

## **910 KAR 2:040. Service provisions for adult guardianship.**

RELATES TO: KRS 17.500 - 17.540, Chapter 202A, Chapter 202B, 209.030, 209.990, 210.290(3), (4), 311.6225, 311.6231, 367.97501, 367.97524, 367.97527, 387.500-387.990, 389A.010, 389.015, 20 C.F.R. 416.212, 42 U.S.C. 1382(e)(1)(G)

STATUTORY AUTHORITY: KRS 194A.050(1)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 194A.050(1) requires the secretary of the cabinet to promulgate administrative regulations necessary under applicable state laws to protect, develop, and maintain the health, personal dignity, integrity, and sufficiency of the individual citizens of the commonwealth. This administrative regulation establishes service provisions for adult guardianship.

### Section 1. Definitions.

- (1) "Best interest" means a course of action that maximizes what is best for a ward and that includes consideration of the least intrusive, most normalizing, and least restrictive course of action possible given the needs of a ward.
- (2) "Comorbid condition" means the presence of one (1) or more additional disorders or diseases co-occurring with a primary disease or disorder, or the effect of an additional disorder or disease.
- (3) "Conservator" is defined by KRS 387.510(1).
- (4) "Court" means a court of competent jurisdiction.
- (5) "DAIL" means the Department for Aging and Independent Living.
- (6) "Division" means the Division of Guardianship.
- (7) "Guardian" is defined by KRS 387.510(3).
- (8) "Guardian ad Litem" means an attorney appointed to represent the interests of a person with respect to a single action in litigation.
- (9) "Informed consent" means a person's agreement to a particular course of action based on a full disclosure of facts needed to make the decision intelligently.
- (10) "Interested party" means interested parties as defined by KRS 387.860(5).
- (11) "Least restrictive alternative" means an alternative to guardianship that has been exhausted prior to becoming eligible for state appointment, including:
  - (a) Power of attorney;
  - (b) Living wills;
  - (c) Advance directives;
  - (d) Case management;
  - (e) Representative payee;
  - (f) Curator;
  - (g) Trustee;
  - (h) Health care surrogate;
  - (i) Ex-parte order;
  - (j) Emergency protective services;
  - (k) Adult protective ongoing services;
  - (l) Informal network of support; or
  - (m) Supported decision making.
- (12) "Limited conservator" is defined by KRS 387.510(2).
- (13) "Limited guardian" is defined by KRS 387.510(4).
- (14) "Nurse consultant" means a nurse consultant inspector employed by the Cabinet for Health and Family Services.
- (15) "Provider" means a facility or entity providing services for a ward such as:
  - (a) Self;
  - (b) Caretaker;
  - (c) Relative;

- (d) Group home placement;
  - (e) Hospital;
  - (f) Psychiatric hospital;
  - (g) Personal care home; or
  - (h) Medicaid waivers.
- (16) "Quitclaim Deed" means a document by which an individual disclaims an interest in a piece of real property and passes that claim to another person.
- (17) "Substituted judgment" means a principle of decision-making made by the division that comports with the individual ward or beneficiary's known wishes expressed prior to the appointment of a guardian, if the individual was once capable of developing views relevant to the matter at issue and reliable evidence of these views remains.
- (18) "Successor guardian" means an individual, agency, or corporation who is appointed to succeed a current guardian removed by the court.
- (19) "Terminal condition" is defined by KRS 311.621(17).
- (20) "Ward" is defined by KRS 387.510(15).

#### Section 2. Annual Court Report.

- (1) Within thirty (30) calendar days of the anniversary date of the guardianship appointment, the division shall submit to the court an annual report on the ward's personal status.
- (2) In order to complete the annual report, the division shall:
- (a) Report the current physical condition and needs;
  - (b) Review the ward's records;
  - (c) Consult with the provider concerning the ward's care; and
  - (d) Verify the names, addresses, and telephone numbers of the ward's relatives, if known.
- (3) The division shall:
- (a) Review, sign, and notarize an annual report; and
  - (b) Maintain a scheduling system that ensures the timely filing of annual reports in court for each guardianship ward.

#### Section 3. Renewal of Limited Appointments.

- (1) A limited guardian or limited conservator shall not be appointed for more than five (5) years pursuant to KRS 387.590(4).
- (2) The division shall be responsible for initiating procedures for continued guardianship or conservatorship, if appropriate.
- (3) To make this determination, the division shall review the last annual court report to determine if continued guardianship was recommended.
- (4) The division shall secure a verified affidavit from a physician, psychiatrist, or social worker, not serving in the division, verifying the petition to continue guardianship if required by the court.
- (5) At least sixty (60) calendar days prior to the date of the expiration of the limited guardianship, the division shall file with the court the following:
- (a) Petition for Relief, Modification or Termination (AOC-795) issued by the Administrative Office of the Courts and available at <https://courts.ky.gov/resources/legalforms/LegalForms/795.pdf>; and
  - (b) A verified affidavit as specified in subsection (4) of this section, if required.
- (6) If the request for modification involves the removal of additional rights, the division shall request a bench or jury trial.
- (7) If required by the court, the division shall attend the renewal hearing and testify.
- (8) Once a court order is issued, the division shall obtain a copy of the court documents.

#### Section 4. Restoration, Modification of Rights, or Successor Guardian or Conservator.

- (1) The division shall inform the ward of the restoration or modification of rights process.
- (2) If a ward requests the restoration of his or her rights, the division shall assess and assist the ward's request.
- (3) The division shall assess the ward for the following:
  - (a) Community supports available to assist the ward;
  - (b) Least restrictive alternatives that are available to the ward;
  - (c) Improvements in the ward's ability to manage personal or financial affairs;
  - (d) Risks and benefits of restoration or modification of rights; and
  - (e) A recommendation of what rights could be appropriately restored, including voting rights.
- (4) If the assessment supports restoration or modification, the division shall assist the ward in preparation of the Petition for Relief, Modification or Termination (AOC-795), for submittal to the court.
- (5) If the assessment does not support restoration or modification, the division shall inform the ward or other interested party and advise that he or she may call or write the court to request restoration.
- (6) If it is in the ward's best interest, the division shall work with the ward towards the goal of restoration or modification by developing a plan and setting attainable and measurable goals.
- (7) The division shall involve community partners in formulating the plan to ensure focus on comprehensive services.
- (8) The division shall agree on a time frame for evaluating the ward's progress.
- (9) If the ward has some or all rights restored, a successor is appointed, or the cabinet no longer serves in any capacity and the cabinet's appointment is modified, the division shall:
  - (a) Obtain a copy of the new court order;
  - (b) Update the Kentucky Guardianship Fiduciary Information System (KYGFIS) by attaching the appointment papers to an event; and
  - (c) Update the appointment type in KYGFIS if partial restoration of rights were obtained by the ward.

#### Section 5. Inappropriate Appointments.

- (1) If an individual is appointed to the state guardianship program in any capacity and does not meet the requirements of KRS 210.290, the cabinet shall file an appeal.
- (2) The cabinet shall seek relief of any powers appointed:
  - (a) Pursuant to KRS 387.740 that exceed six (6) months; or
  - (b) If an interdisciplinary evaluation report indicates the individual does not need a guardian.

#### Section 6. Sale of Real Estate and Personal Property.

- (1) If a ward of the cabinet has real property, the DAIL shall explore options for management of property and determine what is in the best interest of the ward.
- (2) Information concerning the property valuation for tax purposes, the real estate or personal property, or offers to purchase the ward's property shall only be disclosed for cabinet business purposes to the following authorized persons:
  - (a) Other staff employed by the cabinet's division such as:
    1. Office of the Inspector General (OIG);
    2. Office of Legal Services (OLS);
    3. Ombudsman;
    4. Adult Protective Services (APS); or
    5. Child Protective Services (CPS);
  - (b) The insurance agent or claims representative of the insurance company that wrote the insurance policy on the property;

- (c) The real estate agent or attorney with an agreement to manage property and legal matters for the service region; or
- (d) The Guardian ad Litem appointed for the sale of the ward's property.
- (3) In disposing of the ward's assets, the DAIL shall make a reasonable effort to preserve the estate as designated in the ward's will or other estate planning device executed by the ward prior to the finding of disability in accordance with KRS 387.700(1).
- (4) The DAIL shall review court appointment papers to ensure that the cabinet has the authority to handle real estate and personal property matters.
- (5) If necessary, or if mandated by the court, the DAIL shall secure a title search or an independent appraisal of real and personal property.
- (6) The DAIL shall secure an attorney to handle the sale of property pursuant to KRS 389A.010 and 389A.015.
- (7)
  - (a) The DAIL shall ensure the cabinet only passes title by means of a Quitclaim Deed on behalf of the ward.
  - (b) A Quitclaim Deed passes only the interest held by the ward.
  - (c) Warranties shall not be expressed in a Quitclaim Deed.
- (8) If a relative or other interested party is interested in purchasing real property, they may purchase the property at fair market value as appraised by a realtor or licensed appraiser.
- (9) If the division determines it is in the ward's best interest to sell real and personal property, a public forum for sale shall include a:
  - (a) Public auction;
  - (b) Dealer consignment;
  - (c) Yard sale; or
  - (d) Realtor.
- (10) The DAIL shall dispose of remaining items that did not sell, if applicable, through donation.
- (11) The DAIL may seek eviction through the court if a person residing in the ward's property:
  - (a) Refuses to vacate the property;
  - (b) Is not paying rent; or
  - (c) Is causing damage to the property.
- (12) The DAIL shall attend a closing on the ward's real property and shall sign documents such as a:
  - (a) Quitclaim Deed;
  - (b) Settlement Statement; or
  - (c) Tax form.

#### Section 7. Guardianship Ongoing Service Provision.

- (1) The division:
  - (a) Shall have someone on call twenty-four (24) hours a day; and
  - (b) May have duties such as:
    - 1. Managing assets, which may include managing or liquidating real and personal property;
    - 2. Providing consent for social services, medical services, and other needed support services necessary for the well-being of the ward; or
    - 3. Providing consent or denial for temporary or permanent living arrangements recommended and found by the case manager, family, service provider, discharge planner, or other interested person involved with the ward.
- (2) Pursuant to KRS 387.640(1), the cabinet as guardian shall have the general duty to assure that the personal, civil, and human rights of the ward are preserved and protected.

(3) The division shall not:

- (a) Assume physical custody of the ward;
- (b) Become the caregiver or custodian of the ward;
- (c) Be personally liable for the ward's expenses, placement, or actions; or
- (d) Provide transportation of the ward in a state or personal vehicle, but may assist in arranging transportation through a third party willing to transport if the ward has funds available to cover the cost.

#### Section 8. Decision Making on Behalf of a Ward.

(1) A decision made on behalf of a ward by the division shall be based on the principles of:

- (a) Informed consent;
- (b) Substituted judgment;
- (c) Best interest; or
- (d) Least restrictive alternative.

(2) The division shall use the following guidelines if making a decision on behalf of a ward:

- (a) The exact request of the ward;
- (b) Conditions identified necessitating action;
- (c) Identify and determine alternatives that best meets the individual needs of the ward while placing the least restrictions on the ward's:
  - 1. Freedom;
  - 2. Rights; and
  - 3. Ability to control the ward's own environment;
- (d) Based on available information, determine whether the ward has previously stated preferences prior to the cabinet being made the ward's guardian;
- (e) Communication of decisions with the ward;
- (f) A determination of risks and benefits:
  - 1. While balancing the ward's maximum self-determination; and
  - 2. Maintaining the safety of the ward; and
- (g) Directions from the court.

(3) The division shall make each decision based on the principle of informed consent.

(4) The division shall not use substituted judgment if:

- (a) Following the ward's wishes causes substantial harm to the ward; or
- (b) The division is unable to establish the ward's prior wishes.

(5) The division shall consider the least intrusive, best interest, and least restrictive alternative course of action possible to provide for the needs of the ward.

#### Section 9. Visiting the Ward.

(1) The division shall visit the ward in the home environment at least once annually unless the ward resides in another state that is not within 100 miles of the closest guardianship field office.

(2) If the visit identifies a concern, the division shall:

- (a) Report known or suspected incidents of abuse, neglect, or exploitation in accordance with KRS 209.030;
- (b) Report immediately to the appropriate regulatory or certifying agency; or
- (c) If the issue is not related to health, safety, or welfare, bring it to the attention of the provider's administrator or designee and develop an agreement for corrective action with the provider's administrator.

#### Section 10. Out of State Travel.

(1) If a request is made for a ward to travel out of the state of Kentucky, the division using a person-centered approach shall consider the following:

- (a) Risk of or prior Absence Without Leave (AWOL);
  - (b) Medical issues of the ward that may require attention while out of state that shall be:
    - 1. Paid through the ward's insurance;
    - 2. Paid with the ward's own funds if insurance does not cover the expenses; or
    - 3. Eligible for indigent care if neither insurance or personal funds are available to cover the medical expenses;
  - (c) The ward's ability to handle the trip; and
  - (d) The ward's financial ability to afford the trip.
- (2) If a request includes travel out of the United States, the division shall inform the court of jurisdiction and allow the court to express any concerns.
- (3) The division shall request a signed memorandum or letter from the provider detailing the following information:
- (a) The potential for AWOL risk and if measures will be taken to lessen the risk;
  - (b) Acceptance of the involved responsibilities of the ward; and
  - (c) Proposed dates of travel.
- (4) If the division determines that the provider has been responsible and agrees travel is in the best interest of the ward, the division shall share all necessary emergency contact numbers with the provider and request the provider to:
- (a) Make contact upon return home; and
  - (b) Carry a copy of the current court order appointing the cabinet as guardian in case of an emergency.

#### Section 11. Signing Documents on Behalf of a Ward or Signing Reports to Courts.

- (1) The division shall review each provider contract to ensure a ward's rights are preserved.
- (2) The division shall not sign a contract for arbitration on behalf of a ward.
- (3) A division employee shall use the term:
  - (a) "Conservator" or "limited conservator" if the cabinet has been appointed for the sole purpose of performing the duties of a full or limited conservatorship; or
  - (b) "Guardian" or "limited guardian" in all other designations or combinations thereof.

#### Section 12. Placement and Movement of Wards.

- (1) To ensure a ward is receiving the least restrictive and highest quality services from the most appropriate provider, the division shall develop and maintain a working knowledge of:
  - (a) Services;
  - (b) Providers; and
  - (c) Facilities in the community.
- (2) The division shall consider various ancillary and support services and approve a provider that best meets the needs of the individual ward, with consideration given to the ward's preference.
- (3) If the cabinet has been appointed to facilitate and approve living arrangements of the ward, the division shall provide consent for the most appropriate, least restrictive environment taking into consideration the ward's financial abilities, wishes, and needs.
- (4) Consent to move to a new environment, including an intermediate care facility for individuals with intellectual disabilities, nursing facility, or psychiatric hospital, may only be made after the division:
  - (a) Evaluates physical and mental health needs by reviewing recommendations of treating professionals;
  - (b) Receives acceptance from the placement as meeting the level of care; and
  - (c) Determines care options.
- (5) The division shall, upon the move to a new environment:

- (a) Participate in the initial care plan meeting; and
  - (b) Visit the ward within thirty (30) days of the move.
- (6) The division shall, if known, notify the provider where the ward resides if the ward is listed on the Sex Offender Registry, has committed a sex crime or a crime against a minor, or is otherwise required to be on the registry pursuant to KRS 17.500 through 17.540.

Section 13. Physical and Mental Health Care Needs of a Ward.

- (1) The division may approve health care, treatment, or services of a ward as authorized by a court.
- (2)
- (a) The division may discuss with the ward or the ward's relative or other interested party, if appropriate, the need for surgery or treatment if:
    - 1. The surgery or treatment is in the best interest of the ward; and
    - 2.
      - a. The ward is capable of understanding the information; or
      - b. The ward's relative or other interested party has been involved with the ward's case.
  - (b) Discussion may include the possibility of the ward's relative or other interested party petitioning the court to be appointed as full guardian, guardian for personal affairs, or as limited guardian for medical affairs only.
- (3) The division:
- (a) Shall comply with KRS 387.660(3) and KRS Chapters 202A and 202B; and
  - (b) May sign a provider's voluntary admission form if:
    - 1. A ward meets criteria for admission to a mental health or intellectual disability provider;
    - 2. The ward agrees with voluntary admission; and
    - 3. The cabinet is authorized by the court to make medical decisions for the ward.
- (4) If the medical opinion recommends nonemergency removal of a bodily organ, amputation of a limb, sterilization, abortion, electro-convulsive therapy, or psychosurgery, the division shall obtain and submit to the CHFS Office of Legal Services:
- (a) A written request for legal assistance in anticipation of a motion and order to provide the medical procedure; and
  - (b) A statement from two (2) physicians, who have evaluated the ward providing their professional opinion as to why the benefits of having the procedure outweighs the risks involved.
- (5) If the motion and order have been received, the division shall file the following information with the court in the case:
- (a) The motion and order prepared by OLS;
  - (b) The two (2) physicians' statements;
  - (c) An AOC-775, Order of Appointment of Guardian, available at the court of a ward's disability case; and
  - (d) An AOC-785, Disability Judgment, available at the court of a ward's disability case.
- (6) If required by the court, the division shall attend the hearing on the motion and order.
- (7) The division shall provide a copy of the signed order, signed consent, or denial to the:
- (a) Hospital or provider where the surgery or treatment is recommended to be performed; or
  - (b) Provider where the ward is residing so that the order can be sent with the ward to the hospital or provider.

Section 14. Emergency Removal of a Bodily Organ, Amputation of a Limb, Sterilization, Abortion, Electro-convulsive Therapy, or Psychosurgery.

- (1) If an emergency procedure needs to be performed within twenty-four (24) hours of notification of need from a physician to preserve the life or prevent serious impairment of the physical health of a ward, the division shall not seek court approval.
- (2) The division staff shall notify the division director or designee of the need for an emergency procedure.
- (3)
  - (a) The division shall document the emergency need and time table for the procedure and request a signed statement of emergency need from the physician.
  - (b) The division may request a second opinion and a signed statement from the second physician to verify the need for surgery or that treatment is an emergency.

Section 15. Life Saving Measures.

- (1) A decision made prior to appointment shall be honored pursuant to KRS 311.6231, if:
  - (a) The ward's decision was made prior to the disability adjudication;
  - (b) The prior guardian or health care surrogate established end of life decisions; and
  - (c) There are no concerns that the decision was made for the purpose of abuse, neglect, or exploitation.
- (2) The division may provide for end of life decisions by consulting with the ward, if appropriate, and if no objection, initiating:
  - (a) The Medical Order For Scope Of Treatment (MOST) form pursuant to KRS 311.6225, incorporated by reference in 201 KAR 9:470, and available at <https://kbml.ky.gov/board/Documents/MOST%20Form.pdf>; or
  - (b) The Do Not Resuscitate (DNR) form, incorporated by reference in 202 KAR 7:401.
- (3) The procedure for the division to request a change in code status from Full Code (FC) to Do Not Resuscitate (DNR) for a ward for whom the cabinet has the authority to make health care decisions shall include:
  - (a) Being advised by an attending physician, after clinical examination, that the ward:
    1. Has a terminal condition;
    2. Is permanently unconscious; or
    3. Has a comorbid condition, in which two (2) or more coexisting medical conditions compromise the ward's chance of recovery or of benefiting from active treatment;
  - (b) The physician requests that the ward's code status be changed to DNR; and
  - (c) Notifying and sending the signed DAIL-DNR-01 State Guardianship DNR Request Form and diagnostic documentation or testing completed within the last twelve (12) months that documents the ward's condition to one (1) of the nurse consultants.
- (4) The nurse consultant shall determine if the ward meets criteria or defer the request to change the ward's code status to DNR to the commissioner of the department.
- (5) The nurse consultant shall notify the division of the determination that was made on the ward's code status.
- (6) Upon reaching the determination to change the ward's code status to DNR, the nurse consultant shall notify all involved facilities verbally and in writing by forwarding a copy of the approval.
- (7) If the ward's medical condition improves significantly, any party involved, including the division, may review and make a request to change the code status.

Section 16. End of Life Determination.

- (1) Each ward shall be full code status at the time of appointment unless an advance directive was in place prior to appointment.
- (2) If the cabinet has the authority to make health care decisions and a health care professional has requested end of life consideration, the division, after consulting with the



ward regarding their wishes, may request end of life care, including:

- (a) Comfort care;
  - (b) Hospice care;
  - (c) Withholding of care; or
  - (d) Termination of life prolonging treatment.
- (3) The decision for end of life care shall follow the procedures established in this subsection.
- (a) The division shall be advised by two (2) physicians, after clinical examination, that:
    1.
      - a. The ward has an irreversible terminal condition;
      - b. The ward is permanently unconscious;
      - c. The ward is in a persistent vegetative state; or
      - d. Inevitable death is expected by reasonable medical judgment within a few days; and
    2. The physicians request that the ward's treatment be altered.
  - (b) The nurse consultant shall obtain a signed statement from each of the two (2) physicians documenting the physician's professional opinion as to why it is in the best interest of the ward to change the course of treatment.
  - (c) The nurse consultant shall:
    1. Obtain the medical records supporting the diagnosis and each physician's opinion;
    2. Review the statements and documentation submitted to determine if the ward meets the criteria of paragraph (a)1. of this subsection; and
    3. Assemble an electronic outline concerning the ward's health status including recommendation for end of life care and submit the outline to the division designee.
  - (d) The division designee shall:
    1. Review the request and make a recommendation to approve or not approve the request for end of life care; and
    2. Submit the electronic outline, the nurse consultant's recommendation, and the division designee's recommendation to the DAIL commissioner or appointed designee for final determination of the request.
  - (e) Upon approval by the commissioner, or the appointed designee, of a request for comfort care, hospice, or termination of life support or withholding of life support measures, the division shall give verbal approval to all involved facilities and follow-up with written notification.

#### Section 17. Death of a Ward.

- (1) If a ward dies, the division shall update the data system maintained by Guardianship by changing the ward's status to "deceased" within one (1) working day upon notification of the death.
- (2) The division shall ensure that a relative or other interested party, if known, is notified of the ward's death and the selected funeral home.
- (3) If there are no funds available for burial, the division shall attempt to contact a known relative or other interested party to inform them of the ward's inability to pay for burial expenses and provide information on possible resources for assistance.
- (4) The division shall not grant permission for:
  - (a) An autopsy;
  - (b) Organ or tissue donation; or
  - (c) Release of the body.
- (5) If a ward dies in an unusual or unknown circumstance, the division shall make a referral to the Department for Community Based Services, Adult Protective Services.

#### Section 18. Incorporation by Reference.

(1) The "DAIL-DNR-01 State Guardianship DNR Request Form", 7/2018 edition, is incorporated by reference.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Department for Aging and Independent Living, 275 East Main Street, Frankfort, Kentucky 40621, Monday through Friday, 8 a.m. to 4:30 p.m.

(35 Ky.R. 1978; 2290; eff. 5-1-2009; 40 Ky.R. 2361; 2801; 41 Ky.R. 48; eff. 8-1-2014; 46 Ky.R. 984, 1162; eff. 11-1-2019.)