

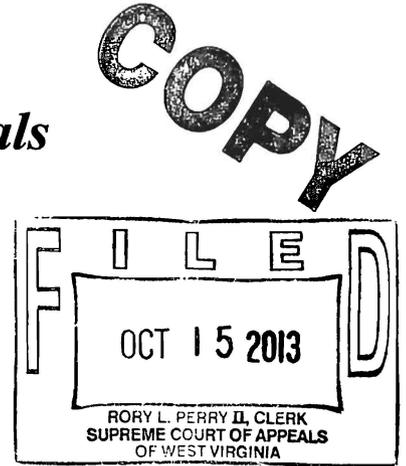
*In the Supreme Court of Appeals  
of the State of West Virginia*

Docket No: 13-0653

E. D., Guardian/Conservator  
Petitioner/Appellant,

V.

Donald M., a Protected Person,  
Respondent/Appellee



PETITIONER'S BRIEF

STATEMENT OF THE FACTS

Petitioner, E.D., filed a petition with the Mineral County Circuit Court for her appointment as Guardian/Conservator for her father, Donald M., who is 79 years old, and suffers from dementia and is unable to care for himself physically or financially. She was appointed his Guardian/Conservator by The Mineral County Circuit Court without objection.

She lives in Winchester, Virginia, approximately 75 miles from the home of her father in Fort Ashby, Mineral County, West Virginia, approximately a 90-minute drive. In order to better care for her father she intends to sell his real estate and move him to her home or a nearby appropriate residential care facility. He owns a home and lot in Fort Ashby and an undeveloped lot in Allegany County, Maryland, approximately 15 miles from his home. The sale of the real estate

would therefore substantially benefit Donald M. and Petitioner, E.D., sought the Court's approval for the sale of the real estate.

### ASSIGNMENTS OF ERROR / ARGUMENT

- I. THE COURT ERRED IN RULING THE  
GUARDIAN/CONSERVATOR HAS NO AUTHORITY TO SELL  
REAL ESTATE OF THE PROTECTED PERSON LOCATED IN  
ANOTHER STATE.
- II. THE COURT ERRED IN DENYING THE SALE OF THE WEST  
VIRGINIA PROPERTY BASED SOLELY ON THE STATED  
DESIRE OF THE PROTECTED PERSON.
- III. THE COURT ERRED BY PROHIBITING THE GUARDIAN/  
CONSERVATOR FROM MOVING THE PROTECTED PERSON  
TO A NEW RESIDENCE

### ARGUMENT

- I. DOES GUARDIAN/CONSERVATOR HAVE AUTHORITY TO SELL  
REAL ESTATE IN ANOTHER STATE?

The issue is not whether the Circuit Court of Mineral County has authority to order the sale of real estate located in the State of Maryland.

The petition filed seeks Court approval of the sale of protected person's real estate: it does not seek authority to sell such property. The Court is not being asked to Order any sale. The Court's function by statute is to determine whether the sale benefits the Protected Person. The authority, generally and as it regards jurisdiction, of the Conservator to sell the property is not an issue before the Court.

Donald M., if competent, can sell the real estate in Maryland. A person acting pursuant to a valid power of attorney from him can sell the real estate in Maryland. Certainly a person acting as a court-appointed guardian/conservator also has the same authority. The only difference is the sale by a conservator requires Court approval, which is a Finding that the sale benefits the Protected Person. The authority to sell the property has existed since the date the Conservator was appointed. W.Va. Code 44A-3-5 provides: "A Conservator shall not sell real estate . . . . without the approval of the Court. The Court's 'approval' is required, not 'authority'. The statute requires a grant of 'authority' from the Court only to mortgage the property, not sell it."

While the uniform statute provides for transferring a conservatorship to another jurisdiction when appropriate or necessary, those statutes do not apply to our situation. The Mineral County Court has no basis for such transferring as it has the statutory authority to approve the sale: there is no need for assistance from or proceedings in another jurisdiction. The concepts of personal verses in rem

jurisdiction are irrelevant here. By statute in West Virginia the Court has jurisdiction to appoint the Conservator and from that point on jurisdiction is not an issue as the Conservator can, as can an attorney-in-fact, sell real estate no matter where it is located, provided the sale benefits the Protected Person, subject to “approval” of the Court.

At the hearing in this case the Mental Hygiene Commissioner indicated the Guardian/Conservator should proceed in accordance with 44A-1-7 for transfer of venue. “...the Court..., may Order the transfer of jurisdiction..... if it appears to the Court the interests of the Protected Person will be served by such transfer”.

That is not the case here. The Protected Person’s interests cannot be better served by a guardianship proceeding in another jurisdiction such as the State of Maryland. The Protected Person is not in Maryland.

Certainly if the legislature intended all cases involving real estate in another jurisdiction are to be transferred pursuant to this statute the legislation would have included some language, somewhere in their statute or elsewhere, to indicate the transfer is necessary to sell real estate. No such language or inference exists. The language is if “better served” by another jurisdiction, inferring the Protected Person could be “served” in this jurisdiction, albeit not as well.

Thus, transfer of the jurisdiction to Maryland in this case would not “better” serve the Protected Person, and in fact would be a substantial expenses and

significant effort for the Protected Person and Guardian/Conservator. The Protected Person is best served by resolution in this Circuit Court; not by erecting further obstacles. Under West Virginia Law the Guardian has authority to sell real estate and therefore no proceeding in Maryland is necessary.

W.Va. Code 44C-1-1 et seq., is the Uniform Guardianship Act to define and guide Guardian/Conservator proceedings necessarily involving more than one jurisdiction. However, W.Va. Code 44-1-1 et seq., does not mention the sale of real estate, which is indisputable proof the legislature did not intend the sale of a Protected Person's real estate to require action by Courts in some other jurisdiction other than the jurisdiction of the original guardianship/conservatorship proceeding. In reading W.Va. Code 44C-1-1 et seq., to cover situations such as emergencies and taking of testimony, but nothing related to the sale of land.

Again, the legislature should, could and would have clearly states the guardian/conservator in West Virginia has no authority to sell real estate in another state, if that were the case. It is not.

W.Va. Code 44-C-2-8, "Proceedings in Another State", is linked to situations regarding the emergency appointment of Guardian/Conservator or the issuance of protective orders. The statute is irrelevant to our discussion.

Likewise, W.Va. Code 44C-3-1, which provides for transfer of a guardianship to another state, is irrelevant as the Guardian/Conservator is not

attempting to transfer the Guardian/Conservator to another state, although such may ultimately be the case if the Protected Person becomes a resident of Virginia.

It is also noteworthy the Guardian Ad Litem did not object to the sale of the Maryland property and joined with Petition on that issue. The Guardian Ad Litem stated to the Court he believed Petitioner did in fact have authority to sell the Maryland property and he would not object (Transcript dated 04/29/13, Pg. 14, Lines 8-10). The Guardian did, however, object to the sale of West Virginia property as the Protected Person stated he did not want to leave.

W.Va. Code 44A-3-6 “Protective Arrangements” also clearly provides, albeit in a different context, the Conservator has the authority to “...sell, mortgage, lease ....” The Protected Person’s property. Again, the authority exists, subject to approval by the Court as beneficial to the interests of the Protected Person.

Counsel, notwithstanding diligent research, could locate no W.Va. Case on point. The issue seems to be one of first impression before this Court.

## II. SALE OF THE HOME IN FORT ASHBY WILL BENEFIT THE PROTECTED PERSON.

Donald M., currently lives alone at his house in Fort Ashby. Petitioner, E.D., his Guardian/Conservator, and the only family interested in his welfare, lives in Winchester, Virginia.

Home health worker visits him 2 hours per day, primarily to bathe him and prepare a meal. The other 22 hours he is alone. He is incompetent as determined by this Court. He sits around the house naked from the waist down. While he maintains he cooks, drives, etc..., this is not true. The garage door is intentionally disabled so he cannot attempt to move the car. Also, Mr. James spoke with the caretaker, Donna (2 hours/day) and she confirmed Donald M., does not drive and cannot successfully prepare meals (Transcript dated 04/29/13, Pg. 12, Lines 20-24). He has fallen four times in the last year requiring medical attention (Transcript dated 04/29/13, Pg. 13, Lines 24-25).

The Conservator believes sale of the house will promote the interests of the Protected Person financially and if he is near the Conservator she can obviously better monitor the situation and be available to care for Donald M., on a frequent, daily basis. The sale will result in a profit of approximately \$50,000 for the Protected Person.

Donald M., will always say he wants to stay in his house regardless of his physical well being. His desire cannot be controlling here but is to be considered. However, the best interest of the Protected Person is the primary issue to be decided, not what he desires.

W.Va. Code 44-3A-1, the statute provides the Guardian/Conservator is to determine the place of residence for the Protected Person. The best place for him

to be is near his daughter, not 90-minutes away from her. This Court had determined he is incompetent to make substantial decisions concerning his welfare by the appointment of a Guardian/Conservator. There is no basis now for accepting his factual representations as a basis to undermine the function of the Guardian/Conservator. For myriad reasons he is better off in Winchester where more supervision and assistance is available from the Guardian/Conservator.

Also, as noted by counsel and Guardian Ad Litem, the real estate market is depressed: Many local properties are listed for many months, or years, before the sale. It is also likely the condition of Donald M., age 79, will continue to decline as time passes. The Conservator intends to allow him to reside in the house until the home is sold and the transaction completed. This could be many months from now. It would not be prudent to wait until his condition deteriorates and then begin the process of the sale of the property. The money from the sale will substantially ease the burden of the cost of care and housing for Donald M.

W.Va. Code 44A-3-3 and 44A-1-8(C) does require Guardian/Conservator to consider the express desires of the Protected Person when making decisions. However, it is the Guardian/Conservator with the ultimate responsibility and authority to determine the place of residence. The desires of the incompetent person cannot be substituted for the rational decision making of the Guardian/Conservator. Certainly all elderly persons desire to remain in their home

indefinitely, but this is obviously not always in the best interest of the incompetent person.

The Guardian/Conservator, daughter of the Protected Person, resides in Winchester, Virginia, a 90-minute drive from the Protected Person's home. She is the only relative available to care for the Protected Person. Her stated objective was to move her father close to her in Virginia to allow her to care for her father on a 24/7 basis, and when necessary, locate an appropriate living arrangement. The sale of the West Virginia and Maryland properties would allow her to purchase or rent an appropriate residence in her neighborhood or for the expense of an assisted living or nursing home placement as necessary.

### III. SALE OF HOUSE SEPARATE ISSUE FROM THAT OF MOVING PROTECTED PERSON.

The petition filed seeks approval of the sale of the real estate. This is separate and independent of the issue of moving of Donald M., to a new residence. When Mr. Magelitz needs to be moved to better serve his needs is solely within the discretion of the Guardian/Conservator. That issue was not plead and is not before the Court. The Court's Order, however, prohibits the moving of the Protected Person to a new residence. The Order therefore exceeds the authority of the Court and the scope of the pleadings in this case. The Guardian/Conservator could move

the Protected Person and not seek to sell the property and the Court would have no knowledge of the move, and certainly no authority to stop it absent some objection being appropriately filed with the Court, which did not happen here.

CONCLUSION

It is clear the only provision relevant here is W.Va. Code 41-A-3-5: The Guardian/Conservator needs the Court's approval of the sale, not authority to sell it. Further the evidence in this case proves the sale would benefit the Protected Person, and the Court cannot therefore deny the sale.

REQUEST FOR ORAL ARGUMENT

The Petitioner, E.D., would respectfully request an oral argument before the Court.

E.D., GUARDIAN/CONSERVATOR  
FOR DONALD M  
A PROTECTED PERSON

By:   
\_\_\_\_\_  
Timothy M. Sirk, Attorney at Law

Prepared by:  
Timothy M. Sirk  
Attorney at Law  
PO Box 356  
Keyser, WV 26726  
WVSB#3428  
Phone: 304-788-5603  
E-mail: timsirk@mindspring.com  
Counsel for E. D., Petitioner

**CERTIFICATE OF SERVICE**

I, Timothy M. Sirk, a practicing attorney, do hereby certify that I served a true and exact copy of the foregoing *Petitioner's Brief* upon the Respondent, by mailing a true copy thereof by United States First Class mail, postage prepaid, to Nicholas T. James, Guardian Ad Litem, James Law Firm, PLLC, 65 N. Main Street, Keyser, WV 26726 on this the 10<sup>th</sup> day of October, 2013.



---

Timothy M. Sirk