BERRIEN MENTAL HEALTH AUTHORITY
PROCEDURE

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| SUBJECT: GUARDIANSHIP | SECTION: #01-07-02<br><br>Page 1 of 9 |
| APPLICATIONS: Direct Care Staff<br><br>EFFECTIVE DATE: 05/22/96<br><br>APPROVED BY: _____<br>Chief Executive Officer<br><br>REVISED: 3/02, 9/04, 3/05, 10/06, 1/10, 3/10, 7/15, 7/18, 9/2022, 3/2023, 6/2025 | REQUIRED BY:<br><br><br><br>DCH Contract |

**POLICY:**
It is the policy of Berrien Mental Health Authority (BMHA) to assess consumers when there is a question of their competency; make recommendations regarding obtaining a guardian or the least restrictive option to guardianship when appropriate; to assess if pre-existing legal restrictions are still appropriate; and provide information to interested parties and make referrals for appropriate resources to assist our consumers.

**PURPOSE:**
To provide direction to staff when assisting individuals who need help with some form of legal decision making in their life; additionally, to provide guidance to staff regarding the expectation that any limitation on a person's legal status should be continued only as long as it is appropriate and necessary; as well as, provide direction to staff relative to obtaining proper consents for treatment.

**STANDARDS:**
The primary role of the clinician, in relationship to guardianship, is to clarify the legal status of a guardianship or alternatives, so that appropriate care can be delivered with appropriate consents.

**DEFINITIONS:**
**WHAT IS A GUARDIANSHIP?**
**Guardianship** is a legal relationship between a competent adult and a person over the age of 18, whose disability is declared legally incapacitating by a court of law. It is an involuntary trust relationship in which one party, termed a "guardian," acts on behalf of an individual termed the "ward." The law regards the ward as incapable of managing his or her person and/or affairs, in whole or in part, as stated in the order. The incapacitating disability may be caused by mental illness, developmental disability, age, accident or other causes. A developmental disability or mental illness is not, by itself, sufficient reason to declare someone incompetent. In addition, a person may not be declared incompetent simply because it saves someone money or because the disabled person at times acts or uses personal money in ways that seem inappropriate to someone else.

**Competency** has to do with a person's ability to make an "informed decision" or, with the risk of harm that they may experience due to their inability to provide for themselves or manage their affairs. A person could be incapacitated to make an informed decision in an acute situation, however in terms of guardianship; the issue of competency is a prevailing state.

**WHO NEEDS A GUARDIAN?**
A guardian may be appointed for either an incompetent person, or a minor, which are defined by statute as:

**Incompetent:** Any person who is mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that person is incapable of taking proper care of himself or his property or fails to provide for his/her family or other persons for whom he/she is charged by to provide, or any person confined to a penal institution within this state.
**Minor: Any** person under 18 years of age, who has neither father nor mother, or whose parents are unsuitable to have custody and tuition of such minor, or whose interests, in the opinion of the Court, will be promoted.

**ALTERNATIVES TO A FULL GUARDIAN:**
**The individual must plan the following alternatives before he or she becomes mentally incapable of making the decisions:**

1. **Health Care Power of Attorney**
   Also called a patient advocate designation or a durable power of attorney for healthcare. This document enables a person to name an agent (called a patient advocate) to make his or her health care decisions when not capable or not competent to do so. The document may cover any type of health care decision including guidance to the agent about the type and extent of health care desired. It can also include authority to withhold or to withdraw life support services. The adult can give the "agent" or "patient advocate" as much or as little authority as the person wants and they must be of sound mind to sign this document

2. **Do-Not-Resuscitate (DNR) Order**
   A do-not-resuscitate order is a document directing the person named in the order not be resuscitated if the patient's spontaneous respiration and circulation stop in a setting outside a nursing home, hospital, or mental health facility owned or operated by the Department of Community Health. The patient must sign the document in the presence of his/her attending physician and two adult witnesses. If the patient is an adherent of a religious denomination or a church whose members depend upon spiritual means through prayer alone for healing, the adult patient may sign a do-not-resuscitate order that meets special statutory requirements and that does not require the signature of an attending physician.

3. **Power of Attorney**
   A power of attorney is a document signed a competent person giving another person the power to manage some or all of his or her affairs. A notary in the presence of at least one witness must sign the document. A power of attorney is durable if it remains valid even if the maker of the power of attorney later becomes disabled or incapacitated. A durable power of attorney is the means for a mentally competent adult to grant a person (called an agent)

authority to act for him/her if incapacity occurs. It usually affects property decision-making but may affect health care decisions. See the Health Care Power of Attorney stated in item 1.

4. **Trust**

A trust may be a substitute for a conservator and a will. The trust expresses the desires of the maker (called a settlor) about the management of his or her assets during his or her lifetime and when physically or mentally unable to manage the assets. Under a trust, assets are owned by the trust and managed by the trustee for the benefit of the persons to be protected. The trust also names the individuals to whom the assets will go upon the settlor's death. A trustee frequently is the maker of the trust at first and usually names a relative to be the successor.

5. **Joint Ownership**

Joint ownership involves certain assets to be held by two or more persons and may entitle any of the owners to have control and management of the assets.
Some of the assets that can be held in joint ownership are real estate, bank accounts, corporate stocks, and mutual funds. A joint owner can apply the funds of an account for the disabled co-owner without court action. This can involve the loss of sole control over the funds by the disabled person and can result in dishonest use of funds by the co-owner.

**The following alternatives do not need to be planned by the individual before he or she becomes mentally incapable of making the decisions.**

1. **Conservator**

A conservator is a person appointed by probate court and given power and responsibility for the estate (financial assets and property) of an adult (called a protected individual). If an individual has property such as real estate, large bank accounts, or stock that he or she can no longer manage, it may be appropriate to file a petition for a conservator. See separate instructions on **Conservatorship Proceedings.**

2. **Protective Order**

When only a single transaction affecting the property of a disabled person is required, the Probate court may enter a protective order for this one time matter. At a hearing, the court may authorize, direct, or ratify and contract, trust, or other transaction relating to that person's financial affairs or estate without appointing a conservator or a guardian.

3. **Representative Payee**

A representative payee is appointed by a government agency to receive, manage, and spend government benefits for a beneficiary. This is most often done for Social Security benefits. The beneficiary may request a representative payee, but usually the agency requires one when the beneficiary is no longer able to manage benefits. A payee is approved by the agency and there is no court involvement. The representative payee's authority is limited to the government funds for which he or she is the payee.

4. **Special Services for the Aging**

Many communities have voluntary services available upon request to help the aging with their financial affairs. Services may include depositing and writing checks, balancing checkbooks, paying bills, preparing insurance claims, preparing tax information and counseling, and applying for public benefits and counseling. The Commission on Aging and the Family Independence Agency provide these services in

many communities as well as church organizations. A person capable of asking for or accepting the services must request the services to receive them.

5. **Limited Guardian**
   A limited guardian is appointed by a judge to make limited decisions in certain instances. For example, the judge may say that the guardian can only make decisions about living arrangements. A limited guardianship can give a person some independence while providing the specific help needed.

6. **Full Guardianship**
   This is the last alternative that should be used, and is the most restrictive; essentially this gives powers to the guardian. The guardian has power to do what is possible to provide all personal and medical needs for the incompetent person or minor. A guardian may sign a person in for psychiatric treatment if they assent. A guardian cannot take away the incompetent person's civil rights, they cannot prevent a person from voting, in the state of Michigan, and they cannot perform sterilization, or ECT, on the incompetent person.

## GUARDIANSHIP OF LEGALLY INCAPACITATED INDIVIDUAL (L.I.I.)

If an adult is an incapacitated individual such that he or she lacks sufficient understanding or capacity to make or communicate informed decisions due to mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or another cause not including minority, the Probate Court may appoint a guardian for that individual.

## GUARDIANSHIP OF AN INDIVIDUAL WITH A DEVELOPMENTAL DISABILITY (DD)

If an adult is not able to make decisions or care for themselves because of a mental or physical condition that existed before the age of 22 and that condition is likely to continue indefinitely, a petition may be filed to request that the Court appoint a guardian for the developmentally disabled person. Any person interested in the welfare of the developmentally disabled person may file this petition.

## PROCEDURE:

### Assessment of Need

1. If the consumer **has** a guardian, the clinician will ensure a copy of the guardianship is in the record. The clinician should also assess if the individual is a person that presents as needing the assistance of that guardian.
2. If the consumer is a minor, and the court has terminated the parental rights, DHS becomes responsible for signing consents. The primary clinician will ensure the court order for termination of rights must also be filed in the consumer's record. If the alleged guardian has not been able to produce guardianship documents the primary clinician whenever possible and appropriate will ask the consumer to sign any consents to treatment in the meantime. **Emergency services will not be withheld**.
3. If the consumer **does not** have a guardian at the time of intake; the clinician will proceed in the identification of consumer need, service eligibility and medical necessity. If the need for a guardianship along with other services is identified the clinician will document this accordingly and proceed. If assistance in obtaining guardianship is the only identified service requested then the clinician will provide the guardianship and alternative options to the consumer, family or other interested parties (*BMHA

brochure, "What you need to know before filing a petition…."). If the consumer, family or other interested parties are interested in purchasing court required testing services and documents to accompany a guardianship petition those services and documents can be arranged/provided on a case by case basis with prior approval from the Director of Services.

4. If the consumer **does not** have a guardian and the primary clinician has started to provide services; the primary clinician shall ascertain if the consumer is able to make decisions for themselves from both a cognitive standpoint and from a maturation legal-age standpoint and is able to make an informed consent. In general the need for guardianship will be limited to those consumers who have a physical illness that impact their mental capacity, or who have a psychiatric illness that has incapacitated the person to the level that they are no longer able to make informed consent, or to those consumers who are cognitively challenged such as clients with diagnosis of IDD where the client is unable to make decisions for themselves.
5. Children who have a guardian appointed would be subject to similar guidelines; a copy of the legal guardianship papers will be required to initiate treatment other than emergency services. If a person is acting as "a person in loco parentis" for a minor, assess the appropriateness of the request for services and refer to the procedure 01-03-01 regarding consent to treatment and services.

**Review of Options**

1. The primary clinician along with the consumer, family or other interested parties will identify interested parties that could fulfill the role of a guardian or other legally recognized advocate. The primary clinician will document efforts to encourage the consumer's closest family member's involvement in this process. If a primary clinician has concerns about the appropriateness of the recommended party they will consult with their supervisor prior to making a recommendation to the court.
2. The primary clinician will provide guardianship and alternative options to the consumer, family or other interested parties (*BMHA brochure, "What you need to know before filing a petition…").
3. The primary clinician will provide assistance and advocacy with facilitating changes, if appropriate, in obtaining increased legal autonomy status. If needing assistance in making such a determination, the clinician can consult the informed consent board for their recommendation.

**Informed Consent Board Review**

1. If the primary clinician believes the consumer is unable to make informed consent, the primary clinician will complete a referral to the Informed Consent Board (see Informed Consent Board Policy 06-54-02) to determine the most suitable level of intervention needed for the consumer.
2. The Informed Consent Board will review the available information and make a recommendation as follows:
    a. The Informed Consent Board may recommend no intervention is necessary. If this is the case the primary clinician will take no further action.
    b. The Informed Consent Board may recommend a level of intervention less then guardianship. The primary clinician will refer the interested parties to the

proper resources to follow up with the recommendations.

c. The Informed Consent Board may recommend a guardian. If this is the case the Informed Consent Board will include a recommendation on the correct level of guardianship and areas a guardian should represent the consumer in.

**3.** If the Informed Consent Board's decision conflicts with the interested parties, the interested party may continue with the guardianship process as they choose without further BMHA assistance.

**<u>If the Informed Consent Board Recommends Guardianship</u>**

Psychological Testing/Evaluation

**1.** The primary clinician and interested parties will complete planning documentation that includes securing the recommended action of the Informed Consent Board. The primary clinician will obtain authorizations for the following:

a. If there is a current (within the last 365 days) psychological evaluation to support the petition for guardianship the primary clinician will request a copy from the school.

b. If no psychological evaluation has been completed within the last 365 days, the primary clinician will complete an addendum to request authorization of psychological testing. The psychologist will complete the psychological evaluation as soon as possible. The party pursuing guardianship must be timely, filing the petition with the court immediately following completion of the evaluation.

**i.** If not approved and the consumer had specifically requested psychological testing, the consumer will be provided an Adequate Notice for the denial.

**2.** Authorization for BMHA to pay for testing may be granted for consumer's receiving services at BMHA. Decision for granting payment would be based on meeting all of

**3.** the following criteria:

a. Open case at BMHA;

b. Active Medicaid enrollment any exceptions will need approval by the Director of Services;

c. Individual receives ongoing services, other than those related to obtaining guardianship;

d. No psychological testing or evaluation has been completed within the last 365 days from any sources (CMH, private pay, school, etc.)

**<u>Preparing and Submitting the Petition for Guardianship or Modification/Termination of Guardianship</u>**

**1.** Preparing and submitting the petition for guardianship or termination/modification shall be done within 60 days of the recommendation from the Informed Consent Board or assessment. Any delays must be documented in the consumer's record and/or reported to the Informed Consent Board. If there are concerns regarding health and safety, a referral shall be made to Protective Services.

2. If the consumer has family members or other parties willing and able to complete the guardianship or successor paperwork for the court: *(Note: The person submitting the petition is not required to be the entity interested in becoming the assigned guardian. The Probate Court will accept a petition from an interested party, even if that party is not able to become guardian.)*
    a. The primary clinician will request the Release of Information Coordinator to provide, as requested by the interested parties with a consent for release of information, a current Biopsychosocial Assessment and the Psychological Testing/Evaluation or other supporting documentation that identifies the ability of the consumer to meet their basic needs and the need to secure a guardian.
    b. The family may then complete and submit the appropriate paperwork and supporting documentation directly to the Probate Court.
3. If there are no family members or willing parties to complete and submit the petition for guardianship, BMHA shall act as an "agency" filing a petition. BMHA shall only act as an agency filing a petition for proceedings that a public guardianship service is being pursued. Private guardianships are not the fiscal responsibility of BMHA to secure legal counsel/representation. At the discretion of the clinical team, they may request funds to assist in pursuit of a private guardianship, if there is a demonstrated hardship and a private individual is determined to be in the consumer's best interest.
    a. The primary clinician will complete and send a referral to the contracted legal counsel. The referral packet will include copies of the following:
        **i.** Referral Form for Legal Counsel for Guardianship (one copy only)
        **ii.** Petition for Appointment of Guardian (there are different petitions to appoint a guardian for a IDD or SMI individual)
        **iii.** Appropriate supportive documentation
            1. Psychological Testing/Report (required for IDD adults only and completed within the last 365 days)
            2. BMHA Annual Assessment
            3. Report, statement or letter from a primary care physician
            4. Any other reports or evaluations to support the need for guardianship
    b. The contracted legal counsel upon receipt of a completed referral packet, complete the following steps in a timely manner:
        **iv.** Review the referral, forms and reports to assure they have been completed correctly according to legal requirements.
        **v.** Complete any additional required forms for the guardianship petition process.
        **vi.** Consult with, as needed, the primary clinician to obtain required information.
        **vii.** Sign as "Attorney or Person Assisting Petitioner"
        **viii.** Submit the complete packet to Probate Court and provide legal counsel and representation for BMHA employees in the court process.
4. If the consumer cannot independently complete and submit the Petition to Terminate or Modify Guardianship paperwork and there is no family or natural supports to assist the consumer, the primary clinician shall assist in completing the forms, with the

consumer as the petitioner, to obtain greater legal autonomy.

**Guardianship related hearings:**

1. The primary clinician and psychologist may be subpoenaed and/or court ordered to provide further support (ie. Court testimony) as needed to secure the recommended action of the Informed Consent Board. Any court testimony and release of documents to the court will be in compliance with HIPAA regulations.
2. The contracted legal counsel will represent BMHA employees throughout the guardianship hearing process.
3. If the court orders the appointment of a guardian, the primary clinician will request copies of court papers ordering guardianship assignment for BMHA records. Upon receipt, records will upload guardianship documents received in the consumer's chart in IRIS. Records will add the Guardianship banner to the consumer's chart in IRIS. Current information is crucial to ensure protection of health information and that documents are signed by the person with legal authority to do so. Failure to do so which results in a breach of information, may lead to investigation by the HIPAA Security Officer and formal disciplinary action.

***The Berrien County Court House has a "Legal Resource Center" office to assist with completion of paperwork prior to submission of the required petitions and forms to Probate Court. This resource can be used by clinicians and the general public to assure adherence to Probate Court's processes and expectations.***

**Post Guardianship / Representative Payee Process within Riverwood for External Contracted Provider:**

1.Assigning Guardianship/Representative Payee Service Provider for a consumer

a) The Case Manager completes the Request for Services Form

b) The Case Manager sends the referral form as well as Physician's Statement if clinically needed to their direct supervisor who will review for appropriateness, sign the form and send it to the selected Provider.

c) The Provider will sign the form if they accept the referral. The Provider will return the completed form to Riverwood's Claim Specialist.

   a. The provider may begin to start receiving payment the month the guardianship has been accepted by the provider representative's signature.

d) The Claims Specialist will keep the signed form in electronic form and will use the form to justify payment of the monthly invoice for services rendered by the Provider.

e) The Claims Specialist will run a monthly report in IRIS to verify the consumer is enrolled and open to services with Riverwood when the Provider requests reimbursement for services.

f) The Claims Specialist will send a copy of the fully signed referral form to records to be added to the consumer's chart for future reference.

2. Setting up Guardianship Services in IRIS

   a. The Case Manager/Supervisor will notify Records that a Legal Guardian has been appointed.

   b. Records will upload any new guardianship documents received from the Provider

in the consumer's chart in IRIS to reflect the service that is being provided.

c. Records will add the Guardianship banner to the consumer's chart in IRIS

3.Setting up Representative Payee Services in IRIS

a. The Case Manager/Supervisor will be notified by the provider agency that Representative Payeeship has been awarded and is active.

b. The Case Manager adds the contact/payeeship information of the Provider in the consumer's chart in IRIS to reflect the service that is being provided.

4. Termination of Guardianship/Representative Payee Service

a. The Case Manager will complete a "Termination of Service Request" form (Guardianship and Alternatives only) when a current consumer is closing to services for any reason, or if the service is no longer needed or appropriate. In the event of a consumer death, and that a consumer has a legal guardianship with a provider, no "Termination of Service Request" form will be necessary.

b. The Case Manager will send a copy of the completed form to the Provider and the Claims Specialist.

c. The Case Manager updates the consumer's information page in IRIS to reflect the removal of the Guardian / Rep Payee service.

d. The Claims Specialist removes the consumer from payment the month following the date on the notice to terminate services.

**FORMS:**

*Informed Consent Board Referral*
*Court Required Forms*
*Legal Counsel Referral Form*
*Request for Services Form*
*Termination of Service Request*

**Reviewer**: Office of Recipient Rights

**Reviewed:** 5/07, 3/08, 7/09, 3/10, 4/11, 5/12, 6/13, 3/14, 7/15, 6/16, 4/17, 7/18, 5/19, 4/2020, 9/2021, 9/2022, 3/2023, 6/2025