

INTRODUCTION TO THE MASSACHUSETTS UNIFORM PROBATE CODE: GUARDIANSHIP & CONSERVATORSHIP

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§1.1 INTRODUCTION

Sweeping codification of Massachusetts probate law, namely, the Massachusetts version of the Uniform Probate Code [hereinafter the ‘MUPC’ or the ‘Code’] becomes effective July 1, 2011. The Guardianship and Conservatorship provisions of the Code (commonly referred to as “Article V”), however, become effective July 1, 2009. Article V includes significant changes to both the law and practice, incorporating many additional protections for minor, incapacitated and disabled persons and admonishing the court to look for a least restrictive protection approach. [Massachusetts Comment & Prefatory Note, Article V].

Repealing, *inter alia*, G.L. c. 201, Article V, relative to guardians and conservators, is inserted as G.L. c. 190B, §§ 5-101 through 5-431.

(a) Separate Roles of Guardians and Conservators

Under current Massachusetts law, a guardian may be appointed over the person and property of the ward. The Code, however, separates the roles of guardians and conservators. A guardian has custody of the individual who is either a minor or an incapacitated person as defined under the Code. A conservator controls the business affairs and has possession of the property of the protected person, who is either a minor or a disabled person as defined under the Code. If circumstances require proceedings for both guardianship and conservatorship, two petitions should be filed which thereafter may be consolidated for hearing. [MA Comment, G.L. c. 190B, §5-303; See G.L. c. 190B, §1-302 (d); hereinafter, all section references not otherwise cited are to G.L. c. 190B].

(b) Jurisdiction

The Probate and Family Court is granted subject matter jurisdiction relative to estates of protected persons and protection of minors and incapacitated persons. [§1-302]. The district and juvenile courts have concurrent jurisdiction with the probate court to appoint guardians of minors and subsequent proceedings in certain instances. [§1-302 (c)].

(c) Limited Guardianships & Protective Orders

A fundamental position concerning guardianship under the Code is that the Court should not confer more authority over a person than is necessary. Instead, a ‘limited guardianship’ approach should be utilized. [Comment, §5-306]. Additionally, the court in protective proceedings is required to make orders only to the extent necessitated by the protected person’s limitations and other conditions warranting the procedure. [§§5-407(a) & (d)].

(d) Court Appointed Counsel

The court is required to appoint counsel in a proceeding for the appointment of a guardian, conservator or other protective order, if the ward, incapacitated person or person to be protected or someone on her behalf requests such appointment. [§5-106 (a)]. Counsel will be appointed on the court’s own initiative if the court determines at any time in the proceeding that the interests of ward, incapacitated person or person to be protected may be inadequately represented. [§5-106 (a)]. Counsel is paid: 1) by the estate, if resources are adequate; 2) the petitioner, if ordered by the court; or 3) by the commonwealth, if indigent. [§5-106 (a)].

(e) Commitment to Mental Health Facility

The Court no longer has the authority to commit an individual into a mental health facility, even if substituted judgment orders are made by the Court; rather, that authority lies in the District Court. [5-309(f); MA Comment, 5-309(f); MA Comment, 5-306A].

(f) Admission to Nursing Facility

Under the Code, a guardian may admit an incapacitated person to a nursing facility only with specific Court authorization, after appropriate petition or motion. [§5-309(f)].

(g) Definitions

Article V contains definitions of numerous words and phrases, most of which are consistent with their common usage. The following highlights 11 definitions important for the within discussion.

1. A *Conservator* is a person who is appointed by a court to manage the estate of a protected person and includes a limited conservator, temporary conservator and special conservator. [§5-101 (2)].
2. *Disability* is cause for appointment of a conservator or for a protective order under the applicable Code provision. [§1-201 (11); §5-101 (4); §5-401].
3. A *Guardian* is a person who has qualified as a guardian of a minor or incapacitated person pursuant to court appointment and includes a limited guardian, special guardian and temporary guardian, but excludes one who is merely a guardian ad litem. [§5-101 (6)].
4. An *Incapacitated Person* is an individual for whom a guardian has been appointed. To be an incapacitated person, the individual must have, for reasons other than advanced age or minority, 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. [1-201(22); 5-101(9)].

5. *Letters* include certificates of guardianship and certificates of conservatorship. [§5-101 (11)].

6. *Mentally retarded person* is an individual who has a substantial limitation in present functioning beginning before age 18, manifested by significantly subaverage intellectual functioning existing concurrently with related limitations 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. [§5-101 (12)].

7. *Nursing facility* is an institution or a distinct part of an institution which is primarily engaged in providing to residents:

(A) skilled nursing care and related services for residents who require medical or nursing care,
(B) rehabilitation services for the rehabilitation of injured, disabled or sick persons, or
(C) 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 them only through institutional facilities, and is not primarily a mental health facility or mental retardation facility. [§5-101 (15)].

8. *Petition* is a written request to the court for an order after notice. [§5-101 (19)].

9. A *Protected Person* is a minor or disabled person for whom a conservator has been appointed or for whom protective orders are made. [1-201(41); 1-201(12); 5-101(4); 5-101(22)].

10. A *Protective proceeding* is a court proceeding for conservatorship of a minor or adult. [§5-101 (23)].

11. A *Ward* is a minor under guardianship. [§5-101 (25)].

§1.2 GUARDIAN OF AN INCAPACITATED PERSON

§1.2.1 Conceptual References Under the Code

The Court is given authority to appoint a guardian over an ‘incapacitated person,’ defined as 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. [§1-201(22); §5-101(9)].

The court is charged with encouraging the development of maximum self-reliance and independence of the incapacitated person and, to that end, to make appointive and other orders only to the extent necessitated by the incapacitated person’s limitations. [§5-306 (a)].

§1.2.2 Parental or Spousal Nomination

Under the Code, the parent of an unmarried incapacitated person or the spouse of a married incapacitated person may nominate a guardian for the incapacitated person. [§5-301]. The nomination may be made in a will or other writing signed by the parent or the spouse and attested to by two witnesses. [§5-301]. A nominated guardian has priority for court appointment under the Code. [§§5-305 (c)(1-2)].

§1.2.3 Appropriate Petitioners & Priorities

Any person interested in the welfare of the alleged incapacitated person may petition for a determination of incapacity, in whole or in part, and for the appointment of a limited or general guardian. [§5-303 (a)].

Any qualified person may be appointed guardian of an incapacitated person. [§5-305 (a)]. The court must appoint as guardian the person nominated in the incapacitated person's most recent durable power of attorney, except for good cause or lack of qualification. [§5-305 (b)]. Absent such a suitable nomination, a parental or spousal nominee has priority for court appointment as a guardian. [§§5-305 (c)(1-2)]. Given a best interest standard, the court may pass over a person having priority and appoint as guardian a person having a lower priority or no priority. [§5-305 (d)].

§1.2.4 The Petition

A proceeding for court appointment of a guardian of an incapacitated person is commenced by petition. [§5-303 (b)]. At the outset, the petitioner must state the reason why a guardianship is necessary; if seeking a general guardianship, the reason why a limited guardianship is not appropriate and, if limited, the powers to be granted. [§5-303 (b)(10)].

The petition includes the petitioner's: 1) identifying information; 2) relationship to the alleged incapacitated person; and 3) interest in the appointment. [§5-303 (b)]. It must set forth significant detail with respect to the alleged incapacitated person, including, *inter alia*: 1) identifying information; 2) the proposed residential address after appointment; 3) a brief description of the nature of the alleged incapacity; 4) spouse and children, or if none, parents and siblings, or, if none, heirs apparent or presumptive; 5) identifying information of one who has had care or custody of the person alleged to be incapacitated or with whom the person has resided during the last 60 days; 6) identifying information as to any agent, nominated guardian or currently acting guardian or conservator; and 7) a general statement of income and property and its estimated value. [§5-303 (b)]. The petition must also include the proposed guardian's: 1) identifying information; 2) relationship to the alleged incapacitated person; 3) basis of suitability; and 4) priority for appointment, if any. [§5-303 (b)(4)].

The petition must include a statement that a medical certificate dated within 30 days of the filing of the petition is in the possession of the court or accompanies the petition or a verified statement as to why one cannot be obtained. [§5-303 (b)(11)]. The medical certificate is signed by a physician or licensed psychologist. [§5-303 (c)]. It contains: 1) a description of the nature, type and extent of the person's specific cognitive and functional limitations; 2) an evaluation of her mental and physical condition and, if appropriate, her educational potential, adaptive behavior, and social skills; 3) a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and 4) the date of the examination. [§§5-303(c)(1-4)].

The petition must also state whether the petitioner is seeking: 1) Court authorization to consent to treatment for which a substituted judgment may be required; or 2) Court authorization to admit the alleged incapacitated person into a nursing facility. [§§5-303 (b)(3)(B-C)].

§1.2.5 Notice

In a proceeding for the appointment of a guardian, notice is required upon *at least*: 1) the person alleged to be incapacitated; 2) his spouse and children, or, if none, parents and siblings, or, if none, heirs apparent or presumptive; and 3) any guardian, conservator or person having, within the last 60 days, the care or custody of the person or with whom the person has resided. [§5-304 (a)].

Personal service is required on the person alleged to be incapacitated. [§5-304 (c)]. The alleged incapacitated person may not waive notice. [§5-304 (d)]. Notice is given to all other interested persons who have not assented by citation through: 1) mailing a copy of the citation at least 14 days prior to the return day to those interested or their counsel, at the office or residence, if known; or 2) delivering personally a copy of the citation at least 14 days prior to the return date; or 3) by publication at least 7 days before the return date. [§5-304 (c); §§1-401(a)(1-3)]. If interested persons reside outside of the country or are of parts unknown, the notice period may be extended. Prob.Ct.R. 6.

§1.2.6 Findings and Order of Appointment

Upon hearing, the court, after due notice, may appoint a guardian if: 1) procedure is proper; 2) the medical certificate is dated and the examination has taken place within 30 days prior to the hearing; 3) the subject is an incapacitated person; 4) the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person; and 5) the person's needs cannot be met by less restrictive means, including use of appropriate technological assistance. [§§5-306 (b)(1-8)].

Any limitation on the statutory power of a guardian of an incapacitated person must be endorsed on the guardian's letter. [§5-306 (c)].

§1.2.7 Substituted Judgment (i.e. *Roger's Authority*)

The court may authorize treatment for which a substituted judgment determination is required when it: 1) specifically finds that the person, if not incapacitated, would consent to such treatment; and 2) specifically approves and authorizes a treatment plan and endorses the plan in its order or decree. [§5-306A (a)]. A treatment plan may not be authorized except after a hearing for the purpose of which counsel must be provided for an incapacitated person who is indigent [§5-306A (a)].

The types of treatment requiring substituted judgment may vary given the invasiveness of the proposed procedure and advances in the field reducing side effects. [MA Comment, §5-306A, citing In Matter of Spring, 380 Mass. 629 (1980)]. Treatment for which a substituted judgment is required may include treatment with antipsychotic medication, electroconvulsive therapy, and withdrawal of artificial maintenance of nutrition and hydration. [MA Comment, §5-303; MA Comment, §5-306A].

The court may delegate to a guardian the authority to monitor the treatment process or appoint another suitable person to act as monitor. [§5-306A (b)].

Each order authorizing a treatment plan must provide for periodic review, at least annually. [§5-306A (c)]. Moreover, each order requires an expiration date beyond which the authority to provide treatment by substituted judgment terminates if not extended by the court. [§5-306A (c)].

§1.2.8 Temporary Guardians

While a petition for appointment of a guardian is pending, a temporary guardian may be appointed when no guardian exists, and no other person appears to have the authority to act in the circumstances. [§5-308 (a)]. To appoint a temporary guardian, the court must find that following the routine procedure for permanent appointment will likely result in immediate and substantial harm to the health, safety or welfare of the person alleged to be incapacitated prior to the return date. [§5-308 (a)].

A motion for appointment of a temporary guardian must state the nature of the circumstances requiring appointment, the particular harm sought to be avoided, the necessary actions of the temporary guardian to avoid the harm and the identifying information of any health care proxy or durable power of attorney agent of the alleged incapacitated person. [§5-308 (a)]. The motion must be accompanied by a supporting affidavit. [§5-308 (a)].

In general, the appointment of a temporary guardian is for a period up to 90 days, which may be extended for additional 90 day periods. [§5-308 (b)].

Notice for the appointment of a temporary guardian is in writing, 7 days prior to the hearing, in hand to the alleged incapacitated person and by delivery or by mail to all persons named in the petition. [§5-308 (c)].

If the court determines that an immediate emergency situation exists which requires the immediate appointment of a temporary guardian, it may shorten or waive the notice requirements in whole or in part and grant the motion, provided, however, that prior notice shall be given to the alleged incapacitated person as the court may order. [§5-308 (d)]. Additionally, under these circumstances, post appointment notice must be given to the alleged incapacitated person and those named in the petition stating further that any such person may move to vacate the order of the court or request that the court take any other appropriate action on the matter. [§5-308 (d)]. Within 7 days following the appointment, a certificate stating that this notice has been given must be filed with the court. [§5-308 (d)].

§1.2.9 Reporting and Monitoring Requirements

A guardian of an incapacitated person shall make decisions regarding the incapacitated person's support, care and welfare. [§5-309]. Within 60 days following appointment and at least annually thereafter, the guardian is mandated to file a report concerning: 1) the incapacitated person's condition and living arrangements; 2) the services provided; 3) a summary of the guardian's visits with and activities on the incapacitated person's behalf and the extent to which the incapacitated person participated in decision making; 4) whether the current treatment plan is in the incapacitated person's best interests; 5) plans regarding future care; and 6) a recommendation as

to the need for continued guardianship and any recommended changes in the scope of the guardianship. [§5-309(b)].

The court is mandated under the Code to establish a system for monitoring guardianships, including the filing and review of annual reports. [§5-309(7)(c)].

§1.2.10 Powers, Duties and Limitations of a Guardian

To the extent permitted by the decree, a guardian is charged with making decisions concerning an incapacitated person's support, care, education, health and welfare. [§5-309 (a)]. A guardian may exercise her authority only as necessitated by the incapacitated person's mental and adaptive limitations, and, to the extent possible, must encourage participation in decisions and self reliance. [§5-309].

In addition to the reporting and monitoring requirements, the Code sets out various powers, duties and limitations of a guardian for an incapacitated person. A guardian of an incapacitated person shall, *inter alia*: 1) take custody and establish a place of abode within or outside the commonwealth; 2) maintain sufficient contacts to know of the person's capacities, limitations, needs, opportunities, and physical and mental health; 3) take care of personal effects; 4) commence protective proceedings, if necessary; and 5) apply available money to current needs. [§5-209 (b)]. A guardian of an incapacitated person may: 1) apply for and receive financial support for the incapacitated person; 2) in general, consent to usual and customary medical or other professional care or treatment; and 3) utilize the services of agencies and individuals to provide necessary and desirable social and protective services. [§5-209 (c)].

A guardian may not revoke a health care proxy without court order. [§5-309 (e)]. Moreover, if a health care proxy is in place, absent court order, a health-care decision of the agent takes precedence over that of a guardian. [§5-309 (e)].

A guardian may not admit or commit an incapacitated person to a mental health facility. [§5-309 (f)]. Guardians will need to proceed in the District Courts under G.L. c. 213 for such a commitment. [MA Comment, §5-306A].

A guardian may not 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. [§5-309 (g)].

§ 1.3 CONSERVATOR OF A PROTECTED PERSON

§1.3.1 Conceptual References Under the Code

Article V calls for 'protective proceedings' for 'disabled persons,' that is, 'persons to be protected' and each is given specific definition under the Code. [See §5-101 and §1.1 (g) *Definitions*, herein]. A 'protective proceeding' is a generic term for a conservatorship proceeding or other proceeding to address some management of another's estate (i.e. to obtain 'protective orders'). [Comment, §5-401].

Under the Code, the court may appoint a limited or unlimited conservator. [§5-401]. Moreover, without appointing any conservator, the court may make financial management orders, known as

protective arrangements, for the protected person. [§5-408]. Finally, a determination that a basis for appointment of a conservator or other protective order exists is not a determination of incapacity of the protected person. [§5-407 (f)].

The Court has all those powers over the property and business affairs of the protected person which are or may be necessary for the best interest of the protected person and his family; provided, however, that the Court must exercise that authority to encourage the development of maximum self-reliance and independence of a protected person, and make protective orders only to the extent necessitated by the protected person's limitations and other conditions warranting the procedure. [§§5-407(a) & (d)].

§1.3.2 Basis for Conservatorship or Other Protective Order

Appointment of a conservator or other protective order may be made in relation to the estate and financial affairs of an adult disabled person if the court determines that: 1) the person is unable to manage property and business affairs effectively due to 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 2) 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. [§5-401 (c)].

§1.3.3 Appropriate Petitioners, Conservators & Priorities

Any person interested in the estate, affairs or welfare of an individual may petition the court for a determination of disability, in whole or in part, and the appointment of a conservator or for other appropriate protective order. [§5-404].

The Court may appoint any suitable individual or corporation to serve as conservator. [§5-409]. The Code, however, includes a list of those persons entitled to consideration for appointment in the following order:

1. Person nominated in the protected person's most recent durable power of attorney, unless good cause dictates to the contrary;
 2. Conservator or like fiduciary appointed in or recognized by jurisdiction of protected person's residence;
 3. Individual or corporation nominated by a protected person at least 14 years of age and of sufficient mental capacity;
 4. Agent appointed by the protected person under a durable power of attorney;
 5. Parent of the protected person, or any parental nominee; and
 6. Any person deemed appropriate by the Court.
- [§5-409 (a)].

The Court, acting in the best interests of the protected person, may pass over a person having priority and appoint a person having a lower priority or no priority. [§5-409 (b)].

Unless related to the protected person, an owner, operator or employee of a long-term care institution at which the protected person is receiving care or a paid caretaker may not be appointed conservator. [§5-409 (c)].

§1.3.4 The Petition

A proceeding for court appointment of a conservator is commenced by petition. [§5-404 (b)]. The petition must identify the type of conservatorship requested, and if a general conservatorship, the reason why a limited conservatorship is inappropriate. [§5-404 (c)(3)]. If a limited conservatorship is requested, the petition must identify the powers to be granted or property to be placed under the conservator's control. [§5-404 (c)(3)].

The petition includes the petitioner's: 1) identifying information; 2) relationship to the person to be protected; and 3) interest in the appointment. [§5-404 (b)]. It must set forth significant detail with respect to the person to be protected, including, *inter alia*: 1) identifying information; 2) the proposed residential address after appointment; 3) a brief description of the nature of the alleged incapacity; 4) spouse and adult children, or if none, parents and adult siblings, or, if none, heirs apparent or presumptive, 5) identifying information of one who has had care or custody of the person or with whom the person has resided during the last 60 days, 6) identifying information as to any representative payee or trustee of which the person to be protected is a beneficiary, 7) identifying information as to any agent, nominated conservator or currently acting guardian or conservator; and 7) a general statement of income and property and its estimated value. [§5-404 (b); see also, §5-404 (c)(2)]. The petition must also include the proposed conservator's: 1) identifying information; 2) relationship to the person to be protected; 3) basis of suitability; and 4) priority for appointment, if any. [§5-404 (c)].

The petition must state why the appointment of a conservator is in the best interest of the person to be protected. [§5-404 (b)(10)].

The petition must include a statement that a medical certificate dated within 30 days of the filing of the petition is in the possession of the court or accompanies the petition or a verified statement as to why one cannot be obtained. [§5-404 (11)]. The medical certificate is signed by a physician or licensed psychologist. [§5-303 (c)]. It contains: 1) a description of the nature, type and extent of the person's specific cognitive and functional limitations; 2) an evaluation of her mental and physical condition and, if appropriate, her educational potential, adaptive behavior, and social skills; 3) a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and 4) the date of the examination. [§§5-303(c)(1-4)].

§1.3.5 Notice

In a proceeding for the appointment of a conservator, notice is required upon *at least*: 1) the person to be protected; 2) his spouse and children, or, if none, parents and siblings, or, if none, heirs apparent or presumptive; 3) any guardian, conservator or person having, within the last 60 days, the care or custody of the person or with whom the person has resided. [§5-405 (a); §5-304 (a)].

Personal service is required on the person to be protected. [§5-405 (a); §5-304 (c)]. The person to be protected may not waive notice. [§5-304 (d)].

If the person to be protected has disappeared or is otherwise situated so as to make personal service impracticable, notice must be given by leaving a copy of the petition and citation at the person's last and usual place of abode. [§5-405 (a)].

Notice is given to all other interested persons who have not assented by citation through: 1) mailing a copy of the citation at least 14 days prior to the return day to those interested or their counsel, at the office or residence, if known; or 2) delivering personally a copy of the citation at least 14 days prior to the return date; or 3) by publication at least 7 days before the return date. [§5-405; §5-304 (c); §§1-401(a)(1-3)]. If interested persons reside outside of the country or are of parts unknown, the notice period may be extended. Prob.Ct.R. 6.

After full hearing, and after making the requisite determination based upon findings of fact that the conservatorship or protective order is warranted, the Court may appoint a limited or unlimited conservator, or make any other protective order. [§5-407].

§1.3.6 Findings and Order of Appointment

Upon hearing, the court, after due notice, may appoint a conservator if: 1) procedure is proper; 2) the medical certificate is dated and the examination has taken place within 30 days prior to the hearing; 3) the subject is a disabled person; 4) the appointment is necessary or desirable as a means of providing continuing care and supervision of the property and business affairs of the person to be protected; and 5) the person's needs cannot be met by less restrictive means, including use of appropriate technological assistance. [§§5-407 (b)(1-7)].

The appointment of a conservator vests in the conservator fiduciary title to all property, or to the part thereof specified in the order, of the protected person, held at the time of appointment or thereafter acquired. [§5-419 (a)]. An order which vests title to only some of the property of the protected person creates a conservatorship limited to assets specified in the order. [§5-419 (a)].

Any limitation or specification of assets subject to the conservatorship must be endorsed upon the letters of appointment. [§5-425].

§1.3.7 Estate Plans

After full hearing, upon determining that a basis for a protective order exists, and after making appropriate findings of fact, the court has all those powers over the property and business affairs of the adult protected person which are necessary for her best interest or the best interest of her immediate family. [§5-407 (d)]. This includes, *inter alia*, the power to: make gifts; create, revoke or amend trusts; and, make, amend or revoke the protected person's will. [§5-407 (b)].

§1.3.8 Temporary Conservators

While a petition for the appointment of a conservator or other protective order is pending, the court may make necessary orders to preserve and apply the property of the person to be protected for her support or the support of her family, without notice to others. [§5-412A].

While a petition for appointment of a conservator is pending, a temporary conservator may be appointed when no conservator exists, and no other person appears to have the authority to act in the circumstances. [§5-412A (b)]. To appoint a temporary conservator, the court must find that following the routine procedure for permanent appointment will likely result in substantial harm

to the property, income or entitlements of the person to be protected or those entitled to her support prior to the return date. [§5-412A (b)].

A motion for appointment of a temporary conservator must state the nature of the circumstances requiring appointment, the particular harm sought to be avoided, the necessary actions of the temporary conservator to avoid the harm and the identifying information of any agent under a durable power of attorney of the person to be protected. [§5-412A (b)]. The motion must be accompanied by a supporting affidavit. [§5-412A (b)].

In general, the appointment of a temporary conservator is for a period up to 90 days, which may be extended for additional 90 day periods. [§5-412A (d)].

Notice for the appointment of a temporary guardian is in writing, 7 days prior to the hearing, in hand to the person to be protected and by delivery or by mail to all persons named in the petition. [§5-412A (d)].

If the court determines that an immediate emergency situation exists which requires the immediate appointment of a temporary conservator, it may shorten or waive the notice requirements in whole or in part and grant the motion, provided, however, that prior notice shall be given to the person to be protected as the court may order. [§5-412A (e)]. Additionally, under these circumstances, post appointment notice must be given to the person to be protected and those named in the petition stating further that any such person may move to vacate the order of the court or request that the court take any other appropriate action on the matter. [§5-412A (e)]. Within 7 days following the appointment, a certificate stating that this notice has been given must be filed with the court. [§5-412A (e)].

§1.3.9 Protective Arrangements and Single Transactions

Upon petition, notice and hearing, the Court, without appointing a conservator, may address a financial transaction of the adult disabled person if the court determines that: 1) the person is unable to manage property and business affairs effectively due to 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 2) 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. [§5-408; §5-401 (c)].

Under this provision, the court may authorize, direct or ratify any transaction necessary or desirable to achieve any arrangement for security, service or care meeting the foreseeable needs of the protected person. [§5-408 (a)]. So called 'protective arrangements' include, *inter alia*, payment or deposit of funds, sale of personal property, entry into annuity contracts, and contracts for life care. [§5-408 (a)]. The court may authorize, direct or ratify any contract, trust or other transaction relating to the protected person's property and business affairs, including settlement of a claim, if in the protected person's best interest. [§5-408 (b)].

This section of the Code is intended to provide authority for court approval of single transactions or an alternative to a full conservatorship. [MA Comment, §5-408]. It should be noted that sale of real estate is still governed by G.L. c. 202. [MA Comment, §5-408].

In a proceeding for a protective order, notice is required upon *at least*: 1) the person to be protected; 2) his spouse and children, or, if none, parents and siblings, or, if none, heirs apparent or presumptive; and 3) any guardian, conservator or person having, within the last 60 days, the care or custody of the person or with whom the person has resided. [§5-408; §5-405; §5-304 (a)].

Personal service is required on the person to be protected. [§5-408; §5-405 (a); §5-304 (c)]. The person to be protected may not waive notice. [§5-408; §5-405 (a); §5-304 (d)].

If the person to be protected has disappeared or is otherwise situated so as to make personal service impracticable, notice must be given by leaving a copy of the petition and citation at the person's last and usual place of abode. [§5-408; §5-405 (a)].

Notice is given to all other interested persons who have not assented by citation through: 1) mailing a copy of the citation at least 14 days prior to the return day to those interested or their counsel, at the office or residence, if known; or 2) delivering personally a copy of the citation at least 14 days prior to the return date; or 3) by publication at least 7 days before the return date. [§5-408; §5-405; §5-304 (c); §§1-401(a)(1-3)]. If interested persons reside outside of the country or are of parts unknown, the notice period may be extended. Prob.Ct.R. 6.

§1.3.10 Plans, Inventories and Accounts of Conservators

The Court may order a conservator to file a plan for managing, expanding and distributing the protected person's assets. [§5-416 (c)]. The plan must be based on the actual needs of the person and take into consideration his best interests. [§5-416 (c)]. The plan must include steps to develop or restore the person's ability to manage his property, an estimate of the duration of the conservatorship, and projections for expenses and resources. [§5-416(c)].

Within 90 days after qualification, the conservator must prepare and file a verified, detailed inventory of the estate. [§5-417 (a)]. The conservator must provide a copy of the inventory to the protected person, if over 14 years of age, and any guardian or parent with whom the protected person resides. [§5-417 (a)].

The conservator is subject to annual accounting requirements. [§5-418]. Additionally, the conservator must keep suitable records of her administration and exhibit the same upon request of any interested person. [§5-417 (b)].

The Court is required to establish a system for monitoring conservatorships, including the filing and review of conservator's accounts and plans. [§5-418 (f)].

§1.3.11 Powers and Duties of a Conservator

The conservator may distribute or expend income or principal of the estate without court authorization or confirmation for the support, education, care or benefit of the protected person and dependents in accordance with certain principles set out in the Code. [§5-424 (a)].

The conservator must observe the standards of care applicable to trustees as described by the Prudent Investor Act, G.L. c. 203C. [§5-416(a)].

The Code includes an expansive list of powers of a conservator which may be exercised without leave of Court. [§5-423]. These include, *inter alia*, to: 1) invest and reinvest funds; 2) collect and retain assets; 3) continue in the operation of any business; 4) dispose of tangible and intangible

personal property; 5) vote securities; 6) insure assets; 7) borrow money; 8) pay, contest or settle any claim by or against the estate or the protected person; 9) pay sums distributable to the protected person or a dependent; 10) employ persons, including attorneys, auditors, investment advisors, or agents, to advise or assist in the performance of administrative duties and act upon their recommendation without independent investigation; 11) commence, prosecute or defend actions; and 12) execute and deliver all instruments that will facilitate the exercise of the powers vested in the conservator. [§5-423; 5-427; see also §5-423A as to delegation of investment management].

Subject to court approval, a conservator may, *inter alia*: 1) acquire estate assets including land, and lease, manage, improve, or abandon an estate asset; 2) enter for any purpose into a lease or renew for a term within or extending beyond the term of the conservatorship. [§5-423 (c)].

If the estate is ample, the conservator of an adult protected person may make gifts to charity and persons which the protected person has expressed an intent to benefit, in amounts that do not exceed in total for any year 10 percent of the income from the estate. [§5-424 (b)]. The Court may confer upon a conservator of an adult protected person the power to create an estate plan. [§§5-425; §5-407 (d). See §1.3.6 Estate Plans, herein].

A conservator may not sell, mortgage or grant options in real estate, except as provided in G.L. c. 202. [§5-423 (c)].

§1.4 BONDS OF GUARDIANS AND CONSERVATORS

Prior to receiving letters, a guardian must accept appointment by filing a bond containing a statement of acceptance and conditioned upon the faithful discharge of all the duties according to law. [§5-307 (a); See also, §5-208]. A surety is required on the bond of the guardian unless the court determines that it is in the incapacitated person's best interest to waive the surety. [§5-307 (b)]. Language in a durable power of attorney or health care proxy waiving the guardian's bond is akin to a request to waive sureties. [§5-307 (b)]. The court may require additional sureties if it determines that such is in the best interest of the incapacitated person. [§5-307 (b)].

Prior to receiving letters, a conservator, temporary conservator or special conservator must accept appointment by filing a bond containing a statement of acceptance and conditioned upon the faithful discharge of all the duties according to law. [§5-412; §5-410]. A surety is required on the bond of a conservator unless the court waives the requirement for good cause shown by the conservator. [§5-410 (a)]. The court establishes the amount of a bond with sureties. [§5-410 (a)].

A conservator will not be required to furnish sureties on her bond if the conservator was nominated under the protected person's most recent durable power of attorney which expressly waived the requirement. [§5-410 (b)].

Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition for an order requiring sureties, additional sureties or collateral. [§5-415 (a)(1)].

§1.5 GUARDIAN AND CONSERVATOR OF A MINOR

Under the Code, a minor under guardianship is deemed a 'ward,' while adults under guardianship and conservatorship are known as 'incapacitated persons' and 'protected persons,' respectively. [§§ 1-201 (56), 1-201 (22), 1-201 (41)].

§1.5.1 Parental Appointment of Temporary Agent

The parents of a minor may appoint a temporary agent for a 60 day period to exercise authority over the care, custody or property of the minor child. [§5-103 (a)]. This delegation must be: 1) in writing; 2) signed by the parents; 3) attested to by 2 disinterested witnesses; and 4) accepted, in writing, by the temporary agent. [§5-103 (b)].

§1.5.2 Parental Appointment of Guardian

A person may become a guardian of a minor by parental appointment. [§5-201]. A parent may name a guardian of a minor in a signed writing, attested to by 2 witnesses, or by will. [§5-202 (a)]. This appointment becomes effective on: 1) the appointing parent's death; 2) an adjudication that the parent is an incapacitated person; or 3) or a written determination by an examining physician that the parent is no longer able to care for the child. [§5-202 (d); See also, §5-203].

Within 30 days after the appointment becomes effective, the guardian must file a written acceptance of the appointment and petition the Court for confirmation. [§5-202(e)]. Notice is identical to that required for the court appointment of a guardian of a minor (i.e. by citation to delineated interested persons). [§5-202 (e)(2); §5-206(b)].

Upon petition of an appointing parent, upon finding that such parent will likely become unable to care for the minor within 2 years, and after notice by citation to interested persons, the court, before the appointment becomes effective, may confirm and adjudicate the parent's selection of a guardian. [§5-202 (c)]. The appointment, thereafter, becomes effective on: 1) the appointing parent's death; 2) an adjudication that the parent is an incapacitated person; or 3) or a written determination by an examining physician that the parent is no longer able to care for the child. [§5-202 (d)]. Within 30 days after the appointment becomes effective, the guardian must file a written acceptance. [§5-202(e)].

§1.5.3 Effect of Parental Agent and Appointment Provisions

The Code provisions for a temporary agent and a parentally appointed guardian are intended to replace the standby emergency and short term emergency proxy provisions of G.L. c. 201 §2A to 2H. [MA Comment, §5-202]. The purpose of the confirmation of appointment proceeding is to convert the nominated guardianship into a regular guardianship as soon as possible. [Comment, §5-202].

Of course, the parental appointment of a guardian does not supersede the parental rights of either parent. [§5-202 (f)].

§1.5.4 Court Appointment of Guardian of Minor

The Court may appoint a guardian of a minor if: 1) the minor's parents are deceased or incapacitated; 2) the parents consent; 3) the parents' parental rights have been terminated; 4) the parents have signed a voluntary surrender; or 5) the Court finds the parents jointly, or the surviving parent, to be unavailable or unfit to have custody. [§5-204(a)]. A guardian appointed by a parent pursuant to the Code has priority over any guardian who may be appointed by the court. [§5-204 (a)].

The minor or any person interested in her welfare may petition for the appointment of a guardian. [§5-206 (a)]. Notice by citation must be given to interested persons as delineated by the Code, including the minor if she is at least 14 years old. [§5-206; §1-401]. The Court may appoint any person whose appointment would be in the best interest of the minor, and shall appoint a person nominated by the minor, if the minor is at least 14 years old, unless contrary to the child's best interest. [§5-207 (a)].

A temporary guardian may be appointed when no guardian exists, or, if an appointed guardian is not effectively performing his duties and immediate action is required, a special guardian may be appointed for the ward. [§§5-204 (b)-(c)]. A temporary or special guardian may be appointed without notice if immediate action is necessary, provided that, in the case of a temporary guardianship, post appointment notice is required. [§5-204].

The guardian of a ward has the powers and responsibilities of a parent regarding the ward's support, care, education, health and welfare and shall annually report to the Court concerning the ward's condition. [§5-209]. A guardian of a ward may apply for and receive money for the child's support as delineated by the Code. [§§5-209 (c)(1) & (2)].

§1.5.5 Bond of Guardian of a Minor

Prior to receiving letters, a guardian must accept appointment by filing a bond containing a statement of acceptance and conditioned upon the faithful discharge of all the duties according to law. [§5-208]. A surety is required on the bond of a guardian of a minor unless the court determines that it is in the best interest of the minor to waive the requirement. [§5-208 (b)].

§1.5.6 Conservator of a Minor

Upon petition and after notice and hearing in accordance with the Code, the court may appoint a limited or unlimited conservator or make other protective orders. [§5-401 (a)]. An appointment of a conservator or other protective order may be made relative to the estate and affairs of a minor if the court determines that the child has real or personal property requiring management or that funds are needed for her support or education and protection is warranted to obtain or provide money. [§5-401 (b); see also §§5-209 (c)(1) & (2)].

§1.5.7 Creation of Trusts by a Conservator of a Minor

The Code permits the minor's conservator to create a trust for the property of the minor and also allow that trust to extend beyond the age of 18. [§5-407 (c)]. In order to create such a trust, the Court must determine that it is in the best interest of the minor to extend the management and protection of the minor's money and property beyond age 18. [§5-407 (c)(1)]. The trust must provide that: 1) only the minor and her issue are beneficiaries of the trust during the minor's lifetime; 2) upon termination of the trust during the minor's lifetime, the property is to be distributed only to the minor; and 3) upon attaining the age of 18, the minor is afforded both a testamentary and a presently exercisable general power of appointment over the property. [§§5-407 (c)(2-4)]. Upon the minor's death, to the extent that the minor fails to exercise the power to appoint, the trust must provide for the distribution of the property to such relatives as would be likely recipients of legacies from the minor. [§5-407 (c)(5)]. After full hearing, if in the minor's best interest, the court may amend the trust. [§5-407 (c)]. The court retains jurisdiction over the trust while it continues to exist. [§5-407 (c)].