

Date Issued: July 12, 1983 (AGO 83-26)

Requested by: Robert G. Hoy, Cass County State's Attorney

- QUESTION PRESENTED -

Whether a guardian may give consent, on behalf of a ward, to medical care and treatment of the ward, and may apply for admission of the ward as a voluntary patient to the State Hospital or other treatment facility for care and treatment of mental illness, alcoholism, or drug abuse.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a guardian may give consent, on behalf of a ward, to medical care and treatment of the ward, and may apply for admission of the ward as a voluntary patient to the State Hospital or other treatment facility for care and treatment of mental illness, alcoholism, or drug abuse.

- ANALYSIS -

Section 30.1-28-12 of the North Dakota Century Code sets forth the general powers of a guardian appointed under the provisions of chapter 30.1-28, N.D.C.C., and provides that a guardian of an incapacitated person has the same powers, rights, and duties respecting a ward that a parent has respecting an unemancipated child. This section specifically empowers a guardian to give such consent or approval that may be necessary to enable the ward to receive "medical or other professional care, counsel, treatment, or service." This provision is consistent with general case law that a guardian stands in loco parentis to the ward and that the powers and duties of guardians are substantially the same whether the guardianship is of a minor or of an incapacitated person, unless there is a specific statutory provision that the powers shall differ (39 Am. Jur.2d. Guardian and Ward, sections 61, 65).

Therefore, insofar as medical care and treatment, and professional care and treatment for mental illness, alcoholism, and drug abuse in a setting other than the State Hospital or other public treatment facility are concerned, section 30.1-28-12, N.D.C.C., authorizes a guardian to consent on behalf of the ward, regardless of whether the ward is a minor or an incapacitated person.

Insofar as the care and treatment of mental illness, alcoholism, or drug abuse at the State Hospital or other public treatment facility are concerned, section 25-03.1-04, N.D.C.C., specifically provides that an application for admission of a minor as a voluntary patient to the State Hospital or other public treatment facility may be made by the minor's parent or legal guardian. While this statute does not refer to incapacitated persons, the fact that such reference is omitted cannot be construed as an expression of legislative intent that a guardian cannot apply for admission of an incapacitated ward for such care and treatment.

Consequently, the general law, as cited above, would apply and allow an application to be made by a guardian for an incapacitated ward.

It should be noted that the statutory procedure for voluntary admission to treatment facilities for mental illness, alcoholism, and drug abuse, set forth at section 25-03.1-04, N.D.C.C., is not an automatic commitment process. Instead, it consists of an application for admission, an examination, and determination by the professional staff at the facility that the applicant is mentally ill, an alcoholic, or drug addict. It is not tantamount to an involuntary commitment proceeding without the due process of law protection afforded by a court. If it is determined that the ward does not fit any of the described categories, the facility will presumably discharge the ward.

In arriving at the conclusions expressed in this opinion, I am not unmindful of the need to protect the rights of incapacitated persons in proceedings which can result in institutionalization, and I am aware that the issue presented in this opinion is currently being litigated in at least one jurisdiction. However, the statutory provisions for establishment of guardianships for incapacitated persons and the procedures established for voluntary admission of mentally ill, alcoholic, and drug addicted persons afford sufficient protection of the rights of wards in this state.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

ROBERT O. WEFALD
Attorney General

Prepared by: Robert P. Brady
Special Assistant Attorney General