

PERSONAL, MARITAL & PARENTAL RIGHTS

CHAPTER 14

The family, marital, and sexual rights of persons with disabilities are, in many instances, the same as those enjoyed by persons without disabilities. Problems in the free exercise of these rights most frequently arise with the event of guardianship or institutionalization. This chapter deals primarily with those persons with disabilities who are living in the community and do not have guardians.

MARRIAGE

Any person capable of consenting to a marriage and is over the age of 18 may obtain a license to marry in Missouri. By obtaining permission of a parent or guardian, any person over the age of 15 may acquire a license. For persons under 15 years of age, only a circuit court judge or an associate circuit judge may allow issuance of a marriage license and only in unusual circumstances. There must, however, be unusual conditions and good cause shown for allowing the marriage.

In most situations when the parties to a proposed marriage are over the age of 18 years, the crucial element is consent to the marital contract. In Missouri, by statute, it is a misdemeanor for any official to knowingly issue a license to persons who lack capacity to enter into a marriage contract. This statute has been substantially eroded by court interpretations. The courts have generally held that the consent requirement is met when both parties are capable of understanding the nature and consequences of entering into a marriage. Therefore, it appears that in Missouri, persons with disabilities who can appreciate the meaning of a marital relationship are free to marry if they so choose.

DISSOLUTION OF MARRIAGE (DIVORCE)

There is no requirement in Missouri law that one party to a marriage be “at fault” in a dissolution action. A person with a developmental disability who does not have a guardian receives the same treatment in such a proceeding as does a person without a disability. The petitioner (husband or wife) may file a petition for dissolution, which sets forth an allegation that the marriage is irretrievably broken. This means that the couple’s difference cannot be resolved. No other grounds for the request for dissolution need to be stated.

Should the person be named as a respondent in the action (i.e., his/her spouse is the one who files the petition), the statute affords no special treatment of virtue of disability. If the respondent denies that the marriage is irretrievably broken, the court can consider relevant factors and circumstances surrounding the marriage and the prospect of reconciliation between the husband and wife. The court may then order that the petitioner make a further showing of irretrievability

(e.g. abandonment, adultery, lengthy separation) or may set aside the matter for one to six months. At the end of that period, the court may grant the dissolution or require the further showing of irretrievability.

ABORTION

In the past few years, abortion has become a very hotly contested legal issue. Generally, a woman over the age of 18 who is in her first three months of pregnancy (trimester) can consent to an abortion. Thus, a pregnant woman with a disability and over 18 may arrange for her own abortion if she so chooses.

The difficulty of the abortion issue in such cases is magnified when the woman has a guardian who wants to substitute consent for the abortion. The determination of the ward's freedom of choice versus the guardian's decision-making power in consenting to an abortion may vary from jurisdiction to jurisdiction. Obviously, the time factor is a big problem when one anticipates entering into a legal battle that must be resolved before the end of the first trimester.

Another problem may arise when a woman with a disability wants an abortion but cannot find a physician who is willing to perform the operation. Some physicians question the ability of persons with disabilities to give consent to medical procedures and refuse to perform non-emergency operations without authorization by a guardian. This refusal may stem from the physician's fear of subsequent liability should the person not realize until after the surgery the nature and the consequences of the procedure. The person may claim that she did not give a valid consent to the operation because she did not understand the possible results of the operation and that; therefore, she never legally authorized the procedure. Additionally, a physician may make it a policy never to accept a patient with a developmental disability for an abortion with a substitute consent (of the guardian) only.

STERILIZATION

Some legal scholars argue that freedom of choice regarding sterilization is even more protected than abortion situations because of the permanent denial of the ability to procreate. The Constitutional arguments against substitute consent for abortions may also be applied to sterilization. In addition, enabling statutes should be addressed.

Enabling statutes are special laws that allow courts to make certain types of orders that may not otherwise be covered by the broadly defined authority of the court. Missouri does not have an enabling statute that authorizes court-ordered sterilization. Because of the highly personal and sensitive nature of sterilization, it has been held by the court of some states that courts should be allowed to make orders involving this issue only if enabling statutes specifically empower them to do so. In other states, it has been held that the courts have this power even if there is no enabling statute specifically authorizing it. The Missouri Supreme Court has not determined this question one-way or the other. However, in 1974, that court did indicate,

though it did not so hold, that there is perhaps no authority for any court in Missouri to order sterilizations. Due to this lack of a definite statement of the authority of Missouri courts to act upon this issue, the status of the law regarding sterilization in Missouri is in a state of confusion.

If a person with a disability wants to be sterilized, he/she generally has the same rights as a person without a disability in having a sterilization performed. As in the abortion situation, he/she may encounter the reluctance of the physician to accept the patient's consent as valid. If an individual has a guardian, and both the ward and the guardian favor the surgery, consent given by both of them might resolve the consent problem.

PARENTAL RESPONSIBILITIES AND JUVENILE COURT PROCEEDINGS

Parents under Missouri law are responsible for the care, education, support, and supervision of their children. If parents are unable to meet those responsibilities because of death, incompetence, etc., Missouri law dictates that the juvenile court may decide who will be responsible for the children. Missouri does not provide special statutory treatment for parents with disabilities whose children are involved in juvenile court proceedings. It is suggested that any individual who is interested in obtaining more information should check with the local circuit court, since proceedings may differ from jurisdiction to jurisdiction. Juvenile court proceedings ordinarily begin when the court is requested, in writing, to authorize a preliminary inquiry to determine whether the best interests of a child are being served under current conditions. Because of the wide discretion granted to the juvenile court, several courses of action are available. If parental responsibilities are not met, the following alternatives exist.

Temporary Detention

During the preliminary inquiry, the investigator may find that it is in the child's best interest to place the child in temporary detention. If so, the investigator will take physical custody of the child and ask either a juvenile officer or person in charge of a detention facility to authorize a temporary detention for a period not to exceed 48 hours, pending a detention hearing in juvenile court. The juvenile officer or other person authorizing the temporary detention must notify the court, as soon as it is practicable, that the child is being held. The child's parents must also receive notice that the child is being detained. The court, after examining the reasons presented for the detention, may do any of the following:

1. Release the child;
2. Order continued detention; or
3. Order, on its own motion, a hearing to determine whether detention should continue.

In addition, the court may schedule a hearing to determine the appropriateness of continued detention within four days after receiving a written request by the child or his parents that such hearing be held. Because of the wide discretionary powers granted to the juvenile court, there may be other types of orders made or time extensions granted during this process. No juvenile shall be detained more than seven days without a formal petition being filed with the court requesting placement of the child in foster care or another suitable facility.

Other Preliminary Proceedings

If temporary detention does not seem necessary to the investigator, he will submit the results of the preliminary inquiry to the court. The report should describe the type of care, custody, and support being received by the child and any other relevant information that may assist in determining whether the child's best interests are being served. The court may:

1. Close the investigation;
2. Make arrangements for any practical informal adjustment (e.g., a juvenile officer-parent conference without the filing of a petition); or
3. Authorize the juvenile officer to file a position.

Petition and Hearing

If a petition is filed, it will generally set forth allegations that the child needs to be placed under the jurisdiction of the court because those persons legally responsible for the child's care (usually the parents) are not providing necessary care, support, education, or supervision. The parents must be notified that the petition has been filed. The court will issue a summons to the parents directing them to appear, with the child, at the hearing. If the court deems it necessary, it may order the officer serving the summons to take the child into custody. The child may, however, be returned to the parents upon the parents' written promise to bring the child into court on the hearing date. The court may also subpoena any other people whose presence and testimony may be necessary at the hearing. Both the parents and the child have the right to be represented by an attorney at the hearing. If the parent cannot afford to hire counsel, then the juvenile court must appoint one. The hearing may be conducted as formally or informally as the judge determines appropriate, except that the rules of civil procedure must be adhered to unless specifically modified by the juvenile court rules or by statute. Evidence may be presented as to what type of home life the child needs and has been provided in the past.

At the conclusion of the proceedings, the court may:

1. Return the child to his parents (or the party who previously had legal custody);
2. Place the child in the home of a relative or other suitable facility;
3. Cause the child to undergo medical, psychological, or other evaluation or treatment in an appropriate facility; or
4. Make any other necessary and appropriate orders regarding placement of the child.

Parents who have adequate funds may be required to continue payment for the support of the child, even though the child is not returned to the family home. A parent may at any time request a modification of the court's order for placement. The court may deny the request or find that another hearing is necessary to determine the need or desirability of a modification.

Termination of Parental Rights

Discussion so far has been limited to proceedings that may result in a physical separation of parents from the child without actually dissolving the parents' status as guardians. In other words, the parents retain their legal rights as natural guardians and are usually given visitation rights and assigned financial responsibility for the child's support when possible. Even if the allegations in

the petition explained above are accepted as true, the child may not be adopted without parental consent or further court intervention. Any further court proceedings involving the child will require that notice be given to the parents, unless the right to receive such notice is waived by the parents (i.e., the parents have consented), or if the parents are unknown and cannot be ascertained.

The process of terminating parental rights begins with an informant's statement to the court or juvenile officer that the child's best interests may be jeopardized if the child continues to live under current conditions. An informant may be any person who has reason to believe the child's best interests are not being served.

The next step in this process is a preliminary investigation, during which time the juvenile office will determine the propriety of filing a Termination Petition with the court. A Termination Petition is a request that the court dissolve the parents' legal status as the natural guardians of the child. If the juvenile officer determines that filing of this petition is not appropriate, the informant may make a request to the court for the filing of the petition. After considering the request, the court may either deny the request or order the juvenile officer to file a Termination Petition.

Should a petition for termination be filed, the parents receive notice and summons as described earlier. They also have the right to representation by counsel. The hearing will be held as soon as is practicable, but the parents should be allowed adequate time to prepare their case and gather evidence.

At the conclusion of the hearing, the judge may decide to terminate the parents' rights, if it is in the child's best interests and one or more of the following conditions exist:

1. The parents have willingly consented to the termination;
2. There is clear, cogent, and convincing evidence that the parent has without good cause:
 - a. abandoned a child under the age of one for 60 days or longer or a child aged one to seventeen for six months or longer;
 - b. neglected the child for six months or longer prior to the filing of the petition;
 - c. sexually abused the child;
 - d. mentally or physically abused the child;
 - e. committed an act resulting in injury or willfully and wantonly permitted the child to be injured in a life-threatening incident;
 - f. the parent, otherwise capable, has refused to financially support the child when it is a legal responsibility and the resources are available.
 - g. the parent has a permanent mental condition that renders him unable to act knowingly or intentionally and has neglected or failed to care for the child properly.

The last basis for termination, which refers to "mental condition," may affect parents with disabilities more than parents without disabilities. Since the court will usually request the Division of Family Services to compile a report on the child's background, the general fitness of the parents, and similar information, the incapacity of one or both parents due to a developmental

disability may be one of the primary bases for the termination. It therefore may be necessary for the parent who is involved in termination proceedings to produce psychological evaluations that demonstrate his abilities to act “knowingly” and “intentionally” as well as describe his capabilities as a responsible parent. Even though the parent may not technically have the burden of proving his “fitness,” it may be of benefit to such parent to come to court with an abundance of evidentiary support that will be entered in the records. If the judge should decide to terminate the parents’ rights, such evidence may be useful if the parent wants to appeal the decision.