

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2012-IA-01238-SCT

-E

IN RE: THE GUARDIANSHIP OF
BLAINE MICHAEL ROSHTO, A MINOR

ON APPEAL FROM THE
CHANCERY COURT OF AMITE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualifications or recusal.

Natalie Deason, Appellant.

Gary L. Honea, Counsel for Appellant.


Ronnie F. Penton, Counsel for Appellant.

James W. Shelton, Phelps Dunbar LLP, Counsel for Appellant.

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Joseph M. Stinson, Guardian Ad Litem.

.....
So Certified, this the 24th day of June, 2013.



JOSEPH M. STINSON
GUARDIAN AD LITEM FOR
BLAINE MICHAEL ROSHTO
.....

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INTRODUCTION AND STATEMENT OF ISSUES

This is a guardianship case in the Chancery Court of Amite County. Only two issues are on appeal to this Court:

1. Whether the Chancellor was wrong, abused her discretion, and should be reversed for deciding that Blaine's money should be protected by being kept under the control of the Court in a guardianship and invested as recommended by the guardian ad litem and as authorized by Mississippi law, rather than by being placed, as the guardian proposed, outside the control of any court with half being used to purchase a structured settlement annuity and half being placed in a trust outside Mississippi.

2. Whether the Chancellor was wrong, abused her discretion, and should be reversed for refusing to transfer Blaine's guardianship to Louisiana. The Court heard all the relevant testimony, gave the words of Miss. Code Ann., Section 93-13-63 (1972):

"If a guardian desire to remove the person and personal property of his ward out of this state, on petition and on his making settlement of his guardianship accounts, the court which appointed him may make an order to that effect; . . ." (Emphasis Supplied),

a literal construction, that is, the Court construed those words as giving the Court discretion to transfer or to decline to transfer Blaine's guardianship to Louisiana, decided that the guardianship should remain in Amite County, Mississippi, and articulated reasons supporting that finding.

STATEMENT OF THE CASE

Nature of the Case: This is a guardianship in the Chancery Court of Amite County. The ward, Blaine Roshto ("Blaine"), is now six years old. His guardian is his mother who was formerly Natalie Roshto and is now Natalie Deason ("Natalie"). The guardian is appealing two decisions by the Chancellor: One that Blaine's guardianship money should be invested in FDIC insured deposits in Mississippi rather than in an uninsured structured settlement annuity and a foreign trust; and the other that Blaine's guardianship should remain in the Chancery Court of Amite County rather than being transferred to Louisiana.

Course of the Proceedings: Because his father, Shane Roshto ("Shane") died in the Deepwater Horizon Platform explosion and fire April 20, 2010, Blaine, who was then three years old, needed a guardian, and that guardian needed court authority to pursue claims on Blaine's behalf for the death of his father.

Amite County, Mississippi was the home of the Roshto family. Blaine and his mother had lived there all their lives, and Blaine's father lived there at the time of his death. The Chancery Court of Amite County, therefore, had jurisdiction and venue to appoint a guardian for Blaine, and it did so on June 21, 2010, appointing Natalie to serve as guardian of his person and estate. (C. P. 8). Soon thereafter, that same Court authorized Natalie, as Blaine's guardian, to file suit on his behalf for the wrongful death of his father. (C. P. 17).

Natalie engaged lawyers, filed suit, and reached an agreement during the following year to settle all claims for Shane's injuries and death for \$15.2 million. Blaine is Shane's only child and Natalie was his widow, so they were entitled to equal shares of the net proceeds of the settlement. After the payment of attorney's fees and expenses, the net

share of each was about \$4.5 million. On Natalie's petition, the Chancellor entered orders April 26, 2011 (C. P. 24), and May 2, 2011. (C. P. 28) authorizing Natalie to join in the settlement as Blaine's guardian.

Soon after the settlement was reached and approved, a dispute erupted among lawyers over attorney's fees. Natalie had signed two contingent fee contracts with lawyers to represent her and Blaine in their claim for Shane's death. The first contract was with three lawyers and the second was with only two of those lawyers, and the contingent attorney's fee percentages in one were different from the percentages in the other. (C. P. 15 and 41). The lawyer that was left out of the second contract and out of the planned division of the attorney's fees, filed a Circuit Court lawsuit for his claimed part, and petitioned the Chancery Court to intervene in Blaine's guardianship proceeding to assert his claim there. (C. P. 32, 43, 51). The lawyers' dispute and the disclosure that two contracts having different fee arrangements stalled the proceeding and the guardian's receipt of Blaine's share of the settlement.

Meanwhile, the guardian, although not filing any formal petition for authority to invest the guardianship funds, submitted to the Court (C. P. 88) through documents prepared by her financial advisors, Mr. Wiggins and Mr. Palmer, materials showing how Blaine's money could be invested. Those materials became part of the record when Natalie later filed her petition to transfer the guardianship to Louisiana and attached them as an exhibit. They contain a plan under which about half of Blaine's guardianship money would be used to purchase a structured settlement annuity that would pay out through Blaine's age 35, and the remaining half would be invested through an irrevocable Tennessee Grantor Asset Protection Trust in market investments. (C. P. 105).

In an Order entered May 26, 2011, the Chancellor held: "Due to issues stemming from the execution of multiple fee contracts, which were not brought to the Court's attention prior to the approval of the attorney contract herein, and the issues stemming from the request to invest the ward's funds in non-insured deposit accounts, the Court finds it necessary to appoint a Guardian Ad Litem to protect the ward's interest and to assist the Court." (CP 88). The Court appointed Joseph M. Stinson (the "GAL") as guardian ad litem for Blaine and assigned him eight matters for recommendation. Six of those matters related to the settlement of Blaine's claim and attorney's fees, one to the investment plan proposed for Blaine's money, and the other was what might be termed an omnibus charge: "Any and all other matters affecting the estate of the minor child which may develop prior (to) the discharge of the Guardian Ad Litem." (C. P. 88-89).

The GAL accepted the appointment and qualified. (C. P. 90,91). The attorneys fee dispute was settled by negotiation and, once that issue was resolved, an agreement was reached on all other issues relating to the settlement of Blaine's claim. The Court approved those agreements, reaffirmed its approval of the settlement of Blaine's claims, and modified the earlier orders to reflect the agreements. (C. P. 92).

At that time, the only matter remaining of those assigned to the GAL, was the question how Blaine's guardianship money should be invested. But another was added under the GAL's omnibus charge when Natalie remarried, moved to Louisiana, and filed a "Petition to Approve Final Accounting and For Authority to Transfer Guardianship". (C. P. 99). She reported in that petition that she had married Slade Deason in July, 2011, moved with Blaine to Louisiana, and opened a Louisiana tutorship for Blaine to which she wants the Chancellor to transfer Blaine's guardianship. (C. P. 99). To that motion she

attached her plan for the investment of Blaine's guardianship money in the form of a lengthy letter from her investment advisors recommending a structured settlement for half of Blaine's money and an irrevocable Grantor Asset Protection Trust administered by a Tennessee trust company for the remaining half. (C. P. 105). Why Natalie attached the investment proposal is somewhat puzzling because she did not ask the Chancellor to approve it or allege in the Motion that its approval would serve Blaine's best interest, but, apparently concluding that the guardianship would, without question, be transferred to Louisiana, said in the Motion that the Louisiana Court was the appropriate court to approve the investment of the guardianship money. (C. P. 100).

The guardian ad litem filed an Interim Report January 6, 2012 opposing both the guardian's investment plan and the transfer of the guardianship to Louisiana. (C. P. 115-135).

Disposition in the Court Below: The Court allowed prolonged hearings on the investment plan of Natalie and her advisors, taking, as the Court put it, “. . . more testimony regarding the investment of this minor's fund than any other case during my tenure of office.” (T. 234). She heard live testimony from the guardian, the guardian's investment advisors, one of the guardian's attorneys, and the GAL.

The Court directed that the money be moved from the escrow account in New York where it had been held for months incurring fees far greater than the small interest it was earning, and deposited into FDIC insured bank accounts in Mississippi with the bank acknowledging receipt of a copy of the order and restrictions on the deposit, all in conformity to Section 93-13-17 (C. P. 201), and denied the guardian's Motion to transfer the guardianship to Louisiana.

Statement of Facts Relevant to Issues Presented for Review:

Blaine's guardian has \$4.5 million in her care that belong to him. The guardian's investment advisors presented the Chancellor in multiple hearings, more than one idea how Blaine's money should be handled. In the end, their plan is still not precisely clear, but it, generally is that half of Blaine's money plus \$200,000 should be used to purchase an uninsured structured settlement annuity that would pay out in installments, and the remaining half, less \$200,000, would go into a foreign asset protection trust to be invested in market securities. The periodic payments from the structured settlement would go into the trust.

The GAL opposed the plan proposed by Natalie and her advisors and recommended instead the deposit of the guardianship funds for the present time, in FDIC insured certificates of deposit.

After getting the Court's authority to settle Blaine's claim, Natalie remarried and moved to Louisiana, taking Blaine with her. She opened a tutorship for Blaine in La Salle Parish, Louisiana and petitioned the Chancery Court of Amite County to transfer Blaine's guardianship to that tutorship proceeding.

The Court held a lengthy hearing January 6, 2012 (T.56-172), heard testimony from the guardian, the guardian's investment advisors, the GAL, and Jeffrey Koonce, a tax attorney who represents Natalie, and made the decision that the guardianship would not be transferred to Louisiana. (T.149-150). Another hearing was held March 27, 2012. (T.173-223). The Court found that the Blaine's only tie to Louisiana is that his mother currently lives there. The Court, in one of her expressions of concern for both Blaine and Natalie, commented that Natalie had been through ". . . an unimaginable tragedy in the

loss of her husband less than two years ago, . . ." and had met and married a man who had had two "unspeakable tragedies in his life", and while she hoped that the relationship is a long and healthy one, the Court was hesitant to believe that Blaine will continue to live in Louisiana until he is an adult. (T. 150-151).

The Court entered an order (C. P. 250-256) ordering the guardian to deposit the guardianship funds into FDIC insured bank accounts in Mississippi in restricted deposits prohibiting withdrawal except upon order of the Court, and denying the petition to transfer the guardianship to Louisiana.

SUMMARY OF THE ARGUMENT

Mississippi statutes and case law establish a system for the protection of the assets of any minor or disabled person. The application of that system begins when a guardian is appointed to have the responsibility for the management of those assets under the supervision, watchfulness and, ultimately, the control of the Chancery Court. The ward's assets are protected by safeguards that both the ward and the Court must observe. Those safeguards include investment restrictions, a requirement of bond security when the ward's assets are not deposited in insured accounts with restrictions on withdrawal, and annual accountings. Then the law requires when the ward attains the age of majority, a final accounting and rendition to him of his assets.

Plainly put, Natalie and her advisors believe they have better ideas and plans for Blaine's money than the statutory guardianship plan in Mississippi affords, and want to handle Blaine's assets as they choose, in effect, outside a guardianship.

Natalie's plan is not in Blaine's best interest for several reasons. Mississippi law does not permit a guardian to deposit a ward's funds in such a manner as to put it beyond

the ward's reach upon his attaining majority, such as by purchasing a structured settlement annuity payable after the Ward reaches majority as Natalie proposed, and the purchase of a structured settlement annuity is not authorized under either the statutes relating to guardianship or Miss. Code Ann., Section 91-13-1, *et seq* (1972) relating to investments by fiduciaries. Mississippi law does not permit the transfer of guardianship funds to foreign trusts for investment, and it would not be a proper exercise of the Court's discretion and power to allow the deposit of Mississippi guardianship funds in a foreign trust crafted to circumvent Mississippi law. The guardianship Court would not have jurisdiction of the trust, the trustee or the investments. The placement of any guardianship funds outside fully insured and restricted bank deposits triggers a requirement of bond under Miss. Code Ann., Section 93-13-17 (1972). A guardianship bond for Blaine's multi-million dollar guardianship funds would be difficult, if not impossible, to get, and, if obtained, would be very costly.

The annual fees of the investment advisors and the trustee under Natalie's plan would amount to 1.5% of the total assets under management. And the uninsured investment would be subject to risk of loss as well as market risks.

The Chancellor was correct under the facts and the law, and served Blaine's best interest, when she declined to approve the guardian's investment plan and directed that the guardianship funds be deposited for now in FDIC insured accounts, which are safer, have no market risk, and incur no bond cost or management fees.

Natalie petitioned for the transfer of Blaine's guardianship to Louisiana, but her reasons for the transfer revolve, not around Blaine's best interest, but around Natalie and her plans and desires. She did not even allege (C. P. 100), or make any effort to prove,

that the move would be in Blaine's best interest.

Multiple reasons justify the Court retaining the guardianship in Amite County. Blaine and his mother had been lifetime residents of Amite County, Mississippi until Natalie's remarriage seven months before the application to transfer the guardianship was filed. The Chancellor had heard the testimony from Natalie and her investment advisors of their proposal that would have the Court allow Blaine's money to be effectively transferred out of the Court's control, and the Court intervened appropriately, maintaining proper and lawful control of Blaine's guardianship. There is every reason to expect that if the guardianship is transferred, Natalie and her advisors will ask the Louisiana Court to follow their plan, and the Louisiana Court may or may not be as diligent as the Chancellor in Amite County and, in the end, may allow the plan.

Mississippi law provides that Blaine is a minor until age 21 while Louisiana law will emancipate him at age 18. The three years that Mississippi law will delay Blaine's access to his substantial guardianship money could be crucial in his maturation process, and the delay for that period of time in delivering that money to him may mean all the difference.

Natalie has been through many changes, beginning with the violent death of her husband, Shane Roshto, and needs mature guidance by a Court devoted to Blaine's interest.

Natalie is young and is not financially sophisticated. Without the guidance of a Court as interested in her and Blaine as the Chancellor who tried this case obviously is, she could make catastrophic mistakes with Blaine's money.

The Chancellor was correct under the facts, was acting within her statutory discretion, and served Blaine's best interest when she denied the transfer.

ARGUMENT

The trial Court listened carefully to counsel in multiple hearings, and recessed the January 6, 2012 and March 27, 2012 hearings to allow Natalie and her financial advisors to supplement of the record. The Court's Order Denying Approval of Final Accounting, Denying Transfer of Guardianship, Directing Deposit of Funds Into Proper Guardianship Account and Compensating Guardian Ad Litem (C. P. 196) is both lengthy and thoughtful, evidencing substantial concentration and work by the Court.

Today's question is whether the Chancellor abused her discretion in her decision how to best serve Blaine and protect his financial future by managing his money that by almost all standards is a fortune, but is all he will ever have from his father.

1. Standard of Review.

Any argument on appeal from the decision of a Chancellor should begin with the recognition of the appropriate standard under which the Chancellor's decision is to be judged. The Supreme Court's standard of review of an appeal from a Chancery Court is deferential. If substantial credible evidence supports the Chancellor's decision, the decision should be affirmed and is not to be reversed unless the Chancellor abused her discretion, was manifestly wrong or clearly erroneous, or applied the wrong legal standard. The Supreme Court recognizes that a Chancellor, having heard the testimony and observed the demeanor of the witnesses, is in the best position to judge their credibility, and will not undermine the Chancellor's authority by substituting its judgment for the Chancellor's. *Estate of Carter v. Shackelford, et al*, 912 So.2d 138, 143 (Miss 2005).

2. The Chancellor is the "Superior Guardian" of the Ward, and the Minor is a ward of the Chancery Court.

There is a statutory and case law plan in effect in Mississippi for the preservation and protection of the persons and estates of helpless people through guardianships and conservatorships. While it may seem to some that the Chancery Court is merely a supervisory figure, distant from the administration of the guardianship and called upon only for rubber stamp approval when the guardian requests it, the statutory plan is that the Court have a much more central position, that it be much more involved, and that it have much more control of the guardianship.

"A minor under guardianship is a ward of the Chancery Court." *Welch v. Childers*, 195 Miss. 415, 15 So.2d 690, 691 (1943). *Carpenter v. Berry*, 58 So.3d 1158, 1162 (2011).

The Chancellor's position in a guardianship is not secondary to that of the guardian. On the contrary, the Chancellor is the "superior guardian" of the ward. *Conservatorship of Mathews, Matthews v. Williams*, 633 So.2d 1038, 1040 (1994).

"Infants and persons of unsound mind are disabled under the law to act for themselves. Long ago it became the established rule for the court of chancery *to act as the superior guardian* for all persons under such disability. This inherent and traditional power and protective duty is made complete and irrefragable by the provisions of our present state constitution. It is not competent for the Legislature to abate the said powers and duties or for the said court to omit or neglect them. *It is the inescapable duty of the said court and of the chancellor to act with constant care and solicitude towards the preservation and protection of the rights of infants and persons non compos mentis.* The Court will take nothing as confessed against them; will make for them every valuable election; will rescue them from faithless guardians, designing strangers, and even from unnatural parents, and in general will and must take all necessary steps to conserve and protect the best interest of these wards of the court. The court will not and cannot permit the rights of an infant to be prejudiced by any waiver, or omission or neglect or design of a guardian, or of any other person, so far as within the power of the court to prevent or correct." (Emphasis added). *Union Chevrolet Co. V. Arrington*, 162 Miss. 816, 826, 827, 138 So. 593, 595 (1932).

The Chancery Court's duty to the ward under guardianship extends to the investment of the ward's money. Miss. Code Ann., Section 93-13-57 (1972) provides: "Whenever the guardian shall have the money of his ward not needed for current expenditures, or directed to be invested for the ward, he shall apply to the court or chancellor in vacation for direction as to the disposition he shall make of it; . . ." In *Brewer v. Herron*, 171 Miss. 435, 157 So. 522, 523 (1934), the Supreme Court said, "The provision of this statute requiring a guardian to apply to the chancery court or the chancellor for authority so to do before investing the funds of his ward is mandatory. Without an antecedent order of the court or chancellor *directing* him as to the disposition of the surplus funds of his ward, a guardian has no authority to loan or otherwise invest such funds, . . . The purpose of the statute was to make it the precedent duty of the chancellor to supervise and *control* the investment of wards' funds and the security to be taken, . . . (Emphasis Supplied)."

The Chancellor in this case should not, therefore, be seen as a passive participant who is expected to agree with Natalie and her advisors just because she is the guardian and they are her advisors. The Court has a leadership position and an independent obligation to the ward because the ward is, after all, the ward of the Court. *Carpenter v. Berry, supra*.

The statutes are replete with examples of the investiture of the Court with authority over guardians. From the Mississippi Code of 1972, the following sections are examples:

- 93-13-13 The Court appoints the guardian;
- 93-13-23 The Court removes the guardian for sufficient cause;
- 93-13-27 Judicial proceedings can be brought only after the Court grants

- authority;
- 93-13-31 The Court decrees that the ward's property is delivered to the guardian;
- 93-13-35 The Court makes allowances for the maintenance and education of the ward;
- 93-13-38 The Court can authorize estate planning gifts;
- 93-13-39 The Court can authorize the payment of premiums on life insurance;
- 93-13-41 The Court can authorize the purchase of stock and implements to cultivate the ward's land or leased land;
- 93-13-43 The Court can authorize the lease of the ward's minerals;
- 93-13-45 The Court can authorize expenditures to improve buildings and land;
- 93-13-47 The Court can authorize the creation, extension or renewal of encumbrances on the ward's property;
- 93-13-48, 49 The Court can authorize the purchase or sale of land;
- 93-13-57 The Court can determine how to invest the ward's money;
- 93-13-59 The Court can authorize the compromise of doubtful claims;
- 93-13-67 The Court is to examine, approve and allow accountings; and
- 93-13-73 The Court can require or waive the production of vouchers at the guardian's accountings.

As can be seen, the Chancellor is not to occupy the position of a passive, secondary, uninvolved observer, generally leaving the guardian to his or her own devices and rubber-stamping the plans of the guardian submitted for approval. Rather, the Chancellor is to be actively involved in, and directing, the guardianship. The statutory and

case law plan is apparent. The chancery court is to *direct and control* the guardian as to the investment of the ward's funds.

The Chancellor here was correct in following the Court's judgment as to Blaine's best interest and not blindly following the guardian's plan.

3. The Court was eminently correct, not manifestly wrong and was serving Blaine's best interest when it directed that Blaine's money be invested conservatively and not through the plan proposed by the guardian.

Taken as established that Miss. Code Ann., Section 93-13-57 (1972) gives the Court the duty and the authority to supervise and control the ward's money, we should note that the statute was amended in 2013, designating the first portion as subsection 1 and substituting there the words, "Whenever the guardian has money" for "Whenever the guardian shall have money", and adding subsection 2, which directs the newly authorized special general guardian to apply to the court or chancellor for direction as to the disposition of money he has in excess of the amounts or values listed. The point in mentioning the amendment to the statute is that the amendment reaffirms the legislative intent expressed in the statute and in the decisions construing it, that chancellors are to supervise and control the investment of guardianship funds.

Multiple proposals by the guardian's investment advisors were presented to the Court, but they all ultimately mean, "Let me handle Blaine's money outside the guardianship in a structured settlement annuity and in a foreign trust, or move the guardianship to Louisiana where I can get a correct decision." (See Appellant's Brief P. 10).

None of the guardian's proposed investments would be insured by FDIC (T. 131),

although Buddy Wiggins, one of the guardian's investment advisors, testified that safety of the principal is paramount and that first consideration should be given to FDIC insured certificates of deposit and government agency obligations, which he said are the safest investments available. (T. 22).

The advisor, Fred Palmer testified at the first hearing on April 26, 2011, that the advisors' recommendation was to invest enough in government instruments so produce an amount of money equal to 100% of Blaine's current principal at the point in time when Blaine attains majority. (T. 35-36). Then at the next hearing on May 24, 2011, Mr. Palmer testified that their recommendation was "... that half of the proceeds in (Blaine's) account be invested in a structured settlement that would end at his age 35. And half of the proceeds be placed into a grantor asset protection trust, and those assets placed in the grantor trust . . . be managed collectively by Buddy Wiggins and (him)." (T. 94). Their suggestion at that time was, "... a series of distributions to be made from the structured settlement into the asset protection trust over a period of time with the thought in mind and the discussion had with the trustee and with the mother, that they would immediately withdraw funds from the trust and put them into a checking account for the benefit of Blaine, if they so chose. Or if they were concerned about his maturity and ability to manage the funds at that time they could continue to manage them in the trust until he was 21." (T. 95). It is clear from this testimony that the plan advanced by Natalie and her advisors was that the money not be under the control of a guardianship court.

By January 6, 2012, Mr. Palmer's recommendation had changed again. He proposed then that the structured settlement annuity be reduced from a term to Blaine's age 35 to his age 21. (T. 97). He touted the strength of large insurance companies that

participate in the structured settlement market, but admitted that there is no federal insurance insuring them. Then he made a claim that when he was later called upon by the Court to prove he could not. He said, "There is no federal insurance guaranteeing these large insurance companies, but there is a bit of a co-op amongst all of the big insurance companies where if one of them were in trouble the others come to the rescue." (T. 98).

Then Mr. Palmer made his second claim that he could not back up. Under questioning by Natalie's attorney and knowing that the Court had expressed concern about the customary discounts at which structured settlement annuities are sold prior to maturity, Mr. Palmer said,

"But just to add a comment to what the Court was talking about, if you don't mind. A lot of these structured settlements, all of the structured settlements require a qualified intermediary to intercede between the insurance carrier and the beneficiary. . . .

"Many of these intermediaries permit in the event that the structure has to be terminated early, . . . They permit you to terminate it back to the carrier that issued the structure. And generally the fee is about eight percent to do it.

"Now, the Court was absolutely correct with the example of the J. G. Wentworth, because those will take anywhere between 40 and 55 percent of a structure. That's typically not a qualified structure that we are talking about. A qualified structure, you can take it back to the insurance carrier that issued it, and there is a smaller, much smaller redemption fee." (T. 108-109).

Under additional questioning by the Court, Mr. Palmer stood by his testimony, but modified the discount to eight to nine percent. (T. 135). He could not produce anything at the hearing to prove his testimony that the cost of redeeming the structure would be only about eight percent, but promised to get it and provide it to the GAL. (T. 139). The record was kept open for Mr. Palmer to get a statement or certificate from the proposed issuing company as to the terms of an premature surrender of the structured settlement. (T. 165). When the Court reconvened almost three months later, no such affidavit was forthcoming. Natalie's counsel said, ". . . we could not get an Affidavit from a structured company, . . . because no one would give us one without actually giving them something." (T. 177). And, upon cross examination at that reconvened hearing, Mr. Palmer was asked, ". . . when you were not able to get the annuity companies to issue you an Affidavit that they would buy the annuity back at an eight percent discount, did you consider bringing to the Court some evidence of other annuities that you have seen repurchased at eight percent discount?" His answer was at first, "No. We haven't, because that hasn't necessarily been a matter of public record." Then to the question, "Have you seen any annuities repurchased in your own personal experience(?)", he answered, "I have not." (T. 189).

None of the investments proposed by the guardian would be FDIC insured (T. 131), and Mr. Palmer made an unbelievable statement when asked, "In your opinion is the structure you're proposing any more risky to Blaine than a CD?", he answered, "Oh, absolutely not." (T. 110). Then his willingness to take risks with the guardianship money was apparent in his reply when asked, "And you are making a decision here that it is better to risk this young man's capital in an investment that is not insured as opposed to taking a lower rate of return under an insured investment(?)", and he answered, "My

recommendation would be that, yes." (T. 193).

The Court considered testimony of the cost and risk to Blaine of following the guardian's plan. Mr. Palmer testified that the drafting of a trust agreement would be \$7,000.00 to \$10,000.00 (T. 133); management fees would 1% per annum of the total assets under management, payable quarterly, and annual trustee's fees would be one-half of one percent annually. (T. 133). He testified that there are no management costs relating to bank certificates of deposit. (T. 125).

Mr. Palmer said the top interest rate he found on a \$500,000 certificate of deposit the preceding day was 1.92%. (T. 99). He said the "tax free internal rate of return" on a structured settlement ending at Blaine's age 21 was 3.288%. (T.101), and that the structure company charges 4% up front. (T. 107). He testified that interest should rise over the next 17 years until Blaine attains majority, and that money in a structured settlement annuity would not increase even if interest increases dramatically. (T.127-128).

Natalie agreed with the proposals of her investment advisors, although her testimony leads to justifiably question whether she understood them, since she testified that the management fee she pays her investment advisors, who are her same advisors for Blaine's money, is 1% of earnings (T.79, 115), rather than 1% of the funds under management.

While touting their plan for Blaine's money, Natalie and her advisors did not put any of her money from the settlement in a structured settlement or in an asset protection trust. (T. 118, 120).

The GAL opposed the guardian's investment plan on several grounds. Miss. Code Ann., Sec. 93-13-17 (1972) requires every guardian to enter into bond and all guardianship

funds not deposited pursuant to a restrictive order of the Court in fully insured accounts in an institution described in Miss. Code Ann., Sec. 93-13-17 (1972) have to be bonded. Had the Court authorized guardianship funds to be used to purchase a structured settlement annuity and to be deposited in the trust, those funds would have had to be bonded as provided by Section 93-13-7. (C. P. 122-123). The Court heard testimony about the availability and cost of a guardian's bond, and held that, were the guardian's investment plan approved, Miss. Code Ann., Section 93-13-17 (1972) would require that all the funds be bonded since they would not be deposited in an FDIC insured account from which withdrawals were restricted without a Court order, and that such a bond would be extremely difficult to find and that the annual premium would be exorbitant. (C. P. 200).

It would not be in Blaine's best interest to place his money outside the guardianship Court's control, as that money used to purchase the structured settlement annuity and that in a foreign trust would be. An annuity would be an unsecured, uninsured, inflexible, long-term investment, the return from which is based on today's historically low interest rates.

And there is no authority for the guardian to purchase, or for the Court to authorize the purchase of, a structured settlement annuity with Blaine's money for a term extending beyond Blaine's minority since, under Miss. Code Ann., Sec. 93-15-75 (1972), the duties and powers of the guardian will end when Blaine arrives at the age of 21 years, and under Miss. Code Ann., Section 93-13-77 (1972), the Court is obligated to decree the delivery of Blaine's property to him when he attains that age. The delivery to Blaine of his assets encumbered by the pay-out provisions of a structured settlement until his age 35 would not be an appropriate settlement of his guardianship. In addition, Blaine's money used to purchase a structured settlement would be placed beyond the control of the Court, and

would not be available for emergencies or other legitimate uses. And finally, the funds in the structured settlement annuity would not be insured by the Federal Deposit Insurance Corporation or any similar entity.

The guardian has proposed that she be allowed to place half of Blaine's money in an Asset Protection Trust outside Mississippi. The proposal submitted by the guardian was for a Tennessee trust which would require a trustee based in Tennessee, a trust agreement incorporating Tennessee law, a spendthrift clause prohibiting voluntary and involuntary alienation of Blaine's interest in the trust, and that the trust be irrevocable. (C. P. 127). At a hearing, the guardian's advisors said that the trust might be drafted under the law of some state other than Tennessee, but not Mississippi. The guardian did not produce a proposed trust agreement even as late as the hearing dates, so details were not clear. Mississippi law does not allow the placement of Mississippi guardianship assets in a trust outside Mississippi, or in a trust that would not allow Blaine full access to his assets upon attaining the age of majority.

The preservation of Blaine's principal is the first obligation of all those involved in his guardianship. The deposit of guardianship funds in FDIC insured banks in Mississippi is an investment plan allowed by law and often followed by guardians, offering control by the Court, low risk of loss, and avoidance of bond premiums. The limitation of FDIC insurance for any one depositor at any one bank to be \$250,000.00, and Blaine's guardianship funds are substantially in excess of that amount, however, the Certificate of Deposit Account Registry Program (CDARS), is a network of FDIC insured banks that allows depositors to place large deposits with one bank which spreads the money to fully insured certificates of deposit issued by other banks. (C. P. 130).

No confidence can be given Mr. Palmer's testimony that other insurance companies would take care of Blaine and his structured settlement annuity if one is purchased and the company issuing it fails. (T. 146).

Mr. Palmer testified that the only way for interest to move is up. (T. 143). It would be a mistake to lock Blaine's money into a structured settlement at a time when interest rates are at historic lows. Interest rates are low because banks "are full of cash", are not lending, and don't need to attract money. (T. 143). Blaine's money is best protected with FDIC insurance. The guardian will have the opportunity to invest Blaine's money when rates are higher for better returns and tying up the money for long term in today's market would be a mistake. (T. 143-144).

The GAL did not make a recommendation, and the Court did not decree, as Natalie infers in her brief, that the Court ordered that the guardianship funds will be in certificates of deposit until Blaine attains majority. The following appears in the transcript of the cross-examination of the GAL:

"Q. Mr. Stinson, is it your recommendation that for 17 (sic) year period that the minor's settlement funds not be put in any investment other than something that is FDIC insured?

"A. No. It is my recommendation that for now the money be put in CDs to see what happens (sic). It may be the recommendation would change when other opportunities arise.

"Q. And who do you envision making those recommendations?

"A. The guardian.

"Q. Would you have a role in that?

"A. Not likely. I suspect the judge is going to release me when the decision is made based on her appointment, and that it will be the guardian to propose to the Court and the Court to decide.

"Q. So, you even envision that the guardian could invest in other investment vehicles such as stocks, bonds, those sort of investments?

"A. I think the statute says that. I think that at her peril she may do that if she bonds that money. That's my interpretation of the statute."

(T.151-152).

And the Chancellor, having heard and considered all the testimony, ordered that the money be placed in FDIC insured certificates of deposit. That order was not a permanent order as the guardian claims on appeal, and the Court will look at other investment proposals when submitted by the guardian. (T. 162).

The Chancellor's decision was the right one. She ordered the guardianship funds deposited with a view toward protecting the principal in secure, FDIC insured certificates of deposits.

4. The Court was eminently correct, and certainly not manifestly wrong in declining to transfer Blaine's guardianship to Louisiana.

Natalie remarried just after the settlement of the claim for Shane's death was made and moved to Louisiana, taking Blaine with her. She now argues that, because of that move, and because she and her husband are building a house there and Blaine goes to school there, Blaine's guardianship should be transferred to La Salle Parish Louisiana where she has opened a tutorship.

She admits that Miss. Code Ann., Section 93-13-63 (1972), is controlling and that

the permissive, "may", grants the Chancellor discretion in the matter. She says that Mississippi case law does not establish any standard for moving a guardianship, and misses the point that the use of the plain permissive language, in the statute and the wide and deep case law vesting the Chancellor with sound discretion, do establish a standard. That standard is the sound discretion of the chancellor, which is not to be overturned unless manifestly wrong.

To avoid the *permissive* language of Section 93-13-63 that grants the Chancellor discretion in the matter of the transfer, Natalie has attempted to analogize the statute to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, which has never been adopted in Mississippi, and its *mandatory* language which appears to grant no discretion to the Court. Then, without taking note of the differences, she makes the broad claim that the Chancellor abused her discretion by not finding that "reasonable standards" such as those in the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act have been met. And she attempts to bolster that insufficient argument with *Guardianship of Z.J.*, 804 So.2d 1009 (Miss. 2002) which is not on point, and was decided under the now repealed Uniform Child Custody Jurisdiction Act.

The legislature enacted 93-13-63 with a permissive "may" in it. Had it so intended, the legislature could have used instead the word "shall", and then the statute would have meant what Natalie would like it to mean now. It simply does not say or mean what she claims, but vests the Chancellor with sound discretion to make the decision whether a guardianship should be transferred.

The Chancellor here held several hearings and gave Natalie all the opportunity that she could need to make out her case why the Chancellor should exercise her discretion

and move the case to Louisiana rather than keeping it in Mississippi. The Chancellor heard all that testimony and decided that the case should not be moved.

What was the testimony the Chancellor heard, and what did it mean to her?

First, there was the recognition by the Chancellor that change had swept through Blaine and Natalie's lives during the preceding year and a half. Amite County, Mississippi was the home of both Blaine and Natalie their entire lifetimes until July, 2011 when Natalie married Slade Deason. It is where some of Blaine's maternal grandparents and great-grandparents live. Natalie and Mr. Deason had known each other less than a year when they married and had been married six to eight months at the times of the hearings. During the period of less than a year and a half, Natalie and Blaine had lost their husband and father in a horrible event. Tremendous adjustments had to be made while many things were taking place. There were the memorial services for Shane. For Natalie, there was the rigors of a lawsuit for Blaine's injuries and death, meetings with lawyers and the director of the Gulf Coast Claims Facility, trips to Washington to meet with the President and to address Congress and other units of government, interviews with money managers, the selection of her investment advisors, and her learning about investing her money. The Chancellor was sensitive to that and remarked from the bench more than once.

Next, there was Natalie's proposals for the "investment" of Blaine's money for all practical purposes outside any court control in a long term structured settlement annuity and a foreign trust, and the clear implication that, if this Court didn't authorize those investments, the guardianship should be transferred to Louisiana where, as the Appellant's Brief puts it, ". . . a Louisiana court can authorize the most prudent decisions in handling Blaine's settlement funds." (Appellant's Brief P.10). Those proposals, the lack of showing

that they meet Mississippi's notion of proper management of guardianship money, and Natalie's lack of financial sophistication bear upon the advisability of keeping Blaine's guardianship where it is.

The Chancellor was skeptical of the recommendations of Natalie's investment advisors (C. P. 253 - P.11 and P.12), and that skepticism grew when one of those advisors testified that an issuing company would repurchase structures it issued with only an approximate eight percent discount from the purchase price, which testimony was contrary to the Court's experience (C. P. 253), and failed to substantiate it when the Chancellor asked for proof. (T.139, 165, 177).

The Chancellor noticed, and was worried about Natalie's inexperience in managing money. She pointed out to Natalie the tremendous difference between Natalie's understanding and testimony that she was paying her advisors annually 1% of her income for managing her money, and the fact that she is paying them annually 1% of the assets under management. (T. 166). She noted that Natalie presented proposals to be allowed to deposit the guardianship money in non-FDIC insured accounts. (C. P. 253). She refused the proposal of the investment advisors and supported by Natalie to purchase an uninsured structured settlement with half, or slightly more than half, of Blaine's money. She saw the purchase of a structured settlement annuity and the placement of Blaine's money in a foreign trust outside Mississippi, unwise.

Natalie complains about having been cut off in her offer of testimony about moving the guardianship. The GAL was testifying as the last witness of the day and had already undergone detailed cross-examination by Natalie's attorney, when, in that cross-examination which had already touched everything the GAL could possibly know about the

proposed transfer, the Court announced that she was not going to move the guardianship to Louisiana. (T. 146). The hearing continued, and the witness was examined further, and Natalie's attorney eventually rested without calling other witnesses. No proffer was made then or in two later appearances before the Court of any other evidence that would have been presented in support of the issue.

Rule 103(a)(2) of the Mississippi Rules of Evidence reads as follows:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) . . .

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

. . .

Natalie's failure to make a proffer of any other expected evidence procedurally bars her from appealing that claim. *Howell v. Holiday*, 2013 WL 1197885 (Miss. App.).

The standard of review for the admission or suppression of evidence is abuse of discretion. *Howell v. Holiday*, *supra*. There has been no showing that the Chancellor abused her discretion in refusing to hear more testimony on the proposed transfer of the guardianship, a matter that was to be decided in her discretion.

Several other factors proven at the hearings were proper for the Court's consideration. The Court heard testimony from Mr. Palmer, a Louisiana lawyer that Blaine will be an adult in Louisiana at age 18. (T. 133), and knows that he will be a minor in Mississippi until age 21. It would be proper for the Court to conclude that it was in Blaine's

best interest for his funds to be held under guardianship until age 21 rather than being released to him at 18.

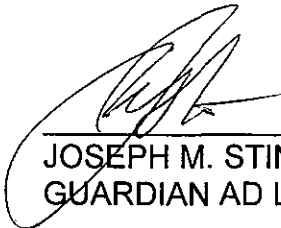
Another thing proper for consideration is the Mississippi law that requires a bond of a fiduciary for funds not invested in insured bank deposits under an order prohibiting withdrawal without a court order contrasted with the testimony of Mr. Palmer, a Louisiana Lawyer, that a tutrix in Louisiana who is a family member can probably have the bond of the tutrix waived, and that if Blaine's guardianship is transferred to Louisiana, there may not be a bond of Natalie as tutrix. (T. 133). There is just too much at risk here for Blaine's assets that are not in insured deposits under a restrictive order for deposit to not be bonded.

The Court correctly exercised her discretion and declined to transfer the guardianship to Louisiana. There is too much at risk.

CONCLUSION

The Chancellor correctly exercised her discretion both in requiring that the guardianship money be placed in safe, fully insured deposits under an order permitting no withdrawal without a prior court order, and in declining to transfer Blaine's guardianship to Louisiana. The decision of the Chancellor should be affirmed.

Respectfully submitted



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CERTIFICATE OF SERVICE

I certify that the original and three copies of the Brief of Appellee have been mailed to the Honorable Kathy Gillis, Mississippi Supreme Court Clerk, P. O. Box 249, Jackson, MS 39205, and a copy of the said brief has been mailed to each of the following:

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