

TENNESSEE JUDICIAL CONFERENCE

WHAT ARE YOU SIGNING?

March, 2014

Judge Randy Kennedy

Circuit Court, Division VII

In Small Estate Proceedings, before you sign the Order; be familiar with T.C.A. § 30-4-101 et seq. and consider the following:

- a. What is the Affiant's relationship to the Estate and has the Affiant listed all Heirs at Law and Will Beneficiaries, if applicable; (in cases where decedent had a Will, has it been filed with the Affidavit)?
 - b. Does the affidavit reflect that the heirs and Will beneficiaries (if applicable) have been duly and properly notified of the hearing?
 - c. Has the affiant properly listed all known assets and known debts of decedent, and is the total monetary amount of assets reflected in the estate consisting only of personal property not in excess of \$25,000?
 - d. Is the Affidavit sworn to by the affiant?
 - e. Does the proposed Order granting the affiant authority to act on behalf of the estate grant any authority to do anything not contemplated by the statute on Small Estates?
1. In all other cases involving the Administration of Decedents' Estates; before signing an Order Opening an Intestate Estate or Order Admitting Will To Probate, consider the following:
- a. Does the original pleading, (Complaint or Petition) provide you with sufficient information pursuant to T.C.A. §30-1-117 to begin the Administration of the Estate, or to appoint a Personal Representative?
 - b. Does the Order to appoint the Administrator or Executor reflect a waiver of Bond without complying with T.C.A. §30-1-201?
 - c. Are the Prayers for Relief in the Petition and any supporting documentation consistent with the proposed Order's language as to Inventory and Accounting requirements?

- d. Does the Order Appointing Administrator or Order Admitting Will also grant authority to the Personal Representative to sell Real Property? If so, what supporting documentation (i.e., language in a Will or Codicil, Consent and Waivers from all Heirs at Law, and/or Will Beneficiaries) or testimony has been presented to you that grants that authority to the Personal Representative?
 - e. If the Petition seeks to Probate a Will, has the Petitioner presented the Original or just a copy for you to admit to Probate?
 - f. Because it is rarely appropriate to accept a Copy of a Will and to treat it as an Original, has the Petitioner properly pled his case pursuant to T.C.A. §32-4-106 (Petition to Establish Lost Will)?
3. In Conservatorship Proceedings calling for Emergency Relief, before signing an Order appointing an Emergency Temporary Conservator or appointing an Expedited Limited Healthcare Fiduciary, read T.C.A. §34-1-132 and T.C.A. §34-1-133 and consider the specifics set forth in the following attachments:
- a. Does the Petition establish that this is really a case for emergency relief, or should this case be presented to you as a traditional conservatorship?
 - b. Does the proposed Order contain the required language reflecting findings of fact by the court regarding **substantial harm** to the Respondent?
 - c. Does the proposed Order expressly find that no other person appears to have authority to act, is willing to act, or is acting on behalf of the Respondent?
 - d. Because Time Limits are Mandatory, can a Hearing be set within five days regarding the appropriateness of the emergency appointment; and do you have a lawyer available to be appointed as an Attorney ad Litem?
 - e. Does the Petition and the accompanying testimony at the initial hearing satisfy the statutory requirements for detailed information in T.C.A. §34-3-104 (i.e., felony or misdemeanor convictions by petitioner, or proposed Conservator) to satisfy the court that the person being appointed as a Conservator is the proper person to serve in a fiduciary capacity for the respondent?
 - f. Does the proposed Order set forth the Enumerated Powers that are being transferred to the Conservator in compliance with T.C.A. § 34-3-107? If not, do you have a form Order that can be utilized by you in your court (see attached)?

EMERGENCY TEMPORARY CONSERVATOR/GUARDIAN § 34-1-132

SUBSECTION A:

1) PETITION FILED BY PERSON INTERESTED IN PERSON'S WELFARE

2) IMMEDIATELY COURT MUST:

- appoint attorney ad litem

3) NOTICE MUST BE GIVEN OF TIME/PLACE OF HEARING

- to respondent
- to any other person the court directs

EXCEPTION TO NOTICE REQUIREMENT SUBSECTION B:

IF:

- 1) petition is sworn **AND**
- 2) court finds that respondent will be substantially harmed before a hearing on the appointment can be held

THEN:

- 1) court may appoint emergency guardian/conservator
- 2) does not have to give notice to respondent or attorney ad litem

BUT:

If court does appoint one without notice:

1) WITHIN 48 HOURS of appointment: Respondent must be given notice

2) WITHIN 5 DAYS of appointment: Hearing must be held on appropriateness of the appointment

TIME LIMITS ARE MANDATORY - FAILURE TO COMPLY VOIDS THE APPOINTMENT & REMOVES ALL POWERS GRANTED (SUBSECTION E)

4) AT HEARING, IF COURT FINDS:

1) **SUBSTANTIAL HARM**: compliance with procedures of normal conservatorship will **LIKELY** result in **SUBSTANTIAL** harm to respondent's health, safety, or welfare

2) **NO OTHER OPTION**: NO OTHER PERSON appears to have authority to act, is willing to act, or is acting in best interests of respondent in the circumstances
this includes: acting as agent for healthcare, DPOAHC, living will

5) THEN COURT CAN:

- 1) Appoint an emergency guardian or conservator
TIME LIMIT: authority may not exceed sixty (60) days
POWER LIMIT: only the powers specified in the order.

THIS APPOINTMENT IS NOT A DETERMINATION OF INCAPACITY (SUBSECTION C)
TEMPORARY GUARDIAN/CONSERVATOR CAN BE REMOVED BY COURT AT ANY TIME (SUBSECTION D)
COURT MAY APPOINT GUARDIAN AD LITEM TO INVESTIGATE CIRCUMSTANCES (SUBSECTION D)
IN ALL OTHER RESPECTS, CONSERVATOR/GUARDIAN STATUTES APPLY TO TEMPORARY G/C

§ 34-1-132

(a) If the court finds that compliance with the procedures of this title will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person, including an agent acting under the Health Care Decision Act compiled in title 68, chapter 11, part 18, or a person acting under the Durable Powers of Attorney for Healthcare Act, compiled in chapter 6, part 2 of this title or a living will pursuant to title 32, chapter 11, appears to have authority to act, willingness to act, and is acting in the best interests of the respondent in the circumstances, then the court, on petition by a person interested in the respondent's welfare, may appoint an emergency guardian or conservator whose authority may not exceed sixty (60) days and who may exercise only the powers specified in the order. Immediately upon receipt of the petition for an emergency guardianship or conservatorship, the court shall appoint an attorney ad litem to represent the respondent in the proceeding. Except as otherwise provided in subsection (b), reasonable notice of the time and place of a hearing on the petition shall be given to the respondent and any other person as the court directs.

(b) An emergency guardian or conservator may be appointed without notice to the respondent and the attorney ad litem only if the court finds upon a sworn petition that the respondent will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian or conservator without notice to the respondent, the respondent shall be given notice of the appointment within forty-eight (48) hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within five (5) days after the appointment.

(c) Appointment of an emergency guardian or conservator, with or without notice, is not a determination of the respondent's incapacity.

(d) The court may remove an emergency guardian or conservator at any time. The court may appoint a guardian ad litem to investigate the circumstances. An emergency guardian or conservator shall make any report the court requires. In other respects, the provisions of this title concerning guardians or conservators apply to an emergency guardian or conservator.

(e) The time periods set forth above in this section are mandatory and not directory. Failure to comply with those provisions shall void any emergency appointment and remove the authority previously granted to an emergency fiduciary.

EXPEDITED LIMITED HEALTHCARE FIDUCIARY § 34-1-133

SUBSECTION A:

1) IF RESPONDENT IS HOSPITALIZED (*statute refers to definition in another statute*)

AND PETITION FILED BY PERSON INTERESTED IN PERSON'S WELFARE

2) IMMEDIATELY COURT MUST:

- appoint attorney ad litem

3) IF COURT FINDS:

1) **NO OTHER OPTION:** NO OTHER PERSON appears to have authority to act, is willing to act, or is acting in best interests of respondent in the circumstances
this includes: acting as agent for healthcare, DPOAHC, living will

NOTE: Court CAN vary time limits in statutes for guardianships/conservatorships for hearings in order to expedite this appointment

NOTE: Court CANNOT vary requirements necessary to determine need of the fiduciary

4) THEN COURT CAN:

1) Appoint an **expedited limited healthcare fiduciary**

TIME LIMIT: authority may not exceed sixty (60) days

POWER LIMIT: authority is for the limited purpose of

- consenting to discharge, transfer, and admission and
- consenting to any financial arrangements or medical care necessary to affect such discharge, transfer or admission to another healthcare facility

5) **HEARING MUST BE HELD WITHIN FIVE DAYS OF APPOINTMENT** (SUBSECTION B)

- to determine appropriateness of appointment

TIME LIMITS ARE MANDATORY - FAILURE TO COMPLY VOIDS THE APPOINTMENT & REMOVES ALL POWERS GRANTED (SUBSECTION E)

THIS APPOINTMENT IS NOT A DETERMINATION OF INCAPACITY (SUBSECTION C)

EXPEDITED LIMITED HEALTHCARE FIDUCIARY CAN BE REMOVED BY COURT ANY TIME (SUBSECTION D)

§ 34-1-133

(a) If the respondent is under hospitalization in a hospital as those terms are defined in TCA title 68, chapter 11, part 2, and no other person, including an agent acting under the Healthcare Decision Act TCA title 68, chapter 11, part 8, a person acting under the Durable Powers of Attorney for Healthcare Act title 34, chapter 6, part 2 or a living will under TCA title 32, chapter 11, Part 1 appears to have the authority and willingness to act and is acting in the best interest of the respondent, the court on petition of a person interested in the respondent's welfare may appoint an expedited limited healthcare fiduciary whose authority is for the limited purpose of consenting to discharge, transfer, and admission and consenting to any financial arrangements or medical care necessary to affect such discharge, transfer or admission to another healthcare facility and whose authority may not exceed sixty (60) days. Immediately upon the receipt of the petition for an expedited limited healthcare fiduciary, the court shall appoint an attorney ad litem to represent the respondent in the proceeding. In expediting the appointment of an expedited limited healthcare fiduciary, the court may vary the time periods for hearings including but not limited to the minimum number of days before a hearing under TCA § 34-1-108 or the number of days before appointment of a guardian ad litem under TCA § 34-1-107 or other time periods, but shall not vary requirements as necessary to determine the respondent is in need of a fiduciary.

(b) The court shall hold a hearing on the appropriateness of the appointment within five (5) days of the appointment.

(c) Appointment of an expedited limited healthcare fiduciary is not a determination of the respondent's incapacity.

(d) The court may remove an expedited limited healthcare fiduciary at any time.

(e) The time periods set forth in this section are mandatory and not directory. Failure to comply with those provisions shall void any expedited appointment and remove the authority previously granted to the expedited limited healthcare fiduciary.

IN THE SEVENTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

**LIST OF ENUMERATED POWERS
FOR
CONSERVATOR OVER PERSON**

IT IS ORDERED that all the following powers and authority described below are removed from and divested out of the heretofore named respondent, and shall be and are vested in the heretofore named Conservator pursuant to T.C.A. §34-3-107(2) as follows:

1. The right to give, withhold, or withdraw consent and make other informed decisions relative to medical and mental examinations and treatment;
2. The right to make end of life decisions:
 - a. To consent, withhold, or withdraw consent for the entry of a "Do Not Resuscitate" Order or the application of any heroic measures or medical procedures intended solely to sustain life and other medications;
 - b. To consent or withhold consent concerning the withholding or withdrawal of artificially provided food, water, or other nourishment or fluids;
3. The right to consent to admission to hospitalization, and to be discharged or transferred to a residential setting, group home, or other facility for additional care and treatment;
4. The right to consent to participate in activities and therapies which are reasonable and necessary for the habitation of the respondent;
5. The right to consent or withhold consent to any residential or custodial placement;
6. The power to give, receive, release, or authorize disclosures of confidential information;
7. The right to execute, on behalf of respondent, any and all document(s) to carry out the authority vested above.

JUDGE RANDY KENNEDY

*This form is available to print from the Probate Court Clerk's website:
<http://circuitclerk.nashville.gov/probate/probateforms.asp>*

IN THE SEVENTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

LIST OF ENUMERATED POWERS
FOR
CONSERVATOR OVER PROPERTY

IT IS ORDERED that all the following powers and authority described below are removed from and divested out of the heretofore named respondent, and shall be and are vested in the heretofore named Conservator pursuant to T.C.A. §34-3-107(2) as follows:

1. The power to give, receive, release, or authorize disclosures of confidential information;
2. The right to apply for benefits, public and private, for which the person with a disability may be eligible;
3. The right to dispose of personal and real property subject to statutory and judicial constraints;
4. The right to determine whether or not the respondent may utilize a Tennessee driver license for the purpose of driving;
5. The right to make purchases;
6. The right to enter into contractual relationships;
7. The right to execute instruments of legal significance;
8. The right to pay the respondent's bills and protect and invest the respondent's income and assets;
9. The right to prosecute and defend lawsuits; and
10. The right to execute, on behalf of respondent, any and all document(s) to carry out the authority vested above.

JUDGE RANDY KENNEDY

*This form is available to print from the Probate Court Clerk's website:
<http://circuitclerk.nashville.gov/probate/probateforms.asp>*

IN THE SEVENTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

LIST OF ENUMERATED POWERS
FOR
CONSERVATOR OVER PERSON AND PROPERTY

IN RE:)
)
_____)

DOCKET NO: _____

IT IS ORDERED that all the following powers and authority described below are removed from and divested out of the heretofore named respondent, and shall be and are vested in the heretofore named Conservator pursuant to T.C.A. §34-3-107(2) as follows:

1. The right to give, withhold, or withdraw consent and make other informed decisions relative to medical and mental examinations and treatment;
2. The right to make end of life decisions:
 - a. To consent, withhold, or withdraw consent for the entry of a "Do Not Resuscitate" Order or the application of any heroic measures or medical procedures intended solely to sustain life and other medications;
 - b. To consent or withhold consent concerning the withholding or withdrawal of artificially provided food, water, or other nourishment or fluids;
3. The right to consent to admission to hospitalization, and to be discharged or transferred to a residential setting, group home, or other facility for additional care and treatment;
4. The right to consent to participate in activities and therapies which are reasonable and necessary for the habitation of the respondent;
5. The right to consent or withhold consent to any residential or custodial placement;
6. The power to give, receive, release, or authorize disclosures of confidential information;
7. The right to apply for benefits, public and private, for which the person with a disability may be eligible;
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11. The right to enter into contractual relationships;
12. The right to execute instruments of legal significance;
13. The right to pay the respondent's bills and protect and invest the respondent's income and assets;
14. The right to prosecute and defend lawsuits; and
15. The right to execute, on behalf of respondent, any and all document to carry out the authority vested above.

JUDGE RANDY KENNEDY