

ALTERNATIVES TO GUARDIANSHIPS IN MASSACHUSETTS

**Prepared by the Mental Health Legal Advisors Committee
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What is Guardianship?

A court orders a guardianship when a person is determined incompetent to make legal decisions and grants another person the legal authority to make decisions for the incapacitated person. These decisions may be regarding health, support, education and welfare.¹ The amount of decision making power a guardian has depends upon the type of guardianship. For more specific information about guardianship, please see MHLAC's "Guardianship of an Adult in Massachusetts" pamphlet.

Alternatives to Guardianship

Guardianships may be appropriate under some circumstances. However, in most situations, one should consider less restrictive alternatives. This is due to the fact that individuals have varying degrees of mental capacity and ability. Any limitation on a person's autonomy should seek to meet both the needs of the individual as well as maximize the person's rights and liberties. Alternatives to guardianship are less restrictive to the individual and can help eliminate both the costs and burden of court involvement. Below are some alternatives to guardianship.

Non-legally Binding Health Planning Alternatives

Non-legally binding alternatives are meant to keep the individual and caregivers or family members out of court and allow a person to express his or her medical treatment desires. These alternatives may also be valuable if there is a disagreement about medical care and someone petitions the court for guardianship.

Supported Decision Making

Supported Decision Making² is a framework that enables those with disabilities to make legal decisions. The goal of supported decision making is to maximize the incapacitated person's autonomy. Self-determination plays a role in supported decision making because it allows different practices, relationships and arrangements help the designated incapacitated person make decisions about their care. For example, people may rely on a chosen network of people to inform and guide them. Supported decision making places a high value on independence of the individual.

Supported decision making doesn't involve a court process. It is an arrangement between the individual, his or her providers, and the support network (friends, family, caregivers, etc.).

Advance Directives

An Advance Directive is a statement or plan an individual makes about his or her wishes for future health care. Advance Directives are not legally recognized as binding in Massachusetts. Even if a person drafts an advance directive, the court can take the advance directive as instructional, and has discretion as to whether to include it in an order. Any document that states an individual's wishes for future medical and psychiatric care is valuable and can ease the burden of loved ones when making decisions. Advance Directives can be modified or changed at any time.

The term "Advance Directive" covers these various documents.

- A Health Care Proxy, which is a legal document where a person appoints another person someone to make medical decisions for them if they become incapacitated.
- Medical Order for Life Sustaining Treatment (MOLST), which is a medical order allowing patients with serious advancing illnesses to express their wishes for life-sustaining treatment in consultation with providers.
- Psychiatric Advance Directives are documents that state preferences for treatment including specific medications a person does or does not want, particular hospitals a person wishes to avoid or go to, and other alternative services. These are non-binding documents, but can be instructive for family and healthcare providers. For a template, see [Psychiatric Advance Directive](#). For more information, visit [National Resource Center on Psychiatric Advance Directives](#).
- A Medical Directive or Living Will is a written plan of an individual's instructions regarding life sustaining treatment. In Massachusetts, a medical directive is not binding, but can be instructive regarding which doctor, hospital, treatment, or medication to choose. Note that if a Health Care Agent is appointed, the Agent should look to the Medical Directive for input.

For more information, see [Differences between Health Care Proxies, MOLSTs and Living Wills Personal Wishes Statement Form](#).³

Wellness Recovery Action Plan (WRAP)

The Wellness Recovery Action Plan is a self-management and recovery system developed by a group of people who had mental health difficulties and were struggling to incorporate wellness tools and strategies into their lives.⁴ A WRAP is not a legally enforceable document, but is helpful for individuals to prepare for crisis and also inform family and friends about their wishes.

Purpose of WRAP

WRAP is designed to:

- decrease and prevent intrusive or troubling feelings and behaviors;
- increase personal empowerment;
- improve quality of life; and
- achieve one's life goals and dreams.⁵

How WRAP works

WRAP is a structured system used to help monitor uncomfortable and distressing feelings and behaviors. The WRAP system aims to address these feelings and behaviors “when an individual cannot make decisions, take care of him or herself, or keep him or herself safe.”⁶

With a WRAP in place, individuals can use techniques focusing on self-help and use their own support network.⁷

Who can participate in WRAP

Anyone who wants to create positive change in the way they feel, or increase their enjoyment in life may participate in WRAP. WRAP emphasizes a toolbox as way of self-help.

Choosing a WRAP program

There are a variety of programs for WRAP led by different facilitators.⁸

Pursuing a WRAP at a Recovery Learning Center

Massachusetts currently has six Recovery Learning Centers which are “consumer-run networks of self-help/peer support, information and referral, advocacy and training activities.” A recovery learning center or community focuses on using tools for recovery in addition to social events. RLCs focus on advocacy and collaboration with diverse communities.⁹ Anyone living with a mental health condition may go to an RLC. RLCs are a good place to find help to develop a WRAP.

More Information

- [WRAP Website](#)¹⁰
- <http://www.mentalhealthrecovery.com/wrap/RLC>¹¹

Legally-Binding Health Care Alternatives

Health Care Proxies¹²

A competent adult can create a Health Care Proxy (HCP), a legal document appointing a trusted person, called a Health Care Agent (HCA), to make medical care and treatment decisions on the person's behalf if he or she *later becomes incapacitated*.

The individual executing the HCP and appointing an agent is called the principal. The principal must have capacity to understand the nature of the document and make an informed decision regarding the document at the time the document is signed by the principal.

A HCP only comes into effect after a doctor determines in writing that the principal is no longer able to make and/or communicate his or her own medical decisions.¹³ A HCP is a powerful tool which allows a person a say over decision making. However, it requires advance planning. A HCP may be limited by the principal at any time while the principal has capacity and before the HCP is invoked. The principal can limit the HCP by expressly indicating when the agent may act or by limiting the agent's authority.¹⁴ For example, the principal may state in the proxy that the HCA does not have the authority to decide whether the principal will be admitted to a facility or consent to certain medications.

When an individual becomes incapacitated and does not have a HCP, treating providers may refuse to treat (other than what is needed to address an emergency). The provider may petition the court to intervene or ask family members to petition the court to appoint a guardian to make medical treatment decisions on the individual's behalf.

Creating a HCP

In Massachusetts, every competent adult has the right to appoint his or her own HCA. The adult must be 18 years old, of sound mind, and under no constraint or undue influence. The law does not provide one legal definition or test of sound mind. Massachusetts HCP forms can be found online or requested at any major hospital.

Responsibilities and Authority of a Health Care Agent

A HCA has the power to make medical care and treatment decisions on behalf of someone who is incapacitated, unless certain powers are expressly limited by the HCP. Decisions relating to health are interpreted broadly unless the HCP specifically limits the power of the agent. The principal should be extremely clear if he or she does not want the agent to have certain authority, like the authority to admit to a psychiatric facility or nursing facility, or the authority to sign a Do Not Resuscitate (DNR)/Do Not Intubate (DNI) order form.

In general, the HCA has authority to make any and all decisions a patient would make, if able. These decisions may include:

- reviewing medical charts;
- discussing treatment options;
- receiving the same medical information the individual would receive;
- consenting to or refusing medical tests or treatments, including life-sustaining treatment;
- asking questions and getting explanations;
- conferring with medical teams;
- requesting consultations and second opinions; and
- authorizing a transfer to another physician or institution, including another type of facility (such as a hospital or skilled nursing home).

The authority of a guardian and a HCP differ. For information about the differences, see Appendix A.

When there is a disagreement about the Health Care Proxy

The court also has jurisdiction over certain disputes even when there is a HCP, such as when the principal and HCA disagree (and therefore the proxy is “revoked” by the principal) or when family members disagree over treatment. In these cases, the court may determine that the HCP remains valid (or “affirms” the proxy) or it may revoke the proxy and appoint a guardian.

If there is a disagreement over the HCP, a party can bring the matter to court. This action begins by filing a “Petition for Special Proceeding in re: a Health Care Proxy Pursuant to G.L. c. 201D” to:

- affirm a HCP;
- remove a HCA;
- override a HCA’s decisions; or
- determine the validity of the HCP.

Once the petition is filed, a hearing date will be scheduled. If the principal does not have an attorney, the court will appoint one. The principal must be provided notice of this proceeding. An interested party may object by filing an appearance to object prior to the proceeding. At the hearing, the court may order that the proxy is valid or invalid, affirm the proxy or remove the agent. The court may reject an agent’s decision.¹⁵ If guardianship becomes necessary, the court should limit it to the extent possible.

Comparing the Potential Authorities of a Guardian and a Health Care Agent

Authority to admit to a facility

Guardian with authority to admit to a nursing home

A guardian, unless specifically authorized may not admit a person to a nursing home for more than 60 days.¹⁶ However, a guardian may admit to a nursing home, if all of the following circumstances are met:

- the admission is **less than 60 days**;
- the guardian and the treating provider sign the Notice of Intent to Admit to Nursing Facility for Short Term Service, a court form recommending such treatment;¹⁷
- nobody objects, including the incapacitated person;
- the incapacitated person has counsel; and
- the proper court form has been completed, filed with the court and served on the incapacitated person.¹⁸

In all other cases, a guardian must seek authorization through the court to admit an incapacitated person to a nursing home. The court must specifically find that admission is in the incapacitated person's best interests.

Health Care Agent with authority to admit to a nursing home

A HCA may admit a person to a nursing home unless the HCP instrument restricts this ability by its terms or the principal objects to the admission.¹⁹

Health Care Agent with authority to admit to a psychiatric facility

A HCA may admit the principal to a psychiatric facility as long as the principal does not object to the admission and the principal has not expressly limited that authority of the agent within the HCP.²⁰

Authority to consent to medical treatment

Guardian for extraordinary medical treatment

A guardian may not make decisions regarding extraordinary treatment, such as antipsychotics or ECT, unless they are granted that authority by the probate court after a hearing. The incapacitated person will be appointed an attorney in such a case. For more information about medication and *Rogers* orders, see "Your Rights Regarding Medication in Massachusetts."²¹

Health Care Agent with authority to consent to health care decisions

A HCA is authorized to make any health decisions that the principal would make for him or herself, unless the HCP is expressly limited. For more information, see

- [Health Care Proxy Form](#)²²

Medical Order for Life Sustaining Treatment (MOLST)

An individual has the right to accept or refuse medical treatment even when treatment is necessary to prolong life. A Medical Order for Life Sustaining Treatment (MOLST) allows for patients with serious advancing illnesses to express their wishes for life-sustaining treatment in

consultation with providers. It is a medical order, like any medical order in a patient's records, and providers should follow it. Unlike an advance directive, described below, a MOLST form is filled out when a person is nearing the end of life. The person completing the form must still have capacity at the time of signing.

Creating a MOLST

Before filling out a MOLST, it is important for the individual executing the MOLST and doctor to have a discussion about:

- the individual's current medical condition;
- what may happen next;
- the individual's goals and values for care; and
- possible risks and benefits of treatment.²³

A person creates a MOLST by having a clinician complete a MOLST form after discussions regarding treatment decisions. Both the individual and the completing doctor must sign this form.²⁴

A MOLST form becomes effective immediately upon signing. Unlike with HCPs, a person who has a MOLST does not have to become incapacitated in order for it to go into effect.

A MOLST may be modified if a competent individual changes his or her mind and asks for treatment or asks the clinician to disregard the instructions of the MOLST.²⁵ If the individual seeking to execute a MOLST lacks capacity, and a HCP exists, the appointed HCA could seek to sign on the incapacitated person's behalf.²⁶ A HCA can execute a MOLST unless the proxy limits that authority.²⁷ If a guardian is appointed he or she can seek specific court authority to sign a MOLST on the incapacitated person's behalf, but if possible, this should be a limited guardianship with only so much authority as to execute the MOLST.

Note that a MOLST form does not take the place of a HCP. See the differences at <http://molst-ma.org/massachusetts-health-care-proxy-form>.

For more information see,

- [MOLST website](#)²⁸
- http://www.mhlaac.org/Docs/practical_guide_dnr
- [MOLST Form, available at http://www.mass.gov/eohhs/docs/dph/quality/healthcare/molst-form-and-instructions.pdf](http://www.mass.gov/eohhs/docs/dph/quality/healthcare/molst-form-and-instructions.pdf)

Appendix A

Guardian vs. Health Care Agent (HCA) Authority

	What Actions May a Guardian Take?²⁹	What Actions May a HCA Take?³⁰
Routine Medical Decisions	May make routine medical decisions.	May make routine medical decisions.
Admission to a psychiatric hospital	May not admit. This must be done through District Court proceedings.	May not admit over person's objection. This must be done through District Court proceedings.
Admission to a Nursing Home <i>(See below for further explanation)</i>	May not admit unless specifically requested and authorized by the Court, or for periods under 60 days with notice.	May do so unless the principal objects or has not limited authority in the HCP.
MOLST (Medical Order for Life Sustaining Treatment)	May not execute unless requested and specifically authorized by the Court	Unless the HCP expressly restricts the agent's ability to sign a MOLST, an agent may execute a MOLST.
Extraordinary Treatment such as antipsychotics or ECT <i>(See below for further explanation)</i>	A guardian may not make decisions regarding extraordinary treatment such as antipsychotics or ECT, unless specifically requested and authorized by the Court.	A HCA is authorized to make any health decisions that the principal would make for the principal, unless the HCP is limited.
Non-medical Decisions	Depending on the order, the guardian may be able to make decisions about housing, education, etc.	A HCA is not authorized to make non-medical decisions.
Revocability	The incapacitated person may not "fire" the guardian. The guardian will maintain authority unless and until the Court removes the guardian or dismisses the guardianship. Also, a guardian cannot revoke a HCP unless specifically requested and authorized by the Court.	If the principal objects to any treatment authorized by the agent, the best practice is for the agent to assume the authority has been revoked and seek court intervention.

Glossary

Incapacitated Person	An individual who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance. ³¹
Principal	A person who has executed a HCP. ³²
Capacity to make health care decisions	The ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision. ³³
Guardian	A person who has qualified as a guardian of a minor or incapacitated person pursuant to court appointment and includes a limited guardian, special guardian and temporary guardian, but excludes one who is merely a guardian ad litem. ³⁴

ENDNOTES

¹ MASS. GEN. LAWS ch. 190B, § 5-309(a).

² See NAT'L RES. CTR. FOR SUPPORTED DECISION-MAKING at <http://supporteddecisionmaking.org>; *Supported Decision-Making*, CTR. FOR PUB. REP., available at <http://www.centerforpublicrep.org/litigation-and-major-cases/supported-decision-making>.

³ See, e.g., Personal Wishes Statement Form, THE CENT. MASS. P'SHIP TO IMPROVE CARE AT THE END OF LIFE 5, available at http://www.umass.edu/uhs/sites/default/files/documents/forms/180-127%20advance_directive.pdf; see also A Guide for a Better Ending: Assure Your Final Wishes, THE CENT. MASS. P'SHIP TO IMPROVE CARE AT THE END OF LIFE, available at <https://www.unicarestateplan.com/PDF/Guide%20Btr%20Ending%20bklet.pdf>.

⁴ The Wellness Recovery Action Plan, COPELAND CENTER FOR WELLNESS AND RECOVERY, available at <https://copelandcenter.com/wellness-recovery-action-plan-wrap>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Recovery Learning Communities, MASS. DEP'T OF MENTAL HEALTH, available at <http://www.mass.gov/eohhs/consumer/behavioral-health/mental-health/recovery-learning-communities.html>.

¹⁰ WRAP, WELLNESS RECOVERY ACTION PLAN, available at <http://www.mentalhealthrecovery.com>.

¹¹ Recovery Learning Communities, *supra* note 32.

¹² MASS. GEN. LAWS ch. 201D § 1-17.

¹³ MASS. GEN. LAWS ch. 201D § 6.

¹⁴ Thomas Merritt, 36 Mass. Prac., Consumer Law § 25:14 (3d ed.)

¹⁵ The Probate and Family Court Department: Procedure for Actions Filed Under G.L. c. 201D, MPC Form 956, *available at* <http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/mpc956-pf-court-procedure-for-actions-filed-under-glc-201d.pdf>.

¹⁶ MASS. GEN. LAWS ch. 190B § 5-309.

¹⁷ MASS. GEN. LAWS ch. 190B § 5-309(g).

¹⁸ *Id.*

¹⁹ *Cohen v. Bolduc*, 760 N.E.2d 714 (2002).

²⁰ *Id.*

²¹ http://mhlac.org/Docs/your_rights_regarding_medication.pdf

²² Massachusetts Health Care Proxy Form, MASS. HEALTH DECISIONS, *available at* [http://www.massmed.org/patient-care/health-topics/health-care-proxies-and-end-of-life-care/massachusetts-health-care-proxy---information,-instructions-and-form-\(pdf\)/](http://www.massmed.org/patient-care/health-topics/health-care-proxies-and-end-of-life-care/massachusetts-health-care-proxy---information,-instructions-and-form-(pdf)/). If there is an affirmation, the Decree itself will show that the proxy only continues until the Principal regains capacity. *Id.*

²³ *See* MASS. MED. ORDERS FOR LIFE SUSTAINING TREATMENT (MOLST), *available at* <http://molst-ma.org/>.

²⁴ *Id.*

²⁵ Frequently Asked Questions- Patients and Families, MOLST, *available at* <http://molst-ma.org/consumers/faq>.

²⁶ *See* MOLST, *supra* note 20.

²⁷ *Id.*

²⁸ *Id.*

²⁹ These are the general parameters; the specific guardianship order governs.

³⁰ These are the general parameters; the specific HCP governs.

³¹ MASS. GEN. LAWS ch. 190B § 5-101.

³² MASS. GEN. LAWS ch. 201D § 1.

³³ *Id.*

³⁴ MASS. GEN. LAWS ch. 190B § 5-101.