

IN THE SUPREME COURT OF MISSISSIPPI

IN RE: CONSERVATORSHIP OF RUBY CHISM ELLIS

BOBBIE L. ELLIS

APPELLANT

vs

CAUSE NO. 2008-TS-01993

STEPHANIE CHISM TURNER

APPELLEE

**APPEAL FROM THE CHANCERY COURT
OF LEE COUNTY, MISSISSIPPI**

BRIEF OF APPELLEES

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ORAL ARGUMENT REQUESTED

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. Bobbie L. Ellis, Appellant
2. Stephanie Chism Turner, Appellee
3. Ruby Chism Ellis
3. Honorable Jacqueline Estes Mask, Trial Court Judge
4. Rhett R. Russell, Attorney for Appellants
5. Thomas M. McElroy, Attorney for Appellees
6. Jonathan W. Martin, Guardian Ad Litem

This the 1st day of July, 2009.

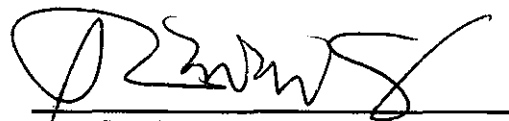

THOMAS M. McELROY
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ATTORNEY FOR APPELLEES

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STATEMENT OF ISSUES

ISSUE ONE:

WHETHER OR NOT THE LOWER COURT ERRED IN ESTABLISHING A CONSERVATORSHIP AND APPOINTING MS. ELLIS'S GRANDDAUGHTER AS A 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 HEALTH CARE DIRECTIVE EACH DULY EXECUTED IN 2002 WHEN SHE WAS COMPETENT.

ISSUE TWO:

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

ISSUE THREE:

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 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.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Stephanie Chism Turner filed a complaint for appointment of a Conservator for her grandmother, Ruby Chism Ellis, on April 10, 2008, which was joined by her father who is the son of Ruby Chism Ellis. The statements of examining physicians, Dr. David Greenhaw and Dr. David Chase, both reported that Ruby Chism Ellis suffered from dementia and alzheimers and was not capable of managing her affairs. Process was served on Ruby Chism Ellis on July 1, 2008. A hearing was held on July 8, 2009 wherein Stephanie Chism Turner was appointed Conservator of the person and estate of Ruby Chism Ellis. Letters of Consevatorship were issued on the same date.

On July 24, 2008, Bobbie L. Ellis, husband of Ruby Chism Ellis, filed a Complaint to set aside or declare invalid the judgement appointing Stephanie C. Turner Conservator or in the alternative, to substitute the ward's spouse as Conservator. On August 6, 2008, Bobbie Ellis filed a Motion for Return of Funds and for Accounting.

The Lee County Chancery Court entered its judgement on August 19, 2008 appointing Jonathan Martin guardian ad litem for Ruby Chism Ellis. Martin filed his report on August 28, 2008.

Testimony was presented on September 5, 2008 in Pontotoc and on October 20, 2008 in New Albany. The Judgement of the Court was entered on October 28, 2009, confirming the prior appointment of Stephanie Chism Turner as Conservator and denying Ellis's Complaint for removal of Stephanie and appointing him as conservator for Ruby. Pursuant to the Request of Bobbie L. Ellis for Findings of Facts and Conclusions of Law, the Court issued its Memorandum Opinion and Judgement on November 13, 2009.

FACTS

Bobbie L. Ellis and Ruby Chism Ellis were married on July 29, 2000. Ruby and Bobbie made their marital home in Ruby's house. Ruby was the sole owner of the house and lot as the result of the death of her former husband. Ruby's memory began to fail shortly after her marriage to Bobbie L. Ellis due the onset of alzheimers / dementia. Prior to her marriage to Bobbie Ellis, Stephanie Chism Turner, age 39, assisted her grandmother with bill paying (T44). Stephanie, her mother and step mother continued to assist in carrying Ruby to Doctor's appointments. Sometime in 2005 Ruby spent two weeks at the Region Three Behavioral Center which was followed by six months in a facility in Amory, Mississippi. Bobbie Ellis then moved her to the Nursing and Rehabilitation Center in Tupelo for six months. And finally in 2006 moved her to the Landmark facility in Booneville, Mississippi, where she now resides in the alzheimers unit (T 45). Bobbie Ellis continues to live in the marital home owned by Ruby Chism Ellis.

In January 2007, Bobbie L. Ellis began a relationship with Grace Matthews. Grace moved into the house of Ruby Chism Ellis in January 2008 and resided there until July 8, 2008. Both Grace Matthews and Bobbie L. Ellis admitted that the relationship was a sexual relationship (T154 & T160).

The actions of Bobbie L. Ellis in moving Grace Matthews into Ruby's house prompted Stephanie Chism Turner, joined by her father, Jerry Chism, son of Ruby Chism Ellis to file a Complaint to be appointed Conservator of the person and estate of Ruby Chism Ellis. Bobbie L. Ellis was not notified of the July 8, 2008 hearing on Stephanie's Complaint for Appointment of Conservator.

After Bobbie Ellis filed his Complaint for removal of Stephanie as Conservator, the

Court appointed Jonathan Martin as Guardian Ad Litem for Ruby Ellis. The Lee County Chancery Court then confirmed the appointment of Stephanie Chism Turner as Conservator of Ruby Chism Ellis, after having received the report of the Guardian Ad Litem and having heard the testimony of the witnesses.

LAW AND ARGUMENT

STANDARD OF REVIEW

All issues of law are considered de novo by this Court. *Estate of Bodman v. Bodman*, 674 So.2d 1245, 1248 (Miss.1996). When reviewing matters arising out of the administration of estates, this Court is mindful that the chancellor is the ultimate guardian of wards of the court, and the removal of guardians lies within the sound discretion of the chancellor, whose decision will be reversed only if it is manifest that he abused that discretion. *Matter of Conservatorship of Mathews v. Williams*, 633 So.2d 1038, 1041 (Miss.1994) The factual findings of a chancellor will not be disturbed on appeal unless the findings are manifestly wrong, clearly erroneous, an erroneous legal standard was applied or there has been an abuse of discretion. *Gulf Coast Research Laboratory v. Amaraneni*, 877 So. 2d 1250, 1252 (P8) (2004). This Court will not reverse a chancellor's findings of fact if they are supported by substantial credible evidence. *Hammett v. Woods*, 602 So. 2d 825, 827 (Miss. 1992). This Court must look at the entire record and accept the evidence which supports or reasonably tends to support the findings of the chancellor, together with all reasonable inferences which may be drawn therefrom and which favor the chancellor's findings of fact. *Clark v. [196] Myrick*, 523 So. 2d 79, 81 (Miss. 1988). However, this Court reviews questions of law *de novo*. *Dieck v. Landry*, 796 So. 2d 1004, 1007 (P7) (Miss. 2001).

This Court has a limited standard of review in examining and considering the decisions of a chancellor. *McNeil v. Hester*, 753 So. 2d 1057, 1063 (P21) (Miss. 2000). "The chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the credibility of witnesses and the weight of their testimony." *Fisher v. Fisher*, 771 So. 2d 364,

367 (P8) (Miss. 2000) (citing *Richard v. Richard*, 711 So. 2d 884, 888 (P13) (Miss. 1998)). A chancellor's findings will not be disturbed upon review by this Court unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard. *Bank of Miss. v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992). [**12] "The standard of review employed by this Court for review of a chancellor's decision is abuse of discretion." *McNeil*, 753 So. 2d at 1063 (P21). A chancellor's findings of fact will not be disturbed unless manifestly wrong or clearly erroneous. *Sanderson v. Sanderson*, 824 So. 2d 623, 625 (8) (Miss. 2002). This Court will not disturb the findings of a chancellor when supported by substantial credible evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Id.* at 625-26 (¶18).

SUMMARY

The Lee County Chancery Court followed the provisions of Mississippi Code Section 93-13-251 in its decision dated October 28, 2008, affirming the prior appointment of Stephanie Chism Turner as Conservator of the Person and Estate of Ruby Chism Ellis and denying the Complaint to set aside her appointment or in the alternative appointing Bobbie Ellis as Conservator. The subsequent hearing on the Complaint of Bobbie L. Ellis for removal of the Conservator or in the alternative to have himself appointed as Conservator corrected any alleged deficiencies in the original Judgement dated July 8, 2008. Section 93-13-259 gives conservators the same duties and responsibilities as guardians and makes applicable those laws relative to guardianships. Nothing in these statutes grants to husbands the same preference for appointment granted by § 91-7-3, nor has that preference been extended beyond the statutory directive.

LAW

Section 93-13-251 provides as follows:

If a person is incapable of managing his own estate by reason of advanced age, physical incapacity or mental weakness, ..., the chancery court of the county wherein the person resides..., upon the petition ...of one or more of his friends or relatives, may appoint a conservator to have charge and management of the property of the person and, if the court deems it advisable, also to have charge and custody of the person subject to the direction of the appointing court.

Section 93-13-255 provides as follows:

The chancery court shall conduct a hearing to determine whether a conservator is needed for the person or the estate of the person. Before such hearing, the court may, in

its discretion, appoint a guardian ad litem to look after the interest of the person in question, which guardian ad litem shall be present at the hearing and present the interests of the persons for whose property or person a conservator is to be appointed.

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, or another state or one (1) such physician and a psychologist, licensed in this state or another 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, which certificate shall be filed with the clerk of the court and become a part of the record of the case. They may also be called to testify at the hearing.

Section 93-13-253 provides as follows:

Upon the filing of the petition, the clerk of the court shall set a time and place for hearing and shall cause not less than five (5) days' notice thereof to be given to the person for whom the conservator is to be appointed.... Unless the court finds that the person for whom the conservator is to be appointed is competent and joins in the petition, the notice shall also be given to one (1) relative of the person for whom the conservator is to be appointed who is not the petitioner and who resides in Mississippi if such relative is within the third degree of kinship, preferring first the spouse, unless legally separated, then an ascendant or descendant,... so that personal service is had on the person for whom the conservator is to be appointed and on one (1) relative who resides in Mississippi other than the petitioner....

ARGUMENT

ISSUE ONE:

WHETHER OR NOT THE LOWER COURT ERRED IN ESTABLISHING A CONSERVATORSHIP AND APPOINTING MS. ELLIS'S GRANDDAUGHTER AS A 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 HEALTH CARE DIRECTIVE EACH DULY EXECUTED IN 2002 WHEN SHE WAS COMPETENT.

Stephanie did not have knowledge of the location of the original Durable Power of Attorney until between the first hearing in Pontotoc on September 5, 2008, and the hearing in New Albany on October 20, 2009 (T 124, 125 & 130) because the original document was in Stephanie's mother's safety deposit box. (T 125, line 4). Stephanie Chism Turner did not have knowledge of the fact that her grandmother had appointed her as attorney in fact in 2002. The document recorded by Ellis in the Lee County Chancery Clerk's office was not the original and did not meet the requirements for it to be effective. First, two licensed physicians must certify in writing that Ruby lacked sufficient understanding and capacity to make or communicate responsible decisions about property and business affairs, and second, deliver such certification to the attorneys in fact. The Power of Attorney further provided that copies of the certification of the two physicians shall be attached to the original and all copies of the instrument, including those filed or recorded in the in the public record (Exhibit 8, paragraph D). The physician certifications were not attached to the original or the copy of the Durable Power of Attorney.

Even if the requirements of Ruby's Durable Power of Attorney had been met, Section 87-3-109 of the Mississippi Code does not exclude the appointment of a Conservator after execution of a Durable Power of Attorney. Section 87-3-109 (1) reads

as follows:

(1) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.

The duty of an attorney in fact is similar to that of a conservator. A fiduciary owes a duty of loyalty to the principal or the ward in the case of a conservator. Bobbie's conduct in moving Grace Matthews into Ruby's house and applying for a loan to purchase a double wide mobile home into which he and Grace intended to move, brings into question whether or not he had the best interest of Ruby in mind. Only the rejection of Bobbie's loan kept this plan from materializing. (T148) Ample evidence was found in the record to support leaving Stephanie Chism Turner as Ruby's conservator and denying Ellis's complaint to be appointed Conservator.

When reviewing matters arising out of the administration of estates, ...the chancellor is the ultimate guardian of wards of the court, and the removal of guardians lies within the sound discretion of the chancellor, whose decision will be reversed only if it is manifest that he abused that discretion. *Matter of Conservatorship of Mathews v. Williams*, 633 So.2d 1038, 1041 (Miss.1994).

The conservator stands in position of trustee, has fiduciary relationship with the ward and is charged with duty of loyalty toward the ward. *Bryan v. Holzer* (Miss 1991) 589 So.2d 648. Bobbie Ellis's conduct did not exhibit loyalty to Ruby which in itself justifies the Chancellor's decision to leave Stephanie in the position of Conservator.

ISSUE TWO:

WHETHER OR NOT THE LOWER COURT'S JUDGEMENT APPOINTING MRS. ELLIS'S

GRANDDAUGHTER AS CONSERVATOR OF HER PERSON AND ESTATE IN INVALID AS RESULT OF FAILURE TO ADHERE TO THE REQUIREMENT THAT THE HUSBAND, A NEXT OF KIN OR OTHER DESCENDANT BE GIVEN PRIOR NOTICE PERSONAL SERVICE AT THE TIME AND PLACE FOR THE HEARING.

In view of the subsequent hearings held at Pontotoc on September 5, 2008, and New Albany on October 20, 2008, the Court heard all of the evidence presented by Bobbie Ellis, as husband, and Stephanie Chism Ellis, granddaughter, and Jonathan Martin, guardian ad litem for Ruby Chism Ellis. Bobbie Ellis was given a full hearing on his complaint. The Court ruled that any deficiencies in the original hearing appointing Stephanie were overcome by the subsequent hearings. Ellis, as an adulterous husband, was given a full hearing on his Complaint for termination of the conservator or in the alternative appointment as Conservator for Ruby and removal of Stephanie. The appointment of Jonathan Martin as Ruby's GAL and his investigation of the circumstances relating to Ruby Chism Ellis and the testimony and evidence presented at the two hearings overcomes any deficiency in Turner's appointment as conservator for her grandmother. In *Jackson v. Jackson*, the Mississippi Supreme Court, held that Section 93-13-259 gives conservators the same duties as Guardians and makes applicable those laws relative to guardianships. Nothing in these statutes grants to husbands the same preference for appointment granted by Section 91-7-3, nor has the Court extended that preference beyond the statutory directive. *Jackson v. Jackson* 732 So2d 916,922.

ISSUE THREE:

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 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.

1. Perjury. The allegation of perjury by Ellis is ironic in light of the perjury committed by Bobbie C. Ellis (T-160). Only after the un-controverted testimony of Grace Matthews did Bobbie C. Ellis change his testimony and admit to the un-condoned adulterous relationship with Grace Matthews. Bobbie L. Ellis and Grace Matthews slept in the same bed and had a sexual relationship with Grace while living in the home which was owned by Ruby. (T152-154). The testimony of Grace Matthews was corroborated by Bobbie Ellis (T160) at the second hearing. Section 93-5-1 provides that adultery is a ground for divorce in Mississippi, to which Ruby would be entitled by virtue of the testimony of Grace and Bobbie at the hearing.

2. Unlawful entry. Entry was made on July 18, 2008, by Stephanie after she was appointed conservator on July 8, 2008. (T 50). Stephanie was accompanied by Nell Chism, wife of Jerry Chism, who had a key to the house (T 51). The testimony of Stephanie Chism Ellis was undisputed and no rebuttal testimony was presented that Nell Chism did not have implied permission to enter the home of Ruby Chism Ellis by virtue of the fact that she had the key and that Nell Chism helped with carrying Ruby to doctor's appointments. Nell was married to Jerry Chism the only child of Ruby Chism Ellis. Stephanie entered the house for the sole purpose of pursuing her duties as conservator and committed no crime in entering the house which was soley owned by her grandmother.

3. The allegations of conversion of funds, failure to file an accounting and other abuses of power are insufficient grounds to remove Stephanie as Conservator for her grandmother, Ruby Chism Ellis.

"The chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the credibility of witnesses and the weight of their testimony." *Fisher v. Fisher*, 771 So. 2d 364, 367 (P8) (Miss. 2000) (citing *Richard v. Richard*, 711 So. 2d 884, 888 (P13) (Miss. 1998)). A chancellor's findings will not be disturbed upon review by this Court unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard. *Bank of Miss. v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992).

CONCLUSION

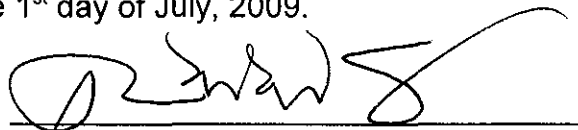
The Findings of Fact and Judgement of the Chancellor establish a sufficient factual and legal for this Court to affirm the judgment of the Chancellor. First, the original Durable Power of Attorney was not of record in the office of the Lee County Chancery Court nor did it contain the statements of two physicians certifying to her condition. Even if the Durable Power of Attorney was in effect, this does not preclude the appointment of a Conservator. In fact the attorney in fact is charged with the duty to report to the Conservator as well as to the principal. Nothing in the Mississippi Code or case law prohibits the appointment of a conservator when a durable power of attorney is in effect.

Any deficiencies in the original appointment of Stephanie were remedied by the subsequent hearings when all parties were given an opportunity to present evidence in support of their respective claims. The statutory scheme of notification of at least one next of kin was satisfied by the joinder of Jerry Chism to the original complaint filed by Stephanie Turner Chism.

Sufficient questions were raised by virtue of Bobbie Ellis's conduct in committing adultery and his handling of Ruby's funds that the Chancellor followed the recommendations of the guardian ad litem and confirmed the original appointment of Stephanie as conservator.

The judgement of the Chancellor should be affirmed.

RESPECTFULLY SUBMITTED, this the 1st day of July, 2009.

A handwritten signature in black ink, appearing to read 'Tom McElroy', is written over a horizontal line.

THOMAS M. McELROY
ATTORNEY FOR THE PLAINTIFF

CERTIFICATE OF SERVICE

I, Thomas M. McElroy, do hereby certify that I have this day mailed by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing *APPELLE'S BRIEF* to:

Honorable Jacqueline Estes Mask
Trial Court Judge
Post Office Box 7395
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THIS, the 1st day of July, 2009.



THOMAS M. McELROY