REL: July 2, 2020

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2020

1190193

Ex parte Joann Bashinsky

PETITION FOR WRIT OF MANDAMUS

(In re: In the matter of the Estate of Joann Bashinsky, a protected person)

(Jefferson Probate Court, No. 19BHM02213)

MENDHEIM, Justice.

Joann Bashinsky petitions this Court for a writ of mandamus directing the Jefferson Probate Court to vacate its orders disqualifying her attorneys from representing her in the underlying proceedings and appointing a temporary guardian

and conservator over her person and property. Bashinsky also seeks dismissal of the "Emergency Petition for a Temporary Guardian and Conservator" ("the emergency petition") that initiated the underlying proceedings and the petition for a permanent guardian and conservator ("the permanent petition") filed simultaneously with the emergency petition in the probate court, both of which were filed by John McKleroy and Patty Townsend. We grant the petition in part, deny it in part, and issue the writ.

I. Facts

Joann Bashinsky ("Ms. Bashinsky") is the widow of Sloan Y. Bashinsky, Sr. ("Mr. Bashinsky"), who owned the majority stock in Golden Enterprises, Inc., and who was the founder, chairman, and chief executive officer of Golden Flake Foods ("Golden Flake"). At the time of the events that precipitated this petition, Ms. Bashinsky was 88 years old. Mr. Bashinsky married Ms. Bashinsky in 1968, following the death of his first wife. Mr. Bashinsky had three children by his first wife. At the time Mr. Bashinsky married Ms. Bashinsky, she had one daughter, Suzanne, by an earlier marriage. Suzanne, now deceased, was adopted by Mr. Bashinsky when he and

Ms. Bashinsky married. Currently, Ms. Bashinsky's only blood relative is Suzanne's only son, Landon E. Ash.

McKleroy has had a professional relationship with Ms. Bashinsky that dates back to 1968, the year she and Mr. Bashinsky married. McKleroy acted as a personal lawyer to Mr. Bashinsky, to Ms. Bashinsky, and to the corporate entities in the family businesses, including Golden Flake, Golden Enterprises, SYB, Inc., and Bashinsky Foundation, Inc., and for related family trusts. McKleroy served on the board of Golden Enterprises from 1976 until the company merged with Utz in 2016, and he has served on the board of SYB, Inc., since its formation in 1981. On April 2, 1992, Ms. Bashinsky appointed McKleroy as the holder of her power of attorney.[1]

---

[1]In the emergency petition, McKleroy and Townsend give the impression that the power of attorney in favor of McKleroy is still in force. In her mandamus petition, Ms. Bashinsky asserts that on October 1, 2019, she revoked McKleroy's power of attorney and the following day appointed attorney Tamera Erskine as the holder of her power of attorney, exercisable in the event she became incapacitated. A "Revocation of Power of Attorney John P. McKleroy, Jr." is attached as an exhibit to Ms. Bashinsky's "motion to reconsider" the probate court's orders pertaining to the emergency petition and disqualifying Ms. Bashinsky's attorneys.

Instead of directly responding to this assertion regarding the revocation of the power of attorney in their reply brief, McKleroy and Townsend argue that this fact and others that Ms. Bashinsky presents in her mandamus petition

Townsend previously served the Bashinsky family as Mr. Bashinsky's executive assistant. She was the corporate secretary, controller, and chief financial officer at Golden Enterprises, and she served as Ms. Bashinsky's personal financial assistant beginning in 2017, often having daily contact with Ms. Bashinsky. Ms. Bashinsky alleges that on October 1, 2019, she terminated Townsend's employment. The emergency petition acknowledges this assertion, stating that, "[o]n October 1, 2019, Ms. Townsend received a letter purportedly written by Ms. Bashinsky, terminating Ms. Townsend."

At the time of the events in question, Ms. Bashinsky's personal estate was estimated to be worth $80 million, and her entire estate (including trusts and business assets) was valued at $218 million. The emergency petition asserts that, beginning in 2012, Ash asked Ms. Bashinsky for loans for

---

should not be considered by this Court because such facts were first alleged in her "motion to reconsider." McKleroy and Townsend observe that Ms. Bashinsky filed this mandamus petition, and this Court ordered answers and briefs and entered a stay in the proceedings below, before the probate court ruled on Ms. Bashinsky's motion to reconsider. Thus, the additional facts in Ms. Bashinsky's motion to reconsider were not considered by the probate court for purposes of the emergency petition.

himself and for his various business ventures. The emergency petition, which was filed on October 1, 2019, states that the loan amounts increased over time and that Ash's total amount of indebtedness to Ms. Bashinsky at that time was approximately $23.5 million. Ash allegedly borrowed $13.4 million from Ms. Bashinsky in 2019. The emergency petition also states that in August 2019 Ms. Bashinsky hired Bise Business Advisory, LLC ("Bise"), to evaluate Ash's primary business venture, Xtreme Concepts, Inc ("XCI").[2] Bise recommended that Ms. Bashinsky not make any further investments in XCI because XCI had "a history of operating losses"; it has "extraordinarily poor administrative order"; and its common stock had no value. The emergency petition asserts that Ms. Bashinsky's financial transactions with Ash "are problematic in that, if the IRS were to review these loans, they might have tremendous tax consequences for Ms. Bashinsky." The emergency petition also asserts:

> "Ms. Bashinsky has a Last Will and Testament in which she makes general specific bequests to charities and nonprofits that have been important to the Bashinsky family and names [Ash] as residuary beneficiary. ... The value of the loans to [Ash]

[2]The Bise report itself indicates that that review of XCI was initiated by McKleroy and Townsend.

> have decreased Ms. Bashinsky's estate to such a level that if she were to pass away today, her executor could not fund her specific bequests in the amounts set forth in her will."[3]

The emergency petition states that "[b]oth Mr. McKleroy and Ms. Townsend have witnessed a decline in Ms. Bashinsky's faculties in their discussions with Ms. Bashinsky about financial matters." Attached to the emergency petition is a letter dated September 26, 2019, from Dr. Carolyn Harada, a geriatric physician at the University of Alabama at Birmingham ("UAB") Geriatrics Clinic, in which Dr. Harada states that she evaluated Ms. Bashinsky on September 19, 2019.[4] The letter states, in part:

> "I assessed [Ms. Bashinsky's] cognition and found her to have significant cognitive impairment, likely due to dementia. Her cognitive deficits on

---

[3]In her motion to reconsider and in her reply brief in this Court, Ms. Bashinsky asserts that McKleroy and Townsend are the executors of her will and that they are also named beneficiaries in the will.

[4]Ms. Bashinsky notes in her reply brief that Dr. Harada's letter is not an affidavit, and, therefore, it is not admissible evidence. See Rules 801 and 802, Ala. R. Evid. Ms. Bashinsky also observes that Dr. Harada is not her personal physician. Ms. Bashinsky does not deny, however, that she was evaluated by Dr. Harada or that the letter accurately states Dr. Harada's views of that evaluation, and, of course, there was no objection to the admissibility of the letter because Ms. Bashinsky's attorneys were disqualified at the outset of the hearing on the emergency petition.

> office-based testing included deficits in executive function. Based on reports from her care team, it sounds as though there is reason to question her judgment and her ability to make sound decisions about her finances."

A supplemental report filed by the guardian ad litem appointed by the probate court elaborated:

> "Dr. Harada reported her staff administering the 'Montreal Cognitive Assessment' test to Joann Bashinsky while in an office examination on September 19, 2019 that rendered a score of 18 out of 30. Dr. Harada reported that she spent approximately one hour with Mrs. Bashinsky during which time she showed signs of short term memory loss and some confusion. Dr. Harada stated that she recommended a MRI to determine if Joann Bashinsky had possibly suffered a CVA (stroke) in the past that might have caused her dementia but the MRI test was cancelled by someone in Mrs. Bashinsky's inner circle of caregivers. Dr. Harada rendered her opinion that Joann Bashinsky is a 'risk for exploitation by others due to her dementia.'"[5]

Approximately $35 million of Ms. Bashinsky's personal assets are held in investment accounts at Level Four Advisory Services, LLC ("Level Four"). Ms. Bashinsky asserts that in 2018 she asked both McKleroy and Townsend to transfer

[5]The guardian ad litem's original report explained that the evaluation by Dr. Harada had been performed at the recommendation of Christy Baynes, the owner and operator of LifeCare for Seniors, who had evaluated Ms. Bashinsky herself on July 31 and August 1, 2019. Baynes had observed that Ms. Bashinsky had several caregivers, but that "there was no one person in charge."

$17.5 million from Level Four to financial advisor David Heath at the investment firm Morgan Stanley. According to Ms. Bashinsky, McKleroy and Townsend refused to carry out her request.

On September 26, 2019, Stephen Laconis, the chief financial advisor for Level Four, e-mailed McKleroy and Townsend, informing them that Ms. Bashinsky had telephoned him that day. Laconis stated that, after preliminary small talk between him and Ms. Bashinsky, Ms. Bashinsky "could not remember" why she had called him. She then asked someone who was with her why she was calling, and Laconis heard that person, who Laconis stated had a female voice, tell Ms. Bashinsky "'transfer [half] of her personal assets to Morgan Stanley.'" Laconis told McKleroy and Townsend that he believed Ms. Bashinsky was being "coach[ed] .... It clearly was not her idea." Laconis wanted instructions from McKleroy and Townsend on how to proceed.

Later the same day, September 26, 2019, Ms. Bashinsky e-mailed Laconis with the following instruction: "Please send $17.5 million to Morgan Stanley c/o David Heath in order to correctly diversify and halve my personal assets." Laconis

forwarded this e-mail to others at Level Four, including Jill Zacha, Level Four's chief compliance officer, with the added comment: "I do not believe this is her typing." Zacha sent Laconis a reply in which she stated, in part:

> "This request has a number of glaring red flags and accordingly we should most definitely pause on acting on it until the legitimacy and circumstances surrounding the request has been fully vetted.
>
> "More specifically, per company policy (and industry standards), you would need to confirm email instructions verbally with Mrs. [Bashinsky] anyway.
>
> "I would also recommend involving the POA [Power of Attorney John McKleroy] particularly given the recent dementia diagnosis and given that this request is out of line with typical interactions with Mrs. [Bashinsky] and completely contrary to previous discussions with her (i.e., that she did not want any more distributions the rest of the year)."

(Emphasis added.) Laconis forwarded Zacha's response to McKleroy.

The emergency petition asserts that also on September 26, 2019, Ms. Bashinsky telephoned Townsend 19 times and that in one of those calls Ms. Bashinsky stated:

> "'I don't know why I am calling you.' Then Ms. Bashinsky asked a caregiver, Melanie Myers, 'What am I supposed to tell her?' Ms. Townsend overheard Melanie say 'Diversify.' Ms. Bashinsky then repeated to Ms. Townsend: 'Diversify.' Ms. Townsend then overheard Melanie say to 'give

> David Heath half her personal investment.' Ms. Bashinsky then said: 'Patty, I'm sick and I wish I did not have a damn penny.'"

The emergency petition also states that later on the same day Ash called Townsend to tell her that she should move half of Ms. Bashinsky's accounts to David Heath at Morgan Stanley. Further, the emergency petition recounts: "On Friday, September 27, Ms. Bashinsky called Ms. Townsend again. She asked whether Ms. Townsend had received an email from [Ash]. Ms. Townsend confirmed receipt. Ms. Bashinsky then said: 'He's going to get all my money.'"[6]

On October 1, 2019, Ms. Bashinsky sent Laconis an e-mail letter that contained her signature, which stated:

> "On September 26, 2019, I sent you an email requesting that $17.5 million of my funds be transferred to David Heath at Morgan Stanley in order to diversify my assets. To date, that has not been done nor has anyone responded to my inquiries as to when this would be done. Please have the funds transferred immediately to Morgan Stanley and contact me when the transfer has taken place."

The emergency petition asserts that "[t]his written communication is in a different form and is inconsistent with

[6]There is no documentation in the emergency petition, such as an affidavit from Townsend, supporting the conversations recounted in the emergency petition between Townsend and Ms. Bashinsky or between Townsend and Ash.

all prior communications from Ms. Bashinsky to Level Four and as such raises red flags." In a letter dated October 1, 2019, Level Four responded to Ms. Bashinsky's requests of September 26 and October 1 that $17.5 million be transferred to Morgan Stanley.[7] The letter stated, in part:

> "Please be advised that we have a number of compliance concerns regarding this request that we are currently investigating. More specifically, it is our understanding that immediately prior to this request that you were diagnosed with dementia. Additionally, also immediately prior to the request, you contacted your Level Four financial advisor, Mr. Stephen Laconis, via telephone, and it appeared that you were likely being repeatedly coached throughout that conversation. Moreover, this request is out of line with the ongoing management and objective of your account as well as recent discussions regarding same.
>
> "As your fiduciary representative for this account, it is our responsibility to ensure that the account and the assets within it continue to be managed in your best interests and in accordance with your goals, objectives and needs. We will continue to keep you apprised of the progress of our investigation regarding the circumstances surrounding this request and our related concerns."

(Emphasis added.) In her petitioner's brief to this Court, Ms. Bashinsky states that she was unaware of a dementia

[7]This letter is an attachment to an affidavit from one of Ms. Bashinsky's attorneys that was attached as an exhibit to her "motion to reconsider." McKleroy and Townsend do not deny the validity or content of this letter in their respondents' brief.

diagnosis when she received the foregoing letter from Level Four and that she was perplexed as to how Level Four could have acquired such information. As has already been noted, it appears that in the afternoon on October 1, 2019, Ms. Bashinsky terminated Townsend's employment and revoked McKleroy's power of attorney.

Subsequently, on the same date, October, 1, 2019, McKleroy and Townsend filed the emergency petition in the Jefferson Probate Court seeking appointment of a temporary guardian and conservator "who can make decisions for Ms. Bashinsky and give consent for her care and treatment and manage finances." The emergency petition asserted that Ms. Bashinsky was

> "in need of a guardian and conservator in that she is unable to provide for her basic needs of shelter, food, clothing, and healthcare. Her [dementia] diagnosis indicates that she may be mentally incapable of adequately caring for herself and her interests without serious consequences to herself and others, and due to her physical and/or mental impairments, she is unable to protect herself from abuse, neglect or exploitation by others."

The emergency petition recommended Gregory H. Hawley, the Jefferson County conservator, as "the fit and proper person to assume this role" of guardian and conservator. Simultaneously

with the emergency petition, McKleroy and Townsend also filed the permanent petition, which contained exactly the same allegations as the emergency petition. It is undisputed that neither the emergency petition nor the permanent petition contained instructions for service of either petition upon Ms. Bashinsky and that the case-action summary does not show a return of service on Ms. Bashinsky for either petition.

On October 3, 2019, Judge Alan King of the Jefferson Probate Court entered an appointment of guardian ad litem, appointing attorney Robert Squire Gwin as Ms. Bashinsky's guardian ad litem. Judge King also assigned social worker Michele D. Sellers as the court representative in the matter. Judge King set the hearing on the emergency petition for October 8, 2019.

On October 4, 2019, Gwin and Sellers made an unannounced visit to Ms. Bashinsky's residence. In his initial report to Judge King, Gwin related that an individual who was in the house with Ms. Bashinsky refused to admit Gwin and Sellers or to accept the copy of the emergency petition Gwin tried to give to her and that the individual had Gwin talk to attorney Tamera Erskine on the telephone. According to Gwin, Erskine

identified herself as an attorney for Ms. Bashinsky. Erskine asked Gwin to delay the interview with Ms. Bashinsky until she could be present, but Gwin refused. Gwin and Sellers were then told that Ms. Bashinsky had an appointment she needed to go to, so they would need to come back later. Gwin and Sellers returned later the same afternoon, and, according to Gwin, they were met by three attorneys: Erskine, John Bolus, and Rusty Dorr, who identified themselves as Ms. Bashinsky's attorneys. According to Gwin, he provided the attorneys with a copy of the emergency petition "with all of the exhibits."[8] Gwin then interviewed Pauline Thomas who had identified herself as Ms. Bashinsky's primary caregiver.[9] During that interview, Gwin learned that Ms. Bashinsky had not had an appointment earlier in the day when Gwin and Sellers had been told they needed to come back later. Thomas also told Gwin that she did not notice "any substantial memory loss behavior"

[8]In her mandamus petition, Ms. Bashinsky asserts that Gwin gave her attorneys an incomplete copy of the emergency petition.

[9]Thomas told Gwin that she had cared for Mr. Bashinsky until his death in 2005 and that she also had cared for Ms. Bashinsky's daughter Suzanne until her death in 2010.

in Ms. Bashinsky and that Ash visited Ms. Bashinsky several times a week with no set schedule of when those visits occur.

Gwin and Sellers then interviewed Ms. Bashinsky. Gwin reported that Ms. Bashinsky was "pleasant and cooperative during the interview and responded to almost all questions in an appropriate manner." Gwin reported that Ms. Bashinsky

> "appeared to understand the pending litigation and was aware of the fact that both John McKleroy and Patty Townsend are the petitioners in this emergency petition. Mrs. B[ashinsky] voiced her strong opinion that she was 'totally disappointed and disgusted with John McKleroy and Patty Townsend' since they both have been long time advisors over many years. She stated that she 'felt betrayed by these former employees and advisors.'"

Ms. Bashinsky was able to identify relevant dates and events in her life to Gwin and Sellers. With respect to Ash, Ms. Bashinsky told them he "'is her only grandson, that she loves him very much and she has tried to help him with his business ventures.'" Ms. Bashinsky "had no idea how much money she had given to her grandson, but she was quick to correct [Gwin] by stating 'there are no gifts -- these are loans to my grandson to help him in his business ventures.'" Ms. Bashinsky did acknowledge that the loans to her grandson were excessive, but she focused on the fact that Ash is her

only grandson. Ms. Bashinsky confirmed to Gwin and Sellers that in late September 2019 she had contacted Laconis at Level Four and Townsend and that she had instructed them to transfer $17.5 million to Morgan Stanley. Ms. Bashinsky told Gwin and Sellers that the reason for this request was "'because Level Four was not making a good return on her portfolio and that she wanted to diversify at least half her funds in order to obtain a better return on her investments.'" Gwin observed in his report that he "did not observe any level of significant confusion by Ms. Bashinsky nor did she appear to be out of touch with reality" during the interview.

The observations in Sellers's initial report coincided with Gwin's with respect to Ms. Bashinsky. For example, Sellers stated that Ms. Bashinsky "was oriented to person, place and time. She did not present with any significant level of confusion and appeared to be aware of her current surroundings and circumstances." Regarding the request to transfer funds from Level Four to Morgan Stanley, Sellers reported that Ms. Bashinsky "stated that she received the idea to do this in a board meeting for SYB[, Inc.,]" and that "she

was not pressured to do this and felt that this was the best way to get more of a return on her assets."

Gwin filed his initial report with the probate court on October 7, 2019. In the conclusion of this report, Gwin stated:

> "This guardian ad litem is unable to formulate a definitive opinion or recommendation at this time concerning what may be in the best interest and welfare of Joann Bashinsky. The medical evaluation by Dr. Harada indicates cognitive impairment and confusion, but it is not very specific or definitive. It might be in the best interest of Joann Bashinsky that a more elaborate and detailed evaluation is appropriate ...."

Sellers filed her initial report with the probate court on October 8, 2019. In the conclusion of this report, Sellers stated:

> "At this time, this court representative is not able to give a definitive recommendation regarding Mrs. Bashinsky's need for a guardian and conservator. This court representative feels that a more detailed and extensive psychological evaluation would benefit Mrs. Bashinsky and might offer a more accurate description of her mental capacity at this time."

On October 8, 2019, attorneys Erskine and Dorr appeared for Ms. Bashinsky at the scheduled hearing without objection by the attorneys for McKleroy and Townsend. Judge King decided that the hearing should be rescheduled for October 17,

2019, because he did not have sufficient time on his October 8 schedule to hold the hearing.

On October 16, 2019, Gwin filed a supplemental report to the probate court. In that report, Gwin noted that, since the initial report, he had interviewed McKleroy, Townsend, and Mary H. McCoy, a longtime business associate of Ms. Bashinsky's. Gwin observed that each of those three had "been fired by either Joann Bashinsky or those who are in her inner circle of caregivers, including her grandson, Landon Ash." Gwin also observed that on October 15, 2019, he and Sellers had interviewed Dr. Harada.[10] Gwin further noted in his supplemental report that it had come to his attention that attorney Erskine represented Ash and that attorneys from the Maynard, Cooper & Gayle, P.C., law firm ("Maynard") had previously represented Ash. Gwin expressed the view that Ms. Bashinsky's attorneys had a conflict of interest by also representing Ash because he "considers the interest of Joann Bashinsky and the interest of Landon Ash to be in direct conflict and therefore these attorneys should recuse themselves from the representation of Joann Bashinsky in the

[10]Gwin's statement recounting the substance of this interview with Dr. Harada was quoted earlier in this opinion.

case at bar." Based on the information he garnered from his interviews with McKleroy, Townsend, and McCoy, Gwin recommended:

> "[A]dditional extensive testing be ordered by this Honorable Court through the Department of Neurology at UAB and that in the interim, it would be in the best interest, safety and welfare of Joann Bashinsky for Gregory Hawley [to] be appointed as the temporary guardian conservator for Joann Bashinsky so that her assets can be marshaled and protected in addition to having a third party professional in charge of paying the bills for Mrs. Bashinsky's care during the pendency of this litigation."

Sellers filed an "Addendum to the Court Representative's Report" on October 17, 2019. This addendum recounted that Sellers "was involved in a meeting with petitioners John McKleroy and Patty Townsend" in which they had "provide[d] more historical information about the reasoning behind them filing this petition for guardianship and conservatorship." Sellers also related information she garnered from the interview with Dr. Harada she and Gwin had conducted. In particular, Sellers noted that "Dr. Harada stated she felt that with the impairment indicated by [Ms. Bashinsky's] low score [on the Montreal Cognitive Assessment], Mrs. Bashinsky could be at risk of someone taking advantage of her." Sellers concluded: "Based on the information received, it is the

opinion of this court representative that Mrs. Bashinsky is in need of someone to assist her in making decisions. This court representative feels additional testing and more extensive psychological evaluations would benefit Mrs. Bashinsky at this time."

On October 16, 2019, McKleroy and Townsend filed a "Motion to Disqualify" Erskine and any attorney from Maynard from representing Ms. Bashinsky "in this matter." The motion asserted that Erskine and the firm with which she was associated, Webster Henry, "currently represent, and have continually represented, Ash" and Ash's business ventures. The motion also asserted that Maynard had represented Ash in the past in various capacities. McKleroy and Townsend argued in the motion that, under Rules 1.7(a), 1.9, and 3.7, Ala. R. Prof. Cond., Ms. Bashinsky's attorneys should be disqualified from representing her.

On October 17, 2019, Judge King held a hearing on the emergency petition. Present at the hearing were attorneys for McKleroy and Townsend; Ms. Bashinsky; Erskine, Bolus, and Dorr, attorneys for Ms. Bashinsky; Gwin; and Sellers. At the outset of the hearing, Judge King decided to address McKleroy

and Townsend's motion to disqualify Ms. Bashinsky's attorneys. Judge King heard arguments from the attorneys for both sides regarding the motion. Following those arguments, Judge King disqualified Ms. Bashinsky's attorneys. The same day, Judge King entered a written order memorializing this decision, which stated, in part:

> "The Court reviewed the legal authority set forth in the Motion and provided to the Court by counsel, including the Alabama Rules of Professional Conduct, as well as the numerous exhibits attached to the Motion setting forth clear documentary evidence of the extensive prior legal representation of Landon Ash and his business entities by lawyers with the Webster Henry law firm and Maynard Cooper law firm, and the current representation of Landon Ash by Ms. Erskine.
>
> "The Court also reviewed and took into consideration the sworn allegations in the Petition for Temporary Conservator and Guardian setting forth the magnitude of the transfers that are alleged to have been made by Mrs. Bashinsky to Landon Ash and his business entities, and the recent efforts made to transfer significant funds away from Mrs. Bashinsky's current financial advisor.
>
> "Based on all of the foregoing, the Court finds that Mrs. Bashinsky's interests and Mr. Ash's interests are not aligned for purposes of this matter, and further finds that pursuant to the Alabama Rules of Professional Conduct, particularly Rules 1.7, 1.9, and 3.7, the lawyers associated with the Webster Henry law firm and the Maynard Cooper law firm are due to be disqualified from providing legal representation to Mrs. Joann Bashinsky in the matter currently pending before the Court. The

> Court also notes that, pursuant to its understanding of the Alabama Rules of Professional Conduct, because said lawyers have purported to represent Mrs. Bashinsky and have met with her regarding this matter (and thereby presumably obtained relevant and confidential and/or privileged information from her), such lawyers and law firms would also seemingly be disqualified by the same Rules of Professional Conduct cited above from representing Landon Ash in this matter going forward."

Following the disqualifications, Gwin informed Judge King that he was not able to, and he would not, act as Ms. Bashinsky's counsel during the proceedings. Ms. Bashinsky's former attorneys asked Judge King for a continuance of the hearing on the emergency petition so that Ms. Bashinsky could retain substitute counsel, but Judge King denied the request.[11]

---

[11]Ms. Bashinsky asserts that she also specifically requested a continuance so that she could retain new counsel. Ms. Bashinsky's brief, p. 3. In his brief, Judge King asserts that Ms. Bashinsky "made no request herself to Judge King for a continuance, and in fact, did not speak at all at the October 17 hearing." Judge King's brief, p. 7. For purposes of this petition, we need not settle this factual discrepancy, but we do note that, although Ms. Bashinsky's assertion is supported by an affidavit from Erskine, Judge King's statement -- as well as several other observations made in his brief about the emergency hearing proceedings -- is not supported by an affidavit. See Ex parte Guaranty Pest Control, Inc., 21 So. 3d 1222, 1228 (Ala. 2009) (observing that "we have previously considered affidavits submitted in response to a petition for mandamus from trial judges describing the proceedings below").

The hearing then proceeded on the matter of the appointment of a temporary guardian and conservator. Judge King heard testimony from Sellers elicited solely by his questioning. In his brief, Judge King states:

> "After hearing Sellers's testimony, Judge King decided that he had heard sufficient testimony to enable him to make a decision regarding whether an 'emergency' existed under the AUGPPA [Alabama Uniform Guardianship and Protective Proceedings Act], and that he did not need to hear testimony from anyone else on behalf of the petitioners or the respondent. Therefore, neither petitioners nor respondent was offered the opportunity to question Sellers or call other witnesses."

Judge King's brief, p. 11. Judge King concluded that the situation warranted appointment of a temporary guardian and conservator. In his brief, Judge King explains that he then

> "asked counsel for petitioners and Bashinsky's [guardian ad litem] how many days they anticipated would be needed to present their case. The consensus was that two days of court time would be needed, so Judge King reviewed his calendar and told the lawyers a two-day block of time was difficult to find on his docket and that he would need to set the matter out to March 2020, given the current status of his docket."

Judge King's brief, p. 15.

On the same day, Judge King entered a written order confirming his judgment, which stated, in part:

"[T]he Court finds that Joann Bashinsky is a person in need of protection, and an emergency need exists for the appointment of a Temporary Conservator and Temporary Guardian to administer her estate.

"....

"It is further ORDERED that Gregory H. Hawley be, and he hereby is, appointed Temporary Guardian, pursuant to Alabama Code [1975,] § 19-2A-107(a), and he shall have all powers and authority as set forth in § 26-2A-108 of the Alabama Code 1975, including, without limitation, the authority to establish the terms and conditions of the interaction of any and all persons with Mrs. Bashinsky to ensure her ongoing health and well-being. The appointment of Mr. Hawley as Temporary Guardian pursuant to Alabama Code [1975,] § 19-2A-107(a), shall automatically renew every fifteen (15) days until the Permanent Hearing in this matter, scheduled for March 12, 2020 at 9:00 a.m. and March 13, 2020 at 9:00 a.m.

"It is further ORDERED that letters of conservatorship shall be issued to Gregory H. Hawley upon posting a $200,000.00 bond. Assets are to be used for support, maintenance, and investment. The Temporary Conservator is ORDERED to file an inventory within ninety (90) days from the date of issuance of the Temporary Letters of Conservatorship and Guardianship at which time if the Temporary Conservator and Guardian is aware of excess funds over the posted amount, he is to advise the Court and request an additional bond.

"It is further ORDERED that there shall be no distributions made from Ms. Bashinsky's personal investment accounts at Level Four Advisory Services, LLC ('Level Four') pending further Order of this Court; provided that Level Four shall be authorized to pay their own investment advisory fees and continue to have the same discretionary investment authority as set forth in their existing investment

> advisory agreement with Mrs. Bashinsky, pending further Order of this Court.
>
> "It is further ORDERED that any authority that Mrs. Bashinsky currently has with respect to any of the accounts of SYB, Inc. and the Bashinsky Foundation is hereby rescinded, pending further Order of this Court.
>
> "It is further ORDERED that all powers of attorney previously executed by Mrs. Bashinsky are hereby rescinded pending further Order of this Court."

(Capitalization in original.)

On November 7, 2019, Hawley filed a "Motion for Instructions" concerning several issues, including how it should be determined who would select Ms. Bashinsky's new attorneys. On November 25, 2019, Susan Walker, an attorney who had entered an appearance on behalf of Ms. Bashinsky, filed a "Motion for Reconsideration of Order Appointing Temporary Conservator and Guardian." On December 2, 2019, Walker filed the present petition for a writ of mandamus on behalf of Ms. Bashinsky. On December 5, 2019, Judge King entered a written order that stated, in part:

> "This is a case of first impression in my nearly nineteen years as a Jefferson County Probate Judge regarding the issue of whether an individual who has been determined to be mentally incapacitated in a court hearing may employ legal counsel to represent their interests in a Guardianship and/or

> Conservatorship hearing. It should be noted that a Guardian ad litem has been appointed by the Court to represent the incapacitated individual."

In that order, Judge King set a hearing for January 9, 2020, to discuss the issue of Ms. Bashinsky's representation. On January 7, 2020, this Court ordered answers and briefs and stayed all proceedings in the probate court.

II. Standard of Review

> "Mandamus is an extraordinary remedy and will be granted only where there is '(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.' Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991)."

Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003).

The two primary arguments raised in Ms. Bashinsky's mandamus petition are that the probate court lacked personal jurisdiction over her because she was not properly served with the emergency petition and that her basic due-process rights were violated because the probate court disqualified her attorneys and did not allow her the opportunity to retain new counsel so that she could be heard in the October 17, 2019, hearing on the emergency petition. Additionally,

Ms. Bashinsky contends that subject-matter jurisdiction is absent because, she says, McKleroy and Townsend lacked "standing" to file the emergency petition.

As to Ms. Bashinsky's final argument, "a lack of subject-matter jurisdiction may be raised at any time, and ... the question of subject-matter jurisdiction is reviewable by a petition for a writ of mandamus." Ex parte Flint Constr. Co., 775 So. 2d 805, 808 (Ala. 2000). With respect to Ms. Bashinsky's two primary arguments, we acknowledge that the probate court did not consider them, which ordinarily would preclude our reviewing them. See, e.g., Ex parte Flowers, 991 So. 2d 218, 225 (Ala. 2008) ("'In determining whether the trial court [exceeded] its discretion, this [C]ourt is bound by the record and cannot consider a statement or evidence in brief that was not before the trial court.'" (quoting Ex parte Baker, 459 So. 2d 873, 876 (Ala. 1984))). However, "[m]andamus will lie to direct a trial court to vacate a void judgment or order," Ex parte Sealy, L.L.C., 904 So. 2d 1230, 1232 (Ala. 2004), and "[i]f a court lacks jurisdiction of a particular person, or if it denied that person due process, then the court's judgment is void." Ex parte Pate, 673 So. 2d

427, 429 (Ala. 1995). See also Ex parte Third Generation, Inc., 855 So. 2d 489, 493, 492 (Ala. 2003) (observing that "'a want of due process ... voids a judgment'" when the "foundation for declaring a judgment void[] refers to procedural, rather than substantive, due process" (quoting Neal v. Neal, 856 So. 2d 766, 782 (Ala. 2002) (emphasis omitted))). Ms. Bashinsky's two primary arguments raise issues of procedural due process -- notice and opportunity to be heard -- that could render the probate court's underlying judgment on the emergency petition void. Therefore, a mandamus petition is an appropriate method of seeking review of the trial court's judgment as to those two issues.

III. Analysis

At the outset, we note that in her mandamus petition Ms. Bashinsky appears to challenge both the emergency petition and the permanent petition. However, the only orders that the probate court has issued in this case pertain to the emergency petition. Therefore, any potential defects with respect to the permanent petition are not before us because the probate court has not ruled on the permanent petition. Accordingly, Ms. Bashinsky's mandamus petition insofar as it seeks relief

with respect to the permanent petition is due to be denied because the probate court has not entered a ruling adverse to her concerning that petition.

Having clarified what is properly before us for review, we begin by addressing Ms. Bashinsky's "standing" argument. Ms. Bashinsky cursorily argues that "McKleroy and Townsend lack standing to bring the [emergency petition]" because neither person has a "familial relationship with Joann Bashinsky." Ms. Bashinsky's brief, pp. 18, 19.

We first note, as we have done on many occasions, that "the concept of standing was developed '"for public law" cases, ... not "private law" cases,' and thus [we have] removed the gate-keeping function of standing from private-law cases." Ex parte Wilcox Cty. Bd. of Educ., 218 So. 3d 774, 779 n.7 (Ala. 2016) (quoting Ex parte BAC Home Loans Servicing, LP, 159 So.3d 31, 44 (Ala. 2013)). Thus, the alleged error about which Ms. Bashinsky complains -- whether McKleroy and Townsend are proper parties to file a petition for guardianship and conservatorship under the Alabama Uniform Guardianship and Protective Proceedings Act, § 26-2A-1 et seq., Ala. Code 1975 ("the AUGPPA") -- does not implicate

standing but is rather more akin to a real-party-in-interest issue. See Dennis v. Magic City Dodge, Inc., 524 So. 2d 616, 618 (Ala. 1988) (explaining that "'the real party in interest principle is a means to identify the person who possesses the right sought to be enforced'" (quoting 6 C. Wright & A. Miller, Federal Practice & Procedure § 1542 (1971))). Consequently, it is doubtful that this issue is susceptible to mandamus review. Compare Ex parte Sterilite Corp. of Alabama, 837 So. 2d 815, 818 (Ala. 2002) (declining to consider the argument that plaintiff is not a real party in interest as a basis for mandamus relief when the petitioner had confined its arguments to standing), with Ex parte 4tdd.com, Inc., [Ms. 1180262, March 27, 2020] ___ So. 3d ___, ___ (Ala. 2020) (noting that "[t]his Court has held that a mandamus petition is the proper method by which to review the issue whether a party should be allowed to proceed as the real party in interest, albeit in the context of issues arising from the trial court's determination pursuant to Rule 17, Ala. R. Civ. P.").

In any event, Ms. Bashinsky's argument is plainly refuted by the relevant provisions of the AUGPPA, which contain no

requirement that a petitioner seeking a guardianship or a conservatorship have a familial relationship with the person who is the subject of the petition. Section 26-2A-102(a), Ala. Code 1975, provides: "(a) Except as provided by subsection (e), an incapacitated person or any person interested in the welfare of the incapacitated person may petition for appointment of a limited or general guardian."[12] (Emphasis added.) Section 26-2A-133(a), Ala. Code 1975, provides:

> "(a) The person to be protected or any person who is interested in the estate, affairs, or welfare of the person, including a parent, child, guardian, custodian, or any person who would be adversely affected by lack of effective management of the person's property and business affairs may petition for the appointment of a conservator or for other appropriate protective order."

(Emphasis added.) Although some of the facts appear to indicate that McKleroy and Townsend are no longer employed by Ms. Bashinsky, it appears from the information before us that those two people, who have had connections with Ms. Bashinsky for decades, nonetheless have an interest in her welfare.

[12]Section 26-2A-102(e), Ala. Code 1975, concerns parents, custodial parents, or adult custodial siblings of an incapacitated adult child who seek appointment of a guardian for the adult child and therefore is not relevant in this case.

Thus, Ms. Bashinsky's "standing" argument is not a valid ground for voiding the probate court's orders.

As we have already noted, Ms. Bashinsky has presented two arguments as to why the probate court's orders disqualifying her counsel and appointing a temporary guardian and conservator are void: (1) She asserts a defect in personal jurisdiction based on the lack of proper service of process of the emergency petition; and (2) she asserts a fundamental lack of due process as a result of the disqualification of her counsel at the outset of the October 17, 2019, hearing on the emergency petition.

With respect to her argument on service of process, Ms. Bashinsky notes that this Court has stated: "The jurisdiction of the probate court in the premises attaches upon the filing of a proper petition and the service of summons and notice upon the alleged non compos mentis." Prestwood v. Prestwood, 395 So. 2d 8, 11–12 (Ala. 1981). She further observes that § 26-2A-33, Ala. Code 1975, of the AUGPPA provides: "Unless specifically provided to the contrary in this chapter or inconsistent with its provisions, the rules of civil procedure including the rules concerning

vacation of orders and appellate review govern proceedings under this chapter." Rule 4(a)(1), Ala. R. Civ. P., states:

> "Upon the filing of the complaint, or other document required to be served in the manner of an original complaint, the clerk shall forthwith issue the required summons or other process for service upon each defendant. Upon request of the plaintiff separate or additional summons shall issue at any time against any defendant."

Moreover, this Court has stated that a "[f]ailure of proper service under Rule 4 deprives a court of jurisdiction and renders its judgment void." Ex parte Pate, 673 So. 2d at 428-29. Finally, and most specifically with respect to the AUGPPA, § 26-2A-103, Ala. Code 1975, provides, in part:

> "(a) In a proceeding for the appointment of a guardian of an incapacitated person, and, if notice is required in a proceeding for appointment of a temporary guardian, notice of hearing must be given to each of the following:
>
> > "(1) The person alleged to be incapacitated, her or his spouse (if any), and adult children, or if none, parents;
> >
> > "....
>
> "(c) Notice must be served personally on the alleged incapacitated person. Notices to other persons as required by subsection (a)(1) must be served personally if the person to be notified can be found within the state. In all other cases, required notices must be given as provided in Section 26-2A-50[, Ala. Code 1975]."

Section 26-2A-134(a), Ala. Code 1975, provides, in pertinent part, that, "[o]n a petition for appointment of a conservator or other protective order, the requirements for notice described in Section 26-2A-103 apply ...."

With respect to Ms. Bashinsky's argument that she was deprived of due process at the October 17, 2019, hearing on the emergency petition by the disqualification of her counsel and the probate court's refusal to allow her to obtain new counsel, she notes that § 26-2A-102, Ala. Code 1975, of the AUGPPA provides, in part:

> "(b) After the filing of a petition, the court shall set a date for hearing on the issue of incapacity so that notices may be given as required by Section 26-2A-103, [Ala. Code 1975,] and, unless the allegedly incapacitated person is represented by counsel, appoint an attorney to represent the person in the proceeding. The person so appointed may be granted the powers and duties of a guardian ad litem. ...
>
> "(c) A person alleged to be incapacitated is entitled to be present at the hearing in person. The person is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician or other qualified person and any court representative, and upon demand to trial by jury as provided in Section 26-2A-35[, Ala. Code 1975]. The issue may be determined at a closed hearing if the person alleged to be incapacitated or counsel for the person so requests."

(Emphasis added.) The analogous provision in the AUGPPA regarding a petition for conservatorship is § 26-2A-135, Ala. Code 1975, which provides, in part:

> "(b) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has chosen counsel, the court shall appoint an attorney to represent the person who may be granted the powers and duties of a guardian ad litem. ...
>
> "....
>
> "(d) The person to be protected is entitled to be present at the hearing in person. When the person to be protected is not present in person at the hearing, the court, before proceeding at the hearing in the person's absence, must determine that the person's absence is in the best interest of the person to be protected. At the request of the person to be protected, the person is entitled to be represented by counsel, at the person's expense, to present evidence, to cross-examine witnesses, including any court-appointed physician or other qualified person and any court representative, and upon demand to trial by jury as provided in Section 26-2A-35. The issue may be determined at a closed hearing if the person to be protected or counsel for the person so requests."

Ms. Bashinsky contends that the probate court clearly violated §§ 26-2A-102 and 26-2A-135 by disqualifying her chosen counsel and not affording her the opportunity to obtain new counsel and to present evidence or to cross-examine witnesses at the October 17, 2019, hearing.

McKleroy and Townsend, as well as Judge King, have the same core response to both of the foregoing arguments. They do not deny that Ms. Bashinsky was not properly served with the summons and the emergency petition, and they concede that her attorneys were disqualified from representing her at the outset of the October 17, 2019, hearing and that those attorneys were not permitted to present arguments on Ms. Bashinsky's behalf or to cross-examine witnesses in that hearing. They also concede that her guardian ad litem, Gwin, stated in the October 17, 2019, hearing that he would not and could not serve as Ms. Bashinsky's attorney in that hearing. They contend, however, that the notice and counsel requirements provided in §§ 26-2A-102, 26-2A-103, 26-2A-134, and 26-2A-135 pertain to permanent petitions seeking a guardianship and/or conservatorship, not to an emergency petition, which was the subject of the October 17, 2019, hearing. McKleroy, Townsend, and Judge King all contend, in the case of an emergency petition, that no notice is required to be provided to the person the petition seeks to protect and that the hearing may be held ex parte, and thus, they say, the protected person is not entitled to representation by counsel

at a hearing on an emergency petition. In support of these contentions, McKleroy, Townsend, and Judge King cite § 26-2A-107(a), Ala. Code 1975, and § 26-2A-136(b)(1), Ala. Code 1975. Section 26-2A-107(a) provides:

> "(a) If an incapacitated person has no guardian, an emergency exists, and no other person appears to have authority to act in the circumstances, on appropriate petition the court, without notice, may appoint a temporary guardian whose authority may not extend beyond 30 days and who may exercise those powers granted in the order."

(Emphasis added.) Section 26-2A-136(b)(1) provides:

> "(b) The court has the following powers that may be exercised directly or through a conservator in respect to the estate and business affairs of a protected person:
>
> > "(1) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice, the court may preserve and apply the property of the person to be protected as may be required for the support of the person or dependents of the person."

(Emphasis added.) McKleroy, Townsend, and Judge King argue that, because the foregoing provisions allow a temporary guardian or conservator to be appointed without notice, it follows that the other provisions of the AUGPPA listing notice and counsel requirements do not apply in the case of an

emergency petition and that Judge King acted within his discretion in granting the temporary guardianship and conservatorship and in disqualifying Ms. Bashinsky's counsel.

Ms. Bashinsky responds by noting that the commentary to § 26-2A-107 specifically observes that "[s]ubsection (a) requires an 'emergency' situation for its application." She argues that no "emergency" existed in this case and that, therefore, § 26-2A-107(a) and § 26-2A-136(b)(1) do not apply. Ms. Bashinsky further argues that, although the AUGPPA itself does not contain a definition of the term "emergency," the Alabama Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, § 26-2B-101 et seq., Ala. Code 1975 ("the AUAGPPJA"), does define that term. Specifically, § 26-2B-201, Ala. Code 1975, provides, in part:

> "(a) In this article, the following terms shall have the following meanings:
>
> > "(1) EMERGENCY. A circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf."

Ms. Bashinsky observes that this Court has stated that "[i]t is a fundamental principle of statutory construction that

statutes covering the same or similar subject matter should be construed in pari materia." Ex parte Johnson, 474 So. 2d 715, 717 (Ala. 1985). Ms. Bashinsky therefore contends that the definition of the term "emergency" in § 26-2B-201(a)(1) should be considered in pari materia with the discussion in § 26-2A-107(a) of an "emergency" petition for guardianship. She further asserts that nowhere in their petition did McKleroy and Townsend allege, much less demonstrate, that "substantial harm to [Ms. Bashinsky's] health, safety, or welfare" existed at the time they filed the emergency petition.

McKleroy and Townsend counter that the probate court "was not required to consider Section 26-2B-201(a)(1) in determining whether there was an emergency under the Emergency Statute [§ 26-2A-107(a)] applicable to guardianship" because that definition by its own terms applies only to Article 2 of the AUAGPPJA. McKleroy and Townsend's brief, p. 21. They assert that the AUAGPPJA only "relates to adult guardianship proceedings involving other states or countries," whereas the AUGPPA specifically applies to guardianship proceedings for protected persons originating in Alabama, as in this case.

Id., p. 21 n.3. Judge King echoes this argument, asserting: "AU[A]GPPJA deals with protective proceedings in the context of one state interacting with another state in connection with a protective proceeding involving incapacitate adults; hence the substantive circumstances are materially different in AU[A]GPPJA proceedings and AUGPPA proceedings." Judge King's brief, p. 26 n.6.

Rather than offer their own definition of what constitutes an "emergency" under the AUGPPA, McKleroy and Townsend, as well as Judge King, suggest that the meaning of the term is left open to the probate court's discretion. Thus, McKleroy and Townsend argue that, although § 26-2A-136(b)(1)

> "is ordinarily used in emergency circumstances necessitating a temporary conservator, [it] does not describe any particular set of factual circumstances that are necessary for the Probate Court's order to be permissible. Accordingly, that Emergency Statute [§ 26-2A-136(b)(1)] leaves to the Probate Judge the authority and discretion to determine whether, based on his or her judicial experience and considered judgment in dealing with the population of potentially incapacitated persons, the appointment of a temporary conservator is appropriate."

McKleroy and Townsend's brief, p. 28. Judge King likewise contends: "The question whether there is an 'emergency' as

set forth in §§ 26-2A-107(a) and 26-2A-136(b)(1) is a factual determination for the Probate Court to make." Judge King's brief, p. 26.

We reject the foregoing proposition. It does not follow that, because there is no specific definition of the term "emergency" in § 26-2A-107(a) and that term is not expressly used in § 26-2A-136(b)(1), what constitutes the legal definition of an "emergency" for purposes of appointing a temporary guardian or a temporary conservator is solely left to the discretion of the probate court. Often when a key word in a statute is not specifically defined it is because the word has a common usage, i.e., its meaning is widely understood. See, e.g., Ex parte Pepper, 185 Ala. 284, 294, 64 So. 112, 116 (1913) ("If nothing appears to the contrary, words and phrases employed in ... statutes should be interpreted as having the meaning popular signification accorded to them when appropriated for expression."). Cf. Hughes v. State, [CR-17-0768, Feb. 7, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (observing that, "when terms in a statute are terms that, in their common usage, can be understood by the average person, a statute is not void for

vagueness for failing to define the terms"). Indeed, the general legal definition of the term "emergency" has barely changed over time. The definition of the term "emergency" in the edition of Black's Law Dictionary in use at the time the AUGPPA was enacted in 1987 provided: "A sudden unexpected happening; an unforeseen occurrence or condition; perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity. Emergency is an unforeseen combination of circumstances that calls for immediate action." Black's Law Dictionary 469 (5th ed. 1979). In the current edition of Black's Law Dictionary, the term is defined as "[a] sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm." Black's Law Dictionary 660 (11th ed. 2019). Regardless of whether "emergency" is defined in a statute, the lack of a definition does not empower a court to act in violation of basic constitutional rights and fundamental fairness.

What the definition of the term "emergency" in § 26-2B-201(a)(1) provides is a contextual definition for the

term with respect to guardianships.[13] See State v. Georgia-Florida-Alabama Equip. Co., 425 So. 2d 472, 475 (Ala. Civ. App. 1982) (noting that "it is a rule of construction that terms are viewed in light of their usual and ordinary meaning with consideration of the purpose and context of the statute where they are found"). Section 26-2B-201(a)(1)

---

[13]The Alabama Commentary to § 26-2B-204, Ala. Code 1975, which employs the term "emergency" in empowering a court with "special jurisdiction" to appoint a temporary guardian in certain circumstances under the AUAGPPJA, contains a relevant cautionary note:

> "This section should be clearly distinguished from the provisions of the Alabama Guardianship and Protective Proceedings Act concerning the emergency or temporary appointment of guardians. See Ala. Code § 26-2A-107 (1975). Nothing in this section should be construed as repealing the provisions of the Uniform Guardianship and Protective Proceedings Act concerning such temporary appointments. Rather, this provision is intended to limit the court's exercise of special jurisdiction in an emergency to ninety (90) days. When a petition for an emergency appointment is brought pursuant to Section 26-2A-107 and no dispute concerning interstate jurisdiction is raised, the provisions of Section 26-2A-107 apply without the limitations contained in this section."

In other words, the limitations placed upon a court by § 26-2B-204 for appointing a guardian should not be construed to carry over to the authorization for appointing a temporary guardian in § 26-2A-107. This cautionary note is not saying, however, that what constitutes an "emergency" for purposes of Article 2 of the AUAGPPJA cannot enlighten what the term "emergency" means in § 26-2A-107.

categorizes an "emergency" in the guardianship context as "[a] circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf."

The requirement of "substantial harm" to the respondent's health, safety, and welfare to constitute an "emergency" is unsurprising when it is considered in the light of other legal contexts involving the disposition of persons that permit ex parte emergency actions by our courts. In postdivorce proceedings brought by a parent in a circuit court to modify custody, the general rule is that "a parent having custody of a minor child cannot be deprived of that custody, even temporarily, without being given adequate notice under Rules 4 and 5, [Ala.] R. Civ. P., and an opportunity to be heard." Ex parte Williams, 474 So. 2d 707, 710 (Ala. 1985). The only exception to this general rule is a situation in which the "'actual health and physical well-being of the child are in danger.'" Id. (quoting Thorne v. Thorne, 344 So. 2d 165, 171 (Ala. Civ. App. 1977) (emphasis omitted)). The same rule

applies when a child is determined to be dependent on an emergency basis. See, e.g., M.S. v. State Dep't of Human Res., 681 So. 2d 633, 634 (Ala. Civ. App. 1996) (noting that, "[i]n situations where it appears that the actual health and physical well-being of the minor child are in danger, a trial court has the authority to make a temporary ruling concerning custody until a final determination can be made"). Similarly, Rule 65(b), Ala. R. Civ. P., provides, in part:

> "A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition ...."

(Emphasis added.) This Court has observed that "this kind of relief cannot be accorded without notice or hearing unless 'the verified facts of the complaint clearly justify the petitioner's apprehension about the threat of irreparable injury. See Committee Comments, Rule 65, A[la].R.C[iv].P.'"[14]

[14]The AUGPPA was enacted in 1987. The Comment to § 26-2A-1 of the AUGPPA observes that the AUGPPA was "substantially based on the Uniform Guardianship and Protective Proceedings Act, which is contained in the Uniform Probate Code, Article V, Parts 1, 2, 3, and 4 (1982 edition)." Section § 26-2A-107(a) of the AUGPPA appears to be patterned after § 2-208(a) of the Uniform Guardianship & Protective

Ex parte Williams, 474 So. 2d at 711 (quoting Falk v. Falk, 355 So. 2d 722, 725 (Ala. Civ. App. 1978)).

The common theme in legal contexts that permit emergency action is an immediate threat of actual, substantial harm to the person or to the property at issue. As a result, we reject McKleroy, Townsend, and Judge King's insistence that, even under a definition like the one provided in § 26-2B-201(a)(1), "the Probate Court would have been well within its statutory authority to find that the circumstances satisfied that definition." McKleroy and Townsend's brief, p. 21. Boiled down to the basics, the occasion for the emergency petition was Ms. Bashinsky's demand that $17.5 million in a $35 million investment account managed by Level Four be transferred to Morgan Stanley. The emergency petition

---

Proceedings Act of 1982, which states:

> "(a) If an incapacitated person has no guardian, an emergency exists, and no other person appears to have authority to act in the circumstances, on appropriate petition the Court may appoint a temporary guardian whose authority may not extend beyond [15 days] [the period of effectiveness of ex parte restraining orders], and who may exercise those powers granted in the order."

(Emphasis added.) Thus, the text of the Uniform Act itself analogized the appointment of temporary guardians to the legal context of temporary restraining orders.

attempts to buttress the urgency in this demand by implying that the $17.5 million would in actuality go to Ms. Bashinsky's grandson, Landon Ash, who allegedly has already borrowed over $23 million from his grandmother's assets. The emergency petition augments this insinuation with a doctor's unsworn opinion that "it sounds as though there is reason to question [Ms. Bashinsky's] judgment and her ability to make sound decisions about her finances."[15] Regardless of these accessories to the $17.5 million transfer demand, nowhere in the emergency petition or in the subsequent reports provided by Gwin or Sellers is there any evidence indicating that Ms. Bashinsky is at immediate risk of sustaining substantial harm to her health, safety, or welfare. "'That a person makes an improvident bargain, or many improvident bargains; that he is generally unthrifty in his business, or unsuccessful in one or many enterprises, does not, per se, prove him to be non compos mentis. They may co-exist with a mind perfectly and legally sound.'" Hornaday v. Hornaday, 254

[15]The submissions before us do not clearly divulge how Ms. Bashinsky came to be evaluated by Dr. Harada, but it is clear that Dr. Harada was not appointed by the probate court as § 26-2A-102(b) requires in the context of an ordinary petition for guardianship.

Ala. 267, 269, 48 So. 2d 207, 209 (1950) (quoting In re Carmichael, 36 Ala. 514, 522 (1860)). McKleroy, Townsend, Level Four, and Judge King may all firmly believe that Ms. Bashinsky's generosity to her grandson is financially unwise, and they may be correct in that judgment. But such a concern is not an occasion for invoking the emergency procedures afforded a court in § 26-2A-107(a) and § 26-2A-136(b)(1) as a result of which Ms. Bashinsky was admittedly deprived of proper notice of the hearing and, more egregiously, not given the opportunity at that hearing to present her own explanations for her behavior. Put simply, the purported evidence presented to the probate court clearly, and by any standard, did not establish that an "emergency" existed that required action so immediate that the probate court could not allow Ms. Bashinsky an opportunity to respond to the accusations or to retain counsel after the probate court, at the outset of the hearing, dismissed the three lawyers she had chosen to represent her. Consequently, the provisions in the AUGPPA requiring notice, the presence of counsel for the respondent, and an opportunity for the respondent to present arguments and evidence could not be

circumvented in this instance. See §§ 26-2A-102, 26-2A-103 and 26-2A-134(a), and 26-2A-135.

Any lingering doubt that the situation was not a true emergency is erased by the probate court's scheduling of the subsequent hearing on the permanent petition. As was recounted in the rendition of the facts, the hearing on the emergency petition was held on October 17, 2019. After the probate court rendered its judgment appointing a temporary guardian and conservator, the probate court scheduled a hearing on the permanent petition for March 12, 2020, five months after the emergency hearing. In a dependency context, removing a child from the custody of a parent without giving that parent notice and an opportunity to be heard requires that a full hearing be scheduled within 72 hours of such a determination. See § 12-15-308(a), Ala. Code. 1975. Temporary restraining orders are subject to a 10-day limitation period. See Rule 65(b), Ala. R. Civ. P. Section 26-2A-107(a) itself limits the appointment of a temporary guardian to 30 days, a provision Judge King attempts to ignore by ordering that the temporary guardian's appointment "shall automatically renew every fifteen (15) days until the

Permanent Hearing in this matter." The short duration of such orders underscores that emergency rulings are permitted based on the understanding that the truncation of constitutional due-process rights they entail will be mitigated in short order. The probate court's decision at the October 17, 2019, hearing not to grant a continuance to allow Ms. Bashinsky to retain new counsel is unfathomable, given the length of the scheduled delay between the hearings on the emergency petition and on the permanent petition. More broadly, the fact that the probate court believed that the matter could wait another five months for a permanent determination starkly illustrates that any potential harm to Ms. Bashinsky's health, safety, or welfare was not immediate or substantial, i.e., this was not an "emergency" by any reasonable definition.

Even though the lack of an "emergency" implicates the notice-provision requirements in §§ 26-2A-103 and 26-2A-134(a), we must note that McKleroy and Townsend further contend that Ms. Bashinsky did receive actual notice of the emergency-petition hearing because her attorneys made an appearance at the October 8, 2019, hearing, and both Ms. Bashinsky and her attorneys were present at the

October 17, 2019, hearing. Indeed, Ms. Bashinsky concedes that her attorneys were given (an incomplete) copy of the emergency petition on October 4, 2019, by Gwin, the guardian ad litem. "[T]he purpose of service is to notify or inform the defendant of the action being lodged against him." Goodall v. Ponderosa Estates, Inc., 337 So. 2d 726, 728 (Ala. 1976). The case Ms. Bashinsky relies upon in arguing that the lack of service rendered void the probate court's orders entered following the October 17, 2019, hearing, Prestwood v. Prestwood, 395 So. 2d 8 (Ala. 1981), observed:

> "The jurisdiction of the probate court in the premises attaches upon the filing of a proper petition and the service of summons and notice upon the alleged non compos mentis. Craft v. Simon, 118 Ala. 625, 24 So. 380 [(1898)]. But every purpose and office of the summons and notice prescribed by the statute is served when it brings the alleged non compos into court, and when, as here, it appears from the recitals of the judgment entry that the subject of the inquisition has appeared in person at the time and place of trial, though it does not otherwise appear that there was summons and notice, the decree of the court must be respected as having been rendered in the exercise of jurisdiction lawfully acquired."

Id. at 11-12. Because Ms. Bashinsky was sufficiently informed of the nature of the filed action, based on Prestwood the lack

of proper service was ultimately harmless error.[16] Therefore, the probate court's orders disqualifying her counsel and appointing a temporary guardian and conservator cannot be held void based on a lack of service of process.

However, it is still the case that the probate court disqualified Ms. Bashinsky's attorneys at the outset of the October 17, 2019, hearing on the emergency petition and that she was not afforded the opportunity to retain new attorneys or to present any evidence or question witnesses at that hearing. Because we have determined that no "emergency" was presented in that hearing, the representation and case-presentation rights afforded to a respondent in §§ 26-2A-102 and 26-2A-135 were applicable. Those provisions, and Ms. Bashinsky's basic due-process rights, were egregiously violated, as the probate court treated the proceeding like an ex parte hearing even though Ms. Bashinsky was present.

[16]The statutory provision under which Prestwood was decided, § 26-2-43, Ala. Code 1975, was modified by § 26-2A-103, Ala. Code 1975, of the AUGPPA in 1987. However, the requirement that notice be given to "the person alleged to be incapacitated" has remained consistent in the law, undoubtedly because, as the Prestwood Court noted, "fundamental fairness would require adequate notice of a competency hearing." Prestwood, 395 So. 2d at 11.

But the problems with the probate court's disqualification of Ms. Bashinsky's attorneys extend even beyond basic constitutional due process and the procedures afforded by §§ 26-2A-102 and 26-2A-135. The probate court disqualified Ms. Bashinsky's attorneys primarily based upon Rules 1.7 and 1.9 of the Alabama Rules of Professional Conduct. Both of those rules expressly state that the conflicts of interest described therein can be waived by the client if the client is made aware of the conflict and still elects to have the attorney continue the representation. Yet, there is no indication that the probate court asked Ms. Bashinsky at any point during the October 17, 2019, hearing whether she was aware of her attorneys' alleged conflicts of interest. This fact suggests that the probate court had already decided that Ms. Bashinsky was not competent to make her own decisions because the court assumed for itself the duty of determining that the alleged conflicts could not be waived. In other words, the probate court's disqualification of Ms. Bashinsky's counsel at the outset of the October 17, 2019, hearing indicated prejudgment of the very question at issue in that hearing: Whether

Ms. Bashinsky's competence was sufficiently in question to warrant appointment of a temporary guardian and conservator.

Moreover, the manner in which the probate court handled the issue of the motion to disqualify Ms. Bashinsky's attorneys -- granting the motion and then choosing to proceed directly with the hearing on the issue of Ms. Bashinsky's competence -- created an unnecessary complication that was highlighted by the probate court's subsequent scheduling of a hearing in January 2020 to discuss how Ms. Bashinsky's new attorneys were to be selected. That is, because the probate court disqualified Ms. Bashinsky's attorneys and then declared Ms. Bashinsky to be incompetent, it raised the specter that she cannot enter into a contract to hire new counsel to represent her interests in this matter. This complication would have been avoided if the probate court had followed basic procedures of due process and fundamental fairness with respect to Ms. Bashinsky.

In sum, because the allegations raised in the emergency petition and the facts presented in the hearing on that petition clearly did not constitute an "emergency," the provisions for appointing a temporary guardian or conservator

in §§ 26-2A-107(a) and 26-2A-136(b)(1) were inapplicable. Under §§ 26-2A-102 and 26-2A-135, Ms. Bashinsky was entitled to have counsel of her choosing represent her, to cross-examine witnesses, and to present evidence on her behalf, none of which she was afforded in the October 17, 2019, hearing and which, in fact, was openly refused by the probate court. Furthermore,

> "[p]rocedural due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 6, of the Alabama Constitution of 1901, broadly speaking, contemplates the rudimentary requirements of fair play, which include a fair and open hearing before a legally constituted court or other authority, with notice and the opportunity to present evidence and argument, representation by counsel, if desired, and information as to the claims of the opposing party, with reasonable opportunity to controvert them."

Ex parte Weeks, 611 So. 2d 259, 261 (Ala. 1992) (emphasis added). Thus, Ms. Bashinsky's constitutional and statutory rights of due process were also violated through a deprivation of counsel and a lack of opportunity to present evidence and argument before the probate court. "A judgment is void ... if the court rendering it ... acted in a manner inconsistent with due process." Insurance Mgmt. & Admin., Inc. v. Palomar Ins. Corp., 590 So. 2d 209, 212 (Ala. 1991). Accordingly, we

conclude that the probate court's October 17, 2019, order appointing a temporary guardian and conservator must be set aside. Given that the hearing appointing a temporary guardian and conservator was a nullity, it follows that the determination to disqualify Ms. Bashinsky's attorneys that occurred during that hearing, and which precipitated the aforementioned due-process violations, must also be set aside.

IV. Conclusion

The permanent petition for appointing a guardian and conservator over the person and property of Ms. Bashinsky is not properly before us; therefore, insofar as the relief Ms. Bashinsky requests regards that petition, the petition for a writ of mandamus is denied. However, the October 17, 2019, order appointing a temporary guardian and conservator for Ms. Bashinsky is void, as is the order disqualifying Ms. Bashinsky's counsel. We therefore grant the petition for the writ of mandamus as to those orders and direct the probate court to vacate its October 17, 2019, orders, to require the temporary guardian and conservator to account for all of Ms. Bashinsky's funds and property, and to dismiss the emergency petition.

PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, and Stewart, JJ., concur.

Mitchell, J., recuses himself.