

## Chapter 6: Guardianship Petitions and Court Proceedings

When it is clear that an individual must have a **guardian** with authority to give informed consent to recommended medical care or treatment, someone must make the necessary preparations. Where there are resources available, that is, where the individual has an estate (**assets**), a prospective guardian would be well advised to consult with an elder law attorney who is experienced in guardianship matters. Where the individual **ward** has little or no resources, any party interested in the welfare of the proposed ward may undertake to begin the process of securing the protections of a guardian for the individual.

This chapter takes the reader through the guardianship process, including how the guardian may be compensated through the **Rudow** procedure (130 C.M.R. 520.026(E)(3); see Appendix 6-O) for the services to be provided to the ward. The appendices to this Chapter contain forms filled out as if Rebecca Thatcher were petitioning to become guardian for her aunt, Agatha Adams. Given that many nursing home residents are treated with **anti-psychotic medications** to treat the symptoms associated with dementia (e.g., agitation, combativeness, delusional thought), the petition will be asking the court for authority to authorize the use of anti-psychotic medications as part of an approved treatment plan, which is the essence of a **Rogers** guardianship.

In preparing the petition to be filed with the **Probate Court**, the prospective guardian should be aware of all documents that are typically generated in the course of the proceedings:

Documents potentially developed prior to filing:

- The Petition
- Affidavit of Indigency
- The medical certificate <sup>1</sup>
- The bond form
- Motion for appointment of Temporary Guardian
- Affidavit for Temporary Guardianship
- Physician's Affidavit and Treatment Plan
- Temporary Decree of Guardianship
- Motion for appointment of a guardian ad litem
- Motion for appointment of counsel for the proposed ward

Documents developed upon filing:

- The citation (also called the notice)
- The inventory

Documents developed in preparation for the hearing before the Court:

- Medical Certificate
- Affidavit and Treatment Plan
- Report of Guardian ad Litem
- Proposed Findings on Substituted Judgement
- Motion to Excuse Ward for attendance
- Decree of Permanent Guardianship
- Motion for Approval of Fees
- Statement of Services to be Provided by Guardian
- Order for Allowance of Guardian's Expenses

Documents developed after the Guardian's appointment:

- Annual accounts
- Letter to Medicaid
- Petition to Terminate Guardianship

### **The Petition (Appendix 6-A)**

The petition form can be obtained from the Register's office of the **Probate Court**. When a prospective guardian visits the court, he or she should obtain copies of all the forms required (the medical certificate and the bond form) and inquire about the filing fee (in 2003, \$95.00) or, in the alternative, request an Affidavit of Indigency form. Massachusetts law (G.L. c. 261 § 27) provides access to the courts for indigents and low-income persons by requiring the court to waive filing fees and other costs where the party meets the indigency standards, that is, can show an inability to pay such court-related costs. See the self explanatory Affidavit of Indigency in Appendix 6-B.

In filling out the petition, the petitioner informs the court of the relevant details of the proposed ward's situation and describes the order or decree which the petitioner is seeking.

Identify the county in which the proposed ward resides. Leave the Docket Number blank, since that number will be assigned by the Court when the petition is filed.

Check which box describes the proposed ward. Check *Mental illness* if the medical certificate indicates that the proposed ward does indeed suffer from a mental illness or a suspected mental illness. A proposed ward in a coma is not mentally ill, but rather may be incapacitated by a physical illness (inability to communicate), in which case the third box should be checked. Where the proposed ward is an elderly nursing home resident, the medical certificate may describe a dementia that results from symptoms of a physical nature, like Alzheimer's or Parkinson's disease, and a physician may be unwilling to indicate a mental illness.

Very few nursing home residents are mentally retarded, and if the proposed ward is such a person, that is, developmentally disabled, there is a significantly different guardianship process, where the medical certificate is completed by a team of experts. Consult with the local ARC (Association for Retarded Citizens ) or the Massachusetts Department of Mental Retardation for assistance.

The *Special Request* section requires that the petitioner(s) inform the court if the authority being requested is to: 1. authorize treatment of the ward with anti-psychotic medications in accordance with a treatment plan (*Rogers*) (see Appendix 6-A-2 for a list of the anti-psychotic medications generally in use in 2004), or 2. authorize the ward's admission or commitment to a mental health or mental retardation facility (Technically, the law does not require that the guardian obtain specific authority to admit the proposed ward to a nursing home, but the petitioners are well advised to make it clear if such authority is being sought), or 3. authorize or refuse extraordinary medical treatment (e.g., life supports such as feeding tubes or artificial respiration, amputation, or kidney dialysis.) If any of these boxes are checked, the court will appoint an attorney to represent the ward and may appoint a guardian *ad litem* to investigate the facts of the case and report back to the court.

The petitioners must be identified and must check which box describes their status or standing to file the petition.

The proposed ward must be identified by name and home address. If the ward is a nursing home resident, the home address is filled in here. If the nursing home resident has been in the facility for so long that there is no longer any home address, then the nursing home address may be used. The petitioner next checks the box corresponding to the box checked at the top of the petition form, regarding whether the proposed ward is mentally ill, developmentally disabled, or physically incapacitated and unable to communicate.

All of the apparent or presumptive heirs of the ward must be listed by name, address, and relationship. Heirs are persons who are legally entitled to share in the estate of a deceased person. If a person dies with a valid will in effect (**testate**), the beneficiaries named in the will are the heirs. If a person dies without a will in effect (**intestate**), then a Massachusetts statute (G.L. c. 190 § 1; see Appendix 6-A-1 for a summary) prescribes what blood relatives share in the estate. The petitioner should list all such heirs, including the beneficiaries of any will of which the petitioners are aware. If the heirs are too numerous to list on the petition, enter *See attached list*, and attach a complete list of all heirs. Heirs must be given notice of the proceedings and have the right to intervene.

A veteran or the spouse or widow/er of a veteran may be eligible for benefits from the federal Department of Veterans Affairs. If there is some doubt, contact the Fiduciary Unit of the **VA** for assistance.

On the back of the form, nominate the person(s) or entity(ies) to be appointed the

guardian(s), and identify any specific authority to be conferred on the guardian by the court. The form also indicates that an agency, such as a non-profit organization with expertise in providing guardianship services, may be appointed guardian rather than a person or persons.

If any of the heirs at law wish to assent to the petition, there is space for them to do so; such assents bolster the standing of the petitioners and may obviate the need for giving notices to such heirs later on in the proceedings.

The petition must be signed by the petitioners under the penalties of perjury. If the petitioners are not represented by counsel, they are *pro se*, that is, representing themselves and must be identified in the space following *For Petitioners*. If the proposed ward is represented by counsel, identify that attorney under *For Respondent*. Otherwise, leave the space blank.

The space headed *PETITION-DECREE* is filled in by court officials.

### **The Medical Certificate (Appendix 6-C)**

The Medical Certificate — Guardianship must be filled out and signed by a physician who has examined the proposed ward/patient within 30 days of the filing of the petition, and later, within 30 days of any request for action by the court. In guardianship proceedings, the judge will always insist on current information regarding the proposed ward's medical condition. The treating or examining physician should be familiar with this form and should give the court specific information about the patient's condition, diagnosis and symptoms, prescribed treatment, and the necessity for the appointment of a guardian because of the patient's limitations. For a patient in a hospital or a resident of a nursing home, the petitioner should have no difficulty obtaining a medical certificate since any treating physician understands that informed consent is required for all medical care being furnished to a patient.

### **The Bond (Appendix 6-D)**

Along with the petition, the medical certificate, and the filing fee (or Affidavit of Indigency), the petitioners must also submit a Bond form to the court. The judge will not appoint the guardian without first approving a fiduciary bond to ensure that the proposed ward's resources are protected against the misconduct of a dishonest guardian.

In the space under which appears, *type of fiduciary*, enter the appropriate title, either *Temporary Guardian* or *Permanent Guardian*. The bond will be either without **sureties**, with personal sureties, or with corporate sureties:

Without Surety: The judge will rarely allow a bond without sureties, but may do so when the guardian is appointed as the guardian of the person and not the estate of the ward. A guardian of the person has no authority relative to the ward's income or assets, and presumably the court need not be concerned about such a guardian's bond when the financial affairs of the ward are

not involved.

**With Personal Surety:** The court requires that two persons sign as guarantors of the integrity of the guardian and in essence represent to the court that they will insure the fiduciary's honesty and trustworthiness in carrying out the duties of guardian. The sureties must understand that they are genuinely insurers, and can be sued on the bond if the guardian is found to have misappropriated the ward's finances. When the proposed ward has significant assets, the court may inquire about the financial ability of the sureties to meet their obligations.

**With Corporate Sureties:** Where the ward has substantial or significant assets or income or the court concludes that personal sureties do not afford sufficient protection of the ward's finances, a corporate surety will be required. In such a case, the prospective guardian must obtain a corporate bond from an insurance company that issues such coverage for fiduciaries.

Identify the name of the estate, that is, the proposed ward and the name and address of the prospective guardian/fiduciary. (The term "fiduciary" appears because this form is used in other Probate Court contexts, for example in the appointment of an executor of an estate, etc.)

The bond form calls for the estimated value of any real estate in which the proposed ward has any interest. A guardian must obtain the permission of the court before taking any action affecting the ward's ownership of real estate. If a guardian plans to sell, transfer, or mortgage the ward's real estate, the guardian must ask the court for license to do so.

The estimated personal estate of the proposed ward must also be entered in the space provided. The personal estate consists of anything owned by the proposed ward that is not real estate. The bond is approved on the strength of the petitioners' estimation of the estate, but, once appointed, if the guardian discovers that the assets were substantially underestimated, a revised and more accurate bond must be filed.

The Penal Sum of the Bond requires the calculation of 150% of the estimated personal estate of the proposed ward. Any value of real estate is not part of the equation because the court supervises that aspect of the ward's holdings through the licensure process. If Agatha Adams has \$1,800.00 in the bank, the penal sum is 150% of that value or \$2,700.00.

The prospective guardian/fiduciary and the two personal sureties sign at the appropriate spaces. As explained on the reverse side of the bond form, a surety must be a resident of Massachusetts. If a corporate surety is used, the insurance company will endorse the bond in the space provided.

At the very bottom of the bond, the judge approves the bond as the last step before appointing the guardian by decree.

### **Motion for Appointment of Temporary Guardian (Appendix 6-E)**

Once the petition is filed, the normal course is for the court to issue a citation or notice to be served on all interested parties (see Appendix 6- J). The petitioners serve the notices as prescribed by the court, either in hand or by mailing or publication in a designated newspaper's legal notice section. The notice contains a "return day," that is, a date by which any person objecting to the petition must file a written appearance on or before 10:00 a.m. on the return day. If no objections are filed and the papers are otherwise in order with no further review or actions to be taken by the court, the guardian will receive a copy of the decree of appointment.

Where there is an urgent need for the appointment of a guardian, however, and the emergency attention of the court is required to make such an appointment promptly, the petitioners may file a motion for the appointment of a temporary guardian. A temporary guardian is appointed by the court for a 90-day period, but only when the petitioner shows that there is an emergency, that there is a risk of a particular harm to the proposed ward that the petitioner seeks to avoid, and that the actions requested of the court by the petitioners are reasonably necessary to avoid that harm. The motion must be accompanied by an affidavit or affidavits sufficiently in support of the motion to convince the court to grant the relief sought.

### **Affidavit for Temporary Guardianship (Appendix 6-F)**

The affidavit or affidavits must allege under the penalties of perjury the nature of the emergency, the harm to be avoided, and the reasonableness of the action requested of the court to avoid the harm. Need for emergency surgery is a typical basis for the appointment of a temporary guardian and requires affidavits from the petitioner and the treating physician and/or surgeon.

### **Motion to Appoint Counsel for Ward (Appendix 6-G)**

In Rogers and Brophy guardianships, the court must appoint counsel for the proposed ward, and generally speaking, the court will pay the fees of the counsel appointed. Depending on the nature of the case, the court may pay other costs as well, for example, the costs of a medical expert witness. The court has authority to appoint counsel for the ward in every case but generally does so only when there is an obvious need, such as when the ward objects to the proceedings.

### **Physician's Affidavit and Treatment Plan (Appendix 6-H)**

Where the medical treatment plan for the ward involves the administration of anti-psychotic medications, the physician's affidavit and treatment plan must also be submitted to the court.

### **Draft (or Proposed) Findings of Fact and Conclusions of Law (Appendix 6-I)**

The court may require that the petitioner submit proposed findings of fact and conclusions of law at the time of appointment of either the temporary or permanent guardian. This document can speed the process, because the petitioners, who have knowledge of the ward's circumstances can, in effect, summarize the facts for the court to review and approve. Proposed findings of fact are a list of the important facts about the ward, and the court will agree to adopt the proposed facts as long as the petitioners have submitted testimony or documentary evidence to support the facts. Proposed conclusions of law recite the law, that is, the statutes, court decisions, or other authorities that apply to the facts of the case.

### **Citation or Notice (Appendix 6-J)**

After the petition is filed, the court issues a citation that explains how the notice of the petition is to be given to all parties of interest. The petitioner must return the citation and certify that the citation has been complied with.

### **Temporary Decree of Guardianship (Appendix 6-K)**

If all goes well, the court will appoint a temporary guardian as requested by the petitioners. Again, to expedite the process, the petitioners should come to court with a completed decree form, ready to be signed by the judge. The temporary guardianship is for only 90 days, but the court may extend the term of the temporary guardianship if for some reason the permanent guardianship cannot be granted by the expiration date of the temporary guardianship.

### **Permanent Decree of Guardianship (Appendix 6-L)**

At the end of the process, a permanent guardian will be appointed.

### **Inventory (Appendix 6-M)**

Upon appointment of a guardian, whether temporary or permanent, the court issues an inventory form on which the guardian is required to list the assets of the ward. The inventory must be completed and filed with the court within 90 days. The inventory is important and will be the basis for the future accounts that the guardian must file annually with the court.

### **Motion for Allowance of Guardianship Costs/fees (Appendix 6-N)**

For a *Rudow* guardian to be compensated for his or her services to the ward, the petitioner must submit a motion for the allowance of costs and fees. The motion should explain the work done by the guardian, and an affidavit should be submitted to support the claim. The *Rudow* regulations are found in Appendix 6-O.

### **Model Letter to Medicaid (Appendix 6-P)**

Once a guardian has been appointed, the procedure to be followed to implement the *Rudow* mechanism for payment is to submit a letter to Medicaid, along with copies of the decree of appointment, and the order of the Probate Court that approved the fees and costs. The guardian is compensated when the Medicaid program revises the ward's PPA for the next 12-month period; one-twelfth of the fees/costs are recovered each month. Thereafter, the guardian must file an affidavit annually with Medicaid that conforms with the requirements of the *Rudow* regulations at 130 C.M.R. § 520.126(E)(3)(d). See Appendix 6-O. The affidavit must describe the guardianship services provided and must include the assertion that the guardian has attended and participated in the quarterly care plan meetings held for the resident at the nursing home.

### **Accounts (Appendix 6-Q)**

Each year the guardian must submit an annual account by which the guardian informs the court of the state of the ward's assets, income, and expenses. The account describes the period covered, and accounts for assets and income (Schedule A), expenses (Schedule B) and the remaining balance of the ward's estate (Schedule C).

### **Petition to Discharge Guardianship (Appendix 6-R)**

If the ward recovers and is no longer incapacitated, there is a procedure for discharging the guardian or terminating the guardianship. For example, suppose that medical tests find an operable tumor as the suspected source of Agatha Adams' dementia, and surgery succeeds in restoring her to sound mental health. Where the medical certificate attests to her recovery and regained capacity, this petition asks to have the guardianship terminated.

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1. In rare cases where the proposed ward has not been medically evaluated, the petitioner may request that the court order an evaluation, and in an emergency, appoint a temporary guardian, pending the evaluation.

## Appendices to Chapter 6

- 6-A Petition
- 6-A1 Law of Intestate Succession (Identifying Heirs at Law)
- 6-A2 Current List of Anti-psychotic Medications in Use
- 6-B Affidavit of Indigency
- 6-C Medical Certificate
- 6-D Bond
- 6-E Motion for Appointment of Temporary Guardian
- 6-F Affidavit for Temporary Guardian
- 6-G Motion to Appoint Counsel for the Ward
- 6-H Physician's Affidavit and Treatment Plan
- 6-I Draft Findings of Fact and Conclusions of Law
- 6-J Citation/Notice
- 6-K Temporary Decree of Guardianship
- 6-L Permanent Decree of Guardianship
- 6-M Inventory
- 6-N Motion for Allowance of Fees/costs
- 6-O "Rudow" Regulations
- 6-P Model Letter to Medicaid
- 6-Q Guardian's Account
- 6-R Petition to Discharge Guardianship