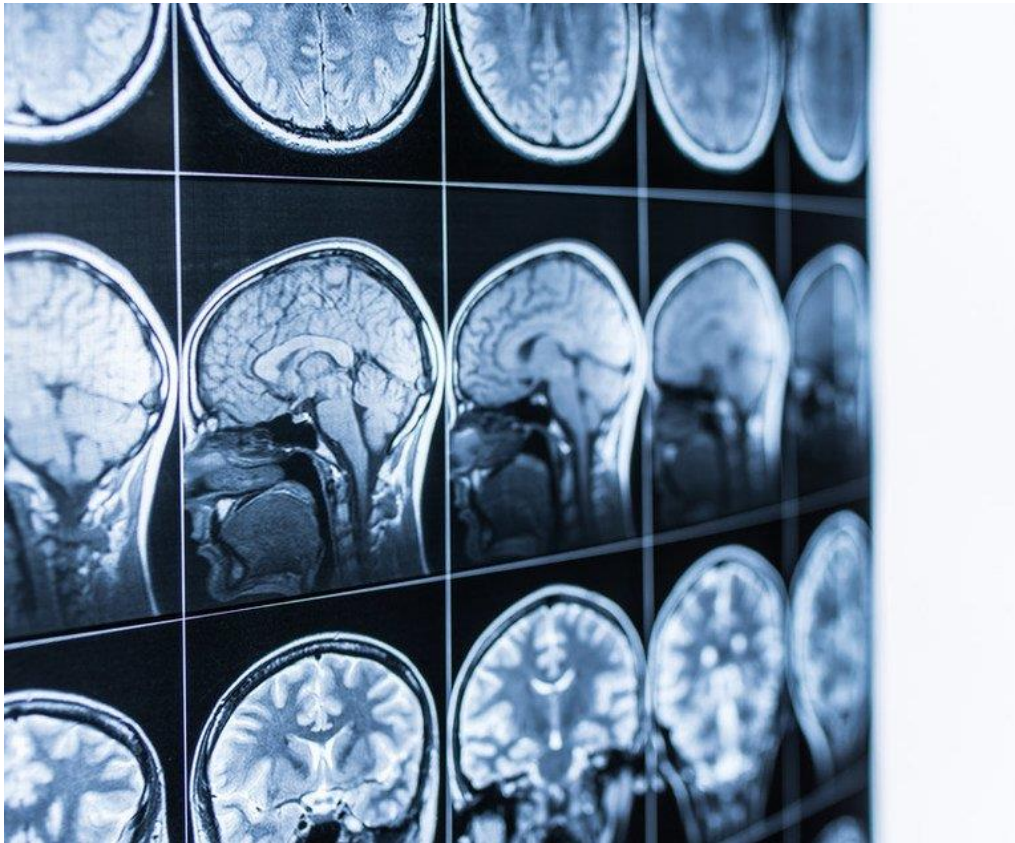


Does having dementia mean your loved one is incompetent?

Elisa Reiter and Daniel Pollack | March 16, 2022



An older parent or relative seems to be increasingly forgetful. They remember to take the frying pan off the stove top but neglect to turn off the gas burner. They firmly believe that someone no longer in office is the president. Is such a person competent to sign legal documents? To run a corporation? To make medical decisions?

According to the Texas Department of State Health Services, “The Alzheimer’s Association estimates that 6.2 million people of all ages have Alzheimer’s disease in the United States. In Texas, 400,000 people aged 65 and older have Alzheimer’s disease.”

Justice Thomas J. Baker of the Third Court of Appeals in Austin recently grappled with some of these issues in *Henges v. Dolliver*. David Henges, a retired orthopedic surgeon, lived with Leslie Henges Dolliver and her family for about 10 years. In 2014, Henges experienced some medical issues, including a cardiac event that triggered his defibrillator pacemaker. Following that medical event, Dolliver and others observed changes in his behavior, as well as in his ability to manage his retirement account. Dolliver urged Henges to submit to a neurological evaluation. As a result of that evaluation, Henges was diagnosed with mild dementia. In 2015, Henges updated his estate planning documents, including a durable power of attorney and a medical power of attorney. Those new documents named Dolliver and her sister as co-agents. Following procedures that necessitated being given anesthesia three times in 2018, Henges’ ability to care for himself seemed to further diminish. As a result, he was moved into an assisted care facility. By March 2019, Henges was 81 years old. Dolliver and her sister filed a joint application for a limited guardianship over Henges’ person, as Henges had been diagnosed with vascular dementia, and was refusing medical advice and treatments. Dr. Matthew Freeman, who treated Henges, felt that the powers of attorney were insufficient to meet his needs.

Freeman is a neuropsychologist. Freeman provided a report in support of the application for limited guardianship. Following Henges’ initial diagnosis with mild cognitive impairment in 2014 by Dr. Bertelson,

Henges sought another assessment from Dr. Devere. Devere supported the diagnosis, and prescribed an Exelon patch. Exelon patches are used for treatment of Parkinson's disease, and for treatment of mild to moderate Alzheimer's. Additional testing was done to determine if Alzheimer's was a contributing factor to Henges' condition. Freeman determined that there was a strong likelihood of Alzheimer's. Henges did not return to the neuropsychologist from 2015 to 2018. Henges instead sought refills for the Exelon patch prescription from an old friend, Dr. Phil Leonard. Leonard's medical license was apparently revoked in June 2018.

Freeman reported that while Henges had appointed Dolliver and her sister to act as his co-agents, Henges was argumentative, and that Henges' driving presented a danger to himself and others. Freeman also indicated that the time had come for someone to make sound medical decisions for Henges. Henges retained counsel, Don Ford, to fight the guardianship, or to strive for a less invasive alternative allowing Henges to make his own decisions.

The probate court ordered an assessment of Henges, to which he submitted. The parties agreed that Henges would not drive during the pendency of the case, and that a representative of a temporary guardian service would accompany him to all medical appointments. The resulting assessment included a diagnosis of Major Neurocognitive Disorder, secondary to cerebrovascular disease, recommending that Henges "be placed in a secure facility for the elderly or in a secure nursing facility that specialized in the care and treatment of dementia." The report also noted that while Henges could attend to the basics of living, such as bathing and dressing, "he was not able to initiate and make reasonable

decisions regarding complex financial decisions, managing a bank account, operating a motor vehicle, consenting to medical treatment, or determining his own residence.” As a result, Dolliver amended the guardianship application to seek guardianship of Henges’ person and estate.

While the probate court found that Henges was partially incapacitated, the court ruled that he should have the ability to vote, and further, that he should be granted a \$300/month allowance for personal expenditures. The probate court granted a limited guardianship of the person, but a full guardianship of the estate, ordering Dolliver to post a \$700,000 bond. Henges appealed the rulings.

The probate court shall consider the best interests of the proposed ward in determining whether or not a guardianship is warranted. What findings are mandated prior to the appointment of a guardian?

1. The proposed ward is an incapacitated person.
2. The proposed ward’s best interests will be served by the appointment of a guardian.
3. The proposed ward’s property and the rights of the proposed ward will be served and protected by appointing a guardian.
4. Less stringent alternatives to guardianship have been considered, but are not achievable.

The burden of proof as to guardianship is clear and convincing evidence. Henges argues on appeal that the probate court abused its discretion by failing to consider less intrusive alternatives, including the very type of powers of attorney already established, as well as a family limited partnership or trust.

Henges did have a family partnership and trust, created in 2015. However, the family partnership and trust did not include his IRA retirement account or his monthly military retirement benefits. Dolliver argued that by May 2020, the powers of attorney no longer presented a feasible alternative, in that “an independent geriatric psychiatrist had determined that Henges lacked the capacity to make complex business decisions.” Dolliver testified at the probate court that Henges had established a new cell phone account and had stated he wanted to buy his own house and car. Henges’ testimony at trial substantiated that, i.e., he wanted to “get the hell out of” assisted care and “go buy my own damn place and run it.”

The appellate court considered the argument that a joint banking account could be a less invasive alternative, only to conclude that such an account would “provide Dolliver with access to Henges’ funds,” but not assure that she could protect those funds “from his impaired decision making.”

As to the assertion that Henges could rely on review by the Texas Department of Public Safety as to whether he could safely operate a vehicle, Baker writes that the Texas Estates Code grants the trial court the discretion to determine if the proposed ward lacks capacity to operate a motor vehicle safely, adding that it “is not the purview of the DPS to evaluate or make a personal decision regarding whether or not to drive.” Henges also asserted that the six neurologists and psychiatrists who assessed him over the years, and diagnosed him with cognitive impairment had misdiagnosed him.

The court concluded that the probate court did not abuse its discretion in granting relief.

What does the *Henges* case tell us? If you are dealing with a case where an individual may be suffering from some type of cognitive impairment, it may behoove that individual to submit to an neuropsychological assessment prior to signing off on estate planning documents or other significant documents. What do families fight over?

- Money.
- Homes.
- Closely held business interests.
- The family jewels.
- Whether or not an individual has or had the capacity to make a major gift to a favored family member or to someone outside of the family.
- Whether or not duress was applied by a family member, or an outsider, to force a loved one to sign documentation.

Proper assessments can disclose infirmity that could prevent future litigation. A concurrent assessment may give a court a better view as to an individual's cognitive state than one that is done after the fact and attempts to piece together the individual's status retrospectively. Sometimes children need not only to care for their parents, they also need to know when to take them to a doctor for a neurological assessment.

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