

# Amending Tennessee’s Incapacity Statute: It “May Not Be a Sexy Story, But It’s One, Frankly, That . . . Will Help People”

L. MATHEW JEHL\*

I. INTRODUCTION.....	576
II. HISTORY OF THE TENNESSEE INCAPACITY STATUTE .....	581
A. <i>The Tennessee Incapacity Statute Prior to 2011</i> .....	582
B. <i>The 2011 Amendment and a New Incapacity Standard</i> ..	588
1. Update the Terminology .....	588
2. A Completely New Standard .....	591
C. <i>The 2016 Amendment</i> .....	594
1. Fix the Injustice Created by the 2011 Statute .....	594
2. The Amendment.....	597
3. The Fiduciary Problem .....	600
III. THE OTHER PROBLEMS .....	604
A. <i>Ambiguous Statutory Language and Its Implications</i> ....	605
B. <i>Punishing a Person for the Inactions of a Conservator         or Agent</i> .....	607
C. <i>Protecting a Conservator or Agent Who Commits a         Tort Against a Person Who Is Incapacitated</i> .....	610
D. <i>Completely Removing the Right to Sue from a         Person Who Is Incapacitated</i> .....	611
IV. THE FIX.....	614
V. CONCLUSION.....	616

## I. INTRODUCTION

In 2016, when the Tennessee legislature amended the incapacity statute,<sup>1</sup> Representative Jon Lundberg argued that the amendment

---

\* Juris Doctor Candidate May 2019, The University of Memphis Cecil C. Humphreys School of Law; Senior Staff Member, *The University of Memphis Law Review*, Volume 49; B.A., American Political History, Rhodes College, 2013. I am grateful to Kaitlyn Abernathy Hansen, Professor Ralph Brashier, Naira Umarov, and Whitney Robinson for all their advice and support throughout the completion of this Note.

1. TENN. CODE ANN. § 28-1-106 (2017). While the text of the *current statute* is included in the body of this Note, *see infra* Section II.C.2, it is also included here:

(a) If the person entitled to commence an action is, at the time the cause of action accrued, . . . adjudicated incompetent, such person, or such person's representatives and privies, as the case may be, may commence the action, after legal rights are restored, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from restoration of legal rights.

. . .

(c)(1) If the person entitled to commence an action, at the time the cause of action accrued, lacks capacity, such person or such person's representatives and privies, as the case may be, may commence the action, after removal of such incapacity, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from removal of such incapacity, except as provided for in subdivision (c)(2).

(2) Any individual with court-ordered fiduciary responsibility towards a person who lacks capacity, or any individual who possesses the legal right to bring suit on behalf of a person who lacks capacity, shall commence the action on behalf of that person within the applicable statute of limitations and may not rely on any tolling of the statute of limitations, unless that individual can establish by clear and convincing evidence that the individual did not and could not reasonably have known of the accrued cause of action.

(3) Any person asserting lack of capacity and the lack of a fiduciary or other representative who knew or reasonably should have known of the accrued cause of action shall have the burden of proving the existence of such facts.

of the incapacity statute “may not be a sexy story, but it’s one, frankly, that . . . will help people. This legislation makes a difference.”<sup>2</sup> Although well-intentioned, the Tennessee legislature’s amendment of the incapacity statute created several unintended consequences that now threaten the rights of adults who are incapacitated.<sup>3</sup> Designed to

---

(4) Nothing in this subsection (c) shall affect or toll any statute of repose within this code.

(d) For purposes of this section, the term “person who lacks capacity” means and shall be interpreted consistently with the term “person of unsound mind” as found in this section prior to its amendment by Chapter 47 of the Public Acts of 2011.

*Id.*

2. *Statutes of Limitations and Repose—As Enacted, Revises Provisions Governing Statutes of Limitations for Persons Lacking Capacity to Understand Legal Rights and Liabilities: Hearing on H.B. 1651 Before the H. Civil Justice Subcomm.*, H. 109-1651, at 1:22:27–1:22:36 [hereinafter *2016 Hearing on H.B. 1651 Before the H. Civil Justice Subcomm.*] (Tenn. 2016) (statement of Rep. Lundberg, Member, H. Civil Justice Subcomm.), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=278&clip\\_id=12065&meta\\_id=248395](http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=12065&meta_id=248395).

3. The use of People-First Language is very intentional throughout this Note:

People-First Language emphasizes the person, not the disability [or incapacity]. By placing the person first, the disability [or incapacity] is no longer the primary, defining characteristic of an individual, but one of several aspects of the whole person. People-First Language is an objective way of acknowledging, communicating, and reporting on disabilities [or incapacities]. It eliminates generalizations and stereotypes, by focusing on the person rather than the disability [or incapacity].

*What is People First Language?*, THE ARC, <https://www.thearc.org/who-we-are/media-center/people-first-language> (last visited Jan. 25, 2018). A citation to The Arc’s website is particularly appropriate because The Arc was the advocacy organization that first pushed the Tennessee legislature to amend and remove outdated language from the Tennessee Code. *Disabled Persons—As Enacted, Replaces Outdated Terminology Related to Individuals with Disabilities: Hearing on S.B. 0850 Before the S. Gen. Welfare, Health and Human Res. Comm.*, S. 107-0850, at 54:07–54:11 (Tenn. 2011) [hereinafter *2011 Senate Hearings before the S. Gen. Welfare, Health and Human Res. Comm.*] (statement of Sen. Henry, Member, S. Gen. Welfare, Health and Human Res. Comm.), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=196&clip\\_id=3785&meta\\_id=68640](http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=3785&meta_id=68640) (“This bill was brought to me by what is now called The Arc.”). This Note argues that these well-intentioned attempts to remove outdated terminology have

toll the statute of limitations in tort cases where the injured party is incapacitated, the incapacity statute is supposed to protect the rights of vulnerable people who cannot protect themselves. The statute has a dual purpose: (1) to protect the rights of adults who are vulnerable and incapacitated<sup>4</sup> by allowing them to bring suit against tortfeasors if and when they regain capacity and (2) to prevent tortfeasors from getting away with committing torts against adults who are unable to bring suit.<sup>5</sup> Yet, under the current construction, the incapacity statute does little to protect vulnerable adults or hold tortfeasors accountable.

In 2011, the Tennessee legislature updated the language of the Tennessee Code to remove outdated and offensive language related to people with disabilities.<sup>6</sup> When the legislature updated the language of the Code, it amended the incapacity statute and replaced “the person . . . of unsound mind”<sup>7</sup> with “the person . . . adjudicated incompetent.”<sup>8</sup> In amending the statute, the Tennessee legislature in-

---

created a litany of problems that now plague the current incapacity statute in Tennessee. *See infra* Sections II & III.

4. The statute also protects the rights of minors, TENN. CODE ANN. § 28-1-106(a) (2017), but this Note focuses on adults who are incapacitated.

5. *Arnold v. Davis*, 503 S.W.2d 100, 102 (Tenn. 1973); *see also Sullivan ex rel. Wrongful Death Beneficiaries of Sullivan v. Chattanooga Med. Inv’rs, LP*, 221 S.W.3d 506, 509 (Tenn. 2007).

6. The legislature updated the language of the entire Tennessee Code and replaced outdated terms, such as “idiot,” “handicapped,” “retarded,” “lunatics,” and “unsound mind.” Act of Apr. 6, 2011, ch. 47, 2011 Tenn. Pub. Acts §§ 1–106. In total, the legislature made approximately 110 changes. *Id.* This Note focuses on the specific change to the incapacity statute; however, the Tennessee legislature almost certainly changed the law inadvertently in other ways with the 110 changes and should examine how broad that impact may have been.

7. The *pre-2011 version* of the statute read as follows:

If the person entitled to commence an action is, at the time the cause of action accrued, . . . of *unsound mind*, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three (3) years, and in that case within three (3) years from the removal of such disability.

TENN. CODE ANN. § 28-1-106 (1980) (amended 2011) (emphasis added).

8. The *2011 version* of the statute read as follows:

If the person entitled to commence an action is, at the time the cause of action accrued, . . . *adjudicated incompetent*, such person,

advertently created a completely new standard for determining incapacity in Tennessee.<sup>9</sup> To try to correct its mistake, the legislature amended the statute again in 2016, but in doing so, it created more problems. Under the current statute, an adult who is incapacitated, or the adult's family, is left with little ability—or, depending on how the Tennessee courts interpret the new language, possibly with *no ability*—to bring suit against a tortfeasor when the adult regains capacity or passes away. Because the 2016 Amendment is so recent, courts have had little opportunity to interpret the meaning of the amended statute. This Note dissects the language of the amended statute, raises certain and several potential issues with the statute, and urges the Tennessee legislature to amend the statute before adults who are incapacitated are stripped of their right to bring suit.

Sections (c)(2) and (c)(3) of the current statute are particularly troublesome as they create an exception to the typical tolling period.<sup>10</sup> The exception applies when the adult who is incapacitated has a court-ordered representative with a fiduciary responsibility to the adult—most likely a conservator—or has someone else who possesses the legal right to bring suit on the adult's behalf—most likely someone who holds a power of attorney.<sup>11</sup> While it may seem intuitive to some that an adult who is incapacitated should not get the benefit of tolling when the adult has someone who can represent his

---

or such person's representatives and privies, as the case may be, may commence the action, after legal rights are restored, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from restoration of legal rights.

TENN. CODE ANN. § 28-1-106 (2011) (amended 2016) (emphasis added).

9. See *infra* Section II.B.2.

10. Because the incapacity statute tolls the statute of limitations, courts often refer to the Tennessee incapacity statute as the “tolling statute.” See, e.g., *Jacobs v. Baylor Sch.*, 957 F. Supp. 1002, 1008 (E.D. Tenn. 1996) (“This case requires the Court to determine the reach of [the Tennessee] tolling statute . . . .”); *Sherrill v. Souder*, 325 S.W.3d 584 (Tenn. 2010) (referring to the “tolling statute” throughout its opinion); *Sullivan ex rel. Wrongful Death Beneficiaries of Sullivan v. Chattanooga Med. Inv'rs, LP*, 221 S.W.3d at 509 (tagging Tennessee Code Annotated section 28-1-106 as “the ‘Tolling Statute’”). A tolling statute is “[a] law that interrupts the running of a statute of limitations in certain situations . . . .” *Tolling Statute*, BLACK'S LAW DICTIONARY (10th ed. 2014).

11. TENN. CODE ANN. § 28-1-106(c)(2)–(3) (2017).

or her interests, this exception creates several issues, including the potential to strip away the right to bring suit altogether. First, this exception to the amended statute punishes an adult who is incapacitated for the failings of a conservator or an agent.<sup>12</sup> Next, the exception may actually protect an agent or conservator who commits a tort against the adult who is incapacitated.<sup>13</sup> Finally, the language of the exception—specifically the language that prevents tolling when someone has the legal right to bring suit on behalf of the incapacitated person<sup>14</sup>—is particularly problematic because Tennessee allows a “next friend” to bring suit on behalf of an incompetent adult under the Tennessee Rules of Civil Procedure.<sup>15</sup> Reading the Tennessee Rules of Civil Procedure and the amended statute together, a Tennessee court could determine that the statute of limitations should never toll as someone always possesses the legal right to bring suit on behalf of an adult who is incapacitated.<sup>16</sup>

While the Tennessee appellate courts have yet to deal with the current statute, it will cause unpredictable results and, almost certainly, limit the tolling period for adults who are incapacitated. What began as a simple change to update the language of the Tennessee Code<sup>17</sup> has caused an unintended shift in the law, and the Tennessee legislature should correct its mistake to protect adults who are incapacitated from losing their ability to bring suit.<sup>18</sup> Section II of this Note tracks the history and purposes of the incapacity statute and the amendments to the statute.<sup>19</sup> That history and those purposes demonstrate that the incapacity statute is supposed to *protect* adults who are incapacitated.<sup>20</sup> Section III, however, shows that the 2016 amend-

---

12. See *infra* Section III.B.

13. See *infra* Section III.C.

14. TENN. CODE ANN. § 28-1-106(c)(2) (2017).

15. TENN. R. CIV. P. 17.03.

16. While this interpretation may seem unlikely in the abstract, the example given in Section III.D. in this Note will explain how a court could come to this conclusion rather easily. See *infra* Section III.D.

17. See *infra* Section II.B.1 for a discussion of the intent behind the initial change in the statute.

18. See *infra* Section IV for proposed alternatives to fix the problems with the current statute.

19. See *infra* Section II.

20. See *infra* Section II.A.

ment had unintended consequences, which *threaten* the rights of adults who are incapacitated.<sup>21</sup> Section IV includes proposed statutory language, which would resolve the current issues with the incapacity statute.<sup>22</sup> Finally, Section V concludes.

## II. HISTORY OF THE TENNESSEE INCAPACITY STATUTE

Until 2011, the incapacity statute (the “Pre-2011 Statute”) was straightforward, and it protected individuals who were incapacitated and their right to bring suit when they regained capacity.<sup>23</sup> Then in 2011, the Tennessee legislature amended much of the Tennessee statutory code to update the language and remove outdated terminology.<sup>24</sup> As a part of that amendment process, the Tennessee legislature also updated the language in the incapacity statute (the “2011 Statute”).<sup>25</sup> The effect of the change was quickly litigated, and the courts determined that the 2011 Statute had caused a complete shift in the standard for determining incapacity.<sup>26</sup> Accordingly, in 2016, the Tennessee legislature tried to correct its mistake, but, in this second amendment process, the legislature made the incapacity statute (the “2016 Statute”) more complicated and created new issues that need to be addressed.<sup>27</sup> The following subsections show the purposes and history of the Pre-2011 Statute,<sup>28</sup> the 2011 Statute,<sup>29</sup> and the 2016 Statute.<sup>30</sup> This history demonstrates that the current statute is contrary to the purposes behind the enactment of the incapacity statute and the subsequent amendments to the statute.

---

21. See *infra* Section III.

22. See *infra* Section IV.

23. See *infra* Section II.A.

24. See *infra* Section II.B. See also *supra* note 6 for the terminology that was updated.

25. See *infra* Section II.B.1.

26. See *infra* Section II.B.2.

27. See *infra* Section II.C.

28. See *infra* Section II.A.

29. See *infra* Section II.B.

30. See *infra* Section II.C.

### A. The Tennessee Incapacity Statute Prior to 2011

The Pre-2011 Statute was straightforward, and the courts had a long history of interpreting it to protect the rights of persons who are incapacitated. While statutes of limitations are designed to ensure fairness to defendants by preventing the destruction of evidence and undue delay in filing lawsuits,<sup>31</sup> the Tennessee legislature created an exception to the statute of limitations to prevent its harsh application against an individual who is incapacitated.<sup>32</sup> In fact, “[t]he legislative purpose involved” in the incapacity statute “is to declare that statutes of limitation do not begin to run until a person’s disability is removed”<sup>33</sup> because “justice would not be served by barring an individual from pursuing a claim when he cannot *by his own actions* comply with the statute’s time limit for bringing his suit.”<sup>34</sup> Although designed to protect individuals who are incapacitated, the incapacity exception has its limitations as the incapacity “must exist at the time the cause of action accrued.”<sup>35</sup>

The Pre-2011 Statute achieved the goal of protecting the right of people who were incapacitated or their representatives to bring suit when the incapacity was lifted. It read as follows:

---

31. *Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 820 (Tenn. 1994) (“[T]he policy reasons for the development of statutes of limitations [are] to ensure fairness to the defendant by preventing undue delay in bringing suits on claims, and by preserving evidence so that facts are not obscured by the lapse of time or the defective memory or death of a witness.”).

32. *See Jacobs v. Baylor Sch.*, 957 F. Supp. 1002, 1008–09 (E.D. Tenn. 1996).

33. *Arnold v. Davis*, 503 S.W.2d 100, 102 (Tenn. 1973); *see also Sullivan ex rel. Wrongful Death Beneficiaries of Sullivan v. Chattanooga Med. Inv’rs, LP*, 221 S.W.3d 506, 509 (“The purpose of the statute is ‘to declare that statutes of limitation do not begin to run until a person’s disability is removed.’”) (quoting *Arnold*, 503 S.W.2d at 102).

34. *Sullivan*, 221 S.W.3d at 513–14 (emphasis added).

35. *Foster v. Allbright*, 631 S.W.2d 147, 150 (Tenn. Ct. App. 1982); *see also Smith v. Grumman-Olsen Corp.*, 913 F. Supp. 1077, 1083 (E.D. Tenn. 1995) (“The general rule is that tolling statutes based on disabilities only apply if the disability existed at the time the cause of action accrued.”). In *Foster*, the court also held “that disability arising at the time of injury will toll the statute,” *Foster*, 631 S.W.2d at 150, so, if the injury that served as the basis for the cause of action also caused incapacity, then the statute of limitations would toll.



If the person entitled to commence an action is, at the time the cause of action accrued, . . . of unsound mind, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three (3) years, and in that case within three (3) years from the removal of such disability.<sup>36</sup>

Under the Pre-2011 Statute, the incapacity statute tolled or extended the statute of limitations from the time the person regained capacity for the amount of time of the original limitations period for the cause of action,<sup>37</sup> or, if the statute of limitations for the cause of action was greater than three years, the person would only have an additional three years to file suit from the time when he or she regained capacity.<sup>38</sup> The Pre-2011 Statute required the courts to determine two important issues—(1) when is someone of “unsound mind” and (2) and when is incapacity or disability removed—but the courts in Tennessee had settled these two issues.

First, the courts had established that persons were of “unsound mind” when they could not manage their day-to-day affairs. The Supreme Court of Tennessee first established the standard in 1842, when it decided that the statute of limitations tolled when the injured party “was incapable of attending to any business, or of taking care of herself, and had to break up keeping house and remove to the house of a relative to be taken care of by her friends.”<sup>39</sup> As that standard

---

36. TENN. CODE ANN. § 28-1-106 (1980) (amended 2011).

37. For example, in a healthcare liability action, the statute of limitations would toll or extend for one year from the time the person regained capacity because the statute of limitations for healthcare liability actions is one year. TENN. CODE ANN. § 29-26-116 (2012) (“The statute of limitations in health care liability actions shall be one (1) year . . .”).

38. For example, in an action to prevent adverse possession, the person would only have three years after regaining capacity to file suit because the limitations period is seven years, which is greater than three years. TENN. CODE ANN. § 28-2-103 (2017) (“No person or anyone claiming under such person shall have any action, either at law or in equity, for the recovery of any lands, tenements or hereditaments, but within seven (7) years after the right of action accrued.”).

39. *Porter v. Porter*, 22 Tenn. (3 Hum.) 586, 589 (1842).

was somewhat fact-specific, the Court announced the more straightforward and modern standard in *Sherrill v. Souder*:

While the language from *Porter* still serves as a guide in the determination of whether an individual is of unsound mind, the modern test for determining whether an individual is of “unsound mind” for purposes of section 28-1-106 is whether that individual was unable to manage his or her day-to-day affairs at the time the cause of action accrued.<sup>40</sup>

This test is consistent with that used by other jurisdictions as well.<sup>41</sup> Furthermore, while a prior adjudication of incompetency was evidence of a person being incapacitated,<sup>42</sup> it was not actually determinative;<sup>43</sup> instead, incapacity was a question for the finder of fact.<sup>44</sup> As such, under the Pre-2011 Statute, the test for incapacity was whether someone could manage his or her day-to-day affairs, and that question was one of fact.

The courts had also decided that incapacity was removed by recovery of sound mind or by death.<sup>45</sup> Recovery of sound mind is

---

40. *Sherrill v. Souder*, 325 S.W.3d 584, 600–01 (Tenn. 2010).

41. *Id.* at 601; *see also* 54 C.J.S. *Limitations of Actions* § 172 (2018) (“The general test that is applied in determining whether a mental condition is of the type that will toll a statute of limitations, is whether a person could know or understand his or her legal rights sufficiently well to manage his or her personal affairs, and it is not required that there be a formal finding of incompetency by a court.”).

42. *Foster v. Albright*, 631 S.W.2d 147, 150 (Tenn. Ct. App. 1982) (“[T]he dominant line of authority is that an adjudication of incompetency is some evidence that incompetency existed at a time prior to the adjudication.”); *see also* *Parham v. Walker*, 568 S.W.2d 622, 624 (Tenn. Ct. App. 1978) (“Even the existence of a guardianship or conservatorship is not per se an adjudication of an unsound mind . . .”).

43. *Smith v. Grumman-Olsen Corp.*, 913 F. Supp. 1077, 1084 (E.D. Tenn. 1995) (“[T]he dominant line of authority holds that such a decree is just ‘some evidence’ of incapacity at any time prior to the decree. Consequently, the Court has considered [the case law] and does not agree an adjudication is conclusive of the issue.”) (internal citations omitted).

44. *Sherrill*, 325 S.W.3d at 603 (“Whether the one-year limitations period for medical malpractice actions should be tolled due to a lack of mental competence is a question of fact.”).

45. *Sullivan ex rel. Wrongful Death Beneficiaries of Sullivan v. Chattanooga Med. Inv’rs, LP*, 221 S.W.3d 506, 512 (Tenn. 2007). In *Sullivan*, the courts also

relatively straightforward: If the finder of fact determined—or a judge on a motion for summary judgment found that there was no genuine issue of material fact—that someone was of sound mind when the tort occurred, then the statute of limitations did not toll.<sup>46</sup> Likewise, because death removes incapacity, the statute would toll and extend a representative's right, on behalf of the estate, to bring suit for injuries that were caused to the person while he or she was living and "of unsound mind." For instance, in *Sullivan v. Chattanooga Medical Investors, LP*, the plaintiff, on behalf of his dad's estate, brought suit against a nursing home for injuries that occurred to his dad more than one year—the length of the statute of limitations—before the suit was filed.<sup>47</sup> The court determined that the statute of limitations tolled because the plaintiff's dad was mentally incapacitated until his death, which was less than a year before the filing of the suit.<sup>48</sup> Because the statute of limitations tolled and gave the plaintiff an additional year to file suit, the plaintiff's suit was timely and allowed to proceed.<sup>49</sup>

---

established that incapacity could be lifted by reaching the age of majority or by acts of the Tennessee legislature, *id.*, but those two reasons are only relevant to cases involving minority, which, as previously stated, is not the subject of this Note. *Sullivan* cited to the Tennessee legislature's decision to lower the age of majority to eighteen. *Id.* (citing *Arnold v. Davis*, 503 S.W.2d 100, 102 (Tenn. 1973) ("We construe the Legal Responsibility Act of 1971 as removing the disabilities of minority of all persons 18 to 21 years of age on May 11, 1971, as of May 11, 1971, and from and after that date all persons reached their majority at age 18.")); *see also* *Abels v. Genie Indus., Inc.*, 202 S.W.3d 99, 105 (Tenn. 2006) ("The disability of unsound mind is removed when the individual is no longer of unsound mind, due either to a change in the individual's condition or the individual's death.").

46. *See, e.g.*, *Jacobs v. Baylor Sch.*, 957 F. Supp. 1002 (E.D. Tenn. 1996). In *Jacobs v. Baylor School*, the plaintiff alleged that she had been in a sexual relationship with a teacher when she was a minor; however, she waited more than two years after the statute of limitations had run to file suit against the teacher and the school she attended. *Id.* at 1009. The plaintiff argued that the statute of limitations should toll due to her incapacity. *Id.* The court determined that, although the plaintiff likely suffered from anxiety and depression, there was no genuine issue of material fact as to whether she was "of unsound mind" and, therefore, granted summary judgment. *Id.* at 1012.

47. *Sullivan*, 221 S.W.3d at 508.

48. *Id.* at 509–10.

49. *Id.* at 514.

Additionally, in *Sullivan*, the court examined whether the designation of an agent under a power of attorney could remove the protections of the incapacity statute.<sup>50</sup> Following the passage of the Uniform Durable Power of Attorney Act in Tennessee,<sup>51</sup> parties argued that the appointment of a power of attorney would remove the protections of the incapacity statute, but that argument was dismissed by the court in *Sullivan* when it held “that the existence of a durable power of attorney does not remove the protection afforded by section 28-1-106.”<sup>52</sup> The Tennessee courts were also firm that incapacity was not removed when someone had a guardian appointed on his or her behalf, even when the guardian filed suit on behalf of the person who was incapacitated.<sup>53</sup> This decision was consistent with the decisions of courts in other jurisdictions examining the same issue.<sup>54</sup> Accord-

---

50. *Id.* at 511–14.

51. TENN. CODE ANN. §§ 34-6-101 to 112 (2015).

52. *Sullivan*, 221 S.W.3d at 514.

53. *Abels v. Genie Indus., Inc.*, 202 S.W.3d 99, 105 (Tenn. 2006) (“[T]he disability of unsound mind referenced in Tennessee Code Annotated section 28-1-106 is not removed when the disabled person’s legal representative is appointed and/or accepts responsibility for the disabled person’s tort claims. Rather, the tolling of the statute of limitations continues until the disabled person’s mind becomes ‘sound,’ or the person dies.”).

54. *Id.* at 103–05. The court went on to examine and cite to cases from numerous jurisdictions. *Id.* (citing *Weaver v. Edwin Shaw Hosp.*, 819 N.E.2d 1079, 1080–81 (Ohio 2004); *Freeman v. Alex Brown & Sons*, 73 F.3d 279, 282 (10th Cir. 1996) (holding that, under Oklahoma law, “the tolling statute preserves a legally-disabled person’s cause of action regardless of whether he is represented by a guardian who might otherwise bring the action within the normal limitation period”); *Mason v. Ford Motor Co.*, 755 F.2d 120, 121 (8th Cir. 1985) (assuming that Missouri would apply the general rule that the appointment of a guardian has no effect on tolling); *Wayne Cty. Reg’l Educ. Serv. Agency v. Pappas*, 56 F. Supp. 2d 807, 815 (E.D. Mich. 1999) (holding that “[u]nder Michigan law, it is well-settled that an individual with a mental disability is the beneficiary of the tolling statute even where his rights have been capably handled by a guardian or an attorney”); *Desert State Life Mgt. Servs. v. Ass’n of Retarded Citizens of Albuquerque*, 939 F. Supp. 835, 838 (D.N.M. 1996) (construing New Mexico’s tolling statute to continue in effect as to mentally incompetent persons even if they acquire a general guardian who may legally sue on their behalf); *Alber v. Ill. Dep’t of Mental Health & Developmental Disabilities*, 786 F. Supp. 1340, 1359 (N.D. Ill. 1992) (recognizing that, under Illinois law, the tolling statute covering the mentally incompetent is not avoided upon appointment of a guardian); *Emerson v. S. Ry. Co.*, 404 So. 2d 576, 579 (Ala. 1981) (holding that the appointment of a guardian for a mentally incompetent or nonage

---

person does not have the effect of commencing the running of the period of limitations tolled by virtue of the disability); *Kiley v. Jennings, Strouss & Salmon*, 927 P.2d 796, 801 (Ariz. Ct. App. 1996) (holding that the appointment of a conservator will not cease the tolling of the statute of limitations for those of unsound mind); *Mason v. Sorrell*, 551 S.W.2d 184, 185 (Ark. 1976) (adopting majority rule that appointment of guardian does not commence running of statute of limitations tolled on account of infancy or incompetence); *Tzolov v. Int'l Jet Leasing, Inc.*, 283 Cal. Rptr. 314, 317 (Ct. App. 1991) (holding that tolling statute applicable to incompetent plaintiffs continues in effect in spite of appointment of guardian ad litem); *Morgan v. Amerada Hess Corp.*, 357 So. 2d 1040, 1043 (Fla. Dist. Ct. App. 1978) (adopting majority rule that appointment of guardian for mentally incompetent person does not terminate tolling and start running of limitations period); *Whalen v. Certain-Teed Prods. Corp.*, 134 S.E.2d 528, 530 (Ga. Ct. App. 1963) (holding that appointment of guardian does not operate to start statute of limitations running in cases where title to cause of action is in person belonging to class of disabled persons encompassed within tolling provision); *Barton-Malow Co. v. Wilburn*, 556 N.E.2d 324, 326 (Ind. 1990) (holding that appointment of guardian over incompetent adult does not remove legal disability so as to halt tolling and commence running of statute of limitations); *Newby's Adm'r v. Warren's Adm'r*, 126 S.W.2d 436, 438 (Ky. 1939) (holding that tolling accorded to persons of unsound mind continued during disability regardless that next friend might have sued); *Green v. Lombard*, 343 A.2d 905, 914 (Md. Ct. Spec. App. 1975) (holding that statute of limitations did not begin to run against a *non compos mentis* individual in spite of interested parties being available to bring suit); *O'Brien v. Mass. Bay Transp. Auth.*, 541 N.E.2d 334, 337 (Mass. 1989) (holding that tolling statute applicable to those disabled by minority or mental illness continues to operate regardless of guardian's appointment); *Talley v. Portland Residence, Inc.*, 582 N.W.2d 590, 592 (Minn. Ct. App. 1998) (holding that appointment of a conservator does not remove a mentally disabled person's legal disability so as to start the statute of limitations running); *Sacchi v. Blodig*, 341 N.W.2d 326, 330 (Neb. 1983) (holding that "[c]learly, the purpose of [our legal disability statute] is to lift the burden of severe time restrictions or limitations from those under legal disability, that is, from those who do not have the ability and capacity to protect their rights existing under our laws"); *Chagnon v. Metro. Life Ins.*, 75 A.2d 167, 169 (N.H. 1950) (permitting an action for payments under a contract ten years after alleged incompetence began, where plaintiff had not recovered from disability at the time the complaint was filed); *Unkert v. Gen. Motors Corp.*, 694 A.2d 306, 311 (N.J. Super. Ct. App. Div. 1997) (concluding that appointment of guardian for person rendered incompetent in accident does not end period of incompetence for that individual, and that the limitations period therefore does not begin to run upon appointment of a guardian); *Henry ex rel. Henry v. City of New York*, 724 N.E.2d 372, 373 (N.Y. 1999) (holding that New York's statute tolling statute of limitations during a period when a person is "under a disability because of infancy," is not terminated by acts of guardian or legal representative in taking steps to pursue claims on infant's behalf); *Costello v. N. Shore Univ. Hosp. Ctr. for Extended Care & Rehab.*, 709 N.Y.S.2d 108, 110 (App. Div. 2000) (remaining disability of injured

ingly, under the Pre-2011 Statute, death and recovery of sound mind removed the protections of the incapacity statute, while having a guardian, conservator, or agent did not.

Thus, under the Pre-2011 Statute, the limitations period tolled when a jury determined that an individual could not manage his or her day-to-day affairs at the time that the cause of action accrued, regardless of whether the individual had a representative who could bring suit. This formulation of the statute was straightforward, served the purposes of the incapacity statute, and protected the rights of people who were incapacitated.

The 2011 Amendment to the statute, however, created a completely new standard for incapacity in Tennessee.

### *B. The 2011 Amendment and a New Incapacity Standard*

The Tennessee legislature amended the Tennessee Code in 2011 to update outdated terminology; the legislature, however, inadvertently changed the incapacity standard in the process of updating the language.<sup>55</sup> The small changes to the language of the incapacity statute created a new, objective standard for determining incapacity, and courts quickly determined that a person had to be *adjudicated* incompetent *prior to the accrual of the cause of action* for the incapacity statute to apply and to toll the statute of limitations.<sup>56</sup>

#### 1. Update the Terminology

The intent of the legislature was simply to update the terminology in the incapacity statute and the rest of the statutory code. The 2011 Act that changed the incapacity statute was titled:

---

person tolls the statute of limitations, whether or not a personal representative has filed actions on individual's behalf); *Young v. Key Pharm., Inc.*, 770 P.2d 182, 186 (Wash. 1989) (holding that Washington's statute "tolls the statute of limitations for a legally incompetent person notwithstanding the appointment of a guardian. This is so because the right to the tolling statute vests in the incompetent person not in the guardian. From this premise, it follows that the guardian's subsequent actions on the incompetent person's behalf should have no additional effect upon the statute of limitations unless they result in *res judicata*.")).

55. See *infra* Section II.B.1.

56. See *infra* Section II.B.2.

“DISABLED PERSONS—CHANGE OF TERMINOLOGY.”<sup>57</sup> Furthermore, the Bill history indicates that the purpose of the Act was to “replace[] outdated terminology related to individuals with disabilities.”<sup>58</sup> The Bill summary indicates the same: “Disabled Persons - As introduced, replaces outdated terminology related to individuals with disabilities.”<sup>59</sup> The Bill’s summary also states that “[t]his bill replaces outdated terminology related to individuals with disabilities, such as replacing ‘handicapped persons’ with ‘persons with disabilities’ and ‘idiot, lunatic, or person of unsound mind’ with ‘person adjudicated incompetent.’”<sup>60</sup>

The statements of the sponsors, in both the House and Senate, also show that the intent was simply to change outdated language, not to make any substantive changes to the Tennessee Code. Senator Douglas Henry, the sponsor of the Senate version of the Bill, noted that The Arc, an advocacy group for people with intellectual and developmental disabilities,<sup>61</sup> first brought the Bill to him.<sup>62</sup> In committee, Senator Henry stated the purpose of the Amendment: “It won’t change the law in any respect. All the law remains just the same. All it does is change the terminology used from what is offensive to what is not offensive.”<sup>63</sup> Senator Henry indicated the same before the full Tennessee Senate: “What the bill does—it strikes everywhere in the code language it designates as offensive to many people. When I had the bill drawn, I said let’s do just that and nothing more—not change any law.”<sup>64</sup>

57. Act of Apr. 6, 2011, ch. 47, 2011 Tenn. Pub. Acts.

58. S.B. 0850, BILL SUMMARY, S. 107-850, Reg. Sess. (Tenn. 2011).

59. *Id.*

60. *Id.*

61. *Mission & Values*, THE ARC, <https://www.thearc.org/who-we-are/mission-and-values> (last visited Jan. 25, 2019).

62. *2011 Senate Hearings before the S. Gen. Welfare, Health and Human Res. Comm.*, *supra* note 3, at 54:07–54:11 (statement of Sen. Henry, Member, S. Gen. Welfare, Health and Human Res. Comm.) (“This bill was brought to me by what is now called The Arc.”).

63. *2011 Senate Hearings before the S. Gen. Welfare, Health and Human Res. Comm.*, *supra* note 3, at 55:01–55:12 (statement of Sen. Henry, Member, S. Gen. Welfare, Health and Human Res. Comm.).

64. *Disabled Persons—As Enacted, Replaces Outdated Terminology Related to Individuals with Disabilities: Hearing on S.B. 0850 Before the Sen.*, S. 107-0850,

Representative Glen Casada echoed the statements of Senator Henry. In committee, Representative Casada stated, “This bill is simply about cleaning up the word imbecile, idiot, and things like that in [the] Code.”<sup>65</sup> In response to questions about the potential impact of the Bill, Representative Casada clarified that the “intent of this bill is not to be substantive; it’s to just correct language. . . . I am only interested in cleaning up the language. That is the only intent of this bill.”<sup>66</sup> Representative Casada also made this intent clear to the full Tennessee House when he specified that the “legislation simply eliminates outdated terminology related to individuals with disabilities . . . . I did not want this bill to be a substantive change.”<sup>67</sup>

Furthermore, the actual change to the incapacity statute indicates that the Amendment was merely an attempt to update the language. The Bill substituted small, updated phrases for old, outdated language throughout the Code.<sup>68</sup> The change to the incapacity statute read:

Tennessee Code Annotated, Section 28-1-106, is amended by deleting “of unsound mind” and by substituting instead “adjudicated incompetent” and is further amended by deleting the first reference to “the removal of such disability” and by substituting instead “legal rights are restored” and by deleting the second refer-

---

at 19:57–20:17 (Tenn. 2011) (statement of Sen. Henry), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=196&clip\\_id=3824&meta\\_id=69349](http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=3824&meta_id=69349).

65. *Disabled Persons—As Enacted, Replaces Outdated Terminology Related to Individuals with Disabilities: Hearing on H.B. 1089 Before the H. Health & Human Res. Comm.*, H. 107-1089, at 6:50–6:56 [hereinafter *2011 Hearing on H.B. 1089 Before the H. Health & Human Res. Comm.*] (Tenn. 2011) (statement of Rep. Casada, Member, H. Health & Human Res. Comm.), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=138&clip\\_id=3722](http://tnga.granicus.com/MediaPlayer.php?view_id=138&clip_id=3722).

66. *2011 Hearing on H.B. 1089 Before the H. Health & Human Res. Comm.*, *supra* note 65, at 7:51–7:56, 8:48–8:52 (statement of Rep. Casada, Member, H. Health & Human Res. Comm.), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=138&clip\\_id=3722](http://tnga.granicus.com/MediaPlayer.php?view_id=138&clip_id=3722).

67. *Disabled Persons—As Enacted, Replaces Outdated Terminology Related to Individuals with Disabilities: Hearing on H.B. 1089 Before the H.*, H. 107-1089, at 19:53–20:03, 22:00–22:03 (Tenn. 2011) (statement of Rep. Casada, Member, H. Health & Human Res. Comm.), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=196&clip\\_id=3869&meta\\_id=70062](http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=3869&meta_id=70062).

68. Act of Apr. 6, 2011, ch. 47, 2011 Tenn. Pub. Acts.



ence to “removal of such disability” and by substituting instead “restoration of legal rights.”<sup>69</sup>

With these changes, the 2011 Statute read as follows:

If the person entitled to commence an action is, at the time the cause of action accrued, . . . *adjudicated incompetent*, such person, or such person's representatives and privies, as the case may be, may commence the action, after *legal rights are restored*, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from *restoration of legal rights*.<sup>70</sup>

Despite the intent to simply update the terminology, with these changes to the incapacity statute, the standard for determining incapacity shifted completely.

## 2. A Completely New Standard

When the Tennessee legislature amended the incapacity statute, it unintentionally created a new standard for incapacity that required a judicial determination of incapacity prior to the accrual of a cause of action to toll the statute of limitations. In *Cobb ex rel. Mallardi v. Tennessee Valley Authority*, a federal district court examined this new statutory language and determined that “[t]he term ‘adjudicated incompetent,’ by any reasonable interpretation, means that the person must have been the subject of a judicial declaration that she was incompetent to handle her own affairs as a matter of law.”<sup>71</sup> Fur-

---

69. *Id.* § 17.

70. TENN. CODE ANN. § 28-1-106 (2011) (amended 2016) (emphasis added). This standard was particularly problematic as adjudications of incompetency are rare in the United States; unfortunately, there is very little data on exactly how rare, but estimates “range from fewer than 1 million to more than 3 million.” BRENDA K. UEKERT & RICHARD VAN DUIZEND, NAT’L CTR. FOR STATE COURTS, ADULT GUARDIANSHIPS: A “BEST GUESS” NATIONAL ESTIMATE AND THE MOMENTUM FOR REFORM 109 (2011), <https://www.ncsc.org/~media/Microsites/Files/Future%20Trends/Author%20PDFs/Uekert%20and%20Van%20Duiزند.ashx>.

71. *Cobb ex rel. Mallardi v. Tenn. Valley Auth.*, 1 F. Supp. 3d 864, 869 (W.D. Tenn. 2014) (citing *Adjudicate*, BLACK’S LAW DICTIONARY (9th ed. 2009) (“adjudicate” means to “rule upon judicially”)).

thermore, the court noted that “[t]he legislature’s use of past tense and the phrase ‘at the time the cause of action accrued’ also clearly require that incompetency be declared *prior* to the injury-causing event.”<sup>72</sup> Ultimately, the court held “that the 2011 amendment to Tenn. Code Ann. § 28-1-106 created a new objective standard requiring actual adjudication of incompetency to invoke its application.”<sup>73</sup> A Tennessee appellate court relying on similar reasoning held that “a plaintiff’s mental incompetency must have been judicially adjudicated at the time his cause of action accrued” for the statute of limitations to toll.<sup>74</sup>

These changes were a major departure from the pre-2011 standard for determining incapacity. Whereas the 2011 Statute required a judicial determination prior to the injury, the Pre-2011 Statute allowed a jury to determine, after the fact, that people were incapacitated if they could not manage their day-to-day affairs.<sup>75</sup> While courts had held under the Pre-2011 Statute that a prior adjudication of incompetency was not actually determinative of whether a person was incapacitated,<sup>76</sup> the 2011 Statute now required a prior adjudication of incapacity.

---

72. *Id.*

73. *Id.* at 870, *aff’d*, 595 F. App’x 458 (6th Cir. 2014); *see also* Jones v. City of Franklin, 677 F. App’x 279, 280–81 (6th Cir. 2017) (per curiam) (“As explained in the appended opinion, the district court rejected this argument, reasoning that the ‘term “adjudicated incompetent,” by any reasonable interpretation, means that the person must have been the subject of judicial declaration that he was incompetent to handle his own affairs as a matter of law.’”).

74. Johnson v. UHS of Lakeside, LLC, No. W2015–01022–COA–R3–CV, 2015 WL 9426034, at \*7 (Tenn. Ct. App. Dec. 23, 2015); *see also* Efferson v. Stephens, No. M2014–00326–COA–R3–CV, 2015 WL 544849, at \*2 n.2 (Tenn. Ct. App. Feb. 9, 2015) (“The current version of Tenn. Code Ann. § 28-1-106, effective July 1, 2011, requires an adjudication of incompetence to toll the running of the statute of limitations.”).

75. Sherrill v. Souder, 325 S.W.3d 584, 600–01 (Tenn. 2010).

76. Smith v. Grumman-Olsen Corp., 913 F. Supp. 1077, 1084 (E.D. Tenn. 1995) (“[T]he dominant line of authority holds that such a decree is just ‘some evidence’ of incapacity at any time prior to the decree. Consequently, the Court has considered [the case law] and does not agree an adjudication is conclusive of the issue.”) (internal citations omitted).

This version of the statute also rejected the possibility of tolling when a defendant's actions or inactions cause the incapacity<sup>77</sup> because the 2011 Statute required an adjudication of incapacity *prior to* the injury-causing event. The court exposed this particular injustice of the 2011 Statute in *Woodruff v. Walker*.<sup>78</sup> There, a mother suffered "serious permanent injuries and brain damage" while she was delivering her baby on June 21, 2012.<sup>79</sup> The injuries and alleged negligence of the defendants incapacitated the mother, and, on November 29, 2012, a court appointed a conservator for the mother.<sup>80</sup> The mother's conservator brought suit on September 29, 2015,<sup>81</sup> which was after the one-year statute of limitations for health care liability actions had expired.<sup>82</sup> The court faced the question of whether the 2011 version of the incapacity statute would toll the statute of limitations when the tortious act caused the incapacity.<sup>83</sup> In looking at the 2011 Statute, the court found that the language is clear that a person must be adjudicated incompetent *prior to* the injury-causing event to gain the benefit of the incapacity statute.<sup>84</sup> The court held:

While Plaintiffs contend that this case is factually distinguishable from *Johnson*<sup>85</sup> because, unlike the plaintiff in that case, Mother was rendered incompetent by the wrongful conduct on which her claims are based, there is no basis for making such a distinction in the statute. Mother's claims accrued on June 21, 2012. She was "adjudicated incompetent" on November 29, 2012. As such, we agree with the trial court's conclusion that Tennessee Code Annotated section 28-1-106

---

77. See *Foster v. Allbright*, 631 S.W.2d 147, 150 (Tenn. Ct. App. 1982) ("This Court agrees . . . that disability arising at the time of injury will toll the statute.").

78. *Woodruff ex rel. Cockrell v. Walker*, 542 S.W.3d 486 (Tenn. Ct. App. 2017).

79. *Id.* at 490–91.

80. *Id.* at 491.

81. *Id.*

82. *Id.* at 490–92. See TENN. CODE ANN. § 29-26-116(a) (2012), for the statute of limitations for health care liability actions.

83. *Woodruff*, 542 S.W.3d at 496–97.

84. *Id.* at 497.

85. See *supra* note 74 and accompanying text.

did not apply to toll the statute of limitations as to Mother's claims.<sup>86</sup>

The result in *Woodruff* is an example of the injustice of the 2011 Statute, and the holding illustrates that the legislature—despite its efforts to make no substantive changes to the statute—inadvertently created a new standard for determining incapacity when it amended the statute in 2011.

Accordingly, the Tennessee legislature attempted to correct its mistake in 2016 with another amendment.

### C. *The 2016 Amendment*

In the aftermath of the creation of this new standard, the Tennessee legislature amended the statute once again in 2016 to try to correct its mistake and return to the old standard. The legislators working on the 2016 Amendment were clear that they were simply trying to correct the injustice created by the 2011 Statute, and that they also wanted to make sure that people who are incapacitated would be protected under the new language.<sup>87</sup> Despite these efforts, the 2016 Statute is long, complicated, and a major departure from both the Pre-2011 Statute and the 2011 Statute.<sup>88</sup>

#### 1. Fix the Injustice Created by the 2011 Statute

The Bill's sponsors and other representatives who supported the Bill were concerned about protecting the rights of adults who are incapacitated and intended to correct the injustice created by the 2011 Statute. Senator Becky Duncan Massey, the sponsor of the Senate Bill, explained that “[a]s a result of the 2011 legislation, person-first language was substituted for the outdated language. The legislature's intent was to change terminology, not meaning.”<sup>89</sup> She continued with an explanation of the problems with the 2011 Statute:

---

86. *Woodruff*, 542 S.W.3d at 498.

87. *See infra* Section II.C.1.

88. *See infra* Section II.C.2.

89. *Statutes of Limitations and Repose—As Enacted, Revises Provisions Governing Statutes of Limitations for Persons Lacking Capacity to Understand Legal Rights and Liabilities: Hearing on S.B. 1597 Before the S. Comm. on the Judici-*

In the 2011 legislation, “adjudicated incompetent” replaced “unsound mind,” and, while this worked as an equal substitution in the majority of Tennessee [C]ode and did not change the intent of the law, it did inadvertently change the intent of the law in the section of the Code referencing tolling of statutes of limitation for civil law suits, including law suits alleging abuse, neglect, and exploitation. It created a higher standard in the eyes of the court and eliminated an entire population of people previously protected under the law. People like an elderly man living with Alzheimer’s disease in a nursing home who has not been determined by a court to be incompetent. *So, whether or not someone has a conservator should not be the litmus test for determining whether or not someone falls under the tolling statute.*<sup>90</sup>

She explained that the 2016 Amendment was designed to “restore[] the rights of a population of vulnerable Tennesseans previously protected under the tolling statute, and a population of individuals defined in case law as persons lacking capacity.”<sup>91</sup>

House members echoed Senator Massey and stressed the importance of getting this legislation right so that there would not be unintended consequences, such as those that arose following the 2011 Amendment. The House-sponsor, Representative David Hawk, described the purpose of the 2016 Amendment and explained that he was trying to correct the statutory language that had changed the incapacity standard in 2011:

---

ary, S. 109-1597, at 1:31:11–1:31:22 [hereinafter *2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary*] (Tenn. 2016) (statement of Sen. Massey, Member, S. Comm. on the Judiciary), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=278&clip\\_id=12007&meta\\_id=244597](http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=12007&meta_id=244597).

90. *2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary*, *supra* note 89, at 1:32:05–1:33:00 (statement of Sen. Massey, Member, S. Comm. on the Judiciary) (emphasis added).

91. *2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary*, *supra* note 89, at 1:30:32–1:30:42 (statement of Sen. Massey, Member, S. Judiciary Comm.).

This bill seeks to repair a problem resulting from legislation that we passed in 2011. The 2011 legislation changed outdated language in multiple sections of Tennessee code. The outdated language referred to people with disabilities in offensive ways, such as “lunatic,” “imbecile,” “handicapped,” and “unsound mind,” among other words that were used. . . . As a result of the 2011 legislation, person-first language was substituted for the outdated language. The legislature’s intent at the time was to change terminology, not meaning. So, what we’re trying to do with this piece of legislation is to correct an ill that we caused in 2011.<sup>92</sup>

Other House members emphasized the importance of this legislation. Representative Jon Lundberg argued that it “is critical that we address this issue because, frankly, we have some folks who are not being taken care of because this bill has not been passed,” but he also explained the importance of getting the language right so “that we don’t have unintended consequences.”<sup>93</sup> Representative Mike Carter

---

92. *Statutes of Limitations and Repose—As Enacted, Revises Provisions Governing Statutes of Limitations for Persons Lacking Capacity to Understand Legal Rights and Liabilities: Hearing on H.B. 1651 Before the H. Subcomm. on Civil Justice*, H. 109-1651, at 1:06:52–1:07:36 (Tenn. 2016) (statement of Rep. Hawk, Member, H. Subcomm. on Civil Justice), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=278&clip\\_id=11701&meta\\_id=231416](http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=11701&meta_id=231416).

93. *Statutes of Limitations and Repose—As Enacted, Revises Provisions Governing Statutes of Limitations for Persons Lacking Capacity to Understand Legal Rights and Liabilities: Hearing on H.B. 1651 Before the H. Civil Justice Subcomm.*, H. 109-1651, at 1:10:30–1:10:38 (Tenn. 2016) [hereinafter *2016 Hearing on H.B. 1651 Before the H. Civil Justice Subcomm. II*] (statement of Rep. Lundberg, Member, H. Subcomm. on Civil Justice), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=278&clip\\_id=12027&meta\\_id=246018](http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=12027&meta_id=246018). In an earlier subcommittee meeting, Representative Lundberg also stated, “I think the legislation you bring before us is really important because we have a class of people out there that are not protected, and we’ve limited their rights. So, I’ll tell you I think this committee is 100% with you, and we just need to do some work on those definitions.” *Statutes of Limitations and Repose—As Enacted, Revises Provisions Governing Statutes of Limitations for Persons Lacking Capacity to Understand Legal Rights and Liabilities: Hearing on H.B. 1651 Before the H. Subcomm. on Civil Justice*, H. 109-1651, at 20:50–21:05 (Tenn. 2016) (statement of Rep. Lundberg, Member, H. Subcomm. on Civil Justice), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=278&clip\\_id=11803&meta\\_id=234742](http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=11803&meta_id=234742).

also highlighted the importance of the Amendment: “This has got to be corrected . . . . We literally have a group of people not protected. I don’t know of any other group in Tennessee that is not protected.”<sup>94</sup> Representative Bill Beck followed up on Representative Carter’s comments and said, “I don’t want to go home after this session without making sure this is done. . . . We want it right.”<sup>95</sup>

As the Bill prepared for passage in the Civil Justice Subcommittee, Representatives Lundberg and Carter explained the importance of protecting people who are incapacitated. Representative Lundberg reflected, “I think many of us would have, literally, lost sleep had we not passed something like this because we have folks out there who, truly, were unprotected.”<sup>96</sup> He continued, “It may not be a sexy story, but it’s one, frankly, that . . . will help people. This legislation makes a difference.”<sup>97</sup> Representative Carter announced, “[T]his is government working as it’s supposed to—to protect a group of very vulnerable people that we accidentally did not protect . . . .”<sup>98</sup> Although narrowly aimed at correcting the problems created by the 2011 Amendment, the 2016 Amendment goes further and creates several unintended consequences.

## 2. The Amendment

The 2016 Amendment started as a narrow change, but after several months of bouncing among committees, the 2016 Statute is much longer and departs from the Pre-2011 Statute and its standard

---

94. 2016 Hearing on H.B. 1651 Before the H. Civil Justice Subcomm. II, *supra* note 93, at 1:11:40–1:11:52 (statement of Rep. Carter, Member, H. Subcomm. on Civil Justice).

95. 2016 Hearing on H.B. 1651 Before the H. Civil Justice Subcomm. II, *supra* note 93, at 1:13:33–1:13:42 (statement of Rep. Beck, Member, H. Subcomm. on Civil Justice).

96. 2016 Hearing on H.B. 1651 Before the H. Civil Justice Subcomm., *supra* note 2, at 1:22:14–1:22:22 (statement of Rep. Lundberg, Member, H. Subcomm. on Civil Justice).

97. 2016 Hearing on H.B. 1651 Before the H. Civil Justice Subcomm., *supra* note 2, at 1:22:27–1:22:36 (statement of Rep. Lundberg, Member, H. Subcomm. on Civil Justice).

98. 2016 Hearing on H.B. 1651 Before the H. Civil Justice Subcomm., *supra* note 2, at 1:23:29–1:23:37 (statement of Rep. Carter, Member, H. Subcomm. on Civil Justice).

for determining incapacity. Initially, the Amendment would have changed uses of “adjudicated incompetent” throughout the Tennessee Code, including the incapacity statute:

As introduced, changes references from “persons adjudicated incompetent” to “persons who lack capacity to understand their legal rights and liabilities” for the purposes of civil proceedings. - Amends [Tenn. Code Ann.] Title 16; Title 20; Title 27; *Title 28*; Title 29; Title 30; Title 32; Title 34; Title 54; Title 66 and Title 69.<sup>99</sup>

The sponsors changed the Bill’s original intent to amend all references to “persons adjudicated incompetent” and, instead, focused solely on the incapacity statute.<sup>100</sup> After the 2016 Amendment, the 2016 Statute now reads as follows:

(a) If the person entitled to commence an action is, at the time the cause of action accrued, . . . adjudicated incompetent, such person, or such person’s representatives and privies, as the case may be, may commence the action, after legal rights are restored, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from restoration of legal rights.

. . .

(c)(1) If the person entitled to commence an action, at the time the cause of action accrued, lacks capacity, such person or such person’s representatives and privies, as the case may be, may commence the action, after removal of such incapacity, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from removal of such incapacity, except as provided for in subdivision (c)(2).

---

99. S.B. 1597, S. 109-1597, 2d Reg. Sess. (Tenn. 2015) (emphasis added).

100. See Act of Apr. 27, 2016, ch. 932, 2016 Tenn. Pub. Acts. § 1.



(2) Any individual with court-ordered fiduciary responsibility towards a person who lacks capacity, or any individual who possesses the legal right to bring suit on behalf of a person who lacks capacity, shall commence the action on behalf of that person within the applicable statute of limitations and may not rely on any tolling of the statute of limitations, unless that individual can establish by clear and convincing evidence that the individual did not and could not reasonably have known of the accrued cause of action.

(3) Any person asserting lack of capacity and the lack of a fiduciary or other representative who knew or reasonably should have known of the accrued cause of action shall have the burden of proving the existence of such facts.

(4) Nothing in this subsection (c) shall affect or toll any statute of repose within this code.

(d) For purposes of this section, the term “person who lacks capacity” means and shall be interpreted consistently with the term “person of unsound mind” as found in this section prior to its amendment by Chapter 47 of the Public Acts of 2011.<sup>101</sup>

Although the legislature attempted to address and correct the injustice of the 2011 Statute, the 2016 Statute is a major departure from the Pre-2011 Statute. Subsections (c)(1) and (d) attempt to go back to the old standard for determining incapacity as “the term ‘person who lacks capacity’ means and shall be interpreted consistently with the term ‘person of unsound mind’ as found in this section” in the Pre-2011 Statute.<sup>102</sup> But, the statute is, otherwise, much different from the pre-2011 version. For instance, subsections (c)(2) and (c)(3)

---

101. TENN. CODE ANN. § 28-1-106 (2017).

102. *Id.* § 28-1-106(c)(1), (d). I realize that subsection (c)(1) does not actually contain the phrase “person who lacks capacity;” however, it does say “[i]f the person . . . lacks capacity.” *Id.* § 28-1-106(c)(1). A court using rules of statutory construction should determine that subsection (d) also defines the similar phrase in subsection (c)(1), but this incongruity is one of the litany of problems with the new statute that I discuss in Section III of this Note.

appear to be a direct rejection of the holdings in *Sullivan*<sup>103</sup> and *Abels v. Genie Indus., Inc.*<sup>104</sup> as the new statute does not allow tolling when people who are incapacitated have an “individual with court-ordered fiduciary responsibility towards” them or an “individual who possesses the legal right to bring suit on behalf of” them.<sup>105</sup> This change significantly differs from the Pre-2011 Statute and the standard that other states have used in addressing the issue of whether the appointment or designation of a conservator, guardian, or agent removes the benefits of tolling under an incapacity statute.<sup>106</sup> The introduction of these new subsections also creates numerous issues that could prevent people who are incapacitated from bringing suit altogether.<sup>107</sup> Legislators raised one potential issue during the committee hearings on the Bill.

### 3. The Fiduciary Problem

Multiple legislators raised one particular concern with the new language: the meaning and scope of subsection (c)(2). Representative Mike Carter raised his concerns about the “fiduciary responsibility” language, presenting a hypothetical situation to demonstrate the potential problem with that language:

I’ve got extreme heartburn with that. . . . What if I appoint you the trustee of my grandson’s trust, and I don’t tell you, and I’m killed in a car accident, and my grandson is horribly injured, and fourteen months later, he

---

103. *Sullivan ex rel. Wrongful Death Beneficiaries of Sullivan v. Chattanooga Med. Inv’rs, LP*, 221 S.W.3d 506, 514 (Tenn. 2007) (“We also hold that the existence of a durable power of attorney does not remove the protection afforded by section 28-1-106.”).

104. *Abels v. Genie Indus., Inc.*, 202 S.W.3d 99, 105 (Tenn. 2006) (“[T]he disability of unsound mind referenced in Tennessee Code Annotated section 28-1-106 is not removed when the disabled person’s legal representative is appointed and/or accepts responsibility for the disabled person’s tort claims. Rather, the tolling of the statute of limitations continues until the disabled person’s mind becomes ‘sound,’ or the person dies.”).

105. TENN. CODE ANN. § 28-1-106(c)(2) (2017).

106. *See supra* note 54.

107. *See infra* Section III.

comes to. You find out you're the trustee and the statute of limitations ran on that.<sup>108</sup>

Senator Lee Harris raised similar concerns in the Senate Judiciary Committee. He asked, “[T]he part I was curious about . . . was that the tolling benefit would not apply if they have a fiduciary, and so I’m just curious about why you ultimately put that back in and that you would not get the tolling if you have a fiduciary?”<sup>109</sup> Committee Chairman, Senator Kelsey, put the hearing into recess so that members from The Arc, Disability Rights Tennessee, and the Tennessee Bar Association, who had worked on the language, could answer Senator Harris’ question.<sup>110</sup> As this discussion is the only insight into why that language is included in the current statute, the following is an in-depth excerpt of that discussion:

Allan Ramsaur<sup>111</sup>: The fiduciary provisions here, Senator, were an attempt to say that, if a fiduciary has this responsibility, they should exercise it during that time

---

108. 2016 Hearing on H.B. 1651 Before the H. Civil Justice Subcomm. II, *supra* note 93, at 1:12:03–1:12:35 (statement of Rep. Carter, Member, H. Civil Justice Subcomm). It appears that the sponsor ended up adding “court-ordered” to subsection (c)(2) to address Representative Carter’s concerns, TENN. CODE ANN. § 28-1-106 (2017), but as I will explore in Section III of this Note, that small addition does not really solve the larger problem created by the “fiduciary responsibility” and “legal right to bring suit” language in the statute. *See infra* Section III. The sponsors “worked with The Arc of Tennessee, Disability Rights of Tennessee, Administrative Office of the Court, the Tennessee Healthcare Association, Tennessee Disability Coalition, and the Tennessee Bar Association” on the eventual language of the statute. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:33:12–1:33:31 (statement of Sen. Massey, Member, S. Judiciary Comm.).

109. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:34:09–1:34:30 (statement of Sen. Harris, Member, S. Judiciary Comm.).

110. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:34:54–1:35:08 (statement of Sen. Kelsey, Chairman, S. Judiciary Comm.).

111. At the time Mr. Ramsaur was the Executive Director of the Tennessee Bar Association. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:35:07–1:35:10 (statement of Allan Ramsaur, Exec. Dir., Tenn. Bar Ass’n). Mr. Ramsaur is now the Executive Director Emeritus. *Professional Profile*, TENN. B. ASS’N, <https://www.tba.org/profile/allan-ramsaur> (last visited Jan. 26, 2019).

period and shouldn't wait and allow the statute to simply to continue to run.<sup>112</sup>

Senator Harris: [T]he question is what do you mean by fiduciary here and/or if you could just give me an example of a fiduciary—that may be the easiest.<sup>113</sup>

Allan Ramsaur: A conservator is a fiduciary. . . . And actually, there is a whole statutory scheme for fiduciaries that go[es] beyond conservators.<sup>114</sup>

Angela Webster<sup>115</sup>: [W]e didn't really have anything to add except that the original language . . . was specific to being adjudicated incompetent and, so, we removed that language to take it back to the original intent. So, I know there was a lot said about it and think that's probably where some of the lack of clarity came in. Did you have additional questions?<sup>116</sup>

Senator Harris: The short of it is whether or not the [Bill without this subsection dealing with fiduciaries] is a better Bill than [the Bill with this subsection]. The

---

112. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:35:10–1:35:31 (statement of Allan Ramsaur, Exec. Dir., Tenn. Bar Ass'n).

113. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:35:34–1:34:41 (statement of Sen. Harris, Member, S. Comm. on the Judiciary).

114. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:35:42–1:35:50 (statement of Allan Ramsaur, Exec. Dir., Tenn. Bar Ass'n).

115. At the time of this hearing, Ms. Webster worked for Disability Rights Tennessee. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:36:06–1:36:09 (statement of Angela Webster, Disability Rts. Tenn.). Ms. Webster is now the Executive Director of the Association of Infant Mental Health in Tennessee. *AIMHiTN Staff and Board*, ASS'N OF INFANT MENTAL HEALTH IN TENN., <http://aimhitn.org/about-us/staff-board> (last visited Jan. 26, 2019).

116. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:36:14–1:36:46 (statement of Angela Webster, Disability Rts. Tenn.).

[Bill without this subsection] does what you've described. It more or less makes the tolling benefit broadly available to those who lack capacity to understand their legal rights and liabilities. As it stands now with [this subsection], that tolling benefit is only available for those who lack capacity to understand their legal rights and liabilities *and* don't have a fiduciary. So, I'm trying to understand why the limitation improves the bill.<sup>117</sup>

Senator Harris: Are the stakeholders in the disability community okay with those who have a fiduciary, such as a conservator, not having this tolling benefit because they won't have this tolling benefit if they have a fiduciary? The only people that will have this benefit are those who do not have a fiduciary.<sup>118</sup>

Angela Webster: [Y]our question is: are advocates in the disability community okay with the language of the final amendment? So the legal director at Disability Rights Tennessee, along with Mr. Ramsaur and a representative from THCA actually met multiple times to discuss the language, and yes we are comfortable with the final language.<sup>119</sup>

Allan Ramsaur: Yes, we're comfortable with the final language. The only thing you could do to make it any

---

117. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:36:46–1:37:28 (statement of Sen. Harris, Member, S. Comm. on the Judiciary).

118. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:38:02–1:38:25 (statement of Sen. Harris, Member, S. Comm. on the Judiciary).

119. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:38:44–1:39:12 (statement of Angela Webster, Disability Rts. Tenn.). The THCA is an acronym for the Tennessee Health Care Association, whose “mission is to enhance the ability of its members to provide essential long-term care services for the elderly and disabled through education, advocacy and leadership.” *History and Mission*, TENN. HEALTH CARE ASS'N, <https://www.thca.org/about/history-and-mission/> (last visited Jan. 26, 2019).

more clear would be to make it a court-ordered fiduciary, in case there is somebody who believes they're in that fiduciary capacity that's without a court order. That's the only thing you could do to make it any more clear.<sup>120</sup>

While Senator Harris raised the issue, it is still unclear why this language was added as he did not really get answers. Furthermore, the provisions that were added are directly contrary to the purposes of the Amendment as articulated by the sponsor Senator Massey: “[s]o, whether or not someone has a conservator should not be the litmus test for determining whether or not someone falls under the tolling statute.”<sup>121</sup> Subsections (c)(2) and (c)(3), which contain the language at issue,<sup>122</sup> are the basis of the problems discussed in the next section.<sup>123</sup>

### III. THE OTHER PROBLEMS

Although the 2016 Statute has not been interpreted by any appellate courts, it has numerous issues that could give courts problems and unnecessarily strip away the rights of people who are incapacitated. First, courts will have to deal with how the new subsections interact with subsection (a), which the legislature left intact after the 2011 Amendment to the statute.<sup>124</sup> Further, subsections (c)(2) and (c)(3) create an exception to the typical tolling period,<sup>125</sup> which will punish adults who are incapacitated for the failings of their conservators or agents.<sup>126</sup> Even more troublesome, this exception may protect agents or conservators who commit torts against adults who are inca-

---

120. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:39:17–1:39:35 (statement of Allan Ramsaur, Exec. Dir., Tenn. Bar Ass’n).

121. 2016 Hearing on S.B. 1597 Before the S. Comm. on the Judiciary, *supra* note 89, at 1:32:52–1:33:01 (statement of Sen. Massey, Member, S. Comm. on the Judiciary) (emphasis added).

122. TENN. CODE ANN. § 28-1-106(c)(2)–(3) (2017).

123. *See infra* Section III.

124. *See infra* Section III.A.

125. TENN. CODE ANN. § 28-1-106(c)(2)–(3) (2017).

126. *See infra* Section III.B.

pacitated.<sup>127</sup> Finally, subsections (c)(2) and (c)(3)—specifically, the language that prevents tolling when someone has the legal right to bring suit on behalf of the person who is incapacitated<sup>128</sup>—could remove the tolling period altogether if courts read these subsections in conjunction with Tennessee Rule of Civil Procedure 17.03,<sup>129</sup> which allows a next friend to bring suit on behalf of an incompetent adult.<sup>130</sup>

#### A. Ambiguous Statutory Language and Its Implications

The 2016 Statute is unnecessarily complicated and may make statutory interpretation difficult. When the Tennessee legislature amended the statute in 2016, it left subsection (a) intact and simply tacked on several new subsections.<sup>131</sup> The courts will have to decide the basic question of whether subsection (a) has any meaning as it relates to adults who are incapacitated. The 2011 Statute created a completely new test for determining incapacity—an adjudication of incompetency prior to the injury-causing event<sup>132</sup>—yet the legislature left that part of the statute intact.<sup>133</sup> The addition of subsections (c)(1) and (d), however, appear to make subsection (a) needless for determining capacity of adults because those subsections appear to reinstate the old test for determining incapacity<sup>134</sup>: whether a person can manage his or her day-to-day affairs.<sup>135</sup> Courts will have to decide the basic question of what test to apply, and that question is complicated by the fact that subsection (c)(1) does not contain the actual language that is used in subsection (d), which defines “person who lacks capacity.”<sup>136</sup> Instead, subsection (c)(1) states as follows:

---

127. See *infra* Section III.C.

128. TENN. CODE ANN. § 28-1-106(c)(2)–(3) (2017).

129. TENN. R. CIV. P. 17.03.

130. See *infra* Section III.D.

131. TENN. CODE ANN. § 28-1-106 (2017).

132. See *supra* Section II.B.2.

133. TENN. CODE ANN. § 28-1-106(a) (2017).

134. *Id.* § 28-1-106(c)(1), (d).

135. *Sherrill v. Souder*, 325 S.W.3d 584, 600–01 (Tenn. 2010).

136. TENN. CODE ANN. § 28-1-106(d) (2017) (“For purposes of this section, the term “person who lacks capacity” means and shall be interpreted consistently with the term “person of unsound mind” as found in this section prior to its amendment by Chapter 47 of the Public Acts of 2011.”).

If the *person* entitled to commence an action, at the time the cause of action accrued, *lacks capacity*, such person or such person's representatives and privies, as the case may be, may commence the action, after removal of such incapacity, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from removal of such incapacity, except as provided for in subdivision (c)(2).<sup>137</sup>

Although the language of (c)(1) and (d) are similar, courts may face difficulty in interpreting these new subsections and in applying the correct test because the statute is unclear.

It is also challenging to understand exactly how subsections (c)(1), (c)(2), and (c)(3) interact with each other. Assuming courts determine that subsection (c)(1) returns to the old test for determining incapacity, subsection (c)(2) and (c)(3) complicate that test by adding a new exception to the benefits of tolling for a person who is incapacitated.<sup>138</sup> These subsections appear to remove the benefit of tolling if a person who is incapacitated has a conservator or an agent.<sup>139</sup> But, this removal is not entirely clear as, on its face, subsection (c)(2) appears to limit only the ability of the conservator or agent to bring suit outside of the limitations period:

Any individual with court-ordered fiduciary responsibility towards a person who lacks capacity, or any individual who possesses the legal right to bring suit on behalf of a person who lacks capacity, shall commence the action on behalf of that person within the applicable statute of limitations and may not rely on any tolling of the statute of limitations, unless that individual can establish by clear and convincing evidence that the individual did not and could not reasonably have known of the accrued cause of action.<sup>140</sup>

---

137. *Id.* § 28-1-106(c)(1) (emphasis added).

138. *Id.* § 28-1-106(c)(2)–(3).

139. *Id.*

140. *Id.* § 28-1-106(c)(3).



One way to read this subsection is that a conservator or agent shall commence the action within the statute of limitations and may not rely on any tolling.<sup>141</sup> Under that reading, a person who is incapacitated would still be able to bring suit if he or she regained capacity because the statute would only prevent a conservator or agent from getting the benefit of the tolling period. But that reading seems unlikely considering subsection (c)(3), which states that “[a]ny person asserting lack of capacity and the lack of a fiduciary or other representative who knew or reasonably should have known of the accrued cause of action shall have the burden of proving the existence of such facts.”<sup>142</sup> This subsection suggests that a person who was incapacitated would have to prove that he or she did not have a conservator or agent who knew or reasonably should have known of the accrued cause of action. Ultimately, the courts will make the difficult determination of how these subsections interact, and, if a court determines that the presence of an agent or conservator removes the benefit of tolling, then the statute will have some very serious problems that could completely remove the right of a person who is incapacitated to bring suit.<sup>143</sup>

*B. Punishing a Person for the Inactions of a  
Conservator or Agent*

The new statute is contrary to the purpose of the Pre-2011 Statute and punishes a person who is incapacitated for the failures of his or her agent or conservator. “The legislative purpose involved” in the Pre-2011 Statute was “to declare that statutes of limitation do not begin to run until a person’s disability is removed”<sup>144</sup> because “jus-

---

141. I have omitted the exception (could not reasonably have known of the cause of action) to the exception (no tolling for an agent or conservator) to the exception (tolling) for simplicity’s sake. In Section III.C of this Note, I also delve into a more expansive reading of “any individual who possesses the legal right to bring suit on behalf of a person who lacks capacity,” *id.* § 28-1-106(c)(2), as that language is particularly problematic in Tennessee.

142. *Id.* § 28-1-106(c)(3).

143. *See infra* Section III.D.

144. *Arnold v. Davis*, 503 S.W.2d 100, 102 (Tenn. 1973). *See also Sullivan ex rel. Wrongful Death Beneficiaries of Sullivan v. Chattanooga Med. Inv’rs, LP*, 221 S.W.3d 506, 509 (“The purpose of the statute is to declare that statutes of limi-

tice would not be served by barring an individual from pursuing a claim when he cannot by his own actions comply with the statute's time limit for bringing his suit."<sup>145</sup> The new statutory language, which appears to remove the tolling period when a person who is incapacitated has an agent or conservator,<sup>146</sup> is contrary to that policy and contrary to notions of "justice," according to the Supreme Court of Tennessee.<sup>147</sup> It punishes a person who is incapacitated when an agent or conservator fails to file suit on his or her behalf. It punishes them even though an agent or conservator may not be in the best position to determine if a cause of action has accrued.

Consider the example of *Sherrill v. Souder*.<sup>148</sup> In *Sherrill*, the injured party suffered from dementia or Alzheimer's, and she was prescribed a medication over several months that caused a serious medical condition that exacerbated her dementia or Alzheimer's.<sup>149</sup> The injured party's daughter held a durable power of attorney for her mother.<sup>150</sup> The injured party was told to stop taking the medicine that caused the serious medical condition at a doctor's appointment in December 2002; however, her daughter testified that she was not present for that appointment.<sup>151</sup> The Court determined that the cause of action would have accrued, absent the tolling period, at that December 2002 appointment because that is when the injured party should have been aware of the tort that had been committed against her.<sup>152</sup> Despite the warning, the injured party continued taking the dangerous medication.<sup>153</sup> In January 2003, the injured party's daughter went with her to a follow-up appointment and learned about the dangers of

---

tation do not begin to run until a person's disability is removed.") (internal quotations omitted).

145. *Sullivan*, 221 S.W.3d at 513–14.

146. *See supra* Section III.A

147. *Sullivan*, 221 S.W.3d at 513–14.

148. *Sherrill v. Souder*, 325 S.W.3d 584 (Tenn. 2010). The Court was reviewing a grant of summary judgment against the plaintiff, so the Court viewed the evidence in a light most favorable to the plaintiff, so the facts, as discussed, are a little skewed in that way. *Id.* at 602.

149. *Id.* at 590–91.

150. *Id.* at 590.

151. *Id.* at 601.

152. *Id.* at 599.

153. *Id.* at 589.

the medication that her mom had been taking, and she immediately stopped her mom's use of the drug.<sup>154</sup> The injured party filed suit in January 2004, which would have been outside of the limitations period, but the Court determined that there was a genuine issue of material fact as to whether the injured party was of sound mind in December 2002, and, thus, remanded the case back for trial.<sup>155</sup> The Court noted that the power of attorney was not relevant as it had recently decided that exercising a power of attorney did “not constitute a removal of her disability that would have caused the limitations period to expire before the date the lawsuit was filed.”<sup>156</sup>

This case is illustrative of why holding a person who is incapacitated responsible for the inactions of an agent is troublesome. The agent, the injured party's daughter, was not in the best position to know about the accrual of the cause of action because she was not present for the doctor's appointment when her mother was first told to discontinue the use of the dangerous medication.<sup>157</sup> Had the 2016 Statute been in effect, the injured party would have been barred from bringing suit in January 2004 because her daughter did not institute the action on her behalf in time. Or, at the very least, the injured party, after regaining capacity, would have to prove, by clear and convincing evidence, that her daughter should not have reasonably known about the accrual of the cause of action.<sup>158</sup> Proving that by clear and convincing evidence seems unlikely as the daughter cared for her mother, had a durable power of attorney for medical decisions, and arguably should have been monitoring her mother's medications and speaking with her doctors.

Punishing a person who is incapacitated for the inactions of a conservator or guardian is even more problematic. Whereas a person can choose his or her agent under a durable power of attorney, a person might have little choice as to who is selected as his or her conservator.<sup>159</sup> In Tennessee, “[a] petition for the appointment of a conservator may be filed by any person having knowledge of the

---

154. *Id.*

155. *Id.* at 603.

156. *Id.* at 602 n.15 (citing *Sullivan ex rel. Wrongful Death Beneficiaries of Sullivan v. Chattanooga Med. Inv'rs, LP*, 221 S.W.3d 506, 513 (Tenn. 2007)).

157. *Id.*

158. *See* TENN. CODE ANN. § 28-1-106(c)(2)–(3) (2017).

159. *See* TENN. CODE ANN. § 34-3-102 (2015).

circumstances necessitating the appointment of a conservator.”<sup>160</sup> While priority is given to a person selected in writing by the adult who is incapacitated, the court can make a different decision, or, if the person has not designated someone in writing, then the court goes down a statutory list to the spouse, a child, a close relative, a public guardian, and, then, any other person.<sup>161</sup> As such, a person who is incapacitated could lose the right to bring suit if the conservator, whom he or she may not have even had a voice in choosing, fails to bring a cause of action on his or her behalf.

*C. Protecting a Conservator or Agent Who Commits a Tort  
Against a Person Who Is Incapacitated*

One of the most concerning problems with the 2016 Statute is that it might protect a conservator or agent who commits a tort against a person who is incapacitated. If the courts determine that the statute prevents tolling when a person who is incapacitated has a conservator or agent,<sup>162</sup> the statute will insulate that conservator or agent from liability if they commit a tort against a person who is incapacitated.<sup>163</sup> In *In re Guardianship of Mowrer*, Mowrer executed a power of attorney to the Eddies.<sup>164</sup> The Eddies immediately closed her bank accounts and transferred the funds, cash, and certificates of deposit to themselves.<sup>165</sup> Ultimately, the Eddies transferred more than \$800,000

---

160. *See id.*

161. *See* TENN. CODE ANN. § 34-3-103 (2015).

162. *See* TENN. CODE ANN. § 28-1-106(c)(2)–(3) (2017). *See supra* Section III.A. for a discussion of how the statute could be interpreted in that way.

163. Abuse—financial, physical, and emotional—by agents and conservators is a common problem against adults who are incapacitated. *See generally* Nicole M. Arsenault, *Start with a Presumption She Doesn't Want to Be Dead: Fatal Flaws in Guardianships of Individuals with Intellectual Disability*, 35 L. & INEQ. 1, 1, 27–33 (2016); Jane A. Black, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population*, 82 ST. JOHN'S L. REV. 289 (2008); Julia Calvo Bueno, *Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly*, 16 NAELA Q. 20 (2003); John C. Craft, *Preventing Power of Attorney Abuse—A Lawyer's Role*, 75 ALA. LAW. 116 (2014); Joseph A. Rosenberg, *Regrettably Unfair: Brooke Astor and the Other Elderly in New York*, 30 PACE L. REV. 1004 (2010).

164. *In re Guardianship of Mowrer*, 979 P.2d 156, 158 (Mont. 1999).

165. *Id.*

from Mowrer.<sup>166</sup> Under Montana law, the Eddies had to pay the money back to Mowrer after Mowrer's attorney demanded an accounting of the money;<sup>167</sup> in Tennessee, however, this type of behavior by a conservator might be protected under a literal interpretation of the 2016 Statute.

Subsection (c)(2) states that “any individual who possesses the legal right to bring suit on behalf of a person who lacks capacity, shall commence the action on behalf of that person within the applicable statute of limitations and may not rely on any tolling of the statute of limitations.”<sup>168</sup> Under facts similar to those in *Mowrer*, an agent, under the power of attorney, “possesses the legal right to bring suit on behalf of a person who lacks capacity.”<sup>169</sup> Furthermore, under subsection (c)(3), “[a]ny person asserting lack of capacity and the lack of a fiduciary or other representative who knew or reasonably should have known of the accrued cause of action shall have the burden of proving the existence of such facts.”<sup>170</sup> Yet, under facts similar to those in *Mowrer*, the person who was incapacitated could not possibly prove that the agent, or “other representative,” did not know that the cause of action had accrued because the agent was the one committing the tort. Accordingly, the amended incapacity statute might protect an agent or conservator who commits a tort against a person who is incapacitated.

*D. Completely Removing the Right to Sue from a  
Person Who Is Incapacitated*

Under a particular interpretation of subsection (c)(2), a person who is incapacitated could lose the ability to bring suit altogether. While the courts may interpret “any individual who possesses the legal right to bring suit on behalf of a person who lacks capacity”<sup>171</sup> to mean an agent designated under a power of attorney, the courts could read this language in conjunction with Rule 17.03 of the Tennessee Rules of Civil Procedure. Rule 17.03 provides that “[i]f an . . . in-

---

166. *Id.* at 159.

167. *Id.*

168. TENN. CODE ANN. § 28-1-106(c)(2) (2017).

169. *Id.*

170. TENN. CODE ANN. § 28-1-106(c)(3) (2017).

171. *Id.* § 28-1-106(c)(2).

competent person does not have a duly appointed representative, or if justice requires, he or she may sue by next friend.”<sup>172</sup> Accordingly, under Rule 17.03, anyone has the “legal right to bring suit on behalf of a person who lacks capacity.” The courts could ultimately determine that a person who was incapacitated lost the right to sue because the person had a next friend who had the legal right to bring suit on his or her behalf.

While that may seem an unlikely interpretation in the abstract, consider this example. Mom hires a home-health company to help take care of her at home. She starts taking a new medication, causing her to lose capacity, and is no longer able to manage her day-to-day affairs,<sup>173</sup> but she had set up auto-pay for the home-health care company, so they keep coming and taking care of her. One of the employees starts abusing mom.<sup>174</sup> Mom does not say anything to anyone because she does not really understand what is happening, but it would have been obvious if her son, for instance, had come to visit. The home-health company fires the employee for unrelated reasons, and the abuse stops. A year passes. Her son comes to visit and starts talking to mom, and mom tells him that one of the home-health company employees abused her. Son does not believe her at first because she seems fine otherwise, and she never said anything while it was happening.<sup>175</sup> Another year passes. The former home-health employee is arrested for abusing someone else. Son now believes mom

---

172. TENN. R. CIV. P. 17.03.

173. See, e.g., Sherrill v. Souder, 325 S.W.3d 584, 590–91 (Tenn. 2010). I discussed this case in depth in Section III.B. See *supra* Section III.B.

174. Abuse by home health aides is unfortunately all too common. See Rick Schmitt, *Elder Abuse: When Caregiving Goes Wrong*, AARP, <https://www.aarp.org/caregiving/basics/info-2017/elder-abuse-assisted-living.html> (last visited Jan. 26, 2019).

175. “Often victims who ask for help are not believed. If an older woman discloses that she has been abused, the professional should offer her support and give her information about local domestic violence and sexual assault services. If the older person does not appear competent or has said things in the past that are not true, calling social services or law enforcement for an investigation should still be considered. Often abusers look for victims who are not competent or not considered ‘good reporters’ because they see them as easy prey.” Bonnie Brandl & Julie Rozwadowski, *Responding to Domestic Abuse in Later Life*, 5 MARQ. ELDER’S ADVISOR 108, 117 (2003) (emphasis added).

and decides to file suit as next friend against the home-health company for negligent hiring.

The attorney for the home-health company moves for dismissal based on the statute of limitations, which is one year for injuries to the person in Tennessee.<sup>176</sup> The attorney argues credibly that the statute of limitations should not toll because the son had the legal right to bring suit on behalf of his mom two years ago, or, alternatively, a year ago, when his mom first told him about the abuse. Either way the statute of limitations has run. The court looks to the language of the statute and sees that the statute now says that the statute of limitations does not toll unless the son, who had the legal right to bring suit on behalf of his mom, can prove by clear and convincing evidence that he should not have reasonably known about the abuse to his mom.<sup>177</sup> The court dismisses the case.<sup>178</sup> Mom stops taking the medicine that caused her incapacity, and she decides to bring suit against the home health company. Again, the court finds that she had someone who had the legal right to bring suit on her behalf and, thus, dismisses the case.<sup>179</sup>

With the 2016 Statute, the Tennessee legislature created a litany of potential complications, and it needs to correct those problems before people who are incapacitated lose their right to bring suit against tortfeasors.

---

176. TENN. CODE ANN. § 28-3-104(a)(1) (2017).

177. See TENN. CODE ANN. § 28-1-106(c)(2) (2017).

178. This result does not seem unlikely especially since the court was willing to interpret the 2011 version in a way that barred tolling when the injury-producing event caused the incapacity. See *supra* Section II.B.2.

179. These types of cases are not uncommon as elder abuse is a widespread problem. See Claudia Cooper et al., *The Prevalence of Elder Abuse & Neglect: A Systematic Review*, 37 AGE AND AGEING, no. 2, Mar. 1, 2008, at 151–60 (concluding that “[o]ne in six professional careers reported committing abusive acts but over four-fifths observed it”); CDC, UNDERSTANDING ELDER ABUSE (2016), <https://www.cdc.gov/violenceprevention/pdf/em-factsheet-a.pdf> (“In 2008, one in 10 elders reported emotional, physical, or sexual abuse or potential neglect.”); *Elder Abuse Facts*, NAT’L COUNCIL ON AGING, <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/> (last visited Jan. 26, 2019) (“Approximately 1 in 10 Americans aged 60+ have experienced some form of elder abuse. Some estimates range as high as 5 million elders who are abused each year.”).

## IV. THE FIX

With these definite and potential problems that could arise under the amended incapacity statute, the Tennessee legislature needs to correct the statute, or, at the very least, clarify how subsections (c)(2) and (c)(3) should apply.<sup>180</sup> While there are numerous ways to fix the statute, here is the simplest:

If the person entitled to commence an action is, at the time the cause of action accrued, either under eighteen (18) years of age, or *lacks capacity*, such person, or such person's representatives and privies, as the case may be, may commence the action, after the removal of such incapacity, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from restoration of legal rights.

For purposes of this section, the term "lacks capacity" means that the person was unable to manage his or her day-to-day affairs at the time the cause of action accrued.

This is the ideal statute. It returns to the pre-2011 standard for determining incapacity<sup>181</sup> and serves the purposes of the incapacity statute.<sup>182</sup> Furthermore, it provides the most protection for people who are incapacitated because it eliminates fiduciary concerns and clarifies the incapacity standard.<sup>183</sup>

---

180. TENN. CODE ANN. § 28-1-106 (2017).

181. *Sherrill v. Souder*, 325 S.W.3d 584, 600–01 (Tenn. 2010) (“[T]he modern test for determining whether an individual is of ‘unsound mind’ for purposes of section 28-1-106 is whether that individual was unable to manage his or her day-to-day affairs at the time the cause of action accrued.”).

182. *Arnold v. Davis*, 503 S.W.2d 100, 102 (Tenn. 1973) (“The legislative purpose involved” in the incapacity statute “is to declare that statutes of limitation do not begin to run until a person’s disability is removed.”); *see also Sullivan ex rel. Wrongful Death Beneficiaries of Sullivan v. Chattanooga Med. Inv’rs, LP*, 221 S.W.3d 506, 513–14 (“[J]ustice would not be served by barring an individual from pursuing a claim when he cannot *by his own actions* comply with the statute’s time limit for bringing his suit.”) (emphasis added).

183. *See supra* Sections II.C.3., III.B., III.C., & III.D.



One alternative, however, is to include language that would prevent people with powers of attorney or conservatorships from gaining the benefits of the tolling statutes when they represent the interests of people who are incapacitated. If the addition of subsections (c)(2) and (c)(3) was integral to passage in 2016,<sup>184</sup> then the legislature could add the following subsection:

Notwithstanding the foregoing provisions,  
Any individual with a court-ordered fiduciary responsibility towards a person who lacks capacity, or any individual who holds a valid power of attorney that enables that individual to bring suit on behalf of a person who lacks capacity, shall commence the action on behalf of that person within the applicable statute of limitations and may not rely on any tolling of the statute of limitations, unless that individual can establish by clear and convincing evidence that the individual did not and could not reasonably have known of the accrued cause of action.

Nothing in subsection (c) shall affect the right of persons who regain capacity to bring suit under subsection (a).

Nothing in subsection (c) will shield, from liability, an agent or conservator who commits a tort against an incapacitated person.

These added subsections do not solve all the problems created by the 2016 Amendment, but they would fix the most egregious ones. Under this language, an agent or conservator would not be immune from liability if they commit a tort against a person who is incapacitated.<sup>185</sup> This language would also clarify that the statute should not be interpreted broadly to include next friends under Tennessee Rule of Civil Procedure 17.03, as the language is limited to conservators and agents acting under a valid power of attorney.<sup>186</sup> Either of these solu-

---

184. It seems unlikely that this language was integral to its passage based on the statements of the Bill's sponsors and other legislators, *see supra* Section II.C, but I have included the following language out of an abundance of caution.

185. *See supra* Section III.C.

186. *See supra* Section III.D.

tions would be a marked improvement on the current version of the statute and would better protect people who are incapacitated.

## V. CONCLUSION

The Tennessee legislature needs to fix the problems that it created by amending the incapacity statute once again. In 2011, a simple update of the terminology of the Tennessee Code<sup>187</sup> created an entirely new standard for determining incapacity and lessened the protections for people who are incapacitated.<sup>188</sup> When the legislature attempted to fix its initial mistake in 2016, it ended up creating a whole new set of issues for courts and people who are incapacitated. The statute is a mess, and it now threatens to punish an adult who is incapacitated for the failings of the adult's conservator or an agent. Meanwhile, the exception may actually protect an agent or conservator who commits a tort against the adult who is incapacitated because the adult does not get the benefit of tolling when he or she has a conservator or agent. Finally, reading the new statute and Rule 17.03 of the Tennessee Rules of Civil Procedure<sup>189</sup> together, the courts could completely strip away the right of an incapacitated person to bring suit. The legislature should correct the problems that they have created by updating the statute to protect adults who are incapacitated.

---

187. See S.B. 0850, BILL SUMMARY, S. 107-850, Reg. Sess. (Tenn. 2011); S.B. 0850, BILL HISTORY, S. 107-850, Reg. Sess. (Tenn. 2011).

188. *Johnson v. UHS of Lakeside, LLC*, No. W2015-01022-COA-R3-CV, 2015 WL 9426034, at \*7 (Tenn. Ct. App. Dec. 23, 2015); see also *Efferson v. Stephens*, No. M2014-00326-COA-R3-CV, 2015 WL 544849, at \*2 n.2 (Tenn. Ct. App. Feb. 9, 2015) (“The current version of Tenn. Code Ann. § 28-1-106, effective July 1, 2011, requires an adjudication of incompetence to toll the running of the statute of limitations.”).

189. TENN. R. CIV. P. 17.03.