# **SECTION 15: ADULT PROTECTIVE SERVICES: GUARDIANSHIP/CONSERVATORSHIP**

**15.01 PUBLIC GUARDIANSHIP AND CONSERVATORSHIP: INTRODUCTION**

**(A)** **Authorization.** DHHS OES is authorized by state law to act as public guardian and/or conservator for adults who are adjudicated incapacitated for reasons other than mental retardation. The authority of the public appointment rests with the Commissioner of DHHS who may delegate this authority to qualified Department staff. Adults with mental retardation or autism in need of guardianship or conservatorship will be referred to DHHS, Office of Adult with Physical and Cognitive Disabilities.

**(B)** **Intent**. Public guardianship appointments are made to provide continuing care and supervision of incapacitated adults, and public conservatorship appointments are made to protect, preserve, manage and apply estates of incapacitated adults, when it has been determined that no suitable private guardian or conservator is available and willing to assume responsibilities for such service.

**15.02 NOMINATIONS AND REFERRALS**

**(A)** **Capacity.** All adults are presumed to have full capacity, unless adjudicated otherwise by a court of law, in accordance with the Probate Code.

**(B)** **Nominations.** Persons identified by 18-A M.R.S.A. §5-604 may file a petition nominating DHHS to serve as guardian or conservator. The Department shall file a written acceptance or rejection of a nomination with the appropriate Probate court within thirty days. If the Department requires more time in order to respond, an extension must be requested from the court.

**(C)** **Referrals.** A request for a guardianship or conservatorship study is a referral. Referrals will be received in accordance with OES Policy Manual Section 11.03. On accepted referrals, an assessment of capacity and the need for guardianship/conservatorship will be completed in a timely fashion.

**15.03 PRIVATE GUARDIANSHIP AND CONSERVATORSHIP STUDY**

**(A)** **Investigation/Obtaining a Legal Appointment.** The caseworker will complete an investigation, in accordance with OES Policy Manual Section 12.01, to determine the need for guardianship, conservatorship and/or other protective arrangement and initiate the procedure for obtaining a legal appointment, when necessary. The caseworker will also determine if a temporary private appointment is needed.

**(B) Petition**. In order to ensure the least restrictive legal appointment of an allegedly incapacitated adult, DHHS may either:

**(1)** Recommend that the interested party independently seek a private appointment; or

**(2)** Petition the court for appointment of a suitable private guardian and/or conservator. The PPA may approve payment for the costs of an appointment in accordance with OES Procedure Section 15.03.

**15.04 PETITION AND COURT PLAN**

**(A)** **Petition.**

**(1)** The PPA, or casework supervisor after consultation with a PPA, shall review all documentation of the need for an appointment and required court forms before deciding whether to authorize a petition.

**(2)** A completed certificate of incapacitation (PP-505) or its equivalent (physician’s or psychologist’s report) will be obtained from a licensed physician or clinical psychologist prior to petitioning. If OES’ findings are that the client is incapacitated, and the client refuses to undergo an examination by a physician or psychologist, DHHS may petition the court for an appointment but must also file a motion for a court-ordered evaluation.

**(3)** A petition for public appointment shall not be initiated under the following circumstances:

**(a)** Investigation findings do not support the need for guardianship or conservatorship;

**(b)** There is no supporting documentation of incapacitation after medical, psychological, or psychiatric exams or consultation have been completed;

**(c)** There is clear documentation as to incapacitation, but a suitable private individual is willing and able to serve in a private legal appointment; or

**(d)** An appointment is not necessary or desirable as a means of providing for the continuing care and supervision of the adult.

**(B) Court Plan.**

**(1)** Court plans will maximize self-reliance and independence to meet the needs of the allegedly incapacitated adult.

**(2)** Annual review and update of the court plan for every person in public guardianship and/or conservatorship shall be completed by the caseworker, reviewed by the casework supervisor, approved by the PPA, and filed with the appropriate court.

**15.05 TEMPORARY PUBLIC APPOINTMENTS**

**(A)** **Temporary Guardianships/Conservatorships/Other temporary Orders**. When all available less restrictive measures have been explored, the Department may seek temporary guardianship/conservatorship and/or other temporary orders pending a full hearing under the following conditions:

**(1)** In order to prevent serious, immediate and irreparable harm to the health of the allegedly incapacitated adult in situations that cannot be addressed by 17-A M.R.S.A. §106, this statute provides a licensed physician, or a person acting under his direction, may use force under certain circumstances in administering treatment when no one competent to consent can be consulted; or

**(2)** In order to prevent serious, immediate and irreparable harm to the financial interests of the allegedly incapacitated adult; or

**(3)** If an appointed guardian/conservator is not effectively performing his/her duties and the welfare of the incapacitated adult requires immediate action or if an appointed guardian/conservator is deceased; or

**(4)** DHHS may request that the public guardian’s temporary powers include Do Not Resuscitate, Do Not Hospitalize and Comfort Measures Only authority, and/or the ability to authorize psychotropic medications.

The authority sought by DHHS under the temporary appointment will be limited to those powers necessary to address the emergency.

**15.07 ESTATE MANAGEMENT**

**(A)** **Estate Management Fees and other Administrative Expenses.**

**(1)** DHHS may recommend to the court that a management fee be assessed on the estate of a protected person. Court approval is necessary before payment can be authorized.

**(2)** The PPA must approve the use of the ward's/protected person's personal funds to pay for necessary legal expenses, ensuring that personal funds shall not be depleted by these payments.

**(3)** DHHS may file a Claim Against Estate on deceased estates in accordance with 18-A M.R.S.A., §5-612 and 18-A M.R.S.A., §3-801 *et seq*.

**(B) Retention and Disposition of Assets.**

**(1)** The PPA is responsible to ensure that assets and obligations of the ward/protected person are identified; and that assets are secured and used to the benefit of the client. The physical location of the ward/protected person does not alter the responsibility to protect the estate.

**(2)** Upon receipt or discovery of cash, checks, or savings, OES district staff will authorize Regional Operations account associates to immediately establish a DHHS account.

**(3)** The caseworker will complete a budget plan as soon as possible and within three months of the court appointment. The budget plan will identify income, assets and expenses.

**(4)** Case reassessments shall include review of and necessary revisions to budget plans.

**(5)** The caseworker, in consultation with the casework supervisor, will recommend a decision regarding the sale or disposition of assets. The decision must have PPA approval before action is taken.

**(6)** Designated OES staff in central office are responsible for carrying out or coordinating the sale or disposition of assets. When the sale of real property is proposed, the property must be appraised by an independent fee appraiser or receive a market analysis by a realtor. An appraisal or market analysis may also be required for the purposes of tax or asset valuation. Whenever possible, DHHS will inform and consult the ward/protected person about any plan to sell or dispose of assets. Sale or disposition of assets will be completed in accordance with procedure.

**(7)** Sale of any property to an employee of DHHS or any person who has an interest shall comply with 18-A M.R.S.A. §5-422, and 5 M.R.S.A. §18.

**(8)** AAG approval is necessary before obtaining any legal services in connection with the disposition of assets, except from the Department of Transportation.

**(9)** The public guardian and/or conservator may use funds from the ward's estate to bury the ward if no one else assumes this responsibility. In all other areas, the public guardian's and/or conservator's legal authority to dispose of assets terminates upon the death of the ward or protected person, except to the extent necessary to preserve the estate pending transfer to a Personal Representative or other person or agency authorized by law to take possession.

**15.09 LEVELS OF AUTHORIZATION DELEGATED BY THE COMMISSIONER**

The authority of the public guardian/conservator shall be exercised by the Commissioner or by persons duly delegated by the Commissioner to exercise such authority pursuant to 18-A M.R.S.A. §5-606 (b) & (c). Persons duly delegated by the Commissioner may include a staff of competent individuals qualified by education and/or experience. Caseworkers, casework supervisors, PPAs and designated central office staff employed by DHHS, OES are authorized to represent the DHHS in Probate Court proceedings as provided for in 4 M.R.S.A §807 and 22 M.R.S.A. §3473.

**(A)** **Commissioner Level Authority**. The Commissioner retains the authority to approve requests for sterilization pursuant to 34-B M.R.S.A. §7005 *et seq*., and abortions. In the absence of an advanced directive, the Commissioner retains the authority to approve withholding or withdrawal of artificially administered nutrition and hydration for a public ward. (See also Uniform Health Care Decisions Act.) In addition, the Commissioner retains the authority to delegate public guardianship responsibilities to another suitable person through a power of attorney pursuant to 18-A M.R.S.A. §5-104. In the Commissioner’s absence, the Commissioner's authority will be delegated. The Commissioner's designees for the above authorizations are the Director of the OES, or if unavailable, the Deputy Commissioner for Integrated Services.

**(B)** **Delegated Authority**. Unless the Commissioner expressly reserves the right to make a decision in a given case, authorization to make other decisions not specified in "A" above is delegated by the Commissioner as follows:

**(1)** **Estate Management**. Except as otherwise provided, the Office Director and designated OES staff in central office may make decisions related to public wards/protected persons regarding estate management, including but not limited to the following:

**(a)** Signing sales contracts;

**(b)** Signing conservator's deeds and closing documents;

**(c)** Completing and signing legal documents related to inventories;

**(d)** Completing and signing legal documents related to accountings;

**(e)** Completing and filing tax returns;

**(f)** Petitioning to become personal representative;

**(g)** Petitioning to become special administrator;

**(h)** Filing a claim as creditor to an estate;

**(i)** Petitioning for estate share of augmented estate;

**(j)** Signing petitions for other special probate court activities, including termination of conservatorship; and

**(k)** Signing documents relating to non-Probate litigation (e.g. foreclosure, personal injury, Worker’s Comp., and bankruptcy.)

**(2)** **Caseworkers - Routine decisions re: care of wards.** Except as otherwise provided in this policy, caseworkers may make decisions on behalf of public wards regarding routine care, including but not limited to the following:

**(a)** Approving transportation;

**(b)** Approving transfer to or from a facility such as a residential care facility, nursing home or hospital, including Riverview Psychiatric Center and Dorothea Dix Psychiatric Center;

**(c)** Signing contracts which admit a ward to a facility;

**(d)** Completing hospital emergency forms requesting names of persons to contact in an emergency;

**(e)** Approving care and treatment plans, recommended by an attending physician, psychologist, agency, or multi-disciplinary team and approving ISPs.

**(f)** Approving medication and medication changes (except experimental medications) recommended by the attending physician;

**(g)** Except as provided in OES Policy Manual Section 15.10, authorizing routine diagnostic procedures routine medical procedures and non-invasive surgical procedures;

**(h)** Authorizing visits with family or friends, and participation in other social or community activities; and

**(i)** Authorizing third parties to open the mail of a ward or to take photographs of the ward.

**(3) Caseworkers-Routine financial decisions re: wards and protected persons.**

Except as otherwise provided in this policy, caseworkers may make routine decisions on behalf of public wards and protected persons, including but not limited to the following:

**(a)** Releasing information needed by hospitals and nursing homes for insurance purposes;

**(b)** Applying for benefits and authorizing payment for care or treatment;

**(c)** Entering into mortuary trust agreements as part of an approved court plan; and

**(d)** Ensuring suitable burial.

**(4) Casework Supervisors.**

Except as otherwise provided, casework supervisors may make all decisions delegated to caseworkers above and in addition may:

**(a)** Authorizing routine surgical procedures for public wards;

**(b)** Determining when a second medical or psychological opinion should be sought on behalf of a public ward;

**(c)** After review and authorization by a PPA, signing petitions for the appointment of a public or private guardian or conservator or other protective arrangement, and related documents which may include public guardianship or conservatorship plans and acceptances.

**(5) Office Director, Director of Adult Protective Services and PPAs.**

Except as otherwise provided, the Office Director, Director of Adult Protective Services, and PPAs may make any decisions delegated to caseworkers and casework supervisors above and in addition may:

**(a)** Authorizing all non-routine medical and surgical procedures for public wards, except those for which the Commissioner has expressly reserved the right to make the decision;

**(b)** Signing other legal documents related to public wards and protected persons, to the extent allowed by law and court rule;

**(c)** Issuing an administrative subpoena. AAG consultation may be requested;

**(d)** In the absence of advanced directives, authorizing Do Not Resuscitate (DNR), Do Not Hospitalize (DNH) and Comfort Measures Only orders for public wards. This decision must be consistent with the advice of the ward’s physician.

**(i)** DNR, DNH and Comfort Measures Only orders may be authorized when treatment would only serve to prolong the dying process with little possibility of benefit, or when the ward is irreversibly comatose or in a persistent vegetative state, or when cardio-pulmonary resuscitation is medically contraindicated.

**(ii)** Whenever a DNR, DNH and Comfort Measures Only order is requested or sought by DHHS or by an attending physician for a public ward, the physician shall be requested to provide verbal or written documentation justifying the order.

**(iii)** Once a DNR, DNH and Comfort Measures Only order has been authorized, the decision and written documentation must be shared with persons involved in the care and treatment of the ward, and entered in the ward's permanent case record.

**(iv)** DNR, DNH and Comfort Measures Only orders shall be subject to review whenever there is significant change in a ward's medical condition, and the Department may be request that the physician rescind the order at any time.

**15.10 HUMAN IMMUNODEFICIENCY VIRUS**

**(A)** **Testing**. When appropriate, regional staff may authorize testing of public wards for Human Immunodeficiency Virus (HIV) after consultation with a PPA , Director of Adult Protective Services, or Office Director.

**(B)** **Confidentiality**. HIV related information shall be kept confidential except:

**(1)** HIV related information may be disclosed verbally only, if relevant and necessary to the functions and responsibilities of the following designated DHHS staff:

**(a)** The assigned caseworker;

**(b)** The assigned caseworker's supervisor;

**(c)** The PPA;

**(d)** The Director, Adult Protective Services;

**(e)** Other DHHS staff responsible for carrying out the OES' activities on behalf of a ward.

**(2)** PPAs or the Director of Adult Protective Services may disclose HIV related information either, verbally or in writing, only if relevant and necessary to the functions and responsibilities of the following:

**(a)** Those responsible for treatment of the ward, including medical and psychiatric personnel;

**(b)** Those responsible for care of the ward when the care includes nursing care;

**(c)** Those responsible for care of the ward if that responsibility includes twenty-four hour supervision of the ward;

**(d)** A court in accordance with 5 M.R.S.A. §19203-D(2) when that medical information is relevant;

**(e)** The attorney representing DHHS; and

**(f)** Under other circumstances permitted by 5 M.R.S.A., Chapter 501.

**(C)** **Coordination with other DHHS Offices**. The OES will cooperate with other DHHS Offices, to the extent permitted by law, to coordinate planning on behalf of a public ward who has been diagnosed with HIV infection.

**15.11 CLASS MEMBER PUBLIC WARDS.**

All public wards who were patients at the former Augusta Mental Health Institute (AMHI) or Riverview Psychiatric Center on or after January 1, 1988, as well as any wards who will be admitted to Riverview in the future are members of the Plaintiff class of the AMHI Consent Decree. DHHS, as the Defendant in this lawsuit, entered into a Consent Decree and Settlement Agreement which was approved by the Court.

**(A)** **Performance Obligations**. DHHS has the responsibility to assure that class member public wards are provided all the benefits of the Settlement Agreement. In addition, DHHS is to meet specific performance obligations outlined in paragraphs 254-261 and 281 of the Agreement, namely:

**(1)** DHHS shall provide casework services to its class member public wards. Services shall include the active monitoring of all ISPs or hospital treatment and discharge plans and attendance at all planning meetings.

**(2)** Caseworkers will give informed consent after reviewing necessary information and while acting in the ward’s best interest. Informed decisions will maximize the ward's independence consistent with the ward's current circumstances.

Before authorizing treatment, DHHS will seek the counsel or opinion of an independent professional:

**(a)** When the risks associated with the proposed medical order or procedure are great; or

**(b)** When the proposed medical order or procedure limits the ward's independence and the prognosis for improvement as a result of implementing a proposed medical order or procedure is poor or guarded.

**(3)** Caseworkers shall visit all class member public wards at least twice monthly. Visits may be reduced to monthly in accordance with procedure.

**(4)** Caseworkers shall advise class member public wards of their right to name a designated representative or representatives and the availability of advocacy and peer advocacy assistance.

**(5)** Caseworkers shall additionally advise class member public wards at least annually of their right to petition the Probate Court for termination of guardianship. The advice shall be given both verbally and in writing and shall include information on the application and hearing procedure and on the availability of legal assistance.

**(6)** Caseworkers shall prepare annual reports on each class member public ward, or more often if requested by the Court Master. Reports will be submitted to the Court Master and counsel for the Plaintiffs.

**(B)** **Referrals for Community Support Services and ISPs.** Caseworkers shall refer each class member public ward for the assignment of a community support worker, or other support services, and an ISP. Caseworkers shall notify public wards annually of their right to receive the services of a community support worker or other individualized services in accordance with and ISP.

**(C)** **Advocacy.** DHHS staff participating in the development of an ISP and case plan for class member public wards will advocate for those wards to receive generic resources and services to the maximum extent possible. When there appears to be a wrongful denial of generic services, DHHS will refer the case to the Maine Disability Rights Center. DHHS staff with advocate to ensure that unmet needs are identified on the ISP. Advocacy may include filing a grievance in accordance with the Rights of Recipients of Mental Health Services.

**15.12 DISMISSALS/TERMINATIONS**

The Department may dismiss or terminate a public guardianship or public conservatorship under the following conditions:

**(A)** There is medical and/or psychological documentation that incapacitation no longer exists;

**(B)** A suitable private individual is willing to assume administrative or legal responsibility;

**(C)** A public appointment is no longer necessary or desirable as a means of providing continuing care and supervision of the adult;

**(D)** The ward or protected person has died;

**(E)** Income and/or assets, excluding the value of a mortuary trust, have been depleted so that the conservatorship is no longer required; or

**(F)** Where there is a joined guardianship and conservatorship appointment, a termination of the conservatorship only may be sought when assets fall below program guidelines excluding the value of a mortuary trust, and there is little likelihood that assets will increase, or the purpose for the original conservatorship no longer exists.

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