

Elder Law: What Every Health Care Professional Needs to Know.



AndoverLaw, P.C.



Sources of Law

Health Care Proxies M.G.L. c. 201D

- Signed into law December, 1990

Massachusetts Uniform Probate Code M.G.L. c. 190B

- Signed into law January 15, 2009
- Guardian Provisions enacted July 1, 2009
- Remainder of code enacted March 31, 2012

Massachusetts Medical Order for Life Sustaining Treatment

- Massachusetts Department of Public Health – Clinical Standard of Care
- Began being used throughout the Commonwealth on April 1, 2012

Health Care Proxy Definitions

M.G.L. c. 201D §1

Health Care Proxy: Provides agent with legal authority to make decisions for the Principal should that person become incapacitated or unable to communicate their wishes.

*NH calls this a Durable Power of Attorney for Health Care / Advance Directive

Health Care Agent: An adult to whom authority to make health care decisions is delegated under a health care proxy.

Principal: The person who signed the health care proxy.

Capacity to make Health Care Decision: The ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of an alternatives to any proposed health care, and to make an informed decision.

Living Will: A section or sections of the Health Care Proxy in which the Principal provides statements as to what their wishes are in certain medical situation

Example: Wish to refuse feeding tubes, respirators and / or cardiac resuscitation.

HCP Requirements

M.G.L. c. 201D § 2

1. **Competent Adult:** One who has the capacity to make decisions / ability to understand the nature and ability of one's acts and is over the age of 18.
2. **In writing**
3. **Signed in the presence of to Two Witnesses** (other than the Agent)
* The agent cannot be a health care provider unless related to the Principal
4. **Witnesses shall affirm** in writing the Principal appeared to be at least 18 years of age, sound mind (competent) and under no duress, constraint or undue influence (influence by another in a position to do so because of a weakened state)

The Authority of an agent to act shall begin **only** after the attending physician makes a determination in writing that the principal lacks capacity to make or to communicate health care decision.

A HCP can limit the agents power and direct certain decisions such as DNR.

May have an alternative or contingent agent but only one agent can serve at one time in Massachusetts

Hospital / Nursing Facility should always ask patient upon admittance if they already have a HCP and if so should ask for a copy for the file.

Liability of Health Care Providers and Agents

M.G.L. c. 201D § 8-9

No health care provider or employee thereof shall be subject to criminal or civil liability or be deemed to have engaged in unprofessional conduct, for carrying out in good faith a health care decision by an agent pursuant to a health care proxy.

No person acting as agent pursuant to a health care proxy shall be subject to criminal or civil liability for making a health care decision in good faith pursuant to this chapter

Liability for the cost of health care provided pursuant to an agent's decision shall be the same as if the health care were provided pursuant to the principal's decision. NOTE: This is currently being challenged in the Courts.

Foreign Proxies

M.G.L. c. 201D § 11

Health Care Proxies or similar instruments executed in another state that are in compliance with the law of that state are enforceable.

Lack of Proxy – Effect

M.G.L. c. 201D § 16

A health care provider may rely upon the informed consent of responsible parties on behalf of incompetent or incapacitated parties to the extent permitted by law – (DNR, treatment with Antipsychotic Medications and any other extraordinary invasive treatments in situations other than emergencies will require court approval)

A power of attorney delegating power to make health care decisions executed prior to 1990 are valid.

A competent adult's failure to appoint an agent or to provide specific instructions shall create no presumptions regarding his or her wishes about health care.

Guardianship Definitions

M.G.L. c. 190B Article V. § 5-101

Four Types: Guardianship of Minors and Guardianship of Incapacitated Person, Temporary Guardianships, Guardianship of Intellectually Disabled Person.

Incapacitated Person: An individual who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self care, even with appropriate technological assistance.

Mentally Retarded Person: An individual who has a substantial limitation in present functioning beginning before age 18, manifested by significantly sub-average intellectual function existing concurrently with related limitation in 2 or more of the following applicable adaptive skills areas: – communication, self-care, home living, social skills, community use, self-direction, health and safety, functioning academics, leisure and work.

Note: in 2010 Gov. Deval Patrick signed into law An Act Eliminating the word “Retardation” from the General Laws. Mental retardation is now called “intellectual disabilities”

Guardianship Definitions

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Nursing facility: An institution or a distinct part of an institution which is primarily engaged in providing to residents: (i) skilled nursing care and related services for residents who require medical or nursing care; (ii) rehabilitation services for the rehabilitation of injured, disabled or sick persons; or (iii) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services, above the level of room and board, which can be made available to that individual only through institutional facilities that are not primarily a mental health facility or developmentally disabled facility; provided however, that the term nursing facility shall not apply with regard to the placement or transfer of a patient to a facility that is (i) licensed by the Department of Public Health, under section 51 of chapter 111, as a long term acute care hospital or inpatient rehabilitation facility; (ii) licensed by the Department of Public Health, under section 71 of chapter 111, as a rest home; or (iii) licensed or certified as an assisted living residence by the Executive Office of Elder Affairs under 651 CMR 12.00 et seq. M.G.L. c. 190B Article V. § 5-101

Guardian: A court appointed agent who makes decision for an Incapacitated Person with regards to support, care, education, health and welfare. Guardians do not have the power to make decisions to allow for medical procedure and treatment that are considered particularly intrusive, risky or restrictive of the incompetent person's liberty except in an emergency. M.G.L. c. 190B Article V. § 5-309

Types of Guardianships

- **Full Guardianship M.G.L. c. 190B Article V, § 5-301**
 - Guardian is given broad powers to make health care decisions, still must seek court approval for decisions which restrict the incapacitated person's liberties.
- **Temporary Guardianship M.G.L. c. 190B Article V, § 5-308**
 - In emergency situations the Court may appoint a temporary guardian if it finds that absent such appointment there will be substantial harm to the incapacitated person's health. The initial period is 90 days but can be extended. Petition for Guardianship must be pending. Requires 7 days notice to interested parties
- **Limited Guardianship**
 - Court favors limited Guardianships. The Guardian should only be given power over those areas that are absolutely necessary to protect the incapacitated person and enhance his or her quality of life.
- **Minors M.G.L. c. 190B Article V, § 5-201**

When is a Guardianship Needed?

- When there is no valid Health Care Proxy.
- When a person is alleged to be incapacitated
- When impaired judgment or capacity poses a *Major Threat* to a person's welfare.

Who can File a Petition for Guardianship? M.G.L. c. 190B Article V § 5-303.

An incapacitated person, or any person interested in the welfare of the person alleged to be incapacitated, may petition for a determination of incapacity, in whole or in part, and the appointment of a guardian, limited or general.

Guardianship Forms

- Petition for Appointment of a Guardian for Incapacitated Person (MPC 12)
- Medical Certificate for Guardianship or Conservator (MPC 400)
- Clinician's Affidavit as to Competency and Treatment (MPC 800)
- Clinical Team Report (For Intellectually Disabled) (MPC 402)
- Citation Giving Notice of Petition for Appointment of Guardian (MPC 520)
- Request for Counsel (MPC 301)
- Bond (MPC 801)

Who can act as Guardian?

M.G.L. c. 190B Article V § 5-305

- Any person deemed qualified may be appointed guardian of an incapacitated person. Cannot be a minor. The undefined qualified person gives the court considerable discretion as to whom to appoint convicted of a
- Court will appoint a guardian in accordance with the persons most recent POA unless unsuitable to serve.
- The following are suitable guardians
 - The spouse of the incapacitated person or a person nominated in the will of a deceased spouse
 - The parent of the incapacitated person
 - Any person the court deems appropriate (Professional Guardian)

Court Finding Required for Appointment

The Court must find that the alleged incapacitated person for reasons other than advanced age or minority

1. Has a clinically diagnosed condition
2. That results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care even with appropriate technological assistance
3. The appointment is necessary or desirable as a means of providing continued care and supervision of the incapacitated person and the person's needs cannot be met by less restrictive means, including use of appropriate technological assistance.

M.G.L. c. 190B, § 5-306 (7-8)

Guardian's Power: Nursing Facility – July 2012 Amendment M.G.L. c. 190B Article V § 5-309(g)

- No guardian shall have the authority to admit an incapacitated person to a nursing facility, except upon a specific finding by the court that such admission is in the incapacitated person's best interest, (1) unless the admission shall not exceed 60 days; (2) any person authorized to sign a medical certificate recommends the admission (3); neither any interested person nor the incapacitated person objects (4); on or before such admission a written notice of intent to admit the incapacitated person to a nursing facility for short term services has been filed by the guardian in the appointing court and a copy thereof has been served in-hand on the incapacitated person and provided to the nursing facility; and (5) the incapacitated person is represented by counsel or counsel is appointed forthwith.

Guardianship Forms Clinicians Need to be Familiar With

- **Medical Certificate for Guardianship or Conservator (MPC 400)**
 - Must be filled out by a M.D. with a relevant specialty, Psychologist, Psychiatric Nurse or Nurse Practitioner with relevant experience.
 - Describes clinically diagnosed condition that results in incapacity
 - Describes inability to make or communicate decisions and inability to meet essential requirements for physical health, safety and self care.
 - Allows for recommendations
 - This form provides the evidence needed and relied upon by the judge to place someone under guardianship
- **Clinician's Affidavit as to Competency and Treatment (MPC 800)**
 - Must be filled out by a M.D. with a relevant specialty, Psychologist, Neuropsychologist, Psychiatric Nurse or Nurse Practitioner with relevant experience who is *supervising* the incapacitated persons treatment.
 - Lists most recent hospital visit / facility stay
 - Lists current antipsychotic medications, if any
 - Describes proposed treatment, risks and Prognosis
- **Clinical Team Report (Intellectually Disabled Individuals) (MPC 402)**
 - 3 parts to be filled out by licensed psychologist, registered physician and licensed social worker
 - Describes: Types of evaluations, Clinically diagnosed reasons for incapacity; Medications which may hinder capacity; Any Intrusive treatments such as antipsychotic medication; Social Networks to assists in decision making, Risk of harm to self and others and Recommendations.

Substituted Judgment M.G.L. c. 190B

Article V § 5-306A

- Substituted Judgment is a principle that allows a surrogate decision maker to attempt to establish, with as much accuracy as possible, what decisions an incompetent person would make if he were competent to do so.
- IMPORTANT DISTINCTION – Not what is in the best interest of the incompetent person, but what the person would have done.
 - In order to make this decision one must consider 1) The patient's expressed preferences regarding treatment, 2) his religious beliefs, 3) the impact of the decision on the patient's family, 4) the probability of adverse side effects, 5) the prognosis without treatment, and 6) the prognosis with treatment.
Rogers et al v. Commissioner of the Department of Mental Health et Al. 390 Mass. 489, 458 N.E.2d 308
- Treatment for which Court authorization may be required include:
 - Antipsychotic medication
 - Sterilization
 - Abortion electro-convulsive therapy
 - Psychosurgery and
 - Removal of artificial maintenance such as nutrition or hydration
 - Amputation

Uncontested *Roger's* Hearing Process and Forms - Slide 1

- Procedure is outlined by Standing Order 4-11 of the Probate and Family Court.
- Occurs at minimum once a year

Parties:

Guardian

Roger's Monitor -monitor's the administration of medication

Roger's Counsel –represents the Incapacitated Person

Incapacitated Person

Secondary Parties:

Interested Person

Clinicians

Treatment Facilities

Uncontested *Roger's* Hearing Process and Forms

Forms / Documents:

- Guardian Care Plan Report (MPC 821)
- *Roger's* Monitor Supplemental Report to the Guardian's Care Plan Report (MPC 824)
- Report of Monitor (MPC 404)
- Motion to Extend Treatment Order (MPC 826)
- Clinician's Affidavit and Report for Extension of Treatment Plan (MPC 823)
- Medical Certificate for Guardianship or Conservator (MPC 400)
- Treatment Plan (MPC 825)
- Review Order (MPC 827)
- Representation of Respondent's Counsel (MPC 512)
- Motion to Waive Appearance of Respondent (of Incapacitated Person) (MPC 391)

Roger's Forms Clinicians Need to be Familiar With

- Clinician's Affidavit and Report for Extension of Treatment Plan (MPC 823)
 - Filled out by Treating Clinician;
 - Discusses Background and Course of Treatment;
 - Competency;
 - Treatments and Proposed Treatments;
 - Prognosis;
 - Risks; and
 - Patients Preferences.
- Medical Certificate for Guardianship or Conservator (MPC 400)
- Medical Certificate Affidavit (MPC 403)
 - Filed in place of a new Medical Certificate only if incapacitated person continues to be stable as described in most recent Medical Certificate.
- Treatment Plan (Antipsychotic Medications) (MPC 825)
 - Only the specific medication and dosage or specifically listed alternative medications and dosages may be administer to the patient.
- Review Order (Antipsychotic Medications) (MPC 827)
 - Must pay specific attention to date and make sure the Order approving the Treatment Plan has not expired.

Massachusetts Medical Orders for Life-Sustaining Treatment (MOLST)

- MOLST is a standardized form designed to allow patients to make end of life decisions ahead of time.
- The form was designed by the Executive Office of Health and Human Services and began being used statewide on April 1, 2012
- Unlike an Advanced Directive or Living Will, this form is designed to be filled out after a discussion with the patients physician and is often filled out in a hospital or medical office setting.
- It becomes effective immediately after being signed by an individual and a Physician, Nurse Practitioner or Physician Assistant.
- A Health Care Agent can sign a MOLST on behalf of a patient in the case of incapacity.
- Checklist for Clinician Signers of MOLST
- New Hampshire in the process of implementing Provider Order for Life-Sustaining Treatment (POLST)