] to remain impartial." Appellant's Br. at 29. The first instance occurred when the court interjected while Randy's counsel questioned Randy about his method for handling his parents' household expenses, specifically:

> THE COURT: I . . . it's twenty minutes to four and we've kind of had this thrown out there that he signed checks and took care of his parents, and there's not been anything presented to me that means a darn thing on him doing anything untoward with it, other than not technically following the rules. So, this doesn't mean a whole lot to me, unless I have missed something drastic.
>
> MR. WISCO: I agree, and I was trying to move on with it.
>
> THE COURT: Okay. So, unless there's something else that you think is there, to me it's kind of a non-issue.
>
> MR. WISCO: Thank you.
>
> THE COURT: Other than what inference you might have that he's not a rule follower. But there are bigger inferences floating around out there on that in this case, so . . .
>
> MR. WISCO: Sure.
>
> THE COURT: Got it.

Tr. Vol. 2 at 149-50. The second instance occurred later in the hearing when the court asked Randy about his work history and his taxes, specifically:

Q. Okay. When's the last time you had a forty hour a week, taxes out, paycheck job?

A. Years. While I was taking care of mom and dad I did not do very much work at all.

Q. Okay.

A. Because it was my primary concern to take care of them.

Q. Did you file taxes last year?

A. No.

Q. Did you file taxes the year before?

A. No.

Q. Did you file taxes the year before that?

A. I think it was 2017 was the last time.

Q. And why haven't you filed taxes if you've been working part time?

A. Most of the time people are just paying for basically the service.

Q. Okay. So you're just . . .

A. And I don't make enough to actually file.

Id. at 183-84. The third instance occurred when the court asked Randy about what had occurred when Randy and Carol visited Coffey's office.

[51] To prevail on a claim of impartiality, a party must show that the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced the party's case. *See Timberlake*, 690 N.E.2d at 256. Randy has failed to meet his burden. Nothing in the exchanges cited by Randy on appeal indicate that the trial court acted as an advocate in this case or failed to remain impartial. Therefore, we hold that the trial court did not commit any error, much less fundamental error, and did not violate Randy's due process right to a fair trial before an impartial decisionmaker.

Conclusion

[52] We conclude that the trial court did not abuse its discretion when it determined that Carol did not have sufficient mental capacity on February 28 to execute the February 28 POAs, and the court did not act as an advocate and therefore did not violate Randy's due process right to a fair trial before an impartial decisionmaker. The trial court's judgment is affirmed; however, we remand with instructions for the trial court to enter an order declaring that the February 28 POAs are null and void and directing that said order be recorded in the Office of the Recorder of Morgan County.[12]

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[12] Neither the parties nor the trial court's final order address the validity of the February 3 POA that designated Ben as Carol's attorney-in-fact. If the court appoints a guardian other than the attorney-in-fact,

[53] Affirmed and remanded with instructions.

Vaidik, J., and Weissmann, J., concur.

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the court must account for the attorney-in-fact's powers when setting forth the guardian's powers. *See In re Guardianship of Morris*, 56 N.E.3d 719, 724-25 (Ind. Ct. App. 2016); *see also In re Guardianship of Hollenga*, 852 N.E.2d 933, 938-39 (Ind. Ct. App. 2006). Here we conclude that, since Ben remains Carol's attorney-in-fact under the February 3 POA and her guardian, there is no conflict that needs to be resolved.