

IN THE COURT OF APPEALS

STATE OF GEORGIA

IN RE: ESTATE OF

DOROTHY R. WILSON,

APPELLANT

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CASE NO. A24A1325

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

Comes now Tami Clarke and Tracy Walker as Appellants (“Appellants”) in the above styled action, and files their Appellant’s Brief, showing and stating as follows:

**PART ONE: JURISDICTIONAL STATEMENT, ENUMERATION OF ERROR,
STANDARD OF REVIEW, AND STATEMENT OF CASE**

Jurisdictional Statement

Appellants appeal the Trial Court’s ruling pursuant to O.C.G.A. § 5-6-34(a). The Court of Appeals, rather than the Supreme Court of Georgia, has jurisdiction over this case on appeal as jurisdiction has not been reserved to the Supreme Court under Article 6, Section 6, Paragraph III of the Constitution of the State of Georgia (1983) and O.C.G.A. § 15-3-3.1.

This appeal is timely because the notice of appeal was timely filed on December 7, 2023. (R. 1-2). This Court docketed the appeal on April 16, 2024. The Parties presented a joint motion to extend the briefing schedule on May 2, 2024, which the Court granted on May 3, 2024. Appellants now timely file their Brief.

Enumeration of Error No. 1:

The Trial Court erred when denied Appellant's Petition for Appointment of a Guardian and/or Conservator based on information not in evidence before the Trial Court.

Standard of Review:

Clearly erroneous standard of review. The Court "...will not set aside the probate court's findings unless they are clearly erroneous." *Cruver v. Mitchell*, 289 Ga.App. 145 (2008).

Statement of the Case:

This appeal stems from a dispute regarding Appellants' efforts to care for Appellee, Ms. Dorothy Wilson, in her advancing age, and Appellants' Petition for Guardianship and Conservatorship for Appellee ("Petition"), which the Trial Court denied. The Trial Court held hearings on October 23rd to October 25th, 2023 to receive evidence and hear testimony on the Petition. (R. 3). On November 15, 2023, the Trial Court denied Appellants' Petition, finding that they had not met their burden of proof for the appointment of a guardian or conservator. (R. 11).

Appellants timely filed their Notice of Appeal. (R. 1-2). The Parties jointly requested an extension to the briefing schedule and the Court granted that request on May 3, 2024¹.

This appeal follows.

PART TWO: STATEMENT OF FACTS

Appellants filed their Petition because they were deeply concerned about Appellee's declining mental and physical health. (R. 29). Specifically, Appellants were alarmed that Appellee was acting erratically, firing caregivers without reason, forgetting recent decisions she made about her care and finances, and Appellee's insistence that she did not require caregivers to stay overnight with her in her home. *Id.*

¹ A copy of the Court's May 3, 2024 Order is attached to this brief.

Prior to the final hearing of this case, the Trial Court ordered an evaluation of Appellee and Appellants concede that the Evaluator did not believe, in her opinion, that Appellee required a guardian or conservator. (R. 49-51). However, Appellants provided ample, additional evidence that Appellee was experiencing significant cognitive decline and was placing herself in dangerous conditions due to her declining faculties. (T1², pp. 125-126; 136-140; T2, pp. 17-22). Appellee herself was concerned about her declining abilities and executed a healthcare directive naming Appellant Clarke as her agent. (T2, p. 29). By February 2022, Appellee's condition was progressing to the point that she required fulltime caregivers to be with her in home. (T2, pp. 34-35). At that point in time, Appellee had to go to the emergency room and afterwards her mental condition rapidly declined. (T2, pp. 38-41). Appellee began to become hostile with her caregivers, experienced falls in her home, was increasingly confused and agitated, and ultimately terminated Appellant Clarke and her caregivers in July 2022. (T2, pp. 42-44).

Appellee has filed an unrelated lawsuit where she alleges improper actions by Appellant Clarke's husband, Tim Clarke, regarding their business relationship. (T2, pp. 165-166). However, in her testimony at the hearing on this matter about this connected, but legally unrelated lawsuit, Appellee was apparently unaware that she had filed suit against Mr. Clarke. *Id.* In fact, the Trial Court took the extraordinary action of allowing Appellee's counsel to privately confer with her, while she was testifying at the hearing, regarding the allegations and Appellee's sworn assertions in that unrelated lawsuit against Mr. Clarke. (T2, pp. 178-179). This off-record conversation between Appellee and her counsel occurred prior to the resumption of her direct testimony at the hearing. (T2, pp. 180-181).

² The final hearing in this matter occurred on October 23-25, 2023. Appellant will refer to the hearing transcript from October 23, 2023 as "T1", October 24, 2023 as "T2", and October 25, 2023 as "T3".

The Trial Court heard evidence that conflicted with the above evidence and ultimately concluded that Appellants had not met their burden of proof that Appellee required a guardian and conservator to ensure her health, safety, and to make responsible financial decisions. (R. 9-12). However, in denying Appellants' Petition, the Trial Court stated the following: "...the Court held a pre-hearing direct conversation with the Proposed Ward, and the Proposed Ward's statement was **weighed heavily**." (R. 11)(**emphasis added**).

PART THREE: ARUMENT AND CITATION OF AUTHORITY

Enumeration of Error No. 1:

The Trial Court erred when denied Appellant's Petition for Appointment of a Guardian and/or Conservator based on information not in evidence before the Trial Court.

As noted above, the Trial Court "weighed heavily" information obtained from a conversation that is not in evidence as when the Trial Court denied Appellants' Petition. (R. 11). This was error.

First, O.C.G.A. § 29-4-12(d)(4) states that:

"The court shall utilize the criteria in Code Section 29-4-1 to determine whether there is clear and convincing evidence of the need for a guardianship in light of the evidence taken at the hearing. In addition, the court may consider the evaluation report and any response filed by the proposed ward."

The Trial Court's Order denying the Petition explicitly states that it "weighed heavily" information obtained by the Trial Court directly from Appellee that was not properly placed into evidence. (R. 11).

The relevant statutes clearly demand that a probate court consider only evidence taken at the hearing, the evaluation report, and any response filed by the proposed ward when determining whether or not to grant a petition for guardianship and/or conservatorship. Here,

the Trial Court explicitly stated that it “heavily weighed” information that is not in evidence. (R. 11). If a trial court obtains information from a person(s) that is not sworn testimony and bases their ruling, even partially, on that information then the trial court’s actions in that regard are “clearly improper” and have resulted in reversal on appeal. *Cousins v. Maced. Baptist Church of Atlanta*, 283 Ga. 570, 573 (2008). The instant case clearly shows that the Trial Court considered non-sworn testimony, which it “heavily weighed”, in deciding to deny the Petition. (R. 11).

Therefore, Appellant respectfully requests that the Court reverse the Trial Court’s decision denying Appellants’ Petition.

CONCLUSION

Appellant has demonstrated that the Trial Court “heavily weighed” non-sworn testimony when it decided to deny the Petition. This was clearly erroneous and error warranting a reversal by this Court.

Respectfully submitted this 27th day of June, 2024.

This submission does not exceed the word count limit imposed by Rule 24.

HARRISON LLP

//s// Benjamin H. Pierman

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing *BRIEF* upon all counsel by electronic filing and service and by placing a copy of same in the United States mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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Respectfully submitted this 27th day of June, 2024.

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Court of Appeals of the State of Georgia

ATLANTA, May 03, 2024

The Court of Appeals hereby passes the following order

A24A1325. IN RE: DOROTHY R. WILSON, PROPOSED WARD .

The APPELLANT'S motion for AN EXTENSION OF TIME in which to file an enumeration of errors and brief in the above-styled case is hereby GRANTED until 06/27/2024.

The appellee's brief shall be filed within 20 days after the filing of the appellant's brief.



*Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, May 03, 2024.*

*I certify that the above is a true extract from the minutes
of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court hereto
affixed the day and year last above written.*

Stephen E. Castles , Clerk.