IN THE SUPREME COURT OF MISSISSIPPI

NO. 2017-CA-01457-SCT

IN THE MATTER OF THE CONSERVATORSHIP OF CAROLYN BOWEN YOUNG: JIM YOUNG, AS EXECUTOR OF THE ESTATE OF CAROLYN BOWEN YOUNG, DECEASED

v.

JOHN KENNEDY, JOSEPH KENNEDY, AND JIMMY KENNEDY

DATE OF JUDGMENT:	10/11/2017
TRIAL JUDGE:	HON. JOHN ANDREW HATCHER
TRIAL COURT ATTORNEYS:	ROY O. PARKER, JR. RHETT R. RUSSELL OTIS R. TIMS T. K. MOFFETT
COURT FROM WHICH APPEALED:	LEE COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANTS:	RICHARD SHANE McLAUGHLIN
ATTORNEY FOR APPELLEES:	RHETT R. RUSSELL
NATURE OF THE CASE:	CIVIL - WILLS, TRUSTS, AND ESTATES
DISPOSITION:	ON DIRECT APPEAL: REVERSED AND RENDERED. ON CROSS-APPEAL: DISMISSED AS MOOT - 01/30/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

BEAM, JUSTICE, FOR THE COURT:

¶1. Carolyn Bowen Young had medical problems affecting her ability to make financial decisions, so the chancery court appointed a conservator over her estate. When Carolyn's conservatorship no longer was necessary, the chancery court terminated the conservatorship by agreement of Carolyn's husband, her sons, her conservator, and the guardian ad litem.

But the agreed judgment also made provisions for Carolyn's funds to be retained in the registry of the court, an agreement to which Carolyn was not privy.

¶2. Carolyn later requested release of the entirety of her funds, which the chancery court denied. Carolyn appealed. But, she died shortly after filing the appeal. Jim Young, Carolyn's husband, filed, and this Court granted a motion to substitute himself as a party.

¶3. We find that the chancery court erred by continuing to hold Carolyn's funds in the registry of the court after the conservatorship was terminated. We further find that the chancery court abused its discretion by sua sponte ordering that the sons' attorneys' fees be paid out of Carolyn's funds held in the registry of the court. Because Carolyn is now deceased, the issues on cross-appeal are moot.

FACTS AND PROCEDURAL HISTORY

¶4. Carolyn was a successful businesswoman and ran a cosmetology school in Tupelo for more than thirty years. Carolyn married Jim Young in 2009, when she was seventy years old. Carolyn had three sons from a previous marriage, John Kennedy, Joseph Kennedy, and Jimmy Kennedy. Before Carolyn's marriage to Jim, the couple had entered into a prenuptial agreement, which stated that each party would retain full control and management of all property owned before the marriage and later acquired so that the property shall "descend to her said children or to the heirs of her body at her death."

¶5. Carolyn began having various medical problems from 2011 to 2014, and family members noticed a decline in her cognitive ability at that time. On July 7, 2015, Carolyn entered into a real-estate purchase contract to sell her commercial property on which her

cosmetology school was located for a total sale price of $580,000. But, before the contract could be consummated, Carolyn became severely ill and was again hospitalized for a lengthy period of time. At that point, Carolyn's cognitive ability declined even further.

¶6. On October 30, 2015, within days of being released from the Intensive Care Unit, Carolyn revoked two previous durable powers of attorney that she had executed that had named her son Jimmy as her agent. The sons testified that Carolyn then executed a power of attorney naming her husband, Jim, as her agent. Yet six days later, on November 5, 2015, Dr. Jessica Willis examined Carolyn and stated that Carolyn had been

> unable to answer even the simplest of questions with a yes or no answer and is maximum assist for most ADLs at this time. During today's exam, she stated Reagan was the president, she could not tell me her age, she said it was "2000 and twenty something" and that she was currently in the hospital. When asked further questions, she stated "I knew them all earlier." Her long-term memory seems to be better than short-term. She stated she has 3 sons and told me their names and that she is currently married and lives in Tupelo. Despite seeing her and introducing myself the past two days prior, she did not recognize me. . . . Though I am uncertain of her full condition and cognition during the hospitalization and prior, I am certain that she is in no condition to make decisions about her own healthcare, much less manage her own finances at this time. . . .

¶7. On November 13, 2015, Carolyn's sons John and Joseph filed a petition for the appointment of a conservator, alleging that Carolyn was incapable of managing her own estate and reasonably caring for herself by reason of advanced age, physical incapacity, and/or mental weakness. The petition requested that John be appointed as conservator of the person and estate of Carolyn. Attached to the complaint were two physicians' certificates signed by Dr. Willis and Dr. Christopher Richard, who gave the opinion, after conducting an examination of Carolyn, that she was incapable of managing her own estate and person.

¶8. Jim filed a separate petition to establish a conservatorship on November 23, 2015, in which he also alleged that Carolyn was not capable of managing her person or estate. Jim requested that the court appoint him as conservator. In addition, Jim requested that he be authorized on behalf of the conservatorship to sign an extension on the commercial-property contract, that the court approve the sale of the commercial property, and that the funds be deposited into the conservatorship account pending further order of the court.

¶9. The chancery court consolidated the two petitions, and on November 24, 2015, appointed Jonathan Martin as guardian ad litem for Carolyn. All three of Carolyn's sons then filed a petition to dispense or delay the sale of Carolyn's real property and to revoke any power of attorney provided by Carolyn until a conservator had been appointed.

¶10. Jim filed four separate motions on February 19, 2016: a motion to remove Carolyn's guardian ad litem; a motion to approve the sale of Carolyn's commercial property for the amount of the original sale price of $580,000; a motion to dismiss the petitions for conservatorship upon the court's approval of the pending sale of the commercial property; and a motion to compel production of personal property.

¶11. The sons responded and argued that the prenuptial agreement negated any interest or claim Jim had to Carolyn's assets and that Jim was not a fit and proper person to serve as her fiduciary. The sons requested dismissal of Jim's petitions to remove the guardian ad litem and to dismiss the conservatorship petitions. The chancery court scheduled a hearing on the motions for February 22, 2016.

¶12. The parties entered into an agreed order in which the court ordered Martin to schedule

a reevaluation of Carolyn: one psychologist and one medical doctor were to determine whether Carolyn was in need of a conservatorship. The court extended the contract for sale of the commercial property for an additional period of sixty days. In addition, the chancery court ordered the parties not to dissipate or lay waste to Carolyn's personal property, and it ordered that no power of attorney be utilized while resolution of the issue of the conservatorship was pending.

¶13. Dr. Louis Masur III, a clinical psychologist, examined Carolyn on February 29, 2016, and opined that Carolyn had "a significant decline in cognitive functioning." On March 3, 2016, Dr. Chanda Miller, a psychiatrist, examined Carolyn and opined that Carolyn was in need of a conservator to oversee her finances because she had mild cognitive impairment.

¶14. A hearing was held on the petition for appointment of a conservator on March 10, 2016. Martin recommended that it was in the best interest of Carolyn that a conservator of her estate be appointed. But because Carolyn had "the ability to function without minute-to-minute care," Martin recommended that a conservator of Carolyn's person not be appointed.

¶15. On March 15, 2016, the chancery court found "by clear and convincing evidence" that a conservator should be appointed over the estate of Carolyn. It appointed Bill Benson, the Chancery Clerk of Lee County, to serve as conservator. The chancellor left open the determination of whether a conservator of Carolyn's person should be appointed. The judgment allowed the sons visitation with Carolyn without Jim's presence.

¶16. Jim filed a motion to reconsider the judgment or, alternatively, for restoration and removal of the conservatorship. Jim argued that Carolyn was competent to manage her own

estate and asked that the conservatorship be set aside. Attached to the motion was a letter from Dr. Raymond G. Overstreet, a general psychiatrist, written to Jim's attorney, which stated, "[Carolyn] was aware of the reason for the evaluation. She understood the consequences of it. She feels that she is competent to manage her own affairs. She has a general understanding of her current financial state, income, and expenses."[1]

¶17. The sons filed a motion to dismiss Jim's motion for reconsideration and a motion for contempt alleging that Jim had refused to allow them to exercise visitation rights with Carolyn outside his presence.

¶18. On June 22, 2016, Benson filed a petition for authority to sell Carolyn's real estate. Benson had examined the commercial-property contract, believed that it was in the best interest of the estate to sell the commercial property, and determined that the purchase price was reasonable. Benson requested authority to fulfill the terms of the contract and to sell the property. Jim joined the petition, as did the sons. The chancery court granted the petition and directed Benson to deposit the proceeds of the sale into an account for the benefit of the estate until further order of the court.

¶19. At the hearing on June 23, 2016, the court entered an agreed judgment in which it

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[1]At the hearing on June 23, 2016, counsel for Jim moved the court to enter the report by Dr. Overstreet as a medical record under Mississippi Rule of Evidence 902(11). Opposing counsel objected and argued that Dr. Overstreet's report was unreliable and contrary to the court's order because Jim had been in the room during the examination and because Dr. Overstreet was not one of the court-ordered doctors. The chancellor allowed the document to be entered as a medical record, but he stated that he was "not going to consider it a very trustworthy document" because the doctor had not signed it and because it did not include the actual tests that Dr. Overstreet referenced.

closed Carolyn's conservatorship. The agreed judgment provided that

> 1. Carolyn . . . shall not be subject to the restrictions of a conservatorship from and after this date. However, the Court finds that certain property of Carolyn . . . shall nevertheless be held in the registry of this Court for the protection of said assets as set forth in this Order.
>
> 2. By prior Order entered on this day, the Court approved the sale of certain real property of Carolyn . . . for the sum of $580,000. The Court orders that the funds be distributed and maintained as follows:
>
> > a. Any tax liability associated with the subject real property shall be satisfied from the net proceeds of the sale of the property. This shall include, but not be limited to, capital gains taxes, income taxes, *ad valorem* taxes or any other tax associated with the property or its sale.
> >
> > b. The expenses of the guardian ad litem and conservator in this matter shall be paid from the remaining proceeds. The guardian ad litem shall be paid a total fee of $2,500 from said proceeds. The Conservator shall be paid a total fee of $1,250.
> >
> > c. The sum of $13,500 shall be released to Carolyn . . . for her immediate use.
> >
> > d. All of the remaining funds shall be held in the registry of the Court and subject to Court oversight. None of the funds shall be withdrawn or expended for any purpose without prior Court approval in Carolyn Young's best interest and is necessary for her health, support and maintenance. Any of the Parties hereto may seek a withdrawal of the remaining funds provided notice to all parties is given pursuant to Miss. R. Civ. P. 5. Any Party hereto may file an objection to such withdrawal and the matter shall be decided by the Court.
> >
> > e. The balance of the remaining funds held in the registry of the Court at the time of Carolyn Bowen Young's death, if any, shall be distributed as follows: one-fourth to John Kennedy, one-fourth to Joseph Kennedy, one-fourth to Jimmy Kennedy and one-fourth to Jim Young. In the event any of these four (4) parties pre-deceases Carolyn . . . , then their share shall pass to their heirs or beneficiaries.

> 3. All of Carolyn Bowen Young's monthly income shall be released to her for her immediate use. Carolyn . . . shall be entitled to immediate use of her monthly income without Court oversight. However, no portion of the funds held in the registry of the Court, or the interest thereon, shall be considered Carolyn Bowen Young's monthly income for the purposes of this paragraph.
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> 4. Carolyn Bowen Young's banking accounts, both savings, checking and otherwise, shall be released to her for her immediate use. Carolyn . . . shall be entitled to immediate use of her bank accounts without Court oversight.
>
> 5. All personal property removed from Carolyn Bowen Young's home by John Kennedy, Joseph Kennedy or Jimmy Kennedy shall be returned to Carolyn . . . . This shall include but not be limited to all coin collections, jewelry, documents or any other item of personalty.
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> . . . .
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> 8. John Kennedy, Joseph Kennedy, Jimmy Kennedy and Jim Young shall each be responsible for their own attorneys' fees.

Benson, Jim, John, Joseph, and Jimmy each signed the final judgment.

¶20. After agreeing to the final judgment, the sons renewed the request for appointment of a conservator for the person and estate of Carolyn on November 10, 2016, stating that it would be in the best interest of Carolyn that the court direct further examination and testing of Carolyn by Dr. Miller, the court-ordered psychiatrist, and, upon review of Dr. Miller's report, that the court appoint a competent person as conservator of the person and estate of Carolyn.

¶21. The chancery court found that the evidence was insufficient as to the sons' renewed request for appointment of a conservator and dismissed the sons' claims with prejudice. The court concluded, "all claims in this matter are dismissed with prejudice. All Parties shall bear his or her own respective costs and attorneys' fees."

¶22. Carolyn then filed a motion for the release of funds, requesting that the court release the total remaining balance of the funds held in the registry of the court. The motion contended that Carolyn was no longer under a conservatorship and was competent to manage her own affairs. In response, the sons requested that Carolyn undergo a mental evaluation and examination before the court ruled on the matter, objected to Carolyn's motion, and requested that Carolyn's motion be denied.

¶23. At the hearing on August 28, 2017, Carolyn testified that she would like the remaining funds to be released to her. The court denied Carolyn's request but authorized the chancery clerk to release to Carolyn the monthly sum of $1,285.03 per month to make up for the deficiency in the funds that Carolyn needed for necessities. The court also allowed up to $3,000 per year for travel expenses but held that Jim would have to be responsible for half of those expenses, exclusive of care for a caretaker. The court allowed reasonable attorneys' fees to be paid to Carolyn's attorney from the funds in the registry.

¶24. Finally, the court sua sponte found that the sons' attorneys' fees should be paid from the funds held in the registry. The court stated that the sons' attorney could submit a bill on his fees at an hourly rate of $200, a customary fee in the area.

¶25. The sons filed a motion for leave to amend their response to the release-of-funds motion and requested that the court allow them to add a claim of undue influence and a claim that a confidential relationship existed between Jim and Carolyn. The court denied the motion. The court then entered an opinion and final judgment, allowing payment of the sons' attorneys' fees in the amount of $4,505.12 from the remaining proceeds of the sale of

Carolyn's real estate held in the registry of the court.

Issues on Appeal

1. Whether the chancery court erred by refusing to release Carolyn's funds after terminating her conservatorship.

2. Whether the chancery court erred by awarding attorneys' fees in favor of John, Joseph, and Jimmy.

Issues on Cross-Appeal

3. Whether the chancery court erred by allowing Dr. Overstreet's report to be admitted into evidence as an exception to hearsay.

4. Whether the court erred by failing to allow Carolyn's health and competency to be periodically re-evaluated.

5. Whether the court erred by not requiring compliance with Rule 5.04 of the Uniform Chancery Court Rules by approving a typed judgment differing from its bench ruling without the instrument being first presented to counsel opposite.

6. Whether the chancery court erred by denying the motion of John, Joseph, and Jimmy to amend so as to conform to the evidence and, regardless of whether or not any pleading was amended, failing to recognize and conclude that by operation of law Jim Young was shouldered with a burden to prove that he had not unduly influenced or abused his confidential relationship with Carolyn Young.

¶26. Because Carolyn is now deceased, we find that the issues on cross-appeal are moot, and we address only the two issues on appeal.

ANALYSIS

I. Release of Funds

¶27. Jim argues that the chancellor erred by refusing to release the entirety of Carolyn's funds after the conservatorship was terminated. The agreed judgment terminating the

conservatorship stated in relevant part that "The conservatorship of the estate of Carolyn Bowen Young shall be, and hereby is, closed. Carolyn Bowen Young shall not be subject to the restrictions of a conservatorship from and after this date." Therefore, the portion of the agreed judgment that stated "certain property of Carolyn Bowen Young shall nevertheless be held in the registry of this Court for the protection of said assets" is erroneous.

¶28. The purpose of a conservatorship is to care for a person that is "incapable of managing h[er] own estate by reason of advanced age, physical incapacity or mental weakness . . . ." Miss. Code. Ann. § 93-13-251 (Rev. 2018).[2] Physicians' certificates stated that Carolyn was suffering from mild cognitive impairment at the time that she was attempting to enter into a real-estate purchase contract to sell her commercial property for a large sum of money. It was at this time that both her husband and her sons became concerned about her ability to make financial decisions and filed petitions for appointment of a conservatorship over Carolyn. Therefore, the chancellor appropriately found by clear and convincing evidence that the appointment of a neutral conservator over her estate was necessary.[3]

¶29. But, once Benson was appointed as Carolyn's conservator and he had examined the commercial-property contract and believed that it was in the best interest of Carolyn to sell the property at a reasonable purchase price, he achieved the purpose of the conservatorship. Benson requested authority to fulfill the terms of the contract and to sell the property, in

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[2] The guardianship and conservatorship statutes were repealed and replaced effective January 1, 2020. 2019 Miss. Laws ch. 463, § 18 (S. B. 2828).

[3] The chancellor held out on appointing a conservator over her person at the recommendation of the guardian ad litem because Carolyn had "the ability to function without minute-to-minute care."

which request both Carolyn's husband and sons joined. The next day, Carolyn's husband, her sons, Benson, and the guardian ad litem agreed that the need for the conservatorship was met and the conservatorship could be terminated.[4]

¶30. Mississippi Code Section 93-13-267[5] provided for a conservator to resign or be discharged by the appointing court when it appears that the conservatorship is no longer necessary. Miss. Code. Ann. § 93-13-267 (Rev. 2018). The chancellor signed off on an agreed judgment that all parties signed except for Carolyn, agreeing to terminate the conservatorship. But the agreed judgment also contained various provisions and directions for Carolyn's money.

¶31. At the point that the conservatorship was terminated by agreed judgment, no one except for Carolyn had the right to say or agree to what she would or could do with *her* money. Therefore, the court erred by not releasing the entirety of Carolyn's funds back to her upon termination of the conservatorship. She was no longer under a conservatorship that

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[4] Presiding Justice King finds that the chancellor erred by terminating the conservatorship without conducting a full hearing and without finding that Carolyn had been restored to mind as provided by statute. We find that nothing in the statutes prohibits termination by agreed judgment. "The law favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the agreement which the parties have made, absent any fraud, mistake, or overreaching." ***Ladner v. O'Neill (In re Estate of Davis)***, 42 So. 3d 520, 527 (Miss. 2010) (quoting ***Chantey Music Publ'g, Inc. v. Malaco, Inc.***, 915 So.2d 1052, 1055 (Miss. 2005)). Further, we find that the chancellor had Carolyn's best interest in mind when he signed off on the agreed judgment because the conservatorship was no longer necessary. Carolyn's funds should have been returned at the "close" of the case. In situations in which conservatorships or guardianships can be limited, it is good practice to do so in order to maintain the dignity of a ward's life as much as possible.

[5] Mississippi Code Section 93-13-267 was repealed effective January 1, 2020. 2019 Miss. Laws ch. 463, § 18 (S.B. 2828).

needed to provide protection for her funds; her funds were *hers* and should have been released to her.

¶32. Accordingly, the chancellor erred by denying Carolyn's request, and we direct the chancery court to transfer the funds retained by the court to Carolyn's estate. The funds in the registry of the court will be transferred to Carolyn's estate to be distributed under Carolyn's will.

II. Attorneys' Fees

¶33. Jim next argues that the chancery court erred in awarding attorneys' fees in favor of John, Joseph, and Jimmy. "A trial court's decision on attorney's fees is subject to the abuse of discretion reviewed . . . . It is well-settled that attorney's fees are not to be awarded unless the state or other authority so provides." ***U.S. Fid. & Guar. Co. v. Conservatorship of Melson***, 809 So. 2d 647, 662 (Miss. 2002) (internal quotation marks omitted) (quoting ***Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.***, 743 So. 2d 954, 971 (Miss. 1999)). Carolyn requested that her attorneys' fees be paid out of the money retained in the registry of the court, which the court approved. But the court then sua sponte ordered that Rhett Russell, attorney for John, Jimmy, and Joseph Kennedy, to submit a statement of reasonable fees to be paid out of the funds belonging to Carolyn held in the registry of the court.

¶34. Russell then submitted a petition for attorneys' fees in the amount of $4,505.12. Carolyn objected. The court sustained the petition, reasoning that both parties had

> engaged in protracted, sometimes needless, wasteful litigation, which has been paid for in part by the funds held by the parties' agreement in the registry of

> the Court. Carolyn Bowen Young's attempt to get all the funds released to her constituted, as the Court sees it, an unjustified attempt to renege on and break the Agreed Judgment of June 23, 2016, with no real justification, was such an instance. Nevertheless, in spite of such, the Court ordered her attorney's fees of $3,520.00 paid from the funds. The Kennedy sons filed a Motion for Leave to Amend ruled on September 27, 2017, which was likewise such an instance. The Kennedy sons prayed for general relief in their [responses]. This is a Court of equity, and as a matter of equity, the Court made its said Orders that resulted in the Petition for Attorney Fees of Rhett Russell for the sons.

¶35. We find that the chancery court abused its discretion by sua sponte ordering that attorneys' fees for the sons be paid out of Carolyn's funds. Under Mississippi Code Section 93-13-257, if a petition for conservatorship was sustained, costs were paid out of the estate of the conservatee. Miss. Code Ann. § 93-13-257 (Rev. 2018).[6] If the petition was not sustained, "the costs shall be paid by the party requesting the appointment of the conservator." *Id.* Here, the chancellor terminated Carolyn's conservatorship on June 23, 2016. Yet the chancellor sua sponte ordered the sons' attorneys' fees to be paid out of Carolyn's funds for services rendered after May 15, 2017.

¶36. Although the sons argue that attorneys' fees are appropriate when a party is financially unable to pay, this argument has no merit in this case. This Court previously has held that "[a]ttorney fees are not generally awarded unless the party requesting such fees has established the inability to pay." ***Creekmore v. Creekmore***, 651 So. 2d 513, 520 (Miss. 1995) (citing ***Dunn v. Dunn***, 609 So. 2d 1277, 1287 (Miss. 1992)).

¶37. First, this concept generally has been applied in divorce cases and not in conservatorship cases. Second, the sons did not request attorneys' fees. Instead, the

[6] Mississippi Code Section 93-13-257 was repealed effective January 1, 2020. 2019 Miss. Laws ch. 463, § 18 (S. B. 2828).

chancellor sua sponte ordered that attorneys' fees for Russell would be paid out of the estate. And third, the sons failed to establish the inability to pay for attorneys' fees. Although Russell submitted an affidavit stating that, "[a]ll such clients do not have the present financial resources to satisfy my billing for legal services," the chancellor ordered that attorneys' fees for all of the sons be paid out of Carolyn's funds held in the registry of the court. Testimony suggested that Joseph had serious health issues and could not pay for an attorney. Therefore, Joseph likely had an inability to pay his portion of the attorneys' fees. Jimmy, however, testified that he was a chef in Vermont. In addition, John was the chief pilot for a private air travel company, Nicholas Air.

¶38. Because the chancery court had no legal basis to award attorneys' fees to the sons, it abused its discretion in sua sponte ordering that the sons' attorneys' fees be paid out of Carolyn's funds held in the registry of the court. Accordingly, we reverse the chancery court's decision to sua sponte order that the sons' attorneys' fees be paid out of Carolyn's funds held in the registry of the court.

CONCLUSION

¶39. We reverse the chancery court's decision to deny Carolyn's request for the release of funds back to her and order that Carolyn's funds held in the registry of the court should be transferred to her estate. We reverse the chancery court's decision to sua sponte award Carolyn's sons' attorneys' fees to be paid out of Carolyn's funds held in the registry of the Court. The issues on cross-appeal are dismissed as moot.

¶40. **ON DIRECT APPEAL: REVERSED AND RENDERED. ON CROSS-APPEAL: DISMISSED AS MOOT.**

RANDOLPH, C.J., MAXWELL, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR. KING, P.J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, P.J., AND COLEMAN, J.

KING, PRESIDING JUSTICE, CONCURRING IN PART AND IN RESULT:

¶41. I agree with the majority's conclusion that the funds of Carolyn Bowen Young, which were retained in the registry of the court, should be transferred to her estate. In reaching this conclusion, the majority appears to hold by inference that the chancellor acted properly by signing the agreed order terminating the conservatorship. Because I find that the chancellor erred by terminating the conservatorship without a full hearing and without finding that Carolyn's mind had been restored, I concur in part and in result.

¶42. "[T]he chancellor is the ultimate guardian of wards of the court, and the removal of guardians lies within the sound discretion of the chancellor, whose decision will be reversed only if it is manifest that he abused that discretion." ***Jackson v. Jackson***, 732 So. 2d 916, 920-21 (Miss. 1999) (citing ***Mathews v. Williams (In re Conservatorship of Mathews)***, 633 So. 2d 1038, 1041 (Miss. 1994)). After a full hearing on the petitions for conservatorship, the chancellor found "by clear and convincing evidence" that a conservator should be appointed over Carolyn's estate. The conservatorship was established under Mississippi Code Section 93-13-251, which stated,

> If a person is incapable of managing his own estate by reason of advanced age, physical incapacity or mental weakness, . . . the chancery court of the county wherein the person resides . . . upon the petition of the person or of one or more of his friends or relatives, may appoint a conservator to have charge and management of the property of the person and, if the court deems it advisable, also to have charge and custody of the person subject to the direction of the appointing court.

Miss. Code. Ann. § 93-13-251 (Rev. 2018).[7]

¶43. Later, Jim filed a motion to reconsider the judgment or, alternatively, for restoration and removal of the conservatorship. Section 93-13-265 provided the avenue for the termination of a conservatorship, stating that "[w]hen any person for whom a conservator has been appointed, as set out above, is afterwards restored in mind or body, the procedure for his restoration shall be on petition for appropriate hearing by the court and decree thereof." Miss. Code. Ann. § 93-13-265 (Rev. 2018). Therefore, I would find that, by statute, a conservatorship may be terminated only if the person is restored in mind or body. ***Butler v. Brantley (In re Conservatorship of Brantley)***, 865 So. 2d 1126, 1132 (Miss. 2004).

¶44. The chancellor in this case failed to make a determination regarding whether Carolyn's competence had been restored. The chancellor scheduled a hearing for June 23, 2016, to determine whether Carolyn's conservatorship should be removed. On June 23, the chancellor then prematurely aborted the termination hearing after the testimony of only one witness. That witness, Carolyn's son Joseph, testified that Carolyn was "incapable of managing her affairs." He stated that Carolyn's memory came and went and requested that the current conservator continue managing her financial affairs. The court then granted a recess for "settlement negotiations." That same day, the court entered an agreed judgment terminating the conservatorship and an order approving the sale of Carolyn's real property.

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[7]The conservatorship statutes were repealed effective January 1, 2020. 2019 Miss. Laws ch. 463, § 18 (S.B. 2828) (repealing Miss. Code Ann. §§ 93-13-251 through 93-13-267). Section 93-20-430 of the Mississippi Guardianship and Conservatorship Act now states that "[t]he court *must* hold a hearing to determine whether termination or modification of a conservatorship is appropriate . . . ." Miss. Code Ann. § 93-20-430(3) (Supp. 2019) (emphasis added).

The trial court stated in the agreed judgment that it had been fully advised and ordered that the conservatorship be terminated. Yet a conservatorship may not be terminated by agreement of the parties without holding a full hearing, especially after the testimony of only one witness at the termination hearing who testified that the conservatorship should remain in place.

¶45. The trial court did not make a finding that Carolyn had been restored in mind, as Section 93-13-265 requires. Chancellors have "special and far-reaching fiduciary duties." ***In re Conservatorship of Mathews***, 633 So. 2d at 1040. "Long ago it became the established rule for the court of chancery *to act as the superior guardian* for all persons under [a conservatorship]." ***Id.*** (quoting ***Union Chevrolet Co. v. Arrington***, 162 Miss. 816, 138 So. 593, 595 (1932)).[8] After the termination of the conservatorship, the court held Carolyn's funds from the sale of her real property in the registry of the court "for the protection of said assets."[9] Yet the purpose of a conservatorship is to provide protection to an individual who

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[8]*See also* ***Miss. Comm'n on Judicial Performance v. Shoemake***, 191 So. 3d 1211, 1217 (Miss. 2016) ("[T]he court will take nothing as confessed against [the ward]; 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 those wards of the court." (second alteration in original) (quoting ***Arrington***, 138 So. at 595)).

[9]Although the majority states that the conservatorship was no longer necessary, the trial court's decision to hold Carolyn's funds for the protection of those assets could only be done if the chancellor found a continuing need for the conservatorship. Mississippi Code Section 93-13-259 provided that

> Should the court appoint the conservator of the property or person or property and person of the subject party, the said conservator shall have the same duties, powers and responsibilities as a guardian of a minor, and all laws relative to the guardianship of a minor shall be applicable to a conservator.

is incapable of managing her own estate. ***U.S. Fid. & Guar. Co. v. Conservatorship of Melson***, 809 So. 2d 647, 651 (Miss. 2002). Because Carolyn was under a conservatorship, she was a ward of the court. Therefore, the chancellor had a duty to act as the superior guardian and to terminate the conservatorship only if he had determined Carolyn had been restored in mind, no longer requiring the court's protection.

¶46. The record contains evidence showing that the conservatorship over Carolyn's estate was still needed. Four doctors each had opined that Carolyn was not capable of making important financial decisions. The evidence in the record supports those opinions. In addition, in 2011, Carolyn had prepared two powers of attorney appointing her son Jimmy to act as her agent when she began having medical problems. However, on October 30, 2015, immediately after being released from the ICU, Carolyn revoked the two powers of attorney. Testimony suggested that Carolyn prepared a new power of attorney appointing Jim to act as her agent. Yet six days later, on November 5, 2015, Dr. Willis examined Carolyn and observed that she had been unable to answer even the simplest questions with a yes or no

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Miss. Code. Ann. § 93-13-259 (Rev. 2018). Section 93-13-77 stated that when a guardianship ceases,

> The court shall examine the final account, and hear the evidence for and against it; and if the court is satisfied, after examination, that the account is just and true, shall make a final decree of approval . . . and shall also decree that the property of the ward shall be delivered to him, if not already delivered, and that the guardian be discharged.

Miss. Code Ann. § 93-13-77 (Rev. 2018). Thus, because the statute states that the court *shall* decree that the property of the ward be delivered to him, the trial court erred by retaining control of Carolyn's funds after terminating the conservatorship. The trial court's decision to retain control of Carolyn's funds instead showed that the conservatorship over Carolyn's estate was still necessary.

answer. Dr. Willis stated that she was "certain" that Carolyn was in no condition to make decisions about her own healthcare, much less to manage her own finances at that time.

¶47. On February 29, 2016, Dr. Masur examined Carolyn and concluded that Carolyn had a significant decline in cognitive functioning. Dr. Masur stated that he did not believe Carolyn could manage decision making when substantial amounts of money were at risk. And on March 3, 2016, Dr. Miller examined Carolyn and concluded that Carolyn was in need of a conservator to oversee her finances. Dr. Miller reported that Carolyn thought the year was 2008. In addition, Carolyn had been confused about whether or not she had any money, she said that she was not aware of any discussions about selling the commercial property, she stated that she was not aware of any court proceedings, and she stated that she was not aware of any conflicts between her sons and her husband regarding financial decisions.

¶48. And although Jim produced the report written by Dr. Raymond G. Overstreet, the court found that the report was untrustworthy. At the hearing for the appointment of a conservator, the parties agreed to schedule a reevaluation of Carolyn with one psychologist and one medical doctor to determine whether Carolyn was in need of a conservatorship. The order stated that Jim "shall not be present during the evaluations." The two doctors who examined Carolyn by court order determined that Carolyn was not capable of managing her finances. Jim then had Carolyn examined by a separate psychiatrist, Dr. Overstreet, on March 28, 2016. The court stated that it was "not going to consider [the Overstreet report] a very trustworthy document." First, the chancellor stated that the report was unsigned and said that he did not know whether Dr. Overstreet had written the report or if someone else had.

Second, the chancellor stated that the report did "not enclose the actual test that he is referencing, if that is, in fact, his letter." The chancellor lastly stated that Jim's presence during the examination also "considerably" diminished the trustworthiness of the report.

¶49. Therefore, at the time the chancellor removed the conservatorship, four court-ordered doctors had concluded that Carolyn was in need of a conservatorship over her estate. Only one report, which the chancellor deemed untrustworthy, stated that Carolyn was competent to manage her own affairs. In addition, the chancellor failed to conduct a full hearing to determine whether the conservatorship should have been terminated and failed to make a determination as to whether Carolyn had been restored in mind. The chancellor's judicial responsibility to make a determination as to the continued need for a conservatorship cannot be delegated to the parties. The mere rubber stamping of an agreed order submitted by the parties is a complete abdication of the chancellor's judicial responsibility.[10] While the chancellor has some discretion in determining if a conservatorship should be terminated, he does not have the discretion to do so without conducting a full hearing and, based upon the evidence presented, making appropriate findings to determine if the conservatorship should be terminated. Accordingly, I would find that the chancellor erred by terminating the

[10]This Court previously has decided cases in which the chancellor short-circuited his role as the ultimate guardian of the ward with disastrous results. *See* ***Shoemake***, 191 So. 3d at 1217 (finding that the chancellor had failed to act as the ward's superior guardian and stating that "[f]or Shoemake to sign orders without further consideration of the facts at hand was a disservice to the ward and conservatorship."); ***Brown v. McClinton (In re Guardianship of McClinton)***, 157 So. 3d 862, 866 (Miss. Ct. App. 2015) (chancellor approved final accounting and closed guardianship without addressing petition to compel accounting, in which it was alleged that more than $1.3 million dollars had been misappropriated).

conservatorship without conducting a full hearing.[11]

¶50. However, because Carolyn is deceased, the determination of whether her conservatorship should be terminated is now moot. Therefore, because Carolyn has since died and because her assets were preserved by the chancery court, I would find that the chancellor's error in terminating the conservatorship has now become harmless. I agree that the correct action in this case is to transfer the money held in the registry of the court to Carolyn's estate.

KITCHENS, P.J., AND COLEMAN, J., JOIN THIS OPINION.

[11]Although it is true that the law favors the settlement of disputes by agreement of the parties, the parties to the settlement must be competent. Yet this is not a case involving the settlement of disputes between competent parties. Here, it was the chancellor's job to determine whether Carolyn, the ward of the court, should continue to be under a conservatorship for her estate. The chancellor failed to do that job. Instead, the chancellor became complicit in accepting an agreed judgment to terminate the conservatorship and to hold Carolyn's money without a hearing to determine whether Carolyn's conservatorship should in fact be terminated. In accepting the chancellor's actions, this Court also becomes complicit in the failure to protect a ward of the court.