

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

ALANA DOWELL, ET AL. v. JESSE C. MINOR, ET AL.

**Interlocutory Appeal from the Circuit Court for Davidson County
No. 98C2275 Carol Soloman, Judge**

No. M2000-00378-COA-R9-CV - Decided April 26, 2000

This interlocutory appeal involves the appointment of a guardian ad litem for a 73-year-old prisoner who is a defendant in a proceeding pending in the Circuit Court for Davidson County. The prisoner's daughter requested to be appointed as her father's guardian ad litem because he is unable to effectively assist with his defense. The trial court denied the petition but granted the daughter's petition for an interlocutory appeal. We concur with the trial court that an interlocutory appeal will prevent needless, expensive, and protracted litigation. Accordingly, we grant the interlocutory appeal and reverse the order denying the petition for the appointment of a guardian ad litem in accordance with Tenn. Ct. App. R. 10(b).¹

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court Reversed.

KOCH, J., delivered the opinion of the court, in which CANTRELL, P.J., M.S. and COTTRELL, J. joined.

Hugh C. Howser, Jr. and Kenneth Mark Bryant, Nashville, Tennessee, for the appellants, Evylee Minor and Leann Morrison.

Hal Hardin, Nashville, Tennessee, for the appellant, Jesse C. Minor.

Nadar Baydoun and Stephen C. Knight, Nashville, Tennessee, for the appellees, Alana Dowell and Debra Fleming.

MEMORANDUM OPINION

¹Tenn. Ct. App. R. 10(b) provides:

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

Jesse C. Minor is currently seventy-three years old. In 1997, a grand jury in Davidson County indicted him for rape and aggravated sexual battery. In August 1998, Mr. Minor's victim and her mother filed a civil action against Mr. Minor and others in the Circuit Court for Davidson County alleging sexual assault and seeking \$4,000,000 in damages. Several months later, the Criminal Court for Davidson County accepted Mr. Minor's "best interest" plea and sentenced him to an eight-year term in the custody of the Tennessee Department of Correction. Mr. Minor is currently incarcerated in Shelby County.

Mr. Minor is suffering from dementia - a condition that prevents him from making financial decisions, complex legal decisions, or medical decisions for himself. Accordingly, in December 1998, his daughter, Leann M. Morrison, petitioned the trial court to be appointed as her father's guardian ad litem for the purpose of assisting him in retaining counsel to represent him in the civil proceeding and to otherwise assist with his defense. Counsel was later retained for Mr. Minor, and in October 1999, Mr. Minor's counsel requested a protective order staying discovery pending the resolution of the questions regarding Mr. Minor's competency and the appointment of a guardian.

The trial court heard Ms. Morrison's petition on January 14, 2000. Ms. Morrison presented a December 1998 psychologist's report concluding that Mr. Minor's "mental state has deteriorated so that he cannot make important self-care decisions" and evaluating his mental, physical, and social condition as "poor." She also presented the testimony of another psychologist who had examined Mr. Minor in September 1999. This psychologist concluded that Mr. Minor "showed significant cognitive impairment" caused by multi-infarct dementia² and that the dementia was "severe." The witness opined that Mr. Minor's condition was "going to get worse" and that Mr. Minor was currently incapable of making complex financial decisions or complex legal decisions. Accordingly, the witness concluded that Mr. Minor was a suitable candidate for a guardian ad litem. Neither the victim nor her mother presented evidence to contradict these expert opinions.

The trial court ruled from the bench that Ms. Morrison had not carried her burden of proving that Mr. Minor was disabled and in need of a guardian ad litem. However, the trial court also granted Ms. Morrison permission to pursue an interlocutory appeal in accordance with Tenn. R. App. P. 9. We have determined that an interlocutory appeal is warranted in this case. We have also determined that the Tenn. R. App. P. 9 application, the response thereto, and the documents filed by the parties fully set forth the parties' positions and the facts needed to decide this appeal. Accordingly, in order to save the parties the additional time and expense of further briefing and oral argument, we suspend the application of Tenn. R. App. P. 24-26 and 29 and find in accordance with Tenn. R. App. P. 35(c) that oral argument is unnecessary. *See* Tenn. R. App. P. 2; *Hammock v. Sumner County*, No. 01A01-9710-CV-00600, 1997 WL 749461 (Tenn. Ct. App. Dec. 5, 1997), *pet. reh'g denied*, (Tenn. Ct. App. Dec. 30, 1997) (No Tenn. R. App. P. 11 application filed).

I.

²The psychologist explained that multi-infarct dementia results from impairment of the blood flow to the brain caused by mini-strokes or mini-blockages.

Tenn. R. Civ. P. 17.03 provides that the trial court “shall at any time after the filing of the complaint appoint a guardian ad litem to defend an action for an infant or incompetent person who does not have a duly appointed representative, or whenever justice requires.” Decisions regarding the appointment of a guardian are discretionary. *See Gann v. Burton*, 511 S.W.2d 244, 246-47 (Tenn. 1974). However, even discretionary decisions must have adequate evidentiary support. Accordingly, our task on appeal is to determine whether the trial court’s decision not to appoint Ms. Morrison as her father’s guardian ad litem is supported by the evidence.

The trial court did not have an opportunity to observe Mr. Minor because he was not present at the hearing. The only proof submitted was the December 1998 psychologist’s report and the testimony of the second psychologist who had examined Mr. Minor approximately three months before the hearing. Despite its recognition that Mr. Minor’s cognitive ability was impaired, the trial court concluded that Mr. Minor did not require a guardian because his responses could be meaningful and coherent when he is asked questions repeatedly.

The trial court’s decision overlooks two salient points. First, the proof is un rebutted that Mr. Minor’s short-term and long-term memory are impaired and that he is incapable of making complex decisions involving conceptual matters. Second, participating as a defendant in a civil lawsuit requires more than merely being able to communicate in response to repeated questions. In addition to providing factual information, it requires an ability to understand the nature of the proceeding, to understand the advice of counsel regarding trial tactics and strategy, and to make informed substantive or procedural choices when requested by counsel. At this stage, the evidence is uncontradicted that Mr. Minor is completely incapable of comprehending these conceptual matters, let alone making informed choices about them.

Based on the evidence in this record, we find that the trial court erred by concluding that Mr. Minor does not require a guardian ad litem for this proceeding. His guardian need not be a lawyer because Mr. Minor is already represented by counsel. In light of the fact that there is no evidence in the record that Ms. Morrison is unfit to act as her father’s guardian, the trial court should have granted her petition to serve as guardian ad litem.

II.

We reverse the order denying Ms. Morrison’s petition to be appointed guardian ad litem for Mr. Minor and remand the case to the trial court for further proceedings. We tax the costs of this appeal jointly and severally to Alana Dowell and Debra Fleming for which execution, if necessary, may issue.