8-1800-6984-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of the Department of Human Services Rules Governing Public Guardianship Services to Adults with Mental Retardation, Proposed Parts 9525.3010 to 9525.3100.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde on November 16, 1992, at 9:00 a.m. in Rooms 3E and 3F, 444 Lafayette Road, St. Paul, Minnesota. Chief Administrative Law Judge William G. Brown extended the due date for this Report from January 13, 1993, to January 15, 1993.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Human Services (DHS or Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the DHS after initial publication are impermissible substantial changes.

David Iverson, Special Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Department. DHS's hearing panel consisted of Laura Doyle and Gerald Nord, both from the Department's Division for Persons with Developmental Disabilities; Laura Plummer Zrust, Rules Division; Kay Hendrickson, DHS Guardianship Unit; and John Kalachnick, Principal Planner for DHS.

Eleven persons attended the hearing. Seven persons signed the hearing register. Only one member of the public gave testimony about these rules. DHS submitted changes to the proposed rules at the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the last hearing, to December 7, 1992. Pursuant to Minn. Stat. § 14.15, subd. 1, five business days were allowed for the filing of responsive comments. At the close of business on December 14, 1992, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The Department submitted written comments responding to matters discussed at the hearings and making changes in the proposed rules.

This Report must be made available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Department makes changes in rule other than those recommended in this Report, the Commissioner must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On September 18, 1992, DHS filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules certified by the Revisor of Statutes;
(b) an estimate of persons expected to attend the hearing and an estimate of the expected duration of the hearing;
(c) the Order for Hearing;
(d) the Notice of Hearing proposed to be issued;
(e) the Statement of Need and Reasonableness (SONAR);
(f) the Statement of Additional Notice; and,
(g) a Fiscal Note.

2. On October 7, 1992, DHS mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice and discretionary notice to the 87 Minnesota County Human Service Agencies, the 87 Chairs of Minnesota County Commissioners, the members of the advisory committee to these proposed rules, and 29 other persons known to be interested in this rulemaking.

3. On October 12, 1992, a copy of the proposed rules and the Notice of Hearing were published at 17 State Register 768.

4. On October 15, 1992, DHS filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed;
(b) a copy of the State Register containing the Notice of Hearing and the proposed rules;
(c) a copy of the Notice of Solicitation of Outside Opinion published at 15 State Register 129 together with all materials received in response to that notice.
(d) the Agency's certification that its mailing list was accurate and complete and the Affidavit of Mailing the Notice to all persons on the Department's mailing list and to those persons receiving discretionary notice; and,

(e) the names of agency personnel and witnesses to testify for the Department at the hearing.

Statutory Authority.

5. Chapter 252A of Minnesota Statutes ("Public Guardianship for Adults with Mental Retardation Act", or "the Act") establishes a program to protect and supervise mentally retarded adults. Among the general provisions of the Act, the Commissioner of Human Services is required to adopt rules. The pertinent portion of the Act states:

> The commissioner shall adopt rules to implement this chapter. The rules must include standards for performance of guardianship or conservatorship duties including, but not limited to: twice a year visits with the ward; quarterly reviews of records from day, residential, and support services; a requirement that the duties of guardianship or conservatorship and case management not be performed by the same person; specific standards for action on "do not resuscitate" orders, sterilization requests, and the use of psychotropic medication and aversive procedures.

Minn. Stat. § 252A.21, subd. 2.

Subdivision 2 was amended, in effect, by Laws of Minnesota 1992, c. 465 to prohibit any rule which precludes county case managers from serving the same client as a public guardian, unless the State funds the additional costs of such rule. SONAR, at 2. The proposed rules establish standards and procedures to govern public guardianships established by county boards under the Department's delegation of authority. The Department has the statutory authority to promulgate these rules.

Nature of the Proposed Rules.

6. Public guardianships place a competent decisionmaker in legal control of a person's affairs. Due to the Act's limited scope, only adults with mental retardation are considered under these rules. To carry out its statutory obligation to provide public guardianships, DHS delegates much of the actual functioning of those guardianships to the counties. The remainder of the guardianship function is retained by the Department. This distinction had been denoted as "local guardian" for the counties and "public guardian" for the Department. The proposed rules define more precisely who is responsible for what function when acting as public guardian. The rules also establish standards by which the division of responsibility is established between the counties and the Department and the rights of wards are specified.

Small Business Considerations in Rulemaking.

7. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. The Department asserted that these rules

would have no adverse impact on small businesses. SONAR, at 51. The small business consideration requirement of Minn. Stat. § 14.115, subd. 2 does not apply to these rules.

Fiscal Note.

8. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal note when the adoption of a rule will result in the expenditure of public funds in excess of $100,000 per year by local public bodies. The note must include an estimate of the total cost to local public bodies for a two-year period. DHS estimates the proposed rules will require expenditures by both the State and local governmental units in excess of $100,000 per year. DHS Exhibit 3. The Department estimated local costs of $203,408 annually. Id.

Kevin P. Kenney, Associate County Administrator of the Hennepin County Bureau of Social Services (Hennepin County) objected to the cost calculations in the Department's fiscal note. The fiscal note prepared by DHS itemized costs imposed by aversive and deprivation procedures, psychotropic medications, nondelegated consents, record maintenance, and training. Hennepin County is responsible for 1,300 of the 4,812 wards state-wide. When Hennepin County divided the totals of each cost category by 26% (to represent that County's share) the totals were significantly lower than the County's actual costs.

The fiscal note estimated costs for all local agencies from across the State. DHS did not purport to estimate the costs for each individual county. Hennepin County acknowledged that its "cost of conducting business ... is considerably different from the cost of conducting business outside the Metro Area." The Department's estimate advised all counties of the likelihood that their costs would increase. The Department has met the fiscal notice requirements of Minn. Stat. § 14.11, subd. 1.

Impact on Agricultural Land.

9. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

Analysis of the Proposed Rules.

10. The Department supported its proposed rules with a Statement of Need and Reasonableness which DHS relied upon as its affirmative presentation of facts. Due to the nature of the rules, the Administrative Law Judge will not comment on any rule part which did not receive critical comment or otherwise needs discussion. Any rule not discussed in this Report is found to be needed and reasonable. In locations where a change is made affecting more than one rule part, only the first instance of that change will be discussed. Any change in the rules proposed by DHS not specifically mentioned in this Report is found not to constitute a substantial change.

Inclusion of Statutory Language in the Proposed Rules.

11. Marcia B. Bryan, Ed.D., Executive Director of the Association of Residential Resources in Minnesota (ARRM); Duane Shimpach, Chair of the Governor's Planning Council on Developmental Disabilities (Governor's Council); and Luther Granquist, Deputy Director of the Minnesota Disability Law Center objected to the pervasive inclusion of statutory language in the proposed rule. ARRM identified eight pages of rule provisions which, in its opinion, duplicates the Act, other rules, or federal regulations.

The Department acknowledged that the proposed rules frequently repeat language used in other laws or rules. The actual language of other regulations was included at the express urging of some members of the Task Force assembled to aid in the rulemaking process. Department Comment, at 6. The members of Task Force include county representatives, service providers, Department personnel, representatives of other agencies, and representatives of persons subject to guardianship orders. SONAR, Attachment 1. The intended outcome was for the rules to explain what is required, not simply cross-reference all the myriad other sources of regulation applicable to public guardianships.

Ordinarily, a rule should be drafted as succinctly as possible without losing its meaning. Cross-referencing is the tool used to incorporate existing rule provisions into new rules, at least for extensive existing rules. However, in this case, inclusion of this language eases the burden on those regulated by providing a "one-stop" location for the rules on the guardianship process. The Department acquiesced in the Task Force's request for this assistance. Including the duplicative language has been shown to be needed and reasonable.

Proposed Rule 9525.3010 - Scope.

12. Proposed rule 9525.3010 identifies the words to whom the rules apply and the purpose of the rules. Subpart 1 limits the proposed rules to adults with mental retardation and delegates the Department's authority to counties. The county which receives the delegation of guardianship authority is known as the county of guardianship responsibility. The Governor's Council queried whether the Department would "still be able to take steps to ensure the rights of persons ... even if this means questioning the actions taken by the county ...." The Department responded to this comment by adding language to subpart 1 which expressly grants the Commissioner the discretion to modify or rescind the delegation of guardianship responsibilities to a county. The Commissioner's discretion is conditioned on either: a) the county failing to comply with the rules; or b) the Commissioner finding that the action is in the best interest of the ward. These rules are limited to persons with mental retardation because the statute governing the rules is limited to such persons. Subpart 1, as modified, is needed and reasonable to clarify the applicability of the proposed rules. The conditions set for intervention adequately restrain the Commissioner's discretion. The modification arose from comments after the hearing and does not constitute a substantial change.

Proposed Rule 9525.3015 - Definitions.

13. Thirty-three terms used in the rules are defined in proposed rule 9525.3015. Most of the definitions were not commented on and are hereby found

to be needed and reasonable. Subpart 3 defines "best interest" as the principle of decision making that weighs the desires and objectives of the ward with the probable outcomes and maximizes the benefits and minimizes the harms. ARRM questioned whether this definition is consistent with other legal definitions of best interest. DHS surveyed many definitions to arrive at the language in subpart 3. Department Comment, at 1. The Department maintains that its definition is "state-of-the-art." Id. No commentator suggested any language to improve the subpart. Subpart 3 is needed and reasonable to provide a guiding principle for guardians' and Commissioner's decision making.

14. "Psychotropic medication" is defined in subpart 24 as "a medication prescribed to treat mental illness and associated behaviors or to control or alter behavior." The definition also listed the major groups of psychotropic medications. Floyd Anderson, M.D., Staff Psychologist for the Anoka-Metro Regional Treatment Center, objected to the phrase "to control or alter behavior" as pejorative and not descriptive of the purpose for prescribing medication. Dr. Anderson suggested deleting that language, since physicians do not prescribe medication to control behavior. The Department cited federal regulations, state guidelines, and several reference books as sources for definitions which include controlling or altering behavior as a proper use of psychotropic medication. DHS explained that no pejorative meaning was implied and the Department did not want to foreclose use of medication when an individual's behavior did not "neatly fit into existing frameworks such as the DSM-III-R (Diagnostic and Statistical Manual). The definition of "psychotropic medication" in subpart 24 has been shown to be needed and reasonable.

Dr. Anderson also suggested a change to the list of categories of major classes of psychotropic medication. He indicated that item A, "neuroleptic," is not used uniformly throughout the rule. Instead, Dr. Anderson suggested that the item be changed to read "antipsychotic (or neuroleptic)." DHS sustantially adopted that suggestion only dropping the "or." The modification is needed and reasonable and not a substantial change. The Department also replaced "neuroleptic" in a subsequent rule part, which will be discussed later in this Report.

15. Subparts 25 and 26 define "public conservator" and "public guardian," respectively. ARRM pointed out that "public conservator" is not used in the proposed rules. The Department pointed out, in response to ARRM's comment, that the statutory system subsumes public conservators within the category of public guardian. DHS intends for all of the standards expressly applicable to public guardians to also apply to public conservators. Department Comment, at 4. Leaving out references to public conservators only avoids having to state "and/or public conservator" and "or conservatorship" ad nauseam. The improvement in the readability of the rules alone demonstrates the need for and reasonableness of the Department's choice to omit the term.

Luther Granquist objected to the use of "guardian" and "public guardian" as leaving open who exactly is responsible for a particular decision. DHS acknowledged that, as originally worded, the rules made determining who was responsible for what action a difficult task. To clarify the rule, the Department added a subpart (subpart 13) defining "Department staff acting as public guardian," modified the definition of "county staff acting as guardian," modified the definition of "public guardian," and modified the

definition of "public conservator." All four of these definitions are being discussed together because they relate to the same concept, which is at the heart of the public guardianship system.

The Department holds the statutory authority to act as public guardian for wards. DHS also acts on behalf of wards by overseeing the care provided by others in the guardianship role. Both of these roles may be held by the Department toward a single ward at the same time. Ordinarily, however, the county is delegated the authority from the Department to act as public guardian. By adding subpart 13, DHS has clarified the specific role for those Department staff who are delegated the authority to act as public guardian.

The changes to the definitions of public conservator and public guardian incorporate the two definitions of "department staff acting as public conservator" and "county staff acting as public conservator" (or guardian where appropriate). While this expanded language in subparts 25 and 26 does make the wording of those definitions unwieldy, the effect of the changes clarifies that either the Department or the county may be the public guardian, depending on the particular circumstance. The subparts modified in this fashion are needed and reasonable. The new language does not constitute a substantial change.

Those locations in the rules where "guardian" appears have been modified to specify "public guardian." Since these changes pervade the rule, each change will not be identified and discussed. However, proposed rule 9525.3030 contains the terms which were modified in other places and that rule was not modified. To be consistent, DHS should add "department staff acting as public guardian" and "public guardian" to the rule part. Since the Department has altered the definition to avoid confusion, the inconsistency should be eliminated. The modification suggested by this Finding does not constitute a substantial change.

Proposed Rule 9525.3020 - Persons Subject to Public Guardianship.

16. Patricia Moore, Administrator of St. Anne's (a division of Catholic Charities) and ARRM suggested that the Department ensure that public guardianship not be chosen for wards until all means of locating private guardians have been exhausted. Both commentators suggested expressly requiring public advertising in subpart 1 of proposed rule 9525.3020. That part restates the statutory preference for private guardianships expressed in Minn. Stat. § 252A.01, subd. 1(a)(1). The Department concluded that indicating any particular method of seeking out potential guardians would be overly prescriptive. Department Comment, at 6. Requiring local agencies to seek a private guardian until all means have been exhausted does not add any substance to the statutory directive and would incorporate a significant element of uncertainty into the rule. Subpart 1 is needed and reasonable, as proposed.

Proposed Rule 9525.3025 - Process of Appointing a Public Guardian.

17. The procedures of appointing a public guardian are specified under proposed rule 9525.3025. Subparts 1, 3 and 4 received no comment and have been shown to be needed and reasonable. A comprehensive evaluation of the proposed ward must then be ordered by the commissioner under subpart 2. ARRM

and St. Ann's objected to the comprehensive evaluation provision as duplicative of existing rules. DHS explained that any evaluation done to comply with an existing rule may certainly be used to fulfill the requirement of subpart 2. Department Comment, at 7. Since any other evaluation is undertaken for purposes other than appointing a public guardian, the evaluation must meet the specific guardianship evaluation standards. The Department has shown that subpart 2 is needed and reasonable, as proposed. ARRM objected to subparts 5 through 8 as duplicative of general guardianship law. The duplication objection was discussed at Finding 11, supra. Proposed rule part 9525.3025 is needed and reasonable.

Proposed Rule 9525.3030 - Limits of Guardianship Powers and Duties.

18. Proposed rule 9525.3030 sets out the guiding principle of guardianships generally, that is, the ward's personal freedom is to be restricted only to the extent necessary to provide needed care and services. ARRM suggested that this provision cite the specific guardianship provisions of proposed rule 9525.3035 and 9525.3040 and be consistent with those parts. DHS distinguished the rule parts as addressing different aspects of guardianships. Expressing the general and specific guardianship responsibilities in separate rule parts is needed and reasonable. Since the rule parts are consecutive, guardians are unlikely to be misled about what is required of them. ARRM did not identify any particular provision which is inconsistent between the two parts. Limitations on the application of guardianship power is consistent with specific grants of power (in part 9525.3035 and 9525.3040) due to the statutory goal of imposing the least restrictive environment on wards. Proposed rule 9525.3030 is needed and reasonable.

Proposed Rule 9525.3035 - General Standards for Public Guardianship.

19. Public guardianship responsibilities are set out in proposed rule 9525.3035. A number of modifications were made after the hearing to conform this rule part to the clarification of "public guardian," discussed at Finding 15, supra. ARRM suggested that subpart 6, governing the release of information, exceeded the Department's statutory authority. Luther Granquist expressed concern that subpart 6 divested the Department of the authority to release information concerning a ward.

The privacy rights of the ward are the concern of subpart 6. DHS intends that any person acting as guardian consider whether a release of information is: a) lawful under the Data Practices Act (Chapter 13); or b) in the best interest of the ward. SONAR, at 23. The first criterion only announces that another law applies to the release of information. The second criterion states the standard that governs all guardianship actions. Of the two, the "best interest" standard is likely to be more restrictive on releases of information. The new language added by DHS indicates that the subpart applies to whoever holds the public guardianship responsibilities for a ward. The relationship between the counties and groups seeking to protect the wards' interests must continue on a case-by-case basis. Subpart 6 is needed and reasonable, as proposed. Since the standard for public guardianship action is identical to those in all other areas, it is not beyond the general statutory authority of the Department in promulgating this rule. The modification to the rule part is not a substantial change.

Proposed Rule 9525.3040 - Powers and Duties of Public Guardian.

20. Public guardianship powers are listed in subparts 1 and 2 of proposed rule 9525.3040. Among the general guardianship powers in subpart 1 are: a) determining the ward's place of residence; b) determining the ward's care, comfort, and maintenance needs are met; c) taking care of the ward's property; d) granting or withholding consent to medical or other professional care; e) granting or withholding approval of contracts made by the ward; and, f) exercising general supervisory power over the ward.

ARC suggested that subpart 1(A) be clarified to expressly include the state and federal requirement that the least restrictive environment be sought for a ward's residence. The Department agreed with this comment and added that language. Department Response, at 2. The new language reads:

> A. The power to determine the ward's place of residence consistent with state and federal law and the least restrictive environment consistent with the ward's best interest.

The new language advises public guardians of their obligations under law in choosing a ward's residence. The modification is not a substantial change.

21. In addition to the general powers of the guardian, special powers may be granted to a public guardian by the court. In subpart 2, as originally proposed, a guardian's special powers were referred to only by the statutory reference under which those powers are granted. ARRM suggested that these powers should be explicitly listed. DHS agreed with that comment and modified the rule to read:

> The public guardian has the additional powers granted under Minnesota Statutes, section 252A.111, subdivision 2. These additional powers, as granted by the court, are:
>
> [items A-C omitted]

Items A-C repeat the powers listed in Minn. Stat. § 252A.111, subd. 2. As altered, subpart 2 is somewhat difficult to understand. The first sentence appears to grant the listed powers to each guardian, but the second sentence conditions holding those powers upon a court order. For persons experienced in the area of public guardianships the meaning is clear. Therefore this language does not rise to the level of a defect in the proposed rules. The Administrative Law Judge suggests, but does not require, that the Department make the following modification to subpart 2:

> The public guardian may have the additional powers granted under Minnesota Statutes, section 252A.111, subdivision 2, if such power is granted by the court. These additional powers are:
>
> [items A-C omitted]

The suggested language clearly conditions the guardian's power upon the court's order and lists the specific powers for the convenience of the person reading the rules. The modification is not a substantial change.

22. Special duties of the public guardian are listed in subpart 3. These duties are identical to those required of the Commissioner under Minn. Stat. § 252A.111, subd. 6. ARRM suggested replacing all three subparts with the nine powers of the public guardian. DHS responded that the statutory scheme divided public guardianship powers into general powers, additional powers, and special duties and the rules must be consistent with the statute. The Department has shown that three subparts conforming to the statutory labelling system is needed and reasonable. However, each subpart uses the phrase "county staff acting as guardian." DHS has changed that reference in the definitions and throughout the rule. The Department should alter the phrase to "county staff acting as public guardian" to conform the three subparts to the change in proposed rule 9525.3015, subp. 11. The modification is not a substantial change.

Proposed Rule 9525.3045 - Consent to Use of Aversive and Deprivation Procedures.

23. ARRM questioned whether the Department has authority to include a rule on use of aversive and deprivation procedures in the guardianship rules. DHS cited Minn. Stat. § 252A.21, subd. 2 which states:

> The commissioner shall adopt rules to implement this chapter. The rules must include standards for performance of guardianship or conservatorship duties including, but not limited to: ... the use of psychotropic medication and aversive procedures.

The Department has the statutory authority to adopt proposed rule 9525.3045. Subpart 1 of that rule authorizes county staff acting as public guardian to consent to the use of aversive and deprivation procedures and requires withdrawal of that consent when the procedures do not appear to be in the best interest of the ward.

24. William R. Zuber, Manager of the Disabilities Section, Social Services Division, Ramsey County Human Services Department (Ramsey County), pointed out that DHS "requires counties to have a second person in addition to the regular case manager serve as guardian for ... approving and monitoring aversive/deprivation plans" under Rule 40 (Minn. Rules 9525.2700 to 9525.2810). Ramsey County cited Laws of Minnesota 1992, Chapter 459, Section 2, which states in pertinent part:

> Notwithstanding the contrary requirements of section 252A.21, subdivision 2, the commissioner of human services shall not adopt any rule provision under this section requiring that the county staff that performs public guardianship or conservatorship duties on behalf of a person with mental

retardation cannot be the same worker that provides case management services, unless the state provides sufficient new state funding to cover the additional costs of complying with this requirement.

DHS has not obtained new state funding for any additional county costs of complying with the proposed rules. Department Comment, at 24. Ramsey County argues that the Department must expressly state in the proposed rules whether a second person will be required for approval or monitoring of aversive and deprivation procedures. Ramsey County then maintains that any such rule (requiring two persons to consent) would be defective for failing to comply with the 1992 law.

ARC expressed its opinion that an inherent conflict of interest exists when the public guardian and case manager are the same person. Mr. Granquist argues that, regardless of the lack of funding, the fundamental policy of the Act is to protect wards and this protection requires a guardian and a separate case manager. Wards with private guardians must have different persons as case managers. Mr. Granquist maintains that the same separation should be required for wards with public guardians.

Minn. Rule 9525.2780, subp. 3(C) requires informed consent from the county staff acting as guardian for use of aversive and deprivation procedures. That rule also states "the ... guardian must not be the same individual who is serving as case manager." This rule, part of Rule 40, imposes a current requirement on counties. The inclusion of Rule 40 in the language of proposed rule 9525.2810 does not add any requirement on counties that did not already exist. The 1992 law conditions the limitation on the Department's rulemaking on "additional costs" of compliance. Since the proposed rule does not add any additional costs to the services provided by the counties, there is no conflict between the proposed rule and Laws of Minnesota 1992, Chapter 459, Section 2. The express language of Chapter 459, Section 2 authorizes individuals to be both public guardian and case manager. While an inherent conflict of interest may exist, it is authorized by the Legislature. Subpart 2 is needed and reasonable.

Proposed Rule 9525.3050 - Consent to Use of Psychotropic Medications.

25. Proposed rule 9525.3050 governs the conditions under which consent can be given for the use of psychotropic medications. As originally proposed, subpart 1 was identical to subpart 1 of the proposed rule on aversive and deprivation procedures (see Finding 23, supra). DHS proposed to add a requirement that consent for use of psychotropic medications must be in writing. No commentator objected to the additional language. Davey S. Mills, Social Service Supervisor for the Aitkin County Family Service Agency (Aitkin County), believes that consent to the use of psychotropic medications should not be part of the proposed rules, since county departments of public health would be more knowledgeable about medical and health concerns than case managers. Minn. Stat. § 252A.21, subd. 2 requires the Department to adopt rules on the use of psychotropic medications. The interest of the public guardian is informed consent, not prescribing the medication. Subpart 1, as modified, is needed and reasonable. The modification renders the documentation on using psychotropic medication complete and does not constitute a substantial change.

26. Subpart 2 contains a list of documents which must be available and reviewed by the local agency before consent may be given for psychotropic medications. Jean Searles, Director of RESA, Inc., questioned whether guardians would be required to visit the ward's home to complete the consent under this rule part. DHS explained that the documentation is required to allow guardians flexibility in granting consent. Department Comment, at 12. The guardian is not required to compile the documentation, that is done pursuant to other rules. Id. The information may be reviewed by mail or telephone, but the information must be available to the guardian to be reviewed. DHS modified the subpart to clarify the information needed on side effects and to permit consent to be renewed on an annual basis. Subpart 2, as modified, is needed and reasonable. The modifications do not constitute a substantial change.

27. Consent to the use of psychotropic medications is conditioned on adequate monitoring of side effects under the terms set by subpart 3. Originally, the Department required both the Dyskinesia Identification System: Condensed User Scale (DISCUS) and Monitoring of Side Effects Scale (MOSES). Dr. Anderson suggested that MOSES was a good requirement for assessing side effects for all psychotropic medications, but DISCUS was appropriate only for antipsychotic medication or Amoxapine. DHS agreed with this suggestion and altered subpart 3. The new language requires a standardized method for assessing and monitoring side effects, including a scale. When antipsychotic medication or Amoxapine is administered, DISCUS must be used and a method to monitor for other extrapyramidal system side effects must be in place.

The Department also altered the definitions of tardive dyskinesia, akathisia, and DISCUS which were included as items in subpart 3. Item A, defining tardive dyskinesia, was altered by dropping examples of antipsychotic medication. The examples were not important to the definition. Item B was originally a definition of akathisia. DHS replaced that definition with a definition of extrapyramidal side effects. The new definition includes references to akathisia, pseudoparkinsonism, and dystonia, with a summary description of each condition.

Item C of subpart 3 originally defined DISCUS. DHS retained a short description of the assessment scale, but deleted the definitional portion of the item and replaced it by incorporating the original publication of DISCUS by reference. DHS has stated in the new language that DISCUS forms are available from the Department upon request. The incorporation meets the statutory requirements of Minn. Stat. § 14.07, subd. 4.

Item D originally defined MOSES. Since the foregoing changes to proposed rule 9525.3050 replaced the reference to MOSES with a "standardized side effects assessment scale," the definition has been replaced as well. The new definition requires only that the scale used be published or professionally developed to monitor side effects.. The new language gives professionals the flexibility to use whatever scale is best to monitor the ward's condition. The modified subpart 3 is needed and reasonable. The alterations were prompted by comments from interested persons and do not constitute substantial changes.

28. Consent for use of psychotropic medication cannot be given by a public guardian unless monitoring schedules are in place as set forth in proposed subpart 4. The overall schedule consists of monitoring once within

seven to fourteen days after initial administration or any dosage increase, side effect monitoring at least once every six months, extrapyramidal side effect monitoring at least once every six months where antipsychotic medication or Amoxapine is administered, and monitoring at least once a year after that medication is no longer prescribed if certain conditions are diagnosed. If this monitoring schedule is not maintained, subject to limited exceptions, the county staff acting as public guardian must withdraw consent to use of psychotropic medication.

Limited exceptions were added to the initial side effects monitoring provision by the Department. The applicability of the exception must be documented and justified in one of the following clinical situations: a) prescribed for emergency use; b) prescribed pro re nata (p.r.n. or "as needed") for five days or less; c) an increase from the prescribed dosage for no more than fourteen days to control a particular problem; d) a return to the originally prescribed dosage from an attempt to create a new minimal effective dosage; and, e) a gradual upward titration. In the case of situation (e), a stricter monitoring schedule is imposed than the monitoring required in the normal administration of psychotropic medications. The Department explained at the hearing that these exceptions were intended to bring the monitoring requirements into line with existing rules. Hearing Transcript, at 61. The intended effect of the exceptions is to reduce costs and confusion over what frequency of monitoring is required when psychotropic medications are administered. Id. Other changes were made to item C to conform to earlier changes in the rules. No commentator objected to the proposed changes. The Department has shown that subpart 4 is needed and reasonable. The modifications to the subpart are not substantial changes.

29. Consent to the administration of psychotropic medication is conditioned upon having a methodology to collect and review the effectiveness of the medication. Subpart 5 lists seven specific items which must be included in the data collection method. No commentator objected to the specific items. The only problematic portion of the proposed rules is as follows:

> ... This data collection method must include:
>
> . . .
>
> B. the data collection method;
>
> . . . .

This language includes the thing to be described within the description. The apparent intent is to include the manner in which data will be recorded for analysis. Since the regulated public appears to understand the meaning of item B, there is no defect in the proposed rule part. However, to accomplish this intent more clearly, the Department may wish to consider altering item B to read:

> B. the methodology of collecting data on target behaviors;

As stated, there is no defect in the proposed rule, and the foregoing language is not required. If the alteration is accepted, it would not constitute a substantial change.

DHS did make several changes to subpart 5. Two of the changes are minor clarifications to ensure that the Department's intent is clearly stated in the rule. One change replaces "for collecting" with "to collect and review," and the other moves the word "and." These alterations are not substantial changes. DHS inadvertently left out a requirement that the data review must include a gradual minimal effect dosage attempt at least once a year or explain why such an attempt is not possible. That requirement was added to ensure that the rules are consistent with Federal regulations and other guidelines. Hearing Transcript, at 64. No commentator objected to the changes. Subpart 5, as modified, is needed and reasonable. The new language is not a substantial change.

Proposed Rule 9525.3055 - Nondelegated Consent.

30. Proposed rule 9525.3055 lists the areas in which the power to consent is reserved by the Department. These areas are: a) do not resuscitate orders (DNRs); b) limited medical treatment; c) research; and, d) temporary care placement. In each case, the rules specify how county staff acting as public guardian can apply for consent from the Department and what criteria are used to determine the propriety of the specific action for which consent is requested. ARRM objected to DNRs being included in this rule, since the State has not adopted a uniform DNR form. DHS is not aware of any applicable Federal regulation which is not being met by the proposed procedure. Department Comment, at 16. The Department is expressly required to adopt rules on DNRs by Minn. Stat. § 252A.21, subd. 2.

Fr. Richard Gross, Chairperson of the Life Support Subcommittee of the Medical Park Bioethics Advisory Committee (serving United Hospital, Medical Center Rehabilitation Hospital, and Valley Memorial Homes), expressed concern that the Department's reservation of DNR consent would lead to delay in acting on such orders and could harm patients. Public Exhibit 1. DHS pointed out that its "average" response time was about four hours. Department Comment, at 15. The Department stated:

> While the Department agrees that local agencies are in a better position to have first-hand knowledge about a ward's or conservatee's situation, it is the Department's position that requiring Department consent for DNR orders provides a safeguard and facilitates a level of objectivity and uniformity that is in the best interest of wards, particularly in view of the life-ending nature of the order. Overall, county agencies have been in agreement with the Department's assumption of final authority in such decisions.

Department Comment, at 15.

The Department has shown that retaining the power to consent to DNR orders is needed and reasonable. Fr. Gross also questioned what procedures are to be affirmed by the health care institution's bioethics committee, those of the county staff acting as public guardian or those of the health care provider. DHS acknowledged that the rule, subpart 2(F), was unclear on that point. The Department added "by the health care providers" to remove the ambiguity. Subpart 2, as modified, is needed and reasonable.

31. The same standards for granting an application for a DNR order apply to applications for limited medical treatment under subpart 3. "Limited medical treatment" is defined in subpart 3 as "a life-sustaining treatment that has been deemed through ethical decision making, to be useless or gravely burdensome to the ward." Fr. Gross questioned the need for treating wards differently than other persons. Public Exhibit 1, at 2. DHS explained that requests for these determinations are being made currently, and the proposed rule is an effort to streamline the process. Wards have major life-decisions made for them by public guardians or the courts. Other persons have the capacity and legal right to make such decisions on their own. The Department needs rules to set out its requirements for all types of applications. Using the same standards as for DNR orders is reasonable, since the same risks are inherent in the public guardian's decision. Subpart 3 is needed and reasonable, as proposed.

32. Luther Granquist objected to the scope of the Department's retention of the power to consent to involve the ward in research. Specifically, the wording "research of any kind" found in subpart 4 was cited as overbroad. Mr. Granquist recalled a monitoring project wherein wards were questioned regarding their satisfaction with community placement. While this type of activity would qualify as research, it is not particularly intrusive or potentially harmful to its subjects. The Department noted that surveys, interviews, and educational tests were not intended to be included amongst the research for which consent must be obtained from the Commissioner. DHS incorporated the exemption for research in those three areas as found at 45 C.F.R. § 46.101(b) in new language added to subpart 4.

Item H in subpart 4 originally contained a reference to the U.S. Food and Drug Administration's right to inspect records. Mr. Granquist objected to that reference as unnecessary. Hearing Transcript, at 85. DHS agreed and deleted that language. Mr. Granquist also stressed that significant portions of the informed consent requirements in 45 C.F.R. § 46.116(b) were ignored in subpart 4. Id. at 86-8. The Department added item L to subpart 4, which incorporates the additional information required under that regulation, where relevant to the application. All of the changes to subpart 4 were made at the express suggestion of commentators and conforms the rule to existing requirements. None of the alterations constitute substantial changes. Subpart 4, as modified, is needed and reasonable.

Proposed Rule 9525.3060 - Nondelegated Consent Requiring a Court Order.

33. Whereas proposed rule 9525.3055 lists the areas in which the Department has retained the power to consent, proposed rule 9525.3060 lists the areas where a court order is required to obtain consent for the procedures. Again, applications to the Department are required of the county staff acting as public guardian. Rather than consent, however, the Department only issues a recommendation. Consent is obtained by the public guardian through a petition to the court under Minn. Stat. § 525.56, subd. 3(4)(b). ARRM suggested that subparts 2, 3 and 4 (governing sterilization; the Department's recommendation; and electroconvulsive therapy, psychosurgery, and experimental treatment, respectively) be replaced. The new language would simply prohibit consent by the public guardian for the listed medical procedures. This approach retains the specific prohibitions and relies upon the statutory provisions for specific standards.

ARRM's suggestion does not provide any standards to limit the Department's discretion in requiring information in applications to perform those procedures, or in evaluating the requests for recommendations. Aitkin County suggested that these matters be transferred to county departments of public health, to take advantage of their greater expertise. Minn. Stat. § 252A.21, subd. 2 requires the Department to adopt standards on sterilization requests. DHS has demonstrated that the serious nature of the other listed medical procedures renders application requirements and criteria needed and reasonable to ensure the court has adequate information to reasonably decide on those procedures on behalf of the ward. Proposed rule 9525.3060 is needed and reasonable.

Proposed Rule 9525.3065 - Monitoring and Evaluation.

34. Minn. Stat. § 252A.16 requires the Commissioner to "provide an annual review of the physical, mental, and social adjustment and progress of every ward and conservatee." Proposed rule 9525.3065 delegates the responsibility of providing the annual review to county staff acting as public guardian. Subpart 1 sets the minimal requirements for information to be included in the annual review. Aitkin County and ARRM suggested that the provision be deleted in the rules as a duplication of the requirements of Rule 185 (Minn. Rules 9525.0015 to 9525.0165). The duplication issue was addressed at Finding 11, supra. DHS added language to subpart 1 which expressly permits the Rule 185 review to be used to meet this requirement, so long as all the information specified in subpart 1 is in that review. The Department also added the requirement that the county staff acting as public guardian must examine and sign each annual review. The additions meet the objection raised by Aitkin County and do not constitute substantial changes. Subpart 1, as modified, is needed and reasonable.

35. Subpart 2 identifies the information which must be contained in the quarterly review required under Minn. Stat. § 252A.21, subd. 2. RESA, Inc. objected to the responsibility for compiling the information falling on the care givers, as that would increase their costs and duties without further resources to pay for that effort. DHS pointed out that service providers are already obligated to compile quarterly reports under Rules 18, 34, 38, and 42. Department Comment, at 20. As the subpart is written, the quarterly reporting requirement falls on county staff acting as public guardian, not service providers. Id. No undue burden is imposed by the requirement for the information listed in the rule. Subpart 2 is needed and reasonable to meet the statutory mandate of quarterly review.

Proposed Rule 9525.3075 - Supervising Agency.

36. When a ward moves to another county, the county of guardianship responsibility has the discretion to refer the ward to the new county of residence under subpart 1 of proposed rule 9525.3075. The Governor's Council suggested that the county of guardianship responsibility be required to refer wards to prevent them from being "lost in the system." The Department asserts that it has no statutory authority to require referrals. Department Comment, at 21. At present, referrals are performed according to individual county policies. Id. The Administrative Law Judge finds that the Department does have the statutory authority to require the county of guardianship responsibility to refer wards to the new county of residence to request assumption of public guardianship duties. However, there is no requirement,

either in the applicable statute or in the facts of this rulemaking record, that DHS must impose a rule to bridge that connection between the counties. The Department has chosen to leave referrals to the discretion of the counties. That option has been shown to be needed and reasonable.

37. ARRM challenged subpart 3, governing transfer of venue, as violating state law, since only a court can authorize that action. DHS responded that the subpart itself notes that fact and references the applicable statute. Subpart 3 is needed and reasonable to advise persons of how responsibility is changed and does not violate state law.

Proposed Rule 9525.3080 - County Contracting for Public Guardianship Services.

38. Proposed rule 9525.3080 restricts local agencies to contracting for representation required by the screening process and the individual service planning process. Ramsey County requested that the rule expressly state that counties are authorized to contract with both public or private agencies for guardianship services. This change was urged to avoid confusing persons unfamiliar with the public guardianship system. DHS agreed that the rule could be misconstrued. The modified rule part clarifies that the only service to be contracted for is public guardianship representation. An added sentence incorporates the limitation of contracting for these services with persons or agencies who are not service providers for the person. The rule part, as modified, clarifies and restates the contracting limits set by Minn. Stat. § 256B.092, subd. 7(a). The rule is needed and reasonable. The new language does not constitute a substantial change.

Proposed Rule 9525.3095 - Guardianship Training.

39. Proposed rule 9525.3095 requires local agencies to create training plans for county staff acting as public guardians. As originally proposed, the training must include at least ten hours in guardianship and mental retardation. Aitkin County expressed concern that existing guardians would suffer some hardship at being required to attend training. Aitkin County also suggested that more specific categories be provided for training. DHS did modify the rule to require ten hours of training in guardianship or mental retardation areas. The Department did not specify any other categories or resources for training in this rule part. However, a number of resources were listed in the Department's post-hearing comment. Department Comment, at 23. No specifics were offered to demonstrate how training would work undue hardship on existing guardians. The rule part, as modified, is needed and reasonable. The modification conforms the rule to existing training courses and is not a substantial change.

Proposed Rule 9525.3100 - Review of Public Guardianship.

40. The Department incorporated the statutory review and appeal processes for public guardianships into proposed rule 9525.3100. De novo court review is available under Minn. Stat. § 252A.19 and incorporated into the rule at subpart 2. The subpart is needed and reasonable.

Subpart 1 establishes informal review by the Department's Guardianship Unit. The language of subpart 1 expressly distinguishes between informal

review and statutory appeal rights. Mr. Granquist asserted that the rule is inconsistent with the holding in Crawford v. Department of Human Services, 468 N.W.2d 583 (Minn.App. 1991). In Crawford, the Court of Appeals held that appeals under Minn. Stat. § 256.045, subd. 4a apply to guardianship issues, when the case manager and public guardian are the same person. The inconsistent language states "because section 256.045 does not apply to guardianship matters. In response, DHS stated that the Department did not intend to preclude any appeals. Department Response, at 3. To ensure that there is no confusion, DHS deleted that language from subpart 1. The phrase is superfluous and its deletion does not constitute a substantial change. The modified subpart is needed and reasonable.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Human Services (DHS) gave proper notice of this rulemaking hearing.

2. DHS has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. DHS has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. DHS has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. The additions and amendments to the proposed rules which were suggested by DHS after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted in accordance with the Findings and Conclusions in this Report.

Dated this 15th day of January, 1993.

Jon L. Lunde

JON L. LUNDE
Administrative Law Judge

Reported: Transcript prepared by
Colleen M. Sicho.
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