MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE MATTER OF: MARGIE E. SUMMERS;

LISA SUMMERS

APPELLANT,

v.

MARGIE SUMMERS AND BONNIE NIMS

RESPONDENTS.

DOCKET NUMBER WD83124

DATE: January 5, 2021

Appeal From:

Clay County Circuit Court
The Honorable David P. Chamberlain, Judge

Appellate Judges:

Division Three: Edward R. Ardini, Jr., Presiding Judge, Alok Ahuja, Judge and Gary D. Witt, Judge

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Attorneys:

Michael J. Gunter, Kansas City, MO, for appellant.

Steven M. Petry, Gladstone, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

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WESTERN DISTRICT

IN THE MATTER OF: MARGIE E. SUMMERS;
LISA SUMMERS, APPELLANT,
v.
MARGIE SUMMERS AND BONNIE NIMS, RESPONDENTS.

WD83124 Clay County

Before Division Three Judges: Edward R. Ardini, Jr., Presiding Judge, Alok Ahuja, Judge, and Gary D. Witt, Judge

Appellant, Lisa Summers ("Lisa") appeals from the Probate Division of the Circuit Court of Clay County, which dismissed Lisa's Petition for Guardianship and Conservatorship of her mother, Margie Summers ("Margie") and awarded attorneys' fees to Margie's appointed counsel and Margie's agent, Bonnie Nims ("Nims").

Margie has progressive memory loss and dementia as a result of Alzheimer's disease, and all parties agree that she is incapacitated and disabled to the point she cannot manage her essential daily living requirements and financial resources. Over several years, Margie executed four durable powers of attorney. In 2008, Margie executed a durable power of attorney ("2008 DPOA") appointing Lisa as her agent. In 2014, Margie executed a durable power of attorney for health care ("2014 DPOA") appointing Nims as her agent for health care decisions. In 2015, Margie executed a general durable power of attorney ("2015 DPOA") purporting to revoke all prior durable powers of attorney and naming Nims as her agent. In 2017, several days after her treating physicians document that Margie was incapacitated, Margie executed a general durable power of attorney appointing Lisa as her agent ("2017 DPOA").

On June 4, 2018, Lisa filed an Application for Appointment of Guardian alleging that Nims removed Margie from her home and took her to Bolivar. On June 27, 2018, Lisa filed an Amended Petition for Appointment of Guardian and Conservator ("Lisa's Petition") alleging that Nims illegally removed Margie from her home, Nims illegally obtained credit and loans in Margie's name and Nims obtained utility accounts in Polk County in Margie's name while Margie resided in Clay County. Lisa further alleged that Margie was being sued in Polk County for unpaid loans that were not hers.

On July 5, 2018, the probate court appointed counsel to represent Margie in the proceedings.

On July 18, 2018, Nims filed a Motion to Dismiss Application for Appointment of Guardian and Conservator ("Motion") requesting the probate court dismiss the Petition because Nims was acting as Margie's agent under the 2014 DPOA and the 2015 DPOA. In support of her

Motion, Nims attached: (1) the 2014 DPOA, (2) the 2015 DPOA, (3) a letter written on August 22, 2017, prepared by Margie's primary care physician providing that Margie was incapacitated as a result of progressive dementia and that Margie had a durable power of attorney in effect, (4) a letter written on May 1, 2017, prepared by Margie's neurologist, and two letters prepared by a second physician providing that Margie was incapacitated but had a durable power of attorney naming Nims as her agent, (5) a letter written on September 16, 2017, prepared by Margie's neurologist, indicating that at the time of his most recent evaluation on May 30, 2017, Margie was not capable of comprehending long term risks and benefits, and Nims was acting as her agent, (6) the 2017 DPOA, and (7) a letter dated July 10, 2018, prepared by Margie's primary care physician, indicating that Meritas Health had refused to recognize the 2017 DPOA and that it considered Nims to be Margie's agent.

On July 19, 2018, the probate court entered an order designating the proceeding as "adversary probate proceeding" and specified that "[t]his proceeding shall be governed by Civil Rules 41 through 101 inclusive."

On August 17, 2018, Lisa filed her Response and Suggestions in Opposition to Interested Party's Motion to Dismiss Application for Appointment of Guardian and Conservator ("Suggestions in Opposition"). Lisa attached an affidavit stating that Margie "owes utility companies in Bolivar, Missouri, for internet or phone service despite [Margie] never residing in Bolivar, Missouri. This utility was apparently opened in Bolivar, Missouri, at [Nims's] address on November 17, 2017." Lisa further stated that "[Margie] is named on an account with Synchrony Bank for approximately $822.00. This account was supposedly opened on March 29, 2017 and is in collection with Midland Funding, LLC." Lisa further asserted that Nims had used Margie's funds to pay Nims's attorney's fees in this matter. Lisa's Suggestions in Opposition argued that the powers of attorney naming Nims as agent were invalid or unenforceable both because Margie lacked capacity to execute them, and based on Nims's alleged self-dealing and breach of fiduciary duty. Lisa also attached (1) a petition for suit on contract originating in Polk County, (2) a photograph from a website indicating that Margie has an account in collections on her credit report, (3) a photograph from an unknown website purporting to indicate Margie has a second account in collections, and (4) a photograph from an unknown website purporting to indicate Margie has a third account in collections.

On September 21, 2018, Nims filed an Application for Appointment of Guardian and Conservator ("Nims's Application"), and on March 29, 2018, the probate court conducted a hearing on the Motion at which Nims provided sworn testimony and was subject to cross-examination. On April 15, 2019, the probate court conducted an additional hearing regarding the assessment of attorneys' fees.

On July 23, 2019, the probate court entered its judgment dismissing the Petition. The court "presumed" the 2008 DPOA was valid at the time of its execution, found that the 2014 DPOA and the 2015 DPOA were valid at the time they were executed, and found the 2017 DPOA to be invalid because it found Margie was incapacitated at the time it was executed. The court further found that:

> [T]he Applications for Guardianship and Conservatorship are not the least restrictive means for care for Margie Summers because she has a valid and effective power of attorney for health care and for financial affairs[.]

The court further assessed the sum of $6,160.00 against Lisa for Appointed Counsel's attorney's fees and assessed the sum of $19,500.00 against Lisa for Nims's attorneys' fees.

REVERSED AND REMANDED.

Division Three holds:

(1) Because Nims submitted matters beyond the pleadings in her Motion and Lisa submitted matters beyond the pleadings in her response to the Motion, the parties converted the Motion from a motion for dismissal to a motion for summary judgment pursuant to Rule 55.27(a).

(2) The probate court erred in entering judgment and findings of fact because the probate court relied heavily on Nims's live testimony rather than limiting its consideration to the affidavits and documents attached to the Motion, clearly establishing that material facts remained in dispute after consideration of the Motion and attachments thereto. Therefore, the existence of genuine issues of material facts precludes the entry of summary judgment and we reverse and remand for further proceedings.

Opinion by: Gary D. Witt, Judge January 5, 2021

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