CHAPTER 4

Guardianship

Scope Note

This chapter introduces the reader to the procedures pursuant to G.L. c. 190B, where guardianship and surrogate decision-making authority on behalf of an adult is at issue and in which the right to counsel obtains.

§ 4.1 INTRODUCTION

Whenever there is a petition seeking the appointment of a guardian or a conservator, issuance of a protective order to manage property, or for the termination or modification of any such appointment or order, the Probate and Family Court must appoint counsel if requested by the subject of the petition (hereinafter "the client") or someone on the client's behalf, or if the court "determines at any time in the proceeding that the interests of the [client] are or may be inadequately represented." G.L. c. 190B, § 5-106(a). Counsel also must always be appointed when either treatment for which a substituted judgment determination is required or when short-term admission to a nursing facility is sought. G.L. c. 190B, §§ 5-306(A)(a), 5-309(g).

This chapter deals with proceedings, pursuant to G.L. c. 190B, in which surrogate decision-making authority on behalf of an adult is at issue and where there is a right to counsel. The capacity and substituted judgment discussions that appear in this chapter are also applicable to G.L. c. 123, § 8B proceedings in the District, Municipal, and Juvenile Courts.

Counsel for indigent adults against whom guardianship petitions are filed under G.L. c. 190B is assigned by the Probate and Family Court from lists of Mental Health Litigation Division–certified attorneys. Counsel for minors in such proceedings will be provided by the Children and Family Law Division of CPCS.

§ 4.2 COMPETENCE AND CAPACITY

In Massachusetts, once an individual turns eighteen years old, they are "presumed competent unless demonstrated to be incompetent by a preponderance of the evidence. See Guardianship of Roe, 383 Mass. 415, 425 (1981); Guardianship of Jackson, 61 Mass.App.Ct. 768, 769 (2004)." Scanzani v. Scanzani, 84 Mass. App. Ct. 1102 (2013).

In some circumstances, a minor may be permitted to make certain decisions regarding treatment. G.L. c. 112, §§ 12E (medical care and hospitalization related to diagnosis or treatment of drug dependency for child twelve years of age or older), 12F (medical or dental care for mature minor); *see* 104 C.M.R. § 25.03. "In certain contexts . . . a mature minor may be entitled to make informed medical decisions." *Commonwealth v. Robinson*, 74 Mass. App. Ct. 752, 762 (2009); *see Baird v. Attorney Gen.*, 371 Mass. 741, 754–55 (1977); *see also* Department of Children and Families regulations at 110 C.M.R. § 2.00 (2008) ("[a] child who is 14 years old or older is presumed to be a mature child").

Adults are presumed competent to make decisions about health care other than in the following circumstances:

- A life-threatening emergency in which the person is unconscious or otherwise unable to provide consent to treatment and the harm from the failure to treat is imminent and outweighs any risk posed by the treatment. If time permits, a phy-

sician should attempt to obtain the consent of a close family member of the person. If none is available or if time does not permit, the physician may administer life-saving procedures. *Shine v. Vega*, 429 Mass. 456 (1999).

- Where the person's behavior places the person or others at imminent risk of serious physical injury, the person may be restrained in accordance with state law and regulations. Where chemical restraint would be the least restrictive method by which to effectively and safely control the dangerous behavior, antipsychotic medication may be administered over the person's objection. *Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. 489, 507–11 (1983). *Rogers* defines an emergency as "an unforeseen combination of circumstances or the resulting state that calls for immediate action." This form of forced medication may only occur in an emergency, and only if the facility follows the requirements for utilizing chemical restraint.
- Where a person, thought to be incompetent by treating clinicians, refuses to accept treatment with antipsychotic medication and such refusal is likely to result in the "immediate, substantial and irreversible deterioration" of the person's mental condition. Such medication may be administered on a short-term basis in order to stabilize the person while judicial authorization is pursued. *Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. at 512.
- Where the authority to make certain decisions is delegated to another. Such delegation must be executed at a time when the person is capable of fully understanding the consequences thereof, and may be drafted so as to be effective only while the person is competent (e.g., a power of attorney), to be effective only while the person is incompetent (e.g., a health-care proxy—G.L. c. 201D), or to be effective during either circumstance (e.g., a valid durable power of attorney under G.L. c. 190B, § 5-501).
- A judicial determination that the person is incapable of providing informed consent. *Guardianship of Roe*, 383 Mass. 415, 442 (1981) (adult presumed competent unless evidence proves otherwise).

A client's admission to, or retention at, a psychiatric facility, whether voluntary or involuntary, is not determinative of incompetency. G.L. c. 123, § 24; *see Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. at 512; *Guardianship of Roe*, 383 Mass. 415, 442 (1981).

§ 4.2.1 Competence and Capacity—Legal Standard—G.L. c. 190B

Individuals can be placed under guardianship if found, by a preponderance of the evidence, to be incapacitated. G.L. c. 190B, § 5-306(b)(6). An incapacitated person is defined as

> an individual who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an in-

> ability 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.

G.L. c. 190B, § 5-101(9).

General Laws c. 190B provides guidance as to what decision-making deficiencies must be found before anyone can be placed under guardianship or conservatorship. Counsel must remain vigilant to ensure that it is the *process* by which a client arrives at decisions, rather than the decisions themselves, that the court looks to in determining incapacity or disability. People who make choices with which others agree are not necessarily possessed with sufficient decision-making capacity; those who make what others believe are bad decisions are not necessarily incapacitated. That a decision may universally be considered wrong or foolish may be an indication of incapacity or disability, but it is not dispositive of the issue. Competent adults have the right "to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks however unwise his sense of values may be in the eyes of the medical profession." *Harnish v. Children's Hosp. Med. Ctr.*, 387 Mass. 152, 154 (1972) (quoting *Wilkinson v. Vesey*, 295 A.2d 676, 687–88 (R.I. 1972)); *see, e.g.*, *Lane v. Candura*, 6 Mass. App. Ct. 377 (1978) (life-saving treatment may be refused if consequences understood).

§ 4.2.2 Competence and Capacity—The Clinical Perspective

There is a consensus in the psychiatric and psychological communities that the following four factors or abilities should be assessed in evaluating a person's competence:

- Comprehension—the ability to comprehend information pertinent to the decision to be made. That is, is the person able to understand that, in the opinion of a clinician, they suffer from a particular ailment, and are they able to understand the basis of such an opinion? Does the person understand the procedure or treatment that has been prescribed, its anticipated benefits, its possible side effects, the likelihood that any such side effects will occur, and, if so, their potential severity? Does the person understand that alternative procedures or treatments are available, and their risks and benefits? Finally, does the person understand why the treating clinician considers the prescribed procedure to be preferable to the available alternatives?
- Appreciation—the ability to appreciate the relevance of information pertinent to the person's circumstances. That is, does the person understand the implication to them of the information? Does the person acknowledge the existence of the described ailment? Does the person appreciate the consequences of undergoing the prescribed treatment (or alternative treatments, if any) or of refusing all treatment? *Compare Guardianship of John Roe*, 411 Mass. 666 (1992) (where refusal to accept diagnosis of mental illness results from denial of objectively established historical and behavioral circumstances serving as basis of diagnosis, determination that client unable to appreciate benefits of prescribed

treatment and adjudication of incompetency warranted), *with Starson v. Swayze*, 2003 S.C.C. 32, [2003] 1 S.C.R. 722 (where historical and behavioral circumstances serving as basis of diagnosis understood, refusal to acknowledge diagnostic label not indicative of incompetence). "Canada has been a leader in advancing the human rights of persons with intellectual disabilities, and there is much to learn from our neighbor to the North. Because Canada is a federal system, over the past decade or so its provinces have developed a number of different models. While none represent pure supported decision-making, a number of provinces have moved, in various degrees, away from the prior model of substituted decision-making, toward a more autonomy-producing regime. The Supreme Court of Canada has clearly enunciated the right to autonomy of persons with intellectual disabilities, noting that '"[u]nwarranted findings of incapacity severely infringe upon a person's right to self-determination"' and has recently emphasized the value of autonomous decision-making for allegedly incapable people." Kristin Booth Glen, "Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond," 44 *Colum. Human Rights L. Rev.* 93, 145 (2012). A thorough discussion of supported decision making is beyond the scope of this chapter. For information on this important alternative to guardianship from the Center for Public Representation, review the material at https://supporteddecisions.org.

- Reasoning—the ability to use logical thought processes to compare the risks and benefits of the various treatment options. Is the person able to use the pertinent information in such a way as to make a reasoned choice regarding the proposed treatment? The existence of this reasoning ability is not dependent upon the particular decision that is made; rather, it is the process by which the decision is reached, and not the decision itself, that is significant. In order that a choice be reasoned, there must be a nexus between the information provided and the decision made (i.e., the reasoning process must utilize pertinent data).
- Consistency—the ability to maintain and communicate a consistent choice. While changing one's mind may be entirely reasonable, the inability to maintain a consistent position is often indicative of substantial impairment.

See, *e.g.*, Thomas Grisso, "Evaluating Competencies: Forensic Assessments and Instruments," *Springer Sci. & Bus. Media* (2006); Finucane, M.L. & Gullion, C.M., "Developing a tool for measuring the decision-making competence of older adults," 25(2) *Psychol. & Aging* 271–88 (2010); Sessums, L.L., Zembrzuska, H. & Jackson, J.L., "Does This Patient Have Medical Decision-Making Capacity?," 306(4) *JAMA* 420–27 (2011).

§ 4.2.3 Degree of Incompetence or Incapacity

The issue to be resolved in assessing competence or capacity is the client's ability to make informed choices in specific decision-making areas. To label a client as incompetent or as an incapacitated person is, in most cases, inaccurate; few people are in fact incompetent to make all decisions. The evaluator should consider the degree or level of incompetence or incapacity. A client may be entirely unable to make informed decisions in some areas but fully competent to do so in others. For example, the person

may be unable to provide informed consent to medical treatment, but may be able to prudently manage finances. A client may be able to provide informed consent to some forms of medical treatment, but not others. "A person may be adjudicated legally incompetent to make some decisions but competent to make other decisions." *Matter of Moe*, 385 Mass. 555, 567–68 (1982); *see also Cohen v. Bolduc*, 435 Mass. 608, 618 n.25 (2002) (citing *Matter of Moe*, 385 Mass. 555, 567–68). The capacity "to make treatment decisions" is distinct from the capacity "to make informed decisions as to [one's] property or financial interests." *See Cohen v. Bolduc*, 435 Mass. at 618 n.25 (quoting *Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. 489, 497 (1983), and *Fazio v. Fazio*, 375 Mass. 394, 403 (1978)).

Competence may vary over time. A client may be competent to make a decision about a particular matter at one point in time, while incompetent to do so for this same matter at another time. The issue before the court is the client's present ability to make informed decisions with respect to the treatment proposed. *Guardianship of Pamela*, 401 Mass. 856, 858 (1988). The degree of current incapacity and areas in which decision-making abilities remain intact must be addressed by the treating physician in the medical certificate accompanying the petition. *See* Form MPC 400, Medical Certificate Guardianship or Conservatorship. The physician is required to address the areas in which the individual is able to, and unable to, meet the essential requirements for physical health, safety, and self-care. As part of an order for guardianship, the court must make explicit the rights that the incapacitated person retains. *See* Form MPC 720, Decree and Order of Appointment of Guardian for an Incapacitated Person.

§ 4.3 BURDEN AND STANDARD OF PROOF

Where a judicial determination of incompetence is sought, the person alleging the incompetence, the petitioner, bears the burden of proof. *Willett v. Willett*, 333 Mass. 323, 324 (1955). In order to make such a determination, the court must find, by a preponderance of the evidence, that the person is incapable of making informed decisions or of providing informed consent regarding personal health, safety, and general welfare. *Guardianship of John Roe*, 411 Mass. 666 (1992); *Guardianship of D.C.*, 479 Mass. 516 (2018); G.L. c. 190B, § 1-109.

§ 4.3.1 Admission or Commitment to Mental Health or Retardation Facilities

"No guardian shall be given the authority under this chapter to admit or commit an incapacitated person to a mental health facility or a mental retardation facility as defined in the regulations of the department of mental health." G.L. c. 190B, § 5-309(f). Note that the passage of the Massachusetts Uniform Probate Code (MUPC) abrogates the provision of G.L. c. 123, § 10 that authorizes a guardian to admit a person to an inpatient mental health facility.

§ 4.3.2 Practice Advisory

Any guardianship can result in a substantial deprivation of autonomy—the equivalent of a "civil death." Former Congressman Claude Pepper famously said of guardianships that "[t]he typical [person subject to guardianship] has fewer rights than the typical convicted felon. . . . It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty." *See Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination for People with Disabilities*, *available at* https://ncd.gov/publications/2018/beyond-guardianship-toward-alternatives. The burden of proof is on the petitioner to prove both present incapacity and the need for the proposed limitations on the client's decision-making ability. Counsel must file an objection to the guardianship petition and should never acquiesce to the petition without thorough investigation. Guardianship petitions and the accompanying medical certificates tend to focus on, and may overstate, the individual's deficits. Once the objection is filed, counsel is ethically required to investigate the client's wishes and capabilities, as well as less restrictive alternatives to guardianship. The use of an independent medical evaluator (IME) must always be considered in initial guardianship cases, particularly ones that seek substituted judgment for extraordinary treatment. The IME will conduct an independent assessment of the respondent's capacity, and even if some type of guardianship decree is entered, an IME may be able to help limit the guardianship and proposed treatment plan.

§ 4.4 INITIATING THE GUARDIANSHIP PROCEEDING

§ 4.4.1 Venue

Venue for a guardianship proceeding for an incapacitated person is in the Probate & Family Court at the place where the incapacitated person resides or is present at the time the proceedings are commenced, or, in the case of a nomination by will (*see* G.L. c. 190B, § 5-301), in the court of the county in which the will was or could be probated. G.L. c. 190B, § 5-105(a)(2). If the respondent has been admitted to a facility referred to in G.L. c. 111, § 70E, venue is also in the county in which that facility is located. G.L. c. 190B, § 5-105(a)(2).

If proceedings are initiated in more than one court, the court in which the proceeding is first brought has the "exclusive right to proceed unless that court determines that venue is properly in another court or that the interests of justice otherwise require that the proceeding be transferred." G.L. c. 190B, § 5-105(b).

§ 4.4.2 Who May Petition?

"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." G.L. c. 190B, § 5-303(a).

Interested persons include, among others, heirs, children, and spouses, as well as persons having priority for appointment as personal representatives, and other fiduciaries representing such persons. G.L. c. 190B, § 1-201(24). (For a discussion of who can petition for or intervene in a guardianship, see *Guardianship of B.V.G.*, 474 Mass. 315 (2015).)

§ 4.4.3 Contents of the Guardianship Petition

General Laws c. 190B, § 5-303(b) requires that the petition contain at least the following information:

- the petitioner's name, residence, and address, their relationship to the alleged incapacitated person, and their interest in the appointment;
- the name, age, current residence, and date such residence was established of the alleged incapacitated person;
- the address where the alleged incapacitated person will reside if the appointment is made;
- a brief description of the nature of the alleged incapacity, and whether
  - the person is alleged to have an intellectual disability (still termed "mental retardation" in the statute);
  - authorization to consent to treatment for which a substituted judgment determination may be required is sought; or
  - court authorization to admit the alleged incapacitated person to a nursing facility is sought;
- the name and address of the proposed guardian, their relationship to the alleged incapacitated person, the reason why they should be selected, and the basis of the claim, if any, for priority for appointment;
- the name and address of the alleged incapacitated person's spouse and children, or, if none, parents and siblings, or, if none, heirs apparent or presumptive and the ages of any who are minors, "so far as known or ascertainable with reasonable diligence by the petitioner";
- the name and address of the person who has care or custody of the alleged incapacitated person, or with whom the person has resided during the sixty days (exclusive of any period of hospitalization or institutionalization) preceding the filing of the petition;
- the name and address of any representative payee;
- the name and address of any person nominated as guardian by the alleged incapacitated person, and the name and address of any person then serving as guardian or conservator of the alleged incapacitated person, in the Commonwealth or elsewhere;
- the name and address of any agent designated under a durable power of attorney or health-care proxy of which the alleged incapacitated person is the principal,

if known to the petitioner (a copy of any such instrument is to be filed with the petition, if available);

- the reason why a guardianship is thought to be necessary, the type (i.e., the scope) of guardianship requested, and, if a general (plenary or full) guardianship, the reason why limited guardianship is inappropriate, and, if a limited guardianship, the powers to be granted to the limited guardian;
- a statement that
  - a medical certificate dated within thirty days of the filing of the petition, or, in the case of a person alleged to be mentally retarded, a clinical team report dated within 180 days of the filing of the petition, is in the possession of the court or accompanies the petition; or
  - there exist circumstances that make it impossible to obtain a medical certificate or clinical team report, supported by affidavits describing the nature of such circumstances and meeting the requirements set forth in Mass. R. Civ. P. 4.1(h); if sufficient, the court may waive or postpone the requirement of filing of a medical certificate or clinical team report; and
- a general statement of the property and income of the alleged incapacitated person.

(a) *Medical Certificate*

Except in the case of a person alleged to be incapacitated by reason of mental retardation, a medical certificate dated within thirty days of the filing of the guardianship petition must be filed with the court. G.L. c. 190B, § 5-303(b)(11)(A). However, if the court finds that circumstances exist that make the certificate "impossible to obtain," its filing may be waived or postponed. G.L. c. 190B, § 5-303(b)(11)(B).

The medical certificate must be signed by a physician, certified psychiatric nurse clinical specialist, nurse practitioner, or licensed psychologist, and must contain the following:

- a description of the nature, type, and extent of the alleged incapacitated person's specific cognitive and functional limitations;
- an evaluation of the person's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;
- the prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and
- the date of any examination upon which the report is based.

G.L. c. 190B, § 5-303(c).

Reasonable expenses incurred in securing a medical certificate are to be paid by the petitioner, the estate of the alleged incapacitated person, or the Commonwealth, as determined by the court. G.L. c. 190B, § 5-303(f).

(b) *Clinical Team Report*

Where guardianship is sought for a person alleged to be incapacitated by reason of intellectual disability, a clinical team report dated within 180 days of the filing of the guardianship petition must be filed with the court. G.L. c. 190B, § 5-303(b)(11)(A). However, if the court finds that circumstances exist that make the clinical team report "impossible to obtain," its filing may be waived or postponed. G.L. c. 190B, § 5-303(b)(11)(B).

The clinical team report must be signed by a clinical team consisting of a physician, a licensed psychologist, and a social worker, each of whom is experienced in the evaluation of persons with intellectual disabilities and who has examined the person. G.L. c. 190B, § 5-303(d).

Reasonable expenses incurred in securing a clinical team report are to be paid by the petitioner, the estate of the alleged incapacitated person, or the Commonwealth, as determined by the court. G.L. c. 190B, § 5-303(f).

§ 4.4.4 Notice of the Petition and Citation

Upon the filing of a guardianship petition, the court must set a return date and issue a citation. G.L. c. 190B, § 1-401. The petitioner must then serve notice of the petition and the return date upon all interested persons (or their attorneys), as described below, as follows:

- by mailing a copy of the citation at least fourteen days before the return date by certified, registered, or ordinary first-class mail; or
- by delivering a copy of the citation to the person being notified personally at least fourteen days before the return date (note that notice must be served personally upon the alleged incapacitated person, G.L. c. 190B, § 5-304(c)); or
- by publishing a copy of the citation once in a newspaper, designated by the register of probate, at least seven days before the return date.

G.L. c. 190B, § 1-401(a).

Counsel should always confirm that proper service was made on the respondent, even when assigned as counsel in an established guardianship where a *Rogers* order or nursing home placement is sought. There are documented cases where petitioner's counsel has failed to properly notify the respondent and then filed a motion to waive the presence of the respondent at any hearing or trial.

The court, for good cause shown, may provide for a different method or time of giving notice for any return date. G.L. c. 190B, § 1-401(b).

Notice is to be given by the petitioner to

- the alleged incapacitated person;

- the person's spouse and children, or, if none, the person's parents and siblings, or, if none, the person's heirs apparent or presumptive (or, if no such persons can be served, at least one of the nearest adult relatives, if any can be found);
- any person who is then serving as guardian, conservator, or who has the care or custody of the person or with whom the person has resided during the sixty days (exclusive of any period of hospitalization or institutionalization) preceding the filing of the petition;
- all other persons named in the petition;
- if the person is alleged to be mentally retarded, the Department of Developmental Services;
- the U.S. Department of Veterans Affairs, where applicable; and
- any other person as directed by the court.

G.L. c. 190B, § 5-304(a).

Proof of the giving of notice must be made on or before the hearing or return day and filed in the proceeding. G.L. c. 190B, § 1-401(c).

Notice of all proceedings subsequent to the appointment of a guardian is to be given to the incapacitated person, the guardian, and any other person, as ordered by the court. G.L. c. 190B, § 5-304(b).

As noted above, the alleged incapacitated person must be personally served with the citation and petition. G.L. c. 190B, § 5-304(c). They may not waive notice. G.L. c. 190B, §§ 1-402, 5-304(d).

§ 4.4.5 Opposition to the Petition

Any party who opposes the guardianship petition, for any reason, must enter an appearance, in writing, no later than 10:00 a.m. on the return date. G.L. c. 190B, § 1-401(d).

Within thirty days after the return date, an objecting party must file an affidavit of objections, stating the specific facts and grounds upon which the objection is based. G.L. c. 190B, § 1-401(e). Failure to do so may result in the objecting party's appearance being struck. G.L. c. 190B, § 1-401(f).

§ 4.5 ASSIGNMENT OF COUNSEL

An incompetent person against whom is filed a petition seeking the authority to administer extraordinary treatment is presumed to be indigent. SJC Rule 3:10, §§ 1(h)(iii)(2), 6. The court should immediately appoint counsel from CPCS's list of certified mental health attorneys.

If the person refuses legal representation, the court must determine whether the person's waiver is competent. Before allowing a waiver of counsel, the judge, after conducting a colloquy with the person, shall make written findings that the person is competent to waive counsel and that the person has knowingly and voluntarily elected to proceed without counsel. SJC Rule 3:10, § 3. "Notwithstanding a party's waiver of counsel, where the interests of justice require, the judge may assign standby counsel to assist the party in the course of the proceedings. . . ." SJC Rule 3:10, § 4. If the person objects to a particular attorney despite that attorney's best efforts to establish an effective professional relationship, the attorney should move the court to permit withdrawal, and move that successor counsel be assigned. In doing so, of course, counsel must be careful to avoid divulging any confidential information or other information that could be harmful to the person's interests. The court should determine whether the person's objections are reasonable. If so, the motions should be allowed and successor counsel appointed. If not, the motion to withdraw should be denied and the attorney should continue as counsel or be directed to serve as standby counsel. SJC Rule 3:10, §§ 3, 4, 6.

§ 4.5.1 Hearing

The alleged incapacitated person has the right to be present at any hearing, to be represented by counsel, to present evidence, and to cross-examine witnesses. G.L. c. 190B, § 5-106(c). Counsel is not always assigned (see § 4.1, above). If assigned to an established guardianship, counsel should check to see if the petitioner filed a motion in the initial guardianship to waive the presence of the respondent at the guardianship hearing. If so, it may be that the respondent has no actual knowledge of the proceedings.

The patient-psychotherapist privileges established by G.L. c. 233, § 20B (applicable to psychiatrists, psychologists, and psychiatric nurses) and G.L. c. 112, § 135A (applicable to social workers) do not preclude the

> filing of reports or affidavits, or the giving of testimony . . . for the purposes of obtaining treatment of a person alleged to be incapacitated; provided, however, that such person has been informed prior to making such communication that they may be used for such purpose and has waived the privilege.

G.L. c. 190B, § 5-306A(e).

The court may appoint a guardian ad litem to "investigate the condition of the [alleged] incapacitated person . . . and make appropriate recommendations to the court." G.L. c. 190B, § 5-106(b).

The hearing may be closed at the request of the alleged incapacitated person or their counsel. G.L. c. 190B, § 5-106(c).

"Any person may apply for permission to provide information in the proceeding and the court may grant the request, with or without hearing, upon determining that the

best interest of the person to be protected will be served thereby. The court may attach appropriate conditions to the permission." G.L. c. 190B, § 5-106(d).

§ 4.5.2 Required Findings and Orders

The court must tailor its guardianship order to the specific decision-making needs of the incapacitated person: "The court shall exercise [its] authority . . . so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure." G.L. c. 190B, § 5-306(a). To that end, "the court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian . . . and thereby create a limited guardianship." G.L. c. 190B, § 5-306(c). Where a limited guardianship is ordered, the limitations on the guardian's decision-making authority are to be specified in the court's order. G.L. c. 190B, § 5-306(c).

After hearing, the court may appoint a guardian if it finds that

- a qualified person is available to serve as guardian;
- venue is proper;
- the required notices have been given;
- a medical certificate is dated and examination has taken place within thirty days prior to the hearing, or a clinical team report is dated and examinations have taken place within 180 days prior to the filing of the petition;
- the person for whom a guardian is sought is an incapacitated person, as defined in G.L. c. 190B, § 5-101(9);
- the appointment is "necessary or desirable as a means of providing continuing 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."

G.L. c. 190B, § 5-306(b); *Guardianship of D.C.*, 479 Mass. 516 (2018).

The standard of proof as to each of these criteria is a preponderance of the evidence. G.L. c. 190B, § 1-109.

§ 4.5.3 Practice Advisory

The mandate that a guardianship decree be tailored and limited so as to be no more intrusive than necessary may be the most important change brought about by the adoption of the MUPC in 2009. The role of respondent's counsel in making this change a meaningful reality for clients cannot be overstated. If the guardianship petition will not be dismissed, counsel should explore ways in which the decree should be limited in order to preserve the client's rights. *Guardianship of B.V.G.*, 474 Mass. 315 (2015);

Guardianship of D.C., 479 Mass. 516 (2018). During the annual *Rogers* reviews, counsel should be alert to changes in circumstances that make previously imposed limitations of the respondent's rights inappropriate.

§ 4.6 WHO MAY SERVE AS GUARDIAN?

Any qualified person may be appointed guardian of an incapacitated person. G.L. c. 190B, § 5-305(a). The court "shall appoint a guardian in accordance with the incapacitated person's most recent nomination in a durable power of attorney" unless there is other good cause not to accept the nomination. G.L. c. 190B, § 5-305(b).

Where no such nominee exists, the following persons, if suitable and in the order listed, are to be considered for appointment:

- the spouse of the incapacitated person or a person nominated by will of a deceased spouse or by other writing signed by the spouse and attested to by at least two witnesses, G.L. c. 190B, § 5-301(b);
- a parent of the incapacitated person, or a person nominated by will of a deceased parent, G.L. c. 190B, § 5-301; and
- any person the court deems appropriate.

G.L. c. 190B, § 5-305(c). Where persons have equal priority, the court is to select the one it deems best suited to serve. Further, the court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having a lower priority or no priority. G.L. c. 190B, § 5-305(d).

§ 4.7 EMERGENCY ORDERS AND TEMPORARY AND SPECIAL GUARDIANS

While a guardianship petition is pending, if the court finds that "immediate and substantial harm to the health, safety or welfare of the person alleged to be incapacitated" will likely occur prior to the return date, the court may, on appropriate motion, appoint a temporary guardian. G.L. c. 190B, § 5-308(a).

The motion, accompanied by an affidavit, must state the "nature of the circumstances requiring appointment, the particular harm sought to be avoided, the actions which will be necessary by the temporary guardian to avoid the occurrence of the harm," and the name and address of any agent designated under a health-care proxy or durable power of attorney. G.L. c. 190B, § 5-308(a).

The petitioner must give written notice seven days prior to any hearing for the appointment of a temporary guardian in hand to the person alleged to be incapacitated and by delivery or by mail to all persons named in the guardianship petition. G.L. c. 190B, § 5-308(c). If any person to whom notice is required is of parts unknown, notice must be delivered or mailed to that person's last known address. G.L. c. 190B, § 5-308(e).

However, if the court determines that an emergency situation exists that requires the immediate appointment of a temporary guardian, the court may shorten or waive the notice requirements and grant the temporary guardianship motion. In such a case, the court may order that prior notice be given to the alleged incapacitated person; notice must be given after the temporary appointment to the alleged incapacitated person and to those persons named in the guardianship petition, and certification of such notice must be filed with the court within seven days of the appointment. At any time during the pendency of the emergency order, any such person may move to vacate the order or request any other appropriate action. The court must hear said motion as a de novo matter, as expeditiously as possible. G.L. c. 190B, § 5-308(d).

The temporary guardian may exercise only those powers specifically granted in the order. G.L. c. 190B, § 5-308(a). The powers authorized by the court should be only those that are necessary to prevent the occurrence of the feared immediate and substantial harm, and the temporary order should clearly delineate those powers.

An initial appointment may be for a period of up to ninety days, except that upon a finding of extraordinary circumstances, the court may order a longer period to a date certain. The court may for good cause shown extend the appointment for additional ninety-day periods. G.L. c. 190B, § 5-308(a). The court may remove a temporary guardian at any time. G.L. c. 190B, § 5-308(g).

The appointment of a temporary guardian is not a final determination of a person's incapacity. G.L. c. 190B, § 5-308(f).

If a previously appointed guardian is not effectively performing their duties and the court finds that the welfare of the incapacitated person requires immediate action, it may appoint, with or without notice, a special guardian. The appointment may be for a period of up to ninety days, except that upon a finding of extraordinary circumstances, the court may order a longer period to a date certain. The court may for good cause shown extend the appointment for additional ninety-day periods. G.L. c. 190B, § 5-308(b).

§ 4.7.1 Practice Advisory

Counsel must investigate whether there is a true emergency that requires the appointment of a temporary guardian and ensure that any temporary order is limited to only those powers needed to address the emergency. In the event that a general guardianship is sought, the petitioner must offer an explanation as to why a limited guardianship is "inappropriate." *See Guardianship of D.C.*, 479 Mass. 516, 523 (2018) (citing *Guardianship of B.V.G.*, 474 Mass. 315 (2015)). Counsel should investigate whether there is anyone with authority to act (e.g., health-care proxy agent or attorney in fact). (See, G.L. c. 201D, § 2, "[e]very competent adult shall have the right to appoint a health care agent by executing a health care proxy.) If there is not, counsel should explore whether the client has the capacity to execute a valid health-care proxy as an alternative to a temporary guardianship. Counsel will also want to ensure that any order that was entered on an ex parte emergency basis is the subject of a motion to vacate and a

de novo review unless there is good cause not to assert these protections on behalf of the client.

§ 4.8 POWERS, DUTIES, AND RESPONSIBILITIES OF GUARDIANS

§ 4.8.1 Powers

The court must tailor its guardianship order to the specific decision-making needs of the incapacitated person, and issue a limited guardianship rather than a full, or plenary, guardianship whenever possible. A guardian should exercise decision-making authority "only as necessitated by the incapacitated person's mental and adaptive limitations." G.L. c. 190B, § 5-309(a); *see Guardianship of B.V.G.*, 474 Mass. 315 (2015); *Guardianship of D.C.*, 479 Mass. 516 (2018) (statute favors limited guardianships in order to maximize the liberty and autonomy of persons subject to guardianship).

In exercising their authority, the guardian,

> to the extent possible, shall encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, to the extent known, shall consider the expressed desires and personal values of the incapacitated person when making decisions, and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence. A guardian shall immediately notify the court if the incapacitated person's condition has changed so that he or she is capable of exercising rights previously limited.

G.L. c. 190B, § 5-309(a).

§ 4.8.2 Reports

Within sixty days of a guardian's appointment, at least annually thereafter, and when otherwise ordered by the court, the guardian must file with the court a written report of the incapacitated person's condition and an accounting of the person's assets, if subject to the guardian's control. G.L. c. 190B, § 5-309(b).

Reports are to briefly state the following:

- the incapacitated person's current mental, physical, and social condition;
- the incapacitated person's living arrangements during the reporting period;
- the medical, educational, vocational, and other services provided to the incapacitated person, and the guardian's opinion as to the adequacy of the incapacitated person's care;

- 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;
- if the incapacitated person is institutionalized, whether the guardian considers the current treatment or habilitation plan to be in the incapacitated person's best interests;
- plans regarding future care; and
- a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.

G.L. c. 190B, § 5-309(b).

§ 4.8.3 Monitoring

The court must monitor the implementation of all guardianship orders and review all annual reports. G.L. c. 190B, § 5-309(c). To that end, the court may appoint a guardian ad litem to "review a report, to interview [an] incapacitated person or guardian, and to make such other investigation as the court may direct." G.L. c. 190B, § 5-309(d).

§ 4.8.4 Miscellaneous

A guardian is not personally liable for the incapacitated person's expenses and is not liable to third persons for the incapacitated person's acts. G.L. c. 190B, § 5-309(a).

A guardian must "protect and preserve the incapacitated person's right of freedom of religion and religious practice." G.L. c. 190B, § 5-313.

§ 4.9 LIMITATIONS ON THE GUARDIANSHIP AUTHORITY

§ 4.9.1 Health-Care Proxies

A guardian, without authorization of the court, may not revoke an incapacitated person's health-care proxy. If a health-care proxy is in effect, absent an order of the court to the contrary, a health-care decision of the agent takes precedence over that of a guardian. G.L. c. 190B, § 5-309(e).

§ 4.9.2 Admission or Commitment to a Psychiatric Facility

A guardian may not be authorized to admit or commit an incapacitated person to a mental health facility or a mental retardation facility. G.L. c. 190B, § 5-309(f).

§ 4.9.3 Admission to a Nursing Facility

The Probate and Family Court may not order a person to be admitted to a nursing facility unless the judge appoints a guardian after finding that the person is an incapacitated person as defined in G.L. c. 190B, § 5-101(9), and then makes a specific finding that admission to a nursing facility is in the incapacitated person's best interest. Unless a person is found to be incapacitated, a Probate and Family Court judge may not appoint a limited guardian for the sole purpose of admitting that person to a nursing facility. *See Guardianship of D.C.*, 479 Mass. 516 (2018).

"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." G.L. c. 190B, § 5-309(g). The guardian has the authority to place the incapacitated person in a nursing home on a short-term basis without prior court permission, provided that

- such admission shall not exceed sixty days;
- any person authorized to sign a medical certificate recommends such admission;
- neither any interested person nor the incapacitated person objects;
- 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
- the incapacitated person is represented by counsel or counsel is appointed forthwith.

G.L. c. 190B, § 5-309(g). The notice of intent to admit the incapacitated person to a nursing facility for short-term services shall be on a form prescribed by the chief justice of the Probate and Family Court.

A guardian may be vested with the authority to admit an incapacitated person into a nursing facility only upon a specific finding that such admission would be in the person's best interest. The statute, however, establishes no procedural requisites to making such a determination. G.L. c. 190B, § 5-309(g).

Because such admissions are particularly restrictive of a person's liberty, counsel should advocate for the application of the substituted judgment procedure whenever such authority is sought. *Cf. Doe v. Doe*, 377 Mass. 272, 278–79 (1979) (substituted judgment appropriate to determine best interest where incapacitated person objecting to admission to psychiatric facility in guardianship proceeding under G.L. c. 201 (repealed), and incapacitated person's "stated preference must be treated as a critical factor in the determination of his 'best interests'" (citations omitted)).

A nursing facility is an institution or a distinct part of an institution primarily engaged in providing the following:

- skilled nursing care and related services for persons who require medical or nursing care;
- rehabilitation services to injured, disabled, or sick persons; or
- on a regular basis, health-related care and services to persons 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.

G.L. c. 190B, § 5-101(15).

§ 4.10 MODIFICATION OF GUARDIANSHIP ORDERS

As noted above, a guardian must immediately notify the court if the incapacitated person's condition has changed such that the person is capable of exercising rights previously limited. G.L. c. 190B, § 5-309(a).

At any time after the issuance of a guardianship order, an incapacitated person, or other interested person, may petition the court to modify the order so as to limit the guardian's decision-making authority. G.L. c. 190B, § 5-306(c). The incapacitated person has the right to be present at any hearing as to such modification, to be represented by counsel, to present evidence, and to cross-examine witnesses, as provided in G.L. c. 190B, § 5-106(c).

§ 4.11 TERMINATION OF GUARDIANSHIP

The authority and responsibility of a guardian of an incapacitated person terminates upon

- the death of the guardian or incapacitated person;
- the determination of incapacity of the guardian;
- the determination that the person is no longer incapacitated; or
- the guardian's removal or resignation.

G.L. c. 190B, § 5-310.

§ 4.12 REMOVAL OR RESIGNATION OF GUARDIAN

§ 4.12.1 Termination (Revocation) of Guardianship

The incapacitated person or any person interested in their welfare may petition for an order that the person is no longer incapacitated and for termination of the guardianship. A request for an order may also be made "informally to the court." G.L. c. 190B, § 5-311(b).

The incapacitated person has the right to be present at any hearing on such petition, to be represented by counsel, to present evidence, and to cross-examine witnesses, as provided in G.L. c. 190B, § 5-106(c).

§ 4.12.2 Removal or Resignation of Guardian

On petition of the incapacitated person or any person interested in the incapacitated person's welfare, the court, after notice and hearing, may remove a guardian if the person "is no longer incapacitated or for other good cause." G.L. c. 190B, § 5-311(a). Note that inclusion of an allegation that the person is "no longer incapacitated" as a ground for *removal* of the guardian is likely an error, as such a finding should properly result in the *termination* of the guardianship order in its entirety, rather than in appointment of a successor guardian.

On petition of the guardian, the court, after hearing, may accept the guardian's resignation. G.L. c. 190B, § 5-311(a).

Upon the removal, resignation, or death of a guardian, or if a guardian is determined to be incapacitated or disabled, the court may appoint a successor guardian and make any other appropriate order. G.L. c. 190B, § 5-311(c).

In any proceeding for the removal, resignation of a guardian, or appointment of a successor guardian, the incapacitated person has the right to be present, to be represented by counsel, to present evidence, and to cross-examine witnesses. G.L. c. 190B, § 5-106(c).

§ 4.13 SUBSTITUTED JUDGMENT AND EXTRAORDINARY TREATMENT

In most instances, after a client is determined to be incompetent or incapacitated, a guardian will be appointed and authorized to make decisions in the best interests of the client. G.L. c. 190B, § 5-309(a). However, there is an important exception to this general, best-interest approach of court-appointed guardian decision making. Where medical procedures and forms of treatment are considered particularly intrusive, risky, or restrictive of a client's liberty, the guardian must seek specific court authority. Counsel must be mindful that "[t]here is no bright line dividing those decisions which are (and ought to be) made by a guardian, from those for which a judicial determination is necessary." *Guardianship of Roe*, 383 Mass. 415, 435 (1981). In *Roe* the court reiterated

> the factors to be taken into account in deciding when there must be a court order with respect to medical treatment of an incompetent patient. "Among them are at least the following: the extent of impairment of the patient's mental faculties, whether the patient is in the custody of a State institution, the prognosis without the proposed treatment, the prognosis with the pro-

> posed treatment, the complexity, risk and novelty of the proposed treatment, its possible side effects, the patient's level of understanding and probable reaction, the urgency of decision, the consent of the patient, spouse, or guardian, the good faith of those who participate in the decision, the clarity of professional opinion as to what is good medical practice, the interests of third persons, and the administrative requirements of any institution involved." *Matter of Spring*, supra at 115, 405 N.E.2d 115. Without intending to indicate the relative importance of these and other factors in all cases, it is appropriate to identify some of those factors which are weighty considerations in this particular case. They are: (1) the intrusiveness of the proposed treatment, (2) the possibility of adverse side effects, (3) the absence of an emergency, (4) the nature and extent of prior judicial involvement, and (5) the likelihood of conflicting interests.

Guardianship of Roe, 383 Mass. at 435–36.

Examples of such procedures include sterilization (*In the Matter of Moe*, 385 Mass. 555 (1982)), initiation or removal of life-sustaining mechanisms (*Brophy v. New Eng. Sinai Hosp.*, 398 Mass. 417 (1986); *In the Matter of Spring*, 380 Mass. 629 (1980); *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977)), abortion (*In the Matter of Mary Moe*, 31 Mass. App. Ct. 473 (1991)), and the use of antipsychotic medication (*Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. 489 (1983); *Guardianship of Roe*, 383 Mass. 415 (1981)). In addition, certain intrusive and painful aversive procedures that are used for behavior modification have been determined by regulation to require Probate and Family Court approval following a substituted judgment determination. *See generally* Department of Developmental Services regulations at 115 C.M.R. § 5.14; *Guardianship of Brandon*, 424 Mass. 482 (1997).

Only a court may authorize such treatments or procedures, typically referred to as extraordinary, to be administered to, or to be withheld from, persons who have been found to be incompetent or incapacitated. *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. at 758; G.L. c. 190B, § 5-306A(a). Such authorization most often is sought in the Probate and Family Court Department, but may in limited circumstances be sought in the District Court Department pursuant to G.L. c. 123, § 8B (authorization to administer medical treatment for mental illness to incompetent persons who have been committed).

After finding that the client is incapacitated, the court must determine what the client would decide if they were competent or had the capacity to do so. In making this determination, the court must consider "1) the ward's expressed preferences regarding treatment; (2) his religious beliefs; (3) the impact upon the ward's family; (4) the probability of adverse side effects; (5) the consequences if treatment is refused; and (6) the prognosis with treatment." *In re Quigley*, 81 Mass. App. Ct. 1138 (2012), citing *Guardianship of Roe*, 383 Mass. 415, 444 (1981). The court may authorize "treatment for which [a] substituted judgment determination may be required" only if it "(i) spe-

cifically finds using the substituted judgment standard that the person, if not incapacitated, would consent to such treatment and (ii) specifically approves and authorizes a treatment plan and endorses said plan in its order or decree." G.L. c. 190B, § 5-306A(a).

It is important to note that, although brought under G.L. c. 190B, a substituted judgment proceeding does not result in the delegation of this decision-making authority to a guardian. Rather, it is the court, and the court alone, that will serve as the alternative decision maker. G.L. c. 190B, § 5-306A(a). However, the substituted judgment decision can only be requested as a component of a guardianship case. It is not a separate pleading that can be filed in the Probate and Family Court.

A substituted judgment determination may be made and order issued only after a full hearing at which the putatively incompetent or incapacitated person has the right to counsel, at the Commonwealth's expense if the person is indigent. G.L. c. 190B, § 5-306A(a); *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. at 758.

The hearing on a petition requiring a substituted judgment determination is to be conducted as soon as practicable. G.L. c. 190B, § 5-306A(a). However "where the welfare of the . . . person alleged to be incapacitated requires an immediate authorization of treatment," a temporary order authorizing the proposed treatment may be issued in accordance with the expedited procedures established at G.L. c. 190B, § 5-308. G.L. c. 190B, § 5-306A(a).

The putatively incompetent or incapacitated person is to be present at the hearing unless the court finds that there "exist extraordinary circumstances requiring [their] absence in which event the attendance of [their] counsel shall suffice." G.L. c. 190B, § 5-306A(d).

The patient-psychotherapist privileges established by G.L. c. 233, § 20B (applicable to psychiatrists, psychologists, and psychiatric nurses) and G.L. c. 112, § 135A (applicable to social workers) do not preclude the "filing of reports or affidavits, or the giving of testimony . . . for the purposes of obtaining treatment of a person alleged to be incapacitated; provided, however, that such *person has been informed prior to making such communication that they may be used for such purpose and has waived the privilege*." G.L. c. 190B, § 5-306A(e) (emphasis added).

The court may base its findings on documentary evidence only if it determines, "after careful inquiry and upon representations of counsel, that there are no contested issues of fact." The findings must include the reasons that oral testimony was not required. G.L. c. 190B, § 5-306A(d).

§ 4.13.1 The Substituted Judgment Determination

In applying the substituted judgment standard, the court should not authorize the administration of a proposed treatment merely upon a finding that the treatment is clinically desirable or likely to be efficacious (i.e., that such treatment would be in the incapacitated person's best interests). *See In the Matter of Moe*, 385 Mass. 555 (1982)

(sterilization); *Guardianship of Roe*, 383 Mass. 415 (1981) (antipsychotic medication); *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977) (chemotherapy). Rather, the court must determine in each case, taking into account all of the factors and concerns that would likely serve to form the particular incapacitated individual's subjective perspective, which, if any, treatment the individual would consent to if they were competent. *See, e.g.*, *In the Matter of Moe*, 385 Mass. at 565; *In the Matter of Spring*, 380 Mass. at 634; *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. at 752–53. Any such treatment, of course, must comport with accepted professional practice. *In the Matter of McKnight*, 406 Mass. 787, 801 (1990). However, the court cannot require a doctor or hospital to provide medical treatment "contrary to its moral and ethical principles, when such principles are recognized and accepted within a significant segment of the medical profession and the hospital community." *Brophy v. New Eng. Sinai Hosp.*, 398 Mass. 417 (1986).

§ 4.14 APPLICABILITY OF SUBSTITUTED JUDGMENT STANDARD

§ 4.14.1 Treatment Modalities Requiring Substituted Judgment Determination

> In determining whether the decision to accept or refuse to accept the administration of a particular treatment or procedure may be made by a guardian or, rather, may only be made by a court by means of a substituted judgment determination, the Probate and Family Court must take into account: the extent of impairment of the [person's] mental faculties, whether the [person] is in the custody of a State institution, the prognosis without the proposed treatment, the prognosis with the proposed treatment, the complexity, risk and novelty of the proposed treatment, its possible side effects, the [person's] level of understanding and probable reaction, the urgency of decision, the consent of the [person], spouse, or guardian, the good faith of those who participate in the decision, the clarity of professional opinion as to what is good medical practice, the interests of third persons, and the administrative requirements of any institution involved.

In the Matter of Spring, 380 Mass. at 636–37.

It is well settled that sterilization, initiation or removal of life-sustaining mechanisms, abortion, and antipsychotic medication require a substituted judgment determination (see above).

While there have been no judicial rulings regarding the applicability of the substituted judgment standard where the authority to treat an incompetent client with electroconvulsive therapy (ECT) or psychosurgery is sought, the District Court Committee on Mental Health has concluded that a substituted judgment determination should be

made where treatment with ECT is sought. *See* Dist. Ct. Standard 7:04 (ECT would require substituted judgment decision as well as showing that there is no less intrusive alternative). Thus, counsel should ask that the court apply the substituted judgment standard whenever judicial authority to administer such treatment is sought.

Behavior modification techniques involving corporal punishment, infliction of pain or physical discomfort, or deprivation of food or sleep are not permitted by the DMH. 104 C.M.R. § 27.13(5). Similar techniques, referred to as Level III interventions, are permitted by the Department of Developmental Services under certain circumstances. Where the person to be subjected to such techniques is not competent to consent, judicial authorization must be obtained by means of a substituted judgment determination. 115 C.M.R. § 5.14(4)(e)(3)(c). Note that in 2011, DDS regulations were changed such that no individuals without preexisting court orders for Level III aversive treatment could be subject to them prospectively. This regulation is the subject of ongoing litigation as of this writing. *Judge Rotenberg Ctr., Inc. v. Comm'r of Dep't of Developmental Servs.*, Bristol Probate & Family Ct. Docket No. 86E-00180GI (on appeal to the Appeals Court but not yet docketed).

§ 4.15 DO-NOT-RESUSCITATE ORDERS

The Supreme Judicial Court and the Appeals Court have consistently held that prior judicial authorization is required whenever the administration of an intrusive or risky treatment modality or procedure is indicated for an incompetent patient. Petitions for do-not-resuscitate (DNR) and do-not-intubate (DNI) are matters of life and death and therefore require a substituted judgment determination. *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977); *In the Matter of Spring*, 380 Mass. 629 (1980). The doctrine of informed consent and the constitutional right to privacy protect an incapacitated person's right to refuse (or accept) life-sustaining treatment. Such a decision must conform as closely as possible to the decision that would be made by the incompetent person if that person were competent. Thus, a substituted judgment determination by the Probate and Family court is required. Counsel has the responsibility to present to the court, after a thorough investigation, all reasonable arguments in favor of administering life-prolonging treatment. *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. at 757.

The one exception has been in a case where the Probate and Family court ruled in a petition for declaratory relief, where there was no guardianship pending, the person was irreversibly terminally ill, and in a persistent vegetative state, and loving, involved family members agreed with medical providers, no court involvement was necessary for entry of DNR orders. *In the Matter of Dinnerstein*, 6 Mass. App. Ct. 466 (1978).

The Supreme Judicial Court has held that a substituted judgment determination is required to enter a DNR order for a minor who has "no loving family" with whom medical professionals may consult. *Custody of a Minor*, 385 Mass. 697 (1982). Similarly, a substituted judgment determination is required to enter a DNR order for a minor in state custody whose parents are also minors and whose mother is also in state custody. *Care & Prot. of Beth*, 412 Mass. 188 (1992).

A DNR or DNI order may be authorized only where a client is in the end stages of a terminal illness. Clients living with Alzheimer's, dementia, cancer, or other chronic ailment may live for many months or even years. The entry of a DNR or DNI in such a case would be entirely inappropriate unless and until the client's demise was imminent. *Guardianship of Linda*, 401 Mass. 783, 786 (1988) (no guardianship authority regarding prospective situations). A premature decision will make a substituted judgment determination less accurate; determination will be more precise as it approaches implementation since an incapacitated person's choice might change as medical conditions and circumstances change. *Guardianship of Roe*, 383 Mass. 415, 432, n.8 (1981).

The Supreme Judicial Court has firmly rejected the formulation that "quality of life" equates with the value of life. Thus, a person's supposed inability to appreciate or experience life due to cognitive limitations has no place in a substituted judgment determination on a petition for DNR or DNI. *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. at 754.

§ 4.15.1 Practice Advisory

Where there is no terminal illness, the case is not ripe for substituted judgment of DNR or DNI orders. Counsel must seek dismissal of premature petitions. Counsel should seek to have the client found competent to make this specific decision. If the client cannot be found competent, counsel should ensure that the court holds a substituted judgment hearing. Counsel should also oppose the DNR/DNI petition in order to investigate the client's preference and evidence relevant to the substituted judgment factors. If the client is incapable of expressing a preference and their preference is truly unknowable and no other information can be discerned, counsel should argue in favor of life, in opposition to the petition and to present all alternatives to the court. *Supt. of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728, 757 (1977) (It is counsel's duty to do as "thorough an investigation as time will permit, [and present] all reasonable arguments in favor of administering treatment to prolong the life of the individual involved.")

If the client expresses a preferences for a DNR or DNI and cannot be found competent to make this specific decision, counsel should make sure to present their expressed preference to the court and ensure that the order is not overly inclusive—e.g., that Do Not Hospitalize, or Comfort Measures Only, are not inappropriately included.

A MOLST (Medical Order for Life Sustaining Treatment, *see* http://www.molst-ma.org) is not a legal document and cannot be used to evade a required substituted judgment determination by a court that has jurisdiction of a guardianship case. Nothing in the MUPC authorizes guardians to sign MOLSTs without court authority. If a guardian has signed a MOLST without court authority, counsel should seek an emergency hearing directing the guardian to rescind the MOLST forthwith, and inform all medical providers of rescission. End-of-life measures restricting resuscitation, intubation, hydration, nutrition, and hospitalization require substituted judgment determinations by the court. Be prepared to argue applicable law discussed above regarding each specific procedure.

§ 4.16 "PASSIVE ACCEPTORS"

The question of whether judicial authorization is required prior to administering antipsychotic medication (or other extraordinary treatment) to someone who is incapable of providing informed consent, but who accepts or does not object to the treatment (a passive acceptor), has not been specifically considered by the courts. Where neither of the exceptions discussed below applies, prior judicial authorization, by means of a substituted judgment determination, should be secured regardless of the client's willingness to accept the treatment. *See Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. at 500 n.14 ("a patient's acceptance of antipsychotic drugs ordinarily does not require judicial proceedings. . . . [H]owever, because incompetent persons cannot meaningfully consent to medical treatment, a substituted judgment by a judge should be undertaken for the incompetent patient even if the patient accepts the medical treatment"). For a general discussion of the circumstances under which prior judicial authorization to treat an incompetent client is required, see *Guardianship of Roe*, 383 Mass. at 433–43.

§ 4.16.1 Exceptions—Antipsychotic Medication

There are two circumstances in which antipsychotic medication may be administered to an incompetent person without first obtaining judicial authorization.

(a) *Police Power Exception*

Where a person's behavior places that person or others at imminent risk of serious physical injury, the person may be restrained in accordance with applicable state law and regulations. *Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. at 509–10. Restraint of a person with mental illness may only be used "in cases of emergency, such as the occurrence of, or serious threat of, extreme violence, personal injury, or attempted suicide." G.L. c. 123, § 21. The DMH has further restricted the circumstances in which restraint is permitted to those involving "an emergency, such as the occurrence of, or serious threat of, extreme violence, personal injury, or attempted suicide." 104 C.M.R. § 27.12(8)(b). The regulations further state that

> [s]uch emergencies shall only include situations where there is a substantial risk of, or the occurrence of, serious self-destructive behavior, or a substantial risk of, or the occurrence of, serious physical assault. As used in the previous sentence, a substantial risk includes only the serious, imminent threat of bodily harm, where there is the present ability to effect such harm.

104 C.M.R. § 27.12(8)(b). Medication restraint, mechanical restraint, physical restraint, or seclusion may be used only after the failure of less restrictive alternatives. 104 C.M.R. § 27.12(8)(b)(1). Thus, the mere fact that restraint is warranted does not necessarily justify the administration of antipsychotic medication; only in situations where such chemical restraint would be the least restrictive method to effectively and safely control a person's dangerous behavior may it be used. 104 C.M.R.

§ 27.12(8)(d). See also the discussion in *Rogers v. Commissioner of Department of Mental Health*, 390 Mass. at 507–11.

(b) *Parens Patriae Exception*

The other exception applies when a person's refusal to accept proposed treatment would result in the "immediate, substantial, and irreversible deterioration of a serious mental illness." *Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. at 511–12. The administration of treatment in this circumstance, however, may be short-term only; the person may be treated only in order to stabilize them while judicial authorization is pursued. *Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. at 512–13.

The administration of treatment under this exception is permissible only if a client, in the opinion of their treating clinician, is incompetent to consent to the treatment. The police power exception, however, is not dependent on the person's ability to provide consent. Whenever a person's behavior constitutes a danger to themselves or to others, the state or its agents may take appropriate steps, subject only to the least-restrictiveness standard discussed above. This parens patriae exception is fundamentally different. Here, the need for treatment in order to prevent clinical deterioration, as opposed to the control of dangerous behavior, serves as the rationale for the administration of medication (i.e., the exercise of the state's parens patriae authority), and a competent person may refuse even urgently needed treatment. *See, e.g.*, *Shine v. Vega*, 429 Mass. 456 (1999); *Lane v. Candura*, 6 Mass. App. Ct. 377 (1978). Thus, only an incompetent client may be forced to undergo such treatment, and only for as long as may be necessary to secure judicial authorization. Judges are on call twenty-four hours a day for medical emergencies. This exception should only be used for very brief administrations of medication and should never be used for the administration of long-acting forms of antipsychotic medication.

§ 4.16.2 Practice Advisory

Be wary of an argument by petitioner's counsel that because a particular treatment modality is not among those that have been found to require a substituted judgment determination the court need only determine whether the client is competent to provide informed consent to medical treatment and, if found not competent, appoint a guardian who may decide the issue. While this assertion may be technically correct, most often the reason that a particular treatment is not included among those requiring a substituted judgment determination is that neither the Supreme Judicial Court nor the Appeals Court has yet had occasion to consider whether such a determination is necessary.

Consider, for example, the case of antidepressant medications prescribed for a twenty-year-old man who has been found by the court to be incompetent. At this point, petitioner's counsel would, no doubt, argue that the court need only appoint a guardian, who would then be free to decide whether administration of the medication was in the young man's best interest. After all, there is no dispositive ruling that a substituted

judgment determination is required in order to authorize the administration of antidepressants. However, given that the U.S. Food and Drug Administration requires that antidepressant medications contain a black-box warning about the increased risks of suicidal thinking and behavior in young adults ages eighteen to twenty-four, there can be little doubt that the Supreme Judicial Court or the Appeals Court would require that a substituted judgment determination be made in such a case, due to the "complexity, risk and novelty of the proposed treatment and its possible side effects." *See In the Matter of Spring*, 380 Mass. at 637.

Regardless of the judicial process by which a surrogate decision maker is chosen and whether that decision maker is known to the incapacitated person, the surrogate decision maker should attempt to determine what the incapacitated individual would decide regarding the proposed treatment or procedure were they competent. All decisions are subjective; a person who is in fact competent will often make decisions that do not appear to be in their best interest when measured against some ostensibly objective standard. Since a guardianship proceeding is the vehicle by which an incompetent person is to be afforded the opportunity to exercise their right to make decisions, the surrogate decision maker should always seek to determine those subjective issues, matters, and concerns that the individual would likely take into account were they competent. General Laws c. 190B, § 5-309(a) states that "[a] guardian, to the extent known, shall consider the expressed desires and personal values of the incapacitated person when making decisions, and shall otherwise act in the incapacitated person's best interest" but stops short of requiring a real investigation into what the person would likely take into account where there is no clear indication of those desired or values.

Counsel should argue that the trial court must apply the substituted judgment standard whenever a petitioner seeks authority to administer any other treatment besides the most routine measures. When in doubt it is better to err on the side of presenting the issue to the court. Generally routine measures are relatively noninvasive actions such as taking temperature, blood pressure, height and weight measurements, and the like. Anything that requires anesthesia, even if it is referred to as "routine," such as a colonoscopy, should be presented to the court.

§ 4.16.3 Factors for Determining Substituted Judgment

In determining an incapacitated person's substituted judgment, the court must consider the following factors and concerns:

- Expressed preference. The court must give "great weight" to any preference expressed by the individual regarding the proposed treatment or similar treatment in both the present and the past. *Guardianship of Roe*, 383 Mass. at 444–45; *In the Matter of R.H.*, 35 Mass. App. Ct. 478, 486 (1993) (incapacitated person's expressed preference is of "nonpareil significance"). If the individual expressed a preference when they were competent, that preference should be accorded great deference; however, it is not necessarily dispositive. Preferences may change over time and, therefore, the court must consider the likely effect of new information or circumstances on the previously expressed choice. *Guardianship of Linda*, 401 Mass. at 786–87.

- Religious convictions. The court must consider whether the incapacitated person adheres to (and, if so, the strength of) any religious tenets that may influence their decision regarding the proposed treatment. *Guardianship of Roe*, 383 Mass. at 445–46; *see, e.g.*, *Norwood Hosp. v. Munoz*, 409 Mass. 116 (1991) (blood transfusion of Jehovah's Witness).

- Familial relationship. The court must consider the incapacitated individual's relationship with their family and the impact that the decision about the treatment may have on this relationship. *Guardianship of Roe*, 383 Mass. at 446–47. It is the individual's perspective on such matters, and not the family's, however, that must be considered; the wishes of the family are relevant only to the extent that the individual themselves would take their wishes into account in making their choice. *See, e.g.*, *In the Matter of R.H.*, 35 Mass. App. Ct. at 488–89. The court must "be careful to ignore the desires of institutions and persons other than the incompetent 'except in so far as they would affect his choice.'" *Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. at 506 (quoting from *Guardianship of Roe*, 383 Mass. at 447).

- Side effects and alternative treatment modalities. The court must consider what the possible adverse side effects are, if any; how likely it is that these side effects will occur; and, if they do occur, their likely severity. *Guardianship of Roe*, 383 Mass. at 447. The court should also consider any alternative treatments, their risks, and their benefits. *Cf. In the Matter of Moe*, 385 Mass. at 567; *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. at 757.

- Consequences if treatment refused. One may assume that as a person's prognosis without treatment worsens, the more likely it is that they will accept such treatment. However, the court must determine whether this assumption holds in light of the incapacitated person's unique perspective. *Guardianship of Roe*, 383 Mass. at 447; *see, e.g.*, *In re Boyd*, 403 A.2d 744, 752 (D.C. App. 1979) (even in life-or-death situation, one's religion may dictate a best interests antithetical to getting well).

- Prognosis with treatment. As a general rule, as the probability increases that a proposed treatment will improve a person's condition, so too will the likelihood that they will accept such treatment, even treatment that is intrusive or likely to cause adverse side effects. However, it is not at all unusual for clinicians to disagree about "the probability of specific benefits being received by a specific individual upon administration of a specific treatment. [Therefore] [b]oth of these factors[,] the benefits sought and the degree of assurance that they actually will be received[,] are entitled to consideration." *Guardianship of Roe*, 383 Mass. at 448.

- Other relevant factors. In addition to the foregoing, the court must consider any other factors the individual would be likely to take into account if they were competent to make the decision at issue. *Guardianship of Brandon*, 424 Mass. at 487; *Guardianship of Roe*, 383 Mass. at 448. For example, in a criminal proceeding, a defendant asserting their lack of criminal responsibility has the right to appear before the fact finder in an unmedicated or natural condition. *Com-*

> *monwealth v. Louraine*, 390 Mass. 28 (1983). Therefore, a court hearing a petition seeking authority to administer antipsychotic medication to a criminal defendant should take into account the impact of that decision upon the criminal proceeding from the defendant's perspective.

Guardianship of Roe, 383 Mass. at 444–48.

Finally, the court should also take into account the "present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person." *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. at 752–53.

After taking evidence on each of these factors and entering "specific and detailed findings demonstrating that close attention has been given [thereto]" (*Guardianship of Roe*, 383 Mass. at 425), the court must determine what decision the individual would make if they were competent to do so. Again, this determination must be made from the incapacitated person's perspective, taking into account all of the factors that would be of significance, even if only to the individual themselves. *Guardianship of Roe*, 383 Mass. at 444.

§ 4.17 STANDARD OF PROOF

In order to authorize treatment under the substituted judgment standard, the court first must find that the respondent is incapable of providing informed consent to the proposed treatment (i.e., that they are incompetent). If it makes this finding, the court must then determine what the incapacitated individual would decide when faced with the proposed treatment, if they were competent to do so. In both instances the applicable standard of proof is preponderance of the evidence. *Guardianship of Doe*, 411 Mass. 512, 523 (1992). However, the Supreme Judicial Court has recognized the serious impingement upon an individual's personal rights that result from a finding of incompetency (*Guardianship of Doe*, 411 Mass. at 517; *Guardianship of Roe*, 383 Mass. at 444), and the substantial liberty interests implicated in the administration of highly intrusive treatments such as antipsychotic medication (*Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. at 504; *Guardianship of Roe*, 383 Mass. at 451; *see also Washington v. Harper*, 494 U.S. 210 (1990)). Thus, in applying the preponderance of the evidence standard, the trial court must carefully consider the evidence and enter specific written findings on the incapacitated person's decision-making ability and the substituted judgment factors described above. *Guardianship of Roe*, 383 Mass. at 425. Indeed,

> [t]he judge must document his analysis of the various relevant factors not merely by making specific written findings of fact on every material issue, as would normally be required. He must additionally, because of the seriousness of the decision involved, set forth those findings in "meticulous detail"; and those specific, meticulously detailed findings must be set forth on each of the relevant factors and must reflect a careful bal-

> ancing and weighing of the various interests and factors involved, including within each factor those reasons both for and against treatment, as well as a logical nexus between the conclusion reached and the facts found.

In the Matter of R.H., 35 Mass. App. Ct. 478, 485–86 (1993) (citation omitted). This process is often referred to as the "heightened preponderance of the evidence" standard.

§ 4.18 OVERRIDING STATE INTERESTS

If the court determines that the individual's substituted judgment would be to refuse the proffered treatment, there may be state interests that are "capable of overwhelming the right to refuse." *Guardianship of Roe*, 383 Mass. at 433. "There are circumstances in which the fundamental right to refuse extremely intrusive treatment must be subordinated to various State interests." *Guardianship of Roe*, 383 Mass. at 448. Such interests include "(1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession." *Guardianship of Roe*, 383 Mass. at 448–49. The listed state interests are not exhaustive; others may be pertinent to specific circumstances. *E.g.*, *Comm'r of Corr. v. Myers*, 379 Mass. 255, 264 (1979) (state's interest in orderly prison administration sufficient to compel inmate to submit to hemodialysis).

§ 4.19 EXTENDED SUBSTITUTED JUDGMENT DETERMINATION

If the court finds that there is a state interest sufficient to override the individual's choice to refuse the proffered treatment but finds that that interest can be satisfied by means other than forcing them to accept that treatment, the incapacitated person must be afforded the opportunity, by means of an extended substituted judgment determination, to choose from among all acceptable and available means of satisfying the state interest. *Guardianship of Roe*, 383 Mass. at 433.

For example, if an individual's substituted judgment would be to refuse to accept antipsychotic medication, but the court determines that their behavior when not medicated would be extremely dangerous and that the state's interest in preventing serious harm to the incapacitated person and/or to others is sufficient to override their right to refuse the medication, the court must determine whether the individual would choose, if competent, commitment at a psychiatric facility or forced treatment with antipsychotic medication. In doing so, the court must opt for the least intrusive means of restraint, from the individual's perspective, which adequately protects the public safety. *Guardianship of Roe*, 383 Mass. at 451–52. Paying heed to the substituted judgment principle, the court in *Roe* was "unwilling to establish a universal rule as to which is less intrusive—involuntary commitment or involuntary medication with mind-altering drugs. Since we feel that such a determination must be individually made, we conclude that the lesser intrusive means is the means of restraint which would be chosen by the

incapacitated person if he were competent to choose." *Guardianship of Roe*, 383 Mass. at 452 n.24.

§ 4.20 THE TREATMENT PLAN

After the court has found a person to be incompetent and has determined that they would accept the proposed treatment if they were competent to do so, it must approve a specific, written treatment plan. G.L. c. 190B, § 5-306A(a); *Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. at 504; *Guardianship of Roe*, 383 Mass. at 453. While there are no authoritative guidelines on how specific the plan must be, treatment plans should clearly describe the treatment and dosage ranges authorized to be administered, as well as any procedures or treatments that may be used to counteract potential side effects. Alternative treatments should be authorized only to the extent that resorting to them is reasonably foreseeable, and the circumstances under which these alternatives may be used should be clearly defined.

§ 4.20.1 Monitoring the Treatment Plan

The court also must establish a process by which the implementation of the approved treatment plan is to be monitored. G.L. c. 190B, § 5-306A(b); *Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. at 504; *Guardianship of Roe*, 383 Mass. at 453. For this purpose, the court will appoint a monitor "to report to the Court regarding the ongoing administration of antipsychotic medication and other medications . . . as authorized by the Court." Among the monitor's specific responsibilities are to

- meet with the incapacitated person within thirty days of the issuance of the order, and as appropriate thereafter;
- meet with the individual's treating physician and associated staff; and
- file written reports with the court at least annually.

G.L. c. 190B, § 5-306A.

The written reports must inform the court of, among other things, the petitioner's compliance with the treatment order, whether the incapacitated person remains incapable of providing informed consent to medical treatment, and whether there has been a substantial change in the circumstances and conditions that had justified the treatment order. *See Guardianship of Brandon*, 424 Mass. at 488. The *Rogers* monitor report (Form MPC 404) is available at https://www.mass.gov/lists/probate-family-court-forms-for-guardianship-and-conservatorship.

Where a guardian has been previously appointed to make other decisions for the client, the court typically will request that they also serve as the monitor for the treatment order. G.L. c. 190B, § 5-306A(b). A guardian who also serves in this capacity is often referred to as a *Rogers* guardian, a term that has resulted in much confusion and that should be avoided. As a monitor, the guardian has no decision-making authority whatsoever. Again, it is the court and the court alone that may authorize the administration of antipsychotic medication and other extraordinary treatments.

§ 4.20.2 Expiration of the Order and Periodic Review

Since a client's circumstances, both in terms of their competency and treatment needs, are likely to change over time, particularly where treatment has had its intended therapeutic effect, substituted judgment orders and treatment plans are not to be effective indefinitely. Rather, the court must periodically review the implementation of the approved treatment plan and set an expiration date. *Guardianship of Weedon*, 409 Mass. 196, 201 (1991); *Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. at 507; *Guardianship of Roe*, 383 Mass. at 448 n.19. The purpose of a periodic review is to determine whether a client's condition and circumstances have substantially changed since the order was issued, such that, if the client were competent, they would no longer consent to the previously authorized treatment. *Guardianship of Brandon*, 424 Mass. at 488.

In *Guardianship of Weedon*, 409 Mass. 196 (1991), the court declined to establish specific timelines for such periodic reviews and expiration dates. Rather, it left it to the Probate and Family Court Department to do so under its rules. To date, no such rule has been promulgated. However, these requirements, as well as the standard applicable at the reviews (*Brandon*), have been codified under G.L. c. 190B.

Substituted judgment orders must "provide for an expiration date beyond which the authority to provide treatment thereunder shall, if not extended by the court, terminate." And, "[e]ach order authorizing a treatment plan pursuant to this section shall provide for periodic review at least annually to determine whether the incapacitated person's condition and circumstances have substantially changed such that, if competent, the incapacitated person would no longer consent to the treatment authorized therein." G.L. c. 190B, § 5-306A(c).

§ 4.20.3 Practice Advisory

The Probate and Family Court Department has implemented Standing Order 4-11, under which a motion to extend an *uncontested* antipsychotic medication order (*Rogers* order) may be processed by an assistant register and, if everything is in order, submitted to a judge for allowance. Initial petitions and contested extensions, as well as all proposed extensions for minor wards, continue to be heard by a judge. The pertinent forms, along with a brief outline of the administrative process, are available on the Probate and Family Court website.

Respondent's counsel *may not* assent to an extension of a *Rogers* order pursuant to this administrative procedure. At most, counsel may indicate that they have no objection thereto. Counsel may not do so, however, thereby forgoing a hearing before a judge, if *either* of the following obtains:

- counsel determines that there has been a "substantial change in circumstances" since the entry of the court's current order (*see Guardianship of Brandon*, 424 Mass. at 488); or
- the respondent has indicated their objection to the extension.

Further, among the forms to be filed in this administrative procedure is one entitled "Representations of Respondent's Counsel." The CPCS Mental Health Litigation Division has serious concerns as to certain items on this form. Counsel are cautioned that

- counsel's discussions with and advice given to a client, including the client's responses thereto (e.g., a desire not to contest, a desire not to attend hearing), are confidential and may not be divulged; and
- counsel's opinion as to the client's incompetence may not be divulged if it is adverse to the client's interests, as would be counsel's opinion that the *Brandon* criteria of changed circumstances cannot be met.

In those cases in which, in counsel's professional judgment, there is no reasonable legal basis to object to an extension or amendment, and in which the client does not object to the extension or amendment, it is suggested that counsel file the representation form with any offending language excised.

§ 4.21 DISTRICT, MUNICIPAL, AND JUVENILE COURT AUTHORIZATION TO TREAT

As noted above, in most situations in which authorization to administer, or to refrain from administering, extraordinary treatments or procedures is sought, a substituted judgment proceeding will be initiated in the Probate and Family Court Department pursuant to G.L. c. 190B. In some circumstances, however, the District Court Department or Juvenile Court Department may authorize the administration of certain treatments. G.L. c. 123, § 8B. See also **Appendix ?**, District Court Standards.

§ 4.21.1 Jurisdiction

A petition seeking the authority to administer antipsychotic medication or other "medical treatment for mental illness" may be filed by the superintendent of a mental health facility or the medical director of Bridgewater against a client who is either the subject of a petition for commitment for care and treatment or the subject of an existing order of commitment for care and treatment. G.L. c. 123, § 8B(a).

The petition must be considered separate from any pending commitment petition, and may not be heard or otherwise considered unless the court has first issued an order of commitment. G.L. c. 123, § 8B(b); Dist. Ct. Standard 8:02.

§ 4.21.2 Practice Advisory

The statute expressly limits the subjects of such authorization-to-treat petitions to those clients against whom commitments for care and treatment are sought or have been ordered. G.L. c. 123, § 8B(a). Similarly, only clients subject to commitment orders under G.L. c. 123, § 8, 15(e), 16(b), 16(c), or 18 may be treated pursuant to Section 8B. G.L. c. 123, § 8B(b). Criminal defendants or inmates of correctional facilities confined at a facility or Bridgewater under G.L. c. 123, § 15(b), 15(e), 15(f), 16(a), or

18(a) for forensic observations and examinations may not be made the subjects of Section 8B petitions or orders.

The court may only authorize treatment with antipsychotic medication or "other medical treatment . . . for mental illness." G.L. c. 123, § 8B(a). While there may be some dispute as to what constitutes medical treatment (e.g., may the court authorize the implementation of a behavior modification regime?), it is clear that only the client's (alleged) mental illness may be addressed by means of a Section 8B order. Thus, although a client may be incapable of providing informed consent to treatment for physical ailments, as well as to treatments for their mental illness, the District or Juvenile Court lacks jurisdiction to authorize the treatment of any physical ailments. In order to obtain proper consent to treat the client's physical problems, the facility must seek authorization in the Probate Court Department in a guardianship proceeding under G.L. c. 190B. *See* Dist. Ct. Standard 7:04.

§ 4.21.3 Assignment of Counsel

A person against whom a petition seeking authorization to treat under G.L. c. 123, § 8B is filed is entitled to the assistance of counsel. G.L. c. 123, § 5. They are presumed to be indigent. SJC Rule 3:10, § 1(h)(iii). The court should notify CPCS immediately upon its receipt of a petition to treat. CPCS will assign counsel from its list of certified mental health attorneys.

If the person refuses legal representation, the court must determine whether their waiver is competent. SJC Rule 3:10, § 3. Notwithstanding a party's waiver of counsel, where the interests of justice so require, the judge may assign standby counsel. SJC Rule 3:10, § 4. If the person objects to a particular attorney despite that attorney's best efforts to establish an effective professional relationship, the attorney should move the court to permit withdrawal, and move that successor counsel be assigned. In doing so, of course, counsel must be careful to avoid divulging any confidential information or other information that could be harmful to the client's interests. The court should determine whether the person's objections are reasonable. If so, the motions should be allowed and successor counsel appointed. If not, the motion to withdraw should be denied and the attorney should continue as counsel or be directed to serve as standby counsel. SJC Rule 3:10, §§ 3, 4, 6.

An attorney assigned to represent a client in a mental health proceeding who is also a defendant in a criminal proceeding should immediately contact the defendant's criminal defense counsel and work cooperatively with them. While not required under G.L. c. 123, the court should immediately notify criminal defense counsel and afford them the opportunity to be heard at the Section 8B hearing. Dist. Ct. Standards 3:03, 3:05.

§ 4.21.4 The Hearing

A hearing on the treatment petition must be commenced within fourteen days of filing unless a continuance is requested by the client or their counsel. However, if the treatment petition is filed concurrently with a commitment petition, commencement of the

treatment hearing may not be delayed beyond the date of the commitment hearing. G.L. c. 123, § 8B(c).

With the client's consent, the court may base its findings exclusively on affidavits and other documentary evidence if it determines, based on the representations of counsel, that there are no contested issues of fact. The court must give careful inquiry to this determination, paying particular attention to the adequacy of counsel's investigation and preparation of the case. The court must include in its findings the reasons that oral testimony was not required. G.L. c. 123, § 8B(d); Dist. Ct. Standard 8:02.

The hearing is to be adversarial, with counsel permitted to "inquire fully into the facts of the case and vigorously advocate for [his or her] client." Dist. Ct. Standards 4:03, 9:03.

The court must render its decision within ten days of the completion of the hearing unless an extension of time is granted for good cause by the administrative justice for the District or Juvenile Court Department. G.L. c. 123, § 8(c); Dist. Ct. Standard 9:04.

§ 4.21.5 Practice Advisory

The fourteen-day period within which a hearing on a petition to treat must commence is statutorily defined and may be extended only upon the request of the client or their counsel. Where this requirement is not met, a motion to dismiss must be allowed. *Hashimi v. Kalil*, 388 Mass. 607 (1983) (time limits established in G.L. c. 123 are jurisdictional and to be strictly construed); *see* Dist. Ct. Standard 8:04.

§ 4.22 CRITERIA FOR AUTHORIZING TREATMENT

As with proceedings before the Probate and Family Court Department, the District, Municipal, or Juvenile Court must first find the client incapable of making informed decisions regarding the proposed medical treatment. G.L. c. 123, § 8B(d); Dist. Ct. Standard 9:04. The fact that the client has been committed is not a determinative of incompetency. G.L. c. 123, § 24; *see Rogers v. Comm'r of Mental Health*, 390 Mass. 489 (1983); Dist. Ct. Standard 7:02.

After finding the client unable to competently decide whether to accept or refuse the proposed treatment, the court may authorize the administration of the proposed treatment according to the "applicable legal standard." G.L. c. 123, § 8B(a). Where the administration of antipsychotic medication is sought, the applicable standard is clear: the court must determine the client's substituted judgment. G.L. c. 123, § 8B(a). In applying the substituted judgment standard, the court cannot authorize the treatment merely upon a finding that it is clinically desirable or likely to be efficacious (i.e., that such treatment would be in the client's best interests). Rather, the court must determine in each case, taking into account all of the factors and concerns that would likely influence the client's decision, whether they would consent to treatment with antipsychotic medication if they were competent to do so. *See* Dist. Ct. Standards 7:03, 10:00.

Should the court find that the client's substituted judgment would be to refuse the proffered treatment, the court then may be asked by the petitioner to determine whether there exist any overriding state interests. *See* Dist. Ct. Standard 7:03. If such interests exist, an extended substituted judgment determination may be necessary. *See* Dist. Ct. Standard 7:03.

Where the administration of other medical treatment for mental illness is sought, the applicable legal standards must be determined by the court. G.L. c. 123, § 8B(a); *see* Dist. Ct. Standard 7:04.

§ 4.22.1 Practice Advisory

Counsel should argue that the court must apply the substituted judgment standard whenever a petitioner seeks authority to administer any treatment besides the most routine.

Behavior modification is not generally considered to be a medical treatment and, therefore, the District or Juvenile Court may not authorize its use pursuant to G.L. c. 123, § 8B. However, should a particular court rule otherwise, counsel should be aware that behavior modification techniques involving corporal punishment, infliction of pain or physical discomfort, or deprivation of food or sleep are not permitted by the DMH. 104 C.M.R. § 27.13(5). (Similar techniques, referred to as "Level III interventions," are permitted by the Department of Developmental Services under certain circumstances.) Where the person to be subjected to such techniques is not competent to consent, judicial authorization must be obtained by means of a substituted judgment determination. 115 C.M.R. § 5.14(4)(e)(3)(c).

§ 4.22.2 The Treatment Plan

After the court has found a person to be incompetent and has determined that they would accept the proposed treatment if they were competent to do so, it must approve a specific, written treatment plan. G.L. c. 123, § 8B(d). While there are no authoritative guidelines on how specific this plan must be, treatment plans should clearly describe the treatment and dosage ranges authorized to be administered, as well as any modalities that may be used to counteract potential side effects. Alternative treatment should be authorized only to the extent that resort to them is reasonably foreseeable, and the circumstances under which these alternatives may be used should be clearly defined.

(a) *Monitoring the Treatment*

The court must also establish a process by which the implementation of the approved treatment plan can be monitored. G.L. c. 123, § 8B(e). Where a guardian has been previously appointed in the Probate and Family Court to make other decisions for the client, the District Court typically will request that they also serve as monitor for the Section 8B treatment order. A guardian who serves in this capacity is often referred to as a *Rogers* guardian, a term that has resulted in much confusion and that should be

avoided. As a monitor, the guardian has no decision-making authority whatsoever. Again, it is the court, and the court alone, that may authorize the administration of antipsychotic medication and other medical treatment for mental illness under G.L. c. 123, § 8B.

The court should clearly define in the order the role and responsibilities of the monitor. Among the most important of these will be regular visits with the client to review the efficacy of the treatment and the provider's compliance with the treatment plan, and the immediate notification of the court and counsel of noncompliance, adverse side effects, or a substantial change in the client's circumstances or condition.

(b) *Expiration and Modification of an Order*

An order authorizing treatment under Section 8B expires at the same time as the expiration of the commitment order that was in effect when the treatment order was issued. G.L. c. 123, § 8B(f).

Any party may at any time petition the court for modification of a treatment order. G.L. c. 123, § 8B(f).

(c) *Appeal or Review of Treatment Orders*

There are two procedures by which an order authorizing medical treatment for mental illness under G.L. c. 123, § 8B may, in the first instance, be reviewed.

First, matters of law (including evidentiary rulings) may be appealed to the Appellate Division of the District Court Department. G.L. c. 123, § 9(a); *see* G.L. c. 231, § 108; Mass. R. Civ. P. 64.

Second, at any time during the period of commitment, the client or anyone on their behalf may petition the Superior Court Department to determine whether the criteria for the administration of medical treatment for mental illness, as found by the District or Juvenile Court, are still met. G.L. c. 123, § 9(b). A full hearing on the merits will be held; thus, proceedings under Section 9(b) are not, strictly speaking, appeals. The procedural steps applicable in a Section 9(b) proceeding seeking the revocation of a treatment order issued pursuant to G.L. c. 123, § 8B are identical to other Superior Court matters, but note that an expedited hearing is called for. Typically, along with the petition seeking revocation of the treatment order, counsel will want to file a motion seeking funds for an independent clinician and an affidavit of indigency and related forms. The affidavit of indigency and related forms may be found on the Supreme Judicial Court website at https://www.mass.gov/lists/court-forms-for-indigency.

In a proceeding under Section 9(b), the client as petitioner bears the burden of proving by "a fair preponderance of the evidence that his situation has significantly changed since last his [treatment order] was reviewed judicially, whether on the basis of new factual developments or new evidence, so as to justify [revocation or modification of the order]." *Andrews, petitioner*, 449 Mass. 587 (2007).

Trial counsel should immediately notify CPCS of the filing of an appeal under G.L. c. 123, § 9(a), and/or a petition under G.L. c. 123, § 9(b), in order that counsel may be assigned.