

Introduction to the Massachusetts Uniform Probate Code

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Part 1

THE CODE AND THE COURT

§ 1 INTRODUCTION

Sweeping codification of Massachusetts probate law, namely the Massachusetts version of the Uniform Probate Code (hereinafter the “MUPC” or the “Code”) becomes effective July 1, 2011. The guardianship provisions of the Code (commonly referred to as “Article V”) become effective July 1, 2009, and are discussed in MCLE’s *Introduction to the Massachusetts Uniform Probate Code: Guardianship & Conservatorship* (2009).

Repealing the majority of chapters and statutes on probate law, the Code, some 150 pages, is inserted as Chapter 190B of the Massachusetts General Laws. The Code is divided into several articles, parts, and sections. Article I includes general provisions and definitions. Article II covers intestacy, wills, and donative transfers. Article III involves the process of appointing representatives, probating wills, and administering the estates of decedents. Article IV addresses foreign fiduciaries. Article V encompasses the protection of persons under disability and their property (i.e., guardianship, conservatorship, and durable powers of attorney). Article VI covers nonprobate transfers on death. Article VII sets out the law on trust administration.

To date, eighteen states have adopted the Uniform Probate Code, sometimes with significant modifications, including states in which many Massachusetts residents own property, such as Florida and Maine.

§ 1.1 Overview

The Code is designed to simplify, streamline, and clarify the process of settling a decedent’s affairs in a manner consistent with the decedent’s intent. G.L. c. 190B, § 1-102. Overall, the system accepts the premise that the court’s role concerning probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. General Comment, Art. III.

The Code provides for both informal and formal proceedings for the probate of a will and appointment of a personal representative. Estates that are relatively routine and involve no controversy will generally be administered through informal probate, which may be sought in both testate and intestate estates.

In general, a person seeking informal probate and appointment as a personal representative must give at least seven days notice of the petition to the heirs and devisees. If the petition is satisfactory, then the informal probate and appointment will be granted. After the appointment, provided that no interested party requests intercession by the court, the personal representative will administer the estate virtually free of court supervision. Closing the estate can be accomplished by simply filing a sworn statement with the court that debts, expenses, and taxes have been paid and distributions have been made to the persons entitled to them.

Under the Code, unless supervised administration is ordered, each proceeding (whether formal or informal) may be independent of other proceedings. In this manner, persons interested in estates (including personal representatives) may use an “in-and-out” relationship to the court so that any issue relating to the estate may be resolved or established by adjudication, after notice, without subjecting the estate to the necessity of judicial orders in regard to other or further matters. General Comment, Art. III(7).

§ 1.2 Falsified Documents and Fraud

All documents filed with the court pursuant to the Code are deemed verified and subject to penalties of perjury for any deliberate falsification of information. G.L. c. 190B, § 1-310. Additionally, any person injured by another’s fraud, perpetrated in connection with any proceeding under the Code, may seek and obtain relief from the perpetrator or may seek and obtain restitution from any person (other than a bona fide purchaser) who benefited from the fraud, whether innocent or not, if brought within the appropriate time frame. G.L. c. 190B, § 1-106.

§ 1.3 Definitions

The Code contains definitions of numerous words and phrases, most of which are consistent with their common usage. The following highlights twelve important definitions:

- The *court* means the Probate and Family Court Department of the Trial Court. G.L. c. 190B, § 1-201(7).
- *Administration* includes both formal and informal testate and intestate proceedings. G.L. c. 190B, § 1-201(1).

- The *magistrate* is an official of the court designated to perform certain acts and orders delineated in the Code. G.L. c. 190B, §§ 1-201(29), 1-307.
- The *personal representative* encompasses the familiar terms executor, administrator, special administrator, and the like. G.L. c. 190B, § 1-201(37). The court may appoint a general personal representative and, when necessary, a special personal representative.
- A *special personal representative* is one who may be appointed by the court, with or without notice, when such appointment is necessary to preserve the estate or to secure its proper administration, including its administration in circumstances where a general personal representative cannot or should not act. G.L. c. 190B, § 3-614.
- *Informal proceedings* are those conducted by a magistrate with at least seven days notice to interested parties for the probate of a will or appointment of a personal representative. G.L. c. 190B, §§ 1-201(23), 3-306.
- *Formal proceedings* are those conducted by a judge with notice by citation to interested persons. G.L. c. 190B, §§ 1-201(18), 3-403, 1-401.
- An *interested person* includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claims against a trust estate or the estate of a decedent. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. G.L. c. 190B, § 1-201(24).
- The *descendant* replaces the term “issue” under the Code. G.L. c. 190B, § 1-201(25). An individual’s descendants are identified at all generations through the parent-child relationship and specifically excludes step relationships. G.L. c. 190B, §§ 1-201(9), 1-201(5), 1-201(34).
- The term *devise* includes all testamentary dispositions, both real and personal. G.L. c. 190B, § 1-201(10).
- A *petition* is a written request to the court for an order after notice. G.L. c. 190B, § 1-201(38).

- *Successors* are persons, other than creditors, who are entitled to property of a decedent under the decedent's will or applicable Code provisions. G.L. c. 190B, § 1-201(49).

§ 2 GENERAL PROVISIONS

§ 2.1 Jurisdiction

The Probate and Family Court is granted subject matter jurisdiction over all matters relating to

- estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons;
- protection of minors and incapacitated persons;
- trusts; and
- any other matters authorized by G.L. c. 215, § 6 (equity jurisdiction).

G.L. c. 190B, §§ 1-302, 7-201. The territorial application of the court's jurisdiction is based upon:

- the relevant individual's domicile or presence in the Commonwealth;
- the property's location in the Commonwealth;
- the fiduciary controlling the property being subject to the laws of the Commonwealth; and
- the trust being subject to administration in the Commonwealth.

G.L. c. 190B, § 1-301.

§ 2.2 The Necessity of Probate and Administration

Upon death, the decedent's real and personal property devolves to the persons to whom it is devised by the decedent's last will or, in the absence of testamentary disposition, to the decedent's heirs. G.L. c. 190B, § 3-101.

Generally, in order to provide for the transfer of property or to nominate a personal representative, a will must be declared valid by an order of informal probate by a magistrate or an adjudication of probate by the court. G.L. c. 190B, § 3-102. Additionally, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by court order or magistrate, qualify, and be issued letters. G.L. c. 190B, § 3-103. Administration of an estate is commenced by the issuance of letters. G.L. c. 190B, § 3-103.

In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestacy. G.L. c. 190B, § 3-901.

§ 2.3 Notice

In informal proceedings, written notice is given to interested persons seven days prior to appointment or proceeding. G.L. c. 190B, § 3-306(a)(1)–(3). Additionally, not more than thirty days *after* informal probate or appointment, the petitioner must publish a notice once in a designated newspaper of general circulation. G.L. c. 190B, § 3-306(b).

In formal proceedings, notice is given to interested persons who have not assented by citation through:

- mailing a copy of the citation at least fourteen days prior to the return day to those interested or their counsel, at the office or residence, if known; or
- delivering personally a copy of the citation at least fourteen days prior to the return date; or
- by publication at least seven days before the return date.

G.L. c. 190B, § 1-401(a)(1)–(3). Moreover, in formal proceedings, notice by publication is required “to all unknown persons.” G.L. c. 190B, § 3-403. If interested persons reside outside of the country or are of parts unknown, the notice period may be extended. Prob. Ct. R. 6.

§ 2.4 The Magistrate

The Code creates a new position in the Probate and Family Court, known as the magistrate. The magistrate is an official appointed by the court to perform the administrative duties of reviewing informal petitions and determining whether

they comply with the statute. If the statutory requirements are met, the magistrate, upon making the requisite findings, will appoint the petitioner and/or issue a written statement of informal probate. G.L. c. 190B, §§ 3-302, 3-303, 3-307, 3-308. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. G.L. c. 190B, § 3-302.

If the magistrate finds the petition irregular or deficient, the magistrate may decline the informal petition. G.L. c. 190B, § 3-305.

§ 2.5 Appearance and Objection to Formal Proceedings

Any party to a formal proceeding who opposes it for any reason must enter an appearance in writing by 10:00 a.m. on the return date. G.L. c. 190B, § 1-401(d). Moreover, within thirty days after the return date, the objecting party must file a written affidavit of objection to the proceeding, stating the specific facts and grounds upon which the objection is based. G.L. c. 190B, § 1-401(e). The appearance and affidavit may be struck on motion, after notice, if the affidavit fails to comply with the statutory requirements. G.L. c. 190B, §§ 1-401(f), 1-401(e).

If the proceeding is unopposed, after the return date and upon proof of due notice, the court may enter appropriate orders on the strength of the pleadings, without hearing. G.L. c. 190B, § 1-401(g).

§ 2.6 Practice in the Court

The Probate Court Rules will continue to apply to practice in the court where not superseded by specific provisions of the Code. G.L. c. 190B, § 1-304 MA cmt.

As with current practice, contested accounts are subject to certain procedural rules of the Massachusetts Rules of Civil Procedure. Discovery provisions of the Mass. R. Civ. P. are applicable to all probate matters, as is summary judgment under Mass. R. Civ. P. 56. Prob. Ct. R. 27A, 27B.

§ 2.7 Virtual Representation

The Code provides a mechanism by which persons unrepresented may be bound by the court's orders under certain formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements. G.L. c. 190B, § 1-403. Adopting the concept of virtual representation, the Code eliminates the need for a guardian ad litem for persons unborn or unascertained when there is notice to a person having a substantially

identical interest in the proceeding. G.L. c. 190B, §§ 1-403(2)(iii), 1-403 cmt. Additionally, if there is no conflict of interest and no appointed conservator or guardian, a parent may represent a minor child. G.L. c. 190B, § 1-403(2)(ii).

§ 2.8 Time Limitations on Probate and Administration

Informal probate or appointment may not be granted until at least seven days after the decedent's death. G.L. c. 190B, § 3-302.

With few exceptions, no initial informal or formal proceedings may be commenced more than three years after the decedent's death. G.L. c. 190B, § 3-108. One such exception allows for a proceeding to be commenced within twelve months from the informal probate in order to contest an informally probated will and to secure appointment of the appropriate personal representative if the contest is successful. G.L. c. 190B, § 3-108. Accordingly, if no will is probated within three years from death, the assumption of intestacy is final; and, if a will has been informally probated within the period, the informal probate is conclusive after three years, or within twelve months from informal probate, if later. G.L. c. 190B, § 3-108 cmt. Heirs or devisees can protect themselves against change in testacy status within the three-year statute by commencing a formal proceeding to address the issue. G.L. c. 190B, § 3-108 cmt.

§ 3 THE PERSONAL REPRESENTATIVE

§ 3.1 Priority and Disqualification for Appointment

The Code utilizes the comprehensive identifier "personal representative," which includes executor, administrator, successor, personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. G.L. c. 190B, § 1-201(37).

Whether the proceedings are formal or informal, the Code provides for priority among persons seeking appointment as a personal representative. For testate proceedings, the order of priority is:

- the persons named in the will or nominated by a power conferred in the will;
- the surviving spouse who takes under the will; and
- other devisees.

G.L. c. 190B, § 3-203(a)(1)–(3). For intestate proceedings, the order of priority is: first, the surviving spouse; and next, other heirs. G.L. c. 190B, § 3-203(a)(4)–(5). If there is no known spouse or next of kin, a public administrator will be appointed. G.L. c. 190B, § 3-203(a)(6).

A person entitled to letters, other than one named in the will or nominated by a power in the will, may nominate a qualified person to act as personal representative. G.L. c. 190B, § 3-203(c).

An objection to an appointment can only be made in formal proceedings. G.L. c. 190B, § 3-203(b). In the case of objections made, the priorities above apply, except:

- in certain insolvent estates, the court, on petition of the creditors, may appoint any qualified person, G.L. c. 190B, § 3-203(b)(1); and
- when an heir or devisee with a substantial interest in the estate objects to the appointment of a person whose priority is not established by the will, the court may appoint a mutually acceptable person, or, if none, a suitable person, G.L. c. 190B, § 3-203(b)(2).

The court must appoint one whose priority is determined by the will, unless the court finds that such appointment is contrary to the best interest of the estate. G.L. c. 190B, §§ 3-203(f)(2), 3-203(b)(2).

Appointment of one who does not have priority may be made only in formal proceedings. G.L. c. 190B, § 3-203(e). Before appointing one without priority, the court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary. G.L. c. 190B, § 3-203(e).

Finally, a personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates a different person to act in the Commonwealth. G.L. c. 190B, § 3-203(g). Such domiciliary personal representative may nominate another who will then have priority to act in the Commonwealth. G.L. c. 190B, § 3-203(g).

§ 3.2 Appointment Necessary

A personal representative, in order to acquire powers and duties, must be appointed by order of the court or a magistrate, qualify, and be issued letters. G.L. c. 190B, § 3-103. Administration of an estate is commenced by the issuance of letters. G.L. c. 190B, § 3-103. Letters, under the Code, are issued either through informal or formal appointment. G.L. c. 190B, §§ 3-307, 3-414.

§ 3.3 Powers of the Personal Representative

General Laws c. 195, § 5A (repealed and replaced by the Code) contains a relatively short list of powers of executors and administrators. The Code greatly expands statutory powers and gives personal representatives many of the powers found enumerated in wills. The Code includes all of the powers described in G.L. c. 184B, § 2 (statutory optional fiduciary powers), as well as powers not found in that statute. The following is an abbreviated list of the powers given a personal representative under the Code, except as restricted or otherwise provided by the will or by an order in a formal proceeding. A special personal representative may perform only those powers indicated.

- Retain assets owned by the decedent, including those in which the representative is personally interested or which are otherwise improper for trust investment. A special personal representative may exercise this power.
- Receive assets from fiduciaries or other sources. A special personal representative may exercise this power.
- Perform, compromise, or refuse performance of the decedent's contracts, including land contracts, that continue as obligations of the estate. A special personal representative may exercise this power.
- If funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or prudently invest liquid assets of the estate. A special personal representative may exercise this power.
- Make repairs or alterations to buildings or other structures. A special personal representative may exercise this power.
- Enter for any purpose into a lease for a term within or extending beyond the period of administration.
- Abandon property when, in the opinion of the personal representative, it is valueless or is so encumbered or is in a condition that it is of no benefit to the estate.
- Vote stocks or other securities in person or by general or limited proxy. A special personal representative may exercise this power.

- Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate.
- Insure the assets of the estate and the personal representative against liability as to third persons. A special personal representative may exercise this power.
- Borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate.
- Effect a fair and reasonable compromise with any debtor or obligor, or modify the terms of any obligation owing to the estate.
- Pay taxes and other expenses incident to the administration of the estate. A special personal representative may exercise this power.
- Employ persons, including attorneys, auditors, investment advisors or agents, to advise or assist the personal representative in the performance of administrative duties; act without independent investigation upon their recommendations; and, instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary. A special personal representative may exercise this power.
- Defend and prosecute claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his or her duties. A special personal representative may exercise this power.
- Sell or lease any personal property of the estate.
- Continue any unincorporated business or venture in which the decedent was engaged at the time of death, as further delineated under the Code provision. A special personal representative may exercise this power.
- Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate. A special personal representative may exercise this power.
- Satisfy and settle claims and distribute the estate as provided under the Code. G.L. c. 190B, § 3-715(a), (b).

The personal representative may also

- compromise claims against the estate, G.L. c. 190B, § 3-813;
- distribute assets in kind, G.L. c. 190B, § 3-906; and
- employ appraisers to ascertain the fair market value of estate assets, G.L. c. 190B, § 3-707.

The personal representative is entitled to receive necessary expenses and disbursements, including reasonable attorney fees, incurred in the good-faith defense or prosecution of estate litigation, regardless of success. G.L. c. 190B, § 3-720.

The powers conferred on personal representatives by the Code apply in both testate and intestate estates. These powers are consistent with the intent of the Code to facilitate the administration of estates without court intervention. A significant exception, however, is any transaction involving real estate. The Code does not grant a personal representative the authority to sell or mortgage real estate without license and G.L. c. 202 will remain in effect after the adoption of the Code. *See* G.L. c. 190B, § 3-715 MA cmt. Accordingly, as with current practice, the personal representative will need to obtain a license to sell or mortgage real estate unless the governing instrument grants him or her that power.

§ 3.4 Proceeding Without Court Direction

The personal representative is obligated to proceed expeditiously with the settlement and distribution of a decedent's estate, and, unless supervised administration is ordered, to do so without order or direction of the court. The personal representative, however, may at any time petition the court to resolve questions concerning the estate or its administration. G.L. c. 190B, § 3-704.

§ 3.5 Bonds

Under the Code, prior to receiving letters, a personal representative accepts appointment and qualifies by filing a bond. G.L. c. 190B, § 3-601. Sureties on the bond are required of a personal representative unless:

- the will waives the requirement;
- all heirs, if no will has been probated, or all of the devisees named in the will file a written waiver of sureties;
- the personal representative is a bank or qualified trust company; or

- the court concludes that sureties are not in the estate's best interest.

G.L. c. 190B, §§ 3-603(a), 3-603(b). The court, on its own motion, may require sureties or additional sureties in any formal proceeding. G.L. c. 190B, § 3-603(a).

Any individual apparently having, or a creditor claiming to have, an interest in the estate in excess of \$5,000 may demand that sureties be given. G.L. c. 190B, § 3-605. After receiving notice of the demand, the personal representative shall, within thirty days, provide suitable sureties. G.L. c. 190B, § 3-605.

If the provisions of the will do not specify the amount, the personal representative must submit to the court on the petition or by separate verified statement, his or her best estimate of the personal estate's value and file a bond equal to that amount. G.L. c. 190B, § 3-604(a). The court may, upon petition, increase or reduce the amount of bond, release the surety or permit the substitution of another bond with the same or different surety. G.L. c. 190B, § 3-604.

§ 4 APPOINTMENT OF PERSONAL REPRESENTATIVE

The Code eliminates temporary executors and administrators, providing instead for the appointment of a personal representative in informal proceedings after seven days notice to interested persons. Notice to heirs and devisees in any informal or formal proceeding must include information concerning the meaning of the proceeding and their rights concerning the administration of the estate. G.L. c. 190B, §§ 3-301, 3-306, 3-402(a), 3-403.

§ 4.1 Informal Appointment Proceedings

(a) *The Petition*

As with current practice, the appointment of a fiduciary will be by petition, presumably on an approved form generated by the court. The petition for the informal appointment of the personal representative must include the following:

- a statement of the interest of the petitioner;
- the name, date of death, age, and address of the decedent at death, and the names and addresses of the spouse, children, heirs, and devisees, and the ages of any who are minors;

- a statement identifying any heir or surviving spouse who may be an incapacitated person;
- if the decedent was not domiciled in the Commonwealth at death, a statement showing venue;
- identifying information concerning any personal representative previously appointed in the Commonwealth or elsewhere whose appointment has not been terminated;
- a statement that a copy of the petition and death certificate have been sent to the Division of Medical Assistance by certified mail; and
- a statement that informal appointment is timely under the circumstances.

G.L. c. 190B, § 3-301(a)(1)(i)–(vii). A petition for informal appointment of a personal representative in intestacy must additionally assert

- that after the exercise of reasonable diligence, the petitioner is unaware of any unrevoked will relating to Massachusetts property, or a statement why any such instrument of which the petitioner may be aware is not being probated;
- the priority of the person seeking appointment and the names of any other persons having a prior or equal right to same; and
- a statement of concurrent or previous filing of the death certificate.

G.L. c. 190B, § 3-301(a)(4)(i)–(iii). A petition for informal appointment of a personal representative to administer an estate under a will must describe the will by date of execution, and state the time and place of probate or the pending petition for probate. G.L. c. 190B, § 3-301(a)(3). The informal petition for appointment to administer an estate under a will must adopt the statements in the petition for probate and identify the proposed personal representative, indicating his or her priority for appointment. G.L. c. 190B, § 3-303(a)(3). See § 5.1, Informal Testacy Proceeding, below.

(b) *Notice Requirements*

The petitioner must give written notice at least seven days prior to petitioning for informal appointment by delivery or by mail to the following:

- all heirs and devisees;

- any person having a prior or equal right to appointment not waived in writing and filed with the court; and
- any personal representative of the decedent whose appointment has not been terminated.

G.L. c. 190B, § 3-306(a)(1)–(3). A certificate that such notice has been given, identifying the names and addresses of those noticed, is prima facie evidence of notice. G.L. c. 190B, § 3-306(a).

If there is no spouse or heir of the decedent or if any devisee is a charity, notice must be provided to the attorney general. G.L. c. 190B, § 3-306(d). If a spouse, heir, or devisee is a minor or an incapacitated person, the petitioner must give notice to that person and that person's guardian or conservator. G.L. c. 190B, § 3-306(e).

Additionally, not more than thirty days after informal probate or appointment, the petitioner must publish a notice once in a designated newspaper of general circulation. G.L. c. 190B, § 3-306(b).

Failure to give the prescribed notice is a breach of the fiduciary's duty to the persons concerned but does not affect the validity of the probate, appointment, powers, or other duties. G.L. c. 190B, § 3-306(f).

(c) *Notice Information*

The notice required for an informal appointment must include the following:

- the name and address of the petitioner and personal representative;
- an indication that it is being sent to persons who have or may have an interest in the estate;
- an indication of whether the bond is with or without surety;
- a description of the court where the papers relating to the estate are on file;
- a statement that the estate is being administered under informal procedure by the personal representative under the Code without supervision by the court;
- a statement that inventory and accounts are not required to be filed with the court, but that interested parties are entitled to notice regarding the administration from the personal representative

and can petition the court in any matter relating to the estate, including distribution of assets and expenses of administration; and

- a statement that interested parties are entitled to petition the court to institute formal proceedings and to obtain orders terminating or restricting the powers of personal representatives appointed under informal procedure.

G.L. c. 190B, § 3-306(c). It should be noted that within three months after appointment, a personal representative is obligated to prepare a reasonably detailed, fair-market valued, inventory of property owned by the decedent at the time of death. G.L. c. 190B, § 3-706. A copy of the inventory must be filed with the court or mailed to all interested persons. G.L. c. 190B, § 3-706.

(d) *Magistrate's Responsibility and Findings*

In informal appointment proceedings, the court or magistrate will determine whether

- the petition is verified, timely, and complete;
- the petitioner appears to be a proper, interested person;
- venue is proper;
- proper notice has been timely made;
- the appointee has priority in appointment;
- the spouse and heirs are not incapacitated persons or minors, or if any are, they are represented by guardians or conservators; and
- a death certificate is in the court's possession.

G.L. c. 190B, § 3-308(a)(1)–(4), (6)–(9). In a testate informal appointment, the magistrate must also find that any will to which the requested appointment relates has been formally or informally probated. G.L. c. 190B, §§ 3-308(a)(5), 3-307.

After making the requisite findings, the magistrate will appoint the petitioner, subject to qualification and acceptance. G.L. c. 190B, § 3-307.

(e) *Effect of Informal Appointment by Magistrate*

The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment by the magistrate. G.L. c. 190B, § 3-307(b).

§ 4.2 Formal Appointment Proceedings**(a) *Purpose and Effect***

A formal proceeding concerning the appointment of a personal representative is necessary when there is a question as to the priority or qualification of the personal representative. G.L. c. 190B, § 3-414. If testacy is at issue, a formal appointment proceeding may occur for adjudication regarding priority or qualification of the petitioner or of one who has been previously appointed informally. G.L. c. 190B, § 3-414; *see also* G.L. c. 190B, § 3-414 cmt. A formal appointment proceeding is also required when the magistrate has declined to approve an informal appointment petition. G.L. c. 190B, § 3-309.

If prior appointment has not been made, any pending informal appointment proceeding is stayed upon petition for formal appointment. G.L. c. 190B, § 3-414. If prior appointment has been made, the previously appointed personal representative, after receipt of notice, must refrain from exercising any power of administration, except as necessary to preserve the estate or unless the court orders otherwise. G.L. c. 190B, § 3-414.

(b) *The Petition*

The formal petition for appointment must include all the statements required for an informal appointment and will further identify the question relating to priority or qualification which requires resolution. G.L. c. 190B, § 3-414. See § 4.1(a), above.

If an issue concerning the testacy of the decedent is involved, the petition for formal appointment must also include those statements required for formal testacy proceedings. G.L. c. 190B, §§ 3-414, 3-402. See § 5.2(b), below.

(c) Notice and Hearing

In formal appointment proceedings, notice is given to interested persons who have not assented by citation through

- mailing a copy of the citation at least fourteen days prior to the return day to those interested or their counsel, at the office or residence, if known; or
- delivering personally a copy of the citation at least fourteen days prior to the return date; or
- by publication at least seven days before the return date.

G.L. c. 190B, §§ 3-414(b), 3-403, 1-401(a)(1)–(3). Moreover, in formal proceedings, notice by publication is required “to all unknown persons.” G.L. c. 190B, §§ 3-414(b), 3-403. If interested persons reside outside of the country or are of parts unknown, the notice period may be extended. Prob. Ct. R. 6.

Notice of a formal appointment proceeding must be given to the following:

- the surviving spouse, children, and other heirs of the decedent;
- the devisees and executors named in any offered or probated will in the county or elsewhere;
- any personal representative of the decedent whose appointment has not been terminated; and
- all interested unknown persons and all interested persons whose addresses are unknown, by publication.

G.L. c. 190B, §§ 3-414(b), 3-403(b). Notice is required upon all persons interested in the administration of the estate as successors, any previously appointed personal representative, and any person who may have a priority for appointment. G.L. c. 190B, § 3-414(b).

If there is no spouse or heir of the decedent or if any devisee is a charity, notice must be provided to the attorney general. G.L. c. 190B, §§ 3-414 (b), 3-403(d). If a spouse, heir, or devisee is a minor or an incapacitated person, the petitioner shall give notice to that person and that person’s guardian or conservator. G.L. c. 190B, §§ 3-414(b), 3-403(e).

Failure to give the prescribed notice is a breach of the fiduciary's duty to the persons concerned but does not affect the validity of the probate, appointment, powers, or other duties. G.L. c. 190B, §§ 3-414(b), 3-403(f).

(d) *Notice Information*

The notice required for a formal appointment must include the following:

- the name and address of the petitioner and personal representative;
- an indication that it is being sent to persons who have or may have an interest in the estate;
- an indication of whether the bond is with or without surety;
- a description of the court where the papers relating to the estate are on file;
- a statement that the estate is being administered under formal procedure by the personal representative under the Code without supervision by the court; and
- a statement that inventory and accounts are not required to be filed with the court, but that recipients are entitled to notice regarding the administration from the personal representative and can petition the court in any matter relating to the estate, including distribution of assets and expenses of administration.

G.L. c. 190B, §§ 3-414(b), 3-403(c).

(e) *The Decree*

After appropriate notice, the court will determine who is entitled to appointment, make a proper appointment, and, if appropriate, terminate any prior appointment. G.L. c. 190B, § 3-414. If the proceeding is unopposed, after the return date and upon proof of due notice, the court may enter the appropriate orders on the strength of the pleadings, without hearing. G.L. c. 190B, § 1-401(g).

It is important to distinguish formal appointment proceedings from supervised administration. G.L. c. 190B, § 3-414 cmt. Supervised administration, discussed below, originates from a formal proceeding and may be requested in addition to formal rulings; that is, the formally appointed personal representative may or may not be "supervised." G.L. c. 190B, § 3-414 cmt.

§ 5 TESTACY PROCEEDINGS

The word “testacy” is used to refer to the general status of a decedent in regard to a will. Thus, it embraces the possibility that the decedent left a valid will disposing of all his or her property, no will, or that the decedent died partially testate and partially intestate. G.L. c. 190B, § 3-401 cmt.

§ 5.1 Informal Testacy Proceeding

(a) *The Petition*

The petition for informal probate of a will must include all the information required for an informal appointment, as well as statements that

- the original purported will is attached or previously filed with the court, or that an authenticated copy of a will probated in another jurisdiction accompanies the petition;
- the petitioner believes this will to have been validly executed;
- after exercising reasonable diligence, the petitioner is unaware of any instrument revoking the will and he or she believes that the subject instrument is the decedent’s last will; and
- the death certificate is attached or previously filed.

G.L. c. 190B, § 3-301(a)(2)(i)–(iv).

(b) *Notice*

The petitioner must give written notice at least seven days prior to petitioning for informal probate by delivery or by mail to the following:

- all heirs and devisees;
- any person having a prior or equal right to appointment not waived in writing and filed with the court; and
- any personal representative of the decedent whose appointment has not been terminated.

G.L. c. 190B, § 3-306(a)(1)–(3). A certificate that such notice has been given, identifying the names and addresses of those noticed, is prima facie evidence of notice. G.L. c. 190B, § 3-306(a).

If there is no spouse or heir of the decedent or if any devisee is a charity, notice must be provided to the attorney general. G.L. c. 190B, § 3-306(d). If a spouse, heir, or devisee is a minor or an incapacitated person, the petitioner shall give notice to that person and that person's guardian or conservator. G.L. c. 190B, § 3-306(e).

Additionally, not more than thirty days after informal probate or appointment, the petitioner must publish a notice once in a designated newspaper of general circulation. G.L. c. 190B, § 3-306(b).

Failure to give the prescribed notice is a breach of the fiduciary's duty to the persons concerned but does not affect the validity of the probate, appointment, powers, or other duties. G.L. c. 190B, § 3-306(f).

(c) *Notice Information*

The notice required for an informal probate must include the following:

- the name and address of the petitioner and personal representative;
- an indication that it is being sent to persons who have or may have an interest in the estate;
- an indication of whether the bond is with or without surety;
- a description of the court where the papers relating to the estate are on file;
- a statement that the estate is being administered under informal procedure by the personal representative under the Code without supervision by the court;
- a statement that inventory and accounts are not required to be filed with the court, but that interested parties are entitled to notice regarding the administration from the personal representative and can petition the court in any matter relating to the estate, including distribution of assets and expenses of administration; and
- a statement that interested parties are entitled to petition the court to institute formal proceedings and to obtain orders terminating or

restricting the powers of personal representatives appointed under informal procedure.

G.L. c. 190B, § 3-306(c).

(d) *Magistrate's Responsibilities and Findings*

In informal proceeding for original probate of a will, the court or magistrate will determine whether

- the petition is verified, complete, and timely;
- the petitioner appears to be a proper, interested person;
- venue is proper;
- an original, duly executed, and apparently unrevoked will is in the court's possession
- proper notice has been timely made;
- the instrument is not one or more of a known series acting collectively, other than a will and one or more codicils,
- the spouse and heirs are not incapacitated persons or minors, or if any are, they are represented by guardians or conservators; and
- a death certificate is in the court's possession.

G.L. c. 190B, § 3-303(a)(1)–(9). A will which appears to have the required signatures and which contains an attestation clause of due execution shall be probated without further proof. G.L. c. 190B, § 3-303(c). In other cases, a magistrate may assume execution if the will appears to have been properly executed. G.L. c. 190B, § 3-303(c).

The magistrate, upon making findings that the above requirements have been met, shall issue a written statement of informal probate. G.L. c. 190B, §§ 3-302, 3-303.

If the magistrate is not satisfied that the will is entitled to be informally probated because of a failure to meet the statutory requirements or for any other irregularity, the magistrate may decline the petition. G.L. c. 190B, § 3-305. Such a declination is not an adjudication and does not preclude formal probate proceedings. G.L. c. 190B, § 3-305.

(e) *Effect of Informal Probate of a Will by Magistrate*

Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. G.L. c. 190B, § 3-302. A defect in the petition or procedure resulting in an informal probate of a will does not render the probate void. G.L. c. 190B, § 3-302.

§ 5.2 Formal Testacy Proceedings

(a) *Purpose and Effect*

A formal testacy proceeding is litigation to determine whether a decedent left a valid will. G.L. c. 190B, § 3-401. It may also be a proceeding to secure a decree of intestacy and a determination of heirs in a case where no will has been offered. G.L. c. 190B, § 3-401 cmt.

A formal testacy proceeding is commenced by the petition of an interested person which requests that the court enter an order

- probating a will;
- setting aside an informal probate of a will;
- preventing a pending petition for informal probate; or
- that the decedent died intestate.

G.L. c. 190B, § 3-401. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative. G.L. c. 190B, § 3-401.

During the pendency of a formal testacy proceeding, the magistrate cannot act upon any petition for informal probate or appointment. G.L. c. 190B, § 3-401.

Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the formal proceeding, cannot make any further distribution of the estate. G.L. c. 190B, § 3-401. A petitioner seeking appointment of a different personal representative may also request an order restraining the acting representative from exercising any powers and may request the appointment of a special personal representative. G.L. c. 190B, § 3-401. In the absence or denial of such requests, the commencement of formal proceedings has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution. G.L. c. 190B, § 3-401.

(b) *The Petition*

A petition for formal probate of a will requests judicial approval of the instrument as the last will of the decedent and determination of the decedent's heirs. G.L. c. 190B, § 3-402(a)(1). The petition contains the same identifying statements as for informal probate, along with the statements that the petitioner believes this will to have been validly executed; that after exercising reasonable diligence, he or she is unaware of any instrument revoking the will; and that he or she believes that the subject instrument is the decedent's last will. G.L. c. 190B, §§ 3-402(a)(2), 3-301(a). The original instrument, or an authenticated copy probated in another jurisdiction, is filed with the petition, unless the instrument is already in the court's possession and the petition so states. G.L. c. 190B, § 3-402(a)(3). If the will is otherwise unavailable, lost, or destroyed, the petition must indicate same and state the will's contents. G.L. c. 190B, § 3-402(a)(3).

A petition for adjudication of intestacy must request a judicial finding and order that the decedent left no valid will, as well as a determination as to the decedent's heirs. G.L. c. 190B, § 3-402(c). The petition must contain the same identifying statements as for informal appointment and additionally assert

- that after the exercise of reasonable diligence, the petitioner is unaware of any unrevoked will relating to Massachusetts property, or a statement why any such instrument of which the petitioner may be aware is not being probated;
- the priority of the person seeking appointment and the names of any other persons having a prior or equal right to same; and
- a statement of concurrent or previous filing of the death certificate.

G.L. c. 190B, §§ 3-402(c), 3-301(a)(1), 3-301(a)(4)(i)–(iii). Finally, a petition for adjudication of intestacy must indicate whether supervised administration is sought. G.L. c. 190B, § 3-402(c).

A petition may request an order determining intestacy and heirs without requesting the appointment of a personal representative, in which case the statement concerning priority may be omitted. G.L. c. 190B, § 3-402(c).

(c) Notice and Hearing

In formal testacy proceedings, notice is given to interested persons who have not assented by citation through

- mailing a copy of the citation at least fourteen days prior to the return day to those interested or their counsel, at the office or residence, if known; or
- delivering personally a copy of the citation at least fourteen days prior to the return date; or
- by publication at least seven days before the return date.

G.L. c. 190B, §§ 3-403(a), 1-401(a)(1)–(3). Moreover, in formal proceedings, notice by publication is required “to all unknown persons.” G.L. c. 190B, § 3-403(b). If interested persons reside outside of the country or are of parts unknown, the notice period may be extended. Prob. Ct. R. 6.

Notice of a formal testacy proceeding must be given to the following:

- the surviving spouse, children, and other heirs of the decedent;
- the devisees and executors named in any offered or probated will in the county or elsewhere;
- any personal representative of the decedent whose appointment has not been terminated; and
- all interested unknown persons and all interested persons whose addresses are unknown, by publication.

G.L. c. 190B, § 3-403(b). If there is no spouse or heir of the decedent or if any devisee is a charity, notice must be provided to the attorney general. G.L. c. 190B, § 3-403(d). If a spouse, heir, or devisee is a minor or an incapacitated person, the petitioner shall give notice to that person and that person’s guardian or conservator. G.L. c. 190B, § 3-403(e).

Failure to give the prescribed notice is a breach of the fiduciary’s duty to the persons concerned but does not affect the validity of the probate, appointment, powers, or other duties. G.L. c. 190B, § 3-403(f).

If the proceeding is unopposed, after the return date and upon proof of due notice, the court may enter the appropriate orders on the strength of the pleadings, without hearing. G.L. c. 190B, § 1-401(g).

(d) Notice Information

The notice required for a formal appointment must include the following:

- the name and address of the petitioner and personal representative;
- an indication that it is being sent to persons who have or may have an interest in the estate;
- an indication of whether the bond is with or without surety;
- a description of the court where the papers relating to the estate are on file;
- a statement that the estate is being administered under formal procedure by the personal representative under the Code without supervision by the court; and
- a statement that inventory and accounts are not required to be filed with the court, but that recipients are entitled to notice regarding the administration from the personal representative and can petition the court in any matter relating to the estate, including distribution of assets and expenses of administration.

G.L. c. 190B, § 3-403(c).

(e) The Decree

After the return date, upon proof of due notice and after hearing, if necessary, if the court finds that the testator is deceased, venue is proper, and the petition timely, then it will determine the decedent's domicile, the heirs, and status of testacy. G.L. c. 190B, § 3-409. Any will found to be valid and unrevoked shall be formally probated. G.L. c. 190B, § 3-409.

After entry of a final order in a formal testacy proceeding, no petition for probate of any other instrument of the decedent may be entertained, except by petition to vacate and subject to certain time limits. G.L. c. 190B, § 3-410.

§ 5.3 The Special Personal Representative

Upon petition of an interested person, after notice and hearing, the court may appoint any suitable person to act as a special personal representative when the appointment is necessary to preserve the estate or to secure its proper administration,

including its administration in circumstances where a general personal representative cannot or should not act. G.L. c. 190B, §§ 3-614, 3-615. If an emergency exists, the court may make the appointment without notice. G.L. c. 190B, § 3-614.

The special personal representative's powers are limited by statute and as prescribed in any court order. G.L. c. 190B, §§ 2-617, 3-715. See § 3.3, Powers of the Personal Representative, above. The appointment of a special personal representative may be for a period up to ninety days except in extraordinary circumstances, in which case the court may order an appointment for a longer period. G.L. c. 190B, § 3-617. The court may, for good cause shown, extend the appointment for an additional period of up to ninety days. G.L. c. 190B, § 3-617.

The special personal representative continues to act during the pendency of an appeal on his or her appointment. G.L. c. 190B, § 3-614.

§ 6 SUPERVISED ADMINISTRATION

Supervised administration is described under the Code as a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative. G.L. c. 190B, § 3-501. Supervised administration is appropriate when an interested person desires assurances that the essential steps regarding the opening and closing of an estate will be adjudicated. G.L. c. 190B, § 3-501 cmt.

Supervised administration should not be confused with formal proceedings. A formal proceeding is the judicial determination of the validity of a will or the appointment of an appropriate personal representative, but after the court has made such a decision, the estate administration is unsupervised.

§ 6.1 The Petition and Order

A petition for supervised administration may be filed by any interested person or by a personal representative at any time, or the request for supervised administration may be joined with a petition in a testacy or appointment proceeding. G.L. c. 190B, § 3-502.

If a will has been previously probated in informal proceedings, a petition for supervised administration may seek to set it aside, obtain a judicial adjudication as to it, or obtain an order that the decedent died intestate. G.L. c. 190B, §§ 3-503(b), 3-401. It may request confirmation of the previous informal appointment

or an order appointing a different personal representative. G.L. c. 190B, §§ 3-503(b), 3-401.

If no previous adjudication exists, the petition for supervised administration must include the matters required of a petition for formal testacy proceeding and the formal notice and procedural requirements must be followed. G.L. c. 190B, § 3-502. See § 5.2, Formal Testacy Proceedings, above.

If not previously adjudicated, the court will adjudicate the testacy of the decedent and make determinations concerning the priority and qualifications of the personal representative even though the request for supervised administration may be denied. G.L. c. 190B, § 3-502. After notice to interested persons, the court will order supervised administration if the decedent's will directs, unless circumstances bearing on the need for supervision have changed, or upon a finding of necessity. G.L. c. 190B, § 3-502.

§ 6.2 Effect on Other Proceedings and Powers of a Supervised Personal Representative

The pendency of a proceeding for supervised administration stays action on any informal petition. G.L. c. 190B, § 3-503(a).

After receiving notice of the filing of a petition for supervised administration, a previously appointed personal representative may not make any distributions of the estate, but is otherwise authorized to exercise any other power or duty unless otherwise ordered by the court. G.L. c. 190B, § 3-503(c).

Unless restricted by court order, a supervised personal representative has all the powers of personal representatives except that he or she may not make any distribution of the estate without prior court order. G.L. c. 190B, § 3-504. Any additional court-ordered restriction on the power of a supervised personal representative must be endorsed on his or her letters of appointment. G.L. c. 190B, § 3-504.

§ 6.3 Interim Orders and Distribution

Interim orders directing partial distributions or granting other relief may be issued by the court at any time during the pendency of a supervised administration on the petition of the personal representative or an interested person. G.L. c. 190B, § 3-505. Unless otherwise required by court order, notice of interim orders in supervised administration need be given only to interested persons who request notice of all orders entered in the proceeding. G.L. c. 190B, § 3-505.

Unless otherwise ordered by the court, supervised administration is terminated by formal estate closing procedures under the Code. G.L. c. 190B, §§ 3-505, 3-1001.

§ 7 CLOSING THE ESTATE

§ 7.1 Informal Closing Procedure

Except for estates being administered in supervised administration proceedings, a personal representative may informally close an estate by filing with the court a verified statement that he or she has

- determined that the time period for presentation of creditor claims has expired;
- fully administered the estate, except as specified, and that the assets of the estate have been accordingly distributed;
- sent a copy of the statement to all distributees, established creditors, and known claimants; and
- furnished a full written account to the distributees.

G.L. c. 190B, §§ 3-1003(a)(1)–(3), 3-803, 1-201(13). This statement may be filed no earlier than six months from the date of original general appointment, keeping in mind, however, that under the Code, the statute of limitations for creditor's claims, in general, is one year from the date of the decedent's death. G.L. c. 190B, §§ 3-1003, 3-803, 3-806.

If no proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the personal representative's closing statement may not be challenged except for fraud or manifest error. G.L. c. 190B, § 3-1003(b).

§ 7.2 Formal Closing Proceedings

A personal representative or any interested person may petition for an order of complete settlement of the estate. G.L. c. 190B, § 3-1001(a). This petition may request the court to determine testacy, if not previously determined, to consider the final account, compel or approve an accounting or distribution or both, to construe any will, determine heirs, or adjudicate the final settlement and distribution of the estate. G.L. c. 190B, § 3-1001(a).

Subject to the statute of limitations concerning creditors' claims, the personal representative may petition at any time for an order of complete settlement and any other interested person may petition one year after the appointment of the original personal representative. G.L. c. 190B, §§ 3-1001(a), 3-803.

Unless the petition is assented to by all interested parties, notice is by citation to all interested persons in accordance with the Code. G.L. c. 190B, § 3-1001(a), 1-401.

After the return day, upon due notice, and after any necessary hearing, the court, when appropriate, may

- determine those entitled to distribution;
- direct or approve distribution or settlement; and
- discharge the personal representative from any further claims or demands.

G.L. c. 190B, § 3-1001(b). The discharge of the personal representative through this proceeding, will forever exonerate him and his sureties from all liability unless his account is impeached for fraud or manifest error. G.L. c. 190B, § 3-1001(b).

A petition for an order of complete settlement may also be utilized in the event one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding. G.L. c. 190B, § 3-1001(c). After notice to the omitted or unnotified persons and other interested parties as determined, the court may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy. G.L. c. 190B, § 3-1001(c).

INTRODUCTION TO THE UNIFORM PROBATE CODE

Part 2

GUARDIANSHIP AND CONSERVATORSHIP

§ 8 INTRODUCTION

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

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

§ 8.1 Separate Roles of Guardians and Conservators

Under current Massachusetts law, a guardian may be appointed over the person and property of the ward. The Code, however, separates the roles of guardians and conservators. A guardian has custody of the individual who is either a minor or an incapacitated person as defined under the Code. A conservator controls the business affairs and has possession of the property of the protected person, who is either a minor or a disabled person as defined under the Code. If circumstances require proceedings for both guardianship and conservatorship, two petitions should be filed which thereafter may be consolidated for hearing. G.L. c. 190B, § 5-303 MA cmt.; *see* G.L. c. 190B, § 1-302(d).

§ 8.2 Jurisdiction

The Probate and Family Court is granted subject matter jurisdiction relative to estates of protected persons and protection of minors and incapacitated persons. G.L. c. 190B, § 1-302. The District and Juvenile Courts have concurrent jurisdiction with the Probate Court to appoint guardians of minors and subsequent proceedings in certain instances. G.L. c. 190B, § 1-302(c).

§ 8.3 Limited Guardianships and Protective Orders

A fundamental position concerning guardianship under the Code is that the court should not confer more authority over a person than is necessary. Instead, a “limited guardianship” approach should be utilized. G.L. c. 190B, § 5-306 cmt. Additionally, the court in protective proceedings is required to make orders only to the extent necessitated by the protected person’s limitations and other conditions warranting the procedure. G.L. c. 190B, § 5-407(a), (d).

§ 8.4 Court-Appointed Counsel

The court is required to appoint counsel in a proceeding for the appointment of a guardian, conservator, or other protective order, if the ward, incapacitated person, or person to be protected or someone on his or her behalf requests such appointment. G.L. c. 190B, § 5-106(a). Counsel will be appointed on the court’s own initiative if the court determines at any time in the proceeding that the interests of ward, incapacitated person, or person to be protected may be inadequately represented. G.L. c. 190B, § 5-106(a). Counsel is paid

- by the estate, if resources are adequate;
- the petitioner, if ordered by the court; or
- by the Commonwealth, if indigent.

G.L. c. 190B, § 5-106(a).

§ 8.5 Commitment to Mental Health Facility

The court no longer has the authority to commit an individual into a mental health facility, even if substituted judgment orders are made by the court; rather, that authority lies in the District Court. G.L. c. 190B, § 5-309(f); G.L. c. 190B, § 5-309(f) MA cmt.; G.L. c. 190B, § 5-306A MA cmt.

§ 8.6 Admission to Nursing Facility

Under the Code, a guardian may admit an incapacitated person to a nursing facility only with specific court authorization, after appropriate petition or motion. G.L. c. 190B, § 5-309(f).

§ 8.7 Definitions

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

- A *conservator* is a person who is appointed by a court to manage the estate of a protected person and includes a limited conservator, temporary conservator and special conservator. G.L. c. 190B, § 5-101(2).
- *Disability* is cause for appointment of a conservator or for a protective order under the applicable Code provision. G.L. c. 190B, §§ 1-201(11), 5-101(4), 5-401.
- A *guardian* is a person who has qualified as a guardian of a minor or incapacitated person pursuant to court appointment and includes a limited guardian, special guardian, and temporary guardian, but excludes one who is merely a guardian ad litem. G.L. c. 190B, § 5-101(6).
- An *incapacitated person* is an individual for whom a guardian has been appointed. To be an incapacitated person, the individual must have, for reasons other than advanced age or minority, a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self care, even with appropriate technological assistance. G.L. c. 190B, §§ 1-201(22), 5-101(9).
- *Letters* include certificates of guardianship and certificates of conservatorship. G.L. c. 190B, § 5-101(11).
- *Mentally retarded person* is an individual who has a substantial limitation in present functioning beginning before age eighteen, manifested by significantly subaverage intellectual functioning existing concurrently with related limitations in two or more of the following applicable adaptive skills areas: communication, self care, home living, social skills, community use, self direction, health and safety, functioning academics, leisure, and work. G.L. c. 190B, § 5-101(12).

- *Nursing facility* is an institution or a distinct part of an institution which is primarily engaged in providing to residents
 - skilled nursing care and related services for residents who require medical or nursing care;
 - rehabilitation services for the rehabilitation of injured, disabled, or sick persons; or
 - on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services above the level of room and board which can be made available to them only through institutional facilities, and is not primarily a mental health facility or mental retardation facility. G.L. c. 190B, § 5-101(15).
- *Petition* is a written request to the court for an order after notice. G.L. c. 190B, § 5-101(19).
- A *protected person* is a minor or disabled person for whom a conservator has been appointed or for whom protective orders are made. G.L. c. 190B, §§1-201(41), 1-201(12), 5-101(4), 5-101(22).
- A *protective proceeding* is a court proceeding for conservatorship of a minor or adult. G.L. c. 190B, § 5-101(23).
- A *ward* is a minor under guardianship. G.L. c. 190B, § 5-101(25).

§ 9 **GUARDIAN OF AN INCAPACITATED PERSON**

§ 9.1 **Conceptual References Under the Code**

The court is given authority to appoint a guardian over an “incapacitated person,” defined as an individual who, for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self care, even with appropriate technological assistance. G.L. c. 190B, §§ 1-201(22), 5-101(9).

The court is charged with encouraging the development of maximum self reliance and independence of the incapacitated person and, to that end, to make appointive and other orders only to the extent necessitated by the incapacitated person's limitations. G.L. c. 190B, § 5-306(a).

§ 9.2 Parental or Spousal Nomination

Under the Code, the parent of an unmarried incapacitated person or the spouse of a married incapacitated person may nominate a guardian for the incapacitated person. G.L. c. 190B, § 5-301. The nomination may be made in a will or other writing signed by the parent or the spouse and attested to by two witnesses. G.L. c. 190B, § 5-301. A nominated guardian has priority for court appointment under the Code. G.L. c. 190B, § 5-305(c)(1)–(2).

§ 9.3 Appropriate Petitioners and Priorities

Any person interested in the welfare of the alleged incapacitated person may petition for a determination of incapacity, in whole or in part, and for the appointment of a limited or general guardian. G.L. c. 190B, § 5-303(a).

Any qualified person may be appointed guardian of an incapacitated person. G.L. c. 190B, § 5-305(a). The court must appoint as guardian the person nominated in the incapacitated person's most recent durable power of attorney, except for good cause or lack of qualification. G.L. c. 190B, § 5-305(b). Absent such a suitable nomination, a parental or spousal nominee has priority for court appointment as a guardian. G.L. c. 190B, § 5-305(c)(1)–(2). Given a best-interest standard, the court may pass over a person having priority and appoint as guardian a person having a lower priority or no priority. G.L. c. 190B, § 5-305(d).

§ 9.4 The Petition

A proceeding for court appointment of a guardian of an incapacitated person is commenced by petition. G.L. c. 190B, § 5-303(b). At the outset, the petitioner must state the reason why a guardianship is necessary; if seeking a general guardianship, the reason why a limited guardianship is not appropriate and, if limited, the powers to be granted. G.L. c. 190B, § 5-303(b)(10).

The petition includes the petitioner's

- identifying information;
- relationship to the alleged incapacitated person; and

- interest in the appointment.

G.L. c. 190B, § 5-303(b). It must set forth significant detail with respect to the alleged incapacitated person, including, *inter alia*,

- identifying information;
- the proposed residential address after appointment;
- a brief description of the nature of the alleged incapacity;
- spouse and children, or, if none, parents and siblings, or, if none, heirs apparent or presumptive;
- identifying information of one who has had care or custody of the person alleged to be incapacitated or with whom the person has resided during the last sixty days;
- identifying information as to any agent, nominated guardian, or currently acting guardian or conservator; and
- a general statement of income and property and its estimated value.

G.L. c. 190B, § 5-303(b). The petition must also include the proposed guardian's

- identifying information;
- relationship to the alleged incapacitated person;
- basis of suitability; and
- priority for appointment, if any.

G.L. c. 190B, § 5-303(b)(4). The petition must include a statement that a medical certificate dated within thirty days of the filing of the petition is in the possession of the court or accompanies the petition or a verified statement as to why one cannot be obtained. G.L. c. 190B, § 5-303(b)(11). The medical certificate is signed by a physician or licensed psychologist. G.L. c. 190B, § 5-303(c). It contains the following:

- a description of the nature, type, and extent of the person's specific cognitive and functional limitations;
- an evaluation of his or her mental and physical condition and, if appropriate, his or her educational potential, adaptive behavior, and social skills;

- a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and
- the date of the examination.

G.L. c. 190B, § 5-303(c)(1)–(4). The petition must also state whether the petitioner is seeking court authorization to consent to treatment for which a substituted judgment may be required; or court authorization to admit the alleged incapacitated person into a nursing facility. G.L. c. 190B, § 5-303(b)(3)(B)–(C).

§ 9.5 Notice

In a proceeding for the appointment of a guardian, notice is required upon *at least*

- the person alleged to be incapacitated;
- his or her spouse and children, or, if none, parents and siblings, or, if none, heirs apparent or presumptive; and
- any guardian, conservator or person having, within the last sixty days, the care or custody of the person or with whom the person has resided.

G.L. c. 190B, § 5-304(a). Personal service is required on the person alleged to be incapacitated. G.L. c. 190B, § 5-304(c). The alleged incapacitated person may not waive notice. G.L. c. 190B, § 5-304(d). Notice is given to all other interested persons who have not assented by citation through

- mailing a copy of the citation at least fourteen days prior to the return day to those interested or their counsel, at the office or residence, if known; or
- delivering personally a copy of the citation at least fourteen days prior to the return date; or
- by publication at least seven days before the return date.

G.L. c. 190B, §§ 5-304(c), 1-401(a)(1)–(3). If interested persons reside outside of the country or are of parts unknown, the notice period may be extended. Prob. Ct. R. 6.

§ 9.6 Findings and Order of Appointment

Upon hearing, the court, after due notice, may appoint a guardian if

- procedure is proper;
- the medical certificate is dated and the examination has taken place within thirty days prior to the hearing;
- the subject is an incapacitated person;
- 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)(1)–(8). Any limitation on the statutory power of a guardian of an incapacitated person must be endorsed on the guardian's letter. G.L. c. 190B, § 5-306(c).

§ 9.7 Substituted Judgment (*Roger's Authority*)

The court may authorize treatment for which a substituted judgment determination is required when it specifically finds that the person, if not incapacitated, would consent to such treatment; and specifically approves and authorizes a treatment plan and endorses the plan in its order or decree. G.L. c. 190B, § 5-306A(a). A treatment plan may not be authorized except after a hearing for the purpose of which counsel must be provided for an incapacitated person who is indigent. G.L. c. 190B, § 5-306A(a).

The types of treatment requiring substituted judgment may vary given the invasiveness of the proposed procedure and advances in the field reducing side effects. G.L. c. 190B, § 5-306A MA cmt. (citing *In Matter of Spring*, 380 Mass. 629 (1980)). Treatment for which a substituted judgment is required may include treatment with antipsychotic medication, electroconvulsive therapy, and withdrawal of artificial maintenance of nutrition and hydration. G.L. c. 190B, § 5-303 MA cmt.; G.L. c. 190B, § 5-306A MA cmt.

The court may delegate to a guardian the authority to monitor the treatment process or appoint another suitable person to act as monitor. G.L. c. 190B, § 5-306A(b).

Each order authorizing a treatment plan must provide for periodic review, at least annually. G.L. c. 190B, § 5-306A(c). Moreover, each order requires an expiration date beyond which the authority to provide treatment by substituted judgment terminates if not extended by the court. G.L. c. 190B, § 5-306A(c).

§ 9.8 Temporary Guardians

While a petition for appointment of a guardian is pending, a temporary guardian may be appointed when no guardian exists and no other person appears to have the authority to act in the circumstances. G.L. c. 190B, § 5-308(a). To appoint a temporary guardian, the court must find that following the routine procedure for permanent appointment will likely result in immediate and substantial harm to the health, safety, or welfare of the person alleged to be incapacitated prior to the return date. G.L. c. 190B, § 5-308(a).

A motion for appointment of a temporary guardian must state the nature of the circumstances requiring appointment, the particular harm sought to be avoided, the necessary actions of the temporary guardian to avoid the harm and the identifying information of any health care proxy or durable power of attorney agent of the alleged incapacitated person. G.L. c. 190B, § 5-308(a). The motion must be accompanied by a supporting affidavit. G.L. c. 190B, § 5-308(a).

In general, the appointment of a temporary guardian is for a period up to ninety days, which may be extended for additional ninety-day periods. G.L. c. 190B, § 5-308(b).

Notice for the appointment of a temporary guardian is in writing, seven days prior to the hearing, in hand to the alleged incapacitated person and by delivery or by mail to all persons named in the petition. G.L. c. 190B, § 5-308(c).

If the court determines that an immediate emergency situation exists which requires the immediate appointment of a temporary guardian, it may shorten or waive the notice requirements in whole or in part and grant the motion, provided, however, that prior notice shall be given to the alleged incapacitated person as the court may order. G.L. c. 190B, § 5-308(d). Additionally, under these circumstances, postappointment notice must be given to the alleged incapacitated person and those named in the petition stating further that any such person may move to vacate the order of the court or request that the court take any other appropriate action on the matter. G.L. c. 190B, § 5-308(d). Within seven days following the appointment, a certificate stating that this notice has been given must be filed with the court. G.L. c. 190B, § 5-308(d).

§ 9.9 Reporting and Monitoring Requirements

A guardian of an incapacitated person shall make decisions regarding the incapacitated person's support, care, and welfare. G.L. c. 190B, § 5-309. Within sixty days following appointment and at least annually thereafter, the guardian is mandated to file a report concerning the following:

- the incapacitated person's condition and living arrangements;
- the services provided;
- 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;
- whether the current treatment plan is in the incapacitated person's best interest;
- 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). The court is mandated under the Code to establish a system for monitoring guardianships, including the filing and review of annual reports. G.L. c. 190B, § 5-309(7)(c).

§ 9.10 Powers, Duties, and Limitations of a Guardian

To the extent permitted by the decree, a guardian is charged with making decisions concerning an incapacitated person's support, care, education, health, and welfare. G.L. c. 190B, § 5-309(a). A guardian may exercise his or her authority only as necessitated by the incapacitated person's mental and adaptive limitations, and, to the extent possible, must encourage participation in decisions and self reliance. G.L. c. 190B, § 5-309.

In addition to the reporting and monitoring requirements, the Code sets out various powers, duties, and limitations of a guardian for an incapacitated person. A guardian of an incapacitated person shall, *inter alia*,

- take custody and establish a place of abode within or outside the Commonwealth;

- maintain sufficient contacts to know of the person’s capacities, limitations, needs, opportunities, and physical and mental health;
- take care of personal effects;
- commence protective proceedings, if necessary; and
- apply available money to current needs.

G.L. c. 190B, § 5-209(b). A guardian of an incapacitated person may

- apply for and receive financial support for the incapacitated person;
- in general, consent to usual and customary medical or other professional care or treatment; and
- utilize the services of agencies and individuals to provide necessary and desirable social and protective services.

G.L. c. 190B, § 5-209(c). A guardian may not revoke a health care proxy without court order. G.L. c. 190B, § 5-309(e). Moreover, if a health care proxy is in place, absent court order, a health-care decision of the agent takes precedence over that of a guardian. G.L. c. 190B, § 5-309(e).

A guardian may not admit or commit an incapacitated person to a mental health facility. G.L. c. 190B, § 5-309(f). Guardians will need to proceed in the District Courts under G.L. c. 213 for such a commitment. G.L. c. 190B, § 5-306A MA cmt.

A guardian may not admit an incapacitated person to a nursing facility except upon a specific finding by the court that such admission is in the incapacitated person’s best interest. G.L. c. 190B, § 5-309(g).

§ 10 CONSERVATOR OF A PROTECTED PERSON

§ 10.1 Conceptual References Under the Code

Article V calls for “protective proceedings” for “disabled persons,” that is, “persons to be protected” and each is given specific definition under the Code. See G.L. c. 190B, § 5-101 and § 8.7, Definitions, above. A “protective proceeding” is a generic term for a conservatorship proceeding or other proceeding to address some management of another’s estate (i.e., to obtain “protective orders”). G.L. c. 190B, § 5-401 cmt.

Under the Code, the court may appoint a limited or unlimited conservator. G.L. c. 190B, § 5-401. Moreover, without appointing any conservator, the court may make financial management orders, known as protective arrangements, for the protected person. G.L. c. 190B, § 5-408. Finally, a determination that a basis for appointment of a conservator or other protective order exists is not a determination of incapacity of the protected person. G.L. c. 190B, § 5-407(f).

The court has all those powers over the property and business affairs of the protected person which are or may be necessary for the best interest of the protected person and his or her family; provided, however, that the court must exercise that authority to encourage the development of maximum self-reliance and independence of a protected person, and make protective orders only to the extent necessitated by the protected person's limitations and other conditions warranting the procedure. G.L. c. 190B, § 5-407(a), (d).

§ 10.2 Basis for Conservatorship or Other Protective Order

Appointment of a conservator or other protective order may be made in relation to the estate and financial affairs of an adult disabled person if the court determines that

- the person is unable to manage property and business affairs effectively due to a clinically diagnosed impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate technological assistance; and
- the person has property that will be wasted or dissipated unless management is provided or money is needed for the support, care and welfare of the person or those entitled to the person's support and that protection is necessary or desirable to obtain or provide money.

G.L. c. 190B, § 5-401(c).

§ 10.3 Appropriate Petitioners, Conservators, and Priorities

Any person interested in the estate, affairs, or welfare of an individual may petition the court for a determination of disability, in whole or in part, and the appointment of a conservator or for other appropriate protective order. G.L. c. 190B, § 5-404.

The court may appoint any suitable individual or corporation to serve as conservator. G.L. c. 190B, § 5-409. The Code, however, includes a list of those persons entitled to consideration for appointment in the following order:

- person nominated in the protected person's most recent durable power of attorney, unless good cause dictates to the contrary;
- conservator or like fiduciary appointed in or recognized by jurisdiction of protected person's residence;
- individual or corporation nominated by a protected person at least fourteen years of age and of sufficient mental capacity;
- agent appointed by the protected person under a durable power of attorney;
- parent of the protected person, or any parental nominee; and
- any person deemed appropriate by the court.

G.L. c. 190B, § 5-409(a). The court, acting in the best interest of the protected person, may pass over a person having priority and appoint a person having a lower priority or no priority. G.L. c. 190B, § 5-409(b).

Unless related to the protected person, an owner, operator, or employee of a long-term care institution at which the protected person is receiving care or a paid caretaker may not be appointed conservator. G.L. c. 190B, § 5-409(c).

§ 10.4 The Petition

A proceeding for court appointment of a conservator is commenced by petition. G.L. c. 190B, § 5-404(b). The petition must identify the type of conservatorship requested, and if a general conservatorship, the reason why a limited conservatorship is inappropriate. G.L. c. 190B, § 5-404(c)(3). If a limited conservatorship is requested, the petition must identify the powers to be granted or property to be placed under the conservator's control. G.L. c. 190B, § 5-404(c)(3).

The petition includes the petitioner's

- identifying information;
- relationship to the person to be protected; and
- interest in the appointment.

G.L. c. 190B, § 5-404(b). It must set forth significant detail with respect to the person to be protected, including, *inter alia*,

- identifying information;
- the proposed residential address after appointment;
- a brief description of the nature of the alleged incapacity;
- spouse and adult children, or, if none, parents and adult siblings, or, if none, heirs apparent or presumptive;
- identifying information of one who has had care or custody of the person or with whom the person has resided during the last sixty days;
- identifying information as to any representative payee or trustee of which the person to be protected is a beneficiary;
- identifying information as to any agent, nominated conservator or currently acting guardian or conservator; and
- a general statement of income and property and its estimated value.

G.L. c. 190B, § 5-404(b); *see also* G.L. c. 190B, § 5-404(c)(2). The petition must also include the proposed conservator's

- identifying information;
- relationship to the person to be protected;
- basis of suitability; and
- priority for appointment, if any.

G.L. c. 190B, § 5-404(c). The petition must state why the appointment of a conservator is in the best interest of the person to be protected. G.L. c. 190B, § 5-404(b)(10).

The petition must include a statement that a medical certificate dated within thirty days of the filing of the petition is in the possession of the court or accompanies the petition or a verified statement as to why one cannot be obtained. G.L. c. 190B, § 5-404(11). The medical certificate is signed by a physician or licensed psychologist. G.L. c. 190B, § 5-303(c). It contains the following:

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

G.L. c. 190B, § 5-303(c)(1)–(4).

§ 10.5 Notice

In a proceeding for the appointment of a conservator, notice is required upon *at least*

- the person to be protected;
- his or her spouse and children, or, if none, parents and siblings, or, if none, heirs apparent or presumptive;
- any guardian, conservator, or person having, within the last sixty days, the care or custody of the person or with whom the person has resided.

G.L. c. 190B, §§ 5-405(a), 5-304(a). Personal service is required on the person to be protected. G.L. c. 190B, §§ 5-405(a), 5-304(c). The person to be protected may not waive notice. G.L. c. 190B, § 5-304(d).

If the person to be protected has disappeared or is otherwise situated so as to make personal service impracticable, notice must be given by leaving a copy of the petition and citation at the person's last and usual place of abode. G.L. c. 190B, § 5-405(a).

Notice is given to all other interested persons who have not assented by citation through

- mailing a copy of the citation at least fourteen days prior to the return day to those interested or their counsel, at the office or residence, if known; or

- delivering personally a copy of the citation at least fourteen days prior to the return date; or
- by publication at least seven days before the return date.

G.L. c. 190B, §§ 5-405, 5-304(c), 1-401(a)(1)–(3). If interested persons reside outside of the country or are of parts unknown, the notice period may be extended. Prob. Ct. R. 6.

After full hearing, and after making the requisite determination based upon findings of fact that the conservatorship or protective order is warranted, the court may appoint a limited or unlimited conservator, or make any other protective order. G.L. c. 190B, § 5-407.

§ 10.6 Findings and Order of Appointment

Upon hearing, the court, after due notice, may appoint a conservator if

- procedure is proper;
- the medical certificate is dated and the examination has taken place within thirty days prior to the hearing;
- the subject is a disabled person;
- the appointment is necessary or desirable as a means of providing continuing care and supervision of the property and business affairs of the person to be protected; and
- the person's needs cannot be met by less restrictive means, including use of appropriate technological assistance.

G.L. c. 190B, § 5-407(b)(1)–(7). The appointment of a conservator vests in the conservator fiduciary title to all property, or to the part thereof specified in the order, of the protected person, held at the time of appointment or thereafter acquired. G.L. c. 190B, § 5-419(a). An order which vests title to only some of the property of the protected person creates a conservatorship limited to assets specified in the order. G.L. c. 190B, § 5-419(a).

Any limitation or specification of assets subject to the conservatorship must be endorsed upon the letters of appointment. G.L. c. 190B, § 5-425.

§ 10.7 Estate Plans

After full hearing, upon determining that a basis for a protective order exists, and after making appropriate findings of fact, the court has all those powers over the property and business affairs of the adult protected person which are necessary for his or her best interest or the best interest of his or her immediate family. G.L. c. 190B, § 5-407(d). This includes, *inter alia*, the power to make gifts; create, revoke, or amend trusts; and make, amend, or revoke the protected person's will. G.L. c. 190B, § 5-407(b).

§ 10.8 Temporary Conservators

While a petition for the appointment of a conservator or other protective order is pending, the court may make necessary orders to preserve and apply the property of the person to be protected for his or her support or the support of his or her family, without notice to others. G.L. c. 190B, § 5-412A.

While a petition for appointment of a conservator is pending, a temporary conservator may be appointed when no conservator exists, and no other person appears to have the authority to act in the circumstances. G.L. c. 190B, § 5-412A(b). To appoint a temporary conservator, the court must find that following the routine procedure for permanent appointment will likely result in substantial harm to the property, income, or entitlements of the person to be protected or those entitled to his or her support prior to the return date. G.L. c. 190B, § 5-412A(b).

A motion for appointment of a temporary conservator must state the nature of the circumstances requiring appointment, the particular harm sought to be avoided, the necessary actions of the temporary conservator to avoid the harm, and the identifying information of any agent under a durable power of attorney of the person to be protected. G.L. c. 190B, § 5-412A(b). The motion must be accompanied by a supporting affidavit. G.L. c. 190B, § 5-412A(b).

In general, the appointment of a temporary conservator is for a period up to ninety days, which may be extended for additional ninety-day periods. G.L. c. 190B, § 5-412A(d).

Notice for the appointment of a temporary guardian is in writing, seven days prior to the hearing, in hand to the person to be protected and by delivery or by mail to all persons named in the petition. G.L. c. 190B, § 5-412A(d).

If the court determines that an immediate emergency situation exists which requires the immediate appointment of a temporary conservator, it may shorten or

waive the notice requirements in whole or in part and grant the motion, provided, however, that prior notice shall be given to the person to be protected as the court may order. G.L. c. 190B, § 5-412A(e). Additionally, under these circumstances, postappointment notice must be given to the person to be protected and those named in the petition stating further that any such person may move to vacate the order of the court or request that the court take any other appropriate action on the matter. G.L. c. 190B, § 5-412A(e). Within seven days following the appointment, a certificate stating that this notice has been given must be filed with the court. G.L. c. 190B, § 5-412A(e).

§ 10.9 Protective Arrangements and Single Transactions

Upon petition, notice, and hearing, the court, without appointing a conservator, may address a financial transaction of the adult disabled person if the court determines that

- the person is unable to manage property and business affairs effectively due to a clinically diagnosed impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate technological assistance; and
- the person has property that will be wasted or dissipated unless management is provided or money is needed for the support, care and welfare of the person or those entitled to the person's support and that protection is necessary or desirable to obtain or provide money.

G.L. c. 190B, §§ 5-408, 5-401(c). Under this provision, the court may authorize, direct or ratify any transaction necessary or desirable to achieve any arrangement for security, service or care meeting the foreseeable needs of the protected person. G.L. c. 190B, § 5-408(a). So-called "protective arrangements" include, *inter alia*, payment or deposit of funds, sale of personal property, entry into annuity contracts, and contracts for life care. G.L. c. 190B, § 5-408(a). The court may authorize, direct, or ratify any contract, trust, or other transaction relating to the protected person's property and business affairs, including settlement of a claim, if in the protected person's best interest. G.L. c. 190B, § 5-408(b).

This section of the Code is intended to provide authority for court approval of single transactions or an alternative to a full conservatorship. G.L. c. 190B, § 5-408 MA cmt. It should be noted that sale of real estate is still governed by G.L. c. 202. G.L. c. 190B, § 5-408 MA cmt.

In a proceeding for a protective order, notice is required upon *at least*

- the person to be protected;
- his or her spouse and children, or, if none, parents and siblings, or, if none, heirs apparent or presumptive; and
- any guardian, conservator or person having, within the last sixty days, the care or custody of the person or with whom the person has resided.

G.L. c. 190B, §§ 5-408, 5-405, 5-304(a). Personal service is required on the person to be protected. G.L. c. 190B, §§ 5-408, 5-405(a), 5-304(c). The person to be protected may not waive notice. G.L. c. 190B, §§ 5-408, 5-405(a), 5-304(d).

If the person to be protected has disappeared or is otherwise situated so as to make personal service impracticable, notice must be given by leaving a copy of the petition and citation at the person's last and usual place of abode. G.L. c. 190B, §§ 5-408, 5-405(a).

Notice is given to all other interested persons who have not assented by citation through

- mailing a copy of the citation at least fourteen days prior to the return day to those interested or their counsel, at the office or residence, if known; or
- delivering personally a copy of the citation at least fourteen days prior to the return date; or
- by publication at least seven days before the return date.

G.L. c. 190B, §§ 5-408, 5-405, 5-304(c), 1-401(a)(1)–(3). If interested persons reside outside of the country or are of parts unknown, the notice period may be extended. Prob. Ct. R. 6.

§ 10.10 Plans, Inventories, and Accounts of Conservators

The court may order a conservator to file a plan for managing, expanding, and distributing the protected person's assets. G.L. c. 190B, § 5-416(c). The plan must be based on the actual needs of the person and take into consideration his or her best interest. G.L. c. 190B, § 5-416(c). The plan must include steps to develop or restore the person's ability to manage his or her property, an estimate

of the duration of the conservatorship, and projections for expenses and resources. G.L. c. 190B, § 5-416(c).

Within ninety days after qualification, the conservator must prepare and file a verified, detailed inventory of the estate. G.L. c. 190B, § 5-417(a). The conservator must provide a copy of the inventory to the protected person, if over fourteen years of age, and any guardian or parent with whom the protected person resides. G.L. c. 190B, § 5-417(a).

The conservator is subject to annual accounting requirements. G.L. c. 190B, § 5-418. Additionally, the conservator must keep suitable records of his or her administration and exhibit the same upon request of any interested person. G.L. c. 190B, § 5-417(b).

The court is required to establish a system for monitoring conservatorships, including the filing and review of conservator's accounts and plans. G.L. c. 190B, § 5-418(f).

§ 10.11 Powers and Duties of a Conservator

The conservator may distribute or expend income or principal of the estate without court authorization or confirmation for the support, education, care, or benefit of the protected person and dependents in accordance with certain principles set out in the Code. G.L. c. 190B, § 5-424(a).

The conservator must observe the standards of care applicable to trustees as described by the Prudent Investor Act, G.L. c. 203C. G.L. c. 190B, § 5-416(a).

The Code includes an expansive list of powers of a conservator which may be exercised without leave of court. G.L. c. 190B, § 5-423. These include, inter alia, the power to

- invest and reinvest funds;
- collect and retain assets;
- continue in the operation of any business;
- dispose of tangible and intangible personal property;
- vote securities;
- insure assets;

- borrow money;
- pay, contest, or settle any claim by or against the estate or the protected person;
- pay sums distributable to the protected person or a dependent;
- employ persons, including attorneys, auditors, investment advisors, or agents to advise or assist in the performance of administrative duties and act upon their recommendation without independent investigation;
- commence, prosecute, or defend actions; and
- execute and deliver all instruments that will facilitate the exercise of the powers vested in the conservator.

G.L. c. 190B, §§ 5-423, 5-427. See also G.L. c. 190B, § 5-423A as to delegation of investment management. Subject to court approval, a conservator may, *inter alia*,

- acquire estate assets including land, and lease, manage, improve, or abandon an estate asset;
- enter for any purpose into a lease or renew for a term within or extending beyond the term of the conservatorship.

G.L. c. 190B, § 5-423(c). If the estate is ample, the conservator of an adult protected person may make gifts to charity and persons which the protected person has expressed an intent to benefit, in amounts that do not exceed in total for any year 10 percent of the income from the estate. G.L. c. 190B, § 5-424(b). The court may confer upon a conservator of an adult protected person the power to create an estate plan. G.L. c. 190B, §§ 5-425, 5-407(d). See § 10.7, Estate Plans, above.

A conservator may not sell, mortgage, or grant options in real estate, except as provided in G.L. c. 202. G.L. c. 190B, § 5-423(c).

§ 11 BONDS OF GUARDIANS AND CONSERVATORS

Prior to receiving letters, a guardian must accept appointment by filing a bond containing a statement of acceptance and conditioned upon the faithful discharge

of all the duties according to law. G.L. c. 190B, § 5-307(a); *see also* G.L. c. 190B, § 5-208. A surety is required on the bond of the guardian unless the court determines that it is in the incapacitated person's best interest to waive the surety. G.L. c. 190B, § 5-307(b). Language in a durable power of attorney or health care proxy waiving the guardian's bond is akin to a request to waive sureties. G.L. c. 190B, § 5-307(b). The court may require additional sureties if it determines that such is in the best interest of the incapacitated person. G.L. c. 190B, § 5-307(b).

Prior to receiving letters, a conservator, temporary conservator, or special conservator must accept appointment by filing a bond containing a statement of acceptance and conditioned upon the faithful discharge of all the duties according to law. G.L. c. 190B, §§ 5-412, 5-410. A surety is required on the bond of a conservator unless the court waives the requirement for good cause shown by the conservator. G.L. c. 190B, § 5-410(a). The court establishes the amount of a bond with sureties. G.L. c. 190B, § 5-410(a).

A conservator will not be required to furnish sureties on his or her bond if the conservator was nominated under the protected person's most recent durable power of attorney which expressly waived the requirement. G.L. c. 190B, § 5-410(b).

Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition for an order requiring sureties, additional sureties or collateral. G.L. c. 190B, § 5-415(a)(1).

§ 12 **GUARDIAN AND CONSERVATOR OF A MINOR**

Under the Code, a minor under guardianship is deemed a "ward," while adults under guardianship and conservatorship are known as "incapacitated persons" and "protected persons," respectively. G.L. c. 190B, §§ 1-201(56), 1-201(22), 1-201(41).

§ 12.1 **Parental Appointment of Temporary Agent**

The parents of a minor may appoint a temporary agent for a sixty-day period to exercise authority over the care, custody or property of the minor child. G.L. c. 190B, § 5-103(a). This delegation must be

- in writing;
- signed by the parents;

- attested to by two disinterested witnesses; and
- accepted, in writing, by the temporary agent.

G.L. c. 190B, § 5-103(b).

§ 12.2 Parental Appointment of Guardian

A person may become a guardian of a minor by parental appointment. G.L. c. 190B, § 5-201. A parent may name a guardian of a minor in a signed writing, attested to by two witnesses, or by will. G.L. c. 190B, § 5-202(a). This appointment becomes effective on

- the appointing parent's death;
- an adjudication that the parent is an incapacitated person; or
- or a written determination by an examining physician that the parent is no longer able to care for the child.

G.L. c. 190B, § 5-202(d); *see also* G.L. c. 190B, § 5-203. Within thirty days after the appointment becomes effective, the guardian must file a written acceptance of the appointment and petition the court for confirmation. G.L. c. 190B, § 5-202(e). Notice is identical to that required for the court appointment of a guardian of a minor (i.e., by citation to delineated interested persons). G.L. c. 190B, §§ 5-202(e)(2), 5-206(b).

Upon petition of an appointing parent, upon finding that such parent will likely become unable to care for the minor within two years, and after notice by citation to interested persons, the court, before the appointment becomes effective, may confirm and adjudicate the parent's selection of a guardian. G.L. c. 190B, § 5-202(c). The appointment, thereafter, becomes effective on

- the appointing parent's death;
- an adjudication that the parent is an incapacitated person; or
- or a written determination by an examining physician that the parent is no longer able to care for the child.

G.L. c. 190B, § 5-202(d). Within thirty days after the appointment becomes effective, the guardian must file a written acceptance. G.L. c. 190B, § 5-202(e).

§ 12.3 Effect of Parental Agent and Appointment Provisions

The Code provisions for a temporary agent and a parentally appointed guardian are intended to replace the standby emergency and short-term emergency proxy provisions of G.L. c. 201, §§ 2A–2H. G.L. c. 190B, § 5-202 MA cmt. The purpose of the confirmation of appointment proceeding is to convert the nominated guardianship into a regular guardianship as soon as possible. G.L. c. 190B, § 5-202 cmt.

Of course, the parental appointment of a guardian does not supersede the parental rights of either parent. G.L. c. 190B, § 5-202(f).

§ 12.4 Court Appointment of Guardian of Minor

The court may appoint a guardian of a minor if

- the minor’s parents are deceased or incapacitated;
- the parents consent;
- the parents’ parental rights have been terminated;
- the parents have signed a voluntary surrender; or
- the court finds the parents jointly, or the surviving parent, to be unavailable or unfit to have custody.

G.L. c. 190B, § 5-204(a). A guardian appointed by a parent pursuant to the Code has priority over any guardian who may be appointed by the court. G.L. c. 190B, § 5-204(a).

The minor or any person interested in his or her welfare may petition for the appointment of a guardian. G.L. c. 190B, § 5-206(a). Notice by citation must be given to interested persons as delineated by the Code, including the minor if he or she is at least fourteen years old. G.L. c. 190B, §§ 5-206, 1-401. The court may appoint any person whose appointment would be in the best interest of the minor, and shall appoint a person nominated by the minor, if the minor is at least fourteen years old, unless contrary to the child’s best interest. G.L. c. 190B, § 5-207(a).

A temporary guardian may be appointed when no guardian exists, or, if an appointed guardian is not effectively performing his or her duties and immediate action is required, a special guardian may be appointed for the ward. G.L. c. 190B,

§ 5-204(b)–(c). A temporary or special guardian may be appointed without notice if immediate action is necessary, provided that, in the case of a temporary guardianship, postappointment notice is required. G.L. c. 190B, § 5-204.

The guardian of a ward has the powers and responsibilities of a parent regarding the ward's support, care, education, health, and welfare and shall annually report to the court concerning the ward's condition. G.L. c. 190B, § 5-209. A guardian of a ward may apply for and receive money for the child's support as delineated by the Code. G.L. c. 190B, § 5-209(c)(1), (2).

§ 12.5 Bond of Guardian of a Minor

Prior to receiving letters, a guardian must accept appointment by filing a bond containing a statement of acceptance and conditioned upon the faithful discharge of all the duties according to law. G.L. c. 190B, § 5-208. A surety is required on the bond of a guardian of a minor unless the court determines that it is in the best interest of the minor to waive the requirement. G.L. c. 190B, § 5-208(b).

§ 12.6 Conservator of a Minor

Upon petition and after notice and hearing in accordance with the Code, the court may appoint a limited or unlimited conservator or make other protective orders. G.L. c. 190B, § 5-401(a). An appointment of a conservator or other protective order may be made relative to the estate and affairs of a minor if the court determines that the child has real or personal property requiring management or that funds are needed for his or her support or education and protection is warranted to obtain or provide money. G.L. c. 190B, § 5-401(b); *see also* G.L. c. 190B, § 5-209(c)(1), (2).

§ 12.7 Creation of Trusts by a Conservator of a Minor

The Code permits the minor's conservator to create a trust for the property of the minor and also allow that trust to extend beyond the age of eighteen. G.L. c. 190B, § 5-407(c). In order to create such a trust, the court must determine that it is in the best interest of the minor to extend the management and protection of the minor's money and property beyond age eighteen. G.L. c. 190B, § 5-407(c)(1). The trust must provide that

- only the minor and his or her issue are beneficiaries of the trust during the minor's lifetime;

- upon termination of the trust during the minor's lifetime, the property is to be distributed only to the minor; and
- upon attaining the age of eighteen, the minor is afforded both a testamentary and a presently exercisable general power of appointment over the property.

G.L. c. 190B, §§ 5-407(c)(2)–(4). Upon the minor's death, to the extent that the minor fails to exercise the power to appoint, the trust must provide for the distribution of the property to such relatives as would be likely recipients of legacies from the minor. G.L. c. 190B, § 5-407(c)(5). After full hearing, if in the minor's best interest, the court may amend the trust. G.L. c. 190B, § 5-407(c). The court retains jurisdiction over the trust while it continues to exist. G.L. c. 190B, § 5-407(c).

Part 3

INTESTATE SUCCESSION

§ 13 INTRODUCTION

Sweeping codification of Massachusetts probate law, namely, the Massachusetts version of the Uniform Probate Code (hereinafter the “MUPC” or the “Code”) becomes effective July 1, 2011. The Guardianship provisions of the Code (commonly referred to as “Article V”) become effective July 1, 2009, and are discussed in MCLE’s *Introduction to the Massachusetts Uniform Probate Code: Guardianship & Conservatorship* (2009).

Repealing, inter alia, G.L. c. 190 (descent and distribution of real and personal property), G.L. c. 190A (simultaneous deaths), and G.L. c. 196 (allowances and advancements), the Code is inserted as G.L. c. 190B. Divided into several articles, parts, and sections, Article II of the Code, §§ 2-101 through 2-114, sets out the new law of intestate succession.

§ 14 IN GENERAL

Any part of a decedent’s estate not effectively disposed of by will passes by intestate succession to his or her heirs as delineated under the Code. G.L. c. 190B, § 2-101(a). As with current law, a surviving spouse is an heir of the deceased spouse. G.L. c. 190B, § 1-201(21). Under the Code, succession to “property” includes both real and personal property. G.L. c. 190B, § 1-201(40). Intestate distributions are made from the net estate after all debts, family protections, taxes, and administrative expenses have been paid. *See, e.g.*, G.L. c. 190B, §§ 2-403, 2-404, 3-807.

§ 15 DESCENDANTS UNDER THE CODE

Descendant replaces the term “issue” under the Code. G.L. c. 190B, § 1-201(25). An individual’s descendants are identified at all generations through the parent-child relationship and specifically excludes step relationships. G.L. c. 190B, §§ 1-201(9), 1-201(5), 1-201(34).

§ 16 **INTESTATE SHARE OF SURVIVING SPOUSE**

The Code gives the surviving spouse a larger share than is provided under current Massachusetts law. G.L. c. 190B, § 2-102 MA cmt.; G.L. c. 190, § 1. Empirical studies support this increase in the surviving spouse's intestate share, showing that testators in smaller estates tend to devise their entire estates to their surviving spouses, even when the couple has children. G.L. c. 190B, § 2-102 cmt.; *see also* G.L. c. 190B, § 2-102 MA cmt.

Under the Code, the intestate share of a decedent's surviving spouse is the entire intestate estate if there is no surviving descendant or parent of the decedent. G.L. c. 190B, § 2-102(1)(i). Additionally, the surviving spouse takes the entire intestate estate if all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent. G.L. c. 190B, § 2-102(1)(ii).

If there is no surviving descendant but a parent survives the decedent, then the surviving spouse's intestate share is the first \$200,000 and three-fourths of any balance of the intestate estate. G.L. c. 190B, § 2-102(2).

If all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent, then the surviving spouse's intestate share is the first \$100,000 and one-half of any balance of the intestate estate. G.L. c. 190B, § 2-102(3).

If one or more of the decedent's surviving descendants are not descendants of the surviving spouse, then the surviving spouse's intestate share is the first \$100,000 and one-half of any balance of the intestate estate. G.L. c. 190B, § 2-102(4).

In all cases where the surviving spouse receives a lump sum plus a fraction of the balance, the lump sums are in addition to the exemptions and allowances provided for under the Code. G.L. c. 190B, § 2-102 cmt. See also § 20, Exempt Property and Family Allowance, below.

§ 17 **INTESTATE SHARE OF HEIRS OTHER THAN THE SURVIVING SPOUSE**

Any part of the intestate estate not passing to the decedent's surviving spouse as delineated above, or the entire estate if there is no surviving spouse, passes in the following order:

- to the decedent's descendants per capita at each generation;
- if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
- if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them per capita at each generation;
- if there is no surviving descendant, parent, or descendant of a parent, then equally to the decedent's next of kin in equal degree; but if there are two or more descendants of deceased ancestors in equal degree claiming through different ancestors, those claiming through the nearest ancestor is preferred to those claiming through an ancestor more remote.

G.L. c. 190B, § 2-103. See § 18, Per Capita at Each Generation, below. Degrees of kindred are computed according to the rules of civil law. G.L. c. 190B, § 2-103(4).

"Descendants" replaces the word "issue" for purposes of intestate succession which is established by the legal parent-child relationship, thereby including adopted children and those born out of wedlock. G.L. c. 190B, § 2-103 cmt.; *see* also G.L. c. 190B, § 2-114.

§ 18 **PER CAPITA AT EACH GENERATION**

As with current law, if all descendants who are entitled to a share of the estate are of the same generation, then the intestate estate is distributed equally or "per capita." However, if the first generation of takers includes both living individuals and deceased individuals with living descendants, then the estate is distributed under a scheme known as "per capita at each generation." G.L. c. 190B, § 2-106. It is believed that this system is favored among most individuals in that it always provides equal shares to those equally related. G.L. c. 190B, § 2-106 cmt.

Under the per capita at each generation system,

- the estate is divided equally into as many shares as once existed in that generation;
- payment of shares is made to the survivors in this first generation; and
- the shares remaining (representing the shares of those persons deceased in the first generation), are combined and redistributed equally to those in the second generation.

G.L. c. 190B, § 2-106. For example, grandfather dies with no surviving spouse, two surviving children and two deceased children, one of which left two children and the other left one child. Under the per capita at each generation scheme, the two surviving children both take a one-fourth share and each of the three grandchildren take a one-sixth share (the one-fourth share of each deceased parent being combined to make one-half share which is then distributed equally among the grandchildren). For further explanation and examples, see the comment to G.L. c. 190B, § 2-106.

§ 19 STATUS OF CERTAIN INDIVIDUALS

§ 19.1 Adopted Children

An adopted individual is the child of his or her adopting parents and not of his or her natural parents, but adoption of a child by the spouse of either natural parent has no effect on the right of the child or a descendent of the child to inherit from or through either natural parent. G.L. c. 190B, § 2-114(b).

§ 19.2 Children Born Out of Wedlock

For purposes of intestate succession, an individual is the child of his or her parents, regardless of their marital status. G.L. c. 190B, § 2-114(a). The parent child relationship may be established under applicable state law (e.g., through a paternity action under G.L. c. 209C). G.L. c. 190B, § 2-114(a).

§ 19.3 Kindred of the Half Blood

In keeping with current Massachusetts law, relatives of the half blood inherit the same share they would inherit if they were of the whole blood. G.L. c. 190B, § 2-107; G.L. c. 190B, § 2-107 MA cmt.

§ 19.4 After Born Heirs

Under the Code, an individual in gestation is treated as an heir if the individual lives 120 hours or more after birth. G.L. c. 190B, § 2-108.

§ 19.5 Relations by Affinity

The Code defines descendants as those with the relationship of parent and child, thereby excluding persons related by affinity. G.L. c. 190B, § 1-201(5), (9), (34). Stepchildren and stepparents are specifically excluded under the Code. G.L. c. 190B, § 1-201(5), (34).

§ 20 EXEMPT PROPERTY AND FAMILY ALLOWANCE

For decedents who die domiciled in the Commonwealth, the Code deems exempt certain assets and grants various allowances to the decedent's surviving spouse and children. Comment, Art. II, Part 4; *see also* G.L. c. 190B, § 2-401. Rights to exempt property are in addition to any share passing to the surviving spouse or children by intestate succession. G.L. c. 190B, § 2-403(a). Moreover, the discretionary family allowance is not chargeable against any share passing to the surviving spouse or children by intestate succession. G.L. c. 190B, § 2-404(b).

Rights to exempt property have priority over all unsecured claims against the estate. G.L. c. 190B, § 2-403(a). Additionally, the discretionary family allowance is exempt from and has priority over all unsecured claims. G.L. c. 190B, § 2-404(a). *See also* Comment, Art. II, Part 4.

The decedent's surviving spouse may remain in the house of the decedent for not more than six months from the date of death without being chargeable for rent. G.L. c. 190B, § 2-403(b).

If there is a surviving spouse, he or she is entitled from the estate up to \$10,000 in excess of any security interests, in household goods, automobiles, and personal

effects. G.L. c. 190B, § 2-403. If there is no surviving spouse, the decedent's children are jointly entitled to same. G.L. c. 190B, § 2-403.

In addition to the right to exempt property, the decedent's surviving spouse and minor and dependent children are entitled to a reasonable allowance paid out of the estate for their maintenance during the period of administration. G.L. c. 190B, § 2-404(a). The personal representative may determine the discretionary family allowance in a lump sum not exceeding \$18,000 or periodic installments not exceeding \$1,500 per month for one year. G.L. c. 190B, § 2-405.

§ 21 SIMULTANEOUS DEATHS

Under the Code, if both joint tenants die simultaneously, then the property passes equally to their respective estates. G.L. c. 190B, § 2-702(c). If there are more than two joint tenants who all die simultaneously, then the property passes proportionately to their respective estates. G.L. c. 190B, § 2-702(c).

§ 22 ADVANCEMENTS

A gift made by the decedent to an heir is treated as an advancement against the heir's intestate share only if the decedent declared or otherwise indicated in a contemporaneous writing, or the heir so acknowledged in writing, that the gift is an advancement. G.L. c. 190B, § 2-109. Advanced property is considered as part of the intestate's estate in the division and distribution of the estate, and is taken by the receiving heir against his or her share, except that he or she will not be required to restore any part of the advance even if it exceeds his or her intestate share. G.L. c. 190B, § 2-109(c). The advancement rules under the Code are substantially similar to current Massachusetts law. G.L. c. 190B, § 2-109 MA cmt.; *see* G.L. c. 196.

§ 23 DEBTS OWED A DECEDENT BY AN HEIR

A debt owed to a decedent is not charged against the intestate share of any individual except the debtor. G.L. c. 190B, § 2-110. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's descendants. G.L. c. 190B, § 2-110.