No. 17-0634

THE SUPREME COURT OF TEXAS

IN RE VERNA FRANCIS COLEY THETFORD,

Relator.

On Mandamus Review
from the Second Court of Appeals
No. 02-17-00182-CV

RESPONSE TO BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of Proceeding: In the guardianship action underlying this original proceeding, Robert Aldrich, a lawyer purporting to represent Relator Verna Francis Coley Thetford, the ward, moved to disqualify Alfred G. Allen, III, trial counsel for Real Parties in Interest, Jamie Kay Rogers and Ciera Bank of Graham, Texas, the guardians of Mrs. Thetford's person and estate, respectively. [R 47]. Aldrich argued that Allen's prior representation of Mrs. Thetford in estate planning and real estate matters disqualified him from participating in the guardianship proceeding. [R 49].

Trial Court: The 90th Judicial District Court, Young County, Texas, the Honorable Stephen Bristow, presiding.

Trial Court Disposition: The trial court denied Aldrich's motion to disqualify Allen. [R 156, 169]. The next day, the trial court entered an order appointing Rogers the temporary guardian of Mrs. Thetford's person, establishing a Management Trust to protect and manage Mrs. Thetford's estate, and appointing Ciera Bank as trustee. [R 160-61].

Court of Appeals: Second Court of Appeals. Panel: Justices Meier, Sudderth, and Pittman.

Parties in Court of Appeals:

Relator:
Verna Francis Coley Thetford

Real Parties in Interest:
Jamie Kay Rogers
Ciera Bank of Graham, Texas

Respondent:
Hon. Stephen Bristow

Court of Appeals' Disposition:

In a per curiam opinion, the court of appeals denied Mrs. Thetford's lawyers' petition for writ of mandamus. *In re Thetford*, No. 02-17-00182-CV, 2017 WL 2590576, at *1 (Tex. App.—Fort Worth June 15, 2017, orig. proceeding [mand. filed]) (per curiam) (mem. op.). The court also denied Mrs. Thetford's lawyers' motion for *en banc* reconsideration.

ISSUE RESTATED

Whether the trial court appropriately exercised its discretion by denying Mrs. Thetford's lawyer's motion to disqualify Allen when:

1. The conflict-of-interest rules relied on by Mrs. Thetford's lawyers do not apply because:

    a. the underlying guardianship proceeding is not adverse to Mrs. Thetford as a matter of law and fact; and

    b. Allen's prior representation of Mrs. Thetford is not substantially related to the guardianship proceeding;

2. Allen had an affirmative duty under Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct to initiate the underlying guardianship proceeding to protect Mrs. Thetford, and he did so on behalf of the person (Rogers) that Mrs. Thetford had previously identified as her preferred guardian; and

3. Mrs. Thetford's lawyers have neither alleged nor shown that she has been prejudiced by Allen's participation in the guardianship proceeding.

INTRODUCTION

The Petition for Writ of Mandamus does not warrant the Court's review. Verna Francis Coley Thetford is an elderly woman who suffers from dementia and has been found to be legally incapacitated by both her long-time physician and the Director of Neuropsychology at UT Southwestern Medical Center in Dallas.[1] She is cared for, primarily, by her niece Jamie Kay Rogers, with whom she has had a very close relationship for years. Rogers served as Mrs. Thetford's attorney-in-fact since 2015, a duty Rogers takes very seriously and has performed excellently. In her power of attorney, Mrs. Thetford identified Rogers as her preferred guardian if the need ever arose. But, as Mrs. Thetford's mental state has declined over the last fifteen months, she—perhaps under the influence of two non-family members[2]—has become more combative and intolerant toward Rogers and law enforcement officials (and others) for imagined slights.

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[1] A third medical professional, hired by Robert Aldrich was less conclusive, but still found that Mrs. Thetford's cognitive abilities were in global decline and that she is suffering from a "vascular cognitive disorder." [R 116-18].

[2] Shortly before the guardianship hearing, Eddie Dalton and his wife Priscilla, who had previously visited Mrs. Thetford only about once a year, curiously began visiting her more frequently and taking her places without Rogers' knowledge and permission. [Supp. R Vol. 4 at 104-08, 134-35, 141, 143]. Even after the trial court appointed Rogers as temporary guardian of Mrs. Thetford's person, the Daltons continued to secretly take Mrs. Thetford from her residence. [*See* Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction at 1-3; App. A]. Rogers was ultimately forced to obtain an injunction preventing the Daltons from taking Mrs. Thetford from her residence without Rogers' knowledge and permission. [*See* Order Granting Temporary Restraining Order; App. B; Agreed Temporary Injunction; App. C].

In March of 2017, Mrs. Thetford attempted to revoke the power of attorney naming Rogers as her attorney-in-fact. Rogers was genuinely and understandably concerned by this act because, if valid, a revocation left no one to oversee Mrs. Thetford's care. Rogers consulted Alfred G. Allen III, a local Graham lawyer who had prepared estate planning documents for Mrs. Thetford in 2015.[3]

After Mrs. Thetford's long-time doctor examined her and declared her legally incapacitated, Allen, recognizing his affirmative duty under the Texas Disciplinary Rules of Professional Conduct to protect Mrs. Thetford's well-being, initiated the underlying guardianship proceeding. In accordance with Mrs. Thetford's stated wishes, Allen asked the trial court to appoint Rogers as guardian of Mrs. Thetford's person and Ciera Bank of Graham, Texas (Mrs. Thetford's bank) as trustee of a Management Trust for Mrs. Thetford's estate.

Mrs. Thetford then "hired" Robert Aldrich to challenge the guardianship application.[4] Aldrich moved to disqualify Allen based on his prior representation

[3] Although not pertinent to these proceedings, Rogers worked as a legal assistant in Allen's firm from 1985 to 2005, came back to work for the firm in January 2016, and continues to be employed by Turner & Allen, P.C.

[4] If Mrs. Thetford lacks capacity to understand and make contracts, as her doctor and the trial court found, it is questionable whether Aldrich's engagement is valid. *See Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969) (addressing whether widow had sufficient mental capacity to hire lawyers).

of Mrs. Thetford. The trial court denied Aldrich's motion to disqualify Allen and Mrs. Thetford's lawyers now challenge that denial in this Court.[5]

Aside from Mrs. Thetford's lawyers' motion to disqualify and mandamus petition being unsupported in either the law or facts, the Petition does not warrant review because the relief it seeks—disqualification of Allen—has no practical effect on the underlying guardianship proceeding. Because Allen's purported disqualification from the proceeding is wholly unrelated to Rogers' or Ciera Bank's qualifications to serve as Mrs. Thetford's guardians, the proceeding would simply move forward.[6]

Mrs. Thetford's lawyers' disqualification motion and subsequent mandamus petitions have been nothing but a tactic to delay the permanent guardianship

[5] This brief refers both to Mrs. Thetford's "lawyer" and her "lawyers" because, in the trial court proceedings, she had only one lawyer, Aldrich, and he engaged additional attorneys "on behalf of Verna Thetford" for the mandamus proceeding.

[6] Mrs. Thetford's lawyers think that a disqualification of Allen as attorney for Rogers means that Rogers must be disqualified as temporary guardian. [*See* Relator's Emergency Motion to Reconsider May 31, 2017 Order at 3-6]. The premise is patently wrong. A person or entity's ability to serve as a guardian is governed by the Texas Estates Code, whereas disqualification of a lawyer is largely based on the Texas Rules of Disciplinary of Professional Conduct; the two have nothing to do with one another. *Compare* Tex. Estates Code § 1104.001 *et seq*; *see also id.* at § 1105.001 *et seq*; *id.* at § 1251.052 (outlining qualifications for guardians);), *with In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding) (per curiam) (discussing the law regarding the disqualification of lawyers). Mrs. Thetford's lawyers do not extend their illogical argument to Ciera Bank's qualifications to serve as trustee of the Management Trust.

proceeding.[7] As this Court has repeatedly held, parties may not seek the "severe remedy" of disqualification for such a reason.[8]

The Petition for Writ of Mandamus should be denied.

STATEMENT OF FACTS

1. Mrs. Thetford is an elderly woman who unquestionably suffers from dementia.

Mrs. Thetford is an 86-year-old woman who resides in an assisted-living facility in Graham, Texas, called Brookdale Graham.[9] [R 1]. She is legally blind, suffers from "moderate dementia that is increasing in severity," and is legally incapacitated.[10] [R 1-2, 13-22; Supp. R Vol. 3 at 102; Supp. R Vol. 4 at 10-14, 20; 2nd Supp. R Tab 2].

Rogers, Mrs. Thetford's niece, also lives in Graham.[11] [R 1; Supp. R Vol. 3 at 10; 2nd Supp. R Tab 1]. Through the years, the two have had a close

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[7] By law, the temporary guardianship order originally would have expired on July 9, 2017—60 days after it was entered. *See* Tex. Estates Code § 1251.151; [R 161, 164]. Mrs. Thetford's lawyers filed an interlocutory appeal to challenge the temporary order but that appeal was stayed pending this Court's resolution of Mrs. Thetford's lawyers' mandamus petition. The temporary order has been extended by agreement several times and the permanent guardianship proceeding has been correspondingly delayed.

[8] *In re Nitla*, 92 S.W.3d at 422; *see also Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 658 (Tex. 1990) (the law strongly discourages the use of motions to disqualify as tactical weapons in litigation).

[9] Mrs. Thetford turns 87 on March 14, 2018. [R 1].

[10] Although Mrs. Thetford is currently incapacitated, there is no evidence and no allegation that she was incapacitated when she executed the note, deed of trust, power of attorney, or will.

[11] Rogers and Rogers' father (Mrs. Thetford's brother) are Mrs. Thetford's only relatives who have been active in her care. They are, therefore, the preferred persons to serve as Mrs. Thetford's guardian. *See* Tex. Estates Code § 1104.102(2).

relationship. [Supp. R Vol. 3 at 10-11; 2nd Supp. R Tab 1]. In July 2015, Mrs. Thetford appointed Rogers as her attorney-in-fact. [R 4, 25]. Since then, Rogers has faithfully and capably served in that capacity. [R 4; Supp. R Vol. 3 at 11-17, 31-33, 102; Supp. R Vol. 4 14-15]; *see infra* pp. 7-9. In early 2017, after Mrs. Thetford was hospitalized and could not move back into her home, Rogers found and arranged for Mrs. Thetford to move into Brookdale, where she continues to reside today. [Supp. R Vol. 3 at 19-20; 2nd Supp. R Tab 1].

2. Mrs. Thetford loaned money to Rogers and the note was fully paid.

The Petition incorrectly reports the circumstances of the loan. In March 2012, Mrs. Thetford and her husband loaned Rogers (and her husband) $350,000 to purchase family land in Jack County, Texas, that had once been owned by Rogers' great-grandparents and Mrs. Thetford's grandparents. [R 51-52; Supp. R Vol. 3 at 52-53]. The note was for five years, carried a 4% interest rate, and had a maturity date of March 15, 2017. [R 51-52; Supp. R Vol. 3 at 53]. Allen prepared the note. [R 120]. Simultaneously, Rogers and her husband executed a deed of trust securing the note with the underlying property. Allen prepared the deed of trust and was named trustee.[12] [R 53-58, 120]. At the time of this transaction, Rogers was not employed by Allen's law firm.

[12] A trustee under a deed of trust assumes limited legal duties—not a broad fiduciary duty like a trustee otherwise might. *See Stephenson v. LeBoeuf*, 16 S.W.3d 829, 837-38 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Rogers made timely principal and interest payments on the note for five years. [Supp. R Vol. 3 at 53]. At the end of the fifth year, a balloon payment of $285,000 came due.[13] [*Id.*]. In the fall of 2016, months before the note's maturity date, Rogers asked Mrs. Thetford whether she wanted to renew the note or have Rogers seek alternative funding. [*Id.* at 53-54]. Mrs. Thetford volunteered to renew. [*Id.* at 54].

As the due date approached, however, Rogers grew concerned about Mrs. Thetford's capacity to renew the note. [2nd Supp. R Tab 1]. Mrs. Thetford had begun to behave irrationally. *See infra* pp. 9-11. Consequently, Rogers decided to refinance the note with a local bank. [R 125; Supp. R Vol. 3 at 54; 2nd Supp. R Tab 1]. The refinancing was slightly delayed as Rogers waited on an appraisal of the property, and the note briefly became past due. [Supp. R Vol. 3 at 54]. Despite the note being overdue, Mrs. Thetford never asked Allen to write a demand letter or initiate foreclosure proceedings. [R 125, 150].

On April 28, 2017, two weeks before the temporary guardianship hearing, Rogers obtained financing and paid the note in full, including interest at an 18% penalty rate from and after the maturity date. [R 120, 148; Supp. R Vol. 3 at 52-57; Supp. R Vol. 5 at Ex. A-9]. Rogers' payment of the note eliminated any

[13] The note called for yearly payments of $10,500 in the first year, $12,000 in the second year, $12,500 in the third year, $13,000 in the fourth year, and a balloon payment of "all remaining accrued interest and unpaid principal" at the end of the fifth year. After maturity, the interest rate rose to 18% per annum. [R 51].

statutory impediment that might disqualify her as Mrs. Thetford's guardian.[14] *See infra* pp. 23-25.

3. In 2015, Mrs. Thetford executed a will and power of attorney naming Rogers as her attorney-in-fact and preferred guardian if the need ever arose.

On July 22, 2015, Allen prepared and Mrs. Thetford executed a last will and testament and power of attorney. [R 59, 75]. Rogers did not work for Allen's law firm at the time Mrs. Thetford executed these documents.[15] [R 153]. The power of attorney appointed Rogers as Mrs. Thetford's attorney-in-fact and designates Rogers as Mrs. Thetford's preferred guardian "if the need for a guardian later arises." [R 59].

4. Rogers has faithfully and capably served as Mrs. Thetford's attorney-in-fact.

Since Mrs. Thetford appointed Rogers as her attorney-in-fact, Rogers has faithfully and capably managed Mrs. Thetford's personal and business affairs. [R 4; Supp. R Vol. 3 at 11-17, 31-33, 102]. Aside from providing general care for Mrs. Thetford, and among countless other things, Rogers performed bookkeeping for an accountant to prepare Mrs. Thetford's tax returns for 2014 and 2015,

[14] The Texas Estates Code provides that a person is disqualified from serving as a guardian if that person is indebted to the proposed ward unless "the person pays the debt before appointment[.]" Tex. Estates Code § 1104.354(2).

[15] Allen never revealed the contents of the will to anyone—including Rogers. [R 152]. The only reason the contents of the will are now known is because Aldrich attached it as an exhibit to his motion to disqualify Allen, thereby publishing it to the world. [R 75, 153].

ensured that Mrs. Thetford's bills were paid, and helped with Mrs. Thetford's medical needs—including taking Mrs. Thetford to many doctor appointments and to the emergency room on multiple occasions. [Supp. R Vol. 3 at 11-17, 31-33, 41-43, 102].

Carolyn Scott, the Executive Director of Brookdale, testified that Rogers is "very caring" toward Mrs. Thetford despite the fact that Mrs. Thetford is "not kind towards" Rogers. [Supp. R Vol. 4 at 14-15; *see also id.* at 77-78]. Scott also acknowledged that she has never seen Rogers "take any action regarding [Mrs. Thetford] not in [Mrs. Thetford's] best interest." [Supp. R Vol. 4 at 19].

Mrs. Thetford's step-son, Larry Thetford, who saw Mrs. Thetford almost daily for over two years until February 2017, testified that Rogers has been instrumental to Mrs. Thetford's well-being:

> Q. Has she provided a tremendous variety of services to your mother over the past nine months?
>
> A. I would say so, yes.
>
> Q. Has she done a good job?
>
> A. I think so.
>
> Q. Has she ever done anything that you—have you ever seen her do anything to mistreat or belittle your mother?
>
> A. No.

[Supp. R Vol. 3 at 102].

Additionally, despite paying many of Mrs. Thetford's bills from her own personal account, Rogers has never withdrawn money from Mrs. Thetford's account for personal benefit. [*See* Supp. R Vol. 3 at 32, 49-50, 119].

5. One day before the guardianship hearing, Aldrich obtained temporary checks and withdrew $43,000 from Mrs. Thetford's account to pay fees.

The only unusual withdrawals on Mrs. Thetford's account have been by her trial counsel, Aldrich, who, the day before the temporary guardianship hearing, received from Mrs. Thetford's account three checks totaling $43,000. [App. D]. The checks were "temporary" instruments on a new account. They were signed by Mrs. Thetford, but obviously prepared by someone other than her. [*Id.*].

6. Mrs. Thetford's mental and physical capabilities have rapidly deteriorated.

Over the last year and a half, Mrs. Thetford's mental state has deteriorated and she has become increasingly verbally abusive to those around her, including Rogers. [R 4; Supp. R Vol. 3 at 45, 96]. In July 2016, Mrs. Thetford was reported to Adult Protective Services for being verbally abusive to her late-husband and for interfering with his receipt of medications. [R 2; Supp. R Vol. 3 at 16-18]. As a result, Brookdale, where Mrs. Thetford's husband also lived prior to his death, required Mrs. Thetford to relinquish the management of her husband's medications. [R 2; Supp. R Vol. 3 at 18].

In December 2016, the Texas Department of Public Safety revoked Mrs. Thetford's driver's license because it "determined that [she was] incapable of safely operating a motor vehicle." [R 2-3, 23; Supp. R Vol. 3 at 20-21]. Notwithstanding the revocation, on February 18, 2017, Mrs. Thetford, without a license, drove her truck through downtown Graham where she narrowly missed having a head-on collision with another vehicle, struck a trailer attached to the vehicle, and drove away. [R 3, 24; Supp. R Vol. 3 at 23-26; Supp. R Vol. 5 at Exs. A-4, A-5, A-6]. When questioned by Graham police about the incident, Mrs. Thetford denied it ever happened.[16] [R 3]. When describing the accident to Rogers, Mrs. Thetford's account was markedly different from the account of the person whose trailer she hit. [Supp. R Vol. 3 at 24-26].

The Graham Police Department instructed Rogers to take possession of Mrs. Thetford's truck and disable all of Mrs. Thetford's vehicles. [R 3]. Rogers did so, which led to Mrs. Thetford angrily complaining to Graham Police, the Sheriff's Department, the Daltons, and others, on numerous occasions, that Rogers had stolen Mrs. Thetford's truck.[17] [R 3; Supp. R Vol. 4 at 84-85, 99; 2nd Supp. R Tab 1].

[16] Mrs. Thetford later acknowledged the wreck at the temporary guardianship proceeding. [Supp. R Vol. 4 at 152].

[17] Mrs. Thetford also made numerous unfounded accusations that Rogers was "stealing [her] money." [Supp. R Vol. 3 at 32, 114].

On March 27, 2017, Mrs. Thetford purported to revoke Rogers' power of attorney. [R 4, 112]. Mrs. Thetford's revocation, if valid, left no one to legally manage her person or estate and placed her in immediate jeopardy of not receiving vital care and medical treatment. [R 4].

7. Mrs. Thetford's personal doctor determined that she is legally incapacitated.

Two days later, Dr. Pete Brown, Mrs. Thetford's doctor since 2006, examined Mrs. Thetford and issued a physician's certificate, finding that she suffers from "moderate dementia that is increasing in severity," which renders her incapable of managing her personal or business affairs. [R 6, 21-22]. Dr. Brown further opined that Mrs. Thetford "is[] incapacitated as that term is defined by Section 1002.017 of the Texas Estates Code" and that Mrs. Thetford is an "Incapacitated Person."[18] [R 22].

[18] In December 2017, Dr. Brown's opinion about Mrs. Thetford was corroborated by Dr. Munro Cullum, the Director of Neuropsychology at UT Southwestern Medical Center in Dallas. [2nd Supp. R Tab 2]. After reviewing Mrs. Thetford's medical records and her neuropsychological test results, examining Mrs. Thetford, and interviewing several others familiar with Mrs. Thetford, Dr. Cullum concluded that Mrs. Thetford suffers from dementia and her "condition is likely to worsen over time." [*Id.*]. Dr. Cullum also opined that, in addition to dementia, Mrs. Thetford suffers from "significant visual and hearing impairments, which together make her functionally incapacitated and unable to provide for many of her basic needs and manage her affairs." [*Id.*]. In Dr. Cullum's opinion, it is in Mrs. Thetford's "best interest" to have a "permanent guardian to assist with the management of her estate and personal needs." [*Id.*].

8. The underlying guardianship proceeding was initiated to protect Mrs. Thetford.

Because of Mrs. Thetford's increasingly erratic behavior, her purported revocation of Rogers' power of attorney, and Dr. Brown's report, Allen initiated the underlying guardianship proceeding (seeking, per Mrs. Thetford's wishes) to have Rogers appointed temporary guardian of Mrs. Thetford's person. [R 1, 6, 59]. The application also requested that a Management Trust for Mrs. Thetford's benefit be established to manage her financial assets and property and that Ciera Bank serve as trustee.[19] [R 7].

9. Allen had a duty to initiate the guardianship proceeding.

Allen initiated the guardianship because he reasonably believed that Mrs. Thetford was legally incapacitated. [R 161; *see also id.* at 2, 13-22, 121-23, 125]. Under Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct, a lawyer "*shall* take reasonable action to secure the appointment of a guardian … for … a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client." Tex. Disciplinary Rules Prof'l Conduct R. 1.02(g) (emphasis added); [R 120-21, 143-45]. Such "reasonable action" includes "initiating the appointment of a guardian." Tex. Disciplinary Rules Prof'l Conduct R. 1.02(g) cmt. 13.

[19] Aldrich opposed the guardianship proceeding, but no one has filed a competing guardianship application naming an individual that might be better-suited to serve as Mrs. Thetford's guardian.

10. Aldrich moved to disqualify Allen from representing Rogers and Ciera Bank; the trial court denied the motion.

Before a hearing on the temporary guardianship application could be held, Aldrich moved to disqualify Allen from the guardianship proceeding. [R 47]. After full hearing, the trial court denied the motion. [R 129, 156, 169].

11. The trial court entered a Temporary Guardianship Order.

After denying Aldrich's motion to disqualify Allen, the trial court held a hearing on the temporary guardianship application. Based on the evidence, the trial court entered an order appointing Rogers as the temporary guardian of Mrs. Thetford's person, establishing a Management Trust to protect and manage Mrs. Thetford's estate, and appointing Ciera Bank as trustee (the "Temporary Guardianship Order"). [R 160-61].

In the Temporary Guardianship Order, the trial court made the following findings, among other things:

- "There is substantial evidence that [Mrs. Thetford] may be an incapacitated person";
- "There exists an imminent danger that the physical health or safety of Mrs. Thetford will be seriously impaired and that Mrs. Thetford's estate will be seriously damaged or dissipated unless immediate action is taken";
- "There is an immediate need for the appointment of a temporary guardian and the creation of a Management Trust";

- "It is in the best interest of Mrs. Thetford that a temporary guardian of the person be appointed to promote and protect Mrs. Thetford's well-being"; and

- "It is in the best interest of Mrs. Thetford that a Management Trust be established to protect and manage her estate."

[R 160-61].

12. The court of appeals denied Mrs. Thetford's lawyers' mandamus petition.

Mrs. Thetford's lawyers sought mandamus relief in the Second Court of Appeals, asking the court to vacate the trial court's order denying the motion to disqualify Allen.[20] The court denied their petition and a subsequent motion for *en banc* reconsideration. *In re Thetford*, 2017 WL 2590576, at *1.

SUMMARY OF THE ARGUMENT

Under Texas law, disqualification of an attorney is a severe remedy. Mrs. Thetford's lawyers bear a heavy burden to prove (1) that Allen violated a *Texas* disciplinary rule and (2) that Mrs. Thetford suffered prejudice as a result.

Relying on Rules 1.06 and 1.09 of the Texas Disciplinary Rules of Professional Conduct, Mrs. Thetford's lawyers allege that Allen was disqualified from participating in the underlying guardianship proceeding because he previously assisted Mrs. Thetford in drafting estate planning documents and

[20] Mrs. Thetford's lawyers also filed an appeal of the Temporary Guardianship Order in the Second Court of Appeals roughly one week after they filed their mandamus petition in that court. *Guardianship of Verna Francis Colely Thetford*, No. 02-17-00195-CV. That appeal has been stayed for almost a year.

memorializing a loan from Mrs. Thetford to Rogers. The premise is wrong for several reasons.

Rules 1.06 and 1.09 do not apply because the guardianship is not "adverse" to Mrs. Thetford but is, instead, in her best interest as a matter of both Texas law and the facts of this case. Contrary to their arguments, Rogers' indebtedness to Mrs. Thetford at the time the guardianship was filed does not create an adverse interest. Regardless, Rogers paid her debt to Mrs. Thetford before the guardianship hearing, and by the express language of the Estates Code, eliminated any imagined adverse interest Rogers had.

Rules 1.06 and 1.09 also do not apply because Allen's prior representation of Mrs. Thetford is not "substantially related" to the guardianship proceeding. The main issue in the guardianship proceeding—Mrs. Thetford's legal capacity—was being determined for the first time and as a result of the application. Moreover, Aldrich voluntarily disclosed the allegedly confidential information—her will—that his disqualification motion was designed to protect. Thus, confidentiality concerns did not exist.

In addition, Allen, in good faith, had an affirmative duty under Rule 1.02(g) to initiate the guardianship proceeding to protect Mrs. Thetford, who he reasonably believed to be incapacitated. In seeking to have Rogers appointed Mrs. Thetford's guardian, Allen was carrying out Mrs. Thetford's directive that Rogers be her

guardian if the need for a guardian arose, a choice made by Mrs. Thetford at a time when no one disputes that she had the capacity to do so. Because the disciplinary rules required Allen to initiate the guardianship, he is not disqualified by those same rules from participating in that proceeding.

Further, Mrs. Thetford's lawyers did not show—and scarcely argue—that Allen's participation in the guardianship proceeding resulted in any *actual* prejudice to Mrs. Thetford. Instead, they speculate that Allen possesses Mrs. Thetford's confidential information that *could* be used to her disadvantage. Disqualification requires *actual*, not possible, prejudice. In the papers filed, it is obvious that Allen did not reveal Mrs. Thetford's confidential information or use it to prepare and pursue the guardianship application. Indeed, the only "confidential information" exposed during the proceedings resulted from her lawyer's decision to attach her will to the motion to disqualify.

Finally, Mrs. Thetford's lawyers' reliance on ABA rules and foreign precedent is improper. Under this Court's precedent, ABA rules and opinion are not binding and a Texas lawyer cannot be disqualified for the alleged violation of an ABA rule. This is particularly true when, as here, the ABA rule is different from the parallel Texas rule in a critical way.[21]

[21] Texas has always forged its own path and has never been afraid to stand alone in its statement or rendering of the law. Rule 1.02(g) gives attorneys in this State an affirmative duty to take steps to protect the client. This is particularly important in smaller towns, where there are fewer

ARGUMENT

I. Under applicable law, Mrs. Thetford's lawyers bear a heavy burden of proof.

Mandamus is an extraordinary remedy that "issues only to correct a clear abuse of discretion," from which there is no adequate appellate remedy. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). A trial court does not abuse its discretion if its decision is based on conflicting evidence and some evidence reasonably supports the court's decision. *See Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). Instead, a trial court commits a clear abuse of discretion only when it acts "without reference to any guiding rules or principles"—making a relator's mandamus burden a "heavy one." *Walker*, 827 S.W.2d at 839.

The Texas standards for lawyer disqualification are similarly stringent because disqualification is "a severe remedy" that results in "immediate and palpable harm, disrupt[s] trial court proceedings, and deprive[s] a party of the right to have counsel of choice."[22] *In re Nitla*, 92 S.W.3d at 422. In considering a motion to disqualify, a court "must strictly adhere to an exacting standard to discourage a party from using the motion as a dilatory trial tactic." *Id.*

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attorneys and closer relationships with clients. Rule 1.02(g) requires protection of the client. The ABA rule and other states tell the attorney to back away and possibly leave an incapacitated person to the mercy of an uncaring and potentially abusive situation that the incapacitated person is ill-equipped to handle alone. The Texas Disciplinary Committee and the Court should be commended for requiring its lawyers to stay engaged and take action to protect the client.

[22] Unwarranted disqualification constitutes fundamental error. *In re Vossdale Townhouse Ass'n*, 302 S.W.3d 890, 893 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).

Texas courts look "to the disciplinary rules to decide disqualification issues," but those rules "are merely guidelines—not controlling standards—for disqualification motions." *Id.* When, as here, a movant seeks disqualification based on an alleged violation of a disciplinary rule, she must carry the burden to establish the rule violation with specificity. *Spears*, 797 S.W.2d at 656. This burden cannot be satisfied with "[m]ere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules …." *Id.*

Critically, "even if a lawyer violates a disciplinary rule, the party requesting disqualification must demonstrate that the opposing lawyer's conduct caused actual prejudice that requires disqualification." *In re Nitla*, 92 S.W.3d at 422; *see also In re Meador*, 968 S.W.2d 346, 350 (Tex. 1998) (orig. proceeding) (explaining that "a court should not disqualify a lawyer for a disciplinary violation that has not resulted in actual prejudice to the party seeking disqualification").

II. The trial court properly denied the motion to disqualify Allen.

Mrs. Thetford's lawyers argue that Allen should be disqualified because his involvement in the underlying guardianship proceeding violates Rules 1.06 and 1.09 of the Texas disciplinary rules. Their argument fails because: (1) Rules 1.06 and 1.09 do not apply; (2) Allen had an affirmative duty to initiate the guardianship proceeding under Rule 1.02(g) and, thus, should not be disqualified by those same

rules; and (3) Mrs. Thetford's lawyers have not alleged, much less proven, that Allen's involvement in the guardianship proceeding has prejudiced Mrs. Thetford.

A. The conflict-of-interest rules do not apply because the guardianship is not adverse to Mrs. Thetford, nor is it substantially related to Allen's prior representation.

Rules 1.06 and 1.09 of the Texas Disciplinary Rules of Professional Conduct prohibit a lawyer from taking on representation in a (1) "substantially related" matter that is (2) "adverse" to a former or current client. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.06(b) & cmt. 2, 1.09(a) & cmt. 2; *In re Tex. Windstorm Ins. Ass'n*, 417 S.W.3d 119, 141-42 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (adversity is a "fundamental precondition" to the application of Rule 1.09). Neither prong is met here.

1. The guardianship proceeding is not adverse to Mrs. Thetford as a matter of law and fact.

Texas law and the evidence conclusively establish that the underlying guardianship proceeding is not adverse to Mrs. Thetford. Instead, the guardianship is in Mrs. Thetford's best interest. Rogers—who Mrs. Thetford previously identified as her preferred guardian—and Allen have only Mrs. Thetford's well-being in mind.

Mrs. Thetford's lawyers try to confuse this conclusion by contending that Rogers does not have standing to file the guardianship application because she was indebted to Mrs. Thetford when Allen filed the application. That premise is invalid

because the debt was paid and a debt is not an interest adverse to a ward under Texas law. But even assuming Rogers' standing has bearing on whether Allen is disqualified from participating in the guardianship proceeding, Mrs. Thetford's lawyers did not properly challenge Rogers' standing through a motion in limine. *See* Tex. Estates Code § 1055.001(c).

Under long-standing *Texas* law, guardianship proceedings "are not adversary in character."[23] *Henderson v. Shell Oil Co.*, 202 S.W.2d 492, 497 (Tex. Civ. App.—Fort Worth 1947), *aff'd*, 208 S.W.2d 863 (Tex. 1948); *see also Franks v. Roades*, 310 S.W.3d 615, 627 (Tex. App.—Corpus Christi 2010, no pet.) (observing that the trial court denied the ward's motion to disqualify the proposed guardian's lawyer who had previously prepared the ward's power of attorney and noting that "[g]uardianships are not inherently adversarial proceedings"). The opposite is true. Guardianships are designed "to promote and protect the well-

[23] Mrs. Thetford's lawyers do not provide the Court with one Texas case holding that a guardianship proceeding *is* an adversarial proceeding. Mrs. Thetford's lawyers cite *Allison v. Walvoord*, 819 S.W.2d 624, 626 (Tex. App.—El Paso 1991, no writ) for this proposition, but that is not what *Allison* says. In that case, the court suggested, in *dicta* and without any supporting authority, that a contested guardianship *could be* adversarial. *See id.* (although "guardianship proceedings are not intended to be adversary in character …. *[p]erhaps* there is an exception where the ward opposes a guardianship. That exception does not exist in this case.") (emphasis added). Regardless, *Allison* has no application to this case because Rogers, unlike the plaintiffs in *Allison*, is not seeking to obtain a "substantial judgment" *against* Mrs. Thetford. *Id.* at 626. Rogers is trying to protect Mrs. Thetford.

being of the incapacitated person."[24] Tex. Estates Code § 1001.001(a); *see also Overman v. Baker*, 26 S.W.3d 506, 509 (Tex. App.—Tyler 2000, no pet.).

That is the case here. The record overwhelmingly demonstrates that the underlying guardianship proceeding is not adverse to Mrs. Thetford. As the trial court found, and as multiple people testified, a guardianship is "in the best interest of Mrs. Thetford" and necessary "to promote and protect [her] well-being[.]" [R 161; *see also id.* at 2, 13-22; Supp. R Vol. 3 at 22-23, 38, 41, 44, 102; Supp. R Vol. 4 at 19-20, 76-79]. The record also shows that Rogers and Allen do not have an interest adverse to Mrs. Thetford and are concerned only for Mrs. Thetford's welfare.[25] [R 2-5, 13-22, 120-21, 143-45, 161; Supp. R 3 at 22-23, 38, 41, 44, 102; Supp. R 4 at 19-20, 76-79, 104]; *cf. Betts v. Brown*, No. 14-99-00619-CV, 2001 WL 40337, at *4 (Tex. App.—Houston [14th Dist.] Jan. 18, 2001, no pet.) (not designated for publication) (explaining that an interest is adverse to a proposed ward only when "that interest does not promote the well-being of the ward").

Ignoring the foregoing law and facts, Mrs. Thetford's lawyers complain that the guardianship is adverse to Mrs. Thetford because Rogers was indebted to Mrs.

[24] As discussed *infra* at pp. 29-32, the disciplinary rules contemplate that a guardianship proceeding *is not* "adverse" to the client within the meaning of Rules 1.06 and 1.09 because the rules *require* a lawyer to "take reasonable action to secure the appointment of a guardian," such as "initiating the appointment of a guardian" for a client the attorney "reasonably believes … lacks legal competence," *Compare* Tex. Disciplinary R. Prof'l Conduct 1.02(g) and cmt. 13, *with* R. 1.06 *and* R. 1.09.

[25] The trial court specifically found that Rogers "is a suitable person to act as Temporary Guardian and is not disqualified by law from acting as such." [R 161].

Thetford at the time Allen filed the guardianship application (they say nothing of Ciera Bank). [Relator's Br. at 7-8]. Their argument is without merit.

The adversity argument rests entirely on section 1055.001 of the Estates Code, which pertains to a person's *standing* to commence or contest a guardianship application. Under section 1055.001, a person does not have standing to file a guardianship application if she has "an interest that is adverse to the proposed ward …." Tex. Estates Code § 1055.001(b)(1). The Estates Code does not define "adverse" interest, but courts have held that a person's interest is adverse to the ward's only when it "does not promote the well-being of the ward." *Betts*, 2001 WL 40337, at *4.

A person challenging another person's standing due to an adverse interest must do so through a motion in limine. *See* Tex. Estates Code § 1055.001(c) ("The court *shall* determine by motion in limine the standing of a person who has an interest that is adverse to a proposed ward or incapacitated person.") (emphasis added); *see, e.g.*, *In re Guardianship of Miller*, 299 S.W.3d 179, 182 (Tex. App.—Dallas 2009, orig. proceeding) (considering whether the trial court erred in granting motions in limine challenging standing); *Betts*, 2001 WL 40337, at *1, 3-5 (same).

Aldrich did not file a motion in limine to challenge Roger's standing based on an adverse interest. The newfound reliance on section 1055.001 is too little, too

late. *See In re Am. Optical Corp.*, 988 S.W.2d 711, 714 (Tex. 1998) (orig. proceeding) (per curiam) (refusing to consider argument in mandamus petition that was not presented to the trial court).

Moreover, Texas courts have held that a person's indebtedness to the proposed ward does not, in and of itself, create an interest that is "adverse" to the proposed ward. *See In re Guardianship of Miller*, 299 S.W.3d at 189 (applicant's debt to ward did not create an adverse interest); *Betts*, 2001 WL 40337, at *4 (applicant did not have interest adverse to ward even though the ward had guaranteed a loan for the applicant). This is because the Estates Code permits a "person who is indebted to the proposed ward to pay the debt and be appointed as guardian."[26] *In re Guardianship of Miller*, 299 S.W.3d at 189; *see* Tex. Estates Code § 1104.354(2) ("A person may not be appointed guardian if the person … is indebted to the proposed ward, *unless the person pays the debt before appointment*[.]") (emphasis added). "Without evidence of the amount of the debt in relation to the estate of the ward or proposed ward, the ability or inability of the proposed guardian to repay the debt, or some other evidence such as misuse of

[26] Contrary to Mrs. Thetford's lawyers' contentions, section 1104.354 *does not* provide that a debt creates an adverse interest. [Realtor's Br. at 7]. It simply provides that a person indebted to a ward cannot serve as a guardian. And as the court observed in *Betts*, although a debt may prevent a person from serving as a guardian, it does not create an adverse interest that defeats a person's standing to file a guardianship application. 2001 WL 40337, at *4.

funds to the detriment of the ward or proposed ward," a debt does not give rise to an adverse interest.[27] *In re Guardianship of Miller*, 299 S.W.3d at 189.

Here, Mrs. Thetford named Rogers as her preferred guardian in the 2015 power of attorney, knowing of the existing debt. Rogers paid her debt to Mrs. Thetford on April 28, 2017—*before* the hearing on the motion for disqualification, *before* the temporary guardianship hearing, and *before* Rogers was appointed guardian of Mrs. Thetford's person.[28] [R 151; Supp. R 3 at 52-57; Supp. R 5 at Ex. A-9]. This payment eliminates any alleged adverse interest Rogers may have had *and* removes any obstacle to Rogers being guardian of Mrs. Thetford's person.[29]

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[27] Mrs. Thetford's lawyers' reliance on *In re Guardianship of Olivares*, No. 07-07-0275-CV, 2008 WL 5206169 (Tex. App.—Amarillo Dec. 12, 2008, pet. denied) (mem. op.) is misplaced. The court in *Olivares* did not hold, as Mrs. Thetford's lawyers contend, that a "proposed guardian had an interest adverse to the ward when the proposed guardian is indebted to the ward." [Relator's Br. at 7]. Instead, the court held that the proposed guardian (the ward's son), had an adverse interest to his mother because, in addition to owing her a substantial amount of money, he lived in her house and used her "finite" assets to pay off his debts, despite the fact that he was able to earn his own living, and did so even after he had himself appointed as her attorney-in-fact. 2008 WL 5206169, at *1-2 ("Given the evidence of his self-dealing, we cannot hold that the trial court erred in determining that Olivares had an interest sufficiently adverse to his mother …."). There is no evidence (or even allegations) of self-dealing by Rogers in this case.

[28] Mrs. Thetford's lawyers argue that the Court should not consider the evidence from the temporary guardianship hearing that shows that Rogers paid the note in full prior to the guardianship proceeding. [Relator's Br. at 8-9]. Even if this were correct, Allen told the trial court, *at the disqualification hearing*, that Rogers paid the debt on April 28th, before the guardianship hearing. [R 151]. Mrs. Thetford's lawyers offered no evidence controverting this statement. Accordingly, the trial court properly found that "the note is now paid in full." [R 139]. This factual determination may not be disturbed. *See Walker*, 827 S.W.2d at 839-40.

[29] Mrs. Thetford's lawyers assert that "Allen's representation of Rogers would reasonably limit or adversely impact his ability or willingness to consider foreclosure on the promissory note …." [Relator's Br. at 7]. But there is no *evidence* to support this statement. And although Mrs. Thetford's lawyers' motion to disqualify baldly alleged that she asked Allen to foreclose on the note, Allen specifically told the trial court that she did not. [R 150; *see id.* at 125]. The

See Tex. Estates Code § 1104.354(2); *In re Guardianship of Miller*, 299 S.W.3d at 189; *Betts*, 2001 WL 40337, at *4.

2. Allen's prior representation of Mrs. Thetford is not substantially related to the guardianship proceeding.

A precondition to the applicability of Rules 1.06 and 1.09 is that the lawyer is representing a person in a matter that is "substantially related" to the matter in which the lawyer represented the current or former client. Tex. Disciplinary R. Prof'l Conduct 1.06(b)(1), 1.09(a)(3); *see NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 399-400 (Tex. 1989) (orig. proceeding). Two matters are "substantially related" within the meaning of Rules 1.06 and 1.09 when the movant shows that a prior matter is "so related to the facts in the pending litigation that a genuine threat exists that confidences revealed to former counsel will be divulged" in the pending litigation. *Metro. Life Ins. Co. v. Syntek Fin. Corp.*, 881 S.W.2d 319, 320-21 (Tex. 1994) (per curiam). This must be done with "evidence of specific similarities capable of being recited in the disqualification order." *Coker*, 765 S.W.2d at 400. Neither "[c]onclusory statements about similarities in the representations" nor "superficial resemblance between issues" suffice. *J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Morris*, 776 S.W.2d 271, 278 (Tex. App.—Dallas 1989, no pet.) Additionally, a substantial relationship cannot

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resolution of this factual dispute was, therefore, within the trial court's province. *See Walker*, 827 S.W.2d at 839-40.

be based on the perceived risk of disclosure of facts that the movant has revealed to the other party or that the other party already knows.[30] *Syntek*, 881 S.W.2d at 321; *Morris*, 776 S.W.2d at 278; *see, e.g.*, *In re Tex. Windstorm*, 417 S.W.3d at 138-39 (lawyer not disqualified under conflict-of-interest rules where confidences that lawyer possessed had been voluntarily provided by movant to opposing party).

Allen's prior representation of Mrs. Thetford (drafting a will, power-of-attorney, a note, and deed of trust) is not related to the guardianship proceeding or the issues presented therein—i.e., whether Mrs. Thetford is *currently* incapacitated and incapable of managing her affairs. Indeed, these issues are being raised and decided *for the first time*.

Rogers has been Mrs. Thetford's attorney-in-fact since 2015 and was a party to the note Allen drafted for Mrs. Thetford. [R 25, 52, 58, 59; Supp. R 3 at 11-17, 31-33, 102]. Presumably, Rogers has independent knowledge of the confidential information that Allen allegedly gained in these matters—further undercutting any argument that the representations are substantially related. *Morris*, 776 S.W.2d at 278.

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[30] A trial court's determination of whether two matters are substantially related is a factual determination. *See In re Winterrowd*, No. 07-99-0245-CV, 1999 WL 807654, at *2 (Tex. App.—Amarillo Oct. 8, 1999, orig. proceeding) (not designated for publication). Thus, a reviewing court must defer to the trial court's determination unless the record conclusively demonstrates that the court could have reached only one decision. *See Walker*, 827 S.W.2d at 389-40; *see, e.g.*, *In re Winterrowd*, 1999 WL 807654, at *2 (affirming denial of motion to disqualify because the evidence was conflicting as to whether two probate proceedings were substantially related).

Mrs. Thetford's lawyers argue that the matters are substantially related because "it was Thetford's revocation of the power of attorney … that formed the basis of the guardianship case." [Relator's Br. at 13]. Not true. The purported revocation was only part of the equation. Allen initiated the guardianship because of Mrs. Thetford's unpredictable behavior and Dr. Brown's conclusion that Mrs. Thetford was incapacitated and needed a guardian, together with the purported revocation, which, if valid, left Mrs. Thetford in a precarious position should she attempt to make personal or financial decisions in her incapacitated condition. [R 1, 6, 59].

Mrs. Thetford's lawyers also claim a substantial relationship exists because Mrs. Thetford purportedly conveyed to Allen confidential information "regarding the nature of [her] estate and [her] intention with regard to her estate's disposition" when he drafted her will. [Relator's Br. at 13]. But, to the extent Mrs. Thetford conveyed any confidential information to Allen "regarding the disposition [her] estate," Aldrich exposed that information by attaching her will as an exhibit to his motion to disqualify. [R 75]. This is fatal to the Petition. *In re Tex. Windstorm*, 417 S.W.3d at 138-39 (lawyer not disqualified under conflict-of-interest rules where confidences that lawyer possessed had been voluntarily provided by movant to opposing party). Moreover, Allen flatly denied that he revealed any of Mrs.

Thetford's confidential information to Rogers or Ciera Bank, but stated that he did not use such information in preparing the guardianship application. [R 145].

Mrs. Thetford's lawyers further argue that Allen's prior representation is substantially related to the guardianship because, when Allen prepared Mrs. Thetford's will in 2015, he was "a witness to [her] legal capacity," which, they argue, is "an issue central to the 2017 guardianship proceeding." [Relator's Br. at 14]. But no one challenges Mrs. Thetford's capacity to execute her will in 2015, and Mrs. Thetford's lawyers do not explain how Mrs. Thetford's capacity to execute a will in 2015 has any relevance to whether, two years later, she is now incapacitated and needs a guardian.

Mrs. Thetford's lawyers are, in effect, trying to confuse the issue by arguing that, because the transactions underlying Allen's representations have involved Rogers in one way or another, the representations must be substantially related. But a "superficial resemblance" between matters is "not enough to constitute a substantial relationship," as that term is defined in Texas law.[31] *Morris*, 776 S.W.2d at 278; *see, e.g.*, *In re Drake*, 195 S.W.3d 232, 236-37 (Tex. App.—San Antonio 2006, orig. proceeding) (mere fact that lawyer had long represented county tax appraisal district in suits over valuation of property, involving similar

[31] At best, the evidence about whether the matters are substantially related is conflicting. Thus, the Court should defer to the trial court's implicit finding that the matters are not substantially related. *See, e.g.*, *In re Winterrowd*, 1999 WL 807654, at *2.

defenses and strategies, did not establish "substantial relationship" with subsequent valuation dispute in which counsel represented property owner).

B. Allen had an affirmative duty to initiate guardianship proceedings under Rule 1.02(g).

As a matter of law, and notwithstanding Rules 1.06 and 1.09, Allen is not disqualified from participating in the guardianship proceeding because the Texas Disciplinary Rules of Professional Conduct *required* him to initiate that proceeding.

Rule 1.02(g) unequivocally states:

> A lawyer *shall* take reasonable action to secure the appointment of a guardian or other legal representative for … a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

Tex. Disciplinary R. Prof'l Conduct 1.02(g) (emphasis added).[32]

The comments to that rule provide that "reasonable action" includes "*initiating the appointment of a guardian*." *Id.* cmt. 13 (emphasis added); *see, e.g.*, *Franks*, 310 S.W.3d at 626-30 (proposed ward's former attorney had a "special duty" to initiate guardianship application). The rules further state that, in complying with this affirmative duty, the lawyer may reveal the client's

[32] A "reasonable belief" is defined to mean that "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Tex. Disciplinary R. Prof'l Conduct, Terminology.

confidential information. *See* Tex. Disciplinary R. Prof'l Conduct 1.05(c)(4) & cmt. 17.

Because the disciplinary rules *require* a lawyer to initiate a guardianship proceeding for an incapacitated client—*and* allow the lawyer to reveal the client's confidences in doing so—the lawyer cannot, simultaneously, be disqualified by the conflict-of-interest rules from participating in the guardianship proceeding the rules instruct him to initiate. Stated another way, a lawyer cannot violate Rules 1.06 and 1.09 by complying with Rule 1.02(g). That would be an absurd result.[33] *Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011) ("interpret statutes to avoid an absurd result").

Franks v. Roades—a case remarkably similar to this one—is instructive. 310 S.W.3d 615. There, an attorney, Roades, prepared a power of attorney for an elderly woman, Franks, appointing her son as attorney-in-fact. *Id.* at 618. Franks later amended her power of attorney to name her daughter as her attorney-in-fact. *Id.* As Frank's mental condition deteriorated, her daughter approached Roades about the best way to protect Franks. *Id.* at 619. Believing Franks to be incapacitated, Roades filed a guardianship application, seeking to have Franks' daughter appointed her guardian. *Id.*

[33] A contrary reading would improperly *de*-harmonize Rules 1.02(g), 1.06, and 1.09, and effectively render 1.02(g) meaningless. *See City of Dallas v. TCI W. End, Inc.*, 463 S.W.3d 53, 55-56 (Tex. 2015) (per curiam) (courts "must avoid adopting an interpretation that renders any part of the statute meaningless").

Franks moved to disqualify Roades from representing her daughter in the guardianship proceeding. *Id.* Like Mrs. Thetford's lawyers, Franks argued that Roades had a conflict of interest because he had previously prepared her power of attorney. *Id.* at 621. The trial court denied the motion. *Id.* Although Franks did not challenge that denial on appeal, the court of appeals specifically noted that "[g]uardianships are not inherently adversarial proceedings" and observed that it was "not aware of any authority" indicating that, "under the rule 1.02(g) duty, the attorney cannot file an application for guardianship on behalf of the person the client has already empowered with the ability to act on her behalf …." *Id.* at 627.

The court recognized Roades' "special duty" to initiate the guardianship proceeding under Rule 1.02(g) because he reasonably believed Franks was incapacitated. *Id.* at 625-30. In initiating the guardianship, Roades "was doing exactly what rule 1.02(g) required him to do. Instead of abandoning his client as Franks suggests Roades did, Roades acted under the disciplinary rules and in his client's best interest when he believed that she was incompetent." *Id.* at 629.

The result should be no different in this case. Initiating the guardianship proceeding in this case, Allen reasonably believed—and the record evidence overwhelmingly supports—that Mrs. Thetford is incapacitated and a guardian was and continues to be needed to protect her interests. *See supra* pp. 9-12; [R 161; *see*

also id. at 2, 13-22, 121-23, 125; Supp. R Vol. 3 at 22-23, 38, 41, 44, 102; Supp. R Vol. 4 at 19-20, 76-79]. Mrs. Thetford's lawyers do not argue otherwise.[34]

When seeking to have Rogers appointed guardian of Mrs. Thetford's person, Allen was dutifully following Mrs. Thetford's wishes. [R 59 (Mrs. Thetford "designat[ing] Jamie Kay Rogers to serve as guardian of my person and estate if the need for a guardian later arises")].

Mrs. Thetford's lawyers contend that Rule 1.02(g) did not permit Allen to initiate the guardianship proceeding on Rogers' behalf because Rogers has an interest that is adverse to Mrs. Thetford. [Relator's Br. at 16]. This argument fails because Rogers is not adverse to Mrs. Thetford.[35] *See supra* at pp. 19-25.

Equally meritless is the complaint that there were other "[r]easonable action[s]" Allen could have taken. [Relator's Br. at 16-17]. This argument ignores the fact that Rule 1.02(g) states that "reasonable action" includes "initiating the

[34] And even if they did, whether Allen's belief was reasonable was a factual determination by the trial court that is, without question, supported by some evidence and should not be disturbed. *See Walker*, 827 S.W.2d at 839-40.

[35] Moreover, Mrs. Thetford's lawyers ignore the fact that Rogers was already Mrs. Thetford's attorney-in-fact and that, in seeking to have Rogers appointed Mrs. Thetford's guardian, Allen was following Mrs. Thetford's wishes. [R 59]. As the *Franks* court noted, there is no Texas authority prohibiting a lawyer from filing an application for guardianship "on behalf of the person the client has already empowered with the ability to act on her behalf …." 310 S.W.3d at 672.

appointment of a guardian." Tex. Disciplinary R. Prof'l Conduct 1.02(g) & cmt. 13. Regardless, what Allen "could have done" is not at issue here.[36]

C. The Petition for Writ of Mandamus does not show actual prejudice.

A party moving to disqualify a lawyer must prove that the lawyer's participation in a case caused her "actual prejudice." *In re Nitla*, 92 S.W.3d at 421-22; *see also In re Users Sys. Servs., Inc.*, 22 S.W.3d 331, 336 (Tex. 1999) (orig. proceeding); *In re Meador*, 968 S.W.2d 346, 350. This must be done with '"convincing proof' that the lawyer's continued representation would be 'unduly harmful' …." *In re Sw. Bell Yellow Pages, Inc.*, 141 S.W.3d 229, 231 (Tex. App.—San Antonio 2004, orig. proceeding) (mem. op.) (citing *In re Davila*, No. 04-99-00571-CV, 1999 WL 735164, at *1 (Tex. App.—San Antonio Sept. 22, 1999, orig. proceeding) (not designated for publication) (Green J., concurring)). The "mere allegation of potential prejudice is insufficient to warrant the extreme remedy of disqualification." *Id.* at 232.

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[36] Mrs. Thetford's lawyers sound the false alarm by contending that permitting lawyers to initiate guardianships on behalf of persons identified by the proposed ward as their preferred guardian "would shield attorneys from all conflict-of-interest rules under *any* circumstance …." [Relator's Br. at 17 (emphasis in original)]. But whether a lawyer has a duty under Rule 1.02(g) to file a guardianship action necessarily turns on whether his belief that the client is incapacitated is "reasonabl[e]." Tex. Disciplinary R. Prof'l Conduct 1.02(g). Here, the trial court implicitly found Allen's belief to be reasonable and that finding is supported by the record. *See supra* at pp. 9-12, 31-32. Further, the temporary guardian was appointed only after the court considered the evidence and the court, not Allen, held that Mrs. Thetford is incapacitated, and that the rulings it made were in her best interest.

A lawyer's possession of the movant's confidential information is insufficient to warrant disqualification of that lawyer; the movant must show that the lawyer's possession of the information has, or will, cause the movant harm. *See In re Nitla*, 92 S.W.3d at 423 (no actual prejudice based on disclosure of privileged documents to opposing counsel where movant only demonstrated that reviewing the documents "might" have enabled opposing counsel to identify four new witnesses and their testimony could "potentially" harm movant); *In re Sw. Bell Yellow Pages*, 141 S.W.3d at 232 (no actual prejudice when movant "showed a potential for prejudice").

Mrs. Thetford's lawyers have not shown actual prejudice. They speculate that Allen "obtained confidential information"—not specified—that "*could* be used to the disadvantage of Verna Thetford …." [R 49 (emphasis added)]. But there is no identification of *what* confidential information Allen gained, or, more importantly, *how* his knowledge of this mystery information *actually* caused prejudice.

The only evidence the trial court heard on this point is Allen's uncontroverted statement that he neither revealed Mrs. Thetford's allegedly confidential information, nor used that information in preparing and pursuing the guardianship application:

> [T]here's not any evidence that will come up that shows that I have revealed confidential information of Mrs. Thetford … any. What I

> have done is taken independent information and put together the application to protect her interest.

[R 145]. Mrs. Thetford's lawyers have produced no evidence controverting this statement. This failure of proof is fatal. *See In re Nitla*, 92 S.W.3d at 423; *In re Sw. Bell Yellow Pages*, 141 S.W.3d at 232. And, ironically, by attaching Mrs. Thetford's will to his motion to disqualify, it was Aldrich—not Allen—who disclosed Mrs. Thetford's "supposedly" confidential information. [R 75].

Mrs. Thetford's lawyers do not deny that their prejudice allegation is insufficient. Nor do they join issue with the fact that Aldrich revealed Mrs. Thetford's confidential information. Instead, they contend that they have shown actual prejudice because Allen "was instrumental in the court's decision to appoint an adverse party … as [Mrs. Thetford's] temporary guardian." [Relator's Br. at 14]. But, again, Rogers is not an "adverse party" and the appointment of Rogers as guardian has not prejudiced Mrs. Thetford. As the trial court found, it was and continues to be in her best interest. *See supra* pp. 13-14; [2nd Supp. R Tab 2].

III. The ABA rule and opinion and other non-Texas authorities have no bearing on this Texas disqualification issue.

Unable to grapple with applicable Texas law and the facts of this case, Mrs. Thetford's lawyers resort to arguing that Allen should be disqualified based on his alleged violation of an ABA model rule, an ABA opinion interpreting that rule, and several out-of-state authorities agreeing with the ABA opinion. The Court should

reject these arguments and authorities for two independent reasons: (1) under this Court's precedent, ABA opinions are not binding on this Court or Texas lawyers and cannot be used as a basis to disqualify a Texas lawyer; and (2) the ABA model rule on which ABA Opinion 96-404 is based (ABA Model Rule 1.14) is different from Texas Disciplinary Rule 1.02(g) in a critical way.[37]

A. ABA opinions are not binding on Texas courts and cannot serve as a basis for disqualifying Texas attorneys.

As Chief Justice Phillips observed in a unanimous decision, ABA rules and opinions are not binding on Texas courts. *In re Meador*, 968 S.W.2d at 349 n.1; *see also Comm'n for Lawyer Discipline v. Hanna*, 513 S.W.3d 175, 182 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("The ABA's interpretation of the model rule amendments—particularly those not yet adopted in Texas—is not binding on us."); ABA Informal Op. 1420 (1978) ("Enforcement of legal ethics and disciplinary procedures are local matters securely within the jurisdictional prerogative of each state and the District of Columbia."). In fact, "ABA opinions are binding upon no one" because they merely "represent the views of a small committee of a private association, and they construe that private association's Model Rules and Model Code." *In re Meador*, 968 S.W.2d at 349 n.1.

[37] Mrs. Thetford's lawyers' reliance on ABA Model Rule 1.14 and ABA Opinion 96-404 is waived because Aldrich did not argue in the trial court that Allen violated Model Rule 1.14. *See In re Am. Optical*, 988 S.W.2d at 714.

ABA rules and opinions do not "impose a binding disciplinary standard on Texas attorneys" and an alleged violation of an ABA rule does not provide a basis for the disqualification of Texas attorneys.[38] *Id.* at 350.

Meador is on all fours with this issue and is dispositive. There, this Court ruled that the Dallas Court of Appeals had abused its discretion by disqualifying a Texas attorney based entirely on his alleged violation of an ABA opinion:

> Meador first argues that the trial court could not properly disqualify Masterson because he did not violate a specific disciplinary rule. *She contends that ABA Formal Opinion 94–382, on which the court of appeals relied, is merely advisory, and does not impose a binding disciplinary standard on Texas attorneys. This contention is correct.* The Texas Disciplinary Rules of Professional Conduct and opinions from Texas courts and the State Bar of Texas interpreting those rules provide the disciplinary standards for Texas attorneys.

Id. at 350 (emphasis added); *see also In re Quintanilla*, No. 14-16-00473-CV, 2016 WL 4483743, at *3 (Tex. App.—Houston [14th Dist.] Aug. 25, 2016, orig. proceeding) (per curiam) (mem. op.) (explaining that Texas courts only "look to the Texas Disciplinary Rules of Professional Conduct to decide disqualification issues").

Thus, the Court should reject this ill-conceived attempt to disqualify Allen based solely on an ABA rule and opinion not adopted in Texas. [App. E]. Put simply, because the Texas courts do not view guardianship proceedings as

[38] Indeed, Texas attorneys are not automatically disqualified from a case even if they violate a *Texas* disciplinary rule. *In re Nitla*, 92 S.W.3d at 422.

"adversarial," and because this Court does not disqualify Texas lawyers based on ABA rules and opinions, Mrs. Thetford's lawyers' rationale as to the model rule does not apply.[39]

B. ABA Model Rule 1.14 and Texas Disciplinary Rule 1.02(g) are different in a critical way.

The Court should also decline to use ABA Opinion 96-404 as persuasive authority because it is based on an ABA model disciplinary rule far different from rule adopted in Texas. For reasons not explained, Mrs. Thetford's lawyers do not quote the rule that serves as the basis for ABA Opinion 96-404 (ABA Model Rule 1.14). While ABA Model Rule 1.14 and Texas Disciplinary Rule 1.02(g) both contemplate a lawyer taking action to protect an incapacitated client, there is a critical distinction between the two rules that Mrs. Thetford's lawyers ignore.

ABA Model Rule 1.14 provides that a lawyer "*may* take reasonably necessary protective action" for an incapacitated client. ABA Model Rule 1.14 (emphasis added); [App. E]; *see* ABA Formal Opinion 96-404 at 5 ("While Rule 1.14 permits a lawyer to take protective action … it does not compel the lawyer to do so …."). Rule 1.02(g), on the other hand, states that a lawyer "*shall* take

[39] In any case, ABA Opinion 96-404 actually supports Allen's actions in this case. *See* ABA Opinion 94-404 at 9 ("The lawyer may recommend or support the appointment of a particular person or other entity as guardian, even if the person or entity will likely hire the lawyer to represent it in the guardianship proceeding, provided the lawyer has made reasonable inquiry as to the suggested guardian's fitness, discloses the self-interest in the matter and obtains the court's permission to proceed.").

reasonable action," "such as initiating the appointment of a guardian" to protect an incapacitated client. Tex. Disciplinary R. Prof'l Conduct 1.02(g) and cmt. 13 (emphasis added). In other words, while the Model Rule 1.14 simply grants a lawyer discretion to take protective action, Texas Rule 1.02(g) requires a lawyer to take protective action and also places a "special duty" on a lawyer to do so.[40] *Id.*; *see Franks*, 310 S.W.3d at 629; *In re E.L.T.*, 93 S.W.3d 372, 376 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (explaining that "an attorney *must* seek appointment of a guardian or other legal representative for … a client whom the attorney reasonably believes is lacking legal competence") (emphasis added).

Texas certainly could have adopted the discretionary standard in ABA Model Rule 1.14, but chose not to. The Court must presume the drafters' decision to *mandate* rather than *permit* has meaning. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) ("It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose." (citations omitted)).

The Petition cites a number of "out-of-state authorities" that supposedly "adopted the ABA opinion in full." [Relator's Br. at 18-22]. But these authorities

[40] The differences between the two rules in this area reflect "Texas insistence that the disciplinary rules [are], *not procedural rules governing disqualification of advocates in civil litigation*." Rule 1.06 Conflict of Interest: General Rule, 48 Tex. Prac. Tex. Lawyer & Jud. Ethics § 6:6 (2017 ed.) (emphasis added).

are irrelevant to the issue before the Court because every jurisdiction cited by Mrs. Thetford's lawyers either has adopted Model Rule 1.14 in full or has adopted a substantially similar version of that rule—i.e., the out-of-state rules *permit* but do not *require* a lawyer to take action to protect an incapacitated client.[41] Texas, on the other hand, "does not adopt" ABA Model Rule 1.14. [App. E]. In fact, Texas is the only jurisdiction that has not adopted ABA Model Rule 1.14. [*Id.*]. Mrs. Thetford's lawyers' reliance on out-of-state authorities is misplaced.

PRAYER

Real Parties in Interest respectfully request that the Court deny the Petition for Writ of Mandamus and grant them all relief to which they may be entitled, whether at law or equity.

[41] Ohio, Utah, Maryland, South Dakota, New Hampshire, South Carolina, and Colorado have all adopted Model Rule 1.14 verbatim. [App. E]. Virginia and Vermont have adopted Model Rule 1.14 but made partial—and inconsequential—amendments. [*Id.*]. Additionally, the jurisdictions that, according to Mrs. Thetford's lawyers that "do not rely on ABA Formal Opinion 96-404," but that have, nevertheless, reached "the same conclusion," have also adopted Model Rule 1.14 verbatim or adopted a substantially similar amended version. [Relator's Br. at 21-22 & n.7 (citing authorities from Massachusetts, New York, and Connecticut; App. E]. The same is true for the authorities that Mrs. Thetford's lawyers say "reached the exact same conclusion" before the issuance of ABA Opinion 96-404. [Relator's Br. at 21 & n. 6 (citing authorities from Michigan, Vermont, and Washington); App. E]. Kentucky and Maine, which Mrs. Thetford's lawyers cite for varying propositions, also have adopted Model Rule 1.14. [Relator's Br. at 22-23 & n. 8; App. E].

Respectfully submitted,

/s/ Donald E. Herrmann

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ATTORNEYS FOR
REAL PARTIES IN INTEREST

CERTIFICATE OF COMPLIANCE

1. This response complies with the type-volume limitations of Texas Rules of Appellate Procedure 9.4(i)(2)(B) because it contains 10,541 words, excluding the parts of the response exempted by the Texas Rules of Appellate Procedure.

2. This response complies with the typeface requirements of Texas Rules of Appellate Procedure 9.4(e) because this response has been prepared in a proportionally spaced typeface using "Microsoft Word 2010" in fourteen (14) point "Times New Roman" style font.

/s/ Donald E. Herrmann
Donald E. Herrmann

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded via electronic filing on March 13, 2018, to the following counsel of record:

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/s/ Donald E. Herrmann
Donald E. Herrmann

No. 17-0634

THE SUPREME COURT OF TEXAS

IN RE VERNA FRANCIS COLEY THETFORD,

Relator.

From the Second Court of Appeals
No. 02-17-00182-CV

INDEX TO APPENDIX TO RESPONSE TO BRIEF ON THE MERITS

A. Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction.

B. Temporary Restraining Order and Order Setting Hearing for Temporary Injunction.

C. Agreed Temporary Injunction.

D. Affidavit of Kyle Peavy.

E. Variations of the ABA Model Rules of Professional Conduct.

Appendix A

Filed: 6/27/2017 9:56 AM
Jamie Freeze Land
District Clerk
Young County, Texas
Teresa Kilpatrick

No. 33,186

GUARDIANSHIP OF	§	**IN THE DISTRICT COURT**
	§	
VERNA FRANCIS COLEY THETFORD,	§	**90th JUDICIAL DISTRICT**
	§	
AN INCAPACITATED PERSON	§	**YOUNG COUNTY, TEXAS**

APPLICATION FOR TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Jamie Kay Rogers ("Rogers"), Temporary Guardian of the Person of Verna Francis Coley Thetford ("Mrs. Thetford"), and pursuant to §1251.051, Texas Estates Code, Rule 680, Texas Rules of Civil Procedure, and §21.001, Texas Government Code, seeks a Temporary Restraining Order, Temporary Injunction, and Permanent Injunction against Eddie Dalton ("Eddie") Priscilla Dalton ("Priscilla"), and their agents, servants and employees, or anyone acting at their request or in concert with them, or who receive actual notice of such Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, that restricts their taking Mrs. Thetford out of the Brookdale facility without first communicating their intention to do so to Rogers by text or telephone and obtaining her acquiescence with their intent. In support of such motion, applicants would respectfully show the Court as follows:

I. Parties.

1. By Order signed May 10, 2017, Rogers was appointed the Temporary Guardian of the Person of Mrs. Thetford.

2. Eddie is not related to Mrs. Thetford. He is an individual who may be served at 1115 Eastside Lake Road, Graham, Young County, Texas 76450.

3. Priscilla is not related to Mrs. Thetford. She is an individual who may be served at 1115 Eastside Lake Road, Graham, Young County, Texas 76450.

II. Venue and Jurisdiction.

4. Pursuant to §21.001, Texas Government Code, the Court has all powers necessary for the enforcement of its lawful orders.

5. Additionally, the Court, on its own motion, or on the motion of any interested party, may grant a temporary restraining order under both §1251.051, Texas Estates Code, and Rule 680, Texas Rules of Civil Procedure.

III. Factual Background.

6. The Order appointing Rogers as Temporary Guardian of the person of Mrs. Thetford specifically gives Rogers the following power:

"To have possession and control of Mrs. Thetford and to deny anyone access to Mrs. Thetford if such is in the best interest of Mrs. Thetford."

7. Rogers takes her fiduciary duty and responsibilities as Temporary Guardian of the Person of Mrs. Thetford very seriously. As Temporary Guardian of Mrs. Thetford's person, Rogers has both a duty and a desire to make every effort to maintain Mrs. Thetford's safety, while giving her freedom to see friends and acquaintances. Consequently, Rogers has arranged for Mrs. Thetford to reside at Brookdale, Graham, where she receives assisted living services and has access to regular visits from her friends and acquaintances. Brookdale appears to be meeting the goal of maintaining Mrs. Thetford's safety and giving her reasonable freedoms in the Brookdale environment.

8. However, Eddie and Priscilla are thwarting Rogers' efforts to meet her fiduciary duties to Mrs. Thetford. Rogers has apprised Eddie (and he was present at the hearing when she was

appointed) that Rogers is Temporary Guardian of Mrs. Thetford's person on at least two occasions, and has requested him, at the very least, to text or call Rogers with details regarding when he or Priscilla would like to take Mrs. Thetford from Brookdale, where he or she is taking her, and when they will be returning to Brookdale. Rogers' counsel asked Eddie to do the same several months ago. Then, by letter dated June 20, 2017 (a copy of which is attached hereto as Exhibit A), the request was made to Eddie and Priscilla. On June 26, 2017, Rogers' counsel made one last request to Eddie by phone. Eddie refuses to cooperate in any manner, and Eddie and Priscilla each persist in taking Mrs. Thetford from Brookdale without informing Rogers of her whereabouts, thereby interfering with Rogers' duties as Temporary Guardian of Mrs. Thetford's person. Eddie told Rogers' counsel on June 26, 2017, that he will not abide by the June 20, 2017 letter, and to file this application if Rogers' counsel deemed it appropriate. Such wanton disregard for the authority and order of this Court and its appointee, Rogers, makes it necessary to seek this immediate action.

9. The actions of Eddie and Priscilla in wantonly refusing to recognize Rogers' power and responsibilities under the Court's Order signed May 10, 2017, despite their knowledge of the Court's Order, and despite repeated requests by Rogers and her counsel for their cooperation, demonstrate absolute contempt for the Court's authority, and Rogers is left with no alternative but to seek immediate relief.

IV. Relief Requested.

A. Temporary Restraining Order.

10. Rogers is in an extraordinary situation in that she has no adequate remedy at law or otherwise to prevent irreparable harm from occurring to Mrs. Thetford unless Eddie and Priscilla, and their agents, servants and employees, or anyone acting in concert with them who receives actual

notice of this order are immediately restrained from removing Mrs. Thetford from Brookdale, unless they comply with the procedures set forth in the June 20, 2017 letter. In order to preserve the status quo and to prevent imminent and irreparable injury to Mrs. Thetford, the Court should grant an immediate Temporary Restraining Order.

11. Rogers requests that this Court immediately issue a Temporary Restraining Order enjoining Eddie and Priscilla, and their agents, servants and employees, or anyone acting in concert with them who receives actual notice of this order from having any access to Mrs. Thetford outside of the Brookdale facility unless and until they each agree to comply with the reasonable requests of Rogers set forth in the June 20, 2017 letter.

12. Rogers is willing and able to post a reasonable bond in relation to this application for temporary restraining order. Because Eddie and Priscilla will suffer no injury even if it is later established that this injunctive relief was entered in error, only a nominal bond is warranted.

B. Temporary Injunction.

13. Rogers also requests that such Temporary Restraining Order be made a Temporary Injunction. Rogers requests that this Court set a hearing on her application for temporary injunction and issue an order directing Eddie and Priscilla to appear at that hearing and show cause, if any, why this Court should not enter a temporary injunction to fully protect the safety of Mrs. Thetford during the pendency of this proceeding.

14. Rogers is in an extraordinary situation in that she has no adequate remedy at law or otherwise to prevent potential irreparable harm from occurring to Mrs. Thetford unless Eddie and Priscilla, and their agents, servants and employees, or anyone acting in concern with them who receives actual notice of this order are immediately restrained from removing Mrs. Thetford from

Brookdale, unless and until each of them agrees to comply with the procedures set forth in the June 20, 2017 letter. In order to preserve the status quo and to prevent imminent and irreparable injury to Mrs. Thetford, the Court should grant a Temporary Injunction.

C. Permanent Injunction.

15. Rogers requests that this Court enter a Permanent Injunction at the final trial of this case to fully protect the safety of Mrs. Thetford. Eddie and Priscilla should show cause, if any, why this Court should not enter a permanent injunction to fully protect the rights of Mrs. Thetford.

D. Declaratory Judgment.

16. §37.005, Texas Civil Practice & Remedies Code, provides that a guardian or other fiduciary may seek a declaration of rights or legal relations to determine any question arising in the administration of a guardianship or estate. Rogers seeks a judicial determination that the Court's Order signed May 10, 2017, authorizes her to reasonably restrict access to Mrs. Thetford outside of the Brookdale facility. Accordingly, Rogers seeks and is entitled to recover her reasonable and necessary attorneys' fees and costs of suit from Eddie and Priscilla which are incurred in obtaining this protection for Mrs. Thetford, pursuant to §37.009, Texas Civil Practice & Remedies Code.

WHEREFORE, Rogers prays that she have and recover from and against Eddie and Priscilla the following:

(1) a temporary restraining order denying them access to Mrs. Thetford outside the Brookdale facility unless they comply with the procedures set forth in the June 20, 2017, letter;

(2) a temporary injunction denying them access to Mrs. Thetford outside the Brookdale facility unless they comply with the procedures set forth in the June 20, 2017, letter;

(3) a permanent injunction denying them access to Mrs. Thetford outside the Brookdale facility unless they comply with the procedures set forth in the June 20, 2017, letter;

(4) declaratory relief that the Court's Order signed May 10, 2017, authorizes Rogers to restrict access to Mrs. Thetford by Eddie and Priscilla outside of the Brookdale facility unless they comply with the procedures set forth in the June 20, 2017 letter;

(5) reasonable and necessary attorneys' fees and costs of suit from Eddie and Priscilla incurred in obtaining this protection for Mrs. Thetford; and

(6) all such other and further relief, both general and special, at law and in equity, to which Rogers may show herself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 27th day of June, 2017, this document was properly served on all parties in compliance with Texas Rule of Civil Procedure 21a.(a)(1) by serving such document, through the electronic file manager, on the counsel of record for all parties.

/s/ Alfred G. Allen, III

No. 33,186

GUARDIANSHIP OF	§	**IN THE DISTRICT COURT**
	§	
VERNA FRANCIS COLEY THETFORD,	§	**90TH JUDICIAL DISTRICT**
	§	
AN INCAPACITATED PERSON	§	**YOUNG COUNTY, TEXAS**

AFFIDAVIT OF JAMIE KAY ROGERS
IN SUPPORT OF TEMPORARY RESTRAINING ORDER

THE STATE OF TEXAS	§
	§
COUNTY OF YOUNG	§

BEFORE ME, the undersigned Notary Public, on this day personally appeared Jamie Kay Rogers, who, after being by me duly sworn according to law, upon her oath, deposed and stated as follows:

1. My name is Jamie Kay Rogers. I am over the age of eighteen years, am of sound mind, suffer from no legal disabilities and am fully competent to make this Affidavit. I have personal knowledge of the facts set forth hereinbelow, such facts are true and correct, and I am fully competent to testify to each and all such facts.

2. By an Order signed in this cause of action on May 10, 2017, I was appointed Temporary Guardian of the Person of Verna Francis Coley Thetford ("Mrs. Thetford"). Among other things, this Order provided that I had:

> The power and authority to take charge and control of the person of Mrs. Thetford, including having physical possession of Mrs. Thetford, and to establish Mrs. Thetford's legal domicile and place of residence, including a private home, group home, hospital, residential care facility, assisted living unit, memory care unit, nursing home or such other place as the Guardian of the Person directs; and
>
> The power and authority to have possession and control of Mrs. Thetford and to deny anyone access to Mrs. Thetford if such is in the best interest of Mrs. Thetford.

3. I take my fiduciary duty and responsibilities as Temporary Guardian of the Person of Mrs. Thetford very seriously. I believe that as Temporary Guardian of Mrs. Thetford's person, I

have a duty to make every effort to maintain Mrs. Thetford's safety, while allowing her reasonable freedom within her environment. Consequently, I have arranged for Mrs. Thetford to reside at Brookdale, Graham, where she receives assisted living services and has access to regular visits from her friends and acquaintances. Brookdale appears to be meeting the goal of maintaining Mrs. Thetford's safety and giving her reasonable freedoms in the Brookdale environment. .

4. By a letter dated June 20, 2017, a copy of which is attached as Exhibit A to Alfred G. Allen, III's affidavit, I made Eddie and Priscilla aware of my appointment as Temporary Guardian of the Person of Mrs. Thetford.

5. I have asked Eddie and Priscilla not to take Mrs. Thetford out of Brookdale without communicating to me by text or telephone their intent to do so and obtaining my acquiescence to their intentions.

6. Eddie and Priscilla refuse to cooperate in any manner and Eddie and Priscilla each persist in taking Mrs. Thetford from Brookdale without informing me of her whereabouts, thereby interfering with my duties as Temporary Guardian of Mrs. Thetford's person and placing her safety at risk. Such wanton disregard for the authority and order of the Court and of me, as its appointee, makes it necessary to seek immediate relief.

7. Given Eddie's lack of cooperation and refusal to acknowledge the Court's Order signed May 10, 2017, Mrs. Thetford will suffer imminent, irreparable injury in the absence of a temporary restraining order and temporary injunctive relief, unless and until Eddie and Priscilla agree to comply with the June 20, 2017 letter, and a lawsuit for damages would not be an adequate remedy.

Further, Affiant sayeth not.

Jamie Kay Rogers

Jamie Kay Rogers

SWORN TO AND SUBSCRIBED BEFORE ME by the said Jamie Kay Rogers on this 27th day of June, 2017, to certify which witness my hand and seal of office.

Marsha Sloan

Notary Public, State of Texas

MARSHA SLOAN
Notary Public, State of Texas
Expires 03/19/2021
I.D.# 205880-0

No. 33,186

GUARDIANSHIP OF	§	IN THE DISTRICT COURT
	§	
VERNA FRANCIS COLEY THETFORD,	§	90th JUDICIAL DISTRICT
	§	
AN INCAPACITATED PERSON	§	YOUNG COUNTY, TEXAS

AFFIDAVIT OF ALFRED G. ALLEN, III, IN SUPPORT OF TEMPORARY RESTRAINING ORDER

THE STATE OF TEXAS	§
	§
COUNTY OF YOUNG	§

BEFORE ME, the undersigned Notary Public, on this day personally appeared Alfred G. Allen, III, who, after being by me duly sworn according to law, upon her oath, deposed and stated as follows:

1. My name is Alfred G. Allen, III. I am over the age of eighteen years, am of sound mind, suffer from no legal disabilities and am fully competent to make this Affidavit. I have personal knowledge of the facts set forth hereinbelow, such facts are true and correct, and I am fully competent to testify to each and all such facts. I am an attorney at law admitted to practice in the State of Texas and the United States District Courts for the Northern and Southern Districts of Texas. I am competent to give this Affidavit and have personal knowledge of all matters set forth herein.

2. By an Order signed in this cause of action on May 10, 2017, Jamie Kay Rogers ("Rogers") was appointed Temporary Guardian of the Person of Verna Francis Coley Thetford ("Mrs. Thetford"). Among other things, this Order provided that Rogers had:

> The power and authority to take charge and control of the person of Mrs. Thetford, including having physical possession of Mrs. Thetford, and to establish Mrs. Thetford's legal domicile and place of residence, including a private home, group home, hospital, residential care facility, assisted living unit, memory care unit, nursing home or such other place as the Guardian of the Person directs; and
>
> The power and authority to have possession and control of Mrs. Thetford and to deny anyone access to Mrs. Thetford if such is in the best interest of Mrs. Thetford.

3. My observations of Rogers indicate that she takes her fiduciary duty and responsibilities as Temporary Guardian of the Person of Mrs. Thetford very seriously. Rogers has made every

effort to maintain Mrs. Thetford's safety, while allowing her reasonable freedom within her environment. Consequently, she has arranged for Mrs. Thetford to reside at Brookdale, Graham, where Mrs. Thetford receives assisted living services and is allowed to receive guests and move about the facility. Brookdale appears to be meeting the goal of maintaining Mrs. Thetford's safety, while giving her freedom to see friends and acquaintances.

4. Rogers has apprised Eddie Dalton ("Eddie") that Rogers is Temporary Guardian of Mrs. Thetford's person on at least two occasions, and has requested that he, at the very least, text or call Rogers with details regarding when he would like to take Mrs. Thetford from Brookdale, where he is taking her, and when they will be returning to Brookdale. I first asked Eddie to comply with Rogers's request several months ago, and then by letter dated June 20, 2017 (a copy of which is attached hereto as Exhibit A), I asked both Eddie and his wife, Priscilla Dalton ("Priscilla"), to comply with Rogers' request. I again made the same request by a phone call to Eddie on June 26, 2017. Eddie refuses to cooperate in any manner, and Eddie and Priscilla each persist in taking Mrs. Thetford from Brookdale without informing Rogers of her whereabouts, thereby interfering with Rogers' duties as Temporary Guardian of Mrs. Thetford's person. Eddie told me on June 26, 2017, that he will not abide by the June 20, 2017 letter, and to file this application if I deemed it appropriate. Such wanton disregard for the authority and order of this Court and its appointee, Rogers, makes it necessary to seek this immediate action.

5. Given Eddie's lack of cooperation and refusal to acknowledge the Court's Order signed May 10, 2017, Mrs. Thetford will suffer imminent, irreparable injury in the absence of a temporary restraining order and temporary injunctive relief, unless Eddie and Priscilla agree to comply with the June 20, 2017 letter, and a lawsuit for damages would not be an adequate remedy.

Further, Affiant sayeth not.

Alfred G. Allen, III

SWORN TO AND SUBSCRIBED BEFORE ME by the said Alfred G. Allen, III, on this 27th day of June, 2017, to certify which witness my hand and seal of office.

MARSHA SLOAN
Notary Public, State of Texas
Expires 03/19/2021
I.D.# 205880-0

Notary Public, State of Texas

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SPECIALIZATION
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*ALSO LICENSED IN
NORTH DAKOTA AND OHIO

June 20, 2017

Mr. Eddie Dalton
Mrs. Priscilla Dalton
1115 Eastside Lake Rd.
Graham, Texas 76450

Re: Contact with Verna Thetford

Dear Eddie and Priscilla:

As attorney-in-fact for Verna Thetford and now as temporary guardian of her person, Jamie Rogers has consistently tried to work with you and be amenable to you freely visiting with Verna and taking her places around town or to the pasture to see her cattle. I have asked that you call or text Mrs. Rogers when you do so, since she is responsible for Mrs. Thetford, and Mrs. Rogers has also asked you on several occasions to do so.

Now that the temporary guardianship has been extended for several months, if you desire to have contact with Mrs. Thetford and leave the Brookdale facility, we must insist on you following the following procedures:

1. Mrs. Thetford will be signed out and back in to Brookdale upon her return every time she leaves with you or you pick her up.

2. You agree to call or text Mrs. Rogers at (940) 393-5149 and tell her that you would like to take Mrs. Thetford out of Brookdale, and the place you plan to take her and the approximate length of time you expect to be gone. If Mrs. Rogers has a reason for not allowing the activity, she will let you know.

These are simple procedures, but we expect them to be followed. Mrs. Rogers wants her aunt to have freedom to visit with whomever she likes and people who are good to her, but she is responsible for Mrs. Thetford's care and you need to respect the authority granted to Mrs. Rogers by the Court. For your convenience, I have attached a copy of the Order Appointing Temporary

Guardian and Establishing a Management Trust. If you desire to continue to visit Mrs. Thetford, you agree that you will comply with this order and the simple procedures set out above, so that Mrs. Thetford is safe and secure.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Alfred G. Allen, III

AGA,III:jr

Enclosure

Appendix B

Filed: 6/27/2017 3:41 PM
Jamie Freeze Land
District Clerk
Young County, Texas
Teresa Kilpatrick

No. 33,186

GUARDIANSHIP OF	§	**IN THE DISTRICT COURT**
	§	
VERNA FRANCIS COLEY THETFORD,	§	**90th JUDICIAL DISTRICT**
	§	
AN INCAPACITATED PERSON	§	**YOUNG COUNTY, TEXAS**

TEMPORARY RESTRAINING ORDER AND ORDER SETTING HEARING FOR TEMPORARY INJUNCTION

On June 27, 2017, this Court considered the Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, filed by Jamie Kay Rogers ("Rogers"), Temporary Guardian of the Person of Verna Francis Coley Thetford ("Mrs. Thetford"), in the above entitled and numbered cause. After considering the pleadings, the facts set forth in the Application, the affidavits, and the arguments of counsel, the Court holds that the Application is granted.

The Court finds that there is evidence that harm is imminent to Mrs. Thetford, if the Court does not issue the temporary restraining order enjoining Eddie Dalton and Priscilla Dalton, their agents, servants and employees, or anyone acting at their request or in concert with them who receives actual notice of this order from having any access to Mrs. Thetford outside the Brookdale, Graham, facility, unless they comply with the procedures set forth in the June 20, 2017 letter from counsel for Rogers to them. The Court is issuing this Order in order to preserve the status quo and because, in its absence, imminent and irreparable harm to Mrs. Thetford will result.

The Court finds that this Order is necessary to enforce its prior Order signed May 10, 2017, which gives Rogers the power to have possession and control of Mrs. Thetford and to deny anyone access to Mrs. Thetford if such is in the best interest of Mrs. Thetford; and that it is not in Mrs.

Thetford's best interests for Eddie Dalton and Priscilla Dalton to refuse to recognize the Court's Order signed May 10, 2017, and they are placing Mrs. Thetford's safety at risk by refusing to communicate with Rogers when they desire to take Mrs. Thetford out of the Brookdale facility, where they want to take her, how long they will be gone, and obtain Rogers' acquiescence.

The Court further finds that based on the evidence before it, Rogers has met her burden to show that she will likely succeed on the merits of her cause of action for declaratory judgment against Eddie Dalton and Priscilla Dalton that the Court's Order signed May 10, 2017, authorizes her to deny access by them to Mrs. Thetford outside of the Brookdale facility unless and until they comply with the procedures set forth in the June 20, 2017 letter to them.

IT IS, THEREFORE, ORDERED that Eddie Dalton and Priscilla Dalton, and their agents, servants and employees, or anyone acting at their request or in concert with them who receives actual notice of this Order by personal service or otherwise, shall immediately cease and desist from taking Verna Francis Coley Thetford outside the Brookdale facility without communicating their intentions with Rogers by text or telephone and obtaining her acquiescence to their intentions.

IT IS FURTHER ORDERED that the District Clerk shall forthwith issue a Temporary Restraining Order in conformity with the law and the terms of this Order.

IT IS FURTHER ORDERED that the amount of the Temporary Restraining Order bond in this case shall be $500.00, which may be paid by a firm check issued by Turner & Allen, P. C.

IT IS FURTHER ORDERED that the Clerk issue notice to Eddie Dalton and Priscilla Dalton that the hearing on Plaintiff's Application for Temporary Injunction is set for July 11, 2017, at 9:00 a.m./~~p.m.~~

IT IS FURTHER ORDERED that this Order expires on July 10, 2017.

SIGNED and ISSUED on June 27, 2017, at 2:00 ~~XX~~ a.m./p.m.

JUDGE PRESIDING

Appendix C

No. 33,186

GUARDIANSHIP OF	§	**IN THE DISTRICT COURT**
	§	
VERNA FRANCIS COLEY THETFORD,	§	**90th JUDICIAL DISTRICT**
	§	
AN INCAPACITATED PERSON	§	**YOUNG COUNTY, TEXAS**

AGREED TEMPORARY INJUNCTION

On June 27, 2017, this Court considered the Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, filed by Jamie Kay Rogers ("Rogers"), Temporary Guardian of the Person of Verna Francis Coley Thetford ("Mrs. Thetford"), in the above entitled and numbered cause. After considering the pleadings, the facts set forth in the Application, and the affidavits attached thereto, the Court granted a Temporary Restraining Order and scheduled a hearing on Rogers' Application for Temporary Injunction for July 11, 2017, at 9:00 a.m.

As evidenced by their signatures below, Eddie Dalton and Priscilla Dalton agree to the entry of a Temporary Injunction against them as set forth below.

IT IS, THEREFORE, ORDERED that an Agreed Temporary Injunction is hereby granted. Eddie Dalton and Priscilla Dalton, and their agents, servants and employees, or anyone acting at their request or in concert with them who receives actual notice of this Order by personal service or otherwise, are denied access to Mrs. Thetford outside the Brookdale facility unless they first comply with the procedures set forth in the June 20, 2017, letter to them from Alfred G. Allen, III, to them, a copy of which letter is attached to this Agreed Temporary Injunction. This Agreed Temporary Injunction shall remain in effect until such time as a Final Judgment is entered

with regard to Rogers' Application for a Permanent Guardianship of the Person of Mrs. Thetford.

SIGNED this 11th day of July, 2017.

JUDGE PRESIDING

AGREED AS TO SUBSTANCE AND FORM:

Eddie Dalton

Priscilla Dalton

APPROVED AS TO FORM:

TURNER & ALLEN
A Professional Corporation
P. O. Drawer 930
Graham, Texas 75450
(940) 549-3456
(940) 549-5691 (Telecopier)

By: Alfred G. Allen, III
ATTORNEYS FOR APPLICANT

~~CANTEY HANGER, LLP~~
~~Cantey Hanger Plaza~~
~~600 West 6th Street, Suite 300~~
~~Fort Worth, Texas 76102-3685~~
~~(817) 877-2833~~
~~(817) 877-2807 (Telecopier)~~

By: ~~Robert E. Aldrich, Jr.~~ Stephen O. Crawford
ATTORNEYS FOR EDDIE DALTON AND PRISCILLA DALTON

LAW OFFICES
TURNER & ALLEN
A PROFESSIONAL CORPORATION
P.O. DRAWER 930
GRAHAM, TEXAS 76450

455 ELM STREET, SUITE 100
TELEPHONE 940 549-3456
TELECOPIER: 940 549-5691
E-MAIL: ta@turnerandallen.com

JESS N. TURNER, III†□
jnt@turnerandallen.com

ALFRED G. ALLEN, III†*
aga@turnerandallen.com

†BOARD CERTIFIED
OIL, GAS & MINERAL LAW
TEXAS BOARD OF LEGAL
SPECIALIZATION
□CERTIFIED MEDIATOR
*ALSO LICENSED IN
NORTH DAKOTA AND OHIO

June 20, 2017

Mr. Eddie Dalton
Mrs. Priscilla Dalton
1115 Eastside Lake Rd.
Graham, Texas 76450

Re: Contact with Verna Thetford

Dear Eddie and Priscilla:

As attorney-in-fact for Verna Thetford and now as temporary guardian of her person, Jamie Rogers has consistently tried to work with you and be amenable to you freely visiting with Verna and taking her places around town or to the pasture to see her cattle. I have asked that you call or text Mrs. Rogers when you do so, since she is responsible for Mrs. Thetford, and Mrs. Rogers has also asked you on several occasions to do so.

Now that the temporary guardianship has been extended for several months, if you desire to have contact with Mrs. Thetford and leave the Brookdale facility, we must insist on you following the following procedures:

1. Mrs. Thetford will be signed out and back in to Brookdale upon her return every time she leaves with you or you pick her up.

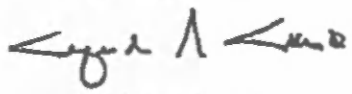
2. You agree to call or text Mrs. Rogers at (940) 393-5149 and tell her that you would like to take Mrs. Thetford out of Brookdale, and the place you plan to take her and the approximate length of time you expect to be gone. If Mrs. Rogers has a reason for not allowing the activity, she will let you know.

These are simple procedures, but we expect them to be followed. Mrs. Rogers wants her aunt to have freedom to visit with whomever she likes and people who are good to her, but she is responsible for Mrs. Thetford's care and you need to respect the authority granted to Mrs. Rogers by the Court. For your convenience, I have attached a copy of the Order Appointing Temporary

Guardian and Establishing a Management Trust. If you desire to continue to visit Mrs. Thetford, you agree that you will comply with this order and the simple procedures set out above, so that Mrs. Thetford is safe and secure.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Alfred G. Allen, III

AGA,III:jr

Enclosure

Appendix D

AFFIDAVIT OF KYLE PEAVY

BEFORE ME, the undersigned authority, on this day personally appeared KYLE PEAVY, known to me, who being by me duly cautioned and sworn upon his oath, deposed and stated as follows:

1. My name is Kyle Peavy. I am over eighteen (18) years of age. I have personal knowledge of the facts set forth hereinbelow, such facts are true and correct, and I am fully competent to testify to each and all such facts. I do not suffer from any incapacity.

2. I am an Executive Vice President of Ciera Bank in Graham, Texas, and I have held that position since 2015. I have been employed in the banking business for 30 years.

3. By an Order signed May 10, 2017, under Cause No. 33,186, *Guardianship of Verna Francis Coley Thetford,* in the 90th Judicial District Court of Young County, Texas, Jamie Kay Rogers was appointed Temporary Guardian of the Person of Verna Francis Coley Thetford, and Ciera Bank, Graham, Texas was appointed Trustee of a Management Trust over the Estate of Mrs. Thetford ("the May 10, 2017 Order").

4. The May 10, 2017 Order appointing Ciera Bank, Graham, Texas, Trustee of the Management Trust, granted Ciera Bank the power to possess and manage the properties of Mrs. Thetford, including all cash on hand and bank accounts. The Order further provided that Ciera Bank had the power to take possession of Mrs. Thetford's financial records.

5. Such Order states that it constitutes sufficient legal authority for all persons owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to Mrs. Thetford, to pay or transfer the applicable asset without liability to Ciera Bank, Graham, Texas, as Trustee of a Management Trust over the Estate of Mrs. Thetford.

6. Pursuant to the May 10, 2017 Order, Ciera Bank immediately began taking steps to take possession of Mrs. Thetford's assets and financial

records as Trustee of the Management Trust that had been created for her benefit. Attached hereto as Exhibit A is a true and correct copy of a bank statement dated May 14, 2017, for Verna Thetford, Account No. 1755427395, InterBank, Graham, Texas, for the period from May 8, 2017, to May 14, 2017. This bank statement was obtained by Ciera Bank from InterBank pursuant to the May 10, 2017 Order. Attached to the bank statement are copies of the following checks:

(A) Check No. 1005, dated May 8, 2017, in the amount of $17,787.50, payable to Robert Aldrich, signed by Verna Thetford.

(B) Check No. 1006, dated May 8, 2017, in the amount of $7,212.50, payable to Robert Aldrich, signed by Verna Thetford.

(C) Check No. 1007, dated May 9, 2017, in the amount of $18,000.00, payable to Robert Aldrich, signed by Verna Thetford.

These three (3) checks were written on the eve or the first day of the temporary guardianship hearing. The checks do not appear to have been written by Verna Thetford, but they appear to have been signed by her.

7. The notations on the bank statement indicate that each of these three checks was paid by InterBank on May 11, 2017, after the May 10, 2017 Order was entered, but before Ciera Bank, Graham, Texas, as Trustee of the Management Trust over the Estate of Mrs. Thetford, could gain possession of the accounts that these checks were drawn on.

8. As Executive Vice President of Ciera Bank, Trustee of the Management Trust established by the May 10, 2017 Order, I have reviewed the two accounts of Verna Thetford on which checks were written by or for Verna Thetford from July 2015 through April 2017. The other two accounts of Verna Thetford had no withdrawal activity. Copies of the bank statements reviewed are not being attached hereto for privacy reasons. After such review, I have concluded that no checks were written and/or signed by Verna Thetford payable to Jamie Rogers, other than eight (8) checks for incidental reimbursements for phone expenses

and for performing bookkeeping services for Mrs. Thetford. These checks total $1,273.83. Attached hereto as Exhibit B is a list of the checks written to Jamie Rogers and signed by Verna Thetford between July 2015 and April 2017, indicating, the date, check number, amount and purpose listed on each check. No checks were written and/or signed by Jamie Rogers, in her capacity as agent or attorney in fact for Verna Thetford, to herself.

FURTHER, AFFIANT SAYETH NOT.

Kyle Peavy

Kyle Peavy

SWORN TO AND SUBSCRIBED BEFORE ME by the said Kyle Peavy on this 2nd day of June, 2017, to certify which witness my hand and seal of office.

JESSI RIBBLE
NOTARY PUBLIC
STATE OF TEXAS
My Comm. Expires 10-05-2019

Notary ID# 1303926-9

Jessi Ribble

Notary Public, State of Texas

InterBank®

www.interbank.com
P.O. Box 450 • Graham, TX 76450
940-549-3434

ACCOUNT NUMBER
1755427395

STATEMENT PERIOD
5/8/2017 TO 5/14/2017

**********AUTO**ALL FOR AADC 760
1170 0.5760 AB 0.403 4 5 53
VERNA THETFORD
PO BOX 540
GRAHAM TX 76450-0540

CHECKING SUMMARY

Senior NOW		1755427395
CHECKING BALANCE LAST STATEMENT.....		0.00
1	DEPOSITS	405,819.22
1	OTHER CREDITS	10.96
5	CHECKS	43,251.91
0	OTHER WITHDRAWALS	0.00
CHECKING BALANCE THIS STATEMENT.....		362,578.27

INTEREST SUMMARY

7	DAYS IN EARNINGS PERIOD
0.15%	ANNUAL PERCENTAGE YIELD EARNED
10.96	INTEREST PAID THIS PERIOD
10.96	INTEREST PAID YTD

DEPOSITS AND OTHER CREDITS

DATE	AMOUNT	DESCRIPTION
05/08	405,819.22	Deposit
05/14	10.96	Accr Earning Pymt Added to Account

CHECKS

DATE	CHECK NO	AMOUNT	DATE	CHECK NO	AMOUNT
05/10	1002	226.29	05/11	1006	7,212.50
05/10	1003	25.62	05/11	1007	18,000.00
05/11	1005*	17,787.50			

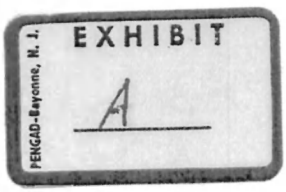
* indicates gap in check sequence

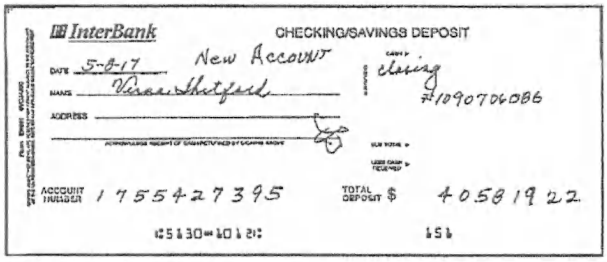
DAILY BALANCE INFORMATION

DATE	BALANCE	DATE	BALANCE	DATE	BALANCE
05/08	405,819.22	05/11	362,567.31		
05/10	405,567.31	05/14	362,578.27		

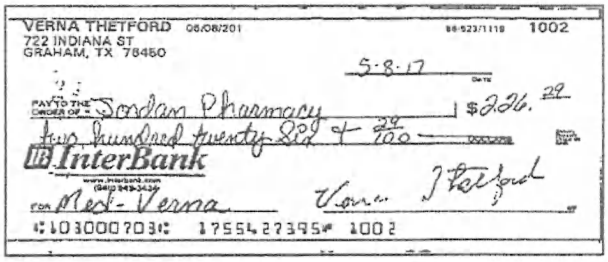
SUMMARY OF OVERDRAFT AND RETURNED ITEM FEES

	TOTAL FOR THIS PERIOD	TOTAL YEAR TO DATE
TOTAL OVERDRAFT FEES	$0.00	$0.00
TOTAL RETURNED ITEM FEES	$0.00	$0.00

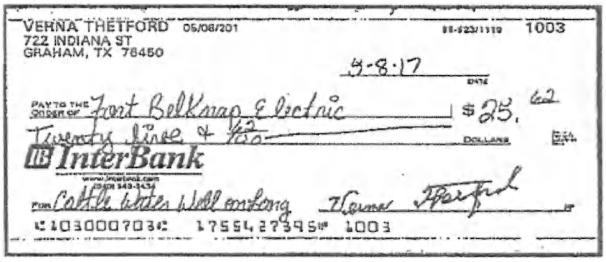



InterBank CHECKING/SAVINGS DEPOSIT
DATE 5-8-17 New Account
NAME Verna Thetford
ADDRESS
CASH closing
#1090706086
ACCOUNT NUMBER 1755427395
TOTAL DEPOSIT $ 405819 22
⑆5130⑈4018⑆ 151

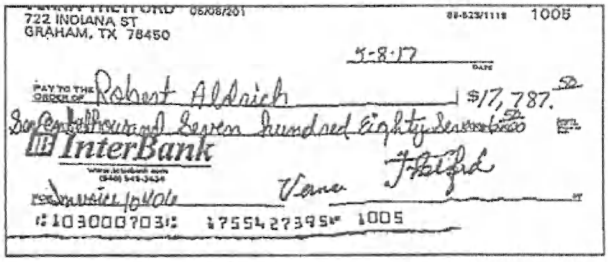
5/8/2017 1755427395 405,819.22


VERNA THETFORD 05/08/201 88-523/1119 1002
722 INDIANA ST
GRAHAM, TX 76450
5-8-17
PAY TO THE ORDER OF Jordan Pharmacy $226.29
two hundred twenty Six & 29/100 DOLLARS
InterBank
FOR Med - Verna Verna Thetford
⑆103000703⑆ 175542739 5⑈ 1002

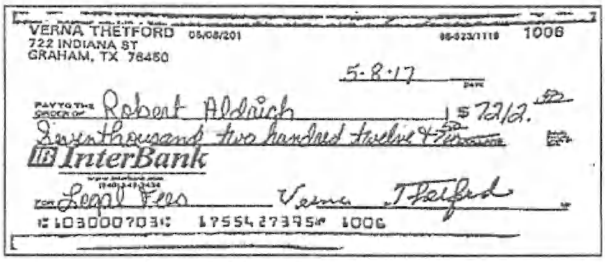
5/10/2017 1755427395 1002 226.29


VERNA THETFORD 05/08/201 88-523/1119 1003
722 INDIANA ST
GRAHAM, TX 76450
5-8-17
PAY TO THE ORDER OF Fort BelKnap Electric $25.62
Twenty five & 62/100 DOLLARS
InterBank
FOR Cattle Water Well overhaul Verna Thetford
⑆103000703⑆ 175542739 5⑈ 1003

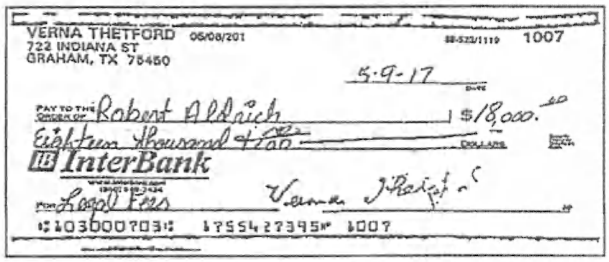
5/10/2017 1755427395 1003 25.62


722 INDIANA ST
GRAHAM, TX 76450 88-523/1119 1005
5-8-17
PAY TO THE ORDER OF Robert Aldrich $17,787.50
Seventeen thousand Seven hundred eighty seven & 50/100 DOLLARS
InterBank
FOR Invoice 10406 Verna Thetford
⑆103000703⑆ 175542739 5⑈ 1005

5/11/2017 1755427395 1005 17,787.50


VERNA THETFORD 05/08/201 88-523/1119 1006
722 INDIANA ST
GRAHAM, TX 76450
5-8-17
PAY TO THE ORDER OF Robert Aldrich $7212.50
Seven thousand two hundred twelve & 50/100 DOLLARS
InterBank
FOR Legal Fees Verna Thetford
⑆103000703⑆ 175542739 5⑈ 1006

5/11/2017 1755427395 1006 7,212.50


VERNA THETFORD 05/08/201 88-523/1119 1007
722 INDIANA ST
GRAHAM, TX 76450
5-9-17
PAY TO THE ORDER OF Robert Aldrich $18,000.00
Eighteen thousand & 00/100 DOLLARS
InterBank
FOR Legal Fees Verna Thetford
⑆103000703⑆ 175542739 5⑈ 1007

5/11/2017 1755427395 1007 18,000.00

EXHIBIT B

Affidavit of Kyle Peavy

Date	InterBank Check No.	Ciera Check No.	Memo	Amount
02/25/16	21523		Bookkeeping	$500.00
05/18/16	21567			99.16
06/12/16	21581			74.00
07/15/16	21598		LD Phone	49.61
07/27/16	21611		Bookkeeping	75.00
08/17/16	21618		Bookkeeping and LD Phone	89.60
10/21/16	21650		Bookkeeping and Phone	330.00
11/04/16		9269	New Cell Phone	56.46
TOTAL				$1,273.83

Appendix E

	American Bar Association **CPR Policy Implementation Committee** **Variations of the ABA Model Rules of Professional Conduct** **RULE 1.14: CLIENT WITH DIMINISHED CAPACITY** **(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.** **(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.** **(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.** Variations from ABA Model Rule are noted. Based on reports of state committees reviewing recent changes to the model rules. For information on individual state committee reports, see http://www.abanet.org/cpr/jclr/home.html. Comments not included. *Current links to state Rules of Professional conduct can be found on the ABA website: http://www.abanet.org/cpr/links.html*
AL Effective 2/19/09	(a) Changes "capacity" to "ability"
AK Effective 4/15/09	(a) Changes "diminished" to "impaired;" (b) Changes "diminished" to "impaired;" adds "that the client" before "cannot adequately;" (c) Changes beginning of paragraph, until "capacity," to: "The

	confidences and secrets of a client with impaired capacity."
AZ Effective 12/1/03	Same as MR
AR Effective 5/1/05	(b) Adds to end: Extreme caution must be exercised by a lawyer before nominating the lawyer, a member or employee of the lawyer's firm, or a relative within the third degree or relationship to serve as guardian ad litem, conservator or guardian.
CA Current Rule	[California's Rules of Professional Conduct are structured differently from the ABA Model Rules. Please see California Rules : http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf]
CO Effective 1/1/08	Same as MR
CT Effective 1/1/07	Same as MR
DE Effective 7/1/03	Same as MR
District of Columbia Effective 2/1/07	(b): replaces "guardian ad litem, conservator or guardian" with "surrogate decision-maker"
FL Effective 5/22/06	Title: same as former MR (a): same as former MR but adds "Maintenance of Normal Relationship." to beginning (b): same as former MR but adds "Appointment of Guardian." to beginning
GA Effective 1/1/01	Adds: The maximum penalty for a violation of this Rule is a public reprimand.
HI Effective 1/1/14	Title: Client Under A Disability (a) Changes "capacity" to "ability" (c): Changes 1.6 to 1.6(a)
ID Effective 7/1/04	Same as MR
IL Effective 1/1/2010	Same as MR
IN Effective 1/1/05	Adds as (d): This Rule is not violated if the lawyer acts in good faith to comply with the Rule.
IA Effective	Same as MR

7/1/05	
KS Effective 7/1/07	Same as MR
KY Effective 7/15/09	(a) Adds "age" after "minority"
LA Effective 3/1/04	(b), at the end: replaces "guardian ad litem, conservator or guardian" with "fiduciary, including a guardian, curator or tutor, to protect the client's interests."
ME Effective 8/1/09	Same as MR
MD Effective 7/1/05	Same as MR
MA Amendment Effective 7/1/2015	(b) Adds after "diminished capacity," "that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation;" replaces language after "client's own interest" with "the lawyer may take reasonably necessary protective action in connection with the representation, including consulting individuals or entities that have ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian." (c) Changes all instances of "information" to "confidential information"
MI* Rules effective 10/1/88	**Made only partial amendments effective 1/1/2011 since the most recent amendments to the ABA Model Rules (amended Rules 3.1, 3.3, 3.4, 3.5, 3.6, 5.5, and 8.5 and adopted new Rules 2.4, 5.7, and 6.6.* Title: "Client Under a Disability;" (a) Has "ability" instead of "capacity;" has "impaired" instead of "diminished;" has "mental disability" instead of "mental impairment;" Does not have MR (b) or (c); Adds: *(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.*
MN Effective 10/1/05	(b): changes "reasonable necessary" to "reasonable" (c): reference is to 1.6(b)(3)
MS Effective 11/3/05	Title: retains former MR (a) and (b): retains former MR (c): replaces "client with diminished capacity" with "client who may be impaired," deletes "reasonably"
MO	(c) Changes "Rule 1.6(a)" to "Rule 4-1.6(a)" throughout.

Effective 7/1/07	
MT Effective 4/1/04	Same as MR
NE Effective 9/1/05	Same as MR
NV Effective 5/1/06	Same as MR
NH Effective 1/1/08	Same as MR
NJ Effective 1/1/04	Did not change title
NM Effective 11/2/09	Changed to Rule 16-114; (a) Renamed "**A. Client lawyer relationship**;" (b) Renamed "**B. Protective action**;" (c) Renamed "**C. Protected information**."
NY Effective 4/1/09	(a) Replaces "a normal client-lawyer" with "a conventional."
NC Effective 3/1/03	Same as MR
ND Effective 8/1/06	Replaces "diminished" with "limited" throughout rule
OH Effective 2/1/07	Same as MR
OK Effective 1/1/08	Same as MR
OR Effective 12/1/06	Same as MR
PA Effective 7/1/06	Same as MR
RI Effective 4/15/07	Same as MR
SC	Same as MR

Effective 10/1/05	
SD Effective 1/1/04	Same as MR
TN Effective 1/1/2011	Same as MR
TX	Does not adopt.
UT Effective 11/1/05	Same as MR
VT Effective 9/1/09	(a) Replaces "paragraph (b)" with "paragraph (b) or (d);" Adds new paragraph (d): "In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of the person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, provided that the following conditions exist: (1) The person or another person acting in good faith in that person's behalf has consulted with the lawyer; (2) The lawyer reasonably believes that the person has no other lawyer, agent or other representative available The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer acting under this paragraph has the same duties under these rules than the lawyer would have with respect to a client. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible."
VA Effective 1/1/04	Title: Client with Impairment
WA Effective 9/1/06	Same as MR
WV *Amendment effective 1/1/2014	Same as MR
WI Effective 7/1/07	Same as MR
WY Effective 7/1/06	Adds: (d) A lawyer appointed to act as a guardian ad litem represents the best interests of that individual, and shall act in the individual's best interests even if doing so is contrary to the individual's wishes. To the

	extent possible, however, the lawyer shall comply with paragraph (a) of this rule.