

WHAT YOU NEED TO KNOW ABOUT THE NEW MASSACHUSETTS PROBATE CODE!

“Elder Law Today”, Surprenant Beneski, Estate Tax, Medicaid and Disability Planning

In January 2009 Massachusetts adopted the uniform Probate Code. The code is effective July 1, 2009 for Guardianships and Conservatorships (sometimes called living probate and in 2011 for death probates.

When an adult person is not capable of taking care of himself because of mental or physical illness then someone else must be legally authorized to make those decisions for him. Contrary to common belief a husband or wife is not legally authorized to make medical decisions for the spouse and cannot legally access any financial accounts owned individually by the incapacitated person. If the person has not legally authorized someone to make decisions for him in a valid **Health Care Proxy** or **Durable Power of Attorney** then the person’s family must petition the probate court to appoint someone as Guardian of the incapacitated individual.

Under the current law there are two kinds of guardianships. Guardian of the person makes medical decisions and Guardian of the estate makes financial decision. The person under guardianship is currently called “the ward”. The new law changes all of this. The person appointed to make medical decisions will be called the Conservator. The incapacitated person will now be called “incapacitated person or person in need of services”. If a person cannot make medical and financial decisions two separate petitions must be filed, involving two separate fees. One person can be appointed as both conservator and guardian.

The new proceedings will be much more involved than prior guardianship proceedings. The person for whom guardianship is being sought is entitled to legal counsel if requested. The Court must make specific findings when appointing a guardian including a finding that the person’s needs cannot be met by a less restrictive means. Currently if a person under guardianship needs anti-psychotic medication then a hearing is held to have the court determine if the medication is in the patient’s interest. This is known as a **“Rogers hearing”**. Under the new probate code a **Rogers’s** type hearing will be required for every person under guardianship who the guardian wants to place in a nursing facility. This additional burden is sure to add both time and expense to the process. It is often when the loved one is leaving the hospital for a nursing home that the family finds out that a guardianship is needed. The hospital is often under great pressure to discharge the patient. The requirement of a hearing is sure to slow things down.

The new law also requires the guardian to report in writing to the court on the condition of the incapacitated person and account for funds and other property under the Guardians control within 60 days of appointment and at least annually thereafter. This was not required under the current statute and is sure to add more expense to the guardianship process.

Overall, the Uniform Probate Code will give incapacitated persons more rights and more protections which is a good thing. However, the code will place additional expense and responsibilities on the guardian or conservator who is usually a family member. It is more important than ever to avoid the need for a guardianship or conservatorship by legally selecting and appointing alternative decision makers.

No one over 18 should be without a **Durable Power of Attorney**, which allows another person to make legal and financial decisions and a **Health Care Proxy** that allows another person to make medical decisions for him if the person cannot make decisions for himself. These two documents properly drafted and executed will avoid the need for a guardianship or conservatorship in most (but not all) situations. If you don’t have these documents, call an estate-planning attorney, and make an appointment to get them drafted. If you do have them make sure they are current and meet with current law. Your power of attorney should be updated every three to five years. Also make sure your adult children and parents have these documents as well. This information is for general informational purposes only and does not constitute legal advice. For specific questions you should consult a qualified attorney. Mention this article to **“Surprenant Beneski, Elder Law Attorney” 508-994-5200** and receive a free consultation.