

# SENATE . . . . . No. 738

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## The Commonwealth of Massachusetts

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In the Year Two Thousand Nine  
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An Act to establish a public guardianship commission..

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1           SECTION 1. Chapter 10 of the General Laws, as appearing in the 2004 Official Edition,  
2 is hereby amended by inserting after section 35BB the following new section: --

3           Section 35CC. There shall be established and set up on the books of the commonwealth  
4 a separate fund to be known as the Public Guardianship Commission Fund, to be used to meet  
5 the operational costs of the public guardianship commission established under the provisions of  
6 chapter 221D, in addition to any appropriation from the General Fund. Said fund shall consist of  
7 amounts received from public and private sources as gifts, grants, donations, bequests and  
8 devises of money any amounts to be received by said commission in fees for services pursuant to  
9 sections 5 and 6 of chapter 221D. All revenues created under this section shall remain in said  
10 Public Guardianship Commission Fund, subject to appropriation, to meet the operational costs of  
11 said commission. All monies, as determined by the comptroller, remaining in the Public  
12 Guardianship Commission Fund, in excess of appropriations from the fund for the fiscal year  
13 then ending, shall on June thirtieth of each year be transferred by the treasurer to the General  
14 Fund unless the general court otherwise provides.

15               SECTION 2. Subsection (a) of section 6 of chapter 201 of the General Laws, as  
16 appearing in the 2004 Official Edition, is hereby amended by striking out the first sentence and  
17 inserting in place thereof the following sentence: -- A parent of a mentally ill person, two or  
18 more relatives or friends of a mentally ill person, a nonprofit corporation organized under the  
19 laws of the commonwealth whose corporate charter authorizes the corporation to act as a  
20 guardian of a mentally ill person, the public guardianship commission or any agency with which  
21 it contracts for guardianship or conservatorship services or any agency within the executive  
22 offices of health and human services or educational affairs may file a petition in the probate court  
23 asking to have a guardian appointed for such mentally ill person and if, after notice as provided  
24 in section seven and a hearing, the court finds that he is incapable of taking care of himself by  
25 reason of mental illness, it shall appoint a guardian of his person and estate.

26               SECTION 3. Subsection (a) of section 6A of said chapter 201, as appearing in  
27 the 2004 Official Edition, is hereby amended by striking out the first sentence and inserting in  
28 place thereof the following sentence: -- A parent of a mentally retarded person, two or more  
29 relatives or friends of a mentally retarded person, a nonprofit corporation organized under the  
30 laws of the commonwealth whose corporate charter authorizes the corporation to act as a  
31 guardian of a mentally retarded person, the public guardianship commission or any agency with  
32 which it contracts for guardianship or conservatorship services or any agency within the  
33 executive offices of health and human services or educational affairs may file a petition in the  
34 probate court asking to have a guardian appointed for such mentally retarded person.

35               SECTION 4. Section 7 of said chapter 201 of the General Laws, as appearing in  
36 the 2004 Official Edition, is hereby amended by striking out the first sentence and inserting in  
37 place thereof the following sentence: -- Upon such petition the court shall cause not less than

38 seven days notice of the time and place appointed for the hearing to be given to the alleged  
39 mentally ill or mentally retarded person, to the public guardianship commission if it or one of the  
40 agencies with which it contracts for fiduciary services is nominated, to the department of mental  
41 health in the case of a petition filed pursuant to section six, or the department of mental  
42 retardation in the case of a petition filed pursuant to section six A, and, if the alleged mentally ill  
43 or mentally retarded person is entitled to any benefit, estate or income paid or payable through  
44 the United States veterans' bureau or its successor, to said bureau or its successor, except that the  
45 court may, for cause shown, direct that a shorter notice be given.

46               SECTION 5. Subsection (a) of section 14 of said chapter 201 of the General  
47 Laws, as appearing in the 2004 Official Edition, is hereby amended by striking out the first  
48 sentence and inserting in place thereof the following sentence: -- Upon the petition of any agency  
49 within the executive offices of health and human services or educational affairs, the public  
50 guardianship commission or any agency with which it contracts for guardianship or  
51 conservatorship services or other person in interest, the court may, if it finds that the welfare of a  
52 minor, a mentally ill or mentally retarded person, or person unable to make or communicate  
53 informed decisions due to physical incapacity or illness or spendthrift requires the immediate  
54 appointment of a temporary guardian of his person and estate, appoint a temporary guardian of  
55 such minor, mentally ill or mentally retarded person or spendthrift, with or without notice, and  
56 may in like manner remove or discharge him or terminate the trust; or in the absence or a person  
57 to serve as temporary guardian, the court by order or decree may authorize and monitor, as  
58 appropriate, medical treatment; provided, however, that if the court makes the findings required  
59 in paragraph (c), it shall authorize treatment with antipsychotic medication and shall, in the

60 absence of a person to serve as temporary guardian, appoint a suitable person to monitor the  
61 treatment process to ensure that the treatment plan approved by the court is followed.

62 SECTION 6. Said chapter 201 of the General Laws is hereby amended by  
63 striking out section 16, as appearing in the 2004 Official Edition, and inserting in place thereof  
64 the following section: --

65 Section 16. If a person by reason of mental weakness is unable to properly care  
66 for his property, the probate court may, upon his petition or upon the petition of one or more of  
67 his friends, or of the public guardianship commission or any agency with which it contracts for  
68 guardianship or conservatorship services, or if a person by reason of physical incapacity is  
69 unable to properly care for his property, the probate court may, upon his petition or with his  
70 written assent, and in each case if after notice as provided in section seventeen and after hearing  
71 it appears that such person is incapable of properly caring for his property, appoint a conservator  
72 to have charge and management of his property, subject to the direction of the court.

73 SECTION 7. Section 16B of said chapter 201 as appearing in the 2004 Official  
74 Edition, is hereby amended by striking out the first sentence and inserting in place thereof the  
75 following sentence: -- A parent of a mentally retarded person, two or more of his relatives or  
76 friends, a nonprofit corporation organized under the laws of the commonwealth whose corporate  
77 charter authorizes the corporation to act as a conservator of a mentally retarded person, the  
78 public guardianship commission or any agency with which it contracts for guardianship or  
79 conservatorship services or any agency within the executive offices of health and human services  
80 may file a petition in the probate court asking to have a conservator appointed for such mentally  
81 retarded person.

SECTION 8. Section 21 of said chapter 201, as appearing in the 2004 Official Edition, is hereby amended by striking out the first sentence and inserting in place thereof the following sentence: -- Upon the petition of a person of mental weakness or of a friend or upon the petition of the department of transitional assistance, of the public guardianship commission or any agency with which it contracts for guardianship or conservatorship services or upon the petition or with the written assent of a person who by reason of physical incapacity is unable to properly care for his property, the probate court may, if it finds that the welfare of the person of mental weakness or physical incapacity requires the immediate appointment of a temporary conservator of his property, appoint such temporary conservator, with or without notice, and may in like manner remove or discharge him or terminate his trust.

SECTION 9. The General Laws are hereby amended by inserting after chapter 221C, as appearing in the 2004 Official Edition, the following chapter: --

#### CHAPTER 221D.

#### PUBLIC GUARDIANSHIP COMMISSION

Section 1. (a) There is established under the general superintendence of the supreme judicial court a commission to be known as the public guardianship commission, composed of nine members who shall be appointed by the members of the said court. One member shall be nominated by the chief judge of the probate and family court department for the purpose of representing that court on the commission; at least one member shall be a person with a disability; at least one member shall be a person who is more than sixty years old; at least one member shall be a representative of an organization whose primary purpose is to advocate for persons with disabilities; at least one member shall be a representative of an organization whose

104 primary purpose is to advocate for elderly persons; and at least one member shall be  
105 representative of elderly or other human service providers.

106 (b) Members of the commission shall serve for terms of five years, except  
107 that the original terms of membership shall be one one-year term; two two-year terms; two three-  
108 year terms; two four-year terms; and two five-year terms. No person shall be appointed to more  
109 than two consecutive terms on the commission.

110 (c) No less than thirty days prior to making any appointment to the  
111 commission, the justices of the supreme judicial court shall give public notice that a vacancy on  
112 the commission exists and shall give interested persons an opportunity to advise regarding the  
113 appointments.

114 (d) Any vacancy occurring on the commission shall be filled within ninety  
115 days by the justices. A person appointed to fill a vacancy occurring other than by expiration of a  
116 term of office shall be appointed for the unexpired term of the member he succeeds, and shall be  
117 eligible for appointment to one full five-year term.

118 (e) The commission shall elect from among its members a chairperson and  
119 any other officers it deems necessary.

120 (f) Five members of the commission shall constitute a quorum and five  
121 affirmative votes shall be required for any action or recommendation of the commission. The  
122 chairperson or any five members of the commission may call a meeting. Advance notice of all  
123 meetings shall be given to each member of the commission and to any other person who requests  
124 such notice.

125                   (g)       Members of the commission shall not be compensated for work  
126 performed for the commission, but they shall be reimbursed for their actual and necessary  
127 expenses.

128                   (h)       Within three months after the appointment of the first executive director,  
129 and at least every other year thereafter, the commission shall set priorities for service delivery.  
130 Prior to adopting a principal service delivery mode, the commission shall publicly solicit and  
131 take into consideration the views of clients, family members, advocates, providers of fiduciary  
132 services, affected government officials and others concerned with the plight of persons in need of  
133 such services. In order to establish a decentralized delivery system, the commission shall  
134 consider promotion and support of delivery of fiduciary services by local, non-profit  
135 organizations and encourage educational services and support to such families and friends of  
136 persons in need of fiduciary services as are willing and, with assistance, able to provide such  
137 services on a voluntary basis.

138                   (i)       The commission shall regularly report to the joint committee on elder  
139 affairs, the joint committee on mental health and substance abuse, the house and senate  
140 committees on ways and means of the general court and to the justices of the supreme judicial  
141 court. The commission shall make its first report one year from the date this section takes effect  
142 and thereafter annually on the last day of July (except if such would be within six months of its  
143 first report), detailing (1) its priorities for service delivery and the reasons therefore; (2) the  
144 actions it has taken during the preceding year, including the number of persons served and the  
145 types of services provided to such persons; (3) a description of all funds, including state  
146 appropriations and other assistance received by the commission; (4) the names, duties and  
147 salaries of all individuals in its employ; (5) the money it has disbursed and any savings to the

commonwealth which its services have produced; (6) a determination of the feasibility of utilizing volunteers to assist the commission in the delivery of services; and (7) a detailed plan and cost estimate for any recommended expansion of the service, including any savings to the commonwealth which such expansion might reasonably be expected to produce.

Section 2. (a) The policies and standards contained in this section shall be adopted and implemented by the commission through its rules and regulations, selection of and contracts with individuals and agencies to act as fiduciary or provide fiduciary services, decisions regarding persons being served or to be served by the commission, and other such ways as the commission may determine.

(b) A guardianship, conservatorship or other fiduciary relationship shall be established only when necessary to meet the needs of the incapacitated person and when such needs cannot be satisfied using a less restrictive alternative.

(c) Each such fiduciary relationship shall be established and structured so that the incapacitated person is allowed to make his or her own decisions to the maximum extent possible.

(d) A guardian, conservator or other fiduciary shall exercise authority only as necessitated by the incapacitated person's mental and adaptive limitations, and to, the extent possible, shall encourage the incapacitated person to participate in decisions, to act on his or her own behalf and to develop or regain the capacity to manage personal affairs. A guardian, conservator or other fiduciary shall consider the expressed desires and personal values of the incapacitated person when making decisions and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence and prudence. It shall be assumed until



170 demonstrated otherwise that such incapacitated person would choose to live in the least  
171 restrictive appropriate environment.

172 (e) With respect to each ward or proposed ward for whom the commission, or  
173 any individual or agency with whom or with which it contracts for fiduciary services, is  
174 responsible, the commission shall establish standards and procedures, and, subject to  
175 appropriation, bear the expenses, to ensure that:

176 (1) the ward will understand, to the maximum extent feasible, the  
177 nature and significance of any court proceedings;

178 (2) independent counsel is, to the extent necessary, made available to  
179 him or her for all court proceedings, or, when he or she so requests, in order to petition for  
180 discharge or removal of a guardian or other fiduciary;

181 (3) the commission shall immediately notify the court if the  
182 incapacitated person's condition is changed so that he or she is capable of exercising rights  
183 previously limited; and the commission shall cause an independent clinical review to be made at  
184 least annually to determine whether any fiduciary relationship created is still necessary, and if it  
185 is not necessary, that steps are taken to discharge the fiduciary;

186 (4) an annual accounting is made as required by procedures of the  
187 probate and family court department; and

188 (5) there is adequate monitoring and review of the quality of fiduciary  
189 services and of compliance with the policies, standards and procedures of the commission.

190                   Section 3. (a) The commission shall, subject to appropriation, employ an  
191 executive director who shall be authorized to appoint such other staff, subject to appropriation,  
192 necessary to carry out the commission's duties pursuant to this chapter and chapter two hundred  
193 and one. The staff shall serve at the pleasure of the commission and shall not be subject to the  
194 provisions of chapter thirty-one or section nine A of chapter thirty. The executive director shall  
195 be responsible for the administrative operation of the commission and shall perform such other  
196 tasks as the commission may determine. The commission may employ, subject to appropriation,  
197 the services of experts and consultants necessary to carry out its duties and may also accept the  
198 services of volunteers, who may be reimbursed for their actual and necessary expenses incurred  
199 in carrying out their duties.

200                   (b)       The commission, pursuant to the provisions of section two of chapter  
201 thirty A, shall adopt such rules and regulations as are necessary to carry out the purposes of this  
202 chapter.

203                   (c)       The commission shall be subject to all laws and regulations governing the  
204 procurement by state agencies and commissions of supplies, services or construction.

205                   Section 4. (a) Any resident of the commonwealth who is indigent (as defined in  
206 section twenty-seven A of chapter two hundred and sixty-one) and who is an incapacitated  
207 person for whom no other qualified person or organization is available and willing to accept  
208 appointment as guardian, conservator or other fiduciary, shall be eligible for the services of the  
209 commission.

210                   (b)       A court or other appointing authority shall not appoint as guardian,  
211 conservator or other fiduciary either the commission or any agency or individual contracting

with the commission unless the court or other appointing authority first determines that no other qualified person or organization is available and willing to accept the appointment. In addition, in any case involving a minor, the court or other appointing authority shall not appoint as guardian, conservator or other fiduciary either the commission or any agency or individual contracting with the commission unless the court or other appointing authority first determines that responsibility for the minor cannot be accepted by the department of social services pursuant to chapter one hundred and nineteen. No court or other appointing authority shall appoint either the commission or any agency or individual contracting with the commission as guardian, conservator or other fiduciary of any eligible person unless the commission or the agency or individual contracting with the commission first determines, in accordance with this chapter and rules and regulations of the commission, and communicates with the court, that it, he or she has the capacity to provide high-quality fiduciary services and can otherwise carry out the responsibilities under such appointment; and any appointment in violation of this provision shall be void.

Section 5. (a) The commission may, subject to appropriation, contract with non-profit private agencies and individuals to serve as the guardian, conservator or other fiduciary or to provide guardianship, conservatorship or other fiduciary services to any individual for whom the commission has been or might be appointed such fiduciary; provided, however, that no such contract shall be entered into with a non-profit private agency unless the articles of incorporation of the agency authorize it to serve in such fiduciary capacity. Any such non-profit private agency or individual with which or with whom the commission so contracts shall in this section and in sections 6 and 7, be referred to as a "fiduciary agency."

234                   (b)     The commission or any fiduciary agency may serve as a plenary, limited  
235 or temporary guardian, guardian ad litem, conservator or monitor after appointment by a court  
236 pursuant to the law of the commonwealth, including but not limited to chapters nineteen A, one  
237 hundred and nineteen, one hundred and twenty-three, one hundred and twenty-three B and two  
238 hundred and one.

239                   (c)     The commission or any fiduciary agency may petition the court for  
240 appointment as guardian, guardian ad litem, or conservator. Any other petitioner for  
241 guardianship or conservatorship after preliminary investigation by, and approval of, the  
242 commission or fiduciary agency, as the case may be, may nominate the commission or such  
243 fiduciary agency as a guardian, guardian-ad-litem or conservator, with notice to the commission  
244 or fiduciary agency in accordance with chapter two hundred and one.

245                   (d)     The commission or any fiduciary agency may serve as trustee or other  
246 fiduciary, except an administrator or executor of an estate. Before serving as a trustee or  
247 fiduciary, the commission or fiduciary agency must receive court approval, except as provided in  
248 subsection (e).

249                   (e)     The commission or any fiduciary agency may serve as representative  
250 payee by appointment of the appropriate federal agency without court review or approval. A  
251 representative payee shall be considered a fiduciary for purposes of this chapter.

252                   (f)     The commission or any fiduciary agency, on its own motion or at the  
253 request of the court, may petition to intervene at any time in a guardianship or conservatorship  
254 proceeding to protect the best interests of the proposed ward.

255                   (g)     The commission or any fiduciary agency may provide information and  
256 assistance pertaining to guardianship, conservatorship and other fiduciary services, and may  
257 perform such other tasks as may be necessary to carry out its responsibilities under this chapter.

258                   (h)     The commission or any fiduciary agency shall maintain records of each  
259 case in which the commission or fiduciary agency provides guardianship, conservatorship or  
260 other fiduciary services. Each such case record shall include the financial and personal  
261 information necessary for the commission or fiduciary agency to carry out its fiduciary  
262 responsibilities. Such records shall be the property of the commission. Access to such records  
263 shall be limited to members and staff of the commission, to staff of the agency serving as the  
264 fiduciary of the subject of a particular record and to others pursuant to an order of a court of  
265 competent jurisdiction; provided, however, that authorized agents of the commonwealth, for  
266 auditing purposes, shall be afforded access to such records, with information which may be used  
267 to identify the subject redacted.

268                   (i)     The commission shall be eligible for and shall have the authority to accept  
269 any and all donations, grants, appropriations, bequests and devises of money, property, personnel  
270 services or other assistance which may be received from the commonwealth or any agency  
271 thereof, the United States or any agency thereof, and other governmental agency, any institution,  
272 person, firm or corporation, public or private; to be held, used or applied for any or all purposes  
273 specified in this chapter. No such assistance shall in any way compromise or limit the  
274 independence and autonomy of the commission or its authority to carry out the purposes of this  
275 chapter. Any funds received by the commission other than by appropriation shall be deposited  
276 into the Public Guardianship Commission Fund, as provided for in section 35CC of chapter 10.

Section 6. (a) If the commission or any fiduciary agency is appointed a guardian, conservator or other fiduciary, it shall not charge for the costs of its services or the costs of the appointment or approval procedure against the property or income of the individual for whom it serves as fiduciary, unless the court or other appointing authority determines at any time after the commission's or fiduciary agency's appointment that the individual is financially able to pay all or part of the costs.

(b) The court or other appointing authority shall determine ability to pay by investigating the nature, extent and liquidity of assets and the disposable net income of the individual.

(c) The commission, through its executive director, may recommend fees to be assessed for its services in any individual case in which the ward is no longer indigent, in accordance with standards established in its rules and regulations. No fees may be assessed for fiduciary services unless the eligible person or ward is given written notice at the start of such services that such fees may be assessed.

(d) The commission shall deposit any payment of assessed fees into the Public Guardianship Commission Fund, as provided for in section 35CC of chapter 10.

(e) The commission may claim the reasonable value of services rendered to any individual against his estate upon the death of that individual, if the individual was no longer indigent at the time of death.

Section 7. Notwithstanding any other law to the contrary, neither the commission nor any fiduciary agency shall be required to file a bond in individual cases in which the commission or a fiduciary agency is appointed to act in a fiduciary capacity but shall give a

bond, with sufficient sureties, for the joint benefit of all persons for whom the commission or fiduciary agency is appointed to act in an amount not less than the value of all assets held by the commission and such contracted fiduciary agencies as of the last day of the most recent fiscal year, but at no time less than fifty thousand dollars. Such bond shall be filed with the chief judge of the probate and family court department, and a copy thereof shall be filed with the register of probate of each division of said court in which the commission or a fiduciary agency has been appointed to serve in a fiduciary capacity. The state treasurer may, subject to appropriation, set aside sufficient funds for the purpose of providing a surety for the commission's bond pursuant to this section.

Section 8. The books and records of the commission shall be audited by the state auditor within eighteen months after this chapter becomes effective as to Suffolk county, and every two years thereafter. A copy of such audit shall be sent to the clerk of the house of representatives who shall forward the same to the house and senate committees on ways and means, the joint committee on elder affairs, and the joint committee on mental health and substance abuse.

SECTION 10. Section 1 of this Act and sections 1, 2 and 3 of chapter 221D of the General Laws, as inserted by section 9 of this Act, shall take effect on July 1, 2010.

All other sections of this Act, including the other sections of said chapter 221D, shall take effect on October 1, 2010, provided, however, that, at said effective date, the provisions of subsection (a) of section 4 of said chapter 221D shall apply only to Suffolk county.

319                   Said provisions of subsection (a) of section 4 of chapter 221D shall apply to the  
320   counties of Plymouth, Worcester, Norfolk and Barnstable on January 1, 2012 and to all  
321   remaining counties on July 1, 2012.