

CHAPTER 43
GUARDIANSHIP: NEED, APPOINTMENT,
CONTINUITY

Authority

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

Source and Effective Date

R.2008 d.107, effective May 5, 2008.
 See: 39 N.J.R. 1382(a), 40 N.J.R. 2270(c).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 43, Guardianship: Need, Appointment, Continuity, expires on May 5, 2015. See: 43 N.J.R. 1203(a).

Chapter Historical Note

Chapter 43, Determination of Need for a Guardian, was filed and became effective prior to September 1, 1969.

Pursuant to Executive Order No. 66(1978), Chapter 43, Determination of Need for a Guardian, was readopted as R.1983 d.390, effective September 1, 1983. See: 15 N.J.R. 1111(a), 15 N.J.R. 1581(a).

Chapter 43, Determination of Need for a Guardian, was repealed and Chapter 43, Determination of Need for a Guardian, was adopted as new rules by R.1989 d.430, effective August 21, 1989.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.

Chapter 43, Determination of Need for a Guardian, was adopted as new rules 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). Pursuant to Executive Order No. 66(1978), Chapter 43 expired on December 19, 1999.

Chapter 43, Determination of Need for a Guardian, was adopted as new rules by R.2000 d.131, effective March 20, 2000. See: 31 N.J.R. 3957(a), 32 N.J.R. 1017(a). Chapter 43, Determination of Need for a Guardian, expired on March 20, 2005.

Chapter 43, Guardianship: Need, Appointment, Continuity, was adopted as new rules by R.2008 d.107, effective May 5, 2008. See: Source and Effective Date.

Subchapter 3, Guidelines for Guardianship Assessment, was renamed Petition for Guardianship by R.2010 d.280, effective December 6, 2010. See: 42 N.J.R. 1288(a), 42 N.J.R. 2954(b).

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SUBCHAPTER 1. GENERAL PROVISIONS

10:43-1.1 Philosophy

(a) In addressing the issue of an individual’s potential need for a guardian, the Division shall acknowledge and take into account the following considerations:

1. 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 N.J.A.C. 10:43-8.1;

2. Guardianship is the removal of a person’s fundamental right of self-determination and, therefore, shall be a solution of last resort. The staff of the Division of Developmental Disabilities shall make efforts to seek solutions that are the least restrictive and intrusive to a person’s liberty and that preserve to the maximum extent possible the individual’s autonomy while providing the needed protections. Restricting a person’s decision-making authority shall be limited to only those areas in which the person has demonstrated a lack of capacity as determined by a clinical assessment;

3. The ability to make decisions depends upon the complexity of the decisions to be made and the potential consequences of those decisions. All decisions are not complex, nor are all decisions simple. Most of the daily decisions that people make do not require a high degree of

abstract thinking. They are about making everyday choices that relate to their immediate needs;

4. Decision-making is a continuum of reasoning ability from a simple preference to a choice between alternatives (often defined by others) to weighing pros and cons, risks and benefits and anticipating possible consequences. A person moves back and forth along this continuum relative to the demands of the decision to be made;

5. Restricting a person's right to make decisions also may restrict the opportunities to develop decision-making skills. The ability to choose is expressed in many ways. It is a skill that is difficult to acquire without practice and difficult to express without opportunity. In order for an individual to learn to make decisions, he or she needs real opportunities to make decisions with real consequences. Taking away a person's right to make decisions further limits that person's opportunity to acquire decision-making skills;

6. Decisions may be expressed by verbal or non-verbal language, written communication or behavioral action; and

7. Guardianship is not appropriate for those individuals who are deemed capable of making and expressing all of their own decisions. Limited guardianship is appropriate for those individuals who are deemed capable of making and expressing some, but not all, decisions. General guardianship is appropriate only for those individuals who are deemed incapable of making or expressing any decisions.

10:43-1.2 Authority

(a) Pursuant to N.J.S.A. 30:4-165.1, the Commissioner of the Department of Human Services shall provide comprehensive services, in order that eligible persons with developmental disabilities may be provided with adequate training, care and protection.

(b) Pursuant to N.J.S.A. 30:4-165.5, the Commissioner of the Department of Human Services shall evaluate each minor admitted to Division services provided by the Division of Developmental Disabilities as he or she approaches adulthood to assess the potential need for a guardian on attainment of his or her age of majority.

(c) The Commissioner is also required pursuant to N.J.S.A. 30:4-165.5, to ascertain whether individuals, who are already 18 years old at the time of their admission into services, are in need of a guardian.

(d) Pursuant to N.J.S.A. 30:4-165.7, the Commissioner or any parent, spouse, relative, or interested party, on behalf of a person assessed to be in need of a guardian who is receiving Division services and is over 18 years of age, may file a complaint with the Superior Court for a judgment appointing a guardian.

(e) Pursuant to N.J.S.A. 30:4-165.12, the Commissioner can only serve as guardian of the person. The Commissioner

shall file a complaint for guardianship of the person only and not for guardianship of property on behalf of an individual receiving Division services.

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 functioning” 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 measured by a standardized assessment.

“Bureau of Guardianship Services” or “BGS” means the unit within the Department of Human Services that the Commissioner has designated to exercise the Commissioner's responsibility and authority to provide guardian of the person services to individuals in need of such services.

“Capacity” means the ability to employ the appropriate reasoning relative to the demands of the decisions to be made. An individual may have capacity for decision-making in some areas of life, but not for others, or for some decisions within an area of life, but not all.

“Caregiver” includes, but is not limited to, direct support professional, direct care staff and home health aides.

“Choice” means reasoning ability in which a selection of alternatives (either/or) is made, based upon a subjective feeling, relating to an immediate need. Others may define the alternatives.

“Clear and convincing evidence” is a legal standard that means evidence that is so clear, direct, weighty and convincing as to establish, without hesitancy, the precise facts in issue.

“Clinical assessment” means a comprehensive evaluation of a person's decision-making abilities and need for guardianship that meets the standards in N.J.A.C. 10:43-3.3.

“Clinical interview” means an interview, conducted by a clinician, with the alleged incapacitated person that focuses on the person's rights, needs, strengths, abilities and history of opportunities for decision-making and problem-solving.

“Clinician” means a physician licensed to practice pursuant to N.J.S.A. 45:9-1 et seq., a psychologist licensed to practice pursuant to N.J.S.A. 45:14B-2 et seq. or a person employed by the Division of Developmental Disabilities pursuant to N.J.S.A. 45:14B-2 et seq.

“Closely related person” means such individuals with or without legal or genetic relationship, shared household or familial affiliation known to the Division as being involved and interested in the welfare and best interests of the individual receiving services.