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Derbyshire County Council Adult Care Practice Guidance

Mental Health – Use of Guardianship

Name	Job Title	Date
Authored by: Carole Robinson	Group Manager Mental Health	September 2016

Change History

Version	Date	Name	Reason
V 1	August 2014	Carole Robinson	Development of new practice guidance
V 2	February 2015	Carole Robinson	Update of practice guidance
V3	September 2016	Carole Robinson	Update of practice guidance
V4	June 2019	Helen Platt	Update of practice guidance

Derbyshire County Council Adult Care publishes a range of Practice Guidance documents to support workers managing individual cases. They are written in plain language and give clear and precise guidance detailing how professionals and other relevant parties should respond when dealing with the use of Guardianship.

See also Mental Health Act 1983, Amended by the Mental Health Act 2007.

Please contact Phil Robson: phil.robson@derbyshire.gov.uk if you have any queries regarding this document.

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	Action to be Taken by
<p>About this Document</p> <p>This document should be read in conjunction with sections 7, 8, 9 and 37 of the Mental Health Act 1983 (MH Act), as amended by the Mental Health Act 2007, Chapter 28 of the Reference Guide to the Mental Health Act 1983 and Chapter 30 of Code of Practice.</p> <p>Code of Practice references in this document are given as CoP chapter number followed by paragraph, e.g. 30.1 = chapter 30 paragraph 1.</p> <p>This document covers the main aspects of guardianship that are likely to be used. It is not however exhaustive. If particular issues arise that are not covered by this policy and procedure, advice should be sought from the Legal Department in Derbyshire County Council (DCC) or the group manager, mental health.</p>	

The Purpose of Guardianship

The purpose of guardianship is to enable patients to receive care outside of hospital when it cannot be provided without the use of compulsory powers. Such care may or may not include specialist medical treatment for mental disorder. However, patients cannot be made to accept treatment unless they consent and it does not allow the guardian to consent to treatment on their behalf. CoP 30.5

Guardianship provides an authoritative framework for working with a patient, with a minimum of constraint, to achieve as independent a life as possible within the community. Where it is used, it should be part of the overall care plan.

The application should only be made when other less restrictive options have been considered. CoP 30.10

Guardianship is most likely to be appropriate when:

- the patient is thought to be likely to respond well to the authority and attention of a guardian and so be more willing to comply with necessary treatment or care; or
- there is a particular need for someone to have the authority to decide where the patient should live, or to insist that access is given to key clinicians

Reference: CoP 30.9.

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<p>The Mental Health Act Section 7 – Application for Guardianship</p> <p>A patient who has attained the age of 16 years may be received into guardianship, for the period allowed by the provisions of the act.</p> <p>The grounds are: (both grounds must exist)</p> <p>a) That he is suffering from a mental disorder of a nature or degree which warrants his reception into guardianship. N.B people with a learning disability cannot be made subject to guardianship unless their learning disability is accompanied by ‘abnormally aggressive or seriously irresponsible conduct’. CoP 20.7</p> <p>b) It is necessary for the welfare of the patient or for the protection of other persons that the patient should be so received.</p> <p>The guardianship application shall be founded on two written medical recommendations in the prescribed form. The application can be made by the nearest relative or the approved mental health professional (AMHP). The preferred applicant is always the AMHP.</p>	
<p>The Mental Health Act Section 8 Effects of Guardianship</p> <p>Guardians have three specific powers:</p> <ul style="list-style-type: none"> • the power to require that the patient lives at a specified place - this takes precedence over an attorney or deputy appointed under the MCA 2005 (CoP 30.7) - it can also be used to return someone to the place they are required to live • the power to require the patient attends at places and at times specified for the purpose of medical treatment, occupation, education or training • the power to require access to the patient to be given, at any place where the patient is residing, to any registered medical practitioner, approved mental health professional or other person so specified <p>A guardianship order confers no powers on the guardian to manage the person’s property or financial affairs.</p>	

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<p>Guardianship and Hospital Care</p> <p>Guardianship does not restrict patients' access to hospital services on an informal basis. This applies to both physical and mental health care. CoP 30.33</p> <p>Guardianship does not prevent an authorisation granted under Deprivation of Liberty (DOL) Safeguards in the Mental Capacity Act (MCA). CoP 30.34</p> <p>NB DOL safeguards only apply to people aged 18⁺ whereas guardianship can be used for people aged 16⁺.</p> <p>Guardianship should not be used to require someone to reside in hospital, unless for a very short time in order to provide shelter while community care is arranged. CoP 30.55</p> <p>Guardianship remains in force if a patient is detained under section 2 or 4 of the MH Act, but ends automatically if a patient is admitted under section 3. A patient may also be transferred from guardianship into hospital for treatment under regulation 8 2.</p>	
<p>Guardianship Orders Under Section 37</p> <p>Guardianship may be used by the courts as an alternative to hospital orders for offenders with mental disorders where the criteria set out in the act are met.</p> <p>The guidance in CoP chapter 30 applies. The main difference between a guardianship application and a guardianship order made by the courts is that the nearest relative cannot discharge a guardianship order but they can apply to a tribunal instead.</p> <p>Under section 33.7 of the MH Act the court may request the local authority to say whether it is willing to receive the offender into guardianship, and if so, how the powers will be used. In this case the AMHP should produce a court report in consultation with the group manager mental health</p> <p>The court cannot make a guardianship order under section 37 if the local authority does not agree to comply with such a request.</p>	

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<p>The Appointment of The Guardian</p> <p>The person named as guardian in the application will usually be the Local Social Services Authority (LSSA), but it can be any other individual. In this case the LSSA where the proposed guardian resides must accept the guardianship application and it must be accompanied by a statement in writing that the person is willing to act as the guardian.</p>	
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The Interface with the Mental Capacity Act 2005 (MCA)

Where a patient lacks capacity to make some or all important decisions concerning their own welfare, one potential alternative to guardianship will be to rely solely on the MCA. AMHPs and doctors need to consider all the circumstances of a particular case, see CoP 30.11 to decide which piece of legislation to use.

Where an adult is assessed as requiring residential care but lacks capacity to make a decision about whether they wish to be placed there, guardianship is unlikely to be necessary where the move can properly, quickly and efficiently be carried out on the basis of:

- section 5 of the MCA or the decision of a deputy
- (where relevant) the MCA's deprivation of liberty safeguards (which came into force April 2009) CoP 30.12

In exceptional cases guardianship may be used as an alternative to, or in addition to, deprivation of liberty safeguards. 30.13 of the CoP notes, that guardianship may still be appropriate in such cases if:

- there are other reasons – unconnected to the move to residential care – to think that the patient might benefit from the attention and authority of the guardian
- there is a particular need to have explicit statutory authority for the patient to be returned to the place where the patient is to live if they should go absent
- it is thought to be important that decisions about where the patient is to live are placed in the hands of a single person or authority

Note that the Court of Protection cannot rule on residence when a guardianship residence requirement remains in effect, see *C v Blackburn with Darwen BC* [2011] EWHC 3321 (CoP)

In cases which raise unusual issues, or where guardianship is being considered in the interests of the patients welfare and there are finely balanced arguments about where the patient should live, it may be preferable to seek a best interests decision from the Court of Protection under the MCA. CoP 30.14.

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<p>Use of Guardianship or Supervised Community Treatment</p> <p>If guardianship is being considered for someone in hospital who is detained, supervised community treatment may be more appropriate if the patient needs to remain liable to be recalled to hospital – and the patient is eligible. CoP 31.7</p> <p>However, if the power of recall is not required, guardianship may be used to require the patient to attend at a specified place for medical treatment (although treatment cannot be given without valid consent or where permitted by the MCA).</p>	
<p>Procedure for Making an Application for Guardianship</p> <p>Considerations Before an Application is Made</p> <p>AMHPs should use their professional supervision to consider the legal options available to provide effective community support to people with mental disorders.</p> <p>Any application for guardianship under section 7 should be preceded by a multi-disciplinary meeting which should include all the professionals involved in the person’s care and treatment, to include their GP, psychiatrist, care co-ordinator, care manager and representatives from any care provider that provides a significant element of the care plan. The meeting should also include the person’s nearest relative as defined by section 26 of the MH Act, other significant family members or carers and the service user. If the service user is being treated within the secondary mental health services this meeting will be within the framework of the Care Programme Approach (CPA).</p> <p>The meeting should explore alternative ways of delivering the care plan without the use of compulsory powers.</p> <p>Other statutory powers such as Section 17A of the MH Act – Community Treatment Orders, or the use of the MCA should also be considered.</p> <p>If the meeting considers that the use of guardianship is the most effective way to ensure the service user receives the care plan in the community they need, the AMHP and their service manager should meet with the group manager mental health who has the delegated authority to accept guardianship applications to ascertain in principle that the application will be accepted.</p>	

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<p>Choice of Guardian</p> <p>In most cases, the local authority will be the appropriate guardian. However, it is possible for an individual to be a private guardian, and in these cases the AMHP should establish if the private guardian is suitable. Paragraphs 30.22 to 30.26 of the CoP give guidance on this. Section 7(5) of the MH Act also applies. This states that if a guardianship application is made, naming a private guardian, it shall have no effect unless it is accepted on behalf of that person by the Local Social Services Authority for the area in which he (the private guardian) resides, and it must be accompanied by a statement in writing by that person, that he is willing to act as guardian.</p>	<p>AMHP</p>
<p>Consultation with the Nearest Relative</p> <p>The AMHP must consult with the nearest relative to ascertain if they object to the application for guardianship. Ideally the nearest relative will be included in the multi-disciplinary planning meeting. If this is not possible, the AMHP should establish their views before the meeting.</p> <p>If the nearest relative objects to the application, it cannot proceed.</p> <p>Under Section 29 of the Mental Health Act it is possible for the county court to appoint an acting nearest relative. The procedure for this should be followed. Chapter 5 of the Code of Practice gives guidance on the identification, appointment and displacement of nearest relatives under the act.</p>	<p>AMHP</p>
<p>Application for Guardianship</p> <p>Section 13 of the Mental Health Act states that “if a local social services authority has reason to think that an application for guardianship may need to be made in respect of a patient within their area, they shall make arrangements for an AMHP to consider the patient’s case on their behalf”.</p> <p>The grounds are:</p> <ul style="list-style-type: none"> • that the patient is 16 or over • that he is suffering from mental disorder of a nature or degree which warrants his reception into guardianship - if the person has a learning disability the disability must be accompanied by abnormally aggressive or seriously irresponsible conduct • it is necessary in the interest of the welfare of the patient or for the protection of other persons that the patient be so received 	

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<p>Medical Recommendations</p> <p>The AMHP’s application is founded on two medical recommendations in the prescribed forms; form G3 where both doctors examine the patient at the same time or two form G4s for single recommendations. One of the recommendations must be from a section 12 doctor.</p> <p>Where practical at least one of the doctors should have prior knowledge of the patient.</p> <p>The doctors providing the recommendations must have personally examined the patient, either together or if separately, with not more than five clear working days between the examinations.</p>	<p>AMHP</p>
<p>The Application</p> <p>The AMHP should check both medical recommendations to ensure they have been correctly completed.</p> <p>The AMHP must make their application, and it must be received by the group manager mental health within 14 days of the date of the last medical recommendation. The AMHP must use form G2. There is no time limit within which the application must be accepted.</p> <p>Before making an application the AMHP must interview the patient in a suitable manner and satisfy himself that the use of guardianship is appropriate. Ideally the AMHP will undertake their assessment with one or both of the doctors.</p> <p>The AMHP must consult with the nearest relative to ascertain they do not object. If they are unable to contact the nearest relative the application can proceed if it is not reasonably practicable to contact the nearest relative, or it would involve unreasonable delay. It is also possible to make the application if the AMHP has been unable to establish who the nearest relative is, or they believe there is no nearest relative within the meaning of the act.</p>	<p>AMHP</p> <p>AMHP</p> <p>AMHP</p> <p>AMHP</p>

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<p>The Report to Support The Guardianship Application</p> <p>The AMHP should prepare a full social circumstances report and care plan to support the guardianship application. The care plan should stipulate who will be responsible for monitoring the progress of the patient, and who will make the welfare visits in accordance with the mental health regulations. The care plan should also identify which approved clinician will be the patient’s responsible clinician.</p> <p>The care plan must state which powers of guardianship will be used.</p> <p>If the person is required to live at a specified place, and this is a care home or supported living, the care plan must state that the provider is aware that guardianship is being used and that they will co-operate with the care plan.</p>	<p>AMHP</p>
<p>Application to the Local Social Services Authority</p> <p>The AMHP should send the following paperwork to the group manager mental health who is responsible for accepting the application:</p> <ul style="list-style-type: none"> • two medical recommendations in the prescribed form (Forms G3 or G4) • the AMHP’s application (Form G2) • a blank form G5 for completion by the senior local authority manager - this is the record of the acceptance of the guardianship order • the AMHP’s report which supports the guardianship application • the Guardianship Care Plan • the Guardianship Social Circumstances Report • report supporting the use of a private guardian, plus their signed agreement to act as such. <p>The service manager mental health should check the above before it is sent with the AMHP.</p>	<p>AMHP</p>

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<p>Acceptance</p> <p>Derbyshire County Council has identified the group manager mental health as having the delegated authority to accept applications for guardianship on behalf of the local authority. This manager has a duty to ensure forms are scrutinized to ensure they are valid. Guardianship commences on the date of acceptance identified on form G5.</p> <p>Any errors in the paperwork that can be rectified must be rectified within fourteen days of the receipt of the application. The group manager mental health will liaise with the AMHP to facilitate this.</p> <p>The group manager mental health will inform the AMHP that the application has been accepted. The AMHP is then responsible for:</p> <ul style="list-style-type: none"> • informing the patient orally and in writing and the nearest relative and confirming to the guardianship administrator that they have done so - they must also inform the nearest relative of their power to discharge the guardianship order • providing the patient with an information leaflet which is the Department of Health’s information leaflet on guardianship • ensuring patients are advised of their right to apply to the tribunal and are given the necessary support to do so • ensuring that the patient is aware of their right to access Independent Mental Health Advocacy (IMHA) • ensuring that the patient’s nearest relative is aware of the IMHA service <p>A member of Secretariat will provide copies of the paperwork to the AMHP to be retained on the patient’s file. The original paperwork will be retained by the guardianship administrator.</p>	<p>AMHP</p> <p>AMHP</p> <p>AMHP</p> <p>AMHP</p> <p>Secretariat</p>
<p>Visits</p> <p>The local authority must ensure that the person subject to guardianship is visited at least every three months by a representative of the local authority. The person responsible for undertaking these welfare visits should be identified in the AMHPs social report. It does not need to be the AMHP.</p> <p>There should also be at least an annual visit by an approved clinician or a section 12 approved practitioner. The AMHP should ensure these visits take place, which will be necessary anyway to review the continuing necessity of the guardianship order.</p>	<p>AMHP</p> <p>AMHP</p>

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<p>Duration of Orders</p> <p>A guardianship order is initially for six months. It is renewable for a further six month period and thereafter at annual intervals.</p>	<p>AMHP</p>
<p>Transfer into Guardianship From Section 2 or 3</p> <p>A patient detained in hospital under section 2 or 3 may be transferred into guardianship under section 19 1(a) of the MH Act.</p> <p>In such cases, the duration of authority dates from the date the patient was liable to be detained in hospital. MH Act section 19 2 (b).</p> <p>Form G6 part 1 must be completed on behalf of the hospital managers. The most appropriate person to do this is the person's responsible clinician.</p> <p>Fresh medical recommendations are not required.</p> <p>The AMHP must agree the date of the transfer in advance with the group manager mental health responsible for accepting guardianship applications. The patient remains liable to be detained until that date, although they can be granted leave under section 17 of the MH Act.</p> <p>The procedure for decision making in relation to a transfer into guardianship is the same as for an ordinary guardianship application. However, the nearest relative has no statutory right to object to the transfer, but they can discharge the person from guardianship.</p> <p>The AMHP must write a full social report to accompany form G6 which must be sent to the group manager</p> <p>The form G6 must also be accompanied by the original paperwork (medical recommendations and application, and any renewal paperwork) relating to the patient's detention in hospital. The AMHP must liaise with the Mental Health Act (MHA) administrator at the detaining hospital to obtain these forms. The MHA administrator should retain copies of the original forms.</p>	<p>AMHP</p> <p>AMHP to liaise with mental health act Administrator</p> <p>AMHP</p> <p>AMHP</p>

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<p>Transfer From Guardianship to Hospital</p> <p>It is possible for someone subject to a guardianship order to be transferred to hospital as a detained patient for treatment. MH Act section 19.2(b).</p> <p>In this case the duration of detention begins with the date that the guardianship order was made. (MH Act section 19.2 (d)).</p> <p>Form G8 part 1 gives the authority for the transfer. This will be completed by the group manager mental health. It must be accompanied by an application for admission for treatment, completed by an AMHP using form A6 and be founded on two medical recommendations in the prescribed form for section 3 on form A7 for joint recommendations or two form A8s for single recommendations. The AMHP must consult the nearest relative as if the proposed transfer were an application for admission for treatment.</p> <p>The person should be accepted by the managers of the detaining hospital within 14 days beginning with the date of the authority to transfer.</p>	<p>AMHP</p>
<p>Renewal</p> <p>Guardianship orders are initially made for six months, then for a further six month period, then at intervals of one year.</p> <p>Within two months of the expiry of the order, the AMHP should arrange for the responsible clinician to review the need for the continuation of a guardianship order. If the patient has a private guardian, they must appoint a nominated medical attendant who is responsible for examining the patient in the last two months of each period of guardianship to decide if they wish to make a report extending the patient’s guardianship.</p> <p>The need for the continuation of an order should be discussed at a case review, under the Care Programme Approach if the person is known to the secondary mental health services.</p> <p>The case review should include the responsible clinician, the GP, the AMHP, the care-co-ordinator or care manager, the nearest relative, other family members, representatives of care providers, the service user and their advocate.</p>	<p>responsible clinician</p>

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<p>If it is agreed that the guardianship order is renewed the responsible clinician completes Part 1 of Form G9.</p> <p>Form G9 and a full social report prepared by the AMHP should be sent to the group manager mental health.</p> <p>The need for the continuation of the guardianship order will be reviewed by a panel of county council elected members. This will be organized by the administrator to take place before the order is likely to expire.</p> <p>If the panel decides not to discharge the order, the group manager mental health will sign part 2 of form G9.</p> <p>The AMHP must advise the patient that they remain subject to guardianship. They must also ensure they are aware of their right to appeal to a tribunal, and assist them to do so if necessary.</p> <p>The nearest relative should also be informed, and advised of their continued right to discharge the patient from guardianship.</p>	<p>AMHP</p> <p>AMHP</p>
<p>Discharge</p> <p>Guardianship orders can be discharged in the following ways:</p> <ul style="list-style-type: none"> • by a written order to the local authority by the nearest relative of the patient • by a written order by the responsible clinician • by the local authority (this power would normally be exercised by the panel of elected members on receipt of form G9 and the AMHP report) <p>It is preferable for the guardianship order to be formally discharged, rather than being allowed to lapse. However, if no form G9 is received from the responsible clinician, and no written order is received, the order will lapse when the period it is due to run expires.</p> <p>The AMHP must inform group manager mental health for the reasons why an order is not to be renewed. They should also inform the group manager mental health if the patient dies.</p> <p>The AMHP must inform the nearest relative if the order expires or lapses.</p> <p>Transfer into hospital from guardianship, or a fresh application for MH Act section 3 automatically discharges the guardianship order.</p>	<p>AMHP</p> <p>AMHP</p>

Mental Health Tribunals

The person subject to guardianship can apply to the tribunal within the first six months of reception into guardianship and during each period of renewal. There is no automatic referral to tribunal. The AMHP should ensure the patient has information and support to apply to a tribunal if they so wish.

As the nearest relative has the power to discharge the guardianship order, they cannot apply to the tribunal.

If a nearest relative has been displaced under section 29 sub section (c), (d) or (e) of the MH Act, they can apply to the tribunal in the first 12 months of the order, and subsequently once in each 12 month period for which the order is in force. (MH Act Section 66 (1) (h) and (2) (g)).

If the patient wishes to appeal to the tribunal the group manager MH should be informed.

The AMHP should liaise with the clerk of the tribunal to agree the most appropriate venue and format for any tribunal hearing.

AMHP

AMHP

Absent Without Leave

If one of the powers of guardianship being used is the power to require the patient to live at a specified place, there should be a contingency plan within the care plan that describes the action to be taken should the patient be absent without leave.

If the required place of residence is a care home or supported living the contingency plan must outline the steps the provider will take if the patient goes missing.

A person who is absent without leave may be returned to the specified place of residence by any officer on the staff of the local social services authority, any constable, or any person authorised in writing by the local authority if it is the guardian. The Police will require documentary evidence of the guardianship order. If the police are used the AMHP should agree the most appropriate method of transportation back to the designated place of residence.

If a person is missing for more than 28 days MH Act Section 21B applies.

AMHP

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<p>The group manager mental health must be notified if a person subject to Guardianship is absent without leave.</p> <p>If a pattern of absconding develops the AMHP should convene an urgent review of the case. CoP 30.37 suggests that if a patient consistently resists exercise by the Guardians of their powers, it can normally be concluded that Guardianship is not the most appropriate form of care, and it should be discharged.</p>	
<p>Information</p> <p>Local authorities are required to give information to the Department of Health on an annual basis concerning the use of guardianship. The guardianship administrator will keep a central record of all applications and renewals to facilitate the provision of this information.</p>	