

Introduction to Guardianship and Competence

Basic Training Materials

Civil Courts

Presumption of Competence

Under Massachusetts law, individual 18 years or older is presumed competent to conduct personal and financial affairs. [115 CMR 5.07].

Only a court can adjudicate incompetent and appoint guardian to make decisions in the best interest of ward.

Guardianships Should be Narrowly Tailored

- Guardianship involves substantial loss of liberty therefore the least restrictive model, (appropriate to the individual's needs) should be pursued.

The assessment for competence on the basis of mental retardation, is called a Clinical Team evaluation.

- This evaluation results in a report which provides information on an individual's guardianship needs.

Legal Standard: guardianship on the basis of mental retardation M.G.L. c 201 s. 6A

Person is mentally retarded to the degree that s/he is
incapable of making informed decisions with respect to
the conduct of his/her personal and financial affairs

AND

failure to appoint a guardian would create an
unreasonable risk to health, welfare and property,

AND

Appointing someone with more limited powers
(i.e. a conservator, trustee, or more limited guardian)
would not be sufficient.

Legal Standard (cont)

- A probate court may also appoint guardians for minors, mentally ill persons, and persons unable to make or communicate informed decisions based on physical incapacity or illness. M.G.L. c. 201, Section 1.

Equal Right To Take Risks/Make Bad Decisions

- A competent person may make harmful, unreasonable or even foolish decisions concerning personal and financial affairs. Simply because a person arrives at a decision different from most others is not sufficient basis for pursuing guardianship.
- Incompetence is demonstrated only by facts showing that a person *does not have the **cognitive or functional capacity** to understand a problem and make an informed decision* even when the facts and consequences are clearly and simply explained to them.

Alternatives to Full Guardianship

- Joint bank accounts with trusted family member, appointment of representative payee, trust, health care proxy, guardian with limited authority such as medical guardian or conservator.
- Decision making with supports: Individual's family, friends and staff advice, support and guide decision-making.
- Modification of living circumstances: eg. increase structure or support.
- Modification of services such as increased staff supervision, the addition of mental health services, a more intensive day program, evaluation for treatment with medication, etc.

Alternatives continued...

- Identification of Advocate: Pursue availability of citizen advocacy programs/community support services to address specific issue e.g. need for more assistance with medical appointments, more socialization, etc.
- Education/training specific to the skill area, which needs development.
- Implementation of shared or delegated financial management plan (see 115 CMR 5.10)

The Clinical Team Report: Guardianship Based on MR

- The CTR is a probate court form developed pursuant to the guardianship statute. M.G.L. c. 201, section 6A.
It is used to outline facts and professional opinions leading a team of clinicians to recommend that the court find an individual incompetent by reason of mental retardation.
- The CTR is a sworn statement signed under the penalties of perjury.
- The examining clinicians must include a registered physician, a licensed psychologist and a social worker, or a clinical nurse specialist, each experienced in evaluation of mentally retarded persons.

Clinical Team Report continued...

- A Clinical Team Report (CTR) must include a coherent recommendation, which is agreed upon by all the clinicians who must all sign it. This recommendation should be tailored to the needs of the individual who has been evaluated.
- The original must be filed with the Court.
- The CTR expires if not filed with the court within 180 days after the first exam.

Referral for Clinical Team Evaluation

- The decision to initiate a Clinical Team evaluation may be made at any time.
- Typically an individual's capacity to make his/her own decisions is raised during a yearly ISP or Risk Management meeting.
- There may also be an incident or a series of events which give rise to questions regarding competency.
- The Service Coordinator (or other Area Office designee) is typically the one who initiates the referral.
- Area offices may have a slightly different methods for referring an individual for a clinical team evaluation.

Substituted Judgment –Special Court Authority

- The Massachusetts Supreme Judicial Court has determined that decisions involving highly intrusive medical procedures and treatment must be made by a probate court applying the “substituted judgment” doctrine.
- Even a duly appointed guardian must seek a court’s approval before giving or withholding consent to such treatment or procedure.
- In a substituted judgment proceeding the court attempts to “stand in the shoes” of the ward and determine what s/he would choose if competent. This differs from guardianship standard, which is “best interests” of the ward.
- An attorney is appointed and a Guardian Ad Litem (GAL) may also be appointed to investigate and make specific findings and recommendations.

Procedures Requiring Substituted Judgment Determination

Decisions about treatment of an incompetent individual in the following areas require a specific order from the court

- Administration of antipsychotic medication; (Rogers orders)*
- Provision/Withdrawal of life-prolonging treatment
- Psychosurgery
- Electroshock therapy
- Sterilization

Substituted Judgment continued

- Abortion
- Level III behavior modification plans
- Other “extraordinary” medical procedures and treatments
- A guardian cannot commit a ward to a psychiatric facility for an extended period of time without a hearing

Questions about whether a specific procedure requires a substituted judgment determination should be directed to the Legal Office

“Rogers” Orders

- Substituted judgment is most often discussed in the context of a treatment with antipsychotic medication. Such cases are known as “Rogers” cases because a substituted judgment prior to administration of antipsychotic medication to an incompetent individual was first required in the Massachusetts case, Rogers v. Commissioner of Dept. of Mental Health., 390 Mass. 489, 458 N.E. 2d 308.
- In such cases the court will appoint an attorney for the individual and someone to monitor the individual’s treatment plan (the Rogers monitor) who may be the same person as the guardian or may be someone different).

“Rogers” Orders continued...

- The Legal Office gets a sworn, signed affidavit/treatment plan from the physician who prescribes the antipsychotic medication. It is this affidavit/treatment plan that the court must approve before antipsychotics will be administered to an incompetent individual. An individual's treatment with antipsychotics is typically reviewed by the court every year.

Health Care Proxy- (only for competent individuals)

- A health care proxy or “advance health care directive” is a legal document that allows a **competent** individual (known as the “Principal”) to designate another individual (known as the “Agent”) to make health care decisions on his or her behalf in the event that the Principal becomes unable to make or communicate such decisions in the future. M.G.L.c.201D.
- The proxy document only goes into effect when the Principal becomes unable to make informed health care decisions as determined by the Principal’s (individual’s) physician.

Health Care Proxy (continued)

- A health care proxy allows competent individuals to protect their right to make important choices regarding their health care should they later be unable to do so, whether due to serious illness, injury, dementia, unconsciousness or coma.
- Executing a proxy may eliminate the need for appointment of a guardian or for substituted judgment determinations before a probate court.
- In some cases, the proxy document simply names the individual the principal trusts to act on his or her behalf in the event of incapacity. In other proxy documents the Principal may actually direct the agent with respect to his or her specific medical treatment wishes.

Health Care Proxy continued...

- A Health Care Proxy does **NOT** require court approval but must be witnessed and signed by the individual, the proposed health care agent and two witnesses.
- If the Principal regains capacity, the Agent's authority ends.
- The Health Care Proxy is revoked if the Principal
- Executes a new proxy
- Notifies his or her physician orally or in writing of intent to revoke proxy or engages in action which clearly demonstrates intent to revoke the proxy such as tearing up or destroying document.

Refusing Extraordinary Treatment Authorized by Health Care Agent

- **A health care agent's authority may include decisions regarding extraordinary treatment.**
- But in the event that a resident of a DMR operated or funded program physically or verbally continues to reject such treatment, and if such treatment would otherwise require court approval, the legal office will typically recommend that substituted judgment be sought for that treatment.

Competence to Stand Trial/ Criminal Responsibility

MGL c. 123 s15

MGLc.123 s15

- There is a distinction when talking about “competence” in a criminal context. The standard here is very different and significantly lower.
- Competence to stand trial has its own meaning as follows:

Competence to Stand Trial

The test for **competence to stand trial** is whether or not the defendant has sufficient present ability to understand the nature of the charges, the role of counsel and the court, and the ability to assist his/her attorney in the preparation of a defense.

The court clinician (the Designated Forensic Psychologist) is usually the first one to assess the defendant for competency to stand trial and make recommendations to the court. DMR is often involved in making the referral to the DFP.

Criminal Responsibility

The test for **criminal responsibility** relates to defendant's ability to understand the wrongfulness of his/her conduct. A person will not be held criminally responsible if he/she lacks substantial capacity to understand the criminal nature or wrongfulness of his/her acts. Lack of capacity must be result of mental disease or defect existing *at the time of the offense*.