

Guardian ad Litem in Probate Cases

Matter of A.W., 637 P.2d (Colo. 1981).

The issue is whether and under what circumstances a court may order sterilization of a mentally retarded minor on petition by that minor's parents.

The choice to procreate or not to procreate is a fundamental right. The parental consent statute concerning medical procedures does not apply to sterilization because there is a past record of parental abuse of that authority and because of the government's need to protect individual rights.

Section 27-10.5-128 through 132, C.R.S. provides for voluntary sterilization of adult mentally retarded persons. Since there is no statute governing sterilization of minors, the court has the authority to make the decision. Sterilization of a minor must, then, be ordered by the court.

The court must first talk with the person and try to determine the person's wishes. Second, the court must make a determination that the person's capacity to make a decision about sterilization is not likely to improve. Third, the person must be proven capable of reproduction.

Once these have been established, the court must find clear and convincing evidence that sterilization is medically essential. A procedure is "medically essential" if clearly necessary, in the opinion of experts, to preserve the life or physical or mental health of the mentally retarded person.

In some circumstances, the possibility of pregnancy could justify granting a petition for sterilization if no other means of birth control would be effective.

Matter of Conservatorship of Roth, 804 P.2d 265 (Colo. App. 1990).

The conservator of a minor's estate took out a \$50,000 loan from a bank and, as collateral, granted the bank a security interest in a certificate of deposit owned by the estate. The bank was aware that there was a restriction in the letters of conservatorship which stated, "Assets to be placed in a restricted account in a Federally Insured Depository, no withdrawal without prior Court Order and approval of GAL."

The issue is whether the bank, in going forward with the transaction as it did, exceeded the restriction in the letters of conservatorship and is therefore not entitled to collect from the minor's estate on the defaulted loan.

Third parties knowingly dealing with a conservator are not required to make inquiry into the existence or propriety of the conservator's power, "except that restrictions on powers of conservators which are endorsed on letters provided in Section 15-14-246 are effective as to third persons." Section 15-14-423, C.R.S. (1987 Repl. Vol. 6B).

The bank did find out about the restriction on the power of the conservator, however, it contends that the transaction was a “pledge,” not a “withdrawal,” and may enforce the security interest without violating the letters of conservatorship.

The bank did not get permission of the court or GAL to withdraw funds in case of default. Now the bank is trying to circumvent the restriction by calling the conservator’s action a “pledge.” With the restrictions, the conservator did not have the power to “pledge” the minor’s assets. The estate would be entirely depleted if the bank were allowed to take the money. The bank will not be allowed to recover the money from the minor’s estate.

Matter of Romero, 790 P.2d 819 (Colo. 1990).

Ms. Romero’s guardian petitioned for a court order authorizing her sterilization because she is an incapacitated adult woman. Ms. Romero became incapacitated when was thirty three due to complications associated with diabetes resulting in brain damage.

After the petition was filed, a GAL was appointed for Ms. Romero. The court ordered the sterilization after an evidentiary hearing. The issue here is whether a court can order sterilization of an incapacitated person at the request of a guardian when the incapacitated person is able to object to sterilization.

The right to procreate or prevent procreation is a constitutionally protected choice. Therefore the court must exercise great care in evaluating petitions for non-consensual sterilization.

The court must first consider whether the person is competent to grant or withhold consent to sterilization. The petitioner must prove by clear and convincing evidence that the individual is incompetent to make a decision about sterilization and that the individual’s capacity to make such a decision is not likely to improve in the future.

An individual who is incompetent to make some decisions is not necessarily incompetent to make all decisions. Some mentally retarded individuals are competent to grant or withhold consent to sterilization.

An individual should be deemed competent to grant or withhold consent if the individual understands the nature of the district court’s proceedings, the relationship between sexual activity and reproduction, and the consequences of the sterilization procedure.

Ms. Romero has an IQ that is higher than most persons classified as mentally retarded. Her testimony demonstrates that she understands the nature of the proceedings and that she has expressed the desire not to be sterilized. Even though many would consider that decision unwise, if Ms. Romero is competent to make the decision it must be left up to her.

Miller v. Clark, 356 P.2d 965 (Colo. 1960).

Vinton died leaving no will or known heirs. The public administrator petitioned for letters and Miller was appointed guardian ad litem “for all persons under legal disability.” Later the court entered a determination that a Ms. Clark was the sole heir-at-law of Vinton. Ms. Clark

was not a minor. Miller then petitioned for permission to prosecute a writ of error. The issue here is whether Miller, as the guardian ad litem to all persons under disability who could possibly be an heir, has the authority to proceed.

For a person to prosecute a writ of error before the court, that person must either be a party to the action or he just be a person substantially aggrieved by the disposition of the case in the lower court.

Here, Miller is not aggrieved by the determination of heirs. Miller was appointed as GAL for persons under disability and it was determined that there were no such persons. Therefore, Miller is protecting the interests of no one. After the determination, Miller had no standing to continue in the case.

In re Estate of Edwards, 794 P.2d 1092 (Colo. App. 1990).

Reginald Howard assisted in negotiations for the sale of a farm and water stock owned by Edwards, a person with a degenerative nerve disease who requires continuous care. Howard filed two claims against Edwards' estate for services rendered. Howard also filed a petition requesting findings of Edwards' incapacity, for appointment of a GAL, for protective orders relating to conservatorship, and for permission to participate in the proceeding. The court denied his petition saying that Howard had not standing to bring the action.

The issue is who qualifies as a person "interested in the welfare" of an incapacitated person so as to have standing to petition the court for a finding of incapacity, appointment of a GAL, and others.

Section 15-14-303(1), C.R.S. (1987 Repl. Vol. 6B) says that any person "interested in the welfare" of the incapacitated person may petition the court for a finding of incapacity, for appointment of a GAL, and for other protective orders."

A person "interested in the welfare" is not specifically defined in the code and is a question of law for the court. The does, however, define "interested person" as including "heirs, devisees...creditors...and any others having a property right in or claim against the estate. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and the matter involved in, any proceeding."

As the second sentence of the "interested person" definition states, the interpretation of the phrase requires examining the specific facts and circumstances of the case. The court should examine the allegations made and the evidence presented on a case-by-case basis in making its determination.

Here, the court dismissed Howard's petition as not being a person "in interest of the welfare" of Edwards without an evidentiary hearing. This was error given the complicated circumstances of the case.

Southard By and Through Southard v. Miles, 714 P.2d 891 (Colo. 1986).

Twenty-year-old Southard became disabled when he suffered cardio-respiratory arrest and was deprived of oxygen for a period of time. He then sued several doctors for medical malpractice for failure to properly diagnose a heart condition that developed after an operation he underwent some years earlier. Southard experienced heart problems post-operation, but the doctors failed to follow up on his condition. The doctors moved for summary judgment, claiming that the medical malpractice statute of limitations of two years and the three year repose had passed. The issue here is whether there exists a genuine issue of material fact over Southard's disability that would cause the statute of limitations to be tolled and making summary judgment improper.

Section 13-81-103(1)(a), C.R.S. provides that a person under disability who is represented by a guardian shall have the statute of limitations run against him in the same way as a person not under disability. The legal representative shall not have less than two years after his appointment within which to take action on behalf of the person with a disability.

The above statute is intended to toll the statute of limitations during the period of disability. It operates to suspend the running of the applicable statute of limitations until either the disability is removed or a legal representative is appointed for the person under disability. These provisions apply equally to the three-year repose period for medical malpractice claims.

Also, a "person under disability" includes a "mentally incompetent" person under Section 13-81-103(1)(a), C.R.S., thus duplicating the definition in the medical malpractice statute of limitations and repose. Section 13-80-105(3), C.R.S.

Section 27-10.5-135(1), 11 C.R.S. (1985 Supp.) states that whenever the term "mental incompetent" is used in the laws of Colorado, it shall refer to the "mentally ill or gravely disabled" as defined in Section 27-10-102, or a person with "developmental disabilities," as defined in Section 27-10.5-102.

Section 27-10-102(7), 11 C.R.S. (1985 Supp.) defines "mentally ill" as "a person with a substantial disorder of the cognitive, volitional, or emotional processes that grossly impairs judgment or capacity to recognize reality or to control behavior."

Section 27-10-102(5) defines "gravely disabled" as "a condition in which a person, as a result of mental illness, is unable to take care of his basic personal needs or is making irrational or grossly irresponsible decisions concerning his person and lacks the capacity to understand this is so. This term does not include mentally retarded persons by reason of such retardation alone.

Section 27-10.5-102(10)(a) defines "developmentally disabled" as a "disability that is manifested before the person reaches twenty-two years of age; constitutes a substantial handicap to the affected individual; and is attributable to mental retardation or related conditions which include cerebral palsy, epilepsy, autism or other neurological conditions when such conditions result in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons.

Here, several doctors submitted affidavits indicating Southard's debilitated mental

condition. Further evaluation must be conducted to determine whether he fits into the definition of “a person under disability” for purposes of the statute of limitations. A genuine issue does exist as to whether Southard is disabled for purposes of tolling the statute of limitations and summary judgment is reversed.