

# Understanding the Impact of Guardianship on Adults with Intellectual Disabilities Engaged in Sexual Activity and/or Victimized by Sexual Abuse

Guardianship is one form of “substitute decision making” – a legal way for one person to make decisions for another person who lacks capacity to make decisions for themselves. Just because a person with a disability – even an intellectual disability – turns 18, does not mean that they need a guardian. The majority of people with disabilities live their entire lives without guardians, either making their own decisions or using less restrictive alternatives to guardianship (e.g., natural supports like family, health care representatives for medical decisions, and representative payees for managing social security benefits).

**“Guardianship should only be used as a last resort because it is the most restrictive form of substitute decision-making.”**

Guardianship should only be used as a last resort because it is the most restrictive form of substitute decision-making and can come with high costs, including financial expenses, emotional stress, and significant limits on self-determination. Understanding guardianship and how it may impact

the ability of a person with an intellectual disability to engage in sexual activity or prevent sexual abuse is important.

## Guardianship Procedures

Any person interested in the welfare of an individual alleged to be incapacitated and in need of a guardian can file a guardianship petition in the local Court of Common Pleas, Orphans’ Court Division. The petition must state the type and scope of guardianship sought. The petition, with a notice written in simple language about the importance of the guardianship proceeding, must be personally served on the alleged incapacitated person at least 20 days prior to the hearing.

The alleged incapacitated person has many important rights during the guardianship proceeding, including the right to be present at the hearing, the right to legal counsel (if the individual can pay for an attorney although the court can also appoint an attorney in “appropriate cases”), the right to request an independent evaluation, the right to cross-examine witnesses, and the right to a jury trial, if requested (20 Pa.C.S.A. §§ 5511(a), (d), 5518.1).

The person who files the petition has the legal burden

to prove, by clear and convincing evidence, that the alleged incapacitated person is both incapacitated and in need of a guardian. An adult is incapacitated if their “ability to receive and evaluate information and communicate decisions in any way is impaired to such a significant extent that they are partially or totally unable to manage their financial resources or to meet essential requirements for their physical health or safety” (20 Pa.C.S.A. §§ 5501). Even if a person is “incapacitated” under that definition, the court may not appoint a guardian if they have natural supports that are preferred over guardianship and that adequately meet their physical and financial needs.

A person petitioning for guardianship must present the testimony of an expert qualified by training and experience to evaluate the particular disability of the alleged incapacitated person and to explore if and how the disability affects their adaptive behavior, social skills, and ability to make or communicate decisions. Other relevant evidence includes the types of assistance that the alleged incapacitated person needs to meet their physical health and safety needs and/or to manage their financial resources, what services are available or already provided to meet those needs, and why less restrictive alternatives to guardianship are inappropriate.

## Powers and Duties of Guardians of the Person

A court may appoint a “guardian of the person” to make personal decisions for an individual who lives in Pennsylvania and/or a “guardian of the estate” to make financial decisions for an individual who has property in Pennsylvania if the court determines that the person is incapacitated and needs a guardian in those areas (20 Pa.C.S.A. §§ 5512.1). The scope of a court order granting guardianship can be either plenary (i.e., very broad) or limited (i.e., covering only those areas specifically identified in the order).

Duties of a guardian of the person, whether plenary or limited, include asserting the rights and interests of the incapacitated person, respecting the person’s preferences and wishes to the greatest extent possible, participating in the development of service

plans and selection of providers to meet the person’s needs, and encouraging the person to participate to the maximum extent possible in decisions that affect them, to act on their own behalf when they can, and to develop or regain abilities, if feasible.

Depending on whether the guardianship is plenary or limited, powers of a guardian of the person may include providing for the general care, maintenance, and custody of the incapacitated person, designating the person’s residence, assuring appropriate services, medical care, education, and vocational opportunities, assuring opportunities to maximize independence, and providing necessary consents or approvals.

Even a plenary guardian of the person does not have absolute authority over the incapacitated person. When it comes to the person’s fundamental rights, there are some things a guardian can do only if they receive express authorization from the court following a hearing on the subject (e.g., consenting to sterilization, psychosurgery, experimental treatment or removal of a healthy bodily organ, prohibiting marriage, authorizing divorce).

There are other things that not even a court can authorize a guardian to do (e.g., consenting to admission to a psychiatric hospital, consenting to relinquishment of parental rights, compelling an abortion, withdrawing or refusing to authorize life-preserving treatment).



**“There are some things a guardian can do only if they receive express authorization from the court.”**

## Potential Impact of Guardianship on Sexual Activity

Capacity to consent to sexual activity is the key factor in deciding whether any person, including a person with an intellectual disability, can make their own decisions to engage in sexual activity.

This rule should apply generally as well when the individual has a court-appointed guardian. If the individual only has a guardian of their estate and/or a limited guardian of the person without specific court authority to control their sexual activity, then the guardian does not have authority to limit or prohibit their sexual choices.

Arguably, even a plenary guardian of the person cannot limit or preclude the individual from engaging in sexual activity since sexuality is closely tied to the individual's fundamental rights to procreate and to bodily integrity unless the court has explicitly authorized the guardian to exercise control over the person's sexual activity after a finding that such activity would be harmful.

**“...a plenary guardian of the person cannot preclude the individual from engaging in sexual activity...”**

As a practical matter, however, a plenary guardian of the person may be able to effectively foreclose the individual's sexual activity even without specific court authorization by controlling where they live, separating the individual from the person with whom they want a relationship.

## Potential Impact of Guardianship on Sexual Abuse

There are several different ways in which guardianship can come into play when a person with a disability is subject to alleged sexual abuse:

- If the guardian is the source of the abuse or is allowing the abuse to continue, procedures to terminate the guardianship or remove the specific guardian may be initiated in court by any person interested in the individual's welfare, including protective services agencies that are involved.
- If the individual does not have a guardian and does not have the capacity to make choices that will protect them from further sexual abuse (e.g., leaving an abusive living arrangement, or getting information and sexual education including how to engage in safe sex and how to recognize and report abuse) and other less intrusive interventions fail or are not feasible, emergency guardianship may be sought by involved protective services agencies or other interested persons.
- In a situation where sexual abuse is suspected, a plenary guardian of the person or limited guardian with the authority to make medical decisions can consent to a forensic medical exam and/or other invasive medical examinations and treatments that require informed consent. If the guardian withholds consent unreasonably, it may be necessary to seek to terminate the guardianship.



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This publication was printed under Grant no. 2015-SW-AX-0025 awarded by the Office of Violence Against Women, U.S. Department of Justice. The points of view in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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