

STATE OF TENNESSEE

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Opinion No. 05-157

Conflict of Law - Mental Capacity

QUESTION

Tenn. Code Ann. §§ 33-3-217 and 33-3-218 address the ability of a person who has mental illness or mental retardation limitations to make decisions about necessary, routine medical and dental care. When it appears there exists an inability to give informed consent or permission by a person in need of such services, these statutes speak to this lack of capacity and in this eventuality provide a “surrogate decision maker” to perform this function. On the other hand, conservatorship law confronts some of the same issues but seems to approach this question from an overall “competency” viewpoint.

If the language in the surrogate decision making act is the best definition for whether an individual possesses adequate mental capacity to make his or her life choices, then is there a conflict of law to the extent that a different standard is followed by the courts in conservatorship cases?

OPINION

No. There is no conflict of law as the surrogate decision making and conservatorship statutes both focus on capacity when determining whether an individual is able to make his or her life choices.

ANALYSIS

When statutes conflict, it is the role of the courts to reconcile the conflict and give effect to both statutory schemes to the extent possible. *Harman v. Moore's Quality Snack Foods, Inc.*, 815 S.W.2d 519, 525 (Tenn. Ct. App. 1991). "The cardinal rule of statutory construction is to effectuate legislative intent, with all rules of construction being aides to that end." *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998). Legislative intent is primarily discerned from the language of the statute. *Halbert v. Shelby County Election Comm'n*, 31 S.W.3d 246, 248 (Tenn. 2000). The statute must be construed as a whole and its words given their common and ordinary meaning. *State v. Levandowski*, 955 S.W.2d 603, 604 (Tenn. 1997). "Statutes relating to the same subject or sharing a common purpose must be construed together ('in pari materia') in order to advance their common purpose or intent." *Frazier v. East Tennessee Baptist Hosp.*, 55 S.W.3d 925, 928 (Tenn. 2001).

However, there is no conflict between the surrogate decision making provisions of Title 33 and the conservatorship provisions of Title 34 with respect to the standard used to determine whether an individual is able to make his or her life choices. Both statutes focus on the decision making capacity of the individual. Tenn. Code Ann. §§ 33-3-218 (Supp. 2004); and Tenn. Code Ann. §§ 34-1-126 and 34-1-127 (2001).

Incompetence was but is no longer the standard required for the creation of a conservatorship or limited guardianship. Tenn. Code Ann. §§ 34-4-202 and 34-4-302 (repealed 1992). Since 1993, conservatorship proceedings have focused on the capacity of the person for whom the conservatorship is sought. *In re Conservatorship of Groves*, 109 S.W.3d 317, 330-331 (Tenn. Ct. App. 2003). A conservator will only be appointed for a person who is fully or partially disabled and in need of the court's assistance, and then only to the extent necessary to protect the person. Tenn. Code Ann. §§ 34-1-126 and 34-1-127 (2001). "The court has an affirmative duty to ascertain and impose the least restrictive alternatives upon the disabled person which are consistent with adequate protection of the disabled person and the disabled person's property." Tenn. Code Ann. § 34-1-127 (2001). "[P]ublic policy . . . favors allowing incapacitated persons to retain as much autonomy as possible and selecting alternatives that restrict incapacitated persons' autonomy as little as possible." 109 S.W.3d at 329.

Tennessee's conservatorship statutes define "disabled person" as "any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity." Tenn. Code Ann. § 34-1-101(7) (2001). These statutes do not define capacity or incapacity. 109 S.W.3d at 331.

However, in *Groves*, the Court of Appeals defined incapacity in the context of this statute as follows:

Incapacity is the legal status that occurs when a person's autonomy becomes either partially or totally impaired. A person lacks the ability to be autonomous — to exercise free will — when he or she lacks the ability to absorb information, to understand its implications, to correctly perceive the environment, or to understand the relationship between his or her desires and actions. A person is likewise incapacitated when he or she cannot control his or her actions or behavior.

Id. at 328-329.

Surrogate decision making is a generally less intrusive statutory alternative to conservatorship's judicial intervention. Tenn. Code Ann. § 33-3-217 *et seq.* (2000) and Tenn. Code Ann. § 68-11-1806 (Supp. 2004). The surrogate decision making provisions of Title 33 define capacity as follows:

IF

(A) a service recipient, due to mental retardation or mental impairment related to a developmental disability, is unable to make an informed decision about application for admission to a developmental center under § 33-5-301, request discharge under § 33-5-303, or a routine medical, dental, or mental health treatment, OR

(B) a service recipient, due to a diagnosed mental illness or serious emotional disorder, is unable to make an informed decision about application to a hospital or inpatient treatment resource under § 33-6-201, requesting discharge under § 33-6-206, inpatient mental health treatment, release of information, or getting information, AND

(2) the incapacity is shown by the fact that the person is not able to understand the proposed procedure, its risks and benefits, or the available alternative procedures, THEN

(3) the person "lacks capacity" under this title for decision about that matter at this time.

Tenn. Code Ann. § 33-3-218 (Supp. 2004) (emphasis in original). Incapacity also triggers the ability of a surrogate to make decisions under the Tennessee Health Care Decisions Act. Tenn. Code Ann. § 68-11-1806 (Supp. 2004). In that statute, capacity is defined as “an individual’s ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health care decision.” Tenn. Code Ann. § 68-11-1802(a)(3) (Supp. 2004).

Inasmuch as both the conservatorship and the surrogate decision making statutes focus on capacity when determining whether an individual is able to make his or her life choices, no conflict exists with respect to the standard applicable to this determination.

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