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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 SUR-REPLY BRIEF

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REQUEST TO PARTICIPATE IN ORAL ARGUMENT

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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"), respectfully files this Sur-Reply Brief to address the arguments raised in the Reply Brief filed by Appellant Leticia R. Benavides ("Leticia").

SUMMARY OF ARGUMENT

In the first two sections below, Cristy addresses the two issues to which this Court limited oral argument. Namely:

1. Because Carlos has died, the dissolution of Carlos and Leticia's marital bonds cannot be undone; and
2. Because the summary-judgment evidence established that Carlos and Leticia lived apart without cohabitation for more than three years and had no community property, divorce was proper.

In case this Court's oral-argument notice should be read more broadly, in the remainder of this Sur-Reply Brief, Cristy responds to certain arguments raised in Leticia's Reply Brief. In short:

1. Leticia lacks standing to challenge Cristy's appointment as Carlos's guardian;
2. Leticia's challenges to Cristy's appointment as Carlos's guardian are actually removal arguments, which were never heard or proved;
3. Cristy was not required to plead or prove waiver or estoppel in the underlying divorce;
4. Judge Garza's orders are not void, and Leticia lacks standing to claim otherwise; and
5. No relief Cristy sought was barred by *res judicata*; in fact, *res judicata*

requires that the marital-property agreements be enforced in the divorce.

ARGUMENT

I. Due to Carlos's death, the divorce cannot be undone (responsive to Leticia's Reply Brief Heading L).

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, Carlos's post-divorce death prevents the divorce from being undone.

In her Reply Brief, Leticia cites *Dunn v. Dunn*, 439 S.W.2d 830 (Tex. 1969), to support her argument that this Court can undo the divorce because "substantial property rights are at issue." Leticia's reliance on *Dunn* is misplaced for two reasons.

First, there *are no* substantial property rights at issue in this appeal—Leticia was awarded her separate property (4CR3122-24), Carlos was awarded his separate property (*id.*), they had no claims to each other's property (2CR853-65), Leticia had no claims for affirmative relief (2CR1138), and there was no community property—the marital-property agreements controlled (2CR853-65; 4CR3113-14, 3122-24). If Leticia is instead claiming to have "property rights" through the will she had Carlos sign when he was incapacitated, those are not rights. *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) ("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) (same); *Davis v. Davis*, 734 S.W.2d 707, 709–10 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (same).

Second, in *Dunn*, the trial court orally rendered divorce; after that oral rendition, but before a decree was signed, the husband died, so the wife moved to dismiss the divorce in the trial court, which was denied. 439 S.W.2d at 831-33. On appeal, the wife argued that (1) oral rendition was not a final decision and (2) because the spouses' property rights were not fully determined, the rendition was an impermissible interlocutory divorce. *Id.* The court of appeals agreed, so it "reversed and remanded the cause with instructions to the trial court to dismiss the case . . . ." *Id.* at 832. The Supreme Court of Texas, however, disagreed and held that (1) the oral rendition was a final decision and (2) the rendition was not an impermissible interlocutory divorce—the trial court determined the spouses' property rights by stating they each had a 50% interest in their community property. *Id.* at 833-34. Finally, *Dunn* commented that the spouses' property rights "would be significantly affected depending upon whether the marriage was held to have been terminated by divorce decree or by death." *Id.* at 834.

Dunn involved an entirely different situation than the one before this Court:

- In *Dunn*, the husband died after rendition but before a decree was signed, and before the appeal. Here, Carlos died after rendition, after the decree was signed, and after Leticia appealed.
- In *Dunn*, the wife—*on her own behalf*—sought to dismiss the *divorce*. Here, Cristy—*on Carlos's behalf*—seeks to dismiss a portion Leticia's *appeal*.
- In *Dunn*, the effect of the requested dismissal would have been to *undo* the divorce (or remain married). Here, the effect of the requested dismissal would be to *uphold* the divorce.
- In *Dunn*, there was community property, and the spouses' rights in that property would be affected depending on whether they were divorced. Here, there is no community property, and the martial-property agreements control.

Leticia's reliance on *Dunn* is simply misplaced. Carlos's death prevents this Court from undoing the dissolution of marital bonds. *In re Marriage of Wilburn*, 18 S.W.3d 837, 840–43 (Tex. App.—Tyler 2000, pet. denied) (wife could not revisit issue of marital status following husband's post-divorce death, as court lacked personal jurisdiction, but court maintained jurisdiction to reconsider property rights incidental divorce); *In re Marriage of Fannette*, No. 10-12-00141-CV, 2013 WL

3533238, at *4 (Tex. App.—Waco July 11, 2013, pet. denied) (mem. op.) (due to husband's post-divorce death, wife could only address portion of decree affecting property division).

II. Because Carlos and Leticia lived apart without cohabitation for more than three years and had no community property, it was not error to grant the divorce (responsive to Leticia's Reply Brief Headings K-O).

These issues—as well as responses to Leticia's arguments about consent, visitation, and the summary-judgment record—are more fully briefed in Cristy's Appellee's Brief, so Cristy will not repeat those arguments here. The bottom line is that, because Carlos and Leticia lived apart for more than three years without cohabitation and had no community property to divide, the divorce was not error. The summary judgment based on living apart without cohabitation and the summary judgment on the marital-property agreements—which meant there was no community property to divide—were supported by the summary-judgment record and, together, were sufficient to support—if not require—rendering the divorce.

Like her consent and voluntariness arguments, Leticia seems to argue that divorce is a purely personal right that cannot be asserted by a ward's guardian. That argument fails because: (1) Texas law allows a guardian to file for divorce on a ward's behalf (*e.g., Wahlenmaier v. Wahlenmaier*, 762 S.W.2d 575 (Tex. 1988)); (2) rights that *are* purely personal to a ward can still be exercised by a guardian if a court authorizes it (*Benavides v. Alexander et al.*, -- S.W.3d --, No. 04-19-00318-

CV, 2021 WL 5088742 (Tex. App.—San Antonio Nov. 3, 2021, no pet. h.)); and (3) the court authorized this by (A) giving Carlos's guardians permission to file for divorce (1CR31-43) and (B) granting the divorce (4CR3120; *Alexander et al.*, -- S.W.3d --, No. 04-19-00318-CV).

As in the trial court, Leticia makes much of visits and Cristy's termination of visitation due to Leticia's abuse of Carlos. But this is not an appeal about visitation. This is simply a tangential rabbit trail that Leticia raised because it was obvious she could not assail the fact that she and Carlos had lived apart without cohabitation.

Even so, *Leticia* placed in the record the reasons her visits were terminated: Leticia "failed to attend her visitation as scheduled, . . . badgered and belittled the caregivers, argued with the caregivers regarding [Carlos's] care, argued with his treating physician regarding the appropriateness of medication, disparaged the guardian of the person, disparaged the guardian of the estate, attempted to administer un-prescribed medication, and made inappropriate gestures and innuendos towards [Carlos]." 4CR2913; 4RR619 (Px21). This is to say nothing of Leticia marrying Carlos upon her false promises regarding his property (2CR853-71; 2CR877-81); looting nearly $1 million from his bank accounts (*Alexander et al.*, -- S.W.3d --, No. 04-19-00318-CV); and suing him for everything he had. *Id.*; 3CR1645-52; 2RR126-29.

And after visitation was terminated, nowhere does Leticia show any effort to compel visitation; instead, counsel conducted a constant letter-writing campaign that never resulted in a motion. 4CR2815-2953. Whatever the reason Leticia's counsel created these unpersuasive and irrelevant exhibits, visitation is not cohabitation, and Cristy's termination of visits has no bearing on living apart. Carlos and Leticia lived apart without cohabitation for at least three years as provided under the Texas Family Code. The grounds for divorce were established as a matter of law.

As explained in Cristy's Appellee's Brief, the summary judgments and the divorce decree are proper, there was no community property because the pre-marital and marital-property agreements are valid, the trial court was required by the agreements and Texas law to award Carlos and Leticia their separate property, and, because of Carlos's death, the marriage dissolution cannot be undone.

III. Leticia lacks standing to challenge the guardianship orders (responsive to Leticia's Reply Brief Headings A-K).

Leticia lacks standing to contest Cristy's appointment as guardian. *In re Guardianship of Benavides*, No. 04-13-00197-CV, 2014 WL 667525, *2 (Tex. App.—San Antonio Feb. 19, 2014, pet. denied) (mem. op.) ("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").

To challenge an order—even an allegedly void order—a party must have standing. *Interest of A.V.T.R.*, No. 14-19-00986-CV, 2021 WL 924372, at *6–7 (Tex. App.—Houston [14th Dist.] Mar. 11, 2021, no pet.) (mem. op.) (to attack order based on voidness, one must have standing and interests that are directly and necessarily affected by the order—not interests that are tangentially or indirectly affected).

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. *In re Guardianship of Benavides*, No. 04-13-00197-CV, at *2 (citing *In re Estate of Denman*, 270 S.W.3d 639, 642 (Tex. App.—San Antonio 2008, pet. denied)). 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 in 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.

Moreover, a *ward's* preference regarding who should or should not serve as guardian is not a right of the *proposed guardian* or the *ward's spouse*. To the extent Leticia claims she had a right to serve as Carlos's guardian, that is not her "right," and she refused to serve as guardian anyway. *Alexander et al.*, -- S.W.3d --, No. 04-19-00318-CV. To the extent Leticia claims Carlos disqualified Cristy from serving as guardian, Leticia lacks standing to make this complaint, Carlos was represented by an attorney *ad litem*, and Leticia's rights were not affected by Cristy's appointment. *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; 1CR305; 4RR166-71 (Px6).

Additionally, there is no "right" to an inheritance. *Archer*, 556 S.W.3d at 234 ("a prospective beneficiary has no right to a future inheritance"); *Gauntt*, 161 S.W.2d at 272 ("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*, 531 S.W.2d at 685 (same); *Davis*, 734 S.W.2d at 709–10 (same).

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").

The underlying guardianship orders are not void. But, in any event, because Leticia lacks standing to challenge the underlying guardianship orders (*i.e.*, the creation of the guardianship and the orders appointing Carlos's guardians), and because no legal interests of Leticia were necessarily and directly affected by those orders, she cannot claim those orders are void. *A.V.T.R.*, No. 14-19-00986-CV, at *6–7 (to attack order based on voidness, one must have standing and interests that are directly and necessarily affected by the order—not interests that are tangentially or indirectly affected).

IV. Leticia's challenges to Cristy's capacity as guardian are actually removal arguments (responsive to Leticia's Reply Brief Headings C-D and I-K).

All of Leticia's arguments—even her argument that Cristy was not properly appointed in the first place—are arguments used to seek a guardian's *removal*, not to disregard the guardian's existence. TEX. ESTATES CODE § 1203.052 (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); TEX. ESTATES CODE §§ 1104.352-1104.355 (Subchapter H, Chapter 1104, encompassing all grounds of ineligibility for appointment, including unsuitability, bad conduct, conflicts of interest, or being disqualified in a declaration).

Instead of filing another motion to remove Cristy—which would have been fruitless given Leticia's complaints were about actions Cristy took with court permission—Leticia filed a plea in abatement, a plea to the jurisdiction, and "objections" to Cristy's motions for summary judgment. But, absent Cristy being removed, those filings were improper.

Leticia argues that she did not need to file a plea in abatement and could instead challenge Cristy's capacity through "objections." First, Leticia ignores the fact that she *did* file a plea in abatement and a plea to the jurisdiction, both of which were denied. 1CR101-03, 285-86. Second, by claiming a plea was not required, Leticia is necessarily acknowledging that her arguments are indeed removal arguments. Third, by raising these "objections" in response to Cristy's motions for summary judgment, Leticia seeks to benefit from summary-judgment standards when, in fact, Leticia has the burden of proof in challenging Cristy's capacity. *E.g.*, *Howell v. Thompson*, No. 11-09-00340-CV, 2011 WL 664763, at *1 (Tex. App.—Eastland Feb. 24, 2011, no pet.) (mem. op.) (guardian need not prove she was ward's guardian or verify her pleadings because her status as guardian was of record and appellant admitted guardian had been appointed). And that is a burden she could not meet because a challenge to Cristy's capacity—through whatever means—could only be successful if Cristy *had been removed* as Carlos's guardian.

If Cristy *had been removed* as Carlos's guardian, then a plea, verified denial, or objection might have made sense, but that is not the situation here. The situation here is that Cristy was guardian of Carlos's person and estate, Leticia knows and admits this and has even used this to her advantage. Leticia's arguments that Cristy should have been removed or should not have been appointed[1] change nothing (nor do they have anything to do with the elements established in Cristy's motions for summary judgment).

Leticia's "fact issues" arguments are irrelevant to the issues she is appealing. Those arguments might apply if, in response to a motion to *remove* Cristy, Cristy filed a *no-evidence* motion for summary judgment, and Leticia responded to that no-evidence motion for summary judgment by raising fact issues on whether Cristy committed misconduct, had conflicts of interest, or would be disqualified. Instead, Leticia raised those arguments in response to motions for summary judgment on whether Leticia and Carlos *lived apart*, whether certain property *belonged* to Carlos as his separate property, and whether Leticia and Carlos's *marital-property agreements were valid*. 3CR1143, 1466, 1790, 2113, 2436. Unproven claims that Cristy had conflicts of interest or should not have been appointed have no bearing

[1] Again, even if Cristy's appointment had been improper, she would still be Carlos's guardian unless she were removed. TEX. ESTATES CODE § 1203.052 (court may *remove* the guardian if the guardian would be *ineligible for appointment* under Subchapter H, Chapter 1104); TEX. ESTATES CODE §§ 1104.352-1104.355 (Subchapter H, Chapter 1104, encompassing all grounds of ineligibility for appointment).

on any of that.

V. Cristy did not need to plead her "new defenses" (responsive to Leticia's Reply Brief Heading B).

As explained in Cristy's Appellee's Brief, capacity challenges can be waived, Leticia waived her challenges to Cristy's capacity as guardian for numerous reasons, and Leticia is estopped from making those challenges in this appeal. In her Reply Brief, Leticia alleges that Cristy improperly raised these "new defenses" of waiver and estoppel for the first time in this appeal and should have pleaded and proved them in the divorce.

Leticia confuses Cristy's argument. Cristy is arguing that Leticia waived her capacity challenges and, for that reason, is estopped from making those challenges in this appeal. That is not a novel concept. *See, e.g.*, *State v. McAllister*, No. 07-03-0405-CV, 2004 WL 2434347, at *2 (Tex. App.—Amarillo Oct. 29, 2004, pet. denied) (mem. op.) ("we first consider McAllister's contention that TxDOT waived its affirmative defense of sovereign immunity and is now estopped from raising it on appeal").

And Cristy had no reason to plead or prove any defenses. In the divorce, Leticia filed a plea in abatement and a plea to the jurisdiction, raising the same arguments she makes to this Court, and they were denied. 1CR101-03, 285-86. In the guardianship, Leticia filed yet another motion to vacate the order appointing Carlos's guardians, making those same arguments. 1CR480 (9-26-19 entry);

3CR1143; *In re Benavides*, 605 S.W.3d 234 (Tex. App.—San Antonio 2020, pet. denied).[2]

Leticia raised her capacity arguments again in response to Cristy's motions for summary judgment, which explains why Cristy "didn't raise [these waiver and estoppel arguments] in her motions for summary judgment." Plus, some of Leticia's actions that constituted waiver occurred *after* the divorce was granted—such as obtaining an order for spousal support. 4CR4455-59; 1CR14-15 (2-8-21 entry).

Still, Leticia cites Texas Rule of Appellant Procedure 33.1 and erroneously insists that Cristy was required to plead and prove waiver and estoppel. That is not the case.

First, the "burden of preserving error for appellate review rests on the *party challenging* the trial court's ruling." *Spielbauer v. State*, 622 S.W.3d 314, 318 (Tex. Crim. App. 2021) (emphasis added). "Since the appellee generally is defending the trial court's ruling, [the appellee] generally has no duty of preservation," and an "appellee's failure to file a brief would not relieve the appellate court of its duty to thoroughly review the appellant's claims and 'any subsidiary issues that might result

[2] She did this despite: unsuccessfully challenging that same order in this Court in 2013 (*In re Guardianship of Benavides*, No. 04-13-00197-CV, at *2); filing a 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 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.

in upholding the trial court's judgment.'" *Id.* at 318–19. As *Spielbaur* explained:

> If an appellee's failure to file a brief would not relieve the appellate court of its duty to uphold the trial court on any applicable theory, neither would the appellee's failure to make a particular argument. Instead, appellate courts will uphold the trial court's ruling on any legal theory applicable to the case, even one that was not mentioned by the trial court or the appellee. The applicable legal theories in a case are limited to those that will not "work[ ] a manifest injustice."

Id. at 319 (internal citations omitted).

Giving this Court examples of Leticia's embracing Cristy's serving as guardian does not "work a manifest injustice." What *would* work a manifest injustice would be allowing Leticia to claim Cristy was *not* Carlos's guardian while simultaneously suing Cristy *as* Carlos's guardian to get more of Carlos's property.

Pleading and error-preservation requirements are based on logic, not hard rules: "If what looks at first glance to be a forfeitable right or requirement cannot actually be affirmatively insisted upon by a party, or acted on by a trial court, that right or requirement cannot logically be subject to the general rule [of error preservation in Rule 33.1]." *Burg v. State*, 592 S.W.3d 444, 448–49 (Tex. Crim. App. 2020); *see City of San Antonio v. Winkenhower*, 875 S.W.2d 388, 391 (Tex. App.—San Antonio 1994, writ denied) (appellee could raise constitutional challenge for first time on appeal because it was "an alternative position to seek affirmance of the judgment").

Cristy was the only party with affirmative claims in the divorce, she was the petitioner, and she was the movant in the summary-judgment motions. In response to those summary-judgment motions, Leticia, the respondent and non-movant, argued that Cristy was not entitled to summary judgment—regardless of the motions' merits—because Cristy was somehow not Carlos's guardian. Those arguments fall under "any other matter constituting an avoidance or affirmative defense." TEX. R. CIV. P. 94. The court rejected Leticia's arguments and granted Cristy's motions for summary judgment. Then Leticia filed this appeal, challenging those orders, and Cristy defends those orders. Cristy had no reason—or need—to raise defenses *to* Leticia's defenses in the trial court. That is because one is not required to plead a defense to an affirmative defense. *See N. Am. Land Corp. v. Boutte*, 604 S.W.2d 245, 247 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (party cited "no cases that hold that one must plead a defense or exception to an affirmative defense"); *see also Jones v. Ray Ins. Agency*, 59 S.W.3d 739, 751–52 (Tex. App.—Corpus Christi 2001, no pet.) (party was not required to plead estoppel as a defense to other party's affirmative defense); *see also Glendon Investments, Inc. v. Brooks*, 748 S.W.2d 465, 467–68 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (same).

Further, "[i]f the matter constituting the estoppel is apparent on the face of the pleadings as in this case, estoppel need not be specially pleaded." *Jones*, 59 S.W.3d

at 752. In *Jones*, the estoppel was apparent because the response to a motion for summary judgment revealed: the insurance companies—whose defense was that the policy was cancelled—nevertheless accepted policy payments; the companies indicated that the policy was in effect; and that conduct was completely inconsistent with the companies' defense that the policy was cancelled. *Id.* In other words, the court was not going to allow the insurance companies to have it both ways. The court further held, "[i]n any event, pursuant to Rule 2 of the Texas Rules of Appellate Procedure, we suspend the operation of Rule 94 of the Texas Rules of Civil Procedure to uphold [the insured's] estoppel claim as we do not believe [the insurance companies] were surprised by such claim and will not be unfairly prejudiced thereby." Finally, the court held "as a matter of law the [insurance companies] are estopped because [the insured] relied to her detriment on the failure to refund the December premium payment to her and [the insurance companies] cannot claim the coverage of the policy was cancelled as attempted." *Id.*

The insurance companies' actions in *Jones* are just like Leticia's—trying to have it both ways depending on the circumstances. Leticia cannot genuinely claim that she is surprised or unfairly prejudiced by Cristy's record references to Leticia's own actions.

To summarize:

1. Cristy had no reason or need to plead or prove waiver or estoppel because:

    a. Leticia's capacity challenges had already failed;

    b. some of Leticia's actions supporting waiver happened after the divorce was granted; and

    c. one need not plead a defense to a defense;

2. Only Leticia—the appealing party—has the burden to preserve error;

3. The summary judgments can be upheld on any theory—even theories not raised in the trial court (if considering them would not work a manifest injustice); and

4. Leticia's actions creating estoppel are apparent in the record.

Leticia knows that Cristy was Carlos's guardian, and she acknowledged it many times. *E.g.*, 2RR126-29. Even ignoring everything else—like the facts that Cristy *was* Carlos's guardian, that Leticia *lacks standing* to claim Cristy was not Carlos's guardian, that Leticia *sought relief* from Cristy *as* Carlos's guardian, that Leticia *waived* her capacity challenges, that Leticia is *estopped* from claiming Cristy was not Carlos's guardian, that Cristy was *never removed*, etc.—Leticia's acknowledgment, by itself, is sufficient to negate her arguments. *See Howell*, No. 11-09-00340-CV, at *1 (guardian need not prove she was ward's guardian or verify her pleadings because her status as guardian was of record and appellant admitted guardian had been appointed).

VI. Judge Garza's orders are not void (responsive to Leticia's Reply Brief Headings F and G).

While Leticia lacks standing to complain about Judge Garza's orders, his orders are not void anyway.

This issue has already been litigated. 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 on April 25, 2018. 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. Leticia had her day in court regarding her spurious allegations against Judge Garza. The court ruled against her. Try as she might, Leticia may not relitigate the issue in order to obtain a different result.

Leticia knows these orders are valid, which explains why she has constantly relied on them by, *inter alia*:

- seeking visitation (4CR2880-89, 3879);
- recovering $12,500 per month of spousal maintenance for eight years (1CR157, 255-58; 4CR3998-99, 4458-59, 4490-95);
- suing the guardians for all of Carlos's property (2RR126-29; 4CR3262, 3370, 4020-55); and
- taking other actions set forth in Cristy's Appellee's Brief (*see* Appellee's Br., pp. 14-17).

Additionally, Leticia has never shown that Judge Garza had any interest—let alone a disqualifying interest—in the guardianship proceeding. There is simply no

evidence that any order or judgment in the guardianship resulted from any sort of direct personal or pecuniary interest in the case. *E.g.*, *Cameron v. Greenhill*, 582 S.W.2d 775, 779 (Tex. 1979) (per curiam).

Leticia's further authorities relating to resignation in lieu of discipline are rightly ignored. *Bishop v. Commission of Lawyer Discipline*, No. 01–18–01115–CV, 2020 WL 4983246 (Tex. App.—Houston [1st Dist.] Aug. 25, 2020, no pet.) (mem. op.)—an unreported opinion—was an appeal of a jury trial suspending a lawyer from practice. Similarly, the Texas Rules of Disciplinary Procedure apply to a Disciplinary Proceeding before the Commission for Lawyer Discipline. TEX. R. DISC. P. 1.06(D), (L). There is no such proceeding in this appeal.

Leticia invited the court to take judicial notice of Jesus Garza's State Bar of Texas page, which unambiguously states "Voluntarily Resigned from the State Bar of Texas" and "No Public Disciplinary History." Part X of the Texas Rules of Disciplinary Procedure is completely irrelevant to this appeal. Those rules apply only to a Disciplinary Proceeding, of which there is none in the record.

Further, were there such a proceeding, the only thing that can be "conclusively established" under Rule 10.02 is the Chief Disciplinary Counsel's "detailed statement of the Professional Misconduct." There is no such statement in the record. There simply was no resignation from the State Bar of Texas in lieu of discipline.

The record reveals no proceeding before the State Bar of Texas; Judge Garza's proceeding was before the State Commission on Judicial Conduct. 3CR1174; *see* TEX. GOV'T CODE Ch. 33. He resigned judicial office, but unambiguously denied the allegations and did not admit to guilt or fault. 3CR1174. The Commission agreed with this disposition.

Leticia asserts that the claim of privilege against self-incrimination by one person—Mathis—is evidence of guilt of a different person—Judge Garza. That assertion is premised on the assumption that Mathis was an agent or co-conspirator of Judge Garza so that her refusal to testify is a vicarious refusal to testify by him. But Leticia failed to prove the predicate of either agency or conspiracy. Absent that proof, Mathis's refusal to testify is no evidence of Judge Garza's guilt of any alleged crime. *P.C. v. E.C.*, 594 S.W.3d 459, 465 (Tex. App.—Fort Worth 2019, no pet.) (declining to hold that deponent's Fifth Amendment invocation gave rise to inference against party).

VII. *Res judicata* barred nothing Cristy sought in the divorce and, in fact, requires enforcement of the marital agreements (responsive to Leticia's Reply Brief Headings A and N).

Leticia argues that, because Cristy failed to obtain findings in the interpleader that the pre-marital and marital-property agreements were enforceable and that certain property was separate property, the divorce court could not award that property to Carlos's guardianship estate. That argument is (1) negated in Cristy's

Appellee's Brief and (2) completely foreclosed by this Court's opinion in the appeal of the interpleader action, holding that—as a matter of law—the marital-property agreement ratified the pre-marital agreement and that both agreements are enforceable. *Alexander et al.*, -- S.W.3d --, No. 04-19-00318-CV. In that case, because the pre-marital agreement required a writing signed by both parties to waive or abandon its terms, and because Leticia admitted signing the marital-property agreement that expressly ratified the pre-marital agreement, this Court reversed and rendered the district court's judgment awarding Leticia the only property she recovered—the house. *Id.* This Court's opinion bars Leticia from asserting in the divorce proceeding that:

- the pre-marital and marital-property agreements are invalid (or that *res judicata* barred Cristy from asserting their validity);
- there is any community property or that she has claims against Carlos's separate property;
- the court could do anything other than what it did—award each spouse's separate property to that spouse.

VIII. The record speaks for itself (responsive to Leticia's Reply Brief Heading A).

Leticia claims that Cristy's Appellee's Brief is "littered with representations that are misleading or flat out false." Leticia doesn't elaborate on that claim, much less remedy her own unsupported misrepresentations. But Cristy will not waste the Court's time. Suffice it to say that the arguments and factual statements in Cristy's Appellee's Brief are supported by case law and record references.

PRAYER

Appellee, 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, affirm the dissolution of marital bonds), affirm the summary judgments, and 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 Sur-Reply Brief contains a total of 5,253 words, excluding the parts exempted under Texas Rule of Appellate Procedure 9.4, as verified by Microsoft Word 2020. Appellee's Brief and this Appellee's Sur-Reply Brief contain a combined total of 23,007 words. This Appellee's Sur-Reply 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 Sur-Reply Brief was served on counsel for Appellant, as indicated below, in accordance with the Texas Rules of Appellate Procedure on this 19th day of November, 2021:

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