IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 07, 2015

IN RE CONSERVATORSHIP OF HORACE DUKE

Appeal from the Chancery Court for Robertson County
No. CH11CV10615 Laurence M. McMillan, Jr., Judge

No. M2015-00023-COA-R3-CV – Filed September 3, 2015

Conservator appealed the trial court's order adopting the special master's report. We find merit in the conservator's argument that the trial court was required to hold a hearing before acting on the special master's report. As we are unable to ascertain from the record whether a hearing was held, we vacate and remand for a determination of whether a hearing was held by the trial court. If no hearing was held, the trial court must hold a hearing on the special master's report in accordance with Tenn. R. Civ. P. 53.04(2).

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS and W. NEAL MCBRAYER, JJ., joined.

Paul T. Nowak, Franklin, Tennessee, for the appellant, Jerry D. Stephens.

William K. Lane, Franklin, Tennessee, for the appellee, Charles Duke.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Jerry D. Stephens ("Mr. Stephens"), the son-in-law of Horace Duke ("Mr. Duke"), filed a petition to be appointed conservator of the person and property of Mr. Duke on September 27, 2011. According to the petition, Mr. Duke suffered from dementia and was "incapable of managing his own property." Mr. Duke's closest relatives were his wife, Gladys Duke; his two sons, Charles and Wayne Duke, and his step-daughter, Sherry

Duke Stephens. Attached in support of Mr. Stephens's petition are an affidavit of Mr. Duke's physician and Mr. Duke's durable power of attorney appointing Mr. Stephens to serve as conservator without necessity of posting a bond.

The petition alleges that Mr. Duke was a defendant in a lawsuit brought by his son, Wayne, and that it was necessary for the following rights to be removed from Mr. Duke and transferred to Mr. Stephens: "the right to participate in litigation, dispose of property, execute instruments, enter into contractual relationships, or do any other act of legal significance the Court deems necessary or advisable." The petition lists the property that Mr. Duke owns or in which he has a beneficial interest. Mr. Stephens requested that he be appointed conservator of Mr. Duke's person and property and that a guardian ad litem be appointed to represent Mr. Duke in this matter.

The guardian ad litem submitted a report on November 23, 2011. Based upon his investigation, the guardian ad litem concluded that a fiduciary should be appointed, and he found "no reason to oppose the appointment of" Mr. Stephens as conservator in light of Mr. Stephens's position as trustee of the Duke Family Irrevocable Trust and the power of attorney executed by Mr. Duke.

On December 12, 2011, the court entered an order appointing Mr. Stephens conservator for Mr. Duke. The order provided, in pertinent part, that Mr. Stephens would file annual accountings and a management plan within the time required by law.

Mr. Duke died on February 28, 2012. Mr. Stephens, as conservator, submitted a final accounting on October 9, 2012 covering the period from November 21, 2011 through March 20, 2012. The final accounting stated:

> No conservatorship account was opened. All payments on behalf of the conservatorship were paid from the Duke Family Trust Account.
>
> The total for that Account are as follows:

	Acct. No. 13----------
Beginning balance	$8,307.78
Total Receipts	$44,244.62
Total Disbursements	$49,826.07
Ending Balance	$2,726.33

Other assets: None

The only payments (copies enclosed) made on behalf [of] the estate were:

Check No. 1459 – CNA insurance - $1,666.00
Check No. 1460 – Yost Robertson Nowak (attorney fee) - $805.00
Check No. 1463 – CS&A Insurance (bond) - $620.00
Check No. 1464 – Yost Robertson Nowak (attorney fee) - $2,879.00
Check No. 1467 – Bill Goodman (G.A.L.) - $2,000.00

The only attachments to the conservator's accounting were copies of the listed checks and the attorney fee statements.

The final accounting was not approved by the clerk and master. Mr. Stephens filed another final accounting on October 22, 2012, but the clerk and master did not approve it. In an objection to the accounting and a request for additional information filed on October 30, 2012, Wayne Duke requested that Mr. Stephens provide:

> (1) . . . a full, complete, and accurate statement of all of the assets of Horace Duke from (a) when it was alleged Horace Duke was incompetent; (b) at the start of the conservatorship; (c) and the conclusion of the conservatorship;
> (2) . . . evidence of his bond, financial records, monthly accountings, a final accounting, and other appropriate documents and records related to the finances of Horace Duke and the Conservatorship;
> (3) complete bank statements from Horace Duke's IRA account and the three other bank accounts listed in the Motion to Appoint Conservator at Heritage Bank;
> (4) complete bank statements from the bank account listed in the "Final Accounting" at Pinnacle National Bank that was used as the Conservator's account[.]

Charles Duke filed a motion on March 5, 2013 to remove conservator and compel an appropriate accounting. Prior to the hearing on this motion, the conservator filed a report and final accounting on January 10, 2014. The accounting corrected several mistakes in the petition's list of property owned by Mr. Duke or in which he had a beneficial interest. According to this accounting, the corrected (and updated) version should read as follows:

a. Real property at 2860 Highway 49W, Pleasant View, TN

b. IRA Account at Lincoln Financial with a value of $82,909.00 as of September 1, 2011 (as of November 28, 2011, balance of only $32,976.67).
c. Account No. 53---------- at Heritage Bank, value of $13.72 as of February 28, 2012, owned jointly with spouse, Mr. Stephens, and Sherry Stephens
d. Account No. 13---------- at Heritage Bank, value of $1,594.14 as of February 28, 2012, owned jointly with spouse, Mr. Stephens, and Sherry Stephens
e. Account No. 54---------- at Pinnacle Bank, value of $471.53 as of February 28, 2012, owned jointly with spouse, Mr. Stephens, and Sherry Stephens
f. 100% of stock of H. Duke Enterprises, Inc. (to be distributed with probate estate)
g. 1998 Coachman motor home
h. 1993 Ford Aerostar van
i. Social Security income of $674.00 per month

According to the accounting, Mr. Duke conveyed his ownership of the Pleasant View residence and his strip mall in Belleview, Tennessee to the Duke Family Irrevocable Trust on November 19, 2002. The deeds evidencing these transfers are attached to the accounting. The conservator also attached a register for Pinnacle Bank account number 54--------, an account he used to pay Mr. Duke's expenses, and "during the three month term of the conservatorship, [the account] was funded by transfers from the trust account." For this account, the final accounting report states the opening balance, the credits, disbursements, and closing balance as of February 28, 2012. The accounting register and bank statements are attached. The same is true for Heritage Bank accounts number 53-------- and 13----------, accounts that were also used to pay Mr. Duke's expenses and were funded by transfers from the trust account.

The report further states that, on July 6, 2011, $26,703.36 was withdrawn from the Lincoln Financial IRA account and deposited in the Duke family trust account. Although "[t]he verification of this transfer cannot be found," the Pinnacle Bank statement showing the deposit is attached to the report. On January 27, 2012, the remaining $32,976.67 was withdrawn from the Lincoln Financial account and deposited in the trust. At that time, Mr. Duke was the sole beneficiary of the trust. The stock of H. Duke Enterprises was held in the trust. The conservator's report and final accounting was not approved by the clerk and master.

On February 3, 2014, the chancellor appointed the clerk and master as a special master "to conduct a full accounting of all assets identified in the sworn Petition to

Establish Conservatorship through the date of the Ward's death, and to prepare a report upon the matters hereby submitted to her." If necessary, the special master was to prepare findings of fact and conclusions of law. The special master had the power to require the production of evidence, to put witnesses under oath, and to "do all acts and take all measures necessary or proper for the efficient performance of her duties under this Order." Within ten days of receiving the special master's report, the parties were to serve any objection thereto. After a hearing, the court "may adopt the report or may modify it or may reject it in whole or part or may receive further evidence or may recommit it with instructions."

The clerk and master had already made requests for documents prior to her appointment as special master. She made additional requests as special master. Moreover, Wayne Duke requested documents. The conservator responded by submitting lists of transactions and checks and bank statements regarding Heritage Bank account 3---, Heritage Bank account 4---, the Lincoln Financial account, and the Pinnacle Bank account; as well as statements for the Regions Visa account and the American Express account. The conservator also submitted a document entitled, "Documents Requested From Conservator" in which he listed the documents requested by the special master and explained what documents had been provided and why certain documents had not been provided. The conservator noted that, "The Duke Family Trust was not an asset of the conservatorship estate." Further, the conservatorship estate owned no real property.

In an affidavit, the conservator testified: "I have disclosed and furnished to the Clerk and Master all information and documentation concerning assets in which Mr. Duke had an ownership or a beneficial interest as of November 29, 2011, which I was able to find after conducting exhaustive due diligence." He further stated that, during the nine years prior to his appointment as conservator, he acted as attorney-in-fact for Mr. Duke and managed the assets and finances of Mr. and Mrs. Duke "on direction from them." Any money paid to him during that time was "at their direction." After he was appointed conservator, Mr. Stephens testified, "I continued to manage their assets and finances in exactly the same way." He asserted that he "did not convert any of their assets to my own use before or after I was appointed as Conservator."

The conservator's affidavit continues with a breakdown of the ways in which Mr. Stephens (and his wife) took care of Mr. Duke (and his wife) during the three months of the conservatorship. The affidavit lists the ways in which the conservator tended to Mr. Duke's healthcare needs, social needs, and physical needs. According to the affidavit, the conservator also took care of Mr. Duke's car repairs, home maintenance, tenant issues and building management, and other day-to-day problems.

Special Master's Report

On July 18, 2014, the special master filed her report. In her recitation of the facts, she noted that many requests to provide documents and an accounting were made to the conservator, and there were two orders requiring production. As clerk and master, she sent her first request for documents on January 28, 2014 so that they could be reviewed in advance of a hearing set for February 3, 2014.[1] Counsel for the conservator replied by letter received on January 31, 2014 stating that the original petition contained incorrect information and that the conservator refused to provide any information outside of the period from November 30, 2011 until Mr. Duke's death. The conservator provided some documents, along with explanations with respect to specific requests.

The special master responded with a letter on February 5, 2014 stating that, pursuant to the court's order, she was required to "conduct a full accounting of all assets identified in the sworn Petition through the date of the Ward's death." The special master sent a second request for documents. On February 18, 2014, the conservator submitted a three-ring binder and a cover letter stating that the notebook contained the following listed items:

> Item 7—$1,000 payments to Sherry Roberts, appreciation gift from Mr. Duke
> Items 1, 2 & 8—check registry spreadsheets from Heritage & Pinnacle accounts for the required time periods
> Item 10—no stock certificates were ever issued to Mr. Duke
> Items 3 and 4—Lincoln quarterly and withdrawal statements, including a spreadsheet showing withdrawal disbursements
> Items 5 and 6—Regions credit card statements (formerly FIA)
> Item 9—American Express credit card statements

All parties participated in a conference call to discuss whether there was a need for further information. Thereafter, the special master sent a third request to the conservator consisting of a list of documents compiled from the parties and the special master. The special master requested that the conservator sign an affidavit "to assure the parties and the Special Master that all documents requested had been supplied and an accounting was provided for all the assets of the ward." The conservator did not sign the prepared affidavit; instead, he submitted his own affidavit (summarized above).

Both the special master and counsel for Charles Duke filed a notice to take Mr. Stephens's deposition. Mr. Stephens objected and did not appear for the depositions.

[1] A new clerk and master was appointed in January 2014.

Although Charles Duke filed a motion to compel depositions, he later struck the motion.

Having summarized the facts, the special master proceeded to analyze the case. The following quotation begins with a list of the information not provided to the special master:

> Stocks; Note from Charles Duke; all commodities; all machinery, equipment, tools, all art, sculptures, paintings, jewelry; all antiques; all boats, planes; vehicles; original documents; Lincoln Financial documents from the date of the Petition; Trust accounts.
>
> The Conservator argues that there were no stocks, yet his Petition, which was never amended, stated otherwise. No note from Mr. Charles Duke was filed in this case. Whether the commodities were jointly owned or not, they should have been disclosed as requested. The same is true of other personal property. Original documents were requested repeatedly but never produced. The conservator argues and states in his affidavit that he has not disclosed and furnished every document of him.
>
> It is clear after three requests from the Special Master that the Conservator will not provide anything further. He justifies this because he says the Trust is not a part of the Conservatorship. The conservator did not open a conservator's bank account and continued to operate out of the trust account. By doing so, it could be argued that the Conservator made the Trust a part of the conservatorship. The Special Master is, therefore, making her report based on the information provided.
>
> . . .
>
> The concern is not for any time before the Petition that requested that a Conservator be appointed. When the Conservator asked the Court to be involved, he changed everything. In his affidavit, the Conservator states that "After I was appointed as Conservator, I continued to manage their assets and finances in exactly the same way." That is, the Conservator made no adjustments for his legal obligation as the Count-appointed Conservator. That appointment required more than business as usual. A fiduciary duty arose and an accountability to the Court.
>
> The Conservator's Affidavit reflects that he has done his due diligence. The documents provided included statements from three bank accounts, an investment account and statements from two credit card companies. From these documents certain accountings have been made.
>
> The Petition listed assets of the ward. The Lincoln Financial IRA had $82,909.00 as of September 1, 2011. There is a statement from Lincoln Financial dated September 30, 2011 showing a value of $82,314.01. The value on December 30, 2011 was $87,587.14. A

withdrawal was made that left a balance of $60,241.12 as of March 10, 2012. The conservator shows $10,138.34 was paid to the Metro Trustee for property tax for property the Conservator states is owned by the trust and is not a part of the Conservatorship. $1,894.00 was paid to Robertson County for property tax for property owned by the trust. $370 was paid to Farm Bureau for insurance associated with the real property. $1,000.00 was paid to R & B Heating and Cooling for A/C repair on real property. $13,000.00 was paid for Mrs. Gladys Duke's credit cards.

The only allowable expenditures appear to be for the $2,000 Guardian ad litem fee and the $2,879.00 attorney fee. Therefore, $27,121.00 should be brought back into the conservatorship.

From September 2011 until February 2012, charges were made to Mr. Duke[']s FIC Regions credit card account in the amount of $15,323.55 and to his American Express Account in the amount of $3,939.10. In reviewing the FIC charges, the majority of the charges do not appear to be for Mr. Duke. The same is true of the American Express charges. There are multiple charges on the same day for restaurants, gas stations and grocery stores. The Special Commissioner does not agree that all these charges were for the ward. Therefore she suggests that this $19,262.65 be brought back into the conservatorship.

A review of Mr. Duke's bank statements show[s] payments that are questionable. However, the Heritage Bank account was in the name of Mr. Duke, his wife, the conservator and the conservator's wife. There were social security deposits into the account for both Mr. Duke and his wife, payments from Mr. Duke's Lincoln Annuity and Mrs. Duke's pension. There is no evidence of funds from the conservator or his wife. Yet they paid personal expenses from the account. However, the checks were signed either by Horace Duke or his wife, Gladys. For that reason, reimbursement is not requested from the Heritage Bank account.

The Pinnacle Bank account also has the same four names on the account as the Heritage Account. The only deposits into that account came from the Trust with the exception of the $13,000 from Mr. Duke's Lincoln Annuity. Where there are many charges against that account which are questionable, the charges were paid from the trust and not Mr. Duke's personal bank accounts. The $13,000 has been addressed previously. Therefore, no refund is suggested from that account.

For all the reasons set out herein, the Special Master finds that the Conservator had a fiduciary duty to his ward and that he should reimburse the ward's conservatorship the amount of $46,383.65. That amount should then be transferred to the estate account. This will complete the Final Accounting required by the Probate Court resulting in this matter being

closed.

The conservator failed to object to the special master's report within ten days as required by Tenn. R. Civ. P. 53.04(2). On October 7, 2014, Charles Duke moved that the findings and recommendations presented in the special master's report be adopted by the court. The conservator filed a response to the special master's report on October 17, 2014. On November 14, 2014, the trial court entered a final order adopting the special master's report as an order of the court. Mr. Stephens, the conservator, appealed.

Issues on Appeal

On appeal, the conservator raises the following issues: (1) whether the trial court abused its discretion by entering a final order approving the special master's report without acting on the report as required by Tenn. R. Civ. P. 53.04(2); (2) whether the special master abused her discretion by assessing damages against the conservator based on actions taken by the conservator before December 12, 2011, when the order appointing him conservator was entered; and (3) whether the special master abused her discretion by failing to file a transcript of the evidence and the original exhibits with her report as required by Tenn. R. Civ. P. 53.04.

STANDARD OF REVIEW

The trial court's referral of all or part of a case to a special master affects the applicable standard of review: "A concurrent finding of fact by a Master and a trial court is conclusive on appeal, except where the finding is on an issue not appropriate for referral, where it is based on an error of law or a mixed question of fact and law, or where the factual finding is not based on material evidence." *Aussenberg v. Kramer*, 944 S.W.2d 367, 370 (Tenn. Ct. App. 1996) (citing *Archer v. Archer*, 907 S.W.2d 412, 415 (Tenn. Ct. App. 1995)). We must affirm such a concurrent finding if there is any material evidence to support it. *Archer*, 907 S.W.2d at 415; *see* TENN. R. APP. P. 13(d).

ANALYSIS

(1)

We begin with the issue regarding the trial court's failure to hold a hearing as we believe it is dispositive. The conservator asserts that the trial court abused its discretion in failing to hold a hearing on the special master's report as required by Tenn. R. Civ. P. 53.04(2). In non-jury actions, Tenn. R. Civ. P. 53.04(2) gives the parties ten days after being served with notice of the filing of the master's report to file written objections to the report. The rule further states: "The court *after hearing* may adopt the report or may

modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." Tenn. R. Civ. P. 53.04(2) (emphasis added). The conservator cites caselaw holding that, under Tenn. R. Civ. P. 53.04(2), the requirement that the court hold a hearing is mandatory. *See Hollow v. Ingram*, No. E2010-00683-COA-R3-CV, 2010 WL 4861430, at *5-6 (Tenn. Ct. App. Nov. 29, 2010).

According to the defendants, the trial court did, in fact, hold a hearing. The special master's report was served upon the parties on July 18, 2014. On October 7, 2014, Charles Duke filed a motion to adopt the Special Master's Report. The conservator did not file anything in response to the special master's report until October 17, 2014, well after the ten-day time period set forth in Tenn. R. Civ. P. 53.04(2). Charles Duke's motion states that his motion was set to be heard on October 27, 2014, and the defendants assert that a hearing took place. The trial court's final order was entered on November 24, 2014 and does not mention a hearing. This Court cannot resolve the factual discrepancy regarding whether or not there was a hearing.

As noted above, the conservator failed to file objections to the special master's report within ten days, as required by Tenn. R. Civ. P. 53.04(2). This Court has previously discussed its interpretation of Rule 53.04(2) with respect to the hearing requirement:

> Tenn. R. Civ. P. 53.04(2) mandates action by the trial court. It provides that in a non-jury action the trial court "shall act upon the report of the master." The rule requires the judgment of the trial court. The court cannot abdicate to the master its responsibility to *make a decision* on the issue in question. It must do more than "rubber stamp" what the master has done. Should it decide to confirm the master's report, it must be satisfied, after exercising its independent judgment, that the master is correct in the decision he has made.
>
> A party dissatisfied with a master's report "*may* serve written objections . . . upon the other parties" (emphasis added), but 53.04(2) does not expressly provide, or by implication indicate, that such objections are a prerequisite to a hearing. That rule again emphasizes that the trial court is to "act" on the master's report when it directs that "[a]pplication to the court for *action* upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6.04." (Emphasis added). We read this sentence of the rule to mean that the court will be called upon to "act" by motion whether objections have been filed or not. The last sentence of 53.04(2) is most critical. It provides that "[t]he court *after hearing* may adopt the report or may modify it or may reject it in whole or in part or may

> receive further evidence or may recommit it with instructions." (Emphasis added). The Chancellor and the Plaintiffs' expert read this provision as if the filing of objections was a condition precedent to receiving a hearing; but this is not what the rule says. As a general proposition, and regardless of whether objections have been filed, the trial court *must* hold a hearing. Our interpretation is consistent with the rule's overall mandate that the trial court must exercise its independent judgment.

Lakes Prop. Owners Ass'n, Inc. v. Tollison, No. 03A01-9402-CV-00038, 1994 WL 534480, at *3 (Tenn. Ct. App. Oct. 4, 1994); *see also Hollow*, 2010 WL 4861430, at *5; *Pruett v. Pruett*, No. E2007-00349-COA-R3-CV, 2008 WL 182236, at *5 (Tenn. Ct. App. Jan. 22, 2008).

In the interest of judicial economy and in light of these authorities, we must remand for the trial court to clarify whether or not a hearing was held; if there was no hearing, the trial court must hold a hearing to exercise its independent judgment on the special master's report.

(2)

In order to provide guidance to the trial court on remand, we will discuss the other issues raised. The conservator argues that the special master abused her discretion by assessing damages against him based on actions taken before his appointment as conservator on December 11, 2011.

"The purpose of a conservatorship is to protect the person and the property of the disabled person, the ward." *AmSouth Bank v. Cunningham*, 253 S.W.3d 636, 641 (Tenn. Ct. App. 2006). Conservators are court-appointed fiduciaries "who act as agents of the court and their rights and responsibilities are set forth in the court's orders." *Id.* Tennessee Code Annotated section 34-3-107(a)(2) states that the court shall "[e]numerate the powers removed from the respondent and those to be vested in the conservator." Pursuant to Tenn. Code Ann. § 34-1-104(a), "no person shall undertake the administration of the estate of a minor or person with a disability until the person has been issued letters of guardianship or letters of conservatorship." The conservator's appointment becomes effective "[o]n the entry of an order appointing the fiduciary, the administration of the oath as provided in subsection (b) and the posting of any required bond." Tenn. Code Ann. § 34-1-109(a).

> The following is a helpful summary of a conservator's role:
> A conservator occupies a fiduciary position of trust of the highest and most sacred character. Although the conservator plays a most important

> fiduciary role, it is significant to note that "the court itself is ultimately responsible for the disabled persons who come under its care and protection."
>
> The authority, rights and responsibilities of a conservator are not independent of the court. "Conservators act as the court's agent and are under the court's supervision." The courts appointing conservators "retain continuing control over guardians and conservators because the persons who accept these appointments become 'quasi-officials' of the court appointing them."

AmSouth, 253 S.W.3d at 642 (citations and footnote omitted).

From all of these principles, we must conclude that the conservator's authority began with his appointment, and that the special master erred in ordering the conservator to reimburse the conservatorship for transactions preceding the date of his appointment.[2]

With this conclusion in mind, we will examine the financial transactions at issue. The special master ruled that $27,121.00 should be brought back into the conservatorship for expenditures made out of funds withdrawn from the Lincoln Financial IRA between December 30, 2011 and March 10, 2012. Thus, this ruling did not involve actions taken prior to Mr. Stephens's appointment as conservator. We note, however, that the following expenditures were found by the special master not to be for the conservatorship: $10,138.34 for property taxes; $1,894.00 for property taxes; $370.00 for insurance; $1000.00 for A/C repair; and $13,000.00 for Ms. Duke's credit cards. The total of these expenditures is $26,402.34.

Next, the special master found that, from September 2011 until February 2012, the conservator made charges of $15,323.55 on Mr. Duke's Regions credit card and $3,939.10 on his American Express card and that "the majority of the charges do not appear to be for Mr. Duke." The special master suggested that this $19,262.65 "be brought back into the conservatorship." As discussed above, we have concluded that charges made prior to the conservator's appointment should not be brought back into the conservatorship. We find that $9,632.36 of the Regions credit card and American Express charges that the special master ordered to be brought back into the conservatorship were made prior to December 11, 2011, when the order appointing the conservator was entered. Subtracting this amount from the total amount of the Regions

[2] Nothing in this opinion should be interpreted to mean that the attorney-in-fact is immune from liability or that the administrator or executor of Mr. Duke's estate is precluded from bringing an action against Mr. Stephens as attorney-in-fact for conversion, misappropriation of funds, or a similar cause of action if justified.

credit card and American Express charges at issue, which we find to be $18,703.29,[3] we conclude that $9,070.93 is the amount of credit card charges that the special master could have recommended for recovery.

Adding this $9,070.93 to the $26,402.34 withdrawn from the Lincoln Financial account, Mr. Stephens could be required to pay the estate $35,473.27, but only if the trial court adopts these findings in the special master's report. After a hearing, the court "may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." Tenn. R. Civ. P. 53.04(2).

(3)

The conservator also argues that the special master abused her discretion by failing to file with her report the evidence and original exhibits as required by Tenn. R. Civ. P. 53.04(1). Rule 53.04(1) of the Tennessee Rules of Civil Procedure provides as follows:

> The master shall prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and, *unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits.* The clerk shall forthwith mail to all parties notice of the filing.

(Emphasis added). Our Supreme Court has ruled, however, that a special master's failure to file a transcript may be harmless error in certain circumstances. *In re Estate of Tipps*, 907 S.W.2d 400, 403 (Tenn. 1995). In *In re Estate of Tipps*, the Court found that material evidence in the record fully supported the result reached by the lower courts; therefore, the Court deemed "the failure of the master to file a transcript to be harmless error." *Id.*; *see also O'Connell v. Metro. Gov't of Nashville & Davidson Cnty.*, 99 S.W.3d 94, 97 (Tenn. Ct. App. 2002) (discussing the *In re Estate of Tipps* rule).

In the present case, all of the documents referenced in the special master's report appear in the record. The conservator does not argue that any document was unavailable to the trial court for review, only that the special master did not provide them with her report. We conclude that there is material evidence to support the findings in the master's report, and the special master's failure to attach a transcript or other evidence

[3] While we agree that the total amount of the Regions charges was $15,323.55, we find the total American Express charges to be $3,379.74 (rather than $3,939.10, as found by the special master).

was harmless error.

CONCLUSION

For the foregoing reasons, we vacate the trial court's judgment and remand the case to the trial court with directions for the trial court to hold a hearing or clarify that a hearing has already been held. Costs of this appeal are to be assessed against both parties equally, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE