

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.2000 d.131, effective March 20, 2000.
See: 31 N.J.R. 3957(a), 32 N.J.R. 1017(a).

Executive Order No. 66(1978) Expiration Date

Chapter 43, Determination for Need of a Guardian, expires on March 20, 2005.

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Chapter 43, Determination of Need for a Guardian, was repealed and Chapter 43, Determination of Need for a Guardian, was adopted as new rules by R.1989 d.430, effective August 21, 1989.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

CHAPTER TABLE OF CONTENTS

SUBCHAPTER 1. GENERAL PROVISIONS

- 10:43-1.1 Philosophy
- 10:43-1.2 Authority; scope of services
- 10:43-1.3 Definitions
- 10:43-1.4 Scope; applicability

SUBCHAPTER 2. PROCEDURES FOR DETERMINATION OF GUARDIANSHIP NEED

- 10:43-2.1 Time for examination of need for guardianship
- 10:43-2.2 Initial examination

SUBCHAPTER 3. GUIDELINES FOR GUARDIANSHIP DETERMINATIONS

- 10:43-3.1 Approach
- 10:43-3.2 Factors to be addressed
- 10:43-3.3 Clinical assessment

SUBCHAPTER 4. COMMUNICATION REGARDING GUARDIANSHIP NEED

- 10:43-4.1 Communication with client and family
- 10:43-4.2 (Reserved)

SUBCHAPTER 5. APPOINTMENT OF GUARDIAN

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

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

SUBCHAPTER 6. INDIVIDUALS RECEIVING GUARDIANSHIP SERVICES WITHOUT COURT APPOINTMENT

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

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

10:43-7.1 Procedures

SUBCHAPTER 8. ADDRESSING SUITABILITY OF PROSPECTIVE GUARDIAN

10:43-8.1 Procedure for questioning prospective guardian suitability

SUBCHAPTER 9. REVIEW OF GUARDIANSHIP STATUS

- 10:43-9.1 Procedure
- 10:43-9.2 Individual receiving guardianship services without court appointment; staff review of guardianship
- 10:43-9.3 Individual who has a court-appointed guardian; staff review of guardianship
- 10:43-9.4 Special review

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 this chapter.
2. Guardianship is the removal of a person's fundamental constitutional right of self-determination and, therefore, shall be a solution of last resort to a problem for which someone needs help. 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 life 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.
3. The ability to make decisions depends upon the complexity of the decision 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. 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 limits that person's capacity.

5. 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. Plenary guardianship is appropriate only for those individuals who are deemed incapable of making or expressing any decisions. Even in the instance of plenary guardianship, the individual's ability to state choices and/or preferences, as well as to participate in the decision-making process to the extent of his or her capabilities, shall be duly respected by the guardian.

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. 10:43-3.2).

"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.

"Capacity" means an individual's level of reasoning expressed as preference, choice or decision relative to the demands of various areas of daily life.

"Caregiver" includes, but is not limited to, direct care personnel, 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" 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 report based upon the integration of findings.

"Clinical interview" means an interview, conducted by a clinician, with the alleged incapacitated person which 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 psychologist employed by the Division of Developmental Disabilities pursuant to N.J.S.A. 45:14B-2 et seq.

"Collateral interview" means any interview with family, supportive personnel, caregivers and friends which focuses on the alleged incapacitated person's experiences and opportunities for decision-making. The data provides comparison on skills performed in different environments and varying perspectives of the interviewees.

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

"Decision" means reasoning ability that begins with a subjective feeling, moves beyond the immediate need and requires abstract reasoning which is defined as the ability to identify the relevant factors to be considered, the ability to weigh the pros and cons and the risks and benefits, and the ability to anticipate possible outcomes.

"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.

“Examination” means an initial screening conducted through the intake process or the Individual Habilitation Plan process to reach a preliminary finding regarding the need for a guardian.

“Family” means spouse, children, parents and siblings of the individual alleged to be in need of a guardian. By extension, “family” may also include less closely related persons known to the Division as being involved and interested in the welfare and best interests of the individual receiving services.

“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 or a Regional Office of Community 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.

“Incapacitated person” means an individual who is unable to make decisions and manage his or her affairs to the extent that he or she requires a guardian to make some or all decisions on his or her behalf.

“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.

“Integration of findings” means a compilation of data gathered from clinical interviews, collateral interviews and standardized tests that is interpreted by the clinician and states a conclusion.

“Less restrictive alternatives” means mechanisms other than guardianship that impose less intrusive burdens upon an individual’s exercise of self-direction, such as through the use of powers of attorney, health care representatives, advocates or case managers.

“Limited guardian” means someone who is appointed by a court of competent jurisdiction to make only those decisions for which an incapacitated person has been adjudicated to lack capacity.

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

“Plenary guardian” means someone who is appointed by a court of competent jurisdiction to make all decisions in a person’s life.

“Preference” means reasoning ability that is based solely upon a basic like or dislike, or a subjective feeling.

“Significant chronic functional impairment” means that an individual lacks cognitive and/or adaptive capacities which substantially limits his or her ability to make decisions for himself or herself or to communicate, in any way, decisions to others.

“Supportive personnel” includes but is not limited to case managers, group home managers, sponsors, program staff, employees, teachers, counselors and/or therapists.

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. PROCEDURES FOR DETERMINATION OF GUARDIANSHIP NEED

10:43-2.1 Time for examination of need for guardianship

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 examination is made to reach at least a preliminary finding as to whether an individual appears to be 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 18, the examination regarding the need for a guardian shall be completed no later than 30 days after the date of the eligibility determination.

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 Initial examination

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

1. The examination shall involve review by an interdisciplinary team of the component of the Division of Developmental Disabilities or an out-of-State facility that provides services to the individual. In every instance, the team review shall include the involvement of a clinician. Each individual shall be presumed to have capacity and not to be in need of a guardian unless the individual has significant chronic functional impairments.

2. Depending upon the circumstances of the situation, the examination shall consist of either a simple, informal screening or a formal clinical assessment.

i. If an examination, consisting of a review by the Interdisciplinary Team of the individual's cognitive and adaptive abilities and deficits, leads to a reasonable conclusion that the individual obviously is not in need of a guardian, or that he or she appears to be in need of a guardian but there is no urgency, a written statement to that effect shall be signed by the clinician involved.

ii. If the examination raises a question about whether or not the individual needs a guardian, or if the need for imminent decision-making pertinent to the individual's welfare appears to be urgent, the matter shall be referred for a formal clinical assessment. Situations of urgency may include, but are not limited to, serious medical conditions, specialized programming regimens, placement issues, risk of abuse or neglect, and other developments or situations which require the prompt or immediate involvement of a guardian.

iii. When a preliminary finding is reached, based upon an examination under (a)2 above that the individual appears to need a guardian on a non-urgent basis, the regional office or developmental center of the Division of Developmental Disabilities shall route the individual's name, address, and proposed guardian, together with the signed statement of the clinician, to the appropriate office of the Bureau of Guardianship Services.

iv. The Bureau of Guardianship Services shall maintain a list of those individuals identified as being in need of a guardian on a non-urgent basis. Cases of such individuals shall be processed and submitted to the Court as soon as possible. When a non-urgent guardianship case is scheduled by the Bureau of Guardianship Services to be processed for court, a clinical assessment of the individual in this regard shall be initiated.

SUBCHAPTER 3. GUIDELINES FOR GUARDIANSHIP DETERMINATIONS

10:43-3.1 Approach

(a) In determining whether or not an individual needs a guardian, the clinician shall be guided by the following considerations:

1. The clinical assessment process shall begin with the presumption of capacity. The evidence to support the need for a limited or plenary guardian must be clear and convincing. The burden of proof lies with the clinician to establish that the individual needs guardianship to any degree.

2. In order to evaluate an individual's decision-making capacity, the clinician shall assess both the information and the opportunities that have been afforded to that individual. Having opportunities to make decisions is essential to the development of decision-making skills. As opportunities are increased and the individual learns to make more decisions, a new assessment may be necessary. If a person has had limited opportunities to make decisions, but, in the professional judgment of the evaluating clinician, has potential for greater decision-making, the clinician may incorporate in his or her conclusion of incapacity a recommendation to the Court that the determination be reviewed in a specified period of time.

10:43-3.2 Factors to be addressed

(a) The clinician shall include the following components in the clinical assessment used to determine the need for guardianship:

1. Clinical interview;
2. Collateral interviews;
3. Adaptive behavior;
4. Measured intelligence;
5. Integration of findings; and
6. Recommendations.

(b) The clinical assessment shall include the following:

1. The clinician shall conduct a clinical interview to attempt to elicit information about the person's life experiences, his or her interpretation of those experiences and what he or she wants for himself or herself in the future, as well as his or her understanding of guardianship. The clinician shall also assess the opportunities the individual has had and currently has for decision-making. Other factors that may impact upon decision-making include, but are not limited to: severe emotional disturbance, chronic mental disorder, physically disabling conditions or persistent lack of opportunity to make or express decisions. The need for guardianship may be affected by the extent to which these factors interfere with the individual's capacity for self-direction.

2. The clinician shall conduct collateral interviews, to the extent deemed necessary according to his or her professional judgment, with family, friends, supportive personnel and/or caregivers to provide comparison data on skills performed by the individual in different environments. The clinician shall consider the perspective of the interviewees as an important source of information.

3. The clinician either shall administer a scale of adaptive behavior in accordance with professional standards, or shall review the most recently completed scale of adaptive behavior.

4. The clinician shall administer, to the extent possible, the appropriate instrument for measured intelligence in accordance with professional standards and the requirements of the individual being tested, or shall review the most recently completed instrument for measured intelligence.

5. The clinician shall assess the individual's ability to make decisions in areas of daily life that include, but are not limited to, the following:

- i. Residence;
- ii. Employment and vocational training;
- iii. Legal matters; and
- iv. Medical decisions that require informed consent.

6. The clinician also shall address the individual's abilities in the following areas:

- i. Capacity for independent living; and
- ii. Understanding of guardianship.

7. The clinician may also address the individual's ability to make choices and indicate preferences in areas of daily life that include, but are not limited to, the following:

- i. Self-care;
- ii. Food;
- iii. Clothing;
- iv. Leisure activities; and

v. Social and interpersonal relationships.

8. The clinician shall make a final recommendation regarding the need for guardianship based on the integration of findings. The findings may lead to a conclusion that the individual does not need a guardian. Alternatively, the findings may lead to a clinical judgment that the individual lacks the capacity to govern himself or herself and manage his or her affairs with respect to some or all areas and, consequently, is in need of a limited or plenary guardian.

10:43-3.3 Clinical assessment

(a) If a clinical assessment has been conducted, the findings of the clinician, together with a summary of the clinical data and integration of findings, 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 facilitate the process toward adjudication of incapacity 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 assessment 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 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 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 incapacitated person, 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 incapacitated person.

2. The family 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. 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 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. 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 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 finding resulting from a clinical assessment that an individual is in need of a guardian in accordance with N.J.A.C. 10:43-3.3(a)2, and the process of identifying the recommended guardian has been completed, the regional office or developmental center of the Division of Developmental Disabilities shall route to the appropriate office of the Bureau of Guardianship Services the following:

1. A copy of the clinical assessment report which contains the particulars upon which the psychologist's or physician's finding regarding the need for a guardian is based. The report shall be no more than three years old;

2. 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 interested party; 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;

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

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

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

(b) Based on the information presented by the service unit, the Bureau of Guardianship Services shall prepare the documents necessary to petition the Court for appointment of a guardian. These shall include certifications attesting to the need for appointment of a guardian to be signed by the administrative head of the service unit and the clinician who assessed the individual. The Bureau shall also prepare appropriate certifications pertinent to the proposed guardian.

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

Upon receipt of the completed certifications pursuant to N.J.A.C. 10:43-5.1(b) above, 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. 4:86-10 of the Rules governing the Courts of the State of New Jersey.

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 clinically assessed 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 assessments 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. 10:43-2.2(a)1 and 10:43-3.

(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 a certification attesting to the individual's need for a guardian. The certification may also contain content addressing whether or not the functional service unit supports appointment of the proposed guardian.

2. The affidavit or certification 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 certification 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 certification 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, or contends that the individual needs a limited guardian of the person, not a plenary guardian:

1. No certifications 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 or appropriate documentation that only limited guardianship of the person is needed.

2. Within 15 working days after the administrative head receives a request for a certification, 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 requires limited, not plenary guardianship, 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, after appropriate legal consultation, determine whether legal action should be initiated. That determination shall be based

on the best interest of the individual and shall give due weight to the individual's stated wishes.

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 incapacitated person in accord with the provisions of N.J.S.A. 30:4-165.13. All attempts at informal resolution and their outcomes 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 assessment.

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.

(b) If determination is reached by the IHP review that the individual appears to be no longer in need of guardianship, a referral shall be made to the clinician for an assessment. If the assessment supports termination of guardianship services, the clinical 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

2. If there is disagreement on the issue by any of the parties involved, the Division's appeal procedure shall be followed, in accordance with N.J.A.C. 10:48, to resolve the dispute.

10:43-9.3 Individual who has a court-appointed guardian; staff review of guardianship

(a) The need for guardianship and the suitability of the guardian shall be reviewed at the annual IHP meeting.

(b) If a conclusion is reached by the IHP team that all or some capacity should be restored, the team shall make a referral to a clinician for an assessment.

(c) If the clinician concludes that a proceeding should be instituted to adjudicate that an incapacitated person is restored in whole or in part to capacity, he or she shall communicate this recommendation to the administrative head of the functional service unit.

(d) If the IHP team concludes that the current guardian is no longer suitable and that a proceeding should be instituted to modify the guardianship, the chairperson shall communicate this finding and relevant information to the administrative head of the functional service unit.

(e) If the administrative head of the functional service unit concurs with the recommendation of the clinician that a proceeding should be instituted to modify or rescind the guardianship:

1. This conclusion shall be communicated in writing within 30 days to the guardian and the individual. If the Bureau of Guardianship Services is the appointed guardian, this finding shall also be communicated to the Public Defender.

2. If the guardian agrees with the finding, an attempt shall be made by the functional service unit to obtain a written statement of concurrence.

3. If the guardian disagrees with the Division's position, an effort shall be made by the functional service unit to resolve the matter informally. This attempt and the outcome shall be documented in the individual's confidential record.

(f) Whether or not the legal guardian has agreed or disagreed with the Division's position, the matter shall be referred to the Chief of the Bureau of Guardianship Services for referral to a court of competent jurisdiction. The Chief of the Bureau of Guardianship Services shall inform

the administrative head of the functional service unit of the documentation required in each individual case. If the incapacitated person desires to pursue the matter privately, the functional service unit shall provide the necessary assistance to obtain an attorney and initiate the legal process.

10:43-9.4 Special review

Notwithstanding any other provisions of this subchapter, a special review of an individual's guardianship status by the IHP review team may be requested at any time by the incapacitated person, his or her guardian or any interested party. If the administrative head of the functional service unit, or his or her designee determines that the request is appropriate, the special review shall be conducted within 30 days. The same potential disposition would be available as those delineated above under N.J.A.C. 10:43-9.2 and 3. Results of the special review shall be documented in the individual's confidential record.