

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JUN 23 2003

PATRICIA PRESLEY, COURT CLERK
by Deputy

OKLAHOMA DEPARTMENT OF
SECURITIES *ex rel.*, IRVING L.
FAUGHT, ADMINISTRATOR

Plaintiff,

v.

ACCELERATED BENEFITS
CORPORATION, *et al.*,

Defendants.

Case No. CJ-99-2500-66

Supreme Court
Case No. 98854

**CONSERVATOR'S MOTION TO SUPPLEMENT
DESIGNATION OF RECORD FOR APPEAL AND BRIEF IN SUPPORT**

COMES NOW, Conservator Tom Moran, by and through his attorneys, and moves this Court for an order permitting the Designation of Record for Appeal in Oklahoma Supreme Court Case No. 98854 to be supplemented as provided in Rule 1.28(b) to include: (1) Defendants' Motion for Stay of Enforcement of Sale Order filed February 21, 2002 ("Defendants' Motion to Stay"); (2) the Conservator's Application for Approval of Purchase Contract with Infinity Capital Services (the "Conservator's Application") filed February 26, 2003; (3) the Order of this Court entered March 12, 2003, granting the Conservator's Application and denying Defendants/Appellants' Motion to Stay (the "Order Approving the Infinity Contract"); and (4) the Conservator's Report to the Court Regarding Closing on the Sale of Conservatorship Assets filed June 3, 2003. In support of his Motion the Conservator states as follows:

BRIEF IN SUPPORT

On February 12, 2003, Defendants filed a Petition in Error and Designation of Record with the Oklahoma Supreme Court Case No. 98854, challenging this Court's

Order Approving Sale of Conservatorship Assets entered January 16, 2003, and Order Modifying the Court's Order Approving Sale of Conservatorship Assets entered January 24, 2003 (collectively, the "Order Approving the Sale"). On March 3, 2003, the Conservator filed his Response to Petition in Error in Case No. 98854, but did not file a Counter-Designation of Record because the record as designated by Defendants/Appellants was complete at that date.

After the Petition in Error was filed, the Conservator's Application and Defendants' Motion to Stay were filed, and this Court entered the Order Approving the Infinity Contract on March 12, 2003. The Conservator consummated the sale of the Conservatorship Assets to Infinity on March 24, 2003, and filed his Report to the Court Regarding Closing on the Sale of Conservatorship Assets on June 3, 2003 (the "Report on the Sale"). Importantly, the Report on the Sale states in pertinent part that Infinity has (1) tendered all sums as due under the Infinity Contract; (2) assumed payment of all monthly premiums and servicing costs for the viatical policies; and, as of that date, (3) paid approximately \$4,300,000 in escrow funds, premiums and servicing costs under the Infinity Contract.

As noted by the United States Supreme Court in *Board of License Commissioners of the Town of Tiverton v. Pastore*, 469 U.S. 238, 240, 105 S.Ct. 685, 686 (1985), counsel have a "continuing duty to inform the Court of any development which may conceivably affect the outcome" of the litigation, particularly when the development may deprive the Court of jurisdiction. Similarly, the Oklahoma Supreme Court has recognized that it may take cognizance of facts arising during the pendency of an appeal if such facts have a direct impact on the issues tendered for review. *See Northeast Oklahoma Electric Cooperative, Inc. v. State of Oklahoma ex rel*

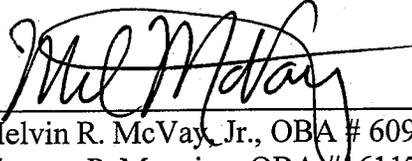
Corporation Commission, 1991 OK 28, 808 P.2d 680, 683 fn. 6; *City of Tulsa v. Chamblee*, 1940 OK 431, 106 P.2d 796, 797-98.¹ In fact, in *City of Tulsa*, the Oklahoma Supreme Court further stated that facts occurring during the pendency of the appeal are particularly noteworthy where they affect the right and duty of the Court to proceed in the exercise of its appellate jurisdiction. *Id.* at 798. Under such circumstances, Supreme Court Rule 1.28(b) permits materials not before the trial court at the time of the decision appealed to be included in the record on appeal pursuant to an order of the trial court.

In the current case, the Conservator's Application, the Defendants' Motion to Stay, the Order Approving the Infinity Contract and the Conservator's Report on the Sale directly impact the Supreme Court's jurisdiction of the subject appeal because the consummation of the sale has rendered the appeal moot. Accordingly, the Conservator has a duty to inform the Supreme Court of these facts and this Court's Order approving the Infinity Contract. Therefore, the Conservator seeks this Court permission to supplement the record in Oklahoma Supreme Court Case No. 98854 to include: (1) the Conservator's Application; (2) Defendants' Motion to Stay; (3) the Order Approving the Infinity Contract; and (4) the Conservator's Report.

¹ Similarly, under 12 Okla. Stat. § 990.2(B) the successful party to a post-trial "motion to correct, open, modify, vacate or reconsider" must to advise the Supreme Court of the action taken on such motion, although that section is not directly applicable to the pleadings at issue here.

CONCLUSION

For the reasons stated herein, the Conservator hereby requests that its Motion to Supplement Designation of Record for Appeal be granted as set forth herein.



Melvin R. McVay, Jr., OBA # 6096

Thomas P. Manning, OBA #16117

PHILLIPS McFALL McCAFFREY

McVAY & MURRAH, P.C.

Twelfth Floor, One Leadership Square

211 N. Robinson

Oklahoma City, OK 73102

Telephone: (405) 235-4100

Facsimile: (405) 235-4133

Attorneys for Conservator Tom Moran

CERTIFICATE OF MAILING

This is to certify that on the 23rd day of June, 2003, a true and correct copy of the foregoing document was mailed via First Class Mail, postage pre-paid to:

Eric S. Eissenstat
Dino E. Viera
Brent M. Johnson
Fellers, Snider, Blankenship, Bailey & Tippens
100 North Broadway, Suite 1700
Oklahoma City, OK 73102-8820

Patricia A. Labarthe
Oklahoma Department of Securities
First National Center, Suite 860
120 North Robinson
Oklahoma City, OK 73102

Clerk of the Supreme Court
of the State of Oklahoma
State Capitol, Room B-2
2300 N. Lincoln
Oklahoma City, OK 73152

Patricia Presley, Court Clerk
320 Robert S. Kerr, 4th Floor
Oklahoma City, OK 73102



Mark Malby