

When Your Consumer Needs A Guardian Practical, Ethical, and Legal Aspects of Seeking Guardianship

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Legal Aspects of Seeking Guardianship

Who can initiate guardianship proceedings?

Any person.

Who can apply to be a guardian?

Any qualified/eligible person.

Is testimony from an expert witness required?

Generally, yes.

Is there liability for a person who initiates guardianship proceedings?

Not as long as the applicant is acting in good faith.

Legal Aspects of Seeking Guardianship

- Terminology
 - Ward - individual alleged to be in need of guardian or conservator.
 - Incapacitated - unable to care for personal needs.
 - Disabled - unable to manage finances and property.
 - Guardian - person appointed by court to care for ward's personal needs.
 - Conservator - person appointed by court to care for ward's finances and property.
 - Probate Court - division of circuit court that handles guardianships, conservatorships, estates, and trusts.
 - Person - interested? qualified? eligible? corporation?
 - Guardian Ad Litem - person appointed by court to look after the best interests of the proposed ward during the proceeding.

Legal Aspects of Seeking Guardianship

- Likely course of guardianship proceedings
 - Application
 - Interrogatories
 - Appointment of a Guardian Ad Litem
 - Preparation with the Attorney
 - Trial

Legal Aspects of Seeking Guardianship

- Trial
 - Bench Trial vs Jury Trial
 - Testimony by the clinician
 - Common pitfalls facing the witness
 - Limitations of testimony and admissibility of testimony

Role of the Clinician Witness

- expert and fact witnesses
- expert opinion
- records that form the bases of an expert opinion
- observable facts

Tips on Testifying

- Always tell truth
- be yourself, (your better self)
- stay centered
- don't get baited, intimidated, or seduced by counsel
- assist the judge
- teach the jury
- don't get out over you skis
- being professional can be as important as being expert
- be careful about elaborating
- "I don't know" or "I would have to refer to the document" can be acceptable answers (most of the time)

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Clinical Aspects of Guardianship

- Guardianship confers legal authority, and duty, on a person to care for the personal and property interests of another.
- It grants almost total authority over the life decisions of the incapacitated person.
- Guardianship will result in that consumer losing a great deal of personal autonomy. Therefore, placing a person under guardianship is fraught with moral and ethical considerations.
 - Examples

Clinical Aspects of Guardianship

- Revised Statutes of Missouri Chapter 475 addresses guardianship matters.
- The assistance of an attorney is highly recommended. It is important for any prospective expert witness in a guardianship proceeding to introduce themselves and offer time to prepare with that attorney for court.

Clinical Aspects of Guardianship

- Taking the autonomy of an allegedly incapacitated person is a major infringement on the person's liberty
- But failure to do so, when necessary, can lead to great harm
- Consumers who are intellectually disabled, or suffering from a serious mental illness, may come to harm or be victimized if they are unable to make important life decisions or manage their financial resources.

Clinical Aspects of Guardianship

- In my experience, waiting too late to undertake this step can lead to serious or even life-threatening harm.
 - examples
- Important points to remember when evaluating a consumer who may be incompetent:
 - **lucidity does not necessarily equal competency**
 - examples
 - **agreeability does not necessarily equal competency**
 - examples

Clinical Aspects of Guardianship

- Once guardianship proceedings are initiated, the clinician may be called upon to answer interrogatories from the court.
- This document, a sworn and notarized affidavit, will require expert answers to questions regarding the incapacity and disability of the consumer.
- It may be completed by a physician, but a clinical psychologist or “other appropriate professional” may be used.
- In these documents, the consumer will typically be referred to as the “respondent.”

Clinical Aspects of Guardianship

- RSMO Chapter 475 provides that the clinician conducting an examination shall advise the consumer:
 - That the purpose of the examination is to produce evidence which may be used to determine whether the consumer is incapacitated, disabled, partially incapacitated, or partially disabled;
 - That the consumer has the right to remain silent;
 - That anything the consumer says may be used at the court hearing, and in making the determination of incapacity or disability.

Clinical Aspects of Guardianship Incapacity

- Do you consider the person to be “incapacitated,” that is unable by reason of any physical or mental or cognitive condition to receive and evaluate information or to communicate decisions to such an extent that the person lacks capacity to manage the person’s essential requirements for food, clothing, shelter, safety, or medical care such that serious physical injury, illness, or disease is likely to occur were a guardian not appointed for the person?
- Please describe the cognitive or behavioral deficits upon which your answer is based. (Include examples of tasks/activities that the individual is unable to perform due to the incapacity)

Clinical Aspects of Guardianship **Disability**

- Do you consider the person to be “disabled,” that is, unable by reason of any physical or mental or cognitive condition, to receive and evaluate information or to communicate decisions to such an extent that the person lacks ability to manage the person’s financial resources?
- Please describe the cognitive or behavioral deficits upon which your answer is based. (Include examples of tasks/activities that the individual is unable to perform due to the disability)

Clinical Aspects of Guardianship

Least Restrictive Environment

- In your professional opinion, what is the least restrictive environment or alternative for the person; that is, what course of action allows the incapacitated person to live, learn, and work with minimum restrictions on the person, and is appropriate for the person considering his or her physical and mental condition and financial means?

Clinical Aspects of Guardianship

- RSMO 475 was amended a few years ago to authorize the court to make specific rulings on three areas of autonomy that the ward might retain; the right **to vote**, the right **to drive a motor vehicle**, and the right **to marry**.
 - RSMO 475.078
- Responses to these specific questions may be required from the clinician by the Judge or attorney.
- There is literature to guide the clinical assessment of such questions.

Clinical Aspects of Guardianship

Right to Drive

- Clinicians are not usually experts in the assessment of driving ability
- RSMO 475.078 comes to our rescue, and requires the court to authorize this only if the ward “can pass the required driving test.”
- However, the clinician’s opinion may be sought. It is my recommendation that this question be approached with caution as there may be liability if the ward causes an accident.
- Remember, the ward’s *ability* to drive may not imply that he/she *should* drive!

Clinical Aspects of Guardianship

Right to Vote

- Psychiatrists Paul Appelbaum and attorney Richard Bonnie have developed the **CAT-V**, Competence Assessment Tool for Voting.
- It is a six item test. The test is simple and takes about 5 minutes.
- Items 1 and 2 address the ability to understand the nature and effect of voting and the ability to make a choice; items 3 and 4 the ability to reason; and items 5 and 6 the ability to appreciate.
- Each item is scored from 0-2. Total scores range from 0-12.

Clinical Aspects of Guardianship

Right to Vote

- There is no “score” that determines competency to vote. However, those scoring very low are likely not capable of voting meaningfully.
- Those scoring 6 or higher likely have the capacity to vote meaningfully.
- The authors suggest: *“In the absence of a clear indication of incapacity, however, the fundamental nature of voting rights suggests that such a person should be regarded as eligible to cast a ballot.”*

Clinical Aspects of Guardianship

Right to Marry

- The consumer is able to express a clear and consistent choice.
- The consumer is able to understand the risks and benefits of the decision, as well as the alternatives.
- The consumer is able to apply this information to his/her own circumstances.
- The consumer is able to consider the question rationally, meaning there is no mental impairment such as dementia, psychosis, or severe depression that is hindering rational thought.

The consumer should meet all four criteria to be deemed to have the capacity to marry.

Evaluation of the Capacity to Marry: A. Glezer, J. Devido, *J Am Acad Psychiatry Law* 45:292–97, 2017

Clinical Aspects of Guardianship

Right to Marry

- Summary
 - The decision must be **voluntary**. There cannot be undue influence or coercion.
 - The consumer must have the **capacity** to do so, as defined by the previous four criteria.
 - The consumer must know with whom he/she is entering this marriage.

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Legal Aspects of Seeking Guardianship

- Liability of the clinician witness
 - good faith
 - sovereign immunity
- Special considerations
 - Partial or limited guardianship
- Termination of Guardianship
 - Due to death or disability of the guardian
 - Upon application by the ward
 - For cause

QUESTIONS?