

# SENATE . . . . . No. 755

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## The Commonwealth of Massachusetts

PRESENTED BY:

*Cynthia S. Creem*

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to establish a public guardianship commission.

PETITION OF:

NAME:

*Cynthia S. Creem*

DISTRICT/ADDRESS:

# SENATE . . . . . No. 755

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By Ms. Creem, a petition (accompanied by bill, Senate, No. 755) of Cynthia S. Creem for legislation to establish a public guardianship commission. The Judiciary.

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[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE SENATE, NO. 738 OF 2009-2010.]

## The Commonwealth of Massachusetts

\_\_\_\_\_  
In the Year Two Thousand Eleven  
\_\_\_\_\_

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 2008 Official  
2 Edition, is hereby amended by inserting after section 35NN the following new section: -

3                   Section 35OO. There shall be established and set up on the books of the  
4 commonwealth a separate fund to be known as the Public Guardianship Commission Fund, to be  
5 used to meet the operational costs of the public guardianship commission established under the  
6 provisions of chapter 221D, in addition to any appropriation from the General Fund. Said fund  
7 shall consist of amounts received from public and private sources as gifts, grants, donations,  
8 bequests and devises of money any amounts to be received by said commission in fees for  
9 services pursuant to sections 5 and 6 of chapter 221D. All revenues created under this section  
10 shall remain in said Public Guardianship Commission Fund, subject to appropriation, to meet the  
11 operational costs of said commission. All monies, as determined by the comptroller, remaining

12 in the Public Guardianship Commission Fund, in excess of appropriations from the fund for the  
13 fiscal year then ending, shall on June thirtieth of each year be transferred by the treasurer to the  
14 General Fund unless the general court otherwise provides.

15               SECTION 2. Subsection (a) of section 6 of chapter 201 of the General Laws,  
16 as appearing in the 2008 Official Edition, is hereby amended by striking out the first sentence  
17 and 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 education may file a petition in the probate court asking  
23 to have a guardian appointed for such mentally ill person and if, after notice as provided in  
24 section seven and a hearing, the court finds that the person is incapable by reason of mental  
25 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 2008 Official Edition, is hereby amended by striking out the first sentence and inserting in  
28 place thereof the following sentence: - A parent of a person with intellectual disabilities, two or  
29 more relatives or friends of a person with intellectual disabilities, a nonprofit corporation  
30 organized under the laws of the commonwealth whose corporate charter authorizes the  
31 corporation to act as a guardian of a person with intellectual disabilities, the public guardianship  
32 commission or any agency with which it contracts for guardianship or conservatorship services  
33 or any agency within the executive offices of health and human services or educational affairs

may file a petition in the probate court asking to have a guardian appointed for such persons with intellectual disabilities.

SECTION 4. Section 7 of said chapter 201 of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by striking out the first sentence and inserting in place thereof the following sentence: - Upon such petition the court shall cause not less than seven days notice of the time and place appointed for the hearing to be given to the alleged mentally ill person or person with intellectual disabilities, to the public guardianship commission if it or one of the agencies with which it contracts for fiduciary services is nominated, to the department of mental health in the case of a petition filed pursuant to section six, or the department of developmental services in the case of a petition filed pursuant to section six A, and, if the alleged mentally ill person or person with intellectual disabilities is entitled to any benefit, estate or income paid or payable through the United States veterans' bureau or its successor, to said bureau or its successor, except that the court may, for cause shown, direct that a shorter notice be given.

SECTION 5. Subsection (a) of section 14 of said chapter 201 of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by striking out the first sentence and inserting in place thereof the following sentence: - Upon the petition of any agency within the executive offices of health and human services or education, the public guardianship commission or any agency with which it contracts for guardianship or conservatorship services or other person in interest, the court may, if it finds that the welfare of a minor, a mentally ill person or person with intellectual disabilities, or person unable to make or communicate informed decisions due to physical incapacity or illness or spendthrift requires the immediate appointment of a temporary guardian of his person and estate, appoint a temporary guardian of

57 such minor, mentally ill person or person with intellectual disabilities spendthrift, with or  
58 without notice, and may in like manner remove or discharge him or terminate the trust; or in the  
59 absence or a person to serve as temporary guardian, the court by order or decree may authorize  
60 and monitor, as appropriate, medical treatment; provided, however, that if the court makes the  
61 findings required in paragraph (c), it shall authorize treatment with antipsychotic medication and  
62 shall, in the absence of a person to serve as temporary guardian, appoint a suitable person to  
63 monitor the treatment process to ensure that the treatment plan approved by the court is followed.

64  
65 SECTION 6. Said chapter 201 of the General Laws is hereby amended by  
66 striking out section 16, as appearing in the 2008 Official Edition, and inserting in place thereof  
67 the following section:-

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

76 SECTION 7. Section 16B of said chapter 201 as appearing in the 2008  
77 Official Edition, is hereby amended by striking out the first sentence and inserting in place  
78 thereof the following sentence: -- A parent of a person with intellectual disabilities, two or more

of his relatives or friends, a nonprofit corporation organized under the laws of the commonwealth whose corporate charter authorizes the corporation to act as a conservator of a person with intellectual disabilities, the public guardianship commission or any agency with which it contracts for guardian ship or conservatorship services or any agency within the executive offices of health and human services may file a petition in the probate court asking to have a conservator appointed for such person with intellectual disabilities.

SECTION 8. Section 21 of said chapter 201, as appearing in the 2008 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 property owned by the person, 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 property owned by the person,, appoint such temporary conservator, with or without notice, and may in like manner remove or discharge the person or terminate the trust.

SECTION 9. The General Laws are hereby amended by inserting after chapter 221C, as appearing in the 2008 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 primary purpose is to advocate for elderly persons; and at least one member shall be representative of elderly or other human service providers.

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

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

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

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

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

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

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

141 (i) The commission shall regularly report to the joint committee on elder  
142 affairs, the joint committee on mental health and substance abuse, the house and senate  
143 committees on ways and means of the general court and to the justices of the supreme judicial

144 court. The commission shall make its first report one year from the date this section takes effect  
145 and thereafter annually on the last day of July (except if such would be within six months of its  
146 first report), detailing (1) its priorities for service delivery and the reasons therefore; (2) the  
147 actions it has taken during the preceding year, including the number of persons served and the  
148 types of services provided to such persons; (3) a description of all funds, including state  
149 appropriations and other assistance received by the commission; (4) the names, duties and  
150 salaries of all individuals in its employ; (5) the money it has disbursed and any savings to the  
151 commonwealth which its services have produced; (6) a determination of the feasibility of  
152 utilizing volunteers to assist the commission in the delivery of services; and (7) a detailed plan  
153 and cost estimate for any recommended expansion of the service, including any savings to the  
154 commonwealth which such expansion might reasonably be expected to produce.

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

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

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

166 (d) A guardian, conservator or other fiduciary shall exercise authority only as  
167 necessitated by the incapacitated person's mental and adaptive limitations, and to the extent  
168 possible, shall encourage the incapacitated person to participate in decisions, to act  
169 independently and to develop or regain the capacity to manage personal affairs. A guardian,  
170 conservator or other fiduciary shall consider the expressed desires and personal values of the  
171 incapacitated person when making decisions and shall otherwise act in the incapacitated person's  
172 best interest and exercise reasonable care, diligence and prudence. It shall be assumed until  
173 demonstrated otherwise that such incapacitated person would choose to live in the least  
174 restrictive appropriate environment.

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

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

181 (2) independent counsel is, to the extent necessary, made available  
182 the ward for all court proceedings, or, when the ward requests , in order to petition for discharge  
183 or removal of a guardian or other fiduciary;

184 (3) the commission shall immediately notify the court if the  
185 incapacitated person's condition is changed so that the ward is capable of exercising rights  
186 previously limited; and the commission shall cause an independent clinical review to be made at

187 least annually to determine whether any fiduciary relationship created is still necessary, and if it  
188 is not necessary, that steps are taken to discharge the fiduciary;

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

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

194 Section 3. (a) The commission shall, subject to appropriation, employ an  
195 executive director who shall be authorized to appoint such other staff, subject to appropriation,  
196 necessary to carry out the commission's duties pursuant to this chapter and chapter 211. The  
197 staff shall serve at the pleasure of the commission and shall not be subject to the provisions of  
198 chapter thirty-one or section nine A of chapter thirty. The executive director shall be  
199 responsible for the administrative operation of the commission and shall perform such other  
200 tasks as the commission may determine. The commission may employ, subject to appropriation,  
201 the services of experts and consultants necessary to carry out its duties and may also accept the  
202 services of volunteers, who may be reimbursed for their actual and necessary expenses incurred  
203 in carrying out their duties.

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

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

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

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

230                   Section 5. (a) The commission may, subject to appropriation, contract with  
231 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, how - ever, that no such contra ct 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."

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

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

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

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

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

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

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

(i) The commission shall be eligible for and shall have the authority to accept any and all donations, grants, appropriations, bequests and devises of money, property, personnel services or other assistance which may be received from the commonwealth or any agency

thereof, the United States or any agency thereof, and other governmental agency, any institution, person, firm or corporation, public or private; to be held, used or applied for any or all purposes specified in this chapter. No such assistance shall in any way compromise or limit the independence and autonomy of the commission or its authority to carry out the purposes of this chapter. Any funds received by the commission other than by appropriation shall be deposited 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.

318                   SECTION 10. Section 1 of this Act and sections 1, 2 and 3 of chapter 221D of  
319 the General Laws, as inserted by section 9 of this Act, shall take effect on July 1, 2012.

320                   SECTION 11. All other sections of this Act, including the other sections of  
321 said chapter 221D, shall take effect on October 1, 2012, provided, however, that, at said effective  
322 date, the provisions of subsection (a) of section 4 of said chapter 221D shall apply only to  
323 Suffolk county.

324                   SECTION 12. Said provisions of subsection (a) of section 4 of chapter 221D  
325 shall apply to the counties of Plymouth, Worcester, Norfolk and Barnstable on January 1, 2014  
326 and to all remaining counties on July 1, 2014.