

OPINION
67-249

October 18, 1967 (OPINION)

Charles C. Rand, M.D.

Superintendent

Grafton State School

RE: State School - Patients - Guardianship

This is in response to your letter addressed to the Board of Administration, who in turn referred it to this office for an opinion on the following situation:

Occasionally you have a resident at your institution who should have surgery performed, but you are unable to contact any relatives to obtain permission to proceed with the surgery. You inquire what is your obligation and function with reference to such situations. More specifically, at present you have an elderly woman who has been a resident of the School for some time. A doctor has recommended that a cataract extraction operation be performed on her left eye. You have written to the last known address of a sister of this person, but the letter has been returned unclaimed and with no forwarding address. Your staff feels that the resident would profit immensely by cataract extraction surgery. You then ask if you have any legal authority to authorize the performance of the operation. You also inquire what is your responsibility, duty and authority in other similar cases, particularly as to persons committed to the School by the County Mental Health Board or County Judge. You also advise that certain emergency operations can be performed at the School, but other operations of a more specialized nature are referred to either the local hospital at Grafton or to the hospital at Grand Forks. In all cases, the State School pays for the hospitalization and for the services of the doctor performing the operation.

Section 25-04-13, as amended by Chapter 214 of the 1967 Session Laws, pertains to appointment of guardian of the person by operation of law and to guardians of estates. The first paragraph provides as follows:

25-04-13. GUARDIANSHIP OF PERSON AND ESTATE - SUPERINTENDENT AND BOARD OF ADMINISTRATION TO ACT AS GUARDIANS IN LIEU OF COURT APPOINTMENT OR ASSUMPTION BY PARENT. The superintendent of the Grafton State School shall be the guardian of the person of any resident of the Grafton State School who does not otherwise have a guardian of his person duly appointed by a court of competent jurisdiction, or whose parents do not elect to retain their natural guardianship of the person as herein provided. * * *."

The above provision, in effect, appoints the superintendent of the Grafton State School as guardian for all residents of the State School who do not have a guardian appointed by a Court of competent jurisdiction or whose parents do not elect to retain guardianship of

the person. This section, read by itself, would clearly indicate that the superintendent would be guardian in every instance where the natural parent does not exercise any right of guardianship or where the person does not have any Court appointed guardian regardless of the age of the resident.

The first sentence in the third paragraph in said section provides as follows:

Upon the effective date of this section the superintendent of the Grafton state school and the board of administration shall notify by certified mail the parents or responsible relatives of all residents of the Grafton state school under the age of twenty-one that the superintendent shall assume the guardianship of the persons of such residents and that the board of administration shall assume the guardianship of the estates of such residents, unless the parents shall elect in writing to retain their natural guardianship until the age of twenty-one of either the person, estate, or both of such residents within ninety days of receipt of such notice.* * *."

This language on first impression might suggest that the entire section pertains only to residents under twenty-one years of age. However, the further language immediately following the above quoted language, which is as follows, indicates that notice must be given to parents or other responsible relatives as pertaining to residents over twenty-one years of age. The language referred to is as follows:

* * * Notification by certified mail shall also be given to the parents or responsible relatives of all other residents of the Grafton state school that the superintendent will assume guardianship of the persons * * *." (Underscoring ours)

The combined language, in effect, provides that the superintendent is to give notice to the parents of all residents, or the responsible relatives of such residents, that unless they will request within ninety days to be appointed guardian by a court of competent jurisdiction, the superintendent will assume guardianship after ninety days of such notice.

Assuming that you, pursuant to the provisions of Section 25-04-13, give notice to the parent, parents or responsible relatives of the woman resident involved, and assuming that no action was taken by anyone to be appointed guardian, you are the legal guardian of such person. Also assuming further that you were unable to give notice to any parent, parents or responsible relative,s you would also be the legal guardian of such person. As legal guardian you would have the duty, responsibility and authority to determine whether or not the cataract operation should be performed.

It is recommended that you obtain the written recommendations of your staff and of the physician concerned, upon which you will make your determination, and place these recommendations and reasons why the operation should be or should not be performed in the file of the resident for future reference.

It is our opinion that in instances where you are the legal guardian, you have the authority, duty and responsibility to make decisions with respect to operations and other treatments, except for such operations mentioned in Chapter 25-04.1, which specify the statutory procedures to be followed for such operations referred to therein.

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