

JUDICIAL CONDUCT BOARD

IN RE:

Honorable Bernard Lewis

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Docket No. 18.008

FORMAL COMPLAINT

This Formal Complaint is filed pursuant to Rule 7(4) of the Rules of Supreme Court for Disciplinary Control of Judges and arises out of the Complaint filed with the Judicial Conduct Board on or about January 26, 2018 by Elizabeth Guest, Bruce Thomas and F. Bryce Thomas. Based on investigation of that Complaint, the Board has found probable cause that Judge Bernard Lewis has violated Canons 3(B)(2) and 3(B)(8) of the Vermont Code of Judicial Conduct.

NOTICE

Judge Lewis has the right to file a written answer within twenty-one (21) days of service of this Complaint and to be represented by an attorney of his choice who may cross-examine witnesses and produce evidence on the Judge’s behalf.

FACTUAL BASIS

1. Bernard Lewis is, and has been since 2002 the Probate Judge in the Vermont Superior Court, Orange Unit, Probate Division.
2. Bernard Lewis’ term as Probate Judge expires in January 31, 2019.
3. Judge Lewis did not run for another term and intends to retire at the expiration of his present term.

4. Elizabeth Guest (Thomas), Bruce B. Thomas, F. Bryce Thomas, III, (collectively the Petitioners) are three of the five children of Miriam Thomas who lived in Newbury, Vermont.
5. Mrs. Thomas, as of December 2009, was 85 years old and had been suffering from dementia.
6. The Petitioners filed a petition for Guardianship in the Orange Probate Court in or around December 2009.
7. Paul Thomas and Mary Thomas (the balance of Mrs. Thomas' children) filed a Counter Petition seeking to appoint Paul as the guardian.
8. After an initial hearing in January 21, 2010, where no evidence was taken, but each party was allowed to make offers of proof, Judge Lewis appointed Paul as the guardian, both financial and medical, of Miriam Thomas.
9. The Order Appointing Paul as guardian required a Guardian's Bond in the amount of \$1 MM dollars, and was entered by Judge Lewis on January 25, 2010.
10. Every year an accounting was filed, the Petitioners filed an Objection to the accounting on several bases, and each of the objections noted that the Guardian was paying himself prior to filing an annual accounting with the Court in violation of 14 VSA § 3076 (d)(1).
11. Each objection to an account included in the analysis of the monies Paul had paid to himself, which was in excess of \$250,000.00 as of 2018, for work allegedly done through 2016.
12. Miriam Thomas' estate was valued at \$2,433,058.00 as of February 10, 2010. Mrs. Thomas owned significant real estate holdings including thirteen parcels

which were tree farms or woodlots, one office building in Wells River and a residence in Newbury, Vermont.

13. Personal property was estimated at \$50,000.00 and there were ten accounts in different financial institutions which totaled \$ 483,058.00.
14. Paul filed each subsequent annual accounting late. The Petitioners filed objections to each accounting after it was filed. In each of those objections they noted that the guardian was paying himself prior to filing his annual account and without seeking any court approval for the payments, in violation of 14 VSA § 3076(d)(1).
15. After the objection to the initial account was filed, the Court set a hearing on the accounts filed for the years 2011-2012. That hearing occurred on October 7, 2013. Subsequent to that hearing, the Court issued a Findings and Order On Objection To Allowance Of Accounting on December 12, 2013.
16. The Court approved the accountings for 2011 – 2012 subject to certain conditions. Those conditions were:
 1. The Guardian may continue to reside in the house, 63 Pulaski Street, Newbury Vermont, [an old Inn which had twenty-one rooms] until sold but the sale price will be reduced in increments as agreed to by the parties until sold.
 2. The information on the vehicles requested above shall be submitted to the Court and the parties subject to any adjustment by the Court.
 3. A plan should be prepared for an orderly liquidation of the tree farm/woodlot properties along with a proposal for minimum management of the properties until sale. These plans will be circulated to all parties for concurrence, and, in the event of no agreement, the Court shall schedule a hearing to resolve the issues.

16. One additional condition discussed by the Court at the October 7 hearing, but which was not included in the Order, was that the guardian should get an auctioneer to sell the personal property out of the house and directed the attorneys to see “if you can all agree on something like that, then, you know, put a license in to sell personal property and have an auction and let’s get rid of it.” (Transcript Record at P. 151, L. 1.5-13; hereinafter TR, at P.151 L.1.5-13).
17. The December 12, 2013 Order also included the Court’s admonition to the guardian as follows:

“Moving forward, the Guardian needs to modify his management of the estate to remove any perceived conflicts of interest and to avoid any grounds for allegations on breach of fiduciary duty.”
18. The affidavit of the guardian concerning the cars wasn’t received until February 27, 2014.
19. There was no sale of personal property nor any motion for a license to sell the personal property. Additionally, no plan for sale of the tree farm/woodlot properties was agreed to or submitted to the court.
20. After the October 7, 2013 hearing, the next hearing was July 31, 2014. The Court opened up the hearing with “we’ve got a whole bunch of things kind of hanging out there, and I want to have these things resolved and not languish.” (TR, at P.3, L.1.3-6).
21. The October 7, 2013 hearing included testimony by Paul and had to do with sales of property in Bolton, Vermont including a sale to the Green Mountain Club.

22. There was a dispute over what information Paul had provided in obtaining the license to sell and how the sale of the remainder of Bolton Property which had been broken down into three lots, was completed.

23. Petitioners' attorney was pressing for more information and the Court said "I think getting the information so that we can get this objection wrapped up is more important than that. I guess if I had to prioritize, I'd say let's get the rest of the Bolton Property sold." (TR, at P.28, L.15-18).

24. At that hearing the Court also determined that the three conditions in his order of December 12, 2013 had been satisfied and that an order would be issued

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personal property sold, he then stated "if I don't get a sale plan within thirty days – I'll make a sales plan." (TR, at P.106 L.13-17).

28. At the end of the day the Court agreed that the hearing on the still pending motions would have to be scheduled for two days. (TR, at P.112 L.6-9).
29. The next hearing was held on June 23, 2016. At the opening of that hearing, the Court stated "so we got a bunch of stuff to do today." The Attorney for the Petitioners described what he thought was the status of the case and what issues still had to be addressed. He outlined the history of discovery and issues on the 2013 accounting (TR, at P.5-7).
30. Toward the middle of that hearing, Judge Lewis stated that even though the non-production by the guardian was not willful and was just due to his lack of organization, it would be hard for the Judge to approve accountings if it couldn't see the documents to back up the expenses.
31. On June 23, 2016, Judge Lewis also voiced concerns about the guardian's ability to maintain proper records. (TR at P.66-68).
32. At that hearing, Judge Lewis also again expressed his desire to see the personal property sold and stated he didn't know why that was not being done. (TR at P.97).
33. The Court continued to discuss the need for the sale of personal property and noted that "intentions are good but nothing happens." (TR at P.100).
34. The Court went on direct a personal property sale plan to be submitted within ten days. The Court also set the date for the hearing on removal of the guardian for August 24-25, 2016.

35. The next hearings were the evidentiary hearings on August 24-25, 2016. During the second day, the hearings began to break down after there were discussions of how this matter was going to proceed. Toward the end of the day of August 25, 2016 the Court in response to argument of counsel stated:

Here's the problem. The problem is that there sufficient here for the Rule 67(b). The question - - is yeah, go ahead - - is there more than there. (sic) And it seems like there is more than that. It seems like there's questions that have to be answered about potential fraud, potential self-dealing, you know, those kinds of issues which I think go beyond the rule of 67(b). So I think that puts it down. What are you going to do rebut that? (Transcript at P.151, L. 2-9).

36. Judge Lewis went onto say "I don't want to just say, let's do the 67(b) notice and move on because I think we have gone beyond that." Id. at p. 152, L. 19-20.

37. At the end of the August 25th hearing, after discussion about what would be filed and when, the Guardian's attorney agreed that Paul would submit requests for payments and would not pay himself without Court approval.

Mr. Stearns: I just had one more thing, your Honor. That is, I'd like to move right now for the Court to issue an order directing that no more payments be made to the Guardian or for tree management until accountings are approved or other approval is given by this Court. I believe that is consistent with the statute.

Mr. Olmstead: Just so we are clear, so if Mr. Thomas does work from this moment forward he is to submit a request for payment for approval of the Court is that where we - -

Mr. Stearns: That's what I am requesting, yes.

The Court: Yeah, he can log his time and then ask to be - - submit a request for payment.

Mr. Olmstead: No objection to that your Honor.

(TR, at P. 159 L.13-25).

38. There was discussion in the August 25, 2016 hearing about filing a Complaint, Petitioners' attorney filed a Rule 67(b) Notice on September 28, 2016. An additional Motion to Find the Guardian in Contempt was filed on October 11, 2016. On behalf of the guardian a Motion for More Definite Statement was filed on October 13, 2016 and a Motion Hearing was held on December 1, 2016.
39. At the December 1, 2016 hearing, Judge Lewis brought up mediation. The Judge noted "maybe it's because I've been too permissive about allowing things to go on." (TR at P.8), and then went on over the next several pages to express his displeasure with the guardian's lack of compliance with the Court's orders. At the close of the hearing the Judge directed the parties to submit an order concerning mediation. (TR, at P. 3 L.10-13).
40. Judge Lewis expressed his frustration with the guardian's apparent inability to do what the Court told him to do. The Judge stated:

The Court: I guess I have to say, from my perspective, it seems like we got to drag Paul screaming and kicking to do what we have told him to do. And their point is well taken. An Order that's a year old, and we're still saying what happened to that? Like the sale of personal property, what happened to that?

(TR, at P. 12 L.2-7).

The hearing ended with discussions between the counsel and Court about potential mediators.

41. At the next hearing, on March 20, 2017, which was set to hear a Motion to Hold Guardian in Contempt, the Judge again brings up the issue of mediation and directs the parties to submit an agreed upon order as to mediation.

42. The Court then again addressed the failure of the guardian to sell the personal property, and again expressed his apparent frustration:

The Court: But the problem is, we were going to get rid of this stuff didn't have to insure it and all those other reasons to do it. And it's just another thing that's slipped out and slipped out and slipped out.

43. The Court went onto direct that the attorneys submit an order within five days either on consent or not and if the adversary doesn't agree within five days, the

Court was going to make an order

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In terms of is it insurable or not, there are two properties that are being insured within the estate or within our father's trust, that are buildings. and insurance is - - is being provided on those two properties, and either they have no furnishings or nobody's living there. So obviously, it's not a problem. So I just can't imagine how this should be any hold up to selling the personal property and moving out.

The Court: I agree with you. There shouldn't be.

(TR, at P.14 L.1.6-14).

46. There was only one additional hearing in this matter before Judge Lewis recused himself. That hearing was on March 1, 2018. At that hearing, the parties reported that the mediation had not been successful and that there had been a suggestion of a successor financial guardian but that the suggested replacement was not acceptable to the guardian. The Petitioners' attorney noted both sides had filed Rule 67 Orders in 2016 and that it was all still before the Court. The Court responded that it was his understanding that all of that had been put on hold pending what happened in mediation, the Motion to Postpone Ruling on Outstanding Motions was filed on August 3, 2017.
47. Right before the March 21, 2018 Rule 67 Notice and Order (the Rule 67 Order) was issued, Mr. Stearns was contacted by the Court Clerk and asked if he would send her his Rule 67 Pleading.
48. The Order that was entered on March 21, 2018 and entitled "Rule 67 Notice and Order" is taken in large part from the document that was submitted by the Petitioners' attorney in September 2016. Paragraphs 1-9, 10, 17-20, and 24 were taken in whole or in part from Mr. Stearns submission.
49. All of the evidence concerning the guardian's failure as set forth in the Rule 67 (b) Order were before the Court by August 25, 2016. As of that date, there had

been five years of complaints against the guardian's accounting and his behavior.

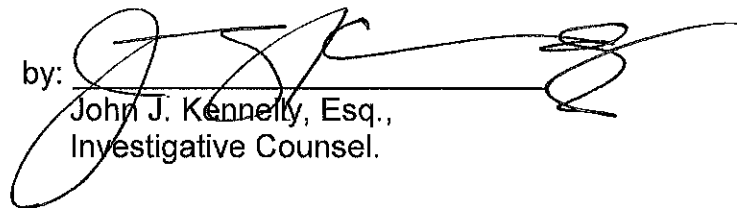
50. The Court repeatedly noted its frustration with the pace of the proceedings and the guardian's failure to comply with Orders of the Court, but did nothing to require that its Orders be followed and that the guardian follow the law.
51. When the guardian kept paying himself after the Court's direction at the August 25, 2016 hearing and that non-compliance was brought to the Court's attention at the March 20, 2017 hearing, the Court simply said that the Order hadn't been specific enough, and that was everyone's fault.
52. The Judge did not do everything a Judge should and could have done to dispose of the matters before the Court promptly, efficiently, and fairly. The Guardian paid himself enormous amounts of money during the seven and half years he was in control of the estate. Those payments were obviously of little benefit to the ward.
53. The Judge was not faithful to the law in that notwithstanding the recitation of 14 VSA 3076 (d) by the Petitioner in each year's objection to the Annual Account the guardian consistently paid himself before filing an account or seeking approval for his fees from the Court. The Petitioners have spent approximately \$100,000.00 in attorneys' fees over the six and half years they have been represented in this matter and the guardian paid his attorney, who was representing the Guardian's interest and not the Wards, approximately \$60,000.00.

54. The Judge failed to promptly, efficiently and fairly dispose of the issues before him.
55. Judge Lewis failed to dispose of his judicial matters promptly, efficiently and fairly in violation of Canon 3(B)(8).
56. Judge Lewis failed to be faithful to the law in violation of Canon 3(B)(2).

DATED at Rutland, Vermont, this 7th day of January, 2019.

Judicial Conduct Board

by:



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