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**FIFTY SHADES OF SILVER  
SEX AND ROMANCE:  
RIGHTS, RESERVATIONS, ETHICS**

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## I. INTRODUCTION

Sexual expression is a part of human behavior, regardless of age. When an individual has become functionally incapacitated as a result of physical or mental illness, the desire for intimacy and sexual expression may remain.<sup>1</sup> When considering a guardianship as a vehicle to provide assistance to the ward in the least restrictive setting possible, to maximize the ward's autonomy and to honor the ward's wishes and preferences whenever possible, it is likely that at some point the guardian will have a ward who is engaged in or wishes to be in an intimate relationship. Individuals and facilities have their own definitions of sexual activity and what is appropriate sexual activity.

In this presentation, we review a number of issues which concern the sexual activities of a person who has been determined to be incapacitated and the role of the guardian in monitoring or facilitating such activities. We'll discuss:

- Respecting the Ward's right to appropriate sexual activity;
- Providing the Ward with a safe environment in which to discuss issues concerning intimacy and sexual activity;
- Identifying when sexual activity may not be appropriate and what to do when a Ward cannot recognize his or her inappropriate behaviors;
- Safe sex, including protections against sexually transmitted diseases;
- Counseling and advising family members as to the Ward's rights;
- Protecting others against sexually inappropriate Wards;
- Roles and responsibilities of the attorneys who represent the guardians and who has a duty to the Ward; and
- Understanding how the personal opinions and ethics of guardians and their attorneys affect successful counseling.

Respecting a Ward's sexuality is not a statutory issue. If you search state statutes, including Texas, for guidance, you'll find general references regarding the rights lost and retained by the Ward. The Texas statute reads: "An incapacitated person for whom a guardian is appointed retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been *specifically granted to the guardian* [emphasis added]."<sup>2</sup> Obviously the right to engage in sexual activity is not a delegable right, but in many jurisdictions, the right to make decisions about social environment and other social aspects of the Ward's life is a right which may be removed.<sup>3</sup>

The guardian must think through the issues, her responsibilities, discretionary powers, and obligations, as well as the possibility of any potential liability that may arise in various situations when the Ward engages in sexual expression, and in situations when the Ward's sexual expression is inappropriate, or in the worse case, criminal. While it is not a likely outcome that the guardian is liable for the Ward's torts or crimes, the guardian's appropriate standard of care must be identified and applied in these situations to avoid any liability when the guardian is negligent or her conduct falls below the appropriate standard. The Texas Estates Code states that "[a] person is not liable to a third party solely because the person has

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<sup>1</sup> See *The Arc*, "Sexuality Position", <https://www.thearc.org/who-we-are/position-statements/life-in-the-community/sexuality> (2017).

<sup>2</sup> Texas Estates Code § 1151.001.

<sup>3</sup> The 2017 Florida Statute § 744.3215(3)(g).

been appointed guardian of a Ward under this chapter.”<sup>4</sup> As counsel for guardians, we need to protect our clients from liability in the event that the Ward is a sexual predator. We must protect the Ward from sexual abuse. And we must recognize when the Ward is entitled to engage in sexual activity which creates no harm to either party and is within an appropriate realm of behavior.

The primary concerns about sexual activity among the *legally* incapacitated include: choice of partner, capacity of partner (if the Ward resides in a place where other residents might lack capacity), safe sex practices, lack of capacity to consent to sex, and sexual predators. In this presentation we will discuss the situations in which the issue may arise and review some applicable statutes, standards and regulations in dealing with the issue of sex. This issue applies to wards of all ages and abilities. We expect this presentation to raise as many questions as answers, but our primary objective is to have attorneys recognize this issue for the benefit of the Wards whose lives are affected.

## II. CONSTITUTIONAL ISSUES

What rights does a functionally incapacitated Ward retain, and how does one define who loses and who retains the right to sexual expression? One place to begin a legal analysis is with the basic rights given by the U.S. Constitution and some more distinct rights which might be allotted under an individual state’s constitution. Two points bear discussion: (1) for this topic, a significant issue would center around the guardian’s ability to assert the rights of the ward, and (2) the most important rights as the ward’s basis for sexual expression—liberty and privacy.

### A. Right to Assert Interests of Others

The Supreme Court has previously examined who can assert the interest of another, in the landmark case of *Griswold v. Connecticut* where the appellants were the Executive Director of Planned Parenthood of Connecticut and the medical director for that Planned Parenthood chapter. The Court noted, “We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship.”<sup>5</sup> The Court also examined the issue in *Eisenstadt v. Baird*, where an individual was convicted of passing out contraceptives to an unmarried woman, which violated a state law prohibiting the distribution of contraceptives by anyone other than a doctor or pharmacist and to unmarried persons. The Court expanded on *Griswold*, holding that the individual did have standing to assert the unmarried woman’s rights even though he did not have a professional relationship with her.<sup>6</sup>

### B. Liberty Interests

As noted by the Supreme Court, the constitutional liberty interest provides broad protections to citizens:

“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>7</sup>

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<sup>4</sup> Texas Estates Code § 1164.001.

<sup>5</sup> *Griswold v. Conn.*, 381 U.S. 479, 481 (1965).

<sup>6</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972)

<sup>7</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

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