

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of)	
)	OAH No. 16-0038-PER
X T)	Agency No. 2015-1221
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DECISION

I. Introduction

X T is a retiree with the Alaska Public Employees Retirement System (PERS). He selected long term care (LTC) insurance as part of his retirement package. On March 7, 2013, he cancelled the LTC insurance. Subsequently, Mr. T’s son, who holds his power of attorney, requested that the LTC insurance be reinstated, arguing that his father was not competent when he made the decision to cancel that insurance.

The PERS administrator denied the request to reinstate the LTC insurance. Mr. T appealed. The evidentiary hearing was held on March 29, 2016. Dr. S T, Mr. T’s son and designed power-of-attorney, represented Mr. T. Assistant Attorney General Kevin Dilg represented the PERS administrator.

In order to prevail in this case, Mr. T had to demonstrate, by a preponderance of the evidence, that he was not competent when he cancelled his LTC insurance in March 2013. Mr. T has not demonstrated that it is more likely true than not true that he was not competent when he cancelled his insurance. Accordingly, the PERS administrator’s determination that his LTC insurance should not be reinstated is AFFIRMED.

II. Facts

Mr. T retired at the beginning of 2003. He selected long term care (LTC) coverage as part of his retirement package. The premium for that coverage was deducted from his retirement payment.¹ Ms. T, Mr. T’s wife, is also a State of Alaska retiree who elected LTC coverage as part of her retirement package. On March 7, 2013, Mr. T, along with his wife, went in person to the Retirement and Benefits office in Anchorage where they each presented signed typed requests to cancel their LTC insurance. Mr. T’s request reads “[p]lease discontinue my Silver LTC plan effective immediately. I understand I may not re-enroll.”²

The Ts met with a Retirement and Benefits counselor. The counselor would have written a note in the Ts’ records if she had noticed any signs of confusion, disorientation, abnormal, unusual, or bizarre behavior on their part. There are no such notes in either of their member

¹ X. T Record, pp. 61, 66.

² X. T Record, p. 59; Debbie Bialka-Benedict’s testimony.

files. The counselor would have advised Mr. T, as part of her normal practice, that once cancelled, the LTC insurance could not be reinstated.³ The cancellation resulted in an increase in Mr. T's monthly retirement benefit payment.⁴

H U is a registered nurse who was the medical case manager for Mr. T at No Name.⁵ She started working with Mr. T in June 2014. She noticed that he had a very flat affect, and did not reflect any emotion on his face. Ms. T told her that Mr. T had been having problems for some time, which involved writing less, erratic behavior at home, and losing/misplacing things. Ms. U spoke to Mr. T's physicians, who had noticed a decline in his functioning over the immediately preceding years. Mr. T had a mini-mental status exam⁶ conducted in August 2014, where he had very limited recall. He had his driver's license taken away immediately thereafter, which he did not resist.⁷

Mr. T had a full neuropsychological evaluation performed on October 24, 2014. It resulted in a diagnosis of dementia, most likely Alzheimer's. There was also a possibility that he was experiencing vascular dementia.⁸ "His results across all domains generally fell in the impaired to severely impaired ranges. . . his overall intellectual functioning is estimated to fall in the borderline range at this time."⁹ His basic mathematical skills were severely impaired.¹⁰ There was some indication that his cognitive decline might be attributed to several falls which occurred in the beginning of 2014.¹¹ However, the evaluation stated that "[i]t is strongly suspected that his decline has been occurring for several years, and that the recent head injuries have only provided him a plausible excuse for his difficulties."¹²

Ms. U, who has experience in elder care and working with dementia and Alzheimer's patients, testified that gait issues and falls were beginning symptoms of Alzheimer's, and speculated that Mr. T's falls were indicative of his cognitive issues and not a causative factor.

³ Jennifer Dalton's testimony; Ms. Bialka-Benedict's testimony.

⁴ Ms. Dalton's testimony.

⁵ Mr. T is retired military.

⁶ A mini-mental status exam is a short (approximately five minutes) exam designed to detect competency issues. *See* Ms. U's testimony.

⁷ Ms. U's testimony.

⁸ X. T Record, p. 21.

⁹ X. T Record, p. 22.

¹⁰ X. T Record, p. 19.

¹¹ X. T Record, pp. 13 – 25.

¹² X. T Record, p. 22.

She believed that Mr. T had Alzheimer's beginning several years before his testing, although she stated that Alzheimer's could progress rapidly.¹³

Several relatives of Mr. T testified regarding his cognitive capacity. R N is married to his wife's brother. During a summer 2013 visit with Mr. and Ms. T in Alaska, she noticed that Mr. T was not talking as much as he usually did, and not participating socially. He was normally the driver for the group. During this visit, however, he just sat in the back seat, and someone else drove. He would try to give directions to the driver; however, he was confused and gave wrong directions. His wife would speak to him and he would just stare at her. His wife would coach him. He would wander off from the group, whereas he would have normally stayed with the group in the past. While he was quieter than usual, when he spoke, he made "absolute sense."¹⁴ C D, Mr. T's sister-in-law, was also present during that visit. She also noticed the confusion with directions, the decrease in communication and social interactions, and his just staring at his wife when she would speak to him. Shortly after that 2013 Alaska trip, Mr. and Ms. T visited Ms. D in Nashville. Mr. T is familiar with Nashville, but got lost. The Ts' nephew ended up driving them around. In the past, Mr. T would have done the driving.¹⁵

D R is Mr. T's niece. She lives in Houston. She is a pharmacist. Her aunt and uncle visited her in 2012, 2013, and 2014. She went through their medications in 2012 and found out they were taking each other's medications. She thought both Mr. and Ms. T were rational in 2012, but did not think that they should be traveling alone. She thought there was some decline for both Mr. and Ms. T in 2012 and 2013, with Mr. T having the stronger mental decline, and Ms. T experiencing a stronger physical decline and being in denial about their mutual decline. During the Ts' visit in 2012, they missed their flight and Mr. T got lost driving to her home and also got lost driving in Huntsville. Mr. T is familiar with both Houston and Huntsville. During the Ts' 2013 visit, they also missed their flight.¹⁶

Dr. T, Mr. T's son, related that his parents came to visit him in the Los Angeles area in the fall of 2011, and that they became lost driving from the airport. He was in contact with his parents in March of 2013. He was not then concerned about their mental condition, but was concerned because they were not handling their affairs correctly. He did, however, notice that

¹³ Ms. U's testimony.

¹⁴ Ms. N's testimony.

¹⁵ Ms. D's testimony.

¹⁶ Ms. R's testimony.

his father's conversations became shorter, and that his father would obsess, and engage in circular discussions.¹⁷

X E is a certified financial planner. Mr. and Ms. T were his clients starting in 2005, and he met annually with them. He had a face-to-face meeting with them on March 15, 2013. He recalled that both of them were engaged and he did not see anything that would have caused him to be concerned about either's mental capacity. He would have asked them not to cancel their LTC insurance if he had known about their plans to do so; he had previously told them that he thought it was a wise choice to carry it; and their financial situation was such that they did not need the extra income they received by cancelling it.¹⁸

In September 2014, Mr. and Ms. T both signed powers of attorney designating Dr. T as their agent. Dr. T set up the appointment with the lawyer who drafted the powers of attorney, and spoke to him about his parents' mental issues. That lawyer then met privately with both Mr. and Ms. T, who signed the powers of attorney. That lawyer informed Dr. T that if the appointment had occurred at a later date, he might not have allowed Dr. T's parents to sign the powers of attorney.¹⁹

III. Discussion

The issue is whether Mr. T's cancellation of his LTC insurance should be rescinded. This issue is resolved by answering the question of whether Mr. T was mentally competent when he cancelled the insurance. In *Pappert*, a contractual formation case, the Alaska Supreme Court upheld the trial court's rescission of the contract entered into by Mr. Pappert because he "was unable to understand the nature and consequences of the [underlying] transaction" when he entered into it.²⁰ Mr. T has the burden of proof by a preponderance of the evidence. In order to prevail, he must therefore demonstrate that it is more likely true than not true that he was unable to understand the nature and consequences of cancelling his LTC insurance. As the *Pappert* case and cases involving testamentary capacity make clear, the critical question is whether Mr. T was incompetent **at the moment when** he rescinded his LTC insurance.²¹ By analogy to testamentary cases, in order to prevail, Mr. T would have to demonstrate either or both of the

¹⁷ Dr. T's testimony.

¹⁸ Mr. E's testimony; X. T Record, p. 12.

¹⁹ Dr. T's testimony.

²⁰ *Pappert v. Sargent*, 847 P.2d 66, 68 (Alaska 1993).

²¹ *Pappert* at 68 – 69; *Riddell v. Edwards*, 32 P.3d 4, 9 (Alaska, 2001).

following: that he did not understand the nature of his action (cancelling the LTC insurance) or that he did not understand the consequences of that cancellation.²²

Mr. T did not testify. His direct recollection of his reasoning and understanding of the LTC insurance cancellation is not available. The limited medical evidence shows that he was not competent in August of 2014, when he underwent a mini-mental status exam. The full neuropsychological exam, conducted in October 2014, resulted in a diagnosis of dementia, with impaired cognition. There is no medical evidence regarding his mental status as of March 2013, when he cancelled the LTC insurance, which was approximately 18 months before the mini-mental status exam. However, the neuropsychological exam stated that it was “strongly suspected” that his mental decline began several years earlier. Additionally, Ms. U, Mr. T’s medical case manager, was told by his doctors that he had been declining in the years preceding 2014.

Mr. T’s extended family members testified about his behavior in the summer of 2013 and earlier. It included getting lost in cities that he was familiar with, difficulty navigating in Anchorage (where he then resided), not driving, wandering away from the group, and a decrease in communication.

The contrary evidence consists of the fact that Mr. T met with his financial planner and with the Retirement and Benefits counselor in March of 2013, neither of whom noticed anything amiss. The written LTC insurance cancellation was clear as to what his wishes were. In addition, one family member, Ms. N testified that when Mr. T spoke, during her summer 2013 visit, he made sense.

When examining the evidence as a whole, Mr. T did not meet his burden of proof. This conclusion is reached by examining his behavior in the summer of 2013 and before, and the October 2014 neuropsychological evaluation. In March 2013, neither the Retirement and Benefits counselor nor Mr. T’s financial planner noticed anything wrong with Mr. T’s behavior, or anything to indicate that he was not mentally competent. The family members’ testimony showed there was a decline in Mr. T’s functioning in the summer of 2013, but nothing to indicate that Mr. T might not have known what he was doing as a general matter at the time he cancelled his LTC insurance. Indeed, as noted above, in the summer of 2013, when he spoke, he made

²² Testamentary capacity is determined by whether the testator “had sufficient mental capacity to understand the nature and extent of [her] property, the natural or proper objects of [her] bounty, and the nature of [her] testamentary act.” *Riddell* at 9, quoting from *Paskvan v. Mesich*, 455 P.2d 229, 234 (Alaska 1969). If the testator fails to meet any one of these three elements, the will is invalid. *Riddell* at 9.

sense. The medical evidence is, unfortunately, of little assistance in determining Mr. T's mental capacity in March of 2013. While Ms. U and the physicians speculated that Mr. T's mental decline had been occurring for several years before 2014, there was no medical evidence showing the onset of his decline, nor the rate of its progression.

When the evidence is examined as a whole, Mr. T was certainly not competent as of August 2014, the date of his mini-mental status exam. However, although there is evidence showing some degree of diminished capacity in the summer of 2013, the evidence is not sufficient to show that Mr. T's mental capacity was diminished to the point where he was unable to understand the nature and consequences of cancelling his LTC insurance in March 2013, when he cancelled the insurance.

IV. Conclusion

The PERS administrator's decision to not reinstate Mr. T's LTC insurance is affirmed.

Dated this 28th day of April, 2016.

By: Signed
Lawrence A. Pederson
Administrative Law Judge

Adoption

This Decision is issued under the authority of AS 39.25.006. The undersigned, in accordance with AS 44.64.060, adopts this Decision as the final administrative determination in this matter.*

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 26th day of May, 2016.

By: Signed
Name: Lawrence A. Pederson
Title: Administrative Law Judge

** The division filed an opposition to Mr. T's proposal for action. Opposition to proposals for action are not allowed for per AS 44.64.055(e). Accordingly, the Division's opposition was not considered. Similarly, Mr. T's reply was not considered.*

Signed
Lawrence A. Pederson, ALJ

[This document has been modified to conform to the technical standards for publication.]