

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

October 23, 2020

Opinion No. 20-17

NICS and Department of Safety Reporting Requirements for Court Clerks

Question

Do the requirements to report certain information to the FBI-NICS Index and the Tennessee Department of Safety imposed on court clerks by Tenn. Code Ann. § 33-3-115(a) apply when a court orders a conservatorship?

Opinion

Yes. The Tenn. Code Ann. § 33-3-115(a) reporting requirements for court clerks apply when a Tennessee court orders the appointment of a conservator for a person who is in need of supervision, protection, and assistance due to mental illness or other mental incapacity.

ANALYSIS

In 2009, the General Assembly passed legislation requiring Tennessee courts that order a person committed to a mental institution or that “adjudicate a person as a mental defective” to enter a standing and continuing order instructing their respective court clerks to collect and periodically disclose certain information to the Federal Bureau of Investigation-NICS Index¹ and the Tennessee Department of Safety. 2009 Tenn. Pub. Acts, ch. 578, § 1 (circuit and criminal courts), § 2 (chancery courts), § 3 (general sessions courts), § 4 (county or probate courts).

This same duty of disclosure² is also separately imposed directly on “[a]ny clerk of court that maintains records of an adjudication as a mental defective or a judicial commitment to a mental

¹ “NICS” refers to the National Instant Criminal Background Check System. This system and the NICS Index are discussed below.

² The following information must be reported:

- (1) Complete name and all aliases of the individual judicially committed or adjudicated as a mental defective, including, but not limited to, any names that the individual may have had or currently has by reason of marriage or otherwise;
- (2) Case or docket number of the judicial commitment or the adjudication as a mental defective;
- (3) Date judicial commitment ordered or adjudication as a mental defective was made;
- (4) Private or state hospital or treatment resource to which the individual was judicially committed;

institution” *Id.* § 5 (codified at Tenn. Code Ann. § 33-3-115). The General Assembly imposed these reporting requirements on court clerks expressly for the purpose of complying with the federal NICS Improvement Amendments Act of 2007 and Tenn. Code Ann. §§ 16-1-117(a), 39-17-1316, 39-17-1351, 39-17-1352. Tenn. Code Ann. § 33-3-115(a).

The NICS Improvement Amendments Act of 2007 is the most recent of three major federal legislative enactments aimed in part at curbing firearm possession by individuals with mental deficiencies. Taken together, the first two acts—the Gun Control Act of 1968 and the Brady Handgun Violence Prevention Act of 1993—made it unlawful for a person “who has been adjudicated as a mental defective³ or who has been committed to any mental institution” to possess a firearm, made it unlawful to sell or transfer a firearm to such a person, and established the NICS—the National Instant Criminal Background Check System. 18 U.S.C. § 922(g)(4), § 922(d)(4), § 922(t); 28 C.F.R. §§ 25.1 to -.11. This information system included the NICS Index, which federally licensed firearms dealers must check before they sell or transfer any firearm and to which States and other governmental entities could submit information regarding individuals who should be denied firearms due to mental health reasons under applicable state or federal law.⁴

(5) Date of birth of the individual judicially committed or adjudicated as a mental defective, if such information has been provided to the clerk;

(6) Race and sex of the individual judicially committed or adjudicated as a mental defective; and

(7) Social security number of the individual judicially committed or adjudicated as a mental defective if available.

Tenn. Code Ann. § 33-3-115(b).

³ “Adjudicated as a mental defective” is defined under federal regulations as follows:

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

(1) Is a danger to himself or to others; or

(2) Lacks the mental capacity to contract or manage his own affairs.

(b) The term shall include—

(1) A finding of insanity by a court in a criminal case; and

(2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

27 C.F.R. § 478.11.

⁴ See Federal Bureau of Investigation, *National Instant Criminal Background Check System Posts NICS Index Data*, <https://www.fbi.gov/news/pressrel/press-releases/national-instant-criminal-background-check-system-posts-nics-index-data> (last visited Sept. 25, 2020); M. Roxana Nahhas Rudolph, *Balancing Public Safety with the Rights of the Mentally Ill: The Benefit of a Behavioral Approach in Reducing Gun Violence in Tennessee*, 45 U. Mem. L. Rev. 671, 679 (2015); see generally 28 C.F.R. §§ 25.1 to -.11.

Under the Brady Act, however, NICS was dependent on voluntary contributions of information by the States and the mental health information that it got was lacking in both quantity and quality. Emily Wajert, *Navigating the Rights of the Mentally Ill and the Second Amendment: Defining Responsibility, Balancing Safety, and Weighing Constitutional Rights*, 19 U. Pa. J. Const. L. 731, 738-39 (2017). With the passage of the NICS Improvement Amendments Act in 2007, Congress sought to encourage States to supply accurate and up-to-date information to NICS by authorizing federal grants to assist States in their compliance efforts and by imposing penalties for non-compliance. *Id.* at 739; *see Tyler v. Hillsdale Cnty. Sheriff's Dept.*, 837 F.3d 678, 682 (6th Cir. 2016); Pub. L. No. 110-180, §§ 103-04, 121 Stat. 2559, 2567-69 (2008).

The NICS Improvement Amendments Act of 2007 caused the General Assembly to amend Tenn. Code Ann. § 33-3-115 in 2009 to require, as it now does, clerks of courts that maintain records of “an adjudication as a mental defective or a judicial commitment to a mental institution” to disclose the statutorily specified information (see note 2, above) about the relevant person to the NICS Index and the Tennessee Department of Safety. And in the same 2009 Act, the General Assembly likewise amended Tennessee’s Criminal Code to restrict firearm possession and handgun carry permit rights for individuals who have been “adjudicated as a mental defective” or judicially committed to a mental institution. *See* 2009 Tenn. Pub. Acts, ch. 578, §§ 9-12.

“Adjudicated as a mental defective” is defined throughout the 2009 Act to mean:

A determination by a court in this state that a person, as a result of marked subnormal intelligence, mental illness, incompetency, condition or disease:

- (i) Is a danger to such person or to others; *or*
- (ii) Lacks the ability to contract *or manage such person’s own affairs due to mental defect.*

2009 Tenn. Pub. Acts, ch. 578, §§ 1, 2, 3, 4, 5, 8 (emphasis added).⁵

In Tennessee, a conservatorship is “a proceeding in which a court removes the decision-making powers and duties, in whole or in part, in a least restrictive manner, from a person with a disability who lacks capacity to make decisions in one or more important areas and places responsibility for one or more of those decisions in a conservator or co-conservators.” Tenn. Code Ann. § 34-1-101(4)(B). A “person with a disability” is any adult “determined by a court to be in need of partial or full supervision, protection, and assistance by reason of mental illness, physical illness or injury, developmental disability, or other mental or physical incapacity.” Tenn. Code Ann. § 34-1-101(14). Conservatorship petitions are filed when a disabled person cannot “manag[e] [his or her] affairs.” *In re Lawton*, 384 S.W.3d at 756; *AmSouth Bank v. Cunningham*, 253 S.W.3d 636, 643 (Tenn. Ct. App. 2006); *In re Conservatorship of Groves*, 109 S.W.3d 317, 327 (Tenn. Ct. App. 2003); *Blackburn v. Blackburn*, 63 S.W.3d 338, 339 (Tenn. Ct. App. 2001); *In re Conservatorship of Clayton*, 914 S.W.2d 84, 88 (Tenn. Ct. App. 1995); *see also* Tenn. Code

⁵ This definition under Tennessee’s 2009 Act is nearly identical to the definition of “adjudicated as a mental defective” under federal law. *See* note 3, above.

Ann. § 71-6-107(c) (provision of the Tennessee Adult Protection Act stating “[i]f the adult is in need of a person to manage the adult’s affairs . . . the procedures and requirements for appointment of a conservator pursuant to title 34 . . . must be followed”).

A petitioner seeking the appointment of a conservator must prove by clear and convincing evidence that the person for whom a conservator is sought is a disabled person. *In re Groves*, 109 S.W.3d at 329-330 (citing Tenn. Code Ann. § 34-1-126). If the petitioner meets that burden and the court determines that a conservator is in the person’s best interest, the court must enter an order that “enumerates the powers removed from the respondent and vested in the conservator.” Tenn. Code Ann. § 34-3-107(a)(2); *In re Lawton*, 384 S.W.3d 754, 761 (Tenn. Ct. App. 2012).

Thus, when a Tennessee court orders the appointment of a conservator for a person, it has perforce determined that the person is “disabled,” i.e., needs a conservator due to mental or physical incapacity. If the disability is due to mental incapacity, then that judicial determination meets the statutory definition of an “adjudicat[ion] as a mental defective” because the court will of necessity have determined that the person, “as a result of marked subnormal intelligence, mental illness, incompetency, condition or disease . . . [l]acks the ability to manage such person’s own affairs due to mental defect.” And because such a court-ordered conservatorship is an adjudication as a mental defective of the person for whom the conservator is appointed, the reporting requirements imposed on the clerk under Tenn. Code Ann. § 33-3-115 apply.

A contrary construction would be inconsistent with the purposes of the 2009 Act and would conflict with the General Assembly’s express intent to include within the scope of the Act persons for whom conservators are appointed due to mental incapacity. As amended by the 2009 Act, Tenn. Code Ann. § 39-17-1351(c)(12) requires an applicant for a handgun carry permit to show

[t]hat the applicant has not been adjudicated as a mental defective; has not been judicially committed to or hospitalized in a mental institution; *has not had a court appoint a conservator for the applicant by reason of a mental defect; has not been judicially determined to be disabled by reason of mental illness, developmental disability or other mental incapacity . . .*

(Emphasis added.) The italicized language reinforces that, for purposes of gun-control measures, the legislature views a person for whom a conservator has been appointed by reason of a mental incapacity to be equivalent to a person “adjudicated as a mental defective.” Neither class of persons is eligible for a handgun carry permit. The italicized language appeared in the prior version of Tennessee Code Ann. § 39-17-1351(c)(12)⁶ and was retained in the 2009 Act. The General Assembly could have, but did not, delete this language. That decision must be viewed as purposeful. *See Lee Medical, Inc. v. Beecher*, 312 S.W.3d 516, 527 (Tenn. 2010) (courts presume the legislature uses every word deliberately).

Moreover, when statutes relate to the same subject matter or share a common purpose, they must be construed together to advance their common purpose or intent. *Carver v. Citizen Utils.*

⁶ *See* Tenn. Code Ann. § 39-17-1351(c)(12) (2008).

Co., 954 S.W.2d 34, 35 (Tenn. 1997). A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted that carries out the intent of the General Assembly. *See Faust v. Metropolitan Gov't*, 206 S.W.3d 475, 490 (Tenn. Ct. App. 2006). It would be inconsistent to exempt a conservatorship based on mental disability from the reporting requirements of Tenn. Code Ann. § 33-3-115, which are imposed for gun-control (NICS Index) purposes, when the legislature purposefully chose not to exempt such a conservatorship from the handgun-carry-permit-eligibility requirements.

In sum, the Tenn. Code Ann. § 33-3-115(a) reporting requirements for court clerks apply when a Tennessee court orders the appointment of a conservator for a person who is in need of supervision, protection, and assistance due to mental illness or other mental incapacity.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

LAURA T. KIDWELL
Assistant Solicitor General

Requested by:

The Honorable Bill Dunn
Speaker Pro Tempore
612 Cordell Hull Bldg.
Nashville, Tennessee 37243