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May 26, 2022

VIA Fax and Email to:

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Division of Appeals and Hearings,
James K. Polk Building
505 Deaderick Street, 1st Floor
ATTN: Clerk's Office
PO Box 198996
Nashville, TN 37219-8996

Re: [REDACTED]
REQUEST FOR IN-PERSON FAIR HEARING

Dear Sir or Madam,

We are requesting an **in-person** fair hearing from your decision dated **May 10, 2022** finding that Mrs. [REDACTED] is only eligible for TennCare nursing home coverage from October 1, 2021 ongoing. For the following reasons, we believe TennCare's decision is incorrect and eligibility should be approved for January 1, 2021 ongoing. This appeal is being filed within 40 days of May 10, 2022 as required by Policy Manual Number 200.055.¹ Attached to this letter are authorizations signed by [REDACTED]'s conservator authorizing the undersigned and this firm to represent Mrs. [REDACTED].

History:

Mrs. [REDACTED] was admitted to The [REDACTED] on January 7, 2021. On January 18, 2021, Dr. [REDACTED] signed a PAE Certification form listing her diagnoses as: Alzheimer's disease, dementia, delusional d.o, psychosis, anxiety, auditory hallucinations, hypothyroidism, HTN, HLD, malnutrition and GERD. TennCare issued a PAE Approval letter on January 19, 2021. (See collective Exhibit 1). Further, a letter signed by [REDACTED] on January 19, 2021, describes Mrs. [REDACTED] as an un-

¹ <https://www.tn.gov/content/dam/tn/tenncare/documents/Appeals.pdf>.

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befriended elder, stating that she would be unsafe in a home environment. (See collective Exhibit 1).

Mrs. [REDACTED] filed applications for nursing home Medicaid on January 22, 2021, on April 22, 2021 (after receiving an agreed upon extension from the TennCare caseworker), and July 21, 2021. Notices of Decision dated April 27, 2021, July 26, 2021 and October 22, 2021, denied the application for failure to provide verification on a timely basis. (collective Exhibit 2). Mrs. [REDACTED] has filed subsequent Medicaid applications to "connect the dates" so she can continue seeking eligibility from the date of admission.

On February 3, 2021, TennCare requested verification regarding the nursing home admission form, letter from life insurance companies showing face and cash values, burial resources, bank statements, income verification and information regarding home expenses. Since Mrs. [REDACTED]'s condition prevented her from helping secure verification, [REDACTED] reached out to Mrs. [REDACTED]'s sister. To the extent possible, Mrs. [REDACTED]'s sister provided assistance. Upon receipt of verification documents, [REDACTED] promptly forwarded said verification to TennCare including information regarding [REDACTED] Life Policy Number [REDACTED].²

On March 29, 2021, Dejuanica Moore, acting for TennCare, emailed [REDACTED] [REDACTED]'s Medicaid specialist stating the case would be denied due to the cash value of the [REDACTED] policy. Mrs. Moore stated Mrs. [REDACTED] needed to spend down \$3934. Mrs. Moore failed consider Mrs. [REDACTED]'s mental impairment and, in so doing, failed to follow Tennessee Policy Manual Number 110.060³(3)(a) by taking Mrs. [REDACTED]'s mental impairment into account.⁴

² In or around August, the Chancery Court approved spend-down of proceeds from the [REDACTED] life policy paying court costs, attorney's fees and funding a burial. Those funds were immediately disbursed consistent with the Chancery Court's Order.

³ Tennessee Policy Manual Number 110.060 is attached as Exhibit 3.

⁴ It is worth noting that virtually every notice TennCare sent Mrs. [REDACTED] asks in bold, extra-large font: "Do you need help talking with us or reading what we send you? Do you have a disability and need help getting care or taking part in one of our programs or services?" Due to Mrs. [REDACTED]'s dementia, she did need such help. Eventually she received help from the Chancery Court and from Mr. [REDACTED].

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Efforts were made to assign the [REDACTED] Life policy toward payment of an irrevocable funeral contract, at which time it was discovered that Mrs. [REDACTED]'s sister was a health agent, but not a financial agent. Initially it was believed that Mrs. [REDACTED]'s son, [REDACTED], might be an agent under a power of attorney; however, despite best efforts, he could not be located. When a verified Petition for emergency conservatorship was filed on 3, 2021, the Petition stated:

“Reports from family members indicate Respondent’s son, [REDACTED] [REDACTED], may be a financial power of attorney for Respondent. Respondent has since received confirmation from a family member that Mr. [REDACTED] is not a financial or medical power of attorney for Mrs. [REDACTED].”

Thus, despite efforts to identify someone with legal authority to liquidate Mrs. [REDACTED]'s excess resources, no one could be found. No one had legal authority to either assign the excess resources to a funeral home or otherwise liquidate them and spend them down. (collective Exhibit 4).

On May 3, 2021, a verified Petition for Appointment of Emergency Conservatorship was filed in the Chancery Court of Hamilton County, Tennessee. (collective Exhibit 4). On May 10, 2021, the Chancery Court of Hamilton County heard the Petition for Appointment of an Emergency Conservator and appointed [REDACTED] as emergency conservator. (collective Exhibit 4). Emergency Conservatorships are governed by T.C.A. § 34-1-132 and the Chancery Court’s Order did not confer authority to liquidate life insurance or other excess resources.

On June 2, 2022, Mr. [REDACTED] was appointed limited conservator. He also filed a motion to approve spend-down of previously controverted resources (e.g., proceeds from a [REDACTED] life policy). His motion included a spend-down plan which was approved after a hearing. The Chancery court authorized liquidation of the [REDACTED] life policy but required further approval to spend-down the proceeds. (collective Exhibit 4). Notably, at that time, no one with authority to act knew of the existence of the [REDACTED] life policy.

Mrs. [REDACTED]'s application continued to linger with TennCare requesting additional verification and Mrs. [REDACTED] with the assistance of Mr. [REDACTED] and the [REDACTED] [REDACTED], attempting to assist. At some point in October, Mrs. [REDACTED]'s authorized representative received a verbal denial. Mrs. [REDACTED] filed a

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timely request for a fair hearing regarding her eligibility.⁵ (See collective Exhibit 5). By Notice dated December 28, 2021, TennCare approved QMB Medicaid for January 1, 2022 ongoing, but **denied** eligibility for nursing home Medicaid alleging that Mrs. [REDACTED] had \$3,688.86 as of the notice date.

A Notice of Hearing dated March 17, 2022, recited that Mrs. [REDACTED] was over resourced due to continued ownership of a life insurance policy with [REDACTED] having a cash value in excess of \$2,000. A prior Notice of Hearing dated January 4, 2021, including more than 200 pages of attached documentation, included information regarding the [REDACTED] life policy that which was cashed out, and where funds placed in a conservatorship account pending approval from the Chancery Court regarding spend-down. (collective Exhibit 4). The Chancery Court's prior authorization of liquidation and spend-down of the [REDACTED] life policy proceeds should be a non-issue for the same reasons the ALJ found the [REDACTED] policy excluded; the limited conservator had no authority to act except with the Chancery Court's approval. However, those issues were not raised in the notice of hearing failed to address Mrs. [REDACTED]'s argument that she was eligible from the date of her initial application and incorrectly framed the issues for the fair hearing, violating T.C.A. § § 4-5-307.

Mrs. [REDACTED] was given a fair hearing on March 29, 2022. She contends the issues were improperly limited due to the faulty notice of hearing. The ALJ found that a litigation exception applied and that Mrs. [REDACTED] had no access to, or authority to, sell the [REDACTED] policy without Chancery Court approval. The ALJ entered an Order on April 20, 2022 **remanding** Mrs. [REDACTED]'s case to TennCare. Said Order specifically required that "TennCare SHALL review **Petitioner's entire record** and reconsider her eligibility for LTSS Institutional Medicaid benefits excluding the value of the [REDACTED] life insurance policy as of October 28, 2021. Should TennCare require additional information, TennCare shall request such information from Petitioner, Mr. [REDACTED] and Ms. [REDACTED] in writing and said individuals are strongly encouraged to cooperate with TennCare and timely provide any requested information..." Notably, on remand, while reviewing the entire record as ordered, TennCare could have applied

⁵ The quest for a fair hearing was sent by facsimile on November 8 following a verbal denial. Although it does not specifically state that it sought review of eligibility from January 2021 on-going, it clearly states that the denial appeared to be based on failure to provide verification which had been an on-going issue since the application was initially filed. Further, it refers to the conservatorship. Mrs. [REDACTED] contends her request for fair hearing was adequate to cover her grievance for all eligibility denials and that TennCare's attempt to limit the issue to the [REDACTED] insurance policy violated T.C.A. § 4-5-307.

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Tennessee Policy Manual Number 110.060(3)(a) or Policy Manual Number 110.060(8), and 20 C.F.R. § 416.1201(a) to find that the same limitations on liquidating excess resources existed prior to October 18, 2021. NOWHERE did the ALJ instruct TennCare to limit its review on remand regarding Mrs. [REDACTED]'s other Medicaid eligibility claims.⁶

Rather than reviewing Mrs. [REDACTED]'s entire record as ordered, TennCare issued a summary decision approving eligibility from October 1, 2021 on-going. Mrs. [REDACTED] still contends she was eligible from January 1, 2021 ongoing for the same reasons she was approved from October 1, 2021 ongoing. Since the matter was remanded for reconsideration, Mrs. [REDACTED] contends she was entitled to full reconsideration and TennCare should have approved eligibility from January 1, 2021 ongoing. She requests a fair hearing on that issue.

Mrs. [REDACTED] effectively had no authority or control over excess resources (e.g., life policies or accounts) in issue from the date of her January 22, 2021 Medicaid application through the date the Chancery Court authorized spend-down.⁷ For optional coverage of the aged, blind and disabled, a state cannot use eligibility requirements more restrictive than those of the Supplanted Security Income Program unless it has elected 209(b) status.⁸ 42 U.S.C. § 1396a(r)(2)(A)&(B) provide:

(A) The methodology to be employed in determining income and resource eligibility for individuals under subsection (a)(10)(A)(i)(III), (a)(10)(A)(i)(IV), (a)(10)(A)(i)(VI), (a)(10)(A)(i)(VII), (a)(10)(A)(ii), (a)(10)(C)(i)(III), or (f) or under section 1905(p) may be less restrictive, and shall be no more restrictive, than the methodology—

⁶ In *P. R. Mallory & Co. v. Ramsey*, 566 S.W.2d 859 (Tenn. Sct. 1978), the Tennessee Supreme Court stated "the necessary effect of the remand was to reopen the adjudication of permanent partial disability which the trial court had awarded in its original decree." Therefore, on remand, TennCare could (and should) have reviewed Mrs. [REDACTED]'s entire file as instructed and considered her claim of eligibility from January 2021.

⁷ Tenn. Rule 1240-03-03-.03(2)(a)(x) provides: Resources excluded from consideration in determination of eligibility for medical assistance are Other resources determined to be unavailable to the applicant/recipient due to circumstance beyond his/her control." Although the ALJ found the UAI life policy was unavailable due to litigation, the ALJ failed to consider other time periods and reasons discussed herein why the excess resources were beyond Mrs. [REDACTED]'s control.

⁸ 42 C.F.R. § 435.401(c).

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(i) in the case of groups consisting of aged, blind, or disabled individuals, under the supplemental security income program under title XVI...

(B) For purposes of this subsection and subsection (a)(10), methodology is considered to be "no more restrictive" if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance.⁹

See also 42 C.F.R. § 435.601(d)(1)¹⁰; 42 C.F.R. 435.401(c)¹¹ *and see* Tennessee Medicaid State Plan, Attachment 2.6-A.¹² authorizing less restrictive criteria,¹³ *and see* Tenn. Rule 1200-13-13-.02(1)(d).¹⁴ One such SSI regulation, cited both in the ALJ's opinion and as support for Tennessee Medicaid Policy is 20 C.F.R. § 416.1201(a).¹⁵ That subsection

⁹ Tennessee is a 1634 State, not a 209(b) State. See POMS SI 01715.010, available at <https://secure.ssa.gov/poms.nsf/lnx/0501715010>. As such, it has linked its Medicaid program to SSI for purposes of making disability determinations. Section 1396a(r)(A) & (B) require that eligibility criteria be no more restrictive than the SSI program for certain applicant grounds. One such group are individuals covered under subsection(a)(10)(A)(ii), which incorporates Section 1905(a) of the Social Security Act by reference. Subsection (4) of Section 1905(a) applies to individuals whose income and resources are insufficient to meet all of such cost (4)(A) nursing facility services (other than services in an institution for mental diseases) for individuals 21 years of age or older. Mrs. [REDACTED] is such an individual.

¹⁰ Available at <https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-C/part-435/subpart-G/section-435.601>.

¹¹ Available at <https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-C/part-435/subpart-E/section-435.401>.

¹² See Exhibit 6.

¹³ CMS Program Overview and Policy Chapter 1, available at <https://www.cms.gov/files/document/chapter-1-program-overview-and-policy.pdf>, provides at footnote 28: For example, states can disregard specific amounts of income or amounts or categories of assets, or effectively remove the asset limit by disregarding all assets. For more information on state flexibilities, see "Enrollment and Retention Flexibilities to Better Serve Medicare-Eligible Medicaid Enrollees" CMS Information Bulletin, January 23, 2015 at <https://www.medicaid.gov/sites/default/files/FederalPolicyGuidance/Downloads/CIB-01-23-2015.pdf>. See also, "Improving Participation in the Medicare Savings Programs," Chapter 3 in June 2020 Report to Congress on Medicaid and CHIP, Medicaid and CHIP Payment and Access Commission (MACPAC) at <https://www.macpac.gov/publication/chapter-3-improving-participation-in-the-medicaresavings-programs/>.

¹⁴ <https://publications.tnsosfiles.com/rules/1200/1200-13/1200-13-13.20220517.pdf>.

¹⁵ https://www.ssa.gov/OP_Home/cfr20/416/416-1201.htm.

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provides “If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).” (Emphasis added).

The ALJ found, “neither Petitioner nor Mr. [REDACTED] had legal authority to redeem life insurance or to spend down the proceeds of the policy absent a court order authorizing such action,” rendering the life policy TennCare sought to count as excluded; however, the ALJ failed to consider the Tennessee conservatorship statute.¹⁶ The ALJ found (April 20, 2022 Initial Decision, p. 20) 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 [REDACTED] life insurance policy of her own accord, as this right was exclusively conferred upon Mr. [REDACTED] began when the conservatorship was established. Further, the ALJ found (April 20, 2022 Initial Decision, p. 21) that “the order establishing Mr. [REDACTED] as limited conservator requires him to first get court approval to access and sell Petitioner’s sources” began when the conservatorship was established pursuant to T.C.A. § 34-3-107(a)(3)(D).¹⁷

As shown below, Mrs. [REDACTED]’s legal impediment to selling or liquidating and spending-down excess resources began prior to October, 2021. It existed from the date of her initial January 2021 application.

Litigation Exception

In the Initial Decision dated April 20, 2022, the ALJ relied on Tennessee Policy Manual Number 110.060(8)¹⁸ to find excess resources were unavailable as of the date a motion was filed. The litigation exception provides:

¹⁶ See Tenn. Rule 1240-03-03-.03(2)(a)(x). Essentially failure to consider the effect of Tennessee legislation placing the excess resources beyond Mrs. [REDACTED]’s control and beyond that of the limited conservator is the type of mistake which can and should be corrected pursuant to Tenn. R. & Regs. § 1360-04-01-.17. With deference to the ALJ, the decision that litigation involving the ward’s resources began in October 28, 2021 was legal error. T.C.A. § 34-3-107(a)(3)(D) makes it clear that while the Conservatorship was in-place, beginning in May (emergency) or June (limited conservatorship), additional authority was required to sell any property belonging to the ward. It is possible the ALJ simply noted paragraph 10 of the Order granting the limited conservatorship since the Order makes no specific reference to T.C.A. § 34-3-107(a)(3)(D).

¹⁷ <https://codes.findlaw.com/tn/title-34-guardianship/tn-code-sect-34-3-107.html>.

¹⁸ <https://www.tn.gov/content/dam/tn/tennCare/documents/ABDIInaccessibleResources.pdf>.

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The equity value of any resource involved in litigation is considered to be unavailable to the individual. Litigation means involved in a lawsuit or some type of court action. Verify with the individual's attorney that litigation is ongoing or secure written documentation that substantiates the individual's allegation that the asset is involved in litigation. The asset is considered unavailable to the individual effective the date it became involved in the litigation action. (emphasis added).

A Petition for emergency conservatorship was filed on May 3, 2021 and granted on May 10, 2021.¹⁹ Thereafter, a Petition for Conservatorship was filed²⁰ and granted on June 2, 2021 with [REDACTED] being appointed Limited Conservator.²¹

A conservatorship begins with the filing of a petition and continues until the Conservator is discharged pursuant to T.C.A. § 34-3-108.²² In *In re Conservatorship of Duke*, 2015 Tenn. App. LEXIS 718, the Court provided the following is a helpful summary of a conservator's role: "The authority, rights and responsibilities of a conservator are not independent of the court." Conservators act as the court's agent and are under the court's supervision. "The courts appointing conservators "retain continuing control over guardians and conservators because the persons who accept these appointments become "quasi-officials' of the court appointing them." (Emphasis added).

In *Salvatore v. Clayton (In re Clayton)*, 914 S.W.2d 84 (Tenn. Ct. App. 1995),²³ the Court stated:

¹⁹ Pursuant to T.C.A. § 34-1-132(a), an emergency conservatorship, if granted, may not exceed sixty (60) days and the emergency conservator may exercise only the powers specified in the order.

²⁰ T.C.A. §§ 34-3-101 and 34-3-104.

²¹ T.C.A. § 34-1-129 provides that a limited conservator only has those powers specified in the letters of conservatorship or in an attached Order. Although T.C.A. § 34-3-107(a)(3)(D) is not cited in the Order, the sum and substance of that provision appears in paragraph 10 where it states the conservator shall have no power to sell the ward's property without Court approval.

²² <https://codes.findlaw.com/tn/title-34-guardianship/tn-code-sect-34-3-108.html>.

²³ Available at

[https://scholar.google.com/scholar_case?case=11209641138611129213&q=Salvatore+v.+Clayton+\(In+re+Clayton\),+914+S.W.2d+84&hl=en&as_sdt=206](https://scholar.google.com/scholar_case?case=11209641138611129213&q=Salvatore+v.+Clayton+(In+re+Clayton),+914+S.W.2d+84&hl=en&as_sdt=206).

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The courts are ultimately responsible for the property of persons for whom they appoint conservators or guardians. *Hinds v. Buck*, 177 Tenn. at 448, 150 S.W.2d at 1072. They retain continuing control over guardians and conservators because the persons who accept these appointments become "quasi-officials" of the court appointing them. See *Logan v. Graper*, 155 Tenn. 565, 568, 4 S.W.2d 955, 956 (1927). Part of this control includes the authority to order an accounting when a conservatorship is terminated. Tenn Code Ann. § 34-13-108(e) (Supp. 1994).

Even though the probate court eventually determined that it did not have jurisdiction to appoint a conservator for Ms. Clayton, it was the probate court's order, and nothing else, that justified Mr. Clayton's control over his mother's assets since January 1993. Thus, Mr. Clayton has been an officer of the court from the time of his appointment as his mother's conservator. Now that the probate court is withdrawing Mr. Clayton's authority to act as his mother's conservator, it may require him to account for his use of his mother's property. (Emphasis added).

Conservators may only be appointed for persons who are disabled. T. C. A. § 34-1-101(7)²⁴ defines a "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. See *In the Matter of the CONSERVATORSHIP OF Ellen P. GROVES*, 109 S.W.3d 317 (2003).²⁵ Pursuant to T.C.A. § 34-1-126,²⁶ the Chancery Court was required to find by clear and convincing evidence that Mrs. [REDACTED] was fully or partially disabled and that the respondent is in need of assistance from the court before a fiduciary can be appointed. As stated in *Groves*:

²⁴ <https://codes.findlaw.com/tn/title-34-guardianship/tn-code-sect-34-1-107.html>.

²⁵ https://scholar.google.com/scholar_case?case=17735237525172525589&q=109+S.W.3d+317+&hl=en&as_sdt=206.

²⁶ <https://codes.findlaw.com/tn/title-34-guardianship/tn-code-sect-34-1-126.html>.

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“This heightened standard of proof eliminates all serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence. *Walton v. Young*, 950 S.W.2d 956, 960 (Tenn.1997); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn.Ct.App.2001). Evidence satisfying this standard will produce in the fact-finder's mind a firm belief or conviction regarding the truth of the factual propositions sought to be established by the evidence. *Fruge v. Doe*, 952 S.W.2d 408, 412 n. 2 (Tenn.1997); *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn.Ct.App.1995).”

The Chancery Court ultimately found, as the TennCare case worker should have, that Mrs. [REDACTED] had a mental impairment; the court appointed evaluator was the same evaluator who completed the PAE Certification form, Dr. [REDACTED]. The evaluator's report, dated April 27, 2021, reaffirms his initial diagnoses of Alzheimer's dementia with psychotic features, schizophrenia, hypertension and hyperlipidemia. Dr. [REDACTED] stated Mrs. [REDACTED] had “impaired insight and judgment.” (See collective Exhibit 1).

It is clear under *Duke, Salvatore* and other authority that a Conservatorship begins when a Petition is filed meeting the requirements of T.C.A. § 34-3-104.²⁷ Motion practice under Rule 7.02 does not initiate litigation so the mere filing of a motion in October did not begin the litigation in which Mrs. [REDACTED] was involved²⁸. The litigation began with a Petition on May 3, 2021.²⁹

²⁷ <https://codes.findlaw.com/tn/title-34-guardianship/tn-code-sect-34-1-104.html>.

²⁸ Rule 7.02 describes a motion as “An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.” In this case, the motion was required under T.C.A. § 34-1-116(e). Chancery Court motions, which are part of continuing litigation, must be filed in conformance with local rule 6, available at https://www.tncourts.gov/sites/default/files/docs/2018_chancery_and_circuit_court_rules_effective_2018sept1.pdf.

²⁹ It is worth noting the ALJ found in the April 20, 2022 Initial Decision that TennCare offered no legal authority to narrow the scope of its own definition of “litigation” for purposes of determining the availability of a financial resource. Nor did TennCare present any legal authority to provide further guidance on interpreting this provision of its own policy. (Initial decision, page 23).

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Mental Impairment and Lack of Authority

January, 2021 through May 2021

Tennessee Policy Manual Number 110.060(3)(a) provides: "If the individual's mental impairment precludes her negotiating the sale of an asset, and she has no guardian or conservator to act on her behalf, exclude the asset as unavailable under certain conditions. It is not necessary that the individual be adjudicated incompetent by a court of law. If, in the Eligibility Specialist's opinion or that of the responsible party or person in a position to know the facts of the individual's situation, the individual is mentally impaired, apply the provisions of this policy." (See Exhibit _____, emphasis added).

As noted above, Mrs. [REDACTED] was admitted to [REDACTED] on January 7, 2021 with diagnoses in a PAE Certification Form listed as: Alzheimer's disease, dementia, delusional d.o, psychosis, anxiety, auditory hallucinations, hypothyroidism, HTN, HLD, malnutrition and GERD. Information underlying the Pre-Admission Evaluation, approved January 25, 2021 (See Exhibit 1) should have placed TennCare on notice that Mrs. [REDACTED] had dementia and was unable to conduct business. She had no capacity to contract and, therefore, any liquidation under those circumstances would violate Tennessee law.

The issue of contractual capacity was considered in *Harris v. Edwards*, 2008 Tenn. App. LEXIS 284. Citing *Roberts v. Roberts*, 827 S.W.2d 788 (Tenn. App.1991),³⁰ the Tennessee Court of Appeals described the issue of mental capacity to execute instruments as follows:

The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction in which he is engaged; the law does not gauge contractual capacity by the standard of mental capacity possessed by reasonably prudent men. It is not necessary to show that a person was incompetent to transact any kind of business, but to

³⁰ Available at
https://scholar.google.com/scholar_case?case=16970755624981139407&q=827+S.W.2d+788+&hl=en&as_sdt=80006.

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invalidate his contract it is sufficient to show that he was mentally incompetent to deal with the particular contract in issue, ...

In *Maupin v. Holmes (In re Estate of Holmes)*, 1998 Tenn. App. LEXIS 213,³¹ the Court of Appeals affirmed a probate court's finding that a decedent lacked capacity to establish a joint bank account with rights of survivorship. Following a bench trial, the court found that at the time the joint account was opened, decedent did not have the mental capacity to create the account. She had been diagnosed with Alzheimer's disease in December, 1995, seven months before the account was established at First Tennessee Bank in Memphis. Evidence during the hearing included the following: (1) She could not remember conversations of the previous day; (2) when ten to fifteen members of the family came to decedent's home for a couple of days to clean-up and fix-up. They removed the furniture, cleaned the house and painted, and decedent never knew what was going on; (3) she was very forgetful, confused and in his opinion could not handle her financial or physical needs; and (4) she could not remember how to sign her name. On appeal, the Court found:

Respondent initially contends that decedent lacked the mental capacity to participate in the creating of a joint bank account with claimant that granted a right of survivorship. As noted in *Lowry*, joint bank accounts with a right of survivorship are analyzed under the "contract theory." Simply put, this means that a joint account agreement with the right of survivorship establishes a contract that transfers the proceeds at death by operation of law. The law of contractual capacity controls. See *Roberts v. Roberts*, 827 S.W.2d 788, 791 (Tenn. Ct. App. 1991). The *Roberts'* court set forth the following as the test of mental capacity required of the person involved to enter into a contract, stating it must be ascertained whether the person "possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction in which he is engaged." *Id.* The issue thus becomes whether the person entering into the contract has the mental capacity to know the nature and terms of the contract. In order to invalidate the contract, there must be shown at the time of execution "such impairment of reasoning powers as to make the person incapable of acting rationally in the transaction involved, or such mental unsoundness as occasions an inability to comprehend the subject of the contract and its nature and probable consequences." *Id.* at 792. Whether a

³¹ Available at <https://casetext.com/case/in-re-estate-of-holmes-v-holmes>.

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person has contractual capacity is to be determined in the light of facts and circumstances surrounding each case. *Id.*

Petitioner contends that a Medicaid applicant with diagnoses of: Alzheimer's disease, dementia, delusional d.o, psychosis, anxiety, auditory hallucinations, hypothyroidism, HTN, HLD, malnutrition and GERD fails the test laid out in *Roberts v. Roberts* and, as a result, lacked contractual capacity, and therefor lacked the authority required under 20 C.F.R. § 416.1201(a) to liquidate property until a conservator was appointed and given authority to do so by the Chancery Court. Petitioner contends recognition of this inability to contract is implicit in Tennessee Policy Manual Number 110.060(3)(a) and the life policies should have been excluded from the time of the initial application

May 2021 through the present

From the inception of the conservatorship, T.C.A. § 34-3-107(a)(3)(D) prohibited the Conservator from taking any action to sell Mrs. [REDACTED]'s property without court approval. T.C.A. § 34-3-107(a) provides "If the rights and powers transferred to the conservator include management of the respondent's property, the order shall... Prohibit the sale of any property except as permitted by § 34-1-116(b) without prior court approval or as permitted in the property management plan approved by the order." To the extent the litigation exception applies, it did not begin with a motion in October, 2021; at the latest, it began on May 3, 2021, when the Petitioner for Emergency Conservatorship was filed and granted. Further, neither Mrs. [REDACTED] nor the Limited Conservator had the legal authority contemplated under 20 C.F.R. § 416.1201(a) until the Chancery Court granted authority to sell or liquidate property and then lacked authority to spend-down the funds until the spend-down order was approved. As noted in the ALJ's opinion, as of the hearing date, March 29, 2022, [REDACTED] had not disbursed the policy proceeds and the Chancery Court had not approved the spend-down.

Petitioner contends any conclusion except that (1) Tennessee State law regarding contractual capacity and (2) Tennessee conservatorship law limiting authority of Conservators to act pursuant to T.C.A. § 34-3-107(a)(3)(D) would violate 42 U.S.C. § 1396a(a)(19) which requires States to provide such safeguards as may be necessary to assure that eligibility ... and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients. Tennessee Policy Manual Number 110.060(3)(a) is such a safeguard and, in this case, it

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was ignored. Further, as discussed below, requiring a conservator to seek authority to liquidate unknown resources is both preposterous and contract to the POMS.³²

Agreement to Sell Property

The ALJ found that an unsigned agreement to sell property was not a basis for conditional approval of benefits. However, that finding failed to consider two important points. First, under T.C.A. § 34-3-107(a)(3)(D), the limited conservator had no authority to sign such an agreement without Chancery Court Approval. Second, and more important, TennCare's delivery of the agreement to sell property was an admission against interest that the life policy was unavailable. In *Logan v. Estate of Cannon*, 2016 Tenn. App. LEXIS 708 the Court of Appeals explained that a declaration against interest may be admissible from a non-party provided in each case that the prerequisites of the exception are met. McCormick on Evidence, 3rd ed., § 262, sets forth the following:

Admissions are the words or acts of a party-opponent, or of his predecessor or representative, offered as evidence against him

A type of evidence with which admissions may be confused is evidence of declarations against interest. The latter, coming in under a separate exception to the hearsay rule, to be admissible must have been against the declarant's interest when made. No such requirement applies to admissions Hence, the common phrase in judicial opinions, "admissions against interest," is an invitation to confuse two separate exceptions to the hearsay rule and to engraft upon admissions an against-interest requirement without basis in reason or authority.

In this case, Mrs. [REDACTED] contends that delivery of the Agreement to Sell was an admission against interest that she had no authority to sell or liquidate the life policy while she lacked contractual capacity and while the limited conservator lacked authority to sell the policy and spend-down the proceeds.

Unknown Resources

The ALJ's decision indicated that the Limited Conservator became aware of existence of the [REDACTED] life policy between August 19, 2021 and October 7, 2021. Clearly his awareness came from someone other than Mrs. [REDACTED] given her condition. It

³² The conservator did not learn about the existence of the United American policy until at least August 2021 and did not know it would impact eligibility until October 2021.

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appears it was first noticed August 17, 2021 when a caseworker inquired about a \$13 monthly charge on a bank statement. In an email exchange, the Medicaid specialist told the caseworker she thought it was for a Medicare Part D policy, but she would make inquiries. On or around October 7, 2021, [REDACTED] provided a letter confirming the policy was life insurance with a case value of \$2,184.66.

As noted above, 42 U.S.C. § 1396a(r)(2)(A)&(B) prohibit eligibility methodologies more restrictive than those used by the Supplemental Security Income program. POMS SI 01110.117.A provides "An individual may be unaware of his or her ownership of an asset.³³ If this is the case, the asset is not a resource during the period in which the individual was unaware of his or her ownership." Since an unknown resource cannot be counted until it becomes known, and since Mrs. [REDACTED] could not have assisted her limited conservator due to her dementia, Petitioner contends POMS SI 01110.117.A requires exclusion of the life policies during any period before they were known to exist.

Covid-19

On March 13, 2020, the President of the United States issued a proclamation that the COVID-19 outbreak in the United States constitutes a national emergency by the authorities vested in him by the Constitution and the laws of the United States, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 et seq.), and consistent with section 1135 of the Act. The Centers for Medicare & Medicaid Services (CMS) granted an initial approval to the State of Tennessee for multiple section 1135 flexibilities on March 31, 2020.³⁴

Tennessee Governor's Executive Order No. 36 provided that "The Division of TennCare is hereby authorized to create policies or modify existing policies as is necessary to ensure that members of the TennCare and CoverKids programs continue to receive medically necessary services without disruption during this state of emergency."³⁵

³³ <https://secure.ssa.gov/poms.nsf/lnx/0501110117>.

³⁴ <https://www.medicaid.gov/state-resource-center/disaster-response-toolkit/federal-disaster-resources/99161>.

³⁵ <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee36.pdf>.

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The Centers for Medicare and Medicaid Services now maintains a list of Coronavirus waivers & flexibilities.³⁶ Further, it maintains a summary of COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers.³⁷

Further, the Medicaid.gov website, maintained by CMS states:

Under section 1135 of the Act, the Secretary has the authority to temporarily waive or modify certain Medicare, Medicaid, and CHIP requirements to ensure that sufficient health care items and services are available to meet the needs of enrollees in an area affected by a federally-declared PHE. The Secretary may invoke section 1135 waiver authority when a declaration of emergency or disaster under the National Emergencies Act or Stafford Act and a Public Health Emergency Declaration under Section 319 of the Public Health Service Act have been made.³⁸

The Tennessee Supreme Court declared a judicial state of emergency, publishing certain orders on its website.³⁹ The Hamilton County Chancery Court website states: "Due to the Pandemic, there is no docket call in Part 1. To set a hearing on a motion, the moving party must first file their motion and then call 423-209-7380 for available dates. Once a date has been established, the moving party will submit an agreed order to set the hearing. If the parties cannot agree, the movant shall submit a proposed order to set the motion for hearing."⁴⁰

In light of the national emergency clearly recognized by the President of the United States, CMS and the Tennessee Courts, Mrs. [REDACTED] contends that failure to provide assistance, at least in excluding resources under Tennessee Policy Manual Number 110.060(3)(a) while she lacked capacity and before her limited conservator had legal authority to spend down excess resources violated 42 U.S.C. § 1396a(19).

Conclusion

Mrs. [REDACTED] requests an **in-person** fair hearing in Chattanooga, Tennessee, where she may call witnesses and present documentation substantiating her eligibility. She

³⁶ <https://www.cms.gov/coronavirus-waivers>.

³⁷ <https://www.cms.gov/files/document/covid-19-emergency-declaration-waivers.pdf>.

³⁸ <https://www.medicaid.gov/resources-for-states/disaster-response-toolkit/section-1135-waiver-flexibilities/index.html>.

³⁹ <https://www.tncourts.gov/Coronavirus>

⁴⁰ https://www.hamiltontn.gov/ChanceryCourt_Dockets.aspx.

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also reserves the right to present additional evidence and legal argument at said hearing regarding why she is entitled to eligibility from January, 2021 on-going. Mrs. [REDACTED] requests a copy of her entire file and a notice of hearing outlining in detail as required by federal and state law each reason why TennCare contends eligibility does not begin as of January 2021. Further, prior to receipt of TennCare's May 10, 2022 decision, Mrs. [REDACTED] filed additional documents by facsimile to 855-315-0669. Those documents included:

1. A copy of the Petition for Appointment of Emergency Conservator, filed stamped with the Court May 3, 2021.
2. A copy of the Court evaluator's report filed stamped with the Court on May 3, 2021. Said report shows that Mrs. [REDACTED] had Alzheimer's dementia with psychotic features, schizophrenia, hypertension and hyperlipidemia.
3. A copy of Letters of Limited Conservatorship of Property dated June 2, 2021. T.C.A. § 34-1-129, a copy of which is included, shows that Limited Letters of Conservatorship must be clearly marked "Limited," which they are.
4. Relevant pages from a TennCare notice dated August 19, 2021, requesting more information regarding an insurance policy.
5. A facsimile request from the Limited Conservator dated August 23, 2021, requesting information from the insurance carrier regarding said policy.
6. A facsimile from [REDACTED] Insurance Company dated October 7, 2021 to the Limited Conservator disclosing the face amount and case value of the policy.
7. A Motion for Additional Compensation and to Approve Spend Down dated January 14, 2022.
8. An Order Setting Additional Compensation and Approving Spenddown dated February 10, 2022.
9. Cover letter from [REDACTED] Insurance Company dated March 30, 2022, transmitting a check for \$2,235.34 which was immediately spent down paying additional compensation approved in the February 10, 2022 Order.

Mrs. [REDACTED] incorporates her response dated May 18, 2022, together with all attached documentation into her request for a fair hearing.

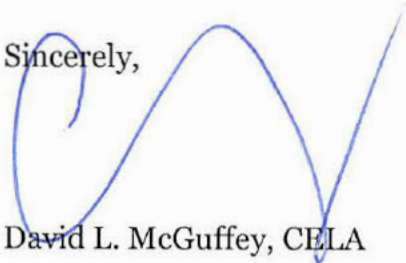
Request for Fair Hearing re [REDACTED], Person ID [REDACTED]
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Finally, if additional documentation must be considered first by the caseworker, then Mrs. [REDACTED] expressly requests that this request for fair hearing be considered and that the case be remanded again to TennCare for FULL consideration of her eligibility for nursing home Medicaid beginning January, 2021.

Mrs. [REDACTED] also puts TennCare on notice that she may call certain witnesses such as Dr. [REDACTED] by affidavit pursuant to T.C.A. § 4-5-313(4).

Sincerely,



David L. McGuffey, CELA

Exhibit Attached

ATTACHMENTS HAVE BEEN DELETED