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04-20-00599-cv
FOURTH COURT OF APPEALS
SAN ANTONIO, TEXAS
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No. 04-20-00599-CV

In the Court of Appeals
Fourth District of Texas — San Antonio

IN THE MATTER OF THE MARRIAGE OF
CARLOS Y. BENAVIDES JR. AND LETICIA R. BENAVIDES

On appeal from the County Court at Law No. 1 of Webb County, Texas
Cause No. 2011-PB6-000081-L2-A

APPELLEE'S BRIEF

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REQUEST TO PARTICIPATE IN ORAL ARGUMENT, IF GRANTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellee asks that the Court deny oral argument because: there is ample authority on the dispositive issues; the relevant facts and legal arguments are fully presented in the briefs; and oral argument would not aid the Court in making its decision.

However, if oral argument is granted, Appellee asks that she be allowed to participate.

ISSUES PRESENTED

1. Did the court abuse its discretion in rejecting Leticia's challenges to Cristy's capacity as guardian when: Leticia's capacity challenges were actually removal arguments; Cristy was never removed as guardian; Leticia waived her capacity challenges; Leticia lacks standing to challenge Cristy's capacity; and Judge Garza's orders appointing Carlos's guardians are not void?
2. Did the court err in granting Cristy's motions for summary judgment when Cristy proved the requisite elements as a matter of law, and Leticia failed to raise any fact issues?
3. Does *res judicata* forever bar Carlos from getting divorced simply because he didn't seek divorce in an interpleader?
4. Did the court abuse its discretion in granting the divorce when the grounds for divorce were conclusively established, and there was no community property to divide?

IDENTITY OF PARTIES

"**Carlos**" refers to Carlos Y. Benavides Jr., an incapacitated person. Carlos passed away on December 23, 2020, after the divorce was rendered and the decree was signed.

"**Cristy**" refers to Appellee Linda Cristina Benavides Alexander, acting in her capacity as guardian of the person and estate of Carlos. Cristy is Carlos's daughter.

"**Leticia**" refers to Appellant Leticia R. Benavides, the former wife of Carlos. They were divorced on September 4, 2020.

"**Judge Garza**" was the former judge of the Webb County Court at Law No. 2 (the prior guardianship court) before he resigned and the guardianship was transferred to the Webb County Court at Law No. 1

"**Judge Martinez**" is the current judge of the Webb County Court at Law No. 1 (the guardianship and divorce court) who rendered the decree that is the subject of this appeal.

"**Shirley Mathis**" or "**Mathis**" was Carlos's temporary guardian and, later, guardian of Carlos's estate while Cristy served as guardian of Carlos's person. Upon Mathis's resignation, Cristy became sole guardian of Carlos's person and estate.

TO THE HONORABLE FOURTH COURT OF APPEALS:

Appellee Linda Cristina Benavides Alexander ("Cristy"), as guardian of the person and estate of Carlos Y. Benavides Jr. ("Carlos"), asks the Court to dismiss the portion of this appeal relating to the dissolution of marital bonds due to Carlos's post-divorce death (or, alternatively, to affirm the dissolution of marital bonds), to affirm the summary judgments, and to affirm the divorce decree. Cristy further asks for other relief to which she is entitled.

INTRODUCTION

The divorce decree below should rightly end Leticia's ten-year legal assault against Carlos and his family. The marriage was based on Leticia's false promise. 2CR853-71. It was immediately followed by another false promise. 2CR877-81. Before he became totally incapacitated, Carlos filed for divorce, but his escape was stymied, presumably by his dementia. 4RR125 (Px3); 2RR143; 1CR52; 4CR3068, 3384, 4396, 4406.

Carlos's severe dementia necessitated his guardianship. A loving and loyal wife would seek a guardianship and protect Carlos. Leticia instead abused his cognitive decline and brought in a lawyer to place a stack of documents before Carlos, totally incapacitated, for signature. *See In re Guardianship of Benavides*, 403 S.W.3d 370 (Tex. App.—San Antonio 2013, pet. denied).

A loving and loyal wife would protect her spouse's property. Leticia instead

started suing Carlos and has never stopped.[1] She sued Carlos's temporary guardian and family trustees for Carlos's family trust distributions. *Benavides v. Mathis*, 433 S.W.3d 59 (Tex. App.—San Antonio 2014, pet. denied) (affirming judgment that Carlos's distributions from the Benavides Family Mineral Trust were separate property in which Leticia had no community interest); *Benavides v. Benavides*, No. 04-14-00523-CV, 2014 WL 5020283 (Tex. App.—San Antonio Oct. 8, 2014, pet. denied) (mem. op.) (affirming order that income distributions from trust were Carlos's separate property). She sued Carlos's temporary guardian, his attorney *ad litem*, and the guardian *ad litem*. *Benavides v. Mathis*, No. 04-13-00270-CV, 2014 WL 1242512 (Tex. App.—San Antonio Mar. 26, 2014, pet. denied) (mem. op.). She sued the guardian of Carlos's estate for $12,500 a month in temporary spousal maintenance. *Mathis v. Benavides*, 511 S.W.3d 294 (Tex. App.—San Antonio 2016, no pet.). She sued both guardians, Carlos's children, and Carlos's family companies, going after, *inter alia*, Carlos's bank accounts, his family trust (again), his home, and his family companies. 3CR1645-52; 2RR126-29 (Leticia claimed Carlos made an oral gift to her of everything he owned); *Benavides v. Alexander*, No. 04-19-00318-CV (pending).

A loving and loyal wife would provide the best care for Carlos. Instead,

[1] There have been at least 24 appellate proceedings arising from the guardianship, interpleader, and divorce, the vast majority of which were brought by Leticia. A list is attached in Appendix Tab A.

Leticia's care of Carlos was so dreadful that the court-appointed guardian *ad litem* recommended Carlos be removed from their home and the unqualified caretakers be replaced. 4RR166-71 (Px6). After being appointed as guardian of the person, Cristy rescued Carlos from Leticia. 2CR832. Even then, Leticia's abuse continued during visitation, which Cristy terminated due to Leticia's "disruptive and harmful behavior." 4RR275 (Px9); 4CR2870. When visits were ordered, Leticia often failed to attend, badgered and belittled the caregivers, argued with the caregivers and physicians regarding Carlos's care and medication, disparaged the guardians, attempted to administer un-prescribed medication, and made inappropriate gestures and innuendos towards Carlos. 4RR619 (Px21); 4CR 125-26.

The circumstances demonstrate that Carlos's wellbeing was always irrelevant to Leticia. She has not communicated with Carlos since 2014. 2CR832. Her objectives are plain: for ten years, she has invariably sought Carlos's fortune—to share with her attorneys, who are to take one-third. 2RR137-39, 142. This litigation must end before this tragedy becomes farce.

STATEMENT OF FACTS[2]

A. Carlos and Leticia sign a premarital agreement, marry, sign a marital-property agreement, and, seven months later, Carlos files for divorce.

Before marrying in 2004, Carlos and Leticia signed a pre-marital agreement and an agreement waiving further disclosure of their respective financial information. 2CR851-81. After marrying, they signed a marital-property agreement. 2CR877-81. As a result, no community property was created during their marriage.

In 2005, Carlos filed for divorce from Leticia, but the divorce was dismissed for want of prosecution in 2007. 4RR125 (Px3); 2RR143; 1CR52; 4CR3068, 3384, 4396, 4406.

B. After Carlos's children apply for guardianship due to his incapacity, Leticia hires a lawyer to draft several estate-planning documents for Carlos, including a will leaving everything to her.

On September 2, 2011, Carlos's children filed a guardianship for their father due to his declining cognitive capacity. 1CR52.

Days later, Leticia hired an attorney, Richard Leshin, to draft several estate-planning documents for Carlos to sign, which included: a Last Will and Testament (purporting to leave Carlos's entire estate to Leticia); a Declaration of Guardian in the Event of Later Incompetence or Need of Guardian (purporting to disqualify

[2] Leticia's Statement of Facts is inaccurate, largely irrelevant, and much of it lacks record references, refers to records in other appeals, or refers to mere allegations. Cristy moves this Court to strike or ignore assertions of fact that are not supported by valid references to the record in this appeal.

Carlos's children from serving as his guardian); and several other documents. 1CR34.

Leticia and Leshin—whom Leticia hired but who purported to represent Carlos—contested the guardianship. *In re Guardianship of Benavides*, 403 S.W.3d at 377; 1CR303-09. Carlos's children and the attorney *ad litem* challenged Leshin's authority to represent Carlos. 1CR305. At the hearing, Leshin testified that he was contacted by Leticia, and it was Leticia who asked him to draft estate-planning documents for Carlos and told him what to put in those documents. 1CR335-36, 376; 3RR1525.

A psychologist testified that Carlos had suffered from progressive dementia for many years, and that he did not have the capacity to hire an attorney in 2011. *In re Guardianship of Benavides*, 403 S.W.3d at 376. A psychiatrist who had examined Carlos testified that Carlos suffered from severe dementia and functioned at the mental level of a two-year old. *Id.* at 376-77. He also testified that Carlos did not have capacity to contract for legal services in September of 2011. *Id.*

C. The court finds that Leshin failed to show that Carlos hired him or possessed the capacity to hire him; this Court affirms.

The guardianship court found that Leshin failed to show that Carlos hired him or that Carlos had capacity to hire him. 1CR337 (5-22-2012 entry). This Court affirmed (*In re Guardianship of Benavides*, 403 S.W.3d at 377) and denied a separate mandamus filed by Leshin due to his lack of authority to represent Carlos.

In re Benavides, No. 04-13-00280-CV, 2013 WL 2145997 (Tex. App.—San Antonio, May 15, 2013, orig. proceeding) (mem. op.).

D. Leticia's attempt to recuse Judge Garza is unsuccessful.

Leticia moved to recuse Judge Garza—the judge of the guardianship court at that time—but Judge Peeples denied her motion. 1CR352, 354.

E. Leticia asserts claims to Carlos's funds, the banks file an interpleader, Carlos's temporary guardian files for divorce, and the guardianship court finds Leticia adverse to Carlos before appointing guardians of Carlos's person and estate.

In 2012, Texas Community Bank filed an interpleader in district court alleging competing demands—between Leticia and the guardian of Carlos's estate—for funds on deposit. 4CR3262, 3370, 4020-55; *In re Benavides*, No. 04-14-00718-CV, 2014 WL 6979438, at *2 (Tex. App.—San Antonio, Dec. 10, 2014, orig. proceeding) (mem. op.).

Later that year, Shirley Mathis—as Carlos's temporary guardian—filed for divorce on Carlos's behalf. 1CR109; 4RR127 (Px4).

On February 22, 2013, the guardianship court signed its Order on Applicants' Motion in Limine, which found that, due to her interests that were adverse to Carlos, Leticia lacked standing to contest the guardianship or the appointment of Carlos's guardians. 1CR25-28. On March 6, 2013, the court: appointed Cristy as guardian of Carlos's person and Mathis as guardian of Carlos's estate; gave Cristy the right to have physical possession of Carlos and establish his domicile; gave Mathis the right

to manage Carlos's property; declared the Leshin-drafted estate-planning documents void due to Carlos's incapacity; and authorized Mathis to continue pursuing Carlos's divorce from Leticia. 1CR31-40. A few days later, the guardianship court authorized Cristy to join Mathis in pursuing Carlos's divorce from Leticia. 1CR43. When Leticia appealed those orders, this Court affirmed:

> Because we affirm the probate court's order granting the motion in limine and finding Leticia lacks standing to contest the guardianship proceeding and the appointment of a guardian, Leticia similarly has no standing to challenge the probate court's orders arising from the guardianship proceeding in this appeal. *See In re Estate of Denman*, 270 S.W.3d 639, 642 (Tex. App.—San Antonio 2008, pet. denied) (appealing party does not have standing to complain of errors that merely affect the rights of others). . . .

In re Guardianship of Benavides, No. 04-13-00197-CV, 2014 WL 667525, at *2 (Tex. App.—San Antonio Feb. 19, 2014, pet. denied) (mem. op.).

In 2013, Carlos was moved from the O'Meara residence to a home next to Cristy. 2CR832. Carlos and Leticia never cohabitated after April 8, 2013. *Id.*

Meanwhile, Leticia sued Mathis, as guardian of Carlos's estate, in district court, claiming that Carlos's distributions from the Benavides Family Mineral Trust were community property.[3]

[3] In *several* appeals, this Court held that distributions from the Benavides Family Mineral Trust were Ward's separate property. *Benavides*, 433 S.W.3d at 63; *Benavides*, No. 04-13-00270-CV, at *2; *Benavides*, No. 04-14-00523-CV, at *1; *In re Guardianship of Benavides*, No. 04-13-00197-CV, at *1-2.

In 2015, Mathis revoked any survivorship designations on Carlos's accounts with Texas Community Bank, BBVA Compass Bank, and Merrill Lynch—the accounts at issue in the interpleader. 3CR1438.

F. Cristy becomes guardian of Carlos's person and estate, Leticia attempts to void all orders arising from the guardianship, the interpleader goes to trial, and Cristy files a new divorce proceeding.

Eventually, Mathis resigned as guardian of Carlos's estate,[4] and the guardianship court appointed Cristy as guardian of Carlos's person *and* estate. 1CR47-49.

In February 2018, Leticia filed her Motion to Vacate All Orders Signed by Former Judge Jesus (Chuy) Garza. 1CR459. The court—Judge Martinez now presiding—denied that motion. 4CR3087. Leticia did not appeal; rather, she expressly waived her right to appeal the order denying her motion to vacate. 1CR461 (4-30-18 entry); 3CR2726-27; 2RR126-28.

Cristy filed the new underlying divorce proceeding in March 2018. 1CR51. Leticia answered with a plea to the jurisdiction, plea in abatement, and general denial. 1CR95, 101.

Meanwhile, Leticia asserted additional claims in the interpleader action—namely, that Carlos had orally gifted her everything he owned, including the funds

[4] The divorce Mathis filed was nonsuited in 2017. 4RR150-51 (Px4). However, in another lawsuit, Leticia obtained an order requiring the guardian of Carlos's estate to continue paying her spousal maintenance. 1CR157, 255-58; 4CR3302, 3998-4000, 4458-59, 4490-95. Cristy filed the new underlying divorce proceeding in March 2018. 1CR51.

in the accounts that were the subject of the interpleader. 2RR126-29; 4CR3262, 3370, 4020-55. The interpleader went to a jury trial in 2019, resulting in a final judgment. 3CR1645-52. The court directed a verdict against Leticia on her claims to an interest in Carlos's companies, Rancho Viejo and Benavides Management. 3CR1648. The jury failed to find that Carlos made an oral gift to Leticia of his interest in the Benavides Family Mineral Trust or his accounts at Texas Community Bank, BBVA Compass Bank, or Merrill Lynch, found that Carlos contributed 100% of the funds in those accounts, but found that Carlos did give Leticia one gift—the O'Meara Circle residence. 3CR1625, 1628. The judgment stated that Carlos, "acting through the guardian of his estate, is entitled to possession and control of the funds, subject to the orders of the guardianship court . . . ." 3CR1650. Both sides appealed. *Benavides v. Alexander*, No. 04-19-00318-CV (pending).

G. Leticia attempts to remove Cristy as guardian, void Cristy's appointment, void more guardianship orders, and recuse Judge Martinez.

On July 7, 2019, Cristy filed a petition for instruction, seeking guidance regarding distributions from the Benavides Family Mineral Trust. 4CR3904, 3967.

In response, Leticia objected and moved to remove Cristy as Carlos's guardian. 4CR3915, 3981, 3992.

The guardianship court ruled that Leticia still lacked standing due to her adverse interests[5] but, to alleviate Leticia's concerns, appointed a guardian *ad litem* to represent Carlos's interests on the trust-distribution issue. 4CR4062.

In her plea to the jurisdiction and plea in abatement in the divorce, Leticia claimed that Cristy lacked standing (*i.e.*, capacity) to act on Carlos's behalf because Cristy should not be his guardian, and the divorce should be abated while the interpleader was appealed. 1CR101-03. The court denied those pleas on September 20, 2019. 1CR285-86.

A few days later, Leticia filed *yet another* motion to vacate a guardianship order (the March 6, 2013, order appointing guardians). 1CR480 (9-26-19 entry); 3CR1143; *In re Benavides*, 605 S.W.3d 234 (Tex. App.—San Antonio 2020, pet. denied). She did this despite: unsuccessfully challenging that *very order*, including the *same* portions she challenges in her *second* motion to vacate, in this Court in 2013 (*In re Guardianship of Benavides*, No. 04-13-00197-CV, at *2); filing a *very similar* motion in 2018 that the court denied (1CR459, 4CR3087); agreeing to *waive* her appeal of the denial of that similar motion (1CR461 (4-30-18 entry); 3CR2726-27; 2RR126-28); and numerous other orders and this Court's Opinions stating she

[5] This Court reversed that decision because (1) the adverse-interest statute does not bar one from objecting to a guardian's actions and (2) since the petition for instruction was a new, discrete phase of the guardianship, the court should have determined Leticia's general standing anew rather than relying on a prior order. *Matter of Guardianship of Benavides*, No. 04-19-00801-CV, 2020 WL 7365454 (Tex. App.—San Antonio Dec. 16, 2020, no pet.) (mem. op.).

lacks standing to complain about the appointment of Carlos's guardians. *E.g., In re Guardianship of Benavides*, No. 04-13-00197-CV, at *2. When *that* motion to vacate was denied (1CR481), Leticia appealed and filed a mandamus proceeding, both of which failed. *In re Benavides*, 605 S.W.3d at 234-39.

Meanwhile, Cristy filed a different petition for instruction, asking the guardianship court to allow her to establish new bank accounts that would generate more income for Carlos. 1CR482 (10-22-19 entry).

On November 25, 2019, the guardianship court granted the petition, giving Cristy permission to move the funds to new accounts. 3CR1441. Leticia filed a motion to vacate that order, too (1CR484 (11-26-19 entry)) and, one day before a divorce-related hearing, moved to recuse Judge Martinez and requested a temporary restraining order to delay moving the funds and the divorce hearing. 1CR485; 4RR435 (Px17). Those motions were denied by Judge Sid Harle, the Presiding Judge of the Fourth Administrative Judicial Region. 1CR487-88. Leticia did not appeal.

H. The divorce is severed from the guardianship proceeding, the court grants Cristy's motions for summary judgment, the divorce is rendered, Leticia attempts to recuse Judge Martinez again, Leticia appeals, and Carlos dies.

Afterward, the underlying divorce was severed from the guardianship. 1CR509.

The divorce proceedings had dragged on for years, and Leticia demanded that—if a trial was to occur—it must be a jury trial. 2CR1140. This caused further

delay because it was virtually impossible to conduct a jury trial during the COVID-19 pandemic.

So Cristy filed a motion for summary judgment based on the undisputed fact that Carlos and Leticia had lived apart without cohabitating for more than three years and another motion for summary judgment to establish that Carlos and Leticia's marital-property agreements were enforceable, thus eliminating any community estate. If both motions were granted, there would be nothing for a jury to decide—no need to litigate fault, no need to characterize separate and community property, and no community property for the court to divide. 2CR827, 829, 834, 846-47. In addition, Cristy filed motions for summary judgment to confirm that various assets were Carlos's separate property. 2CR652, 738, 790, 889, 1052, 1060, 1113, 1122.

Rather than raise a fact issue on any of the elements Cristy proved in her motions for summary judgment, Leticia contended (again) that all the guardianship orders were void and that Cristy should not be Carlos's guardian. 3CR1143, 1466, 1790, 2113, 2436.

The trial court granted the motions for summary judgment that were set for hearing. 4CR3109-19. Cristy's remaining claims and other motions for summary judgment (such as one tracing Carlos's other separate property) became unnecessary, so she nonsuited what remained, and, with no remaining claims for

affirmative relief, the trial court rendered the divorce.[6] 1RR72[7] (nonsuit), 96-97 (court orally rendering divorce); 4CR3120 (decree).

The divorce decree incorporated the summary-judgment rulings, stated that there was no community property, and—as required by the marital-property agreements—awarded each spouse his and her respective separate property. 4CR3120-25.

Leticia lodged various complaints and falsely claimed that the trial court based its summary judgments on information not contained in the record. 4CR3134. In fact, she filed yet another a motion to recuse Judge Martinez on that very basis. *Id.* The motion was denied by Judge Kazen. 4CR4447.

Leticia appealed the divorce decree and requested spousal maintenance pending appeal to be paid by Cristy as guardian of Carlos's estate (because all the spousal maintenance required under the prior temporary orders that were enforced as a contract had expired). 4CR4455-59, 4490. The court granted Leticia's motion. 1CR14-15 (2-5-21 and 2-8-21 entries).

In a last-ditch effort, Leticia asks this Court to reverse the divorce and reinstate the marriage even though Carlos died after the divorce was rendered. This, Leticia

[6] Later that day, the court authorized Cristy to establish an estate plan for Carlos—another ruling Leticia is appealing (Cause No. 04-20-00598-CV).

[7] This is the only instance in this Brief where "1RR" refers to the summary-judgment hearing. All other "1RR" references refer to the recusal hearing.

cannot do, as detailed in Cristy's March 19, 2021, Motion to Dismiss Appeal from Dissolution of Marital Bonds and April 9, 2021, Reply in Support of Motion to Dismiss Appeal from Dissolution of Marital Bonds. That motion remains pending and should be considered and decided in conjunction with this Brief.

SUMMARY OF ARGUMENT

Leticia's arguments fail: her "capacity" arguments, "pleas," and "objections" are really removal arguments; Cristy was, indeed, Carlos's guardian, and Leticia is barred from claiming otherwise; Leticia lacks standing to challenge the fact that Cristy was Carlos's guardian; Judge Garza's orders are not void; the guardianship declaration Leticia had Carlos sign when he was incapacitated is void; *res judicata* does not apply in the way Leticia asserts; and the summary-judgment record established Carlos's right to judgment as a matter of law.

As this Court will see, the trial court committed no error, Leticia and Carlos are divorced, and the long-running legal saga ends here.

ARGUMENT

I. Leticia's capacity arguments fail for numerous reasons (responsive to Leticia's Issues 1-4).

Despite Leticia's arguments, the simple truth is that Cristy was duly appointed as Carlos's guardian. Leticia recognized this many times. 2RR126-29.

Leticia obtained and enforced temporary orders against Cristy, *as Carlos's guardian*. 4CR2880-89 ("Leticia R. Benavides respectfully requests that your client,

Linda Cristina Benavides Alexander, Permanent Guardian of The Person of Carlos Y. Benavides, Jr., honor the standing Temporary Orders signed by Judge Garza . . . ."), 3879 (testimony of Leticia regarding temporary orders), 3998 (discussing spousal maintenance payments made by prior guardian of the estate); 1CR255 (order on Leticia's motion to compel payment of spousal maintenance).

Leticia also sued Mathis, the then-serving guardian of Carlos's estate, to pay spousal maintenance to Leticia. 1CR157, 255-58; 4CR3998-99 (discussing lawsuit), 4458-59, 4490-95 (judgment). After the last spousal-maintenance payment, Leticia filed a Motion for Temporary Orders Pending Appeal—again seeking temporary support from Cristy, as guardian of Carlos's estate. 4CR4455-59. The court granted that motion. 1CR14-15 (2-8-21 entry).

In the interpleader, Leticia sued Carlos's guardians, claiming that Carlos orally gifted Leticia everything he owned, which, once again, would require that those guardians *actually be* Carlos's guardians. 2RR126-29; 4CR3262, 3370, 4020-55.

Therefore, Leticia waived her capacity complaints, accepted the benefits of Cristy's serving as guardian of Carlos's person and estate, and is estopped/quasi-estopped from claiming Cristy was somehow *not really* Carlos's guardian. *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996) (lack of capacity can be waived); *Garza v. Garza*, 155 S.W.3d 471, 474 (Tex. App.—San

Antonio 2004, no pet.) (explaining that acceptance of benefits bars a party from treating a judgment as both right and wrong); *Bank of Am., N.A. v. Prize Energy Res., L.P.*, 510 S.W.3d 497, 511 (Tex. App.—San Antonio 2014, pet. denied) (quasi-estoppel "applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit" and "forbids a party from accepting the benefits of a transaction and then subsequently taking an inconsistent position to avoid corresponding obligations or effects"); *Enochs v. Brown*, 872 S.W.2d 312, 317 (Tex. App.—Austin 1994, no writ) (quasi-estoppel barred party from challenging validity of attorney-fee contract because party accepted benefits of attorney's services); *Thompson v. Cont'l Airlines*, 18 S.W.3d 701, 703 (Tex. App.—San Antonio 2000, no pet.) (judicial estoppel prohibits parties from "changing positions according to the exigencies of the moment").

When Leticia succeeded in suing the prior guardian of Carlos's estate for spousal maintenance, she enforced the prior temporary orders as a *contract*—a contract between Leticia and the guardian of Carlos's estate. 4CR3302, 3998-4000, 4458-59, 4490-95. Estoppel by contract now bars Leticia from claiming the guardians were not validly appointed. *Johnson v. Structured Asset Services, LLC*, 148 S.W.3d 711, 721–22 (Tex. App.—Dallas 2004, no pet.) (estoppel by contract).

Aside from Leticia's Judge-Garza-related complaints, which are addressed

separately below and were *expressly waived by Leticia* (1CR461 (4-30-18 entry); 3CR2726-27; 2RR126-28), her challenges to Cristy's capacity allege misconduct as guardian and claims that Cristy was disqualified to be appointed in the first place. While such allegations and claims might be used to seek a guardian's *removal*, they cannot be used to simply pretend the guardian *doesn't exist*. The Texas Estates Code is clear: Section 1203.052 states that, after giving the guardian proper notice and an opportunity to be heard, a court "may" remove the guardian for various reasons, including *misconduct*, *mismanagement*, or if the guardian *would be ineligible for appointment under Subchapter H, Chapter 1104* (*i.e.*, if the guardian would be *disqualified*). Subchapter H, Chapter 1104, encompasses all grounds for disqualification, which include unsuitability, bad conduct, conflicts of interest, or being disqualified in a declaration. TEX. ESTATES CODE §§ 1104.352-1104.355.

This is not a capacity issue; if Leticia's allegations were true, it would merely mean that, after an evidentiary hearing *in the guardianship case*, the trial court *could have* removed Cristy as Carlos's guardian. But none of that happened, and "[a] court cannot make findings of fact solely from the record on file without hearing evidence, and findings so made would be without effect." *Timmons v. Luce*, 840 S.W.2d 582, 586 (Tex. App.—Tyler 1992, no writ).

While Leticia *did* file a motion to remove Cristy as guardian that contained virtually identical arguments she makes to this Court (4CR3992-4008), it was never

heard. To rebrand her unheard *removal* arguments as "pleas" and "objections" to Cristy's capacity to bring the divorce (*not* to Cristy's summary-judgment evidence) misplaces the burden of proof, circumvents the Estates Code's removal procedure, and improperly raises the matter collaterally in the severed divorce proceeding brought under the Family Code. *See* TEX. ESTATES CODE §§ 1203.052 (after giving notice and opportunity to be heard, court "may" remove guardian for various reasons, including misconduct and disqualification); 1104.352-1104.355 (grounds for disqualification); *In re Guardianship of Thrash*, No. 04-19-00104-CV, 2019 WL 6499225 (Tex. App.—San Antonio Dec. 4, 2019, pet. denied) (mem. op.) (similar guardianship case discussing removal and disqualification); *Timmons*, 840 S.W.2d at 586 ("A court cannot make findings of fact solely from the record on file without hearing evidence, and findings so made would be without effect").

Leticia did not file a motion to intervene in the guardianship either—a prerequisite to challenging a guardian's appointment or seeking a guardian's removal. TEX. ESTATES CODE § 1055.003 ("an interested person may intervene in a guardianship proceeding only by filing a timely motion to intervene" and the trial court "has the discretion to grant or deny the motion" and must consider whether the intervention "will unduly delay or prejudice the adjudication of the original parties' rights" or the "intervenor has such an adverse relationship with the ward . . . that the intervention would unduly prejudice the adjudication of the original parties' rights").

Leticia did not pursue the statutory remedies available in the guardianship proceeding. She cannot sidestep the Estates Code's requirements in a divorce proceeding under the Family Code.

If Cristy *had* been removed as guardian, a plea, verified denial, or objection might have been proper, but that is not the situation here. Here, Cristy was the duly appointed guardian of Carlos's person and estate; Leticia took advantage of that fact when it suited her purposes; and Leticia's arguments that Cristy should have been removed change nothing (nor do they support a plea in abatement or have anything to do with the elements established in Cristy's motions for summary judgment). Cristy proved the elements she needed to prove *via* summary judgment; rather than raise fact issues on those elements, Leticia chose to raise entirely irrelevant arguments. *See Howell v. Thompson*, No. 11-09-00340-CV, 2011 WL 664763, at *1–2 (Tex. App.—Eastland Feb. 24, 2011, no pet.) (mem. op.) (generally, only a guardian may bring a lawsuit on behalf of the ward; appellant admitted ward had a guardian and, thus, could not bring suit as ward's "next friend").

Leticia's claimed fact issues are simply irrelevant to the issues she is appealing. Leticia raised these arguments in response to motions for summary judgment on whether Leticia and Carlos *lived apart* without cohabitation for more than three years, whether certain property *belonged* to Carlos, and whether Leticia and Carlos's *marital-property agreements were valid*. 3CR1143, 1466, 1790, 2113,

2436. Unproven, false claims that Cristy had conflicts of interest or should not have been appointed have no bearing on the summary judgments or the divorce.

Leticia's assertions that the trial court never addressed her capacity-related "pleas" or "objections" is inaccurate. On April 25, 2018, the guardianship court denied her Motion to Vacate All Orders Signed by Former Judge Jesus (Chuy) Garza. 1CR459 (motion); 4CR3087 (order). Leticia waived her right to appeal that denial on the condition that the interpleader went to trial (it did). 1CR461 (4-30-18 entry); 3CR2726-27; 2RR126-28. In the divorce proceeding, the trial court specifically denied Leticia's plea in abatement and plea to the jurisdiction on September 20, 2019. 1CR101-03 (pleas), 285-86 (orders). After that, Leticia filed a motion to vacate the March 6, 2013, order appointing Carlos's guardians—an order that was previously affirmed by this Court. 1CR480 (9-26-19 entry); *see* 3CR1143 (response); *In re Guardianship of Benavides*, No. 04-13-00197-CV, at *2; *In re Benavides*, 605 S.W.3d at 234-39. When the guardianship court denied that motion (1CR481), Leticia appealed and filed a mandamus proceeding, both of which failed. *In re Benavides*, 605 S.W.3d at 234-39.

These "pleas" and "objections" were not objections to summary-judgment evidence—they were complaints that the guardianship court had already ruled on numerous times. Regardless, the "pleas" and capacity-related "objections" in Leticia's summary-judgment responses were presumptively overruled. *Taylor-Made*

Hose, Inc. v. Wilkerson, 21 S.W.3d 484, 493 (Tex. App.—San Antonio 2000, pet. denied) (appellate courts can presume trial court overruled objection based on circumstances). That the trial court referenced an order that was reversed on appeal is irrelevant because (1) that has no relation to the merits of Leticia's summary-judgment objections, (2) Leticia's motion to remove—which she filed in light of Cristy's prior, unrelated petition for instruction on trust distributions—was never heard, and (3) Leticia never filed a different motion to remove.

Further, the capacity arguments Leticia raised in response to Cristy's motion for summary judgment essentially constituted a plea in abatement, which is the proper procedure to challenge a party's capacity. *E.g., Coakley v. Reising*, 436 S.W.2d 315, 317 (Tex. 1968). Leticia knows this because she filed a plea in abatement and a plea to the jurisdiction making the same arguments. 1CR101-03, After those pleas were denied (1CR285-86), Leticia asserted them again in her Second Amended Answer. 2CR1136-38. But she never set those new pleas for hearing before trial (*i.e.*, before the summary-judgment hearing), so she waived them. *Mekeel v. U.S. Bank N.A.*, 355 S.W.3d 349, 353 (Tex. App.—El Paso 2011, no pet.); *Shiffers v. Estate of Ward*, 762 S.W.2d 753, 755 (Tex. App.—Fort Worth 1988, writ denied).

Despite Leticia's desire to apply summary-judgment standards, the true standard of review for the ruling on a plea in abatement is abuse of discretion. *Dolenz*

v. Continental Nat'l Bank, 620 S.W.2d 572, 575 (Tex. 1981). Likewise, removal and disqualification of a guardian are reviewed for abuse of discretion. *Guardianship of A.S.K.*, No. 14-15-00588-CV, 2017 WL 3611845, at *4 (Tex. App.—Houston [14th Dist.] Aug. 22, 2017, pet. denied) (mem. op.) (disqualification); *In re Keller*, 233 S.W.3d 454, 458 (Tex. App.—Waco 2007, pet. denied) (removal). Under that standard, evidence is viewed in the light most favorable to the court's decision, and a court does not abuse its discretion when its decision is based on conflicting evidence. *In re Keller*, 233 S.W.3d at 459.

Since Leticia never set a hearing on her latest plea—or her *de facto* pleas in abatement contained in her summary-judgment responses—one cannot say the trial court abused its discretion by not ruling on a plea: (1) that was never heard; (2) that was improperly couched as an objection; (3) that should have been brought as a motion to remove in the guardianship proceeding rather than a plea or objection in response to motions for summary judgment in the divorce; and (4) that, if properly brought as a motion to remove, would have been denied given that the court repeatedly rejected Leticia's complaints, most of which were complaints about actions the guardianship court had authorized.

Finally, the fact that Leticia's latest plea or *de facto* pleas (which, again, were removal arguments) were never heard is fatal to her appeal. In *In re Guardianship of Soberanes*, this Court wrote:

> [A]ppellant asserts the trial court abused its discretion in failing to remove Sanchez as Marcello's temporary guardian . . . . Because the trial court did not rule on . . . her motion to remove Sanchez as temporary guardian, appellant is precluded from raising these complaints on appeal.

100 S.W.3d 405, 407 (Tex. App.—San Antonio 2002, no pet.).

II. Leticia lacks standing to challenge Cristy's capacity as guardian (responsive to Leticia's Issues 1-4).

In addition, this Court has already ruled that Leticia lacks standing to contest Cristy's appointment as guardian. *In re Guardianship of Benavides*, No. 04-13-00197-CV, at *2 ("Leticia lacks standing to contest the guardianship and the appointment of a guardian" and an "appealing party does not have standing to complain of errors that merely affect the rights of others"); *Matter of Guardianship of Benavides*, No. 04-19-00801-CV, 2020 WL 7365454, at *4-5 (Tex. App.—San Antonio Dec. 16, 2020, no pet.) (mem. op.) (Leticia lacked standing to contest the "creation of the guardianship and appointment of the guardian" and "a person who has an interest adverse to the proposed ward may not: . . . contest the creation of a guardianship [or] contest the appointment of a person as guardian . . . .").

By arguing in this divorce that the orders creating the guardianship and appointing the guardians are void, Leticia is contesting the creation of the guardianship and contesting the appointment of a guardian—two things she expressly cannot do. *Id.*

Because Leticia cannot contest those orders, she cannot claim that Cristy is

not the duly authorized representative to sue for a divorce on Carlos's behalf. Indeed, as Carlos's guardian, Cristy is the only one who can. TEX. ESTATES CODE § 1151.101(a); *In re Guardianship of Archer*, 203 S.W.3d 16, 21-24 (Tex. App.—San Antonio 2006, pet. denied) ("Generally speaking, only the guardian of the ward's estate may bring a lawsuit on behalf of the ward").

Moreover, when this Court first held that Leticia could not contest the appointment of Carlos's guardians or complain of other guardianship orders in that appeal, the Court cited *In re Estate of Denman*, 270 S.W.3d 639, 642 (Tex. App.—San Antonio 2008, pet. denied), and stated that an "appealing party does not have standing to complain of errors that merely affect the rights of others." *In re Guardianship of Benavides*, No. 04-13-00197-CV, at *2. The situation is no different today: Leticia lacked standing to contest the guardianship's creation and the appointment of the guardians in 2013, and her complaints in this appeal all relate back to those rulings. If her rights were not affected by those rulings 2013, they cannot now be retroactively affected by those very same rulings. *See id.*; *see also Matter of Guardianship of Benavides*, No. 04-19-00801-CV, at *4-5; *see also Siddiqui v. Unlimited Asset Recovery, Inc.*, No. 01-09-00026-CV, 2009 WL 3930748, at *2 (Tex. App.—Houston 1st Dist.] Nov. 19, 2009, no pet.) (mem. op.) ("While true that a lack of jurisdiction is fundamental error that does not need to be preserved and may be raised for the first time on appeal, this does not mean that a

person may appeal the trial court's lack of subject matter jurisdiction 'at any time.' Appellant confuses the time for lodging one's complaint regarding want of jurisdiction with the timeline for filing an appeal. Her reading would change the deadline to appeal a jurisdictional defect to 'at any time she feels like it.'").

It is also *true* that no rights belonging to Leticia were affected by the court's rulings in 2013—such as appointing Carlos's guardians and declaring void the Leshin-drafted estate-planning documents. That is because (1) there is no "right" to an inheritance, and (2) a *ward's* preference in who serves as guardian is not a right of the *proposed guardian*. *Archer v. Anderson,* 556 S.W.3d 228, 234 (Tex. 2018) ("a prospective beneficiary has no right to a future inheritance"); *Clark v. Gauntt*, 161 S.W.2d 270, 272 (Tex. Comm'n App. 1942) (expectant heir has no existing interest or right in the property she expects to inherit; she "had only an expectancy of inheritance, which, although it is carelessly referred to in some of the decisions as a right, is nothing more than a hope or a possibility of title"); *Raulston v. Raulston*, 531 S.W.2d 683, 685 (Tex. Civ. App.—Texarkana 1975, no writ) ("a mere hope of inheritance or possibility of acquiring a title in the future is not such a legal expectancy as will amount to a present right or title in property"); *Davis v. Davis*, 734 S.W.2d 707, 709–10 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (a potential beneficiary lacks standing to sue; the possibility of inheritance is not a present right; a right to inherit does not vest until death); *see Mayers v. Mayers*, No.

04-01-00346-CV, 2002 WL 491737, at *1–5 (Tex. App.—San Antonio Apr. 3, 2002, no pet.) (mem. op.) (beneficiary previously named on account could not sue owner of account for removing beneficiary's name—beneficiary "lost nothing because he owned nothing").

Despite the foregoing and this Court's rulings that she cannot contest Cristy's appointment, Leticia argues that Cristy lacks capacity because:

- Judge Garza's order appointing Cristy is void because he had a personal interest in the case;
- Carlos disqualified Cristy from serving as his guardian;
- Cristy engaged in self-dealing; and
- Cristy committed mismanagement.

As shown below, none of these assertions demonstrates that Cristy lacks capacity, much less that Judge Martinez committed reversible error in granting the divorce and awarding Carlos and Leticia their separate property.

III. Judge Garza's orders are not void (responsive to Leticia's Issue 1).

For the same reasons discussed above, Leticia waived her Judge-Garza complaints, she accepted the benefits of Cristy's serving as guardian, and she is estopped/quasi-estopped from making this argument. *Garza*, 155 S.W.3d at 474 (acceptance of benefits bars party from treating judgment as both right and wrong); *Bank of Am., N.A.*, 510 S.W.3d at 511 (quasi-estoppel "applies when it would be

unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit" and "forbids a party from accepting the benefits of a transaction and then subsequently taking an inconsistent position to avoid corresponding obligations or effects"); *Enochs*, 872 S.W.2d at 317 (quasi-estoppel barred party from challenging validity of attorney-fee contract because party accepted benefits of attorney's services); *Thompson*, 18 S.W.3d at 703 (judicial estoppel prohibits parties from "changing positions according to the exigencies of the moment"); *Johnson*, 148 S.W.3d at 721 (estoppel by contract).

And by arguing that Cristy's appointment—and every other order in the guardianship case—is void, Leticia is doing the exact things she lacked standing to do—contesting the *creation* of a guardianship and contesting the *appointment* of a guardian. *In re Guardianship of Benavides*, No. 04-13-00197-CV, at *1-2; *Matter of Guardianship of Benavides*, No. 04-19-00801-CV, at *4.

As also explained above, no rights belonging to Leticia were affected by Judge Garza's orders. *See In re Guardianship of Benavides*, No. 04-13-00197-CV, at *2. Plus, her complaints do not involve legal rights that belong to *her*, and "Texas courts have long held that an appealing party may not complain of errors that . . . merely affect the rights of others." *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 843 (Tex. 2000).

Also recall that Leticia has sought to vacate and/or declare void the

guardianship orders several times before—all for these same reasons, and all to no avail. 1CR459 (motion); 4CR3087 (order); 1CR461 (4-30-18 entry); 3CR2726-27; 2RR126-28; 1CR101-03 (pleas), 285-86 (orders); 1CR480 (9-26-19 entry showing motion filed); 3CR1143 (response); 1CR481 (order); *In re Benavides*, 605 S.W.3d at 234-39 (denying appeal and mandamus).

Throughout her Brief, Leticia treats her challenges to Cristy's capacity as if they are subject to summary-judgment standards. But because her challenges to Cristy's capacity are in the nature of a plea in abatement (or a motion to remove), they are reviewed for abuse of discretion. *Dolenz*, 620 S.W.2d at 575; *Guardianship of A.S.K.*, No. 14-15-00588-CV, at *4; *In re Keller*, 233 S.W.3d at 458. They are not subject to *de novo* review, evidence favorable to Leticia is not taken as true, inferences are not indulged in her favor, and doubts are not resolved in her favor. The standard is not whether Leticia raised a genuine issue of material fact; it is whether the court abused its discretion in denying/not ruling on these "pleas." In short, Leticia applies an erroneous standard of review throughout her capacity arguments. Even more, she applies that erroneous standard of review to capacity challenges that she never set for hearing (or never re-set for hearing after the court denied her pleas), and her capacity challenges are actually removal arguments—another issue that was never heard.

The court did not abuse its discretion by not ruling on something: (1) that was

never heard; (2) that was improperly couched as a plea or objection; and (3) that should have been brought as a motion to remove in the guardianship rather than a plea or objection in the divorce. *See In re Guardianship of Soberanes*, 100 S.W.3d at 407 (Tex. App.—San Antonio 2002, no pet.) ("Because the trial court did not rule on . . . her motion to remove Sanchez as temporary guardian, appellant is precluded from raising these complaints on appeal").

Leticia argues that Judge Garza's appointment of Mathis (not Cristy) as guardian of the estate in 2013 (3CR1601) was retroactively tainted by his alleged solicitation of a loan for a court coordinator—*two years after* Mathis was appointed. *Compare* 1CR28, 40, & 43 (2013) *with* 3CR1173 (2015). Leticia does not contend and has not shown that Cristy, the current guardian, or Judge Martinez, the current judge, were involved in any way.

But Leticia alleges that Judge *Garza* had a personal interest in the *guardianship*.

However, there is no support to claim that the alleged loan came from Carlos's funds or had any relation to the guardianship or related cases. 3CR1173. Nor is there an allegation that the alleged loan was a loan *to* Judge Garza (let alone a *bribe*). *Id.*

Further, a judge is "interested" in a case—and thus disqualified under Article V, Section 11 of the Texas Constitution—if an order or judgment in the case will directly affect him to his personal or pecuniary loss or gain. *Cameron v. Greenhill*,

582 S.W.2d 775, 779 (Tex. 1979) (per curiam) (the interest which disqualifies a judge rests upon a direct pecuniary or personal interest in the result of the case); *Elliott v. Scott*, 25 S.W.2d 150 (Tex. 1930) ("The rule is likewise elementary that the interest sufficient to disqualify a judge from sitting on a case must be a direct, real and certain interest in the subject matter of the litigation, not merely indirect or incidental or remote or contingent or possible"); *Kennedy v. Wortham*, 314 S.W.3d 34 (Tex. App.—Texarkana, 2010, pet. denied) (holding that trial judge, who had no direct pecuniary or personal interest in case, was not disqualified); *Williams v. Viswanathan*, 64 S.W.3d 624, 627 (Tex. App.—Amarillo 2001, no pet.) (the type of interest required for disqualification must be of a pecuniary nature and direct, real, certain and in the subject matter of the case).

An indictment is a charge, not a conviction. Judge Garza's resignation is not evidence that he solicited a loan or bribe from the guardian in this case, that guardianship funds were involved, or that it related to the guardianship whatsoever. The allegation was not that he benefitted personally, but rather that he solicited from Mathis a $3,000 loan for a court coordinator (3CR1171-76), not that Cristy had anything to do with it or even knew about it. And unlike in the cases relied on by Leticia, Judge Garza did not plead guilty or sign a plea agreement admitting to receiving a bribe for making a certain ruling. To the contrary, Judge Garza did not admit wrongdoing, and the disciplinary proceeding was dismissed; there is no

finding that he had an illegal personal interest in any case and certainly not in Carlos's guardianship. *Id.*

Mathis's exercise of her Fifth Amendment rights is no evidence that Judge Garza had a personal interest in the guardianship. Leticia's theory that Mathis's invocation of the Fifth Amendment in a deposition somehow proves Judge Garza had a personal interest in the guardianship involves exactly the type of piling inferences on inferences that appellate courts have consistently rejected. *Marathon Corp. v. Pitzner*, 106 S.W.3d 724 (Tex. 2003) ("Some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence"); *Johnson v. Brewer & Prichard, P.C.*, 73 S.W.3d 193, 210 (Tex. 2002) (same); *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927, n.3 (Tex. 1993) ("When the evidence offered to prove a vital fact is so weak as to do more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence").

Leticia's argument goes like this:

- First, that Mathis and Judge Garza were co-conspirators (without any evidence of the elements of a conspiracy);
- Second, that Judge Garza "made himself a party by having an illegal interest in the case" (which begs the question because this is what Leticia is trying to prove);

- Third, that a refusal to testify is a "statement";
- Fourth, that the "statement" (refusal to say anything) is a deemed admission of guilt (when the very reason for the Fifth Amendment is so that a defendant does not have to admit guilt, *i.e.*, incriminate himself).

The adverse inference rule does not stretch so far. And even if Mathis's assertion of her Fifth Amendment rights in a deposition could give rise to an adverse inference against another person (such as Judge Garza), it is no evidence that Judge Garza had a personal interest in the guardianship. "[A] claim of privilege is not a substitute for relevant evidence." *United States v. Rylander*, 460 U.S. 752, 761 (1983). Without more, the negative inference that Leticia seeks to draw cannot rise beyond "mere suspicion." *Lozano v. Lozano*, 52 S.W.3d 141, 149 (Tex. 2001) (Phillips, C.J., concurring).

Consequently, the inference cannot be considered as evidence at all. *Matbon, Inc. v. Gries*, 288 S.W.3d 471, 489 (Tex. App.—Eastland 2009, no pet.) (negative inferences drawn from truck driver's repeated invocations of the Fifth Amendment privilege against self-incrimination cannot rise beyond mere suspicion and consequently, cannot be considered evidence that the truck driver had actual awareness of the extreme risk created by his conduct); *Blake v. Dorado*, 211 S.W.3d 429, 433 (Tex. App.—El Paso 2006, no pet.) (automobile driver's assertion of his Fifth Amendment privilege against self-incrimination in answer to plaintiffs'

interrogatories did not create an inference of liability sufficient to withstand a no-evidence summary judgment where plaintiffs presented no other relevant evidence); *Webb v. Maldonado*, 331 S.W.3d 879 (Tex. App.—Dallas 2011, pet. denied) ("Without some probative evidence as to the elements of the Webb's' claims, any negative inference that might be drawn from Maldonado's invocation of his privilege against self-incrimination cannot rise beyond mere suspicion").

Because there is no evidence that Judge Garza had a personal interest in the guardianship, his order appointing Cristy as guardian is not void.

Letica discusses the need for an impartial, unbiased judiciary, but she applies that rationale—which relates to a judge's *recusal*—to support her argument that Judge Garza's orders are *void due to an alleged personal interest*. She is applying the wrong standard. Even if her irrelevant arguments are entertained, they do not show judicial bias. *See Shaw v. Harris County Guardianship Program*, No. 01-17-00214-CV, 2018 WL 3233237, at *1–7 (Tex. App.—Houston [1st Dist.] July 3, 2018, pet. denied) (mem. op.).

Additionally, Judge Garza's successor, Judge Martinez, repeatedly ratified Cristy's appointment as guardian. Judge Martinez considered and denied Leticia's motion to declare all of Judge Garza's orders void. 1CR459 (motion); 4CR3087 (order); 3CR2725-27 (discussion). Leticia did not appeal and, in fact, waived her right to appeal that ruling. 1CR461 (4-30-18 entry); 3CR2726-27; 2RR126-28.

Judge Martinez also denied Leticia's motion to vacate the order appointing Carlos's guardians. 1CR480 (9-26-19); 1CR481 (order); *In re Benavides*, 605 S.W.3d at 234-39 (denying appeal and mandamus). Judge Martinez denied Leticia's plea in abatement and plea to the jurisdiction, which were based on similar arguments. 1CR101-03 (pleas), 285-86 (orders). And Judge Martinez has repeatedly acknowledged and approved Cristy's annual reports and accounts as guardian. 1CR427, 442, 451, 456, 458, 463, 467, 472, 498, 508.

Further, if one ignores her unsuccessful appeals and treats Leticia's all-orders-are-void argument as a direct attack, it is too late; if one treats it as a collateral[8] attack, it is improper. *See Kenseth v. Dallas County*, 126 S.W.3d 584, 596 (Tex. App.—Dallas 2004, pet. denied) (plaintiffs, in action against county for charging unauthorized fees in divorce cases filed by plaintiffs, could not collaterally attack allegedly void trial court orders disbursing funds from court registry, given that appeal from those orders was untimely taken); *see also In re Estate of Mitchell*, 20 S.W.3d 160, 161 (Tex. App.—Texarkana 2000, no pet.) (order for partition was an appealable order that was never timely appealed, and thus, it could not be collaterally

[8] It should be considered a collateral attack because (1) the divorce was severed from the guardianship, and (2) even if the divorce had not been severed, the early guardianship orders were the result of discrete phases of the guardianship. *See Matter of Marriage of Thrash*, 605 S.W.3d 224, 234 (Tex. App.—San Antonio 2020, pet. denied) (annulment of ward's marriage was separate from guardianship itself and was not a proceeding to decide whether to remove ward's guardians); *see also Matter of Guardianship of Benavides*, No. 04-19-00801-CV, 2020 WL 7365454, at *3-4 (Tex. App.—San Antonio Dec. 16, 2020, no pet.) (mem. op.) (discussing discrete phases).

attacked by appellant challenging confirmation of sale on basis that it was error to partition property while it retained its homestead character); *see also Bahar v. Lyon Fin. Services, Inc.*, 330 S.W.3d 379, 383–88 (Tex. App.—Austin 2010, pet. denied) (exercising jurisdiction over portion of amended order that reproduced text of prior order that was not appealed "would serve to improperly resurrect the unappealed, 'finally final' portions" of the earlier order); *see also Abira Med. Labs., LLC v. St. Jude Med. SC, Inc.*, No. 14-17-00849-CV, 2018 WL 3911084, at *1–2 (Tex. App.—Houston [14th Dist.] Aug. 16, 2018, no pet.) (mem. op.) (motion to vacate turnover order was a challenge to turnover order itself, so denial of motion to vacate did not re-start appellate timetables); *see also Gulf Energy Expl. Corp. v. Fugro Chance, Inc.*, No. 13-10-686-CV, 2012 WL 601413, at *2 (Tex. App.—Corpus Christi Feb. 23, 2012, no pet.) (mem. op.) (no jurisdiction over order that ruled on same matter previously ruled on); *see also Pilot Travel Centers, LLC v. McCray*, No. 05-13-00002-CV, 2013 WL 3488020, at *4 (Tex. App.—Dallas July 10, 2013, no pet.) (mem. op.) (second order was similar to first order, so second order was not a "further order" under Rule 29.6); *see also London v. London*, 349 S.W.3d 672, 674–75 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (second denial of same request is not independently appealable); *see also CTL/Thompson Texas, LLC v. Morrison Homes*, 337 S.W.3d 437, 441–44 (Tex. App.—Fort Worth 2011, pet. denied) (denial of second motion that was similar to first was not appealable—order denying second

motion "simply rules on the same matters already ruled on by the trial court in the" first denial); *see also In re Saldivar*, No. 13-17-00648-CV, 2017 WL 5760319, at *4-6 (Tex. App.—Corpus Christi Nov. 28, 2017, no pet.) (mem. op.) (denial of second motion raising same arguments as first is not appealable); *see also Siddiqui*, No. 01-09-00026-CV, at *2 ("While true that a lack of jurisdiction is fundamental error that does not need to be preserved and may be raised for the first time on appeal, this does not mean that a person may appeal the trial court's lack of subject matter jurisdiction 'at any time.' Appellant confuses the time for lodging one's complaint regarding want of jurisdiction with the timeline for filing an appeal. Her reading would change the deadline to appeal a jurisdictional defect to 'at any time she feels like it.'").

It should be reiterated that the ruling that Leticia lacked standing, the creation of the guardianship, and the appointment of the guardians all happened *before* Judge Garza allegedly asked Mathis to loan a court coordinator $3,000. *Compare* 1CR28, 40, & 43 (2013) *with* 3CR1173 (2015). And there is no support to claim that the $3,000 were Carlos's funds or had any relation to the guardianship or related cases. 3CR1173.

IV. Carlos lacked capacity to sign estate-planning documents (responsive to Leticia's Issues 1-4).

In yet another attempt to challenge Cristy's appointment as guardian, Leticia argues that Cristy lacks legal authority to act on Carlos's behalf because he allegedly

executed a declaration disqualifying his children from serving as guardian—a document drafted by Leshin, whom Leticia hired days after Carlos's children filed for guardianship. 1CR34, 52.

As noted above in the Statement of Facts, after Leticia and Leshin contested the guardianship (*In re Guardianship of Benavides*, 403 S.W.3d at 377); 1CR303-09), Carlos's children and the attorney *ad litem* challenged Leshin's authority to represent Carlos. 1CR305. At the hearing, Leshin testified that he was contacted by Leticia, and it was Leticia who asked him to draft estate-planning documents for Carlos and told him what to put in those documents. 1CR335-36, 376; 3RR1525.

A psychologist testified that Carlos had suffered from progressive dementia over a course of many years, and that he did not have the capacity to hire an attorney in 2011. *In re Guardianship of Benavides*, 403 S.W.3d at 376. A psychiatrist who had examined Carlos testified that Carlos suffered from severe dementia and functioned at the mental level of a two-year old. *Id.* at 376-77. He also testified that Carlos did not have capacity to contract for legal services in September of 2011. *Id.*

The guardianship court found that Leshin failed to show that Carlos hired him or that Carlos had capacity to hire him. 1CR337 (5-22-2012 entry). This Court affirmed (*In re Guardianship of Benavides*, 403 S.W.3d at 377) and denied a separate mandamus filed by Leshin. *In re Benavides*, No. 04-13-00280-CV, at *1.

On February 22, 2013, the guardianship court found that, due to her interests that were adverse to Carlos, Leticia lacked standing to contest the guardianship or the appointment of Carlos's guardians. 1CR25-28. On March 6, 2013, the court: appointed Cristy as guardian of Carlos's person and Mathis as guardian of Carlos's estate; gave Cristy the right to have physical possession of Carlos and establish his domicile; gave Mathis the right to manage Carlos's property; declared that the Leshin-drafted estate-planning documents were void due to Carlos's incapacity; and authorized Mathis to continue pursuing Carlos's divorce from Leticia. 1CR31-40. A few days later, the guardianship court authorized Cristy to join Mathis in pursuing Carlos's divorce from Leticia. 1CR43. When Leticia appealed those orders, this Court affirmed:

> Because we affirm the probate court's order granting the motion in limine and finding Leticia lacks standing to contest the guardianship proceeding and the appointment of a guardian, Leticia similarly has no standing to challenge the probate court's orders arising from the guardianship proceeding in this appeal. *See In re Estate of Denman*, 270 S.W.3d 639, 642 (Tex. App.—San Antonio 2008, pet. denied) (appealing party does not have standing to complain of errors that merely affect the rights of others). . . .

In re Guardianship of Benavides, No. 04-13-00197-CV, at *2.

Circumstance are no different today: Leticia lacked standing to contest the guardianship's creation and the appointment of the guardians in 2013, and her claim that Cristy was disqualified in a declaration relates back to those rulings. If Leticia's rights were not affected by those rulings 2013, they cannot now be retroactively

affected by those very same rulings. *See id.*; *see also Matter of Guardianship of Benavides*, No. 04-19-00801-CV, at *4-5; *see also In re Benavides*, 605 S.W.3d at 234-39 (denying appeal and mandamus and dismissing Leticia's challenges to the portion of the 2013 order finding Carlos's guardian declaration void).

And voiding the declaration allegedly disqualifying Cristy as guardian did not affect Leticia's rights—a *ward's* preference to who serves as guardian is not a right belonging to the *proposed guardian*.

Again, Leticia is collaterally contesting the creation of the guardianship and contesting the appointment of a guardian—two things she expressly cannot do. *In re Guardianship of Benavides*, No. 04-13-00197-CV, at *2; *Matter of Guardianship of Benavides*, No. 04-19-00801-CV, at *4-5.

Moreover, the estate-planning documents—including the declaration allegedly disqualifying Cristy as guardian—were found to be void, and this Court upheld that decision. 3CR1604; TEX. ESTATES CODE § 1104.202 (a person, *other than an incapacitated person*, may, in a declaration, disqualify a person from serving as guardian); *Matter of Guardianship of Benavides*, No. 04-19-00801-CV, at *1 ("The trial court later signed a final judgment declaring Carlos incapacitated, appointing guardians of his person and estate, and declaring his 2011 estate plan invalid. We affirmed those orders and the parties have since engaged in protracted litigation"); *In re Guardianship of Benavides*, 403 S.W.3d at 377 (Leshin failed to

show Carlos had capacity to hire him); *see In re Benavides*, 605 S.W.3d at 234-39 (denying appeal and mandamus and dismissing Leticia's challenges to the portion of the 2013 order finding Carlos's guardian-declaration void); *see also Guardianship of Bernsen*, No. 13-17-00591-CV, 2019 WL 3721339, at *8 (Tex. App.—Corpus Christi Aug. 8, 2019, pet. denied) (mem. op.) (trial court could have concluded that contestant knew ward lacked capacity to execute documents); *see also Ross v. Sims*, No. 03-16-00179-CV, 2017 WL 672458, at *1–8 (Tex. App.—Austin Feb. 15, 2017, pet. denied) (mem. op.) (similar guardianship case discussing rights, due process, and voiding of documents without notice).

Leticia's present attempt to revisit Cristy's appointment—which this Court has previously affirmed—is barred by these earlier rulings. *E.g.*, *Matter of Guardianship of Benavides*, No. 04-19-00801-CV, at *1 ("The trial court later signed a final judgment declaring Carlos incapacitated, appointing guardians of his person and estate, and declaring his 2011 estate plan invalid. We affirmed those orders and the parties have since engaged in protracted litigation").

Further, Leticia's unproven allegation that Carlos disqualified Cristy from serving as his guardian is an allegation that one uses to seek a guardian's *removal*, *not* to challenge *capacity* and *ignore* the guardian's *existence*. The Texas Estates Code makes that clear: Section 1203.052 states that, after giving the guardian proper notice and an opportunity to be heard, a court "may" remove the guardian for various

reasons, including if the guardian *would be ineligible for appointment under Subchapter H, Chapter 1104* (*i.e.*, if the guardian would be *disqualified*). Subchapter H, Chapter 1104, encompasses all grounds for disqualification, which include *being disqualified in a declaration.* TEX. ESTATES CODE §§ 1104.352-1104.355.

The guardianship court was correct to disregard Carlos's alleged guardianship declaration. *In re Guardianship of Parker*, 275 S.W.3d 623, 632–33 (Tex. App.—Amarillo 2008, no pet.) (court did not abuse discretion in disregarding ward's declaration that disqualified daughter from serving as guardian given that ward was incapacitated).

Finally, even if Carlos's had capacity to sign a declaration disqualifying his children from serving as his guardian (he didn't), and even if the validity of that declaration had been proved (it wasn't), Cristy's appointment would not be void. *Id.*; *see Hailey v. Paduh*, No. 04-12-00823-CV, 2014 WL 1871334, at *11 (Tex. App.—San Antonio May 7, 2014, no pet.) (mem. op.) (statute saying court "may not" act on application until notice is given is not jurisdictional, so lack of notice did not render guardian's appointment void); *see also In re Keller*, 233 S.W.3d at 459 (guardianship determinations are reviewed for abused of discretion). The ward's best interest is the primary consideration in appointing a guardian. TEX. ESTATES CODE § 1104.101.

None of Leticia's arguments is valid:

- Judge Garza's orders are not void.
- Cristy was Carlos's duly appointed guardian, and Leticia is nevertheless estopped/quasi-estopped from claiming otherwise.
- Leticia is bound by the order appointing Cristy as guardian—even though she was not a party—because she is prohibited from contesting it.
- This Court *has* affirmed the finding of Carlos's incapacity, and, regardless, Leticia has never had standing to contest the creation of the guardianship.
- Leticia still does not have standing to contest the appointment of a guardian (which is measured at the time of the appointment), and she is still adverse. If the Court has any doubt about Leticia's adversity, it need look no further than the 24 appellate proceedings and the four pending appeals.
- Leticia's arguments relate to removal, but Cristy was never removed.
- An attack on the appointments of Carlos's guardians must be brought in the guardianship proceeding, not in a severed divorce case. *See Matter of Marriage of Thrash*, 605 S.W.3d at 234 (annulment of ward's marriage was ancillary but separate from guardianship and "annulment

proceeding was not a proceeding to decide whether to remove either of [ward's] guardians").

V. Cristy is not disqualified, she committed no wrongdoing, and Leticia's arguments miss the mark (responsive to Leticia's Issues 1-4).

Leticia further argues that Cristy should not be Carlos's guardian because Cristy allegedly had conflicts of interest and committed self-dealing, breaches of fiduciary duty, misconduct, and mismanagement.

First, for the same reasons above: Leticia is estopped/quasi-estopped from challenging the fact that Cristy was Carlos's guardian; Leticia lacks standing to contest Cristy's appointment; Leticia is complaining about rights that do not belong to her and matters that do not affect her; and this is not a capacity issue.

Second, just like her arguments on Carlos's guardianship declaration, Leticia's unproven allegations of misconduct relate to seeking a guardian's *removal*—they are *not* grounds to challenge *capacity* and *ignore* the guardian's *existence*. Texas Estates Code Section 1203.052 states that, after giving the guardian proper notice and an opportunity to be heard, a court "may" remove the guardian for various reasons, including *misconduct, mismanagement*, or if the guardian *would be ineligible for appointment under Subchapter H, Chapter 1104* (*i.e.*, if the guardian would be *disqualified*). Subchapter H, Chapter 1104, encompasses all grounds for disqualification, which include unsuitability, bad conduct, conflicts of interest, or being disqualified in a declaration. TEX. ESTATES CODE §§ 1104.352-1104.355.

Leticia claims Cristy "had to decide whether certain property was Carlos's separate property or community property, which, in effect decided [Cristy's] own claim." Of course, it was Cristy's duty as guardian to manage all property belonging to Carlos as a prudent person would. TEX. ESTATES CODE §§ 1151.101, 1151.151. It is the court—not the parties—that decides what is community or separate property. 4CR3120; *Benavides v. Mathis*, 433 S.W.3d at 63 (affirming judgment that Carlos's distributions from the Benavides Family Mineral Trust were separate property in which Leticia had no community interest); *Benavides*, No. 04-14-00523-CV, at *1 (affirming order that income distributions to Carlos from trust were separate property); *Benavides*, No. 04-19-00318-CV (pending) (appeal of interpleader judgment awarding 108 O'Meara Circle to Leticia, finding Carlos contributed all funds to his bank accounts, and declaring that Carlos did not give Leticia his bank accounts or interest in the Benavides Family Mineral Trust). The issue is also moot given that Carlos and Leticia signed marital-property agreements eliminating community property. 4CR3120.

Leticia's complaints surrounding the application to establish an estate plan are not part of this appeal—Leticia has already appealed the order on the estate-planning application, which is pending in this Court in Cause No. 04-20-00598-CV. Further, those arguments are rebutted by the facts that (1) Carlos and Leticia were divorced *before* that application was heard (4RR159-60 (divorce hearing on 9-4-20 at

8:30a.m.; 1CR502 (estate-planning hearing on 9-4-20 at 1:30p.m.)), (2) there is an entire chapter in the Texas Estates Code (Chapter 1162) authorizing these types of estate-planning applications, and (3) Leticia has no rights to Carlos's separate property.

A guardian cannot be guilty of self-dealing for engaging in conduct that the Estates Code permits and the guardianship court approves. The Estates Code expressly allows a guardian, *upon court approval*, to make gifts or transfers, outright or in trust, of the ward's property for the purpose of minimizing income, estate, inheritance, and other taxes, payable out of the ward's estate to or for the benefit of the ward's descendants or devisees, including the guardian. TEX. ESTATES CODE § 1162.001.

Nor does Cristy have a statutorily defined conflict of interest. The Estates Code's conflict-of-interest provision prohibits *appointment* of a person as guardian if the person "asserts a claim adverse to the proposed ward or the proposed ward's property." TEX. ESTATES CODE § 1104.354. A claim is defined as "a liability against" or "a debt due to the estate of an incapacitated person." TEX. ESTATES CODE § 1002.005. A gift is not a liability or a debt, so it is not a claim.

Finally, the court authorized Cristy's estate-planning application. 1CR499-504; 4CR4469-80.

Next, Leticia complains that Cristy removed funds from Carlos's bank

accounts and reinvested them. But prudent investment of a ward's property is a duty of a guardian. TEX. ESTATES CODE §§ 1151.101(a) ("the guardian of the estate of a ward is entitled to: (1) possess and manage all property belonging to the ward"), 1151.152 (guardian of estate shall take possession of the ward's personal property), 1151.153 (guardian of estate is entitled to possession of all of the ward's property, including jointly owned property); 3CR1607. And that is precisely what Cristy did—again, with court approval. 3CR1441-42. And the funds in those accounts belonged to Carlos, not Leticia. 4CR4025, 4038-39.

Even ignoring the foregoing, as noted in Section II above, Leticia cannot complain about the disposition of Carlos's payable-on-death or survivorship bank accounts because Leticia had no interest in them. A "right" of survivorship is not a right at all—it is a mere "expectancy" under Texas law. *See Archer*, 556 S.W.3d at 234 ("a prospective beneficiary has no right to a future inheritance"); *see also Wirtz v. Sovereign Camp, W.O.W.*, 268 S.W. 438, 440 (Tex. 1925) (designated beneficiary of a policy has no vested right in the policy); *see also Raulston*, 531 S.W.2d at 685 ("a mere hope of inheritance or possibility of acquiring a title in the future is not such a legal expectancy as will amount to a present right or title in property"); *see also McNair v. Deal*, No. 13-05-264-CV, 2006 WL 3445245, at *3 (Tex. App.—Corpus Christi Nov. 30, 2006, pet. denied) (mem. op.) (one cannot assert ownership of CD funds if she did not contribute money into the CDs, even if she has a right of

withdrawal; joint account belongs to each party in proportion to his net contributions); *see also Nipp v. Broumley*, 285 S.W.3d 552, 557 (Tex. App.—Waco 2009, no pet.) (multi-party account was owned by decedent who contributed 100% of funds in account); *Dawson v. Lowrey*, 441 S.W.3d 825, 836–37 (Tex. App.—Texarkana 2014, no pet.) (payable-on-death beneficiary of account lacked standing to complain that attorney-in-fact withdrew funds during account owner's life); *see also Edwards v. Pena*, 38 S.W.3d 191, 198 (Tex. App.—Corpus Christi 2001, no pet.) (secretary with withdrawal rights on CD funded by ward could not sue guardian to recover funds in CD—secretary "lost nothing because she owned nothing"); *see also Mayers*, No. 04-01-00346-CV, at *1–5 (beneficiary previously named on account could not sue owner of account for removing beneficiary's name—beneficiary "lost nothing because he owned nothing"); *see also Plummer v. Estate of Plummer*, 51 S.W.3d 840, 843 (Tex. App.—Texarkana 2001, pet. denied) (the right of survivorship does not create an ownership right in the funds during the lifetime of the party); *see also Yates v. Blake*, 491 S.W.2d 751, 754 (Tex. Civ. App.—Corpus Christi 1973, no writ) (owner of CD may add or delete other names on CD at any time); *see also Gauntt*, 161 S.W.2d at 272 (expectant heir has no existing interest or right in the property she expects to inherit; she "had only an expectancy of inheritance, which, although it is carelessly referred to in some of the decisions as a right, is nothing more than a hope or a possibility of title"); *see also*

Davis, 734 S.W.2d at 709–10 (a potential beneficiary lacks standing to sue; the possibility of inheritance is not a present right; a right to inherit does not vest until death); *see also Torrington Co.*, 46 S.W.3d at 843 ("Texas courts have long held that an appealing party may not complain of errors that . . . merely affect the rights of others"); *see also* TEX. ESTATES CODE §§ 113.157 (party to account may remove another party's name from account), 113.002 ("party" to an account includes a party's guardian).

In any event, because Carlos and Leticia were divorced before Carlos's death, the survivorship designations would have lapsed anyway. TEX. ESTATES CODE § 123.151(b).

The hearing on reinvesting those accounts was not "*ex parte*" as Leticia claims. She was not entitled to notice because the funds were not hers, she had no right to the funds, no provision of the Texas Estates Code required that she be given notice, and she never filed a motion to intervene in the guardianship, as required. TEX. ESTATES CODE § 1055.003.

The foregoing is precisely why Leticia was not involved in the hearing regarding reinvestment of Carlos's funds. She did not participate in the hearing for the same reasons any given stranger did not participate—she was not a party to the guardianship's general administration.

It is worth noting that Leticia filed a motion to vacate the court's order

regarding the bank accounts (1CR484 (11-26-19 entry)), which was denied and not appealed. She also filed a motion to recuse Judge Martinez for signing that order, which was likewise denied (along with her request for a temporary restraining order). 1CR487-88; *see Whatley v. Walker*, 302 S.W.3d 314, 327–28 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (motion to recuse was ineffective because movant had no justiciable interest in the guardianship proceedings); *see also Kaminetzky v. Dosohs I, Ltd.*, No. 14-03-00567-CV, 2004 WL 1116960, at n.3 (Tex. App.—Houston [14th Dist.] May 20, 2004, no pet.) (mem. op.) (lack of standing).

Next, Leticia alleges Cristy violated a court order that said Leticia could visit Carlos. Of course, the reality is far different. But this allegation is irrelevant to the divorce grounds because visitation—no matter how frequent—is not the same as living together with cohabitation, and living apart without cohabitation was the basis of the divorce. And Cristy, as guardian of Carlos's person, was "entitled to take charge of the person of the ward," had "the right to have physical possession of the ward and to establish the ward's legal domicile," and had "the duty to provide the ward with . . . shelter." TEX. ESTATES CODE § 1151.051; *see* TEX. ESTATES CODE § 1151.056(b) (guardian shall inform relatives if ward's residence has changed).

Cristy was not subject to removal for changing Carlos's residence or limiting visitation because of Leticia's abuse. 2CR831-33; 4CR83, 125-26. The Estates Code expressly authorizes a guardian to limit, supervise, or restrict visitation with the ward

to protect the ward from substantial harm:

> [I]if the guardian determines that certain communication or visitation causes substantial harm to the ward: the guardian may limit, supervise, or restrict communication or visitation, but only to the extent necessary to protect the ward from substantial harm.

TEX. ESTATES CODE § 1151.351(b)(16).

If Leticia truly believed these were removable offenses, she should have filed a motion to remove in the guardianship proceeding and set it for hearing rather than disguising her complaints as summary-judgment objections or pleas in the divorce.

Leticia's logic is circular—she claims that Cristy could not seek the underlying divorce because, *by seeking the divorce*, Cristy therefore had conflicts of interest and was disqualified from continuing to serve as guardian. But, given that Carlos was incapacitated, his guardian was the *only* person who could seek the divorce. *Howell*, No. 11-09-00340-CV, at *1–2 (generally, only a guardian may bring a lawsuit on behalf of the ward; appellant admitted ward had a guardian and, thus, could not bring suit as ward's "next friend"); *see Wahlenmaier v. Wahlenmaier*, 762 S.W.2d 575 (Tex. 1988) (guardian of incapacitated ward may exercise ward's right to petition for divorce); *see also Stubbs v. Ortega*, 977 S.W.2d 718, 722 (Tex. App.—Fort Worth 1998, pet. denied) ("allowing a guardian to petition for divorce on behalf of her ward does not violate the public policy of this state").

Leticia implies that, by virtue of being Carlos's daughter and exercising her statutory powers as guardian, Cristy had impermissible conflicts of interest. That is

not true; that is not how Texas law operates; it ignores the fact that the *prior* guardian also initiated divorce proceedings; and the bottom line is that Cristy was never removed as Carlos's guardian. *See Carney v. Aicklen*, 587 S.W.2d 507 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (although guardian had expectancy in ward's home under terms of ward's will and ward no longer had capacity to revoke or alter will, guardian's refusal to sell home did not constitute a conflict of interest); *see also In Guardianship of Phillips*, No. 01-14-01004-CV, 2016 WL 3391249, at *10 (Tex. App.—Houston [1st Dist.] June 16, 2016, no pet.) (mem. op.).

Cristy acted with court approval in each instance of which Leticia complains. The guardianship court is "vested with broad discretion in determining what is in the best interest of the ward." *Shaw*, No. 01-17-00214-CV, at *6; *In re Guardianship of Tonner*, 514 S.W.3d 242, 246 (Tex. App.—Amarillo 2014), *aff'd*, 513 S.W.3d 496 (Tex. 2016) ("Texas also vests the trial court with broad discretion to decide both the type of guardianship needed, and the ward's best interests"); *In re Guardianship of Glasser*, 297 S.W.3d 369, 376 (Tex. App.—San Antonio 2009, no pet.) ("The probate court has the ultimate responsibility for protection of an incapacitated person's best interest"); *Bank of Tex., N.A., Trustee v. Mexia*, 135 S.W.3d 356, 364 (Tex. App.—Dallas 2004, pet. denied) ("[A] trial court determines whether a guardian should be authorized to take action for a ward by evaluating the best interest of the ward").

The trial court did not abuse its broad discretion in rejecting Leticia's collateral attacks on the statutorily authorized and court-approved actions of which Leticia complains, and Leticia's complaints have no bearing on the issues in this appeal.

VI. The divorce should be affirmed (responsive to Leticia's Issues 5-9).

As an initial matter, because Carlos died after the divorce was rendered, this Court lacks jurisdiction to undo the dissolution of marital bonds. *In re Marriage of Wilburn*, 18 S.W.3d 837 (Tex. App.—Tyler 2000, pet. denied) (when an ex-spouse dies after a divorce, a court has no jurisdiction to undo the divorce). An appellate court can reconsider the property rights of parties incident to the divorce but cannot revisit the issue of marital status. *Bartree v. Bartree*, No. 11-18-00017-CV, 2020 WL 524909, at *5 (Tex. App.—Eastland, Jan. 31, 2020, no pet.) (mem. op.). So this Court has no jurisdiction to reverse the dissolution of marital bonds.

Despite the fact that Carlos was totally incapacitated and could only act through his guardian, Leticia insists that Carlos did not consent to living apart from Leticia. This is not only inaccurate (1CR52; 4CR3068, 3384, 4396, 4406; 4RR125 (Px3); 2RR143 (testimony regarding the 2005 divorce))—it is also irrelevant because Cristy, as guardian of Carlos's person, was "entitled to take charge of the person of the ward," had "the right to have physical possession of the ward and to

establish the ward's legal domicile," and had "the duty to provide the ward with . . . shelter." TEX. ESTATES CODE § 1151.051.

Leticia alleges that Cristy refused to allow Leticia to visit Carlos. She also alleges that the court went outside the summary-judgment record by discussing its recollection about an attorney conference regarding visitation. That discussion and that issue were irrelevant to the question of whether the parties lived apart without cohabitation for more than three years. Visitation—no matter how frequent—is not the same as cohabitation, and lack of cohabitation was the basis of the divorce. It was irrelevant whether Leticia did or did not visit, did or did not file a motion for court-ordered visitation, or did or did not request a hearing on a motion to visit with Carlos. The cause of separation and whether Leticia consented to the separation were equally irrelevant. TEX. FAMILY CODE § 6.006; *Robertson v. Robertson*, 217 S.W.2d 132, 136 (Tex. Civ. App.—Fort Worth 1949, no writ); *Fields v. Fields*, 399 S.W.2d 958, 958-59 (Tex. Civ. App.—Waco 1966, no writ). The summary-judgment evidence established as a matter of law that Carlos and Leticia lived apart for at least three years without cohabitation. That is all the Family Code requires. It would have been reversible error to deny the divorce.

Further, Leticia did not raise lack of consent in her summary-judgment response (4CR2796), so she cannot raise it for the first time on appeal. TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written motion,

answer or other response shall not be considered on appeal as grounds for reversal."); *see Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000) ("On an appeal from summary judgment, we cannot consider issues that the movant did not present to the trial court."); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 679 (Tex. 1979) ("the non-movant must now, in a written answer or response to the motion, expressly present to the trial court those issues that would defeat the movant's right to summary judgment and failing to do so, may not later assign them as error on appeal").

Family Code Section 6.006 provides that "the court may grant a divorce in favor of either spouse if the spouses have lived apart without cohabitation for at least three years." For a living-apart divorce, there is no requirement that the separation have been either voluntary or by mutual consent. *Robertson*, 217 S.W.2d at 136; *Fields*, 399 S.W.2d at 958-59. Here, Carlos—acting through his guardian—did consent by filing the divorce. *Wahlenmaier*, 762 S.W.2d at 575 (guardian of incapacitated ward may exercise ward's right to petition for divorce); *Stubbs*, 977 S.W.2d at 722 (same); TEX. HEALTH & SAFETY CODE § 576.001.

The reason why the spouses lived apart without cohabitating is irrelevant to a no-fault marriage dissolution. Whatever prompted Cristy to move Carlos next to her residence, the fact remains that the spouses lived apart without cohabitation for more than three years, and the reason does not matter in a no-fault divorce. *Robertson*, 217

S.W.2d at 136 (for a living-apart divorce, there is no requirement that separation be voluntary or by mutual consent); *Fields*, 399 S.W.2d at 958-59 (living apart without cohabitation is an independent, no-fault ground for divorce, "and the cause of the separation, and subsequent conduct, of the one seeking a divorce are not proper subjects of inquiry"); *McGinley v. McGinley*, 295 S.W.2d 913, 916 (Tex. Civ. App.—Galveston 1956, no writ) (same).

Once the living-apart ground for divorce is proved, the court "may" grant a divorce. TEX FAMILY CODE § 6.006. Some courts have held that the court *must* grant a divorce once the living-apart ground is proved. *Teas v. Teas*, 469 S.W.2d 918 (Tex. Civ. App.—Waco 1971, no writ) (upon conclusive proof that spouses lived apart, refusal to render divorce was abuse of discretion); *Coleman v. Coleman*, 348 S.W.2d 384, 388 (Tex. Civ. App.—Austin 1961, writ dism'd) (summarily rejecting complaint about divorce when parties stipulated to living apart without cohabitation for more than statutory period); *McGinley*, 295 S.W.2d at 916 (where living apart was basis for divorce, fault or responsibility for separation was not material; and "[u]nder Texas law, marriage is not, in and of itself, a contract, vesting rights in parties, but a status and is subject to dissolution civilly at absolute will of sovereign state"); *Spray v. Spray*, 368 S.W.2d 159 (Tex. Civ. App.—Austin 1963, writ dism'd w.o.j.) (husband was entitled to divorce based on living apart notwithstanding that husband was living bigamously).

But even if granting the divorce was discretionary, the trial court did not abuse its discretion: Carlos and Leticia lived apart without cohabitation for more than three years, and, for that reason, the court "may" grant a divorce. TEX. FAMILY CODE § 6.006; *Taylor v. Taylor*, No. 10-03-002-CV, 2003 WL 23120178, at *2–4 (Tex. App.—Waco Dec. 31, 2003, pet. denied) (mem. op.) (summary-judgment proof established that the spouses lived apart without cohabitation for at least three years, so court did not abuse its discretion in granting the divorce). This is especially so given the circumstances in this case—the numerous attacks Leticia has brought in trial courts and this Court, Leticia's unproven claims and defenses (such as her pleaded but unproved claim that she did not sign the premarital agreement or did not sign it voluntarily), Carlos's inability to have a meaningful relationship due to his incapacity, and Leticia's abuse of Carlos (2CR831-33; 4CR83, 125-26).

Leticia argues that Cristy cannot, on Carlos's behalf, divorce Leticia because grounds giving rise to the divorce must have been committed while Carlos was competent. The simple answer to this argument is that she relies on old cases based on statutes that were subsequently amended and ultimately replaced. There is no such limitation in current Texas Family Code Section 6.006.

Long before the Family Code was adopted, the divorce statute provided that "except where the husband or wife is insane" divorce may be had under sections setting forth grounds. The statute was amended in 1941 to delete that provision. *See*

Robinson v. Robinson, 199 S.W.2d 256, 257 (Tex. Civ. App.—Eastland 1947, no writ). That statute was replaced in 1969 when the Family Code was adopted, and the Family Code contains no such exception.

Even as early as 1923, the Texas Commission of Appeals refused to require a spouse to remain married to an insane person, stating: "By no possible construction can article 4632 be made to deny the granting of divorce in all cases where one of the parties is insane. . . . Divorce, where there is cause for it, is the plaintiff's right. If the defendant were sane, he could not prevent it; he has no election. Therefore, it is not otherwise when he is insane." *Wilemon v. Wilemon*, 250 S.W. 1010, 1012-13 (Tex. Comm'n App. 1923).

The rule Leticia advocates applied only when the divorce was sought under the section of the statute basing the right to the divorce on the insanity of the spouse. *See, e.g., Clarady v. Mills*, 431 S.W.2d 63, 64 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ) ("A person may assert his or her rights to a divorce against the other when such right is based on any ground specified by Article 4629, even though the spouse, who is made defendant, is insane, provided that if the ground is insanity the provisions of subd. 6 must be satisfied").

And even that rule applied only until the disability was lifted by the *appointment of a guardian*. In *Miller v. Miller*, 487 S.W.2d 382 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.), a divorce was vacated because the *respondent*

wife was sued for divorce when she was incompetent, had no guardian or guardian *ad litem* appointed to protect her interests, and was not served. But the court stated that her disability ended when her son as her next friend sued on her behalf. Here, Carlos *had a guardian*, so he could—through his guardian—sue for divorce.

Seeking this divorce—especially with the guardianship court's approval—was completely proper. *Wahlenmaier*, 762 S.W.2d at 575 (guardian of incapacitated ward may exercise ward's right to petition for divorce); *Stubbs*, 977 S.W.2d at 722 ("allowing a guardian to petition for divorce on behalf of her ward does not violate the public policy of this state"); TEX. HEALTH & SAFETY CODE § 576.001.

A. Leticia's *res-judicata* arguments fail (responsive to Leticia's Issues 7-9).

Leticia claims that *res judicata* somehow barred (1) establishing the validity of the marital agreements, (2) confirming what was Carlos's separate property, and (3) the divorce itself, supposedly because those issues could have been addressed in the interpleader. Leticia cites this Court's opinion in *In re Benavides*, No. 04-14-00718-CV, 2014 WL 6979438, at *2 (Tex. App.—San Antonio, Dec. 10, 2014, orig. proceeding) (mem. op.). But there, this Court was ruling on a plea in abatement. The issue was which court had dominant jurisdiction; there was no question about claim preclusion. While the Court said that the interpleader *could* be amended to include all claims pending in the divorce, it did not say that they *ought or must* be brought there. It simply ruled that the divorce should be abated until after the interpleader.

And the test for *res judicata* is different than the test for abatement. In determining whether *res judicata* bars a claim that could have been brought in a prior suit, Texas courts—*in ordinary civil cases*—apply a transactional test: whether two claims arise from the same transaction and are based on the same "nucleus of operative facts." *Citizens Ins. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007); *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 629 (Tex. 1992). A transaction is determined pragmatically, "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms with the parties' expectations or business understanding or usage." *Citizens Ins.*, 217 S.W.3d at 449; *Barr*, 837 S.W.2d at 631.

Here, an interpleader brought by banks to resolve competing claims to certain funds is not the same transaction as a divorce. The divorce and the interpleader do not share a common nucleus of operative fact. The facts are not related in time, space, origin, or motivation. They do not form a convenient trial unit. They do not conform to expectations or business understanding or usage.

Moreover, in *Jeanes v. Hamby*, 685 S.W.2d 695, 699 (Tex. App.—Dallas 1984, writ ref'd n.r.e.), the court wrote: "res judicata is a harsh doctrine, which should be applied narrowly and with caution" and held:

> [E]ven though Jeanes' cause of action for fraudulent conspiracy arose from some of the same events which gave rise to his original suit against

> appellees for payment on the note, the two causes of action depend upon the determination of altogether different factual and legal questions and are sufficiently distinct so as to prevent the doctrine of res judicata from precluding Jeanes' suit.

Id.

But divorces do not involve a single transaction—there are often hundreds of thousands of transactions spanning decades. So the role *res judicata* plays in the characterization of marital property upon divorce is even more limited than in ordinary civil litigation. The Texas Constitution prohibits a court from taking a spouse's separate property in a divorce, and to do so violates a constitutional protection. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140-141 (Tex. 1977). This constitutional protection extends to personal and real property. *Cameron v. Cameron*, 641 S.W.2d 210, 213 (Tex. 1982). In divorce litigation, the doctrine of *res judicata* is applied only to assets that were specifically adjudicated—not other property that could have been adjudicated but wasn't. For example, in *Walton v. Johnson*, 879 S.W.2d 942 (Tex. App.—Tyler 1994, writ denied), the divorce court failed to adjudicate ownership of certain bank accounts of the wife. The ex-husband brought a later suit asking that the accounts be held to be community property and divided equally. The ex-husband asserted *res judicata* barred his ex-wife from proving the separate-property character of the accounts. The appellate court rejected this use of *res judicata*, saying that the issue before the divorce court was the division of the community estate and that the assertion of separate property in the post-

divorce suit was distinct and independent from the adjudication of community-property assets. *Id.* at 945.

The limited application of the doctrine of *res judicata* to questions involving the division of marital property has long been recognized in Texas.

In *Busby v. Busby*, 457 S.W.2d 551, 554-55 (Tex. 1970), the Supreme Court considered a case where the divorce decree failed to divide military retirement benefits, and the ex-wife brought a post-divorce lawsuit to divide the community-property portion. The ex-husband claimed that "partition of such community property is barred under the doctrine of res judicata, since the [ex-wife] failed to ask for a partition in the divorce suit." *Id.* at 554. The Supreme Court wrote: "Since this property was not partitioned at the time of the divorce, we hold that the judgment entered in the divorce suit did not preclude the [ex-wife] from seeking a partition of the undivided community property sought to be partitioned here." *Id.* at 554-55. Because the specific asset was not divided in the divorce, *res judicata* did not apply, even though the community-property assertion could have been presented in the divorce.

In *Brown v. Brown*, 236 S.W.3d 343, 348 (Tex. App.—Houston [1st Dist.] 2007, no pet.), Justice Bland (now of the Texas Supreme Court) wrote: "Res judicata bars post-divorce property division actions, however, only when the divorce decree has disposed of the asset at issue." *See Busby v. Busby*, 439 S.W.2d 687, 689–90

(Tex. Civ. App.—Austin 1969), *aff'd*, 457 S.W.2d 551 (Tex. 1970) (*res judicata* applies to the determination of separate and community property *only if* the marital-property character of that specific asset was actually adjudicated); *see also Walton*, 879 S.W.2d at 944–47 (former wife's failure during divorce proceeding to establish separate character of property not presented to court for division did not, under doctrine of *res judicata*, establish community nature of bank accounts and mineral estates for purposes of former husband's later action for division of that property); *see also Harkness v. McQueen*, 207 S.W.2d 676 (Tex. Civ. App.—Galveston 1947, no writ) (allegation in wife's petition for divorce that no property was accumulated during marriage would not support a judgment based on finding in accordance with such allegation or afford basis for partitioning to her any separate property, and hence finding and recital in divorce decree that no property was accumulated during marriage were not *res judicata* so as to bar subsequent suit by husband to partition realty shown by deed to have been acquired during marriage); *see also Clendenin v. Krock*, 527 S.W.2d 471, 472–74 (Tex. Civ. App.—San Antonio 1975, no writ) (recitation in a divorce decree that no community property was acquired during the marriage is not *res judicata* so as to prevent plaintiff from bringing a suit to partition property shown to have been community property).

While the body of case law involves the limited scope of *res judicata* in a lawsuit brought after the divorce (presumably because spouses rarely sue each other

while remaining married), in this case, the claim *of res judicata* is based on litigation that preceded the divorce. But the same principles apply.

Still, the interpleader: did not adjudicate the marital-property character of the assets subject to Cristy's motions for summary judgment in the divorce; did not award or divide property upon divorce; and did not adjudicate the enforceability of the marital-property agreements.

In the interpleader, Leticia claimed Carlos orally gifted all his property to her. 2RR128-29. But the judgment:

- directed a verdict against her on her claim to Rancho Viejo and Benavides Management (3CR1648-51);
- rendered judgment on the verdict that Carlos did not give her any of the interpleaded funds and that he had contributed 100% of the funds and assets (3CR1650); and
- rendered judgment on the verdict that Carlos did not give her his interest in the Benavides Family Mineral Trust (3CR1650-51).

The only claim Leticia was successful on was the claimed oral gift of the O'Meara Circle residence. 3CR1649. So, if *res judicata* applies, it bars Leticia's claim to the rest of Carlos's property. And that is not a claim that Leticia could have made but did not—it is a claim she actually made and lost.

It is a perversion of the doctrine of *res judicata* for Leticia to argue that her mostly unsuccessful claims of oral gift that she pressed in the interpleader would prohibit the divorce court from fulfilling its statutory duty under Family Code Section 7.001 to distinguish separate from community property and to divide what, if anything, falls within the community estate. Texas Constitution art. XVI, § 15 establishes that property owned or claimed prior to marriage is separate property. *Eggemeyer* holds that the constitutional definition of separate property cannot be altered, and that the Constitution prohibits a court from taking one spouse's separate property and awarding it to the other spouse. A spouse is constitutionally entitled to have his or her separate property set aside to him or her in a divorce. Any application of the doctrine of *res judicata* that would preclude a spouse from proving separate property ownership in a divorce, where the marital-property character of that property has not been previously adjudicated, would violate both constitutional protections. It would also contravene the marital-property agreements signed by Carlos and Leticia, which are binding on the parties. And it would ignore the special treatment that Texas courts have given to claims of *res judicata* stemming from divorces. *Twyman v. Twyman*, 855 S.W.2d 619, 625 (Tex. 1993); *Walton*, 879 S.W.2d at 944–47; *Nu-Way Energy Corp. v. Delp*, 205 S.W.3d 667, 674–78 (Tex. App.—Waco 2006, pet. denied); *Gilbert*, 611 S.W.2d at 870–80; *Moreno v. Alejandro*, 775 S.W.2d 735, 738–39 (Tex. App.—San Antonio 1989, writ denied);

Dean v. First Nat. Bank of Athens, 494 S.W.2d 222, 225–26 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.); *Cohen v. Cohen*, 663 S.W.2d 617, 620–21 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Hicks v. Hicks*, 546 S.W.2d 71, 73 (Tex. Civ. App.—Dallas 1976, no writ); *Sutherland v. Cobern*, 843 S.W.2d 127, 130–31 (Tex. App.—Texarkana 1992, writ denied); *Dunn v. Dunn*, 703 S.W.2d 317, 320 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *Busby*, 439 S.W.2d at 689–90; *Krock*, 527 S.W.2d at 472–74; *Espeche v. Ritzell*, 123 S.W.3d 657, 665–67 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Brown*, 236 S.W.3d at 348–50.

In addition, *res judicata* applies to "claims" (*Daniels v. Empty Eye, Inc.*, 368 S.W.3d 743, 754–55 (Tex. App.—Houston [14th Dist.] 2012, pet. denied)), but "[a]n interest in community property is not a claim or right against the other spouse." *Thompson v. Thompson*, 500 S.W.2d 203, 206–09 (Tex. Civ. App.—Dallas 1973, no writ). In other words, one does not make a "claim" to what he already owns.

Moreover, *res judicata* does not bar a divorce court from giving effect to the terms of marital-property agreements. There are only two defenses to the enforcement of those agreements: lack of voluntariness and unconscionability. TEX. FAMILY CODE §§ 4.006, 4.105. Neither defense was submitted to the jury in the interpleader. 3CR1625-43. There were no rulings on either agreement in the judgment. 3CR1645-52. *Res judicata* was never intended and has never been used as Leticia is trying to use it.

Leticia's theories of recovery in each case were polar opposites, too. In the divorce, she claimed that she owned Carlos's property as community property. The marital-property agreements are relevant to that issue because they provide that there is no community property and that the court must award each spouse's separate property and debts to that spouse. In the interpleader—in contrast—Leticia claimed that Carlos's property was her separate property by virtue of a gift, necessarily admitting that Carlos owned his property because he could not gift what he did not own. Carlos had no need to raise the marital-property agreements in the interpleader because Leticia was not claiming it as community property or contesting that it was Carlos's separate property; instead, Leticia was claiming it was her separate property because Carlos gave all *his* property to her. So *res judicata* does not bar summary judgment on the validity of the marital-property agreements or the confirmation that Carlos's property was his separate property. If *res judicata* did apply, *Leticia* is the one whose claims would be barred. The marital-property agreements are presumptively valid. To contest their validity in the interpleader, Leticia would have had the burden to obtain findings of non-voluntariness and/or unconscionability. This, she failed to do.

In sum, the 49th District Court where the interpleader was tried did not have before it the dissolution of marital bonds, the existence of community property, the confirmation of separate property, the division of the parties' property upon divorce,

or the directive effect of the marital-property agreements. In no sense could the interpleader court have made a property division incident to divorce.

Family Code Section 9.201 further negates *res judicata*'s application: a "former spouse may file a suit . . . to divide property not divided or awarded to a spouse *in a final decree of divorce or annulment*." (emphasis added). Because the interpleader judgment was not a decree of divorce or annulment, claiming the interpleader judgment is *res judicata* would violate Section 9.201.

It makes sense that *res judicata* does not apply here if one takes Leticia's argument to its logical conclusion:

- In the interpleader, Leticia claimed Carlos verbally gifted her everything he owned. The jury rejected that and found that Carlos gave her one gift—a house,
- In the divorce, Leticia claimed *res judicata* barred the court from confirming that other assets were Carlos's separate property and from enforcing the marital agreements because Carlos's guardians—who Leticia also claims *never had capacity to act*—should have obtained affirmative findings that Carlos did *not* make certain gifts, that his property was his separate property, and that the marital agreements were enforceable.

According to Leticia, because Carlos's guardians (whose appointments were void, she claims) failed to obtain those findings, the divorce court is now forever deprived of its statutory authority to decide whether the marital agreements are enforceable, to decide what belongs to whom, to divide property, and, ultimately, to render the divorce itself. This raises the question: Who owns this property then? Surely not Leticia. Presumably, it would still be Carlos because Leticia's entire argument in the interpleader—that Carlos *gifted* her everything *he owned*—is premised on the fact that Carlos *owned* those things. Leticia's argument raises another question: If the court is barred from determining the validity of the marital agreements and from determining what is separate versus community property, how can the court ever render a divorce given that Texas law requires the division of community property *simultaneously with* rendering divorce? Surely, the law would not forever lock one into a marriage simply because he failed to obtain unnecessary findings in an unrelated interpleader. This illustrates how inapplicable *res judicata* is.

Rather than promoting judicial economy, Leticia seeks to turn *res judicata*'s purpose on its head. But she is wrong—"*res judicata*" does not mean everything and anything she wishes it meant. The divorce court had the authority *and the duty* to divide the community property of the spouses (if any existed) and award the spouses their separate property. TEX. FAMILY CODE § 7.001; *Eggemeyer*, 554 S.W.2d at 140-141. Applying *res judicata* here would deprive the court of this authority, based

simply on mostly failed claim of gift in an interpleader. *Res judicata* is inapplicable, and, even when one considers it, its elements are lacking in this case.

B. There is no error in the decree, and granting the divorce was proper (responsive to Leticia's Issues 7-9).

Next, Leticia argues that the divorce decree erroneously declared there is no community property because the trial court did not address ancillary bank accounts, Carlos's retirement benefits, Interbond Group, or gems and jewelry. She contends that, because not every single item was mentioned in the decree, they are presumptively community property. But the court did address them by finding that the marital-property agreements were valid and enforceable (and thus there was no community property) and by awarding each spouse his or her separate property as required by those agreements. Further, there is no requirement that a decree list every single item of property. TEX. FAMILY CODE § 9.201 (authorizing post-divorce suit to divide or award property not addressed in decree); *Shields v. Shields*, No. 09-06-334CV, 2007 WL 2683524, at *1–4 (Tex. App.—Beaumont Sept. 13, 2007, no pet.) (mem. op.) (affirming decree even though it did not list certain property, including wife's separate property); *Redeaux v. Redeaux*, No. 09-06-084 CV, 2007 WL 274728, at *2–4 (Tex. App.—Beaumont Feb. 1, 2007, pet. denied) (mem. op.) (affirming decree even though it did not list value of any personal property); *Sheldon v. Sheldon*, No. 03-11-00803-CV, 2013 WL 6175586, at *7 (Tex. App.—Austin Nov. 22, 2013, no pet.) (mem. op.) (decree made no reference to antique furniture).

Finally, granting the divorce at the conclusion of the summary-judgment hearing was proper, and there was no lack of due process.

In *Matter of Marriage of Thrash*, Thrash's guardians sought to annul Thrash's marriage to Laura because he was incapacitated and, in fact, was already under guardianship when he and Laura married. 605 S.W.3d at 228. The trial court annulled the marriage without holding an evidentiary hearing. *Id.* Laura appealed, claiming the trial court abused its discretion by annulling the marriage without an evidentiary hearing, rendering its decision without sufficient evidence, and depriving Thrash due process by failing to appoint a guardian *ad litem*. *Id.* This Court noted that Thrash's guardians were authorized to seek annulment and that the trial court had discretion to grant or deny annulment if it found that (1) Thrash did not have the mental capacity to consent to marriage or to understand the nature of the marriage ceremony; and (2) since the marriage ceremony, Thrash did not voluntarily cohabite with Laura when Thrash possessed the mental capacity to recognize the marriage relationship. *Id.* at 229. The trial court made those findings simply by considering the pleadings on file in the underlying proceedings, as well as prior testimony and evidence from the guardianship. *Id.* at 231. This Court held that an evidentiary hearing was not required, and the evidence was legally and factually sufficient. *Id.* at 231–31. This Court also rejected Laura's arguments that Thrash was deprived of due process because a guardian *ad litem* was not appointed:

> [T]he guardians' original petition for annulment created an ancillary but separate proceeding from the guardianship proceeding. The trial court made it clear that the annulment hearing was not about the guardianship and the court would not hear issues pertaining to the guardianship. The record shows beyond dispute that the annulment proceeding was not a proceeding to decide whether to remove either of Thrash's guardians. . . . Section 1203.051(b)'s requirement to appoint a guardian ad litem did not apply in the annulment proceeding, and the trial court did not violate Thrash's due process or equal protection rights as alleged.

Id. at 234.

Here, the trial court did not need to hold an evidentiary hearing either. In fact, it did not even need to consider the pleadings—Texas Family Code Section 6.006 says "[t]he court may grant a divorce in favor of either spouse if the spouses have lived apart without cohabitation for at least three years," and Cristy proved that on summary judgment. With that summary judgment, combined with the summary judgment that the marital-property agreements were enforceable (which meant there was no community property to divide), no fact issues remained, and the court properly rendered the divorce.

There was no reason to require a subsequent evidentiary hearing or trial—this was a no-fault divorce with no community property to divide, and the necessary elements were proved as a matter of law. *See Teas*, 469 S.W.2d at 918–20 (instructing divorce court to (1) disregard jury's "no" answer on whether husband

and wife lived apart and (2) grant divorce because husband and wife lived apart[9]); *see also Robertson*, 217 S.W.2d at 136 (for a living-apart divorce, there is no requirement that separation be voluntary or by mutual consent); *see also Fields*, 399 S.W.2d at 958-59 (living apart without cohabitation is an independent, no-fault ground for divorce, "and the cause of the separation, and subsequent conduct, of the one seeking a divorce are not proper subjects of inquiry"); *see also McGinley*, 295 S.W.2d at 916 (where living apart was basis for divorce, fault or responsibility for separation was not material; and "[u]nder Texas law, marriage is not, in and of itself, a contract, vesting rights in parties, but a status and is subject to dissolution civilly at absolute will of sovereign state"); *see also Spray*, 368 S.W.2d at 159 (husband was entitled to divorce based on living apart notwithstanding that husband was living bigamously); *see also Coleman*, 348 S.W.2d at 388 (husband was entitled to divorce based on living apart); *see also Shaw*, No. 01-17-00214-CV, at *1–7; *see also Taylor*, No. 10-03-002-CV, at *2–4 (where grounds for divorce were established on summary judgment, other grounds need not be considered—living apart without cohabitation, alone, was sufficient to support divorce); *see also Ross*, No. 03-16-00179-CV, at *1–8 (similar guardianship case discussing rights, due process, and voiding of documents without notice).

[9] While Texas Family Code Section 6.006 says the court "may" grant a divorce if the spouses have lived apart, *Teas* held that, upon proof of living apart, the refusal to render divorce was an abuse of discretion, which implies that "may" means "must."

Finally, if considering further evidence *had been* necessary, ample evidence supported granting the divorce. 2CR831-33 (abuse); 4CR83, 125-26 (abuse); *see Matter of Marriage of Thrash*, 605 S.W.3d at 228-31 (pleadings and evidence from prior hearings supported granting annulment); *see also Trimble v. Tex. Dep't of Protective & Regulatory Serv.*, 981 S.W.2d 211, 215 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (guardianship court may take judicial notice of prior evidence, rulings, and filings).

The divorce should be affirmed.

CONCLUSION

After inducing Carlos to marry her by agreeing that there would be no community estate and that she would have no claims against his separate property, Leticia has tried everything she can to get Carlos's separate property. She hired a lawyer to draft Carlos—when he was incapacitated—a fraudulent will, a guardianship declaration, and powers of attorney. She attempted to disqualify Carlos's children from being his guardian. She claimed a right to the funds in Carlos's financial accounts. She claimed an interest in Carlos's separate-property minerals and his separate-property interest in, and distributions from, the Benavides Family Mineral Trust. She sued Carlos's guardians several times, including her interpleader claim that Carlos made a verbal gift of everything he owned to her. She claimed in her pleadings that she didn't sign the premarital agreement. And she has

complained to this Court more than 20 times.

After all that, Leticia tries to paint herself as a devoted wife being victimized by her stepchildren, but the truth is plain to see.

To undo ten years of guardianship orders—signed by at least six different judges (Garza, Martinez, Peeples, Harle, Carr, Kazen)—and nullify numerous lawsuits and appeals based on unsound arguments with no legal or factual basis would be absurd. These are not jurisdictional issues, the underlying orders are not void, and the arguments of Leticia—who lacked standing in 2013 to challenge the very orders she challenges here—must be rejected. *See, e.g.*, *Paduh*, No. 04-12-00823-CV, at *11 (refusing to set aside 60 guardianship orders for lack of notice of guardianship).

Leticia's arguments are irrelevant to the issues she is appealing. She raised these arguments in response to motions for summary judgment on whether she and Carlos *lived apart* without cohabitation for more than three years, whether certain property *belonged* to Carlos, and whether her and Carlos's *marital-property agreements were valid*. Spinning conspiracy theories about a prior judge does not "raise a fact issue" on any of the relevant elements.

The trial court committed no error, there was no community property, the grounds for divorce were established as a matter of law, and Carlos's death prevents undoing the dissolution of marital bonds anyway. The divorce must be affirmed.

PRAYER

Appellee Linda Cristina Benavides Alexander, as guardian of the person and estate of Carlos Y. Benavides Jr., asks the Court to dismiss the portion of this appeal relating to the dissolution of marital bonds due to Carlos's post-divorce death (or, alternatively, to affirm the dissolution of marital bonds), to affirm the summary judgments, and to affirm the divorce decree. Appellee further asks the Court to grant her other relief to which she is entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellee's Brief contains a total of 17,754 words, excluding the parts exempted under Texas Rule of Appellate Procedure 9.4, as verified by Microsoft Word 2020. This Appellee's Brief is therefore in compliance with Texas Rule of Appellate Procedure 9.4.

/s/ Richard R. Orsinger
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee's Brief was served on counsel for Appellant, as indicated below, in accordance with the Texas Rules of Appellate Procedure on this 8th day of September, 2021:

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APPENDIX

Tab A List of Appellate Proceedings

TAB A

Date Filed	**Leticia Benavides's Appellate Proceedings:**	**Case No.**
2011-10-18	Leticia's mandamus in guardianship, denied	04-11-00755-CV
2011-10-31	Leticia's appeal of several Oct. 14, 2011, orders, dismissed	04-11-00780-CV
2012-05-24	Leshin's appeal of order on Rule 12 motion, affirmed	04-12-00321-CV
2013-01-08	Leticia's mandamus in divorce, denied	04-13-00012-CV
2013-02-15	Leticia's mandamus in guardianship, denied	04-13-00126-CV
2013-03-18	Leticia's appeal of trust judgment in 406th District Court, affirmed	04-13-00186-CV
2013-03-20	Leshin's appeal of motion to compel sanctions, reversed	04-13-00196-CV
2013-03-20	Leticia's appeal of order on standing and trial, affirmed	04-13-00197-CV
2013-04-29	Leticia's appeal of MSJ suit against Guardian and both *ad litems*, affirmed	04-13-00270-CV
2013-04-30	Leshin's mandamus, denied	04-13-00280-CV
2014-07-24	Leticia's appeal of trust judgment in 406th, affirmed	04-14-00523-CV
2014-10-16	Abatement, writ granted	04-14-00718-CV
2015-09-04	Appeal of judgment from 49th District Court on spousal maintenance, affirmed	04-15-00555-CV

2019-05-15	Interpleader appeal, pending	04-19-00318-CV
2019-10-22	Leticia's mandamus (Oct 16, 2019, Order denying Leticia's Motion to Vacate), denied without opinion Nov. 20, 2019, opinion withdrawn, consolidated and denied with opinion May 20, 2020	04-19-00741-CV
2019-11-15	Leticia's appeal of order on standing to remove guardian or participate in Petition for Instruction, reversed and remanded—court must determine standing anew in each discrete phase of guardianship	04-19-00801-CV
2019-11-22	Leticia's appeal (Oct 16, 2019, Order denying Leticia's Motion to Vacate), dismissed	04-19-00831-CV
2020-07-07	Texas Supreme Court denied stay of divorce, denied mandamus, and denied petition for review of 04-19-00741-CV and 04-19-00831-CV	20-0518 (Mandamus)
2020-08-26	Texas Supreme Court denied stay of divorce, denied mandamus, and denied petition for review of 04-19-00741-CV and 04-19-00831-CV	20-0520 (Petition for Review)
2020-12-11	Leticia's appeal of order authorizing estate plan, pending	No. 04-20-00598-CV
2020-12-11	Leticia's appeal of divorce, pending	No. 04-20-00599-CV
2020-12-11	Leticia's appeal of order requiring her to return Carlos's property, pending	No. 04-20-00600-CV
2021-01-08	Leticia's mandamus seeking stay of probate, denied	04-21-00008-CV

2021-03-04	Leticia's appeal of order finding she lacked standing in Carlos's probate, pending	04-21-00077-CV

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