

COPY

IN THE SUPREME COURT OF MISSISSIPPI

EMMA JANE HESTER

APPELLANT

VS.

CAUSE NO. 2007-CA-00225

DAVID HESTER

APPELLEE

FILED
JUL 19 2007
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

BRIEF OF THE APPELLANT

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TABLE OF AUTHORITIES

MISSISSIPPI STATUTORY AUTHORITY

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Emma Jane Hester - Appellant;
2. W. Brady Kellems, Joseph P. Durr - Attorneys for Appellant;
3. David Hester - Appellee;
4. Lane B. Reed- Attorney for Appellee;
5. Jimmy W. Jones - Chancery Clerk of Franklin County, Mississippi;
6. Judge Debbra K. Halford, Chancellor for the 4th Judicial District.

SO CERTIFIED this 25 day of July, 2007.


JOSEPH P. DURR
Attorney for Appellant

IN THE SUPREME COURT OF MISSISSIPPI

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DAVID HESTER

APPELLEE

BRIEF OF THE APPELLANT

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STATEMENT OF THE ISSUES

1. Is the Conservatorship of Emma Jane Hester valid where the purported doctors certificate did not indicate that the person for whom the conservatorship is to be established was incapable of managing her own affairs, and further, where one doctor testified that the person for whom the conservatorship is to be established could handle most of her affairs; and
2. Whether an Order entered without notice and without posting of security, restraining the withdrawals of the putative ward's funds is void as a matter of law for failure to comply with Mississippi Rule of Civil Procedure 65.

STATEMENT OF THE CASE

On the 2nd day of October, Appellee herein, David Hester, requested from the Chancery Court of Franklin County, Mississippi, the appointment of a Conservator for the person and Estate of Emma Jane Hester. A trial was had on whether a Conservator was for the person and Estate of Emma Jane Hester was necessary, and evidence was presented and testimony was heard in the Chancery Court of Franklin County, Mississippi. According to Mississippi Code Annotated Section 93-13-255, two doctors certificates are required to before a conservatorship shall be established. However, Appellee simply submitted a written letter from one doctor, and a purported certificate from the other physician, neither of which indicated that the proposed ward, Emma Jane Hester, was incapable of managing her own affairs. Moreover, Dr. Ben Yarbrough testified that Emma Jane Hester was capable of managing most of her affairs. Appellant Emma Jane Hester contends that the Chancellor, nevertheless, issued her opinion against the overwhelming weight of the evidence, and improperly concluded that a Conservatorship was necessary, notwithstanding the failure of David Hester to comply with Mississippi Code Annotated Section 93-13-255, as well as the testimony of the learned physician.

Further, before the trial was had in this matter, the Chancellor, in her Order Setting Trial and Prohibiting Disposal and Transfer of Assets, dated October 24, 2006, precluded the purported ward, Emma Jane Hester, from accessing her own bank accounts and being able to provide for her own needs. The action by the Chancellor is tantamount to a temporary restraining order, which mandates notice and the posting of a bond. However, no security was posted, and notice was not given; both of which are required pursuant to Mississippi Rule of Civil Procedure 65.

SUMMARY OF THE ARGUMENT

The Conservatorship purportedly established for Emma Jane Hester is not proper and should be voided by this Court for the following reasons: (1) According to Mississippi Code Annotated § 93-13-255, two reputable licensed physicians must personally examine and certify in writing as to the medical necessity of appointment of a conservator. This statutory mandate was not followed, so the Conservatorship must fail; and (2) the overwhelming weight of the evidence, including the testimony of Dr. Ben Yarbrough, indicated that the proposed ward, Emma Jane Hester, was capable of managing most of her affairs. In order for a Conservatorship to be established, the evidence must show, pursuant to Mississippi Code Annotated Section 93-13-121, that the ward is incapable of managing her estate. The evidence presented in this case is contrary to the ruling of the Chancellor and goes against the overwhelming weight of the evidence; therefore, the conservatorship is invalid and must fail.

Further, before the trial on this matter, the Chancellor, through Order of the Court, prohibited the purported ward, Emma Jane Hester, from accessing her own funds. This measure is a temporary restraining order which requires notice and the posting of a bond pursuant to Mississippi Rule of Civil Procedure 65. No bond was posted, and notice was not afforded to Emma Jane Hester. Therefore, the trial court Order is invalid as a matter of law.

ARGUMENT

I. THE CONSERVATORSHIP OF EMMA JANE HESTER IS CLEARLY INVALID ACCORDING TO MISSISSIPPI CODE ANNOTATED § 93-13-255 (1972) AND IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Generally, Conservatorships were instituted in 1962 to broaden the class of individuals who were legally recognized as requiring assistance in the management of their person and estate. Harvey v. Meador, 459 So.2d 288 (Miss. 1984). In Meador, the Court spoke to conservatorships, noting that guardians may be appointed for minors, or incompetent adults, persons of unsound mind, alcoholics or drug addicts; and further that the guardian is the legally recognized custodian of the person or property of another with prescribed fiduciary duties and responsibilities under court authority and direction. However, there are certain guidelines in place that must be followed before a conservatorship can be deemed valid. At issue here in Mississippi Code Annotated Section 93-13-255, which states in relevant part that

The chancery judge shall be the judge of the number and character of the witnesses and proof to be presented, except that there shall be included therein at least two (2) physicians who are duly authorized to practice medicine in this state . . . each of whom shall be required to make a personal examination of the subject party, and each of whom shall make in writing a certificate of the result of such examination.

Mississippi Code Annotated 93-13-255 (1972).

In the case *sub judice*, the Appellant, Emma Jane Hester, was examined by her primary physician, Dr. Ben Yarbrough, as well as a physician with which she was not familiar. Her primary physician, in his report, which is attached hereto as Exhibit "A", states that the Appellant is able to handle most of her affairs. Further, he remarks that her overall health

is "good." Even though this report is favorable to Emma Jane Hester, Appellant contends that this report definitely is not a certificate of which is required pursuant to Mississippi Code Annotated Section 93-13-255. Dr. Yarbrough uses none of the required statutory language and describes none of the characteristics necessary to convince this Court that a conservatorship is needed. Mississippi Code Annotated Section 93-13-251 states that

If a person by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate, the chancery court of the county wherein such person resides may, upon the petition of such person or of one or more of his friends or relatives, appoint a conservator to have charge and management of the property of such person. (Emphasis added).

Mississippi Code Annotated Section 93-13-251 (1972).

The letter report of Dr. Yarbrough is not a certificate as contemplated of statute, but that notwithstanding the writing in no way indicates that Emma Jane Hester is a person that needs a conservatorship. Therefore, Appellant asserts that this letter from Dr. Yarbrough is not a certificate; accordingly, the statutory requirements of Mississippi Code Annotated Section 93-13-255 have not been met, and the conservatorship must fail.

The other examining physician, psychologist Linda Wilbourn, notes in her certificate that Emma Jane Hester is incapable of managing her own estate due to "below average intellect" and "memory problems." The psychologist's certificate is attached hereto as Exhibit "B" and incorporated herein by reference. This certificate is insufficient according to the law found in the landmark guardianship case of Harvey v. Meador. The Court in Harvey reiterates the statutory language in Mississippi Code Annotated Section 93-13-255 that a conservator may be appointed by the chancery court if a person by reason of advanced age, physical incapacity, or mental weakness is incapable of managing her own estate. Mississippi Code Annotated Section 93-13-251; See also Harvey v. Meador, 489 So.2d 288

(Miss. 1984). Here, the reporting psychologist mentions none of the requisite factors needed to properly petition the court for the appointment of a conservator of the person and/or estate of Emma Jane Hester. Further, the factors that are addressed by the psychologist, memory problems and below average intellect, are insufficient and insignificant in and of themselves to warrant the establishment of a conservatorship.

Clearly, the findings and reports of the two examining physicians (with one of the physicians, Dr. Yarbrough, noting that Emma Jane Hester can handle most of her affairs) in no way indicate that Emma Jane Hester needs the limitations and restrictions that are imposed by a conservatorship. Further, the letter submitted by Dr. Yarbrough is in no way a certificate recognized by Mississippi statutory law. Appellants submit that the statutory requirements of Mississippi Code Annotated Section 93-13-255 are elements or conditions precedent that must be satisfied before a management analysis as contemplated by the Harvey v. Meador case. Emma Hester contends and urges the Court to accept that the requirements of two doctors certificates is a statutory prerequisite that must be complied with before requiring the putative ward to endure the expense and difficulty of litigation. In effect Mississippi Code Annotated Section 93-13-255 must be satisfied before a prima facie case can be met.

Accordingly, the conservatorship must fail because the statutory requirements were not followed; and assuming arguendo that the conservatorship is valid, which it clearly is not, then the chancellor's decision is against the overwhelming weight of the evidence and the conservatorship implemented by the trial court must fail.

II. THE CHANCELLOR'S RULING THAT RESULTED IN A TEMPORARY RESTRAINING ORDER MUST FAIL FOR NON-COMPLIANCE WITH THE RULES OF CIVIL PROCEDURE.

Mississippi Rule of Civil Procedure 65 addresses injunctive relief. Rule 65 states that that

A temporary restraining order may be granted, without notice to the adverse party or his attorney if (1) it clearly appears from specific facts show 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 his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice. (Emphasis added.)

Mississippi Rule of Civil Procedure 65 (b).

From a practical as well as legal perspective it is inconceivable that a chancellor would grant a temporary restraining order which in effect limits a person subject to a conservatorship proceeding from accessing their own funds. The Order filed October 24, 2007, but issued approximately October 2, states "neither Emma Jane Hester nor any person living with her or associated with her business matters shall expend any funds . . . until trial be had on this matter on October 24, 2006." In this situation, Emma Jane Hester has not been given her day in Court, and is not under a court ordered conservatorship; however, she is prohibited from accessing her funds and spending money in the way she chooses. This action on part of the Chancellor is a temporary restraining order and said conduct is governed by Mississippi Rule of Civil Procedure 65. Furthermore, David Hester's attorney failed to certify to the court in writing the efforts made supporting his claim that notice should not be given to Emma Jane Hester nor her counsel. The court also failed to comply with Rule

65 in that the Order does not state why the temporary restraining order was entered and why it was granted without notice. Accordingly, the mandates set forth by Mississippi Rule of Civil Procedure 65 were not followed, and the Order must be judged invalid.

Further, Mississippi Rule of Civil Procedure 65 states that

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and reasonable attorney's fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Mississippi Rule of Civil Procedure 65(c).

The posting of a security is mandated by the above rule. However, there was no security posted in this instance. The requirement for security is in place for situations just like the one in this case; where an aggrieved son, David Hester, is attempting to exert control over his elderly mother, Emma Jane Hester, and will go to all lengths to accomplish said control.

The practical effect and actual result in this case being that the conservator has expended the ward's meager funds to force the implementation of a conservatorship on Emma Hester, while depriving Emma from accessing her funds to defend her rights.

Here, a temporary restraining order was wrongfully placed against Emma Jane Hester and the court nor David Hester followed the guidelines set forth by Mississippi Rule of Civil Procedure 65. Therefore, the temporary restraining order must fail.

CONCLUSION

Appellant Emma Jane Hester clearly demonstrates that the conservatorship must fail for a variety of reasons. First, the purported certificate of Dr. Ben Yarbrough is not a certificate at all. The document provides none of the magic language found in Mississippi

Code Annotated Section 93-13-251 that would approve the establishment of a conservatorship. Also, it is evidenced from the case law and statutory law provided above, that the trial Court erred in establishing a conservatorship for the person and estate of Emma Jane Hester. Even assuming that the report of Dr. Yarbrough is a certificate, which it is not, then the doctor's reports, especially that of Dr. Ben Yarbrough, evidence the fact that Emma Jane Hester is physically and mentally capable of providing for her own needs, and that she is able to manage her estate and own affairs.

Further, the temporary restraining order entered by the Chancellor is void as a matter of law. Rule 65 of the Mississippi Rules requires bond and notice in a situation that restricts a persons liberty without notice. However, these requirements were not met, nor were they waived by the Appellant; therefore, the Order is void as a matter of law.

Clearly, the statutory requirements and rules of civil procedure mandate strict compliance that the statutory required certificates be valid and that bond and notice be given for a restraining order pursuant to Rule 65 of the Mississippi Rules of Civil Procedure. These requirements were not met. Therefore, the conservatorship must fail.

Respectfully submitted,

EMMA JANE HESTER

By: _____

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the above and foregoing document on the following:


**Lane B. Reed
P.O. Box 188
Meadville, MS 39653**

**Betty Sephton
Supreme Court Clerk
P.O. Box 117
Jackson, MS 39205**

**Honorable Debbra Halford
Chancellor
P.O. Box 578
Meadville, MS 39653**

placing a copy of the same in the United States mail, postage prepaid, addressed to their regular business mailing address.

This the 19th day of July, 2007.



JOSEPH P. DURR

FAMILY MEDICAL GROUP
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MEADVILLE, MISSISSIPPI 39653
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October 6, 2006

Lane B. Reed, Esquire
McGehee, McGehee & Torrey
Post Office Box 188
Meadville, Mississippi 39653

RE: In the Matter of the Conservatorship of Emma
Jane Hester; Franklin County Chancery Court
Cause No. 2006-163

Dear Mr. Reed

I examined Mrs. Hester on October 4, 2006. My history was obtained from both Mrs. Hester and her son, Glen Hester. They both spoke approximately the same amount of time although his answers were more specific and he did answer for her on more than one occasion. I found her general health to be good. She has no acute medical problems at this time. She does suffer from diabetes and arthritis.

When eliciting information from her she had a fair general knowledge. She was not able to provide specific information to every question asked of her.

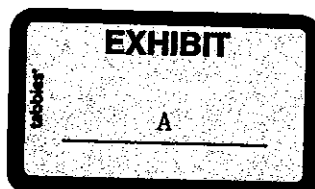
Based on my examination I feel like she is able to manage most of her affairs. She still requires help giving herself medication and she is somewhat uncertain at times of her business affairs.

I hope this information is helpful. If I can be of any further assistance please feel free to contact me.

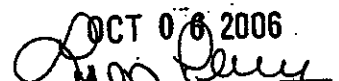
Very truly yours,



Benjamin Owen Yarbrough, M.D.



FILED
JIMMY W. JONES
CHANCERY CLERK

OCT 06 2006

DEPUTY CLERK

IN THE CHANCERY COURT OF FRANKLIN COUNTY, MISSISSIPPI

IN THE MATTER OF THE CONSERVATORSHIP
OF EMMA JANE HESTER

CAUSE NO. 2006-163

CERTIFICATE OF PHYSICIAN

The undersigned physician hereby certifies that she is duly authorized to practice medicine in the State of Mississippi and that she has had at least five years actual practice.

Said physician certifies that she has made a personal physical and mental examination of

EMMA JANE HESTER and that as a result of said examination finds that because of her

mental and physical condition which is a result of below average intellect, & memory problems which are probably subsequent to arteriosclerosis and/or unknown etiology.

she is incapable of managing her own estate.

Executed on this the 6th day of October, 2006.

L. Wilbourn, P.D.
L. WILBOURN, PSYCHOLOGIST

FILED
JIMMY W. JONES
CHANCERY CLERK

OCT 06 2006
Lynn Jones
DEPUTY CLERK



TOTAL P.03

TOTAL P.02