UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 15-81298-CV-MARRA-MATTHEWMAN

JULIAN BIVINS, as Personal Representative
of the ancillary Estate of Oliver Wilson Bivins,

Plaintiff,
vs.
CURTIS CAHALLONER ROGERS, JR.,
as former guardian, STEPHEN M. KELLY,
as successor guardian, BRIAN M. O'CONNELL,
ASHLEY N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN,
BEYS LISTON MOBARGHA & BERLAND, LLP
f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP,
and LAW OFFICES OF KEITH B. STEIN, PLLC,
n/k/a STEIN LAW, PLLC,
Defendants.

_____/

PLAINTIFF'S RESPONSE TO DEFENDANTS, KELLY'S, O' CONNELL'S, CRISPIN'S, STEIN'S, THE CIKLIN LUBITZ & O'CONNELL LAW FIRM'S, AND THE STEIN LAW FIRM'S MOTION TO DISMISS OR STAY

COMES NOW, the Plaintiff, JULIAN BIVINS as ancillary Personal Representative of the Estate of Oliver Wilson Bivins in Palm Beach County, Florida, by and through his undersigned counsel, ("the Estate") and files its Response to Defendants, Stephen M. Kelly's, Brian M. O'Connell's, Ashley N. Crispin's, Keith B. Stein's, the Ciklin Lubitz & O'Connell Law Firm's, and the Stein Law Firm's (hereinafter referred to collectively as "Defendants") Motion to Dismiss or Stay, and in support thereof provides the following Memorandum of Law.

MEMORANDUM OF LAW

I. Background

The Estate filed the instant Complaint on September 17, 2105 ("The Federal Lawsuit"). On December 4, 2015 the Defendants filed an Adversary Proceeding for Declaratory Judgment ("Declaratory Judgment Proceeding") in the guardianship court in Palm Beach County, Florida.[1] *See* Exhibit 3 to Defendants' Motion to Dismiss or Stay [Docket 21-1]. The Declaratory Judgment Proceeding is an unabashed effort to circumvent the Federal Lawsuit by asking the guardianship court to render an advisory opinion for the purpose of raising a collateral estoppel argument to deprive the Estate of a trial by jury as to the negligence, professional negligence, and breaches of fiduciary duty of the Defendants.

The Defendants have sought a declaratory judgment as to the following:

> Have the Petitioners breached their fiduciary duty, if any, to the Ward? In the unlikely case there is a determined breach, to what extent has Julian released the Petitioner(s) or has become barred by the doctrine(s) of laches, estoppel, waiver, satisfaction, set off, offset, payment, res judicata, collateral estoppel, failure to mitigate damages, unclean hands or lack of authority? [2]

On December 18, 2015, The Estate moved to dismiss or stay the Declaratory Judgment Proceeding pending resolution of the instant action. (*See* Motion to Dismiss [DE 29]). Despite the fact that the proceedings in the guardianship court concern the administration of the guardianship of the deceased ward, Oliver Wilson Bivins (the "Ward") (whose guardianship has continued almost a year after he died in Amarillo, Texas), the Defendants are eager to have the

---

[1] Defendants Ashley Crispin and Keith Stein were served with the instant complaint on December 3, 2015.

[2] Julian Bivins is the son of Oliver Wilson Bivins Sr. At all times material hereto prior to the death of Oliver Wilson Bivins Sr., Julian Bivins raised various objections to the Defendants' handling of the guardianship matters, individually, as an interested party, by virtue of his status as the son of Oliver Wilson Bivins Sr. and the sole heir under his will. The instant action is brought on behalf of the Estate of Oliver Wilson Bivins Sr., by its ancillary personal representative, Julian Bivins.

guardianship court rule on the torts the Estate has alleged against them because of the appearance that the guardianship court is a favorable forum.[3] (*See* Motion for Original Trial Judge to Retain and/or Handle Case attached as Ex. 1). The ancillary Personal Representative of the Estate, as an out-of-state litigant, however, is entitled to file this lawsuit brought on behalf of the Estate against the Defendants and have the claims of the Estate heard by a jury in federal court based upon diversity jurisdiction.

II. Diversity Jurisdiction

In the instant case, the Defendants did not raise any issues that would challenge this Court's subject-matter jurisdiction. Thus, this Court has jurisdiction over this case. When a federal court has jurisdiction, it also has a "virtually unflagging obligation ... to exercise" that authority. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

Congress extends the benefits and safeguards of federal courts to "provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries." *Holston Investments, Inc. B.V.I. v. LanLogistics Corp.*, 677 F.3d 1068, 1070 (11th Cir. 2012) (quoting S.Rep. No. 1830, at 3 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101–02). In the present case, Julian Bivins, the ancillary Personal Representative of the Florida Estate of the deceased Ward, is a domiciliary of the State of Texas.[4] As the ancillary Personal Representative of the Estate, Julian Bivins filed the instant action in federal court to avoid the prejudices of local courts and local juries against out-of-state litigants.

---

[3] In fact, before the ink had even dried on the Palm Beach Post's February 3, 2016 article (which strongly suggested that Judge Martin Colin – the presiding judge in this guardianship case – may be transferred to another division due to the various facts and issues disclosed in the Palm Beach Post's investigation, the Federal Defendants filed a Motion for Instant Trial Judge to Retain and/or Handle the Case, seeking to retain Judge Colin as the presiding judge, irrespective of bias raised in the investigation and recommendation by Judge Colbath.

[4] Julian Bivins resides and has is domicile in the State of Arizona.

The Estate requires that this Court exercise jurisdiction so that it can be afforded an impartial and fair trial. Moreover, the recent investigation conducted by The Palm Beach Post has raised serious concerns about the impartiality of Judge Martin Colin, the presiding judge in the guardianship and probate proceeding, and other judges within the Probate and Guardianship Division of Palm Beach County, Florida. The Palm Beach Post articles explore conflict of interest that Judge Colin has because of his wife's role as a guardian and her representation by the attorneys before her husband in the Probate and Guardianship Division of Palm Beach County, Florida. (*See* Palm Beach Post articles attached hereto as Ex. 2). Further, Judge Colin has already stated his position on this case in response to a December 3, 2015 request of the Estate to have the Defendants reported to the Florida Bar for trust violations and for a direct and secretive violation of a court order regarding disbursement of the proceeds of the sale of a large asset of the Ward for an entire year:

> The Court: Mr. Denman, in this category you are really barking up the wrong tree because despite the contentiousness of this case and now the branches that it is going including federal court and maybe the Florida Bar, I mean, the Ciklin Lubitz law firm has a well-earned reputation of honesty. And this is honesty. Okay.
>
> And not for a moment do I have any concern because their reputation is well-earned in this respect. You may disagree agree [sic] with the notices and things like that. But I don't have any sense whatsoever, and never have in the years I've dealt with this firm, as a lawyer and a judge, all of which I can take into consideration, that they are not trustworthy to have that money available for control over the jurisdiction so that request is denied. (December 14, 2015 Hearing Transcript at p. 59.18 to p.60.10 attached hereto as Ex. 3).

The sentiments expressed by Judge Colin exemplify the purpose and function of federal diversity jurisdiction. The Estate requires that this matter be heard before this Court to avoid the

preferences and prejudices of judges and attorneys that have worked with one another throughout long spans of their careers.[5]

Now, the Defendants seek to have this Court abstain from exercising its jurisdiction pursuant to the *Colorado River* doctrine in order to have all of the claims against them resolved by a court that considers them beyond reproach.

III. The Colorado River Doctrine

Contrary to the representation of the law in the Defendant's Motion to Dismiss, the *Colorado River* doctrine is a very narrow exception to the general rule, which requires federal courts to exercise jurisdiction. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River,* 424 U.S. at 813, 96 S.Ct. at 1244 (quoting *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188–89, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959)). "[T]he mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 816 (1976). "Only the clearest of justifications will warrant dismissal." *Id.* at 819.

A. Parallel Proceedings

A threshold requirement for application of the *Colorado River* doctrine is that the federal and state cases be sufficiently parallel.

In the present case, the state court and the federal action are not parallel under the "first-filed rule." The Estate filed the federal lawsuit alleging breaches of fiduciary duties, negligence,

[5] The Estate will be filing as soon as practicable, a Motion to Disqualify Judge Colin based upon his bias in favor of the Guardians' attorneys and his bias as the husband of a professional guardian whose livelihood depends upon the favorable and consistent rulings from the Palm Beach guardianship judges, as well as positive relationships with the most influential law firms and lawyers in Palm Beach County.

and malpractice against the Defendants in federal court on September 17, 2015 several months before the Defendants filed their petition for declaratory judgment, albeit service was not perfected until the beginning of December, 2015. Accordingly, at the time of filing of the federal action, there was not a state proceeding that was parallel to the federal action. The court in *Freeman v. U.S. Bank, N.A.*, No. 8:13-CV-338-T-26MAP, 2013 WL 2147558, at *2 (M.D. Fla. May 16, 2013) refused to stay an action under the Colorado River doctrine reasoning as follows:

> The circumstances of this case fail to satisfy even the first factor of *Colorado River,* because this Court obtained jurisdiction of the declaratory judgment action first.... Piecemeal litigation is avoided by following the first-filed rule, and this action was filed first.

Under the first filed rule, the *Colorado River* doctrine is not applicable.

The threshold requirement for the application of the *Colorado River* doctrine also requires that the federal and state cases must "involve substantially the same parties and substantially the same issues." *Ambrosia Coal & Const. Co. v. Pages Morales*, 368 F.3d 1320, 1330 (11th Cir. 2004). If the federal and state proceedings are not parallel, then the *Colorado River* doctrine does not apply. *Id.*

For example, in *Acosta v. James A. Gustino, P.A.*, 478 F. App'x 620, 621-22 (11th Cir. 2012), the 11th Circuit Court of Appeals reversed the lower court's decision to abstain from exercising jurisdiction, concluding that the state and federal proceedings at issue were not parallel. The lower court decided that the actions were substantially similar because, though the state action did not involve the attorneys as defendants, the attorneys acted as agents in the state action and thus the parties were "substantially similar." *Id.* at 622. The 11th Circuit disagreed reasoning that though the attorneys acted as agents of the state court defendant, there was no precedent standing for the proposition that agency supported substantial similarity of parties for the purposes of applying the *Colorado River* analysis. *Id.*

Similar to the *Acosta* case, the parties in the federal action before this Court are not substantially similar to the parties in the state guardianship proceeding because the Federal Lawsuit seeks damages against the guardians *and* their attorneys for their tortious conduct, not merely a refund of the fees that the guardians and their counsel have charged the guardianship. The Defendants contend that both actions involve the same parties parroting the argument that the 11th Circuit expressly rejected in *Acosta*:

> Defendant Kelly, one of the guardians, was a formal party in the guardianship. The lawyer Defendants, as agents of the guardians, cannot be considered strangers to the guardianship proceedings. (DE 20 p. 7).

Based upon *Acosta*, the fact that the lawyer Defendants are alleged "agents of the guardians" and "no strangers to the guardianship proceedings," does not create similar parties.

Regardless of the Defendant attorneys' familiarity with the guardianship proceedings and regardless of their claims for fees within those proceedings, the Federal Lawsuit is significantly dissimilar. The Federal Lawsuit involves claims against the Defendants directly by the Estate, not for the return of property misappropriated from the guardianship and not for refunds to the guardianship, but for civil damages from them individually for their professional negligence and breach of fiduciary duty. The guardianship court is not even the appropriate court to bring claims against any of the Defendants. While the guardianship court may entertain an action for surcharge against the guardian, (which is by no means a required venue) no such mechanism exists with respect to a direct claim against attorneys who failed to comply with their professional responsibility to a ward. Yet, in light of the issues with the Palm Beach Probate and Guardianship Division, it should come as no surprise that all of the Defendant attorneys now seek to avail themselves of the jurisdiction of that court to have their actions rubber stamped. (*See* Ex. 2).

Likewise, the issues involved in the Federal Action are completely dissimilar from those concerning the winding down of the guardianship in circuit court and which the Estate has attempted desperately to resolve since the death of Oliver Wilson Bivins Sr. in March, 2015. The Federal Lawsuit concerns issues of negligence, such as duty, breach, causation, and damages; whereas the guardianship merely addresses the final distribution of the guardianship assets in the form of guardianship accountings. To illustrate the clear distinction between civil causes of action and accountings, it is worth noting that in guardianship accountings the burden of proof is on the guardian. *Beck v. Beck*, 383 So. 2d 268, 270-71 (Fla. 3d DCA 1980). This is because an accounting merely considers the disbursement of the guardianship funds. The Estate's objection to the accounting, however, cannot result in an award of damages against the guardians or against the guardians' attorneys.

The Federal Lawsuit, as it pertains to the attorney Defendants, concerns issues of professional liability and the standard of care owed by attorneys to their clients, which is completely foreign to a guardianship court. The Defendants' rationale supporting their argument that the issues in both cases are substantially similar is based on the idea that both cases involve the same property, but again, the distinction is that the Federal Lawsuit is directed at the negligence and the malpractice that has been committed by the Defendants. There is no support for the proposition that attorney negligence or guardianship negligence must be heard in a guardianship court if it takes place in the context of a guardianship. To the contrary, actions involving breaches of fiduciary duty committed by guardians against wards are subject to jury trial, which is an exception to the general rule that probate matters are to be determined by courts of equity. *See e.g. Beck v. Barnett Nat. Bank of Jacksonville*, 117 So. 2d 45, 50-51 (Fla. 1st DCA 1960); *In re Guardianship of Medley*, 587 So. 2d 619 (Fla. 2d DCA 1991).

Further, the idea that the circuit court is an "adequate vehicle for the complete and prompt issue[s] between the parties,"[6] is belied by the fact that the guardians have not yet been discharged despite the death of the Ward nearly one year ago. The Defendants, of course, prefer the guardianship court because it permits them to continue to draw fees from the Ward's Estate.[7] In fact, just since the time of the Ward's death in March 2015, the attorneys and guardians have sought fees purportedly for the benefit of the Ward that exceed $200,000. This is in addition to the more than $2.5 million the guardians' attorneys have already obtained in fees from the Ward's assets since he became a Ward in 2011. Remarkably, the guardians and attorneys also have pending fee petitions for more than $250,000 they claim to have incurred for the Ward's benefit from May 2014 until the Ward's death. In fact, just today, the Guardian and his attorneys filed petitions for thousands more in fees and costs, including those incurred defending the instant tort claims in Federal Court.

Indeed, this case has remarkable similarity to *Batzle v. Baraso*, 776 So. 2d 1107, 1109 (Fla. 4th DCA 2001), wherein the guardianship extended for six months after the death of the ward. In that case, the court commented that the lengthy extension of the guardianship was "...outrageous and repugnant to the Florida Probate Code." *Id.* Yet, in the present case, the guardianship persists, and the guardianship, against the interest of the Ward, now seeks to prolong the guardianship even further with an improper declaratory judgment action. Left to the circuit court, the guardianship

---

[6] *Sini v. Citibank*, N.A. 990 F. Supp. 2d 1370, 1376 (S.D. Fla. 2014) (*citing and quoting Brown v. Blue Corss and Blue Shield of Fla. Inc.*, 2011 WL 11532078, at *8(S.D. Fa. Aug. 8, 2011).

[7] In all guardianship proceedings, costs may be awarded. When the costs are to be paid out of the property of the ward, the court may direct from what part of the property the costs shall be paid. Fla. Stat. § 744.105. Likewise, Fla. Stat. 744.108(1) provides: "(1) A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward."

will continue to its natural end – the complete exhaustion of the Ward's estate. Abstention from jurisdiction in this case will only further prolong the guardianship, and thus expand the endless draining of the Ward's estate by the Defendants.

The parties and the issues in the proceedings are not substantially similar. "If there is any substantial doubt about whether two cases are parallel the court should not abstain." *See Huon v. Johnson & Bell, Ltd.,* 657 F.3d 641, 646 (7th Cir. 2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 28, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)*Moses H. Cone,* 460 U.S. at 28, 103 S.Ct. 927). "The decision to invoke *Colorado River* necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case." *Moses H. Cone* 460 U.S. 1, 28, 103 S.Ct. 927, 943, 74 L.Ed.2d 765. Accordingly, the guardianship proceeding does not constitute a parallel case within the meaning of the *Colorado River* doctrine, and this Court must exercise its jurisdiction.

B. Application of the Colorado River Doctrine

If, however, this Court chooses to apply the analysis under the *Colorado River* doctrine framework, the analysis favors the exercise of jurisdiction. The *Colorado River* doctrine considers six factors that must be weighed in analyzing the permissibility of abstention: (1) whether one of the courts has assumed jurisdiction over property, (2) the inconvenience of the federal forum, (3) the potential for piecemeal litigation, (4) the order in which the fora obtained jurisdiction, (5) whether state or federal law will be applied, and (6) the adequacy of the state court to protect the parties' rights. *Am. Bankers Ins. Co. of Fla. v. First State Ins. Co.,* 891 F.2d 882, 884 (11th Cir.1990). In *Moses H. Cone,* 460 U.S. at 17 n. 20, 103 S.Ct. at 937, the Supreme Court assessed two additional factors: the vexatious and reactive nature of the second lawsuit and forum shopping. It is also important to note that the *Colorado River* abstention

inquiry must be "heavily weighted in favor of the exercise of jurisdiction," *Ambrosia Coal & Const. Co.*, 368 F.3d 1320, 1332.

i. Jurisdiction over Property

Neither proceeding at issue in this case constitutes a proceeding in rem. Thus, the first *Colorado River* factor does not favor abstention. *Id.*

ii. The Relative Inconvenience of the Fora

The fora are within one-half mile of one another. (DE 20 Defendants' Motion to Dismiss or Stay). Thus, there is no hardship for the parties to try this case in federal court. Accordingly, this factor does not weigh in favor of abstention.

iii. Avoidance of Piecemeal Litigation

This factor "does not favor abstention unless the circumstances enveloping those cases will likely lead to piecemeal litigation that is abnormally excessive or deleterious." *Jackson-Platts v. Gen. Elec. Capital Corp.*, 727 F.3d 1127, 1142 (11th Cir. 2013). This is because if the mere threat of piecemeal litigation warranted abstention, "defendants could always escape federal courts simply by filing parallel state lawsuits." *Ambrosia Coal and Constr. Co.*, 368 F.3d at 1333. Indeed, the Defendants here have attempted to do this by filing the Declaratory Judgment Proceeding in an effort to have a basis upon which to argue "piecemeal litigation" will exist.

Defendants contend that the size of the guardianship proceeding and the docket entries justify the maintenance of the action in the guardianship court. (DE 20). Additionally, the Defendants argue that the probate and guardianship court is "intimately familiar with… the actions taken by the guardians… [and] the attorneys…." *Id.* The undue familiarity of that court with the guardians and the guardians' attorneys, however, should not weigh in favor of abstention, but strongly against it.

The Defendants fail to discuss what issues they contend will be litigated multiple times implicating res judicata. The only issue the Defendants cite as being duplicative is the management of a certain property in the Ward's Estate. *Id.* Nevertheless, the issues of negligence, malpractice, and breach of fiduciary duty have not been litigated. The guardianship court has made no ruling on these issues, and any such ruling by the guardianship court on these issues would be improper in that forum. Indeed, the Estate has moved to the stay the guardianship proceedings for that very fact.

Further, even if some of the issues in the Federal Action were impacted by res judicata, it does not warrant abstention. The *Colorado River* doctrine requires that the threat of piecemeal litigation be "abnormally excessive," and the Defendants have not put forth any argument as to why the present case represents a threat to lead abnormal piecemeal litigation within parallel proceedings. Accordingly, this factor does not weigh in favor of abstention.

iv. The Order in Which Jurisdiction was Obtained and the Relative Progress of the Two Actions

Courts in applying the *Colorado River* doctrine have held that the order in which the different fora obtained jurisdiction, is "not measured by which complaint was filed first, but rather by how much progress has been made in the two actions." *Moses H. Cone,* 460 U.S. 1, 21–22, 103 S.Ct. 927, 74 L.Ed.2d 765. However, this factor does not address a situation, like the present case, where the two actions are completely different. The simple fact that the guardianship in whole pre-dated the filing of the Federal Lawsuit does not mean that any progress has been made as to the causes of action raised by the Estate in this Court. In fact, this factor, itself, clarifies the dissimilar nature of the guardianship and the Federal Lawsuit. In the guardianship, there is no proceeding, which has been instituted for damages against the guardians and their counsel for negligence, malpractice, and breaches of fiduciary duties of the Defendants. The only proceeding

stating any of those causes of action in the guardianship case is the Declaratory Judgment Proceeding, which was filed by the Defendants *after* the Federal Lawsuit. Moreover, any issues relating to breaches of fiduciary duty that may arise in the guardianship proceeding cannot be made against the defendant attorneys in the guardianship proceeding and they have not been made against the guardians to obtain an award of damages.

Even if the Court were to accept the Defendants' argument that any action taken in the guardianship dates back to the inception of the guardianship itself, this factor still does not weigh in favor of abstention because no progress has been made in the guardianship court as to the causes of action pled in the instant action in this Court. There have not been depositions of any of the Defendants regarding any of the issues in the Federal Lawsuit, nor has discovery been propounded relating to the elements of the causes of action in the Federal Lawsuit. Mediation has not occurred. Trial has not been set. In fact, none of the claims asserted in the present action in this Court must even be commenced until three years after the resolution or the discharge of the guardianship.[8] No advancement of the present case has taken place in the guardianship proceedings, and thus this factor does not weigh in favor of abstention.

v. Whether Federal Law Provides the Rule of Decision

This factor only favors abstention if the case involves "complex questions of state law." *Ambrosia Coal and Constr. Co.,* 368 F.3d at 1334; *Noonan South, Inc. v. County of Volusia,* 841 F.2d 380, 382 (11th Cir.1988) (abstention not appropriate where case involves simple tort and contract principles).

[8] Fla. Stat. § 744.531 provides: "The discharge [of the guardianship] shall operate as a release from the duties of the guardianship and as a bar to any action against the guardian or the guardian's surety *unless the action is commenced within 3 years after the date of the order*. (emphasis supplied).

The instant case does not involve complex questions of state law. The mere presence of state law claims does not weigh in favor of abstention, and lack of a federal substantive issue does not favor dismissal. *American Bankers Insurance Company of Florida v. First State Ins. Co.*, 891 F.2d 882, 886 (11th Cir. 1990). It is only in "rare circumstances" that the presence of a state-law issue may weigh in favor of surrender of jurisdiction. *Moses H. Cone*, 460 U.S. 1, 26, 103 S. Ct. 927, 942. The Defendants do not cite any authority for their assertion that a claim of breach of fiduciary duty is particularly novel, complex, or unsettled. Accordingly, this factor does not weigh in favor of abstention.

vi. Whether the State Court Will Adequately Protect the Rights of All Parties

The sixth factor, the adequacy of the fora to protect the parties' rights, only "weighs in favor of abstention when one of the fora is inadequate." *Ambrosia Coal and Constr. Co.,* 368 F. 3d at 1334. The Defendants have not shown that this Court would inadequately protect the Defendants' rights, and thus, this factor does not favor abstention.

The Estate's rights, on the other hand, are clearly threatened by proceeding in the guardianship court. Most importantly, it would be unable to file any claims against the Defendant attorneys, let alone the New York Defendants. It would also not be able to seek damages for negligence against the Defendants. Moreover, there are questions surrounding conflicts of interest within the very Probate and Guardianship Division in which the guardianship presently resides. Thus, this factor heavily weighs against abstention.

vii. Forum Shopping

The Estate has not filed causes of action against the Defendants in any other forum. This case satisfies the requirements of diversity jurisdiction, and the Defendants have not articulated

any basis to support the contention that the filing of this lawsuit constitutes forum shopping. Accordingly, this factor weighs against abstention.

viii. Vexatious or Reactive Nature of the Second Suit

The Federal Lawsuit is not vexatious or reactive to the guardianship proceeding. In reality, the present action is the first lawsuit that was filed, and the issues raised in the Federal Lawsuit are separate and apart from the issues raised in the guardianship. In fact, the only vexatious and reactive action is the Declaratory Judgment Proceeding filed by the Defendants after they were served with the Complaint in this Court. Accordingly, this factor weighs against abstention.

IV. Conclusion

The present action does not represent parallel proceedings within the meaning of the *Colorado River* doctrine. The Estate is proceeding in this Court with common law claims against the Defendants which are dissimilar from the guardianship and are not appropriate for consideration by the guardianship court. Accordingly, consideration of the *Colorado River* factors is not appropriate.

Even if the Colorado River doctrine is applied to this case, abstention is not warranted. The abstention inquiry under the *Colorado River* doctrine must be heavily weighted in favor of the exercise of jurisdiction, and consideration of the factors does not weigh heavily in favor of abstention. Accordingly, this Court must exercise jurisdiction.

The Defendants also move to stay the present action, but they fail to identify any rationale supporting the staying of this action. If this Court were to stay the present action, it would be tantamount to allowing the Defendants to forum shop through their subsequently filed Declaratory Judgment Proceeding with a judge that has already provided glowing support for their purported honesty and integrity, so that they can continue to brazenly bill the Estate, clearly against the

interest of the deceased Ward. The Defendants' maneuvering should not be rewarded, and this action should proceed accordingly.

WHEREFORE based upon the above, JULIAN BIVINS, as ancillary Personal Representative of the Estate of Oliver Wilson Bivins in Palm Beach County, Florida, respectfully requests this Court deny the Defendants' Motion to Dismiss and deny the Defendants' Motion to Stay for the reasons stated therein, and any other relief this Court deems just and proper.

Dated: February 5, 2016.

Respectfully submitted,
THE BLEAKLEY BAVOL LAW FIRM

/s/ J. Ronald Denman
J. Ronald Denman, Esquire
Florida Bar Number: 0863475
15170 North Florida Avenue
Tampa, FL 33613
(813) 221-3759 [Telephone]
(813) 221-3198 [Facsimile]
rdenman@bleakleybavol.com
Attorneys for JULIAN BIVINS

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2016, the foregoing document was served on all counsel of record identified on the attached Service List via CM/ECF.

/s/ J. Ronald Denman
J. Ronald Denman, Esq.

SERVICE LIST

Charles L. Pickett, Jr.
Ciklin Lubitz & O'Connell
515 North Flagler Drive, 20th Floor
West Palm Beach, FL. 33401
Telephone: (561) 832-5900
Facsimile: (561) 833-4209
Cpickett@ciklinlubitz.com

Wendy J. Stein, Esq.
D. David Keller, Esq.
Keller Landsberg, P.A.
Broward Financial Centre, Suite 1400
500 East Broward Boulevard
Fort Lauderdale, FL 33394
Telephone: (954) 761-3550
Facsimile: (954) 525-2134
Wendy.stein@kellerlandsberg.com
David.keller@kellerlandsberg.com
Lydia.dellatto@kellerlandsber.com