

**TOP 10 THINGS ELDER RIGHTS ADVOCATES
NEED TO KNOW
ABOUT MENTAL HEALTH LAW**

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By:

Mark B. Epstein
Mark@EpsteinLawOffice.com
Epstein and Epstein
Attorneys at Law
33 N. Dearborn, Suite 801
Chicago, IL 60602
312.782.3193

#10

A Guardian cannot admit a ward to a mental health facility except *via* the Mental Health Code.

See *Matter of Gardner*, 121 Ill.App.3d 7 (4th dist. 1984):

In 1982, a petition for involuntary admission to a mental health facility was filed alleging that Ronald Gardner was mentally ill and as a result was unable to provide for his basic needs so as to protect himself from serious harm. Dr. Radecki testified that, in his opinion, Gardner was mentally ill, having a chronic low-level psychosis; although not immediately dangerous to himself or others, he was allegedly unable to fend for himself in society, totally lacking in judgment and understanding about the “outside” world, having no rational discharge plans and having not done well on home visits. Dr. Radecki also testified that Gardner suffered from delusions, making frequent paranoid statements that staff members were going to kill him and raise him from the dead; however, Gardner was not considered to be “acutely suicidal.” The prognosis was not very good and Dr. Radecki was not optimistic that Gardner would return to a normal mental state in the near future.

The trial court was then advised that Office of State Guardian had previously been appointed Gardner's guardian, but had refused, despite request from staff, to sign Gardner in "voluntarily." The trial court, possibly believing that the State's case for commitment was weak but that Gardner still needed protection, ordered OSG to sign in Gardner "voluntarily." The Court likened the situation to the ability of the guardian to consent to medical treatment for the ward. OSG conceded that a guardian may order medical treatment for a disabled ward without that party's consent, but argued that its authority under the probate code did not extend to a work-around of the protections provided by the Mental Health Code.

In a case of first impression in Illinois, the Appellate Court agreed with OSG and reversed the trial court.

"The State argues that if a plenary guardian has the power to consent to open-heart surgery to save the ward's life and has the power to consent to the adoption of its wards, then it seems logical that a guardian should, subject to court approval, have the authority to seek psychiatric care and treatment for a mentally ill ward. The State argues that such power can easily be inferred from the broad language of [755 ILCS 5/11a-17] placing upon the guardian the duty of providing for the health and care of the ward and providing professional services where such services would be appropriate.

Construing section 11a-17 in that manner would place it into conflict with the [Mental Health Code]. . . [which] provides that a person may be admitted as an in-patient to a mental health facility only as provided in the [Mental Health Code]. . . [T]he legislature has clearly provided that the [Mental Health Code] is to be the exclusive means by which a mentally ill person is admitted to a mental health facility. The [Mental Health] Code contains an elaborate and complex system of procedures designed to protect the rights of the mentally ill. By bypassing the procedures for involuntary commitment set forth in the [Mental Health] Code, the trial court has denied respondent the rights guaranteed under those provisions. . . .

. . . . Section 11a-14.1 [of the Probate Code] prohibits placement of a ward in a “residential facility” without prior authorization by the trial court. To expand the definition of “residential facility” to include mental health facilities . . . would bring the Probate Act into conflict with . . . the [Mental Health] Code."

#9

A mentally ill person cannot voluntarily sign into a mental health facility unless sufficiently "competent" to do so.

See *Zinerman v. Burch*, 494 U.S. 113 (1990):

On December 7, 1981, Darryl Burch was found wandering along a Florida highway, appearing to be hurt and disoriented. He was taken to a private mental health center in Tallahassee. Upon arrival he was hallucinating, confused, and psychotic and believed he was "in heaven." His face and chest were bruised and bloodied, suggesting that he had fallen or had been attacked. He was asked to sign forms giving his consent to admission and treatment, and he signed them. He remained for three days, was diagnosed as having paranoid schizophrenia and was given psychotropic medication. He was then transferred to a public mental health facility where he again signed forms requesting admission and authorizing treatment. He remained there 5 months. Shortly after his release, he filed a complaint stating he did not remember having signed any forms and that he had been inappropriately committed.

His complaint reached a Florida Human Rights Advocacy Committee. The Committee investigated and stated that there was "documentation that you were heavily medicated and disoriented on admission and . . . you were probably not competent to be signing legal documents." The Committee also stated that "hospital administration . . . were very likely asking medicated clients to make decisions at a time when they were not mentally competent."

Eventually, in 1985, Burch filed a section 1983 lawsuit arguing that his constitutional rights had been violated when he was treated as a "voluntary" patient: because he was incapable of giving voluntary consent, he had been entitled to -- but failed to receive -- the procedural safeguards of an involuntary admission hearing.

In 1990, the US Supreme Court agreed that Burch was entitled to proceed with his section 1983 action. Writing for the majority, Justice Blackmun noted that Florida's law explicitly required the patient to give "express and informed consent" and that "the very nature of mental illness makes it foreseeable that a person needing mental health care will be unable to understand the forms that person is asked to sign, and will be unable to make a 'knowing and wilful decision' whether to consent to admission." Yet, wrote Judge Blackmun, Florida statutes "do not direct any member of the facility staff to determine whether a person is competent to give consent, nor to initiate the involuntary placement procedure for every incompetent patient." The state's violation of the duty to investigate the patient's competence to sign admission forms was therefore "fully predictable" and state officials could be found liable if it is shown that they had failed to make the required examination of Burch's capacity to give informed consent.

In a footnote, the Court observed: "The characteristics of mental illness thus create special problems regarding informed consent. Even if the state usually might be justified in taking at face value a person's request for admission to a hospital for medical treatment, it may not be justified in doing so, without further inquiry, as to a mentally ill person's request for admission and treatment at a mental hospital." And in the body of the decision Judge Blackmun wrote: "Florida already has an established procedure for involuntary placement. The problem is only to enforce that this procedure is afforded to all patients who cannot be admitted voluntarily, both those who are unwilling and those who are unable to give consent."

#8

Under the Mental Health Code, a nursing home or unit operated for treatment of persons with mental illness qualifies as a "mental health facility," so that admission of an unwilling person – even a ward under guardianship – is prohibited except by civil commitment under the Mental Health Code.

See *Guardianship of Muellner v. Blessing Hospital*, 335 Ill.App. 3d 1079 (4th dist. 2002):

In September 2001, Sandra Muellner was 55 years old and resided in Hotel Quincy Apartments. The manager noticed respondent holding a towel in her arms and acting like she had a baby. A maid convinced respondent to go to Blessing Hospital (Blessing), where she was voluntarily admitted as an inpatient to an adult psychiatric unit. In October 2001, Melissa Penn, a social worker at Blessing, filed a guardianship petition and a petition for temporary guardianship. Penn alleged respondent was a disabled person because she was unable to care for herself and she suffered from [chronic paranoid schizophrenia](#) with delusions. The petitions sought to appoint the State Guardian as guardian of respondent's person with authority to make residential placement. The State Guardian was appointed temporary guardian with residential placement authority and the State Guardian placed Sandra with New Horizons in Sycamore Health Care, a 24-hour skilled nursing facility. New Horizons is a behavioral unit that works to stabilize psychiatric patients. The facility is not locked, but access to other areas of Sycamore or the outside community is restricted until the resident gains levels of trust.

After the plenary hearing, the trial court appointed the State Guardian as limited guardian with authority to place Sandra in a group home, shelter-care facility, or in the community. The court also granted the State Guardian authority to residentially place Sandra in a nursing facility but only if placement in a less restrictive environment would cause substantial harm to her.

The appellate court reversed. It held that a nursing facility or section of a nursing facility for the treatment of persons with mental illness is equivalent to a “mental health facility” under the Mental Health Code, requiring the same protections – in particular, the right to a civil commitment hearing for an unwilling resident – as provided by an inpatient psychiatric facility.

#7

Psychotropic medications¹ may not be administered to a recipient in the absence of the recipient's informed consent. The only exceptions are: (a) by petition and order pursuant to 2-107.1 of the Mental Health Code; (b) by consent of a guardian but only if the ward is not objecting; (c) an emergency pursuant to 2-107 of the Mental Health Code; (d) by consent of an authorized agent under a Health Care Power of Attorney or (e) Mental Health Treatment Preference Declaration

405 ILCS 5/2-107.1. Administration of psychotropic medication ...upon application to a court....

(a-5) [Notwithstanding the right to refuse set forth in 405 ILCS 5/2-107] psychotropic medication ... may be administered to an adult recipient of services without the informed consent of the recipient under the following standards:

...(4) ... (A) That the recipient has a serious mental illness or developmental disability.

(B) That because of said mental illness or developmental disability, the recipient currently exhibits any one of the following: (i) deterioration of his or her ability to function, as compared to the recipient's ability to function prior to the current onset of symptoms of the mental illness or disability for which treatment is presently sought, (ii) suffering, or (iii) threatening behavior.

(C) That the illness or disability has existed for a period marked by the continuing presence of the symptoms set forth in item (B) of this subdivision (4) or the repeated episodic occurrence of these symptoms.

(D) That the benefits of the treatment outweigh the harm.

(E) That the recipient lacks the capacity to make a reasoned decision about the treatment....

(F) That other less restrictive services have been explored and found inappropriate. . . .

(b) A guardian may be authorized to consent to the administration of psychotropic medication ...to an objecting recipient only under the standards and procedures of subsection (a-5).

(c) Notwithstanding any other provision of this Section, a guardian may consent to the administration of psychotropic medication ... to a non-objecting recipient under Article XIa of the Probate Act of 1975.

(d) Nothing in this Section shall prevent the administration of psychotropic medication ... to recipients in an emergency under Section 2-107 of this Act.

(e) Notwithstanding any of the provisions of this Section, psychotropic medication ... may be administered pursuant to a power of attorney for health care under the Powers of Attorney for Health Care Law or a declaration for mental health treatment under the Mental Health Treatment Preference Declaration Act.

¹ The law applying to psychotropic medications applies equivalently to electro-convulsive therapy.

#6

The Nursing Home Care Act trumps the Mental Health Code regarding psychotropic medications -- apparently authorizing a guardian or even a surrogate to give informed consent to psychotropic medications.

210 ILCS 45/2-106.1 "Drug treatment...."

(b) Psychotropic medication shall not be prescribed without the informed consent of the resident, the resident's guardian, or other authorized representative. "Psychotropic medication" means medication that is used for or listed as used for antipsychotic, antidepressant, antimanic, or antianxiety behavior modification or behavior management purposes in the latest editions of the AMA Drug Evaluations or the Physician's Desk Reference.

(c) The requirements of this Section are intended to control in a conflict with the requirements of Sections 2-102 and 2-107.2 of the Mental Health and Developmental Disabilities Code with respect to the administration of psychotropic medication.

(Source: P.A. 95-331, eff. 8-21-07.)"

The above provision of the Nursing Home Care Act appears to authorize psychotropic medications for a resident by substituting the informed consent of the guardian for the informed consent of the resident -- substitute decision-making that is prohibited under the Mental Health Code -- and specifying that this provision of the the Nursing Home Care Act controls in a conflict with Mental Health Code. By implication, it also appears to supplant a provision of the Mental Health Code that prohibits a health care surrogate from consenting to psychotropic medications or electroconvulsive therapy.

Thus, apparently supplanted by the Nursing Home Care Act is the following excerpt from section 2-102(a-5) of the Mental Health Code, 405 ILCS 5/2-102(a-5): . . . "If the recipient lacks the capacity to make a reasoned decision about [psychotropic medication or electroconvulsive therapy], the treatment may be administered only (i) pursuant to the provisions of Section 2-107 [emergency circumstances] or 2-107.1 [petition and hearing] or (ii) pursuant to a power of attorney for health care under the Powers of Attorney for Health Care Law or a declaration for mental health treatment under the Mental Health Treatment Preference Declaration Act. A surrogate decision maker, other than a court appointed guardian, under the Health Care Surrogate Act may not consent to the administration of electroconvulsive therapy or psychotropic medication. A surrogate may, however, petition for administration of such treatment pursuant to this Act."

However, since 210 ILCS 45/2-106.1 does not explicitly trump 405 ILCS 5/2-107.1, the result is ambiguous and in need of interpretation.

1 Pursuant to 405 ILCS 5/2-107.1(c) a guardian may consent to psychotropic medications but only when the recipient is not objecting

#5

For the purposes of the Mental Health Code, dementia and Alzheimer's, absent psychosis, are not mental illnesses.

405 ILCS 5/1-129. "Mental illness' means a mental, or emotional disorder that substantially impairs a person's thought, perception of reality, emotional process, judgment, behavior, or ability to cope with the ordinary demands of life, but does not include a developmental disability, dementia or Alzheimer's disease absent psychosis, a substance abuse disorder, or an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

"Mental illness" is a precondition for civil commitment and for court-authorized psychotropic medications and electroconvulsive therapy under the mental health code. Accordingly, in the absence of psychosis a person with only dementia or Alzheimer's disease is not subject to civil commitment or to court-authorized psychotropic medications or electroconvulsive therapy.

Query: Where does that leave a person with non-psychotic dementia who lacks the capacity to consent voluntarily to a mental health facility (see Zinermon v. Burch) and yet is in need of the services of a mental health facility? Is such person denied services because of this definition?

#4

Subpoenas for most mental health records require a court order, subject to civil and criminal penalties.

740ILCS 110/2: "...'Confidential communication' or 'communication' means any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient. Communication includes information which indicates that a person is a recipient."

740 ILCS 110/10(a): Except as provided herein, in any civil, criminal, administrative, or legislative proceeding, or in any proceeding preliminary thereto, a recipient, and a therapist on behalf and in the interest of a recipient, has the privilege to refuse to disclose and to prevent the disclosure of the recipient's record or communications.

740 ILCS 110/10(d): "No party to any proceeding described under paragraphs (1), (2), (3), (4), (7), or (8) of subsection (a) of this Section, nor his or her attorney, shall serve a subpoena seeking to obtain access to records or communications under this Act unless the subpoena is accompanied by a written order issued by a judge, authorizing the disclosure of the records or the issuance of the subpoena. No person shall comply with a subpoena for records or communications under this Act, unless the subpoena is accompanied by a written order authorizing the issuance of the subpoena or the disclosure of the records.

740 ILCS 110/15: Any person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief. Reasonable attorney's fees and costs may be awarded to the successful plaintiff in any action under this Act.

740 ILCS 110/16: Any person who knowingly and wilfully violates any provision of this Act is guilty of a Class A misdemeanor.

#3

But not all subpoenas for mental health records require a court order.

740ILCS 110/2: "...'Confidential communication' or 'communication' means any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient. Communication includes information which indicates that a person is a recipient."

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740 ILCS 110/10(d): "No party to any proceeding described under paragraphs (1), (2), (3), (4), (7), or (8) of subsection (a) of this Section, nor his or her attorney, shall serve a subpoena seeking to obtain access to records or communications under this Act unless the subpoena is accompanied by a written order issued by a judge, authorizing the disclosure of the records or the issuance of the subpoena. No person shall comply with a subpoena for records or communications under this Act, unless the subpoena is accompanied by a written order authorizing the issuance of the subpoena or the disclosure of the records."

740 ILCS 110/10(a)(5): "Records and communications may be disclosed in a proceeding under the Probate Act of 1975, to determine a recipient's competency or need for guardianship, provided that the disclosure is made only with respect to that issue."

740 ILCS 110/10(a)(6): [fitness to stand trial].

740 ILCS 110/10(a)(9): [homicide investigations and trials].

740 ILCS 110/10(a)(10): [records and communications of a deceased recipient to a coroner regarding factual circumstances of the incident being investigated in a mental health facility]

740 ILCS 110/10(a)(11): [involving motion or petition under the Juvenile Court Act and the recipient is a parent, guardian, or legal custodian of a minor and there is an allegation that the minor was abused, neglected, or dependent; or involving an adoption proceeding].

740 ILCS 110/10(a)(12): [involving collection of mental health or developmental disabilities services charges by provider therapist or agency or third-party payor].

#2

It's important to know the standard for civil commitment that no longer exists.

Until June 1, 2008, the standard for involuntary admission was:

405 ILCS 5/1-119:

“ *Person subject to involuntary admission* means:

“(1) A person with mental illness and who because of his or her illness is reasonably expected to inflict serious physical harm upon himself or herself or another in the near future which may include threatening behavior or conduct that places another individual in reasonable expectation of being harmed; or

“(2) A person with mental illness and 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 the assistance of family or outside help.

“In determining whether a person meets the criteria specified in paragraph (1) or (2), the court may consider evidence of the person's repeated past pattern of specific behavior and actions related to the person's illness.”

#1

Because the new standard for civil commitment is a dramatic lowering of the standard.

Since June 1, 2008, the standard for involuntary admission is:

405 ILCS 5/1-119:

“ *Person subject to involuntary admission* ’ means:

"(1) A person with mental illness and who because of his or her illness is reasonably expected to engage in dangerous conduct which may include threatening behavior or conduct that places that person or another individual in reasonable expectation of being harmed;

"(2) A person with mental illness and 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 the assistance of family or outside help; or

"(3) A person with mental illness who, because of the nature of his or her illness, is unable to understand his or her need for treatment and who, if not treated, is reasonably expected to suffer or continue to suffer mental deterioration or emotional deterioration, or both, to the point that the person is reasonably expected to engage in dangerous conduct.

"In determining whether a person meets the criteria specified in paragraph (1), (2), or (3), the court may consider evidence of the person's repeated past pattern of specific behavior and actions related to the person's illness."

405 ILCS 5/1-104.5. “Dangerous conduct” means threatening behavior or conduct that places another individual in reasonable expectation of being harmed, or a person's inability to provide, without the assistance of family or outside help, for his or her basic physical needs so as to guard himself or herself from serious harm.

#0.5

BUT...The new civil commitment standard in #1 has been declared unconstitutional (in part) so that, *de facto*, we are back to #2

On November 17, 2009, the Fourth District Appellate Court, in *In re Torski C.*, 295 Ill.App.3d 1010, determined that the definition of “dangerous conduct” in 405 ILCS 5/1-104.5 was unconstitutionally vague. Since that definition was part of the new “third prong” of 405 ILCS 5/1-119, the Fourth District ruled that Torski C.’s civil commitment under that prong denied him or her substantive due process and the commitment was overturned.

Because “dangerous conduct” is also part of the new “first prong” of 405 ILCS 5/1-119, that makes the new “first prong” suspect.

Accordingly, as a matter of practice, by and large throughout the state, the current *de facto* standard for civil commitment has reverted to the former standard (see #2).

On March 24, 2010, the Illinois Supreme court allowed the appeal of *In re Torski C.*