

POLICY & PROCEDURE CONCERNING GUARDIANSHIP & CONSERVATORSHIP

I. PURPOSE

This policy and procedure is designed to assist agency team members and others in matters relating to legal guardianship and conservatorship.

II. AUTHORITY

This procedure has been implemented with the approval of the Governing Board and/or its designee.

III. DEFINITIONS

- A. **Minor**-any person under the age of nineteen, unless married prior to the age of nineteen. Parents are the natural guardians of their minor children unless they are unable to exercise parental authority due to death, relinquishment of authority, or legal termination of parental rights. Natural parental guardianship automatically ends when the child reaches nineteen years of age.
- B. **Incapacitated Person**-An individual who lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her/his person (NE revised statute 30-2601 (1), revised 1989) due to mental illness, mental deficiency, physical illness or disability, advanced age, chronic chemical dependency, or other causes.
- C. **Protected Person**-A minor or incapacitated person who has been appointed a conservator.
- D. **Ward**-A person who has a legal guardian.
- E. **Guardian**-A competent adult or non-profit organization (not providing direct service) who has legal authority to make decisions for a ward and an obligation to act in the best interest of the ward.
- F. **Conservator**-A competent adult or institution appointed by the court to manage money and/or property for a protected person (NE revised statute 30-2209 (6) reissued 1989).
- G. **Guardian ad litem**-A person appointed by the court to represent the best interest of a potential ward during the court proceedings. A guardian ad litem may only make decisions relating to the court proceedings, and the relationship ends once the proceedings terminate.

- H. **Visitor**-A trained person who is appointed by the court who has experience/expertise to evaluate the needs and circumstances of an allegedly incapacitated person. Visitors must be trained in at least one of the following fields: law, nursing, social work, mental health, mental retardation, gerontology, or developmental disabilities.
- I. **Protective Proceedings**-Court hearing to determine the need for a conservator to manage an individual estate.
- J. **Full or Plenary Guardianship**-All decision making power is transferred from the ward to the guardian. Some decisions, however, are so personal that a guardian may not make them on behalf of a ward. This includes, but is not limited to, decisions regarding marriage, child-bearing, or sterilization.
- K. **Limited or Partial Guardianship**-A guardian's authority is limited to specific areas, while other authority remains with the ward. The court determines the division of power between the guardian and the ward.
- L. **Authority**-
 - Ward's place of residence
 - Ward's medical care
 - Protection of personal effects
 - Consents, approvals, or releases
 - Training, education, habilitative services
 - Private or governmental benefits entitled to the ward
 - Proceedings compelling legal support, if no conservator
 - Contractual agreement
 - Reception of money and tangible property to apply to room and board, medical care, personal effects, training, education and habilitative services.

IV. PROCEDURAL DIRECTIVES

- A. Each IPP Team will annually address the guardianship status of the individual served and its appropriateness.

The Team must consider the necessity of a guardian and the rights and authority the individual is capable of maintaining, if allowed to do so.

The Team members will use the definitions in Section II, as well as their own personal knowledge, in making their determinations.

- B. Methods to assist in establishing a guardian:
 - 1. The request for guardianship may originate from parents, other family members, friends of the individual served, court recommendation, the IPP Team, or any other interested party.

2. The IPP Team will discuss the request for guardianship to determine appropriateness. During this discussion, the Team will consider the exact scope the guardianship needs to cover. It is recommended that the guardianship be limited as much as possible, while meeting the needs of the individual (see definitions).
3. Team members must assist family members to initiate and establish guardianship when assistance is requested and the Team agrees that the action is appropriate.
4. If the Team determines the guardianship is in the best interest of the individual, but no willing or appropriate family member can be located, a third party will be considered. An agency employee **MAY NOT** be considered as a guardian for a person receiving agency services (see definition E.). **The potential ward will be involved in locating and selecting a suitable guardian.**
5. Once a suitable candidate has been selected, a petition must be filed with the court in the ward's county of residence. The petition will be composed by an attorney and must include a statement citing that the alleged incapacitated person lacks sufficient understanding to make or communicate responsible decisions and reasons why.
6. The court will set a hearing date and serve notices to parties involved. The notice will be personally served to the proposed ward, her/his spouse, and parents.
7. The Team will ask that the court appoint a guardian ad litem to protect the interest of the proposed ward during court proceedings. If the court fails to do so, a member of the Team will then speak directly with the judge to request counsel for the individual. If the judge does not make the appointment, the Team member will then meet with the attorney for the proposed guardian advising that the proposed ward is without representation. If these attempts fail, the Nebraska Civil Liberties and Nebraska Advocacy Services will be contacted. The Human and Legal Rights Committee will also be notified.
8. The Team will also request that a visitor be appointed. The visitor's report will help determine the scope of a limited guardianship.
9. The alleged incapacitated person has certain rights during the proceedings. These rights include:
 - a. To be present at the hearing
 - b. To see and hear evidence relating to her/his condition
 - c. To be represented by counsel

- d. To present evidence
- e. To cross-examine witnesses, including physicians and visitors
- f. To request a closed hearing, which is done only at the request of the potential ward and her/his attorney.

The Team will act in an advocacy role to monitor and protect these rights throughout the proceedings.

- 10. The court may order the visitor or physician fees be charged to the ward.
- 11. The court will stipulate those areas in which the guardian will have authority and those which will remain with the ward (see Section II). No guardianship grants more authority than a parent has over their own minor child.
- 12. The guardian will be required to make a biannual report to the court. The IPP Team may review and/or request the report.

Note: Legal notice may be waived at any time, but in doing so, the person also waives the right to challenge the court's decision. This must be discouraged. Agency employees are not to be a party to the denial of individual legal rights.

C. Challenging or changing guardianship:

- 1. If, during the annual review of guardianship status, the IPP Team determines that the existing guardianship is inappropriate, steps must be taken to correct the situation. An existing guardianship can be challenged, changed, or modified through subsequent court proceedings.
- 2. The IPP Team must clearly define the aspect(s) of the current guardianship determined to be inappropriate.
- 3. The Team may petition the court in which guardianship was originally established for a change in the order. The change may involve appointment of a different person as guardian or adding limitations to the guardian's scope of authority, thereby restoring some independence to the ward. It may also become necessary to delete some of the limitations in a guardianship if the individual's circumstances or condition change.
- 4. Requests for a change in the current guardianship may also be made in writing to the court within thirty days after the guardian's biannual report.

5. Guardianship may also be changed or terminated if the guardian resigns, the person is no longer incapacitated, the ward or guardian dies, or the guardian becomes incapacitated. The death or incapacitation of a guardian does not restore competency to the ward.

D. Conservatorship:

1. Annually, each IPP Team will review the finance handling of the individual served and determine what restrictions are appropriate to protect the resources of the individual. The review will include currently existing conservatorships and/or the need to establish a conservator.
2. If the Team determines that a conservatorship is warranted, a suitable, responsible person must be identified. The priority for appointment is as follows:
 - a. A person already nominated by the incapacitated person as power of attorney, a durable power of attorney, or attorney
 - b. A conservator or trustee appointed by another court
 - c. An individual or corporation chosen by a protected person over the age of fourteen who is able to make a responsible choice
 - d. The spouse of a protected person
 - e. The parent of the protected person, or the person named in the parent's will
 - f. The adult child of the protected person
 - g. Any relative with whom the individual has lived for at least six years
 - h. A person nominated by the individual caring for the protected person or paying benefits to them
3. Once a suitable candidate has been selected, a petition must be filed with the court. The petition must include a general statement of the person's property and asset value, as well as an explanation as to why a conservator is necessary. The Team will request that a guardian ad litem be appointed to protect the individual's rights throughout the proceedings.

4. The court must determine that property and/or funds would be wasted unless protected for the ward's care, support, and welfare before appointing a conservator
5. The due process is the same as in establishing guardianship (see Section III.B.6-9). Teams will maintain an advocacy role to protect the rights of the individual throughout the court proceedings.
6. The court can:
 - a. Act to preserve the estate while conservatorship proceedings are pending
 - b. Choose not to directly appoint a conservator, but to arrange for transactions necessary for protecting the estate.
 - c. Appoint a "special conservator" who will conduct a specific transaction and then be discharged
 - d. Appoint a full conservator who will have control of the protected person's estate on an ongoing basis
7. Conservators may enter into a wide variety of transactions with the protected person's funds, including borrowing against the estate, buying, selling, investing, and employing persons to assist the individual. The conservator has a fiduciary responsibility to act in the best interest of the protected person.

Conservatorship should always allow the person to have access to an appropriate amount of personal spending money, as defined by the IPP Team.
8. Conservators must make reports to the court accounting for the estate as requested.

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