

Adult Protective Services

Chapter 7.E Guardianship/conservatorship and Mental Health Board

A. Guardianship/Conservatorship

1. A guardian or conservator is a person or entity appointed by a court of competent jurisdiction to have full or limited authority over an incapacitated person or their assets, depending on the incapacitated person's specific mental or physical limitations. The purpose of the appointment and the role of the guardian/conservator are to protect and promote the well-being of the incapacitated person.
2. The appointment of a guardian and/or conservator should occur only after all other lesser restrictive alternatives have been explored.
These include the following in order of least restrictive:
 - a. Informal community intervention, including family, friends, banking assistance in paying bills, and other volunteers.
 - b. Social services involvement through case management, Home Community Based Services (HCBS), home health care, and other community based services.
 - c. Social Security payee without a guardian or conservator.
 - d. Durable Power of Attorney (only a possibility if the individual person is not legally impaired and has the capacity to know what he or she is signing).
 - e. Durable Power of Attorney for Health Care Decisions (only a possibility if the person is not legally impaired and has the capacity to know what he or she is signing).
 - f. Voluntary conservatorship (must have capacity).
 - g. Full conservatorship with court approved conservatorship plan limiting certain authority.
 - h. Full guardianship.
3. CFS Specialist Responsibilities:
 - a. If the CFS Specialist finds, through investigation or during service coordination, indications that a vulnerable adult exhibits impaired decision making capacity and all other lesser restrictive options have been tried to correct the abuse, neglect, or exploitation or to prevent future abuse, neglect, or exploitation, the CFS Specialist may consider the option of pursuing a guardian.
 - b. A best practice guideline is to make efforts to collaborate with the vulnerable adult to determine who should be the guardian or conservator when the vulnerable adult is able.
 - c. Criteria for determining the appropriateness of a person to serve as guardian/conservator includes:
 - 1) a relationship with the adult alleged to need a guardian/conservator;
 - 2) geographic accessibility to the alleged incapacitated adult;
 - 3) the absence of a conflict of interest; and
 - 4) emotional stability.
4. Procedures: When it is determined that a guardianship or conservatorship is necessary, the CFS Specialist shall complete the following:
 - a. Obtain a competency evaluation by a medical or mental health professional; as needed;
 - b. Document the needs of the alleged victim and the options for a guardian and all other interventions pursued;
 - c. Determine whether an emergency exists;
 - i. Nebraska Revised Statute 28-387 states that a county court may issue an ex parte order authorizing the provision of short-term involuntary adult protective services or temporary placement for a vulnerable adult for up to

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forty-eight hours excluding non-judicial days, pending the hearing for a need for continuing services, after finding on the record that the person is a vulnerable adult, and an emergency exists, and there are compelling reasons for ordering protective services or temporary placement.

- d. Select the least restrictive intervention and Consult with CFS Supervisor about the recommendation. If the plan is approved, continue with the following steps;
 - i. Identify potential guardian/conservator/payee.
 - 1) Although APS does not recommend a person to be the guardian, APS may play a role identifying person(s) who is eligible, able, and willing to be the guardian to the petitioner.
 - 2) Institutions or persons ineligible to become a guardian
 1. any agency providing residential care in an institution or community-based program, or
 2. any owner, part owner, manager, administrator, employee, or spouse of an owner, part owner, manager, administrator, or employee of any nursing home, room and board home, assisted-living facility, or institution engaged in the care, treatment, or housing of any person physically or mentally handicapped, infirm, or aged to be appointed guardian of any such person residing, being under care, receiving treatment, or being housed in any such home, facility, or institution within the State of Nebraska.
 - ii. If otherwise not ineligible, the CFS Specialist will consider the potential guardians as the persons who have priority for appointment as guardian are listed in the following order:
 - 1) A person nominated by the incapacitated person in a power of attorney or durable power of attorney;
 - 2) A person acting under a power of attorney or durable power of attorney; or
 - 3) A person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the incapacitated person
 - 4) The spouse of the incapacitated person
 - 5) An adult child of an incapacitated person
 - 6) A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent
 - 7) Any relative of the incapacitated person with whom he or she has resided for more than six months prior to filing of the petition
 - 8) A person nominated by the person who is caring for him or her or paying benefits to him or her
 - iii. The CFS Specialist will contact the above-mentioned persons to discuss the needs of the vulnerable adult, the rights, and duties of a guardianship, the required training to be a guardian and the potential for accepting the guardianship role. Explaining the process and procedures of petitioning the court for guardianship or conservatorship in generic terms is acceptable, providing specific advice on how to proceed in a pending legal matter is not.
 - iv. If no one is willing or able, the CFS Specialist will next make inquiries about potential guardians from guardianship services or attorneys.

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- v. The CFS Specialist will document all efforts to find a guardian in N-FOCUS.
- e. Once CFS Specialist has identified someone that may be a potential guardian, the CFS Specialist will initiate background checks. A signed Release/Exchange of Information form is required by the potential guardian allowing the exchange of information between the CFS Specialist and the court regarding the APS/CPS Central Registry/Register.
 - i. The four reports required by the court to complete a background check include a credit check, a NE State Patrol criminal history check, a sex offender registry check, and a check of the Adult and Child Abuse and Neglect Registry/Register.
 - ii. In order for the Probate Court to appoint a person as a guardian/conservator, the statute requires the potential guardian/conservator to submit the four reports to the Court at least 10 days prior to the hearing, unless waived or in a temporary/emergency guardianship/conservatorship.
 - iii. DHHS is not responsible for payment for a credit check report, because the potential guardian may obtain a free credit check report. DHHS will not mandate what a credit rating needs to be in order to qualify to be a guardian.
 - iv. The CFS Specialist will have the identified attorney get releases from the potential guardian(s) and complete the background checks. The cost of the background checks would need to be incorporated into the fee.
- f. APS will not identify any person to be a guardian if there are reasons that the person would not be appropriate such as the following:
 - i. presence of the person on the Adult Protective Service Registry,
 - ii. presence of the person on the Child Protective Service Register;
 - iii. person owes money to the proposed ward or vice versa;
 - iv. Bankruptcy;
 - v. Revocation of a professional or occupational license;
 - vi. criminal history of domestic violence, assault, been convicted of a felony;
 - vii. The potential provider must not engage in or have an ongoing history of criminal activity that may be harmful or may endanger individuals for whom they provide services; and
 - viii. Specific Criminal History
- g. The CFS Specialist will not provide any financial assistance to a potential guardian when conviction has occurred in the following areas:
 - i. Child pornography;
 - ii. Child or adult abuse;
 - iii. Driving under the influence: a DUI conviction within the past eight years;
 - iv. Domestic assault;
 - v. Shoplifting after age 19 and within the last three years;
 - vi. Felony fraud within the last 10 years;
 - vii. Misdemeanor fraud within the last five years;
 - viii. Termination of provider status for cause from any Department program within the last 10 years;

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- ix. Possession of any controlled substance within the last five years;
 - x. Possession of a controlled substance with intent to deliver within the last 10 years;
 - xi. Felony or misdemeanor assault without a weapon in the last 10 years;
 - xii. Felony or misdemeanor assault with a weapon in the last 15 years;
 - xiii. Prostitution or solicitation or prostitution within the last five years;
 - xiv. Felony or misdemeanor robbery or burglary within the last 10 years;
 - xv. Rape or sexual assault; or
 - xvi. Homicide.
- h. The CFS Specialist will discuss any entries on the APS Registry or CPS Register with the CFS Supervisor to decide if the facts of the situation should prohibit the individual from being a Guardian. This discussion will explore how significant the event was, in relationship to the individual's role as a Guardian. If the name appears on the APS/CPS Registry/Register and is connected to an ongoing investigation and the proposed guardian is listed as an alleged perpetrator, the CFS Specialist will not provide the person's name to the attorney and will not provide any financial assistance.

If Law Enforcement checks reveal a criminal history, the CFS Specialist will discuss the criminal history and the individual's proposed role as a guardian with the CFS Supervisor. If the CFS Supervisor agrees, the CFS Specialist will request approval from the Protection and Safety Administrator.

- i. When the initial review of information indicates that the person may be an acceptable potential guardian, the CFS Specialist will gather financial information from the alleged victim to determine if financial assistance is required. The maximum financial support to be provided by DHHS in connection with the hiring of an attorney should always be clearly documented. DHHS is not a party in the case. DHHS may provide financial assistance on behalf of the vulnerable adult or the proposed guardian to hire an attorney.
- j. DHHS has no authority to prohibit someone from applying to be a guardian. If the CFS Specialist identified a reason for the interested person not to become a guardian, the CFS Specialist will not provide financial assistance to the person to obtain an attorney. If there is a signed authorization to release information from the potential guardian, the CFS Specialist will share the information with the court.
- k. If the CFS Specialist has identified reasons for the interested person to not become the guardian, the CFS Specialist will inform the interested person that he or she apply to become a guardian of the APS client and provide names of attorneys who may file the petition; clarifying that the court will determine who to appoint as guardian.
- l. It is acceptable to provide a list of attorneys who are qualified to perform the work, but the CFS Specialist must make it clear that DHHS does not make specific recommendations and that the potential guardian is free to hire whomever he or she wants as long as the attorney does not have any conflict with representing the proposed guardian.

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- m. Once the potential guardian has hired an attorney, the CFS Specialist may continue to assist in arranging for the guardianship/conservatorship, as needed.
- n. The CFS Specialist will provide information to the attorney to complete the petition to the attorney. The authority to release information is found in Neb. Rev. Stat. § 28-376 to § 28-380. The information in the Central Register is protected, however, the statutes can be read to imply that the Department has the authority to release sufficient information to accomplish the goal of providing for and protecting vulnerable/abused adults.

Attorneys who file guardianships in these cases can request that a visitor/physician be appointed to make necessary medical determinations and provide information necessary to complete a guardianship.

- 1) Information Provided to an Attorney: Information provided to the attorney filing a petition for guardianship/conservatorship may include, but is not limited to:
 - a) The subject's name and address;
 - b) Names and addresses of relatives of the subject, if known;
 - c) Names and addresses of any possible candidates for guardianship/conservatorship;
 - d) Any medical/psychological information showing mental or functional impairment; and
 - e) Evidence to support the need for substitute decision maker.
- o. The CFS Specialist may not sign as the petitioner in a guardianship case unless the attorney filing the petition is a county attorney doing so in his/her official role as county attorney or the attorney is a special representative of the Nebraska State Attorney General. If direction is needed in this area, the CFS Specialist must contact the Department's Legal Division.

B. Mental Health Commitment:

- 1. The Nebraska Mental Health Commitment Act allows persons who are mentally ill and dangerous either to others or themselves to be subject to involuntary custody and treatment as determined by mental health board proceedings when voluntary treatment is not obtained.
- 2. CFS Responsibilities - Request Assistance from Law Enforcement: When the CFS Specialist is involved in a situation where a person they have come into contact with during the course of an investigation may suffer from a mental illness and is presenting a risk of harm to them or others, the CFS Specialist will immediately contact Law Enforcement to assist with the situation. Law enforcement has the authority to place a person into emergency protective custody (EPC).
- 3. Request a Mental Health Board Hearing: In the event that law enforcement declines to place the person into protective custody and the CFS Specialist has assessed the person to be a danger to themselves or others, the CFS Specialist may contact the County Attorney to request a mental health commitment hearing under the Nebraska Mental Health Commitment Act Neb. Rev. Stat. §§71-901-71-962 if the following conditions are met:

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- a. The person presenting the risk of harm is; the vulnerable adult, whom is the subject of the investigation; or is a person posing a risk of harm to the vulnerable adult
 - b. All other lesser restrictive options have been exhausted to reduce or prevent continued abuse, neglect, or exploitation,
 - c. Law Enforcement has not deemed EPC appropriate,
 - d. The CFS Specialist still believes that the person is mentally ill and poses a threat of harm to themselves or others.
4. Information Provided to the County Attorney: The CFS Specialist should provide the following information to the County Attorney when requesting a petition to be filed for a mental health commitment hearing:
- a. The subject's name and address, if known
 - b. The name and address of the subject's spouse, legal counsel, guardian or conservator, and next-of-kin, if known;
 - c. The name and address of anyone providing psychiatric or other care or treatment to the subject, if known;
 - d. The name and address of any other person who may have knowledge of the subject's mental illness or substance dependence who may be called as a witness at a mental health board hearing with respect to the subject, if known;
 - e. An affidavit describing specific behavior, acts, attempts, or threats giving reason to believe that the subject is mentally ill and dangerous;
 - f. The name and address of any other person who may have knowledge of the subject's mental illness or substance dependence and who may be called as a witness at a mental health board hearing with respect to the subject, if known.
5. Continue Adult Protective Services Responsibilities: The CFS Specialist must continue to monitor the vulnerable adult's situation until it has been resolved through the mental health commitment process or other actions to determine if there is risk for continued abuse, neglect, or exploitation and provide Adult Protective Services as eligible.
6. Citation - Mental Health Board Commitment.
According to Neb. Rev. Stat. §71-921:
Any person who believes that another person is mentally ill and dangerous may communicate such belief to the county attorney. The filing of a certificate by a law enforcement officer under Neb. Rev. Stat. §71-919 shall be sufficient to communicate such belief. If the county attorney concurs that such person is mentally ill and dangerous and that neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment ordered by a mental health board is available or would suffice to prevent the harm described in Neb. Rev. Stat. §71-908, he or she shall file a petition as provided in this section.

The petition shall be filed with the clerk of the district court in any county within:

- a. The judicial district in which the subject is located;
- b. the judicial district in which the alleged behavior of the subject occurred which constitutes the basis for the petition; or
- c. another judicial district in the State of Nebraska if authorized, upon good cause shown, by a district judge of the judicial district in which the subject is located. In

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such event, all proceedings before the mental health board shall be conducted by the mental health board serving such other county, and all costs relating to such proceedings shall be paid by the county of residence of the subject. In the order transferring such cause to another county, the judge shall include such directions as are reasonably necessary to protect the rights of the subject.

7. Eligibility for a Mental Health Board Commitment

According to Neb. Rev. Stat. §71-908 a mentally ill and dangerous person means a person who is mentally ill or substance dependent and because of such mental illness or substance dependence presents:

- a. A substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm; or
- b. A substantial risk of serious harm to himself or herself within the near future as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm or evidence of inability to provide for his or her basic human needs, including food, clothing, shelter, essential medical care, or personal safety.