

CHAPTER 43

DETERMINATION OF NEED FOR A GUARDIAN

Authority

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

Source and Effective Date

R.1994 d.611, effective December 19, 1994.
See: 26 N.J.R. 2838(a), 26 N.J.R. 3341(a), 26 N.J.R. 5020(a).

Executive Order No. 66(1978) Expiration Date

Chapter 43, Determination of Need for a Guardian, expires on December 19, 1999.

Chapter Historical Note

Chapter 43, Determination of Need for a Guardian, was filed and became effective prior to September 1, 1969. Amendments were filed and became effective September 18, 1978 as R.1978 d.332. See: 10 N.J.R. 284(a), 10 N.J.R. 444(d). A readoption was filed and became effective September 1, 1983, with amendments effective September 19, 1983, as R.1983 d.390. See: 15 N.J.R. 1111(a), 15 N.J.R. 1581(a). Chapter 43 was repealed and replaced with new rules by R.1989 d.430, effective August 21, 1989. See: 20 N.J.R. 2850(a), 21 N.J.R. 2501(a).

Pursuant to Executive Order No. 66(1978), Chapter 43 expired on August 21, 1994, and subsequently was adopted as new rules by R.1994 d.611. See: Source and Effective Date. See, also, section annotations.

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SUBCHAPTER 1. GENERAL PROVISIONS

10:43-1.1 Philosophy

An adult individual with developmental disabilities may or may not require appointment of a guardian to act on his or her behalf. A conclusion that a guardian is required shall be founded upon a sound clinical basis and shall be regularly reviewed, in accordance with this chapter.

10:43-1.2 Authority; scope of services

(a) Pursuant to N.J.S.A. 30:4-165.5, the Commissioner of the Department of Human Services shall evaluate each minor admitted to functional or other services provided by the Division of Developmental Disabilities as he or she approaches adulthood to determine if it appears that such person will need a guardian on attainment of his or her majority.

(b) The Commissioner is also required to ascertain whether those individuals, who are already 18 years old at the time of their admission into functional or other services, are in need of guardian.

10:43-1.3 Definitions

The following words and terms shall, for the purposes of this chapter, have the meanings contained in this section unless the text clearly indicates otherwise.

“Adaptive behavior” means the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group (see N.J.A.C. 10:43-2.2).

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

responsibility and authority to provide guardian of the person services to individuals in need of same.

“Clinical and social factors” means conditions, disabilities, impairments of a mental, psychological, and/or physical nature which diminish capacity to make judgments and decisions or to communicate decisions to others in any way, even though the use of an augmentative communication device.

“Commissioner” means the Commissioner of the Department of Human Services.

“Developmental disability” means a severe, chronic disability of a person which is attributable to a mental or physical impairment or combination of mental or physical impairments; is manifest before age 22; is likely to continue indefinitely; 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 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 N.J.S.A. 30:6D-3(a)).

“Division” means the Division of Developmental Disabilities.

“Functional or other services” means those services and programs in the Division which are available to provide persons with developmental disabilities with education, training, rehabilitation, adjustment, treatment, care and protection. Functional or other services 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 Special Residential Services.

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

“Guardianship services” means those services and programs provided by the Division of Developmental Disabilities 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 found in N.J.S.A. 30:6D-11.

“Intelligence quotient (I.Q.)” means a number held to express the relative level of intelligence of a person in terms of scores on standardized intelligence tests.

“Measured intelligence” means the level of an individual’s cognitive functioning as measured by a standard intelligence test.

“Mental incompetence” means the state or condition of a person who is impaired by reason of physical disability, mental illness, or mental deficiency to the extent that he or she lacks sufficient capacity to govern himself or herself and manage his or her affairs.

“Mental retardation” means a state of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period (see N.J.S.A. 30:4-23).

Amended by R.1994 d.611, effective December 19, 1994.
See: 26 N.J.R. 2838(a), 26 N.J.R. 3341(a), 26 N.J.R. 5020(a).

10:43-1.4 Scope; applicability

(a) The provisions of this chapter shall apply to persons who have been admitted to functional or other services for 30 or more continuous days or who have been determined eligible and placed on a waiting list for such services.

(b) The Division shall initiate action for the appointment of a guardian of the person only.

SUBCHAPTER 2. GUIDELINES FOR GUARDIANSHIP DETERMINATIONS

10:43-2.1 Approach

(a) Not every individual with developmental disabilities needs a guardian. Only a person with developmental disabilities who suffers from significant chronic functional impairment such as lack of comprehension of concepts related to personal care, health care, medical treatment; inability to understand money as a medium of exchange; and/or inability to use public transportation to such a degree that he or she either lacks the cognitive capacity to make judgments for himself or herself or to communicate decisions in any way may be determined in need of a guardian.

(b) The conclusion that an individual needs a guardian shall be based upon an assessment by a psychologist or a physician that the individual's ability to receive and evaluate information effectively and/or to communicate decisions is impaired to such an extent that he or she lacks the capacity to meet essential requirements for his or her health, safety, and/or well-being.

Case Notes

Party challenging present status of woman who lacked capacity to decide where to live and who resided with other party had burden of proving that change in residence would be in woman's best interest. Matter of M.R., 135 N.J. 155, 638 A.2d 1274 (1994).

Burden of proving developmentally disabled woman's incapacity to decide with which of her divorced parents she wished to reside; person who challenged her capacity to decide. Matter of M.R., 135 N.J. 155, 638 A.2d 1274 (1994).

10:43-2.2 Factors to be addressed

(a) The functional service unit shall address the following basic factors in determining a person's need for a guardian. Each of these factors may lead to a clinical judgment by the functional service unit that the individual lacks the capacity to govern himself or herself and manage his or her own affairs and consequently is in need of a guardian:

1. Measured intelligence, determined by a standardized intelligence test, or clinical estimate of intellectual functioning;
2. Deficits in adaptive behavior with behavioral description; and/or
3. Clinical and social factors.

SUBCHAPTER 3. PROCEDURES FOR DETERMINATION OF GUARDIANSHIP NEED

10:43-3.1 Time for guardianship need assessment

At least six and no more than 18 months prior to the eighteenth birthday of an individual already receiving functional or other services from the Division, the administrative head of the functional service unit shall ensure that an assessment is made as to whether an individual is in need of a guardian. If the individual is determined to be eligible for services in accordance with N.J.A.C. 10:46 after having attained the age of 17, the assessment regarding the need for a guardian shall be completed no later than 30 days after the date of the eligibility determination.

10:43-3.2 Initial screening

(a) The initial assessment as to whether an individual may be in need of a guardian shall be conducted according to the following guidelines:

1. Each individual is presumed competent and not in need of a guardian unless there is significant functional impairment which substantially limits the individual's ability to make decisions and/or to communicate decisions in any way.

2. Depending upon the individual's level of functioning, the assessment may be limited to a simple, informal screening, or it may further involve a formal clinical evaluation.

- i. If a screening, consisting of a review of available records and a personal interview by one or more professional staff, such as an intake worker, case manager, or habilitation plan coordinator, leads to a reasonable conclusion that the individual is obviously competent, a written statement to that effect shall be filed in the individual's confidential record.
- ii. If the screening raises a question about competency, the matter shall be referred for clinical evaluation of the possible need for a guardian.

10:43-3.3 Clinical evaluation

(a) When a clinical evaluation regarding the need for a guardian is determined necessary according to N.J.A.C. 10:43-3.2(a)2ii above, the following criteria are applicable:

1. A clinical evaluation shall consist of one or both of the following:
 - i. Review of clinical data; and/or
 - ii. Examination of the client.
2. An individual whose measured intelligence falls within the profoundly or severely retarded range, or who is clinically estimated by a qualified psychologist or physician to be functioning intellectually within this range, may be determined in need of a guardian on the basis of this clinical measurement or estimate alone.
3. An individual whose measured intelligence or estimated intellectual functioning level is moderately retarded, mildly retarded, or normal may be determined in need of a guardian only if there is significant impairment of adaptive behavior, or persistent clinical and social factors, or both.

(b) If a clinical evaluation has been conducted, the findings of the psychologist or physician, together with a summary of the clinical data and other information upon which it is based, shall be provided to the administrative head of the functional service unit.

1. If the administrative head of the functional service unit concurs with a clinical finding that there is no need for a guardian, the administrative head shall sign a statement to that effect, which shall be filed in the individual's confidential record.
2. If the administrative head of the functional service unit concurs with a clinical finding that there is a need for a guardian, he or she shall initiate the process towards adjudication of incompetence and appointment of a guardian.
3. If the administrative head of the functional service unit disagrees with a clinical finding regarding the need for a guardian, he or she shall direct that a reevaluation be conducted.

SUBCHAPTER 4. COMMUNICATION
REGARDING GUARDIANSHIP NEED

10:43-4.1 Communication with client and family

(a) Within 30 days after concurrence by the administrative head of the functional service unit with a clinical evaluation that an individual does or does not need a guardian, functional service unit staff shall notify the individual of the determination. The determination and the ramifications of guardianship shall be explained at the time of notification. This explanation shall be communicated consistent with the individual's limitations and capabilities. Where appropriate, based upon the individual's limitations and capabilities, the explanation shall be made in writing. Notification and explanation shall be documented in the individual's record.

(b) The individual's family, or, in their absence, any other interested party reflected in the functional service unit's record, shall also be notified regarding the determination concerning the individual's need for a guardian. Such notice shall be made in writing within 30 days of concurrence by the administrative head of the functional service unit.

1. If the determination is that the individual is in need of a guardian, the written communication to the family or other interested parties shall relate the following options, one of which may be selected by the recipient and indicated on a standardized reply form to be supplied by the Division:

i. The recipient wishes to be designated guardian of the person at no personal expense for the legal costs, as the court action will be processed by the Division of Developmental Disabilities.

ii. The recipient elects to pursue appointment as guardian privately, securing the services of a personal attorney at his or her own expense. This option shall be exercised if guardianship of property as well as person is being sought.

iii. The recipient is not able or willing to serve as guardian of the person, but proposes another prospective appointee. The latter's name, address, telephone number, relationship to the alleged incompetent, and signature of proposed appointee, attesting to his or her willingness to be designated guardian of the person, shall be provided by the recipient to the functional service unit staff.

iv. The recipient is not able or willing to serve as guardian of the person; he or she accepts proposed appointment of the Bureau of Guardianship Services as guardian of the person of the alleged incompetent.

2. The family or other interested party shall be instructed to return the reply form within 30 days. If there is no response within 30 days, a telephone call shall be attempted by a staff member of the functional service unit to the family or other interested party. If the matter is still unresolved, a second letter shall be sent by the functional service unit via certified mail. This second communication shall apprise the family or other interested party that the absence of any response within an additional 30 calendar days from the date of the letter shall occasion an application to Superior Court for the appointment of the Bureau of Guardianship Services as guardian of the person.

3. If the Division's conclusion is that the individual is not in need of a guardian, the functional service unit staff shall notify the family or other interested party. The written communication shall instruct the recipient to contact the functional service unit within 30 calendar days if he or she wishes to discuss the matter.

i. If a family member or interested party disagrees with the determination of the functional service unit, an informal meeting shall be arranged within 20 working days. Participants may include the disagreeing party and his or her representative, if desired; appropriate staff of the functional service unit; and the individual in question. This informal meeting is intended to enable the parties to reach agreement on the need for a guardian.

ii. A written summary of the results of the meeting shall be forwarded to all participants within 20 working days by the functional service unit. If there is continuing disagreement, the summary shall advise of the option of initiating a court action for the purpose of requesting appointment of a guardian. The summary shall also advise that the Division may communicate its findings to the court.

10:43-4.2 (Reserved)

Repealed by R.1994 d.611, effective December 19, 1994.
See: 26 N.J.R. 2838(a), 26 N.J.R. 3341(a), 26 N.J.R. 5020(a).

Section was "Communication with the Department of the Public Advocate".

SUBCHAPTER 5. APPOINTMENT OF GUARDIAN

10:43-5.1 Referral for court appointment of a guardian

(a) When the administrative head of a functional service unit concurs with a clinical finding that an individual is in need of a guardian in accordance with N.J.A.C. 10:43-4.1, and the process of identifying the recommended guardian has been completed, the administrative head shall refer the matter to the Chief, Bureau of Guardianship Services. The referral shall include:

1. An affidavit by the administrative head of the functional service unit attesting to the individual's need for a guardian;

2. An affidavit by a psychologist, who is either employed by the Division or licensed to practice in New Jersey, or by a practicing physician. The affidavit shall include information as to the clinical basis for the psychologist's or physician's professional judgment that the individual is unable to govern himself or herself or manage his or her own affairs. The affidavit shall include a statement relating a specific date when the psychologist or physician personally examined the individual;

3. A copy of the most current psychological evaluation report or other clinical examination report upon which the psychologist's or physician's affidavit is based. This report shall be no more than three years old;

4. Information and documentation regarding the proposed guardian, which shall consist of any of the following.

i. The original signed and dated reply form (see N.J.A.C. 10:43-4.1 (b)1) from the family member or other interested party indicating his or her intention relative to being appointed guardian;

ii. Copies of letters and certified mail receipts when there has been no response from the family or other interested party. An affidavit by a Division staff person attesting to the communication attempts and lack of any response shall also be developed and forwarded; or

iii. A detailed documentation of facts, events, and other information to support a conclusion by the functional service unit that a family member or other interested party, who has indicated a desire to be appointed guardian, would be unsuitable;

5. Names and addresses of immediate family members to receive notice of the guardianship action;

6. Identification of the county of settlement for the individual, if applicable;

7. A summary of the individual's current functioning and social history; and

8. If the individual is placed in a residential facility outside New Jersey, the last known address of the individual in New Jersey.

10:43-5.2 Procedure for referral to the Attorney General

Upon receipt of the referral package, the Chief, Bureau of Guardianship Services, shall review material for completeness, as the Commissioner's designated agent in accordance with N.J.S.A. 30:4-165.5, shall sign a Verified Complaint and shall refer the matter to the Office of the Attorney General for the purpose of bringing a guardianship action in court pursuant to R. 4:83-10.

SUBCHAPTER 6. INDIVIDUALS RECEIVING GUARDIANSHIP SERVICES WITHOUT COURT APPOINTMENT

10:43-6.1 Procedures for individuals receiving guardianship services without court appointment

(a) Persons who have been receiving guardianship services from the Division without prior judicial review shall be evaluated regarding the continuing need for a guardian, in accordance with the provision of N.J.S.A. 30:4-165.13. The scheduling of these evaluations shall be coordinated with the functional service unit by the Bureau of Guardianship Services.

(b) The same guidelines and criteria shall be applied as are delineated under N.J.A.C. 10:43-2 and 10:43-3.3.

(c) When a conclusion has been reached that an individual does or does not need a guardian, the matter shall then proceed in the same manner as delineated above under N.J.A.C. 10:43-4 and, except that the communication with the family or other party regarding their interest and ability to serve as guardian shall be the responsibility of the Bureau of Guardianship Services.

SUBCHAPTER 7. APPLICATION BY A PARTY OTHER THAN THE DIVISION FOR APPOINTMENT OF A GUARDIAN

10:43-7.1 Procedures

(a) As provided in N.J.S.A. 30:4-165.7, if a family member or other interested party initiates legal action for the appointment of a guardian, and if the functional service unit agrees that the individual is in need of a guardian:

1. The administrative head of the functional service unit shall provide upon request within 15 working days an affidavit attesting to the individual's need for a guardian. The affidavit may also contain content addressing whether or not the functional service unit supports appointment of the proposed guardian.

2. The affidavit of a physician or licensed psychologist shall be arranged by the party filing the guardianship complaint. The standardized format developed by the Division for this affidavit may be made available for this purpose. According to availability of resources, the administrative head of the functional service unit may upon request and, at his or her discretion, direct that the affidavit be completed by a Division psychologist.

(b) If a family member or other interested party initiates legal action for the appointment of a guardian, and if the functional service unit does not agree that the individual is in need of a guardian:

1. No affidavits relative to the issue of guardianship shall be completed by the functional service unit. Instead, the administrative head of the functional service unit shall complete and forward to the applicant for guardianship a copy of the statement signed by the administrative head of the functional service unit that the individual is not considered to be in need of a guardian.

2. Within 15 working days after the administrative head receives a request for an affidavit, the administrative head shall notify the family or interested party and give them an opportunity to discuss the guardianship application with appropriate staff. This meeting shall be scheduled within 30 days of a request by the family or interested party.

(c) If a complaint has been filed in Superior Court by a family member or other interested party for a judgment designating a guardian, a copy of the moving papers shall be provided by the filer to the administrative head of the functional service unit within 10 days of filing.

(d) If the administrative head of the functional service unit ascertains that a guardianship action is being pursued even though the functional service unit disagrees that the individual is in need of a guardian or if the functional service unit does not support the appointment of the proposed guardian, he or she shall notify the Chief, Bureau of Guardianship Services. The Chief, Bureau of Guardianship Services, shall determine whether legal action should be initiated.

Amended by R.1991 d.5, effective January 7, 1991.
See: 22 N.J.R. 2671(a), 23 N.J.R. 62(a).

Clarified the role of the Division when it does not support the appointment of a guardian as proposed by a party outside the Division.

SUBCHAPTER 8. ADDRESSING SUITABILITY OF PROSPECTIVE GUARDIAN

10:43-8.1 Procedure for questioning prospective guardian suitability

(a) If the functional service unit or the Bureau of Guardianship Services, as applicable, is informed pursuant to N.J.A.C. 10:43-4.1(b)i or ii or any other method, that a family member or other interested party wishes to be appointed guardian, and conclusion is reached by the staff of the functional service unit that the prospective guardian may not be suitable:

1. The Chief, Bureau of Guardianship Services, shall be notified by applicable staff.

2. After consultation with the Chief, Bureau of Guardianship Services, the functional service unit staff may attempt to resolve the matter informally.

3. If attempts at informal resolution are unsuccessful, the administrative head of the functional service unit shall then communicate in writing with the person deemed unsuitable to be the individual's prospective guardian, conveying the Division's intention to recommend that an alternative guardian be appointed. This same correspondence shall clarify the recipient's right to contest the Division's position in a court hearing (see N.J.S.A. 30:4-165.13).

(b) If the functional service unit has some question about the suitability of a prospective guardian, this question shall be communicated in writing to the attorney appointed by the court to represent the alleged incompetent in accord with the provisions of N.J.S.A. 30:4-165.13. All attempts at informal resolution and their outcome shall be documented in the client record.

SUBCHAPTER 9. REVIEW OF GUARDIANSHIP STATUS

10:43-9.1 Procedure

As a part of the annual Individual Habilitation Plan process for each adult with a guardian or receiving guardianship services, the functional service unit shall review the continuing appropriateness of the individual's status with respect to guardianship. A recommendation for a change in guardianship status shall be supported by a clinical evaluation.

10:43-9.2 Individual receiving guardianship services without court appointment; staff review of guardianship

(a) If a determination is reached by the IHP review that the individual continues to require guardianship, this finding shall be noted in the individual's record and the Bureau of Guardianship Services informed within 30 days.

(b) If determination is reached by the IHP review that the individual is no longer in need of guardianship, this finding shall be communicated to the administrative head of the functional service unit. If the latter concurs with the finding, he or she shall sign a statement to that effect. The Bureau of Guardianship Services shall be notified and, if in agreement, written notification of this finding shall be provided to the client and to the client's family.

1. If all parties are in agreement, the Bureau of Guardianship Services shall terminate guardianship services immediately. This disposition shall be communicated to all parties within 30 days with an effective date of termination of guardianship services; or