

GUARDIANSHIP OF AN ADULT IN MASSACHUSETTS

Prepared by the Mental Health Legal Advisors Committee
December 2015

This pamphlet describes Massachusetts law regarding guardianships of adults only.

Guardianship generally

A guardianship is a relationship where one person (the guardian) is appointed by the court to make decisions for another person. A guardian may be appointed for a minor when the parents are deceased or incapacitated, or for an incapacitated adult.

The types of decisions a guardian can make depend on the guardianship order. If the guardianship is plenary (also called full or general), the **Incapacitated Person** no longer has the authority to make decisions about his or her own healthcare, support, education and welfare. A limited guardianship, however, may allow the **Incapacitated Person** to participate in decision making to the extent they are able. A limited guardianship can be limited to certain decisions, such as medical decisions, or decisions about where the person will live, and the incapacitated person retains decision making power in all other areas not included in the guardianship. Under Massachusetts law, all guardianship should be limited to the extent possible.¹ The court and physician completing the paperwork for a guardianship must consider limits on the guardianship based on the specific strengths and deficits of the Incapacitated Person to preserve the rights of the **Incapacitated Person** in specific areas.²

A guardian must take into account the preferences of the incapacitated person by following the incapacitated person's express values and desires.³ A guardian must consider the best interests of the incapacitated person when making such decisions because they are a **fiduciary**.⁴ In making the guardianship order the court shall encourage the self-reliance and independence of the incapacitated person while taking into account the person's limitations.⁵

If the guardianship is ultimately granted, the guardian reports to the court annually about the incapacitated person

The authority of a guardian differs from a conservator in that a conservator makes legal decisions about a person's property and financial matters. .

Please note that asking the court for a guardian is an important decision. There are less restrictive means that a concerned person thinking of petitioning for guardianship can use to help an incapacitated person. For more information about less restrictive options, please see MHLAC's flier entitled "Alternatives to Guardianships and Conservatorships in Massachusetts."

Court process

To file for guardianship or to change an existing guardianship order, there are specific forms to use, available at the Massachusetts Probate and Family Court website: <http://www.mass.gov/courts/forms/pfc/upc-guardianship-of-adults-and-conservatorship.html>. This link has useful information about the court process as well as links to other resources. You can ask the court clerk what paperwork you need to file or questions about court procedure.

How to obtain a guardianship

Either the incapacitated person or a person interested in the incapacitated person's welfare can file a **petition** for guardianship. The **petition** is filed in the Probate and Family Court in the county where the incapacitated person lives.

To petition for guardianship you need to:

- file the **petition** for the court to appoint a guardian;
- submit a **medical certificate** or **clinical team report** with the **petition**.

A **clinical team report** is used for “intellectually disabled” people.

A **medical certificate** is used for people with mental illness.

A medical certificate must be signed by a physician, psychologist **or** psychiatric nurse. A clinical team report must be signed by a physician, psychologist **and** social worker.

A medical certificate is valid for 30 days from the date of examination. A clinical team report is valid for six months from the date of examination.

Therefore, in some cases the medical certificate or clinical team report will need to be updated between filing and the court hearing. This is to ensure that the medical determination is still accurate.

These are the two main documents needed in order to initiate a guardianship hearing. There are other requirements (such as notice and service of process) that you must meet before a hearing is held. When you file the paperwork, the court clerk can tell you about the other requirements.

Preparing to defend against a guardianship in court (see also Finding an Attorney, below)

Before a guardianship can be put in place over a person, there must be a court hearing. To defend against a guardianship, you can prepare for this hearing in the following ways.

Gather evidence to present at hearing that a person does not need a guardian

In general you should be sure to present evidence regarding the person's capabilities and ability to make informed decisions. The lists below are not meant to be exhaustive and there are overlaps between the two.

For a person with an **intellectual disability**, gather evidence of:

- intellectual functioning;
- training programs completed in money management, basic living skills and sex education etc;
- activities demonstrating ability to make decisions;
- employment history;
- ability to communicate through reading and writing skills;
- indications of willingness to seek guidance on decisions, and names of people willing to give advice;
- estimate of potential for growth given more education.

For a person with **mental illness**, gather evidence of:

- progress in treatment programs;
- employment history;
- level of education;
- support systems in the environment where the person will be or is living including job, school, family, friends, outpatient treatment programs;
- if institutionalized, access to off-grounds privileges, decreases in supervision, preparation for discharge to less restrictive environment, participation in work or training programs.

Have an expert testify at hearing that a person does not need a guardian

It is crucial to have an expert testify, such as a psychiatrist, social worker or psychologist. The expert should examine the person and form an opinion on his or her ability to manage personal and financial matters. If the person is indigent, a motion to the court may be made for an independent psychiatrist to examine him or her at the court's expense.

Gather evidence to present at hearing about the potential guardian

Gather evidence such as:

- the amount of concern and support the potential guardian provides to the respondent;
- the availability of the potential guardian;

- any possible conflicts of interest between the guardian and respondent;
- any information about hostility or abuse between the potential guardian and respondent.

Then, to the extent that this information helps defend against the guardianship, present it at hearing.

Consider less restrictive alternatives

Consider less restrictive means other than guardianship that may be used to help a person make decisions. If a guardianship order is entered it should be the least restrictive order possible while still meeting the needs of the incapacitated person. See <http://www.mhlac.org/Library.htm> for further information about alternatives.

How to change a guardian

To change a guardian, there are two or three steps.

- File a **petition for removal** OR a **petition for resignation** in the same court as the original order.
 - A person other than the guardian would file a **petition for removal**.
 - A guardian would file a **petition for resignation**.

On both forms, one can include the name of a proposed new guardian.

- File a new **petition** for appointment of a guardian.
- Possibly file a new **medical certificate** or **clinical team report**, depending on the circumstances.

How to end a guardianship

To end a guardianship for yourself or for another person, you must:

- File a **petition for termination** with the same court as the original order.

An appropriate medical professional must complete a **medical certificate for termination**

Finding an Attorney

When defending against a guardianship

The person that the guardianship is being sought for, often called the incapacitated person or respondent, may seek legal representation by:

- requesting a court-appointed attorney using this form: <http://www.mass.gov/courts/docs/forms/probate-and-family/mpc301-request-for-counsel-fill.pdf> (also available at the courthouse). Fill out the form and submit it to the court where the petition for guardianship was filed. Any person can submit this form to the court to request an attorney be appointed. (If the court determines that the respondent is not indigent, the court may allow the appointed attorney to collect fees or other compensation from the respondent's estate.)
- finding a private attorney including through the
 - Massachusetts Bar Association Referral Service at (866) MASSLRS or (866) 627-7577 (toll free in Massachusetts) or <http://www.massbar.org/for-the-public/need-a-lawyer>; or
 - county bar association referral agencies (listed online).

When pursuing a guardianship

The person pursuing a guardian over someone else may seek legal representation by:

- seeking a private attorney through the Mass Bar Association Referral Service or local county bar association referral service (see above);
- contacting the Volunteers Lawyer Project (VLP) at (617) 603-1700, which represents petitioners in uncontested guardianship hearings, once one obtains a medical certificate or clinical team report.
- contacting Senior Partners for Justice (see http://www.spfj.org/gship_help.htm regarding free legal advice and help filling out the guardianship paperwork).

One may also file the **petition** and **medical certificate** or **clinical team report** without an attorney or find the “Attorney for the Day” at the courthouse and ask for assistance in filling out the paperwork.

Other resources on adult guardianship

Resources are available at Massachusetts Legal Services, Information on Adult Guardianships, <http://www.masslegalservices.org/disabilityrightsandservices?tid=1478>

Massachusetts Guardianship Association: <http://www.massguardianshipassociation.org/>

Rogers Guardianship

Guardians have the power to make general medical decisions for routine medical practices. However, a guardian may not consent to the administration of antipsychotic

medications or other extraordinary medical treatment without an explicit authority to do so from the court.

When a hospital or the Department of Mental Health believes that a person is incapable of giving informed consent, that entity can petition the court for a *Rogers* guardianship (this type of guardianship is named after a case called *Rogers v. Department of Mental Health*). This order gives the guardian specific authority to consent to extraordinary medical treatment on behalf of the incapacitated person.

The court must first hold a hearing. At the hearing, the court must first make a determination as to whether the alleged incapacitated person is competent to make medical decisions. If the judge finds the person to be incompetent, the judge must make a **substituted judgment decision** to determine what the person would choose if the person were competent.

The judge must take into account a number of specific factors in order to determine if the person would choose to take a medication(s) if that person were competent. Using the substituted judgment decision-making process to determine what the person would choose, the judge may issue a treatment order and appoint a *Rogers* monitor who monitors the administration of the court-ordered treatment plan.

A *Rogers* monitor may be the same person as the person who is the guardian, or a different person (for example, an attorney, social worker or other professional). A judge also may deny a petition for a *Rogers* guardianship if he or she finds that the incapacitated person would not consent to the proposed treatment if he was competent.

Obtaining a *Rogers* guardian

- One files a guardianship **petition** in the Probate Court in the county where the alleged incapacitated person lives. If the next of kin is known, one must list them on the petition. This way, the next of kin can be made aware of the matter.
- A physician must file with the court a **comprehensive medical certificate**.
- The court schedules a hearing date.
- If the alleged incapacitated person cannot afford an attorney the court will appoint one. This lawyer represents the client's wishes, not what the attorney thinks is in the client's best interests.
- After hearing all of the information from both sides, the judge makes a ruling about the alleged incapacitated person's ability to make informed decisions about antipsychotic medication or other extraordinary medical treatment. If the judge determines the person is incompetent, the judge will make a **substituted judgment decision** regarding the proposed treatment plan. This means that the judge determines what treatment, if any, the person would want were he or she competent, taking into account such factors as:
 - the person's expressed preferences;
 - religious beliefs;
 - impact on family;

- side effects; and
 - prognosis without treatment.
- If the court approves a treatment plan, the judge will appoint a monitor, sometimes referred to as a guardian, to make sure that the plan is being followed. This monitor cannot approve any change in the administration of antipsychotic medications. To make any changes the guardian must go back to court with a proposed modified treatment plan and get court approval.

Resources:

- Massachusetts Department of Mental Health, Rogers Guardianships, Authorizing the Use of Antipsychotic Medications -- Questions and Answers, http://www.namimass.org/wp-content/uploads/brochure_rogers_guardian1.pdf
- MHLAC, Your Rights Regarding Medication in Massachusetts, http://www.mhlac.org/Docs/your_rights_regarding_medication.pdf
- Resources are available at Massachusetts Legal Services, Information on Adult Guardianships, <http://www.masslegalservices.org/disabilityrightsandservices?tid=1478>.

ENDNOTES

¹ MASS. GEN. LAWS ch. 190B, § 5-306(a) (2015).

² General information regarding guardianships and conservatorships can be found under *Probate and Family Court Guardianship and Conservatorship Forms*, MASS. COURT SYS., at <http://www.mass.gov/courts/forms/pfc/pfc-upc-forms-generic.html#1> (last updated 2015).

³ MASS. GEN. LAWS ch. 190B, § 5-309(a).

⁴ *Id.*

⁵ MASS. GEN. LAWS ch. 190B, § 5-306(a).