Obtaining Guardianship

A Guide for Health Care Professionals

The objective of this document is to help healthcare providers to understand the process of how to help a patient who may need a guardian. While it relates closely to understanding a patient's capacity to make health care decisions, guardianship involves the Probate Court determining the patient's incapacity, a legal definition based on the patient's functional skills.

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The Probate Court may appoint a guardian over the person to make health care decisions and other decisions. The guardian is directly answerable to the court. A guardian's authority begins when the judge signs the guardianship order and ends when the judge terminates the guardianship or the person dies. There are both temporary and permanent guardianships:

- Temporary guardianship – Time limited as determined by court order, typically 60 days.
- Permanent guardianship – Established when it is expected that the proposed ward will no longer be able to meet their basic needs and will or has come to substantial harm because they are incapacitated as determined by the court.

The process of obtaining guardianship over the person consists of five components:

- Assessing the need for guardianship
- Identifying a potential guardian
- Petitioning for guardianship of incapacitated person
- The probate court hearing
- After the probate court hearing

1. Assessing the Need for an Alternate Patient Decision-Making Process

Prior to seeking guardianship over the person, the healthcare provider organizations (e.g. hospitals, VNAs, home health agencies, LTC facilities, etc.) must first assess whether the current illness is something that will temporarily or permanently prohibit the patient from making decisions about their health care. Consult with family and other providers such as the primary care provider, specialty medical provider, nursing social service, home care professionals or other agencies with whom the individual has been associated.

If the patient has an Advance Care Directive with a Durable Power of Attorney for Healthcare (DPOAH) in place, the patient's physician or nurse practitioner should first be consulted regarding the necessity of activating the DPOAH. If the DPOAH has been activated, an assessment should then be made regarding the likelihood that the patient may lack health care decision-making capacity for the long-term and may require a guardian (e.g. in the case of possible admission to a long-term care facility).

2. Identifying a Potential Guardian

A. If the patient has a DPOAH, that person should first be contacted about assuming the role of guardian. If there is no DPOAH, or that person refuses, then consider who are other people in the patient's life who may be willing to assume guardianship – family or other "persons of interest"? If available, talk with them to explain how they can help as guardian. You will likely need to explain to them the role of a guardian and the process for petitioning the Probate Court to be appointed as guardian.
General information about guardianship is available from the Probate Court at (603) 271-7525 or www.courts.state.nh.us/probate/guardianship.htm. The National Guardianship Association also provides general information about guardianship on their website at www.guardianship.org.

B. The State of NH has a limited amount of funds available to compensate public guardians in cases where the individual is indigent, has no family or friends able to serve as guardian, and meets other eligibility requirements. Contact the public guardianship contract administrator (Ken Nielsen, (603) 271-5144 or knielsen@dhhs.state.nh.us at NH Department of Health and Human Services (DHHS) for patients with developmental disabilities, acquired brain disorder, or mental illness. Contact the contract administrator (Mary McGuire, (603) 271-4725 or mmcguire@dhhs.state.nh.us at DHHS at Bureau of Elderly and Adult Services (BEAS) for active BEAS Protective Services clients.

C. There are 3 other options listed below if you are obtaining a guardianship and there are no family/friends able to serve and the person is not eligible for DHHS or there are no DHHS funds.

- Office of Public Guardian (OPG) (224-8041) www.opgnh.org
- Tri-County CAP, Inc./ Guardianship Services (837-9561) www.gsgs.org. Provides services statewide.
- Professional Guardians (List) (http://www.courts.state.nh.us/probate/professional-guardian-list.pdf.)

Note that OPG and Tri-County CAP also provide private professional guardianship services. You can contact them or an individual Professional Guardian to discuss their availability and fees. All of the guardianship options will require an initial assessment of the patient's financial resources (e.g., savings, real estate, etc) as well as public assistance programs for which the patient may be eligible (e.g., Medicaid, SSDI, SSI, etc.)

3. Petitioning for Guardianship of Incapacitated Person

Any interested party, including a health care organization, may initiate the petition for guardianship over a person.

- Obtain the Court Service Center checklist, forms and the pamphlet "General Information about Guardianship of Incapacitated Persons" from the Probate Court website for guardianship: http://www.courts.state.nh.us/probate/guardianship.htm. Since forms can change frequently, it is best to print forms as needed.
- Complete the "Petition for Guardianship of Incapacitated Person" form:
    - The health care organization is the "petitioner"; the patient is the "proposed ward"
    - If the proposed ward doesn't have a lawyer, the court will appoint one.
    - If the proposed ward has a DPOAH or Living Will, include them with the petition.
    - Question #20 explains the rationale for requesting a guardianship. Here you can describe the current medical conditions that limit the ward's ability to meet their basic needs, as well as any pattern of decline over the past 6 months. Reports from others, such as EMS, Visiting Nurse Agency, family or friends, may be included. At least one incident must have occurred within 20 days of filing the petition. Report behavior and objective medical findings, rather than opinions.
- If the ward is indigent, complete the "Financial Affidavit of Assets & Liabilities". This needs to be completed for a ward that cannot pay for counsel.
- The proposed guardian must complete the "Health & Human Services Record Release Authorization" and the "Division of State Police Criminal Record Release Authorization". These forms require a notary.
- If the ward is unable to attend the hearing, the physician needs to complete the "Waiver of Personal Appearance" form. This form also requires a notary.
- A copy of the petition needs to be given to all interested parties as identified on the petition. Complete the "Certification of Copies to Parties" to record that this has been done.
- If possible, hand-deliver the completed petition to the Probate Court in either the county where the proposed ward resides or where the ward is physically present when the proceedings are begun. Review the information in the petition with the court staff person who oversees petitions for guardianship of incapacitated persons to be sure that everything is complete.
- There are 3 possible options in seeking a Probate Court hearing on the petition:

  Regular hearing schedule – varies from court-to-court; call to inquire
  Expedited hearing request – generally within two weeks
  Emergency hearing request – in cases of imminent life and death

Since many health care organizations petition directly to the court after pursuing other options, they often will request an expedited hearing.

4. Probate Court Hearing

Attendees: Petitioner (person who completed the petition), petitioner's lawyer, proposed ward's lawyer, proposed guardian, witnesses if applicable, and interested parties at their discretion. The petitioner has the burden of proof to show that the proposed ward is incapacitated beyond a reasonable doubt as defined in RSA 464-A.

5. After the Hearing

The Probate Court will issue a "Certificate of Appointment" noting the name of the guardian, as well as "Letters of Guardianship" outlining the rights and responsibilities of the guardian. It may be useful to copy or scan these documents along with the ward's Advance Care Directives, if available, into the ward's medical record.

ADDITIONAL INFORMATION

Legal guardian of the person is responsible for all consents, and medical care cannot be delivered without informed consent. Consequently, the guardian may interact with healthcare providers in a variety of settings:

Primary Care & Specialty Care - A guardian may accompany the patient to encounters with the physician. In a medical emergency, unanticipated care in an Emergency Department requires notification to the guardian, and should result in the guardian making immediate contact with the ED to learn about the care recommendations and to guide future care decisions.

Specialty care (e.g., neurologists, cardiologists, etc.), likewise should involve the direct participation of the guardian. When a specialist follows the course of an illness or condition over time, the guardian may arrange for an alternate means of communication which will allow the guardian to be informed of the patient's condition, to indicate consent or to make choices among treatment options in a timely manner.

Acute Care: Hospitals, Psychiatric In-patient Facilities - These institutions concentrate many providers in a single effort, and often require several decisions regarding care pathways each day to respond to serious illness or rapidly changing medical conditions. A guardian should expect to be available round-the-clock during these periods of care, and may be consulted by several different providers in a short period. It is often necessary to meet in person with hospital staff to complete written consent to treat and other related consents. Likewise, a guardian, or the care provider identified by the guardian, should be the repository, upon discharge, of any written instruction issued to the patient.

Sub and post acute care: (Rehabilitation Centers, Home Care, Skilled Nursing Facilities) - These organizations provide goal directed care for inpatients who are restricted due to a medical condition. The patient is discharged when either the condition has improved sufficiently for care to be continued at home or in a less confining setting, or when progress toward the rehabilitation goal has slowed or stopped so that ongoing, custodial care is needed. The guardian may be required to provide this care, and should establish a working dialogue with a key member of the treatment team to be in a position to oversee and guide care on the ward's behalf.

Long-Term Care - Nursing Facility–Provides ongoing care of individuals who cannot, without substantial assistance, perform one or several activities of daily living such as eating, seeing to one's own personal hygiene, toileting, walking or taking one's own medication.

- Assisted Living Program-Provides many forms of ongoing care, featuring live-in round-the-clock personnel to aid or support. These programs are most often populated by elders, and may be specialized, e.g. for dementia care, provide low acuity care for high-functioning residents or be quite specialized and technical in capacity to provide care, e.g. trachia care to bed-bound patients.
- Specialized care/treatment programs, such as long term rehabilitation centers, are based on diagnosis, e.g. psychiatric, brain injury, etc.
- Care/custodial centers are for limited populations, e.g. veterans facilities, mental health group homes, and may be similar to forms of care previously mentioned or encompass several types.

All long term care settings operate under some form of license, and all require a care plan individualized to the needs of each individual resident. All rely on active involvement of the patient or their guardian for oversight and endorsement of the recommended plan of care, as well as emergencies as they may arise. Providing the best care for the patient is most successful when guardians have an ongoing in-person relationship with facility staff and officials.

On-Going Medical Care - The guardian has the responsibility for guiding the overall direction and goal of the ward's care. The default position of all medical care is to sustain life by any means available, a desired goal for those expected to return to good health, though it may be a challenge for those struggling with serious illness and an uncertain prognosis. Primary care physicians and specialists are expected to elicit this understanding from all their patients. A guardian must be prepared to speak to goals of care on behalf of and, when possible, with the ward. It is recommended that these discussions begin whenever a diagnosis of a major illness is made, or when the same condition hospitalizes a patient, or at the quarterly review of a resident in a nursing facility. These are occasions in which a guardian should review these goals with a ward's primary care or attending physician.