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By: raul serrano

CAUSE NO. 2011-23444

IN THE MATTER OF THE MARRIAGE OF KATHERINE LOUISE KING AND CHRISTOPHER MICHAEL KING, AND IN THE INTEREST OF ROY ALLEN KING, A CHILD	IN THE 311TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

AMENDED PLEA TO JURISDICTION

This Amended Plea to the Jurisdiction is brought by KATHERINE LOUISE KING, Petitioner, who shows in support shows as follows. This Plea is brought to the Court's attention because the Respondent in this case is totally incapacitated by Court Order and his Guardian is filing litigation on his behalf without authority. The Guardian, Rodney King, is seeking rulings from this Court for his benefit when he is not empowered by Court Order, Probate Code Statue, or a provision giving a party Standing under the Family Code. The Court is without Jurisdiction to hear the claims and causes of action asserted by Rodney King and his pleadings should be struck for lack of jurisdiction.

ISSUES PRESENTED

Katherine King presents the following issues.

Issue No. 1: May a guardian of an incapacitated parent bring a SAPCR on behalf of the ward-parent under Texas law? ***No.***

Issue No. 2: May a guardian of an incapacitated parent exercise *individual* rights as a managing conservator of the minor child, as well as rights of possession and access, without the non-parent offering the required proof? ***No.***

Issue No. 3: May non-parents who have filed no pleadings with a Court obtain and exercise rights of possession and access over a minor child, over the objection of the sole competent parent? ***No.***

Issue No. 4: May a parent who has been declared totally incapacitated—and who has no right to exercise any authority over his own affairs—be designated joint managing conservator over a minor child, over the sole competent parent's objections? ***No.***

I. STATEMENT OF FACTS

A. Individuals Involved

Name	Relationship
Katherine Louise King	Biological mother; sole competent parent of Roy Allen King
Christopher Michael King	Biological father of Roy Allen King; totally incapacitated; Ward of Rodney King
Roy Allen King	Minor, disabled child from the marriage between Katherine King and Christopher Michael King
Rodney King	Guardian of the person and of the estate of Christopher King; paternal grandfather of Roy Allen King
Sharon King	Non-party; paternal grandmother of Roy Allen King
Nancy Rommelmann	Counsel for Rodney King

B. Background Facts

1. Birth of Roy Allen King and Eventual Dissolution of the Marriage

On or about November 8, 1998, Katherine Louise King ("Katherine") and Christopher Michael King ("Christopher") married. On April 11, 2000, Roy Allen King ("Roy"), their son, was born. Due to complications, Roy was born with cerebral palsy, microencephaly, and cortical blindness. (Affidavit of Katherine King ("King Affidavit"), Exhibit A, ¶3.) He is unable to crawl, walk, sit up on his own, communicate verbally, feed himself, or hold a toy. (*Id.* ¶4; Tr. of April 16, 2012 Hearing ("4/16/2012 Hearing"), Exhibit O, at 39:10-18.) He also suffers from seizures. *Id.* at ¶ 23. At all times following his birth, Katherine has served as Roy's primary caretaker. (*Id.* ¶ 4; Deposition of Rodney King ("Rodney King Depo."), Exhibit C, 46:5-7, 13-15.) She is devoted to his care daily. (King Affidavit, Ex. A, ¶4.)

By 2005, the marriage between Katherine and Christopher had grown unsustainable, and the two separated. In their separation, Katherine continued to be Roy's primary caretaker, and Roy continued residing exclusively and solely with his mother. (Ex. A, at ¶5.)

2. *Rodney and Sharon King's Lack of Possession, Control, or Custody of Roy*

Rodney and Sharon King are Roy's paternal grandparents and Christopher's parents. They have been married for approximately 40 years, although spent some time separated and nearly divorced. Affidavit of Katherine King dated March 12, 2013, attached as Exhibit P, at ¶3. In 2007, Rodney underwent treatment for prostate cancer. *Id.* He has a history of heart problems, having had a heart attack at home in his early 40s, when Sharon and Christopher resuscitated him and saved his life. *Id.* Sharon has Type II diabetes. *Id.* As a result of the diabetes, Sharon has severe neuropathy of the feet. *Id.* Years ago, she underwent a quadruple bypass. *Id.* Neither Sharon nor Rodney have ever been involved in Roy's caretaking or issues concerning him and have never had custody, possession, or control of him. *Id.* at ¶4; Ex. C, at 51:5-52:20. They have actually never cared for Roy for more than 12 hours at a time—and this only a few times and only then with assistance of family members or, in this proceeding, a court-ordered third party. Ex. P at ¶4. In fact, during Roy's young childhood years—when he was approximately ages 4 and 5—Rodney and Sharon rarely made an effort to see or visit their only grandson. *Id.* at ¶4.

Rodney and Sharon provided no support to Katherine—financial or otherwise—after Christopher's accident to help her support Christopher or Roy, much less inquired about her or Roy's well-being. *Id.* at ¶5. By way of example, Rodney and Sharon made no inquiries about Christopher, Katherine, or Roy during or after Hurricane Ike, despite that Christopher was still

staying with Katherine after his accident and despite that she was caring for Christopher and Roy around the clock, with no help except that provided by Katherine's own family. *Id.*

Rodney and Sharon King have never taken an interest in Roy's health, education, welfare, finances, or circumstances. *Id.* at ¶6. The only information they have ever had about Roy is what Katherine has shared with them or what they have garnered from discovery in the course of this proceeding. *Id.* Rodney and Sharon King have never taken an interest in Roy on any significant level. *Id.*

3. Total Incapacitation of Christopher

In the middle of the night on December 1, 2007, Christopher drove his car from a Heights-area bar and ran into a tree. *See* (Caring Bridge Entry by Sharon King, My Story, Exhibit B.) Christopher suffered severe traumatic brain injury that left him permanently incapacitated. (Ex. B at 10:11-21, 31:18-23, 33:15-25.)

Following his accident, Christopher stayed with Katherine and Roy, and Katherine tended to both Christopher's and Roy's care. (Ex. C, at 19:5-18). On September 13, 2011, Hurricane Ike hit the Texas Gulf Coast, and Katherine, Christopher, and Roy were displaced due to damage to their home. Excerpts of the Deposition of Katherine King ("Katherine King Depo."), attached as Exhibit D, at 20:16-17. Being displaced following the hurricane and caring for two, brain-injured individuals, with no support, proved a daunting undertaking. (Ex. A, ¶8; Ex. C, at 43:12-18.) Eventually, Katherine asked Rodney and Sharon, if he could live with them. (Ex. C, at 19:17-18; Ex. A at ¶ 8.)

4. Initiation of Divorce Proceedings and Rodney's Appointment as Guardian by the Harris County Probate Court

On April 18, 2011, approximately three-and-one-half years after the accident and after consultation with Rodney and Sharon, Katherine initiated divorce proceedings against

Christopher. *See* (Original Petition for Divorce.) She also filed a suit affecting parent-child relationship ("SAPCR"), later seeking to be appointed Roy's sole managing conservator. *See* (First Am. Original Petition for Divorce.)

On Rodney's application, the Harris County Probate Court appointed Rodney as guardian of Christopher's person and estate. (Order Appointing Permanent Guardian of the Person and Estate, Exhibit E.) In the course of the guardianship proceedings, the Court declared Christopher to be "totally incapacitated." *See id.* Katherine did not contest Rodney's serving as guardian of Christopher's person and estate and, in fact, waived her spousal right to be designated as guardian. The Probate Court later authorized Rodney to hire Nancy Rommelmann to serve as attorney ad litem for Christopher in the divorce proceeding before this Court. (Order Appointing Attorney Ad Litem, Exhibit F.)

5. Rodney's Initiation of a Parent-Child Counterclaim Against Katherine

On February 10, 2012, Rodney appeared in the lawsuit as Christopher's guardian and filed a counterclaim affecting parent-child relationship against Katherine, purportedly on Christopher's behalf, seeking rights of joint managing conservatorship over Roy. *See* (Original Counterpetition for Divorce.) Katherine has opposed the request, arguing that Rodney had no authority from the Probate Court or any other legal basis to seek managing conservator rights over Roy. (Exhibit O, at 22:7-23; 23:4-5; 24:10-25:3; 36:5-14.) Katherine also argued that Rodney has no independent basis to seek this relief or standing to file an original SAPCR. *Id.* Rodney has argued that he stands in the shoes of Christopher as a parental proxy for his now-incapacitated son. (Ex. O, at 24:15-18.)

Further, Rodney also sought appointment as a joint managing conservator of Roy not only in his capacity as guardian of Christopher, but also personally, as a non-parent. Rodney is Roy's grandfather.

> Q: (Ms. Rommelmann) Are you asking that the Court would appoint you [Rodney] joint managing conservator with Katherine?
>
> A: Yes.

(Ex. O, at 22:25-23:3.)

At the hearing, Katherine's counsel repeatedly objected to Rodney's lack of standing and lack of pleadings seeking his appointment as Roy's joint managing conservator, either in his own right or as Christopher's guardian. (Tr. of 4/16/2012 Hearing, Ex. O, at 22:7-23; 23:4-5; 24:10-25:3; 36:5-14.) This Court overruled those objections. *Id.*

6. Issuance of Temporary Orders and Visitation

On May 18, 2012, this Court entered Temporary Orders making Katherine and Christopher temporary joint managing conservators of Roy. (*See* Temporary Order of May 18, 2012, Exhibit G.) The Court also granted visitation rights to Christopher at Rodney's and Sharon's residence, giving Rodney and Sharon the right to supervise the visitation. *Id.*

On October 19, 2012, this Court issued additional Temporary Orders ("Additional Temporary Orders") because of an injury that Roy sustained in Rodney's care at visitation. The Additional Temporary Orders require that a nurse be present at all times that Roy is out of Katherine's custody. (Judge's Rendition, Exhibit H; Additional Temporary Orders dated Oct. 19, 2012, Exhibit I.) The Additional Temporary Orders, however, give Rodney, as Christopher's guardian, the option to disqualify Katherine's choice of nurse and does not allow adjustments to the visitation schedule if Rodney rejects the choice of nurse. (Ex. I at 2-3.) The Additional Temporary Orders also give Rodney the right to exercise other joint managing conservator rights on behalf of Christopher. (*See id.*)

There is evidence that, during visitation which occurs outside of Katherine's custody, Rodney ignores Katherine's directives on Roy's care. See (Ex. A, at ¶¶ 30-31, 33-34; Ex. O, at

41:3-11, 50:7-18); *see* Affidavit of Walter Josin DeFoy ("DeFoy Affidavit"), Exhibit Q, at ¶¶5-7.) First, during visitation, Rodney has placed Roy on top of Christopher in a reclining chair. Ex. A, ¶30. This is dangerous because it places pressure on Roy's hips—which Roy's physician has said must be avoided—and aggravates Roy's hip dysplasia. *Id.* ¶ 28. Next, Roy is on anti-seizure medication pursuant to a physician's supervision and prescription. *Id.* ¶23. A side effect of the medication, Trileptal, is the lowering of sodium and water levels in the body. *Id.*; Ex. Q, ¶¶8-9. To prevent the risk of liver or kidney damage or failure, it is critical that Roy's fluid and sodium intake be maintained at adequate levels. Ex. A, ¶23; Ex. Q at ¶¶8-14. Thus, Katherine has specified how, during visitation, Roy is to be given food and fluids and what type of food he is to eat. (Ex. A, ¶¶23-25, 34; Ex. O, at 41:3-11; 50:7-18.) Katherine believes that Rodney disregards her instructions. (Ex. A, ¶¶33-34; Ex. O, at 48:17-50:18.) As a consequence, Roy repeatedly returns from court-ordered visitation extremely thirsty, listless, and with sunken eyes. (Ex. A, ¶33; Ex. O, at 48:17-49:3; Ex. Q at ¶¶5, 7.) In addition, Roy has had severe seizures following visitation at the Kings' residence. Ex. Q at ¶6.

7. Discovery

In this proceeding, Rodney has devoted a substantial amount of interest in the Roy Allen King Section 142.005 Trust (the "Trust"). Rodney is using his position as Christopher's guardian to obtain information about the Trust, under the guise of discovery. The Trust, however, is *not* a party to this lawsuit. The Trust is neither an asset of Christopher's estate nor community property between Katherine and Christopher. The Trust is under the independent management of a court-appointed Trustee of the 151st Judicial District Court, Harris County, Texas. As Katherine has testified, she has no control over or say in the trust. (Ex. D at 27:2-3.) Rodney concedes this fact. (Ex. C at 58:9-22, 64:12-14, 65:16-23.) The Trustee manages the Trust in its court-ordered fiduciary capacity, and all matters regarding the administration of the

Trust are under the jurisdiction of the 151st District Court. (*See, e.g.,* Order Granting Joint Petition to Resign as Trustee and to Appoint Successor Trustee, Exhibit R.) Regardless, Rodney has abused his authority as guardian and abused the process here by misleading this Court about his standing here to obtain discovery about Roy's Trust, to which he is not entitled as a matter of law.

II. SUMMARY OF ARGUMENT

For numerous reasons, Rodney—either in his own right or as Christopher's guardian—has no standing to petition this Court for any relief regarding Roy, and Sharon, a non-party, has no right to possession of and access to the child for the following reasons:

> (1) As a matter of law, Rodney has no standing in his own right or as Christopher's guardian;
>
> (2) As a matter of law, Rodney has no authority to exercise Christopher's parental rights or usurp those belonging solely and exclusively to Katherine;
>
> (3) The Probate Court gave Rodney no authority to exercise parental rights or file a parent-child counterclaim on behalf of Christopher. The Probate Court gave Rodney only authority to hire an attorney to represent Christopher in the divorce suit in the underlying proceeding;
>
> (4) Rodney and Sharon have no pleadings on file with this Court to obtain possession and access to Roy; and
>
> (5) Rodney and Sharon cannot make the statutory showing to be designated managing or possessory conservators of Roy.

The basis for this plea goes beyond the inquiry regarding the best interest of the child. In fact, Rodney has not argued that the appointment of Katherine as sole managing conservator would not be in Roy's best interest. He has not because he cannot: by Rodney's admission, Katherine has always been Roy's primary caretaker, has done a "good job" in caring for Roy, has always had primary custody of him, and has overseen and tended to all issues concerning Roy's

physical and emotional well-being since his birth. (Ex. O, at 23:25-24:2, 35:9; Ex. C, at 46:5-7, 13-15, 98:17-19.) Neither Rodney nor Sharon have ever been involved in any of these issues concerning Roy, including after Christopher's car accident. (Ex. A at ¶9.)

Without question, a tragic set of circumstances gives rise to this petition. Regardless, Rodney has no right to usurp the parental rights belonging to others. Rodney cannot do indirectly through Christopher, his ward, what Rodney cannot do directly: serve as a joint managing conservator of Roy and co-parent Roy over the objections of Katherine, Roy's sole, fit parent. Rodney has no standing to assert a parent-child counterclaim against Katherine—either in his own right or as Christopher's guardian—in allowing him to exercise rights as a managing conservator under the temporary orders, and in giving him and Sharon King, a non-party, possession of and access to Roy. Because Rodney has no standing, this Court is without jurisdiction to enter any orders giving him or Christopher any relief on his parent-child counterclaim. In addition, because the Temporary Orders and Additional Temporary Orders effectively require Katherine to (1) surrender her child for visitation with third parties outside her custody and (2) consult with a non-parent about issues concerning Roy, the Temporary Orders and Additional Temporary Orders are unconstitutional violations of her parental rights. For these reasons, Katherine King asks this Court to dismiss the parent-child counterclaim asserted by Rodney King on behalf of Christopher King, strike Christopher's pleadings, and vacate the Temporary Orders and Additional Temporary Orders that give Christopher or Rodney any managing conservator rights over Roy or Rodney, Sharon, or Christopher any rights of possession of or access to Roy.

III. ARGUMENT & AUTHORITIES

A. Katherine King has the constitutional right to parent her child as she sees fit without interference from a non-parent, third party.

The legal issues here are clear-cut. Katherine is Roy's sole competent parent. Her right to parent her son as she sees fit is the most fundamental liberty interest that she enjoys under the United States Constitution. As the United States Supreme Court has said:

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. . . . "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."
>
> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. . . . In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Troxel, 530 U.S. at 65-66 (overturning state statute giving non-parents rights of possession and access over children) (emphasis added) (citations omitted). Thus, consistent with *Troxel*, Texas courts may not disturb a parent's right of care, custody, and control of their children and give rights over those children to non-parents without the express requirements of the Family Code being met. *See, e.g., In re Mays-Hooper*, 189 S.W.3d at 777 (conditionally granting mandamus where trial court gave grandparent visitation without the requisite statutory showing); *In re Scheller*, 325 S.W.3d at 641 (same); *In re Derzapf*, 219 S.W.3d at 327 (same); *In re Johnson*, No. 03-12-00427-CV, 2012 WL 2742122 (Tex. App.—Austin July 3, 2012, orig. proceeding); *In re K.K.C.*, 292 S.W.3d 788 (Tex. App.—Beaumont 2009, orig. proceeding); *In re Russell*, 321

S.W.3d 846 (Tex. App.—Fort Worth 2010, orig. proceeding); *In re Aubin*, 29 S.W.3d 199 (Tex. App.—Beaumont 2000, orig. proceeding).

"There is a strong presumption that the best interest of a child is served if a natural parent is appointed as managing conservator." *In the Interest of M.T.C. and D.L.C.*, 299 S.W.3d 474, 481 (Tex. App.—Texarkana 2009, no pet.). Indeed, "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69. Here, there is no evidence that Katherine is an unfit mother. To the contrary, Rodney concedes that she has done "a good job" caring for Roy. (Ex. O, at 35:9; Ex. C, at 46:5-7, 13-15.) Accordingly, under *Troxel* and the Texas Family Code, respectfully, this Court cannot inject itself into Katherine's family and compel her to surrender her child for visitation with third parties—cloaked as visitation with the child's father—or require her to confer with Rodney, a non-parent, on issues concerning Roy. (Ex. G; Ex. H at p. 3.) In fact, the requirement that Katherine surrender her medically fragile child to non-parents for visitation outside of her custody has created a scenario where Rodney can—and does—disregard Katherine's instructions on Roy's care. (Ex. A at ¶¶33-34; Ex. O at 41:3-11, 48:17-50:18.) This is an impermissible usurpation of parental rights under the United States Constitution, as the United States Supreme Court, the Texas Supreme Court, and every intermediate Texas court of appeal that has considered the issue has held. As the Texas Supreme Court has explained in a case involving a lower court's giving access and possession of a child to non-parties, "the temporary orders here divest a fit parent of possession of [her child], in violation of *Troxel's* cardinal principle and

without overcoming the statutory presumption that [the mother] is acting in [her child's] best interest. Such a divestiture is irremediable." *In re Derzapf*, 219 S.W.3d at 335.

B. <u>Rodney, as Christopher's guardian, has no standing under the Family Code to assert a SAPCR counterclaim against Katherine.</u>

As the First Court of Appeals has recently explained:

> In any case involving an issue of conservatorship, the best interest of the child must always be the primary consideration of the trial court. Tex. Fam. Code Ann. § 153.002 (Vernon 2008). And the court must presume that the best interest of the child is served by appointing a biological parent as sole managing conservator or both biological parents as joint managing conservators. See id. § 153.131(a) (Vernon 2008); see also *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000); *Mumma v. Aguirre*, 364 S.W.2d 220, 221 (Tex. 1963).
>
> Nonparents seeking conservatorship carry a "heavy burden" of overcoming this presumption. *Lewelling v. Lewelling*, 796 S.W.2d 164, 176 (Tex. 1990).

Bhan v. Danet, No. 01-10-00963-CV, slip op. at 12-13 (Tex. App.—Houston [1st Dist.] Nov. 29, 2012) .

The basic issue of standing is before this Court. "Standing is a component of subject matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit under Texas law." *Rupert v. McCurdy*, 141 S.W.3d 334, 339 (Tex. App.—Dallas 2004, no pet.) "A party's lack of standing deprives the trial court of subject matter jurisdiction and renders any trial court action void. A party's standing to pursue a cause of action is reviewed *de novo*." *In re Russell*, 321 S.W.3d at 856 (internal citations omitted). Standing is never presumed, cannot be waived, and can be challenged at any time. *Tex Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993); *In re K.K.C.* 292 S.W.3d at 790.

In the family law context, "a party's standing in a SAPCR is governed by the Texas Family Code, and a party seeking relief in such suits must plead and establish standing within the

parameters of the language used in the Code. If a party fails to do so, the trial court must dismiss the suit." *In the Interest of M.T.C.*, 299 S.W.3d at 479-80 (citations omitted) (emphasis added); *see also In re McDaniel*, No. 01-11-00711-CV, --- S.W.3d ---, 2011 WL 4926002, at *7 (Tex. App.—Houston [1st Dist.] Oct. 11, 2011, orig. proceeding); *see also In re Sullivan*, 157 SW.3d 911, 915 (Tex. App.—Houston [14th Dist.] Feb. 24, 2005, orig. proceeding) (in statutory standing cases, "the analysis is a straight statutory construction of the relevant statute to determine upon whom the Texas Legislature conferred standing and whether the claimant in question falls in that category") (citation omitted). As one court of appeals has explained:

> The power of a trial court to adjudicate disputes between a parent and a nonparent, and to enforce its own orders contrary to a parent's decisions concerning her children, constitutes state involvement that implicates the parent's fundamental liberty interests in the care, custody, and control of her children. **The jurisdictional requirement of standing helps ensure that a parent's constitutional rights are not needlessly interfered with through litigation**.

In re Russell, 321 S.W.3d at 857 (citations omitted) (emphasis added).

In this case, the grandfather, through his role as guardian, is attempting to do through the back door (a guardianship proceeding) what he cannot do through the front door (force mother to accept grandfather's involvement and visits with her child). With Christopher's total incapacitation, the only person benefitting from the enforcement of visits with the child would be the guardian-grandparent—not the ward. As explained below, Christopher is ineligible to be appointed joint managing conservator over Roy, and Rodney has no standing under the Family Code and no authority from the Probate Court to assert a parent-child counterclaim on his own or Christopher's behalf. Rodney's parent-child counterclaim must be dismissed, his pleadings struck, and this Court must vacate its Temporary Orders and Additional Temporary Orders.

1. Rodney has no standing as Christopher's guardian to file a SAPCR on Christopher's behalf.

Under the express terms of the Family Code, Rodney's lack of standing as guardian to file a SAPCR counterclaim is alone dispositive.

Section 102.003(a) of the Family Code identifies fourteen categories of people who may initiate an original action affecting parent-child relationship. Tex. Fam. Code Ann. § 102.003(a) (West Supp. 2012). Nowhere does the statute confer standing upon the guardian of an incapacitated parent—either in his own right or on behalf of the ward-parent—to file a suit affecting parent-child relationship.

Between Christopher and Rodney, only Christopher as parent has standing to file an original suit affecting parent-child relationship. Tex. Fam. Code Ann. § 102.003(a)(1) (West Supp. 2012). To be clear, however, Christopher has not filed a SAPCR counterclaim against Katherine.[1] The SAPCR counterclaim in this proceeding is Rodney's and Rodney's alone. The Family Code, however, gives him no authority to bring this counterclaim. Thus, because Rodney has no standing, this Court has no jurisdiction to award relief based on his counterclaim and, therefore, cannot make Christopher or Rodney a managing or possessory conservator of Roy. *See In re McDaniel*, 2011 WL 4926002, at *7.

A recent decision from the Fourteenth Court of Appeals confirms this result. See *Gribble v. Layton*, No. 14-11-00856-CV, --- S.W.3d ---, 2012 WL 6055678 (Tex. App.—Houston [14th Dist.] Dec. 6, 2012, no pet. h.). *Gribble* involves a paternity suit, which has been brought by the guardian-mother of her adult disabled son against the alleged biological father. The mother

[1] "Parent" is not defined under the Family Code to include a guardian or representative of the parent. Under Section 101.024, "'[p]arent' means the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father. . . ." Tex. Fam. Code Ann. § 101.024(a) (West 2008).

initiated the paternity suit in her individual capacity and as guardian of the person and estate of her adult son. The father moved to dismiss on statute-of-limitations grounds and, alternatively, on the grounds that the mother lacked standing to pursue a paternity claim on her adult son's behalf. The Court rejected both arguments.

On the question of standing, the Court examined section 160.602 of the Family Code, which identifies the categories of people who have standing to bring a paternity suit, including "a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, is incapacitated, or is a minor." *Id.* at *3, citing Tex. Fam. Code Ann. § 160.602(a)(6) (West 2008). Based on the language of the statute, the Court held that the mother had standing as guardian to pursue the paternity suit on behalf of her adult son.

Section 102.003 contains no similar provision conferring standing on a guardian of an incapacitated person to bring a SAPCR on behalf of his ward. See Tex. Fam. Code Ann. § 102.003 (West 2008). Had the Legislature intended to include such a provision, it could have, but it did not. The absence of this provision from section 102.003—in light of its inclusion in section 160.062—demonstrates that the Legislature did not intend to give guardians of ward-parents standing to file a SAPCR on behalf of their wards, and no standing can be presumed. *Fitzgerald v. Adv. Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999) ("[W]hen we stray from the plain language of a statute, we risk encroaching on the Legislature's function to decide what the law should be."); *In re K.K.C.*, 292 S.W.3d at 792 ("A court construes a statute to give effect to the Legislature's intent as expressed in the actual language used in the statute."); *Tex. Ass'n of Bus.*, 852 S.W.2d at 444 (standing cannot be presumed). Rodney has no standing to bring his SAPCR counterclaim as Christopher's guardian, and this Court has no jurisdiction to

entertain the counterclaim or award relief based on it. Because Rodney has no standing, this Court's Temporary Orders and Additional Temporary Orders giving Christopher—and effectively Rodney—rights as a managing conservator and possession of and access to Roy are void as a matter of law and must be vacated. *In re Russell*, 321 S.W.3d at 856 ("A party's lack of standing deprives the trial court of subject matter jurisdiction and renders any trial court action void.")

2. Rodney has no pleadings on file, making his actions before this Court void and improper.

While this Court has given Rodney and Sharon King access to Roy—through Christopher—neither Rodney nor Sharon has any pleading on file to support this grant of relief. It is fundamental that "a trial court abuses its discretion by awarding relief to a person who has not requested such relief in a live pleading." *In re Russell*, 321 S.W.3d 846, 855 (Tex. App.—Fort Worth 2010, orig. proceeding) (granting mandamus due to, among other things, possession and access awarded to non-parents who had no pleadings on file and had not established standing) (citing *In re S.A.A.*, 279 S.W.3d 853, 856 (Tex. App.—Dallas 2009, no pet.); *In re Dukes*, No. 04-10-00257, 2010 WL 1708251, at *2 (Tex. App.—San Antonio, Apr. 28, 2010, orig. proceeding) (memo op.); Tex. R. Civ. P. 301); *see* also Tex. R. Civ. P. 301 ("The judgment of the court shall conform to the pleadings, . . . ").

Before the Court of Appeals, Rodney attempted to create an alternate reality, portraying himself as a mere passive actor in the proceedings below and identifying Christopher King as the only active party between them in this proceeding. Nonetheless, let the record be clear, even if Rodney is not: as this Court is well aware, this proceeding has been driven by and focused exclusively on Rodney.

- Rodney, not Christopher, has been pursuing seemingly endless discovery in the trial court.

- Rodney, not Christopher, has been pursing rights as a managing conservator over Roy.
- Rodney, not Christopher, is seeking information about and access to Roy's trust.
- Rodney, not Christopher, returns Roy from the court-compelled visitation in a parched and listless state.
- In Rodney's care, not Christopher's, Roy was injured at visitation.
- Rodney, not Christopher, has dragged Katherine through an irrational, groundless twenty-month process, requiring her to incur over $110,000 in fees and costs to date to defend her right to parent her child without his unwarranted and unwelcome interference.

And Rodney has done all of this without standing, any legal authority, or pleadings whatsoever. Rodney has failed to address in any meaningful way the two fundamental legal issues in this proceeding: (a) his lack of standing under the Family Code to pursue a suit affecting parent-child relationship as Christopher's guardian and (b) his lack of authority under the Probate Code or the Probate Court's Orders to exercise Christopher's parental rights as to Roy.

The only person in this proceeding who is entitled to be appointed managing conservator of Roy is Katherine. Because Rodney has no standing and no pleadings on file, his parent-child counterclaim on behalf of Christopher must be dismissed and the temporary orders awarding Christopher, Rodney, or Sharon relief must be vacated.

C. Rodney, as guardian, has no authority from the Probate Court or under the Probate Code to pursue a parent-child counterclaim on behalf of Christopher.

1. Christopher cannot be appointed joint managing conservator of Roy.

Apart from his lack of standing under the Family Code—which alone is dispositive—Rodney also lacks standing because he has no authority from the Probate Court or under the Probate Code to obtain the relief he seeks. Understanding why requires the following inquiries:

1. Whether a totally incapacitated parent can be appointed joint managing conservator of his child; and
2. Whether a guardian of a totally incapacitated parent can ever exercise his ward's parental rights.

The answer to these questions is no, based on the relevant provisions of (1) the Family Code on parental rights and conservatorship and (2) the Probate Code on guardianship.

a. Rights and duties of parents and conservators under the Family Code

Section 151.001(a) of the Texas Family Code details the rights and duties of parents, which include:

> (1) the right to have physical possession, to direct the moral and religious training, and to designate the residence of the child;
>
> (2) the duty of care, control, protection, and reasonable discipline of the child;
>
> (3) the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education;
>
> (4) the duty, except when a guardian of the child's estate has been appointed, to manage the estate of the child, including the right as an agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;
>
> (5) except as provided by Section 264.0111, the right to the services and earnings of the child;
>
> (6) the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment;
>
> (7) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
>
> (8) the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child;
>
> (9) the right to inherit from and through the child;
>
> (10) the right to make decisions concerning the child's education; and
>
> (11) any other right or duty existing between a parent and child by virtue of law.

Tex. Fam. Code Ann. § 151.001(a) (West 2008).

Under Section 153.131 of the Family Code, a parent is to be appointed sole managing conservator or both parents appointed joint managing conservators of the child, unless the appointment would significantly impair the child's physical health or emotional development. Tex. Fam. Code. Ann. § 153.131 (West 2008). Pursuant to Section 153.073(a):

> (a) Unless limited by court order, a parent appointed as a conservator of a child has at all times the right:
>
> (1) to receive information from any other conservator of the child concerning the health, education, and welfare of the child;
>
> (2) to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the child;
>
> (3) of access to medical, dental, psychological, and educational records of the child;
>
> (4) to consult with a physician, dentist, or psychologist of the child;
>
> (5) to consult with school officials concerning the child's welfare and educational status, including school activities;
>
> (6) to attend school activities;
>
> (7) to be designated on the child's records as a person to be notified in case of an emergency;
>
> (8) to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and
>
> (9) to manage the estate of the child to the extent the estate has been created by the parent or the parent's family.

Tex. Fam. Code Ann. § 153.073(a) (West 2008). By Rodney's own admission, Christopher has no capacity to exercise any of the above-listed parental or conservator rights or duties. Specifically, as Rodney represented to the Probate Court to support his appointment as Christopher's guardian:

> Proposed Ward is totally without sufficient capacity, as provided by the Texas Probate Code, to care for himself, to manage his property and financial affairs, and to operate a motor vehicle....

> Proposed Ward cannot understand and carry out higher level commands or multiple commands. He cannot understand and assess ordinary financial, legal and personal situations. He is acutely impaired in his thought processes, especially when there is a change in his usual environment.

(Application for Appointment of Permanent Guardian of the Person and the Estate, Exhibit J, at paras. V and VII.) Indeed, the Probate Court Investigator stated as follows:

> WITHOUT A DR'S LETTER IT IS OBVIOUS THAT HE SHOULD BE CONSIDERED TOTALLY INCAPACITATED.

(Court Investigator Report Pursuant to § 648A of the Texas Probate Code, Exhibit K.) The Probate Court agreed, declared Christopher totally incapacitated[2], and appointed Rodney as Christopher's *permanent* guardian.

Christopher's recent pyschosocial assessment, done at Katherine's request and over Rodney's objections, confirms the correctness of the Probate Court's determination. In examining the interaction between Christopher and Roy at visitation, the psychologist observed that:

> There are concerns that neither Chris nor Roy understands what is taking place during their visitation when they are together. This is especially true for Roy.

(Limited Psychosocial Assessment Report of Dr. Stephen L. Tate ("Tate Report"), Exhibit S, at 9.)

While Christopher has no capacity to exercise parental or conservator rights over Roy, it is not Katherine's position that Christopher is no longer Roy's father. Rather, it is her position

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[2] Under Section 601(14)(B) of the Probate Code, an "incapacitated person" is defined as:

> an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs; . . .

Tex. Prob. Code Ann. § 601(14)(B) (West 2003).

that (1) Christopher is ineligible to be appointed joint managing conservator of Roy due to his total incapacity and (2) Rodney has no standing, no pleadings, and no authority to file a SAPCR against Katherine or to obtain managing or possessory conservator rights over Roy in his own right or as Christopher's guardian. *Cf.* (Original Counterclaim of Rodney King, Exhibit L.)

b. Christopher is not eligible to be appointed a managing conservator of Roy.

Section 153.005 of the Texas Family Code states:

> (a) In a suit, the court may appoint a sole managing conservator or may appoint joint managing conservators. If the parents are or will be separated, the court shall appoint at least one managing conservator.
>
> (b) **A managing conservator must be a parent, a *competent* adult**, an authorized agency, or a licensed child-placing agency.

Tex. Fam. Code Ann. § 153.005 (West 2008) (emphasis added). The Family District Court has the authority and discretion to establish the terms and conditions of a conservatorship. *In re M.A.M.,* 346 S.W.3d 10, 18 (Tex. App.—Dallas 2011, pet. denied); *see Blackwell v. Humble,* 241 S.W.3d 707, 719 (Tex. App.—Austin 2007, no pet.). Again, it is a rebuttable presumption that a parent be appointed sole managing conservator or both parents be appointed joint managing conservators of the child. Tex. Fam. Code Ann. § 153.131 (West. 2008). Here, however, the Court has crafted a temporary order giving the ward rights and powers that he is incapable of exercising. In other words, if Christopher has no capacity—indeed, no legal right following the Probate Court's declaration of his incapacity and under the express terms of the Probate Court's Order—to care for his own physical health or manage his own financial affairs, how can he possibly tend to issues concerning the health, education, and well-being of his minor, disabled son? It is indeed a tragic question confronting this Court but one for which there is only one answer.

On the basis of Section 153.005, Christopher is ineligible to be appointed a managing conservator of Roy. While the statute does not specify that a parent be competent as it does in reference to a "competent adult," requiring that a parent be competent to serve as managing conservator is the only logical interpretation of the statute that can be reached. To conclude otherwise would mean that a totally incapacitated parent could be imbued with all the rights and duties of a managing conservator despite having no ability to fulfill those duties, as is the case here. As a consequence, a totally incapacitated parent could be appointed managing conservator over his child whereas he could not be appointed, for example, a guardian of that child. See Tex. Prob. Code Ann. § 681(3) (West 2003) ("A person may not be appointed guardian if the person is…(3) an incapacitated person."). This is precisely the type of absurd result that courts are to avoid in statutory construction. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996) ("Courts should not read a statute to create such an absurd result."); *accord, C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 322 n. 5 (Tex.1994) ("Statutory provisions will not be so construed or interpreted as to lead to absurd conclusions, great public inconvenience, or unjust discrimination, if the provision is subject to another, more reasonable construction or interpretation."); *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 135 (Tex.1994) (Hecht, J., concurring) ("in some circumstances, words, no matter how plain, will not be construed to cause a result the Legislature almost certainly could not have intended"); see Tex. Gov't Code Ann. § 311.021(3),(4) (West 2005) ("In enacting a statute, it is presumed that ... (3) a just and reasonable result is intended ... [and] (4) **a result feasible of execution is intended**...." (emphasis added)). For this reason alone, the Temporary Orders and Additional Temporary Orders are void.

Christopher cannot perform any duty or enjoy any right under the statutory provisions of the Temporary Orders or Additional Temporary Orders. Indeed, he has no legal right to do so under the Probate Court's declaration of his incapacity. Thus, the action prosecuted here is done by the guardian who is also the child's grandfather. Rodney is doing indirectly what he would never have standing to do directly. The record is clear: when Christopher is not at his facility in Galveston, Rodney as Guardian resides with Christopher; Sharon King, Christopher's mother, resides with Christopher. The court-appointed access time with the child is for them and is done under the guise that it is for the benefit of an adjudicated incapacitated male. The grandparents are doing what they would not be permitted to do in any other Court: gain court-ordered access to a grandchild in the face of an objection by a parent without a finding of her inability to operate in her child's best interest as required by *Troxel*, its progeny, and the Texas Family Code.

As Katherine has repeatedly testified, it is not her position that Christopher ceases to be Roy's father. Quite the contrary is true. However, while Christopher's situation is tragic—as is Roy's—Christopher's condition cannot be grounds for this Court to disregard fundamental principles on standing and give managing conservator rights to him or his guardian that the law does not allow. There are other ways of ensuring that Christopher and Roy's relationship continue, which do not involve trampling on Katherine's constitutional rights. Whether Christopher's guardian is his father, a neighbor, or a professional guardian, Katherine should not be compelled to leave her child in the care of Christopher's guardian or a non-parent or confer with the guardian about her son's health, education, and welfare. See Tex. Fam. Code Ann. § 153.073(a) (West 2008). This, however, is the practical effect of the Court's Temporary Orders and Additional Temporary Orders.

Katherine does not need Rodney's involvement in Christopher's relationship with Roy. Following their separation and before the accident, Katherine and Christopher continued to be best friends, continued to parent Roy together, and were in each other's everyday lives. (Ex. O at 43:22-44:5.) She has repeatedly testified that she wants Christopher and Roy to maintain their relationship. (Ex. D at 15:2-11.) Before the divorce proceedings were initiated, in fact, she always accommodated the Kings' schedule and their requests to see Roy. (Ex. O at 47:8-20.); see *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (noting that, in *Troxel,* there was no evidence that the mother intended to exclude access completely).

Because Rodney has no standing to seek managing conservator rights or rights of possession and access to Roy—either in his own right or as guardian—Katherine asks that this Court dismiss the parent-child counterclaim against her and make her sole managing conservator of Roy.

2. The Probate Court has authorized Rodney only to attend to the well-being of Christopher and manage his estate; it has not given him authority over Christopher's minor son.

Rodney's actions in this Court and the relief that he seeks here far exceed his limited authority as guardian. On November 9, 2011, the Honorable Christine Butts of Probate Court Number 4 of Harris County, Texas, appointed Rodney the guardian of Christopher's person and estate and ordered:

> [T]hat this Guardianship shall be a full guardianship and that ***the Ward shall be declared totally incapacitated without the authority to exercise any rights or powers <u>for himself</u> or <u>his Estate</u>.***

(Ex. E.) In other words, under the express language of the Order, the scope of Rodney's powers as guardian are limited to those directly affecting Christopher King and his estate.

The Probate Court's Orders are consistent with statute and case law. Section 693 of the Probate Code establishes the criteria for the appointment of a guardian of the person or estate, stating in relevant part:

> Sec. 693. ORDER OF COURT. (a) If it is found that the proposed ward is **totally without capacity to care for himself or herself, to manage the individual's property, to operate a motor vehicle, and to vote in a public election, the court may appoint a guardian of the individual's person or estate, or both**, with full authority over the incapacitated person except as provided by law.

Tex. Prob. Code Ann. § 693 (West 2003) (emphasis added).

Section 602 of the Probate Code further states:

> Sec. 602. POLICY; PURPOSE OF GUARDIANSHIP. **A court may appoint a guardian with full authority over an incapacitated person** or may grant a guardian limited authority over an incapacitated person as indicated by the incapacitated person's actual mental or physical limitations and ***only as necessary to promote and protect the well-being of the person***.

Tex. Prob. Code Ann. § 602 (West 2003) (emphasis added); *see also Guardianship of Parker*, 275 S.W.3d 623, 631-32 (Tex. App.—Amarillo 2008, no pet.) (stating that, under section 602, a trial court has discretion in determining what powers the guardian should be allowed to exercise over the ward); *accord* Tex. Prob. Code Ann. § 767(a) (West 2003) (guardian is "entitled to take charge of the person of the ward" and his duties "correspond with his rights" as guardian); *see also* Tex. Prob. Code Ann. § 677 (West 2003) (governing the appointment of guardians for a legal adult; focus of this section is on the identity of the guardian rather than his powers).

a. Guardian of the Estate

Section 768 of the Probate Code enumerates the general powers and duties of a guardian of the estate of a ward, which include:

- possession and management of all property belonging to the ward;
- the collection of debts;
- rentals or claims that are due to the ward;

- enforce all obligations in favor of the ward; and
- bring and defend suits by or against the ward.

Tex. Prob. Code Ann. § 768 (West 2003). The statute further states that it is the duty of the guardian of the estate to take care of and manage the estate as a prudent person would manage the person's own property. *Id.*

Section 773 specifies what lawsuits may be brought by a guardian of an estate, stating that: "the guardian of a ward's estate may institute suits for the recovery of *personal property, debts, or damages and suits for title to or possession of land* or for any right attached to or growing out of the same or for injury or damage done." Tex. Prob. Code Ann. § 773 (West 2003) (emphasis added). This statute, however, speaks to the guardian's *fiduciary duty to the ward,* by limiting the guardian's right to sue on behalf of the ward to strictly *fiduciary* matters related to the ward's estate, and not personal rights related to the ward. *See id.* In the instant case, Rodney has instituted a lawsuit for the enforcement of managing conservator rights and Christopher's visitation with his child. The right to care for or visit with a child, however, is not associated with personal property, a debt, or a land related-matter under Christopher's estate. Accordingly, Rodney has no authority as guardian of Christopher's estate to pursue this relief for Christopher.

(1) Powers that may be exercised only *after* court authorization

Under section 774(a), on written application to the court and based only on the best interests of the estate, a guardian of the estate may exercise the following fiduciary powers only ***after*** court authorization:

- purchase or exchange property;
- take a claim or property for the use and benefit of the estate in payment of a debt due or owing to the estate;

- compound a bad or doubtful debt due or owing to the estate;
- make a compromise or settlement in relation to property or a claim in dispute or litigation;
- compromise or pay in full secured claims;
- abandon worthless or burdensome property; or
- purchase a prepaid funeral benefits contract.

Tex. Prob. Code Ann. § 774(a) (West 2003). Thus, for the scenarios enumerated in the statute, a guardian of an estate is intended to be similar to a dependent administration rather than an independent administration, requiring the court's prior approval for the exercise of powers. *Hartford Cas. Ins. Co. v. Morton,* 141 S.W.3d 220, 226 (Tex. App.—Tyler 2004, pet. denied). Exercising rights as to the ward's minor child is not among the guardian's powers within section 774(a).

(2) Powers that may be exercised without court authorization

Section 774 (b) specifies what the guardian of an estate can do without a previous court order, stating:

> (b) The guardian of the estate of a person, without application to or order of the court, may exercise the following powers provided, however, that a guardian may apply and obtain an order if doubtful of the propriety of the exercise of any such power:
>
> (1) release a lien on payment at maturity of the debt secured by the lien;
>
> (2) vote stocks by limited or general proxy;
>
> (3) pay calls and assessments;
>
> (4) insure the estate against liability in appropriate cases;
>
> (5) insure property of the estate against fire, theft, and other hazards; and
>
> (6) pay taxes, court costs, and bond premiums.

Tex. Prob. Code Ann. § 774(b) (West 2003). As is apparent from the statute, pursuit of a parent-child suit is not among a guardian of the estate's pre-authorized powers under section 774(b).

Thus, under the express terms of the Probate Code, Rodney has no authority to pursue a parent-child counterclaim as guardian of Christopher's estate.

b. Guardian of the Person

The statutory provisions governing the powers granted over the ward's person are far less detailed than those governing the powers of a guardian of the estate. In addition to authorizing full or limited guardianship over the person, section 767 provides that a guardian of a person has the right to physical possession of the ward and to establish domicile, the duty to provide care, supervision, protection, clothing, food, and shelter, the power to consent to medical care of the ward, and with permission of the court, the power to establish a trust. Tex. Prob. Code Ann. § 767 (West 2003). This grant of "authority" over the ward is only as necessary to "promote and protect" his well-being, suggesting that the concern is only the protection of the ward's physical and medical needs, not to fully exercise the legal rights the ward otherwise enjoys. *See, e.g., Valdes-Fuerte v. State*, 892 S.W.2d 103, 107 (Tex. App.—San Antonio 1994, no pet.) (purpose of guardianship is to "protect a person who is, for any reason, mentally incapable of taking care of himself or his property"); *Decker v. Wiggins*, 421 S.W.2d 189, 192 (Tex. Civ. App.—Fort Worth 1967, no writ) (job of a guardian is to "guard the interest of his ward and provide for his education and maintenance"); *Little v. Little,* 576 S.W.2d 493, 495 (Tex. Civ. App.—San Antonio 1979, no writ) (guardian lacks the power to consent on behalf of the ward to donate a kidney, because while the donation benefits the recipient it cannot be said to be a "treatment" that benefits the ward).

(1) According to the Texas Supreme Court, a guardian may not exercise the personal rights of the ward.

It is a prevailing view that a guardian may not exercise the purely personal elective rights of his ward. *See Weatherly v. Byrd,* 566 S.W.2d 292, 293 (Tex. 1978), citing *Howard v. Imes,* 265 Ala. 298 (1956). As the *Howard* court recognized:

> ***The guardian of a mental incompetent does not become his alter ego***, and is not empowered by virtue of his office to act for the incompetent in matters involving the exercise of a personal discretion so as to change an act performed by the incompetent while mentally normal, . . .

265 Ala. at 300, citing C.J.S., Insane Persons, § 49, p. 134 (emphasis added). Moreover, under section 675 of the Probate Code, "[a]n incapacitated person for whom a guardian is appointed retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been specifically granted to the guardian." Tex. Prob. Code Ann. § 675 (West 2003). This limit is directly applicable to the instant matter, where the guardian is seeking to exercise purely personal rights on behalf of the ward but where the Probate Court has not granted him this authority or delegated the exercise of these personal rights to him. In fact, the Probate Court cannot grant Rodney this authority. *See Delevan v. Thom,* 244 S.W.2d 551, 556 (Tex. Civ. App.—Beaumont 1951, no writ) (holding that a widow's right of election under a will was a purely personal elective right that she alone could exercise, not a property right of the estate which had been committed to the care of the guardian); *see also Weatherly*, 566 S.W.2d at 293 (holding that right to revoke a revocable trust is not a property right related to the ward's estate but a purely personal right of the ward involving the exercise of personal discretion, which does not vest in a guardian).

In this case, this Court has issued temporary orders regarding Christopher's purported rights to possession and access with the child. This is Christopher's temporary order, not an

order benefiting Rodney. Further, as in *Delevan* and *Weatherly,* the right to possession of and access to a child is not a property right, nor does it involve personal property or a debt or obligation related to Christopher's estate. The right to possession and access of a child, like a right to make an election in a will in *Delevan*, is a purely personal right of the ward and one that may not be exercised by the guardian. *See* 244 S.W.2d at 556. Here, Rodney has exceeded his authority guardian in seeking to enforce Christopher's purported personal right. He cannot maintain his counterclaim, and the counterclaim should be dismissed on that basis.

Although there may be significant overlap between a ward's powers and the things necessary to protect his well-being (for example, a person has the power to decide what medical care he needs, and so a guardian certainly would have the power to ensure the ward receives appropriate medical care), in this case the "powers" the guardian would exercise and the powers a conservator would exercise are different. As a practical matter they seem to have little if anything to do with the ward's well-being. Rather, the powers to be exercised by a conservator ensure that the child's—not the ward's—well-being is protected. The conservator's exercise of powers is therefore not necessary to benefit the ward.

(2) A guardian may not exercise rights based on social grounds.

The Texas Legislature has allowed guardians to have powers only as necessary to protect the physical and medical well-being of the ward. *See Frazier v. Lev*, 440 S.W.2d 393, 394-95 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) (denying application by guardian for an order authorizing an operation to make the ward sexually sterile because the application was based solely on social and economic grounds and not on the medical or physical necessity for the operation). It has not given them sweeping authority reaching beyond issues concerning their

wards—such as a guardian's attempt to obtain managing or possessory conservator rights over the ward's minor child.

The same reasoning applies here. While a full guardianship has been put in place by the Probate Court, Rodney's powers as guardian over Christopher are not unbounded. His rights and duties as guardian of the person are limited to Christopher's medical and physical needs. Enforcing Christopher's purported right to possession and access of Roy is not related to medical or physical necessity for Christopher, and seeking to exercise such rights far exceeds the powers delegated to Rodney by the Probate Court.

3. Rodney has authority only to obtain a divorce for his ward—not pursue a SAPCR counterclaim purportedly on his behalf.

In this proceeding, Rodney has authority only to obtain a divorce for his ward. He has no authority to pursue a SAPCR counterclaim on behalf of his ward in the District Court.

Under the Family Code, a divorce proceeding is technically a separate suit from a SAPCR proceeding, although they must be consolidated in certain circumstances. *Compare* Tex. Fam. Code Ann. § 6.01 (West 2006) (suit for dissolution of marriage) *with* Tex. Fam. Code Ann. § 102.001 (West 2008) (suit affecting parent-child relationship); Tex. Fam. Code Ann. § 6.406 (West 2006) (consolidation). On October 31, 2011, by his motion ostensibly titled "Motion to Retain Attorney for Divorce Proceedings," Rodney requested permission from the Probate Court to retain Nancy Rommelmann as attorney ad litem to represent Christopher "*in the divorce proceeding*" before this Court. See (Motion to Retain Attorney For Divorce Proceedings, Exhibit M (emphasis added).) The Probate Court granted only this limited authority. See (Ex. F.) As is apparent on the face of the Court's Order, the Probate Court did not authorize Rodney to retain Nancy Rommelmann to represent Christopher's interest in a SAPCR proceeding, much less file a SAPCR against Katherine seeking to procure for Christopher—or effectively for

himself—rights of managing or possessory conservatorship as to Roy. His attempt to obtain such relief, allegedly on behalf of his ward, constitutes an impermissible end-run around the Probate Court's Orders and the limits of the Family and Probate Codes.

A court may confer upon a party only such powers as are authorized by the constitution or by statute. *Goodman v. Summit at West Rim, Ltd.,* 952 S.W.2d 930, 933 (Tex. App—Austin 1997, no pet.). It is settled that a guardian can exercise the right of his ward to obtain a divorce, as the Probate Court has authorized Rodney to do here. *Wahlenmaier v. Wahlenmaier,* 762 S.W.2d 575 (Tex. 1988). The policy allowing a ward to obtain a divorce is entirely consistent with and facilitated by Texas' no-fault divorce policy. Tex. Fam. Code Ann. § 6.001 (West 2006) ("On the petition of either party to a marriage, the court may grant a divorce ***without regard to fault*** if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation." (emphasis added)).

However, at no point has the Texas Legislature, the Texas Supreme Court, or any Texas court of appeals ever given a guardian authority to file a SAPCR to obtain managing conservatorship rights in the name of the ward, as Rodney attempts to do through this proceeding. These limits on Rodney's power as guardian are consistent with the Texas Legislature's overhaul of the guardianship system in 1993, which was intended to restrain guardians' powers—not unleash them—and to provide a series of safeguards for incapacitated persons in the guardianship system. See *Daves v. Daniels*, 319 S.W.3d 938, 943 (Tex. App.—Austin 2010, pet. denied) (recognizing that the "older, substantially different probate code . . . lacked many of the required findings, procedures, and presumptions that operate here [under the current code]"), citing A. Frank Johns, *Ten Years After: Where is the Constitutional Crisis with*

Procedural Safeguards and Due Process in Guardianship Adjudication?, 7 Elder L.J. 33, 79-81 (1999) (discussing Texas's guardianship reforms in 1993).

If these limits are not observed, questions about a guardian's exercise of powers could abound, as they did in the pre-1993 era. See Johns, 7 Elder L.J. at 80 (observing that the previous "outmoded and antiquated guardianship system" in Texas "allowed the appointment of a guardian—who received total control over a person and that person's property—simply by walking into the office of the local probate judge" (citations omitted)). In a case where a guardian-grandparent seeks rights as a managing conservator in the ward-parent's name, is the guardian using the ward's estate for prosecuting child-related issues for his own benefit? Is he creating a conflict between himself and the ward by taking actions that may not be in the ward-son's best interest? This highlights a practical problem with vesting a guardian with these powers: under the circumstances, the "will" that would be exercised would be the guardian's, and the guardian's alone. While, in many cases, it can be assumed that the guardian's exercise of will reflects the ward's preferences (i.e., the guardian provides the ward with food, housing or medical care, and we may safely assume that, were he able, the ward would do the same thing), we cannot assume that Rodney's involvement with Roy would result in his doing the same things Christopher would have done. There is, thus, a disconnect between the power Rodney would exercise as conservator, standing in the shoes of the ward, and Christopher's actual will.

These are important questions, given a guardian's fiduciary obligations to his ward. *Byrd v. Woodruff*, 891 S.W.2d 689, 706 (Tex. App.—Dallas 1994, writ dism'd by agr.) (cited in *Epstein v. Hutchison*, 175 S.W.3d 805, 809 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)). Still, the answers to these inquiries do not change the result here. As a matter of law, based on the express language of the Probate Code, Rodney has no authority and can never obtain

authority as guardian of Christopher's person or estate to pursue or exercise managing conservator rights in Christopher's name. See Pet. at 20-42.

4. Rodney's reliance on the "Minimum Standards for Guardianship Services" is misplaced.

Lacking any statutory support for his position, Rodney—here and before the First Court of Appeals—has instead relied upon "Minimum Standards for Guardianship Services"[3] to argue that, as guardian, he must: (1) assist Christopher in maintaining relationships with family;[4] (2) exercise "substituted judgment" to make personal decisions for Christopher, presumably concerning Roy; and (3) pursue a suit affecting parent-child relationship on Christopher's behalf in the course of divorce proceedings.

Rodney offers no authority to support that these standards somehow replace the express constraints on a guardian's power under the Probate Code. In addition, the Minimum Standards do not apply to Rodney King. They apply only to "the provision of guardianship services by certified guardians, guardianship programs, and the Texas Department of Aging and Disability Services" to ensure that "certified guardians and guardianship programs provide guardianship services in a professional and competent manner." (Preamble, Standard 1, attached at Exhibit T (emphasis added)); *see also id.* at 2, Standard 3(I) and Standard 4(I).); see also Tex. Prob. Code Ann. §§ 696-697B (West 2003); Tex. Gov't. Code Ann. § 111.001 et seq. (West Supp. 2012). Rodney King is not a certified or professional guardian and does not work for the Texas Department of Aging and Disability Services. He has offered no support for the notion that these standards apply to him.

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[3] The standards are promulgated by the Guardian Certification Board and have been adopted by Texas Supreme Court.

[4] Ironically, Rodney has not allowed Katherine—Christopher's former wife and the mother of Christopher's son—to have contact with Christopher. (Ex. C, at 110:25-111:10.)

Concerning his suggestion to this Court previously that he can make decisions for Roy on behalf of Christopher on the principle of "substituted judgment," this too is without merit. Rodney is not Christopher's alter ego. *Howard*, 265 Ala. at 300. The Texas Supreme Court has held that he has no right to exercise Christopher's personal rights. *Weatherly*, 566 S.W.2d at 293, citing *Howard*, 265 Ala. at 298. This includes decisions that Christopher might have made concerning Roy. *See Howard*, 265 Ala. at 300.

While the Minimum Standards acknowledge a professional guardian's need to "seek specific judicial authority [for] the dissolution of a marriage . . .," they do not authorize the guardian to pursue rights of conservatorship to exercise on behalf of the ward. Rodney ignores this reality. He also has no answer for the fact that the Texas Legislature, the Texas Supreme Court, and the Texas courts of appeal have never given a guardian authority to file a SAPCR to obtain managing conservatorship rights in the name of the ward, as Rodney attempts to do through this proceeding.

For all these reasons, Rodney has no authority under either the Probate Court's Order or the Probate Code to assert a SAPCR counterclaim on behalf of Christopher in this proceeding. Because he has no authority, he has no standing to pursue such counterclaims. Since it is impossible for Rodney to cure this deficiency, since the Probate Court did not authorize him—and cannot authorize him—as guardian, to exercise rights, powers, and duties over Christopher's minor son, his parent-child counterclaim must be dismissed with prejudice. *Develo-Cepts, Inc. v. City of Galveston*, 668 S.W.2d 790, 793 (Tex. App.—Houston [14th Dist.] 1984, no writ) ("...[T]he lack of standing in our case could not be cured by amended pleadings."); *Green Tree Servicing, LLC v. Woods*, No. 01-11-00670-CV, ---S.W.3d ---, 2012 WL 3222360, *5 (Tex. App.—Houston [1st Dist.] Aug. 9, 2012, no pet.) ("When a plea to the jurisdiction is granted, the

case is dismissed without prejudice unless it is established that the plaintiff is incapable of remedying the jurisdictional defect.")

D. <u>Rodney, a non-parent, has no right to exercise managing conservator rights or rights over Roy without the requisite statutory showing.</u>

On their face, the Temporary Orders make Katherine and Christopher temporary joint managing conservators of Roy. (Ex. G, at 2.) While Christopher has no capacity to exercise any of the rights and duties under the Court's Temporary Order, the Additional Temporary Orders indicate that Rodney can exercise these rights for him. *See, e.g.*, (Ex. I, at 2-3) ("IT IS FURTHER ORDERED that the Registered Nurse or Licensed Vocation Nurse to be present at Respondent's periods of possession shall be chosen by Katherine Louise King, ***and approved by Christopher Michael King, by and through James Rodney King in his capacity as guardian of the person and estate of Christopher Michael King***.) By Rodney's admission, Christopher does not have the capacity to understand, respond, approve, challenge, or communicate in any way concerning the powers given to him in the Temporary Orders or the Additional Temporary Orderss. *See* (Ex. J.) Thus, this Court's Temporary Orders and Additional Temporary Orders essentially and improperly delegate those powers to Rodney.

1. At no point has Christopher transferred his parental rights to Rodney.

The law does not allow parental rights to be transferred to another so easily. In fact, the Texas Legislature has recognized only two instances in which a parent may transfer his rights to another. Under the Family Code, a parent may transfer his rights to another only by "an affidavit of relinquishment of parental rights" or "an affidavit by the parent designating another person or agency to act as managing conservator." Tex. Fam. Code Ann. § 151.001(d)(2),(d)(3) (West 2008). A court cannot transfer parental rights to another without the express requirements of the statute being fulfilled. *See In re Mata*, 212 S.W.3d 597, 600 (Tex. App.—Austin 2006, orig.

proceeding) (conditionally granting mandamus where trial court excluded biological mother from possession of her child where she did not relinquish her parental rights pursuant to specific procedures in the Family Code). Before his incapacity, Christopher never relinquished his parental rights to Rodney or designated Rodney as managing conservator over Roy in the event of his incapacitation. There is no basis to assume that he would have done so and certainly no legal basis to assign his rights as a parent and conservator to his guardian, as is the effect of the Court's Temporary Orders and Additional Temporary Orders in the underlying matter.

2. *Rodney has no independent standing to seek rights as a managing conservator of Roy.*

a. Texas Family Code, Section 102.003(a)(9).

Again, section 102.003 of the Texas Family Code establishes the criteria that a non-parent must satisfy to have standing to file an original suit affecting parent-child relationship. It is undisputed that Rodney has no independent standing to file a SAPCR against Katherine under the express language of the statute.

(1) No evidence of risk of physical or emotional harm to the child if Rodney not appointed

Under the Family Code, it is presumed that a parent acts in the best interest of the parent's child. Tex. Fam. Code Ann. § 151.131 (West 2008). To overcome the presumption, the non-parent must—by a preponderance of the evidence—show "specific actions or omissions of the parent that demonstrate an award of custody to the parent would result in physical or emotional harm to the child." *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990) (construing section 153.131 of the Family Code). Rodney has no evidence to overcome the presumption that Katherine acts in her son's best interest. To the contrary, he has conceded that Katherine has done a "good job" caring for Roy. (Ex. C at 46:5-7, 13-15; Ex. O, at 35:9.)

(2) No actual care, control, and possession of Roy

In addition, to have standing, a non-parent must have had "actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition" to file an original SAPCR. Tex. Fam. Code Ann. § 102.003(a)(9) (West 2008). "Occasional visitation with or possession of a child is not 'actual care, control, and possession' under the statute and does not satisfy section 102.003(a)(9)'s strict time requirement." *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 634 (Tex. App.—Dallas 2003, no pet.). At no point has Rodney ever exercised actual care, control, and possession of Roy. He therefore has no standing to bring a SAPCR under Section 102.003(a)(9).

b. Texas Family Code, Section 102.004(a)

Nor can Rodney satisfy the requirements for standing as a grandparent to obtain rights as a managing conservator under Section 102.004(a). Section 102.004(a) allows a grandparent to file an original suit requesting managing conservatorship if: (1) "the child's present circumstances would significantly impair the child's physical health or emotional development" or (2) "both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit." Tex. Fam. Code. Ann. § 102.004(a) (West 2008). There is no evidence that Roy's physical health or emotional development is in danger; to the contrary, Katherine has cared for Roy well. *See* (Ex. C, at 46:5-7, 13-15.) Furthermore, Katherine has not consented to Rodney's filing a SAPCR counterclaim here.

Rodney is not Roy's parent. However, this Court's current Temporary Orders and Additional Temporary Orders give him *de facto* authority and involvement in parental decision-making for the minor child, which he acknowledges he—not Chris—would exercise. (Ex. C, at 83:18-21, 96:4-18; *see, e.g.,* Ex. G, at 6; Ex. H, at 2-3.) This is impermissible under *Troxel* and its progeny.

This is not even a close call. Because Katherine is Roy's only fit, competent parent, she is the only parent who can be appointed Roy's managing conservator or exercise parental rights as to him. *In the Interest of M.T.C.*, 299 S.W.3d at 481 ("There is a strong presumption that the best interest of a child is served if a natural parent is appointed as managing conservator."); *see King v. King*, 544 S.W.2d 795 (Tex. App.—San Antonio 1976) ("Since the trial court found that plaintiff is the sole parent of the child, there is no other person who can claim any rights or powers with respect to the child."); *see In re Derzapf*, 219 S.W.3d at 335 (grandparents lacked standing to be appointed managing conservators under section 102.004(a)(1) "because there was no evidence that the parent's care of children created 'serious question[s] concerning their physical or health or welfare" required by the statute.) Because Rodney has no standing, this Court is without jurisdiction to issue orders on conservatorship, possession, and visitation based on his SAPCR counterclaim or award to him—either directly or through his ward—rights as a managing conservator. *See Rupert,* 141 S.W.3d at 341.

3. Neither Rodney nor Sharon have standing to obtain possession of and access to Roy.

The Temporary Orders require Katherine to surrender her child at the residence of Rodney and Sharon, a non-party, for visitation with Christopher. (Ex. G, at 6.) Christopher, however, does not reside at Rodney and Sharon's home; he is a resident of a long-term care facility in Galveston County, Texas. (Caring Bring Entry of Sept. 10 & 29, 2012, by Sharon King, Exhibit N.) Moreover, despite the fact that Rodney and Sharon have no standing to obtain possession of and access to Roy, the Court's Temporary Orders effectively give them this right. In fact, the Temporary Orders order that they "shall supervise the periods of possession and access." (Ex. G, at 6.) Rodney admits that, during visitation, he—not Christopher—primarily has the care, control, and protection of Roy. (Ex. C, at 83:18-21.)

As an initial matter, neither Rodney nor Sharon King can bring an original suit requesting possessory conservatorship. Section 102.004(b) of the Family Code expressly states: "An original suit requesting possessory conservatorship may not be filed by a grandparent or any other person." Tex. Fam. Code Ann. § 102.004(b) (West 2008).

Furthermore, "[p]ossession of or access to a child by a grandparent is governed by the standards established by Chapter 153." *In re Derzapf*, 219 S.W.3d at 331. "[T]he jurisdictional prerequisite of standing [in the grandparent access context] serves to ensure that the statutory scheme is narrowly tailored so that a parent's personal affairs are not needlessly intruded upon or interrupted by the trauma of litigation by any third party seeking access." *In re Pensom*, 126 S.W.3d 251, 254 (Tex. App.—San Antonio 2003, orig. proceeding) (emphasis added).

"A trial court abuses its discretion in granting temporary access to grandchildren when a grandparent does not overcome the presumption contained in section 153.433 of the family code that a parent acts in his or her child's best interest." *In re Johnson*, 2012 WL 2742122, at *2 (citations omitted). To overcome the presumption, a grandparent must overcome the "**hefty statutory burden**" and prove "by a preponderance of the evidence that denial of access to or possession of [the child] would **significantly impair [the child's] physical health or emotional well-being**." *In re Scheller*, 325 S.W.3d at 643, 641; Tex. Fam. Code Ann. § 153.433(a)(2) (West Supp. 2012) (emphasis added). In addition, a court must state with specificity the findings required under section 153.433(b) of the Family Code for giving grandparents possession and access. Tex. Fam. Code Ann. § 153.433(b) (West. Supp. 2012).

Rodney and Sharon have not made—and cannot make—the showing that section 153.433 requires. Thus, "[a]bsent a finding, supported by *evidence*, that the safety and welfare of [the child] is significantly impaired by the denial of the [grandparents'] visitation, [the mother's]

decision regarding whether the children will have any contact with the [grandparents] is an exercise of her ***fundamental right as a parent***." *In re Aubin*, 29 S.W.3d at 204 (emphasis added). "That right is shielded from judicial interference by the Due Process clause of the United States Constitution." *Id.* at 204. These fundamental principles of constitutional law cannot be disregarded to allow Rodney and Sharon King to interfere in Katherine's care, custody, and possession of her child and require her to surrender her child for visitation with them. (Ex. O, at 46:22-47:4.)

There are numerous other ways to ensure that Christopher has access to his son that will not violate Katherine's constitutional and statutorily protected rights. Katherine has already offered that Christopher come for visitation at Roy's house since this would allow Katherine to tend to Roy's care during visitation, instead of having to surrender him to third parties who disregard her instructions on Roy's care. (Ex. A at ¶¶10, 33-34; Ex. O, at 48:17-50:18.) Moreover, Christopher lived with Katherine and Roy for approximately six months following his discharge from medical facilities following the accident. (Ex. C at 19:5-18.) As Katherine repeatedly testified in deposition, she "absolutely" wants Christopher to maintain his relationship with Roy and wants to foster that relationship. (Ex. D at 15:2-11.) Her actions following Christopher's accident demonstrate her commitment to do so. (Ex. O at 47:5-20.)

4. Having no standing, Rodney—aided by his counsel—have abused the legal process and Katherine's constitutional rights in this proceeding.

By any objective standard, this lawsuit presents an outrageous abuse of the legal process by a litigant and his attorney. Rodney represented to this Court that he had the authority as guardian to pursue a SAPCR counterclaim on behalf of Christopher. (Ex. L at ¶ 3.) This statement was false. He had no such authority under the Probate Court or the law to engage in the conduct or assert the claims he has here.

Moreover, despite the incessant barrage of discovery and motions to compel served upon Katherine by him and his counsel, Nancy Rommelmann, he admits that he has no basis to seek the relief that he is pursuing here, whether in the form of managing conservatorship rights for himself or for Christopher. Specifically, Rodney concedes that Katherine has cared for Roy well (Ex. C at 46:5-15); that ***Katherine is the biological mother of Roy and sole boss in control over what will be done with Roy*** (50:6-14); and that he has no position, claim, or legal standing as a grandparent to force her to do anything regarding Roy (51:4-24). Rodney, in fact, can identify nothing that Katherine has done that has been bad or a detriment to Roy or that she has failed to do that has been bad or detrimental to Roy. (*Id.* at 52:4-11.) Regardless, Rodney and his counsel, Nancy Rommelmann, have engaged in a continuing campaign of harassment of Katherine and offered misleading and contradictory statements to this Court about the basis and the scope of Rodney's authority and their motives in this lawsuit.

Over the past two years, the discovery to which Katherine has been subjected has invaded the most personal details of her life, including humiliating and invasive questions about:

- The last time she was sexually active (Deposition of Katherine King, Exhibit D, at 134:12-17);
- The loss of her and Roy's home and property in Hurricane Ike and second-guessing the Trustee's decision-making concerning the repair of the home (which is an asset of the Trust), decisions over which Katherine has no control (24:9-27:9);
- An inquisition into Katherine's spending of her own money (197:6-8, 197:22-198:3);
- Medical history and laboratory work related to medical needs (116:4-117:6, 140:7-18, 144:1-25; 149:14-150:7);
- Medical facials necessitated by her severe cystic acne caused by extreme stress following (1) Christopher's accident, (2) her attempt to care for both Christopher and Roy following the accident, and (3) the loss of her home in Hurricane Ike (112:23-113:5: 114:18-116:9; 131:12-133:16; 173:5-10; Ex. A at ¶¶13, 21);

- Cosmetic surgery (131:12-14, 140:7-25); and
- Fibroid tumor surgery, the pain resulting from same, and the diagnosis of the tumor (117:7-16, 142-144, 148:1-149:13; Ex. A ¶21).

And perhaps the most distasteful—and typical—example of counsel's unseemly tactics in this litigation is Nancy Rommelmann's asking Katherine if she is HIV positive or has other sexually transmitted diseases. (Ex. D, at 133:19-134:20, 143:7-8, 143:15-23.) The answer is no. *Id.* Rodney King and Nancy Rommelmann have also made numerous factual misrepresentations to this Court on a number of issues in written filings. (Ex. A at ¶¶11-22.)

As Katherine testified, this discovery has pricked "the worst years of her life." (Ex. D, at 206:12-14.) ***None*** of this discovery, however, is relevant to any legitimate issue before this Court. This is a divorce proceeding. On the division of property between Katherine and Christopher, there are no assets to divide between them. (Ex. C, at 99:8-20.)[5] In addition, Katherine has already stated that she will assume any debts and obligations that may be in her name or in her son's name and will indemnify and hold Christopher harmless for any of those debts. (Ex. D at 129:2-7.)

Thus, this proceeding should have been the most straightforward, streamlined divorce proceeding in Texas history. Instead, Rodney and Nancy Rommelmann have waged an unnecessary, irrational, costly, and scorched-earth legal battle against Katherine, despite that there is no basis in fact or law for Rodney to obtain the relief he is seeking here *by his own*

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[5] As Rodney testified at his deposition:

Q: . . . what do you think the two of them have?
A: Under their names, not much.
Q: Is there any property-division issue that you think is important to look out for on behalf of Chris?
A: No.

Ex. C, at 99:11-16.

admission. As a consequence, Katherine has incurred over $110,000 in legal fees defending against Rodney's groundless, harassing parent-child counterclaim to protect her child and her constitutional rights to parent him as she sees fit. (Ex. A at ¶35.) Katherine is a single mother of a disabled child who, due to her full-time-plus caretaking responsibilities, is precluded from working outside the home. (*Id.* at ¶ 4.) She is indebted to family members to repay the amounts that have been incurred on her behalf in defending against a counterclaim that Rodney has no standing to bring. (*Id.* at ¶ 35.)

To adapt one Chief Justice's words in a dissenting opinion—in a case where he dissented because he would have granted mandamus immediately and not conditionally as the majority held—in the present case, Rodney King, through an arm of state government, to wit a court, and aided by his counsel, Nancy Rommelmann, has sought to, and indeed has, interfered with Katherine's parental rights by attempting to obtain rights of managing and possessory conservatorship over Roy without standing, without sincere pursuit of the legal process, and without regard to Katherine's parental rights. *See In re Aubin*, 29 S.W.3d at 204-05 (C.J. Walker dissenting); *see also In re Derzapf*, 219 S.W.3d at 328 (mandamus granted where trial court granted access to grandparents over sole living parent's objections). Rodney's SAPCR counterclaim and his and his counsel's tactics intend an unconstitutional invasion of Katherine's liberty rights, their discovery is patently abusive, and this lawsuit is clearly brought for an improper purpose. In fact, it is hard to conceive how a legal war of atrophy having no basis as a matter of law and targeting a single mother of a disabled child solely for the purpose of extracting her constitutionally protected parental rights could be characterized as anything other than frivolous and intended solely for harassment. This entire process has violated Katherine's constitutional rights, making mandamus proper. *In re Aubin*, 29 S.W.3d 199 at 203.

IV. SUMMARY

Rodney cannot prevail here as a matter of law because:

- He has no standing under section 102.003 of the Texas Family Code to pursue a parent-child counterclaim as Christopher's guardian;
- He has no authority under any Probate Court Order to pursue, obtain, or exercise managing conservator rights on Christopher's behalf;
- He has no authority under the Probate Code or any other code to pursue, obtain, or exercise managing conservator rights on Christopher's behalf; and
- Neither he nor Sharon has standing or pleadings on file to satisfy the requirements of the Texas Family Code.

V. CONCLUSION

Rodney has no standing to assert a parent-child counterclaim—either on his own behalf or on Christopher's behalf. For these reasons, Christopher's pleadings struck to the extent that they assert a parent-child counterclaim, through Rodney, against Katherine; the parent-child counterclaim must be dismissed; and the Temporary Orders and Additional Temporary Orders giving Christopher and Rodney managing conservator rights over Roy and rights of possession and access to Christopher, Rodney, and Sharon must be vacated.

VI. PRAYER

For these reasons, Katherine King respectfully asks this Court to dismiss the parent-child counterclaim asserted by Rodney King, both on his own behalf and Christopher King's behalf. Katherine King further asks that the Court vacate the Temporary Orders and Additional Temporary Orders giving any managing conservator rights to Christopher King or Rodney King and any possession and access to Christopher, Rodney, and Sharon King.

Respectfully submitted,

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NOTICE OF HEARING

The above motion is set for hearing on March 22, 2013 ***at 10:00 a.m.*** in the 311th Judicial District Court, Harris County, Texas.

SIGNED on _____.

_____
Judge or Clerk

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on _____, 2013.

MAR 15 2013

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