

**BEFORE THE COMMISSIONER OF THE TENNESSEE
DEPARTMENT OF FINANCE AND ADMINISTRATION**

IN THE MATTER OF:)
)
) APPEAL to the DIVISION OF
Appellant.) TENNCARE
)
) Appeal # [REDACTED]
)

**APPELLANT’S CONSOLIDATED STATEMENT OF FACTS FOR ALL
RESPONSES TO TENNCARE MOTIONS**

[REDACTED], Appellant, files this Consolidated Statement of Facts For All Responses to TennCare Motions as follows:

Consolidated Statement of Facts

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On July 28, 2022, TennCare filed (1) a Motion to Dismiss Based on Failure to State a Claim Upon Which Relief May be Granted; (2) a Motion to Dismiss based on Untimeliness; and (3) a Motion to Dismiss Based on Res Judicata.

For simplicity and to avoid repetition, Appellant files this Consolidated Statement of Facts for use in her response to each of the above motions. This Statement of Facts is incorporated by reference in each of Appellant’s responses. Documents which were previously omitted or which Appellant believes merit special attention are Bates numbers and attached. Other documents are referred to by their Bates number in Appellant’s Response to Notice of Hearing and Pre-Trial Brief, filed July 25, 2022 (the “Appellant’s Pre-Trial Brief”) and/or the Bates number in TennCare’s Notice of Hearing dated July 19, 2022 (“TennCare’s Notice of Hearing”).

Who is the Appellant and How Did This Case Start?

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Appellant’s is [REDACTED]. Her date of birth is [REDACTED], which means she recently attained the age of 88. Prior to institutionalization, Appellant resided at [REDACTED]. Appellant is a U.S. citizen and a citizen of Tennessee. She was born in Tennessee. *See* Birth Certificate; *see also* Appellant’s Pre-Trial Brief, pages 398-399 (pages from the January 22, 2021 Medicaid application).

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Appellant does not have records from her prior hospital admission, but information described in documents at Appellant's Pre-Trial Brief, pages 139-141, indicates Appellant could not care for herself, had active hallucinations and dementia. She was admitted to [REDACTED] on October 22, 2020 and remained there until she was admitted to the [REDACTED] (" [REDACTED] ") on January 7, 2021. Appellant's Pre-Trial Brief, page 411.

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[REDACTED], the Administrator at [REDACTED] is expected to testify on August 2, 2022, that [REDACTED] reviewed Appellant's file prior to Appellant's admission to ensure it could meet Appellant's needs. [REDACTED] also inquired into the payment source available to pay for [REDACTED] care. Mr. [REDACTED] is expected to testify he thought Appellant would qualify for nursing home Medicaid (or at least had no reason to believe she wouldn't qualify). He is also expected to testify that, despite payments from October 1, 2021 following the first fair hearing, if Appellant's arguments are rejected and payment is denied from January 2021 through September 30, 2021, [REDACTED] will not receive \$71,714.33 which is owed.

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Progress notes attached to the Pre-Admission Certification Form ("PAE") show Appellant's attending physician was (and remains) Dr. [REDACTED]. Dr. [REDACTED] examined Appellant on January 11, 2021, finding Appellant was unable to give a meaningful medical history. Dr. [REDACTED] noted Appellant was at [REDACTED] for Alzheimer's and confusion. Dr. [REDACTED]'s diagnoses on January 11, 2021 were Alzheimer's, hypothyroidism, hard of hearing (deaf left ear), HTN, GERD, hyperlipidemia, anxiety, schizophrenia, dementia, and cognition comm. Deficit. See Appellant's Pre-Trial Brief, page 138-140; and pages 317-321.

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On January 18, 2021, Dr. [REDACTED] completed the PAE and it was sent to TennCare, along with the attached progress notes. See Appellant's Pre-Trial Brief, page 138. In the PAE Certification Form, Dr. [REDACTED] lists Appellant's diagnoses as Alzheimer's disease, dementia, delusional disorder, psychosis, anxiety, auditory hallucinations, hypothyroidism, HTN, HLD, malnutrition and GERD. See Appellant's Pre-Trial Brief, page 138.

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[REDACTED], a Social Worker with [REDACTED] is expected to testify on Tuesday August 2, 2022 regarding how the PAE was submitted. She was involved in submitting Appellant's PAE and enclosed a letter dated January 19, 2021 stating:

[REDACTED] has no family support to assist with her care. Spoke with family friend, [REDACTED] who reported she was hallucinating and

delusional. Pt. was living in an elderly apartment building and was wandering around her building. The staff at the apartment building on numerous occasions had to redirect her back to her apartment due to her knocking on her neighbor's door. She is not able to pay her bills, clean her own home, cook or bath herself or take her own medication due to Dementia. Ms. [REDACTED] would not have anybody to assist her with food due to COVID-19 outbreak, and she is a high risk patient due to her mental health and risk of harming herself or others if left alone. Please review the information for a safety determination for an open Level 1 PAE. Any questions or concerns can be addressed to [REDACTED], Social Worker. Attached; *see also* Appellant's Pre-Trial Brief, page 141.

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Appellant's PAE was approved on January 25, 2021, stating "We have approved your Pre-Admission Evaluation (PAE) for nursing home care. This means that you meet the medical rules to get care in a nursing home" Appellant's Pre-Trial Brief, page 49. A clearer copy is attached.

Appellant Was Cognitively Impaired

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Although evidence cited above, as well as other evidence described below indicates Appellant was cognitively impaired, it appears TennCare concedes the issue. During a telephone conference on July 28, 2022, beginning at 2:00 p.m. (central) between the Hon. Christie R. Taylor, TennCare Administrative Judge; Amos Bailey, Esq., Assistant Counsel for TennCare and David L. McGuffey, counsel for Appellant, TennCare conceded that Appellant was cognitively impaired at all relevant times. When Appellant's Counsel asked whether that included January 2021, Counsel for TennCare repeated "all relevant times." As shown below, TennCare's stipulation is significant. Judge Taylor indicated the call was recorded and, should an appeal be required, Appellant requests that the recording be included with the record.

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On July 13, 2022, notice was given pursuant to T.C.A. § 4-5-313¹ that the affidavit of Dr. [REDACTED] will be introduced as evidence along with a copy of his affidavit and C.V. The Notice of hearing does not include said notice or Dr. [REDACTED]'s affidavit. Both are attached as Appellant's Pre-Trial Brief, page 53 and 56. The successful facsimile confirmation page is Appellant's Pre-Trial Brief, page 62. Despite TennCare's concession that Appellant was cognitively impaired at all relevant times, Appellant contends the affidavit is relevant on the issue of Appellant's legal incapacity and inability to "convert [resources] to cash" within the meaning of 20 C.F.R. § 416.1201.² Appellant also

¹ <https://codes.findlaw.com/tn/title-4-state-government/tn-code-sect-4-5-313.html>.

² https://www.ssa.gov/OP_Home/cfr20/416/416-1201.htm.

contends it is relevant on the issue of her disability status and whether she had the type of disability described in 42 U.S.C. § 12131(2),³ which triggers her right to assistance under the American's with Disabilities Act and other civil rights legislation.

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Dr. ██████'s affidavit includes the following medical opinions which are based on his education, experience and his examinations of Mrs. ██████ beginning with her admission to ██████ and ongoing. His opinions, which are given within a reasonable degree of medical certainty, are:

- ██████, at all times since her admission to ██████, lacked the ability to understand, in a reasonable manner, the extent, character or effect of financial transactions. If given a contract, it is my opinion she would not be capable of understanding its meaning or import.
- ██████ was not capable of identifying her financial resources, much less managing them upon admission to ██████ or at anytime thereafter.
- If ██████ had been shown forms necessary to liquidate insurance policies at any time from her admission to ██████ or thereafter, she would not have understood them.
- If anyone had tried to explain to ██████ the reasons for liquidating her insurance policies, she would not have understood the conversation and would not have been capable of responding or rendering assistance.
- It is my opinion that ██████ lacks the ability to engage in relatively simple financial tasks such as balancing a check book, making change or even recognizing the significance of money. I do not believe ██████ had the ability to assist her caregivers in identifying her financial resources for the purpose of disclosing them to TennCare.
- In my experience, engagement in financial transactions is usually more complex and requires greater cognitive capacity than assisting health care providers in the health-care decision process and ██████ dementia and confusion was significant enough that she is unable to do either.
- In my opinion, ██████ has a physical and mental impairment which substantially limits more than one major life activities, has a record of such an impairment, and is regarded as having such an impairment. To the extent additional help should be given to someone who is handicapped, it is my opinion that ██████ needed that additional assistance.

The January 22, 2021 Application

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On January 22, 2021, Standifer Place assisted Appellant in filing her first application for Medicaid. The tracking number for that application was ██████. Box 35 on page 7 of the application is checked "yes," which indicates Appellant has

³ <https://codes.findlaw.com/us/title-42-the-public-health-and-welfare/42-usc-sect-12131.html>.

intellectual or developmental disabilities. The January 22, 2021 application is attached to Appellant's Pre-Trial Brief, pages 376 through 420, which includes copies of TennCare related to the January application.

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The January 22, 2021 application requested a **payment start date of 1/01/2021**. See Appellant's Pre-Trial Brief, page 402. Appellant (or at least her assistants, Conservator and counsel) have no record of or knowledge of a January 6, 2020 application for Medicaid and, to their knowledge, no claim for payment prior to January 1, 2021 has been raised in this case. However, for the reasons that follow, Appellant contends the January 22, 2021 application is relevant and that it is properly considered in this appeal.

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TennCare issued a Notice on February 3, 2021 requesting verification including: (1) proof you're in a nursing home; (2) life insurance; (3) burial resource; (4) unearned income; and (5) shelter expense. Appellant's Pre-Trial Brief, page 412-413.

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██████████ submitted verification on March 1, 2021 including ██████████ bank statements for November 2020, December 2020 and January 2021. That disclosure also included information regarding a life insurance policy from ██████████ Life Insurance Company. The policy was issued on June 6, 2020. It had a face (death benefit) amount of \$9,000. A chart listed the cash value of a 20 year old policy as \$5,043.33.

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The facsimile cover page for the March 1, 2021 disclosure stated: "According to sister, ██████████ does not have a burial" This becomes relevant in the next several paragraphs. Attached at page 43.

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On March 9, 2021, ██████████ employee, ██████████ (██████████), sent TennCare employee Dejuanica Moore ("Ms. Moore") an email.⁴ ██████████ stated she filed Appellant's Medicaid application on 1/22/2021, but when she checked the system, ██████████ couldn't see it. Attached email at page 44. Ms. Moore responded the same day saying "Ok I will check." Attached at page 45.

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On March 22, Ms. Moore contacted ██████████ saying "the applicant may be over resources of \$2,000 due to life insurance policies cash value of \$5,040+." Later, the

⁴ Appellant's witnesses will testify they also dealt with other TennCare caseworkers including Jacinta West, Nakeisha Butler and Scotia Cooper.

same day, Ms. Moore tells ██████ by email “Currently the case is denying because the life insurance policy cash value is over the resource limit – a Spend down would be required or a [sic] the insurance policies assigned to a burial contract.” Ms. Moore’s comments are consistent with the disclosure submitted on March 1, 2021 stating there was no burial.

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On March 24, 2021, TennCare requested verification regarding “Burial Resource (Burial Contract/Insurance.” Specifically, TennCare’s notice requests “A copy of the contract or policy including a list of itemized goods and services.”

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Since the March 1, 2021 disclosure stated Appellant had no burial, TennCare’s March 24, 2021 notice appears to mirror the email conversation between ██████ and Ms. Moore where Ms. Moore stated “a Spend down would be required or a [sic] the insurance policies assigned to a burial contract.”

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On April 14, 2021, ██████, a ██████ employee (“█████”) emailed Ms. Moore stating she was helping ██████ and “I noticed on email that you sent [█████] on 3/29/21 regarding life insurance cash value putting Ms. ██████ over resources. You stated that a spend down would be required or the life policies could be assigned to a burial contract. Do the policies need to be assigned to an Irrevocable Funeral Trust or just an itemized burial contract through the funeral home.” Attached at page 50.

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Ms. Moore responded: “It can be assigned to an irrevocable burial contract.” Attached at page 50. ██████ will be available at the August 2, 2022 hearing and is expected to say she relied on Ms. Moore’s statements, believed there was no eligibility issue as long as the policy was assigned, and began her attempt to work with the family to assign the life policy toward a burial contract.⁵

Reliance on TennCare and Discovery that Appellant Had No Agent

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As ██████ began working to help Appellant’s family assign the life policy toward payment of a burial contract, she emailed Ms. Moore on April 15, 2021, requesting additional time. ██████ was concerned the assignment would need to take place by the 85th day (April 17/2021) and the 90th day of the application (4/22/2021). Attached at

⁵ This belief seems to have been well founded because the ██████ Life policy is the only one known to exist while the first application was pending. It was not spent down until the Chancery Court approved spend-down on October 8, 2021 and TennCare never raised it as an eligibility issue, presumably because it was spent down purchasing a burial contract.

page 49. ██████ was concerned the family would not have time to complete the assignment.

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On April 15, 2021, ██████ tells Ms. Moore by email the family has an appointment with the funeral home on 4/21/2021 – “she wanted to know if 4/21/21 would be ok – so they can get everything finalized.” Attached at page 48. Ms. Moore replied “ok.” Attached at page 48. ██████ is expected to testify that she relied on Ms. Moore comments as she worked with Appellant’s family, believing Appellant would be approved beginning with the payment start date listed in the January 22, 2021 application.

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On April 19, 2021, ██████ again emailed Ms. Moore. This time she stated:

We have encountered an issue w/ ██████’s life insurance. The life policy issuer will not give any information to ██████, the sister, because she is only the POA for Health Care and not Financial. The Financial POA is Ms. ██████’s son – whom the family has not seen or heard from in 2 years and he was last known to be homeless.

Our Administrator is filing for emergency conservatorship, to assist Ms. ██████ – she herself has dementia and is not able to sign the policy or change anything herself.

You granted us an extension until 4/21/202 – which is her 90th day. Would we be able to get an extension beyond that date **or would it be in our best interest to submit a new application, to protect our date.**” (Emphasis added). Attached at page 47. See also Appellant’s Pre-Trial Brief, page 50.

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██████ is expected to testify that she made numerous attempts to locate Appellant’s son, including calling homeless shelters and attempting to contact him at his last known email address. All efforts were unsuccessful and he could not be located.

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On April 19, 2021, Ms. Moore replied to ██████ saying “Submit a new application.” Attached at page 47. ██████ replied to Ms. Moore saying “Thank you, I will do that.” Attached at page 46.

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██████ is expected to testify on August 2, 2022 that she expressly relied on Ms. Moore, the TennCare caseworker, in filing the second application on April 22, 2021, that

she believed it would protect the date back to the payment start date of 1/01/2021, and that upon filing the second application, no appeal was necessary when a denial was issued on April 27, 2021. Appellant's Pre-Trial Brief, page 418.

TennCare Had Actual Notice of Cognitive Impairment Prior to the First Denial

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TennCare had actual notice of Appellant's cognitive impairment upon submission of the PAE Certification Form and accompanying documentation. [REDACTED] is expected to testify regarding the submission of the PAE Certification Form and documentation, that TennCare uses that form to determine medical eligibility and that TennCare issued PAE Approval on January 25, 2021. Appellant's Pre-Trial Brief, page 49. Appellant contends such notice triggered TennCare Policy Number 110.060.3 which is included in TennCare's Notice of Hearing, pages 343 through 345; Appellant's Pre-Trial Brief, pages 163-165.

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Ms. Moore, TennCare's caseworker (and agent) assigned to Appellant's file, had actual notice of Appellant's cognitive impairment, that Appellant had no financial agent and Appellant needed a conservator not later than April 19, 2021. Actual notice to Ms. Moore occurred at least eight days prior to issuance of the first denial. Appellant contends such notice triggered TennCare Policy Number 110.060.3 which is included in TennCare's Notice of Hearing, pages 343 through 345; Appellant's Pre-Trial Brief, pages 163-165. It should have caused TennCare to offer the special help noted in Appellant's Pre-Trial Brief, pages 4 through 6.

The April 22, 2021 Application

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Appellant's second application for nursing home Medicaid was filed on April 22, 2021 with Tracking Number [REDACTED]. Appellant's Pre-Trial Brief, pages 421 through 442, which includes TennCare Notices.

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The first TennCare notice Appellant received relating to the second application is dated May 26, 2021. Appellant's Pre-Trial Brief, page 437. It includes Notes from your case worker as follows: "Please provide copies of the following to determine TennCare eligibility: Bank statements (ALL ACCOUNTS) for February, March, and April and [REDACTED] ending [REDACTED] life insurance policy including cash surrender value."

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[REDACTED], along with her supervisor [REDACTED] (" [REDACTED] ") are expected to testify they relied on Ms. Moore's communication above, as well as notes in TennCare's May 26

notice requesting information for February, March and April believing the original date (January 1, 2021) was protected. They are also expected to testify TennCare routinely protects a date when a new application is filed before the original application is denied, or within 90 days of the original application, and that when eligibility is ultimately approved, it relates back to the protected date. They are expected to testify that reliance on TennCare's statements, as well as its past practice, is the reason overlapping applications were filed instead of appeals.⁶

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Appellant notes the petition for emergency conservatorship was filed on May 3, 2021 and granted on May 10, 2021, both prior to the date of the May 26, 2021 notice or the July 26, 2021 denial. Appellant's Pre-Trial Brief, page 440. Also of note, [REDACTED] ("[REDACTED]"), [REDACTED] employee, filed a third overlapping application on July 21, 2021. Appellant's Pre-Trial Brief, page 443 through 461. [REDACTED], and her supervisor, [REDACTED], are expected to testify the third application was filed to protect the date in the same manner as before and for the same reasons. [REDACTED], [REDACTED] and [REDACTED] have reviewed other TennCare application submitted for [REDACTED] residents and prepared a list of exemplar applications (with names redacted) where a concurrent application was filed to protect the date of the initial application and are expected to use that list as they discuss TennCare practice. See attached list.

The Conservatorship

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On April 19, 2021, the same day Ms. Moore had actual notice a conservatorship was needed, Administrator [REDACTED] contacted attorney [REDACTED] by email. [REDACTED] stated:

[REDACTED],
I'm needing another emergency conservator due to a financial matter concerning our resident, Ms. [REDACTED], that is presenting with a financial hardship on her that she cannot bare and for which [REDACTED] will unduly suffer.

Please prepare the necessary paperwork as I get [REDACTED] to complete an examination. [REDACTED], review my explanation below and reply to both of us with any corrections. Thx!!

⁶ Appellant gave TennCare notice at page 34 of her Pre-Trial Brief of her intent to raise TennCare's practice of approving applications back to a prior application's protected date and requested that TennCare produce the original caseworkers who worked on Appellant's applications. If they are not produced, then Appellant contends TennCare has made them unavailable and a hearsay exception applies to their statements. Alternatively, they are opposing party admissions. Regardless, they are relevant because Appellant's application assistants at [REDACTED] relied on them and acted accordingly.

██████████ is an 86 year old severely demented patient of ours that must be housed in our secure unit due to her tendency to wander out of closed doors. She is unable to answer for herself in any way. The issue at stake is a life insurance policy that must be spent down or converted to a pre-burial policy. This is preventing her Medicaid ins. Approval. The person that the insurance company identifies as her financial power of attorney who is the sole person with authority to change or convert the ins. Policy is her son, ██████████. We and the family are completely unable to locate him. Family says he was last known to be homeless. Therefore, Ms. ██████████ is stuck without Medicaid insurance creating no way for her to pay for her care. Her current S income is \$600 and she gets a pension of \$44.33.

As far as contacts go, the medical POA is Ms. ██████████'s sister, ██████████. Due to the poor health of Ms. ██████████, another sister, ██████████ has been the primary contact. The emails below are with ██████████'s daughter (██████████'s niece) ██████████. Phone numbers and addresses are on the attached facesheet.

See attached email.⁷

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██████████ is expected to testify on August 2, 2022 regarding his efforts to secure an emergency conservatorship for Appellant beginning April 19, 2021, which was prior to denial of the January 22, 2021 application.

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Attorney ██████████ filed a Petition for Emergency Conservatorship in the Chancery Court of Hamilton County, Tennessee on May 3, 2021. Copy attached. On May 5, 2021, ██████████ was appointed emergency conservator pending a hearing and a notice was issued setting a hearing on May 10, 2021 at 9:30. Copies attached. On May 10, 2021, after holding a hearing, the Chancellor issued an Order appointing Mr. ██████████ as emergency conservator. Copy attached.

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On May 25, 2021, Mr. ██████████ filed a Notice to Court of Necessity to Irrevocably Assign or, Alternatively, Cash Out and Spend Down Whole Life Policy Owned by Respondent and Insuring Respondent's Life. Copy attached. Said Notice states: "Per the Medicaid specialist, the policy must be irrevocably assigned to a funeral home or cashed out and spent down."

⁷ Dr. ██████████ evaluation for the Chancery Court is at Appellant's Pre-Trial Brief, pages 363-364.

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Mr. ██████ is expected to testify that, so far as he knew, TennCare would approve Appellant's application if the policy was assigned toward payment of a burial contract.

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On June 2, 2021, the Chancellor issued an Order which appointed ██████ as conservator of Appellant's person and ██████, Esq., as Limited Conservator of Appellant's property. Copy attached. *See also* TennCare's Notice of Hearing, paragraph 3.2 at page 10. See Letters of Limited Conservatorship at TennCare's Notice of Hearing, page 198, and Order at p. 199-205.

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Rights transferred from Appellant to the conservator are listed in paragraph 4 of the June 2, 2021 Order. Notably, at paragraph 10, the Order provides: "the Conservator shall not sell any of Respondent's property, except as permitted by Tennessee Code Annotated § 34-1-116(b) without permission from the Court." (Emphasis added). See TennCare's Notice of Hearing, page 204. This limitation is required by T.C.A. § 34-3-107(a)(3)(D).

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On June 2, 2021, the Chancellor issued an Order authorizing the conservator to make application with an unnamed insurance policy to cash out a whole life policy. However, the Chancellor further ordered "Upon receiving the proceeds from the insurance company, the Limited Conservator of Property shall make application with the Court for approval of a spend down plan in order to qualify Ms. ██████ financially for Tenn-Care benefits." Copy attached.

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The original ██████ Life policy, discussed by Ms. Moore and ██████, was eventually liquidated. On October 8, 2021, the Chancellor approved a spend down leaving Appellant with a balance of \$405.81. TennCare's Notice of Hearing, page 284-285.

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By all appearances, Mr. ██████ did not know the ██████ life policy needed to be liquidated until he received a letter on October 8, 2021. TennCare's Notice of Hearing, page 99. Mr. ██████ immediately disclosed ██████'s letter to TennCare via facsimile on October 8, 2021. Mr. ██████'s billing records show he filed a Motion to Redeem that policy on October 27, 2021. TennCare's Notice of Hearing, page 353. A copy of the October 28, 2021 Motion to Redeem Whole Life Policy was admitted

during the first fair hearing and is referenced in the Order at pages 5, 8 and 22 and is attached hereto as 110.

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On January 12, 2022, the Chancery Court entered an Order substantially similar to its prior Order dated October 8, 2021, except that it specifically identified the ██████ Insurance Policy. It also directed Mr. ██████ to “apply by motion with the Court to approve a spend down plan, which motion will be set for hearing expeditiously, as time is of the essence.” Copy attached; also at TennCare’s Notice of Hearing, page 208. Prior to receipt of the surrendered funds, Mr. ██████ filed a Motion for Additional Compensation and to Approve Spend Down on January 14, 2022. TennCare’s Notice of Hearing, page 360.

The July 21, 2021 Application

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It is undisputed that Appellant filed a third application for nursing home Medicaid on July 21, 2021. See TennCare’s Notice of Hearing section 3.3 at page 10. The tracking number for the July 21, application appears to be ██████. See TennCare’s Notice of Hearing, page 49. The July 21, 2021 Application is at Appellant’s Pre-Trial Brief, pages 443 to 461, and in TennCare’s Notice of Hearing, pages 54-70.

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TennCare contends it mailed a notice requesting verification on August 19, 2021 and that most of the requested information was submitted in October, 2021. See TennCare’s Notice of Hearing sections 3.3 and 3.5 at page 10. See TennCare’s Notice of Hearing, page 71.

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Appellant notes the August 19, 2021 notice asks for “proof of what the ██████ premium is for (insurance card or policy). See TennCare’s Notice of Hearing, page 71. It is expected several witnesses will testify that, as of August 19, 2021, they believed the ██████ policy was a Medicare Part D prescription drug plan.

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Upon receipt of TennCare’s notice, Mr. ██████ contacted ██████ on August 23, 2021, to determine what the policy covered. See Appellant’s Pre-Trial Brief, page 86-87. In his letter, Mr. ██████ states: “The Tennessee Bureau of TennCare has requested information regarding this insurance policy including, but not limited to, whether this is [sic] a life insurance or health insurance policy and, if a life insurance policy, the name of the owner, the insured, and the beneficiary.” By all appearances, Mr. ██████ did not know what type of policy ██████ issued Appellant between August 23, 2021 and October 8, 2021.

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Of note, TennCare's August 19, 2021 notice still requests proof regarding "Burial Resource (Burial Contract/Insurance)" and specifically requests "A copy of the contract or policy including a list of itemized goods and services." See TennCare's Notice of Hearing, page 88.

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On October 8, 2021 (see fax line date), ██████████ Insurance Company faxed Mr. ██████████ a letter stating the United American policy was a life policy with a \$10,000 face value and had cash value of \$2,184.66. See TennCare's Notice of Hearing, page 99.

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TennCare sent a notice requesting verification on October 20, 2021. See TennCare's Notice of Hearing, page 102. Of note, it still requests proof regarding "Burial Resource (Burial Contract/Insurance)." See TennCare's Notice of Hearing, page 103.

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On October 22, 2021, TennCare denied Appellant's July 2021 application. See TennCare's Notice of Hearing, page 116-117.⁸ The basis for the denial was "We sent you a letter asking for more facts but you didn't send us what we needed." *Id.*, page 117. Appellant filed an appeal on November 8, 2021. See Appellant's Pre-Trial Brief, page 213.

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At some point while the July 21, 2021 application was being processed, TennCare had actual knowledge that ██████████ was appointed conservator because it added him as an assisting person. See TennCare's Notice of Hearing, page 122 and page 140.

Subsequent Applications and Notices Prior to First Hearing

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TennCare approved Appellant for QMB Medicaid by notice dated December 28, 2021. See TennCare's Notice of Hearing, pages 152-153. However, that same notice again denied nursing home Medicaid (*Id.*, page 154), for the first time stating Appellant had too many resources. Apparently admitting Appellant could not liquidate the controverted insurance policy, it included an Agreement to Sell (page 158). That agreement was never signed, probably because neither Appellant nor the conservator had authority to sign it. It is worth noting the agreement states: "You may have good cause for not selling your personal property within 3 (three) months if the reasons you couldn't sell was beyond your control. Some good cause reasons might be ... You could

⁸ Paragraph 3.13 of the March 17, 2022 notice for the first fair hearing, attached hereto, states the July 21, 2021 application was denied by notice of decision dated December 28, 2021.

not make good faith efforts to sell for reasons beyond your control.” (Emphasis added) (Id., page 159).

Efforts to Liquidate Policies

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Mr. ██████, as conservator, attempted to liquidate the controverted whole life policy. See TennCare’s Notice of Hearing, page 196. Requests to liquidate the policy were made on January 6, 2022, January 25, 2022 and February 8, 2022. Ultimately, ██████ issued a check after the first fair hearing. Appellant’s Pre-Trial Brief, page 210. The ██████ funds were immediately spent down paying expenses of the conservatorship pursuant to the Chancellor’s Order dated February 7, 2022. Appellant’s Pre-Trial Brief, pages 208-209.

Hearing Notice Dated March 17, 2022

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Appellant contends the March 17, 2022 Notice of Hearing for the first fair hearing was defective and violated 42 C.F.R. § 431.210⁹ and T.C.A. § 4-5-307.¹⁰ The original notice of hearing is attached.

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42 C.F.R. § 431.210 provides:

A notice required under § 431.206 (c)(2), (c)(3), or (c)(4) of this subpart must contain -

- (a) A statement of what action the agency, skilled nursing facility, or nursing facility intends to take and the effective date of such action;
- (b) A clear statement of the specific reasons supporting the intended action;
- (c) The specific regulations that support, or the change in Federal or State law that requires, the action;
- (d) An explanation of -
 - (1) The individual's right to request a local evidentiary hearing if one is available, or a State agency hearing; or
 - (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
- (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

⁹ <https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-C/part-431/subpart-E/subject-group-ECFR803dd5eda355b92/section-431.210>.

¹⁰ <https://codes.findlaw.com/tn/title-4-state-government/tn-code-sect-4-5-307.html>.

T.C.A. § 4-5-307 provides:

- (a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.
- (b) In all proceedings the notice shall include:
 - (1) A statement of the time, place, nature of the hearing, and the right to be represented by counsel;
 - (2) A statement of the legal authority and jurisdiction under which the hearing is to be held, including a reference to the particular sections of the statutes and rules involved; and
 - (3) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon timely, written application a more definite and detailed statement shall be furnished ten (10) days prior to the time set for the hearing.

(Emphasis added)

The March 17, 2022 notice of hearing failed to include for consideration the January 22, 2021 and April 22, 2021 applications which improperly narrowed the issues presented.

The March 17, 2022 notice of hearing failed to identify TennCare Policy Number 110.060.3 regarding mental impairment as relevant legal authority. Apparently, conceding it is now relevant, Policy 110.060.3 is cited in the July 19, 2022 Notice of Hearing at section 5.8. See TennCare Notice of Hearing, page 16.

Although Judge Ren considered Policy Number 110.060.8 regarding litigation, the March 17, 2022 notice of hearing failed to identify it as relevant authority. Apparently, conceding it is now relevant, Policy 110.060.8 is cited in the July 19, 2022 Notice of Hearing at section 5.8. See TennCare Notice of Hearing, page 16.

The March 17, 2022 notice of hearing failed to address how Appellant's cognitive impairment impacts her ability or inability to "convert to cash" resources within the

meaning of 20 C.F.R. 416.1201(a) and, if she could not, the date her legal incapacity began.

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The March 17, 2022 notice of hearing failed to address whether TennCare owed Appellant any additional assistance under the American's with Disabilities Act and other civil rights legislation after TennCare had actual knowledge of her cognitive impairment. As such, the notice is defective.

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Although TennCare cited its alleged authority for denying Appellant's Medicaid coverage, it hid the ball by failing to include any reference to clear authority that would, if properly applied, render Appellant eligible. TennCare's action violated the letter and spirit of the law relating to the notice requirements in 42 C.F.R. § 431.210 and T.C.A. § 4-5-307.

First Fair Hearing, March 29, 2022

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As discussed above, [REDACTED], [REDACTED], [REDACTED], [REDACTED] and Mr. [REDACTED] expected to testify they believed the January 1, 2021 date was protected and eligibility would relate back to Appellant's admission at [REDACTED]. However, the notice of hearing was defective as discussed above and improperly limited the issues brought to Judge Ren's attention. The scope of the stipulation in footnote one is unknown, but to the extent it would limit Appellant's ability to seek coverage for any period prior to April 1, 2021 (three months prior to the July 21, 2021 application, Appellant hereby withdraws that stipulation.

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During the first fair hearing, the mental impairment provisions of Policy Number 110.060.b are not mentioned in the Notice of Hearing. Judge Ren mentions them in passing as authority at page 14 of the Order. TennCare's Notice of Hearing, page 35. However, Judge Ren cites only subsection 3(a) before moving on to the litigation exception at subsection 8. This is remarkable since Judge Ren found, at page 20 of his Order, that "Mr. Atchley was appointed as the Limited Conservator of Property for Petitioner on June 6, 2021... Furthermore, this conservatorship converted all rights to access and dispense of property to Mr. [REDACTED] and revoked said rights for Petitioner." TennCare Notice of Hearing, page 41.

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Judge Ren then finds, after examining 20 C.F.R. § 416.1201, **"the record establishes that at the time of application and at all times relevant to this matter, Petitioner no longer had the legal right or authority to liquidate the**

██████████ life insurance policy of her own accord, as this right was conferred upon Mr. ██████████.” TennCare Notice of Hearing, page 41. (Emphasis added).

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The only apparent use of Policy 110.060.3 was TennCare’s attempt to misuse its policy where Judge Ren states:

“TennCare argued, however, that pursuant to policy, as Mr. ██████████ was appointed Petitioner’s Limited Conservator of her Property as of her application date, and because he remained cooperative throughout the entire application process, the ██████████ life insurance policy cannot be deemed an inaccessible resource [Citing Policy Numbers 110.045 and 110.060]. The argument that the existence of a conservator at the time of the application, who happens to be cooperative rather than uncooperative, should result in a finding that all of the applicant’s resources are automatically deemed assessable, was not supported by legal authority.

Furthermore, despite this argument, the record establishes that Mr. ██████████ *does not* have carte blanche legal authority to access and liquidate Petitioner’s resources; rather, as address above, the order establishing Mr. Atrchley as limited conservator requires him to first get court approval to access and sell Petitioner’s resources. (Emphasis in original). TennCare Notice of Hearing, pages 41-42.¹¹

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Judge Ren held **“neither Petitioner nor Mr. ██████████ had the legal authority to redeem the life insurance policy or to spend down the proceeds of said policy, absent a court order authorizing such action. Moreover, the record reflects that any delay in securing such an order was not the fault of Mr. ██████████.”** TennCare Notice of Hearing, page 43.

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Judge Ren could have stopped there, at least with regard to the July 21, 2021 application. Federal law trumps state law and subsection (a)(1) of 20 C.F.R. § 416.1201 prohibits TennCare from treating property rights that cannot be converted to cash as available. Judge Ren could have immediately granted coverage from July 1, 2021 ongoing in reliance on his holding that “the record establishes that at the time of application and at all times relevant to this matter, Petitioner no longer had the legal right or authority to liquidate the ██████████ life insurance policy of her own accord, as this right was conferred upon Mr. ██████████” TennCare Notice of Hearing, page 41. Further, if Judge Ren had considered Tennessee conservatorship law, then in accordance with 42

¹¹ Although unmentioned in Judge Ren’s Order, the Tennessee legislature imposed this requirement at T.C.A. § 34-3-107(a)(3)(D).

C.F.R. § 435.915, he could have granted eligibility back to May 3, 2021, when the Petition for Emergency Conservatorship was filed. If Judge Ren had further considered Tennessee law regarding legal incapacity, he could have awarded eligibility back to April 1, 2021 (or earlier) in accordance with 42 C.F.R. § 435.915.

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42 C.F.R. § 435.915 provides:

- (a) The agency **must** make eligibility for Medicaid effective no later than the third month before the month of application **if** the individual -
- (1) **Received Medicaid services**, at any time during that period, of a type covered under the plan; and
 - (2) **Would have been eligible** for Medicaid at the time he received the services **if he had applied** (or someone had applied for him), regardless of whether the individual is alive when application for Medicaid is made.
- (b) The agency may make eligibility for Medicaid effective on the first day of a month if an individual was eligible at any time during that month.
- (c) The State plan must specify the date on which eligibility will be made effective.

(Emphasis added)

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TennCare argues, at section 5.3 of the Notice of Hearing, that the Centers for Medicare and Medicaid Services waived the requirement that TennCare comply with 42 C.F.R. § 435.915 when CMS approved its TennCare's 1115. However, TennCare drafted that agreement, and 42 C.F.R. § 431.420(a)(1) provides: "Any provision of the Social Security Act that is not expressly waived by CMS in its approval of the demonstration project are not waived," TennCare Notice of Hearing, page 14.

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Since ambiguous contracts are usually construed against the drafter, Appellant contends it is worth exploring the text of TennCare's 1115 waiver.

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The precise text of the waiver, which seeks to waive Section 1902(a)(34) and 42 CFR 435.915 is "To enable the state not to extend eligibility prior to the date that an application for assistance is made."¹²

¹² TennCare III Demonstration Approval Period: January 8, 2021 – December 31, 2030, available at <https://www.tn.gov/content/dam/tn/tenncare/documents/tenncarewaiver.pdf>. See also TennCare's Notice of Hearing, section 5.3, at page 13.

If the Court construes the 1115 waiver (which is a contract between CMS and TennCare) against the drafter, which Appellant will ask the Court to do, then the April application was pending and not denied when the July 21, 2021 was filed. That means Appellant is not asking TennCare “to extend eligibility prior to the date that an application for assistance is made.” (Emphasis added). Instead, she is asking for coverage for periods when she was eligible and had an application pending. The same logic extends eligibility to January 1, 2021, which explains the conversations between Ms. Moore and ██████████ employees regarding protecting the date.” In other words, poor drafting in TennCare’s 1115 waiver creates a set of circumstances in this particular case where the requirement to consider and award retroactive coverage was not expressly waived.

Inexplicably, Judge Ren did none of the above. Instead he began examining the litigation exception in 110.060.8. The litigation exception did not somehow make the life insurance policy more inaccessible than it already was under his prior findings, so why Judge Ren considered it is unknown.¹³ Nonetheless, in considering it, Judge Ren erred by finding the litigation began on October 28, 2021. The record included Exhibits 1 through 5, 8, 10, 11. See TennCare Notice of Hearing, page 41, and pages 28-29 (listing exhibits admitted at the first fair hearing), which clearly showed the October 28, 2021 motion was simply one motion in continuing litigation.¹⁴ The petition initiating the litigation (as opposed to motions within that litigation) was filed on May 3, 2021. According, even if the litigation exemption was necessary (which it wasn’t as a result of Judge Ren’s prior findings), eligibility should have been approved as of May 3, 2021 (or earlier), for the same reasons discussed above.

Judge Ren’s Order concluded, by remanding the case to TennCare and holding the March 29, 2022 hearing was:

Decided in favor of Petition and is GRANTED, in part, and **REMANDED** to TennCare for further processing pursuant to the findings in this Order. **TennCare SHALL review Petitioner’s entire case and reconsider her eligibility for LTSS Institutional Medicaid benefits**, excluding the value of the ██████████ life insurance policy as of October 28, 2021. Should TennCare require additional information, TennCare shall request such information from Petitioner, Mr. ██████████, and Ms. ██████████, in writing, and said individuals are strongly encouraged to cooperate with TennCare and timely provide any requested information pursuant to the instructions

¹³ Perhaps he was the victim of bad lawyering and a defective notice of hearing.

¹⁴ Compare Tennessee Rules of Civil Procedure, Rules 3 and 7.02.

in any request. TennCare SHALL provide Petitioner Mr. [REDACTED] and Ms. [REDACTED] with written notice of its determination and **full appeal rights for Petitioner shall attach to said determination**. Should Petitioner be found eligible for LTSS Institutional Medicaid benefits, **TennCare SHALL grant said benefits with an effective date in compliance with applicable law**. Nothing in this Order shall affect Petitioner's current QMB coverage, nor shall it preclude Petitioner from submitting a new application for LTSS Institutional Medicaid benefits.

TennCare Notice of Hearing, pages 46-47 (emphasis added). In essence, Judge Ren's Order directs TennCare to determine when Appellant lost the ability to convert the life insurance policy to cash as contemplated in 20 C.F.R. § 416.1201 and award eligibility as of that date. Appellant filed the present request for a fair hearing because TennCare got that determination wrong.

Post Hearing

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On remand TennCare did not review Petitioner's entire file and grant benefits with an effective date in compliance with applicable law. TennCare did not attempt to determine when Appellant lost the ability to convert the life insurance policy to cash. Instead, on May 10, 2022, TennCare issued a Notice of Decision finding Appellant eligible for TennCare Medicaid from October 1, 2021 – ongoing. TennCare's Notice of Hearing, page 214-215.

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Of note, the Notice of Decision states: "Do you think we made a mistake? If so you can file an appeal. When you appeal you're asking to tell your side to a judge or hearing office. It's called a fair hearing." (Page 215) (Emphasis added). This is ironic since the notice of at least gives lip-service to Judge Ren's Order, while TennCare's argument in its Notice of Hearing would deprive Appellant of the "full appeal rights for Petitioner shall attach to said determination" Judge Ren granted.

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On May 27, 2022, believing TennCare made a mistake, Appellant filed a request for a fair hearing.

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An in-person hearing is currently scheduled for August 2, 2022 at 9am.

Respectfully submitted this 1st day of August, 2022.

David L. McGuffey (BPR#021112)
Attorney for [REDACTED]
P.O. Box 2023
Dalton, Georgia 30722-2023
(706) 428-0888 Office
(706) 264-4338 Cell
(706) 395-4008 Fax
david@mcguffey.net

**BEFORE THE COMMISSIONER OF THE TENNESSEE
DEPARTMENT OF FINANCE AND ADMINISTRATION**

IN THE MATTER OF:)
)
) APPEAL to the DIVISION OF
Appellant.) TENNCARE
)
) Appeal #)
)

**CERTIFICATE OF SERVICE OF
APPELLANT’S CONSOLIDATED STATEMENT OF FACTS FOR ALL
RESPONSES TO TENNCARE MOTIONS**

The undersigned hereby certifies that this day true and correct copies of the foregoing Appellant’s Timeline For All Responses to TennCare Motions was sent as follows:

VIA Email: amos.bailey@tn.gov
Amos Bailey, Esq.
P.O. Box 305240
Nashville, TN 30722

VIA Email: talley.a.olson@tn.gov
Talley A. Olson, Esq. | Director
Office of Civil Rights Compliance
310 Great Circle Road, 3 West
Nashville, TN 37243

VIA FAX to 844-563-1728
And VIA Email: Appeals.Clerk.TennCare@tn.gov
TennCare Eligibility Appeals Clerk
P.O. Box 305240
Nashville, Tennessee 37230

with copy to:
Hon. Christie R. Taylor via email at:
christie.1.Taylor@tn.gov

Respectfully submitted this 1st day of August, 2022.

David L. McGuffey (BPR#021112)
Attorney for)
P.O. Box 2023
Dalton, Georgia 30722-2023
(706) 428-0888 Office
(706) 264-4338 Cell
(706) 395-4008 Fax
david@mcguffey.net