

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JEANNE SAUNDERS and GEORGE)
SAUNDERS,)
)
Appellants,)
)
v.)
)
M. ASHLEY BUTLER, PH.D., as Guardian)
of Claudine B. O'Connor; RICHARD S.)
SCOLARO; MICHAEL MULLARNEY;)
SCOLARO, SHULMAN, COHEN, FETTER)
& BURSTEIN, P.C.; LUTHERAN)
SERVICES FLORIDA, INC., as Emergency)
Temporary Guardian of Thomas F.)
O'Connor; and ERNIE C. LISCH, as)
Guardian of the Property of Thomas F.)
O'Connor,)
)
Appellees.)
_____)

Case No. 2D11-4786

Opinion filed February 13, 2013.

Appeal pursuant to Fla. R. App. P. 9.130
from the Circuit Court for Sarasota County;
Charles E. Williams, Judge.

John J. Waskom of Icard, Merrill, Cullis,
Timm, Furen & Ginsburg, P.A., Sarasota,
for Appellant Jeanne Saunders.

Alfred J. Bennington, Jr. and David J. Markese
of Shutts & Bowen, LLP, Orlando, for
Appellant George Saunders.

Kimberly A. Bald and Brian L. Trimyer of Harllee & Bald, P.A. Bradenton, and Erika Dine of Dine Law, P.L., Sarasota, for Appellee M. Ashley Butler, Ph.D., as Guardian of Claudine B. O'Connor.

No appearance for remaining Appellees.

DAVIS, Judge.

Jeanne Saunders is the daughter of Thomas F. O'Connor and the stepdaughter of Claudine B. O'Connor. She and her husband, George Saunders, challenge the trial court's order granting M. Ashley Butler, Ph.D., as guardian of Claudine B. O'Connor, a temporary injunction in the declaratory action filed by Ms. Butler against the Saunderses and several other named defendants.¹

Thomas and Claudine O'Connor married in 1998.² Both were widowed after the deaths of their first spouses. In 1984, prior to their marriage, Mrs. O'Connor established a revocable living trust, which was subsequently amended in 2002.

Similarly, Mr. O'Connor established a revocable living trust in 1998. The parties also

¹The other named defendants in the declaratory action are not challenging this order and are designated as appellees pursuant to Florida Rule of Appellate Procedure 9.020(g)(2). They are Richard S. Scolaro, an attorney licensed to practice law in the state of New York but not in Florida; Michael Mullarney, an insurance agent who is a named successor trust protector in the Thomas F. O'Connor 2008 trust; the Scolaro, Shulman, Cohen, Fetter & Burstein, P.C., law firm, which has offices in New York and Florida and is authorized to conduct business in Florida; Ernie C. Lisch, an attorney licensed in the state of Florida and appointed to be the plenary guardian of the person of Thomas O'Connor; and Lutheran Service Florida, Inc., a Florida nonprofit corporation that was appointed temporary guardian of Thomas O'Connor prior to the appointment of Mr. Lisch.

²Due to the procedural posture of this action, most of the facts are culled from the verified allegations that were before the trial court at the time the order imposing the injunction was rendered. Other details are gleaned from the pleadings and orders contained in the record.

executed a prenuptial agreement in which they not only expressed their desire to individually retain their separate property but also listed Mrs. O'Connor's assets at the time as \$17,704,386.83 and Mr. O'Connor's as \$1,100,942.00. This agreement was amended in 2002, reaffirming that the property individually owned by each would remain separate.

In 2005, the Scolaro law firm prepared additional revocable trusts for both Mr. and Mrs. O'Connor, individually. These trusts, however, did not revoke either Mrs. O'Connor's 1984 trust or Mr. O'Connor's 1998 trust. Rather, these new trusts were in addition to the original trusts. These trusts were amended in 2008 and are designated as the 2008 Trusts.

After twelve years of marriage, a petition for incapacity was filed against Mrs. O'Connor by the Department of Children and Family Services. On March 23, 2011, a hearing was held on the Department's motion for the appointment of an emergency temporary guardian for Mrs. O'Connor, at which the trial court took testimony regarding her lack of capacity. At the conclusion of that hearing, the trial court determined that Mrs. O'Connor lacked capacity and appointed Ms. Butler as her temporary guardian. A member of the Scolaro law firm was present in the courtroom for the hearing. Following the hearing, the attorney went to the home of Mr. and Mrs. O'Connor with trust amendments and new wills for the parties to execute. However, after Ms. Butler arrived at the home, these documents were not executed. The newly drafted documents would have altered Mrs. O'Connor's testamentary plan in that the new documents deleted her grandchildren as beneficiaries as well as the charities which had been included in her beneficiaries for many years. Additionally, Mr.

O'Connor was added as a substantial beneficiary, and the Scolaro law firm was named as the trustee of Mrs. O'Connor's trust upon her death or incapacity. The proposed trust for Mr. O'Connor was an irrevocable trust, of which the Scolaro law firm would have been named trustee and trust protector.

At the final hearing on Mrs. O'Connor's incapacity, the trial court found that she was incapacitated and thus appointed Ms. Butler as plenary guardian for the wife on April 29, 2011. In the petition seeking the appointment of an emergency temporary guardian for Mrs. O'Connor, the Department alleged that she was "susceptible to being exploited either financially and/or physically" and that "[h]er husband, Thomas O'Connor, was very threatening and tried to keep his wife from speaking with Petitioner."

The Department also filed a petition for incapacity against Mr. O'Connor, resulting in the trial court appointing Ernie C. Lisch as Mr. O'Connor's plenary guardian. In its petition alleging Mr. O'Connor's incapacity, the Department alleged the following:

He lacks insight and judgment in managing his own affairs. Household members and caregivers in the home providing care to Mr. O'Connor's wife report that he is very confused. Jean[ne] Saunders (daughter) is his power of attorney and Jean[ne] and George Saunders are constantly badgering Mr. O'Connor and cause him to decompensate. It is believed that Jean[ne] and George Saunders may have misappropriated some funds from Mr. O'Connor. Mr. O'Connor is susceptible to the influence of others and guardianship is needed to make sure that all of his day-to-day matters (personal, health, and financial) are managed and protected.

Upon accepting the appointment as Mrs. O'Connor's guardian, Ms. Butler began to marshal her ward's assets and became concerned as to the whereabouts of certain funds previously owned by Mrs. O'Connor's trust. Specifically, Ms. Butler was

unable to account for more than \$6 million of assets originally owned by Mrs. O'Connor. Further, based on the information she could gather, Ms. Butler suspected that many of these assets had been transferred to Mr. O'Connor's family members or into accounts held in the name of Mr. O'Connor's 1998 trust. This concern led Ms. Butler to file a complaint for a declaratory decree, asking the trial court to determine who owned these funds titled in the name of Mr. O'Connor's trust but alleged to be the property of Mrs. O'Connor.

After filing the declaratory action, Ms. Butler filed her verified petition seeking a temporary, emergency injunction against Jeanne Saunders, George Saunders, the Scolaro law firm, individual members of the Scolaro law firm, and Ernie C. Lisch. By the petition, Ms. Butler asked that an ex parte order be entered enjoining the named defendants from "withdrawing, disbursing, investing, or otherwise transferring any trust assets of Thomas F. O'Connor maintained at Benjamin F. Edward & Co., including without limitation the assets titled in the name of Thomas' 1998 trust." Ms. Butler also sought the suspension of Mrs. Saunders as the trustee of her father's 2008 trust; an injunction enjoining Mr. Saunders and the Scolaro law firm, including Mr. Scolaro individually, from acting as trustees of Mr. O'Connor's 2008 trust; an injunction enjoining the named defendants from exercising power as trust protector of Mr. O'Connor's 2008 trust or naming any successor trustees or trust protectors; and the appointment of Mr. Lisch as special fiduciary to administer Mr. O'Connor's 2008 trust until further order of the court.

Based on the allegations included in Ms. Butler's verified petition, on May 31, 2011, the trial court granted her petition for an emergency temporary injunction

without notice to the defendants or a hearing. The injunction also required that Mr. Lisch, a named defendant, post a security bond in the amount of \$50,000.

On June 8, 2011, Mrs. Saunders sought removal of the case to federal court. The federal court, however, remanded the case back to state court on September 19, 2011. On November 18, 2011, Ms. Butler filed a motion to modify the order appointing the special fiduciary to allow Mr. Lisch, as Mr. O'Connor's guardian and the special fiduciary controlling his assets, to access the funds necessary to provide for Mr. O'Connor's care and welfare.

At the January 10, 2012, hearing on the motion to modify, Mrs. Saunders agreed that the injunction should be modified to allow Mr. Lisch the necessary access to the funds, but she added that the order should also be modified to delete the requirement that Mr. Lisch provide a \$50,000 bond and instead require Ms. Butler to post a \$250,000 security bond. Mrs. Saunders also sought permission to act as trustee of her father's 2008 trust upon her posting of a \$200,000 bond. Finally, Mrs. Saunders represented that she would be filing a motion to dissolve the temporary injunction within the next few days. Following the hearing, the trial court modified the injunction to allow Mr. Lisch to take control of the Benjamin F. Edwards & Co. assets titled in the name of Mr. O'Connor's trust for the purpose of providing for Mr. O'Connor's care and living expenses and to pay attorneys' fees for representation of Mr. O'Connor and Mr. Lisch in his capacity as Mr. O'Connor's guardian.

On January 20, 2012, Benjamin F. Edwards & Co. filed a motion for clarification of the order granting Mr. Lisch access to the funds it held. A hearing was held on the motion, and again, Mrs. Saunders represented that a motion to dissolve the

temporary injunction would be immediately filed. Her attorney argued that the court had exceeded its authority in entering the injunction and in appointing Mr. Lisch as special fiduciary of Mr. O'Connor's assets. Anticipating that the matter would be resolved by the motion to dissolve the injunction, on February 8, 2012, the trial court entered its order vacating that portion of the January 10, 2012, order granting Mr. Lisch access to the funds. The court also denied Benjamin F. Edward's motion as moot.

True to the representations she made to the court, Mrs. Saunders did file her motion to dissolve the injunction, and she set the motion for hearing on February 9, 2012. However, on the evening of February 8, 2012—after the entry of the order rescinding Mr. Lisch's access to Mr. O'Connor's funds—Mrs. Saunders withdrew her motion to dissolve the injunction. This appeal then proceeded.³

On appeal, Mr. and Mrs. Saunders raise several issues regarding the procedure followed in entering the injunction, the scope of the injunction, and the appropriateness of removing Mrs. Saunders as trustee of Mr. O'Connor's 2008 trust.

First, Mr. and Mrs. Saunders argue that the trial court did not have the sufficient evidence to allow it to issue an emergency ex parte, temporary injunction. We disagree. Mr. and Mrs. Saunders argue that the trial court had no factual basis to enter the injunction because the complaint was not verified and no evidentiary hearing was held. Contrary to the representations made at oral argument by counsel for Mr. and Mrs. Saunders, the trial court did have sworn testimony to consider in the form of the verified motion for the ex parte injunction. These allegations are sufficient to provide the

³The notice of appeal was actually filed on September 26, 2011. Upon motion of the parties, this court relinquished jurisdiction so that the February 9, 2012, hearing could be held. With the withdrawal of the motion to dissolve the injunction, this appeal proceeded in this court.

trial court with a factual basis on which to enter the emergency temporary, ex parte injunction. See Salamon v. Karan Munuswamy, M.D., P.A., 566 So. 2d 899, 900 (Fla. 4th DCA 1990) ("While it certainly would have been most appropriate for the complaint to have contained the necessary allegations for injunctive relief, it appears that, under the circumstances of this case, such supplementary relief can be sought by verified motion. In the present case, the verified motion . . . fulfill[ed] the pleading requirements for a temporary injunction." (citation omitted)). Furthermore, the veracity of the allegations was subject to challenge by a motion to dissolve the temporary injunction. We therefore conclude that Mr. and Mrs. Saunders are not entitled to relief based on this argument.

Mr. and Mrs. Saunders also argue, however, that the trial court's order is deficient in that it fails to make factual findings as to each of the four elements the moving party must establish in order to obtain a temporary injunction. With this argument, we must agree. See Randolph v. Antioch Farms Feed & Grain Corp., 903 So. 2d 384 (Fla. 2d DCA 2005). As noted in Randolph, the trial court has an "obligation to state sufficient factual findings in support of each element entitling a party to a temporary injunction." Id. at 385. Like the order in Randolph, the order on review in the instant case "omits any recitation of facts justifying a finding (1) that the plaintiff[] will suffer irreparable harm absent the entry of the injunction; (2) that no adequate legal remedy exists; (3) that the plaintiff[] enjoy[s] a clear legal right to the relief sought; and (4) that the injunction will serve the public interest." Id. This omission of factual findings by the trial court requires us to reverse the injunction and remand for further proceedings. On remand, the trial court must either make the factual findings required

or dissolve the injunction. See Seashore Club of Atl. City, Inc. v. Tessler, 405 So. 2d 767, 768 (Fla. 4th DCA 1981).⁴

The reversal of the trial court's order based on its lack of factual findings is not to be considered as a conclusion by this court that the allegations of the verified motion are not legally sufficient to support the entry of the emergency ex parte temporary injunction but only that the order is facially insufficient due to the lack of factual findings.⁵

Reversed and remanded.

ALTENBERND and KELLY, JJ., Concur.

⁴Because we are reversing on this basis, we need not address the other arguments raised by Mr. and Mrs. Saunders.

⁵We note that had the motion to dissolve the temporary injunction been filed and litigated immediately after the entry of the injunction in May 2011, many of the issues raised on appeal already would have been resolved.