

**AMERICAN BAR ASSOCIATION**

**Commission on Law and Aging**

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April 16, 2009

Mr. Sam Golden  
Chair  
VOR Government Affairs Committee  
P.O. Box 1208  
Rapid City SD 57709

Re: Guardians of Individuals with Intellectual Disabilities

Dear Mr. Golden:

We are responding to your January 13 letter on "Recent Efforts to Dilute the Rights of Legal Guardians with Profound Developmental Disabilities." Thank you for writing to the ABA Commission on Law and Aging and the ABA Commission on Mental and Physical Disability Law. Both Commissions have played a leadership role for over 20 years in seeking good guardianship laws and practices to protect the rights of vulnerable at-risk incapacitated individuals while providing for their needs.

We recognize that family members of individuals with profound developmental disabilities face a tough task in advocating for needed care and quality of life. Certainly guardian involvement in decisions about discharge can be important. However, we wish to make the following points:

- You ask that we review your concerns and take action. While the ABA has significant policy concerning adult guardianship, it does not have specific policy concerning any mandatory guardian involvement in institutional discharge procedures. Thus, while we can opine about the points below, we are not in a position to take the kind of action you request.
- The role of a guardian is a complex one, determined not only by the needs and wishes of the incapacitated person, but by the requirements of state law and the scope of the guardianship order. Often the authority of guardians is limited – for example to property decisions, or to specific health care, placement and other choices. A guardian may or may not have authority to make a decision concerning the living arrangements of an incapacitated person.

- If a guardian does have such authority, the guardian in most states must make a determination based on the values, preferences and desires of the individual if this is possible and is known. Neither the state agency nor the guardian should substitute its/his/her judgment for that of the individual if the person's wishes can be determined. If the person's preferences cannot be determined, the guardian must make a decision taking all factors into account based on the best interest of the person. This is consistent with the National Guardianship Association's *Standards of Practice* (Std. #9).
- Moreover, under many state laws and according to the NGA *Standards*, a guardian should "encourage the ward to participate, to the maximum extent of the ward's abilities, in all decisions that affect him or her, to act on his or her own behalf in all matters in which the ward is able to do so, and to develop or regain his or her own capacity to the maximum extent possible" (Std. #9-IV).
- Additionally, consistent with many state laws and according to the NGA *Standards*, a guardian must "carefully evaluate the alternatives that are available and choose the one that best meets the needs of the ward while placing the least restrictions on his or her freedom, rights and ability to control his or her environment" (Std. #8). Thus, an opportunity to move to a home and community based setting should be given careful consideration as a less restrictive alternative to an institutional setting.
- Regarding your concerns with settlement agreements and other court actions initiated by Protection and Advocacy and other federally funded programs, both federal and state courts have abundant experience in safeguarding the interests of all individuals in any litigation. The Federal Rules of Civil Procedure, including Rule 23, provide a number of protections to ensure that the merits of any action and resulting settlement agreement or orders are fair to all participants.
- Finally, it is important to recognize that while most guardians have the best interests of the individual at heart, some have conflicting priorities, and may make a decision based on his or her own interests, such as convenience or cost.

Placement and discharge determinations are complex, guardian authority varies, and the preferences of the individual should be honored if possible. However, an opportunity for home and community based care in which community resources are available could open doors for an individual and allow greater integration into society. Home and community based options – as provided under state Olmstead Plans and federal funding programs – often represent a significant advantage for the person, and frequently merit guardian support.

We appreciate your concerns and hope that our points about a guardian's role and the importance of community based options offer a useful perspective.

Sincerely,



Joseph D. O'Connor  
Chair  
Commission on Law and Aging



Alex J. Hurder  
Chair  
Commission on Mental and Physical  
Disability Law

Cc: state bar associations