

Estate Planning: Guardianship & Conservatorship

Ilana Abramson, Esq.

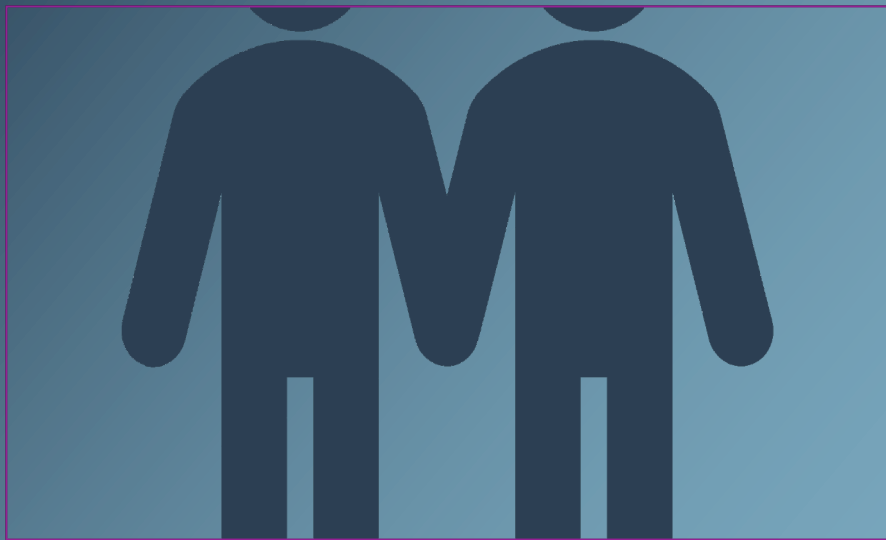


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Suggested Documents

- Will
- Durable Power of Attorney
- Health Care Proxy
- HIPAA Release
- Revocable Trust
- Guardianship nomination





Planning for Financial Management

Durable Power of Attorney

- Appoints agent to act for you in the event of incapacity
- Most important estate planning document





Planning for Financial Management

Revocable Living Trust

- Legal document that governs how property will be managed
- Grantor, Beneficiary, Trustee
- Stronger than POA, some financial institutions don't honor POAs



Planning for Financial Management

Revocable Living Trust (continued)

- Avoids probate (if you transfer assets into it)
- Avoids conservatorship (the conservator is not responsible for money held in the trust)
- Manage assets for minors
- Designate successor trustees



Planning for Financial Management

Joint Account

If client has only one adult child, a joint account may be sufficient (several children each with a joint account gets cumbersome to manage and is not a good planning tool).



Medical Decision Making and Medical Directive

Health Care Proxy—Names a trusted person to make health care decisions in case the principal is unable to make or communicate medical decisions

Difference between Health Care Proxy,
Medical Directive and Living Will



Medical Orders for Life-Sustaining Treatment

Patients with a serious illness and their medical providers complete the form that translates the patient's wishes regarding medical care to standing medical orders.



Alternatives

What if the patient has done nothing in advance?

Or what if the documents are insufficient for what the patient needs now?



Guardianship and conservatorship – a legal relationship whereby the Probate Court gives one person the power to make personal or financial decisions for another.

What is
Guardianship?

A **guardian** is appointed for personal and medical decisions.

What is
Conservatorship?

A **conservator** is appointed for financial decisions.



The Legal Standard for Capacity: Three Parts

Component	Guardianship Standard	Conservatorship Standard
A diagnosis	“clinically diagnosed condition”	“clinically diagnosed condition”
A decision-making problem	“an inability to receive and evaluate information or make or communicate decisions”	“an inability to receive and evaluate information or make or communicate decisions”
Functional Problem	“lacks the ability to meet essential requirements for physical health, safety, or self-care”	“unable to manage property or business affairs effectively and/or has property that will be wasted or dissipated unless management is provided”

Guardianship

- Guardianship is a last resort when an individual becomes incapable of caring for themselves or making proper decisions about health, living arrangements, and care.
- Guardianship is the court appointment of one person to make health care for another person, however, it also takes away the legal rights of the person for whom a guardian has been appointed.
- Courts prefer limited guardianships for that reason.



Guardianship Nomination

- Is there a co-guardian?
- Execute will and guardianship nomination
- Execute a living guardianship nomination

Role: Medical treatment
decisions, Housing decisions, Day-
to-day decisions, Education



Limitations to Guardianships

Care to Self – Retains the right to:

Be responsible for bathing, dressing, toileting, and dental care (with assistance).

Choose and determine daily meals.

Medical – Retains the right to:

Make and communicate decisions routine health care decisions.

Choose a health or long-term care facility.

Choose and direct home health care providers.

Manage medications (with assistance).



Limitations to Guardianships cont.

Home and Community Life – Retains the right to:

Choose to live at home, with accommodations, as needed.

Be responsible for maintaining and cleaning the home (with assistance).

To be left alone (with time limit)

Drive with a valid driver's license.

Use public transportation independently.

Make choices about roommates.

Select and plan daily and leisure activities.

Vote.

To smoke at respondents choosing, within the law

Seek and obtain employment.

Travel.

Determine who to have friendships and visitation

Determine participation in religious activities.

Use the telephone or computer (without supervision).

Guardianship – What you Need

Required forms

- Petition for Appointment of Guardian for an Incapacitated Person (MPC 120)
- Medical Certificate (MPC 400): Completed and signed by a registered physician, licensed psychologist, or certified psychiatric nurse clinical specialist. The incapacitated person must be examined within 30 days of when the petition is filed.
- Bond (MPC 801) The Bond confirms that you agree to the jurisdiction of the court. The bond must include the estimated value of the incapacitated person's real estate and personal estate.
- Depending on the circumstances, you may also need to file these forms:
 - Clinical Team Report (MPC 402) if the person has an intellectual disability. Filled out by a physician, licensed psychologist, and a social worker. The incapacitated person must be examined within 180 days from when the petition is filed.
 - Military Affidavit
 - If the incapacitated person is treated with antipsychotic medications. This treatment requires special court authority and is called a Rogers Authority. If you request a Rogers Authority:
 - A lawyer will be appointed by the court
 - You'll need to submit Findings and a Treatment Plan for the court to approve
 - The Decree will include an annual review date



Petition for Appointment of Guardian for an Incapacitated Person (MPC 120)

6. **A Medical Certificate dated with an examination having taken place within 30 days of the filing of the petition or, if Respondent is alleged to be intellectually disabled, a Clinical Team Report dated with an examination having taken place within 180 days of the filing of the petition:**

- ☐ is filed with this Petition or is on file with the Court (Docket No.); OR
☐ is not filed with this Petition and is not on file with this Court.

If a Medical Certificate or Clinical Team Report is not filed with this Petition, or on file with this Court, you must immediately file and present a motion requesting that the Court permit it to be filed late or waive the filing requirement. An affidavit must accompany the motion explaining why it is impossible to file a Medical Certificate or Clinical Team Report with this Petition.

7. **The reason a guardianship is necessary is detailed in the most recent Medical Certificate or Clinical Team Report filed with this petition or is described as follows:**

8. **The nature and extent of Respondent's alleged incapacity is detailed in the Medical Certificate or Clinical Team Report filed with this petition or is described as follows:**





What are the Responsibilities of the Guardian?

- Medical treatment decisions
- Housing decisions
- Day-to-day decisions
- File annual guardianship reports with the Probate Court

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What Guardians Cannot Do

A guardianship removes some or all of the incapacitated person's decision-making abilities.

- Can't remove a Health Care Proxy without specific court authority
 - Can't spend or give out the incapacitated person's assets or income
 - Isn't personally responsible for the incapacitated person's expenses
-
- Learn more: <https://www.mass.gov/info-details/learn-about-the-responsibilities-of-a-guardian-of-an-incapacitated-person>



Conservatorship

A conservator may be appointed for a person to be protected if “the person is unable to manage property and business affairs effectively because of a clinically diagnosed impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate technological assistance ... and the person has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, and welfare of the person or those entitled to the person’s support and that protection is necessary or desirable to obtain or provide money.”



Conservatorship Responsibilities

- Serve as a fiduciary responsible for managing the protected person's property, but only as the court authorized in the decree and order.
- Encourage the protected person to participate in decisions, act on their own behalf, and regain the ability to manage their estate and business matters to the extent possible.
- Tell the court if your address or the protected person's address change.
- Tell the court if the protected person dies by filing a copy of their death certificate and a final account.
- Learn more: <https://www.mass.gov/info-details/learn-about-the-responsibilities-of-a-conservator-of-a-protected-person>



Conservatorship – What you Need

Required forms

1. Petition for Appointment of Conservator for Disabled Person (MPC 130)
2. Medical Certificate (MPC 400): Completed and signed by a registered physician, licensed psychologist, or certified psychiatric nurse clinical specialist. The incapacitated person must be examined within 30 days of when the petition is filed. **OR**
2. Clinical Team Report (MPC 402): if the person has an intellectual disability. Filled out by a physician, licensed psychologist, and a social worker. The incapacitated person must be examined within 180 days from when the petition is filed.
3. Bond (MPC 801) The Bond confirms that you agree to the jurisdiction of the court. The bond must include the estimated value of the incapacitated person's real estate and personal estate.
4. Military Affidavit



6. Unless the Respondent is a minor, a Medical Certificate dated with an examination having taken place within 30 days of the filing of the petition or, if Respondent is alleged to be Intellectually Disabled, a Clinical Team Report dated with an examination having taken place within 180 days of the filing of the petition:

☐ is filed with this Petition or is on file with the Court (Docket No.); OR

☐ is not filed with this Petition and is not on file with the Court.

If a Medical Certificate or Clinical Team Report is not filed with this Petition, or on file with this Court, you must immediately file and present a motion requesting that the Court permit it to be filed late or waive the filing requirement. An affidavit must accompany the motion explaining why it is impossible to file a Medical Certificate or Clinical Team Report with this Petition.

7. A conservator is necessary and in the best interest of Respondent because Respondent is:

☐ a minor; OR

☐ alleged disabled for reasons other than minority. A description of the nature and extent of the Respondent's alleged incapacity is detailed in the most recent Medical Certificate or Clinical Team Report filed with this Petition or is described as follows:

OR

☐ detained or otherwise unable to return to the United States. State the relevant circumstances, including the time and nature of detention or inability to return and a description of any search or inquiry concerning the person's whereabouts:

AND

☐ Respondent has property which will be wasted or dissipated unless proper management is provided;

AND/OR

☐ Respondent or persons entitled to Respondent's support require money for support, care, and welfare, and protection is necessary or desirable to obtain or provide money.

8. Respondent ☐ is ☐ is not alleged to be Intellectually Disabled.



Conservatorship Responsibilities – After Appointment

- Inventory (MPC 854) or Inventory Without Schedules (MPC 854a) within 90 days of when you were appointed as conservator.
 - Lists the protected person's assets as of the date of appointment.
- Account (MPC 853) or Account Without Schedules (MPC 853a) and a Petition for Allowance of Account (MPC 857) every year within 60 days of your appointment anniversary.
 - Annual accounts detail all income and expenses.
 - Conservator liable for all acts until court allows (approves) the account.
- Final Account (MPC 853) or Account Without Schedules (MPC 853a) with the Petition for Order of Complete Settlement (Conservator) (MPC 860) if/when you resign, are removed, or when the protected person dies or the conservatorship ends. The final account is due 60 days from when the conservatorship ends.
- Conservator's Financial Plan (MPC 861) only if the court orders it.
- If you need to change your responsibilities: Petition to Expand/Modify/Limit/Conservator (MPC 230).



Expansion of Powers

Guardianship

- Rogers authority (consent to antipsychotic medications)
- Facilitate admission to a nursing facility
- Apply for MassHealth
- Revoke Health Care Proxy

Conservatorship

- Real estate transactions
- Estate planning
- Gifting



Probate Court Process



Temporary Guardianship/Conservatorship

- Motion for Temporary Guardianship
- Motion for Temporary Conservatorship
- Emergency Affidavit
- Motion for Speedy Hearing





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Q & A and THANK YOU

Ilana Abramson, Esq.

20 William Street, Ste. 320

Wellesley, MA 02481

Phone: 781.943.5413

Fax: 781.943.5413

iabramson@margolisbloom.com

www.margolisbloom.com