

Essay

11. Shut Down, Two Days Into Hearings, by Terry W. Hammond

"There are lives at stake. Our state governmental policy appears to regard the mentally challenged as just beggars, robbers and thieves. But Hammond's clients include a Katrina evacuee, a Boston University graduate, and other very bright, talented, but mentally ill people. ... Texas has failed miserably. " -- Hammond writes about the state-halted hearings into "personal care" homes.

Editor's note: We invited El Paso attorney Terry W. Hammond to write about his investigation into living conditions for mentally and physically challenged people in El Paso and the State of Texas. Hammond was appointed as master in chancery and guardian ad litem for multiple mentally ill clients by El Paso Probate Judge Max Higgs after Higgs had observed repeated psychiatric hospitalizations of residents emanating from the same unlicensed motels, boarding houses and foster homes. Those hearings were shut down by the State of Texas, which argued that the venue in which the hearings were being held was inappropriate. The hearings were in Judge Max Higgs' probate court, and the state argued, in part, that only a district court could call such a hearing.

Some state governments readily accept their responsibility to care for the aged and disabled. Some do so reluctantly. Other must be forced to do so. This is a story about how the state that consistently jockeys for 50th place in health and human services responds to its neediest citizens.

Two years ago, El Paso County Probate Judge Max Higgs appointed me on a number of cases which made national news after case presentations revealed a system in which frail and elderly El Pasoans suffered abuse, neglect, and exploitation even after investigations by Texas Adult Protective Services, a division of the Texas Department of Health and Human Services (HHSC). The cases garnered headlines for months, and Gov. Rick Perry issued an executive order calling for the Office of Inspector General, also a division of HHSC, to conduct a statewide investigation of the agency. The investigation revealed that over 20,000 Texans had been reported three or more times to APS as being abused, neglected or exploited, and no one knew the fate of these people.

The Legislature then began an effort to reform the Adult Protective and Children's Protective Services System in Texas. Notably, El Paso was nowhere near the top of the HHSC regions in the level of harm occurring to elderly and disabled Texans; in fact, there were six regions worse than ours, and only four that were better. In the Spring of 2005, after months testimony and 11th hour negotiations, the Legislature passed a \$34,000,000.00 protective services and guardianship reform bill that attempted to improve the State's protective services and guardianship systems, including certification and standards for guardians.

Clearly, as one legislator commented, the State was committing "malpractice" in its treatment of elderly, vulnerable Texans. This was a statewide problem, and Judge Higgs and I were the ones who initially exposed it.

One of Governor Perry's key aides told a colleague that he wished his office had known about the problem before it hit the national news. The reason why is beginning to become clear.

Just eight months later, in January of 2006, Judge Higgs heard a commitment proceeding on a schizophrenic woman who nearly died at a local motel where the owner and a "liaison" who brought clients to the motel, had gained control of her money, and allegedly failed to

properly feed, clothe, and shelter her. The woman, who had been traveling from Alabama to California by bus, ran out of money and ended up at a local homeless shelter. A caseworker at the homeless shelter referred her to the "liaison." The liaison took her to the motel. A non-profit organization managed by the motel owner became payee for her money, and paid the owner and his partner \$420 of her \$603 monthly Social Security check. According to testimony, the motel owner then proceeded to feed her discarded, rotted convenience store food. The woman lost 60 pounds in six months, was digging in dumpsters for food, and had not changed clothes in nearly two months. She was hanging out of a balcony window when the police were called to take her to the psychiatric hospital.

At that hearing, Higgs appointed me to be a guardian ad litem to represent the best interests of all mentally ill residents of that motel. Judge Higgs also appointed me as a master in chancery to gather evidence about my clients' living conditions in these locations and present it to the Court. A few weeks later, he expanded my appointment to include all residents of a local "boarding home" which was entirely populated with persons with mental illness, primarily schizophrenia, most of whom had been placed there by MHMR or at the recommendation of MHMR. In all, the appointments totaled 27. I agreed to compensation of less than \$400 per case to take the cases to hearing, and engaged in a six-month investigation to determine the quality of care my clients were receiving in these unlicensed facilities and to hold three days of hearings before the Court.

I had lined up about 30 witnesses (to include clients, family members, owners of facilities, and professionals in the community). The hearings began on Tuesday, June 21, and continued until about 10 a.m. on Wednesday, June 22. On Tuesday morning, I was met by a host of opposing counsel who were resisting the subpoenas I had issued, chief of whom was an Assistant Attorney General for the State of Texas who had flown in to El Paso from Austin to quash the subpoenas issued to the director of the El Paso Psychiatric Center and two employees of our local Area Agency on Aging. I personally knew each of these witnesses and had given them a friendly invitation to testify. The subpoenas were not issued until late in the week before the hearings after the Assistant Attorney General advised me they would not appear voluntarily.

The judge took the Attorney General's motion under advisement, and the hearings continued with other witnesses being called to testify. As the hearings entered their tenth hour, the Attorney General's Office filed a mandamus brief, took it to the Court of Appeals, and secured an ex parte order staying the proceedings. Weeks of legal wrangling in the Court of Appeals ensued in which I had to hire two appellate attorneys to represent me. Finally, an agreed order was entered where Judge Higgs excised my appointment as master in chancery, ending a theoretical argument by the Attorney General that I might serve as the judge hearing my own cases presented by me as master in chancery. The hearings were heard in their entirety by Judge Higgs; I only presented evidence.

Before the state stifled the testimony, the primary caretaker at one boarding home testified that 16 people with schizophrenia, mental retardation, major depression, bipolar disorder, and/or dementia had been living in a space of 520 square feet. The evidence revealed the men were sleeping with up to five or six people per 80 square foot room. The walls and locked gates were nine to 10 feet tall. The residents, many of whom had been put there by MHMR, ranged from 21 to 80 years of age. Social Security had appointed the owner of the boarding home as representative payee for some of the residents, and he was paying himself \$450 per month for room and board, leaving them only about \$5 per day to live on. My investigation revealed that numerous neighbors had complained to public officials about the poor care the residents were receiving, including reports of naked residents urinating and defecating in the yard. The 16-plus residents were often left in the care of minor

children. The owner of the boarding home had previously referred to his clients as "rejects," according to newspaper reports.

The evidence also showed that the motel in question was primarily populated with mentally ill residents as well. Most of these residents were referred to the owner by a local homeless shelter. A non-profit company had gained control of the Social Security checks, which normally amounted to no more than \$603 per month, thereby controlling every aspect of their lives. Three of my clients testified that the residents were served rotted food from convenience stores, while the motel owner and his liaison, who was responsible for tending to the residents' personal needs, pocketed almost all of the money. The residents, who again had diagnoses of schizophrenia, depression, and mental retardation, were left to live on \$5 a day. One client said she dug in dumpsters for food because she knew the dumpsters were dumped daily so the food in them could only be one day old.

Police records revealed more than 100 emergency visits at each of these places each year, at a cost to local taxpayers of tens of thousands of dollars. EMS and the fire department were going to each place 20 to 30 times a year, again costing taxpayers. Many required repeated hospitalizations at local hospitals.

The 10 hours of testimony revealed that there was a total failure of any and all governmental entities to properly intervene to prevent suffering of the mentally ill in El Paso and, I suspect, in the entire State of Texas. Under Chapter 247 of the Texas Health and Human Services Code, the State (specifically, ironically, the Texas Attorney General) is responsible for enjoining the operation of illegal "personal care homes" operating as assisted living facilities. However, the State has defined "personal care home" so narrowly that motels, boarding homes, and foster homes dispensing medication, providing transportation, and feeding mentally ill residents is not considered "personal care." The State has allowed the proprietors of these "facilities" to make hundreds of thousands of dollars a year while operating completely unregulated.

Just after the Order staying the hearings was read before an anxious and bewildered audience, the local MHMR director whispered in my ear:

"We've just received information indicating that there are 4000 of these homes around the State caring for 60,000 mentally ill residents." This number was up from 1200 homes just six years ago.

Everyone in the courtroom was in a state of shock. Residents of these homes had shaved, dressed up, and had come to tell the judge about their lives in these places. Local advocates were left wondering what to do next. The first thought in my mind was, "Why is the State shutting us down when they should be shutting down the low lives who are exploiting these Texans?" The cost of taking a more comprehensive, holistic approach to caring for the mentally ill must be a factor here. And...there was a gubernatorial campaign in the works as well.

The Texas Attorney General may have won a fleeting tactical victory in staying the proceedings, or at least in obstructing them. However, the problems still remain. There are lives at stake. Those Texans with mental illness are being stored away in conditions reminiscent of the Whitechapel district in 19th century England.

Our state governmental policy appears to regard the mentally challenged as just beggars, robbers and thieves. But my clients include a Katrina evacuee, a Boston University graduate with a degree in philosophy and a legal education, and other very bright, talented, but

mentally ill people. If, indeed, the most basic function of government is to care for those who cannot care for themselves, Texas has failed miserably.

The custodial role of a guardianship and probate court, and the advocacy that committed legal counsel can provide, have been highlighted in this ongoing struggle to ensure at least a modicum of comfort and care for vulnerable Texans. I have been advised that the Texas Rangers, our elite law enforcement agency in Texas, has been investigating us. I have learned of two APS investigations into my conduct as an attorney and guardian. It is a rather McCarthyesque environment in which I am trying to practice and exist.

But, it seems to me that this is what advocacy is all about. Time will tell if I continue to choose to continue to practice in Texas, or if I find it more enjoyable and fulfilling to work in other jurisdictions. In the meantime, I am interested in finding out if our experience in Texas is unique, or if it is a reflection of where we are as a nation. This is a dialogue that cannot be stayed.

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