



INTRODUCTION TO GUARDIANSHIP OF ADULTS

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Appointment of Guardian of Adult

- The Probate and Family Courts have jurisdiction over the appointment of guardians.
- Guardianship may be established of the person, of the estate, or of the person and the estate.



Appointment of Guardian of Adult

- Guardianships of adults are granted on three different grounds of incapacity:
 - Mental Retardation
 - Physical Incapacity
 - Mental Illness



Grounds for Guardianship: Mental Retardation

- Massachusetts General Laws c. 201, § 6A authorizes the probate court to appoint guardian for a mentally retarded person who incapable of making informed decisions with respect to the conduct of his personal and financial affairs.
- A mentally retarded person is a person who, as a result of inadequately developed or impaired intelligence, is substantially limited in his ability to learn or adapt, as determined in accordance with established standards for the evaluation of a person's ability to function in society. Mass. Gen. Laws c. 201, § 1.



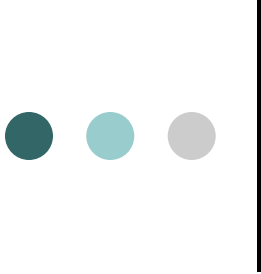
Grounds for Guardianship: Physical Incapacity

- Massachusetts General Laws c. 201, § 6B authorizes the probate court to appoint a guardian for a person who is unable to make or communicate informed decisions due to physical incapacity or illness.



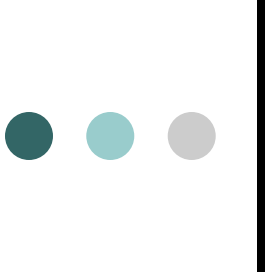
Grounds for Guardianship: Mental Illness

- o Massachusetts General Laws c. 201, § 6 authorizes the probate court to appoint a guardian for a mentally ill person. A finding of mental illness alone is not sufficient for the appointment of a guardian. A ward must be incapable of caring for him or herself by reason of mental illness to warrant a guardianship. Fazio v. Fazio, 375 Mass. 394 (1978).



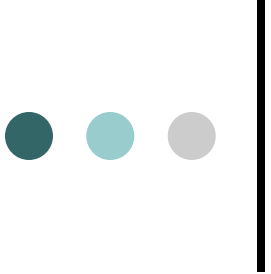
Grounds for Guardianship: Mental Illness and Treatment with Antipsychotic Drugs

- Wards who are mentally ill are sometimes treated with antipsychotic drugs. Treatment of a ward with antipsychotic drugs requires special court authority. Such authority is obtained through the appointment of Rogers counsel to investigate and make a report to the Court. The Court will make a substituted judgment for the ward and decide whether to authorize the guardian to administer antipsychotic drugs to the ward. Rogers v. Commissioner of Dep't of Mental Health, 390 Mass. 489 (1983).



Grounds for Guardianship: Mental Illness and Treatment with Antipsychotic Drugs

- In order to authorize treatment under the substituted judgment standard, the court must find that the ward is incapable of providing informed consent to the proposed treatment, and must then determine what the ward would decide when faced with the proposed treatment, if s/he were competent to do so.
- The applicable standard of proof is preponderance of the evidence.



Grounds for Guardianship: Mental Illness and Treatment with Antipsychotic Drugs

- The Court must consider the following factors:
 - Expressed preference of the ward
 - Religious convictions of the ward
 - Impact on ward's family
 - Risks and benefits of proposed treatment
 - Prognosis without treatment
 - Prognosis with treatment
 - Other relevant factors



Appointment of Guardian of Adult

- A guardianship is only appropriate when the ward is incapacitated.
- Poor judgment is insufficient proof of the need for a guardianship.
- A competent adult has the ability to receive information, consider the costs and benefits, and communicate decisions. Absent those abilities, a guardianship may be appropriate.



Appointment of Guardian of Adult

- A petition can be filed by:
 - one parent; or
 - two or more relatives or friends of the proposed ward
- Mass. Gen. Laws c. 201, §§ 6, 6A, 6B.



Duration of Guardianship

- Temporary
 - expires in ninety days.
- Permanent guardianship
 - expires upon the ward's death, guardian's death or further order of the Court
 - can be terminated by the guardian or by court order at the request of any interested party at any time.



Procedural Matters: Where to file

- Venue: The Probate Court has the authority to appoint a guardian for an adult residing in the Commonwealth of Massachusetts or if the proposed ward resides outside of Massachusetts but has property within the Commonwealth. Mass. Gen. Laws c. 201, § 27.



Obtain documents for filing

- Probate Court

- Websites:

- <http://mcpfc.com/>

- <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/forms.html>

- Use bonded, acid free paper if required by Court.



Documents for filing

- Petition for Guardianship*
- Medical Certificate
- Assents
- Military Affidavit*
- Bond
- Affidavit of Indigency* and
- Court Order re: Costs and Fees and
- Supplement to Affidavit of Indigency or
- Filing Fee
- Motion for Temporary Guardianship
- Affidavit of Guardian*
 - * requires client signature



Petition for Guardianship*

- Person, person and estate, or estate
- Information regarding petitioner, ward, ward's heirs
- Assents of heirs
- With or without sureties
- Petition is request for permanent guardianship
- *Requires guardian's signature



Medical Certificate

- Guardianships of incapacitated adults require medical evidence. In order to obtain a guardianship of an adult, the petition must be accompanied by a physician's Medical Certificate signed under the pains and penalties of perjury attesting to the fact that the physician has examined the proposed ward, and determined that the ward is incompetent.



Medical Certificate

- The physician must set forth a detailed narrative with the diagnosis leading to his or her conclusion.
- The physician must describe the types of decisions, if any, that the proposed ward still has sufficient ability to make.
- The Medical Certificate must be signed by the physician and dated.
- The examination on which the certificate is based must have occurred within 30 days prior to the entry of each decree, temporary or permanent.
- See Unif. Prob. Ct. Prac. XXII.



Military Affidavit*

- Caption of case
- Whether any interested party is in the military
- *Requires guardian's signature



Assents

- Assents from relatives who are heirs at law.
- Heirs at law can sign the back of the petition to indicate their assent. Heirs at law can also sign a separate assent.



Motion for Temporary Guardianship

- If the ward's welfare requires the immediate appointment of a guardian of the ward's person and/or estate, the Court may appoint a Temporary Guardian. Mass. Gen. Laws c. 201, § 14(a).
- The Supreme Judicial Court has held that a “temporary guardian may be appointed pursuant to Gen. Laws c. 201, § 14, on proof that it is more likely than not that the welfare of a mentally ill person requires the immediate appointment of a temporary guardian.” Guardianship of Roe, 383 Mass. 415, 426 (1981).



Motion for Temporary Guardianship

- A Motion for Temporary Guardianship should describe the nature of the emergency situation, the particular harm sought to be avoided and the specific authority requested by the proposed temporary guardian to avoid the occurrence of such harms. Mass. Gen. Laws c. 201, § 14(f).
- The Motion for Temporary Guardianship must be accompanied by a medical certificate, valid at the time of the filing of the medical certificate.



Motion for Temporary Guardianship

- The Probate Court has the authority to appoint a Temporary Guardian of an incapacitated adult, with or without notice, and may in like manner remove or discharge the guardian. See Mass. Gen. Laws c. 201, §§ 14, 15 .
- No Temporary Guardian has the authority to commit a ward to a mental health facility or to consent to treatment with antipsychotic medication unless the Court specifically authorizes such commitment or treatment by its order. For provisions regarding commitment to a mental health facility and treatment with antipsychotic medication, see Massachusetts General Laws chapter 201, section 6.



Motion for Temporary Guardianship

- Only necessary if guardian seeks temporary guardianship
- Must be accompanied by guardian's affidavit
- Motion must be filed with Court
- Notice must be given to interested parties
- Motion must be scheduled for hearing



Affidavit of Guardian*

- Affidavit sets forth the factual basis for the guardianship:
- Relationship between the guardian and ward
- Information regarding ward's physical/mental health
- *Requires guardian's signature
- Signed under the pains and penalties of perjury



Affidavit of Guardian

- Affidavit must establish factual basis of the need for a temporary guardianship and the particular harm sought to be avoided.
- Mass. Gen. Laws c. 201, § 14 requires that the decree indicate the nature of the emergency requiring such appointment should only authorize such actions as are reasonably necessary to avoid the occurrence of that harm.



Affidavit of Guardian

- *Ex Parte* (without notice to the ward and ward's heirs) Motion for Temporary Guardianship also requires that Affidavit establish the factual basis of the emergency, the whereabouts of the ward's parents, and the difficulty involved in providing proper notice to them.



Bond*

- Mandatory.
- Required for Temporary and Permanent Guardianships.
- Penal sum of the bond determined by the Court.
- Must be filed within thirty days of the allowance of a temporary or permanent guardianship.
- Bond
 - Without surety
 - With personal surety
 - With corporate surety
- \$50 bond filing fee where the minor has assets in excess of \$100, unless there is a fee waiver in the case.



Bond, without surety*

- Value of ward's estate
- Penal sum
- *Requires guardian's signature



Bond, with personal surety*

- Requires signature of two persons (typically friends or relatives) who agree to be bound in the penal sum amount.
- The penal sum is double the value of the ward's estate.
- Must be signed by an attorney or official (example, municipal or town official) who certifies that the sureties are sufficient in his or her belief.
- *Requires guardian's signature.



Bond, with corporate surety*

- Private bond company.
- Penal sum is in the amount of the value of the ward's estate.
- A reputable and convenient bonding company is:
 - A.A. Dority Company, Inc.
 - 262 Washington Street
 - Boston, MA 02108
 - 617-523-2935
 - Fax: 617-523-1707
- *Requires guardian's signature.
- Attorney signature is not required.
- Annual bonding fee.
- Required when the ward has significant assets.



Fees

- Filing fee for petition
 - \$165 if the ward's estate exceeds \$100.
- Service of Process
 - Cost varies. Service by publication is about \$65 for newspaper ad.
- Filing fee for bond
 - \$50 if the ward's estate exceeds \$100.
- Cost of Decree
 - \$20 each.



Fees: Fee Waiver

- Client is eligible if:
 - A. the client receives TAFDC, Mass Health, SSI; or
 - B. earns income less than 125% of the poverty guidelines, after taxes; or
 - C. unable to pay fees and costs, the client must complete and submit the Supplement to the Affidavit of Indigency.
- Court will issue Determination Regarding Fees and Costs.



Motion for Appointment for Temporary Guardian

- File Motion for Temporary Guardianship in Probate Court
- Obtain Hearing Date for Motion for Temporary Guardianship
- Request interpreter
- Provide necessary notice



Motion for Appointment for Temporary Guardian

- The notice requirements for temporary guardianship are set forth in Prob. Ct. R. 29B. Written notice of the hearing on the motion for temporary guardianship must be given at least 72 hours (excluding weekends and holidays) in advance of the hearing to the ward and to the ward's heirs at law. A sworn affidavit of notice must be filed with the Court at the or before the time of the hearing. This Notice is different and apart from the notice given for a hearing on the Petition for Guardianship leading to Permanent Guardianship.



Motion for Appointment for Temporary Guardian

- The ward's heirs are set forth below in the order in which they must be served.
 - The ward must be served **in hand**. All others can be served in hand, by mail or by publication.
 - The ward's spouse, if any and the ward's children (over 18), if any.
 - If none, the ward's mother and father.
 - If none, the ward's siblings.
 - If none, the ward's nieces and nephews.
 - If none, the ward's aunts and uncles.
 - If none, the ward's cousins.
- For notice purposes, the client's nearest next of kin must receive notice of the petition for guardianship as well as the Motion for Temporary Guardianship.



Notice of Petition for Appointment of Guardian

- Generated by the Probate Court and mailed to attorney of record.
- Often called a “citation.”
- Notice contains:
 - Return date
 - Order of Notice – newspaper, notice required
 - Return of Service



Motion for Appointment for Temporary Guardian: Notice

- This notice is different and apart from the notice given for a hearing on the Petition for Guardianship leading to Permanent Guardianship.
- Serve any motions and affidavits with at least 72 hours notice (excluding, Saturdays, Sundays and holidays).
- Allow 3 days for regular mail.



Motion for Appointment for Temporary Guardian: Notice

- Notice to:
 - a. the minor, if he is over fourteen years of age;
 - b. the parents of the minor;
 - c. the person or persons to whom custody of the minor has been awarded by a Court ;
and
 - d. the person or persons with whom said minor child is residing.
- Rule 29B requires an affidavit from the attorney attesting to service.



Motion for Appointment for Temporary Guardian: Day of Hearing

- Court

- Hearing before the Court
- Court will issue Decree of Temporary Guardianship

- Clerk's Office

- Obtain certified copy of decree
- \$20 or fee waiver



Permanent Guardianship: Notice

- Petition must be served upon:
 - The ward, in hand
 - The ward's heirs



Permanent Guardianship: Notice

- In hand service by disinterested party, with affidavit of person who made in hand service.
- By certified or registered mail, return receipt requested.
- By publication in newspaper selected by Court.
- If the ward is eligible for Veteran's benefits, the Court also requires mailing by registered or certified mail to the United States Veteran's Administration fourteen days before the return date.



Permanent Guardianship: Notice

- Publication is only unnecessary if there is proof of actual notice.
 - a signed green card showing receipt of the Notice
 - affidavit of in-hand service by a disinterested party
 - an objection filed by the party served



Permanent Guardianship: Return of Service

- File the following with Court:
 - original Notice of Guardianship of Minor With/Without Sureties with signed and completed return of service
 - original uncut tear sheet from newspaper
 - returned, undelivered, certified mail to all interested parties or signed green cards



Permanent Guardianship: Day of Hearing

- Family Service Office
 - Complete Guardianship Intake sheet
 - FSO will make criminal record check
 - FSO will make DSS check
- Court
 - Hearing before the Court
 - Court will issue Decree of Permanent Guardianship
- Clerk's Office
 - Obtain certified copy of decree
 - \$20 or fee waiver



Inventory

- A guardian is required to complete an inventory of the ward's assets.
- See Mass. Gen. Laws c. 205, § 1.
- The Court will mail the attorney of record an Inventory form to be completed and signed by the guardian, stating the ward's assets, if any.
- This form must be completed with the Court when it is completed.



Termination of Guardianship

- Termination upon motion of the guardian, ward or other interested party.
- Removal of guardian.
- Resignation of guardian.