

PATHWAYS CMH

POLICY TITLE: GUARDIANSHIP AND ALTERNATIVES	CATEGORY: RECIPIENT RIGHTS	
EFFECTIVE DATE: January 5, 2011	BOARD APPROVAL DATE: January 5, 2011	
REVIEW DATE: April 15, 2017	REVISION(S) TO POLICY STATEMENT: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	OTHER REVISION(S): <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
RESPONSIBLE PARTY: Recipient Rights Supervisor or Designee	CEO APPROVAL: Mary J. Swift, CEO	

APPLIES TO:

Employees, volunteers and contractual providers of Pathways CMH

POLICY: Pathways CMH and its contracted providers shall endeavor to preserve the constitutional right of a recipient to self-determined and autonomous decision-making. A provider shall not petition for, nor endorse, a petition for the appointment of a guardian (plenary/full, partial/limited, temporary, or emergency) for an adult recipient after a documented assessment and determination that a recipient’s comprehension and capacity to make informed decisions is in substantial doubt and that alternatives to guardianship and/or conservatorship have been explored and ruled out in accordance with this policy.

PURPOSE:

To protect the rights of recipients

DEFINITIONS:

Guardian: A person appointed by the Probate Court and given power and responsibility to make certain decisions about the care of another individual (ward).

Full Guardian of a Legally Incapacitated Individual: A guardian who has total care and control of the adult.

Limited Guardian of a Legally Incapacitated Individual: A guardian of an adult whose rights, powers, and duties have been specifically enumerated by a court order.

Conservator of a Protected Individual: An individual appointed by the Probate Court who has the authority and responsibility to manage the adult’s finances.

Guardian of the Person: A guardian of a developmentally disabled adult.

Guardian of the Estate: A guardian with the same duties and responsibilities as a conservator except the ward is a developmentally disabled person.

Plenary Guardian: A guardian of a developmentally disabled person who possesses the legal rights and powers of a full guardian of the person, or of the estate, or of both.

Partial Guardian: A guardian of a developmentally disabled person whose rights, powers and duties have been specifically enumerated by court order.

Temporary Guardian: A guardian appointed for a temporary period of time pending a full guardianship hearing or when the appointed guardian is not performing his or her duties.

Guardian Ad Litem: A guardian ad litem is appointed to represent the interest of a party in a proceeding before the court where that party is unable to adequately represent themselves. The guardian ad litem may make a recommendation to the court based upon what they believe to be in the best interest of the party they represent. They have no authority to make decisions for the party they represent. They have no authority to make decisions for the party they represent and should not be confused with a guardian.

REFERENCES:

Michigan Estates and Protected Individuals Code (EPIC), MCL 700.5306
Michigan Mental Health Code, MCL 330.1600 - .1644 and MCL 330.1702(2)
Michigan Administrative Code, R 330.7003 and 7009

HISTORY:

Dates Reviewed: July 11, 2013; July 11, 2014; May 5, 2015; April 19, 2016; April 15, 2017

Dates Revised: July 11, 2013

Dates Approved: January 5, 2011

PROCEDURES

A. Presumption of Legal Competency:

1. An adult recipient age 18 or older and a minor recipient when state law allows consent by a minor shall be presumed to have the capacity to make informed decisions and, therefore, to be considered competent. Michigan Administrative Code, R 330.7003 and 7009.
2. The recipient of mental health services does not constitute a determination or adjudication that the individual is competent. Michigan Mental Health Code, MCL 330.1702(2).
3. A determination that an individual meets the criteria of a person requiring treatment or for judicial admission, or any form of admission to a facility including by judicial order does not constitute a determination or adjudication that the individual is competent. MCL 330.1702(2).
4. The presumption that an individual is competent may be rebutted only by court appointment of a guardian or exercise by a court of guardianship powers. R 330.7003 and 7009.
5. A provider shall also presume a recipient with a limited guardian is legally competent in all areas which are not specifically identified as being under the control or scope of the guardian. R 330.7003 and 7009.

B. Provision of Information Pertaining to Guardianship and Alternatives to Guardianship:

When alternative decision-making is being discussed, Pathways and its contracted providers shall provide recipient and family members with information regarding the different types of guardianship and the alternatives to guardianship. Providers shall not, in any manner, attempt to reduce or restrict the ability of the recipient or his/her family from seeking to obtain any form of legal guardianship without just cause as prescribed by this policy.

C. Exploring Alternatives to Guardianship:

When questions arise as to whether an individual is able to provide informed consent to the treatments and/or supports chosen and/or recommended in the person-centered planning process, providers shall first explore a recipient's interest in and ability to benefit from a variety of planned means to preserve the recipient's autonomy. In order to avoid the loss of self determination inherent in the appointment of a guardianship or conservatorship, education and planning shall occur with the recipient and his/her natural supports regarding alternatives to guardianship. Education and planning will be provided in order to avoid the potential use of coercive, involuntary treatment interventions that may not conform to the recipient's wishes. (See Attachment A for a detailed description of some possible alternatives to guardianship.)

D. Evaluating Comprehension and Supervisory Review:

1. In accordance with R 330.7003 and 7009, a provider shall not initiate, nor endorse guardianship or conservatorship proceedings for an adult recipient unless there is sufficient reason to substantially doubt the recipient's comprehension as determined by both of the following:
 - a. A documented assessment of the recipient's capacity to make and communicate informed decisions based on a reasonable person test. This may be supplemented, as appropriate, with a comprehensive assessment by a licensed or limited licensed psychologist training in evaluating comprehension, AND
 - b. A documented determination that alternatives to guardianship have been explored with the recipient but would be insufficient to meet the recipient's alleged need for protection. (See Attachment B, Worksheet for Consideration of Guardianship and Alternatives.)
2. Except in emergency situations where the life of the recipient may be in immediate jeopardy, a provider shall not initiate, nor endorse guardianship or conservatorship proceedings for an adult recipient without first obtaining approval from their supervisor.

3. The two clinical supervisors, one of whom is not familiar with the recipient, shall review the proposed reasons for consideration of guardianship or conservatorship and the recipient's case record and other relevant information, including, when appropriate, the input of the recipient, the recipient's chosen natural supports, and other mental health professionals. Consultation should also be sought, as may be appropriate, with the Office of Recipient Rights.
4. If the two clinical supervisors conclude that informed consent is absent either because a person has not been made sufficiently aware of the procedures, risks, other ramifications, benefits, or alternatives or because a decision is not voluntary as required for informed consent, the provider shall provide the recipient necessary information or, when possible, an opportunity for voluntary choice.
5. If the two clinical supervisors conclude that a person can give or has already given informed consent, or has the capacity to give informed consent but has refused to do so, the provider shall accept the recipient's decisions.
6. If the two clinical supervisors conclude that further mental, social, or educational evaluations are necessary to ascertain the capacity of the recipient to give informed consent or that alternatives to guardianship should be further explored, the provider shall act accordingly and return the results of the assessments and planning decisions for further consideration.
7. If the two clinical supervisors conclude that the recipient's comprehension is still in doubt, that alternatives to guardianship are not viable, and that the protective services of guardian or conservator are necessary, he or she shall make recommendations regarding the type, scope, and duration of the guardianship or conservatorship with the appropriate Probate Court for consideration or endorse a petition already filed with the court consistent with the limitations and obligations listed below.

E. Provider Obligations Regarding Guardianship or Conservatorship Proceedings

1. A provider shall not petition for guardianship or conservatorship unless there is no other capable and willing alternative petitioner, such as an interested person.
2. A provider shall not petition for, otherwise causing the filing of, nor endorse a petition for guardianship or conservatorship of greater scope or duration than is essential.
3. An individual filing a petition for guardianship or conservatorship has the affirmative obligation to state in the petition what alternatives may still be viable options for the court to consider.
4. The justification for petitioning the probate court for consideration of guardianship or conservatorship shall be entered into the recipient's clinical record. As guidance:
 - a. For a person other than with a developmental disability, the Michigan Estates and Protected Individual Code (EPIC), MCL 700.5306, provides that the court may only order guardianship if it finds both that:
 - i. The person is legally incapacitated, which means, pursuant to MCL 700.1105, "An individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions, AND
 - ii. "That the appointment of a guardian is necessary as a means for providing continuing care and supervision of the person, with each finding supported separately on the record."
 - b. EPIC requires that the guardian ad litem appointed for the recipient must inform the court whether there are one or more appropriate alternatives to the appointment of a guardian.
 - c. EPIC requires the court to design the guardianship to encourage the development of maximum self-reliance. If the court determines, by clear and convincing evidence, that guardianship is warranted it may order an Emergency, Temporary, Limited, or Full Guardian

who is granted decisional authority regarding the individual's Psychiatric Care, Medical Care, Legal Affairs, Financial Affairs, Housing, and/or Placement, in whole or in part for a specified duration.

- d. For individuals with developmental disabilities, the Michigan Mental Health Code, MCL 330.1602, provides that guardianship shall be imposed only as necessary to promote and protect the well-being of the individual, including protection from neglect, exploitation, and abuse; shall take into account the individual's abilities; shall be designed to encourage the development of maximum self-reliance and independence in the individual; and shall be ordered only to the extent necessitated by the individual's actual mental and adaptive limitations.

If the court determines, by clear and convincing evidence that guardianship is warranted, it may order an Emergency, Temporary, Partial, or Plenary Guardian who is granted decisional authority regarding the individual's Psychiatric Care, Medical Care, Legal Affairs, Financial Affairs, Housing, and/or Placement, in whole or in part and for a specified duration.

5. A copy of the recipient's guardianship or conservatorship order shall be maintained in the recipient's clinical record and copies shall be provided to and maintained in the recipient's record at all applicable services sites. The recipient's legal status with respect to decisional authority, specifying the specific type, scope, duration of guardianship or conservatorship, and date of review, shall be accurately reflected in the recipient's Individual Plan of Service.

F. Provider Obligation to Review Continued Necessity of Guardianship.

1. A provider shall periodically, but at a minimum no less than during the annual assessment process, assess the capacity of a recipient who has been appointed a guardian or conservator to make informed decisions. Alternatives to guardianship not previously explored or previously rejected shall be offered to the recipient. This assessment and planning process shall be based on the criteria listed in Section D.1 above and be documented in the recipient's clinical record/
2. If after the assessment/evaluation, the provider determines that the recipient may be capable of providing informed consent, the provider shall review the findings with the guardian. An explanation of alternatives to guardianship shall be explored with the guardian.
3. If the guardian is in agreement with the provider, the guardian will be encouraged to petition the court for a reduction or removal of the guardianship.
4. If the guardian is not in agreement or refuses to petition the court, the provider shall immediately petition or cause a petition to be filed with the court to terminate a recipient's guardian or conservator or narrow the scope of the guardian's or conservator's powers.

G. Prohibition of Provider as Recipient's Agent:

1. A Workforce Member or employee or agent of a provider shall not accept appointment to serve in the capacity of Guardian, Conservator, Designated Patient Advocate for Mental Health Care Decisions, or Durable Power of Attorney for Health Care Decisions for a recipient except when otherwise allowed by law.
2. A Workforce Member or employee or agent of a provider shall not accept appointment to serve as a representative payee, fiduciary, or any similar capacity for payments to a recipient under a public or private benefit arrangement except in situations where no other responsible individual or entity has been determined to be available after reasonable efforts have been made to obtain this support and only upon the prior approval of the Chief Executive Officer or designee. If approved, this shall be subject to the following limitations:
 - a. At no time shall this fiduciary relationship be used to coerce compliance with or consent to treatment.
 - b. This fiduciary relationship shall be considered temporary with continued efforts made by the provider to obtain natural or community supports to serve in this capacity.

H. Provider Education and Community Consultation:

Pathways and contract providers will develop assessment tools and a training curriculum to assure that clinical supervisors and their staff have the necessary resources and knowledge to effectively implement this policy. All clinical providers shall receive and successfully complete this training.

GUARDIANSHIP AND ALTERNATIVES – ATTACHMENT A ALTERNATIVES TO GUARDIANSHIP PERSON-CENTERED PLANNING:

Utilizing Natural Supports: Person-centered planning assumes that all individuals have preferences no matter how severe their disability and decisions are best made by a recipient with the help of family, friends, and others in the individual's circle of support. Natural support persons cannot legally substitute for the judgment of the recipient, however, those persons who are most knowledgeable about and can best represent the recipient's values, wishes, and choices can act as adjunct decision-makers with the consent of the recipient.

Transition/Independence Planning: The choices for minors with disabilities reaching the end of school age can be complex and may determine how independent he or she is as an adult. Planning the transition from school to adult life begins, at the latest, during high school. Transition planning is required by law to start once a student reaches 14 years of age, or younger if appropriate. This transition planning becomes formalized as part of the student's Individualized Education Program (IEP). Transition services are provided by the school and are intended to prepare students to make the transition from the world of school to the world of adulthood. In planning what type of transition services a student needs to prepare for adulthood, the IEP Team considers areas such as postsecondary education or vocational training, employment, independent living, and community participation. The transition services are a coordinated set of activities that are based on the student's needs and that also take into account his or her preferences and interests. Ideally, transition services should be integrated with the minor's Person-Centered Planning Process.

Plan for Difficult times/Crisis Planning: Through the Person-Centered Planning process the recipient is offered an opportunity to develop detailed options for crisis resolution in the event he or she experiences an urgent situation to ameliorate the crisis and/or avoid a psychiatric emergency utilizing natural, community, and professional supports. This plan also includes strategies and choices for treatment and for how the recipient's personal affairs will be managed in the event the emergency requires protective and/or restrictive measures.

Expanding Access to Mental Health or Community-Based Supports: Through the Person-Centered Planning process, providers explore and ensure that recipients are aware of adjunct supports which he or she may be eligible to receive from Pathways or another community agency. These may include Community Living Supports, Peer Supports, Home Nursing, Home Health Aides, Chore Services, Home-Delivered Meals, Transportation, Bill- Payor Programs, etc.

LEGAL INSTRUMENTS FOR SURROGATE MEDICAL, MENTAL HEALTH, OR FINANCIAL DECISION-MAKING:

An individual who is of "sound mind" may execute a variety of legal documents expressing their wishes and/or designating another individual to act on his or her behalf to honor previously stated wishes in certain circumstances or under certain conditions. As guidance, the term "of sound mind" is the same test of capacity used for last wills and testaments created under the 12/06/10 revision

Estates and Protected Individuals Code (MCL 700.2501), but is only defined in Michigan case law.

Advance Directives or Living Wills (without Designation of Patient Advocate): While not legally binding in Michigan without the designation of a durable power of attorney or patient advocate, a legally competent individual may express, in writing, his or her wishes for treatment or care in the event of incapacity. If clearly expressed, these wishes must also be honored by a guardian appointed after the date they were created except under certain conditions allowed by law.

Non-Durable Power of Attorney: A legal document by which an individual grants in writing specified powers to a trusted person age 18 or older who acts as the individual's agent (attorney in fact) that is effective at a specified time or circumstance.

“Specific” or “Limited” Power of Attorney: A type of Power of Attorney that is for a single, specific, and time-limited purpose.

Durable Power of Attorney (General DPOA): A type of power of attorney by which an individual designates another person who is 18 years or older as his or her attorney in fact in writing and which is not affected by the principal's subsequent disability or incapacity and notwithstanding the lapse of time since the execution of the instrument (Estates and Protected Individuals Code, MCL 700.5501).

Designation of Patient Advocate for Medical and/or Mental Health Decisions (DPA-MH and/or HC): A type of Durable Power of Attorney whereby an individual designates in writing another individual who is 18 years of age or older to exercise powers and preferences concerning care, custody, and medical and/or mental health treatment decisions for the individual making the patient advocate designation in the event the person becomes incapacitated and who may be authorized to make an anatomical gift on his or behalf in the event of death (Estates and Protected Individuals Code, MCL 700.5506-5513, as amended; Designation of Patient Advocate).

Do Not Resuscitate Declaration (DNR):

Michigan Do-Not-Resuscitate Procedure Act, PA 193 of 1996 directing that resuscitation will not be initiated in the event that the individual suffers cessation of both spontaneous respiration and circulation. A DNR Declaration is not legally binding in a hospital.

ALTERNATIVE MEANS TO PROTECT FINANCES:

Electronic Bill Paying: Many individuals who have difficulty paying bills can arrange to have them automatically deposited and paid directly from their bank accounts each month to a Creditor Pour-over accounts: Some banks have available a restricted access account that only leaves a specified sum of money in it for withdrawal at all times. Thus, someone who has problems managing their money will only be able to withdraw a limited amount of money at any given time.

Joint Property Arrangements or Dual Signature Bank Accounts: Joint property arrangements are where two or more people share ownership of real estate or bank accounts. A family member or trusted individual can be listed on a joint bank account so that the other person can take care of their finances. A choice to create joint property arrangements or bank accounts should be very carefully considered since all persons listed have complete authority over monies in the account or over other property, giving rise to the potential for exploitation.

Fiscal intermediaries: An independent legal entity (organization or individual) that acts as a fiscal agent of an individual for the purpose of assuring fiduciary accountability for the funds comprising an individual's budget.

Special Needs Trusts: Sometimes referred to as a "amenities trust," this is a legal instrument that allows an individual with a disability to create a trust and designate a trustee to spend funds in the trust to enhance the life of an individual as a supplement to public funds. Such trusts may be especially useful for individuals with more than \$2000 in savings as a means of preserving funds without a loss of SSI or Medicaid benefits.

Representative Payee: A person designated by the Social Security Administration or to receive and manage federal benefit funds on behalf of an individual to meet his or her basic needs. The Social Security Act requires that a representative payee assist the beneficiary in gaining skills to regain independence and decision-making authority over his or her benefits.

WORKSHEET FOR CONSIDERATION OF GUARDIANSHIP AND ALTERNATIVES – ATTACHMENT B

Recipient Name: Case # _____ Date: _____

I. Recipient's capacity to make decisions is in doubt regarding (check all that apply and explain):

- Psychiatric care
- Medical care
- Legal matters
- Financial matters
- Housing
- Placement

II. Emergency Care and Treatment needed. Explain:

III. Relevant Diagnoses:

IV. Assessments/Evaluations Conducted:

- Yes
- No

V. Additional Evaluations Recommended:

- Yes
- No

List: _____

VI. Current Services Provided:

VII. Change in Services Recommended: _____

VIII. Recipient's Natural and Community Supports:

IX. Adjunct natural and/or community supports recommended: _____

X. Recipient's Financial Resources

XI. Input of Recipient and Significant Others:

- Yes
- No

XII. Consideration of Alternatives:

A. Has the need for alternative decision-making been discussed with the recipient?

- Yes
- No

- B. Has the need for alternative decision-making been discussed with appropriate family members?
 - Yes
 - No

- C. Is the recipient and/or family members identified individual(s) willing to assume alternative decision-making responsibility?
 - Yes
 - No

DISPOSITION

- I. No Guardianship or Conservatorship is warranted.
 Recipient can currently grant informed consent.
 Recommendations: _____

- II. Appropriate Decision-Making Alternatives (Check all that apply):
 - Durable Power of Attorney (General –DPOA)
 - Designation of Patient Advocate for Mental Health Care/Treatment (DPA –MH)
 - Designation of Patient Advocate (DPA-HC) – Health Care/treatment
 - Designation of Patient Advocate for Health Care and Mental Health Treatment (DPA-MH/HC)
 - Representative Payee

- III. Guardianship or Conservatorship is warranted, as follows:
 - Conservator – Explain why DPOA or Rep Payee is not appropriate: _____
 - Limited guardian (MI) OR Partial Guardian (DD)
 In what specific matter(s) _____
 - Explain why DPA-MH is not appropriate _____
 - Explain why DPA-HC is not appropriate _____
 - Explain why DPA-MH/HC is not appropriate _____
 - Temporary guardian.
 For what specific matter(s) _____
 For how long: _____
 - Full guardian (MI) OR Plenary Guardian (DD)
 - Explain why preceding alternatives are not appropriate: _____

Clinician Signature: _____ Date: _____

Supervisor’s Signature: _____ Date: _____

Supervisor’s Signature: _____ Date: _____

