

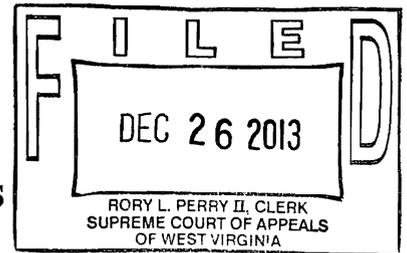
NO. 13-0653

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON, WEST VIRGINIA



E.D., GUARDIAN/CONSERVATOR

Petitioner/Appellant,

v.

DONALD M., A PROTECTED PERSON

Respondent/Appellee.

SUMMARY RESPONSE

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COMES NOW the Respondent/Appellee, Donald M., a protected person, by Counsel Nicholas T. James, pursuant to the Amended Scheduling Order and Rule 10(e) and accordingly replies to the Petitioner's Brief.

FACTUAL BACKGROUND

On the 25th day of April, 2012, Petitioner E.D., daughter of Donald M., filed a Petition For The Appointment Of A Guardian/Conservator in the Circuit Court of Mineral County and Counsel was appointed as Guardian Ad Litem. Upon investigating the matter, Counsel

recommended to the Court that it would be in the best interest of Donald M. to approve E.D. as both Guardian/Conservator. The Court concurred and appointed E.D. as Guardian/Conservator.

The matter remained inactive until Petitioner E.D. filed a Petition For the Sale Of Real Estate on the 16th day of January, 2013. Counsel met with Donald M. to explain the most recent Petition. Donald M. agreed that his lot in Rawlings, Maryland should be sold, but did not agree that his house in Fort Ashby, West Virginia should be sold. April 29, 2013 Hearing, page 15, paragraphs 6-16 After looking into the matter, Counsel specifically reported to the Court the following, *to-wit*,

I went down there this afternoon, [Donald M.] does not need to be moved out of the house today but, in the near future I think that it's going to be definitely a necessity. He only has a caretaker down there right now for two hours a day for six days a week, the seventh day E.D. drives up from Winchester. April 29, 2013 Hearing, page 12, paragraphs 8-15

I talked to his caretaker, Donna Everly, and she informed me ... he [Donald M.] is not able to make his meals. So, there is going to come a time, I think, here probably in the near future where he is going to need more care than what he is receiving now. April 29, 2013 Hearing, page 12, paragraph 21-24; page 13, paragraphs 1-2

He has fallen several times in the last year, which is a concern obviously. April 29, 2013 Hearing, page 13, paragraph 24

After performing the statutory duties pursuant to W.Va. Code § 44A-3-1, Counsel recommended that "the process should start now; I think the house (Fort Ashby residence) should probably be listed now. April 29, 2013 Hearing, page 12, paragraph 7 Counsel further recommended that the Maryland property be sold as well.

I. THE COURT ERRED BY HOLDING THE GUARDIAN/CONSERVATOR DOES NOT HAVE AUTHORITY TO SELL REAL ESTATE LOCATED IN MARYLAND

Donald M. owns a small lot in Rawlings, Maryland. E.D. properly filed a petition pursuant to W.Va. Code § 44A-3-5 to sell the Maryland property Without getting into the merits

of the petition, the Court simply held that it does not have the authority to order the sale of real estate in Maryland. Counsel disagrees.

W.Va. Code § 44A-3-5 simply states that a “conservator shall not sell real estate ...without approval of the Court.” Said statute does not limit the sale of real estate to property situated just in West Virginia. In any matter involving statutory interpretation, the goal is to “ascertain and give effect the intent of legislature.” *State ex rel. Goff v. Merrifield*, 191 W.Va. 473, 446 S.E.2d 695 (1994) Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted. *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968) W.Va. Code § 44A-3-5 is clear and unambiguous and its plain meaning must be accepted.

It simply would be impractical for the Court to limit the authority of a conservator to not sell property of a protected person simply because it is located in another State. Harmful consequences could result if real property owned by a protected person outside the State of West Virginia could never be sold. The legislature certainly did not intend to limit the authority of a conservator. For example, pursuant to W.Va. Code § 44A-3-4(a)(2), a conservator can “collect, hold, and retain assets of the estate, including **land in another state**,...” Consequently, it is clear that lower Court erred.

II. SALE OF FORT ASHBY RESIDENCE

After exercising the statutory duties in W.Va. Code § 44A-3-1, Counsel recommended to the Court the sale of the Fort Ashby residence despite the fact that Donald M. objected. In making said recommendation, Counsel noted that E.D. must travel from Winchester to check on her father, Donald M. has missed taking his medications, his current caretaker stated that Donald M. is not able to make his own meals and Donald M. has fallen several times in the last year. Counsel agrees that Donald M. will always say he wants to stay in his house regardless of his

physical wellbeing. It is the desire of E.D. to move her father to Winchester so he is in close proximity to her. April 29, 2013 Hearing, page 18, paragraph 12 Of four siblings, E.D. is the only one that shows any interest in caring for her father. April 29, 2013 Hearing, page 11, paragraph 21 Counsel stands by his recommendation to sell the residence in Fort Ashby and submits that it is in the best interest of Donald M.

CONCLUSION

The lower Court erred by finding W.Va. Code § 44A-3-5 does not authorize a conservator to sell the real estate of a protected person in another State. The Court further erred by not ordering the sale of the Fort Ashby residence as it is in the best interest of Donald M.

**DONALD M.
BY COUNSEL**



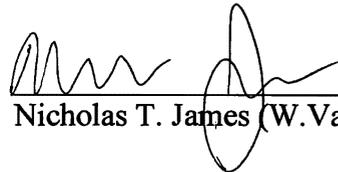
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CERTIFICATE OF SERVICE

I, Nicholas T. James, Counsel for Donald M., do hereby certify that I have served a true copy of the **SUMMARY RESPONSE** upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 23rd day of December, 2013, addressed as follows:

Timothy M. Sirk, Esquire
P.O. Box 356
Keyser, WV 26726

Rory L. Perry, II
Clerk of the Court
State Capitol Building, Room 317
Charleston, West Virginia 25305



Nicholas T. James (W. Va. Bar # 10545)