

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED
September 30, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

IN RE: ELIZABETH D. MESSAMORE) ANDERSON COUNTY
) 03A01-9704-CH-00120
ANN M YARBER)
)
Petitioner - Appellee)
)
v.) HON. WILLIAM E. LANTRIP,
) CHANCELLOR
)
SAMUEL J. MESSAMORE)
)
)
Intervenor - Appellant) AFFIRMED AND REMANDED

CHARLES T. WEBBER, JR., OF KNOXVILLE FOR APPELLANT

A. THOMAS MONCERET OF KNOXVILLE FOR APPELLEE

O P I N I O N

Goddard, P. J.

Samuel J. Messamore, son of Elizabeth Messamore, and sister of Ann M Yarber, appeals a judgment of the Chancery Court for Anderson County which appointed Ms. Yarber Conservator for Ms. Messamore.

By his issue on appeal Mr. Messamore insists that the Trial Court was in error because he was attorney-in-fact for his

mother by power of attorney dated July 29, 1996, and also because he is named Executor in his mother's will.

In support of his issue he relies upon T. C. A. 34-13-103, which provides the following:

34-13-103. Priority of persons to be considered for appointment. -- Subject to the court's determination of what is in the best interests of the disabled person, the court shall consider the following persons in the order listed for appointment of the conservator;

(1) The person or persons designated in a writing signed by the alleged disabled person;

(2) The spouse of the disabled person;

(3) Any child of the disabled person;

(4) Closest relative(s) of the disabled person;

and

(5) Other person(s).

We first point out that the power of attorney principally relied upon by Mr. Messamore was not introduced into evidence.¹ However, assuming it was, it is certainly arguable that the execution of a power of attorney is equivalent to designating him to be her Conservator.

This determination, however, does not resolve this appeal. It will be noted that the priorities listed are all subordinate to the first sentence of the Code Section, which

¹ Mr. Messamore alleges in his petition for appointment of Conservator that he was appointed by his mother as attorney-in-fact "by virtue of a power of attorney she signed on July 29, 1996, a copy of which is attached as Exhibit A and incorporated herein by reference." This instrument is not an exhibit to his petition.

makes them "Subject to the court's determination of what is in the best interest of the disabled person."

The proof in this case supports the following determination of the Trial Court:

I'm going to appoint M. Yarber as the conservator. Finding that, first of all, that the power of attorney was executed at a time when everyone testified as to confusion, that they were surprised at the time that M. Messamore decided -- or learned that his mother wanted to come to Kingsport. So, I have no confidence as to the validity of any type of pronouncement. There really was not introduced and I don't even know the time frame when that was even executed.² But even if it was executed at a time when she was fully competent and aware of the consequence of what she was doing, I find that the person best suited, because of the connections to the home place and the family, friends, medical care, and all of the associated support mechanisms existing here in this locality and that it's in her best interest that she remain in Anderson County.

In addition to the foregoing, we note that the remaining child of Ms. Messamore, Samuel Messamore, her brother, Thomas Dyer, and her guardian ad litem were all of the opinion that Ms. Yarber should be appointed Conservator.

Before concluding, we do concede that the memorandum opinion does not expressly find it is in the best interest of Ms. Messamore that Ms. Yarber be appointed Conservator.

² The power of attorney, according to Mr. Messamore's allegation, was dated July 29, 1996, only nine days before her physicians issued letters stating that she was not competent to handle "her finances or personal business affairs."

However, we believe it is implicit, as evidenced by the Court finding Ms. Yarber "best suited" to be Conservator and appointing her as such. In any event, our de novo review of the record persuades us that the evidence preponderates in favor of a finding that it is in the best interest of Ms. Messamore that Ms. Yarber be appointed her Conservator.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for such further proceedings as may be necessary and collection of costs below. Costs of appeal are adjudged against M. Messamore and his surety.

Houston M. Goddard, P. J.

CONCUR:

Don T. McMurray, J.

Charles D. Susano, Jr., J.