



ILLINOIS GUARDIANSHIP ASSOCIATION CHICAGO SPRING CONFERENCE

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Mental Health Issues – What’s a Guardian to Do?

Joseph T. Monahan, M.S.W., A.C.S.W., J.D.

Monahan Law Group, LLC, Chicago

jmonahan@monahanlawllc.com

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TOPICS COVERED

- **Mental Health Code**
- **Mental Health Treatment**
 - Voluntary Admission
 - Involuntary Admission
 - Outpatient Treatment
 - Medication
- **Declaration for Mental Health Treatment**
- **Mental Health Information**
 - Access to Records
 - Communication with Providers

Mental Health Code

- **Governing Law: The Illinois Mental Health and Developmental Disabilities Code - 405 ILCS 5/ et seq.**
- **Definitions**
- **Procedure focused**

Mental Health Facility

- **405 ILCS 5/1-114**
- **“Mental health facility”** means any licensed private hospital, institution, or facility or section thereof, and any facility, or section thereof, operated by the State or a political subdivision thereof for the treatment of persons with mental illness and includes all hospitals, institutions, clinics, evaluation facilities, and mental health centers which provide treatment for such persons.
- **Case law narrowing the definition:**
 - *In re Moore*, 301 Ill. App. 3d 759 (4th Dist. 1998)
 - *In re Linda B.*, 2015 IL App (1st) 132134 (February 18, 2015)

Mental Health Facility – Case Law

- **In re Moore, 301 Ill. App. 3d 759 (4th Dist. 1998)**
 - The emergency room was not considered a “mental health facility”
 - “...there may be sections within a hospital devoted to treatment of mentally ill patients. Those sections or units, and not the entire hospital, are mental health facilities for purposes of the involuntary admission provisions of the Code.”
- **In re Linda B., 2015 IL App (1st) 132134 (February 18, 2015)**
 - The medical unit of the hospital was not a “mental health facility,” only the psychiatric unit.
- **Position Letter of Illinois Dept. of Public Health**
 - Dated April 24, 2013
 - Stated that the emergency department is subject to the provisions of the Mental Health Code “at the point in time that the Emergency Department Health Care Professional has diagnoses and start treatment of the patient for a mental illness.”
- **Disagreement on Definition**
 - Within legal community about *Moore* and *Linda B*
 - Illinois Supreme Court Task Force – to consider changes in the law

Voluntary Inpatient

- **405 ILCS 5/3-400**
- **Application can be executed by:**
 - Person seeking admission, if 18 or older.
 - Any interested person, 18 or older, at the request of the person seeking admission.
 - A minor, 16 or older, as provided in Code provisions on admissions of minors.
 - Effective January 1, 2010, a guardian can admit under the provisions discussed above.
- **Standard for Admission**
 - Clinically suitable
 - Capacity to Consent – the recipient understands:
 - He or she is being admitted to a mental health facility
 - He or she may request discharge at any time; in writing, discharge is not automatic
 - Within 5 business days after requesting discharge, the facility must either discharge the person or initiate commitment proceedings
 - Must be “determined” and documented

Voluntary Inpatient

- **Discharge**

- Recipient shall be discharged at the earliest appropriate time not to exceed 5 days, excluding Saturdays, Sundays and holidays, after recipient gives written notice of desire to be discharged.
 - Unless petition for involuntary admission is filed

- **Review of Voluntary Admissions**

- 30 days after voluntary admission, the facility director shall review the need for continuing hospitalization

Involuntary Inpatient

- Involuntary admission on an inpatient basis
- 405 ILCS 5/1-119

Involuntary Inpatient

- **“Persons subject to involuntary admission on an inpatient basis”:**
 - (1) A person with a mental illness who because of his or her illness is reasonably expected, unless treated on an inpatient basis, to engage in conduct placing such person or another in physical harm or in reasonable expectation of being physically harmed; OR
 - (2) A person with mental illness who because of his or her illness is unable to provide for his or her basic physical needs so as to guard himself or herself from serious harm without assistance of family or others, unless treated on an inpatient basis; OR
 - (3) A person with mental illness who:
 - refuses treatment or is not adhering adequately to prescribed treatment; AND
 - because of the nature of his or her illness, is unable to understand his or her need for treatment; AND
 - if not treated on an inpatient basis, is reasonably expected, based on his or her behavioral history, to suffer mental or emotional deterioration and is reasonably expected, after deterioration, to meet the criteria of either paragraph (1) or paragraph (2) of this Section.
- **Practical Considerations**
 - State’s Attorneys want (1) or (2)
 - Generally will not go forward on (3) alone

Involuntary Inpatient - Petition

- **Petition (*see Appendix*)**
- **405 ILCS 5/3-601**
- **Must be completed, signed and dated, and made by a person 18 years of age or older**
 - A surrogate decision-maker under the Health Care Surrogate Act may not consent to admission to a mental health facility, but he or she may petition for involuntary admission (405 ILCS 5/3-601.2).
 - A guardian may not consent to admission to a mental health facility but may petition.
 - The person preparing the petition (the petitioner) may be the facility director so long as he or she has actual knowledge of the facts.
- **Person with personal knowledge**

Involuntary Inpatient - Petition

- **Petition must have all requirements elements in 405 ILCS 5/3-601**
 - DHS form petition (in Appendix)

Involuntary Inpatient – Examination and Certificates

- In sum, ONE Petition and TWO Certificates must be completed and filed with the Court for involuntary admission on an inpatient basis. (See Timelines below.)
- 405 ILCS 5/3-602
- DHS form in Appendix

Involuntary Inpatient – Examination and Certificates

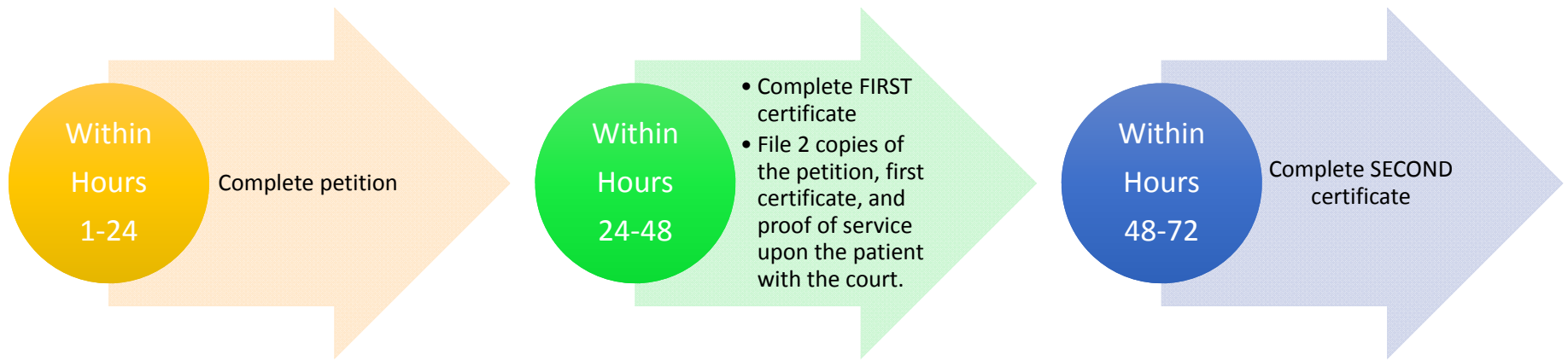
First Certificate

- Must be completed and filed with the Petition
- Executed by a physician, qualified examiner, psychiatrist, or clinical psychologist
- “which states that the respondent is *subject to involuntary admission on an inpatient basis and requires immediate hospitalization*” 405 ILCS 5/3-602
- May be completed **up to 72 hours** prior to admission, but no later than 24 hours after completion of the Petition

Second Certificate

- Must be completed within 24 hours (excluding Saturday, Sunday, or holidays) of the first Certificate and “promptly” filed with the court.

Timelines



Excluding Saturdays, Sundays, and Holidays

- **Within 5 days of Filing**

- Court shall set a hearing to be held within 5 days, excluding Saturdays, Sundays and holidays, after receipt of the petition. 405 ILCS 5/3-611

Duration of Order (Involuntary Admission)

- 405 ILCS 5/3-813
- Initial order is valid for a period not to exceed 90 days.
- Upon new petition and two certificates, court may enter another commitment order for 90 days.
- 180 day periods thereafter.
- DHS form in Appendix

Involuntary Outpatient

- **Involuntary Admission of Adult Patient on an Outpatient Basis**
- **Standard (405 ILCS 5/1-119.1):**
 - (1) A person who would meet the criteria for admission on an inpatient basis as specified in Section 1-119 in the absence of treatment on an outpatient basis and for whom treatment on an outpatient basis can only be reasonably ensured by a court order mandating such treatment; or
 - (2) A person with a mental illness which, if left untreated, is reasonably expected to result in an increase in the symptoms caused by the illness to the point that the person would meet the criteria for commitment under Section 1-119, and whose mental illness has, on more than one occasion in the past, caused that person to refuse needed and appropriate mental health services in the community.

Involuntary Outpatient

- **Petition**

- Petitioner may be any person 18 years of age or older
- Personal knowledge
- May be combined with petition for involuntary admission on inpatient basis
- May be filed for a person currently admitted to hospital on an informal or a voluntary basis
 - Documented history of illness and treatment demonstrating that he or she is unlikely to continue to receive needed treatment following release and that an order for alternative treatment or for care and custody is necessary in order to ensure continuity of treatment outside a mental health facility.
 - Patient can still request discharge

- **DHS form in Appendix**

Involuntary Outpatient

- **Certificates**

- One certificate must be executed by a psychiatrist.
- The other certificate must be executed by another psychiatrist, physician, clinical psychologist, or qualified examiner.
- Personal examination within the past 72 hours
- DHS form in Appendix

- **Examination**

- If no certificate was filed, the respondent shall be examined separately by:
 - a physician, or clinical psychologist or qualified examiner; and
 - a psychiatrist.
- The examining physician, clinical psychologist, qualified examiner or psychiatrist may interview by telephone or in person any witnesses or other persons listed in the petition for involuntary admission.
- If, as a result of an examination, a certificate is executed, the certificate shall be promptly filed with the court.
- Respondent is permitted to remain in his or her place of residence pending any examination.

Involuntary Outpatient

- **Hearing**

- Notice at least 36 hours before hearing
- Court shall set a hearing to be held within 15 days of receipt of the second certificate

Involuntary Outpatient

- **Orders**

- Initial order - a period not to exceed 180 days.
- A second order may be entered for an additional 180 days if a new petition and two certificates are filed with the court and the person continues to meet commitment standards.
- Thereafter, additional 180-day orders may be sought pursuant to the petition procedures and if the person continues to meet commitment standards.
- Agreed Order
 - May be entered at any time before the conclusion of the hearing and the entry of the court's findings
 - Requirements
 - Written report
 - Court advises respondent in open court
 - Proposed custodian advised
 - May include provisions for psychotropic medication
 - May authorize the custodian to hospitalize respondent for failure to comply with order
 - Can be extended with the agreement of the parties for additional 180-day periods

Patient Rights

- **Right to refuse treatment and psychotropic medication**
 - “Treatment” is defined as an effort to accomplish an improvement in the mental condition or related behavior of a patient. (450 ILCS 5/1-128).
 - Includes hospitalization, outpatient services, examination, diagnosis, evaluation, care, training, psychotherapy, pharmaceuticals, and other services provided for recipients by mental health facilities.
 - Patients shall be informed of his or her right to refuse medication upon admission. 405 ILCS 5/3-608
- **No recipient of services shall be presumed to be legally disabled by virtue of being admitted to a psychiatric unit. (405 ILCS 5/2-101).**

Patient Rights

- **Notification**

- 40 ILCS 5/2-102(a-5)
- If psychotropic medications are part of the treatment plan, the recipient must be informed in writing of the side effects, risks, benefits, and alternatives
- Advice must be “consistent with the recipient’s ability to understand the information communicated”
- It is sufficient notice under section 2-102(a-5) if the physician attempts to tender the written information the recipient even if the recipient refuses to accept the written information. *In re Maureen D.*, 2015 IL App (1st) 141517 (where physician made two attempts to provide written information and then, *only after such attempts*, left the written information on the nurses’ station counter when the respondent refused to accept it)

Psychotropic Medications and ECT

- **Right to Refuse Treatment**

- Adults
- Guardians have the right to refuse BUT NOT override recipient's refusal without a separate court proceeding.
- Agents under POA may consent

- **Emergency administration**

- “necessary to prevent the patient from causing serious and imminent physical harm to the patient or others and no less restrictive alternative is available.” 405 ILCS 5/2-107
- Up to 24 hours
- For a period not in excess of 72 hours, excluding Saturdays, Sundays, and holidays, unless a petition is filed under Section 2-107.1 and the treatment continues to be necessary
- No long-acting psychotropic medications

Involuntary Treatment – Meds and ECT

- **405 ILCS 5/2-107.1**
- **Petition for Administration of Psychotropic Medications / Electroconvulsive Therapy (DHS form in Appendix)**
- **Petitioner can be any person 18 years of age or older, including any guardian**
- **Petitioner delivers copy of petition to respondent no less than 3 days before hearing**
- **Hearing within 7 days of filing**
- **Clear and convincing evidence of all the factors set forth in Mental Health Code**

Involuntary Treatment – Meds and ECT

- **Order:**

- No more than 90 days
- Second 90-day period may be authorized pursuant to a hearing
- Thereafter, 180-day periods
- Designate the person(s) authorized to administer the treatment
- Specify the medications and anticipated range of dosages and any alternatives

- **DHS form in Appendix**

Involuntary Treatment – Case Law

- **Respondent has the right to receive written treatment information in the language he or she understands**
 - *In re Katarzyna G.*, 2013 IL App (2d) 120807
- **Court must specific the tests a physician is authorized to administer**
 - *In re Donald L.*, 2014 IL App (2d) 130044

Declaration for Mental Health Treatment

- ***Mental Health Treatment Preference Declaration Act (755 ILCS 43/1 et seq.)***
- **Definitions**
 - Attorney-in-fact - an adult validly appointed under the Act to make mental health treatment decisions for a principal under a declaration for mental health treatment and also means an alternative attorney-in-fact.
 - Incapable - (1) in the opinion of two physicians or the court; and (2) a person's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person currently lacks the capacity to make mental health treatment decisions.
 - Mental health treatment - (1) ECT; (2) treatment with psychotropic medication; and (3) admission and retention to mental health facility not to exceed seventeen (17) days
- **Declaration**
 - Adult; sound mind
 - May be invoked for up to three (3) years
 - Continues in effect as long as in effect or until the attorney-in-fact has withdrawn
 - Can remain in effect until the principal is no longer incapable
 - Signature of principal and two (2) competent adult witnesses. (755 ILCS 43/20)

Declaration for Mental Health Treatment

- **Agent (Attorney-in-Fact)**

- makes decision only when the principal is incapable (755 ILCS 43/15)
- Cannot be
 - Attending physician
 - Mental health service provider
 - Employee of the physician or provider (if unrelated to patient)
 - Owner, operator, or employee of a health care facility
- Authority (755 ILCS 43/30)
 - Principal must be “incapable”
 - Not guarantor of payment
 - Right to receive, review, and consent to disclose of medical records
 - Act using "substituted judgment" or if not known then use of “best interest”

Declaration for Mental Health Treatment

- **Operation of declaration (755 ILCS 43/25)**
 - delivered to principal's attending M.D.
 - valid until revoked or expired
- **Declaration should become part of the medical record (755 ILCS 43/40)**
- **Principal's wishes must be followed unless: (755 ILCS 43/45)**
 - Court order
 - Emergency endangering life or health
- **Revocation**
 - May be revoked at any time by the Principal IF PRINCIPAL IS NOT INCAPABLE

Appendix of Forms

- **Declaration for Mental Health Treatment (Illinois Department of Public Health)**
- **Mental Health Code**
 - Petition for involuntary/judicial admission (IL 462-2005)
 - Inpatient certificate (IL 462-2006)
 - Order for detention, examination, diagnostic evaluation (IL 462-2008)
 - Order for treatment or discharge (IL 462-2208M)
 - Order for Hearing (IL 444-2009)
 - Petition for administration of psychotropic medications/electroconvulsive therapy (IL 462-2025)
 - Order for administration of psychotropic medications/ electroconvulsive therapy (IL 462-2024)
 - Petition for involuntary outpatient admission to a state-operated center (IL 462-2210)
 - Out-Patient Certificate (IL 462-2012)

Guardianship and Mental Health

Benefits

- Access to information
- Communication with providers

Limitations

- Admission to mental health facilities
- Medication and ECT
- Admission to residential facilities

Limitations of Guardianship

- **Admission to Mental Health Facilities**

- *In re Muellner*, 335 Ill.App.3d 1079, 782 N.E.2d 799 (4th Dist. 2002)
- A guardian of the person may not admit a ward to a mental health facility unless:
 - admission is at the ward's request as provided in the Mental Health Code; and
 - the ward has the "*capacity to consent*" to such admission as provided for in Article IV of the Mental Health Code:
 - He or she is being admitted to a mental health facility;
 - He or she may request discharge at any time; and
 - Within 5 business days after receipt of written request for discharge, the facility director must either discharge the person or initiate commitment proceedings.
 - Note: *If ward does not request/consent or lacks capacity, guardian may initiate involuntary commitment proceedings.*

Limitations of Guardianship

- **Medication and ECT**

- Guardian may consent to Psychotropic Medication for "non-objecting" ward.
- The provisions of 2-107 with respect to the emergency administration of "authorized involuntary treatment" (psychotropic medication and ECT) DO NOT APPLY to facilities LICENSED under the NURSING HOME CARE ACT. Consequently, there is the option to use psychotropic medications or ECT on an emergency basis in a nursing home. [5/2-107(f)]

- **Admission to residential facilities (755 ILCS 5/11a-14.1)**

- Public Guardians and Office of the State Guardian no longer need prior court approval.
- *Muellner* issues
- 2010 legislation regarding Mental Health Code

Mental Health Records and Communications

- **Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1, et seq.**
- **General Rule – 740 ILCS 110/3**
 - All records and communications are confidential
 - Legislative change effective Jan. 1, 2016 regarding therapeutic relationship
- **Definitions – 740 ILCS 110/2**
 - Mental Health or Developmental Disabilities Services
 - Therapist
 - Communication or Confidential Communication
 - Record

Mental Health Records and Communications

- **Records may be disclosed pursuant to:**
 - Authorization
 - Proper court order
 - Exception
- **Fact that individual is a recipient is confidential**
 - Cannot say affirmatively that the person whose records are being requested is or ever was a recipient without authority to disclose

Mental Health – Disclosure Pursuant to Authorization

- **Signed by those persons who are entitled to inspect and copy a recipient's record pursuant to Section 4 of the Confidentiality Act**
 - Parent or guardian of a recipient who is under 12 years of age
 - Recipient if he is 12 years of age or older
 - Guardian of a recipient who is 18 years or older
 - Attorney or guardian ad litem who represents a minor 12 years of age or older in any judicial or administrative proceeding, provided that the court or administrative hearing officer has entered an order granting the attorney this right
 - Agent under power of attorney
 - Attorney-in-fact appointed under the Mental Health Treatment Preference Declaration Act
 - Any person in whose care and custody the recipient has been placed pursuant to Section 3-811 of the Mental Health and Developmental Disabilities Code.

Persons with Authority - Closer Look

- **Parent or guardian – recipient under 12**

- Only need signature of one parent (*Dymek v. Nyquist*, 128 Ill. App. 3d 859 (1st Dist. 1994))

- **Guardian of an adult recipient**

- Temporary guardian – must have specific authority set forth in the order appointing
- Limited guardian – if the limited guardian is not vested with the authority to execute, power stays with disabled person
- Plenary guardian – guardian with full authority
- Co-guardians – need only signature of one guardian

Mental Health – Disclosure Pursuant to Authorization

- **Section 5 Requirements**

- the person or agency to whom disclosure is to be made
- the purpose for which disclosure is to be made
- the nature of the information to be disclosed
- the right to inspect and copy the information to be disclosed
- the consequences of a refusal to consent, if any
- the calendar date on which the consent expires
- the right to revoke the consent at any time
- not a blanket consent (specifies information to be disclosed)
- witnessed



monahan law group, llc

P 312.419.0252 | F 312.419.7428 | www.monahanlawllc.com

