

SENATE No. 1177

The Commonwealth of Massachusetts

PRESENTED BY:

Cynthia Stone 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 the office of adult guardianship and decisional support services.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	
<i>Cynthia Stone Creem</i>	<i>First Middlesex and Norfolk</i>	
<i>Thomas M. McGee</i>	<i>Third Essex</i>	<i>1/25/2017</i>
<i>Angelo J. Puppolo, Jr.</i>	<i>12th Hampden</i>	<i>1/26/2017</i>
<i>Jack Lewis</i>	<i>7th Middlesex</i>	<i>1/27/2017</i>
<i>Joan B. Lovely</i>	<i>Second Essex</i>	<i>1/30/2017</i>
<i>Barbara A. L'Italien</i>	<i>Second Essex and Middlesex</i>	<i>1/31/2017</i>
<i>Brian Murray</i>	<i>10th Worcester</i>	<i>2/2/2017</i>
<i>Jason M. Lewis</i>	<i>Fifth Middlesex</i>	<i>2/2/2017</i>
<i>Sal N. DiDomenico</i>	<i>Middlesex and Suffolk</i>	<i>2/2/2017</i>
<i>Paul Tucker</i>	<i>7th Essex</i>	<i>2/3/2017</i>

SENATE No. 1177

By Ms. Creem, a petition (accompanied by bill, Senate, No. 1177) of Cynthia S. Creem, Thomas M. McGee, Angelo J. Puppolo, Jr., Jack Lewis and other members of the General Court for legislation to establish the office of adult guardianship and decisional support services. Public Health.

The Commonwealth of Massachusetts

In the One Hundred and Ninetieth General Court
(2017-2018)

An Act to establish the office of adult guardianship and decisional support services.

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. The General Laws are hereby amended by inserting after Chapter 19D the
2 following chapter:-

3 CHAPTER 19E

4 OFFICE OF ADULT GUARDIANSHIP AND DECISIONAL SUPPORT SERVICES

5 Section 1. Definitions

6 As used in this chapter, the following words shall, unless the context clearly requires
7 otherwise, have the following meanings:-

8 “Act,” the Adult Guardianship and Decisional Support Act.

9 “**At Large Member,**” a person with personal or professional experience with
10 guardianship, conservatorship or voluntary decisional support for elderly,
11 intellectually/developmentally disabled persons, and/or mentally ill persons.

12 “**Chief Justice,**” the individual who is the Chief Justice of the Probate and Family Court
13 Department of the Trial Court of the Commonwealth of Massachusetts.

14 “**Council,**” the Governor’s Advisory Council for Adult Guardianship and Decisional
15 Support, as established and empowered herein.

16 “**Decisional Support Services,**” a range of informal and formal services to meet the needs
17 of persons with diminished decisional capacity.

18 “**Executive Director,**” the executive director of Adult Guardianship and Decisional
19 Support Services, as appointed and empowered herein.

20 “**HHS,**” the Secretary of the Executive Office of Health and Human Services of the
21 Commonwealth of Massachusetts.

22 “**Incapacitated person,**” someone as defined in MGL Ch. 190B, Section 5-101 (9).

23 “**Office,**” the Office of Adult Guardianship and Decisional Support Services, as
24 established and authorized herein.

25 “**Public Guardian,**” the entity designated as such under applicable provisions of the Act.

26 “**Volunteer,**” a person recruited, trained and supervised by the Public Guardian to assist
27 the Public Guardian in carrying out the duties of a guardian, conservator or other decisional

support person on behalf of the Public Guardian, but who is not named individually in any court decree to that effect.

Section 2. Office of Adult Guardianship and Decisional Support Services created; duties.

(a) The Governor shall create an Office of Adult Guardianship and Decisional Support Services within the Executive Office of Health and Human Services and shall appoint the executive director. The Governor may consider advice of the Council when making this appointment. The executive director shall be knowledgeable of (1) the clinical causes and manifestations of incapacity; (2) statutes and common law governing the appointment of guardians and conservators, and/or authorizing individuals to make decisions for persons who are incapacitated, or to assist such persons to make their own decisions; and (3) the appropriate services available to meet the needs of incapacitated persons. The executive director shall serve on a full-time basis, and shall personally, or through representatives of the office, carry out the purposes and functions of the Office in accordance with state and federal law. The executive director shall serve at the pleasure of and report to the Secretary of Health and Human Services.

(b) The executive director shall appoint and designate a suitable organization that is in good standing with the Secretary of the Commonwealth to be the Office of Public Guardian for the Commonwealth, and shall oversee the Public Guardian as further provided in this Act.

(c) Consistent with the purposes and objectives of this Act, the executive director shall:

(i) Review and evaluate the work of the Public Guardian through visits, forms, audits and/or other reasonable and appropriate means, in the discretion of the Commissioner;

(ii) Develop practice standards for the Public Guardian and its employees and volunteers, in order to promote best practices in the performance of all such services throughout the Commonwealth;

(iii) Promote or provide educational materials and programs to increase public awareness of guardianship alternatives, such as Health Care Proxies, Durable Powers of Attorney, Medical Orders for Life Sustaining Treatment (“MOLST”) directives, and similar instruments, that may delay or avoid the need for judicial or other involuntary process in the event of incapacity;

(iv) Promote or provide, in conjunction with private and other public resources, statewide curricula and programs to train interested parties to serve as guardians, conservators and voluntary decisional support persons;

(v) Develop a uniform system of reporting and collecting statistical data regarding guardianships and conservatorships;

(vi) Prepare an annual budget for the implementation of the Act;

(vii) Establish procedures for the investigation and resolution of complaints against the Public Guardian.

(viii) The executive director may, as time and funding permit, also (a) develop resources to serve as an informational, professional and/or clinical resource for persons serving as guardian, conservator or voluntary decisional support person; (b) define, coordinate and promote research related to decisional surrogacy and support, including research into different approaches for supporting diverse clinical populations; (c) perform such other duties as the

executive director finds useful and appropriate to ensure that high-quality decisional support services of all kinds are available to all who need them in the Commonwealth.

Section 3. Advisory Council on Adult Decisional Support created; members; duties.

(a) There shall be a Governor's Advisory Council for Adult Guardianship and Decisional Support, to consist of not less than 15 members and not more than 30 members. The members of the Council shall be appointed by the Governor for terms of three years. The Council shall consist of persons who live in the Commonwealth and shall include guardians, advocates for people under guardianship and other interested individuals. The chairman of the Council shall be appointed by the Governor and shall serve for a term of three years. The following shall also serve as members of the Council: the Chief Justice of the Probate and Family Court or his designee, the Senate President, the Speaker of the House of Representatives, the Attorney General or his designee, the Secretary of the Executive Office of Health and Human Services or his designee, the Commissioner of the Department of Developmental Services or his designee, the Secretary of the Executive Office of Elder Affairs or his designee, the Commissioner of the Department of Mental Health or his designee, and representatives from such other secretariats, departments, divisions or agencies as the Governor or the Council may request.

(b) The Council shall : (i) advise the Governor on policy, planning, and priorities for the Office of Adult Guardianship and Decisional Support Services and the Public Guardian for the Commonwealth; (ii) assist the executive director of the Office of Adult Guardianship and Decisional Support Services in coordinating the efforts of all public agencies concerned with decisional support services and in promoting the accessibility of all state services; (iii) increase

communication, mutual understanding, and willingness to cooperate among community groups and organizations that serve people with decisional support needs; and (iv) review the Annual Reports of the Public Guardian and executive director. The Council may meet quarterly.

(c) Members of the council shall not receive a salary or per diem allowance for serving as members of the council, but shall be reimbursed for actual and necessary expenses reasonably incurred in the performance of their duties.

Section 4. Public Guardian: designation; replacement; transfer of duties and powers.

(a) The executive director shall identify a non-profit agency that demonstrates, to the executive director's satisfaction, its business plan and financial capability to perform the duties of the Public Guardian as a pilot project or statewide, as the executive director deems appropriate. This agency shall serve as the Public Guardian for the Commonwealth for a length of time, not exceeding five years, as designated by the executive director.

(b) The executive director may revoke the designation of the Public Guardian by signed letter, with or without the recommendation or consent of the Advisory Council, at any time during a term of designation, provided that revocation may not take effect sooner than one hundred eighty days from the date that written notice thereof is received by the Public Guardian, unless a sooner effective date is essential to the protection of the person or property of individuals for whom the Public Guardian has been appointed as guardian or conservator. Upon expiration of the designated term resignation, or removal of the Public Guardian, the procedure set forth in subsection (a) shall be followed to re-designate the Public Guardian, or to designate a different public or private agency to be Public Guardian, as the case may be, for a new term of up to five years.

(c) In the event that the agency serving as Public Guardian is replaced for any reason, either during or at the conclusion of its term of designation, it shall continue, unless prohibited by law or by directive of the Chief Justice, to serve as guardian or conservator for all individuals for whom it has been so appointed, and shall continue to have the same authority and provide the same services under the same terms that existed prior to said replacement, and the continuation of authority of the Public Guardian shall remain in effect, until a new Public Guardian has been duly designated under the foregoing subsection (a), and has been authorized under the following subsection (d) to assume all of the duties and powers of the departing Public Guardian under each said appointment.

(d) Upon any replacement of the agency designated hereunder to serve as Public Guardian, the Chief Justice shall, unless he or she finds the successor agency unsuitable, cause a decree to issue in each guardianship and conservatorship case in which the former Public Guardian was named as fiduciary, naming as successor fiduciary the new Public Guardian, and notice of the change of fiduciary shall be issued by the new Public Guardian to all interested parties of record in each said case. The new Public Guardian may, in its sound discretion, in any case for which has been appointed hereunder as successor fiduciary, accept as employee or volunteer any person who has served in that capacity in that case for the prior Public Guardian.

Section 4A. Public Guardian: bond

(a) The Public Guardian shall secure a general bond in an amount fixed by the executive director, payable to the state and issued by a surety company approved by the Court, an attested copy of which shall be filed with the Probate and Family Court for each county in the

Commonwealth. The bond shall insure the faithful performance by the Public Guardian of duties as conservator or guardian under Chapter 190B of the Massachusetts General Laws.

(b) The general bond and oath of the Public Guardian is in lieu of the bond and oath required of a private conservator or guardian.

Section 4B. Public Guardian: authority to serve as guardian or conservator

(a) The Public Guardian shall:

(i) receive referrals and recommendations regarding individuals who may be in need of a guardian and independently evaluate the referral to make a determination as to the physical, social, and financial conditions of the individual, whether there are alternatives to public guardianship, and whether the individual is at risk of abuse, neglect, or exploitation;

(ii) if duly appointed as guardian or conservator, be vested with all the powers and duties of a guardian and/or a conservator, as the case may be, under Article V of Chapter 190B of the Massachusetts General Laws, except as otherwise provided by law.

(b) The Public Guardian may:

(i) After evaluation of the conditions of the individual:

(A) Make a recommendation as to a suitable individual who is available and willing to serve as guardian or surrogate decision maker or refer to an appropriate private, nonprofit, or other entity willing to serve as guardian; or

153 (B) File a petition for its own appointment, or file for the appointment of any other
154 individual as guardian where it is determined that the filing of a petition on behalf of another
155 may avoid the need for public guardianship; or

156 (C) Consent to serve as guardian where another entity or individual files a petition for
157 the appointment of the Public Guardian.

158 (ii) Employ staff and delegate to members of the staff or to volunteers the powers and
159 duties as guardian under the said Chapter 190B; however, the Public Guardian retains
160 responsibility for the proper performance of the delegated powers and duties.

161 (c) The executive director, in consultation with the Public Guardian, shall develop
162 standards and procedures to ensure that any employee or volunteer retained by the Public
163 Guardian as guardian or conservator is qualified by character, education, experience and training
164 to meet the fiduciary standards that apply to the services that the person will perform. Such
165 standards and procedures shall include background checks, but they shall emphasize a weighing
166 of factors rather than minimum requirements, and the executive director shall not directly or
167 indirectly influence the Public Guardian to hire or retain any particular individual as employee,
168 volunteer or independent contractor, either by regulation or otherwise.

169 (d) The executive director shall, in consultation with the Public Guardian, develop
170 standards and procedures specifying –

171 (i) Any duties or decisions that may not be delegated to a volunteer for the Public
172 Guardian, and whether or how any such duty or decision may be exercised temporarily at a time
173 when no employee of the Public Guardian can be reached; and

(ii) Requirements for ongoing training, supervision and evaluation that are required of any person acting for the Public Guardian in its capacity as guardian or conservator.

(e) If the Public Guardian ascertains, after having been appointed guardian or conservator of an incapacitated person, that a family member or other person who is qualified to serve as guardian or conservator is available to serve in that capacity, the Public Guardian shall, upon its own petition or the petition of the qualified person, seek or support, as the case may be, the appointment of the qualified person as successor guardian or successor conservator. The Public Guardian shall give the executive director timely notice of all such proceedings, sufficient to allow the executive director to intervene or oppose the substitution if he or she determines that it is not in the best interests of the incapacitated individual, or otherwise is not appropriate.

Section 4C. Fees for Service.

(a) The Public Guardian may charge fees for service, pursuant to a fee schedule developed by the executive director, upon approval of such schedule by the Chief Justice, which shall identify in reasonable detail the circumstances under which an incapacitated person is deemed to have sufficient available income or assets to pay for such services.

(b) The Public Guardian's financial accounts shall identify clearly as a separate source of income all revenue that is paid as a fee for guardianship or conservatorship services from income or assets of the incapacitated individual, and an accounting of such revenue shall be made available upon request to the executive director, provided that the Public Guardian shall not be required to provide said accounting more often than monthly.

Section 4D. Standards and records; disclosure

(a) The manner in which the Public Guardian provides guardianship and conservatorship services at all times shall conform substantially to practice standards promulgated from time to time by the executive director.

(b) The Public Guardian shall keep and maintain the following kinds of records of its operations, in accordance with regulations or guidelines issued by the executive director –

(i) Financial records in accordance with generally accepted accounting principles;

(ii) Case control and management records that are adequate to show whether services provided and outcomes achieved by the Public Guardian are consistent with the intent of the Act;

(iii) Detailed referral information showing the number, reasons and sources of all referrals for fiduciary services, the disposition of each referral, and pertinent clinical information that the Public Guardian receives with respect to the individual being referred.

(c) Except as provided herein or otherwise required by law, no personal, financial or medical information about any person referred to or receiving services from the Public Guardian, other than information that already is a public record, shall be disclosed by the Public Guardian.

(d) The following kinds of disclosures are specifically authorized:

(i) De-identified statistical information may be disclosed in the sound discretion of the Public Guardian to any public or private entity that the Public Guardian reasonably believes is engaged in research, education or advocacy intended to foster best practices, increased public support or legal reforms to benefit persons in need of decisional support.

(ii) Information required by any public or private provider of benefits, services or goods that the Public Guardian elects, in its sound discretion, seeks to obtain or acquire for the

individual may be disclosed to the extent required, provided that the Public Guardian shall inquire into, and to the extent possible, shall take reasonable steps to ensure, the confidentiality of the information in the hands of said provider.

(iii) Information may be disclosed in the sound discretion of the Public Guardian to any relative or other person who is authorized under any Massachusetts law to act on behalf of a person referred to or receiving services from the Public Guardian, including any provider of essential medical or financial services, to the extent that the Public Guardian believes that releasing such information is in the best interests of the individual.

(iv) Any similar disclosure that is required in order to benefit an individual receiving services from the Public Guardian may be made, to the minimum extent required.

(v) Other than de-identified information that is authorized under the above subsection (1), disclosures that benefit the Public Guardian, the executive director, or any other public or private entity, but that do not materially benefit a person receiving services from the Public Guardian, are prohibited.

Section 4E. Oversight and Accountability

(a) The executive director shall have at all times unfettered access to the books and records of the Public Guardian, provided that –

(i) The executive director shall provide reasonable notice and accommodation to the Public Guardian anytime he or she wishes to review records, including scheduling with those employees or volunteers of the Public Guardian that it wishes to be present with the executive director when records are reviewed;

237 (ii) The executive director shall not remove any records from the Public Guardian,
238 but may take copies;

239 (iii) The executive director shall be bound by the same disclosure and privacy of
240 information requirements with respect to any copies or knowledge of case records of the Public
241 Guardian, as set forth in the foregoing Section 4D, that apply to the Public Guardian;

242 (iv) The executive director shall not disclose any proprietary information about the
243 Public Guardian or its operations without the prior written consent of the Public Guardian.

244 (b) The Public Guardian shall file with the executive director a written annual report
245 on its operations by September 1 of each year for the preceding fiscal year. Said report shall
246 include –

247 (i) The number of persons for whom the Public Guardian is serving as guardian or
248 conservator;

249 (ii) The number of employees, volunteers and contractors who are acting for the
250 Public Guardian to perform its duties as guardian and/or conservator;

251 (iii) Statistics as to the number, sources, types, disposition and other relevant
252 information about the referrals received by the Public Guardian;

253 (iv) A description of all premises from which the Public Guardian operates and the
254 service capacity of each location;

255 (v) A cash flow and Financial Statement;

- 256 (vi) A description of policies and initiatives for locating family members or other
257 suitable persons to act as guardian or conservator in the cases for which it has been appointed;
- 258 (vii) A description of policies and initiatives for encouraging and supporting
259 independence and self-determination to the extent possible among all of the individuals for
260 whom the Public Guardian serves as guardian or conservator.
- 261 (c) The directors or trustees of the Public Guardian shall commission an annual audit
262 of its operations by a qualified certified public accountant, and a copy of such audit shall be
263 provided to the executive director when completed.
- 264 (d) The executive director shall designate a qualified agency or provider to conduct
265 an investigation (a “Clinical Audit”) once every two years into the practices of the Public
266 Guardian related to the management of each ward’s personal affairs and property. The Clinical
267 Audit may, in the executive director’s discretion, include a review of the presence and accuracy
268 of
- 269 (i) Intake information, including presenting issues, demographic information and
270 contact information for family and friends;
- 271 (ii) Medical information including the individual’s diagnoses and all medications
272 prescribed to him or her;
- 273 (iii) Functional assessments including Activities of Daily Living (ADLs), Instrumental
274 Activities of Daily Living (IADLs) and safety;
- 275 (iv) End-of-life planning assessments;
- 276 (v) Assessments of psycho-social and spiritual needs;

277 (vi) Legal documents including bonds, petitions, Orders of Appointment, Expansions
278 of Authority, Inventories, Accounts, Care Plans and similar instruments;

279 (vii) Case notes demonstrating all work done with, or on behalf of, the incapacitated
280 person;

281 (viii) Correspondence on behalf of the incapacitated person;

282 (ix) Case closing documents, when applicable.

283 (e) So long as the Public Guardian, through its employees and/or volunteers, has
284 complied with the requirements of this chapter with respect to a matter concerning its duties or
285 powers as guardian and/or conservator –

286 (i) If the employee or volunteer in good faith intended to perform said duties and
287 exercise said powers with respect to such matter in accordance with applicable standards of law,
288 the Public Guardian and any employee or volunteer whose conduct is or may be at issue shall
289 not be liable for ordinary negligence to (A) the protected or incapacitated person for whom the
290 Public Guardian has been appointed, or (B) any third party who reasonably relies upon the Public
291 Guardian’s performance of those duties.

292 (ii) The immunity herein shall apply, even though it would have been prudent to have
293 made a different decision, or to have intervened (or not intervened), or to have taken steps to
294 gather more or better information about the circumstances, or otherwise to have acted with
295 ordinary care.

296 (iii) The immunity herein shall not apply to any acts or omissions constituting gross
297 negligence or willful misconduct; to any intentional breach of ethics; to any conflict of interest;

298 or to any circumstance in which the Public Guardian or its employee or volunteer gained, or
299 reasonably would have expected to gain, any direct or indirect benefit as a result of the manner in
300 which said duties were performed or powers were exercised.