

# Mental Health Matters

The newsletter of the Illinois State Bar Association's Section on Mental Health Law

## Editor's Note

BY SANDRA M. BLAKE

### **PRIOR TO THE MENTAL HEALTH**

Section Council's October 28 meeting, vice-chair Mark Heyrman posted a proposal for a Cook County pilot program on the community chat and asked for comment.

According to the post, "The County Division (which handles commitment and involuntary treatment matters) and the Probate Division (which handles guardianships for disabled adults) are working on a pilot project to coordinate when an individual has a matter in both divisions.

"To some extent this is a uniquely Cook County problem. Given the volume of litigation and the number of judges, the Circuit Court is divided into many divisions. But creating coordination between guardianship proceedings and

mental health matters makes some sense everywhere," according to Heyrman.

While several Section Council members spoke in favor of the proposal at the meeting, we were unable to vote on the proposal because a quorum wasn't present. Heyrman requested comments, criticisms, or suggestions to relay to the judges proposing the pilot project.

The proposal is printed in this issue, together with a detailed commentary that was submitted in response to the request.

The Mental Health Law Section is comprised of attorneys who represent individuals with mental illness, guardians, the State, and mental health service providers, to name a few. As noted, comments, criticisms, and suggestions from all were sought in an effort to include positions from all stakeholders. ■

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## Response to the Proposal for a Pilot Project to Establish a Single Docket for Mental Health and Guardianship Proceedings

BY ANN KRASUSKI

### **A PROPOSAL WAS RECENTLY**

circulated in the ISBA's Mental Health Law Section Council for "a pilot project to enhance case management in [sic] respondents involving both mental health proceedings and guardianship proceedings." The three-page proposal was submitted by Judge Maureen Ward Kirby, Presiding Judge of the County Division; Judge Daniel Malone, Presiding Judge of

the Probate Division; and Judge Susan Kennedy Sullivan of the Probate Division.

The proposal seeks to create "a single court call wherein an assigned judge hears a case involving a resident with legal issues in both the County Division (Mental Health) and the Probate Division (Guardianship). The dually-assigned judge would be ... prepared to hear the matters

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## Pilot Project

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under both areas of law.” There would be three “pathways” to this combined docket, according to the proposal:

- 1) After a hearing on a petition for involuntary treatment, if the respondent agrees to a court-ordered outpatient treatment plan, the judge may, at their discretion, refer the matter to the Pilot Project;
- 2) After the Report of a GAL in a guardianship matter where the respondent is already receiving mental health treatment voluntarily or involuntarily; and
- 3) In a guardianship proceeding “where there is an active mental health issue,” the judge may, at their discretion, transfer the matter to the Pilot Project.

According to these pathways to the proposed combination docket, judges would, in their discretion, refer people facing mental health proceedings to be potentially subjected to guardianship proceedings and also steer some people facing guardianship into involuntary mental health proceedings. The proposal does not appear to try to coordinate proceedings for people already facing existing mental health and guardianship cases but seeks to generate new petitions and thereby possibly more wholly—or, as the proposal states, “holistically”—curtail people’s right to self-determination.

Although there are many practical questions about how the pilot project would be implemented (including the authority to establish such a project, and that information disclosed in mental health proceedings shall not be redisclosed except in connection with those proceedings under 740 ILCS 110/11(vi); but see 755 ILCS 5/11a-3), there are two overarching concerns with this proposal in terms of the rights of people with mental illnesses. First, the proposal appears to be a solution in search of a problem, as the proposal does not provide data about how often a person with a mental illness is subject to

both a mental health and a guardianship proceeding. Second, whereas its stated mission is to promote judicial “efficiency” to “benefit” Cook County residents, separating people from their rights should not be “efficient,” and is not usually viewed as a benefit by the person whose rights are involuntarily curtailed.

### **The proposal is a solution in search of a problem.**

The proposal does not provide citations or specific information to show why such a pilot project would be needed. There is no data, research, or citations whatsoever to show how many respondents have faced a proceeding under the Mental Health Code while also facing guardianship in Cook County, or generally why a person would need to holistically lose their rights to personal and/or financial and mental-healthcare decision-making in one fell swoop in related proceedings on one docket. Instead, the proposal offers vague assertions as “fact,” stating: “There exists a heightened focus on mental health issues: in the news, through legislation and in categories of not-for-profit institutions. Also in the media, there is a greater awareness of guardianship proceedings and the resulting benefits and constraints.” Not only is this fact section devoid of supported facts, but it does not reflect the actual reporting about guardianship, which is largely negative and tends to describe the one-way route to losing one’s rights under guardianship. The first story that pops up in a quick Google search is from a Detroit news station (WXYZ) dated November 13, 2024, and titled, *“I’m kidnapped.” Vietnam veteran fighting Michigan guardianship system,*” where the article begins, “Prosecutors have called court-ordered guardianship a superhighway that you can’t exit from and that’s exactly what one Macomb County combat veteran says has happened to him[.]” The second news story in the Google search is dated November 22, 2024, and called *The Deciders: How vulnerable*

## Mental Health Matters

This is the newsletter of the ISBA’s Section on Mental Health Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are \$35 per year.

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### **OFFICE**

ILLINOIS BAR CENTER  
424 S. SECOND STREET  
SPRINGFIELD, IL 62701  
PHONES: 217-525-1760 OR 800-252-8908  
WWW.ISBA.ORG

### **EDITOR**

Barbara Goeben

### **COMMUNICATIONS MANAGER**

Celeste Niemann

✉ [cniemann@isba.org](mailto:cniemann@isba.org)

### **ART DIRECTOR**

Ticara Turley

✉ [tturley@isba.org](mailto:tturley@isba.org)

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*adults end up in guardianships* by a CBS News station in Florida, where a physician is quoted as saying, “You are talking about someone’s life. You take away someone’s rights, and they are dead in the law.” (See also *Bloomberg Law’s* 2023 six-part investigative series about guardianship, *In the Name of Protection*, which notes that “Britney Spears’ conservatorship dispute brought the guardianship system to the public eye. It’s a system that entraps thousands more Americans without a platform to fight back.”)

There have even been fictional feature-length movies about guardianship. The movies depict financial exploitation by guardians, such as the 2020 fictional movie, *I Care a Lot*, and the 2024 Lifetime movie, *The Bad Guardian*.

Undoubtedly, there are instances when guardianship may be helpful to a respondent who does not have family to act as surrogates, or who has not executed advance directives. But the proposal relies on vague statements without any citations or data, nevertheless calling its statements

“FACT,” that the media has a greater awareness of the “benefits and constraints” of guardianship. In the face of largely negative press about guardianship, and with no actual data or reasons to support the pilot project, and no stated problem that needs to be fixed, the project looks to be a solution in search of a problem.

**The proposed pilot project works to separate people from their rights “efficiently” and “holistically” to “benefit” stakeholders, except the most important stakeholder—the respondent.**

An order for involuntary treatment under the Mental Health Code is effective for 90 days, and in some circumstances for 180 days. 405 ILCS 5/2-107.1(a-5)(5); 5/3-813. Appointment of a guardian is forever, or until the person convinces the court that their rights should be restored. 755 ILCS 5/11a-19. A person subject to involuntary treatment temporarily loses their constitutional right to refuse medication and “will only be given such medication for the period of time it is

most needed” with the understanding that after 90 days of treatment, “a respondent may well have [their] faculties restored and no longer require treatment.” *In re C.E.*, 161 Ill. 2d 200, 219 (1994). A person under guardianship loses their right to make medical and personal and/or financial decisions to a limited or plenary extent. 755 ILCS 5/11a-12. While a guardian has authority over health care decision-making, they generally do not have authority over mental health care decisions. Specifically, a guardian cannot consent to psychotropic medications or electroconvulsive therapy unless the recipient is not objecting. 405 ILCS 5/2-107.1 (a-10)(b), (c). And a guardian does not have the authority to voluntarily admit the person to a mental health facility. *In re Gardner*, 121 Ill.App.3d 7, 12 (4th Dist. 1984). The Code explicitly provides that a person under guardianship retains their right to decide for themselves whether to admit themselves voluntarily to a mental health facility. 405 ILCS 5/3-400(a).

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Accordingly, there is not typically much overlap between court authority under the Mental Health Code and under the Probate Act, as decision-making for mental health and non-mental health is governed separately under each statute. A guardian would have little, if any, authority over mental healthcare decisions.

But the pilot project seeks to insert a unified judicial process into all aspects of decision-making over a person's health care and personal decisions. Though it may be beneficial to divert a person away from guardianship when temporary involuntary treatment may suffice to restore a person's capacity (*See C.E.*, 161 Ill. 2d at 219), the proposed pilot project does not suggest this. Instead, it advances the idea that after involuntary treatment, if a person agrees in an agreed court order to continue outpatient treatment, it is at that point, according to the proposal, that the person may be referred to the pilot project to also become subject to a guardianship proceeding. The proposal, perhaps due to its brevity, does not address why a person who has the capacity to consent to an agreed order for treatment would be in need of a guardian, except possibly to exercise judicial "efficiency" in advance should there be a perceived

need for guardianship in the future, or to provide a guardian with access to mental health records against the respondent's wishes. Unfortunately, the proposal sends the message that while the court is weighing whether a person currently and possibly temporarily lacks capacity to make a reasoned decision about mental health treatment, it would be efficient to also consider whether that person's right to make non-mental-healthcare and personal decisions should also be permanently ceded to a guardian.

The proposal states it is to benefit stakeholders, but the most important stakeholder—the respondent—does not seem adequately considered in the proposal. While the state possesses a *parens patriae* interest in caring for people who lack capacity, the proposal overlooks a person's right to self-determination and the central tenet of mental health law: the right to the least restrictive incursions on a person's liberty. *See* 755 ILCS 5/11a-3(b); 405 ILCS 5/2-107.1(a-5)(4)(F). A proposal that would truly benefit individuals with mental illnesses would be to inform or remind them about advance directives, where they could take charge of their decision-making by memorializing their treatment preferences in a declaration for

mental health treatment (755 ILCS 43/1 *et seq.*), or by selecting a trusted person to make all health care decisions in their behalf under a power of attorney for health care. (755 ILCS 45/1 *et seq.*; *See In re Estate of Beetler*, 2017 IL App (3d) 160248, ¶¶ 30-39, (holding that appointment of a plenary guardian does not automatically extinguish a valid, unchallenged power of attorney).

The court could include information about advance directives when issuing its findings, and in its written orders, and could also encourage the establishment of an advance directives help desk next to, or as part of, the guardianship help desk at the Daley Center.

A focus on self-determination through advance directives would demonstrate the recognition that people with mental illness are presumed competent to direct their legal affairs and do not lose their constitutional rights by virtue of a diagnosis of mental illness. *In re Phyllis P.*, 182 Ill. 2d 400, 401-402 (1998); 405 ILCS 5/2-100(a). Indeed, our Illinois Supreme Court explicitly held that "an adjudication of mental illness is not an adjudication of incompetence to direct one's legal affairs." *Id.* at 403.

Instead of advocating for self-determination through advance directives, and for the least restrictive and most temporary deprivation of rights via the judicial process when there is clear and convincing evidence to do so, the proposal suggests "efficiently," "holistically," and possibly permanently curtailing the rights of people with mental illnesses. In doing so, the proposal calls to mind the well-known admonition of Justice Brandeis: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. ... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928), Brandeis, J., dissenting. ■

*Ann Krasuski is a staff attorney with the Illinois Guardianship and Advocacy Commission, Legal Advocacy Service, West Suburban Regional Office.*

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# Proposal for a Pilot Project to Enhance Case Management in Respondents Involving Both Mental Health Proceedings and Guardianship Proceedings

BY JUDGE MAUREEN WARD KIRBY, JUDGE DANIEL MALONE, AND JUDGE SUSAN KENNEDY SULLIVAN

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## Fact:

There exists a heightened focus on mental health issues: in the news, through legislation, and in categories of not-for-profit institutions. Also in the media, there is a greater awareness of guardianship proceedings and the resulting benefits and constraints.

## Issue:

Because of the size of our Cook County Court system, in certain circumstances, there is a more burdensome, costly, and inefficient legal process where a resident is a respondent in two separate legal arenas: a resident is or will be ordered to outpatient treatment for his/her/their mental health treatment and where the same Cook County resident is or will benefit from some level of guardianship.

## Mission of the Pilot Project:

With an eye toward access to justice and judicial efficiency, Cook County citizens would benefit by creating a single court call wherein an assigned judge hears a case involving a resident with legal issues in both the County Division (Mental Health) and the Probate Division (Guardianship). The dually-assigned judge would be familiar with the applicable laws and prepared to hear the matters under both areas of law. The approach would further benefit all the stakeholders by approaching the Cook County resident more holistically

under a narrow set of circumstances involving both a mental health diagnosis and a level of guardianship.

## Pilot Project Proposed Outline:

There would be THREE PATHWAYS to a case being assigned to the Pilot Project:

- 1) After a hearing is held on a Petition for Involuntary Treatment before the judge in the County Division under the Mental Health Code.
- 2) After the Report of a GAL and other information is brought to the attention of the judge in a probate hearing for guardianship.
- 3) In the discretion of the judge in a guardianship proceeding where there is an active mental health issue.

## Applicable Rules:

*Mental Health and Developmental Disabilities Code* (405 ILCS 5/*et seq*)  
Agreed order for admission on an outpatient basis (405 ILCS 5/3-801.5)  
Involuntary admission; alternative mental health facilities (405 ILCS 5/811)  
Court-ordered admission on an outpatient basis modification (405 ILCS 5/3-812)  
An initial order of commitment on an outpatient basis (405 ILCS 5/3-813(a-1))  
*Mental Health and Developmental Disabilities Confidentiality Act* (740 ILCS 110/*et seq*)

Limited access to basic inpatient mental health information (740 ILCS 110/5.5)

*Probate Act: Guardians for Adults with Disabilities* (755 ILCS 5/11a *et seq*)  
Definition of “person with a disability” (755 ILCS 5/11a-2)  
Legal disability of ward (755 ILCS 5/11a-14) *i.e.*, limited guardianship

## Proposal for Pathway 1:

A Petition for Involuntary Treatment is filed in the County Division. A County Division judge will triage the matter. If the respondent agrees to a court-ordered outpatient treatment plan, the judge at his/her/their discretion may refer the matter to the Pilot Project.

## Proposal for Pathway 2:

A Petition for Adult Guardianship is filed in the Probate Division where the respondent already is being treated for mental health issues—either voluntarily or involuntarily.

## Proposal for Pathway 3:

If a respondent to a Guardianship Petition has an active mental health issue, the judge at his/her/their discretion may transfer the matter to the Pilot Project. ■

*Judge Maureen Ward Kirby, Presiding Judge, County Division. Judge Daniel Malone, Presiding Judge, Probate Division. Judge Susan Kennedy Sullivan, Probate Division.*

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