

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

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

---

**RESPONSE TO MOTION TO DISMISS BASED ON FAILURE TO STATE A  
CLAIM UPON WHICH RELIEF MAY BE GRANTED**

---

[REDACTED], Appellant, files this Response to Motion to Dismiss Based on Failure to State a Claim Upon Which Relief May Be Granted as follows:

**Facts**

Appellant incorporates by reference the facts stated in Appellant’s Consolidated Statement of Facts for All Responses to TennCare Motions, filed August 1, 2022.

Of particular note in this response, on July 28, 2022, TennCare conceded that at all relevant times, including January 2021, Appellant was cognitively impaired.

**Argument**

The concession that that at all relevant times, including January 2021, Appellant was cognitively impaired, in conjunction with other facts showing Appellant had no agent until a conservator was appointed, and the conservator had no power to convert the controverted life insurance policy to cash until the Chancery Court allowed it, should resolve this case in Appellant’s favor. Under Tennessee law, a person who lacks legal capacity cannot contract unless an agent with capacity was appointed. Under Tennessee law, a conservator cannot liquidate a ward’s property without court approval. 20 C.F.R. § 416.1201(a)(1) provides “If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).” This leads to the inescapable conclusion that at all relevant times, including January 2021, the controverted life insurance policy cannot be considered Appellant’s resource.

The gravamen of TennCare motion seems to be that TennCare is unable to grant coverage prior to the date of an approval or qualifying event and that October 1, 2021 is the earliest date possible. TennCare is wrong and its motion should be denied.

Judge Ren examined 20 C.F.R. § 416.1201 and then found “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. This finding alone gives Petitioner the right to demand coverage from July 1, 2022 ongoing. Notwithstanding TennCare’s contention otherwise, 20 C.F.R. § 416.1201(a) is clear: “If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).” Therefore, Appellant was not over-resourced during any period when she could not convert the life insurance policy to cash.

Appellant contends her legal incapacity prevented her from selling and spend-down excess resources prior to the time Mr. ██████ was appointed. She further contends Mr. ██████’s authority was limited by the Chancery Court and T.C.A. § 34-1-107(a)(3)(D) until the Chancery Court authorized disposal of Appellant’s resources..

In *Ballard v. Saul*, 414 F. Supp. 3d 1240 (D. N. Cal. 2019),<sup>1</sup> the Court stated:

the Social Security Administration's initial inquiry into the issue is governed by Program Operations Manual System (POMS) SI 01120.010.<sup>2</sup> POMS are not binding on courts, although they frequently consider them in interpreting the statutory and regulatory policies of that agency. *Kubetin v. Astrue*, 637 F. Supp. 2d 59, 63 (2009).<sup>3</sup> Under POMS SI 01120.010, the agency will not consider property of any kind to be a resource for SSI eligibility purposes "unless . . . it meets all three criteria" listed in the section. First, the individual "must have some form of ownership interest in property in order for the property to be considered a resource." POMS SI 01120.010.B.1. Second, the individual "must have a legal right to access [the] property" and "the legal ability to access funds for spending or to convert noncash property into cash." POMS SI 01120.010.B.2. "The fact that an owner does not have physical possession of property does not mean it is not his/her resource, provided the owner still has the legal ability to spend it or convert it to cash." *Id.* The property is not a resource "[w]hen there is a legal bar to sale of

<sup>1</sup>

[https://scholar.google.com/scholar\\_case?case=3665008940851967460&q=414+F.+Supp.+3d+1240+&hl=en&as\\_sdt=206](https://scholar.google.com/scholar_case?case=3665008940851967460&q=414+F.+Supp.+3d+1240+&hl=en&as_sdt=206).

<sup>2</sup>

<https://secure.ssa.gov/poms.nsf/lnx/0501120010>.

<sup>3</sup>

[https://scholar.google.com/scholar\\_case?case=15344340952148823105&q=Kubetin+v.+Astrue,+637+F.+Supp.+2d+59&hl=en&as\\_sdt=206](https://scholar.google.com/scholar_case?case=15344340952148823105&q=Kubetin+v.+Astrue,+637+F.+Supp.+2d+59&hl=en&as_sdt=206).

property (e.g., if a co-owner legally blocks sale of jointly-owned property)" such that litigation would be required ". . . in order to accomplish sale or access." POMS SI 01120.010.C.2. Third, the individual must have the legal ability to use the property for his/her personal support and maintenance, such that even if the individual meets the first two requirements, "a legal restriction against the property's use for the owner's own support and maintenance means the property is not his/her resource." POMS SI 01120.010.B.3.

(Emphasis added); *see also Simonsen v. Bremby*, 679 Fed. Appx. 57 (2nd Cir. 2017) (an individual is "not require[d] . . . to undertake litigation in order to accomplish . . . access" to a resource. POMS SI § 01120.010(C)(2). "The property is not a resource under such circumstances . . . ).<sup>4</sup>

### **January, 2021 through May 3, 2021**

TennCare cannot change Tennessee statutory or common law regarding legal incapacity and Dr. ██████'s affidavit is relevant in showing Appellant lacked legal capacity.<sup>5</sup> 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 3, emphasis added).

As noted Appellant's Statement of Facts, Mrs. ██████ was admitted to ██████ on January 7, 2021 with diagnoses listed in a PAE Certification Form as: Alzheimer's disease, dementia, delusional d.o, psychosis, anxiety, auditory hallucinations, hypothyroidism, HTN, HLD, malnutrition and GERD. The PAE put TennCare on notice Appellant was cognitively impaired and unable to conduct business. Appellant had no capacity to contract and, therefore, any liquidation of the controverted life insurance policy 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),<sup>6</sup> the Tennessee Court of Appeals described the issue of mental capacity to execute instruments as follows:

---

<sup>4</sup>

[https://scholar.google.com/scholar\\_case?case=10655201409799875439&q=Simonsen+v.+Bremby,+679+Fed.+Appx.+57+&hl=en&as\\_sdt=206](https://scholar.google.com/scholar_case?case=10655201409799875439&q=Simonsen+v.+Bremby,+679+Fed.+Appx.+57+&hl=en&as_sdt=206).

<sup>5</sup> T.C.A. § 4-5-103, stating "Administrative agencies shall have no inherent or common law powers, and shall only exercise the powers conferred on them by statute or by the federal or state constitutions.

<sup>6</sup> Available at

[https://scholar.google.com/scholar\\_case?case=16970755624981139407&q=827+S.W.2d+788+&hl=en&as\\_sdt=80006](https://scholar.google.com/scholar_case?case=16970755624981139407&q=827+S.W.2d+788+&hl=en&as_sdt=80006).

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 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,<sup>7</sup> 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 person has contractual capacity is to be determined in the light of facts and circumstances surrounding each case. *Id.*

---

<sup>7</sup> Available at <https://casetext.com/case/in-re-estate-of-holmes-v-holmes>.

In *Francis v. Barnes*, 2013 Tenn. App. LEXIS 625 (Ct. Apps., Jackson),<sup>8</sup> the Court found that capacity has both functional and decision-making components. “A person's capacity encompasses two concepts: functional capacity and decision-making capacity. *In re Conservatorship of Groves*, 109 S.W.3d at 334. Functional capacity relates to a person's physical ability to take care of themselves and their property. *Id.* It can be determined by observing a person's ability to perform daily activities, such as maintaining personal hygiene, obtaining nourishment, and mobility. *Id.* Decision-making capacity relates to the person's mental ability to make and communicate decisions related to caring for themselves and their property. *Id.* at 335. Choices based on deranged or delusional reasoning or irrational beliefs may signal decision-making incapacity. *Id.* at 336. Functional impairments are relevant insofar as they have a tendency to bear upon the person's decisionmaking capacity, but alone will not render a person incompetent. *Keasler v. Estate of Keasler*, 973 S.W.2d 213, 218 (Tenn. Ct. App. 1997) (citing *Harper v. Watkins*, 670 S.W.2d 611, 629 (Tenn. App. 1983)). .... In all, the trial court heard the live testimony of 24 witnesses regarding Ms. Park's competency on November 19, 2010 and made the factual determination that Ms. Park was incompetent on that date.’

In *Jones v. Kindred Healthcare Operating, Inc.*, 2008 Tenn. App. Lexis 486 (8/20/2008)<sup>9</sup> the question of authority to act as agent was presented in the context of an arbitration agreement. The Court framed the issue as “May an attorney-in-fact holding authority under a general durable power of attorney convey to a third party the authority to make healthcare decisions for the principal--namely, the authority to enter into an arbitration agreement collateral to a nursing home admission?” The Court held she may not. In so holding, the Court found “it is quite another for the attorney-in-fact to delegate her powers to another not chosen by the principal.” In this case, Mrs. ██████████ had no agent or fiduciary prior to the appointment of Mr. ██████████. Thus, there was no one with authority to sell or liquidate and spend-down excess resources.

Appellant contends the PAE Certification Form, Dr. ██████████'s affidavit, the conservatorship evaluation and the Chancery Court's finding that Appellant was in need of a conservator all point to the inescapable conclusion that Appellant lacked both functional and decision-making contractual capacity described in *Roberts v. Roberts*. As a result, , 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. That the life policy was not, in fact, liquidated until after the first fair hearing further supports this conclusion.

Although TennCare caseworkers are not expected to know federal regulations, Tennessee law concerning legal capacity or conservatorship law, TennCare's policy manual is a guide caseworkers have so they can recognize and respond appropriately in most cases. Here, if the caseworker had applied Tennessee Policy Manual Number

---

<sup>8</sup>

[https://scholar.google.com/scholar\\_case?case=13146534877932480623&q=Francis+v.+Barnes,+2013+Tenn.+App&hl=en&as\\_sdt=206](https://scholar.google.com/scholar_case?case=13146534877932480623&q=Francis+v.+Barnes,+2013+Tenn.+App&hl=en&as_sdt=206).

<sup>9</sup> <https://casetext.com/case/jones-v-kindred-ho>.

110.060(3)(a), she would have reached the conclusion compelled by 20 C.F.R. § 416.1201 and exempted the life policy until a conservator was appointed and given authority to convert the life policy to cash.

TennCare's Motion should be DENIED. Respectfully submitted this 1<sup>st</sup> 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: )  
 )  
 [REDACTED], ) APPEAL to the DIVISION OF  
Appellant. ) TENNCARE  
 )  
 ) Appeal # [REDACTED]  
 )

---

**CERTIFICATE OF SERVICE OF  
RESPONSE TO MOTION TO DISMISS BASED ON FAILURE TO STATE A  
CLAIM UPON WHICH RELIEF MAY BE GRANTED**

---

The undersigned hereby certifies that this day true and correct copies of the foregoing Appellant's Response 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 1<sup>st</sup> 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