

SEVENTH CIRCUIT COURT FOR NASHVILLE, DAVIDSON COUNTY, TENNESSEE

Honorable Randy Kennedy, Judge

TIPS FOR ADJUDICATION IN CONSERVATORSHIP AND GUARDIANSHIP CASES

1. Be aware of all non-profit, governmental, institutional organizations and contract agencies offering fiduciary services in your judicial district, i.e., District Public Guardian for Regional Council on Aging, Guardianship and Trust Corporation, Fifty-Forward, Inc., Michael Dunn Center, etc.
2. Establish a list of attorneys and non-attorneys (willing and competent) to serve as independent conservators for all disabled persons who have no available and qualified family member or available and qualified friend to serve.
3. Establish a list of attorneys willing to be appointed by you to serve as guardians ad litem and as attorneys ad litem with the express understanding that there will be an occasional pro bono appointment.
4. Thoroughly examine the Petition for statutory compliance prior to hearing. For Guardianships see T.C.A. §34-2-101, et seq. For Conservatorships see T.C.A. §34-3-101, 102, 103, 104, 106).
5. After reviewing Petition, determine the following:
 - A. Does Petition disclose required information on all necessary parties (i.e., petitioner, respondent, proposed fiduciary, extended family, caretakers, and healthcare or residential care facilities)? (See T.C.A. §34-3-104* for Conservatorships, and T.C.A. §34-2-104 for Guardianships.)
 - B. Is there a current Report of Physician being filed with Petition (or is one required as prerequisite to adjudication)? (See T.C.A. §34-3-105)?
 - C. Do we need a guardian ad litem (GAL) to be our “eyes and ears of the Court” (T.C.A. §34-1-107), and/or an attorney ad litem (AAL) (T.C.A. §34-1-125, T.C.A. §34-3-106(3)(5), to “represent” the respondent in this matter?
 - D. If a GAL has been appointed, do we have a written report from the GAL?
 - (1) What are the specific findings of the GAL?
 - (a) In Petitions seeking “Conservator over person only,” does GAL confirm respondent’s disability?
 - (b) For Petitions seeking “Conservator over property,” did GAL report on assets, income, debts, and liabilities?
 - (c) Does the respondent express any objection to the establishment of a conservatorship or to the appointment of the proposed conservator?
 - (d) Who and what does the GAL recommend, and do I agree with the GAL’s recommendation?
 - (e) Is this a case where a bond, property management plan (Inventory), and/or accountings, are warranted. (See T.C.A. §34-1-105, 110, 131, T.C.A. §34-3-108).
In the alternative, should the Court waive any, or all the foregoing requirements (T.C.A. §34-1-121), and make this a status report-only case?
 - E. If the GAL reports an objection from the respondent to the establishment of a conservatorship, or objects to the proposed conservator, then must the Court appoint an attorney ad litem (AAL)?
 - (1) Per statute, the Court is obligated to appoint an AAL to defend the respondent if he/she objects to establishing a conservatorship or objects to the proposed conservator.
 - (2) Now that you have appointed an AAL, is this case a contested matter?
 - (3) Should the matter be continued, and if so, is there any temporary relief that you can impose pending a final hearing? (T.C.A. §34-1-132, 34-1-133)

- (4) May the Court appoint a temporary conservator prior to the final hearing? Is extraordinary relief permitted, i.e., TRO, injunction, etc. (See §34-1-132, 34-1-133).
- F. If there is clear and convincing evidence requiring a conservatorship; what is the Court's ultimate duty?
- (1) Determine what is in the manifest best interest of the respondent?
 - (2) Who is the fit and proper person of agency to serve as conservator? (T.C.A. §34-3-103) (§34-1-133).
 - (3) Which of the enumerated rights of the respondent should be transferred to the conservator? (T.C.A. §34-3-107)
 - (4) What are the specific responsibilities to be imposed on the conservator for bond, property management plan (Inventory) and accountings (if any)?
 - (5) Who will be responsible for payment of attorney's, GALs/AALs fees, expert, discretionary and court costs? (T.C.A. §34-1-113, 114, 125)
- G. Is this case one which requires emergency treatment? If the answer is "yes," the Court should review T.C.A. §34-1-132 and T.C.A. §34-1-133. (A synopsis of these two statutes is attached.)
- H. If this case began as an emergency petition but needs to be converted to a traditional conservatorship, can and should the Court modify the emergency ruling? (See synopsis of In re Conservatorship of Bartlett, No. M201402027COAR3CV, 2015 WL 80259121 (Tenn. Ct. App. Dec. 4, 2015).

**Be aware of statutory changes in conservatorship law regarding T.C.A. §34-3-104(4) effective January 1, 2022 as follows bolded and in italics:*

- (4) The name, age, mailing address, relationship of the proposed conservator, statement of any felony or misdemeanor conviction of the proposed conservator, and, if the proposed conservator is not the petitioner, a statement signed by the proposed conservator acknowledging awareness of the petition and a willingness to serve. ***"The petition must also include current copies of the following reports on the proposed conservator:***
- (A) A search of the department of health's registry of persons who have abused, neglected or misappropriated the property of vulnerable persons, established by title 68, chapter 11, part 10; and***
- (B) A search of the national sex offender registry maintained by the United States department of justice;"***

SYNOPSIS OF EMERGENCY STATUTES:

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 AND 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)

- (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 period sets 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.

Can and should the Court modify the emergency ruling?

Only Appellate Court Case on Either Statute:

In re Conservatorship of Bartlett, No. M201402027COAR3CV, 2015 WL 80259121 (Tenn. Ct. App. Dec. 4, 2015):

In March 2015, Vanderbilt University Medical Center (through attorney Monica Edwards, CAT member) filed a petition for an Expedited Limited Healthcare Fiduciary over one of its patients, Bill Bartlett, as it was time for discharge and there were no family members available to help. The trial court, Judge Randy Kennedy in Nashville, appointed one of CAT's own, Michelle Poss, as Expedited Limited Healthcare Fiduciary and named Jacqueline Dixon the attorney ad litem. Kennedy affirmed the petition at the appropriateness hearing five days later.

At the appropriateness hearing, Vanderbilt orally made a motion to be allowed to file an amended petition for a permanent conservatorship, which was granted and Vanderbilt filed it a month later. At the hearing on the petition, Judge found clear and convincing evidence that Mr. Bartlett was disabled and in need of assistance, and named the ELHF, Michelle Poss, as temporary conservator. Mr. Bartlett became agitated and refused to abide by the order appointing his conservator. He told the Judge he would rather go to jail than return to VUMC or any facility. The trial court held Mr. Bartlett in contempt and had him involuntarily committed to Middle Tennessee Mental Health Institute.

Jacqueline Dixon appealed on behalf of Mr. Bartlett. The Court of Appeals did not analyze the ELHF statute as the determination of this case was based on evidence at the permanent conservatorship hearing. The Court found that while dementia diagnosis itself was not enough to warrant a conservatorship, it quoted In re Conservatorship of Groves: "the pivotal inquiry involves not merely the diagnosis but also the effect that the illness, injury, or condition has had on the capacity of the person for whom a conservator is sought." The court noted that Kennedy based his decision in part on Bartlett's own testimony: he claimed he owned 1,000 acres yet only owned a trailer; admitted he had been institutionalized the past 16 years, and testified he was 80 years old when he was only 72. UPDATE:

Mr. Bartlett died in October, 2016.