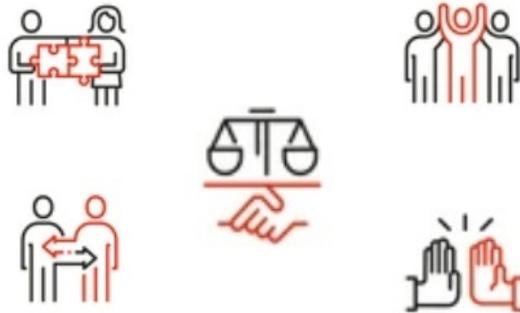


Social Rights

of Adults with Developmental Disabilities

Legal Protections



publication of
Capacity to Love

<https://alternativestoguardianship.com/capacity-to-love.html>

Social Rights of Adults with Developmental Disabilities

Legal Protections

This memo explores the legal principles governing the social rights of adults with developmental disabilities. Part I focuses on adults who are not living under an order of guardianship. Part II on those who are.

Provisions of the United States and Missouri constitutions limit the extent the government can infringe on social rights. Various federal and state statutes protect social rights from intrusion by individuals and private businesses.

An understanding of these legal provisions will help adults with developmental disabilities to assert and exercise their social rights. It will also assist government agencies and private businesses to comply with the law as they provide services for this population.

Part I Adults Not in a Guardianship

Constitutional Protections

The First and Fourteenth Amendments limit the authority of federal, state, and local governments to restrict the social rights of adults with developmental disabilities. The First Amendment protects freedom of speech and association from interference by the federal government. The Fourteenth Amendment applies the First Amendment to state and local governments. *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968).

There are two aspects to freedom of choice. One is the freedom to do something, while the other is the freedom not to do it. As the United States Supreme Court once clarified: “Freedom of association . . . plainly presupposes a freedom not to associate.” *Roberts v. Jaycees*, 468 U.S. 609 (1984); *Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

“As the First Amendment protects freedom of association and the corollary right not to associate, so too does it protect freedom of speech and the corollary right not to speak.” *Wilkins v. Daniels* 744 F.3d 409, 414 (6th Cir. 2014).

Just as the First Amendment protects individuals against government compulsion to speak, some legal commentators convincingly argue that it also protects individuals from “compelled listening.” Corbin, “The First Amendment Right Against Compelled Listening,”

Boston University Law Review, Vol. 89:939 (2009).

Freedom of speech is also protected by Article I, Section 8 of the Missouri Constitution, which declares: “That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty . . .”

Federal Statutory Protections

Developmental Disabilities Assistance and Bill of Rights Act of 2000 ([link](#))

Congress declared that the nation has a goal of providing individuals with developmental disabilities with the information, skills, opportunities, and support to:

- * make informed choices and decisions about their lives;
- * live in homes and communities in which such individuals can exercise their full rights and responsibilities as citizens;
- * have interdependent friendships and relationships with other persons.
- * have friendships and relationships with individuals and families of their own choice.

With this goal in mind, Congress created protection and advocacy systems in each state to protect the legal and human rights of individuals with developmental disabilities,

Americans with Disabilities Act ([link](#))

When it adopted the ADA in 1990, Congress recognized the need to protect the social rights of people with disabilities. Congress declared that, despite their right to participate fully in all aspects of society:

- * many people with physical or mental disabilities have been precluded from doing so because of discrimination;
- * people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially; and
- * physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

To remedy these and other problems identified by Congress, the ADA was enacted to prohibit state and local governments and private business establishments from discriminating

against people with physical and mental disabilities.

The passage of these federal laws establish a clear national policy that adults with developmental disabilities should have the same social rights as adults without such disabilities.

Deprivation of Rights ([link](#))

It is a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States. Persons acting under color of law within the meaning of this statute include judges, care providers in public health facilities, and others who are acting as public officials. It is not necessary that the conduct be motivated by animus toward the disability of the victim. Title 18, U.S.C., Section 242

Since the social rights of adults with developmental disabilities are protected by federal law, it is a crime for persons acting under color of Missouri law to willfully deprive them of such rights.

HCBS Rule ([link](#))

The HCBS Rule is a federal Medicaid regulation that defines person-centered planning (PCP) standards for individuals receiving Home and Community Based Services which are an array of long-term care services funded by Medicaid.

The [website](#) of the federal Administration for Community Living explains: “The PCP approach identifies the person’s strengths, goals, medical needs, needs for home-and community-based services, and desired outcomes. The approach also identifies the person’s preferences in areas such as recreation, transportation, friendships, therapies and treatments, housing, vocational training and employment, family relationships, and social activities. Unique factors such as culture and language also are addressed.”

These elements are included in a written plan for supporting the person, which is developed based on those considerations.

Any private or public entity providing HCBS to an adult with a developmental disability must help the individual develop and implement a plan that respects their social rights, including recreation, friendships, family relationships, and social activities. [Missouri](#) has a wide range of HCBS programs.

State Statutory Protections

Unless a person has been adjudicated to be incapacitated by a court of law, the person is

presumed to be competent to make decisions. Missouri Probate Code Sec. 475.078. A presumption of capacity is a longstanding rule of law. *Norton v. Paxton*, 110 Mo. 456 (1892). Therefore, adults with developmental disabilities who are not living under an order of guardianship are presumed to be competent to make social decisions.

“You have the same legal rights and responsibilities as any other person unless the court says you do not.” This statement is found in “Knowing Your Rights: A Guide for Individuals with Developmental Disabilities to Understanding Rights and Responsibilities,” Missouri Department of Mental Health, Division of Developmental Disabilities, [Booklet](#).

If an individual is not living under an order of guardianship but is receiving services from the Division of Developmental Disabilities of the Missouri Department of Mental Health, departmental [policy](#) requires that “Any proposed limitation of rights must be reviewed by DMH Regional Office or State Operated Programs Human Rights Committee to ensure that a person’s rights are adequately protected.”

The booklet and policy statement were issued pursuant to a legislative directive that the department “shall promulgate reasonable rules relative to the implementation of patient, resident and client rights . . .” Revised Statutes of Missouri Section 630.135.

Missouri has statutes that could be used to penalize anyone who willfully interferes with the social rights of adults.

Isolation. It is a crime for a person to knowingly attempt to cause or cause the isolation of a family or household member by unreasonably and substantially restricting or limiting his or her access to other persons, telecommunication devices or transportation for the purpose of isolation. Revised Statutes of Missouri Section 565.076. Preventing an adult from associating or communicating with a person of their choice is a form of isolation.

Abuse. It is a crime for a person to purposely engage in conduct involving more than one incident that causes emotional distress to an elderly person, a person with a disability, or a vulnerable person. The course of conduct shall be such as would cause a reasonable elderly person, person with a disability, or vulnerable person to suffer substantial emotional distress Revised Statutes of Missouri Section 565.184. Preventing an adult from having personal contact or communications with someone of their choice may cause substantial emotional distress. The same would be true for forced communication or contact with someone the adult does not want to speak with or be around.

False Imprisonment. It is a crime to knowingly restrain another unlawfully and without consent so as to interfere substantially with his liberty. R.S.M. Section 565.130. Preventing an adult from traveling from one place to another to spend time with someone of their choice, through physical means or intimidation, could constitute false imprisonment.

Part II Guardianship of the Person

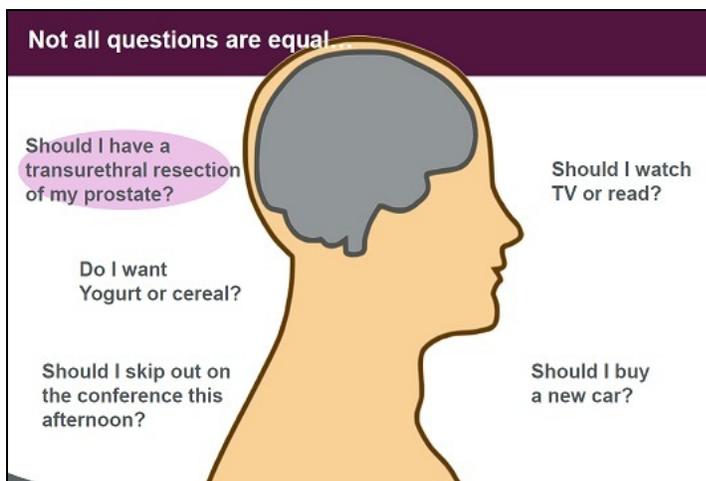
About 3,000 adults are targeted annually with guardianship petitions in Missouri. Some 30,000 adults are currently living under an order of guardianship in the state. Many of the adults in pre and post-adjudication phases of guardianship proceedings are adults with developmental disabilities. Guardianships place their social rights in jeopardy.

Assessment Phase

The filing of a guardianship petition triggers a procedural phase in which the incapacity of an adult to care for their personal needs occurs. The law calls for a determination by the court as to whether the adult lacks the capacity to make all or only some decisions affecting their health, well being, and safety.

An adult's capacity to make social decisions should be evaluated during this phase of a guardianship proceeding. A doctor, court-appointed attorney, and judge are involved in this evaluation. Doctors, however, often render an opinion on incapacity in a general sense. They often make specific findings regarding a person's capacity to make health care decisions. Doctors, lawyers, and judges may not separately review a person's capacity to make social decisions.

Someone who lacks the capacity to make informed decisions regarding health care or finances may nonetheless have the capacity to make social decisions. Unlike health care and finances which may involve complex mental processing and evaluation, social decisions may be based primarily on feelings and emotional considerations. If capacity to make social decisions were evaluated properly by doctors, lawyers, and judges, it is quite possible that most adults would retain the right to make social decisions even if a full or limited guardianship was ordered by the court.



The greater the risk of harm, the greater the level of capacity should be required to make a decision. Almost everyone has the capacity to decide what clothes to wear or how to style their hair. Someone who may lack capacity to make major medical or financial decisions, may easily have the capacity to make their own social decisions – especially decisions regarding those with whom they do not want to associate.

While some decisions are rooted primarily in intellect and mental judgment, others are based primarily in emotions. Decisions that are *truly* social are generally driven by emotions. “I like that person or I don’t like that person and therefore I want to be with them or I don’t want to be with them.” Especially since there is little harm in not socializing with someone, a person should never be deprived of the right to say “no” to unwanted social interactions. No one would dare to argue that a judge or a conservator should have the authority to order a person to have sex with someone when they do not want to. The same should be true for social interactions.

While minor children may not have a legal right to choose their friends or who they will hang out with, an adult with disabilities should have wide latitude in making social choices. Only for compelling reasons should a person be found to lack legal capacity to make their own social decisions.

For example, if there has been a history of social decision-making that has caused serious harm to the individual, then the risk of future harm may outweigh the right to make social decisions without restrictions. Absent such evidence, however, a capacity assessment professional recommending the restriction of social rights should be required to show exactly how the retention of these rights will harm the person and specifically what clear and convincing evidence exists to support an opinion that social rights should be restricted.

Supported Decision-Making

While some adults with developmental disabilities may be unable to *independently* make their own social decisions, many who fall into this category could do so with help from a trusted friend or relative who they have designated as a “supporter” in a formal or informal supported decision-making (SDM) arrangement.

The legislatures in five states have recognized (DE, IL, NH, NV, RI) that all adults: (1) should have the freedom to choose to live in the manner they wish; (2) should be able to participate in the management of their affairs; and (3) should receive the most effective and least restrictive form of support when they are unable to manage their affairs alone.

In new California legislation dealing with supported decision-making, social decisions are specifically mentioned. “‘Life decision’ means any decision that affects the adult with a disability, including, but not limited to, a decision regarding any medical, psychological, financial, educational, living arrangement, access to home and community-based services, social, sexual, religious, or occupational matter.”

Any SDM legislation that may eventually be adopted in [Missouri](#) should define “life decisions” broadly and specifically to include social decisions.

Post-Adjudication Phase

Once an adult with developmental disabilities is ordered into a guardianship, various rights may be restricted. This may include social rights under specific circumstances such as a guardian restricting visitation with a person who has been exerting undue influence on the adult.

However, such protective action may not extend to forcing the adult to visit with persons against their will. In this regard, adults in a guardianship are treated differently by the law than children in guardianships. *Conservatorship of Navarrete*, 58 Cal.App.5th 1018, 1031.

“We are aware of no case reading the statute to allow a conservator or a court to require an adult conservatee to spend time with someone against their will, even a parent. . . . An adult conservatee's disability does not put them in the legal position of a minor. . . . ‘[v]isitation is a form of custody,’ and the Family Code section allowing the trial court to impose visitation orders does not reach a child who has attained the age of majority.”

The Standards of Practice adopted by the National Guardianship Association contains a “[Bill of Rights](#)” explaining that adults in a guardianship have the right to fully participate in all decisions, including their social interactions.

NGA Standard 4 explains: “The guardian shall promote social interactions and meaningful relationships consistent with the person’s goals, needs and preferences.” It further states that extended imitations on social interactions should have safeguards against abuse:

“The guardian may take reasonable steps to restrict contact between the person and another who poses a risk of significant, financial, physical, or psychological harm to the person. If the guardian believes the restriction will exceed seven business days for family or established relationships, and 60 days for other relationships, the guardian shall bring the restriction and the reason for the restriction to the court’s attention.”

Part III Visitation of Adults with Parents

Whether they are in a guardianship or not, adults with developmental disabilities should not be forced to visit with parents. Family visitations should be voluntary.

Court orders requiring adults to visit with parents are unconstitutional. The protections of the First Amendment – freedom of speech and freedom of association – apply to everyone.

The issue of mandatory visitation of adults with parents sometimes arises in the context of a divorce proceeding. It may also occur in a guardianship or conservatorship proceeding. In any event, strong legal arguments can be made that any governmental action mandating adults with developmental disabilities to spend time with an estranged parent is unconstitutional.

The issue recently arose in an adult guardianship case in New Jersey where Peter Brumlik, a young man with autism, was ordered by a judge to do zoom meetings with his mother twice a week over his objection. This order is being challenged in a pending appeal.

What follows is a section of a brief on appeal arguing that the court lacked authority to issue such an order. The brief cites appellate court rulings from other states.

The Court Exceeded Its Authority in Ordering Peter to Visit with His Mother

“Comments from the court at various times in the proceedings indicate that it had difficulty viewing Peter as an adult. “I want to call him a child . . .” (RT, p. 48) The court referred to the guardian ad litem as “the child’s Guardian ad Litem.” (RT, p. 79) When commenting on the role of Peter’s father in an IEP process with the school system, the court stated: “He refused, he refused to take the child.” (RT, p. 115) At another point, the court stated: “The child has been receiving services.” (RT, p. 116)

“Peter’s attorney reminded the court that Peter is not a child. “I mean, we refer to him as a child, but right or wrong, he’s 18 years old. He’s stepped into adulthood.” (RT, p. 117)

“The court’s difficulty in viewing Peter as an adult may have been based in part on the court’s perspective as a sometimes family court judge. “I’m a little wearing my family Judge, family Judge hat . . . “ (RT, p. 35) At one point, the court was considering “reunification therapy” – something that is common with minors and parents in a divorce proceeding. (RT, p. 13).

“Perhaps the court’s view of Peter as a child influenced its decision to order Peter to attend Zoom sessions with his mother twice a week. Mandating that a child visit with a parent is common in divorce proceedings. Such an order has no place in an adult guardianship proceeding.

“It is important to remember that Peter’s freedom to speak and not to speak, and his freedom to associate and not to associate, are grounded in the First Amendment as made applicable to the states through the Fourteenth

Amendment. Wilkins v. Daniels, 744 F.3d 409, 414 (6th Cir. 2014) These fundamental rights apply to adults with developmental disabilities, absent a finding of incapacity – something lacking in this case. In re M.R., 135 N.J. 155, 169-170 (1994) In formulating its order of mandatory visitation, the court failed to consider Peter’s constitutional rights as an adult.

“The issue of mandatory visits of an adult with his or her parent has not been the subject of any reported appellate decisions in New Jersey. However, in other jurisdictions where the issue has been litigated, mandatory visitation orders have been reversed.

“A California decision is instructive, especially since it involved the reversal of an order of mandatory therapy sessions of an adult daughter with her father – a parent whom she said had sexually abused her. The woman argued that forced visitation with her father was unconstitutional and an abuse of judicial discretion. The appellate court avoided the constitutional issues by ruling that the court lacked statutory authority to order mandatory visits with the father. The court observed: “An adult conservatee's disability does not put them in the legal position of a minor.” Conservatorship of Navarrete, 58 Cal.App.5th 1018, 1030-1031 (Cal. Ct. App. 2020) Even in the context of family law orders, “the trial courts have no authority to order adult disabled children to visit with a parent.” Ibid. The court added: “the trial court's attempt to intervene in the dispute between a disabled adult and her estranged father based on its own judgment about her best interests overstepped its role.” Id., p. 1032. The same can be said here.

“A case in Illinois presented an issue of “whether the circuit court may order visitation between a mentally disabled adult and his estranged father” in a divorce proceeding. In Re Marriage of Casarotto, 36 Ill.App. 3rd 567 (Ill.App. Ct. 2000). Kevin Casarotto, who was an adult at the time the visitation order was entered, has Down's syndrome. Although Kevin expressly objected to visiting his father, the circuit court ordered visitation between Kevin and his father anyway. Kevin argued that the order was unconstitutional and was not authorized by statute. Th appellate court avoided the constitutional issue by ruling that, without statutory authorization, the trial court lacked subject matter jurisdiction to order a disabled adult to visit with a parent. Casatotto, supra, at p. 571.

“A decision in Pennsylvania held that an adult with Down Syndrome cannot be ordered to visit with a parent. The court stated: “Kimberly Schmidt is chronologically an adult. She has not been adjudicated incompetent. Her mental limitations do not compel the conclusion that she lacks capacity to

make rational decisions regarding parental preferences. Because she is an adult she enjoys many of the same rights and privileges enjoyed by other adult citizens. These include a constitutionally protected freedom of choice to make certain basic decisions regarding marriage, procreation, family life and privacy.” Schmidt v Schmidt, 313 Pa. Super. 83, 86 (Pa. Super. Ct. 1983) It added: “choice, it would seem, should include the same right which an adult has to refuse to visit a parent. In the absence of an adjudication of incompetency, a handicapped adult should not be deprived of the freedom to make for himself or herself the same family related decisions which other adults enjoy. Such a person has the same needs as other adults for social approval, respect and privacy, as well as freedom to make important decisions regarding personal preferences and associates.” Id., at pp. 86-87.

“Peter has never been adjudicated to lack general capacity, much less the capacity to make social decisions. He therefore retains his First Amendment rights. As a result, the court lacked jurisdiction to order Peter to visit with his mother over his objections.”

Conclusion

Adults with developmental disabilities have social rights under the federal constitution, statutes, and regulations. These rights are also protected by Missouri state law. The social rights of adults who are not in a guardianship are nearly absolute. Those living under an order of guardianship have social rights too, although they may be limited for good cause. The social rights of such adults are more likely to be respected if judges, attorneys, guardians, and service providers understand the legal basis for these right. An easy-to-understand brochure on social rights should be developed for self-advocates.