



HURON BEHAVIORAL HEALTH OPERATIONAL POLICY

Policy #: RR.1.15
Issue Date: 05/07/08

Rev. Date: 05/18/16
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Title: Guardianship and Alternatives Policy

Prepared By: Office of Recipient Rights

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Purpose:

To define the guidelines for guardianship and the alternatives to guardianship.

Scope:

This policy applies to all employees (including full-time employees, part-time employees, contractual providers, volunteers, students, and/or interns, of Huron Behavioral Health (HBH) programs, both direct and contracted.

Information:

HBH and its contracted providers shall endeavor to preserve the constitutional right of a consumer to self-determined and autonomous in his/her decision-making. A provider shall not petition for the appointment of a guardian (plenary/full, partial/limited, temporary, or emergency) for an adult consumer or for the appointment of a conservator (full or limited) for the estate of an adult consumer except after a documented assessment and determination that a consumer'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.

Definitions:

Conservator – is a person that is appointed by the court to handle investments and other assets of an individual who cannot effectively manage them.

Durable Power of Attorney (DPOA) – A type of Power of Attorney for financial or legal affairs that begins only when the person has been determined to be incapacitated.

Full Guardianship – authority to make all decisions about person, i.e. living arrangements, medical treatment, legal matters, etc.

Guardian Ad Litem – Is a person appointed by the court to look out for the best interests of the person during the course of legal proceedings.

Informed Consent – This is a written agreement signed by the consumer, the parent of a minor, or legally empowered guardian, to give consent, which assumes and requires competence, knowledge, and voluntariness.

Limited/Partial Guardianship – authority to make only those decisions which a person is unable to make, i.e. medical treatment, living arrangements, arrange for the purchase of food, etc.

Limited Guardian of a Minor - A guardian appointed under MCL (Michigan Compiled Laws) 700.5202. Limited also implies consent because no limited guardianship can be implemented without the consent of the custodial parents, the proposed guardian, and the court.

Patient Advocate – This is an individual designated to exercise powers concerning another individual's care, custody, and medical or mental health treatment, or authorized to make an anatomical gift on behalf of another individual.

Payee – A representative payee is an individual or organization that receives Social Security and/or SSI payments for someone who cannot manage or direct the management of his/her money.

Peer Support Specialist – A Peer Support Specialist (PSS) is a person with a mental illness who has been trained to help his/her peers (other consumers with a mental illness) to identify and achieve specific life goals. The PSS cultivates the abilities of those they assist to make informed, independent choices, set goals, and gain information and support from the community to achieve their goals.

Power of Attorney – A legal document by which an individual grants specified powers that are effective immediately or at a specified time to a trusted person who acts as the individual's agent for financial or legal affairs.

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Reasonable Person Test - standard for determining whether statement is testimonial hearsay. The idea of a reasonable person test can be applied on the basis of an intelligent non-expert person, that is a reasonable person, being put in a position able to consider the evidence or facts that might have been available at a place or time. The test becomes: what would a reasonable person do under these circumstances, given the evidence or being exposed to a particular situation. (resource: <http://www.argospress.com/Resources/risk-management/reasonperson.htm>).

Policy:

1. It is the policy of HBH to preserve the basic human and civil rights of every individual receiving treatment, services, and supports. As such, each individual is presumed legally competent unless the court has appointed a guardian. Because an individual is a recipient of mental health services (including those ordered by a court) it does not mean that the individual is incompetent. In the case of individuals who have cognitive disabilities, the right to be deemed competent remains unless a guardian has been appointed.
2. When questions arise as to whether individuals are able to consent to supports /services/treatment chosen in their person-centered planning process, all supports to assist them should be available so that court-appointed guardianship, which restricts their ability to make their own decisions and choices, is the last resort. As available and appropriate, HBH endorses least restrictive alternatives to court-appointed guardianship.

Standards:**A. Presumption of Legal Competency:**

1. An adult consumer age 18 years of age or older and a minor consumer 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.
2. The receipt of mental health services does not constitute a determination or adjudication that the individual is incompetent .
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 incompetent.
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.
5. A provider shall also presume a consumer with a limited guardian is legally competent in all areas which are not specifically identified as being under the control or scope of the guardianship.

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

In accordance with Section 474 of the Michigan Appropriations Act of 2006, HBH and its contracted providers shall provide each consumer and his/her family 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 a consumer or his/her family from seeking to obtain any form of legal guardianship without just cause.

C. Exploring Alternatives to Guardianship:

When questions arise as to whether an individual is able to provide informed consent for the treatments and/or supports chosen and/or recommended in the person-centered planning process, providers shall first explore a consumer's interest in and his/her ability to benefit from a variety of planned means to preserve the consumers autonomy. Education and planning shall occur with the consumer and his/her natural supports regarding alternatives to guardianship in order to avoid the loss of self-determination which is inherent with the appointment of a guardianship or conservatorship and/or in the potential implementation of coercive, involuntary treatment interventions that may not conform to the consumer's wishes. (See also "[Alternatives to Guardianship Form](#)" 90-422).

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D. Evaluating Comprehension and Supervisory Review

1. A provider shall not initiate, nor endorse guardianship or conservatorship proceedings for a consumer unless there is sufficient reason to substantially doubt the consumers comprehension as determined by both of the following:
 - a. A documented assessment of the consumers capacity to make and communicate informed decisions based on a reasonable person test. This may be supplemented with a comprehensive evaluation by a licensed psychologist trained in evaluation comprehension, and
 - b. A documented determination that alternatives to guardianship have been explored with the consumer but would be insufficient to meet the consumers alleged need for protection.
2. A provider shall not petition for guardianship or conservatorship without first consulting a clinical supervisor who shall review the consumer's case record and provide the clinical guidance regarding consideration for guardianship or conservatorship.
3. Except in emergency situations where the life of the consumer may be in immediate jeopardy, the clinical supervisor shall, if he/she determines that guardianship or conservatorship may still be warranted, convene a meeting of the Informed Consent Review Board in order to thoroughly evaluate the proposed reasons and conclusions that a consumer may lack the capacity to give or refuse informed consent. The Informed Consent Review Board shall conduct its proceedings and submit a report with recommendations in accordance with the procedures section of this policy.

E. Provider Action Subsequent to Informed Consent Review Board Report

1. If the Informed Consent Review Board concludes 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 an informed consent, the provider shall give the consumer necessary information or, when possible, an opportunity for voluntary choice.
2. If the Informed Consent Review Board concludes that a person can give or already has given informed consent or has the capacity to give informed consent but has refused to do so, the provider shall discuss the decision and further treatment options with the consumer.
3. If the Informed Consent Review Board recommends further mental, social, or educational evaluations deemed necessary to ascertain the capacity of the consumer to give informed consent or the exploration of alternatives to guardianship, the provider shall set up the appropriate assessments/evaluations, and, if recommended or indicated, return the results of the assessment and further plans to the Informed Consent Review Board for further consideration.
4. If the Informed Consent Review Board concludes that the consumer comprehension is still in doubt, that alternatives are not viable, and that the services of a guardian or conservator are necessary to protect the well being of the consumer, with recommendations regarding the type, scope, and duration of guardianship or conservatorship, a provider may file a petition with the appropriate Probate Court for consideration of this determination consistent with the limitations and obligations listed below.

F. 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 a family member. This information will be documented in the consumer's record.
2. A provider shall not petition for, otherwise cause the filing of, nor endorse a petition for guardianship or conservatorship of greater scope or duration than is essential.
3. The justification for petitioning the probate court of consideration of guardianship or conservatorship shall be entered in the consumer's case record. As guidance:
 - a. For a person other than with intellectual/developmental disability, the Michigan Estates and Protected Individuals Code, MCL 700.5306, provides that the court may only order guardianship if it finds both that:

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- 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 of providing continuing care and supervision of the person, with each finding supported separately on the record".

Additionally, MCL 700.5305 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. This statute also 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, and/or housing, in whole or in part and for a specified duration.

- b. For individuals with intellectual/developmental disabilities, the Michigan Mental Health Code, MCL 330.1602, provides that guardianship shall be:

- utilized only as is 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, and/or housing, in whole or in part and for a specified duration.

G. Provider Obligation To Review Continued Necessity of Guardianship

1. A provider shall periodically, but at a minimum no less than annually, assess the capacity of a consumer who has an appointed guardian or conservator to make informed decisions. This assessment shall be documented in the consumer's clinical record. (See also "[Request for Guardianship or Continuation of Guardianship Form](#)" 90-421.)
2. If the recipient demonstrates that he or she is capable of providing informed consent, the provider shall, in a timely manner, petition or cause a petition to be filed with the court to terminate a consumer's guardian or conservator or narrow the scope of the guardian's or conservator's powers.
3. Alternatives to guardianship previously rejected shall be explored again and offered to the consumer.

H. Prohibition of Provider as Consumers Agent

1. HBH staff shall not accept appointment to serve in the capacity of Guardian, Conservator, Designated Patient Advocate for Mental Health Decisions, or Durable Power of Attorney for Health Care Decisions for a consumer of HBH.

Procedures:

Informed Consent Review Board proceedings

1. Within ten (10) business days of a referral from a clinical supervisor after his/her review of a request to consider the capacity of a consumer to give informed consent, an Informed Consent Review Board shall be convened, comprised of at least the following members:

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- a. One mental health professional with prior clinical contact with the person whose ability to give informed consent is at issue. This mental health professional shall not have voting rights regarding the decision by the Informed Consent Review Board as to whether guardianship proceedings should or should not be initiated, and
 - b. Two (2) other mental health professionals of different disciplines, one (1) of whom shall be a licensed psychologist, with appropriate clinical experience or training and one who has had no prior contact with the consumer, and
 - c. One (1) Medical Professional, i.e. Registered Nurse (RN) or Doctor
 - d. The Recipient Rights Officer or his/her designee as a consultant, but non-voting member
 - e. Legal Counsel as requested by the Informed Consent Review Board as a consultant, but non-voting member.
 - f. Peer Support Specialist, unless objected to by the consumer.
 - g. The consumer may invite anyone they would like to support them, (i.e. friend, relative, etc.).
2. The Informed Consent Review Board shall review and evaluate the proposed reasons and conclusions that a consumer may lack the capacity to give or refuse informed consent in light of the consumer's available clinical records, especially assessment, person-centered planning documentation and previous consideration of alternatives to guardianship. The Informed Consent Review Board shall also receive and evaluate the input of the consumer and/or his/her natural supports, with special consideration given to the consumer's abilities, preferences, and choices.
 3. The Informed Consent Review Board may conclude any of the following:
 - a. That informed consent is absent either because the consumer 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 an informed consent.
 - b. That the consumer can give or already has given informed consent or has the capacity to give informed consent but has refused to do so.
 - c. That further mental, social, or educational evaluations are deemed necessary to ascertain the capacity of the consumer to give informed consent or that further exploration of alternatives to guardianship are warranted.
 - d. That the consumer's comprehension is still in doubt, that alternatives are not viable, and that the protective services of a guardian or conservator are necessary to protect the well being of the consumer, with recommendations regarding the type, scope and duration of guardianship or conservatorship.
 4. The Informed Consent Review Board shall submit a written report to the consumer's primary worker, stating the board's finding of fact, a conclusion whether the consumer's consent or refusal is or can be informed, and the board's recommendations. The report shall be placed in the consumer's record. (See also "[Informed Consent Review Board Findings and Recommendations Form](#)" 90-423).

Acronyms:

DPOA – Durable Power of Attorney

HBH – Huron Behavioral Health

MCL – Michigan Compiled Laws

MDHHS – Michigan Department of Health and Human Services

PSS – Peer Support Specialist

RN – Registered Nurse

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MDHHS Administrative Rules 7003 and 7009

Michigan Mental Health Code, MCL 330.1702 (2)

MCL 700.5305

Michigan Estates and Protected Individuals Code, MCL 700.5306

MCL 700.1105

Estates and Protected individuals Code, MCL 700.5506-5513, as amended; Designation of Patient Advocate

Estates and Protected Individuals Code (MCL 700.2501)

Michigan Do-Not-Resuscitate Procedure Act, PA 193 of 1996

[QI.1.23 HBH Record Retention & Storage Policy](#)**Change History:**

Change Letter	Date of Change(s)	Changes
A	04/02/13	Reviewed and revised to comply with 8 th edition COA standards – changed “guardian” to “guardianship” (2 places) in “Purpose” section, reformatted document, removed “exhibit” language and added correct form numbers (90-421, 90-422, & 90-423) throughout document and in “Form” section.
B	05/18/16	In “Acronyms” section added “RN”, “PSS” and changed “MDCH” to “MDHHS”, changed “development disability” to “intellectual/developmental disability” (2 places), made numerous small grammatical/wording changes/corrections throughout document without changing sentence content.