

WSR 24-12-057

PROPOSED RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Aging and Long-Term Support Administration)

[Filed June 3, 2024, 9:52 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 24-04-015.

Title of Rule and Other Identifying Information: The department of social and health services (DSHS) is proposing new rules to implement the establishment of a state-funded guardianship and conservatorship assistance program by adding new sections in chapter 388-106 WAC. Services have been provided since 2022 under a pilot project status. The purpose of the proposed rules is to convert from pilot to program. The new sections include WAC 388-106-2100 What is the home and community services guardianship and conservatorship assistance program?, 388-106-2105 Definitions, 388-106-2110 Eligibility criteria, 388-106-2115 Referral process, 388-106-2120 Acceptance into the program, 388-106-2125 Reconsideration of acceptance determination, 388-106-2130 Notice of department decisions, 388-106-2135 Appeal of acceptance determination or discontinuation of program participation, 388-106-2140 Overpayment, 388-106-2145 Program hold and reinstatement or forfeiture of program participation, 388-106-2150 Estate recovery, 388-106-2155 Exception to rule (ETR), 388-106-2160 Personal needs allowance increase or participation reduction, and 388-106-2165 Split appointment.

Hearing Location(s): On July 10, 2024, at 10:00 a.m., virtually via Microsoft Teams or call in. See the DSHS website at <https://www.dshs.wa.gov/sesa/rpau/proposed-rules-and-public-hearings> for the most current information.

Date of Intended Adoption: Not earlier than July 11, 2024.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, email DSHSRPAURulesCoordinator@dshs.wa.gov, fax 360-664-6185, beginning at noon on June 5, 2024, by 5:00 p.m. on July 10, 2024.

Assistance for Persons with Disabilities: Contact Shelley Tencza, rules consultant, phone 360-664-6036, fax 360-664-6185, TTY 711 relay service, email shelley.tencza@dshs.wa.gov, by 5:00 p.m. on June 26, 2024.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: DSHS is proposing new rules to implement the establishment of a state-funded guardianship and conservatorship assistance program in alignment with the 2022 adoption of chapter 11.130 RCW by adding new sections in chapter 388-106 WAC. DSHS is adding new sections in chapter 388-106 WAC to support the establishment of the new guardianship and conservatorship assistance program. These sections include WAC 388-106-2100 to 388-106-2165. The proposed rules describe eligibility for the guardianship and conservatorship assistance program, the package of services provided for individuals who are referred by acute care hospitals who have been found unable to consent to services due to a qualifying neuro-cognitive disorder, and the contractor payments for services. The rules will describe services, duration, and payments.

Reasons Supporting Proposal: Washington state court implementation of chapter 11.130 RCW, The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act of 2022; the success of the home

and community services guardianship pilot project since July 2022, which will be converted from pilot to program status with approval of said rules.

Statutory Authority for Adoption: RCW 43.17.060, 43.20B.030, and 74.08.090.

Statute Being Implemented: RCW 43.17.060, 43.20B.030, 74.08.090; and Laws of 2022.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: DSHS, governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Sarah Tremblay, P.O. Box 45600, Olympia, WA 98504, 564-999-1032; Enforcement: Kelli Emans, P.O. Box 45600, Olympia, WA 98504, 360-725-3213.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Sarah Tremblay, P.O. Box 45600, Olympia, WA 98504, phone 564-999-1032, email sarah.tremblay@dshs.wa.gov.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(4).

Is exempt under RCW 34.05.328.

Explanation of exemptions: DSHS has analyzed the probable costs and benefits of the proposed amendments, taking into account both the qualitative and quantitative benefits and costs. DSHS analysis revealed that there are no new costs imposed since the proposed rules describe the program, including eligibility requirements for participants and contractors. The rules themselves do not impose any new costs on businesses. If a business wants to participate in the program as a contractor then it must perform the service and will be paid according to the terms of the contract. Participation as a contractor is completely voluntary.

Scope of exemption for rule proposal from Regulatory Fairness Act requirements:

Is fully exempt.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. There is no cost, therefore no small business economic impact statement is required.

May 30, 2024
Katherine I. Vasquez
Rules Coordinator

SHS-5031.5

NEW SECTION

WAC 388-106-2100 What is the home and community services guardianship and conservatorship assistance program? (1) Subject to available state only funds, the department of social and health services

(DSHS) pays for certain fees and costs for professional guardianship and conservatorship services for eligible persons as described in WAC 388-106-2110.

(2) The amounts paid and which services and costs are covered are determined by DSHS in its sole discretion and are contained in contracts with certified professional guardians and conservators (CPGCs).

(3) Subject to available funds, and in its sole discretion, DSHS may file petitions for guardianship with a Washington state superior court for certain patients occupying beds in acute care hospitals who no longer require inpatient hospital care or who require assistance in accessing or maintaining long-term support and services (LTSS) services due to the person's inability to give consent.

NEW SECTION

WAC 388-106-2105 Definitions. (1) "**Aging and long-term support administration**" or "**AL TSA**" means an administration within DSHS.

(2) "**Client**" means a person who is an applicant for, or recipient of, any Washington apple health program, including managed care and long-term care. See definitions for "applicant" and "recipient" in RCW 74.09.741.

(3) "**Contractor**" means a certified professional guardian and conservator who has met contractor eligibility criteria and has executed a contract with DSHS to provide guardianship and conservatorship services through the state funded home and community services guardianship and conservatorship assistance program.

(4) "**Court order**" means any judgment, decree, instruction, or order of a Washington state superior court, a court of comparable jurisdiction of an Indian tribe, another state, or country.

(5) "**Decision-making assistance**" means support for an individual with diminished decision-making ability in making decisions affecting health, safety, or to manage financial affairs. Assistance includes, without limitation, acting as a representative payee, fiduciary, an attorney-in-fact, a trustee, or a certified professional guardian or conservator.

(6) "**DSHS**" means the department of social and health services.

(7) "**Due diligence**" means the acute care hospital has adequately investigated whether a family member or friend would be able and willing to serve as a lay guardian, and, if not, has contacted agencies and individuals providing professional guardianship and conservatorship services, has submitted a referral to the statewide guardianship listserv managed by the office of public guardianship (OPG) through the administrative office of the courts (AOC), and at least 14 days have elapsed without identification of a potential professional guardian for nomination.

(8) "**Estate Recovery**" means the state's process for recapturing the cost of long-term care services, related hospital, and prescription drug services from a recipient's estate. Federal and state laws allow states to recover state-funded services and certain medicaid costs.

(9) "**Guardian**" or "**Conservator**" means a professional individual, agency, or a corporate fiduciary (such as a nonprofit corporation or bank trust department) appointed by a court to assist and protect an individual who the court has determined requires assistance in managing their own affairs.

(10) **"Home and community services"** or **"HCS"** means a division within the DSHS aging and long-term support administration.

(11) **"LTSS"** means long-term support and services under the home and community services division.

(12) **"Neuro-cognitive disorder"** means a primary diagnosis of dementia, Alzheimer's, Parkinson's, Huntington's, traumatic brain injury, or stroke which results in the individual's lack of decision-making capacity impacting accessibility for long-term care benefits.

(13) **"Notice of department decisions"** means a generated written notice provided to an individual client or their legal representative or both identifying them of:

(a) The action taken by DSHS that impacts the individual client's benefits;

(b) The reason DSHS took said action;

(c) The legal authority to take said action;

(d) Date of the notice;

(e) Effective date of the action taken;

(f) Department representative contact information;

(g) Hearing rights; and

(h) Information about continued benefits, if any.

(14) **"Overpayment"** means any payment or benefit to a recipient or to a vendor in excess of that to which is entitled by law, rule, or contract, including amounts in dispute as outlined in chapter 41.05A RCW.

(15) **"Participation"** means the portion of the client's responsibility or financial obligation paid by the client to the provider to cover part or all of their cost of care.

(16) **"Private pay"** means the status for any period of time in which a client is ineligible for medicaid-funded LTSS and must use their own personal resources to pay for their services.

(17) **"Program hold"** means an intervention taken by DSHS to place future payment authorizations on hold whenever an approved state funded guardianship and conservatorship assistance program recipient is identified as financially ineligible for medicaid LTSS per chapter WAC 182-513-1315 (1)-(3). Under a program hold, a recipient's state funded guardianship and conservatorship assistance program slot can be held for up to 90 days from date of financial ineligibility discovery.

(18) **"Program recipient"** means an individual meeting eligibility criteria for inclusion into the state funded home and community services guardianship and conservatorship assistance program.

(19) **"Program slot"** means a program vacancy based on timeframe of needed resources as designated by "tier 1" and "tier 2". A tier 1 program slot is a slot with a maximum service benefit of up to 12 months duration. A tier 2 program slot is a continuous slot for individuals not required to pay participation towards their cost of care based on financial thresholds per WAC 182-513-1315 (1)-(3) or individuals who are not United States citizens.

(20) **"Provider one"** means the invoice processing system used by DSHS to process and pay some social service providers and contractors who provide care or services to medicaid clients.

(21) **"Provisional approval"** means the process of allowing clients a conditional approval for accessing the state funded guardianship and conservatorship assistance program under medicaid long-term services and supports (LTSS), without having to wait for the full functional and financial medicaid eligibility determination.

(22) **"Split appointment"** means when two or more individuals are appointed to serve as either a guardian, a conservator, co-guardians,

or co-conservators on a single case appointed under chapter 11.130 RCW.

(23) **"Successor guardian or conservator"** means a successor or replacement guardian or conservator appointed by the court to act on behalf of an individual subject to either guardianship, conservatorship, or both if the existing guardian or conservator resigns, dies, becomes incapacitated, is determined no longer qualified to serve, declines to serve the individual, or due to noncompliance with court reporting requirements or duties.

(24) **"Termination"** means the final termination order of a preestablished guardianship or conservatorship judicial matter or both which negates the previous orders of case establishment. Such an order restores the individual's civil rights and decision-making authority. A termination is completed through a judicial process by which the court determines that a preestablished guardianship or conservatorship matter or both no longer meets judicial grounds under RCW 11.130.265, that termination would be in the best interest of the adult based on a change in functionality or circumstances, or that less restrictive alternative protective arrangement is available to meet the needs of the individual.

(25) **"The certified professional guardian and conservator review board"** or **"CPGCRB"** means the regulatory board tasked by the administrative offices of the court (AOC) to oversee the statutory and regulatory requirements and to investigate guardian and conservator complaints of certified professional guardians and conservators (CPGCs) statewide.

(26) **"The guardianship or conservatorship"** means the establishment of a guardianship or conservatorship matter from the date of appointment of a guardian or conservator agent, not from the date of original petition.

(27) **"Tier 1"** means a one-year contract term for state-funded guardianship and conservatorship services under the state funded guardianship and conservatorship assistance program.

(28) **"Tier 2"** means an ongoing, renewable contract term for state-funded guardianship and conservatorship services under the state funded guardianship and conservatorship assistance program:

(a) When an individual is determined to:

(i) Not have financial ability to pay monthly guardianship or conservatorship fees through alternative participation reduction procedures due to lack of or limited income; or

(ii) Be a noncitizen approved for long-term care through the state-funded long-term care services program for noncitizens under WAC 182-507-0125.

(b) When starting the 13th month from the original appointment date, a contractor will be paid a monthly rate of \$235.00, or a medic-aid aligned guardianship or conservatorship monthly rate, whichever is greater, for a tier 2 client.

NEW SECTION

WAC 388-106-2110 Eligibility criteria. (1) To be eligible to participate as a contractor in the program a person must:

(a) Hold certification as a professional guardian and conservator approved by the state of Washington supreme court;

(b) Be in good standing with the certified professional guardian and conservator review board (CPGCRB);

(c) Have sufficient insurance coverage to meet DSHS contract requirements;

(d) Hold a program contract with DSHS; and

(e) Comply with the requirements of the program as described in this chapter.

(2) To be eligible to participate as a recipient in the program a person must:

(a) Meet long-term care services and supports (LTSS) medicaid functional eligibility requirements in chapter 388-106 WAC and financial eligibility requirements in WAC 182-513-1315 (1)-(3) or be determined provisionally approved;

(b) Not have financial resources to pay for guardianship services, fees, or costs from their estate;

(c) Have a qualifying neuro-cognitive diagnosis as defined in WAC 388-106-2105;

(d) At the time of referral and acceptance into the program, be occupying an acute care hospital bed, and not be in a restricted subgroup including current occupancy in a bed readiness program, skilled nursing facility, inpatient rehabilitation, inpatient mental health, emergency department, long-term acute care hospital bed, facility bed under observation status, or in a facility bed under a single bed certification pursuant to a cause under chapter 71.05 RCW;

(e) At the time of referral, no longer requires an inpatient level of care at an acute care hospital;

(f) Likely requires the appointment of a guardian or conservator to be able to access and maintain long-term services and support; and

(g) Not have a professional or lay guardian or conservator willing to accept nomination.

(3) To remain eligible to participate as a recipient in the program a person must:

(a) Remain functionally and financially eligible for DSHS LTSS benefits; and

(b) Receive a DSHS LTSS service.

NEW SECTION

WAC 388-106-2115 Referral process. (1) An acute care hospital may submit a referral to home and community services under the following circumstances:

(a) Acute care hospital clinicians have determined that the person likely needs a guardian or conservator;

(b) The acute care hospital has a good faith belief that the person meets the eligibility requirements to participate in the program;

(c) The acute care hospital has documented due diligence in attempting to identify a proposed guardian or conservator;

(d) The acute care hospital has submitted a long-term care medicaid application to DSHS on behalf of the person;

(e) The acute care hospital provides complete referral documents as required by DSHS; and

(f) The acute care hospital has, or will file, a petition for guardianship or conservatorship.

(2) DSHS, in its sole discretion, and subject to available funds, may waive the requirement of subsection (f) of this section and file a

petition for guardianship or conservatorship or both instead of the referring acute care hospital.

NEW SECTION

WAC 388-106-2120 Acceptance into the program. (1) Within available resources, home and community services will accept a person into the guardianship and conservatorship assistance program if DSHS determines that the person meets the eligibility requirements, the referral packet is complete, and there is a program slot available at the time of acceptance.

(2) DSHS prioritizes acceptance into the program on a first-come, first-served basis determined by the date DSHS receives a complete referral packet and DSHS completes an eligibility determination for the person.

(3) If there is not an appropriate program slot available for an eligible person, DSHS will put them on the waitlist for the determined tier slot. Placement on the waitlist does not guarantee that a person will be accepted into the program.

(4) Waitlist priority is determined based on a first-come basis utilizing the date DSHS receives a complete referral packet and DSHS completes an eligibility determination for the person.

(5) In the event that a person is found eligible for a tier 2 slot, but at the time of acceptance only a tier 1 slot is available, DSHS will accept the person into the tier 1 slot while simultaneously placing the person on the waitlist for a tier 2 slot. Acceptance into the tier 2 waitlist does not guarantee that a person will be accepted into the program under a tier 2 slot designation.

(6) Once a person is accepted into a program slot, DSHS makes a referral to all program contracted certified professional guardians and conservators for consideration of acceptance of nomination. DSHS has the sole discretion to remove a person from the program if after two months of initial contractor referral, no program contracted certified professional guardian or conservator agrees to accept the case for nomination by the court.

(7) Removal from the guardianship and conservatorship assistance program in no way affects the person's ability to be rereferred and reconsidered for inclusion onto the guardianship and conservatorship assistance program at a future date.

NEW SECTION

WAC 388-106-2125 Reconsideration of acceptance determination. A referring acute care hospital may request that DSHS reconsider its decision to accept a person onto the guardianship and conservatorship assistance program. A request for reconsideration must be supported by the referring acute care hospital submission of supplemental documentation to support the person's eligibility. An acute care hospital does not have a right to an administrative hearing to contest any department decision made under this chapter.

NEW SECTION

WAC 388-106-2130 Notice of department decisions. DSHS will provide an applicant or participant in the program, and their guardian or conservator as applicable, with written notice about department decisions about eligibility for acceptance onto, or continuation on, the program.

NEW SECTION

WAC 388-106-2135 Appeal of acceptance determination or discontinuation of program participation. The person who is the subject of a referral for acceptance into or a recipient of services under the guardianship and conservatorship assistance program may request an administrative hearing to contest a department decision that they are not eligible for acceptance or continuation in the program. The person does not have a right to a hearing to contest the adequacy of the services, costs covered, or the amounts paid to the contracted guardian or conservator.

NEW SECTION

WAC 388-106-2140 Overpayment. If DSHS or the guardian or conservator discovers that the person's estate has available and adequate resources to pay for guardianship fees or costs, the payments made under this program on behalf of the client are overpayments to the extent a court determines that the person's estate is able to pay for guardianship fees and costs paid for by the state funded guardianship and conservatorship assistance program.

NEW SECTION

WAC 388-106-2145 Program hold and reinstatement or forfeiture of program participation. If a client ceases to remain financially eligible as required by WAC 182-513-1315 (1)-(3) while occupying a program slot, their program slot can be held for up to a maximum of 90 days from the date it is discovered the client is overresourced. This process is referred to as a "program hold". In the event that a client becomes financially reeligible for LTSS medicaid as outlined in WAC 182-513-1315 (1)-(3) within the designated 90-day hold period, they will be reinstated to their program slot for the remaining portion of the originally approved tier slot term; however, if at the end of the designated 90-day hold period, the client continues to be financially ineligible for the program, DSHS terminates their eligibility for the program.

NEW SECTION

WAC 388-106-2150 Estate recovery. Services provided under this program are exempt from estate recovery as outlined in WAC 182-527-2742.

NEW SECTION

WAC 388-106-2155 Exception to rule (ETR). Services provided under this program are exempt from the exception to rule process in WAC 388-440-0001.

NEW SECTION

WAC 388-106-2160 Personal needs allowance increase or participation reduction. Services provided under this program are paid by state only funds. While DSHS is paying for services under this contract for a client, there will be no reduction in the amount a client must pay towards client responsibility to account for costs and fees associated with establishing and maintaining guardianship or conservatorship as outlined in WAC 182-513-1380 and 388-79A-005.

NEW SECTION

WAC 388-106-2165 Split appointment. This program only pays for guardianship and conservatorship services of one contractor per case. In the event that the court orders a split appointment amongst multiple contracted providers, DSHS will only pay the guardian.