

CAPS REPORTING: INTRODUCTION TO REGULATIONS AND IMPLICATIONS FOR PROFESSIONAL FIDUCIARIES

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PRESENTATION OUTLINE

1. APS, CAPS, CAPS CHECK, HB21-1123
2. Regulations (select sections)
3. Practice Tips for Fiduciaries
4. Overview of Appeal of a Substantiated Finding of Mistreatment

I. APS PROGRAM, CAPS, CAPS CHECK, HB21-1123

Adult Protective Services (APS) Program means

The State Department supervised, county department administered program that has the authority to investigate and/or assess allegations of mistreatment and self-neglect of **at-risk adults**. The APS Program offers protective services to prevent, reduce, or eliminate the current or potential risk of mistreatment or self-neglect using community based services and resources, health care services, family and friends when appropriate, and other support systems. The APS Program focuses on the at-risk adult and those services that may prevent, reduce, or eliminate further mistreatment or self-neglect. **The APS Program refers possible criminal activities to law enforcement and/or the district attorney for criminal investigation and possible prosecution.**

WHAT IS AN AT-RISK ADULT?

At-risk adult means:

An individual eighteen years of age or older who is susceptible to **mistreatment** or **self-neglect** because the individual is unable to perform or obtain services necessary for his or her health, safety, or welfare, or lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his or her person or affairs.

WHAT IS CAPS?

- CAPS is a database.
- **CAPS** is the Colorado Ault Protective Services state department prescribed data system.

WHAT IS A CAPS CHECK?

- CAPS Check = search of the database.
- **A CAPS Check** means a statutorily authorized search of the Colorado Adult Protective Services data system to determine whether the name of the person submitted has a **reportable substantiated finding of mistreatment** of an at-risk adult in the database.
- If a **reportable** finding is discovered, the entity requesting the search will receive date(s) of report(s) of mistreatment, the county department(s) completing the investigation(s), and the type(s) and severity level(s) of mistreatment.
- A **substantiated finding** is **reportable** upon issuance and **remains reportable** unless it is expunged or overturned by a successful appeal.
 - If expunged, expungement may be immediate or time-delayed (period of months or years).

SITUATIONS CAPS CHECK SYSTEM IS DESIGNED TO ADDRESS

- **Perpetrators could move from facility to facility, county to county.**
 - Employers (agencies, facilities, families) terminated employment. Perpetrator moved on to next job (next target).
 - Statewide audit discovered some jurisdictions provided insufficient monitoring of court-appointed fiduciaries.
 - 2016 Mandatory Reporting Statutes.
 - No statewide central tracking of mistreatment of at-risk adults by those who provided direct care or other fiduciary services.
- **A fiduciary's actions may not rise to the level of criminal behavior or DA declines to file criminal charges.**
 - No criminal history → No convictions appear on pre-employment background check.
- **Financial exploitation cases can be challenging to prosecute.**
 - Statute of limitations has run. (SOL = Time within which a DA can file charges.)
 - Investigation may require substantial resources and special expertise (Elder Abuse Unit, Economic Crimes Unit, Forensic Accounting, Expert Witnesses)
 - Lack of cooperation by injured party (e.g., Mom says she authorized son to use her funds.)
 - Unavailability of injured party – incapacity or death – and testimony not preserved prior to trial.
 - Insufficient evidence or incomplete records (e.g., financial records no longer available due to institution's retention policies)

HB21-1123: THE CAPS CHECK BILL

- A direct result of the May 2020 Performance Audit of APS
- Audit determined that as to guardianships and conservatorships, APS was not doing enough to protect at-risk adults.
- HB21-1123 was the Auditor Committee's proposed solution with bi-partisan support.
- The audit report made various policy recommendations, including
 - Courts must be required to request CAPS checks for nominees in guardianship and conservatorship proceedings.
 - APS must report new substantiated findings to employers, courts, and regulatory bodies.

BEFORE HB21-1123:

WHO WAS REQUIRED TO REQUEST CAPS CHECKS?

- Employers prior to hiring a new employee who will provide direct care to an at-risk adult.
- Such employers may request a CAPS check for existing employees or volunteers who provide direct care to an at-risk adult.
 - Employer means a person, facility, entity, or agency described in C.R.S. § 26-3.1-111(7), and includes a prospective employer.
 - Employer also includes a person hiring someone to provide Consumer-Directed Attendant Support Services, pursuant to Article 10 of Title 25

AFTER HB21-1123:

WHO ADDITIONALLY **MUST** REQUEST A CAPS CHECK?

With the passage of HB21-1123, as of January 1, 2022,

- **ALL COURTS** receiving
 - Petitions for the appointment of an emergency or permanent guardian
 - Petitions for the appointment of a special or permanent conservator

must request a CAPS check for EACH individual nominee listed on the petition, regardless of whether multiple nominees are affiliated with the same professional entity.

Stated differently, a CAPS check must be conducted on each nominated co-guardian or co-conservator regardless of any affiliation with a professional fiduciary business entity.

CAPS CHECK AUTHORIZATION FORM

Each nominee must submit his/her own **CAPS Check Authorization Form** with the petition.

- **How do I find the form?**
 - Go to the Judicial Branch Website
 - Select *Self Help / Forms tab*
 - Select *All Court Forms and Instructions*
 - Select *Guardian & Conservator*
 - Look at *General Probate Information table*
 - Select *CAPS Check Authorization Form*

Written Authorization to Request a CAPS Check

A check of the Colorado Adult Protective Services (APS) data system (CAPS) is required for you (individual) because you are:

- A potential employee/contractor who will provide direct care to at-risk adults, or
- A person who may be appointed as a conservator or guardian of an at-risk adult.

An employer may also request a CAPS check for you if you provide direct care to an at-risk adult and you:

- Were hired/contracted prior to the CAPS check requirement (1/1/2019), or
- Are a volunteer, or
- Will provide services to a CDASS recipient

The CAPS check will alert the employer or court (agency) whether you have or have not been substantiated in an APS case of mistreating an at-risk adult, to include physical abuse, sexual abuse, caretaker neglect, exploitation, and/or harmful act.

More information on the CAPS check requirement can be found in Colorado Revised Statute (26-3.1-111, C.R.S.) and in the Colorado code of Regulations (12 CCR 2518-01).

Written authorization is required from the individual being checked, using this form. Please complete this form in its entirety. Knowingly providing inaccurate information on a CAPS check request is a class 1 misdemeanor pursuant to 18-1.3-501, C.R.S.

■ AGENCY INFORMATION (To be completed by the agency.)

Agency Name: _____

Agency Address: _____

■ INDIVIDUAL'S INFORMATION (To be completed by the individual being checked.)

First Name: _____ Middle Name: _____ Last Name: _____

Maiden Name/Previous Name(s)/Alias: _____

Date of Birth: _____ SSN (Last 4 digits): _____ DORA License #: _____
(required for all licensed professionals)

Provide the Name(s) of Your Previous Employer(s) Over the Past Five (5) Years: _____

You must provide at least one (1) personal phone number and one (1) email address.

Personal Email Address: _____

Work Email Address: _____

Cell Phone: _____ Home Phone: _____

Work Phone: _____ Work Phone Extension: _____

All individuals are required to provide five (5) years of residential history, regardless of whether in the U.S. or abroad. If you lived outside the US in the past five (5) years, provide the international address(es), including the name of the city and country. If you have lived at your current address less than 5 years, please list your previous addresses for the past 5 years. Use another sheet of paper, if necessary.

Current Address Start Date (DD/MM/YYYY): _____

Current Street and Number (No PO boxes): _____

Current Address City: _____ Current State: _____ Current Zip/Postal Code: _____

Previous Address Start Date (DD/MM/YYYY): _____ Previous Address End Date (DD/MM/YYYY): _____

Previous Street and Number (No PO boxes): _____

Previous City (City & country for international addresses): _____

Previous State (Not required for international addresses): _____ Previous Zip Code (Use "00000" for international addresses): _____

Previous Address Start Date (DD/MM/YYYY): _____ Previous Address End Date (DD/MM/YYYY): _____

Previous Street and Number (No PO boxes): _____

Previous City (City & country for international addresses): _____

Previous State (Not required for international addresses): _____ Previous Zip Code (Use "00000" for international addresses): _____

Previous Address Start Date (DD/MM/YYYY): _____ Previous Address End Date (DD/MM/YYYY): _____

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Previous State (Not required for international addresses): _____ Previous Zip Code (Use "00000" for international addresses): _____

Previous Address Start Date (DD/MM/YYYY): _____ Previous Address End Date (DD/MM/YYYY): _____

Previous Street and Number (No PO boxes): _____

Previous City (City & country for international addresses): _____

Previous State (Not required for international addresses): _____ Previous Zip Code (Use "00000" for international addresses): _____

I, _____, by my signature below, authorize the agency referenced above to request a CAPS check to determine if I have a substantiated finding as a perpetrator of mistreatment of an at-risk adult. I acknowledge that a substantiated finding resulting from such a check, unless the finding was expunged through a successful appeal, shall be provided to the person directly involved in the employer's hiring process or the court's hearing process and may be used to inform their decision. I acknowledge notification may occur through CAPS to this agency, for the duration of my employment, volunteer assignment, or authority as an appointed or potential conservator or guardian with them, of any future substantiated findings against me. I understand that willfully providing false information on this form is a misdemeanor 1 penalty, punishable as outlined in §18-1.3-501, C.R.S. I declare under penalty of perjury under Colorado Law that this CAPS Check Request Form, including supporting documents, has been examined by me and is true, correct, and complete.

Signature: _____

Date: _____

CLEAR FORM

PRINT



COLORADO
Adult Protective Services
CAPS Check Unit

EFFECT OF HB21-1123 ON REPORTING SUBSTANTIATED FINDINGS

With the passage of HB21-1123, as of January 1, 2022, **APS must provide notification** of a **new substantiated finding** entered into the CAPS database as follows:

- **To an employer** if a substantiated finding of mistreatment of an at-risk adult by an employee is subsequently entered into the system;
- **To the court** within 7 calendar days after a substantiated finding of mistreatment by a person appointed as a guardian or conservator for an at-risk adult is subsequently entered into the system. Such notification shall disclose person's right to appeal the finding.
- **To DORA or a regulator within a health oversight agency** within 10 calendar days after a substantiated finding of mistreatment of an at-risk adult by a professional licensed or regulated by such agency is subsequently entered into the system. Such notification shall disclose the person's right to appeal the finding.

2. REGULATIONS

WHERE DO I FIND THE APS REGULATIONS?

- 12 CCR 2518-1-30.100 through -30.960 (Updated as of 3/2/2022)
- **Section 30.100 – Definitions**
- Section 30.200 – APS Program Administration and Overview
- Section 30.300 – Staff Qualifications, Training, and Duties
- Section 30.400 – Report Receipt and Response
- **Section 30.500 – Investigation and Assessment** (see Sections 30.500 - 30.520 for investigation requirements / deadlines)
- Section 30.600 – Case Planning and Implementation
- Section 30.700 – County Assignment and Courtesy Visits
- Section 30.800 – Community Collaboration (30.810 cooperative agreements with law enforcement agencies, DA's offices)
- **Section 30.900 – Notice to Substantiated Perpetrators; State Level Appeals Process; and CAPS Checks**

DEFINITIONS: WHAT IS MISTREATMENT?

Mistreatment means:

- A. Abuse;
- B. Caretaker neglect;
- C. Exploitation;
- D. An act or omission that threatens the health, safety, or welfare of an at-risk adult; or,
- E. An act or omission that exposes an at-risk adult to a situation or condition that poses an imminent risk of bodily injury to the at-risk adult.

DEFINITIONS: WHAT CONSTITUTES ABUSE?

Abuse means:

Any of the following acts or omissions committed against an at-risk adult:

- A. The **non-accidental infliction** of physical pain or injury, as demonstrated by, but not limited to, substantial or multiple skin bruising, bleeding, malnutrition, dehydration, burns, bone fractures, poisoning, subdural hematoma, soft tissue swelling, or suffocation;
- B. Confinement or restraint that is unreasonable under generally accepted caretaking standards; or,
- C. Unlawful sexual behavior as defined in Section 16-22-102(9), C.R.S.

DEFINITIONS: WHAT IS CARETAKER NEGLECT?

Caretaker neglect means neglect that occurs:

- When adequate food, clothing, shelter, psychological care, physical care, medical care, habilitation, supervision, or other treatment necessary for the health, safety, or welfare of the at-risk adult is not secured for an at-risk adult or is not provided by a caretaker in a timely manner and with the degree of care that a reasonable person in the same situation would exercise, or
- When a caretaker knowingly uses harassment, undue influence, or intimidation to create a hostile or fearful environment for an at-risk adult.

DEFINITIONS:

WHO IS A CARETAKER?

WHAT IS ASSUMED RESPONSIBILITY?

Caretaker means a person who:

- A. Is responsible for the care of an at-risk adult as a result of a family or legal relationship;
- B. Has assumed responsibility for the care of an at-risk adult; or
- C. Is paid to provide care, services, or oversight services to an at-risk adult.

Assumed Responsibility:

As used in the definition of a caretaker, means a person who is providing or has provided recurring or temporary assistance to help meet the basic needs of an at-risk adult.

The assumption of responsibility can attach by

- (1) entering into a formal or informal agreement, whether paid or unpaid;
- (2) by identifying oneself as a caretaker to others; or
- (3) based on the nature of the situation or relationship between the caretaker and the at-risk adult.

DEFINITIONS:

WHAT IS **NOT** CARETAKER NEGLECT?

Caretaker neglect is not:

- The withholding, withdrawing, or refusing of any medication, any medical procedure or device, or any treatment, including but not limited to resuscitation, cardiac pacing, mechanical ventilation, dialysis, artificial nutrition and hydration, any medication or medical procedure or device, in accordance with any valid medical directive or order, or as described in a palliative plan of care.
- Access to Medical Aid in Dying, pursuant to Title 25, Article 48, C.R.S.

DEFINITIONS: WHAT CONSTITUTES EXPLOITATION?

Exploitation means **an act or omission** that:

- A. Uses deception, harassment, intimidation, or undue influence to permanently or temporarily deprive an at-risk adult of the use, benefit, or possession of anything of value; or,
- B. Employs the services of a third party for the profit or advantage of the person or another person to the detriment of the at-risk adult, or,
- C. Forces, compels, coerces, or entices an at-risk adult to perform services for the profit or advantage of the person or another person against the will of the at-risk adult; or,
- D. Misuses the property of an at-risk adult in a manner that **adversely affects** the at-risk adult's ability to receive health care or health care benefits or to pay bills for basic needs or obligations.



**DEFINITIONS:
WHAT IS UNDUE INFLUENCE?**

Undue influence is the use of influence to take advantage of an at-risk adult's vulnerable state of mind, neediness, pain, or emotional distress.

INFLUENCE VS. UNDUE INFLUENCE

As Guardian or Conservator, you will be exerting some **influence** in your fiduciary role to act in the best interest of the client.

- Care Plans, Behavior Plans, Financial Plans
- Placement recommendations or decisions
- Level of care decisions (in-home, memory care, hospice)
- Limitations or conditions regarding communication / visitation
- Control or limit access to assets (personal spending, personal property)

Undue influence is the use of influence to take advantage of an at-risk adult's vulnerable state of mind, neediness, pain, or emotional distress.

DOCUMENT, DOCUMENT, DOCUMENT why you are taking specific actions or making certain decisions, especially if the client or other interested persons demonstrate opposition.

DEFINITIONS: SEVERITY LEVELS

Severity Level means the extent of the impact caused to the client as a result of the mistreatment.

- **Minor** – Mistreatment occurred that resulted in **little to no harm or change** to the client's health, safety, welfare, or finances.
- **Moderate** – Mistreatment occurred that resulted in **harm or change** to the client's health, safety, welfare, or finances.
- **Severe** – Mistreatment occurred that resulted in **substantial harm or change** to the client's health, safety, welfare, or finances.

3. REPORT – INVESTIGATION – FINDINGS

REPORT AND INITIAL ASSESSMENT (COUNTY DEPARTMENT OF APS)

- **County Department of APS receives a report of mistreatment of an at-risk adult**
 - Reporting party calls APS Hotline for elder abuse (mandatory reporter or interested third-party)
 - Law enforcement refers reports of allegations of abuse, neglect, exploitation of an at-risk adult to County Department of APS received through their intake whether allegations are founded (probable cause established that a crime took place) or unfounded (no probable cause). (APS has lower standard of proof.)

- **County Department of APS performs initial assessment to determine if case should be opened.**
 - Is the potential client an “at-risk adult”?
 - Do the allegations on their face rise to the level of mistreatment?
 - If yes, to both questions above, then a county department of APS opens a case and conducts investigation to determine if they can substantiate a finding of mistreatment.

REPORT – INVESTIGATION – FINDINGS

INVESTIGATION (COUNTY DEPARTMENT OF APS)

An investigation to determine findings related to allegations of mistreatment shall include the following:

- **Need for protective services.** If APS determines the client is in clear and immediate danger, APS will notify emergency first responders.
- **Joint investigation.** APS to determine if the investigation should be conducted jointly with another entity, such as law enforcement or the district attorney's office, a community center board, health facilities division, the Attorney General's Medicaid Fraud Unit, and or entities.
- **Visits with client.** Under current regulations, APS is to conduct a **face-to-face** interview with the client, unannounced and in private, whenever possible.

REPORT – INVESTIGATION – FINDINGS

INVESTIGATION (COUNTY DEPARTMENT OF APS)

- **Interview alleged perpetrator (AP).**
 - To gather identifying information and current contact information for the CAPS database.
 - To address the allegations of mistreatment with the AP.
 - APS may conduct interview of AP with or without law enforcement present.
 - If an AP cannot be located or interviewed for good cause, such good cause must be documented in the CAPS database.
- **Interview collateral contacts.**
 - A person who has relevant knowledge about the client's situation that supports, refutes, or corroborates information by a client, reporting party, or other person involved in the case.
 - **Examples:** Family members, law enforcement, health care professionals, service providers, facility staff, neighbors, the reporting party, friends, and person who provides or provided ongoing care or support to the client.

REPORT – INVESTIGATION – FINDINGS

INVESTIGATION (COUNTY DEPARTMENT OF APS)

- **Collect Evidence.** APS has the authority to obtain access to police reports; prior and current investigative reports from an involved facility, as well as staffing records and employee work schedules; medical and mental health records; bank and other financial records; and care plans and daily logs or charts from a facility or caregiving service.
- **Make Findings.** After completing their investigation, the county department must make a finding regarding each allegation and alleged perpetrator.
 - **Inconclusive finding.** Indicators of mistreatment may be present but the investigation could not confirm the evidence to a level necessary to substantiate the allegation.
 - **Unsubstantiated finding.** Investigation did not establish any evidence that mistreatment has occurred.
 - **Substantiated finding.** Investigation established by a preponderance of evidence that mistreatment has occurred.

REPORT – INVESTIGATION – FINDINGS

INVESTIGATION (COUNTY DEPARTMENT OF APS)

- **Timeline.** The county department must complete its investigation into allegations of mistreatment and makes its findings no later than **60 days** from the date of the receipt of such allegations.
- **Documentation.** All information relating to an investigation, as well as the actual findings must be entered into and maintained in the CAPS system.
 - Interviews
 - Contacts or attempted contacts with a client, collateral contacts, the AP(s)
 - Other evidence collected (documents, photos, reports, medical records, financial information, etc.)

NOTIFICATION OF SUBSTANTIATED FINDING OF MISTREATMENT OF AN AT-RISK ADULT

- Letter from County Department of APS entitled **Notice of Substantiated Finding**.
- Identifies county that conducted the investigation.
 - May not be county of residence for at-risk adult or perpetrator.
- Identifies the APS client (the at-risk adult).
- Identifies each allegation of mistreatment by a unique 10-digit number (the AP#), the type of mistreatment, and the severity level.
- Gives notice of the **right to appeal** the substantiated finding to the **State Department of APS** known as **CAMDRS** (Child and Addult Mistreatment Dispute Review Section)
- **Advises of 90-day deadline** (actual date) by which the appeal must be **received**.
- Also enclosed is list of Frequently Asked Questions.
- Also enclosed is blank **Request for State Level Fair Hearing Form** (Request for Appeal)

SAMPLE NOTICE OF SUBSTANTIATED FINDING LETTER

Human Services Department
Economic Security and Aging Services
Division
www.adco.gov.org



Pete Mirelez Human Services Center
11860 Pecos Street
Westminster, CO 80234
PHONE 720.523.2001
FAX 720.523.2002

Notice of Substantiated Finding

July 27, 2021



Notice of Substantiated Finding of Mistreatment of an At-Risk Adult

Dear Sir or Madam:

Adams County Department of Human/Social Services has completed an investigation into an allegation(s) of mistreatment of an at-risk adult. The allegation(s) has been substantiated and you have been identified as the perpetrator of mistreatment of an at-risk adult, as detailed below:

Date of Finding	Client	Allegation #	Mistreatment Type	Severity
07/22/21	[REDACTED]	AP-0000 [REDACTED]	Caretaker Neglect	Severe
07/22/21	[REDACTED]	AP-0000 [REDACTED]	Exploitation	Severe

Your name will be maintained in the Colorado Adult Protective Services statewide data system (CAPS), as a person responsible for the mistreatment noted above. CAPS may be accessed by county caseworkers and the State when making decisions regarding adult protection reports and cases. Certain employers are required or allowed by law to request a check of CAPS when screening employees for employment in jobs that provide direct care to at-risk adults.

You have the right to appeal the finding as outlined in the attached forms. You have ninety (90) calendar days from the date of this Notice of Substantiated Finding to request an appeal. If your appeal is not received by the State Department by October 25, 2021, your appeal will not be accepted and your name will remain permanently in CAPS as a person responsible for the mistreatment noted above.

After your request for an appeal has been accepted by the State Department, you will have access to the investigative record relied upon by the county department to make the finding. In order to receive this information, you are required to

request it from the staff member responsible for your appeal. Your use of the investigative record for any other purpose is prohibited unless otherwise authorized by law.

Prior to providing access to the investigative record, the State Department will redact certain identifying information contained in the investigative record and documents to ensure compliance with all state and federal confidentiality laws and rules regarding adult mistreatment records or other protected information.

You and the State Department will have up to one hundred twenty (120) calendar days from the date the State Department receives the appeal to resolve the issue(s) on the appeal. The one hundred twenty (120) day time frame may be extended by agreement of both you and the State Department if it is likely that the additional time will result in a fully executed settlement agreement or resolution of the appeal.

You have the right to appeal, even if a court action or criminal prosecution is pending as a result of the mistreatment. The State Department will hold in abeyance the administrative appeal process pending the outcome of the court action or criminal prosecution at your request, or if the State Department determines that awaiting the outcome of the court case is in the best interest of the parties. If you object to the continuance, the continuance will remain in place, but the continuance of the appeal will not exceed one hundred eighty (180) calendar days without you having the opportunity to seek a review of the continuance by an administrative law judge. The pendency of other court proceedings will be considered good cause to extend the continuance of the appeal past the one hundred eighty (180) day time frame.

This is a civil administrative proceeding and not a criminal charge. You can choose to hire a lawyer to represent you for this appeal. Additional information regarding the substantiated finding and the appeal process is explained in detail in the attached forms.

WHEN DOES A SUBSTANTIATED FINDING BECOME REPORTABLE?

- A **substantiated finding** is **reportable** upon determination of the finding and entry into CAPS database.
- It remains **reportable**:
 - If no appeal is submitted (waiver of right to an appeal).
 - An untimely appeal is submitted and rejected for lack of good cause.
 - During the pendency of an accepted appeal.
 - As a condition of a settlement agreement involving a time-delayed expungement.

3. PRACTITIONER TIPS FOR PROFESSIONAL FIDUCIARIES TO AVOID A SUBSTANTIATED FINDING OF MISTREATMENT/MALFEASANCE

Seek Court Approval of Conservator's Annual Report:

- Under C.R.S. §15-14-420(1), conservators are entitled to file a motion to settle all matters covered in their intermediate or final report.
- By doing so, and receiving an order approving the same, the conservator's, his or her counsel's, and the conservator's other agent's liabilities are adjudicated if properly disclosed in the report.
- Once adjudicated, this should eliminate any concern of mistreatment or malfeasance in the administration.

PRACTITIONER TIPS FOR PROFESSIONAL FIDUCIARIES TO AVOID A SUBSTANTIATED FINDING OF MISTREATMENT/MALFEASANCE

Petition for Instruction

- A conservator does not have to guess as to the appropriate course of action to take when serving as a fiduciary.
- If there is a question as to the appropriate way to proceed in a case, a fiduciary is entitled to seek instructions from the Court pursuant to C.R.S. §15-14-414(2).
- In seeking Court instruction, the fiduciary will be afforded protection in that he or she will not only have set out the option to both the Court and parties in their petition for instructions, but will also then obtain the Court's authority as to how to proceed.

PRACTITIONER TIPS FOR PROFESSIONAL FIDUCIARIES TO AVOID A SUBSTANTIATED FINDING OF MISTREATMENT/MALFEASANCE

Right to Counsel

- A fiduciary has the right to an attorney or other advisor to assist the fiduciary in the performance of his or her duties. C.R.S. § 15-1-804(2)(x)(I).
- If a fiduciary has a question as to the appropriate course of action, or has concerns in more challenging litigious cases, he or she always has the right to employ counsel to advise the fiduciary.
- Furthermore, if a fiduciary becomes the subject of an investigation of mistreatment by APS and/or law enforcement, the fiduciary should seek out advice of counsel before participating in a substantive interview.

PRACTITIONER TIPS FOR PROFESSIONAL FIDUCIARIES TO AVOID A SUBSTANTIATED FINDING OF MISTREATMENT/MALFEASANCE

Status Report to the Court

- Provides transparency in a guardianship and/or conservatorship proceeding.
- Provides the Ward, Protected Person, Court and other interested parties an update as to the fiduciary's specific action or decision relating to the client.
- Ideally, this will help prevent the issue from escalating to a report to APS, but if it does, the fiduciary will already be ahead of the issue.

PRACTITIONER TIPS FOR PROFESSIONAL FIDUCIARIES TO AVOID A SUBSTANTIATED FINDING OF MISTREATMENT/MALFEASANCE

Guardian's Reports

- The annual report should serve as notice to the court and designated interested persons of significant changes or developments regarding the ward.
- A guardian should document in the appropriate narrative sections of the annual report any significant cognitive decline or improvement, behavioral changes, new or resolved medical issues or illnesses, or other problems and concerns that have developed over the last reporting period and specify the guardian's actions to address those issues, if appropriate.
- Ideally, in situations involving contentious family dynamics, robust annual reports will prevent issues from escalating to a report to APS, but should a report be filed, the fiduciary will have some documentation already in place.

PRACTITIONER TIPS FOR PROFESSIONAL FIDUCIARIES TO AVOID A SUBSTANTIATED FINDING OF MISTREATMENT/MALFEASANCE

Transparency and Open Communication with Adult Protective Services

- Fiduciaries should maintain detailed, organized, complete records of all financial interactions and/or important decisions affecting the client's well-being taken during their administration / appointment.
- Fiduciaries should be willing to share that information with APS, as appropriate.
- **Caution:** APS may share with law enforcement information it receives during an investigation without first obtaining a court order under various circumstances, including when APS and law enforcement are conducting a joint investigation.

4. OVERVIEW OF APPEAL

SCOPE OF APPEAL

Scope of appeal is limited to challenging:

- Whether the finding is supported by a preponderance of evidence, and/or
- Whether the actions substantiated as mistreatment meet the statutory or regulatory definition of mistreatment.

Preponderance of the Evidence means:

Credible evidence that a claim is more likely true than not.

SAMPLE REQUEST FOR STATE LEVEL HEARING

**REQUEST FOR STATE LEVEL FAIR HEARING
REGARDING A COUNTY DEPARTMENT SUBSTANTIATED FINDING OF MISTREATMENT OF AN
AT-RISK ADULT**

To request a state level fair hearing regarding the decision of a county department of human/social services to substantiate you as a perpetrator of mistreatment of an at-risk adult, you may request an appeal online at (<https://cdhs.colorado.gov/child-and-adult-mistreatment-dispute-review-section>) OR by fully completing this form and mailing it to:

Child and Adult Maltreatment Dispute Review Section (CAMDRS)
3550 W. Oxford Ave
Denver, Colorado 80236

IMPORTANT! All paperwork must be received by CAMDRS within ninety (90) calendar days from the date of the county notice to appeal this finding. If your appeal is not received within ninety (90) calendar days of the county notice, your appeal will be considered untimely and it will be returned to you.

Full Name (Please Print): _____ Date of Birth: _____

Mailing Address: _____

City, State & Zip Code: _____

Email Address: _____

Home Phone: _____ Work Phone: _____ Cell Phone/Other Phone: _____

Allegation#(s): _____

County Department of Human/Social Services That Made the Finding: Jefferson County

How do you wish to receive correspondence from the State in regards to this appeal (circle one)?

Email Standard Mail

Will you have an attorney representing you in this matter (circle one)? Yes No

Attorney Name: _____

Attorney Address: _____

Attorney Phone Number: _____ Attorney Email Address: _____

All correspondence on this matter going forward is to be through my attorney, Kris Zumalt.

I am appealing the decision of the county department of human/social services to find (substantiate) me as the perpetrator of mistreatment of an at-risk adult. The basis for my appeal is as follows (Please use extra sheets if necessary):

See attached.

Please attach a copy of the notice you received from the County Department. This is required to process your appeal. **See attached.**

I understand that if my mailing address, email address, or phone number changes during this appeal process, I will immediately notify the State Department at the above address or at telephone number 303-866-4546. I understand that my appeal may be dismissed if the State Department is unaware of my current contact information.

Signature: _____

Today's Date: October _____, 2021

For Official Use Only:

Appeal #:

Date Received:

Case #:

Prior Case or Report #(s):

STATEMENT OF BASIS FOR APPEAL

Finding is not supported by preponderance of evidence.

- Evidence is not credible.
 - Examples: False allegation; Incomplete investigation; Absence of credible evidence.
- Police reports or calls for service.
- Medical records.
- Transcripts of depositions or hearing testimony or orders from other proceedings.
- Financial records; Powers of Attorney; Trust Agreement.
- Collateral contacts not interviewed by County Department investigator.
 - Estate planning counsel; notary public; banker; investment advisor; accountant; medical provider; caregivers; family; friends.

STATEMENT OF BASIS FOR APPEAL

Actions substantiated as mistreatment DO NOT meet the statutory or regulatory definition of mistreatment.

Review facts in light of definitions for:

- Abuse
- Caretaker neglect
- Exploitation

4. OVERVIEW OF APPEAL

TWO PHASES OF APPEAL

1. CAMDRS Review

- CAMDRS reviewers are not attorneys.
- 120 days to resolve issues. May be extended by agreement of parties.
- Reviewer may provide little-to-no additional information regarding the substantiated finding.
- Will consider additional information supporting the appeal or mitigation from Appellant.
- Reviewer may discuss offer of settlement.
 - If appellant declines offer of settlement, Reviewer refers case to OAC to set for hearing before an Administrative Law Judge (ALJ).
 - If either CAMDRS or the Appellant is unwilling to discuss an offer of settlement, the Reviewer refers case to OAC to set for hearing before an ALJ.

4. OVERVIEW OF APPEAL

TWO PHASES OF APPEAL

2. HEARING PHASE

- Case assigned to an Assistant Attorney General (attorney)
- Request / Receive Investigative Record (redacted)
- Scheduling Conference to Set Hearing Date (now dealing with OAC and the AG's Office)
 - Note: Hearing dates may be set out 12 to 24 months due to the AAG's schedule.
- Protective Order Issued
- Notice of Issues filed by AAG and Appellant Required to Provide Written Responses
- Potential further discussions / negotiations with AAG
- Potential offer of settlement
- Hearing before ALJ (Regulations re: pre-hearing exchange of discovery, expert disclosures, witness lists, exhibits lists)
- **Many deadlines during the hearing phase. Read regulations carefully and meet deadlines or appeal may be dismissed.**

REGULATIONS GOVERNING HOW HEARING CONDUCTED

12 CCR 2518-1-30.930(B)

- Conducted in accordance with Administrative Procedure Act, C.R.S. § 24-4-105
- State Department has burden of proof to establish the facts by a preponderance of evidence and that the facts support the conclusion that the appellant is responsible for the mistreatment indicated in the notice of issues.
- ALJ can consider evidence other than the case record in CAPS in concluding that the finding is supported by a preponderance of evidence.
- Each party has right to present case or defense by oral or documentary evidence, to submit rebuttal evidence, and conduct cross-examination.
- To expedite hearing and where no party's interest will be prejudiced, ALJ may receive all or part of the evidence in written form or by oral stipulation.
- **Telephonic hearing** may be conducted as alternative to face-to-face hearing.
- **Hearing by videoconference**, if technology is available, may be alternative to face-to-face hearing. Burden on party requesting hearing by videoconference to investigate and confirm feasibility of this approach and make written request to court outlining arrangements to be made. **OAC shall hold hearing via videoconference for convenience of the parties whenever requested and feasible.** Such request may result in hearing being rescheduled.
- **Request for face-to-face hearing required in writing and filed no less than 10 days before hearing.** May result in hearing being rescheduled.

QUESTIONS?

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