

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF  
JOHN F. MALONE  
PRESIDING JUDGE, CHANCERY



COURTHOUSE  
ELIZABETH, NEW JERSEY 07207

May 11, 2010

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Re: In the Matter of T.S.  
an alleged incapacitated person

Dear Counsel:

This letter is the court's decision with respect to Petitioner's application for the appointment of a guardian. Petitioner F.S. ("Frank"), the son of defendant T.S. ("Tom"), seeks a declaration that Tom is a mentally incapacitated person, unable to govern himself or manage his personal and financial affairs.

Tom was born on ; he is currently 88 years old. Tom was married for nearly 62 years until his wife died on . Tom and his wife had three children, Frank, Tom and Carol. Tom earned his Ph.D. in organic chemistry from Purdue University. He retired from Merck in 1984 as the Executive Director of Microbiology and Natural Product Isolation. In 2003 and 2004, Tom at the age of 83, returned to college and obtained two Associate degrees, one in psychology and one in criminal justice.

Tom has Parkinson's disease and diabetes. Tom sustained two hip fractures when he fell as a direct result of his Parkinson's disease. It is undisputed that Tom cannot live without assistance.

The matter is before the court on Petition filed on behalf of Frank seeking to have his father declared to be incapacitated and to be appointed his guardian. The question before the court is whether Tom has a mental impairment that renders him incapable of managing his medical and personal affairs. Petitioner argues that Tom is incapable of managing his own personal and financial affairs due to his psychiatric illness. Respondent asserts that there is no clear and convincing evidence of Tom lacking the capacity to manage his personal and financial affairs.

### PETITIONER'S ARGUMENT

On July 16, 2007, prior to commencement of litigation, Tom was examined by Dr. J.S., Tom's neurologist, who noted that Tom was exhibiting psychiatric issues and recommended seeing a psychiatrist due to Tom's psychiatric behavior. Neurologist Dr. M.V. was consulted for a second opinion on August 22, 2007, finding "[Tom] has significantly impaired judgment and that it stems from a psychiatric involvement. ...He is probably out of touch with reality because of underlying psychiatric involvement."

In 1998, Tom was diagnosed with Parkinson's disease. At that time he disagreed with his doctors and refused treatment for his tremors. Although he now admits to having the disease, he has poor judgment in following medical advice regarding his medication.

At trial, Petitioner presented the testimony of 3 physicians who testified as to Tom's medical and physical disorders.

Dr. H.H., a psychiatrist who first examined Tom in October 2007, explained that Parkinson's disease is frequently associated with depression and volatility of mood and dementia. Dr. H.H. testified that dementia is characterized by an inability to make appropriate judgments and poor impulse control to such an extent that a patient would not treat his physical ailments because of his psychiatric illness. Dr. H.H. testified that Tom suffers from pre-senile dementia as a result of his Parkinson's disease. Dr. H.H. explained Tom has "superficial cognitive capacity" making Tom appear competent at times and able to perform some basic tasks but he lacks the insight and judgment necessary for self-governance.

Dr. H.G. , a psychiatrist and psychoanalyst, also testified for Petitioner. It was Dr. H.G.'s opinion that Tom was not competent to make decisions regarding his own medical and financial matters. Dr. H.G. expressed concerns over Tom's failure to recognize his diabetes and his tendency to minimize the significance of depression in his life. Dr. H.G. was concerned over the ambiguity of Tom's relationship with J.D.

, who Tom referred to as his girlfriend, companion, physical therapist and friend interchangeably. Dr. H.G. noted that the questionable decisions Tom has made concerning Ms. J.D. (e.g. monetary and other gifts) were in sharp contrast to Tom's analytic, careful style he had for many years. Tom told Dr. H.G. that if he stopped his medication "you just get a little bit more tremor and a little bit harder to walk; I've done that already," showing he does not grasp that failing to take his medication could lead to another fall. Dr. H.G. diagnosed Tom as having major depression as a side effect of his Parkinson's disease. Drs. H.H., J.S. and H.G. have diagnosed Tom with paranoid personality disorder.

Petitioner further argues that due to Tom's incompetency he cannot manage his health care. Following his second hip surgery Tom received rehabilitation services from P.T. Center . Tom hired a full-time receptionist from P.T. Center, J.D. , as his home health aide. J.D. is not licensed in home health aide care and is not trained in physical rehabilitation. She does not meet with Tom's doctors and has not reviewed a health care plan for Tom with any physician. J.D. lives in Tom's home with her three children. J.D. is paid \$300 per week and receives free room and board although she owns her own home. She also receives substantial gifts in the form of cash and vacations including: \$5,000 each month from May 2007 to October 2007, jewelry worth over \$3,000, payment for her children's camp, between \$20,000 and \$30,000 for her credit card bills, assistance in mortgage payments, and the purchase of a car for her use. All of this belies Tom's spending habits before 2007. Tom's personal attorney, M.H. , testified that Mr. T.S. is almost indigent. Furthermore, Tom told Dr. H.H. he didn't know how much money he had and that gifts to J.D. were relatively minor. When Tom was questioned about those gifts he could not recall or explain what they represented. Petitioner contends that Tom's relationship with J.D. demonstrates

that he is incapable of managing his financial affairs and must have a guardian appointed.

Petitioner refers to other incidents which he contends are further evidence of Tom's psychiatric impairments. These include Tom's decision to wait five hours to seek medical care after his second hip break and that Tom signed out of the Rehabilitation Facility against medical advice.

Tom no longer has a close relationship with his son Frank as he did prior to this litigation. Tom no longer attends family events or birthdays, which he never missed prior to 2007. Tom's neighbor, S.P., noticed Tom sleeping all day and he was awake most of the night after his wife's death. Ms. S.P. formed a close relationship with Tom as a result to help him recover and he told her "you saved my life. I didn't realize how depressed I was." However, in 2007 S.P. noticed Tom's pets were being neglected and his beloved items were disappearing from his home. Tom now calls S.P. a "wacko" and maintains no relationship with her.

### **RESPONDENT'S ARGUMENT**

Respondent T.S. contends that the Petitioner has not satisfied its burden of proving that he is incapacitated by clear and convincing evidence. Respondent notes that a court may appoint a guardian "if it finds that an individual is incapacitated as defined in N.J.S.A. 3B:1-2... "An incapacitated individual," is defined as an individual who is impaired by reason of mental illness or mental deficiency to the extent that he lacks sufficient capacity to govern himself and manage his affairs. It is Respondent's contention that the Petitioner has failed to prove that Tom suffers from a mental illness or mental deficiency as required pursuant to the first prong of the statutory definition of incapacity.

Respondent points out that although Petitioner's experts Drs. H.H. and H.G. are psychiatrists; neither have a specialty in geriatrics. Conversely, Respondent notes that Drs. B.H., D.O. and Z.S., M.D., who testified on his behalf both specialize in geriatric medicine. Respondent points out that his medical experts as well as his expert geriatric social worker performed a battery of standardized objective tests that are accepted by the American Geriatric Society and the American Medical

Association. On the other hand, with the exception of the mini-mental status examination, Petitioner's experts performed no objective tests and relied solely upon subjective impressions of Tom based upon brief meetings and input from Frank and his wife P.S. Tom scored well on the mini-mental status exam indicating that his cognitive capacities are intact.

Dr. B.H. is board certified in geriatric medicine and has evaluated over 100 elderly individuals. Dr. Z.S. is board certified in internal medicine and board certified in geriatrics. In the past eleven years she has performed more than 300 capacity evaluations. Both of Tom's experts, B.H. and Z.S. performed a battery of standardized subjective tests and concluded in their professional opinions, that Tom is capable of making his own personal, medical and financial decisions and that his decision-making capacity is not impaired.

With regards to depression, Respondent points out that Dr. H.H. did not diagnose Tom with clinical depression and Dr. H.G. testified that he never observed any symptoms of clinical depression in Tom.

As to the paranoia, Tom's experts both noted that paranoia is a symptom rather than a diagnosis, falling short of proving a "mental illness, mental disease or condition" to establish the first prong of the two-prong test for incapacity. Moreover, the Respondent's experts contend that in light of Petitioner's actions taken in preparation for commencing this action, Tom's feelings for his son and daughter-in-law may constitute well-founded mistrust rather than paranoia. Respondent further points out that on direct examination, Dr. H.H. did not mention paranoia. Dr. H.G. testified on direct that his first suggestion of paranoia came from Respondent's daughter-in-law P.S.

It is Respondent's contention that none of the doctors, both for the Petitioner and Respondent, diagnosed him with a psychiatric disorder.

Respondent contends that the evaluations conducted by Drs. H.H. and H.G. were inadequate. Although both experts opined that Tom was in need of a guardian, the doctors spent little time meeting with Tom and primarily interviewed Petitioner and his wife for information about Tom. Respondent further asserts that Drs. H.H. and H.G. are not consistent in their conclusions. Dr. H.H. indicated that although Tom

scored well on the mini-mental status examination he conducted, Tom nevertheless suffered an impairment of judgment and insight characteristic of dementia. In contradiction of this diagnosis, Dr. H.G. testified that he saw no evidence of dementia.

Respondent contends that even if Petitioner had proven the first prong for incapacity, the Petitioner failed to prove the second prong of the statutory definition requiring that Tom suffers from such illness or deficiency to the extent that he lacks sufficient capacity to govern himself.

Respondent disputes Petitioner's claims asserting that his conduct is rational and a legitimate exercise of his right to make decisions even if those decisions are not approved by the Petitioner.

Respondent believes that his relationship with J.D. is the primary basis for the claim of poor judgment demonstrating lack of capacity. Contrary to the claims of Petitioner, Tom asserts that his relationship is a rational choice made by himself. He points out that J.D.'s presence in the house at night after the day-time home health aid has left provides assistance and security to him. Tom contends that he benefits from the presence of J.D. and her family and he enjoys their company. Tom notes that he sought legal advice from his personal attorney and arranged to have a personal care contract prepared and signed by J.D. Tom acknowledged that J.D. is benefitting financially from the relationship, but he also benefits and has the right to spend his money as he chooses. Respondent points out that his decision to allow J.D. and her family to move in was made only after he got to know her family through several weekend visits after which he felt that they were compatible.

With regard to the decision to delay seeking medical help for several hours after a fall Tom notes the testimony of geriatric social worker M.C., Ms. M.C. indicated that Parkinson's sufferers often fall and it would not be an exercise of poor judgment to wait for a few hours to determine the extent of injury before seeking medical help.

Respondent asserts that his decision to check himself out of rehabilitation does not indicate lack of capacity, but rather a belief that he could receive the same benefit from outpatient treatment. It is not that he failed to recognize the need for rehabilitation but rather that he chose to receive it on an outpatient basis.

Concerning the claims that Tom failed to manage his medical conditions he notes that Dr. R.R. testified that his diabetes was under control, evidencing that he was compliant with taking his diabetes medication. Tom also purchased a Glucometer to monitor his blood sugar at home which he contends is further evidence of proper diabetes management.

Although Tom initially delayed taking medication for Parkinson's, he points out that Dr. H.H. acknowledged that because the medication loses its effectiveness over time there may be some benefit to delay taking it. Nevertheless, Tom argues that there is no evidence at the present time that he has failed to take his medication at the appropriate time and in the correct dosage.

### DECISION

The law regarding guardianships is clear. The court may appoint a guardian of the person, estate or both under N.J.S.A. § 3B:12-24.1, if it is proven that an individual is incapacitated. The court must make specific findings regarding the individual's capacity to make such an appointment. N.J.S.A. § 3B:12-24.1 (b).

The basic test of mental competency is whether the mind of the individual is unsound to such an extent as to render him incapable of governing himself and managing his affairs. N.J.S.A. §§ 3B:1-1, 3B:1-2. Mere failure of memory, decay and feebleness of the intellectual faculties are not evidence of that degree of unsoundness of mind that will justify a finding a person incapacitated. To warrant declaration as an incapacitated person, his faculties must be such as to impart a total deprivation or suspension of the ordinary powers of the mind. C.I.S. Mental Health §131.

"All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty... and of pursuing and obtaining safety and happiness." N.J. Const. Art. I, ¶ 1. Unless they endanger themselves or others, competent people ordinarily can choose what they want, even if their choices are irrational or dangerous. In re M.R. 135 N.J. 155 (1994). Further, competent persons enjoy the right to determine treatment alternatives, including the termination of medical treatment. Id. The Supreme Court of New Jersey has held that the right to self-determination is a fundamental right. Matter of M.R., supra, 135 N.J. at 169. Self-determination is a fundamental right, thus the burden of proof must fall to the

challenger of that right. *Id.* at 166, 169. Moreover, “the burden of demonstrating that an individual is incompetent requires proof that is clear and convincing.” *In re Goldemberg*, 2006 WL 337083 (N.J. Super. Ch.) *citing In re Grady*, 85 N.J. 235, 265. Evidence is clear and convincing when it enables the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. *In re Goldemberg* at 7 *citing In re Jobes* 108 N.J. 394 (1987), quoting *State v. Hodge*, 95 N.J. 369, 376 (1984).

In the case at bar, the Petitioner has failed to demonstrate its case to a clear and convincing standard showing that Tom has an impaired ability to govern himself and manage his affairs pursuant to N.J.S.A. § 3B:1-2. Tom is logical, coherent and has good clarity of thought. Tom functions cognitively he is lucid, alert, he can understand, communicate and remember information. In terms of everyday activities, Tom cares for himself by dressing, eating adequate nutrition in compliance with his diabetes regimen and being aware of his environment, including that he may be subject to exploitation by J.D.. Although Tom has spent large amounts of money recently, specifically in relation to J.D., in contrast to his past frugal lifestyle, Tom is still able to maintain his home and person financially. Tom does not fill out his own checks but he reviews and signs them, he gives gifts as he chooses, he is capable of pursuing claims in court as he is currently doing in Somerset County, he has entered into a contract for the purchase of a vehicle and for the services of J.D. under the advice of counsel, Mr. M.H.

Tom manages his medical conditions, including Parkinson's disease and diabetes. Tom takes Glucophage regularly and monitors his blood sugar levels with a Glucometer. Although J.D. is not a certified home health aide, Tom has chosen J.D. as his caregiver. Tom is able to direct J.D. in helping him to make and communicate healthcare decisions or medical treatment. At the current time, it appears that Tom can contact help if he is ill or in a medical emergency. Even if Tom could not do so, he has someone in the home 24 hours a day to assist in such a circumstance.

It is true that Tom cannot complete certain home and community life activities without assistance, such as: maintaining a safe and clean home, be left alone in the home, drive or use public transportation, or travel. However, with J.D. living in the home and access to a health aide during the day, Tom has been able to maintain much of the above.

Additionally, Tom can make legal decisions including retaining counsel and making decisions on legal documents. Tom has sought the counsel of Mr. M.H. to form a contract with J.D. . Tom has successfully made motion on the court to seek payment of back rent on his Martinsville property. Tom has signed deeds with his son Frank concerning his Bridgewater and Martinsville properties. Tom has also brought a suit in Somerset County concerning those deeds.

Although Tom's spending habits are not consistent with his long-held patterns of spending, eccentricity cannot be confused with diminished capacity. Tom does not want a guardian and he wants to spend his money how he pleases. Tom wants to make his own decisions in a manner that makes his life good and meaningful and he has done so through non-traditional means by moving J.D. and her three children into his home. Tom wants to reside in his home and he is able to do so with the help of J.D. Though there are more qualified caregivers available, Tom has chosen J.D. to assist him in the home. It is Tom's fundamental right to make such choices because he is a competent person.

All adults are presumed competent until proven otherwise. Adults maintain a right even when frail, vulnerable or eccentric to make their own decisions and to govern their own affairs, even if their decisions are unwise and their methods objectionable to the reasonable observer. Petitioner has not proven with clear and convincing evidence that Tom is incompetent and cannot manage his financial and medical affairs within N.J.S.A. 3B:1-2.

For the foregoing reasons, Petitioner's complaint for appointment of a guardian is denied.

Very truly yours,



JOHN F. MALONE, P.J. Ch.

JFM/mb