

IN THE COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION
AT NASHVILLE

2010 OCT 28 PM 2:25

APPELLATE CLERK
NASHVILLE

JOHN DANIEL TATE,)
)
Petitioner,)
)
v.)
)
HONORABLE RANDY KENNEDY,)
Seventh Circuit Court Judge for Davidson)
County, Tennessee,)
)
Respondent.)

Case No.: _____
related to
Case No.: M2010-01904-COA-R3-CV
Trial Court Case No. 07P-1654

**AFFIDAVIT OF MICHAEL G. HOSKINS IN SUPPORT OF
EMERGENCY PETITION FOR WRIT OF MANDAMUS**

I, Michael G. Hoskins, after being duly sworn, depose and state as follows:

1. I am above the age of majority, competent to testify and have personal knowledge of the matters stated herein. I am licensed to practice law in the state of Tennessee (B.P.R. No. 024507) and counsel for the Petitioner in the above captioned appeal.
2. On August 3, 2009, I filed a Notice of Appearance, as adversary counsel, on behalf of John Daniel Tate ("Mr. Tate"), in the conservatorship of John Daniel Tate, Case No. 07P-1654, which at that time was pending in the Seventh Circuit Court for Davidson County, Judge Randy Kennedy presiding.
3. On August 7, 2009, the trial court entered an Order approving my representation of Mr. Tate (the conservatee) as adversary counsel. Soon thereafter, I began reviewing the case file and noticed that there were no transcripts from the October 23, 2007 and November 14, 2007 hearings (hereinafter "Oct. 23rd and Nov. 14th") in the file transferred to me by prior counsel or filed of record with the court clerk.

4. Unable to locate said transcripts, I contacted opposing counsel, Mr. Paul T. Housch, Esq., and requested copies of the Oct. 23rd and Nov. 14th hearing transcripts. After repeated requests, Mr. Housch informed me that he did not have any transcripts for these hearings and that he did not hire a court reporter to attend or prepare a stenographic transcript of either the Oct. 23rd or Nov. 14th hearings. This was particularly troubling, because Mr. Tate had not been served with the Petition to Appoint Conservator, until November 2, 2007 (ten (10) days after the Oct 23rd hearing was conducted) and Mr. Tate was not represented by counsel at the November 14th hearing. (See Return of Service, filed Nov. 2, 2007 and Affidavit of Bert L. Denton, attached hereto, respectively, as **Exhibits 1 and 2**).

5. Unable to locate the Oct. 23rd or Nov. 14th hearing transcripts, sometime in September or October of 2009, I contacted Ms. Kitty Lammers, Judicial Assistant to Judge Randy Kennedy, and requested copies of the audio/video recordings from Judge Kennedy's courtroom for the Oct. 23rd and Nov. 14th hearings. Specifically, I left two or three separate voicemails to Ms. Lammers requesting copies of the subject audio/video recordings, so I could send them out to a court reporter to have stenographic transcripts prepared and filed of record with the court clerk.

6. I waited several days for a response from Ms. Lammers, but did not receive a return call. Thereafter, sometime in October of 2009, I hand delivered a letter addressed to Ms. Lammers, in Judge Kennedy's chambers, formally requesting a copy of the audio/video recordings so that stenographic transcripts of the Oct. 23rd and Nov. 14th hearings could be prepared and filed of record with the court clerk.

7. That same day or the following day, Mr. Lammers telephoned my office and left a voice mail stating that she had contacted the Systems Manager in the Court's Administrative

Office, who informed her that there were no audio/video recordings made for the Oct. 23rd or Nov. 14th hearings related to Mr. Tate's conservatorship.

8. Thereafter, I informed my client, that if he ever wanted to challenge the prior rulings on the trial court on appeal, which he did, it would be very difficult to obtain any relief based on factual issues, without being able to provide the appellate court with a fair, accurate and complete account of what transpired at the Oct. 23 and Nov. 14th hearings.

9. Having been led to believe that there were no audio/video recordings made for the Oct. 23rd or Nov. 14th hearings, I sent Mr. Housch a request to take the depositions of his client, David E. Tate (petitioner in the underlying conservatorship action), and Dr. William Kenner (opposing counsel's expert witness). I wanted to take their depositions, in part, to protect the record on appeal and to discover their respective recollections of what transpired at the Oct. 23rd or Nov. 14th hearings, and the substance of their respective testimonies. Mr. Housch denied my requests for deposition dates and stated that he would not comply with the deposition of his client without a court order.

10. Subsequently, after this court granted Mr. Tate's T.R.A.P 10 application for extraordinary appeal, directing that the trial court enter a final judgment, Mr. Housch filed a Motion to Set Final Hearing or Alternatively, to Enter Final Judgment. In response to Mr. Housch's Motion to Set, I complained that "there is no record or transcript of the testimony offered against Respondent [Mr. Tate] back on November 14, 2007." (See, Response Motion to Set Final Hearing or Alternatively, to Enter Final Judgment, pp.1 and 2, attached hereto as **Exhibit 3**). Additionally, during oral argument of the Motion to Set (held on Feb. 5, 2010), I informed the court that I needed to depose the persons who testified at the prior hearings in order to preserve the record on appeal. Thereafter, the court ordered that I could schedule the

depositions of David E. Tate and Dr. Kenner, whose depositions were finally taken in the spring of 2010. In their depositions, neither David Tate nor Dr. Kenner could recall any specifics of their testimony from the Oct. 23rd or Nov. 14th hearings. Both cited the passage of time as the reason for not being able to recollect their prior testimonies.

11. The primary reason I took David Tate and Dr. Kenner's depositions was to preserve the record on appeal and to investigate into what had transpired at the Oct. 23rd and Nov. 14th hearings.

12. On September 7, 2010, while filing the Notice of Appeal as a Poor Person, I informally spoke to the an employee in the Probate Court's Clerk's office about the status of the case; I informed this person that an appeal would be very challenging because there were no transcripts of the Oct. 23rd and Nov. 14th hearings, and that due to the contentious nature of the case, our Statement of Evidence would likely be hotly contested. This person told me "there were audio recording of those hearings, there has to be." I told this person, I had requested copies a long time ago and was told that they did not exist. This person told me, again, "there has to be audio/video recordings."¹

13. Based on those affirmations, in early October of this year, I told my client (Danny Tate) I needed his assistance on preparing the Statement of Evidence that would need to be filed in conjunction with his appeal, and to work on getting the audio/video recordings from the Oct. 23rd and Nov. 14th hearings. He said he would, however, I did not hear back from him on the progress of his efforts.

14. On October 18, 2010, while walking into the courthouse to hand deliver my designation of the record to the Probate Court Clerk's office, I passed by the same employee of

¹ I have omitted this person's identity at their specific request.

the Probate Court's Clerk's office who stated "did you get the tapes for those hearings, you were looking for?" I stated "no," and this person responded "they have them, but you didn't hear that from me."

15. On October 19, 2010, I went to the Court Administrator's office and spoke to a woman named "Sandy" at the front desk. I told Sandy that I needed to get copies made of the audio/video recordings for the Oct. 23rd and Nov. 14th hearings in the Tate Conservatorship. She told me I needed to speak with Ted Wallace, whose office was immediately adjacent to her desk. I walked into Mr. Wallace's office, introduced myself, and told him I needed copies of the Oct. 23rd and Nov. 14th hearings from Judge Kennedy's courtroom. He asked if I had the case number. I immediately told him the case number, and he handed me a compact disk and stated "Here's the Oct. 23rd hearing." (A true and exact copy of the Oct. 23rd hearing, which I was previously told did not exist, is attached hereto as **Exhibit 4**). I was shocked that Mr. Wallace had the disk sitting right on his desk and had already made a copy of it. What I did not know at the time is that my client, Mr. Tate, had already recently met with Mr. Wallace and arranged to have the copies made and to pay for them. (See, Affidavit of John Daniel Tate, contemporaneously filed herewith). Mr. Wallace told me that he had some other work to complete that afternoon, but that he could get me a copy of the Nov. 14th hearing as well, he just needed to get into Judge Kennedy's courtroom to make the copy. I left Mr. Wallace my contact information and asked that he contact me when the Nov. 14th disk was ready to be picked up. He told me he would contact me once it was ready to be picked up. I told him that I was on a strict deadline and needed the copy as soon as possible.

15. On October 22, 2010, Mr. Wallace telephoned me and stated that "he checked but there were no audio/recordings for Nov. 14, 2007, but there were some for November 15, 2007,

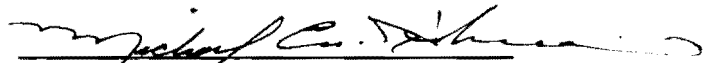
is it possible that the dates were mixed up.” Frustrated, I did not call Mr. Wallace back, but told my client that “now they are again saying the recording from the Nov. 14th hearing does not exist anymore.”

16. Determined to get to the bottom of the matter, I again visited Mr. Wallace’s office on October 27, 2010. Mr. Wallace told me that when he went down to Judge Kennedy’s courtroom to have the copy of the Nov. 14th hearing made, Judge Kennedy told him not to make the copy for me and that I should call Judge Kennedy or Mr. Lammers regarding the matter.

17. That same afternoon, on October 27, 2010, I telephoned Ms. Lammers and again requested a copy of the courtroom audio/recording from the Nov. 14th hearing. That same afternoon, Mr. Lammers called me back and stated that she was in the room when Mr. Wallace came into Judge Kennedy’s chambers or courtroom to make a copy of the Nov. 14th audio recording, and that Judge Kennedy “denied your request.” Ms. Lammers told me that Judge Kennedy is not required to handover the tape and that the tape recording is not for public consumption. I told her that I needed the tape to send out to a court reporter to have a transcript prepared. Ms. Lammers again stated that Judge Kennedy has denied your request for a copy of the audio recording. I informed Ms. Lammers to notify Judge Kennedy that I would be filing this Writ of Mandamus, and she told me she could not or would not relay the message.

Dated this 28th day of October, 2010.

FURTHER AFFIANT SAYETH NOT


Michael G. Hoskins

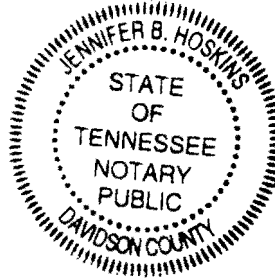
VERIFICATION

Personally appeared before me, Michael G. Hoskins, the above named affiant, who, being sworn by me, states that the statements contained in the foregoing affidavit are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me on this 28th day of October, 2010.

Jennifer B. Hoskins
Notary Public

My commission Expires November 4, 2013



FILED

IN THE SEVENTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
(PROBATE DIVISION)

RICHARD R. ROOKER, CLERK

IN THE MATTER OF:
John D. Tate, Respondent.

[Signature]
D.C.

No. 07P1654

NOTICE OF HEARING

TO:
John D. Tate
5909 Old Harding Pike
Nashville, TN 37205

Pursuant to Tennessee Code Annotated 34-1-108, you are hereby notified that a petition has been filed, a copy of which is attached, in which it is alleged that the above referenced respondent is incapable of caring for himself/herself or disabled from managing his/her property or both. The petition seeks the appointment of a Conservator for the respondent's person or property or both. The Court being satisfied that there is good cause for the exercise of jurisdiction as to the matters alleged in the petition, has set a hearing on the 14th day of November, 2007, at 10 A.M., Seventh Circuit Courtroom, Historic Courthouse, One Public Square, Sixth Floor, Nashville, TN 37201, before the Honorable Randy Kennedy, Probate Court Judge.

The Court has appointed a guardian ad litem to investigate the matters alleged in the petition and make a report to the Court. The guardian ad litem is charged with asserting the respondent's best interests and with making recommendations, consistent with the law, as to what action should be taken in the best interest of the respondent. The guardian ad litem appointed by the Court is Robert H. Stratton, Attorney at Law, 4811 Lebanon Road, Suite 209, Hermitage, TN 37076.

IN WITNESS WHEREOF, I have set my hand and affixed the Seal of this Court, this 23rd day of October, 2007.

RICHARD R. ROOKER, Clerk

[Signature]
Tommy King, Deputy Clerk



If you are the respondent, please note the following:

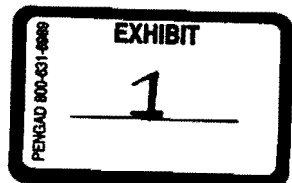
You, the respondent, have the right to:

1. demand a hearing on the issue of disability;
2. present evidence, confront and cross-examine witnesses;
3. appeal the final decision on the petition;
4. attend any and all court hearings;
5. have an attorney ad litem appointed to represent your interests.

SERVICE

THIS DOCUMENT executed this
24th day of October 2007

[Signature]
Deputy Sheriff / Process Server



IN THE COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION
AT NASHVILLE

FILED
2010 APR 30 AM 9:42

IN RE: CONSERVATORSHIP OF JOHN)
DANIEL TATE,)

Respondent-Appellant)

v.)

DAVID E. TATE,)

Petitioner-Appellee)
"Temporary Conservator")

RICHARD R. ROOKER, CLERK

P. Heubel

Case No.: M2009-02130-COA-R3-CV

Seventh Circuit Court for Davidson
County (Probate): Case No. 07P-1654

AFFIDAVIT OF BERT L. DENTON

I, Bert L. Denton, after being duly sworn, depose and states as follows:

1. I am above the age of majority, competent to testify and have personal knowledge of the matters stated herein. I am a licensed and practicing Tennessee attorney, B.P.R. No: 020722, and give this affidavit of my own free will and to the best of my recollection of the events contained herein.

2. I am personally acquainted with the Appellant, Mr. John D. Tate, as he is my neighbor and lives two doors down from my residence located at 5913 Old Harding Pike, Nashville, TN 37205.

3. On the evening of November 13, 2007, as I was pulling into my driveway, Mr. Tate approached me and told me that a conservatorship hearing was scheduled for the next morning and asked if I could help him. I told Mr. Tate that I did not practice in that area of law, but if he would bring over a copy of the Petition I would review it and offer him whatever advice I could.

PENGAD 800-631-6988
EXHIBIT
2

4. Mr. Tate then brought me a copy of the Petition for Appointment of Conservator and after review, I told Mr. Tate there was no way for me to adequately defend him at this hearing on such short notice, but that I would accompany him to the courthouse the next morning solely to seek a continuance so he could hire reputable counsel to defend him. I did not enter into a formal retainer agreement with Mr. Tate nor did I file a notice of appearance with the trial court.


5. As represented, on November 14, 2007, I accompanied Mr. Tate to the hearing, and when the matter was called on the docket, I informed the judge, Honorable Randy Kennedy, that I had only received a copy of the Petition the night before, did not practice in this area of law and was there solely to request a continuance so Mr. Tate could hire adequate legal representation.

6. Judge Kennedy summarily denied Mr. Tate's request for a continuance and proceeded with a conservatorship hearing. I represented Mr. Tate in no capacity other than requesting a continuance.

7. Prior to the hearing, I had no knowledge that the trial court had already granted a Temporary Conservatorship and directed the issuance of Temporary Letters of Conservatorship. I also had no knowledge of who would be testifying against Mr. Tate or the nature of their testimony.

8. Prior to the hearing, I had not received the Guardian Ad Litem's Report, and the Physician's Report was handed to me in the courtroom foyer approximately fifteen (15) minutes before the hearing began. I did not have time to review it or prepare any defense to it.

FURTHER AFFIANT SAYETH NOT.


Bert L. Denton

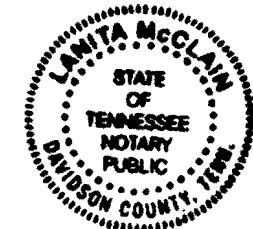
VERIFICATION

Personally appeared before me, Bert L. Denton, the above named affiant, who, being sworn by me, states that the statements contained in the foregoing affidavit are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me on this 12th day of November 2009.

Lanita McClain
Notary Public

My commission Expires March 20, 2010



My Commission Expires MAR. 20, 2010

FILED

IN THE SEVENTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

2010 FEB -1 PM 3: 35

IN RE: CONSERVATORSHIP OF JOHN
DANIEL TATE,
RESPONDENT

v.

DAVID E. TATE,
TEMPORARY CONSERVATOR

)
)
) *14ccw* D.C.
)
)

Case No. 07P-1654

**RESPONSE TO MOTION TO SET FINAL HEARING
AND/OR, ALTERNATIVELY, TO ENTER FINAL JUDGMENT**

Respondent John D. Tate hereby responds to the Temporary Conservator's Motion to Set Final Hearing and/or Alternatively, to Enter Final Judgment. Respondent does not oppose the setting of a Final Hearing in this matter. However, Respondent submits that the final hearing in this matter should be evidentiary in nature, and the parties allowed to offer expert testimony as to the current need of a partial or full conservatorship over Respondent, and to diligently consider whether there are less restrictive alternatives that may be appropriate in this case.

Whether the court should find Respondent to be temporarily or permanently disabled and in need of a partial or full conservatorship over his person or estate (or both) should rightly be determined based on his *current* mental and physical condition, and not merely on what the court recalls of his condition back on November 14, 2007.


Respondent further submits that the proffer of such expert testimony is also necessary for preservation of the record on appeal. There is no record or transcript of the testimony offered against Respondent back on November 14, 2007. On November 14, 2007, this court found Respondent to be "disabled" without first giving him the opportunity to present competing expert testimony. Respondent's counsel has recently retained a competing expert witness, a duly



licensed Psychiatrist, to oppose the continuation of the conservatorship. Sufficient time is needed to generate and submit this competing Physician's Report, and to conduct witness depositions of anticipated witnesses. Sufficient time is also needed to file Daubert motions, if appropriate. To that end, the parties should be required to disclose their anticipated witness lists, including expert witnesses, on a date certain; required to disclose their Physicians' Reports on a date certain; required to complete all witness depositions on a date certain; and a Final Hearing set which provides sufficient time to properly prepare for trial.

In conclusion, Respondent does not oppose the setting of a Final Hearing but simply requests that said hearing be evidentiary in nature, and the parties be allowed to put on expert testimony regarding Respondent's current medical and physical condition.

Respectfully submitted,



Michael G. Hoskins (BPR No. 024507)
Law Office of Michael G. Hoskins, P.C.
3200 West End Ave., Suite 500
Nashville, TN 37203
telephone: (615) 783-1757
facsimile: (615) 866-5816
email: mgh@michaelghoskins.com

Attorney for Respondent, John Daniel Tate

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2010, a true copy of the foregoing *RESPONSE TO MOTION TO SET FINAL HEARING AND/OR, ALTERNATIVELY, TO ENTER FINAL JUDGMENT* has been served *via facsimile* to the following:

Mr. Paul T. Housch, Esq.
Attorney at Law
Washington Square, Suite 310
222 Second Avenue North
Nashville, TN 37201
Facsimile: 615-259-3315

Attorney for Temporary Conservator. David E. Tate


Michael G. Hoskins