

CHAPTER 45

GUARDIANSHIP SERVICES

Authority

N.J.S.A. 30:1-12 and 30:4-165.4 et seq.

Source and Effective Date

R.2001 d.91, effective March 19, 2001.
See: 32 N.J.R. 3928(a), 33 N.J.R. 1001(a).

Executive Order No. 66(1978) Expiration Date

Chapter 45, Guardianship Services, expires on March 19, 2006.

Chapter Historical Note

Chapter 45, Guardianship Services, was adopted prior to September 1, 1969.

Chapter 45, Guardianship Services, was readopted as new rules by R.1983 d.391, effective September 19, 1983. See: 15 N.J.R. 1073(a), 15 N.J.R. 1581(a).

Pursuant to Executive Order No. 66(1978), Chapter 45, Guardianship Services, expired on September 19, 1988.

Chapter 45, Guardianship Services, was adopted as new rules by R.1990 d.76, effective February 20, 1990. See: 21 N.J.R. 607(a), 22 N.J.R. 653(b).

Pursuant to Executive Order No. 66(1978), Chapter 45, Guardianship Services, expired on February 20, 1995.

Chapter 45, Guardianship Services, was adopted as new rules by R.1995 d.572, effective November 6, 1995. See: 27 N.J.R. 2668(a), 27 N.J.R. 4310(a).

Pursuant to Executive Order No. 66(1978), Chapter 45, Guardianship Services, expired on November 6, 2000.

Chapter 45, Guardianship Services, was adopted as new rules by R.2001 d.91, effective March 19, 2001. See: 32 N.J.R. 3928(a), 33 N.J.R. 1001(a).

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SUBCHAPTER 1. GENERAL PROVISIONS

10:45-1.1 Authority

(a) The Department of Human Services is directed to provide comprehensive services, specifically including guardianship services, to eligible developmentally disabled persons, in order that they may be provided with adequate training, care and protection (see N.J.S.A. 30:4-165.1).

(b) The Division of Developmental Disabilities is directed to perform such services for adults who are incapacitated, for whom no guardian has been appointed, as would otherwise be rendered by a guardian of the person (see N.J.S.A. 30:4-165.5).

(c) The Commissioner of the Department of Human Services is mandated to make all reasonable and necessary provisions to insure the health, safety, welfare and earliest appropriate release of persons admitted to residential services for the developmentally disabled (see N.J.S.A. 30:4-25.7).

(d) The Bureau of Guardianship Services within the Division of Developmental Disabilities has been assigned the responsibility of providing guardianship services by the Division Director. Guardianship services are limited to guardianship of the person only and not property.

Case Notes

Guardianship under this chapter is entirely different from guardianship for purposes of the Division of Youth and Family Services regulations. In re: Guardianship Services Regulations, 198 N.J. Super. 132, 486 A.2d 888 (App.Div.1984), affirmed as modified 103 N.J. 619, 512 A.2d 453 (1986).

Regulatory language does not suggest a mandate for the Bureau of Guardianship Services to substitute its judgment for that of parents in critical decision making; agency left to develop appropriate hearing process to cover critical situations. In re: Promulgation of Guardianship Services Regulations, 103 N.J. 619, 512 A.2d 453 (1986).

10:45-1.2 Definitions

The following words and terms, as used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Bureau of Guardianship Services (BGS)” means the unit within the Division of Developmental Disabilities which has

the responsibility and authority to provide guardianship of the person services to individuals in need of such services.

"Commissioner" means the Commissioner of the Department of Human Services.

"Developmental disability" means a severe, chronic disability of a person which: (1) is attributable to a mental or physical impairment or combination of mental or physical impairments; (2) is manifest before age 22; (3) is likely to continue indefinitely; (4) results in substantial functional limitations in three or more of the following areas of major life activity, that is, self-care, receptive and expressive language, learning, mobility, self-direction and capacity for independent living or economic self-sufficiency; and (5) reflects the need for a combination and sequence of special interdisciplinary or generic care, treatment or other services which are of life-long or extended duration and are individually planned and coordinated. Developmental disability includes, but is not limited to, severe disabilities attributable to mental retardation, autism, cerebral palsy, epilepsy, spina bifida, and other neurological impairments where the above criteria are met. (see P.L. 1985, c.145).

"Director" means the Director of the Division of Developmental Disabilities.

"Division" means the Division of Developmental Disabilities.

"Functional or other services" means those services and programs in the Division which are available to provide the persons with developmental disabilities with education, training, rehabilitation, adjustment, treatment, care and protection. Functional or other services shall include residential care, case management, social supervision, and day programming.

"Functional service unit" means any of the following components of the Division: a Developmental Center, a Regional Office of Community Services, or the Bureau of Special Residential Services.

"Guardian" means a person or agency appointed by a court of competent jurisdiction or otherwise legally authorized and responsible to act on behalf of a minor or incapacitated adult to assure provision for the health, safety, and welfare of the individual and to protect his or her rights.

"Guardian ad litem" means a person appointed by a court to perform an extremely limited type of guardianship, namely to protect a child's or incapacitated adult's interest during a single instance of some form of court proceedings or litigation.

"Guardianship services" means those services and programs provided by the Division for the purpose of implementing its responsibility toward the individual with developmental disabilities, for whom it is performing the services of guardian of the person.

"Individual Habilitation Plan (IHP)" means a document that provides an evaluation of the capabilities and needs of an individual with developmental disabilities and sets forth clearly defined and measurable goals and behaviorally stated objectives describing an individualized program of care, training, treatment, and therapies designed to attain and/or maintain the physical, social, emotional, educational and vocational functioning of which the individual is presently or potentially capable. Specific contents of an IHP are elaborated in N.J.S.A. 30:6D-11.

"Limited guardian" means a person or agency appointed by a court of competent jurisdiction to make only those decisions for which an incapacitated person has been adjudicated to lack capacity.

"Mental retardation" means a state of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

SUBCHAPTER 2. ELIGIBILITY REQUIREMENTS FOR GUARDIANSHIP SERVICES

10:45-2.1 Eligibility requirements for adults

(a) An individual 18 years or older is eligible for guardianship services if he or she is receiving or has been formally determined by the Division to be eligible for functional or other services from the Division and has been:

1. Administratively determined to be in need of guardianship by the administrative head of the functional service unit, based upon an assessment and recommendation of a team of professional staff, and referred to BGS before April 12, 1985;
2. Adjudicated as an incapacitated person by a court of competent jurisdiction and have had BGS appointed by the court as guardian of the person; or
3. Adjudicated as an incapacitated person by a court of competent jurisdiction and has had BGS granted power of attorney by the appointed guardian of the person.

(b) Notwithstanding the provisions of (a) above, every person receiving guardianship services from BGS without prior judicial review will be reevaluated pursuant to N.J.S.A. 30:4-165.13 to determine whether the need for such services continues and, if so, application shall be made to a court of competent jurisdiction for appointment of a guardian of the person for that person.

10:45-2.2 Eligibility requirements for children

(a) An individual under the age of 18 years is eligible for guardianship services if he or she is receiving functional or other services from the Division, and:

1. Is without parent or guardian after the requirements of (b)2 below have been satisfied; or

2. Has a legal guardian of the person, who has granted a power of attorney to BGS to make personal decisions on behalf of the child.

(b) In the instance of a child determined eligible for guardianship services where no parent or guardian is deemed available, staff of the functional service unit shall verify such status by:

1. Documentation that the child's legal guardian(s) is(are) deceased and that there are no other relations or close family friends available to serve as guardian; or

2. Documentation that the following efforts to locate the child's guardian(s) have been unsuccessful:

i. Notice in the primary language of the guardian, if known, by regular mail and follow-up by certified mail, return receipt requested, to the guardian's last known address, with no response received within 45 days of forwarding the certified letter;

ii. Documented inquiry among any known relatives, friends and current or former employers of the guardian(s); and

iii. Documented inquiries, unless restricted by law, using the guardian's last known or suspected address, to the local post office, the Division of Motor Vehicles, and any social service and law enforcement agencies known to have had contact with the guardian(s) both in New Jersey and in other states. Failure to receive response to the inquiries within 45 days shall constitute a negative response.

3. The New Jersey Protection and Advocacy, Inc. shall be notified in writing by the BGS within 10 days of initiation, termination or change of guardianship services for a child whose parents are deemed unavailable.

Amended by R.1995 d.572, effective November 6, 1995.
See: 27 N.J.R. 2668(a), 27 N.J.R. 4310(a).

SUBCHAPTER 3. CONTINUATION OF ELIGIBILITY FOR GUARDIANSHIP SERVICES

10:45-3.1 Continuation of eligibility for adults

(a) Eligibility for guardianship services continues for an adult individual as long as:

1. He or she remains a recipient of functional or other services from the Division; and

2. None of the following has occurred:

i. A court order reversing a previous adjudication of incapacity and appointment of BGS as guardian;

ii. In the instance of an individual receiving guardianship services on the basis of determination of need for guardianship prior to April 12, 1985, a change of this status resulting from a review and re-evaluation of the IHP pursuant to N.J.A.C. 10:43; or

iii. A revocation of a power of attorney by the guardian, or a lapse of the time specified therein.

10:45-3.2 Continuation of eligibility for children

(a) Eligibility for guardianship services continues for a child as long as he or she:

1. Remains a recipient of functional or other services from the Division;

2. Remains under the age of 18 years. Prior to reaching the age of majority, an assessment shall be made as to the continuing need for a guardian as an adult, in accordance with the provisions of N.J.S.A. 30:4-165.4 et seq. and N.J.A.C. 10:43; and

3. Remains without a guardian, or there is power of attorney still in force designating BGS to act on the child's behalf.

i. In the instance of a child previously without a parent or guardian available, when a parent or appointed legal guardian who had been inaccessible again becomes available to exercise his or her role:

(1) If interim guardianship services are provided, guardianship services shall immediately and automatically cease with written notification to the parent or appointed guardian.

(2) If BGS has been appointed by a court as guardian, a termination or change of guardianship is required by the court.

(3) In the instance of the return of a parent or a guardian who is deemed by BGS to be unsuitable, BGS shall petition the court of competent jurisdiction for termination of the parent guardianship rights.

(4) If a power of attorney lapses or is revoked, BGS shall discontinue services as of the applicable date.

(b) A referral to the courts for appointment of a guardian shall be made within one year of the initiation of BGS guardianship services.

SUBCHAPTER 4. ROLE AND RESPONSIBILITIES OF BUREAU OF GUARDIANSHIP SERVICES

10:45-4.1 Distinct role of BGS staff

(a) BGS staff shall function distinctly and independently from functional service units in terms of their interrelation with individuals receiving services from the Division.

(b) BGS staff shall focus exclusively on the following:

1. Protective services;
2. Safeguarding individual rights;
3. Substitute decision-making;
4. Advocacy on behalf of the individual; and
5. Maximizing the individual's self-determination.

10:45-4.2 Functions and duties of BGS staff

(a) In order to exercise their role and responsibilities, for all individuals receiving guardianship services, BGS staff shall be knowledgeable and informed about individual status, program and progress by means of the following:

1. Direct contact: Individuals served should be visited at least annually, more often as necessary.
2. Interviews with staff, service providers, relatives and other involved parties;
3. Participation at case conferences, individual habilitation plan sessions and other meetings when feasible;
4. Review of records; or
5. Utilization of any other appropriate source of information.

(b) BGS staff shall be responsible to advocate for individuals served in areas including, but not limited to:

1. Placement in the least restrictive environment;
2. Programs and services appropriate to individual needs;
3. The exercise of individual rights; and
4. Self advocacy.

(c) BGS staff may give or withhold consent for proposed medical or dental procedures and behavior modification involving the use of Level III techniques as defined in "Levels of aversiveness" at N.J.A.C. 10:41-4.3. Such consent shall be premised upon:

1. Adequate information regarding the procedure, the risks involved, anticipated benefits, the possible alternatives and any experimental or irreversible aspects of the proposed procedure. (A second opinion may be requested.); and
2. Freedom from coercion by other parties.

(d) BGS staff may give or withhold consent for access to client records, release of confidential information and/or photographing individuals served consistent with the requirements of N.J.S.A. 30:4-23.4 governing confidentiality of client records.

(e) BGS staff may give or withhold approval for major changes of program or transfers.

(f) BGS staff may give or withhold approval of the IHP.

(g) Consent or approval as provided for in (c) through (f) above may be withheld if there is basis for an informed judgment by BGS staff that what has been proposed would not be in the individual's best interest or that the potential risks involved would outweigh any anticipated benefit.

(h) BGS staff shall make surrogate decisions on behalf of individuals receiving guardianship services, as delineated above under (c) through (f), only within the following parameters:

1. If the individual is receiving guardianship services on the basis of an administrative determination and referral to BGS prior to April 12, 1985, and no court review has yet transpired, the Individual Habilitation Plan developed in accordance with the provisions of N.J.S.A. 30:6D-10 shall include content addressing the individual's capacity to make decisions. BGS staff, in the course of providing guardianship services, shall give due consideration to the conclusions delineated in the most recent Individual Habilitation Plan relative to the individual's decision-making abilities.

2. If the individual has been adjudicated as an incapacitated person by a court of competent jurisdiction, BGS staff shall make decisions on the person's behalf in accordance with the provisions of the court order appointing BGS as guardian of the person.

(i) With respect to the decisions described under (c) through (f) above, BGS staff shall ascertain and consider those characteristics which define personal uniqueness and individuality, including, but not limited to, likes, dislikes, hopes, aspirations and fears. Moreover, BGS shall encourage the individual to express preferences and to participate in decision-making to the extent of his or her capability. Special care should be taken to ascertain the feelings of the individual whenever possible before making a decision.

Amended by R.1995 d.572, effective November 6, 1995.
See: 27 N.J.R. 2668(a), 27 N.J.R. 4310(a).

Case Notes

Procedure for resolution of differences of opinion between guardianship services staff and functional-service workers cited as an example of an agency-devised method for problem resolution. In re: Promulgation of Guardianship Services Regulations, 103 N.J. 619, 512 A.2d 453 (1986).

10:45-4.3 Duty to inform

Functional service unit staff shall inform BGS staff promptly and comprehensively regarding any significant life events, proposed program changes, or incidents involving individuals being served by BGS.

**SUBCHAPTER 5. LIMITATIONS OF AUTHORITY
BUREAU OF GUARDIANSHIP SERVICES**

Guardianship Services Regulations, 198 N.J.Super. 132, 486 A.2d 888 (App.Div.1984), affirmed as modified 103 N.J. 619, 512 A.2d 453 (1986).

10:45-5.1 Guardianship of person

The responsibility and authority of BGS shall be restricted to guardianship of the person only, and not of property, pursuant to N.J.S.A. 30:4-165.12. BGS' role as provider of guardianship of the person services shall be exercised according to the guidelines and within the parameters described under N.J.A.C. 10:45-4.2(h) and (i).

Case Notes

Guardianship role limited to guardianship of person, not property; instances where court-appointed guardian ad litem required. In re:

10:45-5.2 Procedures requiring court approval

(a) In accord with N.J.S.A. 30:6D-5(a), BGS staff shall not consent to the following procedures but may, with the approval of the Chief of the Bureau, refer the matter to a court of competent jurisdiction for appointment of a guardian ad litem:

1. Shock treatment;
2. Psychosurgery;

3. Sterilization; or
4. Medical, behavioral or pharmacological research as experimentation.

10:45-5.3 Guardianship services for a child whose parent or guardian is deemed unavailable

(a) Guardianship services initiated on the basis of the procedures delineated in N.J.A.C. 10:45-2.2(b) may be provided on an interim basis for a maximum of one year without judicial appointment.

(b) No later than 10 months after the commencement of guardianship services, petition shall be made to a court of competent jurisdiction pursuant to N.J.S.A. 30:4-165.1 et seq. for the appointment of a guardian, unless the parent(s) or appointed guardian shall have reassumed their role under the provision of N.J.A.C. 10:45-3.2(a)3i.

(c) During the course of providing interim guardianship services, BGS shall render consent in certain critical areas of decision-making only after an administrative review procedure shall have been conducted.

1. Critical areas of decision-making requiring administrative review shall include the following:

- i. A transfer which involves a change of the individual's place of residence;
- ii. A medical procedure which entails major, irrevocable consequences including, but not limited to, amputation of a limb, abortion, removal or transplant of a vital organ; and
- iii. A major change in the individual's IHP, including but not limited to implementation of a behavior modification program involving the use of Level III techniques as defined in "Levels of aversiveness" at N.J.A.C. 10:41-4.3.

2. When the need for consent in a critical area of decision-making arises, BGS staff shall renew attempts to locate the child's parent(s), unless the child is orphaned. The extent and time-frame for these efforts shall be proportionate to the emergent nature of the situation, but shall be documented. Within one working day of reaching conclusion that the parent(s) is/are unavailable, the matter shall be referred to the Chief of BGS at which time notice shall be given to the New Jersey Protection and Advocacy, Inc.

3. Within one working day of receipt of the referral, the Chief, BGS, shall request assignment of an Administrative Review Officer by the Director. The Administra-

tive Review Officer shall not have any role of responsibility in a functional service unit of the Division.

4. The Administrative Review Officer shall arrange and schedule an administrative review as soon as possible, but no later than eight working days after his/her designation.

i. Participants shall be a representative of the New Jersey Protection and Advocacy, Inc., a representative of BGS and, at their option, witnesses for either party.

ii. The representative of BGS shall present evidence relating to the unavailability of the parent(s) and the appropriateness of the proposed decision in the best interests of the child.

iii. The representative of the New Jersey Protection and Advocacy, Inc. shall define that office's position, either of concurrence or disagreement with the proposed action of BGS. In either case, the basis for the New Jersey Protection and Advocacy, Inc.'s position regarding the issue shall also be defined and supported by evidence where appropriate.

iv. After hearing the evidence presented by both parties, the Administrative Review Officer shall render a final decision either to uphold or to reverse the proposed decision of BGS. The final decision shall be based upon clear and convincing evidence. The final decision shall be communicated to the New Jersey Protection and Advocacy, Inc. and BGS, in writing, no later than five working days after the hearing. The final decision shall clearly articulate the positions of the parties, what evidence was presented and considered, and how the determination was reached.

v. A tape recording of the Administrative Review shall be maintained by the Administrative Review Officer for a minimum period of one year.

5. In any situation of extreme medical emergency, where any delay of decision-making on behalf of the child would pose a serious threat to the child's life or health, BGS shall render a decision without an administrative review. The existence of an extreme medical emergency must be certified in writing by a licensed physician. The physician's certification shall be maintained in the child's client record.

6. The New Jersey Protection and Advocacy, Inc. shall be informed of the decision of BGS to (c)5 above as soon as possible.

Amended by R.1995 d.572, effective November 6, 1995.
See: 27 N.J.R. 2668(a), 27 N.J.R. 4310(a).