Report From Agency

ADMINISTRATIVE RULES
REPORT TO LEGISLATURE
CLEARINGHOUSE RULE 09-061

By the Department of Health relating to ch. DHS 85,
Non-profit Corporations and Unincorporated Associations as Guardians

Basis and Purpose of Proposed Rule

Sections 54.15 (7), Stats., provides the Department with the authority to promulgate rules to specify standards for approval of non-profit corporate guardians or unincorporated associations as guardians of a person or an estate, or both. The Department proposes to repeal and recreate ch. DHS 85 to update the rules to reflect current standards of practice, require corporate guardians to maintain policies in the areas of abuse and neglect, misappropriation of property, complaint and grievance investigation, to establish standards for approval or changing ownership, and to determine whether a person is fit and qualified to operate as a corporate guardian. This rule will further the purpose of the statute to modernize the law and provide additional standards to protect the health, safety and welfare of wards in Wisconsin.

Responses to Legislative Council Rules Clearinghouse Recommendations

The Department accepted the comments made by the Legislative Council Rules Clearinghouse and modified the proposed rule where suggested.

Final Regulatory Flexibility Analysis

The Department data sets list 72 corporate guardianships in Wisconsin at this time. These entities must be “nonprofit corporations” as defined in s.181.0103 (17), Stats., namely a corporation, no part of the income which is distributed to its members, officers, or directors. The Department of Financial Institutions also requires corporate guardianships to be non-stock corporations. The fiscal impact of the rule requirements does not appear to be significant and will vary directly with the size of the guardianship agency. Agencies have the ability to increase fees charged to their wards or via the county court system; the overall effect of these proposed changes on corporate guardian agencies should be minimal. It is unknown if the costs identified will exceed the current consumer price index of 4.2 percent for any given agency; no single requirement appears to exceed this limit.

Changes to the Analysis or Fiscal Estimate

Analysis

Grammatical revisions recommended by the Legislative Council Rules Clearinghouse were made. In addition, the department added item 6., information about a requirement for applicants to submit a written statement, with the initial application, agreeing to submit such reports and answer such questions as the Department requires to monitor the corporate guardian. The provision was inadvertently omitted from the proposed rule that was submitted to the Legislative Clearinghouse.

Fiscal Estimate

No changes were made to the fiscal estimate.

Public Hearing Summary

The Department began accepting public comments on the proposed rule via the Wisconsin Administrative Rules Website on August 12, 2009. Public hearings were held on October 8th in

Waukesha and on October 14th in La Crosse. Three individuals attended the hearings. Comments were accepted until 4:30 p.m. on October 21, 2009.

List of Public Hearing Attendees and Commenters

The following is a complete list of the persons who attended the public hearing or submitted comments on the proposed rule, the position taken by the commenter and whether or not the individual provided written or oral comments.

Name and Address		**Position Taken** (Support or Opposed)	**Action** (Oral or Written)
1.	Charles Nagle 5732 183rd St. Chippewa Falls, WI 54729	Oppose	Oral
2.	Sandra F. Weisser 1219 Madison St. Onalaska, WI 54650	None taken	Observer only
3.	Doreen Koehler, Advocacy Programs of Family Services, President of the Wisconsin Guardianship Association 1930 North 8th Street Sheboygan, WI	Support	Oral and written
4.	Mitchell Hagopian, Attorney Diane Greenley, Attorney Disability Rights Wisconsin	Support	Written

Public Comments and Department Responses

The number(s) following each comment corresponds to the number assigned to the individual listed in the Public Hearing Attendees and Commenters section of this document.

Rule Provision	Public Comment	Department Response
General comments	The proposed rule is top heavy in the areas of administrative issues and staff qualifications and contains very little regarding the care or management of wards. 1	No change was made to the proposed rule. Chapter DHS 85 establishes criteria which the Department uses to determine whether a nonprofit corporation is suitable to perform the duties of a guardian. The proposed administrative rule contains administrative requirements and staff qualifications to ensure a nonprofit corporation is able to meet this responsibility. Proposed s. DHS 85.14 (4) and (5) require the corporate guardian to fulfill the duties of a guardian of the person and a guardian of estate pursuant to statutory requirements under ch. 54, Stats., which contain the provisions for wards' care and management by guardians. In addition, there are several provisions in proposed ch. DHS 85 that establish standards for the care and management of guardians, including s. DHS 85.13, Rights of wards, and s. 85.14 Duties, with notification of how to file a complaint, required medical exam and face-to-face contact with wards. The proposed standards are significantly more extensive than the current administrative rule.
General Comment	Question how the proposed rule was developed; in person face-to-face meetings or sharing drafts via mail? 1.	The Department formed an advisory committee consisting of 5 advocates, 5 corporate guardians, 4 county human Directors, 3 Registers in Probate and 5 Department staff. All members of the

Rule Provision	Public Comment	Department Response
		committee were employed by the agency they represented at the time of the committee meetings. Committee meetings were held face-to-face. In addition, the Department held 4 listening sessions with wards across the state to gain their perspective on corporate guardian services. Comments from wards related to frequency and location of visits with their guardian, notification of rights and grievance procedure, involvement of wards in decision making and other areas are reflected in the proposed rule.
General Comment	In the comparison of rules in other states, Minnesota has a limited number of statutes and administrative rule. The corporate guardians have agreed upon standards. A copy of this standard was forwarded to the Division of Quality Assurance, for distribution to the DHS 85 advisory committee. 1	Division of Quality Assurance staff sent copies of the Minnesota Association for Guardianship and Conservatorship: Standards of Practice and the Minnesota Association for Guardianship and Conservatorship: Professional Power of Attorney, to all members of the DHS 83 advisory committee.
General Comment	The rule specifies that the Department may withdraw its approval of the corporate guardian but does not create a procedure by which complaints about the conduct or suitability of the corporate guardian may be lodged. We assume that such complaints will be filed with and reviewed by the Division of Quality Assurance. However, the procedure should be specified in the rule itself.	The Department has revised s. DHS 85.13 (2) to state that any individual may file a complaint with a corporate guardian or the Department of Health Services and that the Department of Health Services may investigate the complaint. Section DHS 85.14 (1) (e) was revised to require the corporate guardian to notify wards of their right to file a complaint with the Department and how to file a complaint.

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General Comment	I served on the committee that worked on the proposed changes to DHS 85. I was pleased to see the input by the various disciplines. I believe that all possible interpretations were discussed and worked out to the satisfaction of the group as a whole. I believe the proposed changes will improve the way all corporate guardianship agencies run their businesses. This will benefit our wards overall as well. 3	No response necessary.
DHS 85.04	This section allows default approval of any waiver or variance request if it has not been acted upon by DHS within 60 days. We believe the Department should affirmatively review all requests and that no default approvals should be permitted. Given the breath of the waiver/variance authority and the liberal standards for granting them, DHS review and affirmative approvals necessary. Otherwise there is the possibility that a waiver/variance that is detrimental to a ward could get approved because DHS staff was too busy to review the request in a timely manner. We believe a provision should be changed to require the Department to approve, deny or modify a waiver/variance request within 60 days. A provision permitting DHS to extend the deadline by up to 30 days could be added to the provision to account for the possibility that DHS staff might be unable to complete review within 60 days. In general, it seems odd that the waiver and variance	No change was made to the proposed rule. Waiver and variance provisions are typically placed at the front of the Department's rules. This standard is not a part of any specific requirement and applies to all aspects of the rule. The Department may only issue a waiver or variance if the corporate guardian is able to show that enforcement of the requirement would result in unreasonable hardship on the ward or that an alternative to the requirements is in the interest of better care or management. Additionally, the waiver or variance may not adversely affect the health, safety or welfare of any ward. The Department reviews all requests for a waiver or variance before the request is approved; default approvals are not given by the Department. The language in the waiver/variance section of s. DHS 85.04 is the same language used in other DQA

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	section would be placed at the beginning of the rule. Placing the right to waive or obtain a variance at the start of the rule creates the impression that DHS is inviting request for waivers or variance. We believe the waiver/variance section should be placed at the end of the rule, in a new subchapter. Placing it at the end of the rule appropriately sends the message that waivers and variance will be the exception, not the rule. 4	administrative rules. The Department establishes a 60 day limit to respond to requests to ensure providers receive a timely response. The 60 day time period begins when the provider has submitted all information needed to review the request. If additional information is needed to complete the review, the 60 day time period does not begin until all information has been received by the Department.
DHS 85.09 (5)	It is unclear if background checks are required for guardians who volunteer their services to the corporate guardian. The background check requirement in 85.09 (3) appears to only apply to "employees." We believe anyone who serves in a guardian capacity for a corporate guardian, whether as a volunteer or an employee should be subject to a background check. 4	No change was made to the proposed rule. DQA policy requires a provider to complete a caregiver background check for any volunteer if the volunteer is used to replace a staff person or to comply with the requirements in ch. DHS 85. Therefore, if a volunteer serves in the capacity of a guardian, the volunteer would be subject to a caregiver background check.
DHS 85.11 (1)	This provision requires each corporate guardian to have an adequate number of staff to meet the needs of its wards. We believe this is vague and that there should be a stated ratio of guardians to wards that may not be exceeded. Our proposal would be for a ratio of no more that 25 wards for each FTE guardian. A higher ratio would make it difficult for a guardian to maintain contact and complete protective duties mandated by the rule. This is not an academic concern. For example, today one of our staff spoke to a corporate guardian employee who told her their two staff currently manages 120 wards and the capacity is 180. We were in contact with the guardian because the county long term support agency was proposing a radical change in the living arrangement for one of the corporation's wards due to budget issues. The corporate guardian was	No change was made to the proposed rule. The Department did not include a staffing ratio in the proposed rule because the ratio should be developed according to the needs of the wards. A number of factors may come into play to determine the ratio of staff to wards including living arrangement of the wards and the level of supportive services provided. Setting an arbitrary staff ratio may give the impression that as long as the corporate guardian staffs at that ratio, there is an adequate number of staff to meet the needs of wards and that the corporate guardian is in compliance with the rule.

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	unwilling to advocate for maintenance of the current living arrangement (which has been working well for the ward) because she did not have enough time to devote to such a dispute. Absent a reasonable ratio, guardian will be overloaded and the sections of the rule mandating certain responsibilities will be seriously undermined. For programs that could prove that a higher ratio was possible without negatively affecting the wards, the waiver/variance procedure would be available. (4)	
DHS 85.12 (4)	Suggest the Department include the "county court commissioner hearing petitions for guardianship" as an individual that create a conflict for the corporate guardian. Medicaid managed care organizations both SSI and long term care should be added to the list of organizations that create a conflict for the corporate guardian. 1, 4	The Department has amended s. DHS 85.12 (4) as requested by the commenter.
DHS 85.13 (1)	The introductory language to this section was added after the final draft was reviewed by the advisory committee. We believe it is unnecessary and confusing. The rights delineated in the section are not ones that are subject to restriction, either under chapter 54, 55 or via a court order. Corporate guardians need to understand that these are the core, nonnegotiable rights that they are duty bound to protect for each of their wards. 4	The Department has amended s. DHS 85.13 (1) as requested by the commenter and omitted the broad reference to ss. 54.18 to 54.24 and court orders. The provision was further amended to clarify: 1) who the ward holds the rights against, 2) that the right to confidentiality may be limited to the extent the corporate guardian may be authorized under the guardianship order to give informed consent to disclosure, and 3) that guardianship services be provided in a way that is least restrictive as defined in s. 54.01 (18), Stats.
DHS 85.13 (1) (g)	Suggest that the Department change the word "advocate" to the plural "advocates." 1	The Department has amended s. DHS 85.13 (1) (g) as requested by the commenter.

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DHS 85.14 (6)	Consider adding words clarifying what happens when there are no funds available to pay for the corporate guardian. The commenter states the person generally goes to a nursing home as it may be financially advantageous for the guardian but may not be in the best interest of the ward. 1	No change was made to the proposed rule. Section DHS 85.14 (4) and (5) requires the corporate guardian to fulfill the duties of the guardian of person and of estate pursuant to s. 54.18 (2) (b), Stats., including to act in the best interest of the ward. The corporate guardian must fulfill this responsibility regardless of the ward's financial status. Wards with no funds may reside in a nursing home, in an assisted living facility or independently in the community depending on the wards' needs and the available services, similar to other individuals in the community.