

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

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

No. FID-NFC-14-0011

5 **KAY KOZAK,**)
6 License Number 20507.)

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, Kay Kozak (“Kozak”) timely requested a hearing
10 and a hearing was held on November 13, 2017. At the conclusion of the hearing, the Fiduciary
11 Program filed Proposed Findings of Fact and Conclusions of Law dated December 5, 2017
12 [Exhibit A]. On May 29, 2018, Judge O’Neil filed his Findings of Fact, Conclusions of Law,
13 and Recommendation in complaint number 14-0011 [Exhibit B]. Pursuant to ACJA § 7-
14 201(H)(22), the Board may adopt or modify the Hearing Officer’s recommendation in whole or
15 in part. The Board adopts the Hearing Officer’s recommendation report as indicated in this
16 Order. The Board holds the authority to proceed with this action pursuant to ACJA § 7-
17 201(D)(5)(c).
18

19 **JURISDICTION**

20 Pursuant to Arizona Code of Judicial Administration (“ACJA”) § 7-201 and § 7-202, the
21 Board served Notice of Formal Statement of Charges and Right to Hearing to Kozak on July 6,
22 2017. The Board has jurisdiction over this matter as Kozak’s license was granted on July 27,
23 2004 and renewed without interruption through the current licensure period.

24 Pursuant to ACJA § 7-201(H) and ACJA § 7-202(H), the matter was investigated, and
25 Kozak was provided an opportunity to respond to the complaint, participate in the investigation

1 of the complaint, file an Answer to the Notice of Formal Statement of Charges, and request a
2 hearing.

3 **PROCEDURAL HISTORY**

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

6 2. On January 13, 2015, the Division sent Kozak a copy of the complaint and notice of the
7 ACJA § 7-201(H)(3)(c) requirement Kozak submit a written response to the complaint within
8 thirty (30) days. Division records confirm delivery of the mailing on January 16, 2015.

9 3. Kozak provided a timely written response to the complaint as required by ACJA § 7-
10 201(H)(3)(c).

11 4. On November 2, 2016, pursuant to Arizona Code of Judicial Administration (“ACJA”)
12 § 7-201(H)(5)(a)(3), Probable Cause Evaluator Mike Baumstark entered a finding probable
13 cause exists in complaint number 14-0011.

14 4. On May 11, 2017, the Fiduciary Board (“Board”) accepted the finding of the Probable
15 Cause Evaluator and entered a finding grounds for formal disciplinary action exists as to
16 Allegations 1, 2, 4, 5, 6 and 7 pursuant to ACJA § 7-201(H)(6)(a) and voted to revoke Kozak’s
17 license.

18 5. On July 6, 2017, Kozak was served with a Notice of Formal Statement of Charges and
19 Right to Hearing in complaint number 14-0011. Kozak timely requested a hearing and a hearing
20 was held on November 13, 2017.

21 **FINDINGS OF FACTS**

22 The Board adopts the Findings of Fact in Exhibit B as the Findings of Fact in the matter.
23
24
25

CONCLUSIONS OF LAW

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

FINAL DECISION and ORDER

Having adopted the above-referenced findings and conclusions, the Board orders the following disciplinary sanction in complaint number 14-0011:

- a) Revoke Kay Kozak’s license, pursuant to ACJA § 7-201(H)(24)(a)(6)(i);
- b) Issue a cease and desist order enjoining Kozak from representing herself to the public as a licensed fiduciary, pursuant to ACJA § 7-201(H)(24)(a)(6)(g);

DATED this 31 day of May, 2018.

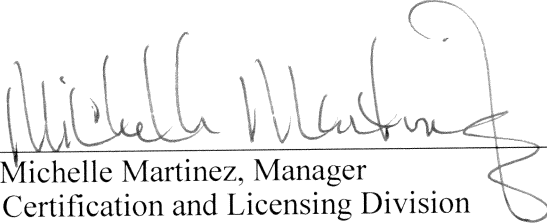

Deborah Primock, Chair
Fiduciary Board

1 A copy of the foregoing hand delivered and/or mailed this 18 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 Ben Norris
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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25
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

KAY KOZAK,
License Number 20507

Licensee.

FID-NFC-14-0011

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

FILED MAY 29, 2018

This matter proceeded to hearing before the Presiding Disciplinary Judge, (“PDJ”), as the assigned hearing officer on November 13, 2017. The central issue in this proceeding is well stated by the opening lines in Kozak’s proposed findings of fact and conclusions of law.

Kozak’s contention that although she was named as a Power of Attorney as of November 1, 2009, including a durable financial one, being so named did not by itself cause her to be subject to the Section 7-202(J) of the Arizona Code of Judicial Administration (“ACJA”), unless and until she acted on those powers. She acknowledges she was subject to the code when acting as the court-appointed personal representative of Ella Rubino’s estate.

I. PROCEDURAL HISTORY

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

investigated the complaint. The Division wrote Kozak on January 13, 2015. Multiple exchanges followed. [*i.e.* Ex. 2, 5-8 & 12.]

The matter was presented for review to the Probable Cause Evaluator in accordance with § 7-201(H)(5). On November 2, 2016, the Probable Cause Evaluator entered a finding of probable cause regarding Ms. Kozak. Under ACJA § 7-201(H)(5)(c), the Division forwarded to the Fiduciary Board (“Board”), pursuant to § 7-201(H)(1)(i)(2), the investigation summary with attachments, the finding by the probable cause evaluator and a written recommendation by the division director for the appropriate disposition of the complaint. [Ex. 8.]

On May 11, 2017, the Board accepted that finding and determined grounds for formal disciplinary action existed. The Notice of Formal Statement of Charges and Right to Hearing on Kozak was filed on July 6, 2017 and contained six separate counts. [Ex. 13.] Kozak was properly served. Kozak and her husband 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, Kozak 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 ACJA, Part 7, Chapter 2, Section 7-201, subsections (E)(2)(c)(1-5), (H)(12) through (H)(23) and (H)(25) through (H)(27), as the sections that apply regarding the proceeding. The parties were informed that while the hearing officer makes binding findings of fact and conclusions of law, these then form the basis of 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 § 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 order was issued to assure compliance with the Code¹ and avoid surprise. The parties were also ordered to exchange the names of 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

¹ § 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.

discussion of how these facts apply to that party's interpretation of the 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 Alleged Violated

In six separate counts, Kozak was charged with violations of the following ACJA Sections.

Count 1. Kozak was charged with violations of § 7-202(B)(9). On September 27, 2017, the Division filed a Notice of Typographical Error stating it had intended to cite § 7-202(J)(1)(d)(9). There is no § 7-202(B)(9). Kozak objected to the change. There was no evidence that the Board authorized a charge under ACJA § 7-202(J)(1)(d)(9). Nothing precludes Kozak from being charged with a violation of § 7-202(J)(1)(d)(9) on a later date. The request was denied rendering Count 1, unadjudicated and withdrawn.

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.

Count 3. § 7-201(H)(6)(k)(7-8), Grounds for Discipline. A certificate holder is subject to disciplinary action if the Board finds the certificate holder has engaged in one or more of the following:

- k. Engaged in unprofessional conduct, including:
 - (7) Failed during the performance of any responsibility or duty of the profession or occupation to use the degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful and prudent professional certificate holder engaged in similar practice under the same or similar conditions regardless of any level of harm or injury to the client or customer;
 - (8) Failed to practice competently by reason of any cause on a single occasion or on multiple occasions by performing unsafe or unacceptable client or customer care or failed to conform to the essential standards of acceptable and prevailing practice;

Counts 4 & 5. § 7-202(J)(6)(b and e-g). Personal Representative.

A fiduciary acting as personal representative shall settle and distribute the estate of the decedent efficiently, timely, and in the best interests of the estate and, if appropriate, in accordance with the terms of any probated and effective will.

b. On appointment, the fiduciary shall take reasonable steps to marshal and secure the property and income of the decedent's estate as soon as possible. The fiduciary shall provide stewardship of the property for safekeeping and, at a minimum, record pictorially and establish and maintain accurate records of all real and personal property

e. A fiduciary shall resolve questions in good faith and make decisions that are most beneficial to the estate.

f. A fiduciary shall have no self-interest in the management of the decedent's estate and shall exercise caution to avoid even the appearance of self-interest.

g. A fiduciary shall ensure that all fees and expenses for the estate, including compensation for the fiduciary, are reasonable in amount and necessarily incurred in the administration of the decedent's estate.

Count 6. § 7-202(J)(2)(b)(1-2), 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. (See Count 2 above.)

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 applies under ACJA § 7-202(J) “to all licensed fiduciaries.”
5. The Fiduciary Board is established by the Supreme Court of Arizona, whose members are appointed by the Chief Justice.²
6. The Board is empowered to enact its authority under ACJA §§ 7-201 and § 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.³
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).”

² ACJA § 7-201(D)(5)(a-b) & 7-202(D)(4)(a).

³ ACJA § 7-201(I).

The Hearing

On November 13, 2017, this matter proceeded to hearing. Ben Norris appeared for the Division. Roger W. Frazier appeared for Kozak. 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. § 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. § 7-201(H)(21)(c)(3). The hearing was conducted and recorded in compliance with § 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). Nearly 2,000 pages of exhibits were initially offered but some included duplications. The parties substantially resolved by stipulation the admission of nearly all exhibits with few exceptions that were ruled upon or withdrawn. Besides Kozak, the witnesses at the hearing were Christina Burchwell, Debra Ramirez, Joanie Vrbanic Shawn, Fred Brinckerhoff, the husband of Kozak, and Denice Shepherd, Esq.

II. FINDINGS OF FACT⁴

According to the records of the Division, Kay Kozak became a licensed Fiduciary in Arizona in late 2004. She was assigned License Number 20507. Kozak testified she operated a business under the name of Marik for many years prior to her Fiduciary certification. Within months of her licensure, she formed a limited liability company to enable her to operate under an assumed name, Marik Fiduciary and Care Management, LLC. [Ex. 135.] It is well established law that a corporation is a separate legal entity. Kozak solely controlled that separate legal entity. During the time of her

⁴ Where not otherwise indicated, the findings of fact are drawn from testimony or exhibits.

services to Ella Rubino (“Rubino”), Kozak was operating under the name of Marik Fiduciary and Care Management, LLC (“Marik”).

The Pertinent Facts Preceding the Allegations

Protected person Ella Rubino (“Rubino”), was born July 20, 1912. [Ex. 59.] During or about the late 1980s to early 1990s, Rubino moved into a home on East Linden Street, Tucson, Arizona. [Kozak Ex. K, Bates L010122-3.] Joanne Wallace (“Wallace”) lived across the street from her, on the corner. [Id.]

Rubino had been capable for caring for herself, “pretty much on her own. She could do just about anything.” This changed after her bout with cancer. “I really started doing things for her...” [Id. at Bates L010123, p. 13:19-22.] Sharon Smith (“Sharon”) was the niece to Rubino. [Kozak proposed FOF 40.] Wallace knew that Ella Rubino had given Sharon Smith a power of attorney “over all of Ella’s finances.” [Kozak Ex. K, Bates L010124, p. 17:8-10.]

The Severe Cancer of Rubino

Rubino was diagnosed with cancer. Because of her severe cancer, Rubino had to have a complete hysterectomy. [Id. at Bates L010124.] She had that surgery for cancer when she was 89 years old. Wallace took her to the hospital for that surgery and stayed there during those approximately six hours of surgery. Rubino required regular radiation treatments as a follow up to that surgery. Wallace believes that radiation treatments were the beginning of the blood problems that Rubino experienced. [Id.]

The Severe Anemia of Rubino Requiring Regular Blood Transfusions

Dr. Leff gave Rubino blood transfusions every two to three months, apparently because of upper GI bleeding causing severe anemia. Having undergone

extensive surgery for her cancer, Rubino apparently declined further invasive surgeries. They anemia left her very weak. Wallace drove her to those procedures. [Id. & Ex 20, Bates 000006.]

The Major Depressive Disorder of Rubino and Oxycodone

Rubino had been faithful in attending church at St. Pius. When another neighbor she regularly attended St. Pius with was put in assisted living, Rubino no longer felt up to going any longer. [Id.at Bates L010126.]

Depression is a mood disorder. It affects one's reasoning, behaviors, and feelings. It is a cause of persistent feeling of sadness and loss of interest. It affects memory, thinking and making decisions. Rubino had long been on Lexapro, an antidepressant. She was also prescribed Aricept (donepezil hydrochloride) used to treat memory issues for patients with dementia associated with Alzheimer's. It usually is effective for one year. It is not clear how long Rubino had been on it by late 2009. [Id.at Bates 000007-8.] Dr. Cox assumed Rubino had been on it for six months because it was reported to her, likely by Kozak, that Rubino only had dementia for six months, which was untrue. [Id.]

Rubino no longer had the mental will or ability to handle matters. [Kozak Ex. K, Bates L010123.] Rubino had turned over the depositing of checks and renewing CDs to Wallace, who then occasionally called Sharon Smith for direction. Kozak knew this.

Kozak brought a list of medications that Rubino was taking when she would ultimately direct Rubino to Dr. Cox, whom Kozak took all her clients to. The medications also included Oxycodone. Rubino took multiple medications known by Kozak. She suffered from depression, dementia, pain, and ongoing blood related issues that affected her cognitive abilities. Kozak knew this.

Wallace testified she was always being told by Rubino that she wanted all her possessions to go to her niece, Sharon Smith, when she died. To accomplish that purpose, Ella was constantly writing on checks that she received and “on everything ‘in trust for Sharon Smith and all that. I mean everything in the house was Sharon’s and she would write notes all over the place, ‘for Sharon.’” [Id. at Bates L010124, p. 17:24-18:6.] Those notes disappeared under Kozak.

The Loss of Eyesight of Rubino

Approximately seven years after her cancer surgery, Rubino had to have eye surgery as she was going blind in one eye. The first surgery failed. She had another surgery after that. She could not drive. [Id. at Bates L010124-25.] Rubino had “lots of surgeries on her eyes. She was blind in one eye and her vision was impaired in the other.” Rubino did not like to go out to eat. [Id. at Bates L010158.]

The Increasing Dementia of Rubino

Rubino increasingly and more obviously became incapacitated. Dr. Leff, was Rubino’s physician for forty years. [Id. at Bates L010138.] “Early on” he told Wallace that Rubino had dementia. [Id. at Bates L010148.]

Dr. Leff told Rubino he did not want her to drive because of his concern for her incapacity. On one occasion, prior to her having any paid caregivers, she had driven to the bank a few blocks away, became confused and didn’t know where she was. A neighbor drove her home. [Id. at Bates L010152.] After one of her multiple transfusions that required her hospitalization, Dr. Leff informed Rubino that she needed someone to be present overnight as he did not want her alone overnight. Rubino was not competent to recognize the need, any more than she was competent to recognize she should no longer be driving. [Id. at Bates L010126.]

The medical records of Dr. Leff confirm the testimony of Wallace. On January 18, 2008, Dr. Leff performed a Mini Mental Status Examination known as the Folstein test. It is a test that measures cognitive impairment. It is a common test used to screen patients for dementia. He found Rubino had “poor recall” and diagnosed her with dementia. He noted that her eyes had become “pale.” [Ex. 49.]

On July 29, 2008, his notes reflect her memory was getting worse. He found the conjunctiva, or membrane that lines the eyes and eye lids, had become “pink” rather than clear. He again diagnosed her dementia. He discussed the need for her to have helpers in the home with her for her care. [Ex. 50.]

On May 5, 2009, Dr. Leff took special note that Rubino was blind in her left eye. Rubino had been hospitalized at El Dorado Hospital. She was sleeping more. Her anemia was noted as chronic. Her dementia remained part of his diagnosis. The pain in her joints were worsening. [Ex. 51.]

Rubino Internal Bleeding, Confirmation of Dementia and Poor Insight

The medical records of Dr. Leff report that on August 25, 2009, Rubino’s health took another turn for the worse as she had additional internal bleeding. He found that besides her poor recall and dementia, Rubino also had poor insight. He recommended the services of a public fiduciary and urged she get more supervision. He urged she give a medical power of attorney. [Id. at Bates L010135 and Ex. 52.]

The following day on August 26, 2009, she had another transfusion at St. Joseph’s Hospital. After a preliminary examination, Dr. Steven Pike, M.D. ordered a social service consult because of the level of her dementia. Wallace requested assistance from the rehabilitation center near St. Joseph’s hospital for a recommendation for 24-hour care providers. Based on that recommendation, Wallace introduced one of the recommended caregivers to Rubino. Wallace then referred that individual to Sharon Smith for approval and financial arrangements.

Soon there were concerns they were stealing money. Rubino had little trust in others but made Wallace her health power of attorney. [Bates L010124-25.] The health power of attorney was signed before a licensed notary public on September 11, 2009. [Id. at Bates L010169-70.]

The First Fall, Head Trauma, and Severe Injuries of Rubino

While in the care of the home health care givers, Rubino had a serious fall, was hospitalized, and had rehabilitative care. She had head trauma which required stitches. She had contusions and injuries resulting in multiple and wide spread bruising. [Id. at Bates L010126-127, 35.]

Rubino Worsened to Having No Insight

Close to three weeks after that fall, on October 6, 2009, Rubino was seen again by Dr. Leff. He removed the sutures from her first fall. She still had a large hematoma on her forehead and widespread colorization from her bruising fall. He noted that she could not remember the names of her caregivers even though she had seen them multiple days. He found that she continued to have poor recall but noted her insight had greatly worsened. His medical opinion was blunt. He opined that she had “no insight.” He again suggested a public fiduciary be consulted to protect Rubino. [Ex. 54.] Two days later, on October 8, 2009, Rubino fell again.

The Second Fall, Head Trauma, Fractures and Infections of Rubino

The night of the fall, Wallace was awakened by a phone call from the caregivers. She had an ambulance take Rubino to the hospital. Rubino’s attending physician was Dr. Jon Larson, M.D. He independently diagnosed her dementia. He also noted she had a urinary tract infection. She was admitted to HealthSouth

Rehabilitation Institute of Tucson for inpatient rehabilitation. She was discharged on October 23, 2009. [Ex. 55.]

Rubino had suffered long term from dementia as reported by multiple physicians. She had two significant falls in the space of three weeks that twice resulted in head trauma and fractures. She had recurrent urinary tract infections. She required regular transfusions. She was blind in one eye and did not see well in the other. She had no insight by the time she met Kozak and was likely suffering from Alzheimer's when she would meet Kozak.

The Calls for a Public Fiduciary

Kozak was operating the entire pertinent time under an assumed name of an entity which she had created, *Marik Fiduciary and Care Management LLC*. (Emphasis added.) The Code of Conduct for fiduciaries precludes “[a] certificate holder” from transacting business under an assumed name or under any designation, name or style, corporate or otherwise, other than the legal name of the individual” certificate holder. ACJA § 7-201(F)(2). Kozak, as a certificate holder, operated under an assumed name created shortly after her licensure. It is apparent her purpose was to lead the public into concluding it was dealing with a public fiduciary, and a public fiduciary had been recommended by Dr. Leff.

Dr. Leff had twice recommended a public fiduciary to Rubino and Wallace. His medical records reflect he gave her the phone number for a public fiduciary. [Ex. 52.] Wallace swore that she never met Kozak until Rubino was transported home by her organization. Kozak at the hearing testified it was a medical order that required Rubino to have around the clock care. None was offered. Kozak also says she met Rubino at the hospital. It appears Kozak introduced herself to Rubino at the hospital. Kozak swears that “it was Rubino alone who ultimately hired Marik...” There appears to be no objective evidence of how or why Kozak was chosen, except that

she apparently met privately with Rubino at HealthSouth and declared that she was hired. [Ex. 2, para. 7, 000005.]

The Appearance of a Fiduciary Services under an Assumed Name

Rubino was released back to her home from HealthSouth Rehabilitation Institute on October 22, 2009. Kozak knew that Rubino suffered from dementia because it was stated in the discharge papers. [Day 1/11:45-48.] Kozak testified that she had operated Marik for thirty-eight years. [Day 2/9:19.] Her testimony was misleading. Marik Fiduciary and Care Management LLC, was incorporated months after her licensure. That she may have operated some other business under a fictitious name is unclear because her testimony was not credible. If her prior business entities were for care giving, she would have possessed much experience dealing with senior citizens, their care, and recognizing their weaknesses.

Multiple Independent Findings Confirming Medical Diagnoses of Dementia

That Rubino remained not competent and never regained insight was noted independently from Dr. Leff by Dr. Sean Patrick Mayo [Ex. 76] and Dr. Kent V. Carey. [Ex. 77]. Rubino was taken for her medically ordered and needed blood transfusion by Kozak on December 4, 2009. Kozak removed Rubino against medical advice on December 4, 2009 but fortunately for Rubino returned her on December 5, 2009. Two different physicians each separately evaluated her regarding her ordered transfusion. They each diagnosed her neurological weakness in their respective medical reports of December 4 and 5, 2009. In reviewing her history, they noted her dementia and the fact of her mental or behavioral problem of hallucinating.

Kozak seems to claim that by December 4, 2009 Rubino had no dementia. She emphasizes that position by the submission of a single sentence paragraph in her March 5, 2015 sworn response to the Division. It is grossly misleading. She swore

that “Dr. Leff’s office record of December 4 (2009) also shows at the bottom a diagnosis of anemia, high blood pressure and hemorrhoids, with no mention of dementia, with the next visit set three months off.” [Ex. 2, 000007.] But the document is not office visit records of the examination by Dr. Leff. It appears to be an insurance claim form which states the basis for the recommended transfusion. [Id. 000025.] As importantly, Kozak was there when doctors on December 4 and December 5 interpedently reported her dementia. This deceptive claim, was consistent in one way. It helps establish that Kozak looked for anything to substantiate that Rubino was competent and ignored the rest.

Breaking the Relationship with Dr. Leff

In the deposition of Dr. Cox on August 9, 2013, questions were asked by Kozak’s attorney regarding the legal and then ethical and moral duties of a doctor to report exploitation. [Ex. 20, Bates 000011.] Dr. Leff had twice expressed his concerns and encouraged the seeking of a public fiduciary for Rubino. He diagnosed that Rubino had no insight. Kozak exercised her authority under the durable power of attorney and severed the long term personal relationship between Rubino and Dr. Leff, without telling him, and replaced him with Dr. Carol Cox.

Because Kozak did not inform Dr. Leff that she had removed him as the primary care physician for Rubino, Kozak was called at the direction of Dr. Leff to schedule an appointment for Rubino because Rubino was seemingly suffering with an active “gastrointestinal bleed.” Exercising her durable power of attorney regarding relationships, Kozak kept Rubino from seeing Dr. Leff and self-servingly said, “I am determined to have a peaceful December.” [Ex. 56.]

The Kozak Relationship with Dr. Cox

Because of her relationship with Dr. Cox, Kozak frequently transferred her clients to Dr. Cox for medical care. Dr. Cox swore that Kozak had “been bringing people to her under her business for medical, folks mostly who have problems with memory and need help getting around, need help with activities of daily living and need help with their financial affairs.” [Ex. 20, Bates 000005.] Dr. Cox had been working with Kozak “through these patients over the years.” [Id. at Bates 000006.]

Kozak entered into a “Statement of Partnership” with Dr. Cox on behalf of Rubino, by filling out that statement and may have had had Rubino sign it. [Ex. 60.] It is clear from the examination of Rubino by Dr. Cox that Rubino did not even know what day it was. The Statement contains no date. It is unclear who dated the notes of the “mini-mental state examination” that were submitted with that statement in the same exhibit.

Dr. Cox relied upon her medical records in testifying in her deposition on August 9, 2013 that she first met and examined Rubino on December 14, 2009. She had been given no prior medical records of Rubino and relied on the history given to her by those present. Kozak was there during the medical examination of Rubino.

The Immediately Recognizable Dementia

The dementia of Rubino was apparent at the outset of the initial informational gathering meeting, prior to the physical medical examination. During Cox’s deposition, Kozak’s attorney asked a leading question of whether the history she received had been told to her by Rubino. Dr. Cox was unwilling to accept that leading suggestion by him. She declined to swear the history was reported to her by Rubino. Cox swore, “I start with the patient first as a general rule.” She then testified, “but if they are uncommunicative, then I often end up having to talk with caregivers...” [Ex 20, 000006.] One question later Kozak’s attorney again asked if

the history Dr. Cox received was reported to her by Rubino. Dr. Cox held firm. “You know, sometimes it’s a group effort.” She then repeated “So I’m not sure who told me that.”

Kozak’s attorney interrupted again, “Okay, I keep interrupting you but—” Dr. Cox politely pointed out the obvious. “*Usually—I mean, usually, people who have memory problems, it’s hard for them to gauge, you know, for obvious reasons why they—you know, how long something has been going on.*” Having failed to follow the lead, her attorney rebutted, “I’m going to ask you a lot more about that. In a few minutes.” With the clear memory problems of Rubino it was Kozak who was the historian on that date. Kozak also caused a list of Rubino’s prescriptions to be written and given to Dr. Cox. [Id. at Bates 00007, p. 17:7-9.]

The Cover Up

In reviewing the deposition testimony of Dr. Cox, the Court takes note that by the time of her deposition, Kozak had already told Dr. Cox that she wanted the records to say that Rubino was competent. [Ex. 25, Bates 000033.] A negative inference is drawn from this.

Tellingly, at that first medical examination of December 14, 2009, Dr. Cox swore it was reported to her at that meeting that Joanne was the healthcare power of attorney. Kozak had Rubino sign appointing Kozak as the healthcare power of attorney. Kozak, not Rubino, ordered Wallace to turn in her health power of attorney. Kozak also knew she was the general power of attorney for Rubino. But that was not reported to Dr. Cox. Instead she was told Sharon Smith, the niece of Rubino, was the power of attorney, not Kozak. Kozak was untruthful by intentional omission with Dr. Cox. Rubino did not even know who her present powers of attorney were. Kozak was present and aware of this. It was also reported to Dr. Cox that Rubino only had dementia for six months, which was also untrue. [Id. at Bates 000007-8.] Kozak did

not inform Dr. Cox nine days earlier that Rubino was taken to the Emergency Room for her medically ordered and needed blood transfusion by Kozak. [Id. at Bates 000014.]

This series of omissions were not negligent. They were done with the intention to mislead. Because of this, Dr. Cox assumed Rubino was healthier than she was and was uninformed that Kozak had complete control of Rubino's assets, and health care. Dr. Cox as a result questioned that Rubino even needed blood transfusions. She soon would increase the rate of those transfusions based on the medical records and her examinations.

The Obvious Inabilities of Rubino and legal incapacity of Rubino

Even if Rubino was not incapacitated at the time of her will, she was on December 4, 2009. The medical findings of the emergency room doctors, and the finding of dementia by Dr. Cox establish that. Later, when asked about the mental status test performed on Rubino by Dr. Cox, she was asked by Kozak's attorney, "Well, did you think that Ms. Rubino was in a state where she could still make decisions about her own health?" Dr. Cox again would not take the lead and entirely evaded the question. "For someone to make decisions about their health, it's a very case by case—in my experience, it's a very case-by-case situation by situation, how to figure that out." [Id. at Bates 000008, p. 20:1-7.]

Dr. Cox did not have the healthcare power of attorney of Kozak in her file. [Id. at Bates 000013.] Kozak's attorney seemingly recognized this by his use of leading questions and own factual assertions to cover the misleading disclosure to Dr. Cox that JoAnne was the medical power of attorney. Dr. Cox was not willing to follow the lead. Dr. Cox was asked if she knew of the date Rubino signed a health power of attorney over to Kozak. Dr. Cox answered, "no." Dr. Cox was told, "Well, it was about—it was November 1, 2009. That's the date it was dated." Dr. Cox

answered, “Okay.” Dr. Cox was then told, “Which would be about six weeks before you saw her.” She again answered, “Okay.” [Id. at Bates 000008, p. 20:11-19.]

By his leading questions, Kozak’s attorney phrased his own description of whatever the note regarding Kozak was in the file. Attorneys typically do not ask questions that they do not want answers to. Dr. Cox was never asked *when* that note was entered in the file. Dr. Cox was not asked *which*, if any, of the two medical powers of attorney Kozak had Rubino sign November 1, 2009 the note was referencing. Or even if it referenced the living will signed on that date.

The Lack of Reasonable Inquiry

Dr. Cox was then asked “[D]o you have any opinion about whether Ms. Rubino would have been cognizant to sufficiently understand signing such a document?” Dr. Cox, who due to the passage of time, could not remember the conversations from December 14, 2009 was asked to opine about the events of November 1, 2009. But that had occurred six weeks before she even met Rubino but was the same date the durable power of attorney and will was signed. Dr. Cox expressed no opinion about whether Rubino would have been “cognizant to sufficiently understand” the document, but instead tellingly answered a different question. “It wasn’t something where Kay was dictating what was to be done. That was my general impression of their interaction.” [Id. at Bates 000008-9, p. 20:20-21:7.] Rubino was incapacitated not later than her examination by the Emergency Room doctors and by the time she was examined by Dr. Cox.

The willingness to cover for Kozak regarding this pivotal date made the testimony of Dr. Cox suspect. Dr. Cox was not there at the time, was completely unaware of Rubino’s condition at that time as she had no medical records but still covered for Kozak. The unwillingness of Dr. Cox to give the medical opinions sought by Kozak, further establishes how obvious the vulnerability of Rubino was

and that Kozak took calculated steps to assure that the only witnesses to the competence of Rubino on November 1, 2009, were in her control.

Dr. Cox refused to go further despite repeated attempts to get her to offer a favorable opinion. While there is no expectation that Kozak herself should have had the legal expertise of her attorney, Kozak chose not to have any independent observer present. Kozak was an educated and licensed fiduciary but self-servingly made no serious inquiry into the competency of Rubino. The inquiry that her attorney made of Dr. Cox highlight that any objective examination that an independent party would have brought would have precluded the signing by Rubino of the documents on November 1, 2009, and further bolster that Kozak took calculated steps to preclude that independence.

The examination of Dr. Cox also underscores the medical testing that an independent doctor would have taken if asked about competency. Kozak did not want to know whether Rubino was competent to: “understand financial things at that time?” [Id. at Bates 000009, p. 21:20-23.]; “would understand, for example, a regular checking account.” [Id. at p. 22:1-3.] whether Rubino understood what her estate was or; “who the people are that you want to give it to.” [Id. at p. 23:3-12.]

Another Folstein Result Established Deficiencies in Rubino

Dr. Cox was asked if she had any reason to believe that Rubino could not understand financial matters, she answered, “the mini-mental status indicates that she might have some difficulty, you know, that it would be an area worth exploring.” Dr. Cox also testified that certain cognitive deficits don’t always show up on that test. [Id. 00009 and 14.] Even though Dr. Cox testified that Rubino had a gradual decline, she never repeated the standard Folstein test to measure the predictable decline in Rubino. For that she acknowledges that she should have and that she could be taken to task for failing to do so. [Id. at Bates 000010.]

The Recurrent Low Hemoglobin Effect on Cognitive Abilities

While in the care of Dr. Cox, Rubino had lab tests done twice a month. Her lab test results showed consistently low readings for hemoglobin, that were at times dangerously low. Her low hematocrit regularly brought fatigue and shortness of breath. Dr. Cox opined that the low readings of her blood would affect her cognitive abilities. [Ex. 20, Bates 000015.]

Rubino, Oxycodone and Hydrocodone.

The February 27, 2012 notes reflect Kozak had been giving Rubino Oxycodone which Dr. Cox had never prescribed. When Kozak was asked who had given Rubino a prescription for Oxycodone, Kozak was evasive and said she would have to look it up. Then said, “That’s OK.” It was then agreed they “would just discuss it...at the patient’s next appointment in March.” [Id. at Bates 000030.]

The March 7, 2012 notes of Dr. Cox state that Kozak again contacted her, that Rubino had only slept 2-4 hours, “had confusion and agitation, she was up all night.” Kozak asked if it might be a response to the pain medications or an infection. Dr. Cox prescribed Hydrocodone at ½ to one tablet every four hours. Two days later, Kozak told Dr. Cox that she wanted to increase the dose, that Rubino had begun “the dying process,” and wanted a hospice consult. The Hydrocodone was increased to two tablets every 4-6 hours by Dr. Cox. Rubino was read her last rites that day. [Id. at Bates 000031.] Even in this heavily drugged, dying process, with dementia, sleepless nights and Alzheimer’s, Kozak continued to assert that Rubino was fully competent and directing her affairs.

The Death of Rubino and Appearance of Alzheimer's

Rubino died on March 12, 2012. In the death certificate, Dr. Cox, who had been the physician for Rubino since the end of 2009, reported from her personal knowledge and examinations of Rubino over that multi-year time, that the Alzheimer's and Hypertension she believed existed in Rubino was a "significant condition-contributing to death but not resulting in the underlying causes given above." Dr. Cox made no examination of Rubino before issuing the death certificate. [Ex. 59.]

When Kozak saw while at the funeral parlor that finding on the death certificate by Dr. Cox, she became upset and immediately called, trying to reach Dr. Cox to have her change the death certificate and was emphatic about Rubino not having Alzheimer's. [Kozak Ex. K, Bates L010148.] As with her first communication with Dr. Cox, this was to further cover up her misconduct. The records of Dr. Cox reflect that Kozak conversed with Dr. Cox and was upset.

On March 19, 2012, Kozak demanded that Dr. Cox change her medical opinion to support Kozak's position that Rubino, "Up until the end," had been handling "all of her own business and affairs," despite her being heavily drugged with a double dose of Hydrocodone, in the midst of the dying process, with dementia, sleepless nights and apparent Alzheimer's. Kozak informed Dr. Cox that she had directed the funeral home to refax the death certificate to Dr. Cox for an amendment in conformity with Kozak's position and directed that it be resigned if possible. [Ex. 20, Bates 000033.]

On March 22, 2012, Dr. Cox reported her conversation with Kozak and, based on that conversation, noted that she assured Kozak that the Alzheimer's was "mild" and, to further assist Kozak, wrote in her notes that the Alzheimer's "did not prevent the patient from assisting in her financial decisions that Kay implemented for her..."

[Id.] Dr. Cox admitted she never saw Rubino during this end time. Dr. Cox was again covering for Kozak.

Dr. Cox explained in her deposition that “the diagnosis of Alzheimer’s is based on clinical suspicion. Academically speaking, you can’t make a diagnosis of Alzheimer’s while you are still alive.” She stated it can only be clinically diagnosed by biopsy. Because no biopsy was done, she can make no conclusion that Rubino in fact had Alzheimer’s. Therefore, Alzheimer’s cannot be said to have prevented Rubino from assisting in her financial decisions. [Id. at Bates 000010.] Notably, Dr. Cox was not asked how accurate such a “clinical suspicion” is by physicians when biopsies are performed.

What is not said is more important than what was said. The record strongly supported that Rubino was not capable. There is no opinion expressed by Dr. Cox that Rubino was competent. The evidence is that the long term dementia, use of powerful prescription drugs, significant history of cancer followed by a major surgery, unexplained continuing blood loss, fractures and head injuries from falls, depression, consistently low readings for hemoglobin, and health issues, all known by Kozak, were collectively, if not singularly, cause for independent inquiry, which Kozak intentionally avoided, “up until the end.”

Additional Facts Regarding the Complaint

The Documents

A little more than a week after beginning care in the home for Rubino, on November 1, 2009, Kozak crafted a series of documents dated November 1, 2009 that may have been signed by Rubino, specifically: (a) a General Power of Attorney (“POA”), [Ex. 40]; (b) a Last Will and Testament [Ex. 34]; (c) a Healthcare Power of Attorney – Short Form [Ex. 39]; (d) a Healthcare (Medical) Power of Attorney

with Mental Health Authority [Ex. 35]; (e) a Healthcare Power of Attorney [Ex. 123]; and (f) a Living Will – Statutory Short Form [Ex. 124,] (“ Documents”).

The powers of attorney included in the Documents named Kozak agent for Rubino, and the will included in the Documents made Kozak personal representative for Rubino’s estate in the event of Rubino’s death. One medical power of attorney attempted to assure that in the event the court intervened that Kozak would be required to be appointed guardian. [Exhibit 123.] In February, 2011 Kozak assured she was also named as power of attorney over a Schwab account. The funds in the account were paid to Kozak’s company. [Ex. 2, 000012.]

The Absence of Credibility

The statements of Kozak regarding the creation of those documents varied and are strong evidence that she is intentionally evasive and untruthful.

1. On March 5, 2015, Kozak responded to the Division stating she had provided a sample will to Rubino that Kozak received from an attorney. [Ex. 2, Bates 000014-15.] In this hearing she could not recall whether Rubino had used a form provided by Kozak.
2. But Kozak testified that she provided no form will to assist Rubino in writing her will, but that Rubino dictated the entire will. It is noted that A.R.S. § 14-2504 provides that a will may be self-proved if it substantially follows the form clause stated in that statute. The will that Kozak swears Rubino dictated verbatim and without assistance substantially quotes that statute.
3. Kozak swore she had no memory of whether she regularly gave a packet of forms with similar documents to her clients (including Rubino) as part of her “routine.” But in a written response to the Division she swore she

- “does that as a routine part of her practice to ask clients if they have any such documents, and if so to show them to Kozak.” [Ex.2, 000013-14.]
4. Kozak swore that she reviewed with Rubino all Rubino’s major financial and legal documents, including the will, and changes. She swore that “Rubino discussed these with Kozak.” [Id., 000014.] But at the hearing Kozak testified she had not seen Rubino’s trust documents as of November 1, 2009.
 5. In the opening memorandum, Kozak gave a third story that Rubino pulled out her 2009 will and used it to draft a new will. But in her testimony in the Brinkerhoff case she did not know what the word “drafting” meant and required that it be defined for her. [Brinkerhoff hearing, 122:14-22.]
 6. Kozak testified that she did not assist with producing the typeset of the will. Instead, she swore Rubino, on her own, produced the typeset on the will. More than that, Kozak swore she *watched* Rubino do that. [Id. 122:24-123:3.] Both counsel physically reacted to that testimony which this officer noted. Whether because of her own reflection on the such completely not credible testimony or in response to the actions of either or both counsel reactions, her answers changed. When asked who did the typing that resulted in the will, Kozak admitted, “I did.” [Id. 124:10-15.]
 7. Kozak then shifted her position again and swore that Rubino did not dictate it unilaterally. Instead that Rubino *with* Wallace dictated it. In order to sustain such a radical change in her previous claims for its creation, Kozak swore that Rubino had been influenced by Joanie Wallace for three months since August, 2009. She testified her personal “recollection” was “Joanie would go over and talk to Ella every, day, every day, every day, every day. And I was providing the care.” And at some time, “within three months,

Ella decided to change her documents...” [Id. 124:4-16.] It is noted that Kozak did not meet Rubino until mid-October.

Her testimony was more than inconsistent and not credible. They were made with an intent to deceive. While the Dead Man’s Statute, A.R.S. § 12-2251 is directly applicable to Kozak only as relate to her duties as a named personal representative, 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 and independent contractors. Their testimony had no guarantee of reliability or trustworthiness.

Kozak had much to “gain from her distortion of the transaction with decedent Rubino. Kozak chose the terms to be put in the documents. The document speaks for itself. It establishes what Kozak intended. The general power of attorney instantly extended to Kozak the power to charge any amount to Rubino, without any written agreement beyond the power of attorney, to the benefit of herself and the limited liability company she created. She had the power to vary those amounts unilaterally and did whenever she chose. She exercised that power by directing that Rubino not

have a written contract with the company she controlled. She directed that Rubino would pay a flat case hourly management fee to the benefit of Kozak that could be changed by Kozak. Kozak proposed and accepted on behalf of Rubino a “flat fee of \$1,500 quarterly for Marik’s geriatric management services that covered administrative costs, case and the like. It also was to cover for Kozak filling in or “changes in medical condition.” But Kozak appears to have changed even approved a change in that provision on behalf of Rubino.

Kozak Acted Repeatedly Under the POA

Billings

Kozak would later act under the POA repeatedly regarding this flat hourly management fee. Kozak negotiated for her company nearly a 30% increase in that hourly fee and acted under her POA by accepting that substantial increase. The billings show that on February 22, 2012 she negotiated an increase in the fee from \$20 to \$22.50 and acted under the POA to accept the increase. [Ex. 73, Bates KO1239.] Virtually all the attendant charges were for 24 hours per day. But, at that increased rate on February 28, 2012, attendants charged 27.50 hours. On March 6, 2012, she accepted for Rubino an increase in this hourly fee to \$27.50. [Id. at Bates KO1240.] On March 7, 2012, at that increased rate charged which was accepted for attendant charges for 27 hours. On March 9, 2012, Kozak again negotiated and accepted an increase to \$35.00 per hour. [Id.]

On March 11-12, 2012, Kozak accepted for Rubino that a Marik employee worked 34 straight hours and charged \$35.00 per hour for those services. [Id.]

Kozak also acted under the POA to approve payments to herself for her own claimed services, each time claiming she worked for five hours. Previously, her hourly fee was \$50.00 for 1 hour for “medi tray set-up.” On March 3, 2012, she charged for the same service 2 hours or \$100.00. On March 6, 2012, she increased

her own hourly rate to \$57.50. On March 8, 2012, she accepted for Rubino a charge for her own services at \$57.50 per hour for five hours (\$287.50) for Kozak to “set up the bedroom.” [Id. at Bates KO1240.] On March 9, 2012, she accepted for Rubino payments to herself for another \$287.50, to run “errands for Ella.” On March 10, 2012, she accepted for Rubino her claim that she spent five hours on “fr. Harry” for \$287.50. On March 12, 2012, she accepted for Rubino her own claim for \$287.50 for “arrangement.” [Id. at Bates KO1240.]

Kozak also approved for Rubino a charge of \$1,000 for 1 hour of service, for which the “Date of Service” was listed as 12/23/11. Those services covered “previous billed” services for October, November, and December 2011. [Id. at Bates KO1241.] A review of Exhibit 73 shows no such charges.

Kozak also negotiated for her company a flat “geriatric fee” which was paid quarterly and which Kozak accepted for Rubino through the POA. [Ex. 2, pp.8-9.]

Personal Relationships and Affairs

The POA gave Kozak the power to waive any claims Rubino might have for her negligence. It extended so far as to empower Kozak to control all “Personal relationships and affairs” of Rubino. Kozak quickly acted under the POA. She controlled the relationships and affairs of Rubino in multiple ways. It gave the power to Kozak to delegate the same extensive power to anyone of Kozak’s choosing without informing Rubino. The power Kozak took included the power over “All other matters.”

Contrary to the testimony of Kozak, and the representations made on her behalf, Kozak immediately exercised those powers in obvious ways. It was Kozak who directed Wallace to come over and turn over her health power of attorney, not Rubino. Wallace came as ordered, brought her health power of attorney and

delivered it to Kozak. It was Kozak who did the talking, not Rubino. [Ex. K, L010137.] Kozak also kept Wallace from Rubino.

Kozak argued that A.R.S. § 36-3209A governed the healthcare powers of attorney and that as a result “the most recent directive is deemed to represent the wishes of the patient.” That statute relates solely to health care directives which are distinct from a healthcare power of attorney. A health care directive is a “document” that deals with a person’s “future health care decisions.” A.R.S. § 36-3201(5). A health care power of attorney “means a written designation of an agent to make health care decisions that meets the requirements of § 36-3221 and that comes into effect and is durable as provided in § 36-3223, subsection A.”

Kozak wrote a document dated December 7, 2009. Rubino may have signed it. Kozak wrote the words declaring to anyone who it might be shown to that she controlled the relationships and affairs of Rubino. As the document directs, this assured Rubino would be isolated and “left alone” from everyone except Marik. The signature of Kozak emphasized the expression of her power by identifying herself as operating under the general power of attorney for Rubino with the initials that followed her signature, “p.o.a.” By that document, Kozak further exercised her power over the affairs of Rubino by delegating her powers under the general power of attorney to the limited liability company she created. Kozak mandated that her company take care of (and charge) Rubino until her death. [Ex. 45.]

On March 6, 2012, Kozak made gifts of \$12,000 expressly stating “I, Kay Kozak,” distributed from “the funds owned by Ella J. Rubino and for whom I have power-of-attorney privileges.” [Ex. 18.]

Kozak transferred \$100,000 from Trust funds of Kozak into a Schwab account for which she had the power of attorney and complete control. [Ex. 21, pp. 35, 38.] On the day Rubino died, Kozak exercised her power of attorney and transferred \$60,000 of Rubino’s monies into her Marik account. [Ex. 31, pp. 35, 51.] Well after

the death of Rubino, Kozak under her power of attorney, deposited \$120,000 to Marik. She claimed the checks for these transfers were written on March 6, 2012. [Ex. 21, p. 35.] She knew these monies were in trust, knew the trust existed, and kept the monies for her personal use for months. Kozak had no explanation for these transactions. It is fair to infer from the evidence that she intended to wrongfully keep the monies.

After the death of Rubino, Kozak took nearly \$140,000 in cash from Rubino's home and kept the money for her own use for months. [Ex. 79, pp. 1-2.]

Partial Analysis of Argument, Conclusions of Law and Findings of Fact

Kozak testified that she believed she could only use the general power of attorney upon the incapacitation of Rubino. This is not credible. She obtained, regularly used, and knew what the form stated. She had Rubino initial every term of the document. She testified of thirty-eight years of experience in the field and that it is part of her routine that she gives such forms to her clients. She filled out the form. She swore she knew that no doctor had found Rubino incompetent, but also swore she did not have the records of Dr. Leff at the time. She acknowledges she knew Rubino had dementia.

Kozak argues that some deed or action must be taken prior to ACJA § 7-202(B)(3) and § 7-202(J)(7) being applicable in these proceedings. Kozak acted frequently under the power of attorney. Notwithstanding that she acted under the power of attorney, it is a misreading of the language quoted from A.R.S. § 14-5651(J) and from which those code provisions arise. Kozak cites to 2A C.J.S. Agency § 37, apparently for the position that the power of attorney only gives authority, but the agent must do something to "carry out the transaction." 2A CJS Agency 37 relates to consideration or compensation.

2A C.J.S. Agency § 34 is clear that the agency may be created by the active consent of the principal and agent. One cannot act under a power of attorney until one takes the act of assent to serve. However, it is essential to the formation of the relationship that the principal has in some manner, either expressly or by implication from conduct for which he or she is responsible, appointed the agent, and it is equally essential that the agent accept the appointment. Kozak acted under the power of attorney.

2A C.J.S. Agency § 36 further explains the initial “act” required for one to be “acting” under a power of attorney. Unlike in the creation of professional relationships, an individual can be named as the power of attorney and be unaware of it. There is no relationship in such an instance. That is not what occurred here. Kozak wrote the power of attorney and named herself. She knew and consented to it by allowing Rubino to sign it.

Agency, either implied or expressed, requires consent to the agency by both the principal and agent. The manifestation of consent to form an agency relationship can be established by contract or implied by the factual circumstances. Such manifestation of consent includes conduct from which, in light of the circumstances, it is reasonable for another to infer consent; such a manifestation may be made by words or other conduct, including acquiescence.

Although neither a contract nor an express appointment and acceptance is necessary for an agency relationship, an agency agreement must possess the elements essential to every contract. Thus, there must be an offer and an acceptance thereof.

The power was manifestly final and complete. The factual circumstances under which it was made more than establish that Kozak accepted the appointment

and took steps to manifest her power. When Kozak gathered the signature of Rubino she manifested her agreement to the power. From that point forward Kozak was acting under the power of attorney. The contrary argument obfuscates the plain text. By example, the section *applies* to a licensed fiduciary serving as a guardian, conservator or personal representative, “whether or not that person is acting pursuant to a court appointment.” Kozak argues the only time the section applies is when such an agent IS acting pursuant to the appointment.

In *City of Grantsville v. Redevelopment Agency*, 233 P. 3d 461 (2010). The Supreme Court of Utah clarified this in its ruling,

A fiduciary relationship ““results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”” *Wardley Corp. v. Welsh*, 962 P.2d 86, 89 (Utah Ct.App.1998) (quoting Restatement (Second) of Agency § 1(1) (1958)). The manifestation of consent to form an agency relationship can be established by contract or implied by the factual circumstances. *First Sec. Bank of Utah N.A. v. Banberry Dev. Corp.*, 786 P.2d 1326, 1332 (Utah 1990).

It is the manifestation of agreement to the appointment that establishes that the agent is “acting” under the ACJA.

Kozak also attempts to bolster her argument by citing to A.R.S. § 14-5502 for her proposition that “It is not just being an agent, i.e., the constant existence of the agency, but the action taken under the authority conferred, that is at issue.” That statute explains that when a durable power of attorney is established by the consent of the agent, (as was here) then “All acts done” even during the disability or incapacity of the principal are effective.

The argument ignores A.R.S. § 14-5501. That establishes that in Arizona, “A

durable power of attorney is a written instrument by which a principal designates another person as the principal’s agent.” Nowhere within that statute is the act of consent of the agent required for the durable power of attorney. That is because one is not acting under a power of attorney unless and until they accept the position. Once the nominated agent *acts* to accept the appointment, that person is acting under that power, whether that power is exercised later or not. In the same way, an attorney at law, once the act of accepting representation occurs remains that client’s attorney, regardless of whether directly working on that client’s case. The attorney-client relationship is established when the act of the two parties agreeing occurs. The same is true that the naming of a personal representative in a will does not cause that individual to be “acting” until the act of concurrence to serve is stated.

The law establishes public policy. It is of note that A.R.S. § 14-5506 states that in Arizona the public policy in a civil proceeding is that if, when the power of attorney was executed, the principal was a vulnerable adult, that agent must prove the principal had capacity. In Arizona a vulnerable adult is defined in A.R.S. § 46-451. That definition includes an individual like Rubino, who could not protect herself from exploitation. Exploitation under that statute includes the “improper use of a vulnerable adult or his resources to another’s profit or advantage.” Kozak conceded that Rubino may have been vulnerable. Rubino was a vulnerable adult as defined by that statute.

Kozak, in the proposed findings of fact and conclusions of law at page 3, cites Professor Carolyn L. Dessin, Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role, 75 Neb.L.Rev. 574 (1996). Kozak certifies that article by Professor Dessin supported Kozak’s argument that “a durable power of attorney as it exists now is merely an empowerment instrument: it described what the agent can do. But the statement by Dessin is footnoted. It references, *In re Estate*

of *Lienemann*, 222 Neb. 169, 178, 602 (1986). Her footnote explains, “The agent can also be called an ‘attorney in fact.’” Kozak apparently argues that Dessin and *Lienemann* meant to say “attorney in potential” not “in fact.” This is nonsensical.

The *Lienemann* court stated,

A power of attorney is an instrument in writing authorizing another to act as one's agent. The agent holding the power of attorney is termed an “attorney in fact” as distinguished from an attorney at law. *See Matter of Estate of Mehus*, 278 N.W.2d 625 (N.D.1979). Because the power of attorney creates an agency relationship, the authority and duties of an attorney in fact are governed by the principles of the law of agency, see *Matter of Estate of Mehus, supra*, including the prohibitions against an agent's profiting from the agency relationship to the detriment of his principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal, see *Johnson v. First Nat. Bank*, 253 Ga. 233, 319 S.E.2d 440 (1984).

On the same page of her article Dessin stated her purpose in writing the article.

She stated,

[C]oncerns have been voiced that perhaps we have created an instrument of abuse rather than a useful tool. Sometimes the problems are as clear as wrongful misappropriation of the principal's property by the agent. Often, however, problems arise because the standards governing the behavior of agents under durable powers of attorney have never been clearly defined.” [Dessin at p. 576.]

The purpose of her article discusses “the general lack of definition of the role of the agent” and the “problems that this lack of definition has begun to cause.”

Dessin condemns the type of power of attorney Kozak wrote. “These forms

make little effort to ensure that the agent will act responsibly. Often, forms suggest the use of broad exculpatory clauses (such as used by Kozak) which further exacerbates the potential problem caused by the lack of definition of the agent's role." She then states, "Not only is the law unclear about what action or inaction will trigger liability, practitioners are using forms that excuse all but the most egregious misconduct." [Dessin, *supra*, p. 586-587.]

Kozak also quoted the Dessin article that, "Once the principal loses competence, the agent should have some responsibility to either step in and act on behalf of the principal or take some action to protect the principal's property." Kozak then asserted "Rubino did not lose competence here."

The argument is again misleading because the method of the creation of the power of attorney was contrary to the express restrictions in Arizona law. Kozak knew this, as did her husband (Brinckerhoff). 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. He was not an impartial witness. Her husband knew his wife had written the documents. He had read the will and the power of attorney and the multiple health power of attorneys before the signatures were obtained and witnessed them because he benefited from them. He knew that that he had a conflict of interest and evaded it willingly to support the plan of Kozak to keep Rubino from express protections intended under Arizona law for obtaining a power of attorney. *See, e.g. Ariz. Rev. Stat. Ann. § 14-5501* which requires notarization and attestation.

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. Ironically, in a matter involving competency, Kozak and her husband argue that he was competent under A.R.S. § 41-320A to notarize her signature. He was not acting as an agent of a company. He was acting for his wife and himself. There is an important distinction between competency and impartial conduct that both Kozak and her husband knew and intentionally ignored.

That Kozak and her husband intended to disregard any conflict is apparent from his notarization of the health power of attorney which states it was “made under section 36-3221, Arizona Revised Statutes.” [Ex. 123.] There, in conformity with A.R.S. § 36-3221(A)(3), her husband affirmed that he was present when Rubino dated and signed the health care power of attorney and reported she “appeared to be of sound mind and free from duress,” as required under that statute.

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.” Kozak’s husband was conflicted. Both the named agents and Brinckerhoff was involved provisioning health care to Rubino and intentionally ignored the law.

Kozak also avoided the protections afforded Rubino under A.R.S. § 14-5503. The power of attorney she wrote assured there would be no conservator or court appointed fiduciary that she might be “accountable to.” Kozak intentionally did not create a springing power of attorney under which she would be empowered only upon the determination of incompetence of Rubino. Instead, days after her solely controlled company took control of Rubino’s physical care, she took control of all Rubino’s assets, relationships, and affairs, including, with the assistance of her husband, her estate.

“Once a financial durable power of attorney is validly executed, it can be an extremely powerful document, authorizing an agent to perform virtually any act with respect to the principal’s property that the principal could perform.” “Because the agent under a durable power of attorney can act with respect to any of the principal’s property, his power is broader than that of a trustee. *See* John J. Lombard, Jr., *Asset Management Under a Durable Power of Attorney-The Ideal Solution to Guardianships or Conservatorships*, 9 Prob. 151-53 (1973) (emphasis added.)

Kozak intentionally drafted a general durable power of attorney that was effective prior to the loss of competence to obviate the need for an objective determination of her incompetence. The power was also durable. It proclaimed the opposite of the cited Dessin quote. It *remained* effective “once the principal loses competence,” as it stated, “this power of attorney shall not be affected by the subsequent disability or incompetence of the Grantor.” [Ex. 40.]

Of note, Kozak concedes only that Rubino “could be considered vulnerable.” [Kozak, Day 1/10:1.] Kozak knew at all times knew Rubino suffered from dementia, knew the severity of her two falls, knew her doctor recommended a fiduciary and knew that she had aptly named her company to give that appearance. The medical history of Rubino was that she was extremely vulnerable after her two falls, the last of which fractured her pelvis and gave her a concussion with multiple contusions. [Ex. 55.]

Kozak relies on the non-medical opinion of Dr. Cox to argue Rubino remained capacitated in 2011. But as cited above, Dr. Cox refused to give an

The testimony that Rubino dictated the will to Kozak or that Kozak was a scribe, is not credible. Kozak created the documents. Kozak wrote the will. Kozak misleadingly identified herself in the will as “KAY KOZAK, of Marik Fiduciary Care Management.” Kozak knew the name of her own company but omitted the

distinction between fiduciary and care management with a purpose. She suggested, because of the intentional evasion of the restrictions on the creation of the documents, this court finds unreliable and not credible the witnesses and notarization that Rubino was capable at that time. The witnesses and notary were flawed and conflicted. It is equally not credible that Sharon Smith had no objection to the changed will written by Kozak. The challenge by Smith to the will is clear and convincing evidence that she did not agree with the changed will. Her court challenge to the Kozak will was successful. The testimony of Kozak and her witnesses is self-serving and not credible.

Kozak stated in a letter from her counsel (verified by Kozak) that she (Kozak) supplies her clients with forms for life-planning and estate-planning documents as “as a routine part of her practice.” “Soon after hiring Marik, Kozak provided Rubino with a packet of materials that included a set of sample forms covering various situations and including a sample will that Kozak had received from an attorney in the past. Kozak does that as a routine part of her practice to ask clients if they have any such documents, and if so to show them to Kozak.” [Ex. 2, pp. 13-14, ¶22.] These are not the actions of a scribe. It is proof of an intent and a plan.

Adopted Findings of Fact and Conclusions of Law

Central to much of the Board’s determination was whether Kozak acted as a public fiduciary. She was. Kozak concedes her actions after the death of Rubino were done as a Fiduciary due to her personal knowledge that she had written herself into the Rubino will as the named personal representative. This hearing officer read every exhibit to assure his finding, analysis and recommendation was independently determined and based on that record.

Kozak acted as a public fiduciary regarding her multiple decisions. She had to keep complete records of her decisions as required under ACJA §§ 7-202(J)(1)(c)(2)

and 7-202(J)(3)(e). The Program has requested an adverse inference from her failure to do so. This hearing officer finds a negative inference, but also notes that the absence of a negative inference would not alter the findings or recommendations.

To avoid redundancy, the PDJ adopts multiple findings of facts and conclusions of law (collectively “Findings”), by reference from the Division and incorporates them by this reference. Findings 1-15 are not rejected but were substantially found separately above. Findings 16-17, 21-25, 28, 30-39, 41-77, 79-.84, 86-88, 90-92, 94-190 are accepted.

Finding 18 is accepted, but rejected in part only, because A.R.S. § 36-3209 establishes that the later healthcare power of attorney was controlling. Finding 20 is accepted but rejected in part because the document attempted to substantially change the pre-existing estate plan but was properly rejected by the Court. Findings 26 and 27 are accepted but rejected in part, as the POA is effective upon the acceptance of the appointment. That occurred immediately when signed by Kozak. However, she was a vulnerable adult without the capacity to grant the power. Finding 29 is accepted but clarified that the factual circumstances made clear that Kozak accepted upon Rubin signing the POA.

Finding 40 is adopted but clarified that the evidence cited above convincingly established Rubino was not only vulnerable but had significant mental impairment and was not capable of managing her own affairs. Finding 78 is adopted but clarified that the testimony of Kozak was not credible. Finding 85 is clarified because Kozak sought to affect the affairs of Rubino as well. Finding 89 is clarified that such inability to retain what her doctor was telling her, also establishes that Rubino was incapacitated and the healthcare power of attorney was in effect. Finding 93 is rejected. Kozak knew of the dementia and actively ignored it because it did not serve her purpose. It is fair to infer from the evidence that is was one reason she caused the removal of Dr. Leff.

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

III. FINDING AND CONCLUSION OF LAW

Kay Kozak, License Number 20507 violated the provisions of the ACJA Sections 7-202(J)(2)(b)(1-3), 7-201(H)(6)(k)(7-8), 7-202(J)(6)(b, and e-g), and 7-202(J)(2)(b)(1-2) as alleged in Counts 2 through 6 of the complaint in ACJA Sections.

IV. MITIGATING AND AGGRAVATING FACTORS

Upon the finding of one of 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 Kozak had a prior disciplinary record. Kozak is a long time licensed Fiduciary. 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 Kozak 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. Kozak 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. In less than two weeks Kozak, a virtual stranger, had control of not merely the assets of Rubino, but of the

relationships and affairs of Rubino. Kozak apparently had 38 apparent years of experience managing senior citizens. She knew Rubino had dementia and was objectively vulnerable. She made no inquiry of the extent of that dementia. She made sure there was no independent agent present and isolated Rubino. She knew from her training as a licensed fiduciary that her conduct was dishonest and in violation of the code and law. This is a strong aggravating factor.

- B. Selfish Motive. All of her acts of commission and omission by Kozak selfishly profited her personally. This is a strong aggravating factor because it is the opposite of the service required for a fiduciary.
- C. Multiple offenses. Kozak violated the ACJA in multiple ways and in multiple counts. 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 Kozak contradicted themselves.
- E. Failure to acknowledge wrongful nature of the conduct. Kozak, even in light of the extensive holding of the cash monies taken from the house of Rubino, has failed to acknowledge the wrongful nature of her conduct.
- F. Vulnerability of the victim. Rubino was extraordinarily vulnerable.
- G. Substantial experience in the profession. Kozak has long been a licensed fiduciary.
- H. Indifference to making restitution. There was no evidence that Kozak ever stepped forward voluntarily to make restitution.

V. RECOMMENDATION

It is recommended that the Board affirm its decision to revoke the license of Kay Kozak. The aggravating factors strongly outweigh the mitigating factors.

DATED this 29th 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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Your BofA Core Checking

for December 22, 2015 to January 20, 2016

Account number: 4570 1920 1472

ELTON ROSE TEETERS DEBORAH A DELLISANTI

Account summary

Beginning balance on December 22, 2015	\$13.01
Deposits and other additions	1,097.00
ATM and debit card subtractions	-1,100.00
Other subtractions	-0.00
Checks	-0.00
Service fees	-12.00
Ending balance on January 20, 2016	-\$1.99

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EXHIBIT

B

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9
10 **UNDER THE ARIZONA CODE OF JUDICIAL ADMINISTRATION**
Fiduciary Board
11 BEFORE THE ASSIGNED HEARING OFFICER
12 1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

13 In the Matter of Fiduciary Licensee,
14
15 **KAY KOZAK,**
16 License Number 20507

FID-NFC-14-0011

FIDUCIARY PROGRAM PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

17
18
19 **I. General Law and Jurisdiction**

20 A. While the burden of proof lies with the Program, to the extent Kozak has failed to produce records to explain her conduct, the Program is entitled to a negative inference

21 1. Conclusion of Law: In this disciplinary action against licensed fiduciary Kay Kozak
22 (“Kozak”), the Fiduciary Program (the “Program”) has the burden of proof by a
23 preponderance of the evidence: “In all formal disciplinary matters brought as the result of
24 an order by the board, evidence in support of the formal statement of disciplinary charges is
25 presented first and carries the burden of proof by a preponderance of the evidence.” ACJA
26 §7-201(H)(21)(c)(4).

1 2. Conclusion of Law: However, ACJA §7-202(J)(1)(c)(2) requires fiduciaries to keep
2 records that are, among other things, both (a) complete, and (b) accurate: “The fiduciary
3 shall . . . (2) Provide or ensure that reports, notices, financial accounts, and other documents
4 are timely, complete, accurate, understandable, in a form acceptable to the court, consistent
5 with the requirements specified in Arizona law, court rule, and the applicable sections of the
6 Arizona Code of Judicial Administration.”

7 3. Conclusion of Law: Under ACJA §7-202(J)(3)(e), the requirement to complete and
8 maintain accurate records expressly applies to records relating to *a fiduciary's decisions*:
9 “The fiduciary shall maintain accurate and complete records to support the decisions made
10 in the administration of a case, in compliance with court rules and the applicable sections of
11 the Arizona Code of Judicial Administration.”

12 4. Conclusion of Law: Accordingly, to the extent Kozak has failed to present records of
13 her decisions that are both (a) complete and (b) accurate, the Program is entitled to an
14 adverse inference. *Matter of Dwight*, 117 Ariz. 407, 410 (1997) (attorney’s failure to call
15 his secretary to testify about, among other things, “[t]he issues of alleged inadequacy of
16 books and records,” justified adverse inference in proceeding in which attorney was
17 disbarred); *State Tax Comm’n v. Greybar Elec.*, 86 Ariz. 253, 257 (1959) (where party put
18 only part of contract into evidence and failed to produce the rest, “[w]here such vital
19 information is readily available to a party, it can only be presumed from the failure to
20 produce it that the inference is adverse” (citation omitted)); *see also McMurry v.*
21 *Weatherford Hotel*, 231 Ariz. 244, 259-61(App. 2013) (adverse inference may be
22 appropriate even if evidence was destroyed without an “evil mind,” so long as there is
23 prejudice to opposing party). The Court will note its invocation of a negative inference
24 wherever applicable in these Findings of Fact and Conclusions of Law.

25 B. Kozak obtained substantial powers from Rubino while serving as Rubino’s caregiver

26 5. Finding of Fact: Protected person Ella Rubino (“Rubino”) was born July 20, 1912.
Program Ex. 59

1 6. Finding of Fact: The events that led to Kozak becoming fiduciary for Rubino began
2 on or before October 16, 2009, the date when Kozak (through her company, Marik, LLC)
3 began providing care for Rubino, who was then 97 years old. Program Ex. 73, p. 1
4 Beginning with Rubino's discharge from a HealthSouth rehabilitation facility on October
5 23, 2009, Kozak (through Marik) provided 24/7 care for Rubino until Rubino's death on
6 March 12, 2012, at age 99. Program Ex 73; Program Ex. 59

7 7. Finding of Fact: Kozak testified at trial that there was never a written contract
8 between Marik and Rubino covering the caregiving services that Marik provided.

9 8. Finding of Fact: Marik, LLC was formerly "Marik Fiduciary & Care Management,
10 LLC ," the name used on much of the documentation admitted into evidence. At trial,
11 Kozak testified she was unable to recall when she changed the name of her company from
12 Marik Fiduciary & Care Management, LLC to Marik, LLC. Marik, LLC will be referred to
13 as "Marik" herein. As Kozak testified, Kozak owns Marik, Kozak is the sole member of
14 Marik, and Kozak is "the boss" at Marik. See also Program Ex. 135

15 9. Finding of Fact: Kozak testified at trial that it was a "medical order" that Rubino
16 could be released to her home from HealthSouth on October 23, 2009 only if 24/7 care was
17 in place. Kozak agreed in her trial testimony that the services that Rubino required (and that
18 Kozak and Marik provided) included assistance with bathing; dressing; using the toilet; food
19 preparation; taking medication; housekeeping; and transportation.

20 10. Finding of Fact: Approximately a week after Kozak began providing 24/7 care for
21 Rubino, on or about November 1, 2009, Kozak obtained a series of documents dated
22 November 1, 2009 that were signed by Rubino, specifically: (a) a General Power of
23 Attorney (Program Ex. 40); (b) a Last Will and Testament (Program Ex. 34); (c) a
24 Healthcare Power of Attorney – Short Form (Program Ex. 39); (d) a Healthcare (Medical)
25 Power of Attorney with Mental Health Authority (Program Ex. 35); (e) a Healthcare Power
26 of Attorney (Program Ex. 123); and (f) a Living Will – Statutory Short Form (Program Ex.
124) (together, the "11/1/09 Documents"). The powers of attorney included in the 11/1/09

1 Documents named Kozak agent for Rubino, and the will included in the 11/1/09 Documents
2 made Kozak personal representative for Rubino's estate in the event of Rubino's death.

3 11. Finding of Fact: Kozak has admitted in writing that she provided Rubino with the
4 forms used to create the 11/1/09 Documents. Program Ex. 2, pp. 13-14, ¶22 (Kozak
5 verified this writing at Program Ex. 2, p. 22) However, at trial Kozak claimed that she did
6 not recall whether she had provided Rubino with the forms used to create the 11/1/09
7 Documents. The Court finds that Kozak was deliberately evasive in testifying at trial
8 regarding these matters, and the Court accordingly finds her testimony not credible.

9 12. Finding of Fact: As Kozak admitted at trial (and through her counsel's e-mail
10 admitted as Program Ex. 9), Kozak filled in the blanks on the forms that were used to create
11 the 11/1/09 Documents, except for Rubino's signatures and the other signatures on these
12 documents.

13 13. Finding of Fact: Kozak testified at trial that she did not see Rubino's trust (Program
14 Ex. 42) at the time she provided the forms to Rubino that were used to create the 11/1/09
15 Documents and filled in the blanks on those forms.

16 14. Finding of Fact: At trial, Kozak claimed in her testimony that (a) Rubino, then 97
17 years old, had "dictated" the 2009 will (Program Ex. 34), but that (b) she (Kozak) could not
18 recall whether Rubino had used a form provided by Kozak in doing so. Having heard
19 Kozak's testimony and reviewed Program Ex. 34, the Court finds Kozak's testimony that
20 Rubino dictated the 2009 will to be not credible.

21 15. Finding of Fact: Kozak testified at trial that Sharon Smith, Rubino's niece and sole
22 heir under the will that pre-existed Program Ex. 34 (Program Ex. 42) had no objection to
23 the 11/1/09 Documents, notwithstanding that Sharon Smith later (a) successfully moved to
24 have Kozak removed as personal representative after Rubino's death, with Sharon Smith
25 substituted for Kozak as personal representative; and (b) successfully moved to have the
26 will that is Program Ex. 34 set aside and to have the will that is Program Ex. 42 admitted
to probate instead. The Court finds Kozak's testimony that Sharon Smith had no objection
to the 11/1/09 Documents to be (a) inadmissible hearsay, and (b) not credible.

1 16. Finding of Fact: The Court finds that the 11/1/09 Documents effectively replaced
2 Rubino's 1991 will (Program Ex. 41) and 1991 durable/financial power of attorney
3 (Program Ex. 43), but not Rubino's 1991 revocable living trust (Program Ex. 42), so that
4 James Smith (husband of Rubino's niece and sole heir under Rubino's 1991 trust, Sharon
5 Smith) remained as first successor trustee upon Rubino's death, and Sharon Smith remained
6 as the second successor trustee on Rubino's trust.

7 17. Finding of Fact: The Court further finds that Rubino's 1991 will (Program Ex. 41)
8 was a "pour over" will, so that any property owned by Rubino at her death would "pour
9 over" into Rubino's trust, unlike the 2009 will that Kozak participated in drafting (Program
10 Ex. 34), which divided Rubino's non-trust assets into one-third shares for Sharon Smith,
11 Rubino's long-time friend and neighbor Joanie Wallace ("Wallace"), and St. Pius X church,
12 the church that Rubino had attended.

13 18. Finding of Fact: The Court finds that the healthcare power of attorney signed by
14 Rubino in September, 2009 making Joanie Wallace Rubino's agent for healthcare purposes
15 (Program Ex. 44) was effectively replaced by the healthcare powers of attorney that Kozak
16 assisted in preparing, Program Ex. 39; Program Ex. 35; and Program Ex. 123, all of which
17 made Kozak (and not Wallace) Rubino's agent for healthcare purposes.

18 19. Finding of Fact: The Court further finds that because the healthcare powers of
19 attorney that are Program Ex. 39 and Program Ex. 123 listed (in Kozak's handwriting)
20 Joanie Wallace as the successor agent (in the event Kozak was unavailable to act as agent)
21 and the healthcare power of attorney that is Program Ex. 35 listed (in Kozak's handwriting)
22 Kozak's husband and Marik employee Fred Brinckerhoff ("Brinckerhoff") as successor
23 agent, Kozak's preparation of three separate healthcare powers of attorney with different
24 language and provisions (in particular, regarding the identity of the successor agent) created
25 considerable risk of confusion in providing healthcare services to Rubino.

26 20. Finding of Fact: Accordingly, the Court finds that the 11/1/09 Documents that Kozak
supplied the forms for and filled in the blanks for substantially changed Rubino's pre-
existing estate plan and life-planning arrangements.

1 21. Finding of Fact: Kozak stated in a letter from her counsel (verified by Kozak) that she
2 (Kozak) supplies her clients with forms for life-planning and estate-planning documents as
3 “as a routine part of her practice”: “Soon after hiring Marik, Kozak provided Rubino with a
4 packet of materials that included a set of sample forms covering various situations, and
5 including a sample will that Kozak had received from an attorney in the past. Kozak does
6 that as a routine part of her practice to ask clients if they have any such documents, and if so
7 to show them to Kozak.” Program Ex. 2, pp. 13-14, ¶22 However, at trial Kozak refused
8 to give clear answers on whether providing her clients with sample forms covering various
9 situations was or was not a part of her regular practice, and refused to provide clear answers
10 regarding how many Marik clients have signed powers of attorney making Kozak an agent.
11 The Court finds that Kozak was deliberately evasive in testifying at trial regarding these
12 matters, and the Court accordingly finds her testimony not credible.

13 C. The General Power of Attorney obtained by Kozak from Rubino created a fiduciary duty
14 owed by Kozak to Rubino from the moment Rubino signed it

15 22. Finding of Fact: At trial, Kozak denied owing a fiduciary duty to Rubino while
16 Rubino was alive.

17 23. Finding of Fact: With regard to the General Power of Attorney (with Durable
18 Provisions) dated 11/1/2009 that was prepared by Kozak and signed by Rubino (Program
19 Ex. 40), because Rubino initialed each of the optional paragraphs (A) through (N)
20 (including in particular paragraph (N), covering “All other matters”), this document gave
Kozak power of attorney over *all* of Rubino’s financial affairs.

21 24. Finding of Fact: This General Power of Attorney (Program Ex. 40) did not contain a
22 “springing” provision, *i.e.* it was immediately effective upon signing, because there is no
23 language in the General Power of Attorney conditioning it becoming effective on any
24 change in Rubino’s health or mental capacity, or on any other future event. Program
25 witness Denice Shepherd, a licensed fiduciary and lawyer with a long-time practice in elder
26

1 law, further testified that none of the language in Program Ex. 40 could be construed as
2 constituting a “springing” provision.

3 25. Finding of Fact: Paragraph “(O)” made the General Power of Attorney (Program
4 Ex. 40) “durable,” so that it “shall *not* be affected by the *subsequent* disability or
5 incompetence of [Rubino].” (emphasis added)

6 26. Conclusion of Law: Powers of attorney containing language such as that in Program
7 Ex. 40 are *immediately* effective, and do *not* go into effect only when the protected person
8 later becomes incompetent. *See, e.g., Watson v. Underwood*, 407 S.C. 443, 454-55, 756
9 S.E.2d 155, 161-62 and n. 11 (App. 2014) (power of attorney that did not contain language
10 making it effective only upon the protected person’s subsequent incompetence, held to have
11 gone into effect immediately upon signing).

12 27. Conclusion of Law: That Kozak owed Rubino a fiduciary duty from the moment
13 Kozak had Rubino sign the General Power of Attorney is made clear by Arizona’s version
14 of the Uniform Durable Power of Attorney Act, A.R.S. §14-5501 *et seq.* Under this Act, the
15 execution of a power of attorney creates a principal/agent relationship. A.R.S. §14-
16 5501(A) (“A durable power of attorney is a written instrument by which a principal
17 designates another person as the principal’s agent”). In turn, “Agents owe their principals a
18 fiduciary duty. This duty requires an agent to work with reasonable care and skill.” *Keg*
19 *Restaurants Arizona v. Jones*, 240 Ariz. 64, 78 (App. 2016) (approving jury instruction
20 including the quoted language; affirming jury verdict against agent).

21 28. Conclusion of Law: Thus, a fiduciary violates her fiduciary duty not only when she
22 *acts* contrary to the protected person’s interests, but when she *fails to act* to protect the
23 protected person’s interests. *Walk v. Ring*, 202 Ariz. 310, 320 (2002) (“[I]f the fiduciary
24 nature of the relationship charges the fiduciary with a duty to disclose his wrong to the
25 plaintiff and he fails to disclose, the statute of limitations will be tolled” [citation omitted];
26 holding that even where no intent to deceive was shown, failure to act in the protected
person’s interest violated fiduciary duty); *Matter of Breen*, 171 Ariz. 250, 253-54 (1992)
(lawyer’s failure to act to protect clients, regardless of lawyer’s intent, violated lawyer’s

1 fiduciary duty); *Matter of Swartz*, 129 Ariz. 288, 293-94 (1981) (same, even where
2 protected persons ultimately not harmed); *Rhue v. Dawson*, 173 Ariz. 220, 231 (App. 1992)
3 (partner's failure to act to protect other partner's interest in partnership breached fiduciary
4 duty); *Mason v. Bulleri*, 25 Ariz.App. 357, 359-60 (1975) (failure of brokers to act to protect
5 vendor's interests was a "serious breach of their fiduciary duty"); *Ornamental & Structural*
6 *Steel v. BBG*, 20 Ariz.App. 16, 19-20 (1973) (same, "even without a showing of damages or
7 without establishing the elements of actionable fraud").

8 29. Finding of Fact: Applying the findings of fact and conclusions of law addressed
9 above, the Court finds that as a matter of law Kozak was a fiduciary for Rubino from the
10 moment Kozak had Rubino sign the General Power of Attorney (*Program Ex. 40*).

11 30. Finding of Fact: Accordingly, Kozak as licensed fiduciary "act[ed] as a trustee or
12 agent under a power of attorney" for purposes of ACJA §7-202(J)(7) *at all times that that*
13 *General Power of Attorney was in effect*, not just if or when she engaged in an affirmative
14 act relying on the General Power of Attorney, such signing a document in place of Rubino.

15 D. The Arizona Code of Judicial Administration ("ACJA") applies to this matter

16 31. Finding of Fact: Kozak admitted completing her original application to be a licensed
17 fiduciary (*Program Ex. 101*) and a series of renewal applications (*Program Ex. 102; 103;*
18 *104; and 105*), each of which required her to represent that she agreed to abide by or had
19 read and reviewed the portions of the ACJA applicable to licensed fiduciaries. Kozak's
20 testimony at trial that "I would have skimmed them" when asked if she had read the
21 applicable portions of the ACJA when she submitted these applications does not excuse her
22 from understanding and complying with all of her obligations under the ACJA.

23 32. Conclusion of Law: While Kozak has argued that "[she] was not a court-appointed
24 fiduciary or conservator" (*Program Ex. 74, p. 7*) and that the General Power of Attorney
25 was "never needed" (*Program Ex. 2, p. 6, ¶8*), the Arizona Code of Judicial Administration
26 ("ACJA") provides that the ACJA applies to all fiduciaries acting under a power of attorney,
whether or not court-appointed: "A licensed fiduciary who is acting as a trustee or agent

1 under a power of attorney shall abide by this code of conduct, regardless of whether that
2 person is acting pursuant to court appointment.” ACJA §7-202(J)(7).

3 33. Finding of Fact: Because the General Power of Attorney that Kozak obtained from
4 Rubino was (for the reasons stated above) in effect from November 1, 2009 forward, the
5 ACJA is applicable to Kozak’s conduct from November 1, 2009 forward.

6 E. Even after Rubino’s death, Kozak continued to owe a fiduciary duty

7 34. Conclusion of Law: Upon Rubino’s death at age 99 on March 12, 20012 (*see*
8 Program Ex. 59), the General Power of Attorney that Kozak obtained from Rubino
9 (Program Ex. 40) ceased to be effective. *Matter of Charles*, 174 Ariz. 91, 93 (1993) (power
10 of attorney expired upon grantor’s death, so agent’s attempt to use the power of attorney
11 after grantor’s death was improper).

12 35. Conclusion of Law: However, even after Rubino’s death, Kozak’s subsequent
13 actions, taken under color of acting as personal representative under the Will she had
14 obtained from Rubino (Program Ex. 34), subject Kozak to a claim for breach of fiduciary
15 duty because a personal representative is a fiduciary as a matter of law: “Except as provided
16 in the will of the decedent, a personal representative is a fiduciary who shall observe the
17 standards of care applicable to trustees. . . .” A.R.S. §14-3703(A). “A [personal
18 representative] owes a fiduciary duty to all beneficiaries to keep them reasonably informed
19 of the estate and its administration and to deal with estate assets in a manner in which a
20 prudent person would deal with the property of another.” *In re Estate of Goldman*, 215
21 Ariz. 169, 173 (App. 2007) (citations omitted). And ACJA §7-202(J)(6)(d) holds a
22 fiduciary acting as personal representative to the duties of a trustee: “A fiduciary acting as a
23 personal representative shall observe the standards of care and duties applicable to trustees.”

24 36. Conclusion of Law: In turn, the obligations of a trustee (and, therefore, a personal
25 representative held to the standard of a trustee) are defined under Arizona law to require
26 *undivided loyalty* to the trustor and to the trust’s beneficiaries:

Under Arizona law, a trustee is required to “observe the standard in dealing with the
trust assets that would be observed by a prudent man dealing with the property of

1 another.” [citing A.R.S. §14-7302] “The first duty of any trustee is to act with
2 undivided loyalty to the trustor.” *Shetter v. Rochelle*, 2 Ariz.App. 358, 366 (1965),
3 *modified by* 2 Ariz.App. 607 (1966). Self-dealing can occur when “a trustee, acting
4 for himself and also as trustee, seeks to consummate a deal where self interest is
5 opposed to duty. *Seven G. Ranching Co. v. Stewart Title & Trust of Tucson*, 128 Ariz.
6 590, 592 (App. 1981).”

7 *Davis v. Zlatos*, 211 Ariz. 519, 527 (App. 2005) (caregiver of elderly, vulnerable adult
8 violated duties of a trustee). The trustee’s duty of undivided loyalty has been expressly
9 extended to include not just the trustor but also the beneficiaries: “[T]he trustee owes the
10 beneficiary a duty of undivided loyalty.” *Lane Title & Tr. Co. v. Brannan*, 103 Ariz. 272,
11 278 (1968) (citing Restatement [Second] Trusts, §§170 and 206 [now found at Restatement
12 (Third) Trusts, §§78 and 100], and expressly holding that a trustee's duty of “undivided
13 loyalty” extends to beneficiaries); *see also* Restatement (Third) Trusts, §78, titled “Duty of
14 Loyalty” (“[1] Except as otherwise provided in the terms of the trust, a trustee has a duty to
15 administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its
16 charitable purpose. [2] Except in discrete circumstances, the trustee is strictly prohibited
17 from engaging in transactions that involve self-dealing or that otherwise involve or create a
18 conflict between the trustee's fiduciary duties and personal interests.”); *see also* Restatement
19 (Third) Trusts, §100, titled “Liability of Trustee for Breach of Trust” (“A trustee who
20 commits a breach of trust is chargeable with (a) the amount required to restore the values of
21 the trust estate and trust distributions to what they would have been if the portion of the trust
22 affected by the breach had been properly administered; or (b) the amount of any benefit to
23 the trustee personally as a result of the breach.”).

24 37. Finding of Fact: While Kozak denied owing a fiduciary duty to Rubino while Rubino
25 was alive, Kozak did agree in her trial testimony that after she was provisionally appointed
26 personal representative by the Probate Court in (in Pima County Superior Court PB-
20120630; the “Probate Litigation”), she (Kozak) did owe a fiduciary duty as personal
representative.

1 38. Finding of Fact: based on the foregoing findings, Kozak owed a fiduciary duty to
2 Rubino from November 1, 2009 through the date of Rubino's death, March 12, 2012, and
3 owed a fiduciary duty to the beneficiaries of Rubino's estate from March 12, 2012 forward.

4 F. Because Kozak was required under the ACJA to act in accordance with all applicable
5 laws, Kozak's conduct with regard to any applicable law is relevant here

6 39. Conclusion of Law: ACJA §7-202(J)(1)(a) requires fiduciaries to act in accordance
7 with all applicable laws: "The fiduciary shall perform all duties and discharge all obligations
8 in accordance with current Arizona law, federal law, administrative rules, court orders, court
9 rules, administrative orders, and the Arizona Code of Judicial Administration." Thus,
10 Kozak's failure to act in accord with any applicable law is material to determining whether
11 the Court should find in favor of the Program and against Kozak.

12 G. Rubino was a "vulnerable adult" under the Adult Protective Services Act ("APSA");
13 Kozak held "a position of trust and confidence" with regard to Rubino and was in a
14 "confidential relationship with Rubino; and to the extent Kozak illegally or
15 improperly used Rubino's resources for Kozak's benefit, Kozak committed
"exploitation" under the ACJA

16 1. The APSA definition of "vulnerable adult"

17 40. Conclusion of Law: The Arizona Adult Protective Services Act ("APSA"), A.R.S.
18 §46-451 *et seq.*, defines the duties owed to vulnerable adults, and provides a statutory cause
19 of action for incapacitated or vulnerable adults who are the victims of neglect, abuse, or
20 exploitation. *Equihua v. Carondelet Health Network*, 235 Ariz. 504, 506 (App. 2014)
21 (reversing lower court's dismissal of APSA claim).

22 41. Conclusion of Law: A.R.S. §46-451(A)(9) of the APSA defines "vulnerable adult" as
23 "an individual who is eighteen years of age or older and who is unable to protect himself
24 from abuse, neglect or exploitation by others because of a physical *or* mental impairment.
25 *Vulnerable adult includes an incapacitated person as defined in §14-5101.*" (emphasis
26 added)

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

6 43. Conclusion of Law: Thus, the terms “incapacitated” and “vulnerable” under the
7 APSA are not equivalent and address distinct dangers to the elderly. “An incapacitated
8 person cannot make informed decisions. A vulnerable person may be able to make such
9 decisions, but is unable to protect herself against being abused, neglected or exploited. *The*
10 *protections of the statute extend to a vulnerable adult even if the person is not*
11 *incapacitated.”* *Davis v. Zlatos*, 211 Ariz. 519, 525 (App. 2005) (emphasis added; reversing
12 trial court, and holding that caretaker violated the APSA by failing to act for elderly
13 woman's benefit the same extent as a trustee).

14 44. Conclusion of Law: While a “vulnerable adult” under the APSA may still have the
15 capacity to make financial decisions, deed property, and transfer cash, the version of A.R.S.
16 §46-456(A) adopted by the Arizona legislature in 2009¹ (and, therefore, applicable to this
17 case) provides that a person in a position of trust and confidence may only use a vulnerable
18 adult's assets for the *vulnerable adult's sole benefit*, unless (1) there is a *valid* power of
19 attorney, *and* (2) the transaction in question is *specifically authorized* by that power of
20 attorney:

21 A. A person who is in a position of trust and confidence to a vulnerable adult shall
22 use the vulnerable adult's assets solely for the benefit of the vulnerable adult and
23 not for the benefit of the person who is in the position of trust and confidence to
24 the vulnerable adult or the person's relatives unless any of the following applies:
25

26 ¹ See 2009 Ariz. Sess. Laws, ch. 119, §9; see also *Yamamoto v. Kerckmar & Feltus*, 2016
WL 1574086 p. *2 and n. 4 (App. 4/19/2016), cited here under Ariz. R. Supreme Ct.
111(c)(1)(C). Before 2009, A.R.S. §46-456 required a person in a position of trust and
confidence to a vulnerable adult to act for that adult's benefit to the same extent as a trustee.

1 2. The transaction is *specifically authorized* in a *valid* durable power of attorney that
2 is executed by the vulnerable adult as the principal or in a valid trust instrument
3 that is executed by the vulnerable adult as a settlor. (emphasis added)

4 *See also In re Estate of Rodriguez*, 2015 WL 6698535, p. *3 (Ariz.App. 11/3/2015)²
5 (“Arizona law provides that a person in a position of trust and confidence to a vulnerable
6 adult may only use the vulnerable adult’s assets for that adult’s benefit unless the transaction
7 is specifically authorized by the adult’s valid durable power of attorney. A.R.S. §46-
8 456(A)(2). Domingo’s power of attorney did not specifically authorize the transactions at
9 issue in this matter. . . . Accordingly, we reject their argument that the superior court erred
10 as a matter of law in its application of A.R.S. §46-456. . . .”); *Davis* at 211 Ariz. 527
11 (holding pre-2009 APSA was violated if a person in a position of trust and confidence
12 “failed to act for the benefit of the vulnerable adult to the same extent as a trustee”).

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

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

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

18 (d) A person who is in a *confidential relationship* with the vulnerable adult. The issue
19 of whether a confidential relationship exists shall be an issue of fact to be decided by
20 the court based on the totality of the circumstances. (emphasis added)

21 46. Conclusion of Law: In turn, a “confidential relationship” (as that term is used in
22 A.R.S. §46-456(J)(5)(d), quoted above) is defined as follows:

23 A relationship which arises by reason of kinship between the parties, or professional,
24 business, or social relations that would reasonably lead an ordinarily prudent person
25 in the management of his business affairs to repose that degree of confidence in
26 another which largely results in the substitution of that other’s will for his in the
material matters involved in the transaction; or where the parties occupy relations,
whether legal, natural, or conventional in their origin, in which confidence is
naturally inspired, or, in fact, reasonably exists.

² Cited under Ariz. R. Supreme Ct. 111(c)(1)(C).

1 *In re Guardianship of Chandos*, 18 Ariz.App. 583, 585 (1972) (finding a confidential
2 relationship, where vulnerable adult lived with defendants, and defendants had been
3 managing vulnerable adult’s finances; citation omitted). Whether or not an elderly person
4 considers herself to be abused, neglected, or exploited does not control whether she is a
5 “vulnerable adult” under the APSA. *Davis* at 211 Ariz. 526 (finding the elderly woman in
6 issue to be “vulnerable,” despite also finding “there is nothing in the record to indicate that
7 Mrs. Zlatos considered herself to be abused, neglected or exploited”).

8 47. Finding of Fact: Based on the foregoing findings of fact and conclusions of law, the
9 Court finds that (a) Kozak was in a “positon of trust and confidence” within the meaning of
10 A.R.S. §46-456 as to Rubino, and (b) Kozak was in a “confidential relationship” within the
11 meaning of A.R.S. §46-456 with regard to Rubino.

12 2. Rubino’s physical condition made her a “vulnerable adult” under the APSA

13 48. Finding of Fact: At trial, Kozak’s own witness, Debbie Ramirez (a Marik caregiver),
14 testified that during the two-and-a-half years that she (Ramirez) cared for Rubino, Rubino
15 was not capable of getting around without a walker.

16 49. Conclusion of Law: A person who requires 24/7 physical care by others – such as
17 Rubino – is by definition “vulnerable,” even if able to make informed decisions so as not to
18 be “incapacitated”:

19 [T]he trial court erred in concluding that Mrs. Zlatos was not a “vulnerable adult”
20 under the APSA. She was a frail eighty-six-year-old in failing health. Many of her
21 financial affairs were handled by the Cagneys. She was totally dependent on Saenz
22 [her caregiver] for her daily needs. . . . Under these facts, we must conclude that Mrs.
23 Zlatos was physically unable to protect herself if targeted for abuse, neglect or
24 exploitation. Therefore, we hold that Mrs. Zlatos was a vulnerable adult”

25 *Davis* at 211 Ariz. 525-27 and n. 6 (holding that the APSA “only requires a finding of
26 ‘physical *or* mental impairment,’ not both”; emphasis in original); *see also Delgado v.*
Manor Care of Tucson AZ, 242 Ariz. 309, 314 (2017) (“Shaw qualifies as a vulnerable
adult. She was a frail seventy-four-year-old woman who, at the time of her admission,
needed assistance in virtually every daily activity of life”); *Yamamoto v. Kercksmar &*

1 *Feltus*, 2016 WL 1574086 (Ariz.App. 4/19/2016)³ at pp. *5-*6 (elderly woman not capable
2 of managing her finances or maintaining her home without assistance was “vulnerable
3 adult”).

4 50. Finding of Fact: Based on the forgoing findings of fact and conclusions of law, the
5 Court finds that Rubino was physically impaired within the meaning of A.R.S. §46-
6 451(A)(9) and physically dependent on Marik and Kozak from November 1, 2009 through
7 her death on March 12, 2012, so that Rubino’s physical condition made her a “vulnerable
8 adult” under the APSA for this entire period of time.

9 3. Rubino’s mental condition made her a “vulnerable adult” under the APSA

10 51. Finding of Fact: Numerous of Rubino’s healthcare records show that she had been
11 diagnosed with significant mental health issues well before Kozak and Marik became
12 involved in Rubino’s life:

- 13 a. Notes from Rubino’s long-time physician, Dr. Leff, dating back to 2000, noting
14 “dementia” Program Ex. 46
- 15 b. January 29, 2007 Mini-Mental State Examination/Folstein (MME/Folstein) test (a 30-
16 point questionnaire used extensively in clinical and research settings to measure
17 cognitive impairment and commonly used to screen for dementia), on which Rubino
18 scored 21 out of 30, after failing to correctly identify the current month and the current
19 date, and being unable to count backwards from 100 by 7s, to spell “world” backwards,
20 or to repeat the phrase “no ifs, ands, or buts.” Program Ex. 47
- 21 c. October 25, 2007 report of Dr. Leff’s office to ADES, noting that Rubino had been
22 diagnosed with dementia and “forgets to take meds unless prompted . . . poor insight . . .
23 patient doesn’t understand that she needs help.” Program Ex. 48
- 24 d. January 18, 2008 notes from Dr. Leff’s office, noting on p. 2 “Folstein 22/30 poor
25 recall; world backwards, wrong month.” Program Ex. 49

26

³ Cited under Ariz. R. Supreme Ct. 111(c)(1)(C).

- 1 e. July 29, 2008 notes from Dr. Leff's office, noting "per neighbor – memory getting
2 worse" (p. 1); "poor recall" (p. 2); and "dementia" (p. 3) Program Ex. 50
- 3 f. May 5, 2009 notes from Dr. Leff's office, noting on p. 1 "dementia" as one of the
4 reasons listed under "chief complaint/reason for visit"; and "poor recall" (p. 2) Program
5 Ex. 51
- 6 g. August 25, 2009 notes from Dr. Leff's office, noting on p. 1 "Neighbor Joan there daily
7 > reminds her to eat, bathe, do laundry. . . ."; on p. 2 "poor recall, poor insight" Program
8 Ex. 52
- 9 h. August 26, 2009 notes from Carondelet Health Network/St. Joseph's Hospital, noting on
10 p. 2 "IMPRESSION: . . . 4. Dementia" Program Ex. 53
- 11 i. October 6, 2009 notes from Dr. Leff's office, noting on p. 1 "Now in 24 hour care . . .
12 gets paranoid with different caregivers "stealing things." – Can't remember their names
13 even with multiple days with her"; "poor recall – no insight" (p. 2); diagnosis of
14 "dementia" (p. 4) Program Ex. 54
- 15 j. October 12, 2009 discharge notes from HealthSouth, noting in the "history" section on p.
16 1 that "She has a history of . . . dementia, nonetheless has been able to perform her own
17 self-care utilizing a walker episodically for balance." Program Ex. 55

18 52. Finding of Fact: Prior to trial, Kozak agreed (in a letter from Kozak's counsel that
19 Kozak verified) that Rubino suffered from dementia from prior to Kozak's involvement
20 with Rubino. Program Ex. 2, p. 3 At trial, while Kozak denied that Rubino was either
21 incapacitated or not competent, Kozak agreed that (a) Rubino suffered from dementia
22 beginning prior to Kozak's involvement with Rubino, and (b) Rubino "could be considered"
23 a vulnerable adult, and that as a result Rubino was at risk of being taken advantage of.
24 Kozak's own witness, Debbie Ramirez (a Marik caregiver), testified that Rubino would
25 confuse the caregivers, and sometimes was confused enough that the caregivers would have
26 to tell her what day or date it was.

53. Finding of Fact: Shortly after Kozak became involved with Rubino, Rubino's
primary doctor was switched from Dr. Leff (who had been Rubino's primary doctor for

1 years) to Dr. Carol Cox, to whom Kozak previously had referred other clients. On
2 December 22, 2009, a member of Dr. Leff's staff wrote the following note (Program Ex.
3 56):

4 P.C. [phone call] to Kay @ Marik per Dr. Leff. Asking PT to return to Ofc. for F.U.
5 [follow-up] visit as she left hospital AMA [Against Medical Advice]. Kay told me
6 PT was looking for a female provider and she would bring PT in mid Jan. Dr. Leff
7 wanted this week to see her. Again Kay said PT wanted female provider and wanted
8 to stay home during the holidays. I asked if PT knew she had GI gastrointestinal
9 bleed (active) and needed F.U. labs. Kay stated she has had F.U. lab. I asked if they
10 were forwarding all labs to our office because I have not seen any results. Kay said
11 "Yvonne I am determined to have a peaceful December and if Dr. Leff would have
12 just listened to what Ella wanted we wouldn't be going through all these issues." I
13 said OK thank you and hung up.

14 54. Finding of Fact: After Rubino came in to Kozak's care beginning October 16, 2009,
15 Rubino's medical records continued to reflect concerns with her mental faculties. See the
16 December 4, 2009 report from Dr. Sean Patrick Mayo, sating under the mental or behavioral
17 problem category, "hallucinations, hears big bands playing" (Program Ex. 76, pp. 1-2) and
18 the December 5, 2009 report from Dr. Kent V. Carey, sating under the mental or behavioral
19 problem category, "hallucinations, hears big bands playing." Program Ex. 77, pp. 1-2

20 55. Finding of Fact: When Rubino was taken to see Dr. Cox, Dr. Cox had Rubino sign a
21 "Statement of Partnership" that Kozak filled out before Rubino signed it. Program Ex. 60
22 Dr. Cox also administered a "mini-mental state examination" on December 14, 2009, on
23 which Rubino scored 23 out of 30, after failing to correctly properly draw a clock face
24 showing a particular time, failing to identify the day, county, or floor, and being unable to
25 spell "world" backwards. Program Ex. 60

26 56. Finding of Fact: On February 22, 2012, notes from Rubino's visit to Carondelet
Health Network/St. Joseph's Hospital stated "dementia" under the category "Past Medical
History" Program Ex. 58, p. 1

1 57. Finding of Fact: Rubino's death certificate (signed by Dr. Cox) listed "Alzheimers"
2 as one of the "other significant conditions contributing to death but not resulting in the
3 underlying causes given above." Program Ex. 59

4 58. Finding of Fact: Rubino's long-time friend and neighbor, Joanie Wallace, testified in
5 deposition that Kozak was upset that Dr. Cox listed Alzheimer's on Rubino's death
6 certificate (*see* Program Ex. 59), and that Kozak tried to have Rubino's death certificate
7 changed to omit the reference to Alzheimer's. Program Ex. 75, Transcript p. 115:7 to
8 116:11

9 59. Finding of Fact: Based on the foregoing findings of fact and conclusions of law, the
10 Court finds that Rubino was mentally impaired within the meaning of A.R.S. §46-451(A)(9)
11 and consequently dependent on Marik and Kozak from November 1, 2009 through her death
12 on March 12, 2012, so that Rubino's mental condition made her a "vulnerable adult" under
13 the APSA for this entire period of time.

14 H. Kozak had a statutory duty to report anyone taking financial advantage of Rubino

15 60. Conclusion of Law: In her capacity as caregiver for Rubino, Kozak had a statutory
16 duty to report anyone taking financial advantage of Rubino to a peace officer or to a
17 protective services worker: "[A] person who has responsibility for the care of a vulnerable
18 adult and who has a reasonable basis to believe that . . . exploitation of the adult's property
19 has occurred shall immediately report or cause reports to be made of such reasonable basis
20 to a peace officer or to a protective services worker. . . ." A.R.S. §46-454(A).

21 61. Conclusion of Law: In addition, in her capacity as holder of a power of attorney that
22 gave Kozak authority over Rubino's financial affairs, Kozak had a separate duty to anyone
23 taking financial advantage of Rubino to a peace officer, to a protective services worker or to
24 the county public fiduciary:

25 [A] trustee, guardian, conservator or other person who has responsibility for . . . the
26 use or preservation of the vulnerable adult's property and who, in the course of
fulfilling that responsibility, discovers a reasonable basis to believe that exploitation
of the adult's property has occurred or that abuse or neglect of the adult has occurred

1 shall immediately report or cause reports to be made of such reasonable basis to a
2 peace officer, to a protective services worker or to the [county] public fiduciary. . . .

3 A.R.S. §46-454(B).

4 62. Finding of Fact: Based on the foregoing findings of fact and conclusions of law, the
5 Court finds that Kozak had a statutory duty to report anyone taking financial advantage of
6 Rubino from November 1, 2009 through Rubino's death on March 12, 2012.

7 I. To the extent that Kozak took possession of Rubino's estate without authority, Kozak
8 was a *de facto* conservator, and to the extent Kozak took possession of Rubino's
9 physical person without authority to do so, Kozak was a *de facto* guardian for Rubino

10 63. Conclusion of Law: A.R.S. §46-451(A)(2) defines "de facto conservator" as "any
11 person who takes possession of the estate of a vulnerable adult, without right or lawful
12 authority. A de facto conservator is subject to all of the responsibilities that attach to a
13 legally appointed conservator or trustee."

14 64. Conclusion of Law: A transaction between a *de facto* conservator and the protected
15 person that benefits the *de facto* conservator at the protected person's expense is presumed
16 invalid. *Eagerton v. Fleming*, 145 Ariz. 289, 292 (App. 1985) ("The existence of the de
17 facto conservatorship having been established by the trial court, the gift by the ward,
18 Millard, to his son, Jerry, is presumed to be invalid"; citations and footnote omitted).

19 65. Conclusion of Law: A.R.S. §46-451(A)(2) defines "de facto guardian" as "any
20 person who takes possession of the person of a vulnerable adult, without right or lawful
21 authority. A de facto guardian is subject to all of the responsibilities that attach to a legally
22 appointed guardian."

23 66. Conclusion of Law: A *de facto* guardian is not allowed to profit from the protected
24 person's estate. *Chandos*, at 18 Ariz.App. 586 ("[A] guardian cannot profit from his ward's
25 estate"; citations omitted); *Maish v. Valenzuela*, 71 Ariz. 426, 429 (1951) ("A guardian
26 cannot profit from its ward's estate"; citations omitted).

67. Conclusion of Law: To the extent Kozak took control of Rubino's estate (which
Kozak denies) *without* exercising her power as agent under the General Power of Attorney

1 that is Program Ex. 40 (and Kozak *does* assert she never acted as agent under that General
2 Power of Attorney), then Kozak would have acted as a *de facto* conservator for Rubino
3 under A.R.S. §46-451(A)(2). *See also Chandos*, at 18 Ariz.App. 586.

4 68. Conclusion of Law: To the extent that Kozak took possession of Rubino's person
5 (which Kozak denies) *without* acting under the healthcare powers of attorney that Kozak
6 obtained from Rubino and that are Program Ex. 39, Program Ex. 35 and Program Ex. 123
7 (and Kozak *does* assert she never acted as agent under those powers of attorney), then
8 Kozak would have been acting as *de facto* guardian to Rubino under A.R.S. §46-451(A)(2).

9 69. Finding of Fact: Here, the Court has found that Kozak was acting as agent with
10 fiduciary duties under the General Power of Attorney (Program Ex. 40), but if there had
11 been no such General Power of Attorney, the Court finds that Kozak would have been a *de*
12 *facto* conservator for Rubino.

13 70. Finding of Fact: Here, the Court has found that Kozak was acting as agent with
14 fiduciary duties under the healthcare powers of attorney that she obtained from Rubino
15 (Program Ex. 35, 39 and 123), but if there had been no such healthcare powers of attorney,
16 the Court finds that Kozak would have been a *de facto* guardian for Rubino.

17 II. Count 2⁴

18 Kozak violated §7-202(J)(2)(b)(1), (2) and (3) by engaging in self-dealing or the
19 appearance of self-dealing when she prepared the will and by her appointment as
20 agent under a power of attorney while providing assisted living services

21 A. The ACJA bars both (a) self-dealing, and (b) the appearance of self-dealing

22 71. Conclusion of Law: ACJA §7-202(J)(2)(b)(1) provides that a fiduciary must avoid
23 not just self-dealing and conflicts of interest, but the *appearance* of self-dealing or
24 conflicting interests: "The fiduciary shall: (1) Avoid self-dealing, conflict of interest
25 impropriety, or the appearance of a conflict of interest or impropriety. Self-dealing, a
26 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

⁴ As the Court has stated that Count No. 1 was based on a non-existent section of the ACJA
and that trial would not go forward on that count, Count No. 1 is not addressed herein.

1 interest of the ward, protected person, or decedent. A conflict of interest may also arise if
2 the fiduciary has dual or multiple relationships with a ward that conflict with each other or
3 has a conflict between or among the best interests of two or more wards.”

4 72. Conclusion of Law: Under ACJA §7-202(J)(2)(b)(2), *a fiduciary must maintain*
5 *independence from all service providers:* “The fiduciary shall: (2) Maintain
6 independence from all service providers to enable the fiduciary to coordinate services,
7 challenge inappropriate or poorly delivered services, and act in the best interests of the ward
8 or protected person.”

9 73. Conclusion of Law: ACJA §7-202(J)(2)(b)(3)(a) specifically *bars providing non-*
10 *fiduciary services through an entity in which the fiduciary or a fiduciary's relative has an*
11 *interest, unless court-authorized:* “Unless otherwise authorized by the court, the fiduciary
12 shall not: (a) Provide non-fiduciary services to the ward or protected person if the fiduciary
13 or a person or entity closely related to the fiduciary has a personal or financial interest. For
14 the purposes of this subsection, ‘closely related’ includes a spouse, child, parent, sibling,
15 grandparent, aunt, uncle, or cousin of the fiduciary, and any business . . . that the fiduciary
16 or a closely related person has a financial interest in, is employed by, or receives
17 compensation or financial benefit from.”

18 74. Conclusion of Law: ACJA §7-202(J)(2)(b)(3)(b) also *bars a fiduciary from*
19 *receiving anything of value other than ordinary social hospitality from a service provider*
20 *without a prior court order:* “Unless otherwise authorized by the court, the fiduciary shall
21 not: . . . (b) Solicit or accept incentives or gifts from service providers other than ordinary
22 social hospitality.”

23 75. Conclusion of Law: ACJA §7-202(J)(2)(b)(3)(c) bars a fiduciary from receiving
24 anything of value other than ordinary social hospitality *from a protected person* without a
25 prior court order: “Unless otherwise authorized by the court, the fiduciary shall not: . . . (c)
26 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.”

1 76. Conclusion of Law: The allowance for “ordinary social hospitality” is limited by
2 ACJA §7-202(J)(2)(b)(6), which requires fiduciaries to maintain “professional”
3 relationships with their protected persons and to avoid “personal” relationships with their
4 protected persons: “The fiduciary shall maintain a professional relationship with the ward or
5 protected person and shall avoid personal relationships with the ward and protected person
6 or the family or friends of the ward or protected person, unless the fiduciary is a family
7 member, or unless such a relationship existed before the appointment of the fiduciary.”

8 77. Conclusion of Law: A.R.S. §46-451(A)(3) defines “exploitation” as “the illegal or
9 improper use of a vulnerable adult or his resources for another’s profit or advantage.”
10 (emphasis added); *see also Davis v. Zlatos*, 211 Ariz. 519, 525 (App. 2005) (holding that
11 caregiver had exploited and taken advantage of vulnerable adult in accepting gifts and loans;
12 reversing lower court decision in favor of defendant); *Yamamoto v. Kerckmar & Feltus*,
13 2016 WL 1574086 p. *6-*7 (evidence supported finding of exploitation).

14 B. Kozak was Rubino’s agent from November 1, 2009 forward under both the General
15 Power of Attorney (*Program Ex. 40*) and the healthcare powers of attorney (*Program*
16 *Ex 35, 39 and 123*) that Kozak obtained from Rubino

17 78. Finding of Fact: At trial, Kozak admitted that while (as noted above) the General
18 Power of Attorney that she obtained from Rubino (*Program Ex. 40*) contains no “springing”
19 provision, but Kozak nevertheless asserted she believed *Program Ex. 40* would only go into
20 effect if Rubino had become disabled, incompetent, or incapacitated in the opinion of
21 Rubino’s primary doctor. The Court finds that: (a) Kozak’s claimed subjective beliefs are
22 irrelevant, (b) that Kozak’s claim that she believed this General Power of Attorney would
23 only go into effect if Rubino had become disabled, incompetent, or incapacitated,
24 notwithstanding the lack of a “springing” provision, is not credible.

25 79. Finding of Fact: Despite Kozak’s testimony at trial that the General Power of
26 Attorney (*Program Ex. 40*) was “never needed,” on March 6, 2012, 6 days *prior* to
Rubino’s death on March 12, 2012, Kozak executed a document utilizing this power of
attorney and stating “*I, Kay Kozak*, am making gift payments totaling \$12,000 from the

1 funds owned by Ella J. Rubino and *for whom I have power-of-attorney privileges*, as a gift
2 to Sharon Smith, Dale Smith, Daryl Smith, David Smith, Joanie Wallace, and St. Pius X
3 Roman Catholic Church on behalf of, and pursuant to Ms. Rubino's verbal wishes issued to
4 me instructing me to do so, as is being attested to by the undersigned eye-witnesses to Ms.
5 Rubino speaking her above-described wishes to me." Program Ex. 18 (emphasis added)
6 Christina Burchwell ("Burchwell"; Kozak's niece and a Marik employee, who Kozak called
7 as a witness) testified that while she (Burchwell) did sign the document that is Program Ex.
8 18 and that while she was asked to speak to Rubino about the gifts she (Rubino) wanted to
9 make before signing this document, she (Burchwell) did *not* speak with Rubino about the
10 amounts of the gifts, because the amounts had been "previously arranged."

11 80. Finding of Fact: Despite having admitted she signed Program Ex. 18, Kozak denied
12 in her trial testimony that her signing of this document was an action utilizing her powers as
13 agent under the General Power of Attorney that is Program Ex. 40; Kozak testified that this
14 was not an exercise of her power as agent for Rubino because her long-time accountant, J.
15 Mitchell Kopystynsky, had instructed her (Kozak) to sign this document in the event Rubino
16 became incapacitated. Given the text of Program Ex. 18 quoted above, the Court finds
17 Kozak's testimony that she did not believe she was exercising her authority under the power
18 of attorney that is Program Ex. 40 when she signed Program Ex. 18 to be not credible.

19 81. Finding of Fact: The Court finds that notwithstanding Kozak's claimed subjective
20 beliefs to the contrary, Kozak's signing of the document that is Program Ex. 18 constituted
21 an exercise of her powers as agent under the General Power of Attorney (Program Ex. 40).

22 82. Finding of Fact: On March 12, 2012 (the date of Rubino's death), five (5) sets of
23 \$5,000 and \$7,000 checks (totaling \$12,000 for each person) were issued made payable to
24 Sharon Smith, her sons Dale, Daryl and David Smith, and Joanie Wallace. Program Ex. 18,
25 21 (pp. 48 and 51), and 71 Kozak claimed in her trial testimony that these checks were all
26 written and signed by Rubino on March 6, 2012.

83. Finding of Fact: The Court finds that regardless of whether the checks identified in
Program Ex. 21 (pp. 48 and 51), and 71 were written and signed on March 6, 2012 or on

1 March 12, 2012, Kozak's actions in preparing these checks for Rubino's signature pursuant
2 to Program Ex. Ex. 18 constituted an exercise of Kozak's powers as agent under the
3 General Power of Attorney that is Program Ex. 40.

4 84. Finding of Fact: With regard to the healthcare powers of attorney that Kozak
5 obtained from Rubino (Program Ex. 35, 39 and 123), Dr. Carol Cox (the doctor who Kozak
6 had taken other Marik clients before Rubino, and to whom Kozak subsequently took
7 Rubino) was deposed, and testified that Kozak "was asking for a prescription for
8 [Oxycodone]" for Rubino, *i.e.* that Kozak was exercising her powers under the healthcare
9 powers of attorney that Rubino gave to Kozak. Program Ex. 20, transcript p. 31:11-22,
10 and Exhibit 1 thereto, at p. 1 At trial, Kozak admitted requesting the additional oxycodone
11 for Rubino but denied that this was an exercise of her ability to act as agent for Rubino
12 under the three healthcare powers of attorney (Program Ex. 35, 39 and 123) that Kozak
13 obtained from Rubino, stating that she had "simply requested a refill" and arguing that
14 Rubino would have had to have been "incapacitated" and unable to speak for herself for
15 Kozak's request to have amounted to an exercise of her powers as Rubino's agent.

16 85. Finding of Fact: The Court finds that in seeking and obtaining additional oxycodone
17 for Rubino, Kozak acted as Rubino's agent under one or more of the healthcare powers of
18 attorney that are Program Ex. 35, 39 and 123.

19 86. Finding of Fact: Kozak testified that she regularly accompanied Rubino into the exam
20 room when Marik took Rubino to see her doctors. Kozak also testified that Rubino's
21 doctors would provide instructions to her (Kozak) as to when to bring Rubino in for the
22 blood transfusions that Rubino needed on a regular basis for her anemia, but denied that in
23 acting in response to these instructions that she (Kozak) was acting as Rubino's agent under
24 any of the healthcare powers of attorney that Rubino had signed making Kozak her agent
25 (i.e., Program Ex. 39; Program Ex. 35; and Program Ex. 123).

26 87. Finding of Fact: The Court finds that (a) in taking instructions from Rubino's doctors
as to when to bring in Rubino for transfusions, and (b) in following those instructions,

1 Kozak was acting as Rubino's agent under all of the healthcare powers of attorney that are
2 Program Ex. 39; Program Ex. 35; and Program Ex. 123.

3 88. Finding of Fact: Kozak testified at trial that when she (Kozak) accompanied Rubino
4 into the exam room with Rubino's doctors, she (Kozak) would take notes and then provide
5 these notes Rubino for Rubino's use.

6 89. Finding of Fact: The Court finds that in taking these notes for Rubino's use, Kozak
7 was acting as Rubino's agent under the healthcare powers of attorney that are Program Ex.
8 39; Program Ex. 35; and Program Ex. 123.

9 90. Finding of Fact: Joanie Wallace testified that from the time Kozak and Marik began
10 providing caregiving services to Rubino, Rubino wanted to talk with her (Wallace) alone
11 about her (Rubino's) unhappiness with the Marik caregivers, but that Kozak and the Marik
12 caregivers never allowed Wallace and Rubino to be left alone together. Program Ex. 75,
13 transcript pp. 91:23 to 92:12

14 91. Finding of Fact: Taking into account Kozak's actions in changing Rubino's doctors,
15 in always accompanying Rubino into the exam room when Rubino did see her doctors, and
16 in not allowing Rubino to be left alone with Wallace, the Court finds that Kozak engaged in
17 a deliberate effort to isolate Rubino from persons Rubino might have been likely to discuss
18 any unhappiness Rubino might have had with Kozak and Marik.

19 92. Finding of Fact: Just over a month after obtaining the 11/1/2009 Documents from
20 Rubino, Kozak handwrote another document that was then signed by Rubino, which read:
21 "12/7/09 I do not want to be hospitalized. (DNH) I want to be left alone. I have 24/7
22 homecare care giver that will take care of me." Program Ex. 45 At trial, Kozak admitted
23 that the text of this document is in her own handwriting. Kozak also testified that Program
24 Ex. 45 did not allow hospitalization and did not constitute a "do not resuscitate" directive,
25 but she was unsure whether it would or would not allow intubation. The Court finds that
26 Kozak acted improperly in drafting a document for Rubino's signature that she (Kozak) did
not fully understand and could not completely explain.

1 93. Finding of Fact: According to a letter from Kozak's counsel that was verified by
2 Kozak, no doctor in two-and-a-half years Kozak was involved with Rubino, ever discussed
3 Rubino's dementia with Kozak or raised it as a major care issue. Program Ex. 2, p. 3, ¶3
4 At trial, Kozak testified that during the time Kozak was in the care of Marik, no doctor ever
5 discussed Rubino's dementia with Kozak or raised it as a major care issue. The Court finds
6 Kozak's testimony that no doctor ever discussed Rubino's dementia with Kozak or raised it
7 as a major care issue to be not credible.

8 C. Kozak was Rubino's agent under the General Power of Attorney (Program Ex. 40) at
9 the time she (Kozak) had Rubino engage in various transactions and write checks to
10 Marik, which was both (a) self-dealing, and (b) created the appearance of self-dealing

11 94. Finding of Fact: As Kozak admitted at trial, after Kozak started providing care
12 services to Rubino on October 16, 2009, Kozak and others began filling out checks for
13 Rubino, with Rubino only signing the checks. Program Ex. 24; Program Ex. 25 (pp.
14 KO2719-20); Program Ex 26 (p. K02600); Program Ex 27 (p. K02511); Program Ex 28
15 (p. K02519-20); and Program Ex 29; 30; 65; 68; 69; and 70

16 95. Finding of Fact: As Kozak admitted at trial, checks for payments to Marik frequently
17 were prepared by Kozak herself, with Rubino left to only sign the checks to Marik that
18 Kozak had prepared for Rubino to sign. Program Ex. 24, 25, 26, 27, 28, 29, 65, and 69; see
19 also Kozak Ex. AA, pp. 831-35, 838-43

20 96. Finding of Fact: As Kozak admitted at trial, Kozak wrote out several large checks
21 payable to "cash" that Rubino then signed. Program Ex. 30 and 68

22 97. Finding of Fact: Kozak testified at trial that on March 6, 2012, six days before
23 Rubino's death, she (Kozak) made out two checks payable to Marik to be signed by Rubino,
24 one for \$14,838.75 for "Feb caregivers" and a second check for \$16,740.00 for "March
25 caregivers" (even though only six days had elapsed in the month), both of which Rubino
26 then signed on March 6, 2012. Kozak Ex. W, pp. 817-18 Both of these checks show a
"settle date" of March 8, 2012, just two days later. Program Ex. 12, p. 101

1 98. Finding of Fact: Kozak also testified at trial that checks were made payable to
2 Rubino's utility companies in large block amounts sufficient to pay more than one month's
3 bill (rather than for the amount shown on each month's bill). However, the check dated
4 October 17, 2009 that is Program Ex. 23 shows that before October 23, 2009 (when Rubino
5 was released from HealthSouth and came into Kozak's 24/7 care), Rubino was paying her
6 utilities expenses in precise amounts, down to the penny.

7 99. Finding of Fact: As of 2009 (at a time before Rubino met Kozak), Rubino's trust
8 (documented by Program Ex. 42) had had a Wells Fargo money market account ***9919
9 with a balance of \$9,851.56. Program Ex. 21, pp. 21 and 50 After Kozak became
10 Rubino's fiduciary, this account was depleted through transfers to another Wells Fargo
11 account ****8850, which in turn was used to pay Marik (in particular, Marik's quarterly
12 "geriatric case management" fees), among others. Program Ex. 2, p. 11, ¶17; Program Ex.
21, pp. 41-49

13 100. Finding of Fact: In 2010 Rubino (not her Trust) owned a CD on which Rubino's
14 niece Sharon Smith was the transferable-on-death beneficiary at Washington Federal
15 Savings in the amount of \$114,730.82. Program Ex. 21, p. 21 In March, 2010 this CD
16 was cashed out and the money was put into Bank of the West account ****0889, which
17 belonged to Rubino's trust. Program Ex. 2, p. 12, ¶18; Program Ex. 21, pp. 21, 29 and 40
18 Also in March, 2010, a \$100,000 Bank of the West CD (which belonged to Rubino's trust;
19 see Program Ex. 21, pp. 21 and 31) also was cashed out and deposited into Bank of the
20 West account ****0889. Program Ex. 21, pp. 29 and 31 The hundreds of thousands in
21 Bank of the West account ****0889 then were almost exclusively used to make payments to
22 Marik, until this account belonging to Rubino's trust was reduced to a \$0 balance by May,
23 2011. Program Ex. 21, pp. 29-30

24 101. Finding of Fact: Needing still more funds to continue to make payments to Marik, in
25 February, 2011 \$133,423.27 was taken from Rubino's Chase account ****1824 (which
26 belonged to Rubino herself, with a transfer-on-death provision; see Program Ex. 21, pp. 21
and 36) and deposited into Schwab account ****5747, which belonged to Rubino herself,

1 transferable-on-death to Rubino's niece, Sharon Smith. Program Ex. 2, p. 13, ¶20;
2 Program Ex. 21, pp. 34 and 36 Kozak obtained power of attorney from Rubino over
3 Schwab account ****5747, making Kozak agent for Rubino on this account. Program Ex.
4 2, p. 12, ¶19 (Kozak verified this writing; see Program Ex. 2, p. 22). The funds in Schwab
5 account ****5747 were then used to pay almost exclusively to make payments to Marik.
6 Program Ex. 2, p. 12, ¶19; Program Ex. 21, p. 34 Rubino's Schwab account ****5747
7 was reduced to a \$8,328.94 balance by October, 2011 as a result of payments to Marik.
8 Program Ex. 21, p. 34

9 102. Finding of Fact: As Rubino's Schwab account ****5747 was being depleted through
10 payments to Marik, and with the need to pay then-future Marik bills, in July, 2011
11 \$278,062.39 was transferred from a Transamerica annuity owned by Rubino's trust (see
12 Program Ex. 21, pp.21 and 38) and moved into Schwab account ****8332, also owned by
13 Rubino's trust. Program Ex. 2, p. 13, ¶20; pp 131-32; Program Ex. 21, pp. 35 and 38
14 Rubino's Schwab account ****8332 was then used almost exclusively to make payments to
15 Marik from November, 2011 until Rubino died on March 12, 2012, with the notable
16 exception of a single \$25,000 check to Rubino in October, 2011. Program Ex. 21, p. 35

17 103. Finding of Fact: As Rubino's Schwab account ****5747 was being depleted through
18 payments to Marik, and with the need to pay then-future Marik bills, in July, 2011
19 \$278,062.39 was transferred from a Transamerica annuity owned by Rubino's trust (see
20 Program Ex. 21, pp.21 and 38) and moved into Schwab account ****8332, also owned by
21 Rubino's trust. Program Ex. 2, p. 13, ¶20; pp 131-32; Program Ex. 21, pp. 35 and 38
22 Rubino's Schwab account ****8332 was then used almost exclusively to make payments to
23 Marik from November, 2011 until Rubino died on March 12, 2012, with the notable
24 exception of a single \$25,000 check to Rubino in October, 2011. Program Ex. 21, p. 35

25 104. Finding of Fact: In this manner, Kozak (through Marik) received significant sums
26 from Rubino over the period beginning October, 2009: During the time that Kozak was sole
caregiving provider for Rubino, Kozak's own accounting shows that Kozak (through Marik)
was paid \$603,077.99 by Rubino and/or Rubino's estate (\$326.40 + \$11,500 + \$445,913.75

1 + \$9,337.84 + \$100,000 + \$20,000 + \$15,000 + \$1,000 = \$603,077.99). Program Ex 21,
2 pp. 22, 24, 27-28

3 105. Finding of Fact: Kozak's records showed that Marik charged \$20/hour for most
4 caregivers, though some (including Kozak) were billed at higher rates. Program Ex. 73
5 Kozak testified at trial that she paid most of the caregivers an average of \$15/hour and that
6 he caregivers received no benefits from Marik and were treated as independent contractors
7 who were issued IRS Form 1099s. Kozak's own witness, Marik caregiver Debbie Ramirez,
8 testified that she (Ramirez) was paid \$14/hour. Thus, the Court finds that Kozak (through
9 Marik) received approximately 25% of the \$445,913.75 that Kozak's records show was
10 collected from Rubino for caregiver services. See Program Ex 21, p. 24; Program Ex. 73

11 106. Finding of Fact: In addition to the approximately \$15,000/month Kozak had Marik
12 charge Rubino for healthcare services (see Program Ex. 73) Kozak had Marik charge a
13 quarterly "flat fee" case management charge (\$1,500 per quarter starting the 4th quarter of
14 2009 through the end of 2010, and \$1,000 per quarter from 2011 through March, 2012,
15 when Rubino died). Program Ex. 2, pp. 8-9; Program Ex. 32

16 107. Finding of Fact: At trial, Kozak testified that (a) the \$8,997.18 in "receipts
17 reimbursed to Marik" shown at pp. 7-10 of Kozak's disclosure in the Probate Litigation that
18 is Program Ex. 21 were expenses that Marik had paid initially and then been reimbursed
19 with Rubino's money, and (b) the \$11,021.56 in "receipts/items paid by Ella Rubino" shown
20 at pp. 11-18 of Program Ex. 21 were expenses paid directly by Rubino when she and her
21 Marik caregiver were out of the house. However, Kozak was unable to explain how either
22 of these figures could be reconciled with the \$9,337.84 for "Marik, reimbursements" shown
23 on p. 24 of the same document, testifying that she would have to see the back-up
24 documentation before she could explain the differences in these numbers. Accordingly, the
25 Court draws a negative inference regarding whether Kozak was entitled to all of the money
26 that Kozak (through Marik) collected from Rubino.

108. Finding of Fact: Based on the findings of fact and conclusions of law set forth
above, the Court finds as follows:

- 1 a. Kozak violated ACJA §7-202(J)(2)(b)(1) by engaging in significant financial
2 transactions with Rubino through Marik during that time that Kozak owed a fiduciary
3 duty to Rubino, including collecting hundreds of thousands of dollars from Rubino for
4 caregiving services, thereby engaging in self-dealing while having a conflict of interest,
5 and also creating the appearance of self-dealing while having a conflict of interest.
- 6 b. Kozak violated ACJA §7-202(J)(2)(b)(2) by failing in her capacity as fiduciary to
7 “maintain independence from all service providers,” specifically Marik, which (i) Kozak
8 owned and which employed Kozak’s husband Brinckerhoff and Kozak’s niece, Christina
9 Burchwell, and (ii) which collected hundreds of thousands of dollars from Rubino.
- 10 c. Kozak violated ACJA §7-202(J)(2)(b)(3)(a) by providing non-fiduciary services through
11 an entity (Marik) in which Kozak had an interest (specifically, as 100% owner of Marik,
12 and as the spouse of Brinckerhoff, who was a Marik employee).
- 13 d. Kozak violated ACJA §7-202(J)(2)(b)(3)(b) by receiving things of value other than
14 ordinary social hospitality from a service provider (here, Marik), by virtue of her
15 position as 100% owner of Marik and as the spouse of Brinckerhoff, who was employed
16 by Marik.
- 17 e. Kozak violated ACJA §7-202(J)(2)(b)(3)(c) by receiving things of value other than
18 ordinary social hospitality from a protected person (here, Rubino), by virtue of her
19 position as 100% owner of Marik and as the spouse of Brinckerhoff, who was employed
20 by Marik.
- 21 f. In engaging in these transactions, Kozak illegally *and* improperly used Rubino’s funds
22 for Kozak’s benefit, and thereby committed exploitation under A.R.S. §46-451(A)(3).
- 23 g. Kozak violated A.R.S. §46-454(A) in her capacity as caregiver for Rubino, as a result of
24 Kozak’s failure to comply with her statutory duty to report anyone taking financial
25 advantage of Rubino to a peace officer or to a protective services worker.
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III. Count 3

Kozak violated ACJA §7-201(H)(6)(k)(7) and (8) by changing Rubino's investment plan and taking over the management of Rubino's trust even though there was a successor trustee named. In doing so, Kozak attempted to exercise control over trust assets after Rubino's death and she had no authority to do so

A. A fiduciary engaging in unprofessional conduct may be disciplined under the ACJA

109. Conclusion of Law: ACJA §7-201(H)(6)(k)(7) provides that a fiduciary may not engage in unprofessional conduct, specifically by failing to provide fiduciary services with the skill of a professional fiduciary: "A certificate holder is subject to disciplinary action if the board finds the certificate holder has . . . (k) Engaged in unprofessional conduct, including: . . . (7) Failed during the performance of any responsibility or duty of the profession or occupation to use the degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful and prudent professional certificate holder engaged in similar practice under the same or similar conditions regardless of any level of harm or injury to the client or customer."

110. Conclusion of Law: In turn, ACJA §7-201(H)(6)(k)(8) provides that "unprofessional conduct" justifying discipline includes "performing unsafe or unacceptable client or customer care or fail[ing] to conform to the essential standards of acceptable and prevailing practice."

B. After Rubino's death, Kozak engaged in unprofessional conduct by taking and/or retaining funds that belonged to Rubino's trust, and commingling and/or using those funds for the benefit (through Marik) of herself and others of Kozak's choosing, despite Kozak not being the successor trustee

111. Finding of Fact: As Kozak admits in a letter from her counsel that she verified (*see Program Ex. 2, p. 3, ¶2*), in 1991 Rubino executed the Ella J. Rubino Revocable Living Trust (*Program Ex. 42*).

112. Finding of Fact: As Kozak also admits, Rubino's trust held significant assets when Kozak met Rubino in 2009. See Kozak's disclosure at *Program Ex. 21, p. 21*.

1 113. Finding of Fact: Under the terms of Rubino's trust, Rubino's niece, Sharon Smith,
2 was the second successor trustee under the Trust document, after James Smith (James Smith
3 was Sharon Smith's husband). Program Ex. 42, p. 2; Program Ex. 2, p. 3, ¶2 However,
4 James Smith died March 25, 2012, just 13 days after Rubino's death (see Program Ex. 78,
5 p. 3), making Sharon Smith the trustee as of March 25, 2012. Later, after Sharon Smith had
6 brought claims against Kozak (in the Probate Litigation, Pima County Superior Court PB-
7 20120630), Sharon Smith also died and was replaced as trustee by her son, Daryl Smith.

8 114. Finding of Fact: Kozak testified at trial that she was aware of the trust that is
9 Program Ex. 42, even though she also testified that she was not provided with a copy of this
10 document by Rubino or anyone else as of November 1, 2009.

11 115. Finding of Fact: The balance in Rubino's individually-owned (i.e., not trust-owned)
12 Schwab account ****5747 (over which Kozak had obtained power of attorney; see
13 Program Ex. 2, p. 12, ¶19) of \$8,329.20 was paid out to Marik on March 6, 2012, just six
14 days before Rubino died on March 12, 2012, and deposited into a "Marik Trust" account.
Program Ex. 21, p. 34

15 116. Finding of Fact: On March 12, 2012 – the date of Rubino's death – a further \$60,000
16 of Rubino's money was deposited into this "Marik Trust" account, with \$30,000 of this
17 money coming from the Schwab account ****8332 that belonged to Rubino's trust and a
18 second \$30,000 coming from what Kozak has described as "cash received from Ella
19 [Rubino]" on the date of Rubino's death, March 12, 2012. Program Ex. 21, pp. 35 and 51

20 117. Finding of Fact: On that same day, March 12, 2012, Kozak used this Marik Trust
21 account to disburse \$60,000 of this money in the form of five (5) separate \$12,000 checks to
22 Sharon Smith, Sharon Smith's three sons, and Joanie Wallace. Program Ex. 21, p. 51;
Program Ex. 18

23 118. Finding of Fact: After Rubino's death on March 12, 2012 and through August 21,
24 2012 – a period of over five months – Kozak continued to use this "Marik Trust" account
25 (still containing monies that belonged to Rubino's trust as well Rubino herself) to pay out
26 almost \$7,000 for various expenses incurred by Kozak and/or Marik, including breakfast for

1 Kozak and others on the morning of Rubino's funeral, over \$2,500 of extra funeral
2 expenses (despite Rubino having a pre-paid funeral), and other items, including \$326.40
3 paid to Marik itself. Program Ex. 21, pp. 51-52 Kozak's explanation for why she spent
4 thousands of extra dollars on the funeral made no sense – "[T]he funeral home advised
5 Kozak that certain expenses for things already included in the plan had gone up in cost, such
6 as flowers, clergy and death certificates." Program Ex. 2, p. 18, ¶33 (Kozak verified this
7 writing; see Program Ex. 2, p. 22) If these items were "things already included in the plan"
8 – as Kozak asserts – then there was no need to pay extra for any of these items.

9 119. Finding of Fact: The Court finds that Kozak engaged in other transactions after
10 Rubino's death with money that belonged to both Rubino and Rubino's trust. Thus, on
11 March 19, 2012, Kozak had Marik paid \$100,000 out of the Rubino Trust Schwab account
12 ****8332, and 10 days later (on March 29, 2012), Kozak had Marik paid a further
13 \$20,000 out of this account. Program Ex. 21, p. 35 Kozak testified at trial that the
14 \$100,000 and \$20,000 checks were written and signed on March 6, 2012 and that she did
15 not know why they did not show as having been deposited until March 19, 2012 and March
16 29, 2012, respectively. This testimony is not compatible with other evidence presented at
17 trial, specifically Kozak's testimony that on March 6, 2012, she made out two checks for
18 Marik to be signed by Rubino, one for \$14,838.75 for "Feb caregivers" and a second check
19 for \$16,740.00 for "March caregivers" (even though only six days had elapsed in the
20 month), both of which (according to Kozak's testimony) Rubino then signed on March 6,
21 2012 (Kozak Ex. W, pp. 817-18), both of which checks show a "settle date" of March 8,
22 2012, just two days later. Program Ex. 12, p. 101 Kozak did not present any documentary
23 evidence from the accounts she had controlled that would support her claim that the
24 \$100,000 and \$20,000 checks referenced above were written on March 6, 2012 or explain
25 why they did not show as having been deposited until weeks later. Accordingly, the Court
26 finds Kozak's testimony on the matter of when the \$100,000 and \$20,000 checks were
written to be not credible.

1 120. Finding of Fact: Kozak did not have Marik return this \$120,000 to the Rubino Trust
2 account until several months later, on June 8, 2012, and only after Kozak was instructed to
3 return this money by her accountant. Program Ex. 21, p. 35; Program Ex. 2, p. 13, ¶21
4 Kozak testified at trial that she would not be able to explain why this \$120,000 was paid to
5 Marik “until I read the notes.” The Court finds Kozak’s claim that she did not know and
6 could not recall why these two checks totaling \$120,000 were written to Marik to be not
7 credible.

8 121. Finding of Fact: Kozak also used money belonging to Rubino’s trust to make a
9 \$5,000 donation to St. Pius X church on March 20, 2012, more than a week after Rubino’s
10 death; Kozak’s records do not show that this money was ever returned to this account.
11 Program Ex. 21, p. 35 Kozak testified at trial that this \$5,000 check to St. Pius X church
12 was signed by Rubino sometime before Rubino’s death on March 12, 2012; given the
13 document that is Program Ex. 18, the Court finds Kozak’s testimony on this point to be not
14 credible.

15 122. Finding of Fact: With regard to the Rubino Trust’s Wells Fargo account ****8850,
16 Kozak’s own records show that Kozak made a number of expenditures from this account
17 after Rubino’s death, including an April 2, 2012 donation in the amount of \$7,000 to St.
18 Pius X church; Kozak’s records do not show this money being returned to this Rubino Trust
19 account either. Program Ex. 21, pp. 48-49 Kozak testified at trial that this \$7,000 check to
20 St. Pius X church was signed by Rubino sometime before Rubino’s death on March 12,
21 2012; given the document that is Program Ex. 18, the Court finds Kozak’s testimony on
22 this point to be not credible.

23 123. Finding of Fact: Kozak held onto over \$16,000 that belonged to the Rubino estate
24 and/or Rubino’s trust until February 12, 2013, 11 months after Rubino’s death, specifically:
25 (1) a \$15,000 “deposit” that Kozak had obtained October 27, 2010; and (2) a further
26 \$1,640.47 that Kozak admits was an overpayment. Program Ex. 2, pp. 105-06; Program
Ex. 16 Kozak’s testimony at trial was that the reason she took so long to return this money
was that Denice Shepherd, counsel for Sharon Smith, “extended the case.” When asked

1 how Ms. Shepherd could have “extended the case” in a way that would have delayed the
2 return of these funds, Kozak was able to state only that she did not know, and that that
3 information would have to be obtained from Shepherd, Elizabeth Smith (the attorney who
4 represented Kozak as personal representative), and/or Roger Frazier (Kozak’s personal
5 attorney in both the Probate Litigation and in this ligation over her fiduciary license). The
6 Court finds that Kozak failed to provide a reasonable explanation for her failure to return
7 these funds for 11 months and that her testimony on this matter was not credible.

8 124. Finding of Fact: At trial, Kozak testified that she recalled being sued by Sharon
9 Smith (replaced by her son Daryl Smith after Sharon Smith passed away) in the Probate
10 Litigation, but that she (Kozak) did not recall whether Sharon Smith or Daryl Smith was
11 seeking a money recovery from Kozak. The Court finds Kozak’s claim that she (Kozak)
12 could not recall whether Sharon Smith (and then Daryl Smith) had been seeking to recover
13 money from Kozak to be not credible.

14 125. Conclusion of Law: Kozak was in breach of her fiduciary duty for her actions after
15 Rubino’s death (1) because Kozak was able to obtain – and then keep for some time – her
16 status as presumptive personal representative in large part because of the power that Kozak
17 previously had wielded under the General Power of Attorney (Program Ex. 40) and as
18 result of being Rubino’s 24/7 caregiver, and (2) because Kozak’s actions after Rubino’s
19 death were possible because of the knowledge Kozak had obtained as a result. *See Standage*
20 *v. Planned Inv. Corp.*, 160 Ariz. 287, 290 (App. 1988) (breach of fiduciary duty action
21 could be based on acts of former fiduciary committed after fiduciary duty ended, where
22 fiduciary’s ability to create apparent legitimacy for his later actions arose from the prior
23 fiduciary relationship, and the knowledge he had gained: “The only reason the agreements
24 ever had any credibility was because of Standage's prior fiduciary relationship to [the
25 corporation]. The fact that Standage was found to have manufactured the agreements in
26 1984 [after he no longer was corporate secretary, in which capacity he owed a fiduciary duty
to corporation] is of no consequence in the action for breach of fiduciary duty. What is of
consequence is the fact that he dated them 1976 and 1980 and represented that they were

1 drafted and executed in those years at a time when he did owe a fiduciary duty to
2 [corporation] in an attempt to assert a long-term claim to a portion of [corporation's]
3 property”).

4 126. Finding of Fact: Kozak’s explanation for her conduct in excising control and
5 expending assets of Rubino’s trust after Rubino’s death – that “Kozak was securing the
6 assets in the belief she was to be duly appointed the personal representative” (Program Ex.
7 2, p. 19, ¶36) – only serves to show her deliberate ignoring of the right of the trustee to
8 control trust assets, rather than the personal representative.

9 127. Finding of Fact: Based on the foregoing findings of fact and conclusions of law, the
10 Court finds Kozak engaged in unprofessional conduct as defined in ACJA §7-
11 291(H)(6)(k)(7) by failing to exercise the degree of care, skill and proficiency commonly
12 exercised by the ordinary skillful, careful and prudent fiduciary.

13 128. Finding of Fact: Based on the foregoing findings of fact and conclusions of law, the
14 Court finds Kozak engaged in unprofessional conduct as defined in ACJA §7-
15 291(H)(6)(k)(8) by performing unacceptable client care and failing to conform to the
16 essential standards of acceptable and prevailing practice for a fiduciary.

17 IV. Count 4

18 **Kozak violated ACJA §7-202(J)(6)(b) and Rule 31, Rules of Probate Procedure, by**
19 **inappropriately marshaling or accounting for substantial cash found in the home**

20 A. Immediately on becoming Rubino’s fiduciary, Kozak was required to (a) marshal and
21 secure Rubino’s cash; (b) keep Rubino’s cash separately from money belonging to
22 any other person or entity, including specifically Kozak and Marik; and (c) keep
23 complete and accurate records relating to Rubino’s cash

24 129. Conclusion of Law: ACJA §7-202(J)(6)(b) requires a fiduciary acting as a personal
25 representative to (1) as soon as possible, marshal and secure the property of the decedent’s
26 estate; (2) provide safekeeping for any such estate property, and (3) *at a minimum*, record
pictorially and establish and maintain accurate records of all real and personal property:

A fiduciary acting as personal representative shall settle and distribute the estate of
the decedent efficiently, timely, and in the best interests of the estate and, if

1 appropriate, in accordance with the terms of any probated and effective will. . . . b.
2 On appointment, the fiduciary shall take reasonable steps to marshal and secure the
3 property and income of the decedent's estate as soon as possible. The fiduciary shall
4 provide stewardship of the property for safekeeping and, at a minimum, record
5 pictorially and establish and maintain accurate records of all real and personal
6 property.

7 130. Conclusion of Law: ACJA §7-202(J)(6)(c) prohibits commingling of estate property
8 with property of any other person or entity, including specifically the fiduciary: “[A]
9 fiduciary shall not co-mingle any property or assets of the decedent's estate with property or
10 assets of other estates the fiduciary may hold as personal representative, or co-mingle with
11 the fiduciary's own property or assets.”

12 131. Conclusion of Law: As noted above, ACJA §7-202(J)(6)(d) holds a fiduciary to the
13 acting as a personal representative to the standards required of a trustee: “A fiduciary acting
14 as a personal representative shall observe the standards of care and duties applicable to
15 trustees.”

16 B. Upon Rubino's death on March 12, 2012, Kozak failed to marshal and secure
17 Rubino's cash that was in Rubino's home

18 132. Finding of Fact: Kozak testified during trial that she (Kozak) had been told
19 sometime before Rubino's death by Sharon Smith and Joanne Wallace that Rubino kept a
20 considerable sum of cash in Rubino's house, but that she (Kozak) made no search for cash
21 in Rubino's home.

22 133. Finding of Fact: Despite her status as fiduciary for Rubino, Kozak has claimed that
23 “[d]uring Rubino's lifetime, it was neither Kozak's, nor Marik's, nor the caregivers business
24 purpose to look for or find this this money [i.e., the cash that was found in Rubino's home
25 after her death on March 12, 2012].” Program Ex. 74, p. 5

26 134. Finding of Fact: Based on the evidence presented at trial, the Court finds that (a)
even before Rubino's death, Kozak had a duty as Rubino's fiduciary to locate, secure and
account for the cash in Rubino's home as soon as Kozak was aware of its existence,

1 regardless of whether at that time Kozak knew the exact amount of cash in the home, and
2 (b) Kozak willfully failed to perform this duty.

3 135. Finding of Fact: Kozak testified during trial that she (Kozak) did not recall ever
4 seeing the cakebox in which the money was found.

5 136. Finding of Fact: According to a letter from Kozak's counsel that was verified by
6 Kozak, Kozak did not know the total amount of cash in Rubino's house until the cash was
7 located and counted after Rubino's death. Program Ex. 2, p. 16

8 137. Finding of Fact: Shortly after Rubino's death, Kozak removed what Kozak testified
9 at trial was \$139,400 in cash found in Rubino's home by Burchwell (Kozak's niece), Joanie
10 Vrbanic and Jeannie Wallace (Rubino's neighbor) in a cake box in Rubino's closet. Kozak
11 failed to deposit the \$139,400 in cash into a trust account for Rubino's estate until June 26,
12 2012, more than three months after Rubino's death on March 12, 2012. See Program Ex.
79, pp. 1-2

13 138. Finding of Fact: Kozak's testimony at trial was that there was only \$139,420 in cash
14 found in Rubino's home, not the \$187,000 reported by Wallace (Program Ex. 75, transcript
15 pp. 51:7 to 55:6). However, Kozak also testified at trial that she had received \$30,000 in
16 "cash received from Ella [Rubino]" and deposited this \$30,000 into the "Marik Trust"
17 account. See also Program Ex. 21, pp. 35 and 51

18 139. Finding of Fact: At trial, Kozak testified that all she knew about where the \$30,000
19 in cash (which Kozak testified she had deposited into the "Marik Trust" account) had come
20 from, was that she (Kozak) had walked into Rubino's home on March 6, 2012 and the cash
21 was sitting on a table next to Rubino, with Joanie Wallace and a Marik caregiver also
22 present. On redirect examination by her own counsel, Kozak testified for the first time that
23 she thought this \$30,000 was the cash Rubino kept in the house that she (Kozak) had heard
24 about before but had not seen. However, this statement of Kozak's is not consistent with the
25 testimony of Kozak's own witness, Marik caregiver Joanie Vrbanic Shawn, who testified
26 that that after Rubino died, Kozak instructed her (Vrbanic-Shawn) and other Marik
personnel to look for cash in Rubino's house. Based on all of the evidence presented at

1 trial, the Court finds Kozak's trial testimony to be not credible regarding (a) her claimed
2 lack of knowledge as to where the \$30,000 in cash came from, and (b) her claim that she
3 thought this \$30,000 constituted the cash in Rubino's house that she had previously been
4 informed of.

5 140. Finding of Fact: Wallace testified that when she (Wallace) told Kozak that there was
6 over \$40,000 missing from when Wallace had counted the money earlier, Kozak responded
7 by saying "That's hearsay," even though Wallace's statement of what she had seen with her
8 own eyes was *not* hearsay. Ex. 75, 102:25 to 103:22

9 141. Finding of Fact: At trial, Marik employee Christina Burchwell (who was also
10 Kozak's niece) testified that the cash was counted on the Wednesday following Rubino's
11 death (March 12, 2012, the date of Rubino's death, was a Monday, so that would have been
12 March 14, 2012), and that as far as she (Burchwell) knew, Kozak had taken the cash to
13 Marik's bank to be deposited the next day, i.e. Thursday, March 15, 2012. On re-direct (i.e.,
14 following Kozak hearing Burchwell's testimony), Kozak testified for the first time that she
15 had attempted to deposit the cash the day following its discovery, but had been unable to
16 open an account for Rubino's estate until June 20, 2012. See Program Ex. 79, p. 1

17 142. Finding of Fact: At trial, Kozak testified that she attempted to comply with her
18 obligation under ACJA §7-202(J)(6)(b) to marshal and secure the property of the decedent's
19 estate as soon as possible, but that she was prevented from completing this task because the
20 locks were changed at Rubino's home within the first month after Rubino's death, although
21 Kozak could not recall the date this occurred. Kozak did remove personal property from
22 Rubino's home after Rubino's death, but Kozak's only documentation regarding the items
23 that Kozak removed from Rubino's house were minimal notes (consisting of scraps of paper
24 with scribbled generalizations of what was removed, without any meaningful itemization)
25 admitted as Program Ex. 19. Kozak claimed in her testimony at trial that there had been an
26 itemization of the items removed from Rubino's home while Kozak as personal
representative, stating that this itemization might have appeared in "care notes" (though
Rubino, having passed away, no longer needed care), but Kozak failed to produce any such

1 documents. Kozak's testimony at trial regarding Program Ex. 19 was that "Elizabeth Smith
2 [Kozak's attorney in the Probate Litigation] told me to write this." In deposition, Joanne
3 Wallace, testified regarding a number of items of Rubino's personal property being removed
4 from Rubino's home while Kozak had access to Rubino's home. Program Ex. 75,
5 transcript pp. 117:4 to 118:22; and 120:15 to 121:8; Program Ex. 19

6 143. Finding of Fact: Based on the foregoing findings of fact and conclusions of law, the
7 Court finds that with respect to Rubino's cash (and her tangible personal property), Kozak
8 failed to comply with her obligation under ACJA §7-202(J)(6)(b) to marshal and secure
9 property belonging to Rubino's estate as soon as possible after Rubino's death.

10 C. Kozak failed to keep Rubino's cash separate from money belonging to any other
11 person or entity, including specifically Kozak and Marik

12 144. Finding of Fact: As noted above, Kozak testified that on March 6, 2012 (six days
13 before Rubino's death), Kozak acquired \$30,000 in cash from Rubino and/or Rubino's trust,
14 which Kozak testified she (Kozak) did not know the source of, though she believed it to be
15 the cash she had heard was in Rubino's house.

16 145. Finding of Fact: While ACJA §7-202(J)(6)(c) prohibits commingling of estate
17 property with property of any other person or entity, including specifically the fiduciary,
18 according to Kozak's own disclosure, she (Kozak) deposited this \$30,000 into the "Marik
19 Trust" account on the date of Rubino's death, March 12, 2012, along with \$8,329.20 from
20 Rubino's individually-owned (i.e., not trust-owned) Schwab account ****5747 (over which
21 Kozak had obtained power of attorney; see Program Ex. 2, p. 12, ¶19) and another \$30,000
22 from the Schwab account ****8332 that belonged to Rubino's trust. Program Ex. 21, pp.
23 34, 35 and 51

24 146. Finding of Fact: Kozak admitted at trial that she used first \$2,000 and then a further
25 \$8,322.95 (totaling \$10,322.95) from the "Marik Trust" account to pay Kozak's attorney
26 Elizabeth Smith. See also Program Ex 12, pp. 2 at ¶4 (stating that pp. 32-98 of this
document relate to the account into which Rubino's cash was deposited) and Program Ex

1 12, pp. 33-35 (showing these payments to Elizabeth Smith). Program Ex. 12 was verified
2 by Kozak. Program Ex. 12, p. 3

3 147. Finding of Fact: Kozak testified at trial that she was not sure if attorney Elizabeth
4 Smith's receipt of this \$10,322.95 had ever been approved by the Probate Court, and Kozak
5 produced no evidence of any such approval by the Probate Court.

6 148. Finding of Fact: As stated above, after Rubino's death on March 12, 2012 and
7 through August 21, 2012, Kozak continued to use this "Marik Trust" account (still
8 containing monies that belonged to Rubino's trust as well Rubino herself) to pay out almost
9 \$7,000 for various expenses incurred by Kozak and/or Marik, including breakfast for Kozak
10 and others on the morning of Rubino's funeral and \$326.40 paid to Marik itself. Program
Ex. 21, pp. 51-52

11 149. Finding of Fact: based on the foregoing findings of fact and conclusions of law, the
12 Court finds that Kozak failed to keep Rubino's cash separate from money belonging to other
13 persons or entities, specifically Kozak and Marik, and that Kozak used some of Rubino's
14 cash to pay for expenses incurred by and for the benefit of Kozak and Marik.

15 D. Kozak failed to keep complete and accurate records of Rubino's cash

16 150. Finding of Fact: Kozak's disclosure dated September 5, 2012 (Program Ex. 21)
17 failed to disclose the \$139,420 in cash Kozak since has admitted (in a letter from her
18 counsel that she verified) she removed from Rubnio's house after Rubino's death. *See*
19 Program Ex. 2, pp. 16-17, ¶¶30-32

20 151. Finding of Fact: At trial, while Kozak continued to insist that the amount of cash
21 found in Rubino's home after Rubino's death amounted to \$139,420, Kozak was unable to
22 explain why the amounts shown on the two scraps of cardboard (one showing \$127,300 [*see*
23 Program Ex. 79, p. K03001 and Program Ex. 75, p. 82], and the other showing \$12,920
24 [*see* Program Ex. 79, p. K03002 and Program Ex. 75, p. 83]) that she (Kozak) kept as her
25 records of this cash showed a total of \$140,220, not \$139,420 (i.e., \$127,300 + \$12,920 =
26 \$140,220, not \$139, 420).

1 152. Finding of Fact: Kozak testified at trial that her bank had miscounted the cash and
2 then later re-counted it and made a downward adjustment of \$800, citing a June 20, 2012
3 deposit slip showing a deposit of \$140,220 (Program Ex. 79, p. 1) and a June 26, 2012
4 debit memo for \$800 (Program Ex. 79, p. 2), but this claimed explanation is inconsistent
5 with Kozak's own cardboard records showing that there was \$140,220 in cash.

6 153. Finding of Fact: Rubino's long-time friend and neighbor Joanie Wallace, who was
7 present for the counting of Rubino's cash after Rubino's death, expressly denied signing the
8 scraps of cardboard that Kozak produced as Kozak's records of the cash found in Rubino's
9 home after Rubino's death. Program Ex. 75, pp. 82-89, and transcript pp. 106:12 to
10 108:10

11 154. Finding of Fact: Kozak's own witnesses, Kozak's niece Christina Burchwell and
12 former Marik employee Joanie Vrbanic-Shawn, both testified at trial that they had been
13 present for the counting of the cash and that the \$127,300 and \$12,920 figures (totaling
14 \$140,220, not \$139,420) shown on Kozak's scraps of cardboard (Program Ex. 75, pp. 82-
15 83) were accurate at the time the money was counted.

16 155. Finding of Fact: Kozak was unable to explain at trial why the cash found in Rubino's
17 home after Rubino's death was not disclosed in Kozak's disclosure in the Probate Litigation
18 that is Program Ex. 21.

19 156. Finding of Fact: Taking into account all of the evidence presented at trial and
20 Kozak's failure to keep and produce a clear set of accurate records, the Court draws a
21 negative inference and concludes that Kozak improperly failed to keep an accurate and
22 contemporaneous accounting of the cash found in Rubino's home, so that Kozak was unable
23 to properly account for these funds even as late as September 5, 2012, in Program Ex. 21.
24 Accordingly, the Court draws a negative inference regarding whether Kozak ever properly
25 and accurately accounted for all of the assets of Rubino that Kozak had in her control during
26 the time that Kozak served as personal representative.

157. Finding of Fact: Based on the foregoing findings of fact and conclusions of law, the
Court finds that Kozak (a) failed to marshal and secure Rubino's cash as soon as possible

1 after Rubino's death; (b) failed to keep Rubino's cash separately from money belonging to
2 any other person or entity, including specifically Kozak and Marik; and (c) failed to keep
3 complete and accurate records relating to Rubino's cash.

4 **V. Count 5**

5 **Kozak violated ACJA §7-202(J)(6)(e), (f) and (g), by inappropriately causing Rubino
6 or Rubino's estate to reimburse Kozak or Kozak's business for meal expenses**

7 A. Kozak had a duty to properly account for meal expenses charged to Rubino

8 158. Conclusion of Law: ACJA §7-202(J)(6)(e) provides: "A fiduciary acting as personal
9 representative shall settle and distribute the estate of the decedent efficiently, timely, and in
10 the best interests of the estate and, if appropriate, in accordance with the terms of any
11 probated and effective will. . . . e. A fiduciary shall resolve questions in good faith and
12 make decisions that are most beneficial to the estate."

13 159. Conclusion of Law: ACJA §7-202(J)(6)(f) provides in pertinent part: "A fiduciary
14 shall have no self-interest in the management of the decedent's estate and shall exercise
15 caution to avoid even the appearance of self-interest."

16 160. Conclusion of Law: ACJA §7-202(J)(6)(g) provides in pertinent part: "A fiduciary
17 shall ensure that all fees and expenses for the estate, including compensation for the
18 fiduciary, are reasonable in amount and necessarily incurred in the administration of the
19 decedent's estate."

20 161. Finding of Fact: Kozak's petition for approval of her accounting (Program Ex. 128)
21 was never approved by the Probate Court (in Pima County Superior Court PB-20120630;
22 the "Probate Litigation"), because Rubino's niece Sharon Smith (and later Sharon's son,
23 Daryl) settled their dispute with Kozak before that issue was tried. Program Ex. 2, p. 19,

24 ¶138

25 162. Conclusion of Law: Consequently, because there was never any formal approval of
26 Kozak's accounting by the Probate Court, Kozak cannot claim protection that would have
existed under A.R.S. §14-3808(D), had her account been approved by the Probate Court.

1 B. Kozak failed to properly account for meal expenses charged to Rubino

2 163. Finding of Fact: Kozak's response to the allegation that "[Kozak] did produce many
3 receipts, but was unable to produce receipts for all transactions" consisted of excuses, not
4 explanations, stating only that this allegation "overlooks the fact that Rubino herself was in
5 charge of her own money and spent it in various ways during the two and a half years that
6 Kozak was involved" and that Kozak did not have certain records because Kozak had given
7 them to her own attorney. Program Ex. 2, p. 21, ¶41 These excuses are inadequate as a
8 matter of law, given that (1) Kozak owed a fiduciary duty to Rubino, and therefore had a
9 duty to both keep and maintain complete and accurate records under ACJA §7-
10 202(J)(1)(c)(2); and (2) Kozak remained responsible for keeping and maintaining her
11 records regardless of what she did (or did not) provide to her own attorney.

12 164. Finding of Fact: Kozak testified at trial that she and Marik had no set schedule for
13 determining how often Marik would calculate its claims for reimbursement from Rubino,
14 stating that she (Kozak) tried to do this on a monthly basis, but that "it didn't always work
15 out that way." Accordingly, the Court finds that Kozak failed to put into place a systematic
16 practice for dealing with reimbursements from Rubino to Marik.

17 165. Finding of Fact: Some of the receipts Kozak produced for restaurant meals,
18 groceries, or other expenses alleged to be attributable to Rubino were illegible or had been
19 made unreadable by handwriting. Program Ex. 86, p. K01787 (Lowe's receipt); Program
20 Ex. 88, p. K01766 (KFC receipt); Program Ex. 89; Program Ex. 94, pp. K01857-61,
K01880, K01890.

21 166. Finding of Fact: Many of the receipts Kozak produced were produced out of date
22 order, or with the portion of the receipt that had showed the date omitted. Program Ex. 86
23 (receipts on pages with consecutive "K0" Bates-numbers from Kozak produced out of date
24 order, or with the part of the receipt showing the date not provided); Program Ex. 88
25 (same); Program Ex. 94, pp. K01855-61 (same); Program Ex. 91, p. 1 (random receipts
26 from different months produced by Kozak on the same page)

1 167. Finding of Fact: Some of the receipts produced by Kozak showed grocery purchases
2 on consecutive days. Program Ex. 87 Also among the records produced by Kozak were
3 grocery receipts from Walmart and Safeway showing grocery purchases on the same day,
4 July 2, 2010 (Program Ex. 90, p. 1) and receipts from Fry's and Walmart showing grocery
5 purchases on the same day, June 6, 2009 (Program Ex. 90, p. 2).

6 168. Finding of Fact: Among the records produced by Kozak were grocery receipts from
7 Fry's show two separate purchases of peaches (2.84 lbs. and 3.94 lbs.) made 8 minutes apart
8 on the same date, September 27, 2010. Program Ex. 88, pp. 1-2 The Court finds that it is
9 highly unlikely that a then 98-year-old woman would be able to consume over 6¾ pounds of
10 peaches purchased in a single day.

11 169. Finding of Fact: Kozak's accounting (Program Ex. 21, p. 10) shows that on
12 Saturday, July 30, 2011, Rubino ate out twice at Red Lobster, with identical bills for \$23.33.
13 However, Marik's Time and Activity record for that day (Program Ex. 107) shows no
14 mention of Rubino eating at Red Lobster, and instead states that Rubino ate a lunch at home
15 of "chik. salad - fruit bar - tea - H₂O," after which the caregiver "cleaned up kitchen," and
16 that Rubino ate a dinner at home of "meatloaf m-pot – broc. –tea – cookies," after which the
17 caregiver again "cleaned up kitchen."

18 170. Finding of Fact: The Marik Time & Activity record for October 23, 2010 (Program
19 Ex. 114) shows that Rubino ate at Mimi's Café that day. Kozak's accounting (Program Ex.
20 21, p. 9) shows that Kozak and Marik billed Rubino \$119.00 for this meal. The Court finds
21 that \$119.00 was not a reasonable amount for a then-98-year-old woman eating a meal at
22 Mimi's Café, even if her caregiver's meal also was included.

23 171. Finding of Fact: The Marik Time & Activity record for October 12, 2010 (Program
24 Ex. 116) shows that Rubino ate dinner at Mimi's Café with her Marik caregiver, Kay
25 Kozak, Fred [Brinckerhoff] and two other Marik personnel, "Ruby and Rosie." Kozak's
26 accounting (Program Ex. 21, p. 9) shows that Kozak and Marik billed Rubino \$136.15 for
this meal. The Court finds that \$136.15 was not a reasonable amount for a then-98-year-old
woman eating meal at Mimi's Café, even if her caregiver's meal also was included.

1 172. Finding of Fact: While Kozak has claimed that “Rubino liked to eat out often”
2 (Program Ex. 74, p. 4), Rubino’s long-time friend and neighbor Joanie Wallace testified in
3 deposition that Rubino did not like to eat out, especially in the last years of her life, and that
4 Rubino preferred to eat at home. Program Ex. 75, transcript pp. 36:24 to 38:6 Wallace
5 also testified that Rubino did not want to provide Marik’s caregivers with food or pay for
6 their food, and that Rubino was “a very thrifty lady” who “didn’t like people eating her
7 food.” Program Ex. 75, transcript pp. 39:16 to p. 40:7 Wallace further testified that
8 Rubino repeatedly expressed her unhappiness with the quantity of groceries that were being
9 bought for her, and with the fact that Marik caregivers were eating food that Rubino had
10 paid for. Program Ex. 75, transcript pp. 92:13 to 94:8

11 173. Finding of Fact: Based on the foregoing findings of fact and conclusions of law, the
12 Court finds that Kozak (a) failed to adopt systematic practices to ensure that Rubino was
13 fairly billed by Marik for only reasonable expenses; (b) failed to create and maintain
14 accurate and credible records relating to such expenses and reimbursements; and (c) as a
15 result, inappropriately caused Rubino or Rubino’s estate to reimburse Kozak (through
16 Marik) for meal expenses.

17 VI. Count 6

18 **Kozak violated ACJA §7-202(J)(2)(b)(1) and (2) by self-dealing or appearance of self-
19 dealing by authorizing Marik along with Marik employee and Kozak’s husband [Fred]
20 Brinckerhoff to sell Rubino’s husband’s art collection**

21 A. Kozak was required by law to avoid self-dealing and the appearance of self-dealing

22 174. Conclusion of Law: As noted above, ACJA §7-202(J)(2)(b)(1) requires a fiduciary
23 to avoid both (a) self-dealing and conflicts of interest, and (b) *the appearance of* self-dealing
24 and conflicts of interest, while §7-202(J)(2)(b)(2) further requires a fiduciary to maintain
25 independence from all service providers.
26

1 B. Kozak involved Marik and her husband Brinckerhoff in a sale of Rubino's artworks
2 in a manner that resulted in neither Marik nor Brinckerhoff having any clearly-
3 established responsibilities to Rubino, and then allowed the sale to be conducted
4 without any clear accounting of what artworks had been sold for what amounts, what
5 the expenses were, or the amount Rubino ultimately received after expenses

6 175. Finding of Fact: Kozak initially claimed that her husband Fred Brinckerhoff (who
7 also was a Marik employee), rather than Kozak or Marik, had contracted with Rubino to sell
8 Rubino's artwork. Program Ex. 2, p. 15, ¶26; Program Ex. 118, p. 1 ("Neither Marik nor
9 Ms. Kozak hired Mr. Brinckerhoff to sell the art work and did not bill Ms. Rubino for doing
10 so. He worked on that project independently of Marik, and under the direction of Ms.
11 Rubino"); see also Program Ex. 118, p. 35 ("When it came to Ms. Rubino's request for his
12 assistance in the art show, he did so not as a Marik employee but independently").

13 176. Finding of Fact: However, it later came out that Kozak had signed a written contract
14 (dated April 12, 2010) on behalf of Marik with Rubino that called for Marik (*not*
15 Brinckerhoff) to sell Rubino's artworks. Program Ex. 17; Program Ex. 118, p. 3 When
16 asked at trial if she (Kozak) had advised Rubino to sign this contract, Kozak avoided the
17 question and testified that Rubino had decided for herself to sign the contract. The Court
18 finds that Kozak's testimony on this issue was evasive and not credible.

19 177. Finding of Fact: Brinckerhoff testified at trial that the sale of Rubino's artworks ran
20 from May or June, 2010 through October, 2010, but he also testified that he did not see
21 Marik's contract with Rubino to sell Rubino's artwork (Program Ex. 17; Program Ex. 118,
22 p. 3) until after the sale of Rubino's artworks had been completed.

23 178. Finding of Fact: Kozak included in the Marik/Rubino contract a provision that had
24 *Rubino holding harmless Marik and Alliance Bank* (which provided the site at which the
25 artwork was sold), rather than having Marik indemnify Rubino and Alliance Bank ("Mrs.
26 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"). Program Ex. 17; Program Ex. 118, p. 3 Despite the fact that this

1 contract waives Rubino's right to make a claim against both Marik and Alliance Bank,
2 Kozak claimed in her trial testimony that Marik "held the liability." The Court finds that
3 Kozak's testimony on this issue was evasive and not credible.

4 179. Finding of Fact: Adding to the confusion already created by Kozak having Marik
5 and Rubino enter into the contract that is Program Ex. 17 while not informing Brinckerhoff
6 of this contract and allowing Brinckerhoff to believe that he was conducting the sale, Kozak
7 later made the claim (through her attorney) that "once the decision [to sell Rubino's
8 artwork] was made, Marik and those related to Marik took on many roles: organized and
9 were paid to organize the sale, received commissions for the sale and purchased some of the
10 property." Program Ex. 118, p. 4 However, at trial, Kozak again reversed position,
11 testifying that this statement was not true.

12 180. Finding of Fact: Kozak allowed Brinckerhoff to print brochures for the art sale in
13 which Brinckerhoff was shown as being with Marik, and as being reachable at Marik's
14 business address. Program Ex. 118, pp. 26, 28 and 30 Kozak testified at trial that she did
15 not recall who paid to print the brochures, and Kozak did not produce any records at trial
16 that showed what the cost of printing these brochures was, or who paid these costs.

17 181. Finding of Fact: Kozak also testified that the brochures (Program Ex. 118, pp. 26,
18 28 and 30) were distributed by Kozak, Brinckerhoff and Christina Burchwell placing them
19 all around Tucson and by mailing them, but that she did not recall who paid to mail the
20 brochures. Kozak did not produce any records at trial that showed what the cost of mailing
21 these brochures was, or who paid these costs.

22 182. Finding of Fact: The Court finds that the relative roles of Marik and Brinckerhoff in
23 the sale of Rubino's artworks were never definitively established, and that this occurred
24 because Kozak never took the trouble to have the roles of Marik and Brinckerhoff clearly
25 defined. The Court further finds that Kozak's trial testimony regarding the relative roles of
26 Marik and Brinckerhoff in the sale of Rubino's artworks was evasive and not credible.

1 183. Finding of Fact: Kozak allowed Marik caregivers purchase unidentified artwork
2 belonging to Rubino (*see Program Ex. 74, p. 5*, admitting that Marik caregivers Anna
3 Vitale and Rose Marie Stone purchase some of Rubino’s artwork).

4 184. Finding of Fact: Kozak allowed her brother, Kevin Kozak, to purchase unidentified
5 artwork belonging to Rubino. Program Ex. 120 Kozak’s husband, Brinckerhoff, testified
6 at trial that he did not even know if this check was for one or multiple pieces of artwork.

7 185. Finding of Fact: Kozak kept only inadequate records of expenses incurred by Marik
8 and/or Brinckerhoff in selling Rubino’s artwork, and no records of (a) how much money
9 Rubino made on the art sales, or (b) what specific artworks were sold. Program Ex. 118,
10 p.1 and the other pages of Program Ex. 118 referenced there; *see also Program Ex. 119-122*
11 Kozak testified at trial that she did not recall if there was ever an itemized list of Rubino’s
12 artworks that were sold in this art sale. Kozak also testified at trial that there was no single
13 accounting of the monies received, the costs incurred, and/or the net amount ultimately paid
to Rubino, stating “there’s no one page, it’s just itemized.”

14 186. Finding of Fact: Kozak had Marik pay Rubino \$2,058.52 for “art sales,” using a
15 check signed on behalf of Marik by Kozak, but without providing any record of where these
16 funds came from or what artworks were sold to produce these funds (Program Ex. 3) Kozak
17 admitted at trial that these funds were run through a “regular” Marik account. The Court
18 finds that by running these funds through a “regular” Marik account, Kozak commingled
19 Rubino’s money from the proceeds of the sale with Marik’s money.

20 187. Finding of Fact: Based on the foregoing findings of fact and conclusions of law, the
21 Court finds that Kozak violated ACJA §7-202(J)(2)(b)(1) and (2) by (a) self-dealing and
22 creating the appearance of self-dealing by authorizing Marik (along with Brinckerhoff, her
23 husband and a Marik employee) to sell Rubino’s art collection without seeking other bids to
24 conduct the sale; (b) deliberately failing to establish clear roles and responsibilities for
25 Marik and Brinckerhoff in conducting the sale; and (c) failing to create and maintain clear
26 and credible records of what was sold, what expenses were paid (and by who), and what
Rubino ultimately paid and received as a result of this sale.

1 VII. Conclusion

2 188. Conclusion of Law: ACJA §7-202(H)(6)(a), (g), (h); and (k)(3), (6), (7), (8), (12)
3 and (16) provide:

4 Grounds for Discipline. A certificate holder is subject to disciplinary action if the
5 board finds the certificate holder has engaged in one or more of the following: a.
6 Failed to perform any duty to discharge any obligation in the course of the certificate
holder's responsibilities as required by law, court rules, this section or the applicable
section of the ACJA; . . .

7 g. Exhibited gross negligence;

8 h. Exhibited incompetence in the performance of duties; . . .

9 k. Engaged in unprofessional conduct, including: . . .

10 (3) Failed to comply with any federal, state or local law or rule
governing the practice of the profession or occupation; . . .

11 (6) Failed to practice competently by use of unsafe or unacceptable
practices;

12 (7) Failed during the performance of any responsibility or duty of the
profession or occupation to use the degree of care, skill and proficiency
commonly exercised by the ordinary skillful, careful and prudent
13 professional certificate holder engaged in similar practice under the
same or similar conditions regardless of any level of harm or injury to
14 the client or customer;

15 (8) Failed to practice competently by reason of any cause on a single
occasion or on multiple occasions by performing unsafe or unacceptable
16 client or customer care or failed to conform to the essential standards of
acceptable and prevailing practice; . . .

17 (12) Failed to file required reports, records or pleadings in the practice
of the profession or occupation; . . .

18 (16) Engaged in undue influence over a client or customer to the benefit,
19 financial or otherwise, of the certificate holder or a third party.

20
21 189. Finding of Fact: Based on the findings of fact and conclusions of law set forth
22 above, the Court finds that Kozak has violated and is subject to discipline under ACJA §7-
23 202(H)(6)(a), (g), (h); and (k)(3), (6), (7), (8), (12) and (16).

1 190. Finding of Fact: Based on the findings of fact and conclusions of law set forth
2 above, it is recommended to the Fiduciary Board that (1) Kozak's license as a fiduciary be
3 revoked pursuant to ACJA §7-201(H)(24)(a)(6)(i),⁵ and (2) the Fiduciary Board issue a
4 cease and desist order to Kozak enjoining Kozak from representing herself to the public as a
5 licensed fiduciary, pursuant to ACJA §7-201(H)(24)(a)(6)(g).⁶

6 Dated this 5th day of December, 2017.

7 MARK BRNOVICH
8 Attorney General

9
10 By: _____
11 Benjamin Norris
12 Assistant Attorney General
13 Attorney for Fiduciary Program
14
15
16

17 ⁵ ACJA §7-201(H)(24)(a)(6)(i) provides: "Upon completion of an investigation concerning
18 alleged acts of misconduct or violations by a certificate holder, which may or may not
19 include a formal interview, informal or formal disciplinary proceedings, or a hearing, the
20 board shall do one or more of the following: . . . (6) Enter a finding the certificate holder has
21 violated any of the provisions of the statutes, court rules, this section, the applicable ACJA
22 sections or subsection (H)(6) and issue an order imposing any or a combination of the
23 following informal or formal disciplinary sanctions: . . . (i) Order revocation of a certificate
24 with specific conditions for reinstatement."

25 ⁶ ACJA §7-201(H)(24)(a)(6)(i) provides: "Upon completion of an investigation concerning
26 alleged acts of misconduct or violations by a certificate holder, which may or may not
include a formal interview, informal or formal disciplinary proceedings, or a hearing, the
board shall do one or more of the following: . . . (6) Enter a finding the certificate holder has
violated any of the provisions of the statutes, court rules, this section, the applicable ACJA
sections or subsection (H)(6) and issue an order imposing any or a combination of the
following informal or formal disciplinary sanctions: . . . (g) Issue a cease and desist order
pursuant to subsection (E)(6)."

1 ORIGINAL of the foregoing filed
2 with Disciplinary Clerk Amanda McQueen
3 this 5th day of December, 2017.

4 COPY of the foregoing delivered in Word format
5 by e-mail this 5th day of December, 2017 to:

6 Honorable William J. O'Neill
7 Assigned Hearing Officer
8 1501 West Washington, Suite 104
9 Phoenix, Arizona 85007-3231
10 officepdj@courts.az.gov

11 COPY of the foregoing delivered in PDF format
12 by e-mail this 5th day of December, 2017 to:

13 Roger W. Frazier
14 Law Offices of Roger W. Frazier
15 2525 E. Broadway Blvd., Suite 200
16 Tucson, AZ 85716
17 roger@frazierlawaz.com

18

Phylis K. Durbin
19 Assistant to Benjamin Norris
20 6614792.2

**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: Certification Number: Type of Certificate/License:	Kay Kozak 20507 INV/FID
<i>COMPLAINANT</i>	Name:	Denise Shepherd
<i>INVESTIGATION INFORMATION</i>	Complaint Number: Investigator(s):	14-0011 Hal White
Complaint Received:		11/18/2014
Complaint Forwarded to the Certificate Holder:		01/13/2015
Certificate Holder/Licensee Received Complaint:		01/16/2015
Response From Certificate Holder:		04/01/2015
Period of Active Certification/Licensure:		12/24/2003
Status of Certification/License:		Active
Availability of Certificate Holder/Licensee:		Available
Availability of Complainant:		Available
Report Date:		10/31/16

ALLEGATIONS:

Allegation 1. Ms. Kozak violated the Arizona Code of Judicial Administration (“ACJA”) when she prepared health and financial powers of attorney and a will for Ms. Rubino.

Allegation 2: Ms. Kozak engaged in self-dealing or the appearance of self-dealing when she prepared the will and by her appointment as agent under a power of attorney.

Allegation 3. Ms. Kozak did not follow the advance directives of Ms. Rubino, changed her primary care physician (whom she had seen for many years), and changed the advance directives.

Allegation 4. Ms. Kozak changed Ms. Rubino’s investment plan and took over management of Ms. Rubino’s trust even though there was a successor trustee named. In doing so, Ms. Kozak attempted to exercise control over trust assets after Ms. Rubino’s death and she had no authority to do so.

Allegation 5. Once Ms. Kozak was appointed PR for Ms. Rubino’s estate, she inappropriately marshaled or accounted for substantial cash found in the home.

Allegation 6. Ms. Kozak inappropriately caused Ms. Rubino or Ms. Rubino’s estate to reimburse Ms. Kozak or Ms. Kozak’s business for meal expenses.

Allegation 7. Marik along with Marik employee and Kozak’s husband Fred Brinckerhoff (Brinckerhoff) sold Ms. Rubino’s husband’s art collection.

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

- Written complaint and documentation submitted by complainant Denise Shepherd (“Complainant”)
- Written response and documentation submitted by certificate holder Kay Kozak (“Kozak”)
- 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 § 7-202, and Arizona Supreme Court Rules
- 3 boxes of discovery from Complainant
- Deposition (exhibit 18 in above three boxes of discovery) of Joanne Wallace (“Joanie”), neighbor, friend and former power of attorney of ward and 1099 employee for Kozak

PERSONS INTERVIEWED:

Kay Kozak
Fred Brinckerhoff (“Brinckerhoff”)
Denise Shepherd
Roger W. Frazier, Kozak’s Attorney (Frazier)
Deposition of Dr. Cox (Cox)
Deposition of Joanne Wallace

SUMMARY OF INVESTIGATION:

Kozak met 97 year old Ella Rubino (“Rubino”) after her second fall in a short period of time, in a hospital recovery ward. Doctor’s recommended round the clock care for Rubino. On Friday, October 23, 2009, when Rubino was released from the hospital. Kozak’s company Marik Fiduciary and Care Management, LLC (“Marik”) became Rubino’s round the clock caregiver.

On or about Sunday, November 1, 2009, Kozak assisted Rubino in the preparation of three documents: a healthcare power of attorney, financial power of attorney and a will. Brinckerhoff, Kozak’s husband, and employee of Marik notarized Rubino’s medical and financial powers of attorney which made Kozak the agent. He also notarized a new will that Kozak “scribed” for Rubino’s benefit. The “2009 Will” named Kozak as the Personal Representative (“PR”).

Two and one half years later, on March 12, 2012, Rubino passed away. Pursuant to the terms of the 2009 Will, Kozak became the PR and was appointed by the court. The niece and attorney learn about the circumstances around the creation of the 2009 Will and file a lawsuit challenging the appropriateness of Kozak's appointment as PR. Kozak relinquished her PR position.

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 file complaint number 14-0011.

In 1991, Rubino's attorney, Paul Bartlett, drafted a will, a trust, a health and financial power of attorney for Rubino, which Rubino signed. Her niece, Sharon Smith, was named her successor in the trust, PR in the will and agent in the powers of attorney. With Sharon Smith's knowledge, in September, 2009, Ella named her neighbor, Joanie, as agent under a health care power of attorney.

According to Complainant, prior to her death, Rubino was visually impaired, hard of hearing and was diagnosed with dementia. Rubino had a number of physical ailments including a blood condition which required her to have regular transfusions. Rubino had difficulties paying her bills, so a neighbor, Joanie, assisted her by writing out the checks, which Rubino would sign.

Allegation 1_ Kozak violated the ACJA by Drafting the Will and Powers of Attorney

In November of 2009, upon Marik being retained to provide Rubino with assisted living services, Complainant says that, "Kozak prepared health and financial powers of attorney and a will for Rubino. The powers of attorneys were forms but constituted a substantial change from Ms. Rubino's prior documents. The will was not a standard form will and named Kozak as PR."

Kozak says, "Soon after hiring Marik, Kozak provided Rubino with a packet of materials that included a set of sample forms covering various situations, and including a sample will that Kozak had received from an attorney in the past. Kozak stated she does that as a routine part of her practice to ask clients if they have any such documents, and if so to show them to Kozak.

From Kozak's response (Page 14, ¶ 2),

"Rubino reviewed all of her major financial and legal documents, including but not limited to her then-existing will dated 1991 (1991 Will). Sitting around a table, Rubino, Kozak, Joanne Wallace, and caregivers discussed what changes should be made to the will. According to Kozak during interview, Rubino, sitting at the table, with others around, read from her 1991 Will and told Kozak what to write for a new one. Kozak, acting none other than as a scribe, wrote what she was instructed.

Kozak, with her handwritten document, typed up the new Will for Rubino (2009 Will). The witnesses to the will were 1099 contract caregivers Sandy McIntosh and Christina Burchwell, and Frederick Brinckerhoff, Kozak's Husband was the witnessing notary."

Kozak states that her involvement in drafting the will was limited to writing what Rubino asked her to write and she was therefore just a scribe. Kozak also prepared powers of attorney. Kozak further states that she can act as a scrivener and to look at a case, "*In re Estate of Shumway*, 197 Ariz. 57, 66 and 32-24, 3 P3d 997 (App.1999). In *Shumway*, the caregiver was not a licensed fiduciary and subject to the ACJA.

Allegation 2. Kozak engaged in self-dealing or the appearance of self-dealing. Kozak engaged in the following activities:

- Kozak drafted and was appointed an agent under a power of attorney and at the same time Kozak's company, Marik, provided assisted living services for Rubino.
 - Kozak paid herself from Rubino's money, to attend Rubino's funeral and go out to breakfast
 - Rubino is paying for the caregivers to eat in her home, as well as paying for the caregivers meals when on doctor visits and errands
 - After Rubino's death, Kozak charged Rubino's estate for numerous undocumented or poorly documented Marick expenses.
- Marik and Brinckerhoff sold Rubino's husband's art at Rubino's request.
- Marik and Marik contract workers bought some of Mr. Rubino's art from Marik.

Kozak, by drafting and accepting the appointment as agent under the power of attorney and agreeing to provide and providing assisted living services, created a situation in which a conflict or the appearance of a conflict arose. (The conflict did in fact arise when Kozak reimbursed Marick for expenses after Rubino died).

Kozak could not act both as the agent under the power of attorney and provide assisted living services to Rubino. ACJA § 7-202((J)(2)(b)(2) provides:

A fiduciary shall maintain independence from all service providers to enable the fiduciary to coordinate services, challenge inappropriate or poorly delivered services, and act in the best interest of the ward or protected person.

Kozak provided various explanations for her actions that created a conflict of the appearance of a conflict of interest. Kozak stated she attended and charged for attending the funeral because Rubino asked her too. Kozak stated that having Rubino pay for caregiver's meals was standard practice and helped keep Rubino socially active.

As for the art sale, Kozak said that her husband and Rubino's husband went to the same art school and Kozak's husband had managed a studio earlier in his life. Kozak also said that she did not ask her husband to sell Rubino's artwork, Rubino did. Kozak also said that the

art purchases were for Rubino's husband's art that was on sale in a "gallery" to the public, and the prices paid were the prices listed.

ACJA § 7-202(J)(2)(b)(1) & (2) provides: 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.

Allegation 3. Kozak did not follow the advance directives of Rubino, changed her primary care physician (whom she had seen for many years), and changed the advance directives.

Complainant alleges that, and Kozak admits that Kozak changed the advance directives and primary care physician. Kozak says she was acting as Rubino's care giver and Rubino changed her primary care physician because she wanted a female doctor.

Allegation 4. Kozak changed her investment plan and took over management of Ms. Rubino's trust even though there was a successor trustee named. She attempted to exercise control over trust assets after Rubino's death and she had no authority to do so.

Kozak's involvement in trust assets for the purposes of this investigation should be viewed from two perspectives: (i) the time period before Rubino's death in March of 2012 and (ii) the time period after Rubino's death in March of 2012.

Pre March 12, 2012.

It appears to be undisputed that trust assets were "consolidated" prior to Rubino's death in 2012.

For example, in 2011, Rubino opened a Charles Schwab account and signed a new power of attorney at Schwab allowing Kozak total control of that account. Acct – 5747. According to Kozak, this was part of consolidating various accounts. What can be determined from the documents is that the account was titled in Rubino's name, Sharon Smith was the beneficiary and Kozak was named the power of attorney on that account, (consistent with the previous general power of attorney she completed in 2009, in the event Rubino became incapacitated). What cannot be determined is the extent to which Kozak exercised control over the account, either indirectly by influencing Rubino or directly through the power of attorney. Kozak asserts that she did not do any transactions without Rubino's decision and that Rubino made all of her own decisions and transactions.

In addition to the Charles Schwab account noted above, and -8332. In February of 2011, funds were taken from a Chase investment account, Chase 1824, - of about \$130,000 and deposited into Schwab -5747, with a total initial deposit into Schwab -5747 of \$138,437.27. In July of 2011, funds in the amount of \$278,062.39 were withdrawn from Transamerica, deposited into Schwab -5747, and then ultimately deposited into Schwab .

What cannot be determined is whether Rubino had sufficient capacity so that she was exercising control over the accounts and “consolidation” or on the other hand the extent to which Kozak exercised control over the accounts, either indirectly by influencing Rubino or directly through the power of attorney. Kozak asserts that she did not do any transactions without Rubino’s decision and that Rubino made all of her own decisions and transactions. Because staff cannot determine the extent of Rubino’s capacity staff cannot determine if Kozak took over management of trust assets prior to March 2012.

Post March 12, 2012.

Kozak did exercise control over trust assets after Rubino’s death. Kozak states that she was securing the assets under the belief she was to be duly appointed the PR, and subsequently when the court appointed her PR.

Kozak caused a number of funds to be withdrawn from trust assets after Rubino’s death and prior to her appointment as power of attorney. Kozak withdrew or caused to be withdrawn the following trust assets after Rubino’s death:

After March 12, 2012 withdrawals from the following accounts happened while Kozak was the personal representative:

Schwab	Acct. ending 8332	\$125,000.00	(pg. 35, exhibit 5)
Wells Fargo	Acct. ending 8850	6,226.40	(pg. 48-9, exhibit 5)
Marik Trust		8,261.78	(pg. 51-2, exhibit 5)

Kozak had no authority to withdraw these trust assets.

Allegation 5. Once Ms. Kozak was appointed PR for Rubino’s estate, she inappropriately marshaled or accounted for substantial cash found in the home.

Shortly after Rubino’s death, Kozak caused Marik to clean, organize and dispose of certain property located in the house. In Kozak’s response to the complaint, she states through her lawyer that this was done in good faith, apparently in anticipation of being named the personal representative. These actions included, among other things:

- Donating Rubino’s clothing to St. Vincent de Paul, cleaning out the refrigerator, and other tasks.
- Allowing paintings to be removed that had previously been purchased by caregivers.

- Removing \$139,400 that was found by either Christina Burchwell, Joanie Vrbanic (who is Kozak’s niece) or Jeannie Wallace (who is Ella’s neighbor) in a cake box in Rubino’s closet.

The \$139,400 is the item in question for the purposes of this allegation. Once found the funds were counted and given to Kozak. After the funds were given to Kozak, it is unclear what happened to the funds until more than three months later when they are deposited into the bank.

Kozak asserts that she removed the funds from Rubino’s home and placed the money in her personal safe that same day. While staff has found no evidence to dispute the funds were placed into the safe and remained there, staff has also not been able to confirm the funds remained there.

On approximately June 26, 2012, a little over three months later, Kozak deposited \$139,400 into a trust account for Rubino estate. Staff was able to verify the deposit through account receipts.

Kozak explanation for her behavior is that her mother was ill and she had to travel back East to care for her for a month.

Allegation 6. Kozak inappropriately caused Rubino or Rubino’s estate to reimburse Kozak or Kozak’s business for meal expenses.

For the purpose of this allegation, staff reviewed only “reimbursements” that were sought after the Rubino’s death.

Rubino died in March of 2012. On September 5, 2012, Kozak, after her appointment as personal representative, sought “reimbursement” for expenses allegedly incurred by her company, Marik. Some of these “expenses” occurred up to two years prior to Rubino’s death. The expenses were “reimbursed” by Kozak from Rubino’s estate. The “reimbursements” were paid to Marik.

In addition to honoring “reimbursement” requests that had “aged” Kozak/Marik failed to provide appropriate documentation regarding these expenditures or evidence that Rubino paid only for her share and the expenses of a caregiver. In addition Kozak sought reimbursement for attending the funeral and for a meal consumed on the same day.

During the investigation, Kozak was also asked to provide additional information for the following receipts that were presented to Rubino’s estate for reimbursement. The meals are either high reimbursements or more than one meal on the same day:

- | | | |
|--------------|----------------------|---------|
| • 4/1/2010 | KFC | \$12.74 |
| • 4/1/2010 | Wendy’s | 18.36 |
| • 10/12/2010 | Mimi’s Café | 136.15 |
| • 10/21/2010 | Fronimo’s Greek Cafe | 270.00 |

- 10/23/2010 Mimi's Café 119.00
- 2/3/2010 Mimi's Café 68.00
- 3/1/2010 Mimi's Café 63.14
- 3/2/2010 PF Chang's China Bistro 60.00
- 3/16/2010 Mimi's Café 81.00
- 4/2010 Mimi's Café 40.00
- 4/12/2010 Mimi's Café 68.77
- 4/19/2011 Red Lobster 38.00
- 7/30/2011 Red Lobster 23.33
- 7/30/2011 Red Lobster 23.33
- 6/2/2011 KFC 24.93
- 8/1/2011 Venice Restaurant 27.19
- 8/1/2011 Mimi's Café 18.75
- 10/1/2011 KFC 13.59
- 10/1/2011 McMahan's Steak 33.33

Of the above receipts, the following are high reimbursements that receipts were not provided:

- 2/3/2010 Mimi's Café 68.00
- 3/1/2010 Mimi's Café 63.14
- 3/2/2010 PF Chang's China Bistro 60.00
- 3/16/2010 Mimi's Café 81.00
- 4/12/2010 Mimi's Café 68.77
- 10/12/2010 Mimi's Café 136.15
- 10/23/2010 Mimi's Café 119.00

Kozak's reply was:

“On a 24/7 watch, caregivers are supposed to maintain people in their normal lifestyle, and a goal is to keep the client mentally stimulated, and with socialization, not to be kept as a hermit or to be isolated. It is usual and customary to eat the client's food with the client. Rubino herself was gregarious, social, engaging, and liked to laugh. Kozak's intent was to maintain a socially active life for Rubino. Other than what caregivers brought for themselves, Rubio paid for a caregiver's food, whether it was at a restaurant or at home, but not for Kozak or Kozak's family in addition to the caregiver. Rubino often asked to go out to many places she enjoyed, including for example, KFC, Jerry Bob's, Mimi's Café. Receipts are provided that document what was paid for on those occasions. (See sample of the receipts at **Exhibit 4**. With Wallace before Kozak, Rubino spent allegedly about \$40 every two weeks, which is not enough even for Rubino alone. With caregivers, she was buying and actually eating more food herself, in addition to eating out.

Ms. Shepherd misunderstands or [sic] how charges when eating out with others were handled. Marik would pay such bills and then charge Rubino's share for herself and her caregiver back to Rubino. Periodically, Marik would bill Rubino for various items that Marik paid for in this fashion. The outings to restaurants were often with other clients which were for socialization, outings, stimulations, activities and entertainment, to maintain and enhance activities of daily living. For example, if there were ten persons altogether, which would be four client and caregiver pairs, and Kozak and Brinckerhoff, Marik would pay the entire bill, and Marik would then bill each client their respective share which would include that of the client and is or her caregiver; Kozak and Brinckerhoff's share was paid by Marik.

Exhibit 4 shows this process. One is Fromino's Greek Café, on 12/17/11. Marik paid the total receipt of \$110.86. There were a total of twelve attendees, or six separate groups to be charged. Rubino and her caregiver are one group. Kozak and Brinckerhoff are one group (designated on the receipt as K/F). Each of the six groups was charged one sixth of the total. Three other receipts from P.F. Chang's China Bistro, Coco's, and Fuddruckers, Kozak and Brinckerhoff are not always present. In those cases, a designated person for Marik pays (not the Clients), and the same dividing process and billing to each client for their respective share occurs afterwards...

...As for receipts showing outings and activity records showing a meal at home on the same day, Dr. Cox as well throughout the numerous daily activity records, show that Rubino had a healthy appetite, and ate a lot. So the inference that the outings were falsely charged, or charge without Rubino's presence at the outings, is without merit."

Division reviewed Exhibit 4's provided receipts, and determined that they did evidence that Marik supplied restaurant receipts to Rubino who then reimbursed Marik. Staff was not provided the same evidence for the receipts described above.

In addition Kozak sought reimbursement for attending the funeral and for a meal consumed on the same day. Kozak charged 6 hours for attending the funeral and breakfast at IHOP afterwards. Kozak also charged \$25.64 for two guests for breakfast. Kozak has explained that Rubino specifically asked that Kozak go to her funeral, so she charged for it. Kozak said she took someone from the funeral out to breakfast afterwards.

Allegation 7. Marik along with Marik employee and Kozak's husband Brinckerhoff sold Rubino's husband's art collection.

Kozak and Brinckerhoff both admit to selling Mr. Rubino's paintings for Rubino at an art sale. Kozak says,

"...Rubino, herself, decided to sell some artwork prior to her death, and was assisted by Kozak and other caregivers, and by Fred Brinckerhoff as explained in

the answer to No. 26, below. Kozak had conversations with Rubino, with Sharon Smith and James Smith as well as Joanne Wallace about selling the artwork before it was sold...

...Selling the artwork was Rubino's idea, not Kozak's. Kozak notified Sharon Smith and Smith's husband, who wanted all of the paintings sold. They said that Joanne Wallace tried to do so previously, with no luck. They were not opposed.

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. Mr. Brinckerhoff had been managing director of the Norman Rockwell Museum of Vermont and Prints 'N Things Art Center for fifteen years. He interviewed Rubino several times over time, and Rubino wanted to sell, so Brinckerhoff prepared a brochure for her. Alliance Bank at Camp Lowell and Swan in Tucson wanted paintings to display, and permitted an art showing and sale, so Brinckerhoff facilitated that for Rubino. A painting that was to remain in the family and not be sold was a nude of Rubino, above her bed, and that was left in the house and not sold. Rubino authorized everything that was sold to be sold. Mr. Brinckerhoff's charges were reasonable, and a copy is attached hereto as **Exhibit 7**, which is a list of his hours (42.25) that he put in for that \$1,000 payment, receipts for expenses, brochures that Mr. Brinckerhoff prepared, and bank depositions of the receipts."

It is not possible to now determine who initiated the sale of the art work, Rubino or a third party. Once the decision was made, Marik and those related to Marik took on many roles: organized and were paid to organize the sale, received commissions for the sale and purchased some of the property.

Marik, Rubino's caregiver, entered into a contract with Rubino to sell the paintings. The contract is described below:

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


Witness

Notwithstanding the contract and Marik's involvement, Brinckerhoff, Kozak's husband and an employee of Marik, was paid a \$1,000 commission for the sale. This is demonstrated in part by the invitation to the sale described below:

You are Cordially Invited to Attend a Reception
To View the Exhibit of Mr. Rubino's Art.

Thursday October 21, 2010 from 5pm to 7pm.

Alliance Bank of Arizona

4703 East Camp Lowell Road

Tucson, Arizona 85712



Charles E. Rubino

hors d'oeuvres will be served.

RSVP by October 14, 2010

Fred Brinckerhoff at (520) 795-8286 Marik Fiduciary & Care Management LLC -or-
Brenda Koedyker at (520) 784-6021 Alliance Bank of Arizona

A review of the auction documentation, demonstrated that Marik and its employees purchase art work at the auction. The records indicate that Marik expended \$2,000.

ANALYSIS OF ALLEGATIONS:

Pursuant to ACJA § 7-202(B)(3), A licensed fiduciary who is acting under a power of attorney must act in compliance with the code of conduct set forth in ACJA § 7-202 regardless if the fiduciary is court appointed.

Allegation 1. Ms. Kozak violated the Arizona Code of Judicial Administration (“ACJA”) when she prepared health and financial powers of attorney and a will for Ms. Rubino.

Kozak acknowledges preparing the will and powers of attorney.

Kozak states that she is allowed to act as a scrivener citing *In re Estate of Shumway*, 197 Ariz. 57, 66 3 P3d 997 (App.1999). While in *Shumway* the court determined that acting as a scrivener was not the unauthorized practice of law, the law has changed since *Shumway* at least as to fiduciaries. ACJA § 7-202(B)(9) provides a fiduciary may only prepare powers of attorney or other legal documents if the fiduciary is also certified as a legal document preparer.

Kozak is not a certified Legal Document Preparer. Kozak admitted preparing the documents in her written response and in interview. Allegation 1 is substantiated.

Allegation 2: Kozak engaged in self-dealing or the appearance of self-dealing when she prepared the will and by her appointment as agent under a power of attorney.

Kozak, assisted Rubino in the drafting of Rubino's will. The revised will selected Kozak as personal representative. In that capacity Kozak caused Rubino's estate to "reimburse" Marik for "expenses" incurred two years prior to Rubino's death.

Kozak, by drafting and accepting the appointment as agent under the power of attorney and agreeing to provide and providing assisted living services, created a situation in which a conflict or the appearance of a conflict arose.

Kozak could not act both as the agent under the power of attorney and provide assisted living services to Rubino. ACJA § 7-202(J)(2)(b)(2) provides:

A fiduciary shall maintain independence from all service providers to enable the fiduciary to coordinate services, challenge inappropriate or poorly delivered services, and act in the best interest of the ward or protected person.

ACJA § 7-202(J)(2)(b)(1) & (2) 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.

Allegation 2 is substantiated.

Allegation 3. Kozak did not follow the advance directives of Rubino, changed her primary care physician (whom she had seen for many years), and changed the advance directives.

While Kozak did assist Rubino in changing her primary healthcare provider, the Division could not determine whether this was compliant with Rubino's desires.

Allegation 3 is unsubstantiated.

Allegation 4. Kozak changed Rubino's investment plan and took over management of Rubino's trust even though there was a successor trustee named. In doing so, Kozak attempted to exercise control over trust assets after Rubino's death and she had no authority to do so.

As mentioned in the Summary of Factual Findings, it is not possible to determine if Rubino independently decided to change her investment plans prior to her death.

After her death, however, Kozak continued to make changes to trust assets. Kozak had no authority to make such changes.

Allegation 4 is substantiated.

Allegation 5. Once Kozak was appointed PR for Rubino's estate, she inappropriately marshaled or accounted for substantial cash found in the home.

On or about March 21, 2012. \$139,400 was found in Rubino's home. Kozak asserts she placed the cash in Kozak's safe. It was not until June 26, 2012 that the money was deposited into a trust account.

It was not until early 2013 that an "Inventory and Appraisalment" and "Petition for Approval of Account of Former PR" were filed in the probate case and appropriately identified that there was \$139,420 cash in the estate.

Kozak possessed cash in the amount of \$139,400 and did not appropriately and timely deposit or account for the cash.

Allegation 5 is substantiated

Allegation 6. Kozak inappropriately caused Rubino or Rubino's estate to reimburse Kozak or Kozak's business for meal expenses.

After Rubino's death, Kozak caused Rubino's estate to "reimburse Marik for numerous meal and other expenses occurring up to two years prior to Rubino's death. Kozak and Marik were unable to provide documentation demonstrating the appropriateness of these "reimbursements." In addition, Kozak admitted eating breakfast the day of Ella Rubino's funeral with a guest and charged the estate.

Allegation 6 is substantiated.

Allegation 7. Marik along with Marik employee and Kozak's husband Brinckerhoff sold Rubino's husband's art collection.

Marik said Brinckerhoff sold the artwork and Brinckerhoff agreed. Brinckerhoff provided paperwork for the art sale. Marik was also involved in the sale of the art work. Marik entered a contract with Rubino to sell the artwork. Investigation found Rubino paying both Marik and Brinckerhoff (a Marik employee) for expenses relating to the art sale.

Kozak admitted to selling the artwork. Brinckerhoff was paid a \$1,000 commission for the sale. Marick and Marick employees or contractors purchased the artwork.

ACJA § 7-202(J)(2)(b)(1) & (2) 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.


Allegation 7 is substantiated.

SUBMITTED BY:

 10/31/16

INVESTIGATOR, Investigator Date
Certification and Licensing Division

REVIEWED BY:

 10/31/16

Certification and Licensing Division Date

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 **14-0011**, 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):

#3.

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

#s 1, 2, 4, 5, 6 + 7.

Mike Baumstark

Mike Baumstark
Probable Cause Evaluator

11/2/16

Date

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

<i>CERTIFICATE HOLDER/LICENSEE INFORMATION</i>	Certificate Holder:	Kay Kozak
	Certification Number:	20507

Recommendation:

It is recommended the Board accept the finding of the Probable Cause Evaluator and enter a finding Kay Kozak has not committed the alleged act(s) of misconduct as detailed in Allegation 3 of the Investigation Summary and Allegation Analysis Report in complaint number 14-0011.

It is recommended the Board accept the finding of the Probable Cause Evaluator and enter a finding Kay Kozak has committed the alleged act(s) of misconduct as detailed in Allegation 1, 2, 4, 5, 6, 7 of the Investigation Summary and Allegation Analysis Report in complaint number 14-0011.

It is recommended the Board enter a finding grounds for formal disciplinary action exists pursuant to Arizona Code of Judicial Administration (“ACJA”) § 7-201(H)(6)(a) for act(s) of misconduct involving ACJA § 7-202(B)(9) for preparing powers of attorney and a will; ACJA § 7-202(J)(2)(b)(1), (2) and (3) by creating the conflict of interest or the appearance of a conflict of interest by being appointed as the agent under the powers of attorney while providing assisted living services; ACJA § 7-201(H)(6)(k)(7) and(8) by exercising control over trust assets when there was no legal authority to do so; Rule 31, Rules of Probate Procedure and ACJA § 7-202(J)(6)(b) for failure to exercise property stewardship and to timely inventory estate cash assets; ACJA § 7-202(J)(6)(e),(f) and (g) by reimbursing herself of her company for “expenses” for which there was no proper documentation; and ACJA § 7-202(J)(2)(b)(1) and (2) for the self-dealing or appearance of self-dealing in the sale and purchase of the art work.

It is further recommended the Board issue a Censure.

SUBMITTED BY:

 11/4/16

Director Date

Certification and Licensing Division

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 14-011 and Kay Kozak, certificate number 20507, 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).

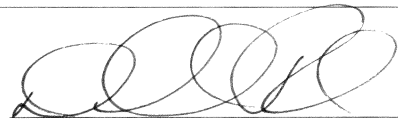
enters a finding the public health, safety or welfare is at risk, requires emergency action, and orders the immediate emergency suspension of the certificate and sets an expedited hearing for:

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 revocation



Deborah Primock, Chair
Fiduciary Board

5/11/17
Date

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