

Prepared by:
the Center for Public Representation



Center for Public
Representation

Alternatives to General Adult Guardianships: A Handbook

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1. INTRODUCTION

Other than involuntary institutionalization, guardianship is the most restrictive impositions on the liberty of an individual with a disability who has not been charged with or convicted of a crime. General (or full, or plenary) guardianship is the most intrusive of the variety of protective interventions that constitute guardianship and conservatorship. However, even plenary guardianship is not really plenary – the guardian’s authority is still limited by statute and court opinions. Courts have always supervised guardians and decades of Massachusetts case law and more recently statutes, particularly Article V of the Massachusetts Uniform Probate Code (“MUPC”), have curtailed their “plenary” authority.¹

Moreover, the MUPC, like all other modern guardianship laws, requires that less restrictive supports and interventions be employed whenever possible and that guardianship be considered a last resort.² Before appointing a guardian, a court must find that “the person's needs cannot be met by less restrictive means, including use of appropriate technological assistance.” G.L. c. 190B § 5-306(b)(8).

Consideration of alternatives to guardianship may arise at several stages of a guardianship case:

¹ The list of things guardian cannot do (some at all, others without specific court authority) is lengthy. Without specific authority from a court, guardians cannot consent to, for example:

- antipsychotic medication, Guardianship of Roe, 383 Mass. 415 (1981) (in the community) and Rogers v. Comm’r of Dep’t of Mental Health, 390 Mass. 489 (1983) (in a facility; also listing other interventions including ECT and psychosurgery which require a substituted judgment analysis);
- sterilization, Matter of Moe, 385 Mass. 555 (1982);
- withholding lifesaving or life prolonging treatment, Sup’t of Belchertown State School v. Saikewicz, 373 Mass. 728 (1977);
- stopping kidney dialysis treatment, Matter of Spring, 380 Mass. 629 (1980); and,
- long term admission to a nursing home, G.L. c. 190B § 5-309(g).

Courts may not authorize a guardian to consent to admission to a mental health facility. G.L. c. 190B § 5-309(f). Likewise, a guardian may not revoke a health care proxy, G.L. c. 190B § 5-309(e).

See generally, G.L. c. 190B § 5-306A (without court authorization, guardian may not consent to a treatment for which a substituted judgment analysis is required).

- ***Before a petition is filed*** the potential petitioner should consider whether there are alternatives which will provide the protection that the petitioner seeks for the person. If the Petitioner is seeking a general guardianship, Petition (Form MPC 120) requires the Petitioner to state why limited guardianship is inappropriate.
- ***In the course of the case*** parties may discuss and the court may inquire about whether there are alternatives to general guardianship.
- ***In consideration of limitations to the guardian's authority.***
- As part of the decision whether to ***modify a guardianship or remove a guardian and terminate the guardianship.***

This Handbook lists and briefly explains less restrictive alternatives to general adult guardianship available in the Commonwealth. Each section (1) describes a particular alternative with citations to relevant laws and (2) lists any resources related to a particular alternative that might be of assistance to the Court in a guardianship proceeding.

2. Recent Probate Court Initiatives

In October 2021, the Massachusetts Trial Court received a national **Elder Justice Innovation Grant** from the U.S. Department of Health and Human Services Administration for Community Living. In the course of this two-year project, the Probate and Family Court and its partners create an Office of Adult Guardianship and Conservatorship Oversight (OAGCO) within the PFC. The goal of this project is to increase court oversight of guardians/conservators to protect older adults (aged 60+) and adults with disabilities from abuse, financial exploitation, and neglect.

The project will assess the Massachusetts adult guardianship/conservatorship system to increase data collection in order to make evidence-based/data driven recommendations for improvement. By the end of the project period, there will be increased reporting compliance rates of guardians/conservators and court monitoring of the protected person's well-being, assets, and income; increased services for the public to voice concerns about the guardianship/conservatorship system and/or report suspected abuse, neglect, and financial exploitation by guardians/conservators; and, increased use of limited guardianships/conservatorships granted and increase petitions to restore rights.

The **Public Guardianship Services** provides guardianship and conservatorship services to residents of Suffolk and Plymouth Counties. PGS staff serve as a guardian, conservator, or other fiduciary those who are decisionally impaired and who have no other suitable person available to assist. For information see <https://www.publicguardianservices.org/>.

3. TYPES OF GUARDIANSHIP ALTERNATIVES

There are myriad alternatives to general guardianship described in this Handbook, and they exist on a spectrum between the most and least restrictive on a person's autonomy to make decisions about their day-to-day life. General and other types of guardianship, which impose substituted decision-making by a guardian appointed by the court, are the most restrictive option. Alternatively, options such as Supported Decision-Making (SDM) prioritize retained or autonomous decision-making by the individual with support from the people they choose.

Some alternatives to general (plenary) guardianship are really less restrictive types of guardianship. Like guardianship, they are systems of substituted decision-making; that is, a designated or appointed person makes decisions for another individual. For example, limited guardianship, temporary guardianship, and conservatorships, are alternatives that while less restrictive than general guardianship, still rely on decision-making imposed by another. Likewise, substituted decision-making can be imposed or established by entities or persons other than courts, as with a trust, a representative payee for public benefits, or other fiduciary relationships.

In other circumstances, it may be more appropriate for individuals to voluntarily create arrangements that delegate decision-making authority to others in certain areas of their affairs, such as health or financial decisions. Usually, voluntary arrangements are revocable at any time, and include agreements such as Health Care Proxies, Durable Power of Attorney, and some types of trusts.

There are even less restrictive options in which the individual retains autonomous decision-making, often with support from family or people they choose. These types of arrangements are the least restrictive on a person's liberty. Supported Decision-Making is an alternative legal framework to guardianships, in which individuals retain their legal ability to make decisions about their personal affairs. Other agreements that retain decision-making authority are options like: joint bank accounts, shared educational decision-making, or even some kinds of health care directives like Medical Orders for Life-Sustaining Treatment (MOLST).

4. SUBSTITUTED DECISION-MAKING: IMPOSED BY A COURT

4.1 LIMITED GUARDIANSHIP

The purpose of limited guardianship is to “maximize the liberty and autonomy of the persons subject to guardianship.”³ The MUPC and case law recognize that individuals may be incapable for some purposes, but not for others. Even the pre-MUPC case law⁴ establishes that the Probate Court has inherent powers to limit guardianships. The MUPC incorporated that power into the statute, requiring that guardians’ authorities be limited to only those activities which persons under guardianship are incapable to undertake themselves.⁵ Post-MUPC cases have interpreted that requirement broadly.⁶

³ Guardianship of B.V.G., 474 Mass. 315, 323 (2016).

⁴ As early as 1889, the SJC recognized limits on a guardian’s authority when it held that a “ward” might have capacity to determine his own domicile. Talbot v. Chamberlain, 149 Mass. 57 (1889). The modern seminal and often cited case is Guardianship of Bassett, 7 Mass. App. Ct. 56 (1979) (holding that Probate Courts have the inherent authority to limit guardianships). That inherent authority was reiterated in Guardianship of Hurley, 394 Mass 554 (1985) (capacity to vote); Matter of Moe, supra, n.1 (capacity to consent to sterilization); and, Guardianship of Zaltman, 65 Mass. App. 678 (2006)(capacity to retain a lawyer).

⁵ G.L. c. 190B, § 5–303 (a)(petition to appoint guardian may seek “a determination of incapacity, in whole or in part, and the appointment of a guardian, limited or general”); § 306 (a) (“The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure.”); § 306(c)(“The court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian ... and thereby create a limited guardianship.”); and, § 5-309(a)(“A guardian shall exercise authority only as necessitated by the incapacitated person's mental and adaptive limitations, and, to the extent possible, shall encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs.”).

⁶ Guardianship of B.V.G., supra n.1 (interpreting MUPC, including § 5-306, to allow the grandfather of a person under guardianship to intervene to seek to limit the guardianship); Guardianship of D.C., 479 Mass. 516 (2018)(discussing MUPC and holding that a judge may not appoint a limited guardian to consent to a nursing home admission without first making a finding of incapacity to consent to the admission). See,

Nearly every guardianship order should probably include some limitations on the guardian's authority.

Resources:

- **Limitations to Guardianship – For Judges and Attorneys:** The Probate and Family Court has drafted examples of the types of limitations that might be placed on a guardian's authority and includes suggestions for language that can be placed in guardianship decrees and orders. The document is available at <https://www.mass.gov/doc/limitations-to-guardianship-and-conservatorship-mpc-903b/download>.
- Rebecca Brendel, Jennifer Rivera Ulwick, and John Dugan, Massachusetts Legal Practice Library, Volume 8, Guardianship and Conservatorship in Massachusetts (Lexis). The following sections of this treatise discuss limited guardianship:
 - §1.02 provides an overview of alternatives to Guardianship or Conservatorship
 - §3.15 describes how limited appointments are favored in the law. *See also: appendix 3-NN General Information Regarding Guardianships and Conservatorships*
 - §9.11 discusses limited guardianship of minors.
- Robert D. Fleischner, Adult Guardianship, Conservatorship, Substituted Judgment, And Alternatives, in Legal Rights of Individuals with Disabilities (MCLE 2015; new edition forthcoming in 2022). See specifically §14 Adult Guardianship, Conservatorship, Substituted Judgment, and Alternatives.
- Ruth A. Mattson, Guardianship and Conservatorship Practice Under the Massachusetts Uniform Probate Code, Massachusetts Probate Manual §17 (2014). §17.1.1 states that the MUPC “emphasizes limitations on guardians' and conservators' powers, rather than general appointments.”
- Probate & Family Court A Guide to Rogers Guardianships (2015) available at <https://www.mass.gov/doc/rogers-guardianship-booklet/download>

also, In re Jamison, 467 Mass. 269 (2014) (applying MUPC's limited guardianship requirements in juvenile court custody matter).

4.2. TEMPORARY GUARDIANSHIPS

Temporary guardianships are time limited (up to 90 days), intended for emergency situations and only provide the guardians with the authority necessary to address the imminent harm sought to be avoided.⁷ If a temporary guardianship is discontinued when the emergency is over, a permanent order may be unnecessary.⁸ In that sense, the temporary order may be an alternative to general guardianship. However, in practice, temporary guardianships are sometimes extended beyond the 90-day limit and often are followed by a permanent decree and order.

Resources:

- Rebecca Brendel, Jennifer Rivera Ulwick, and John Dugan, Massachusetts Legal Practice Library, Volume 8, Guardianship and Conservatorship in Massachusetts (Lexis). See Chapter 4, Temporary Guardians and Special Guardians, with specific attention to §4.03 and §4.10.

⁷ G.L. c.190B § 5-308.

⁸ A verified motion for appointment of a temporary guardian is filed with or after the filing of a petition for guardianship. Certain of the procedural requirements for a permanent guardianship are waived. G.L. c. 190B §5-308. The permanent petition may be abandoned after the emergency warranting a temporary appointment passes.

4.3. CONSERVATORSHIP

Since the enactment of the MUPC, a guardian does not have any authority to make decisions regarding a person's property and financial matters. But, a conservator does.⁹ Conservatorships may be general or limited.¹⁰ A conservator has a fiduciary duty to manage the person's property and assets in the person's best interest. Accordingly, if the person is only incapable to manage financial affairs, and no other support alternative is available, a conservatorship may be appropriate. The court may also "direct or ratify" a protective arrangement, or a single transaction, and may appoint a special conservator to assist in its arrangement in cases in which appointment of a conservator is unnecessary.¹¹

Resources:

- General Information Regarding Guardianship and Conservatorship, Probate & Family Court informational document available at <https://www.mass.gov/doc/general-information-regarding-guardianship-and-conservatorship-mpc-190/download>.
- Rebecca Brendel, Jennifer Rivera Ulwick, and John Dugan, Massachusetts Legal Practice Library, Volume 8, Guardianship and Conservatorship in Massachusetts (Lexis). See Chapter 8, Conservatorship.
- Ruth A. Mattson, Guardianship and Conservatorship Practice Under the Massachusetts Uniform Probate Code, Massachusetts Probate Manual §17 (2014). See specifically §17.1, §17.3, and §17.4 for information regarding the scope of conservatorships.
- Alternatives to Conservatorship in Massachusetts, Prepared by the Mental Health Legal Advisors Committee, November 2015, http://mhlac.org/wp-content/uploads/2018/10/alternatives_to_conservatorship.pdf

⁹ G.L. c. 190B §§ 5-401 ff. There is, therefore, no longer a "guardian of the estate."

¹⁰ G.L. c. 190B §§ 5-401, 5-404(c)(3), 5-409.

¹¹ G.L. c. 190B § 5-408.

5. SUPPORTED DECISION-MAKING

Supported Decision-Making (SDM) is a framework which allows individuals with disabilities to make choices about their own lives with support from a team of people they choose. Individuals with disabilities choose people they know and trust to be part of a support network to help with decision-making. Supported Decision-Making can be an alternative to guardianship. Instead of having a guardian make a decision *for* persons with a disability, SDM allows persons with a disability to make their own decisions.

Individuals using Supported Decision-Making identify areas where they need decision-making assistance — e.g., health care, employment, relationships, finances — and the kind of support they want and need. Then, they choose supporters they trust. Supporters commit to providing information to the individuals so that they can make their own decisions. Importantly, supporters also commit to honoring the individual’s decisions. The individual and supporters usually execute a written Supported Decision-Making agreement.¹² At least one general guardianship has been discharged upon the “incapacitated person’s” showing to a Massachusetts Probate Court judge that his Supported Decision-Making agreement and support team would provide sufficient “protection” that guardianship was not necessary.¹³

As of early 2022, fourteen states have statutes that recognize supported decision-making arrangements. Other states, including Massachusetts have legislation pending in 2022.¹⁴

¹² For information about SDM in Massachusetts, including a significant body of legal and practical resources, see the Center for Public Representation’s SDM website at <https://supporteddecisions.org/>.

¹³ The case is described in “Meet Cory” at <https://supporteddecisions.org/stories-of-supported-decision-making/corys-story/>.

¹⁴ Information about the status of the Massachusetts legislation will be available on the website link to in n. 12.

Resources:

- Center for Public Representation, Supported Decision-Making website: <https://supporteddecisions.org>
- Center for Public Representation, Supported Decision-Making getting started guide: <https://supporteddecisions.org/getting-started-with-supported-decision-making/>
- PRACTICAL Tool for guardianship Alternatives, American Bar Association Commission on Law and Aging: https://www.americanbar.org/groups/law_aging/resources/guardianshiplaw_practice/practical_tool/
- National Resource Center on Supported Decision-Making: <http://www.supporteddecisionmaking.org/>

6. FINANCIAL DECISION-MAKING

It is possible to support individuals with disabilities in making sound financial decisions without a plenary guardianship or conservatorship. There are a variety of additional, less restrictive options.

6.1. REPRESENTATIVE PAYEE – SOCIAL SECURITY AND SSI

A representative payee may be an alternative to conservatorship. A representative payee is a person who receives and controls the use of Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits for a person who is not fully capable to manage the benefits. Representative payees are appointed by the local Social Security Administration (SSA) office based on medical documentation that the person is unable to manage their own funds. A representative payee is expected to assist the person with money management and to provide protection from financial abuse and victimization.¹⁵ The SSA is supposed to monitor the representative payee's activities. The Disability Law Center (www.dlc-ma.org) investigates allegations of abuse by representative payees in Massachusetts.

Resources:

- “Rights of Individuals with Representative Payees,” Mental Health Legal Advisors Committee, Aug. 2017: http://mhlac.org/wp-content/uploads/2018/10/Representative_payees.pdf
- “Alternatives to Conservatorship in Massachusetts,” Mental Health Legal Advisors Committee, November 2015, http://mhlac.org/wp-content/uploads/2018/10/alternatives_to_conservatorship.pdf. See pgs. 1-2 for discussion and additional resources.
- Social Security's Representative Payment Program: <https://www.ssa.gov/payee/>

¹⁵ 42 U.S.C. § 1007; 20 Code Fed. Regs. § 416.601 ff. See, Frequently Asked Questions for Representative Payees, available at <https://www.ssa.gov/payee/faqrep.htm>.

- “When a Payee Manages your money” publication by SSA:
<https://www.ssa.gov/payee/bene.htm>
- Disability Law Center of Massachusetts Representative Payee Program – program to investigate issues with representative payees: <https://www.dlc-ma.org/representative-payee-program/>
- Ruth A. Mattson, Guardianship and Conservatorship Practice Under the Massachusetts Uniform Probate Code, Massachusetts Probate Manual §17.2.3 (2014).

6.2 FIDUCIARY – VETERANS’ BENEFITS

The Department of Veterans Affairs may appoint fiduciaries to manage the benefits eligible veterans who are “unable to manage [their] affairs.”¹⁶ This is similar to the Social Security Administration’s representative payee program, discussed in 5.1.1 above. Fiduciaries “are also responsible for monitoring the beneficiary's well-being and using available funds to ensure that the beneficiary's needs are met. Fiduciaries owe VA and beneficiaries the duties of good faith and candor ...and must disburse or otherwise manage funds according to the best interests of the beneficiary and the beneficiary's dependents and in light of the beneficiary's unique circumstances, needs, desires, beliefs, and values.”¹⁷

Resources:

- Veterans Affairs Fiduciary Program: <https://www.benefits.va.gov/fiduciary/>
- Massachusetts Department of Veterans Services:
<https://www.mass.gov/orgs/massachusetts-department-of-veterans-services>
- Veterans Legal Services: <https://veteranslegalservices.org/>
- Ethos Elder Services: <https://www.ethocare.org/services/counseling-supportive-services/money-management/> .This organization has a payee program, and also offers financial counseling and budgeting assistance on a voluntary basis.

¹⁶ 38 U.S.C. §§ 5502-2210; 38 C.F.R. Part 13. See, generally, A Guide For VA Fiduciaries, available at https://benefits.va.gov/FIDUCIARY/Fid_Guide.pdf.

¹⁷ 38 C.F.R. § 13.140(a).

6.3. TRUSTS

A trust – which may be an alternative to a conservatorship -- is a legal arrangement, usually memorialized in a trust document, in which a trustee (a person or organization) holds assets for the benefit of another person, called the beneficiary. A trust can be created in many ways (i.e. a written instrument, an oral declaration, a will, or a court order). The trustee has ownership of the property and/or funds in the trust but is obligated to act in the best interest of the beneficiary in accordance with the term of the trust.¹⁸

The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) established general rules for the treatment of trusts in determining Medicaid eligibility generally prohibiting the use of trusts to shelter assets as a way to be eligible for public benefits. However, OBRA '93 does allow for the individual and pooled special needs trusts.¹⁹ Discretionary distributions from these kinds of trusts do not count as assets or income for determining Medicaid (“MassHealth”) and SSI eligibility. They, however, are subject to very specific rules and fraught with restrictions that make their use by individuals with disabilities challenging.

Resources:

- “Alternatives to Conservatorship in Massachusetts,” Mental Health Legal Advisors Committee, November 2015, http://mhlac.org/wp-content/uploads/2018/10/alternatives_to_conservatorship.pdf. See pgs. 4-5 for information about trusts and special needs trusts.

¹⁸ Massachusetts trust law is complex. It includes the Massachusetts Uniform Trust Code (MUTC), G.L. c. 203E, various provisions of the MUPC and myriad other statutes, and common law. See, Courtney J. Maloney & Charles E. Rounds, The Massachusetts Uniform Trust Code: Context, Controversy and Critique, 96 Mass. L. Rev. 27 (2014) available at <https://www.jdsupra.com/legalnews/the-massachusetts-uniform-trust-code-co-72092/>.

¹⁹ 42 U.S.C. §§ 1396p(d)(4)(A)(individual trust) and (C)(pooled trust). Pooled trusts are special needs trusts where the assets of numerous individuals, while maintained in separate accounts, are “pooled” for investment purposes. Pooled trusts are administered by not-for-profit organizations. There are several in Massachusetts.

- Mass.gov website on Massachusetts trust law: <https://www.mass.gov/info-details/massachusetts-law-about-trusts#related->. See specifically the resources on special needs trusts (requires access to Trial Court Libraries).
- Ruth A. Mattson, Guardianship and Conservatorship Practice Under the Massachusetts Uniform Probate Code, Massachusetts Probate Manual §17.2.3 (2014).
- Attorney John Roberts of Longmeadow has a list of pooled trust on his website. <https://masshealthhelp.com/pdf/pooled-trusts-massachusetts.pdf>.

7. DURABLE POWER OF ATTORNEY

A Power of Attorney is a legally enforceable document where a trusted person, called an “Attorney-in-Fact,” is appointed by an individual, called the “principal,” to manage and protect the money, property, and business affairs and make financial decisions.²⁰ A Durable Power of Attorney allows the Attorney-in-Fact to continue acting on behalf of principals even when they become incapacitated. A springing Power of Attorney executed when a person is competent, but does not come into effect until the individual is incapacitated.

Resources:

- Durable power of attorney guide, Honoring Choices Mass: <https://www.honoringchoicesmass.com/resources/5-ma-planning-documents/dpoa/>
- “Alternatives to Conservatorship in Massachusetts,” Mental Health Legal Advisors Committee, November 2015, http://mhlac.org/wp-content/uploads/2018/10/alternatives_to_conservatorship.pdf. See pgs. 2-3 for specific discussion.
- Ruth A. Mattson, Guardianship and Conservatorship Practice Under the Massachusetts Uniform Probate Code, Massachusetts Probate Manual §17.2.2 (2014).

²⁰ G.L. c. 190B §§ 5-501 and 5-502.

8. ABLE SAVINGS PLANS

ABLE accounts are tax-advantaged savings accounts for the health and personal expenses of persons with disabilities. MEFA is the Massachusetts sponsor of these savings plans.²¹ ABLE accounts allow persons with disabilities to save money without jeopardizing their access to public benefits. Anyone may contribute to the person's account. Distributions are tax-free and within limits do not count for determining eligibility for Medicaid and SSI.

Resources:

- What is an ABLE Account, ABLE National Resource Center:
<https://www.ablenrc.org/what-is-able/what-are-able-accounts/>
 - Massachusetts specific ABLE Account information:
<http://www.ablenrc.org/state-review/massachusetts/>.

²¹ MEFA is the Massachusetts college loan authority. Information about MEFA's ABLE plans is available at <https://www.mefa.org/save/attainable-savings-plan>.

9. JOINT BANK ACCOUNT

A person with a disability may keep a joint bank account with another adult. Such accounts allow for money management learning and oversight. It is important to note that there are implications for public benefits, tax liabilities, and other liability issues that may arise with a joint bank account that individuals and families should consider in advance.

Resources

- SSI Benefits and Ownership of Joint Bank Accounts, National Center on Law and Elder Rights July 2018, <https://ncler.acl.gov/pdf/SSI%20Benefits%20and%20Ownership%20of%20Joint%20Bank%20Accounts.pdf>. A joint bank account can negatively impact a person's ability to collect SSI benefits, so this option should be considered with caution.
- Avoid this Common Banking Error, Special Needs Alliance, The VOICE, Vol. 5 Issue 8 (May 2011), <https://www.specialneedsalliance.org/the-voice/avoid-this-common-banking-error-2/>.

10. Health Care Decision-Making

As with financial decisions, there are alternatives to general guardianship, which still support people with disabilities in making their own decisions about their health and well-being.

10.1. HEALTH CARE PROXIES & ADVANCE DIRECTIVES

A health care proxy is a form of an advance directive in which an individual (the principal) designates another person (the agent) to make health care decisions for the individual when the principal is not capable to make them.²² This alleviates the need for a guardian as least as far as health care decisions are involved. Indeed, absent a court order to the contrary, a health care agent's decision trumps the decision of a guardian.²³ Although a principal may revoke a health care proxy at any time,²⁴ the agent may petition the Court to "affirm" the proxy upon a showing that the principal lacks the capacity to revoke.²⁵

Resources

- Health care proxy overview with sample forms in 19 languages:
<https://www.honoringchoicesmass.com/resources/5-ma-planning-documents/health-care-proxy/>
- For discussion of health care proxy in context of Supported Decision-Making, discussed infra, <https://supporteddecisions.org/getting-started-with-s-decision-making/sdm-and-health-care-decisions/>
- Distinguishing Health Care Proxy from MOLST, discussed infra:
<https://www.molst-ma.org/forms/the-massachusetts-health-care-proxy-form>
- "Alternatives to Guardianships in Massachusetts," Mental Health Legal Advisors Committee, November 2015, http://mhlac.org/wp-content/uploads/2018/10/alternatives_to_guardianship.pdf. See page 2 for discussion of advance directives, including designating a health care proxy.

²² G.L. c. 201D.

²³ G.L. c. 190B § 5-309(e).

²⁴ G.L. c. 201D § 7.

²⁵ G.L. c. 201D § 17. See, Guardianship of Emma Mason, 41 Mass. App. Ct. 298 (1996).

10.1.1 PSYCHIATRIC ADVANCE DIRECTIVE

Unlike some other states, Massachusetts does not distinguish between health care proxies and advance directives specifically for psychiatric care and treatment.²⁶ However, some individuals write their health care proxies to specifically include their wishes and instruction for mental health care. Sometime these documents include what is sometime called a “Ulysses Clause” stating that the document is not revocable when the principal is not competent. The legality of such clauses is uncertain in Massachusetts, and therefore a health care proxy is recommended (see above).²⁷

10.2 MEDICAL ORDER FOR LIFE SUSTAINING TREATMENT (MOLST) OR PORTABLE MEDICAL ORDER (POLST)

A MOLST (soon to be called a POLST in Massachusetts²⁸) allows for patients with serious advancing illnesses to express their wishes for life-sustaining treatment in consultation with providers. It is significant that the patient is only offered limited reasonable choices by the medical providers. A MOLST is a medical order, like any medical order in a patient’s records, and providers should follow it. 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.²⁹ A MOLST is revokable, but concerns have been raised about challenges associated with communicating a change to a MOLST as it is a medical order within a patient’s records.

²⁶ *Cohen v. Bolduc*, 435 Mass. 608, 760 N.E.2d 714 (2002). The proxy statute does not prevent an agent from making a decision about a treatment decision related to hospitalization for mental health or psychiatric purpose, unless expressly limited by the principal in the health care proxy.

²⁷ See, generally, Robert D. Fleischner, *Advance Directives for Mental Health Care: An Analysis of State Statutes*, 4 *Psychology, Pub. Pol’y & L.* 788 (1998).

²⁸ Massachusetts is transitioning from use of the Massachusetts MOLST Form to adoption of the National POLST Form and processes. For information see, <https://www.honoringchoicesmass.com/update-ma-adopting-the-national-polst-form-and-process/>.

²⁹ Mass. Med. Orders For Life Sustaining Treatment (MOLST), *available at* <http://molst-ma.org/>. For comprehensive information about advance care planning in Massachusetts see Honoring Choices Massachusetts at <https://www.honoringchoicesmass.com/>.

Finally, there is nothing in the MUPC that authorizes guardians to sign MOLSTs without court authority.³⁰

Resources:

- History of MOLST in Massachusetts: <https://www.molst-ma.org/about> including Circular Letter: DHCQ -12-3-560 from Commissioner of Public Health detailing the statewide expansion of MOLST effective April 1, 2012: https://www.molst-ma.org/sites/molst-ma.org/files/DHCQ_560.pdf.
- MOLST planning documents are available at <https://www.honoringchoicesmass.com/resources/5-ma-planning-documents/molst/>
- Distinguishing Health Care Proxy from MOLST, discussed infra: <https://www.molst-ma.org/forms/the-massachusetts-health-care-proxy-form>
- “Alternatives to Guardianships in Massachusetts,” Mental Health Legal Advisors Committee, November 2015, http://mhlac.org/wp-content/uploads/2018/10/alternatives_to_guardianship.pdf. See pg. 2 of MHLAC’s document for description of different types of advance directives, including MOLST.

³⁰ See CPCS Mental Health Proceedings in Massachusetts: A Manual for Defense Counsel, Chapter 4, GUARDIANSHIP, MHP MCLE 4-1.

10.3 HIPAA, FERPA AND SERVICE PROVIDERS RECORD ACCESS PERMISSION

Some family members seek guardianship in part because they have experienced difficulty getting information about their adult family member's health care, human services, and school records and status. If the person with a disability wants other adults to have access to such information, a waiver or permission form should be sufficient.

Federal³¹ and State³² law protect the privacy of health information. A HIPAA release will allow access to health care information.³³

Federal³⁴ and State³⁵ law also protect the privacy of educational records. A release form should provide authorized third parties with access to information and records.³⁶

State law also protects the privacy of records kept by state agencies serving persons with disabilities and the vendor agencies that contract with the state.³⁷ A release of information form should be sufficient to allow a third party to have access.

³¹ HIPAA privacy regulations are at 45 C.F.R. Part 160 and subparts A and E of Part 164.

³² Massachusetts health privacy laws include G.L. c. 111 § 70E and c. 112 § 17A.

³³ The American Bar Association has a model form at https://www.americanbar.org/content/dam/aba/administrative/law_aging/samplehipaaa_uthorizationformforfamilymembers.authcheckdam.pdf.

³⁴ Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, 34 C.F.R. Part 99. The US Department of Education has a model release form at <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform2.html>.

³⁵ See, G.L. c. 71 §§ 34D, 34E, 37L and 87.

³⁶ The US Department of Education has a model release form at <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform2.html>.

³⁷ See, e.g., G.L. c. 123 § 36 (privacy of records of persons in DMH facilities); 104 Code Mass. Regs § 28.09 (privacy of records of person being served by programs licensed by DMH); G.L. c. 123B § 17 (DDS facility record privacy); 115 Code Mass. Regs § 405 (all programs under DDS supervision).

Resources

- Mass. Dept. of Public Health HIPAA release:
<https://www.mass.gov/files/documents/2016/07/rh/model-authorization-eng.pdf>
- American Bar Association model HIPAA authorization form,
https://www.americanbar.org/content/dam/aba/administrative/law_aging/samplehipaaaauthorizationformforfamilymembers.authcheckdam.pdf
- Individuals' Right under HIPAA to Access their Health Information 45 CFR § 164.524, <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html>
- U.S. Department of Education model FERPA release,
<https://www2.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform2.html>
- General information on FERPA
<https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>

10.4 WELLNESS RECOVERY ACTION PLAN (WRAP)

The Wellness Recovery Action Plan is a self-management and recovery system. It was developed by people with lived experience with the mental health system. It is not a legally enforceable document, but can be helpful for individuals to prepare for crisis and also inform family and friends about their wishes.³⁸

Resources:

- Comprehensive WRAP Resource website: <https://mentalhealthrecovery.com/>.
 - Includes documents for planning, such as a crisis planning form and a post-crisis planning form. <https://mentalhealthrecovery.com/wp-content/uploads/2015/07/CrisisPlan2012Manual.pdf>.
- “Alternatives to Guardianships in Massachusetts,” Mental Health Legal Advisors Committee, November 2015, http://mhlac.org/wp-content/uploads/2018/10/alternatives_to_guardianship.pdf. See pgs. 2-3 for discussion of WRAP services and plans.

³⁸ For information see, <https://mentalhealthrecovery.com/wrap-is/>

11. Additional Alternatives for Retained Decision-Making

11.1. REAL LIVES LAW – PARTICIPANT DIRECTED PROGRAM

The Real Lives Law created participant directed programs in the Department of Developmental Services (DDS).³⁹ Among other things, the law allows DDS service recipients to determine how their DDS funding is spent for services, supports and goods. Individuals and their families locate and direct services with the assistance of support brokers and fiscal intermediaries.

Resources:

- The Department of Developmental Services (DDS) Real Lives website with additional information about the law and services available to individuals: <https://www.ddslearning.com/real-lives-bill/>.
- Resources on self-direction including Real Lives Act information: <https://thearcofmass.org/self-determination-and-self-direction>
- Massachusetts Real Lives website: <https://massreallives.org/>

³⁹ G.L. c. 19B § 19, added by Statutes 2014 c. 255.

11.2 SHARED (OR DELEGATED) EDUCATIONAL DECISION- MAKING AUTHORITY (18-21 YEAR OLDS)

When students turn 18, they attain the right to make their own educational decisions. This is particularly important for students with Individual Education Programs (IEP). The student may elect to share educational decision making with parents or other adults. Or, the student may delegate decision making to parents or another adult. The election is revocable.⁴⁰

Resources:

- Administrative Advisory SPED 2011-1, Department of Elementary and Secondary Education, https://www.doe.mass.edu/sped/advisories/11_1.html.
- The Individuals with Disabilities Education Act (IDEA) and Secondary Transition, National Parent Center on Transition and Employment, PACER, <https://www.pacer.org/transition/learning-center/laws/idea.asp>.

⁴⁰ The federal regulations are at 603 C.F.R. §§ 300.320(c) & 300.520. Massachusetts regulations are at 603 Code Mass. Regs. 28.07(5).