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## Ethics of Guardianship - August 2021

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# Objectives for this training:

Establish that guardianship is a legal relationship;

Establish the various types of guardianships and how they interplay with advance directives;

Establish the duties of a guardian;

Establish the ethical considerations a guardian should employ;

Establish the rights retained by the ward despite the guardianship; and

Establish the ward's right to challenge the guardianship after it is entered.

# What is the Illinois Office of State Guardian?

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Guardianship is a court ordered legal relationship conferring one party (guardian) with the authority of substitute decision-making for another party (Ward).

20 ILCS 3955 created the Illinois Guardianship and Advocacy Commission in which the Illinois Office of State Guardian (OSG) was established as a division.

OSG acts as the guardian of last resort when **no other suitable and willing person is available to act** and historically handles estates valued at \$25,000 or less, although OSG is not precluded from larger estates.

**It can be that a suitable and willing person comes forward after OSG's appointment in which case that person should become appointed successor guardian.**

# Guardianship is a legal relationship.

- When is a guardianship appropriate?
- When is a guardianship **not** appropriate?

# What is guardianship?

Guardianships are authorized and controlled exclusively by a statute known as the Probate Act of 1975 (755 ILCS 5/11a-1).

Guardianships are created as a result of court action; a Petition for Guardianship is filed with the court by the Petitioner (for OSG this often is a hospital, an APS agency and sometimes a nursing home).

A physician's report is filed that indicates why the person needs a guardian. In Cook County this is referred to as the CCP-211. The report must be based on an exam that took place within 3 months of filing.

Generally, the court will appoint a Guardian ad Litem for the Respondent (the person is not yet under a guardianship so the term "Ward" is not yet appropriate) who is to report to the court whether guardianship is warranted and if so to what extent.

# Guardianship should be seen as a tool of last resort.

- ▶ The Illinois Probate Act of 1975 (§11a-3(b)) provides that guardianship is to be ordered only to the extent necessary:

- (1) to promote the well-being of the person with disability (PWD),
- (2) to protect the PWD from harm, and
- (3) to encourage development of maximum self-reliance and independence.

**These concepts are competing and can create conflict.**

- ▶ Natural supports that create a supported decision-making environment may obviate the need for guardianship altogether or may be suggestive of a limited guardianship. This is commonly referred to as “**supported/supportive decision-making.**”
- ▶ Powers of attorney (POA) for property and health care are useful alternatives to guardianship.

**Note:** A guardian’s authority is subordinate to a POA unless it has been suspended or terminated by court order.

# Inability to manage affairs, not disability, is the basis for guardianship.

Disability alone cannot be a basis for guardianship.

“Plenary guardianship over a disabled adult is not appropriate where the adult is capable of intelligently directing others to perform tasks for him.”

*Estate of Fallos*, 386 Ill. App. 3d 831 (4<sup>th</sup> Dist. 2008)

# Categories of Guardianship

- Temporary (expires after 60 days — can be renewed for up to a total of 120 days)
- Guardian of Person (Plenary or Limited)
- Guardian of Estate (Plenary or Limited)



# Temporary Guardianship Orders

Temporary Guardianship Orders expire after 60 days. The order can be renewed for an additional 60 days.

Temporary orders are also **limited orders**. The authority conferred will be stated in the order. It is imperative to always read the order because a guardian has no authority to act beyond the powers conferred. If in doubt consult legal counsel.

If a provider wants some type of action that exceeds the guardianship order, then the Petitioner will need to go back into court and seek expansion of authority.

A temporary guardianship often does not adjudicate disability due to the fast-moving nature of this process as a remedy in a crisis or emergency.

# Temporary guardianships

Be sure to have the expiration date of the temporary order well documented in your calendar and case file. If a temporary order has expired, the guardian **no longer** has any authority to act. This lapse can expose the guardian to court sanctions and possible liability.

# Limited guardianships are least restrictive.

Limited guardianships are generally regarded as the least restrictive guardianship. Why:

1. By law, they do not result in a judicial finding of incompetence, so these do not adversely affect the right to a driver's license or a FOID card the way a plenary guardianship does.
2. By law, the only powers the guardian may exercise are spelled out in the order. They can be broad or narrow in scope.

However, most Petitioners and courts will resort to plenary guardianships as these are regarded as the most protective measure.

# Differences between Estate Guardianships and Person Guardianships

Estate guardianships deal with financial affairs of the Ward, including real and personal property (chattel), income (but not Federal benefits such as SSI), assets, debts and liabilities.

Person guardianships cover all other decisions about the Ward.

Person guardianships can include management of Social Security.

In Illinois, OSG has authority by virtue of the ABLI Act to create accounts based solely upon being appointed guardian of the person.



# **Duties imposed upon the guardian by the Probate Act of 1975.**



# The Probate Act imposes duties upon guardians of the estate.

Duty to collect, preserve and inventory (755 ILCS 5/14-1).

Duty to manage, frugally invest, and apply the estate for the Ward's (and any dependents) care and comfort (755 ILCS 5/11a-18).

Duty to account (755 ILCS 5/24-11).

## **Probate Code limitations on Guardian of Estate's authority**

Cannot sell/mortgage real estate absent court order (755 ILCS 5/19-1).

Cannot sell, lease, pledge or mortgage Ward's chattel (personal property) absent court order (755 ILCS 5/20-3).

# Standard for estate decision-making:

Disbursements are made using the best interest standard, however:

“The ward’s wishes as best they can be ascertained **shall** be carried out, whether or not tax savings are involved.” 755 ILCS 11a-18(a-5).



## Differences between a Representative Payee and a Guardian of the Estate

A representative payee is appointed by a federal agency (e.g., SSA, VA), not the court, to handle one specific payment/benefit and nothing else. (The agency makes this appointment when it has decided that this person would be better off with someone else handling the payment.) The duty to account is to the federal agency, not the court.

A guardian of the estate may designate a facility where the Ward resides to be the representative payee. The federal agency must accept the facility as the representative payee. There is an SSA form for this purpose.

There are processes in place for changing a representative payee as well as “restoring” the person to handle the federal benefit.

## **The Probate Act imposes duties on guardian of the person.**

An overarching duty is that a guardian “shall maximize the independence and self-reliance of the ward.”

# The duty to maximize independence is the duty to empower.

The ability to make decisions is part of the ability to function. Viewing guardianship as a means of developing and supporting the ability of a person to function will naturally lead to involving that person to the greatest extent possible at his or her own level of expression. Some Wards will be more involved in directing personal affairs whereas others will be able to offer little engagement.

**Self-determination is a fundamental right** that gives an individual the right to make decisions about medical care, where to live, where to work, who to associate with for company, what to eat, and what recreational activities to enjoy.

Person-centered decision-making by a guardian supports an individual's right to self-determination. This approach focuses on what a person wants, values and deems important rather than what is best for the person or what is good for the person. **Doing so always involves a balance between risk and independence.**

Convenience to the guardian is **not** at issue under this approach.

# The Probate Act of 1975 establishes a two-part decision-making standard.

1. Guardians are to make decisions first by complying with the **substituted judgment standard** (i.e., decisions that conform with the Ward's wishes).
2. If the guardian cannot use the substituted judgment standard for decision-making, the guardian is to then make decisions in the Ward's **best interests**.

# Substituted Judgment

Prior to August 6, 2021, the Probate Act of 1975 provided that a guardian was to make decisions that conform to what the Ward would have done if competent. The guardian was to take into consideration the Ward's personal, philosophical, religious and moral beliefs based on the Ward's previously expressed preferences when he or she was competent.

All of this provided a look back in time to when the Ward had his or her full abilities. Doing so led to contextually adequate decisions for individuals suffering a life-changing trauma such as TBI, coma or loss of capacity due to disease progression.

**There was no requirement for a guardian to follow a Ward's currently expressed preferences.**

## **Substituted Judgement and Public Act 102-0258**

Public Act 102-0258 was signed on August 6, 2021. It requires a guardian of the person to involve a Ward, so the decision-making process is now in line with Probate Act duties and nationally recognized best practices.

# Public Act 102-0258

(e) Decisions made by a guardian on behalf of a ward shall be made in accordance with the following standards for decision making. The guardian shall consider the ward's current preferences to the extent the ward has the ability to participate in decision making when those preferences are known or reasonably ascertainable by the guardian. Decisions by the guardian shall conform to the ward's current preferences: (1) unless the guardian reasonably believes that doing so would result in substantial harm to the ward's welfare or personal or financial interests; and (2) so long as such decisions give substantial weight ~~Decisions made by a guardian on behalf of a ward may be made by conforming as closely as possible to what the ward, if competent, would have done or intended under the circumstances, taking into account evidence that includes, but is not limited to, the ward's personal, philosophical, religious and moral beliefs, and ethical values relative to the decision to be made by the guardian. Where possible, the guardian shall determine how the ward would have made a decision based on the ward's previously expressed preferences, and make decisions in accordance with the preferences of the ward. If the ward's wishes are unknown and remain unknown after reasonable efforts to discern them, or if the guardian reasonably believes that a decision made in conformity with the ward's preferences would result in substantial harm to the ward's welfare or personal or financial interests , the decision shall be made on the basis of the ward's best interests as determined by the guardian. In determining the ward's best interests, the guardian shall weigh the reason for and nature of the proposed action, the benefit or necessity of the action, the possible risks and other consequences of the proposed action, and any available alternatives and their risks, consequences and benefits, and shall take into account any other information, including the views of family and friends, that the guardian believes the ward would have considered if able to act for herself or himself.~~

## **Substituted judgment decision-making is context sensitive.**

A guardian is now required to consider the Ward's wishes to the extent he or she is able to participate in decision-making.

The ability to make a decision depends upon what is being decided and this is inherently context sensitive.



## **Conflicts between prior and current expressed preferences**

The “substantial weight” verbiage is intended to provide a guardian with a tool for resolving conflicts in preferences expressed by a Ward.

A ward’s current statements may substantially differ from those previously shared raising concern on the part of a guardian; but, in some instances, a Ward may have good reasons for changing his or her beliefs.

When ascertaining a Ward’s wishes based upon prior statements, the guardian is to consider the Ward’s personal, philosophical, religious and moral beliefs, and ethical values in balancing alternatives, risks, consequences, and benefits of a proposed decision.

## Best Interests and Public Act 102-0258

Public Act 102-0258 also changes the best interests standard.

If the ward's wishes are unknown and remain unknown after reasonable efforts to discern them, or if the guardian reasonably believes that a decision made in conformity with the ward's preferences would result in substantial harm to the ward's welfare or personal or financial interests, the decision shall be made on the basis of the ward's best interests as determined by the guardian.

# Best Interests

The best interests standard remains the standard to use when a Ward's wishes cannot be ascertained. It is essentially a totality of the circumstances analysis that weighs the risks and benefits of a proposed decision. Consider:

- (1) What is the reason for the decision?
- (2) How is it of benefit to the Ward and/or why is it necessary?
- (3) What are the risks and consequences of the proposed decision?
- (4) Are there any alternatives and what are the associated risks and consequences?
- (5) Is other evidence (including views of family and friends) available?

Sounds a lot like informed consent.

# **Ethical considerations**



# National best practices

The National Guardianship Association (NGA) has issued a set of Standards of Practice and a set of Ethical Principles that help guide a guardian in balancing the twin duties of maximizing the Ward's independence with the duty of keeping the Ward safe. It is permeated with steps a guardian is to take to involve a Ward in all aspects of decision-making to the level of his or her ability.

<https://www.guardianship.org/standards/>

<https://www.guardianship.org/education/publications/ethical-principles/>

Public Act 102-0258 brings Illinois in line with these national best practices for guiding a guardian of the person.

## NGA Ethical Principles and related NGA Standards

1. A guardian treats the person with dignity. (Standard 3)
2. A guardian involves the person to the greatest extent possible in all decision making. (Standard 9)
3. A guardian selects the option that places the least restrictions on the person's freedom and rights. (Standard 8)
4. A guardian identifies and advocates for the person's goals, needs, and preferences. (Standard 7)
5. A guardian maximizes the self-reliance and independence of the person. (Standard 9)
6. A guardian keeps confidential the affairs of the person. (Standard 11)
7. A guardian avoids conflicts of interest and self-dealing. (Standard 16)
8. A guardian complies with all laws and court orders. (Standard 2)
9. A guardian manages all financial matters carefully. (Standard 18)
10. A guardian respects that the money and property being managed belong to the person. (Standard 17)

# Decisional Capacity vs. Legal Competency

Ability to participate:

- Does a person retain the right to make own medical/other decisions even when he/she has a plenary guardian?
- When it comes to medical decisions, including a DNR, the answer is “yes” if the person has **decisional capacity**.

*In Re Estate of Austwick*, 275 Ill. App. 3d  
(1<sup>st</sup> Dist. 1995).

## Medical Decisions: Presumption of decisional capacity

Patients are presumed to have decisional capacity even at an advanced age.

Under the Health Care Surrogate Act (755 ILCS 40), a diagnosis of mental illness or intellectual disability, alone, is not a bar to a determination of decisional capacity.

The determination that a patient lacks decisional capacity must be made by the attending physician to a reasonable degree of medical certainty in writing in the patient's records.

If foregoing life sustaining treatment is proposed, the attending physician must also make a similar finding as to qualifying condition and then a second physician must personally examine the patient and concur in writing with the attending physician's findings.

**Note:** Public Act 102-0140 (effective January 1, 2022) will allow APNs, NPs, and others sign for concurrence.



# DNR decision-making

The decision to withhold/withdraw life sustaining treatment is made in the same manner as other decisions using the substituted judgment standard to determine the Ward's wishes and then the best interests standard if his or her wishes cannot be ascertained.

Both standards take into consideration ethical values relative to the purpose of life, sickness, medical procedures, suffering and death.

An advance directive (such as a POA-HC) may be used as evidence of a Ward's wishes - even if there are technical defects.


No inference is to be drawn about a Ward's wishes based on the absence of an advance directive.

# Rights retained by a Ward

A Ward retains certain fundamental rights even when under plenary guardianship of the person.



# Sterilization - Right to sexuality and procreation



A guardian does not have authority to consent to sterilize a Ward without a court order. At hearing, the court will first test a Ward's decisional capacity and wishes. If a Ward is found to have decisional capacity and does not want to be sterilized, the hearing ends and no court approval will be provided.

A procedure affecting reproductive organs for medical reasons is not regarded as sterilization (e.g., hysterectomy).

There may be other instances where a guardian would want to seek court approval prior to consenting to a proposed controversial medical procedure.

# Right of marriage

A ward has the right to marry so long as he or she has the mental capacity to understand the nature of marriage.

*Larson v. Larson* (1963); *Pape v. Byrd* (1991).

A guardian may petition the court for leave to consent to marriage.

A guardian can go to court and attempt to prevent marriage.

# Conditional right to divorce

A guardian seeking to end a marriage by divorce must get court approval prior to filing a petition for divorce.



# MHDDC: Right to refuse treatment

The Mental Health and Developmental Disabilities Code (405 ILCS 5) grants all recipients of mental health and developmental disability services the right to refuse treatment, including psychotropic medication and electroconvulsive therapy.

There are exceptions for emergencies (imminent threat of physical harm) or a court order by a facility that filed a petition seeking to force treatment.

A guardian has no authority to consent to admission or treatment over a Ward's objections.

*In re Guardianship of Muellner*, 335 Ill.App.3d 1079 (4<sup>th</sup> Dist. 2002)

*In re Jennice L.*, 2021 IL App (1st) 200407 (1<sup>st</sup> Dist. 2021)

# Voting rights

In Illinois, a person under guardianship retains the right to vote. He or she must have the functional capacity in exercising the vote and all other legal requirements for voting must be satisfied.

Under the Americans with Disabilities Act (42 USC 12101) and the Help America Vote Act (52 USC 20901), certain disability-related accommodations are available as supports to persons with disabilities.

# Restoration, Modification, Revocation, Resignation

A person under guardianship has right to seek to be restored to his or her rights if they are able to demonstrate clearly that they have the capacity to take care of his or herself. A physician's statement is not required under the Probate Act of 1975; however, some judges may order a physician examination and report before allowing the matter to proceed to hearing. In addition, there are advantages to a guardian having a report of physician on file before proceeding.

A request to be restored can be made at any time by the individual or another person acting on behalf of the individual. Any means can be used, including an informal letter, a telephone call, or an in-person visit to the judge. If a request to be restored is denied, a subsequent request will still be allowed; however, some courts may then require that a change in circumstances favoring restoration be shown for action.

A court order is required to terminate an estate - it cannot be done solely by agreement of the parties.



# Modification of guardianship

An individual or other interested person acting on behalf of the individual has the right to seek to modify the duties of the guardian.

Example:

An individual wants to live in a particular setting, such as with a partner, but the guardian is preventing it.

The individual, or the individual's partner as an "interested person," could write the judge and seek to modify the guardian's authority by having the authority to make residential placement removed from the guardian and restored to the individual. At hearing, the judge would consider the individual's stated residential preference taking into consideration the nature of the relationship, the safety of the individual's living environment and the need for any services

# Revocations and Resignations

## Revocation:

“On petition of any interested person or on the court's own motion, the court may remove a representative [including a guardian of the person and/or estate]”. 755 ILCS 5/23-2

10 possible reasons listed for removal:

- conviction of a felony,
- waste or mismanagement of the estate,
- failure to file an inventory or accounting after being ordered to do so,
- incapacity or unsuitability to discharge duties, and
- other good cause (e.g., abuse, neglect, self-dealing and financial exploitation)

## Resignation:

A guardian has the right to resign, and this is accomplished through the filing of a resignation.



# QUESTIONS

