

RENDERED: NOVEMBER 21, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000449-MR

AGNES G. TALBOTT AND
JOHN R. TALBOTT

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE
ACTION NO. 07-CI-001779

HON. AUDRA J. ECKERLE;
MADELINE TALBOTT; AND
JENNIFER LIEBSON

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Agnes Talbott (Agnes) and John Talbott appeal from the Jefferson Circuit Court's denial of their request for a writ of mandamus. For the reasons set forth below, we affirm.

FACTS

On October 24, 2005, the Nelson District Court entered a judgment finding that Agnes was partially disabled in managing her personal affairs and financial resources. The district court also appointed Madeline Talbott (Madeline) guardian for Agnes. Pursuant to the judgment and order of appointment, Agnes's rights to dispose of property, to execute instruments, to enter into contractual relationships, to determine living arrangements, to consent to medical procedures, and to obtain a motor vehicle operator's license were placed in Madeline's control. It does not appear from the record that any appeal was taken from either the judgment or the order of appointment.

Following the entry of the Nelson District Court's judgment and order, Agnes filed a number of motions, which the court addressed in its October 5, 2006, order. Because it provides some procedural and factual context to this case, we adopt the following portions of that order:

In January of 2006 Madeline Talbott placed her mother in Our Lady of Peace Hospital for a period of time. Upon Agnes' [sic] release from that hospital, on the advice of medical professionals, Madeline placed Agnes in Meadows East Nursing Home and Rehabilitation Center in Louisville, KY. To simply say that Agnes was unhappy in being placed at Meadows East would be a gross understatement. Agnes began filing motions to remove Madeline as her Guardian as early as March 1, 2006. For various reasons the hearing on said motions was continued several times. On July 25, 2006 Agnes filed a Pro Se [sic] motion requesting that her case be transferred to Louisville, Jefferson County, KY. On August 1, 2006 attorney John David Seay filed the same motion along with a number of additional motions that will be addressed later in this Opinion and Order. On September 6,

2006 attorney Seay and attorney Allen Gailor filed a joint motion asking that the case be transferred to Louisville.

The Court will now address the various motions on which testimony was taken at the hearing. Agnes' [sic] pro se motion as well as the motions of her attorneys to transfer venue of this case from the Nelson District Court to the Jefferson District Court was previously overruled by Order of this Court dated September 22, 2006 and entered on September 25, 2006.

The Defendant's [sic] next motion was to set aside the appointment of Madeline Talbott as Limited Guardian for Agnes alleging that the Court failed to give Agnes' [sic] wishes due consideration when Madeline was named Limited Guardian. This Court conducted a full hearing on the issue of the appointment of a Limited Guardian and a Limited Conservator for Agnes on October 21, 2005. Agnes' [sic] wishes were once again stated to the Court at that time. The Court after hearing all the testimony on that date appointed Madeline Talbott after giving due consideration to the testimony of Agnes, Madeline Talbott, and John Talbott, a sibling of Madeline's who also applied to be appointed as Limited Guardian and Limited Conservator for his mother.

Agnes' [sic] next motion was to set aside the appointment of Madeline as Limited Guardian because the Court failed to limit her term of appointment as provided in KRS 387.590(7) and a companion motion that asked in the alternative that if the Court failed to set aside the appointment for failure to limit the term of appointment, that the Court hold a hearing concerning the appropriate term of appointment. The Court has previously entered an Order addressing the order of appointment which did limit the term of appointment of Limited Guardian to a period of five years which will expire October 21, 2010. This Order was dated September 19, 2006 and entered on September 20, 2006.

Agnes then moved the Court to allow her to move from her present location at Meadows East to her home at 207 West Beall Street in Bardstown KY. She alleges that she is a virtual prisoner at Meadows East. During the hearing held on

September 27, 2006 Agnes admitted that she did go out with friends and family on occasions from Meadows East but stated that she still felt she should be allowed to go home to Bardstown and believed that she could properly care for herself. At the time Agnes testified it was apparent that she was oriented to time and place and was aware of a number of current events. However, it was also apparent from her answers to various questions that Agnes is not competent to handle her personal affairs or her financial resources at this time. Agnes suffers from a number of delusions including one that she has found the cure for the disease of Alzheimers [sic] which she claims to be the drug lithium. She also claims to know more about lithium than all doctors and that she expects to be awarded the Nobel Prize for her finding the cure to Alzheimers [sic]. She testified she receives \$8000.00 a month in Social Security benefits. When asked by the Court if she remembered giving \$10,000.00 to a handy man shortly before the Limited Conservatorship was sought she indicated that she did and felt that it was the right thing to do. This was not the only instance in which Agnes had been duped out of money by someone. At the disability trial held on October 20, 2005 Agnes admitted she had bought a car for an employee at Walmart, because the women [sic] told Agnes she needed a car. While Agnes and her husband. . . are not poor people they don't appear to have the financial means to make gifts of this size to people who would not qualify as a family member or a close personal acquaintance of the Talbott's.

It is apparent that Agnes, even if capable of doing so, would not take medications as prescribed. This is based upon Agnes' [sic] testimony that she knows better than the doctors when it comes to various medicines. Agnes also is not capable of driving a car due to her belief that she does not have to stop for stop signs if she doesn't want to stop. According to Agnes, a policeman told her she did not have to stop if no other cars were at the intersection. When asked about this she simply laughed and stated [sic] "Well, this is Bardstown."

The Court finds that Agnes is not capable of living independently nor is she capable of managing her financial affairs at this time.

Therefore, the premises considered, IT IS HEREBY ORDERED, the above described motions of Agnes Talbott, are overruled.

Agnes did not appeal from this order, choosing instead to file a petition for termination or modification of guardianship and conservatorship in Jefferson District Court. In her petition, Agnes stated that she had undergone a preliminary and cursory examination by a psychiatrist who determined that she "is probably capable of making informed decisions in her personal affairs and in her financial affairs, with such advice and assistance as she is fully capable of obtaining voluntarily, and, therefore, she is not now partially disabled." Although we cannot locate a copy of that petition in the record containing an entry date by the clerk, it appears that it was filed on or near February 5, 2007. At that time, Agnes also filed a motion for an interdisciplinary evaluation report and a motion for jury trial. We note that these pleadings were filed just three months after the Nelson District Court's finding that Agnes lacked the capacity to manage her personal or financial affairs and denied her request to transfer venue to Jefferson District Court.

On February 15, 2007, the Jefferson District Court denied Agnes's petition and motions and dismissed her case. In doing so, the Jefferson District Court found that it lacked jurisdiction and noted that the Nelson District Court had previously issued an order "regarding jurisdiction and venue." Agnes then filed a petition for mandamus with the Jefferson Circuit Court. In that petition, Agnes argued that she is involuntarily

confined at Meadows East Rehabilitation and Care Center (Meadows East); that the Jefferson District Court properly had jurisdiction; that Jefferson District Court was the proper venue for her action; that she had no adequate remedy by way of appeal; that the Jefferson District Court should be ordered to schedule the requested interdisciplinary evaluation and to hold the requested jury trial; and that the Jefferson District Court judge who ruled against Agnes should not be permitted to sit on the case. The Jefferson Circuit Court dismissed Agnes's petition for mandamus noting, in pertinent part, that the proper mechanism for relief was an appeal, not mandamus. Furthermore, the circuit court noted that Agnes could pursue her motion to terminate or modify guardianship/conservatorship in the Nelson District Court. It is from this order that Agnes appeals.¹

In her appeal, Agnes argues that the Jefferson Circuit Court erred when it dismissed her petition for mandamus. In support of her position, Agnes argues that mandamus was appropriate because appeal is not an "adequate remedy." Furthermore, Agnes argues that the Jefferson District Court was a proper forum for her action, and that she was not required to return to the Nelson District Court. We disagree as to Agnes's first argument; therefore, we affirm.

STANDARD OF REVIEW

To prevail in this appeal, the appellant must demonstrate that the circuit court abused its discretion when it denied the petition for writ of mandamus. *Cf. Rowley v.*

¹ We note that Agnes filed a motion for immediate intermediate relief with this Court, which this Court denied. *Agnes G. Talbott; et al. v. Hon. Audra J. Eckerle; et al.*, 2007-CA-000449-MR (March 6, 2007). In doing so, this Court noted that Agnes could have filed an appeal from the Jefferson District Court's order of dismissal and that Agnes had failed to demonstrate why that mechanism of redress was not adequate.

Lampe, Ky., 331 S.W.2d 887 (1960). This court will not determine the merits of the motion filed by the appellant in the district court; rather, we will confine ourselves to the question of whether the circuit court abused its discretion in failing to direct the district court to rule on the pending motion. "Mandamus is a proper remedy to compel an inferior court to adjudicate on a subject within its jurisdiction where it neglects or refuses to do so, but will not lie to revise or correct a decision." *Hargis v. Swope*, 272 Ky. 257, 114 S.W.2d 75, 77 (1938), citing *J.B.B. Coal Co. v. Halbert*, 169 Ky. 687, 184 S.W. 1116 (1916).

Owens v. Williams, 955 S.W.2d 196, 197 (Ky.App. 1997).

ANALYSIS

With the above standard in mind, we must address whether the Jefferson Circuit Court abused its discretion when it dismissed Agnes's petition for a writ of mandamus. In the appropriate situation, a litigant may obtain a writ of mandamus as set forth in CR 81. However, "[a] writ of mandamus is an extraordinary remedy which should only be granted in cases where, if it was not, the moving party would suffer great and irreparable injury." *Owens Chevrolet v. Fowler*, 951 S.W.2d 580, 582 (Ky. 1997). A writ of mandamus is not appropriate "when a movant has another adequate remedy available to him." *Id.* at 582.

The Jefferson Circuit Court pointed out, in pertinent part, that Agnes had other adequate remedies available, namely an appeal from the Jefferson District Court's order. Agnes argues that an alternative remedy was not adequate because an appeal to the circuit court would have been too time consuming, the appellate process does not provide for expediting an appeal, and any delay would have negated all of Agnes's

discovery. However, we note that the Jefferson District Court stopped all discovery; therefore, no discovery could have occurred and no discovery could have been negated. Furthermore, although CR 72 does not specifically provide a mechanism for expediting an appeal from the district court to the circuit court, it does not specifically prohibit a litigant from requesting an expedited appeal. Finally, we note that Agnes has stated repeatedly throughout the record that she is "incarcerated" at Meadows East and that delay in freeing her from this incarceration amounts to "inexorable irreparable harm." However, Agnes's testimony before the Nelson District Court that she "did go out with friends and family on occasions from Meadows East" negates her statements that she is incarcerated. Therefore, any delay that may have resulted from an appeal would not result in inexorable, irreparable harm. Because Agnes had a viable alternative to seeking a writ of mandamus, we hold that the Jefferson Circuit Court did not abuse its discretion when it dismissed Agnes's petition for such a writ.

We need not address whether Agnes was free to pursue an action in Jefferson District Court, as that is an issue for the circuit court to address on appeal.

CONCLUSION

The Jefferson Circuit Court did not abuse its discretion when it dismissed Agnes's petition for a writ of mandamus because Agnes had a viable alternative avenue of redress; an appeal to the circuit court. Therefore, we affirm the Jefferson Circuit Court order.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Alex F. Talbott
Louisville, Kentucky

BRIEF FOR APPELLEE MADELINE
TALBOTT:

Daniel M. Oyer
Louisville, Kentucky

NO BRIEFS FOR APPELLEES HON.
AUDRA J. ECKERLE AND JENNIFER
LIEBSON