Department of Children's Services

POLICY

19.10 Designating a Medical Decision Maker for Youth with Disabilities Aging Out of DCS Custody	
Application: To All Department of Children's Services Employees	
Authority: TCA §37-5-105(3), TCA §37-5-106(20) and (21), TCA §34-3-102, TCA §34-1-101(12)	**Standards: None**
Commissioner:	**Date:**
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Glossary:

- Attorney ad litem
  - In conservatorship proceedings, an attorney appointed by the court pursuant to T.C.A. §34-1-107(f)(1)(B), to act as counsel for the Respondent.
- Conservator
  - Conservator (or "co-conservators") means a person or persons or an entity appointed by the court to exercise the decision-making rights and duties of the person with a disability in one or more areas in which the person lacks capacity as determined and required by the orders of the court. T.C.A. §34-1-101(4)(A)
- Conservatorship
  - Conservatorship is a proceeding in which a court removes the decision-making powers and duties, in whole or in part, in a least restrictive manner, from a person with a disability who lacks capacity to make decisions in one or more important areas and places responsibility for one or more of those decisions in a conservator or co-conservators. T.C.A. §34-1-101(4)(B)
- Full Conservatorship
  - When all decision-making rights are transferred from the Respondent to the Conservator. A full conservatorship is sometimes referred to as a conservatorship over "the person and the estate".
- Guardian
  - "Guardian" or "co-guardian" means a person or persons appointed by the court to provide partial or full supervision, protection and assistance of the person or property, or both, of a minor. T.C.A. §34-1-101(10))
- Developmental Disability
  - "Developmental disability", as defined in Tennessee law (T.C.A. §33-1-101(11)) means in a person over five (5) years of age a condition that: (i) Is attributable to a mental or physical impairment or combination of mental and physical impairments; (ii) Manifested before twenty-two (22) years of age; (iii) Likely to continue indefinitely; (iv)Results in substantial functional limitations in three (3) or more of the following major life activities: (a) Self-care; (b) Receptive and expressive language; (c) Learning; (d) Mobility; (e) Self-direction; (f) Capacity for independent living; or (g) Economic self-sufficiency; and (v) Reflects the person's need for a combination and sequence of special interdisciplinary or generic services, supports, or other assistance that is likely to continue indefinitely and need to be individually planned and coordinated;
- Guardian ad litem (GAL)
  - In conservatorship proceedings, an attorney appointed by the court pursuant to T.C.A. §34-1-107, to impartially investigate the allegations in a petition, perform the duties set forth in § 34-1-107(d), and report to the court with recommendations as to the best interests of the respondent. The guardian ad

litem serves as an agent of the court, and is not an advocate for the respondent or any other party.

- Informed Consent
  - See DCS Policy 20.24 Informed Consent
- Intellectual Disability
  - "Intellectual disability", as defined in Tennessee law (T.C.A. §33-1-101(16) means substantial limitations in functioning: (i) As shown by significantly sub-average intellectual functioning that exists concurrently with related limitations in two (2) or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and (ii) That are manifested before eighteen (18) years of age; "Mental retardation" means, until March 1, 2002, significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior that are manifested during the developmental period.
- Least Restrictive Alternatives
  - Pursuant to TCA §34-1-101(18), "least restrictive alternatives" means techniques and processes that preserve as many decision-making rights as practical under the particular circumstances for the person with a disability.
- Limited Conservatorship
  - When decision making rights transferred from the Respondent to the Conservator are limited to specific, enumerated rights. For example, a Limited Conservatorship might cover only health care decisions but not any decisions pertaining to financial matters.
- Mental Disability
  - A mental illness that impairs the person's ability to function independently. Mental illness is defined in Tennessee law (T.C.A. §33-1-101(19)) as a psychiatric disorder, alcohol dependence, or drug dependence, but does not include an intellectual disability or other developmental disabilities.
- Person
  - Within the context of Tennessee conservatorship law, "person" means any individual, nonhuman entity or governmental agency. T.C.A. §34-1-101(13)
- Person with a Disability
  - "Person with a disability" means any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection, and assistance by reason of mental illness, physical illness or injury, developmental disability, or other mental or physical incapacity. T.C.A. §34-1-101(7)
- Petitioner
  - The person, entity, or governmental agency who asks the court to appoint a conservator for someone. In the context of this policy, DCS is the Petitioner
- Physical Disability

- A physical impairment due to illness, injury, disease, or deformity that impairs the person's ability to function independently.

♦ Respondent
- The person who is alleged to have a disability and is the subject of the conservatorship proceedings. In the context of the policy, the DCS youth with a disability who is aging out of custody is the Respondent.

♦ Ward
- A person who has a court-appointed guardian or conservator to make decisions for them.

Policy Statement:
DCS petitions a court with competent jurisdiction to appoint a conservator for aging out youth with disabilities ONLY IF: (1) permanency was not achieved for the youth either through a Trial Home Visit/reunification, subsidized permanent guardianship, adoption, or otherwise exiting custody to live with family; (2) there is medical proof of the disability and an affidavit from the youth's doctor indicating that the youth is unable to make competent, informed decisions even with support as a result of his/her disability (3) conservatorship is the least restrictive alternative to adequately protect the disabled individual and; (4) there is no family member or other person to file the conservatorship petition.

Purpose:
To designate who is the legally authorized decision maker for any youth with disabilities when they age out of DCS custody and transition to adult services rather than living with their family. This can be either the youth making decisions by himself/herself, the youth making decisions with a support person to help with decisions, or a court appointed conservator making decisions for the young adult.

Procedures:

A. Designating a Medical Decision Maker

1. When the Child and Family Team (CFT) does transition planning, pursuant to DCS Policy ***16.51 Independent Living and Transition Planning*** and if the youth has a disability, the team also determines at that time whether the youth can: (a) make medical decisions for himself/herself; (b) make decisions with the help of a support person; (c) designate a Health Care Agent or Proxy; or (d) will need a conservator when he/she ages out of DCS custody. The timeframes set out in this policy below must be followed in order to allow time for conservatorship proceedings to occur.

When the need for a conservator is going to be discussed, the Family Service Worker (FSW)/Juvenile Service Worker (JSW) and supervisor should consult with the designated central office attorney prior to the meeting, and must invite that DCS attorney to the CFTM. The CFTM to discuss conservatorship must include:

- The Regional Licensed Mental Health Clinician if the youth's disability is an intellectual disability, developmental disability, or mental illness;
- The Regional Nurse if the youth's disability is a physical disability, mental illness for which the youth has been on psychotropic medications, or if the youth is placed in a medically fragile foster home;
- The Regional Educational Specialist if the youth has been in Special Education and has an IEP;
- The designated central office attorney; and
- The professional members of the regional Child Health Unit are to serve as resources for the CFT in discussing the youth's disability, but they may abstain from rendering an opinion about whether the youth needs a conservator if they are unfamiliar with that youth's case. They may participate in the CFTM by telephone, WebEx, or by **Skype for Business** if unable to attend in person.

2. The factors and information to be considered in determining whether a youth is a candidate for conservatorship include, but are not limited to, the following:

- Whether the youth has a developmental disability, an intellectual disability, a mental disability, or a physical disability;
- Whether the disability prevents the youth from making competent, informed decisions for themselves;
- Whether the youth can make decisions with the help of a support person;
- Whether the disability prevents the youth from independently taking care of himself or herself;
- Whether there is a Permanent Planned Living Arrangement (PPLA) in place for the youth with a disability when they age out of DCS custody;
- Whether the youth is a candidate for ***Employment and Community First (ECF) CHOICES*** services upon aging out of DCS custody and whether the youth is able to voluntarily give informed consent for these services;
- Whether the youth needs transitioning to adult mental health services and whether the youth is able to voluntarily give informed consent for adult mental health services;
- Whether the youth needs specialized care for a physical disability and whether the youth is able to voluntarily give informed consent to the care;

- Whether the youth would benefit from extension of foster care services and whether the youth is able to voluntarily give informed consent to participate in extension of foster care.
- Whether the youth has identified a Health Care Proxy as referenced in DCS policy ***16.51, Independent Living and Transition Planning*** and is likely to execute a document designating someone else to make health care decisions for them if they are unable. See form ***CS-1133, Appointment of Health Care Agent.***
- Whether having the youth's decision-making rights removed through a conservatorship is the least restrictive alternative to provide adequate protection of the person and/or their property.

B. Obtaining Medical proof of the need for a Conservator

1. If the Child and Family Team determine that the youth is a candidate for a conservatorship upon aging out of DCS custody, and that a conservatorship is the least restrictive alternative to protect that individual, medical proof must be obtained to determine whether there is clinical information to support the need for a conservatorship.
2. Proof of the disability must accompany the petition. Therefore, a medical or psychological report and affidavit must be obtained from a qualified provider with firsthand knowledge of the youth's disability.
   Note: This cannot be done by a DCS Regional Licensed Mental Health Clinician. It must be done by a physician, psychologist, or senior psychological examiner who has a provider patient relationship with the youth.
3. The FSW/JSW contacts the youth's treating physician, psychologist, or senior psychological examiner to inquire if they are willing to provide written attestation and testimony at a hearing, as to the youth's disability and need for a conservator.
4. If the youth's physician, psychologist, or senior psychological examiner is willing, then the FSW/JSW provides form ***CS-1010, Medical/Psychological Report and Affidavit*** to the health care professional to complete. This should not be completed more than 90 days prior to the youth's eighteenth (18th) birthday.
5. If the youth's treating physician, psychologist, or senior psychological examiner does not support a conservatorship for the youth, then DCS cannot petition the court asking that a conservator be appointed.

C. Identifying an appropriate proposed Conservator

1. If the Child and Family Team determine that the youth is a candidate for a conservatorship and the child's treating physician, psychologist, or senior psychological examiner supports this decision, efforts must be made to identify an appropriate and willing person or entity to serve as the conservator.
2. Persons who may be considered as the proposed conservator include:
    - Former or current foster parents of the young adult, unless they are going to be the Family Model Home provider for the young adult in the ECF CHOICES program;
    - Adult relatives, other than the youth's former parents whose rights have been terminated;
    - Other adults who currently have a positive relationship with the youth, unless they are a family member of the Family Model Home provider;
    - Professional guardianship/conservatorship entities;
    - The person serving as the local Public Guardian in the appropriate jurisdiction, with the approval of the Executive Director of the Commission on Aging and Disability;
    - Other persons known to serve as court appointed conservators in the jurisdiction;
    - A DCS employee may be the proposed conservator:
        - If not currently assigned to or supervising the young adult's case,
        - If all other sources listed above have been exhausted, and
        - With approval of the Regional Administrator.
    - A DCS employee can only be conservator over the young adult and cannot be conservator over the young adult's money, property, or any financial assets.
        - Note that TennCare Rules prohibit someone who is paid as a Family Model Provider, or that person's family member, from being conservator.
3. Any person that the Child and Family Team identifies as an appropriate person to be the conservator of the youth must:
    - Submit to a criminal background check, if one has not already been done on the person in the past three (3) months, and agree for the results to be released to the court. It is the responsibility of the FSW/JSW to facilitate the criminal background check and do all the checks listed in 3-bullet 1-6;
    - Have their name(s) and any known aliases checked against the Child Abuse Registry maintained by DCS for persons who have been indicated or substantiated as a perpetrator of child abuse or neglect, (FSW/JSW submits form ***CS-0741, Database Search Results***);
    - Have their name(s) and any known aliases checked against the ***Abuse Registry*** maintained by the Tennessee Department of Health

- Have their name(s) and any known aliases checked against the ***Sex Offender Registry Search*** maintained by the TBI
- Have their name(s) and any known aliases checked against the ***Felony Offender Information*** search
- Have their name(s) and any known aliases checked against the ***Drug Offender Registry Database***
- Sign before a Notary Public, form ***CS-1008, Consent to Serve as Conservator***, indicating their willingness to serve as conservator and their understanding of the duties and responsibilities if appointed. It is the responsibility of the FSW/JSW to get the signed/notarized form ***CS1008, Consent to Serve as Conservator*** from the proposed conservator.

4. Any person, whose name appears in any sources listed in 3-bullet 2-5 above, will not be recommended as a proposed conservator for a DCS youth.
5. When reviewing criminal background checks for someone to serve as conservator, the standards in DCS Policy ***4.1 Employee Background Checks*** serves as guidelines.
6. The selection and appointment of a conservator is subject to the court's determination of what is in the best interests of the Respondent. The court has sole discretion as to who it appoints as the conservator, regardless of who DCS proposes.
    - For more information for identified conservators, see attachment: ***Information for Potential Conservators for Youth with Disabilities Aging Out of DCS Custody***
7. If no suitable or willing candidate can be identified after all sources have been exhausted, or if a DCS employee is the proposed conservator, the FSW/JSW must complete form, ***CS-1134, Affidavit of Diligent Search for a Proposed Conservator*** and submit with the packet submitted to central legal office.

D. Requesting assistance from DCS Legal

1. Once medical proof has been obtained and the background check completed on the proposed conservator, the FSW/JSW may submit a request for DCS Legal to review the information and file a petition for conservatorship.
2. Requests for DCS Legal to review and file a conservatorship petition must be submitted to the DCS Office of General Counsel (OGC); i.e. Central Legal Office, for review. OGC assigns to a DCS attorney if OGC determines the legal standard for a conservatorship is met.
3. The request must be accompanied by a packet containing copies of the following:
    - DCS Form, ***CS-1009, Conservatorship Request and Worksheet***;

- A copy of the signed & notarized, DCS Form, ***CS-1008, Consent to Serve as Conservator***, from the proposed conservator or a list of persons considered and the reason for not recommending them;
- A copy of the results of the criminal background check and all checks listed in Section C. above, of the proposed conservator; and
- Clinical information describing the disability. A notarized DCS form, ***CS1010, Medical/Psychological Report and Affidavit*** from a physician, psychologist, or senior psychological examiner must be sent 90 days or less prior to the youth's 18th birthday.

4. A completed ***CS-1009*** and ***CS-1008*** with accompanying clinical information about the youth's disability must be submitted to OGC no later than six (6) months prior to the youth's 18th birthday. Requests submitted less than 6 months from the youth's 18th birthday may result in the petition not being filed or the youth's transition to adult services being delayed.

5. After reviewing the packet, if OGC determines there is sufficient information to support petitioning the court for a conservator, OGC assigns the case to a DCS attorney who prepares the petition. The same DCS attorney or the local DCS attorney physically closest to the appropriate court files the petition and get a hearing scheduled. The youth's FSW/JSW is responsible for signing the petition as the Petitioner.

6. If additional information comes to light that, in the opinion of the assigned DCS attorney, demonstrates that a conservatorship is no longer supported then the DCS attorney may withdraw the petition or nonsuit the case.

E. Conservatorship proceedings

1. Once a petition is filed requesting the court to appoint a conservator, the following happens:

a) DCS requests that the court appoint a guardian ad litem (GAL) for the Respondent.

b) The DCS attorney requests a hearing date.

c) The court clerk sends notices of the hearing and a copy of the petition to the Respondent, any known adult next of kin, the proposed conservator, the GAL and the Petitioner.

d) Pursuant to TCA §34-1-107, the GAL is charged with meeting the Respondent to inform them of the proceeding, to determine whether the GAL agrees with the petition, and whether the Respondent objects to the conservatorship.

e) If the GAL determines that the Respondent objects to the conservatorship or the proposed conservator, the GAL asks the court to appoint attorney ad litem for

the Respondent pursuant to TCA §34-1-125. The attorney ad litem then advocates for what the Respondent wants; the GAL advocates for what they believe is in the Respondent's best interest.

F. Responsibilities for the Hearing

1. The DCS attorney is responsible for preparing and filing the petition, preparing witnesses and representing DCS' position at the hearing by putting on testimony and other proof.
2. The FSW/JSW is responsible for attending the hearing, testifying as determined necessary by the DCS attorney, and arranging transport of the youth to the hearing.

G. Responsibilities after the Hearing

1. If the court grants DCS' petition and appoints a conservator for the youth, the DCS attorney ensures that certified copies of the order and letter of conservatorship gets delivered to:
   - The FSW/JSW for the youth's case file;
   - The DCS legal file; and
   - The appointed conservator.
2. The FSW/JSW is responsible for coordinating and planning with the conservator, the youth's transition out of DCS custody including finding an appropriate post-custody placement if the youth cannot remain in their current placement once they turn 18. Any decision about post-custody placement requires the conservator's consent.

Note: The appointment of a conservator does not relieve the FSW/JSW of their job duties and responsibilities as to that case.

Forms:

CS-1008, Consent to Serve as Conservator

CS-1009, Conservatorship Request and Worksheet

CS-1010, Medical or Psychological Report and Affidavit

CS-1133, Appointment of Health Care Agent

CS-1134, Affidavit of Diligent Search for Proposed Conservator

CS-0741 Database Search Results

Collateral Documents:

16.51 Independent Living and Transition Planning

16.52 Extension or Re-establishment of Foster Care for Young Adults

16.53 Eligibility for Independent Services

19.7 Transitioning DCS Youth with Serious Psychiatric Disorders into Adult Behavioral/Mental Health Services

19.8 Transitioning Youth to the Employment and Community First (EFC) Choices Program for Adult Services

20.24 Informed Consent

16.31 Policy Attachment- Protocol for Planned Permanent Living Arrangement

Information for Potential Conservators for Youth with Disabilities Aging Out of DCS Custody

Independent Living and Transition Planning Guide

Permanency Plan Development Guide