

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2023-P-1394

Norfolk, ss.

IMPOUNDED CASE

On Appeal from Norfolk Probate and Family Court

Brief of Amici Curiae Center for Public Representation, Mental Health Legal Advisors Committee, Disability Law Center, Inc., and the Committee for Public Counsel Services in Support of Respondent and the Rights of Similarly Situated Individuals to Choose and Retain Counsel in Guardianship and Conservatorship Proceedings

Morgan K. Whitlatch, BBO #713923*
Kathryn Rucker, BBO #644697
Center for Public Representation
5 Ferry Street, Suite 314
Easthampton, MA 01027
413-586-6024

mwhitlatch@cpr.ma.org
krucker@cpr-ma.org

*Certified to practice law
in Massachusetts under SJC Rule 3:04

Deborah A. Dorfman, BBO #625003
Jennifer Honig, BBO #559251
Mental Health Legal Advisors Committee
100 Hancock Street, Suite 1002
Quincy, MA 02171
617-338-2345

ddorfman@mhlac.org
jhonig@mhlac.org

Tatum A. Pritchard, BBO #663502
Disability Law Center, Inc.
11 Beacon Street, Suite 925
Boston, MA 02108
617-723-8455

tpritchard@dlc-ma.org

Karen Owen Talley, BBO #644764
Committee for Public Counsel Services
Mental Health Litigation Division
144 Main St, 4th Floor
Brockton, MA 02301
508-583-0560

ktalley@publiccounsel.net

Devorah Anne Vester, BBO #600806
Committee for Public Counsel Services
Mental Health Litigation Division
109 Main Street, Suite 201
Northampton, MA 01060
413-355-5200

dvester@publiccounsel.net

Dated: Sept. 15, 2025

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME JUDICIAL COURT RULE 1:21

Amicus curiae Center for Public Representation states that it is a non-profit corporation exempt from taxation pursuant to § 501(c)(3) of the Internal Revenue Code and is not a publicly held corporation that issues stock. It has no parent corporation. Amicus curiae Disability Law Center states that it is a non-profit corporation exempt from taxation pursuant to § 501(c)(3) of the Internal Revenue Code and is not a publicly held corporation that issues stock. It has no parent corporation. Amicus curiae Mental Health Legal Advisors Committee states that it was established by the General Court in 1973 as an agency of the judiciary. G. L. c. 221, § 34E. It is not a corporation and issues no stock. Amicus curiae Committee for Public Counsel Services states that it is a state agency established by St.1983, c. 673, § 1, and codified at G. L. c. 211D, to provide counsel for indigent persons in criminal and certain non-criminal proceedings. It is not a corporation and issues no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	5
DECLARATION OF AMICI.....	10
INTERESTS OF AMICI.....	10
SUMMARY OF ARGUMENT.....	14
ARGUMENT	16
I. Given that guardianships and conservatorships limit the exercise of fundamental rights and that such orders are difficult to modify or remove, full access to counsel is essential to ensure consideration of less restrictive alternatives.	16
A. Guardianship and conservatorship strip individuals of fundamental rights.....	16
B. Guardianship and conservatorship orders are often plenary or overbroad, and modification, limitation, or termination of orders is difficult to effectuate without counsel.	18
C. The MUPC’s obligations to consider less restrictive alternatives to guardianship or conservatorship are realized by protecting an individual’s right to choose and retain counsel.	20
II. The MUPC strengthened fundamental rights, protections, and safeguards, including the right of people to choose and retain counsel to challenge, modify, or terminate guardianship or conservatorship orders.	22
A. MUPC reforms occurred in response to evidence of fundamental rights violations and lack of safeguards for people subject to guardianship or conservatorship.	22
B. The Legislature sought to reduce reliance on restrictive plenary guardianships, ensure individual rights to seek modification or termination of existing orders, and promote access to counsel, including counsel of one’s choice.	25
C. The MUPC makes clear the right of persons subject to guardianship or conservatorship to retain an attorney of their choice.	27

D.	The MUPC supersedes preexisting case law conditioning a person’s right to choose and retain counsel in guardianship or conservatorship proceedings on a judicial determination of capacity to do so.....	28-29
III.	MUPC reforms are not self-executing but depend on meaningful access to the assistance of counsel.	30
A.	Importance of counsel and the attorney-client relationship	31
B.	The ability to choose and retain counsel is particularly critical when pursuing motions to modify or terminate guardianship or conservatorship orders.....	32
IV.	The Rules of Professional Conduct already address client capacity issues, removing a potential concern about persons subject to guardianship or conservatorship choosing and retaining their own counsel to modify or terminate such orders.	34
V.	The Massachusetts Declaration of Rights supports the right to choose and retain counsel in cases where a person seeks to modify or terminate their guardianship or conservatorship.	37
VI.	Legal scholars and national guardianship experts have affirmed the need for due process protections for individuals subject to guardianship or conservatorship, including the right of the individual to choose and retain counsel to modify or terminate these arrangements.....	42
	CONCLUSION	46
	CERTIFICATE OF COMPLIANCE	49
	CERTIFICATE OF SERVICE	50

TABLE OF AUTHORITIES

Cases

<u>Andrews v. Bridgewater State Hosp.</u> , 449 Mass. 587 (2007).....	13
<u>Boston Hous. Auth. v. Bridgewater</u> , 452 Mass. 833 (2009).....	13
<u>Commonwealth v. A.Z.</u> , 493 Mass. 427 (2024).....	12
<u>Commonwealth v. Montarvo</u> , 486 Mass. 535 (2020).....	29
<u>Foss v. Commonwealth</u> , 437 Mass. 584 (2002).....	13
<u>Guardianship of D.C.</u> , 479 Mass. 516 (2018).....	13
<u>Guardianship of Erma</u> , 459 Mass. 801 (2011).....	13
<u>In re G.P.</u> , 473 Mass. 112 (2015)	13
<u>In re Guardianship of Cory J. Carlotto</u> , Docket No. BE09P0253, slip op. (Mass. Berkshire Div. Probate & Family Ct. Dep’t, Dec. 7, 2015)	41
<u>In re Guardianship of Hocker</u> , 439 Mass. 709 (2003)	29
<u>In re Guardianship of Zaltman</u> , 65 Mass. App. Ct. 678 (2006).....	29
<u>K.J. v. Supt. of Bridgewater State Hosp.</u> , 488 Mass. 362 (2021)	12
<u>Kenniston v. Dep’t of Youth Services</u> , 453 Mass. 179 (2009).....	13
<u>Klinger v. Attorney General</u> , 491 Mass. 38 (2022).....	38, 39
<u>Massachusetts Gen. Hosp. v. C.R.</u> , 484 Mass. 472 (2020).....	13
<u>Mathews v. Eldridge</u> , 424 U.S. 339 (1976)	42
<u>Matter of a Minor</u> , 484 Mass. 295 (2020).....	13
<u>Matter of J.P.</u> , 486 Mass. 117 (2020)	12
<u>Matter of J.P.</u> , 494 Mass. 654 (2024)	12
<u>Matter of M.C.</u> , 481 Mass. 336 (2019)	13
<u>Matter of N.L.</u> , 476 Mass. 632 (2017)	13
<u>Matter of P.R.</u> , 488 Mass. 136 (2021)	12
<u>Newton-Wellesley Hosp. v. Magrini</u> , 451 Mass. 777 (2008)	13
<u>Pembroke Hosp. v. D.L.</u> , 482 Mass. 346 (2019).....	13
<u>Rogers v. Commissioner of Dep’t of Mental Health</u> , 390 Mass. 489 (1983)...	23, 24
<u>Walden Behavioral Care v. K.I.</u> , 471 Mass. 150 (2015)	13

Statutes

29 U.S.C. § 794e	11
42 U.S.C. § 10801	11

42 U.S.C. § 12101(b)	40
42 U.S.C § 15001	11
G. L. c. 190B, § 5-106.....	26
G. L. c. 190B, § 5-106(a)	passim
G. L. c. 190B, § 5-305.....	28
G. L. c. 190B, § 5-306(a)	21, 26
G. L. c. 190B, § 5-306(b)(8)	20, 26
G. L. c. 190B, § 5-306(c)	18, 26
G. L. c. 190B, § 5-310.....	26
G. L. c. 190B, § 5-311.....	18
G. L. c. 190B, § 5-311(a)	26
G. L. c. 190B, § 5-407(b)(8)	20
G. L. c. 190B, § 5-425.....	18
G. L. c. 190B, § 5-429(a)	18
G. L. c. 211D, § 5.....	11
G. L. c. 221, § 34E	11
Md. Code Ann., Estates & Trusts § 13–708 (2022).....	21
Me. Rev. State. Ann. Tit. 18-C, § 5-319(7) (2017).....	21
Vt. Stat. Ann. Tit. 14, § 3065 (2008)	21
Wash. Rev. Code § 11.130.355(7) (2022).....	21

Other Authorities

ABA Commission on Law & Aging, <i>Defense Against Guardianship: A Lawyer’s Guide to Representing Individuals in Guardianship Cases</i> , ed. Trisha Y. Bullock (2023).....	34, 35
Abuses in Guardianship of the Elderly and Infirm: A National Disgrace, H.R. Rep. No. 100-641 Before the Subcommittee on Health and Long-Term Care of the Special Comm. on Aging, 100th Cong., 1st. Sess. 4 (1987)	17
American Bar Ass’n, <i>Less Restrictive Options</i> (Nov. 21, 2023).....	41
American Bar Ass’n, <i>Resolution 113</i> (2017)	41
Cassidy, <i>Restoration of Rights in the Termination of Adult Guardianship</i> , 23 Elder L.J. 83 (2015).....	19, 33
Cavey, <i>Realizing the Right to Counsel in Guardianship: Dispelling Guardianship Myths</i> , Marquette Elder’s Advisor (Aug. 2012).....	32

Center for Public Representation, U.S. Supported Decision-Making Laws (April 2025).....	41
Dumcius, Elder Affairs Chief Backs Guardianship Law Reforms, State House News (Jan. 24, 2008)	24
Gurley, News From a New Generation, Commonwealth Beacon (Apr. 17, 2008) .	24
Kelly, Kowalski, & Novak, Courts Strip Elders of Their Independence: Within Minutes, Judges Send Seniors to Supervised Care, The Boston Globe (Jan. 13, 2008)	23
Kohn & Koss, Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship, 91 Wash. L. Rev. 581 (2016).....	passim
Mass. Family and Probate Court, Limitations to Guardianship For Clinicians & Limitations to Conservatorships (MPC 903a).....	32
Mass. Probate and Family Court, Alternatives to Guardianship and Conservatorship, https://www.mass.gov/info-details/alternatives-to-guardianship-and-conservatorship	32, 40
Massachusetts Access to Justice Commission, Report on Barriers to Access to Justice, App. C. (June 2007).....	24
Nat’l Conference of Commissioners on Uniform State Law, Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (copyright 2017, published Apr. 3, 2020).....	40, 44, 45
Nat’l Conference of Commissioners on Uniform State Laws, The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act: A Summary (Oct. 2017)	44
Nat’l Council on Disability, Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination (2018)	17
Oliver, Chief Justice Carey Delivers State of the Probate and Family Court Address, 17 Mass. Lawyers J. 3 (Dec. 2009)	23
Perlin, Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases, 16 Law and Human Behavior 39 (1992).....	30, 32
R. Fleischner, Adult Guardianship, Conservatorship, Substituted Judgment and Guardianship Alternatives, Legal Rights of Individuals with Disabilities, Ch. 14, LRID MA-CLE 14-1 (2021)	17
Rosinski, Sweeping Probate Reform Approved After Two-Decades, Mass. Bar Ass’n Lawyers J. (Feb. 2009).....	22, 23

Sullivan, Guardianship Provisions in the Uniform Probate Court, 10 Mass. Bar Ass’n, Section Review 3 (2008).....	25, 26
Summit Delegates, Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability - Recommendations Adopted by Summit Delegates, 72 Syracuse L. Rev. 29 (2022).....	45, 46
Uniform Law Commission, About Us	44
Wood, Teaster, & Cassidy, ABA Commission on Law and Aging with the Virginia Tech Center for Gerontology, Restoration of Rights in Adult Guardianship: Research & Recommendations (2017).....	18
Wright, Planning for Cognitive Decline: Combining Formal Supported Decision-Making Agreements and Healthcare Power of Attorney, 35 Health Matrix 225 (2025).....	32

Rules

Mass. R. App. P. 17 (c)(5)	10
Mass. R. Prof. C. 1.14(a), as amended, 471 Mass. 1305 (2015)	35
Mass. R. Prof. C. 1.4, as amended, 480 Mass. 1315 (2018).....	35
Mass. R. Prof. C. 3.3 (2022)	37

Treatises

Restatement (Third) of Law Governing Lawyers § 24(f) (American Law Inst. 2000).....	36
---	----

Regulations

U.S. Dep’t of Health & Human Services, Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 40,066, 40,082, 40,089-90, 40,097, 40,098-99, 40,0110 (July 8, 2024)	41
---	----

Constitutional Provisions

Art. 10 of the Massachusetts Declaration of Rights	37
Art. 12 of the Massachusetts Declaration of Rights	37
Art. 114 of the Amendments to the Massachusetts Constitution.....	40
Fourteenth Amendment to the U.S. Constitution.....	42

Forms

Mass. Probate and Family Court, Request for Counsel Form (MPC 301) (May 30, 2011) 27, 33

Briefs

Disability Rights Organizations' Amici Curiae Brief, In re the Conservatorship of the Person and Estate of Britney Jean Spears, Case No. BP1088790 (Superior Ct., Los Angeles County, Cent. Dist., C.A., filed July 12, 2021).....37

DECLARATION OF AMICI

Pursuant to Mass. R. App. P. 17 (c)(5), Amici declare that no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person or entity – other than Amici, its members, or its counsel – contributed money intended to fund preparing or submitting this brief.

INTERESTS OF AMICI

The Center for Public Representation (CPR) is a Massachusetts based, national advocacy center dedicated to enforcing and expanding the rights of people with disabilities and others who are in segregated settings. For almost fifty years, CPR has used legal strategies, advocacy, and policy change to advocate for the rights of individuals with disabilities to exercise choice in all aspects of their lives. CPR has been recognized for its expertise in alternatives to guardianship, and its leadership in protecting the rights of people with disabilities who are at risk of or subject to guardianship or conservatorship, in Massachusetts and across the nation.

The Disability Law Center (DLC) is the designated Protection and Advocacy system for people with disabilities in Massachusetts mandated, pursuant to federal law, to protect and advocate for the rights, health, and safety of individuals with disabilities, including those involved in guardianship and

conservatorship matters.¹ Informed by decades of monitoring facilities where people with disabilities live and receive services, investigations into instances of abuse and neglect, and other advocacy efforts, DLC understands the vital role that access to zealous legal representation plays in ensuring that the rights of individuals with disabilities are protected and respected.

The Mental Health Legal Advisors Committee (MHLAC) was established by the General Court in 1973 as an agency of the judiciary.² MHLAC provides advice and assistance to individuals with mental health disabilities and their families, and to other attorneys. MHLAC advocates for rigorous procedural protections and substantive standards and has a long history of advising advocates and jurists on questions regarding the interpretation of the state laws impacting Massachusetts residents with mental health disabilities.

The Committee for Public Counsel Services (CPCS) is a state agency created to “establish, supervise and maintain a system for the appointment or assignment of counsel” for indigent persons involved in criminal and certain noncriminal judicial proceedings in which the right to counsel has been established. G. L. c. 211D, § 5. Among such noncriminal proceedings are those in which the Commonwealth seeks to

¹ See, e.g., 42 U.S.C. § 10801 (people with mental illness) and 42 U.S.C § 15001 (people with developmental disabilities), 29 U.S.C. § 794e (people with other disabilities).

² G. L. c. 221, § 34E.

deprive an indigent person of her liberty (e.g., commitment to a psychiatric facility), to administer a highly restrictive or highly intrusive treatment modality (e.g., antipsychotic medications), and to impose a guardianship that limits a person’s autonomy and ability to make their own decisions. In recognition of the highly complex and specialized nature of such “mental health” proceedings, CPCS has established the Mental Health Litigation Division (MHLA). In this matter, the interest of CPCS clients includes the right to “retain” counsel, which includes both choosing counsel and discharging counsel.

Together or separately, CPR, MHLA, DLC, and CPCS have litigated or served as amici in numerous cases involving the rights of persons with mental disabilities.³ The Court has invited interested parties to file amicus curiae briefs in

³ These cases include: Matter of J.P., 494 Mass. 654 (2024) (G.L. c. 123, §35 commitment statute requires clinical evidence that respondents meet statutory definition of “substance/alcohol use disorder”; judges are equipped to make necessary findings of “likelihood of serious harm” and “least restrictive alternative.”); Commonwealth v. A.Z., 493 Mass. 427 (2024) (defendant may not be committed for inpatient G.L. c. 123, § 15(b) evaluation of competency to stand trial unless Commonwealth proves there are no less restrictive means of accomplishing evaluation); K.J. v. Supt. of Bridgewater State Hosp., 488 Mass. 362 (2021) (striking down as unconstitutional provision of mental health statute permitting Commissioner of Correction to “override” court’s determination that Bridgewater respondents no longer needed the strict security of that facility); Matter of P.R., 488 Mass. 136 (2021) (vacating commitment where finding of “no less restrictive alternative” unsupported by specific evidence); Matter of J.P., 486 Mass. 117 (2020) (finding of likelihood of serious harm to others based on evidence others are placed in reasonable fear of serious violent behavior requires that specified person(s) were in such fear and that it was reasonable; homelessness and mental illness alone not sufficient for commitment in absence of other factors);

Massachusetts Gen. Hosp. v. C.R., 484 Mass. 472 (2020) (emergency room detention of five days under G. L. c. 123, § 12(a) not unconstitutional as applied; legislature urged to remedy constitutional issues without delay); Matter of a Minor, 484 Mass. 295 (2020) (involuntary commitment of juvenile for substance/alcohol use disorder must be “carefully circumscribed tool of last resort”; court must rule out cause being typical adolescent behavior; exploration of less restrictive alternatives constitutionally required); Pembroke Hosp. v. D.L., 482 Mass. 346 (2019) (use of word “discharge” in mental health statute interpreted to require respondent to be set “at liberty” upon dismissal of commitment petition; attempt to subvert court’s ruling was an “abuse or misuse” of process); Matter of M.C., 481 Mass. 336 (2019) (mental health statute permits commitment hearings to take place at either courthouse or facility; courts must decide location on a case by case basis); Guardianship of D.C., 479 Mass. 516 (2018) (interpreting MUPC to prohibit involuntary transfer to nursing home of individual not found to be “incapacitated person”); Matter of N.L., 476 Mass. 632 (2017) (interpreting mental health statute to make mandatory first grant of a continuance sought by respondent for purposes of preparing defense); In re G.P., 473 Mass. 112 (2015) (procedural and substantive due process rights in proceedings for civil commitment for alcohol or substance abuse); Walden Behavioral Care v. K.I., 471 Mass. 150 (2015) (rights against self-incrimination in civil commitment proceedings); Guardianship of Erma, 459 Mass. 801 (2011) (due process in cases involving forced treatment with antipsychotic medications); Kenniston v. Dep’t of Youth Services, 453 Mass. 179 (2009) (standard of proof required for civilly committing juveniles within juvenile justice system under G. L. c. 120); Boston Hous. Auth. v. Bridgewater, 452 Mass. 833 (2009) (reasonable accommodations in public housing appeals process); Newton-Wellesley Hosp. v. Magrini, 451 Mass. 777 (2008) (emergency hearings access for involuntarily committed mental health patients); Andrews v. Bridgewater State Hosp., 449 Mass. 587 (2007) (standard of proof in a proceeding seeking discharge from civil commitment under G. L. c. 123, § 9 (b)); and Foss v. Commonwealth, 437 Mass. 584 (2002) (interpreting statutory provision requiring dismissal of charges against incompetent defendant and discussing reform purpose of 1970 overhaul of mental health statute).

this matter to address key questions relating to the right of persons subject to guardianship or conservatorship to retain or discharge an attorney.

SUMMARY OF ARGUMENT

Fundamental rights are at stake in guardianship and conservatorship proceedings. Orders are often overbroad or plenary. While processes exist to contest orders, these are difficult to navigate without counsel and, therefore, access to counsel is essential. That access must include the right to “choose and retain” counsel, an encompassing phrase that includes discharge. Massachusetts statute requires court consideration of less restrictive alternatives in guardianship or conservatorship proceedings; that requirement may only be fulfilled by ensuring access to counsel. (pp. 16-22)

In enacting the Massachusetts Uniform Probate Code (MUPC), the Legislature responded to evidence of fundamental rights violations by including the rights to seek modification or termination of existing orders and to promote access to counsel, including counsel of one’s choice. Article V’s unambiguous language affords individuals the right to retain counsel of their choice before and after the appointment of a guardian or conservator. The statute does not condition that right on any finding of capacity or incapacity. Neither alleged nor adjudicated incapacity should prevent people subject to guardianship or conservatorship from choosing and retaining counsel. The MUPC supersedes preexisting case law that

conditioned a person's right to choose and retain counsel in guardianship or conservatorship proceedings on a judicial determination of capacity to do so. (pp. 22-30)

MUPC reforms are not self-executing but depend on meaningful access to the assistance of counsel. Access to counsel is essential as individuals subject to these orders lose significant autonomy, social connections, and access to resources. The ability of individuals to select and retain counsel of their choice to challenge a guardianship or conservatorship petition or to try to modify or terminate those orders is a key mechanism for ensuring access to zealous legal representation. (pp. 30-34)

Should concern arise regarding client capacity to direct representation, Rules of Professional Conduct 1.4 (communications) and 1.14 (diminished capacity) provide direction for counsel. Further, should the Court believe any individual appearing before them is not adequately represented, it may intervene and, if necessary, remove an attorney for just cause. (pp. 34-37)

The Massachusetts Declaration of Rights supports the right of persons subject to guardianship or conservatorship to choose and retain counsel for the purposes of modification or termination. Massachusetts has interpreted the due process protections of those articles expansively, rejecting more narrow federal

approaches, to avoid perpetuating historic patterns of discrimination. When analyzing the application of the Declaration of Rights, Courts should look to the evolving rights of people with disabilities, including the growing number of alternatives to guardianship and conservatorship, such as supported decision-making. (pp. 37-42)

Legal scholars assert that people subject to guardianship or conservatorship seeking to modify or terminate those orders have a Constitutional right to counsel in order to guarantee Fourteenth Amendment procedural and substantive due process rights. Recent model legislation, the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA), includes the right of people under guardianship or conservatorship to choose and retain counsel in post-appointment proceedings. The Fourth National Guardianship Summit Delegates concur. (pp. 42-46)

ARGUMENT

I. Given that guardianships and conservatorships limit the exercise of fundamental rights and that such orders are difficult to modify or remove, full access to counsel is essential to ensure consideration of less restrictive alternatives.

A. Guardianship and conservatorship strip individuals of fundamental rights.

Guardianship is one of the most sweeping civil judgments that can be levied upon a person and may involve the extreme deprivation of one's most fundamental

rights and liberties.⁴ It can remove people’s ability to be the architect of their own lives and the ability to make fundamental decisions, including where to live; what education, job, or training opportunities to pursue; whom to befriend; how to spend money; and what services or health care to accept. Conservatorship prevents people from managing and making choices about their own financial affairs, decisions which have implications for the exercise of nearly all other rights. As former Chairman Claude Pepper of the U.S. House of Representatives’ Subcommittee on Health and Long-Term Care famously stated: “The typical [person subject to guardianship] has fewer rights than the typical convicted felon ... It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty.”⁵ While notable improvements have been made to the Massachusetts statutes

⁴ See, e.g., R. Fleischner, Adult Guardianship, Conservatorship, Substituted Judgment and Guardianship Alternatives, Legal Rights of Individuals with Disabilities, Ch. 14, LRID MA-CLE 14-1, 2 (2021) (describing history of and restrictive nature of guardianship and noting it is often referred to as “civil death”); Nat’l Council on Disability, Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination, at 27-28 (2018), <https://www.ncd.gov/assets/uploads/docs/ncd-guardianship-report-accessible.pdf> (listing rights subject to removal within a guardianship or conservatorship and noting that, because of rights at stake, guardianship and conservatorship raises fundamental questions about federal civil rights and due process).

⁵ Abuses in Guardianship of the Elderly and Infirm: A National Disgrace, H.R. Rep. No. 100-641 Before the Subcommittee on Health and Long-Term Care of the Special Comm. on Aging, 100th Cong., 1st. Sess. 4, 5-10 (1987), <http://files.eric.ed.gov/fulltext/ED297241.pdf> (statement of Claude Pepper).

governing this area of the law in the past decade,⁶ guardianship and conservatorship continue to deprive people of their fundamental rights.

B. Guardianship and conservatorship orders are often plenary or overbroad, and modification, limitation, or termination of orders is difficult to effectuate without counsel.

According to an American Bar Association (ABA) Commission on Law and Aging (COLA) report, “guardianship [and conservatorship] generally is plenary and permanent, leaving no way out – ‘until death do us part’ but often far harder to undo than marriage.”⁷ Guardianships and conservatorship can be overbroad, overly restrictive, or unnecessary infringements upon a person’s life.

Although Massachusetts has statutory provisions for modification and termination of guardianships and conservatorships,⁸ these processes can be difficult for people to understand and independently navigate. And, while there is no publicly available aggregate data on the frequency of terminations or

⁶ See *infra*, at section II.

⁷ Wood, Teaster, & Cassidy, ABA Commission on Law and Aging with the Virginia Tech Center for Gerontology, *Restoration of Rights in Adult Guardianship: Research & Recommendations*, at 18 (2017), https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration-of-rights-in-adult-guardianship.pdf; see also *id.* at n.3 (indicating the report uses the generic term “guardianship” to refer to “guardians of the person as well as guardians of property, frequently called ‘conservators,’ unless otherwise indicated”).

⁸ See G.L. c. 190B, § 5-306(c) (modification of guardianship); § 5-311 (termination of incapacity determination and removal of guardian § 5-425 (limitation of powers of a conservator); and § 5-429(a) (removal of conservator).

modifications in Massachusetts, national statistics suggest terminations of orders are rare.⁹ In Amici’s experience, termination is far more difficult to achieve than initial guardianship or conservatorship appointments. Access to attorneys who will zealously represent people seeking to modify or terminate these orders is critical to protecting fundamental rights.¹⁰ That access must include the ability to consult with an attorney in advance of deciding whether or not to pursue a petition for modification or termination, without first having to navigate a court process or obtain the permission of the guardian or conservator to do so.¹¹

To ensure full access to counsel, individuals subject to guardianship and conservatorship orders should have the ability to choose and retain their own counsel to seek to modify or terminate those orders. In this brief, Amici use the phrase “choose and retain” counsel to describe the right to control the attorney/client relationship and to direct one’s own legal representation. It includes the right to select an attorney of one’s choice; to enter into a representation

⁹ See R. Fleischner, supra note 4, at § 14.3.19 (noting “[m]ost observers recognize that guardians are not often removed and guardianships are not often discharged” and citing Wood, Teaster, & Cassidy, supra note 7, as a study that confirms this is a national pattern).

¹⁰ See id. at 12-14; see also Cassidy, Restoration of Rights in the Termination of Adult Guardianship, 23 Elder L.J. 83, 101-102 (2015), <http://publish.illinois.edu/elderlawjournal/files/2015/08/Cassidy.pdf>.

¹¹ See Kohn & Koss, Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship, 91 Wash. L. Rev. 581, 587 (2016), <https://tinyurl.com/yru42y77>.

agreement with an attorney; to pay an attorney, if applicable; and to discharge an attorney, including, in appropriate circumstances, one who is appointed.

C. The MUPC’s obligations to consider less restrictive alternatives to guardianship or conservatorship are realized by protecting an individual’s right to choose and retain counsel.

Massachusetts has followed a national trend to adopt the “less restrictive alternative standard” within its guardianship statute.¹² The MUPC requires that, before a court may appoint a guardian or conservator of an adult, there must first be a finding that “the person’s needs cannot be met by less restrictive means, including the use of appropriate technological assistance.”¹³ Access to counsel in these proceedings, including counsel of one’s choice, provides a critical mechanism for enforcing this statutory requirement.¹⁴

Depriving a person subject to guardianship or conservatorship of the ability to choose and retain counsel in proceedings to challenge these orders would almost certainly violate the least restrictive alternative standard. Such an order would impose restrictions “beyond those strictly needed for their protection,” make the legal arrangement more restrictive than necessary, and strip individuals of

¹² *Id.* at 608-609, n.107 (citing States including Alaska, Florida, Georgia, Idaho, Illinois, Kentucky, Maryland, Michigan, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Vermont, Washington, and Wisconsin).

¹³ See G.L. c. 190B, § 5-306(b)(8) and § 5-407(b)(8).

¹⁴ See Kohn & Koss, *supra* note 11, at 610-612.

fundamental rights.¹⁵ It is hard to imagine a situation where it is necessary to “protect” any person from seeking to assert their own rights. Moreover, such an order would also deny the person what is commonly understood to be an essential part of our system of the law: the ability to seek out and retain an attorney for legal advice and counseling to enforce one’s rights.¹⁶ For this reason, a number of States expressly recognize the right of people subject to guardianship or conservatorship to choose and retain their own counsel in post-adjudication guardianship proceedings.¹⁷ Massachusetts also recognizes that right in G. L. c. 190B, § 5-106(a) of Article V discussed infra at Section II.C.

Many State guardianship statutes – including the MUPC – also affirmatively encourage or require courts or guardians to promote the independence and self-reliance of persons subject to guardianship or conservatorship.¹⁸ Allowing a person subject to a petition for or an order of guardianship or conservatorship to choose and retain their own attorney to seek to modify or terminate an order

¹⁵ See id., supra note 11, at 606-612.

¹⁶ Id. at 610.

¹⁷ See, e.g., Me. Rev. State. Ann. Tit. 18-C, § 5-319(7) (2017); Wash. Rev. Code § 11.130.355(7) (2022); Vt. Stat. Ann. Tit. 14, § 3065 (2008); Md. Code Ann., Estates & Trusts § 13–708 (2022).

¹⁸ G.L. c. 190B, § 5-306(a) (requiring the court to exercise authority so as to encourage development of maximum self-reliance and independence of the incapacitated person). See also Kohn & Koss, supra note 11, at 610-612, n.111 (citing twenty-seven other States that affirmatively encourage or require courts or guardians to promote such independence and self-reliance).

further that goal of self-reliance and promotes the person’s dignity by allowing them to advocate for themselves through counsel.

II. The MUPC strengthened fundamental rights, protections, and safeguards, including the right of people to choose and retain counsel to challenge, modify, or terminate guardianship or conservatorship orders.

The MUPC was enacted to modernize the entire probate code and to codify critical substantive and due process protections for respondents, including people subject to guardianship and conservatorship. The statute’s reform purpose, its safeguards against abuse, and its specific provisions on access to counsel should guide the Court’s answers to the reported questions.

A. MUPC reforms occurred in response to evidence of fundamental rights violations and lack of safeguards for people subject to guardianship or conservatorship.

Signed into law on January 15, 2009, An Act Relative to the Uniform Probate Code implemented a sweeping overhaul of the Massachusetts probate code, covering estates and wills as well as guardianship of adults and children and conservatorship. These reforms were more than two decades in the making.¹⁹ The MUPC was “the product of a comprehensive study and review of Massachusetts law” by the joint UPC committee of the Massachusetts and Boston Bar

¹⁹ Rosinski, Sweeping Probate Reform Approved After Two-Decades, Mass. Bar Ass’n Lawyers J. (Feb. 2009), <https://www.massbar.org/publications/lawyers-journal/lawyers-journal-2009-february>.

Associations, and the proposed legislation was “reviewed by lawyers, judges, registers of probate, community groups, legislators, and representatives of the banking and surety communities.”²⁰ Following its enactment, then Chief Justice of the Probate Court, Paula Carey, described Article V of the MUPC as “preserving the liberty and interests of some of the most vulnerable citizens.”²¹

The need for comprehensive reform of Massachusetts’s guardianship laws was illustrated by a January 2008 Boston Globe report and investigation, published while the legislation was pending.²² Through interviews with court personnel and review of guardianship records, reporters revealed a system that was “broken,” subjecting older adults and people with disabilities to guardianship, conservatorship, and institutionalization with minimal judicial review or due process, and even less court oversight.²³ At that time, Massachusetts limited access to legal counsel in guardianship cases to those seeking extraordinary treatment authority.²⁴ Globe investigators found that the absence of attorneys for

²⁰ Id.

²¹ Oliver, Chief Justice Carey Delivers State of the Probate and Family Court Address, 17 Mass. Lawyers J. 3, at 11 (Dec. 2009), https://massbar.org/docs/default-source/publications-document-library/lawyers-journal/2009/december/lj_dec09_web.pdf?sfvrsn=54c00b6_2.

²² Kelly, Kowalski, & Novak, Courts Strip Elders of Their Independence: Within Minutes, Judges Send Seniors to Supervised Care, The Boston Globe (Jan. 13, 2008).

²³ Id.

²⁴ See Rogers v. Commissioner of Dep’t of Mental Health, 390 Mass. 489 (1983).

respondents often led to pro forma hearings, some lasting only minutes, without presentation of required medical evidence, detailed findings, or exploration of the person's specific decision-making abilities.²⁵ Referencing a June 2007 report by the Massachusetts Access to Justice Commission, the Globe cited retired Chief Justice Herbert P. Wilkins' finding that "the interests of a person for whom a guardian is sought are not adequately protected in the system."²⁶

In the months following the Globe report, the MUPC bill began to gain traction in the Legislature. This attention was evident in hearings of the Legislature's Joint Committee on the Judiciary, and in public statements by Governor Deval Patrick's Secretary of Elder Affairs, Michael Festa, pushing for additional reforms including a mechanism to appoint legal counsel for the person subject to the petition.²⁷ This testimony and similar statements of support helped to propel the long-stalled MUPC bill into law the following year.²⁸

²⁵ Id.

²⁶ Id.; see also Massachusetts Access to Justice Commission, Report on Barriers to Access to Justice, App. C., at 45 (June 2007), <https://massa2j.org/wp-content/uploads/2020/01/Report-on-Barriers-to-Access-to-Justice-in-Massachusetts.pdf>.

²⁷ Dumcius, Elder Affairs Chief Backs Guardianship Law Reforms, State House News (Jan. 24, 2008), https://www.statehousenews.com/archives/elder-affairs-chief-backs-guardianship-law-reforms-1-24-2008/article_6e34e26f-6cd5-5dc8-a483-43d586535cdd.html.

²⁸ Gurley, News From a New Generation, Commonwealth Beacon (Apr. 17, 2008), <https://commonwealthbeacon.org/politics/news-from-a-new-generation/>.

B. The Legislature sought to reduce reliance on restrictive plenary guardianships, ensure individual rights to seek modification or termination of existing orders, and promote access to counsel, including counsel of one's choice.

Reforms enacted under Article V of the MUPC reflected both a progression of the law and a change in societal attitudes regarding disability:

Following the tenor of the Americans with Disabilities Act of 1990, the Massachusetts Probate Code looks to abilities rather than disabilities. Rather than marginalizing an individual with compromised ability, the Massachusetts Probate Code seeks to protect the individual's fundamental human rights and minimize the governmental intrusions imposed on those rights....²⁹

This recognition of the ways in which guardianship and conservatorship deprive individuals of their substantive liberty and human rights underscored the need for alternatives and the importance of explicitly protecting due process rights, including constitutional rights of notice and hearing, and the right to counsel in the statute.³⁰

The resulting modernization of the law not only increased uniformity with other States but also added substantive and procedural protections for those persons subject to guardianship or conservatorship petitions and orders, including

²⁹ Sullivan, Guardianship Provisions in the Uniform Probate Court, 10 Mass. Bar Ass'n, Section Review 3, at 23 (2008).

³⁰ Id. at 26.

the right of such persons to attend, and to present evidence at, those hearings and mechanisms to request appointment of counsel. See G. L. c. 190B, § 5-106.³¹

Under the MUPC, Probate Courts are required to carefully consider and make specific findings regarding: (1) the individual's capacity or incapacity; (2) any specific powers afforded to a guardian; and (3) the satisfaction of procedural due process and notice provisions, including that the person's needs "cannot be met by less restrictive means, including the use of appropriate technological assistance."

G. L. c. 190B, § 5-306(b)(8).³² Limited guardianships provide an important avenue for accomplishing this judicial directive, both in lieu of more restrictive, plenary guardianship orders and as an avenue to modify existing orders.³³ To facilitate access to modifications, or termination of guardianship as appropriate,³⁴ mechanisms were created for any interested party, including

³¹ *Id.* at 24.

³² See also G.L. c. 190B, § 5-306(a) ("The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure.")

³³ See G.L. c. 190B, § 5-306(c) ("The court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by parts 1 to 4, inclusive, of this article and thereby create a limited guardianship.")

³⁴ See, e.g., G.L. c. 190B, § 5-310, § 5-311(a).

individuals currently subject to guardianship or conservatorship, to request counsel for this purpose.³⁵

C. The MUPC makes clear the right of persons subject to guardianship or conservatorship to retain an attorney of their choice.

Importantly, for purposes of the questions certified here, § 5-106(a) states that the right to appointed counsel “shall not be interpreted to abridge or limit the right of any ward, incapacitated person or person to be protected to retain counsel of his or her own choice and to prosecute or defend a petition under this article.”³⁶

This language is an unambiguous expression of the Legislature’s intent to afford individuals the ability to retain counsel of their choice before and after any judicial finding of incapacity, thus applying the same rights to counsel to motions to modify or terminate existing guardianship or conservatorship orders as to the original petition. This language also does not apply a different standard to people subject to guardianship versus people subject to conservatorship when it comes to the right to choose and retain an attorney to challenge a petition or to modify or terminate an order.³⁷

³⁵ See Mass. Probate and Family Court, Request for Counsel Form (MPC 301) (May 30, 2011), <https://www.mass.gov/doc/request-for-counsel-mpc-301/download>.

³⁶ G.L. c. 190B, § 5-106(a) (emphasis added).

³⁷ See Reported Questions in Appeals Court 2023-P-1284, question 2.

Moreover, the MUPC expressly states that the right of the person subject to guardianship or conservatorship to retain an attorney of their choice “will not be abridged or limited by access to appointed counsel.” G. L. c. 190B, § 5-106(a) . For individuals fourteen years of age or older who may be subject to guardianship or conservatorship, Courts must consider the individual’s choice of counsel if someone requests an attorney be appointed on their behalf, or if the Court otherwise determines counsel is required.³⁸

Notably, § 5-106(a) does not condition the person’s right to choose and retain counsel to represent them in the proceeding on any finding of capacity or incapacity. The section also does not tie that right to any particular stage or outcome of proceedings under Article V of the statute.

Access to and choice of counsel is necessary to combat the systemic shortcomings and risk of abuse which led to creation of the MUPC, and to ensure that the legislative purpose behind the MUPC reforms is achieved, including individuals’ rights to be free from unnecessary or overly restrictive guardianship or conservatorship orders.

D. The MUPC supersedes preexisting case law conditioning a person’s right to choose and retain counsel in guardianship or

³⁸ Id. The MUPC also strongly supports an individual’s right to nominate their own guardian, including looking to the persons’ most recent nomination in a durable power of attorney, unless that person lacks qualification or other good cause. G.L. c. 190B, § 5-305.

conservatorship proceedings on a judicial determination of capacity to do so.

The Supreme Judicial Court and this Court have previously considered the issue of a person's right to choose and retain an attorney to modify or terminate their guardianships or conservatorships. In re Guardianship of Hocker, 439 Mass. 709 (2003); In re Guardianship of Zaltman, 65 Mass. App. Ct. 678 (2006). Both cases pre-dated the MUPC and, therefore, are superseded by the express language of § 5-106(a) , which emphasizes the right of “any ward, incapacitated person or person to be protected to retain counsel of his own choice to prosecute or defend a petition” under the statute. Thus, the lower court in the instant case erred in ordering³⁹ and holding⁴⁰ a Zaltman evidentiary hearing to determine whether respondent had capacity to retain counsel, and in placing the burden of proof on respondent to demonstrate that capacity.

The MUPC establishes no separate standard, hurdle, or prerequisite hearing that would limit respondent's ability to choose and retain an attorney in this case, given the fundamental liberty interests at stake. “The Legislature is presumed to be aware of the prior state of the law as explicated by the decisions of [the Supreme Judicial Court].” Commonwealth v. Montarvo, 486 Mass. 535, 541 (2020), quoting Commonwealth v. Vega, 449 Mass. 227, 231 (2007). Therefore, it is

³⁹ RAI:323-324.

⁴⁰ RAI:343.

reasonable to assume that the failure to include anything akin to a Zaltman hearing in the provisions of § 5-106(a) was intentional.

Similarly, people seeking to choose and retain attorneys to modify or terminate their guardianship or conservatorship should not – as a threshold issue – be required to demonstrate to a court that they: (1) have the guardian's or conservator's permission to do so;⁴¹ (2) are subject to a guardianship or conservatorship decree explicitly authorizing them to do so;⁴² or (3) have the capacity to self-represent, testify, contract, or make or alter a valid will.⁴³

III. MUPC reforms are not self-executing but depend on meaningful access to the assistance of counsel.

Legal scholar Professor Michael L. Perlin cautioned that many of the hard-won legal rights of people with mental health disabilities are not self-executing but depend for their enforcement on the involvement of counsel:

The declaration by a court of a right "to" a service or a right to be "free from" an intrusion does not in se provide that service or guarantee freedom from intrusion. A right is only a paper declaration without an accompanying remedy, and, without counsel (so as to best guarantee enforcement), there is little chance that the rights "victories" that have been won in test case and law reform litigation in this area will have any impact on the-mentally disabled population.⁴⁴

⁴¹ Contra Appellant's brief at 36, par. 1.

⁴² Contra id.

⁴³ Contra RAI:007-008; RAI:178.

⁴⁴ Perlin, Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases, 16 Law and Human Behavior 39, 47 (1992) (citations omitted), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?params=/context/fac_articles_chapters/article/1981/&path_info=perlin_fatal_assumption.pdf.

Despite the reforms of the MUPC – including provisions regarding access to counsel – guardianship and conservatorship proceedings remain an arena in which Perlin’s prescient warning applies. The ability of individuals subject to guardianship and conservatorship to select and retain counsel of their choice is a critical safeguard and an important mechanism for ensuring access to zealous legal representation.

A. Importance of counsel and the attorney-client relationship

Access to counsel is essential to ensure an adversarial process in guardianship and conservatorship proceedings. Attorneys have legal skills, experience, and knowledge, as well as the ability to identify and retain other entities and individuals who may assist directly or indirectly in the judicial process. Given the fundamental liberty interests at stake and the benefits of effective representation, individuals should have the option to choose who will represent them in any guardianship or conservatorship proceeding. While the MUPC established safeguards in the processes for appointment of guardians and conservators, one observer notes that modern reforms cannot immediately dispense of “the centuries’ old view of guardianship as a paternalistic, parens patriae,

proceeding, which ties in with the myth that we're all here to help.”⁴⁵ It is critical that an attorney be effective at marshaling and presenting evidence of the client’s abilities as well as highlighting less restrictive alternatives, such as a health care proxy, a power of attorney, and supported decision-making.⁴⁶ An attorney can also evaluate, through consultation with their client, the potential for establishing various limitations on a guardianship or conservatorship.⁴⁷

B. The ability to choose and retain counsel is particularly critical when pursuing motions to modify or terminate guardianship or conservatorship orders.

To effectuate the MUPC’s reform goals, the Code establishes processes for a person to regain control of a delegated function or to terminate an existing

⁴⁵ Cavey, Realizing the Right to Counsel in Guardianship: Dispelling Guardianship Myths, Marquette Elder’s Advisor (Aug. 2012), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1329&context=elders>; see also Perlin, *supra* note 44, at 57 (counsel needed in mental health proceedings to address the pervasiveness of heuristic biases, including by judges, in decision-making).

⁴⁶ See *id.*; Wright, Planning for Cognitive Decline: Combining Formal Supported Decision-Making Agreements and Healthcare Power of Attorney, 35 Health Matrix 225, 237-240 (2025) (less restrictive interventions can be provided individually or collectively with supported making agreements to support a person and avoid need for guardianship or conservatorship or demonstrate that need no longer exists); see also Mass. Probate and Family Court, Alternatives to Guardianship and Conservatorship, <https://www.mass.gov/info-details/alternatives-to-guardianship-and-conservatorship>.

⁴⁷ See Mass. Family and Probate Court, Limitations to Guardianship For Clinicians & Limitations to Conservatorships (MPC 903a), <https://www.mass.gov/doc/limitations-to-guardianship-and-conservatorship-for-clinicians-mpc-903a/download>.

guardianship or conservatorship.⁴⁸ However, exercising these rights can be difficult for someone already subject to such an order. These individuals have often lost control of decision-making powers, such as where they live and receive treatment, as well as access to their money. They may be institutionalized in settings that provide little contact with the outside world. In addition to this loss of autonomy and connection, persons subject to guardianship and conservatorship typically have fewer resources at their disposal than do petitioners.⁴⁹ Thus, while a person may seek to modify or terminate an order without counsel, or utilize the Probate and Family Court form created to request court-appointed counsel (if one is aware it exists),⁵⁰ these mechanisms cannot replace the right to retain counsel of one's choice.

Moreover, an individual may choose to seek out counsel with specialized training and knowledge, including specific experience seeking modification or termination of guardianship and conservatorship. An individual may prioritize counsel who understands the nature of their particular condition or disability, has

⁴⁸ See supra note 8.

⁴⁹ See, e.g., Cassidy, supra note 10, at 102 (noting that individuals subject to guardianship or conservatorship orders often lack access to and control over their own finances, leaving them with little or no means to pay for the costs of such litigation, including attorney fees, psychological evaluations, and court costs).

⁵⁰ Mass. Probate and Family Court, Request for Counsel Form (MPC 301) (for use in guardianship and conservatorship matter), <https://www.mass.gov/lists/probate-family-court-forms-for-guardianship-and-conservatorship#miscellaneous->

access to a range of specialized subject matter experts, or is knowledgeable about reasonable accommodations and less restrictive alternatives to guardianship or conservatorship.

IV. The Rules of Professional Conduct already address client capacity issues, removing a potential concern about persons subject to guardianship or conservatorship choosing and retaining their own counsel to modify or terminate such orders.

Retaining an attorney is premised on a mutual agreement between the attorney and the client and governed by Supreme Judicial Court Rule 3:07, the Rules of Professional Conduct for attorneys. The potential client seeks an attorney and asks for legal representation with respect to a specific legal matter. The attorney must then make an individualized determination that they can undertake the requested representation and take direction from the client in accordance with their ethical obligations under the Rules of Professional Conduct. If the attorney makes the individualized determination that the person can direct the goals of representation, then the attorney should be able to represent the person subject to guardianship or conservatorship in defending against, or challenging the terms of, that order.⁵¹

⁵¹ See, e.g., ABA Commission on Law & Aging, *Defense Against Guardianship: A Lawyer's Guide to Representing Individuals in Guardianship Cases*, ed. Trisha Y. Bullock, at 92 (2023).

In Defense Against Guardianship: A Lawyer's Guide to Representing Individuals In Guardianship Cases, the ABA COLA emphasized that, “[a]s zealous advocates, attorneys make independent assessments of clients’ capacity,” which may fluctuate and be impacted by many factors.⁵² Massachusetts Professional Conduct Rule 1.4 creates an ethical duty for attorneys to make adjustments to their communications with clients and to communicate in such a way that the client can give informed consent to the goal of representation.⁵³

Rule 1.14, in turn, addresses an attorney’s ethical responsibilities in cases of clients with diminished capacity. Rule 1.14 requires lawyers to, “as far as reasonably possible, maintain a normal client-lawyer relationship” with a client with diminished capacity and permits attorneys to take certain protective actions in limited circumstances described in greater detail within the Rule’s comments.⁵⁴

Comment 2 on Rule 1.14 further instructs that, even if a client has “a legal representative, the lawyer should as far as possible accord the represented person the status of client particularly in maintaining communication.”⁵⁵ And, while Comment 4 of the Rule states that, when a person has a legal representative, the attorney should “ordinarily” look to the legal representative for direction,⁵⁶ this

⁵² Id. at 10.

⁵³ See Mass. R. Prof. C. 1.4, as amended, 480 Mass. 1315 (2018).

⁵⁴ See Mass. R. Prof. C. 1.14(a), as amended, 471 Mass. 1305 (2015).

⁵⁵ Id. at comment 2.

⁵⁶ Id. at comment 4.

language is permissive and contemplates exceptions. Indeed, the Restatement (Third) of Law Governing Lawyers clarifies that there are situations when deference to the person's guardian is inappropriate, including "when the lawyer is representing the client in proceedings against the guardian, for example, in an attempt to have the guardianship terminated or its terms altered."⁵⁷

Guided by the Massachusetts Rules of Professional Conduct, an attorney must analyze a potential client's capacity to retain them, including when that potential client seeks to modify or terminate their guardianship or conservatorship. Attorneys are required to exercise their professional responsibility: (1) to assess a prospective client's ability to form an attorney/client relationship; and (2) to accommodate the needs of a client who may experience some form of diminished capacity. Amici agree with the Appellant that the "capacity to hire counsel is a case-by-case determination,"⁵⁸ but argue that this determination should be made by the attorney in question.

This legal structure does not mean that the Court cannot intervene if warranted by an attorney's actions. Courts may still exercise discretion when there is reason to believe any individual appearing before them is not adequately

⁵⁷ Restatement (Third) of Law Governing Lawyers § 24(f) (American Law Inst. 2000).

⁵⁸ Appellant's Brief at 39.

represented.⁵⁹ Ultimately, attorneys are officers of the court.⁶⁰ Judges can, for just cause, remove or disqualify attorneys in certain circumstances, including when they have conflicts of interest, engage in unethical behaviors, or other extreme occasions.⁶¹

V. The Massachusetts Declaration of Rights supports the right to choose and retain counsel in cases where a person seeks to modify or terminate their guardianship or conservatorship.

A finding by this Court that all individuals seeking to modify or terminate their guardianship or conservatorship have the right to choose and retain counsel is consistent with due process protections guaranteed by Articles 10 and 12 of the Massachusetts Declaration of Rights.⁶² In Massachusetts, when a statute impacts

⁵⁹ See G. L. c. 190B, § 5-106(a) (“...if the court determines at any time in the proceeding that the interests of the ward, incapacitated person or person to be protected are or may be inadequately represented, the court shall appoint an attorney to represent the person, giving consideration to the choice of the person if 14 or more years of age”).

⁶⁰ See generally Mass. R. Prof. C. 3.3 (2022), including comment 2 (describing attorneys as officers of the court and stating their obligations before a tribunal).

⁶¹ Given the extent of the liberty interests at stake in guardianship and conservatorship proceedings, some have argued that a person subject to guardianship or conservatorship should enjoy the right to select an attorney to challenge the terms of the guardianship, subject only to the same limitations applied in the criminal defense context under the Sixth Amendment of the U.S. Constitution. See Disability Rights Organizations’ Amici Curiae Brief, In re the Conservatorship of the Person and Estate of Britney Jean Spears, Case No. BP1088790, at 7-10 (Superior Ct., Los Angeles County, Cent. Dist., CA, filed July 12, 2021), [2021.07.12-Spears-amicus-AS-FILED.pdf](#) (citing, among other authorities, Powell v. Alabama, 287 U.S. 45, 53 (1932)).

⁶² Art. 10 of the Massachusetts Declaration of Rights; Art. 12 of the Massachusetts Declaration of Rights.

fundamental rights, such as Article V of the MUPC, individual due process protections may be more expansive under the Declaration of Rights than under the federal Constitution.⁶³

To identify fundamental rights and concomitant due process protections enshrined in its Constitution, Massachusetts employs a “comprehensive approach,”⁶⁴ requiring courts to consider such rights “in the light of our whole experience and not merely in that of what we said a hundred years ago...”⁶⁵ The Supreme Judicial Court has recognized that the Massachusetts Constitution “[is] and must be, adaptable to changing circumstances and new societal phenomena.”⁶⁶ The Court also has rejected the more narrow federal approach to constitutional analysis of fundamental rights, cautioning that it “risks perpetuating the discrimination and subordination of the past in a way that is odious to our

⁶³ The narrow federal constitutional standard for determining fundamental rights and due process protections requires courts to: (1) describe, with specificity, the liberty interest at stake; and (2) “consider whether the right is ‘deeply rooted in this [n]ation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if sacrificed.’” Klinger v. Attorney General, 491 Mass. 38, 57 (2022), quoting Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997).

⁶⁴ Id. at 60-61 (holding that narrow analysis employed to evaluate due process rights under Fourteenth Amendment to the United States Constitution “does not adequately protect rights guaranteed by the Massachusetts Declaration of Rights” and that the proper analysis to identify fundamental rights under the Massachusetts Constitution is through a “comprehensive approach”).

⁶⁵ Id. at 60.

⁶⁶ Id.

Constitution.”⁶⁷ The Court has acknowledged the need to afford fundamental rights protections to individuals and groups who have not traditionally “possess[ed] the full panoply of rights enjoyed by others throughout our nation’s history...”⁶⁸

The application of a comprehensive analysis here supports the right of a person to choose and retain an attorney to challenge a guardianship or conservatorship order or to modify or terminate their guardianship or conservatorship order. As discussed in Section II.B, the adoption of the MUPC reflected Massachusetts’ acknowledgment of the need for a more contemporary approach to guardianship recognizing the liberty interests of people with disabilities to be free from unnecessary restrictions in guardianship and the need to consider less restrictive alternatives.⁶⁹ This expansion of rights for people with disabilities is also evidenced in the passage of the Americans with Disabilities Act (ADA) in 1990 (as amended 2008) to broadly remediate pervasive historical and continued discrimination against people with disabilities throughout all facets of

⁶⁷ *Id.* at 6, citing *Goodridge v. Department of Pub. Health*, 440 Mass 309, 312 (2003) (“The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.”).

⁶⁸ *Id.*

⁶⁹ See also R. Fleischner, *supra* note 4, at 2-3.

society.⁷⁰ The Massachusetts Constitution and Massachusetts statutes similarly prohibit disability discrimination.⁷¹

The recent expansion of alternatives to guardianship and conservatorship, including supported decision-making (SDM),⁷² further demonstrates this transformation with respect to rights of people with disabilities to exercise personal autonomy. As defined in current uniform model law, “supported decision-making” means “assistance from one or more persons of an individual’s choosing in understanding the nature and consequences of potential personal and financial decisions, which enables the individual to make the decisions, and in communicating a decision once made if consistent with the individuals wishes.”⁷³

⁷⁰ See, e.g., 42 U.S.C. § 12101(b) (purpose of ADA is to provide clear, comprehensive, and enforceable “national mandate for the elimination of discrimination against individuals with disabilities” and to invoke the sweep of congressional authority, including power to enforce the Fourteenth Amendment and to regulate commerce, in order to address major areas of discrimination faced day-to-day by people with disabilities).

⁷¹ See, e.g., Art. 114 of the Amendments to the Massachusetts Constitution.

⁷² The Probate and Family Court’s Office of Adult Guardianship and Conservatorship Oversight has identified and provided information for the public regarding several alternative to guardianship and conservatorship, including SDM. See Mass. Probate and Family Court, Alternatives to Guardianship and Conservatorship, <https://www.mass.gov/info-details/alternatives-to-guardianship-and-conservatorship>.

⁷³ Nat’l Conference of Commissioners on Uniform State Law, Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (copyright 2017, published Apr. 3, 2020) <http://tinyurl.com/azfnxrsj> (hereinafter “UGCOPAA”), at § 102(31).

The majority of States have adopted some form of SDM legislation.⁷⁴ In Massachusetts, individuals with disabilities have been part of SDM projects, and at least one court has terminated a guardianship after the individual entered into an SDM agreement.⁷⁵ SDM has also been recognized as an example of a reasonable modification for people with disabilities under federal law.⁷⁶

The significant infringement on the liberty, autonomy, and property interests of people subject to guardianship or conservatorship, the historical and ongoing barriers they face to be free from such restrictions, and the continued expansion of legal rights for persons with disabilities are precisely the types of factors to be

⁷⁴ At least thirty-nine States and the District of Columbia have passed legislation recognizing SDM in various ways. See Center for Public Representation, U.S. Supported Decision-Making Laws (April 2025), <https://supporteddecisions.org/resources-on-sdm/state-supported-decision-making-laws-and-court-decisions/>. The ABA has also endorsed SDM. See American Bar Ass’n, Resolution 113, at 1 (2017) (urging courts to consider SDM as a less restrictive alternative to guardianship); *id.* at 2, n.2 (noting that ABA is using the generic term “guardianship” to refer to guardians of the person, as well as guardians of property or “conservators,” unless otherwise indicated); see also American Bar Ass’n, Less Restrictive Options (Nov. 21, 2023), https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/supported-decision-making/ (endorsing SDM and noting the increase in acceptance of SDM nationally by legal practitioners, courts, and legislatures).

⁷⁵ *In re Guardianship of Cory J. Carlotto*, Docket No. BE09P0253, slip op. at 5-8 (Mass. Berkshire Div. Probate & Family Ct. Dep’t, Dec. 7, 2015) (first Massachusetts court order terminating guardianship in favor of an SDM agreement).

⁷⁶ See U.S. Dep’t of Health & Human Services, Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 40,066, 40,082, 40,089-90, 40,097, 40,098-99, 40,0110 (July 8, 2024).

considered when identifying fundamental rights and due process protections guaranteed under the Massachusetts Constitution. The right to choose and retain counsel to modify or terminate one's guardianship or conservatorship aligns with this comprehensive view of fundamental rights.

VI. Legal scholars and national guardianship experts have affirmed the need for due process protections for individuals subject to guardianship or conservatorship, including the right of the individual to choose and retain counsel to modify or terminate these arrangements.

Legal scholars have asserted that, regardless of the status of state law, people subject to guardianship or conservatorship who seek to modify or terminate those orders have a constitutional right to counsel, in order to guarantee procedural and substantive due process under the Fourteenth Amendment.⁷⁷ Applying the three factors of the U.S. Supreme Court's decision in Mathews v. Eldridge,⁷⁸ these scholars conclude that people subject to guardianship or conservatorship have a substantial constitutionally protected interest in "meaningful access to procedures that allow them to challenge the existence and breadth" of those legal arrangements directly through their own attorney.⁷⁹ For States to deny people subject to guardianship or conservatorship access to such legal representation would "impose restrictions on their rights beyond those strictly needed for their

⁷⁷ See Kohn & Koss, supra note 11, at 597-605.

⁷⁸ 424 U.S. 339, 335 (1976).

⁷⁹ See Kohn & Koss, supra note 11, at 597-601.

protection” and violate their substantive due process right to the “least restrictive alternative” to achieve the government’s purpose.⁸⁰

Furthermore, these constitutional due process guarantees mean people subject to guardianship or conservatorship – rather than the Court, guardian, or conservator – should have the right to choose and employ an attorney to “challenge the existence, terms, and conditions” of their guardianship or conservatorship.⁸¹ These scholars are careful to emphasize that this procedural and substantive due process right is “not unlimited” and extends only to obtaining legal representation to challenge the existence, terms, and conditions of the guardianship or conservatorship, and not to address other legal matters within the guardians’ or conservators’ decision-making authority.⁸² They also provide a detailed analysis for why people subject to guardianship or conservatorship – regardless of its scope – can enter into valid agreements with attorneys for legal assistance to remove those restrictions, consistent with agency⁸³ and contract law,⁸⁴ given the fundamental due process and liberty interests at stake.

⁸⁰ Id. at 601-602.

⁸¹ Id. at 604-606.

⁸² Id. at 605-606.

⁸³ Id. at 590-591 (asserting that all people subject to guardianship, regardless of their State’s law, retain the right to due process, which includes challenging the terms and conditions of their guardianship by appointing an attorney as their agent).

⁸⁴ Id. at 591-597 (arguing the “doctrine of necessities” should apply to such legal services).

In its most recent model legislation on guardianship, the Uniform Law Commission⁸⁵ strongly supports the right of people subject to guardianship or conservatorship to choose and retain counsel in post-appointment proceedings, evidencing a national trend to expressly recognize these fundamental due process requirements. In 2017, the Uniform Law Commission issued the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) and commentary.⁸⁶ UGCOPAA is an update of Article V of the Uniform Probate Code, the basis for the MUPC. Among the best practices promoted by UGCOPAA to protect the rights of people subject to guardianship or conservatorship is encouraging courts “to impose the least-restrictive orders possible” and to “monitor the protective arrangement to continuously adapt to an individual’s changing capabilities and needs.”⁸⁷ Section 319(g) (guardianship) and section 431(i) (conservatorship) of the UGCOPAA state that adults subject to those arrangements who seek to modify or terminate their terms have “the right to

⁸⁵ The Uniform Law Commission, established in 1892, provides States with “non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.” Uniform Law Commission, About Us, <http://uniformlaws.org/aboutulc/overview>.

⁸⁶ UGCOPAA, *supra* note 73.

⁸⁷ Nat’l Conference of Commissioners on Uniform State Laws, The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act: A Summary (Oct. 2017), <https://www.guardianship.org/wp-content/uploads/2018/04/UGCOPAA-Summary-Oct-2017.pdf>.

choose an attorney to represent” them in those matters.⁸⁸ Similarly, section 318(d) (guardianship) and section 430(d) (conservatorship) state that adults subject to those arrangements who seek to remove the guardian or conservator and have a successor guardian or conservator appointed also “have the right to choose an attorney to represent” them in those matters.⁸⁹ The UGCOPAA commentary recognizes that “[s]uch representation is essential to protect the individual’s due process rights”⁹⁰ and cites to the same legal scholars referenced above.⁹¹

In 2021, the Fourth National Guardianship Summit, hosting over 125 advocates, guardians, judges, law professors, and other leaders in the field, convened to develop recommendations to improve practices within State guardianship systems. Their recommendations include critical protections for the right to counsel of choice in post-appointment proceedings. For example, Recommendation 3.1 states:

In all guardianship [or conservatorship⁹²] proceedings, including termination or modification, state law should require the appointment of a qualified and compensated lawyer to represent the adult’s

⁸⁸ UGCOPAA, supra note 73, at 126 and 206.

⁸⁹ Id. at 122-123 and 202.

⁹⁰ Id. at 128, 204, and 209.

⁹¹ Id. at 128-129 and 209.

⁹² Summit Delegates, Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability - Recommendations Adopted by Summit Delegates, 72 Syracuse L. Rev. 29, 29 (2022), <https://lawreview.syr.edu/wp-content/uploads/2022/09/29-40-Preface-2.pdf> (defining its use of term “guardianship” as including “adult guardianship, conservatorship and any other corresponding terms used by a state or tribe”).

expressed wishes, paid a reasonable fee through the use of public funds if the adult is unable to pay, and appointed by the court should the adult not have a lawyer of their own choosing.⁹³

Thus, the Summit Delegates underscored that this right to zealous counsel of one's choosing is pivotal in all guardianship and conservatorship proceedings.

CONCLUSION

People subject to guardianship or conservatorship have the right to choose and retain counsel to challenge pending petitions or to modify or terminate existing orders. Exercise of that right should not be abridged by access to court-appointed counsel, or by alleged or adjudicated incapacity, but rather governed by the MUPC and existing rules of professional responsibility.

Respectfully submitted,

/s/ Morgan K. Whitlatch

Morgan K. Whitlatch

BBO #713923*

Kathryn Rucker

BBO #644697

Center for Public Representation

5 Ferry Street, Suite 314

Easthampton, MA 01027

413-586-6024

mwhitlatch@cpr.ma.org

krucker@cpr-ma.org

*Certified to practice law
in Massachusetts under SJC Rule 3:04

⁹³ Id. at 31-32 (emphasis added).

/s/ Deborah A. Dorfman

Deborah A. Dorfman

BBO #625003

Jennifer Honig

BBO #559251

Mental Health Legal Advisors Committee

100 Hancock Street, Suite 1002

Quincy, MA 02171

617-338-2345

ddorfman@mhlac.org

jhonig@mhlac.org

/s/ Tatum A. Pritchard

Tatum A. Pritchard

BBO #664502

Disability Law Center, Inc.

11 Beacon Street, Suite 925

Boston, MA 02108

617-723-8455

tpritchard@dlc-ma.org

/s/ Karen Owen Talley

Karen Owen Talley

BBO #644764

Committee for Public Counsel Services

Mental Health Litigation Division

144 Main St, 4th Floor

Brockton, MA 02301

508-583-0560

ktalley@publiccounsel.net

/s/ Devorah Anne Vester

Devorah Anne Vester

BBO #600806

Committee for Public Counsel Services

Mental Health Litigation Division

109 Main Street, Suite 201

Northampton, MA 01060
413-355-5200
dvester@publiccounsel.net

Dated: September 15, 2025

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17(c)(9) of the
Massachusetts Rules of Appellate Procedure

I, Deborah A. Dorfman, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs amicus curiae including, but not limited to:

Mass. R. A. P. 17 (brief of an amicus curiae); and
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents).

As required by Mass. R. A. P. 17(c)(9), I certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in proportionally spaced 14-point font (Times New Roman), contains 7499 non-excluded words, and was produced using Microsoft word processing software, version 2508.

/s/ Deborah A. Dorfman
Deborah A. Dorfman

CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(e), I hereby certify, under the penalties of perjury, that on September 15, 2025 I have made service of this Brief upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by the MA Electronic Filing System when registered and/or via email or U.S. mail as follows:

Lisa M. Cukier, Esq.
lcukier@burnslev.com

Tracy D. Galloway, Esq.
attorneygalloway@gmail.com

Don J.J. Cordell, Esq.
cordell@casneredwards.com

John J. McGlone, III, Esq.
jmcglone@gncm.net

David Ansin Schwartz, Esq.
david@dschwartzlaw.com

Richard C. Chambers, Jr., Esq.
richard@chamberslawoffice.com

/s/ Deborah A. Dorfman
Deborah A. Dorfman
BBO #625003
Mental Health Legal Advisors Committee
100 Hancock Street, Suite 1002
Quincy, MA 02171
617-338-2345
ddorfman@mhlac.org