

SENATE No. 885

By Ms. Jacques, a petition (accompanied by bill, Senate, No. 885) of Cheryl A. Jacques, Therese Murray and Robert E. Travaglini for legislation to protect the liberty of incapacitated persons under the law concerning guardians and conservators. The Judiciary.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Ninety-Five.

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 first sentence of section 1 of Chapter 201 of
2 the General Laws is hereby amended by deleting the words "men-
3 tally ill persons", and substituting the words "legally incapacitated persons."
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1 SECTION 2. Section 6(a) of said Chapter 201 is hereby
2 deleted, and in its place the following is inserted:

3 (1) Two or more relatives or friends of a legally incapacitated
4 person, a nonprofit corporation organized under the laws of the
5 Commonwealth whose corporate charter authorizes the corpora-
6 tion to act as a guardian of a legally incapacitated person, or any
7 agency within the executive offices of human services or educa-
8 tional affairs may petition the probate court for a finding of legal
9 incapacity and appointment of a guardian. The petition shall
10 contain specific facts about the person's condition and specific
11 examples of the person's recent conduct which demonstrates the
12 need for the appointment of a guardian.

13 (2) "Legally incapacitated person" means a person with func-
14 tional limitations in the ability to provide for personal needs,
15 food, clothing, shelter, health care or safety, and a clinically diag-
16 nosed condition that results in an inability to make an informed,
17 reasoned decision as to one or more important matters and who

18 has suffered, is suffering, or is likely to suffer substantial harm, or
19 is unable to manage his or her property or financial affairs.
20 Inability to provide for personal needs or to manage property shall
21 be evidenced by acts or occurrences, or statements which strongly
22 indicate imminent acts or occurrences. All evidence of inability
23 must have occurred within six months prior to the filing of the
24 petition and at least one incidence of such behavior must have
25 occurred within 20 days of the filing of the petition for guardian-
26 ship. Isolated instances of simple negligence or improvidence,
27 lack of resources, or any act, occurrence or statement which is the
28 product of an informed judgment shall not constitute evidence of
29 inability to provide for personal needs or to manage property.

30 (3) The court may order that a person alleged to be legally inca-
31 pacitated be examined by a physician or mental health
32 professional appointed by the court if such an examination is
33 found to be necessary to determine whether a guardian is needed.
34 If such an examination is ordered, at least five days before the
35 hearing, the examiner shall report in writing to the court and serve
36 a copy of the report on the allegedly legally incapacitated person.
37 Reasonable expenses incurred in such examination shall be paid
38 out of the estate of the person, by the petitioner, or by the
39 Commonwealth, as the court may determine. A report prepared
40 pursuant to this section shall contain all of the following:

41 (a) A detailed description of the physical or psychological
42 infirmities of the person.

43 (b) An explanation of how and to what extent any infirmities
44 interfere with the ability of the person to receive or evaluate
45 information in making decisions.

46 (c) A listing of all medications the person is receiving, the
47 dosage of the medications, and a description of the effects each
48 medication has on the person's behavior.

49 (d) A prognosis for improvement in the person's condition and
50 a recommendation for the most appropriate rehabilitation plan.

51 (e) The signatures of all persons who performed the evaluations
52 upon which the report is based.

53 (4) The alleged legally incapacitated person has the right, at his
54 or her own expense, or if indigent, at the expense of the common-
55 wealth, to secure an independent evaluation. Compensation for
56 an independent evaluation at public expense shall be in an amount

57 that, based upon time and expense, the court approves as
58 reasonable.

59 (5) The hearing must be conducted in the presence of the
60 allegedly legally incapacitated person, either at the court house or
61 where the person resides, so as to permit the court to obtain its
62 own impression of the person's legal capacity unless one of the
63 following conditions is met:

64 (a) the person is not present in the commonwealth;

65 (b) the person knowingly, willingly and upon advice of counsel,
66 waives the right to be present;

67 (c) all of the information before the court clearly establishes
68 both that the person is completely unable to participate and that no
69 useful purpose would be served by the person's presence at the
70 hearing in the court house or elsewhere; or

71 (d) a court-appointed investigator or guardian *ad litem* has met
72 with the person and has submitted a written report to the court
73 assessing, in detail, the person's legal capacity and has served a
74 copy of the report on the allegedly legally incapacitated person.

75 (6) The person is entitled to be represented by legal counsel
76 at the hearing, to present evidence, and to cross-examine
77 witnesses, including the court-appointed physician or mental
78 health professional.

79 (7) The court shall appoint counsel for an indigent person in
80 any of the following circumstances:

81 (A) the person alleged to be legally incapacitated requests
82 counsel, or wishes to contest any aspect of the proposed guardian-
83 ship, or the court receives credible information from any source
84 indicating that there are material objections to any aspect of the
85 petition;

86 (B) the person alleged to be legally incapacitated is subject to
87 commitment to a mental health facility or placement in a nursing
88 facility or other residential health care facility; or

89 (C) the interests of justice require the appointment of counsel
90 for the person alleged to be legally incapacitated.

1 SECTION 3. Section 6(b) of said chapter 201 is hereby
2 amended by being designated as section 6(c).

1 SECTION 4. Said chapter 201 is hereby further amended by
2 inserting the following as section 6(b): —

3 (1) If, after notice as provided for in section seven, and a hear-
4 ing, the court is satisfied that the person for whom a guardian is
5 sought is a legally incapacitated person, and that the appointment
6 is necessary as a means of providing continuing care and supervi-
7 sion of the legally incapacitated person, the court may appoint a
8 guardian. Alternately, the court may dismiss the proceeding or
9 may enter any other appropriate order.

10 (2) Before appointing a guardian, the court shall make a deter-
11 mination that the proposed guardian understands the duties and
12 responsibilities of a guardian to protect and promote the welfare
13 of the ward and that the proposed guardian is free of any interests,
14 responsibilities, or powers which render him or her unable to
15 perform properly the duties of a guardian.

16 (3) A guardian shall be granted only those powers an only for
17 that period of time as is necessary to provide for the demonstrated
18 need of the legally incapacitated person, and the guardianship
19 shall be designed to encourage the development of maximum self-
20 reliance and independence in the person. A court order estab-
21 lishing a guardianship shall specify any limitations of the
22 guardian's powers and any time limits on the guardianship.

23 The substituted judgment standard shall be used by the court
24 and the guardian in making decisions when the legally incapaci-
25 tated person is incapable of communicating his or her opinion in
26 any matter.

27 (4) The court may appoint a guardian whose powers are not
28 limited only if it finds that the person is legally incapacitated and
29 totally without capacity to care for himself or herself in which
30 case the court shall specify that finding and the subsidiary facts
31 upon which it is based in any order issued.

1 SECTION 5. Section 6(c) of said chapter 201 is hereby
2 amended by being designated as section 6(d).

1 SECTION 6. Section 6(d) of said chapter 201 is hereby
2 amended by being designated as section 6(e).

1 SECTION 7. Section 6(e) of said chapter 201 is hereby
2 amended by being designated as section 6(f).

1 SECTION 8. Section 6(f) of said chapter 201 is hereby
2 amended by being designated as section 6(g).

1 SECTION 9. Section 6B of said chapter 201 is hereby deleted.

1 SECTION 10. Section 7 of said chapter 201 is hereby amended
2 by substituting the words "legally incapacitated" for the words
3 "mentally ill" wherever they so appear.

1 SECTION 11. The first sentence of section 12 of said
2 chapter 201 is hereby amended by adding to the beginning the
3 words "Except as limited by section 6."

1 SECTION 12. Section 12 of said chapter 201 is further
2 amended by substituting the words "legally incapacitated" for the
3 words "mentally ill" wherever they so appear.

1 SECTION 13. Section 13 of said chapter 201 is hereby
2 amended by substituting the words "legally incapacitated" for the
3 words "mentally ill" wherever they so appear.

1 SECTION 14. Section 13 of said chapter 201 is further
2 amended by deleting from the first sentence the words "the
3 department of mental health in the case of a guardianship estab-
4 lished pursuant to section six or."

1 SECTION 15. Section 13A of said chapter 201 is hereby
2 amended by substituting the words "legally incapacitated" for the
3 words "mentally ill" wherever they so appear.

1 SECTION 16. Section 14 of said chapter 201 is hereby
2 amended by substituting the words "legally incapacitated" for the
3 words "mentally ill" wherever they so appear.

1 SECTION 17. Section 20 of said chapter 201 is hereby
2 amended by substituting the words "legally incapacitated" for the
3 words "mentally ill" wherever they so appear.

1 SECTION 18. Section 22 of said chapter 201 is hereby
2 amended by substituting the words “legally incapacitated” for the
3 words “mentally ill” wherever they so appear.

1 SECTION 19. The first sentence of section 26 of said
2 chapter 201 is hereby amended by deleting the words “mental
3 illness” and replacing them with the words “legal incapacity.”

1 SECTION 20. Section 42 of said chapter 201 is hereby
2 amended by substituting the words “legally incapacitated” for the
3 words “mentally ill” wherever they so appear.

1 SECTION 21. Section 43 of said chapter 201 is hereby
2 amended by substituting the words “legally incapacitated” for the
3 words “mentally ill” wherever they so appear.

1 SECTION 22. Section 43A of said chapter 201 is hereby
2 amended by substituting the words “legally incapacitated” for the
3 words “mentally ill” wherever they so appear.

1 SECTION 23. Section 45 of said chapter 201 is hereby
2 amended by substituting the words “legal incapacity” for the
3 words “mental illness in the first sentence.”

1 SECTION 24. Section 45 of said chapter 201 is hereby further
2 amended by substituting the words “legally incapacitated” for the
3 words “mentally ill” wherever they so appear.

1 SECTION 25. Section 48A of said chapter 201 is hereby
2 amended by substituting the words “legally incapacitated” for the
3 words “mentally ill” wherever they so appear.

1 SECTION 26. The first sentence of section 24 of chapter 206 of
2 the General Laws is hereby amended by deleting the words “to the
3 department of mental health in the case of mentally ill persons.”

1 SECTION 27. The first sentence of section 15 of chapter 208
2 of the General Laws is hereby amended by deleting the words
3 “mental illness” and replacing them with the words “legal
4 incapacity.”



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