

14. Limitations of Guardianship

This section was authored by Margaret Tyne, Attorney, for the Illinois Office of State Guardian, 1994. The thrust of her article was devoted to civil liberties and the right of privacy and letting a disabled person make as many decisions as possible was very insightful. The article put into perspective what is most important for guardians to remember and that is rather than looking at guardianship as removing rights away and controlling their life it is more of being an advocate for a disabled person so they can participate in life to their fullest.

Guardians Can't Do Everything

- A. A guardian cannot change the ward's behavior. Many people want guardians to change the ward's behavior. The guardian cannot stop the ward from being self-destructive, engaging in criminal activity or make then participate in recommended therapy or programming. Therefore, if the desired result is to change behavior, guardianship is not the answer.
- B. A guardian cannot force the ward to take medication. This situation more generally arises with cases of mentally ill persons. A psychotropic medication may have serious side effects, and the use of these drugs should be limited. The Mental Health Code applies in forced medication cases and should be discussed with the case manager.
- C. A guardian cannot force the ward to stay at a facility. Legally the ward has a right to free movement. The guardian cannot authorize the caregiver to physically restrain the person from leaving. However, the guardian must have residential placement authority if a decision is made to move the ward. For mentally ill persons in a mental health facility the Mental Health Code applies.
- D. A guardian cannot sign a voluntary admission to a psychiatric hospital if a ward does not agree. Unless the ward agrees to be admitted, it is presumed the ward has not consented. Therefore, the Mental Health Code applies and the guardian will need to work with the facility.
- E. The guardian must have court approval to consent to electric convulsive therapy. The guardian must petition the court for approval. Consulting an attorney is recommended if this situation arises.
- F. The guardian may be able to consent to withholding life-sustaining medical treatment. The guardian may withdraw life-sustaining treatment under the Health Care Surrogate Act. See the section on HCSA.

G. The guardian cannot restrict the ward's civil liberties unless there is a direct correlation between the disability and an abuse of the right or the ward's inability to understand the responsibilities that correspond to that right.

1. Marriage. A guardian cannot keep a ward from getting married. The guardian can strongly suggest the ward not get married.
2. Divorce. A guardian cannot file a petition for dissolution of marriage without the ward's concurrence. An attorney should be consulted if the guardian has concerns.
3. Sterilization/Abortion. The courts have determined there is a sacred right to privacy of every woman concerned in decisions regarding abortion. The guardian must carefully weigh burden on the ward of continuing the pregnancy to term against the perceived protections of ending the pregnancy. Religious, moral, societal, and medical considerations are to be examined by the guardian in making these decisions. Sterilization is considered a very intrusive surgical procedure and should be used where other less intrusive alternatives are unacceptable. An attorney should be consulted as needed.
4. Birth Control/Sexual Activity. While some guardians believe they should protect their ward from sexual exploitation in all situations, the disabled person still has personal rights. The guardian should consider the abilities (not disabilities) of the ward and help the person to understand that emotional and medical problems can arise.
5. Parental Rights of the Ward. The ward may be unable to sufficiently care for their offspring. If a court determines that it is in the best interest of the child that the ward's parental rights be terminated, that child will be freed for adoption. The guardian may not feel it is best for the parent (the ward). An attorney should be retained to represent the ward.
6. Voting. Just because a person is disabled, it does not automatically follow that the person cannot vote. The ward has to register, meeting the same requirements of residency, citizenship, and age as anyone else. They must understand the procedure of voting such as entering the booth, voting, and retuning the ballot to the judge. If the person has a physical or language disability requiring special assistance, this should be made known at the time of registration. Special

accommodations will be arranged. There are no tests of mental capacity and the disabled person does not have to be able to read or write. The guardian would want to discuss the important considerations and responsibilities of voting with the ward.

7. Driving. The motor vehicle code allows persons with physical disabilities to drive. Special adaptive restrictions will be placed on persons with physical disabilities. However, the Secretary of State cannot issue licenses to people with a mental disability if there is direct correlation between the disability and ability to drive.
8. Other Freedoms. If a person with a disability is in a mental health facility or nursing home certain rights will be protected. The ward's right to communicate will be protected without the guardian's considerations. The same protection of free speech will not be affected by the guardian's wishes. The freedom of religion and privacy also remain intact.
9. The guardian cannot make decisions regarding matters the court has not authorized. If the guardian has been appointed to manage the ward's person, no decisions regarding financial estate can be made without further court approval. If the guardian has limited powers, those powers only must be followed by the guardian or possible liability charges could be made.

Conclusion

Please remember that the guardian can only make the types of decisions that the court allows. The ward will still be able to make the type of decisions that the court has not determined the guardian should make. It is the role of a guardian to know their client very well and advocate for what is in their best interests.