



*“Is there a legal solution to this family’s crisis?”*

## Is Conservatorship What Is Needed? Here’s Help in Figuring It Out

Debilitating mental illnesses such as major depression, bipolar disorder and others often drive families to the attorney’s office. Why? Isn’t this more a medical than legal issue? Patients suffering mental illness are sometimes in denial of dangerous symptoms and refuse treatment, or they are so incapacitated by the illness that they suffer self-neglect.

For example, John Smith<sup>1</sup> graduated from UT with a master’s degree and enjoyed a successful career. Family reports that he experienced a first-ever psychotic episode at age 55 during which he walked into traffic and was struck by a car. Fortunately, he survived with only minor injuries. Following an involuntary psychiatric hospitalization and good medication management, his mood and behavior stabilized.

Now at age 68, he has stopped taking his medication, and his mood has begun to vacillate between hopelessness and elation. He is able to communicate, but his speech is labored. Medical professionals believe Mr. Smith probably had a stroke two years ago. He has no heat in his house (recent temperature at night was 21° F), bills are piling up, and his mortgage company is threatening foreclosure. Family reports that garbage is strewn throughout his home, moldy food is left lying about, and his refrigerator is nonfunctional. He reasons that it’s so cold in his house he doesn’t need a refrigerator. Bathing is difficult for him and he has lost weight because he is not eating regular meals. He says he has little need for sleep. He has fallen numerous times and describes bruises all over his body.

Is there a legal solution to this family’s crisis? This gentleman has been evaluated, tested, hospitalized and medicated, but care coordination is non-existent. Based on the facts presented, he is at risk of dying just as Juanita Goggins

died, alone and frozen in her home.<sup>2</sup> What legal solutions should we consider? Is conservatorship appropriate? Will he cooperate and accept residential care?

Mr. Smith’s case illustrates an all too common problem for older adults: untreated mental illness. Statisticians tell us that one in four adults (over age 18) suffers from a mental disorder. Major depressive disorder is the leading cause of disability in the United States for adults aged 15-44. Estimates of prevalence in older adults range from 2 to 10 percent for those over age 65. Bipolar disorder affects about 2.6 percent of the U.S. population. Also known as Manic Depressive illness, it is considered a growing public health problem responsible for 8 to 10 percent of late-life psychiatric admissions.

While conservatorship may be necessary, conservatorship alone will not make Mr. Smith magically start to take care of himself or willingly submit to ongoing treatment. What *will* make a difference in his life are good medical treatment, structured care — such as in an assisted living facility — and effective behavior management techniques applied by a family willing to learn what works and what doesn’t work when dealing with mood disorders and self-neglect.

If we pursue conservatorship, what are our chances of winning? If Mr. Smith gets treatment and takes his medication during the pendency of the proceeding,

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won't we ultimately lose the case because he has (temporarily) regained capacity? This is the frustrating conundrum faced by many families who seek an attorney's counsel for conservatorship.

Conservatorship proceedings evolved from English common law in which the King exercising "parens paritea" protected the "insane." Prior to 1993, the Tennessee conservatorship statute protected the "incompetent." That changed with an overhaul of the statute in 1993. Now the statute does not mention the word "incompetent" and this term should be avoided. Instead, the statute requires a showing that the respondent is "disabled" or "incapacitated." The trial court must balance the person's right to personal autonomy versus the state's interest in protecting the person.

### *Groves* is a must-read

The conservatorship statute gives little guidance as to the petitioner's burden of proof other than the requirement that the petitioner prove disability by "clear and convincing" evidence. However, the court of appeals fleshed out the burden of proof in 2003, *In Re Conservatorship of Groves*.<sup>3</sup> *Groves* is a must-read for any attorney involved in a conservatorship.

The *Groves* court explained that the threshold question in a conservatorship is whether the respondent is disabled or incapacitated. Then, the trial court must determine:

1. whether the respondent is fully or partially disabled or incapacitated,
2. whether the disability is permanent or temporary, *and*
3. whether the respondent requires full or partial supervision of the court.

If the answers to those questions establish a need for a conservator, then an order *must* be entered appointing a conservator and specifying the rights to be removed.

So, what does it mean to be "disabled" or "incapacitated?" Incapacity

is the legal status when a person's autonomy is totally or partially impaired. Capacity has two components:

- *Functional capacity* is the respondent's ability to perform activities of daily living (ADLs) and instrumental activities of daily living (IADLs).
- *Decision-making capacity* is the respondent's ability to make decisions regarding her person and property and communicate those decisions.

To determine *functional capacity*, the trial court must examine the person's ability to perform the following ADLs: bathing/grooming, dressing, toileting, transferring (bed to chair), continence, and self-feeding. The IADLs are more complicated and include but are not limited to the following: finding and utilizing resources, driving or arranging travel, preparing meals, shopping, doing housework, managing medication, and managing finances. In other words, is the person able to care for herself?

*Decision-making capacity* involves the person's ability to take in and understand information, process information in accordance with her personal values and goals, make a decision based on the information, and communicate the decision to others. A person lacks capacity when she lacks the ability to absorb information, understand the implications of the information, correctly perceive the environment, understand the relationship between her desires and actions, or control her behavior. The trial court must focus on whether the person's disability or incapacity will lead to waste or dissipation of assets over time.

A person's capacity, especially a person with dementia, is often fluid. There are good days and bad days. Capacity is often affected by the time of day, place and social setting as well as family and community support. For example, a simple urinary tract infection may cause a person with dementia to be functionally incapacitated, but with treatment functional capacity is restored.

Capacity is also task specific. A person may not be physically able to pay bills but may be able to decide where he wants to live, if or when he wants to marry, how he wants to vote, and medical treatment he will accept or reject. When a person suffers from impaired capacity, public policy (*parens patriae*) justifies court intervention to protect the person from harm. The court is required to create an order removing only those rights necessary to impose the least "restrictive alternative."

In Mr. Smith's case, he is unable to care for himself or make decisions regarding his property because of his medical condition and how that medical condition affects his functioning. It is possible that if Mr. Smith were in a supportive living environment (such as assisted living) with good medication management, he would regain some level of capacity. If he regains capacity, then he may sign a power of attorney and revocable trust. Those documents may be the "least restrictive alternative" for Mr. Smith and enable a family member to assist him with bill paying.

However, if Mr. Smith has a pattern of behavior such that he is non-compliant with medications resulting in self-neglect or exploitation, a conservatorship may be necessary to protect Mr. Smith from himself or others. In the next article, we will discuss difficult conservatorship cases, in which trial courts made tough decisions as they balanced the respondent's personal autonomy with the state's interest in protecting that person from harm. 🏠

### Notes

1. Mr. Smith is a fictional composite character for illustration purposes but based on past experience.
2. See Senior Moments, *Tenn. Bar J.*, June 2010 and November 2010.
3. *In Re Conservatorship of Groves*, 109 S.W. 3d 317 (Tenn. Ct. App. 2003).