

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
October 17, 2001 Session

**RUBY FOSHIE, ET AL. v. WARREN BLAKE FOSHIE, ET AL.**  
**IN RE: WILLIS FOSHIE**

**Appeal from the Chancery Court for Hamblen County**  
**No. 99-337 Thomas R. Frierson, II, Chancellor**

**FILED NOVEMBER 6, 2001**

**No. E-2000-02837-COA-R3-CV**

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This appeal challenges the Trial Court's conclusion that Willis Foshie's wife, Ruby Foshie, and his daughter, Darlene Holbert, ("Petitioners") should be appointed co-conservators over the estate and person of Willis Foshie, and the Trial Court's conclusion that Willis Foshie's gift of a truck to his grandson, Warren Foshie, was the result of undue influence. We were provided neither a trial transcript nor a complete and accurate statement of the evidence which complies with Tenn. R. App. P. 24(c). We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Chancery Court Affirmed; Case Remanded.**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and CHARLES D. SUSANO, JR., J., joined.

Mark A. Cowan, Morristown, Tennessee, for the Appellants Warren Blake Foshie and Willis Foshie.

Douglas R. Beier, Morristown, Tennessee, for the Appellees Ruby Foshie and Darlene Holbert.

**OPINION**

**Background**

On June 1, 1999, Willis Foshie executed a Durable Power of Attorney and Durable Power of Attorney for Health Care wherein he gave his grandson, Warren Foshie, the power to make financial and health care decisions on his behalf. Approximately eighteen (18) days later, Petitioners

filed this lawsuit claiming that Willis Foshie was incapable of taking care of himself and handling his own affairs. They also claimed Warren Foshie was taking advantage of his grandfather and had taken funds as well as a truck. Petitioners requested the Trial Court to appoint a conservator and guardian and to require Warren Foshie to account for the funds. Petitioners later amended their claim to assert that Willis Foshie's purportedly giving the truck to Warren Foshie constituted an abuse of the confidential relationship created by the power of attorney and was brought about by undue influence. Warren Foshie denied the pertinent allegations, and he and his grandfather filed a counter-petition.

The trial in this case occurred on October 2, 2000. At trial, it was stipulated that Willis Foshie was in need of a conservator for his person and his estate. The issues to be resolved, therefore, were who should be appointed to serve as conservator and whether Warren Foshie should be required to return the truck or its value to the estate. The Trial Court noted in its memorandum opinion that Willis Foshie was experiencing deteriorating health, and had sustained a fall necessitating transportation to the hospital and, eventually, admission into an assisted care residential facility. The Trial Court also made the following factual findings:

On June 1, 1999, Mr. Willis Foshie executed a durable power of attorney in favor of Respondent Warren Blake Foshie granting the latter all powers authorized by T.C.A. § 34-6-109. By this instrument, Mr. Willis Foshie named Respondent Warren Blake Foshie as his choice for conservator in the event such a judicial appointment was made. Concomitantly, Warren Blake Foshie withdrew approximately \$30,500.00 remaining in the afore-referenced savings account and \$5,000.00 from the afore-referenced checking account. In addition, Respondent Warren Blake Foshie transferred title to a 1997 Ford pickup truck to himself, using said vehicle as a trade-in for the purchase of a vehicle which he now owns. The original certificate of title regarding said vehicle reflects ownership as W.A. Foshie or Ruby Foshie. Respondent Warren Blake Foshie effectuated the transfer of title by means of his application for a lost title.

Of the \$35,500.00 withdrawn by Respondent Warren Blake Foshie in June 1999, all of the funds have been expended for the residential care and expenses of Mr. Willis Foshie, except approximately \$2,000.00 in savings being held for the purpose of Mr. Foshie's funeral expenses ....

The parties stipulated that Willis Foshie was in need of a conservator, and neither party has appealed the Trial Court's agreement with that stipulation. Both Petitioners and Warren Foshie sought to be declared the conservator. Relying on Tenn. Code. Ann. § 34-13-103, the Trial Court observed that it first had to determine what was in Willis Foshie's best interest and, "subordinate to the first determination, is who is the appropriate conservator given the prioritized

list elucidated by statute.” The Trial Court noted that Willis Foshie had named Warren Foshie as his conservator and testified at trial that this was who he wanted to be his conservator. On the other hand, Ruby Foshie had been his primary care-giver up until the time he was hospitalized and then placed in an assisted care residential facility. The Trial Court stated that Ruby Foshie was desirous of continuing to provide necessary care for Mr. Foshie’s person, and Darlene Holbert was capable and properly suited to perform the fiduciary responsibilities. The Trial Court then discussed Warren Foshie’s acquisition of the truck, concluding that his method of acquisition (i.e. applying for a lost title) called into question his ability to perform the necessary fiduciary duties. Warren Foshie lived in Florida 700 miles away from his grandfather. The Trial Court also determined that it would be in Willis Foshie’s best interest to have a conservator who resided nearby, such as the Petitioners who visited him every week. Based on the foregoing, the Trial Court concluded it would be in Willis Foshie’s best interest to appoint Petitioner’s as co-conservators. With regard to the gift of the truck, there was a confidential relationship created by the power of attorney. With the existence of this confidential relationship, the Trial Court concluded that the gift of the truck gave rise to a presumption of undue influence which could be rebutted only by clear and convincing evidence of the fairness of the transaction. One way to establish fairness would be a showing of independent advice on the advisability of making the gift. The Trial Court concluded the evidence did not support a finding that Willis Foshie received any competent, independent advice regarding the transfer of the truck. Since Warren Foshie failed to establish the fairness of the transaction, the Trial Court concluded undue influence had occurred, and the value of the truck had to be restored to the estate. Warren Foshie appeals.

### Discussion

Our standard of review with regard to matters decided by the Trial Court is well settled. A review of findings of fact by a trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999). Review of questions of law is *de novo*, without a presumption of correctness. *See Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

We have a very limited record on appeal. A court reporter was present at the trial. However, due to “technical difficulties”, a true and complete transcript could not be prepared and we have only small portions of the testimony of the witnesses. For example, on direct examination, Willis Foshie testified that he was 70 to 80 years old, that Richard Nixon was the President of the United States, and he has lived “first one place and another” in Morristown. On cross examination, Mr. Willis Foshie testified he wanted his grandson to take care of him and he wanted to give him the truck. On re-direct examination, he stated he did not know if his wife’s name was on the title to the truck, but that the truck belonged to him. The reason he gave for not wanting his wife to handle his financial affairs was that she was “wild with money”. He also admitted he had not seen his grandson in two months. This is essentially the entire trial testimony of Willis Foshie that we have been provided on appeal. The testimony of the remaining witnesses is similarly incomplete and fragmented.

The court reporter did transcribe the limited testimony that was audible, and this was provided as a statement of the evidence pursuant to Tenn. R. App. P. 24(c). A statement of evidence pursuant to this rule “should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.” The court reporter’s certification on the statement of the evidence states: “This is not a true transcript of the trial. Due to technical difficulties that occurred during the trial all of the transcript can not be provided.” We do not believe that the very limited transcript we have been provided on appeal satisfies the requirement that the statement of the evidence should convey a fair, accurate, and complete account of what transpired. In the absence of a transcript or statement of the evidence, we must assume that had the record been preserved, it would have contained sufficient evidence to support the trial court’s factual findings. *Tallent v. Cates*, 45 S.W.3d 556, 562 (Tenn. Ct. App. 2000). *See also Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992)(“This court cannot review the facts de novo without an appellate record containing the facts, and therefore, we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court’s factual findings.”). Since the two issues presented for review involve the Trial Court’s factual findings as to which of the parties was better suited to be Willis Foshie’s conservator and whether undue influence was present with the gift of the truck, we have no choice on appeal but to affirm those factual findings in the absence of a complete record which would enable us to properly and thoroughly review these factual determinations de novo.<sup>1</sup>

### Conclusion

The judgment of the Trial Court is affirmed. This case is remanded to the Trial Court for further proceedings as required, if any, consistent with this Opinion, and for the collection of costs below. Costs of appeal are taxed to Appellants Warren Blake Foshie and Willis Foshie and their surety.

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D. MICHAEL SWINEY

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<sup>1</sup> For the parties’ and their lawyer’s peace of mind, we note that even if we had treated the transcript by the court reporter as having satisfied Tenn. R. App. P. 24(c), the preponderance of the evidence as reflected in that limited transcript or statement does not preponderate against the Trial Court’s findings of fact. The result, therefore, would have been the same.