

1 **SUPREME COURT OF ARIZONA**
2 **FIDUCIARY BOARD**

3 **IN THE MATTER OF FIDUCIARY**)
4 **LICENSE:**)

No. FID-NFC-14-0012

5 **FRED BRINCKERHOFF,**)
6 License Number 20508.)

FINAL ORDER

7 On July 6, 2017, the Fiduciary Board (“Board”) filed a Notice of Formal Statement of
8 Charges and Right to Hearing in the above-captioned matter with the Honorable William J.
9 O’Neil (“Judge O’Neil”). On July 18, 2017, Fred Brinckerhoff (“Brinckerhoff”) filed timely
10 requested a hearing and a hearing was held on October 20, 2017. On May 29, 2018, Judge O’Neil
11 filed his Findings of Fact, Conclusions of Law, and Recommendation in complaint numbers 14-
12 0012 [Exhibit A]. Pursuant to ACJA § 7-201(H)(22), the Board may adopt or modify the Hearing
13 Officer’s recommendation in whole or in part. The Board adopts the Hearing Officer’s
14 recommendation report as indicated in this Order. The Board holds the authority to proceed with
15 this action pursuant to ACJA § 7-201(D)(5)(c).
16

17 **JURISDICTION**

18 Pursuant to Arizona Code of Judicial Administration (“ACJA”) § 7-201 and § 7-202, the
19 Board served Notice of Formal Statement of Charges and Right to Hearing to Brinckerhoff on
20 July 6, 2017. The Board has jurisdiction over this matter as Brinckerhoff’s license was granted
21 on July 27, 2004 and renewed without interruption through the current licensure period.

22 Pursuant to ACJA § 7-201(H) and ACJA § 7-202(H), the matter was investigated, and
23 Brinckerhoff was provided an opportunity to respond to the complaint, participate in the
24 investigation of the complaint, file an Answer to the Notice of Formal Statement of Charges, and
25 request a hearing.

PROCEDURAL HISTORY

1. On November 18, 2014, the Certification and Licensing Division (“Division”) received a complaint involving Brinckerhoff.

2. On January 27, 2015, the Division sent Brinckerhoff a copy of the complaint and notice of the ACJA § 7-201(H)(3)(c) requirement Brinckerhoff submit a written response to the complaint within thirty (30) days. Division records confirm delivery of the mailing on January 28, 2015.

3. Brinckerhoff provided a timely written response to the complaint as required by ACJA § 7-201(H)(3)(c).

4. On November 8, 2016, pursuant to ACJA § 7-201(H)(5)(a)(3), Probable Cause Evaluator Mike Baumstark entered a finding probable exists in complaint number 14-0012.

4. On May 11, 2017, the Fiduciary Board (“Board”) accepted the finding of the Probable Cause Evaluator and entered a finding grounds for formal disciplinary action exists as to Allegations 1 and 4 pursuant to ACJA § 7-201(H)(6)(a) and voted to revoke Brinckerhoff’s license.

5. On July 6, 2017, Brinckerhoff was served with a Notice of Formal Statement of Charges and Right to Hearing in complaint number 14-0012. Brinckerhoff timely requested a hearing and a hearing was held on October 20, 2017.

FINDINGS OF FACTS

The Board adopts the Findings of Fact in Exhibit A as the Findings of Fact in the matter.

CONCLUSIONS OF LAW


The Board adopts the Conclusions of Law contained in Exhibit A as the Conclusions of Law in this matter.

FINAL DECISION and ORDER

1
2 Having adopted the above-referenced findings and conclusions, the Board orders the
3 following disciplinary sanction in complaint number 14-0012:

- 4 a) Revoke Fred Brinckerhoff's license, pursuant to ACJA § 7-201(H)(24)(a)(6)(i);
5 b) Issue a cease and desist order enjoining Brinckerhoff from representing himself to the
6 public as a licensed fiduciary, pursuant to ACJA § 7-201(H)(24)(a)(6)(g);

7 DATED this 31 day of May, 2018.

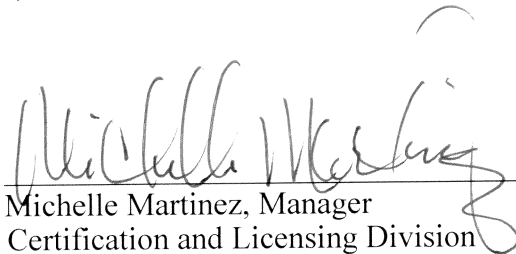
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10 _____
11 Deborah Primock, Chair
12 Fiduciary Board
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1 A copy of the foregoing hand delivered and/or mailed this 15 day of June 2018, to:

2 Roger W. Frazier
3 2525 E. Broadway Blvd., Suite 200
4 Tucson, AZ 85716
5 Counsel for Licensee

6 Pam Linnins
7 Assistant Attorney General
8 Agency Counsel Section
9 Office of the Arizona Attorney General
10 15 South 15th Avenue
11 Phoenix, Arizona 85007

12 David Withey, Assistant Counsel
13 Administrative Office of the Court
14 1501 West Washington
15 Phoenix, Arizona 85007

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By:  _____
Michelle Martinez, Manager
Certification and Licensing Division

EXHIBIT

A

UNDER THE ARIZONA CODE OF JUDICIAL ADMINISTRATION
Fiduciary Board
BEFORE THE ASSIGNED HEARING OFFICER

IN THE MATTER OF A LICENSED
FIDUCIARY

FRED BRINCKERHOFF
Certificate Number 20508

Licensee.

No. FID-NFC-14-0012

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDATION**

FILED MAY 29, 2018

This matter proceeded to hearing under the Arizona Judicial Code of Administration (“ACJA”)¹ before the assigned hearing officer, the Presiding Disciplinary Judge, (“PDJ”), on October 20, 2017.

I. PROCEDURAL HISTORY

The Certification and Licensing Division of the Supreme Court of Arizona (“Division”) received a detailed complaint dated November 18, 2014, regarding Fred Brinckerhoff. [FID000001.] Under § 7-201(H)(1-4), the Division reviewed, screened, and investigated the complaint.

The matter was presented for review to the Probable Cause Evaluator in accordance with § 7-201(H)(5). On November 8, 2016, the Probable Cause Evaluator entered a finding of probable cause regarding Fred Brinckerhoff, (“Brinckerhoff”), Certificate Number 20508. [FID000023.] Under ACJA § 7-201(H)(5)(c), the Division forwarded to the Fiduciary Board (“Board”), pursuant to

¹ All Code references are to the Arizona Code of Judicial Administration.

subsection § 7-201(H)(1)(i)(2), the investigation summary with attachments, the finding by the probable cause evaluator and a May 8, 2017 written recommendation by the division director for the appropriate disposition of the complaint. [FID000015-24.]

The Board accepted the probable cause determinations but rejected the recommendations on May 11, 2017. On July 6, 2017, the Fiduciary Board (“Board”) determined grounds for formal disciplinary action existed under the ACJA § 7-201(H). [FID000024-26.] The Board served Mr. Brinckerhoff with a Notice of Formal Statement of Charges and Right to Hearing dated July 6, 2017. [FID000010-14.] Cumulatively, the two formal charges allege violations of three sections of the ACJA and one statute.

Brinckerhoff and his wife, Kay Kozak, were each charged. (Collectively “Licensees”). Each timely filed a request for hearing on July 18, 2017. Under ACJA § 7-201(H)(13), it is mandated that the request for hearing “include the ACJA subsection entitling a person or business to a hearing, the factual basis supporting the request for hearing and the relief demanded. On July 21, 2017, Brinckerhoff filed an answer. Under ACJA § 7-201(H)(11), “Any defenses not made in the answer are waived.”

In compliance with ACJA § 7-201(H)(20), a telephonic prehearing conference was held on August 10, 2017. Written Orders were entered imposing limitations to promote simplicity in procedures, fairness in administration, elimination of unnecessary expense and protection of the public while preserving the rights of the certificate holder. Both parties were represented and appeared at that initial conference. The matter was set for hearing. By stipulation the two matters were combined except that each adjudication was held separately. Licensees requested there be separate but simultaneous rulings issued independent of one another.

The parties were informed that the legal authority and jurisdiction for the hearing is set forth within the ACJA. The parties were reminded with emphasis that the Division has the burden of proof in this matter. The parties were referred to Part 7, Chapter 2, Section 7-201 of the ACJA subsections (E)(2)(c)(1-5), (H)(12) through (H)(23) & (H)(25) through (H)(27) as the sections that apply regarding the proceeding. The parties were informed that while the hearing officer make binding findings of fact and conclusions of law, that these then support a recommendation to the Board on the action to be based on those findings of fact and conclusions of law.

Under those listed procedures, the broad powers of the hearing officer regarding the procedure at the hearing are stated under ACJA § 7-201(H)(21). As authorized under § 7-201(H)(21)(c), the hearing officer conducted the hearing “in an informal manner and without adherence to the rules of pleading or evidence.” The burden of proof upon the Division under that Code section is “by a preponderance of the evidence.”

The parties were ordered to “immediately exchange any exhibits which they may introduce at hearing.” This was order was issued to assure compliance with the Code² and avoid surprise. The parties were also ordered to exchange the names of their witnesses they each intended to call with a fair description of the expected testimony from each.

The hearings were set initially for September 15, 2017. For reasons stated on the record, the case was stipulated continued multiple times but ultimately set within 120 days from filing the request for a hearing. Each party was ordered to file a prehearing memorandum outlining “the facts which are involved and a brief discussion of how these facts apply to that party’s interpretation of the

²ACJA § 7-201(H)(17)(a). All pleadings or other documents either party desires to file with the Disciplinary Clerk shall be filed not less than fifteen (15) days prior to the scheduled hearing date.

Administrative Code of Judicial Administration.” An order also issued mandating that “after the conclusion of the hearing, each party shall file a proposed recommendation with findings of fact and conclusions of law.” [Supra.] Each party filed those required pleadings.

Code Sections and A.R.S. Alleged Violated

In two separate counts, Brinkerhoff was charged with violations of the following ACJA Sections and State law.

Count 1. **§ 7-201(H)(6)(k)(3).** Engaged in unprofessional conduct, including failed to comply with any federal, state or local law or rule governing the practice of the profession or occupation and;

A.R.S. § 41-328(C). Subject to § 41-320, a notary public shall not perform a notarization on a document if the notary is an officer of any named party, if the notary is a party to the document or if the notary will receive any direct material benefit from the transaction that is evidenced by the notarized document that exceeds in value the fees prescribed pursuant to § 41-316.

Count 2. **§ 7-202(J)(2)(b)(1-3),** Relationship with the Ward or Protected Person. The fiduciary shall exhibit the highest degree of trust, loyalty, and fidelity in relation to the ward, protected person, or estate. The fiduciary shall:

- (1) Avoid self-dealing, conflict of interest impropriety, or the appearance of a conflict of interest or impropriety. Self-dealing, a conflict of interest, or impropriety arises where the fiduciary has some personal or agency interest other individuals may perceive as self-serving or adverse to the position or best interest of the ward, protected person, or decedent. A conflict of interest may also arise if the fiduciary has dual or multiple relationships with a ward that conflict with each other or has a conflict between or among the best interests of two or more wards.

- (2) Maintain independence from all service providers to enable the fiduciary to coordinate services, challenge inappropriate or poorly delivered services, and act in the best interests of the ward or protected person.
- (3) Unless otherwise authorized by the court, the fiduciary shall not:
 - (a) Provide non-fiduciary services to the ward or protected person if the fiduciary or a person or entity closely related to the fiduciary has a personal or financial interest. For the purposes of this subsection, “closely related” includes a spouse, child, parent, sibling, grandparent, aunt, uncle, or cousin of the fiduciary, and any business, partnership, corporation, limited liability company, trust, or other entity that the fiduciary or a closely related person has a financial interest in, is employed by, or receives compensation or financial benefit from.
 - (b) Solicit or accept incentives or gifts from service providers other than ordinary social hospitality; or
 - (c) Solicit or accept a gift from a ward or protected person or the estate of a ward or protected person, other than ordinary social hospitality.

Jurisdictional Findings and Conclusions of Law

1. The Arizona Supreme Court has jurisdiction of the regulation of fiduciaries. A.R.S. § 14-5651. That law directed that the Supreme Court “adopt rules” for implementing licensure for fiduciaries. “At a minimum the rules adopted” are required to have a “code of conduct.”
2. The Arizona Supreme Court promulgated the ACJA to provide the rules for implementing licensure for fiduciaries, the administration of the minimum qualifications for licensure, certification, and discipline of individual and business fiduciaries, and a code of conduct.
3. Fiduciaries are individuals and entities certified under ACJA § 7-202. Licensees. ACJA § 7-201 applies to licensed Fiduciaries. ACJA § 7-201(F) defines the

“Role and Responsibilities of Certificate Holders” including Fiduciaries. It requires among other things, that “Each individual certificate holder shall adhere to the code of conduct or standards of conduct, subsection (J) in the applicable section of the ACJA.”

4. The code of conduct under ACJA § 7-202(J) applies “to all licensed fiduciaries.”
5. The Fiduciary Board is established by the Supreme Court of Arizona, whose members are appointed by the Chief Justice.³
6. The Board is empowered to enact its authority under ACJA §§ 7-201 & § 7-202.
7. The primary role of the Board members is the protection of the public through the certification and oversight of certificate holders and the fair and impartial application of the sections of the ACJA and court rules.⁴
8. Under the ACJA § 7-201 (H)(22)(a), the Hearing Officer makes a written recommendation report to the Board regarding alleged acts of misconduct or violations of the statutes, court rules, or applicable sections of the ACJA by applicants, certificate holders or noncertificate holders. If the Hearing Officer recommends the Board enter a finding the certificate holder committed misconduct or violations, under ACJA § 7-201 (H)(22)(b), the hearing officer “shall include in the recommendation report, in a separately stated section, an analysis of mitigating and aggravating factors and recommended imposition of permissible sanctions pursuant to subsection (H)(24).”

The Hearing

On October 20, 2017, this matter proceeded to hearing. Assistant Attorney General, Pamela J. Linnins represented the Division. Roger W. Frazier represented Brinkerhoff. “In all formal disciplinary matters brought as the result of an order by the Board, evidence in support of the formal statement of disciplinary charges is

³ ACJA § 7-201(D)(5)(a-b) and 7-202(D)(4)(a).

⁴ ACJA § 7-201(I).

presented first and carries the burden of proof by a preponderance of the evidence.” ACJA § 7-201(H)(21)(c)(4).

The hearing was conducted and considered in accordance with the ACJA. The hearing was open to the public and was attended occasionally by the public. ACJA § 7-201(H)(21)(c)(1). All testimony taken was required to be under oath or affirmation, except matters of which judicial notice was taken or entered by stipulation. ACJA § 7-201(H)(21)(c)(3). The hearing was conducted and recorded in compliance with ACJA § 7-201(H)(21)(d)(1).

“In all formal disciplinary matters brought as the result of an order by the board, evidence in support of the formal statement of disciplinary charges is presented first and carries the burden of proof by a preponderance of the evidence.” ACJA § 7-201(H)(21)(c)(4). The parties substantially resolved by stipulation the admission of nearly all exhibits with few exceptions that were ruled upon or withdrawn. Besides Brinckerhoff, the witnesses at the hearing were, Kay Kozak, Denice Shepherd Esq., Patricia Viverto and Hal White.

II. FINDINGS OF FACT⁵ AND CONCLUSIONS OF LAW

Facts Established by Stipulation⁶

Fred Brinckerhoff and Kay Kozak are licensed fiduciaries in the State of Arizona. They are married to each other. Marik Fiduciary and Care Management LLC (“Marik”) is owned by Kay Kozak. Marik employs Christina Burchwell, a niece of Kay Kozak. Kevin Kozak is a relative of Kay Kozak. 97-year old Ella Rubino became a client of Marik and came under their direct care October 23, 2009.

⁵ Where not otherwise indicated, the findings of fact are drawn from testimony or exhibits.

⁶ On October 29, 2017, Hearing Stipulations were filed with the Disciplinary Clerk.

The Provisioning of Health Services

According to the records of the Division, on December 22, 2003, Brinckerhoff applied to be a licensed Fiduciary. [FID000033.]. At that time, he was an employee of a business named Marik and employed by that business as a “Client Representative.” He listed as his job duties that he assisted clients with, among other things, their “health.” Those “health responsibilities include assisting client with medical care for both maintenance and emergency situations.” He also assists with the “procurement and use of pharmaceuticals and medical supplies.” He regularly visited and consulted with the client and caregivers in home, hospitals or assisted living facility.” [FID000028-30.]

He was assigned License Number 20508. The testimony of Brinckerhoff was consistent in that part of his duties included provisioning of health care including finding a doctor for a client. [Tr. 1, 29:25-30:3.] He took care of “client needs.” [Tr. 1, 34:10.]

He was notified by letter that his license was renewed on July 8, 2010. [FID000044.] That letter reminded Brinckerhoff that “All licensed fiduciaries are responsible for having a working knowledge of and maintain compliance with ACJA §§ 7-201 & 7-202, statutes and rules governing fiduciaries in Arizona.” Brinckerhoff applied for renewal of that license in 2012 and again in 2016. [FID000048-56.]

Shortly after he and his wife had become licensed fiduciaries, Kozak changed the name of her corporation and operated under the assumed name of Marik Fiduciary and Care Management LLC. As part of their routine at the company, clients were given a packet of legal forms that included a general power of attorney. It is not clear if or how often Kozak became a power of attorney for other clients as she testified in her proceeding that she could not recall. When Rubino named Kozak as her power of attorney, Brinckerhoff notified her signature. They each knew that if a client, such as Rubino, named Kozak or Brinckerhoff as a power of attorney, they would be acting as

licensed fiduciaries. Anyone doing business with Marik Fiduciary at that time would have assumed they were dealing with a fiduciary upon signing a power of attorney over to either of them. That is the obvious intent in the naming of the company. Brinkerhoff testified he never carried out any duties as a licensed fiduciary but twice paid to renew his license. It appears the only reason he was licensed was to promote the business name and lead clients to assume they were protected under the care of a fiduciary. The business Kozak created and the name both Brinkerhoff and she operated under was to promote their licensure as public fiduciaries. [000211.]

Brinkerhoff testified he knew that a public fiduciary, holding a power of attorney, was obligated to “best represent the interest of the client.” He swore that a licensed fiduciary holding a power of attorney “had the same obligations as a fiduciary under the fiduciary code.” Brinckerhoff testified that the fiduciary activities that Marik carried out required that his wife and he, “act in an ethical way in the best interest of the client.” [Tr. 1, 32:15-22.] After litigation regarding Rubino, he retired from Marik at the end of 2016. It is unclear if he intends to remain retired.

The Witnessing and Notarization

Brinckerhoff renewed his license as a Notary Public on October 1, 2015 and it does not expire until October 30, 2020. [FID000057-59.] By signing the application for his notary license, Brinckerhoff attested that he would perform all notarial tasks in accordance with Arizona state law. [Tr. 1, 37:2-5.]

The statements of when Brinckerhoff met Rubino vary greatly and as a result, are not credible. That Rubino extremely needed 24/7 health care management is not disputed. [Tr. 1, 38:18-25.] Rubino had twice fallen shortly before she came into the care of Marik. She had multiple injuries, including head injuries from the first fall. She compounded those injuries with serious fractures from the second fall only three weeks later. She was blind in one eye, visually impaired, hard of hearing, and

diagnosed with dementia on multiple occasions before these falls. [FID000001 and Tr. 1, 121:17-18.]

The Arizona Adult Protective Services Act (“APSA”), A.R.S. § 46-451 *et seq.*, defines the duties owed to vulnerable adults, and provides a statutory cause of action for incapacitated or vulnerable adults who are the victims of neglect, abuse, or exploitation. *Equihua v. Carondelet Health Network*, 235 Ariz. 504, 506 (App. 2014) (reversing lower court’s dismissal of APSA claim). A.R.S. § 46-451(A)(9) of the APSA defines “vulnerable adult” as “an individual who is eighteen years of age or older and who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment. *Vulnerable adult includes an incapacitated person* as defined in A.R.S. § 14-5101.” (emphasis added)

A.R.S. § 14-5101 defines “incapacitated person” as “any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person. . . .”

“An incapacitated person cannot make informed decisions. A vulnerable person may be able to make such decisions, but is unable to protect herself against being abused, neglected or exploited. *The protections of the statute extend to a vulnerable adult even if the person is not incapacitated.*” *Davis v. Zlatos*, 211 Ariz. 519, 525 (App. 2005) (emphasis added; reversing trial court, and holding that caretaker violated the APSA by failing to act for elderly woman's benefit the same extent as a trustee).

“Position of trust and confidence” in relation to a vulnerable adult is defined in A.R.S. § 46-456(J)(5) as a person who is *any* of the following:

(a) A person who has assumed a *duty to provide care* to the vulnerable adult.

.....

(c) A person who is in a *fiduciary relationship* with a vulnerable adult including a de facto guardian or de facto conservator.

1. Ella Rubino was a vulnerable adult and often incapacitated. Kozak was in a fiduciary relationship with her and Brinckerhoff was in a position of trust and care as a caregiver for her as he had taken on a duty to provide care for Rubino. In his capacity as caregiver for Rubino, Brinckerhoff and Kozak had a statutory duty to report anyone taking financial advantage of Rubino to a peace officer or to a protective services worker: “[A] person who has responsibility for the care of a vulnerable adult and who has a reasonable basis to believe that . . . exploitation of the adult's property has occurred shall immediately report or cause reports to be made of such reasonable basis to a peace officer or to a protective services worker. . . .” A.R.S. § 46-454(A).

On November 1, 2009, Brinckerhoff notarized an original typed Last Will and Testament of Ella Rubino, a General Power of Attorney, and a Health Care Power of Attorney. [FID00060-66.] On the same date he became an agent for Rubino, if Kozak was “unwilling or unable to serve” under a health care directive entitled Health Care (Medical) Power of Attorney with Mental Health Authority.” [FID00067.] Kozak also had Rubino sign (unnotarized) a Living Will and Health Care Power of Attorney naming Kozak as her agent. [000068-69.] (These five documents are collectively referred to as “estate documents.”)

Brinckerhoff had read in advance these estate documents that Kozak had Rubino sign. He swore he did not know who drafted the will. [Tr. 1, 39:14.] Brinckerhoff knew that the will appointed his wife, Kay Kozak, as the personal representative without bond or security because he had reviewed that will and the multiple documents that his wife had Rubino sign that day. The will was the only document that did not have handwritten information added to the body of the document. There was no doubt in his mind that his wife had filled in the blanks on

the other documents. [Tr.1, 40:8-16.] Kozak added that information because Rubino was not capable of filling in that information herself.

Kozak wrote the will and provided multiple forms that she filled in.

The will was the only document that does not appear to be a “form” document. It dramatically changed the estate plan of Rubino. The body of the will was typewritten. Rubino was not capable of typing the will. The testimony of Kozak was intentionally misleading regarding its creation. She created it for Rubino.

Kozak testified initially that it was Rubino that produced the typeset on the pages that Brinckerhoff notarized. She swore she watched Rubino at a table produce the typeset for the will. [Tr. 1, 122:24-123:3.] The hearing officer takes judicial notice of the shifting testimony of Kozak in this proceeding and her own proceeding regarding the creating of these documents signed that day. Kozak next testified she simply typed it. But in her March 5, 2015, sworn response to the Division she swore she reduced these discussions into hand written forma and then typed them. There were no hand-written notes offered in either proceeding. An adverse inference is drawn from the misleading contradictory testimony and the absence of the notes.

This officer takes judicial notice that Kozak, in her March 5, 2015 response to the Division under oath, stated that she immediately began discussing with Rubino “all of her major financial and legal documents, including but not limited to her then-existing will dated 1991 with Kozak” and her caregivers. She swore that she and her caregivers discussed with Rubino multiple changes. But in the hearing, she swore they were created by Rubino and Joanie Wallace months before Kozak ever knew either of them. [124:17.] Even if that were true, it is evidence that Kozak ignored the concerning signs that Wallace, in purportedly working on the will for months, had changed the will to become a beneficiary to 1/3 of the substantial personal property of Rubino. This included Rubino’s multiple original paintings that Kozak and Brinckerhoff would sell off within a year.

Kozak's hearsay upon hearsay and the shifting sands of contradictory testimony are the bedrock of the defenses in this proceeding. Kozak also swore that she tried to call Rubino's prior attorney but could not reach him. This was easy to verify with a phone record, if in fact Kozak left the message with that attorney to call her back. That she did not offer such easily obtainable evidence draws a negative inference. She made no such call.

Familiarity and Responsibility to Provide for Sale of Client property

Brinckerhoff swore he was well familiar with Rubino. He testified that he had personal knowledge of her managing her own finances. He swore that Rubino made all her own decisions about what she wanted. [Tr. 1, 39:9-10.] His testimony is self-serving and not credible. It is a fact that Rubino was in the physical care of Marik for only nine days when the documents were signed by Rubino and he notarized three signatures dated November 1, 2009. It is also a fact that Rubino was not a client assigned to him.

When asked how Brinckerhoff even knew Rubino, Kozak swore, "Uh, from the discharge, I thought, from the hospital and bringing her home and setting up her house." [Tr. 1, 133:8-13.] Despite virtually no contact with Rubino, Brinckerhoff signed his declaration that she was of sound mind on the health care power of attorney. [FID000066.] In his application for licensure he swore that his wife had given him the responsibility to "provide for the sale...of personal property" of the client. [FID000030.] That Brinckerhoff, a stranger to Rubino, could gain knowledge of the management of her own finances may follow his job duties to sell property, but not to establish such powers of attorney.

The Empowerment of the General Durable Power of Attorney

Kozak, through the Power of Attorney, became the licensed fiduciary for Rubino. This was clear in the acceptance by Kozak. It stated, "My attorney-in-fact hereby accepts this appointment subject to its terms and agrees to act and perform in

said *fiduciary* capacity with my best interests...” “A licensed fiduciary who is acting as a trustee or agent under a power of attorney shall abide by this code of conduct, regardless of whether that person is acting pursuant to court appointment.” ACJA § 7-202(J)(7). Brinckerhoff was employed by her alter-ego company which she solely controlled.

Brinckerhoff read and notarized the general durable power of attorney (“POA”) which granted to his wife, Kay Kozak, full and unqualified authority to pledge, sell or otherwise dispose of any and all of the property and “all other matters” of Ella Rubino without advance notice to Ms. Rubino and without her approval. [FID000063-64.]

Kozak either created the form document given to Rubino, obtained it from some source or regularly used it as a form to routinely give to all the clients of Marik over the years. Regardless, Brinckerhoff read it before notarizing it. In bold print the document gave notice to Brinckerhoff the power it was instantly imparting to his wife. It states, **“YOU MAY SPECIFY THAT THESE POWERS WILL EXIST EVEN AFTER YOU BECOME DISABLED OR INCOMPETENT.”**

Kozak intended for the document to immediately give her the “general power of attorney” of Rubino. The document by its express terms states that appointment, constituted and appointed Brinckerhoff’s wife as Rubino’s “attorney-in-fact” from the moment of signing when coupled with her immediate acceptance. A plain reading of that power of attorney is that its power “shall not be affected by the subsequent disability or incompetence of the Grantor.” Any testimony by Kozak or Brinckerhoff to the contrary, ignores that plain language and is not credible.

Other Powers

The only exception to the power granted by the POA, was that is specifically excluded the power to make health care decisions for Ms. Rubino. It stated, “This

document does not authorize any one to make medical or other health care decisions...” Brinckerhoff and Kozak made sure that restriction was removed when he notarized a Health Care Power of Attorney (“HCPOA”) which effectively removed that restriction on the powers by granting to his wife, upon the inability of Rubino, “to make or communicate health care decisions”. The HCPOA nominated the wife of Brinckerhoff to serve as the Guardian of Ms. Rubino in any Court proceeding. The HCPOA also included a release of liability. [FID000065-66.]

On that same day, the wife of Brinckerhoff filled out a Health Care (Medical) Power of Attorney with Mental Health Authority, which listed her as that agent for Ms. Rubino and Brinckerhoff as the alternate agent. The document authorized his wife, or Brinckerhoff in her absence, to have the use and disclosure of the individual identifiable health information or other medical records of Ms. Rubino. [FID000067.]

On that same day the wife of Brinckerhoff also filled out a Health Care Power of Attorney “Short Form.” It also designated his wife to serve as that agent and listed an alternative agent, different from Brinckerhoff. Brinckerhoff knew the niece of his wife, Christina Burchwell, was a witness to that document.

CONCLUSIONS OF LAW

Failing to Comply with the Law Governing Notaries

A.R.S. 41-328(C) precluded him from performing a notarization when he stood to receive any direct material benefit from the transaction evidenced by the notarized document. He knew he would and ultimately did receive a direct benefit from the community income received by Kozak as personal representative. Her intentions are best defined by her actions. It is undisputed that she and their community received direct payment as personal representative. Brinckerhoff was also aware at the time that by his notarization that his wife would be empowered

with “Full and unqualified authority” to delegate “any and all” of the powers granted to her in that document, to anyone she selected, including him. It empowered his wife to give gifts to him of Rubino’s property or any of their family members. He knew that power extended broadly over “all” matters and the multiple way in which this might benefit him and his wife.

A.R.S. § 41-311(5) defines “Jurat” It “means a notarial act in which the notary certifies that a signer, whose identity is proven by *satisfactory evidence*, has made in the notary's presence a voluntary signature and has taken an oath or affirmation vouching for the truthfulness of the signed document.”

A.R.S. § 41-311(9) defines “Satisfactory Evidence.” In his hurry to notarize the documents, Brinckerhoff failed to follow the basic statutory protocols which required him to establish the proof of identity of Rubino. He testified that the only identification he required from Rubino was her social security card and Medicare card which was contrary to that law. [Tr.1, 48:8-11.]

“The functions of a notary public are not to be lightly assumed. A certificate of acknowledgment is an act which must, in the nature of things, be relied on with confidence by men of business. Those buying or taking security by way of liens on real estate ought not to be required to look with suspicion on such a certificate or compelled to take proof of its recital as to the notary's personal acquaintance with the acknowledger.” *Figuers v. Fly* (1916) 137 Tenn. 358, 193 S. W. 117.

A.R.S. § 14-5501(3). Brinckerhoff knew that his notarization of the general power of attorney was contrary to the express restrictions in Arizona law. Arizona is one of the few states that puts restrictions on the establishment of a power of attorney. Most states merely require the signature of the principal. Arizona law protects its citizens by requiring the power of attorney be properly notarized. Knowing this, Kozak and her husband, intentionally evaded that protection. His notarization was prohibited by Ariz. Rev. Stat. Ann. § 14-5501(3). That statute

requires that any power of attorney satisfies four separate requirements. Brinckerhoff and Kozak ignored the third requirement. It mandates that the power of attorney be “witnessed by a person other than the agent, the agent's spouse, the agent's children or the notary public.”

In Arizona, a notary public is a public officer of the State of Arizona, appointed by the Secretary of State, and is a witness. “[A] careful analysis of the duties of a notary public indicates that he does not adjudicate: he witnesses and attests...”. *Transamerica Ins. Co. v. Valley Nat. Bank*, (App. Div. 1 1969) 11 Ariz. App. 121, A.R.S. 41-312. “A notary public is an impartial witness...” A.R.S. § 41-328.

“The duty of a notary public in acting officially is not confined to the one to whom he directly renders service. His duty is to the public and those who may be affected by his act. The public has the right to rely upon the verity of a certificate.” *Samuels v. Brand*, 119 Ky. 13, 82 S. W. 977.

A.R.S. § 36-3221(C). The Health Care Power of Attorney notarized by Brinckerhoff explicitly stated it was “made under Section 36-3221, Arizona Revised Statutes.” [FID000065-66.] A.R.S. § 36-3221(C) is clear in its prohibition. “A notary or witness shall not be any of the following: “A person directly involved with the provision of health care to the principal at the time the health care power of attorney is executed.” Both Kozak and Brinckerhoff knew this statute made the notarization improper. They also knew that the witnesses had all been persons directly involved with the provision of health care to Rubino and intentionally ignored the statute.

The non-applicability of A.R.S. § 41-320(A).

Brinckerhoff seems to claim the exception to the prohibition in A.R.S. § 41-328(C) allowed him to ignore the law regarding each of the documents he notarized apparently because he did this “in his capacity as an employee of Marik.”

Brinckerhoff apparently argues this taking of unbridled power was part of the corporate scheme of his wife and he was merely following instructions. In his opening brief he argues that he somehow planned his notarization of these documents to be done under A.R.S. § 41-320(A). He asserts that these documents naming his wife as personal representative under the will, granting to her the immediate and broadest control of the property, relationships, and all matters involving Rubino, as well as the effort to preclude any court, in any state, from naming anyone other than Kozak as conservator, were all instruments “executed to or by the corporation.” [Opening memorandum & A.R.S. § 41-320(A).]

His willingness to disregard his duty as a witness not only failed to comply with state law regarding his jurat, but it is clear his notarization of the three documents did not fall within the exception cited by him. He was not taking the acknowledgement or oath of any party to any instrument executed to or by the corporation.” Both Kozak and Brinckerhoff have claimed that the corporation was not involved in any of the three documents. Kozak swore she was reluctant to be appointed. It was neither “to or by” the corporation. It is a fact that the will was thrown out upon an adverse motion filed against Kozak. A negative inference exists when a motion attacks the notarization of a document and the opposing party does not oppose the motion. That Kozak and Brinckerhoff claim it was merely a decision to not burden the estate with such a contest, is to no avail.

There was no testimony that Brinckerhoff acted at the direction of Marik to ignore the statutory requirements for identification. Neither the application for licensure nor the testimony during the hearing mentions his notarization of documents as being one of his requirements of employment with Marik. There was no testimony that he was employed because he was a notary. There was no testimony that notarizations were done by him in any substantial way as part of his job with Marik. Nor was there any testimony that he notarized the documents because he

sought to serve Marik. There was no testimony that Marik directed he ignore the statutory requirements for identification and ignore any potential conflicts. To the contrary, Kozak swore that Rubino herself had asked for Brinckerhoff to notarize the documents.

The application of Brinckerhoff states that one of his other duties was the filing and organization of important documents for clients such as Rubino. [FID000028.] Brinckerhoff testified he handled much of the internal business of Marik, yet Brinckerhoff did not take these documents to the office or keep track of them. [Tr. 1, 45:25-46:8.]

Patricia Viverto is the director of business services under the Secretary of State and oversees the commissioning of notaries and multiple other tasks including handling notary complaints and investigations. She is a witness qualified as an expert by her knowledge, skill, education, and training. She offered expert testimony that the purpose of a notary is to “authenticate the signers of documents to ensure the person who appears before a notary is, in fact, that person by taking identification for the individuals.” [Testimony of Patricia Viverto. Tr. 1, 195:3-22.]

Brinckerhoff also failed to adhere to notary requirements in that his notarial certificate is on a separate page from the signatures and does not identify what document is being notarized. [*Supra*, 201:6-20, & FID000060-61.] Ms. Viverto stated her opinion that the other notarizations by Brinckerhoff were improper and each affect their reliability because of his inherent conflict of interest. [Tr. 1, 201:21-205:25.] These failings are the best evidence of the state of mind of Brinckerhoff.

A notary has an obligation to ensure that they are not part of the documents they are notarizing as it is a conflict of interest if they benefit from the documents that they’re notarizing. [*Supra*, 195:15-23.] If a notary exceeds the statutory authority granted to notaries, it is looked at as a violation whether it is on purpose or

by accident. [*Supra*, 197:15-23.] Under the circumstances, the actions were knowingly, if not intentionally done.

The cumulative weight of Viverto's testimony gives perspective to the intentions of Brinckerhoff. Her testimony and opinions are sound and adopted by this hearing officer. There was no contrary expert testimony offered.

The duties of a notary are not new and are wide ranging with good cause. It is a statutory protection for Arizonians. "The duty of a notary public in acting officially is not confined to the one to whom he directly renders service. His duty is to the public and those who may be affected by his act. The public has the right to rely upon the verity of a certificate." *Samuels v. Brand*, 119 Ky. 13, 82 S. W. 977.

"The functions of a notary public are not to be lightly assumed. A certificate of acknowledgment is an act which must, in the nature of things, be relied on with confidence by men of business. Those buying or taking security by way of liens on real estate ought not to be required to look with suspicion on such a certificate or compelled to take proof of its recital as to the notary's personal acquaintance with the acknowledger. *Figuers v. Fly* (1916) 137 Tenn. 358, 193 S. W. 117."

Brinckerhoff responded under oath to the Division by a letter dated February 25, 2015. The letter was also signed by his attorney. While acknowledging he was the notary who witnessed Ella Rubino's signature on these various documents, he denied those "documents nominated Kozak as the fiduciary, so the Notary DID NOT witness a signature that benefited his wife." [FID000100.] This is not credible.

Brinckerhoff knew his wife caused the documents to be written and had filled in the blanks. Brinckerhoff and Kozak knew that the POA signed by his wife declared that she "accepts this appointment subject to its terms and agrees to act and perform in said *fiduciary* capacity consistent with my best interests as *she* (his wife) in *her* (his wife) best discretion deems advisable..." (Emphasis added.) Brinckerhoff also knew or should have known when these documents were being signed that his

wife under the ACJA was a “fiduciary” as she became an “agent under a power of attorney” which no longer required her to be “acting pursuant to court appointment.” § 7-202(B)(3). Brinckerhoff also knew or should have known when these documents were being signed and at the time of his response to the investigation, that the POA also declared that Ms. Rubino, to the benefit of his wife, stated “I affirm and ratify all acts so undertaken” by his wife, regardless of what they were.

The Sale of Art

Kozak directed Brinckerhoff to work on selling the art of Rubino. The sale of client’s property was one of his duties. Kozak had the authority to cause those sales because of the general durable power of attorney that Brinckerhoff had notarized. Despite the testimony of each to the contrary, Brinckerhoff worked at the direction of Kozak. Judicial notice is taken of the sworn response of Kozak to the Division on March 5, 2015.

“Kozak asked Fred Brinckerhoff, who has experience and knowledge in the museum and art world to work with Rubino on this. Kozak introduced Mr. Brinckerhoff to Rubino as her husband and Rubino knew who he was.” “He (Brinckerhoff) interviewed Rubino several times over time...” [March 5, 2015 Kozak response to Division, p. 15.] His “bill” was attached.

By December 22, 2015, a different strategy arose. In an unsworn email, counsel for Brinckerhoff contradicted his other client’s sworn statement and asserted that “Mr. Brinckerhoff met Ms. Rubino socially, not as an obligation or condition of his employment by Marik.” The strategy went further. “Neither Marik nor Ms. Kozak hired Mr. Brinckerhoff to sell the art work and did not bill Ms. Rubino for doing so. He worked on that project independently of Marik...”

The objective evidence is clear. Brinckerhoff acted in concert with his wife and the sale was done by him as an employee of Marik. He assured he would be contacted at work, and listed his work address and phone number, not his home address on his advertisements. [FID000021.]

The written contract is dispositive. [FID 000070.] It is signed by Kay Kozak for Marik Fiduciary & Care Management LLC. Its terms need no parole evidence to understand them. “Marik agrees to the following...3) To handle any sales of the art work to other parties that may occur during this time period.” As planned by Kozak and Brinckerhoff, it is not witnessed by an impartial witness, but rather Sandra McIntosh.

According to the testimony of Denice Shepherd, there was no initial inventory taken. Instead, Brinckerhoff, as directed by Kozak, sold paintings to the “caretakers” hired by Marik. Those paintings were not taken from Rubino’s home, apparently so that Rubino would be unaware of their sale. After she died the caretakers took those paintings. [Kozak March 5, 2015, Division response, p. 16.]

Brinckerhoff swore on February 25, 2015, that he was paid \$1,000 by Rubino in accordance with the bill he submitted, not for expenses of Marik, but rather for his benefit. It is reasonable to assume it was paid in cash by Rubino, who kept large sums of cash at her home and that the payment was approved by Kozak. [FID000100.]

Analysis with Conclusions of Law

Anytime a legal dispute is brought to a court or a hearing officer, the State has a fundamental interest in encouraging the presentation of all relevant and material evidence to assure a full and fair adjudication. Here, the allegations center on two

pivotal events. The first are the multiple notarizations by Brinckerhoff. The second is the entering of a contract and the sales that followed regarding the art collection of Rubino. Kozak and Brinckerhoff are both long time licensed fiduciaries. Brinckerhoff is a long-time notary. Both Kozak and Brinckerhoff assured there would be no objective knowledgeable witnesses to testify regarding the competence of Rubino at any of the times relevant to these proceedings.

They knew Rubino had no children. They each admitted spending extensive time questioning Rubino regarding her estate, her beneficiaries, and knew the original estate plan of Rubino. They knew the primary beneficiary lived out of state and was not actively involved in the oversight of Rubino. They did not anticipate that their actions would be questioned. But as licensed fiduciaries and Brinckerhoff as a notary, understood conflicts of interest, knew Rubino was vulnerable, knew they owed a duty to Rubino and actively precluded the availability of any objective witness to these events. These are not merely oversights. They were done with a purpose to benefit themselves.

Any objective individual would recognize that a 97-year-old woman, known to be suffering from dementia, just released from care with a recommendation for 24/7 care, who had two serious falls in three weeks was vulnerable and not competent. Both acknowledged they had long conversations with her extracting her financial information and estate plan, even though they were complete strangers. Anyone as trained as they are would know, that if questioned, these events would require demand objective determinations of competency from impartial witnesses.

Neither seemed to care, likely because neither thought from the information they had pulled out of Rubino that their actions would never be questioned. It is clear they planned for that event by assuring there would be no impartial witnesses to testify, any though these events cried out for such objective, impartial testimony. A

party naturally would provide for and produce such impartial witnesses. Here, there are none by the actions of Brinckerhoff and Kozak.

In a civil proceeding, when such material evidence is provided by a party, then the court draws a favorable inference to the parties producing such impartial evidence. Here, precluding such impartial testimony by Kozak and Brinckerhoff was done in concert and intentionally. More is expected, and much more is required for licensed fiduciaries. While the Dead Man's Statute, A.R.S. § 12-2251 is not directly applicable to Brinckerhoff, the purpose of the statute applies.

The salutary purpose of the [Dead Man's] statute is not to preclude all testimony of transactions with deceased persons, regardless of the controversy in which offered. It is, rather, to render incompetent as witness persons who will gain from inaccurate distortion of a transaction with decedent, where the interests in issue affect certain representatives of decedent *in their capacity as such*, and where death has rendered decedent incapable of giving the lie to the inaccuracies." *Carrillo v. Taylor*, 81 Ariz. 14, 25 (1956)(emphasis added).

Under ACJA § 7-201(H)(21)(c), the hearing officer conducted the hearing "in an informal manner and without adherence to the rules of pleading or evidence." In considering the testimony of statements made by Rubino this officer determined whether there was equivalent circumstantial guarantees of reliability and trustworthiness. Kozak controlled Marik and its employees, including Brinckerhoff and Marik's independent contractors. Their testimony had no guarantee of reliability or trustworthiness.

The allegations in the complaint have been proven and are true.

III. FINDINGS OF FACT AND CONCLUSION OF LAW

Fred Brinckerhoff, Certificate Number 20508, violated ACJA Sections §§ 7-201(H)(6)(k)(3), 7-202(J)(2)(b)(1-3), and A.R.S. § 41-328(C), all as alleged in Counts 1 and 2.

IV. MITIGATING AND AGGRAVATING FACTORS

Upon the finding of one or more acts of misconduct or violations of the ACJA, the hearing officer shall make an analysis of the mitigating and aggravating factors.

Mitigating Factors

1. The absence of a prior disciplinary record. There was no evidence submitted that Brinckerhoff had a prior disciplinary record. He is a long time licensed Fiduciary and Notary Public. This is a strong mitigating factor.
2. Full and free disclosure to the division staff. From the review of the extensive file and the detailed responses, it is apparent Brinckerhoff hired an attorney that worked hard to disclose the information he had. This is also a strong mitigating factor because it demonstrates professionalism.
3. Cooperative attitude toward the proceedings. Brinckerhoff had a cooperative attitude towards the proceedings. There was no evidence of rudeness or ill will towards the process. While the proceeding was vigorously litigated, there appeared to be cooperation throughout. This is a mitigating factor.

Aggravating Factors

- A. Dishonest Motive. Rubino was in the care of Marik for less than two weeks when Brinckerhoff, a virtual stranger to her, ignored multiple statues in his notarization of documents. Any objective participant

would have known his actions involved serious conflicts of interest. His actions assured his wife had control of not merely the assets of Rubino, but of the relationships and affairs of Rubino. It was obvious Rubino was in 24/7 care and Brinckerhoff transported from the care facility back to her home. He had much experience in managing senior citizens. Rubino was objectively a vulnerable adult and he knew it. He made no inquiry into the reasons for the requirements for her 24/7 care intentionally. He had a duty to be an independent witness and ignored them to profit his wife and thereby himself. He knew from his training as a licensed fiduciary that his conduct was dishonest and in violation of the code and law. This is a strong aggravating factor.

- B. Selfish Motive. All these acts of commission and omission by Brinckerhoff selfishly profited him or his wife personally. This is a strong aggravating factor because it is the opposite of the service required for a fiduciary.
- C. Multiple offenses. In two separate counts, Brinckerhoff violated multiple sections of the ACJA, and in one count also violated the Arizona law. This is an aggravating factor.
- D. Submission of false evidence, false statements or other deceptive practices during the process. There were numerous instances where the sworn statements of Brinckerhoff contradicted themselves.
- E. Failure to acknowledge wrongful nature of the conduct. Brinckerhoff, has failed to acknowledge the wrongful nature of his conduct.
- F. Vulnerability of the victim. Rubino was extraordinarily vulnerable.

G. Substantial experience in the profession. Brinckerhoff has long been a licensed fiduciary.

H. Indifference to making restitution. There was no evidence that Brinckerhoff ever stepped forward voluntarily to make restitution.

Individuals are conscious agents with the capacity to think, feel, choose, and act. Respondents do not operate by blind, automatic forces. Ignorance of one's own short fallings is never a valid excuse. When one attempts to avoid liability by closing eyes to facts, a willful blindness is a practical aggravating factor. In such circumstances there is a proper classifying, analyzing and determining levels of wrongness.

Regardless how we evaluate mitigation, it is often a measuring of the recognition by an individual of their own shortcoming and responsibility for misconduct. Remorse is the boiling down allegations to an individual acceptance of responsibility by the respondent and turning away from that misconduct. It requires an inward reflection of the truth. It is not a reward of that misconduct to apply mitigation. It is the affirmation that balance is being achieved by the acceptance of the authority of being held accountable. That is absent here.

V. **RECOMMENDATION**

It is recommended that the Board affirm its decision to revoke the license of Fred Brinckerhoff, Certificate Number 20508. The aggravating factors strongly outweigh the mitigating factors.

DATED this 29th day of May 2018.

William J. O'Neil

William J. O'Neil, Hearing Officer

COPY of the foregoing mailed/e-mailed
this 29th day of May, 2018, to:

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**ARIZONA SUPREME COURT
 ADMINISTRATIVE OFFICE OF THE COURTS
 INVESTIGATION SUMMARY and PROBABLE CAUSE ANALYSIS
 and DETERMINATION REPORT**

<i>CERTIFICATE HOLDER/LICENSEE INFORMATION</i>	Certificate Holder:	Fred Brinckerhoff
	Certification Number:	20508
	Type of Certificate/License:	FID
<i>COMPLAINANT</i>	Name:	Denice Shepherd
<i>INVESTIGATION INFORMATION</i>	Complaint Number:	14-0012
	Investigators:	Hal White

Complaint Received:	01/03/2015
Complaint Forwarded to the Certificate Holder:	01/27/2015
Certificate Holder/Licensee Received Complaint:	01/28/2015
Response From Certificate Holder:	02/25/2015
Period of Active Certification/Licensure:	07/27/2004
Status of Certification/License:	Active
Availability of Certificate Holder/Licensee:	Available
Availability of Complainant:	Available
Report Date:	7/5/2016

ALLEGATIONS:

Allegation 1: Mr. Fred Brinckerhoff (Brinckerhoff) was the notary who witnessed Ms. Ella Rubino’s (Rubino’s) signature on the estate planning documents his wife, Ms. Kay Kozak (Kozak) drafted. The documents nominated Kozak as fiduciary, so the notary witnessed a signature which benefitted his wife. This is a violation of the notary rules and fiduciaries are not supposed to violate the law.

Allegation 2: Brinckerhoff facilitated his wife’s unlawful practice of law in witnessing the documents she drafted.

Allegation 3: Brinckerhoff was present on occasions when Rubino’s money was used to pay for dining for Ms. Kozak.

Allegation 4: Brinckerhoff was hired by Kozak to sell Rubino’s art collection.

List of sources for obtaining information: (Investigative, records, outside resources, etc.):

- Written complaint and three boxes of discovery submitted by Attorney, Ms. Denice R. Shepherd (Complainant).

- Written response and documentation submitted by certificate holder, Brinckerhoff, Certified Fiduciary and husband of Fiduciary Kozak.
- Written response from Attorney Roger Frazer, (Frazier) representing Brinckerhoff.
- Review of applicable Certification and Licensing Division (Division) records
- Review of applicable sections of Arizona Revised Statutes (ARS), Arizona Codes of Judicial Administration (ACJA) § 7-201 and § 7-208, and Arizona Supreme Court Rules

PERSONS INTERVIEWED:

Brinckerhoff
Kozak
Complainant
Frazier

Discovery included depositions of Dr. Cox and Joanie Wallace (Wallace).

SUMMARY OF INVESTIGATION:

In September 2009, 97 year old Rubino was hospitalized as a result of a fall. Rubino was released from the hospital and fell a second time in October 2009. Because she fell twice in a short period of time, her Doctor would only release Rubino on a condition of 24 hour care. Marik Fiduciary and Care Management (Marik), was suggested as an alternative and was recommended during Rubino’s October 2009 hospital recovery. Rubino, and her niece, after several conversations with Kozak decided to use Marik.

Rubino was released into Marik’s care on October 23, 2009. As part of Marik’s induction process, new clients were asked to look at, and change, outdated documents. By November 1, 2009, Kozak had rewritten Rubino’s Health Care (Medical) Power of Attorney with Mental Health Authority, her General Power of Attorney (Durable) and her Last Will and Testament of Rubino (“2009 Will”). The powers of attorney, made Kozak agent. Rubino’s new 2009 Will, made Kozak the Personal Representative.

Brinckerhoff is married to Kozak, and an employee of Marik and a licensed fiduciary.

During the time Marik was the care provider and Kozak held the power of attorney, Brinckerhoff attended restaurant meals with Rubino. Brinckerhoff, either as an employee of Marik or as an individual sold art for Rubino.

SUMMARY OF FACTUAL FINDINGS OF INVESTIGATION:

Complainant was the attorney for Rubino’s heirs. During litigation, Complainant became aware of information that she believes compelled her to the above allegations. Division received substantial documentation, three boxes, from Complainant related to that litigation. The three boxes of discovery included the following:

1. Ella's medical records from Dr. Leff
2. Ella's medical records from Tucson Medical Center for 2009
3. Financial and health care powers of attorney naming Kozak agent
4. Estate planning documents and powers of attorney drafted by Paul Bartlett with letter dated 11/13/1991
5. Ella's medical records from Dr. Cox
6. Will drafted by Kozak
7. Kozak's informal application and appointment as personal representative
8. Smith's objection to will with Order
9. Smith's Objection to Accounting with Kozak's response to objection Kozak's Response
10. Appointment of Sharon Smith as personal representative
11. All of Kozak's disclosure
12. Successor personal representative's response to non-uniform interrogatories
13. Kozak's accounting in the probate action
14. Charles Schwab subpoena production
15. TransAmerica subpoena production
16. Kozak's reimbursement to Marik and receipts paid by Ella
17. Kozak's receipts from art sale with agreement
18. Joanne Wallace deposition
19. Dr. Carol Cox deposition
20. Health South subpoena production
21. TCI Wealth Advisors Inc. Subpoena production
22. Accounting as of 10/12/09 provided by Kozak through attorney Smith to attorney Krawczyk with enclosure letter dated August 29, 2012.
23. Time records of care givers employed by Kozak.
24. Statements for Marik Fiduciary & Care Management, LLC
25. Wells Fargo bank statements, checks, certificates of deposit, powers of attorney, correspondence and signature card produced by subpoena
26. Evidence of Kozak liquidating Rubino's personalty prior to her death. (*Pamphlet*)
27. Bank of America statements/checks
28. Successor personal representative's ninth disclosure statement.

Substantiated by the above records, in September 2009, 97 year old Rubino fell. She was hospitalized as a result of that fall. Rubino was released from the hospital and fell a second time in October 2009. Because she fell twice in a short period of time, her Doctor would only release Rubino on a condition of 24 hour care. Rubino wanted to stay at home. Kay Kozak's company, Marik Fiduciary and Care Management (Marik), was suggested as an alternative for Rubino and was recommended during Rubino's October 2009 hospital recovery. Ella Rubino, and her niece, after several conversations with Kozak decided to use Marik.

According to hospital records, Rubino was released into Marik's care on October 23, 2009. As part of Marik's induction process, new clients were asked to look at, and change, outdated documents. By November 1, 2009, Kozak had rewritten Rubino's Medical Power of Attorney with Mental Health Authority, her Durable Power of Attorney and her 2009 Will. The powers of attorney, made Kozak agent. Rubino's new 2009 Will, named Kozak the Personal Representative.

Allegation 1: Brinckerhoff was the notary who witnessed Rubino's signature on the documents his wife, Kozak drafted. The documents nominated Kozak as the agent pursuant to two powers of attorney and as personal representative pursuant to a will. As such, Brinckerhoff witnessed a signature which benefitted his wife a violation of the notary rules.

A.R.S. § 41-328(C) provides that "a notary public shall not perform a notarization on a document if the notary is an officer of any named party, if the notary is a party to the document or if the notary will receive any direct material benefit from the transaction that is evidenced by the notarized document that exceeds in value the fees prescribed pursuant to section 41-316."

In his February 25, 2015 response, Brinckerhoff does not deny Kozak drafted the documents. Brinckerhoff denies the documents nominated Kozak as the fiduciary, so that he as the notary DID NOT witness a signature that benefitted his wife. He denies there was a violation of notary rules or fiduciary laws. Division reviewed all three documents drafted by Kozak and confirmed Brinckerhoff is the notary on all three documents.

Kozak's was named as the agent on both powers of attorney ("POA") and also the Attorney-in-Fact on the General Power of Attorney. Kozak was appointed as Rubino's Personal Representative in the 2009 Will. Kozak subsequently used her position as personal representative to reimburse her company Marik for expenses that were incurred up to two years prior to Rubino's death. These expenses were "reimbursed" shortly after Rubino's death and for many, Kozak has failed to provide appropriate supporting documentation. (*see* Complaint no. 14-011).

Allegation 2: Brinckerhoff facilitated his wife's unlawful practice of law in witnessing the documents she drafted.

The facts regarding this allegation are undisputed. Brinckerhoff, as a notary, witnessed Rubino's signature on the 2009 Will.

Allegation 3: Brinckerhoff was present on occasions when Rubino's money was used to pay for dining for Ms. Kozak.

Brinckerhoff's denies that Rubino's money was used to pay for his dining and other family members. While Brinckerhoff was present and dined with Rubino, he denies that her money was used to pay for his dining.

Division requested receipts from Brinckerhoff and found Brinckerhoff did dine with Rubino on August 28, 2011 at Mimi's Café with Rosie and Ella. Marik paid the bill and charged back \$18.75 to Rubino, for her share of the bill. Division also found Fred Brinckerhoff used Rubino's money to purchase food from Fromino's - Hors d'Ouevres for the art sale.

Staff could find no other receipts evidencing that Brinkerhoff dined with Rubino.

Allegation 4: Brinckerhoff was hired by Kozak to sell Ms. Rubino's art collection.

Brinckerhoff does not dispute that he was hired to and he sold the art collection. Brinckerhoff contends that Rubino wanted him to sell it. Brinckerhoff states he was a good choice.

Brinckerhoff's lawyer, Roger Frazier's stated, "Neither Marik nor Kozak hired Brinckerhoff to sell the art work and did not bill Rubino for doing so. He worked on that project independently of Marik and under the direction of Rubino. The hours were billed by Brinckerhoff to Rubino"

Frazier also said, "Brinckerhoff met Rubino socially, not as an obligation or condition of his employment by Marik. She learned of his experience at the Norman Rockwell Museum of Vermont and of his interest in the "gold" and "silver" ages of American Illustration."

Rubino paid Brinckerhoff, an employee of Marik, \$1,000 for selling the Rubino's art collection. In addition, Rubino also contracted with and was charged by Marik for the framing of the art work and to cater the art show.

Division found a contract with Marik to sell Ella's art collection, which is in direct contradiction to the, "He worked on the project independently of Marik" contention.

The following is a screenshot of the contract:

This is a contract between Ella Rubino of 7650 E Linden Tucson, AZ 85715 and Marik Fiduciary and Care Management LLC of 2327 E Speedway Blvd Tucson, AZ 85719.

Whereas Mrs. Rubino wishes to sell some of the art work of her late husband, Charles E. Rubino, to which she represents that she is the sole custodian and beneficiary, Marik agrees to do the following:

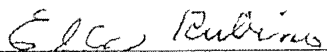
1. Secure gallery space at the Alliance Bank 4703 E Camp Lowell Dr Tucson, AZ 85712 from June 1, 2010 to August 31, 2010.
2. To select and display samples of the art work of Charles E. Rubino during that time period.
3. To handle any sales of the art work to other parties that may occur during this time period.

For these services Marik will charge Mrs. Rubino the following:

1. Actual costs for framing and/ or preparing art work to be displayed and for materials to display it, not to exceed \$1000.00 without Mrs. Rubino's approval.
2. Actual costs for printing of brochures or other advertising materials, not to exceed \$1000.00 without Mrs. Rubino's approval.
3. \$27.50 per hour for Marik personnel to coordinate, set up, and to monitor the display and sale of the art work, not to exceed \$2500.00 without Mrs. Rubino's approval.

Mrs. Rubino will hold Marik and Alliance Bank harmless for any loss or damage to the art work displayed due to fire, theft, natural disaster, or malfunction of any building system where the art work is displayed.

Signed this 12 th of April, 2010.


Ella Rubino


Kay Kozak for
Marik Fiduciary & Care Management LLC

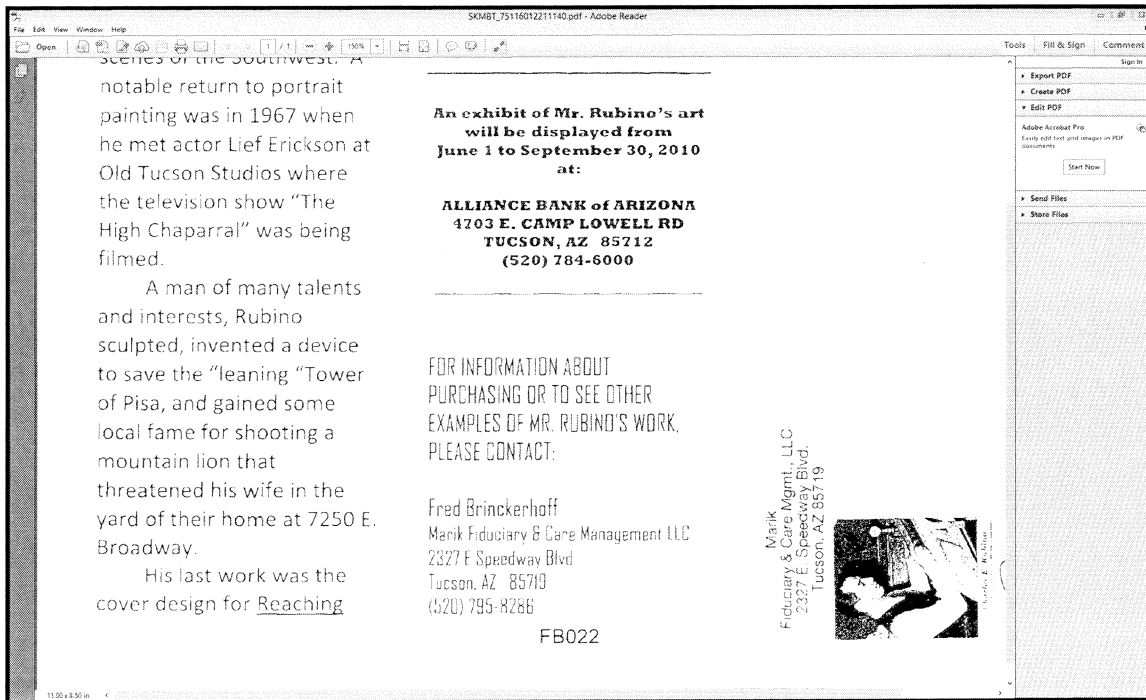
When Division asked about a charge in Marik's bookkeeping regarding selling Rubino's artwork, Brinckerhoff said that he put some of the framing work on Marik's card.

In Mr. Brinckerhoff's response, documents were presented that show that:

“FOR INFORMATION ABOUT PURCHASING OR TO SEE OTHER EXAMPLES OF MR. RUBINO'S WORK. PLEASE CONTACT:

Fred Brinckerhoff
Marik Fiduciary and Care Management, LLC
2327 E Speedway Blvd [sic]
Tucson, AZ 85719
(520) 795-8286

The following is a screen shot of the pamphlet describing the art show:



ANALYSIS OF ALLEGATIONS:

Brinkerhoff was not court appointed to serve as a fiduciary for Rubino. Brinkerhoff was not an agent under a power of attorney of the personal representative pursuant to a will. Brinkerhoff is a licensed fiduciary and in numerous situations acted in concert with his wife, Kozak or the care business Marik. Brinkerhoff held himself out as being related to Marik and further held himself out as a licensed fiduciary.

Allegation 1: Brinkerhoff was the notary who witnessed Rubino's signature on the documents his wife, Kozak drafted. The documents nominated his wife Kozak as agent pursuant to two powers of attorney and as personal representative pursuant to the 2009 Will. the notary witnessed a signature which benefitted his wife. This is a violation of the notary statutes A.R.S. § 41-328(C).

Finding: This Allegation is substantiated. Brinkerhoff's wife Kozak benefited by the 2009 Will. Kozak subsequently used the appointment as personal representative to cause the estate to reimburse Marik for expenses that were up to two years old with little or no documentation. As such Brinkerhoff has failed to comply with state law governing a profession. ACJA 7-201(H)(6)(k)(3).

DECISION OF THE PROBABLE CAUSE EVALUATOR:

Having conducted an independent review of the facts and evidence gathered during the course of the investigation of complaint number 14-0012, the Probable Cause Evaluator:

requests division staff to investigate further.

determines probable cause does not exist the certificate holder has committed the alleged acts of misconduct as to Allegation(s):

243

determines probable cause exists the certificate holder committed the alleged acts of misconduct as to Allegation(s):

124.

Mike Baumstark *11/8/14*

Mike Baumstark
Probable Cause Evaluator

Date

**ARIZONA SUPREME COURT
ADMINISTRATIVE OFFICE OF THE COURTS
ORDER OF THE BOARD**

<i>CERTIFICATE HOLDER/LICENSEE INFORMATION</i>	Certificate Holder:	Fred Brinkerhoff
	Certification Number:	20508

Prior Discipline: None

Recommendation:


It is recommended the Board accept the finding of the Probable Cause Evaluator and enter a finding Fred Brinkerhoff has not committed the alleged act(s) of misconduct as detailed in Allegations 2 and 3 of the Investigation Summary and Allegation Analysis Report in complaint number 14-0012.

It is recommended the Board accept the finding of the Probable Cause Evaluator and enter a finding Fred Brinkerhoff has committed the alleged act(s) of misconduct as detailed in Allegations 1 and 4 of the Investigation Summary and Allegation Analysis Report in complaint number 14-0012.

It is recommended the Board enter a finding grounds for informal disciplinary action exists pursuant to Arizona Code of Judicial Administration (“ACJA”) § 7-201(H)(6)(a) for act(s) of misconduct involving ACJA § 7-201(H)(6)(k)(3) and A.R.S. § 41-328(C) by notarizing Rubino’s signature when his spouse and Marik benefited from the documents notarized; and ACJA §§ 7-202(J)(2)(b)(1),(2) and (3) by, as an employee of Marik, serving both in the capacity as the fiduciary/caregiver and third party liquidator.

It is further recommended the Board issue a letter of concern to Fred Brinkerhoff.

SUBMITTED BY:



Director
Certification and Licensing Division

5/3/17

Date

FINAL DECISION AND ORDER:

The Board having reviewed the above Investigation Summary, Allegation Analysis Report, finding of the Probable Cause Evaluator, and Recommendation regarding complaint number 14-0012 and Fred Brinkerhoff, certificate number 20508, makes a finding of facts

and this decision, based on the facts, evidence, and analysis as presented and enters the following order:

requests division staff to investigate further.

refers the complaint to another entity with jurisdiction.

Referral to: _____

dismisses the complaint, and:

requests division staff prepare a notice of dismissal pursuant to ACJA § 7-201(H)(5)(c)(1).

requests division staff prepare a notice of dismissal and an Advisory Letter pursuant to ACJA § 7-201(H)(5)(c)(2).

determines grounds for discipline exist demonstrating the certificate holder committed the alleged act(s) of misconduct and:

enter a finding the alleged act(s) of misconduct or violation(s) be resolved through informal discipline, pursuant to ACJA § 7-201(H)(7) and issue a Letter of Concern.

enter a finding the alleged act(s) of misconduct or violation(s) be resolved through formal disciplinary proceeding, pursuant to ACJA § 7-201(H)(9).

requests the certificate holder appear before the Board to participate in a Formal Interview, pursuant to ACJA § 7-201(H)(8).

orders the filing of Notice of Formal Charges, pursuant to ACJA § 7-201(H)(10).

enters a finding the public health, safety or welfare is at risk, requires emergency action, and orders the immediate emergency suspension of the certificate and sets an expedited hearing for:

Date, Time, and Location: _____

adopts the recommendations of the Division Director.

does not adopt the recommendations of the Division Director and orders:

formal discipline and order reentry


Deborah Primock, Chair Date 5/11/17
Fiduciary Board of

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