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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE CONSERVATORSHIP OF JAMES FREDERICK SHORT, Known also as James F. Short

JAMES F. SHORT, Appellant,	)	Filed January 25, 1979
vs.	)	
JOHN MANNING, Conservator of James F. Short, Appellee.	)	747 2-61899

Appeal from Van Buren District Court - Dick R. Schlegel, Judge.

Ward under order of voluntary conservatorship appeals trial court's refusal to terminate same or to appoint a different conservator. Reversed.

D. W. Harris of Bloomfield, Iowa, for appellant.

Bailey C. Webber of Ottumwa, Iowa, and James A. Dorothy of Keosauqua, Iowa, for appellee.

Submitted to Oxberger, C.J., Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

James Frederick Short, a ward under order of voluntary conservatorship, appeals from the trial court's refusal to (a) terminate the conservatorship initiated on his voluntary petition executed January 5, 1977; and (b) act upon his prior petition for standby conservatorship executed on October 15, 1976. Because the proceedings below were in equity pursuant to § 633.33, The Code, we review the issues de novo. Rule 4, Rules of Appellate Procedure.

On appeal, the ward advances two reasons why the present conservatorship should be terminated. He contends: (1) that because of the existence of a prior unrevoked petition for standby conservatorship pursuant to § 633.591, The Code, the court should give no effect to the voluntary petition of January 5, 1977; and (2) that the petition of January 5, 1977 was not voluntarily executed by the ward. We review both of these contentions.

I. At the time the ward's voluntary petition for appointment of conservator, executed January 5, 1977, was presented to the court, there was in existence a petition for appointment of conservator on a standby basis which had been executed by the ward on October 15, 1976. The record reveals that the existence of this document was unknown to both the attorney who prepared the January 5, 1977 voluntary petition, and the judge who acted favorably upon that petition.[1] The ward now contends that because of the existence of the standby petition, any action taken with respect to the later petition must be set aside.

The ward's apparent motive in preferring this course of action is not to free himself from conservatorship, but rather to secure appointment of a different conservator. We must reject the theory on which his claim is premised. Section 633.494, The Code, relating to revocation of a standby petition, requires that revocation be by (a) destruction of the petition by the petitioner, or (b) an acknowledged written instrument of revocation. There is no indication that the October 15, 1976 standby petition had been revoked in this manner or in any other manner. We believe, however, that the execution of the January 5, 1977 petition and the court's action thereon should be permitted to stand if consistent with

[1]The ward also contends that there was another standby petition in possession of this attorney, but the record does not support this contention. Several years before January 5, 1977, the attorney had prepared a voluntary petition which had been executed by the ward but never presented to the Court. On January 5, 1977, this instrument was obviously stale.

the intention of the ward at the time the latter petition was executed. The prescribed conditions drafted into the standby petition to trigger its operation, and which are discussed later in this opinion, are narrower in scope than the grounds for a voluntary petition under §§ 633.572, 633.566(2). If it were the intention of the ward to proceed under the broader provisions of these statutes, he should be permitted to do so notwithstanding the existence of the standby petition. The crucial issue in this regard is the intention of the ward. Because that issue is involved in our disposition of the second issue on appeal, we need not treat it further in this division.

II. The trial court determined the January 5, 1977 voluntary petition was knowingly and voluntarily executed by the ward. If the parties involved had been dealing at arm's length, we would be inclined to agree with this finding. But because of the special relationship involved, we conclude that the voluntariness of this action by the ward is sufficiently suspect that it should not be given legal force.

At the time the voluntary petition was executed, those present, other than the ward, were the attorney who had prepared the petition and a nurse who was the ward's niece. Both of these persons concede that the ward was reluctant to sign the instrument, and that this occurred only after some persuasion on the part of the attorney. This circumstance would not ordinarily preclude a finding of voluntariness in the face of other evidence that the ward knew what he was doing. But there are other factors peculiar to the instant case which bear upon this determination.

The record discloses that the attorney who prepared the voluntary petition and beseeched the ward to sign it was a substantial creditor of the ward. The evidence indicates that commencing five or six months prior to January 5, 1977, this attorney sought to influence the marketing of products from the ward's farm in a manner which assured some payment of this indebtedness. Upon the opening of the existing conservatorship, this attorney was designated as attorney for the conservator. He signed the first report of the conservator filed with the court (less than thirty days after the conservatorship was opened) confirming the existence of his own claim in excess of $100,000. While this apparent conflict of interest in the operation of the conservatorship could be removed by directing that other counsel be employed for the conservator, this would not cure any conflict that may have existed with respect to the preparation of the petition for appointment of conservator. Principles relating to cancellation of

instruments and other legal relationships obtained by one party in whom trust and confidence is imposed by the other party (see, e.g., First National Bank v. Curran, 206 N.W.2d 317, 322-23 (Iowa 1973); Johnson v. Johnson, 196 Iowa 343, 399, 191 N.W. 353, 355 (1923)); have been recognized in voluntary guardianship cases. See In re Lyon's Guardianship, 239 Iowa 968, 976, 33 N.W.2d 423, 427 (1948). In application of these principles in the present case, we conclude that because the attorney was purporting to act for the ward in such transaction, because of the fiduciary nature of that relationship, and because the record reveals the attorney urged a course of action contrary to the expressed wishes of the ward at that time, the order of January 5, 1977 appointing a conservator should be set aside as requested by the ward.

III. It is the position of the ward on this appeal that the setting aside of the existing conservatorship will automatically result in the appointment of a conservator pursuant to the petition for appointment of a conservator on a standby basis executed on October 15, 1976. We disagree. That instrument, by its own terms, becomes operative only "upon the petitioner [ward] being adjudged incompetent or having been determined by his physician to be incapable, either physically or mentally, of managing his business affairs."

The trial court did not reach the question of whether the evidence establishes that these conditions exist. Nor do we. We see no reason to give retroactive effect to this instrument. The existence of such conditions or lack thereof should be determined by the trial court after remand of this appeal as of the date the issue is heard. If it is determined that a conservator should be appointed pursuant to the standby petition, the present conservator shall account to whomever is appointed. If no conservator is appointed, he shall account to the ward. Selection of a conservator upon the standby petition, if any be appointed, shall be determined by the trial court who shall give "due regard" to the ward's designation, but shall not be bound thereby. See § 633.592, The Code. All interested parties may be heard on the selection of a conservator if any be appointed.

The order appealed from is reversed and the cause is remanded for further proceedings consistent with this decision.

REVERSED.