

---

<b>Title</b>	<b>Northern Lakes CMHA Policies</b>
<b>Part 106</b>	<b>Supports and Services – NLCMHA Provided and Contract</b>
<b>Subpart J</b>	<b>Mental Health Code Protected Recipient Rights</b>
<b>Policy No.</b>	<b>106.1013</b>
<b>Subject</b>	<b>Guardianship and Alternatives (RR)</b>

---

## **Applicability**

Policy applies to all NLCMHA activities, operations and sites and to all employees except members of the governing body. Policy also applies to any Network Provider and its employees, volunteers, or agents that have elected to adopt and adhere to NLCMHA policies and procedures pertaining to Recipient Rights under the terms of its Participating Provider Agreement.

---

## **Policy**

Northern Lakes CMHA 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 or for the appointment of a conservator (full or limited) for the person or estate of an adult recipient except 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.

### STANDARDS:

#### **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 (MDCH Administrative Rules 7003 and 7009).
2. The receipt of mental health services does not constitute a determination or adjudication that the individual is incompetent [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 incompetent [Michigan Mental Health Code, 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 (MDCH Administrative Rules 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 (MDCH Administrative Rules 7003 and 7009).

### **B. Provision of Information Pertaining to Guardianship and Alternatives to Guardianship**

In accordance with Section 474 of the Michigan Appropriations Act of 2006, Northern Lakes CMHA and its contracted providers shall provide each recipient and his or her interested 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 a recipient or his or 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. Education and planning shall occur with the recipient and his or her natural supports regarding alternatives to guardianship in order to avoid the loss of self-determination inherent in the appointment of a guardianship or conservatorship and/or in the potential use of coercive, involuntary treatment interventions that may not conform to the recipient's wishes. See EXHIBIT A for a detailed description of some possible alternatives to guardianship.

### **D. Evaluating Comprehension and Supervisory Review**

1. In accordance with Administrative Rules 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 rational person tests. This may be supplemented, as appropriate, with a comprehensive assessment by a licensed or limited licensed psychologist trained 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 EXHIBIT 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 a Northern Lakes CMHA Chief Population Officer or a designated clinical supervisor of a contracted service provider agency.
3. The Chief Population Officer, or clinical supervisor 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 may be also sought, as appropriate, with the Office of Recipient Rights.
4. If the Chief Population Officer, or clinical supervisor 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 informed consent, the provider shall provide the recipient necessary information or, when possible, an opportunity for voluntary choice.
5. If the Chief Population Officer, or clinical supervisor concludes 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 decision.
6. If the Chief Population Officer, or clinical supervisor concludes 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 Chief Population Officer, or clinical supervisor concludes that the recipient's comprehension is still in doubt, that alternatives to guardianship are not viable, and that the protective services of a guardian or conservator are necessary, he or she shall make recommendations regarding the type, scope, and duration of guardianship or conservatorship that may be appropriate.

Subsequently, an agency employee may file a petition for 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 cause 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 in the recipient's clinical record. As guidance:
  - a. For a person other than an individual with an intellectual or 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:
    - 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, Housing, and/or Placement, in whole or in part and for a specified duration.

- b. For individuals with intellectual and 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, 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 Services.

#### **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 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 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. An employee 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 by court order.
2. An employee 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. 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.
  - c. Shall not receive a guardianship fee from the individual.
  - d. If the ward is court-appointed, the employee should not be in the chain of decision making to avoid conflict of interest.

#### **H. Provider Education and Community Coordination**

1. Northern Lakes CMHA and contract providers will develop assessment tools and a training curriculum to assure that clinical supervisors and their employees have the

necessary resources and knowledge to effectively implement this policy. All clinical providers shall receive and successfully complete this training.

2. Northern Lakes CMHA will coordinate with and provide copies of informational materials regarding the implementation of this policy to school systems and probate courts within the Northern Lakes CMHA service area.

---

## Procedures

None.

---

**Adoption Date:** May 3, 2007

**Review Dates:**

June 8, 2009  
May 14, 2010  
March 27, 2012  
April 17, 2015  
January 28, 2020 – JB  
July 13, 2021 PK

**Revision Dates:**

August 31, 2010  
May 4, 2020 DL  
October 14, 2020 DL

