IN THE SUPREME COURT

OF

THE STATE OF MISSISSIPPI

IN RE: CONSERVATORSHIP OF RUBY CHISM ELLIS

BOBBIE L. ELLIS — **APPELLANT**

VS. — **NO. 2008-CA-01993**

STEPHANIE C. TURNER — **APPELLEE**

APPELLANT'S RESPONSE TO BRIEF OF APPELLEE

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Pursuant to Rule 28(c) MRAP Appellant, Bobbie L. Ellis hereby replies to the brief of Appellee, Stephanie C. Turner.

It is undisputed that at all relevant times Bobbie L. Ellis (Mr. Ellis), seventy (70) years of age, and Ruby Chism Ellis (Mrs. Ellis), seventy-five (75) years of age, were husband and wife. (T 75). They resided together in their marital home in Lee County, Mississippi, which is still occupied by Mr. Ellis. (T 75, 82-83). Mrs. Ellis was admitted as a patient to the Alzheimer's wing of a nursing home in June, 2006. She has been unable to recognize anyone or otherwise comprehend for about three (3) years. (T 75-76, 82-83). Until the interruption by Stephanie C. Turner (Ms. Turner), Mr. Ellis exclusively handled all of Mrs. Ellis's financial affairs and made all of her healthcare decisions. (T 76-77). He supervised her Medicaid benefits and at least once

per week while she was in the nursing home visited her taking to her personal effects. (T 76-79).

As reported by the guardian ad litem appointed by the lower court, Mr. Ellis was providing personal effects to his wife and was maintaining their residential home with no finding that Mr. Ellis had grossly misspent any of her assets. (T 164). Ms. Turner admitted that Mrs. Ellis was being properly cared for. (T 40). There was absolutely no proof whatsoever that Mr. Ellis physically or mentally abused his mentally incompetent wife.

Before becoming mentally incompetent Mrs. Ellis had in place a durable power of attorney and a medical healthcare directive allowing either Mr. Ellis or Ms. Turner to act as her agent. (Exhibits 2 and 8). On July 19, 2008, Ms. Turner confronted Mr. Ellis at his residential home waiving letters of conservatorship granted at a July 8th hearing, of which Mr. Ellis had absolutely no notice, and demanded as conservator that he immediately vacate his marital home and homestead. (T 34-35, 50, 80, 130-131). Ms. Turner subsequently admitted that she had lied under oath on two (2) occasions to inquiries of the Chancery Judge so as to procure her appointment as conservator at the July 8, 2008, hearing. (T 9-10, 130).

ARGUMENT

I.

WHETHER OR NOT THE LOWER COURT ERRED IN ESTABLISHING A CONSERVATORSHIP AND APPOINTING MRS. ELLIS'S GRANDDAUGHTER AS CONSERVATOR OF THE PERSON AND ESTATE OF MRS. ELLIS WHO AT SUCH TIME HAD IN PLACE A VALID DURABLE POWER OF ATTORNEY AND A VALID HEALTHCARE DIRECTIVE EACH DULY EXECUTED IN 2002 WHEN SHE WAS COMPETENT.

It is undisputed that on July 11, 2002, while Mrs. Ellis was competent she executed a durable power of attorney and a healthcare directive appointing as her lawful agents her husband and Ms. Turner. (Exhibits 2 and 8). These instruments were duly recorded on November 11, 2007, in the records of the Chancery Clerk of Lee County, Mississippi, with certified copies readily available, giving notice to the public and in particular to Ms. Tuner. (T 44, Exhibits 2 and 8). Ms. Turner asserted her intention to go forward in the lower court and be conservator of Mrs. Ellis even though she admitted that she was aware before she filed her complaint of the two (2) powers of attorney and her ability to exercise powers thereunder (T 39, 43-44) and admitted having possession or control of the original instruments. (T 124-125, 130). She admitted that Mrs. Ellis was being properly cared for before her appointment as conservator (T 40) and when asked if she was aware that her appointment as conservator directly resulted in Mrs. Ellis receiving less Medicaid benefits responded: "I am aware of that, and that's fine." (T 69-70).

In her brief Ms. Turner asserts that she could not utilize the durable power of attorney in that its language required certificates of two licensed physicians; however, she exhibited

certificates of two (2) licensed physicians to the complaint to be appointed conservator she filed on April 10, 2008.

Mrs. Turner's only other argument to counter Issue No. I cited Bryan v. Holzer, 258 So.2d 648 (Miss. 1991), which has no applicability to the case *sub juris*. In Bryan v. Holzer, *Id.*, this Court affirmed the removal of a conservator who was utilizing funds of the ward for his benefit while stating that the conservator as a fiduciary is charged with a duty of loyalty to the ward in administering the ward's assets solely in the best interest of the ward. *Id.*, ¶ 7 at Page 657. The issue at hand is not the loyalty of a court-appointed conservator but whether or not any necessity existed for the lower court to appoint a conservator of Mrs. Ellis.

Mr. Ellis did exhibit a character flaw which action he completely remedied before being aware of any conservatorship proceeding on behalf of his wife . (T 34-35, 130-131, 147, 160). Remedy is not moral justification; however, Mr. Ellis never physically or mentally abused his wife who has no knowledge and no mental awareness of Mr. Ellis's past character flaw. (T 76, 102, 164). The matter before the lower court was not that of a divorce.

Ms. Turner does not counter that the purpose of a durable power of attorney is to avoid the establishment of a conservatorship with the beneficial effect of avoiding the time, expense and embarrassment involved with having to establish and conduct a conservatorship for an incompetent person. § 87-3-101 MCA; Estate of Schriver, 441 So.2d 1105, 1106 (Fla. App. 1983); and Guardianship of Savell, 856 So.2d 378, 384, § 33 (Miss. App. 2001). The

establishment of a conservatorship for the ward by the lower court was unnecessary.

II.

WHETHER OR NOT THE LOWER COURT'S JUDGMENT APPOINTING MRS. ELLIS'S GRANDDAUGHTER AS CONSERVATOR OF HER PERSON AND ESTATE IS INVALID AS A RESULT OF FAILURE TO ADHERE TO THE REQUIREMENT THAT THE HUSBAND, A NEXT OF KIN OR OTHER DESCENDANT BE GIVEN PRIOR NOTICE BY PERSONAL SERVICE OF THE TIME AND PLACE FOR THE HEARING.

Ms. Turner proceeded to the lower court on the 8th day of July, 2008, and secured herself the appointment as conservator of the person and estate of Mrs. Ellis whose heirs at law were her adult son and Mr. Ellis. The record depicts no prior notice of the date and time of the hearing being extended to Mrs. Ellis's son who never gave testimony or was even personally present at any of the four (4) lower court hearings. (T 34-35, 127, 130-131). With neither Mrs. Ellis's husband nor son present at the July 8, 2008, proceeding Ms. Turner gave testimony during direct examination and again directly in response to separate inquiries of the Chancery Judge that Mr. Ellis had prior notice of the July 8th hearing and had been made fully aware of the July 8th proceeding by her. (T 9-10). Ms. Turner at a subsequent hearing after Mr. Ellis became a party admitted in open court that her two (2) July 8, 2008, sworn statements to the lower court were false in that she had, in fact, never made Mr. Ellis aware or given him any prior notice whatsoever of the July 8th proceeding. (T9-10, 34-35, 130).

Mr. Ellis first became aware of the July 8th hearing appointing Ms. Turner as conservator

of his wife on July 19th at which time he promptly filed his complaint to have the July 8th judgment set aside resulting in subsequent hearings before the lower court. (T 34-35, 50, 80, 130-131). By judgment dated October 28th the lower court "confirmed" its July 8th judgment. (R 28). Upon a request for conclusions of law the lower court on November 12th stated that, "Any deficiency which may have existed in her initial appointment (as conservator) is resolved hereby." (R 33).

As per the July 8th judgment appointing Ms. Turner as conservator of Mrs. Ellis it is undisputed that no prior notice was given to at least three (3) family members of the "time and place for the hearing" as required, and such judgment is invalid; *viz.*, not of binding force or legal efficacy. § 93-13-253 MCA, Smith v. King, *Supra.*, and Armstrong v. Estate of Thames, *Supra.*

The lower court's October 28th judgment specifically "confirmed" the July 8th judgment appointing Ms. Turner as conservator and directed that Ms. Turner should remain as conservator. (R 28). It should be vacated. Firstly, the lower court has no jurisdiction to validate or confirm the July 8th invalid order which by definition had no binding force or legal efficacy. An "invalid" judgment is incapable of being "validated" at a subsequent time. Further, there was no order continuing the July 8th hearing, and Mrs. Ellis was never summonsed or otherwise given prior notice of the times and places of the hearings conducted subsequently thereto as required by § 93-13-253 MCA. This October 28th judgment is invalid. Smith v. King, 942 So.2d 1290, 1292 ¶¶ 6-8 (Miss. 2006) and Armstrong v. Estate of Thames, 958 So.2d 1258, 1260 ¶7 (Miss. 2007).

The lower court by its November 12th judgment again confirmed Ms. Turner's July 8th appointment as conservator of the person and estate of Ms. Ellis while stating that, "Any deficiency which may have existed in her initial appointment is resolved hereby." (R 33). On November 12th the lower court was totally incapable of curing a prior notice requirement as to the July 8th hearing which was not continued, and Mrs. Ellis was never given summons or otherwise given any prior notice of the time and place of any subsequent hearing. The November 12th judgment of the lower court should be reversed or vacated.

§ 93-13-253 MCA requires personal service of process on Mrs. Ellis of the time and place for the hearing. Further, the statutorily required notice "shall" be given of "the time and place for the hearing" of the appointment of a conservator "at least five (5) days prior thereto." At least three (3) people - the petitioner, the person for whom the conservator is to be appointed and one other relative, are required to be given prior notice of the time and place for the hearing or else the order appointing the conservator is invalid. Smith v. King, *Supra.*, and Armstrong v. Estate of Thames, *Supra.*

III.

ALTERNATIVELY, IF THE APPOINTMENT OF A CONSERVATOR IS DEEMED REASONABLY NECESSARY THEN WHETHER OR NOT HER GRANDDAUGHTER SHOULD BE DISCHARGED AS CONSERVATOR DUE TO HER PERJURY, UNLAWFUL ENTRY INTO MR. ELLIS'S RESIDENCE, UNLAWFUL CONVERSION OF MR. ELLIS'S FUNDS, FAILURE TO ADHERE TO STATUTORY REQUIREMENTS, FAILURE TO GIVE INVENTORY AND ACCOUNTING AS SPECIFICALLY DIRECTED BY THE COURT ON TWO (2) OCCASIONS AND HER OTHER ABUSES OF POWERS UNDER COLOR OF LAW WHILE SUBSTITUTING MRS. ELLIS'S SPOUSE WHO, PRIOR TO THE INTERRUPTIONS BY THE GRANDDAUGHTER, HAD BEEN EXCLUSIVELY HANDLING HIS WIFE'S HEALTH DECISIONS AND FINANCIAL AFFAIRS.

Ms. Turner procured her July 8, 2008, appointment as conservator by twice making false statements under oath. (T 9-10, 34-35, 130). On July 19th she went to Mr. Ellis's residential home, waived in his face letters of conservatorship, and in disregard of his marital and homestead rights demanded that he immediately vacate. (T 34-35, 50, 80, 130-131).

In addition to twice committing perjury in procuring her appointment as conservator and abusing her powers in ignoring Mr. Ellis's homestead and marital rights Ms. Turner as conservator, without notice, caused to be closed out Mr. Ellis's checking account causing numerous checks and automatic withdrawals to be rejected (T35-38, 56-57, 59, 81), unlawfully broke into and entered Mr. Ellis's residential home so as to "plow around and take photographs all over the place" (T 38, 73, 82) and has failed to return an inventory as required by § 93-13-33 MCA being applicable to the conservatorship by virtue of § 93-13-259 MCA even though being twice specifically ordered to do so by the court. (R 52, 59). Further, she has failed or refused to comply with the lower court's November 12, 2008, directive that she file an accounting within

thirty (30) days thereafter. (R 59).

Ms. Turner states on Page 12 of her reply brief that "the allegations of conversion of funds, failure to file an accounting and other abuses of power are insufficient grounds to remove Stephanie (Ms. Turner) as conservator." § 91-7-85 MCA, applicable to conservatorships by virtue of § 93-13-33 and § 93-13-259 MCA, specifically provides that every conservator may be removed for improper conduct in office at the instance of any person interested. A fiduciary's "misrepresentation of the true facts ... to the court amounted to 'improper conduct' under ..." the code sections for which the fiduciary should be removed. Estate of Ladner, 909 So.2d 1051, 1054, ¶ 3 (Miss. 2004). Should, over objections of Mr. Ellis, the July 8, 2008, appointment of Ms. Turner as conservator of Mrs. Ellis be deemed valid then Ms. Turner should be removed from office for improper conduct regarding her misrepresentations to the lower court on July 8, 2008, for her abuses of power and for her failure to present inventory and accounting as required by statutes and as directed by the lower court. Estate of Ladner, *Id.*, and § 91-7-85, § 91-7-105 and § 91-7-285 MCA, applicable to conservatorships by virtue of § 93-13-33 and § 93-13-259 MCA.

CONCLUSION

This Court should reverse or vacate the unnecessary and invalid July 8, 2008, lower court judgment appointing Ms. Turner as conservator of the person and estate of Mrs. Ellis and remand so as to assure that Ms. Turner makes proper inventory and accounting in that: (1) Mr. Ellis was exclusively handling all of Mrs. Ellis's financial affairs without any material abuse and competently making all of her healthcare decisions; (2) Mrs. Ellis had a durable power of attorney and healthcare directive in place which allowed either Mr. Ellis or Ms. Turner to act as her agent for the purpose of avoiding the establishment of a conservatorship with the beneficial effect of avoiding time, expense and embarrassment in conjunction therewith; and (3) the prior notice requirements as to the place and time of the July 8th hearing were not adhered to resulting in the judgment being deemed invalid.

This Court should reverse or vacate the October 28th and November 12th judgments of the lower court which, without grounds or supporting law, "resolved" the lack of prior notice requirement of the time and place of the July 8th hearing. Further, the July 8th hearing was never continued, and Mrs. Ellis never received summons or other prior notice of the time and place for hearings held subsequent to July 8th as required by statute.

Alternatively, without diluting the aforestated protests, this Court should remand this matter back to the lower court for removal of Ms. Turner as conservator in conjunction with enforcement of her statutory and judicially mandated accounting and inventory obligations and, if

deemed appropriate, to conduct a hearing, after the required prior notice and summons requirements are fulfilled, to ascertain whether or not the best interest of Mrs. Ellis would be met by appointing Mr. Ellis as his wife's conservator.

All costs should be assessed against Ms. Turner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Rhett R. Russell, attorney for Appellant, have this day mailed, postage prepaid, by U.S. Postal Service, a true and correct copy of the above and foregoing Appellant's Response to Brief of Appellee to each of the following:

Honorable Jacqueline Estes Mask
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SO CERTIFIED, on this the 14th day of July, 2009.

RHETT R. RUSSELL