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Conservatorship Is a Balancing Act of Autonomy, Protection

Conservatorship cases present unique challenges for families and courts. The court must balance the individual’s right to personal autonomy and the state’s interest in protecting that individual. The removal of personal liberties must be decided based upon “clear and convincing” evidence. There are necessarily gray areas where

convincing evidence may be a matter of subjective opinion. What evidence is so compelling as to convince the court that an individual no longer has the right to make a bad decision?

The conservatorship court’s fact-finding mission should include a detailed analysis of whether the person suffers from a physical or psychological disability of such severity that the court’s assistance is needed. In determining disability, an evaluation of the person’s functional and decision-making capacities must be made. Functional capacity refers to the respondent’s ability to independently perform activities of daily living such as bathing/grooming, dressing, toileting, transferring and self-feeding. Functional capacity also includes the person’s ability to perform instrumental activities of daily living such as driving or arranging travel, preparing meals, shopping, doing housework, managing medication and managing finances. Decision-making capacity is the respondent’s ability to take in and process information in accordance with personal goals and values, weigh the risks and benefits and evaluate putative consequences, make decisions about that information and communicate those decisions.

There are only a handful of Tennessee appellate cases that give the practitioner insight as to when a court will make a finding of disability or incapacity. One case involved a 36-year-old mentally ill daughter and her loving, tenacious

parents. In *The Case of Conservatorship of Helen E. Jewell a/k/a Lisa Jewell*, No. M2008-02621-COA-R3-CV, Dec. 4, 2009, the court of appeals affirmed the trial court’s finding that Ms. Jewell was a disabled person who needed the court’s assistance. In that case, Lisa Jewell, an intelligent woman with a masters degree, suffered from schizoaffective disorder. People with this condition experience a combination of clinical symptoms associated with schizophrenia, such as hallucinations or delusions, and mood disorder symptoms, such as mania or depression. As a result of her mental illness, Jewell suffered from severe self-neglect and would deliberately put herself in harm’s way, incurring inexplicable injuries.

Jewell’s parents aggressively sought treatment for her. Unfortunately, she refused treatment, refused to take her medicine, and abused alcohol, further compromising her mental and physical health. The evidence showed that she lived in filth, refused to eat and placed herself in harm’s way by actions such as walking into traffic. The petitioning parents offered the depositions of five physicians and the testimony of three lay witnesses. Based on that evidence, the trial court found that Lisa, while intelligent and educated, had no insight into the severity of her illness, the squalor of her living conditions, or the effect of alcohol in relation to her illness.

The trial court found that Lisa’s extreme living conditions demonstrated her inability to make reasonable deci-

sions about her psychological, physical, and environmental needs. In other words, she lacked decision-making capacity. The evidence demonstrated that she lacked functional capacity because she refused to take her medicines, did not bathe, refused to eat, failed to maintain a reasonable living environment or manage her finances. On appeal, Jewell argued that two of the doctors' affidavits were deficient because those doctors were not her "treating" physicians, and they had not performed "real" examinations of her. The court of appeals held that the trial court did not err in accepting the two "non-treating" doctors' affidavits. Based upon the evidence, Jewell's conservatorship was upheld.

In a 1999 conservatorship, the court of appeals reversed the trial court's decision to appoint a financial conservator for an elderly gentleman, finding that although he was physically disabled because of a stroke, he did not need the court's supervision. In the *Matter of the Conservatorship of Edward Leo Gray*, 1999 WL 23906 (Tenn. Ct. App.). Gray was a 78-year-old retiree from TVA. Because of his shrewd investing, he had accumulated more than \$800,000. One event in particular precipitated the filing of the conservatorship petition: Gray climbed aboard his scooter and rode down to the bank to cash in \$150,000 in CDs because he wanted to invest in computer stocks. The bank officer was so alarmed for his safety that she called the police. Gray was hospitalized, pursuant to an involuntary commitment, for the next 12 days.

During his hospitalization, Gray "passed" all of the psychological testing and showed no signs of dementia, according to the treating physician. The trial court found that Gray had capacity to manage his finances; however, because of his physical limitations, he needed a conservator to handle his

estate. The court of appeals disagreed.

The appellate court noted that while Gray required assistance, it was not apparent that the assistance must include a conservator. The court characterized as "isolated" several incidents in which he dismissed caregivers, refused to take his medication, threatened to kill himself, and accused the staff at his assisted living facility of trying to poison him. These incidents were merely indicative of the difficulty of Gray's situation, according to the appellate court, which viewed Gray as a successful retired man struggling to maintain his independence. The court stated: "He found himself between a rock and a hard place, and the decisions he made, however unwise, resulted from the lack of better alternatives, not from some fundamental deficiency in his mental processes." The court recognized that although Gray's condition may have deteriorated since the initial conservatorship hearing, he was still entitled to have the conservatorship dismissed because at the time that judgment was entered, Gray had capacity to handle his financial affairs.

The Gray case is one in which the appellate court was clearly sympathetic to the respondent, a man disabled by a stroke but still struggling to remain engaged and in control of his financial affairs. The court favored Gray maintaining his personal autonomy over any threats to his physical and financial well-being.

Important considerations when disability is challenged:

- Know your territory: Become educated regarding the client's diagnosed illness and its impact upon the client's functioning. These are not "WebMD" research projects. Seek the counsel of experienced mental health experts and substantive, scholarly books and articles in preparing the case.

- Impress the trial court with several experts' testimony regarding the respondent's disability and need for the court's protection.
- Present testimony of multiple lay witnesses regarding how the disability affects the respondent's daily life.¹
- Prove that a conservatorship is the least restrictive alternative because either the respondent does not have valid estate planning documents such as a power of attorney and revocable trust, or the respondent lacks capacity to sign such documents.²
- Consider a neutral financial conservator if family members are at war over who should manage the money.³
- Remind your clients from the start that a Conservatorship does not solve the behavioral challenges presented. Provide them with clear instructions and referrals to competent, effective, supportive professionals to promote the best possible outcome for all involved. 

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Notes

1. Lay testimony may be relied upon by the trial court as proof of disability. *In Re Davenport*, 2005 WL 3533299 (Tenn.Ct.App..)

2. In the *Matter of the Conservatorship of Donald E. Todd*, No. E2009-02346-R3-CV, June 14, 2010.

3. A neutral financial conservator was appointed in *Todd, Davenport, Gray* and *In Re: Conservatorship of Goldie Childs*, No. M2008-02481-COA-R3-CV, Jan. 5, 2011.