

**GENERAL MUPC ARTICLE V  
PROCEDURAL OUTLINE FOR  
GUARDIANSHIP OF AN INCAPACITATED PERSON  
CONSERVATORSHIP OF A PROTECTED PERSON  
*LAST UPDATED 07-08-09***

The contents of this outline are intended to provide general guidance to Court staff in the handling of Guardianship of Incapacitated Persons and Conservatorship cases. **THIS OUTLINE DOES NOT COVER GUARDIANSHIP OF MINORS MATTERS.** For Guardianship of Minor matters, please refer to the Procedural Outline for Guardianship of Minors.

This Outline will be periodically updated on the Probate and Family Court MPC Hub website: [www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/](http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/)

For ease of use, alleged incapacitated persons and persons to be protected are interchangeably referred to as Respondents on the forms and throughout this outline.

**A. VENUE**

**Guardianships: 5-105(a) (2)**

Determined by:

- a. the county where the alleged incapacitated person resides at the time the proceeding is commenced. Residence is distinguished from current address on the Petition and the filing should not be based on the current address but on the current residence;
- b. the county in which the will was or could be probated in the case of a nomination by the will of a parent or spouse;
- c. the county where the facility is located in the case of a person admitted to a facility pursuant to 111,70E,<sup>1</sup> which specifically includes a hospital;
- d. the county of their current address if the person is alleged to be homeless.

**Conservatorship Actions: 5-105(a) (3)**

Determined by:

- a. the county where the person to be protected resides at the time the proceeding is commenced;
- b. the county where the property of the protected person is located if the protected person resides outside the Commonwealth.

**B. CHANGE OF VENUE**

1. If an action is filed in more than one county, the county where the action was first filed has the right to proceed forward with the matter. The first Court may decide to proceed forward with the matter, transfer the matter to the second county, or dismiss the matter.
  
2. If a temporary order or permanent decree appointing a fiduciary has entered in a county, that county shall continue to hear all subsequent actions. If the Respondent has moved to a different county making the original county an inconvenient venue, the matter may be transferred for hearing purposes only, if approved by the judge in the county where the case was first filed. A new Petition for the appointment of a fiduciary should not be filed in the second county with the intent to have the fiduciary resign in the first county. G. L. c. 215, §7.

C. **IMPOUNDMENT**

- a. Guardianship and Conservatorship files should continue to be accessible to the public with the exception of medical information as set forth in Standing Order 01-09: Impoundment of Personal Medical Information. This continues the practice of impounding Medical Certificates and Clinical Team Reports as was required by Standing Order 05-08 which is deleted and replaced to include additional documents. Standing Order 01-09 expands the documents being impounded to include treatment plans and medical affidavits.
- b. A Petitioner, surrogate or other interested person may seek restriction of access to any particular pleading or document or to the entire file at any time under Trial Court Rule VIII. In considering whether to restrict access to information in a protective proceeding, the court should consider:
  - i. The preference of the individual under protective proceedings, including:
    - A. stated preferences about access while competent or, in the absence of specific statements, general preferences about privacy and accountability;
    - B. the individual's physical and mental condition;
    - C. the relationship of the proposed surrogate to the individual;
    - D. any history of management of the individual's person and estate by the surrogate or other third parties;
    - E. interests if access is allowed;
    - F. any other concerns that would affect the individual's preference.
  - ii. The rights and interests of third persons, including
    - A. the relationship of the third person to the individual;
    - B. the nature and extent of the third person's personal or financial interest in the matter;
    - C. the potential effect on the individual's interests if access is restricted or allowed;
  - iii. The interest of the general public in having access to the information.
- c. If a case is being dismissed and no Decree has ever entered (Temporary or Permanent), the entire file should be impounded.

**D. FILING OF PETITION**

**1. Who May File**

**a. Guardianship Actions: 5-303(a)**

“An incapacitated person or any person interested in the welfare of the person alleged to be incapacitated may petition for a determination of incapacity.”

**b. Conservatorship Actions: 5-404(a)**

“The person to be protected or any person who is interested in the estate, affairs, or welfare of the person, including a parent, guardian, custodian, or any person who would be adversely affected by lack of effective management of the person’s property and business affairs may petition for a determination of disability, in whole or in part, and the appointment of a conservator or for other appropriate protective order.”

c. A person is defined as an individual or an organization.  
5-101(18).

**2. Irregular Petitions**

If a Petitioner insists on filing a Petition that is incomplete or otherwise irregular on its face, it shall still be taken in for filing but a Motion must be immediately presented to the Court. The Court may:

- a. Accept the Petition as filed;
- b. Issue an order regarding the Petition (i.e. requiring the Petitioner to amend the Petition by a date certain and set a review date); or
- c. Dismiss the Petition after hearing.

**3. Health Care Proxy/Durable Powers of Attorney: 5-303(b)(9)**

HCP and DPOA must be filed with the Petition if available. **If either of these documents contains personal identifying information (such as a date of birth, social security number or investment account numbers), the Petitioner should redact this information.**

In a guardianship proceeding, if the alleged incapacitated person has a HCP and the agent is the person being proposed as guardian, it should be suggested to Petitioner’s counsel that a General Petition to Determine the Validity of the HCP Pursuant to G.L. c.201D, sec. 17 might more appropriately address the alleged incapacitated person’s needs without having to resort to guardianship.

Notwithstanding the fact that the proposed guardian is the Health Care Agent, a Petition for Guardianship may be filed.

The Petition for Guardianship may include a prayer pursuant to G.L. c. 201D, sec 17 to determine that a Health Care Proxy is invalid or should be limited; that the agent should be removed; or that a health care decision

should be overridden.

The Petition may also include a prayer to revoke the authority of the Health Care Agent.

4. **Medical Certificate/Clinical Team Report: 5-303(a), (b)(11), (c) & (d); 5-404(11)**
  - a. Must be filed with the Petition for Guardianship and/or the Petition for Conservatorship or be on file with the Court. If a Petition for Guardianship and/or a Petition for Conservatorship are received in the mail without a Medical Certificate or a Clinical Team Report, it should be returned to the Petitioner or Petitioner's counsel with information stating that a Medical Certificate or Clinical Team Report must be filed or a motion immediately presented to the Court in accordance with subsection (f) below.
  - b. If a Petition for a Guardianship and a Petition for Conservatorship are both filed for the same individual, one Medical Certificate may be filed provided that the date of exam is timely for both Petitions. The Medical Certificate or Clinical Team Report will be filed in one case file and a statement that it is on file with the Court (including the docket number) will be included with the Petition for the other case.
  - c. Date of exam must be timely.
    - i. For Medical Certificate: exam must have taken place within 30 days of the day the petition is filed; or
    - ii. For a Clinical Team Report: exam must have taken place within 180 days of the day the petition is filed;
  - d. The Medical Certificate must be signed by a registered physician, a licensed psychologist or a certified psychiatric nurse clinical specialist.
  - e. The Clinical Team Report must be signed by a physician, a licensed psychologist and a social worker. A psychiatric nurse clinical specialist may not sign the Clinical Team Report.
  - f. If the Medical Certificate or Clinical Team Report does not meet the above-stated requirements or is otherwise irregular on its face, the Petition may be filed but a Motion must be immediately presented to either allow for the Medical Certificate or Clinical Team Report to be filed late or to accept the irregular Medical Certificate or Clinical Team Report.
    - i. The Petitioner must file an Affidavit in support of the motion;

- ii. If seeking to file late, the Petitioner must show circumstances which make it **impossible** to timely obtain the Medical Certificate or Clinical Team Report.
- iii. If seeking to file an irregular Medical Certificate or Clinical Team Report, the Petitioner must adequately explain the irregularity.
- iv. If the motion is allowed, the Court shall designate a specific date when the Medical Certificate shall be filed or designate that a R. 35 motion must be presented. A review date shall be set to insure said filing.
  - A. If Medical Certificate or Clinical Team Report is not filed by the date designated by the Court or if R. 35 motion is denied, the Petition shall be dismissed.
- v. If the motion is denied, the Petition shall be dismissed. This dismissal shall generally not be vacated at a later date. Instead, the Petitioner will be required to file a new Petition.
- vi. If a Petition for Conservatorship is filed for a minor, no Medical Certificate or Clinical Team Report is necessary. See Standing Order 05-09.
- vii. If a Petition for Conservatorship is brought by the person to be protected/Respondent on his or her own behalf (similar to the old “voluntary conservatorships”), a motion to waive the Medical Certificate may be filed and presented.

## 5. Filing Fees

- a. The Uniform Fee Schedule indicates which fees are statutory and which are set by the Administrative Office. Most of the Guardianship and Conservatorship fees are statutory.
- b. Since Petitions for Guardianship over a person’s estate have been eliminated, all Petitions relating to Guardianships will have no fee.
- c. Petitions relating to Conservatorships will continue to require payment of a fee except for the Petition for Resignation or Termination.
- d. The Petition to Remove a Fiduciary will only have a fee associated if the fiduciary is a conservator, not a guardian.
- e. A Guardianship Bond without Sureties will have no associated fee. All other Bonds, i.e. Guardianship with sureties, Conservatorship without sureties and Conservatorship with sureties, will have an associated fee.
- f. There is a new charge for Letters of Foreign Conservator.

**E. ISSUANCE OF CITATIONS**

a. Timing of Issuance

In all cases except for those filed in a satellite session, citations shall be issued at the time a Petition is filed and the case initiated. In any event, a citation shall issue prior to the case going to the judge for the first time in the courtroom ex-parte or in chambers, whichever occurs first. No citation shall issue until a timely Medical Certificate or Clinical Team Report has been filed with the Court or the Court has signed an Order waiving the requirement. If the Court has allowed a Medical Certificate or Clinical Team Report to be filed at a later date, the citation shall not issue until the Medical Certificate or Clinical Team Report has been filed.

b. The Return Date

The return date shall generally be approximately 28 days from the date of issuance of the citation unless:

- i. If no temporary appointment is anticipated and the Petitioner requests a shorter return date, a citation with a return date 15 days or more (to give sufficient time if Petitioner is publishing the citation) from the issuance date may issue.
- ii. A Motion for Short Order is allowed by the Court which can set any return date including one which is less than 15 days from the issuance date.

**F. APPOINTMENT OF COUNSEL: 5-106(A)**

a. Timing of Appointment

i. At filing

A. Mandatory Appointments shall be made at time of filing in the following cases:

1. Substituted Judgment cases
  1. Rogers requests;
  2. Extraordinary medical authority.
2. Request for Counsel Form filed  
Presumably at this point it would only be if Petitioner requested it on behalf of the proposed Respondent.

ii. After filing

A. By Judge in courtroom ex-parte

If the case needs to go into the courtroom for any reason such as a Motion for Emergency Guardian or Conservator or a Motion to File a Medical Certificate Late, the Court shall determine if counsel shall be appointed.

B. By Judge Administratively

If there is no mandatory appointment and the case is not being heard by the Judge immediately after filing, the file shall be given to the Judge to whom the case is assigned as soon as is practicable after the case initiation/issuance of a citation. The Judge, based on a review of the file, shall determine in accordance with the established Policy Guideline whether or not to appoint counsel at the time of the file review:

1. No order for Appointment of Counsel will issue unless the Court exercises its discretion to appoint counsel.
2. Motion for Temporary Guardian or Conservator  
If a Motion for Temporary Guardian or Conservator is filed and the Judge previously reviewed the file but did not appoint counsel, the file shall be returned to the Judge to whom the case is assigned for a re-determination of the issue of appointment of counsel based on the contents of the Motion.

If the file has not been given to the Judge or the Motion is not filed with sufficient time



to be reviewed prior to the hearing on the Motion for Temporary Guardian or Conservator, the Judge should first determine at the hearing whether counsel shall be appointed prior to proceeding with the Motion. The Judge may determine that counsel needs to be present for the hearing on the Motion and the hearing may be deferred to another date.

C. Anytime thereafter

An appointment of counsel shall be made at anytime thereafter if it is requested by the Respondent or by someone on his or her behalf or if the Court at any point determines that the interest of the Respondent are or may be inadequately represented.

1. In open Court

At the initial hearing on the matter, the Court shall advise the Respondent, if present, of his or her right to counsel. SJC R. 3:10.

2. At the counter or by mail

1. When a Request for Counsel form is filed; or

2. When a request is received, regardless of the format (i.e. in a letter), the request shall be entitled Request for Counsel, filed and processed in the same manner as a Request for Counsel allowed by the Judge administratively (supra).

D. Notice to Petitioner or Petitioner's counsel

The Court shall provide a copy of any Order of Appointment of Counsel to the Petitioner or his or her counsel.

- b. Making the Appointment
  - i. A CPCS approved list of available counsel shall be maintained in each courthouse.
  - ii. If Rogers counsel was previously appointed, this counsel may be appointed to represent the Respondent.
  - iii. When a regular appointment is to be made, CPCS counsel shall be appointed in sequential order.
  - iv. When an emergency appointment is to be made, CPCS counsel shall be appointed in sequential order to the extent possible given the exigency of the matter.
  - v. If any CPCS counsel refuses to take a case, this shall be immediately reported to CPCS.
  - vi. The Order of Appointment shall include:
    - A. Information as to who shall pay for counsel (See determination of indigency below)
    - B. Where a Guardianship is sought, counsel's access to medical records for the alleged incapacitated person and where a Conservatorship is sought, counsel's access to financial records of the person to be protected.
    - C. The date of any and all hearings which are pending at the time the appointment is made:
      - 1. If there is no pending hearing scheduled at the time of appointment, a hearing shall then be scheduled;
    - D. A statement to provide counsel with a set period of time within which he/she may file an objection to the underlying petition regardless of any citation which may have a return date which is outstanding or has passed.

- c. Determination of Indigency: 5-106(a)
  - i. At any point when the court is appointing counsel for the Respondent, the court must determine whether or not the Respondent is indigent in accordance with MGL c.261, §27B.

The Court shall determine if the party is indigent, indigent but able to contribute, or not indigent in accordance with SJC R. 3:10.

- ii. Presumption of Indigency  
Under SJC R.3:10§ 1(f) (i), a party is indigent if, *inter alia*, they receive Medicaid or Supplemental Security Income. Rule 3:10 § 1(f)(iii) defines an indigent person as one who, among other things, is “residing in a tuberculosis treatment

center or public or private mental health, mental retardation or long term care facility, including Bridgewater State Hospital and Treatment Center.”

Any Respondent residing in a mental health facility, mental retardation facility, nursing home or other long term care facility when the petition is filed is considered indigent. Moreover, any person who is a Respondent in a proceeding seeking admission to such a facility is presumed indigent.

d. Payment of Counsel Fees

Whenever counsel is appointed, the appointment shall indicate that counsel shall be paid for by:

i. CPCS

A. If the Respondent is indigent.

B. If the Court can not determine whether the Respondent is indigent.

C. If, in accordance with SJC Rule 3:10, it appears that the Respondent is indigent but able to contribute a certain reasonable amount, this amount shall be paid to “the probation officer or other appropriate court employee” towards the cost of counsel.

D. If, prior to the commencement of a hearing, the Court determines that the Respondent is not indigent, assigned counsel may be dismissed, and, if so, the person shall be advised to retain private counsel without delay; provided, however, that if the interests of justice so require, the Court shall authorize the continued services of appointed counsel at public expense. The interests of justice may require such appointment if, for example, the party is incompetent to obtain counsel, incapable of obtaining access to funds, or incapable of locating or contracting with a lawyer. If, subsequent to the commencement of a hearing in such proceedings, the court determines that the person is not indigent, assigned counsel shall continue to represent the party and the party may be ordered to reimburse the Commonwealth therefor. SJC R.3:10, §5.

ii. The Respondent’s estate, if the Court on the basis of the information in the Petition, or other information, determines the Respondent is not indigent;

iii. The Petitioner, if the Court determines based upon the information contained in the petition or based upon other information that indicates that the person is not indigent

and that payment by the Petitioner is warranted, whether or not the person is indigent.

- e. **Withdrawal of Counsel**  
Counsel shall seek to withdraw their representation with the Court in accordance with Mass. R. Civ. P. 11(c).
- f. Upon the allowance of a motion to withdraw where no Notice of Appearance is filed by successor counsel, new CPCS counsel shall be appointed.
- g. **Scope of Appointment and Termination of Appointment.**
  - i. All counsel appointed to represent the Respondent shall represent the Respondent in every aspect of the matter and the representation shall be not be considered to be limited unless the Judge provides for a limitation in the Order of Appointment. This includes counsel appointed as a result of a Rogers request who shall represent the Respondent in every aspect of the underlying case.
  - ii. With the exception of Rogers counsel, a counsel's appointment generally terminates upon the entry of the Decree of Appointment or the Decree of Dismissal. However, in an appropriate case, in the Court's discretion, the Court may indicate on the Decree that counsel shall continue to represent the incapacitated or protected person. The court may indicate a specific time or event in the future when counsel's representation will terminate. Rogers counsel shall continue to represent the Respondent for purposes of the annual review. This representation is limited to the aspects of the review only unless otherwise ordered by the Court.
  - iii. If Rogers counsel is appointed in a matter and the Order of Appointment does not otherwise limit counsel's representation, if the request for Rogers authority is removed or the plan has expired and is not being extended, Rogers counsel shall continue to represent the Respondent in the underlying Petition unless otherwise ordered by the Court.

**G. NURSING FACILITY ADMISSIONS 5-309(G).**

- a. Request should be included on the face of the Petition for Guardianship.
- b. A nursing facility is defined at 5-101(15).
- c. “For the purposes of determining which type of facility will be subject to the definition of “Nursing Facility” contained in the Uniform Probate Code (“UPC”) Article V, Section 5-101(15), only those facilities that are licensed as nursing homes pursuant to G. L. c. 111, §71 fall within the UPC definition.

Therefore, pursuant to a review of its licensure requirements, the Department of Public Health believes that a placement or transfer should not be considered a placement or transfer to a “Nursing Facility” if:

- i. The placement of transfer is to a facility certified by Medicare as an inpatient Rehabilitation Facility (IRF) of a Long Term Care Hospital (LTCH); or
  - ii. The placement of transfer is to a facility licensed as a rest home pursuant to G. L. c. 111, §71; or
  - iii. The placement or transfer is to an assisted living facility.”
- d. If a nursing home admission is requested after the service of the citation but prior to the issuance of Letters, a Motion to Amend the Petition shall be filed and a new citation shall issue.
  - e. The admission must be found to be in the alleged incapacitated person’s best interests. Therefore, the admission must be anticipated within a reasonable period of time and not a mere possibility in the future.
  - f. When the court gives authorization for admission, the authorization allows the guardian to admit the incapacitated person to any nursing home, at any time. Therefore if the incapacitated person is admitted to a nursing facility and needs to move to another nursing facility, no new authorization is needed.
  - g. Complaints of DPH licensing violations regarding nursing homes and hospitals should be referred to the Department of Public Health’s Complaint Intake Unit. Complaints are best faxed in to 617-753-8165. Complaints may also be mailed to:

DPH/DHCQ Intake Unit  
99 Chauncery Street, 2<sup>nd</sup> Floor  
Boston, MA 02111

The Intake Unit may be reached at 617-753-8150.

**H. INDEPENDENT MEDICAL EXAMS**

- a. Generally under guardianship actions only, an Independent Medical Exam can be requested by Counsel with the filing of a motion for funds pursuant to G.L. c.261, §§ 27A-G.
- b. Do not require notice be given to any other party prior to request being presented to the Court.
- c. The funds requested may be limited by the Court.

**I. MOTION FOR TEMPORARY GUARDIAN;5-308  
MOTION FOR TEMPORARY CONSERVATOR; 5-412A**

1. Appointment of Counsel

The issue of the appointment of counsel shall be handled in accordance with Part F of this outline.

2. Notice

a. All Motions for Temporary Guardianship or Temporary Conservatorship shall be accompanied by a Notice of Hearing and Certificate of Service unless the moving party is requesting the hearing be held on an emergency basis and that notice be waived.

b. Notice of Hearing of the Motion for Temporary Guardian or Temporary Conservatorship

i. Shall be given 7 days prior to the hearing:

A. in hand to the Respondent;

B. by mail to all persons named in the petition.

c. Notice may be shortened or waived if the Court determines an emergency exists which requires the immediate appointment of a temporary guardian or temporary conservator. A Notice of Appointment of Temporary Guardian or Temporary Conservator shall be served within 7 days following the appointment:

i. in hand to the alleged incapacitated person;

ii. by mail to all persons named in the petition.

d. Monitoring of Notice

i. Filing of Notice and Certificate of Service

Upon the docketing of a Temporary Decree, a tickler is automatically thrown to insure that proper notice has been given on the Motion for a Temporary Guardian. The docketing of a Notice of Hearing or a Notice of Appointment of Temporary Guardian and Certificate of Service will turn the tickler off.

ii. At the end of each month, the Probate Department shall conduct a batch run of the Guardianship and Conservatorship files sorted by judges. Through the use of the automatic tickler system, the results will show which cases are in non-compliance with the filing of the required Notice and Certificate of Service.

iii. The resulting list of cases shall be provided to the judges who will determine how the case will be handled (schedule a hearing, send a letter of non-compliance, vacate the order,

appoint counsel, etc.).

e. De Novo Review

Any person named in the Petition for Guardianship or Conservatorship who did not receive notice (7 days before the hearing or 7 days after if the appointment was made by an emergency motion) may file a Motion to Vacate the appointment and the hearing shall be heard as soon as possible.

3. CARI Check of Petitioner: 5-107

**The Court may not appoint as a guardian someone who is being investigated or has charges pending for committing an Assault and Battery that resulted in bodily injury to the Incapacitated Person or who is being investigated or has charges pending for the neglect of the Incapacitated Person. The Court will generally require a CARI of the proposed guardian run the day of the hearing BUT need not if the proposed guardian is known to the Court as a member of the bar in good standing or a licensed professional guardian.**

This section does not apply to proposed conservators.

4. Length of Appointment: 5-308(a)

The Court may appoint a Temporary Guardian or Conservator for:

- i. 90 days; or
- ii. Longer if the Court specifically finds extraordinary circumstances warrant the longer period of time and the appointment is to a date certain.

5. Bond

A bond needs to be filed in accordance with Part O of this outline.

6. Inventory

An Inventory shall be filed by the Temporary Conservator. A separate Inventory shall be filed by the Conservator if one is later appointed even if the Temporary Conservator and the Conservator is the same person.

7. Next Hearing Date

The Order Appointing Temporary Guardian or Temporary Conservator shall include a review date.

The Court may indicate whether or not a Motion to Extend the Temporary Guardianship or Temporary Conservatorship may be heard at the review date or on the day the Temporary Guardianship or Temporary Conservatorship expires.



**J. APPEARANCE OF INCAPACITATED PERSON AT HEARING: 5-106(C):**

a. The Respondent is entitled to be present for all hearings.

i. Where the person is represented by counsel

i. It is counsel's obligation to advise the Court as to whether the Respondent desires to attend any proceeding. If the Respondent is residing in an institution, hospital or nursing facility the Petitioner (or the guardian, temporary guardian, conservator or temporary conservator if one has been appointed) shall arrange for Respondent's presence at all proceedings.

A. Where the Respondent is not represented by counsel, but the Court has appointed a GAL

1. Whenever feasible, the GAL shall advise the court in person or by written report as to whether the Respondent desires to attend any proceeding. In such case if the Respondent desires to be present, the Petitioner (or the guardian, temporary guardian, conservator, or temporary conservator if one has been appointed) shall arrange for the Respondent's presence at all proceedings.

2. In the event the GAL cannot fulfill this responsibility, the responsibility shall fall to the Petitioner as set forth in paragraph B below.

B. If the Respondent is not represented by counsel and a GAL has not been appointed.

1. It is the responsibility of the Petitioner (or the guardian, temporary guardian, conservator, or temporary conservator if one has been appointed) to advise the Court as to whether the Respondent desires to attend any proceeding and to arrange for the Respondent to be present if so desired.

2. In the event the Petitioner (or guardian, temporary guardian, conservator, or

temporary conservator if one has been appointed) informs the Court that the Respondent does not desire to be present, the Court shall inquire into the reasons for the decision not to be present and may, in its discretion, appoint a GAL or counsel for the Respondent.

C. If the Petitioner, guardian, temporary guardian, conservator, or temporary conservator or counsel, cannot arrange for Respondent's presence at the hearing, the hearing shall be held in a manner to accommodate the Respondent's presence.

D. MANDATORY APPEARANCE OF ALLEGED INCAPACITATED PERSON 5-306A(D)

The alleged incapacitated person must be present at any hearing where the authority to consent to treatment for which a substituted judgment is required unless there is a representation by counsel indicating that there are no contested issues of facts, the Court specifically finds a reason that oral testimony is not required AND:

Counsel is present; OR

The court finds extraordinary circumstances require the alleged incapacitated person's absence. In considering whether extraordinary circumstances exist, the Court may consider:

1. The desire of the alleged incapacitated person;
2. The opinion stated in the Medical Certificate regarding the ability of the alleged incapacitated person to attend;
3. Other factors that may affect the alleged incapacitated person's ability to attend or participate in the proceeding.

2. At any administrative review of a treatment plan, the Rogers review protocol shall be followed.

**K. CLOSED HEARINGS 5-106(c)**

If the Respondent or Respondent's counsel so requests, the hearing may be closed.

**L. THIRD PARTY TESTIMONY**

A person may apply for permission to provide information by filing an Application for Permission to Provide Information or some other document making such application.

1. The application must:
  - a. be in writing;
  - b. be signed by person submitting request;
  - c. describe subject matter, but not substance, of proffered information.
  
2. Notice and Hearing on the Application
  - a. The Court may grant the request with or without hearing, upon determining that the best interest of the Respondent will be served thereby. The court may attach appropriate conditions to the permission. Generally, the Application should be reviewed administratively by the Judge or Judicial Designee to decide whether or not to rule on the application ex-parte.
  
  - b. In deciding whether or not to rule on the application ex-parte, the Court should consider:
    - i. Relevance of proffered information;
    - ii. Urgency of reaching decision on the underlying petition or motion;
    - iii. Distance, health or other issues affecting ability of parties, counsel and third person to appear at hearing;
    - iv. Other exigent circumstances requiring immediate decision.
  
  - c. If the motion is granted ex-parte, notice of the allowance of the application shall be given to the Petitioner, Petitioner's counsel, the Respondent and the guardian or conservator, if one is appointed.
  
3. In deciding whether or not to grant the permission, court should consider:
  - a. Relevance of proffered information;
  - b. Relationship of third person to the person to be protected;
  - c. Opposition of Petitioner or Respondent to such permission;
  - d. Whether proffered information is cumulative, unduly prejudicial, unreliable or otherwise not likely to be in best interest of the person to be protected.
  
4. The Court may:
  - a. Grant the application:
    - i. without conditions;
    - ii. with conditions such as
      - A. Allowing limited discovery as to the proffered information;

- B. Allowing rebuttal information if appropriate;
    - C. Any further conditions that the court deems appropriate.
  - b. Deny the application;
  - c. Defer the hearing on the application until full notice is given. The information shall be accepted as part of the Court record but the 3<sup>rd</sup> party does not become a party to the action for purpose of future hearings or notice without further Court order.
- 5. All third party information shall be subject to the same rules of admissibility as other evidence.
- 6. If a Decree has entered and there is no pending petition, the Court shall accept the request in the file and the request shall be given to the Judge who may:
  - a. Rule on the application;
  - b. Schedule a hearing;
  - c. Make other necessary orders such as appointing a GAL, counsel or special guardian.

**M. NOTICE OF APPEARANCE AND OBJECTION**

There is a new form called “Notice of Appearance and Objection.” This form was created in order to make it clear when someone is seeking to file an Objection in a case as opposed to a new attorney entering an appearance in the matter. A Notice of Appearance form will still serve as an Objection though.

The filing of a Notice of Appearance and Objection automatically triggers a case management hearing in accordance with Standing Order 1-06 on Case Management and Time Standards. When the Notice of Appearance and Objection or Notice of Appearance form is docketed, the file should be given to the appropriate court personnel to schedule a case management hearing.

N. **ALLOWANCE OF THE PETITION**

**No Petition for the Appointment of a Guardian or Conservator (initial or successor, including the appointment of a co-guardian or co-conservator) shall be allowed administratively.**

The Court can administratively allow other Petitions (1-401(g)) if:

1. The Petitioner or Petitioner's counsel represents that the Respondent does not wish to be present;
2. No objection has been filed; and
3. If on the strength of the pleadings, the Court is "satisfied that all conditions are met."

**The Court may not appoint as a guardian someone who is being investigated or has charges pending for committing an Assault and Battery that resulted in bodily injury to the Incapacitated Person or who is being investigated or has charges pending for the neglect of the Incapacitated Person. The Court will generally require that a CARI of the proposed guardian be run the day of the hearing BUT need not if the proposed guardian is known to the Court as a member of the bar in good standing or a licensed professional guardian.**

After the allowance of a Guardianship Order or Decree or a Conservatorship Order or Decree, a Notice Regarding Plans and Reports shall be provided by the Registry to the Guardian or Conservator with any copy of the Order or Decree being mailed or given to the Guardian or Conservator.

The Appointment of Agent form is no longer necessary as G. L. c.201, §49 was repealed. The Bond statutes state that by accepting the appointment, the fiduciary submits personally to the jurisdiction of the Court.



**O. BONDS 5-208, 5-307, 5-410, 5-411**

1. A Bond shall be filed at the time of the Petition and/or the Motion for Temporary Guardianship.
2. General Rule – Under the statute, sureties are required unless waived by the Court. There is a checkbox on the Petition for Guardianship to seek to waive the sureties and it is anticipated that the Court will generally grant this request unless circumstances of the case dictate otherwise.
  - a. Bond must contain
    - i. Estimated value of real estate
    - ii. Estimated value of personal estate
  - b. Personal sureties
    - i. amount must be 1.5 times total personal estate with a minimum of \$200.
    - ii. By motion amount may be reduced by placing a restriction on liquid accounts limiting access to funds. Additional bond may be required when access to restricted asset is requested.
  - c. Corporate sureties
    - i. amount must be 1 times total personal estate with a minimum of \$200.
    - ii. By motion amount may be reduced by placing a restriction on liquid accounts limiting access to funds. Additional bond may be required when access to restricted asset is requested.
  - d. Exceptions
    - i. Bond without sureties
      - A. Conservator - automatically waived if conservator has priority for appointment, if sureties are waived in DPA.
      - B. Conservator – Court may waive for good cause if waiver is requested in the petition.
      - C. Guardian of minor, incapacitated person – Court may waive if it is in the best interest of the minor/incapacitated person, if waiver is requested in the petition, or a motion to waive is presented.
      - D. Restricted account – An account opened in a federally insured financial institution:

1. Having the sample title “\_\_\_\_ (Name of Fiduciary) as Conservator for \_\_\_\_ (Name of Protected Person)”;
2. Conservator may make internal transfers to take advantage of changes in interest rates; and
3. The financial institution shall permit no withdrawals except by certified order of the court.

### 3. Letters of Guardianship or Conservatorship

If the Bond is insufficient, the Order and Decree shall indicate that additional sureties are necessary and that no Letters shall issue until a Bond with the additional sureties is filed and approved by the Court or a judicial designee. Alternatively, the Court may issue Orders placing a restriction on liquid accounts limiting access to funds. Additional bond may be required when access to a restricted asset is requested.

**P. GUARDIAN PLANS, REPORTS & MONITORING**

1. An initial Guardian Report/Care Plan is due to be filed sixty (60) days after the appointment of a permanent Guardian (i.e. approval of the Bond)
2. Annual Guardian Reports are due to be filed within sixty (60) days following the anniversary of the guardian's appointment.
3. Upon receipt for filing, the Plan/Report will be reviewed for substantial compliance with 5-309(b) by a judicial designee.
4. After review, an Order Regarding Guardian's Plan/Report will be completed, filed with the Plan/Report and mailed to the guardian. If the Court determines the Plan/Report is acceptable, it will be filed. If the Plan/Report is accepted with exceptions or limitations, or rejected, the reasons shall be noted on the Order. The Court may require attendance at a Guardian Workshop or set a time for hearing on the Plan/Report before the Court or a judicial designee. The Order shall set forth the hearing or other date where appearance is required. If the Guardian's Plan/Report has been reviewed by a judicial designee such as a Senior Partners for Justice attorney, any recommendation by the judicial designee shall be maintained in the Court file for public review.
5. Each Division will periodically review the filing of Plans/Reports by MassCourt data retrieval and issue notices by mail to any guardians who are not in compliance with the order appointing them notifying them that if the required Plan/Report is not filed within sixty (60) days a hearing may be scheduled to show cause why they failed to file the Plan/Report.
6. If any required Plan/Report is not filed within 60 days, the Court or judicial designee shall order the guardian to
  - a. Attend a Guardianship Workshop, or
  - b. Appear for a hearing, with notice to interested parties, at which the Court may:
    - i. Remove the guardian,
    - ii. Appoint a special guardian,
    - iii. Appoint counsel for the incapacitated person, and/or
    - iv. Appoint a guardian ad litem.
    - v. Enter such further order as the Court may deem appropriate and requisite.

**Q. CONSERVATOR SPENDING PLAN, INVENTORY AND ACCOUNT & MONITORING (Section 5-418(f))**

1. A conservator's Spending Plan, if ordered by the Court to be filed, shall be filed on or before the date specified by Order of Court. If no date is specified, the Spending Plan shall be filed within sixty (60) days of such Order. 5-416(c)
2. The conservator's Inventory shall be filed within ninety (90) days of the conservator's appointment. 5-417
3. The conservator's Account shall be filed not more than sixty (60) days following each year anniversary of the conservator's appointment, unless otherwise directed by Order of Court. 5-418(a).
4. The conservator's first Account shall be presented for allowance not more than fifteen (15) months following the conservator's appointment. All subsequent Accounts shall be presented annually or at other times as ordered by the Court.
5. A report on a protective arrangement or other specific transaction by a conservator shall be filed at such time as may be required by Order of Court.
6. A conservator's Final Account shall be filed not more than sixty (60) days following (1) the resignation or removal of the conservator, (2) the death of the Protected Person or (3) any other event terminating the conservator's appointment.
7. Upon presentation for allowance of an Account, the Court shall appoint a Guardian ad litem to review such Account. Unless otherwise directed by the Court, the guardian ad litem shall file a written report on the Account within ninety (90) days of the GAL's appointment.
8. Upon receipt of the guardian ad litem's report, the Account and report shall be reviewed by a judge or judicial designee. If the Account appears to be accurate and complete, the Court may enter judgment allowing the Account without hearing. If an objection is filed or if the Account does not appear to be accurate and complete, the Court shall schedule a date for review and conference with respect to the Account, and shall notify the conservator, the protected person, the guardian ad litem and all interested persons of the date and place of such conference. The conservator and any other person required by the Court's notice shall appear at such conference. Other interested persons may attend.

9. If accounts are placed on file and, by Court Order, are not required to be immediately presented for allowance, upon filing of the accounts Court staff or other individuals trained and designated by the Court shall review the account schedules to ensure that the protected person's funds are being properly managed.
10. Each Division will periodically review the filing of Inventories, Spending Plans, Accounts and Reports using MassCourt data retrieval. If any Spending Plan, Inventory, Account or Report is not filed on or before the due date, the Court or a judicial designee shall send to the conservator a Notice of Non-Compliance, advising that if the required document is not filed within fourteen (14) days, a hearing may be scheduled to show cause why the required document has not been filed.
11. If any required Account, Plan or Report is not filed within fourteen (14) days after Notice of Non-Compliance is mailed to the conservator by the Court, the Court shall order the conservator to:
  - a. Attend a conservatorship Workshop, or
  - b. Appear for a hearing, with notice to interested parties, at which the Court may:
    - i. Remove the conservator;
    - ii. Appoint a special conservator;
    - iii. Appoint counsel for the protected person;
    - iv. Appoint a guardian ad litem;
    - v. Order that the conservator pay any costs, counsel fees and/or guardian ad litem fees incurred as the result of such guardian's non-compliance with reporting requirements; or
    - vi. Enter such further order as the Court may deem appropriate and requisite.

**R. GUARDIANS, HEALTH CARE AGENTS AND DURABLE POWER HOLDERS POWERS**

A guardian, without authorization of the Court, may not revoke a health care proxy of which the incapacitated person is the principal. If a health care proxy is in effect, absent an order of the Court to the contrary, a health-care decision of the agent takes precedence over that of a guardian. 5-309(e)

On the other hand, a DPOA agent is accountable to a conservator and the conservator has power to revoke or amend the DPOA. 5-503

A person nominated in a DPOA (but not a HCP) has priority for appointment as guardian or conservator. 5-305(b), 5-409(a) (1). G.L. c. 201B, §3. A nomination in a DPOA may include a request that the guardian and/or conservator bond be without sureties.

**S. POST PETITION ACTIONS**

1. Petition for Removal-Resignation- Termination of a Guardian or Conservator
  - a. If Petitioner is seeking the appointment of a Successor (due to removal or resignation), a new Petition for Appointment of Guardian for Adult must be filed.
    - i. There is no separate form for the appointment of a Successor Guardian or Co-Guardian. In either case, the Petition for Appointment of Guardian for Adult shall be filed.
    - ii. If a Petition for Removal or Resignation and a Petition for Appointment of Guardian for Adult seeking a successor Guardian's appointment are filed concurrently, there is no filing fee for the Petition for Appointment of Guardian for Adult.
    - iii. A new Medical Certificate/Clinical Team Report is necessary if seeking to have a successor Guardian appointed.
  - b. If the Petition seeks a Termination, Medical Certificate for Termination of Guardianship and/or Conservatorship must be filed with the Petition.
2. Petition to Expand, Modify or Limit the Powers of a Guardian and/or Conservator
  - a. A new Medical Certificate/Clinical Team Report is necessary.
  - b. This form shall be used in place of the General Petition form previously used to address such issues. The filing fee shall be the fee for filing a General Petition.
3. Admission to a Nursing Facility  
If a Decree and Order of Appointment of a Guardian of an Adult has issued and the Guardian thereafter seeks to admit the incapacitated person to a nursing facility, the Petition to Expand, Modify or Limit the Powers of a Guardian and/or Conservator shall be filed.

**T. FOREIGN FIDUCIARIES**

1. Guardians

A guardian of the person for a Respondent residing outside of Massachusetts may not file a petition for guardianship in Massachusetts.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, while not enacted in Massachusetts, may give the Court guidance when determining whether the Court has jurisdiction.

2. Conservators

If no conservator or guardian of the person has been appointed in Massachusetts and no petition is pending, a conservator or guardian of the estate for a person residing outside of Massachusetts may file a Foreign Conservator's Sworn Statement and authenticated copies of Letters of Appointment and any bond. A Certificate of Ancillary Filing – Conservatorship will be issued administratively. 5-431.

A petition for appointment of a conservator or for a protective order may be filed for a non-resident Respondent with property located in Massachusetts and the conservator or guardian of the estate appointed in the home state will have priority for appointment. 5-409(a)(2)



**U. TREATMENT OF PENDING CASES OR CASE WITH A DECREE AS OF JULY 1, 2009**

See Standing Order 02-09: Application of G. L. c.190B, Article V to Guardianship and Conservatorship Cases Pending on July 1, 2009 or with a Decree Issued Prior thereto.

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<sup>i</sup> 111:70E: “As used in this section, "facility" shall mean any hospital, institution for the care of unwed mothers, clinic, infirmary maintained in a town, convalescent or nursing home, rest home, or charitable home for the aged, licensed or subject to licensing by the department; any state hospital operated by the department; any "facility" as defined in section three of chapter one hundred eleven B ["Facility", any public or private place, or portion thereof, providing services especially designed for the detoxification of intoxicated persons or alcoholics]; any private, county or municipal facility, department or ward which is licensed or subject to licensing by the department of mental health pursuant to section nineteen of chapter nineteen; or by the department of mental retardation pursuant to section fifteen of chapter nineteen B; any "facility" as defined in section one of chapter one hundred and twenty three [ "Facility", a public or private facility for the care and treatment of mentally ill persons, except for the Bridgewater State Hospital.]; the Soldiers Home in Holyoke, the Soldiers' Home in Massachusetts; and any facility set forth in section one of chapter nineteen [The department shall have supervision and control of all hospitals, comprehensive centers and clinics, and other mental health facilities established within the department and, subject to appropriation, may further develop additional state hospitals, comprehensive centers and clinics, or other mental health facilities under commonwealth operation... The department shall designate those facilities to which persons may be committed or admitted as patients under the provisions of chapter one hundred and twenty-three] or section one of chapter nineteen B [The department shall have supervision and control of all mental retardation facilities established within the department and, subject to appropriation, may further develop additional mental retardation facilities under commonwealth operation or, subject to appropriation, may contract with any private agency furnishing complementary or community mental retardation services].”